

**Merit Systems Protection Board
Annual Report
FY 2004**



March 2005

Foreword

In accordance with section 1206 of Title 5 United States Code, the Merit Systems Protection Board (MSPB, or the Board) provides the annual report on the significant actions of the Board. This report includes summaries of the most significant Board and court decisions issued during the year, case processing statistics, summaries of the Board's merit systems studies, summaries of the significant actions of the Office of Personnel Management (OPM) and a summary of financial results. In addition, where there have been significant activities in recent months, we will provide updated information as a service to the reader.

Additional information about FY 2004 performance results and financial audit information is included in our separate Performance and Accountability Report (PAR). This Annual Report and the PAR as well as other information about the MSPB can be found on our website: www.mspb.gov.

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Fiscal Year 2004 in Review

The Board's role in protecting the merit systems and the increasing flexibility necessary to manage the Federal workforce in the 21st century

The most significant trend affecting the civil service and the merit systems continues to be the proliferation of agency-specific human resources management systems designed to provide the increased flexibility necessary to manage human capital in the 21st century workforce. These flexibilities have usually come as exceptions to or exemptions from traditional procedures contained in Title 5, United States Code and 5 C.F.R. (Code of Federal Regulations). In FY 2004, the Department of Homeland Security (DHS) published proposed regulations to implement the management authorities granted them in FY 2003. In addition, the Department of Defense (DoD) made considerable progress in preparing their proposed regulations related to the authorities granted them in the preceding year. . In addition to DHS and DoD, the National Aeronautics and Space Administration also obtained legislative flexibilities in FY 2004 for managing their workforce and we continue to anticipate that other agencies will do the same. When these systems are fully implemented, almost 1 million Federal employees -- well over half of the Federal civilian workforce -- will be managed under alternative systems that could differ significantly from the traditional system contained in Title 5.

Unlike most past flexibilities granted to Federal agencies, the DHS and DoD laws include provisions to alter their appeals procedures and the rights of their employees to file appeals with the Board. These agencies are concerned with timeliness and with ensuring that their disciplinary and appeals procedures appropriately reflect their mission environments. MSPB worked diligently with both DHS and DoD as required in their legislation to assist them in developing their new appeals procedures and related processes. As the fiscal year ended, DHS had yet to publish their final regulations and DoD's plans were still being developed. However, it is useful to note that early in calendar year 2005, DHS published its final regulations which specify that its employees' initial and secondary appeals will be handled by MSPB. A few days later, DoD published its proposed regulations specifying that its employees' initial and secondary appeals will also be

handled by MSPB. MSPB is reviewing its regulations to account for the DHS procedures.

The increase in flexibilities, especially those regarding appeals, presents a challenge for the Board's adjudication and studies functions. The case law upon which case decisions will be made could change significantly. In addition, the case workload could go up or down or remain fairly stable over time depending on DHS and DoD changes, as well as changes in personnel authorities at other agencies or Governmentwide. As the number and variety of agency-specific laws and accompanying personnel management procedures increases, so does the complexity of our adjudicatory work.

The increase in alternative agency-based systems will also impact our merit systems studies function. Change rightly increases the need for oversight and evaluation of new procedures. In addition, the DHS and DoD personnel authorities, like the flexibilities granted to other agencies in recent years provide that the Title 5 provisions governing merit system principles and prohibited personnel practices may not be waived, modified or otherwise affected. Therefore, there will be an even greater need for studies of the operation of these new personnel systems to ensure they continue to operate in accordance with merit principles and remain free of prohibited personnel practices.

The challenge for the Board is to preserve its role as chief protector of the Federal merit systems as these new, more modern and flexible systems are developed and implemented. We believe that our unique identity as an independent agency ensures both the fact and appearance of impartiality necessary to protect merit. In addition, the Board is the most experienced organization for merit systems appeals in the Federal Government. Maintaining the Board's role is therefore the most efficient and effective way to assure the public of the Government's commitment to merit-based management.

Board and senior staff changes

On December 10, 2003, Neil A. G. McPhie became Acting Chairman of the MSPB when President Bush designated him to be Vice Chairman. (Under the Board's governing statute, the Vice Chairman serves as Acting Chairman when the position of Chairman is vacant.) Susanne Marshall was Chairman for the first portion of FY 2004 and became a member of the Board when Mr. McPhie became Chairman. Ms Marshall's term expired on March 1, 2004, and she remained in her position throughout the rest of the fiscal year. (Under the Board's governing statute, a member may remain on the Board for a period of one year past the expiration date unless a successor is confirmed,

whichever comes first.) We would like to note that on November 21, 2004, Mr. McPhie was confirmed as Chairman of the U.S. Merit Systems Protection Board. Also, while the position of the third member of the Board remained vacant throughout FY 2004, Barbara Sapin was confirmed as member on November 21, 2004. Biographical information about Ms. Sapin is included in this report.

The Director of the Office of Information Resources Management retired in FY 2004. At the end of FY 2004, an Acting Director was managing that office. In early FY 2005, a Director of Information Resources and Chief Information Officer was selected. The Acting Director of the Office of Financial and Administrative Management was selected as the permanent Director for that Office.

Adjudication

The Board continued to decide appeals and petitions for review (PFRs) in accord with the law and regulations governing such appeals. The section on case processing later in this report gives considerable information regarding the adjudication of cases filed with the Board. The section on significant judicial and Board decisions for FY 2004 provides brief summaries of the decisions made in FY 2004. Some of the more significant decisions addressed issues such as: the Board's jurisdiction to review whistleblowing reprisal allegations of Transportation Security Agency employees; appropriate pay-setting in demotions; the Board's jurisdiction over a constructive removal appeal (and therefore over discrimination claims and other issues raised in the appeal) when the employee ultimately fails to prove that the separation was involuntary; the definition of "position" for retirement purposes and the requirement for a hearing when an appeal presents only matters of law.

The significant court opinions covered issues ranging from entitlement of an employee to a higher graded position as an accommodation under the Americans with Disabilities Act (ADA), when an agency can establish an absolute performance standard and imposing a probationary period as a condition of employment. The Board also surveyed a sample of agency representatives, gathering valuable information for ensuring we continue to meet the needs of these stakeholders.

The Board continued its efforts to provide a full menu of dispute resolution options to its customers and improved its capacity for electronic case filing and processing. The Board decided to make the Meditation Appeals Program (MAP) permanent and to expand the program nationwide. Because the MAP

is a supplement to the Board's already successful settlement program, the MAP expands the Board's ability to assist the parties in resolving disputes short of full adjudication on the merits. The Board's new electronic case management system was fully implemented in FY 2004 making the internal processing and tracking of appeals more efficient. The Board also implemented e-Appeal phase II, thus establishing a web-based system for filing appeals and other legal documents and enabling electronic communication of official case notices and decisions.

Merit systems studies

The Board completed six studies and issued reports on merit systems and human capital management issues ranging from automated hiring, to recruitment, to a summary of the human capital issues that are on the minds of our stakeholders. We also conducted a customer survey of our merit systems studies customers and prepared a summary of findings to assist in better meeting the needs of our customers. The Board issued four editions of the *Issues of Merit* newsletter. Newsletter topics included advocacy of merit systems and human capital management reform efforts, practical advice for human resources professionals and specific analyses of ongoing studies.

Legislative activity

The legislative activity for the Board involved confirmation hearings for our Chairman and member and passage of our appropriations for FY 2004. President Bush nominated Neil A.G. McPhie as Chairman and Barbara J. Sapin as member of the MSPB. The Senate held a confirmation hearing to consider both nominations on July 19, 2004. The nominations were confirmed early in FY 2005. Chairman McPhie's appointment will expire on March 1, 2009, and Ms. Sapin's appointment will expire on March 1, 2007. The FY 2004 appropriation for the Board (\$32,877,000 plus up to \$2,626,000 transferred from the Civil Service Retirement and Disability Fund) was enacted on January 23, 2004, in H.R. 2673, the Consolidated Appropriations Act, 2004, (P.L. 108-199).

The most significant legislation affecting the merit systems was the National Defense Authorization Act for FY 2004 (P.L. 108-136). Title XI of the Act authorizes DoD to develop the National Security Personnel System (NSPS) for its civilian employees. This authority includes flexibilities in pay, performance management, classification, hiring, labor relations and appeals. DoD was granted many of the same authorities for appeals as was DHS, however DoD must afford their employees the right to petition the full MSPB Board for review of any decisions made by an internal appeals system that

DoD may establish. MSPB established a formal working group comprised of managers and senior attorneys to work with DoD on their proposed regulations. This work continued throughout FY 2004. At the end of FY 2004 the DoD proposed regulations were not yet published so we do not know the final intent of DoD regarding its appeals system, in particular the rights of its employees to go to MSPB for initial appeals.

In addition, because of the significant impact the Homeland Security Act (P.L. 107-296) may have on our adjudicatory function, we will summarize our FY 2004 activities regarding this law. The Board continued to work with DHS on its regulations during the early part of FY 2004. The DHS proposed regulations were published in Volume 69, No. 34 of the Federal Register on February 20, 2004 and may be found in 5 C.F.R. Part 9701. The employee appeal systems established in these regulations retained MSPB appeal rights for DHS employees for both initial appeals and second-level review for most adverse actions taken by the agency against its employees. Some of the significant changes affecting the Board included reduced time frames for MSPB to process DHS appeals and changes to the Board's authority to mitigate penalties. We submitted comments on the proposed regulations and DHS continued to finalize their regulations during the remainder of FY 2004. At the end of FY 2004, the final regulations had not been published, so we did not know what the impact of the DHS personnel system on MSPB may be. We will continue to update the progress of DHS, DoD and any additional new systems in future annual reports.

Significant Actions of the Office of Personnel Management

We reviewed significant policy actions of OPM ranging from DHS proposed regulations and creating a framework for civil service reform to SES pay and performance regulations and interim regulations for the NO FEAR Act. OPM also completed its internal reorganization to better enable it to serve agencies. OPM and DoD also began discussions to effect the combination of military and civilian background investigations including the transfer of DoD investigators to OPM. OPM also continued to provide valuable leadership and oversight regarding the human capital portions of the President's Management Agenda (PMA). Finally, OPM made progress on other governmentwide initiatives including e-Government programs and employee benefits.

Board Members and Board Organization

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, and confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

Chairman



NEIL A.G. McPHIE was confirmed as Chairman of the U.S. Merit Systems Protection Board on November 21, 2004. Mr. McPhie had served as Acting Chairman since December 10, 2003, when President Bush designated him to be Vice Chairman. He was sworn in as a member of the Board on April 23, 2003, following his recess appointment by President Bush. Prior to joining the Board, he was Senior Assistant Attorney General in the Office of the Attorney General of Virginia. Among other responsibilities, he defended employment discrimination claims brought under Federal law and wrongful discharge claims brought under state law. Previously, he was Executive Director of the Virginia Department of Employment Dispute Resolution (EDR). In that position, he directed implementation of EDR's statewide grievance, mediation, training and consultation programs. He was an Assistant Attorney General in the Office of the Attorney General of Virginia from 1982 to 1988. From 1976 until he joined the Attorney General's Office,

he was a Trial and Appellate Attorney in the Office of the General Counsel at the U.S. Equal Employment Opportunity Commission. He received his J.D. degree from Georgetown University Law Center in 1976. He received a B.A. in Economics from Howard University in 1973, graduating magna cum laude. He is a member of Phi Beta Kappa. He is admitted to the bars of the District of Columbia, Virginia, New York and Iowa, the United States Supreme Court, the United States District Court for the District of Columbia, several of the United States circuit courts of appeals, and district courts in Virginia.

Member



SUSANNE T. MARSHALL was Chairman of the Board for the first portion of FY 2004. She was nominated by President Bush on August 6, 2002 to serve as Chairman of the Merit Systems Protection Board. She had served as Chairman of the Board since February 7, 2002, when President Bush designated her Vice Chairman. Ms Marshall's term expired on March 1, 2004, and she remained in her position throughout the rest of the fiscal year. (Under the Board's governing statute, a member may remain on the Board for a period of one year past the expiration date unless a successor is confirmed, whichever comes first.) She has been a member of the Board since November 17, 1997, following her nomination by President Clinton and confirmation by the Senate. From December 1985 until her appointment to the Board, she served on the Republican staff of the Committee on Governmental Affairs of the United States Senate as both Professional Staff and Deputy Staff Director. While on the committee staff, she was responsible for a variety of legislative issues under the committee's jurisdiction, including Federal workforce policies, civil service matters, and postal issues. From 1983 to 1985, she was Republican Staff Assistant to the House Government Operations Committee. She was Legislative Assistant to a Member from Georgia from 1981 to 1982. Ms. Marshall attended the University of Maryland branch campus in Munich, Germany, and the American University.

Member

The third position on the Board was vacant throughout FY 2004. Ms. Barbara Sapin was confirmed for this position on November 21, 2004. Information about Ms. Sapin will be included in the FY 2005 Annual Report and is available now on our website.

Board Offices and Structure

The Board is divided into several functional offices organized according to its statutory missions to adjudicate appeals and conduct studies and the functions required to support these missions. In addition to its three appointed Board members, the Board has approximately 225 employees assigned to headquarters and other locations throughout the United States.

The **Board Members** adjudicate the cases brought to the Board. 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 the Administrative Law Judge (ALJ)** adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board. (The functions of this office are currently performed by administrative law judges at the National Labor Relations Board under an interagency agreement.)

The **Office of Appeals Counsel (OAC)** conducts legal research and prepares proposed decisions for the Board in cases where a party petitions for review of a judge's initial decision and in most other cases decided by the Board. The office conducts the Board's petition for review settlement program, prepares proposed decisions on interlocutory appeals of rulings made by 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 Clerk of the Board (OCB)** receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's decisions and orders. The office serves as the Board's public information center, coordinates media relations, produces public information publications, operates the Board's library and on-line information services, and administers the Freedom of Information Act and Privacy Act programs. The office also certifies official records to the courts and Federal administrative agencies, and manages the Board's records and directives systems, legal research programs, and the Government in the Sunshine Act program.

The **Office of Equal Employment Opportunity (EEO)** plans, implements, and evaluates the Board's equal employment opportunity programs. It processes complaints of alleged discrimination and furnishes advice and

assistance on affirmative action initiatives to the Board's managers and supervisors

The **Office of Financial and Administrative Management (FAM)** administers the budget, accounting, travel, time and attendance, procurement, property management, physical security, and general services functions of the Board. It develops and coordinates internal management programs and projects, including review of internal controls agency-wide. It also administers the agency's cross-servicing agreements with the USDA's National Finance Center for payroll services and the Department of the Treasury's Bureau of the Public Debt for accounting services.

The **Office of the General Counsel (OGC)**, as legal counsel to the Board, provides advice to the Board and MSPB offices on matters of law arising in day-to-day operations. The office represents the Board in litigation, prepares proposed decisions for the Board on assigned cases, and coordinates the Board's legislative policy and congressional relations functions. The office also drafts regulations, conducts the Board's ethics program, and plans and directs audits and investigations.

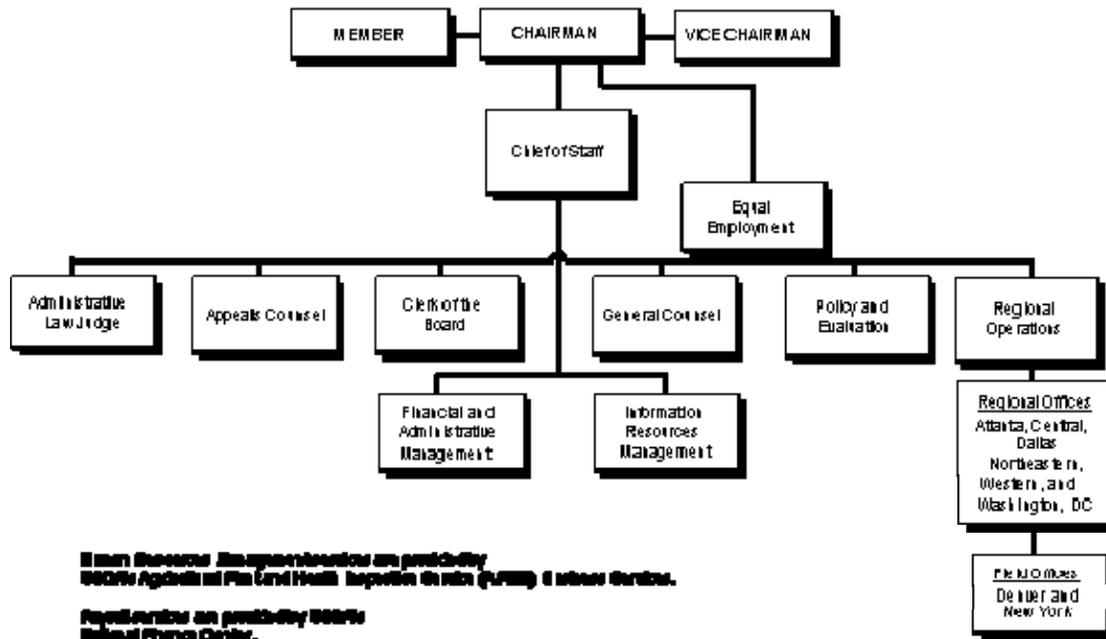
The **Office of Information Resources Management (IRM)** develops, implements, and maintains the Board's automated information systems to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.

The **Office of Policy and Evaluation (OPE)** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office responds to requests from Federal agencies for information, advice, and assistance on issues that have been the subject of Board studies. OPE also conducts special projects for the Board and has responsibility for preparing the Board's reports required by the Government Performance and Results Act (GPRA). The office also provides oversight of the agency's human resources management function and administers the cross-servicing agreement with the U.S. Department of Agriculture's APHIS Business Services for human resources management services.

The **Office of Regional Operations (ORO)** oversees the six MSPB regional and two field offices, which receive and process initial appeals and related cases. Administrative judges in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.

Organization Chart

Mort Systems Protection Board



Human Resources Management positions are provided by
 OSHA Agricultural and Pesticide Health Inspection Division, Pesticide Control Division.

Regulatory positions are provided by OSHA's
 National Pesticide Center.

Accounting positions are provided by the Department of the Treasury
 Internal Audit Division.

Significant Board Decisions issued in FY 2004 and significant opinions issued by the United States Court of Appeals for the Federal Circuit

Significant Board decisions issued in FY 2004

The Board issued a substantial number of noteworthy decisions in fiscal year 2004, several of which are summarized here.

The Board reopened the whistleblower appeals in ***Schott, et al. v. Department of Homeland Security***, 97 M.S.P.R. 35 (August 12, 2004), to discuss its jurisdiction over Screeners who work for the Transportation Security Agency (TSA). Its analysis focused on the words of the relevant statutes and on the legislative history of the laws. It noted that a provision of the Wendell H. Ford Aviation Investment and Reform Act makes it appear that TSA Screeners have individual right of action (IRA) appeal rights; however, the Aviation and Transportation Security Act (ATSA) contains very specific personnel authority, applicable only to Screeners, that authorizes the TSA to hire, discipline, and terminate Screeners “[n]otwithstanding any other provision of law.” Noting the fundamental principle of statutory construction that the specific governs over the general, the Board found that the ATSA does not provide for Screeners to file IRA appeals. Moreover, while a provision of the Homeland Security Act also refers to whistleblower rights, the Board concluded that it too was ineffective to give TSA Screeners whistleblower appeal rights. Although providing Screeners with “whistleblower protections” was consistent with the laws, the legislative history, and certain actions taken within the agency, the Board found that such rights would be under the NO FEAR Act, not the IRA provisions of the Whistleblower Protection Act.

The Board also reopened the appeal in ***Lloyd v. Small Business Administration***, 96 M.S.P.R. 518 (July 15, 2004), here to address divergent lines of cases on the question of when Board jurisdiction over a constructive removal appeal attaches. This case involved an alleged involuntary resignation. The U.S. Court of Appeals for the Federal Circuit ruled in its 1991 *en banc* decision in *Cruz v. Department of the Navy* that Board jurisdiction over a constructive removal appeal is established only upon proof of a constructive removal, and not merely by the assertion of a non-frivolous constructive removal claim. The Board found that such an *en banc* decision is the controlling law of the circuit until it is overruled by the court sitting *en banc*, and the Board must follow the law of the Federal Circuit. In his concurring opinion, then-Acting Chairman McPhie agreed that

binding precedent requires this decision, but he wrote separately “to explain why this approach is ripe for revision.”

In ***Brooks v. Department of Homeland Security***, 95 M.S.P.R. 464 (February 12, 2004), another TSA Screener case, the Board noted that section 111(d) of the ATSA provides that, “[n]otwithstanding any other provision of law, the Under Secretary of Transportation for Security may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service for such a number of individuals as the Under Secretary determines to be necessary to carry out the screening functions of the Under Secretary” The Board concluded that, although other employees of the TSA generally may file appeals, a Screener employed by the TSA may be disciplined notwithstanding the requirements of 5 U.S.C. chapter 75 and so the Board lacks adverse action jurisdiction over TSA Screener appeals.

In another jurisdiction case, after setting out the definition of “employee” in the excepted service under 5 U.S.C. § 7511(a)(1)(B), the Board found in ***Bell v. Department of Homeland Security***, 95 M.S.P.R. 580 (March 4, 2004), that the appellant’s service in the Coast Guard was military service and that military service cannot be added to civilian service to give the appellant the year of current continuous service necessary to have standing to appeal an adverse action under 5 U.S.C. chapter 75. Accordingly, the appeal was dismissed for lack of jurisdiction.

In ***Chen v. U.S. Postal Service***, 97 M.S.P.R. 527 (September 30, 2004), the Board held that to establish Board jurisdiction over a restoration claim as a partially recovered employee, the appellant must allege facts that would show, if proven, that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was “arbitrary and capricious.” To the extent that earlier decisions were inconsistent with this test, the Board overruled them. It also stated that, where the Department of Labor’s Office of Workers Compensation Programs (OWCP) issues a retroactive decision, as happened in this case, the Board has given retroactive effect to that decision when considering restoration rights. Thus, the fact that the agency denied the appellant’s requests for restoration prior to the point at which OWCP rendered its decision in favor of the appellant does not necessarily preclude the Board from exercising jurisdiction over her restoration appeal.

The Board, in ***Fischer v. Department of the Treasury***, 97 M.S.P.R. 546 (September 30, 2004), took a new look at the pay-setting rule that it has applied when it mitigates a removal action to a demotion. Past practice required the imposition of a demotion with the least loss of pay, including consideration of the step level at which pay was set, unless the agency's own pay-setting regulations required otherwise. The Board noted that the long-standing ultimate criterion for evaluating the penalty is whether the penalty exceeds the tolerable limits of reasonableness. The Board reasoned that it has no business imposing a one-size-fits-all rule that, unless the agency's pay-setting regulations require a different result, a Board-ordered demotion must always result in the smallest-possible reduction in pay. The Board held instead that an agency has the discretion to choose the step of the grade to which an employee is demoted pursuant to a Board order. In so holding, the Board vacated its earlier decisions in this appeal and other cases to the contrary.

In ***Ivery v. Department of Transportation***, 96 M.S.P.R. 119 (May 10, 2004), the Board found that, under the Department of Transportation's regulations concerning drug testing, a "split-specimen" procedure must be used both when the first portion of the specimen tests positive for drugs and also when adulteration is suspected. This procedure allows the employee to have the second portion of the specimen tested independently. The agency in this case did not employ the requisite procedure before it removed the appellant for adulteration of a specimen he was required to give during a random drug test. The Board concluded that this was harmful error requiring reversal of the removal. Although the appellant failed to prove that the result of testing the second specimen would have differed from that of the first, an agency's procedural error may constitute harmful error when it effectively destroys, or precludes an appellant from acquiring, the only available evidence by which he can show that the agency likely would have reached a different conclusion in the absence of its error.

In ***Adams, et al. v. Department of Defense***, 96 M.S.P.R. 325 (June 16, 2004), the agency had informed the appellants that, as a result of budget reductions at the Commissary where they work, their full-time positions were being abolished and they would be placed in part-time positions at the same grade and rate of pay. Each accepted the agency's offer and appealed that action as a reduction in force (RIF). The Board reversed the administrative judge's finding of jurisdiction over the actions as RIFs. It found that, to be entitled to appeal a RIF under the OPM's regulations, the appellants must show that they were subject to a separation or a demotion by RIF action or to a furlough for more than 30 days. Since they remained employed at the same grade and rate of pay, the Board noted, they were neither separated nor demoted. The Board found further that, since they

were permanently -- not temporarily -- assigned to part-time positions, they were not furloughed for more than 30 days either. Moreover, the Board concluded that the appellants could not appeal the actions under 5 U.S.C. chapter 75 because an agency's RIF-based actions are excluded from the Board's adverse action jurisdiction.

With regard to the affirmative defense of disability discrimination, the Board noted in ***Burgess v. Department of the Interior***, 95 M.S.P.R. 134 (October 24, 2003), that the 2002 Supreme Court decision in *Toyota Motor Mfg., Kentucky, Inc. v. Williams* addresses solely the proper standard for resolving whether an individual is substantially limited in the "major life activity" of performing manual tasks. The Board found that the Supreme Court decision nonetheless provides appropriate guidance as to other affected life activities. Similarly, the Court's determination that the statutory terms must be strictly interpreted to create "a demanding standard for qualifying as disabled" also warrants application to claims based on other major life activities. The Board concluded that the appellant failed to show he was "disabled" under the law because the evidence indicated that he had impairments, but not how they substantially limited a major life activity.

Regarding entitlement to disability retirement, the Board ruled in ***Ancheta v. Office of Personnel Management***, 95 M.S.P.R. 343 (December 22, 2003), that the Postal Service's obligation to accommodate disabled employees supports a "similar proposition" to the court's holding in *Bracey v. Office of Personnel Management*, 236 F.3d 1356 (Fed. Cir. 2001), "that individual tasks that do not constitute the core functions of an existing position, identified and combined to develop a modified assignment consistent with an injured employee's medical restriction, do not constitute a 'position' as that term is used within the Postal Service." Thus, an employee's declination of an offer to perform such tasks does not disqualify him from eligibility for disability retirement. The Board held further that, where the OPM considered the appellant's entitlement to disability retirement from the wrong position, the Board may examine the record *de novo* and determine his entitlement as to the correct job without remanding to OPM.

In ***King, et al. v. Office of Personnel Management***, 97 M.S.P.R. 307 (July 20, 2004), the Board considered OPM's regulatory requirement that a deposit for post-1956 military service, which entitles the retiree to avoid a reduction in his annuity upon reaching age 62 and qualifying for social security benefits, must be made before retirement begins. It found that the regulatory exception -- when the failure to make such a deposit was "due to administrative error" -- should not be given an expansive scope. The Board held that it will no longer follow cases that allowed a late deposit simply

because of a retirement processing irregularity, unaccompanied by a showing that the irregularity caused the failure to make a timely deposit. There is no administrative error when the employee completes the 1990 version of OPM Form 2801 and elects not to make such a deposit, even where the retirement application package does not include a completed SF-1515.

The Board refined the law governing constructive suspensions in ***Alston v. Social Security Administration***, 95 M.S.P.R. 252 (December 4, 2003). Where the appellant's absence began with her not reporting for duty because of her claimed inability to do so, and it was extended by her failure to timely produce updated proof of her medical status, she was not constructively suspended. The further extension of the absence after the appellant's request for accommodation also was not a suspension where the evidence she eventually provided showed that she could not return and the accommodation suggested by her doctor was not reasonable given the nature of her job.

Finally, in ***Jezouit v. Office of Personnel Management***, 97 M.S.P.R. 48 (August 12, 2004), the Board clarified that an administrative judge is not required to hold an evidentiary hearing where an appeal presents issues of law only. In that case, the administrative judge changed what had been set as a status conference into a hearing, without advance notice to the parties. The Board found on review that any abuse of discretion on the administrative judge's part was not prejudicial because, under the circumstances of this case, the appellant did not have a right to an evidentiary hearing in the first place. The case involved only an issue of law, as to which OPM was correct, so that any conceivable evidence the appellant was prevented from presenting below could not have been relevant and could not have affected the outcome.

Significant Opinions issued by the United States Court of Appeals for the Federal Circuit

As a service to our customers, we also include significant court decisions regarding Federal cases.

Kindall v. Office of Personnel Management, 347 F.3d 930 (Fed. Cir. Oct. 21, 2003)

An annuitant whose survivor annuity has been reinstated due to the dissolution of her remarriage is not entitled to intervening cost-of-living adjustments for the period from the termination of the annuity to the reinstatement.

Simpson v. Office of Personnel Management, 347 F.3d 1361 (Fed. Cir. Oct. 30, 2003)

OPM must notify an annuitant that, even if he had previously elected a survivor annuity for his spouse when married, he must make a new election after his divorce if he wishes for the spouse to remain entitled to a survivor annuity.

Licausi v. Office of Personnel Management, 350 F.3d 1359 (Fed. Cir. Dec. 2, 2003)

In order to continue to be eligible for a disability retirement annuity, a retiree must show that the medical condition is disabling, i.e., that it prevents her from rendering useful and efficient service in the position from which she retired. It is not enough to show that she continues to suffer from the medical condition that led to the initial finding of eligibility for disability retirement. Because the Board is obligated to make an independent determination as to the applicant's eligibility for benefits, its decisions fall outside the *Chenery* rule that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency.

McLaughlin v. Office of Personnel Management, 353 F.3d 1363 (Fed. Cir. Jan. 6, 2004)

The Federal Circuit will apply a substantial evidence standard when reviewing a Board determination that a separated employee is not entitled to a waiver of the statutory deadline for filing an application for disability retirement because she has not shown that she was mentally incompetent during the filing period.

James v. Dale, 355 F.3d 1375 (Fed. Cir. Jan. 26, 2004)

The objective standard for determining whether an agency has proved the charge of "associating with a known or suspected law violator" is whether a disinterested observer with knowledge of the essential facts known to or readily ascertainable by the employee would reasonably conclude that the associate of the employee was a known or suspected law violator.

Ainslie v. United States, 355 F.3d 1371 (Fed. Cir. Jan. 23, 2004)

An individual is not entitled to back pay for the period between the date his revised service appointment became effective pursuant to district court order and the date his appointment actually began because he did not meet the statutory definition of an "employee" during that period.

Office of the Architect of the Capitol v. Office of Compliance, 361 F.3d 633 (Fed. Cir. March 11, 2004)

Under the Americans with Disabilities Act, an employee may be entitled to a higher-graded position as an accommodation if the employing agency has a routine and fluid practice of temporarily placing employees in disparate pay grade positions.

Clark v. Merit Systems Protection Board, 361 F.3d 647 (Fed. Cir. March 17, 2004)

Non-appropriated fund employees are not entitled to file individual right of action appeals with the Board.

Poett v. Merit Systems Protection Board, 360 F.3d 1377 (Fed. Cir. March 18, 2004)

A party has a reasonable amount of time to file a petition for enforcement once he has actual knowledge (not merely a suspicion) of a specific act that constitutes a breach of a settlement agreement.

Guillebeau v. Department of the Navy, 362 F.3d 1329 (Fed. Cir. March 24, 2004)

An employing agency may set absolute performance standards so long as those standards are applied in a reasonable manner.

James v. Tablerion, 363 F.3d 1352 (Fed. Cir. April 13, 2004)

An Internal Revenue Service employee violates the statutory prohibition against threatening to audit a taxpayer for the purpose of extracting personal gain or benefit when the employee's words would be understood by a reasonable person to be a threat to audit unless something is done for the employee.

Kiszka v. Office of Personnel Management, 372 F.3d 1301 (Fed. Cir. June 22, 2004)

To show that active duty service interrupted creditable civilian service, a National Guard technician must show that he requested a leave of absence from his civilian position before entering on active duty.

James v. Office of Personnel Management, 372 F.3d 1365 (Fed. Cir. June 23, 2004)

A retiree's post-retirement election of a survivor annuity for his spouse becomes irrevocable once the applicable form is received by OPM.

Crawford v. Department of Transportation, 373 F.3d 1155 (Fed. Cir. June 29, 2004)

Military service as a cadet in the U.S. Coast Guard Academy is not creditable for the purpose of calculating accrued leave time in the civil service.

Killeen v. Office of Personnel Management, 382 F.3d 1316 (Fed. Cir. Aug. 31, 2004)

Air traffic controllers' annuities, when based in part on part-time service, are calculated using the deemed full-time rate of pay, and the resulting annuity benefits are prorated to account for the part-time service.

Shelton v. Department of the Air Force, 382 F.3d 1335 (Fed. Cir. Sept. 1, 2004)

Under certain circumstances, an agency may impose a probationary period as a condition of employment.

Hathaway v. Department of Justice, 384 F.3d 1342 (Fed. Cir. Sept. 16, 2004)

The charge of "conduct prejudicial to the DEA" could not be upheld because it was premised on allegedly inconsistent statements made by Mr. Hathaway about his past illegal drug use that were not, in fact, inconsistent.

FY 2004 Case Processing Statistics

SUMMARY OF CASES DECIDED BY MSPB IN FY 2004

Cases Decided in MSPB Regional/Field Offices RO/FOs:	
Appeals	6,266
Addendum Cases ¹	498
Stay Requests ²	95
TOTAL Cases Decided in RO/FOs	6,859
Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction³	15
Cases Decided by the Board:	
Appellate Jurisdiction:	
Petitions for Review (PFRs) – Appeals	1,306
Petitions for Review (PFRs) – Addendum Cases	114
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	1
Reopenings ⁴	3
Court Remands	9
Compliance Referrals	34
EEOC Non-concurrence Cases	0
Arbitration Cases	0
Subtotal – Appellate Jurisdiction	1,467
Original Jurisdiction ⁵	9
TOTAL Cases Decided by the Board⁶	1,476
GRAND TOTAL Cases Decided (Board, ALJs, RO/FOs)	8,350

See next page for footnotes.

FOOTNOTES TO TABLE

- 1 Includes 101 requests for attorney fees, 6 requests for compensatory damages (discrimination cases only), 3 requests for consequential damages (whistleblower cases only), 272 petitions for enforcement, 96 Board remand cases, and 20 court remand cases.
- 2 Includes 54 stay requests in whistleblower cases and 41 in non-whistleblower cases.
- 3 Initial Decisions issued by ALJ. Case type breakdown: 2 Office of Special Counsel (OSC) corrective actions, 4 Hatch Act cases, 1 petition for

enforcement in a Hatch Act case, 1 OSC disciplinary action (non-Hatch Act), 3 actions against ALJs, 1 adverse action against a Board employee, and 3 informal hearings in a proposed SES removal (in SES removal cases, a report is issued, but there is no decision by an ALJ or the Board).

- 4 All of these cases were reopened by the Board on its own motion. There were no cases where OPM requested reconsideration.
- 5 Final Board decisions. Case type breakdown: 2 OSC initial stay requests, 2 OSC requests for extension of a stay, 3 PFRs in an action against an ALJ, and 2 requests for regulation review.
- 6 In addition to the 1,476 cases closed by the Board with a final decision, there was 1 interlocutory appeal decided by the Board in FY 2004. Interlocutory appeals typically raise difficult issues or issues not previously addressed by the Board.

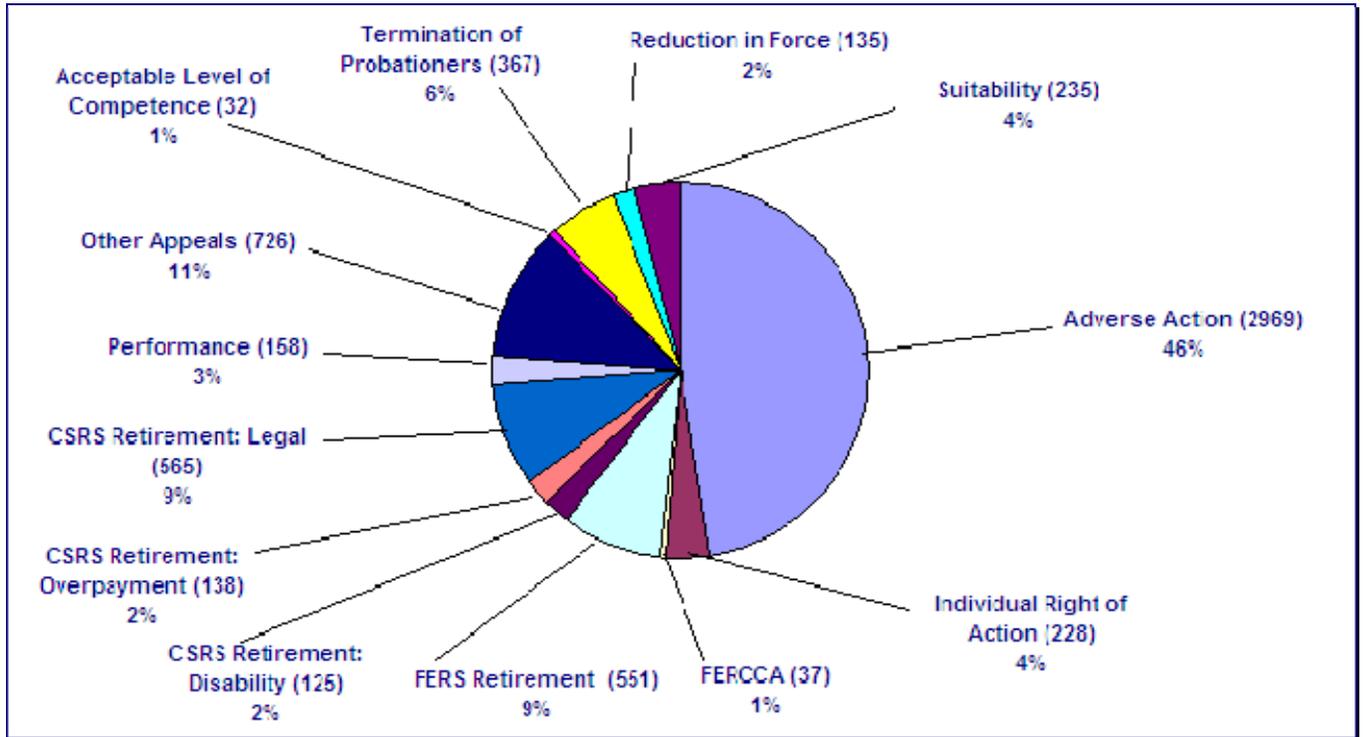
REGIONAL CASE PROCESSING – FY 2004

DISPOSITION OF INITIAL APPEALS DECIDED IN FY 2004 BY TYPE OF CASE										
Type of Case	Decided		Dismissed		Not Dismissed		Settled		Adjudicated	
Adverse Action by Agency	2969	1379	46%	1590	54%	1021	64%	569	36%	
Termination of Probationers	367	332	90%	35	10%	27	77%	8	23%	
Reduction in Force	135	81	60%	54	40%	17	31%	37	69%	
Performance	158	49	31%	109	69%	79	72%	30	28%	
Acceptable Level of Competence (WIGI)	32	19	59%	13	41%	10	77%	3	23%	
Suitability	235	78	33%	157	67%	118	75%	39	25%	
CSRS Retirement: Legal	565	217	38%	348	62%	21	6%	327	94%	
CSRS Retirement: Disability	125	62	50%	63	50%	0	0%	63	100%	
CSRS Retirement: Overpayment	138	47	34%	91	66%	63	69%	28	31%	
FERS Retirement	551	210	38%	341	62%	118	35%	223	65%	
FERCCA	37	23	62%	14	38%	0	0	14	100%	
Individual Right of Action	228	175	77%	53	23%	29	55%	24	45%	
Other	726	614	85%	112	15%	66	59%	46	41%	
Total	6266	3286	52%	2980	48%	1569	53%	1411	47%	

Dismissed and **Not Dismissed** columns are percentages of **Decided** column.

Settled and **Adjudicated** columns are percentages of **Not Dismissed** column.

REGIONAL CASE PROCESSING – FY 2004

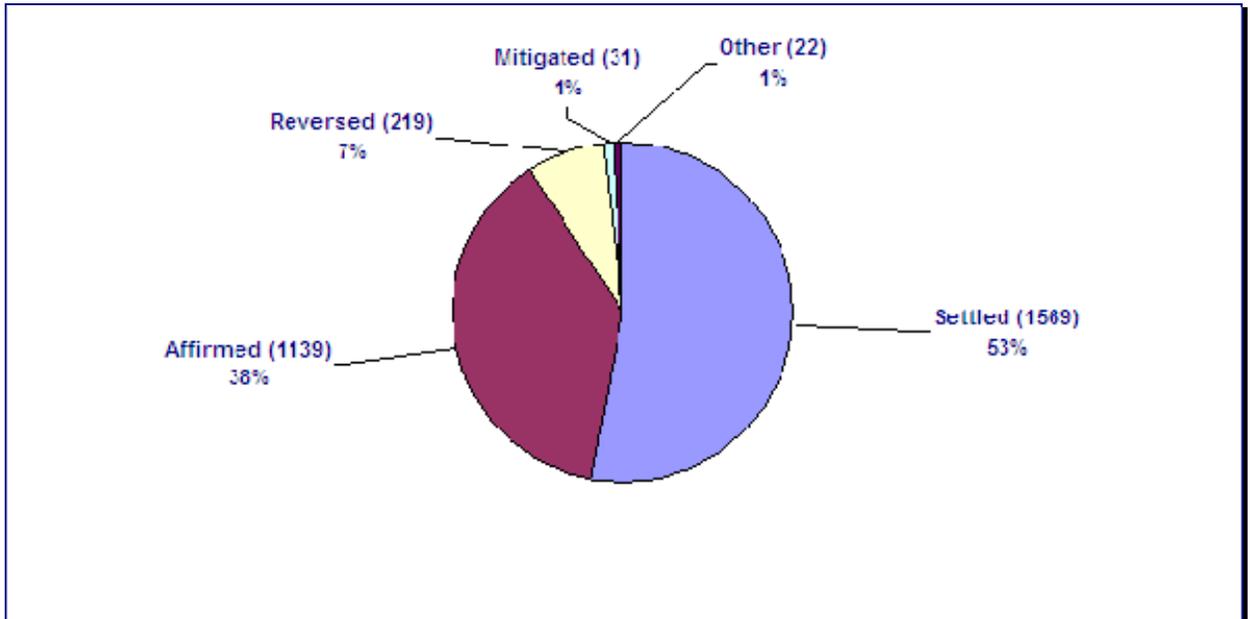


TYPES OF INITIAL APPEALS DECIDED IN FY 2004

Total Number of Appeals: 6,266

(Numbers in parentheses are numbers of appeals. Percentages do not total 100 because of rounding)

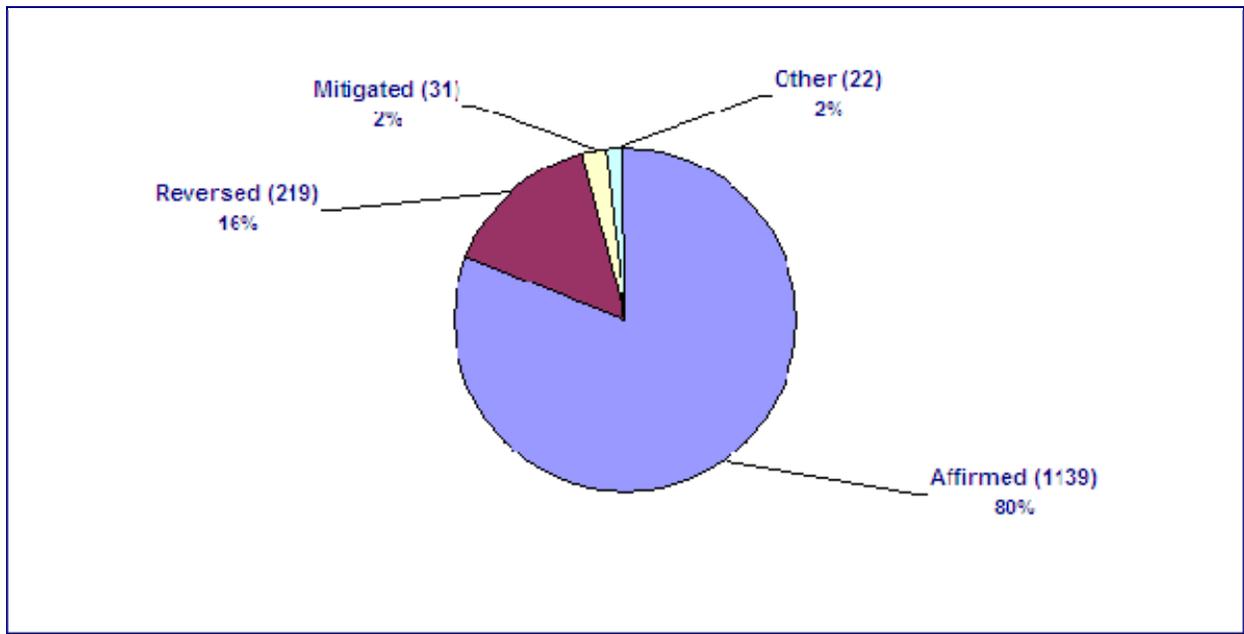
REGIONAL CASE PROCESSING – FY 2004



DISPOSITION OF INITIAL APPEALS IN FY 2004 THAT WERE NOT DISMISSED

Total Number of Appeals that were Not Dismissed: 2,980

DISPOSITION OF INITIAL APPEALS ADJUDICATED ON THE MERITS



(i.e., Not Dismissed or Settled) IN FY 2004

Based on 1,411 appeals adjudicated on the merits

REGIONAL CASE PROCESSING – FY 2004

INITIAL APPEALS DECIDED IN FY 2004 BY AGENCY									
	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
OPM*	1380	530	38.4%	850	61.6%	218	25.6%	632	74.4%
US Postal Service	1144	665	58.1%	479	41.9%	316	66.0%	163	34.0%
Homeland Security	545	344	63.1%	201	36.9%	142	70.6%	59	29.4%
Veterans Affairs	526	299	56.8%	227	43.2%	160	70.5%	67	29.5%
Army	358	205	57.3%	153	42.7%	100	65.4%	53	34.6%
Navy	357	190	53.2%	167	46.8%	96	57.5%	71	42.5%
Air Force	271	149	55.0%	122	45.0%	56	45.9%	66	54.1%
Treasury	253	128	50.6%	125	49.4%	80	64.0%	45	36.0%
Justice	246	115	46.7%	131	53.3%	90	68.7%	41	31.3%
Defense	230	118	51.3%	112	48.7%	56	50.0%	56	50.0%
Agriculture	180	100	55.6%	80	44.4%	66	82.5%	14	17.5%
Interior	177	87	49.2%	90	50.8%	45	50.0%	45	50.0%
Transportation	92	54	58.7%	38	41.3%	22	57.9%	16	42.1%
Health & Human Services	71	33	46.5%	38	53.5%	30	78.9%	8	21.1%
Social Security Adm.	60	32	53.3%	28	46.7%	12	42.9%	16	57.1%
Labor	53	33	62.3%	20	37.7%	14	70.0%	6	30.0%
Commerce	40	19	47.5%	21	52.5%	13	61.9%	8	38.1%
General Service Adm.	40	27	67.5%	13	32.5%	9	69.2%	4	30.8%
Housing & Urban Dev.	31	25	80.6%	6	19.4%	2	33.3%	4	66.7%
Energy	22	9	40.9%	13	59.1%	8	61.5%	5	38.5%
SBA	20	12	60.0%	8	40.0%	2	25.0%	6	75.0%
EEOC	17	11	64.7%	6	35.3%	3	50.0%	3	50.0%
NASA	15	12	80.0%	3	20.0%	2	66.7%	1	33.3%
State	14	10	71.4%	4	28.6%	3	75.0%	1	25.0%
FDIC	13	8	61.5%	5	38.5%	1	20.0%	4	80.0%
Smithsonian Institution	12	7	58.3%	5	41.7%	4	80.0%	1	20.0%
EPA	11	5	45.5%	6	54.5%	2	33.3%	4	66.7%
Adm. Office of US Courts	8	8	100.0%	0	0.0%	0	0.0%	0	0.0%
Armed Forces Retirement Home	8	5	62.5%	3	37.5%	2	66.7%	1	33.3%
TVA	8	7	87.5%	1	12.5%	0	0.0%	1	100.0%
NARA	7	3	42.9%	4	57.1%	3	75.0%	1	25.0%
Agency for Int'l Dev.	6	2	33.3%	4	66.7%	1	25.0%	3	75.0%
GPO	6	5	83.3%	1	16.7%	1	100.0%	0	0.0%
FEMA	5	3	60.0%	2	40.0%	1	50.0%	1	50.0%
Education	3	2	66.7%	1	33.3%	0	0.0%	1	100.0%
Fed Mediation &	3	3	100.0%	0	0.0%	0	0.0%	0	0.0%

Conciliation Service									
Int'l Boundary & Water Commission	3	2	66.7%	1	33.3%	1	100.0%	0	0.0%

REGIONAL CASE PROCESSING – FY 2004

INITIAL APPEALS DECIDED IN FY 2004 BY AGENCY (continued)									
	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
NLRB	3	2	66.7%	1	33.3%	0	0.0%	1	100.0%
Soldier's & Airman's Home	3	3	100.0%	0	0.0%	0	0.0%	0	0.0%
African Dev. Foundation	2	1	50.0%	1	50.0%	1	100.0%	0	0.0%
Fed Retirement Thrift Investment Board	2	1	50.0%	1	50.0%	1	100.0%	0	0.0%
Gov of the District of Columbia	2	2	100.0%	0	0.0%	0	0.0%	0	0.0%
Other	2	2	100.0%	0	0.0%	0	0.0%	0	0.0%
Securities & Exchange Com	2	1	50.0%	1	50.0%	1	100.0%	0	0.0%
American Battle Monuments Com	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
CIA	1	0	0.0%	1	100.0%	0	0.0%	1	100.0%
Commodity Futures Trading Com	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Congress	1	0	0.0%	1	100.0%	0	0.0%	1	100.0%
Consumer Product Safety Com	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Court Services & Offender Supervision	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
FCC	1	0	0.0%	1	100.0%	1	100.0%	0	0.0%
Library of Congress	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
MSPB	1	0	0.0%	1	100.0%	1	100.0%	0	0.0%
Nat'l Capital Planning Com	1	0	0.0%	1	100.0%	1	100.0%	0	0.0%
Nat'l Credit Union Adm.	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Nat'l Transportation Safety Board	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Nuclear Regulatory Com	1	0	0.0%	1	100.0%	1	100.0%	0	0.0%
Office of Administration	1	0	0.0%	1	100.0%	1	100.0%	0	0.0%
Railroad Retirement Board	1	0	0.0%	1	100.0%	0	0.0%	1	100.0%
TOTAL	6266	3286	52.4%	2980	47.6%	1569	52.7%	1411	47.3%

* Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

¹ Percentages in columns "Dismissed" and "Not Dismissed" are of "Decided."

² Percentages in columns "Settled" and "Adjudicated" are of "Not Dismissed."

REGIONAL CASE PROCESSING – FY 2004

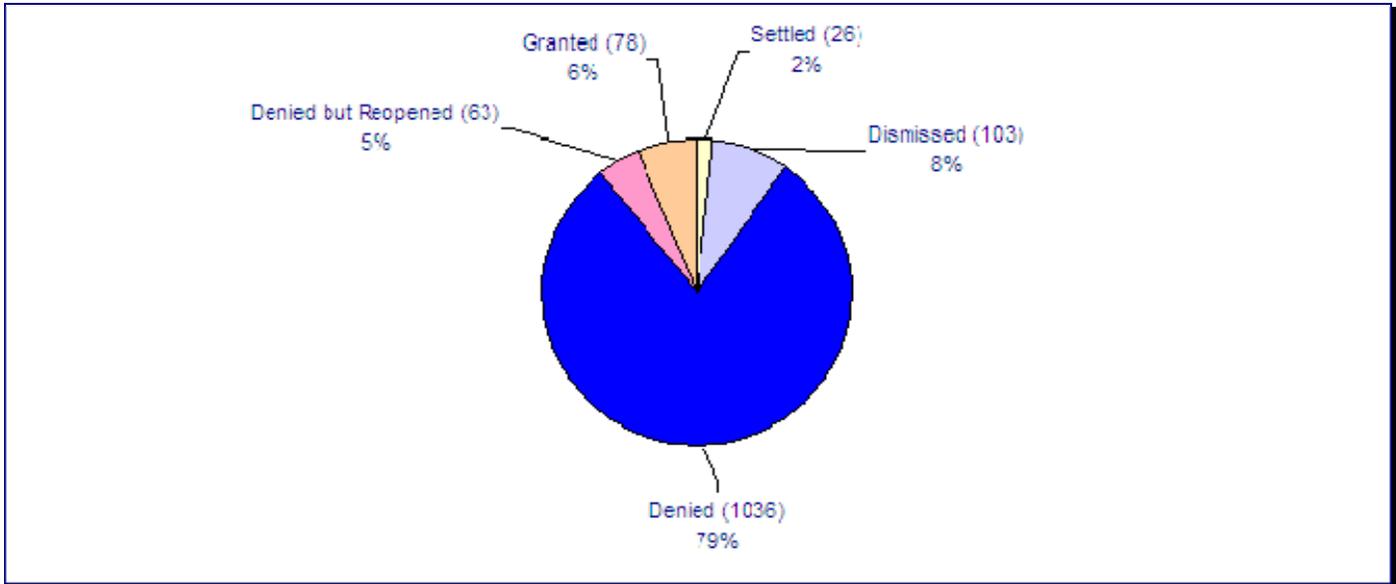
DISPOSTIONS OF INITIAL APPEALS ADJUDICATED IN FY 2004 BY AGENCY										
	Adjudicated		Affirmed		Reversed		Mitigated Modified		Other	
OPM	632	461	72.9%	150	23.7%	4	0.6%	17	2.7%	
US Postal Service	163	144	88.3%	11	6.7%	8	4.9%	0	0.0%	
Homeland Security	59	51	86.4%	4	6.8%	0	0.0%	4	6.8%	
Veterans Affairs	67	59	88.1%	6	9.0%	2	3.0%	0	0.0%	
Army	53	48	90.6%	2	3.8%	3	5.7%	0	0.0%	
Navy	71	60	84.5%	8	11.3%	3	4.2%	0	0.0%	
Air Force	66	60	90.9%	3	4.5%	3	4.5%	0	0.0%	
Treasury	45	39	86.7%	5	11.1%	1	2.2%	0	0.0%	
Justice	41	32	78.0%	6	14.6%	2	4.9%	1	2.4%	
Defense	56	50	89.3%	6	10.7%	0	0.0%	0	0.0%	
Agriculture	14	12	85.7%	1	7.1%	1	7.1%	0	0.0%	
Interior	45	36	80.0%	8	17.8%	1	2.2%	0	0.0%	
Transportation	16	15	93.8%	1	6.3%	0	0.0%	0	0.0%	
Health & Human Service	8	5	62.5%	2	25.0%	1	12.5%	0	0.0%	
Social Security Adm.	16	14	87.5%	2	12.5%	0	0.0%	0	0.0%	
Labor	6	5	83.3%	1	16.7%	0	0.0%	0	0.0%	
Commerce	8	8	100.0%	0	0.0%	0	0.0%	0	0.0%	
General Service Adm.	4	4	100.0%	0	0.0%	0	0.0%	0	0.0%	
Housing & Urban Dev.	4	4	100.0%	0	0.0%	0	0.0%	0	0.0%	
Energy	5	4	80.0%	0	0.0%	1	20.0%	0	0.0%	
SBA	6	6	100.0%	0	0.0%	0	0.0%	0	0.0%	
EEOC	3	3	100.0%	0	0.0%	0	0.0%	0	0.0%	
NASA	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%	
State	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%	
FDIC	4	4	100.0%	0	0.0%	0	0.0%	0	0.0%	
Smithsonian Institution	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%	
EPA	4	3	75.0%	0	0.0%	1	25.0%	0	0.0%	
Armed Forces Retirement Home	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%	
TVA	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%	
NARA	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%	
Agency International Dev	3	2	66.7%	1	33.3%	0	0.0%	0	0.0%	
FEMA	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%	
Education	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%	
NLRB	1	0	0.0%	1	100.0%	0	0.0%	0	0.0%	

CIA	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Congress	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Railroad Retirement Board	1	0	0.0%	1	100.0%	0	0.0%	0	0.0%
TOTAL	1411	1139	80.7%	219	15.5%	31	2.2%	22	1.6%

Note: ADJUDICATED means adjudicated on the merits, i.e., not dismissed or settled. Percentages may not total 100 because of rounding.

HEADQUARTERS CASE PROCESSING – FY 2004

DISPOSITION OF PETITIONS FOR REVIEW DECIDED IN FY 2004 BY TYPE OF CASE											
Type of Case	Decided	Dismissed	Settled	Denied	Denied But Reopened	Granted					
Adverse Action by Agency	550	54	9.8%	6	1.1%	444	80.7%	11	2.0%	35	6.4%
Termination of Probationers	55	6	10.9%	3	5.5%	44	80.0%	1	1.8%	1	1.8%
Reduction in Force	79	3	3.8%	0	0.0%	58	73.4%	17	21.5%	1	1.3%
Performance Acceptable Level of Competence (WIGI)	25	2	8.0%	1	4.0%	18	72.0%	2	8.0%	2	8.0%
Suitability	4	0	0.0%	0	0.0%	4	100.0%	0	0.0%	0	0.0%
CSRS Retirement: Legal	17	1	5.9%	0	0.0%	15	88.2%	1	5.9%	0	0.0%
CSRS Retirement: Disability	125	9	7.2%	9	7.2%	96	76.8%	6	4.8%	5	4.0%
CSRS Retirement: Overpayment	35	1	2.9%	0	0.0%	25	71.4%	4	11.4%	5	14.3%
FERS Retirement	20	0	0.0%	1	5.0%	13	65.0%	1	5.0%	5	25.0%
FERCCA	96	9	9.4%	4	4.2%	71	74.0%	2	2.1%	10	10.4%
Individual Right of Action	11	1	9.1%	0	0.0%	9	81.8%	1	9.1%	0	0.0%
Other	97	8	8.3%	0	0.0%	71	73.2%	9	9.3%	9	9.3%
	192	9	4.7%	2	1.0%	168	87.5%	8	4.2%	5	2.6%
Total	1306	103	7.9%	26	2.0%	1036	79.3%	63	4.8%	78	6.0%

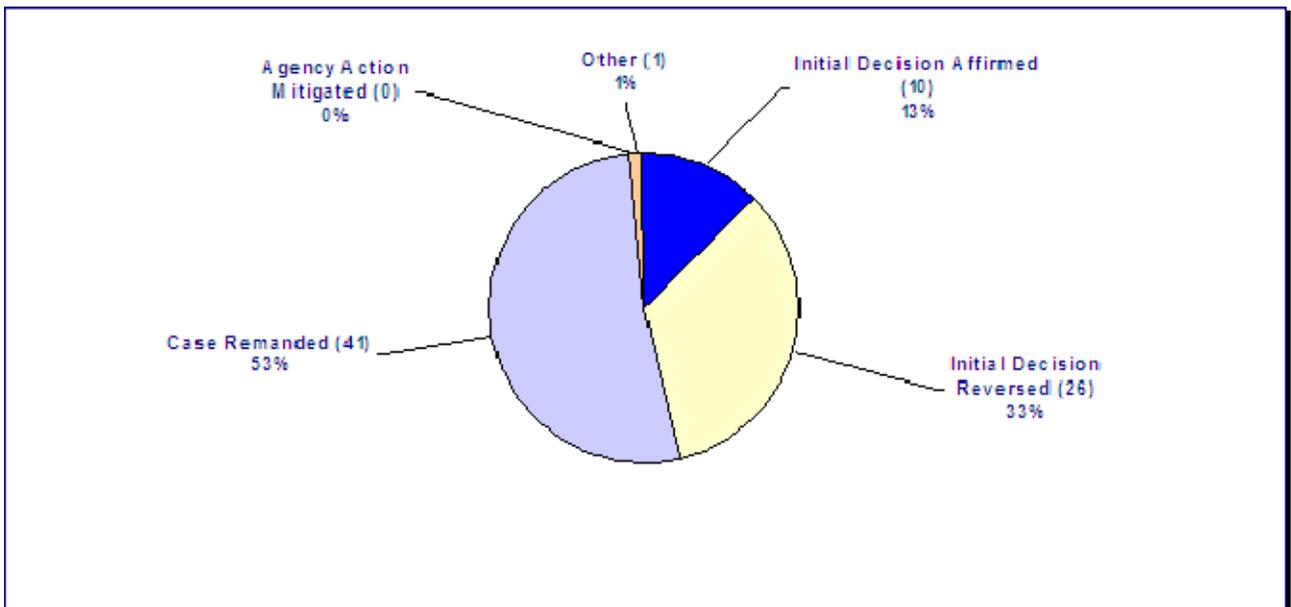


DISPOSITION OF PETITIONS FOR REVIEW DECIDED IN FY 2004

Total Number of Petitions for Review: 1,306

HEADQUARTERS CASE PROCESSING – FY 2004

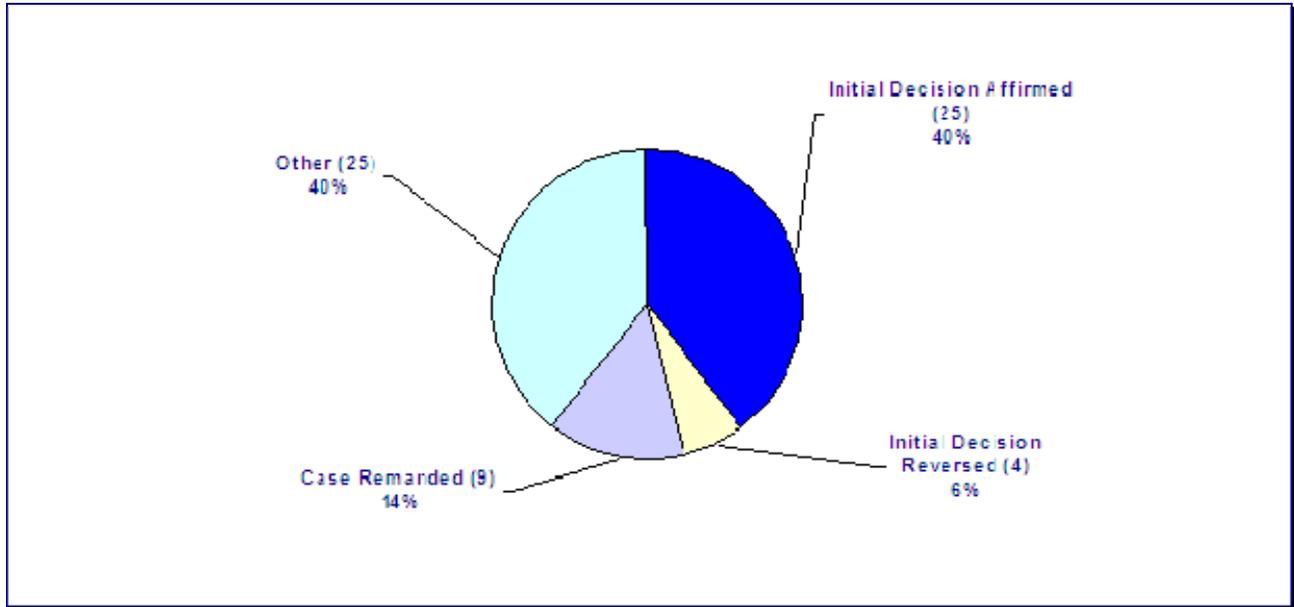
DISPOSITION OF PETITIONS FOR REVIEW OF GRANTED IN FY 2004



Based on 78 Petitions for Review that were Granted

DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DENIED BUT REOPENED IN FY 2004

Initial Decision Reversed (26)



Based on 63 Petitions for Review that were Denied But Reopened

HEADQUARTERS CASE PROCESSING – FY 2004

PETITIONS FOR REVIEW DECIDED IN FY 2004 BY AGENCY												
	Decided			Dismissed		Settled		Denied		Denied But Reopened		Granted
OPM*	288	22	7.6%	14	4.9%	214	74.3%	14	4.9%	24	8.3%	
US Postal Service	254	24	9.5%	3	1.2%	209	82.3%	6	2.4%	12	4.7%	
Veterans Affairs	78	8	10.3%	1	1.3%	60	76.9%	5	6.4%	4	5.1%	
Army	76	4	5.3%	2	2.6%	66	86.8%	1	1.3%	3	4.0%	
Navy	75	7	9.3%	0	0.0%	65	86.7%	1	1.3%	2	2.7%	
Homeland Security	74	3	4.1%	0	0.0%	64	86.5%	6	8.1%	1	1.4%	
Defense	71	4	5.6%	0	0.0%	46	64.8%	19	26.8%	2	2.8%	
Treasury	65	5	7.7%	1	1.5%	53	81.5%	1	1.5%	5	7.7%	
Justice	56	4	7.1%	0	0.0%	47	83.9%	0	0.0%	5	8.9%	
Air Force	51	4	7.8%	1	2.0%	39	76.5%	2	3.9%	5	9.8%	
Agriculture	37	3	8.1%	0	0.0%	30	81.1%	1	2.7%	3	8.1%	
Transportation	31	0	0.0%	0	0.0%	28	90.3%	0	0.0%	3	9.7%	
Interior	28	0	0.0%	0	0.0%	22	78.6%	4	14.3%	2	7.1%	
General Service	16	0	0.0%	1	6.3%	13	81.3%	1	6.3%	1	6.3%	

Adm.											
Social Security	15	0	0.0%	1	6.7%	13	86.7%	0	0.0%	1	6.7%
Adm.											
Labor	11	4	36.4%	0	0.0%	7	63.6%	0	0.0%	0	0.0%
Commerce	9	1	11.1%	1	11.1%	7	77.8%	0	0.0%	0	0.0%
Health & Human Services	9	1	11.1%	0	0.0%	8	88.9%	0	0.0%	0	0.0%
Energy	7	1	14.3%	1	14.3%	5	71.4%	0	0.0%	0	0.0%
Housing & Urban Dev	6	1	16.7%	0	0.0%	2	33.3%	0	0.0%	3	50.0%
FDIC	5	0	0.0%	0	0.0%	5	100.0%	0	0.0%	0	0.0%
Smithsonian	5	1	20.0%	0	0.0%	4	80.0%	0	0.0%	0	0.0%
Inst											
Education	4	1	25.0%	0	0.0%	3	75.0%	0	0.0%	0	0.0%
NASA	4	0	0.0%	0	0.0%	4	100.0%	0	0.0%	0	0.0%
Adm. Office of US Courts	3	1	33.3%	0	0.0%	2	66.7%	0	0.0%	0	0.0%

HEADQUARTERS CASE PROCESSING – FY 2004

PETITIONS FOR REVIEW DECIDED IN FY 2004 BY AGENCY (continued)											
	Decided	Dismissed	Settled	Denied	Denied But Reopened	Granted					
EPA	3	0	0.0%	0	0.0%	3	100%	0	0.0%	0	0.0%
TVA	3	0	0.0%	0	0.0%	2	66.7%	0	0.0%	1	33.3%
EEOC	2	0	0.0%	0	0.0%	2	100%	0	0.0%	0	0.0%
FEMA	2	0	0.0%	0	0.0%	2	100%	0	0.0%	0	0.0%
National Credit Union Adm.	2	2	100%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
SBA	2	0	0.0%	0	0.0%	0	0.0%	1	50.0%	1	50.0%
Armed Forces Retirement Home	1	1	100%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Broadcasting Board of Governors	1	1	100%	0	0.0%	0	0.0%	0	0.0%	0	0.0%
Corp for National & Community Service	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%
Court Services & Offender Superv.	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%
State	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%
Fed Housing Finance Board	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%
Fed Mediation & Conciliation Service	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%
GPO	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%
International	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%

Boundary & Water												
NARA	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%	
NLRB	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%	
Other	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%	
Peace Corps	1	0	0.0%	0	0.0%	1	100%	0	0.0%	0	0.0%	
SEC	1	0	0.0%	0	0.0%	0	0.0%	1	100%	0	0.0%	
TOTAL	1306	103	7.9%	26	2.0%	1036	79.3%	63	4.8%	78	6.0%	

Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System. Percentages may not total 100 because of rounding.

Summaries of Merit Systems Studies

What's on the Minds of Federal Human Capital Stakeholders?

With the many changes sweeping through the Federal civil service in recent years, the Board, more than ever, is concerned about how these changes are affecting Federal merit systems. To ensure that our research and studies are relevant and timely to the issues of the day, the Board embarked on devising a new research agenda. To make certain we consider a full range of potential topics, the Board asked all its stakeholders groups what issues they believe most needed our attention and examination. We solicited input in various ways: by mail, electronically, and personal interviews. We issued a report in 2004 that summarized the information from our stakeholders with the expectation that it would be useful to others who are involved in the Federal human resource management field.

Comments we received ranged from specific complaints about narrowly defined topics to wide-ranging discussions about broad human resources management issues. The suggested research topics covered many different aspects of human resource management, such as competitive sourcing and contracting out, hiring, managing performance, labor relations, leadership and management, and employee protections and due process.

Our review of the stakeholder comments indicated significant concerns and questions about competitive sourcing and contracting out. They also raised concerns about recruitment, assessment and selection, and wanted to know whether the Federal Government has greater difficulties than private sector companies in hiring and retaining employees, and would expanded use of pay flexibilities improve its competitive edge? The issue of performance management—how to fairly reward outstanding employees and effectively handle poor performers—generated many of the suggested research issues, such as, what are the limitations of the current performance appraisal systems, and what options exist for improvement? Do awards really motivate employees and how can perceived favoritism be addressed? In the area of leadership and management, our stakeholders would like to know: do managers have the talents and skills needed to both lead and manage? How can managers be held accountable, and for what? And in the area of employee protections and due process, our stakeholders believe that the current process in addressing a break down in supervisor-employee relations leaves much to be desired. They also wondered whether numerous avenues of seeking relief expose the grievance and appeal systems to abuse.

Hearing from our stakeholders—many of whom are in the Federal workplace daily—helped us understand the issues that promote or inhibit the effective management of the Federal workforce. Over the next several years, the Board will conduct studies addressing a number of the issues raised by our stakeholders, however, the range of topics is so great that the Board—and indeed any single institution—would not be able to study them all. Accordingly, we provided this report to assist others interested in the study of human resource management in developing their research agendas.

Identifying Talent through Technology: Automated Hiring Systems in Federal Agencies

Technology plays an increasing role in Federal hiring. Many Federal agencies are now using automated hiring systems to advertise vacancies, receive applications, and assess applicants' qualifications. MSPB studied the how agencies are using these systems to better understand how these systems affect the application and selection process and to identify steps that agencies should take to use these systems more effectively.

We found that automated systems have great potential to improve Federal hiring: they can make it easier for applicants to apply for a Federal job, reduce time to hire, and support rigorous, merit-based hiring decisions. However, such benefits are not automatic: agencies report that the quality of results depends directly on how the systems are used and on the soundness of the underlying hiring method(s) used. MSPB also found that technology creates challenges as well as benefits. For example, current systems' use of applicant self-assessments reduces the amount of time and work needed to screen and sort applicants – but the accuracy of those self-assessments cannot be taken for granted.

For these reasons, the report recommends that agencies: (1) acknowledge the strengths and limitations of technology when designing their hiring processes, (2) invest the time and resources needed to assess applicants thoroughly, and (3) recognize the continuing role of managers and human resources professionals in hiring.

Managing Federal Recruitment: Issues, Insights, and Illustrations

This report identifies current recruitment trends and challenges in the Federal Government. Additionally, it provides recommendations about how to improve Federal recruitment and highlights examples of how individual agencies have begun to address their recruitment challenges. The Federal Government could be facing major human capital challenges over the next several years as the result of an increasing number of employees eligible to

retire, changing workforce demographics and evolving mission needs. To meet these challenges and continue seamless service to the American public, the Government must be able to continuously recruit a high quality and diverse workforce that has a variety of knowledge and skills.

The most prominent report finding is the degree of variability among agencies. They differ greatly in terms of support, resources, planning, implementation, and evaluation of their recruitment efforts. What remains consistent, conversely, is the increased attention recruitment has received over the past several years. Agencies are concerned about their ability to recruit the employees they need to accomplish their mission and have started acting on these concerns, as described in the agency illustrations included in the report.

Even with stepped up recruitment efforts, many Federal agencies still face a number of recruitment challenges. Among them, the Federal hiring process is long and complicated, many view Federal jobs as less rewarding than private and non-profit sector jobs and budget constraints can limit recruitment activities. Further, labor market shortages, non-competitive salaries and loss of human resources (HR) expertise also negatively affect agency recruitment efforts. Though these factors pose great challenges to agency recruitment efforts, there are a number of steps agencies can take to build strong recruitment programs. These steps are laid out in the report. The most important key to success is gaining the support and involvement of agency leaders – particularly in distinguishing recruitment as a critical management function rather than solely an HR office responsibility.

Customer Satisfaction Survey Results: The Readers' Voice

In 2004, MSPB conducted a customer satisfaction survey regarding merit systems studies, newsletters, and the web site produced by the Office of Policy and Evaluation (OPE) and issued a report concerning the results of the survey. The specific goals of this study were to measure the usefulness of the publications and web site and identify ways to improve them to better meet readers' needs. MSPB has periodically conducted customer satisfaction surveys since 1994 to measure readers' satisfaction with OPE publications.

The study found that readers continue to hold OPE's products in high regard. As in previous years, readers found that the topics of the publications are timely and relevant to the issues they face in their jobs and that they are well written and well analyzed. While the overall satisfaction with the publications was positive, readers suggested a few opportunities for improvement. They would like OPE to publish more reports on a wider

variety of topics. They would also like OPE to shorten the time between data collection and publication. Further, they suggested making publications more widely available on-line. In response to these and other suggestions, OPE has identified a number of potential improvements that can be considered for implementation.

Significant Actions of the Office of Personnel Management

As required by statute, MSPB reports on the significant actions of the OPM. This is the second year in which the Board is presenting a summary of the significant actions by OPM with the greatest long-term implications on the merit systems in the Annual Report.

The past year has seen great changes in Federal human capital management –the most significant since the Civil Service Reform Act of 1978. OPM has undertaken many actions, both in response to legislative action and as the President’s agent for Federal human resources management. Below, we list and briefly discuss the OPM actions with the greatest long-term implications for the Federal civil service. This list is not, by any means, an exhaustive list of all of OPM’s initiatives and actions.

OPM Policy Initiatives

Proposed regulations for DHS

OPM and the Department of Homeland Security (DHS) issued proposed regulations for the DHS personnel system. OPM is currently working with the Department of Defense (DOD) on a National Security Personnel System. OPM and DOD plan to jointly issue proposed regulations for that system early in 2005.

Significance:

The proposed DHS personnel system includes substantial changes to pay, performance management, appeal rights and procedures, and collective bargaining. These or similar changes may appear, in whole or in part, in the Department of Defense personnel system, other alternative personnel systems, or Governmentwide reforms.

Framework for civil service reform

OPM published “OPM’s Guiding Principles for Civil Service Transformation,” a framework for civil service reforms in the Federal Government.

Significance

Agency-level personnel reforms, including those at DHS and DOD, have given selected agencies flexibilities unavailable to Federal agencies operating

under traditional provisions of title 5. That has raised concerns about “fragmentation” of the civil service – counterproductive divergence in Federal agency HR policies and practices. OPM’s framework preserves core values (i.e., merit principles), while ensuring coordination of policies across agencies and maximum advantage of economies of scale to help minimize the possible effects of fragmentation.

Regulations for Senior Executive Service (SES) pay and performance management

OPM issued regulations on compensation for members of the Senior Executive Service (SES) and other senior-level positions. The regulations give agencies increased flexibility in setting the pay of Senior Executives, while requiring agencies to obtain OPM certification of their SES performance management systems (i.e., assure that the systems make credible performance-based distinctions among executives) to set SES pay at the higher levels permitted by law.

Significance

These regulations may set the stage for future changes in Federal pay policy aimed at linking pay to performance governmentwide. The regulations also reflect increased and necessary attention to agency performance measurement and decision-making processes, which are critical to the integrity and effectiveness of pay for performance systems.

Interim regulations for NO FEAR Act

As mandated by the Notification and Federal Employee Antidiscrimination and Retaliation (NO FEAR) Act of 2002, OPM issued interim regulations concerning agency reimbursement of the Judgment Fund for payments related to actual or alleged violations of antidiscrimination, whistleblower protection, and similar laws. OPM has not yet issued rules for a required study of best practices related to disciplinary actions taken against Federal employees who engage in illegal discrimination or similar improper activities.

Significance

The NO FEAR Act is intended to reduce illegal discrimination by strengthening Congressional oversight, increasing agency accountability, and improving agency compliance with the law. As the President has delegated to OPM responsibility for developing many of the rules and guidelines required by this law, OPM leadership is essential to its full implementation.

Actions Related to OPM Organization and Oversight

OPM internal reorganization

OPM completed a major restructuring that organizes OPM along broad business lines: HR policy, HR products and services, and human capital leadership.

Significance

The intent of this restructuring is to align OPM's organizational structure with the functions outlined in its strategic plan and promote a holistic (as opposed to narrowly functional) approach to Federal HR issues and policies. OPM provides technical assistance to agencies in its policy and human capital leadership roles and provides some training. However, even with this restructuring, there exists a continuing tension between OPM's leadership and oversight roles and its role as a provider of products and services. OPM is mandated by law to recover the costs of providing services in the areas of recruitment, assessment, staffing, training and management assistance. Consequently, OPM is not in a position to independently develop costly products (such as entry-level examinations) that provide limited benefits to individual agencies, but that could benefit the Federal Government as a whole. Also, the cost recovery goal creates an incentive for OPM to seek customers for its products and services – an incentive that does not in all ways fit well with OPM's responsibility for overseeing agencies' adherence to merit principles and compliance with law and regulation.

Combining military and civilian background investigation functions

OPM and the DOD discussed the possible transfer of the personnel background investigation function, including employees, from DOD to OPM. (Note: In November 2004, OPM and DOD announced that the transfer would take place in February 2005.)

Significance

The transfer will greatly increase the size of OPM and the scope of its reimbursable activities. In the short term, the transfer will require a great deal of attention from OPM leadership. In the long term, it is hoped that the transfer and other improvements in the investigation and clearance process (such as the e-Clearance electronic government) will make background investigations and clearances more timely and more "portable." Delays in

investigations and clearances are frequently cited as a cause of delays in filling critical security-related jobs.

Leading efforts for the human capital component of the PMA

As the lead agency for the human capital component of the President's Management Agenda (PMA), OPM worked with agencies on the development of human capital plans and established "standards for success" for agency human capital management. OPM also evaluated agency performance on the human capital element of the PMA scorecard.

Significance

OPM oversight of agency human resource management continues to evolve, with OPM exercising increasing influence in high-level agency human capital planning and policy development. The long-term effects of this influence remain unknown. Nevertheless, the Administration's emphasis on managing human capital, actively supported by OPM, has clearly increased Federal agency attention to this area.

Oversight of human capital management

OPM maintained its agency oversight program, while continuing to modify the program in response to Administration initiatives and environmental changes. The modifications include an accelerated audit schedule for major agencies, selective review of outsourced HR processes, and review of agency workforce security practices. OPM plans to develop audit guidelines modeled on standards used by the Government Accountability Office, and to develop methods to better evaluate how agency human capital programs and practices affect organizational outcomes.

Significance

OPM clearly acknowledges the continuing importance of oversight of agency management of human resources, including compliance with law and regulation. The broadening of the program is logical in light of the new emphasis on security issues and the increased role of contractors in carrying out HR functions.

OPM Actions Related to Other Governmentwide Programs

e-Government Initiatives

OPM led several electronic government (“e-gov”) initiatives. These include but may not be limited to:

E-Clearance, an initiative to simplify and speed the processing, tracking, and adjudication of background investigations and security clearances;

Recruitment One-Stop (ROS), an initiative to improve the job search and application processes, for both agencies and job seekers;

Enterprise HR Integration (EHRI), an initiative to develop standards, a repository, and analytical tools for data on the Federal workforce; and

E-Training, an initiative to provide employee development tools and on-line training to Federal employees and Federal agencies; and

E-Payroll, an initiative to standardize and consolidate Federal agency payroll operations.

Significance

Progress on these initiatives varies, but all are important to improving Federal human capital management. For example, ROS and E-Clearance may produce material improvements in the timeliness and quality of Federal hiring processes. The other, more internally-focused initiatives may contribute to improved management of human capital directly (e.g., through better decision-making or better training of employees) or indirectly (e.g., by reducing operating costs).

Employee benefits

OPM took on a more active role in managing Federal employee benefits programs. For example, in the area of health benefits OPM has implemented premium conversion, increased the use of health plan quality and satisfaction data, introduced high-deductible health plan options, and explored the possibility of offering insurance for dental and vision care.

Significance

Employee benefit programs do not have immediate implications for public trust and merit system integrity. Nevertheless, these programs are critical to Federal agencies’ ability to recruit, manage, and retain a high-quality workforce. Active OPM management of these programs is essential if they are to remain responsive to employee’s needs, competitive, cost-effective, and fiscally sustainable.

Financial Summary

Fiscal Year 2004 Financial Summary (dollars in thousands)

Financial Sources

Appropriations	
\$32,683	
Civil Service Retirement and Disability Trust	
Fund	2,611
Total	
Revenue	
\$35,294	

Obligations Incurred

Personnel Compensation		
\$21,802		
Personnel		
Benefits		4,681
Benefits to Former Employees		
110		
Travel of Persons		
525		
Transportation of		
Things		210
Rental		
Payments		
3,063		
Communications, Utilities, and		
Miscellaneous	317	
Printing and		
Reproduction		87
Other		
Services		
2,521		
Supplies and		
Materials		300
Equipment		
1,361		
Total Obligations Incurred		
\$34,977		

Obligated Balance
\$317