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ANNUAL REPORT

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

## **The U.S. Merit Systems Protection Board**

Herbert E. Ellingwood, Chairman  
Maria L. Johnson, Vice Chair  
Dennis M. Devaney, Member



**Letter of Transmittal**



MERIT SYSTEMS PROTECTION BOARD

Washington, D.C. 20419

The Chairman

Sirs:

In accordance with Section 202(a) of the Civil Service Reform Act of 1978 (5 U.S.C. Sec. 1209(b)), it is my honor to submit the Fifth Annual Report of the Merit Systems Protection Board. This Report covers the activities of the Board for Calendar Year 1983.

Respectfully,

A handwritten signature in black ink that reads "Herbert E. Ellingwood". The signature is written in a cursive style with a prominent initial "H".

Herbert E. Ellingwood

The President of the United States  
The President of the Senate  
The Speaker of the House  
of Representatives  
Washington, D.C.

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## **I. Introduction**

The U.S. Merit Systems Protection Board was created pursuant to Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act of 1978 ("the Act"). An independent, quasi-judicial agency, the Board is comprised of a bipartisan three-member panel and charged with the duty of acting as the "watchdog" of the Federal merit systems. This mandate is implemented by the Board through the fulfillment of its statutory duties under the Act including:

- Adjudicating employee appeals and actions brought by the Special Counsel in a fair and impartial manner;
- Conducting special studies of the merit systems to determine whether they are free from prohibited personnel practices;
- Analyzing and reporting on the significant activities of the Office of Personnel Management (OPM); and
- Reviewing the regulations issued by OPM to determine whether they require the commission of prohibited personnel practices on their face or as implemented by an agency.

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

- Guaranteeing the independence of the Board members by providing for nonrenewable terms and permitting removal only under extraordinary circumstances;
- 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 (OMB);
- Permitting the Board to appoint personnel essentially free of approval by the Executive branch; and
- Representing itself in the Federal courts except before the Supreme Court.

## II. Summary of 1983

1983 was a year of historic accomplishment for the Merit Systems Protection Board, but events which took place in 1981 and 1982 accounted for much of the Board's activity in 1983. Briefly, those events were:

- The air traffic controllers (ATC) strike of August 1981 that resulted in 11,125 appeals being filed in the Board's 11 regional offices;
- A 16% reduction in the Board's budget for FY '82; The suspension of hearings for two months and all travel for more than six months in the regions during 1982 as a result of those budget cuts;
- The furlough of nearly all Board employees nationwide for two weeks in July of 1982 as a result of the budget cuts.

Yet in 1983, the Board proved that, through innovative management practices and dedicated Federal employees, a small agency with limited resources could overcome such challenges and create a renewed sense of achievement and purpose.

In the regions, this was accomplished with careful planning and adequate funding, which resulted in the completion of a staggering workload involving 17,442 appellants. By comparison, the regional offices completed approximately 7,000 cases in 1981 and over 8,300 in 1982. Because of this tremendous effort, a return to the processing and adjudication of appeals in the regions within 120 days was imminent at year's end.

At headquarters, the Office of Appeals Counsel, which drafts proposed orders for the Board based on petitions for review filed from regional office decisions, forwarded legal recommendations covering 5,001 controllers and 2,005 non-ATC government employees in 1983, a total of 7,006, a large increase over the 1,784 appellants in 1982.

The Board itself issued orders involving 6,326 appellants. "By any measure," noted Board Chairman Herbert Ellingwood, "completion of this magnitude of work - both in our regional offices and in headquarters by a small agency with only 400 employees nationwide—is an accomplishment of towering proportions."

But the Board's success extended beyond just mastering the largest appeals workload in its existence: there were major successes and new initiatives in virtually every area of Board operations. Among the most important were:

- Considering and deciding appeals involving many novel legal issues;
- Improvement of appeals management. The Board issued new internal guidelines for conducting more efficient hearings, improving the quality and conciseness of appeals decisions, and expanding and refining its case-tracking systems;
- Introducing a new expedited appeals process in five regional offices. The expedited appeals procedure, called Appeals Arbitration, was designed to cut processing time for the more routine type of appeals to 60 days or less, as opposed to the regular 120-day time-line;
- Initiating major new studies of the Federal personnel system and employment of new methods for examining various aspects of the merit systems, including the initial use of Roundtable discussions;

Developing management skills through intensive training of the Board's senior managers;

- Initiating and completing a review of the Board's internal controls in accordance with the Federal Manager's Financial Integrity Act, and auditing of agency personnel management policies, procedures and operations;
- Reorganizing the Office of Administration and creating in its place the Office of the Comptroller to better direct and coordinate for the Chairman and Managing Director the financial and administrative functions, including; general administrative, office support services, budget and finance, and internal audit and control. The reorganization also created independent offices of Personnel and Equal Employment that report directly to the Managing Director.

"1983," noted Chairman Ellingwood, "was an extremely important year for the Board, in which the Board was able to refocus its attention on its primary functions, away from the tremendous distractions of the previous year caused by the severe budget problems.

The Board was able to accomplish in 1983 an achievement rare in the history of adjudicatory agencies: to come back from an overwhelming workload and resultant appeals back- log, with very limited resources, to a position of being very nearly current in all aspects in a very short period of time."



New York Regional Office staff took time out from their work to pose for a group picture. In 1983 the New York Office adjudicated 838 Federal employee appeals.



Members of the Boston Regional Office also moved mountains of work in 1983, adjudicating over 672 appeals.



Secretary Mary B. Green takes a call for Managing Director Richard Redenius.

### III. The Board Members

The three Board members are appointed by the President with the advice and consent of the Senate. In order to ensure the independence of the Board, the designation of any member as Chairman must be approved by the Senate; Members serve a seven-year term and may not be reappointed; and members may be removed only under the higher than ordinary standard of inefficiency, neglect of duty, or malfeasance in office.



Herbert E. Ellingwood

**Herbert E. Ellingwood** was appointed by President Reagan to be the Board's second Chairman on December 14, 1981. At the time of his appointment, Ellingwood was serving as Deputy Counsel to the President. Prior to his White House position, he was in private law practice with the firm of Caldwell & Toms in Sacramento, California. From 1975 to 1979, Ellingwood was Special Assistant Attorney General for California and was Legal Affairs Secretary to Governor Reagan from 1969 to 1974.

**Maria L. Johnson** was nominated by President Reagan to the Board on March 18, 1983, and was confirmed by the Senate on May 6 to the seat formerly held by Ersa H. Poston. Johnson was designated Vice-Chair on September 19, 1983. At the time of her appointment, she was a commercial loan officer with the Security National Bank in Anchorage, Alaska. She has served as a Legal Assistant to the District of Columbia Department of Human Resources in Washington, D.C.; and as an Associate Attorney with the firm of Lambert, Griffin & McGovern in Washington, D.C.



Maria L. Johnson



Dennis M. Devaney

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

#### **IV. 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 its eleven regional offices, is delegated to the Managing Director by the Chairman.

The **Assistant Managing Director for Regional Operations** has responsibility for the operation of the regional offices and for reviewing the initial decisions of those offices.

The **Assistant Managing Director for Management** is responsible for formulating, planning, and coordinating improvements to the policies, procedures, administration and management of the agency.

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

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

The **Office of Legislative Counsel** has dual responsibility for the agency's Congressional affairs and public information functions including responding to Congressional inquiries, preparing Board testimony and legislative comments, providing information to the press and public, providing the agency with audio-visual and graphic arts services and preparing various Board publications.

The **Office of Administrative Law Judges** adjudicates cases under the Hatch Political Activities Act, hears disciplinary cases and proposed removals of administrative law judges and, upon assignment from 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** carries out the Board's reviews of Government wide personnel policies and practices to ensure that they are free from prohibited personnel practices and achieve results consistent with the statutory merit system principles. The office also conducts annual oversight reviews of OPM and participates in the review of OPM-issued rules and regulations. The office's findings are reported to Congress and the President and made available to the public.

The **Office of the Secretary** is the central processing point for all petitions to the Board. The Board has delegated to the Secretary responsibility for establishing and controlling dockets on pending cases; ruling on certain procedural matters, relating to case adjudication; issuing, publishing and distributing Board orders and opinions; making initial rulings on Freedom of Information and Privacy Act requesting; and authenticating official records to the courts, the Equal Employment Opportunity Commission and other interested parties and organizations. The Secretary also keeps the official minutes of Board meetings; makes arrangements for hearings before the full Board; oversees the Board's law library; operates the public documents and reading room; reports to the Board on caseload and case-processing statistics; and publishes the Board's legal publications.

The **Office of the Comptroller** was established in 1983, and includes the functions previously performed by the Offices of Administration and Internal Audit and Control. The Comptroller directs and coordinates for the Chairman and Managing Director the financial and administrative service functions and includes divisions for: Contracts and Materiel Management; Budget and Finance, and Internal Audit and Control .

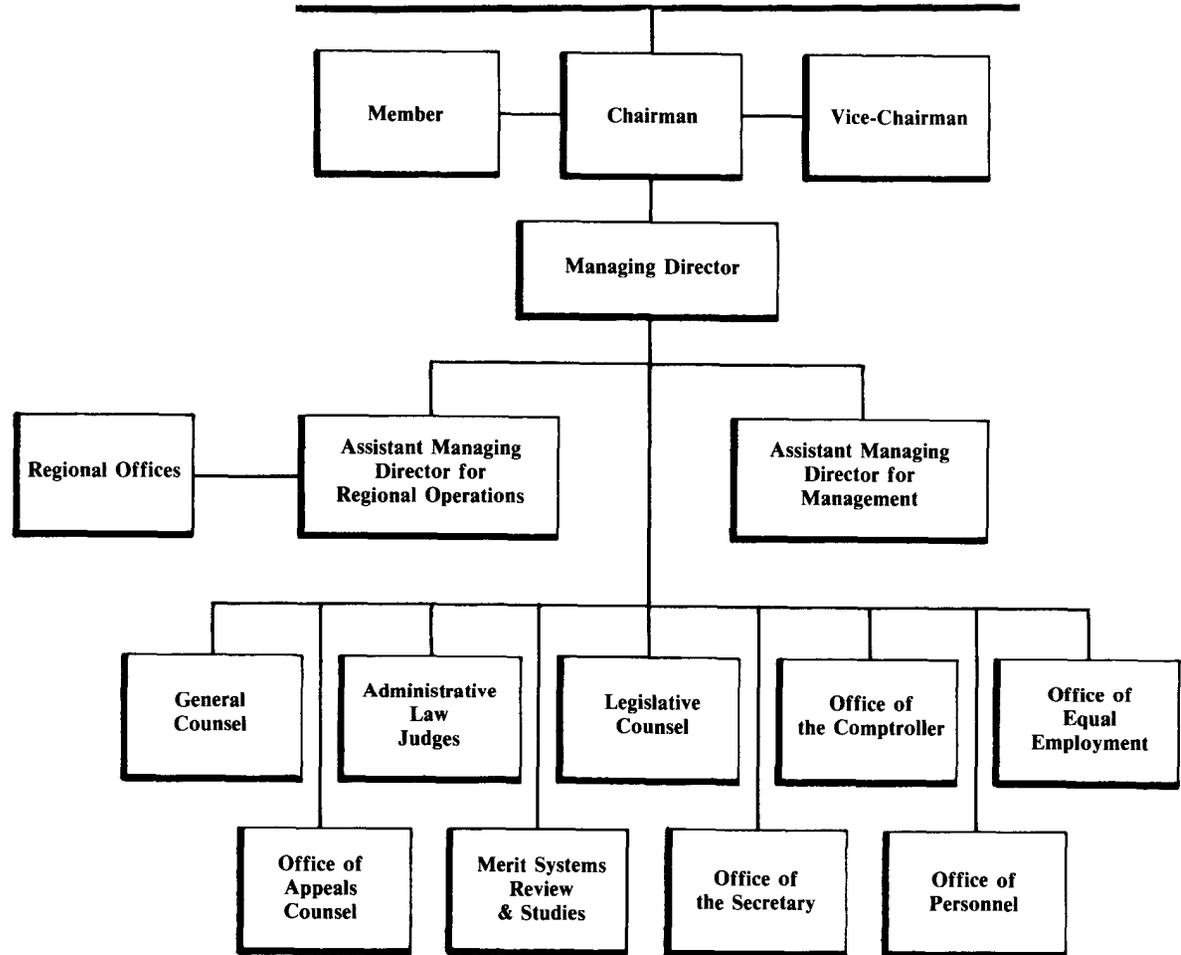
The **Office of Personnel** is responsible for managing the internal personnel programs of the Board. The Office provides personnel assistance to management, employees, and applicants through two divisions: the Programs Division and the Operations Division.

The **Office of Equal Employment** develops and monitors the implementation of all of the Board's equal employment and equal employment opportunity programs and policies. This includes the establishment and maintenance of an agencywide affirmative action program and the evaluation of the sufficiency of the agency's programs and procedures on a continuing basis.

#### The Special Counsel

The **Office of Special Counsel** has independent investigatory and prosecutorial authority and is responsible for bringing certain actions before the Board. The Special Counsel is required by 5 U.S.C. 1206 (m) to submit its own annual report to the Congress; therefore, this report will not address Special Counsel activities except as they pertain to Board orders and decisions.

## U.S. MERIT SYSTEMS PROTECTION BOARD



## **V. The Adjudicatory Framework**

Adjudication of appeals is by far the largest and most time consuming activity of the Board and consequently utilizes the greatest portion of its resources. In 1983, because of the large number of ATC cases, and the resultant backlog of non-ATC cases, the Board's workload was even more concentrated in this area.

Four Board offices besides the Board itself are directly involved in the adjudicatory work: the regional offices, the Office of Appeals Counsel, the Office of General Counsel and the Office of Administrative Law Judges.

### **A. Regional Offices**

Adjudication of cases generally begins with the filing of an appeal in one of the Board's 11 regional offices. Entering 1983, the regional offices had completed hearings of all air traffic controllers' appeals and were concentrating on writing and issuing the remaining decisions. From January 1 through February 1, 1983, the regional offices issued initial decisions on the remaining 7,700 air traffic controllers' appeals.

Prior to receipt of the ATC appeals the regional offices maintained a caseload of between 1,800 and 2,000 appeals and had prided themselves for issuing approximately 95% of all appeals within the Board's 120-day standards. However, with the influx of the ATC cases, the regional offices had 5,450 other appeals pending at the end of February, and of those, 2,656 appeals had been pending in excess of 120 days. The regional offices, therefore, set a goal of adjudicating all appeals which had been pending more than 120 days and also returning to their practice of deciding virtually all new appeals within 120 days.

By year's end, the regional offices had adjudicated 10,480 appeals in addition to the 7,700 ATC appeals, and had reduced the number of cases on hand to only 2,205. In addition, the regional offices had reduced the number of over-age cases from over 2,600 to 561 while processing all newly filed cases within 120 days.

### **B. Office of Appeals Counsel**

Decisions issued in the regions do not become final for 35 days. During that time either party, the Office of Personnel Management or the Special Counsel can petition the Board to review the "initial" decision, or the Board can review it on its own initiative.

The petitions for review (PFR's) are received by the Secretary of the Board, who, after taking appropriate measures to ensure a certified record, forwards the case to the Office of Appeals Counsel (OAC), which reviews the case record and prepares draft final orders for the Board's consideration.

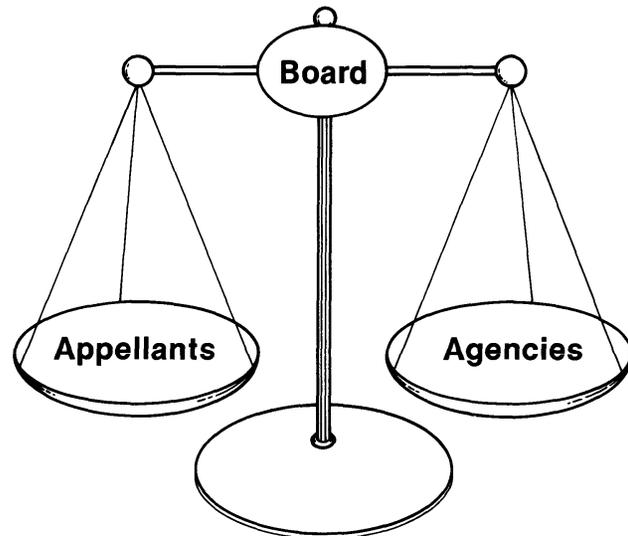
The OAC's workload also reflected the higher work levels seen throughout the Board. In 1983, the Office of Appeals Counsel prepared decisions covering 7,006 appellants. Of those, 5,001 were air traffic controllers. This represented a very significant workload increase when compared to the 1,784 cases processed in 1982.

### C. Office of Administrative Law Judges

The Office of the Administrative Law Judges (OALJ), as already indicated, adjudicates certain special categories of appeals, such as Hatch Act and ALJ removals as well as the more complex or sensitive cases assigned to it by the Board and issues, orders and motions involving subpoenas and discovery.

Decisions of the Board's Administrative Law Judges in original jurisdiction (i.e., all cases not involving appeals from agency actions) are not final Board decisions, but are recommended decisions to the full Board for final decision.

Like the previous year, 1983 was an exceptionally busy year for OALJ. With the addition of a third administrative law judge, the judges responded to a total of 663 motions for subpoenas and discovery and issued 44 decisions addressing a variety of issues.



The office also handled a number of cases including (a) sensitive cases reassigned from the regions; (b) appeals of employees of MSPB; and (c) removals of Senior Executive Service members, as well as the appeals of 152 air traffic controllers assigned to the OALJ for hearing.

### D. Office of General Counsel

As legal advisor to the Board, the Office of General Counsel (OGC) provides a variety of legal services to the Board and its offices. Areas in which OGC made significant contributions to the Board's overall mission in 1983 include: original jurisdiction cases; appellate jurisdiction cases involving designated issues; litigation; cases with equal employment opportunity issues, referred to as "mixed cases"; regulation reviews affecting the Federal work force; labor management relations; government ethics obligations and agency obligations under the Government in the Sunshine Act, the Freedom of Information Act and the Privacy Act.

In addition, the Office of General Counsel was frequently called upon to advise the Board on precedential and significant legal issues arising in employee appeals. Among other issues, OGC prepared advisory memoranda for the Board on questions concerning such issues as off-duty misconduct, reduction-in-force, collateral estoppel, survival of claims, attorney fees, adverse action and retirement.

In addition to preparing advisory memoranda on these issues, OGC also prepares draft final orders upon request. In 1983 OGC, along with other offices of the Board, assisted in adjudicating thousands of ATC appeals. A senior OGC attorney was designated as Special Presiding Official to rule on the procedural motions those cases entailed. Several OGC attorneys contributed to the overall Board effort by drafting ATC opinions for the Board on petitions for review.

## **VI. Major Appeals Issues**

The Board has a major responsibility to thoroughly examine issues that come before it in appeals and to provide agencies, employees and its own presiding officials with precedent-setting opinions applying and interpreting the provisions of the Civil Service Reform Act.

This year, as in previous years, the Board issued a number of decisions addressing and interpreting subjects of significance that will become precedent for future appeals. What follows is a brief discussion of the most significant decisions issued by the Board in 1983, as well as some of the more important recommended decisions sent to the Board by its Office of Administrative Law Judges.

### **A. Appellate Jurisdiction Cases**

Most cases coming to the Board in Washington stem from requests by either an appellant or an agency in the form of Petitions for Review to examine a presiding official's decision. The PFR's must be based on specific legal grounds, not mere disagreement with a regional office decision. Listed below are summations of some of the most significant appeals decisions.

#### **Air Traffic Controllers Issues**

##### **Adverse inference**

*Adams v. Dept. of Transportation*, NY075281F0424 (4-25-83). The Board held that the presiding official properly drew an adverse inference against the appellant because of his failure to attempt to rebut the charges on which his removal was based. The Board ruled that the inference was permissible since the record contained independent probative evidence in support of the charges.

##### **Command influence**

*Anderson v. Dept. of Transportation*, SL075281F0347 (4-25-83). The Board ruled that an appellant's claim of "command influence," which improperly resulted in an adverse action against him, may be established by showing that any statement or instruction by an Executive Branch official deprived the individual agency official, who must propose or decide whether to effect the adverse action, of the requisite authority to do so. The Board found that general statements of the penalty to be imposed by the agency for specific prohibited conduct, as in this case, are not improper and do not establish such a claim.

##### **Harmful Error**

*Baracco v. Dept. of Transportation*, DC075281F0895 (4-25-83). The Board held that an agency's failure to afford an employee the full seven days required by statute for response to a proposed adverse action does not constitute a reversible error *per se*. The Board found that an appellant must prove the procedural error was harmful under 5 U.S.C. 7701 (e) (2) (A) and 5 C.F.R. 1201.56 (c) (3) by preponderant evidence in order to prevail.

### Employee Responsibility

*Campbell v. Dept. of Transportation*, DE075281F0674 (4-25-83). The Board found that the futility rule in private sector labor law, which excuses employees from engaging in the futile act of notifying an employer of intent to abandon a strike and desire to return to work, does not apply in the public sector where striking is prohibited by Federal statute. The Board held that, despite any confusion as to Federal employees' employment status which may have been caused by agency or other Administration announcements, it is incumbent upon the employees to timely notify the agency of their readiness and desire to return to work and to inquire about their individual employment status. The Board ruled, further, that *ex parte* communications between a presiding official and only one party to an appeal do not violate Board regulations if they are strictly procedural in nature.

### Constructive suspension

*Chance v. Dept. of Transportation*, SL075281F0621 (9-20-83). The Board held that the presiding official properly considered, *sua sponte*, the issue of constructive suspension during the removal notice period, and ordered cancellation of both the removal and the suspension upon finding that the agency did not prove the charges on which the removal action was based. The Board found that the presiding official's raising of the constructive suspension claim *sua sponte* was a proper exercise of his remedial powers to afford the appellant full relief from the improper adverse action.

### Suspension jurisdiction

*Martel v. Dept. of Transportation*, BN075281F0558 (4-25-83). The Board ruled that an appellant may establish the Board's jurisdiction over his claim of suspension for more than 14 days during the notice period of proposed removal for strike participation, by proving that he was ready, willing and able to return to work during the time period in question. The Board held that this would require appellant to show that he contacted an agency official with decision-making authority (in person or otherwise) to communicate unequivocally his availability and his desire to return to work.



The Board considers testimony from Special Counsel K. William O'Connor during a hearing involving Hatch Act issues.

### Leave cancellation

*McPartland v. Dept. of Transportation*, DA075281F1018 (2-8-83). The Board found that the agency properly cancelled the appellant's previously approved annual leave under the pertinent collective bargaining agreement provision which prohibited cancelling or rescheduling approved leave, except for an "operational emergency." The Board interpreted the provision as requiring only the existence or reasonable likelihood of an operational emergency, like the nationwide strike involved here, before the agency could cancel the leave prospectively or during the duration of the emergency.

### Consolidation

*Noa v. Dept. of Transportation*, NY075281F0697 (4-25-83). The Board found that multiple appeals involving substantially the same questions of law and operative facts with no apparent conflict of interest, the same legal representative, and substantially the same witnesses, may be consolidated for purposes of a hearing and an initial decision. The Board noted that the consolidation in this case resulted in a savings of time and costs for all parties, and that the complaining appellants showed no ensuing prejudice to their substantive rights. The Board further held that, in order to demonstrate the continuance of a strike on a particular date, the agency need not necessarily present evidence that there existed on that date a certain number of co-workers, mutually withholding their services prior to their deadline shifts, with whom one appellant could affirmatively interact.



Members of the Air Traffic Controller Special Task Force are honored for their tremendous effort in helping process over 11,000 appeals received at MSPB.

### Waiving of filing deadline

*Smith v. Dept. of Transportation*, DE075281F0337 (8-24-83). The Board found good cause to waive the regulatory deadline for filing a petition for appeal of a claim of improper suspension during the removal notice period in the context of the appellant's appeal of his removal for strike participation and absence without leave. The Board made this determination after considering the appellant's lack of notice of his suspension, the unique circumstances surrounding the nationwide strike, the agency's notice that the suspension claim was raised before the record closed, the agency's opportunity to respond to the claim, and the agency's failure to establish prejudice resulting from adjudication of the two appealable actions simultaneously.

## Other Significant Issues

### Employee appointment

*Travaglini v. Education*, DC07528110641, (11-2-83). The Board held that when an employee shows that he has been appointed to a position and has commenced duty upon certification by OPM that he is eligible to do so, and when the appointment is subsequently found to be improper, the individual is an "employee" within 5 U.S.C. 7511 (a) unless the appointment was made in violation of an absolute statutory prohibition or the individual has committed fraud regarding the appointment.

### Warnings and Penalties

*Gober v. Department of Navy*, SF07528110693, (6-7-83). The Board held that there was no rule or regulation which precluded an agency from using nondisciplinary warnings or counseling as a basis for imposing an enhanced penalty.

### Reinstatement after injury

*Cox v. International Trade Commission*, DCO3538010204ADD, (6-14-83). The Board found that an employee who recovers from a compensable injury within one year has an absolute right to immediate restoration.

### Disparate penalty

*Filip v. Veterans Administration*, CH07528110504, (6-1-83). The Board held that a penalty cannot be sustained when the appellant establishes that other employees were disciplined less harshly for the same offense and the agency has not shown a legitimate reason for the different treatment.

### RIFs and bargaining agreements

*Sirkin v. Department of Labor*, DCO3518210509, (8-24-83). The Board held that, consistent with the terms of 5 U.S.C. 7121(a), when a negotiated bargaining agreement does not specifically exclude a reduction-in-force action, such an action is covered by the agreement and can only be grieved under the negotiated grievance procedure.

### Record accuracy and removal

*Ramseur v. Navy*, PH07528110620, (8-9-83). The Board held that a review of the past record in a removal case requires the presiding official to determine whether the past record was "clearly erroneous."



Philadelphia Regional Director Lonnie L. Crawford, Jr. listens intently during a management training seminar.

### **Withdrawal of resignation**

*Almon, Keller, Kuntz, Neighbors v. NASA*, AT07528111048, (8-9-83). The Board held that an agency must show a valid reason for the denial of a timely request to withdraw a resignation and that the Board will only sustain an agency's refusal when such a decision is supported by sufficient evidence.

### **Stay of appeal pending investigation**

*Green v. U.S. Postal Service*, PH07528310352, (9-27-83). The Board held that an appellant who had been removed for alleged criminal activity is entitled to an indefinite stay pending the results of an investigation by the U.S. attorney's office linked to the same charge.

### **Handicap accommodation**

*Ignacio v. U.S. Postal Service*, SF07528110438, (9-16-83). The Board held that the 1973 Rehabilitation Act and EEOC regulations dealing with reasonable accommodation of physical handicap do not require that the agency consider reassignment of the handicapped individual to another position once it was determined that he or she could no longer perform the duties of his or her official position.

### **Summary judgement and presiding of officials**

*McKenzie v. Department of Interior*, DE04328210002, (8-24-83). The Board held that when an appellant moves for judgement at the closing summary of the agency's case-in-chief, the presiding judgement official has the authority under 5 C.F.R. and 1201.55(b) to decide whether the action is supported by the requisite degree of proof under 5 U.S.C. 7701 (c). If the agency has established an unimpeached prima facie case, the appellant's motion must be denied.

### **Privacy of investigatory files**

In *In Re Subpoena Addressed To The Office of Special Counsel*, (Martin) HQ12008310019, the Board held that the Special Counsel must respond to the "subpoena duces tecum" but that documents prepared by or for attorneys in the Office of Special Counsel during investigation in anticipation of a Board proceeding were protected from disclosure by the "work product" privilege. The Special Counsel was ordered to produce documents not within the privileged category and to produce for "in camera" inspection by the Board any documents insufficiently described in the claim of privileged work product.

## **B. Original Jurisdiction Cases**

Cases under the Board's original jurisdiction include appeals of disciplinary actions against administrative law judges, and requests for informal hearings by Senior Executive Service (SES) employees.

### **Adverse Actions Against Administrative Law Judges**

An administrative law judge may not be subjected to an adverse action unless, after an opportunity for a hearing, the employing agency establishes good cause, on the record, for that action. Nine agency requests to discipline administrative law judges were brought to the Board in 1983. These appeals start in MSPB's Office of Administrative Law Judges (OALJ) where hearings are held and recommended decisions are issued for the Board's consideration.

In 1983, the Board considered several major legal issues which are of significant decisional importance.

In *HHS v. Goodman*, HQ75218210015, the Board Members held oral argument and considered, among others, the following issue of first impression: can "good cause" for removal be established through proof of unacceptable low productivity? No previous final administrative or judicial decision had ever decided whether performance-based reasons could be used as a basis for initiating an adverse action against an administrative law judge.

In this case, which has decided in early 1984, the Board considered whether the independence granted to ALJ's by the Administrative Procedure Act immunized them from disciplinary actions for poor performance. While agencies cannot interfere with, or base their actions upon factors which would interfere with, an ALJ's decisional independence, the Board determined that the coverage of section 7521 was not limited to misconduct situations.

In *HHS v. Davis*, HQ75218210026 the Board expanded upon its footnote statement in *Goodman* that the efficiency of the service standard should not be used in Section 7521 cases. The Board held that good cause is a separate and distinct standard. Based upon the nature and effect of the conduct involved in *Davis*, the Board adopted the Recommended Decision determining that respondent's lewd and lascivious conduct did constitute good cause.

In *HHS v. Brennan*, HQ7521820010, and *HHS v. Manion*, HQ75218210008 the issues were related to those in *Goodman* and *Davis*. These cases considered the issue of whether an ALJ may refuse to comply with instructions which arguably interfere with his ability to hold full and fair hearings and to render complete and impartial decisions. In its decision, the Board addressed the extent to which ALJ's are subject to management supervision.

### Senior Executive Service Issues

In *Gaines v. Department of Housing and Urban Development*, HQ12018110066, the Board addressed the questions of informal hearings availability to probationary SES employees, and availability of redress when non-statutory procedures are denied. Gaines, a probationary SES employee, was dismissed for performance deficiencies. She sought an informal hearing under 5 U.S.C. 3592. The administrative law judge dismissed her request upon a finding that the legislative history established that probationary employees were not entitled to an informal hearing. The Board affirmed the order of dismissal with one clarification. The Board further held that SES members denied procedures prescribed by OPM but not provided by the statute do not have redress before the Board.

### Special Counsel Initiated Actions

The majority of cases heard by the Board under its original jurisdiction authority are actions brought by the Special Counsel. The number of cases increased sharply this year and can generally be divided into four types: (1) requests for stays of agency personnel actions believed to be based on prohibited personnel practices; (2) requests for corrective actions; (3) requests for disciplinary actions against federal employees; and (4) Hatch Act cases.



Regional Directors William Carroll of Boston, A. Luis Lucero, San Francisco, and Lonnie L. Crawford, Jr., Philadelphia, participate in discussion of regional office management issues.

*Stay Requests*

Under the provisions of 5 U.S.C. §1208(a), the Special Counsel may request a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken as a result of a prohibited personnel practice. Any Board member may order such a stay unless he or she determines that, under the facts and circumstances involved, the stay would not be appropriate. If no action is taken on the request within three working days after it is filed by the Special Counsel, the stay becomes effective under operation of law. Under 5 U.S.C. §1208(b), upon further request of the Special Counsel, a Board member may extend the original 15-day stay for up to 30 additional days.

Under 5 U.S.C. §1208(c), the Board may extend the period of a stay if a majority of the Board concurs in the determination of the Special Counsel and only after an opportunity is provided for comment by the agency involved.

The Board considered requests for stays of personnel actions in a number of cases in 1983. Among them were:

*Special Counsel v. Department of Defense (DeCarlo)*, HQ12088210049. The Special Counsel requested stays of the proposed geographic-reassignment and demotion of an assistant principal in the Department of Defense Dependent Schools. The Special Counsel alleged the agency was retaliating against the employee's exercise of appeal rights in a discrimination complaint and was in violation of 5 U.S.C. §2302(b) (1) and (9). The Board granted stays pursuant to 5 U.S.C. §1208(a), and (b) and 3 stays pursuant to 1208(c).

*Special Counsel v. Department of Energy (Savitz)*, HQ12088210053. A career appointee in the Senior Executive Service (SES), Savitz was to be removed for refusing a directed geographic reassignment. The Special Counsel alleged that the reassignment was to induce Savitz' resignation or permit her removal, thus constituting a constructive discharge in violation of 5 U.S.C. §2302(b) (11). After granting stays pursuant to §1208(a) and (b) the previous year, in 1983 the Board denied a (c) stay request stating that there were not reasonable grounds to believe that the reassignment was a constructive removal.



*Special Counsel v. Department of Housing and Urban Development (Lesht)*, HQ1208831002. The Special Counsel requested stays of the proposed geographic reassignment of the Director of Personnel in the HUD Chicago Regional Office to a position in HUD's Washington, D.C., Headquarters. The Special Counsel alleged that the reassignment was a reprisal for providing information to the Special Counsel and testimony in a proceeding before the Board and therefore in violation of 5 U.S.C. §§2302(b) (8) (reprisal for "whistle-blowing"), and 2302(b) (10) (discrimination for conduct not affecting performance). The Board granted stays pursuant to 5 U.S.C. §1208(a) and (b) and two stays pursuant to §1208(c).

*Special Counsel v. Department of Defense (Spanton)*, HQ12088310009. The Special Counsel requested the stays of the proposed geographic reassignment of George R. Spanton from his position of Resident Auditor, Defense Contract Audit Agency (DCAA), West Palm Beach, Florida, with audit responsibility for Pratt & Whitney, to one of five specified GM-14 auditor positions outside the DCAA Atlanta region. The Special Counsel alleged that the reassignment was in reprisal for his protected disclosures to the press. 5 U.S.C. §§2302(b) (8) (reprisal for "whistleblowing") and (b) (10) (discrimination for conduct not affecting performance). The Board granted stays pursuant to 5 U.S.C. §1208(a) and (b).

D.C. Regional Director P.J. Winzer considers comments made during a management retreat.

### *Requests for Corrective Action*

Under 5 U.S.C. §1206(c) (1) (A), if after investigation the Special Counsel determines there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, which requires corrective action, the Special Counsel may recommend to the agency that such corrective action be taken.

If the agency does not take the recommended corrective action after a reasonable period, pursuant to 5 U.S.C. 1206(c) (1) (B), the Special Counsel may ask the Board to consider the matter. After opportunity for agency and OPM comment, the Board may then order such corrective action as it deems appropriate. The Board took final action in the following corrective action matters in 1983:

*Special Counsel v. Department of Army (Mortensen)* HQ12068110017. The Special Counsel charged that the proposed removal of Mortensen was a prohibited personnel practice in violation of 5 U.S.C. §2302(b) (1), (9) and (11). The removal was based on three charges: a) insubordination, b) work performance, and c) EEO abuse. After a discussion initiated by the Office of Special Counsel, an Army supervisor deleted the EEO abuse charge on his own initiative. In denying the request for corrective action, the Board held that, although the Special Counsel had established that retaliation was a motive in the proposed removal, the agency had shown that it would have proposed the removal regardless of the protected conduct, because of the employee's insubordination and work performance deficiencies without regard to her EEO activities.

### *Disciplinary Action (Non-Hatch Act)*

Under 5 U.S.C. §1206(g), if, following an investigation, the Special Counsel determines that a disciplinary action should be taken against any employee who is not a Presidential appointee, a written complaint is prepared, containing that determination along with a statement of supporting facts, and presented to the Board for action. Any employee against whom such a complaint has been presented is entitled to certain protections under 5 U.S.C. §1207, including the right to a hearing on the record.

A final order of the Board in such an action may impose a disciplinary penalty against the employee including removal, reduction-in-grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand or the assessment of a civil penalty not to exceed \$1,000. In its only case of this type in 1983, the Board assessed a monetary civil penalty for the first time.

*Special Counsel v. Verrot*, HQ12068310014. The Special Counsel alleged that Respondent had committed a prohibited personnel practice by influencing an individual to withdraw from competition for the purpose of improving the prospects of another for appointment to the announced position. 5 U.S.C. §2302(b) (5) (6). A Joint Motion for Approval of Settlement was received by the Administrative Law Judge before commencement of the hearing. In the settlement agreement, respondent admitted the conduct and the Special Counsel recommended a 60-day suspension and \$1,000 civil penalty. The Board approved the agreement, including the suspension and fine.

### *Hatch Act Disciplinary Action Requests*

Under 5 U.S.C. Chapters 15 and 73, the Special Counsel is authorized to investigate political activities by certain state and local officers and employees, federal employees, and employees of the District of Columbia government. Following such investigations, if the Special Counsel determines there is a basis for doing so, he may file a complaint with the Board seeking certain disciplinary actions against the employee.

The following Board decisions of 1983 were in response to Hatch Act cases involving federal or state employees.

*Special Counsel v. Dukes*, HQ120600020. This case came to the Board from one of its Administrative Law Judges, who recommended a 15-day suspension. After hearing oral arguments on the appropriateness of imposing a penalty less than the statutory minimum, the full Board rejected the Special Counsel's motion to dismiss made upon jurisdictional and constitutional grounds. Instead, the Board found that the Special Counsel has the prosecutorial discretion to seek to withdraw or dismiss actions he has brought. The Board, therefore, treated his motion as one for voluntary dismissal, and when no objection was received, dismissed the complaint.

*Special Counsel v. Morgan*, HQ01268210028. In this case the Board confirmed the holding in its remand order in *Dukes*, that if the Board found a violation of the Act and determined unanimously that removal was not warranted, the statute required a minimum penalty of a 30-day suspension. The Board held on stipulated facts that Morgan had violated the Act, concluded that the violation did not warrant removal, and imposed the minimum penalty of 30 days set out in a settlement agreement. The Board denied Morgan's separate request that he be allowed to serve the 30-day suspension on days selected by his supervisor, holding that the statute limited its authority to impose suspensions to consecutive days only. The Board concluded from the legislative history of the amendment permitting suspension rather than removal, that Congress did not authorize it to exercise additional discretion of the type requested by Morgan.

*Special Counsel v. Biggs*, HQ12068210033. The Board held that the Special Counsel had failed to prove Biggs violated the Act and dismissed the complaint. Biggs had paid a nominal sum to have a letter to the editor published expressing his independent views on a candidate for state office.

*Special Counsel v. Mary Lou Daniel*, HQ12068210031. The Board held on stipulated facts that Daniel violated 5 U.S.C. §1502 of the Hatch Act by running for partisan elective office. She was on unpaid leave of absence from her full-time employment by the Pittsburgh Department of Housing at the time of the violation. She was subject to chapter 15 because her job with the local agency was financed at least in part by federal funds. The Board ruled that the fact that she was on unpaid leave of absence was immaterial because the legislative history showed that her partisan candidacy was prohibited unless she resigned. The stipulated facts showed her violation was knowing, serious, and conspicuous. The Special Counsel had advised her that her candidacy violated the Act and that her arguments were invalid. The Board denied her employer's request for mitigation of the removal penalty. The Board held that the seriousness of her violation was the sole factor that the Board could consider under section 1505(2).



Board Chairman Herbert E. Ellingwood helps move one of the last air traffic controller appeals files after its adjudication had been completed.



A few of the members of the Chicago Regional Office take a break from the rigors of office life. The staff processed a total of 3,471 cases of 1983.

*Special Counsel v. Willett*, HQ12068210029. The Board found, based upon a settlement agreement, that Willett, a Federal employee, violated 5 U.S.C. 7324(a) (2) by running for and assuming a local Republican Party Committee office that had few responsibilities, met infrequently, and had little influence. Under the circumstances, the Board found that removal was not warranted and determined that the 60-day suspension agreed to by the parties was appropriate.

*Special Counsel v. Winfield*, HQ12068210029. The Board found that Winfield violated 5 U.S.C. 7324(a) by being a delegate at political party conventions, but that his activities were not flagrant, willful, or of widespread notoriety and that he resigned immediately upon being told that his activities were not permitted. The Board concluded that removal was not warranted but imposed a suspension of 60 days. The Board imposed more than the minimum 30-day penalty because of respondent's familiarity with the Act, the nature of the activity, and because at the time of the violation Winfield was a counselor and advisor to other employees, although not in the area of political activity.

*Special Counsel v. West*, HQ12068210030. The Board found West had violated section 7324(a) (2) by participating in a partisan political campaign by aiding a friend's candidacy. The Board concluded that removal was not warranted, but imposed a 60-day suspension from duty without pay because West was aware of the Act and was testing its limits when he violated it.

### C. Requests for Reconsideration by the Office of Personnel Management

As part of its appellate jurisdiction, the Board may accept from the Office of Personnel Management requests for reconsideration of its final orders. Under 5 U.S.C. §7703(d) the Director of OPM may petition the Board to reconsider a final order if he determines in his discretion that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. Under the law, the Director must either intervene in a Board proceeding or file a petition for reconsideration and have it denied before he can file a petition for review of a Board order in court.

One group of significant decisions issued in 1983 interpreted 5 U.S.C. §7703(d), the CSRA provision governing petitions for reconsideration of the Board's final decisions by the OPM Director.

### **Standards for consideration**

In the lead decision, *York v. U.S. Postal Service*, PH07528090159, the Board, on remand from the D.C. Circuit Court of Appeals, articulated the standards which determine whether such petitions will be considered. The Board held that when OPM has not intervened in an appeal, the Director is entitled to consideration of his contention that the Board's decision in the case has misinterpreted a civil service law or regulation for which OPM is responsible. In *York*, the Board concluded that Congress did not intend for the Board to review the Director's determination that the impact of the alleged misinterpretation on the administration of the civil service would be substantial.

### **Must be precedent setting**

However, in *Seibel v. Air Force*, AT07528010033, and *Grant v. Department of the Treasury*, AT07528110699, the Board made clear that OPM's right to be heard does not apply to board orders with no precedential value. The Board noted that the alleged legal error can have no impact outside the case in question when the challenged decision merely denies review and leaves in effect the initial decision in the case, since initial decisions are not precedential.

### **Reconsideration not automatic**

In another decision, *Portlock v. Veterans Administration*, CH07528090051, the Board declined to entertain OPM's request for reconsideration as a petition of right under section 7703(d) because OPM's challenge to the Board's decision was not based on an alleged misinterpretation of any civil service law.

### **Must be timely**

Finally, in *Johnson v. Department of Transportation*, PH075281F0845, the Board ruled that OPM's petitions under section 7703(d) must be filed within 30 days of OPM's receipt of the challenged decision.

## **D. Mixed Cases (involving allegations of discrimination)**

"Mixed cases" are those cases that include one or more allegations of discrimination raised in connection with an action that is otherwise appealable to the Board. Under the Civil Service Reform Act, the Board has the authority to adjudicate these "mixed cases" and decide both the appealable issue and the discrimination issue. Since the creation of the Board, hundreds of mixed case appeals have been adjudicated.

Following a Board decision in a mixed case, an appellant may petition the Equal Employment Opportunity Commission (EEOC) for review. In the event the EEOC disagrees with the Board decision, the case may be remanded to the Board for further deliberation. The EEOC remanded eleven (11) of these cases during 1983.

The most significant issues relating to mixed cases involve the extent of Federal agency responsibility to make reasonable accommodation to a qualified handicapped individual under the Rehabilitation Act. Questions concerning handicapped employees were the major issue in 9 of the 11 cases that were remanded to the Board by the EEOC during 1983. Because issues involving the Rehabilitation Act have not been settled by the courts, and because there are a broad range of matters requiring analysis on a case-by-case basis, both the MSPB and the EEOC are carefully reviewing these cases in an effort to arrive at a standard to be used as an administrative precedent in subsequent cases.

In order to ensure efficient processing of mixed cases, the Board has established a Merit Systems Protection Board-Equal Employment Opportunity Commission Liaison in the Office of General Counsel. The Board's liaison function has included coordination with EEOC on several projects, including establishing standard procedures for the transmittal of case records between the agencies, coordination on the drafting of regulations affecting both agencies, exchange of information regarding relevant court cases, and ongoing discussion of substantive legal issues.



EEO Director John H. Taylor receives his 3E years of service pin from Vice Chair Maria L Johnson.

## E. Litigation Activity

During the year, the Board's litigation activity, which is handled by the Office of General Counsel, shifted to matters of substance in the appellate courts. There also was continuing litigation in the district courts contesting the Board's case processing procedures, but many of the difficult issues in that area were successfully resolved in the Board's favor in litigation related to the air traffic controller cases. District Court work, therefore, became more routine, while many questions remained in appellate litigation.

In the appellate courts the Board filed briefs and presented oral argument on substantive issues in a number of cases in various Courts of Appeals dealing with off-duty misconduct cases, jurisdiction and attorney fees issues in disability retirement cases, and other issues. The Supreme Court declined to hear *Borsari v. Department of Transportation*, a case in which the Second Circuit upheld the Board's application of a presumption that the employee's off-duty, drug-related misconduct had an impact on his employment as an air traffic controller.

In a series of important decisions, the Federal Circuit ruled that it lacks jurisdiction to review disability retirement cases and that attorney fees may not be awarded in such cases. These decisions make the Board the forum of last resort in disability cases. The Board intervened in two of the most important air traffic controller cases in the Federal Circuit involving issues of mitigation and coercion. OGC closely monitored the positions taken by the parties in the other cases to ensure that the Board's decisions were properly defended.



Staff in the Office of the Secretary were responsible for docketing, filing, and responding to the enormous numbers of appeals, orders and motions coming to the Board.

In a case which was briefed and argued by OGC in 1983, *Hopkins v. Department of Justice*, the Federal Circuit is considered whether the Board is the proper respondent in cases involving issues limited to questions of the Board's jurisdiction or application of its procedures. The Board took the position that the Civil Service Reform Act should be read to require the Board and not the employing agency to be the respondent in cases of this type. In its decision issued in early 1984, the court determined that the Board is the proper respondent and will appear in the Federal Circuit routinely in such cases. The Board will also continue to appear selectively as an intervenor in cases involving substantive issues of particular importance. The *Hopkins* decision which requires the Board to be the named respondent in a number of cases assures the Board a strong voice in the judicial arena in its continuing effort to fulfill its Congressional mandate in litigation.

In one of the most significant decisions of the Federal Circuit on a procedural matter, the Court held that service of decisions on representatives, as opposed to appellants personally, is lawful. This decision gave judicial approval to the practice followed by the regional offices in the air traffic controller cases. *Grag v. United States*, 717 F.2d 1343 (Fed. Cir. 1983)

In a noteworthy district court decision, the D.C. District Court ruled that it lacked jurisdiction to enjoin Board proceedings. This view was advanced by the Board and accepted by a number of district courts in the litigation involving the Board's processing brought throughout the country by former controllers. *Association of Administrative Law Judges, Inc. v. Schweiker, et al.*, No. 83-0124 (D.D.C. March 14, 1983).

During the year the Office of General Counsel litigation team worked closely with other offices of the Board to develop litigating positions designed to protect the Board's case processing policies. This was particularly important while it cleared away the ATC cases and shifted into approaches aimed at returning to normal operations.

## **F. Regulation Review**

The Board has the responsibility for reviewing regulations issued by the Office of Personnel Management that upon implementation may cause the commission of prohibited personnel practices either on their face or through implementation. Support for this review is provided by the Office of Merit Systems Review and Studies and OGC.

In *Joseph v. Devine*, the Board was asked in 1983 to invalidate an OPM rule which limited the scope of grievable actions. The rule at issue excludes noncompetitive promotion decisions from coverage in an agency grievance system. The Board invalidated the rule and declared invalid the implementation of this rule by the IRS.

In *McDiarmid v. Fish and Wildlife Service, Department of Interior*, the Board was asked to grant a request for review of the agency's implementation of OPM's merit pay and performance appraisal regulations. The issue involved is whether the agency has, as alleged, improperly utilized forced distribution curves in evaluating and rating employee performance. The Board determined in early 1984 that it would review the agency's implementation of the regulations.

## **G. Appeals Arbitration Pilot Project**

In March, the Board launched a comprehensive alternative appeals procedure in the Chicago, San Francisco, Seattle and Denver regions. The program was expanded to include the Dallas region on October 1.

The goals of the pilot project providing an alternative process, called "Appeals Arbitration," are to determine whether an expedited and voluntary procedure, characterized by innovative pleadings and greater involvement by the presiding official, will contribute to the effective and efficient use of parties' resources in an appeal while maintaining the integrity of Board law and providing due process protections to the parties.

Highlights of the expedited alternative process include: the issuance of an initial decision at the regional level in 60 days, a time reduction of 50% from the formal process; the involvement of the presiding official, called an appeals arbitrator, in establishing an environment conducive to settlement of some if not all issues pursuant to the request and agreement of both parties; and reliance on a single, mutually submitted pleading entitled the Joint Arbitration Record.

The types of appeals which may be brought under the process are relatively simple, routine cases which are legally non-precedential. The decisions themselves are non-presidential, but they must be based on existing Board decisions.

At the close of the year, the results of confidential surveys administered by an outside evaluator underscored the acceptability of the regional design feature. The pilot will continue until at least September of 1984, at which time the Board will consider adopting the program throughout the remaining regions.

#### **H. Sunshine Act Meetings**

Under the Government in the Sunshine Act, 5 U.S.C. 552b the Board is required to give notice to the public of all meetings which determine or result in the disposition of official Board business. At least one week prior to the meeting, notice is given by publication in the Federal Register of the time, place, and subject of the meeting and whether the meeting is to be opened or closed.

Where a meeting will involve a discussion or resolution of appeals before the Board, the meeting may be closed to the public. In such a case, it is the responsibility of the Office of General Counsel to determine and certify that the meeting is properly closed and to state the reason for the closing. Pursuant to the requirements of the Act, the certification, together with the minutes of the meeting and a copy of the Federal Register notice, is placed in a file of the Board's official records maintained by the Office of the Secretary.

During 1983, the Board held seven "Sunshine" meetings. Of these, two were open and five were determined to be properly closed under exemption (c) (10) of the Act.

At these meetings the Board primarily considered cases presenting novel or complex issues. In addition, the Board has, on occasion, expanded the meeting to provide expeditious treatment of other non-complex cases.

## **VII. Work of the Office of Merit Systems Review and Studies**

Under 5 U.S.C. 1205(a) (3) and 1209(b) the Board is required to conduct special studies to determine if the merit system is being adequately protected, to review the significant actions of OPM, and to report its findings to the President and Congress. MSRS has responsibility for performing these functions.

In the spring of 1983, a new director was assigned to MSRS and the office began to acquire additional staff and to establish new priorities.

In addition to conducting survey research, the MSRS research agenda was expanded to include other study methodologies such as round-tables and on-site reviews at selected agencies. Two roundtables, one on reductions-in-force (RIF) and the other on OPM significant actions were sponsored by MSRS to gather information on the views of policymakers toward these subject areas. In 1983 MSRS completed several major reports which are described below.

### **Report on Reduction-In-Force In The Federal Government, 1981: What Happened and Opportunities For Improvement**

This study reviewed employee perceptions of the 1981 RIF practices to determine if the RIFE were conducted in accordance with the merit principles and without the commission of prohibited personnel practices. The data for this study were based on on-site interviews with those knowledgeable about the RIF process and Government-wide surveys of 2,600 Federal employees and 800 senior Federal personnel officials. The study reported:

- the RIF system might be improved in the future by giving increased emphasis to performance as a RIF retention factor.
- the 1981 RIFs directly affected 12,594 or less than 1% of the Federal work force and, statistically, affected women and minorities disproportionately.
- the 1981 RIFs generally complied with the RIF regulations, although problems were found concerning improper management pressure on personnel officials to violate the regulations and inadequate communication of RIF information to employees.
- the 1981 RIFs generally complied with merit principals and avoided prohibited personnel practices, although there were some reported instances of management favoritism.
- agency technical preparation for the 1981 RIFs was generally rated as being adequate.
- the 1981 RIFs negatively affected the morale of the majority of employees in RIF-affected agencies.
- alternative actions, such as attrition and personnel freezes, were considered to be effective in minimizing the impact of the 1981 RIFs, and outplacement services were not widely used.

### **Report On The Significant Actions of the Office Of Personnel Management During 1982**

This was the third annual report on the significant actions of the Office of Personnel Management (OPM). This report, required by statute, examined programs and policies initiated by OPM during 1982 and some related 1983 actions to see if they resulted in promoting merit principles and preventing prohibited personnel practices.

Information for this report was derived from several sources: written comments in response to interrogatories sent to the heads of the 20 largest Federal departments and independent agencies; responses of 4,900 Federal employees to the Government-wide "Merit Principles Survey"; statements of OPM and Federal employee union officials at the roundtable on OPM significant actions; and recent studies by the General Accounting Office, OPM, and other public and private research organizations.

The 1982 report included a discussion of the following topics:

- **Three Visions of OPM's Impact on the Merit System:** OPM, agencies, and employee union representatives differed greatly in their evaluations of how OPM actions have affected the merit system. All viewed changing the current pay and benefits systems as a major priority for Executive and Congressional action in the next five years, though they did not agree on the direction that change should take.
- **Incentives to Perform:** An analysis of performance measurements and reward systems showed that there was little perceived linkage between pay and performance, and little employee support for merit pay as currently operated. On the plus side, a majority of employees said their last performance appraisal had been fair and accurate. The perceived pay-performance linkage was also higher for merit pay employees than for the rest of the work force. In addition, the level of supervisory activity in dealing with poor performers was reported to be much greater than was indicated by the record of formal performance-based removal actions.
- **Managerial Discretion and Employee Protection in the SES:** No widespread abuse of management of the SES system was reported; however, SES executives expressed concern about the potential for such abuse.
- **Recruiting and Retaining a Quality Work Force:** Reduced hiring of entry-level employees has limited the impact of OPM's abolishment of the Professional and Administrative Career Examination (PACE) and the new Schedule B authority which replaced it, but there is reason to be concerned about the potential for negative impact. Although a majority of executives criticized the SES for not providing sufficient incentives, they do not plan to leave the Government.
- **OPM Action and Inaction on Previous Board Recommendations:** OPM has taken appropriate action in response to some of the Board's previous recommendations, but needs to take further action in other areas such as assessing the impact of performance appraisal on productivity.

### **Study on MSPB Appeals Decisions for FY 1982**

This third annual report on the Board's appeals decisions provided a comprehensive statistical update on the Board's appeals processing for FY 1982 and places the results in historical context. The study included information on the types and numbers of appeals processed and their outcomes, average appeals processing time, number of hearings held, agency reversal rates, appellant reversal rates, number of petitions for review, and their outcomes.

### **Roundtable Monograph on the RIF System in the Federal Government: Is It Working and What Can Be Done to Improve It?**

This monograph reported on the proceedings of the RIF roundtable sponsored by MSRS in July. Roundtable panel members included individuals from OPM, GAO, MSPB, EPA, and the U.S. Synthetic Fuels Corporation who had extensive knowledge about the subject of RIF. The audience was composed of policymakers and other interested parties from the Congress, employee unions, public policy organizations, and the Federal personnel community.

Topics discussed included the results of recent studies on RIFs, the strengths and weaknesses of the current RIF system, and the impact of OPM's 1983 proposed revisions to the RIF regulations. The report presents the formal presentations of the panel members, selected portions of the questions and answer session between the audience and panel members, and a listing of unanswered policy questions regarding RIF which should be addressed in the future.