# U.S. Merit Systems Protection Board

## Annual Report for Fiscal Year 1997

*Submitted to the President and the Congress of the United States*

U.S. Merit Systems Protection Board
Washington, D.C.

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

In accordance with 5 U.S.C. § 1206, we are pleased to submit the Nineteenth Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during fiscal year 1997, including the Federal employee appeals and other cases decided by the Board.

The Board and its regional and field offices closed 10,154 cases during fiscal year 1997. The Board's administrative judges decided 8,314 appeals, stay requests, and addendum cases. The 3-member Board decided 1,740 *cases* under its appellate jurisdiction, principally petitions for review (PFRs) of administrative judges' initial decisions. The Board also completed action on 100 cases arising under its original jurisdiction—cases brought by the Special Counsel, proposed actions against administrative law judges, and requests to review regulations of the Office of Personnel Management (OPM).

The average time to process appeals and addendum cases in the regional and field offices was 108 days. The average processing time at Board headquarters for PFRs of initial decisions by administrative judges was 183 days. This means that, on average, a case processed through both levels of the Board was completed in about 10 months. Timely processing is important because most of the cases that come to the Board are appeals of agency personnel actions. Early resolution of these disputes benefits all parties, *as* well as the taxpayers who fund Government activities.

One important measure of the Board's performance of its statutory mission is the extent to which its decisions are upheld by its principal reviewing court, the U.S. Court of Appeals for the Federal Circuit. Of the 444 final Board decisions reviewed by the court in fiscal year 1997, 96 percent were unchanged by the court's decisions.

The Board also has a statutory responsibility to conduct studies of the merit systems and to review the significant actions of OPM. In fiscal year 1997, the Board issued reports on the representation of Hispanics in the Federal work force and employees' views of how well agencies are adhering to the statutory merit system principles.

Respectfully submitted,

Ben L. Erdreich
Chairman

Beth S. Slavet
Vice Chairman

Susanne T Marshall
Member

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# Board Mission and Jurisdiction

## Mission

The U.S. Merit Systems Protection Board (MSPB) was established by the Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, as a successor agency to the Civil Service Commission. It is an independent, quasi-judicial agency in the Executive Branch that serves as the guardian of Federal merit systems.

The Board's mission is to ensure that Federal employees are protected against abuses by agency management, that Executive Branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices. The Board accomplishes its mission by:

- Hearing and deciding employee appeals from agency personnel actions under the Board's appellate jurisdiction;
- Hearing and deciding cases brought by the Special Counsel involving alleged abuses of the merit systems, and other cases arising under the Board's original jurisdiction;
- Conducting studies of the civil service and other merit systems in the Executive Branch to determine whether they are free of prohibited personnel practices; and
- Providing oversight of the significant actions and regulations of the Office of Personnel Management (OPM) to determine whether they are in accord with the merit system principles and free of prohibited personnel practices.

## Jurisdiction

### Appellate Jurisdiction

Agency actions that Federal employees may appeal to the Board include: adverse actions (removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less), performance-based removals or reductions in grade, denials of within-grade increases, certain reduction-in-force (RIF) actions, denials of restoration to duty or reemployment rights, and removals from the Senior Executive Service (SES) for failure to be recertified. Determinations by OPM in employment suitability and retirement matters are also appealable to the Board.

Under the Whistleblower Protection Act of 1989 (WPA), personnel actions that are not normally appealable to the Board may result in the right to a Board appeal under certain circumstances. Included are appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training. Such an action may be appealed to the Board *only* if the appellant alleges that the action was taken because of whistleblowing, *and* if the appellant first filed a complaint with the Special Counsel and the Special Counsel did not seek corrective action from the Board.

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Board has jurisdiction over complaints brought for a violation of Chapter 43 of Title 38, relating to the employment and reemployment rights of persons who have served in the uniformed services. Under USERRA, the Board may hear appeals of personnel actions that would not otherwise be appealable, if an appellant alleges that the action was the result of discrimination based on service in the uniformed services.

When an issue of discrimination prohibited by the Civil Rights Act of 1964 and other anti-discrimination laws is raised in connection with an appealable action, the Board has jurisdiction over both the appealable action and the discrimination issue. Such appeals are termed "mixed cases." In these cases, an appellant may ask the Equal Employment Opportunity Commission (EEOC) to review the final decision of the Board. If the EEOC disagrees with the Board's decision on the discrimination issue, the case is returned to the Board. The Board may concur with EEOC, affirm its previous decision, or affirm its previous decision with modifications. If the Board does not concur in the EEOC decision, the case is referred to a Special Pan el for a final decision. (A Special Panel is convened when needed and is composed of a Chairman appointed by the President, one member of the Board, and one EEOC commissioner.)

For the Board to have jurisdiction over an appeal, it must possess jurisdiction over both the action and the individual filing the appeal. The employees and others

(e.g., applicants for employment, annuitants in retirement cases) who may appeal specific actions vary in accordance with the law and regulations governing the specific ac tion. For some actions, classes of employees, such as political appointees, and employees of specific agencies are excluded.

With respect to adverse actions, which account for almost half of all appeals to the Board, the following categories of employees have appeal rights: (1) employees in the competitive service and excepted service employees with veterans preference (called "preference eligibles") who have completed their probationary period; (2) non-preference eligible employees in the excepted service (excluding those in the Postal Service and certain other agencies) who have completed two years current continuous service in an Executive agency; and (3) non-preference eligible supervisors and managers in the Postal Service.

**Original Jurisdiction**

Cases that arise under the Board's original jurisdiction include:

- Corrective and disciplinary actions brought by the Special Counsel against agencies or Federal employees who are alleged to have committed prohibited personnel practices, or to have violated certain civil service laws, rules or regulations;
- Requests for stays of personnel actions alleged by the Special Counsel to result from prohibited pesonnel practices;
- Disciplinary actions brought by the Special Counsel alleging violation of the Hatch Act;
- Certain proposed actions brought by agencies against administrative law judges
- Requests for review of an OPM regulation or of an agency's implementation of an OPM regulation; and,

- Informal hearings in cases involving proposed performance-based removals from the Senior Executive Service.

**Judicial Review**

With two exceptions, judicial review of final Board decisions in both appellate and original jurisdiction cases lies in the U.S. Court of Appeals for the Federal Circuit. The exceptions are as follows:

Board decisions in "mixed cases" may be appealed to an appropriate U.S. district court. (A Special Panel decision also may be appealed to an appropriate U.S. district court.) If review of all issues except the discrimination issue is requested, however, a "mixed case' appellant may elect review by the Federal Circuit.

In Hatch Act cases involving State or local Government employees, judicial review lies first in the U.S. district courts and then in the regional courts of appeals.

The Director of OPM may petition the Board for reconsideration of a final decision. The Director also may seek judicial review in the Federal Circuit of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.

# Board Members

The bipartisan Board consists of a Chairman, a Vice Chairman, and a Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

**CHAIRMAN**

**BEN L. ERDREICH** became Board Chairman on July 2,1993, following his nomination by President Clinton and confirmation by the Senate. His term appointment expires March 1, 2000. Previously, he served for 10 years in the U.S. Congress as the representative of the 6th District of Alabama. He was a member of the Committee on Banking, Finance and Urban Affairs and chaired its Subcommittee on Policy Research and Insurance. Mr. Erdreich was a Member of the Jefferson County (Alabama) Commission from 1974 to 1982. Prior to that, he was a partner in the firm of Cooper, Mitch & Crawford, Attorneys, in Birmingham, Alabama. He served in the Alabama House of Representatives from 1970 to 1974. He is a graduate of Yale University and received his J.D. degree from the University of Alabama School of Law. He is admitted to the Alabama and District of Columbia bars and is a member of the Federal Circuit, District of Columbia, Alabama, and Birmingham bar associations.

**VICE CHAIRMAN**

**BETH S. SLAVET** took the oath of office as Vice Chairman and member of the U.S. Merit Systems Protection Board on August 15, 1995, following her nomination by President Clinton and confirmation by the Senate. Her term appointment expires March 1, 2002. Ms. Slaver served as Labor Counsel to the Committee on Labor and Human Resources of the U.S. Senate from March 1993 until January 1995. Previously, she was Legislative Counsel and Staff Director for U.S. Representative Chester Atkins (D-MA). From 1984 to 1992, Ms. Slaver was an attorney in private practice in Washington, DC, representing public and private sector unions and employees. Prior to that, she served as the staff attorney to the American Federation of Government Employees Local 1812 in Washington, DC. She is a graduate of Brandeis University and received her J.D. degree from the Washington University School of Law. She is admitted to the District of Columbia Bar and is a member of the Federal Circuit and District of Columbia bar associations.

**MEMBER**

**SUSANNE T. MARSHALL** was sworn in as Member of the Board on November 17, 1997, following her nomination by President Clinton and confirmation by the Senate. Her term appointment expires March 1, 2004. Prior to her appointment, she was Professional Staff Member to the Senate Committee on Governmental Affairs, having also served previously as Deputy Staff Director. Before that, she was Staff Assistant to the House Committee on Government Operations. She attended the University of Maryland in Munich, Germany, and The American University.

**ANTONIO C. AMADOR,** whose term appointment expired March 1, 1997, continued to serve as Member of the Board until June 30, 1997. He had been a member of the Board since November 1, 1990.

# Board Organization

The **Chairman, Vice Chairman**, and **Member** adjudicate the cases brought to the Board. Each has his/her individual office.

The **Chairman**, by statute, is the chief executive and administrative officer of the Board. Office heads report to the Chairman through the Chief of Staff

The **Office of Regional Operations** provides leadership to the MSPB regional offices in carrying out their adjudicatory and administrative functions. The five regional offices (including five field offices) receive and process initial appeals and related cases filed with the Board. Administrative judges in the regional and field offices are responsible for adjudicating these cases and for issuing fair and well-reasoned decisions.

The **Office of Appeals Counsel** prepares proposed decisions that recommend appropriate action in cases where a party petitions for review of an administrative judge's initial decision and all other cases decided by the 3-member Board, except for those cases assigned to the Office of the General Counsel. The office conducts legal research and submits proposed opinions to the Board for final adjudication. It also conducts the Board's petition for review settlement program, processes interlocutory appeals of rulings made by administrative judges, makes recommendations on reopening cases on the Board's own motion, and provides research and policy memoranda to the Board on legal issues.

The **Office of the Administrative Law Judge** adjudicates Hatch Act cases, disciplinary action complaints brought by the Special Counsel, and proposed agency actions against administrative law judges. The Administrative Law Judge may adjudicate corrective actions brought by the Special Counsel, may decide an initial Special Counsel stay request under authority delegated by individual Board members, and may hold informal hearings in performance-based removals from the SES. The Administrative Law Judge also adjudicates MSPB employee appeals, appeals involving classified information affecting national security, and other cases assigned by the Board.

The **Office of the Clerk of the Board** receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's Opinions and Orders. The office serves as the Board's public information center, including providing information on the status of cases, distributing copies of Board decisions and publications, and operating the Board's Library and online information services. The office answers requests under the Freedom of Information and Privacy Acts at the Board's headquarters and responds to all other information requests except those for which the Office of the General Counsel or the Office of Policy and Evaluation is responsible. The office also certifies official records to the courts and Federal administrative agencies, manages the Board's records and directives system, and manages the Government in the Sunshine Act program.

The Office of **the General Counsel,** as legal counsel to the Board, provides advice to the Board and its organizational components on matters of law arising in dayto-day operations. Pursuant to the Board's statutory authority under 5 U.S.C. § 1204(i), the office represents the Board in litigation. It also prepares proposed decisions for the Board on assigned cases, including requests to review OPM regulations and cases involving enforcement of a Board order. The office coordinates the Board's legislative policy and congressional relations functions; responds to requests for non-case related information from the White House, Congress, and the media; and produces public information publications and the agencys annual report to the President and the Congress. The office also conducts the Board's ethics program and plans and directs audits and investigations.

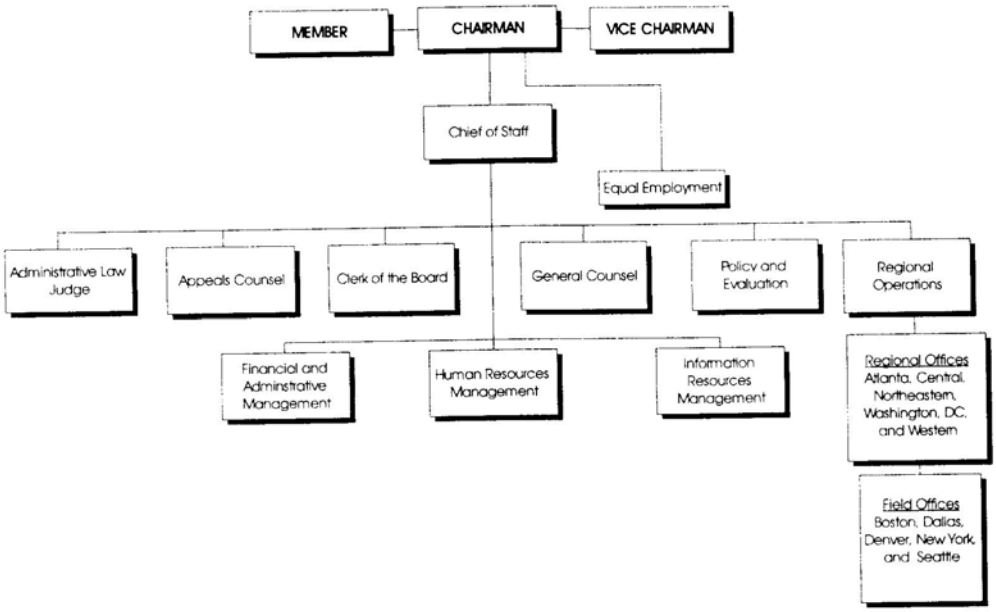
The **Office of Policy and Evaluation** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems, including annual oversight reviews of the Office of Personnel Management. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office disseminates information about the Board's studies through outreach appearances, articles, and electronic media. The office also responds to requests from Federal agencies for information, advice, and assistance on issues that have been the subject of Board studies.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

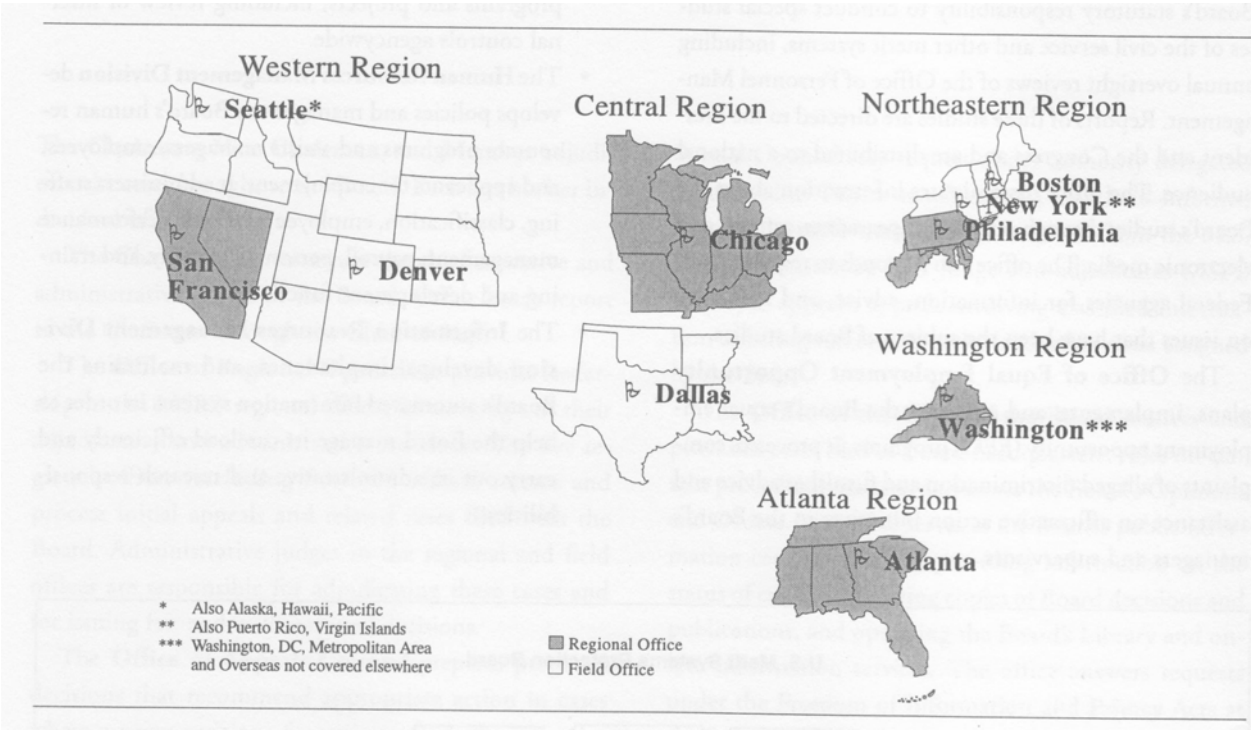
The following three administrative divisions operate under the supervision of the Chief of Staff:

- The **Financial and Administrative Management Division** administers the budget, accounting, procurement, property management, physical security, and general services functions of the Board. It also develops and coordinates internal management programs and projects, including review of internal controls agencywide.
- The **Human Resources Management Division** develops policies and manages the Board's human resources programs and assists managers, employees, and applicants for employment. It administers staffing, classification, employee relations, performance management, payroll, personnel security, and training and development functions.
- The **Information Resources Management Division** develops, implements, and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative and research rcsponsibilities.

## U.S. Merit Systems Protection Board




## Regional and Field Office Jurisdictions




**Atlanta Regional Office -** Alabama, Florida, Georgia, Mississippi, South Carolina, and Tennessee

**Central Regional Office -** Illinois; Indiana; Iowa; Kansas City, Kansas; Kentucky; Michigan; Minnesota; Missouri; Ohio; and Wisconsin

**Dallas Field Office -** Arkansas, Louisiana, Oklahoma, and Texas

**Northeastern Regional Office -** Delaware, Maryland (except the counties of Montgomery and Prince George's), New Jersey (except the counties of Bergen, Essex, Hudson, and Union), Pennsylvania, and West Virginia.

**Boston Field Office -** Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

**New York Field Office -** New Jersey (counties of Bergen, Essex, Hudson, and Union), New York, Puerto Rico, and Virgin Island

**Washington Regional Office -** Washington, DC; Maryland (counties of Montgomery and Prince George's); North Carolina; Virginia; and all overseas areas not otherwise covered

**Western Regional Office -** California and Nevada

**Denver Field Office -** Arizona, Colorado, Kansas (except Kansas City), Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming

**Seattle Field Office -** Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas

# Fiscal Year 1997 Case Processing

# Statistical Highlights

Cases Decided by MSPB in FY 1997

| | |
|---|---|
| **RO/FO Decisions** | |
| Appeals | 7,223 |
| Addendum Cases[1] | 962 |
| Stay Requests[2] | 129 |
| **TOTAL RO/FO Decisions** | **8.314** |
| Board Decisions | |
| Appellate Jurisdiction: | |
| PFRs -Appeals | 1,460 |
| PFRs - Addendum Cases[1] | 152 |
| Reviews of Stay Request Rulings | 0 |
| Requests for Stay of Board Order | 5 |
| Reopenings[3] | 22 |
| Court Remands | 14 |
| Compliance Referrals | 61 |
| EEOC Non-concurrence Cases | 3 |
| Arbitration Cases | 23 |
| Subtotal | 1,740 |
| Original jurisdiction (see separate report) ' | 100 |
| **TOTAL Board Decisions** | **1,840** |
| **TOTAL Decisions (Board + RO/FOs)** | **10,154** |

[1]Includes requests for attorney fees, requests for compensatory damages (discrimination cases only), requests for consequential damages (whistleblower cases only), petitions for enforcement, Board remand cases, and court remand cases.

[2]Includes 92 stay requests in whistleblower and cases and 37 in non-whistleblower cases.

[3] Includes 12 cases reopened by the Board on its own motion and 10 cases where OPM requested reconsideration.

[4] Includes 98 Board decisions and 2 initial decisions issued by ALJ.

**Kinds of Appellate Jurisdiction Cases**

The kinds of appellate jurisdiction *cases* in which the Board's administrative judges issue initial decisions or orders are:

- *Appeal* (or *Initial Appeal)* — A request by an appellant that the Board review an agency action.
- *Stay Request* — A request that the Board order a stay of an agency action (authorized only where the appellant alleges that the action was or is to be taken because of whistleblowing).
- *Motion for Attorney Fees* — A request by an appellant who prevails in an appeal that the Board order the agency to pay the appellant's attorney *fees.*
- *Request for Compensatory Damages* — A request by an appellant who prevails in a mixed case appeal on the basis of discrimination for payment of compensatory damages under the Civil Rights Act of 1991.
- *Request for Consequential Damages* — A request by an appellant who prevails in a whistleblower appeal for payment of consequential damages, as authorized by 5 U.S.C. § 1221.
- *Petition for Enforcement* — A request by a party to an appeal that the Board enforce a final decision or order.
- *Remand* — A case returned to an administrative judge by the Board or court, after an initial decision has been issued, for additional processing and issuance of a new initial decision.

Attorney fee cases, petitions for enforcement, requests for damages, and remands, as a group, are termed "addendum cases" by the Board.

Approximately 20 percent of initial appeals decided result in the filing of a petition for review at Board headquarters. Initial decisions in addendum cases and orders issued on stay requests are also subject to review by the Board. In addition, the Board has authority to review an arbitrator's award when the subject of the grievance is an action appealable to the Board and the grievant raises a discrimination issue in connection with the action. The kinds of appellate jurisdiction cases in which the Board issues final decisions or orders are:

- *Petition for Review* — A request by a party that the Board review an initial decision of an administrative judge. A petition for review may be filed with respect to an initial decision on an appeal or in an addendum case.
- *Request to Review Stay Ruling*— A request by a party that the Board review an administrative judge's order ruling on a stay request.
- *Petition to Review Arbitrator's Award* — A request that the Board review an arbitrator's award where the employee has grieved an action appealable to the Board and the employee raises an issue of prohibited discrimination.
- *Reopening on the Board's Own Motion* —A case that the Board reopens on its own motion, to reconsider either an initial decision of an administrative judge or a final Board decision.

- *OPM Request for Reconsideration* — A request by the Director of OPM that the Board reconsider a final decision.
- *Court Remand*— A case returned to the Board by a court, after an appellant or the Director of OPM has sought judicial review of a final Board decision, for issuance of a new decision. Also, a case returned by a court where the Board has requested remand.
- *EEOC Non-concurrence* — A mixed case returned to the Board by the EEOC, after an appellant has sought EEOC review of a Board decision, in which the EEOC does not concur with the Board decision on the discrimination issue.
- *Compliance Referral* — A case referred to the Board by an administrative judge for enforcement of a final Board decision or order, upon the administrative judge's finding that a party is not in compliance.
- *Request for Stay of Board Order* — A request by a party that a final order of the Board be stayed pending judicial review or a request for reconsideration by the Director of OPM.

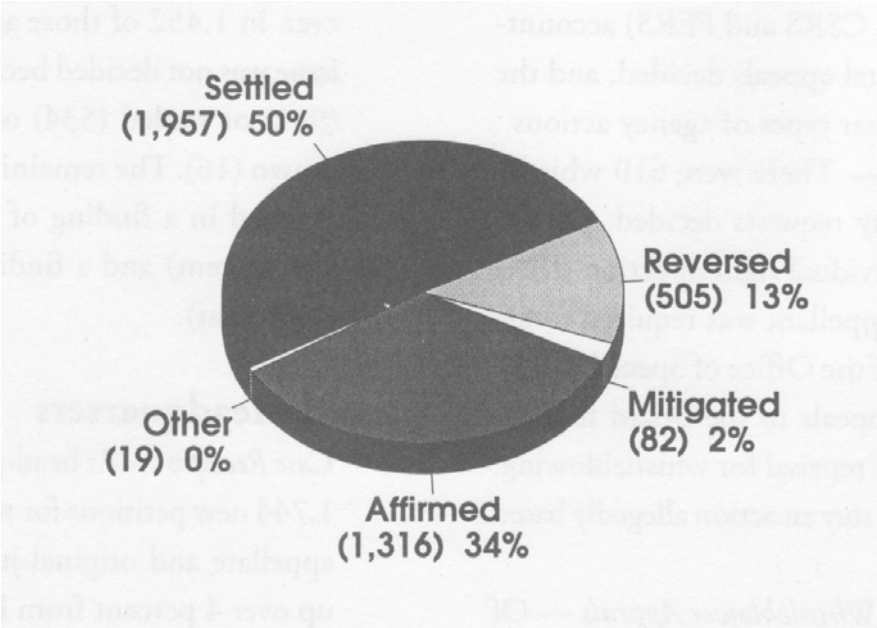
**Appellate Case Processing in Fiscal Year 1997**

**Regional and Field Offices**

- *Case Receipts* — The regional and field offices received 8,721 new cases (initial appeals, addendum cases, and stay requests) in FY 1997—down less than 2 percent from the number received in FY 1996. At the end of the fiscal year, there were 2,695 cases pending in the regional and field offices.
- *Cases Decided*— The administrative judges decided 8,314 cases in FY 1997. This number includes 7,223 initial appeals and 962 addendum cases. There were 129 orders ruling on stay requests-92 in whistleblower cases and 37 in non-whistleblower cases.
- *Disposition* — Of the 7,223 initial appeals decided, 3,344 (46 percent) were dismissed. Of the dismissals, 71 percent were for lack of jurisdiction, agency cancellation of the action, or appellant withdrawal of the appeal; 8 percent were dismissed as untimely; and 22 percent were dismissed without prejudice to later refiling. (Percentages do not total 100 because of rounding.) The accompanying charts show the outcomes of appeals that were not dismissed and the disposition of appeals adjudicated on the merits.
- *Settlement Rate* — Of the 3,879 appeals that were not dismissed, 1,957 were settled, for an overall settlement rate of 50 percent. The settlement rate for adverse action cases was 66 percent; for performance cases, 64 percent; and for denials of within-grade increases, 75 percent.

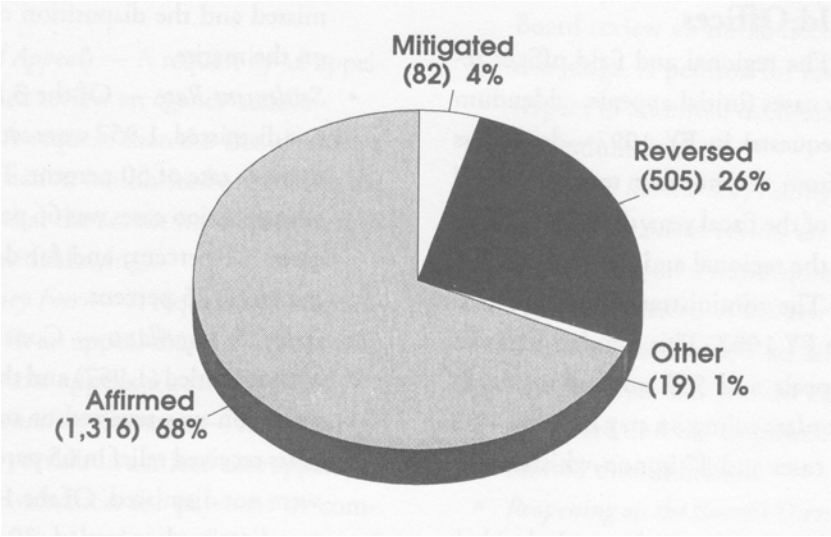
- *Relief for Appellants* — Considering the number of appeals settled (1,957) and those in which the agency action was reversed or mitigated (587), appellants received relief in 65 percent of the appeals that were not dismissed. Of the 1,922 appeals that were not dismissed or settled, 30 percent resulted in reversal or mitigation of the agency action.
- *Processing Time* — The average processing time for initial appeals and addendum cases was 108 days. Of the initial appeals decided, 81 percent were decided within 120 days.

OUTCOMES OF FY 1997 APPEALS NOT DISMISSED




Based on 3,879 initial appeals not dismissed.
(Percentages do not total 100 because of rounding.)

DISPOSITION OF INITIAL APPEALS ADJUDICATED ON THE MERITS IN FY 1997




Based on 1,922 adjudicated initial appeals. (Percentages do not total 100 because of rounding.)

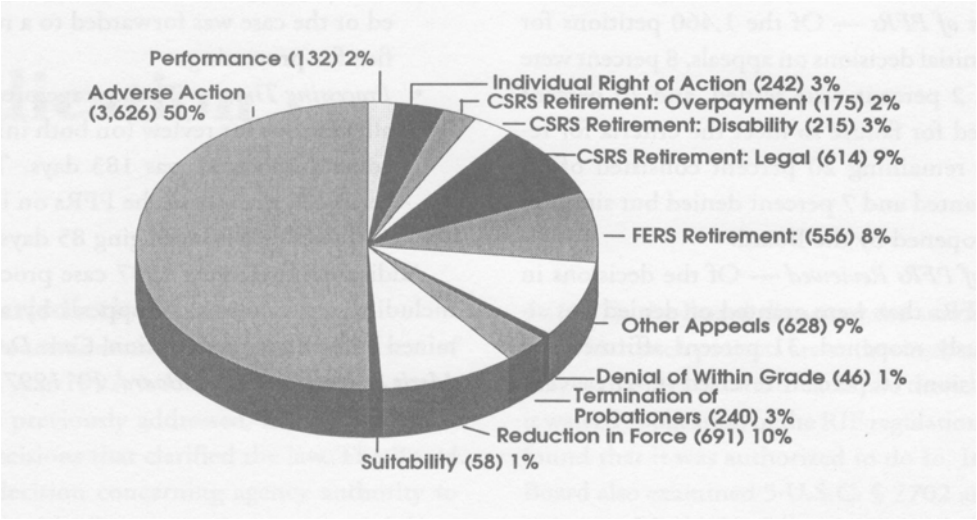
- *Types of Actions Appealed* — Of the initial appeals decided, 50 percent were appeals of agency adverse actions, 10 percent were RIF appeals, and 2 percent were appeals of performance-based actions. Retirement cases (both CSRS and FERS) accounted for 22 percent of total appeals decided, and the remainder involved other types of agency actions.
- *Whistleblower Appeals* — There were 610 whistle-blower appeals and stay requests decided. Of this number, 242 were individual right of action (IRA) appeals in which the appellant was required to exhaust the procedures of the Office of Special Counsel, 276 were direct appeals to the Board that included an allegation of reprisal for whistleblowing, and 92 were requests to stay an action allegedly based on whistleblowing.
- *Relief for Appellants in Whistleblower Appeals* — Of the 518 whistleblower appeals decided (242 IRA appeals and 276 appeals of otherwise appealable actions), 307 (59 percent) were dismissed. In the other 211 whistleblower appeals, appellants received relief—through settlement, reversal, or mitigation—in 143 (68 percent).
- *Mixed Cases* — Allegations of discrimination were raised in 1,833 of the initial appeals decided; however, in 1,452 of those appeals, the discrimination issue was not decided because the case was dismissed (902) or settled (534) or the allegation was withdrawn (16). The remaining 381 mixed case appeals resulted in a finding of no discrimination in 375 (98 percent) and a finding of discrimination in 6 (2 percent).

**Board Headquarters**

- *Case Receipts* — At headquarters, the Board received 1,744 new petitions for review and other cases (both appellate and original jurisdiction) in FY 1997—up over 4 percent from FY 1996. At the end of the fiscal year, there were 925 cases pending.
- *Cases Decided* — The 3-member Board decided 1,840 cases in FY 1997. Of these, 1,460 were petitions for review of initial decisions on appeals, 152 were petitions for review of initial decisions in addendum cases, 128 were other appellate jurisdiction cases, and 100 were original jurisdiction cases.
- *Disposition of PFRs* — Of the 1,460 petitions for review of initial decisions on appeals, 8 percent were dismissed, 2 percent were settled, and 70 percent were denied for failure to meet the criteria for review. The remaining 20 percent consisted of 13 percent granted and 7 percent denied but simultaneously reopened by the Board.
- *Outcome of PFRs Reviewed* — Of the decisions in the 292 PFRs that were granted or denied but *simultaneously* reopened, 31 percent affirmed the initial decision, 16 percent reversed it, 41 percent remanded the case to the administrative judge, and 2 percent mitigated the agency action. In the remaining 10 percent, the initial decision was vacated or the case was forwarded to a regional/field office for processing.
- *Processing Time* — The average processing time for all petitions for review (on both initial appeals and addendum cases) was 183 days. The Board processed 28 percent of the PFRs on initial appeals in 110 days or less, averaging 85 days.

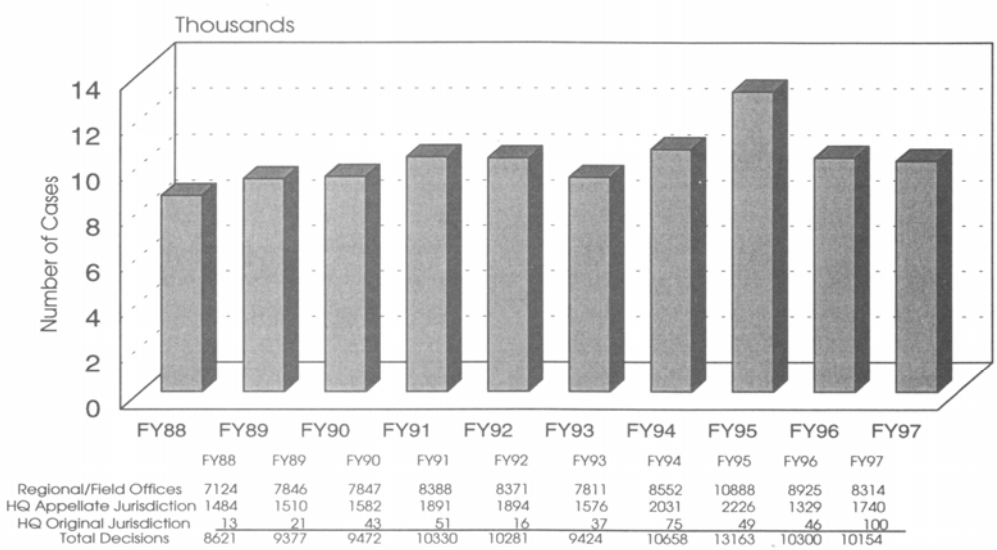
- Additional fiscal year 1997 case processing statistics, including a breakdown of appeals by agency, are contained in the Board publication, *Cases Decided by the US. Merit Systems Protection Board, FY 1997.*

TYPES OF INITIAL APPEALS DECIDED IN FY 1997




Total Number of Initial Appeals: 7,223 (Percentages do not total 100 because of rounding.)

MSPB DECISIONS, FY 1988 – 1997




| | FY89 | FY88 | FY90 | FY91 | FY92 | FY93 | FY94 | FY95 | FY96 | FY97 |
|---|---|---|---|---|---|---|---|---|---|---|
| Regional/Field Offices | 7124 | 7846 | 7847 | 8388 | 8371 | 7811 | 8552 | 10888 | 8925 | 8314 |
| HQ Appellate Jurisdiction | 1484 | 1510 | 1582 | 1891 | 1894 | 1576 | 2031 | 2226 | 1329 | 1740 |
| HQ Original Jurisdiction | 13 | 21 | 43 | 51 | 16 | 37 | 75 | 49 | 46 | 100 |
| **Total Decisions** | **8621** | **9377** | **9472** | **10330** | **10281** | **9424** | **10658** | **13163** | **10300** | **10154** |

NOTES: (1) Regional/Field Office decisions are on initial appeals, addendum cases, and stay requests.
(2) HQ appellate jurisdiction decisions are on petitions for review and other types of appellate cases.
(3) HQ original jurisdiction decisions are on Special Counsel cases and other types of original jurisdiction cases.

## Adjudication

## Appellate Jurisdiction Cases

Although the Board addressed new issues and areas of the law in fiscal year 1997, it focused much of its attention on matters previously addressed, issuing a number of significant decisions that clarified the law. The Board issued its first decision concerning agency authority to run—and OPM authority to approve—personnel demonstration projects, which are experiments in which normally applicable laws, rules, and regulations may be waived to determine whether a change in personnel management policies or procedures would result in improvements to the civil service system. The majority of the important decisions during the year, however, revisited such areas of the law as the Whistleblower Protection Act (WPA), the Family and Medical Leave Act of 1993 (FMLA), the requirements associated with interim relief, several aspects of adverse actions (including the Board's penalty-review authority as well as questions of proof of both the procedural and substantive propriety of certain types of charges), the affirmative defense of discrimination based on a disabling condition (including proof of a disability and the accommodation of disabled employees), and the *bona fides* of reduction-in-force actions.

### Issues of First Impression

Exploring new territory, the Board considered the propriety of a reduction in force that had been run by an agency in connection with a personnel demonstration project. Although authority for OPM to conduct personnel demonstration projects was established by the Civil Service Reform Act of 1978, the matter had not previously come before the Board in any substantive way. In *Kohfield & Porter v. Department of the Navy,* 75 M.S.P.R. 1 (1997), the Board discussed the statutory scheme under which such projects are authorized, noting that OPM may waive regulations to facilitate them. In this instance, it waived application of the RIF regulations, and the Board found that it was authorized to do so. In its rulings, the Board also examined 5 U.S.C. § 7702 and held that it is not part of the body of discrimination law precluded from waiver in a demonstration project under 5 U.S.C. Chapter 47.

Additionally, the Board made new law in two areas with respect to remedies. First, in *Forrest v. Department of Agriculture,* 74 M.S.P.R. 213 (1997), the Board ruled that an appellant's right to a *status quo ante* remedy in a non-mixed case does not entitle him to reimbursement for leave he used to consult with his representative about his Board appeal. In a mixed case, though, he is entitled to reimbursement for such leave, in a reasonable amount, as compensatory damages under Title VII, which allows for more than a return to the *status quo ante,* if he made a nonfrivolous allegation of discrimination in connection with the appealed action.

In *Currier v. USPS,* 72 M.S.P.R. 191 (1996), also noting that the remedy of compensatory damages available under the 1991 Civil Rights Act is broader than just returning the appellant to the *status quo ante,* the Board held that such a situation provides an exception to the general rule that rescission of an action and restoration of the appellant to the *status quo ante* moots *an* appeal. Because an appeal once within the Board's jurisdiction cannot be mooted unless the appellant has received all of the possible relief he requested, a mixed case in which a claim for compensatory damages has been made is not mooted simply by the rescission of the underlying agency action. The Board also held, as a result, that in cases where a nonfrivolous discrimination allegation has been raised, but with no accompanying claim for compensatory damages, MSPB administrative judges must afford the appellant a specific opportunity to make such a claim before dismissing the appeal as moot.

## Adverse Actions

### Procedural, Substantive, and Penalty Issues

Perhaps the Board's most significant action occurred when it reconsidered its own penalty-review authority. In *White v. USPS,* 71 M.S.P.R. 521 (1996), the Board announced a new rule concerning its scope of review of agency penalty determinations. The Board noted that immediately after the issuance of its landmark decision on penalty-setting standards, *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981), it applied a standard giving "careful consideration" to cases in which fewer than all of the charges were sustained, but that in time this standard had been eroded, and the more recent practice was to allow or impose the "maximum" reasonable penalty. In *White,* the Board held that where only some of the agency's charges are sustained, it will itself independently select what it determines to be "a reasonable penalty." Further, in contrast to its earlier position that statements by deciding officials, as to the penalties they would have imposed if only some of the charges had been sustained, were irrelevant, the Board ruled that it may consider such statements, if they are credible, although it will not necessarily defer to them.

Following up on *White,* in *Payne v. USPS,* 72 M.S.P.R. 646 (1996), the Board limited its ruling to those cases in which not all of the charges are sustained. In cases where all of the charges but only some of the specifications are sustained, the agency's penalty determination is still entitled to deference, and the Board will mitigate "only to the extent necessary to bring [the penalty] within the parameters of reasonableness, i.e., a maximum reasonable penalty standard should be applied." *Payne* at 651.

Also of great importance to agency penalty-setting decisions is the Board's decision in *Vaughn v. USPS,* 75 M.S.P.R. 25 (1997), which examined the extent of the parties' rights and obligations where the Board mitigatesa removal to a demotion to the next-lower graded nonsupervisory position. The Board ruled that agencies need not create positions to accommodate such demotions and that an appellant is not entitled to pay at a higher grade level than that of the position in which he was placed upon mitigation. Back pay must be computed at the level of the highest grade nonsupervisory position for which the appellant was qualified or could have become qualified without undue interruption and that was available during the period between the removal and the Board's final decision.

In *Shelley v. Department of the Treasury,* 75 M.S.P.R. 677 (1997), the Board rejected the frequently-advanced agency claim that because of an appellant's many years of service, she "should have known better," so that her failure to conform her conduct accordingly aggravated the penalty. The Board held instead that lengthy service is a factor that supports leniency.

On the subject of attendance-based charges, the Board revisited the relatively new rights and responsibilities arising from the FMLA. In *Ellshoff v. Department ofthe Interior,* 76 M.S.P.R. 54 (1997), the Board ruled that where the facts implicate the FMLA, it will consider and apply the law without shifting the burden of proof to the appellant. The decision in *Ramey v. USPS,* 70 M.S.P.R. 463, was modified accordingly. When certain FMLA requirements were examined, the Board held that under then-applicable interim regulations an employee need not explicitly invoke the law in requesting leave, and that failure to satisfy the requirements of a leave restriction letter does not, without more, warrant denial of FMLA leave. Further, in *Crutchfield v. Department of the Navy,* 73 M.S.P.R. 444 (1997), the Board found that the FMLA does not augment an employee's leave balance; rather, it entitles him or her to approved leave for certain purposes and gives the option of using accrued paid annual and sick

leave or LWOP. The Board noted that under the final regulations an employee must invoke a right to FMLA leave at the time it is needed, and cannot do so retroactively.

Addressing the important subject of workplace violence, the Board clarified and applied the law as to threats in several ways, by building on the lesson of *Metz v. Department of the Treasury,* 780 F.2d 1001 (Fed. Cir. 1986), and the Board's own earlier case law developed under *Metz.* In *McCarty v. Navy,* 72 M.S.P.R. 201 (1996), distinguishing a facially similar decision reaching the opposite result, the Board ruled that although the office atmosphere was one of panic and confusion following the appellant's threatening statements, ultimately, that reaction was due to those statements, co-workers' prior dealings with him, and their knowledge of his reputation, and not to the actions of management in responding to his statements. Under the circumstances, the charge of threatening conduct was sustained and mitigation was not warranted. In *Powell v. Department of Justice,* 73 M.S.P.R. 29 (1997), the Board considered a recurring factual situation, where an employee contacting an Employee Assistance Program (EAP) counselor makes or repeats a threat. The Board held that seeking such help shows that the employee is interested in talking out his frustrations rather than acting on them, and it noted that many agency programs advertised themselves as confidential. The Board therefore held in this case that it would be contrary to the policy and purposes of EAP to find that a threat was made during an EAP session. In *Greenough v. Department of the Army,* 73 M.S.P.R. 648 (1997), the Board drew a significant distinction by deciding that whether an employee intends to carry out a threat is irrelevant to whether he intends to make one.

In the adverse action area, the Board also revisited the vexing subject of labeling of charges. In *Otero v. USPS,* 73 M.S.P.R. 198 (1997), the Board construed *Burroughs v. Department of the Army,* 918 F.2d 170 (Fed. Cir. 1990), and held that an agency need not label its charges. Although it must not label the charge in terms that are not supported by the proof, it need not use a label that has narrow terms with legal elements. The appellant's due process and fairness concerns are satisfied where the narrative is sufficiently specific despite the broad label attached to it. In *Hawkins v. Smithsonian Institution,* 73 M.S.P.R. 397 (1997), and *Crouse v. Department of the Treasury & OPM,* 75 M.S.P.R. 57 (1997), the Board discussed the significance of the wording and structure of the letter of charges and whether the Board may look behind that wording and the language of the decision to define a charge.

**Disability Discrimination**

The Board's decision in *Clark v. USPS,* 74 M.S.P.R. 552 (1997), made several significant rulings, consistent with the law as set forth and applied by the Equal Employment Opportunity Commission. The Board distinguished between direct and indirect evidence of disability discrimination and set forth the burdens of proof applicable to each. It also decided that in determining whether an appellant is substantially limited in a major life activity, the major life activity of working should be examined last, and ruled that where the appellant shows he could be accommodated within his job, the Board should not reach the issue of whether he could be reassigned. In its decision in *Stevens v. Department of the Army,* 73 M.S.P.R. 619 (1997), the proof required to show that a disability is a "substantial impairment" was set forth.

The Board also reexamined agencies' accommodation obligation to alcoholic employees under the ADA's amendments to the Rehabilitation Act. Clarifying its position in *Kimble v. Department of the Navy,* 70 M.S.P.R. 617 (1996), the Board found that leave for treatment of an alcoholic may remain a required accommodation only where the employee requests it before he has committed the misconduct that violates the standards under which the agency uniformly imposes discipline. In a related ruling,

the Board held that although agency regulations on accommodation may derive from the anti-discrimination laws, a claim of the violation of such a regulation properly constitutes one of harmful error rather than discrimination. For a case finding a violation of an agency's obligation to accommodate, see *Humphrey v. Department of the Army,* MSPB Docket No. DE-0752-96-0465-I-1 (Sept. 26, 1997).

**Reduction in Force**

With the increasing need to trim work forces as a result of smaller budgets and changes in agency authority come more RIF actions, and accordingly, more claims that a RIF is not *bona fide,* but rather an improperly effected adverse action. Thus, it was of great importance when the Board decided, in *Cook & Shank v. Department of the Interior,* 74 M.S.P.R. 454 (1997), that an agency does not act prematurely when it separates an employee despite a continuing resolution then funding the agency. The Board held that an agency does not have to wait until it runs out of funds before effecting a RIF to stave off a deficit situation. Another precedential interpretation on the subject came in *Buckler v. Federal Retirement Thrift Investment Board,* 73 M.S.P.R. 476 (1997). There, the Board rejected the argument that a RIF should be found not *bona fide* if the appellant's behavior or performance was a substantial or motivating factor in the decision to implement the RIF. As long as the agency had legitimate reasons to abolish positions, the action is *bona fide* even though the affected employees had performance or conduct problems. Also in the RIF area, the Board issued several more decisions concerning the Postal Service's obligations in running its compliance RIF, intended to ameliorate certain effects of its 1992-93 restructuring-based demotion actions.

**Whistleblower Protection Act**

Once again in fiscal year 1997, the Board addressed many claims advanced under the WPA. In *Wojcicki v. Department of the Air Force,* 72 M.S.P.R. 628 (1996), the Board found, among other things, that even disclosures concerning matters that are applicable to only the appellant and a limited number of his co-workers may be protected. In *Sazinski v. Department of Housing and Urban Development,* 73 M.S.P.R. 682 (1997), the Board ruled that the revelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing is not protected as a substantial and specific danger to public health or safety. Additional issues involving the WPA were decided in Special Counsel cases (discussed below).

**Retirement Issues**

The Board also issued many decisions concerning the rights of employees, retirees, and various other applicants for retirement benefits, exploring the intricacies of the provisions of the retirement statutes applicable in numerous situations. In one such decision, *Finch v. Office of Personnel Management,* 72 M.S.P.R. 221 (1996), the Board found that it was appropriate, under the rules of statutory construction, to defer to OPM's reasonable interpretation of the retirement law concerning designation of

beneficiaries of lump sum retirement contributions, because Congress gave OPM the authority to issue regulations to effectuate the law. Here, the Board deferred to OPM, finding that it was constrained to do so, although this meant that the deceased Federal employee's request could not be honored. In that regard, the Board noted that it is up to OPM to change the regulation implementing the law, or to Congress to change the law itself.

### Interim Relief

The Board made two significant announcements in its decisions to modify or clarify the law relating to interim relief In *Moscato v. Department of Education,* 72 M.S.P.R. 266 (1996), the Board announced that it will no longer automatically dismiss an agency's PFR where it has, in good faith, inadvertently exceeded the requirements of an interim relief order. In *Costin v. Department of Health and Human Services & OPM,* 72 M.S.P.R. 525 (1996), the Board ruled that it may award interim relief to prevailing appellants in IRA appeals. Equally important were the Board's decisions in *Buckler v. Federal RetirementThrift Investment Board,* 73 M.S.P.R. 476 (1997), ruling that it may not examine an undue disruption determination under its authority to enforce final orders, or as a violation of the merit system principles, or in its authority to issue protective orders, and *O'Regan v. Department ofVeterans Affairs,* 74 M.S.P.R. 134 (1997), finding that in the context of providing interim relief, an agency may not reargue the issue of the appellant's qualifications for a job where they were directly at issue in the underlying IRA appeal.

### Original Jurisdiction Cases

Again in fiscal year 1997, the Board's original jurisdiction cases gave it the opportunity to study several important aspects of the various laws governing these cases.

### Actions Against Administrative Law Judges

In *Social Security Administration v. Mills Butler,* 73 M.S.P.R. 463 (1996), the Board established the rule that good cause to remove an administrative law judge may be found even in the absence of misconduct on the part of the judge. Here, the Board ruled that long-term absence resulting from a disability, with no realistic chance of the judge returning to duty, along with the agency's need to fill the position, support a finding of good cause under 5 U.S.C. § 7521. Good cause is a question of fact, to be decided on a case-by-case basis.

A ruling that *is* significant with respect to actions against administrative law judges was made in *Special Counsel v. Eubanks,* MSPB Docket No. CB-1215-94-0018-T-1 (Sept. 19, 1997). The Board remanded that Special Counsel case to the ALJ who heard it, stating that consideration on remand would proceed under the appropriate administrative supervision of the Board's Chief ALJ. In issuing this ruling, the Board noted the statutory proscription against interfering with an ALJ's decisional independence and held that the Chief ALJ may not interfere with that independence in making the actual fact findings, credibility determinations, and conclusions of law, but may provide "appropriate administrative supervision" in terms of support staff and making editorial suggestions.

Another significant ALJ-related ruling is found in *White v. Social Security Administration,* MSPB Docket Nos. CB-7521-97-0038-T-1 and AT-1221-97-0433-W1 (Sept. 23, 1997), dealing with a judge's authority to impose sanctions against an ALJ as necessary to serve the ends of justice. The Board concluded that where the ALJ failed to respond to several orders to address jurisdictional and other issues, imposition of the sanction of dismissal was within the decision maker's discretion.

### Special Counsel Actions

In *Special Counsel v. Eubanks* (discussed above), the Board established that its holding in *Spithaler v. OPM,* 1 M.S.P.R. 587 (1980), concerning the analysis of factual issues necessary to sustain Board review, applies to both appellate and original

jurisdiction cases. Where such standards are not met, the matter must be remanded to the judge who heard it.

In *Special Counsel v. Alexander,* 71 M.S.P.R 636 (1996), the Board found that the Hatch Act is violated where a covered employee engages in activity prohibited by the Act, whether he does so knowingly and willfully or not; intent is relevant only to the penalty. The Board stated that removal is warranted where the violation occurred under circumstances indicating that the employee deliberately disregarded the law. It also determined here that Federal payments to state activities made in the form of reimbursements constitute funding by "grants or loans" and that employees whose work is funded in this manner fall within the Act's coverage.

In *Special Counsel v. Spears,* 75 M.S.P.R. 639 (1997), the Board addressed anonymous disclosures, deciding that the requirement that, to come within the scope of 5 U.S.C. § 2302(b)(8) it must be shown that a person in the position of the person making the disclosure would have a reasonable belief in its protected character, applies even to such cases. The Board further decided that a whistleblower need not fully investigate the facts surrounding a disclosure in order to give it protection.

In *Special Counsel v. Department of Transportation,* 71 M.S.P.R. 661 (1996), the Board ruled that it may order cancellation of a removal action taken subsequent to a reassignment that it found to be a prohibited personnel practice (PPP), even without deciding whether the removal, alone, would constitute a PPP, if there is a sufficient relationship between that PPP and the later adverse action.

The Board's significant decision in *Special Counsel v. Costello & Strehle* and *Special Counsel ex rel. McClintock & Steen v. Department of Veterans Affairs,* 75 M.S.P.R. 562 (1997), addressed both disciplinary actions and corrective actions brought by the Special Counsel. Addressing the burden of proof, the decision in these cases held that the Special Counsel is not required to prove an actual abuse of authority or regulatory violation to prevail in a disciplinary action complaint, but that the Special Counsel's initial burden is much higher than in a corrective action case. The Board also noted that it applies its appellate jurisdiction standards to penalty determinations in such cases. While noting that return to the *status quo ante* is the remedy usually ordered as corrective action for violation of 5 U.S.C. § 2302(b)(8), under the unique facts of this case—where the employee's ability to perform his former job is unclear and the office in which he worked is now closed—the Board modified the usual remedy to require that he be allowed to select his new job location from current vacancies in his former position. (NOTE: This decision was subsequently appealed to the U.S. Court of Appeals for the Federal Circuit.)

**Regulation Review**

In *National Treasury Employees Union v. OPM,* MSPB Docket No. CB-1205-97-0030-U-I (Aug. 21, 1997), the Board granted NTEU's request that it review 5 C.F.R. § 351.504(6), providing that service credit in RIFs is to be based on recent performance ratings. Based on its careful analysis, the Board ruled that the performance-based additional service credit provision of section 351.504(b) is not a prohibited personnel practice under 5 U.S.C. § 2302(b)(11), and is not invalid.

In numerous cases, the Board found that petitioners failed to meet the strict statutory requirements for granting a request for regulation review. One request, *Public Safety Service Employees Union v. OPM,* 76 M.S.P.R. 162 (1997), addressed a request for review of the alleged invalid implementation of OMB Circular A-76 by theTennessee Valley Authority. The Board dismissed the petition, finding that it did not cite any rules or regulations promulgated by OPM. Rather, the Circular was a directive

prepared by OMB and is therefore not a matter within the jurisdiction of the Board's regulation review authority.

The breakdown of original jurisdiction cases by case type, and the disposition of those cases, is shown in the accompanying table.

**Improvements in Adjudictory Procedures**

During FY 1997, the Board purchased and installed video conferencing equipment in its five regional offices. The offices used this equipment to conduct 18 hearings and 1 status conference during the remainder of the fiscal year. Video conferencing has proven to be a cost-saver (travel and court reporting costs) and a time-saver (travel), especially for the administrative judges, who carry a heavy travel burden. The parties and other participants in cases also benefited from video conferencing by avoiding travel time and costs. In one instance, video conferencing equipment was used for testimony by a witness in prison, thus avoiding the expense of having U.S. Marshals transfer and accompany the witness to the hearing. In addition to the use of video conferencing equipment in an instance such as this, it may be used as well for testimony by witnesses located overseas when the hearing is being held in the United States. As this technology is applied to a much greater extent, there should be a significant positive effect on case processing productivity in the regional offices, as well as significant cost savings for both MSPB and the Federal Government as a whole.

The Board also implemented a Petition for Review (PFR) Form as a pilot project during the fiscal year. For many years, the Board has made available an optional Appeal Form to assist appellants in providing the information needed by administrative judges to decide their appeals. There was no comparable form, however, for filing a petition for review of a judge's decision. The new form is designed to assist the filing party in providing the information needed for the Board's adjudication of a PFR. Since May 1, 1997, the regional and field offices have distributed the new PFR Form with each initial decision. Through the end of the fiscal year, 30 percent of all PFRs filed were on the new form. The Board plans to assess this pilot project during FY 1998.

The Board's PFR Settlement Program achieved a 23 percent rate of success in appeals where settlement was attempted at the headquarters review level—up from 21 percent during the previous fiscal year. Considering that settlement had already been attempted at the regional or field office level in nearly all of those cases, and that an administrative judge had issued an initial decision favoring one party or the other, the Board's customers and observers were often surprised to learn of this significant rate of success. In addition, the settlement efforts themselves—whether successful or not—furthered the interests of alternative dispute resolution and customer service. Agency representatives, appellants' representatives, and *pro se* appellants often expressed their gratification with the settlement process as a vehicle to promote better understanding of both the adjudicatory process and the law as applied to their cases.

## Original Jurisdiction Cases Decided by MSPB in FY 1997

| Case Type | No. | Disposition |
|---|---|---|
| **OSC Corrective Actions** | 6 | Corrective action ordered — 2<br>No corrective action ordered — 1<br>Settled — 3 |
| Petition for Enforcement * | 2 | Dismissed |
| OPM Request for Reopening | 1 | Denied |
| **OSC Disciplinary Actions — Non-Hatch Act** | 4 | Disciplinary action ordered — 1<br>No disciplinary action ordered — 2<br>Remanded to ALJ — 1 |
| **OSC Disciplinary Actions — Hatch Act:** | | |
| Federal/DC | 2 | Dismissed — 1<br>Settled — 1 |
| State/Local | 3 | Ordered Federal funds withheld —<br>Dismissed — 2 |
| **OSC Stay Requests:** | | |
| Initial Requests | 4 | Granted |
| Requests for Extension of Stay | 11 | Granted |
| Special Counsel Motion for Termination of Stay | 1 | Granted |
| Petition for Enforcement | 1 | Dismissed |
| Agency Motion for Termination of Stay | 1 | Dismissed |
| **Actions Against ALJs** | 10 | Action authorized — 2<br>Dismissed — 5<br>Settled — 3 |
| **Requests for Regulation Review** | 54 | Denied — 51<br>Dismissed — 3 |
| **SES Performance-based Removals** (Hearing only — No Board decision) | 0 | |
| **TOTAL** | **100** | |

**Changes in Adjudicatory Regulations**

The Board's procedures for both appellate and original jurisdiction cases are set forth in the Code of Federal Regulations at 5 CFR Parts 1201, 1203, and 1209.

During the fiscal year, the Board made several amendments to its procedural regulations to implement provsions of new laws, incorporate new precedential Board rulings, and further streamline its adjudicatory operations. Those amendments are:

- Publication of a new Subpart H to 5 CFR Part 1201 to prescribe procedures for the Board's consideration of requests for attorney fees, consequential damages, and compensatory damages. This new subpart combined the Board's existing attorney fee regulations with new provisions implementing the attorney fee and consequential damages provisions of the 1994 law reauthorizing the Board and the Office of Special Counsel, the attorney fee provision of USERRA, and the compensatory damages provision of the Civil Rights Act of 1991. The amendment also made additional changes to both Part 1201 and Part 1209 to implement other provisions of the 1994 reauthorization law. 62 *Fed. Reg.* 17041, April 9, 1997.
- Amendment to 5 CFR Part 1201 to incorporate the Board's ruling in *Moscato v. Department of Education,* 72 M.S.P.R. 266 (1996), that it will no longer automatically dismiss an agency's PFR where it has, in good faith, inadvertently exceeded the requirements of an interim relief order. 62 *Fed. Reg.* 43631, August 15, 1997.
- Revision of Subpart D to 5 CFR Part 1201 to streamline the procedures for adjudication of original jurisdiction cases. Under the revised procedures, initial decisions—rather than recommended decisions—are issued in Special Counsel corrective and disciplinary actions and in actions against administrative law judges. These decisions are subject to a petition for review by the Board, but if no PFR is filed, they become final in the same way that initial decisions issued in appellate jurisdiction cases do. The revised procedures continue to require that Special Counsel disciplinary actions and actions against administrative law judges be adjudicated by an administrative law judge (normally the Board's Chief ALJ) . Special Counsel corrective actions and requests for informal hearings in SES performance-based removal cases, however, may be assigned to any MSPB judge. The revised procedures also provide that the Chief ALJ may decide initial Special Counsel stay requests under authority delegated by individual Board members. 62 Fed *Reg.* 48449, September 16, 1997.
- Amendment to 5 CFR Part 1201 to prescribe how a Federal employee witness in a Board proceeding may obtain an order that the employing agency grant him or her official time for participation in the proceeding. This amendment also clarifies that the Board's procedures for enforcement proceedings in Subpart F to Part 1201 apply to orders issued in the course of MSPB adjudicatory proceedings, such as an order that official time be provided a witness or an order protecting a witness or other individual from harassment. 62 *Fed. Reg.* 48935, September 18, 1997.

Although not published until after the end of FY 1997, three additional amendments to the Board's procedural regulations should be noted here. They are:

- Amendment to both 5 CFR Part 1201 and Part 1209 to revise the time limits for filing initial appeals (including whistleblower appeals and mixed case appeals), PFRs, and requests to review an arbitrator's award. All of the changes in this amendment are intended to ensure that an appellant has a full 30 days (60 days in the case of a whistleblower's IRA appeal) to file with the Board after the event from which the filing time begins to run. 62 *Fed. Reg.* 59991, November 6, 1997.
- Amendment to 5 CFR Part 1201 to clarify the authority of MSPB judges to exclude a party or representative from all or any portion of a Board proceeding for contumacious misconduct or misbehavior that obstructs a hearing. 62 *Fed. Reg.* 62689, November 25, 1997.
- Amendment to 5 CFR Part 1201 to prescribe procedures for the processing of cases brought under the Uniformed Services Employment and Reemployment Rights Act (Public Law 103-353). 62 *Fed. Reg.* 66813, December 22, 1997.

### Access to MSPB Adjudicatory Procedures and Decisions

Additional information on the Board's procedures is available in its publications, *An Introduction to the MSPB, Questions & Answers About Appeals,* and *Questions & Answers About Whistleblower Appeals,* which were updated in September 1997.

Final Board decisions are published by commercial publishers, including West Publishing Company *(United States Merit Systems Protection Board Reporter),* Labor Relations Press *(Federal Merit Systems Reporter),* and Information Handling Services *(PERSONNET).* All citations to Board decisions in this report are to the West's publication.

Final Board decisions, weekly summaries of significant decisions, the Board's information publications, and the MSPB Appeal Form are available on the Board's World Wide Web site at *www.mspb.gov* and in the MSPB Library of the Government Printing Office's *Federal Bulletin Board.* The bulletin board can be accessed by computer modem at 202-512-1387. Assistance is available from GPO by calling 202-512-1530. Certain significant Board decisions are also available on the OPM *Main-street* BBS, 202-606-4800.

# Litigation

### Judicial Review and Litigation

With two exceptions, final Board decisions in both appellate and original jurisdiction cases are subject to judicial review by the United States Court of Appeals for the Federal Circuit. The exceptions are:

- Decisions in mixed cases involving allegations of discrimination, which may be appealed to an appropriate U.S. district court; and
- Decisions in Hatch Act cases involving State or local government employees, which may be appealed to an appropriate U.S. district court.

The Director of OPM may petition the Board for reconsideration of a final decision, and may also seek judicial review of a final Board decision that the Director determines will have a substantial impact on a civil service law, rule, regulation, or policy.

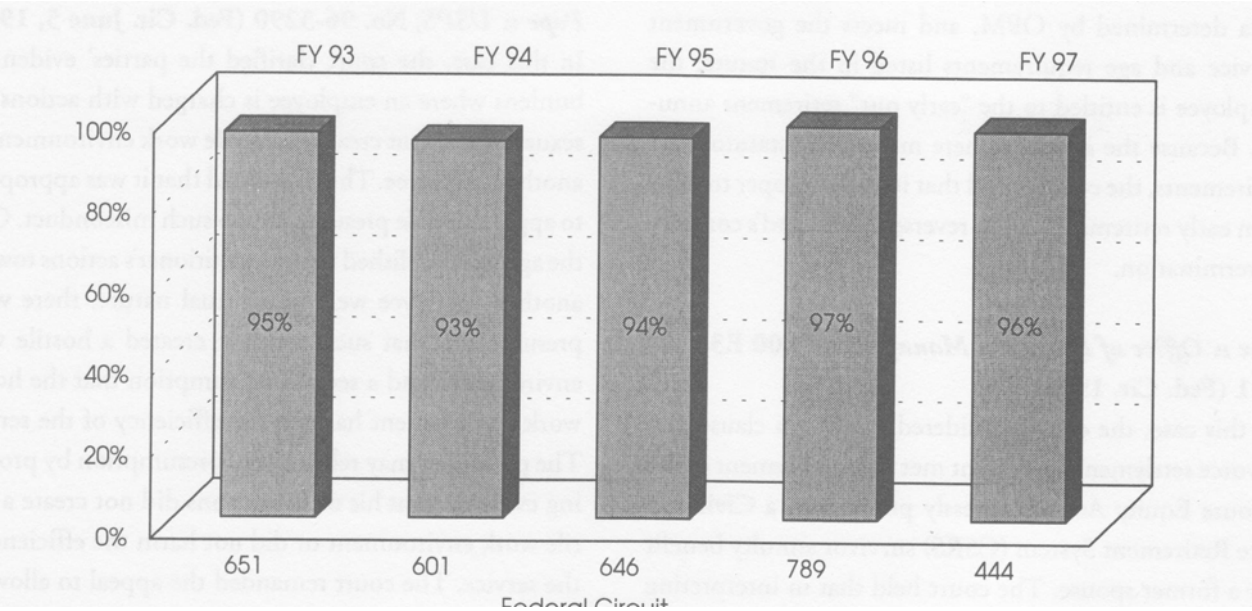
During FY 1997, the U.S. Court of Appeals for the Federal Circuit issued decisions on review of 444 Board decisions, and 96 percent of those decisions were unchanged. The Board actively litigated 133 of these cases.

The Whistleblower Protection Act of 1989 granted the Board litigating authority to defend its appellate decisions except where the merits of the underlying personnel decision or a request for attorney fees is at issue. (The Act modified a Federal Circuit order issued in 1987 that eliminated the Board as a respondent in appeals from cases that the Board had dismissed for lack of jurisdiction or timeliness and attorney fee decisions.) Other litigation in which the Board is named as respondent arises primarily from civil actions appealing decisions issued under the Board's original jurisdiction authority. The Board also is a respondent in all cases in which the Director of OPM seeks judicial review of a Board decision.

Other active litigation includes discrimination cases filed in the various Federal district courts—when the Board is a defendant; cases in which the Board intervenes; cases where Board employees are sued in their personal capacities for actions taken by them within the scope of their employment; and administrative litigation arising out of appeals to MSPB filed by the Board's own employees.

The Office of the General Counsel also monitors cases involving appeals from decisions issued by the Board under its appellate jurisdiction. The agency is the named respondent in these cases and is defended by the Department of Justice. Board activities in connection with monitored litigation include responding to inquiries from the parties or the court, informing the Board of significant cases scheduled for argument or decision by the court, and preparing summaries of published decisions. During FY 1997, attorneys in the Office of the General Counsel monitored 610 cases, including both new filings with the court and cases carried over from the previous year.

JUDICIAL REVIEW* OF MSPB DECISIONS, FY 1993 - 1997 PERCENT OF MSPB DECISIONS UNCHANGED**




Federal Circuit Decisions

* Final MSPB decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit.
** Dismissed or Affirmed

## Case Summaries

The following are summaries of significant decisions by the Federal Circuit on review of Board decisions during the fiscal year:

### *Cooper v. Department of the Navy,* 108 F.3d 324 (Fed. Cir. 1997)

This case involved the application of 5 U.S.C. § 7701(j), which provides that, in determining the appealability of a removal, the Board may not take into account the individual's status under a retirement system. The agency removed the appellant for inability to perform his duties, and he appealed his removal to the Board. While the appeal was pending, the appellant applied for and received disability retirement benefits, and the agency then rescinded the removal, deleting all references to it from his official personnel file and substituting a separation due to retirement. Because the removal was rescinded, the Board's administrative judge dismissed the appeal as moot in a decision which became final after the Board denied review.

On appeal, the court affirmed, ruling that the cancellation of the removal and its expungement from the appellant's record eliminated all consequences of the action. The court acknowledged its decision in *Mays v. Department of Transportation,* 27 F.3d 1577 (Fed. Cir. 1994), finding that section 7701(j) was intended to permit an employee eligible to retire at the time of his removal to take a retirement annuity without forfeiting the right to challenge the removal. However, it found that this case was distinguishable from *Mays* because here the employee's removal was rescinded and could not be the subject of an appeal. The Board did not need to consider the appellant's retirement status to find that his appeal was moot. This result, the court added, does not prevent theemployee who believes he was effectively removed by being improperly coerced into retiring from challenging the retirement as involuntary.

### *Torres v. Office of Personnel Management,* No. 963367 (Fed. Cir. Sept. 12, 1997)

In this case, the court examined the statutory criteria for immediate or "early out" retirement annuities under 5 U.S.C. § 8336(d)(2). OPM argued that section 8336 gave it broad power to impose time restrictions with respect to who could receive the "early out" benefit and thus limited it to employees who had been on the agency rolls for 30 days prior to the time the employing agency requested early out authority from OPM. The court found that the language of the statute was clear, that it did not provide for the type of restriction devised by OPM, and that OPM lacked authority to impose any eligibility requirements beyond those set out by Congress.

According to the court, the only duties delegated to OPM by the statute are to determine where the geographic limits of the offer for early retirement shall extend and whether a "major" personnel action is occurring. If an employee is in an agency undergoing a major reduction in force, as decided by OPM, in a particular geographic area determined by OPM, and meets the government service and age requirements listed in the statute, the employee is entitled to the "early out" retirement annuity. Because the appellant here met all the statutory requirements, the court found that it was improper to deny him early retirement and so reversed the Board's contrary determination.

Fox v. Office of Personnel Management, 100 E3d 141 (Fed. Cir. 1996)

In this case, the court considered whether a clause in a divorce settlement agreement met the requirement of the Spouse Equity Act to expressly provide for a Civil Service Retirement System (CSRS) survivor annuity benefit for a former spouse. The court held that in interpreting the terms of any divorce decree or property settlement incident to that decree, if the terms can fairly be read as awarding a CSRS survivor annuity, it is appropriate to consider extrinsic evidence of the marriage parties' intent and the circumstances surrounding the execution of the document. Because the Court found that the clause at issue here could be read as awarding a survivor annuity, it held that the Board erred in failing to give weight to extrinsic evidence of the parties' intent, which evidence demonstrated that the meaning of the clause entitled "survivors benefit plan" meant a CSRS survivor annuity.

***Natiolski v. Merit Systems Protection Board,* 105 E3d 642 (Fed. Cir. 1997)**

In this case, the court agreed with the Board that an agency does not violate the interim relief provision at 5 U.S.C. § 7701(6) (2) by reassigning an employee. The court held that an agency may reassign an employee as interim relief provided that the agency determines that returning the employee to the original position would unduly disrupt the work environment, and the agency pays the employee all the pay and benefits of the original position. The court affirmed that the Board need not examine an agency's compliance with an interim relief order if the Board finds that the administrative judge improvidently awarded interim relief. The court confirmed the Board's authority to waive any of its own regulations upon a finding of good cause and notice to the parties.

***Pope v. USPS,* No. 96-3290 (Fed. Cir. June 5, 1997)** In this case, the court clarified the parties' evidentiary burdens where an employee is charged with actions of a sexual nature that created a hostile work environment for another employee. The court held that it was appropriate to apply a double presumption to such misconduct. Once the agency established that the petitioner's actions towards another employee were of a sexual nature, there was a presumption that such conduct created a hostile work environment and a second presumption that the hostile work environment harmed the efficiency of the service. The petitioner may rebut either presumption by producing evidence that his or her actions did not create a hostile work environment or did not harm the efficiency of the service. The court remanded the appeal to allow the petitioner an opportunity to rebut the presumption that his actions created a hostile work environment.

**Petitions of Certiorari**

The Supreme Court granted the petition for certiorari in *King v. Erickson,* and *King v. McManus,* 1117 S.Ct. 2506 (June 27, 1997), on the issue of whether the due process clause prohibits Federal agencies from sanctioning employees for making false statements about their involvement in employment-related misconduct. In the decisions under review, the Federal Circuit had found that an agency may not charge an employee with falsification, or a similar charge, on the basis of the employee's denial of another charge or the underlying facts relating to that other charge. The Justice Department's brief to the Supreme Court argues that the Federal Circuit's decision creates a broad constitutional right to lie for Federal employees suspected of employment-related misconduct, that the Supreme Court has consistently rejected such a right, and that the due process clause does not support the Federal Circuit's rulings. The Court heard argument on December 2, 1997.

The U.S. Court of Appeals for the Federal Circuit maintains a Web site at *www.fedcir.gov,* which provides quick access to two other Web sites that make the court's decisions available.

# Studies

### The Statutory Studies Function

The CSRA assigned the Board, in addition to its adjudicatory functions, responsibility for reviewing the significant actions of OPM and for conducting studies of the civil service and other merit systems in the Executive Branch. The studies function complements the Board's adjudicatory activities by reviewing Federal human resources management policies and practices on a systemic basis. The Board is uniquely situated to provide neutral, independent, and non-partisan reviews and assessments as part of the ongoing effort to develop and maintain an effective and efficient civil service.

The Board typically solicits potential study topics from a wide variety of sources in developing its OPM oversight and studies agenda. The Board's studies are usually governmentwide in scope, and are conducted through a variety of evaluation methods, including mail and telephone surveys, on-site systems reviews, written interrogatories to agencies, formal discussions with subject-matter experts, computer-based data analysis, and reviews of secondary source materials.

The Board's reports on the results of its studies are addressed to the President and the Congress, as required by law, and also are made available to a large secondary audience of Federal agency officials, employee and public interest groups, labor unions, academicians, and other individuals and organizations with an interest in public personnel administration.

### Summaries of Reports Issued in FY 1997

*Achieving a Representative Federal Workforce: Addressing the Barriers to Hispanic Participation* (September 1997). This report presents the results of the Board's study of the degree to which Federal agencies have met the statutory goal of a work force representative of all segments of society and the reasons for the continued underrepresentation of Hispanics in the Federal work force. Hispanics remain the only minority group whose aggregate representation in the Federal work force is less than that in the civilian labor force (5.9 percent versus 10.2 percent). Among the specific findings are:

- Efforts to reach full Hispanic representation in the Federal work force are hampered by the fact that 65 percent of white managers and 49 percent of Hispanic managers do not believe that Hispanics are underrepresented in their work units. Further, only 35 percent of white managers (and 63 percent of Hispanic managers) believe they should be held accountable for work force diversity.
- Despite well-documented gains made by minorities in expanding their representation in the Federal work force, racial and ethnic discrimination still affect job opportunities for minorities to some degree.
- Because of a combination of several powerful demographic realities, even the total elimination of discrimination from the Federal work force would not alone result in achievement of full Hispanic representation. Among the reasons are:
- The geographic distribution of Federal jobs is at odds with the distribution of the Hispanic population. While 54 percent of Hispanics live in California and Texas, only 16 percent of Federal jobs are located in these states.

- There are some occupational and educational barriers that make it more difficult to find highly-qualified Hispanics. Over half (53 percent) of all Federal jobs are in professional and administrative occupations, yet nearly 60 percent of Hispanics in the U.S. civilian labor force are employed in blue-collar jobs, and only 9.2 percent of Hispanics have attained a 4-year college degree or higher.
- Over a third (35 percent) of Hispanics in the U.S. civilian labor force are not citizens and, thus, are effectively barred from Federal employment.

The Board concludes that in addition to continued efforts to eliminate any vestiges of discrimination that may still exist, Federal agencies need to address the demographic obstacles that hinder efforts to increase Hispanic representation in the Federal work force. This must be done in a manner consistent with a merit-based civil service and should include: (1) a strategic plan for more effective recruitment of well-qualified Hispanics; (2) ensuring managers are accurately informed about the degree of Hispanic representation in the work force and each manager's responsibility in this regard; and (3) possibly devoting a greater proportion of resources devoted to minority recruitment efforts to the goal of hiring well-qualified Hispanic men and women.

*Adherence to the Merit Principles in the Workplace: Federal Employees' Views* (September 1997). This report presents the results of a study that examines the extent to which employees of Executive Branch departments and agencies believe their organizations are adhering to the requirements of the statutory merit system principles. The centerpiece of this study was a survey administered to over 9,700 Federal employees who were asked about the extent to which their agencies were meeting the goals defined by the merit system principles. The following are among the specific findings in the report:

- Almost one-third of employees believed their agencies regularly fail to uphold the merit principles when promoting people, by basing promotions on something other than candidates' relative ability, knowledge, and skills.
- About one-fifth of the survey respondents thought their agencies have a major problem in hiring new employees based on merit, after fair and open competition.
- One-fifth of respondents felt their agencies regularly fail to make well-qualified selections when hiring new employees from outside their agencies.
- Some 44 percent felt their agencies regularly do a poor job of correcting inadequate performance of their coworkers. Nonsupervisory and supervisory employees' views were almost identical on this issue.
- Just over half (51 percent) said their agencies do not fire people who cannot or will not improve their performance. Even more supervisors felt this way than nonsupervisory employees.
- Almost one-fifth of respondents thought their agencies regularly fail to protect employees against arbitrary personnel actions, and some 15 percent believed their agencies regularly fail to protect employees against reprisals for whistleblowing.
- Only 8 percent saw a major problem in regard to whether agencies are able to protect employees from being coerced to participate in partisan political activities.
- Thirty-eight percent of respondents thought their agencies had only minor problems or no problem in protecting employees from discrimination in personnel management matters. Some 22 percent said this was a recurring problem in their agencies, and 20 percent said it was a moderate problem.

The Board concludes that many Federal employees are not convinced that their organizations are consistently upholding the values embodied by the merit principles. To improve this situation, the Board recommends that: (1) every Federal department and agency examine its own personnel practices and programs, emphasizing the bottom-line results inherent in the merit principles; (2) with help from OPM, Federal departments and agencies should incorporate into their management training programs practical guidance for managers on what they must do to implement the merit system principles effectively; and (3) departments and agencies need to develop meaningful, cost-effective oversight and accountability systems for ensuring that the work environment is free from prohibited personnel practices.

## Other FY 1997 Activities

### Issues of Merit

In fiscal year 1997, the Board continued to actively disseminate its study findings, conclusions, and recommendations through the periodic publication of its "Issues of Merit" newsletter. This publication is directed to Federal policy makers, the human resources community, and others interested in Federal human resources management issues. Among FY 1997 features were:

- A discussion of the quality of new hires, noting that although Federal employees are generally positive about the quality of their coworkers, in the Board's 1996 merit principles survey, Federal managers rated job applicants lower than they had in previous years. Even in the midst of downsizing, the Government needs to pay special attention to work force quality and how it is achieved.
- A discussion of the need for Federal managers to maintain balance between their desire to quickly fill vacancies and their need to find high quality candidates, highlighting the fact that the quickest way to bring a new hire on board does not always result in hiring a superior candidate.
- Survey results showing that Federal supervisors and managers believe that downsizing in administrative and support functions has been accompanied by a degradation in the quantity and quality of human resources management support available to managers.
- An analysis of "delayering" efforts finding that: (1) although the Government has been successful in cutting the number of organizational layers and increasing the average span of control, these changes are not seen by many former supervisors as achieving the desired improvements in individual and work unit performance; and (2) for a sizable portion of employees in the survey sample, a change in status from supervisor to nonsupervisor has not resulted in a change in the duties they perform.
- A report on supervisors' views of third-party agencies (Equal Employment Opportunity Commission, Merit Systems Protection Board, Office of Personnel Management, and the Federal Labor Relations Authority) revealing varying levels of satisfaction with how these agencies handle employee complaints and appeals.

- Views from Federal employees who serve on "standing panels" for MSPB by responding to short, periodic surveys on items of interest, including: (1) supervisors' apprehensions about taking on additional human resources management responsibilities; (2) the ways in which supervisors are held accountable and which ones they believe are most effective; (3) competencies supervisors believe they need in order to effectively carry out their human resources management responsibilities; and (4) supervisors' views (and criticisms) on the quality of human resources services they receive from their personnel offices.

**Studies in Progress**

Substantial work was completed in FY 1997 on: (1) an omnibus report on the results of the 1996 Merit Principles Survey; and (2) a study concerning the effectiveness of OPM oversight of Federal agencies' human resources management programs. Additionally, data gathering was completed on a study of the changing role of Federal supervisors in Federal human resources management and whether they are ready for those changes. A study was also begun that will assess the significant activities of OPM during the almost 20 years since the passage of the Civil Service Reform Act. The Board also initiated studies of delegated personnel examining authorities and the Interagency Career Transition Assistance Program (ICTAP).

**Agency Outreach**

The Board worked collaboratively with other Federal agencies to fulfill its mission in FY 1997, while being careful to maintain its objectivity and non-partisanship. Agencies frequently request information or advice regarding implementation of the merit system principles or eradication of prohibited personnel practices. The Board's study of sexual harassment for the Department of Justice (funded by that department) was completed early in the fiscal year. The Board prepared a report based on the study results, and the Attorney General distributed it to all components within the department. In her memorandum accompanying the report, the Attorney General advised all managers and employees that eliminating sexual harassment in the workplace was one of her highest priorities for the Justice Department. The department proceeded to develop strategies, based on the study results, for dealing with the problem of sexual harassment.

During FY 1997, the Board also provided advice and assistance to several agencies, including the Department of Agriculture and the Department of Commerce, who were interested in surveying their own work force regarding issues and concerns raised by an earlier Board report on minority employment in the Federal Government. Additionally, the Board provided advice and assistance to numerous agency representatives calling with specific questions and data requests after the release of the report, "Adherence to the Merit Principles." The Board also provided staff to collaborate with an inter-agency team to design an organizational change survey for the National Performance Review as part of their ongoing efforts to improve operations throughout all Federal agencies.

**Studies-Related Technological and Procedural Improvements**

During FY 1997, the Board applied emerging technologies to its studies program and initiated a number of procedural improvements. Among the accomplishments in this area are the following:

- The Internet is being used to make Board study reports more readily available to Federal policymakers, agency decisionmakers, and the general public. The "Issues of Merit" newsletter and reports are now readily available for downloading from the

MSPB web site, as well *as* from some commercial sites. This not only makes the information more immediately and more broadly available, but the hundreds of downloads of the newsletter and reports—which are the most frequently downloaded items from the Board's web site—represent significant savings in distribution costs.

- All members of the studies staff now have highspeed access to the Internet and are able to use it to identify key work force issues more efficiently and to obtain or verify information useful in its merit system studies. Increasingly, the Internet is becoming a real-time window on the policies and human resources management initiatives of Federal agencies. Reports from OPM, GAO, NPR and other sources are readily downloaded and made immediately available for use by the studies staff.
- The studies staff is increasingly using its access to OPM's Central Personnel Data File (CPDF) to answer questions about the composition of the Federal work force and the number and types of personnel actions (e.g., hires, separations, adverse actions) affecting the work force. This direct access to the CPDF allows the staff to quickly test hypotheses and answer questions related to the studies program.
- To augment previously established "standing panels" of Federal managers and human resource management specialists, a panel of approximately 540 union representatives was established during FY 1997. While these panels are not representative of the Government as a whole, short surveys of panel members permit timely feedback and informed opinions about a variety of pressing issues related to the management of the Federal work force. For example, in a collaborative effort with the National Academy of Public Administration, the Board surveyed two of the panels to obtain information about the competency requirements of human resources management specialists and about the preparedness of Federal managers to assume more responsibility for delegated human resources management functions. More recently, surveys of managers and union representatives provided important new insights into the extent to which agency partnerships have influenced the working relationships between first-line supervisors and union representatives.

# Administration

## Government Performance and Results Act

In accordance with the requirements of the Government Performance and Results Act (GPRA), the Board delivered the MSPB strategic plan to the Office of Management and Budget (OMB) and the Congress on September 30, 1997. The plan was the product of extensive consultation over the last two years with the Congress, OMB, and the MSPB's stakeholders, including agency representatives, union representatives, members of the private bar who represent appellants before the Board, and academicians and others interested in the Board's studies. The consultations included two focus group meetings with representatives of stakeholders in May of 1997. The strategic plan describes the Board's plans for the next five years under the broad goals of protecting and promoting the Federal merit systems through fair, timely, and efficient dispute resolution and timely and relevant reviews of Federal human resources management systems, programs, policies, and initiatives, including reviews of the significant actions of OPM.

In September 1997, the Board also delivered its first annual performance plan, covering fiscal year 1999. The performance plan lays out the agency's objectives and specific performance measures for that fiscal year. The performance measures for the dispute resolution goal include: the percentage of final Board decisions left unchanged upon review by the courts, the average case processing time for initial decisions and petitions for review, the average processing cost, and indications that costs are being saved by the greater use of an alternative dispute resolution process by individual Federal agencies. The performance measures for the studies and reviews goalinclude: indicators that the Board's research has examined relevant issues, indicators that Federal policy makers have found the information the Board produces to be useful, indicators that the Board's recommendations are useful, and indicators that the Board provides a unique perspective on the issues studied.

These plans will be discussed during the next year as the FY 1999 appropriation request is considered and acted on by OMB, the President, and the Congress.

## Staff Reductions and Use of Temporary Appointments

In an effort to operate within existing budgetary constraints, and in anticipation of additional reductions in appropriations in future fiscal years, the Board determined during FY 1997 that it was necessary to reduce its staff. To accomplish the needed reduction, the Board first offered early out retirement with a buyout opportunity to all support staff. Eight employees retired under that offer. Because further reductions were needed, the Board conducted a RIF of headquarters support staff that was effective October 1, 1997. The RIF resulted in the abolishment of 15 positions; 5 employees retired or found employment with other agencies, and 10 employees were separated. With other attrition, the Board reduced its staff by a total of 39 employees during FY 1997.

The Board's adjudication workload has not fallen even though overall Federal employment levels have been reduced about 15 percent in the last four years. The steps taken to reduce support staff enabled the Board to hire additional administrative judges with temporary appointments to assist in adjudicating the appeals being received. Depending on future workload and funding levels, the Board may extend these temporary appointments. During FY 1997 only one headquarters attorney was transferred to a regional office. Other vacancies were filled by outside hires from the local regional and field office cities.

## Technology and Procedural Improvements

MSPB continued to make technological and procedural improvements during the fiscal year. In addition to the installation of video conferencing equipment (discussed in the "Adjudication" section of this report), notable improvements included the following:

- Implementation of the Wide Area Network (WAN) in the regional and field offices was completed, allowing those offices access to the Local Area Network (LAN) at headquarters. This facilitates the exchange of information and documents, and provides every employee access to documents such as final decisions, research reports, administrative information, and CD-ROM publications.
- The conversion of offices from the DOS version of Microsoft Word to the Windows version was completed, allowing for easier transfer of information among offices.
- The agency extended voice mail to all of the regional and field offices so that callers can leave messages even when no one is available to answer the telephone, such as in the evening and on weekends.
- All offices were given access to the Internet so that information from other agencies as well as outside sources can be accessed more easily and quickly.
- Additional tape recording equipment was provided for the administrative judges so that it is easier to record pre-hearing conferences and hearings. This has resulted in savings in court reporting costs.
- More information on final Board decisions and reports on studies is now available to the public through continuing enhancements to the MSPB World Wide Web site. The MSPB web site is accessed, on average, over 5,600 times monthly. User sessions, which include activities such as browsing or downloading files, average about 1,870 monthly.

To help meet the Board's workload challenges, headquarters and the regional and field offices are continuing to work together to identify and plan for the increased application of computer technology. One regional office has instituted an electronic filing system to permit appellants to file electronically. The Board is continuing to explore the feasibility of converting its paper-intensive file system into an electronic system. Factors affecting any such Board decision will include demonstrated efficiencies in time and cost involved in tracking, filing, duplicating, and mailing case files, preservation of the integrity of the case filing system, and the ability to design and implement a system that is user-friendly for both litigants and Board personnel and which contributes to quality and expeditious case adjudication.

# Financial Statement

The income and expenses for the Merit Systems Protection Board for fiscal year 1997 (October 1, 1996, through September 30, 1997) are shown below. All figures are in thousands of dollars.

| | |
|---|---|
| **INCOME** | |
| Appropriations | 23,923 |
| Civil Service Retirement & Disability Trust Fund | 2,430 |
| Other reimbursements | 22 |
| Total income | 26,375 |
| **EXPENSES** | |
| Direct obligations: | |
| Personnel compensation | |
| Full-time permanent | 14,724 |
| Other than full-time permanent | 1,018 |
| Other personnel compensation | 23 |
| Subtotal, personnel compensation | 15,765 |
| Personnel benefits | 2,779 |
| Benefits — former employees | 345 |
| Travel of persons | 298 |
| Transportation of things | 56 |
| Rental payment to GSA | 1,884 |
| Communications, utilities, and miscellaneous | 535 |
| Printing and reproduction | 94 |
| Other services | 1,338 |
| Supplies and materials | 172 |
| Equipment | 603 |
| Subtotal, direct obligations | 23,869 |
| Reimbursable obligations | 2,452 |
| Total obligations | 26,321 |
| **BALANCE** | 54 |

# For Additional Information

MSPB's World Wide Web site contains information about the Board and its functions, as well as copies of decisions, reports, and publications. Complete copies of decisions from July 1, 1994, are available for downloading, as are copies of the weekly Case Summaries and recent reports and studies. The address of the Board's Web site is **http://www.mspb.gov.**

The MSPB Library on the Federal Bulletin Board can be accessed by computer modem at **202-512-1387** seven days a week. User assistance is available from GPOfrom 8 AM to 4 PM Eastern time, Monday through Friday, by calling 202-512-1530. The Bulletin Board can also be accessed via the Board's Web site.

The Board's toll-free telephone number is

**1-800-209-8960.**

Comments or questions regarding MSPB, the bulletin board, or the Web site may be sent to the Board's e-mail address, **mspb@mspb.gov.**

# Customer Service Standards

The Merit Systems Protection Board has two core missions: (1) Adjudication of appeals brought to it under the provisions of law and regulation, and (2) Oversight of the Federal merit systems. These two missions are authorized in the Civil Service Reform Act of 1978.

*We have established these standards to assure our customers that they receive the quality of service to which they are entitled and to assure the public as a whole that we are ably promoting and protecting the Federal merit systems.*

**MISSION I — Adjudication of Appeals**

1. We will make our regulations easy to understand and our procedures easy to follow.
2. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.
3. We will promptly and courteously respond to customer inquiries.
4. We will facilitate the settlement of appeals.
5. We will issue readable decisions based on consistent interpretation and application of law and regulation.
6. We will issue decisions in initial appeals within 120 days of receipt and within 110 days on petitions for review, except where full and fair adjudication of an appeal requires a longer period.
7. We will make our decisions readily available to our customers.

**MISSION II — Oversight of the Federal Merit Systems and the U.S. Office of Personnel Management**

1. We will conduct research on topics and issues relevant to the effective operation of the Federal merit systems and the significant actions of the U.S. Office of Personnel Management; perform sound, objective analysis; and where warranted, develop practical recommendations for improvement.
2. We will issue timely, readable reports on the findings and recommendations of our research and make these reports available to all interested individuals and parties.
3. We will enhance the constructive impact of our studies and reports through outreach efforts.

*We will conduct surveys of our customers from time to time to see how well we are meeting these standards. However, if at any time, you have comments or suggestions concerning our service, we invite you to provide feedback to our Chairman, Mr. Ben Erdreich, through the Clerk of the Board, at 1120 Vermont Avenue, NW., Washington, DC 20419, telephone (202) 6537200, FAX number (202) 653-7130. Electronic mail may be sent over the Internet to mspb@mspb.gov.*