

**United States
Merit Systems Protection Board
Annual Report
Fiscal Year 1986**

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

Sirs:

In accordance with Section 202(a) of the Civil Service Reform Act of 1978 (5 U.S.C. § 1209(b)), it is my honor to submit the Eighth Annual Report of the U.S. Merit Systems Protection Board. This Report covers the activities of the Board for Fiscal Year 1986.

Respectfully.

A handwritten signature in black ink that reads "Daniel R. Levinson". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Daniel R. Levinson

The President of the United States The
President of the U.S. Senate The Speaker of
the U.S. House of
Representatives

Washington, D.C.

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Mission and Overview

The U.S. Merit Systems Protection Board is an independent, quasi-judicial agency designed to protect the integrity of Federal merit systems against prohibited personnel practices, to ensure adequate protection for employees against abuses by agency management, and to allow the government employer to make employment decisions based on individual merit. The Board, with a statutory mandate to adjudicate appeals from personnel actions for the nation's largest employer, has world-wide jurisdiction, wherever Federal civil servants are found.

The bipartisan Board consists of a Chairman, a Vice Chairman and a Member, with no more than two of its three members being from the same political party. Board members are appointed by the President, confirmed by the Senate and serve overlapping, nonrenewable 7-year terms.

The Board was established on January 1, 1979, by Reorganization Plan No. 2 of 1978, and codified by the Civil Service Reform Act of 1978. The Act restructured the Federal Government's personnel administration by distributing functions performed by the Civil Service Commission to four newly-created independent agencies. The Merit Systems Protection Board was given the responsibility to perform the Civil Service Commission's appeals functions as well as special study authority and authority to review the significant activities of the newly established Office of Personnel Management. Other agencies established by Reorganization Plan No. 2 are the Office of Personnel Management [OPM], which manages the Federal work force; the Federal Labor Relations Authority [FLRA], which deals with labor relations in the Federal establishment; and the Office of Special Counsel [OSC], which investigates prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Political Activities Act.

The Board accomplishes the missions assigned by the Civil Service Reform Act by performing four responsibilities:

- Hearing and deciding employee appeals from agency personnel actions;
- Hearing and deciding cases brought by the Special Counsel involving alleged abuses of the merit system;
- Conducting studies of the civil service and merit systems in the Executive branch to determine whether they are free of prohibited personnel practices; and
- Reviewing regulations issued by the Office of Personnel Management to determine whether implementation would result in the commission of a prohibited personnel practice.

In Fiscal Year 1986, the Merit Systems Protection Board acted upon 9,611 petitions. These petitions consisted of initial appeals filed with the regional offices, petitions for review of initial decisions filed with the Board Headquarters, special petitions for attorney fees, and petitions for compliance with Board decisions. The Board's 11 Regional Offices processed 7,938

petitions, approximately 83 percent of total MSPB adjudications. Of the timely initial appeals within the Board's appellate jurisdiction, decisions issued in 18 percent of the cases changed the agency action by reversal or mitigation of the penalties.

Board Headquarters processed 1,673 petitions for review in Fiscal Year 1986. Of the 1,396 petitions filed from initial decisions, the regional decision was left unchanged in 93 percent of the cases filed. Petitions for review based on attorney fee and compliance actions comprised the additional 277 Headquarters appeals.

The Board also has original jurisdiction to hear certain cases, including 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, as well as proposed disciplinary actions against administrative law judges (ALJ's). During Fiscal Year 1986 the Board received 22 original jurisdiction cases and issued 16 decisions.

The Board's decisions continue to earn deference before the courts. At the end of Fiscal Year 1986, over 97 percent of the Board's decisions had withstood the scrutiny of its chief reviewing court, the United States Court of Appeals for the Federal Circuit.

Non-adjudicatory functions continue to be an important part of the Board's operations. During Fiscal Year 1986 the Board reported a special study of efforts by Federal agencies to involve their employees in combatting waste, fraud, and abuse. The Board issued a separate report on the significant actions undertaken by the Office of Personnel Management, including OPM's efforts to attract and retain a quality work force and to evaluate personnel management in the Federal Government.

The Board also conducted an annual analysis of its appeal decisions and completed a comprehensive 5-year trend analysis of appeals activity.

Extensive outreach was conducted by Board officials during Fiscal Year 1986. During the year, Board officials, on over 100 occasions, gave speeches, or participated in personnel or legal seminars and conferences.

Board Members

Chairman

DANIEL R. LEVINSON, nominated by President Reagan and confirmed by the Senate, took the oath of office as a member and Chairman of the Merit Systems Protection Board on August 15, 1986. At the time of his appointment, Mr. Levinson was General Counsel of the U.S. Consumer Product Safety Commission, a position he held since March 1985. Previously he served for 2 years as Deputy General Counsel of the Office of Personnel Management. Prior to joining OPM, Mr. Levinson was a partner in the Washington, D.C. law firm of McGuiness & Williams.

HERBERT E. ELLINGWOOD was appointed by President Reagan to be the Board's Chairman on December 14, 1981, and served until the expiration of his term on March 1, 1986. 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.

Vice Chairman

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

Member

DENNIS M. DEVANEY was nominated by President Reagan to be a member of the Board on August 4, 1982, and confirmed by the Senate on August 20, 1982. 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 Institute, and from 1975 to 1977 was Assistant General Counsel for the U.S. Brewers Association.

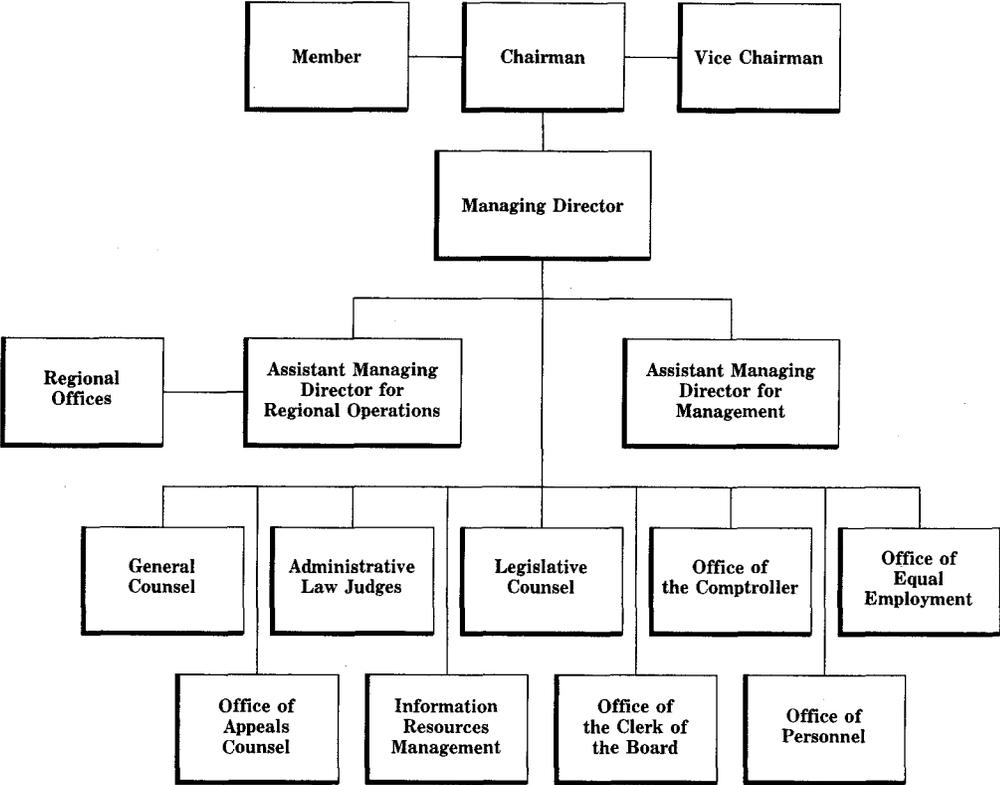
Board Organization

The Merit Systems Protection Board has offices in Washington, D.C., and in key locations throughout the nation. The **Chairman**, as chief executive officer, is responsible for the management and operation of the Board.

The **Managing Director** has authority, as delegated by the Chairman, for the day-to-day management of the Board. Providing direction and coordination for the Board's functional and administrative operations, the Managing Director *oversees* the systems and programs necessary for program planning, organization, and direction.

The **Assistant Managing Director for Management** plans and coordinates improvements to the overall management of the Board. This office has program responsibility to conduct special studies of the Federal Government's merit systems and produce the Board's annual review of the significant actions of the Office of Personnel Management.

FY 1986
U.S. MERIT SYSTEMS PROTECTION BOARD



The **Assistant Managing Director for Regional Operations** provides administrative guidance to and reviews the quality of initial decisions issued by the Board's **Regional Offices**. MSPB Regional Offices are located in 11 major metropolitan areas throughout the United States: Atlanta, Boston, Chicago, Dallas, Denver, New York, Philadelphia, St. Louis, San Francisco, Seattle and Washington, D.C. Regional Offices receive, process, and adjudicate the initial appeals filed with the Board. These offices have the primary function of issuing fair, timely, and well-reasoned decisions on all appeals. Almost one-half of the Board's work force is located in the Regional Offices.

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

The **Office of Appeals Counsel** is the office primarily responsible for assisting the Board members in adjudicating petitions for review from initial decisions issued by the Regional Offices. The Office of Appeals Counsel receives and analyzes the petitions, researches applicable rules and precedents, and submits proposed opinions to the Board members for their final adjudication. This office also provides analytical research memoranda to the Board on legal issues.

The **Office of Legislative Counsel** represent the agency before Congress, the media, and the public. It advises the Board on relevant legislative initiatives and drafts legislative proposals. Included among its responsibilities are responding to congressional inquiries and conducting the Board's public affairs and outreach programs.

The **Office of Administrative Law Judges** principally issues recommended decisions in matters arising under the Board's original jurisdiction. The Board's Office of Administrative Law Judges is required by statute to act on discovery motions and to issue subpoenas. In addition, removals from the Senior Executive Service and appeals from the Board's own employees are assigned to this office.

The **Office of the Clerk** is the Headquarters office which initially receives petitions for review. This office performs the ministerial Board functions that facilitate timely adjudication. The Clerk also rules on certain procedural matters relating to adjudication. After the Board members have considered a petition for review and reach a decision, this office distributes the Board's opinions and orders.

The **Office of the Comptroller** directs and coordinates the administrative services and financial functions of the Board. These duties include administering the agency's budget, accounting, procurement, property management, audit, and security functions.

The **Office of Information Resources Management** is responsible for the Board's automated information systems. This office develops and maintains the computer systems designed to help the Board efficiently manage its caseload and carry out its administrative responsibilities.

The **Office of Personnel** manages personnel programs and assists managers, employees and applicants for employment. This office administers the staffing, classification, employee relations, performance management, and training functions for the Board.

The **Office of Equal Employment** implements the Board's equal employment opportunity programs, including developing annual EEO action plans and procedures for processing discrimination complaints. The office also furnishes advice and assistance on affirmative action initiatives to the Board's offices.

Management Highlights

A. Financial Statement

The obligations and expenditures of the Merit Systems Protection Board for Fiscal Year 1986 (October 1, 1985, through September 30, 1986) are shown below:

1986 Actual Obligations and Expenditures (Thousands of dollars)

Direct obligations:

Personnel compensation	
Full-time permanent	11,139
Other than full-time permanent	513
Other personnel compensation	164
Subtotal	11,816
Personnel benefits	1,243
Benefits for former employees	143
Travel and transportation of persons	482
Transportation of things	89
Rental payment to GSA	1,756
Rental payments to others	25
Communications, utilities, and miscellaneous charges	790
Printing and reproduction	122
Other services	1,055
Supplies and materials	300
Equipment	<u>1,228</u>
Subtotal	19,049
Reimbursable obligations	1,308
Total obligations	20,357

B. Personnel

The full time equivalent employment data as reported in the President's annual budgets reflect a reduction from 392 in Fiscal Year 1982 (after a peak of 420 in Fiscal Year 1983) to 325 in Fiscal Year 1986. This 17 percent FTE reduction from the Fiscal Year 1982 level demonstrates increases in the Board's case management efficiency and reduced staffing requirements following the elimination of appeals resulting from the Air Traffic Controllers strike of 1981.

C.

Management Changes

1. Application of Information Technology

During Fiscal Year 1986 the Board continued to increase its information technology. Among the agency's computer resources are 250 personal computers and 13 minicomputers. The Board's integrated system includes an agency-wide computer network with case tracking, internal communication, and office automation capabilities.

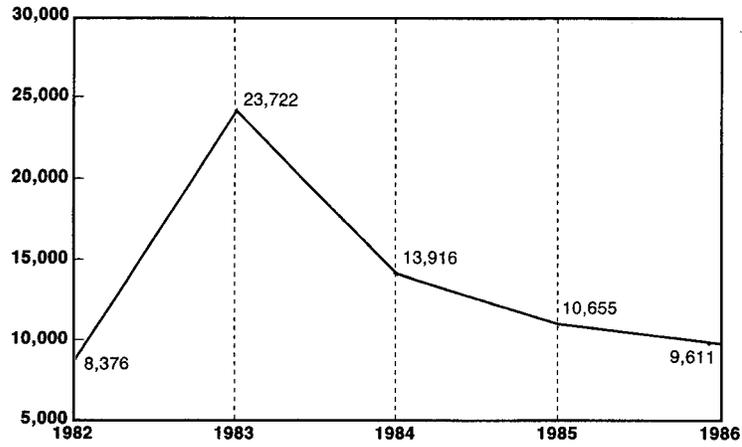
Through its case tracking system, the Board is able to monitor the status of all initial appeals, petitions for review, and appeal litigation actions. In Fiscal Year 1986, this system was enhanced to include compliance cases. The tracking system now provides the Board with useful management information, including types of appeals and representation, date of hearing activity, and file location for all cases pending before the Regional Offices or at Headquarters. The tracking system interfaces with an information system that provides similar data on all Board appellate cases appealed to the Federal courts.

These case management systems assist in effective resource management. Pleadings and docketing information entered into the data base allow generation of statistical reports on case processing time, workload patterns, and administrative issues.

Almost all of the Board's support staff and approximately three-quarters of its professional staff now have personal computers. Word processing capability has significantly increased the productivity of the Board's professional staff, resulting in far less time between initial drafts and final products.

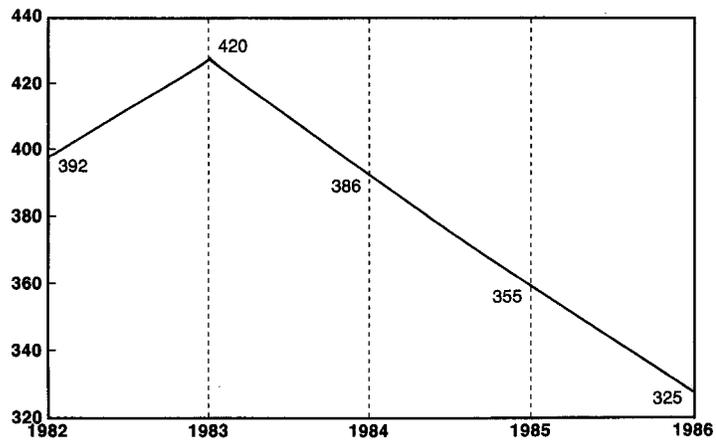
Minicomputers in each Regional Office are used to link the offices with Headquarters. This communications capability, together with integrated office automation supporting electronic mail, calendaring, and filing, enables the Board to be more efficient and responsive. The computers permit varied automated data processing functions and supply inventory management. In addition, the information system facilitates the Board's daily communication with the National Finance Center which handles all administrative payments, personnel, and payroll functions. Time and attendance data are sent electronically to the center, as well as regular administrative, budget, and personnel information.

MSPB PRODUCTION* LEVELS BY FISCAL YEAR



*INCLUDES DECISIONS ON INITIAL APPEALS, PETITIONS FOR REVIEW AND SPECIAL CASES

MSPB FULL TIME EQUIVALENCY LEVELS BY FISCAL YEAR



2. Revision of Regulations

During Fiscal Year 1986, the Board amended its rules of practice and procedure to provide clear and comprehensive regulations. The regulations improve enforcement of Board decisions and provide updated information on time standards for processing appeals in the Regional Offices and at Headquarters. The amended regulations changed the working title of the attorney-examiners in the Board's Regional Offices from "presiding official" to "administrative judge." Regulations governing compliance and enforcement proceedings now provide more expeditious processing.

The Board published its final rules of practice and procedure in both the Federal Register and in pamphlet form for easy use and reference. Nearly 30,000 copies of the amended regulations were distributed to Federal departments and agencies and the public through the Government Printing Office.

The amended regulations provide a better understanding of the appellate process and underscore to the parties their role in assuring that appeals are processed as promptly as possible. In addition, the obligation of each party to cooperate in enforcement and compliance cases is made clear. Since each party now must limit enforcement proceedings to disputed matters, partial compliance is more frequently achieved without Board intervention and those matters in dispute are resolved more promptly. This requirement saves resources for litigants and the Board alike.

3. Settlement/Alternative Dispute Resolution

During Fiscal Year 1986, the Board continued to emphasize mandatory settlement attempts as an alternative means for resolving appeals. Based on the Board's voluntary expedited appeals process, administrative judges increasingly relied on prehearing conferences and settlement negotiations, resulting in a 26 percent settlement rate of merit appeals. The administrative judges also use experience gained from the expedited appeals program in encouraging parties to stipulate facts not in dispute and to identify remaining issues for hearing.

Appellate Jurisdiction

A. Initial Appeals to the Board

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

After the appeal has been docketed and entered into the case tracking system, the Regional Office issues an order acknowledging receipt of the appeal and raising any questions of timeliness or jurisdiction. The appeal is then assigned to an administrative judge for review. By Board order, the agency is required to provide its evidentiary file to the appellant and the administrative judge. The appellant and the agency then have the opportunity to present additional information for the administrative judge's consideration.

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

Based on the Board's established policy, the administrative judge is required to issue an initial decision within 120 days from the date the appeal was filed. In Fiscal Year 1986, over 95 percent of all initial appeals were decided within 120 days. The chart below shows the average number of days required for Regional Offices to issue decisions during Fiscal Year 1986.

DECISION TIMES AT THE REGIONAL OFFICES FOR INITIAL APPEALS DECISIONS ONLY DURING FY 1986

DECISION TIME (DAYS)	Number of Cases	Percent of Cases	Percent Total
0-29	469	6.85	6.85
30-60	1,937	28.28	35.13
61-90	1,814	26.49	61.62
91-119	2,338	34.14	95.76
120+	<u>291</u>	4.24	100.00
TOTAL	6,849		

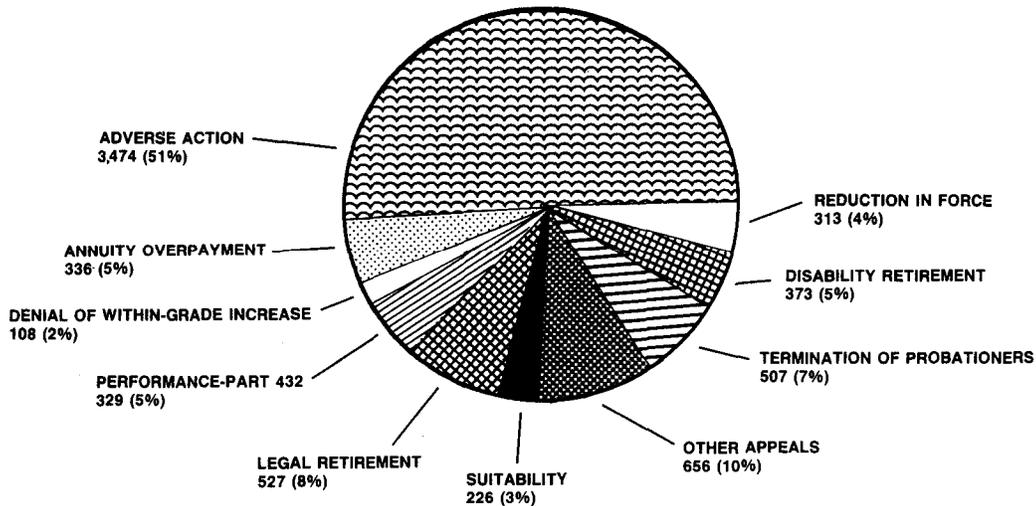
B. Highlights of Fiscal Year 1986 Regional Office Activity

- The Board's Regional Offices decided a total of 7,938 cases in 1986. Of this total, 6,849 were initial appeals and 1,089 were special cases, i.e., attorney fees, remands and compliance, or enforcement.
- Fifty-one percent (3,474) of the initial appeals were adverse actions. The remaining appeals included retirement-related decisions, terminations of probationary employees, performance actions, reductions in force and other appealable actions.
- Settlements among the parties increased significantly over past years to 984 or 26 percent of cases decided on the merits (3,763) and closed during the period.
- The Regional Offices averaged 75 days to issue decisions during this period.
- Of the initial appeals decided on their merits, 693 or 18 percent changed the agency action. Changes included reversals which overturned the agencies actions, and mitigations, which reduced the penalty imposed by the agency.
- Hearings were held in 34 percent of all appeals.
- More detailed information by major type of appeal and closing actions for agencies having 50 or more cases is presented in Appendix A.

Composition of Workload

The distribution of initial decisions among the various types of matters within the Board's appellate jurisdiction is shown below. Fifty-one percent of the appeals decided in Fiscal Year 1986 were adverse action appeals.

APPEALS DECIDED BY MSPB REGIONAL OFFICES BY TYPE FY 1986



TOTAL NUMBER OF APPEALS 6,849

Settlements

Parties before the Board have been willing to make increased use of settlement techniques to resolve their appeals. This is consistent with the trend of dispute resolutions in other judicial bodies. During Fiscal Year 1986, 26 percent of merit cases decided were resolved by settlement.

REGIONAL OFFICE INITIAL APPEALS CLOSED BY SETTLEMENT BETWEEN THE PARTIES FY 1984, 1985, AND 1986

FISCAL YEAR	Number of Decisions *	Number of Settlements	Percent of Settlement
FY 1984	3,703	209	6
FY 1985	2,787	511	18
FY 1986	3,763	984	26

* Represents only decisions decided on the merits and does not include dismissals.

C. Special Cases

In addition to 6,849 initial decisions issued in Fiscal Year 1986, the Regional Offices issued decisions in 1,089 "special cases" which resulted from earlier Board orders. Special cases include requests for attorney fees, enforcement cases alleging that there has not been full compliance with a decision of the Board or Regional Office, and cases remanded to the Regional Offices by the Board or a court.

REGIONAL OFFICE SPECIAL CASE DECISIONS BY CATEGORY OF APPEAL IN FY 1986

CATEGORY OF APPEAL	FY 1986
Attorney Fees	451
Compliance	417
Remanded by Board or Court	221
TOTAL	1,089

D. Petitions for Review

The collegial, three-member Board may grant a petition for review (PFR) when it is established that the initial decision of the administrative judge is based on an erroneous interpretation of statute or regulation, or that new and material evidence is available that, despite due diligence, was not available when the record was closed. Petitions for review may be filed by either party, the Office of Special Counsel, the Office of Personnel Management (OPM) or an intervenor with the Office of the Clerk in Washington, D.C. The Board also has the discretion to reopen and reconsider an initial decision on its own motion.

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

Highlights of Petitions for Review

- The Board completed action on 1,673 PFR's in Fiscal Year 1986. Of this total, 277 PFR's were Special Cases—petitions involving attorney fees, enforcement and remands; and the remaining 1,396 were filed to review initial decisions.
- Most PFR's from initial decisions in Fiscal Year 1986 were filed by employees (1,167 of 1,396).
- Ninety-three percent of the PFR's acted on by the Board in Fiscal Year 1986 left the Regional Office decision unchanged (1,292 of 1,396).
- Through the end of Fiscal Year 1986, Board decisions had been upheld in 97.3 percent of the appeals cases reviewed on the merits by the United States Court of Appeals for the Federal Circuit.
- The Board averaged 122 days overall to issue a decision on PFR's during Fiscal Year 1986.

Original Jurisdiction

The Board has original jurisdiction over certain matters where no formal action has been taken within an agency, or where removal from the Senior Executive Service has been proposed. These cases include:

- Actions brought by the Special Counsel alleging violation of the Hatch Act;
- Corrective and disciplinary action cases brought by the Special Counsel against agencies or Federal employees who are alleged to have committed prohibited personnel practices;
- Disciplinary actions brought by agencies against Administrative Law Judges;

- Review of OPM regulations; and
- Informal recommendations to employing agency heads in cases involving performance removals from the Senior Executive Service.

Original jurisdiction complaints are filed in writing with the Office of the Clerk in Washington, D.C. Employees against whom Hatch Act, disciplinary actions, or Administrative Law Judge disciplinary action complaints are filed have 30 days to respond and are entitled to a hearing. These cases are generally assigned to the Office of the Administrative Law Judges. A judge from that office issues a recommended decision to the Board for final decision except in SES performance removals. Appeals from most original jurisdiction cases are filed with the United States Courts of Appeals.

During Fiscal Year 1986, the Board received 22 original jurisdiction cases and issued decisions on 16 of these cases. The Special Counsel filed 13 actions of which 6 were requests for disciplinary action; 2 were alleged violations of the Hatch Act; and 5 were requests for stays. The Board issued decisions on 13 Special Counsel cases as follows: requests for disciplinary action-7 cases; Hatch Act-1 case; and stay requests-5 cases. In addition, decisions were issued on 3 cases involving review of OPM or agency regulations.

The other 9 cases received included 2 requests for disciplinary action involving Administrative Law Judges; 4 attorney fee requests; 2 hearings involving members of the Senior Executive Service; and 1 request for regulation review.

Special Panel

The Special Panel is a separate entity whose sole purpose is to resolve inconsistencies created when civil service law and discrimination issues intersect. Established by the Civil Service Reform Act of 1978 to resolve disputes between the Merit Systems Protection Board and the Equal Employment Opportunity Commission, the Special Panel consists of one Board Member designated by the MSPB Chairman, one EEOC Commissioner designated by the EEOC Chairman, and a third individual appointed by the President to serve *as* Chairman of the Special Panel. President Reagan appointed Barbara Mahone as Chairman of the Special Panel on October 18, 1985.

During Fiscal Year 1986 the Special Panel issued two decisions which are explained in Appendix C.

Litigation

The Board is the respondent agency in civil actions brought in connection with any function carried out by the Board except final orders or decisions issued under the Board's appellate jurisdiction. This authority includes original jurisdiction appeals, jurisdictional determinations, attorney fees, and timeliness issues. Appendix D is a report of the Board's significant litigation activities during Fiscal Year 1986.

MSPB Reviews and Studies

Another major function of the Merit Systems Protection Board is to conduct ongoing reviews and studies of the Federal civil service system including an annual oversight review and report on the significant actions of the U.S. Office of Personnel Management. The Board's goal in carrying out this responsibility is to assure that the merit principles underlying the civil service system are upheld and that systemic prohibited personnel practices are avoided.

The program and policy research underlying the Board's studies is carried out by a multidisciplinary team of personnel specialists, program analysts, and personnel research psychologists. This staff monitors the Federal civil service system for emerging trends and issues related to the merit system and human resource management. Through these efforts, augmented by suggestions from agency officials, public interest groups, employee unions, and concerned individuals, the Board develops its research agenda.

The Board's governmentwide studies are conducted through a variety of research methodologies including mail and telephone survey research, on-site systems reviews, written interrogatories, formal round table discussions with subject matter experts, computer based data analysis, and review of secondary source material. Using these methods, the Board has issued a cost efficient series of special study reports on a wide variety of topics.

Many of the Board's studies have been "first of their kind" examining subject matters from specific prohibited personnel practices (e.g., sexual harassment and reprisals for whistleblowing) to broad issues affecting the merit system (e.g., employee selection, retention, and compensation). Several topics or issues have been reviewed on more than one occasion, allowing the Board to develop timeline data to conduct trend analyses on the impact of the Civil Service Reform Act.

The Board's studies are an important addition to the public policy discussions concerning civil service matters and a number of the Board's reports have been quoted as authoritative. These studies add the Board's expertise to the ongoing debate on important public policy issues dealing with the civil service.

Outreach

During Fiscal Year 1986, Board officials from the Regional Offices and Headquarters delivered over 100 speeches at meetings and conferences attended by more than 7,500 participants. These included conferences of the U.S. Court of Appeals for the Federal Circuit, programs for government personnel officers, and Federal employee union conventions.

APPENDIX A

REGIONAL OFFICE DECISIONS ON INITIAL APPEALS BY AGENCY,* TYPE OF CASE AND CLOSING ACTION FY 1986

AGENCY—ACTION	TYPE OF CASE							Total
	Adverse Action	Reduction in Force	Probationers Termination	Acceptable Level of Competence	Disability Retirement	Legal Retirement	Other	
OPM								
Affirm Action	2			1	133	265	303	704
Reverse-Procedures					8	4	5	17
Reverse-Merits					109	89	76	274
Reverse-Mitigated							4	4
Settlement	3			1	10	10	21	45
Dismissed	1				109	146	163	419
Other					4	7	11	22
TOTALS	6	0	0	2	373	521	583	1,485
POSTAL SERVICE								
Affirm Action	271					1	1	273
Reverse-Procedures	7							7
Reverse-Merits	63						7	70
Reverse-Mitigated	10							10
Settlement	21							21
Settlement	321	1					7	329
Dismissed	549	2	1	1		1	150	704
Other	1							1
TOTALS	1,243	3	1	1	0	2	165	1,415
NAVY								
Affirm Action	150	9	2	8			19	188
Reverse-Procedures	8		1					9
Reverse-Merits	21			3		1	6	31
Reverse-Mitigated	2						1	3
Settlement	16							16
Settlement	112	4	3	2			12	133
Dismissed	168	23	77	5			67	340
Other	4						1	5
TOTALS	481	36	83	18	0	1	106	725

*Over 50 cases.

REGIONAL OFFICE DECISIONS ON INITIAL APPEALS BY AGENCY,* TYPE OF CASE AND CLOSING ACTION FY 1986—Continued

TYPE OF CASE

AGENCY—ACTION	Ad-verse Action	Reduction in Force	Probationers Termination	Acceptable Level of Competence	Disability Retirement	Legal Retirement	Other	Total
ARMY								
Affirm Action	173	12	1	3			27	216
Reverse-Procedures	5			2			1	8
Reverse-Merits	21	1		2			9	33
Reverse-Mitigated	1							1
Settlement	14							14
Dismissed	66	5		3			16	90
Other	114	20	78	7			95	314
TOTALS	1							1
TOTALS	395	38	79	17	0	0	148	677
VETERANS								
ADMINISTRATION								
Affirm Action	100	1	4	1			16	122
Reverse-Procedures	4							4
Reverse-Merits	18			1			4	23
Reverse-Mitigated	2							2
Settlement	12							12
Dismissed	62	5	2	2			9	80
Other	115	3	64	8			59	249
TOTALS	1							1
TOTALS	314	9	70	12	0	0	88	493
AIR FORCE								
Affirm Action	96	4	1	2			1	134
Reverse-Procedures								0
Reverse-Merits	17			1			2	20
Reverse-Mitigated	3							3
Settlement	7							7
Dismissed	48		1	1			7	57
Other	59	2	45	2			37	145
TOTALS								0
TOTALS	230	6	47	6	0	1	76	366

*Over 50 cases.

REGIONAL OFFICE DECISIONS ON INITIAL APPEALS BY AGENCY,* TYPE OF CASE AND CLOSING ACTION FY 1986—Continued

TYPE OF CASE

AGENCY—ACTION	Adverse Action	Reduction in Force	Probationers Termination	Acceptable Level of Competence	Disability Retirement	Legal Retirement	Other	Total
JUSTICE								
Affirm Action	38	3	1				11	53
Reverse-Procedures	2		1				1	4
Reverse-Merits	13						3	16
Reverse-Discrimination								0
Mitigated	6							6
Settlement	28	1	1				1	31
Dismissed	27	4	52	2			18	103
Other								0
TOTALS	114	8	55	2	0	0	34	213
DOD								
Affirm Action	39	2					7	48
Reverse-Procedures							1	1
Reverse-Merits	4							4
Reverse-Discrimination								0
Mitigated	1							1
Settlement	31			1			1	33
Dismissed	41	1	39	2			20	103
Other	1							1
TOTALS	117	3	39	3	0	0	29	191
AGRICULTURE								
Affirm Action	17	4					2	23
Reverse-Procedures	4							4
Reverse-Merits	3			1			2	6
Reverse-Discrimination								0
Mitigated								2
Settlement	17	3	1	3			5	29
Dismissed	34	25	27				17	103
Other								0
TOTALS	77	32	28	4	0	0	26	167

*Over 50 cases.

REGIONAL OFFICE DECISIONS ON INITIAL APPEALS BY AGENCY,* TYPE OF CASE AND CLOSING ACTION FY 1986—Continued

TYPE OF CASE

AGENCY—ACTION	Adverse Action	Reduction in Force	Probationers Termination	Acceptable Level of Competence	Disability Retirement	Legal Retirement	Other	Total
TREASURY								
Affirm Action	20			1			10	31
Reverse-Procedures			1					1
Reverse-Merits	1						2	3
Reverse-Discrimination	1							1
Mitigated								0
Settlement	17	1	1	2			2	23
Dismissed	36	4	28	4			18	90
Other	1							1
TOTALS	76	5	30	7	0	0	32	150
HHS								
Affirm Action	21			1			17	39
Reverse-Procedures	1						1	2
Reverse-Merits	1						3	4
Reverse-Discrimination	1							1
Mitigated	1							1
Settlement	12	1		1			11	25
Dismissed	24	6	6	7			26	69
Other								0
TOTALS	61	7	6	9	0	0	58	141
TRANSPORTATION								
Affirm Action	29	5	1				7	42
Reverse-Procedures	3							3
Reverse-Merits	7	1						8
Reverse-Discrimination	2							2
Mitigated	1							1
Settlement	15	1		2			3	21
Dismissed	25	1	15	2			19	62
Other								0
TOTALS	82	8	16	4	0	0	29	139

*Over 50 cases.

REGIONAL OFFICE DECISIONS ON INITIAL APPEALS BY AGENCY,* TYPE OF CASE AND CLOSING ACTION FY 1986—Continued

AGENCY—ACTION	TYPE OF CASE							Total
	Adverse Action	Reduction in Force	Probationers Terminated	Acceptable Level of Competence	Disability Retirement	Legal Retirement	Other	
TENNESSEE VALLEY AUTHORITY								
Affirm Action	17	33						50
Reverse-Procedures								0
Reverse-Merits	2	3						5
Reverse-Discrimination								0
Mitigated								0
Settlement	7	2						9
Dismissed	17	28					29	74
Other								0
TOTALS	43	66	0	0	0	0	29	138
INTERIOR								
Affirm Action	18	6		1			5	30
Reverse-Procedures								0
Reverse-Merits	3						1	4
Reverse-Discrimination								0
Mitigated	4							4
Settlement	13	1					5	19
Dismissed	19	6	10	3			12	50
Other								0
TOTALS	57	13	10	4	0	0	23	107
EEOC								
Affirm Action	6	2		1			3	12
Reverse-Procedures								0
Reverse-Merits	2							2
Reverse-Discrimination								0
Mitigated	1							1
Settlement	4						1	5
Dismissed	8	20	2				19	49
Other								0
TOTALS	21	22	2	1	0	0	23	69

*Over 50 cases.

REGIONAL OFFICE DECISIONS ON INITIAL APPEALS BY AGENCY,* TYPE OF CASE AND CLOSING ACTION FY 1986—Continued

TYPE OF CASE

AGENCY—ACTION	Adverse Action	Reduction in Force	Probationers Termination	Acceptable Level of Competence	Disability Retirement	Legal Retirement	Other	Total
GSA								
Affirm Action	18	8					1	27
Reverse-Procedures	1							1
Reverse-Merits		1						1
Reverse-Discrimination Mitigated								0
Settlement	5	1					1	7
Dismissed	15	5	6	1			5	32
Other								0
TOTALS	39	15	6	1	0	0	7	68
16 AGENCY TOTALS								
Affirm Action	1,015	89	10	19	133	267	459	1,192
Reverse-Procedures	35		3	2	8	4	9	61
Reverse-Merits	176	6		8	109	90	115	504
Reverse-Discrimination Mitigated	22						1	23
Settlement	86						4	90
Dismissed	761	26	9	18	10	10	102	936
Other	1,252	150	450	44	109	147	754	2,906
TOTALS	9					4	7	32
TOTALS	3,356	271	472	91	373	525	1,456	6,544
ALL OTHER AGENCIES								
Affirm Action	35	8	2	5			9	59
Reverse-Procedures	2	1		1			2	6
Reverse-Merits	2	2				1	1	6
Reverse-Discrimination Mitigated	3							0
Settlement	22	8	2	5			11	48
Dismissed	52	23	31	5		1	68	180
Other	2			1				3
TOTALS	118	42	35	17	0	2	91	305

*Over 50 cases.

**REGIONAL OFFICE DECISIONS ON INITIAL APPEALS BY TYPE OF CASE
AND CLOSING ACTION FY 1986**

TYPE OF CASE

AGENCY—ACTION	Adverse Action	Reduc- tion in Force	Proba- tioners Termina- tion	Accepts- ble Level of Level Compe- tence	Disabil- ity Retire- ment	Legal ment	Other	Total
TOTAL ALL								
AGENCIES								
Affirm Action	1,050	97	12	24	133	267	468	2,051
Reverse-Procedures	37	1	3	3	8	4	11	67
Reverse-Merits	178	8		8	109	91	116	510
Reverse-	22						1	23
Mitigated	89						4	93
Settlement	783	34	11	23	10	10	113	984
Dismissed	1,304	173	481	49	109	148	822	3,086
Other	11			1	4	7	12	35
GRAND TOTALS	3,474	313	507	108	373	527	1,547	6,849

APPENDIX B

Significant Board Decisions

Significant cases decided by the Board during Fiscal Year 1986 included the following:

Jurisdiction

Appling v. Social Security Administration, HQ75218510001 (April 8, 1986).

The Board found that labor unions have no independent right to seek Board review of an arbitrator's decision because 5 U.S.C. § 7121(d) entitles only "an aggrieved employee" to seek such review.

Passmore v. Department of Transportation, SL07528510177 (June 13, 1986).

The Board held that when an employee is placed on enforced leave pending inquiry or where retention in a duty status would be injurious to the employee, his fellow workers or the public, the enforced leave constitutes an appealable suspension regardless of whether the employee is otherwise ready, willing, and able to work.

Arbitration Awards

Robinson v. Department of Health and Human Services, HQ7128410007 (April 8, 1986).

The Board determined that it would only provide a record review of arbitration awards under 5 U.S.C. § 7121 and held that such awards would only be set aside or modified if the arbitrator erred in interpreting civil service law, rule or regulation.

Denson v. Veterans Administration, HQ71218410020 (April 8, 1986).

The Board held that employees who request review of arbitration decisions under 5 U.S.C. § 7121 are not required to submit a verbatim record of the arbitration hearing; the Board's decision will be based on the documentary record submitted to it. The Board determined that it will require that requests for review include a statement of the grounds for review, evidence or rulings bearing on those issues, arguments with specific references to documents and authority, legible copies of the award, and other pertinent documents.

Handicap Discrimination

Washington v. Department of Navy, SF07528510827 (April 2, 1986).

The Board found that the agency reasonably accommodated the employee's alcoholism when, after proposing his removal, it rescinded the proposal and referred him to counseling. However when the employee refused to attend such counseling sessions, it was not discriminatory for the agency to remove him.

Green v. Department of Air Force, CH07528610143 (July 1, 1986).

The Board found that the agency was required to provide accommodation for the

employee's drug addiction by allowing her to participate in, and complete, a rehabilitation program before removing her from her position of clinical nurse. In reaching this conclusion, the Board declined to apply to the employee the holding of *Kulling v. DOT*, which concerned air traffic controllers.

Senior Executive Service

Berube v. General Services Administration, DC07528410055 (May 20, 1986).

The Board held that members of the Senior Executive Service could be removed on performance-related charges under 5 U.S.C. § 7543 if the underlying conduct rose to the level of "misconduct, neglect of duty, or malfeasance."

Retirement

Briggs v. Office of Personnel Management, NY08318510356 (March 10, 1986).

The Board found that the Uniform Code of Military Justice constituted a "criminal law of the United States" under 5 U.S.C. § 8331(20). Therefore, a criminal investigator with the Department of the Air Force was entitled to law enforcement retirement credit since the position required him to investigate and apprehend individuals suspected or convicted of violations of the Uniform Code of Military Justice.

Attorney Fees

Nadolney v. Environmental Protection Agency, DC531D84A0302 (May 9, 1986).

The Board held that an employee who prevailed before the Board is entitled to attorney fees for work performed in connection with an earlier personnel action when the two actions are factually related and the time expended on the first action was useful to the Board appeal and of the type ordinarily necessary.

Lewis v. Department of Army, DE075285A0187 (August 19, 1986).

The Board held that it has no authority to award attorney fees to agencies, either under 5 U.S.C. § 7701(g) or as a sanction imposed under the Board's regulatory authority, in cases where an appellant has exercised a right of appeal granted by law, rule, or regulation.

Young v. Department of Air Force, DE04328410193ADD (January 8, 1986).

The Board held that it has the authority to award attorney fees for work performed on an equal employment opportunity complaint that was later appealed to the Board under 5 U.S.C. § 7521.

Bartel v. Federal Aviation Administration, PH035380A9002 (April 15, 1986).

The Board held that it has the authority to award attorney fees for work performed in appealing a Board decision to EEOC under 5 U.S.C. § 7702. In addition, an employee who has prevailed on the issue of reprisal for EEO activities is entitled to

attorney fees under 5 U.S.C. § 7701(g)(2).

Simmons v. Office of Personnel Management, DC831L80A0132-1 (September 8, 1986).

The Board set forth the standards to be used in determining whether attorney fees would be awardable in retirement-related matters.

Obremski v. Office of Personnel Management, DC083180A0336 (September 8, 1986).

The Board held that attorney fees should be awarded in legal retirement cases where the

Board finds that the agency based its case on incredible or unspecific evidence or reasoning fully countered by the record. The Board reasoned that the agency's denial of benefits or credit, in the absence of justifiable reasons supported by specific credible evidence or analysis, results in the expenditure of unnecessary fees by the applicant, and that such fees should be reimbursed.

Enforcement

Mann v. Veterans Administration, NY07528510034COMP (November 8, 1985).

In response to a final Board order to cancel the employee's removal and substitute a 60-day suspension, the agency restored the employee to her former position, but immediately detailed her to another position to which she was then permanently reassigned. The Board found the agency did not comply with the Board's order, holding 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.

Special Counsel v. Filiberti and Dysthe, HQ12068310018COMP (December 10, 1985).

After the Board imposed 60-day suspensions on two employees of the Military Sealift Command, the Command requested that the employees be allowed to serve their suspensions sequentially. The Board agreed, but subsequently initiated a show cause proceeding to determine whether the Command should be sanctioned for intentionally concealing information that could have led the Board to deny the modification. The Board adopted the recommendation of the administrative law judge that no sanction was warranted because the information was not material and would not have affected the Board's grant of the modification.

Benjamin v. U.S. Postal Service, DA07528410582COMP (January 7, 1986).

The employee was removed from the Postal Service but was retained on the rolls in a non-duty, non-pay status pursuant to a collective bargaining agreement. Before his appeal was decided, he voluntarily resigned in order to obtain a refund of his retirement contributions.

The Board reversed his removal. The agency paid him back pay only for the period from his removal to the date of his resignation and refused to reinstate him or pay him back pay for the period after his resignation. The Board found that the removal action constructively took effect on the effective date given in the agency's decision letter, and that the resignation after removal had no effect other than relinquishment of the employee's non-duty, non pay status. The decision thus found the agency in non-compliance and ordered the employee's reinstatement with back pay from the date of his removal to the date of his reinstatement.

Myers v. Department of Agriculture, SF07528410396COMP (December 5, 1985).

Under the terms of a settlement agreement between a removed employee and the agency, the agency agreed to give the employee "strong consideration" whenever he applied for positions in the agency. Upon the employee's petition for enforcement of the settlement agreement, the Board found that the agency's action in giving the employee's application the same consideration as any other applicant did not constitute compliance with the agreement. Because it was not clear whether the employee would have been selected for any of the jobs, the Board ordered the retroactive reconstruction of the selection process.

O'Reilly v. Department of Transportation, PH075281F0871COMP (December 5, 1985).

In this case involving the amount of back pay due a wrongfully removed air traffic controller, the Board held that overtime payments may be computed on the basis of the employee's prior overtime assignments or on the experience of similar employees who were not removed during the relevant period. The Board found that the agency relied on the latter method and that its consideration of the overtime experiences of all full-time non-supervisory controllers was proper.

Smith v. U.S. Postal Service, NY075285C0166 (May 2, 1986).

As part of a settlement agreement, the employee agreed to take a psychological fitness for duty examination, and the parties agreed to be bound by the results. The psychiatrist concluded that the employee should undergo twice-weekly treatments for six months to a year. The Board found that the employee's refusal to undergo such therapy constituted bad faith and a breach of the agreement, which justified the agency's refusal to restore him to the position from which he had been removed. It also noted that his subsequent disruptive behavior provided further justification for the agency's reassignment of him to another position.

Papa v. U.S. Postal Service, PH075285C0495 (September 4, 1986).

The Board found that under the agency's regulations, the employee was not obligated to mitigate the Board's back pay award by seeking other employment during the pendency of his appeal to the Board.

Requests for Reconsideration by the Office of Personnel Management

Schuck and Washington v. U.S. Postal Service, CH07528410682COMP (May 13, 1986).

The Board denied OPM's petition for reconsideration of the Board's prior decision finding the employees had been improperly furloughed by the agency when they were placed in a non-pay, non-duty status. The Board found that, although the occasional placement of an employee in a non-duty, non-pay status consistent with the terms of his appointment is not an appealable action, OPM failed to show that such placement was consistent with the terms of the employees' appointments.

ORIGINAL JURISDICTION

Special Counsel Cases

Stay Requests

Special Counsel v. Peace Corps, HQ12088610008 (July 11, 1986).

After temporarily staying the removal and reassignment of the Country Director for the Peace Corps in Malawi, Africa, the Board declined to extend the stay on jurisdictional grounds. The Board found that the Country Director position is excluded from prohibited personnel practice coverage because it is a "confidential or policymaking" position within the meaning of 5 U.S.C. § 2302(a)(2)(B)(i).

Special Counsel v. U.S. Customs Service, HQ12088610022 (September 10, 1986).

The Board granted the Special Counsel's request for a 90-day extension of the Board's previous stay orders staying the removal of the Regional Commissioner for the Northeast Region of the U.S. Customs Service. In reaching its conclusion, the Board noted that while there was an escalating obligation to review each additional stay extension request, there is no requirement that the Special Counsel submit new and additional evidence each time an extension is requested. The Board also found that consideration of the Special Counsel's chances of success in any subsequent corrective action was not appropriate in determining whether to extend a stay where the investigation has not yet been completed.

Hatch Act Cases

Special Counsel v. Carney, HQ12068510030 (June 4 1986).

The Board adopted the recommendation of the Chief Administrative Law Judge and found that appellant knowingly violated the Hatch Act by running as a Democrat for Mayor of Biloxi, Mississippi, despite the contrary advice of his employer and the Special Counsel. The Board ordered appellant removed from his position with the Department of the Air Force.

Review of Regulations of the Office of Personnel Management

Pursuant to 5 U.S.C. § 1205(e), the Board is required to review rules and regulations of the Office of Personnel Management and their implementation in order to ensure against the commission of prohibited personnel practices. The Board issued the following three decisions based on requests by individuals or organizations to review certain OPM rules and regulations.

Larson v. OPM, HQ12068510028 (November 21, 1985).

The Board denied the petition to review OPM's implementation of section 2601 of the Deficit Reduction Act of 1984. That section provides that Federal employees hired after December 31, 1983, are subject to Social Security withholding unless they return to a covered retirement system position after a break in service of less than 366 consecutive days. The Board found that the request for review did not sufficiently establish a likelihood that a prohibited personnel practice had been committed in OPM's implementation of the regulation.

National Council of Field Assessment Locals v. Department of Health and Human Services, HQ12058510002 (January 16, 1986).

The Board declined to exercise its authority under 5 U.S.C. § 1205(e) to review certain performance standards, finding that it was likely that the Board would be presented with the same issue through the normal appellate channels and that the employee failed to present an actual controversy to show the agency's allegedly invalid implementation of the standards.

Johnson v. U.S. Customs Service, HQ12058610013 (June 18, 1986).

The Board declined to exercise its authority to review the agency's implementation of OPM Handbook X-118, which the employee contended was violated by his reassignment. The Board found that because there was little likelihood of success on the merits, and since the employee could have challenged his reassignment through a grievance, it would not hear the case.

APPENDIX C

Special Panel

During Fiscal Year 1986 the Special Panel issued its first two decisions:

Ignacio v. U.S. Postal Service (February 27, 1986).

In a split decision, the Special Panel held that Federal agencies must consider reassignment as a reasonable accommodation for physically handicapped employees prior to taking a removal action. The majority held that the decision of the EEOC, requiring consideration of reassignment prior to removal, is reasonable and consistent with the Rehabilitation Act. The majority set forth its view of the Panel's jurisdiction in reviewing cases certified to it.

Lynch v. Department of Education (August 22, 1986).

The Special Panel in a split decision adopted the Board's opinion that removal of a handicapped employee was lawful because the agency had attempted to accommodate the employee's handicap and the medication used to treat it. The majority of the Panel held that the agency was not required to provide training to the employee as an accommodation where there was no indication that training would improve the employee's performance.

APPENDIX D

Significant

Litigation

The Board is the respondent agency in civil actions brought in connection with any function carried out by the Board except final orders or decisions issued under the Board's appellate jurisdiction. This authority includes original jurisdiction appeals, jurisdictional issues, attorney fees and timeliness issues. Appendix D is a report of the Board's significant litigation activities during Fiscal Year 1986.

Supreme Court Litigation

Lovshin v. Department of the Navy.

The Board filed a brief in support of a petition for writ of certiorari. The petitioner sought reversal of the decision of the appeals court (reported at 767 F.2d 826), holding that either Chapter 43 or Chapter 75 is available to an agency to remove or demote an employee for performance-based reasons. The Supreme Court by a 6-3 vote denied review of the appeal.

Huber v. Merit Systems Protection Board.

The Board opposed a petition for a writ of certiorari from the decision of the appeals court (reported at 793 F.2d 284), which affirmed the Board's ruling that an agency may separate excepted service, non-preference eligibles at any time, with or without cause, and that the Board is without jurisdiction to hear any appeal from such action. The agency's mistake in characterizing its actions as an appealable reduction in force did not affect whether the Board had jurisdiction.

Intervention in OPM-Initiated Litigation

Homer v. Burns and Werts, 783 F.2d 196 (Fed. Cir. 1986).

The Court agreed with the Board that an issue cannot be raised before the Board through a response to a petition for review, but must be raised in a cross-petition. The Court also agreed with the Board's view that initial decisions do not have precedential value, and thus, do not have a "significant impact upon civil service laws" sufficient to warrant the pursuit of judicial review by OPM.

Horner v. Andrzejewski (Pending Federal Circuit decision)

This case involved the issue of whether the Board properly invalidated the emergency furlough regulation. The case remained pending at the conclusion of Fiscal Year 1986.

Horner v. Acosta, et al. (Pending Federal Circuit decision)

This appeal involved the question of whether an individual engaged in a personal services contract with the Federal Government is entitled to service credit for retirement purposes.

Horner v. Schuck and Washington (Pending Federal Circuit decision)

OPM sought review of a Board decision which interpreted the Postal Service's collective bargaining agreement in reaching its determination that the employees had been furloughed without proper procedures. The Board intervened, arguing that the court has no jurisdiction over a "mixed case" appeal and that OPM's right to seek judicial review does not encompass disagreements over the interpretation of a collective bargaining agreement.

Horner v. Merit Systems Protection Board (Pending Federal Circuit decision)

OPM challenged the Board's decision finding that the Special Counsel has the authority under 5 U.S.C. § 1206(e)(1)(D) to investigate and prosecute violations of the government's ethics laws and regulations. The Board opposed the petition, arguing that section 1206(e)(1)(D) is not a civil service law, rule, or regulation which falls under the purview of OPM, but rather is interpreted exclusively by the Special Counsel and the Board. The Court ordered all parties to brief the jurisdictional issues raised by this case.

Special Counsel-Related Litigation

Filliberti and Dysthe v. Merit Systems Protection Board (Pending 9th Circuit decision)

Two high-level personnel officers challenged the Board's determination that they committed a prohibited personnel practice by influencing a disabled veteran applicant to withdraw from competition in order to secure the mistaken appointment of a nonveteran. Also at issue was the scope of the Board's enforcement authority, including authority to modify penalties. The litigation remained pending at the close of the year.

Starrett v. Special Counsel, 792 F.2d 1246 (4th Cir. 1986)

The Court held that substantial evidence did not support the Board's finding that the Director of the Defense Contract Audit Agency retaliated against one of his subordinate auditors for whistleblowing.

Harvey v. Merit Systems Protection Board, 802 F.2d 537 (D.C. Cir. 1986).

The Court held that the facts did not support the Board's finding that Harvey had committed several prohibited personnel practices in connection with his effort to relieve a subordinate of his duties. Therefore, the Court reversed the Board's demotion of Harvey from his Senior Executive Service position.

Jurisdiction

Miller v. Merit Systems Protection Board, 794 F.2d 660 (Fed. Cir. 1986).

The Court affirmed the Board's decision that it lacks jurisdiction over an agency's withdrawal of a job offer when the employee at one agency never entered on duty at a new agency.

Enforcement

Weimers v. Merit Systems Protection Board, 792 F.2d 1113 (Fed. Cir. 1986).

The petitioner appealed the Board's denial of a request for enforcement of a Board order affirming an indefinite suspension pending disposition of a criminal case against him. The petitioner contended that he was entitled to reinstatement and backpay because his criminal conviction was reversed on appeal. The Court affirmed the Board's decision that petitioner was not entitled to any relief because the agency had removed petitioner for the conduct underlying the criminal charges before his conviction was reversed on appeal.

Timeliness of Appeal

Duncan v. Merit Systems Protection Board, 795 F.2d 1000 (Fed. Cir. 1986).

The employee withdrew his appeal from the Board after he filed a grievance of his removal. When the grievance was dismissed, he attempted to renew his appeal with the Board. The Court affirmed the Board's decision finding that the employee's attempted renewal was untimely and that seeking relief through arbitration did not constitute good cause for the delayed appeal.

Attorney Fees

Wise v. Merit Systems Protection Board, 780 F.2d 997 (Fed. Cir. 1985).

In an attorney fee case interpreting the interest of justice standards, the Court found that an employee cannot be substantially innocent of the personnel charges against him, even though he is ultimately vindicated before the Board, if he deliberately withholds from the agency's deciding official evidence that would have exonerated him.

Van Fossen v. Merit Systems Protection Board, 788 F.2d 748 (Fed. Cir. 1986).

The Court held that an award of attorney' fees was warranted in the interest of justice under the "substantially innocent" standard because the charges, though sustained, were insignificant, and because petitioner succeeded in having his removal reduced to a relatively short suspension.

Quality Review

Fuller v. United States, No. 84-1699 (D.D.C. Dec. 19, 1985).

In upholding the Board's removal of an employee, the Court stated that the Board's quality review program, instituted to improve the quality of initial decisions, is not offensive nor contrary to statute.

APPENDIX E

Special Studies

The following is a summary of the major findings and recommendations from special study reports issued by the Board in Fiscal Year 1986. The reports summarized below include a special study of the efforts made by various Federal agencies to seek employee involvement in improving Federal management; an annual analysis of MSPB appeals decisions; and an in-depth annual oversight report on the significant actions of the Office of Personnel Management.

1. **Getting Involved: Improving Federal Management with Employee Participation.** This study focuses on the successful efforts of 22 of the Federal Government's largest agencies to involve employees in improving operations. The report discusses unique programs as well as more commonly used approaches such as quality circles, suggestion programs, and hotlines. Alternatives for employees who might otherwise see "whistle-blowing" as their only means to share information about fraud, waste, or abuse were identified.

Most of the agencies provided examples demonstrating that their employee involvement systems were beneficial and cost-effective. Although systems and procedures varied among agencies, the more effective programs shared the following elements:

- top management commitment;
- middle and first line supervisory support;
- sufficient allocation of resources;
- good communications;
- a willingness to deal with results in good faith;
- feedback to employees;
- positive reinforcement (no reprisals) to employee participants; and
- periodic program assessment and refinement.

Based on the effective programs identified by the study, the Board recommends that Federal managers be encouraged to start or revitalize employee involvement systems incorporating elements of other successful programs.

2. **Study of MSPB Appeals Decisions for Fiscal Year 1985.** This report provides detailed information on MSPB regional and headquarters appeal decisions in Fiscal Year 1985. The report lists categories of appeals in many formats including appeal type, outcome, Federal agency, and MSPB regional jurisdiction. A 5-year trend analysis of appeals was included to illustrate a long-range view of MSPB's appellate workload and related decisions.

3. **Report on the Significant Actions of the Office of Personnel Management (OPM).** OPM has the major role in managing government-wide personnel policies and programs. This annual MSPB report focuses on (a) the

Federal Government's ability to attract and retain a quality workforce; (b) the Federal "grade bulge" problem; and (c) OPM's revised program for evaluating Federal personnel management.

a. **Attracting and Retaining a Quality Workforce.** This part of the review evaluated 6 aspects related to attracting a quality workforce.

(1)**College Recruiting.** The review found that Federal agency success in attracting enough graduates for entry level positions varies by occupation. Agencies reported that prospects for hiring well qualified graduates were good for some occupations (e.g., attorneys) and relatively poor for others (e.g., computer scientists and engineers). Factors which made it difficult to attract graduates for some occupations were lower Federal pay rates and a poor image of the Federal Government as an employer. The Board recommends that OPM consider new or different approaches to overcoming these negative factors, such as an expanded approach to the use of special salary rate procedures for hard-to-fill occupations.

(2)**Entry-Level Professional and Administrative Career Hiring.** This part of the review was a follow-up to the Board's earlier evaluations of how the Federal Government selects candidates from outside government for GS-5 or GS-7 entry level positions. The 118 career occupations reviewed were once covered by the Professional and Administrative Career Examination (PACE) until it was eliminated by a consent decree.

As an alternative to PACE, OPM has granted agencies a special "Schedule B" appointment authority. Employees hired under this excepted appointment authority are not given career status and may not be promoted above the GS-7 level. They may, however, "compete" with other candidates for career GS-9 positions in the competitive service. The review revealed that, through March 1985, Schedule B employees "competing" for these GS-9 positions, were selected in 99.9 per cent of the cases. The report recommends that OPM replace the PACE with more effective alternative examinations to ensure merit system competitiveness.

(3) **White-Collar Pay.** This part of the report enumerates the many complexities that the Government faces in determining a fair pay range for white-collar employees, and presents an overview of studies on the subject. Although there appears to be no "quick fix" solution available, there are some approaches that are arguably better than others. The use of "quit rates" to determine compensation, for example, holds less merit than a re-weighting of the current data used to determine Federal pay comparability with the private sector.

(4)**Senior Executive Service (SES) Candidate Development Programs.** The report shows that agency selection procedures and costs for formal SES candidate development programs vary considerably. There is little relationship between costs and placement rates, and graduates of candidate development programs constitute only 9 per cent of all new career SES members.

The Board recommends that agency use of candidate development programs be reconsidered given their relatively high costs and apparently low contribution to actual SES appointments. Additionally, it was recommended that agency selection procedures be analyzed to identify factors resulting in disparate placement rates.

(5) The Senior Executive Service (SES) in 1984. The report shows that SES turnover has held stable since 1982 at an average of 8 per cent or less but that career losses have been higher among charter members (1979) than among new members. Turnover patterns since 1979 indicate that retirement rates are directly affected by tangible changes in retirement benefits. The report also found that the number of SES bonuses increased but the dollar amount of the average bonus decreased. Legislative changes in 1984 appear to have resulted in some improvement to the SES incentive programs.

(6) Expanded Authority to Make Temporary Limited Appointments. At the end of 1984, OPM extended authority to individual agencies to make temporary limited appointments up to 4 years, and to raise the grade levels covered from GS-7 to GS-12. The Board did not identify any current problems with this delegation. However, given the potential for abuse or misuse of temporary appointment authority, specific guidance to agencies regarding the use of the authority was recommended. The report suggests that OPM evaluate the use of this authority for at least 3 years and consider ways to make temporary employment more attractive for potential candidates.

b. The Office of Personnel Management (OPM) and Office of Management and Budget (OMB) Grade Bulge Initiative. This part of the report looks at the OPM/OMB effort to improve the Federal Government's position management by reducing the number of positions in pay grades 11 through 15. OPM was responsible for presenting recommendations to OMB regarding potential budget savings tied to reducing the size of each agency's "bulge" at the higher-grades. The report shows that the OPM's approach produced results that seem to conflict with the original objective:

- some agencies that had experienced the greatest increase in GS-11 through 15 positions were targeted for the least reduction in those grades; and
- other agencies with either little growth or actual reduction in the number of positions at grades 11 through 15 were identified by OPM for proportionately greater reductions.

The Board's report suggests that OPM's statistical approach to the "grade bulge" is a possible problem. The Board recommends a less complex approach to the "grade bulge" problem, such as assisting agencies to develop strong position management programs and revitalizing the Federal classification and compensation systems.

c. The Office of Personnel Management (OPM) Evaluation Program. This represents the Board's second analysis of major changes in how OPM evaluates Federal Government personnel management. The OPM revised its approach in 1983 from one emphasizing onsite visits to one emphasizing statistical analysis. The report identifies several deficiencies with OPM's current evaluation strategies, and questions the effectiveness and reliability of the results thus far.

The report concludes that OPM's ability to evaluate agency personnel management has been reduced at the same time that agencies have been delegated more authority. The Board recommends that OPM continue to monitor closely its new approach for at least 2 years, issue updated FPM guidance, and again conduct some indepth onsite agency reviews. Increased involvement in agency-led onsite reviews and improved monitoring of agency personnel management evaluation programs were also suggested.