U.S. Merit Systems Protection Board

Fiscal Year 2010

Annual Report

January 2011

Foreword

In accordance with section 1206 of Title 5, United States Code (U.S.C.) the U.S. Merit Systems Protection Board (MSPB) provides this annual report on its significant actions during fiscal year (FY) 2010. This report includes summaries of the most significant Board decisions and court opinions issued during the year, case processing statistics, summaries of MSPB's merit systems studies, summaries of the significant actions of the Office of Personnel Management (OPM), and a summary of MSPB's financial results. In addition, where there have been significant activities since the end of the fiscal year, the report includes updated information as a service to the reader.

Additional information about fiscal year 2010 program performance results and financial audit information is included in MSPB's Performance and Accountability Report (PAR). This Annual Report and the PAR as well as other information about MSPB can be found on MSPB's website: www.mspb.gov.

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U.S. Merit Systems Protection Board
Fiscal Year 2010 Annual Report

Introduction

In accordance with section 1206 of Title 5, United States Code, this annual report provides information on MSPB's significant actions during FY 2010. This report includes summaries of the most significant Board decisions and relevant Court opinions issued during the year, case processing statistics, summaries of MSPB's merit systems studies, summaries of the significant actions of the Office of Personnel Management (OPM), and a summary of MSPB's financial results. The report also contains a review of the Board's legislative and congressional relations activities, a summary of international activities, a review of internal management issues, and a review of external factors that affect our work. When there have been significant activities or events since the end of the FY, the report includes updated information as a service to our stakeholders.

About MSPB

The U.S. Merit Systems Protection Board has its origin in the Pendleton Act of 1883 which was passed following the assassination of President Garfield in 1881 by a frustrated Federal job seeker. The Pendleton Act created the Civil Service Commission (CSC or the Commission) and provided the foundation for improvements in Government efficiency and effectiveness by helping to ensure that a stable, highly qualified Federal workforce, free from partisan political pressure, was available to provide effective service to the American people.

Over time, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate employee appeals. Concern over the inherent conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind the passage of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the Civil Service Commission with three new agencies: MSPB as the successor to the Commission; the Office of Personnel Management (OPM) to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority to oversee Federal labor-management relations.[1]

The MSPB inherited the adjudication functions of the Commission by providing due process to employees and agencies as an independent, third-party adjudicatory authority for employee appeals of adverse actions and retirement decisions. Since the CSRA, Congress has given jurisdiction to MSPB to hear cases and complaints filed under a variety of other laws.[2] MPSB was given the authority to develop its adjudicatory processes and procedures, issue

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[1] Bogdanow, M., and Lanphear, T., History of the Merit Systems Protection Board, Journal of the Federal Circuit Historical Society, Volume 4, 2010.

[2] Including the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Veterans Employment Opportunity Act (VEOA), and the Whistleblower Protection Act (WPA) Chapter 43 of Title 5 and all those set out at 5 Code of Federal Regulations, 1201.3.

subpoenas, call witnesses, and enforce compliance with final MSPB decisions. MPSB was also given broad new authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues. MSPB was also given the authority and responsibility to review and act on the regulations of OPM and review and report on the significant actions of OPM.[3]

Board Members

The bipartisan Board consists of a Chairman, a Vice Chairman, and a Board 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. The Board Members adjudicate the cases brought to MSPB. The Chairman, by statute, is the chief executive and administrative officer of MSPB.

SUSAN TSUI GRUNDMANN
Chairman
November 2009 to Present

Susan Tsui Grundmann was nominated by President Barack Obama on July 31, 2009 to serve as a Member and Chairman of the U.S. Merit Systems Protection Board. She was confirmed by the U.S. Senate on November 5, 2009 and sworn in on November 12, 2009. Chairman Grundmann's term expires on March 1, 2016.

Previously, Ms. Grundmann served as General Counsel to the National Federation of Federal Employees (NFFE), which represents 100,000 Federal workers nationwide and is affiliated with the International Association of Machinist and Aerospace Workers. At NFFE, she successfully litigated cases in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia. In 2004, Ms. Grundmann represented NFFE and other labor unions in the statutory "meet and confer" process with officials from the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM), which sought agreement on how to proceed with new DHS personnel regulations. She represented NFFE and the United Department of Defense Workers Coalition, consisting of 36 labor unions, and has served on the Coalition's litigation team in a coordinated response to proposed personnel changes at the Department of Defense (DoD). In addition to DoD employees, Ms. Grundmann represented employees in the Forest Service, Department of Agriculture, Passport Services, Veterans Administration, General Services Administration, and some 25 additional Federal agencies. From 2003 to 2009, she was a regular instructor on Federal sector labor and employment law at the William W. Winpisinger Education Center in Placid Harbor, Maryland. Prior to

[3] Title 5 U.S.C. § 1204, MSPB may on its own motion, or at the request of other parties, review, and potentially overturn OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a Prohibited Personnel Practice (PPP). 5 U.S.C., § 1206, MSPB is also responsible for annually reviewing and reporting on the significant actions of OPM.

joining NFFE, Ms. Grundmann served as General Counsel to the National Air Traffic Controllers Association. She began her legal career as a law clerk to the judges of the Nineteenth Judicial Circuit of Virginia, and later worked in both private practice and at the Sheet Metal Workers National Pension Fund. Chairman Grundmann earned her undergraduate degree at American University and her law degree at Georgetown University Law Center.

ANNE M. WAGNER
Vice Chairman
November 2009 to Present

Anne M. Wagner was nominated by President Barack Obama on July 31, 2009 to serve as a Member of the U.S. Merit Systems Protection Board with the designation of Vice Chairman. Her nomination was confirmed by the U.S. Senate on November 5, 2009 and she was sworn in November 12, 2009. Ms. Wagner's term expires on March 1, 2014.

Ms. Wagner comes to the Merit Systems Protection Board after serving as General Counsel of the Personnel Appeals Board of the U.S. Government Accountability Office (GAO). Prior to that, Ms. Wagner was appointed by the U.S. Comptroller General to serve a five-year statutory term as a Member of the GAO Personnel Appeals Board. Ms. Wagner began her career as a staff attorney in the Office of the General Counsel for the General Services Administration, where she primarily handled labor and employment issues. From there, she went on to become an Assistant General Counsel for the American Federation of Government Employees (AFGE), AFL-CIO, the largest Federal sector labor organization representing more than 600,000 Federal and District of Columbia government employees. In her nearly twenty years with AFGE, she led precedent setting litigation and handled cases arising under the full array of laws governing Federal employment. Ms. Wagner graduated from the University of Notre Dame and received her J.D. from the George Washington University, National Law Center. She is admitted to practice law in the District of Columbia, Maryland, and Illinois as well as before various Federal courts, including the U.S. Supreme Court.

MARY M. ROSE
Vice Chairman
January 2006 – November 2009
Board Member
November 2009 to Present

Mary M. Rose was sworn in as a Board Member on December 28, 2005, following her confirmation by the Senate on December 17, 2005. She was designated by President Bush as Vice Chairman of the U.S. Merit Systems Protection Board on January 27, 2006 and served in that role until a new Vice Chairman was sworn in November 2009. Mrs. Rose's appointment as Board Member will expire on March 1, 2011.

Prior to joining the Board, Mrs. Rose was appointed by President Bush to serve as Vice Chairman of the Federal Salary Council. She was Chairman of the Federal Prevailing Rate Advisory Committee where she advised the Director of the U.S. Office of Personnel Management on Federal pay, benefits, and other policy issues. Previously, Mrs. Rose served as Deputy Associate Director of the Office of Presidential Personnel at the White House. She served four years as the Elected Clerk of the Circuit Court, Anne Arundel, Maryland. Mrs. Rose has also served as Assistant Director for Executive Administration, Office of Personnel Management; Director of Personnel, White House Personnel Office; and Deputy Undersecretary for Management at the Department of Education. Her private sector experience includes positions as a consultant with an Annapolis law firm and as a Visiting Fellow with The Heritage Foundation where she recruited, interviewed, and recommended Presidential appointments to the George W. Bush transition team. Mary M. Rose received an R.N. degree from the Bon Secours Hospital School of Nursing, and she completed the Maryland Registered Nurse Recertification Program in May 2000.

NEIL A. G. McPHIE
Chairman
December 2003 – November 2009

Neil A. G. McPhie served as Chairman of the U.S. Merit Systems Protection Board from December 2003 to November 2009. He was confirmed as Chairman of the Board on November 21, 2004, having 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. Chairman McPhie's term expired on March 1, 2009, and statutory provisions permitted him to serve until the new Chairman was sworn in on November 12, 2009.

Board offices and their functions

The agency is divided into seven headquarters offices in Washington, DC, and eight regional and field offices located throughout the United States. The agency is currently authorized to employ 226 Full-time Equivalents (FTEs) to conduct and support its statutory duties. The Office Directors report to the Chairman through the Executive Director.

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 ALJs, MSPB employee appeals, and other cases assigned by MSPB. The functions of this office are currently performed by ALJs at the National Labor Relations Board (NLRB), the Federal Communications Commission (FCC), and the Environmental Protection Administration (EPA) under reimbursable interagency agreements.

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board in cases where a party Petitions for Review (PFRs) of an Administrative Judge's (AJ) initial decision and in most other cases decided by the Board. The office 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, policy memoranda and advice to the Board on legal issues.

The **Office of the Clerk of the Board** receives and processes cases filed at MSPB headquarters, rules on certain procedural matters, and issues MSPB decisions and orders. The office serves as MSPB's public information center, coordinates media relations, produces public information publications, operates MSPB'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 MSPB's records systems, legal research systems, and the Government in the Sunshine Act program.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates MSPB's equal employment opportunity programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB's managers and supervisors.

The **Office of Financial and Administrative Management** administers the budget, accounting, travel, time and attendance, human resources, procurement, property management, physical security, and general services functions of MSPB. It develops and coordinates internal management programs, including review of agency internal controls. It also administers the agency's cross-servicing agreements with the U.S. Department of Agriculture, National Finance Center for payroll services, U.S. Department of the Treasury, Bureau of the Public Debt for accounting services, and U.S. Department of Agriculture, Animal and Plant Health Inspection Service for human resources management services.

The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; prepares proposed decisions for the Board to enforce a final

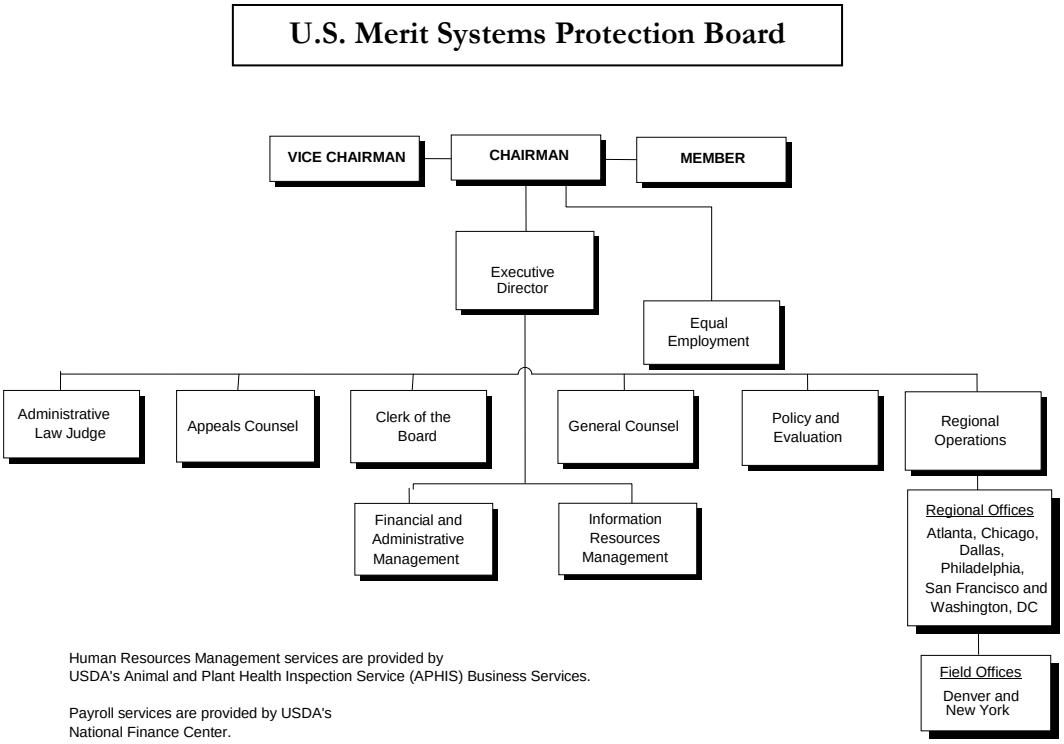
MSPB decision or order, in response to requests to review OPM regulations, and for other assigned cases; conducts the agency's petition for review settlement program; and coordinates the agency's legislative policy and congressional relations functions. The office drafts regulations, conducts MSPB's ethics program, and plans and directs audits and investigations.

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

The **Office of Policy and Evaluation** carries out MSPB's statutory responsibility to conduct special studies of the civil service and other Federal merit systems. Reports of these studies are sent to the President and the Congress and are distributed to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office also conducts special projects for the agency and has responsibility for preparing MSPB's strategic and performance plans and performance reports required by the Government Performance and Results Act.

The **Office of Regional Operations** oversees the agency's six regional and two field offices, which receive and process appeals and related cases. It also manages MSPB's Mediation Appeals Program (MAP). AJs in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair, well-reasoned, and timely initial decisions.

Organization chart



Fiscal Year in Review

Changes in Board membership and senior leadership

Chairman Susan Tsui Grundmann and Vice Chairman Anne Wagner were sworn in on November 12, 2009, giving MSPB a full contingent of three confirmed Board Members for the first time in over a year. In addition, Steve Lenkart was appointed as the Executive Director, James Eisenmann was appointed as the General Counsel, and Ernest Cameron was selected as the Director of the Office of Financial and Administrative Management. These leaders bring a wealth of private sector and Government experience that will help MSPB continue its success now and in the next several years.

Adjudication

The MSPB decided initial appeals and PFRs in accordance with the laws and regulations governing such appeals. MSPB issued 7,863 decisions in FY 2010, slightly fewer than the 7,998 decisions issued in FY 2009. The regional and field offices continued to issue timely, high quality initial decisions. While processing of PFRs slowed somewhat during FY 2010, MSPB headquarters offices continued to issue timely, high quality decisions. MSPB provided a full menu of successful alternative dispute resolution options to its customers, including settlement programs in the regions, field offices, and headquarters, the Mediation Appeals Program, and the availability of administrative judges (AJs) separately designated for settlement of a case. MSPB also conducted outreach to its adjudication stakeholders including agencies, unions, and advocacy groups.

The agency took significant actions beginning in FY 2010 to improve the transparency of its adjudication processes and decisions at headquarters. For the first time in 24 years, the Board heard oral arguments in a case with broad impact on the Government and the merit systems. In September 2010, the Board heard arguments in *Conyers v. Department of Defense* and *Northover v. Department of Defense* on issues involving the Board's jurisdiction in reviewing adverse action cases involving the agency's revocation of a tenured employee's eligibility to hold a non-critical sensitive position. In early FY 2011, the Board heard oral arguments in *Aguzie, et al. v. Office of Personnel Management*, a set of cases involving the application of Title 5, U.S.C., Chapter 75 to cases in which OPM initiated removal of tenured employees based on suitability grounds. The Board expects to continue to hear oral arguments in cases that have broad Governmentwide impact on the Federal civil service and the merit systems. In addition, the Board began issuing expanded explanations of its rationale in non-published decisions on PFRs of certain initial decisions. The additional information is intended to promote understanding of the Board's decisions by the parties.[4] We expect that in the future many non-published decisions will include such expanded explanations.

This report contains case processing statistics, which include detailed information regarding the type, origin, and disposition of cases processed by MSPB. This report also contains brief

[4] Between June 1, 2010 and September 30, 2010, the Board issued approximately 279 decisions. (Cases that were joined or consolidated were only counted once.) Of these, 115 were traditional published opinions and orders (O&Os). Of the 164 non-published orders, 120, or 73 percent, included expanded information on the rationale of the decision.

summaries of the most significant Board decisions issued in FY 2010 which addressed such issues as adverse actions, jurisdiction, retirement, discrimination, veterans' rights, whistleblower protection, compliance, and Board procedures. As a service to our stakeholders, we also we also include summaries of four Board decisions issued in early FY 2011.[5] In addition, we include summaries of significant opinions issued during FY 2010 by the U.S. Court of Appeals for the Federal Circuit and by the U.S. Supreme Court that were relevant to our work.

Merit systems studies

The MSPB completed five external reports dealing with a variety of topics, including supervisory preparedness, Prohibited Personnel Practices (PPPs), Federal employee competencies and how to obtain them, whistleblowing protections and the law, as well as the FY 2009 MSPB annual report. MSPB completed four editions of the *Issues of Merit* newsletter and began posting revolving content to the studies webpage. MSPB successfully administered the 2010 Merit Principles Survey to over 70,000 Federal employees and supervisors, with a 60 percent response rate for the online survey.

MSPB studies continued to be cited by numerous print and online sources, by stakeholder groups such as unions and non-profit groups interested in Federal employment issues, and in Congressional testimony. Several longstanding MSPB policy recommendations were included in the President's 2010 hiring reform initiative, introduced through the *Presidential Memorandum—Improving the Federal Recruitment and Hiring Process*. These recommendations include making the application process less complex; improving communication with applicants; improving the quality of job announcements; improving the validity and reliability of applicant assessment tools; educating and involving selecting officials more in the recruitment and selection process; and replacing the rule of three with category rating. Summaries of MSPB study reports and newsletter topics are provided later in this report.

Review of the significant actions of the Office of Personnel Management

The MSPB is responsible for providing an independent, nonpartisan review of the significant actions of OPM to ensure that these actions conform with Merit Principles (MPs) and do not result in PPPs. MSPB reviewed OPM's new strategic plan, and reviewed policy initiatives including the President's hiring reform initiative, OPM support for hiring reform, improving agency use of recruitment, relocation and retention incentives, and support of agency labor-management forums. MSPB also reviewed OPM's actions on hiring students and recent graduates, including the Federal Career Intern Program (FCIP). The full review of OPM actions on FCIP and hiring students and recent graduates includes previous work of the Board and significant actions taken in early FY 2011, namely decisions on FCIP issued by

[5] The decisions from the Board's oral arguments in *Conyers* and *Northover* were issued in December 2010. The decisions in *Dean v. Office of Personnel Management* and *Evans v. Department of Veterans Affairs* were released in November 2010 and are related to OPM's significant actions on the Federal Career Intern Program (FCIP) and hiring students and recent graduates. More information about the FCIP and hiring of students and recent graduates may be found in the review of OPM significant actions. The decisions in *Chambers v. Department of Interior*, *Aguzie v. Office of Personnel Management*, and *Barnes v. Office of Personnel Management* were released in January 2011.

the Board, subsequent release of Presidential Executive Order 13562 on hiring students and recent graduates, and related OPM guidance on the Executive Order. MSPB also reviewed OPM's significant actions related to the delivery of products and services, including the expansion of employee work-life, benefit and support programs, and the proposal for a health claims data warehouse. Additional information about OPM's significant actions is included later in this report.

Review of MSPB international activities

In FY 2010, MSPB participated in a number of international activities that were designed to inform and educate participants about the U.S. civil service. MSPB hosted a number of meetings at MSPB headquarters to educate representatives from foreign governments about the role of merit in the civil service and portray the advantages of equitable treatment in managing a public workforce. In particular, we met with dignitaries from different provinces in China on six occasions and hosted the Minister of Public Administration and the accompanying delegation from Kosovo. We also provided assistance to the Japanese National Personnel Authority when they requested information on Air Traffic Controller selection and training. In addition, the Director of OPE was invited to Taiwan to make a presentation on public administration in the 21st century for an international conference Taiwan was hosting. The Director also met with the President of the Taiwanese Civil Service, and provided a briefing to members of the Taiwanese civil service concerning issues involving the management of the U.S. civil service.

Legislative and congressional relations update

On July 31, 2009, the President nominated Susan Tsui Grundmann to be a Member and Chairman of the Merit Systems Protection Board. He also nominated Anne Marie Wagner to be a Member of the Board with the designation of Vice Chairman. On November 5, 2009, the Senate voted to confirm the nominations of Ms. Grundmann and Ms. Wagner, and they were both sworn in on November 12, 2009. Chairman Grundmann's term expires on March 1, 2016, and Vice Chairman Wagner's term expires on March 1, 2014.

On January 20, 2010, President Obama nominated Dennis Walsh to be Chairman of the Special Panel on Appeals. The Senate confirmed his nomination on June 22, 2010, and he was sworn in by Chairman Grundmann on July 29, 2010. The Chairman of the Special Panel on Appeals is a position established by the Civil Service Reform Act of 1978 to address "mixed" cases that involve issues concerning both MPs and anti-discrimination principles as applied to Federal employees. When such cases occur, the Chairman of the Special Panel constitutes a Special Panel, consisting of himself, a Member of MSPB, and a Member of the EEOC. Mr. Walsh's term expires on June 21, 2016.

The Consolidated Appropriations Act of 2010 (Pub. Law 111-117) provided FY 2010 appropriations for the MSPB in the amount of $40,339,000. The appropriated funds included reimbursements from the Civil Service Retirement and Disability Fund not to exceed $2,579,000 for administrative expenses incurred in connection with the adjudication of retirement appeals. Chairman Grundmann conducted meetings with members of the House and Senate to discuss MSPB's request for reauthorization. No legislative action occurred on the authorization request during FY 2010.

On December 10, 2010, the Senate passed S. 372, the Whistleblower Protection Enhancement Act of 2010. The House suspended further action on H.R. 1507, its version of the bill, but sought to take action on the Senate bill. Among other things, the Senate version of the bill: (1) authorizes MSPB to assess attorney's fees and court costs in certain cases; (2) requires MSPB to report annually the number and outcome of whistleblower cases filed with the agency; (3) permits appellants to seek de novo review in U.S. district court of cases filed with MSPB and; (4) removes the exclusive jurisdiction of the Court of Appeals for the Federal Circuit and permits any U.S. Federal Circuit Court to hear appeals of MSPB decisions in whistleblower cases. According to the analysis of the Senate version of this legislation provided to the Congressional Budget Office by MSPB, the bill would likely lead to 350 additional cases filed in MSPB's regional and field offices each year, an additional 225 hearings per year, and an additional 64 case receipts at MSPB headquarters each year.[6]

On September 29, 2010, the Senate passed a compromise version of the Telework Enhancement Act (H.R. 1722), and the President signed the Act into law on December 9, 2010. Under the Act, agencies have 180 days to establish a telework policy for eligible teleworkers, determine which employees are eligible for telework, and notify employees of their eligibility. Agencies must also establish a telework training program for employees and managers, include telework in their agency continuity of operations plans (COOP), designate a telework manager with direct access to the agency head, and provide yearly progress reports to OPM. MSPB, which by statute is required to "conduct special studies relating to the civil service, and to other merit systems in the executive branch," could have a new role under this legislation. Section 4(a)(2) of the Act requires the Director of OPM to "review the outcomes associated with an increase in telework, including the effects of telework on energy consumption, job creation and availability, urban transportation patterns, and the ability to anticipate the dispersal of work during periods of emergency." Section 4(c) provides that: "The heads of Federal agencies with relevant jurisdiction over the subject matters in subsection (a)(2) shall work cooperatively with the Director of the Office of Personnel Management to carry out that subsection, if the Director determines that coordination is necessary to fulfill obligations under that subsection."

Internal management programs

Beginning in November 2009, MSPB conducted several major initial reviews and internal assessments (some of which are ongoing). These reviews and assessments included: top-to-bottom reviews of our strategic direction, performance planning, and performance measurement; historic review of internal resource management and support processes and their outcomes; and a general review of how the agency conducts business, makes decisions, and ensures accountability. Reviews of the adjudication and studies programs, including their legislative mandate and history, current funding, staffing levels, and program outcomes were also conducted. Information was gathered from process participants, agency managers and employees, and external stakeholder groups in face-to-face meetings, by email and via electronic survey. The results of these reviews brought to light internal management challenges in mission planning and effectiveness, budgetary planning and resources

[6] This legislation was not enacted into law in the 111th Congress.

management, and management processes that affect our ability to successfully achieve our mission in both the short and long term.

In terms of overall mission planning and ensuring optimum effectiveness, results indicated there has been little to no review of OPM regulations, which is one of our statutory functions[7], and a need for better integration between performance goals and the annual budget process. Adjudication issues include external concern about MSPB time constraints and their impact, more effectively balancing measures of adjudication quality, fairness, and timeliness, increasing outreach to improve adjudication effectiveness and efficiency, and increasing the emphasis on enforcement of compliance decisions.[8] Merit systems studies issues include improving the distribution, promotion, and outreach of study results and recommendations, and improving our ability to administer surveys. Overall agency management issues include justifying budgets to support the full mission thus eliminating the routine use of hiring freezes to offset operational requirements, improving workforce planning, and establishing an accurate and stable FTE structure.

The MSPB made considerable changes and improvements in these areas in FY 2010. We began developing a new outcome oriented strategic plan focused on MSPB's responsibility for protecting merit, promoting MPs, and preventing PPPs, and began planning on how to strengthen and integrate oversight of OPM regulations into daily operations. We reconstructed the budget process to fully involve managers and addressed previous budget inadequacies. We improved the transparency of our adjudication processes and decisions including the use of oral arguments and expanding the explanations supporting our non-published PFR decisions at headquarters. We solicited considerable stakeholder input to our new studies research agenda and held a Sunshine Act meeting on the research agenda in December of 2010. In addition, stakeholders can now follow MSPB on Twitter (@USMSPB). We also created an Executive Committee of all SES, chaired by the Executive Director, and created a labor-management council to facilitate open communication with the Professional Association. Additional information about our internal challenges is available in MSPB's FY 2010 Performance and Accountability Report.

Significant external trends and issues

The most significant external trends or issues affecting MSPB's ability to carry out its mission to protect the Federal merit systems include changes in law and jurisdiction, changes in management and employee flexibilities, veteran's rights and changing demographics of the workforce, and continued pressure on the Federal budget.

Changes in law and jurisdiction

The Americans with Disabilities Act (ADA) Amendments Act of 2008 became effective on January 1, 2009. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment. However, it broadens the way these statutory

[7] Title 5, U.S.C. § 1204(a)(4)

[8] Title 5, U.S.C. § 1204(a)(2)

terms should be interpreted. While discrimination claims alone are not appealable to MSPB, such claims are frequently raised as affirmative defenses to actions that are appealable (thus known as "mixed" cases). The broader interpretation and expanded rights afforded by the ADA Amendments Act will likely make some MSPB appeals more complex and may encourage additional claims.

The MSPB may see an increase in the number of appeals related to implementation of the Postal Service's National Reassessment Project (NRP). While most Postal Service non-preference eligible employees do not have appeal rights to MSPB for an adverse action, appeals from NRP-related actions raise issues concerning the restoration to duty statute and regulations, which cover a much broader category of employees. MSPB expects to continue to see an increasing number of restoration to duty appeals from Postal Service employees.

Changes in appeal rights and appellate jurisdiction also increase the importance of MSPB's statutory responsibility to promote merit and educate employees, supervisors, managers, and leaders on the merit system, MPs, PPPs, and MSPB appellate procedures, processes, and case law. Educating and promoting merit and sharing important information about appeals procedures will improve workforce management, and reduce the cost of appeals to agencies, appellants, and the Government.

Changes in management and employee flexibilities

Changes in management flexibilities could involve employees in single agencies such as those in the Department of Defense (DoD) National Security Personnel System (NSPS). The National Defense Authorization Act (NDAA) for FY 2010 (Public Law 111-84) requires DoD to transfer all employees and positions from NSPS by January 1, 2012. As management flexibilities are used, and as employees move from more flexible systems such as NSPS back to the traditional system under Title 5, it is possible that MSPB could see an increase in its appeals workload as well as increased complexity in the various legal authorities and precedents used to decide these appeals. Management flexibilities may also affect several agencies at a time. The American Recovery and Reinvestment Act may result in considerable hiring by some Federal agencies. It appears that some of this hiring will be under appointing authorities that exclude appeal rights which may generate appeals before MSPB arguing to the contrary. Of course, any additional hiring that does grant appeal rights may generate an increased number of appeals as well.

Management flexibilities may also be directed through administrative action such as the Presidential Initiative on Hiring Reform. These flexibilities include the use of category rating, eliminating the need for applicants to submit Knowledge, Skills, and Abilities (KSA) narratives for each application, the use of multiple hurdles in recruitment and assessment, and shortened hiring times. These initiatives have great potential to improve the effectiveness and efficiency of Federal hiring. However, how these processes are implemented could have either a positive or adverse impact on merit or the perception of merit.

Federal management flexibilities also emphasize the need for MSPB to continue its study of Federal merit systems and human capital management practices to ensure the flexibilities are implemented and operated in accordance with MPs and are free from PPPs. Flexibilities and

other changes in human resource management policies issued through OPM regulation make it imperative that MSPB strengthen and expand its ability to exercise its statutory authority to review OPM regulations. Reviewing OPM regulations can save the Government millions in direct costs such as those associated with transferring employees in and out of more flexible systems that are later terminated, and in indirect costs associated with negative employee perceptions of the new system and possible reductions in morale. Finally, changes in management flexibilities also increase the importance of MSPB's role in promoting and educating employees and the public about the merit system, MPs, and PPPs.

Veteran's rights and changing demographics of the Federal workforce

In FY 2010, MSPB received a combined total of 1,012 cases (slightly fewer than the 1,072 cases processed in FY 2009) under two related veterans' rights laws, the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA). Veterans who seek employment in the Federal civil service and are not hired have the right to seek redress for any alleged violation of their veterans' preference rights before MSPB under the VEOA. VEOA provides a means of redress for any violation of an individual's rights under any statute or regulation relating to veterans' preference. Individuals who left employment in the Federal civil service to serve in the military have the right to reemployment in the Federal civil service and to challenge the terms (or denial) of reemployment before MSPB under USERRA. MSPB expects to continue to receive a large number of cases under these veterans' rights laws as our nation remains engaged in major military conflicts.

The proportion of retirement-eligible Federal employees continues to increase. While current economic conditions may delay the retirements of some of these Federal employees, it is still likely that retirements will increase in the next few years. As retirements increase, we might expect to see an increase in retirement appeals. Changes in Federal retirement such as allowing employees in the Federal Employees Retirement System (FERS) to claim service credit toward retirement for their sick leave balance, and allowing full-time Federal employees to end their careers in a part-time status without adversely affecting the amount of their annuity, may either decrease or increase retirement rates, and thus may impact retirement appeals. As the government replaces retiring employees with relatively younger, less experienced employees, there is likely to be a decrease in the average age of the workforce. As this occurs, we may expect to see an increase in appeals because less experienced employees typically experience more appealable actions than do more experienced employees.

In addition to changes in workforce demographics, Government work has continued to shift from administrative processing, to knowledge-based work. Federal human resources management systems, many designed in the 1940s and 1950s, do not have the flexibility needed to manage a knowledge-based workforce effectively. Issues, including recruitment and hiring, performance management and pay, training and development need to be addressed in order to improve and maintain a diverse workforce of highly engaged and motivated employees who can perform agency missions and serve the public. At the same time, MPs, fair treatment, and freedom from discrimination and from PPPs must be ensured. Improvements are also needed in the selection and training of supervisors and managers who must use the existing management systems to manage a modern workforce

and achieve results for the public. These changes emphasize the need for a strong merit systems studies function and increased focus on promoting and educating employees and the public about the merit systems, MPs, and PPPs.

The Federal budget

The recently enacted freeze in Federal pay may increase retirement and is likely to have some adverse impact on employee morale and productivity. At the same time, freezing pay may also shift employees' attention to performance appraisal systems and ratings which could in turn increase appeals to MSPB. Increasing budget pressures may also result in a greater potential for other agencies to cut costs by decreasing the size of their workforce through reduction in force (RIFs), reducing or freezing hiring, or reducing training. Reducing the workforce may lead to increases in the number of employees who are demoted or separated involuntarily through RIF. Historical trends indicate that increasing RIFs will lead to potentially large increases in the number of appeals to MSPB.

Freezing employee pay and possible reductions in hiring and workforce training may also have long-term impacts on MPs such as the efficiency and effectiveness of the workforce. Employees may perform better and refrain from misconduct in an effort to keep their jobs. On the other hand, employees may experience more workplace conflict and other behavioral and performance issues due to the stress caused by economic conditions over which they have no control. Emphasis on merit systems studies is important to continue to gather longitudinal data on adherence to MPs and avoidance of PPPs as changes occur in the workforce. It is also important to promote merit and educate the workforce, especially managers and leaders, about how to adhere to MPs and avoid PPPs when making management decisions such as those related to reducing the workforce.

Significant Board Decisions and Court Opinions

The MSPB issued a substantial number of noteworthy decisions in FY 2010, several of which are summarized below. Brief summaries of a selected significant opinions issued by the United States Court of Appeals for the Federal Circuit and the United States Supreme Court are also provided as a service to our stakeholders.

Significant decisions issued by the Board

Jurisdiction

Abdullah v. Department of the Treasury, 113 M.S.P.R. 99 (2009): This decision addressed whether an employee dismissed during his probationary period might be an "employee" with adverse action appeal rights. Remand was necessary to determine if the appellant's appointment constituted a reinstatement under Subpart D of Part 315. If so, and if he met the criteria of 5 C.F.R. § 315.801(a)(2), he would be an employee with adverse action appeal rights under 5 U.S.C. § 7511(a)(1)(A)(i) when the agency terminated his appointment.

Sandoval v. Department of Agriculture, 115 M.S.P.R. 71 (2010): The issue in *Sandoval* was whether two positions worked consecutively were in the "same line of work" so that the appellant's service in one position could be tacked to his service in the other so that he would be an "employee" under 5 U.S.C. § 7511 with adverse action appeal rights, instead of the more limited rights afforded probationary employees. In resolving this issue in the affirmative, the Board relied on decisions by its reviewing court that warned against a narrow interpretation of the relevant statutory provisions and against placing too much emphasis on job description dissimilarities, explaining that the focus should be on the skills and fundamental character of the positions in question. The Board also noted an MSPB study emphasizing that the purpose of probationary periods is to provide the government with an opportunity to evaluate an individual's conduct and performance to determine if an appointment to the civil service should be final, and that purpose was satisfied here.

Scull v. Department of Homeland Security, 113 M.S.P.R. 287 (2010): The termination of an intern appointed under the Federal Career Intern Program (FCIP) upon the expiration of his internship is generally not an adverse action appealable to the Board. However, an FCIP intern who is separated from service upon the expiration of his internship may establish Board jurisdiction by establishing the following: (1) Immediately prior to his FCIP appointment, he held a career or career-conditional appointment to the same agency; (2) his failure to complete the internship successfully was for reasons unrelated to misconduct or suitability; and (3) he is an "employee" within the meaning of 5 U.S.C. § 7511.

Adverse Actions

Gonzalez v. Department of Homeland Security, 114 M.S.P.R. 318 (2010): The mere existence of an open investigation into allegations regarding an employee's off-duty conduct is not "cause" for taking an action under subchapter II of chapter 75, where the agency is not basing its action upon reasonable cause to believe that the appellant has committed a crime for which imprisonment may be imposed. Before the Board can reach the issue of whether

an agency action "promotes the efficiency of the service," the agency must first establish that there is "cause" under § 7513(a). Where the agency's pending inquiry into allegations against the appellant is not actionable "cause," the agency's arguments regarding the efficiency of the service are immaterial.

Doe v. Department of Justice, 113 M.S.P.R. 128 (2010): An agency may show a nexus between off-duty misconduct and the efficiency of the service by any of three means: (1) a rebuttable presumption in certain egregious circumstances; (2) preponderant evidence that the misconduct adverse affects the appellant's or co-workers' job performance or the agency's trust and confidence in the appellant's job performance; or (3) preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. The agency established that the appellant's unprofessional conduct of videotaping his sexual encounters with two FBI employees adversely affected the job performance of those employees, as well as the job performance of other employees and the efficiency of the office as a whole.

Lewis v. Department of Veterans Affairs, 113 M.S.P.R. 657 (2010): One of the factors in assessing the reasonableness of a penalty is the consistency of the penalty with those imposed on other employees for the same or similar offenses. To establish disparate penalties, an appellant must show that the charges and circumstances surrounding the charged behavior are substantially similar. Under recent precedent, establishing that the charges and circumstances surrounding the charged behavior are substantially similar has required proof that the proffered comparator was in the same work unit, with the same supervisor, and was subjected to the same standards governing discipline. Consistent with the rationale of the Board's reviewing court in *Williams v. Social Security Administration, 586 F.3d 1365 (Fed. Cir. 2009).*

Woebcke v. Department of Homeland Security, 114 M.S.P.R. 100 (2010): In affirming the mitigation of the removal penalty to a 14-day suspension, the Board found that the administrative judge properly analyzed the applicable *Douglas* factors in determining that the removal penalty exceeded the bounds of reasonableness, including the judge's determination that the agency treated the appellant disparately compared to other similarly-situated employees. Although the fact that a comparator was supervised by a different individual may sometimes justify different penalties, an agency must explain why differing chains of command would justify different penalties.

Restoration to Duty

Urena v. U.S. Postal Service, 113 M.S.P.R. 6 (2009) and *Barachina v. U.S. Postal Service*, 113 M.S.P.R. 12 (2009): In the case of an employee who has partially recovered from a compensable injury, an agency must make every effort to restore the individual to a position within her medical restrictions and within her local commuting area, and such an employee may appeal to the Board for a determination of whether the agency has acted arbitrarily and capriciously in denying restoration. Where the agency searches only the particular facility where the appellant had been employed for available work, and does not look elsewhere in the appellant's local commuting area, as required by 5 C.F.R. § 353.301(d), the agency's failure to comply with that regulation is sufficient to render nonfrivolous her allegation that the agency acted arbitrarily and capriciously in denying her restoration.

Sanchez v. U.S. Postal Service, 114 M.S.P.R. 345 (2010): In an appeal brought by a partially recovered employee, the Board found jurisdiction and remanded for further adjudication, including a determination of the applicable local commuting area. The local commuting area is the geographic area in which an individual lives and can reasonably be expected to travel back and forth daily to his usual duty station. The question of what constitutes a local commuting area is one of fact, which is ordinarily determined by factors such as common practice, the availability and cost of public transportation or the convenience and adequacy of highways, and the travel time required to go to and from work. Regarding the appellant's claim that the agency failed to accommodate his disability, OPM's restoration regulation, 5 C.F.R. § 353.301(d), requires treating employees substantially the same as individuals protected under the Rehabilitation Act of 1973. The relevant standards are those applied under the Americans with Disabilities Act, set forth at 29 C.F.R. part 1630. In resolving an appellant's claim that the agency failed to accommodate his disability, an administrative judge should take into consideration the results of the interactive process required to determine an appropriate accommodation, in which both parties have an obligation to assist in the search for an appropriate accommodation, and both have an obligation to act in good faith in doing so.

Luna v. U.S. Postal Service, 114 M.S.P.R. 273 (2010): In another appeal brought by a partially recovered employee, the Board rejected the agency's argument that the appellant's disability discrimination claim should be held in abeyance because it is covered under a class complaint pending before the EEOC. The class complaint is not a mixed case, because nothing in the EEOC's certification of the class complaint discusses denial of restoration or any other action that may be otherwise appealable to the Board. The appellant's alleged membership in the class therefore does not divest the Board of jurisdiction over any aspect of her Board appeal.

Chen v. U.S. Postal Service, 114 M.S.P.R. 292 (2010): In an appeal brought by a partially recovered employee, the Board found that the agency's delay between the time the appellant was placed off work and when the agency completed its district-wide search for work for the appellant did not render its action arbitrary and capricious. Although an agency's delay may constitute a denial of restoration when work is clearly available or when the delay is extreme and unexplained, the delay in this case was not lengthy and, during the period at issue, the agency was conducting an orderly search for work.

Kinglee v. U.S. Postal Service, 114 M.S.P.R. 473 (2010): In another appeal by a partially recovered employee, the Board found that the appellant presented a nonfrivolous allegation that the agency's decision to reduce his limited duty from 8 hours to 90 minutes per day constituted a denial of restoration. This is not a case where an appellant is challenging the details or circumstances of the restoration, but is instead a situation where the agency is rescinding a previously provided restoration. The Board also found that denials of restoration for partially recovered employees do not give rise to a constructive suspension claim. In these circumstances, the appellant's rights and remedies regarding the portion of his workday for which the agency has not assigned him work are subsumed in the restoration appeal process. If the appellant prevails on the merits of his claim, he would be entitled to relief that would address the agency's failure to provide him with the proper hours of work each day. If the Board determines on the merits that the agency afforded the

appellant the restoration rights to which he is entitled, it would be illogical to then hold that the agency's proper restoration could constitute an improper constructive suspension.

Dean v. U.S. Postal Service, 115 M.S.P.R. 56 (2010): An agency's obligation to make every effort to restore a partially recovered individual "in the local commuting area" refers to the location of the individual's former duty station, not the location of the individual's current residence.

Whistleblower Protections

Weed v. Social Security Administration, 113 M.S.P.R. 221 (2010): In an individual right of action appeal, the appellant need not have been employed by the agency alleged to have taken a retaliatory personnel action when he made a protected disclosure. The language of the statute does not impose such a limitation which would be contrary to the well-established principle that, as a remedial statute, the Whistleblower Protection Act should be construed broadly.

Schnell v. Department of the Army, 114 M.S.P.R. 83 (2010): The Board held that the appellant was entitled to corrective action in this individual right of action appeal. An employee's non-selection for a temporary position and the threatened elimination of the employee's positions are personnel actions under 5 U.S.C. § 2302(a)(2)(A). A Supervisory Quality Assurance Specialist established that he made protected disclosures regarding problems concerning a $109 million contract, in that he disclosed that the agency blurred lines of authority, confused surveillance concepts, employed inexperienced and untrained personnel, failed to provide necessary standards, and overpaid for service. At a minimum, these disclosures implicated a violation of law, rule, or regulation. In particular, these disclosures exposed potential violations of the Federal Acquisition Regulations, 48 C.F.R., part 46, relating to quality assurance in government contracting.

Employment Discrimination

Bowman v. Department of Agriculture, 113 M.S.P.R. 214 (2010): The appellant's age discrimination claim was controlled by the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), even though *Gross* was decided after the hearing in this appeal. Under *Gross*, a plaintiff claiming age discrimination must prove by preponderant evidence that age was the "but-for" reason for the challenged adverse action. Under applicable Supreme Court precedent, when the Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation and must be given full retroactive effect in all cases still open on direct review, regardless of whether the events predate or postdate the Court's announcement of the rule.

Davis v. Department of the Interior, 114 M.S.P.R. 527 (2010): An evidentiary hearing need not be conducted for a claim of discrimination when there is no genuine dispute of material fact regarding discrimination. Nevertheless, an administrative judge must make findings of fact and conclusions of law on all material issues of fact and law presented in an appeal, and this duty extends to the dismissal of claims of prohibited discrimination. Accordingly, the appellant is entitled to a written decision on whether she has raised a genuine dispute of material fact regarding her affirmative defenses of race and sex discrimination.

Special Counsel Disciplinary Actions

Special Counsel v. Lee and Beatrez, 114 M.S.P.R. 57 (2010): The Board held that two Human Resource Specialists committed a prohibited personnel practice when they intentionally assisted the selecting official in giving an existing employee preferential treatment in filling a vacancy for a supervisory position. To establish a violation of 5 U.S.C. § 2302(b)(6), the Special Counsel must establish an intentional or purposeful taking of a personnel action in such a way as to give a preference to a particular individual for the purpose of improving his prospects. Whether a violation occurs turns on the agency officials' intent, not the nature of the action itself. In reversing the administrative law judge's findings, the Board found that the administrative law judge gave a sizable body of particularly telling circumstantial evidence too little weight in favor of *some* direct testimony that was inconsistent with that body of evidence. As a result, the judge explained away serious contradictions between the testimony and the other less favorable evidence in the record, crafting an improbable account of the events leading up to the appointment in question.

Veterans' Rights

Graves v. Department of Veterans Affairs, 114 M.S.P.R. 209 (2010): In filling vacancies for "hybrid" Medical Records Technician positions under 38 U.S.C. § 7401(3), an agency must comply with the veterans' preference requirements for the competitive service set forth in Title 5 of the U.S. Code. A policy of using veterans' preference as a tie-breaker for equally qualified applicants is insufficient to meet these requirements. The agency was required to accept the appellant's application, even though it was submitted after the closing of the vacancy announcement, pursuant to 5 U.S.C. § 3305(b), which is a statute relating to veterans' preference, 5 C.F.R. § 332.311(a), OPM's Delegated Examining Operations Handbook, Chapter 4, § A, and OPM's VetGuide. The agency's failure to accept the appellant's application constituted a violation of veterans' preference rights and warranted corrective action.

Retirement

Muyco v. Office of Personnel Management, 114 M.S.P.R. 694 (2010): Under 5 U.S.C. § 8334(c), an individual generally may make a deposit into the CSRS Retirement and Disability Fund if he is currently an "employee." In 5 C.F.R. § 831.112(a)(2), OPM has interpreted § 8334(c) to permit an individual who is no longer employed by the federal government to make a deposit if he "retains civil service retirement annuity rights based on a separation from a position in which retirement deductions were properly withheld . . . in the Civil Service Retirement and Disability Fund," and if his "annuity has not been finally adjudicated." An individual may not make a deposit under § 8334 if he was not separated from a CSRS-covered position and a retroactive deposit does not convert a non-covered position to a covered position.

Compliance

Allen v. Department of Veterans Affairs, 112 M.S.P.R. 659 (2009): The general rule is that an agency materially breaches a clean record settlement if it discloses information regarding the rescinded adverse action to any third party. The presence of other pertinent contract

language can create an exception to the general rule. Here, the agreement expressly provides that the agency's Human Resources Officer "will truthfully respond regarding those matters required by law" if contacted for any employment inquiry or reference. This provision may reasonably be interpreted as permitting disclosure of removal-related information to a third party as required by law. The parties did not intend to preclude disclosure of removal-related information to the Office of Workers' Compensation Programs (OWCP), and the agency was required by law to truthfully respond to OWCP's request for information regarding the appellant's performance and conduct issues.

Board Procedures

Bowen v. Department of the Navy, 112 M.S.P.R. 607 (2009): There is no requirement for an administrative judge to allow closing arguments or briefs after a hearing.

Bradshaw v. Department of Veterans Affairs, 113 M.S.P.R. 650 (2010): An appellant's negligent failure to inform his agency of a change of address cannot be the basis for deeming him to have constructively received the agency's decision at an earlier date for purposes of determining whether an appeal was timely filed under the Board's regulations.

Significant Board decisions released in early FY 2011

The Board released two important decisions in early FY 2011 that are summarized here because they relate to other significant actions in FY 2010 and as a service to our stakeholders.

Jurisdiction

Conyers and Northover v. Department of Defense, 2010 MSPB 247 and 2010 MSPB 248: At issue in these interlocutory appeals was whether, in adjudicating an adverse action based on the denial or revocation of an employee's eligibility to occupy a position designated as non-critical sensitive (NCS) under the Department of Defense Personnel Security Program Regulation, the Board would apply the limited scope of review set forth in *Department of the Navy v. Egan*, 484 U.S. 518 (1988). In *Egan*, the Supreme Court held that the Board lacks the authority to review the substance of a security clearance determination or to require the agency to support the revocation or denial of the security clearance by preponderant evidence, as it would be required to do in other adverse action appeals. Rather, the Court found that the Board has authority to review only whether the employee's position required a security clearance, whether the clearance was denied or revoked, whether the employee was provided with the procedural protections of 5 U.S.C. § 7513, and whether transfer to a nonsensitive position was feasible. The parties stipulated that the positions held by Conyers and Northover did not require the incumbents to have a confidential, secret, or top secret clearance, or to have access to classified information. The Board, Member Rose dissenting, held that, because the appellants were not required to have a security clearance or to have access to classified information, *Egan* does not limit the Board's statutory authority to review the appellants' adverse action appeals; the Board may exercise its full statutory review authority and review the agency's determination that an appellant is no longer eligible to hold a "sensitive" position.

Aguzie v. Office of Personnel Management and *Barnes v. Office of Personnel Management*, 2011 MSPB 10 (January 26, 2011): Pursuant to its regulations at 5 C.F.R. part 731, OPM may direct employing agencies to remove employees based on suitability grounds. The Board held that when OPM directs an agency to remove an "employee" who generally has the right to appeal his or her removal to the Board under 5 U.S.C. chapter 75 (e.g., those employees who have completed their probationary period), the Board is authorized by statute to review the removal under chapter 75. The Board's review of OPM-directed removals therefore includes determining whether the action promotes the efficiency of the service, whether the penalty was appropriate and whether the removal was the result of harmful procedural error. The Board's review also extends to other suitability actions, i.e., debarment and/or cancellation of eligibilities for other positions, that arise out of the same set of circumstances as the removal. The Board remanded two such appeals for adjudication under chapter 75.

Veterans' Rights

Dean v. Office of Personnel Management/Evans v. Department of Veterans Affairs, 115 M.S.P.R. 157 (2010): In these consolidated appeals under the Veterans Employment Opportunities Act of 1998, the Board held that the agencies had violated the appellants' veterans' preference rights by its use of the Federal Career Intern Program (FCIP), which was created by Executive Order in 2000. Section 3302(1) of Title 5, U.S. Code, which provides that the President may prescribe rules governing the competitive service with "necessary exceptions from the competitive service" is a statute relating to veterans preference because it establishes competitive-service hiring as the norm. Nothing in OPM's rules for the FCIP prohibits an agency from deciding whether to fill a particular position with a competitive-service appointment or an excepted-service Schedule B appointment under FCIP on an ad hoc basis, after applications are received. Civil Service Rule 6.1(b), which provides that "OPM shall decide whether the duties of any particular position are such that it may be filled as an excepted position under the appropriate schedule," clearly contemplates that a position must be classified as competitive-service or excepted-service even before a vacancy announcement is issued. The FCIP is inconsistent with the Civil Service rules that govern placement of positions in the excepted service because it allows an agency to invoke an appointing authority reserved for "positions . . . for which it is not practicable to hold a competitive examination" after the agency holds a competitive examination that yields highly qualified preference-eligible candidates. Neither the Executive Order that created the FCIP nor OPM's implementing regulations except any particular position from the competitive service. Instead, OPM's regulations governing the FCIP leave it to individual agencies to determine which positions will be filled under FCIP. Those regulations do not themselves find that excepting FCIP positions from the competitive service is "necessary" for "conditions of good administration," nor do they require individual agencies to make such findings. As a result, the regulations violate section 3302(1).

Whistleblowing

Chambers v. Department of the Interior, 2011 MSPB 7 (January 11, 2011): The Board decided this removal case on remand from the U.S. Court of Appeals for the Federal Circuit after the court found that the appellant, then the Chief, U.S. Park Police, had engaged in protected whistleblowing activity when she disclosed safety concerns to the Washington Post. *See Chambers v. Department of the Interior*, 602 F.3d 1370 (Fed. Cir. 2010). The court ordered the

Board to determine, among other things, whether the agency would have taken the same personnel actions against the appellant in the absence of her protected disclosures. The Board held that the agency failed to establish by clear and convincing evidence that it would have taken any action against the appellant in the absence of her protected whistleblowing activity. The Board therefore granted the appellant's request for corrective action and ordered the agency to cancel both her removal effective July 10, 2004, and her placement on administrative leave.

Significant opinions issued by the U.S. Court of Appeals for the Federal Circuit

Penalties

Williams v. Social Security Administration, 586 F.3d 1365 (Fed. Cir. 2009) When reviewing a penalty, the Board must consider whether the penalty imposed on the petitioner is consistent with the penalty imposed on similarly-situated employees and, if not, examine whether there was a justification for the disparate penalties.

Retirement

Dorsey v. Office of Personnel Management, 587 F.3d 1111 (Fed. Cir. 2009) A spouse is not entitled to a survivor annuity where her late husband did not elect the benefit during the two-year window provided for by statute. The two-year window is statutory and applies even in cases of mental deficiency.

Delgado v. Office of Personnel Management, 590 F.3d 1352 (Fed. Cir. 2010) Back pay received as a result of an administrative proceeding constitutes income for purposes of determining whether a disability retirement annuity must be terminated on the basis that the annuitant has been restored to earning capacity. Under the applicable OPM regulation, all income which is subject to federal employment taxes (Social Security) constitutes earned income. The petitioner's back pay was subject to such taxes and therefore it constitutes income for purposes of the regulation.

Braza v. Office of Personnel Management, 598 F.3d 1315 (Fed. Cir. 2010) (en banc) OPM Spousal Consent to Survivor Election form in use at the time of the petitioner's retirement was sufficient notice to alert readers to its consequences upon reasonable review and was explicit enough for the act of signing the form to evidence agreement with the terms of the form. A clearly expressed written waiver of annuity benefits is invalid only if it was signed pursuant to fraud, duress, or mental incompetence. Here, the petitioner's claim that she signed the form pursuant to a mistake was not sufficient to invalidate the waiver.

Byrum v. Office of Personnel Management, 618 F.3d 1323 (Fed. Cir. 2010) Where OPM and the Board failed to address the essential issue in the case, whether the claimant was entitled to death benefits as the court-designated assignee of her mother's spouse, it was necessary to return the matter to OPM with instructions to give a full and complete review and decision of the claim. The court further instructed that if the matter is thereafter appealed to the Board, the Board's review shall be as broad and complete as necessary to address all of the issues brought to it by the petitioner.

VEOA

Marshall v. Department of Health & Human Services, 587 F.3d 1310 (Fed. Cir. 2009) In cases where the record shows that an agency would have selected a veteran but for its illegal passover of the veteran, the appropriate remedy under VEOA is for the agency to be ordered to offer the veteran the position. In addition, the petitioner is entitled to compensation for any loss of wages or benefits that he suffered as a result of the agency's VEOA violation, and he may be entitled to an amount equal to back pay as liquidated damages if he can show on remand that the agency's violation was willful. This case is different from cases where it is unknown whether a veteran would have been selected for a position. In such cases, reconstruction of a selection process may be an appropriate way to remedy the situation.

Timeliness

Armstrong v. Department of the Treasury, 591 F.3d 1358 (Fed. Cir. 2010) Although it is appropriate for the Board, in determining whether it should waive its time limits, to consider whether the petitioner's new evidence is of sufficient weight to warrant a different outcome from that of the initial decision, the Board must also consider whether the petitioner was diligent in filing his petition after discovering the new evidence.

Hubbard v. Merit Systems Protection Board, 605 F.3d 1363 (Fed. Cir. 2010) The administrative judge properly dismissed the petitioner's appeal after she failed to respond to an order directing her to file evidence and argument demonstrating that her appeal was timely filed or that good cause exists for the delay.

Employment Practice

Dow v. General Services Administration, 590 F.3d 1338 (Fed. Cir. 2010) An aggrieved job applicant may pursue an employment practice claim with the Board under 5 C.F.R. § 300.104(a) if an employment practice (1) that he believes constitutes non-merit-based discrimination (2) was actually applied to him. Here, the petitioner's application was not rejected because the agency used the challenged employment practice -- the Outstanding Scholar Program -- to hire others. Rather, the agency's decision was based on its conclusion that the petitioner was not suitable for the position he sought.

Settlement Agreements

Slattery v. Department of Justice, 590 F.3d 1345 (Fed. Cir. 2010) The good faith clause of the parties' settlement agreement did not require the agency to ignore the petitioner's past conduct in making its hiring decisions, and therefore the agency did not breach the agreement by not selecting her to fill a vacancy.

Jurisdiction

Roche v. Merit Systems Protection Board, 596 F.3d 1375 (Fed. Cir. 2010) Although the FAA is generally exempt from title 5, the definition of an "employee," for purposes of determining the Board's jurisdiction over appeals by FAA employees, is the statutory definition at 5

U.S.C. § 7511. There is no evidence that Congress intended to expand the category of FAA personnel who could appeal to the Board beyond what was permitted on March 31, 1996.

Hall v. United States, 617 F.3d 1313 (Fed. Cir. 2010) The threshold question for determining whether the Court of Federal Claims has jurisdiction over a federal employee's pay claim is whether the Civil Service Reform Act ("CSRA") covers the challenged personnel action. Here, the CSRA does not encompass the denial of pay for periods in which the employee is deemed to be AWOL. Therefore, the Court of Federal Claims has jurisdiction over the pay claim, and its jurisdiction "did not evaporate when the agency removed Ms. Hall." However, the Court of Federal Claims lacks jurisdiction over Ms. Hall's ancillary claims for reinstatement and post-removal back pay, which were predicated on the removal action.

Morse v. Merit Systems Protection Board, 621 F.3d 1346 (Fed. Cir. 2010) Congress made the Federal Aviation Administration's personnel system exempt from all but certain enumerated provisions of title 5, and those enumerated exceptions do not include the VEOA.

Whistleblowing

Chambers v. Department of the Interior, 602 F.3d 1370 (Fed. Cir. 2010) The petitioner's disclosure regarding parkway patrols was protected under the Whistleblower Protection Act because it evidenced a substantial and specific danger to public health and safety; to wit: (1) an increase in traffic accidents is a significant and serious danger to public safety; (2) the disclosure states a specific consequence that resulted from the diversion of officers from the parkway; and (3) the disclosure contains specific details as to the cause of the increased danger, namely the reduction from four officers to two, and is therefore not vague or speculative.

Significant opinions issued by the U.S. Supreme Court

City of Ontario, Cal v. Quon, 130 S.Ct. 2619 (2010) A city's review of two months' worth of text messages on a police officer's city-issued pager was reasonable where the city was concerned that, among other things, it might be paying for employees' personal use of those pagers. However, the court emphasized the narrowness of its holding and warned that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society becomes clear."

Lewis et al. v. City of Chicago, 130 S.Ct. 2191 (2010) A Title VII plaintiff who does not timely file a charge challenging the adoption of a particular employment practice may nevertheless assert a disparate impact claim that challenges the employer's subsequent application of that practice.

Perdue v. Kenny A. ex rel. Winn, 130 S.Ct. 1662 (2010) An attorney fees award made under a federal fee-shifting statute in a civil rights case can include an enhancement for superior attorney performance.

Case Processing Statistics

Summary of cases decided by MSPB

Table 1: FY 2010 Summary of Cases Decided by MSPB

Cases Decided in MSPB Regional and Field Offices	
Appeals	6,536
Addendum Cases[1]	430
Stay Requests[2]	95
TOTAL Cases Decided in RO/FOs	**7,061**
Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction[3]	**23**
Cases Decided by the Board:	
Appellate Jurisdiction:	
Petitions for Review (PFRs) – Appeals	639
Petitions for Review (PFRs) – Addendum Cases	103
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	2
Reopenings[4]	2
Court Remands	10
Compliance Referrals	15
EEOC Non-concurrence Cases	0
Arbitration Cases	2
Subtotal – Appellate Jurisdiction	773
Original Jurisdiction[5]	6
Interlocutory Appeals	0
TOTAL Cases Decided by the Board	**779**
TOTAL Decisions (Board, ALJs, RO/FOs)	**7,863**

[1] Includes 109 requests for attorney fees, 94 Board remand cases, 192 petitions for enforcement, 26 court remand cases, 4 requests for compensatory damages (discrimination cases only), 3 requests for consequential damages, and 2 requests for liquidated damages.
[2] Includes 70 stay requests in whistleblower cases and 25 in non-whistleblower cases.
[3] Initial Decisions issued by ALJ. Case type breakdown: 13 actions against ALJs, 1 action against a member of the SES, 9 Hatch Act cases, and 3 non-Hatch Act disciplinary actions.
[4] 2 cases were reopened by MSPB on its own motion.
[5] Final MSPB decisions. Case type breakdown: 2 Hatch Act cases, 2 non-Hatch Act disciplinary actions, and 2 OSC Stay requests.

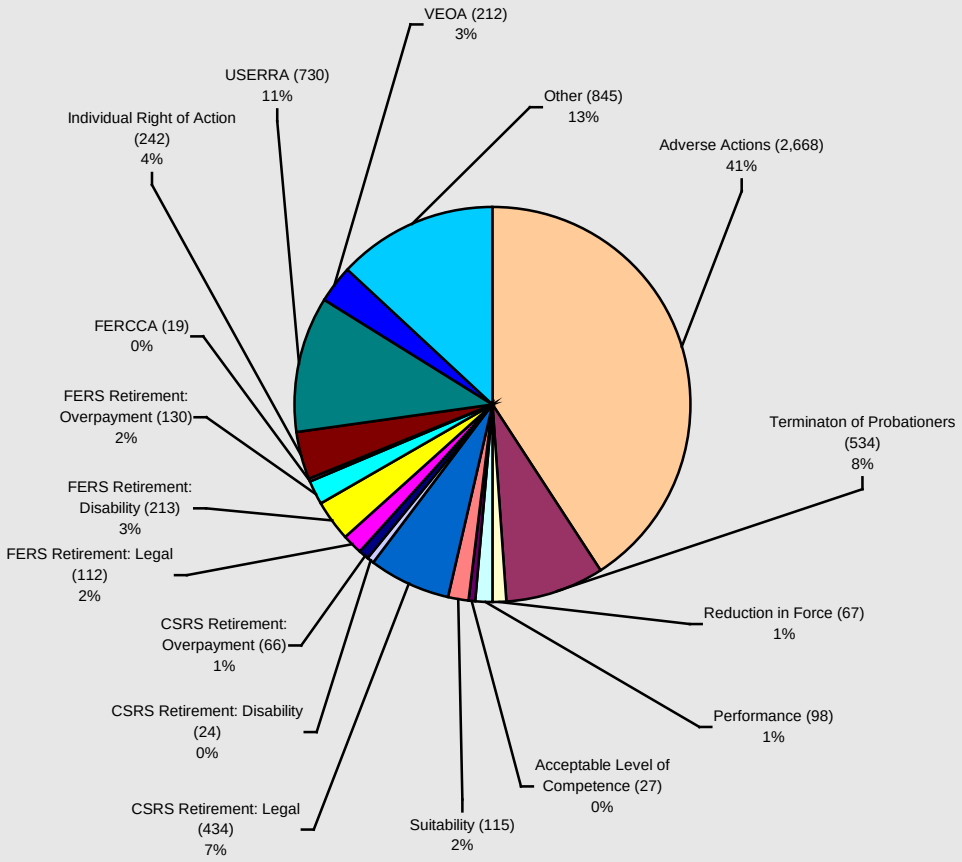
Regional case processing

Table 2: Disposition of Appeals Decided in the Regional and Field Offices, by Type of Case

	Decided	Dismissed[1]		Not Dismissed[1]		Settled[2]		Adjudicated[2]	
Type of Case	#	#	%	#	%	#	%	#	%
Adverse Action by Agency	2668	1366	51.20	1302	48.80	926	71.12	376	28.88
Termination of Probationers	534	480	89.89	54	10.11	47	87.04	7	12.96
Reduction in Force	67	46	68.66	21	31.34	15	71.43	6	28.57
Performance	98	22	22.45	76	77.55	48	63.16	28	38.84
Acceptable Level of Competence (WIGI)	27	21	77.78	6	22.22	5	83.33	1	16.67
Suitability	115	74	64.35	41	35.65	35	85.37	6	14.63
CSRS Retirement: Legal	434	190	43.78	244	56.22	6	2.46	238	97.54
CSRS Retirement: Disability	24	15	62.50	9	37.50	0	0.00	9	100.00
CSRS Retirement: Overpayment	66	29	43.94	37	56.06	16	43.24	21	56.76
FERS Retirement: Legal	112	56	50.00	56	50.00	4	7.14	52	92.86
FERS Retirement: Disability	213	152	71.36	61	28.64	3	4.92	58	95.08
FERS Retirement: Overpayment	130	45	34.62	85	65.38	62	72.94	23	27.06
FERCCA	19	9	47.37	10	52.63	3	30.00	7	70.00
Individual Right of Action	242	172	71.07	70	28.93	45	64.29	25	35.71
USERRA	730	220	30.14	510	69.86	459	90.00	51	10.00
VEOA	212	117	55.19	95	44.81	21	22.11	74	77.89
Other	845	731	86.51	114	13.49	72	63.16	42	36.84
Total	**6536**	**3745**	**57.30**	**2791**	**42.70**	**1767**	**63.31**	**1024**	**36.69**

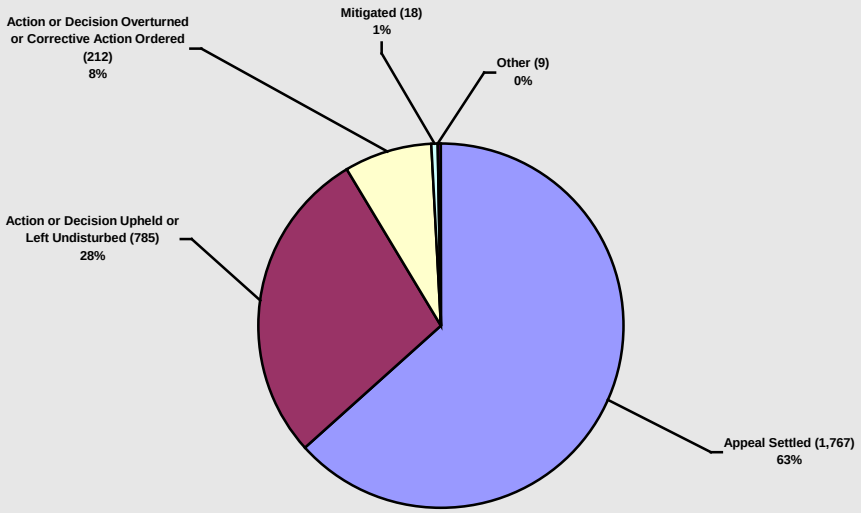
[1] Percent Dismissed and Not Dismissed are of the number Decided.
[2] Percent Settled and Adjudicated are of the number Not Dismissed.

Figure 1: Type of Appeals Decided in the Regional and Field Offices



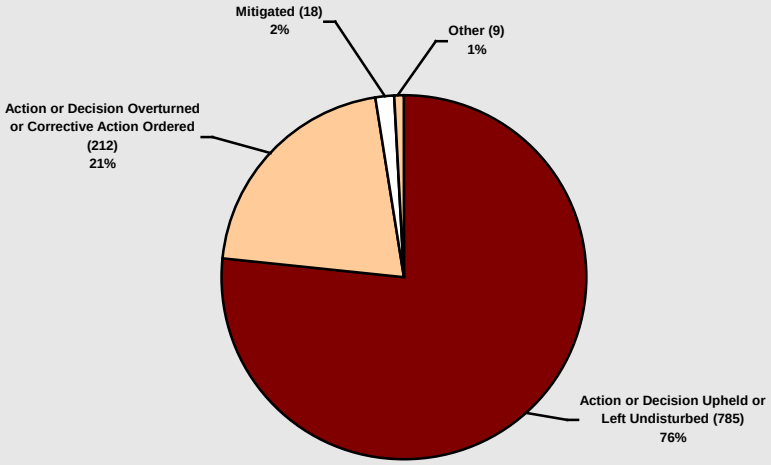
Total Number of Appeals: 6,536

Figure 2: Dispositions: Appeals Not Dismissed by Regional and Field Offices



Total Number of Appeals that were Not Dismissed: 2,791

Figure 3: Dispositions: Appeals Not Dismissed or Settled by Regional / Field Office



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Based on 1,024 appeals adjudicated on the merits

Table 3: Disposition of Initial Appeals by Agency

	Decided	Dismissed[1]		Not Dismissed[1]		Settled[2]		Adjudicated[2]	
	#	#	%	#	%	#	%	#	%
US Postal Service	1287	868	67.4	419	32.6	291	69.5	128	30.5
Office of Personnel Management[3]	1025	507	49.5	518	50.5	117	22.6	401	77.4
Veterans Affairs	788	457	58.0	331	42.0	245	74.0	86	26.0
Army	634	292	46.1	342	53.9	292	85.4	50	14.6
Homeland Security	380	235	61.8	145	38.2	87	60.0	58	40.0
Air Force	375	189	50.4	186	49.6	147	79.0	39	21.0
Navy	351	200	57.0	151	43.0	113	74.8	38	25.2
Treasury	257	152	59.1	105	40.9	83	79.0	22	21.0
Defense	254	137	53.9	117	46.1	89	76.1	28	23.9
Justice	163	107	65.6	56	34.4	35	62.5	21	37.5
Agriculture	145	79	54.5	66	45.5	48	72.7	18	27.3
Interior	122	63	51.6	59	48.4	35	59.3	24	40.7
Social Security Administration	109	71	65.1	38	34.9	23	60.5	15	39.5
Health & Human Services	106	57	53.8	49	46.2	31	63.3	18	36.7
Transportation	100	57	57.0	43	43.0	23	53.5	20	46.5
Commerce	90	68	75.6	22	24.4	16	72.7	6	27.3
Labor	60	42	70.0	18	30.0	10	55.6	8	44.4
Housing & Urban Development	37	23	62.2	14	37.8	10	71.4	4	28.6
Energy	28	11	39.3	17	60.7	15	88.2	2	11.8
General Services Administration	25	13	52.0	12	48.0	9	75.0	3	25.0
State	22	17	77.3	5	22.7	5	100.0	0	0.0
National Aeronautics and Space Administration	19	9	47.4	10	52.6	7	70.0	3	10.0
Environmental Protection Agency	17	8	47.1	9	52.9	6	66.7	3	3.33
Smithsonian Institution	17	6	35.3	11	64.7	8	72.7	3	27.3
Equal Employment Opportunity Commission	13	9	69.2	4	30.8	1	25.0	3	75.0
Broadcasting Board of Governors	11	8	72.7	3	27.3	1	33.3	2	66.7
Government Printing Office	9	2	22.2	7	77.8	4	57.1	3	42.9
Federal Deposit Insurance Corporation	8	2	25.0	6	75.0	1	16.7	5	83.3
Agency for International Development	7	7	100.0	0	0.0	0	0.0	0	0.0
Securities & Exchange Commission	7	4	57.1	3	42.9	1	33.3	2	66.7
Education	6	3	50.0	3	50.0	3	100.0	0	0.0
Tennessee Valley Authority	6	5	83.3	1	16.7	1	100.0	0	0.0
Small Business Administration	5	4	80.0	1	20.0	1	100.0	0	0.0
Court Services and Offender Supervision	4	2	50.0	2	50.0	2	100.0	0	0.0
International Boundary & Water Commission	4	2	50.0	2	50.0	0	0.0	2	100.0
Judicial Branch	4	4	100.0	0	0.0	0	0.0	0	0.0

	Decided	Dismissed[1]		Not Dismissed[1]		Settled[2]		Adjudicated[2]	
	#	#	%	#	%	#	%	#	%
Peace Corps	4	2	50.0	2	50.0	0	0.0	2	100.0
Commodity Futures Trading Commission	3	1	33.3	2	66.7	0	0.0	2	100.0
Consumer Product Safety Commission	3	1	33.3	2	66.7	1	50.0	1	50.0
National Archives and Records Administration	3	0	0.0	3	100.0	3	100.0	0	0.0
Nuclear Regulatory Commission	3	2	66.7	1	33.3	1	100.0	0	0.0
Other	3	3	100.0	0	0.0	0	0.0	0	0.0
Armed Forces Retirement Home	2	1	50.0	1	50.0	1	100.0	0	0.0
Federal Communications Commission	2	2	100.0	0	0.0	0	0.0	0	0.0
National Labor Relations Board	2	1	50.0	1	50.0	0	0.0	1	100.0
Pension Benefit Guaranty Corporation	2	0	0.0	2	100.0	0	0.0	2	100.0
Railroad Retirement Board	2	1	50.0	1	50.0	0	0.0	1	100.0
Administrative Office of the US Courts	1	1	100.0	0	0.0	0	0.0	0	0.0
Chemical Safety Hazard Investigation Board	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
Federal Emergency Management Agency	1	1	100.0	0	0.0	0	0.0	0	0.0
Federal Housing Finance Board	1	1	100.0	0	0.0	0	0.0	0	0.0
Federal Trade Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
Government of the District of Columbia	1	1	100.0	0	0.0	0	0.0	0	0.0
National Capital Planning Commission	1	0	0.0	1	100.0	1	100.0	0	0.0
National Foundation for the Arts & the Humanities	1	1	100.0	0	0.0	0	0.0	0	0.0
Office of Special Counsel	1	1	100.0	0	0.0	0	0.0	0	0.0
Office of the Director of National Intelligence	1	1	100.0	0	0.0	0	0.0	0	0.0
Trade and Development Agency	1	1	100.0	0	0.0	0	0.0	0	0.0
TOTAL	**6536**	**3745**	**57.3**	**2791**	**42.7**	**1767**	**63.3**	**1024**	**36.7**

[1] Percentages in Columns Dismissed and Not Dismissed are of Decided.
[2] Percentages in Columns Settled and Adjudicated are of Not Dismissed.
[3] Most appeals in which OPM is the agency are retirement cases involving decision made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency

	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
US Postal Service	128	91	71.1	31	24.2	6	4.7	0	0.0
Office of Personnel Management[2]	401	281	70.1	107	26.7	4	1.0	9	2.2
Veterans Affairs	86	72	83.7	10	11.6	4	4.7	0	0.0
Army	50	39	78.0	11	22.0	0	0.0	0	0.0
Homeland Security	58	49	84.5	7	12.1	2	3.4	0	0.0
Air Force	39	34	87.2	5	12.8	0	0.0	0	0.0
Navy	38	34	89.5	4	10.5	0	0.0	0	0.0
Treasury	22	21	95.5	1	4.5	0	0.0	0	0.0
Defense	28	23	82.1	5	17.9	0	0.0	0	0.0
Justice	21	20	95.2	1	4.8	0	0.0	0	0.0
Agriculture	18	15	83.3	3	16.7	0	0.0	0	0.0
Interior	24	16	66.7	6	25.0	2	8.3	0	0.0
Social Security Administration	15	14	93.3	1	6.7	0	0.0	0	0.0
Health & Human Services	18	14	77.8	4	22.2	0	0.0	0	0.0
Transportation	20	11	55.0	9	45.0	0	0.0	0	0.0
Commerce	6	6	100.0	0	0.0	0	0.0	0	0.0
Labor	8	6	75.0	2	25.0	0	0.0	0	0.0
Housing & Urban Development	4	4	100.0	0	0.0	0	0.0	0	0.0
Energy	2	2	100.0	0	0.0	0	0.0	0	0.0
General Services Administration	3	1	33.3	2	66.7	0	0.0	0	0.0
National Aeronautics and Space Administration	3	2	66.7	1	33.3	0	0.0	0	0.0
Environmental Protection Agency	3	3	100.0	0	0.0	0	0.0	0	0.0
Smithsonian Institution	3	3	100.0	0	0.0	0	0.0	0	0.0
Equal Employment Opportunity Commission	3	3	100.0	0	0.0	0	0.0	0	0.0
Broadcasting Board of Governors	2	2	100.0	0	0.0	0	0.0	0	0.0
Government Printing Office	3	3	100.0	0	0.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	5	5	100.0	0	0.0	0	0.0	0	0.0
Securities & Exchange Commission	2	2	100.0	0	0.0	0	0.0	0	0.0
International Boundary & Water Commission	2	2	100.0	0	0.0	0	0.0	0	0.0
Peace Corps	2	2	100.0	0	0.0	0	0.0	0	0.0
Commodity Futures Trading Commission	2	2	100.00	0	0.0	0	0.0	0	0.0
Consumer Product Safety Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
National Labor Relations Board	1	1	100.0	0	0.0	0	0.0	0	0.0

Table 4 continued	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
Pension Benefit Guaranty Corporation	2	0	0.0	2	100.0	0	0.0	0	0.0
Railroad Retirement Board	1	1	100.0	0	0.0	0	0.0	0	0.0
TOTAL	**1024**	**785**	**76.7**	**212**	**20.7**	**18**	**1.8**	**9**	**0.9**

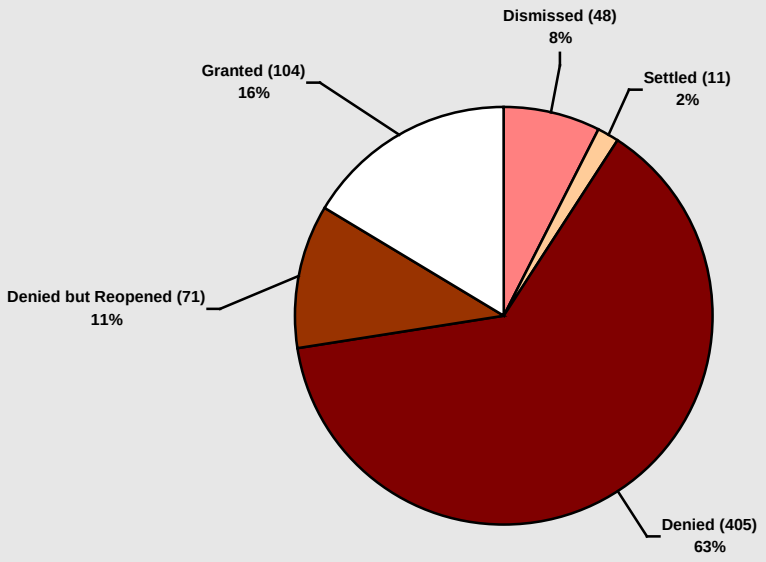
[1] Adjudicated, i.e., not dismissed or settled.
[2] Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.
Percentages may not total 100 because of rounding.

Headquarters case processing

Table 5: Disposition of Petitions for Review (PFR), of Initial Decisions by Type of Case

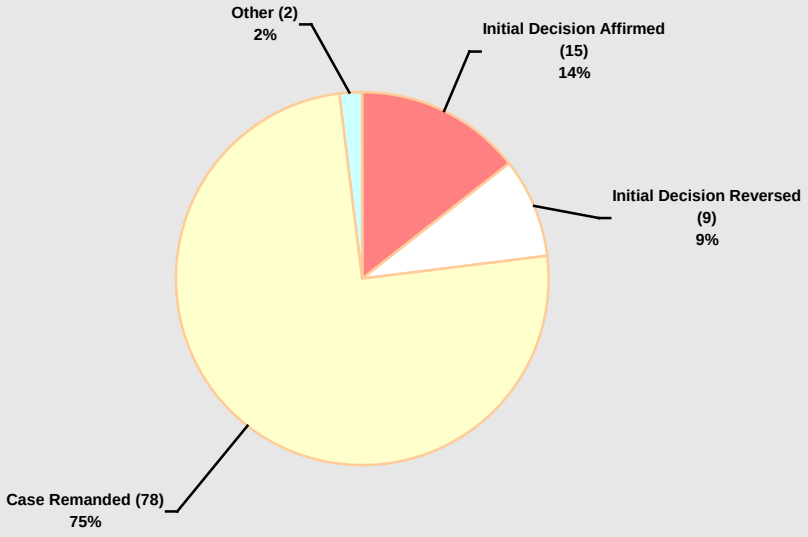
	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
Type of Case	#	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	251	13	5.18	4	1.59	173	68.92	23	9.16	38	15.14
Termination of Probationers	46	3	6.52	1	2.17	35	76.09	4	8.70	3	6.52
Reduction in Force	4	1	25.00	0	0.00	3	75.00	0	0.00	0	0.00
Performance	11	0	0.00	0	0.00	8	72.73	2	18.18	1	9.09
Acceptable Level of Competence (WIGI)	3	0	0.00	0	0.00	3	100.00	0	0.00	0	0.00
Suitability	5	1	20.00	0	0.00	2	40.00	1	20.00	1	20.00
CSRS Retirement: Legal	67	10	14.93	2	2.99	40	59.70	5	7.46	10	14.93
CSRS Retirement: Disability	8	2	25.00	0	0.00	5	62.50	0	0.00	1	12.50
CSRS Retirement: Overpayment	10	0	0.00	2	20.00	4	40.00	2	20.00	2	20.00
FERS Retirement: Legal	9	1	11.11	0	0.00	7	77.78	0	0.00	1	11.11
FERS Retirement: Disability	18	3	16.67	0	0.00	10	55.56	3	16.67	2	11.11
FERS Retirement: Overpayment	5	1	20.00	0	0.00	2	40.00	0	0.00	2	40.00
FERCCA	0	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00
Individual Right of Action	44	2	4.55	1	2.27	26	59.09	8	18.18	7	15.91
USERRA	32	1	3.13	1	3.13	18	56.25	6	18.75	6	18.75
VEOA	38	3	7.89	0	0.00	20	52.63	5	13.16	10	26.32
Other	88	7	7.95	0	0.00	49	55.68	12	13.64	20	22.73
Total	**639**	**48**	**7.51**	**11**	**1.72**	**405**	**63.38**	**71**	**11.11**	**104**	**16.28**

Figure 4: Disposition of Petitions for Review of Initial Decisions



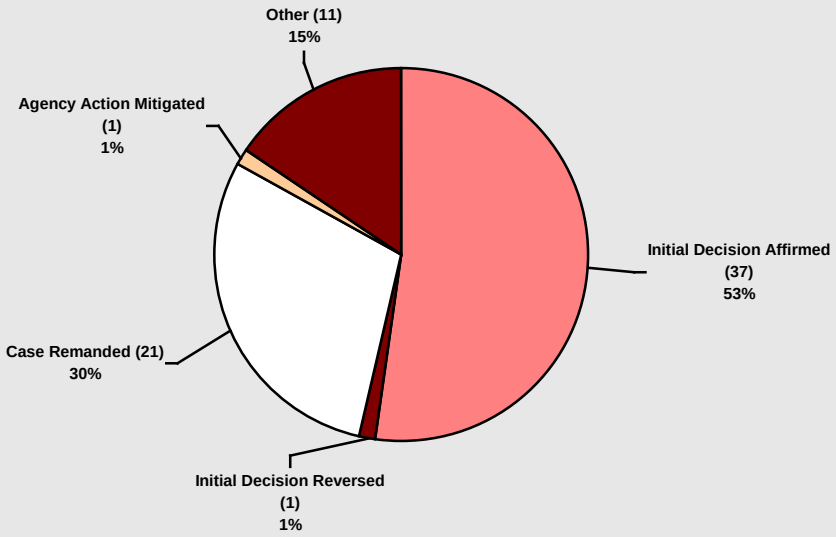
Total Number of PFRs: 639

Figure 5: Disposition of Petitions for Review Granted



Based on 104 PFRs Granted

Figure 6: Disposition of Petitions for Review Denied but Reopened



Based on 71 PFRs Denied but Reopened

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency

	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
	#	#	%	#	%	#	%	#	%	#	%
Office of Personnel Management[1]	125	18	14.40	4	3.20	75	60.00	10	8.00	18	14.40
US Postal Service	114	6	5.26	1	0.88	57	50.00	19	16.67	31	27.19
Veterans Affairs	90	6	6.67	3	3.33	56	62.22	11	12.22	14	15.56
Homeland Security	45	3	6.67	0	0.00	32	71.11	2	4.44	8	17.78
Army	40	2	5.00	2	5.00	26	65.00	2	5.00	8	20.00
Defense	31	0	0.00	0	0.00	20	64.52	7	22.58	4	12.90
Navy	26	3	11.54	0	0.00	20	76.92	1	3.85	2	7.69
Air Force	25	2	8.00	0	0.00	18	72.00	1	4.00	4	16.00
Treasury	24	3	12.50	0	0.00	15	62.50	3	12.50	3	12.50
Justice	20	0	0.00	0	0.00	18	90.00	1	5.00	1	5.00
Interior	15	0	0.00	0	0.00	12	80.00	1	6.67	2	13.33
Social Security Administration	13	0	0.00	0	0.00	8	61.54	4	30.77	1	7.69
Agriculture	12	0	0.00	0	0.00	8	66.67	1	8.33	3	25.00
Transportation	12	1	8.33	0	0.00	8	66.67	1	8.33	2	16.67
Health & Human Services	11	2	18.18	0	0.00	8	72.73	1	9.09	0	0.00
Commerce	6	1	16.67	1	16.67	2	33.33	1	16.67	1	16.67
State	5	0	0.00	0	0.00	4	80.00	1	20.00	0	0.00
Labor	4	0	0.00	0	0.00	4	100.00	0	0.00	0	0.00
Housing & Urban Development	3	0	0.00	0	0.00	0	0.00	2	66.67	1	33.33
Equal Employment Opportunity Commission	3	0	0.00	0	0.00	2	66.67	0	0.00	1	33.33
Government Printing Office	2	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
National Aeronautics and Space Administration	2	0	0.00	0	0.00	1	50.00	1	50.00	0	0.00
Smithsonian Institution	2	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
Agency for International Development	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Broadcasting Board of Governors	1	1	100.00	0	0.00	0	0.00	0	0.00	0	0.00
Education	1	0	0.00	0	0.00	0	0.00	1	100.00	0	0.00
Energy	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Environmental Protection Agency	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Federal Trade Commission	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
General Services Administration	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Office of Special Counsel	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Other	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
TOTAL	**639**	**48**	**7.51**	**11**	**1.72**	**405**	**63.38**	**71**	**11.11**	**104**	**16.28**

[1] 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

The MSPB completed several reports and issued four editions of the *Issues of Merit* newsletter. Summaries of the reports and the topics contained in the newsletter are presented below.

A Call to Action: Improving First-Level Supervision of Federal Employees

Effective supervision is essential to employee engagement, workplace fairness, and organizational performance. Unfortunately, only half of the Federal employees responding to MSPB surveys report that their supervisor has good management skills. In this study, MSPB found that there were several factors that contributed to the seemingly indifferent quality of first-level supervision, including insufficient emphasis on supervisory responsibilities when advertising supervisory positions, suboptimal assessment of supervisory competencies, inadequate training for new supervisors, and minimal use of the supervisory probationary period.

The report recommended actions that Federal agencies can take to improve the recruitment, selection, and management of first-level supervisors. For example, when recruiting and selecting first-level supervisors, Federal agencies should provide realistic job previews to help applicants make an informed decision about a career in supervision and leadership and use highly predictive selection tools to improve the quality of referred candidates and the likelihood that any selectee will succeed on the job. If a new supervisor does not perform or develop satisfactorily, agencies should use the supervisory probationary period to remove the individual from a supervisory role. When managing first-level supervisors, agencies should provide supervisors with adequate training; the information needed to manage their work units and communicate with their employees; and continuing performance feedback and development. Agencies should also strengthen supervisory accountability—both positive and corrective—and base that accountability on both work group outcomes and supervisory behaviors.

Prohibited Personnel Practices—A Study Retrospective

In *Prohibited Personnel Practices—A Study Retrospective*, MSPB announced that it was launching a reexamination of the prevalence of PPPs within the Federal Government. This report was issued to provide MSPB stakeholders with an overview of past MSPB research that explored issues related to PPPs. Over the years, MSPB has conducted extensive research to identify the occurrence of PPPs in the Federal Government, as well as adherence to their complement, the MPs.

In this retrospective report, MSPB noted that the percentage of employees reporting discrimination based on ethnicity/race, sex, age, and religion has declined over time, while an increasing percentage of Federal employees believe that they are being treated fairly. However, MSPB also acknowledged that the Federal Government still has work to do to ensure a workplace free of PPPs. For example, although a decreasing percentage of employees believe that they have experienced prohibited discrimination, many employees believe that personnel decisions are often based on factors other than merit, such as

favoritism. There is also a continuing gap between minority and nonminority employees' perceptions of the prevalence of discrimination and other PPPs.

Avoiding PPPs is critical since the existence of just one such action can damage the working environment in any organization. Continuing to monitor the incidence of PPPs is important to ensure that managers treat employees fairly and equitably, while strengthening the trust the American public has that their public servants are not being managed arbitrarily or based on non-merit factors.

Making the Right Connections: Targeting the Best Competencies for Training

Research on mental abilities distinguishes among competencies that can be developed through training, those that are unresponsive to training, and those that are moderately responsive. In this report, we refer to this dimension as competency "trainability." The goal of the study was to contrast employee perceptions of the trainability of job-relevant competencies with research findings about the actual trainability of these competencies. The results should help agencies identify and avoid training which targets less trainable competencies and is therefore less likely to be successful. This should help agencies make more effective use of their increasingly scarce Federal training dollars.

Whistleblower Protections for Federal Employees

This report is one in a series of reports focusing on PPPs. This particular report described the requirements that must be met in order for a Federal employee's disclosure of wrongdoing to be legally protected as whistleblowing under current statutes and case law. To qualify as a protected whistleblower, a Federal employee or applicant for employment must disclose: a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.

However, this disclosure alone is not enough to obtain protection under the law. The individual also must: avoid using normal channels if the disclosure is in the course of the employee's duties; make the report to someone other than the wrongdoer; and suffer a personnel action, the agency's failure to take a personnel action, or the threat to take or not take a personnel action. Additionally, the employee must seek redress through the proper channels before filing an appeal with MSPB. As the report explains, a potential whistleblower's failure to meet even one of these criteria will deprive the Board of jurisdiction, and render the Board unable to provide any redress in the absence of a different (non-whistleblowing) appeal right.

***Issues of Merit* Newsletter**

The MSPB's *Issues of Merit* newsletter offers insights and analyses on topics related to Federal human capital management—particularly findings and recommendations from MSPB's independent research—to help improve the Government's merit systems. The newsletter's target audience includes Federal policy-makers, managers and executives, human resources professionals, social science researchers, and academics.

The MSPB issued four editions of the *Issues of Merit* newsletter in FY 2010. Each of the four issues included findings from MSPB's research, articles to help clarify readers' understanding of employment issues, and perspectives from the Director of the Office of Policy and Evaluation (OPE) about specific human capital matters. Articles communicating research findings addressed topics such as the state of fair and equitable treatment in the Federal Government, the changing face of the Federal supervisor, the pros and cons of using job simulation assessments, and perceptions of the impact of telework on organizational performance.

Other articles provided insight into issues such as how to avoid committing PPPs in hiring, engaging employees through partnership, a discussion of the new OPM training and development regulations, and how to take advantage of mentoring in career development. The OPE Director addressed issues such as how to build a strong supervisory workforce, the new Federal hiring reform initiative, and a discussion of the PPPs. In addition, we reviewed the results of a survey of newsletter readers to identify possible changes to the newsletter, which we will use as appropriate to improve the publication.

Significant Actions of the Office of Personnel Management

As required by statute, MSPB reviews and reports on the significant actions of OPM. Below, we list and briefly discuss selected OPM actions of the greatest long-term significance for the Federal civil service for FY 2010. This list is not exhaustive.

Internal structure and management

Publication of 2010-2015 Strategic Plan

OPM has published its 2010-2015 Strategic Plan, *A New Day for Federal Service*.[9] That plan includes four broad strategic goals:

- Hire the best;
- Respect the workforce;
- Expect the best; and
- Honor service.

Significance

OPM has used these goals to identify its priorities and initiatives. In particular, OPM is intensely focused on reform of Federal hiring in support of its "hire the best" strategic goal.

Human capital management policy

Hiring reform initiative:

Building on previous OPM efforts to improve Federal hiring, such as the 2008 End-to-End Hiring Roadmap, the Obama Administration issued a memorandum directing agencies to take several actions to simplify and speed Federal hiring. Below, we discuss the following selected key actions required by the memorandum and specific steps that OPM has taken to support its implementation:

- Simplify initial application requirements;
- Use category rating to refer and select among applicants;
- Use valid and reliable assessments;
- Involve supervisors and managers in the hiring process; and
- Notify applicants of their application status at designated points in the hiring process.

Simplify the initial application process: The President's memorandum on hiring reform requires agencies to take two specific steps to make it easier to apply for a Federal job. Specifically, agencies must (1) allow applicants to apply with a basic application form or a resume and cover letter; and (2) eliminate KSA narratives from the initial application.

Significance

[9] The full strategic plan is available online at http://www.opm.gov/strategicplan/.

This requirement could materially change Federal application and assessment processes. KSA narratives have remained central to the hiring process for many Federal jobs, even with the introduction of automated hiring systems.[10] Change along the lines required by OPM is necessary and overdue. In its research, MSPB has documented the need to simplify the application process and the practical and theoretical limitations of KSA narratives as a means of screening and sorting job applicants.[11] Although OPM is providing guidance and technical assistance to agencies, we believe that many will struggle to successfully implement this requirement. Hiring reform does not relieve Federal agencies of the need to make, and document, determinations about an applicant's minimum and relative qualifications. Developing assessment tools and hiring processes to implement OPM's mandates will require considerable innovation and resources. Unfortunately, MSPB research indicates that many Federal organizations lack the resources and expertise needed to develop and administer acceptable alternatives to KSA narratives.

Use Category Rating: Prior to the Presidential memorandum, agencies had two options for ranking and selecting applicants in a competitive examination: the "rule of three" and category rating.[12] Use of category rating will become mandatory, precluding use of the "rule of three" approach.

Significance

Category rating was first permitted by OPM through established demonstration projects in the 1990s. The flexibility was then extended to all Federal agencies as part of the Homeland Security Act (HSA) of 2002 (P.L. 107-296). Many agencies did not start using the flexibility, though, largely due to lack of policies and understanding about the method.[13] MSPB supported the Governmentwide introduction of category rating because category rating can, in most situations, better support the merit system principle of selection based on relative ability than the traditional "rule of three." However, as happened with the 2003 implementation, transition to category rating from the rule of three will pose technical and

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[10] Many automated hiring systems use questionnaires with multiple-choice rating scales to gauge possession of job-related KSAs. However, such questions are often accompanied by a request or requirement that an applicant provide specific descriptions of the training and experience in support of the multiple-choice response. Such questions are, in essence, electronic KSA narratives.

[11] See U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper,* Washington, DC, July 2006 p. 11 and pp. 20-20 and U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Level Supervision of Federal Employees,* Washington, DC, May 2010, pp. 11-13.

[12] See U.S. Merit Systems Protection Board, *The Rule of Three in Federal Hiring: Boon or Bane?*, Washington, DC, December 1995.Under the rule of three, agencies assign numeric scores and the manager must select from among the top three available candidates. Under category rating, candidates are assigned to a limited number of quality groups (usually three) and the manager may select any available candidate in the highest quality group. Veterans' preference applies under either approach. Readers requiring specific information on scoring and selection procedures in a competitive examination should refer to OPM's *Delegated Examining Operations Handbook: A Guide for Federal Agency Examining Offices,* available at http://www.opm.gov/deu/Handbook_2007/DEO_Handbook.pdf

[13] U.S. Government Accountability Office, *Increasing Agencies' Use of New Hiring Flexibilities*, Washington, DC, July 2004.

training challenges in many agency offices. Therefore, it is important that OPM monitor the effects of this requirement, as well as its implementation.

Use valid and reliable assessments: The President's memorandum, while directing agencies to simplify initial application and assessment, reiterates the longstanding requirement that agencies use assessments that are job-related, fair, and predictive of job performance.[14]

Significance

The requirement concerning assessment appropriately reminds agencies that simplifying and speeding the hiring process should not come at the expense of selectivity (identifying, referring, and hiring the best candidates). MSPB's research has noted that many agencies are not using the best assessment tools to distinguish among candidates. In addition, many do not have the resources or expertise to improve the validity and reliability of their assessment tools to ensure that they are highly predictive of how well the applicant will perform the job. This is an area that needs additional attention. As noted below, OPM is taking some steps to help improve the quality of agency assessments. Additional help will likely be needed over the long term.

Increase involvement of managers in hiring: The President's memorandum directs Federal agencies to more fully involve hiring managers in activities such as workforce planning, job analysis, recruitment, and interviewing.

Significance

Managerial involvement in hiring, when managed properly, can improve recruitment, applicant assessment, and the quality and retention of new hires. Managers can provide a unique perspective on job requirements, sources of qualified applicants, and how an applicant's abilities and accomplishments meet (or fail to meet) the organization's needs.

To realize the potential benefits of increasing managerial involvement, agencies must (1) educate managers on legal requirements related to hiring, including MPs, PPPs, and veterans' preference; (2) train managers on how to use assessment tools such as interviews and reference checks;[15] and (3) hold managers accountable for fulfilling their hiring responsibilities. We note below that OPM has done much to provide guidance and training to agencies; that the President's memorandum requires agencies to hold hiring managers

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[14] President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Improving the Federal Recruitment and Hiring Process," May 11, 2010. (http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process.)Although most observers have focused on the requirement to accept resumes and eliminate knowledge, skill, and ability (KSA) narratives, the actual requirement in the memorandum is "Allow individuals to apply for Federal employment by submitting resumes and cover letters or completing simple, plain language applications, and assess applicants using valid, reliable tools."

[15] Assessments such as interviews and reference checks are much more effective and legally defensible when they are structured and conducted by knowledgeable, trained users. See U.S. Merit Systems Protection Board, *The Federal Selection Interview: Unrealized Potential*, Washington, DC, February 2003 and U.S. Merit Systems Protection Board, *Reference Checking in Federal Hiring: Making the Call*, Washington, DC, September 2005.

accountable for "recruiting and hiring highly qualified employees and supporting their successful transition into Federal service;" and that recently-issued regulations require agencies to provide initial training and continuing education to supervisors and managers.[16] Nevertheless, MSPB research shows that many Federal managers have received little supervisory training,[17] suggesting that agencies will need to provide considerable education and training to prepare managers to effectively discharge their new—and perhaps even their existing—responsibilities related to hiring.

Notify applicants of their application status at designated points in the hiring process: The President's memorandum directs agencies to provide OMB timelines and targets for notifying individuals applying for Federal employment through USAJOBS about the status of their application at key stages of the application process.

Significance

One of the most common complaints heard from Federal applicants is that they do not receive sufficient communication from agencies about the status of their application. This has been a common theme in MSPB's research.[18] Applicants are often discouraged by the feeling that their application has disappeared into a "black hole." Given that the Federal hiring process is typically longer than that of other sectors, communication with applicants is critical to keeping them engaged in the hiring process so that they will be less likely to accept positions with other employers who have faster processes or are more communicative. Key contact points in the hiring process include; (1) when the application is received, (2) when the application is assessed for qualifications, (3) when the applicant is referred to the selecting official (or not), and (4) when the applicant is selected (or not). Communication will help improve applicant satisfaction with the hiring process which can reduce applicant attrition and encourage highly qualified applicants to apply in the future even if they do not get the first job for which they apply.

OPM support of hiring reform

Guidance, training, and technical support for agencies: OPM has taken several steps to educate agencies, human resources specialists, and hiring managers about hiring reform and encourage sharing of concerns, successes, and best practices. Those steps include—

- Establishing Mobile Assistance Teams (MATs) composed of OPM and agency experts to help agencies identify and take actions needed to meet the requirements of the Presidential memorandum;
- Delivering workshops, training materials, and webinars on topics such as job analysis, designing an assessment strategy, streamlining job announcements, assessing resumes, occupational questionnaires, structured interviews, and category rating;

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[16] 5 CFR 412.202. This regulation was made final in December 2009 (74 Fed. Reg. 65383-65390).

[17] U.S. Merit Systems Protection Board, *A Call to Action: Improving First-Level Supervision of Federal Employees,* Washington, DC, May 2010, pp. 33-38.

[18] See, for example, Competing for Federal Jobs: Job Search Experiences of New Hires (2000), Reforming Federal Hiring: Beyond Faster and Cheaper (2006), and Attracting the Next Generation: A Look at Federal Entry-Level New Hires (2008).

- Developing a website (http://www.opm.gov/HiringReform/) and a collaborative online space for sharing information, best practices, and implementation issues;[19] and
- Using social media to disseminate information and encourage discussion among individuals, agencies, and OPM on topics related to hiring reform.

Significance

As discussed, agencies must improve the quality of applicant assessment while streamlining application processes for reform to truly succeed. OPM has taken the initiative to strengthen agencies' ability to design and administer improved hiring processes, providing both general guidance and training and direct tailored assistance. However, anecdotal information indicates that the assistance may not be getting down to the operating HR offices in some agencies. OPM's resources are limited. They cannot reach every operating HR office in Government, so agencies will have to assist in ensuring that the information gets to the people who need it to truly reform HR practices.

Measurement and accountability: OPM and OMB have established a process for evaluating agency achievement of hiring reform requirements and goals that includes:

- Development of an action plan template with instructions for agencies to complete and identify appropriate actions to be taken, timelines, and key deliverables;
- Assistance to agencies in developing action plans and metrics; and
- Review of preliminary agency action plans and metrics.

Significance

The effort devoted to tracking and measuring agency progress illustrates the importance of this initiative to OPM and the Administration. The high-level attention is appropriate, given the importance of hiring to agency mission accomplishment, and could encourage agencies to make changes or investments in hiring that they have been previously unwilling or unable to make. Continued evaluation of agency progress, through follow-up and oversight reviews, will be critical to ensuring the success of hiring reform.

Investments in assessment: In addition to training and guidance for agencies, OPM has taken several steps to improve the quality of applicant assessment, such as—

- A survey of job tasks and competency requirements for several important common occupations, which could serve as the basis for updated qualification standards and new or improved assessments;
- Development of online competency assessment tools for agency use in assessing applicants for common occupation; [20] and
- Issuance of a competency model for five financial management occupations.[21]

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[19] The online space is OMB MAX, hosted by the Office of Management and Budget, at https://max.omb.gov. Access is limited to Federal agencies and employees.

[20] As of October 2010, the survey and online competency assessments are in progress.

[21] Memorandum for Chief Human Capital Officers from John Berry, Director, U.S. Office of Personnel Management, "Subject: Financial Management Competency Study," dated December 16, 2009. (http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2823)

Significance

Primary responsibility for identifying job requirements and developing and administering applicant assessments rests with individual Federal agencies. However, MSPB has also identified areas that call for OPM leadership and investment, such as establishing qualification standards and developing assessment tools for common occupations and competencies. These actions indicate that OPM is, in fact, devoting greater resources and attention to these areas.

Enhancements to USAJOBS: OPM has introduced several enhancements to USAJOBS, the Federal Government's Internet employment portal, including—

- Streamlined job announcements;
- A simplified user interface; and
- A USAJOBS application for mobile devices.

OPM has also announced further improvements, such as USAJOBSRecruit (a set of recruitment and collaboration tools for agency managers and human resources specialists) and USAJOBSAssess (a set of online competency-based assessment tools).[22]

Significance

USAJOBS is often the first or only way for members of the public to find and apply for Federal job opportunities. Anecdotal evidence suggests that many Federal job applicants still have trouble navigating the recruitment site. The enhancements should help make USAJOBS more accessible and user-friendly for applicants and, in the long term, more functional and powerful for agencies. Improvements in job announcements are particularly welcome, as past MSPB research has found that agency job announcements are often poorly written, confusing, and uninformative.[23]

OPM actions related to employment policy

Hiring interns, college students, and recent graduates

The Presidential memorandum[24] that directed Federal agencies to overhaul recruitment and hiring also directed OPM to examine the Federal Career Intern Program (FCIP) and to begin assessing the pathways into Federal service for college students and recent graduates. In June 2010, OPM held a public hearing on pathways into Federal service for college students and recent graduates. The purpose was to hear and consider views on whether competitive

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[22] Stephen Losey, "USAJOBS website to offer new features for recruiters," *FederalTimes.com,* September 28, 2010, accessed at http://www.federaltimes.com/article/20100928/PERSONNEL02/9280302/1001.

[23] See U.S. Merit Systems Protection Board, Help Wanted: A Review of Federal Vacancy Announcements, Washington, DC April 2003, pp. 10-17 and U.S. Merit Systems Protection Board, A Call to Action: Improving First-Level Supervision of Federal Employees, Washington, DC, May 2010, pp. 8-10.

[24] President Barack Obama, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Improving the Federal Recruitment and Hiring Process," May 11, 2010. (http://www.whitehouse.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process.)

service examination is an effective method of hiring recent graduates and, if not, whether policy changes and other actions are necessary.

In related actions, the Board issued decisions on November 2, 2010, in *Dean v. Office of Personnel Management* and *Evans v. Department of Veterans Affairs*, finding that the FCIP violates veterans' preference.[25] As a service to our stakeholders, a summary of these decisions is included in this Annual Report. In December of 2010, the President issued Executive Order 13562 Recruiting and Hiring Students and Recent Graduates, which terminates the FCIP effective March 1, 2011 and established three pathways programs for hiring students and recent graduates.[26] In early January 2011, OPM Director issued initial guidance on the Executive Order including termination of the FCIP program and implementing the three pathways programs.[27]

Significance

The Federal Government has struggled to find merit-based, efficient ways to recruit and hire recent college graduates since the discontinuation of the Professional and Administrative Career Examination (PACE). The Federal Career Intern Program (FCIP) is an excepted service appointing authority that can be used to fill a wide array of positions and does not require formal public notice of job opportunities even though the merit principle of fair and open competition still applies. These features have contributed to the growing use of the authority since its inception in 2001, but have also led to legal issues and stakeholder concerns.[28] Prior to its termination, the FCIP accounted for approximately half of new appointments to entry-level professional and administrative positions.[29] Such positions are the primary means of entry into Federal service for recent college graduates. OPM's "pathways" initiative is an effort to develop a means for Federal agencies to recruit and hire college students and recent graduates that avoids the problems associated with the FCIP.[30] OPM actions related to FCIP and "pathways" to Federal employment for college students and recent graduates significantly change how agencies recruit college graduates and fill entry-level positions in the professional and administrative occupations, and could set the stage for broader reform of hiring under Title 5, United States Code.

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[25] *Dean v. Office of Personnel Management and Evans v. Department of Veterans Affairs*

[26] Executive Order 13562 Recruiting and Hiring Students and Recent Graduates

[27] Initial OPM Guidance on Executive Order 13562

[28] Building a High-Quality Workforce: The Federal Career Intern Program, U.S. Merit Systems Protection Board, September 2005; and Federal Appointment Authorities: Cutting through the Confusion, U.S. Merit Systems Protection Board, June 2008.

[29] MSPB analysis of information from OPM's Central Personnel Data File. See U.S. Merit Systems Protection Board, "Fast Fact: The FCIP Continues to Grow," *Issues of Merit,* vol. 15, no. 1, February 2010, p. 3.

[30] As noted, one purpose of OPM's June 2010 public hearing was to hear and consider views on the viability of competitive examining as a means of recruiting and hiring recent college graduates. This suggests that OPM is open to the possibility that regulatory change or legislation may be needed to facilitate routine, high-volume hiring of college graduates in a way that is compatible with MPs and other legal requirements.

Memorandum on the technical standards of the uniform guidelines on employee selection procedures[31]

In a February 2010 memorandum[32] to the Chief Human Capital Officers (CHCO) Council, OPM reminded agencies that "assessment tools must be consistent with the technical standards in the *Uniform Guidelines on Employee Selection Procedures*." OPM also indicated that it was exploring the development of a user-friendly summary of the *Uniform Guidelines'* standards for assessments to help Federal hiring managers and human resources specialists understand and navigate the *Uniform Guidelines*' requirements.

Significance

Hiring reform initiatives have, understandably, focused on accessibility, timeliness, and efficiency. However, fundamental requirements such as job-relatedness, adherence to MPs, and compliance with law and regulation have not been relaxed or eliminated. Thus, OPM's reminder that agency assessment practices, whether traditional or "reformed," must comply with the *Uniform Guidelines* is timely. It is not clear, at this time, whether OPM plans to develop any guidance on the *Uniform Guidelines*. Such guidance could be beneficial, both to educate individual managers and HR specialists and to encourage greater agency attention to, and investment in, valid assessment tools.

OPM plan to improve agency use of recruitment, relocation, and retention incentives

In 2009, OPM requested that agencies review their use of Federal agency use of recruitment, relocation, and retention incentives (the "3Rs" authorities) and convened an interagency work group to develop recommendations for improving the use and oversight of 3Rs authorities. In a February 2010 memorandum to the Chief Human Capital Officers (CHCO) Council, while acknowledging that the 3Rs have been useful, OPM expressed concern that use of the 3Rs had increased despite recent labor market conditions and announced a plan to increase OPM and agency oversight of use of the 3Rs. The plan includes (1) expanding OPM guidance on justifying and monitoring the 3Rs authorities; (2) strengthening agency review of the use of 3Rs authorities, to include more explicit cost-benefit analysis; and (3) issuing regulations to require annual review of all individual retention incentives and all group recruitment incentives.

Significance

The stated need for greater review and oversight of these authorities shows that decisions related to Federal employee pay and benefits are subject to scrutiny—which is likely to intensify given current economic and fiscal conditions. OPM's plan also illustrates two continuing challenges in modernizing Federal human resources management. First, assuring

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[31] 29 CFR 1607.

[32] Memorandum for Chief Human Capital Officers from John Berry, Director, U.S. Office of Personnel Management, "Subject: Plan to Improve the Administration and Oversight of Recruitment, Relocation, and Retention Incentives," dated February 3, 2010. (http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2848.)

proper and adequately documented use of HR flexibilities in a system governed by complex laws and regulations may overtax the time and knowledge of many managers and HR specialists. Second, there is continuing tension between the desire to delegate authority, maximize flexibility, and "cut red tape" and the need to assure stakeholders that HR flexibilities are used judiciously and fairly and that public moneys are used wisely.

OPM Support of Agency Labor-Management Forums

In December 2009, President Obama established a National Council of Federal Labor-Management Relations.[33] The Director of OPM and the Deputy Director for Management of OMB, as the co-chairs of the Council, determine the Council's agenda and direct its work. That work includes supporting the establishment of labor-management forums in Federal agencies, developing suggested metrics for evaluating those forums, and guiding the implementation of pilot programs for collective bargaining over matters such as the technology, methods, and means of performing work.[34] As of October 2010, agencies have established plans for creating and evaluating forums.[35] Metrics and pilot programs have been discussed or identified, but implementation is pending.[36]

Significance

It will be some time until the results of these initiatives are known. We note, however, that the intent—substantive involvement of employees and their representatives in work matters to improve productivity and delivery of services—is consistent with MSPB research on employee engagement and organizational performance. MSPB has found that employee engagement (a heightened connection to work and the organization) is correlated with organizational performance and other positive outcomes.[37] One component of employee engagement is a positive work environment, which includes cooperation and employee involvement in work decisions. Thus, agency-level labor-management forums could potentially increase employee engagement in addition to yielding visible improvements in operations and the labor-management climate.

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[33] Executive Order 13522, Creating Labor-Management Forums to Improve Delivery of Government Services, 74 Fed. Reg. 66203-66206, December 14, 2009.

[34] The pilot involves bargaining over the subjects listed at title 5, United States Code, § 7106(b)(1). The subjects listed in this section, which include staffing patterns and work methods, are often referred to as "permissive" subjects because a Federal agency may elect to bargain over them, but is not required to do so by statute.

[35] Agency plans for implementing the four requirements of E.O. 13522 (a baseline assessment of labor relations, establishment of labor-management forums, metrics, and resources for implementation) are available at http://www.lmrcouncil.gov/plans/index.aspx

[36] Materials from the September 2010 meeting of the Council include a presentation from a work group tasked with researching and developing suggested metrics and a table that lists agreed-upon pilot project for bargaining on subjects covered by 5 U.S.C. 7106(b)(1). (http://www.lmrcouncil.gov/meetings/index.aspx?

[37] See U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement,* Washington, DC, September 2008. In addition to higher scores on the Program Assessment and Rating Tool (PART), Federal agencies with higher levels of employee engagement experienced lower rates of sick leave use and equal employment opportunity complaints than did agencies with lower levels of employee engagement.

Delivery of benefits and services

Results-only work environment (ROWE) pilot

As part of its effort to promote increased availability and use of telework and other flexible work arrangements, OPM has proceeded with a pilot test of a Results-Only Work Environment (ROWE) in which employees have greater control over where and when they work. The pilot was scheduled to run through 2010, with an evaluation to follow in 2011.

Significance

As OPM notes, ROWE differs markedly from existing work-life flexibilities in the Federal Government, in that flexibility is contingent on performance (whether work gets done) rather than permission (whether the agency authorizes or tolerates alternative work arrangements). ROWE, if successful, has the potential to transform working conditions and work arrangements for many Federal employees.

OPM has cautioned that "Implementing ROWE is more challenging in the Federal government than in a private corporation because of the restrictions that Federal law places on some aspects of the workplace flexibilities that are usually implemented under ROWE." Thus, due to current Federal pay and leave laws, full Governmentwide implementation of ROWE may require legislative change in addition to cultural change. Nevertheless, the pilot should provide useful insight into the systems, behaviors, and supervisory and employee characteristics required by ROWE or other nontraditional work arrangements, and into how Federal agencies can assure the public that Federal funds and staff time are used efficiently in the absence of extensive formal controls over work site and hours of work.

Redefining and expanding employee benefits

In June 2010, OPM issued regulations modifying the definitions of "family member" and "immediate relative" for purposes such as sick leave and leave transfer. As OPM stated in a memorandum to the Chief Human Capital Officers Council, those definitions "now cover grandparents and grandchildren, same-sex and opposite-sex domestic partners, step parents, step children, foster, guardianship, and similar relationships."[38] In addition, pursuant to a 2009 Presidential memorandum[39] that directed Federal agencies to act to extend benefits to same-sex domestic partners of Federal employees, OPM issued guidance[40] that (1)

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[38] Memorandum for Directors of Human Resources and Equal Employment Opportunity from Nancy H. Kichak, Associate Director, Employee Services, U.S. Office of Personnel Management, "Subject: Final Regulations on Definitions of Family Member, Immediate Relative, and Related Terms," June 14, 2010. (http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=2996.)

[39] See President Barack Obama, "Memorandum for the Heads of Executive Departments And Agencies, Subject: Federal Benefits and Non-Discrimination," June 17, 2009. (http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri.)

[40] Memorandum to the Chief Human Capital Officers Council from John Berry, Director, U.S. Office of Personnel Management, "Subject: Federal Benefits for Same-Sex Domestic Partners," dated July 10, 2009. (www.chcoc.gov/Transmittals/Index.aspx.)

enumerated specified benefits that agencies should provide to same-sex domestic partners, if permitted by law and (2) established a definition of "domestic partner" to promote consistent provision of such benefits. In September 2010, OPM instructed agencies that these benefits included the use of a limited amount of leave without pay for certain family support purposes.[41]

Significance

These actions continue Administration and OPM efforts to maximize employee access to family-friendly leave and to extend benefits to same-sex domestic partners to the extent permissible under current law. (OPM has also expressed support for providing health, life, and survivor benefits to the same-sex domestic partners of Federal employees,[42] but such change would require legislation.)

Proposal to establish health claims data warehouse

In October 2010, OPM announced its intent to establish a Health Claims Data Warehouse as a system of records subject to the Privacy Act of 1974, stating that "The purpose of this system of records is to provide a central and comprehensive database from which OPM may analyze Federal Employee Health Benefit Program (FEHBP)…costs and actively manage the programs to ensure the best value for both enrollees and tax-payers." [43]

Significance

Actions related to employee benefit programs do not directly affect traditional merit system concerns such as fairness, openness, and effective use of the Federal workforce. However, competitive and sustainable benefit programs are essential to the Federal Government's ability to recruit and retain highly skilled, high-performing employees. The establishment of the health claims data warehouse is one element of a significant shift in how OPM manages the FEHBP. This shift may prove challenging, both in its demands on OPM staff and capacity and in maintaining Federal employee confidence that their privacy will be protected and the program will be administered in their best interests.

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[41] Memorandum to the Chief Human Capital Officers Council from John Berry, Director, U.S. Office of Personnel Management, "Subject: Extension of 24-Hour LWOP Family Support Policy to Same-Sex Domestic Partners of Federal Employees," dated September 10, 2010. (http://www.chcoc.gov/Transmittals/Index.aspx.) This benefit permits a Federal employee to use 24 hours of leave without pay for purposes such as attending to an elderly relative's care and participating in a child's school activities.

[42] Statement of John Berry, Director, U.S. Office of Personnel Management, before the Committee on Homeland Security and Governmental Affairs, United States Senate, on S. 1102, the Domestic Partnership Benefits and Obligations Act of 2009, October 15, 2009. (http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=d5347e63-e680-4ebf-8b9d-5eb5f8cd5e79.)

[43] Action: Notice of a new system of records, 75 Fed. Reg. 61532-61533 (Tuesday, October 5, 2010).

Financial Summary

Fiscal Year 2010 Financial Summary
(dollars in thousands)

Budget Authority	**$42,930**
Appropriation	40,339
Offsetting Collections	12
Transfer from the Civil Service Retirement and Disability Trust Fund	2,579
Obligations Incurred	**$41,784**
Personnel Compensation	26,073
Personnel Benefits	6,317
Benefits for Former Employees	14
Travel and Transportation of Persons	451
Transportation of Things	57
Rental, Communications and Utilities	4,377
Printing and Reproduction	31
Other Contractual Services	2,586
Supplies and Materials	207
Equipment	1,671