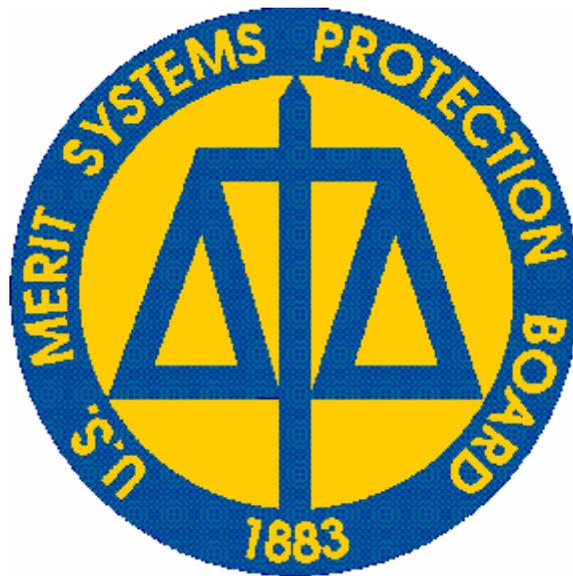


U.S. Merit Systems Protection Board



Annual Report for Fiscal Year 1996

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



U.S. MERIT SYSTEMS PROTECTION BOARD
Washington, DC 20419

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

Sirs:

In accordance with 5 U.S.C. § 1206, we are pleased to submit the Eighteenth Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during fiscal year 1996, including the Federal employee appeals and other cases decided by the Board.

The Board and its regional and field offices closed 10,300 cases during fiscal year 1996. The Board's administrative judges decided 8,925 appeals, stay requests, and addendum cases. This is the second-highest number of cases closed by the regional and field offices in the 10-year period, 1987-1996. The FY 1995 peak year included the influx of cases arising from the U.S. Postal Service restructuring. The 3-member Board decided 1,329 cases under its appellate jurisdiction during fiscal year 1996, principally petitions for review (PFRS) of administrative judges' initial decisions. The Board also completed action on 46 cases arising under its original jurisdiction, principally proposed furloughs of administrative law judges because of expected lapses in appropriations and stay requests filed by the Special Counsel on behalf of whistleblowers.

The average time to process cases in the regional and field offices was 94 days. The average processing time at Board headquarters for PFRs of initial decisions by administrative judges was 121 days. This means that, on average, an appeal to the Board was processed through both levels of Board review in just over seven 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 789 final Board decisions reviewed by the court in fiscal year 1996, 97 percent were unchanged by the court's decisions.

The Board also has a statutory responsibility to conduct studies of the merit systems and to review the significant actions of the Office of Personnel Management (OPM). In fiscal year 1996, the Board issued three reports--an update of its earlier studies of sexual harassment, an examination of the effect of the "rule of three" in Federal hiring, and a study of employment of minorities in the Federal Government.

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, quasijudicial 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 withingrade increases, certain reduction-in-force (RIF) actions, denials of restoration to duty or reemployment rights, and removals from the Senior Executive Service (SES) for failure to be recertified. Determinations by OPM in employment suitability and retirement matters are also appealable to the Board.

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

Under the Whistleblower Protection Act of 1989 (WPA), personnel actions that are not normally appealable to the Board may result in the right to a Board appeal under certain circumstances. Included are appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training. Such an action may be

appealed to the Board *only* if the appellant alleges that the action was taken because of 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



BETH S.

SLAVET took the oath of office as Vice Chairman and member of the 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.

Member



ANTONIO C. AMADOR became Vice Chairman of the Board on November 1, 1990, following his nomination by President Bush and confirmation by the Senate. Currently, he serves as Member of the Board. His term appointment expires March 1, 1997. At the time of his appointment to the Board, Mr. Amador was Deputy Director, Program Review Branch, Employment Development Department of the State of California. Previously, he served as Director of the California Youth Authority, as Chairman of the Youthful Offender Parole Board in California, and as a police officer in the Los Angeles Police Department. He received his law degree from the McGeorge School of Law, University of the Pacific.

BOARD ORGANIZATION

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 and administrative 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** prepares proposed decisions that recommend appropriate action in petition for review cases and all other cases decided by the 3-member Board, with the exception of requests for review of OPM regulations. The office 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 serves as the Board's public information center, including providing information on the status of cases, distributing copies of Board decisions and publications, and operating the Board's Library and on-line information services. The office answers requests under the Freedom of Information and Privacy Acts at the Board's headquarters and responds to all other information requests except those for which the Office of the General Counsel or the Office of Policy and Evaluation is responsible (see below). The office also certifies official records to the courts and Federal administrative agencies, manages the Board's records and directives system, and manages the Government in the Sunshine Act program.

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 for the Board on requests to review OPM regulations. The office coordinates the Board's legislative policy, congressional relations, and public affairs functions; responds to requests for non-case related information from the White House, Congress, and the media; and produces the agency's annual report to the President and the Congress, the annual report on cases decided, 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 and are distributed to a national audience. The office disseminates information about the Board's studies through outreach appearances, articles, and electronic media. The office also responds to requests from Federal agencies for

information, advice, and assistance on issues that have been the subject of Board studies.

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:

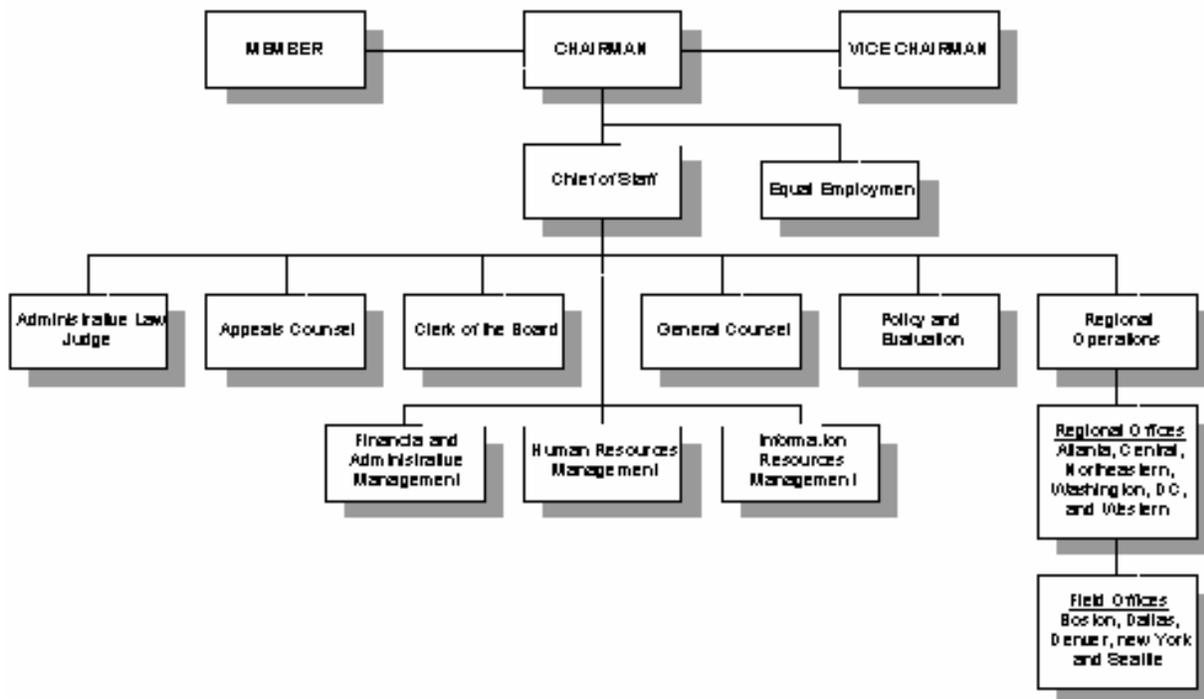
The **Financial and Administrative Management Division** administers the budget accounting, procurement, property management, physical security, and general services

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** develops policies and manages the Board's human resources programs and assists managers, employees, and applicants for employment. It administers staffing, classification, employee relations, performance management, payroll, personnel security, and training and development functions.

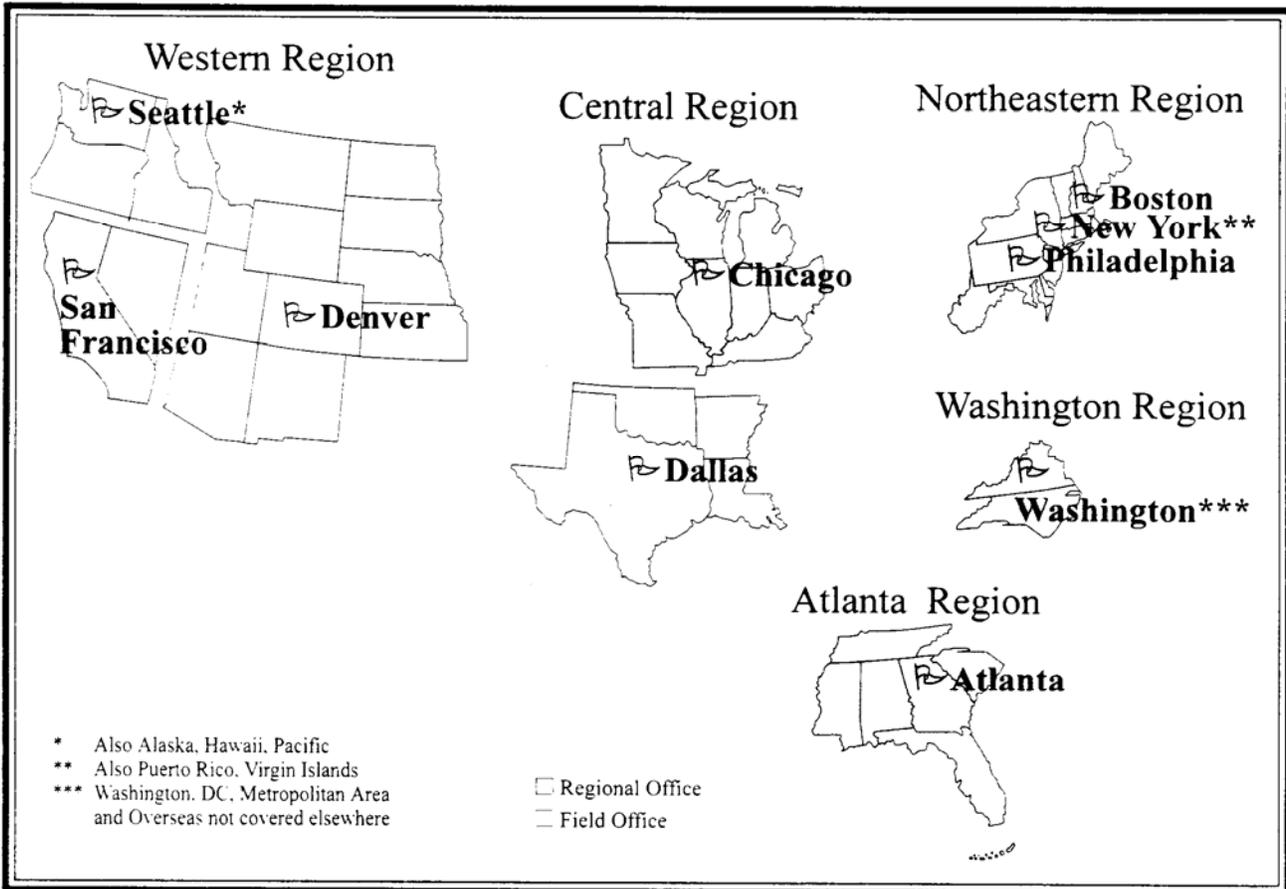
The **Information Resources Management Division** develops, implements, and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.

ORGANIZATION CHART



REGIONAL AND FIELD OFFICE

JURISDICTIONS



Atlanta Regional Office
Alabama, Florida, Georgia, Mississippi, South Carolina, and Tennessee

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

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

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

Dallas Field Office
Arkansas, Louisiana, Oklahoma, and Texas

Western Regional Office
California and Nevada

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

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

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

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

FISCAL YEAR 1996, CASE PROCESSING -

STATISTICAL HIGHLIGHTS

CASES DECIDED BY MSPB IN FY 1996

Regional/Field Office Decisions:

Initial Appeals.....	7,971
Addendum Cases ¹	814
Stay Requests ²	140

TOTAL REGIONAL/FIELD OFFICES..... 8,925

Board Decisions:

Appellate Jurisdiction:

PFRs - Initial Appeals.....	1,087
PFRs - Addendum Cases ¹	111
Reviews of Stay Request Rulings.....	1
Requests for Stay of Board Order.....	2
Reopenings ³	7
Court Remands.....	13
Compliance Referrals.....	103
EEOC Non-concurrence Cases.....	1
Arbitration Cases.....	4

Subtotal..... 1,329

Original Jurisdiction Cases..... 46

TOTAL BOARD..... 1,375

TOTAL BOARD + RO/FOs..... 10,300

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

² Includes 110 stay requests in whistleblower cases and 30 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.)

³ Includes 6 cases reopened by the Board on its own motion and 1 case 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 for 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.

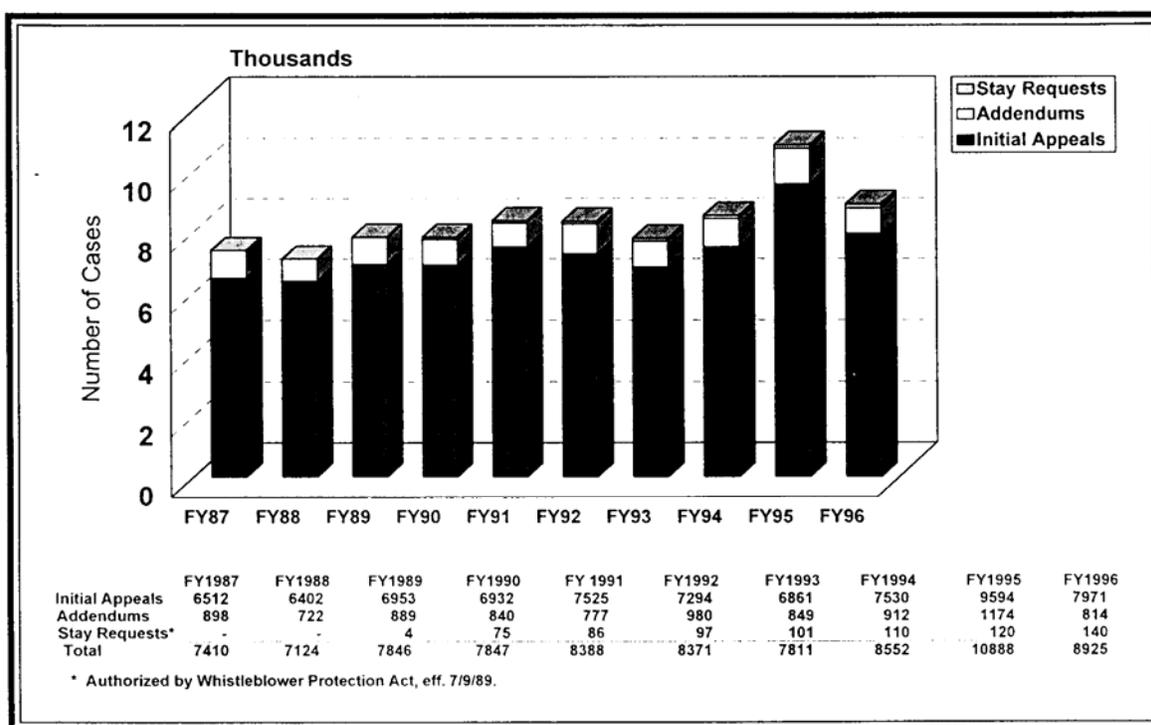
APPELLATE CASE PROCESSING IN FISCAL YEAR 1996

Regional and Field Offices

- *Case Receipts* - The regional and field offices received 8,876 new cases (initial appeals, addendum cases, and stay requests) in FY 1996. At the end of the fiscal year, there were 2,286 cases pending in the regional and field offices.

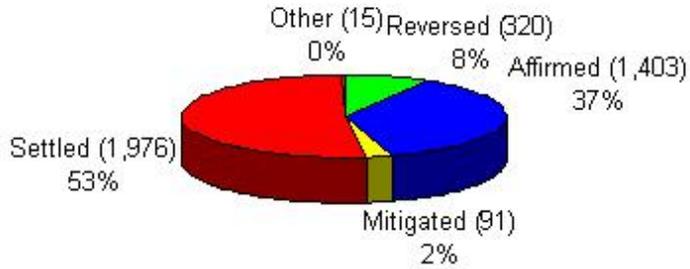
- *Cases Decided* - The administrative judges decided 8,925 cases in FY 1996-the second-highest number in a 10-year period. The decisions included 7,971 on initial appeals and 814 in addendum cases. There were 140 orders ruling on stay requests--110 in whistleblower cases and 30 in non-whistleblower cases.

REGIONAL DECISIONS, FY 1987 - 1996



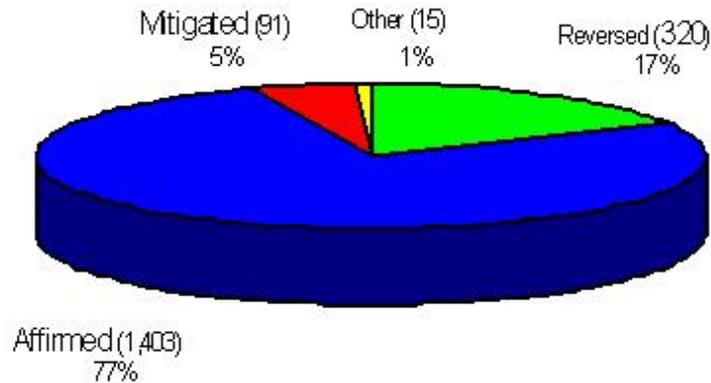
- *Disposition* - Of the 7,971 initial appeals decided, 4,166 (52 percent) were dismissed. Of the dismissals, 71 percent were for lack of jurisdiction, agency cancellation of the action, or appellant withdrawal of the appeal; 7 percent were dismissed as untimely; and 22 percent were dismissed without prejudice to later refiling. The accompanying charts show the outcomes of appeals that were not dismissed and the disposition of appeals adjudicated on the merits.

OUTCOMES OF FY 1996 APPEALS NOT DISMISSED



Based on 3,805 initial appeals not dismissed.

DISPOSITION OF INITIAL APPEALS ADJUDICATED ON THE MERITS IN FY 1996



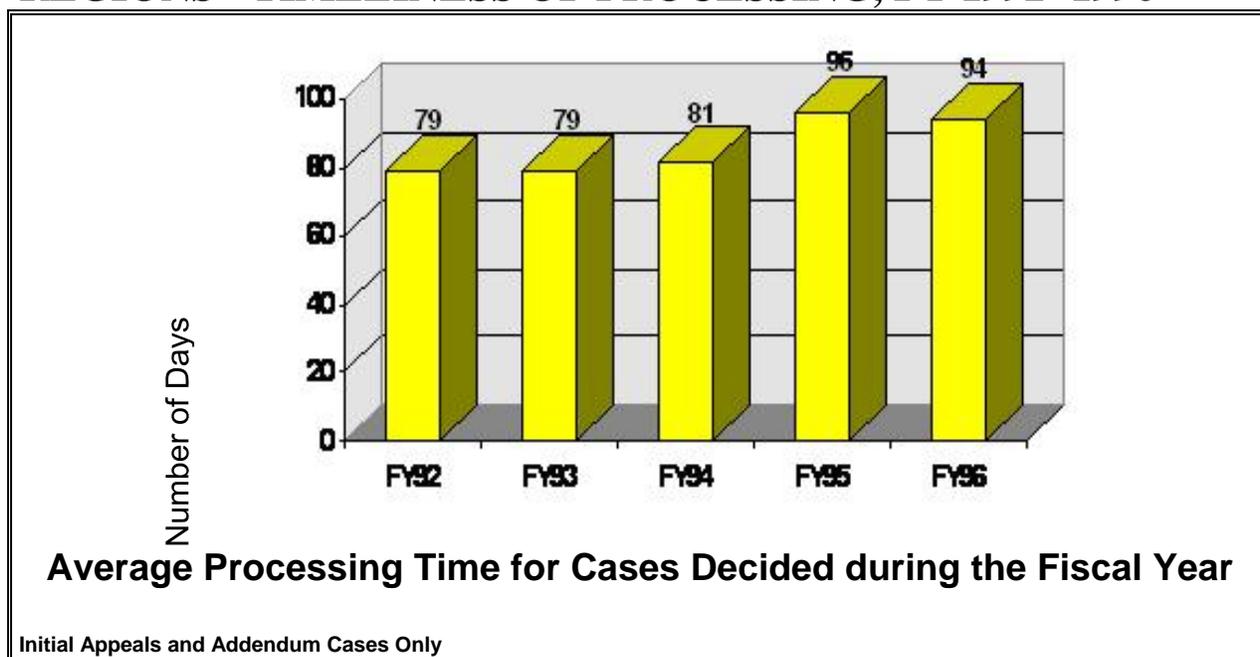
Based on 1,829 adjudicated initial appeals.

- *Settlement Rate* - Of the 3,805 appeals that were not dismissed, 1,976 were settled, for an overall settlement rate of 52 percent. The settlement rate for adverse action cases was 65 percent; for performance cases, 76 percent; and for denials of within-grade increases, 67 percent.
- *Relief for Appellants* - Considering the number of appeals settled (1,976) and those in

which the agency action was reversed or mitigated (411), appellants received relief in 63 percent of the appeals that were not dismissed.

- *Processing Time* - The average processing time for initial appeals and addendum cases was 94 days. Of the initial appeals decided, 87 percent were decided within 120 days.

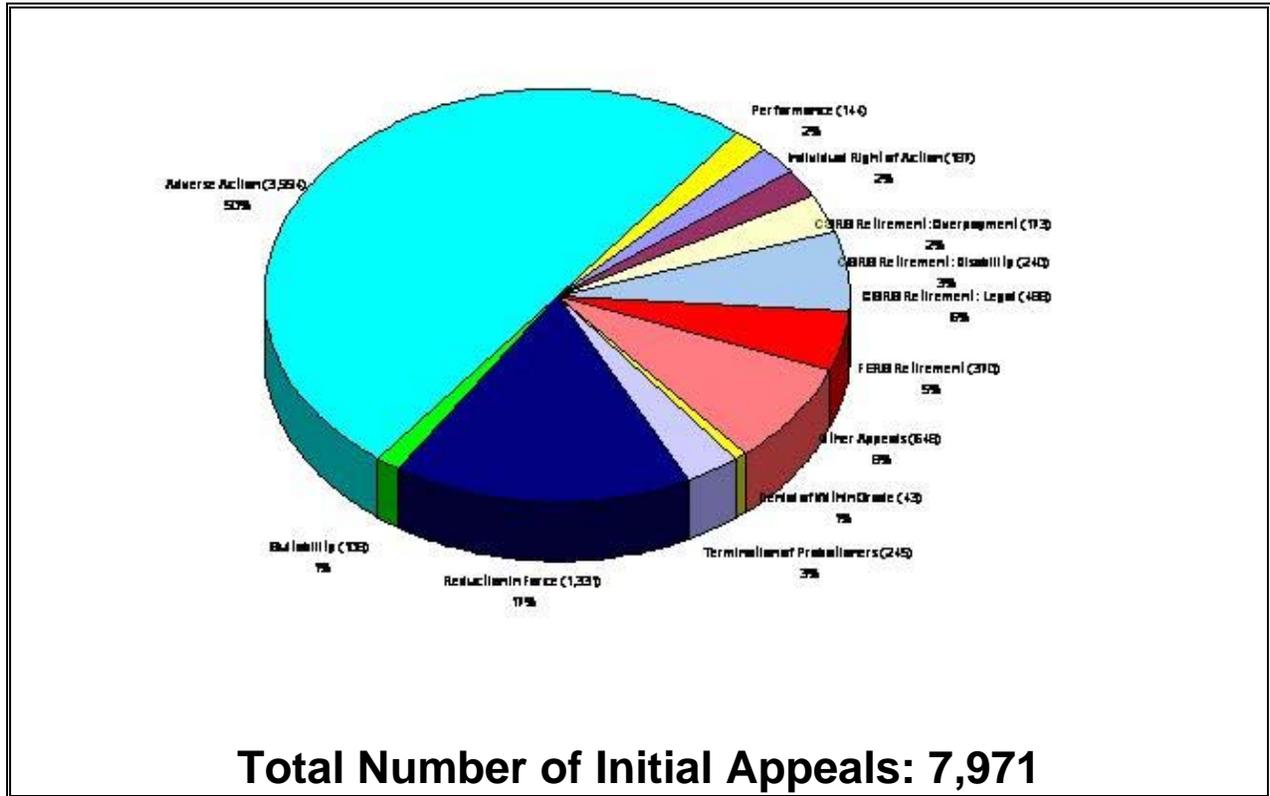
REGIONS - TIMELINESS OF PROCESSING, FY 1992 -1996



Types of Actions Appealed - Of the initial appeals decided, 50 percent were appeals of agency adverse actions, 17 percent were RIF appeals, and 2 percent were appeals of per-

formance-based actions. Retirement cases (both CSRS and FERS) accounted for 16 percent of total appeals decided, and the remainder involved other types of agency actions.

TYPES OF INITIAL APPEALS DECIDED IN FY 1996



- *Whistleblower Appeals* - There were 617 whistleblower appeals and stay requests decided. Of this number, 187 were individual right of action (IRA) appeals in which the appellant was required to exhaust the procedures of the Office of Special Counsel, 320 were direct appeals to the Board that included an allegation of reprisal for whistleblowing, and 110 were requests to stay an action allegedly based on whistleblowing.
- *Relief for Appellants in Whistleblower Appeals* - Of the 507 whistleblower appeals decided (187 IRA appeals and 320 appeals of

otherwise appealable actions), 319 (63 percent) were dismissed. In the other 188 whistleblower appeals, appellants received relief-through settlement, reversal, or mitigation-in 126 (67 percent).

- *Mixed Cases* - Allegations of discrimination were raised in 2,065 of the initial appeals decided; however, in 1,615 of those appeals, the discrimination issue was not decided because the case was dismissed (1,000) or settled (573) or the allegation was withdrawn (42). The remaining 450 mixed case appeals resulted in a finding of no discrimination in 434 (96 percent) and a finding of discrimination in 16 (4 percent).

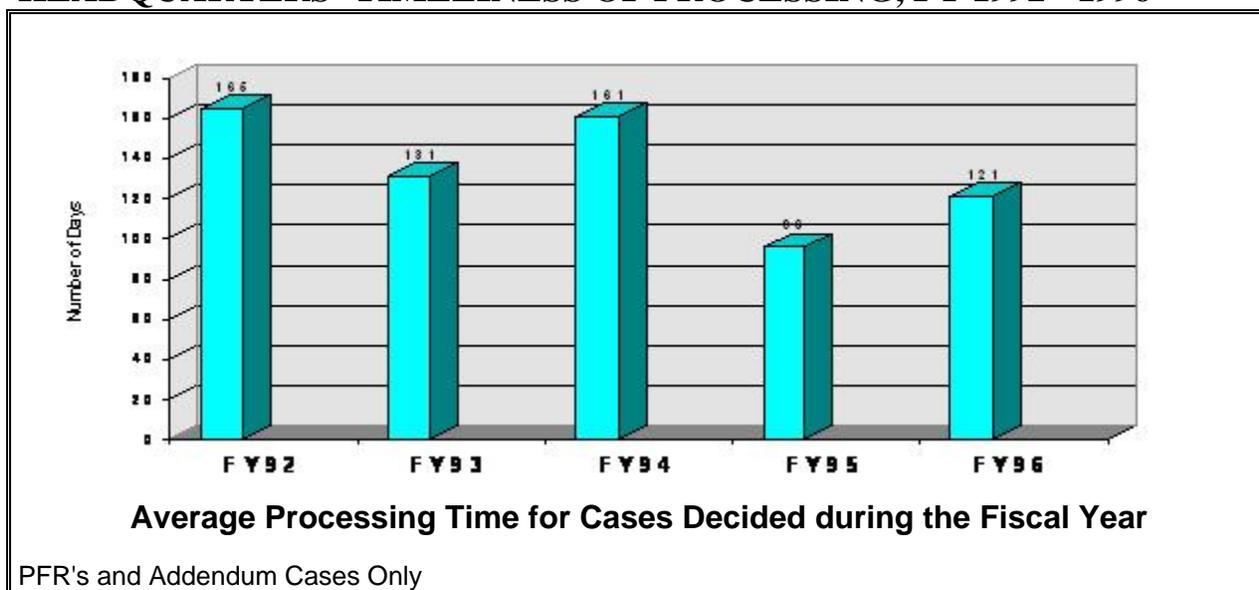
Board Headquarters

- *Case Receipts* - At headquarters, the Board received 1,664 new petitions for review and other appellate jurisdiction cases in FY 1996. At the end of the fiscal year, there were 857 appellate jurisdiction cases pending.
- *Cases Decided* - The 3-member Board decided 1,329 appellate jurisdiction cases in FY 1996. Of these, 1,087 were petitions for review of initial decisions on appeals, 111 were petitions for review of initial decisions in addendum cases, and 131 were other appellate jurisdiction cases.
- *Disposition* - Of the 1,087 petitions for review of initial decisions on appeals, 4 percent were dismissed, 3 percent were settled, and 77 percent were denied for failure to meet the criteria for review. Of the remaining 16 percent of petitions for review, the Board granted 9 percent and denied but simultaneously reopened 7 percent.

- *Outcome of PFRs Reviewed* - Of the decisions in the 181 PFRs that were granted or denied but simultaneously reopened, 23 percent affirmed the initial decision, 10 percent reversed it, 49 percent remanded the case to the administrative judge, and 2 percent mitigated the agency action. In the remaining 15 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 121 days-the second-lowest time in a 5-year period. On average, an appeal to the Board was processed through both levels of Board review in just over seven months. The Board processed 66 percent of the PFRs on initial appeals in 110 days or less, averaging 76 days.

Additional fiscal year 1996 case processing statistics, including a breakdown of appeals by agency, are contained in the Board publication, Cases Decided by the U.S. Merit Systems Protection Board, FY 1996.

HEADQUARTERS- TIMELINESS OF PROCESSING, FY 1992 - 1996

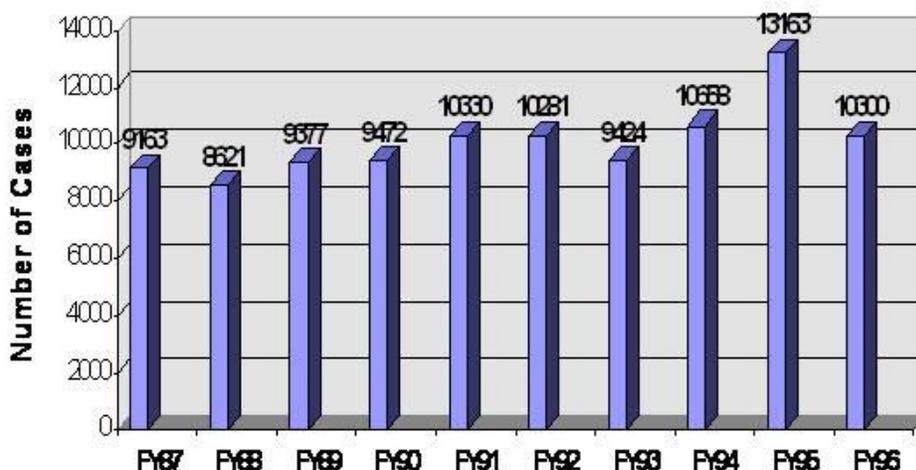


CASE TRENDS

The wave of cases arising from the U.S. Postal Service restructuring peaked in FY 1995, and case processing numbers for FY 1996 represent a return to more normal levels.

The total number of decisions issued by the Board and its administrative judges in FY 1996 (10,300) is in line with the average number of decisions issued annually during the fiscal years 1992 through 1994.

MSPB DECISIONS, FY 1987 - 1996



	FY87	FY88	FY89	FY90	FY91	FY92	FY93	FY94	FY95	FY96
Regional/Field Offices	7410	7124	7846	7847	8388	8371	7811	8552	10888	8925
HQ Appellate Jurisdiction	1733	1484	1510	1582	1891	1894	1576	2031	2226	1329
HQ Original Jurisdiction	20	13	21	43	51	16	37	75	49	46
Total Decisions	9163	8621	9377	9472	10330	10281	9424	10658	13163	10300

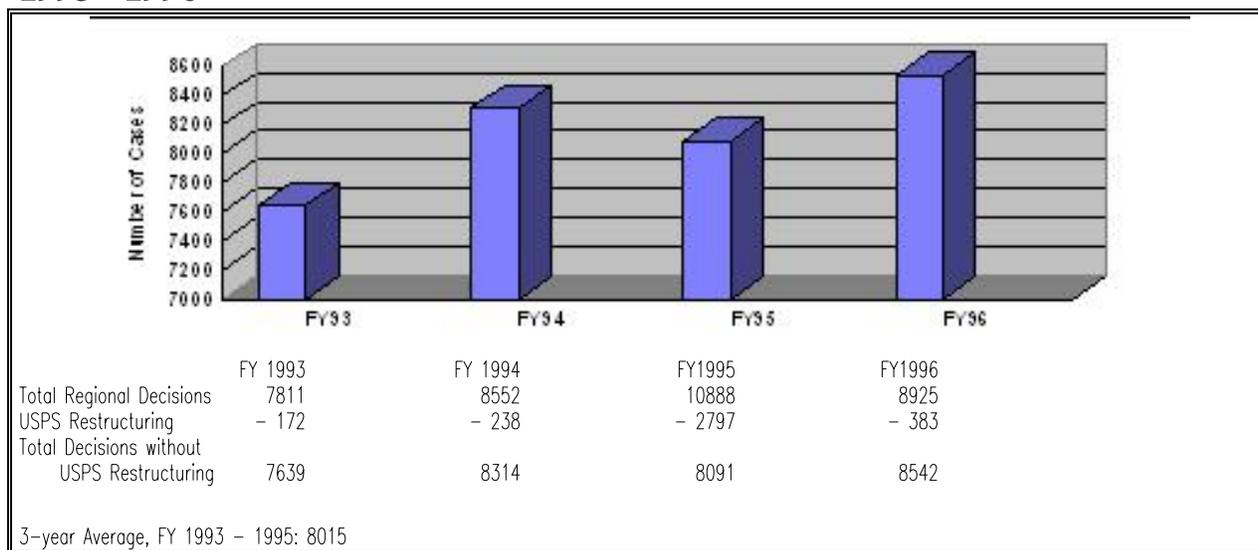
- NOTES:
- (1) Regional/Field Office decisions are on Initial appeals, addendum cases, and stay requests
 - (2) HQ appellate jurisdiction decisions are on petitions for review, reopenings, court remands, and other types of appellate jurisdiction cases
 - (3) HQ original jurisdiction decisions are on Special Counsel cases and other types of original jurisdiction cases

When the Postal Service restructuring cases are excluded, the total number of decisions issued by the 3-member Board offices dropped a few points in FY 1995 because of the and the administrative judges was virtually the same in FY 1996 as in FY 1995. In the regional and field offices, the generally did not settle. In FY 1996, the settlement rate number of decisions issued in FY 1996-excluding Postal Service restructuring cases-actually increased by more than years prior to FY 1995-about half of all appeals that were six percent over the average for the three preceding fiscal years.

During the time the Postal Service restructuring cases were moving through the regional and field offices, the average time for those offices to process cases increased from 79 days to 96 days. In FY 1996, the average processing time improved to 94 days, well within the Board's processing standard of 120 days. With the average processing time for petitions for review at the Board level reduced to 121 days in FY 1996, a case that goes through both levels of review is now completed, on average, in about seven months.

At headquarters, the petition for review settlement program achieved a 21 percent rate of success in appeals where settlement was attempted-up from 17 percent during the last quarter of FY 1995. The Board considers this a satisfactory success rate, considering that settlement had already been attempted at the regional or field office level and an administrative judge had issued a decision favoring one party or the other in nearly all of the cases. Reduced agency budgets, downsizing, and restructuring continued to impede settlement efforts generally, but the settlement process

REGIONAL DECISIONS - EXCLUDING USPS RESTRUCTURING, FY 1993 - 1996



itself, whether resulting in settlement or not, furthered the interests of alternative dispute resolution and customer service. Agency representatives, appellants' representatives, and pro se appellants continued to express their satisfaction with the settlement process as a vehicle to promote better understanding of the adjudicatory process in general and the law as applied to their cases in particular.

Looking to the future, the Board expects that its caseload will at least continue at its current level-and may well increase-as agencies continue with aggressive downsizing in response to reduced appropriations. Be-

cause the Board has no control over the number of cases it receives, it continues to focus on improvements in the adjudicatory process to enable it to continue to process cases efficiently in spite of reduced human and financial resources (see discussion under "Streamlining" in the "Administration" section of this report).

ADJUDICATION

APPELLATE JURISDICTION CASES

First Decisions under FMLA and USERRA

In *Ramey v. US. Postal Service*, 70 M.S.P.R. 463 (1996), the Board issued its first decision involving the Family and Medical Leave Act of 1993 (FMLA). In this decision, the Board set out the requirements of the FMLA as they apply to absence-related charges that form the basis for an adverse action,

The Board also issued its first decision interpreting provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), *Petersen v. Department of the Interior*, 71 M.S.P.R. 227 (1996). The decision was issued on an interlocutory appeal certified to the Board by the administrative judge. The Board addressed several issues concerning its jurisdiction over cases brought under USERRA. Among other things, it ruled that even where the appellant is represented by the Special Counsel, and despite the resulting similarities to its original jurisdiction cases, it would process USERRA appeals under its appellate jurisdiction procedures. In addition, it addressed the timeliness of appeals and the applicable burdens of proof under the new law.

ADA - Firm Choice

The Board issued its first decision discussing the Americans with Disabilities Act's amendment to the Rehabilitation Act regarding "firm choice," *Kimble v. Department of the Navy*, 70 M.S.P.R. 617 (1996). Following the lead Equal Employment Opportunity Commission decision on the subject, *Johnson v. Babbitt*, the Board ruled that, as a result of the ADA amendment, an agency is no longer required to provide a "firm choice" before it imposes discipline on an alcoholic employee.

Postal Service Restructuring

In FY 1996, the Board continued to address issues arising from the Postal Service's 1992 - 1993 nationwide restructuring. In prior years, the Board had ruled that demotions effected in the restructuring constituted reductions in force with respect to preference-eligible employees. In *Sink v. U.S. Postal Service*, 65 M.S.P.R. 628 (1994), and *Unhoch v. U.S. Postal Service*, 66 M.S.P.R. 651 (1995), the Board also ruled on what the Postal Service must do to comply with the Board's reversal of its actions. As a result, the Postal Service effected a reduction-in-force action in July 1995 to comply with the Board's orders.

Issues arising from both the original restructuring and the 1995 compliance RIF occupied the Board during FY 1996. In *Augustus v. U.S. Postal Service*, 69 M.S.P.R. 29 (1995), an appellant, who was given RIF notice in accordance with *Sink*, alleged that the agency's subsequent compliance RIF was not in accordance with RIF regulations. He sought Board review through a petition for enforcement of the Board's order reversing the agency's action in the original restructuring. The Board held that the issues raised in the appellant's petition would properly be considered in an appeal of the compliance RIF, not a petition for enforcement. The Board's decision in *Sink* regarding an appellant's entitlement to RIF procedures only required the agency to give RIF notice or return the appellant to the status quo ante, and here the agency decided to issue a RIF notice. The agency having effected the compliance RIF in July 1995, the Board held that any issue arising out of that action would properly be raised in a separate appeal, not in a petition for enforcement.

In *Kelly v. U.S. Postal Service*, 68 M.S.P.R. 565 (1995), and *Beams v. U.S. Postal Service*, 69 M.S.P.R. 71 (1995), the Board recognized that confusion may have existed regarding what was appropriately brought before the Board in a compliance case or an appeal arising from the

reversal of the demotion action itself, and what had to be encompassed in a new appeal of the July 1995 compliance RIF. To avoid the possibility that such confusion may have deprived appellants of the right to be heard, the Board modified its decision in *Sink v. U.S. Postal Service*, 68 M.S.P.R. 497 (1995), to afford the appellants an additional 30 days in which to file a petition for appeal of the July 1995 compliance RIF.

In *Cooke v. U.S. Postal Service*, 69 M.S.P.R. 259 (1996), the Board ruled that an appellant who had been removed for his failure to report to duty in the job to which he had been assigned in the restructuring was not entitled to the compliance actions applicable to current Postal Service employees. In *Walker v. U.S. Postal Service*, 69 M.S.P.R. 634 (1996), the Board held that an appeal of a 1993 demotion was mooted by the agency's 1995 retroactive reduction-in-force offer. In *Crandall v. U.S. Postal Service*, MSPB Docket No. SF-0351-94-0019-X-1, 69 M.S.P.R. 192 (Table), the Board ruled that where an appellant voluntarily retired before July 1995 the appeal of the compliance RIF was moot. In *Perisho v. U.S. Postal Service*, 69 M.S.P.R. 55 (1995), the Board found mootness as to the appeal of the 1993 restructuring where an appellant rejected an offer during the compliance RIF that would have returned him to his pre- 1993 grade level.

Whistleblower Protection Act

The Board continued its development of the law under the Whistleblower Protection Act (WPA). In two cases, the Board addressed the jurisdictional requirement that an appellant who seeks the protection of the Act must have had a reasonable belief in the correctness of his disclosure. Where an appellant knew that his "disclosure" was false when he made it, he was not protected. *Scott v. Department of Justice and Office of Personnel Management*, 69 M.S.P.R. 211 (1995). In *Bump v. Department of the Interior*, 69 M.S.P.R. 354 (1996), the Board held that although an appellant's motive in making a disclosure is not relevant to

this issue, this appellant could not have had a reasonable belief in the correctness of his disclosure because he knew that his supervisor had abandoned the matter by the time that the appellant complained about it.

In two other cases addressing a jurisdictional prerequisite under the WPA--exhaustion of remedy before the Office of Special Counsel--the Board held that by showing that the Special Counsel conducted an investigation of the appellant's charge, the appellant proved that he informed the Board of the precise basis for his charge and characterized it before the two agencies in the same manner. *Casciotta v. Department of the Navy*, 69 M.S.P.R. 589 (1996), and *Lloyd v. Environmental Protection Agency*, 71 M.S.P.R. 671 (1996).

The Board issued significant decisions on the merits of whistleblower appeals, further defining the burdens of proof under the WPA. In *Powers v. Department of the Navy*, 69 M.S.P.R. 150 (1995), the Board held that any weight an agency gives to an appellant's disclosure, alone or in combination with other factors, can satisfy the appellant's burden of proving that his disclosure was a contributing factor in the personnel action taken against him. In *Scott, supra*, the Board ruled that an appellant cannot meet this burden where he knew when he made the disclosures that they were false. In *Geyer v. Department of Justice*, MSPB Docket No. BN-1221-92-0310-B- I (1996), the Board set forth the test it will apply to determine whether an agency has met its burden of showing by clear and convincing evidence that it would have taken the same personnel action even in the absence of an appellant's protected disclosures. In *Scott*, the Board ruled that in an adverse action appeal the charges are not to be readjudicated under the clear and convincing evidence standard to determine whether the agency met its burden.

The Board set out the test for proving the existence of a "personnel action" where an individual right of action (IRA) appeal is based on a claim of entitlement to promotion through

the reclassification of the appellant's position. *Briley v. National Archives and Records Administration*, 71 M.S.P.R. 211 (1996). It held that a collective bargaining agreement that sets forth an alternative avenue of review does not relieve an appellant from seeking review by the Special Counsel before bringing an IRA appeal to the Board. *Id.* It found that where an arbitration decision is before the Board in an IRA appeal, its merits findings will not be given collateral estoppel effect, although they will be considered in deciding whether the agency met its burden. *Geyer, supra*

Interim Relief

The Board issued a number of decisions during the fiscal year that clarify the applicability of interim relief where an appellant prevails in the initial decision on an appeal. In *Evono v. Department of Justice*, 69 M.S.P.R. 541 (1996), the Board ruled that where the appellant is receiving benefits from the Office of Workers' Compensation Programs for an employment-related illness or injury, it is not proper to order interim relief. In *Ellshoff v. Department of the Interior*, 69 M.S.P.R. 585 (1996), the Board held that the rule that interim relief is not properly awarded where the appellant currently receives other Government benefits does not apply where his alternative source of income is private employment. In *Burke v. Smithsonian Institution*, 69 M.S.P.R. 407 (1996), the Board ruled that an "undue disruption" determination need not take any particular form and that the agency's failure to inform the appellant that it made such a determination is harmless error.

Retirement

The Board addressed two significant retirement-related matters. In *DoPadre v. Office of Personnel Management*, 69 M.S.P.R. 346 (1996), the Board declared an OPM regulation invalid where it purported to remove Board jurisdiction as to OPM's application of court ordered survivor annuities. In a series of cases, the Board re-examined the circumstances in

which OPM should allow an appellant to make a post-retirement election to include credit for his post-1956 military service in his retirement annuity. *Mopps v. OPM*, 69 M.S.P.R. 314 (1996), *Cox v. OPM*, 69 M.S.P.R. 320 (1996), *Nunez v. OPM*, 69 M.S.P.R. 326 (1996), and *Jacob v. OPM*, 69 M.S.P.R. 340 (1996).

Arbitration Cases

The Board addressed jurisdictional Issues in two cases concerning the arbitration process. In *Hill v. Department of the Army*, 70 M.S.P.R. 196 (1996), the Board set forth the circumstances under which it may assert Jurisdiction over a matter normally reserved to the grievance process where the union local that would have represented the appellant is defunct. In *Tetrault v. U.S. Postal Service*, 71 M.S.P.R. 376 (1996), the Board set out the circumstances under which an appellant will not be bound by a union's settlement of an appeal she would otherwise have been able to bring to the Board.

Adverse Actions

In two cases involving alleged constructive removals due to intolerable conditions, the Board further refined the tests it will apply to claimed constructive removals based on discrimination resulting from the creation of a hostile working environment. In *Markon v. Department of State*, 71 M.S.P.R. 574 (1996), the Board declined to find Title VII standards dispositive of such claims, stating that claims of discrimination and reprisal could only be considered, along with the remaining evidence of record, under the coercion test. If the claims meet that test, they could then constitute affirmative defenses. In *Bates v. Department Of Justice*, 70 M.S.P.R. 659 (1996), the Board considered the case under the Title VII standards for a hostile working environment sexual harassment claim. It found, however, that the appellant did not meet the Title VII standards. Nevertheless, based on those claims and the other evidence, it found that she did show that her working conditions had been made so intolerable that she was forced to resign. On a

related matter, the Board ruled that an appellant proves that his acceptance of a lower graded job was coerced where he accepted the position only because the agency refused to grant him the reasonable accommodation for his disability to which he was entitled.

O'Connell v. U.S. Postal Service, 69 M.S.P.R. 438 (1996).

In *Barry v. Treasury*, 71 M.S.P.R. 283 (1996), the Board ruled that in drug-related cases, a claim of stress per se is not a factor for consideration in mitigation or otherwise, absent an explanation of its relationship to the misconduct. With respect to mitigation, in *Franklin v. Department of Justice*, 71 M.S.P.R. 583 (1996), the Board ruled that even though a matter raised by the appellant may not be relevant to a decision on the merits of the charges against him, it may nonetheless be a factor for consideration in mitigation of the penalty.

Board Procedures

Addressing its own procedures, the Board definitively ruled that an appellant has a fundamental right to an in-person hearing if there is a genuine dispute as to any material fact, although a remand will be required only if the error in holding a hearing by telephone had a potentially prejudicial effect. *Evono v. Department of Justice*, 69 M.S.P.R. 541 (1996).

The Board also ruled that it would be unfair to apply collateral estoppel where an appellant previously litigated in another forum matters at issue in an adverse action appeal, where his incentive to litigate had been less than it is before the Board. In that case, *Wildberger v. Small Business Administration*, 69 M.S.P.R. 667 (1996), the Board held that one of the main reasons application of collateral estoppel was inappropriate was the nature of the forums at issue. The forum that previously adjudicated the matter, an internal union tribunal, was not established by opposing

parties for the purpose of dispute resolution. The Board, on the other hand, is an independent administrative agency of the United States, established by Congress for the purpose of adjudicating appeals of Federal employees and guarding Federal merit systems.

Changing its rule that the Director of OPM could not request reconsideration of an appeal under 5 U.S.C. § 7703 where OPM was an original party to the appeal, the Board held that such a request is a jurisdictional prerequisite to the Director's right to seek Federal Circuit review of the Board's ruling, and thus would be considered by the Board. *Jackson v. Office of Personnel Management*, 71 M.S.P.R. 405 (1996).

ORIGINAL JURISDICTION CASES

As shown in the accompanying table, 19 of the 46 Board decisions in original jurisdiction cases during FY 1996 were on proposed actions against administrative law judges. Eighteen of the 19 were issued on complaints filed by agencies late in FY 1995 and early in FY 1996, proposing to furlough their administrative law judges-along with other employees-because of uncertainties over funding for the new fiscal year. 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.

As Congress acted to provide agencies with short-term and then permanent funding for FY 1996, all of these complaints were dismissed as moot or withdrawn by the agencies. Early in the fiscal year, in *Department of Agriculture v. Palmer*, 68 M.S.P.R. 586 (1995), the Board dismissed as moot the agency complaints seeking to furlough administrative law judges for not more than 30 days beginning on October 1, 1995, because the President signed a continuing resolution on September 30, 1995, averting a lapse in appropriations. The Board rejected the argument that the cases were not moot because the funding gap scenario was capable of repetition and could lead to furlough actions that would evade Board review. The Board stated that it was confident that if a lapse in appropriations necessitating the furlough of administrative law judges occurred, it would not evade Board review. The Board also noted that it is prohibited by statute from issuing advisory opinions.

Of the other decisions in original jurisdiction cases, 12 were on Special Counsel requests for stays and related matters, primarily requests for extension of stays granted by the Board. Nine requests for review of OPM regulations were decided, all of which were dismissed for lack of jurisdiction or denied.

ACCESS TO MSPB ADJUDICATORY PROCEDURES AND DECISIONS

The Board's procedures for both appellate and original jurisdiction cases are set forth in the Code of Federal Regulations at 5 CFR Parts 1201, 1203, and 1209. Additional information on the Board's procedures is available in its publications, *An Introduction to the MSPB*, *Questions & Answers About Appeals*, and *Questions & Answers About Whistleblower Appeals*.

Final Board decisions are published by commercial publishers, including West Publishing Company. All citations to Board decisions in this report are to West's *United States Merit Systems Protection Board Reporter*.

Final Board decisions, weekly summaries of significant decisions, the Board's information publications, and the MSPB Appeal Form are available on the Board's Web site at www.access.gpo.gov/mspb and in the MSPB Library of the Government Printing Office's *Federal Bulletin Board*. The bulletin board can be accessed by computer modem at 202-512-1387. Assistance is available from GPO by calling 202-512-1530. Certain significant Board decisions are also available on the OPM *Mainstreet* BBS, 202-606-4800.

ORIGINAL JURISDICTION CASES DECIDED BY MSPB IN FY 1996

<u>CASE TYPE</u>	<u>NUMBER DECIDED</u>	<u>DISPOSITION</u>
OSC Corrective Actions	0	
OSC Disciplinary Actions -		
Non-Hatch Act	2	1 - 90-day suspension
.....		1 - Settled
OSC Disciplinary Actions -		
Hatch Act:		
Federal/DC.....	4....	1 - Dismissed w/o prejudice
.....		2 - Remanded to ALJ
.....		1 - Denied request for
.....		reopening
State/Local	0	
OSC Stay Requests:		
Initial Requests	3....	Granted
Requests for Extension of Stay ..	8....	Granted
Agency Motion for		
Termination of Stay	1....	Denied
Actions Against ALJs	19..	18 - Dismissed
.....		1 - Settled
Requests for Regulation Review	9....	3 - Dismissed Jurisdiction)
.....		6 - Denied
SES Performance-based Removals		
(Hearing only - No Board decision).....	0	
TOTAL	46	

LITIGATION

JUDICIAL REVIEW

The Board defends its final decisions involving issues of its jurisdiction and procedure before the U.S. Court of Appeals for the Federal Circuit, its primary reviewing court. During FY 1996, the Board litigated 98 cases before the Federal Circuit. In addition to these new cases, the Board also litigated 115 cases arising from the U.S. Postal Service restructuring that were filed earlier (see discussion below).

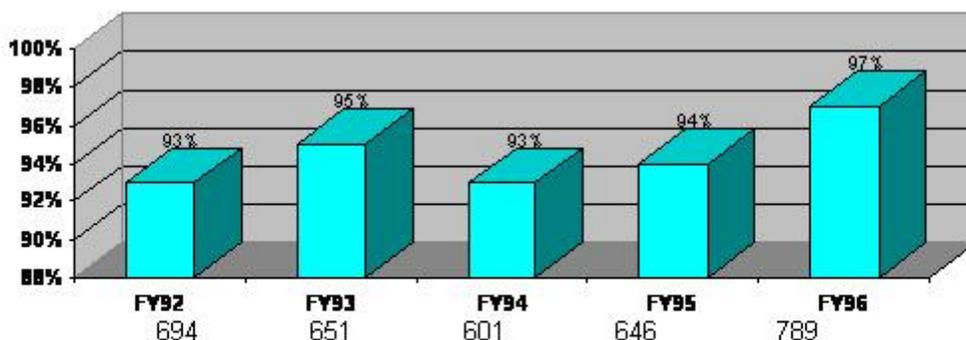
During the fiscal year, the court issued 789 decisions on review of final Board decisions both initial decisions issued by administrative judges that became final when no petition for review was filed and final decisions of the 3-member board. Of this number, 97 percent left the final Board decision unchanged (case dismissed or Board decision affirmed). The court affirmed the final Board decision in 96 percent of the cases it adjudicated on the merits.

The Board 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 brought by the Board and discrimination cases where the Board is named as a defendant. These cases are filed in the various Federal district courts.

JUDICIAL REVIEW* OF MSPB DECISIONS, FY 1992 - 1996

PERCENT OF MSPB DECISIONS UNCHANGED



Federal Circuit Decisions

* The MSPB's final decisions--either initial decisions of an administrative judge that have become final or the Board's final decisions--may be appealed to the U.S. Court of Appeals for the Federal Circuit.
 ** Dismissed or Affirmed

POSTAL SERVICE RESTRUCTURING CASES

Following the Federal Circuit's decision in two lead cases involving the Postal Service restructuring, *Krizman v. Merit Systems Protection Board*, 77 F.3d 434 (Fed. Cir. 1996), and *Mueller v. Merit Systems Protection Board*, 76 F.3d 1198 (Fed. Cir. 1996), the Board filed 115 motions for summary affirmance. Of those 115 motions, the court either granted the Board's motion or affirmed the Board's decision in 104 cases. Two cases were remanded for further consideration, two were dismissed, and seven were pending at the end of the fiscal year.

In both *Krizman and Mueller*, preference eligible Postal Service employees claimed that their retirements during the early-out incentive program preceding the restructuring were involuntary because the agency did not inform them that the restructuring would be a reduction in force. The appellants filed their appeals following the Board's determination that preference-eligible Postal Service employees who were demoted during the restructuring were subjected to a RIF. That determination was made some ten months after most of the appellants retired. The Board dismissed the appeals as untimely, finding that the appellants were not entitled to notice of RIF appeal rights because the agency took no RIF action--separation, demotion, or reassignment requiring displacement--against them. The court agreed.

OPM PETITIONS FOR REVIEW

Three OPM petitions for review decided by the Federal Circuit during FY 1996 are significant. In *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996), the court affirmed a number of the Board's decisions holding that an agency may not charge an employee with both misconduct and making false statements regarding the

alleged misconduct. The court held that, consistent with its decision in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1575 (Fed. Cir. 1988), an agency may not charge an employee with falsification or a similar charge on the basis of the employee's denial of another charge or the underlying facts relating to that other charge. The court held that due process requires that an employee be allowed to deny both a charge and the underlying facts without being subject to a falsification charge. The court noted, however, that employees do not otherwise have a right to lie or make false factual statements to an agency, and such false statements made during agency investigations and relating to alleged misconduct may properly be subject to falsification or similar charges. Likewise, denials of charges and related facts may not be considered in determining a penalty.

In *King v. Briggs and Merit Systems Protection Board*, 83 F.3d 1384 (Fed. Cir. 1996), OPM argued that the Board is not permitted to summarily deny an OPM request for reconsideration without specifically addressing the arguments raised in the petition in a published opinion. The court held that it lacks authority to require the Board to issue a published decision even if public policy would favor such a practice. Further, the court agreed with the Board that while the agency was permitted to appoint, classify, and give pay rates outside of the provisions of Title 5, it was not authorized to remove Ms. Briggs without the procedural protections provided in Chapter 75 of Title 5. The court reasoned that Congress chose which aspects of Title 5 it wished to exclude from the position, and provisions not specifically excluded remain applicable.

In *King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996), the court agreed that employees have a right to notice and an opportunity to respond to the reasons their access to classified information is denied before the agency suspends them under 5 U.S.C. § 7513. The court further found that

when an agency suspends an employee under 5 U.S.C. § 7513 based on its suspension of the employee's security clearance, the proposal notice must provide enough detail to allow the employee to make an informed response. Moreover, the court found that the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), does not foreclose Board review of the procedures used by the agency in placing an employee on enforced leave. Merely providing the employee with information that his access to classified information is being suspended, without more, does not provide the employee with sufficient information to make an informed reply to the agency before being placed on enforced leave.

MONITORED LITIGATION

During fiscal year 1996, the Board monitored 739 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.

The U.S. Court of Appeals for the Federal Circuit maintains a Web site at www.fedcir.gov, which provides quick access to two other Web sites that make the court's decisions available.

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. The Board is uniquely situated to provide neutral, independent reviews and assessments of Federal human resources management policies and practices on a systemic basis.

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 research, usually Governmentwide in scope, includes 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.

SUMMARIES OF REPORTS ISSUED IN FY 1996

Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges (November 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 reported they use in combating the problem of unwanted sexual attention in their workplaces. The following are among the specific findings in the report:

- The reported incidence of unwanted sexual attention has increased since the last survey in 1987. In the latest survey, 44 percent of women and 19 percent of men reported they had experienced some form of unwanted sexual attention during the preceding two years-compared to 42 percent and 14 percent in the previous survey.
- Coworkers and other employees, rather than supervisors, are the source of most unwanted sexual attention. Seventy-nine percent of male respondents and 77 percent of female respondents reported that unwanted sexual attention came from coworkers.
- Only about 6 percent of respondents reported taking formal action, such as filing an EEO complaint. The most common response reported was to ignore the behavior.
- Asking or telling the harasser to stop was identified by 88 percent of respondents as the action they believed would be most effective in stopping the harassment. Of the respondents who had experienced harassment and who took this action, 60 percent said it made things better.
- Comments provided by a number of survey respondents suggest a perception among some employees that the penalties for sexual harassment are inappropriate or inconsistent. Penalties are seen by some as exhibiting a double standard, with higher level employees being dealt with less harshly than lower level workers.

The Board concludes that while the Federal workforce has become more sensitive to the problem of sexual harassment, the problem has by no means disappeared. The Board recommends that managers and supervisors be firm and consistent in penalizing proven harassers, and that agencies diagnose the nature and extent of the problem within their own organizations. Further, the Board advises agencies to evaluate the effectiveness of their sexual harassment

training efforts to ensure that the training addresses identified problems. Finally, agencies should find ways to capitalize on what is already known about the most effective actions to prevent and eliminate sexual harassment, that is, they should encourage assertive actions on the part of employees who are targets of unwanted sexual attention.

The Rule of Three in Federal Hiring: Boon or Bane? (December 1995) - This report reviews significant changes over the last 10 years affecting how the Federal Government recruits and selects new employees, including the most visible change—a major decentralization of authority and responsibility from OPM to individual Federal departments and agencies. While many of the ground rules governing how Federal jobs are filled have changed, the "rule of three" (requiring managers to select new employees from among the top three available candidates referred to them, regardless of the total number of highly qualified applicants in the pool) has been in effect and unchanged for over 50 years, despite a widespread perception that it has an unintended and negative impact on the Federal hiring process.

The report examines how the "rule of three" affects the Federal Government's ability to hire based on merit. It also looks at how the rule of three interacts with the law granting veterans preference in hiring. The review studied hiring under three different procedures: (1) hiring from standing inventories of candidates who are recruited in anticipation of job vacancies (register hiring); (2) recruiting and hiring on a case-by-case basis as vacancies arise (case examining); and (3) hiring under a demonstration project authorized for parts of the U.S. Department of Agriculture (USDA). The USDA demonstration project uses case examining but places eligible candidates into one of two categories instead of assigning each candidate a numerical score. Managers may select any candidate in the higher category without the restrictions imposed by the rule of three. The demonstration project also provides veterans' preference in a unique manner.

The Board's review found that a higher proportion of veterans were hired under case examining or under the USDA demonstration project than were hired from standing registers of candidates. The review also found that the rule of three frequently turns the referral process into a lottery. This is because the rule of three requires that candidates be listed according to their numerical scores, and often a number of candidates have identical scores. Such ties are resolved by randomly determining the order in which candidates with identical scores will be referred, rather than basing the decision on a job-related factor or on the candidates' interest in the specific vacancy under consideration.

The Board reached two key conclusions: (1) the rule of three does not represent the best way to foster merit-based hiring; and (2) the interaction between the rule of three and veterans' preference too often produces results that are not in the best interests of managers or job candidates, including candidates with veterans' preference. The Board recommended eliminating the rule of three in favor of a more flexible requirement for merit-based hiring that would allow a selecting official to select from among "an adequate number of well-qualified candidates" and authorizing agencies to use a category rating system similar to that used in the Department of Agriculture demonstration project. Subsequently, the Administration proposed civil service reform legislation that included provisions for alternate ranking and selection procedures of the type recommended by the Board. Although the proposal was introduced in the 104th Congress, it was not enacted.

Fair and Equitable Treatment.- A Progress Report on Minority Employment in the Federal Government (August 1996) - This report examines the extent to which the Federal Government is in compliance with the statutory merit system principle requiring that employees and applicants for employment receive fair and equitable treatment without regard to race, color, national origin, and other non-merit factors. More

specifically, the review sought to determine whether minorities and nonminorities have equal access to Federal jobs and, once employed, whether they are treated equitably.

Major findings discussed in the report include:

- Minorities have made substantial progress in terms of gaining access to Federal civil service jobs and are now well represented in most white-collar job categories although they are not evenly distributed across the white-collar workforce.
- Even after controlling for differences in education, experience, and other advancement-related factors, minorities have lower average grades than white men, suggesting that the careers of some minorities have been hindered by their race or national origin.
- A comparison of current white-collar promotion rates for minorities and whites suggests that minorities are not now subject to an across-the-board disadvantage (or advantage) in the promotion process, although some areas of difference remain.
- Minorities and nonminorities have significantly different perceptions about the degree to which discrimination may still be present in the workplace. For example, while 55 percent of African Americans surveyed believed that African Americans are subject to "flagrant or obviously discriminatory practices" in the Federal workplace, only 4 percent of white survey respondents share this perspective.

The report concludes that the Federal Government's merit-based employment system has reduced incidences of obvious bias in the workplace significantly. Notwithstanding this success, however, measurable differences that remain in the career advancement opportunities experienced by minorities and nonminorities cannot be fully explained as the effect of merit based factors such as differences in experience

and education. In some measure at least, these remaining differences can be attributed to the subjective judgments that ultimately come into play whenever decisions are made on issues such as employee selections, promotions, and performance appraisals.

The report recommends:

- Agencies should conduct their own analyses of differences in promotion rates, performance awards, and other aspects of the personnel process.
- Assessments of progress toward ensuring equal employment opportunity should include gathering and addressing employee perceptions.
- OPM and Federal agencies should continue to work toward development of better and more "user friendly" tools for assessing candidates that allow supervisors to rate candidates more accurately and objectively on job-related characteristics.
- When choosing from among equally qualified candidates for new hires or promotions, agencies and selecting officials should actively pursue the concurrent goals of the statutory merit system principles that call for selection and advancement based solely on relative ability, knowledge, and skills, combined with efforts to achieve a "work force from all segments of society."

Both the full text and a summary of the report, *Fair and Equitable Treatment: A Progress Report on Minority Employment in the Federal Government*, are available on the Board's Web site at www.access.gpo.gov/mspb. Texts and summaries of certain other Board reports are available in the MSPB Library of the Federal Bulletin Board, which can be accessed via the MSPB Web site.

OTHER FY 1996 ACTIVITIES

Issues of Merit

In fiscal year 1996, the Board inaugurated a new periodic publication titled "Issues of Merit" to disseminate findings, analyses, and recommendations from its studies quickly and widely. The first edition was published in April 1996 and the second in August 1996. The purpose of the publication is to highlight in a concise, readable format information and analyses of use to Federal officials at various levels. Topics covered in the publication to date include:

- A long range perspective on developing and maintaining an effective and efficient Federal workforce. Even in the midst of the largest Federal downsizing effort in recent history, about 4,000 new full-time Federal workers are hired each month to replace critical skills and carry out required functions. Maintaining a long range perspective makes it clear that agencies must continue to attract and select highly qualified candidates for Federal employment even while they out place other employees.
- Accountability for effective human resources management in the Federal Government in a time of diminishing resources and rapid change characterized by decentralization and delegation of authority.
- Federal employee views on the health of the merit system.
- Best practices at the state government level (e.g., recruitment and selection reforms adopted by the State of Wisconsin).
- Communications with employees who have performance or misconduct problems. MSPB surveys have documented the fact that there is a wide gap between what supervisors think they have communicated and what employees say was communicated.

Merit Principles Survey

In FY 1996, the Board conducted another Governmentwide "Merit Principles Survey" that gathered the views and experiences of a representative sample of almost 10,000 Federal employees on a broad range of core civil service issues. These issues included the effectiveness of current approaches to performance management, the extent to which prohibited personnel practices may be occurring, and the degree to which agencies are able to attract and retain highly qualified employees. This was the fifth in the series of surveys the Board has conducted approximately every three years since 1981. A full report of the results of this survey is expected to be released early in 1997.

Studies in Progress

Substantial work was completed in FY 1996 on the following studies: (1) the higher rate of disciplinary actions taken against minority employees-especially African-American males-compared to non-minority employees; (2) performance-based adverse actions in the Federal Government and whether poor performers are being dealt with adequately; (3) the continued under representation of Hispanics in the Federal workforce; (4) the impact of Federal downsizing on the quality and readiness of the Federal workforce; (5) the impact of initiatives to decentralize and delegate personnel management authority to Federal managers and supervisors; and (6) the ability of the Federal Government to attract, select, and retain highly qualified employees.

Reviews of Agency Practices

The Board worked collaboratively with other Federal agencies to fulfill its mission in FY 1996, while being careful to maintain its objectivity and non-partisanship. Agencies frequently request information or advice regarding implementation of the merit system principles or eradication of prohibited personnel practices. For example, on behalf of the U.S.

Attorney General and with active support and funding from the Department of Justice, the Board conducted an in-depth examination of the extent to which sexual harassment is a problem within the bureaus and divisions of the Department and whether departmental initiatives were effective.

Procedural Improvements

The Board's studies and oversight staff have developed new evaluation methodologies and techniques that speed data gathering and report turnaround time. In FY 1996, the Board established two standing panels, one composed of approximately 2,300 human resources management specialists and the other consisting of over 1,800 managers throughout Government, who have agreed to respond to a series of short surveys on emerging workforce and civil service issues in the next few years. This should allow the Board to obtain data quickly on specific issues to meet particular needs of agencies and the Congress.

ADMINISTRATION

STREAMLINING

The Board's *Annual Report to the President and the Congress for Fiscal Year 1995* described the initiatives undertaken by the Board in response to the second phase of the Administration's reinventing Government initiative (REGO II). During FY 1996, the Board began implementing certain recommendations of its REGO II Task Force to streamline the Board's operations and enable the agency to continue to fulfill its statutory mission with reduced financial and human resources. Although the Board's staffing level of 266 at the end of FY 1996 is well below the FTE figure mandated by the Federal Workforce Restructuring Act, the Board's appropriations will not support that staffing level. The Board's staff has already been reduced by 17 percent since mid-1993 and further downsizing is anticipated over the next few years.

Early in 1996, the Board made certain organizational realignments at headquarters, including separating the Office of Regional Operations and the Administrative Law Judge into two offices. At the same time, the Board continued its move towards a four-region structure by closing its St. Louis Field Office and realigning the remaining regional and field offices. As a result, there are now five regions—Western, Central, Northeastern, Washington (DC), and Atlanta.

Near the end of the fiscal year, the Board began to effect certain REGO II changes in the adjudicatory responsibilities of headquarters legal offices and in adjudicatory procedures. The responsibility for preparing Board decisions in original jurisdiction cases—with the exception of requests to review OPM regulations and OPM petitions for reconsideration was transferred from the Office of the General Counsel to the Office of Appeals Counsel, thus centralizing the preparation of Board decisions in virtually all cases filed at Board headquar-

ters in the Office of Appeals Counsel. The Office of the General Counsel continues to process requests to review OPM regulations and retains its non-adjudicatory responsibilities, including litigation, legislative coordination, and advisory functions.

To implement other REGO II Task Force recommendations, the Board's regulations are to be revised to permit the Administrative Law Judge to issue initial decisions in the original jurisdiction cases he adjudicates (Special Counsel corrective and disciplinary actions and proposed actions against administrative law judges) and to permit administrative judges to issue initial decisions on petitions for enforcement where they find non-compliance with a Board order. In both of these instances, the initial decisions issued will be subject to a petition for review by the Board and to judicial review under existing regulations. At the end of the fiscal year, regulations to effect these procedural changes were being developed.

In other functional realignments at headquarters, virtually all of the agency's public information functions were consolidated in the Office of the Clerk of the Board. That office now manages the Board's World Wide Web site in addition to its other on-line services, and it responds to all requests for information except those specifically reserved to the Office of the General Counsel and the Office of Policy and Evaluation. The Office of the General Counsel responds to requests for non-case related information from the White House, Congress, and the media. The Office of Policy and Evaluation responds to requests for information regarding the Board's studies.

The regional and field offices experienced normal staff turnover during the fiscal year as administrative judges and support staff were lost to other agencies or retirement. The Board's policy of replacing vacant judge positions with headquarters attorneys and of replacing permanent support vacancies with term or temporary employees continued a redistribution of resources from headquarters to the regional

"front lines" and maintained high levels of productivity in those offices. As another means of more efficiently staffing for appeals processing, the regional and field offices increased their use of paralegals and law clerks to assist judges in legal research and drafting of legal documents.

The movement of headquarters attorneys to the regional and field offices, of course, has resulted in a reduction in the attorney workforce at headquarters, particularly in the Office of Appeals Counsel. Because of budget constraints, few of the attorney vacancies created at headquarters have been filled. The Office of Appeals Counsel eliminated one attorney group and its supervisory attorney position by establishing larger groups from the other divisions. To expedite case processing, both attorneys and supervisors may now send an expanded range of cases to the Board without further review by one to three additional levels of supervisory attorneys. The result is that both attorneys and supervisors have gained time to concentrate on more significant cases and feel a greater authority and responsibility with respect to all of their cases.

TECHNOLOGY AND PROCEDURAL IMPROVEMENTS

To help meet the Board's workload challenges, headquarters and the regional and field offices are working together to identify and plan for the increased application of computer technology. The Board worked closely with a consulting team from the National Center for State Courts (NCSC) and, at the end of the fiscal year, was responding to the NCSC recommendations. For internal purposes, the Board is reviewing the potential to automate the filing of cases with the Board as a means to improve communications and productivity. The Board also is preparing to implement video conferencing between headquarters and the regional/field offices, and eventually among parties in the appellate process.

The Board is working with the U.S. Court of Appeals for the Federal Circuit in a joint effort to develop an electronic case filing system for MSPB cases appealed to the court. The current system is costly because of the resources required to prepare, distribute, and maintain multiple paper copies of documents in case files. Electronic filing holds the promise of reducing costs substantially. The new system is intended to be accessible to the Government, represented parties, and pro se litigants.

Installation of the Local Area Network (LAN) at headquarters was completed during the fiscal year, and extension of LANs to all regional and field offices is scheduled for completion in FY 1997. The LAN enables MSPB staff to share information easily and to transfer documents from one office to another electronically. It also provides wider and less expensive access to equipment such as modems, scanners, and color printers, and it allows headquarters offices to search and easily access Board decisions and other legal documents.

Along with implementation of the LAN, all personal computers were upgraded to Pentium models. The conversion from the DOS version of Microsoft Word to Microsoft Word for Windows was completed in headquarters offices and will be completed in FY 1997 in the regional and field offices. This conversion enables the development and sharing of standard text and formats placed on the LAN servers and streamlines the preparation of case documents. Access to the Internet was provided to all Board offices, who are using the Internet for research and immediate access to documents issued by other agencies, educational institutions, and other organizations.

During the fiscal year, the Board implemented a toll-free, 24-hour telephone number that allows the Board's customers and others to check on the status of appeals, request special studies and other publications, or receive answers to their questions. An electronic version of both the MSPB Appeal Form and the Desig-

nation of Representative Form were placed on the Board's Web site and the electronic bulletin board. The MSPB Library on the bulletin board was reorganized to enhance user friendliness and expanded to include more information such as *Federal Register* notices. Electronic distribution of final decisions and information on studies continues, and other enhancements are planned.

With the enactment of the *Electronic Freedom of Information Act Amendments of 1996* (Pub. L. 104-231, 110 Stat. 3048), the Board began developing revisions to its FOIA and Privacy Act regulations to bring them into compliance with the new law. Proposed changes address the growing reliance of the Board upon maintenance of its records in electronic media and the legislative requirements that information be provided, if possible, in a format designated by the requester. Fee schedules for duplication of requested materials have been adjusted to reflect economic realities and to encompass the various formats. A guidebook currently is being planned for public distribution to explain how to request information under the Freedom of Information and Privacy Acts from the Board.

GPRA MEASURES

As required by the Government Performance and Results Act (GPRA), the Board has developed measures of its performance as respects the quantity, quality, and timeliness of the work produced and services provided. As part of this effort, the Board's case management system (CMS) provides a timely record of performance in handling its caseload. By tracking the number and types of cases received and progress in processing those cases, and by measuring decisions issued both in terms of timeliness and number, the CMS provides an excellent means of measuring outputs. With respect to measures of outcomes, the Board is considering several potential measures such as customer surveys, rates of reversal of agency actions by the Board's judges, the percentage of cases in which the Board is asked to enforce compliance, the percentage of cases where noncompliance is found, the percentage of initial decisions that result in a petition for review by the Board, the impact of recommendations from MSPB studies that are implemented, and/or follow-up actions taken by OPM and Federal agencies to implement recommendations from MSPB studies.

FINANCIAL STATEMENT

The income and expenses for the Merit Systems Protection Board for fiscal year 1996 (October 1, 1995, through September 30, 1996) are shown below. All figures are in thousands of dollars.

INCOME

Appropriations	24,549
(Less rescission)	(32)
Civil Service Retirement & Disability Trust Fund	2,430
Other reimbursements	<u>84</u>
 Total income	 27,031

EXPENSES

Direct obligations:

Personnel compensation	
Full-time permanent	14,417
Other than full-time permanent	1,103
Other personnel compensation	<u>211</u>
Subtotal, personnel compensation	15,731
 Personnel benefits	 2,702
Benefits - former employees	110
Travel of persons	407
Transportation of things	78
Rental payment to GSA	1,963
Communications, utilities, and miscellaneous charges	431
Printing and reproduction	too
Other services	1,601
Supplies and materials	248
Equipment	<u>1,071</u>
 Subtotal, direct obligations	 24,442
 Reimbursable obligations	 2,514
 Total obligations	 26,956
 BALANCE	 75

FOR ADDITIONAL INFORMATION

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>**.

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

The Board's toll-free telephone number is **1-800-209-8960**,

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**.

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 11 - 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 services 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.