

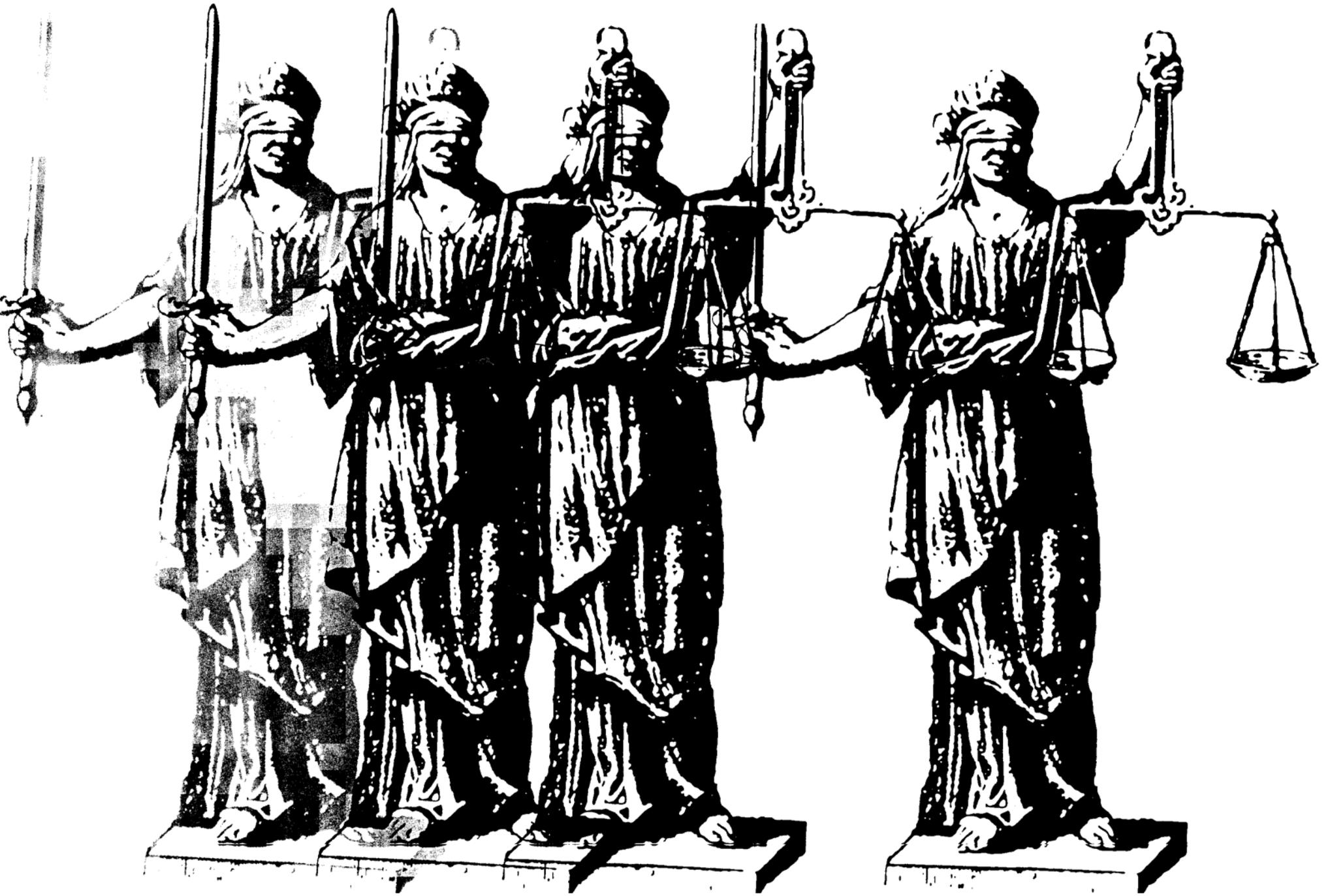
0
United States
Merit Systems Protection Board



1985

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 Seventh Annual Report of the Merit Systems Protection Board. This Report covers the activities of the Board for Calendar Year 1985.

Respectfully,

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

CONTENTS

Page

I.	Introduction	5
II.	The Board Members	6
III.	Organization of the Board	8
	Organization Chart	9
IV.	Summary of 1985	10
V.	The Adjudicatory Framework	12
	A. Appellate Jurisdiction Cases	12
	B. Original Jurisdiction Cases	16
	1. Actions Against Administrative Law Judges	17
	2. Disciplinary Actions Initiated by the Office of Special Counsel	17
	a. Non-Hatch Act Disciplinary Actions	17
	b. Hatch Act Disciplinary Actions	19
	C. Compliance	19
	D. Requests for Reconsideration by the Office of Personnel Management	21
	E. Mixed Cases (involving allegations of discrimination)	23
	F. Regulation Review	23
VI.	Litigation Activity	24
VII.	Reports of the Office of Merit Systems Review and Studies	27
	A. Significant Actions of OPM during 1984	
	B. Study of MSPB Appeals Decisions for FY 1983	
	C. Study of MSPB Appeals Decisions for FY 1984	

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. An independent judicial agency, the Board is a bipartisan, three-member panel appointed by the President and charged with the guardianship of the Federal merit systems. This mandate is implemented by:

- Adjudicating in a fair and impartial manner actions brought by the Special Counsel and employee appeals;
- 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.

To assure the Board's independence in the performance of its functions, Congress provided that:

- Board members be appointed to nonrenewable 7-year terms and be removed only under extraordinary circumstances;
- the Board simultaneously submit budgets and legislative proposals to Congress and the President, thus eliminating the need for prior approval by the Office of Management and Budget (OMB);
- the Board be granted independent appointment authority; and
- the Board be granted authority to defend its decisions in the Federal courts, except the Supreme Court.

The Board consists of 11 trial-level regional offices and an appellate forum at Headquarters in Washington, D.C. The Board operates with approximately 350 employees and a \$20 million budget. Since its inception, the Board has decided over 72,500 appeals and petitions for review. Board decisions have withstood the scrutiny of the U.S. Court of Appeals for the Federal Circuit in over 93% of the cases appealed.

THE Board

II. BOARD MEMBERS

The Board's three members are appointed by the President with the advice and consent of the Senate; the designation of Chairman must be approved by the Senate.



Herbert E. Ellingwood

HERBERT E. ELLINGWOOD was appointed by President Reagan to be the Board's Chairman on December 14, 1981. At the time of his appointment, Mr. 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, Mr. 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 to the Board by President Reagan on March 18, 1983. She was confirmed by the Senate on May 6, and was designated Vice-Chair on September 19, 1983. At the time of her appointment, Ms. Johnson was a commercial loan officer with the Security National Bank in Anchorage, Alaska. From 1978 to 1981, she was an Associate Attorney with the firm of Lambert, Griffin & McGovern in Washington, DC.



Maria L. Johnson



Dennis M. Devaney

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

Organization

III. ORGANIZATION OF THE BOARD

The Merit Systems Protection Board has offices in Washington and around the country. The **Chairman**, as Chief Executive Officer, is responsible for its operations.

The **Managing Director** has the authority for the day-to-day management of the Board as delegated by the Chairman.

The **Assistant Managing Director for Management** plans and coordinates improvements to the overall management of the agency.

The **Assistant Managing Director for Regional Operations** coordinates procedures and reviews the quality of the adjudications in the regional offices.

The **Office of General Counsel**, legal counsel to the Board, represents the Board in court actions, handles compliance actions, and drafts proposed final decisions for the Board in original jurisdiction cases.

The **Office of Appeals Counsel** drafts proposed decisions for the Board based on petitions for review of initial decisions issued in appellate jurisdiction cases, and on cases reopened by the Board.

The **Office of Legislative Counsel** represents the agency before Congress, the media and the public.

The **Office of Administrative Law judges** adjudicates cases within the Board's original jurisdiction, including proposed disciplinary actions against administrative law judges (ALJs) and disciplinary actions filed by the Office of Special Counsel for violations of the Hatch Political Activities Act or for the commission of prohibited personnel practices by supervisors. This office also has jurisdiction over motions to compel discovery and motions for subpoenas filed in the regional offices.

The **Office of Merit Systems Review and Studies** reviews and reports its findings on government personnel policies and practices to ensure compliance with merit system principles.

The **Office of the Clerk** processes petitions to the Board and distributes Board opinions and orders. The Clerk also rules on procedural matters relating to adjudication and makes initial determinations on Freedom of Information and Privacy Act requests.

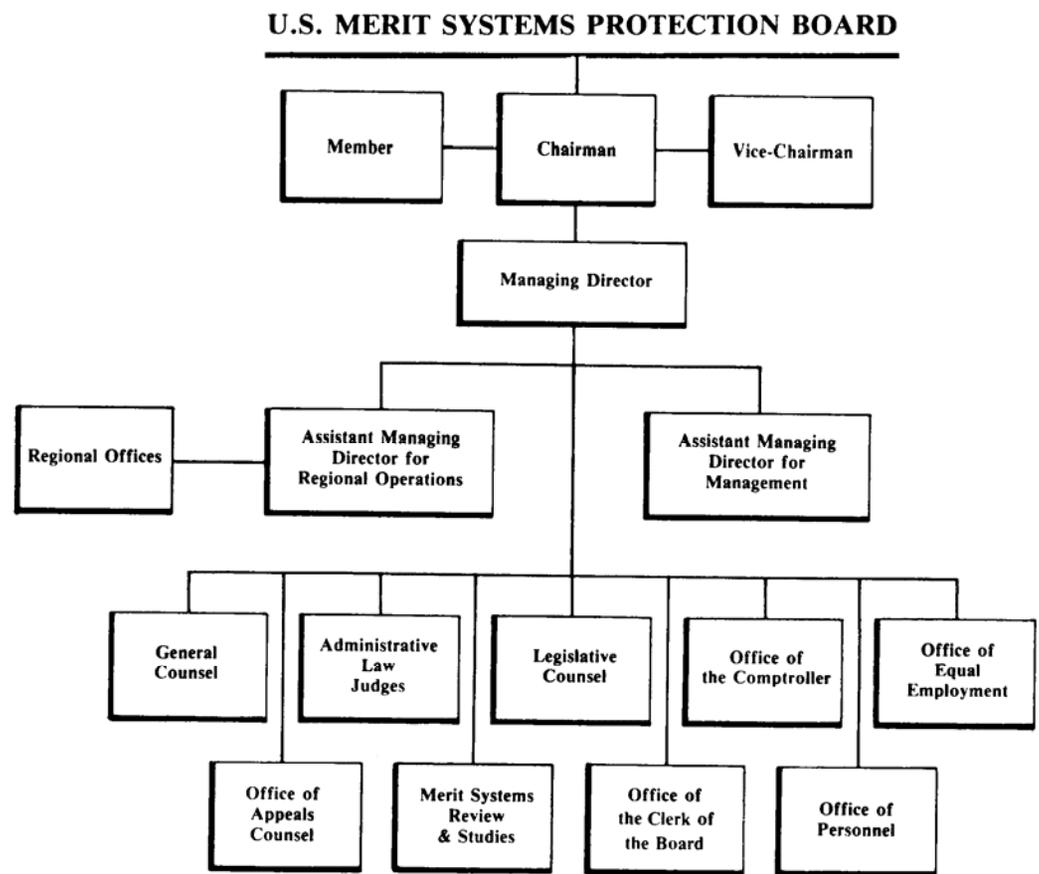
The **Office of the Comptroller** directs and coordinates the administrative services and financial functions of the Board.

The **Office of Personnel** manages internal personnel programs and provides assistance to managers, employees, and applicants for employment.

The **Office of Equal Employment** develops and monitors equal employment opportunity programs and policies.

The Special Counsel

The Office of Special Counsel (OSC) is an independent agency that investigates allegations of prohibited personnel practices and activities prohibited by civil service laws, rules and regulations. The OSC may prosecute before the Board the officials who are alleged to be in violation of those rules and regulations. Because the Special Counsel is required by 5 U.S.C. 1206(m) to submit an annual report to Congress, this report will not address Special Counsel activities except as they pertain to Board decisions.



Organization

IV. SUMMARY OF 1985

1985 was a year in which the Board continued to improve and refine agency operations that established the Board's reputation as a model judicial agency.

Space Reduction -- In response to President Reagan's request for space reduction in the Federal sector, the Board saved over \$100,000 by reducing over 18% of office space in 1985 towards its goal of a 27% reduction.

Realignment -- Based on an analysis of the appeals workload and support capabilities, the Board realigned several regional offices during 1985. The result was an even distribution of case receipts to staff, tighter control of resources, and increased procedural uniformity.

Integrated Information Program -- In 1985, the Board converted its computer and word processing systems to an agency-wide, integrated information system. This new system combines word processing, data processing, case tracking, and telecommunications and provides current information on appeals.

Training -- The Board established an inhouse faculty to train attorneys in significant and complex areas of the law, such as reduction-in-force actions and constitutional issues pertaining to personnel law; credibility determinations; prehearing conferences; and hearing management. The Board held writing skills seminars for attorneys and other professionals.

Administrative staff trained in records management in accordance with National Archives and Records Administration guidelines. At the end of 1985, these employees trained in electronic spread sheets (LOTUS 1-2-3), a tool for funds management and control.

Hewlett-Packard staff instructed employees in the new word processing system. In addition, the Board provided the computer staff specialized training in data-base maintenance, programming, and systems management and operations.

Litigation Case Tracking Automation -- During 1985, the Board's computer staff designed and implemented an automated system for tracking cases litigated by the Office of General Counsel in Federal court.

Conversations in the Law -- The Board invited a wide range of notable speakers to talk about issues of interest to Board professionals. Among the speakers were: The Honorable Edward Markey, Chief Judge, U.S. Court of Appeals for the Federal Circuit; The Honorable Barbara Mahone, then Chairman, Federal Relations Authority; Rosemary M. Collyer, General Counsel, National Labor Relations Board; Joseph Ross, President, Federal Bar Association.

Internal Audit Evaluation Program -- The Board, under the auspices of the Assistant Managing Director for Regional Operations, conducted comprehensive audit/evaluation reviews of seven regional offices. The remaining offices will be evaluated in 1986. The evaluation focused on the quality of presiding official's decision-writing and identification of common administrative matters such as scheduling, form orders, and review procedures which could be improved or shared with other offices. Board staff also audited each office for property and financial management and contract administration. In addition, the Office of Personnel surveyed position management and grade structure of each office.

Automated Budget and Payroll -- The Board computerized its payroll, personnel and accounting functions in conjunction with the National Finance Center in New Orleans.

The Office of the Clerk -- The Board reorganized the Office of the Clerk into two divisions: Case Management and Information Systems. In addition, the clerk's office retired 16,000 files while remaining timely in processing new cases and implemented records review to conform with National Archives and Records Administration.



Adjudicatory Framework

V. THE ADJUDICATORY FRAMEWORK

Adjudicating appeals is the major function of the Board. Appeals are filed in one of the Board's eleven regional offices. In 1985, 99% of the appeals were processed within the Board's 120-day self-imposed time limit. An alternative to the standard process is the Voluntary Expedited Appeals Procedure (VEAP), a streamlined method that reduces processing time by half and is used in routine, non-precedential cases.

Decisions issued by the regions become final after 35 days. During that time either party, the Office of Personnel Management, or the Special Counsel may petition the Board to review the initial decision. The Board may also review the decision on its own initiative. Decisions of the Board's Administrative Law Judges in original jurisdiction cases (i.e., cases not involving appeals from agency actions) are recommended decisions to the full Board. Unlike initial decisions, recommended decisions do not become final and must be acted upon by the full Board.

A summary of some of the most significant decisions issued by the Board in 1985 follows.

A. Appellate Jurisdiction

Most cases before the Board Members stem from requests by an appellant or an agency in the form of petitions for review of a presiding official's decision. The petitions must be based on specific legal grounds, not mere disagreement with the regional office decision. Some of the significant appellate cases decided by the Board are discussed below:

Anderson v. State, DC04328310838 (4/24/85). *Klippert v. DCAA*, SF04328310269 (4/24/85). Board held that *ex parte* communications to agency deciding officials are subject to the harmful error standard. Such communications will not be considered reversible error unless they contravene a statutory or regulatory right and likely had a harmful effect on the outcome before the agency.

Hall v. U.S. Postal Service, DA07528210720, (1/25/85). Board held that preference eligibles in the Postal Service have the right to appeal to the Board as well as the right to invoke grievance procedures.

Darby v. U.S. Postal Service, SF07528210771 (12/31/84). Board held that where credibility determinations directly affect the outcome of a case, substitution of presiding official after hearing is improper.



Cortes v. Interior, SF04328310327 (1/9/85). Board held that performance-based removal action based on duties performed while on detail to a higher-graded position was contrary to the provisions of law.

Coleman v. DOT, NY075281F042COMP (4/5/85). Board held that a subsequent performancebased removal of an employee who had been restored previously by a Board decision was unreasonable because the agency failed to provide sufficient training to enable the employee a fair opportunity to be recertified in his former position.

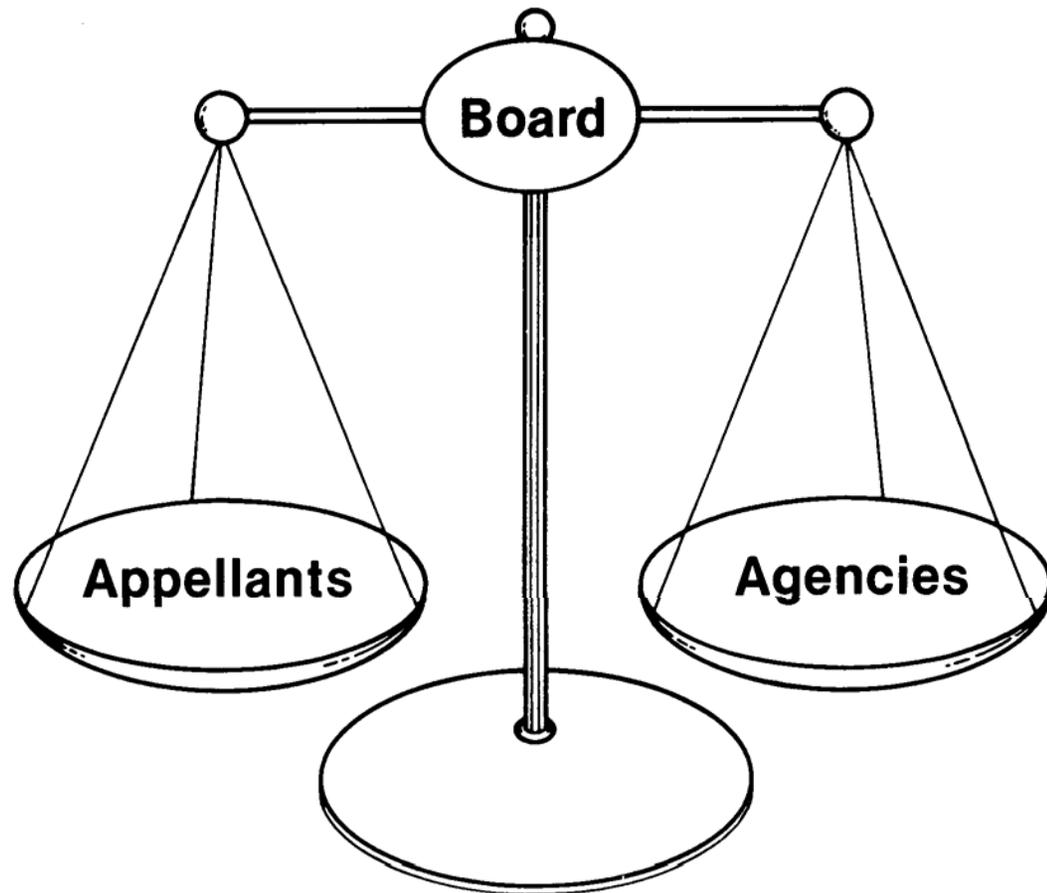
Thomas v. GSA, PH07528310635 (4/29/85). Board held that the doctrine of collateral estoppel was applicable to specifications contained in a removal action where those identical specifications were considered by the Board in a prior suspension action. The doctrine of collateral estoppel recognizes that the determination of facts litigated between two parties in a proceeding is binding on those parties in all future proceedings against each other.

Abbott v. U.S. Postal Service, CH07528410586 (5/9/85). Board held that in deciding whether an interrogatory is unduly burdensome, the benefit to the party seeking information must be balanced against the burden placed upon the opposing party.

Kelmon v. Justice, SF075228411070 (5/29/85). Board held that it has authority to review the propriety of whether the agency abused its discretion or was otherwise unreasonable in denying an employee advance sick leave.

Brooks v. U.S. Postal Service, DA03538310346 (1/23/85). The Board held that the right to restoration after injury applies only to those employees who have been subjected to a compensable injury.

Ferby and Jackson v. U.S. Postal Service, AT07528211068 (2/14/85). The Board determined that employees may enter into last chance agreements with agencies. In those agreements, the employee waives any potential appeal rights to the Board should the employee violate the agreement.





Robinson v. OPM, DE831M8410159 (2/26/85). Board held that it had the authority to review OPM decisions dealing with the amount and waiver of overpayment.

Zoltawski v. Army, CH04328410440 (2/26/85). Board found that an acceptable performance assessment at the conclusion of an employee's improvement period precluded the agency from proposing and effecting a performance action without providing a new notice period.

Cofield v. GPO, DC07528110599COMP (3/11/85). Board held that it was authorized to order any Federal agency to comply with Board decisions.

Withers V. Air Force, DE03538310231REM (7/17/85). Board held that a partially recovered employee has the same entitlements to nationwide consideration as a fully recovered employee unless the agency can show undue hardship.

Egan v. Navy, SF07528310257 (8/8/85). Board held that it lacks jurisdiction to review agency reasons for revocation of employee's security clearance but will review record to ensure that minimum due process has been afforded to the employee regarding the revocation.

In Re Alfred Maisto, SF07528411054 COMP (8/6/85). Board determined that a Federal employee who is a witness at a Board proceeding is entitled to be placed in an official duty status and paid for time spent traveling to and at the hearing.

Thomas v. VA, BNO75283C9053 (8/22/85). Board concluded that it may not award interest on back pay under the Back Pay Act or the Veterans Preference Act.

Lizut v. Army, PH07528110266ADD (6/3/85). Board held that the Back Pay Act and certain implementing regulations apply to judicial review of Board decisions and provide authority for the Board to award attorney fees incurred during such review.

Colgan v. Navy, SF04328510016 (6/19/85). Board held that, by law, a minimally satisfactory performance rating may not trigger remedial performance action by the agency.



Brown v. Army, PH04328310568 (8/21/85). Board refined its seminal decision in *Griffin*. Board concluded that agency regulations that contain no alterations and state that the agency's performance appraisal plan has been approved by OPM constitutes sufficient evidence to establish OPM approval.

Cross v. Air Force, BN04328310121 (12/18/84). Board held that the statutory requirement of communication of performance standards and elements is a substantive right and that employees have the right to be made aware of them at the beginning of the appraisal period.

Walker v. Treasury, DC04328510014 (7/5/85). Board held that the agency abused its discretion in establishing a performance standard that required near perfection absent a showing that the standard was "realistic or reasonably attainable."

Lance v. Energy, DE531DO8410085 (1/3/85). Board held that the opportunity to demonstrate acceptable performance is not a substantive right applicable in a within-grade increase denial action.

Haataja v. Labor, CH03518210565 (1/7/85). Board held that an agency is required to show that its determination of service credit provided for performance during a RIF action was the result of consistent procedures applied by the agency.

Hill v. Commerce, DC03518210663 (12/11/85). Board held that only violations of RIF regulations that affect substantive entitlements of an employee are reversible.

Noe v. USPS, SF07528411002 (6/17/85). Board held that an allegation of alcoholism raised in reply to the notice of proposed adverse action is timely and must be considered by the agency before taking action.

Johnson v. Labor, DC03518210559 (2/14/85). Board held that an employee's first informed choice to proceed with a grievance or an appeal after the effective date of the action constitutes an election under 5 U.S.C. § 7121(d).





Briggie v. DHHS, NY04328210249 (3/29/85). Board held that absent an allegation that the agency's choice of a particular chapter 43 remedy constitutes a prohibited personnel practice, the Board has no authority to determine whether that choice constitutes disparate treatment.

Rogers v. U.S. Customs Service, NY07528510111 (April 24, 1985) (initial decision). Rogers, a criminal investigator for the Customs Service, was removed for charges that he hindered a criminal trial involving alleged IRA activities. He was accused of making unauthorized disclosures that allegedly jeopardized both lives and methods of intelligence collection by the British and Irish governments. In the initial decision, only one of the three charges was sustained and the penalty was mitigated to a 30-day suspension. The parties did not petition the full Board for review and the initial decision became final.

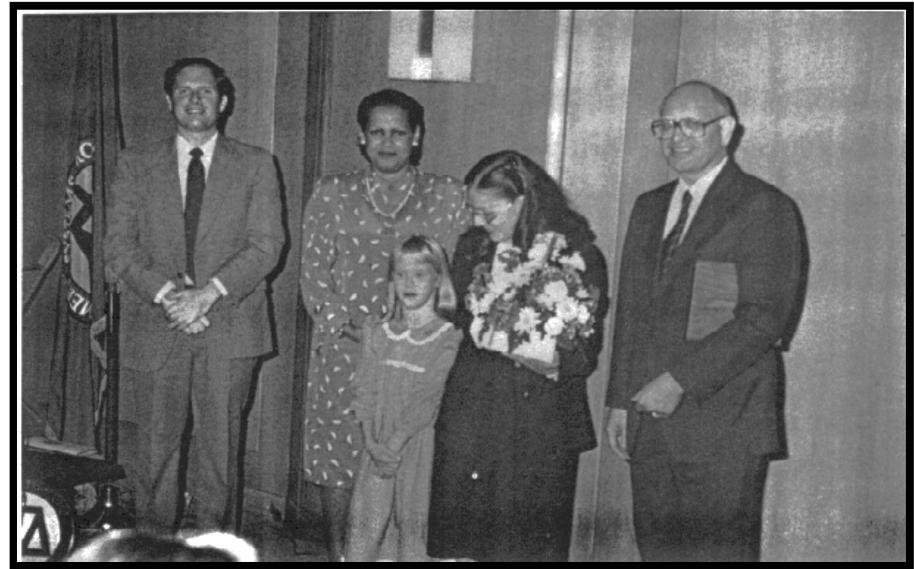


B. Original jurisdiction

Cases under the Board's original jurisdiction include complaints against administrative law judges (ALJs) by their employing agency and actions brought by the Office of Special Counsel for violations of the Hatch Political Activities Act and for commission of prohibited personnel practices by supervisors.

1. Actions Against ALJs

Administrative law judges have qualified independence designed to assure the integrity of administrative adjudications. 5 U.S.C. § 7521 bars employing agencies from taking certain actions against the judges without first obtaining Board permission. The Board issued several decisions concerning ALJs, the most significant of which are discussed below.



Social Security Administration v. Brennan, MSPB Docket No. HQ7521810010 (4/15/85). In *Brennan*, the Board clarified its holding in *Goodman* that an ALJ may be removed for poor performance. The Board found that: the agency failed to give sufficient notice to Brennan that he was being charged with insubordination; Brennan failed to support his defense that the administrative office changes affected his qualified judicial independence or enjoyed Constitutional protection; and the agency failed to establish that Brennan's critical memorandum sent to the Administrative Law Judge in Charge affected the limited supervisory relationship between the ALJIC and Judge Brennan. Based on the single proven charge of disruption of the office, the Board authorized imposition of a 60-day suspension.

In The Matter of Robert F. Doyle, HQ0752185100011, (9/25/85). Board held that while there were no regulations setting forth a procedure for an ALJ to institute an action under 5 U.S.C. § 7521, it has adopted a policy of allowing such a procedure to be initiated by a complaining ALJ.

Social Security Administration v. Goodman, HQ75218210015ADD (6/21/85). Board found that attorney fees were awardable to prevailing administrative law judges in original jurisdiction cases, although in this case none were warranted in the interest of justice.

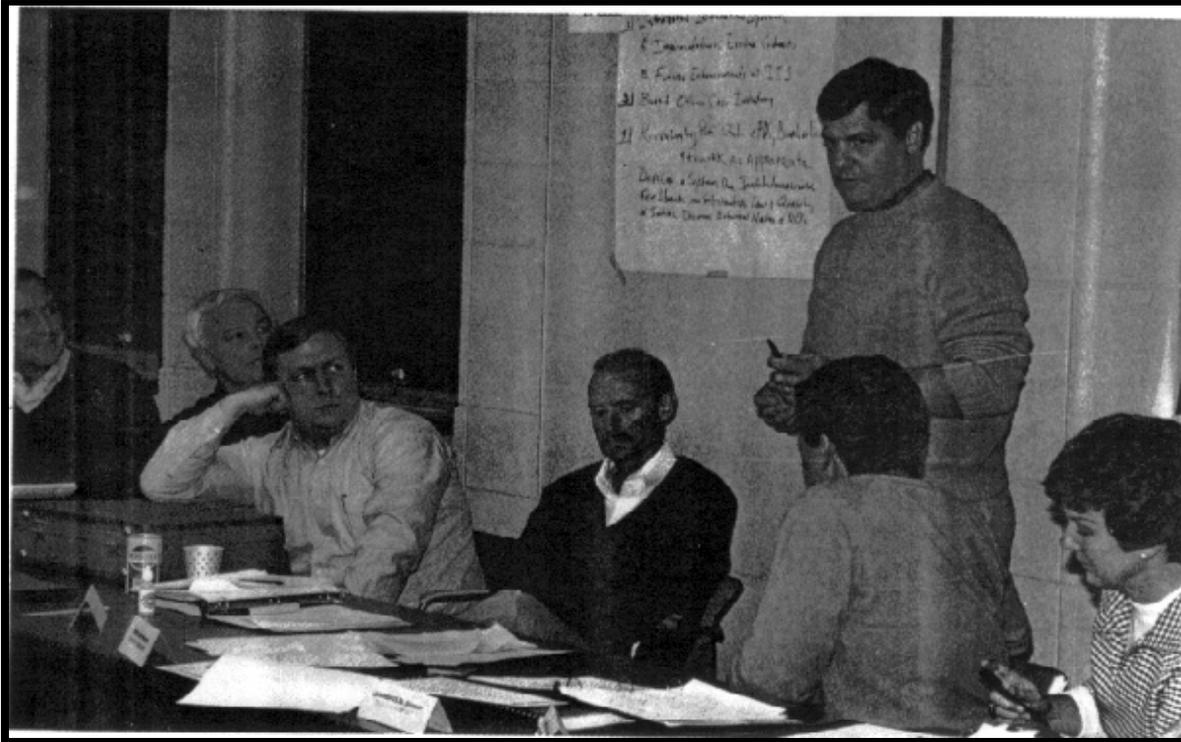
2. Special Counsel Initiated Actions

The majority of cases heard by the Board under its original jurisdiction authority are actions brought by the Special Counsel.

a. Non-Hatch Act Disciplinary Actions

The Board's jurisdiction over non-Hatch Act disciplinary actions is triggered by the filing of a complaint by the Special Counsel alleging the commission of a prohibited personnel practice or an activity prohibited by civil service law, rule or regulation. During 1985, the Board issued several decisions that defined the Office of Special Counsel's jurisdiction. The most significant decisions are discussed below.

Special Counsel v. Starrett, Evans and Tueller, MSPB Docket No. HQ12068310022 (6/13/85). The Special Counsel alleged that whistleblower had been retaliated against by Starrett, the agency head, and Evans and Tueller, two senior officials of the Defense Contract Audit Agency of the Department of Defense. The Board ruled that protected disclosures had been a significant factor in the decision to take a personnel action against the whistleblower and ordered Starrett removed and Evans and Tueller demoted. The Board held that it was not a defense that the charged employee believed the disclosures made by the whistleblower were false.



Special Counsel v. Williams, MSPB Docket No. HQ12068510013 (3/28/85). The Board held that Special Counsel has the investigatory and prosecutorial authority to seek disciplinary action against an employee for violations of the standards of conduct regulations at 5 C.F.R. Part 735. However, the Special Counsel's powers are limited by an affirmative defense that he acted arbitrarily or capriciously in violation of section 1206(e)(2). That section requires the Special Counsel to determine if the charges can be more appropriately resolved by the employing agency rather than in a disciplinary action.

Special Counsel v. Filiberti and Dysthe, MSPB Docket No. HQ12068310018 (12/7/84). The Special Counsel sought to discipline Filiberti and Dysthe, senior personnel officials, for discouraging an applicant for employment to favor another

applicant. The Board ordered Filiberti and Dysthe suspended. The Board rejected contentions that the Special Counsel was required, as a precondition for filing a disciplinary action, to comply with corrective action procedural requirements of 5 U.S.C. § 1206(c)(1)(A) by providing the employing agency with an opportunity to investigate and act upon the allegations.

Special Counsel v. Russell, MSPB Docket No. HQ12068410016 (6/26/85). In a decision on an interlocutory appeal, the Board decided that 29 C.F.R. ~ 1613.11(a), an EEOC regulation prohibiting sexual harassment, was not within the Special Counsel's authority under section 1206(e)(1)(D) to investigate "11 activities prohibited by civil service law, rule or regulation" because EEOC regulations are not civil service regulations. The Board also determined that an alleged violation of 5 U.S.C. § 2302(b)(1)(A), prohibiting discrimination, does not require taking or failing to take a personnel action; that allegations of sexual harassment state a potential violation of section 2302(b)(1)(A)); and that sexual assault against a female employee may be sexual harassment.

b. Hatch Act Disciplinary Actions

The Special Counsel also enforces the Hatch Political Activities Act, which prohibits Federal, state and local government employees from engaging in partisan political activities. The Special Counsel is authorized to investigate allegations of violations of the Hatch Act and to prosecute those persons it finds in violation by filing a complaint for disciplinary action with the Board.

Special Counsel v. Seastrunk, MSPB Docket No. HQ12068510004 (6/12/85). The Board found that Seastrunk, a Federal employee, violated the Hatch Act (5 U.S.C. § 7524(a)) by his candidacy in a partisan election and was ordered suspended for 90 days. Seastrunk contended that he had run as an Independent in a local election and that state law made the election non-partisan. Any argument of non-partisanship by virtue of state law was rebutted because the two candidates opposing Seastrunk appeared on the ballot as Democrats. 5 U.S.C. § 7526(l) requires at least that none of the candidates represent the Democratic, Republican or certain other partisan political parties.

Special Counsel v. Suso, MSPB Docket No. HQ1206820017 (3/22/85). The Board found that Suso fell within the definition of an employee of a state or local agency covered by the Hatch Act (5 U.S.C. § 1501(4)) and that she had violated the Hatch Act by being a candidate in a partisan election contrary to 5 U.S.C. § 1502(a)(3). The Board found Suso's violation did not warrant her removal because the question of whether a regional planning and development organization like the one which employed Suso was covered by the Hatch Act was a matter of first impression. Under the provision of the Hatch Act applicable to state and local employees, if removal is not warranted, no penalty attaches to a violation.

C. Compliance

In *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984), the U.S. Court of Appeals for the Federal Circuit extended the Board's jurisdiction in compliance matters. *Kerr* held that the Board's jurisdiction did not end with an employee's reinstatement after an appeal, but rather the Board had jurisdiction to consider the particulars of an employee's claim that his reinstatement was a "sbam." As a result, the Board issued several significant decisions concerning agency compliance with Board decisions.





Mann v. Veterans Administration, MSPB Docket No. NY07528510034 COMP (11/8/85). In response to a final Board order to cancel Mann's removal and substitute a 60-day suspension, the VA restored Mann to her former position and immediately detailed her to another position, to which she was then permanently reassigned. Finding noncompliance with the Board's order, the Board held that, where an employee is not reinstated to his or her former position, and the position still exists at the same grade and classification levels, the agency must show a strong overriding interest for not placing the employee in the former position, and the VA here failed to show such an interest.

Cofield v. Government Printing Office, MSPB Docket No. DC07528110599COMP (3/27/85). The Board held that because the Public Printer is appointed by the President with the advice and consent of the Senate, the Board could not impose sanctions on him for noncompliance with a final Board order. The Board consequently dismissed Cofield's petition for enforcement and referred the case to the Special Counsel for consideration.

Miller and Hayes v. Department of the Air Force, MSPB Docket No. DA07528090220COMP (5/29/85). Following a Board decision overturning their removal, the appellants were reinstated. Upon reinstatement, however, Miller was reassigned as Warehouse Worker and later as a Woodworker; Hayes was reassigned as a Warehouse Worker and later as a Material Expeditor. The Board held that it was obligated to review the reassignments to determine whether the subsequent positions differed substantially in the scope and status of their duties and responsibilities. The Board ordered the agency to reinstate Miller and Hayes to their former positions and to award them the difference in pay they would have received if they had been reinstated in accordance with the Board's original order.

Frazier v. United States Postal Service, MSPB Docket No. NY07528210641COMP (3/1/85). Appellant's removal was canceled and replaced with a suspension as a result of a prearbitration settlement. The Board ordered the Postal Service to award Frazier back pay for the time from the end of his suspension to the actual date of his reinstatement. The Board granted the award in the interest of placing appellant in the *status quo ante* and pursuant to section 436 of the Postal Service Employee and Labor Relations Manual.

Smith v. Department of Justice, MSPB Docket No. AT07528410931 COMP (8/27/85). The Board held that its obligation to ensure an appellant's return as nearly as possible to his former position requires a two-fold inquiry: (1) whether appellant was returned to the position he formerly occupied, and (2) if not, to ascertain why the agency did not return appellant to that position. Because Smith was transferred to a different location, the Board evaluated the agency's reasons for not returning him to the same position. The Board held that speculation that Smith might retaliate against his superiors and that trust in Smith would be eroded were not valid reasons for not returning him to the position from which he was removed.

Cortez v. Veterans Administration, MSPB Docket No. DA07528210750 COMP (5/28/85). Cortez's settlement agreement with the VA, which was adopted by the Board and made a part of the record, provided that he would receive a lump-sum award of back pay and would reimburse the money he had withdrawn from his retirement plan through periodic payments. The VA claimed it could not lawfully implement the agreement to allow repayment of retirement contributions in installments. The VA offset his back pay by the retirement contributions. Relying on an opinion of the General Accounting Office provided at the Board's request, the Board held that the agreement was lawful and installment payments of the retirement contributions were permissible in this case and ordered the VA to comply with the terms of the settlement agreement.

Special Counsel v. Filiberti and Dysthe, MSPB Docket No. HQ12068310018COMP (5/29/85). When the Board found that Filiberti had retired to escape serving the suspension the Board ordered for commission of a prohibited personnel practice, the Board held that its disciplinary authority extended to preventing Filiberti from escaping the penalty by retiring. The Board ordered the employing agency to withhold from Filiberti's accrued annual leave payment an amount equal to the salary Filiberti would have forfeited had he served the suspension.

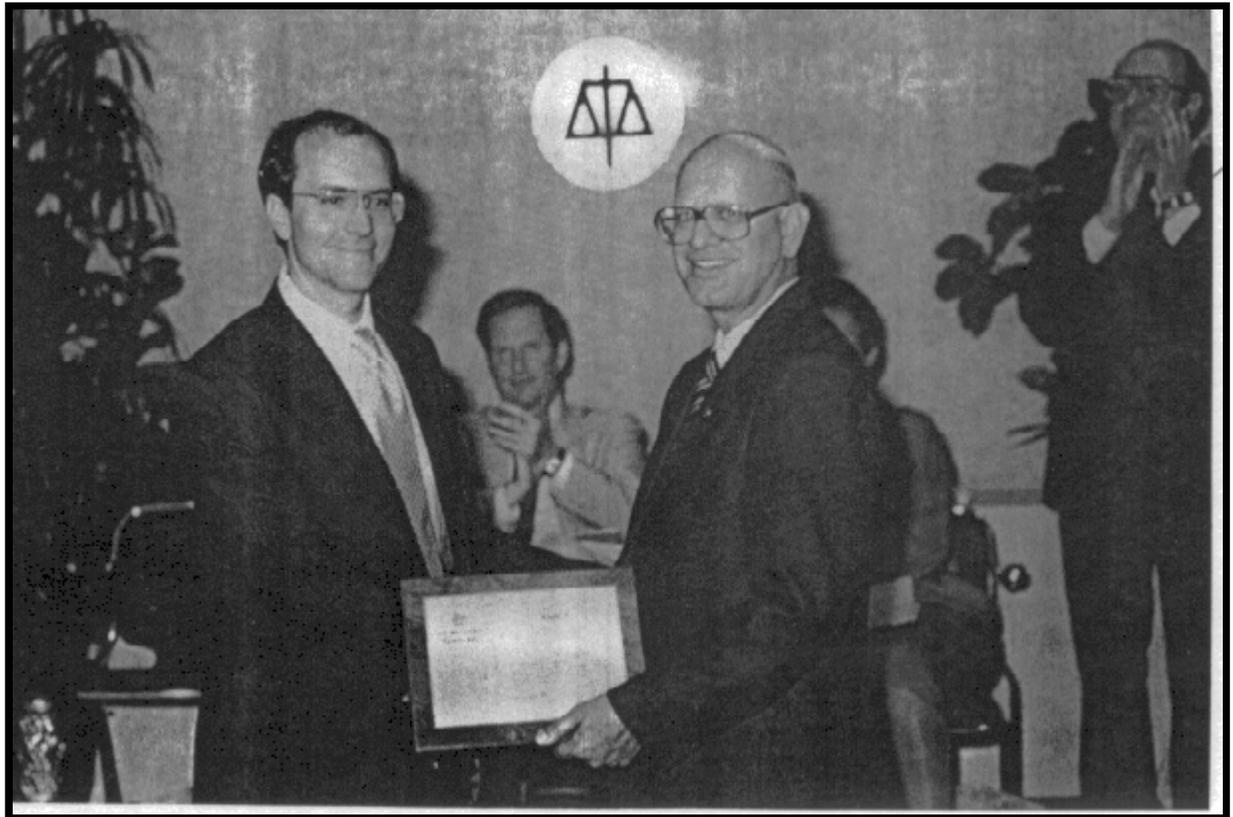
Special Counsel v. Filiberti and Dysthe, MSPB Docket No. HQ12068310018COMP (12/20/85). The Board issued a show cause order to the Military Sealift Command, Filiberti's and Dysthe's employing agency, to answer why it should not be sanctioned for intentionally concealing information when requesting the Board to modify its suspension order to permit Dysthe to serve his suspension before Filiberti. The Board had granted the modification. The Board was concerned that MSC had withheld material information that would have led the Board to deny the modification. After a hearing before the Board's administrative law judge, the Board adopted the recommendation that no sanction was warranted because the information not made known to the Board was not material and would not have affected the Board's grant of the modification.

Tripodi v. Drug Enforcement Administration, MSPB Docket No. PH 0752B8120160COMP (12/16/85) The Board found the evidence did not support a finding that, absent a wrongful reduction-in-rank action, Tripodi would have been promoted to a GS-14 supervisory position. However, the Board remanded this case to the Regional Office because the record did not reflect what actions were available to the DEA when it abolished Tripodi's GS-13 supervisory position in 1978, or the position to which Tripodi would have been entitled. On July 31, 1985, Tripodi voluntarily retired. The Board dismissed the petition for enforcement for mootness.

D. Requests for Reconsideration by the Office of Personnel Management

The Director of the OPM may request the Board to reconsider final Board orders. The grounds for such a request are 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. The Director must either participate in a Board proceeding or file a request for reconsideration before the Director may petition the court for judicial review.

Schaeffer v. Office of Personnel Management, MSPB Docket No. CH07318410069 (8/15/85). The Board denied as untimely OPM's request for reconsideration of the final decision, but reopened and reconsidered the case on its own initiative and concluded that the remedies it had given Schaeffer were unauthorized. After finding that the Immigration and Naturalization Service had incorrectly rated Schaeffer "unsuitable" for a position as a border patrol guard, the Board ordered INS to cancel the unsuitability rating, to place Schaeffer in a position he would have had absent the unsuitability rating, and to give Schaeffer back pay and benefits. On reconsideration the Board concluded it had no authority to order an applicant to be appointed to a position or to be given back pay and benefits. Schaeffer was entitled only to be placed on the eligibility list for appointment as a border guard.



Special Counsel v. Williams, MSPB Docket No. HQ12068410013, (7/24/85). OPM sought reconsideration of a decision finding that the Special Counsel had authority to prosecute employees for improperly accepting gifts from subordinates in violation of 5 U.S.C. § 7351. The Board denied the petition on the ground that OPM had already participated in the case as amicus curiae and, therefore, had no right to reconsideration.

Cofield v. Government Printing Office, MSPB Docket No. DC07528110599COMP (3/1/85). The Board denied OPM's request to reconsider the decision holding that the GPO's refusal to place Cofield in his former position of Policeman, First Class, constituted non-compliance with the Board's reversal of Cofield's removal. The Board held that OPM was asking for reconsideration of factual findings, not a Board interpretation of civil service law, as required under 5 U.S.C. § 7703(d) and that contrary to OPM's contentions, the Board has authority to direct GPO to reinstate Cofield to his position as Policeman, First Class, regardless of the implicit direction that Cofield be issued a firearm, and regardless of the agency's discretion to detail and assign employees.

Sarver v. Department of Treasury, MSPB Docket No. SF07528210370COMP (3/22/85). The Board granted the OPM's request for reconsideration in part and denied in part. OPM contended the Board lost jurisdiction after the appellant filed an appeal when the agency rescinded Sarver's removal. The Board's presiding official dismissed the appeal as moot. The Board held that the agency's cancellation of a removal action followed by the detail and reassignment of appellant to a materially different position did not constitute rescission of the removal action. The Board had jurisdiction not only over the appeal but over any question of compliance even after the cancellation of the removal and the Board's consequent dismissal of the appeal was moot. The Board granted the petition for reconsideration to the extent that Treasury was entitled to a hearing before being ordered to place Sarver in a specific position. The Board held that it will not enforce a compliance decision unless the parties have had an opportunity to be heard on the merits of the case. It remanded the case to hear Sarver's appeal from the reassignment action.

E. Mixed Cases

The most significant issues relating to mixed cases, those involving a matter appealable to the Board associated with an allegation of discrimination, continue to center on an agency's responsibility to make reasonable accommodation to a qualified handicapped individual under the Rehabilitation Act.

When the Equal Employment Opportunity Commission disagrees with a Board decision and remands the case to the **Board under** 5 U.S.C. § 7702(b)(5)(B), the Board may agree or disagree with the EEOC's decision. Upon disagreement with an EEOC decision, the Board must certify the case to a Special Panel described in section 7702(d)(6).

During 1985 the President appointed and the Senate confirmed the first Chairperson of the Special Panel. The Board certified to the Special Panel the case of *Ignacio v. U.S. Postal Service*, MSPB No. SF07528110438, EEOC Petition No. 03820090, in which the Board and EEOC disagreed as to what constitutes reasonable accommodation for a handicapped employee.

Ignacio was discharged from his position with the U.S. Postal Service. In his appeal to the Board, Ignacio alleged unsuccessfully that the agency discriminated against him because of his handicapping condition. Upon Ignacio's petition to the EEOC to review the Board's decision, the EEOC disagreed with the Board's finding of no discrimination.

When EEOC referred the case back to the Board, the Board agreed with the EEOC that the Rehabilitation Act takes precedence over a contrary provision in a negotiated agreement. A Board majority, however, disagreed with the EEOC that consideration of reassignment is required as a means of reasonable accommodation of an individual's handicap. The Special Panel will in due course decide the case.

F. OPM Regulation Review

The Board is required by 5 U.S.C. § 1205(c) to review OPM rules and regulations and their implementation in order to prevent the commission of prohibited personnel practices. The most significant case in this area was *Larson*.

Larson v. OPM, MSPB; Docket No. HQ12068510028 (11/21/85). Larson petitioned the Board pursuant to 5 U.S.C. § 1205(e)(1)(B) to review OPM's implementation of section 2601 of Public Law 98-369, "Deficit Reduction Act of 1984," signed into law on July 18, 1984. Section 2601 amended the Social Security Act and the Internal Revenue Code to provide retroactively that persons appointed to Federal positions after December 31, 1983 would be subject to Social Security withholding. Larson argued that OPM interpreted section 2601 incorrectly because Congress did not intend retroactively to exclude persons with many years of prior Federal service from continued coverage under the prior retirement system merely because they happened to be holding a temporary position on January 1, 1984. The Board found that OPM's interpretation was consistent with section 2601 of the Deficit Reduction Act and, furthermore, in response to additional allegations, that the Air Force did not deceive Larson concerning her employment and retirement rights. The Board denied Larson's request for review because her real concern was not the OPM implementation of the statute but the Congressional enactment itself, which the Board has no power to overturn.

Litigation

VI. Litigation

At the end of the fiscal year, there were 153 appeals in federal circuit courts in which OGC was representing the Board as respondent or intervenor. Several involve important issues of first impression. *Crumbaker v. MSPB*, Fed. Cir. No. 85-1982, argued October 11, 1985, a case concerning the proper method for computing a reasonable attorney fee award, presents the question of when an enhancement of the "lodestar" (the amount determined by multiplying the hours times the attorney's hourly rate) is warranted. The Board found no enhancement was warranted by the extent of Crumbaker's counsel's risk of nonpayment or of delay in his receipt of payment.

Two other attorney fee appeals in the Federal Circuit, *Goodman v. MSPB*, No. 85-2803, and *Balaban v. MSPB*, No. 86-546, present the question of whether the Equal Access to justice Act applies to MSPB proceedings involving an agency request to discipline an administrative law judge instead of, or in addition to, 5 U.S.C. § 7701(g)(1), the attorney fee provision of the Civil Service Reform Act. These appeals also challenge Board rulings that an award of fees was not warranted under 5 U.S.C. § 7701(g)(1).

Another appeal raises questions concerning the relationship between MSPB and OPM under the Reform Act. *Horner v. Burns & Werts*, Fed. Cir. Nos. 85-2025 and 85-2308, argued December 10, 1985, is an appeal filed by OPM under 5 U.S.C. § 7703(d) that challenges the standards the Board has established before it will entertain an OPM petition for reconsideration. Representing the Board as intervenor, OGC defended the Board's decision that it is not required to reconsider at OPM's request a nonprecedential regional office decision. The case also concerns an OPM attack on the requirements in MSPB regulations for petitions for review of regional office decisions.

Three other court appeals by OPM, the only federal agency which is statutorily authorized to seek judicial review of a Board decision, are pending in the Federal Circuit. OGC has filed a brief on behalf of the Board, which is participating as intervenor in *Horner v. Acosta*, Fed. Cir. No. 84-1160. There OPM is seeking review of a decision finding that Acosta and several other individuals were entitled to service credit towards retirement for government service pursuant to personal service contracts.

OGC is also intervening on the Board's behalf in *Devine v. Andrzejewski*, Fed. Cir. Misc. Docket No. 47, where OPM is challenging a Board decision invalidating an OPM regulation that permitted agencies to furlough employees for 30 days or less without adherence to adverse action procedures. Finally, in *Horner v. O'Connor*, Fed. Cir. Misc. Docket No. 8, OPM contends the Board erred in finding that the Special Counsel's investigatory-prosecutorial authority extends to violations of the government ethics or code of conduct rules. OGC is arguing for the Board that an interpretation of the statute governing the Special Counsel's authority to investigate and prosecute cannot be the basis for OPM's seeking judicial review under 5 U.S.C. § 7703(d).



Appeals in four different circuits challenge Board decisions in proceedings brought by the Special Counsel to discipline employees for committing prohibited personnel practices. Section 1207 of Title 5, under which the Board hears these cases, provides for judicial review in the circuit in which the respondent employee resides or works. In *Harvey v. MSPB*, D.C. Cir. No. 84-1650, argued December 18, 1985, a senior executive challenges the Board's order demoting him to a GS-14 nonsupervisory position for deliberately idling a subordinate senior executive and refusing to recommend him for agency vacancies. The Board ruled that Harvey violated the subordinate's right in retaliation for his writing a letter to the Special Counsel and releasing information to a Congressional investigator. The appeal challenges the findings on which the prohibited personnel practice determinations were based and the Board's conclusion that a *Mt. Healthy* defense is not available in a section 1207 disciplinary case.

Starrett v. MSPB, 4th Cir. No. 85-1694, is an appeal filed by the Director of the Defense Contract Audit Agency from a Board decision removing him and fining him \$1000 for reassigning an employee in reprisal for the employee's whistleblowing concerning costing inproprieties by a defense contractor. *Evans and Tueller v. MSPB*, lith Cir. No. 85-8545, is the appeal of two other supervisors who were fined \$500 each for recommending the same employee's reassignment in retaliation for his protected whistleblowing.

In *Filiberti v. MSPB*, 9th Cir. No. 85-7354, the employee has appealed from a decision disciplining him for attempting to discourage an applicant for employment in violation of 5 U. S. C. § 2302 (b) (5). Filiberti also challenges the Board's decision, based on his retirement before serving the suspension ordered by the Board, that his pay for accumulated annual leave should be reduced by the amount he would have lost in pay had he served the suspension. Department of Justice attorneys filed the petition on Filiberti's behalf, and a pending motion filed by the Board asks the court to strike their appearance as unauthorized counsel.

Board decisions dismissing appeals for lack of jurisdiction which were affirmed include *Carey v. MSPB*, 768 F.2d 1338 (Fed. Cir. 1985), finding no MSPB jurisdiction under 5 C.F.R. § 330.202 to consider a claimed violation of reemployment priority rights when petitioner alleged no specific injury as required by the regulation conferring the appeal right, and *Schaffer v. MSPB*, 751 F.2d 1250 (Fed. Cir. 1985), rejecting an argument that early termination of pay retention under 5 U.S.C. § 5366 as a result of a subsequent RIF transformed the employee's classification downgrade (the basis for the pay retention) into an appealable matter. The *Schaefer* decision approves the Board's use of standard-language "short-form" orders to deny petitions for review when appropriate. The Board's treatment of untimely appeals was upheld in *Edgerton v. MSPB*, Fed. Cir. No. 85-1966, July 15, 1985 where the Court agreed with the Board that good cause for excusing the untimeliness of Edgerton's appeal from his allegedly coerced resignation was not shown because he was not diligent in filing his appeal after learning where and how to appeal to the MSPB.

The Board's ruling that it lacked the authority to require the Special Counsel to pay attorney fees of an employee who prevails in a section 1207 disciplinary action was upheld in *Saldana v. MSPB*, 766 F.2d 514 (Fed. Cir. 1985). The court agreed that no waiver of sovereign immunity could be found where section 1207 and section 7701 parallel each other in the procedures they provide, but only section 7701 authorizes fee awards. This contrast and the fact that the conduct which is the subject of a section 1207 proceeding sets it apart from section 7701 precludes finding a clear authorization.

In addition to these cases, OGC attorneys were monitoring at any given time between 400 and 600 Federal Circuit appeals in which the employing agency or OPM was the respondent. Such monitoring is necessary to insure that the Board's position in these cases will be fully presented to the court.

In *Lovshin v. Dept. of the Navy*, 767 F.2d 826 (Fed. Cir. 1985), *cert. filed*, the Board intervened to request that the court remand the appeal for further consideration in light of the Board's intervening decision in *Gende v. Dept. of Justice*, 23 M.S.P.R. 604 (1984). *Gende* was a lead decision pertaining to the Civil Service Reform Act's provisions for performance-based actions. The Board held that, with few exceptions, Congress intended Chapter 43 of Title 5, U.S.C., to be the exclusive procedure for performance-based actions after October 1, 1981 (the date set for the new system to be fully operational).

The Federal Circuit disagreed with *Gende* and, in an 8 to 5 *en banc* decision in *Lovshin*, held that agencies could proceed under Chapter 75 of Title 5 in removing and demoting employees for poor performance. Mr. Lovshin has petitioned the Supreme Court for certiorari, arguing that the Board's decision in *Gende* was correct. After obtaining authorization from the Solicitor General of the United States to do so, the Board has filed a brief in the Supreme Court supporting Mr. Lovshin's petition.

MSRS

VII. Reports by the Office of Merit Systems Review and Studies

The Office of Merit Systems Review and Studies conducts studies to determine if the merit system is being adequately protected, reviews the significant actions of OPM, and reports its findings to the President and Congress. In 1985, MSRS prepared several major reports.

A. Significant Actions of the Office of Personnel Management During 1984

This report examines important OPM programs, policies, and activities during 1984-tracking them into 1985 in some cases-to determine their effect on the merit principles and on prohibited personnel practices.

The report covers four major subject areas:

1. Attracting and retaining a quality workforce;
2. The joint OPM-OMB "Grade Bulge" initiative;
3. A review of compensation practices; and
4. An evaluation of the OPM performance management evaluation program.
- 5.

B. Study of MSPB Appeals Decisions for FY 1983

This report provides detailed information concerning the decisions made in the regional offices and Headquarters, including the types of appeals filed, and the outcomes of those appeals. It provides demographic information on the appellants and categorizes much of the information by Board region and individual Federal agency.

C. Study of MSPB Appeals Decision for FY 1984

This report is similar to the study of FY 1983 appeals decision described earlier with an important exception; it provides a five-year trend analysis of appeals decisions. This trend analysis provides the reader with a more complete perspective of the Board's case load and decisions.