U.S. Merit Systems Protection Board

Ten Years After The CSRA

Annual Report Fiscal Year *1988*

Submitted to
The President and the Congress of the United States

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Fiscal Year
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THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Avenue, NW.
Washington, DC 20419

March 1989

Sirs:

It is with particular pleasure that I submit the Tenth Annual Report of the U.S. Merit Systems Protection Board. Marking the decennial of the Civil Service Reform Act of 1978 (CSRA), this report reviews the activities of the Board during Fiscal Year 1988, as required by 5 U.S.C. § 1209 (b), and assesses the Board's first ten years of operation.

In the course of its first decade, the Board has accomplished a major goal of the CSRA: the development of a uniform and predictable body of civil service law. The Board's decisions on Federal employee appeals have produced a coherent and comprehensive body of settled law that serves to guide both agencies and employees in taking and challenging adverse personnel actions. While novel issues will continue to require the Board to fashion new rules and procedures, the existence of a comprehensive body of civil service law developed over the past decade is a dramatic improvement over the situation that existed prior to the CSRA.

The Reform Act also charged the Board with the new function of reviewing the significant actions and regulations of the Office of Personnel Management (OPM) and conducting studies of the merit systems. The Board has established in its first decade a credible record of study and review on critical personnel issues. Through its reports, which receive extensive media coverage as well as serious consideration by Federal agencies, individuals, and organizations in the personnel management field, the Board serves as a resource for policy makers and practitioners who seek to improve the Federal personnel system.

With a record of accomplishment, the Board looks forward to the challenges of the 90's and to building upon the trust and respect it has earned among all segments of the Federal sector community.

Respectfully,

Daniel R. Levinson

Daniel R. Levinson

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

Cover Photograph:

The photograph on the cover depicts the Theodore Roosevelt Award, which was established in 1988 by the MSPB Chairman. Each year the Board may present this prestigious award to an employee who has demonstrated distinguished performance or leadership in support of the Board's mission to protect the merit systems through its appellate and merit studies functions. The award was named for President and Civil Service Commissioner Theodore Roosevelt in recognition of his outstanding contributions to the development of the civil service system. The bust of Theodore Roosevelt is on permanent display in the Board's headquarters offices, along with a plaque to be engraved with the names of the recipients.

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BOARD MISSION AND ORGANIZATION

MISSION

The U.S. Merit Systems Protection Board is an independent, quasi-judicial agency, charged by Congress with protecting the Federal merit systems against prohibited personnel practices, protecting employees against abuses by agency management, and ensuring that Executive branch agencies base employment decisions on individual merit. The Board has a statutory mandate to adjudicate appeals from personnel actions for the nation's largest employer. It has world-wide jurisdiction, wherever Federal civil servants are found. Additionally, under the Hatch Political Activities Act, it exercises jurisdiction over state and local government employees in Federally-funded positions.

The Board accomplishes its mission by:

Hearing and deciding employee appeals from agency personnel actions (appellate jurisdiction);

Hearing and deciding cases brought by the Special Counsel involving alleged abuses of the merit systems, and other cases arising under the Board's original jurisdiction;

Conducting studies of the civil service and other merit systems in the Executive branch to determine whether they are free of prohibited personnel practices; and

Providing oversight of the significant actions and regulations of the Office of Personnel Management (OPM) to determine whether they are in accord with the merit system principles.

The bipartisan Board consists of a Chairman, a Vice Chairman and a Member, with no more than two of its three members being 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 U.S. Merit Systems Protection Board

BOARD MEMBERS

Daniel R. Levinson
Chairman

Daniel R. Levinson became Board Chairman on August 15, 1986, following nomination by President Reagan and confirmation by the Senate. At the time of his appointment, Mr. Levinson was General Counsel of the U.S. Consumer Product Safety Commission, a position he had held since March 1985. Previously he served for two years as Deputy General Counsel of the Office of Personnel Management. Prior to joining OPM, Mr. Levinson was a partner in the Washington, DC law firm of McGuiness & Williams.

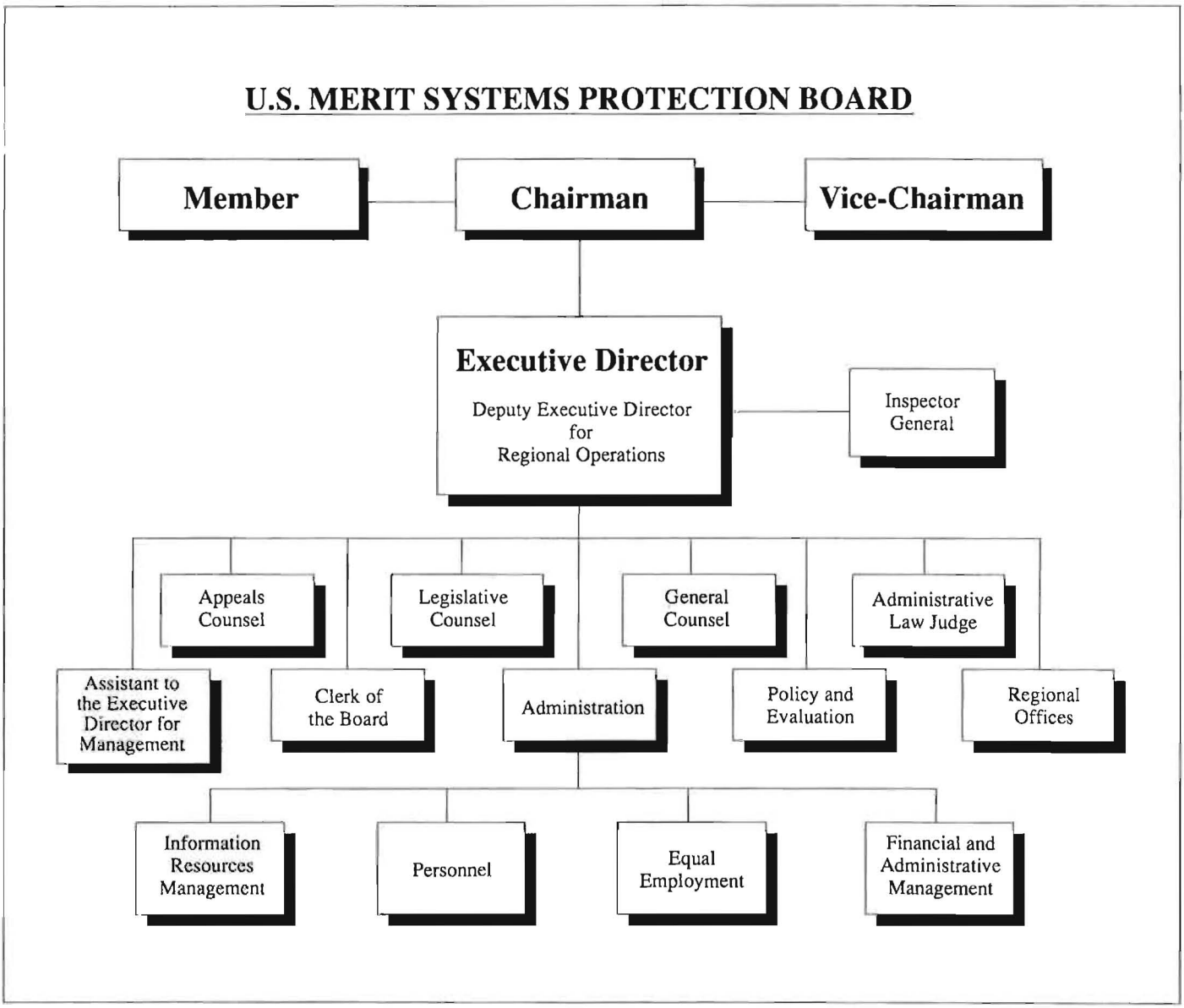
Maria L. Johnson
Vice Chairman

Maria L. Johnson was nominated to the Board by President Reagan on March 18, 1983. She was confirmed by the Senate on May 6, 1983, and was designated Vice Chairman on September 19, 1983. From March 1, 1986 to August 15, 1986, Ms. Johnson served as the Board's Acting Chairman. At the time of her appointment, Ms. Johnson was a commercial loan officer with the Security National Bank in Anchorage, Alaska. From 1978 to 1981, she served as an associate with the law firm of Lambert, Griffin & McGovern in Washington, DC.

Dennis M. Devaney
Member

Dennis M. Devaney was nominated by President Reagan to be a member of the Board on August 4, 1982 and was confirmed by the Senate on August 20, 1982. At the time of his appointment, Mr. Devaney was in private law practice in Washington, DC with the firm of Tighe, Curhan, and Piliero. From 1977 to 1979, he served as Counsel for the Food Marketing Institute, and from 1975 to 1977 he was Assistant General Counsel for the U.S. Brewers Association.

Mr. Devaney resigned from the Board in March 1988 to accept appointment as General Counsel of the Federal Labor Relations Authority.



The **Chairman**, **Vice Chairman**, and **Member** adjudicate the cases brought to the Board. Each heads his/her individual office. The Chairman, by statute, is the chief executive and administrative officer of the Board.

The **Executive Director** manages the operations and programs of the Board's headquarters and regional offices, under authority delegated by the Chairman. This delegation includes the authority to make final decisions in the areas of personnel management, fiscal management, document security, procurement and contracts, and general administrative support services. The Executive Director reports directly to the Chairman.

The **Deputy Executive Director for Regional Operations** manages the appellate functions of the MSPB regional offices,

reviews the quality of initial decisions issued by administrative judges in the regional offices, and assists the Executive Director in carrying out general management responsibilities.

Lucretia F. Myers
Executive Director

The MSPB **Regional Offices** are located in 11 major metropolitan areas throughout the United States: Atlanta, Boston, Chicago, Dallas, Denver, New York, Philadelphia, St. Louis, San Francisco, Seattle and Washington, DC. These offices receive and process the initial appeals filed with the Board. Administrative judges in the regional offices have the primary function of issuing fair, timely, and well-reasoned decisions on all appeals.

The **Office of the Assistant to the Executive Director for Management** develops and coordinates internal management programs and projects for the Executive Director. The office also produces the annual report on the Board's decisions in appellate and original jurisdiction cases.

The **Office of the Inspector General** is the Board's internal auditor. The independent Inspector General plans and directs audits, investigations, and internal control evaluations in compliance with the requirements of the Office of Management and Budget and the U.S. General Accounting Office. The Inspector General evaluates the programs and operations of the Board in order to promote economy and efficiency, to prevent and detect fraud and abuse, and to advise the Chairman and Executive Director of any problems and deficiencies detected. The Inspector General reports directly to the Executive Director.

The Office of the General Counsel is legal counsel to the Board. The office provides advice to the Board and its organizational components on matters of law arising in day-to-day operations. It represents the Board in litigation, prepares proposed enforcement decisions and orders, reviews OPM regulations, and drafts proposed final decisions for the Board in original jurisdiction cases. The office is also responsible for conducting the agency's ethics program.

The **Office of Appeals Counsel** assists the Board in adjudicating petitions for review from initial decisions issued by administrative judges in the regional offices. The office receives and analyzes the petitions, researches applicable laws, rules and precedents, and submits proposed opinions to the Board members for their final adjudication. It also processes interlocutory appeals on matters still pending before the regional offices, makes recommendations to the Board on motions filed during the review process, makes recommendations on reopening appeals on the Board's own motion, and provides analytical research memoranda to the Board on legal issues.

The **Office of Administrative Law Judge** hears cases governed by the Administrative Procedure Act and other cases assigned by the Board. The Administrative Law Judge also rules on discovery motions and subpoena requests.

The **Office of Legislative Counsel** manages legislative policy, congressional relations, and public affairs functions for the Board. These functions include drafting and coordinating prepared testimony, responding to media and congressional inquiries, and analyzing proposed legislation.

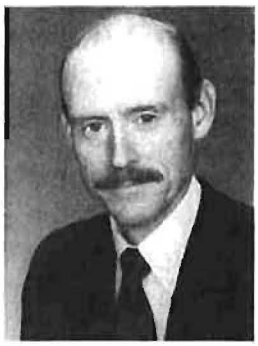
The **Office of Policy and Evaluation** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems, including an annual oversight review of the Office of Personnel Management. Reports of these studies are submitted to the President and the Congress, as required by law.

The **Office of the Clerk of the Board** performs the Board's ministerial functions to facilitate timely adjudication. These include receiving and processing petitions for review and actions under the Board's original jurisdiction authority, ruling on certain procedural matters, and issuing the Board's Opinions and Orders. The Clerk is also responsible for the Board's records, correspondence, and reports management programs. This office certifies official records to the courts and administrative agencies, maintains the Board's law library, and administers the Board's Freedom of Information Act, Privacy Act, and Government in the Sunshine Act programs.

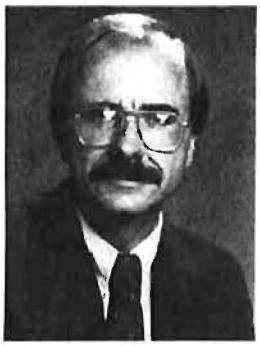
The **Office of Administration** manages the Board's administrative operations. It is made up of four divisions: The **Financial and Administrative Management Division** administers the budget, accounting, procurement, property management, physical security, and general services functions of the Board. The **Personnel Division** manages personnel programs and assists managers, employees, and applicants for employment. It administers staffing, classification, employee relations, performance management, payroll, personnel security, and training functions. The **Equal Employment Division** implements the Board's equal employment opportunity programs, including developing annual EEO action plans and procedures for processing discrimination complaints. It furnishes advice and assistance on affirmative action initiatives to the Board's offices. The **Information Resources Management Division** develops, implements, and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative responsibilities.

Mark Kelleher
Deputy Executive Director for Regional Operations

REGIONAL DIRECTORS



R.J. Payne
Atlanta



William Carroll
Boston

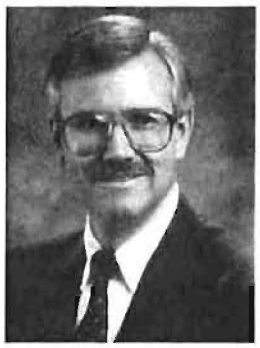
Martin W. Baumgaertner
Chicago

Paula A. Latshaw
Dallas

Gail E. Skaggs
Denver

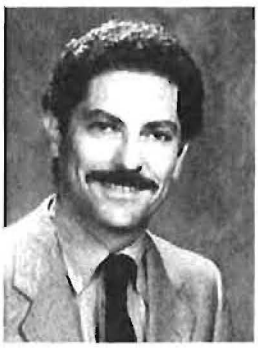
Sean P. Walsh
New York

Lonnie Crawford
Philadelphia



Earl A. Witten
St. Louis

Denis Marachi
San Francisco



Carl Berkenwald
Seattle

P.J. Winzer
Washington, DC

U.S. Merit Systems Protection Board

Ten Years After The CSRA

A TEN YEAR RETROSPECTIVE OF THE MERIT SYSTEMS PROTECTION BOARD

A Decade After The Civil Service Reform Act of 1978

THE CIVIL SERVICE REFORM ACT OF 1978

In its report on the Civil Service Reform Act of 1978 (CSRA), the Senate Committee on Governmental Affairs stated: "One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons."

Both the Congress and the Executive branch had concluded that rules restricting management flexibility should be liberalized to make the Federal workplace more responsive, and thus more productive, while employee due process protections should be strengthened to minimize unfair or arbitrary practices that could accompany increased management flexibility. The statement from the Senate committee report incorporates two of the principal purposes of the Act, the streamlining of Federal personnel management and the assurance that employee rights are protected. The challenge to the Merit Systems Protection Board (MSPB), created by the CSRA, has been the accomplishment of employee protection within the framework of streamlined management.

In the Senate committee report, the CSRA was called "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883." The Pendleton Act established the Civil Service Commission and a merit-based employment system for the Federal Government. The Commission, however, was a markedly different institution from today's MSPB. The Commission grew out of the 19th century reform movement to curtail the excesses of political patronage in Government. Its work centered on rules for merit selection. Since the doctrine of "employment at will" then governed tenure in public service as well as in the private sector, the Commission had no hearing or adjudicatory functions with respect to employee discipline and termination.

During the first half of the 20th century, the Commission steadily grew into an omnibus personnel agency for the Federal Government, managing a full range of employment matters, from pay and classification to retirement and health benefits. As the principles underlying merit selection eventually led to employee tenure laws like the Lloyd-La Follette Act of 1912, prescribing procedures to be followed in discharging civil service employees, the Commission eventually established a highly complicated system for resolving employee appeals from a variety of agency adverse personnel actions.

As the Commission's responsibilities multiplied, a growing consensus emerged that the Commission could not properly and adequately perform managerial and adjudicatory functions simultaneously. Thus, a driving principle behind the CSRA was the separation of the Commission's adjudicatory function from the personnel management

function. The establishment of MSPB and the Office of Personnel Management (OPM) as separate independent agencies was intended to eliminate the conflict of interest inherent in having a single entity serve as both rulemaker and adjudicator. To provide for further checks and balances, the CSRA assigned the Board the tasks of reporting annually on the significant actions of OPM and of conducting studies of the merit systems to ensure the effective operation of the merit principles in practice.

The Act also was intended to address other criticisms directed at the Commission: the appeals process took too long; decisions were inconsistent and not precedential; decisions did not cite cases and (with the exception of Hatch Act decisions) were not reported. Commission decisions did not provide consistent guidance to either Federal agencies or employees. As a result, agencies were uncertain what actions they could take and employees were uncertain as to how to defend against unwarranted actions.

The consideration of comprehensive civil service reform by the Congress ran on a parallel track with consideration of President Carter's Reorganization Plan No. 2, which had grown out of the President's Personnel Management Project. The bill that ultimately became the CSRA (Pub. L. No. 95-454) on October 13, 1978 incorporated features of the House and Senate bills and of the President's reorganization plan. The principal changes made in the civil service system were:

To codify the merit system principles and establish a set of specific prohibited personnel practices;

To establish MSPB as an independent agency to adjudicate employee appeals, perform oversight review of OPM actions, and conduct studies to protect the merit system;

To establish an Office of Special Counsel (OSC) within MSPB to investigate and, where warranted, prosecute prohibited personnel practices, Hatch Act violations, and violations of certain other civil service laws, rules, or regulations;

To provide new protections for employees who disclose illegal or improper Government conduct;

To establish OPM to supervise personnel management in the Executive branch by developing personnel policies, providing personnel leadership to agencies, and administering centralized personnel programs;

To establish a new performance appraisal system and new standards for dismissing Federal employees for unacceptable performance;

The challenge to the MSPB has been the accomplishment of employee protection within the framework of streamlined management.

To streamline the processes for disciplining and dismissing Federal employees;

To create a new Senior Executive Service (SES) for top-level Federal executives;

To establish a merit pay system for managers in grades 13 through 15;

To authorize OPM to carry out demonstration projects to test new approaches to Federal personnel administration; and

To establish the Federal Labor Relations Authority (FLRA) to oversee Federal labor-management relations.

DEVELOPMENT OF THE BOARD'S CASE LAW

The first major challenge for the Board was the development of a body of consistent, logical, and readily accessible civil service law. In its first decade, the Board's decisions on Federal employee appeals, and the decisions of the United States Courts of Appeals and the Supreme Court, have produced a comprehensive body of settled law that guides agencies and employees, and the representatives of each, in taking and challenging adverse personnel actions.

The Board made great efforts to ensure that its early decisions were firmly grounded in law and relevant judicial decisions and that they would provide precedent for application and elaboration in future cases raising related issues. The Board achieved its purpose by issuing decisions that, in large part, are still relied on as precedents.

The Board has addressed substantive areas of civil service law, both those previously addressed by the Civil Service Commission and those that were created as a result of the CSRA. In its early years, the Board issued a number of important decisions defining causes of action that had been carried over into the CSRA from existing law.

The Board established its scope of review in reduction-in-force (RIF) actions in *Griffin v. Department of Agriculture* and *Losure v. Interstate Commerce Commission*, both in 1980. In *Griffin*, the Board held that a decision to contract out services is a reorganization and, therefore, a valid reason for a RIF. The Board stated further that it has no authority to review the management considerations that underlie agency discretion to take such an action. In *Losure*, the Board reversed the agency action, holding that the agency's decision with respect to the appellant was personal to her and did not constitute a reorganization. In so doing, the Board set forth the rule that the burden of proof in demonstrating that RIF procedures have been properly invoked is on the agency and discussed how this burden may be met.

Parker v. Defense Logistics Agency (1980) addressed agency denials of within-grade increases. The Board ruled that the standard of proof the agency must meet in such cases is substantial evidence. It further ruled that, in reviewing such cases, the Board is not limited to the record developed in the agency's proceedings, but may engage in further fact-finding where such is necessary to serve the ends of justice. The decision also established that where the appellant alleges that the agency committed harmful procedural error, the appellant bears the burden of proving this affirmative defense. Although the standard of proof that the appellant must meet was not addressed in this case, the Board subsequently ruled in *Pinto v. Department of Labor* (1982) that the appellant must prove harmful procedural error by a preponderance of the evidence.

Whether the Board may review an agency's selection of penalty in an adverse action was at issue in *Douglas v. Veterans Administration* (1981). The Board held that it may review an agency-selected penalty to determine whether it is appropriate and may mitigate the penalty if it is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. The Board went on to establish a series of explicit and understandable standards to promote the predictability of decisions. In another adverse action case, *Merritt v. Department of Justice* (1981), the Board for the first time examined the nexus between employee off-duty misconduct and the statutory requirement that adverse actions promote the "efficiency of the service." The principal issue was what kinds of conduct off the job would justify agency action against an employee. In subsequent cases, the Board has refined the *Merritt* test and applied it to a variety of factual circumstances.

In *Chavez v. Office of Personnel Management* (1981), the Board established its scope of review in disability retirement appeals. It held that the employee bears the burden of proving entitlement by a preponderance of the evidence and set forth the method for analyzing the evidence.

The Board's decisions on Federal employee appeals have produced a comprehensive body of settled law that guides agencies and employees in taking and challenging adverse personnel actions.

NEW CAUSES OF ACTION AND PROCEEDINGS

In its early years, the Board also addressed causes of action and proceedings newly created by the CSRA. In 1980, the Board issued a series of decisions analyzing its newly-acquired authority to award attorney fees to prevailing appellants. These cases established that for an award of attorney fees to be made, the fees must have been incurred, the award must be warranted in the interest of justice, and the fees must be reasonable. In *Allen v. U.S. Postal Service*, the Board ruled that if either the "incurred" or "warranted in the interest of justice" test is not met, there is no need to determine whether the fees are "reasonable." The decision set forth five categories of circumstances for guidance as to when an award of attorney fees is "warranted in the interest of justice." The Board concluded that such an award is not limited to the circumstances of

the specific examples cited in the legislative history of the CSRA. The factors to be considered in computing the amount of a "reasonable" award of attorney fees were set forth in *Kling v. Department of Justice*. In *O'Donnell v. Department of the Interior*, the Board ruled that an award of attorney fees is not barred because counsel was retained by an employee union rather than the appellant. Under *O'Donnell*, fees are deemed "incurred" when the appellant shows that an attorney-client relationship existed and that the attorney provided legal services in an appeal before the Board as the appellant's representative.

Chapter 43 cases involved an entirely new cause of action with almost no directly applicable precedent for guidance.

In 1984, the Board issued a group of lead-case decisions on performance-based actions taken under Chapter 43 of Title 5. Chapter 43 was enacted to clarify the authority of Federal managers to demote or remove poor performers after providing them with certain rights not available under other sections of the law. Because Chapter 43 actions had to be based on a new performance appraisal system that was not in place until late 1981, issues arising under Chapter 43 did not immediately reach the Board. These cases involved an entirely new cause of action with almost no directly applicable precedent for guidance.

In *Gende v. Department of Justice*, the Board ruled that, effective from October 1, 1981, Chapter 43 was the exclusive statutory avenue available to agencies seeking to demote or remove employees for poor performance. (This rule was subsequently overturned.) In *Lisiecki v. Federal Home Loan Bank Board*, the Board ruled that it has no authority to review an agency's selection of demotion or removal in Chapter 43 performance cases. In *Griffin v. Department of the Army*, the Board held that an agency must prove by substantial evidence that the performance appraisal system relied on in taking the personnel action had been approved by OPM. The Board also held in *Sandland v. General Services Administration* that an agency must prove by substantial evidence that the employee was provided an opportunity to demonstrate acceptable performance. In *Callaway v. Department of the Army*, the Board held that where an agency abuses its discretion in creating performance standards, the Board will reverse the agency action without considering the specific performance that prompted the action. Finally, in *Shuman v. Department of the Treasury*, the Board ruled that the burden is on the agency to prove that failure to perform some, but not all, of the components of a critical element warrants an unacceptable rating on the element as a whole.

The Board has also issued a number of decisions in cases involving allegations of discrimination ("mixed cases"), most importantly in the area of agencies' responsibility

for the reasonable accommodation of handicapped employees. The CSRA established a complex scheme for the handling of cases involving both an action appealable to the Board and an allegation of discrimination. The Board issues a decision on such appeals, but the Board's decision may be appealed to the Equal Employment Opportunity Commission (EEOC). If the EEOC disagrees with the Board on an issue of discrimination law, the case is returned to the Board. If, because of a disagreement over a question of civil service law, the Board does not adopt the EEOC decision, the case is certified to the Special Panel.

The first case where MSPB and EEOC views differed was *Ignacio v. United States Postal Service*. It was certified to the Special Panel in 1985. Approximately five years elapsed between the filing of the initial appeal and issuance of the Special Panel's decision in 1986. In addition to the complex statutory scheme, the attendant administrative difficulties, including issuance of new regulations establishing applicable procedures, contributed to the delay in processing this first case.

Cases involving allegations of discrimination based on an employee's handicapping condition as a result of drug or alcohol abuse have been particularly complex. In *Ruzek v. General Services Administration* (1981), the Board held that alcoholism, or drug abuse, constitutes a handicapping condition under the Rehabilitation Act of 1973 and set forth the requirements that an agency must follow before taking action against an employee with such a handicap. In 1988, the Board issued a series of decisions that modified earlier decisions in this area. *McCaffrey v. U.S. Postal Service*, the first of this series, established that the 1973 Rehabilitation Act, the Alcohol Abuse Act, and the Drug Abuse Act were intended to assist persons handicapped by an actual addiction to alcohol or drugs, rather than casual users who may be intoxicated or under the influence of drugs at the time of their misconduct. In *Brinkley v. Veterans Administration*, the Board established that there must be a causal connection between the employee's misconduct and his alcohol or drug addiction. Finally, in *Hougens v. U.S. Postal Service*, the Board ruled that serious misconduct can negate an agency's general obligation to accommodate an employee's handicap of alcohol or drug addiction. The Board also ruled that the agency can impose discipline, short of removal, while the employee undergoes rehabilitation, if retaining the employee in his position during rehabilitation would be an undue hardship. In this case, the Board upheld the agency's demotion of the employee.

In addition to addressing substantive areas of law, the Board's early decisions also set guidelines for the types of adjudications and actions the Board expected from its administrative judges. For example, in *Spithaler v. OPM* (1980), the Board established that an administrative judge's initial decision must identify all material issues of fact, summarize the evidence on each such issue sufficiently to disclose the evidentiary basis for the findings of fact, set forth those findings clearly and explain how any issues of credibility were resolved, describe the application of the burdens of proof, and address all material legal issues in a fashion that reveals the administrative judge's conclusions of law, legal reasoning, and the authorities on which that reasoning rests. The Board ruled *In the Matter of Larry Bohannon* (1979) that administrative judges are not to use their sanction authority to dismiss appeals for a single failure to comply with an order.

The Board's early decisions also set guidelines for the types of adjudications and actions the Board expected from its administrative judges.

Shortly thereafter, based on its review of the CSRA scheme and analogous court decisions, the Board described its own review of the fact findings of its administrative judges in a decision that probably remains the case most often cited by the Board in its decisions on petitions for review, *Weaver v. Department of the Navy* (1980). The Board ruled that, in its review of an initial decision, it may substitute its own determinations of fact for those of the administrative judge, giving the administrative judge's findings only so much weight as warranted by the record and the strength of the administrative judge's reasoning. The Board further ruled that it will rely heavily on the administrative judge's assessment of witness credibility, at least where there are not other, more persuasive indicia of credibility in the record.

The Board has continued to address important precedential issues in groups of lead cases, while using its short-form decisions (which simply deny the petition for review of the initial decision) in those cases that will not contribute significantly to its body of law. The Board has also taken care to ensure that its decisions will be readily accessible, first through publication of its own volumes of indexed decisions, and, later, through publication in *United States Merit Systems Protection Board Reporter* (West Company), *Federal Merit Systems Reporter* (Labor Relations Press), and others.

JUDICIAL REVIEW OF BOARD DECISIONS

Equally important to the development of a body of consistent and predictable civil service law is the structure of judicial review of Board decisions. Prior to the CSRA, the decisions of the Commission could be appealed to Federal district courts and then to appropriate United States Courts of Appeals. Not only was this scheme duplicative and wasteful of judicial resources, but uniform Federal employment rules were subject to diverse interpretation. The CSRA addressed the problem of duplication by eliminating

trial court review and placing review of MSPB decisions primarily within the regional circuit courts. In 1982, the Congress addressed the problem of inconsistent adjudications by placing review of most Board decisions within the newly established Court of Appeals for the Federal Circuit.

After this new court was created, the Board adjusted its administration of the civil service laws to ensure faithful adherence to Federal Circuit precedent. One significant result has been the consistently high percentage of Federal Circuit decisions each year that have left Board decisions unchanged. Typically, over 90 percent of the Board decisions reviewed by the Federal Circuit each year have either been affirmed or the challenges dismissed.

Notwithstanding this high approval rate, however, the Federal Circuit, through its opinions, continues to leave a significant imprint on the interpretation and application of civil service laws. The court's decisions in *Hopkins v. Department of Justice* and *Peterson v. Department of Energy* in 1984 established that the Board is the proper respondent in cases involving jurisdiction, timeliness, or application of its procedures, and in attorney fee cases. In 1987, however, in *Hagmeyer v. Department of the Treasury*, the court reversed these decisions, ruling that the agency is the proper respondent in such cases.

In an important 1985 decision in *Lovshin v. Department of the Navy*, the Federal Circuit reversed the Board's decision in *Gende* by ruling that agencies could proceed under either Chapter 43 or Chapter 75 of Title 5 in removals and demotions for poor performance. Lovshin petitioned the Supreme Court for review, and the Board filed a brief in support of his position that Chapter 43 provided the exclusive basis for performance-based actions. The Supreme Court's denial of the petition left the Federal Circuit ruling intact, with the result that performance-based actions may be taken under either Chapter 43 or Chapter 75 procedures.

Typically, over 90 percent of the Board decisions reviewed by the Federal Circuit each year have either been affirmed or the challenges dismissed.

The clarity and uniformity that the Federal Circuit appellate scheme promotes does not extend to the entire range of matters that come before the Board. Cases that involve an allegation of discrimination ("mixed cases") are appealed to the Federal district courts for trial *de novo*. Thus, such cases are resolved in various courts around the country and can result in inconsistent interpretations of law. The Board's decisions in cases brought under its original jurisdiction are appealed to the various United States Courts of Appeals.

Most original jurisdiction cases decided by the Board have been brought by the Special Counsel, the independent office within the Board that inherited the Commission's responsibility for enforcement of the Hatch Act and that assumed new responsibilities under the CSRA to investigate prohibited personnel practices and seek

disciplinary or corrective action if warranted. Corrective actions focus on curing problems revealed by the Special Counsel's investigations, while disciplinary actions focus on punishing Federal officials who commit prohibited personnel practices. Although the Board's decisions in original jurisdiction cases have been far fewer in number than its appellate decisions, they have been significant in the development of post-CSRA civil service law.

The clarity and uniformity that the Federal Circuit appellate scheme promotes does not extend to the entire range of matters that come before the Board.

The Special Counsel cases decided by the Board in its first decade have produced opinions that address systemic issues with broad implications for both employees and agencies. Several of those decisions have been appealed to the various United States Courts of Appeals, and the decisions have narrowed the Special Counsel's discretion to enforce the new law in some instances, but have read the law quite broadly in others. A landmark 1982 District of Columbia Circuit decision in a corrective action case, *Frazier v. Merit Systems Protection Board*, approved a number of basic ground rules involving the Board's adjudication of Special Counsel cases. The court confirmed that the relationship of the Special Counsel to the Board is that of prosecutor to judge and that the burden is on the Special Counsel to prove its case by a preponderance of the evidence.

In *Frazier*, the court also endorsed the Board's rule that unlawful reprisal may be established on the basis of what the deciding official knew, or should have known, or on the retaliatory motives of subordinates whose recommendations were the basis for the challenged action. The Board's rule that constructive knowledge may support an inference of retaliatory intent sent an early and powerful message to the Federal community that the CSRA's protection from reprisal would be read broadly to implement fully its remedial purpose.

Subsequent disciplinary action cases reviewed in the regional circuits have produced case law that may place heavy burdens on the Special Counsel to prove wrongful motive. The Fourth Circuit, in its review of *Starrett v. Special Counsel* (1986), overturned the Board's decision and went to considerable lengths to emphasize that the standard used to determine whether supervisors have engaged in prohibited retaliation must be adequate to protect those not motivated by an improper purpose against punishment. In *Harvey v. Merit Systems Protection Board* (1986), the D.C. Circuit rejected the Board's rule that an adverse decision based on a belief in the falsity of an employee's allegations constitutes prohibited retaliation. The court appeared to be crafting a principle that a supervisor who takes action against a "whistleblower," based on a reasonable belief that the employee's allegations are false, may be protected from discipline by the Special Counsel.

Other rulings have narrowed the scope of the Special Counsel's prosecutorial powers or the Board's enforcement authority. In *Horner v. Merit Systems Protection Board*

(1987), the Federal Circuit concluded that the Special Counsel could not bring a disciplinary action for an employee's alleged violation of ethical conduct standards when the conduct is not specifically related to one of the prohibited personnel practices under the Special Counsel's jurisdiction. In *Filiberti v. Merit Systems Protection Board* (1986), the Ninth Circuit limited the Board's authority to impose sanctions to those specifically stated in the applicable statute.

A series of cases in the D.C. Circuit, beginning with *Carducci v. Reagan* (1983), as well as the Fifth Circuit decision in *Towers v. Horner* (1986), articulated a broader jurisdictional power for the Special Counsel than had thus far been exercised. Taken together, these cases suggest strongly that the Special Counsel can and should investigate matters as diverse as allegations of incorrect classification or performance decisions, or allegations of arbitrary or unfair grievance or reassignment determinations, because such decisions, if arbitrary or incorrect, can constitute prohibited personnel practices.

APPEALS PROCEDURES AND DUE PROCESS

Under the CSRA and subsequent OPM regulations, the Board's appellate jurisdiction encompasses adverse actions (removals, demotions, or suspensions of more than 14 days for misconduct), removals or demotions for unacceptable performance, reduction-in-force actions, denials of within-grade increases, and OPM suitability and retirement entitlement determinations. Only competitive service and veteran preference eligible excepted service employees may appeal adverse actions and Chapter 43 performance-based actions. Nevertheless, the majority of Federal workers enjoy MSPB appeal rights.

In contrast to the statute under which the Commission adjudicated cases, the new statute was considerably more specific in detailing the Board's duties and authorities. With the CSRA and its legislative history for guidance, the Board published interim regulations in the *Federal Register* eight days after the effective date of the Act. Two months later, it proposed new regulations, and three months following their publication, it had final regulations in place. Although the Board has amended its regulations several times over the years, the regulatory framework established in 1979 has, on the whole, served both the Board and the parties appearing before it well. At the end of its first decade, the Board is rewriting its regulations in "plain English" to promote better understanding, but the regulatory framework established a decade ago remains in place.

Those regulations provide a comprehensive set of rules to protect the due process rights of the parties in a proceeding that, in scope and effect, rivals that of a Federal civil trial. Whether represented by an attorney or

appearing on their own behalf (*pro se*), appellants before the Board can, by complying with its regulations, pursue their cases so that all relevant issues are developed and presented for decision.

Taking a cue from the CSRA itself, the Board issued regulations that were very specific as to the procedures to be followed by the Board in deciding the cases that come before it. Pursuant to the statute, the regulations allowed the parties to be represented before the Board, provided for the consolidation or joinder of cases, provided for payment of attorney fees, provided for discovery and the issuance of subpoenas, set forth the applicable burdens of proof and their definitions, and provided for the filing of a petition seeking review by the Board members of an initial decision of an administrative judge.

The regulatory framework established in 1979 has, on the whole, served both the Board and the parties appearing before it well.

In an effort to make its regulations as helpful and explicit as possible, however, the Board included provisions detailing additional matters such as the scope of its appellate jurisdiction, the information to be filed by the parties in prosecuting and defending an appeal, the authorities of the administrative judges—including the ability to impose sanctions, and a prohibition against communications between the administrative judge and any party without the knowledge of the other parties. The Board also set out specific procedures to ensure the enforcement of compliance with its decisions.

Although the Board's appeals process is more formal than that of the Commission, its adjudicatory system still is employed by non-lawyers far more frequently than in most adversarial settings. Nearly half the appellants before the Board appear *pro se*, and many agencies customarily employ non-lawyer personnel specialists as their representatives. Thus, the Board is faced with the challenge of administering a judicially-modeled dispute resolution system that must be accessible to lawyers and non-lawyers alike.

Over the years, the Board has sought to meet this challenge in a number of ways. Board members and staff have engaged in information and education campaigns, appeared regularly at various conferences to explain civil service law and procedures, and held a series of symposia at Board headquarters to review specific civil service issues. They have appeared at conventions of Federal employees' and postal workers' unions, actively participated in Federal Bar Association and Federal Circuit Bar activities, and published articles on a wide variety of civil service law topics. Through these efforts, Board members and staff have helped familiarize legal professionals with the Board's processes and have helped make those processes more accessible to the nonspecialist.

In addition to trying to keep the process simple for the nonspecialist, the Board has engaged in administrative initiatives to reduce formalities and time-consuming procedures. Under the authority granted by CSRA to provide for alternative methods of dispute resolution, the Board in 1983 initi-

ated a voluntary expedited appeals procedure (VEAP) in which, in exchange for a quicker decision, the parties agreed to proceed more informally. Although the VEAP program was not used extensively, the Board learned valuable lessons from the VEAP experience and incorporated them into standard Board procedures.

Today, prehearing conferences are standard procedure, and the Board's administrative judges employ an array of alternative dispute resolution techniques to achieve a just result for the parties. Sound settlement practices promote a more equitable and efficient dispute resolution process. The Board's settlement program is a reflection of its commitment not simply to apply the CSRA adjudicatory scheme mechanically, but instead to experiment with different procedures to discover those most likely to result in fair and efficient adjudication. Since Fiscal Year 1984, the rate of settlement of cases not dismissed has climbed from 6 percent to 48 percent, an eightfold increase, testifying to the success of the program.

CASELOAD IN THE FIRST DECADE

In establishing the Board as a quasi-judicial administrative body, civil service reformers explicitly rejected the idea of setting up a special civil service court in the expectation that an administrative body could handle the anticipated high volume of cases more efficiently. The wisdom of that decision is attested to by the Board's handling of its adjudicatory workload in its first decade.

In those ten years the Board's administrative judges have issued decisions in over 68,555 initial appeals, including 11,555 decisions issued in fiscal years 1981 through 1983 in the cases arising from the firing of striking air traffic controllers. The Board itself has issued decisions in over 18,500 petitions for review of initial decisions, including 5,500 air traffic controller cases.

These figures do not include decisions in "addendum" cases, which encompass requests for attorney fees, petitions for compliance with Board orders, and remands. Data on such cases are not available for the entire 10-year period. However, during fiscal years 1985 through 1988, the Board issued 4,179 decisions on addendum cases to initial appeals and 1,056 decisions on petitions for review of addendum cases.

The Board has issued far fewer decisions over the years in cases arising under its original jurisdiction. This is largely a function of the policy of the Office of Special Counsel (OSC) to achieve agency corrective action by request rather than by initiating formal proceedings before the

The Board in its first decade has developed a record of case processing efficiency that is a significant improvement over the record of the Commission.

Board. Thus, much that happens in this area never comes before the Board. The number of decisions in original jurisdiction cases has never been more than a dozen or so in a given year. However, the impact of these decisions, which often address systemic issues, is far greater than sheer numbers would suggest.

In addition to this substantial caseload, the Board in its early years processed a large number of pre-CSRA cases inherited from the Civil Service Commission. When the Board began operations in January 1979, there was a backlog of almost 5,000 pre-CSRA cases. By the end of that year, over 8,600 old system cases had been received. Nevertheless, by the beginning of 1980, only 1,159 pre-CSRA cases remained, and these were completed shortly thereafter.

In spite of that workload, the Board in its first decade has developed a record of case processing efficiency that is a significant improvement over the record of the Commission. Except for 1983, when the air traffic controller appeals more than doubled the Board's caseload, the average time to process initial appeals in the regional offices has steadily declined, and the percentage of those cases decided within the Board's self-imposed 120 day time limit has increased to the point that virtually all are decided within that limit.

OPM OVERSIGHT AND MERIT SYSTEM STUDIES

The CSRA also charged the Board with the new function of reviewing the significant actions and regulations of the Office of Personnel Management and conducting studies of the merit systems to ensure that they are kept free of prohibited personnel practices and are in accord with the merit system principles. This function was added by the Congress to the original civil service reform plan proposed by President Carter. However, this function was not an afterthought, but was contemplated from the beginning of the civil service reform process. In December 1977, the Personnel Management Project, which ultimately produced the President's reorganization plan, recommended a "Division of Special Studies" to help carry out the Board's role as the main protector of merit principles.

While the legislative history of the Act made it clear that the OPM oversight and merit systems studies function is a core component of the Board's mission, it provided little guidance with respect to the expectations of the Congress for the Board's performance of the function. Nevertheless, the Board has established in its first decade a credible record of critical study and review.

The Board spent a significant part of its first year developing the capacity to perform the reviews of OPM significant actions required by the CSRA. Its first review was of OPM's implementation of the new performance appraisal system under Chapter 43 of Title 5. The Board's first report on OPM

significant actions was issued in June 1981, and thereafter annual reports were issued until 1987, when the Board began issuing a series of reports, each covering a specific OPM significant action. The reports in the past two years have covered such topics as revised reduction-in-force regulations, entry-level hiring, expanded temporary appointment authority, and the Performance Management and Recognition System (PMRS).

Also in its first year, the Board held a symposium to elicit reactions to its plans for conducting merit systems studies. Its first study, undertaken in response to a specific request from the Congress, produced the landmark 1981 report on the nature and extent of sexual harassment in the Federal workplace. In succeeding years, the Board has produced important reports on such topics as the Senior Executive Service, whistleblowing in the Federal Government, improving Federal management with employee participation, productivity in the Federal workforce, reductions-in-force, and merit pay. The Board has also published annual reports on its appeals decisions.

In Fiscal Year 1987, the Board made a major commitment to strengthen its OPM review and merit systems studies function. The result has been an impressive series of reports issued in the past two fiscal years, including an update of the earlier sexual harassment study, a report on the difficulties faced by the Federal Government in recruiting highly qualified college graduates, and two reports assessing the operation of Federal performance management programs.

The findings of the Board's studies have been presented to the President and the Congress, as required by statute, and have reached a large secondary audience with an interest in public personnel administration as well. Board reports have been cited by academic and professional authorities, as well as in briefs before many Federal courts, including the Supreme Court. With the increased emphasis on the studies function in recent years, the Board's reports now receive extensive media coverage as well as serious consideration by Federal agencies and individuals and organizations in the personnel management field.

There is increasing evidence that the Board's studies are having a significant impact on a wide range of civil service issues.

At the end of the Board's first decade, there is increasing evidence that the Board's studies are having a significant impact on a wide range of civil service issues. Such evidence comes in the form of citations of Board studies by OPM and other Federal agencies in policy statements and program revisions, as well as in discussion of these reports by committees of the Congress as they consider civil service legislation.

OPERATIONAL CHALLENGES

The Board's ability to accomplish its mission in spite of the crises of the early years is a testament to the quality and committment of the Board's employees.

The Board has been able to achieve this impressive record in both its adjudicatory and studies functions in spite of serious operational challenges, particularly in the early years. In its first year, the Board was seriously hampered by inadequate staff and financial resources, a result, primarily, of the additional responsibilities placed on the Board by CSRA, beyond those originally contemplated in President Carter's reorganization plan. While some personnel from the Civil Service Commission were transferred to the Board, new staff, especially attorneys, had to be hired, and all staff had to be trained in the new provisions of civil service law established by the CSRA.

In addition to establishing procedures, issuing regulations, and dealing with the backlog of cases inherited from the Civil Service Commission, the Board in 1979 had to seek supplemental funding from the Congress. Those funds, essential to the Board's accomplishment of its statutory mission, were not received until late in the fiscal year. Aside from staffing and funding problems, the Board also had to cope with an inadequate physical facility for its headquarters.

In spite of these problems, by the end of its second year, the Board had built its staff both at headquarters and in the regional offices, had established its computerized case tracking system, had developed a research system to increase access to its rapidly developing case law, and had begun publishing its decisions. In 1981, the physical facility problem was overcome with the Board's move to its present headquarters location.

That same year the Board faced the funding and staffing cuts that affected Federal agencies generally and also suffered a 16 percent cut in its budget in the Continuing Resolution passed in December 1981. The Board also was dealing with the influx of air traffic controller appeals that would consume so much of its resources over the next few years. The combined impact of the budget cuts and the air traffic controller appeals forced the Board to implement severe cost-cutting procedures, such as suspending hearings from December 1981 to February 1982. When hearings were resumed, they were held only in the regional office locations, and a ban on travel continued until July 1982.

Before emergency supplemental appropriations were made available in July 1982, the Board was forced to furlough virtually its entire staff. Almost all employees were placed on a half-time schedule for a two-week period. In spite of these problems, the Board issued over 9,000 decisions in 1982. In 1983, it issued over 17,000 decisions and returned to 120-day processing of initial appeals by the end of the year. By 1984, the

case backlog was virtually eliminated, and the Board was able to turn its attention to management improvements to increase efficiency. The automated case tracking system was fully implemented by midyear and the Voluntary Expedited Appeals Procedure (VEAP) was launched.

Since that time, the Board has been adequately funded to perform its statutory mission and has been able to conduct operations in a less crisis-charged atmosphere. Management attention has been devoted to improving and refining agency operations, with emphasis on computerizing functions, realigning headquarters offices, and realigning the jurisdictions of the regional offices. The Board's ability to accomplish its mission in spite of the crises of the early years is a testament to the quality and commitment of the Board's employees.

ASSESSMENT

After a decade of experience with the Civil Service Reform Act, a number of its provisions may well be revisited over the next few years. This review has touched on certain problems or potential problems that are evident from the Board's standpoint, principally the complex "mixed case" procedure and the effect of inconsistent decisions from different reviewing courts. Also, in view of the *Lovshin* decision, it is clear that if the Congress intends that Chapter 43 be the exclusive basis for performance-based actions, legislation will be necessary. The overwhelming passage by the 100th Congress of the "Whistleblower Protection Act," although subsequently vetoed, is evidence of the support for amending the CSRA to provide greater protection for Government whistleblowers.

In this decennial year, various interested parties have proposed additional reforms, ranging from specific amendments to outright repeal. Although there are clearly improvements in the civil service that can and undoubtedly should be made, the Board's experience of the past ten years suggests that the CSRA has been remarkably successful in those areas for which the Board is responsible.

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This special section of the Board's Tenth Annual Report is based on: "The Merit Systems Protection Board: The First Ten Years" by Daniel R. Levinson, Chairman, MSPB, presented at the conference, "Federal Sector Labor Relations - Past, Present & Future," sponsored by the Center for Labor-Management and Employment Law, University of San Diego School of Law, in cooperation with Federal Mediation and Conciliation Service and U.S. Department of Labor, February 1988; "The Merit Systems Protection Board at Ten" by Michael Bogdanow, Assistant to the Director, Office of Appeals Counsel, MSPB, Federal Bar News and Journal, July/August 1988; and the Annual Reports of the MSPB, 1979-1988.

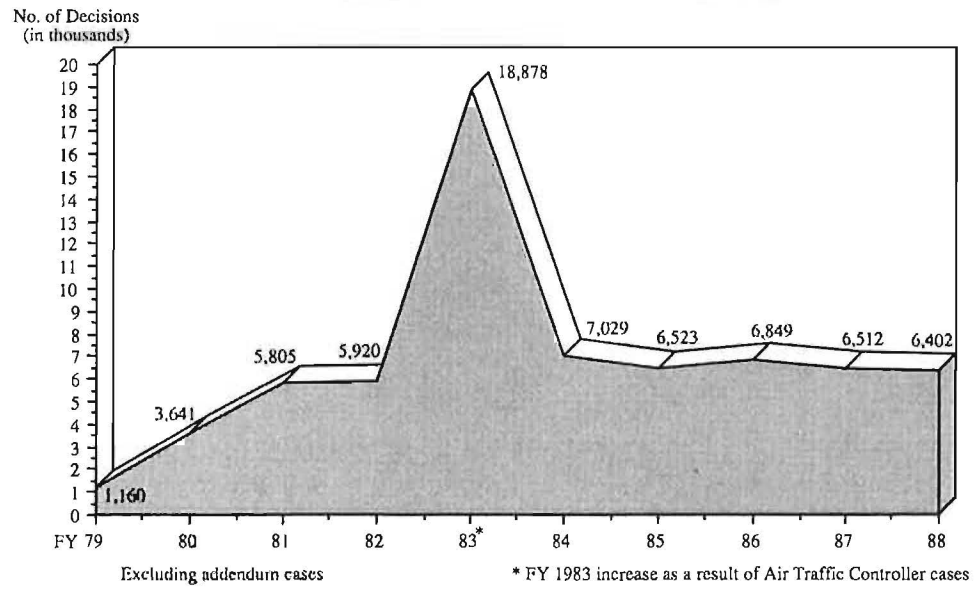
MEMBERS OF THE MERIT SYSTEMS PROTECTION BOARD, 1979-1988

Ruth T. Prokop	*Chairman*	**1979-1981**
Herbert E. Ellingwood	*Chairman*	**1981-1986**
Daniel R. Levinson	*Chairman*	**1986-Present**
Ersa H. Poston	*Vice Chairman*	**1979-1983**
Maria L. Johnson	*Vice Chairman*	**1983-Present**

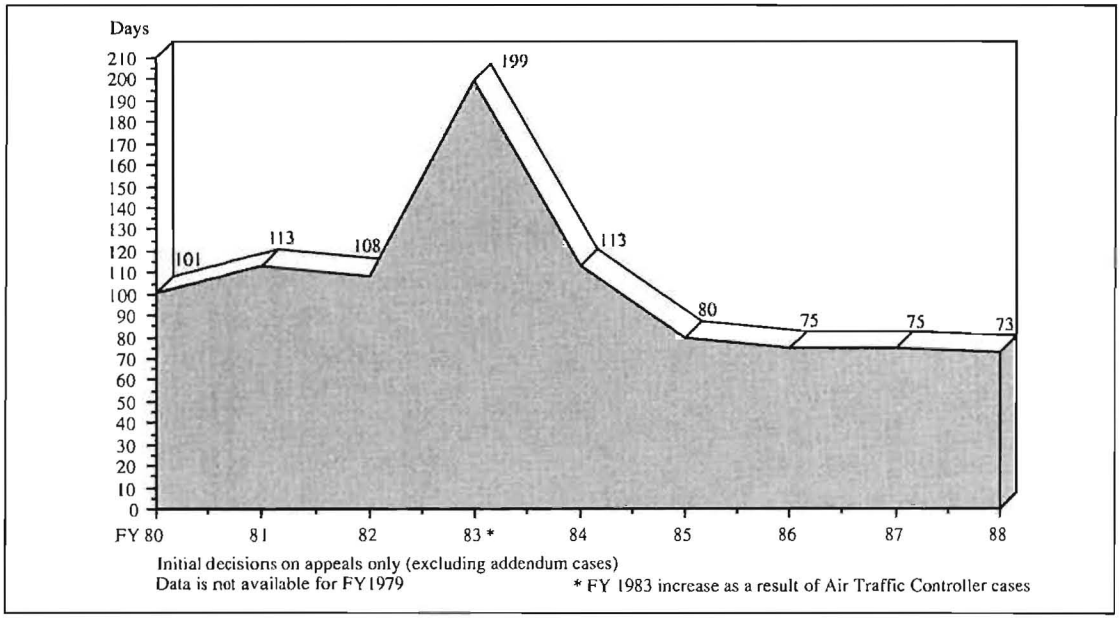
(Ersa H. Poston served as Acting Chairman July 1981-December 1981. Maria L. Johnson served as Acting Chairman March 1986-August 1986.)

Ronald P. Wertheim	*Member*	**1979-1981**
Dennis M. Devaney	*Member*	**1982-1988**

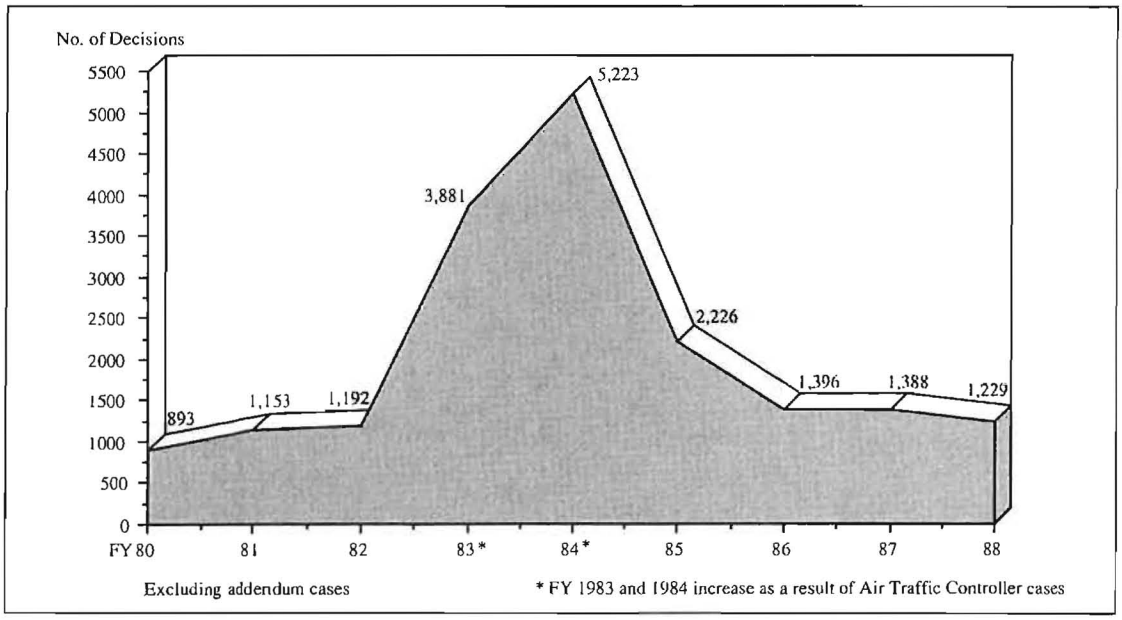
MSPB DECISIONS ON INITIAL APPEALS FY 1979-1988



MSPB AVERAGE PROCESSING TIMES INITIAL DECISIONS FY 1980-1988



MSPB DECISIONS ON PETITIONS FOR REVIEW FY 1980-1988



ALPHABETICAL INDEX OF CASES CITED IN *A TEN YEAR RETROSPECTIVE OF THE MERIT SYSTEMS PROTECTION BOARD*

Board Decisions

Allen v. U.S. Postal Service, 2 M.S.P.R. 582 (1980)
In the Matter of Larry Bohannon, 1 M.S.P.R. 15 (1979)
Brinkley v. Veterans Administration, 37 M.S.P.R. 682 (1988)
Callaway v. Department of the Army, 23 M.S.P.R. 592 (1984)
Chavez v. Office of Personnel Management, 6 M.S.P.R. 404 (1981)
Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981)
Gende v. Department of Justice, 23 M.S.P. R. 604 (1984)
Griffin v. Department of Agriculture, 2 M.S.P.R. 168 (1980)
Griffin v. Department of the Army, 23 M.S.P.R. 583 (1984)
Hougens v. U.S. Postal Service, 38 M.S.P.R. 135 (1988)
Ignacio v. U.S. Postal Service, 30 M.S.P.R. 471 (Spec. Pan. 1986)
Kling v. Department of Justice, 2 M.S.P.R. 464 (1980)
Lisiecki v. Federal Home Loan Bank Board, 23 M.S.P.R. 633 (1984)
Losure v. Interstate Commerce Commission, 2 M.S.P.R. 195 (1980)
McCaffrey v. U.S. Postal Service, 36 M.S.P.R. 224 (1988)
Merritt v. Department of Justice, 6 M.S.P.R. 585 (1981)
O'Donnell v. Department of the Interior, 2 M.S.P.R. 445 (1980)
Parker v. Defense Logistics Agency, 1 M.S.P.R. 505 (1980)
Pinto v. Department of Labor, 11 M.S.P.R. 422 (1982)
Ruzek v. General Services Administration, 7 M.S.P.R. 437 (1981)
Sandland v. General Services Administration, 23 M.S.P.R. 583 (1984)
Shuman v. Department of the Treasury, 23 M.S.P.R. 620 (1984)
Spithaler v. Office of Personnel Management, 1 M.S.P.R. 587 (1980)
Weaver v. Department of the Navy, 2 M.S.P.R. 129 (1980)

M.S.P.R. = U.S. Merit Systems Protection Board Reporter (West Company)

Court Decisions

Carducci v. Reagan, 714 F.2d 171 (D.C. Cir. 1983)
Filiberti v. MSPB, 804 F.2d 1504 (9th Cir. 1986)
Frazier v. MSPB, 672 F.2d 150 (D.C. Cir. 1982)
Hagmeyer v. Department of the Treasury, 809 F.2d 1581 (Fed. Cir. 1987)
Harvey v. MSPB, 802 F.2d 537 (D.C. Cir. 1986)
Hopkins v. Department of Justice, 725 F.2d 1368 (Fed. Cir. 1984)
Horner v. MSPB, 815 F.2d 668 (Fed. Cir. 1987)
Lovshin v. Department of the Navy, 767 F.2d 826 (Fed. Cir. 1985)
Peterson v. Department of Energy, 737 F.2d 1021 (Fed. Cir. 1984)
Starrett v. Special Counsel, 792 F.2d 1246 (4th Cir. 1986)
Towers v. Horner, 791 F.2d 1244 (5th Cir. 1986)

F.2d = Federal Reporter, 2nd Series (West Company)

HIGHLIGHTS OF FISCAL YEAR 1988 ACTIVITIES

In Fiscal Year 1988, the Board's regional offices maintained an already impressive record of case processing timeliness. Decisions on initial appeals from Federal employees were isssued within the Board's established 120-day time standard in 99.6 percent of all cases. The Board's administrative judges issued 6,402 decisions on initial appeals. Except for a small increase in Fiscal Year 1986, this figure has remained relatively constant since Fiscal Year 1985. Voluntary settlements among the parties to an appeal continued the dramatic increases of the past several years, rising to 48 percent of the initial appeals that were not dismissed.

At headquarters, the Board issued decisions on 1,385 petitions for review (including addendum case decisions). The Board also decided 13 cases arising under its original jurisdiction. Most of the original jurisdiction cases were brought by the Office of the Special Counsel, seeking disciplinary action against Federal employees alleged to have committed prohibited personnel practices or prosecuting violations of the Hatch Act.

Clerk of the Board staff members Linda Ruffin and Matthew Shannon

In Fiscal Year 1988 the Board continued to maximize use of its resources to accomplish its mission with a high degree of efficiency and effectiveness. The Board's stated "Improvement Objectives" are:

To ensure the quality of decisions and the adjudicatory process;

To enhance the merit systems studies and OPM oversight functions;

To continue to improve management efficiency and effectiveness; and

To improve the effectiveness of outreach activities.

As part of the Board's strategic plan, each office director in headquarters and the regional offices establishes specific action plans in support of one or more of the improvement objectives. Periodic reviews are conducted to monitor and assess each office's progress in fulfilling its action plan objectives and meeting its milestones.

In the area of case adjudication, the Board has continued to emphasize the need to ensure well-reasoned decisions both in the regional offices and at headquarters. The quality review program for regional office initial decisions has been strengthened, uniform jurisprudence has been promoted among the regions, and training of administrative judges has been conducted. At headquarters the Board has concentrated on issuing precedential decisions in cases involving "major issues," so that these deci-

sions may be used in the adjudication of other cases involving similar issues. In addition, fewer short form Orders summarily affirming initial decisions have been issued, with a corresponding increase in Board Opinions.

The Board continues to encourage use of alternative means of dispute resolution to achieve settlement between the parties. The Board's administrative judges have attended the National Judicial College and other training programs to improve their skills in this area, and the rate of settlements reached in cases brought to the Board has steadily increased. The greater use of settlement procedures has resulted in significant cost savings, without impinging on the rights of the parties.

The increased emphasis on the Board's merit systems studies and OPM oversight functions, initiated in Fiscal Year 1987, reached fruition in Fiscal Year 1988 with the release of seven major reports, including three on various significant actions of OPM. Several of these reports, including an update of the Board's earlier landmark study of sexual harassment in the Federal workplace, attracted national attention. Moreover, there is an impressive amount of evidence that the Board's reports are having an increasingly significant and positive impact in improving the efficiency and effectiveness of the public service.

The Board continued in Fiscal Year 1988 to implement management improvements aimed at increasing the efficiency and effectiveness of its work force. An integrated planning/budgeting process was initiated, significant progress was made on the redesign of the automated case tracking system, and new personal computers capable of utilizing a wide variety of off-the-shelf software were installed at Board headquarters and in the regional offices.

The Board has emphasized outreach activities in order to promote a greater understanding of the Board's practices and procedures, and of important issues in Federal personnel law, among the constituencies that deal with the Board. This emphasis is reflected in the number of appearances made by Board members, senior headquarters staff, and regional office directors and administrative judges at meetings, conferences, and training programs.

Assistant Deputy Director for Regional Operations Sandra Squire with staff member Janice Thomas

APPELLATE FUNCTIONS OF THE BOARD

INITIAL APPEALS

Most Federal employees are entitled to appeal certain personnel actions taken by Federal agencies. Appealable actions include removals or demotions for misconduct or performance, suspensions, employment suitability and retirement determinations, reductions-in-force, denials of within-grade increases, and denials of restoration-to-duty or reemployment rights. Appeals must be filed in writing, within 20 days of the personnel action, with the regional office having geographic jurisdiction.

After an appeal has been received, the regional office issues an order acknowledging receipt of the appeal and raising any questions of timeliness or jurisdiction. The appeal is then assigned to an administrative judge for processing. The agency is required to provide its evidentiary file to the appellant and the administrative judge. The appellant and the agency then have the opportunity to present additional information for the administrative judge's consideration.

The appellant may also request a hearing. If a hearing is held, each party has the opportunity to call and cross-examine witnesses, present evidence, and make arguments to the administrative judge. Hearings are open to the public and fully recorded by a court reporter, with copies of the record available to the parties.

The Board's established policy calls for the administrative judge to issue an initial decision within 120 days from the date the appeal was filed. In Fiscal Year 1988, 99.6 percent of all initial appeals were decided within 120 days. The regional offices averaged 73 days to issue decisions, a 2-day improvement over the average maintained in the 1986 and 1987 fiscal years.

In Fiscal Year 1988, the Board's regional offices issued decisions in a total of 7,124 cases, of which 6,402 were initial appeals and 722 were addendum cases, i.e., attorney fees, remands, and compliance (or enforcement). Settlements increased to 1,932 or 48.3 percent of those initial appeals not dismissed for lack of jurisdiction or timeliness and closed during the fiscal year.

The following table shows the processing times of the initial appeals decided in the regional offices during Fiscal Year 1988.

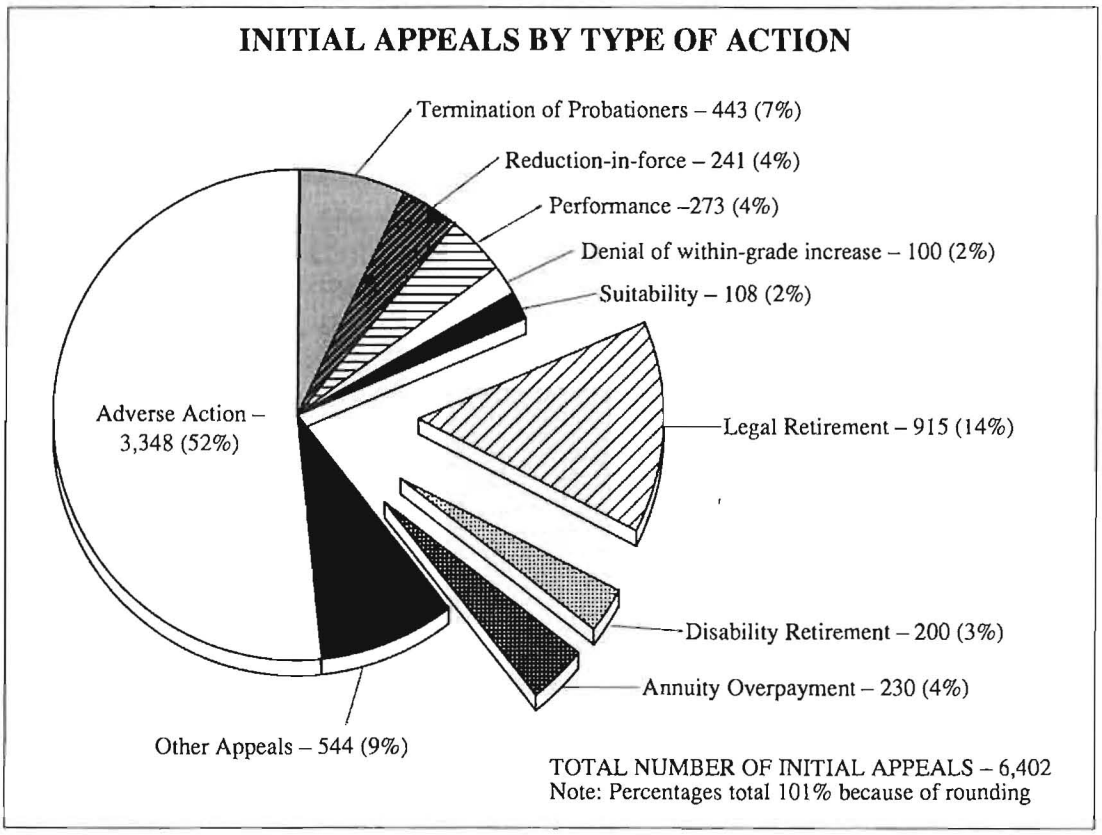
CASE PROCESSING TIMES IN REGIONAL OFFICES

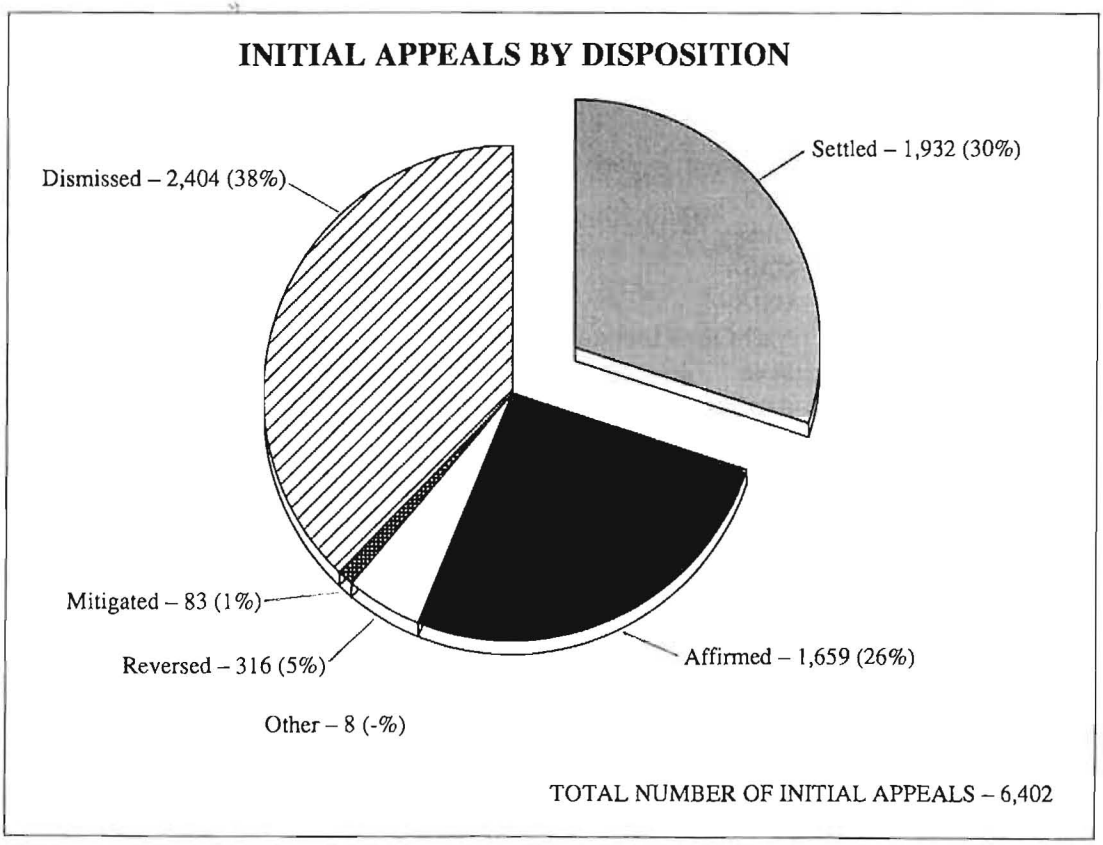
Decision Times (Days)	Number of Cases	Percent of Cases	Percent Total
0-30	551	8.6	8.6
31-60	1,751	27.4	36.0
61-90	1,931	30.1	66.1
91-120	2,144	33.5	99.6
120 +	25	.4	100.0
Total	**6,402**		

Fifty-two percent of the initial appeals were adverse action cases. The remaining appeals included retirement-related decisions, terminations of probationary employees, performance actions, reductions-in-force, and other appealable actions. The top chart shows the breakdown of initial appeals by the type of action appealed.

Hearings were held in 19 percent of all initial appeals. Fifty-five percent of appellants were represented by an attorney, union representative, or other person. Of the initial appeals that were adjudicated, 1,659 or 80.3 percent affirmed the agency action. Decisions on the remaining appeals that were adjudicated included reversals, which overturned the agency action, and mitigations, which reduced or modified the penalty imposed by the agency.

The bottom chart shows the breakdown by disposition of all initial appeals.





Initial Appeals Decided in FY 1988: By Selected Agencies

Agency	Initial Appeals Decided	Percent Dismissed	Number Not Dismissed	Percent Settled	Number Adjudi-cated	Percent Affirmed	Percent Reversed	Percent Mitigated/ Other
Postal Service	1,490	38%	923	68%	293	73%	17%	10%
OPM	1,459	23%	1,123	11%	1,001	85%	13%	1%
Navy	759	40%	457	62%	174	71%	20%	9%
Army	630	42%	368	58%	155	76%	18%	6%
Air Force	402	38%	249	60%	99	85%	11%	4%
VA	394	46%	213	65%	74	80%	15%	5%
Justice	170	45%	94	61%	37	65%	27%	8%
Treasury	167	61%	66	52%	32	75%	16%	9%
Defense	151	36%	96	62%	37	92%	5%	3%
Agriculture	125	46%	68	66%	23	78%	22%	-
HHS	101	41%	60	67%	20	75%	25%	-
Transportation	101	46%	55	58%	23	87%	13%	-
Interior	92	38%	57	61%	22	68%	23%	9%-
TVA	77	64%	28	36%	18	89%	11%	-
GSA	47	40%	28	54%	13	62%	15%	23%
Labor	36	53%	17	71%	5	100%	-	-
HUD	28	68%	9	67%	3	67%	33%	-
Commerce	22	55%	10	70%	3	100%	-	-
EEOC	17	41%	10	40%	6	67%	-	33%
Smithsonian	14	43%	8	88%	1	100%	-	-
SBA	14	50%	7	71%	2	50%	50%	-
EPA	13	46%	7	57%	3	67%	33%	-
FDIC	11	100%	-	-	-	-	-	-
Education	10	50%	5	20%	4	75%	25%	-
GPO	8	38%	5	20%	4	75%	25%	-
Energy	7	43%	4	75%	1	100%	-	-
NASA	7	29%	5	40%	3	67%	33%	-
USIA	6	50%	3	100%	-	-	-	-
Nat'l Credit Union	6	50%	3	50%	-	-	-	-
State	5	20%	4	50%	2	100%	-	-
All Other Agencies	33	57%	10	50%	5	100%	-	-
TOTAL	**6,402**	**2,404**	**3,998**	**1,932**	**2,066**	**1,659**	**316**	**91**
Average Percent		**38%**	**62%**	**48%**	**52%**	**80%**	**15%**	**4%**

Note 1. The selected agencies shown include all Executive agencies with at least 5 cases. Executive agencies, for purposes of this table, include the U.S. Postal Service and other governmental entities where the Board has jurisdiction.

Note 2. Because of the small number of cases involved, some percentages must be interpreted with caution.

Note 3. The large number of initial appeals for the Office of Personnel Management reflect the special jurisdiction this agency has in retirement and suitability issues.

Note 4. Dashes (-) indicate that there were no cases in this category.

ADDENDUM CASES

In addition to the decisions on initial appeals issued in Fiscal Year 1988, the regional offices issued decisions in 722 addendum cases. These included requests for attorney fees, enforcement cases alleging that there has not been full compliance with a decision of the Board or a regional office, and cases remanded to the regional offices. The following table shows the number of addendum cases by type.

ADDENDUM CASES

Category of Appeal	No. of Cases
Attorney Fees	287
Compliance (Enforcement)	309
Remands	126
Total	**722**

PETITIONS FOR REVIEW

The Board may grant a petition for review when it is established that the initial decision of the administrative judge was based on an erroneous interpretation of statute or regulation, or that new and material evidence is available that, despite due diligence, was not available when the record was closed. Petitions for review are filed with the Office of the Clerk in Board headquarters by either party, or, under certain circumstances, by the Office of Personnel Management or the Office of Special Counsel as an intervenor. The Board also has the discretion to reopen and reconsider an initial decision on its own motion.

The Board's decision on a petition for review constitutes final administrative action. Further appeal may then be available in the United States Court of Appeals for the Federal Circuit or, in cases involving allegations of certain types of discrimination, with a U.S. district court or the Equal Employment Opportunity Commission. The Director of OPM may intervene or petition the full Board for reconsideration of a final decision and may also seek judicial review of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.

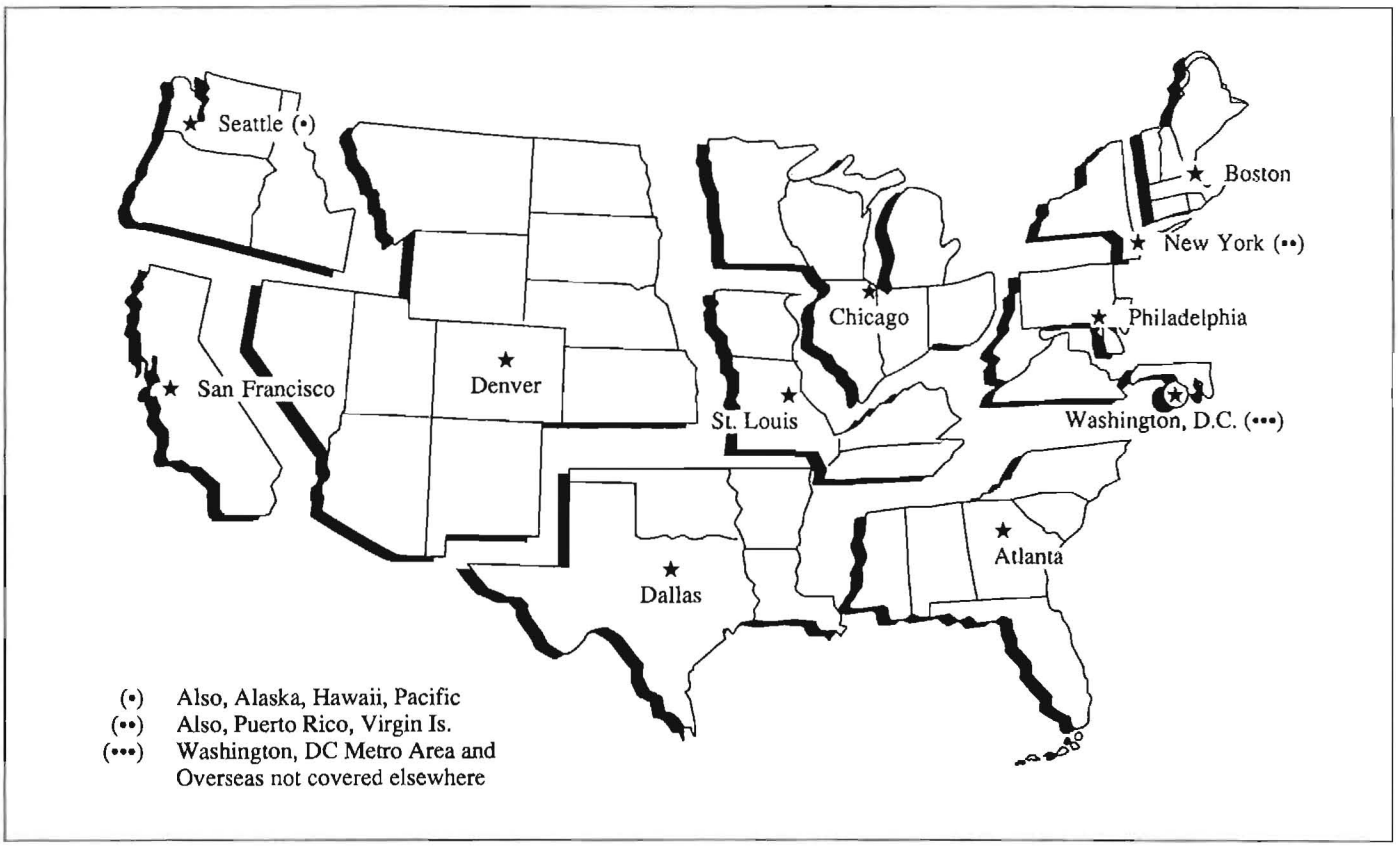
The Board completed action on 1,385 petitions for review in Fiscal Year 1988, of which 1,229 were filed to review initial decisions and the remaining 156 were addendum cases (attorney fees, enforcement and remands). The Board's decisions on 1,051 of the 1,229 petitions for review of an initial decision (85.5 percent) left the initial decision unchanged. During Fiscal Year 1988, 92.4 percent of final Board decisions reviewed by the United States Court of Appeals for the Federal Circuit were unchanged.

STEPS IN PROCESSING INITIAL APPEALS AND PETITIONS FOR REVIEW

Filing of Appeal by Appellant	Within 20 days of effective date of agency personnel action
MSPB REGIONAL OFFICE	
Appeal received Appeal acknowledged Appeal entered in Case Tracking System Case file requested from agency Appeal assigned to administrative judge (If appropriate, show cause order issued re: jurisdiction or timeliness)	1-3 days from receipt of appeal
Agency response and case file received Discovery begins Prehearing conference scheduled Notice of hearing issued (If show cause order issued, response received)	10-25 days from receipt of appeal
Prehearing motions filed and rulings issued Attempts to achieve settlement (various methods) Discovery completed Prehearing conference held (more than one may be held to facilitate settlement) Witnesses identified If no hearing, close of record set	10-60 days from receipt of appeal
Hearing held Record closed	60-75 days from receipt of appeal
Initial Decision issued	**Within 120 days from receipt of appeal**
Filing of Petition for Review (PFR) by Appellant or Agency (or OSC or OPM as intervenor)	Within 35 days of date of Initial Decision
BOARD HEADQUARTERS	
PFR received PFR acknowledged PFR entered in Case Tracking System Case file requested from Regional Office (If appropriate, show cause order issued re: jurisdiction, timeliness, or deficiency of PFR)	1-3 days from receipt of PFR
Response to PFR filed or Cross-PFR filed Case file received (If show cause order issued, response filed)	Within 25 days of date of service of PFR
If Cross-PFR received	Additional 25 days from date of service of Cross-PFR
If Extension of Time request received and granted	Additional time specified in Order granting EOT
Final Decision issued	**(Board time standard for issuance of Final Decisions is 110 days)**
Filing of appeal with U.S. Court of Appeals for the Federal Circuit (or in discrimination cases, with the appropriate U.S. District Court or EEOC)	Within 30 days of the party's receipt of Board Final Decision

(See Appendix A for summaries of significant Board decisions issued on appeals during Fiscal Year 1988.)

MSPB REGIONAL OFFICE JURISDICTIONS



Atlanta Regional Office
Alabama, Florida, Georgia, Mississippi, North Carolina, and South Carolina

Boston Regional Office
Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

Chicago Regional Office
Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

Dallas Regional Office
Arkansas, Louisiana, Oklahoma, Texas, and Swan Island

Denver Regional Office
Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming

New York Regional Office
New York, Puerto Rico, Virgin Islands, and the following counties in New Jersey: Bergen, Essex, Hudson, Hunterdon, Morris, Passaic, Somerset, Sussex, Union, and Warren

Philadelphia Regional Office
Delaware, Pennsylvania, Virginia (except cities and counties served by Washington Regional Office - see below), West Virginia, and the following counties in New Jersey: Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, Middlesex, Monmouth, Ocean, and Salem

St. Louis Regional Office
Iowa, Kentucky, Missouri, and Tennessee

San Francisco Regional Office
California

Seattle Regional Office
Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas

Washington Regional Office
Washington, DC, Maryland, all overseas areas not otherwise covered, and the following cities and counties in Virginia: Alexandria, Arlington, Fairfax City, Fairfax County, Falls Church, Loudoun, and Prince William

ORIGINAL JURISDICTION FUNCTION OF THE BOARD

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

Corrective and disciplinary actions brought by the Special Counsel against agencies or Federal employees who are alleged to have committed prohibited personnel practices, or to have violated certain civil service laws, rules or regulations;

Requests for stays of personnel actions alleged by the Special Counsel to result from prohibited personnel practices;

Disciplinary actions brought by the Special Counsel alleging violation of the Hatch Act;

Certain proposed disciplinary actions brought by agencies against administrative law judges;

Requests for review of regulations issued by the Office of Personnel Management, or of implementation of OPM regulations by an agency; and

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

Edward J. Reidy
Administrative Law Judge

Original jurisdiction complaints are filed in writing with the Office of the Clerk at Board headquarters. Employees against whom Hatch Act, other disciplinary action, or administrative law judge disciplinary action complaints are filed have 30 days to respond and are entitled to hearings. These cases are assigned to the Board's Administrative Law Judge, who issues a recommended decision to the Board for final decision. In SES performance removal cases, the Administrative Law Judge holds an informal hearing, but there is no action by the Board. Special Counsel stay requests and requests for regulation review are decided by the Board. (An initial stay request may be granted by a single Board member.) Appeals from most original jurisdiction cases are filed with the United States courts of appeals.

Two other types of cases, although technically within the Board's appellate jurisdiction, are processed originally at Board headquarters (rather than in a regional office). These are petitions to review an arbitrator's award and appeals from the Board's own employees. Decisions in arbitration cases are issued by the Board. In the case of appeals from MSPB employees, the Administrative Law Judge hears the case and issues the initial decision. Unless a petition for review is filed and the Board considers the case, the decision of the Administrative Law Judge becomes the final decision.

Addendum cases (attorney fees, compliance, and remands) arising out of Board decisions in original jurisdiction cases are also included in the Board's original jurisdiction caseload.

During Fiscal Year 1988, the Board issued decisions in 13 original jurisdiction

cases. Of these, three were actions filed by the Special Counsel alleging violation of the Hatch Act, seven were other Special Counsel disciplinary actions, two were Special Counsel stay requests, and one was a proposed disciplinary action against an administrative law judge. The Board's Administrative Law Judge held an informal hearing in one case involving removal from the Senior Executive Service. There were no requests for review of regulations. Two original jurisdiction addendum cases were decided in Fiscal Year 1988.

The Board also decided 13 cases involving review of arbitrators' awards, including 1 case with 28 appellants, and 1 MSPB employee appeal during the fiscal year.

The following table shows the breakdown of original jurisdiction cases by type of action and provides information on the disposition of these cases.

NUMBER AND DISPOSITION OF ORIGINAL JURISDICTION CASES

FY 1988

Type Case	No. of Cases	Disposition
Special Counsel - Disciplinary Actions (other than Hatch Act)	7	Demotion ordered in 1 case. Settlement of 3 cases. Dismissal of 3 cases.
Hatch Act Violations	3	Violation found in 2 cases: In 1 case involving 3 respondents, debarment of 2 was ordered and removal and debarment of 1 was ordered. In the other case, the respondent's removal was ordered. Dismissal of 1 case.
Special Counsel - Corrective Actions	0	
Special Counsel - Stay Requests	2	Stays granted.
Actions against Administrative Law Judges	1	Suspension upheld.
Review of Regulations	0	
Total	**13**	

(See Appendix B for summaries of significant Board decisions issued in original jurisdiction cases during Fiscal Year 1988.)

SPECIAL PANEL

The Special Panel was established by the Civil Service Reform Act of 1978 as a separate entity to resolve disputes between the Merit Systems Protection Board and the Equal Employment Opportunity Commission in "mixed cases." These are cases that involve both a matter appealable to the Board and an issue of discrimination. The Special Panel consists of one Board Member designated by the MSPB Chairman, one EEOC Commissioner designated by the EEOC Chairman, and a third individual appointed by the President to serve as Chairman of the Special Panel. President Reagan appointed Barbara Mahone as Chairman of the Special Panel on October 18, 1985.

During Fiscal Year 1988 there were no cases pending before the Special Panel.

LITIGATION

During Fiscal Year 1988, the Board monitored over 800 cases involving appeals from decisions issued by the Board under its appellate jurisdiction. These cases are filed in the United States Court of Appeals for the Federal Circuit. The agency is the named respondent and is defended by the Department of Justice. Board activities in connection with monitored litigation include responding to inquiries, assisting in the preparation of briefs, preparing a case summary and chronology, preparing a legal evaluation, and analyzing the published court decision.

General Counsel Lew Fischer with staff member Purla Doster

The most complex litigation in which the Board is named as the respondent arises from civil actions appealing decisions issued under the Board's original jurisdiction authority and filed in the various U.S. Courts of Appeals or Federal district courts. (A Federal Circuit order issued in 1987 eliminated the Board as a respondent in appeals from attorney fee decisions and cases that the Board had dismissed for lack of jurisdiction or timeliness.)

Cases where the Board is the respondent usually involve complex issues such as the extent of the Special Counsel's jurisdiction and Hatch Act violations. Other active litigation includes discrimination cases filed in the various Federal district courts, when the Board is a defendant; cases in which the Board intervenes, such as OPM petitions for review in the Federal Circuit; and administrative litigation arising out of appeals to MSPB filed by Board employees. The Board was the respondent or intervenor in 35 such cases in FY 1988.

(See Appendix C for summaries of the significant litigation activities of the Board during Fiscal Year 1988.)

IMPROVEMENT OBJECTIVES

TO ENSURE THE QUALITY OF DECISIONS AND THE ADJUDICATORY PROCESS

The Board continued to ensure the quality of initial decisions in the regional offices through the quality review program established in Fiscal Year 1987. By the end of Fiscal Year 1988, 41 of the Board's 61 administrative judges had been reviewed for the quality of their initial decisions. All of the Board's administrative judges will have been reviewed by September 1989.

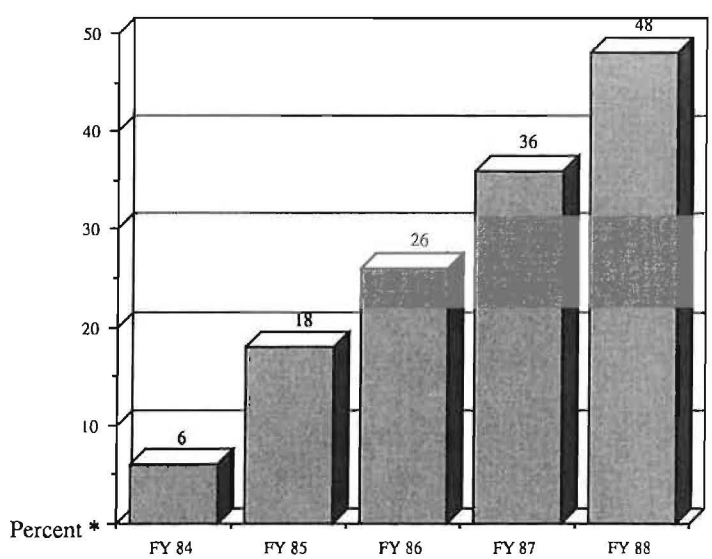
Having implemented new "plain English" standard orders in the regional offices during the previous fiscal year, the Board concentrated in Fiscal Year 1988 on rewriting its regulations in "plain English." The project is expected to be completed during Fiscal Year 1989. Like the other components of the "plain English" initiative, the rewrite of the Board's regulations is intended to make the appeals process easier for employees to understand. Forty-five percent of the employees whose appeals were decided in Fiscal Year 1988 did not have an attorney or other representative.

In Fiscal Year 1988, the Board held a National Administrative Judges conference for the first time since passage of the Civil Service Reform Act of 1978. This national conference provided a forum for training in all aspects of adjudication. The Board's administrative judges have also attended the National Judicial College for training in alternative dispute resolution techniques.

The Board's administrative judges have shown an impressive array of dispute resolution techniques, each with its own special characteristics and applications. The administrative judges facilitate exchanges between the parties, suggesting possible solutions and helping the parties reach a voluntary agreement. They make use of the prehearing conference stage of the appeals process to gain an ongoing involvement with the parties, thus facilitating settlement. They also may conduct a mini-trial where the participants present a condensed version of their best arguments and then discuss settlement. Since these processes are voluntary, the parties surrender no rights if an agreement is not reached, and the case can proceed to adjudication.

These innovative techniques have resulted in increasingly higher settlement rates over the past several years. The chart below shows settlement rates for the past five fiscal years.

SETTLEMENT RATES



* Percent of initial appeals not dismissed for lack of jurisdiction or timeliness. (Addendum cases are not included)

The Board continues to emphasize settlement procedures because, properly utilized, they ensure that the rights of the parties are protected and also provide the single most cost-effective means of dispute resolution. Cost savings are achieved principally in salaries, travel expenses, and court reporting fees. The Board estimates that settlements in Fiscal Year 1988 alone resulted in cost savings of $1,196,092.

Deputy Executive Director for Regional Operations Mark Kelleher and staff member Len Slobodin.

At headquarters, the Board has continued to ensure the quality of decisions through its issuance of detailed Opinions and Orders. These precedential decisions can be relied on by the administrative judges in subsequent appeals, and also serve to inform and guide Federal agencies, their employees, and the representatives of both, in taking and challenging appealable actions. The Board also concentrates on the resolution of cases involving "major issues," those which occur with some frequency in employee appeals. Their resolution in one or two appeals, therefore, allows for resolution in many other cases.

Mary Green and Deborah Johnson of the Executive Director's staff.

In Fiscal Year 1988, the Board, the Equal Employment Opportunity Commission, and the Federal Labor Relations Authority met to discuss problems, possible solutions, and alternatives to the current dispute resolution systems in use throughout the Federal Government. The areas of study that were identified and assigned to task forces included: (1) dispute resolution systems, (2) overlapping jurisdictions, (3) prevention and alternatives, and (4) current issues. The various task forces, after exhaustive study and review, submitted initial reports to the chairpersons of the three agencies. The task forces are continuing their analyses of problems and devising solutions to eliminate those problems.

TO ENHANCE THE MERIT SYSTEMS STUDIES AND OPM OVERSIGHT FUNCTIONS

Evangeline W. Swift
Director
Office of Policy and Evaluation

During Fiscal Year 1988, the impact and utility of the Board's reports of its merit systems studies and OPM oversight became increasingly evident. As a result of a revitalization of these functions, begun during the previous fiscal year, the Board was able to issue seven major reports during Fiscal Year 1988 on important civil service issues. These reports concerned:

Job satisfaction of Federal employees, including differences in overall job satisfaction among various categories of employees and views of specific facets of worklife;

The effects of a significant expansion of Federal agencies' authority to hire temporary employees on the quality and integrity of the civil service;

The effectiveness of the Performance Management and Recognition System (PMRS), highlighting the problem of "rating inflation" in various Federal agencies;

Significant findings from a Board survey of Federal employees who shared their views and experiences on a wide variety of issues, including the relative incidence of prohibited personnel practices, the quality of current job applicants, and how managers deal with problems of poor performance;

The nature and extent of sexual harassment in the Federal Government, detailing the experiences and responses of Federal agencies and employees and providing recommendations for corrective actions;

The Federal Government's ability to attract quality college graduates to entry-level professional positions, with suggestions for improvement; and

The operation of performance management programs in various Federal agencies, focusing on the integration of performance, pay, and awards systems for the purpose of improving individual and organizational effectiveness.

(See Appendix D for summaries of these reports.)

In addition to the reports released during Fiscal Year 1988, the Board developed and started work on an ambitious agenda for forthcoming studies and reports. These include: (1) a retrospective review of the significant actions of OPM: FY 1978-1988; (2) a survey of former members of the Senior Executive Service; (3) a review of the operation of merit-system related programs

Staff members John Palguta and Patricia Carpenter watch Policy and Evaluation Director Van Swift on a news broadcast dealing with the sexual harrassment study.

and procedures in a non-Title 5 agency, the Tennessee Valley Authority; (4) a study of OPM and agency initiatives to free managers from overly prescriptive personnel rules; (5) a review of current OPM initiatives dealing with Federal recruitment matters and, separately, the development of position classification and qualification standards; (6) a study of the selection of first-line supervisors in the Federal Government; (7) a study of who is leaving the Federal Government and why; and (8) a survey of over 3,000 senior and full performance level personnel officials throughout Government on a wide variety of Federal personnel management matters.

The program and policy research underlying the Board's studies is carried out by a highly qualified and multi-disciplinary team of personnel specialists, program analysts, and personnel research psychologists. The Board's studies are conducted through a variety of research methods, including mail and telephone surveys, on-site systems reviews, written interrogatories, formal discussions with subject matter experts, computer-based data analysis, and reviews of secondary source material.

The Board's studies and reports provide important insights and information on the civil service for public policy decision makers at all levels. Moreover, this function is increasingly important in the evolution of effective public personnel policies and practices.

During Fiscal Year 1988, the Board not only responded to literally thousands of requests for copies of its reports but also responded to requests for additional information on various studies from a wide variety of agencies including the Office of Management and Budget, the General Accounting Office, the Office of Personnel Management, the General Services Administration, NASA, and the Departments of Treasury, Health and Human Services, Agriculture, Army, Navy, Air Force, and Defense. In addition, the results of these studies are being used outside the Government, are being referenced in professional journals and national media publications, and are being used by public interest groups such as the National Commission on the Public Service (Volcker Commission).

The Board's issuance of its report on sexual harassment in the Federal workplace received extensive coverage in the print and broadcast media. Since its issuance, it has been cited in numerous followup articles and editorials on the subject of sexual harassment. The Board's performance management and college recruiting reports also received widespread and favorable media coverage. The performance management report was the subject of stories in national

newspapers on the day of its release, and its findings continue to be cited in other articles. The college recruiting report has been cited in numerous articles dealing with initiatives to improve Federal recruiting efforts.

The Board has received very positive responses on the usefulness of its reports from the White House, the Congress, and the Office of Management and Budget. Its data, analyses, and recommendations are widely quoted and viewed as authoritative. Many of the recommendations contained in the Board's reports during Fiscal Year 1988 have been adopted in whole or in part by the agencies affected by the studies. For example, several new issuances by the Office of Personnel Management specifically reference findings or recommendations from the Board's reports, and a number of other Executive branch agencies have also specifically mentioned the Board in revising relevant policy statements and other internal issuances.

TO CONTINUE TO IMPROVE MANAGEMENT EFFICIENCY AND EFFECTIVENESS

During Fiscal Year 1988, the Board continued to enhance management efficiency and effectiveness through its focus on management improvement objectives. To support the strategic planning process, regional and headquarters office directors developed 200 action plans for accomplishing improved operations under one of the four major improvement objectives. These plans were tracked throughout the fiscal year and resulted in significant systems and program improvements. Examples include the development of a new Performance Management Plan and an integrated planning/budgeting system.

Staff members C.P. Handly and Charles Stanislav with Assistant to the Executive Director for Management Paul Mahoney

During Fiscal Year 1988, the Board integrated the separate processes for developing management plans and for developing the annual budget into one unified system. This system ensures that the MSPB mission, goals, and improvement objectives are properly reflected and incorporated into the planning/budgeting process and that underlying office plans are comprehensive, complete, and non-redundant. The system provides for long term (5-year) planning for better workload management and achievement of goals; integration of required 5-year planning for internal controls and information resources management; estimating budget requirements to support the MSPB 5-year strategic plan; and providing budgetary information required by the Office of Management and Budget and the Congress.

T. Paul Riegert
Inspector General

To complement increasing internal audit coverage by the MSPB Inspector General, the Board established an expanded audit followup program in accord with OMB Circular A-50, "Audit Followup." This program is designed to ensure timely action on audit findings and recommendations by providing periodic reports to top management and by providing maximum coordination of corrective action to ensure the uniform benefits of improved management throughout the agency and full compliance with Governmentwide regulations.

The Board continued to expand its automated systems in Fiscal Year 1988. Installation of new IBM-compatible PC's allowed the Board to take full advantage of off-the-shelf software, in lieu of more expensive custom developed software, to support its automated operations. As other PC's need to be replaced, new IBM-compatible computers will be procured to continue the movement toward an IBM-compatible workplace. The Board also procured and installed desktop publishing software that will allow MSPB employees to design and prepare many publications in-house, thereby saving the time and expense involved in using outside contractors for the design and layout of publications.

The Board undertook efforts to improve its automated case tracking system, which provides for the monitoring of all initial appeals, petitions for review, and litigation, and allows the generation of statistical reports on case workload patterns, processing times, and other administrative issues. The goal of the project is to add features such as electronic docketing with automatic generation of case-related routine orders and correspondence, improved user interface, and easier access to information by users. The system design phase will continue into Fiscal Year 1989 and completion of the entire project,

Information Resources Director Steve Beckman *(right)* with staff members Walt Carlson and Bill Cunningham

including computer program development, system testing, training, and implementation, is scheduled for Fiscal Year 1990.

In December 1987, the Board realigned its merit system studies and internal management improvement functions into two separate offices. The streamlined Office of Policy and Evaluation focused on an expanded agenda of merit system studies and reviews of OPM significant actions. The new Office of the Assistant to the Executive Director for Management assumed an expanded internal management role and the responsibility for producing the Board's annual study of its decisions.

TO IMPROVE THE EFFECTIVENESS OF OUTREACH ACTIVITIES

Library Director Kathleen O'Sullivan

The Board continued in Fiscal Year 1988 to enhance its reputation as a fair and impartial adjudicator through its outreach programs to major constituencies. The Board members, headquarters staff, regional office directors, and administrative judges addressed groups, participated in seminars and conferences, conducted training programs, and published articles in order to further an understanding of the Board's policies and procedures and of important issues in Federal personnel law.

To mark the tenth anniversary of the Civil Service Reform Act, the Board sponsored a conference jointly with the Federal Labor Relations Authority and the Public Administration Forum. The conference covered a variety of topics related to the CSRA and included such prominent speakers as Representative Patricia Schroeder, chair of the Civil Service Subcommittee of the House Committee on Post Office and Civil Service; Senator Ted Stevens, Ranking Minority Member of the Federal Services, Post Office and Civil Service Subcommittee of the Senate Governmental Affairs Committee; OPM Director Constance Horner and former OPM Director Donald Devine; FLRA Chairman Jerry Calhoun; EEOC Chairman Clarence Thomas; Special Counsel Mary Wieseman; former Board Chairman Ruth Prokop and former Vice Chairman Ersa Poston; Robert Tobias, President of the National Treasury Employees Union; and Kenneth Blaylock, then President of the American Federation of Government Employees.

A delegation from the Board participated in the Sixth Annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit and presented a program focusing primarily on the Board's settlement initiative. Board attorneys also spoke at Federal Circuit regional conferences and at symposia sponsored by the Federal Bar Association. Topics included recent significant Board decisions, attorney fees, sexual harassment, and AIDS in the Federal workplace. Board

staff also discussed Board procedures and significant decisions on programs for the Departments of Agriculture, Army, and Air Force, and for the Office of Personnel Management.

The Board sponsored a symposium on performance-based actions in December 1987. Among the topics covered by Board attorneys were performance standards and elements, communication of standards, the statutory requirement for a reasonable opportunity to demonstrate acceptable performance, and related Chapter 43 issues. This was the latest in a series of symposia, open to the public, on topical legal issues.

Legal Technician Pam Grayson of the Office of General Counsel

The Board's special studies staff were also active in outreach activities, addressing various meetings on important personnel management topics and the results of recent Board studies. In particular, the release of the Board's 1988 update report on sexual harassment in the Federal workplace led to numerous appearances to discuss the report's findings. Members of the studies staff spoke to units of the Departments of Defense and Interior, the Farmers Home Administration, the Small Agency Council, and the Federal Women's Interagency Board Conference, among others.

The Board's studies and OPM oversight functions, the impact of Board studies, and the findings in various Board reports, were topics addressed at the Sixth Annual Judicial Conference, the Federal Circuit Bar Association Conference, and various meetings of the International Personnel Management Association, the American Society for Public Administration, and the National Academy of Public Administration. Members of the studies staff also continued to respond to requests to speak on a variety of relevant topics to graduate and undergraduate classes at a number of colleges and universities.

In Fiscal Year 1988, the regional offices continued their successful outreach activities. The regional directors and administrative judges delivered more than 100 speeches at meetings and conferences attended by thousands of participants. These activities included the annual conference of the U.S. Court of Appeals for the Federal Circuit, Federal Bar Association meetings, and programs for Government personnel officers and Federal employee union personnel. The Dallas regional office conferences on Merit Systems Protection Board Law and Procedures, which are approved for continuing legal education credit, were presented in three states.

In April 1988, the Vice Chairman and the Executive Director represented the United States at the Fifteenth International Symposium on Public Personnel Administration in London, England. The major discussion topics were improving performance through better management and strategies for selecting and developing managers. The symposium provided an opportunity for representatives from 15 countries, the Council of the European Communities, and the United Nations to exchange information and views about their public personnel management practices.

Articles published by Board employees during Fiscal Year 1988 include "The Merit Systems Protection Board at Ten" by Michael Bogdanow and "Managing Cases in a Nationwide Judicial Agency" by Paul Mahoney, both in the July/August 1988 issue of Federal Bar News & Journal; "The Application of Collateral Estoppel in Proceedings Before the U.S. Merit Systems Protection Board" by Ramon Gomez, in the January 1988 issue of Labor Law Journal; "Current Developments in Whistleblower Protection" by John Howard and "The Merit Systems Protection Board's Application of the Community Rate Principle in its Awards of Reasonable Attorney Fees" by Katharine Klos, both in the February 1988 issue of Labor Law Journal; and "The Health of the Civil Service: What an MSPB Study Reveals" by Carol Hayashida, in the July 1988 issue of Federal Managers Quarterly.

In June 1988, the Director of the Board's Office of Appeals Counsel, William H. DuRoss, III, was appointed Vice-Chair of the Labor and Employment Law Committee of the Administrative Law Section of the American Bar Association. The appointment is for the 1988-89 term. The committee's jurisdiction includes the adjudicative and rulemaking functions of all Federal and state agencies that regulate employment laws in the private sector.

William H. DuRoss, III
Director
Office of Appeals Counsel

A continuing activity of particular interest is the Board's international visitors program. Conducted at Board headquarters by the Chairman and senior staff, this program is responsive to requests from foreign visitors who wish to visit the Board in order to learn about merit system principles and the Board's practices and procedures. During Fiscal Year 1988, the Board made presentations to visitors from Taiwan, the Philippines, Bangladesh, St. Kitts/Nevis, and the Republic of Maldives.

FINANCES AND HUMAN RESOURCES

FINANCIAL STATEMENT

The obligations and expenditures of the Merit Systems Protection Board for Fiscal Year 1988 (October 1, 1987, through September 30, 1988) are shown below:

1988 ACTUAL OBLIGATIONS AND EXPENDITURES

(Thousands of dollars)

Direct obligations:	
Personnel compensation	
Full-time permanent	10,776
Other than full-time permanent	853
Other personnel compensation	201
Subtotal	**11,830**
Personnel benefits	1,433
Benefits for former employees	5
Travel and transportation of persons	453
Transportation of things	84
Rental payment to GSA	1,658
Rental payments to others	37
Communications, utilities, and miscellaneous charges	500
Printing and reproduction	83
Other services	1,333
Supplies and materials	272
Equipment	715
Subtotal	**18,403**
Reimbursable obligations	1,249
Total obligations	**19,652**

The full time equivalent employment data as reported in the President's annual budgets reflect a reduction from a peak of 420 in Fiscal Year 1983 to 281 in Fiscal Year 1988, a reduction of 33 percent. This reduction demonstrates increases in the Board's case management efficiency and reduced staffing requirements following the elimination of appeals resulting from the Air Traffic Controllers strike of 1981.

The representation of women and minorities in the Board's work force continues to be impressive. Women and minorities are not clustered in lower grades, and the Board's representation of these groups in professional occupations is high. The following table shows the percentages of female and minority attorneys, as well as the percentage representation of these groups in the Board's work force as a whole.

MSPB EMPLOYMENT BY RACE, NATIONAL ORIGIN, AND SEX

Data as of September 30, 1988

ATTORNEYS

	No. in Attorney Workforce	Percent of Attorney Workforce
Male	76	60.8
Female	49	39.2
Total	**125**	**100.0**
Minority *	27	21.6
Majority	98	78.4
Total	**125**	**100.0**

MSPB (Entire Agency)

Male	123	42.70
Female	165	57.30
Total	**288**	**100.00**
Minority *	112	38.89
Majority	176	61.11
Total	**288**	**100.00**

* *Excluding White/Female*

Darrell L. Netherton
Director
Office of Administration

The Office of General Counsel conducted ethics training for all Board employees during the past year. The training was designed as a seminar and took place both in the regional offices and at headquarters. Its purpose was to acquaint employees with the Government's rules of ethics and the Board's ethics program. It focused on conflicts of interest, acceptance of gifts, and misuse of Government property. Employees learned how to avoid potential ethical problems and were made aware that the Board's ethics office is available to give them advice.

Other training programs included a full day seminar for all Board employees on the prevention of sexual harassment in the workplace. The Board offered a program on "AIDS in the Workplace" shortly after issuing its policy on this subject. All Board personnel received word processing training aimed at increasing the efficiency of their use of personal computers.

On March 9, 1988, the Executive Director signed the first collective bargaining agreement with the M.S.P.B. Professional Association. Its most significant feature is a grievance procedure that provides a vehicle for the members of the bargaining unit to raise concerns to management about certain employment conditions and for working out amicable resolutions to employment problems. The Association represents most General Schedule attorneys at headquarters and administrative judges in the regional offices.

The Board's Special Emphasis Programs gave various presentations highlighting the many contributions made by the diverse groups that make up our national fabric. For example, the Black Employment Program exhibited the films "From Montgomery to Memphis" and "Remembering the Dream" in commemoration of the life and works of Dr. Martin Luther King, Jr. His son, Martin

Personnel Supervisor Betty Bruce and staff member Louis Polk

Luther King, III, was a guest speaker for one of the Board's Black History Month programs. Other Special Emphasis Programs celebrated Hispanic Heritage Week, honored the contributions of Asian-Americans, and recognized Women's Equality Month.

Three of the Board's senior officials were honored in Fiscal Year 1988 for their distinguished contributions to the public service. Executive Director Lucretia F. Myers was honored by President Reagan with the Presidential Rank Award of Distinguished Executive in the Senior Executive Service. In presenting the award, the President cited Ms. Myers for her "exceptional leadership in developing and implementing management improvements of long-term benefit to Government operations." Paul D. Mahoney, Assistant to the Executive Director for Management, received one of seven Presidential Management Improvement Awards, recognizing individuals, small working groups, and teams whose achievements resulted in substantial tangible benefits to the Government. He was cited for accomplishments resulting in "savings of well over $1 million annually." Martin W. Baumgaertner, Chief Administrative Judge and Regional Director of the Board's Chicago Regional Office, was presented the Arthur S. Flemming Award by the Downtown Jaycees of Washington, DC. This award honors outstanding Federal employees who have made significant contributions both to the Federal Government and to their communities.

Robert E. Taylor
Clerk of the Board

San Francisco Administrative Officer Liz Yee, Dallas Legal Technician Bobbie Williams, and Seattle Administrative Officer Dianne Suhara at a computer training session.

APPENDIX A SIGNIFICANT BOARD DECISIONS

APPELLATE JURISDICTION CASES

Significant appellate jurisdiction cases decided by the Board during Fiscal Year 1988 included the following:

Arbitration Decisions

***Williams v. United States Postal Service*, BN07528510175 (December 11, 1987)**

The Board declined to apply collateral estoppel to arbitration decisions resulting from Postal Service grievances. However, it determined that it would defer to such decisions and set them aside or modify them where the appellant shows that the arbitrator erred in interpreting civil service law, rule, or regulation. Board review of those decisions will be based on Board precedent.

***Fierro, et al. v. Treasury*, SF03518710706 (December 18, 1987)**

The filing of exceptions with the Federal Labor Relations Authority regarding an arbitrator's decision, pursuant to 5 U.S.C. § 7122, keeps that decision from becoming final. Because only a final decision may be appealed to the Board under 5 U.S.C. § 7121, where such exceptions have been filed, an appeal to the Board is premature.

Compliance

***Broadnax v. United States Postal Service*, SF075279C9006 (October 1, 1987)**

Where an agency's action is reversed on a finding of discrimination, Title VII law applies in determining the employee's right to remedy. Where a removal is reversed, the employee is entitled to be placed in the position to which his seniority would have entitled him had he not been removed. That this will require reconstruction of records and some dislocation of junior employees is insufficient reason for denying the appellant his remedy in the absence of a showing of undue interruption or administrative hardship.

***Phelps v. Labor*, DE035182C0200 (October 9, 1987)**

Where a removal action is reversed, overtime earned in a replacement job during the back pay period in excess of that which would have been earned in the desired job should not be offset. This rule is based largely on case law developed under Title VII.

***Souders v. Office of Personnel Management*, AT083186C0453 (October 22, 1987)**

The Board held that it has authority to order OPM to provide the appellant with the health benefits to which she was entitled by virtue of her having prevailed before the Board regarding her entitlement to a survivor annuity.

***Wittl v. Department of the Air Force*, DA075287C0131 (December 22, 1987)**

In its decision on the merits, the Board reversed the appellant's removal from his position for medical disqualification. In this decision, the Board found that the agency was not in compliance when it returned the appellant to his former job, because it continued to impose on him the medical restrictions that had previously been in effect. Although those restrictions had been imposed by a doctor, the Board found that they were overridden by the administrative

judge's holding that the agency had failed to prove its charge. It found, however, that the administrative judge had erred in finding that the agency was not in compliance because it had reassigned the appellant to the day shift when the appellant had not raised this allegation and the agency had discretion to reassign its work force. The Board also rejected the appellant's contention that to be made whole all references to the medical restrictions must be expunged from his records, but noted that the Board's subsequent reversal of the restrictions also must be cited when the agency's original action is. Finally, the Board rejected the agency's contention that the appellant could not seek compliance in connection with later alleged instances of noncompliance, but rejected the appellant's contention that being made to take the same physical and mental examinations as other employees constituted harassment.

***Dancer v. United States Postal Service*, DA075282C0602 (March 2, 1988)**

The Board found that the agency had not complied with its March 5, 1987 Order cancelling the appellant's removal and reinstating him because the agency had failed to inform the appellant of his sick leave balance as of the date of his removal, had not credited him with the annual leave to which he was entitled, and had not restored the health benefits and union dues which were incorrectly withheld from his back pay award. The agency was ordered to comply with the reinstatement Order.

***Dancer v. United States Postal Service*, DA075282C0602 (September 14, 1988)**

While the appellant's compliance case was pending before the Board, the United States Supreme Court issued *Loeffler v. Frank*, 108 S.Ct. 1965 (1988), finding that interest on back pay should be awarded against the Postal Service in Title VII cases. Using the National Labor Relations Act as guidance, the Board found that the appellant should receive interest and that the interest should be computed at the rate and by the method used by the National Labor Relations Board. The Board ordered the Postal Service to compute and pay interest from the date of the appellant's improper removal to the date of final payment of the back pay award.

***Yetman v. Department of the Army*, NY043287C0115 (March 25, 1988)**

The appellant's removal from her supervisory position for performance reasons was reversed. By the time that she was reinstated, two subordinate jobs had been filled and the appellant was made their "work leader" rather than their supervisor. The Board concurred in the administrative judge's finding that the agency's action did not constitute compliance with the decision reversing the removal. It rejected the agency's argument that because the two other jobs did not exist before the removal, it was not required to make the appellant the incumbents' supervisor, finding instead that if the positions had existed, she would have been the supervisor. The Board also rejected the argument that the agency merely took away some paper work responsibilities in order to allow the appellant to concentrate on her more important supervisory duties. The agency was ordered to effect full compliance.

***Wilson v. United States Postal Service*, CH075282C5033 (April 4, 1988)**

The administrative judge found that the appellant, whose removal was reversed in 1987, was entitled to compensation for the additional tax liability he sustained as a

result of his receipt of back pay in 1987 and the concurrent repeal of the income averaging provisions of the tax laws. The Board disagreed, finding no authority for such compensation in the Postal Service regulations. It also held that although there was a "make whole" purpose to the remedy in Title VII cases, that authority did not justify the requested compensation because it did not extend to incidental or consequential losses that are not part of the employment relationship. Although one court of appeals has awarded damages for additional tax liability, the Board noted that it was the only one to have done so and its decision rested on the lengthy course of litigation in that case, litigation that lasted for 17 years, a much longer time than the 5 years at issue here. The Board also noted that there is no explicit statutory authority for the payment of consequential damages by the Government. Finally, the Board found that the appellant failed to "clearly establish" that he would have been promoted if he had not been removed, so that his return to his former job constituted proper restoration.

***Cofield v. Government Printing Office*, DC075281C0599 (April 11, 1988)**

After the Board reversed the appellant's removal from the position of police officer, the agency returned him to a job that did not require that he carry a gun. The Public Printer refused to return the appellant to his former job, arguing that only he had the authority to determine whether an employee should be allowed to carry a gun. The Board then found that, under 5 U.S.C. § 1205(d)(2), it could not enforce compliance by ordering the salary of the Public Printer withheld because he is a Presidential appointee who was appointed with the advice and consent of the Senate. On remand from the Federal Circuit to determine whether the Public Printer delegated his authority to a lower level employee, the Board determined that he had not. The Board found, first, that he was solely responsible for the agency's noncompliance. It next noted that under the agency's statute, the appointing authority resides in the Public Printer or his delegate, and that although authority had been delegated at one time, since 1986 it has resided solely in the Public Printer. The Board rejected the appellant's argument that because the delegation was revoked only to avoid compliance in this case, the Board should find the revocation invalid, and held that it did not have authority to review delegations of the Public Printer. The Board also rejected the argument that the salary of the Director of the Security Service should be withheld, finding that even if he had been responsible for the failure to comply before 1986, he was not responsible for it now. Therefore, the petition for compliance was dismissed.

***Moore v. United States Postal Service*, AT075287C0646 (June 3, 1988)**

In settlement of his removal, the appellant was to be returned to an EAS-18 position (Stations and Branches Manager). In his subsequent petition for enforcement of the settlement agreement, he asserted that the agency had returned him to that title and grade but that his duties were actually those of an EAS-15 superintendent. The administrative judge found that the agency was not in compliance with the agreement. The Board agreed. It noted that the administrative judge clarified what had been discussed at the settlement talks and that the appellant at the time stated that he wanted to be assured of returning to an EAS-18 manager position. In response to the agency's contention to the contrary, the Board determined that it would rely on the recollection of the

impartial administrative judge. The Board also rejected the agency's recently-raised contention that, after having removed the appellant for performance reasons, it gave him the EAS-15 duties because they were training duties. The Board found that the agency should have raised this issue to the administrative judge and that the only sanction for poor performance stated in the settlement agreement was a suspension. The agency was ordered to comply with the terms of the agreement.

***Novinsky v. Department of Defense Dependents Schools*, DC075286C0373 (July 5, 1988)**

The Board reversed the appellant's removal and ordered that he be demoted to "the next highest grade level non-supervisory, non-administrative position of teacher." The agency demoted him to a classroom teacher position, and the appellant asserted that he was entitled to a higher-graded job as an education specialist. The Board found that if the education specialist position were a teacher job, the appellant would be entitled to it, but it examined the evidence and held that the two positions were significantly different in duties and responsibilities. The agency's current practice of grouping the two jobs for purposes of a "Teacher Position Pay Plan" does not overcome the difference in the jobs. The appellant's qualification for the higher- graded job is also irrelevant because he may not dictate a demotion contrary to the terms set by the Board. Finally, the Board held that the agency properly restored him to the geographic area in which he had worked. The appellant's having formerly supervised employees in the geographic area where he is now a member of the bargaining unit does not by itself create a conflict of interest.

***Marshall v. Government Printing Office*, DC075281C9051 (July 8, 1988)**

After the reversal of an appellant's removal, the agency must give him back pay for the entire period when he is available for the performance of his duties. The agency may not reduce its liability by speculating that it would have suspended or removed him for other reasons.

***Nielson v. Department of the Navy*, DC035184C9050 (July 8, 1988)**

The appellant had been downgraded as a result of a reduction-in-force (RIF) resulting from a reorganization, but the action was reversed. The agency then assigned the appellant to a position with the name and grade of his former job but without certain responsibilities he previously performed. The agency asserted that it had to do so because of its required compliance with internal directives and instructions. The Board found that an agency may make arguments in a compliance case that it has not raised before based on changed circumstances created by its attempt to comply with the order. The Board found, however, that the agency's argument in this case was not based on changed circumstances but was merely a continuation of the previously raised argument that the new structure was better than the old, an argument that was rejected in the case on the merits. It agreed with the administrative judge that some disruption would result from most restoration actions, but found that the agency had not shown a compelling reason not to return the appellant to his pre-RIF position.

***Eikenberry* v. *Department of the Interior*, DE075282C9022 (July 13, 1988)**

The Board found that the agency was in noncompliance with the Board's January 19, 1985, order to restore the appellant to the position of Assistant State Director, Bureau of Land Management, Wyoming, or to another position in that commuting area equal in scope and status to the position that he held prior to his June 1982 reassignment/ demotion to Denver. The agency had restored the appellant to a job with the same position description but did not allow him to perform the significant duties of the position. The Board also found that the agency's geographic reassignment of the appellant in November 1986 was a continuation of noncompliance. The agency, therefore, was ordered to rescind the appellant's November 1986 reassignment and to reinstate him to the *status quo ante*.

Discrimination/Mixed Case Procedures

***Fenn v. Army*, AT07528710035 (October 22, 1987)**

In this case, the Board explained the shifting evidentiary burdens in racial discrimination cases where disparate treatment has been asserted. First, the appellant must establish a *prima facie* case by showing that he is a member of a protected group, that he was similarly situated to a non-member of the group who was treated better, and that the difference was based on an intent to discriminate. The agency must then produce evidence showing a legitimate, nondiscriminatory reason for the difference. If it does so, the further burden of proving that the agency's reason is pretextual shifts back to the appellant.

***Bradley v. United States Postal Service*, CH07528710293 (November 3, 1987)**

The Board found that under the remedial "make whole" objective of Title VII, the appellant may be entitled to restoration of sick leave and removal of AWOL from his record where his use of sick leave and placement in an AWOL status were the direct result of the agency's discrimination against him.

***Chaplin v. Navy*, SE04328610117 (December 30, 1987)**

Where an agency that has already afforded an employee an opportunity for rehabilitation from drug or alcohol abuse nonetheless offers him another chance, it is required to allow him the opportunity to complete the program and demonstrate acceptable performance before proceeding with an adverse action.

***Savage v. Navy*, PH07528510760 (February 10, 1988)**

In its decision, the Board set forth the order and burdens of proof in a handicap discrimination case. In order to make a *prima facie* case, an appellant must articulate "to the extent possible" a reasonable accommodation. The extent to which he will be able to do so will vary with the circumstances. In general, the agency can be expected to know more about the essential duties of the jobs at issue, its own ability to modify work schedules, job duties, etc., and the availability of positions for reassignment. On the other hand, appellants can be expected to know more about their qualifications and capabilities. While the agency has the ultimate burden of proof on the issue of its ability to make an accommodation, the

appellant has the initial burden to come forward with evidence to make at least a facial showing that his handicap can be accommodated. The agency can then meet its burden by showing that its action was not based on the appellant's handicap or that he is not a qualified handicapped person. The agency may show that proposed accommodations would impose an undue hardship, considering factors such as the overall size of the agency's program, the type of operation, composition and structure of the work force, and nature and cost of the accommodation. An accommodation need not be made unless the employment barrier posed by the handicap can be surmounted without substantial modification in the requirements of the position and without undue administrative or financial burden. The final step in the analysis is that the appellant has the burden of showing that the agency's reasons for failing to accommodate him are pretextual. An appellant has no right to accommodation through reassignment to an encumbered position.

***Robinson v. Navy*, PH07528510743 (February 10, 1988)**

That an agency may have to incur some costs to accommodate an employee does not alone suffice to establish undue hardship.

***Clark v. DLA*, SL07528610200 (February 10, 1988)**

The Board found that in order to accommodate a handicapped employee, an agency is required to consider restructuring positions to which he seeks reassignment. An agency does not rebut an appellant's showing by its bare assertion that it always needs employees in the subject positions who can perform the full range of duties of the jobs.

***McCaffrey v. United States Postal Service*, PH07528610112 (February 26, 1988)**

The Board here set forth what is necessary to establish a handicap of drug or alcohol abuse. It distinguished between a drug user, who may be intoxicated at the time of the misconduct, and a drug abuser, who is addicted and therefore suffers a handicap. The Rehabilitation and Abuse Acts were intended to assist only the latter. The Board relied on the Narcotic Addict Rehabilitation Act of 1966, 28 U.S.C. § 2901(a) and 42 U.S.C. § 3411(a), for the definition of an addict: "any individual who habitually uses any narcotic drug ... so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." Thus, to prove a handicap, the appellant must provide evidence (1) from himself as to his pattern of use and its effect and (2) from experts as to whether that pattern and other symptoms constitute the handicap of drug abuse. The latter may consist of objective clinical findings, medical diagnoses based on evaluations, and evaluation and assessment by non-medical experts in the field. All such evidence must be specific and not just conclusory. Lay testimony from the appellant, family, and friends will not generally suffice.

***Clopton v. Navy*, AT07528610753 (March 24, 1988)**

The Board held that in order to afford reasonable accommodation to a handicapped employee, an agency is not required to promote her to a higher graded position.

***Gubisch v. Treasury*, DC07528211534 (May 6, 1988)**

The Board found that the EEOC lacked jurisdiction to refer the case to the Board because it was not a mixed case when it was before the Board. That the issue of the appellant's physical condition, and therefore the issue of handicap discrimination, was implicit in the appeal to the Board is not sufficient to convert an ordinary appeal to a mixed case. The Board found that while the appellant's condition had been an issue, the appellant himself specifically chose not to make his now-asserted handicap an issue before the Board.

***Tape v. MSPB*, HQ12018610025 (May 13, 1988 and July 18, 1988)**

The Board held that where an appellant fails to present facts tending to establish a *prima facie* case of discrimination, he has not raised a mixed case. In that instance, however, the Board notifies the parties of mixed case appeal rights because "the Board has an obligation to inform the appellant of the other avenues by which he could appeal the Board's decision on these issues."

***Brinkley v. Veterans Administration*, SL07528610181 (September 6, 1988)**

In this decision, the Board set a causation standard for cases involving allegations of drug and alcohol abuse. The appellant was removed from his position as a pharmacy technician for theft of Darvon capsules from the agency and for off-duty, drug-related misconduct. The Board held that there was no causal connection between the appellant's misconduct and his drug abuse, finding that he did not steal the drug because of concurrent physical pain or because he was under the influence of drugs at the time. Rather, the large number of capsules taken indicated that he stole them for some unspecified future use. The Board stated that it was adopting the causation standard used in other physical and mental handicap cases and thus modifying its earlier ruling in *Ruzek v. General Services Administration*, 7 M.S.P.R. 437 (1981). That case only required that the misconduct or performance problem be "related to" the handicap; under *Brinkley*, the test is whether it was "caused by" the handicap. The Board also modified *Green v. Air Force*, 31 M.S.P.R. 152 (1986), another earlier ruling on the causation issue. By adopting its new rule, the Board emphasized that it was acting in accordance with the Rehabilitation and Abuse Acts, which do not suggest that the alcoholic or drug abuser should be treated more favorably than other employees. The Board concluded in *Brinkley* that the agency did not owe the appellant an opportunity for rehabilitation under these circumstances.

***Hougens v. U.S. Postal Service*, PH07528610373 (September 20, 1988)**

The issue in this case was whether serious misconduct can negate an agency's general obligation to accommodate. The Board concluded that some serious misconduct renders an employee not a "qualified" handicapped individual. An "otherwise qualified" individual is one who, despite his handicap, is "technically, physically, mentally, emotionally, and morally fit to perform the duties of his position." Where misconduct impacts on one of these elements and thereby disqualifies the employee from his job, there is no need to accommodate. "Qualification for public service includes all aspects of one's ability to act consistently with the public trust and in a manner that promotes the efficiency of the public service." The type of misconduct that, standing

alone, disqualifies an employee from his position is "that which, by its very nature, strikes at the core of the job or the agency's mission, or is so egregious or notorious that an employee's abilities to perform his duties or to represent the agency is hampered." Prior decisions in *Green v. Air Force*, *Friel v. Navy*, *Marren v. Justice*, and *Velie v. Treasury* were overruled to the extent that they are inconsistent. The Board also limited its decision in the *Ruzek* case to circumstances where an employee's continuing performance of essential and fundamental job functions remains unaffected. The Board found support for its position in both §§ 501 and 504 of the Rehabilitation Act and in case law interpreting them, as well as in the Alcohol and Drug Abuse Acts. The Board also held that a permanent demotion to a position for which the employee is qualified, at the highest grade level available, may be a reasonable accommodation where the agency shows that retaining the person in his job during rehabilitation would be an undue hardship. It may also show that a detail just during rehabilitation would be unreasonable. Cases disallowing discipline, short of removal, prior to rehabilitation, were overruled. The Board noted that this ruling adopted the medically recognized principle that alcoholics and drug abusers are helped to overcome their problem when they are made to accept the consequences of their actions.

Evidence

***Hillen v. Army & OSC*, DC07528510324-1 (November 23, 1987)**

The Board found that to resolve credibility issues an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible. Factors to be considered in making and explaining a credibility determination, which the Board explained in detail, include the capacity of and opportunity for the witness to observe the event or act in question; the witness' character; any prior inconsistent statements by the witness; his bias or lack thereof; contradiction of his version by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and his demeanor.

Performance-Based Actions

***Stone v. DHHS*, DC04328610460 (December 16 1987)**

The Board found that performance standards that define what is actually unacceptable performance as minimally acceptable are improper.

***Ortiz v. Marines*, SF07528710802 (July 11, 1988)**

The agency will be allowed to attempt to prove its case under 5 U.S.C. Chapter 75, although it may have brought the action under 5 U.S.C. Chapter 43, where the switch is made early enough in the Board proceedings so that the case is heard as one under Chapter 75 and the appellant is afforded the opportunity to respond accordingly.

***Berube v. General Services Administration*, DC07528410055 (July 14, 1988)**

In its decision of May 20, 1986, the Board upheld the removal of the appellant, a career member of the Senior Executive Service. It sustained two of three performance-based charges, but neither of two misconduct charges against the appellant. On

judicial review, the Federal Circuit remanded the case to the Board to determine whether the appellant would have been removed on the basis of the sustained charges alone, holding that the Board cannot mitigate an adverse action taken against a member of the SES. On remand, the Board found that the agency did not prove that it would have imposed removal for the sustained charges alone. The Board noted the evidence that the deciding official considered the two misconduct charges the most serious and testified that while the agency could not tolerate such misconduct, it "could probably tolerate" the problems cited in the other charges. The Board ordered the appellant reinstated with back pay from the effective date of his removal.

Procedures

***Stone v. Army*, NY07528710131 (May 31, 1988)**

Where the appellant had designated a specific union official, not the union itself, as his representative before the agency and the Board, the action of the union in filing a complaint in his name could not serve as the appellant's election to use the grievance system rather than appeal to the Board.

***Biberstine v. DODDS*, DC07528710301 (July 1, 1988)**

The Board noted that if there is good cause and a motion for continuance clearly relates to a matter that is material to the case, it should be granted unless it would be unduly burdensome, harassing, or cause undue delay. Granting a continuance that will cause a case to go beyond the 120-day time limit is not, in itself, a reason to deny an otherwise proper continuance in a case that does not involve an allegation of discrimination. Where discrimination is alleged, an administrative judge must balance all the procedural entitlements of 5 U.S.C. §§ 7701 and 7702. If a lengthy continuance has been found warranted, a case may be dismissed without prejudice if the delay requested is also indefinite. The Board also held that, where settlement efforts do not succeed, the parties may request a different administrative judge if the judge's participation in settlement negotiations makes him or her unable to render an impartial decision.

***Hammond v. Navy*, PH07528710290 (August 8, 1988)**

The Board held that a change in agency representative must be made by the person who designated the representative before the regional office or by some other authorized official, not by the alleged new representative himself.

Retirement-Related Issues

***Wilmot v. OPM*, SF831L8610604 (October 2, 1987)**

The Board found that a Social Security Administration determination of entitlement to disability payments, based as it is on different laws and regulations, would not bind the Board.

***Sawyer v. OPM*, DC08318610141 (February 19, 1988)**

In a case involving a recovery from disability, the Board held that although Social Security law is not binding on the Board, it may provide persuasive analogies where the language of a statute or regulation is similar.

***Dubin v. OPM*, AT831M8610625 (April 6, 1988)**

The Board held that one who is charged with a debt to the Civil Service Retirement and Disability Fund may dispute either the existence and amount of the debt itself, or the amount of interest being levied, or both.

***Dickson v. OPM*, DC831M8610338 (July 21, 1988)**

The Board found that the Department of Defense was the agency charged with the authority to determine the basis for military retirements, and that the Board lacked jurisdiction to review that determination. Thus, whether an annuitant is entitled to have his military service credited toward his civilian annuity is determined by the Department of Defense, which decides the basis of his military retirement.

***French v. OPM*, SL831L8610005 (July 29, 1988)**

The Federal Circuit remanded the case to the Board to formulate procedures for the processing of "a case such as this of an apparently nonfrivolous claim of past incompetence by one presently incompetent" and not represented by counsel or a conservator. The Board found that neither it nor OPM has the authority to appoint counsel or a conservator for the appellant, but that it did not lack authority to request pro bono representation. It may not direct an appellant to a particular attorney, but it may provide him with a list of available attorneys. The Board also directed OPM to cooperate fully in "a non-adversary determination" of the appellant's competence during the period at issue. Medical evidence may be obtained, if necessary, from mutually agreeable private nonprofit or governmental sources. The usual preponderance of the evidence standard will apply to the determination, but consistent with the court's opinion, evidence of incompetency for significant portions of the period at issue will support an inference of incompetency for the remainder of the period, absent preponderant evidence to the contrary. If counsel cannot be found, an order adverse to the appellant cannot be entered; if necessary, the case should then be dismissed without prejudice.

Settlements

***Rhoades v. United States Postal Service*, CH075286A0517/0626 (May 9, 1988)**

A settlement on the merits does not preclude a later request for attorney fees unless the agreement expresses the appellant's intent to waive his right to seek fees or such intent can be reasonably inferred from the circumstances underlying the agreement.

***Smith v. Army*, DC04328710334 (June 13, 1988)**

Absent a formal withdrawal of an appeal, until the parties have agreed on the specific terms of the settlement agreement, the act of settlement has not occurred, and an appellant may continue to prosecute his appeal before the Board.

***Mahoney v. United States Postal Service*, SF035385C0249 (June 15, 1988)**

It was error for the administrative judge to dismiss the appeal without first documenting for the record whether the parties had reached a settlement agreement, understood its terms, and agreed whether it was to be enforceable by the Board.

***Robertson v. United States Postal Service*, AT075286C0833 (August 2, 1988)**

The Board held that it was appropriate to dismiss an appeal without memorializing it for the record where the parties do not wish to have the agreement enforced by the Board. If they want it to be enforceable, the terms of an agreement reached at a conference may be tape recorded, or a verbatim transcript may be prepared, and the parties should then affirm its accuracy. Alternatively, the written terms may be served on the parties with a sufficient time allowed for response and corrections before effectuating the settlement. If a written summary is prepared, it is preferable that it be prepared by the parties rather than the administrative judge, but the parties, in any event, must be given a chance to document their consent. Finally, the terms may be summarized on tape, and the parties asked if they agree.

Suspensions

***Hernandez v. Justice*, DA07528610221 (December 31, 1987)**

The Board found that although it is improper to continue a suspension after the dismissal of criminal charges where the agency bases the action on an employee's indictment or the institution of criminal proceedings, where the agency relies on additional facts, the original cause does not evaporate after such a dismissal. Under these circumstances, an agency may take a reasonable period to institute an investigation and further charges before it must take action to end the suspension.

APPENDIX B SIGNIFICANT BOARD DECISIONS

ORIGINAL JURISDICTION CASES

Significant original jurisdiction cases decided by the Board during Fiscal Year 1988 included the following:

Special Counsel Cases
Hatch Act Cases

***Special Counsel v. Jack I. Winkleman and Connecticut Department of Human Resources*, HQ12068710008 (January 26, 1988)**

The Board held that an employee of the state government violated the Hatch Act by being the candidate of the Republican party for the position of probate judge in a general election. The Board found that the employee knowingly violated the Act and that removal was a proper penalty.

***Special Counsel v. Jack I. Winkleman and Connecticut Department of Human Resources*, HQ12068710008 (May 18, 1988)**

In this decision, the Board ordered the U.S. Department of Health and Human Services (DHHS) to withhold funds from the Connecticut Department of Human Resources because it failed to remove Mr. Winkleman after the Board found that he had violated the Hatch Act. The Board found that the agency's appeal of the Board's order to the district court did not justify denying issuance of a withholding order because the court did not order a stay. It also declined to issue a stay of the withholding order, finding that the four-part test for the issuance of a stay had not been met. Finally, it found no basis for delaying 30 days in informing DHHS to withhold the funds, as the state agency had asked.

***Special Counsel v. Janet B. Purnell, et al.*, HQ12068710001 (June 24, 1988)**

The Board held that respondents Purnell, Fela and Johnson had violated the Hatch Act by coercing other employees to make contributions to a political party and that the respondents should be removed. The Board found that there is no statute of limitations on Hatch Act violations and that although Mr. Fela is no longer working for the state agency where he had committed the violation, he is still subject to punishment. The Board reaffirmed the rule of the Civil Service Commission that it is inherently coercive for a supervisor to ask a subordinate to contribute to a political cause, absent exculpating circumstances.

The Board found that, in this case, it was appropriate to consider all relevant mitigating factors in determining whether the statutorily mandated penalty of removal should be imposed. The Special Counsel must prove by a preponderance of the evidence any facts that support the penalty of removal. The Board found that removal was warranted because the respondents each committed more than one offense; the violations were willful and very serious; the respondents did not believe that the persons they coerced were predisposed to make the contributions; the respondents held high level positions; and the respondents knew or should have known that their actions were prohibited. The Board held that the degree to which an employee is considered important to an agency can never be a significant factor in determining the penalty because, if it were, only those holding "unimportant" jobs would be subject to the proscriptions of the Act. Because two of the respondents were no longer employed by the agencies

where they had committed the violations, the Board imposed an 18-month bar on their employment with new state and local agencies. The Board found that removal was a proper penalty for the third respondent, who had been employed by a new state agency after his resignation from the agency where he had committed the violation.

Special Counsel Cases
Disciplinary Actions

***Special Counsel v. Zimmerman and Pouy*, HQ12068510015 (March 16, 1988)**

The Special Counsel filed a complaint for disciplinary action, charging the respondents, Zimmerman and Pouy, with religious discrimination and reprisal against employeee Wallace Weiss, based on a district court decision finding such discrimination. The Board's Chief Administrative Law Judge (CALJ) issued a Recommended Decision, recommending that Zimmerman be removed from Federal service and that Pouy be demoted for at least three years and fined $1,000.

The Board declined to apply collateral estoppel to the court decision because the respondents were not parties to the court action and were, therefore, entitled to a *de novo* hearing before the Board. The Board looked for guidance to case law in the area of sexual harassment and held that the test of "hostile environment" in the area of religious discrimination is whether the harassing remarks interfered with the employee's work or psychological well-being. It concluded that, generally, the testimony of the harassed employee is acceptable proof that the harassing conduct affected the employee's psychological well-being, and that proof that the victim is oversensitive is immaterial if a person of reasonable sensibilities would have been adversely affected by the conduct. The Board found that the work environment of a reasonable person would have been rendered intimidating, hostile, and offensive by the respondents' conduct, and concluded that the respondents had engaged in religious discrimination against Weiss.

With regard to the charge of taking a personnel action in reprisal for protected conduct, the Board found that Weiss engaged in protected conduct when he complained about Zimmerman's anti-Semitic remarks to his second line supervisor, filed a discrimination complaint, and informed Zimmerman of his intent to file an EEO complaint. The Board held that the definition of "personnel action" to be applied in cases brought under 5 U.S.C. § 1206(e)(1)(E) is that found in Title VII of the Civil Rights Act of 1964, as amended, rather than that found in 5 U.S.C. § 2302(b), and that, as a result, a nonsupervisor such as Pouy could be found to have taken a personnel action in reprisal for protected conduct. The Board concluded that both respondents retaliated against Weiss in reprisal for his protected conduct.

The Board found that the penalty of removal was appropriate for Zimmerman, especially since he had abused his authority as a supervisor. However, since Zimmerman had resigned from the Federal service, the Board imposed the penalty of a 5-year debarment from the Federal service on him. The Board determined that the penalty recommended by the CALJ for Pouy was excessive in light of his subordinate position and the fact that his religiously offensive conduct was not only condoned but also encouraged by Zimmerman. Accordingly, the Board ordered that Pouy be demoted to a GS-13 for a minimum of three years.

Special Counsel v. Nichols,
HQ12068610018 (March 29, 1988),
36 M.S.P.R. 445.

The Special Counsel sought disciplinary action against the respondent manager on charges that she violated 5 U.S.C. § 2302(b)(6) by creating a position and filling it with a friend for the sole purpose of permitting the friend to compete with a reemployment priority candidate for promotion to a bona fide vacancy. The Board adopted the Chief Administrative Law Judge's recommended decision finding that the Special Counsel failed to prove the charges. It found that the position was needed in the organization and that the subsequent redistribution of duties was accounted for by other factors. With respect to the charge that the respondent's actions violated 5 C.F.R. § 735.201(a) because they created an appearance of impropriety, the Board found that the regulation reaches only conduct that the employee reasonably could have known would appear improper to a reasonable observer and that the evidence failed to show that the respondent's conduct created an appearance of preferential treatment.

APPENDIX C SIGNIFICANT LITIGATION

Significant litigation involving the Board during Fiscal Year 1988 included the following:

Intervention in OPM-Initiated Litigation

***Horner v. Benedetto,* 847 F.2d 814 (Fed. Cir. 1988), (Petition for rehearing *en banc* pending).**

The court affirmed the Board's ruling that because of the 1966 repeal of a provision excluding retroactive application of the statute permitting deferred annuitants to elect annuities with survivor benefits, retirees who became eligible for deferred retirement after 1966 are entitled to elect survivor annuities. The Board filed a brief in opposition to a petition for rehearing *en banc* on August 16, 1988.

***Horner v. Barry,* Appeal No. 87-3591 (Fed. Cir., March 15, 1988).**

This appeal challenged the Board's decision (1) that it had jurisdiction to determine whether the respondent, a U.S. Magistrate, was entitled to elect continued full coverage by the Civil Service Retirement System after his coverage by the Social Security Act commenced, and (2) that the respondent was entitled to do so. The case was remanded at the Board's request for a correction that did not change the result. The initial decision was reinstated without modification as the final decision of the Board.

***Horner v. Schuck and Washington*, Nos. 86-1723 and 87-3184 (Fed. Cir., April 6, 1988)**

The court rejected the Board's arguments that the Director of the Office of Personnel Management had no authority under 5 U.S.C. § 7703(d) to seek review of a Board decision that involved the Postal Service and that interpreted a collective bargaining agreement rather than a civil service law. After finding that section 7703(d) jurisdiction was properly invoked, however, the court held that the Board had the authority to interpret and did properly interpret the collective bargaining agreement, rejecting the Director's argument that the Board must yield to the arbitrators' interpretations of the agreement.

Special Counsel-Related Litigation

***Blaylock v. Merit Systems Protection Board*, No. 87-7391 (11th Cir. August 10, 1988)**

Kenneth Blaylock was the President of the American Federation of Government Employees (AFGE). In the newspaper published by AFGE, Mr. Blaylock published a number of articles urging the union's membership to vote against President Reagan and for Walter Mondale in the 1984 presidential election. The Board found that these articles violated the Hatch Act. On appeal, the 11th Circuit reversed. It found that there could be no violation of the Hatch Act unless the individual had a formal relationship with one of the competing political parties.

Because Mr. Blaylock was acting solely as an individual in writing the articles, there was no violation of the Hatch Act.

***Biller and Sombrotto v. Merit Systems Protection Board*, No. 87-4076 (2nd Cir. December 15, 1988)**

This case involved the issue of whether the Board properly found that two postal union presidents who were on leave without pay from their Postal Service jobs violated the Hatch Act by endorsing Walter Mondale in the 1984 presidential election and by soliciting funds to be used to support Mr. Mondale's candidacy. In its decision of December 15, 1988, the court reversed and vacated the Board's decision. It found that there was no nexus between the individual expressions of personal opinion on political subjects and candidates by the two union presidents and the effort of a political party to promote or elect its candidate. The court also found that while the union presidents had solicited funds for their political action committees, there was no violation of the Hatch Act because they did not solicit the funds in concert with a partisan political campaign or organization. The court further found that the union presidents had no supervisory authority over the individuals from whom funds were solicited, so that coercion by supervisors was not an issue, and that they did not personally collect or administer the contributions.

***State of Minnesota, Department of Jobs and Training v. Merit Systems Protection Board, petition for rehearing granted*, No. 87-5346 (8th Cir. November 16, 1988)**

The district court of Minnesota held that the Board properly found that a state employee, whose employment was in connection with Federal funds and who ran for political office while on leave without pay, had violated the Hatch Act. However, the district court reversed the Board's determination that the employee's violation was willful and warranted removal. The Board appealed the holding concerning the removal to the 8th Circuit. Oral argument was held on April 13, 1988. The court of appeals issued a decision reversing the district court decision on October 4, 1988. However, a petition for rehearing *en banc* has been granted and the October 4th decision has been vacated. Oral argument was held on December 8, 1988.

***State of Connecticut, Department of Human Resources* and *Wayne Camillieri v. Merit Systems Protection Board*, H87-406 (JAC) and H87-779 (JAC) (D.Conn.)**

The State of Connecticut, Department of Human Resources (DHR) and Wayne H. Camillieri, a state employee, have challenged the Board's decision finding that Mr. Camillieri violated the Hatch Act by running in a partisan primary election for city council and that this violation warranted removal. The state and Mr. Camillieri have also challenged the Board's related decision, entered as a result of the state's failure to remove Mr. Camillieri, ordering the U.S. Department of Health and Human Services to withhold from Federal monies paid to DHR an amount equal to two times Mr. Camillieri's salary at the time of his Hatch Act violation.

***State of Connecticut, Department of Human Resources and Jack I. Winkleman v. Merit Systems Protection Board*, H88-65 (JAC) and H88-335 (JAC) (D.Conn.)**

The State of Connecticut, Department of Human Resources (DHR) and Jack I. Winkleman, a state employee, have challenged the Board's decision finding that Mr. Win-

kleman violated the Hatch Act by running in a partisan election for probate judge and that this violation warranted removal. The state and Mr. Winkleman have also challenged the Board's related decision, entered as a result of the state's failure to remove Mr. Winkleman, ordering the U.S. Department of Health and Human Services to withhold from Federal monies paid to DHR an amount equal to two times Mr. Winkleman's salary at the time of his Hatch Act violation. These appeals have been consolidated with the *Camillieri* appeals.

Mandamus

***In re Leslie Gonczi*, Appeal No. 88-3145 (Fed. Cir. July 28, 1988).**

The court denied Mr. Gonczi's petition for a writ of mandamus to compel the Board to act on his motion for attorney fees pending before the Board. This case was originally filed in New Jersey district court, but was transferred on the Board's motion to the Federal Circuit.

Mixed Cases

***Willard Deramus v. Merit Systems Protection Board*, 676 F.Supp. 147 (E.D.Mich. 1987)**

In this mixed case appeal, the court granted the Board's motion to dismiss on the grounds that the Board was improperly named as a party. The decision was issued in a memorandum opinion that will be published.

***Michael Kienlen v. Merit Systems Protection Board*, 687 F.Supp. 461 (D.Minn. 1988)**

The court found that Title VII provides the exclusive remedy for alleged discrimination against a Federal employee, in keeping with the Supreme Court's decision in *Brown v. General Services Administration*, 425 U.S. 820 (1976). The court agreed that the Board is not a proper party. The court noted that, although this is a mixed case processed under 5 U.S.C. § 7702, such cases are covered by § 7701, which sets forth the overall procedures for Board cases. Thus, the court concluded, the provision of § 7703 that the Board is not to be named as the respondent in cases decided under § 7701 applies to this case.

APPENDIX D SPECIAL STUDIES

The following summaries of special study reports released by the Board during Fiscal Year 1988 highlight the findings and recommendations in those studies. The reports summarized include three studies issued as a part of the Board's annual oversight review of the significant actions of the Office of Personnel Management, four studies of other merit system issues, and the annual analysis of MSPB case decisions.

REPORTS ON THE SIGNIFICANT ACTIONS OF THE OFFICE OF PERSONNEL MANAGEMENT (OPM)

Expanded Authority for Temporary Appointments: A Look at Merit Issues.

In late 1984, OPM greatly expanded agencies' authority to make and extend temporary appointments. The new authority allowed agencies to make and extend appointments for up to 4 years (compared to a previous limit of 2 years) and to fill positions at GS-12 or below (compared to GS-7 and below previously). Agencies were also given greater discretion in deciding when to use temporary appointments and substantial control over the procedures they use in exercising the authority.

The Board examined agency use of the expanded authority over a 2-year period. It found no evidence of systemic abuse of the authority nor did it find any significant increase, overall, in the use of the authority. The Board concluded that the expanded authority is a positive addition to the management tools available to Federal managers. However, the Board also found that the authority had increased the civil service system's vulnerability to violations of the merit system principles. Nevertheless, the Board concluded that, with adequate safeguards, the benefits inherent in the expanded authority should outweigh the risks. It recommended improving guidance to agencies on appropriate use of the authority.

The Board's report expressed some concern about the Government's ability to attract high-quality job applicants and retain them for the duration of the appointment. Many potential candidates will not consider temporary employment, thus shrinking the "pool" from which agencies select. The ability to attract applicants and retain them may be a problem because temporary employees do not earn life or health insurance benefits. The report suggests that providing such benefits may, in the long run, be cost effective.

Performance Management and Recognition System: Linking Pay to Performance.

This report examined implementation of the Performance Management and Recognition System (PMRS) covering managers and supervisors at GM grades 13 through 15. This pay-for-performance system, which replaced an earlier merit pay system established under the Civil Service Reform Act of 1978, expires on September 30, 1989, unless Congress takes positive action to extend it.

The Board found that while the performance award aspects of PMRS should be valuable as a means of recognizing better-than-average performance, many agencies are concerned that funding for that component of the system is inadequate. The report also

offered evidence that high performance ratings for large percentages of employees are a major factor contributing to the problems agencies are experiencing in providing meaningful recognition to top performers. For example, over two-thirds of all employees subject to PMRS received ratings that either required or encouraged performance awards. In a few agencies, this percentage approached 90 percent.

Among other things, the report recommended that OPM assume a more active role as an "information broker" for PMRS issues common among agencies.

Toward Effective Performance in the Federal Government

This report took a broad look at the performance management process in Government and found that current performance management programs are basically sound in concept, but that some problems diminish their practical effectiveness. While over three-fourths of all Federal employees surveyed by the Board supported the concept of pay for performance, more than half (55 percent) did not see any linkage between their performance and their pay. A review of employee performance rating data maintained by OPM, however, produced evidence of rating inflation for both GS and GM employees. This review also found some rating patterns that may be indicative of underlying biases or other inappropriate influences in the rating process. For example, there is a wide divergence between occupational series in the percent of employees receiving ratings above the "fully successful" level. The report also identified a number of performance management issues that may merit further research.

MERIT SYSTEMS STUDIES

Working for the Federal Government: Job Satisfaction and Federal Employees

This report assessed employee perceptions about their worklives based on responses to a Board survey sent to a cross section of Federal employees. The Board found that employees are fairly positive about their work, with 68 percent reporting that they are satisfied with their jobs, and 71 percent saying they like working where they work.

Federal employees were not satisfied, however, with all aspects of their worklives, nor were satisfaction levels constant across agencies. For example, employees in the 22 largest Federal departments and agencies varied as much as 35 percent in their overall satisfaction levels. Generally speaking, the older the employee, the higher the grade level, or the longer the service, the higher the level of overall job satisfaction.

The report also found that for many individuals, employee benefits, e.g., annual and sick leave, and the Civil Service Retirement System, are important reasons for remaining in Government. In addition, aspects of the work itself, such as a belief that the work is meaningful and that there is an opportunity to accomplish something worthwhile, are critical to the satisfaction of Federal workers. The report suggested that efforts to enhance the Federal Government as an employer or to bring about organizational change within Federal agencies are more likely to succeed if they are directed at

changing those aspects of work that are the source of the least satisfaction, and targeting the change to the least satisfied groups.

Federal Personnel Policies and Practices: Perspectives from the Workplace

This report summarized the significant findings from the Board's 1986 Merit Principles Survey of a sample of over 21,000 Federal employees. The report found some encouraging trends. For example, a greater percentage of employees covered under specific pay-for-performance systems see a link between pay and performance compared to those not covered under such systems. An overwhelming majority of supervisors report they take action to deal with problem employees. The reported incidence of prohibited personnel practices based on political affiliation is practically nonexistent.

There were other issues, however, about which employees expressed concern, including a perception that Federal employees have a generally negative public image and a belief that many Federal jobs pay less than comparable ones outside the Government. Denial of a job or job reward because of discrimination or the operation of a "buddy system," without regard to merit, was another negative perception as were concerns about undue politicization of Federal executives. Finally, from the viewpoint of managers and supervisors, there was a general impression that, on balance, the quality of applicants for Federal jobs has declined slightly over the last four years.

Sexual Harassment in the Federal Government: An Update

This report presented the results of a major 1987 Board survey dealing with sexual harassment in the Federal workplace. It detailed findings on employee attitudes toward and experiences with uninvited behavior of a sexual nature. It also described the actions Federal agencies have taken to reduce sexual harassment and estimated the financial costs of sexual harassment. The report reviewed relevant case law that has developed over the last seven years and concluded with recommendations for future action.

The Board previously studied this issue in 1980. The new report concluded that sexual harassment remains a serious and pervasive problem. In 1987, 42 percent of all women and 14 percent of all men reported they experienced some form of uninvited and unwanted sexual attention. There has been no significant change in these percentages since the Board's 1980 survey. The most frequently experienced type of uninvited sexual attention is "unwanted sexual teasing, jokes, remarks, or questions." The least frequently experienced type of harassment is "actual or attempted rape or assault." The incidence rate for alleged sexual harassment, however, varies by agency.

Other major findings from the report are that coworkers are much more likely than supervisors to be the source of sexual harassment, that almost half of all victims tried to ignore the behavior or did nothing in response, and that the most effective and frequently taken informal action was simply telling the harasser to stop.

During the 2-year period from May 1985 through May 1987, sexual harassment cost the Federal Government an estimated $267 million. This cost is in addition to the personal cost and anguish many of the victims had to bear.

The report called for better and more timely enforcement of the laws against sexual harassment, including the exercise of strong sanctions against harassers. It also recommended that Federal agencies provide training on sexual harassment to nonsupervisory employees as well as to managers and EEO and personnel officials. Finally, the Board recommended that agencies periodically remind all employees of their responsibilities for compliance with Federal law and agency policies prohibiting sexual harassment and make it clear that sexually harassing behavior by any employee cannot and will not be tolerated.

Attracting Quality Graduates to the Federal Government: A View of College Recruiting

This report summarized the findings from a survey of selected college and university deans and placement officials on student attitudes towards the Federal Government as an employer. The results of the study suggest that the Government is not perceived as an "employer of choice" by many graduates of some of the country's most highly rated academic institutions. Furthermore, even among those graduates who have a positive image of the Government as an employer, many are perplexed by the "civil service hiring labyrinth" and find little active encouragement on the part of most Federal agencies. This finding raises concerns about the future quality of the Federal work force and its ability to effectively and efficiently carry out the necessary functions of Government.

The report also contained some recommendations for future action. Among these are a call for continued attention to development of alternative Federal compensation strategies; additional initiatives related to a revived Governmentwide college relations program; aggressive efforts to shorten and simplify the competitive recruitment process while preserving the underlying merit principles; increased on-campus recruitment by individual Federal agencies; and a bipartisan effort to improve the public image of Federal employment.

ANNUAL REPORT ON CASE DECISIONS

A Study of Cases Decided by the U.S. Merit Systems Protection Board in Fiscal Year 1987

This report provided detailed information on appeals decisions issued by the Board and its administrative judges during the fiscal year, including information on initial appeals, petitions for review, and addendum cases (attorney fees, enforcement, and remands). In addition to total numbers, various breakdowns were provided by type of appeal, agency, disposition, and case processing time. Fiscal Year 1987 appeals decisions were placed in the context of decisions issued during the four previous fiscal years (FY 1983-1986) in order to develop a 5-year trend analysis. The Fiscal Year 1987 report also reviewed Board decisions in cases arising under its original jurisdiction, cases that the Board had reopened on its own motion, cases in which OPM had requested reconsideration, and discrimination cases that were appealed to the Equal Employment Opportunity Commission (EEOC).

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