# Merit Systems Protection Board

# ANNUAL REPORT

## FISCAL YEAR 2000

# Foreword

Since it began operations in January 1979, the Merit Systems Protection Board has issued 21 annual reports on its activities. These reports satisfied the statutory requirement (5 U.S.C. § 1206) that the Board report annually to the President and Congress on its activities to carry out its functions under Title 5, United States Code. That statutory reporting requirement, however, terminated on May 15, 2000, under the "sunset" provisions of the Federal Reports Elimination and Sunset Act of 1995 (Public Law 104-66), as amended by the Consolidated Appropriations Act, FY 2000 (Public Law 106-113).

Aside from satisfying the previous statutory reporting requirement, the MSPB Annual Report has long served a public information purpose as well. The annual reports have been used to provide information to Federal employees, agencies, and others with an interest in the Board's activities about the significant decisions issued during the previous fiscal year by the Board and its principal reviewing court, the U.S. Court of Appeals for the Federal Circuit, as well as certain case processing statistical data and summaries of reports issued by the Board under its statutory authority to conduct studies of the civil service and other merit systems in the Executive Branch.

For all but two of the past 21 years, the MSPB Annual Report has been supplemented by an annual case processing statistical report ("Report on Cases Decided," formerly called the "Appeals Study"). This report contained tables and charts on the numbers and types of appeals and other cases decided at both the headquarters and regional office levels, the disposition of cases, and other matters, along with a narrative similar to that in the Annual Report.

The Board believes that continuing to make this information available to the public in a convenient format (both print and electronic) will serve its customer service goals. Therefore, beginning with this Annual Report for FY 2000, the Board is combining the most important information previously included in the Annual Report and "Report on Cases Decided" into a single, streamlined report.

As a part of the streamlining of the combined report, certain information that has been included in the past is omitted where it is available in other MSPB publications or on the MSPB Web site (www.mspb.gov). Descriptions of the Board's jurisdiction, the appeals process, and the methods of conducting studies, for example, are available in the publication, *An Introduction to the MSPB*. More detailed information regarding the appeals process can be found in the publication, *Questions & Answers about Appeals*.

The MSPB Web site contains a wealth of information—including the Board's regulations, complete texts of final Board decisions, complete reports of merit systems studies, a list of the regional and field offices and the geographical jurisdictions of each, contact information for both headquarters offices and the regional and field offices, and the latest agency press releases.

The Board, of course, is aware that both the Administration and Congress are now focused primarily on the annual agency performance reports that are required to be submitted under the Government Performance and Results Act (GPRA). These performance reports, with their requirement to report *results* in relation to *goals*, have essentially replaced the annual reports on *activities* called for by the reporting requirements that were terminated by the Federal Reports Elimination and Sunset Act.

The MSPB Performance Report for FY 2000, available on the MSPB Web site, includes data on case processing times at both the headquarters and regional office levels, information on the Board's work in the area of alternative dispute resolution, data on settlement rates, data on the extent to which final Board decisions are upheld by the U.S. Court of Appeals for the Federal Circuit, information on the impact of the Board's merit systems studies, and information about the agency's progress toward completion of its information technology initiative. The MSPB Strategic Plan and the Performance Plan for FY 2001-2002, both of which were substantially revised beginning in FY 2000, are also available on the MSPB Web site.

The "goals and results" structure of the performance reports required by GPRA does not provide for the inclusion of certain information that we know from experience our customers want—particularly the summaries of decisions and studies. This Annual Report, then, becomes a *companion* to the MSPB Performance Report and the Board's other publications. It provides information that pertains to the fiscal year covered by the report that is not available elsewhere.

The Board welcomes comments on this new approach to the agency's Annual Report. We invite you to let us know what you think of the new format, whether you find the information useful, and what you would like to see added or omitted. Comments may be submitted by e-mail to mspb@mspb.gov or by mail to the Clerk of the Board, 1615 M Street, NW, Washington, DC 20419. We look forward to hearing from you.

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# Fiscal Year 2000 in Review

YEAR OF CHANGES

Fiscal Year 2000 was a year of significant changes for the Merit Systems Protection Board. In addition to the end of the tenure of the Board's Chairman—always a time of change, the year was marked by the departures of key personnel in the top ranks of the agency's management and by the relocation of both the Board's headquarters and its Washington Regional Office.

Former Chairman Ben L. Erdreich completed his 7-year term in March 2000 and left for the private sector. Then-Vice Chair Beth S. Slavet became Acting Chairman, in accordance with the Board's governing statute, and served in that capacity until President Clinton appointed her Chairman in late December 2000. Although President Clinton submitted a nomination in May 2000 to fill the vacancy on the Board, the Senate did not act on it before the 106th Congress adjourned in December. President Clinton then filled the vacancy by appointing Barbara J. Sapin to serve as a member and Vice Chairman of the Board. The 10-month period during which there was a vacancy on the Board was the longest such period since the Board began operations in 1979.

During this long period with a 2-member Board, then-Acting Chairman Slavet and Member Susanne T. Marshall, along with their staffs, worked diligently to ensure that cases continued to be processed expeditiously. Where the two Board members could not agree on a decision on a petition for review (PFR) of an initial decision by a MSPB administrative judge, the cases usually were closed with an Order allowing the initial decision to become the final (but not precedential) decision of the Board. Very few cases were held for the arrival of a new Board member.

When former Chairman Erdreich departed, so did the political appointees who served him, including the Chief of Staff and the Director, Office of Appeals Counsel. The Acting Chairman appointed her Chief Counsel as the new Chief of Staff—the first time an attorney has served in the agency's top administrative position.

Adding to the departures in the top ranks, both the General Counsel and Legislative Counsel retired in early June. And by the end of the fiscal year, both the Director, Office of Regional Operations (ORO), and the Chief Administrative Law Judge (CALJ) had announced that they would retire at the beginning of January 2001. In an unexpected—and extremely sad—loss, the Director of the Western Regional Office in San Francisco died after suffering a heart attack.

By January 2001, the OAC Director, Legislative Counsel, and Western Regional Office Director positions had all been filled with career appointees new to MSPB, while the General Counsel position was filled with a political appointee. The Deputy Director

of ORO was serving as the acting head of that office. Rather than filling the vacant CALJ position, the Board contracted with the National Labor Relations Board (NLRB) to have designated NLRB administrative law judges adjudicate the kinds of MSPB cases formerly adjudicated by the Board's CALJ. With other retirements likely in the next few years, both at the top-management level and in the rest of the agency's workforce, succession planning and preserving institutional memory have become priorities.

FY 2000 brought not only changes in personnel but also changes in surroundings for many MSPB employees. After almost 19 years at 1120 Vermont Avenue, NW, the Board moved its Washington headquarters a few blocks away to 1615 M Street, NW, in July 2000. Despite the inevitable disruptions that accompany a move of this magnitude, the agency continued to provide services to its customers almost without interruption. The new location provides greater safety and security, better configured work spaces, and a state-of-the art computer facility for the agency's increasingly computerized operations.

In September 2000, the Board relocated its Washington Regional Office (WRO) from Falls Church, Virginia, to Alexandria, Virginia. The new WRO location, across from the King Street Metro station, makes this office far more accessible to its customers and also makes commuting by public transportation a viable option for WRO employees. The Board plans to relocate its Denver Field Office late in FY 2001 or early in FY 2002.

ADJUDICATION OF CASES

In FY 2000, the Board continued to address the full range of both substantive and procedural issues that arise in the matters over which it has jurisdiction. It issued significant decisions interpreting newer laws such as the Uniformed Services Employment and Reemployment Rights Act (USERRA), as amended in 1998, and the Veterans Employment Opportunities Act (VEOA), as well as decisions interpreting the now 12-year old Whistleblower Protection Act (WPA). It also decided cases that added to the law in areas the Board has addressed throughout its 22-year history, such as adverse actions, performance-based actions, and retirement.

The Board's principal reviewing court, the U.S. Court of Appeals for the Federal Circuit, also issued several important precedential opinions during the fiscal year.

(See the sections titled "Significant Decisions of the Board" and "Significant Decisions of the U.S. Court of Appeals for the Federal Circuit" for summaries of Board and Court decisions.)

The Board made a number of amendments to its regulations governing the processing of cases, most of them aimed at assisting parties in pursuing their cases before the Board. Perhaps the most significant was the issuance of a new Part 1208 of 5 CFR, setting forth the requirements for processing USERRA and VEOA appeals. (Interim rule at 65 FR 5410, February 4, 2000; final rule at 65 FR 49895, August 16, 2000; conforming amendment to 5 CFR Part 1201 at 65 FR 5409, February 4, 2000.)

The Board also finalized two proposed rules it had issued in 1999. To assist appellants in obtaining adequate legal representation, it amended its regulations on an award of attorney fees to permit reimbursement at the attorney's customary billing rate in the community where the attorney normally practices (65 FR 24381, April 26, 2000). In order to assist appellants in understanding the consequences of an election between appealing to MSPB or filing a grievance, the Board amended its requirements for the notice an agency must give when it takes an appealable action against an employee who has both a right to appeal to MSPB and a right to grieve the matter under a negotiated grievance procedure (65 FR 25623, May 3, 2000).

Other amendments to the regulations in FY 2000 clarified the procedures for obtaining copies of hearing tapes and transcripts (65 FR 19293, April 11, 2000), made address changes to reflect the relocation of the MSPB headquarters office (65 FR 48885-48886, August 10, 2000), and corrected a citation in the rules governing the Board's review of regulations of the Office of Personnel Management (OPM) (65 FR 57939, September 27, 2000).

During the fiscal year, the Board also launched two pilot projects aimed at improving case processing. In November 1999, the Board implemented its suspended case pilot project, which allows appellants and agencies up to 60 days additional time to pursue discovery and settlement efforts in their pending appeals. If the parties mutually request a 30-day suspension, the presiding administrative judge will grant it, without requiring the parties to provide evidence and argument to support the request. A second 30-day suspension will be granted if the parties agree that further time is necessary. By the end of FY 2000, judges had granted 319 initial 30-day suspensions and 98 additional 30-day suspensions. The pilot program will be evaluated during FY 2001.

In June 2000, the Board launched an expanded pilot program at headquarters to expedite the processing of certain petitions for review (PFRs) of administrative judges' initial decisions. The purpose of the program is to identify non-meritorious PFRs that can be disposed of quickly so that the 3-member Board can focus its resources on complex and precedential cases. If a PFR meets one of the eight criteria established for expedited processing (e.g., clearly not within the Board's purview, no attempt to meet the criteria for Board review), the Office of the Clerk prepares a proposed decision and forwards it to the Board, rather than transferring the case to the Office of Appeals Counsel for preparation of a decision. A senior attorney detailed from the Office of Appeals Counsel to the Office of the Clerk of the Board conducts the reviews.

In the first 6 months of the expedited PFR pilot program, approximately 8 percent of the 724 PFRs reviewed were expedited. The average time for processing the expedited cases—from receipt of the PFR to issuance of the decision—was 60 days. This pilot program will also be evaluated during FY 2001.

In a further effort to improve case processing times at headquarters, the Board targeted its enforcement cases during the latter half of FY 2000. These cases arise after the Board issues a final order in a merits case and a party subsequently petitions the Board to

enforce its order. If the judge to whom the petition for enforcement is assigned determines that there is noncompliance with the Board's order, the case is referred to the 3-member Board for enforcement. Because enforcement cases cannot be closed until compliance is achieved, they frequently take longer to complete than other cases.

By focusing on enforcement cases that had been pending at headquarters for more than 300 days, the Board was able to reduce the number of such cases substantially. One of the methods employed to reduce the processing time was to hold meetings with processing agencies such as the Defense Finance & Accounting Service (DFAS), the National Finance Center (NFC), and the Postal Service to develop mutually beneficial systems for achieving full compliance with Board orders in a timely manner. As a result of those meetings, the agencies have developed checklists and other tools that advise agencies and appellants of the information required to process payments agreed upon in settlements or as ordered by the Board. The DFAS and NFC checklists are available on the MSPB Web site. The USPS is developing a compliance handbook.

## MERIT SYSTEMS STUDIES

From the time it was established by the Civil Service Reform Act, the Board has had two separate authorities to conduct studies. The first authorizes the Board to conduct studies of the civil service and other merit systems in the Executive Branch and report to the President and Congress on whether the public interest in a civil service free of prohibited personnel practices is being adequately protected (5 U.S.C. § 1204(a)(3)). The other requires the Board to review the significant actions of OPM and submit an annual report with its analysis of whether the OPM actions reviewed are in accord with merit system principles and free from prohibited personnel practices (5 U.S.C. § 1206).

On May 15, 2000, the requirement for the annual report on reviews of OPM significant actions was terminated in accordance with the "sunset" provisions of the Federal Reports Elimination and Sunset Act of 1995—the same law that terminated the requirement for MSPB to submit an annual report on its own activities. While the Board no longer needs to satisfy an annual reporting requirement with respect to OPM, it continues to review OPM actions, where appropriate, under its merit systems studies authority.

During FY 2000, the Board published two reports of studies conducted by its Office of Policy and Evaluation (OPE) staff and five editions of the *Issues of Merit* newsletter. One report dealt with the Outstanding Scholar and Bilingual/Bicultural hiring authorities. The other reported the results of a survey of new hires on their experiences in seeking and applying for Federal jobs.

(See the section titled "Merit Systems Studies" for summaries of these reports.)

The OPE staff also continued to serve as a valuable resource for the Board in meeting internal agency research needs. During the fiscal year, OPE conducted a survey of appellants and their representatives, agency representatives, and MSPB administrative

judges who participated in the pilot projects testing the use of video conferencing for hearings and the issuance of bench decisions by MSPB judges. The subsequent report of the survey results provided information that the Board and senior managers will use to evaluate these projects. The report was placed on the MSPB Web site, and a press release was issued to announce its availability.

## LEGISLATIVE ACTION

In the Spring of 2000, the MSPB reassessed its appropriation request for FY 2001 and determined that while certain planned spending—primarily for information technology improvements—could be deferred, it was essential that the agency receive increased funding to cover rent increases and the cost of processing additional cases expected to result from the enactment of legislation restoring MSPB appeal rights to Federal Aviation Administration employees (discussed below). Discussions with the Office of Management and Budget (OMB) resulted in OMB support for the requested increase, and the President submitted an amended request for the MSPB to Congress in early June.

By the end of July, House and Senate conferees on the Treasury and General Government Appropriations Act for FY 2001 had agreed that MSPB should receive the full amount requested by the President and by the agency—$29,437,000 (plus up to $2,430,000 in reimbursements from the Civil Service Retirement and Disability Trust Fund to cover the cost of processing retirement appeals). The House agreed to the Conference Report in September, and the Senate followed suit in October, but the bill was vetoed by the President (for reasons unrelated to MSPB) on October 30. The Treasury and General Government Appropriations Act for FY 2001 was not finally enacted until December 21, 2000, as part of the Consolidated Appropriations Act (H.R. 4577, Public Law 106-554). Like many agencies, MSPB operated under a series of 21 continuing resolutions, providing funding at the FY 2000 level, from October 1 until December 21, 2000.

The second session of the 106th Congress also saw the enactment of a comprehensive reauthorization bill for the Federal Aviation Administration (FAA)—legislation that had been in the works since the 105th Congress (H.R. 1000, Public Law 106-181). When the President signed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (FAIR-21) on April 5, 2000, MSPB appeal rights were restored to the approximately 40,000 employees of the FAA. Under the terms of the FY 1996 Department of Transportation Appropriations Act, which authorized FAA to establish its own personnel system—free from most of the provisions of Title 5, United States Code, FAA employees lost their right to appeal personnel actions to MSPB.

With the enactment of FAIR-21, FAA employees may now appeal to the Board with respect to any action that was appealable as of March 31, 1996 (the day before the FAA personnel system took effect). Unless otherwise authorized by law, however, an employee of the FAA must make an election among pursuing a claim through an appeal to MSPB, the FAA internal system (Guaranteed Fair Treatment), or any applicable grievance procedure under a collective bargaining agreement.

The restoration of MSPB appeal rights to FAA employees was expected to increase the appeals workload by about 100 cases per year. In the 6-month period between the time FAIR-21 was enacted and the end of the fiscal year, the MSPB received 66 FAA appeals, suggesting that the annual increase in workload will be somewhat higher than the 100 cases initially projected. The Act also raises a number of issues on which the Board can be expected to rule in coming years. (See the section titled "Significant Decisions of the Board" for a summary of *Miller v. Department of Transportation*, in which the Board ruled that the restoration of appeal rights to FAA employees is retroactive to April 1, 1996.)

The impact of another bill enacted in the second session of the 106th Congress is more difficult to assess. The Federal Erroneous Retirement Coverage Corrections Act (FERCCA) was enacted as Title II of H.R. 4040, signed into law by President Clinton on September 19, 2000 (Public Law 106-265). This law—also in the works since the 105th Congress—provides remedies for Federal employees placed in the wrong retirement system, provided the retirement coverage error was in effect for at least three years of service after December 31, 1986.

Generally, FERCCA requires that employees placed in the wrong retirement system be identified, that their right to make coverage elections under the Act be explained to them, and that changes in retirement coverage be effected in accordance with such elections. The Act authorizes OPM to issue implementing regulations.

Under the provisions of 5 U.S.C. § 8347(d) for the Civil Service Retirement System (CSRS) and 5 U.S.C. § 8461(e) for the Federal Employees Retirement System (FERS), the Board has jurisdiction over appeals from administrative actions affecting an individual's or the Government's rights and benefits under the retirement systems. Therefore, the Board can expect that issues arising from FERCCA will present themselves in future retirement appeals, perhaps beginning as early as FY 2002. Whether FERCCA will have any significant impact on MSPB's appeals caseload, however, remains an open question. Much depends on how well OPM and agency personnel offices carry out their responsibilities under the Act.

Other legislation of significance to MSPB was advanced—but not enacted—by the 106th Congress. A proposal to authorize MSPB to conduct a 3-year pilot program to test the use of voluntary alternative dispute resolution (ADR) in the early stages of certain personnel disputes (that is, before the dispute results in a formal appeal to the Board) was introduced by Rep. George Gekas (R-PA) as H.R. 3312 in November 1999. Former Chairman Erdreich testified in support of this legislation on February 29, 2000, just days before he left office. In the Summer of 2000, the bill was considered by the House Judiciary Committee and House Government Reform Committee.

Soon after the end of the fiscal year (on October 24, 2000), the House passed H.R. 3312, after adopting a Manager's Amendment to include language proposed by the MSPB Professional Association that would establish a pay schedule for MSPB

administrative judges comparable to that for administrative law judges. The Senate did not take up the legislation before the end of the 106th Congress in December, and H.R. 3312 died. Both the ADR pilot program and administrative judge pay comparability proposals, however, are expected to be reintroduced in the 107th Congress.

The Board has established an ADR Working Group—composed of the Chairman, Chief of Staff, and representatives from both regional and headquarters offices—to begin preparing for implementation of the ADR pilot program legislation. The group also is exploring ways in which the Board can expand its ADR initiatives even if the legislation is not enacted.

## OUTREACH

The Board placed renewed emphasis on outreach during FY 2000, participating in approximately 220 outreach events. The Board members and attorneys from the headquarters legal offices, as well as administrative judges from the regional and field offices, participated in conferences and addressed groups representing both employees and agency management. Topics included updates on recent significant decisions of the Board and the U.S. Court of Appeals for the Federal Circuit, Board procedures and regulations, various substantive areas of the law applied by the Board, and the Board's ADR initiatives.

The Office of Policy and Evaluation staff maintained an active outreach program to increase the impact of the Board's merit systems studies. OPE staff participated in interagency or intergovernmental discussions and provided presentations on a full range of human resources management issues and topics that have been the subject of MSPB reviews. Because the data from MSPB studies is publicly available, it frequently finds its way into the professional literature. In some cases, the OPE staff also expands the reach of the Board's efforts by authoring articles in professional journals. One such article, "Working for America: Does Public Service Motivation Make a Difference?," appeared in the *Review of Public Personnel Administration* and was awarded the Outstanding Journal Article in Human Resource Management, 1999-2000, by the American Society for Public Administration.

So that all employees, both in headquarters and the regional and field offices, are aware of outreach appearances by other employees, the Board maintains an electronic Outreach Calendar that is available to the entire staff at any time. Use of the Outreach Calendar avoids scheduling conflicts and enables employees who are addressing the same or similar topics to discuss their presentations with each other.

# Board Members

## CHAIRMAN

**BETH S. SLAVET** was appointed Chairman of the Merit Systems Protection Board by President Clinton on December 22, 2000. From August 15, 1995, following her nomination by President Clinton and confirmation by the Senate, she served as Vice Chairman of the Board. Additionally, she served as Acting Chairman from March 3, 2000, until her appointment as Chairman. Her term appointment to the Board 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 practiced employment and labor law in Washington, DC. 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 and is a member of the Federal Circuit and District of Columbia bar associations.

For the first 5 months of FY 2000, **BEN L. ERDREICH** continued to serve as Chairman of the Board, having assumed that position on July 2, 1993, following his nomination by President Clinton and confirmation by the Senate. His term appointment expired March 1, 2000. Previously, Mr. Erdreich 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.

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.

## VICE CHAIRMAN

**BARBARA J. SAPIN** was appointed as a member and Vice Chairman of the Merit Systems Protection Board by President Clinton on December 27, 2000. From 1995 until the time of her appointment, she served as General Counsel to the American Nurses Association (ANA). Previously, Ms. Sapin served as ANA's Labor Counsel from 1990 to 1995. From 1981 to 1990, she held several positions at the National Labor Relations Board, including attorney for the Appellate Court Branch, Washington, DC; field attorney in the Chicago Regional Office; and Senior Counsel to a Board member in Washington, DC. Ms. Sapin received her B.A. in Psychology from Boston University and her J.D. from Columbus School of Law, Catholic University of America. She is admitted to the District of Columbia Bar.

## MEMBER

**SUSANNE T. MARSHALL** was sworn in as Member of the Board on November 17, 1997, following her nomination by President Clinton and confirmation by the Senate. Her term appointment expires March 1, 2004. She served on the staff of the Committee on Governmental Affairs of the United States Senate, with jurisdiction over all Federal employee personnel issues, from December 1985 until her appointment. During that time, she served three distinguished members of the Senate—Chairman/Ranking Republican William V. Roth, Jr., of Delaware (1985-1995), Chairman Ted Stevens of Alaska (1995-1996), and Chairman Fred Thompson of Tennessee (1997). Before that, she held positions in the House of Representatives as Republican Staff Assistant to the Committee on Government Operations (1983-1985) and as Legislative Assistant on the staff of a Member from Georgia (1981-1982). She has also worked in the private sector while living in Georgia (1976-1981) and for a trade association in Washington, DC (1972-1976). She attended the University of Maryland in Munich, Germany, and the American University.

# Board Organization

The **Chairman**, **Vice Chairman**, and **Member** adjudicate the cases brought to the Board. 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** oversees the five MSPB regional offices (including five field offices), which receive and process initial appeals and related cases. Administrative judges in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.

The **Office of the Administrative Law Judge** adjudicates and issues initial decisions in Hatch Act cases, corrective and disciplinary action complaints brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board.

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board in cases where a party petitions for review of a judge's initial decision and in all other cases decided by the 3-member Board, except for those cases assigned to the Office of the General Counsel. The office also conducts the Board's petition for review settlement program, processes interlocutory appeals of rulings made by judges, makes recommendations on reopening cases on the Board's own motion, and provides research and policy memoranda to the Board on legal issues.

The **Office of the Clerk of the Board** receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's Opinions and Orders. The office serves as the Board's public information center, coordinates media relations, produces public information publications, operates the Board's Library and on-line information services, and administers the Freedom of Information Act and Privacy Act programs. The office also certifies official records to the courts and Federal administrative agencies, and manages the Board's records and directives system, legal research programs, and 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 MSPB offices on matters of law arising in day-to-day operations. The office represents the Board in litigation, prepares proposed decisions for the Board on assigned cases, and coordinates the Board's legislative policy and congressional relations functions. 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. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office also conducts an outreach program and 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 **Office of Financial and Administrative Management** administers the budget, procurement, property management, physical security, and general services functions of the Board. It develops and coordinates internal management programs and projects, including review of internal controls agencywide. It also administers the agency's cross-servicing arrangements with the U.S. Department of Agriculture's National Finance Center (NFC) for accounting and payroll services and with ABS (APHIS Business Services) for human resources management services.

The **Office of Information Resources Management** 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.

# Significant Decisions of the Board

ADVERSE ACTIONS

*Herrera-Martinez v. Social Security Administration*, **84 M.S.P.R. 426 (1999)**

That misconduct was committed by following improper supervisory policies, when not done as a result of intimidation, does not provide a basis for mitigation; nor does condonation require mitigation, especially where the misconduct is clearly illegal. Thus, removal was reasonable for an SSA claims representative's fraud and falsification on behalf of claimants, and her own acceptance of gifts.

*Stabile v. Department of Defense*,
**85 M.S.P.R. 253 (2000)**

Upon reconsideration of its precedent, the Board held that when it orders the agency to demote a manager to a lower-graded non-managerial position, without specifying that it should be done with the least reduction in pay, the agency must set the employee's pay at the step of the lower-graded position that results in the least reduction in pay consistent with its pay-setting regulations on demotions for cause. If it has none, it must place him in the step of the lower-graded position that results in the least reduction in pay. To the extent that *Kopec v. Army*, 63 M.S.P.R. 576, and *Slaughter v. Agriculture*, 56 M.S.P.R. 349, suggest to the contrary, the Board overruled them. In reviewing its established law on the subject, the Board also noted that absent an agreement between the parties, such a demotion order obligates the agency to place the appellant in a position at his former facility, and that if the placement is at a lower grade than he is ultimately entitled to, the appellant is to be notified of higher-graded vacancies the agency fills.

*Edwards & Rodriguez v. Department of the Army*, **87 M.S.P.R. 27 (2000)**

That his supervisor retains confidence in the appellant regardless of his misconduct is not dispositive because that judgment is the agency's to make, not the supervisor's. The Board also ruled here that the fact that the appellant returned to duty after his misconduct does not diminish the seriousness of his on-duty misconduct (alcohol use).

*Clark v. United States Postal Service*,
**85 M.S.P.R.162 (2000)**

Failure to provide an employee notice and an opportunity to respond to an appealable action that deprives him of his property right in his employment abridges his constitutional right to minimum due process, and such deprivation is not subject to a harmful error test. Thus, as here, where the appellant explained to the official trying to serve notice of a proposed removal on him that he was then too mentally and emotionally

upset to focus on or understand the letter, so that he could not sign for it, and the agency made no subsequent efforts to assure its delivery, he was denied due process when the decision to remove him was made without providing him a chance to know and respond to the charges.

*Daigle v. Department of Veterans Affairs,* **84 M.S.P.R. 625 (1999)**

EEO counseling sessions are "a semi-confidential means through which employees complain about the conduct of other agency personnel" under 29 C.F.R. § 1614.105. Further, complainants are likely to be emotionally distraught when they are reporting perceived discrimination. Thus, as to a disrespectful conduct charge, the Board concluded that these sessions are one of the contexts in which it is reasonable to afford them more leeway with regard to conduct than might otherwise be afforded in other employment situations.

*Johnson, et al. v. Department of Health and Human Services,* **86 M.S.P.R. 501 (2000)**

Because the Indian Child Protection and Family Violence Prevention Act, Pub. L. No. 101-630 (25 U.S.C. § 3207), provides that the agency shall ensure that no one in a covered position has been found guilty of or entered a guilty or *nolo* plea to a covered crime, the agency must remove employees from covered positions if they have been so convicted or entered such a plea to a covered crime, irrespective of their good work performance and retention of supervisors' trust.

ATTORNEY FEES

*Joyce v. Department of the Air Force***,**
**83 M.S.P.R. 666 (1999)**

Overruling its recent decision in *Joyce v. Department of the Air Force*, 74 M.S.P.R. 112, the Board held here that in order to act on the merits of a case, it must make a preliminary determination of jurisdiction; thus, attorney fees cannot be awarded in the absence of such a finding, such as where an agency rescinds its action early in the appeal proceeding. The Board's decision, however, reaffirmed its prior holdings that an appellant may be a prevailing party where, after filing his appeal, the agency voluntarily granted the relief sought, the administrative judge dismissed the appeal as moot, and the relief was causally related to the initiation of the appeal.

*Santella & Jech v. Office of Special Counsel & Internal Revenue Service,*
**86 M.S.P.R. 48 (2000), OPM pet. for reconsideration filed June 13, 2000**

This case is the first to hold that the Office of Special Counsel is "the agency involved" under 5 U.S.C. § 1204(m)(1), so that it, not the employing agency, may be required to pay attorney fees. The case also holds that the section is not retroactive, and applies only to portions of a case that occurred after October 29, 1994; that "prevailing party" under section 1204(m) is the same as under 5 U.S.C. § 7701(g); and that in applying the warranted-in-the-interest-of-justice test found in both laws, the

"substantially innocent" category may be applied to 1204(m) cases as it is under chapter 77.

*Auker v. Department of Defense*,
**86 M.S.P.R. 468 (2000)**

The language of 5 U.S.C. § 1221(g)(2) clearly states that the Board is without authority to award fees under it, absent a finding that a prohibited personnel practice was committed; however 5 U.S.C. § 7701(g)(1) covers all cases that come before the Board, including IRA appeals. Thus, fees may be awarded in an IRA appeal under 5 U.S.C. § 7701(g)(1) under circumstances that would not permit an award under 5 U.S.C. § 1221(g).

*Thomas v. United States Postal Service*, **86 M.S.P.R. 635 (2000)**

This decision holds, for the first time, that the expense of computer research is compensable in connection with an application for attorney fees. In other rulings relative to the reasonableness of an attorney fee award, the Board found that clerical work is not normally compensated at attorney rates, but that it may be where it is found to be "indistinguishable from the legal work," and that the Board may make an award for reasonable and necessary long distance faxes, but where counsel charged a fixed rate for sending faxes locally, such charges are not an out-of-pocket expense that may be awarded.

(The Board later reaffirmed this ruling, on reconsideration, 87 M.S.P.R. 331 (2000).)

BACK PAY AND COMPLIANCE ISSUES

*Black v. Department of Justice*,
**85 M.S.P.R. 650 (2000)**

In restating its law, the Board held here that a status quo ante remedy does not require "perfect consistency" as to all aspects of an appellant's pre- and post-removal positions, but that she is entitled to "all the essential privileges of [her] previous position." The Board's enforcement authority under 5 U.S.C. § 1204(a)(2) is not limited by the discretionary authority normally reposed in an agency official, so that, in this case, the appellant, a Special Agent, was entitled to reissuance of the type of badge and credentials she held prior to her removal, despite the general authority of the Commissioner to issue those documents.

BOARD PROCEDURES

*Spradlin v. Office of Personnel Management*, **84 M.S.P.R. 279 (1999)**

The Board addressed two procedural issues in this case: (1) the administrative judge's reliance on statements made during the status conference as evidence; and (2) the appellant's untimely request for a hearing. With regard to the first issue, the Board found that the administrative judge erred when she considered the statements of the appellant

and her husband during the status conference regarding her inability to perform her former position as testimonial evidence supporting her claim for a disability retirement annuity. Unless the parties enter into stipulations of fact (which was not the case here), statements made by a party during a status conference are not evidence. With respect to the appellant's untimely request for a hearing, the Board concluded that she was entitled to show that there was good cause to waive the time limit set in the acknowledgment order for requesting a hearing under the particular facts of this case. In this regard, the Board noted the fact that the acknowledgment order did not inform her that any untimely request must be accompanied by a showing of good cause for the delay and it was not clear in the proceedings below that the administrative judge had ruled on the appellant's request for a hearing.

*Perez v. Department of the Navy*,
**86 M.S.P.R. 168 (2000)**

Although the issue of whether a videoconference hearing satisfies 5 U.S.C. § 7701(a)(1) remained undecided, the Board remanded this case for an in-person hearing because of its facts. Specifically, the appellant claimed that the administrative judge had a view only of the backs of witnesses' heads. In light of that claim and the issues of the appeal, the Board found "there are serious questions of witness credibility going to the central disputed fact in the case as to which the administrative judge could have supported different credibility determinations if he had held the hearing in-person."

DISCRIMINATION

*McFadden v. Department of Defense*,
**85 M.S.P.R. 18 (1999)**

This decision discusses the law under 29 C.F.R. § 1614.203(a)(5), which allows for a finding that an employee meets the test of being "disabled" if she is "regarded as" having an impairment. The Board held, in this regard, that an appellant who has an impairment that actually "substantially limits" her "major life activities" is not "regarded as" having an impairment under 29 C.F.R. § 1614.203(a)(5). Thus, her rights and burdens, including those surrounding accommodation, stem from actually being disabled.

EVIDENCE

*Cheng v. Department of Agriculture***,**
**84 M.S.P.R. 144 (1999)**

It is error for an administrative judge to rely on her own observations of the appellant's conduct at the hearing to support a finding that the agency proved the charge. While considering such behavior may be appropriate in making credibility findings, it

does not constitute circumstantial evidence that the appellant engaged in the charged misconduct.

*Hylick v. Department of the Air Force*, **85 M.S.P.R. 145 (2000)**

The privilege against self-incrimination bars compelled testimony as to past crimes, but does not shelter new perjury.

HATCH ACT

*Special Counsel v. Malone & Utley*,
**84 M.S.P.R. 342 (1999)**

Because the Board had found suspensions to be the appropriate penalties in these Hatch Act (prohibited political activities) cases, but the respondents had retired before the penalties could be imposed, the Board was faced with the question of whether debarment was an appropriate remedy. It concluded, based on its review of the relevant legislative history and case law, that it is not authorized to impose such a penalty.

JURISDICTION

*McFadden v. Department of Defense*,
**85 M.S.P.R. 18 (1999)**

This decision restates the two situations in which constructive suspension claims may arise and the rules applicable with respect to that in which an employee who is absent from work for medical reasons asks to return with altered duties, but her request is denied. The Board here clarified that its law, which requires agencies to offer available light duty to an employee who requests to return to work with restrictions, contemplates a formal policy on light duty work equivalent to a regulation or contract. Evidence that the agency had accommodated other employees with light duty work and that it would have accommodated the appellant if possible does not meet this test.

*Lorenz v. United States Postal Service*, **84 M.S.P.R. 670 (2000)**

*Nordhoff v. Navy*, 78 M.S.P.R. 88, which applies where an employee claims constructive removal through involuntary disability retirement, was clarified to state that to it did not hold that whenever an employee shows that his medical condition could have been accommodated, an involuntary disability retirement claim will automatically succeed. He must generally make the agency aware of his need for accommodation, and request it. Further, the situation at the time of the retirement is not necessarily the only dispositive one, *e.g.*, where the agency had only recently filled a job that would have provided the accommodation the appellant requested, he may still be entitled to prevail on a constructive removal claim.

*Simonton v. United States Postal Service*, **85 M.S.P.R. 189 (2000)**

Only the Office of Workers' Compensation programs (OWCP) may determine that an employee's medical restrictions, once found to have been based on a compensable injury, are no longer work-related. Thus, when the agency determined that the appellant, although still not medically capable of performing his job, withdrew his limited duty based on its own *ultra vires* determination that his medical restrictions are no longer work related, and that action caused the appellant's absence, his absence constituted a constructive suspension. That OWCP several months later made a similar finding only validates the agency's act from the effective date of the OWCP decision.

*Wright v. Department of Veterans Affairs*, **85 M.S.P.R. 358 (2000)**

In this decision, after restating the test for jurisdiction over a claim that an action was made involuntary by intolerable working conditions, which are generally raised in connection with claims of coerced resignation and retirement, the Board held that a claim that return to work was prevented by such conditions (that is, an allegation of a constructive suspension) should also be judged against the same involuntariness standards.

*Hamilton v. United States Postal Service*, **86 M.S.P.R. 215 (2000)**

The Board found that the appellant proved that he was entitled to appeal an adverse action to the Board despite his excepted service status because he proved that he was a preference eligible under 5 U.S.C. § 2108. The decision relied on OPM guidance explaining that any Armed Forces Expeditionary Medal qualifies for veterans' preference and that a DD Form 214 does not have to show the name of the theater or country of service for which the medal was awarded.

*Miller v. Department of Transportation*, **86 M.S.P.R. 293 (2000)**

Section 307 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub.L. No. 106-181, (the Ford Act) is effective beginning April 1, 1996, and provides Board appeal rights to FAA employees from any action that was appealable to the Board as of March 31, 1996. Thus, FAA employees may now appeal to the Board any matter that occurred since that time that was appealable prior to it.

PERFORMANCE ACTIONS

*Daigle v. Department of Veterans Affairs,* **84 M.S.P.R. 625 (1999)**

In Chapter 43 actions, the Board has required agencies since 1984 to produce evidence that OPM approved their performance appraisal systems. However, given the passage of time, the Board's unawareness of any agency that had not received OPM's approval, and the absence of a statutory requirement for renewing approval of a system once in place, the Board revisited the issue and held that "it is no longer necessary to perpetuate an outmoded paperwork requirement." Thus, agencies are no longer required to submit evidence of proof of OPM approval if the issue is not raised by the appellant.

REDUCTION IN FORCE

*Holland, et al. v. Department of the Army,* **84 M.S.P.R. 269 (1999)**

Delaying an appellant's RIF rights by assigning her to a term position when she had right to a permanent position has the significant potential to denigrate or extinguish her current rights. Therefore, it is error to assign an employee to a term position when she had superior rights, as well, to an identical permanent job, irrespective of the agency's claims that the appellant might not be harmed upon the expiration of that appointment and that another employee could be retained under this scheme.

RESTORATION RIGHTS

*Mormon v. Department of Defense,*
**84 M.S.P.R. 96 (1999)**

Neither FECA nor its implementing regulations provides that a compensably-injured individual is precluded from exercising restoration rights upon recovery merely because her separation was voluntary, for example by resignation. Rather, to gain a right to restoration upon recovery, the appellant's separation must only have resulted from, or been substantially related to, her compensable injury.

RETIREMENT ISSUES

*Maurer, et al. v. Office of Personnel Management,* **84 M.S.P.R. 156 (1999)**

The decision in this appeal examines the complex of statutory provisions necessary to determine the proper disposition of excess contributions, that is, the contributions to the retirement system made by an employee who has worked beyond the point of maximum return, at which his annuity could no longer be increased by additional deductions (41 years, 11 months under CSRS).

*Hall v. Office of Personnel Management*, **85 M.S.P.R. 371 (2000)**

This decision notes the rule that an agency has a duty under 5 C.F.R. § 844.202 to apply for disability retirement for an employee before issuing a decision to remove her for cause when it concludes that she is incapable of deciding to file, but modifies *Carillo v. OPM*, 82 M.S.P.R. 61, by noting that both the CSRS and FERS regulations contemplate that an employing agency should effect its removal decision when it applies for disability retirement on the appellant's behalf, and then provide the documentation of the separation to OPM.

*Rule v. Department of Veterans Affairs*, **85 M.S.P.R. 388 (2000)**

The holding in *Nordhoff v. Navy*, 78 M.S.P.R. 88, the case that sets the jurisdictional standard as to an appellant who claims to have been constructively removed through an involuntary disability retirement, was restated. After setting out the distinctions between "accommodation" for purposes of disability retirement and the Rehabilitation Act, the Board clarified *Nordhoff* to hold that an appellant can establish jurisdiction over a disability retirement if he can prove that there was an accommodation available on the date of his separation, either at or below his grade or level, that would have allowed him to continue his employment. He must establish, however, that he indicated to the agency that he wished to continue working despite his medical limitations.

*Watson, et al. v. Department of the Navy*, **86 M.S.P.R. 318 (2000)**

The Board clarified the rules that apply to the adjudication of law enforcement officer (LEO) retirement coverage. It stated that OPM's regulations mandate a "position-oriented" approach. That approach more affirmatively takes into account the basic reasons for the existence of the position, and if it was not created for the purpose of investigation, apprehension, or detention, then the incumbents of the position would not be entitled to LEO credit

SETTLEMENT

*Brown v. Department of the Interior*,
**86 M.S.P.R. 546 (2000)**

The decision sets out the rules for construction of a contract such as a settlement agreement where it appears that both parties did not give it the same construction. Among other rules, it notes that where the parties hold reasonable but different views of an ambiguous term that goes to the heart of the contract, no contract was formed. If the appellant was led to believe one thing during negotiations, and the agency was aware of that, the agreement should be interpreted in accordance with her understanding; if the appellant's interpretation was reasonable, but the agency did not have reason to know that she attached a materially different meaning than it did, the agreement would be set aside for lack of mutual assent if the parties' differences went to the heart of the contract. If

their differences did not go to its heart, the agreement would still be in effect, but neither party would be bound by the meaning attached by the other. Finally, where an agreement is not fully integrated, the appellant may introduce evidence to show that the parties agreed to consistent, additional terms.

## USERRA, VEOA, and VETERANS' RIGHTS

*Tindall v. Department of the Army*,
**84 M.S.P.R. 230 (1999)**

The appellant's claim that the agency did not consider the fact that he was a 5-point preference eligible in its hiring decision did not state a claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) because he was not claiming that he was denied a benefit based on his prior military service. However, for purposes of USERRA, the appellant's service in the Army Reserve qualifies as "service in the uniformed services" (38 U.S.C. § 4303(13), (16)), and his claim of nonselection in favor of a nonreservist states a claim under USERRA.

*Spigner v. Department of the Air Force*, **86 M.S.P.R. 677 (2000)**

This decision discussed the rules under the Veterans Employment Opportunities Act (VEOA) as they apply to a veteran's rights in connection with appointments. In its decision, the Board noted, *inter alia*, that under 5 C.F.R. § 333.201, "preference shall be given first to preference eligibles with compensable service-connected disability of 10 percent or more, and second to other preference eligibles," and that a preference eligible is not entitled to selection, but is only entitled to as much preference as he would have received in a competitive examination. No VEOA violation was found where a 5-point preference eligible was selected for a vacancy over the appellant, a 10-point eligible.

## WHISTLEBLOWER PROTECTION ACT

*Ganski v. Interior & OSC*, **86 M.S.P.R. 32 (2000)**

The holding in *Thomas v. Treasury*, 77 M.S.P.R. 224, that the disclosure of a violation of personnel rules is unprotected if it does not involve the type of waste, fraud, or abuse the WPA was intended to uncover, was overruled; instead, under 5 U.S.C. § 2302(b)(8)(A), "the inquiry into whether a disclosure is protected under subsection (i) ends upon the determination that the appellant disclosed a violation of law, rule, or regulation," without further examination of the type of matter disclosed. Subsection (ii), however, requires the substantive judgments to be made on whether the disclosure was of "gross" mismanagement or "a substantial and specific" danger.

# Significant Decisions of the U.S. Court of Appeals for the Federal Circuit

ATTORNEY FEES

*Raney v. Federal Bureau of Prisons*, **222 F.3d 927 (Fed. Cir. 2000) (en banc)**

The Court held that the Back Pay Act permits, and ethical considerations do not bar, the award of market-rate fees for work by union attorneys when such fees are deposited into a separate fund controlled exclusively by lawyers and the fund is used solely to support litigation on behalf of employee's rights.

FAILURE TO STATE A CLAIM

*Bivings v. Department of Agriculture*, **225 F.3d 1331 (Fed. Cir. 2000)**

An employee failed to state a claim upon which relief could be granted where he was jointly employed by a State university and the Federal Government, and action by the State employer would be necessary to effect a remedy.

HATCH ACT

*Kane v. Merit Systems Protection Board*, **210 F.3d 1379 (Fed. Cir. 2000)**

The Hatch Act applies to part-time employees, even on days when they are not performing the duties of their positions.

JURISDICTION

*Green v. General Services Administration*, **220 F.3d 1313 (Fed. Cir. 2000)**

The regulation governing an employee's withdrawal of a resignation, 5 C.F.R. § 715.202(b), also applies to an employee's request to withdraw from a voluntary separation or "buyout" agreement. An employee's commitment to enter into a separation agreement is a valid reason for the agency to deny an employee's request to withdraw from such an agreement, and where the separation is otherwise voluntary, the Board does not have jurisdiction.

*Hesse v. Department of State*, **217 F.3d 1372 (Fed. Cir. 2000)**

The 1994 amendments to the Whistleblower Protection Act did not make the denial, revocation, or suspension of a security clearance a "personnel action" under 5 U.S.C. § 2302(a)(2) that could be raised in an individual right of action filed with the Board after seeking corrective action from the Office of Special Counsel.

*Schmittling v. Department of the Army*, **219 F.3d 1332 (Fed. Cir. 2000)**

The Board may not assume that all jurisdictional elements are met in order to consider an individual right of action appeal on the merits.

PENALTIES

*Gregory v. United States Postal Service*, **212 F.3d 1296 (Fed. Cir. 2000),**
***cert. granted*, 121 S.Ct. 1076,**
**(U.S. Feb. 20, 2001) (No. 00-758)**

In determining whether a penalty imposed on an employee is reasonable, the employing agency and the Board may not consider prior disciplinary actions taken against the employee that are the subject of ongoing proceedings challenging their merits.

RETIREMENT

*Billinger v. Office of Personnel Management*, **206 F.3d 1404 (Fed. Cir. 2000)**

A congressional employee was eligible to receive credit for his unused sick leave under the Civil Service Retirement System where the leave was accumulated under a "formal leave system" consisting of written rules. Where OPM relies on an employing agency certification that affects an employee's rights under the CSRS, the certification is reviewable by the Board.

*Dick v. Office of Personnel Management*, **216 F.3d 1353 (Fed. Cir. 2000)**

A Federal employee is not entitled to reinstatement of his prior disability annuity if his disability recurs after his employment has ended.

USERRA

*Lourens v. Merit Systems Protection Board*, **193 F.3d 1369 (Fed. Cir. 1999)**

The Board's jurisdiction under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) does not extend to spouses and widows of members of the uniformed service.

WHISTLEBLOWER PROTECTION ACT

*Diefenderfer v. Merit Systems Protection Board*, **194 F.3d 1275 (Fed. Cir. 1999)**

The Board does not have jurisdiction over whistleblower claims brought by employees of the Federal Aviation Administration.

NOTE: This decision was issued prior to the enactment of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub.L. No. 106-181, signed April 5, 2000. This Act restored the MSPB appeal rights of FAA employees.

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.

# FY 2000 Case Processing Statistical Data

## SUMMARY TABLE OF MSPB DECISIONS IN FY 2000

| | |
|---|---|
| **Regional Office (RO)/Field Office (FO) Decisions:** | |
| Appeals [1] | 6,391 |
| Addendum Cases [2] | 979 |
| Stay Requests [3] | 119 |
| **TOTAL RO/FO Decisions** | **7,489** |
| **ALJ Decisions - Original Jurisdiction Cases [4]** | **17** |
| **Board Decisions:** | |
| Appellate Jurisdiction: | |
| PFRs - Appeals | 1,225 |
| PFRs - Addendum Cases | 238 |
| Reviews of Stay Request Rulings | 1 |
| Requests for Stay of Board Order | 1 |
| Reopenings [5] | 3 |
| Court Remands [6] | 244 |
| Compliance Referrals | 110 |
| EEOC Non-concurrence Cases | 0 |
| Arbitration Cases | 5 |
| Subtotal | 1,827 |
| Original Jurisdiction [7] | 41 |
| **TOTAL Board Decisions [8]** | **1,868** |
| **TOTAL Decisions (Board, ALJ, RO/FOs)** | **9,374** |

See next page for footnotes.

## FOOTNOTES TO SUMMARY TABLE

[1] Includes 6 appeals adjudicated by the ALJ at Board headquarters.

[2] Includes 317 requests for attorney fees, 11 requests for compensatory damages (discrimination cases only), 4 requests for consequential damages (whistleblower cases only), 458 petitions for enforcement, 170 Board remand cases, and 19 court remand cases. (Three of the petitions for enforcement were adjudicated by the ALJ at Board headquarters.)

[3] Includes 76 stay requests in whistleblower cases and 43 in non-whistleblower cases. (One of the stay requests was adjudicated by the ALJ at Board headquarters.)

[4] Covers decisions issued by ALJ; all are initial decisions except 1 recommended decision in a Hatch Act case. Case type breakdown: 5 OSC corrective actions (4 initial cases and 1 compliance case), 7 OSC disciplinary actions (5 Hatch Act and 2 non-Hatch Act), and 5 actions against ALJs.

[5] Includes 1 case reopened by the Board on its own motion and 2 cases where OPM requested reconsideration.

[6] Includes 237 consolidated cases.

[7] Covers final Board decisions. Case type breakdown: 6 OSC stays; 2 OSC corrective actions (1 enforcement case and 1 reopening), 5 OSC disciplinary actions (2 reopenings, 2 attorney fee cases, and 1 remand), 2 actions against ALJs, and 26 regulation review requests (including 6 court remands).

[8] In addition to the 1,868 cases closed by the Board with a final decision, there were 3 interlocutory appeals decided by the Board in FY 2000. Interlocutory appeals typically raise difficult issues or issues not previously addressed by the Board.

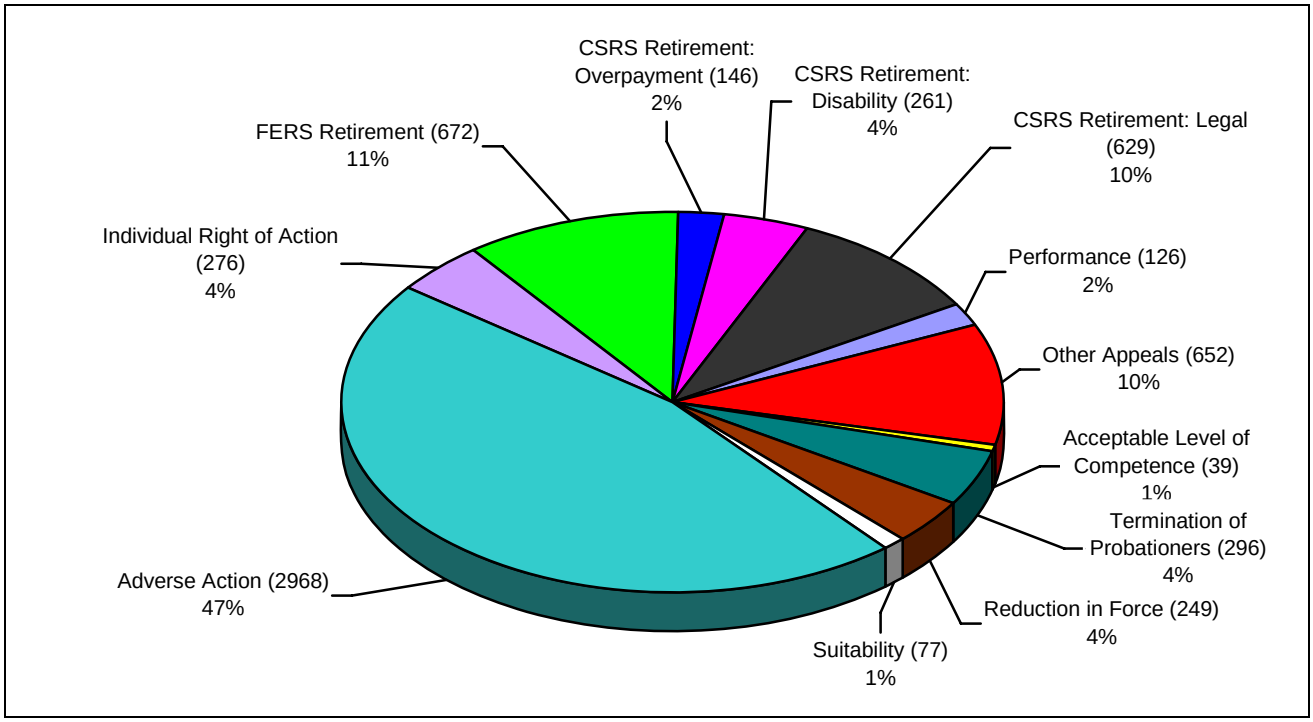
# Regional Decisions

## DISPOSITION OF INITIAL APPEALS DECIDED IN FY 2000 BY TYPE OF CASE

| Type of Case | Decided | Dismissed | | Not Dismissed | | Settled | | Adjudicated | |
|---|---|---|---|---|---|---|---|---|---|
| Adverse Action by Agency | 2968 | 1346 | 45% | 1622 | 55% | 1113 | 69% | 509 | 31% |
| Termination of Probationers | 296 | 266 | 90% | 30 | 10% | 28 | 93% | 2 | 7% |
| Reduction in Force | 249 | 129 | 52% | 120 | 48% | 46 | 38% | 74 | 62% |
| Performance | 126 | 22 | 17% | 104 | 83% | 70 | 67% | 34 | 33% |
| Acceptable Level of Competence (WIGI) | 39 | 22 | 56% | 17 | 44% | 13 | 76% | 4 | 24% |
| Suitability | 77 | 18 | 23% | 59 | 77% | 36 | 61% | 23 | 39% |
| CSRS Retirement: Legal | 629 | 289 | 46% | 340 | 54% | 15 | 4% | 325 | 96% |
| CSRS Retirement: Disability | 261 | 118 | 45% | 143 | 55% | 28 | 20% | 115 | 80% |
| CSRS Retirement: Overpayment | 146 | 54 | 37% | 92 | 63% | 58 | 63% | 34 | 37% |
| FERS Retirement | 672 | 256 | 38% | 416 | 62% | 195 | 47% | 221 | 53% |
| Individual Right of Action | 276 | 177 | 64% | 99 | 36% | 56 | 57% | 43 | 43% |
| Other | 652 | 560 | 86% | 92 | 14% | 58 | 63% | 34 | 37% |
| **Total** | **6391** | **3257** | **51%** | **3134** | **49%** | **1716** | **55%** | **1418** | **45%** |

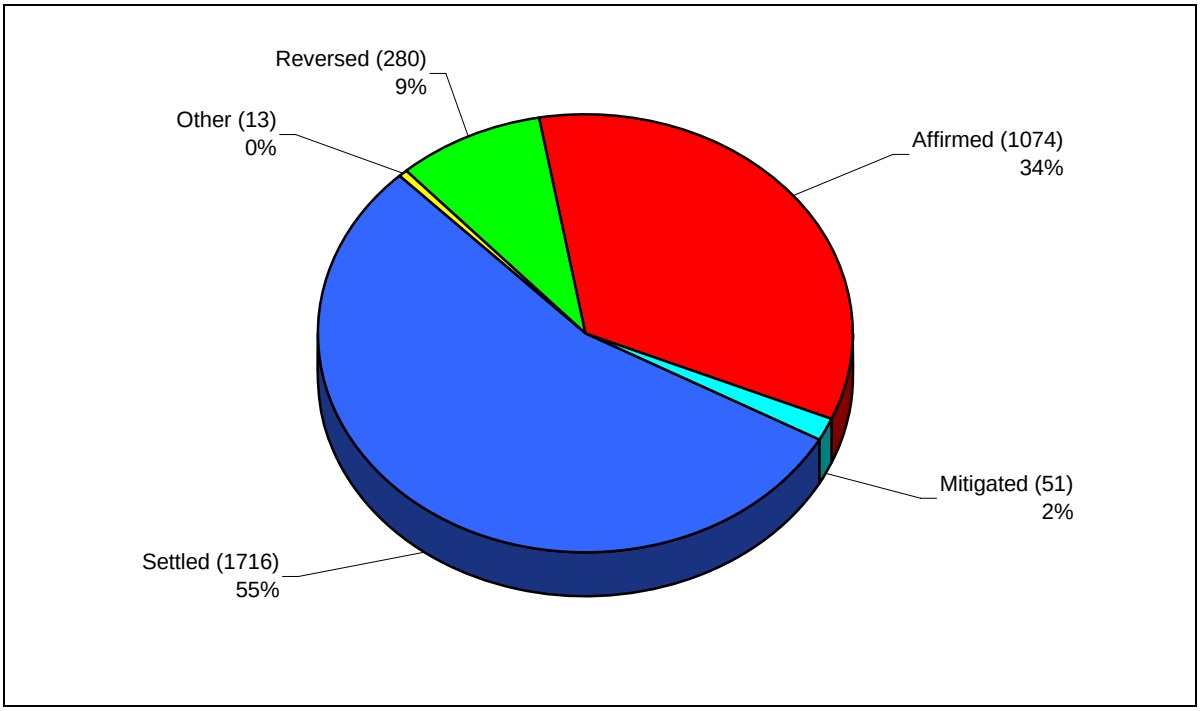
**Dismissed** and **Not Dismissed** columns are percentage of **Decided** column
**Settled** and **Adjudicated** columns are percent of **Not Dismissed** column

## TYPES OF INITIAL APPEALS DECIDED IN FY 2000



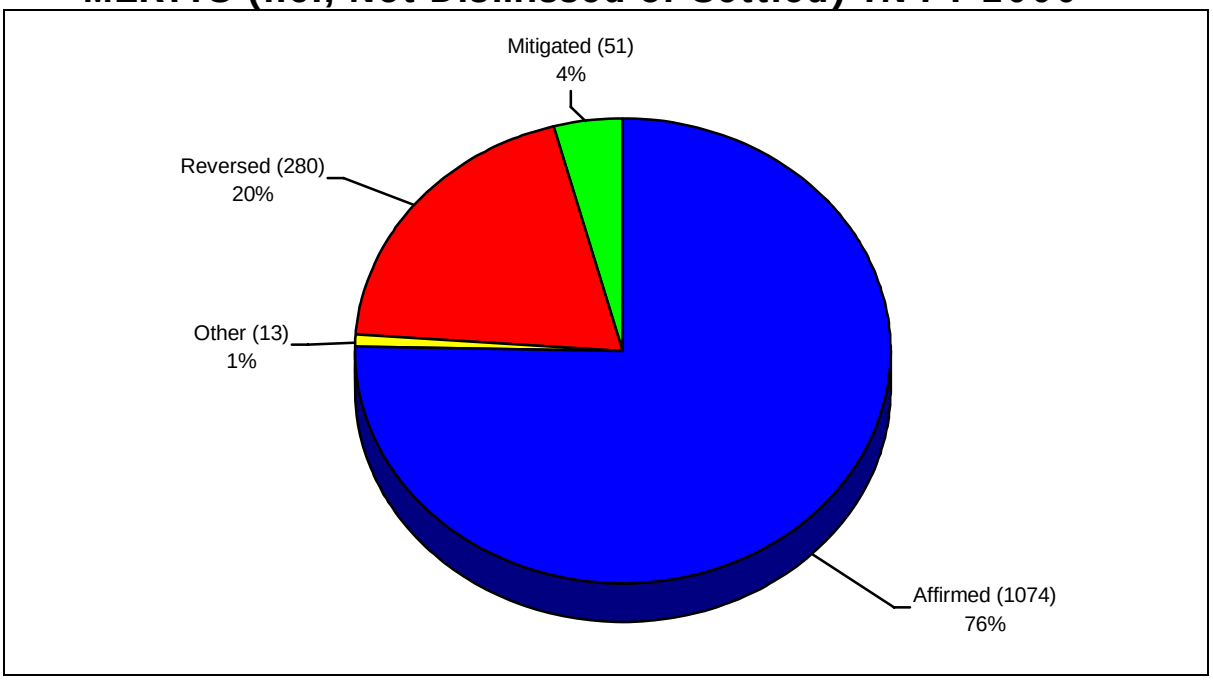

Total Number of Initial Appeals: 6,391

## DISPOSITION OF INITIAL APPEALS IN FY 2000 THAT WERE NOT DISMISSED




Total Number of Initial Appeals that were Not Dismissed: 3,134

## DISPOSITION OF INITIAL APPEALS ADJUDICATED ON THE MERITS (i.e., Not Dismissed or Settled) IN FY 2000




Based on 1,418 initial appeals adjudicated on the merits
(Percentages do not total 100% because of rounding)

## INITIAL APPEALS DECIDED IN FY 2000 BY AGENCY

| | Decided | Dismissed[1] | | Not Dismissed | | Settled[2] | | Adjudicated | |
|---|---|---|---|---|---|---|---|---|---|
| OPM * | 1491 | 587 | 39.4% | 904 | 60.6% | 261 | 28.9% | 643 | 71.1% |
| Postal Service | 1326 | 730 | 55.1% | 596 | 44.9% | 422 | 70.8% | 174 | 29.2% |
| Veterans Affairs | 569 | 323 | 56.8% | 246 | 43.2% | 161 | 65.4% | 85 | 34.6% |
| Navy | 475 | 222 | 46.7% | 253 | 53.3% | 162 | 64.0% | 91 | 36.0% |
| Army | 396 | 193 | 48.7% | 203 | 51.3% | 118 | 58.1% | 85 | 41.9% |
| Justice | 349 | 221 | 63.3% | 128 | 36.7% | 82 | 64.1% | 46 | 35.9% |
| Treasury | 316 | 164 | 51.9% | 152 | 48.1% | 82 | 53.9% | 70 | 46.1% |
| Defense | 293 | 140 | 47.8% | 153 | 52.2% | 89 | 58.2% | 64 | 41.8% |
| Air Force | 271 | 146 | 53.9% | 125 | 46.1% | 83 | 66.4% | 42 | 33.6% |
| Interior | 168 | 106 | 63.1% | 62 | 36.9% | 44 | 71.0% | 18 | 29.0% |
| Agriculture | 138 | 85 | 61.6% | 53 | 38.4% | 46 | 86.8% | 7 | 13.2% |
| Health, Human Servs. | 74 | 34 | 45.9% | 40 | 54.1% | 31 | 77.5% | 9 | 22.5% |
| Commerce | 69 | 48 | 69.6% | 21 | 30.4% | 14 | 66.7% | 7 | 33.3% |
| Transportation | 68 | 46 | 67.6% | 22 | 32.4% | 15 | 68.2% | 7 | 31.8% |
| Social Security | 68 | 38 | 55.9% | 30 | 44.1% | 19 | 63.3% | 11 | 36.7% |
| GSA | 58 | 24 | 41.4% | 34 | 58.6% | 13 | 38.2% | 21 | 61.8% |
| Labor | 42 | 24 | 57.1% | 18 | 42.9% | 15 | 83.3% | 3 | 16.7% |
| Energy | 23 | 14 | 60.9% | 9 | 39.1% | 4 | 44.4% | 5 | 55.6% |
| EPA | 23 | 12 | 52.2% | 11 | 47.8% | 8 | 72.7% | 3 | 27.3% |
| TVA | 23 | 20 | 87.0% | 3 | 13.0% | 3 | 100.0% | 0 | .0% |
| HUD | 16 | 13 | 81.3% | 3 | 18.8% | 2 | 66.7% | 1 | 33.3% |
| National Credit Union Adm. | 15 | 5 | 33.3% | 10 | 66.7% | 3 | 30.0% | 7 | 70.0% |
| FEMA | 10 | 4 | 40.0% | 6 | 60.0% | 3 | 50.0% | 3 | 50.0% |
| NASA | 10 | 5 | 50.0% | 5 | 50.0% | 5 | 100.0% | 0 | .0% |
| SBA | 9 | 5 | 55.6% | 4 | 44.4% | 4 | 100.0% | 0 | .0% |
| GPO | 8 | 6 | 75.0% | 2 | 25.0% | 1 | 50.0% | 1 | 50.0% |
| Smithsonian | 8 | 3 | 37.5% | 5 | 62.5% | 5 | 100.0% | 0 | .0% |
| FDIC | 7 | 3 | 42.9% | 4 | 57.1% | 2 | 50.0% | 2 | 50.0% |
| EEOC | 6 | 3 | 50.0% | 3 | 50.0% | 1 | 33.3% | 2 | 66.7% |
| NLRB | 6 | 5 | 83.3% | 1 | 16.7% | 1 | 100.0% | 0 | .0% |
| SEC | 6 | 1 | 16.7% | 5 | 83.3% | 5 | 100.0% | 0 | .0% |
| Broadcasting Bd. of Governors | 4 | 2 | 50.0% | 2 | 50.0% | 1 | 50.0% | 1 | 50.0% |
| Education | 4 | 2 | 50.0% | 2 | 50.0% | 2 | 100.0% | 0 | .0% |
| Other | 4 | 1 | 25.0% | 3 | 75.0% | 1 | 33.3% | 2 | 66.7% |
| Export-Import Bank | 3 | 0 | 0.0% | 3 | 100.0% | 1 | 33.3% | 2 | 66.7% |
| FCC | 3 | 1 | 33.3% | 2 | 66.7% | 1 | 50.0% | 1 | 50.0% |

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

*Of the 1,491 appeals in which OPM was the agency, 1,417 were retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

[1] Percentages in columns "Dismissed" and "Not Dismissed" are of "Decided."
[2] Percentages in columns "Settled" and "Adjudicated" are of "Not Dismissed."

## INITIAL APPEALS DECIDED IN FY 2000 BY AGENCY (continued)

| | Decided | Dismissed[1] | | Not Dismissed | | Settled[2] | | Adjudicated | |
|---|---|---|---|---|---|---|---|---|---|
| NARA | 3 | 1 | 33.3% | 2 | 66.7% | 1 | 50.0% | 1 | 50.0% |
| Adm. Office, US Courts | 2 | 2 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| Boundary & Water Comm., US & Mexico | 2 | 1 | 50.0% | 1 | 50.0% | 1 | 100.0% | 0 | .0% |
| CPSC | 2 | 2 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| State | 2 | 1 | 50.0% | 1 | 50.0% | 1 | 100.0% | 0 | .0% |
| District of Columbia | 2 | 2 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| Merit Systems Protection Bd | 2 | 2 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| Soldiers' & Airmen's Home | 2 | 1 | 50.0% | 1 | 50.0% | 1 | 100.0% | 0 | .0% |
| ACTION | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| Chemical Safety/Hazard Investigation Board | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| CIA | 1 | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 1 | 100.0% |
| Federal Housing Finance Bd | 1 | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 1 | 100.0% |
| Federal Trade Comm. | 1 | 0 | 0.0% | 1 | 100.0% | 1 | 100.0% | 0 | .0% |
| James Madison Memorial Fellowship Foundation | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| NRC | 1 | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 1 | 100.0% |
| Panama Canal Comm | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| Peace Corps | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| Pension Benefit Guaranty Corp. | 1 | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 1 | 100.0% |
| Railroad Retirement Board | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| SSS | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| Tax Court | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| US Internat'l Develpmnt Agy | 1 | 0 | 0.0% | 1 | 100.0% | 1 | 100.0% | 0 | .0% |
| US Botanic Garden | 1 | 1 | 100.0% | 0 | .0% | 0 | 0.0% | 0 | .0% |
| TOTAL | 6391 | 3257 | 51.0% | 3134 | 49.0% | 1716 | 54.8% | 1418 | 45.2% |

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

[1] Percentages in columns "Dismissed" and "Not Dismissed" are of "Decided."
[2] Percentages in columns "Settled" and "Adjudicated" are of "Not Dismissed."

## INITIAL APPEALS ADJUDICATED* IN FY 2000 BY AGENCY

| | Adjudicated | Affirmed | | Reversed | | Mitigated/Modified | | Other | |
|---|---|---|---|---|---|---|---|---|---|
| OPM | 643 | 482 | 75.0% | 144 | 22.4% | 4 | .6% | 13 | 2.0% |
| Postal Service | 174 | 115 | 66.1% | 39 | 22.4% | 20 | 11.5% | 0 | .0% |
| Veterans Affairs | 85 | 71 | 83.5% | 9 | 10.6% | 5 | 5.9% | 0 | .0% |
| Navy | 91 | 63 | 69.2% | 27 | 29.7% | 1 | 1.1% | 0 | .0% |
| Army | 85 | 68 | 80.0% | 14 | 16.5% | 3 | 3.5% | 0 | .0% |
| Justice | 46 | 35 | 76.1% | 7 | 15.2% | 4 | 8.7% | 0 | .0% |
| Treasury | 70 | 58 | 82.9% | 6 | 8.6% | 6 | 8.6% | 0 | .0% |
| Defense | 64 | 59 | 92.2% | 5 | 7.8% | 0 | .0% | 0 | .0% |
| Air Force | 42 | 27 | 64.3% | 11 | 26.2% | 4 | 9.5% | 0 | .0% |
| Interior | 18 | 12 | 66.7% | 4 | 22.2% | 2 | 11.1% | 0 | .0% |
| Agriculture | 7 | 6 | 85.7% | 1 | 14.3% | 0 | .0% | 0 | .0% |
| Health, Human Servs. | 9 | 7 | 77.8% | 2 | 22.2% | 0 | .0% | 0 | .0% |
| Commerce | 7 | 7 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Transportation | 7 | 2 | 28.6% | 5 | 71.4% | 0 | .0% | 0 | .0% |
| Social Security | 11 | 8 | 72.7% | 3 | 27.3% | 0 | .0% | 0 | .0% |
| GSA | 21 | 20 | 95.2% | 0 | .0% | 1 | 4.8% | 0 | .0% |
| Labor | 3 | 3 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Energy | 5 | 4 | 80.0% | 0 | .0% | 1 | 20.0% | 0 | .0% |
| EPA | 3 | 3 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| TVA | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| HUD | 1 | 1 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| National Credit Union Adm. | 7 | 6 | 85.7% | 1 | 14.3% | 0 | .0% | 0 | .0% |
| FEMA | 3 | 3 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| NASA | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| SBA | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| GPO | 1 | 1 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Smithsonian | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| FDIC | 2 | 2 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| EEOC | 2 | 2 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| NLRB | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| SEC | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Broadcasting Bd. of Governors | 1 | 1 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Education | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Other | 2 | 2 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Export-Import Bank | 2 | 1 | 50.0% | 1 | 50.0% | 0 | .0% | 0 | .0% |
| FCC | 1 | 1 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |

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

* ADJUDICATED means adjudicated on the merits, i.e., not dismissed or settled.

## INITIAL APPEALS ADJUDICATED* IN FY 2000 BY AGENCY (continued)

| | Adjudicated | Affirmed | | Reversed | | Mitigated/Modified | | Other | |
|---|---|---|---|---|---|---|---|---|---|
| NARA | 1 | 1 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Adm. Office, US Courts | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Boundary & Water Comm., US & Mexico | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| CPSC | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| State | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| District of Columbia | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Merit Systems Protection Bd | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Soldiers' & Airmen's Home | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| ACTION | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Chemical Safety/Hazard Investigation Board | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| CIA | 1 | 1 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Federal Housing Finance Bd | 1 | 1 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Federal Trade Comm. | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| James Madison Memorial Fellowship Foundation | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| NRC | 1 | 0 | .0% | 1 | 100.0% | 0 | .0% | 0 | .0% |
| Panama Canal Comm | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Peace Corps | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Pension Benefit Guaranty Corp. | 1 | 1 | 100.0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Railroad Retirement Board | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| SSS | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| Tax Court | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| US Internat'l Develpmnt Agy | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| US Botanic Garden | 0 | 0 | .0% | 0 | .0% | 0 | .0% | 0 | .0% |
| TOTAL | 1418 | 1074 | 75.7% | 280 | 19.7% | 51 | 3.6% | 13 | .9% |

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

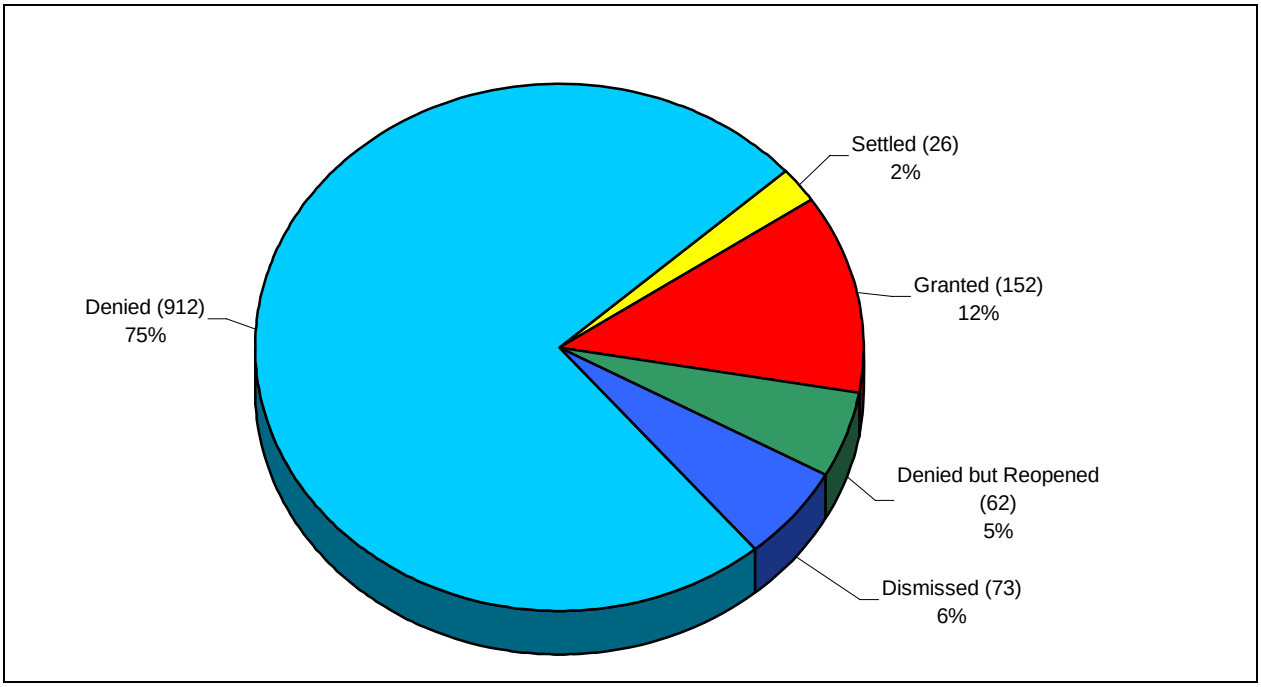
* ADJUDICATED means adjudicated on the merits, i.e., not dismissed or settled.

# Headquarters Decisions

## DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DECIDED IN FY 2000 BY TYPE OF CASE

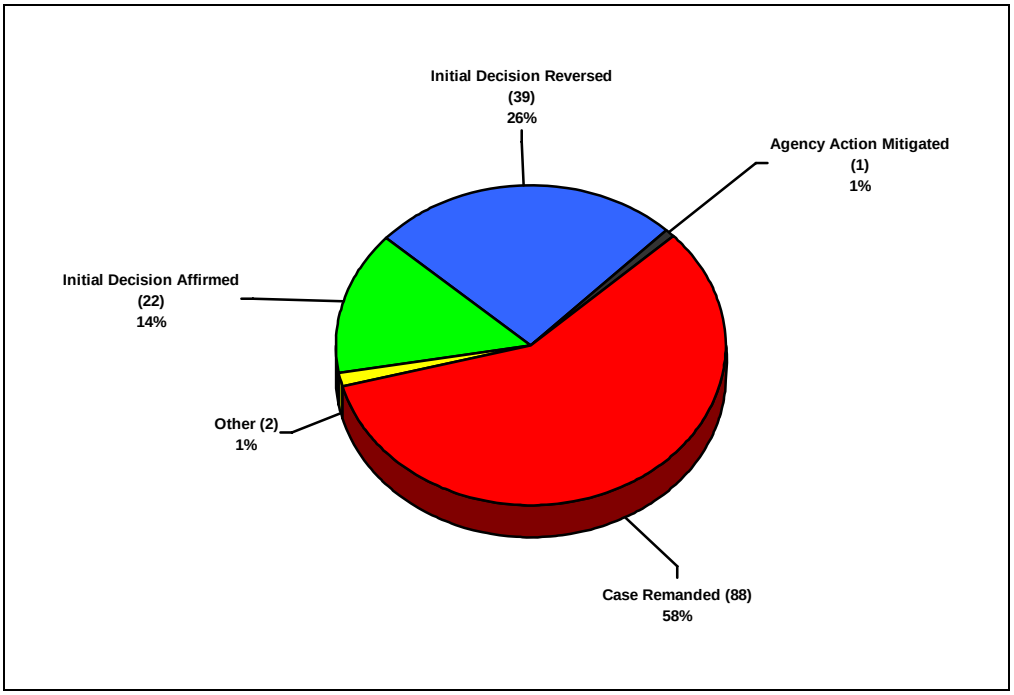
| Type of Case | Decided | Dismissed | | Settled | | Denied | | Denied/Reopened | | Granted | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Adverse Action by Agency | 572 | 37 | 6.5% | 10 | 1.8% | 438 | 76.6% | 27 | 4.7% | 60 | 10.5% |
| Termination of Probationers | 38 | 0 | 0.0% | 6 | 15.8% | 29 | 76.3% | 1 | 2.6% | 2 | 5.3% |
| Reduction in Force | 66 | 4 | 6.1% | 1 | 1.5% | 51 | 77.3% | 3 | 4.6% | 7 | 10.6% |
| Performance | 22 | 2 | 9.1% | 0 | 0.0% | 18 | 81.8% | 1 | 4.6% | 1 | 4.6% |
| Acceptable Level of Competence (WIGI) | 7 | 0 | 0.0% | 0 | 0.0% | 4 | 57.1% | 1 | 14.3% | 2 | 28.6% |
| Suitability | 15 | 1 | 6.7% | 0 | 0.0% | 14 | 93.3% | 0 | 0.0% | 0 | 0.0% |
| CSRS Retirement: Legal | 135 | 9 | 6.7% | 4 | 3.0% | 96 | 71.1% | 12 | 8.9% | 14 | 10.4% |
| CSRS Retirement: Disability | 43 | 0 | 0.0% | 0 | 0.0% | 35 | 81.4% | 2 | 4.7% | 6 | 14.0% |
| CSRS Retirement: Overpayment | 17 | 2 | 11.8% | 2 | 11.8% | 10 | 58.8% | 0 | 0.0% | 3 | 17.7% |
| FERS Retirement | 89 | 4 | 4.5% | 1 | 1.1% | 56 | 62.9% | 2 | 2.3% | 26 | 29.2% |
| Individual Right of Action | 76 | 3 | 4.0% | 1 | 1.3% | 54 | 71.1% | 2 | 2.6% | 16 | 21.1% |
| Other | 145 | 11 | 7.6% | 1 | 0.7% | 107 | 73.8% | 11 | 7.6% | 15 | 10.3% |
| **Total** | **1225** | **73** | **6.0%** | **26** | **2.1%** | **912** | **74.5%** | **62** | **5.1%** | **152** | **12.4%** |

## DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DECIDED IN FY 2000



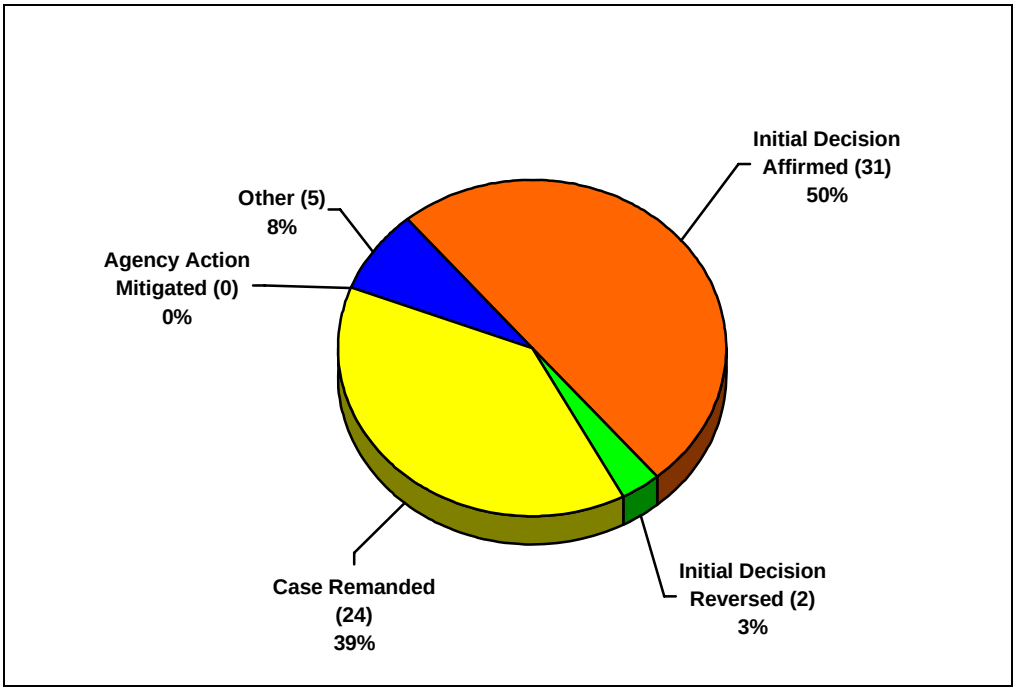

Total Number of Petitions for Review: 1,225

## DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS GRANTED IN FY 2000




Based on 152 Petitions for Review Granted

## DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DENIED BUT REOPENED IN FY 2000




Based on 62 Petitions for Review Denied But Reopened

# PETITIONS FOR REVIEW DECIDED IN FY 2000 BY AGENCY

| | Decided | Dismissed | | Settled | | Denied | | Denied/Reopened | | Granted | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| OPM | 259 | 15 | 5.8% | 7 | 2.7% | 199 | 76.4% | 15 | 5.8% | 23 | 8.9% |
| Postal Service | 243 | 18 | 7.4% | 3 | 1.2% | 178 | 73.3% | 17 | 7.0% | 27 | 11.1% |
| Navy | 130 | 9 | 6.9% | 2 | 1.5% | 87 | 66.9% | 5 | 3.9% | 27 | 20.1% |
| Army | 98 | 3 | 3.1% | 6 | 6.1% | 78 | 79.6% | 2 | 2.0% | 9 | 9.2% |
| Veterans Affairs | 86 | 4 | 4.7% | 1 | 1.2% | 58 | 67.4% | 3 | 3.5% | 20 | 23.3% |
| Defense | 62 | 2 | 3.2% | 1 | 1.6% | 46 | 74.2% | 2 | 3.2% | 11 | 17.7% |
| Air Force | 62 | 2 | 3.2% | 0 | 0.0% | 52 | 83.9% | 4 | 6.5% | 4 | 6.5% |
| Justice | 61 | 8 | 13.1% | 4 | 6.6% | 45 | 73.8% | 1 | 1.6% | 3 | 4.9% |
| Treasury | 56 | 2 | 3.6% | 1 | 1.8% | 39 | 69.6% | 3 | 5.4% | 11 | 19.6% |
| Interior | 26 | 3 | 11.5% | 0 | 0.0% | 18 | 69.2% | 4 | 15.4% | 1 | 3.9% |
| GSA | 22 | 1 | 4.6% | 0 | 0.0% | 17 | 77.3% | 2 | 9.1% | 2 | 9.1 |
| HHS | 19 | 2 | 10.5% | 0 | 0.0% | 11 | 57.9 | 0 | 0.0% | 6 | 31.6% |
| Agriculture | 17 | 0 | 0.0% | 0 | 0.0% | 16 | 94.1% | 1 | 5.9% | 0 | 0.0% |
| Social Security | 10 | 0 | 0.0% | 0 | 0.0% | 8 | 80.0% | 1 | 10.0% | 1 | 10.0% |
| Commerce | 9 | 0 | 0.0% | 0 | 0.0% | 8 | 88.9% | 0 | 0.0% | 1 | 11.1% |
| Energy | 9 | 1 | 11.1% | 0 | 0.0% | 8 | 88.9% | 0 | 0.0% | 0 | 0.0% |
| SBA | 7 | 0 | 0.0% | 0 | 0.0% | 7 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| HUD | 6 | 0 | 0.0% | 0 | 0.0% | 5 | 83.3% | 0 | 0.0% | 1 | 16.7% |
| Labor | 6 | 0 | 0.0% | 0 | 0.0% | 5 | 83.3% | 0 | 0.0% | 1 | 16.7% |
| Transportation | 4 | 0 | 0.0% | 0 | 0.0% | 2 | 50.0% | 2 | 50.0% | 0 | 0.0% |
| FDIC | 4 | 0 | 0.0% | 0 | 0.0% | 4 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| NASA | 4 | 0 | 0.0% | 1 | 25.0% | 1 | 25.0% | 0 | 0.0% | 2 | 50.0% |
| NARA | 3 | 0 | 0.0% | 0 | 0.0% | 2 | 66.7% | 0 | 0.0% | 1 | 33.3% |
| TVA | 3 | 0 | 0.0% | 0 | 0.0% | 2 | 66.7% | 0 | 0.0% | 1 | 33.3% |
| EPA | 2 | 1 | 50.0% | 0 | 0.0% | 1 | 50.0% | 0 | 0.0% | 0 | 0.0% |
| EEOC | 2 | 0 | 0.0% | 0 | 0.0% | 2 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| GPO | 2 | 0 | 0.0% | 0 | 0.0% | 2 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| Smithsonian | 2 | 1 | 50.0% | 0 | 0.0% | 1 | 50.0% | 0 | 0.0% | 0 | 0.0% |
| Broadcasting Board of Governors | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| Education | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| FEMA | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| Fed. Mediation & Conciliation Serv. | 1 | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% | 0 | 0.0% | 0 | 0.0% |
| Holocaust Memorial Council | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| Merit Systems Protection Bd. | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| Nuclear Regulatory Comm. | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| Other | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| Pension Benefit Guaranty Corp. | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| SEC | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| SSS | 1 | 0 | 0.0% | 0 | 0.0% | 1 | 100.0% | 0 | 0.0% | 0 | 0.0% |
| **TOTAL** | **1225** | **73** | **6.0%** | **26** | **2.1%** | **912** | **74.5%** | **62** | **5.1%** | **152** | **12.4%** |

# Merit Systems Studies

The following are summaries of the findings and recommendations from the reports issued by the Board during FY 2000:

*Restoring Merit to Federal Hiring: Why Two Special Hiring Programs Should be Ended*

This report addresses entry-level hiring for professional and administrative jobs in the Federal Government. It presents concerns about the potential harm to merit-based hiring that exists because of the continuing use of two non-competitive hiring mechanisms—the Outstanding Scholar and the Bilingual/Bicultural hiring authorities.

These two programs were created in 1981 by a Federal court consent decree that settled a lawsuit alleging that an employment test used at that time for more than 100 entry-level jobs had an adverse impact on African American and Hispanic job seekers. The programs were created to supplement competitive hiring procedures. The study found that the programs are no longer needed to achieve the goal of a representative workforce. However, despite the passage of two decades and the disappearance of employment conditions that originally gave rise to the programs, their use by Federal agencies persists.

The report shows that both of these special hiring programs conflict with the requirement of the first statutory merit system principle—that hiring be based on merit. Neither program has a mechanism that allows Federal employers to distinguish the best among the eligible job candidates.

The Outstanding Scholar Program permits the Government to hire non-competitively a college graduate who has a high baccalaureate grade point average or upper rank in class, without regard to that candidate's field of study or qualifications relative to other candidates. The Bilingual/Bicultural Program allows the Government to hire a candidate who meets only minimum job requirements if that candidate also has Spanish language ability or knowledge of Hispanic culture. Although these hiring programs may have contributed to the goal of ensuring a representative workforce in the past, competitive hiring today more effectively serves that objective within the more desirable context of hiring based on merit.

The report also provides evidence that the Outstanding Scholar Program has been misused in recent years by being used as a primary hiring method rather than as a supplement to competitive hiring. While its original intent was to increase the representation of African Americans and Hispanics in the Federal workforce, most agencies no longer use it for that purpose. Instead, the emphasis is on the program's use as an easy way to hire any college graduate with a 3.5 grade point average (GPA) even though college GPA, alone, is not a good predictor of job success. Finally, the report establishes that the terms of the consent decree—which was intended to operate only until the employment tests challenged in the 1981 lawsuit could be replaced—have

themselves become an impediment to the development of such tests. The availability of these two special non-competitive hiring programs, which offer managers speed, ease of use, and control over the hiring process, creates little incentive for agencies to use currently available competitive procedures or to develop new and better ones.

The report presents a case for ending the consent decree and the two hiring authorities it created. It further provides a series of recommendations that address the need for improvements in how the Government assesses candidates for jobs in entry-level professional and administrative positions.

*Competing for Federal Jobs: Job Search Experiences of New Hires*

This report focuses on the job search experiences of Federal employees who were hired competitively through Federal agencies' delegated examining units during the period June 1996 through December 1997. The report is based on a survey of nearly 2000 hires, and is a follow-up to the Board's August 1999 report, "The Role of Delegated Examining Units: Hiring New Employees in a Decentralized Civil Service."

The survey revealed that relatives and friends were the most common source of job information for the applicants (who later became employees). The majority of the new hires also said that although they had access to the Internet, only about half of them used it to search for Federal jobs and only 17 percent found the job for which they were hired on the Internet. In general, the new employees' responses to the Board's survey were fairly positive, suggesting that the agency examining units are doing a good job conducting most aspects of the examining process. Survey results indicate that applicants found applying for jobs to be generally easy and that hiring decisions were made within a reasonable period of time.

However, the survey results also suggest that there is room for improvement. The new hires felt that the time between submission of their applications and being called for an interview was too long, as was the time between being told they had the job and being able to report for work. Many of the new employees reported that during their job searches they seldom received timely feedback—and sometimes no feedback at all—about the status of their applications. This signals trouble for Federal agencies trying to hire good people in a competitive job market.

The report makes several recommendations to agencies and to OPM to address the problems identified by the survey. Because timeliness of hiring is a high priority for job applicants and for Federal managers, the Board recommends that agencies look for ways to expedite the hiring process. Agencies should also be sure that the staff who deal with job applicants are careful to treat them in accord with customer service standards, and that knowledgeable staff are readily available to address applicants' questions.

The Board also recommends that OPM and agencies improve vacancy announcements posted on the Internet to make them intelligible to applicants who are not well versed in

Federal terminology and the Federal hiring process. Vacancy announcements should be an effective recruiting tool that helps sell the Government as an employer of choice. The Board noted that electronic announcements accessible on the Internet should be visually appealing, informative, and easy to navigate. This is not currently the case with many of the vacancy announcements that appear on Federal web sites.

*Issues of Merit*

In addition to the major reports summarized above, the Board published five issues of its newsletter, *Issues of Merit*, in FY 2000. The following are some of the topics addressed:

*Handling poor performers*. Two important conclusions the Board has drawn from its work on this issue are that a relatively small percentage of poor performers can have a disproportionately large effect on an organization, and that Federal departments and agencies do not do a good enough job of confronting and resolving individual instances of poor performance.

*Merit-based hiring and special hiring programs*. During FY 2000, the Board updated the information gathered for the its report on special non-competitive hiring programs (described above). It found that more than a third of all hiring into entry-level professional and administrative jobs was still being done through the non-merit-based Outstanding Scholar and the Bilingual/Bicultural programs.

*Employee selection methods*. The Board has concluded that the Government needs better methods of assessing candidates. Federal agencies currently rely most heavily on methods (such as evaluation of training and experience) that are least likely to predict job performance. Methods that have greater predictive value (such as cognitive testing) are used much less frequently. The Board recommends that more attention be paid—and more resources devoted—to improving assessment devices.

*Alternative work schedules*. In an article titled "The Fallacy of Face Time," the Board discusses the attitudes of many managers and supervisors who resist flexible work arrangements, often evaluating their employees by the number of hours they are physically present in the workplace rather than their accomplishments or contributions toward organizational results.

*Quality of job candidates*. The Board found that human resources (HR) directors are evenly divided on the question of their agencies' ability to fill jobs with highly qualified candidates. Those who are satisfied with candidate quality credit the delegation of examining authority to agencies and the creation of a broader applicant pool made possible by Internet recruiting. Those HR directors who are unsatisfied with candidate quality cited their inability to offer competitive compensation packages. The Rule of Three, the manner in which veterans' preference is provided, and time-in-grade restrictions were also cited by HR directors as factors that make it difficult to hire top talent for Federal jobs.

*Workforce diversity and the minority/non-minority perception gap*. In an article titled "The Real Challenge of Workforce Diversity," the Board noted that the Government has made significant progress toward achieving workforce diversity in terms of minority and female representation. Even after the significant downsizing of the 1990s, the percentage of women and minority workers in every race/national origin category has steadily increased since 1990, with some of the largest percentage increases at the higher grade levels. Only Hispanics remain underrepresented in the Federal workforce. Despite these facts, however, there remains a significant and persistent disagreement between minority and non-minority employees over whether or not the workplace is free from blatant discrimination. Such divergent points of view can be damaging in a workforce where team efforts are critical.

*Federal career intern program*. An Executive Order issued in FY 2000 established the Federal Career Intern Program. Based on the its body of research on recruitment, selection, and workforce management practices, the Board published four suggestions for increasing the likelihood of success in the program: (1) start with a good applicant pool that is the result of recruitment efforts that do not cut corners; (2) use valid, merit-based screening and placement procedures; (3) use the 2-year excepted appointment period as an extension of the examining process; and (4) take intern career development seriously.

*Political activity among Federal employees*. The Board believed that an election year was an appropriate time to revisit the extent to which Federal employees were active in politics, especially given the easing of Hatch Act restrictions in 1993. A comparison of results from several editions of the Board's triennial "Merit Principles Survey" revealed that overall Federal worker participation in partisan politics remains relatively low.

*Family-friendly programs*. Results from the Board's latest "Merit Principles Survey" make it clear that family-friendly programs (e.g., flexible and compressed work schedules, job sharing, and sick leave for family care) are important to a large number of Federal workers. The Board noted that family-friendly policies are an important tool for Government employers who may not be able to offer salaries as attractive as their private sector counterparts. The Board suggested that Federal managers make family-friendly programs available to workers to the extent possible.

*Length of time to fill jobs*. It is widely believed that it takes too long to fill Federal jobs. Many supervisors attribute delays to their human resources offices. Data the Board collected for a study of merit promotion suggest that while it may be possible for human resources offices to improve their timeliness on recruitment and placement actions, supervisors may also need to adjust their expectations regarding how quickly a job can—or should—be filled. The Board noted in the article, "Length of Time to Fill Jobs: Expectations Are High—And Unmet," that more than half of the supervisors surveyed do not mind a lengthy hiring process if the result is a high quality employee.

# FY 2000 Financial Summary

**(Dollars in thousands)**

| **FINANCIAL SOURCES** | |
|---|---|
| Appropriations | $27,481 |
| Civil Service Retirement and Disability Trust Fund | 2,421 |
| Reimbursements | 4 |
| **Total Revenue** | **$28,913** |
| **OBLIGATIONS INCURRED** | |
| Personnel Compensation | $18,995 |
| Personnel Benefits | $3,450 |
| Benefits, Former Employees | 8 |
| Travel of Persons | 359 |
| Transportation of Things | 54 |
| Rental Payments to GSA | 1,839 |
| Communications, Utilities, and Miscellaneous Charges | 1,043 |
| Printing and Reproduction | 123 |
| Other Services | 2,820 |
| Supplies and Materials | 186 |
| Equipment | 989 |
| **Total Obligations Incurred** | **$29,866** |
| **Obligated Balance** | **$47** |

# For Additional Information

The MSPB World Wide Web site contains information about the Board and its functions, where to file an appeal, and how the Board's adjudicatory process works.

At the Web site, you can get Board regulations, appeal and PFR forms, important telephone and FAX numbers, and e-mail addresses for the headquarters, regional, and field offices.

Complete decisions from July 1, 1994, are available for downloading. The Web site also provides weekly Case Summaries—an easy way to keep up with changes in Board case law.

From the Web site, you can download recent Board reports and special studies on civil service issues.

The Board's Web site is **http://www.mspb.gov**.

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