

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

**Annual Report  
for Fiscal Year 1995**



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

U.S. Merit Systems Protection Board  
Washington, DC

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 Seventeenth Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during fiscal year 1995, including the Federal employee appeals and other cases decided by the Board.

The Board and its regional and field offices closed 13,163 cases during fiscal year 1995—a 24 percent increase over the number of cases closed in the previous fiscal year. The Board's administrative judges decided 10,888 appeals, stay requests, and addendum cases. The 3-member Board decided 2,226 cases under its appellate jurisdiction, principally petitions for review (PFRs) of administrative judges' initial decisions. The Board also completed action on 49 cases arising under its original jurisdiction, principally prohibited personnel practice and Hatch Act cases brought by the Special Counsel.

Overall, the Board is providing more responsive service to its customers despite a 16 percent reduction in its workforce and a 40 percent increase in caseload since 1993. The average processing time at Board headquarters for PFRs of initial decisions by administrative judges was 96 days—a historic low. The average processing time in the regional and field offices was also 96 days. This means that, on average, an appeal to the Board was processed through both levels of Board review in just over six months. This speedy processing is important because approximately 90 percent of the cases that come to the Board are appeals of agency personnel actions. Early resolution of these disputes benefits all parties, as well as the taxpayers who fund Government activities.

One important measure of the Board's performance of its statutory mission is the extent to which its decisions are upheld by, its principal reviewing court, the U.S. Court of Appeals for the Federal Circuit. Of the 654 final Board decisions reviewed by the court in fiscal year 1995, 94 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 the Office of Personnel Management (OPM), the Board completed three reports during the fiscal year, including an update of its previous studies of sexual harassment in the Federal workplace.

Respectfully submitted

Ben L. Erdreich  
Chairman

Beth S. Slavet  
Vice Chairman

Antonio C. Amador  
Member

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## **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 95-454, 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 and free of prohibited personnel practices.

## **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 train-

ing. Such an action may be appealed to the Board *only* if the appellant alleges that the action was taken because of 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.

With respect to adverse actions, which account for almost half of all appeals to the Board, the following categories of employees have appeal rights: (1) employees in the competitive service and excepted service employees with veterans preference (called "preference eligibles") who have completed their probationary period; (2) non-preference eligible employees in the excepted service (excluding those in the Postal Service and certain other agencies) who have completed two years current continuous service in an Executive agency; and (3) non-preference eligible supervisors and managers in the Postal Service.

### ***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 *except 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, 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, non-renewable 7-year terms.

### Chairman



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. Prior to that, he was a partner in the firm of Cooper, Mitch & Crawford, Attorneys, in Birmingham, Alabama. He served in the Alabama House of Representatives from 1970 to 1974. He is a graduate of Yale University and received his J.D. degree from the University of Alabama School of Law. He is admitted to the Alabama and District of Columbia bars and is a member of the Federal Circuit, District of Columbia, Alabama, and Birmingham bar associations.

## Vice Chairman



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U.S. Merit Systems Protection Board on August 15, 1995, following her nomination by President Clinton and confirmation by the Senate. Her term appointment expires March 1, 2002. Ms. Slavet served as Labor Counsel to the Committee on Labor and Human Resources of the U.S. Senate from March 1993 until January 1995. Previously, she was Legislative Counsel and Staff Director for U.S. Representative Chester Atkins (D-MA). From 1984 to 1992, Ms. Slavet was an attorney in private practice in Washington, DC, representing public and private sector unions and employees. Prior to that, she served as the staff attorney to the American Federation of Government Employees Local 1812 in Washington, DC. She is a graduate of Brandeis University and received her J.D. degree from the Washington University School of Law. She is admitted to the District of Columbia Bar.

ANTONIO C. AMADOR became Vice Chairman of the Board on November 1, 1990,



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s 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.

## Member

## BOARD ORGANIZATION

The **Chairman, Vice Chairman, and Member** adjudicate the cases brought to the Board. Each has his/her individual office.

The **Chairman**, by statute, is the chief executive and administrative officer of the Board. Office heads report to the Chairman through the Chief of Staff.

The **Office of Regional Operations** manages the appellate functions of the MSPB regional offices. The five regional offices (including five field offices) receive and process the initial appeals filed with the Board. Administrative judges in the regional and field offices have the primary function of adjudicating appeals and issuing fair, timely, and well-reasoned decisions.

The **Office of Appeals Counsel** assists the Board in adjudicating petitions for review of initial decisions issued by its administrative judges and requests for review of arbitration decisions in certain cases. The office analyzes the petitions, conducts legal research, and submits proposed opinions to the Board for final adjudication. It also conducts the Board's petition for review settlement program, 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** adjudicates Hatch Act cases, corrective and disciplinary action complaints brought by the Special Counsel, proposed agency actions against administrative law judges, and other cases assigned by the Board.

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 manages the Board's electronic bulletin board files, 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 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 coordinates the Board's legislative policy, congressional relations, and public affairs functions, and produces the agency's annual report to the President and the Congress and public information publications. The office also conducts the Board's ethics program and plans and directs audits and investigations.

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 also provides assistance to Federal departments and agencies seeking to improve agency operations through more effective human resources management.

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 following three administrative divisions operate under the supervision of the Chief of Staff:

The **Financial and Administrative Management Division** administers the budget, accounting, procurement, property management, physical security, and general services functions of the Board. It also develops and coordinates internal management programs and projects, including review of internal controls agencywide.

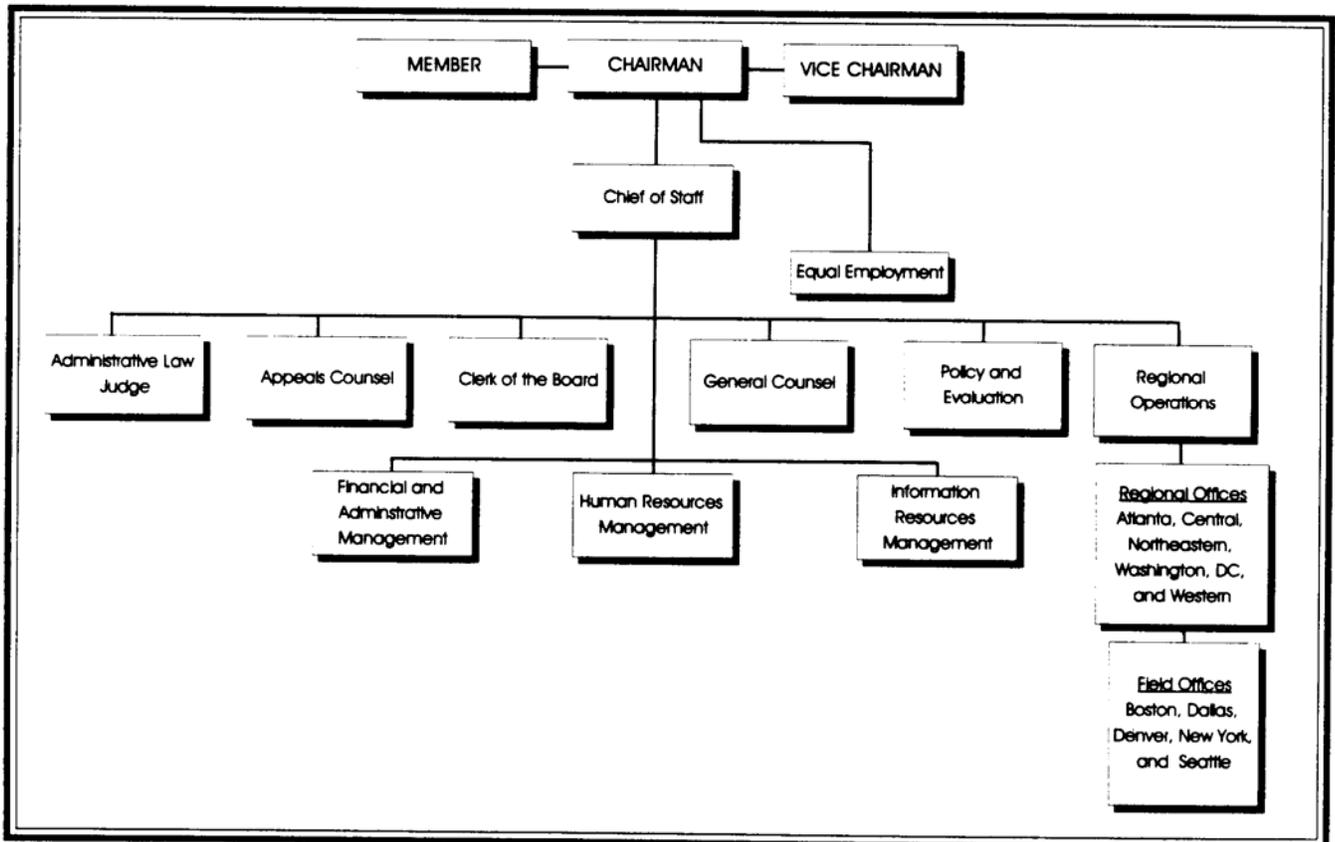
The **Human Resources Management Division** manages personnel programs and assists managers, employees, and

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.

*NOTE: The description of office functions above and the accompanying Organization Chart reflect the MSPB organization at the time of publication of this report. During FY 1995, the Office of Regional Operations and the Office of the Administrative Law Judge were a single office under the direction of the Administrative Law Judge,*

## ORGANIZATION CHART



# REGIONAL OFFICIALS



Darrell L. Netherton  
*Director, Regional Operations*



Thomas J. Lanphear  
*Regional Director  
Atlanta Office*



Martin W. Baumgaertner  
*Regional Director  
Central Office*



Lonnie Crawford  
*Regional Director  
Northeastern Office*

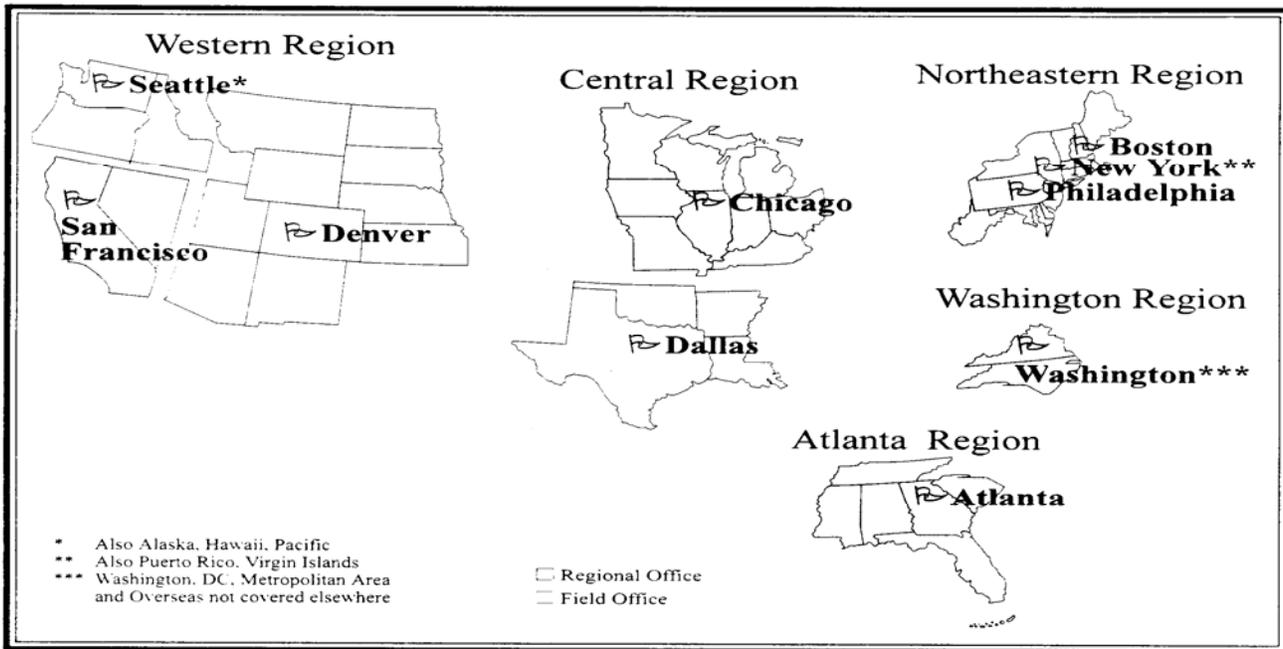


P.J. Winzer  
*Regional Director  
Washington Office*



Denis Marachi  
*Regional Director  
Western Office*

## REGIONAL AND FIELD OFFICE JURISDICTIONS



### Atlanta Regional Office

Alabama, Florida, Georgia, Mississippi, South Carolina, and Tennessee

### Central Regional Office

Illinois; Indiana; Iowa; Kansas City, Kansas; Kentucky; Michigan; Minnesota; Missouri; Ohio; and Wisconsin

### Dallas Field Office

Arkansas, Louisiana, Oklahoma, and Texas

### Northeastern Regional Office

Delaware; Maryland (except the counties of Montgomery and Prince George's); New Jersey (except the counties of Bergen, Essex, Hudson, and Union); Pennsylvania; and West Virginia

### Boston Field Office

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

### New York Field Office

New Jersey (counties of Bergen, Essex, Hudson, and Union); New York; Puerto Rico; and Virgin Islands

### Washington Regional Office

Washington, DC; Maryland (counties of Montgomery and Prince George's); North Carolina; Virginia; and all overseas areas not otherwise covered

### Western Regional Office

California and Nevada

### Denver Field Office

Arizona, Colorado, Kansas (except Kansas City), Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming

### Seattle Field Office

Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas

# FISCAL YEAR 1995 CASE PROCESSING STATISTICAL HIGHLIGHTS

## CASES DECIDED BY MSPB IN FY 1995

### Regional/Field Office Decisions:

Initial Appeals	9,594
Addendum Cases <sup>1</sup>	1,174
Stay Requests <sup>2</sup>	120
<b>TOTAL REGIONAL/FIELD OFFICES</b>	<b>10,888</b>

### Board Decisions:

#### Appellate Jurisdiction:

PFRs - Initial Appeals	1,935
PFRs - Addendum Cases <sup>1</sup>	188
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	6
Reopenings <sup>3</sup>	14
Court Remands	16
Compliance Referrals	60
EEOC Non-concurrence Cases	1
Arbitration Cases	6
Subtotal	2,226
Original Jurisdiction	49
<b>TOTAL BOARD</b>	<b>2,275</b>
<b>TOTAL BOARD + RO/FOs</b>	<b>13,163</b>

<sup>1</sup> Includes requests for attorney fees, requests for compensatory damages (discrimination cases only), petitions for enforcement, Board remand cases, and court remand cases.

<sup>2</sup> Includes 77 stay requests in whistleblower cases and 43 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.)

<sup>3</sup> Includes 6 cases reopened by the Board on its own motion and 8 cases where OPM requested reconsideration.

## **KINDS OF APPELLATE JURISDICTION CASES**

The kinds of appellate jurisdiction 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.
- *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.
- *Request for Consequential Damages* - A request by an appellant who prevails in a whistleblower appeal for payment of consequential damages, as authorized by 5 U.S.C. §1221.
- *Petition for Enforcement* - A request by a party to an appeal that the Board enforce its final decision.
- *Remand* - A case returned to an administrative judge by the Board or court, after an initial decision has been issued, for additional processing and issuance of a new initial decision.

Attorney fee cases, petitions for enforcement, requests for 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. In addition, the Board 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. The kinds of appellate jurisdiction 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 review may be filed with respect to an initial decision on an appeal or in an addendum case.
- *Request to Review Stay Ruling* - A request by a party that the Board review an administrative judge's order ruling on a stay request.
- *Petition to Review Arbitrator's Award* - A request that the Board review an arbitrator's award where the employee has grieved an action appealable to the Board and the employee raises an issue of prohibited discrimination.
- *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.
- *Request for Stay of Board Order* - A request by a party that a final order of the Board be stayed pending judicial review or a request for reconsideration by the Director of OPM.

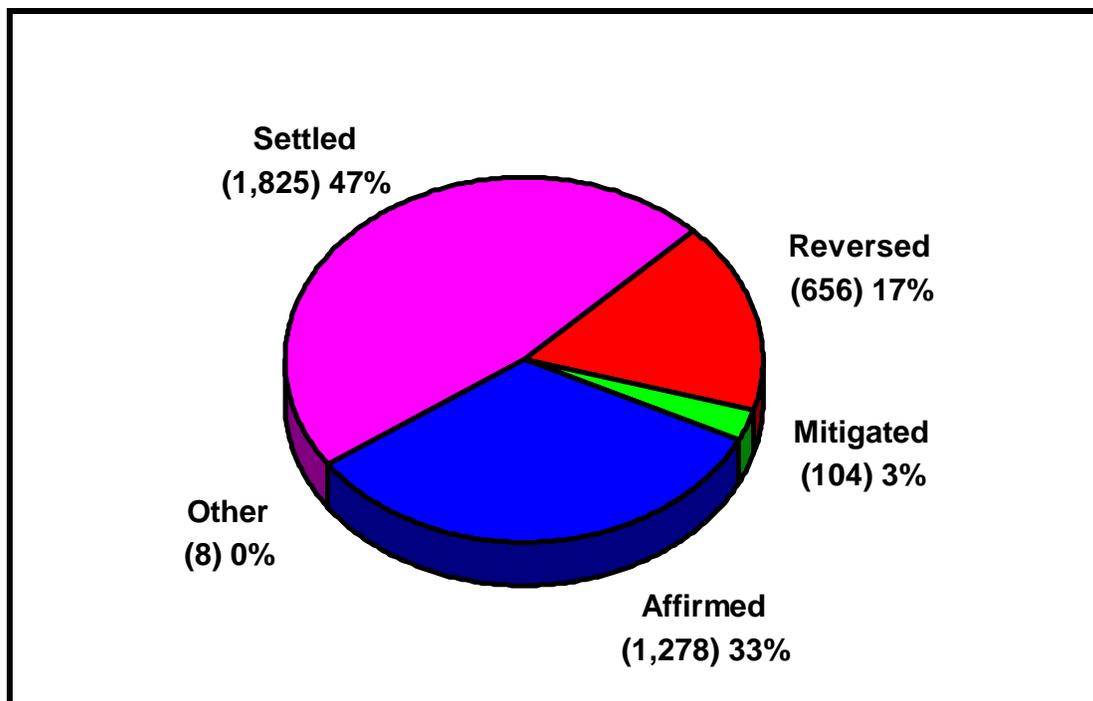
## **APPELLATE CASE PROCESSING IN FISCAL YEAR 1995**

### ***Regional and Field Offices***

- *Case Receipts* - The regional and field offices received 9,978 new cases in FY 1995, compared to 9,965 in the previous fiscal year. Appeals and related cases arising from the Postal Service restructuring accounted for 18 percent of all receipts. At the end of the fiscal year, there were 2,335 cases pending in the regional and field offices, down 28 percent from the number pending at the end of the previous fiscal year.

- *Cases Decided* - The 10,888 cases decided by administrative judges in FY 1995 represented an increase of 27 percent from the previous fiscal year. Of the cases decided, 9,594 were initial appeals and 1,174 were addendum cases. Decisions on initial appeals were up 27 percent from the previous year, and those in addendum cases were up 29 percent. There were 120 orders ruling on stay requests-77 in whistleblower cases and 43 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.) Decisions on stay requests increased 9 percent.
- *Disposition* - Of the 9,594 initial appeals decided, 5,723 (60 percent) were dismissed. Of the dismissals, 59 percent were for lack of jurisdiction, agency cancellation of the action, or appellant withdrawal of the appeal, 31 percent were dismissed as untimely, and 10 percent were dismissed without prejudice to later refiling. (The percentage of cases dismissed as untimely was substantially higher than in previous years because of the impact of appeals resulting from the Postal Service reorganization.) The accompanying charts show the outcomes of appeals that were not dismissed and the disposition of appeals adjudicated on the merits.

## OUTCOME OF FY 1995 APPEALS NOT DISMISSED

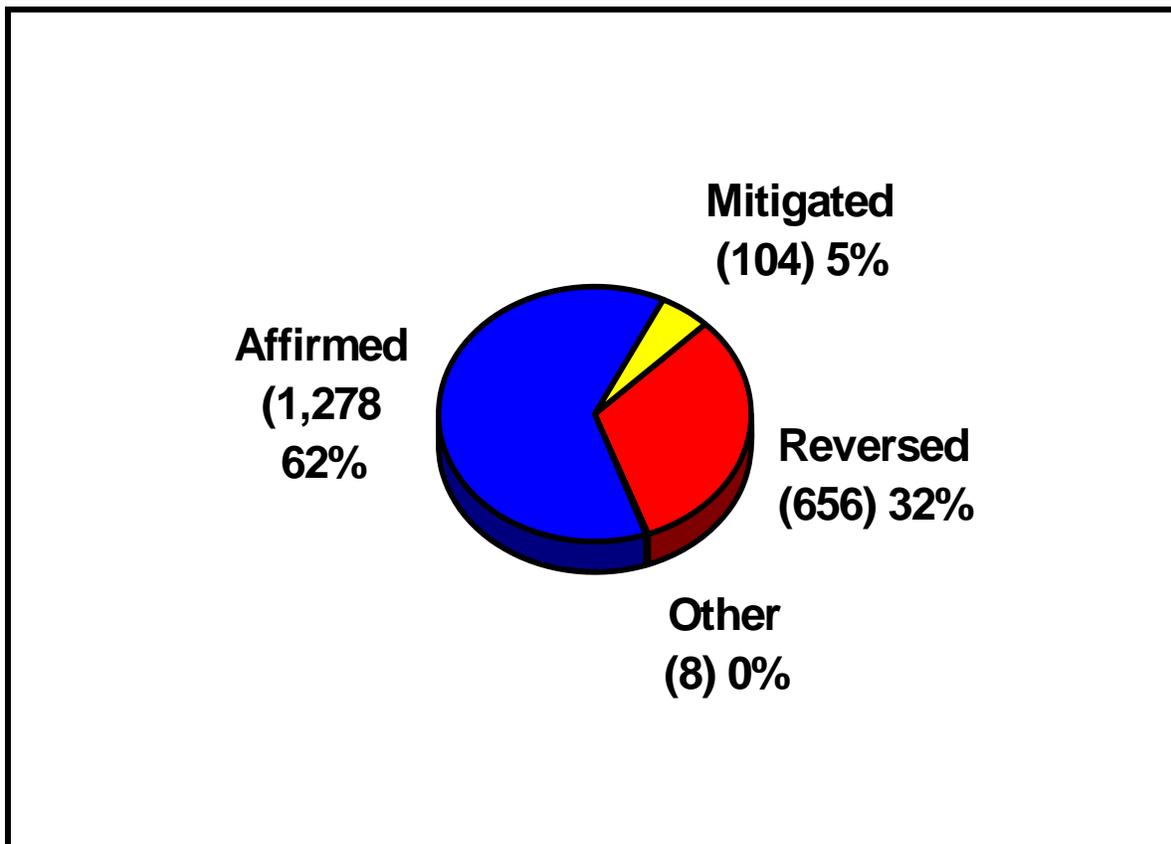


Based on 3,871 initial appeals not dismissed.

## COMPARISON OF MSPS REGIONAL CASE DECISIONS FISCAL YEARS 1994 AND 1995

Cases Decided in Regional/Field Offices	FY 1994	FY 1995	% Increase
Initial Appeals	7,530	9,594	+ 27%
Addendum Cases	912	1,174	+ 29%
Stay Requests	110	120	+ 9%
<b>TOTAL</b>	<b>8,552</b>	<b>10,888</b>	<b>+ 27%</b>

## DISPOSITION OF INITIAL APPEALS ADJUDICATED ON THE MERITS IN FY 1995



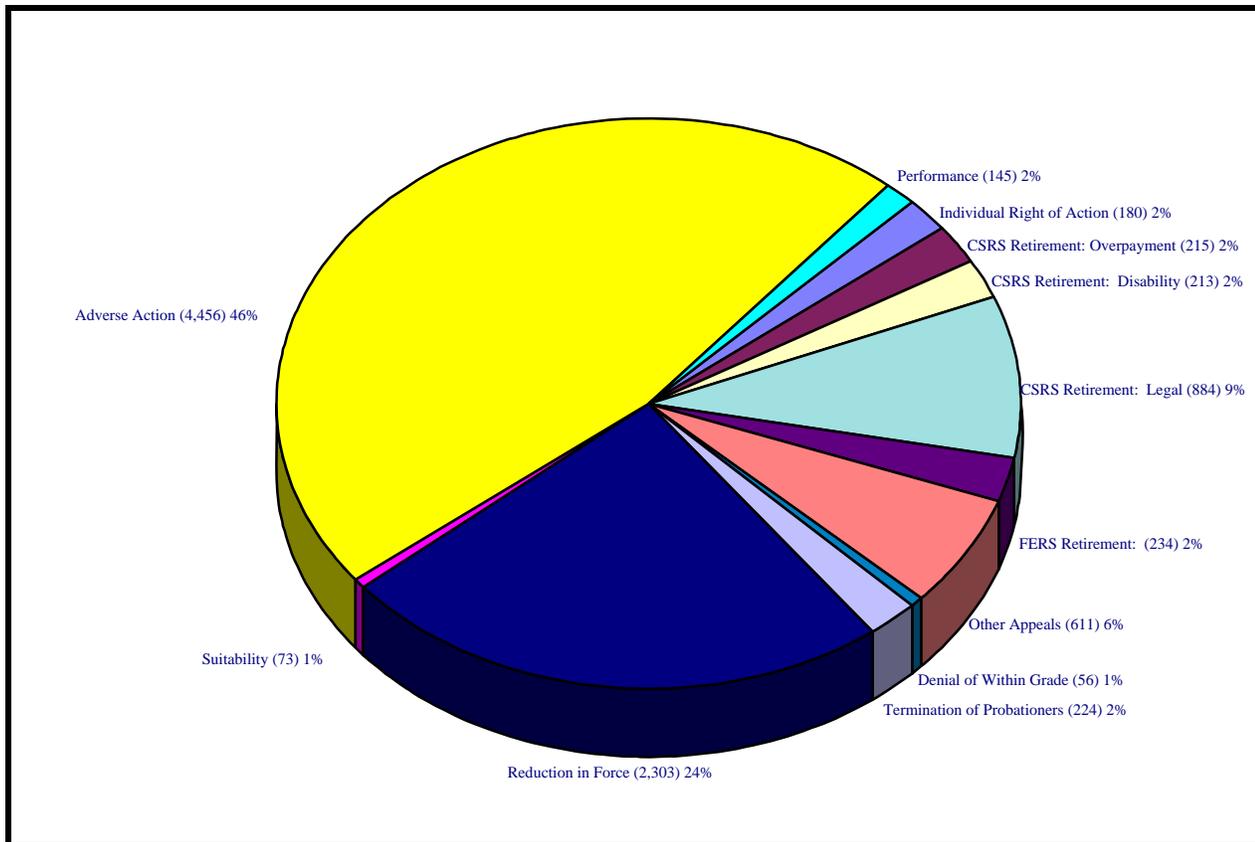
Based on 2,046 adjudicated initial appeals.  
Percentages do not total 100% because of rounding.

- *Settlement Rate* - Of the 3,871 appeals that were not dismissed, 1,825 were settled, for an overall settlement rate of 47 percent. The settlement rate for adverse action cases was 64 percent; for performance cases, 70 percent; and for denials of within-grade increases, 82 percent.
- *Relief for Appellants* - Considering the number of appeals settled (1,825) and those in which the agency action was reversed or mitigated (760), appellants received relief in about two-thirds of the appeals that were not dismissed.
- *Processing Time* - The average processing time for initial appeals and addendum cases was 96 days, compared to 81 days in FY 1994. The increase in processing

time reflects both the increase in number of cases decided and an 8 percent reduction in regional and field office staff. Of the initial appeals decided, 84 percent were decided within 120 days.

- *Types of Actions Appealed* - Of the initial appeals decided, 46 percent were appeals of agency adverse actions, 24 percent were RIF appeals, and 2 percent were appeals of performance-based actions. Appeals arising from the Postal Service restructuring accounted for 68 percent of the RIF appeals and 22 percent of the adverse action appeals. Retirement cases (both CSRS and FERS) accounted for 15 percent of total appeals decided and the remainder involved other types of agency actions.

# TYPES OF INITIAL APPEALS DECIDED IN FY 1995



Total Number of Initial Appeals: 9,594  
 Percentages do not total 100% because of rounding.

- Whistleblower Appeals* - There were 505 whistleblower appeals and stay requests decided. Of this number, 180 were individual right of action (IRA) appeals in which the appellant was required to exhaust the procedures of the Office of Special Counsel, 248 were direct appeals to the Board that included an allegation of reprisal for whistleblowing, and 77 were requests to stay an action allegedly based on whistleblowing.

decided (180 IRA appeals and 248 appeals of otherwise appealable actions), 251 (59 percent) were dismissed. In the other 177 whistleblower appeals, appellants received relief--through settlement, reversal, or mitigation--in 111 (63 percent).
- Relief for Appellants in Whistleblower Appeals* - Of the 428 whistleblower appeals

Mixed Cases - Allegations of discrimination were raised in 2,472 of the initial discrimination in (98 percent) and a finding of discrimination in 10 (2 percent).

## ***Board Headquarters***

- *Case Receipts* - At headquarters, the Board received 2,160 new petitions for review and other appellate jurisdiction cases in FY 1995, an increase of 14 percent over the number received the previous fiscal year. PFRs of initial decisions in appeals resulting from the Postal Service restructuring accounted for 28 percent of all PFR receipts. At the end of the fiscal year, there were 522 appellate jurisdiction cases pending at headquarters, down 11 percent from the number pending at the end of the previous fiscal year.
- *Cases Decided* - The 2,226 appellate jurisdiction cases decided by the 3-member Board in FY 1995 represented an increase of 10 percent from the previous fiscal year. Of the cases decided, 1,935 were petitions for review of initial decisions on appeals, 188 were petitions for review of initial decisions in addendum cases, and 103 were other appellate jurisdiction cases.
- *Disposition* - Of the 1,935 petitions for review of initial decisions on appeals, 7 percent were dismissed, 2 percent were settled, and 78 percent were denied for failure to meet the criteria for review. The Board reviewed the remaining 13 percent-made up of 5 percent denied but simultaneously reopened by the Board and 8 percent granted.
- *Outcome of PFRs Reviewed* - Of the decisions in the 246 PFRs that were granted or denied but simultaneously reopened, percent affirmed the initial decision, percent reversed it, 27 percent remanded the case to the administrative judge, and 2 percent mitigated the agency action. In the remaining 11 percent, the initial decision was vacated or the case was forwarded to a regional/field office for processing.

- *Processing Time* - The average processing time for all petitions for review (on both initial appeals and addendum cases) was 96 days, compared to 161 days in FY 1994. This 40 percent reduction in processing time was achieved in spite of the increased number of cases decided and a 12 percent reduction in headquarters attorneys who process PFRs. The Board processed 81 percent of the PFRs on initial appeals in 110 days or less, averaging 57 days.

## ***Judicial Review***

- The U.S. Court of Appeals for the Federal Circuit reviewed 654 final Board decisions in FY 1995. Of this number, 94 percent were left unchanged (case dismissed or Board decision affirmed). The court affirmed the Board decision in 92 percent of the cases it adjudicated.

Additional fiscal year 1995 case processing statistics, including a breakdown of appeals by agency, are contained in the Board publication, *A Study of Cases Decided in FY 1995*.

# ADJUDICATION

## APPELLATE JURISDICTION PROCEDURES

### *Initial Appeals*

Appeals to the Board must be filed in writing with the regional or field office having geographic jurisdiction within 30 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 35 days of the date of the notice.

After an appeal has been received, the regional or field 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.

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.

Different time limits for filing 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.

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 (30 or 35 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 or field 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 30 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 30 days after the effective date of the agency action.

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

### ***Petitions for Review***

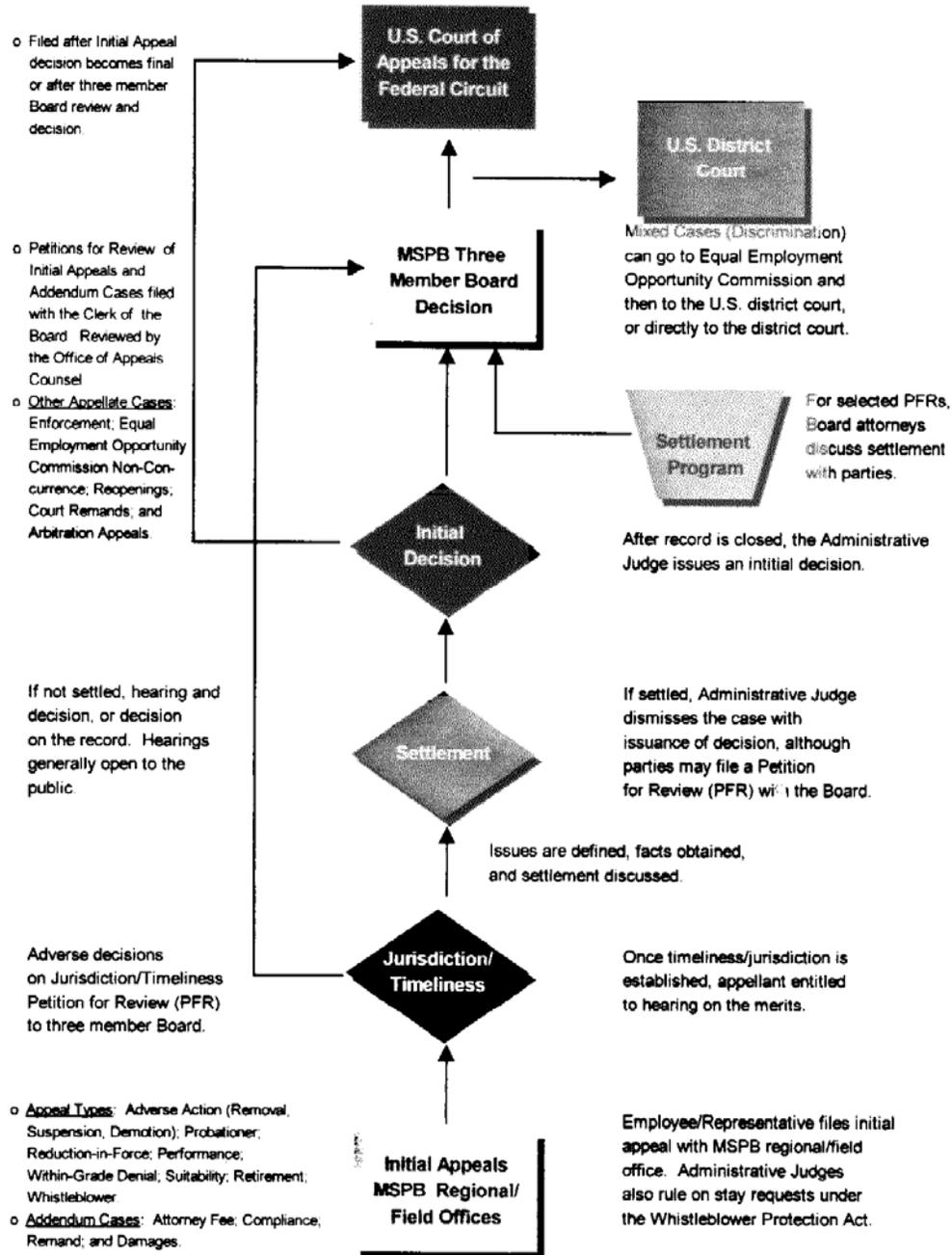
An initial decision on an appeal becomes the final decision of the Board unless a party files a petition for review with the Board within 35 days of the date of the initial decision or the Board reopens the case on its own motion. The Board may grant a petition for review when it is established that 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 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.



## APPELLATE CASE PROCESSING



**SIGNIFICANT ISSUES  
ADDRESSED IN APPELLATE  
CASES**

*Postal Service Restructuring Cases*

The U.S. Postal Service's 1992-1993 nationwide restructuring resulted in a

large number of appeals to the Board, including challenges to actions taken in the restructuring itself as well as attorney fee requests and compliance issues. The accompanying table displays MSPB decisions and related litigation during fiscal years 1993-1995 in all cases arising from the Postal Service restructuring.

**POSTAL SERVICE RESTRUCTURING CASES  
DECIDED BY MSPB IN FY 1993-1995  
AND RELATED LITIGATION**

	FY 1993	FY 1994	FY 1995	TOTAL
<b>Regional\ Field Offices:</b>				
Initial Appeals.....	172	228	2,551	<b>2,951</b>
<b>Addendum Cases:</b>				
Attorney Fee Requests .....	0	2	131	133
Petitions for Enforcement ..	0	7	110	117
Board Remands.....	0	1	5	6
Total Addendum .....	10	246	256	<b>256</b>
<b>Total Regional\ Field Offices.....</b>				
	172	238	2,797	<b>3,207</b>
<b>Board Headquarters:</b>				
<b>Petitions for Review -</b>				
Initial Appeals.....	3	166	550	<b>719</b>
<b>Petitions for Review -</b>				
Addendum Cases .....	0	0	6	6
Reopenings .....	0	23	1	24
Compliance Referrals .....	0	0	2	2
<b>Requests to Stay Board Order .....</b>				
	0	28	0	28
Total Board .....	3	217	559	<b>779</b>
<b>Litigation (Federal Circuit):</b>				
Decisions Issued .....	0	5	32	37
Pending 9 / 30 / 95 .....			<b>204</b>	<b>204</b>

Having previously ruled in such lead cases as *White v. U.S. Postal Service*, 63 M.S.P.R. 299 (1994), and *Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307 (1994), that demotions effected in the Postal Service restructuring were reduction-in-force actions, the Board this year applied that ruling to a number of cases raising related issues. The Board decided numerous appeals involving employees who retired or requested placement in lower graded positions as a result of the uncertainties of the restructuring. It held that where the agency had not assigned such an employee to a lower graded position by the time he retired (see, for example, *Bissett v. U.S. Postal Service*, 66 M.S.P.R. 631 (1995)) or requested a different job (see, for example, *Smitka z7. U.S. Postal Service*, 66 M.S.P.R. 680 (1995)), the employee had not been subjected to a RIF action. Thus, the separation or placement did not become appealable simply because the employee did not know how the restructuring would work out. That the agency did not know any more than the appellant about the future defeated the appellant's claim of misinformation and involuntariness.

Similarly, in *Jones v. U.S. Postal Service*, 65 M.S.P.R. 306 (1994), the Board held that employees who retired rather than face the possibility of being demoted during the restructuring were not entitled to notice of any right of appeal either at the time of their retirement or upon the issuance of the Board's lead 1994 decisions. Thus, their delay in filing with the Board until well after either event could not be excused by the lack of notice.

The Board's decisions in the Postal Service restructuring cases were followed by a number of petitions for enforcement filed in the regional and field offices. Many of the petitions resulted in the issuance of recommendations by the

administrative judges that the agency be found in noncompliance with the Board's orders. The petitions for enforcement were therefore referred to the Board for enforcement.

In December 1994, the Board issued a lead decision in *Sink v. U.S. Postal Service*, 65 M.S.P.R. 628 (1994), ordering the agency to restore the appellant to his former position or to issue him a specific notice of RIF within 120 days of the decision. In light of the extended compliance period and the unusual circumstances, the Board appointed its General Counsel to serve as Special Compliance Officer in this case. The Special Compliance Officer was given full oversight responsibility, including the authority to require periodic progress reports, set deadlines, initiate conference calls, issue show cause orders, and take whatever other steps were necessary and appropriate to obtain full compliance with its order. In a subsequent lead case, *Unhoch v. U.S. Postal Service*, 66 M.S.P.R. 651 (1995), the Board extended the holding of *Sink* to all compliance cases arising out of the agency's 1992-93 restructuring.

Sixty-nine cases were referred to the Board by the regional and field offices as a result of recommendations finding that the Postal Service had not complied with the Board's final decisions in the restructuring cases. In August 1995, the Board issued a final decision in *Sink v. U.S. Postal Service*, 68 M.S.P.R. 497 (1995), finding that the agency had timely issued its specific notice of reduction in force and that, by doing so, it had fully complied with the Board's December 1994 order. The Board, therefore, dismissed the petition for enforcement in that case.

At the end of FY 1995, there were 328 Postal Service restructuring appeals including new appeals arising from the agency's 1995 compliance RIF- and 26 addendum cases pending in the regional and field offices. At headquarters, there were 21 petitions for review, 67 enforcement cases, and 1 reopening pending.

### ***Other Significant Issues Addressed***

The Board addressed many other issues directly affecting the Federal personnel community. It continued to develop the law under 5 U.S.C. 2302(b)(8), the part of the Whistleblower Protection Act that protects employees against reprisals 'For the disclosure of information they reasonably believe evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, by extending its protections to: disclosures made to coworkers; disclosures that constitute statements of opinion; disclosures made in the context of settlement negotiations; certain disclosures that were also made in the exercise of an appeal, complaint, or grievance right under section 2302(b)(9); disclosures that could prevent governmental wrongdoing even though no actual wrongdoing has yet occurred; and statements of an intent to disclose a matter about which the employee has a reasonable belief.

The Board issued its first decision applying its new regulations that address what it will do in the situation where, following an interim relief order, only the appellant files a petition for review. This represents a significant departure from the usual case, because in this situation there is no agency petition subject to dismissal as a sanction for the agency's failure to submit evidence of compliance with the interim relief order. In this decision, the

Board ordered the agency to submit proof of compliance with the interim relief order and retained jurisdiction over the interim relief issue despite its remand of the appeal to the administrative judge.

The Board also clarified and modified its precedent relating to adverse actions. It ruled that an indefinite suspension, which is based on reasonable cause to believe the appellant guilty of a crime for which a sentence of imprisonment may be imposed, cannot be sustained, regardless of what the facts subsequently show, if the agency did not have evidence before it at the time it acted that met the standard. The Board also extended the law by allowing agencies to take an adverse action based on a charge of failure to follow proper procedures for requesting leave, even where that leave was ultimately approved.

Based on an extensive review of the law in connection with an adverse action appeal, the Board determined that an action may be taken on the basis of an appellant's failure to comply with an ordered reassignment, later determined to be invalid, if the invalidity is due to the means by which the reassignment was effected rather than the reasons for it. Thus, the reversal of a reassignment on procedural grounds would not alone insulate the appellant from discipline for his failure to follow that order.

The Board also issued decisions of significance addressing drug abuse. In these decisions, it determined that in accordance with the Americans With Disabilities Act, the Rehabilitation Act no longer protects as a "disability" the use of illegal drugs; ruled that reasonable suspicion drug testing may only be done where such suspicion exists at the time the test is ordered; and held that under Executive Order 12564, neither reversal nor mitiga-

tion is required just because the addictive nature of a drug may cause a temporary relapse shortly after treatment begins.

Beyond these holdings, the Board also ruled on several RIF-related issues that will clarify the requirements for such actions. These rulings will provide guidance in the years ahead as agencies downsize and face an increasing likelihood of the need to use the RIF procedures of 5 CFR Part 351. In addition, the Board addressed such important issues as the extent to which a settlement that does not specify that the agency may not retaliate against the appellant for having entered into it may serve as the basis for a claim that the agreement was breached, and the authority of administrative judges to order a security presence at hearings to safeguard the parties and participants.

*See Appendix A for summaries of significant Board decisions on appeals issued during fiscal year 1995.*

## **ORIGINAL JURISDICTION PROCEDURES AND CASES DECIDED**

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, as well as Special Counsel corrective action complaints, are assigned to the Board's Administrative Law Judge, who issues a recommended decision to the Board for final action.

Special Counsel stay requests and requests for regulation review are decided by the Board. An initial stay request may be granted by a single Board member, while a request for extension of a stay must be acted on by the full Board. A stay may be terminated by decision of the full Board following a motion by either the Special Counsel or the affected agency.

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. 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 Administrative Law Judge, which is then subject to a petition for review by the Board.

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

The number of each type of original jurisdiction case decided in fiscal year 1995 and the outcomes of those cases are set forth in the accompanying table.

## ORIGINAL JURISDICTION CASES DECIDED BY MSPB IN FY 1995

CASE TYPE	NUMBER DECIDED	DISPOSITION
OSC Corrective Actions .....	1 .....	Dismissed - withdrawn
<b>OSC Disciplinary Actions - Non-Hatch Act</b> .....	3 .....	Remanded to ALJ - 2 Settled - 1
<b>OSC Disciplinary Actions - Hatch Act:</b>		
Federal / DC .....	3 .....	Settled - 3
State/Local 1 .....	Settled - 1	
<b>OSC Stay Requests:</b>		
Initial Requests .....	5 .....	Granted - 5
Requests for Extension of Stay .....	16 .....	Granted - 16
Petition for Enforcement.....	1 .....	Dismissed without prejudice
Agency Motion for Termination of Stay .....	1 .....	Denied
Agency Request for Clarification .....	1 .....	Jurisdiction found/ compliance ordered
<b>Actions Against ALJs</b> .....	7 .....	Removal authorized - 1 Dismissed - jurisdiction - 1 Dismissed - withdrawn - 3 Settled - 2
Request to Stay Board Order .....	1 .....	Denied
<b>Requests for Regulation Review</b> .....	7 .....	Denied - 4 Dismissed - jurisdiction - 3
<b>SES Performance-based Removals (Hearing only - No Board decision)</b> .....	2 .....	Dismissed - withdrawn - 1 Report issued - 1
<b>TOTAL</b> .....	<b>49</b>	

*See Appendix B for summaries of significant Board decisions issued in original jurisdiction cases during fiscal year 1995.*

## **ADMINISTRATIVE LAW JUDGE FURLOUGH CASES**

Near the end of the fiscal year, twelve agencies filed actions with the Board asking for authorization to furlough their administrative law judges in the event of a lapse in appropriations at the end of fiscal year 1995. Three of these agencies also asked for authorization to furlough their administrative law judges in the event they received significantly lower appropriations for fiscal year 1996 than their 1995 amounts, as expected.

Unlike other Federal employees, administrative law judges are entitled under 5 U.S.C. §7521 to a hearing and decision by the Board *before* their agencies may subject them to certain personnel actions, including a furlough of 30 days or less. The Board must authorize a proposed action under section 7521, upon a showing of good cause, before an agency can effect it.

At the end of the fiscal year, these cases were pending. The cases based on an anticipated end of the fiscal year lapse in appropriations were subsequently dismissed as moot in October, following the signing of the first continuing resolution for FY 1996. The three cases based on expected reductions in appropriations, as well as new actions filed by agencies in anticipation of a lapse in appropriations as continuing resolutions expired, were referred to the Board's Administrative Law Judge for adjudication.

## **IMPROVEMENTS IN THE ADJUDICATORY PROCESS**

### ***Regional and Field Offices***

The dramatic increase in the number of cases decided in the regional and field offices in fiscal year 1995-27 percent more than in the previous fiscal year occurred as regional staffing declined by 8 percent. The overall increase in productivity was achieved largely through the

efforts of the administrative judges-who handled an average 158 cases each, compared to 124 in FY 1994-and support staff, together with such process improvements as consolidating hearing travel. In light of the continual pressure from Congress, and the efforts of the President, to reduce the size of the Federal Government and its workforce, there appears no reason to expect anything but a continued elevated caseload as agencies work to reduce their employment levels and accommodate shrinking budgets.

In August 1995, the Board realigned the geographical jurisdictions of its regional and field offices to match caseload more closely with the staffing of each office. In addition, two administrative judge positions were reallocated among the offices. The Board continued to fill vacancies in administrative judge positions from within, with several headquarters attorneys moving to administrative judge positions in the regional and field offices and some judges moving from one regional or field office to another.

During the fiscal year, the regional and field offices continued their experimentation with the use of settlement judges. Some offices designated one administrative judge to serve full-time as settlement judge. Other offices employed variations on the concept, such as having the regional director serve as settlement judge or setting up an informal system in which administrative judges assign cases among themselves for settlement.

Reports from the regional and field offices indicate that the settlement judge concept has resulted, in some regions, in an increase in settlements. Use of a settlement judge has the advantage of ensuring the separation of settlement negotiations from the adjudication process. With a single settlement judge, other judges in the office are freed from settlement negotiations, and their production of adjudicated cases can increase. In some instances, however, this approach can lead to burnout of the settle-

ment judge, especially when more complex cases are targeted for settlement. The Board will continue to monitor results in this area in order to determine whether the continued use of settlement judges produces the desired cost savings and increases in production.

The Board also completed its first pilot video tele-hearing early in the fiscal year. Using video teleconferencing technology, the Board electronically brought together an administrative judge in Atlanta, Georgia, with the parties, attorneys, and witnesses at Ft. Bragg, North Carolina. In addition to producing a mutually satisfactory outcome for the parties, the video tele-hearing resulted in savings of both time and money.

### *Headquarters*

The 10 percent increase in decisions on petitions for review and other appellate jurisdiction cases was achieved despite a 12 percent reduction (4 of 34 attorneys) in the legal staff of the Office of Appeals Counsel, the headquarters office that processes almost all such cases. Clearly, the Board has put into practice the theory that Government agencies must deliver more service despite fewer resources.

During fiscal year 1995, the Board saw the benefits of its earlier streamlining and empowerment efforts in two significant ways. First, by empowering headquarters attorneys to submit certain proposed decisions to the Board without further review by supervisors, and in turn, allowing supervisors to send an expanded range of cases to the Board without further review by additional levels of supervisory attorneys, cases were forwarded to the Board more quickly and efficiently. The rate at which cases were returned for revision did not increase as a result of this

change. Second, this process of empowerment provided attorneys and supervisors additional time to concentrate on more significant cases. Both the Board and its customers were better served.

The Board also saw benefits from having established both a settlement team and a policy team in the Office of Appeals Counsel. Specifically, the office was better able to centralize its efforts in deciding issues remaining from the Postal Service's 1992-1993 restructuring. Moreover, it was able to address several cases of a policy nature that required extensive research and drafting efforts through a more collaborative process, than can normally be used in the adjudication of petitions for review. This led to the issuance of cases setting important precedent to guide future actions of administrative judges and the Board itself.

The Board continued its vigorous settlement program at the petition-for-review level. The rate of success during the last quarter of the fiscal year hovered around 17 percent of the cases where settlement was attempted. While interest in alternative dispute resolution procedures continued among Federal agencies generally, reduced budgets, downsizing, and restructuring may have impeded settlement efforts in that reinstatement and reassignment may have become less feasible than in the past. Nonetheless, the settlement program continues to further the interests of both alternative dispute resolution and customer service. Appellants, in particular, regularly express their appreciation for a sympathetic ear and a detailed explanation of the legal reasons for the outcome of their appeals. Thus, even though settlement efforts do not culminate in an agreement in many instances, the parties are at least more satisfied with the adjudicatory process as a result of those efforts.

## LITIGATION

The Board defends its final decisions involving issues of jurisdiction and procedure before the U.S. Court of Appeals for the Federal Circuit, its primary reviewing court. The number of cases the Board defends in the Federal Circuit expanded dramatically during fiscal year 1995, primarily because of appeals involving jurisdictional and timeliness issues filed by U.S. Postal Service employees following the Postal Service restructuring. Forty-three percent of the cases litigated by the Board in fiscal year 1995 were Postal Service restructuring cases. The total number of cases litigated by the Board was 337, compared to 200 in fiscal year 1994. This represents a 69 percent increase over the number of cases the Board litigated in the previous fiscal year. During the same period, there was a 25 percent reduction (3 of 12 attorneys) in the legal staff in the Office of the General Counsel.

The Board also defends appeals of decisions in cases brought by the Special Counsel and decided by the Board under its original jurisdiction authority. All of these cases are appealed to the Federal Circuit except Hatch Act cases involving employees of state and local governments, which are heard by Federal district courts. Original jurisdiction cases typically involve complex issues such as the extent of the Special Counsel's jurisdiction and novel issues involving prohibited personnel practices and Hatch Act violations.

The Board also litigates appeals of decisions in which the Director of OPM petitions for review in the Federal Circuit because he has determined, in his discretion, that the Board's determination is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive. Other litigation

includes subpoena enforcement cases and discrimination cases filed in the various Federal district courts where the Board is named as a defendant.

In fiscal year 1995, the Federal Circuit decided *King v. Nazelrod*, 43 F.3d 663 (Fed. Cir. 1994), affirming the Board's decision holding that when an agency disciplines an employee based on a charge of criminal misconduct, the agency must prove by preponderant evidence all the elements of the criminal charge. The Board found, and the court agreed, that the agency had not proved its charge of theft because the agency did not show that the employee acted with the intent to permanently deprive the owner of the money she was charged with stealing.

The Federal Circuit issued two decisions clarifying the Board's jurisdiction over appeals brought by excepted service employees. In *Forest v. Merit Systems Protection Board*, 47 F.3d 409 (Fed. Cir. 1995), the court held that an excepted service employee's service under a temporary appointment could not be considered in determining whether the employee met the jurisdictional prerequisite of two years of current, continuous service. In *Todd v. Merit Systems Protection Board*, 55 F.3d 1574 (Fed. Cir. 1995), the court concluded that the Civil Service Due Process Amendments did not extend appeal rights to an employee who was appointed under a statute permitting the Department of Defense to hire employees for its dependents schools without regard to the civil service laws.

The Federal Circuit also published two opinions limiting the Board's authority to hear an employee's claims of agency abuse in the adjudicative process. In *King v. Jerome*, 42 F.3d 1371 (Fed. Cir. 1994), the court held that in determining whether an agency has complied with an order granting a prevailing appellant interim relief, the

Board cannot review whether the agency acted in bad faith in determining that returning the employee to duty would unduly disrupt operations, but may only consider whether the agency made such a determination and, if so, whether the agency has provided the employee with appropriate pay and benefits. Similarly, in *King v. Reid*, 59 F.3d 1215 (Fed. Cir. 1995), the court determined that when the Board adjudicates an employee's claim that an agency has not complied with a Board decision granting the employee relief, the Board has no authority to hear a claim that discrimination was a basis for the agency's failure to comply.

The U.S. Court of Appeals for the Fourth Circuit issued a decision in *Williams v. Merit Systems Protection Board*, 55 F.3d 917 (4th Cir. 1995), upholding a Board decision finding that a state employee violated the Hatch Act by running for partisan political office and that this violation warranted removal from state employment. The court agreed with the Board that the employee was covered by the

Hatch Act because she was principally employed in connection with a federally funded activity, notwithstanding that she had no supervisory or discretionary authority over the administration of Federal funds.

During fiscal year 1995, the Board monitored more than 900 cases in the Federal Circuit involving appeals of decisions issued by the Board under its appellate jurisdiction. Although the Department of Justice defends the employing agency against whom the appeal is filed, the Board monitors this litigation closely. Board activities in connection with monitored litigation include evaluating the case to determine if Board intervention is appropriate, responding to inquiries, assisting in drafting briefs, and analyzing the court's decision in these cases to determine its applicability and impact.

*See Appendix C for summaries of significant court decisions issued during fiscal year 1995.*

# STUDIES

## THE STATUTORY STUDIES FUNCTION

The CSRA assigned the Board, in addition to its adjudicatory functions, responsibility for reviewing the significant actions of OPM and conducting studies of the civil service and other merit systems in the Executive Branch. These studies and oversight reviews complement the Board's adjudicatory activities by reviewing Federal human resources management policies and practices on a systemic basis. In this regard, the Board is uniquely situated to provide neutral, independent reviews and assessments as part of the ongoing effort to develop and maintain an effective and efficient civil service.

As confirmed by an extensive customer survey, the Board's studies and oversight reviews provide relevant and useful data, analyses, and recommendations to Federal policy officials and others. From the Board's first published report in 1981 to the present, there have been numerous policy changes and other actions taken at various levels within Government that apply the Board's recommendations. As an example, the Office of Personnel Management recently issued regulations on temporary hiring policy that adopted changes recommended in an earlier Board study of temporary employment. Subsequently, recommendations of the temporary employment study were incorporated in the Administration's proposed civil service reform legislation.

In another recent example of the impact of Board studies, several Cabinet departments have requested that Board staff act as consultants to them on effective methods for preventing sexual ha-

arrassment in their workplaces and for reducing the human and financial costs associated with this prohibited personnel practice. These requests recognize the expertise of the studies staff, gathered through three internationally recognized studies of sexual harassment in the Federal Government. The Department of Justice sought the staff's services to conduct an in-depth, departmentwide study on sexual harassment that will also solicit employee views on the utility (or lack thereof) of any sexual harassment training received.

With an overall focus on compliance with the merit system principles and freedom from prohibited personnel practices, the Board typically solicits specific potential study topics from a wide variety of sources in developing its studies and OPM oversight 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. The impact of these studies is augmented through an active outreach program consisting of public presentations, on-site and telephone consultations in response to requests by Federal agency officials, and papers and articles published in the professional literature.

## HIGHLIGHTS OF 1995 REPORTS AND OTHER ACTIVITIES

*Leadership for Change: Human Resource Development in the Federal Government.* This study determined that the resources being devoted to human resource development activities by Federal agencies were often inadequate and that the uses for these resources were not prioritized. The Board found that in a time of unprecedented change, when programs and priorities of the Federal Government require focused use of developmental activities, human resource development should be made part of the strategic planning process. Further, developmental activities undertaken by Federal agencies should be assessed to ensure their effectiveness in meeting agency needs.

*Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges.* This study updated the Board's 1980 and 1987 studies of sexual harassment and was based on a Governmentwide survey of Federal workers. The Board found that while the Federal workforce is more sensitive to the problem of sexual harassment, the problem has by no means disappeared. Nevertheless, the Government has made progress in building a greater understanding of the relevant underlying issues and sensitivity to how people are treated in the workplace.

*The Rule of Three in Federal Hiring: Boon or Bane?* This study analyzed the effect of the requirement of law that managers hire from among the top three candidates referred for a position. The Board found this legal requirement is not advancing the principle of merit that it was intended to protect. Too often, the procedures for meeting the rule of three have created lottery situations with equally qualified candidates randomly referred for selection. The study also analyzed the interaction

between the rule of three and the veterans preference provisions established by law. Here, the Board found the conventional wisdom that the interaction of these two laws has worked to significantly reduce managers' choices is overstated.

A report, *Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government*, is anticipated for release in 1996. The report is based on a study of the treatment of minorities in the Federal Government. It analyzes differences in the treatment of minorities and nonminorities and recommends ways in which these differences might be addressed.

The Board has continued to seek ways to improve the efficiency with which it gathers data for its studies, including direct access to and use of the Central Personnel Data File (CPDF) maintained by the Office of Personnel Management. The Board has made increasing use of this tool in conducting its research.

In fiscal year 1995, the Board also initiated use of an issue paper format to supplement its in-depth reports. The first was an issue paper, *Removing Poor Performers in the Federal Service*, that served as the basis for testimony presented by the Board to the Civil Service Subcommittee of the House Government Reform and Oversight Committee in October 1995. Data from the issue paper was constructively used by subcommittee staff and by other witnesses before the subcommittee. Several other issue papers were in the planning stages at the end of the fiscal year. These short (1015 page) papers will allow for even more timely input on rapidly developing issues.

*See Appendix D for summaries of reports completed during fiscal year 1995.*

## INFORMATION SERVICES

### ON-LINE INFORMATION AND PUBLICATIONS

During fiscal year 1995, the Board increased the amount of information available to the public on-line through the MSPB Library on the Government Printing Office's Federal Bulletin Board. First implemented in July 1994, the bulletin board now contains more than 1,000 files, including final Board decisions, weekly summaries of significant Board decisions, reports of Board studies, information publications (*An Introduction to the MSPB*, *Questions & Answers About Appeals*, and *Questions & Answers About Whistleblower Appeals*), biographies of the Board members and senior staff, press releases, and *Federal Register* notices. Users of the bulletin board logged more than 1,000 downloads of MSPB files during the fiscal year. As of December 1, 1995, all files on the Federal Bulletin Board are available for FREE downloading. At the end of the fiscal year, the Board was making plans to further expand on-line access to its information through the establishment of a World Wide Web site. The site was subsequently launched in March 1996.

The Board also has its own section in the Employee and Labor Relations Forum of the OPM Mainstreet electronic bulletin board, which can be accessed by computer modem at 202-606-4800. Files placed in this section by OPM include the weekly summaries of Board decisions, certain especially significant decisions, and the MSPB information publications.

The publications made available on-line are available in printed form as well, as are the Board's *Annual Report to the President and the Congress for Fiscal Year 1994* and the *Study of Cases Decided in Fiscal Year 1994*. Requests for copies of Board decisions should be directed to the MSPB Library at 202-653-7183 (or FAX 202-653-7130). Copies of reports of merit systems studies and reviews of OPM actions may be obtained from the Office of Policy and Evaluation at 202-653-8900. Copies of all other publications may be ordered from the Office of the General Counsel's Congressional and Public Affairs line, 202-653-6772, extension 1277.

*The MSPB Library on the Federal Bulletin Board can be accessed by computer modem at 202-512-1387 seven days a week. The Federal Bulletin Board can also be accessed via the Internet--telnet to fedbbs.access.gpo.gov or go via the **Fedworld** site on the World Wide Web, <http://www.fedworld.gov>. User assistance is available from GPO from 8 AM to 4 PM Eastern time, Monday through Friday, by calling 202-512-1530.*

*MSPB's World Wide Web site provides general information about the Board, brief biographies of the Board members, a list of regional and field offices with addresses and telephone numbers, a list of reports of merit systems studies, and directions for obtaining additional information. The address of the site is <http://www.access.gpo.gov/mspb>.*

*Comments or questions regarding MSPB, the bulletin board, or the Web site may be sent to the Board's e-mail address, [mspb@mspb.gov](mailto:mspb@mspb.gov).*

## OUTREACH

In spite of budget-driven reductions in travel, the Board members, headquarters staff, and regional/field office staff still were able to participate in almost 140 outreach activities to major constituencies during fiscal year 1995-down from about 200 annually in previous years. 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, public administration, and human resources management.

Almost half of the outreach appearances during the fiscal year were made by the regional directors and administrative judges. Audiences for these appearances numbered from 10 to 200, with a combined total audience of several thousand. Many of the presentations concentrated on the "how to" of presenting a case before the Board, and some included mock hearings designed to familiarize participants with Board practices and procedures. In addition, regional and field office personnel addressed such topics as significant Board and Federal Circuit decisions, the Whistleblower Protection Act, reductions in force, interim relief for prevailing appellants, and attorney fees.

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, the appeals process, alternative dispute resolution, and ethics. In addition, a number of the presentations focused on reinventing Government initiatives at the Board.

The Board participated in the annual Federal Circuit Judicial Conference in June 1995 and sponsored a breakout session on potential legislative changes that would affect the Federal personnel system and employee appeals process. In August 1995, 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.

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. In addition to addressing the findings and recommendations of recently issued reports, the studies staff discussed studies in progress and potential changes in the Federal personnel system as a result of reinventing Government initiatives and the downsizing of the Federal workforce.

## INTERNATIONAL VISITORS PROGRAM

The Board's international visitors program is conducted at Board headquarters by the Board members and staff of the Human Resources Management Division. 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 1995, the Board hosted 13 visits involving approximately 40 delegates from a number of countries, including Bangladesh, China, Hungary, Korea, Lebanon, Taiwan, and Ukraine. The international visitors included ministers, chairmen, directors-general, inspector generals, judges, and specialists, many of whom expressed particular interest in civil service reform to include restructuring and streamlining initiatives.

## ADMINISTRATION

### STREAMLINING

The Board's *Annual Report to the President and the Congress for Fiscal Year 1994* summarized the reorganization and streamlining initiatives undertaken during that year in response to the

Administration's National Performance Review (NPR) and the Federal Workforce Restructuring Act of 1994. In fiscal year 1995, the Board's focus shifted to the new goals established under the second phase of the Administration's reinventing Government initiative (REGO II) and the deficit reduction targets of the new Congress.

Early in calendar year 1995, as part of the Administration's deficit reduction plan, agencies were given new target budget levels through the year 2000. Because the Board's budget allocations for each year were reduced from previous levels, and because about 80 percent of its budget is consumed by staff salaries and benefits, the Board determined that the budget it could expect in 2000 would support only about 210 employees.

Under NPR and the Federal Workforce Restructuring Act, MSPB would have been required to reduce its staffing from about 320 in 1993 to 275 by 1999. Attrition, assisted by judicious use of early-out authority and buyouts, had already reduced the staffing level to about 270 by early 1995—a 16 percent reduction from 1993. During this same period, caseload increased by 40 percent. To meet the new target staffing level, the Board must find ways to achieve a further reduction of just over 20 percent of its 1995 staffing level while still handling a caseload estimated to continue at the 1995 level.

In order to plan for this further reduction in staff—and to conduct the thorough review of agency functions called for under REGO II—the Chairman, following discussions with employees and pursuant to a recommendation by the MSPB Labor Management Partnership Council, appointed a REGO II Task Force to recommend actions, including changes in the structure of MSPB, that would enable the agency to continue performing its functions effectively at the reduced budget and staffing levels expected through the year 2000. The task force took a functional approach to its review of the agency's operations, rather than the office-by-office approach used in the first reengineering effort. In its final report to the Chairman, the task force made a number of recommendations. The recommendations, although under consideration, had not been implemented by the end of the fiscal year.

### TECHNOLOGY AND PROCEDURAL IMPROVEMENTS

As a first step toward implementation of a Board-wide local area network (LAN), the Information Resources Management Division installed a network in the Office of the General Counsel during fiscal year 1995. A previously-installed LAN in the Office of Appeals Counsel was scheduled to be joined with the new Board-wide LAN in fiscal year 1996, with installation in the remaining headquarters offices to follow shortly thereafter. The next phase will be implementation of LANs in the regional and field offices, which will then be connected to each office and to Board headquarters through a Wide Area Network. This network will enable all MSPB staff to easily share documents, software, and peripherals and will permit future improvements in office automation and case

tracking. During fiscal year 1995, the Board began upgrading personal computers in all MSPB offices in preparation for the installation of additional Windows-based software.

Over 100 reports generated by the automated Case Management System (CMS) were modified to reflect changes in Board processes and to improve their usefulness. These modifications permitted the publication in the *Study of Cases Decided iii Fiscal Year 1994* of CMS reports as they are generated by the system, eliminating the time-consuming task of rekeying statistical tables into a word processing program prior to publication. In addition, an extensive review of data elements included in CMS was conducted during the fiscal year. As a result of this review, many data codes were combined or eliminated, thus reducing considerably the amount of information that must be entered by case trackers for each case processed.

In the Office of the Clerk, a number of steps were taken to increase the efficiency of case processing and to reduce costs. After consultation with OPM, the office was able to save hundreds of dollars by discontinuing the mailing to OPM of copies of all processing letters associated with a case other than the final order of the Board. The office also realized savings of several thousand dollars in copying and mailing costs by negotiating an informal agreement with the EEOC whereby EEOC attorneys come to MSPB to review particularly large records in mixed cases that have been appealed to EEOC. Additional savings were achieved through instructions to the MSPB regional and field offices to provide notice to parties filing petitions for review that documents already included in the record below should not be filed with a PFR. This

change resulted in smaller case records, which reduced costs for mailing and copying files, as well as the cost of storage space. It also reduces the amount of expenditures by the parties.

## **ADMINISTRATIVE ACTIVITIES**

Having assumed responsibility for reviews of internal management controls in the 1994 reorganization, the Financial and Administrative Management Division completed eight management control reviews during fiscal year 1995. The reviews covered time and attendance records, warehouse operations, verification of payroll data, payroll deductions and withholding, the travel charge card program, property management, supply operations, and procurement. In addition, an independent CPA firm conducted reviews of the general ledger and the adequacy of the Board's management control program. As part of its oversight responsibilities, the Office of the General Counsel contracted with a CPA firm to develop methodology and a five-year plan to review the Board's operations. The office is also responsible for processing complaints of waste, fraud, and abuse, including those referred from the Hotline.

In support of National Performance Review recommendations and the President's Executive Order on Labor Management Relations, the Board established an Agency-Wide Partnership Council that includes bargaining unit, non-bargaining unit, senior executive, and middle management representation. This council and the Labor-Management Partnership Council have obviated traditional bargaining on matters as significant as the Board's flexiplace and alternative work schedule pilot programs.

Near the end of the fiscal year, the Board established a Career Transition Center (CTC) as one means of assisting employees who will be affected by the Board's restructuring and downsizing. In its initial phase, the CTC consists of personal resume and SF-171 software and on-line electronic job vacancy and job search programs. The Board expects that, as the

need arises, the CTC will be expanded to include videos, books, and workshops for preparing resumes, cover letters, and applications, as well as skills and interests assessments. The CTC is operated under the supervision of the Director of Equal Employment Opportunity and was implemented through the volunteer efforts of many Board employees.

## FINANCIAL STATEMENT

*The income and expenses for the Merit Systems Protection Board for fiscal year 1995 (October 1, 1994, through September 30, 1995) are shown below. All figures in thousands of dollars.*

### INCOME

Appropriations .....	24,549
(Less rescission).....	(42)
Civil Service Retirement & Disability Trust Fund .....	2,250
Other reimbursements .....	<u>78</u>
 Total income .....	 26,835

### EXPENSES

Direct obligations:

Personnel compensation	
Full-time permanent .....	15,043
Other than full-time permanent .....	803
Other personnel compensation .....	<u>239</u>
Subtotal, personnel compensation .....	16,085
 Personnel benefits .....	 2,740
Benefits - former employees .....	155
Travel of persons .....	462
Transportation of things .....	67
Rental payment to GSA .....	2,119
Communications, utilities, and miscellaneous charges .....	578
Printing and reproduction .....	100
Other services .....	1,299
Supplies and materials .....	218
Equipment .....	<u>629</u>
 Subtotal, direct obligations .....	 24,452
 Reimbursable obligations.....	 2,328
 Total obligations .....	 26,780
 <b>BALANCE</b> .....	 <b>55</b>

## **APPENDIX A -SIGNIFICANT BOARD DECISIONS APPELLATE JURISDICTION CASES**

This appendix contains summaries of significant appellate jurisdiction cases decided by the Board during fiscal year 1995.

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.

Board decisions and weekly summaries of significant decisions are available on the Government Printing Office's *Federal Bulletin Board*. Dial 202-512-1387 via computer modem, and go to the MSPB LIBRARY. Assistance is available from GPO by calling 202-512-1530. Certain significant Board decisions are also available on the OPM *Mainstreet* BBS, 202-6064800.

### **POSTAL SERVICE RESTRUCTURING**

*Bissett z., U. S. Postal Service, 66 M.S.P.R. 631 (1995)*

The Board held that where an appellant had access to as much information as the agency concerning its restructuring, a claim that his retirement is involuntary because the agency did not provide sufficient information fails. Where no action to affect the appellant's grade, pay, or tenure was taken before his retirement, despite the abolishment of his position, he was not released from his competitive

level or affected by a RIF; thus, the agency's failure to provide RIF appeal rights does not cause his retirement to be involuntary.

*Jones v. U.S. Postal Service, 65 M.S.P.R. 306 (1994)*

Employees who retired during the restructuring without having been demoted were not entitled to notice of an appeal right from that action unless they put the agency on notice at that time or later that they considered their retirement involuntary. At the time of the restructuring, there was no law establishing that the restructuring was actually a RIF situation. Where the agency is not required to give notice of appeal rights, the appellant must exercise diligence in discovering **and** pursuing any right of appeal he may have.

*Sink v. U.S. Postal Service, 65 M.S.P.R. 628 (1994)*

Unless it has compelling reasons, an agency must restore an employee who has suffered an unjustified personnel action to *the status quo ante*. The abolishment of the appellant's former job is a compelling reason for not returning him to that position. With respect to the Postal Service restructuring, the Board held that the decision to run a RIF rather than return the appellant as nearly as possible to the *status quo ante* is not compliance with its order. It ruled that, to be in compliance, the agency must either return the appellant to his former position or issue him a specific notice of RIF.

*Kelly v. U.S. Postal Service, 68 M.S.P.R. 565 (1995)*

In petitions for review following reversals on the merits of demotions effected during the restructuring, as in petitions for enforcement, it is proper to treat an allegation on the merits of the agency's compli-

ance RIF as a new RIF appeal and not as a compliance action. The Board extended a 30-day period to the appellant in which he may file such an appeal.

## **WHISTLEBLOWER PROTECTION ACT**

*Van Ee v. Environmental Protection Agency, 64 M.S.P.R. 693 (1994)*

That the appellant's statements constituted expressions of his opinion did not remove them from the status of protected disclosures if he reasonably believed them, since the element of opinion is always present in such a disclosure. That they were made in the context of a settlement discussion also did not remove them from the protection of 5 USC §2302(b)(8). First Amendment arguments and prohibited personnel practice claims not based on (b)(8) cannot be considered in the context of an IRA appeal.

*Sirgo v. Department of Justice, 66 M.S.P.R. 261 (1994)*

Disclosures to co-workers and an intent to disclose to agency officials are both protected by 5 USC §2302(b)(8) as long as they meet the reasonable belief test. Where an appellant who resigned in the face of a threat to terminate his employment during his probationary period requests not just abatement of the threat (i.e., cancellation of the proposed termination), but reinstatement and back pay, he must show that a reasonable person in his position would have resigned under those circumstances.

*Ward v. Department of the Army, 67 M.S.P.R. 482 (1995)*

The disclosure of matters that are only potential violations may be protected where they evidence a reasonable belief of wrongdoing as set forth in 5 USC §

2302(b)(8). Here, because the potential wrongdoing disclosed under such circumstances was "real and immediate," the Board found that the appellant had the requisite reasonable belief.

*Mitchell v. Department of the Treasury, 68 M.S.P.R. 504 (1995)*

That the appellant may have raised her claims in an unfair labor practice (ULP) charge did not in and of itself render them unprotected by 5 USC §2302(b)(8). Rather, if the alleged facts underlying the ULP charge also would constitute independent violations of (b)(8), the employee discloses the facts through additional channels in such a way as to advance her whistleblowing claim, and she suffers personnel actions she alleges constitute whistleblower retaliation, she may avail herself of the IRA procedure. If the facts disclosed evidence only a ULP, however, and not another violation of law, rule, or regulation, or other basis under (b)(8), it is not the type of disclosure intended to be protected by that section.

*Paul v. Department of Agriculture, 66 M.S.P.R. 643 (1995)*

Reassignment and nonselections for vacancies are personnel actions. The denial of certification as a mineral examiner is not a personnel action; nor are the tortious acts of defamation, interference in the appellant's employment relations, placement of the appellant in a false light, or intentional infliction of mental distress.

## **ADVERSE ACTIONS**

*Barresi, et al., v. U.S. Postal Service, 65 M.S.P.R. 656 (1994)*

In order to indefinitely suspend an employee under the crime provision of 5 U.S.C. 7513, an agency must have rea-

sonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. Evidence of an employee's arrest, or evidence of an employee's arrest and conviction, are insufficient to meet this standard. The same is true for media reports, without some form of independent verification, and to the extent that *Martin v. Treasury*, 12 M.S.P.R. 12 (1982), suggests to the contrary, it is modified. Because of the unique nature of the crime provision on which indefinite suspensions are based, the critical factor in the reasonable cause determination is the evidence the proposing and deciding officials have before them at the time they act. It would deny due process to sustain an indefinite suspension based on evidence the agency did not have before it when it made its reasonable cause determination.

*Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401 (1995)

Where an AWOL charge is based on the failure to report for a directed reassignment, the agency must prove that its reassignment decision was bona fide and based on legitimate management reasons. Here, that rule was applied in the context of the agency's order that the appellant report to a lower grade job as part of its nationwide restructuring. As was true of all such similar cases, the placement action was later reversed because the agency failed to follow reduction-in-force procedures in making it. Not having reported for duty, the appellant was removed for AWOL prior to that adjudication. In the context of this adverse action appeal of the removal, the Board examined its relevant case law and found that its review of directed reassignments is intended to assure that they are not used for illegitimate reasons, and is directed to the reasons for the action, not the means by which it was effected. Thus, a demo-

tion like this one is legitimate under this test ' and where the appellant does not obey the order to report, he is properly subject to removal for AWOL. The Board also clarified its law and held that an employee is privileged to disobey an order only where compliance would cause him irreparable harm.

*Wilkinson v. Department of the Air Force*, 68 M.S.P.R. 4 (1995)

This decision extended the rule of *Fleming v. USPS* to agencies other than the Postal Service, allowing employees to be removed for failure to follow leave-requesting procedures despite the approval of their leave.

## **DRUG-RELATED ISSUES**

*Lazenby v. Department of the Air Force*, 66 M.S.P.R. 514 (1995)

Under Executive Order 12564, agencies "shall initiate action to discipline" an illegal drug user except for one who voluntarily identifies himself and agrees to testing, obtains treatment, and thereafter abstains from using illegal drugs. Further, the agency must initiate a removal action where the employee refuses to obtain treatment or "thereafter" uses such drugs. In this context, the Board found that the word "thereafter" means the period beginning immediately after a finding of drug use, so that the fact that the appellant's relapse, which led to the removal, occurred in the early stage of her treatment, even for a drug as addictive as cocaine, does not lessen the seriousness of the offense.

*Garrison v. Department of Justice*, 67 M.S.P.R. 154 (1995)

In deciding whether an agency's reasonable suspicion determination under its drug testing program was proper, the relevant inquiry is whether it was sufficient at the time it was made. It should not be evaluated on facts that did not come to light until after that time.

*Little v. U.S. Postal Service*, 66 M.S.P.R. 574 (1995)

Section 512 of the Americans With Disabilities Act amends the Rehabilitation Act to provide that the term "individual with a disability" does not include "an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use." Whether use of illegal drugs is "current" is determined as of the date of the notice of proposed adverse action, so an appellant's entry into treatment after that date comes too late to protect him under the Act.

## **INTERIM RELIEF**

*Russell v. Department of Justice*, 68 M.S.P.R. 337 (1995)

Where the appellant is the only party to file a petition for review of an initial decision ordering interim relief, the agency, upon order, must submit proof of compliance. This is the first case in which the Board, under its recent regulatory amendment, retained jurisdiction over the issue of interim relief to assure compliance, despite its remand of the appeal on the merits to the field office.

## **MISCELLANEOUS**

*Kuykendall v. Department of Veterans Affairs*, 68 M.S.P.R. 314 (1995)

A *status quo ante* analysis is not per se applicable in enforcing settlement agreements; nor is it applicable simply because the appellant asserts that the agency has retaliated against and harassed her. Allegations of harassment and retaliation are, however, relevant to a determination of whether the agency complied in good faith with a settlement's reinstatement term, even though the parties' agreement does not specifically prohibit reprisal upon reinstatement. To establish such a breach the appellant must show that the agency's "proven ... actions, under the totality of the circumstances, amounted to an unjustified and substantial deprivation of her rights" as the incumbent of her position. It is not necessary, however, to establish a prohibited personnel practice to establish a breach.

*Groshans v. Department of the Navy*, 67 M.S.P.R. 629 (1995)

The Board held that a conversation about a request for a security presence at a hearing concerns a procedural security matter, which need not be raised in writing, and not the merits of the case. It further found that the administrative judge may require such a presence on his own initiative and that the failure to disclose the circumstances surrounding a request for a security presence does not violate the appellant's rights.

## **APPENDIX B -SIGNIFICANT BOARD DECISIONS ORIGINAL JURISDICTION CASES**

This appendix contains summaries of significant original jurisdiction cases decided by the Board during fiscal year 1995.

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### **SPECIAL COUNSEL DISCIPLINARY ACTIONS (NON-HATCH ACT)**

*Special Counsel v. Santella and Jech*, 65 M.S.P.R. 452 (1994) The applicable standard under the Whistleblower Protection Act in Special Counsel disciplinary actions involving reprisal for whistleblowing is whether the protected disclosure was a significant factor in the alleged retaliation. In order to meet the significant factor test, the Special Counsel must demonstrate that the protected disclosure played an important role in the allegedly retaliatory action and that there was an improper motiva-

tion for the action. The test is not met if the official would have taken the same action in the absence of the protected disclosure.

### **SPECIAL COUNSEL STAY REQUESTS**

*Special Counsel v Department of the Treasury*, 65 M.S.P.R. 146 ('1994)

Placement on administrative leave is a personnel action that the Board may stay under the Whistleblower Protection Act because it constitutes a significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level.

### **REGULATION REVIEWS**

*Senior Executives Association v. Office of Personnel Management*, 67 M.S.P.R. 643 (1995)

The regulation concerning detailing career Senior Executive Service (SES) employees during the 120-day period following the appointment of a new agency head or noncareer supervisor does not violate the statutory moratorium on involuntarily reassigning career SES employees during that period or require the commission of a prohibited personnel practice. The regulation providing that career SES employees could not earn credit hours does not violate the statute governing flexible work schedules or require the commission of a prohibited personnel practice. The Senior Executive Association is an "interested person" entitled to seek review of regulations applicable to its members.

## APPENDIX C - SIGNIFICANT COURT DECISIONS

Significant decisions issued by the U.S. Court of Appeals for the Federal Circuit on review of final Board decisions during fiscal year 1995 included the following:

### AFFIRMATIVE DEFENSES

#### *Procedural Error*

*Diaz v. Department of the Air Force, 63 F.3d 1107 (Fed. Cir. 1995)*

An agency's violation of a statutory procedural requirement does not necessarily invalidate the agency action, especially where Congress has not provided any consequences for such procedural violation. The fact that the agency issued its decision to remove the employee more than 30 days after the notice period expired did not mandate reversal of the removal when the employee did not show that this procedural error affected the outcome of the agency's decision.

#### *Reprisal for Whistleblowing*

*Watson v. Department of Justice, 64 F.3d 1524 (Fed. Cir. 1995)*

When the facts supporting an agency's disciplinary action against an employee are intertwined with facts disclosed by the employee in a protected whistleblowing disclosure, the agency must prove by clear and convincing evidence that it would have taken the same action absent the disclosure, but not that it eventually would have discovered the content of the disclosures from another source.

## APPEALABLE ACTIONS

### *Loss of Security Clearance*

*Drumheller v. Department of the Army, 49 F.3d 1566 (Fed. Cir. 1995)*

In reviewing a removal action based on the revocation of a security clearance, the Board only has jurisdiction to consider whether the agency provided the employee with the procedural protections required by statute, regulation, and the Constitution. The Board may not review the substance of the underlying security clearance determination.

### *Misuse of Government-Owned Vehicle*

*Chufu v. Department of the Interior, 45 F.3d 419 (Fed. Cir. 1995)*

A car that was rented by an employee using a Government-issued credit card while on an official business trip was not a Government-owned vehicle because the car was neither owned nor leased by the Government, and the employee was not properly charged with misuse of a Government-owned vehicle when he used the car for personal business.

*Kimm v. Department of the Treasury, 61 F.3d 888 (Fed. Cir. 1995)*

In order to sustain a charge of misuse of a Government-owned vehicle, the agency must prove either that the employee had actual knowledge that the use would be characterized as nonofficial or that the employee acted in reckless disregard as to whether the use was for nonofficial purposes. The agency did not show the requisite intent to support its charge of misuse of a Government-owned vehicle where the employee used the vehicle to transport his child to and from day care on his way to and from work while his wife was ill.

## ***Theft***

*Chauvin v. Department of the Navy*, 38 F.3d 563 (Fed. Cir. 1994)

By charging the appellant with unauthorized possession and attempted removal of Government property, the agency charged him with two separate charges, rather than one charge with two elements, because the charge stated two separate acts of misconduct that are not dependent upon each other. The court found that the agency did not prove its charge of attempted removal of Government property because the agency did not show that the appellant acted with the requisite intent.

*King v. Nazelrod*, 43 F.3d 663 (Fed. Cir. 1994)

When an agency charges an employee with a criminal offense, the agency must prove all the elements associated with the crime. The agency did not prove its charge of theft of an inmate's money because it did not prove that the employee acted with the intent to permanently deprive the owner of possession of the money.

## **ATTORNEY FEES**

*Irvin v. Small Business Administration*, 45 F.3d 417 (Fed. Cir. 1995)

The employee was not the prevailing party entitled to an award of attorney fees where in her amended appeal of her removal she sought reinstatement, a promotion, a voluntary resignation, and back pay, but she settled her appeal for a voluntary resignation and clean personnel record. In order to be a prevailing party, the employee must obtain all, or a significant portion of, the relief sought in filing the appeal.

## **BOARD PROCEDURES AND TIMELINESS**

### ***Interim Relief***

*King v. Jerome*, 42 F.3d 1371 (Fed. Cir. 1994)

In determining whether an agency has complied with an interim relief order, the Board has no jurisdiction to review an agency's decision that the employee's return or presence in the workplace would be unduly disruptive. The Board's authority is limited to determining whether an undue disruption determination has been made and whether the agency has provided the employee with appropriate pay, benefits, and compensation.

### ***Timeliness***

*Pyles v. Merit Systems Protection Board*, 45 F.3d 411 (Fed. Cir. 1995)

When an appellant presents evidence that she suffers from a permanent or progressive medical condition, the condition will be assumed to continue after the date of the diagnosis absent evidence to the contrary, and the Board abuses its discretion by finding that the condition did not continue.

## **ENFORCEMENT OF BOARD ORDERS**

### ***Discrimination Claims***

*King v. Reid*, 59 F.3d 1215 (Fed. Cir. 1995)

The Board has jurisdiction to determine whether an agency has violated a Board order or a settlement agreement that has been entered into the record; however, the Board may not decide a claim of discrimination that is alleged to be a basis in whole or in part for the agency's acts of noncompliance. An allegation of noncompliance

with a Board order is not an appealable action to which a claim of discrimination can be appended to create a mixed case.

## **EVIDENCE**

### ***Conflicting Evidence***

*Holmes v. Department of Veterans Affairs*, 58 F.3d 628 (Fed. Cir. 1995)

The Board erred by finding that the agency complied with the terms of the settlement agreement without addressing and resolving the conflicting evidence in the record concerning the agency's compliance.

### ***Recanted Admissions***

*Uske v. U.S. Postal Service*, 56 F.3d 1375 (Fed. Cir. 1995)

An adverse action will not be sustained when the only proof that the misconduct occurred is a recanted admission. However, where there is other evidence that the misconduct occurred, the agency may use a recanted admission along with other evidence to support the other aspects of its charge.

## **INDIVIDUAL RIGHT OF ACTION**

### ***Protected Disclosures***

*Horton v. Department of the Navy*, 66 F.3d 279 (Fed. Cir. 1995)

A disclosure to the person who is the subject of the disclosure is generally not protected whistleblowing; the purpose of the Whistleblower Protection Act is to encourage disclosure of wrongdoing to persons who are in a position to remedy it. A disclosure that recites violations of rules, regulations, or managerial responsibility, which on their face are covered by 5 U.S.C. §2302(b)(8), are protected disclosures absent evidence that the whistleblower has

no reasonable belief that a violation of law has occurred. A protected disclosure cannot be a contributing factor to a personnel action that was proposed before the disclosure was made.

## **JUDICIAL REVIEW**

### ***Non-final Board Orders***

*Haines v. Merit Systems Protection Board*, 44 F.3d 998 (Fed. Cir. 1995)

A letter by the Clerk of the Board denying an appellant's request to reopen a final Board decision is not a final Board order that may be appealed to the U.S. Court of Appeals for the Federal Circuit.

### ***Scope of Review***

*Anthony v. Office of Personnel Management*, 58 F.3d 620 (Fed. Cir. 1995)

The scope of review of the Board's decision in a disability retirement case under the Federal Employees Retirement System is the same as the scope of review in disability retirement cases under the Civil Service Retirement System. Judicial review is limited to determining whether there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination. The court may not review the Board's findings of fact.

## **JURISDICTION**

### ***Actions Taken Pursuant to a Last Chance Settlement Agreement***

*Briscoe v. Department of Veterans Affairs, 55 F.3d 1571 (Fed. Cir. 1995)*

In order to determine whether an employee has raised a non-frivolous allegation that she was incompetent to enter into a last chance agreement, the Board may properly request sufficient evidence to determine if, in the first instance, there is any support for her mere allegation.

*Link v. Department of the Treasury, 51 F.3d 1577 (Fed. Cir. 1995)*

An agency breaches a last chance settlement agreement when it fails to comply with a provision in a way that was material to the agreement. The employee need not show that the agency acted in bad faith or arbitrarily. When a material breach is shown, the Board may not enforce any waiver of appeal rights contained in the agreement.

### ***Excepted Service Employees***

*Forest v. Merit Systems Protection Board, 47 F.3d 409 (Fed. Cir. 1995)*

To be entitled to file an appeal, an employee in the excepted service must serve two years of current continuous service in the same or similar position under a permanent appointment. An employee cannot tack service under a temporary appointment onto his service under a permanent appointment in order to meet this two-year period.

### ***Involuntary Resignation***

*Braun v. Department of Veterans Affairs, 50 F.3d 1005 (Fed. Cir. 1995)*

An employee need only present a nonfrivolous allegation that his resignation was coerced, not prove his claim by preponderant evidence, in order to warrant a hearing on that issue.

### ***Suspension of Fourteen Days or Less***

*Jennings v. Merit Systems Protection Board, 59 F.3d 159 (Fed. Cir. 1995)*

Two fourteen-day suspensions imposed for different acts of misconduct, although served consecutively, could not be aggregated to constitute a single twenty-eight-day suspension in order to establish Board jurisdiction.

### ***Temporary Employees***

*Todd v. Merit Systems Protection Board, 55 F.3d 1574 (Fed. Cir. 1995)*

The Civil Service Due Process Amendments did not extend appeal rights to an employee who was appointed pursuant to a statute that allowed the Department of Defense to appoint employees for its dependents schools without regard to the civil service laws.

## **RETIREMENT BENEFITS**

### ***Computation of Length of Service***

*Begley v. Office of Personnel Management, 60 F.3d 804 (Fed. Cir. 1995)*

The Office of Personnel Management's method of calculating length of service assuming that each calendar month has thirty days, and that each year has 360 days-reasonably implements the statute that sets out the calculation of length of

service for retirement eligibility under the Civil Service Retirement System.

### ***Election Not to Make Deposit***

*Collins v. Office of Personnel Management, 45 F.3d 1569 (Fed. Cir. 1995)*

An employee is bound by his written election not to make retirement contributions to cover his military service, absent a showing of mental incompetence, duress, or fraud.

### ***Former Spouses***

*Davenport v. Office of Personnel Management, 62 F.3d 1384 (Fed. Cir. 1995)*

In interpreting a qualified domestic relations order providing a Federal employee's former spouse an interest in the employee's retirement benefits, the Office of Personnel Management may look to the divorce decree to insure that the retirement benefits are apportioned in accordance with the intent of the order.

*Holder v. Office of Personnel Management, 47 F.3d 412 (Fed. Cir. 1995)*

A Federal employee's former spouse does not meet the statutory requirements for a survivor annuity under the Civil Service Retirement Spouse Equity Act if she did not apply for benefits by the statutory deadline, May 7, 1989. An employee's election upon retirement of a survivor annuity for his spouse extinguishes upon their subsequent divorce.

*Vallee v. Office of Personnel Management, 58 F.3d 613 (Fed. Cir. 1995)*

A Federal employee's failure to elect a survivor annuity for his former wife after their divorce as required by the Civil Service Retirement Spouse Equity Act was excused by the Office of Personnel

Management's failure to notify the employee that he must make such an election where the employee elected a survivor annuity in favor of his then wife at the time of his retirement and he declined to have his annuity restored to its full value after the divorce.

### ***Indefinite Service***

*Rosete v. Office of Personnel Management, 48 F.3d 514 (Fed. Cir. 1995)*

Indefinite appointments in the excepted service may properly be interpreted as being "temporary or intermittent," and thus do not constitute covered service for establishing entitlement to a civil service retirement annuity.

### ***Recomputed Annuity***

*Pugach v. Office of Personnel Management, 46 F.3d 1081 (Fed. Cir. 1995)*

In order to become entitled to have his retirement annuity recomputed under 5 U.S.C. §8344, a Federal employee who has retired and subsequently been reemployed by the Federal Government must complete five years of continuous service.

### ***Spousal Consent to a Lump Sum Annuity***

*Carpisassi v. Office of Personnel Management, 46 F.3d 1094 (Fed. Cir. 1995)*

A retired Federal employee may not elect a lump sum annuity unless the employee timely files a notice that his spouse consents to the lump sum. OPM's failure to respond to an employee's request for an extension of time and misinformation as to the applicable deadline did not justify waiver of this requirement because the employee did not obtain his wife's consent by the time the deadline expired.

## **APPENDIX D- MERIT SYSTEMS STUDIES AND REVIEWS OF OPM SIGNIFICANT ACTIONS**

### *Leadership for Change: Human Resource*

#### *Development in the Federal Government (July 1995)*

- This report covers the Board's study of the employee training and development programs that constitute human resource development (HRD) in the Federal Government. It concludes that while the level of employee satisfaction with specific programs and presentations is fairly high, the level of satisfaction with the overall resources for HRD is rather low. The Board finds that the level of funding available for HRD is declining under increasing budget pressure. Ironically, this same pressure is requiring the retraining of the workforce to work more efficiently and effectively in reengineered organizations. The Board also finds that the HRD function needs to be integrated into the strategic planning and evaluation processes to ensure that organizations' developmental priorities are being met. Current HRD staffs must be engaged more in the strategic planning process rather than relegated to the role of coordinating specific training courses and compiling statistics on the completion of such courses. Further, the Board finds the Office of Personnel Management needs to use its role as the Government's lead human resources agency to educate Congress, the Administration, and individual agencies on the need to allot resources to develop the organizations of the future.

### *Sexual Harassment in the Federal Workplace:*

*Trends, Progress, Continuing Challenges* (October 1995) - This report presents the results of a Governmentwide survey of Federal workers who provided data on their experiences with sexual

harassment and the effects it had on them, as well as information on their attitudes and beliefs about relationships in the workplace. The survey was the centerpiece of a study undertaken to update the Board's 1980 and 1987 studies of this issue.

The report includes a review of judicial developments and the initiatives agencies described to prevent or eliminate sexual harassment in their organizations. The Board found that while the Federal workforce is more sensitive to the problem of sexual harassment, the problem has by no means disappeared. Nevertheless, the Government has made progress in building a greater understanding of the relevant underlying issues and sensitivity to how people are treated in the workplace.

*The Rule of Three in Federal Hiring: Boon or Bane?* (December 1995) - This report analyzes the effect of the rule of three on competitive Federal hiring. It finds that the rule of three, which requires managers to hire from among the top three candidates referred to them by an examining office, does not advance merit hiring. Too often, this rule requires the use of random number tables to determine the order in which otherwise equal candidates will be listed, essentially turning the referral stage into a lottery. The report also challenges conventional wisdom by finding that the rule of three often does not limit managers' choices in hiring because in many instances there are no more than three qualified candidates for each job vacancy. The Board report concludes that the current rule should be replaced by one that better takes into account the supply of applicants and that gives managers a greater role in selecting among candidates.

The report also analyzes the interaction of veterans preference laws with the rule of three and finds that the interaction of these two laws varies by the kind of hiring procedure used. Further, while proportionately more veterans are referred for hiring through the traditional process of hiring from standing inventories of candidates ("register hiring"), proportionately greater numbers of veterans are actually hired through a hiring process where applicants apply for a specific job vacancy ("case examining"). The report also casts doubt on another conventional belief-that the presence of candidates with veterans preference often prevents managers from hiring preferred candidates. The report finds instead that the interaction of the rule of three with veterans preference laws has not, in fact, significantly reduced management choices. In other words, while the rule of three can have a negative impact on the competitive hiring process, veterans preference laws are not the cause of that negative impact.

## **CUSTOMER SERVICE STANDARDS**

*The Merit Systems Protection Board has two core missions: (1) Adjudication of appeals brought to it under the provisions of law and regulation, and (2) Oversight of the Federal merit systems. These two missions are authorized in the Civil Service Reform Act of 1978.*

*We have established these standards to assure our customers that they receive the quality of service to which they are entitled and to assure the public as a whole that we are ably promoting and protecting the Federal merit systems.*

### **MISSION I - Adjudication of Appeals**

1. We will make our regulations easy to understand and our procedures easy to follow.
2. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.
3. We will promptly and courteously respond to customer inquiries.
4. We will facilitate the settlement of appeals.
5. We will issue readable decisions based on consistent interpretation and application of law and regulation.
6. We will issue decisions in initial appeals within 120 days of receipt and within 110 days on petitions for review, except where full and fair adjudication of an appeal requires a longer period.
7. We will make our decisions readily available to our customers.

### **MISSION II - Oversight of the Federal Merit Systems and the U.S. Office of Personnel Management**

1. We will conduct research on topics and issues relevant to the effective operation of the Federal merit systems and the significant actions of the U.S. Office of Personnel Management; perform sound, objective analysis; and where warranted, develop practical recommendations for improvement.
2. We will issue timely, readable reports on the findings and recommendations of our research and make these reports available to all interested individuals and parties.
3. We will enhance the constructive impact of our studies and reports through outreach efforts.

*We will conduct surveys of our customers from time to time to see how well we are meeting these standards. However, if at any time, you have comments or suggestions concerning our service, we invite you to provide feedback to our Chairman, Mr. Ben Erdreich, through the Clerk of the Board, at 1120 Vermont Avenue, NW, Washington, DC 20419, telephone (202) 653-7200, FAX number (202) 653-7130. Electronic mail may be sent over the Internet to [mspb@mspb.gov](mailto:mspb@mspb.gov).*