

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



**ANNUAL REPORT FOR
FISCAL YEAR 1991**

*Submitted to the President and
the Congress of the United States*



U. S. Merit Systems Protection Board
1120 Vermont Avenue, NW
Washington, DC 20419

Sirs:

In accordance with 5 U.S.C. 1206, we are pleased to submit the Thirteenth Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during Fiscal Year 1991.

During the fiscal year, administrative judges in the Board's regional offices issued almost 8,400 decisions on appeals, stay requests, and addendum cases. The 3-member bipartisan Board issued over 1, 800 decisions on review of administrative judges' decisions and in reopened cases. In this same period, 95 percent of final Board decisions reviewed by the U.S. Court of Appeals for the Federal Circuit were unchanged.

The Board issued just over 50 decisions in original jurisdiction cases--complaints and stay requests filed by the Special Counsel, requests to review regulations of the Office of Personnel Management (OPM), and proposed actions against administrative law judges. This number includes 24 decisions in agencies' proposed furloughs of administrative law judges in anticipation of a sequester at the beginning of Fiscal Year 1991.

During the fiscal year, the Board published two reports of merit systems studies and completed one review of OPM significant actions. One of the merit systems studies reviewed the use of pay setting and reassignment flexibilities in the Senior Executive Service, and the other examined the Title 38 personnel system in the Department of Veterans Affairs. The OPM significant action review, which was to be published early in Fiscal Year 1992, assessed OPM initiatives to help Federal employees balance their work and family responsibilities.

The Fiscal Year 1991 Annual Report also includes a special section on the Board's activities, since it was established by the Civil Service Reform Act of 1978, in fulfillment of its mission to conduct studies of Federal merit systems and to review the significant actions of OPM.

Respectfully submitted,

Daniel R. Levinson
Chairman

Antonio C. Amador
Vice Chairman

Jessica L. Parks
Member

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

MERIT SYSTEMS PROTECTION BOARD

FY
1
9
9
1

TABLE OF CONTENTS

	<u>Page</u>
Board Mission and Organization	7
Mission	7
Board Members	8
Board Organization	10
Regional Officials	13
Highlights of Fiscal Year 1991 Activities	15
Reviews of OPM Significant Actions and Merit Systems Studies	16
Adjudication: Appellate Jurisdiction	26
Jurisdiction	26
Regional Offices	27
Headquarters	35
Special Panel	40
Adjudication: Original Jurisdiction	42
Litigation	45
Outreach Activities	46
Administration, Finance, and Human Resources	49
Administration	49
Financial Statement	50
Human Resources	50
Appendix A - Significant Board Decisions	
Appellate Jurisdiction Cases	53
Appendix B - Significant Board Decisions	
Original Jurisdiction Cases	64
Appendix C - Significant Litigation	66

MERIT SYSTEMS PROTECTION BOARD

BOARD MISSION AND ORGANIZATION

MISSION

The U.S. Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board's mission is to ensure that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices. The Board has a statutory mandate to adjudicate appeals from personnel actions for the nation's largest employer. It has worldwide jurisdiction, wherever Federal civil servants are found. Additionally, under the Hatch Political Activities Act, it exercises jurisdiction over state and local government employees in federally-funded positions.

The Board accomplishes its mission by:

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

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

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

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

The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: the Office of Personnel Management, which manages the Federal workforce; the Federal Labor Relations Authority, which oversees Federal labor-management relations; and the Board.

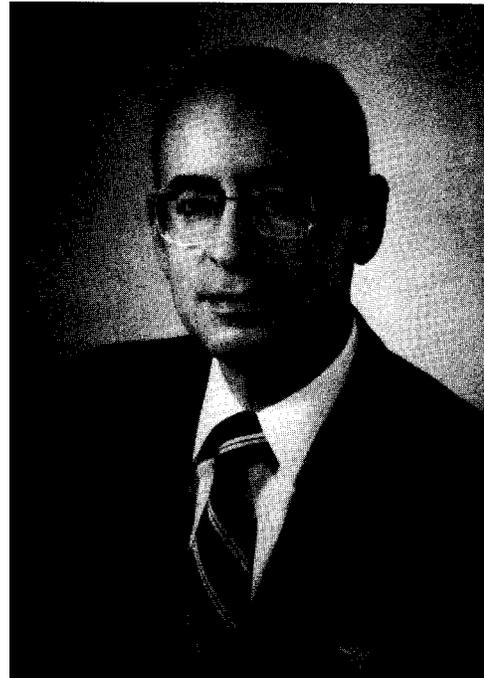
The Board assumed the employee appeals function of the Civil Service Commission and was given the new responsibilities to perform merit systems studies and to review the significant actions of OPM. The CSRA also created the Office of Special Counsel, which investigates allegations of prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Act. Although established as an office of the Board, the Special Counsel functioned independently as a prosecutor of cases before the Board. In July 1989, the Office of Special Counsel became an independent Executive branch agency.

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

MERIT SYSTEMS PROTECTION BOARD

BOARD MEMBERS

CHAIRMAN



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

VICE CHAIRMAN



ANTONIO C. AMADOR joined the Board as Vice Chairman on November 1, 1990, following his nomination by President Bush and confirmation by the Senate. At the time of his appointment, Mr. Amador was Deputy Director, Program Review Branch, Employment Development Department of the State of California. Previously, he served as Director of the California Youth Authority, as Chairman of the Youthful Offender Parole Board in California, and as a police officer in the Los Angeles Police Department. Mr. Amador received his law degree from the McGeorge School of Law, University of the Pacific.

MEMBER

JESSICA L. PARKS took the oath of office as a Member of the Board on May 18, 1990, following her nomination by President Bush and confirmation by the Senate. At the time of her appointment, Ms. Parks was Associate Regional Counsel for Litigation and Program Enforcement for the U.S. Department of Housing and Urban Development in Atlanta, Georgia. From 1982 to 1985, she served as an administrative judge in the Board's Atlanta Regional Office. Previously, she was Agency Counsel for the Craven County Department of Social Services in New Bern, North Carolina. She has also been in private practice in Jacksonville, North Carolina and was an associate in the firm of Bowers and Sledge in New Bern.



BOARD ORGANIZATION

Offices of the Board

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

Office of the Chairman

The **Office of Equal Employment Opportunity** plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It processes complaints of alleged discrimination, including precomplaint counseling and issuance of proposed dispositions of complaints. The office also furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors. The Director, Office of EEO, reports directly to the Chairman.

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

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

Office of the Executive Director

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

The **Office of Regional Operations** manages the appellate functions of the MSPB regional offices and reviews the quality of initial decisions issued by administrative judges in the regional offices. The 11 MSPB **Regional Offices** are located in Atlanta, Boston, Chicago, Dallas, Denver, New York, Philadelphia, St. Louis, San Francisco, Seattle, and Washington, DC. These offices receive and process the initial appeals filed with the Board. Administrative judges in the regional offices have the primary function of adjudicating appeals and issuing fair, timely, and well-reasoned decisions.

Lucretia F. Myers *Executive Director*



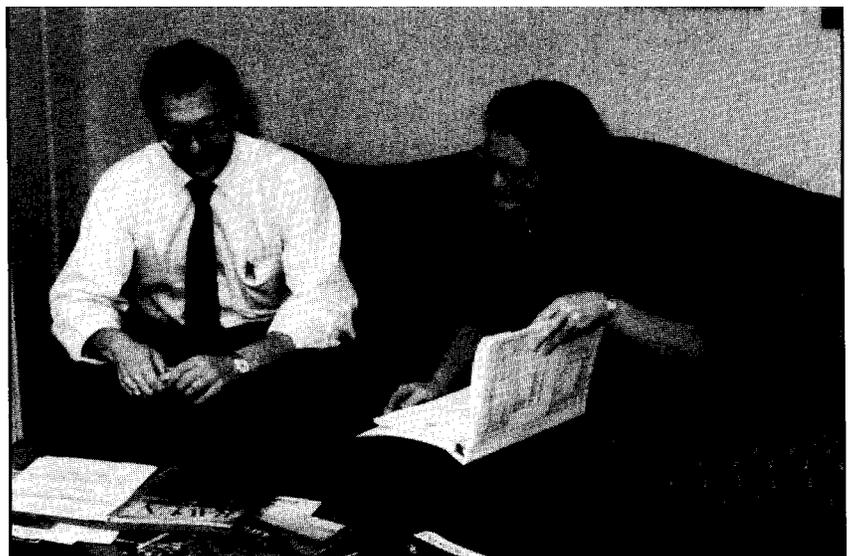
The **Office of Appeals Counsel** assists the Board in adjudicating petitions for review from initial decisions issued by administrative judges in the regional offices. The office receives and analyzes the petitions, researches applicable laws, rules and precedents, and submits proposed opinions to the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

The **Office of the Administrative Law Judge** hears cases governed by the Administrative Procedure Act and other cases assigned by the Board.

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

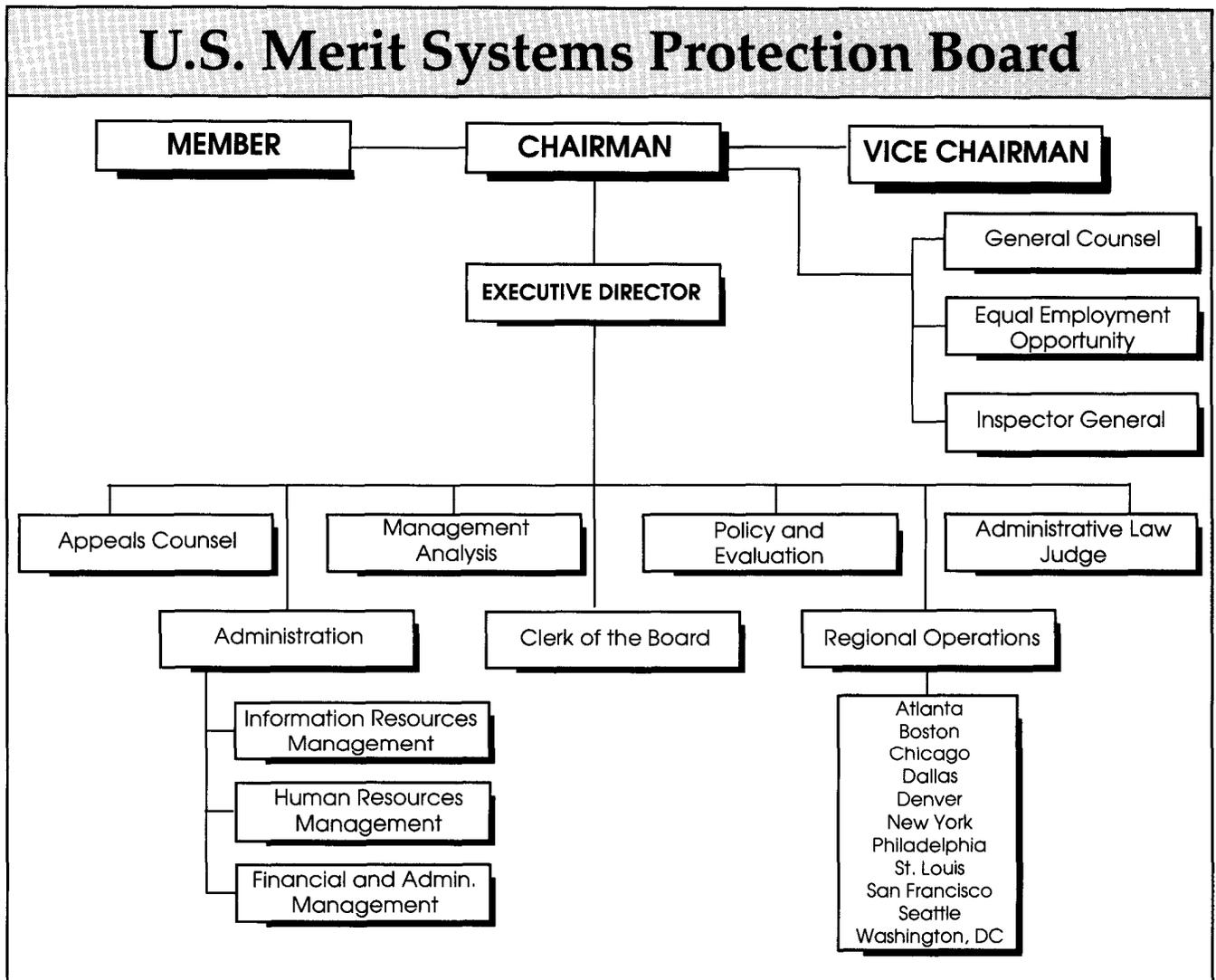
The **Office of Policy and Evaluation** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems, including annual oversight reviews of the Office of Personnel Management. Reports of these studies are submitted to the President and the Congress,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

Michael W. Crum,
*Deputy Executive
Director*, and Barbara
B. Wade, *Director,
Information
Resources
Management
Division*



The **Office of Management Analysis** develops and coordinates internal management programs and projects. The office also manages the Board's public affairs program and produces the agency's annual report to the President and the Congress, the annual report on the Board's decisions in appellate and original jurisdiction cases, and public information publications.

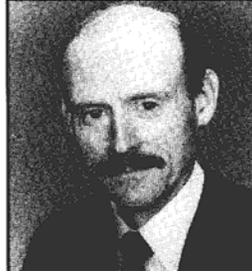
The **Office of Administration** manages the Board's administrative operations. It is made up of three divisions: The **Financial and Administrative Management Division** administers the budget, accounting, procurement, property management, physical security, and general services functions of the Board. The **Human Resources Management Division** manages personnel programs and assists managers, employees, and applicants for employment. It administers staffing, classification, employee relations, performance management, payroll, personnel security, and training functions. The **Information Resources Management Division** develops, implements, and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative responsibilities.



REGIONAL OFFICIALS



Thomas J. Lanphear
*Director, Office of
Regional Operations*



R. J. Payne
*Regional Director
Atlanta Office*



William Carroll
*Regional Director
Boston Office*



Martin W. Baumgaertner
*Regional Director
Chicago Office*



Paula A. Latshaw
*Regional Director
Dallas Office*



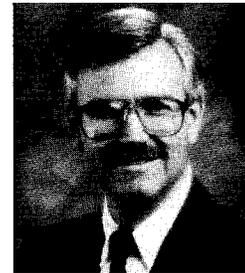
Gail E. Skaggs
*Regional Director
Denver Office*



Sean P. Walsh
*Regional Director
New York Office*



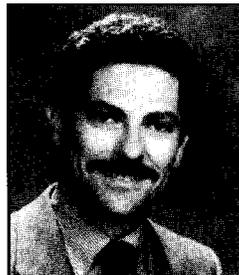
Lonnie Crawford
*Regional Director
Philadelphia Office*



Earl A. Witten
*Regional Director
St. Louis Office*



Denis Marachi
*Regional Director
San Francisco
Office*

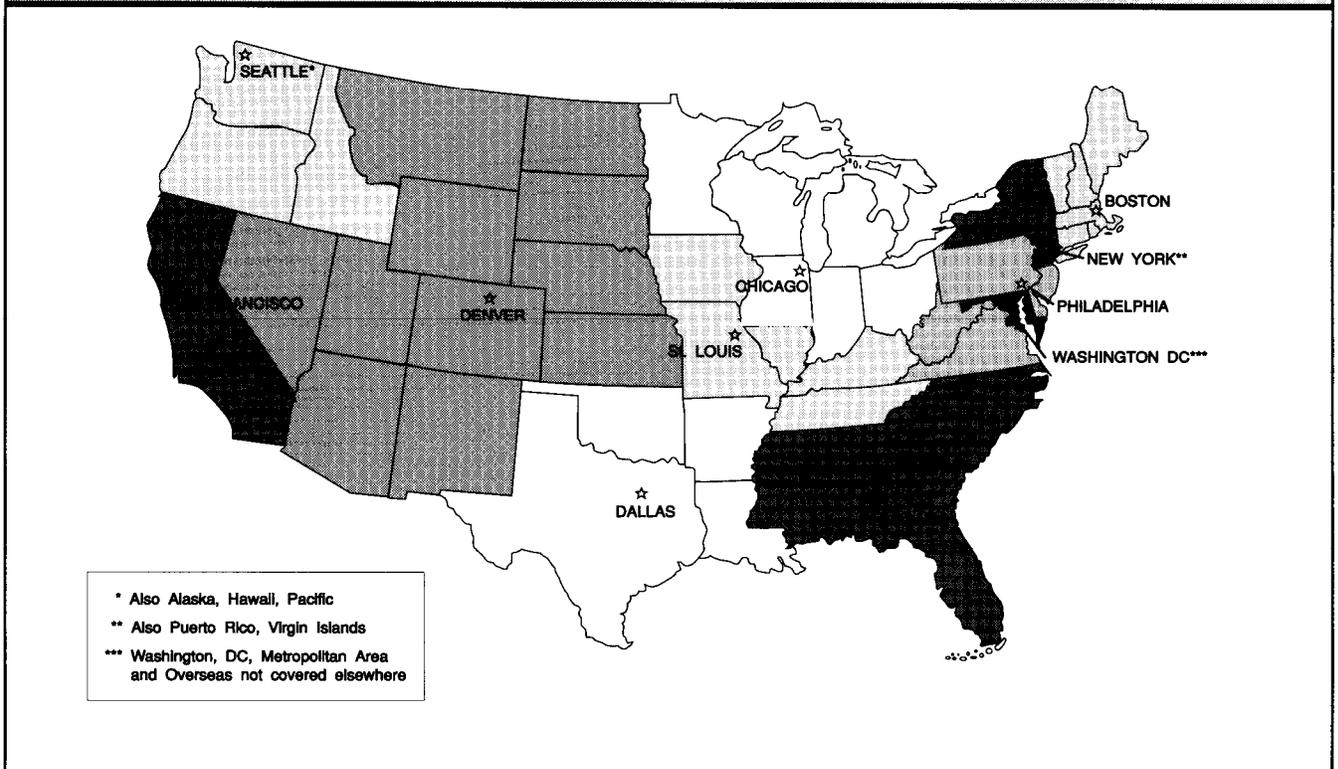


Carl Berkenwald
*Regional Director
Seattle Office*



P.J. Winzer
*Regional Director
Washington, DC Office*

Regional Office Jurisdictions



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

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

Chicago Regional Office -- Illinois (all locations north of Springfield), Indiana, Michigan, Ohio, and Wisconsin

Dallas Regional Office -- Arkansas, Louisiana, Oklahoma, and Texas

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

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

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

St. Louis Regional Office -- Illinois (Springfield and all locations south), Iowa, Kentucky, Missouri, and Tennessee

San Francisco Regional Office -- California

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

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

HIGHLIGHTS OF FISCAL YEAR 1991 ACTIVITIES

Fiscal Year 1991 was marked, at both the regional office and headquarters levels of the Board, by an increase in the numbers of both decisions issued and receipts of new cases. The increase is attributable primarily to the expansion of the Board's jurisdiction by legislation enacted in recent years—particularly the Whistleblower Protection Act of 1989.

Administrative judges in the Board's regional offices issued 8,388 decisions, including decisions on initial appeals, stay requests, and addendum cases (requests for attorney fees, petitions for enforcement, and remands). This represents an increase of 6.9 percent over the number of decisions issued in the previous fiscal year.

At headquarters, the Board issued 1,838 decisions on petitions for review (PFRs) of initial decisions in both appeals and addendum cases, requests to review stay rulings, and reopened cases. This represents a 21.7 percent increase over the previous fiscal year.

During Fiscal Year 1991, receipts of initial appeals in the regional offices increased 13 percent over the previous fiscal year. At headquarters, receipts of PFRs were up 8.5 percent.

The Board, with two new members, made a concerted effort to reduce the number of cases pending at headquarters and to complete action on overage cases. In spite of the increase in receipts of PFRs during the fiscal year, the Board was able to reduce the number of pending cases (including PFRs, reviews of stay rulings, and reopenings) from 1,021 on October 1, 1990 to 784 at the end of the fiscal year.



Pictured to the left, Vice Chairman Amador is welcomed to the Board, November 1990.

The Board issued 51 decisions in cases under its original jurisdiction, a 13.3 percent increase over the previous fiscal year. These cases included complaints brought by the Special Counsel, Special Counsel stay requests, requests to review OPM regulations, and proposed actions against administrative law judges.

The Board continued to issue precedential decisions interpreting provisions of the Whistleblower Protection Act during Fiscal Year 1991. In addition, the Board added significantly to the case law dealing with performance-based actions, harmful procedural error, handicap discrimination, disability retirement, sexual harassment, security clearances, and elections under the Federal Employees Retirement System (FERS).

During Fiscal Year 1991, the Board issued two reports of merit systems studies and completed one review of OPM significant actions. One of the merit systems studies reviewed the use of pay setting and reassignment flexibilities in the Senior Executive Service, and the other examined the Title 38 personnel system in the Department of Veterans Affairs. The OPM significant action review, which was completed and sent to the Government Printing Office for publication at the end of the fiscal year, assessed OPM initiatives to help Federal employees balance their work and family responsibilities. The following special section of this annual report provides an overview of the Board's activities, since enactment of the CSRA, to fulfill its statutory merit systems studies and OPM oversight function.

REVIEWS OF OPM SIGNIFICANT ACTIONS AND MERIT SYSTEMS STUDIES

HISTORICAL PERSPECTIVE

In 1883, the Congress passed the Pendleton Act, which established a merit-based employment system for the Federal Government. Passage of this legislation was in reaction to the increasingly evident ineffectiveness of political patronage, or the "spoils system," as a means of filling Federal career positions.

Since that time, the influence and sophistication of the merit-based civil service system has grown considerably. The basic premise of that system, however, has remained the same—that it is in the public interest to have a Government workforce that is hired, retained, promoted, and rewarded on the basis of demonstrated job-related competency and accomplishments.

It was within this historical framework that the Congress, in enacting the Civil Service Reform Act, assigned to the Board the important responsibilities of conducting oversight reviews of the Office of Personnel Management and studies of the civil service and other merit systems. The reviews of OPM recognize the importance of that agency, as the Government's central personnel agency and the President's personnel management advisor, to the merit system.

The results of these MSPB studies and reviews are reported to the President and the Congress. In the language of the CSRA, the merit systems studies are to include an assessment of "whether the public interest in a civil service free of prohibited personnel practices is being adequately protected." The Board's studies of the significant actions and regulations of OPM are to determine whether they are in accord with merit system principles and free of prohibited personnel practices.

THE OPERATION OF THE MERIT SYSTEMS STUDIES AND OPM OVERSIGHT FUNCTION

The Board's legislative mandate with regard to its studies and OPM oversight function is broad in scope and gives the Board a great deal of discretion in deciding what to review and how to review it. Typically, the Board solicits potential study topics from a wide variety of sources in developing its OPM oversight and studies agenda.

Within the Board, the studies function is performed by the Office of Policy and Evaluation (OPE). On behalf of the Board, OPE develops a studies agenda—updated approximately every 12 to 18 months—concentrating on those topics and human resources management issues to which the Board believes it can make the greatest contribution or on which it can have the greatest impact. In developing the agenda, OPE:

- Solicits the views and recommendations of a large cross-section of interested and informed individuals and organizations;

- Selects those OPM activities for review that appear to have been the most "significant" for the merit system; and

- Develops study proposals for consideration by the three Board members.

Upon approval of a studies agenda by the Board, OPE develops a research plan for each study. Each plan may incorporate one or more of the following methodologies:

Literature Review and Synthesis. Analysis of reports, publications, and other documents prepared by other reviewers and organizations. This is typically the first step taken in any study. In some cases, there may be very little existing data available, and a major purpose of the study becomes the establishment of baseline data.

Survey Research. The development, distribution, and analysis of surveys soliciting information from current and former Federal employees on their experiences, opinions, and attitudes. Such surveys may be on a specific topic, such as the Board's studies of sexual harassment, or they may cover a broad array of topics and issues, such as those covered by the Board's Merit Principles Survey, administered every three years to a random cross-section of over 20,000 Federal employees governmentwide.

Interrogatories. Requests to agencies or the Office of Personnel Management for written responses to a structured set of questions. Interrogatories are often only one component of data gathering, but can provide significant information and official agency viewpoints.

On-site Visits. Visits to agency headquarters or installations. These, typically, are combined with individual or group interviews and reviews of written program and policy issuances.

Statistical Analyses of Relevant Data Bases. OPM and each individual agency typically maintain one or more computerized data bases relevant to human resources management. This includes, for example, OPM's Central Personnel Data File (CPDF) and other centralized OPM data files maintained for the Senior Executive Service (SES) and the Performance Management and Recognition System (PMRS). Information from these data systems can provide useful background or baseline information on a number of topics, such as employee turnover and retention or performance rating distributions.

Focus Groups and Advisory Committees. Joint discussions with groups of informed commentators or individuals representative of a selected portion of the Federal population. This is an effective way of gathering information on newly emerging human resources management concerns or issues. In addition, a formal advisory group of subject matter experts can develop information and views on a selected topic over a period of time.

Comparative Studies. Studies to compare and contrast merit systems that operate under significantly different laws, rules, or regulations in order to determine if there are useful lessons to be learned. Recent efforts include a comparison of the Canadian federal public service with that of the United States.

THE RESULTS AND IMPLICATIONS OF BOARD REPORTS

The Board's reports on the results of its studies are addressed to the President and the Congress, as required by law. They also are reviewed by a large secondary audience of Federal agency officials, employee and public interest groups, labor unions, academicians, state, local and foreign governments, and other individuals and organizations with an interest in public personnel administration.

Since issuing its first report in early 1981, the Board has reviewed a wide array of topics and issues with far-ranging implications. Some of the overall findings and implications of Board studies since the agency began operations are described below.

Significant Actions of the Office of Personnel Management

The Board's reviews of OPM significant actions provide an overview of OPM activities dating back to its establishment in 1978 by the CSRA. The Board has monitored OPM through a series of program and policy transitions, and, in addition to specific findings and recommendations in a number of program areas, a number of general observations have emerged. For example:

OPM clearly is intended to be a leader within the Federal civil service system, especially in the area of personnel policy development and program guidance. The Board found, however, that early cutbacks in funding and staff resources lessened OPM's ability to fulfill that role. By the late 1980's and early 1990's, however, OPM was judged to have made significant progress in recapturing some of the lost initiative, especially in selected areas, such as Federal pay reform.

Prior to 1978, the Federal personnel system had become highly centralized and somewhat inflexible, and was seen as non-responsive to the legitimate needs of the agencies. Accordingly, the Board generally has encouraged and supported OPM's efforts to provide greater decentralization and delegation of personnel authorities to Federal agencies. Although progress in this regard has been uneven since 1978, the general trend has been in the direction of providing agencies with greater flexibility and broader options in the management of their human resources.

OPM's statutory charter requires it to establish and maintain an aggressive oversight program to ensure that delegated authorities are executed properly and merit principles maintained. The Board has reviewed OPM's efforts in this regard periodically and has suggested ways to improve upon those efforts.

Special Studies of the Civil Service and Other Merit Systems



Evangeline W. Swift, Director, and John M. Palguta, Deputy Director, Office of Policy and Evaluation

Either as part of its review of an OPM "significant action" or in a stand-alone study, the Board has provided careful analysis and findings on a wide range of merit system issues. Among the subjects covered, often with periodic updates over a period of several years, are:

Recruitment and Selection. The Board has found that the Government frequently has been at a competitive disadvantage in its ability to recruit its fair share of the "best and brightest." The Board also has found that OPM, in its desire to streamline the hiring process, grant greater flexibility to agencies, and respond to legal challenges to its examination procedures, has been in danger of moving too far from the concept of open recruitment and merit-based selection practices. The Board argues for a careful balance between competing pressures in this regard.

Delegation and Decentralization of Federal Personnel Management Authorities. The Board has found that although more authorities have been delegated appropriately to agencies by OPM, some agencies have been reluctant to re-delegate those authorities further down within the agency.

Federal Compensation Issues. The Board has watched closely and reported on compensation issues leading up to the passage of pay reform legislation in 1991. The Board will be following the progress and effect of pay reform implementation as it is phased in over a number of years.

Quality of the Federal Workforce. Heightened interest in knowing whether the quality of Federal employees has declined over time led to the formation of a joint Advisory Committee on Federal Workforce Quality Assessment, co-chaired by MSPB and OPM. In addition, the Board initiated separate studies to examine workforce quality within selected Federal occupations.

Turnover and Retention. While not unexpectedly finding that many Federal employees who resign from the Government do so in pursuit of better pay and advancement opportunities in the private sector, the Board also found that others left for reasons under the control of agency management, such as unhappiness with the work environment.

Sexual Harassment. In two related studies issued seven years apart, the Board conducted and then built upon a first-of-its-kind survey to measure the prevalence of sexual harassment in the Federal workplace. The survey revealed that sexual harassment was a more pervasive problem than originally thought, but that there are actions that Federal agencies can take to address that problem.

Whistleblowing. The Board is concerned about instances of reprisal against employees who "blow the whistle" on Federal fraud, waste, and mismanagement. In 1980, and again in 1983, the Board conducted precedent-setting reviews of whistleblowing in the Federal workplace, which found that most employees with knowledge of illegal or wasteful activities did not report those activities. Non-reporting was based, in part, on fear of reprisal, but more on a belief that nothing would be done to correct the activity.

Senior Executive Service. The Board periodically has solicited the opinions and experiences of members of the Senior Executive Service. Studies have focused on the operation of the SES system itself, including pay-setting and reassignment practices. Among other findings in this area, the Board has noted that periodic compression of SES salaries at various points over time has had a detrimental effect on the service. Further, the expectation of increased mobility of executives across agency lines and within agencies has not been realized.

Alternative Merit Systems. The majority of civilian employees in the Executive branch operate under a set of personnel laws codified in title 5 of the U.S. Code. There are other merit systems, even within the Executive branch, that operate under a different set of laws, rules, and regulations. State, local, and some foreign governments also have developed merit-based personnel systems. The Board has examined alternative systems covering employees in direct health care occupations in the Department of Veterans Affairs and employees of the Tennessee Valley Authority. A recent study compares the U.S. and Canadian civil service systems. In reviewing these alternative systems, the Board has found that generally they conform to merit principles while operating in a substantially different manner. The Board has suggested that some of these operating differences could be adapted beneficially in the title 5 system.

Performance Management. Board reviews pertaining to this broad topic have explored issues such as the viability of pay for performance and the effectiveness of performance appraisal systems. The Board has found that while the concepts underlying much of the Federal approach to performance management are sound, the methods chosen for the implementation of those concepts frequently have fallen short of their objectives for a variety of reasons.

Position Classification and Qualification Systems. Related to both compensation practices and recruitment and selection issues, the Board's review has found that the Government's approach to the qualifications rating process was working well, but that substantial weaknesses were evident in the Federal position classification system. While some of the latter problems may be amenable to administrative remedies, there were some larger issues—pay comparability among them—that needed to be addressed through legislation.

Other Topics and Issues. The Board also has reviewed and reported on a wide range of other topics germane to the effective and efficient operation of the Federal civil service system, such as:

reduction in force regulations and practices;

temporary appointments to the civil service and potential merit-system implications;

selection practices used for first-line supervisors;

Federal agency policies or procedures for employee involvement in organizational problem identification and resolution; and

employee job satisfaction.

IMPACT OF MSPB STUDIES AND REPORTS

By helping to promote and maintain a civil service based on merit principles and free of prohibited personnel practices, the ultimate purpose of the Board's reports is to enhance the efficiency and effectiveness of Government. In this regard, the impact of the Board's reports has been evident on several levels.

The results of the Board's studies have been the subject of discussion during congressional hearings and have been used in the setting of basic public personnel policies. They also have been used to augment and support the professional research of other organizations and individuals concerned with public personnel policy. The Board's findings on sexual harassment, Federal recruitment and selection practices, the operation of the Senior Executive Service, compensation and pay-for-performance initiatives, and other major issues are regarded as authoritative and influential.

When asked about the value of the Board's studies during Senate appropriations hearings a few years ago, the then-Director of the Office of Personnel Management stated that "we believe they can contribute to an overall understanding of how the personnel system is operating in Government. We have at times used information in MSPB reports in assessing program performance and considering possible regulatory changes." This constructive relationship with OPM has continued over the years.

The results of the Board's studies and the often unique data included in its reports are referenced frequently in professional journals and papers, local and national media, newsletters, conferences, and training classes. Through these means, the Board's reports increase the public awareness of important issues and inject objective data and analysis into the public debate.

Because the Board's reports and underlying data are in the public domain, the Board responds to thousands of requests each year for copies of its reports. Some individual reports, such as the two ground-breaking studies of sexual harassment released in 1981 and 1988, have accounted alone for over ten thousand requests for reports. In addition, data tapes generated during survey research efforts are filed with the National Archives and made accessible to other researchers.

According to one detailed outside review of the Board's reports and studies, which recently appeared in a highly respected journal of public administration: "The [Board's] surveys are models for similar projects among state and local governments, and also serve as the basis for academic studies. The availability of these surveys...enables scholars to engage in a wonderful array of secondary analyses....The Merit System Protection Board's reports offer valuable insights into the functioning of the federal civil service system. They are relatively short, yet crammed with information."

Often, the recommendations resulting from the Board's studies are addressed to Federal agency heads and directors of personnel. Over time, many agencies have adopted these recommendations in whole or in part and have initiated actions to address identified concerns. On request, Board staff have also provided advice, consultation, and additional agency-specific data to a number of agencies to assist them in their management improvement efforts. This affirmative response on the part of individual agencies has had a positive impact on the vitality and effectiveness of the civil service system.

REPORTS ISSUED AND STUDIES INITIATED IN FISCAL YEAR 1991

The major findings and recommendations of the reports of merit systems studies issued by the Board in Fiscal Year 1991 are summarized below:

Senior Executive Service Pay Setting and Reassignments: Expectations vs. Reality - This report examined how major Federal departments and agencies have used key flexibilities of the Senior Executive Service to manage assignments and pay for approximately 8,000 senior Executive branch managers. It concluded that common reference to the SES as a rank-in-person system may be misleading, because the SES lacks both a defined career ladder and established ranks that distinguish among the different members.

Although Federal agencies have made significant use of the SES reassignment flexibilities to move individuals to different executive positions within each agency, other opportunities are used less often. There are relatively few transfers of SES members between agencies, and agencies seldom use SES reassignments to enhance careers or to develop skills.

Finally, little use has been made of SES pay flexibilities to recognize differences in personal qualifications and contributions among SES members. The report sees this as partly attributable to pay compression within the SES levels. It suggests that, since the (then expected) 1991 SES pay increase should create a large and meaningful difference between the lowest and highest SES pay rates, an opportunity is presented to improve on SES pay administration.

The report recommended:

Maintaining the current flexibilities for SES reassignment and pay setting and monitoring their use over the next two to three years to determine if they are being used to improve the administration of Government;

Using the 1991 SES pay increase as a catalyst for reexamining past agency pay-setting practices and revising those practices where beneficial to Government operations;

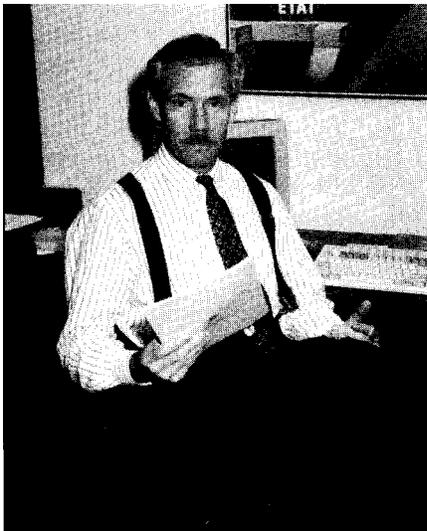
Making maximum use of SES reassignments to provide career enhancement and to further the goals of executive development and training; and

Increasing the use of transfers between agencies for the dual purposes of enhancing mission accomplishment through the infusion of new ideas and providing an energizing and broadening "change of pace" to the executives involved.

The Title 38 Personnel System in the Department of Veterans Affairs: An Alternate Approach

- This study reviewed the title 38 personnel system that covers 75,000 health care professionals in 12 occupations in the Department of Veterans Affairs (VA) medical care system. This system is unusual both because of its size and its relationship with the regular civil service. Employees covered under title 38 work side-by-side with and, in some cases, are supervised by the same supervisors as employees covered under the regular title 5 civil service.

Keith Bell, Senior Research Analyst, Office of Policy and Evaluation



The Board's research included reviews of both the history and the law and regulations governing the title 38 system. In addition, the Board conducted interviews with field managers at eight VA medical centers in high cost areas to determine how the title 38 provisions operate in highly competitive labor markets and how managers deal with two different personnel systems.

Major findings and recommendations from this review of the title 38 system include:

The system uses boards of peers and other health professionals to recommend major personnel actions, including the qualifications of individual applicants and employees, the initial hiring of employees, the promotions and incentive awards of current employees, and the disciplining of employees within the system.

Title 38 uses a modified rank-in-person system in which employees are graded and paid on the basis of their professional qualifications rather than the positions to which they are assigned.

Managers at VA field locations liked the title 38 system's flexibilities and experienced little difficulty in administering two personnel systems.

The title 38 provisions for peer boards to make key personnel decisions should be considered for other occupations.

The use of rank-in-person provisions for other professional occupations in the Federal Government should be considered in lieu of the current classification system.

The major findings and recommendations of the OPM significant action review completed in Fiscal Year 1991 are summarized below:

Balancing Work Responsibilities and Family Needs: The Federal Civil Service Response - This study addressed a number of work and family benefit programs that affect Federal civilian employees. Specifically, it considered both past accomplishments and future possibilities in the areas of child care, elder care, alternative work schedules, part-time employment, flexiplace, leave-sharing programs, cafeteria benefit plans, and other emerging benefit areas.

The report noted that specific work and family benefit programs have limited applicability, that is, any given program may be useful to only a small subset of employees. Accordingly, the report spotlighted the role that Federal agencies have in assessing the needs of their employees.

The report also assessed OPM leadership in managing the Government's work and family benefit programs. It concluded that, while OPM has undertaken some praiseworthy initiatives, there remain a number of unmet challenges, unanswered opportunities, and unresolved policy issues that need to be dealt with at several levels of Government.

Finally, the report posed the question of whether, and if so, how, the Federal Government should seek to position itself as a "model employer" in the work and family benefits area.

The report made a number of substantive recommendations for action by OPM and Federal agencies. For OPM, these included:

changing its regulations to permit some use of sick leave by Federal civilian employees to care for sick or elderly dependents;

initiating action to institute a "cafeteria" benefits approach for employee benefits;

working with Federal agencies to encourage the greatest beneficial use of work and family benefit programs currently available; and

adopting a "Federal Government as model employer" orientation.

Suggested areas of emphasis for agencies included:

assessing the needs of employees regarding work and family benefits;

evaluating whether further subsidies for onsite child care would enhance their mission accomplishment, and if so indicated, taking appropriate action to implement such subsidies; and

expanding the utility of work and family programs as a potential method of increasing workforce efficiency and effectiveness.

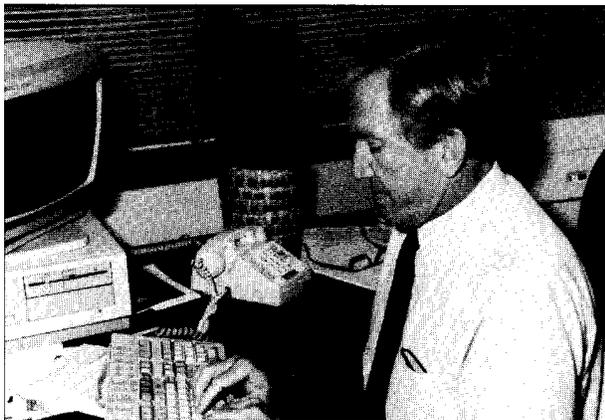
The Board initiated the following studies during the fiscal year:

To Meet the Needs of the Nations: Staffing the U.S. Civil Service and the Public Service of Canada - This study describes and compares merit staffing in the competitive U.S. Civil Service and its Canadian counterpart, the Public Service of Canada. The report also contains information about labor relations and pay practices in the two systems.

A Study of the Federal Blue-collar Workforce - An introduction to and focus on the Federal blue-collar workforce in six different agencies. Using interviews and discussion groups, the study identifies important blue-collar issues from the perspectives of line managers, supervisors, employees, personnel staff, and unions. The final report will include discussions on downsizing, performance management, pay, classification, training, total quality management (TQM), safety, and other topics.

A Study of Contract Specialists - A study of the quality of work performed by contract specialists in the Federal Government. The study includes surveys of incumbents, supervisors, Senior Executive Service members, and private businesses that provide contracted goods or services to the Government. The main objective of the study is to determine whether the quality of Federal procurement specialists is adequate to meet the demands of the job. The study will also attempt to identify training needs and is intended to assist the Office of Management and Budget's Office of Federal Procurement Policy in its attempts to improve the overall quality of the procurement workforce.

A Study of the Efforts of Federal Agencies to Manage Change in the Human Resources Arena - A study of how Federal agencies are managing the changes occurring as a result of shifting demographics and the evolving nature of Federal jobs. The study will examine, in particular, how agencies are reacting to and dealing with some of the predictions contained in the Hudson Institute's report, "Civil Service 2000," and cited in OPM's "Strategic Plan for Federal Human Resources Management." The thrust of this effort will be to identify and share examples of agency successes in grappling with the issues that are reshaping the Federal work environment as the next century approaches.



Frederick L (Lit) Foley, Assistant Director, Office of Policy and Evaluation

Assessing the Quality of Federal First-line Supervisors - A study of the quality and effectiveness of first-line supervisors in the Federal Government. Through the administration of surveys to first-line supervisors, second-level supervisors, and non-supervisory employees, the study will define the tasks and behaviors critical to effective supervisory performance and will determine whether the three groups of survey respondents hold differing views concerning the overall effectiveness of supervisors. The findings of this study should provide a useful baseline for the future assessment of quality in the Federal workforce.

The Federal Personnel Office: Is It Doing The Right Job? - A study of the unfavorable perceptions some Federal managers have of their personnel offices, conducted through on-site interviews and a survey to determine what may be missing from this important link in the human resources management chain and what might be done to help make the system work more satisfactorily.

The Office of Personnel Management's Oversight and Compliance Responsibilities - A study of OPM's oversight and compliance responsibilities, with emphasis on the functions of its Agency Compliance and Evaluation office. The study will focus on the current and future needs in this program area in view of the greater responsibilities being delegated to line managers.

Career Opportunities for Women in the Federal Government - A study to examine the status of women in the Federal Government. The assessment will try to ascertain if there is a "glass ceiling" hindering the movement of women into management; if so, what form it takes; and at what level it may be found. The study will include an analysis of the occupational and grade distribution of men and women over time and a survey of men and women to examine differences in career development.

The Office of Personnel Management and the Research and Demonstration Project Authority - A study to determine whether the intent of title 6 of the Civil Service Reform Act is being met. That provision of the Act authorized the OPM to "establish and maintain research programs to study improved methods and technologies in Federal personnel management" and to "...conduct and evaluate demonstration projects to determine whether a specified change in personnel management policies or procedures would result in improved Federal personnel management." The report will examine the extent and effectiveness of this authority in bringing about constructive change in the Federal personnel system.

ASSESSING THE QUALITY OF THE FEDERAL WORKFORCE

In addition to its individual studies dealing with the quality of selected portions of the Federal workforce, the Board has contributed to the important work being done in this area through its continuing collaboration with the Office of Personnel Management in a special advisory committee organized to address this issue.

In November 1990 and May 1991, MSPB and OPM co-sponsored meetings of the Advisory Committee on Federal Workforce Quality Assessment, a group established in early 1990 and co-chaired by the MSPB Director of Policy and Evaluation and the OPM Assistant Director for Research and Development. Its membership includes 24 individuals from a diverse group of Federal agencies, local government, the private sector, academia, labor unions, and professional associations. Committee goals include suggesting alternative models for assessing workforce quality and providing advice on existing efforts to improve workforce quality and collect quality data.



Office of Policy and Evaluation Staff

In the meetings held during Fiscal Year 1991, the committee discussed current efforts to examine workforce quality in specific occupational areas, including computer specialist and engineering and science occupations. The committee provided advice regarding elements of the Board's studies of workforce quality among first-line supervisors and procurement specialists. In addition, the committee addressed in detail the elements of OPM's workforce quality model, including in its discussion the issues of individual and group outcomes as well as worker productivity and customer satisfaction.

In August 1991, the Committee initiated work on its final report, which is expected to include recommendations on how the Government should proceed with efforts to implement a quality assessment system. The report will provide Government decision makers with the information they need to make sound decisions on matters of public personnel policies and practices.

THE MERIT SYSTEMS STUDIES AND OPM OVERSIGHT STAFF

The Office of Policy and Evaluation consists of a staff of analysts and support personnel. The professional staff has broad experience and expertise in public personnel management, personnel research psychology, and personnel law. In addition to its combination of skills and abilities, the OPE staff has an average of over 15 years of Federal service per staff member.

ADJUDICATION: APPELLATE JURISDICTION

JURISDICTION

Appealable Actions

Under the CSRA, most Federal employees are entitled to appeal to the Board from certain personnel actions taken by Federal agencies. Certain other actions are appealable under OPM regulations. Appealable actions include adverse actions (removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less), performance-based removals or reductions in grade, denials of within-grade increases, certain reduction in force (RIF) actions, denials of restoration to duty or reemployment rights, removals from the SES for failure to be recertified, and OPM determinations in employment suitability and retirement matters.

Under the Whistleblower Protection Act of 1989, additional personnel actions may result in an appeal to the Board under certain circumstances. Included are actions that may be the subject of a prohibited personnel practice complaint to the Special Counsel, such as appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training. Such an action may be appealed to the Board only if the appellant alleges that the action was taken because of his or her whistleblowing, and if the appellant first filed a complaint with the Special Counsel and the Special Counsel did not seek corrective action from the Board.

Eligible Employees

For the Board to have jurisdiction over an appeal of a personnel action, it must possess jurisdiction over both the action and the individual filing the appeal. The employees and others (e.g., applicants for employment, annuitants in retirement cases) who may appeal specific actions to the Board vary in accordance with the law and regulations governing the specific action. For some actions, classes of employees, such as political appointees, and employees of specific agencies are excluded.

Since the CSRA became effective, employees in the competitive service and preference-eligible employees in the excepted service have had the right to appeal adverse actions to the Board. In 1987, nonpreference-eligible supervisors and managers in the Postal Service gained Board appeal rights for adverse actions.

Under the Civil Service Due Process Amendments, which became effective in August 1990, approximately 100,000 additional employees in the excepted service—including attorneys, scientists, teachers, and others hired non-competitively—gained the right to appeal both adverse actions and performance-based actions to the Board. To be eligible to appeal, these excepted service employees must have completed two years current continuous service in an Executive agency. Employees in certain entities, including the Postal Service and the intelligence agencies, are excluded from the coverage of this law.

Legislation

For the first time in several years, the Congress enacted no legislation during Fiscal Year 1991 that would expand the jurisdiction of the Board. The Congress considered several bills, however, that would have an impact on the Board's jurisdiction or procedures.

Among them were bills introduced in both the House and Senate to extend the protections of the Whistleblower Protection Act to employees of Government corporations. A measure was introduced in the House to extend Board appeal rights to the approximately 52,000 civilian technicians in the National Guard. Another measure, introduced in the House, would permit the Board to mitigate penalties in adverse actions against career members of the Senior Executive Service. There had been no action on these bills by the end of the fiscal year.

In addition, the House passed, and the Senate had under consideration at the end of the fiscal year, legislation that would give the Board statutory jurisdiction over appeals involving reemployment rights of Federal employees following military service. The Board's present authority over such appeals is granted by OPM regulation.

REGIONAL OFFICES

Appellate Procedures

Appeals to the Board must be filed in writing with the Board regional office having geographic jurisdiction within 20 days of the effective date of the action. Where the notice of action does not set an effective date, the appeal must be filed within 25 days of the date of the notice.

Different time limits apply to appeals of actions allegedly based on whistleblowing, where the appellant has first filed a complaint with the Special Counsel. As noted above, an appellant *must* file with the Special Counsel first if the complaint is based on an action that is not otherwise appealable to the Board and may file with the Board *only* after exhausting the procedures of the Office of Special Counsel. Appeals that reach the Board in this way are termed "individual right of action" or "IRA" appeals.

An IRA appeal may be filed with the Board within 65 days after the date of a written notice from the Special Counsel stating that the office will not seek corrective action. A direct appeal to the Board is also authorized if 120 days have passed since the filing of the complaint with the Special Counsel, and the Special Counsel has not advised the appellant that the office will seek corrective action on his or her behalf.



F. Lamont Liggett, *Administrative Judge* in the *San Francisco Regional Office*, poses a question at the 3rd National Administrative Judges' Conference.

Where an appeal includes a whistleblower allegation and is based on an action that is otherwise appealable to the Board, the appellant may file directly with the Board or may first file a complaint with the Special Counsel. If the appellant chooses to file directly with the Board, the time limits for filing are the same as for all other direct appeals to the Board (20 or 25 days, depending on the kind of action). If the appellant chooses to file with the Special Counsel first, the time limits for filing with the Board are the same as for an IRA appeal. In either case, such an appeal is termed an "otherwise appealable action" or "OAA" appeal.

Under the Whistleblower Protection Act, an appellant may also ask the Board to stay a personnel action allegedly based on whistleblowing. A stay request may be filed when an appellant is eligible to file a whistleblower appeal, and it may be filed before, at the same time as, or after the appeal is filed. Stay requests are filed in writing with the Board regional office having geographic jurisdiction. By law, stay requests must be decided within 10 days of receipt of the request.

After an appeal has been received, the regional office issues an order acknowledging receipt of the appeal and raising any questions of timeliness or jurisdiction. The appeal is then assigned to an administrative judge for adjudication. 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.

Once jurisdiction and timeliness have been established, the appellant has a right to a hearing on the merits. During prehearing conferences, issues are defined and narrowed, stipulations to undisputed facts are obtained, and the possibility of settlement is discussed. 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, which generally are open to the public, are fully recorded by a court reporter, with copies of the record available to the parties. Once the record is closed, an initial decision is issued by the administrative judge. The Board's established policy calls for the administrative judge to issue an initial decision on an appeal within 120 days from the date the appeal was filed.

Decisions Issued in Fiscal Year 1991

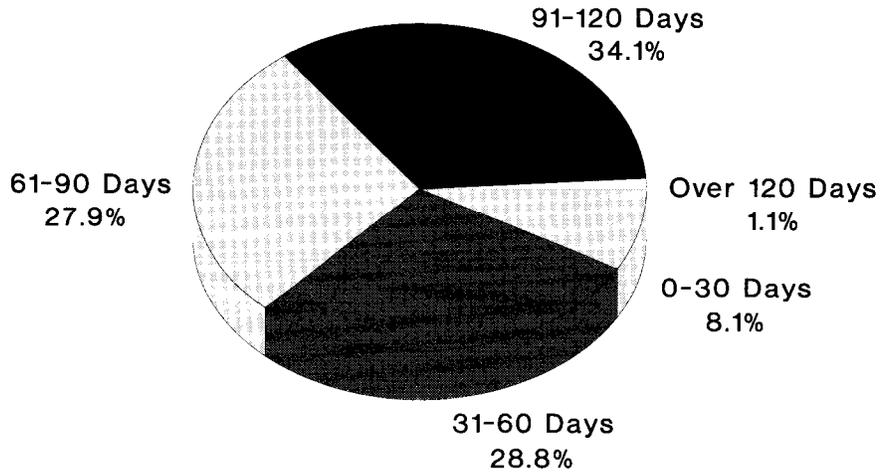
In Fiscal Year 1991, administrative judges in the Board's regional offices issued 8,388 decisions. Of this number, 7,525 were initial decisions on appeals and 86 were decisions on stay requests. The administrative judges also issued 777 addendum case decisions, i.e., requests for attorney fees, remands, and compliance (or enforcement) cases.

Of the initial appeals decided during the fiscal year, 471 were whistleblower appeals. Of this number, 196 were IRA appeals and 275 were OAA appeals.

Overall, the number of decisions issued in the regional offices represented an increase of 6.9 percent over the previous fiscal year. Decisions on initial appeals only were up 8.6 percent from the previous fiscal year.

The regional offices averaged 74 days to issue decisions on initial appeals. As shown in the chart below, 98.9 percent of all initial appeals were decided within 120 days.

Case Processing Timeliness FY 1991

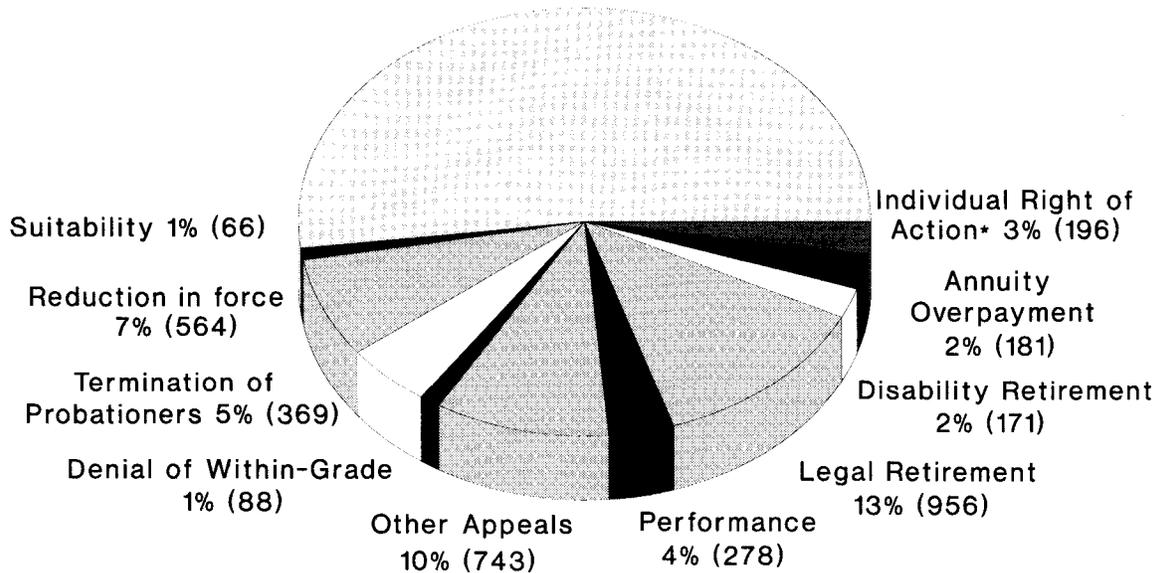


Initial Appeals (excluding stay requests and addendum cases).

FY 1991

Types of Initial Appeals Decided in FY 1991

Adverse Action 52% (3,913)



Total number of initial appeals: 7,525

*Includes various actions NOT otherwise appealable to the Board - and threatened or proposed actions - that may form the basis of an IRA appeal after the appellant has exhausted the procedures of OSC.

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

Although the breakdown by type of action generally is consistent with the previous fiscal year, two exceptions should be noted. The percentage of the total represented by RIF appeals increased from 3 percent to 7 percent, and the number of such appeals almost tripled, as a result of increased agency RIF activity. The number of IRA appeals, based on various actions not otherwise appealable to the Board, increased to the point that such appeals now represent 3 percent of the total.

There were 2,033 settlements of initial appeals in Fiscal Year 1991, or 50 percent of the appeals that were not dismissed for lack of jurisdiction or timeliness. The Board continues to emphasize alternative dispute resolution procedures because, properly used, they promote equitable settlements that protect the rights of the parties while providing the single most cost-effective means of dispute resolution. Cost savings are achieved principally in salaries, travel expenses, and court reporting fees.

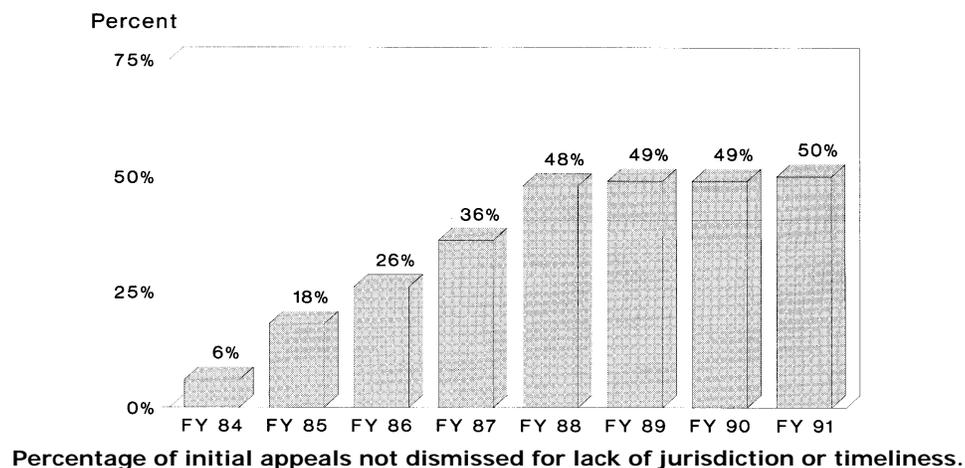
The Board's administrative judges use a wide range of alternative dispute resolution techniques. They make use of the prehearing conference stage of the appeals process to facilitate exchanges

between the parties, suggesting possible solutions and helping the parties reach a voluntary agreement. Because these processes are voluntary, the parties surrender no rights if an agreement is not reached, and the case proceeds to adjudication.

The settlement rate in Fiscal Year 1991 was comparable to that in the three previous fiscal years. The chart above shows settlement rates since Fiscal Year 1984.

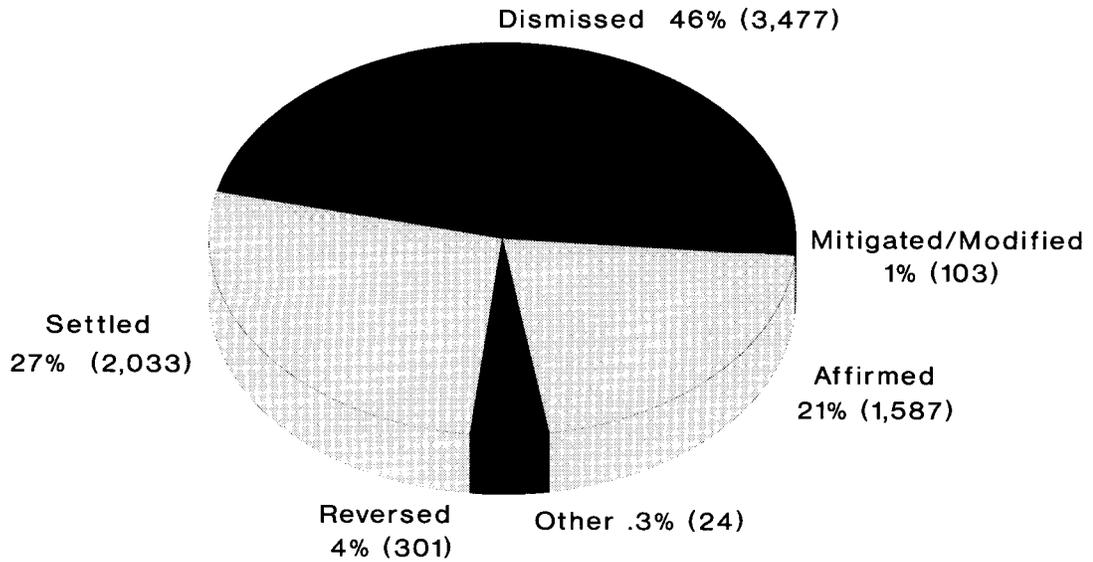
Of the 2,015 appeals that were adjudicated, 79 percent affirmed the agency action. Decisions in the remaining appeals that were adjudicated included reversals, which overturned the agency action, and mitigations, which reduced or modified the penalty imposed by the agency.

Eight Year Trend in Settlement Rates FY 1984 - FY 1991



The following chart shows the breakdown by disposition of all appeals decided in Fiscal Year 1991.

Overall Percentages of Dispositions of Initial Appeals Decided in FY 1991



Total number of initial appeals: 7,525. Percentages do not total 100% because of rounding.



At the Regional Directors' Conference are (left to right) Gail E. Skaggs, *Regional Director, Denver Office*, and P.J. Winzer, *Regional Director, Washington Office*.

The following table shows the disposition of appeals decided in Fiscal Year 1991 by agency.

Initial Appeals Decided in FY 1991: By Selected Agencies

Agency	Number Decided	Percent Dismiss	Number Not Dismiss	Percent Settled	Number Adjudi- cated	Percent Affirmed	Percent Reverse	Percent Mitigate d!
Postal Service	1,556	47%	832	69%	262	65%	22%	13%
OPM	1,496	34%	990	11%	880	84%	13%	3%
Navy	826	46%	444	61%	172	74%	17%	9%
Army	729	44%	407	56%	179	79%	14%	7%
VA	455	51%	222	68%	72	78%	15%	7%
Air Force	438	44%	247	55%	112	77%	13%	10%
Treasury	404	67%	132	64%	48	90%	2%	8%
Interior	267	72%	74	53%	35	63%	29%	9%
TVA	234	31%	161	68%	52	90%	6%	4%
Justice	208	58%	88	60%	35	66%	17%	17%
Defense	165	47%	88	60%	35	74%	14%	12%
HHS	130	52%	63	75%	16	75%	19%	6%
Agriculture	125	42%	72	64%	26	92%	4%	4%
Transportation	117	62%	44	46%	24	62%	38%	0%
Labor	52	48%	27	56%	12	100%	0%	0%
GSA	50	42%	29	59%	12	83%	17%	0%
Commerce	40	55%	18	78%	4	100%	0%	0%
HUD	31	52%	15	73%	4	75%	25%	0%
EEOC	20	40%	12	67%	4	50%	25%	25%
FDIC	19	42%	11	46%	6	50%	50%	0%
SBA	17	53%	8	50%	4	100%	0%	0%
Energy	17	41%	10	80%	2	50%	50%	0%
Smithsonian	16	50%	8	75%	2	100%	0%	0%
EPA	13	77%	3	67%	1	100%	0%	0%
Education	8	63%	3	67%	1	100%	0%	0%
State	7	71%	2	100%	0	0%	0%	0%
GPO	7	57%	3	100%	0	0%	0%	0%
FEMA	6	50%	3	33%	2	100%	0%	0%
National Archives	5	60%	2	0%	2	100%	0%	0%
NRC	5	20%	4	75%	1	100%	0%	0%
Other Agencies	62	58%	26	59%	10	100%	0%	0%
TOTAL	7,525	46%	4,048	50%	2,015	79%	15%	6%

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

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

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

Of the 86 stay requests decided in Fiscal Year 1991, 73 were filed in cases where the action appealed was allegedly based on whistleblowing. The remaining 13 were filed in non-whistleblower cases and were not granted because the Whistleblower Protection Act does not authorize stays in such cases. Of the 73 stay requests in whistleblower cases, 7 were granted, and the remainder were dismissed or denied.

In addition to the decisions on initial appeals and stay requests issued in Fiscal Year 1991, the regional offices issued decisions in 777 addendum cases. This number included 280 requests for attorney fees, 406 enforcement cases alleging that there was not full compliance with a Board decision, and 91 cases remanded to the regional offices. The settlement rate for addendum cases was 39 percent of the cases not dismissed.

Case Receipts and Trends

Receipts of initial appeals in Fiscal Year 1991 increased 13 percent over the previous fiscal year. The increase was apparent throughout the Board's regional offices, with several of those offices processing more appeals than in any year since the appeals from air traffic controllers fired in 1981 caused a substantial increase in caseload throughout the Board.

The impact of expanded Board jurisdiction under the Civil Service Due Process Amendments of 1990 began to be felt during Fiscal Year 1991. The Board's regional offices reported receiving approximately 100 appeals from excepted service employees who gained appeal rights under the Act.

Over 100 adverse action appeals were received as a result of the application of the Financial Institutions Recovery, Reform, and Enforcement Act (FIRREA), enacted in 1989. Under that Act, several thrift institution regulatory agencies were abolished and their employees transferred to other agencies, including the Comptroller of the Currency and the newly established Office of Thrift Supervision (OTS) both agencies of the Treasury Department. As a result of this transfer, several thousand employees gained Board appeal rights.

The FIRREA also directed the Comptroller of the Currency and the Director of OTS to implement restructured pay systems for the employees of those agencies. As a result of the new pay systems implemented early in 1991, many employees of these agencies appealed to the Board, claiming a constructive or actual reduction in grade or pay.

The regional offices noted several trends in appeals during the fiscal year. The Atlanta office experienced a significant increase in reduction in force appeals from the Tennessee Valley Authority. The Denver office also reported an increase in RIF appeals and an increase in the number of appeals of performance-based actions as well.

The Dallas office experienced an increase in both reduction in force and whistleblower appeals. A RIF at the Red River Army Depot resulted in over 60 RIF appeals to the Dallas office in the first quarter of the fiscal year.

The Boston office noted an increase in appeals from Postal Service employees, including managers and supervisors. Approximately 41 percent of the appeals processed by the office were Postal Service appeals.

The Seattle office received a significant number of appeals from individuals who were indefinitely suspended by their agencies, pending a decision whether to initiate proceedings to revoke a security clearance or after initiation of such proceedings. These cases were significant because the suspensions were effected prior to actual revocation of the security clearances.

The Washington office received most of the appeals filed by newly eligible excepted service employees and the appeals resulting from the application of the Financial Institutions Recovery, Reform, and Enforcement Act. The office also noted increased appeals as a result of RIF actions in Department of Defense agencies.

Looking toward the future, the San Francisco office anticipates a large number of RIF appeals during Fiscal Year 1992 as a result of the downsizing of military installations in the region. The St. Louis office also anticipates an increase in RIF appeals next fiscal year as a result of an expected major RIF action at Ft. Knox.

Because of the widespread interest in the restoration to duty rights of Federal employees who served in Operation Desert Storm, the Board set up procedures to monitor any appeals filed by returning veterans claiming that they were denied restoration or were restored improperly. According to OPM, approximately 20,000 Federal employees were mobilized for military service in the Persian Gulf. By the end of the fiscal year, only 10 appeals had been filed alleging denial of restoration to duty or improper restoration.

Significant Activities

During the fiscal year, the Board conducted a pilot project for a more streamlined program to review the quality of initial decisions issued by its administrative judges. Quality review teams made on-site evaluation visits to the Dallas, Philadelphia, and St. Louis regional offices. These teams were composed of a regional director from an office not being reviewed, an administrative judge from another regional office, and a staff attorney from the Office of Regional Operations.

During their visits, the quality review teams discussed the results of their review of the initial decisions issued by the office's administrative judges and conducted in-depth reviews of randomly selected, recently closed case files. The results of this pilot project are undergoing review so that decisions can be made regarding the future direction of the quality review program.



At the 3rd National Administrative Judges' Conference are (left to right) Lonnie Crawford, *Regional Director, Philadelphia Office*; Chief Judge Aubrey Robinson, *U.S. District Court for the District of Columbia*; and Thomas J. Lanphear, *Director, Office of Regional Operations*.

The Board's Third National Administrative Judges' Conference was held in Baltimore in July 1991. Administrative judges from the regional offices participated in training sessions with staff from the Washington headquarters and heard presentations from outside speakers on such subjects as the Americans with Disabilities Act, the Whistleblower Protection Act, settlement, legal opinion writing, issues involved in security clearance cases, and decisions of the U.S. Court of Appeals for the Federal Circuit.

A number of the Board's administrative judges completed courses at the National Judicial College (NJC). In addition, one administrative judge continued to serve as a faculty member of the NJC.

HEADQUARTERS

Procedures for Petitions for Review

An administrative judge's initial decision on an appeal becomes the final decision of the Board unless a party files a petition for review with the Board within 35 days of the date of the initial decision or the Board reopens the case on its own motion. The Board may grant a petition for review when it is established that the initial decision of the administrative judge was based on an erroneous interpretation of statute or regulation, or that new and material evidence is available that, despite due diligence, was not available when the record was closed.

When an appellant prevails in an appeal, interim relief is provided pending the outcome of any petition for review, unless the administrative judge determines that interim relief is not appropriate. An exception to interim relief is also available if the administrative judge's decision requires the return of the appellant to the workplace and the agency determines that such a return would be unduly disruptive. When an agency files a petition for review of an initial decision that provided interim relief to the appellant, the agency must furnish evidence that it has provided appropriate interim relief. If such evidence is not provided, the Board will dismiss the petition for review.



Pictured to the right, Katherine Dress, Confidential Advisor to the Chairman (left), and Cameron P. Quinn, Counsel to the Chairman

Petitions for review are filed with the Office of the Clerk at Board headquarters by either party, or, under certain circumstances, by the Office of Personnel Management or the Office of Special Counsel as an intervenor. The Board also has the discretion to reopen and consider an initial decision on its own motion.

The Board's decision on a petition for review constitutes the final administrative action. Further appeal then may be available in the United States Court of Appeals for the Federal Circuit or, in cases involving allegations of certain types of discrimination, with a U.S. District Court or the Equal Employment Opportunity Commission (EEOC).

The Director of the Office of Personnel Management may intervene or petition the full Board for reconsideration of a final decision. The OPM Director also may seek judicial review of a Board decision involving the interpretation of a civil service law, rule, or regulation affecting personnel management where the Board decision will have a substantial impact on a civil service law, rule, regulation, or policy.

Decisions Issued in Fiscal Year 1991

In Fiscal Year 1991, the Board issued 1,838 decisions on petitions for review of initial decisions, requests to review stay rulings, and reopenings. The total number of decisions represented an increase of 21.7 percent over the previous fiscal year.

Of the total, 1,503 were decisions on petitions for review of initial decisions on appeals, and 189 were decisions on petitions for review in addendum cases. The number of decisions on PFRs only represented an increase of 17.3 percent over the previous fiscal year.

Ten of the decisions issued by the Board were on requests to review rulings by administrative judges on stay requests filed by whistleblowers. The Board denied four, and the remainder were dismissed.

The Board also decided 136 cases that it reopened. This figure does *not* include cases where the Board denied a PFR and simultaneously reopened the case on its own motion; such cases are included in the number of PFRs decided. The reopenings consisted of 121 cases the Board reopened on its own motion, 2 reopened at the request of the Director, OPM, and 13 court remands.

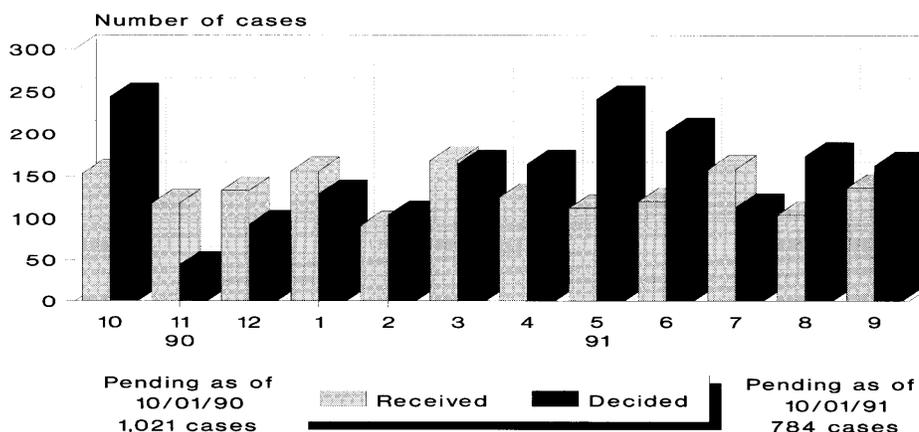
The Board's decisions on 87.6 percent of the petitions for review of initial decisions on appeals left the initial decision unchanged. During Fiscal Year 1991, 95 percent of final Board decisions reviewed by the United States Court of Appeals for the Federal Circuit were unchanged.

Receipts of PFRs were up 8.5 percent over the previous fiscal year. In spite of this increase in receipts, the Board's productivity during the fiscal year resulted in a reduction in the number of pending cases (including PFRs, reviews of stay rulings, and reopenings) from 1,021 on October 1, 1990 to 784 at the end of the fiscal year.

Issues Addressed in Fiscal Year 1991

During Fiscal Year 1991, the Board set important precedent in several areas of concern to Federal employees and retirees. (See Appendix A for summaries of significant Board decisions on appeals issued during Fiscal Year 1991, including the cases cited below.)

Board Decisions and Receipts: FY 1991 *



***Includes decisions and receipts of PFRs of initial decisions on appeals, PFRs of initial decisions in addendum cases, reopenings, and requests to review rulings on stay requests.**



Robert Hernandez, Executive Assistant to the Vice Chairman (left), and Yolanda Haro, Confidential Assistant to the Vice Chairman

The Board continued to develop case law under the Whistleblower Protection Act of 1989. In *Williams v. DOD and OPM*, the Board held that filing an EEO complaint does not constitute a whistleblowing disclosure protected under the WPA. The Act protects the disclosure of information reasonably believed to evidence a violation of law, rule, or regulation. A separate statutory provision, however, protects the filing of EEO complaints. Consequently, the Board held that it has no authority to grant a stay request where retaliation for filing EEO complaints is the basis for the request. In *Fisher v. DOD* and *Coffer v. Navy*, the Board applied the same reasoning to

retaliation for filing grievances and unfair labor practice complaints, which are protected by the same statutory provision that protects the filing of EEO complaints.

In *Horton v. Navy*, the Board held that the right to file an IRA appeal under the WPA is not limited by an appellant's pursuing EEO administrative remedies simultaneously. As the Board explained, there otherwise would be a conflict between the two separate statutory schemes, and the appellant's right to seek a stay would be delayed.

In *Ruffin v. Army*, the Board held that, in order to demonstrate entitlement to WPA protection for a whistleblowing disclosure, the appellant must prove that the agency official responsible for the action against the appellant was aware of the whistleblowing. Otherwise, the Board held, the appellant cannot make the statutorily required showing that the disclosure was a contributing factor in the agency's action. When actual knowledge is present, proximity in time between the knowledge of the protected disclosure and the personnel action is a factor that evidences a retaliatory motive, the Board noted.

The Board held in *Mack v. USPS* that the remedies and burdens unique to the WPA do not apply to Postal Service employees because the Postal Service, by statutory definition, is not a covered agency. Therefore, the Board ruled, such appeals from USPS employees will be analyzed under the burden of proof generally applicable prior to the WPA.

In *Gergick v. GSA*, the Board ruled that, under the legal theory of "continuing wrongs," the WPA applies to the last in a series of allegedly retaliatory actions that occurred after the effective date of the Act.

The Board issued a number of decisions interpreting the new provision for interim relief, that is, restoration of a prevailing appellant to duty and/or pay status between the date of the initial decision and the date on which the Board issues a final decision on the agency's petition or cross petition for review. In *Wallace v. LISPS*, the Board ruled that the agency must show compliance with the administrative judge's order for interim relief when it files its petition for review. Otherwise, the Board will dismiss the petition summarily as provided by regulation.



Judy L. Bowes, Confidential Assistant to the Member (left), and Anne E. Broker, Legal Counsel to the Member

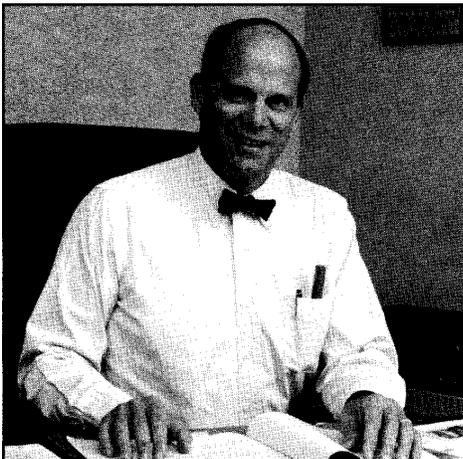
The Board continued to add to the case law concerning disability retirement appeals. In *Dec v. OPM*, the Board held that, in disability retirement appeals, the test to be applied in deciding whether an employing agency could have accommodated an employee's handicapping condition, without

separating him, is whether the employing agency was unable to reasonably accommodate the condition—not whether the agency refused to accommodate the employee.

In *Stevenson-Phillips v. OPM*, the Board held that receipt of a disability retirement application by a former employing agency within the filing deadline of one year after separation does not constitute constructive receipt by OPM. Consistent with the Supreme Court's decision in *OPM v Richmond*, the Board found that OPM cannot be estopped from enforcing the 1-year statutory deadline, despite any mistakes by the former employing agency in processing the application.

The Board issued two significant decisions in FERS election cases—*Moriarty v. OPM* and *Webb v. OPM*. The Board noted that OPM regulations allowed CSRS employees to transfer to FERS retroactively after the "open season" from July 1, 1987 to December 31, 1987 only if the FERS transfer handbook was unavailable to them or if reasons beyond their control prevented them from making an election during the "open season." The Board held in *Moriarty* that an employee, to whom the FERS transfer handbook was available and to whom uncertain but not misleading information about pending pension offset legislation was provided by his employing agency, was not unable to make a proper election. In *Webb*, the Board held that the standard for determining whether an election among retirement options is voidable as a result of misinformation is whether a reasonable person would be confused under the circumstances.

In *Stanley v. Justice*, the Board further refined the standard for determining whether an employee is a "handicapped person" against whom discrimination is prohibited by statute. On a case-by-case basis, the Board will inquire into whether the particular impairment involved "substantially limits" the employee's ability to work or otherwise constitutes a "significant barrier to employment." Relevant considerations, the Board found, are the number and type of jobs from which the employee is disqualified, the geographical area to which he has reasonable access, and his job expectations and training. The Board ruled that the handicap must foreclose generally the type of employment involved, not just the demands of a particular job. In *Konieczko v. LISPS*, the Board ruled that, in the absence of a finding of handicap discrimination, an agency is under no obligation to reassign an employee unless an agency regulation requires it.

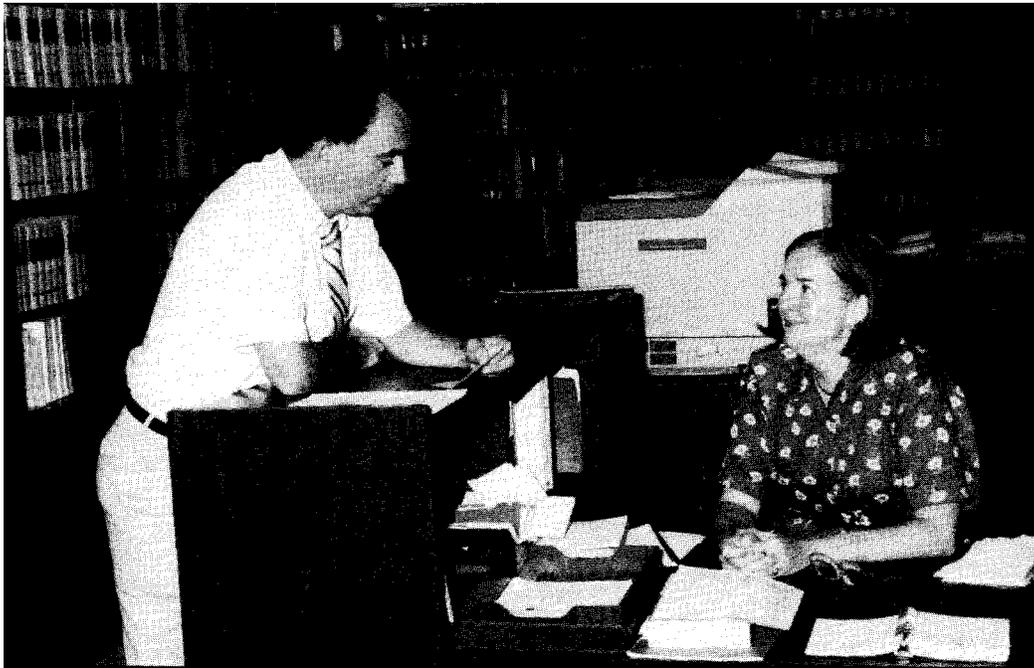


William H. DuRoss III, Director, Office of Appeals Counsel

Robert E. Taylor, Clerk of the Board, with Vice Chairman Amador



With regard to performance-based actions under Chapter 43, the Board held in *Ortiz v. Justice* that the validity of performance standards is properly addressed, despite the fact that the issue was not raised by the parties or identified during the prehearing conference. As to performance-based actions under Chapter 75, the Board determined in *Graham v. Air Force* that the validity test applied to an agency's ad hoc performance standard (where an employee's Chapter 43 performance standards do not apply) is whether the standard is reasonable and provides for accurate measurement. In *Bowling v. Army*, the Board held that, in appeals of performance-based actions under either Chapter 43 or Chapter 75, the agency must establish an objective systematic method for selecting examples of alleged unacceptable performance, so that a reasonable person might conclude that the employee's performance fell below a specified percentage requirement.



Kevin Taugher, Personnel Management Specialist (left), and Kathleen O'Sullivan, Library Director

During this fiscal year, the Board issued its decision in *Anderson v. DOT*, the reopening of appeals from 116 former air traffic controllers whose removal for participation in the 1981 strike the Board sustained in 1983. The appellants claimed that the report of the House Subcommittee on Investigations and Oversight established that the evidence relied on by the agency to undertake their removal actions, and to support the actions on appeal to the Board, was manufactured and otherwise tainted so as to be completely unreliable. The Board found that it had the authority to reopen an appeal where its decision was obtained by fraud, concealment, or misrepresentation by a party, even though many years had passed and even where the Federal Circuit had affirmed the Board's 1983 decision, as here. The Board found, however, that the appellants in this case made no such showing. The Board considered similar contentions when the appeals were originally before it, and no appellant, then or now, alleged individual harm. The Board noted its disapproval of the extent to which the agency had secretly altered its documentary submissions, but concluded that the appellants simply failed to prove any *material* alteration.

Headquarters Appellate Cases

Three types of appellate jurisdiction cases are processed originally at Board headquarters, rather than in a regional office. These are appeals from MSPB employees, appeals involving classified national security information, and petitions to review an arbitrator's award.

In the case of appeals from MSPB employees and appeals involving classified national security information, the Board's Administrative Law Judge hears the case and issues the initial decision. Unless a petition for review is filed and the Board considers the case, the decision of the Administrative Law Judge becomes the final decision. Arbitration cases are decided by the Board in the first instance, with no intermediary.

All cases involving classified information relating to national security, whether appellate or original jurisdiction, are adjudicated by the Administrative Law Judge. No decisions were issued on such appeals in Fiscal Year 1991, although three cases involving national security information were pending at the end of the fiscal year.

No MSPB employee appeals were decided during the fiscal year. One such appeal was filed, however, and was pending at the end of the fiscal year.



Office of Appeals Counsel attorneys, Jill Nelson (left) and Ray Angelo

The Board issued decisions in five cases involving review of arbitrators' awards. The Board also decided one attorney fee case arising from a decision on review of an arbitrator's award.

Significant Activities

To further improve the adjudicatory process, headquarters attorneys visited the Board's regional offices to share current and developing trends in Board law and practice with administrative judges and to receive the judges' input into how those practices and procedures work when applied in "real world" situations. The exchange between headquarters and regional attorneys in this year's Administrative Judges' Conference was similarly useful.

During this fiscal year, headquarters attorneys who prepare recommended decisions for the Board's consideration began using a newly installed local area network that connects their personal computers to each other and to a central storage device. The new system allows the attorneys to share and revise draft documents more easily and offers new and faster methods of computer-assisted legal research.

SPECIAL PANEL

The Special Panel was established by the Civil Service Reform Act of 1978 as a separate entity to resolve disputes between the Merit Systems Protection Board and the Equal Employment Opportunity Commission in "mixed cases." These are cases that involve both a matter appealable to the Board and an issue of discrimination. The Special Panel consists of one Board Member designated by the MSPB Chairman, one EEOC Commissioner designated by the EEOC Chairman, and a third individual appointed by the President to serve as Chairman of the Special Panel. President Reagan appointed Barbara Mahone as Chairman of the Special Panel on October 18, 1985. During Fiscal Year 1991, there were no cases referred to or decided by the Special Panel.

Steps in Processing Initial Appeals and Petitions for Review

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

ADJUDICATION: ORIGINAL JURISDICTION

Jurisdiction

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

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

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

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

Certain proposed actions brought by agencies against administrative law judges;

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

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

Original Jurisdiction Procedures

Original jurisdiction complaints are filed in writing with the Office of the Clerk at Board headquarters. Employees against whom Hatch Act or other Special Counsel disciplinary action complaints are filed have 35 days to respond and are entitled to a hearing. An administrative law judge against whom an agency proposes an action also has 35 days to respond and is entitled to a hearing. These cases are assigned to the Board's Administrative Law Judge, who issues a recommended decision to the Board for final action.

Special Counsel stay requests and requests for regulation review are decided by the Board. An initial stay request may be granted by a single Board member.

In SES performance-based removal cases, the Administrative Law Judge holds an informal hearing, but the Board does not issue a decision. The record of the hearing is forwarded to the employing agency, OPM, and the Special Counsel for whatever action may be appropriate.

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

Appeals from Board decisions in Special Counsel cases (other than Hatch Act cases involving state or local employees in federally-funded positions) and other original jurisdiction cases are filed with the United States Court of Appeals for the Federal Circuit. In Hatch Act cases involving state or local employees in federally-funded positions, the employee may appeal the Board's decision to the appropriate U.S. district court.

Decisions Issued in Fiscal Year 1991

During Fiscal Year 1991, the Board issued 51 decisions in original jurisdiction cases. Of these, 27 were decisions in proposed actions against administrative law judges, 5 were decisions in Special Counsel disciplinary actions, 17 were decisions on Special Counsel stay requests (3 initial requests and 14 requests for extensions), and 2 were decisions on requests for review of OPM regulations.

The number of decisions in original jurisdiction cases represents a 13.3 percent increase over the 45 decisions (including addendum decisions) issued the previous fiscal year. Compared to Fiscal Year 1990, the Special Counsel filed fewer stay requests (including extensions) in Fiscal Year 1991. There were no decisions in Hatch Act cases in Fiscal Year 1991, compared to 10 such decisions the previous fiscal year. The number of decisions in proposed actions against administrative law judges, however, increased significantly.

Actions Against Administrative Law Judges

The large number of decisions in actions against administrative law judges in Fiscal Year 1991 was the result of agencies' proposed furloughs of their administrative law judges to meet the requirements of a sequester that was anticipated to begin October 1, 1990. Unlike other Federal employees, administrative law judges may not be furloughed for 30 days or less until they first have been given the opportunity for a hearing and a decision by the Board. An agency proposing to furlough its administrative law judges first files a complaint with the Board. The Board notifies the affected administrative law judges, who may then respond to the complaint and request a hearing. The Board's Administrative Law Judge issues a recommended decision—after a hearing, if one is requested—and the parties then may file exceptions to the recommended decision prior to issuance of a final decision by the Board. A furlough may be authorized upon a showing of good cause.

In the final weeks of Fiscal Year 1990, the Board received 23 complaints from agencies proposing to furlough a total of 1,053 administrative law judges. Because the furloughs would need to be effected soon after October 1 in the event of a sequester, it was necessary for the Board to adopt expedited procedures to complete the processing of these cases. The time limits for the administrative law judges to respond to the complaint and for the parties to file exceptions to the recommended decision were much shorter than under the Board's normal procedures for such cases. Because the Board's Administrative Law Judge could not be expected to adjudicate all of the cases in the time involved, the Board hired six retired administrative law judges to assist in adjudicating the cases.

Hearings were held in September and October 1990, and recommended decisions were issued. By the end of Fiscal Year 1990, one final Board decision had been issued. The Board then issued 24 final decisions during Fiscal Year 1991 to complete all of these furlough cases. (More than one decision was issued where a complaint was split.) In all cases, there was either a settlement or a decision by the Board that the potential loss of funds constituted good cause for the proposed furloughs. As it turned out, no furloughs were effected because the enactment, on November 5, 1990, of the Omnibus Budget Reconciliation Act removed the threat of sequestration.

In addition to its decisions in the administrative law judge furlough cases, the Board issued three decisions in other cases involving actions against administrative law judges in Fiscal Year 1991. One case was withdrawn and one was dismissed for lack of jurisdiction. In the third case, which was dismissed pursuant to a settlement, the Board authorized the 30-day suspension provided for in the settlement agreement.

Special Counsel Disciplinary Actions

The Board issued five decisions in Special Counsel disciplinary actions during Fiscal Year 1991. Three of these cases involved reprisal for whistleblowing and were the first cases filed by the Special Counsel under the Whistleblower Protection Act. In *Special Counsel v. Marple* and *Special Counsel v. Eidmann*, the Board ordered the demotion of the respondents. In *Special Counsel v. Hathaway*, the Board ordered the respondent suspended.

The two remaining cases were brought against three respondents each. The cases were settled with respect to all respondents.

Special Counsel Stay Requests

Decisions were issued in Fiscal Year 1991 on 3 Special Counsel initial requests for stays and on 14 requests by the Special Counsel for extensions of stays previously granted. All of the initial requests were brought on behalf of whistleblowers, and all were granted by a Board member. The requests for extensions of stays were made in five cases (four of which were filed during Fiscal Year 1990), all involving whistleblowers, and all were granted by the Board.

Review of OPM Regulations

During the fiscal year, the Board decided two cases involving a request for review of an OPM regulation or implementation of an OPM regulation by an agency. In one case, the petitioner also had filed an appeal of a RIF action. When his RIF appeal was settled, the request for regulation review was dismissed in accordance with the settlement agreement. In the other case, the Board denied the request for regulation review.

Addendum Cases

During the fiscal year, the Board's Administrative Law Judge issued two initial decisions on requests for attorney fees arising from the administrative law judge furlough cases. Because the respondents did not show that they had prevailed, the requests for fees were denied. One of these initial decisions became final when no request for review by the Board was filed. The other was pending before the Board at the end of the fiscal year.

SES Performance-Based Removals

There were no informal hearings before the Administrative Law Judge in SES performance-based removal cases during Fiscal Year 1991.

(See Appendix B for summaries of significant Board decisions issued in original jurisdiction cases during Fiscal Year 1991.)

Other Activities

The Office of the Administrative Law Judge continued to handle, through a reimbursable interagency agreement, Department of Education salary offset cases. These cases involve employees in default of federally-insured student loans who are being required to satisfy their debts.



**Edward J. Reidy,
Administrative Law
Judge (left), and Betty
D. Cannon, Secretary**

LITIGATION

Litigation

Fiscal Year 1991 marked the Board's second year operating under the provisions of the Whistleblower Protection Act of 1989. One provision of the Act gave the Board an expanded role in its primary reviewing court, the U. S. Court of Appeals for the Federal Circuit. The Board now defends its decisions in all Federal Circuit cases except those involving the merits of the underlying personnel action or a request for attorney fees.

The number of cases the Board defends in the Federal Circuit expanded dramatically during Fiscal Year 1991 as actions that were begun after the effective date of the Whistleblower Protection Act reached the judicial review stage. In Fiscal Year 1991, the Board defended 96 cases, compared to only 21 in Fiscal Year 1990.

The Board also defends appeals of decisions issued under its original jurisdiction authority. All of these cases are appealed to the Federal Circuit, except Hatch Act cases involving employees of state and local governments, which are heard by Federal district courts. Original jurisdiction cases typically involve complex issues such as the extent of the Special Counsel's jurisdiction and novel issues involving prohibited personnel practices and Hatch Act violations. Other litigation includes cases in which OPM petitions for review in the Federal Circuit and cases filed in the various Federal district courts when the Board is a defendant.



Llewellyn M. Fischer, *General Counsel*

Related Activities

During Fiscal Year 1991, the Board monitored over 800 cases involving appeals of decisions issued under its appellate jurisdiction. These cases are filed in the United States Court of Appeals for the Federal Circuit. Although the agency against which the appeal is filed is the named respondent, and the Department of Justice defends the agency, the Board monitors this litigation closely. Board activities in connection with monitored litigation include evaluating the case to determine if intervention is appropriate, responding to inquiries, assisting in drafting any briefs, preparing a case summary and chronology, and analyzing the published decision.

(See Appendix C for summaries of the significant litigation activities of the Board during Fiscal Year 1991.)

OUTREACH ACTIVITIES

The Board's outreach programs to major constituencies continued in Fiscal Year 1991 to enhance its reputation as a fair and impartial adjudicator and as an authoritative resource on civil service matters. The Board members and headquarters and regional staff addressed groups, participated in seminars and conferences, conducted training programs, and published articles in order to further an understanding of the Board's policies and procedures, developments in Board case law, and important issues in Federal personnel law.

Personal Appearances, Meetings, and Instruction

The regional directors and administrative judges delivered more than 130 speeches at meetings and conferences attended by thousands of participants. In addition to comprehensive training sessions on Board practices and procedures, the Board's regional personnel addressed such topics as the Whistleblower Protection Act, the Civil Service Due Process Amendments, effective advocacy at MSPB hearings, adverse actions, reductions in force, reasonable accommodation in handicap discrimination cases, and mixed case jurisdiction.



**Member Parks and Vice
Chairman Amador with
Chief Justice William
Rehnquist, *United
States Supreme Court***

Because of the callup of numerous Federal employee members of Reserve and National Guard units to serve in Operation Desert Storm, there was substantial interest throughout the country in the restoration to duty rights of these employees. Regional office personnel in several cities performed extensive outreach with the National Committee for Employer Support of the Guard and Reserve to explain these rights.

The Board members and headquarters attorneys participated in over 60 outreach activities to inform agencies, unions, and other interested segments of the public about the Board, its authorities, jurisdiction, practices, procedures, and significant decisions. Many of the presentations focused on the Whistleblower Protection Act. Other topics addressed included settlement, reduction in force actions, and handicap discrimination.

The studies staff participated in almost 40 conferences, seminars, and symposia to discuss human resources management issues and to report on the results and implications of the Board's studies and OPM oversight. Among the topics addressed were employee turnover in the Federal Government, pay for performance, changes in Federal hiring practices, measurement of workforce quality, and the glass ceiling.

In September 1991, the Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Office of Personnel Management, and the Office of Special Counsel jointly sponsored the Federal Dispute Resolution Conference. Board staff made presentations at the conference on such topics as SES recertification, mixed cases, performance management, sexual harassment, and remedies in EEO, personnel, and labor law. The Board also staged a mock hearing to demonstrate Board appellate procedures.

The Board participated in the annual Federal Circuit Judicial Conference by sponsoring an afternoon breakout session. Staff also were involved in various programs sponsored by OPM and by the Justice Department Legal Education Institute (LEI). A number of Board attorneys serve as LEI program instructors on a regular basis. Several regional offices sponsored programs for practitioners before the MSPB. In addition, the Board members and staff addressed meetings of representatives of various Federal agencies, employee organizations, professional associations, and bar associations.

Representation in Organizations

The Merit Systems Protection Board is a member of the Small Agency Council (SAC), the voluntary association of Federal agencies that employ fewer than 6,000 people. Chartered in 1986, the Small Agency Council now represents more than 90 small agencies. The Board's Deputy Executive Director serves on the SAC Executive Committee and represents both MSPB and SAC on the President's Council on Management Improvement Systems Committee.

The SAC training seminar series has been especially beneficial to MSPB employees. The program is funded by voluntary contributions from member organizations. For its \$1,000 contribution in Fiscal Year 1991, the Board was able to send over 50 employees at all ranks to valuable courses and seminars.

The Board is represented in the Public Employees Roundtable, the President's Council on Management Improvement, and the Interagency Committee on Voluntarism. During the fiscal year, MSPB participated in the celebration of Public

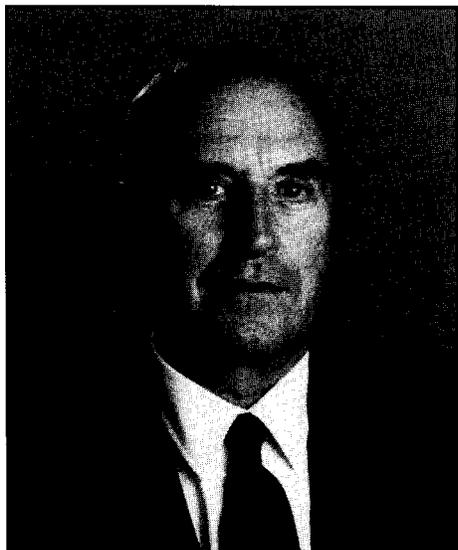
Service Recognition Week with an exhibit on the Mall and coordinated a blood drive involving several small Federal agencies.

The Board's Director of Administration represents MSPB as a member of the Board of Directors of the National Capital Area CASU (Cooperative Administrative Support Units). This Board coordinates the efforts of agencies to combine their administrative resources to take advantage of economies of scale.

In addition, several regional directors and administrative judges serve on the Federal Executive Board (FEB) and FEB committees in their cities. During Fiscal Year 1991, the Director of the Chicago Regional Office served as Chairman of the Chicago FEB. Regional personnel in Philadelphia, St. Louis, and Seattle served as chairs or members of FEB committees in those cities.

Publications and Articles

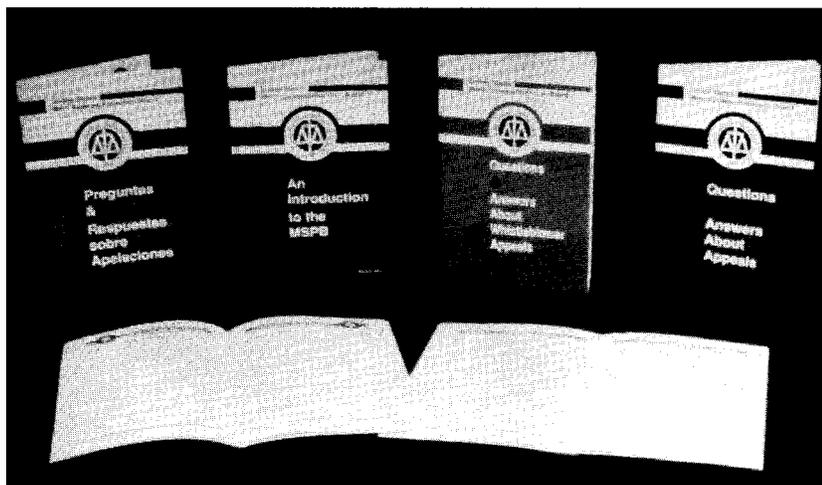
In spring 1991, the Board issued its annual report on case decisions, which provided detailed statistical information on the decisions issued by the Board and its administrative judges in Fiscal Year 1990. The report included information on initial appeals, petitions for review, and addendum cases. In addition to total numbers, various breakdowns were provided by type of appeal, agency, disposition, and case processing time.



Paul D. Mahoney, Director, Office of Management Analysis

The report on case decisions also provided information on appeals involving such special interest issues as whistleblowing, sexual harassment, agency drug testing, AIDS, and accommodation of employees handicapped by drug and/or alcohol abuse. The report reviewed Board decisions in cases arising under its original jurisdiction, cases that the Board reopened on its own motion, cases in which OPM requested reconsideration, and discrimination cases that were appealed to the Equal Employment Opportunity Commission.

The Board's series of public information publications continued in Fiscal Year 1991 to serve as an effective outreach vehicle to Federal employees and agency representatives. The Board responded to numerous requests for copies of "Questions & Answers About Appeals" and "Questions & Answers About Whistleblower Appeals." The former publication provides information on the Board's appellate jurisdiction and its procedures for appeals generally, while the latter publication provides information on the special provisions applicable to whistleblower appeals under the Whistleblower Protection Act of 1989. Both publications are intended primarily for Federal employees and are written in a "plain English" question and answer format.



MSPB Public Information Series

The Board reprinted these publications twice during the fiscal year. Each time, agencies were invited to order copies directly from the Government Printing Office. In addition to the copies distributed by the Board directly, agencies ordered approximately 13,000 copies of "Questions & Answers About Appeals" and 18,000 copies of "Questions & Answers About Whistleblower

Appeals." In addition, one agency arranged for a separate printing of 20,000 copies of "Questions & Answers About Whistleblower Appeals" for distribution to its employees.

During the fiscal year, the Chairman published an article in the *Federal Times* discussing the Board's expanded jurisdiction under legislation enacted in recent years. Board attorneys published two articles in the *Federal Circuit Bar Journal*, one examining the evolution of Federal employee appeal rights and the other summarizing significant Board decisions. Members of the studies staff published articles in nine professional journals, including the *Review of Public Personnel Administration* and *Federal Managers Quarterly*.

International Visitors Program

The Board's international visitors program is conducted at Board headquarters by the Board members and senior staff. The program is responsive to requests from foreign visitors who wish to learn about merit system principles and the Board's practices and procedures. During Fiscal Year 1991, the Board made presentations to approximately 45 visitors from a number of countries, including Australia, Nepal, Taiwan, Ethiopia, and Uganda. The visitors included governors, lieutenant governors, heads of agencies, inspectors general, staff directors, and staff attorneys. Many of these individuals visited the Board during a time when their countries were in the process of developing or revising an appeals system.

ADMINISTRATION, FINANCE, AND HUMAN RESOURCES

ADMINISTRATION

Improvement Objectives

During Fiscal Year 1991, the Board continued to enhance management efficiency and effectiveness through its focus on management improvement objectives. The four major improvement objectives are:

- To ensure the quality of decisions and the adjudicatory process;
- To enhance the merit systems studies and OPM oversight functions;
- To improve the effectiveness of outreach activities; and
- To continue to improve management efficiency and effectiveness.

Program and Management Reviews

During Fiscal Year 1991, the Board conducted Administrative Program and Management Reviews, in accordance with the requirements of OMB Circular No. A-123, in its San Francisco and Seattle regional offices and in the Office of the General Counsel and the Office of Policy and Evaluation at headquarters. These reviews, conducted on a 5-year cycle, cover both administrative management of the office plus program management if the office has delegated responsibility for a program. The reports of these reviews have proven extremely beneficial in improving the quality of administrative and program functions.

During the fiscal year, the Inspector General evaluated the Board's internal controls over its management and operations in accordance with OMB Circular A-123. In addition, the Inspector General issued reports on case tracking workload data and graphs, physical security of headquarters, and accuracy of data in the Federal Procurement Data System. Two audits were conducted of headquarters and regional office imprest funds, and interim reports were issued. Allegations received on the Inspector General Hotline resulted in 11 preliminary investigations that were referred to other agency inspectors general for action, 3 internal investigations that were closed for lack of substance, and 1 internal investigation that was pending at the close of the fiscal year.

Automated Systems

The new automated Case Management System became operational in July 1991. The redesigned system, which was begun four years ago, includes many enhancements to the prior automated system. For the first time, original jurisdiction cases are tracked in the system, and litigation cases are now included in the same system as appeals and original jurisdiction cases. The new system includes several new features, including easy-to-use screens for data entry, automated creation of address sheets and certificates of service, and automated docket number assignment.

Based on a study completed in Fiscal Year 1990, the Board implemented a new nationwide telecommunications network to replace the minicomputers located in each regional office. The new network permits all regional office staff to be on-line with the central minicomputer in headquarters at all times. Installation of the new network eliminated the cost of maintaining minicomputer hardware and software in each regional office and reduced administrative support costs in the regional offices. The new network also permits the Board to use its own facilities to communicate with the National Finance Center, thus reducing commercial telecommunications charges.

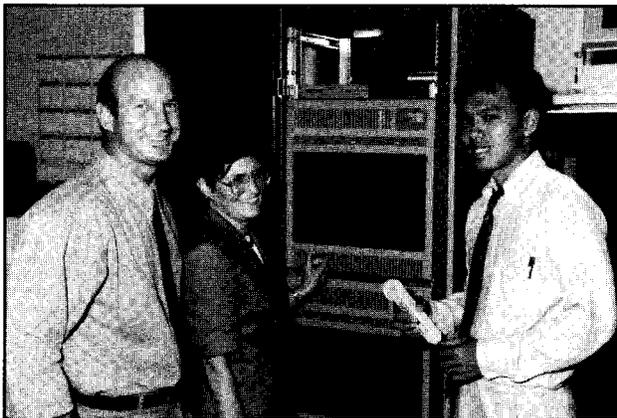


Darrell L. Netherton, *Director of Administration* (left), and Frank E. Hagan, *Assistant to the Director*

Other Management Activities

In a reorganization at headquarters, the offices of Equal Employment Opportunity, General Counsel, and Inspector General were placed directly under the Chairman. This reorganization emphasizes the Board's commitment to its equal employment opportunity, internal control, and ethics programs. In order to provide more consistent and efficient management of the Board's public affairs program, the Board's public information and media relations functions were centralized in the Office of Management Analysis.

The design for the Board's relocated Atlanta Regional Office was selected as a 1991 Government Workplace Benchmark Honoree. The award was presented at the Government Workplace Conference in Washington, DC, and an article featuring award recipients was published in Government Workplace Magazine.



Information Resources Management Division Staff (left to right), Howard K. Schuyler, *Computer Programmer/Analyst*; Barbara B. Wade, *Director*; and Nick Ngo, *Computer Programmer/Analyst*

T. Paul Riegert, *Inspector General*



FINANCIAL STATEMENT

The income and expenses of the Merit Systems Protection Board for Fiscal Year 1991 (October 1, 1990, through September 30, 1991) are shown below. All figures are in thousands of dollars.

INCOME

Appropriations	22,564
Reimbursements -	
Civil Service Retirement & Disability Trust Fund	1,500
Reimbursements - Other (interagency agreement and reimbursable detail)	34
Total income	24,098

EXPENSES

Direct obligations:

Personnel compensation	
Full-time permanent	12,915
Other than full-time permanent	925
Other personnel compensation	<u>333</u>
Subtotal, personnel compensation	14,173
Personnel benefits	2,086
Travel of persons	557
Transportation of things	68
Rental payment to GSA	1,850
Rental payments to others	49
Communications, utilities, and miscellaneous charges	640
Printing and reproduction	93
Other services	1,479
Supplies and materials	304
Equipment	<u>1,176</u>
Subtotal, direct obligations	22,475
Reimbursable obligations	<u>1,534</u>
Total obligations	24,009

BALANCE **89**

HUMAN RESOURCES

The full-time equivalent (FTE) employment for the Board in Fiscal Year 1991 was 302. In the previous fiscal year, the FTE was 299.

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

MSPB EMPLOYMENT BY MALE/FEMALE AND MINORITY/MAJORITY

Attorneys

	No. in Attorney Workforce	Percent of Attorney Workforce
Male	80	60.6
Female	<u>52</u>	<u>39.4</u>
Total	132	100
Minority *	26	19.6
Majority	<u>106</u>	<u>81.4</u>
Total	132	100

MSPB (Entire Agency)

	No. in Workforce	Percent of Workforce
Male	128	42
Female	177	58
Total	305	100
Minority *	105	34
Majority	200	66
Total	305	100

* Excluding White/Female Data as of September 30, 1991

During Fiscal Year 1991, the Office of Equal Employment Opportunity participated in local and national special emphasis program conferences. Representatives attended national conferences sponsored by Federally Employed Women, the Hispanic Association of Colleges and Universities, Blacks in Government, the National Bar Association, and Perspectives on Employment of Persons with Disabilities. The representatives used these opportunities to distribute information about the Board's mission and to discuss employment opportunities at MSPB.

Recruitment was targeted at increasing the Board's representation of minorities, women, and individuals with disabilities. The focus of recruiting remains on minority job fairs and law school consortia in which a high percentage of minorities are represented. The focus also continues on recruiting from law schools from various geographic areas nationwide.

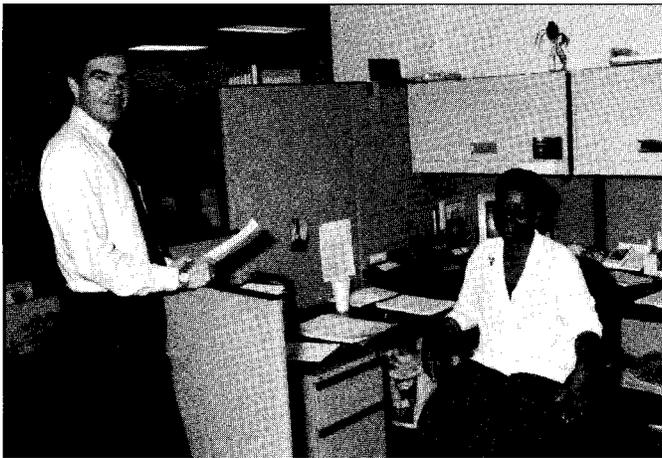


Financial and Administrative Management Division staff (left to right), Dwayne Collins, *Office Automation Clerk*; Rachel Campbell, *Budget Assistant*; and Darnell Mallory, *Clerk Typist*

Bentley M. Roberts, *Deputy Director, Office of Management Analysis* (left), and Janice E. Fritts, *Director, Office of Equal Employment Opportunity*



Michael Hoxie, *Director* (left), and Vanessa Gray, *Correspondence Clerk, Information Services Division of the Office of the Clerk of the Board*



Awards

In January 1991, the Chairman presented the Theodore Roosevelt Award, the Board's highest honor, to John M. Palguta, Deputy Director of the Office of Policy and Evaluation. The award was established in Fiscal Year 1988 to honor Board employees who demonstrate distinguished performance or leadership in

support of the Board's mission to protect Federal merit systems through its adjudicatory and studies functions.



The Board Members with 1990 Recipients of the Chairman's Honor Awards for Excellence

At the annual awards ceremony, 19 other Board employees were honored with the Chairman's Awards for Excellence. During Fiscal

Year 1991, the Board granted over 250 Performance Awards, Quality Step Increases, Performance Bonuses, and Special Act or Service Awards to its employees.

In June 1991, Paula A. Latshaw, Chief Administrative Judge/Regional Director of the Board's Dallas Regional Office, was honored by Federally Employed Women with the Mary D. Pinkard Leader in Federal Equity (LIFE) Award. Among other achievements, Ms. Latshaw was recognized for her work, as Chairman of the Dallas-Fort Worth Federal Executive Board, in obtaining the sponsorship agreement of 59 different Federal agencies for the Federal Child Care Center in downtown Dallas.

Carolyn L. Smith,
*Equal Opportunity Specialist, Office of Equal Employment
Opportunity*



APPENDIX A - SIGNIFICANT BOARD DECISIONS APPELLATE JURISDICTION CASES

This appendix contains summaries of significant appellate jurisdiction cases decided by the Board during Fiscal Year 1991.

Board decisions are published in West Publishing Company's *United States Merit Systems Protection Board Reporter*. The M.S.P.R. citations below are to that publication.

WHISTLEBLOWER PROTECTION ACT

Jurisdiction

NOTE: The first three decisions summarized below turn on the distinction between two sections of 5 U.S.C. 2302, "Prohibited personnel practices." Under 5 U.S.C. 2302(b)(8), it is a prohibited personnel practice to take a personnel action because of an individual's whistleblowing activities. Under 5 U.S.C. 2302(b)(9), it is a prohibited personnel practice to take a personnel action because of, among other things, an individual's exercising an appeal, complaint, or grievance right. For ease of reference, these sections are referred to as (b)(8) and (b)(9), respectively, in the summaries below.

Williams v. Department of Defense and OPM, NY075290S0119 (January 7, 1991) 46 M.S.P.R. 549 (1991)

See NOTE above.

The Board granted OPM's request for reconsideration of the Board's decision granting a stay of the appellant's removal. The Board initially granted the stay, ruling that the appellant had raised a whistleblowing allegation under (b)(8) when he asserted that he had been the victim of reprisal for having filed EEO complaints. On reconsideration, however, the Board reversed its earlier position and found that if (b)(8) were read as broadly as in the first decision in this case, it would render (b)(9) superfluous. Noting that the wording of the two sections suggested protection for distinctly different activities, the Board determined that only (b)(9), the more directly applicable provision, was intended to apply to the filing of EEO complaints.

The Board further noted that the legislative history of the Whistleblower Protection Act indicates that the Congress intended to limit the stay provisions of the Act to personnel actions allegedly based on "a prohibited personnel practice described in section 2302(b)(8)." Based on the statute as a whole and its legislative history, the Board held that the filing of an EEO complaint did not constitute whistleblowing under (b)(8). Accordingly, because a stay may be granted only of actions based on whistleblowing, the Board concluded that consideration of a stay in this case was beyond its jurisdiction.

Fisher v. Department of Defense, PH122190W0645 (April 12, 1991) 47 M.S.P.R. 585 (1991)

See NOTE above.

Relying on its decision in *Williams*, the Board held that the appellant's contention that he was subject to a personnel action because of his filing of EEO complaints constituted an allegation under (b)(9), not (b)(8). Applying the same reasoning to the appellant's additional allegation concerning his filing of grievances, the Board found that it too constituted a (b)(9) contention and not one under (b)(8). Because the Whistleblower Protection Act provides for the filing of an individual right of action appeal only where the appellant claims that the action was based on "a prohibited personnel practice described in section 2302(b)(8)," the Board determined that it lacked jurisdiction to consider the appeal.

Coffer v. Department of the Navy, SF122190W0579/W0695 (August 21, 1991) 50 M.S.P.R. 54 (1991)

See NOTE above.

Also relying on its decision in *Williams*, the Board held that, as with EEO complaints and grievances, unfair labor practice complaints are protected by (b)(9), not (b)(8). Thus, the filing of an unfair labor practice complaint does not constitute whistleblowing.

Ruffin v. Department of the Army, PH122190W0426 (May 15, 1991) 48 M.S.P.R. 74 (1991)

The Board agreed with the administrative judge's determinations that the appellant's disclosures to the Inspector General formed a proper basis for jurisdiction under the WPA but that the appellant had not shown that these disclosures were a contributing factor in the agency's action. While not challenging the administrative judge's finding that the deciding officials were unaware of his whistleblowing, the appellant contended that one employee's disclosure to these officials of the nature of his resignation satisfied the contributing factor test. The Board found, however, that even if that person were aware of the disclosures, the only information he disclosed in this case was what a settlement agreement specifically obligated him to tell. Because the contributing factor test is met by a showing that the deciding official was aware of the whistleblowing, and the appellant made no such showing here, the Board found no basis for an inference that retaliation played any part in the agency's action.

Horton v. Department of the Navy, SF122190W0828 (March 26, 1991) 47 M.S.P.R. 475 (1991)

The Board held that the plain language of the WPA provision setting forth the time limits for an individual to appeal to the Board after seeking Special Counsel review does not condition the right to file an IRA appeal on the exhaustion of EEO administrative remedies. Thus, the Board concluded that the right to file an IRA appeal is independent of the EEO complaint process. To hold otherwise would create a conflict between the different statutory sections governing IRA appeals and EEO complaints and also would delay the appellant's right to seek a stay under the WPA.

The Board found this construction of the law supported by the legislative history of the CSRA as well as the WPA. Specifically, it noted that the Special Counsel's right to seek corrective action before the Board was not dependent on the appellant's exhaustion of the administrative EEO process or on the procedures governing "mixed cases" and that, in passing the WPA, the Congress viewed the IRA right as a separate and distinct cause of action from the right concerning otherwise appealable actions. In short, the Board found no evidence that the Congress intended to impose any exhaustion requirements on IRAs beyond those set out in the WPA.

Mack v. United States Postal Service, NY075289110594 (June 5, 1991) 48 M.S.P.R. 617 (1991)

The Board held that the WPA provisions applying to appeals of personnel actions allegedly based on whistleblowing do not apply to Postal Service employees because the Postal Service is not an "agency" as defined in the prohibited personnel practices statute at 5 U.S.C. 2302(a). Thus, the Board found that the administrative judge erred in considering the stay request filed by the appellant, a former employee of the Postal Service, under the WPA.

The Board noted that the appellant had a right to appeal a removal action under 5 U.S.C. Chapter 75. It noted further that in *Butler v. USPS* it had found that although the Postal Service is not an "agency" as defined in 5 U.S.C. 2302(a), a Postal Service employee with a right to appeal to the Board could, nonetheless, raise as an affirmative defense in such an appeal a prohibited personnel practice described in section 2302(b). On this basis, the Board concluded that the appellant could raise an affirmative defense of whistleblower retaliation.

With respect to the appellant's appeal, the Board found that the administrative judge erred in applying the lower burden of proof applicable to whistleblower claims under the WPA. Thus, when the Board hears an allegation of reprisal for whistleblowing from a Postal Service employee, it will analyze it under the burden of proof generally applicable prior to the WPA.

Gergick v. General Services Administration, SL122190W0030 (July 25, 1991) 49 M.S.P.R. 384 (1991)

The savings provision of the WPA excludes from its coverage actions begun by agencies before the WPA took effect on July 9, 1989. In this case, the Board applied the theory of continuing wrongs to find that the WPA applies to the last in a series of allegedly retaliatory actions that occurred after July 9, 1989, even though some actions in the series occurred prior to that time. To hold otherwise, the Board held, would insulate agency misconduct that began before the effective date of the WPA, even when new instances of the misconduct were initiated after the WPA became effective.

Individual Right of Action

McDaid v. Department of Housing and Urban Development, AT122190W0400 (December 6, 1990) 46 M.S.P.R. 416 (1990)

The Board addressed the burdens of proof applicable to an IRA appeal and noted that an appellant must first show by preponderant evidence that his protected disclosure was a contributing factor in the agency's decision to take (or not take, etc.) a personnel action. The Board examined the evidence on the issue in this case and found that it was undisputed that the appellant had made a disclosure of an alleged violation of regulations by his former supervisor to the agency's regional inspector general. Although that supervisor had issued a counseling notice to the appellant, she played no part in the suspension action, and the Board found that the appellant had not shown that the proposing official in the suspension action had actual or constructive knowledge of the protected conduct. Further, the appellant failed to show that the deciding official, who had actual knowledge of the disclosure, acted within a time period reasonably evidencing a retaliatory motive. In addition, the Board found that no other facts sufficed to establish by preponderant evidence that the protected conduct was a contributing factor in the decision to take the action. Even assuming, however, that the contributing factor test were met, the Board found that the agency had shown by clear and convincing evidence that it would have taken the same action in the absence of the protected disclosure.

(See Appendix B for summaries of decisions in whistleblower cases brought by the Office of Special Counsel.)

INTERIM RELIEF

Wallace v. United States Postal Service, SL07529010400 (May 24, 1991) 48 M.S.P.R. 270 (1991)

The administrative judge reversed the appellant's removal and ordered the agency to provide interim relief in accordance with 5 U.S.C. 7701(b)(2) if it filed a petition for review. The Board noted that its regulations require the submission of proof of interim relief with the agency's petition for review. Further, the regulations specify that failure to submit evidence showing that it has granted interim relief or that it will not be granted, but that the appellant will be returned to a full pay and benefit status, "will result in dismissal of the agency's petition or cross petition for review." Accordingly, because the agency did not indicate that it complied with the interim relief order or that it had, instead, restored the appellant to a pay status, the Board dismissed the agency's petition for review.

DISABILITY RETIREMENT

Dec v. OPM, PH831E9010016 (January 31, 1991) 47 M.S.P.R. 72 (1991)

The appellant applied for a disability retirement annuity on the basis that she suffered from a hearing loss which made it difficult for her to perform her duties. The Board found that its administrative judge applied the wrong standard in deciding whether the appellant's condition could be accommodated by her employing agency. The relevant question in disability retirement appeals is not whether the employing agency has refused to accommodate an employee, but whether the employing agency is unable to reasonably accommodate the employee. The Board remanded the appeal for findings on this issue.

Hite v. OPM, DA831E8810440 (May 1, 1991) 48 M.S.P.R. 27 (1991)

The Board held that its administrative judge erred in finding that the appellant was not entitled to a disability retirement annuity because she was not totally disabled and her condition was not sufficiently "serious." The correct test for determining whether an employee can perform "useful and efficient service" is whether she can demonstrate acceptable performance of the critical elements of her job and maintain satisfactory attendance and conduct.

Here, the appellant presented evidence to show that she could not perform critical aspects of her job because of her back injury. The Board found no persuasive reason to discredit the opinions of the appellant's doctors and the agency on this issue. It concluded that this evidence, along with the other evidence of record, showed that the appellant was entitled to a disability retirement annuity.

Zabalveitia v. OPM, SF08319010378 (May 8, 1991) 48 M.S.P.R. 48 (1991)

OPM terminated the appellant's disability retirement annuity in 1987 after it found that he had recovered. Ten months later, the appellant filed a second disability retirement application, based on an allegedly disabling injury he suffered while on disability retirement. The Board found that the appellant was not entitled to apply for a second disability retirement annuity. Under 5 U.S.C. 8337(b), an applicant for a disability retirement annuity must be an employee, not an annuitant. Because this provision allows an employee to submit application only before separation or within one year after that date, OPM could not accept the appellant's application. Employees and annuitants are defined separately in the statute, and this distinction is preserved throughout the statute.

The Board also found that the appellant was not qualified for a discontinued service annuity under 5 U.S.C. 8337(e). This section was intended to allow a recovered annuitant to obtain an immediate annuity only if he met the age and service requirements of 5 U.S.C. 8336.

Stevenson-Phillips v. OPM, BN08318610100 (May 31, 1991) 48 M.S.P.R. 527 (1991)

The appellant filed a disability retirement application with her former employing agency within one year of her separation. The agency failed to submit the application to OPM within the 1-year time limit required by 5 U.S.C. 8337(b). Relying on the statutory language, the Federal Personnel Manual, and the instructions on the application, the Board found that receipt of the application by the employing agency did not constitute constructive receipt by OPM. Citing the Supreme Court decision in *Office of Personnel Management v. Richmond*, the Board also found that OPM could not be equitably estopped from enforcing the 1-year deadline, despite the agency's mistakes. Absent a claim of incompetence, section 8337(b) provides for no discretion in applying the deadline.

Vice Chairman Amador issued a dissenting opinion, stating that he would have found that the appellant's filing with her former employing agency constituted a constructive filing with OPM.

FERS ELECTION CASES

Moriarty v. OPM, DC08468910097 (March 13, 1991) 47 M.S.P.R. 280 (1991)

After retiring under CSRS on December 18, 1987, the appellant asked to transfer to FERS retroactively. The request was denied by OPM, and he appealed to the Board.

CSRS employees were given one opportunity, from July 1, 1987 to December 31, 1987, to transfer to FERS. However, in 1988, OPM promulgated 5 CFR 846.204(a), which allowed a person who did not elect FERS coverage to change his election if the FERS transfer handbook was unavailable to him or he was unable, for cause beyond his control, to make the election.

Here, the appellant was given a copy of the transfer handbook. Moreover, the documents the appellant was given were not misleading and set forth the information that was then available. Although the appellant's employing agency appeared to have interpreted the OPM issuances as endorsing the option of staying in CSRS rather than transferring to FERS, the appellant could not have been harmed by the mischaracterization because he had a copy of the information itself. Also, it was within the appellant's control to track the progress of the pending Social Security public pension offset legislation through Congress to see if he would be subject to the offset if he transferred to FERS. The record does not show why he could not have postponed his retirement for four days, until after Congress and the President acted to finalize the law on December 22, 1987, then make his election within the next nine days, prior to the expiration of the deadline.

Accordingly, the Board ruled that the appellant did not show that he was misled or given misinformation that rendered him unable to make a proper election.

Webb v. OPM, AT08468910174 (March 13, 1991) 47 M.S.P.R. 275 (1991)

In this case, the Board held that the standard for determining whether an election among retirement options is voidable as a result of misinformation is whether a reasonable person would have been confused under the circumstances. The Board found that the appellant had at her disposal all of the information then available, so that her decision to remain in CSRS was not the result of confusion brought about by improper or inadequate information. Similarly, statements by her employing agency that it was uncertain of all of the ramifications of electing FERS were not unreasonable or misleading, given the state of the law when the appellant retired on October 3, 1987. The uncertainty surrounding FERS and the pending pension offset legislation did not constitute a reason beyond the appellant's control that deprived her of the opportunity to make an informed choice. Thus, the Board ruled that she was not eligible to elect FERS coverage retroactively.

HANDICAP DISCRIMINATION

"Handicapped" Employee

Stanley v. Department of Justice, CH07528910620 (April 16, 1991) 48 M.S.P.R. 1 (1991)

The administrative judge reversed the appellant's removal for physical inability to perform his duties as a correctional officer, finding that the medical evidence did not show that he was unable to perform in that capacity. The administrative judge found that, to the extent that the evidence did support such a showing, the agency had not shown why it could not accommodate the appellant, as it had others, by limiting his exposure to risk and stress while still allowing him to perform within his position description.

On review, the Board stated that the determination of whether an employee is a "handicapped person" is to be made on a case-by-case basis, inquiring whether the particular impairment "substantially limits" the employee's ability to work or otherwise constitutes "a significant barrier to employment." Relevant considerations are the number and type of jobs from which the person is disqualified, the geographical area to which he had reasonable access, and his job expectations and training. The handicap must foreclose generally the type of employment involved, not just the demands of a particular job. Applying those tests here, the Board found that the appellant is handicapped. His medical condition had not affected his performance at the time of his removal, but the agency perceived him as a safety risk and removed him for it. Further, since his work background was in law enforcement, the agency's reasons would make it difficult or impossible for him to secure other employment consistent with his job expectations and training.

The Board ruled that the appellant is also a qualified handicapped person because he was able to perform his job up to his removal and, even if there was some safety risk, the agency did not show why it was willing to accommodate others in correctional officer positions but not the appellant. The Board reversed the removal action.

Joyner v. Department of the Navy, PH07529010513 (April 16, 1991) 47 M.S.P.R. 592 (1991)

The administrative judge sustained the appellant's removal for physical inability to perform the duties of his position, after finding that the appellant was not a handicapped employee or that, if he was, he had failed to show that his handicap could be accommodated. The Board disagreed in part, finding that the appellant had shown that he is a handicapped person under EEOC regulations. Although prior cases have held that a person is not considered handicapped if he is not generally "foreclose[d from] ... the type of employment involved," none uses the test the administrative judge did, namely, that an employee cannot be considered handicapped unless he is unable to perform "other lines of work." Because the type of work the appellant performed in his light duty capacity was not the same type as his usual machinist job, and because of the limitations imposed on him by his doctor, the Board found that the appellant was a handicapped employee.

It found also, however, that he was not a qualified handicapped employee because he had not shown that his handicap could be accommodated. The Board found further that the agency was not required to retain the appellant indefinitely until a suitable vacant position was found. The vacancies that occurred before his removal relate to his earlier light duty assignments, but an earlier light duty assignment does not establish an employee's entitlement to continued light duty once it is established that his handicap is permanent.

Accommodation

Konieczko v. United States Postal Service, SF07528810849 (April 4, 1991) 47 M.S.P.R. 509 (1991)

The administrative judge reversed the agency's removal of the appellant for physical inability to perform the duties of his job, finding that it had failed to reassign him to an available vacant position. The administrative judge found no handicap discrimination, however, because she concluded that the agency acted properly in light of the medical evidence it had when it sought alternative employment for him.

On review, the Board ruled to the contrary that, in the absence of a finding of handicap discrimination, an agency is under no general obligation to reassign an employee unless an agency regulation requires it. The Board found that the administrative judge's error was not prejudicial, however, because the removal action could not be sustained as a result of the agency's failure to accommodate the appellant's handicap. It found that the appellant had established a *prima facie* case of handicap discrimination by showing that he has an impairment that substantially limits his "major life activity" of work, that he was removed because of it, and that he articulated a reasonable accommodation under which he could have performed the essential functions of a position.

The Board noted that the agency had misinterpreted the medical restrictions on the appellant, but found that the agency bears the burden if it misinterprets any nonconclusory evidence. It was undisputed that the agency had three vacant window clerk jobs available, for which the appellant was not considered because the agency found them subject to the bidding rights of clerk craft employees. The Board stated that EEOC had recently held that, where an agency shows that its nondiscriminatory collective bargaining agreement (CBA) precludes it from effecting a reassignment, that suffices to establish undue hardship. The Board deferred to the EEOC view because it rests on Title VII law and modified prior Board decisions to the contrary to be consistent with this decision.

The Board found no undue hardship here, however, because the agency only argued that its CBA gave preference to others, not that it precluded the appellant's reassignment. Indeed, it noted that the agreement provides for such reassignments. The Board ruled that, because the appellant was not medically precluded from performing the duties of a window clerk, such reassignment would have been a reasonable accommodation. The agency's failure to offer it, therefore, resulted in a finding of handicap discrimination, and so the Board reversed the removal action.

DISPARATE IMPACT DISCRIMINATION — STATISTICAL PROOF

Stern v. Federal Trade Commission, DCO3518910441 (October 18, 1990) 46 M.S.P.R. 328 (1990)

The appellant was separated from her part-time attorney position by a reduction in force. The Board first discussed the appellant's argument that she had presented statistical evidence of disparate impact discrimination. She contended that the agency's facially neutral employment practice, focusing its RIF action on part-time employees, had a disparate impact on women, older employees, and older women. The Board rejected the agency's responding argument that, because the RIF action was not a "practice," but simply an "*ad hoc* decision," it could not constitute an employment practice. The Board reasoned that a subjective or discretionary employment practice may be analyzed under the disparate impact approach in appropriate cases. It noted, however, that the administrative judge correctly found that part-time workers are not a protected class, so that to the extent that the appellant has tried to show that they were targeted for separation, she must focus on the connection between that status and the age and sex of those workers to make out a claim under Title VII. The Board also noted that the appellant's part-time status did not result from either her age or sex, but from an alleged handicap, so that her attempt to assert that she was discriminated against as a result of her membership in the protected

classes was "questionable."

The Board rejected the appellant's statistical evidence of discrimination against women and older employees, finding that the sample was too small to be statistically significant. She argued that the sample was large enough because there were 208 employees in her former bureau before the RIF. The Board found, however, that the focus should be the number separated, not the number of employees. Even if the numbers were not too small to be of use, the Board found the numbers not sufficiently probative to constitute a *prima facie* case. It also noted that, because the agency offered the appellant continued part-time employment if she increased her hours, statistics concerning part-time employees alone would not be relevant, and that, if attorneys rather than all employees in the bureau were considered, the statistics would not support a claim of sex discrimination.

The Board found that, using agency-wide statistics, fewer women than men were separated and employees over 40 were separated at only a slightly higher rate than were those under 40. It also noted that the RIF regulations require a somewhat mechanical approach, not allowing for the consideration of EEO factors, and that they require the placement of part-time employees in separate competitive levels. The Board found that the appellant had not established disparate treatment discrimination and affirmed the RIF action.

EVIDENCE

Anderson, et al. v. Department of Transportation, CH075281F0873 (October 30, 1990)
46 M.S.P.R. 341 (1990)

The appellants, 116 former air traffic controllers whose removals for participation in the 1981 strike were sustained by the Board, requested reopening of their appeals. They contended that, as a result of the lengthy inquiry of the House Subcommittee on Investigations and Oversight, they believed that the evidence upon which the agency relied in taking these actions was manufactured and otherwise tainted so as to be completely unreliable.

The Board, with Chairman Levinson having recused himself because of his duties while serving as Deputy General Counsel of OPM during the period in question, denied the request. The Board held that it had the authority to reopen appeals at any reasonable time and that, where the earlier decision was obtained by fraud, concealment, or misrepresentation by a party, it could reopen even though many years had passed. In such cases, the balance would shift from "the desirability of finality" to "the public interest in reaching the right result." That the Board's decision was affirmed on review by the court would not bar reopening under the doctrine of *res judicata*. If the circumstances were as posited by the appellants, it would have the authority to reconsider and reverse its earlier decision.

On the merits, however, the Board found no basis for reopening the appeals because fraud was not shown. After issuance of the first initial decision, the Board had remanded the cases for the taking of further argument and evidence on just the types of record alterations later pointed to by the House Subcommittee. Quoting from the remand decision by the administrative judge, its own decision on petition for review of that decision, and the decision of the Federal Circuit on review, the Board found that the appellants' arguments were heard and fully considered years before; that no appellant, then or now, had made an allegation of individual harm by asserting that he was either not absent or not scheduled to work as charged; that the Subcommittee Report does not suggest that the agency committed harmful error when it altered any of its records, but indicates that the changes were made to correct records that were incomplete because of the circumstances of the strike; and that although perhaps the extent of the alterations pointed out by the Subcommittee was not known to the Board, the Board gave full consideration to the agency's recordkeeping in rendering its decision.

The Board stated that it certainly did not condone the agency's actions in submitting altered records on appeal or in testifying falsely to conceal such alterations. It concluded, however, that the House Subcommittee Report focuses on the extent of the alterations rather than their significance to the legal issues on appeal. Thus, the Board ruled that the appellants failed to establish any material alterations of the evidence because the dispositive facts as found by the Board and the court were known and fully considered at the time.

PERFORMANCE-BASED ACTIONS

Chapter 43

Ortiz v. Department of Justice, CH04329010299 (January 31, 1991) 46 M.S.P.R. 692 (1991)

The agency demoted the appellant based on charges of unacceptable performance under Chapter 43. On appeal, the administrative judge found the appellant's performance standards to be invalid as "backwards" standards under the Federal Circuit's decision in *Eibel v. Navy*. On review, the Board found that, although the validity of the standards had not been raised by the parties and was not specifically identified during the prehearing conference, the issue was not "new" and should not have come as a surprise to the agency. The Board found no merit to the agency's argument that the administrative judge should not have ruled on the validity of the standard without first giving it the opportunity to argue the merits of an "absolute standard."

Noting that an invalid standard cannot be rehabilitated by calling it an absolute standard, the Board found that the standard would have to be rewritten to be a valid standard before it could be considered as a valid absolute standard. Moreover, the Board found that the agency did not communicate to the appellant that the standard was absolute.

Chapter 75

Graham v. Department of the Air Force, AT07528910198 (October 19, 1990) 46 M.S.P.R. 227 (1990)

The Board found that the appellant's removal from his position as a Medical Officer under Chapter 75 for loss of his medical credentials was analogous to a performance-based action under Chapter 75 and that only the standards applicable to such an action should apply. Thus, the establishment of valid performance standards was not a prerequisite to taking the instant action. Moreover, even though in a Chapter 75 action, agencies must prove the standards against which the appellant's performance was measured, the Board's cases simply require that the agency's standard, which may be *ad hoc*, be reasonable and provide for accurate measurement. The Board found that the standards applied in this case met this requirement, even though the appellant did not have a specific set of standards governing the performance deficiencies found, and testimony indicated that there were no specific standards of care addressing each diagnostic entity.

Bowling v. Department of the Army, DA07528810494-1 (March 25, 1991) 47 M.S.P.R. 379 (1991)

The Board held that, in a removal for unacceptable performance under Chapter 75, although it was reasonable for the agency to base its decision on a sample of the appellant's work, the action could not be sustained because the agency did not establish an objective systematic method for selecting the examples of alleged unacceptable performance. The Board found that the agency would be required to meet this standard in a Chapter 43 action and that it was reasonable to impose a similar requirement under Chapter 75.

BACK PAY AWARDS

Harrington v. United States Postal Service, BN075288C0056 (March 22, 1991) 47 M.S.P.R. 415 (1991)

The Board found that the appellant was entitled to back pay for the full 19 months of his improper suspension. The agency regulation in effect when the appellant's suspension began did not require that he look for replacement work during the first 12 months of the time he was not earning pay from the agency. The Board found that this was the regulation that applied, even though the rule was changed during the back pay period. The changed regulation could not apply before it was effective, and there was no evidence that the appellant was made aware of it while he was off the rolls. Further, the appellant was entitled to back pay for the remainder of his suspension because he submitted evidence of his unsuccessful efforts to find employment during that time.

HARMFUL PROCEDURAL ERROR

Stephen v. Department of the Air Force, BN315H8710028 (April 26, 1991) 47 M.S.P.R. 672 (1991)

The administrative judge reversed the appellant's separation, finding that she had completed her probationary period when she was terminated and that the agency's failure to provide her with the procedural protections of 5 U.S.C. Chapter 43 or 75 constituted harmful error. On review, the Board relied on the Supreme Court's decision in *Cleveland Board of Education v. Loudermill* to hold that, if the agency fails to provide prior notice of the charges, an explanation of its evidence, and an opportunity to respond, its action must be reversed because it violates the employee's constitutional right to minimum due process. The Board further held that, when an appealable action is unlawful in its entirety, i.e., there is no legal authority for the agency's action, the Board will reverse the action as "not in accordance with law" under 5 U.S.C. 7701(c)(2)(C).

Re-examining the issue of harmful error, the Board held that, when an action meets minimum due process requirements and is lawful in its entirety, the Board will reverse the action on the basis of harmful error only when the appellant proves that the agency's procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency. The Board, therefore, modified earlier decisions in accordance with this ruling.

Applying these rules to this case, the Board found that the appellant received minimum due process and that the removal action was in accordance with law. Because the appellant had not submitted a written response to the agency's action, and the record lacked evidence as to the effect of the agency's procedural error on the outcome of the case before the agency, the Board remanded the case to the regional office for presentation of evidence and argument on the issue of harmful error.

The Board also determined that the appellant was entitled to back pay for the 17 days of the required 30-day notice period that she did not receive pay. The Board noted that the purpose of the 30-day notice requirement is to provide the employee with a right to receive pay during that entire time. Thus, the Board held that an employee is entitled to back pay under the Back Pay Act for the full 30-day notice period, even if the underlying action is sustained. It overruled prior inconsistent cases.

PHYSICAL INABILITY TO PERFORM

Morgan v. United States Postal Service & OPM, PH07528710588 (June 5, 1991) 48 M.S.P.R. 607 (1991)

The Board denied OPM's petition for reconsideration and reaffirmed its previous decision. In that decision, the Board found that, under *Street v. Army*, the appellant's removal for physical inability to perform the duties of her job could not be sustained because she had recovered sufficiently, during the pendency of her appeal, to be able to return to work. Removal under those circumstances did not promote the efficiency of the service.

The Board noted that it has *de novo* review authority over the actions appealed to it and that it can consider evidence of subsequent events that sheds light on the circumstances at the time the agency acted, including evidence of an improvement in physical condition, because such evidence relates to whether the removal promotes the efficiency of the service. The Board found that it must avoid upholding a removal for physical incapacitation when, during the course of the appeal before the regional office, it is clear that the appellant is no longer incapacitated. If a removal action for physical inability were not based on the incapacity being permanent, or at least long-lasting, the agency could just grant leave to allow the employee to recover.

SUCCESSIVE REMOVALS

Parker v. United States Postal Service, SL07528810363/CO213 (October 18, 1990) 46 M.S.P.R. 214 (1990)

The appellant's April 1988 removal was reversed by the administrative judge on its merits. When the appellant filed a petition for enforcement of the decision, the administrative judge found that he was not eligible for reinstatement because he had been removed again, in May 1988, for AWOL occurring before the first removal was effective. The administrative judge dismissed the appellant's appeal of the second removal because the first removal was still effective. The appeal was refiled after the reversal of the first action, and the administrative judge then sustained the second removal. On petition for review from both initial decisions, the Board joined the appeals and addressed the May removal first because the decision on the compliance action was largely contingent on the finding made as to the second removal.

With respect to the second removal, because the appellant was still an employee at the time of the misconduct leading to it, the Board rejected his argument that the second removal can have no effect until he is restored to the full *status quo ante* after reversal of the first removal. Agencies are not precluded from taking legitimate personnel actions pending Board disposition of earlier actions if valid reasons exist for the later action. The Board found that the second removal could have no effect until: (1) the agency either rescinded the first removal or modified it so as to restore the appellant to duty on a date prior to the effective date of the second removal, or (2) a final decision of the Board or a court reversed that first removal. It then found that the reversal of the first removal had the effect of resurrecting the second, which the administrative judge properly adjudicated.

As to the compliance initial decision, the Board found that because the second removal was proper, the appellant was not entitled to reinstatement as a remedy for the reversal of the first action.

JURISDICTION AND TIMELINESS

Popham v. United States Postal Service, SE07529010105, SE34439010107 (August 30, 1991) 50 M.S.P.R. 193 (1991)

In *Funk v. Army*, 44 M.S.P.R. 320 (1990), the Board held that an appeal could not be dismissed for untimeliness or on other procedural grounds without a determination first on the issue of Board jurisdiction over the appeal. In *Popham*, the Board modified *Funk*, holding that in an appeal that is arguably within the Board's jurisdiction, the case may be resolved on timeliness or other procedural grounds where the interests of fairness and judicial economy would not be served by addressing the issue of jurisdiction, because the case would have to be dismissed regardless of the outcome on the issue of jurisdiction.

Chairman Levinson dissented. He argued that the Board must make a determination of jurisdiction over an appeal before dismissing it on timeliness or other procedural grounds.

SEXUAL HARASSMENT

Hillen v. Department of the Army and Office of Special Counsel, DC07528510324-2 (September 18, 1991) 50 M.S.P.R. 293 (1991)

The agency removed the appellant, based on three charges of sexual harassment. The administrative judge reversed the agency action, and the Board affirmed the initial decision, modifying it to set forth the correct standards to be applied to claims of sexual harassment.

Consistent with the Supreme Court's decision in *Meritor* and the Federal Circuit's decision in *Downes*, the Board held that to establish hostile environment sexual harassment, as distinct from *quid pro quo* harassment, there must be a showing that the conduct at issue is sufficiently pervasive to alter the conditions of employment and create an abusive working environment, and that it is sufficiently severe and persistent to seriously affect the psychological well-being of an employee.

More specifically, the Board held that there must be a showing that the conduct occurred, that it was of a sexual nature, that it was unwelcome, and that it unreasonably interfered with an employee's work performance or created an intimidating, hostile, or offensive work environment. The Board held further that proof of "sexual intent" is not a requirement for proof of a sexual harassment charge under Title VII and that the conduct need not consist of explicit sexual advances.

INDEFINITE SUSPENSION AND ENFORCED LEAVE BASED ON SUSPENSION OF SECURITY CLEARANCE

Jones & McDaniel v. Department of the Navy, PH07529010116 & -0117 (July 5, 1991) 48 M.S.P.R. 680 (1991)

The Board ruled that an agency may suspend an employee indefinitely pending inquiry into his security clearance, despite the absence of reasonable cause to believe that he is guilty of a crime, but that the agency, in so doing, must afford the employee minimal due process. The Board noted that the Federal Circuit and the Board have accepted the extension of indefinite suspensions, originally limited to periods of inquiry into criminal misconduct, to other types of conduct. The Board also observed that OPM, the agency charged with regulating adverse actions, has authorized indefinite suspensions on bases other than criminal misconduct. Although the Board has jurisdiction over such indefinite suspensions, it lacks the authority, under the Supreme Court's decision in *Egan*, to review the merits of a suspension of an employee's security clearance that constitutes the basis of an indefinite suspension. The Board stated that it will consider, nonetheless, whether an employee was afforded minimal due process in the suspension of a security clearance.

Chairman Levinson dissented in part. He found no basis for the Board to require minimal due process for the suspension of a security clearance, as opposed to the revocation of a security clearance.

Alston v. Department of the Navy, AT07529010238 (July 5, 1991) 48 M.S.P.R. 694 (1991)

The Board ruled that an agency may place an employee on enforced leave pending inquiry into his security clearance, but that the agency's action will be reversed if it fails to afford the employee minimal due process in the suspension of his security access. Relying on its decision regarding indefinite suspensions in *Jones & McDaniel*, the Board held that enforced leave, which may be deemed a constructive indefinite suspension, was appropriate pending a security clearance investigation, and that the same limited review authority by the Board applied.

Chairman Levinson dissented in part for the same reason expressed in *Jones & McDaniel*.

APPENDIX B - SIGNIFICANT BOARD DECISIONS ORIGINAL JURISDICTION CASES

This appendix contains summaries of significant original jurisdiction cases decided by the Board during Fiscal Year 1991.

Board decisions are published in West Publishing Company's *United States Merit Systems Protection Board Reporter*. The M.S.P.R. citations below are to that publication.

WHISTLEBLOWER PROTECTION ACT - SPECIAL COUNSEL STAY REQUESTS

Special Counsel v. Department of the Navy, HQ12149010034 (November 2, 1990) 46 M.S.P.R. 274 (1990)

The Board held that an employee is protected under the WPA when he asserts that he has not made a protected disclosure, but that the agency took retaliatory action against him because it believes that he has. The Board found that the plain language of the WPA does not limit the protections of the statute to employees who actually make protected disclosures, because it prohibits an agency official from taking a personnel action against "any" employee because of a disclosure of information by "an" employee and does not require an individual to engage in protected activity to be protected by the statute. Further, the purposes of the WPA indicate that it should not be limited to those who actually make protected disclosures. Based on the legislative history, the Board noted that a primary purpose of the WPA was to encourage whistleblowers and that failure to protect those against whom management acted because it believed they had made disclosures would have a chilling effect on those who might make disclosures themselves.

Special Counsel v. Department of the Army, HQ12149110007 (April 22, 1991) 48 M.S.P.R. 13 (1991)

The Special Counsel requested a stay of the expiration of the temporary appointment of an employee, which was alleged to be in reprisal for six acts of whistleblowing by him. The Special Counsel's request was also based on conversations allegedly overheard by the involved employee and another employee that tended to support the existence of a retaliatory motive. The Board found that it would not be inappropriate under these circumstances to stay the action.

The Board noted that it has the authority to stay an action after its effective date, which would be necessary in this case. Although the expiration of an appointment is not an "action," the Board further noted that 5 U.S.C. 2302(b)(8) requires that an agency not "take or fail to take" an action because of whistleblowing, and here the expiration of the appointment resulted from the agency's failure to take a personnel action to extend it.

WHISTLEBLOWER PROTECTION ACT - SPECIAL COUNSEL DISCIPLINARY ACTIONS

Special Counsel v. Hathaway, HQ12159010005 (August 16, 1991) 49 M.S.P.R. 595 (1991)

This was the first complaint for disciplinary action filed by the Special Counsel under the Whistleblower Protection Act. In the eight-count complaint, the Special Counsel charged the respondent with four counts of engaging in prohibited personnel practices in violation of 5 U.S.C. 2302(b)(8) by taking personnel actions against an employee because of the employee's whistleblowing. In the other four counts, the Special Counsel presented an alternative theory that the same personnel actions violated 5 U.S.C. 2302(b)(9), which prohibits taking personnel actions because of—among other things—an individual's cooperating with or disclosing information to an agency Inspector General or the Special Counsel.

The Board noted that, in the WPA, the Congress, for the first time, set out a standard for determining the causal connection between protected disclosures (whistleblowing) and personnel actions taken in violation of 2302(b)(8). Previously, the Board applied different standards in Special Counsel corrective action and disciplinary action cases. Here, the Board held that the same standard, as set forth in the WPA, would be applied to both corrective actions and disciplinary actions brought by the Special Counsel.

The Board further held that: (1) where a decision maker has already determined to take a personnel action against an employee when he discovers that the employee is a whistleblower, he does not commit a prohibited personnel practice when he carries out the action despite the discovery; and (2) a denial of training is a personnel action for the purposes of the statute only if the training may reasonably be expected to lead to a personnel action.

With respect to the Special Counsel's alternative theory of violation of 2302(b)(9), the Board held that (b)(9) covers disclosures to an Inspector General or the Special Counsel that do not meet the precise terms of the actions described under (b)(8). Because the Board found that the disclosures here fell within the scope of (b)(8), it concluded that they were not covered also by (b)(9).

The Board sustained one of the eight counts, finding that the employee's protected disclosure was a contributing factor in the respondent's action against him and violated 5 U.S.C. 2302(b)(8). The Board ordered the respondent suspended for 30 days.

Special Counsel v. Eidmann, HQ12159010007 (August 16, 1991) 49 M.S.P.R. 614 (1991)

In this decision, the Board established that the savings provision of the Whistleblower Protection Act is controlled in a Special Counsel disciplinary action by the date on which the complaint is filed. The Board ruled, therefore, that the WPA applied to this case, even though the events that formed the basis of the complaint occurred prior to the effective date of the WPA.

The Board held that the respondent violated 5 U.S.C. 2302(b)(8), which prohibits taking a personnel action because of an individual's whistleblowing, when he terminated an employee's appointment in reprisal for protected disclosures. The Board ordered a two-grade demotion for a period of two years.

Special Counsel v. Marple, HQ12069010011 (July 29, 1991) 49 M.S.P.R. 528 (1991)

The Board held that the WPA applied here for the same reason set forth in *Special Counsel v. Eidmann* above.

The respondent was charged with taking a personnel action against an employee in reprisal for her testimony before a Senate subcommittee. The Board found that the testimony was a contributing factor in the decision and ordered the respondent demoted two grades for a period of one year.

APPENDIX C - SIGNIFICANT LITIGATION

Significant litigation involving the Board during Fiscal Year 1991 included the following:

Artmann v. Department of the Interior, 926 F.2d 1120 (Fed. Cir. 1991)

The court affirmed the Board's decision dismissing the petitioner's appeal for lack of jurisdiction because he did not establish that his reassignment from a subsequently upgraded position was a constructive demotion. In doing so, the court approved the Board's decision in *Russell v. Department of the Navy*, 6 M.S.P.R. 698 (1981), which formulated the test for determining whether a reassignment at the same grade constitutes a "constructive demotion." *Russell* held that reassignment from a position which, because of the issuance of a new classification standard or correction of a classification error, is worth a higher grade is a constructive demotion.

Cruz v. Department of the Navy, 934 F.2d 1240 (Fed. Cir. 1991) (en banc)

The court held that an allegation that a proposed removal was tainted by reprisal does not render the proposed removal appealable to the Board. The court affirmed the Board's decision dismissing the appeal for lack of jurisdiction.

The issue was whether Cruz's resignation in the face of a proposed removal was coerced and whether his allegation of reprisal for filing EEO complaints made the case a "mixed" one under 5 U.S.C. 7702. The court found that the Board has authority to determine whether a resignation is voluntary and that voluntariness should be determined by objective facts, not the subjective motives of the employee or the agency. The court ruled that once the Board found the resignation voluntary, it concluded correctly that it lacked jurisdiction over the appellant's claims and neither notification of mixed case appeal rights or transfer of the case to the district court was warranted.

Felzien v. Office of Personnel Management, 930 F.2d 898 (Fed. Cir. 1991)

The court held that the petitioner's duties of maintaining and using communications systems and equipment near fire sites qualified him as a firefighter within the contemplation of 5 U.S.C. 8331(21) and entitled him to early retirement credit under 5 U.S.C. 8336(c)(1) and 8339(d)(1). The court reversed the Board's decision that the petitioner was not entitled to retirement credit as a firefighter for his work as a forest electronics technician.

Perez v. Merit Systems Protection Board, 931 F.2d 853 (Fed. Cir. 1991)

The court affirmed the Board's decision that an agency's placing an employee in absent-without-leave status was not an appealable adverse action because the employee voluntarily chose not to report for work. The court rejected the argument that the agency's action was a "constructive suspension" for more than 14 days and thus an appealable action under 5 U.S.C. 7511 et seq.

Phillips v. General Services Administration, 924 F.2d 1577 (Fed. Cir. 1991)

The issue was whether the Board has authority to make an award of attorney fees for services before the court in connection with judicial review of a Board decision. The court held that applications for fees generated by work before the court under the Back Pay Act must be directed to the court.

Sannier, et al v. Merit Systems Protection Board, 931 F.2d 856 (Fed. Cir. 1991)

Holding that the petitioners did not provide sufficient evidence to substantiate their allegations of constructive removal, the court affirmed the Board's decision dismissing the appeal for lack of jurisdiction. This case involved the appeal of an alleged constructive removal by three administrative law judges, employees of the Social Security Administration, who claimed that, because of the perception that their office's productivity was low, the agency had invoked "punitive" measures, such as public criticism and diminished support staff, amounting to a constructive removal. The court held that, even if the facts recounted by the petitioners were taken as true, these facts did not amount to a constructive removal within the Board's jurisdiction.

Spruill v. Merit Systems Protection Board, No. 91-3245 (Fed. Cir. filed August 5, 1991)

In this issue of first impression under the Whistleblower Protection Act, the Board dismissed the petitioner's individual right of action appeal for lack of jurisdiction because his claim that he was suspended for three days in reprisal for filing an EEO complaint is not a protected whistleblowing activity under 5 U.S.C. 2302(b)(8), and, therefore, is not an appealable action under 5 U.S.C. 1221(a). The Board declined to read section 2302(b)(8), which protects an employee from reprisal for disclosing information the employee reasonably believes evidences a violation of any law, rule, or regulation, literally because a literal reading would be inconsistent with the structure of the statute and would render 5 U.S.C. 2302(b)(9) meaningless. Further, the Board concluded that its interpretation was supported by the legislative history of the Whistleblower Protection Act, which demonstrates that allegations concerning EEO matters were intended to be excluded from the Board's jurisdiction in individual right of action appeals. The petitioner argued before the court that the plain language of section 2302(b)(8) required the Board to adjudicate his appeal. (The case was pending before the court at the end of the fiscal year.)

Stewart v. United States Postal Service, 926 F.2d 1146 (Fed. Cir. 1991)

The court vacated the Board's decision dismissing the petitioner's appeal of his removal based on a finding that he had waived his appeal rights in a "last chance" settlement agreement. The court held that "[w]here an employee raises a nonfrivolous factual issue of compliance with a last chance agreement, the board must resolve that issue *before* addressing the scope and applicability of the appeal rights waiver." (Emphasis in original.)

Wood v. Merit Systems Protection Board, 938 F.2d 1280 (Fed. Cir. 1991)

The court held that the petitioner did not sustain a reduction in grade as a result of reclassification of her position. The court affirmed the Board's decision dismissing for lack of jurisdiction the petitioner's claim that the U.S. Postal Service improperly reduced her grade and pay. The decision established that a decrease in "annual equivalent salary" is not an appealable action when it results from the Postal Service's reducing the number of hours that the postal office operates.

Addison v. Department of Health and Human Services, No. 91-3097 (Fed. Cir. Sept. 25, 1991)

The court affirmed the Board's decision, which held that an agency may remove an employee based on incidents of unacceptable performance that occurred before a failed performance improvement plan as long as the performance related to the same critical element and occurred during the one year period preceding the date of the notice of removal. In affirming *Addison*, the court adopted and approved the reasoning of the Board's landmark decision in *Brown v. Veterans Administration*, 44 M.S.P.R. 635 (1990), which first addressed the evidence of unacceptable performance that may be relied upon to sustain a demotion or removal brought under 5 U.S.C. Chapter 43.

Gromo V. Office of Personnel Management, No. 91-3071 (Fed. Cir. September 19, 1991)

The petitioner, a retired widower, timely requested a survivor annuity benefit upon his remarriage. The annuity became effective in June 1986, after a five-month delay. Because the annuity was required by statute to commence retroactively in the month of January, one year following the petitioner's remarriage, OPM notified the petitioner that his annuity would be reduced in order to collect an \$820 overpayment.

The petitioner sought a waiver of the overpayment on the grounds that he had continued to make payments unnecessarily on four life insurance policies until he was notified of the effective date of the survivor benefit. The Federal Circuit reversed the Board's decision sustaining OPM's finding that recovery would not be against equity and good conscience and found that the Board's decision was an abuse of discretion. The court required OPM to waive recovery of the \$820 overpayment.

Davis v. Office of Personnel Management, 938 F.2d 1283 (Fed. Cir. 1991)

The Department of the Navy placed the petitioner's deceased husband in enforced leave status and ultimately removed him as a result of physical problems. The employee appealed both actions to the Board, but died during the appeal process. Although the Board upheld the removal, it found that the enforced leave status was improper and ordered back pay and benefits to be paid to the employee's estate. The petitioner filed applications for a disability annuity on her late husband's behalf and a survivor annuity on her own behalf. The court affirmed the Board's decision sustaining OPM's denial and held that OPM reasonably interpreted the applicable statute, 5 U.S.C. 8341(b)(1) and (d), to mean that an employee must personally file an application for a disability annuity.