



U.S. MERIT SYSTEMS PROTECTION BOARD  
Washington, D.C. 20419

THIRD  
ANNUAL REPORT

March 1982

## 1. Introduction

In its third year of operation, the Merit Systems Protection Board continued to strive for efficiency and excellence in dealing with the enormous workload of adjudicating Federal employee appeals, while also reporting to the President and Congress on various components of the Federal merit Systems as required by statute. Besides the adjudicatory function the Board has three other statutory obligations which require it to: analyze and report on significant actions of the Office of Personnel Management (OPM); review the validity of OPM regulations both on their face and as implemented by agencies; and conduct studies of the Merit systems.

In addressing these duties, the Board's third year was one filled with major accomplishment, challenge and adjustment to change.

The accomplishments included:

- The adjudication of over 7,000 cases in the regional Offices, an increase of over 19600 from 1980, and accomplished with fewer staff.
- Meeting the 120-day time limit for issuing initial decisions in the regional offices in over 98% of the cases.
- The issuing of several studies on important aspects of the merit systems-
- The addition of a second administrative law judge to assist the Board in dealing with its ever-growing number of complex legal cases.
- The publication of two volumes of the Board's decisions and a comprehensive index and the creation of a monthly digest to summarize current Board actions. Both publications were prepared to give the public and the agencies easier access to Board decisions.

1981 was also a year of major changes for the Board and its personnel. With the resignation of the Board's first head, Chairwoman Ruth T. Prokop, on July 19 Board Vice-Chair Ersa H. Poston assumed the agency's leadership role until President Reagan named Herbert E. Ellingwood to be Chairman on December 14, and he was sworn in December 18. This change in leadership was accompanied by the long awaited relocation of the Board's Headquarters to 1120 Vermont Avenue N.W. in mid-October.

The challenge that dominated agency management in 1981 was one not uncommon to much of the federal bureaucracy: doing more with less. At the Board however,, the problem was even more severe Reduced resources, coupled with a spiraling workload of reduction-in-force (RIF) and over 11,000 air traffic controller appeals, threatened to take the Board's workload right off the agency charts and create backlogs of a magnitude unknown since passage of the Civil Service Reform Act in 1978.

In August, a large number of the nation's air traffic controllers were removed by the Federal Aviation Administration because of their alleged participation in a strike. This event was to have a profound impact on the Board's workload as the Board shortly became the focus of the fired air traffic controllers' efforts to regain their jobs By early October over 11,000 had filed appeals in the-Board's regional offices.

But even while the Board was attempting to cope with this enormous new workload and the limited resources available to deal with it, new challenges were arising. In December, the Board sustained a 16% cut in its budget as a result of wording in a Continuing Resolution approved -by Congress even though the President had not recommended any cuts in the Board's funding because of the workload.

At the year's end, the Board was seeking legislative remedies to the funding dilemma, while examining the possibility of staffing reductions and administrative cuts to comply with the reduced funding.

## **II. The Board and Its Members**

The Merit Systems Protection Board was created pursuant to Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act of 1978. A quasi-judicial agency, the Board is comprised of a bipartisan three member panel and charged with being the watchdog of the Federal merit systems. This mandate is implemented by the Board through the four statutory duties already discussed.

Because the Board has such broad powers in reviewing the personnel practices established by OPM and of the numerous government agencies within its Jurisdiction Congress took measures to assure that the Board would have that degree of independence necessary to properly exercise **its** authority. These measures include:

- Providing the Board with authority to make simultaneous submissions of budgets and legislative proposals to Congress and the President, thus eliminating the need for prior approval by the Office of Management and Budget;
- Permitting the Board to appoint personnel essentially free of approval by the Executive Branch;
- Representing itself in the Federal courts except before the Supreme Court; and
- Appointing the Board members for non-renewable terms and permitting removal only under extraordinary Circumstances.

The Board members are appointed by the President with the advice and consent of the Senate for seven year terms, and the designation of anyone as Chair Must be approved by the Senate. Serving on the Board in 1981 were:

Chairwoman Ruth T. Prokop, who served as the Agency's first chair and was appointed by President Jimmy Carter just days after the Civil Service Reform Act took effect. Prokop, whose government service began on the staff of then Vice President Lyndon Johnson, had, just prior to coming to the Board, served as General Counsel for the Department of Housing and Urban Development and before that as Special Assistant to the Under Secretary of HUD. Mrs.- Prokop resigned from the Board effective July 1 to return to the private practice of law.

Chairman Herbert S. Ellingwood, appointed late in the year by President Ronald Reagan to fill the balance of Prokop's unexpired terms had been serving as Deputy Counsel to the President at the time of his appointment to the Board. Prior to coming to Washington Ellingwood, in addition to private practice served as Special Assistant Attorney General for California for four years as well as Legal Affairs Secretary to then Governor Reagan, and as Deputy District Attorney for Alameda County.

Vice-Chair Ersa B. Poston, who served as the acting head of the agency from July 1 to December 18, Was sworn in January 29 1979 - Poston had been a Commissioner on the United States Civil Service Commission since 1977. Prior to her appointment as Civil Service Commissioner Poston had served as a member of Governor Nelson A. Rockefeller's cabinet, as President and member of the New York State Civil Service Commission. She was also Chairperson of the President's Advisory Council on Intergovernmental Personnel Policy. Prior to serving in those positions, she had been Director of the New York State Office of Economic Opportunity and Confidential Assistant to Governor Rockefeller.

Member Ronald P. Wertheim was sworn in as the third member of the Board in October of 1979 and served on the Board until he resigned in December 1981, to accept a judicial appointment. Wertheim had been in the private practice of law for 10 years prior to coming to the Board, but during that period also served as an advisor to the Secretary of Defense for the Law of the Sea Negotiations and as Alternate Representative to the United Nations Conference on the Law of The Sea. Wertheim had also served &3 Deputy General Counsel of the Peace Corps.

### **III. Organization of the Board**

The Board is comprised of a number of operating offices which carry out the duties of the organization, while the three-member Board has responsibility for implementing its statutory functions. The Chairman, as chief executive officer, is vested with responsibility for its overall operations.

Authority for the day-to-day management of the Board, both in headquarters and in its eleven regional offices, is delegated to the Managing Director by the Chairman. The Deputy Managing Director has overall , responsibility for the operation of the regional offices and reviews the initial decisions of these Offices, recommending that the Board reopen cases or take other appropriate action as necessary.

The Office of the General Counsel provides legal counsel to the Board and offices within the Board, and represents it in all court actions except before the Supreme Court. It also participates in the review of OPM regulations.

The Office of Legislative Counsel responds to Congressional inquiries, drafts testimony provides information about the Board to the public and press, and comments on proposed legislation and regulations.

The Office of Administrative Law Judges adjudicates cases under the Hatch Political Activities Act, hears disciplinary cases and proposed removals involving administrative law judges and, upon assignment by the Board, conducts hearings in sensitive and complex appeals as well as proceedings initiated by the Special Counsel. This office also has jurisdiction over, and issues orders in response to, motions for subpoenas and discovery filed in the Board's regional offices.

The Office of Merit Systems Review and Studies analyzes and studies the health" of the merit systems for the purpose of issuing reports required by the Act; participates in the review of OPM regulations; and has the lead role in reviewing the significant activities Of OPM-

The Office of Appeals prepares draft opinions and orders for the Board based upon its analysis of both petitions for review from initial decisions rendered in the regions and the records of cases reopened by the Board on its own notion.

The Office of the Secretary is responsible for the flow of communications concerning Board actions and related matters to and from the Board. Additionally the Office of the Secretary is responsible for the docketing of pending cases and maintaining records on closed cases; making initial determinations for requests submitted under the Freedom of Information and Privacy Acts; and for the publication and distribution of all Board orders and opinions including regional office initial decisions.

The Office of Administration is responsible for handling procurements personnel, administrative services and budgetary needs of the Board.

The Office of Special Counsel has independent investigator and prosecutorial duties and is responsible for bringing certain actions before the Board. The Special Counsel is required by 5 U.S.C. 1206(m) to submit an annual report to the Congress; therefore, this report will not address Special Counsel activities-

#### **IV. Adjudication of Cases**

The adjudication of cases is by far the most time consuming activity of the Board and consequently utilizes the greatest proportion of its resources

Adjudication Of Cases generally begins with the filing 'of an appeal in one of the Board's 11 regional offices. A brief examination of the numbers and types of cases received in the regional offices therefore tells a great deal about the Board's workload.

#### **Brief Summary of Regional Operations**

As can be seen from the statistics for the appeals pending, received, and processed during Calendar Year 1981 found in the appendix of this document, the accomplishment of the Board's eleven regional offices during the past year was marked by increased productivity.

Apart from air traffic controller appeals (discussed below), the Board received 7,349 other appeals which were filed during 1981, an increase of over 1,000 cases in our normal workload. Thus, with the casework which remained from 1980 filings, the Board's regular appeals on hand for adjudication by the regional Offices during 1981 totaled 9,444 cases, an increase of over 10,800 cases from the previous year's inventory. Over 7,000 appeals were processed to completion by the regional offices, however, representing an almost corresponding increase in productivity of over 1,600 cases beyond the number processed during 1980.

Through coordinated and concentrated efforts the Board also has continued its timely adjudication of appeals casework in the regional offices, with remarkable success at the close of calendar year 1981. In fact, the regional offices improved upon their previous record for timely adjudication of appeals, meeting the Board's 120-day time limit for adjudication in over 98%<sup>1/</sup> of cases processed during the year.

In addition, the Board has continued its emphasis upon maintaining a high quality of adjudication by the regional Offices. Comments during the year by employee unions, agency officials, and other interest groups were increasingly favorable in regard to the excellent level of credibility, integrity, and professionalism being found in the adjudications by the Board's regional offices.

It is noteworthy that the accomplishment of the regional offices during calendar year 1981 were achieved under difficult circumstances: steadily increasing casework receipts, coupled with increasingly severe budgetary constraints prevented the Board from maintaining staffing levels commensurate with the increasing demands of the adjudication work.

A substantial part of the increased workload resulted from reduction-in-force (RIF) appeals caused by the budgetary cutbacks affecting federal agencies generally during 1981. In the last three months of calendar year 1981, as the impact of reduced funding levels began to be felt, a total of 953 reduction-in-force appeals were filed, which is considerably in excess of the total number of RIF appeals filed during all of the preceding year. (For further details see charts in the appendix.)

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1/ A complete report of the cases received as well as of those that exceeded 120 days as required by 5 U.S.C. 7701(i)(2) is included in the appendix.

In addition to the increase of over 1,000 cases in the number of appeals which normally would have been received during 1981, the Board, as already mentioned has received over 11,000 appeals since September 1981 by former air traffic controllers.

The Board's continuing good record of achievement during 1981 resulted primarily from concentrated special efforts by the professional and clerical staffs of the regional offices. However, the Board's restricted funding during the year also required curtailment of needed support activities such as developmental training programs and training conferences for regional office staffs, and on-site evaluation - or assistance Visits to the regional offices by headquarters support staff.

By year's end, the impact of the severe budget restrictions had required the Board to impose stringent limitations on staffing and travel expenses, notwithstanding the heavy caseload, and to initiate regulatory changes in our processing of appeals.

In this regard, the Board's regulations were revised in December 1981 to eliminate a previous requirement for Board service of documents by certified mail; to provide that copies of all filings will be served directly on each other by the parties, rather than by the Board; and to discontinue the previous practice of furnishing hearing transcripts to appellants and agencies free of charge.

Continuance of heavy case receipts and funding limitations in the foreseeable future will require the Board to consider adoption of further alternative means for processing appeals, to the fullest extent Possible under the Civil Service Reform Act of 1978.

### **Office of Appeals**

Once a regional Office issues a decision, termed an initial decision the appellant or the agency can petition the Board itself for a review of the decision or the Board can move to review the decision on its own initiative.

The petitions for reviews as they are known, are handled by the Board's Office of Appeals, which reviews the petitions and recommends action and drafts appropriate wording for the Board's consideration. As happened in most offices of the Board in 1981, the Office of Appeals saw an increase in workload while staff size remained constant. In 1981, the Office of Appeals prepared 1,161 decisions compared to 1,080 the previous year. (A breakdown of these figures is available in the appendix.)

### **Significant Decisions-Of the Board**

One of the major undertakings of the Board itself has been to take an active role in the issuance of leading decisions in appeals Cases. It is the firm policy of the Board that one of the most important services it can provide to agencies employees and its own presiding officials is the Issuance of precedential opinions applying and interpreting the provisions of the Act. It is only through this method that all parties will be provided with that guidance necessary to direct their activities. To this end, the Board has issued a number of decisions this year which have purposefully addressed subjects of major importance and thus have become a guide for future cases of a similar nature. Among the significant decisions issued by the Board during 1981 are the following:

Chavez v. OPM, DA831L09003 (5/28/81), which resolved the issues of who has the burden of proof in employee-initiated disability retirement cases and the standard of proof applicable to such cases. The Board held that the employee bears the burden of proof by a preponderance of the evidence and set forth a method for analyzing the evidence in a group Of such cases.

Merritt v. Department of Justice, PHO75209058 (6/8/81), was the lead case in which the Board examined employee off-duty misconduct. The principal issue was what kinds of conduct off the job would justify agency action against an employee. Several other cases issued in reliance on Merritt have refined and applied its tests to a variety of factual circumstances.

Ruzek v. GSA, SL07520901T (8/20/81), held that alcoholism or drug abuse, constitutes a handicapping condition under the Rehabilitation Act of 1973 and found that it is a prohibited personnel practice to discriminate because of such handicapping conditions and set forth the requirements an agency must follow before taking action against an employee with one of these handicaps.

Douglas v. VA, AT075299006 (4/10/81), considered the authority for, and the scope of, Board review of agency selected penalties, the responsibility of agency officials when selecting a penalty, and the methods and order of proof as to such issues-

Gerlach v. FTC, DC07528010020 (12/15/81), adopted the "but form test in cases where it is determined that an adverse action was taken against an employee for legitimate reasons as well as in reprisal for a protected activity.

Ogden Air Logistics Center and AFGE, B07128010017, (6/9/81), found that the procedures established pursuant to 5 U.S.C. 7121(a)(1) are generally the exclusive procedures for resolving negotiable grievances, but that the Board has authority to review an arbitrator's decision if the employee has been affected by prohibited discrimination (as set forth in 5 U.S.C. 2302(b)(1)) and originally could have appealed the matter to the Board under 5 U.S.C. 7702.

Cuellar v. USPS, SF075299045 (11/13/81)9 held that OPM regulations providing for the emergency suspension of employees during the notice period of a proposed adverse action exceed the scope of the "crime provision" contained in 5 U.S.C. 7513(b)(1).

Stalkfleet v. USPS, SL075209055 (6/10/81), analyzed an agency's duty to handicapped employees under the Rehabilitation Act of 1973, as well as the extent of the Postal Service's obligation under its national agreement with the Postal unions to accommodate a handicapped employee.

Borninkhof v. Department of Justice , SF075209008 (2/27/81), examined the extent to which hearsay evidence may constitute evidence in support of an agency's action and the factors which may properly -be considered in determining its adequacy and reliability. '

Scott v. Kayl, SF0752090153 (9/28/81), held that in order to determine whether an appointment to a position in the federal service occurred, all of the underlying circumstances must be considered rather than Just whether or not a particular form has been executed.

Stewart v.- OPM, DC073109001 (9/30/81), discussed the scope of review by the Board in an appeal from an applicant for employment who had been given an adverse suitability determination. The Board held that such an applicant has the right to a de novo hearing in connection with the appeal.

McClintock v. VA, AT315HO9046 (6/1/81), adopted for cases in which a probationary employee alleges marital .,Status discrimination as the basis for Board jurisdiction, the same burden of establishing a prima facie case as that applicable to an employee alleging as an affirmative defense discrimination prohibited by Title VII of the Civil Rights Act of 19649 as amended.

Powell v. Treasury, DC075299039 (10/2/81), held that an award of attorney fees to a union-paid counsel, who must turn the award over to the union, is limited to the actual Cost to the union of providing the representation.

Miller v. OPM, CH83IL8010103 (8/25/81), decided that the granting of disability retirement benefits solely as a sanction against OPM would result in an unlawful default judgment against the United States and could not properly be consummated.

George Ashford v. Department of Justice, DA075299039 (6/i/81), examined the employee's rights during the pre-adverse action, investigatory stage of a proceeding and found no right to counsel under the Sixth Amendment or the due process clause, and a "Miranda" right to counsel only in custodial interrogations. It also held that an employee may not refuse to answer questions simply because the agency fails to advise him of the charges being investigated, but that the privilege against compulsory self-incrimination is applicable if the employee has not been given (expressly or by operation of law) immunity from use of his statements in a criminal proceeding.

Bolling v. Air Force, NY07528090034 (12/28/81), discussed the scope of review the Board will give to an employee's past disciplinary record where that record is relied on by the agency to enhance the penalty in a new adverse action. The Board adopted for its Use the test applied by the former Civil Service Commission in adjudicating cases that came before it. That test is (1) whether or not the employee was informed of the action in writing, (2) whether the employee was given an opportunity to dispute the action with a higher level than the authority who imposed 'the disciplines and (3) whether the action made a matter of record.

## **T. The Activities of the Office of General Counsel**

### **Litigation Activities**

Litigation for the Board is handled by the Office of General Counsel (OGC) and includes defending final decisions by the Board that an appellant chooses to appeal to the Federal courts, as well as original jurisdiction cases.

1. Employee Appeals Cases--During 1981, 193 cases were filed seeking judicial review of Board decisions in employee appeals. The employing agency, ordinarily the sole respondent in such cases, is represented by the U.S. Attorney or the

Department of Justice- However, OGC attorneys advise Justice how the case should be handled. Moreover, the Board, represented by OGC, intervened in 12 of these appeals during 1981 because they presented significant challenges to Board rulings on such issues as Board jurisdiction, the burden of proof in job performance cases, the authority of the Special Counsel, the standard for award of attorney fees to appellants under the Reform Act and the relationship between employee off-duty misconduct and the statutory efficiency of the service" standard for adverse actions. In the 87 court decisions reviewing Reform lot decisions by the Board or its regional offices during 1981, the outcome was: .

- 58 MSPB decisions affirmed
- 9 dismissed for lack of jurisdiction or want of prosecution
- 9 petitions for review withdrawn
- 2 settled
- 9 remanded to MSPB for further proceedings

2. Original Jurisdiction Cases -- The Board is the statutory respondent when its decisions under Chapter 12 of Title 5 (corrective actions, disciplinary actions, and review of OPM regulations) are challenged in court. In June, two related appeals in this category were argued by OGC in the U.S. Court of Appeals for the District of Columbia. These appeals presented fundamental questions Of first impression under the Civil Service Reform Act, including the statutory role of the Special Counsel in a corrective action proceeding, the availability of attorney fee awards in such proceedings and the burden of proof when reprisal for protected activities is alleged.

3. Other actions -- During 1981, the office successfully defended Or supervised the defense of several suits seeking to compel or restrain action by the Board or the Special Counsel. One such suite currently pending, also seeks Board predecisional memoranda under the Freedom of Information and Privacy Acts.

Seven suits for damages against the Board members or other officials were pending or decided in 1981. The office participated in the defense of these actions, which included Oliver v. MSPB, et al., No. 80-1918 (D.D.C., Oct. 13, 1981); this action was dismissed because of the absolute immunity of Board members from personal liability for their official acts as administrative adjudicators.

### Special Counsel Cases

The Office advises the Board when exercise of its authority under Chapter 12 to stay personnel actions resulting from prohibited personnel practices is invoked, and whether to order corrective action or to impose disciplinary sanctions when any of these actions are requested by the Special Counsel.

In 1981, the Board issued several orders staying personnel actions which the Special Counsel alleged were taken as a result of one or more prohibited personnel practices, including discrimination on the basis of conduct which does not adversely affect the performance of the employee or others, discrimination on the basis of sex and national origin, retaliation for whistleblowing and reprisal for the exercise of appeal rights. The Board also ruled in response to a stay request that it has jurisdiction to stay the removal of a career appointee to the Senior Executive Service (SES) from that SES Position to a non-SES Civil service position.

The Board also considered requests for corrective action in five different cases involving such issues as retaliation for Whistleblowing discrimination on the basis of political affiliation sex, age and national origin, and reprisal for the exercise of appeal rights. Three of these cases were referred to the Board's Office of Administrative Law Judges for processing and the Issuance of recommended decisions. One was dismissed at the request of the Special Counsel. . Recommended decisions have been issued in two cases, but no final decisions were issued in corrective action cases in 1981.

### Review of OPM Regulations

The Board's original jurisdiction also includes its authority under 5 U.S.C. 1205(e) to review rules and regulations of the Office of Personnel Management in order to determine whether, on its face or as implemented, any such provision would require the commission of a prohibited personnel practice. This role of the Board is intended to act as a check on the broad regulatory powers of the Office of Personnel Management. The Board may undertake a regulation review on its own motion, at the request of the Special Counsel, or at the request of any other interested person.

The role of OGC in this process is to review OPM regulations, in concert with the Board's Office of Merit Systems Review and Studies, both independently and in response to requests for review from the Special Counsel or others to determine whether there is reasonable cause to commence a formal Section 1205(e) review proceeding. Once a formal review is undertaken the office advises the Board on procedural and other

matters such as discovery, and prepares any necessary orders and opinions for action by the Board.<sup>2/</sup> Two of the five reviews undertaken resulted in final decisions in 1981t one has been stayed to permit OPM voluntarily to amend the regulation at issue, and two are pending.

## VI. Activities of the Office of Merit Systems Review and Studies

### Special Studies

The Board sent several major reports on the health of the merit system to the Congress and the President during 1981. These reports, prepared by the Office of Merit Systems Review and Studies (MSRS) under the mandate of 5 U.S.C. 1205(a)(3) which requires the Board to conduct special studies of the civil service and other merit systems, included:

- *Sexual Harassment in the Federal Workforce: Is it a Problem?* This report, based on a survey of approximately 23,000 Federal employees nationwide, was the first comprehensive study of this subject ever conducted on a national scale. It included extensive findings on the views of Federal employees about sexual harassment including: the extent of harassment in the workplace, description of the characteristics Of victims and perpetrators of sexual harassment, the estimated dollar Cost of this type of harassment and a discussion of the perceptions and responses Of Victims to the incidents and the impact on their behavior. The report includes a discussion of the policy implications of the findings, a set of recommendations, and a survey of actions being taken by agencies to reduce the occurrence Of sexual harassment. This report was originally undertaken at the request of the Subcommittee on Investigations Of the House Committee on Post Office and Civil Service.
- *Whistleblowing and the Federal Employee.* This study examined "Whistleblowing" and the reprisals that are sometimes taken against Federal employees. The study was not intended to measure the extent of fraud, waste or mismanagement in government, although the observations of the surveyed employees shed considerable light on that subject. Questionnaires

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<sup>2/</sup> Because of its work in this area, the office also provides advice in appellate cases where the validity of an OPM regulation is at issue.

were sent to approximately 13,000 workers employed in the 15 agencies with Offices of Inspectors General. The report assesses the extent of employees' awareness of illegal and wasteful activities and traces what those employees did (or failed to do) with that information, and what, if anything, resulted. The report also assesses employee awareness of, and confidence in, the channels which were intended to encourage their reportings and protect them from reprisal.

- *Status Report on Performance Appraisal and Merit Pay Among Mid-level Employees.* This report, based on a questionnaire survey distributed to approximately 4,900 mid-level employees, sets forth the collective firsthand experiences and viewpoints of those employees concerning the functioning of the new Merit Pay and performance appraisal systems- It also reports on agencies' efforts to develop performance standards in a timely fashion.
- *The Senior Executive Service.* This report examines the impact of the pay incentives promised in the CSRA to Senior Executives and explores what they thought of their incentive value, the equity of their distribution and whether these executives felt the various incentives were sufficient to retain highly competent executives. It R130 examines the efficacy of the statutory safeguards against politicization. The findings were based on a comprehensive survey of approximately 1,000 career SES members.
- *Study of MSPB Decisions During 1980.* This study analyzed the Board's processing of appeals during FY 1980 and contains extensive data on the average processing time, the number of appeals received and decisions issued, the number of hearings held, agency reversal rates, and appellant reversal rates-

#### Report on Significant Actions of the Office of Personnel Management

In June 1981, the Board issued its first annual report to Congress and the President on the significant actions of OPM. This report, required by statute, examined programs and policies initiated by OPM to see if they resulted in promoting the merit principles and prevented prohibited personnel practices. MSRS staff interviewed the Directors of Personnel at each cabinet level agency, attended extensive briefings set up for the Board by OPM staff, met with many groups who had been observers of OPM's actions and conducted a nationwide survey of personnel professionals in grades 13 through 15.

This report is distinctive from others produced by agencies (including the General Accounting Office and OPM itself) in that it is the only report generated within the Executive Branch which is Specifically concerned with the relationship between OPM's programs and the health of the merit System- It is also the only report within the Executive branch by an agency that has no vested interest in the programs and issues upon which it reports.

#### Projected Studios for 1982

Budgetary restraints have prevented the 'Board from implementing through the Office of Merit Systems Review and Studies the comprehensive merit systems oversight the Civil Service Reform Act originally contemplated. For example, the Office has been unable to conduct the number of in-depth, on-site agency-specific follow-ups of the many government-wide insights its studies have revealed as might have been appropriate.

Nevertheless, the Office will continue to produce additional reports including the following to be released in 1982:

- A study on Reduction in Force. In 1981, MSRS initiated a study on RIF in the Federal government. This study will examine the problems associated with this process-- one of the Most important merit issues to be monitored this year. Two questionnaires were sent to employees, one to a random sample of Federal employees and another to personnel professionals. MSRS staff also conducted some On-site work, conducting interviews with knowledgeable people in organizations in stages of the RIF process. An interim report, based on the on-site work will be released soon. A second report based on the results Of the survey will be released later in the year.
- Report on the Significant Actions of the OPM during 1981. This report will look at how the specific OPM policies and programs during the previous year supported or detracted from the merit principles and prohibited personnel practices. In addition to following up on the issues pending from last year's reports the report will focus on two or three new critical issues.
- Report on Appeals Decisions by MSPB, 1981. This report is a continuation of the annual review of the Board's appeals processing, the largest of the Board's functions for 1981.

- Monograph Series. The Office has built up a unique base of objective data about the operations of the merit system through its surveys of key groups of Federal employees. A series of monographs based on this data base will be released during 1982. Each monograph will address in an intensive way such topics as the occurrence of prohibited personnel practices, whether poor performers are removed from the service, the quality of supervision in the Federal service, the morale of Federal employees, and factors of productivity.

In addition to these reports, the Office plans to conduct several new studies, the results of which will quite likely also be released during 1982. These studies will include an omnibus survey of Federal employees to follow-up on key issues identified in past studies, an expanded follow-up on the reprisal study, and a program to establish comparative data by which experiences in the private sector may be related to the Office's findings concerning Federal employees.

**APPENDIX**

**TO THE**

**THIRD ANNUAL REPORT**

**OF THE**

**U.S. MERIT SYSTEMS PROTECTION BOARD**

**APPENDIX I**

**STATISTICAL SUMMARY  
MERIT SYSTEMS PROTECTION BOARD APPEALS**

**Total Cases to Adjudicate:**

| <u>CY 1980</u> | <u>CY 1981</u>      |
|----------------|---------------------|
| 7,641          | 9,444               |
|                | <u>11,054</u> (ATC) |
|                | 20,498              |

**Cases Processed:**

| <u>CY 1980</u> | <u>CY 1981</u>   |
|----------------|------------------|
| 5,544          | 7,026            |
|                | <u>128</u> (ATC) |
|                | 7,154            |

**Cases Pending at Year's End:**

| <u>CY 1980</u> | <u>CY 1981</u>      |
|----------------|---------------------|
| 2,095          | 2,418               |
|                | <u>10,926</u> (ATC) |
|                | 13,344              |

**Cases to Adjudicate 1980/1981:**

**Adverse Actions**

| <u>CY 1980</u> | <u>CY 1981</u>      |
|----------------|---------------------|
| 3,178          | 4,363               |
|                | <u>11,054</u> (ATC) |
|                | 15,417              |

**Unsatisfactory Performance**

| <u>CY 1980</u> | <u>CY 1981</u> |
|----------------|----------------|
| 74             | 28             |

**RIF**

CT 1980  
727

CY 1981  
19739

**Mixed (AA, RIF, Other)**

CY 1980  
1,021

CY 1981  
1,359

**Disability Retirement**

CY 1980  
1,068

CY 1981  
753

**Other Retirement**

CY 1980  
258

CY 1981  
249

**All Others -(Probationers, ALOC, Restoration, Employment Practices, Attorney Fees, Miscellaneous)**

CY 1980  
1,315

CY 1981  
2,317

**APPEALS RECEIVED, DECIDED AND COMPLETED  
WITHIN 120 DAYS IN 1981**

As required by 5 U.S.C. 7701(i)(2), here presented is the Merit Systems Protection Board's report to Congress on the number of appeals submitted to the Board- during Calendar Year 1981, the number processed to completion during that year, and the number not completed by the date originally announced and the reasons therefor. Pursuant to 5 U.S.C. 7701(i)(1) the Board has announced that all appeals processed under the appellate procedures of 5 U.S.C. 7701 and 7702 will be decided within 120 days of the filing of the appeal. 44 Fed. Reg. 9446 (1979).

In the 1981 Calendar Year, 18,403 appeals were filed with the Board's eleven regional Offices- During this same period of time, 7,154 appeals were processed to completion. One hundred and forty-nine (149) appeals were not decided within the Board's 120-day time limit. Of these 149 cases, 62 were completed within the 30-day period following the 120th day, and only 87 required the Board, pursuant to 5 U.S.C. 7701(i)(1), to publicly announce a new completion date.

Our records show that the reasons for the processing delays in the 149 overage cases fall into the following general categories- Ten cases were delayed because of the illness of one of the parties, a representative or the assigned presiding official of the Board. In 59 appeals, a number of which the Board assigned to its Office Administrative Law Judges, the complexity or sensitivity of the case and the extensive discovery and lengthy hearing or decision that resulted prolonged the processing time. Hearing Postponements or continuance granted because of a showing of good cause were responsible for the delay in five cases- In another five cases the 120-day time limit was exceeded because of problems unique to the processing of 4F appeals from overseas locations. The increased travel time involved in these cases and the frequent delays encountered in receiving and exchanging files and other documents do Occasionally impede the presiding officials' ability to issue decisions by the required deadline. Temporary staffing and workload problems with regard to the professional and support personnel of some of the regional offices were responsible for the largest number, 70, of overage cases.

Taking into account the cases already pending at the beginning of the year, as well as those filed during the latter months of 1981 that had 1982 deadlines, the Board had before it 7,973 appeals in which the 120-day time limit expired during the 1981 Calendar Year. In only 149 of those appeals was the 120-day standard not met. Consequently, in over 98 percent of the cases with 1981 deadlines, the Board completed action within 120 days of the filing of the filing. This record demonstrates the Board's continuing commitment to the expeditious processing of appeals mandated by the 1978 Civil Service Reform Act.

## HEADQUARTERS REFORM ACT CASE REPORT

## Total Board Petitions for Review

## CALENDAR YEAR 1981

December 28, 1980 through December 26, 1981

| TYPE OF APPEAL               | On Hand      | Received     | Issued       | Canceled  | Pending      |
|------------------------------|--------------|--------------|--------------|-----------|--------------|
| Adverse Action               | 549          | 1,075        | 700          | 29        | 895          |
| Unsatisfactory Performance   | 11           | 16           | 13           | 0         | 14           |
| Reduction-in-Force           | 62           | 184          | 88           | 5         | 153          |
| Retirement                   | 87           | 264          | 150          | 14        | 157          |
| <b>All Other - Total</b>     | 105          | 303          | 180          | 27        | 201          |
| Probationer                  | 28           | 80           | 63           | 5         | 40           |
| Accepted Level of Competence | 33           | 84           | 46           | 5         | 66           |
| Short Suspension             | 2            | 5            | 3            | 0         | 4            |
| Suitability                  | 4            | 0            | 4            | 0         | 0            |
| Restoration to Duty          | 17           | 39           | 25           | 1         | 30           |
| Employment Practices         | 6            | 17           | 3            | 1         | 19           |
| All Other                    | 15           | 78           | 36           | 15        | 42           |
| <b>SUBTOTAL</b>              | 814          | 1,842        | 1,161        | 75        | 1,420        |
| Old System Cases             | 202          | 210          | 235          | 2         | 175          |
| <b>TOTAL</b>                 | <b>1,016</b> | <b>2,052</b> | <b>1,396</b> | <b>77</b> | <b>1,595</b> |