



U.S. Merit Systems Protection Board

Annual Report For Fiscal Year 1993



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



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

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

Sirs:

In accordance with 5 U.S.C. § 1206, we are pleased to submit the Fifteenth Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during Fiscal Year 1993. It also includes statistical information regarding the Federal employee appeals and other cases decided by the Board.

During the fiscal year, the Board's administrative judges issued 7,811 decisions on appeals, stay requests, and addendum cases. The 3-member bipartisan Board issued 1,576 decisions on petitions for review (PFRs) of administrative judges' decisions and in other appellate cases. The Board also issued 37 decisions in cases arising under its original jurisdiction—Hatch Act cases, Special Counsel stay requests, proposed actions against administrative law judges, and requests to review regulations of the Office of Personnel Management (OPM).

The Board's decisions continue to be upheld by the U.S. Court of Appeals for the Federal Circuit to a significant extent. Of the final Board decisions reviewed by the court in Fiscal Year 1993, 95 percent were unchanged by the court's decisions.

With respect to its statutory mission to conduct studies of the merit systems and to review the significant actions of OPM, the Board completed seven reports during the fiscal year, including an update of its 1983 report on whistleblowing in the Federal Government and a report on the role of Federal personnel offices.

Respectfully submitted,

Ben L. Erdreich
Chairman

Jessica L. Parks
Vice Chairman

Antonio C. Amador
Member

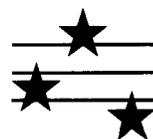


TABLE OF CONTENTS

BOARD MISSION AND JURISDICTION 6

BOARD MEMBERS 8

BOARD ORGANIZATION 10

REGIONAL OFFICIALS 13

REGIONAL OFFICE JURISDICTIONS 14

KINDS OF CASES AND HIGHLIGHTS

OF CASES DECIDED IN FY 1993 15

ADJUDICATION: APPELLATE JURISDICTION 20

ADJUDICATION: ORIGINAL JURISDICTION 26

LITIGATION 28

MERIT SYSTEMS STUDIES AND

REVIEWS OF OPM SIGNIFICANT ACTIONS 29

OUTREACH ACTIVITIES 32

ADMINISTRATION, FINANCE, AND

HUMAN RESOURCES 35

APPENDIX A - CASE PROCESSING STATISTICS 38

APPENDIX B - SIGNIFICANT BOARD DECISIONS

APPELLATE JURISDICTION CASES 54

APPENDIX C - SIGNIFICANT BOARD DECISIONS

ORIGINAL JURISDICTION CASES 62

APPENDIX D - SIGNIFICANT LITIGATION 67

APPENDIX E - MERIT SYSTEMS STUDIES AND

REVIEWS OF OPM SIGNIFICANT ACTIONS 71

BOARD MISSION AND JURISDICTION MISSION

The U.S. Merit Systems Protection Board (MSPB) was established by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95454, as a successor agency to the Civil Service Commission. It 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 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.

JURISDICTION *Appellate Jurisdiction*

The agency actions that Federal employees may appeal to the Board 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, and removals from the Senior Executive Service (SES) for failure to be recertified. Determinations by OPM in employment suitability and retirement matters are also appealable to the Board.

When an issue of prohibited discrimination is raised in connection with an appealable action, the Board has jurisdiction over both the appealable action and the discrimination issue. Such appeals are termed "mixed cases." In these cases, an appellant may ask the Equal Employment Opportunity Commission (EEOC) to review the final decision of the Board. If the EEOC disagrees with the Board's decision on the discrimination issue, the case is returned to the Board. The Board may concur with EEOC, affirm its previous decision, or affirm its previous decision with modifications. If the Board does not concur in the EEOC decision, the case is referred to the Special Panel for a final decision. (The Special Panel is composed of a Chairman appointed by the President, one member of the Board, and one

EEOC commissioner.)

Under the Whistleblower Protection Act of 1989 (WPA), personnel actions that are not normally appealable to the Board may result in the right to a Board appeal under certain circumstances. Included are 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.

For the Board to have jurisdiction over an appeal, 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 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, non-preference eligible supervisors and managers in the Postal Service gained Board appeal rights for adverse actions.

Under the 1990 Civil Service Due Process Amendments, approximately 100,000 additional employees in the excepted service 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, the Federal Bureau of Investigation, and the intelligence agencies, are excluded from the coverage of this law.

Original 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.

Judicial Review

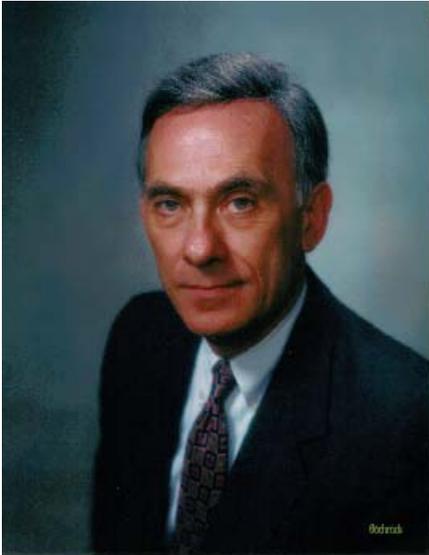
With two exceptions, judicial review of final Board decisions in both appellate and original jurisdiction cases lies in the U.S. Court of Appeals for the Federal Circuit. Board decisions in "mixed cases" may be appealed to the appropriate U.S. district court. (A Special Panel decision also may be appealed to the appropriate U.S. district court.) If review of all issues but the discrimination issue is requested, however, a "mixed case" appellant may elect review by the Federal Circuit. In Hatch Act cases involving State or local government employees in federally-funded positions, judicial review lies first in the U.S. district courts and then in the regional courts of appeals.

The Director of OPM may petition the Board for reconsideration of a final decision. The Director also may seek judicial review in the Federal Circuit of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.

BOARD MEMBERS

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, nonrenewable 7-year terms.

CHAIRMAN



From July 2, 1993

BEN L. ERDREICH became Board Chairman on July 2, 1993, following his nomination by President Clinton and confirmation by the Senate. His term appointment expires March 1, 2000. Previously, he served for 10 years in the U.S. Congress as the representative of the 6th District of Alabama. He was a member of the Committee on Banking, Finance and Urban Affairs and chaired its Subcommittee on Policy Research and Insurance. Mr. Erdreich was a Member of the Jefferson County (Alabama) Commission from 1974 to 1982 and served in the Alabama House of Representatives from 1970 to 1974. Prior to that, he was a partner in the firm of Cooper, Mitch & Crawford, Attorneys, in Birmingham, Alabama. He is a graduate of Yale University and received his J.D. degree from the University of Alabama School of Law.

Through July 1, 1993

DANIEL R. LEVINSON served as Board Chairman from August 15, 1986 through July 1, 1993. Previously, he was General Counsel of the U.S. Consumer Product Safety Commission and, prior to that, Deputy General Counsel of the Office of Personnel Management. Prior to joining OPM, Mr. Levinson was an associate and partner in the Washington, DC law firm of McGuiness & Williams.

VICE CHAIRMAN



JESSICA L. PARKS was designated Vice Chairman of the Board by President Clinton on July 30, 1993. Previously, she served as Member of the Board from May 18, 1990, following her nomination by President Bush and confirmation by the Senate. Her term appointment expires March 1, 1995. 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. She is a graduate of Tulane University and received her J.D. degree from the University of Tennessee College of Law.

MEMBER



ANTONIO C. AMADOR became Vice Chairman of the Board on November 1, 1990, following his nomination by President Bush and confirmation by the Senate. Currently, he serves as Member of the Board. His term appointment expires March 1, 1997. At the time of his appointment to the Board, 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. He received his law degree from the McGeorge School of Law, University of the Pacific.

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.

INDEPENDENT OFFICES

The **Office of the Clerk of the Board** receives and processes cases filed with the Board, rules on certain procedural matters, and issues the Board's Opinions and Orders. The office also certifies official records to the courts and Federal administrative agencies, maintains the Board's law library, manages the Board's records, and administers the Board's Freedom of Information Act, Privacy Act, and Government in the Sunshine Act programs.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

The **Office of the General Counsel**, as legal counsel to the Board, 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 and prepares proposed decisions and orders for the Board in original jurisdiction cases, compliance referral cases, and other assigned cases. The office manages legislative policy and congressional relations functions and conducts the Board's ethics program.

The **Office of the 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 office maintains a 24-hour hotline and conducts investigations of allegations involving Board employees.

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 **Office of Regional Operations** manages the appellate functions of the 11 MSPB regional offices, which receive and process the initial appeals filed with the Board, and reviews the quality of initial decisions issued by the Board's administrative judges. The administrative judges have the primary function of adjudicating appeals and issuing fair, timely, and well-reasoned decisions. Attorneys in the Office of Regional Operations provide legal and administrative counsel to the administrative judges and regional office directors. Attorneys in the Office of Regional Operations also adjudicate and issue initial decisions on assigned appeals.

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

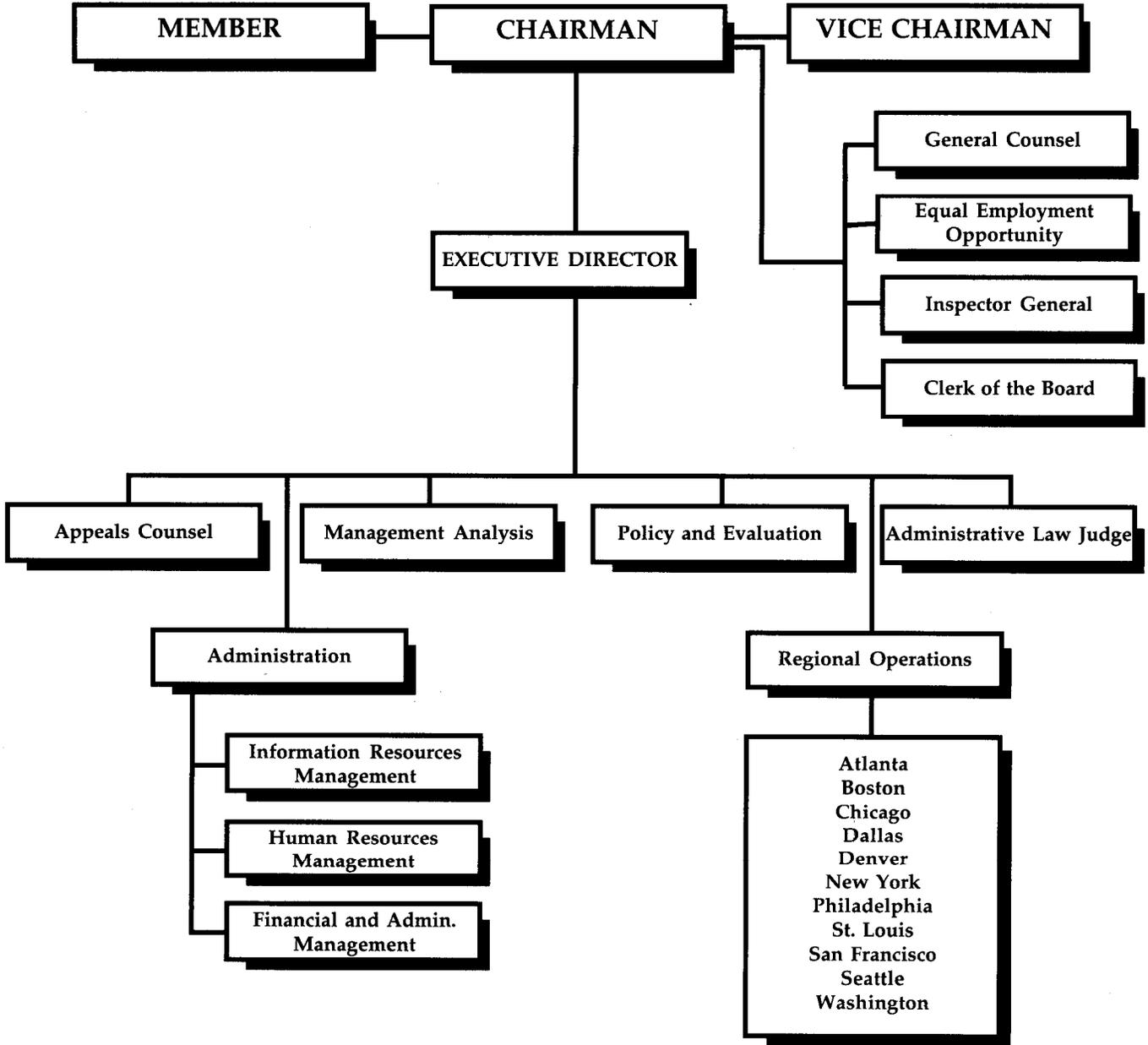
The **Office of the Administrative Law Judge** hears cases governed by the Administrative Procedure Act and other cases assigned by the Board.

The **Office of 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 directed to the President and the Congress.

The **Office of Management Analysis** develops and coordinates internal management programs and projects, including administrative and program management reviews of Board offices. The office manages the Board's public affairs program and produces the agency's annual report to the President and the Congress, the triennial study of cases decided, and public information publications. The office also performs case data analysis and internal studies.

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 and research responsibilities.

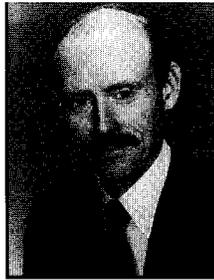
ORGANIZATION CHART



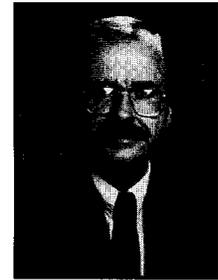
REGIONAL OFFICIALS



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



K. J. Payne
*Regional Director
Atlanta Office*



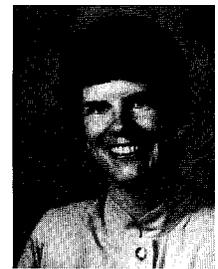
William Carroll
*Regional Director
Boston Office*



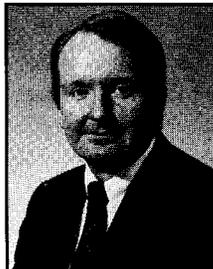
Martin W. Baumgaertner
*Regional Director
Chicago Office*



Paula A. Latshaw
*Regional Director
Dallas Office*



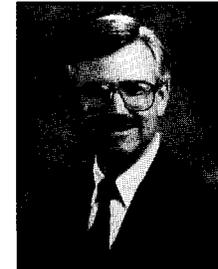
Gail E. Skaggs
*Regional Director
Denver Office*



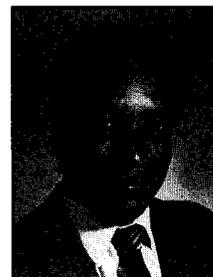
Sean P. Walsh
*Regional Director
New York Office*



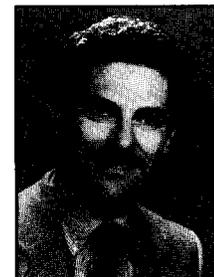
Lonnie Crawford
*Regional Director
Philadelphia Office*



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



Denis Marachi
*Regional Director
San Francisco Office
Office*

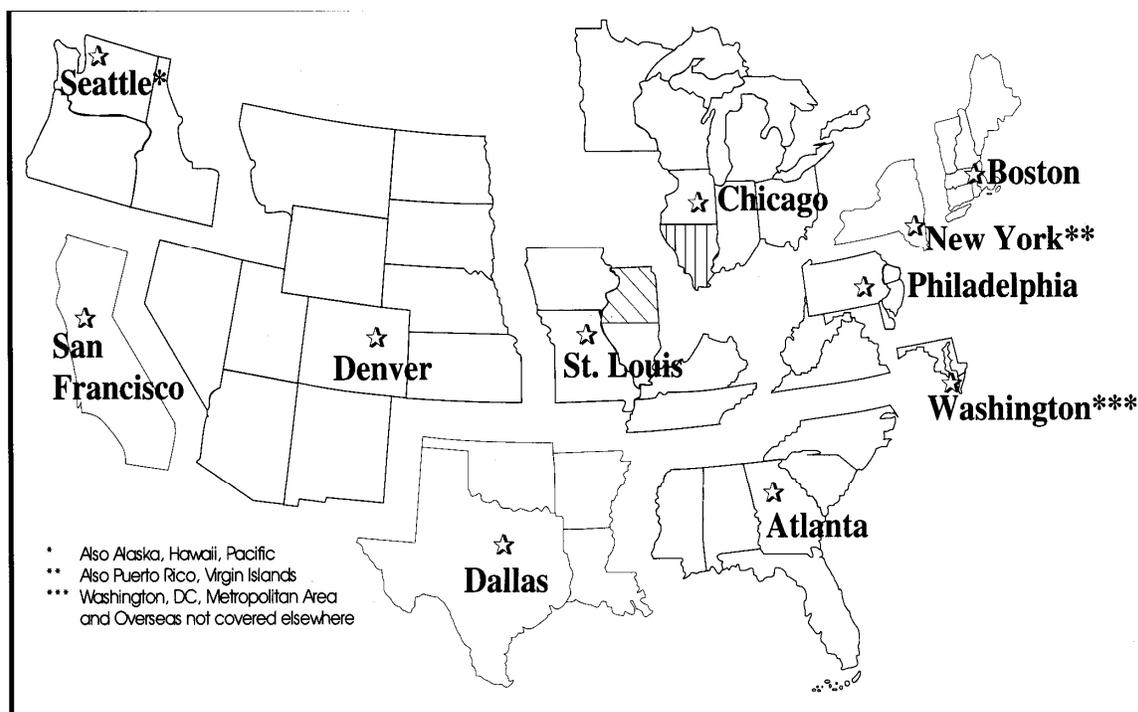


Carl Berkenwald
*Regional Director
Seattle Office*



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

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, Minnesota, 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

KINDS OF CASES AND HIGHLIGHTS OF CASES DECIDED IN FY 1993

KINDS OF CASES

Initial appellate jurisdiction cases are adjudicated by administrative judges in the Board's regional offices. Appeals and related cases also are assigned regularly to the Office of Regional Operations and the Office of the Chief Administrative Law Judge at Board headquarters. Attorneys in those offices act as administrative judges and issue initial decisions in these cases. The kinds of cases in which the Board's administrative judges issue initial decisions or orders are:

- *Appeal (or Initial Appeal)* - A request by an appellant that the Board review an agency action.
- *Stay Request* - A request that the Board order a stay of an agency action (authorized only where the appellant alleges that the action was or is to be taken because of whistleblowing).
- *Motion for Attorney Fees* - A request by an appellant who prevails in an appeal that the Board order the agency to pay the appellant's attorney fees.
- *Petition for Enforcement* - A request by a party to an appeal that the Board enforce its final decision.
- *Request for Compensatory Damages* - A request by an appellant who prevails in a mixed case appeal on the basis of discrimination for payment of compensatory damages under the Civil Rights Act of 1991.
- *Remand* - A case returned by the Board to an administrative judge, after an initial decision on an appeal has been issued, for additional processing and issuance of a new initial decision.

Attorney fee cases, petitions for enforcement, requests for compensatory damages, and remands, as a group, are termed "addendum cases" by the Board.

Approximately 20 percent of initial appeals decided result in the filing of a petition for review at Board headquarters. Initial decisions in addendum cases and orders issued on stay requests are also subject to review by the Board. The kinds of appellate cases in which the Board issues final decisions or orders are:

- *Petition for Review* - A request by a party that the Board review an initial decision of an administrative judge. A petition for review may be filed with respect to an initial decision on an appeal or in an addendum case.
- *Interlocutory Appeal of Stay Order* - A request by a party, certified to the Board by an administrative judge, that the Board review the administrative judge's order ruling on a stay request.
-

Reopening on the Board's Own Motion - A case that the Board reopens on its own motion, to reconsider either an initial decision of an administrative judge or a final Board decision.

- *OPM Request for Reconsideration* - A request by the Director of OPM that the Board reconsider a final decision.
- *Court Remand* - A case returned to the Board by a court, after an appellant or the Director of OPM has sought judicial review of a final Board decision, for issuance of a new decision. Also, a case returned by a court where the Board has requested remand.
- *EEOC Non-concurrence* - A mixed case returned to the Board by the EEOC, after an appellant has sought EEOC review of a Board decision, in which the EEOC does not concur with the Board decision on the discrimination issue.
- *Compliance Referral* - A case referred to the Board by an administrative judge for enforcement of a final Board decision, upon the administrative judge's finding that a party is not in compliance.

The Board also has authority to review an arbitrator's award when the subject of the grievance is an action appealable to the Board and the grievant raises a discrimination issue in connection with the action. Petitions to review an arbitrator's award are filed at Board headquarters, and decisions are issued by the Board. Attorney fee requests and petitions for enforcement related to Board decisions in arbitration cases are referred to a headquarters or regional office for issuance of an initial decision, which is then subject to a petition for review by the Board.

The Board issues final decisions in initial cases that arise under its original jurisdiction—Special Counsel complaints, Special Counsel stay requests, proposed actions against administrative law judges, and requests to review OPM regulations. With respect to attorney fee requests and petitions for enforcement related to Board decisions in Special Counsel and administrative law judge cases, an initial decision is issued by the Chief Administrative Law Judge, which is then subject to a petition for review by the Board. Other kinds of cases that may arise from Board decisions in original jurisdiction cases include OPM requests for reconsideration, court remands, and compliance referrals.

In one kind of original jurisdiction case, the law provides that there is no decision by the Board (or any of the Board's judges). This is the SES performance-based removal case, in which an informal hearing is held by the Chief Administrative Law Judge, but there is no action by the Board.

SUMMARY OF MSPB DECISIONS AND ORDERS ISSUED IN FY 1993

Initial Decisions:	
Appeals	6,861
Addendum Cases ¹	849
Stay Requests ²	101
TOTAL	7,811

Board Decisions:	
Appellate Jurisdiction:	
PFRs - Appeals	1,317
PFRs - Addendum Cases	174
Interlocutory Appeals - Stays	0
Reopenings	4
Court Remands	16
Compliance Referrals	53
EEOC Non-concurrence	1
Arbitration	11
Subtotal	1,576
Original Jurisdiction	37
(see separate report)	
TOTAL	1,613

1 Attorney fee, compliance, compensatory damages, and remand cases.

2 Includes 81 stay requests in whistleblower cases and 20 in nonwhistleblower cases.

NOTE: Board decisions on interlocutory appeals are not included in the above figures. In FY 1993, the Board decided 9 interlocutory appeals not involving stays; 4 of these were in USPS reorganization cases.

HIGHLIGHTS OF CASES DECIDED IN FY 1993

Appellate Jurisdiction -Initial Decisions and Orders

- *Number of Decisions Issued* - Administrative judges issued a total of 7,811 decisions in FY 1993. Of these, 6,861 were initial decisions on appeals, and 849 were initial decisions in addendum cases. There were 101 orders ruling on stay requests-81 in whistleblower cases and 20 in non-whistleblower cases. (Stay requests are authorized in whistleblower cases only. Appellants, however, sometimes file stay requests in cases in which no whistleblower issues are involved.)

- *Disposition* - Of the 6,861 initial appeals decided, 3,017 (44 percent) were dismissed. (Of the dismissals, 87 percent were for such reasons as lack of jurisdiction, agency cancellation, and appellant withdrawal of the appeal. The remainder of the dismissals were for timeliness.) Of the 3,844 (56 percent) appeals that were not dismissed, 1,973 (51 percent) were settled, and 1,871 (49 percent) were adjudicated on the merits. Considering the number of appeals settled (1,973) and those in which the agency action was reversed or mitigated (468), appellants received relief in 63.5 percent of the appeals not dismissed.

RELIEF FOR APPELLANTS

INITIAL DECISIONS IN APPEALS NOT DISMISSED - FY 1993

Number Not Dismissed	Relief for Appellant *	
	Settled	1,973
	Reversed	388
	Mitigated	80
3,844		2,441 (63.5 %)

* "Relief for Appellant" means the case was settled, or the initial decision reversed or mitigated the agency action (or corrective action was ordered in an IRA).

- *Settlement Rate* - The rate of settlement of cases not dismissed was 51 percent. The settlement rate for adverse action cases was 64 percent; for performance cases, 65 percent; and for denials of within-grade increases, 65 percent.
- *Processing Time* - The average processing time for initial appeals was 79 days, the same as in FY 1992. Of the initial appeals decided, 96 percent were decided within 120 days.
- *Types of Actions Appealed* - Of the initial appeals decided, 54 percent were appeals of agency adverse actions, 5 percent were RIF appeals, and 4 percent were appeals of performance-based actions. Retirement cases (both CSRS and FERS) accounted for 17 percent of the total, and the remainder were based on other types of agency actions.

- *Whistleblower Appeals* - There were 532 whistleblower appeals and stay requests decided. Of this number, 221 were individual right of action (IRA) appeals in which the appellant was required to exhaust the procedures of the Office of Special Counsel, 230 were direct appeals to the Board that included an allegation of reprisal for whistleblowing, and 81 were requests to stay an action allegedly based on whistleblowing.
- *Relief for Appellants in Whistleblower Appeals* - Of the 451 whistleblower appeals decided (221 IRA appeals and 230 appeals of otherwise appealable actions), 253 (56 percent) were dismissed. In the other 198 (44 percent) whistleblower appeals, appellants received relief—either through settlement or a decision reversing or mitigating the agency action (or ordering corrective action in an IRA)—in 135 (68 percent).

INITIAL DECISIONS IN WHISTLEBLOWER APPEALS NOT DISMISSED - FY 1993

Whistleblower Case Type	Number Not Dismissed	Relief for Appellant*
OAs	114	72 (63 %)
IRAs	84	63 (75 %)
Total	198	135 (68 %)

* "Relief for Appellant" means the case was settled, or the initial decision reversed or mitigated the agency action (or corrective action was ordered in an IRA).

- *Mixed Cases* - Allegations of discrimination were raised in 2,029 of the initial appeals decided; however, the allegation was withdrawn in 1,196 of those appeals. The remaining 833 mixed case appeals resulted in a finding of no discrimination in 817 (98 percent) and a finding of discrimination in 16 (2 percent).

Appellate and Original Jurisdiction -Final Board Decisions and Orders

- *Number of Decisions Issued* - The 3-member Board issued a total of 1,613 decisions in FY 1993. Of these, 1,317 were decisions on petitions for review of initial decisions on appeals, 174 were decisions on petitions for review of initial decisions in addendum cases, 85 were decisions in other appellate jurisdiction cases, and 37 were decisions in original jurisdiction cases.

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Disposition - Of the petitions for review of initial decisions on appeals, 9 percent were dismissed, 70 percent were denied for failure to meet the criteria for review, 9 percent were denied but simultaneously reopened by the Board, and 12 percent were granted. Thus, 21 percent of the petitions for review of initial decisions on appeals were either granted, or denied but simultaneously reopened. Of the decisions in these cases, 57 percent affirmed the initial decision, 18 percent reversed it, and 19 percent either remanded or forwarded the case to the administrative judge. In the remaining 6 percent, the case was subject to another disposition.

- *Processing Time* - The average processing time for petitions for review of initial decisions on appeals was 131 days, compared to 165 days in FY 1992. The Board processed 78 percent of these cases in 110 days or less, averaging 77 days.
- *Other Appellate Cases* - The Board issued 3 decisions in cases that it reopened on its own motion (excluding decisions on petitions for review where the Board denied the petition but simultaneously reopened the case), 1 on an OPM request for reconsideration, and 16 on court remands. The Board also issued 1 decision in an EEOC non-concurrence case, 53 in compliance referrals, and 11 on petitions to review an arbitrator's award.
- *Original Jurisdiction Cases* - Of the 37 original jurisdiction case decisions, 16 were Hatch Act cases brought by the Special Counsel, 14 were Special Counsel stay requests, 5 were proposed actions against administrative law judges, and 2 were requests to review an OPM regulation.

Judicial Review

- Of the 651 final Board decisions reviewed by the U.S. Court of Appeals for the Federal Circuit in FY 1993, 95 percent were left unchanged (case dismissed or Board decision affirmed). The court affirmed the Board decision in 90 percent of the cases it adjudicated.

ORIGINAL JURISDICTION DECISIONS ISSUED IN FY 1993

Case Type	Number of Decisions	Disposition
OSC Corrective Actions	0	
OSC Disciplinary Actions - Non-Hatch Act	0	
OSC Disciplinary Actions - Hatch Act:		
Federal/DC	6	Removal ordered - 2 Suspension ordered - 1 Settled - 3
State/Local	7	Removal ordered - 5 Settled - 1
Withholding of Funds	1	Remanded to CALF – 1 Ordered funds withheld
Stay of Board Order Pending Judicial Review	1	Denied
Stay of Proceedings Pending Board Decision on Interlocutory Appeal	1	Granted
OSC Stay Requests:		
Initial Requests	6	Granted - 5 Withdrawn - 1
Requests for Extension of Stay	6	Granted
OSC Request for Enforcement	1	Dismissed (Moot)
Agency Motion for Termination of Stay *	1	Denied
Actions Against AJs	5	Settled - 4 Remanded to CALJ - 1
Requests for Regulation Review	2	Dismissed (Jurisdiction) - 1 Denied - 1
 TOTAL	 37	

* A second agency motion for termination of a stay was decided as a part of Board decision on OSC request for extension of the stay.

ADJUDICATION: APPELLATE JURISDICTION

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 agency 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. 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.

Ben L. Erdreich is sworn in as MSPB Chairman by U.S. District Court Judge U.W. Clemon in Birmingham, Alabama, July 2, 1993. Photo used with permission of The Birmingham News.

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.

With respect to mixed cases, if an appellant has first filed a discrimination complaint with the agency, the appellant may file an appeal with the Board within 20 days after receipt of the agency's decision. If the agency has not resolved the discrimination complaint within 120 days of its filing, the appellant may file an appeal with the Board at any time after the 120-day time limit expires. If an appellant elects to file a mixed case appeal with the Board without first filing a discrimination complaint with the agency, the appeal must be filed within 20 days after the effective date of the agency action.

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 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. Under certain circumstances, the appellant may have a right to a hearing on the issues of jurisdiction and timeliness.

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, with copies of the record available to the parties. Once the record is closed, an initial decision is issued by the administrative judge.

Appeals involving classified national security information and appeals from MSPB employees are assigned to the Chief Administrative Law Judge at headquarters for adjudication. The Chief Administrative Law Judge hears these cases and issues an initial decision.

An 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. 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, the agency must nevertheless restore the appellant to pay and benefits status. 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.

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.

FISCAL YEAR 1993 ACTIVITIES REGIONAL OFFICES

Regional office receipts of new cases in Fiscal Year 1993 were down 7 percent from the previous fiscal year. This decrease, however, followed a 17 percent increase from Fiscal Year 1987, the year in which significant expansions of Board jurisdiction began, to Fiscal Year 1992.

The number of initial decisions issued in Fiscal Year 1993 was 7,811, a decrease of 7 percent from the previous fiscal year. Decisions on initial appeals were down 6 percent, and those in addendum cases were down 13 percent. Decisions on stay requests, however, increased 4 percent.



Thomas J. Lanphear, Director, Office of Regional Operations (center), meets with new administrative judges.

The Board continued to review the quality of initial decisions issued by its administrative judges. Reviews were conducted of initial decisions issued by administrative judges in the Atlanta, Boston, Denver, New York, and Washington regional offices. In addition, on-site visits were made to the Boston, Denver, and New York regional offices in connection with the reviews.

The Office of Regional Operations developed a guide to assist the Board in gathering information about case processing in the regional offices. In connection with this guide, questionnaires were distributed, and administrative judges and chief administrative judges/regional directors were interviewed, in the Chicago, Denver, and New York regional offices. The information obtained will be used by the Board to improve and facilitate case adjudication.

The Board's Chief Administrative Judges' Conference was held in Washington, DC, in June 1993. The purposes of the conference were to promote consistency in applying Board procedures and to provide an opportunity for the chief administrative judges to discuss regional office issues and approaches for addressing those issues. The chief administrative judges participated in training sessions and discussions and heard presentations from headquarters staff and outside speakers. The topics considered included labor relations; recruiting, interviewing, and accommodating individuals with disabilities; current legislation; developments in the law; ethics; and financial and personnel matters. The chief administrative judges also heard a presentation by Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit and participated in a tour of the U.S. Supreme Court.

A week-long training session for the Board's most recently hired

administrative judges was held in September 1993 in Washington, DC. The purposes of the session were to familiarize the administrative judges with headquarters staff and their functions and to provide substantive training by more experienced administrative judges in practical aspects of the adjudicatory process, such as doing legal research, conducting prehearing conferences and hearings, and writing high quality initial decisions. In addition, a number of the Board's administrative judges completed courses at the National Judicial College and Harvard Law School during the fiscal year.



Vice Chairman Parks and The Honorable Randall R. Rader, Judge, U.S. Court of Appeals for the Federal Circuit.

FISCAL YEAR 1993 ACTIVITIES - HEADQUARTERS

The number of decisions issued by the Board on petitions for review of initial decisions, both on appeals and in addendum cases, was 1,491, a decrease of 17 percent from the previous fiscal year. Receipts of new petitions for review were down 2 percent.

In decisions issued during Fiscal Year 1993, the Board continued to develop its case law under the Whistleblower Protection Act, including definitions of "gross mismanagement" and "gross waste of funds." The Board also issued important precedential decisions dealing with questions of awarding interim relief to retirement annuitants who prevail before the Board, the timeliness of filings with the Board via private express companies, and participation in an agency's leave transfer program.

In the last quarter of the fiscal year, the Board developed plans for a pilot project to institute alternative dispute resolution at the Board level of the appellate process. A task force appointed by the Chairman gathered information on similar programs in the appellate courts and developed procedures to implement the pilot project. The project was expected to be launched early in Fiscal Year 1994.

POSTAL SERVICE REORGANIZATION APPEALS

In effecting a major restructuring in late 1992, the U.S. Postal Service abolished thousands of management positions, moved several thousand employees to lower graded positions, and offered buyouts as an inducement to employees to retire. The Postal Service maintained that the restructuring was not a reduction in force and that personnel actions taken in the course of the restructuring, therefore, were not appealable to the Board. By the end of the fiscal year, however, the Board had received 277 appeals of actions resulting from the Postal Service reorganization.

In general, appellants alleged that they had been affected by an appealable RIF action or that they had suffered an appealable adverse action, such as a reduction in grade or pay. Preference eligible employees in the Postal Service may appeal both RIF actions and adverse actions to the Board. Supervisors and managers without veterans' preference, however, may appeal adverse actions only.

Most of the initial decisions issued by the Board's administrative judges prior to July 1993 dismissed the appeals, generally for lack of jurisdiction, although some were withdrawn by appellants. In a few decisions issued in the spring and early summer, however, administrative judges found that the Board did have jurisdiction and reversed the agency actions. These decisions covered both RIF actions, in which the judge determined that the appellant had been demoted in a RIF, and adverse actions, in which the judge determined that the appellant had suffered a reduction in grade.

In order to have the 3-member Board rule on the issue of jurisdiction as soon as possible, the Postal Service sought an interlocutory appeal of the administrative judge's ruling finding jurisdiction in *Brown v. USPS*, a RIF appeal pending in the St. Louis Regional Office. The judge certified the interlocutory appeal to the Board, and, on July 21, 1993, the Board issued its decision, finding that the Postal Service restructuring as it affected the appellant constituted a demotion by RIF. The Board then returned the case to the judge to complete adjudication. On July 30, 1993, the Board issued decisions on three other pending interlocutory appeals (*DiPietro v. USPS*, *Hanson v. USPS*, and *Sakagawa v. USPS*), making the same findings and then returning the cases to the administrative judges to complete adjudication.

As administrative judges began applying the Board's *Brown* decision, in both RIF and adverse action appeals, they reversed the Postal Service in additional appeals. The Postal Service then filed petitions for Board review of a number of the initial decisions issued by administrative judges. In one of these, *Roberts v. USPS*, the Director of OPM notified the Board that he was exercising his statutory right to intervene in the case. In late September, however, the Postal Service withdrew its petition for review in *Roberts*. At the end of the fiscal year, it was unclear what further steps the Postal Service and/or the OPM Director might take.

There were a total of 172 Postal Service reorganization appeals decided in Fiscal Year 1993. Of these, 102 (59 percent) were dismissed. Of the 70 cases not dismissed, 13 (19 percent) were settled, and the remaining 57 (81 percent) were adjudicated on the merits. The agency action was reversed in all of the adjudicated cases.

Petitions for review were filed in 69 cases, double the usual rate for these filings. In addition to the four Board decisions on interlocutory appeals noted above, the Board issued three decisions on petitions for review. One was dismissed because the petition was withdrawn, and one was denied, allowing the initial decision that dismissed for lack of jurisdiction to become final. In the third case (*Barnett v. USPS*, September 29, 1993), the Board denied the petition for failure to meet the criteria for review, but reopened the case on its own motion and remanded it to the administrative judge to make a determination of jurisdiction, applying the Board's decision in *Brown*.

See Appendix A for statistical information on cases decided by the Board

during Fiscal Year 1993.

See Appendix B for summaries of significant Board decisions on appeals issued during Fiscal Year 1993.

Appellate Case Processing

- Approximately 600 Board decisions are filed after Initial Appeal decision becomes final or after three member Board review and decision.

- Approximately 1600 Petitions for Review of Initial Appeals and Addendum Cases filed yearly with the Clerk of the Board. Reviewed by the Office of Appeals Counsel.

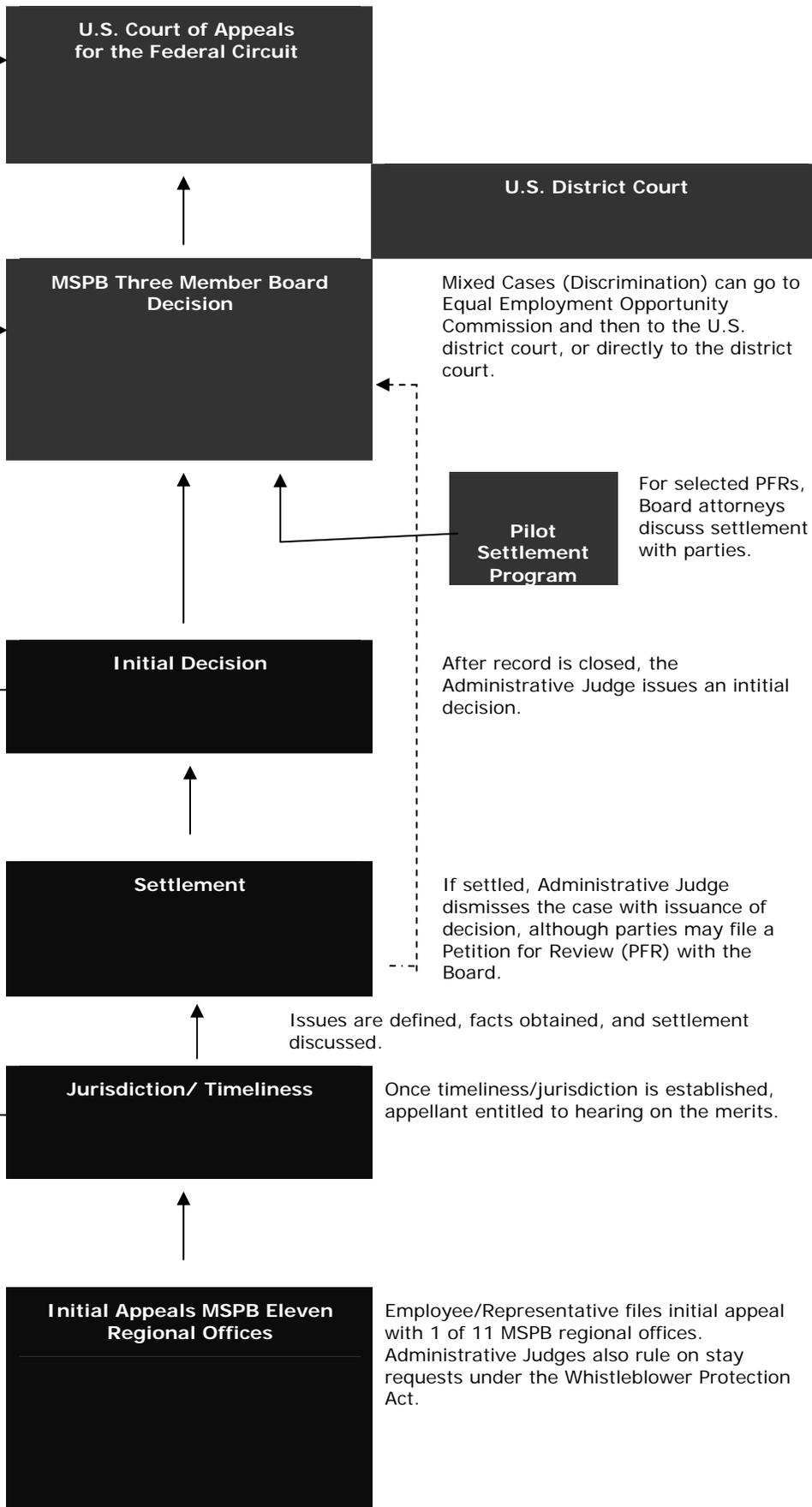
- Other Appellate Cases: Enforcement; Equal Employment Opportunity Commission Non-Concurrence; and Arbitration Appeals.

If not settled, hearing, decision or decision on the record. Hearings generally opened to the public.

Adverse decisions on Jurisdiction/Timeliness Petition for Review (PFR) to three member Board.

- Approximately 8,000 Initial Appeals and Addendums yearly.

- Appeal Types: Adverse Action (Removal, Suspension, Demotion); Probationer; Reduction-in-Force; Performance; Within-Grade Denial; Suitability; Retirement; Whistleblower, Attorney Fee, Compliance, Remand, and Compensatory Damages.



Mixed Cases (Discrimination) can go to Equal Employment Opportunity Commission and then to the U.S. district court, or directly to the district court.

For selected PFRs, Board attorneys discuss settlement with parties.

After record is closed, the Administrative Judge issues an initial decision.

If settled, Administrative Judge dismisses the case with issuance of decision, although parties may file a Petition for Review (PFR) with the Board.

Issues are defined, facts obtained, and settlement discussed.

Once timeliness/jurisdiction is established, appellant entitled to hearing on the merits.

Employee/Representative files initial appeal with 1 of 11 MSPB regional offices. Administrative Judges also rule on stay requests under the Whistleblower Protection Act.

ADJUDICATION: 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 Chief 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, while a request for extension of a stay must be acted on by the full Board.

In SES performance-based removal cases, the Chief 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.

Other cases included in the Board's original jurisdiction caseload include requests for attorney fees, petitions for enforcement, compliance referrals, court remands, and OPM requests for reconsideration arising out of Board decisions in original jurisdiction cases.



Pictured left to right, Bettye Steve, Legal Technician, and Carol Duncan, Legislative Relations Assistant, OGC.

FISCAL YEAR 1993 ACTIVITIES

The Board issued a total of 37 decisions in original jurisdiction cases in Fiscal Year 1993, more than twice the number issued in the previous fiscal year (16). The increase was attributable primarily to significant increases in the

number of Hatch Act cases and Special Counsel stay requests decided.

Hatch Act Cases

There were 16 Board decisions in Hatch Act cases, of which 7 were final decisions in cases involving State or local government employees in federally-funded positions, 6 were final decisions in cases involving Federal or District of Columbia Government employees, and 3 were decisions in related matters. This compares to six such decisions the previous fiscal year.

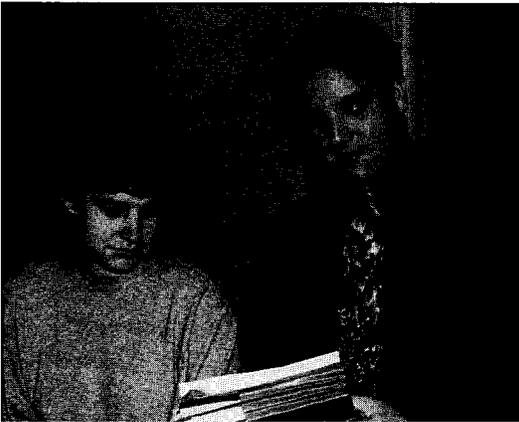
In five of the Hatch Act cases involving State or local government employees, the Board found that the employees had violated the Hatch Act and that the circumstances of the cases warranted their removal. Of the other two Hatch Act cases involving State or local government employees, one was settled, and one was remanded to the Chief Administrative Law Judge for further

proceedings.

In all six of the cases involving Federal or D.C. Government employees, the Board found that the employees had violated the Hatch Act, but it found removal warranted in only two cases. In three of the other cases, the Board approved settlement agreements imposing suspensions. In the sixth case, the Board imposed a 30-day suspension.

The Board issued three other decisions in Hatch Act matters during the fiscal year. In one, the Board ordered Federal funds withheld from a State agency because it failed to remove an employee who had violated the Hatch Act after the Board found that removal was warranted. A second decision denied a Federal employee's request for a stay of the Board's decision ordering him suspended for 30 days for violation of the Hatch Act, pending judicial review of the Board's decision.

In the third case, the Board granted a stay of proceedings before the Chief Administrative Law Judge pending its decision on an interlocutory appeal on the question of jurisdiction. The essential question was whether the respondents, all employees of the State of Tennessee, are covered by the Hatch Act. The respondents maintained that, owing to unique State law, they were not employed by a State agency within the executive branch and, thus, were beyond the reach of the Hatch Act. The Board found there was good cause for a stay of the proceedings because the question before it on interlocutory appeal involved the Board's jurisdiction over the case and should be decided before the merits of the case. (See *Special Counsel v. Bissell, et al.*, summarized in Appendix C.)



Pictured left to right, OGC Attorneys, Melissa Pollack and Eric Flores.

Special Counsel Stay Requests

During the fiscal year, the Board issued 14 decisions involving Special Counsel stay requests and related matters. Of these, six were on initial 45-day stays requested by the Special Counsel, six were on Special Counsel requests for extensions of stays, one was on a compliance matter, and one was on an agency motion for termination of a stay. This compares to four decisions on Special Counsel stay requests and related matters the previous fiscal year. All but one of the initial Special Counsel stay requests were filed on behalf of whistleblowers.

The Special Counsel withdrew one of the initial requests for a stay, and the other five were granted by a member of the Board. All six of the Special Counsel requests for extensions of stays were granted by the Board. The one compliance matter, a Special Counsel request for enforcement of a stay, was dismissed when the agency complied. The Board issued one decision denying an agency motion for termination of a stay; it denied a second such motion as a part of a decision on a Special Counsel request for extension of a stay.

Actions Against Administrative Law Judges

The Board issued five decisions in administrative law judge disciplinary action cases in Fiscal Year 1993. Four of the cases were resolved by settlement agreements approved by the Board. In the fifth case, the Board held that an administrative law judge's adjudicatory errors can establish good cause for disciplinary action and that such an action does not interfere with the administrative law judge's decision-making independence. The case was remanded to the Chief Administrative Law Judge for further proceedings.

Regulation Reviews

The Board issued decisions on two requests for review of agency implementation of an Office of Personnel Management regulation during the fiscal year. In one case, the Board denied the request to review the agency's implementation of a provision of the Federal Personnel Manual because it was substantially identical to a statute and the Board does not have authority to review an agency's implementation of a statutory provision. The other request was dismissed because it did not establish a basis for Board jurisdiction.

See Appendix C for summaries of significant Board decisions issued in original jurisdiction cases during Fiscal Year 1993.

LITIGATION

The Board defends its final decisions on appeals, except those involving the merits of the underlying personnel action or a request for attorney fees, before the U.S. Court of Appeals for the Federal Circuit, its primary reviewing court. The Board also defends many of the final decisions issued under its original jurisdiction authority before the Federal Circuit. (Appeals from Board decisions in Hatch Act cases involving employees of State and local governments, are heard by Federal district courts.) In Fiscal Year 1993, the Board defended 185 cases before the Federal Circuit, a 22.5 percent increase over the number of cases the Board defended in the previous fiscal year.

In Fiscal Year 1993, the Federal Circuit issued a precedential decision affirming the Board's decision in a Special Counsel case where the Board had disciplined a Federal agency management official for taking retaliatory action against an employee because of protected whistleblowing disclosures. *Hathaway v. Merit Systems Protection Board*, 981 F.2d 1237 (1992).

Other active litigation includes cases in which OPM petitions for review in the Federal Circuit, subpoena enforcement cases, and discrimination cases filed in the various Federal district courts when the Board is named as a defendant. This fiscal year, Board attorneys defended two decisions protecting the due process rights of employees. These decisions, which the Director of OPM appealed to the Federal Circuit, are *Brook v. Hillen and Merit Systems Protection Board*, No. 92-3601, appeal from *Hillen v. Department of the Army*, 54 M.S.P.R. 58 (1992), and *Brook v. Nazelrod and Merit Systems Protection Board*, No. 93-3017, appeal from *Nazelrod v. Department of Justice*, 54 M.S.P.R. 461 (1992). In *Hillen*, the Board found that the Department of the Army improperly removed the appellant under anti-discrimination regulations and rejected OPM's argument that the agency also

brought the charges under its own discrimination policy. In *Nazelrod*, the Board held that a charge of theft requires proof of criminal intent.



Pictured left to right, OGC Attorney, Michael Martin, and Martha Schneider Assistant General Counsel.

The Board also litigated a precedential subpoena enforcement action in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed a Federal district court decision which held that a Texas statute creating a physician-patient privilege did not bar enforcement of the Board's subpoenas. *Merit Systems Protection Board v. Dill*, No. 92-5750 (5th Cir. Aug. 20, 1993), and *Gilbreath v. Merit Systems Protection Board*, No. 92-5702 (5th Cir. Aug. 20, 1993). The effect of the appeals court's decision is to vacate a State court order that enjoined enforcement of the subpoenas.

During Fiscal Year 1993, the Board monitored approximately 700 cases involving appeals of decisions issued by the Board under its appellate jurisdiction. These cases are filed in the United States Court of Appeals for the Federal Circuit. Although the Department of Justice defends the employing agency against whom the appeal is filed, the Board monitors this litigation closely, evaluating the case to determine if Board intervention is appropriate, responding to inquiries, assisting in drafting briefs, and analyzing the court's decisions in these cases.

See Appendix D for summaries of the significant litigation activities of the Board during Fiscal Year 1993.

MERIT SYSTEMS STUDIES AND REVIEWS OF OPM SIGNIFICANT ACTIONS

THE STATUTORY STUDIES FUNCTION

The CSRA assigned the Board, in addition to its adjudicatory functions, the responsibilities of reviewing the significant actions of OPM and conducting studies of the civil service and other merit systems in the Executive Branch. The Board's legislative mandate with respect to its OPM oversight and studies functions focuses on ensuring compliance with the merit system principles and keeping the merit systems free from prohibited personnel practices.

Typically, the Board solicits potential study topics from a wide variety of sources in developing its OPM oversight and studies agenda. The Board's studies, usually governmentwide in scope, are conducted through a variety of research methods, including mail and telephone surveys, on-site systems reviews, written interrogatories, formal discussions with subject-matter experts, computer-based data analysis, and reviews of secondary source materials.

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

STUDIES COMPLETED/STUDIES PUBLISHED IN FISCAL YEAR 1993

During Fiscal Year 1993, the Board completed seven studies of important civil service issues. Reports of two of these studies were published by the end of the fiscal year, and a third was being printed; the others were to be published early in Fiscal Year 1994. These studies are:

Federal Personnel Offices: Time for Change? - A study of the effectiveness of agency personnel offices from the perspective of agency managers and personnel office staff. (See Appendix E.)

The Changing Face of the Federal Workplace: A Symposium on Diversity - A report of the proceedings of a symposium sponsored by the Board in the Spring of 1993. (See Appendix E.)

Whistleblowing in the Federal Government: An Update - A study of Federal employees' observations and reports of perceived illegal or wasteful activities in the Federal Government. This survey-based study updates a 1983 Board report on whistleblowing in the Federal Government. (See Appendix E.)

Evolving Workforce Demographics: Federal Agency Action and Reaction - A study of the responses of Federal agencies to demographic changes predicted in the late 1980's by reports such as "Workforce 2000" and "Civil Service 2000." Predicted changes include shortages of entry-level applicants, the rising age of the workforce, the growing minority representation in the workforce, and increasing skill requirements for Federal jobs.

Entering Professional Positions in the Federal Government - A study of six key mechanisms through which Federal agencies select professional and administrative employees at GS grades 5 through 15. The study examines strengths and weaknesses of each mechanism, their effects on representation of women and minorities, and the quality of individuals selected through each.

The Significant Actions of the Office of Personnel Management in Temporary Employment - A study of the impact of current OPM temporary employment policy on effectiveness of managers, fairness for employees, and agency compliance with merit principles, focusing on past criticisms and potential impact of proposed changes.

Merit Principles Survey - A 1992 update of the Board's previous triennial surveys of Federal employees about their perspectives on and experiences with the merit principles and their impact.

In addition, the Board published four reports in the early months of Fiscal Year 1993 that had been completed in the previous fiscal year. These were:

A Question of Equity: Women and the Glass Ceiling in the Federal Government - A study examining career advancement in the Government and whether there are barriers that account for the underrepresentation of women in senior-level jobs.



Civil Service the U.S. Office of Personnel - A study of the role of OPM's personnel management (PME) program in providing oversight of personnel agencies.

Federal Blue Collar In Transition - A study of the people and systems that make up the Federal workforce, analyzing important issues from the perspectives of line managers, employees, personnel offices, and unions.

Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change - A study of OPM's accomplishments in promoting and overseeing research programs and demonstration projects under the authority granted by the CSRA.

IMPACT OF BOARD STUDIES

The Board's studies have become influential in the field of public administration and are especially respected within the human resources management community. The reports are widely used and referenced by the Congress and Federal agencies, as well as by academicians and public interest groups, who influence public personnel policies and operations. Data from the Board's surveys are frequently requested by agencies to help with their management improvement efforts. Data are also requested by the General Accounting Office, the Congressional Budget Office, and the Office of Personnel Management.

Fiscal Year 1993 highlights include the following:

- The National Performance Review (NPR) headed by the Vice President made extensive references to various Board studies and reports in its report devoted to improving Federal personnel management. Many of the recommendations of the NPR report are consistent with those put forth by the Board.
- The Board's report on women and the glass ceiling in the Federal Government received extensive media coverage, resulting in the distribution of over 8,000 copies by the Board. In addition, several thousand more copies were distributed by Federal agencies that reproduced the report internally or ordered copies directly from the Government Printing Office. Since the report was published, Board staff have accepted over 50 speaking engagements on this issue at Federal agency programs, professional conferences, training programs, and other gatherings. The Board also provided data and other assistance to agencies interested in further exploration of the issue within their own agencies.

Alvin E. Ray, Manager, Human

- A symposium sponsored by the Board on workforce diversity was hailed as a pioneering effort to bring multiple viewpoints together to discuss the current status of diversity initiatives and to bring the underlying issues into focus. One agency used the results of the symposium to develop a program for holding its senior executives accountable for achieving a representative workforce and managing the resulting diversity of cultures in the workplace.
- The Board's report on "balancing work responsibilities and family needs" (issued in Fiscal Year 1992) continues to generate interest among the public administration community. The original supply of reports was exhausted, and a second printing was required as requests for copies continued to be received from Federal agencies and the private sector. A paper based on the report will become a chapter in a forthcoming book to be published by the American Psychological Association.



Attendees at the MSPB Symposium on Diversity.

- Advance information from the Board's governmentwide Merit Principles Survey (scheduled for publication early in Fiscal Year 1994) was used by committees of the Congress in their deliberations regarding reform of the Hatch Act, and data supplied by the Board was entered into the record.
- Two of the Board's recommendations in its report, *Federal Research Programs and Demonstration Projects: Catalysts for Change*, were adopted by OPM—the process used for updating the research topics listed in OPM's research agenda and the method used by OPM to disseminate research information by tailoring its reports to the intended users of the information.
- A report on the need for change in Federal personnel offices—released in August 1993—struck a very responsive chord among the Federal personnel community and generated a great deal of constructive dialogue. It is also one of the reports referenced by the Vice President's NPR report in support of several of its positions.
- The Board experienced a high level of interest in its study of glass ceiling issues as they affect *minorities* in the Federal Government, although the report is not scheduled for release until mid-1994. Requests for Board representatives to make presentations concerning the research plan and early findings started coming in June 1993.

See Appendix E for summaries of the reports completed and published during Fiscal Year 1993.

OUTREACH ACTIVITIES

The Board members and headquarters and regional staff conducted or participated in approximately 260 outreach activities to major constituencies in Fiscal Year 1993. These activities included addressing groups, participating in seminars and

conferences, and conducting training programs designed to further an understanding of the Board's policies and procedures, developments in Board case law, and important issues in Federal personnel law. The Board's outreach program also encompasses its participation in interagency organizations, publications and published articles, and the International Visitors Program.

PERSONAL APPEARANCES, MEETINGS, AND INSTRUCTION

Almost half of the outreach appearances during the fiscal year were made by the regional directors, administrative judges, and headquarters regional operations staff. Audiences for these appearances numbered from 10 to 600, with a combined total audience in the thousands. In addition to comprehensive training sessions on Board practices and procedures, the Board's regional personnel addressed such topics as significant Board and Federal Circuit decisions, alternative dispute resolution, effective advocacy at MSPB hearings, interim relief, sexual harassment, whistleblower protection, performance-based actions, firm choice in handicap discrimination cases, and RIF appeals.

Regional personnel presented a number of mock hearings, including mock hearings for the Public Administration Forum and the Postal Service. The Boston Regional Office initiated a monthly training session, consisting of a review of the Board's regulations and procedures, for representatives of parties appearing before judges of the office. The half-day session received favorable responses from the participants. In addition, both the Boston and Washington regional offices prepared and conducted major symposiums on Board law.

Within a few weeks of his appointment, Chairman Ben Erdreich began a series of nationwide meetings with representatives of both appellant and agency groups to discuss their critical perspectives on the functioning of the Board. The purpose of the meetings is to allow the Chairman to hear directly from Board practitioners their views and recommendations for improvement. By the end of the fiscal year, meetings had been held in San Francisco and Seattle.

Vice Chairman Parks and the Director of the Office of Regional Operations participated in Federal Bar Association (FBA) symposiums in Atlanta and Detroit. The Atlanta symposium was sponsored by the Atlanta Chapter of the FBA and the Atlanta Bar Association. The Detroit symposium was sponsored by two sections of the Detroit Chapter of the FBA. Vice Chairman Parks, a member of the National Council of the FBA, arranged these programs.

The Board members and headquarters attorneys participated in outreach activities to inform agencies, employee unions, private practitioners, and other interested parties about the Board, its authorities, jurisdiction, practices, and procedures. Topics addressed included recent developments in Board and Federal Circuit case law, cases decided under the Whistleblower Protection Act, mixed cases, sexual harassment, settlement strategies, and the Board's glass ceiling report.

The Board participated in the annual Federal Circuit Judicial Conference in June 1993 and sponsored a breakout session on Board law. In August 1993, the Board again participated in the Federal Dispute Resolution Conference with EEOC, OPM, the Federal Labor Relations Authority (FLRA), the Federal Mediation and Conciliation Service (FMCS), and the Office of Special Counsel. Chairman Ben Erdreich attended this conference and, at the opening session, announced plans for the new pilot program to settle appeals at the Board review level.

The studies staff participated in conferences, seminars, and symposia to discuss human resources management issues and to report on the results and implications of the Board's studies and reviews of OPM significant actions. More than half of the appearances during Fiscal Year 1993 focused on the Board's report on the glass ceiling that hinders the advancement of women in the Federal Government. Other topics of outreach appearances included balancing work and family responsibilities, workforce quality, issues affecting blue-collar workers, managing change, and the role of Federal personnel offices.

In May of 1993, MSPB again participated in the celebration of Public Service Recognition Week, sharing a booth on the Mall with FLRA. Board staff answered questions from visitors to the booth and distributed information about the agency. Over 300 requests for Board information publications and reports of its merit systems studies and OPM oversight reviews were received.

REPRESENTATION IN ORGANIZATIONS

The Merit Systems Protection Board is an active participant in the Small Agency Council (SAC), a voluntary association of Federal agencies that employ fewer than 6,000 people. The Board is also represented in the Public Employees Roundtable, the President's Council on Management Improvement, and the Interagency Committee on Voluntarism. The Board's Inspector General represents the agency on the President's Executive Council on Integrity and Efficiency. In 1993, the Board's Deputy Director, Office of Policy and Evaluation, served as President of the International Personnel Management Association (IPMA) Federal Section.

The Board's Director of Administration represents MSPB as a member of the Board of Directors of the National Capital Area Cooperative Administrative Support Units (CASU). This Board coordinates the efforts of agencies to combine their administrative resources to take advantage of economies of scale. In addition, several regional directors serve as Board members of CASUs in their cities.

Regional directors, administrative judges, and other personnel in several regional offices serve on the Federal Executive Board (FEB) and FEB committees in their cities. The Regional Director of the Denver Regional Office chaired the Denver FEB in Fiscal Year 1993 and received an award for distinguished FEB member. During her tenure, the FEB Board of Directors met in private session with Vice

President Albert Gore.

PUBLICATIONS AND ARTICLES

In an effort to promote greater awareness by Federal employees of their rights under the Whistleblower Protection Act, the Board announced in September 1993 that it was reprinting its publication, *Questions & Answers About Whistleblower Appeals*, and encouraged agencies to order copies from the Government Printing Office. In addition to publishing an announcement in the *Federal Register*, Chairman Ben Erdreich sent letters to the heads of all Executive Branch agencies with employees covered by the Act and encouraged them to use the publication as one means of advising their employees of their rights under the Act and the Board's procedures for whistleblower appeals.

The *Federal Merit Systems Reporter* (Labor Relations Press) of January 1993 published "Remarks on Decisions of the MSPB Under the Whistleblower Protection Act" by Vice Chairman Parks. These remarks were originally made by the Vice Chairman at the MSPB Practitioners' Forum sponsored by the Public Administration Forum in September 1992 and were updated for publication.

Several members of the Board's studies staff published articles during the fiscal year in such publications as *The Public Manager*, *International Journal of Public Administration*, *PA Times* (monthly publication of the American Society for Public Administration), and *Periscope*. About half of the articles published dealt with the Board's glass ceiling report. Other articles included "Reinventing Public Personnel Management" and "Toward the Year 2000: Issues and Strategies for Federal Labor-Management Relations."

Six members of the studies staff presented papers at the 1993 annual conference of the American Society for Public Administration on the following topics: Federal recruitment and selection; Federal personnel offices; balancing work responsibilities and family needs; the glass ceiling; Federal first-line supervisors; and workforce quality and Federal procurement.

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 1993, the Board members and headquarters staff made presentations to approximately 30 visitors from a number of countries, including Taiwan, Turkey, China, Tanzania, Australia, the Netherlands, and Japan. The Board also arranged for visitors to meet with Board regional office staff.

The visitors included governors, lieutenant governors, heads of agencies, inspectors general, staff directors, and 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. The visitors expressed particular interest in the type of issues that the Board addresses in its decisions and the adjudication of appeals by the Board's regional offices.

ADMINISTRATION, FINANCE, AND HUMAN RESOURCES

ADMINISTRATION

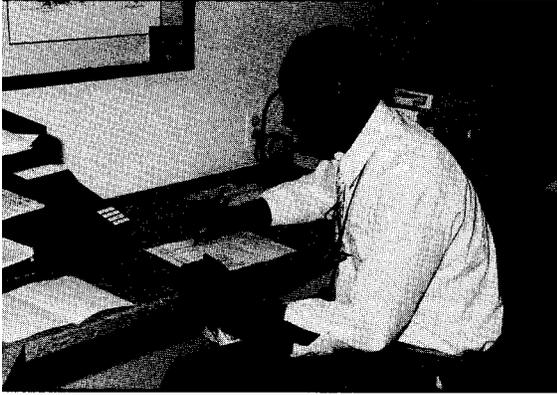
Shortly after assuming his duties as the agency's chief executive officer in July 1993, Chairman Ben Erdreich called on the directors of all Board offices to review the agency's organization and to suggest possible organizational realignments that would allow the Board to continue its efficient operations with fewer employees. This review was underway at the end of the fiscal year and was expected to result in some organizational realignment in Fiscal Year 1994. The only organizational change made in Fiscal Year 1993 was to place the Office of the Clerk of the Board directly under the Chairman, rather than the Executive Director.

Like all Federal agencies, the Board devoted considerable time during the fiscal year to planning to meet the reductions in staff and administrative costs mandated by the Administration through Executive Orders issued by President Clinton early in 1993. By the end of the fiscal year, new Executive Orders issued in response to recommendations in the report of Vice President Gore's National Performance Review were also being incorporated into the planning process.

As one means of promoting greater efficiency and reducing costs, Chairman Erdreich early in his term began to call attention to the burden of reporting requirements imposed on Federal agencies. In testimony before the Subcommittee on Civil Service, House Post Office and Civil Service Committee, the Chairman pointed out that the Board is required to submit approximately 70 reports each year. Gathering information for, completing, and filing these reports requires staff time equivalent to just over four full-time employees at a cost of more than \$250,000 each year. By the end of the fiscal year, the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, was reviewing reporting requirements and surveying agencies with a view towards reducing the number of required reports. The National Performance Review also recommended reducing agency reporting requirements.

During the fiscal year, the Board enhanced its Case Management System (CMS) by adding new information to assist offices in managing workload, expanding document generation capabilities for use by headquarters offices, and preparing additional CMS documentation such as the "Data Dictionary" and "A Guide for Occasional Users." The Board upgraded its minicomputer with a faster central processing unit and software to provide faster help to users. It also upgraded both operating system and word processing software. Information resources management staff visited about half of the regional offices to provide "hands-on" assistance to regional staff.

A conference at Board headquarters was conducted for Administrative Officers of all the regional offices. The conference provided the participants with updated information on a number of administrative topics, including information resources and human resources management.



George Coles, Supply Technician, Financial and Administrative Management Division.

FINANCIAL STATEMENT

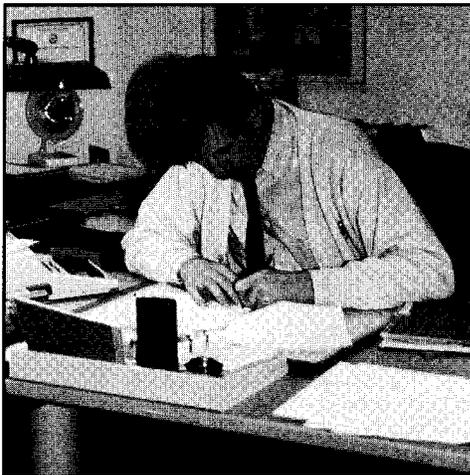
The income and expenses of the Merit Systems Protection Board for Fiscal Year 1993 (October 1, 1992, through September 30, 1993) are shown below. All figures are in thousands of dollars.

INCOME

Appropriations	24,450
Reimbursements - Civil Service Retirement & Disability Trust Fund	1,950
Reimbursements - Other (interagency agreement and reimbursable detail)	<u>40</u>
Total income	26,440

EXPENSES

Direct obligations:	
Personnel compensation	
Full-time permanent	15,070
Other than full-time permanent	1,093
Other personnel compensation	<u>352</u>
Subtotal, personnel compensation	16,515
Personnel benefits	2,578
Benefits - former employees	21
Travel of persons	422
Transportation of things	40
Rental payment to GSA	2,246
Rental payments to others	58
Communications, utilities, and miscellaneous charges	442
Printing and reproduction	83
Other services	1,138
Supplies and materials	301
Equipment	<u>532</u>
Subtotal, direct obligations	24,376
Reimbursable obligations	<u>1,990</u>
Total obligations	26,366
BALANCE	74



Charlie Roche, Contracting Office, Financial and Administrative Management Division.

HUMAN RESOURCES

The full-time equivalent (FTE) employment for the Board in Fiscal Year 1993 was 310.

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

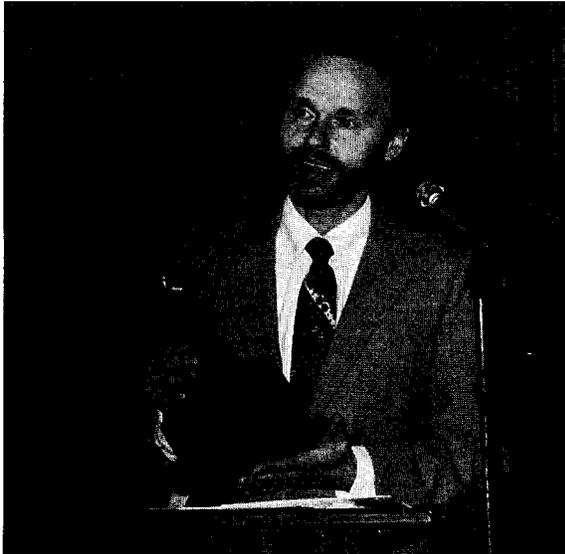
	<u>Attorneys</u>	
	<u>No. in Attorney Workforce</u>	<u>Percent of Attorney Workforce</u>
Male	87	58.0
Female	63	42.0
Total	150	100.0
Minority *	30	20.0
Majority	120	80.0
Total	150	100.0

MSPB (Entire Agency)

	<u>No. in Workforce</u>	<u>Percent of Workforce</u>
Male	126	40.0
Female	190	60.0
Total	316	100.0
Minority *	104	33.0
Majority	212	67.0
Total	316	100.0 * Excluding White/Female

Data as of September 30, 1993

During the fiscal year, the Board's human resources management staff began development of a career pathing project that will identify and document career paths and will include definitive descriptions of work performed by clerical and administrative employees. In addition, the human resources management staff made plans to survey Board employees to determine whether there was interest in a self-directed career development program. The Board should be able to implement such a program with the reduced resources that are likely to be available for career development in the future.



Michael S. Bogdanow accepts the Theodore Roosevelt Award, the Board's highest honor

In November 1992, the Theodore Roosevelt Award, the Board's highest honor, was presented to Michael Bogdanow, Assistant Director, Office of Appeals Counsel. 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. At the awards ceremony, 21 other Board

employees were honored with the Chairman's Awards for Excellence.



Pictured from left to right, Robert Hernandez, Executive Assistant to the Member, and Lorelee Falvey, Computer Programmer/Analyst, Information Resources Management Division.

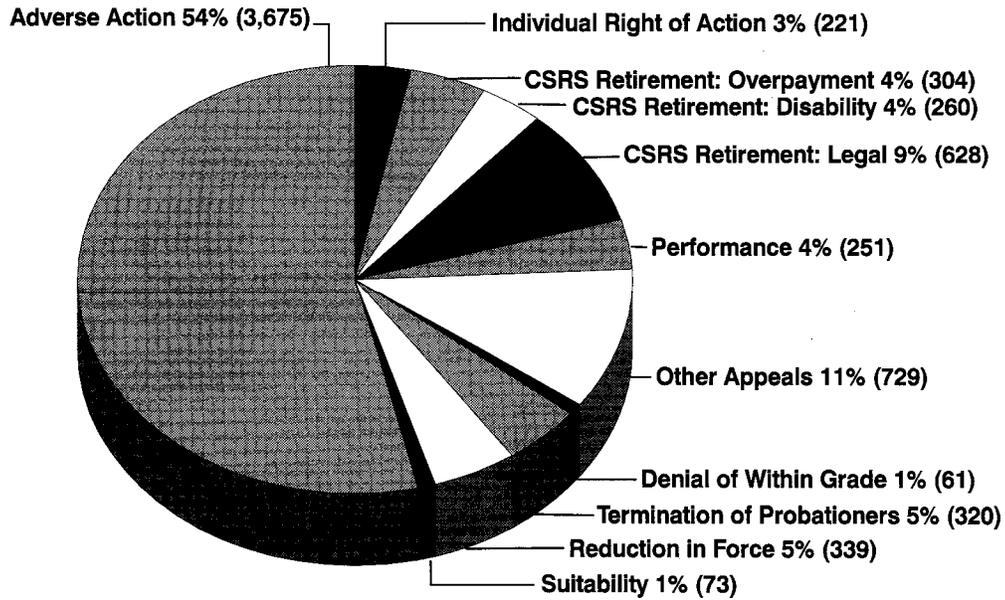
APPENDIX A - CASE PROCESSING STATISTICS

TABLE OF CONTENTS

1. Types of Initial Appeals Decided in FY 1993
2. Disposition of Initial Appeals Decided in FY 1993
3. Dispositions of Initial Appeals Adjudicated on the Merits in FY 1993
4. Outcomes of FY 1993 Appeals Not Dismissed
5. Reasons for Dismissals of Appeals in FY 1993
6. Disposition of Initial Appeals Decided by Type of Case in FY 1993
7. Disposition of Initial Appeals Adjudicated by Type of Case in FY 1993
8. Initial Appeals Decided in FY 1993 by Selected Agencies
9. Case Processing Timeliness in FY 1993
10. Time to Process Initial Appeals by Case Type in FY 1993
11. Time to Process Initial Appeals by Disposition Type in FY 1993
12. Ten-Year Trend in Settlement Rates, FY 1984 - FY 1993
13. Settlement Rates by Type of Initial Appeal Decided in FY 1993
14. Dispositions of Whistleblower Initial Appeals and Stay Requests Decided, FY 1990 - FY 1993
15. Initial Appeals With Allegations of Discrimination Decided in FY 1993
16. Types of Discrimination Alleged in Initial Appeals Decided in FY 1993
17. Disposition of Requests for Attorney Fees Decided in FY 1993
18. Disposition of Compliance Requests Decided in FY 1993
19. Disposition of Remands Decided in FY 1993
20. Disposition of Remands Adjudicated in FY 1993
21. Total Board Cases Decided in FY 1993
22. Petitions for Review of Initial Appeals Decided in FY 1993
23. Disposition of Petitions for Review of Initial Appeals Granted and PFRs Denied and Reopened in FY 1993
24. Dispositions of Whistleblower Petitions for Review of Initial Appeals and Stay Requests Decided in FY 1993
25. Petitions for Review of Initial Appeals with Allegations of Discrimination Decided in FY 1993
26. Dispositions of Petitions for Review of Requests for Attorney Fees, Compliance Requests, and Remands Decided in FY 1993

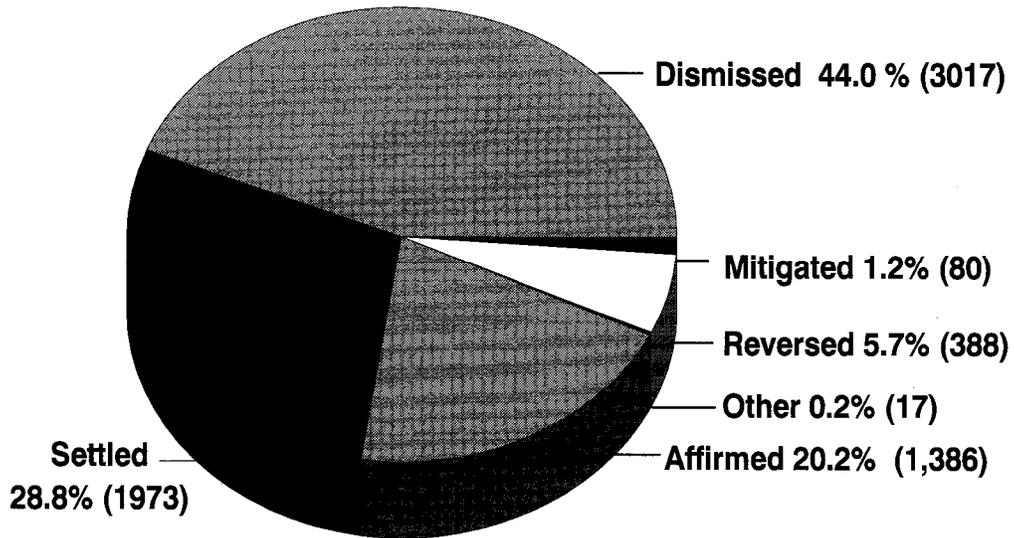
NOTE: In tables of "Dispositions" of initial appeals, whistleblower cases, attorney fee requests, compliance requests, and remand cases, the number of cases decided is first divided into cases "Dismissed" and "Not Dismissed." Cases "Settled" and "Adjudicated" are then expressed as percentages of cases "Not Dismissed." The term "Adjudicated" refers to cases that are adjudicated on the merits.

1. TYPES OF INITIAL APPEALS DECIDED IN FY 1993



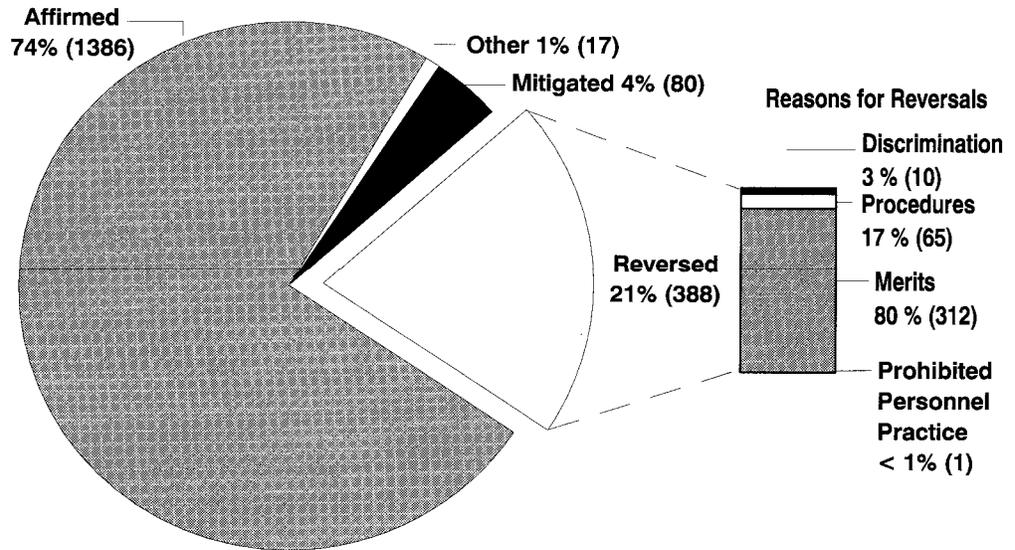
Total Number of Initial Appeals: 6,861
Percentages do not total 100% because of rounding.

2. DISPOSITION OF INITIAL APPEALS DECIDED IN FY 1993



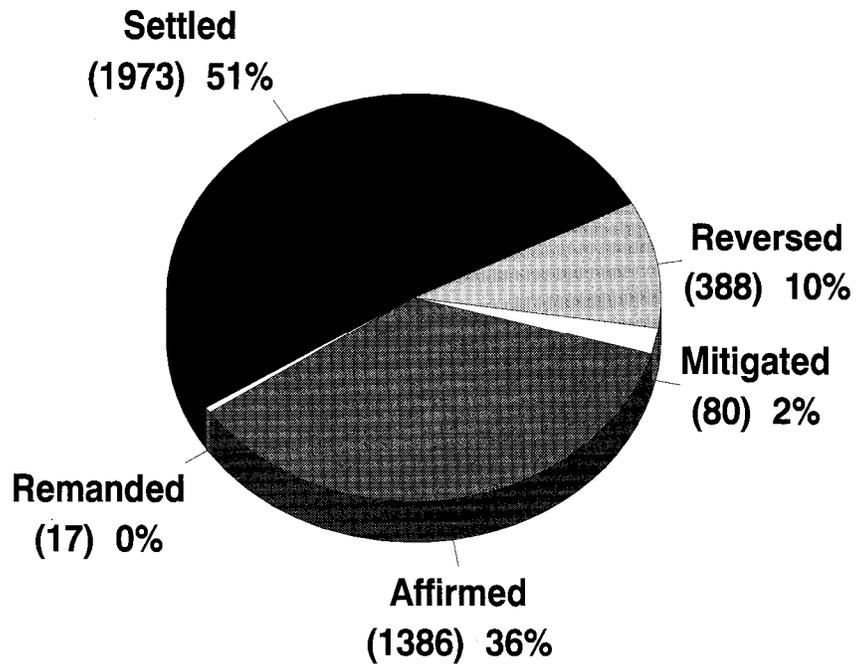
Total number of initial appeals: 6,861
Percentages do not total 100% because of rounding.

3. DISPOSITIONS OF INITIAL APPEALS ADJUDICATED ON THE MERITS IN FY 1993

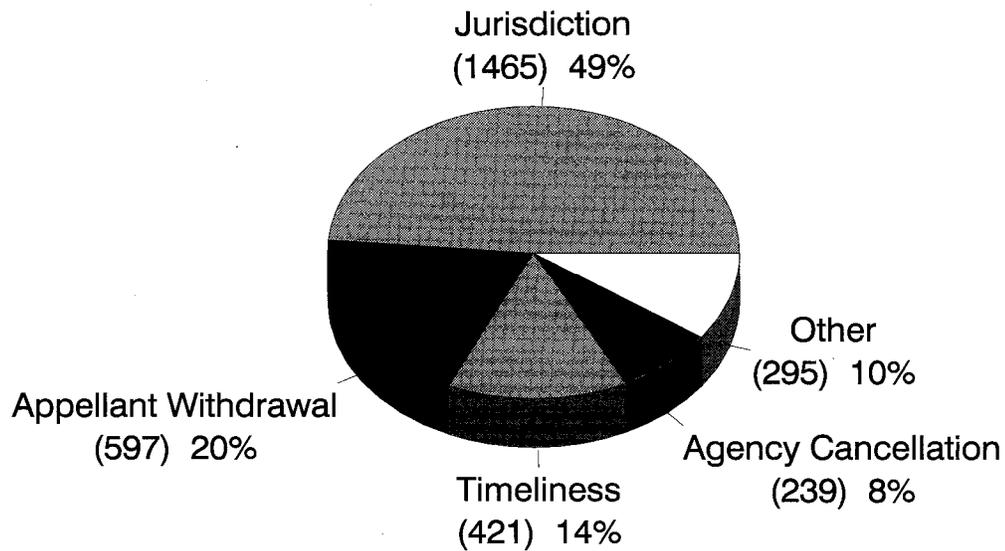


Based on 1,871 adjudicated initial appeals.

4. OUTCOMES OF FY 1993 APPEALS NOT DISMISSED



5. REASONS FOR DISMISSALS OF APPEALS IN FY 1993



Percentages do not total 100% because of rounding.

6. DISPOSITION OF INITIAL APPEALS DECIDED BY TYPE OF CASE IN FY 1993

Type of Case	Decided		Dismissed		Not Dismissed		Settled		Adjudicated	
	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	3675	54%	1342	37%	2333	63%	1492	64%	841	36%
Termination of Probationers	320	5%	296	92%	24	8%	19	79%	5	21%
Reduction in Force	339	5%	117	35%	222	65%	64	29%	158	71%
Performance	251	4%	50	20%	201	80%	130	65%	71	35%
Denial of Within-Grade Suitability	61	1%	21	34%	40	66%	26	65%	14	35%
	73	1%	25	34%	48	66%	23	48%	25	52%
CSRS Retirement: Legal	628	9%	212	34%	416	66%	27	6%	389	94%
CSRS Retirement:	260	4%	123	47%	137	53%	32	23%	105	77%
CSRS Retirement: Overpayment	304	4%	111	37%	193	63%	56	29%	137	71%
Individual Right of Action	221	3%	137	62%	84	38%	56	67%	28	33%
Other	729	11%	583	80%	146	20%	48	33%	98	67%
Total	6861	101%	3017	44%	3844	56%	1973	51%	1871	49%

NOTE: Percentages may not add to 100 due to rounding.

**7. DISPOSITION OF INITIAL APPEALS ADJUDICATED BY TYPE OF CASE IN
FY 1993**

Type of Case	Adjudicated #	Affirmed		Reversed		Mitigated		Remanded	
		#	%	#	%	#	%	#	%
	841	640	76%	133	16%	68	8%	0	0%
Adverse Action by Agency									
Termination of Probationers	5	2	40%	3	60%	0	0%	0	0%
Reduction in Force	158	99	63%	59	37%	0	0%	0	0%
Performance	71	56	79%	15	21%	0	0%	0	0%
Denial of Within-Grade Suitability	14	12	86%	2	14%	0	0%	0	0%
	25	22	88%	3	12%	0	0%	0	0%
	389	328	84%	57	15%	1	0%	3	1%
CSRS Retirement: Legal									
CSRS Retirement: Disability	105	73	70%	31	30%	0	0%	1	1%
CSRS Retirement: Overpayment	137	67	49%	53	39%	9	7%	8	6%
Individual Right of Action	28	21	75%	7	25%	0	0%	0	0%
Other	98	66	67%	25	26%	2	2%	5	5%
Total	1871	1386	74%	388	21%	80	4%	17	1%

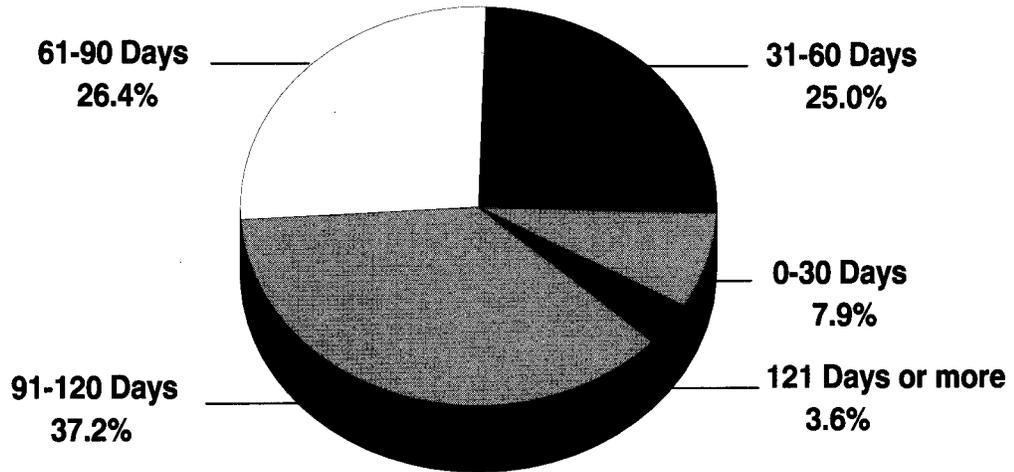
NOTE: Percentages may not add to 100 due to rounding.

8. INITIAL APPEALS DECIDED IN FY 1993 BY SELECTED AGENCIES

	Decided		Dismissed		Not Dismissed		Settled		Adjudicated		Affirmed		Reversed		Mitigated or Other	
	#	#	%	#	%	#	%	#	%	#	%	#	%	#	%	
OPM	1400	523	37%	877	63%	141	16%	736	84%	544	74%	165	22%	27	4%	
Postal Service	1326	660	50%	666	50%	403	60%	263	40%	151	57%	95	36%	17	6%	
Navy	697	256	37%	441	63%	287	65%	154	35%	129	84%	18	12%	7	4%	
Army	615	286	46%	329	54%	198	60%	131	40%	100	76%	23	18%	8	6%	
VA	555	297	54%	258	46%	180	70%	78	30%	63	81%	11	14%	4	5%	
Air Force	385	171	44%	214	56%	116	54%	98	46%	69	70%	19	19%	10	10%	
Defense	349	138	40%	211	60%	132	63%	79	37%	64	81%	5	6%	10	13%	
Treasury	277	137	50%	140	50%	83	59%	57	41%	51	90%	5	9%	1	2%	
Justice	258	108	42%	150	58%	84	56%	66	44%	45	68%	17	26%	4	6%	
Transportation	164	56	34%	108	66%	57	53%	51	47%	44	86%	7	14%	0	0%	
Agriculture	160	70	44%	90	56%	71	79%	19	21%	14	74%	3	16%	2	10%	
Interior	125	60	48%	65	52%	43	66%	22	34%	19	86%	2	9%	1	4%	
HHS	95	36	38%	59	62%	43	73%	16	27%	14	88%	2	12%	0	0%	
GSA	62	33	53%	29	47%	17	59%	12	41%	8	67%	3	25%	1	8%	
HUD	43	17	40%	26	60%	14	54%	12	46%	11	92%	0	0%	1	8%	
Commerce	42	17	40%	25	60%	14	56%	11	44%	8	73%	2	18%	1	9%	
Labor	41	25	61%	16	39%	12	75%	4	25%	4	100%	0	0%	0	0%	
TVA	28	11	39%	17	61%	4	24%	13	76%	13	100%	0	0%	0	0%	
Smithsonian	25	6	24%	19	76%	12	63%	7	37%	4	57%	3	43%	0	0%	
Energy	20	6	30%	14	70%	7	50%	7	50%	6	86%	1	14%	0	0%	
FDIC	17	7	41%	10	59%	5	50%	5	50%	2	40%	3	60%	0	0%	
SBA	17	8	47%	9	53%	5	56%	4	44%	3	75%	1	25%	0	0%	
EPA	14	7	50%	7	50%	2	29%	5	71%	2	40%	1	20%	2	40%	
EEOC	12	7	58%	5	42%	4	80%	1	20%	1	100%	0	0%	0	0%	
NASA	12	8	67%	4	33%	2	50%	2	50%	2	100%	0	0%	0	0%	
FEMA	10	4	40%	6	60%	3	50%	3	50%	1	33%	2	67%	0	0%	
Other	112	63	56%	49	44%	34	69%	15	31%	14	93%	0	0%	1	7%	
Total	6861	3017		3844		1973		1871		1386		388		97		

NOTE. Percentages may not add to 100 due to rounding.

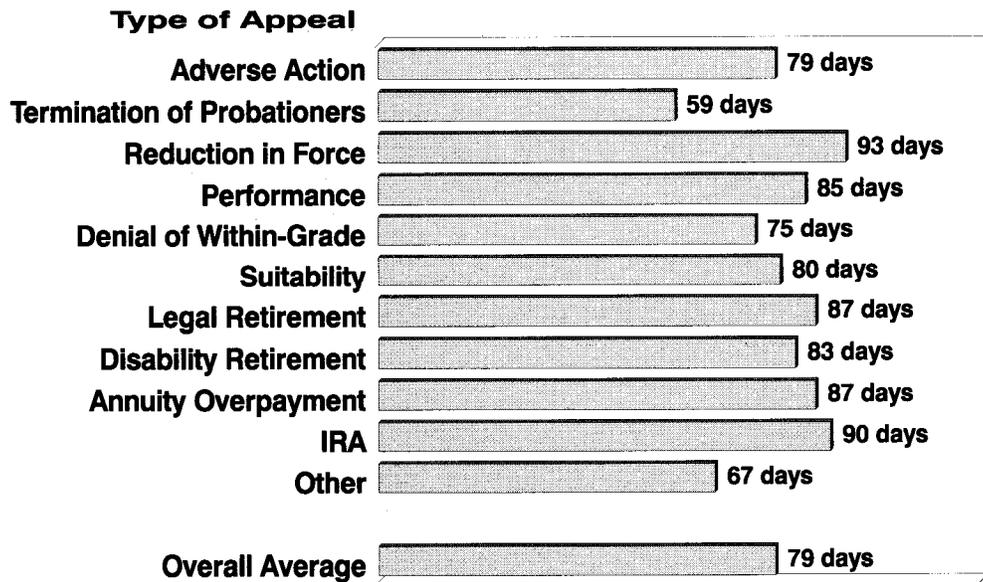
9. CASE PROCESSING TIMELINESS IN FY 1993



FY 1993

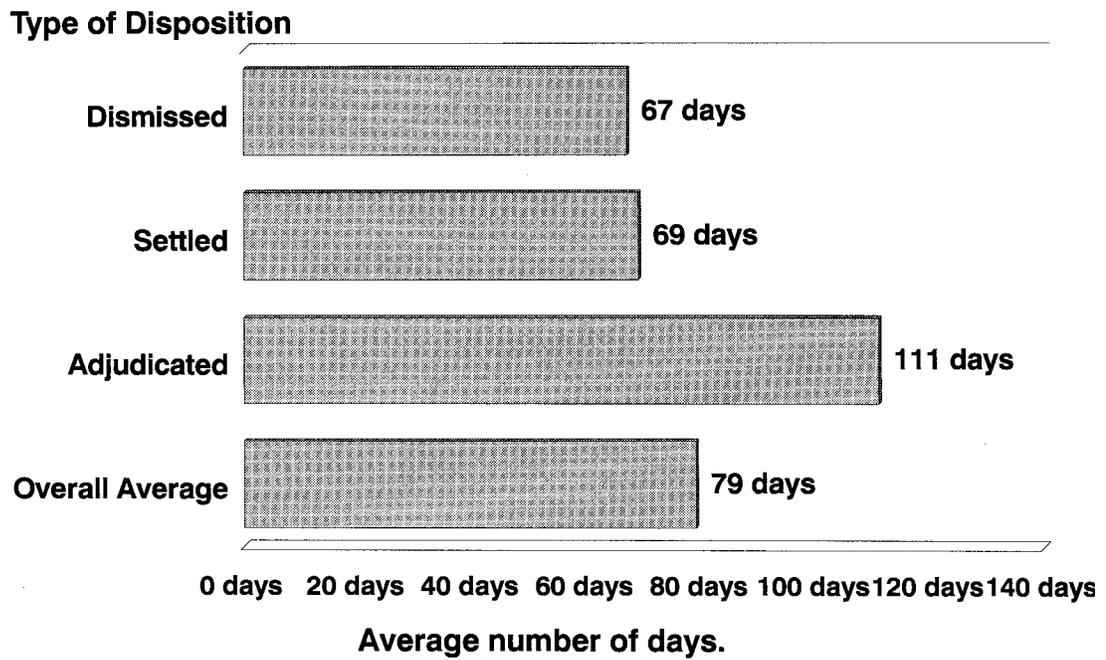
Initial Appeals (excluding requests for stays, attorney fee requests, compliance requests, and remands)

10. TIME TO PROCESS INITIAL APPEALS BY CASE TYPE IN FY 1993

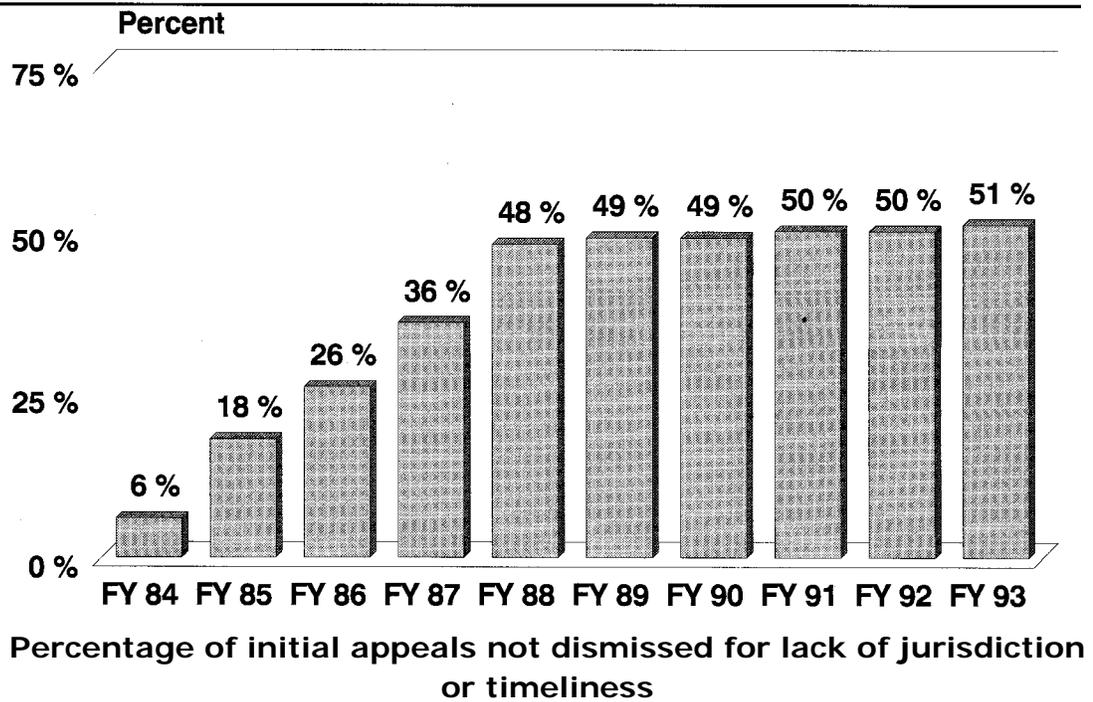


0 days 20 days 40 days 60 days 80 days 100 days 120 days Average number of days.

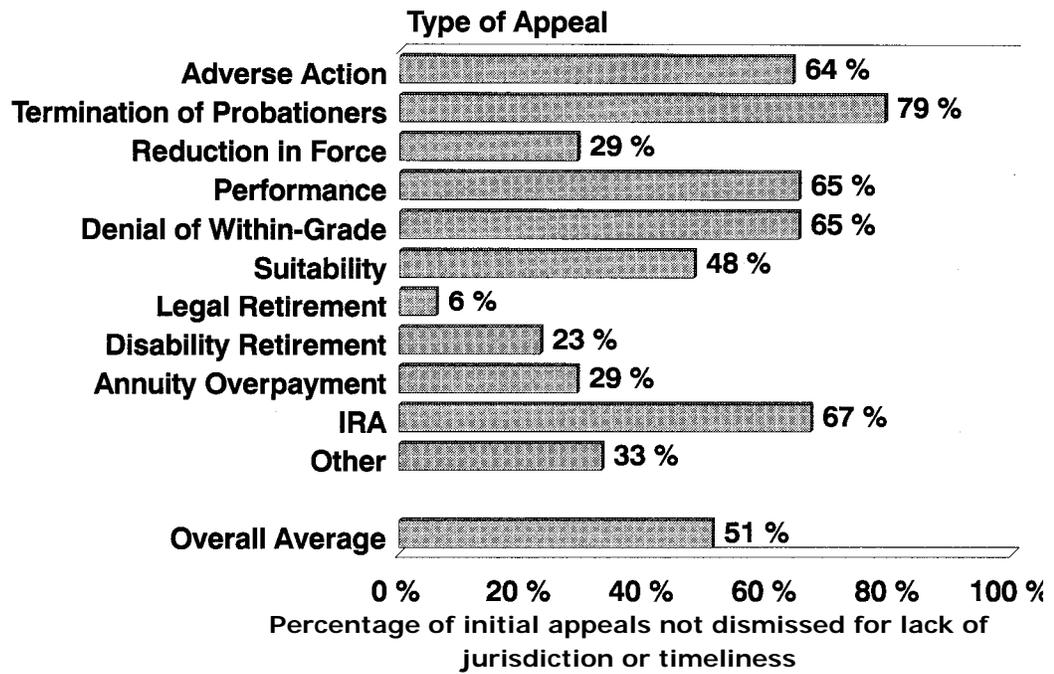
11. TIME TO PROCESS INITIAL APPEALS BY DISPOSITION TYPE IN FY 1993



12. TEN-YEAR TREND IN SETTLEMENT RATES, FY 1984 - 1993



13. SETTLEMENT RATES BY TYPE OF INITIAL APPEAL DECIDED IN FY 1993



**14. DISPOSITIONS OF WHISTLEBLOWER INITIAL APPEALS AND STAY
REQUESTS DECIDED, FY 1990-1993**

Fiscal Year	Decided		Dismissed		Not Dismissed		Settled		Adjudicated	
	#	%	#	%	#	%	#	%	#	%
<u>Individual Right of Action (IRA)</u>										
FY 1990	89		71	80%	18	20%	11	61%	7	39%
FY 1991	196		125	64%	71	36%	49	69%	22	31%
FY 1992	221		144	65%	77	35%	41	53%	36	47%
FY 1993	221		137	62%	84	38%	56	67%	28	33%
<u>Otherwise Appealable Action (OAA)</u>										
FY 1990	163		84	52%	79	48%	43	54%	36	46%
FY 1991	275		141	51%	134	49%	78	58%	56	42%
FY 1992	282		131	46%	151	54%	81	54%	70	46%
FY 1993	230		116	50%	114	50%	61	54%	53	46%
<u>Request for Stay on IRA or OAA</u>										
FY 1990	74		16	22%	58	78%	1	2%	57	98%
FY 1991	73		12	16%	61	84%	0	0%	61	100%
FY 1992	76		16	21%	60	79%	3	4%	57	95%
FY 1993	81		24	30%	57	70%	2	2%	55	96%

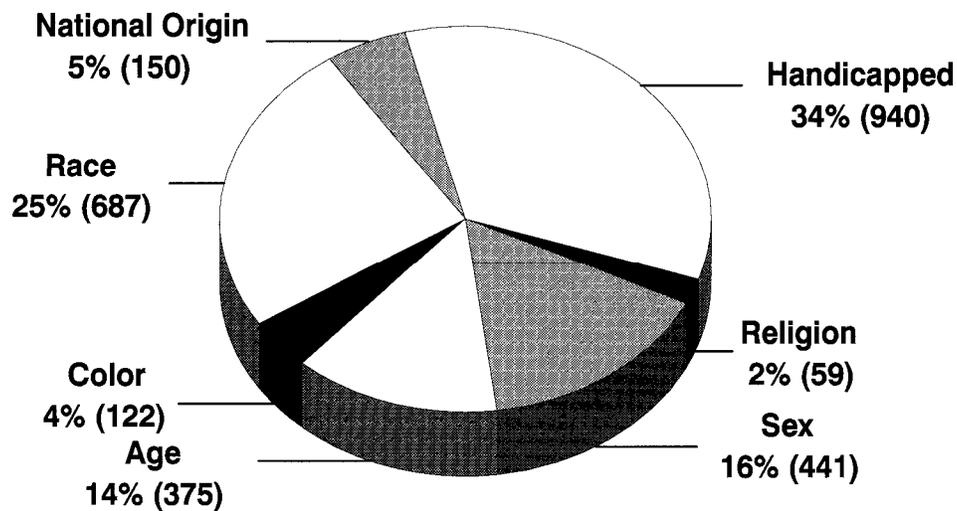
NOTE. The Individual Right of Action (IRA) appeal was created by the Whistleblower Protection Act of 1989. In this kind of case, the individual is subject to a personnel action and claims that the action was taken because of his or her whistleblowing, but the action is *not* one that is directly appealable to the Board. In an IRA, the individual can appeal to the Board *only* if, after having first filed a complaint with the Office of the Special Counsel, either the Special Counsel does *not* seek corrective action on the individual's behalf or 120 days pass with no action by the Office of Special Counsel. In the Otherwise Appealable Action (OAA) appeal, the individual is subject to a personnel action that is directly appealable to the Board, and the individual claims that the action was taken because of his or her whistleblowing. A Request for a Stay can be filed with the Board in connection with an IRA or an OAA. A stay orders the agency to suspend the personnel action being appealed.

15. INITIAL APPEALS WITH ALLEGATIONS OF DISCRIMINATION DECIDED IN FY 1993

	Number	Percent
Total Initial Appeals Decided	6,861	100%
Cases without Allegations of Discrimination	-4,832	<u>-70%</u>
Cases with Allegations of Discrimination	2,029	30%
Cases in which Allegations were Withdrawn	-1,196	<u>-17%</u>
Total Mixed Cases Decided	833	12%
Cases in which Discrimination was Found	16	2%
Cases in which Discrimination was not Found	817	98%

NOTE. Percentages do not add to 100 due to rounding.

16. TYPES OF DISCRIMINATION ALLEGED IN INITIAL APPEALS DECIDED IN FY 1993



Percentage based on 2,774 allegations.

17. DISPOSITION OF REQUESTS FOR ATTORNEY FEES DECIDED IN FY 1993

Decided	Dismissed		Not Dismissed		Settled		Adjudicated		Fees Granted		Fees Not Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
281	29	10%	252	90%	141	56%	111	44%	73	66%	38	34%

18. DISPOSITION OF COMPLIANCE REQUESTS DECIDED IN FY 1993

Decided	Dismissed		Not Dismissed		Settled		Adjudicated		Compliance Found		Compliance Not Found	
	#	%	#	%	#	%	#	%	#	%	#	%
446	121	27%	325	73%	118	36%	207	64%	171	83%	36	17%

19. DISPOSITION OF REMANDS DECIDED IN FY 1993

Decided	Dismissed		Not Dismissed		Settled		Adjudicated	
	#	%	#	%	#	%	#	%
121	31	26%	90	74%	30	33%	60	67%

NOTE. MSPB refers to attorney fee requests, compliance requests, and requests for compensatory damages as addendum cases because they are filed subsequent to the initial appeal and are directly related to an initial appeal. Cases remanded to an administrative judge are also included in addendum cases; decisions on initial appeals, attorney fee requests, compliance requests, and requests for compensatory damages may all be remanded. In FY 1993, there was only 1 request for compensatory damages, and that case was dismissed.

20. DISPOSITION OF REMANDS ADJUDICATED IN FY 1993

Adjudicated #	Affirmed		Reversed		Mitigated Modified/ Other		Attorney Fee Granted/ Compliance Found		Attorney Fee Not Granted/ Compliance Not Found	
	#	%	#	%	#	%	#	%	#	%
60	31	52%	15	25%	5	8%	6	10%	3	5%

NOTE. MSPB refers to attorney fee requests, compliance requests, and requests for compensatory damages as addendum cases because they are filed subsequent to the initial appeal and are directly related to an initial appeal. Cases remanded to an administrative judge are also included in addendum cases; decisions on initial appeals, attorney fee requests, compliance requests, and requests for compensatory damages may all be remanded. In FY 1993, there was only 1 request for compensatory damages, and that case was dismissed.

21. TOTAL BOARD CASES DECIDED IN FY 1993

Type of Case/Activity	Number
<u>APPELLATE JURISDICTION CASES</u>	
Petitions for Review (PFR's) — Initial Appeals	1,317
Petitions for Review (PFR's) — Addendum Cases	174
Reopenings/Court Remands	20
Reviews of Stay Rulings	0
Subtotal	<u>1,511</u>
Compliance Referrals	53
EEOC Non-Concurrence	1
Appeals of Arbitration Awards	11
Subtotal	<u>65</u>
<u>ORIGINAL JURISDICTION CASES</u>	
Actions brought by Special Counsel - Hatch	16
Actions Against Administrative Law Judges	5
OSC Stay Requests	14
Review of Regulations	2
Subtotal - Original Jurisdiction Cases	<u>37</u>
<u>TOTAL BOARD CASELOAD</u>	
	1,613

NOTE. The Board holds hearings for performance-based removals from the SES although no decisions are issued. In FY 1993, no hearings were held.

22. PETITIONS FOR REVIEW OF INITIAL APPEALS DECIDED IN FY 1993

Type of Case	Decided		Dismissed		Denied*		Granted	
	#	#	%	#	%	#	%	
Adverse Action by Agency	702	69	10%	538	77%	95	14%	
Termination of Probationers	49	6	12%	40	82%	3	6%	
Reduction in Force	64	5	8%	56	88%	3	5%	
Performance	44	6	14%	34	77%	4	9%	
Denial of Within-Grade	10	2	20%	8	80%	0	0%	
Suitability	6	0	0%	6	100%	0	0%	
CSRS Retirement: Legal	200	19	10%	158	79%	23	12%	
CSRS Retirement: Disability	49	4	8%	35	71%	10	20%	
CSRS Retirement: Overpayment	23	1	4%	15	65%	7	30%	
Individual Right of Action	61	3	5%	56	92%	2	3%	
Other	109	4	4%	94	86%	11	10%	
Total	1317	119	9%	1040	79%	158	12%	

*Of 1040 PFR's that were denied, 118 (11%) were reopened. Thus, of 1317 PFR's decided, 21% were either granted (158 or 12%) or denied and reopened for review (118 or 9%).

**23. DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL APPEALS
GRANTED AND PFR'S DENIED AND REOPENED IN FY 1993**

Type Of Case	Granted		AJ Affirmed		AJ Reversed		Remanded or Forwarded		Other	
	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	95		57	60%	23	24%	12	13%	3	3%
Termination of Probationers	3		1	33%	0	0%	2	67%	0	0%
Reduction in Force	3		1	33%	1	33%	1	33%	0	0%
Performance	4		1	25%	2	50%	1	25%	0	0%
Denial of Within-Grade	0		0	0%	0	0%	0	0%	0	0%
Suitability	0		0	0%	0	0%	0	0%	0	0%
CSRS Retirement: Legal	23		10	43%	9	39%	3	13%	1	4%
CSRS Retirement:	10		0	0%	4	40%	5	50%	1	10%
CSRS Retirement: Overpayment	7		0	0%	1	14%	4	57%	2	29%
Individual Right of Action	2		2	100%	0	0%	0	0%	0	0%
Other	11		2	18%	4	36%	4	36%	1	9%
Subtotal	158		74	47%	44	28%	32	20%	8	5%
Reopenings of PFRs Denied	118		83	70%	7	6%	20	17%	8	7%
Total	276		157	57%	51	18%	52	19%	16	6%

NOTE. Approximately 19% of initial decisions end in the filing of a PFR by the appellant or the agency. The term "AJ stands for administrative judge. Percentages may not add to 100 due to rounding.

**24. DISPOSITIONS OF WHISTLEBLOWER PETITIONS FOR REVIEW OF
INITIAL APPEALS AND STAY REQUESTS DECIDED IN FY 1993**

Appeal Category	Decided		Dismissed/ Denied		Granted		Affirmed		Reversed		Remanded		Other	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Individual Right of Action	61		59	97%	2	3%	2	100%	0	0%	0	0%	0	0%
Otherwise Appealable Action	58		49	84%	9	16%	4	44%	3	33%	2	22%	0	0%
Review of Stay Ruling	0		—	—	—	—	—	—	—	—	—	—	—	—

NOTE. Percentages may not add to 100 due to rounding. Type

25. PETITIONS FOR REVIEW OF INITIAL APPEALS WITH ALLEGATIONS OF DISCRIMINATION DECIDED IN FY 1993

		Number	Percent
		1,317	100%
Total Initial Appeals Decided			
Cases without Allegations of Discrimination	-	887	-67%
		430	33%
Cases with Allegations of Discrimination			
Cases in which Allegations were Withdrawn	-	169	-13%
Total Mixed Cases Decided		261	20%
Cases in which Discrimination was Found		7	3%
Cases in which Discrimination was not Found		254	97%

26. DISPOSITIONS OF PETITIONS FOR REVIEW OF REQUESTS FOR ATTORNEY FEES, COMPLIANCE REQUESTS, AND REMANDS DECIDED IN FY 1993

Type of Case	Decided	Dismissed		Denied		Granted	
		#	%	#	%	#	%
Request for Attorney Fees	43	2	5%	34	79%	7	16%
Compliance Request	63	4	6%	52	83%	7	11%
Remand	68	5	7%	53	78%	10	15%
Total	174	11	6%	139	80%	24	14%

NOTE. MSPB refers to PFR's of attorney fee requests and compliance requests as PFR's of addendum cases. PFR's of cases remanded to an administrative judge are also included in PFR's of addendum cases. Percentages may not add to 100 due to rounding.

APPENDIX B - SIGNIFICANT BOARD DECISIONS - APPELLATE JURISDICTION CASES

This appendix contains summaries of significant appellate jurisdiction cases decided by the Board during Fiscal Year 1993.

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.

ADVERSE ACTIONS

Leave Transfer Program

Joyner v. Department of the Navy PH-0752-92-0518-I-1 (April 1, 1993) 57 M.S.P.R. 154 (1993)

In its first decision involving the leave transfer program, the Board held that an agency can properly deny an employee's request for leave without pay (LWOP) where there is no foreseeable end in sight to the employee's absence and where that absence is a burden to the agency. Under such circumstances, the denial of LWOP is reasonable, and the agency is not required to prolong the situation by extending the employee's absence on donated leave. Because the agency's policy was to allow participation in the leave transfer program only when LWOP had been granted, the agency's proper denial of LWOP disqualified the employee for such participation. The Board upheld the agency's removal of the appellant for being absent without leave.

Falsification of Employment Application

Beardsley v. Department of Defense DE-0752-91-0157-B-1 (November 13, 1992) 55 M.S.P.R. 504 (1992)

In an adverse action based on falsification of an employment application, the Board's rule is that it will not consider an appellant's good work record in mitigation of the penalty imposed. The Board established an exception to that rule here: In situations where the deciding official considers the appellant's good work record, the Board will also.

ATTORNEY FEES

Anderson v. Government Printing Office DC-0752-91-0758-A-1 (November 18, 1992) 55 M.S.P.R. 548 (1992)

Ruling on a motion for attorney fees, the Board found that an attorney-client relationship may be established by an appellant with an attorney who works for a law school clinical program. In addition, the Board ruled, by analogy to reimbursement of paralegal costs, fees may be payable not only for the services of the attorney but also for the law students who work as her agents.

BACK PAY AND COMPLIANCE

Andress v. U.S. Postal Service CH-0752-89-0302-X-1 (March 10, 1993)

56 M.S.P.R. 501 (1993)

The Board held that the Back Pay Act applies to preference eligible Postal Service employees who prevail in appeals before the Board. The Board reasoned that the Postal Reorganization Act, which removed the Postal Service from the Back Pay Act's coverage, specifically preserved the rights granted to preference eligible employees by title 5 of the U.S. Code at the time of the reorganization. These rights include the remedies the Back Pay Act confers upon appellants who prevail before the Board. The Board found that, as to preference eligibles, the Postal Service could not by regulation alter the rules developed through judicial construction of the Back Pay Act. The Board noted that courts have held that the Back Pay Act does not require an employee to mitigate his or her damages by seeking alternative employment until after his or her administrative appeal is decided. Therefore, the Board concluded that the appellant, who did not seek other employment while he was off the rolls, was entitled to back pay notwithstanding Postal Service regulations to the contrary.

Holtgrewe v. Federal Deposit Insurance Corporation DE-0752-89-0167-C-1 (May 5, 1993) 57 M.S.P.R. 307 (1993)

To comply with a decision mitigating an appellant's removal to a demotion, the Board found in this case, the agency must restore him to his former work location. The appellant is entitled to a mitigation remedy that is as close to the *status quo ante* as the demotion allows, unless the agency shows that "overriding circumstances" require his reassignment to a different location. A claim of overstaffing and a desire for a clean slate do not constitute such a showing.

Holmes v. Department of Veterans Affairs PH-0752-89-0485-X-1 (April 19, 1993) 57 M.S.P.R. 115 (1993)

In petitioning for enforcement of a settlement agreement, the appellant asserted that he lost another job because the agency breached the agreement by responding improperly to an employment inquiry. The Board found that the appellant's entitlement to an award of back pay for the breach depends on his showing that, absent the breach, he would have secured that employment.

Lunkin v. U.S. Postal Service SF-0752-85-0038-X-1 (March 24, 1993) 56 M.S.P.R. 642 (1993)

The Board held that Postal Service preference eligible employees are entitled, upon the reversal of an unjustified personnel action, to restoration of all annual leave that the employee would have earned during the period the action was in effect, even though that amount may exceed the maximum number of hours that agency regulations permit an employee to carry over on a yearly basis. Relying on its decision in *Andress v. U.S. Postal Service*, 56 M.S.P.R. 501 (1993), the Board found that the employee's remedy arose under the Back Pay Act, which authorizes a *status quo ante* remedy, including restoration of annual leave in excess of the maximum leave accumulation authorized by the agency's internal regulations.

DISCRIMINATION

"Handicapped" Employee — Accommodation

Harris v. Department of the Army NY-0752-90-0047-I-1 (March 29, 1993) 57 M.S.P.R. 124 (1993)

In this decision, the Board explained the requirement that an agency provide a "firm choice" to employees handicapped by drug or alcohol abuse. To do so, the agency must offer the appellant an unequivocal choice between effective treatment of his condition and the initiation of removal proceedings if he chooses not to participate in a treatment program, ceases his participation in such a program, is discharged before the program's completion, fails to adhere to its terms, or engages in alcohol- or drug-related misconduct or has alcohol- or drug-related performance deficiencies after completing the program. Failure to provide a "firm choice" would constitute handicap discrimination if the appellant shows that he is a handicapped person and that his misconduct was caused by his substance abuse handicap. (Vice Chairman Parks issued a dissenting opinion.)

Banks v. Department of the Navy PH-0752-89-0296-I-1 (March 29, 1993) 57 M.S.P.R. 141 (1993)

Expanding on *Harris*, above, the Board held that the focus of a "firm choice" analysis should be on the choice offered the appellant at the time the most severe discipline short of removal is imposed, not before that point. "Firm choice" cannot be used merely as a counseling or threatening device, or it will lose its force and not constitute the requisite serious notice that it was intended to be. (Vice Chairman Parks issued a dissenting opinion.)

Yancy v. General Services Administration CH-0752-89-0585-I-1 (April 5, 1993) 57 M.S.P.R. 192 (1993)

Further expanding on *Harris*, the Board held that an appellant is not provided a "firm choice," and therefore is not reasonably accommodated for her alcoholism, where, despite being told that removal may be initiated for her "intolerable" misconduct, the most severe discipline she faced after three such warnings was a 10-day suspension. The Board found here that the agency's subsequent removal action therefore constituted handicap discrimination. (Vice Chairman Parks issued a dissenting opinion.)

EVIDENCE

Exclusionary Rule

Delk v. Department of the Interior DC-0752-92-0526-I-1 (June 3, 1993) 57 M.S.P.R. 528 (1993)

The Board found in this case that the exclusionary rule, which excludes illegally seized evidence from consideration in criminal proceedings, does not apply to Board proceedings. In reaching this conclusion, the Board distinguished Supreme Court decisions extending the exclusionary rule beyond purely criminal proceedings. The primary purpose of the rule, deterrence of police misconduct, is not well served in cases involving Government employees, and the interest in the integrity of the public service far outweighs any possible interest protected by the rule.

INTERIM RELIEF

Authority to Award

Steele v. Office of Personnel Management SF-0831-92-0373-I-1 (May 14, 1993) 57 M.S.P.R. 458 (1993)

The right to an interim relief award extends to retirement annuitants as well as other employees, the Board ruled in this case. In reaching this conclusion, the Board overruled its decision in *Cassity v. OPM*. It cautioned, however, that, while it possesses the authority to award interim relief in retirement appeals, it should take care in doing so to avoid potential problems it may create, such as the annuitant's having to pay back an overpayment, if the initial decision finding in the annuitant's favor is overturned on petition for review. Interim relief should not be awarded in an appeal where, as here, the annuitant seeks only an increase in the amount of her survivor annuity.

Proof

May v. Department of Veterans Affairs AT-0752-92-0636-I-1 (May 7, 1993) 57 M.S.P.R. 422 (1993)

When an agency files a petition for review of an initial decision in which the administrative judge has ordered interim relief, the agency's unsworn statement that it has provided interim relief does not suffice as evidence of compliance with the order. An SF-50 or SF-52 personnel action form, however, or a specific letter to the appellant from the agency will suffice, as will a sworn statement detailing the manner of compliance, in the absence of a challenge.

Details

Bonggat v. Department of the Navy SF-0752-92-0509-I-1 and SF-1221-92-0777-W-1 (February 16, 1993) 56 M.S.P.R. 402 (1993)

In affording interim relief where the initial decision orders restoration of the appellant's former grade, an agency may detail an appellant to a lower-graded position as long as the agency pays the appellant the appropriate salary for his former grade. The Board found such a detail to be acceptable, even though the appellant's professional skills may not be fully utilized in the job, as long as it is not demeaning, unsafe, or discriminatory. Further, it is not improper for the agency to require the appellant to return to duty prior to the actual filing of its petition for review.

Demotions

Slaughter v. Department of Agriculture AT-0752-91-0900-I-1 (February 12, 1993) 56 M.S.P.R. 349 (1993)

Where an initial decision orders a one-grade demotion in mitigation of a removal, the agency complies with the interim relief order when it demotes the appellant one grade, but to the first step of that grade from the higher step level he previously occupied. The Board discerned no rule setting a minimum step level to which a demotion can occur.

Suspension

Stevenson v. Department of Defense SL-0752-91-02744-1 (November 25, 1992) 55 M.S.P.R. 625 (1992)

The Board found in this case that, where the relief ordered by the administrative judge is a suspension that would not be completed until after the date of the initial decision, the agency has complied with the interim relief order when it returns the appellant to the rolls after the completion of the suspension, rather than as of the date of the initial decision.

Compliance

Labatte v. Department of the Air Force SE-0752-91-0445-X-1 (August 23, 1993) 58 M.S.P.R. 586 (1993)

The Board held that once it dismisses an agency's petition for review for failure to comply with an interim relief order, any issue of the agency's compliance with the interim relief order becomes moot. The Board found that in considering the appellant's petition for enforcement of the Board's final order, the issue of the appellant's pay for the interim relief period was an issue of back pay, and the issue of the agency's processing of the appellant's security clearance was an issue of compliance with the Board's final decision. The Board stated that any issue concerning a delay in restoring the clearance was moot for purposes of determining the agency's compliance with the Board's order because the agency was processing the clearance; the Board noted, however, that the issue might be relevant to a petition for attorney fees. The Board concluded that the agency was in compliance with the Board's order reversing the appellant's removal. The Board found that the suspension of the appellant's security clearance justified the agency's failure to return him to his former job, and that the agency properly deducted the wages and tips the appellant earned during the removal period from his back pay.

JURISDICTION

Arbitration Decisions

Confer v. Department of Veterans Affairs CB-7121-92-0031-V-1 (May 12, 1993) 57 M.S.P.R. 401 (1993)

An allegation of marital status or political affiliation discrimination does not provide a basis for review of an arbitration decision under 5 U.S.C. § 7121, the Board ruled in this appeal. Although such discrimination would constitute a prohibited personnel practice under 5 U.S.C. § 2302(b)(1), it is not appealable under 5 U.S.C. § 7702, as section 7121 requires.

Cantrell v. Department of Health and Human Services CB-7121-92-0028-V-1 (November 23, 1992) 55 M.S.P.R. 600 (1992)

Where an arbitrator affords the appellant full relief from the appealable action, there is no longer a matter at issue over which the Board has section 7121 jurisdiction. In the absence of an otherwise appealable action, the Board does not have authority over the appellant's request that it review her discrimination claims because the appeal is not then "mixed."

Military Matters

Boulineau v. Department of the Army AT-0752-90-0622-I-1 (April 21, 1993) 57 M.S.P.R. 244 (1993)

The Board will not review issues relative to "military employees and matters which are inherently of a military nature." As to civilian employees of military agencies, however, where the basis for the removal is not a matter that is subject to the military exception, the Board may consider a discrimination claim raised on appeal of a matter that is properly before it.

Reduction in Force

Brown v. U.S. Postal Service SL-0752-93-0054-I-1 (July 21, 1993) 58 M.S.P.R. 345 (1993)

In this decision on an interlocutory appeal of the administrative judge's ruling that the appeal was within the Board's jurisdiction, the Board ruled that the Postal Service's nationwide "restructuring" constituted a reorganization requiring adherence to Federal reduction in force regulations when releasing employees from their competitive levels by demotion. The Board found that the appellant was a preference eligible veteran entitled to appeal a demotion by RIF, that his assignment to a position in a different pay schedule with a lower rate of pay constituted a demotion despite any entitlement to retained grade and pay, and that the appellant's acceptance of the agency's offer of assignment did not render the action voluntary and thus unappealable. The Board, therefore, remanded the appeal to the administrative judge for adjudication.

PROCEDURES

Bergman v. Department of Justice DE-0353-90-0480-C-2 (December 2, 1992) 56 M.S.P.R. 42 (1992)

In this case, the Board rejected the appellant's assertion that the action of the administrative judge or the agency, in telephoning him at work in connection with his petition for enforcement, constituted error. Once the appellant filed the petition without a specific request that such appeal-related calls not be made, his acquiescence to them must be inferred.

RETIREMENT STATUS/ APPEALABILITY OF ACTION

Drumheller v. Department of the Army PH-0752-91-0279-I-1 (October 30, 1992) 55 M.S.P.R. 441 (1992)

Under the amendment adding subsection (j) to 5 U.S.C. § 7701, an adverse action that was never effected because the appellant retired on or before its scheduled effective date remains unappealable, as before the amendment. Under the amendment, an appellant's right to appeal an action that was effected is unchanged by a decision to retire after that action is taken. Where the appellant retires under the discontinued service retirement provisions of the law, however, and thereby prevents her removal from being effected, the Board does not lose jurisdiction over the removal where, in the absence of the removal, the appellant would not have been eligible for the retirement.

Coltin v. Department of the Navy SF-0752-91-0204-I-1 (November 19, 1992) 56 M.S.P.R. 3 (1992)

The Board found here that the appeal of a removal action, effected before the grant of the appellant's disability retirement application, remains viable under 5 U.S.C. § 7701(j) even though the application is granted retroactive to the effective date of the removal.

RETIREMENT

Malan v. Department of the Air Force & Office of Personnel Management DE-831E-90-02224-1 and DE-0752-90-02374-1 (October 22, 1992) 55 M.S.P.R. 283 (1992)

The appellant's position at the time his application for disability retirement is forwarded to OPM is the one as to which he must prove disability. A later change of position does not render the application moot, the Board ruled, but voluntary acceptance of a demotion would constitute the withdrawal of his application and reassignment to another position would constitute evidence that he was not disabled for a position at the same pay and grade.

Torallo v. Office of Personnel Management SE-831E-92-0034-M-1 (January 21, 1993) 56 M.S.P.R. 294 (1993)

The Board found in this case that the death of a disability retirement applicant does not terminate his legal interest in the continued processing of his appeal. Thus, the appeal may continue despite his death. Where the applicant elected a survivor annuity, the widow is a proper person to substitute for the applicant.

Hobbs v. Office of Personnel Management SF-0831-92-0260-I-1 (September 2, 1993) 58 M.S.P.R. 628 (1993)

The Office of Personnel Management had determined that a Special Inspector with the Department of Treasury's Bureau of Alcohol, Tobacco and Firearms is not entitled to preferential retirement credit for service as a law enforcement officer, and the Board agreed. While the Special Investigator's duties were "primarily investigative," the Board reasoned, the purpose of the investigations was to encourage legitimate businesses in the alcoholic beverage industry to comply with Federal law, rather than to prosecute them criminally. The latter is required by statute for special retirement credit.

SETTLEMENT

Dial v. Department of the Army SE-1221-92-0127-X-1 (March 17, 1993) 56 M.S.P.R. 617 (1993)

The settlement agreement in this appeal provided that all information pertaining to the settled termination action would be expunged. The Board found that, to be in compliance with this provision, the agency may not keep a paper trail of documents showing the termination and its cancellation.

Sternberg v. Department of Transportation NY-531D-86-0013-X-1 (February 25, 1993) 56 M.S.P.R. 520 (1993)

An administrative judge's reference to portions of a settlement agreement in a compliance initial decision does not violate the agreement's confidentiality provision, the Board decided here. Because administrative judges are required to make findings when a party petitions for compliance with a settlement agreement, they must discuss the settlement terms. The Board noted that it was not a party to the agreement in any event and that its regulations put parties on notice that its decisions are available to the public.

TIMELINESS

Holland v. Department of the Air Force DA-0752-90-0563-I-1 (March 15, 1993) 56 M.S.P.R. 592 (1993)

The Board here reaffirmed its holding that a pleading filed via a private express company is deemed filed by personal delivery under its regulations, with the date of filing being the date of receipt by the Clerk of the Board. Because of the Clerk's long-standing administrative practice of accepting such filings as having been made on the date they are deposited with the private express company, however, the Board held that it is appropriate to waive the filing deadline where a pleading is deposited with a private express company by the deadline.

[NOTE: Subsequent to its decision in *Holland*, the Board revised its regulations to provide that the date of filing by commercial overnight delivery is the date the pleading is deposited with the private express company. 58 *Fed. Reg.* 36345 (July 7, 1993)]

WHISTLEBLOWER PROTECTION ACT

Preface

The Whistleblower Protection Act (WPA) prohibits agencies from taking, threatening to take, or failing to take personnel actions against employees because of their disclosures of information concerning Government wrongdoing. In deciding whether the Board has the authority or jurisdiction to consider an employee's claim of reprisal for whistleblowing in an individual right of action (IRA) appeal, and, therefore, the authority to order corrective relief, the Board must first find three things: (1) that the agency took a "personnel action," as defined by the WPA, against the employee, (2) that the employee first sought relief from the Office of Special Counsel, and (3) that the employee reasonably believed that the information disclosed concerned "a violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." If the Board finds these three things, it can then consider the appellant's claim that the agency took the personnel action because of his or her whistleblowing.

Jurisdiction — Protected Activity

Dean v. Department of the Army AT-1221-92-0055-W-1 and AT-1221-92-0216-W-1 (May 5, 1993) 57 M.S.P.R. 296 (1993)

The Board found in this case that an agency's act allegedly in reprisal for an appellant's having filed a complaint with the Office of Special Counsel is not appealable to the Board as an individual right of action appeal under the Whistleblower Protection Act. It constitutes a protected activity under 5 U.S.C. § 2302(b)(9), not (b)(8).

Jurisdiction — Personnel Action

Weaver v. Department of Agriculture DE-0752-91-04084-1 (November 23, 1992) 55 M.S.P.R. 569 (1992)

Where an agency decides to suspend an appellant while he is receiving benefits from the Department of Labor's Office of Workers' Compensation for an on-the-job injury, the Board determined that it lacked jurisdiction over the action under 5 U.S.C. Chapter 75. Such an agency action that has been decided on and recorded in the appellant's official personnel file, however, constitutes a "personnel action" over which the Board may have individual right of action jurisdiction under 5 U.S.C. § 1221.

Merits Issues

Nafus v. Department of the Army NY-0432-91-0502-I-1 (May 5, 1993) 57 M.S.P.R. 386 (1993)

The Board defined two important statutory terms in this case. "Gross waste of funds" constitutes "a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the Government." "Gross mismanagement," on the other hand, constitutes "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." The issue then becomes whether the appellant genuinely and reasonably believes that he or she has disclosed gross waste or gross mismanagement.

Dean v. Department of the Army AT-1221-92-0055-W-1 and AT-1221-92-0216-W-1 (May 5, 1993) 57 M.S.P.R. 296 (1993)

The Board expanded on its finding in *Nafus* here, ruling that it was proper to consider the nature of the appellant's job in determining whether he had a reasonable belief in the truth of his disclosures, because that factor could affect whether the belief is genuine.

Kent v. General Services Administration DC-0752-90-0241-I-1 (March 8, 1993) 56 M.S.P.R. 536 (1993)

In this appeal, the Board held that the language and the legislative history of the Whistleblower Protection Act, which protects disclosures "not specifically prohibited by law," show a clear legislative intent to limit the quoted term to statutes and court interpretations of those statutes. Thus, the Federal Acquisition Regulations do not constitute such a law, but the Trade Secrets Act does.

APPENDIX C - SIGNIFICANT BOARD DECISIONS - ORIGINAL JURISDICTION CASES

This appendix contains summaries of significant original jurisdiction cases decided by the Board during Fiscal Year 1993.

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.

SPECIAL COUNSEL DISCIPLINARY ACTIONS - HATCH ACT

Federal/DC Government Employees

Special Counsel v. Campbell CB-1216-92-0001-T-1 (June 22, 1993) 58 M.S.P.R. 170 (1993)

The Board held that a Federal employee who ran as an independent in a partisan election in Alexandria, Virginia, sought and obtained the endorsement of a national political party, stated in his campaign literature that he was endorsed and fully supported by that party and was a full member of its ticket, and received the same services from the party that its candidates received, was not in fact an independent candidate and, therefore, was in violation of 5 U.S.C. § 7324(a). The Board also held that its authority to enforce the Hatch Act preempts a State's definition of an independent candidate. The Board must interpret the words of the Hatch Act in light of the purpose Congress sought to serve. Because the employee was not an independent, he did not fall within the exemption contained in the OPM regulation permitting Federal employees to run for office as independents in certain areas, including Alexandria, Virginia. By unanimous vote, the Board held that the Hatch Act violation in this case did not require removal. Consideration of mitigating factors was appropriate in determining the proper penalty to be imposed, and a 30-day suspension was ordered.

Special Counsel v. Dominguez CB-1216-92-0014-T-1 (December 3, 1992) 55 M.S.P.R. 652 (1992)

The Board held that removal of an employee of the District of Columbia Government was an appropriate penalty to impose for his violation of the Hatch Act by running as the Republican candidate for county sheriff in Virginia. The Board noted that his employer had cautioned him against his candidacy and found that it was irrelevant that the partisan activity was in a different jurisdiction from the one in which he worked.

Special Counsel v. Lee CB-1216-92-0002-T-1 (June 10, 1993) 58 M.S.P.R. 81 (1993)

The Board sustained the charge that the respondent, a Federal employee, had taken an active part in the mayoral campaign in D.C. in concert with a partisan political party in violation of the Hatch Act. The Board noted that under 5 U.S.C. § 7325, a Hatch Act violation through participation in a campaign requires removal unless the Board unanimously decides that removal is not required. The Board found that removal was warranted in this case despite the respondent's argument that lesser penalties had been imposed in other cases in which there had been settlements. The Board declined to require absolute uniformity between cases that are settled and those that are not because of the public policy in favor of encouraging settlements.

Related Decision - Stay of Board Order Pending Judicial Review

Special Counsel v. Campbell CB-1216-92-0001-S-1 (August 3, 1993) 58 M.S.P.R. 455 (1993)

The Board denied the respondent's request to stay its order directing the agency to suspend him for 30 days, based on a finding that he had violated the Hatch Act, pending judicial review. The Board found that the respondent had not established that there was a likelihood he would succeed on the merits in his appeal to the Federal Circuit, that he would suffer irreparable harm if he was suspended, that other interested parties would not be harmed by the granting of the stay, or that the public interest would be served by the issuance of the stay.

State/Local Government Employees

Special Counsel v. Bianchi & Allegheny County Department of Development & Allegheny County Department of Tax Claims and Revenue CB-1216-92-0027-T-1 (June 10, 1993) 57 M.S.P.R. 627 (1993)

The Board held that the respondent violated the Hatch Act by running as a Democratic candidate for town council while employed by a local agency in connection with a federally-funded activity and that this violation warranted removal. The Board found that the respondent willfully violated the Hatch Act, acting in deliberate disregard of the law in spite of having never received a Special Counsel warning letter, based on his knowledge that the matter had been referred to the Special Counsel and on his having read legal memoranda discussing the Hatch Act's coverage.

Special Counsel v. Blackburne & State of New York Office of Alcoholism and Substance Abuse CB-1216-92-0023-T-1 (July 8, 1993) 58 M.S.P.R. 279 (1993)

The Board held that the respondent, who was employed by a State agency in connection with a federally-funded activity, violated the Hatch Act by becoming a candidate for partisan election to the New York City Council, despite the fact that he was on leave of absence. In determining that removal was the appropriate penalty, the Board found that the respondent's violation was willful. Although the agency had advised him earlier that a leave of absence would avoid a violation, the

Board noted that at the time of the violation the agency clearly informed him that its earlier view was incorrect. The Board noted that he received at least three clear warnings from the agency with respect to his candidacy and no conflicting advice.

Special Counsel v. Fields & Southeastern Center for Mental Health, Developmental Disabilities and Substance Abuse Service CB-1216-92-0034-T-1 (April 12, 1993) 57 M.S.P.R. 60 (1993)

The Board held that the respondent, an employee of a State agency, participated in a partisan election in violation of the Hatch Act and that her removal was warranted. The respondent failed to respond to the Special Counsel's complaint alleging a violation of the Hatch Act. Such a failure is considered an admission of the allegations in the complaint under 5 CFR § 1201.125(a). The Board noted that a party before the Board ignores a Board order at his/her own peril. The Board held that a response to a Special Counsel complaint that does not address or deny either that the respondent was a covered employee or that there was a candidacy in a partisan election will be deemed insufficient to defeat the Special Counsel's allegations of a Hatch Act violation.

Special Counsel v. Jakiela & Allegheny County Department of Development CB-1216-92-0021-T-1 (April 19, 1993) 57 M.S.P.R. 228 (1993)

The Board held that the respondent, who was employed by a local agency in connection with Federal funds, violated the Hatch Act when he participated in a partisan election as a Democratic Party candidate. In finding that the penalty of removal was appropriate, the Board rejected the respondent's argument that no penalty should be imposed because the violation was based on a mistaken belief that there was no bar to his candidacy since his salary did not come from Federal funds. Under the facts of the case, the Board determined that knowledge of the Hatch Act's prohibitions could be imputed to the respondent.

Special Counsel v. Spickard & Virginia Department of Forestry CB-1216-92-0022-T-1 (June 22, 1993) 58 M.S.P.R. 108 (1993)

The respondent, who was employed by a State agency in connection with a federally-funded activity, was charged with violating the Hatch Act by being the Republican candidate for county sheriff in a general election in 1991. The parties reached a settlement that the Board's Chief Administrative Law Judge (CALJ) recommended the Board adopt. In rejecting the settlement agreement and remanding the case to the CALJ, the Board noted that, while it favors settlement agreements, it could not approve this agreement because it called for the U. S. Department of Agriculture and the State agency for which the respondent works to agree on the time and manner for withholding certain funds from Federal grants to the agency. The Board also noted that such a provision would be subject to abuse and difficult to enforce because it does not provide for a starting date or a rate for withholding, and, if the parties were unable to agree, the Board would be unable to enforce the settlement agreement.

Special Counsel v. Williams & Governor's Office for Individuals with Disabilities State of Maryland CB-1216-92-0009-T-1 (January 21, 1993) 56 M.S.P.R. 277 (1993)

The Special Counsel charged the respondent with violation of the Hatch Act when she ran for partisan political office while serving in a position in an executive agency in the State of Maryland. The Board held that it lacked the authority to rule a statute unconstitutional and noted that, in any event, the Supreme Court has held that the Hatch Act is constitutional. The Board also held that the Act's application to her did not violate the First Amendment. The Board found that the respondent's employment was in connection with a federally-funded program, that she had violated the Hatch Act, and that she did not show that mitigation of the statutorily required penalty of removal was warranted. Based on the serious and conspicuous violation, the Board found the appellant's removal was warranted.

Related Decision - Stay of Proceedings Pending Decision on Interlocutory Appeal

Special Counsel v. Bissell, et al. & Public Service Commission of the State of Tennessee CB-1216-93-0016-T-1 and -0019-T-1 through -0032-T-1 (July 8, 1993) 58 M.S.P.R. 274 (1993)

The Special Counsel filed a complaint against the respondents for alleged violations of the Hatch Act. The respondents asserted that the case must be dismissed for lack of jurisdiction because their agency is not an executive branch agency within the State of Tennessee. The Board's Chief Administrative Law Judge certified an interlocutory appeal to the Board on the jurisdiction issue but did not

stay the proceedings before him. The respondents then filed a motion with the Board seeking a stay. The Board found that the presiding official may stay a proceeding pending the outcome of an interlocutory appeal, or the Board may do so on its own motion. Here, where the stay request was more in the nature of a request for a continuance, it was appropriate to apply Board law concerning continuances rather than Federal court law regarding stays. The Board held that continuances will be granted on a good cause basis. The Board found that, because the jurisdictional issue must be decided before the merits of the case, there was good cause to stay the proceedings.

SPECIAL COUNSEL STAY REQUESTS - WHISTLEBLOWER PROTECTION ACT

Special Counsel v. Department of the Air Force CB-1208-92-0017-U-3 (November 6, 1992) 55 M.S.P.R. 482 (1992) CB-1208-92-0017-U-4 (February 5, 1993) 56 M.S.P.R. 368 (1993)

The Special Counsel requested a second extension of the stay (granted in Fiscal Year 1992) of the removal of Ms. Maxwell. She asserted that delays in obtaining interviews and necessary agency files hampered her ability to complete the investigation, but that what had been gathered thus far supported her original determination that the proposed removal was in retaliation for protected conduct (filing of grievances and whistleblowing). In its decision of November 6, 1992, the Board granted a 90-day extension of the stay. The Special Counsel requested a third extension, stating that the investigation was complete but additional time was needed to complete the review process necessary to seek corrective action under 5 U.S.C. § 1214. In its decision of February 5, 1993, the Board granted a further 90-day extension of the stay.

Special Counsel v. Department of Veterans Affairs CB-1208-93-0036-U-1 (June 8, 1993) CB-1208-93-0036-C-1 and CB-1208-93-0036-U-2 (July 23, 1993)

On June 8, 1993, the Special Counsel was granted a 45-day stay on the grounds that she believed Mr. Steen's reassignment and separation were effected in reprisal for his engaging in protected activity (disclosures of statutory and regulatory violations and abuse of authority) and, therefore, were in violation of 5 U.S.C. § 2302(b)(8). The Special Counsel next filed a motion for enforcement of the stay and a request for extension. The agency filed a motion for termination of the stay, challenging the Special Counsel's investigation and presentation of the evidence. In its decision of July 23, 1993, the Board denied the agency's motion for termination of the stay and granted the Special Counsel's request for extension. In denying the agency's motion, the Board found that the agency failed to show that, when the record was viewed in the light most favorable to the Special Counsel, the stay was not appropriate under the facts and circumstances involved. The Board extended the stay for 90 days and dismissed the Special Counsel's motion for enforcement.

Special Counsel v. Federal Aviation Administration CB-1208-93-0040-U-1 (July 21, 1993) CB-1208-93-0040-U-2 and CB-1208-93-0040-U-3 (September 2, 1993)

On July 21, 1993, the Special Counsel was granted a 45-day stay on the grounds that she believed Mr. Jennings was removed in retaliation for his filing of two grievances, activities protected by 5 U.S.C. § 2302(b)(9). The agency filed a motion to terminate the stay, which the Board denied in its decision of September 2, 1993. Also on that date, the Board granted a 90-day extension of the stay in response to the Special Counsel's request. The Board noted that case law developed under the predecessor statute is not directly applicable to the current statute and held that the stay should be extended because the Special Counsel's prohibited personnel practice claim was not clearly unreasonable.

Special Counsel v. Department of Transportation CB-1208-93-0048-U-1 (September 29, 1993)

The Chairman granted the Special Counsel's request for a 45-day stay of the reassignment of Mr. Armstrong. The Special Counsel argued that there were reasonable grounds to believe that the reassignment, which had already been effected, was the result of Mr. Armstrong's whistleblowing activities and his cooperation with the Inspector General. The Special Counsel said that the stay was needed to allow the office time to investigate further and to seek corrective action. The Chairman noted that the statute permits a stay of an action that has already been effected and that, while the lapse of time is to be considered, the Special Counsel had been active in pursuing the investigation from the beginning.

PROPOSED ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES

Social Security Administration v. Anyel CB-7521-91-0009-T-1 (June 25, 1993) 58 M.S.P.R. 261 (1993)

In an action against an administrative law judge based on her performance, the Board remanded the case to its Chief Administrative Law Judge for further proceedings. The Board held that an administrative law judge's adjudicatory errors can establish good cause for disciplinary action under 5 U.S.C. § 7521 and that such an action does not improperly interfere with the administrative law judge's decision-making independence. The Board disagreed with the CALJ's discovery ruling that evidence concerning the agency's Appeals Council's disposition of the respondent's cases was irrelevant. The Board found that, although it has no authority, per se, to review the decisions of the agency's Appeals Council, it must decide whether the charge of adjudicatory errors is supported, and these decisions are relevant to that issue. The Board also found that the respondent was entitled to the files of cases in which she was charged with having denied claimants the right to representation. The Board noted that under 5 CFR 1201.72(a) evidence is relevant if it "includes information that appears reasonably calculated to lead to the discovery of admissible evidence."

REVIEW OF OPM REGULATIONS

Pavlopoulos v. Office of Personnel Management and Department of the Navy
CB-1205-93-0004-U-1 (August 30, 1993) 58 M.S.P.R. 620 (1993)

The Board denied the petitioner's request to review the Navy's implementation of a provision of the Federal Personnel Manual (FPM) under 5 U.S.C. § 1204(f)(2)(B). The Board ruled that the FPM provision relied on by the petitioner was substantially identical to a statute and that the Board does not have authority under section 1204(f) to review an agency's implementation of a statutory provision. The Board further found that, even assuming that this FPM provision is a rule for the purpose of section 1204(f), the record did not show that the Navy invalidly implemented this provision when it declined to promote the petitioner.

APPENDIX D - SIGNIFICANT LITIGATION

Significant litigation involving the Board during Fiscal Year 1993 included the following:

WHISTLEBLOWER PROTECTION ACT

Protected Disclosure

Spruill v. Merit Systems Protection Board, 978 F.2d 679 (Fed. Cir. 1992)

The court affirmed the Board's holding that the petitioner's claim that his employing agency retaliated against him because he filed an equal employment opportunity complaint does not qualify as a protected whistleblower disclosure under 5 U.S.C. § 2302(b)(8) because it is protected under 5 U.S.C. § 2302(b)(9). Section 2302(b)(8) protects employees when they make disclosures they reasonably believe evidence a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial or specific danger to public health or safety. In contrast, section 2302(b)(9) protects employees from retaliation when they file an appeal, grievance or complaint. The court agreed with the Board's conclusion that the Congress intended to protect whistleblowers in section 2302(b)(8) and not to provide yet another protection for situations already covered by section 2302(b)(9). The court, therefore, affirmed the Board's dismissal of the petitioner's individual right of action appeal for lack of jurisdiction.

The court also addressed the question of which agency, the Board or the employing agency, is the proper respondent before the court in appeals filed under 5 U.S.C. § 1221. The Board is the proper respondent when the appeal involves purely jurisdictional or procedural questions, but the employing agency is the proper respondent when the Board's decision addresses the merits of the appeal.

Contributing Factor

Clark v. Department of the Army, 997 F.2d 1466 (Fed. Cir. 1993)

The Federal Circuit affirmed the Board's decision sustaining the petitioner's demotion by reduction-in-force and her removal for cause and its finding that she did not establish that her alleged protected disclosures were a contributing factor in the personnel actions. The court held that the Board did not err in deciding whether the petitioner's disclosures were a contributing factor in the agency's actions without first deciding whether the disclosures were protected under 5 U.S.C. § 2302(b)(8) because the Whistleblower Protection Act did not mandate any particular order of proof. In addition, the court found that neither the language of the Whistleblower Protection Act nor the legislative history mandated an inquiry into the deciding official's knowledge of the disclosure or the timing of the personnel action in relation to the disclosure. Although such factors are relevant to the contributing factor test, they are not dispositive.

The court also found no error in the Board's evaluation of the agency's evidence of the propriety of the personnel actions. Such evidence should be considered in determining whether the employee has met the contributing factor test and evaluated under the preponderance of the evidence standard. If the employee meets that burden, the agency then must prove by clear and convincing evidence that it would have taken the same action in the absence of the disclosure.

Marano v. Department of Justice, 2 F.3d 1137 (Fed. Cir. 1993)

The petitioner filed an individual right of action appeal concerning his transfer to another position, asserting that it was based on whistleblowing disclosures protected under 5 U.S.C. § 2302(b)(8). The Board determined that the petitioner failed to show the disclosures were a contributing factor in the transfer, but the court disagreed. To satisfy the contributing factor test, the employee need not demonstrate that the agency had a retaliatory motive based on his or her status as a whistleblower. Rather, if the content of the employee's disclosures led to the challenged personnel action, this satisfies the employee's burden. The court remanded the appeal to give the agency an opportunity to prove by clear and convincing evidence that it would have taken the personnel action in the absence of the petitioner's disclosures.

Special Counsel Disciplinary Actions

Hathaway v. Merit Systems Protection Board, 981 F.2d 1237 (Fed. Cir. 1992)

The court affirmed the Board's decision suspending the petitioner for 30 days, finding substantial evidence that he threatened personnel actions against an employee who made protected whistleblowing disclosures. Citing *Eidmann v. Merit Systems Protection Board*, 976 F.2d 1400 (Fed. Cir. 1992), the court found that the Board should have determined whether the employee's whistleblowing was a significant factor, rather than a contributing factor, in the petitioner's actions. However, because the petitioner did not challenge the Board's use of the contributing factor test, the court accepted that standard for purposes of review. The court concluded that the Board properly applied that standard; direct evidence of the petitioner's retaliatory intent was not required. The court did not reach the issue of whether an accused management official in a Special Counsel disciplinary action may defeat the action by establishing by clear and convincing evidence that he or she would have taken the same personnel action in the absence of the employee's protected disclosures.

INTERIM RELIEF

Delaughter v. United States Postal Service, 3 F.3d 1522 (Fed. Cir. 1993)

In an initial decision, the administrative judge sustained the agency's charges but mitigated the removal penalty to a 90-day suspension. The administrative judge ordered the agency to provide the appellant with interim relief pursuant to 5 U.S.C. § 7701(b)(2)(A) in the event the agency filed a petition for review. Interim relief constitutes returning the appellant to work or, alternatively, putting the appellant on administrative leave after making an express determination that returning him to the workplace would be unduly disruptive to the work environment.

The agency filed a petition for review and evidence that it had placed the appellant on administrative leave. The majority of the Board found that the agency's failure to make an express determination that returning the appellant to the workplace would be unduly disruptive was a technical failure excused by the fact that the appellant received interim monetary relief in the form of administrative leave. On the merits, the Board majority reversed the administrative judge's mitigation of the penalty and sustained the removal.

The court reversed, holding that the Postal Service failed to follow the appellate review procedure mandated by the Congress for petitions for review of an administrative judge's initial decision reversing an employee's removal and providing interim relief. The court further held that, by excusing as harmless error the agency's failure to make an "unduly disruptive" finding, the Board failed to enforce the agency's statutory obligation. The court remanded the case with instructions to dismiss the agency's petition for review.

RETIREMENT

Employees Removed for Inability to Perform

Bruner v. Office of Personnel

Management, 996 F.2d 290 (Fed. Cir. 1993)

The petitioner was separated from service on the basis of his inability to perform the duties of his position and the unavailability of another position which he could fill. When he applied for disability retirement, the Office of Personnel Management denied his claim, and the Board's administrative judge affirmed the OPM decision.

The court reversed and remanded based on its finding that the administrative judge misallocated the burden of proof. An appellant makes a *prima facie* showing of entitlement to a disability retirement when he shows that he was terminated because of an inability to perform the duties of his position. Such a showing creates a presumption of entitlement to disability retirement. This presumption is rebuttable by the Government, but the presumption shifts the burden of producing evidence to the Government to show that the employee is not sufficiently disabled to warrant disability retirement. However, the ultimate burden of persuasion on the issue of entitlement to a disability retirement still rests with the appellant.

Notice of Election Rights

Brush v. Office of Personnel Management, 982 F.2d 1554 (Fed. Cir. 1992)

When Mr. Brush retired, he elected a reduced annuity to provide an annuity for Mrs. Brush. When the couple divorced, the divorce decree was silent as to the annuity, and no changes were made to the annuity. Mr. Brush died before the time had expired to restate his election. The Board affirmed the decision of the Office of Personnel Management denying Mrs. Brush's application for former spouse survivor annuity benefits. The Board found that Mrs. Brush did not qualify for a former spouse annuity under 5 CFR 831.622 or for an annuity as a surviving widow.

The Federal Circuit affirmed the Board's decision that Mrs. Brush did not qualify for an annuity as a surviving widow or a former spouse. The court reversed the Board, however, on its holding that OPM is not required to send an annual notice to annuitants of their rights of election and remanded for findings on the effect of the lack of notice on the election time periods set out in 5 U.S.C. § 8339. The court held that 5 U.S.C. § 8339 requires that OPM notify annuitants annually of their rights of election and that OPM's regulation at 5 CFR 831.627 is invalid because it does not comport with this statutory mandate.

SECURITY CLEARANCES/ INDEFINITE SUSPENSIONS

Jones v. Department of the Navy, 978 F.2d 1223 (Fed. Cir. 1992)

The court affirmed the Board's decision upholding the agency's indefinite suspensions of the petitioners pending a determination of whether their security clearances should be terminated. Upon completion of the agency's investigation, the petitioners were returned to duty. On appeal, the Board affirmed the suspension actions and rejected their claims to back pay for the 14 months they were suspended.

The court rejected the petitioners' claim that they were denied due process because they were not given full information about the basis for the termination of their access to classified information. Citing *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the court held that there is neither a property right nor a liberty interest in access to classified material, and the loss of such access, therefore, did not implicate any due process rights.

TIMELINESS

Appeals Alleging Breach of Last Chance Settlement Agreements

Clark v. United States Postal Service, 989 F.2d 1164 (Fed. Cir. 1993)

The court affirmed the Board's finding that the agency's failure to give the petitioner notice of appeal rights when it reduced him in grade pursuant to a last chance settlement agreement in which he had waived his appeal rights did not excuse his untimely filed appeal to the Board. The court held that the agency had no obligation to notify the petitioner of his appeal rights because it took the action prior to the issuance of the court's decision in *Stewart v. United States Postal Service*, 926 F.2d 1146 (Fed. Cir. 1991), which clarified the Board's jurisdiction in last chance agreement cases. Therefore, the agency had no reason to know that the petitioner had appeal rights.

The court announced a prospective rule that an agency becomes obligated to notify an employee of appeal rights in last chance agreement cases when the employee informs the agency that he or she contests the agency's assertion of breach of the agreement. The court further held that the Board may consider the employee's delay in so informing the agency in deciding whether the agency's failure to notify the employee of appeal rights constitutes good cause to waive the Board's filing deadline.

APPENDIX E - MERIT SYSTEMS STUDIES AND REVIEWS OF OPM SIGNIFICANT ACTIONS

MERIT SYSTEMS STUDIES

The following are summaries of the Board's merit systems studies completed and published during Fiscal Year 1993:

Federal Personnel Offices: Time For Change - This study examined the quality and timeliness of personnel work as viewed by Federal managers and employees of the personnel offices that provide them service. The functions discussed were position classification, recruiting, training, labor relations, and employee relations. The nearly 400 managers and personnelists interviewed largely agreed that the delivery of services was not as good as desired, but the personnelists held a much more positive view than the managers.

The causes of problems were described as: (1) The Federal personnel system of rules and procedures is far too huge, complex, prescriptive, and rigid; (2) Personnel specialists are expected to be skilled, knowledgeable, and helpful but often are not; and (3) Some managers have not accepted responsibility for personnel management of the employees under their supervision, are not highly skilled in supervision, and are not in agreement on the role of the personnel office.

The Board reported that all three parts of this equation are interdependent and must be addressed together in order for the personnel office to provide better service to managers and to become more valuable in accomplishing the mission of the organization. The report includes recommendations for bringing about such improvements.

The Changing Face of the Federal Workforce: A Symposium on Diversity - This is a report of the proceedings of a symposium on workforce diversity that the Board convened in February 1993. The symposium was intended to heighten agencies' awareness of what managing diversity is all about and highlight what some agencies are doing in this area. The Board invited two panels of Federal officials known for their knowledge of the issues of diversity and for their stature in the Federal community. In addition, the Board invited a wide variety of participants involved in shaping or carrying out policies on diversity, from congressional and public policy organizations, Federal employee unions, professional organizations, personnel offices, and academia. Key issues were:

- Productivity is enhanced when the work environment is supportive and nurturing, where employees feel they are valued and respected, and where their contributions are appreciated.
- Efforts to manage diversity should not be confused with equal employment opportunity (EEO) and affirmative action programs.
- A diverse workforce will succeed with the support and commitment of all levels of management, the union, and employees.
- Managers must ensure that all employees are included, developed, and valued, and that their work environment is not hostile to any of them because they are "different."
- Agencies' management of diversity will vary, depending on their needs, culture, problems, resources, mission, and external obligations.

- Achieving a diverse workforce and managing diversity must be addressed together.

Whistleblowing in the Federal Government: An Update - This study examined the extent to which Federal employees are observing and reporting illegal or wasteful activities and how well employees who report such activities are being protected against reprisal for "whistleblowing." The report, which updates a 1983 Board report on whistleblowing, is based largely on a 1992 survey of over 13,000 Federal employees.

The study results showed a decrease in the percentage of employees who said they had observed an illegal or wasteful activity-18 percent in 1992, compared to 23 percent in 1983. The Board was encouraged to find that there was a dramatic increase in the percentage of these employees who reported the illegal or wasteful activities they observed-50 percent in 1992, compared to only 30 percent in 1983.

Unfortunately, there was also an increase in the percentage of employees who said they had experienced reprisal or the threat of reprisal for reporting an illegal or wasteful activity-37 percent in 1992, compared to 24 percent in 1983. The study also found that the nature of the reprisal actions commonly experienced had changed somewhat; such actions now appear to be more subtle.

The report recommended a number of ways in which agencies can better encourage employees to disclose information about illegal or wasteful activities they observe and protect employees who report such activities from reprisal. The recommendations focused on creating organizational climates in which sharing information about problems and working to resolve those problems is valued by all members of the organization. Included were suggestions for soliciting employees' views and providing feedback, educating employees about the kinds of problems they should share and how to go about sharing information, selecting supervisors and managers who will be receptive to employees' disclosures of problems, and implementing employee participation programs in which employees can feel comfortable sharing problems and ideas.

The following reports, completed in Fiscal Year 1992, were published early in Fiscal Year 1993:

A Question of Equity: Women and the Glass Ceiling in the Federal Government - A study examining career advancement in the Government and whether there are barriers that account for the underrepresentation of women in senior-level jobs. (Summary in Fiscal Year 1992 Annual Report)

Federal Blue Collar Employees: A Workforce In Transition - A study of the people and systems that make up the Federal crafts and trades workforce, analyzing important issues from the perspectives of line managers, employees, personnel offices, and unions. (Summary in Fiscal Year 1992 Annual Report)

SIGNIFICANT ACTIONS OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT

The following reports, completed in Fiscal Year 1992, were published early in Fiscal Year 1993:

Civil Service Evaluation: The Role of the U.S. Office of Personnel Management - A study of the role of OPM's personnel management evaluation (PME) program in providing oversight of personnel management in Federal agencies. (Summary in Fiscal Year 1992 Annual Report)

Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change - A study of OPM's accomplishments in promoting and overseeing research programs and demonstration projects under the authority granted by the Civil Service Reform Act. (Summary in Fiscal Year 1992 Annual Report)