

Merit Systems Protection Board Annual Report Fiscal Year 2005

April 2006

Foreword

In accordance with section 1206 of Title 5 United States Code, the Merit Systems Protection Board (MSPB or the Board) provides this annual report on the significant actions of the Board during FY 2005. This report includes summaries of the most significant Board and Court decisions issued during the year, case processing statistics, summaries of the Board's merit systems studies, summaries of the significant actions of the Office of Personnel Management (OPM), and a summary of financial results. In addition, where there have been significant activities since the end of the fiscal year, we provide updated information as a service to the reader.

Additional information about FY 2005 performance results and financial audit information is included in our separate Performance and Accountability Report (PAR). This Annual Report and the PAR as well as other information about the MSPB can be found on our Web site: www.mspb.gov.

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Fiscal Year 2005 in Review

Protecting merit in multiple alternative human capital management systems

The continued development of alternative human capital management policies and procedures was the most significant trend affecting the Federal merit systems in FY 2005. Among the most notable of these alternative systems are the ones in the Department of Homeland Security (DHS) and the Department of Defense (DoD). When these systems are fully implemented, almost 1 million Federal employees -- well over half of the Federal civilian workforce -- will be managed under alternative systems that could differ significantly from the traditional procedures contained in Title 5 of the United States Code.

The DHS and DoD laws include flexibilities in hiring, performance management, pay, and labor and employee relations. The laws also include provisions to alter their appeals procedures which are currently being reviewed by the courts. Regardless of the outcomes of this judicial review, the increase in the number of agency-specific systems increases the complexity of our adjudication work. The case law upon which decisions will be made for the employees in these agencies could change significantly. In addition, the case workload could change over time depending on DHS and DoD policies and

practices, as well as possible changes in personnel authorities at other agencies or Governmentwide.

The increase in alternative management systems will also impact our merit systems studies function as it increases the need for oversight and evaluation of new procedures. The DHS and DoD personnel authorities, like the flexibilities granted to other agencies in recent years, provide that the Title 5 provisions governing merit system principles and prohibited personnel practices may not be waived, modified, or otherwise affected. Therefore, there will be an even greater need for studies of these new personnel systems to ensure that they operate in accordance with merit principles and are free from prohibited personnel practices.

We will perform our role as chief protector of the Federal merit systems in accordance with the determinations made by the Congress and the President. We are confident that our experience in independently adjudicating appeals will continue to provide effective and efficient protection for the merit systems throughout the Federal government and assure the public of the Government's commitment to merit-based management and oversight of the civil service.

Board membership

The President and Congress took several actions in FY 2005 and early FY 2006 to complete the appointments of three Board members, providing MSPB with a full complement of Board members. On November 21, 2004, Neil A. G. McPhie was confirmed as Chairman and Barbara J. Sapin was confirmed as Member of the U.S. Merit Systems Protection Board. On June 23, 2005, the President nominated Mary M. Rose to serve as a Member of the Board and the Senate confirmed her nomination on December 17, 2005. On January 27, 2006, the President designated Member Rose as Vice Chairman of the Board.

Adjudication

The Board continued to decide appeals and petitions for review (PFRs) in accordance with the law and regulations governing such appeals. The Board continued to issue timely, high quality decisions on appeals in the regional and field offices. In addition, the Board significantly improved the timeliness of headquarters case processing, and reduced the inventory of pending cases at headquarters by almost half, while maintaining the quality of decisions at this level. The case processing statistics presented in this report give considerable information regarding the adjudication of cases filed with the Board. The Board continued to provide a full menu of dispute resolution options to its customers, including the successful operation of its settlement programs for appeals at the regional and field offices, and at headquarters. In addition, the Meditation Appeals Program (MAP) continued to grow with nearly 50 percent of selected cases successfully mediated. The Board continued to improve its automated appeals and case processing systems and the proportion of automated and Web-based appeals continued to increase.

This report also contains brief summaries of the most significant judicial and Board decisions made in FY 2005. Some of the more significant Board decisions addressed issues such as: the 'current continuous service' jurisdictional requirement, as it applies to seasonal and other categories of employees; the use of outstanding scholar appointments when preference eligibles' rights are involved; the assessment of credibility, over the appellant's objection, on the basis of a videoconference hearing; and, various issues related to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). In addition, a Special Panel consisting of the Chairman of the MSPB, the Chair of the Equal Employment Opportunity Commission (EEOC), and the appointed Chairman of the Special Panel heard and decided a case involving interpretation of administrative versus civil service law. The significant court opinions addressed issues such as the definition of 'gross mismanagement' as it applies in whistleblower cases; the Board's scope of review in appeals

from suitability determinations; and, who has appeal rights to the Board.

Merit systems studies

The Board completed six merit systems studies and issued reports on such issues as the probationary period, the Federal Career Intern Program (FCIP), and reference checking. The Board also completed data collection for the FY 2005 Merit Principles Survey (MPS)—the largest ever and first web-based survey administered to approximately 80,000 employees. The Board issued four editions of the *Issues of Merit* newsletter which included articles advocating merit systems and human capital management reform efforts, providing practical advice for human resources professionals and sharing specific analyses of ongoing studies.

Management support

The Board continued to effectively and efficiently manage its fiscal resources and human capital in support of its adjudication and studies missions. As a result, MSPB ranked 4th in the small agency and agency subcomponent category in the “Best Places to Work in the Federal Government 2005” with an overall score of 77.5—higher than the highest scoring “large agency” for the year.

Legislative activity

The FY 2005 appropriation for the Board was enacted on December 8, 2004 as part of the Consolidated Appropriations Act of 2005 (P.L. 108-447). The amount appropriated for the Board was \$34,677,000 plus up to \$2,626,000 in reimbursements from the Civil Service Retirement and Disability Fund. This amount was subject to a .8% rescission, which resulted in a \$277,416 reduction in the appropriations amount and a reduction of \$21,008 in the reimbursement limitation. The net funds available to the Board during FY 2005 were \$34,399,584 in appropriated funds and a reimbursement limitation of \$2,604,992, for a total of \$37,004,576.

The legislative activity for the Board during FY 2005 included briefing congressional staff and testifying at congressional hearings. At the request of the minority staff of the House Government Reform Subcommittee on the Federal Workforce and Agency Organization, the MSPB Chief of Staff, the General Counsel and the Legislative Counsel conducted a briefing for that staff on the Board's potential role in the employee appeals systems under development by the Department of Homeland Security and the Department of Defense. Chairman McPhie submitted a statement for the record in connection with the hearing conducted by the Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia. This Senate hearing was entitled: "Unlocking the Potential within Homeland Security: The New Human Resources System," and was held on February 10, 2005. On March 2, 2005, the Chairman testified before the House Government Reform Subcommittee on the Federal Workforce and Agency Organization during its hearing entitled: "The Countdown to Completion: Implementing The New Department of Homeland Security Personnel System." The Chairman also testified before the same subcommittee during its hearing entitled: "NSPS: the New Department of Defense Civilian Personnel System – Reaching Readiness," which was held on April 12, 2005.

Chairman McPhie met with Congressman Jon Porter, Chairman of the House Government Reform Subcommittee on the Federal Workforce and Agency Organization, in September 2005 to brief him further on the Board's missions and operations. In short, the Board engaged in an active schedule of congressional relations during FY 2005. We expect to continue this work during FY 2006.

Significant actions of the Office of Personnel Management

The Board is responsible for providing an independent, nonpartisan review of the actions of OPM to ensure that these actions conform with merit principles and do not result in prohibited personnel practices. The Board reviewed significant

policy actions of OPM ranging from drafting DHS proposed regulations and creating a framework for civil service reform to issuing SES pay and performance regulations and interim regulations for the No FEAR Act. OPM also completed its internal reorganization to better enable it to serve agencies. OPM and DoD also began discussions to effect the combination of military and civilian background investigations including the transfer of DoD investigators to OPM. In addition, OPM continued to provide valuable leadership and oversight regarding the human capital portion of the President's Management Agenda (PMA). Finally, OPM made progress on other governmentwide initiatives including e-Government programs and employee benefits.

Board Members and Board Organization

Board members

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

Chairman



NEIL A.G. McPHIE was confirmed as Chairman of the U.S. Merit Systems Protection Board on November 21, 2004. Mr. McPhie had served as Acting Chairman since December 10, 2003, when President Bush designated him to be Vice Chairman. He was sworn in as a member of the Board on April 23, 2003, following his recess appointment by President Bush. Chairman McPhie's term expires on March 1, 2009. Prior to joining the Board, he was Senior Assistant Attorney General in the Office of the Attorney General of Virginia. Among other responsibilities, he defended employment discrimination claims brought under Federal law and wrongful discharge claims brought under state law. Previously, he was Executive Director of the Virginia Department of Employment Dispute Resolution (EDR). In that position, he directed implementation of EDR's statewide grievance, mediation, training, and consultation programs. He

was an Assistant Attorney General in the Office of the Attorney General of Virginia from 1982 to 1988. From 1976 until he joined the Attorney General's Office, he was a Trial and Appellate Attorney in the Office of the General Counsel at the U.S. Equal Employment Opportunity Commission. He received his J.D. degree from Georgetown University Law Center in 1976. He received a B.A. in Economics from Howard University in 1973, graduating magna cum laude. He is a member of Phi Beta Kappa. He is admitted to the bars of the District of Columbia, Virginia, New York and Iowa, the United States Supreme Court, the United States District Court for the District of Columbia, several of the United States circuit courts of appeals, and district courts in Virginia.

Vice Chairman

MARY M. ROSE was nominated by President Bush to serve as a Member of the U.S. Merit Systems Board on June 23, 2005. On December 17, 2005, the Senate confirmed the nomination, and Mrs. Rose was sworn in as a Board Member on December 28, 2005. On January 27, 2006, the President designated Member Rose as Vice Chairman of the Board. Vice Chairman Rose's appointment will expire on March 1, 2011. Prior to joining the Merit Systems Protection Board, Mrs. Rose was appointed by the President to serve as Vice Chairman of the Federal Salary Council. She was Chairman of the Federal Prevailing Rate Advisory Committee where she advised the Director of the U.S. Office of Personnel Management on Federal pay, benefits, and other policy issues. Previously, Mrs. Rose served as Deputy Associate Director of the Office of Presidential Personnel at the White House. She served four years as the Elected Clerk of the Circuit Court, Anne Arundel, Maryland. Mrs. Rose has also served as Assistant Director for Executive Administration, Office of Personnel Management; Director of Personnel, White House Personnel Office; and Deputy Undersecretary for Management at the Department of Education. Her private sector experience includes positions as a Consultant with an Annapolis law firm and as a Visiting Fellow with The Heritage Foundation where she recruited, interviewed, and recommended Presidential appointments to the George W. Bush transition team. Mary M. Rose received an R.N. degree from the Bon Secours Hospital School of Nursing, and she completed the Maryland Registered Nurse



Recertification Program in May 2000. Ms. Rose is married to Philip D. Rose, M.D., and has four children.

Member



BARBARA J. SAPIN was confirmed as a Member of the Merit Systems Protection Board on November 21, 2004. Previously, Ms. Sapin served as Vice Chairman during a recess appointment (December 2000 – December 2001). Ms. Sapin's appointment will expire on March 1, 2007. Before joining the Merit Systems Protection Board, Ms. Sapin served in a number of labor and employment law related positions, including General Counsel and Labor Counsel to the American Nurses Association from 1990 to 2001. In addition, Ms. Sapin held several positions at the National Labor Relations Board from 1981 to 1990, including attorney for the Appellate Court Branch in Washington, D.C., field attorney in the Chicago Regional Office, and Senior Counsel to a Board Member. Prior to 1981, Ms. Sapin's Government service included positions with the Occupational Safety and Health Review Commission and the U.S. Environmental Protection Agency. Ms. Sapin received her B.A. in Psychology from Boston University and a Juris Doctorate from the Columbus School of Law, Catholic University of America. She is admitted to the District of Columbia and Maryland Bars.

Board offices and structure

The Board is divided into several functional offices organized according to its statutory missions to adjudicate appeals and conduct studies and the functions required to support these missions. In addition to its three appointed Board members, the Board has approximately 225 employees assigned to headquarters and other locations throughout the United States.

The Board Members adjudicate 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 the Administrative Law Judge (ALJ) adjudicates and issues initial or recommended decisions on petitions for corrective action and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board. (The functions of this office are currently performed by administrative law judges at the National Labor Relations Board with staff support from the MSPB headquarters legal offices under an interagency agreement.)

The Office of Appeals Counsel (OAC) conducts legal research and prepares proposed decisions for the Board in cases where a party, an intervenor, OPM, or the Special Counsel petitions for review of a judge's initial or recommended decision, and in most other cases decided by the Board. The office conducts the Board's PFR settlement program, prepares proposed decisions on 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 (OCB) receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's decisions and orders. The office serves as the Board's public information center, coordinates media relations, publishes public information, 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 systems, legal research programs, and the Government in the Sunshine Act program.

The Office of Equal Employment Opportunity (EEO) plans, implements, and evaluates the Board's equal employment

opportunity 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 (FAM) administers the budget, accounting, travel, time and attendance, procurement, property management, physical security, and general services functions of the Board, and manages the Board's financial audit function. It develops and coordinates internal management programs and projects, including review of internal controls agency-wide. It also administers the agency's cross-servicing agreements with the USDA's National Finance Center for payroll services and the Department of the Treasury's Bureau of the Public Debt for accounting services. In addition, the office provides oversight of the agency's human resources management function and administers the cross-servicing agreement with the U.S. Department of Agriculture's Business Services for human resources management services.

The Office of the General Counsel (OGC), 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 drafts regulations, conducts the Board's ethics program, manages investigations, and oversees audit functions in other Board offices.

The Office of Information Resources Management (IRM) develops, implements, and maintains the Board's automated information systems to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.

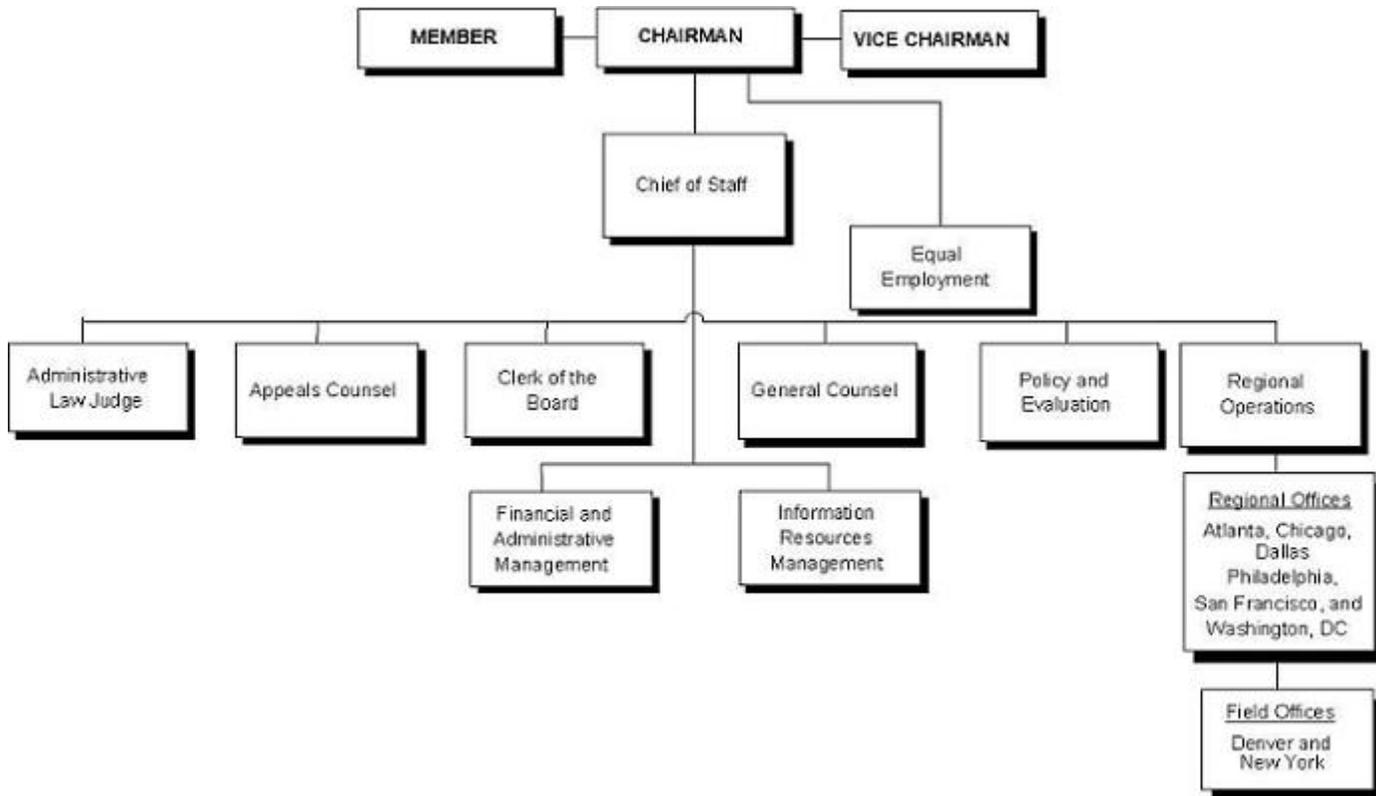
The Office of Policy and Evaluation (OPE) carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems. Reports of these

studies are directed to the President and the Congress and are distributed to a national audience. The office responds to requests from Federal agencies for information, advice, and assistance on issues that have been the subject of Board studies. OPE also conducts special projects for the Board and has responsibility for preparing the Board's reports required by the Government Performance and Results Act (GPRA).

The Office of Regional Operations (ORO) oversees the six MSPB regional and two field offices, which receive and process petitions for appeal 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.

Organization chart

Merit Systems Protection Board



Human Resources Management services are provided by USDA's Agricultural Plant and Health Inspection Service (APHIS) Business Services.

Payroll services are provided by USDA's National Finance Center.

Accounting services are provided by the Department of the Treasury's Bureau of the Public Debt.

Significant Board decisions and Court opinions issued in FY 2005

The Board issued a substantial number of noteworthy decisions in fiscal year 2005, several of which are summarized here. In addition, we include a summary of the decision issued by the Special Panel. As a service to our readers, we also present brief summaries of a number of significant opinions issued by the United States Court of Appeals for the Federal Circuit.

Significant Board decisions

In *Johnston v. Department of the Treasury*, 100 M.S.P.R. 78 (August 29, 2005), the Board ruled that a prevailing appellant in an individual right of action appeal is not entitled to consequential damages under 5 U.S.C. § 1221(g)(1)(A)(ii) for interest lost. This rule was applied to the appellant's requests for interest during the delay in granting her Voluntary Separation Incentive Plan payment, on her lump-sum payment for annual leave, for interest lost on loans she took, and on her own money she used during the period following her removal, as well as the individual retirement account early withdrawal penalty she incurred. The Board held that Congress intended a narrow construction of the term "consequential damages," that interest cannot be recovered against the government in the absence of an express waiver of sovereign immunity, and that consequential damages cover only items similar to the specific items listed in the statute, such as back pay and related benefits, medical costs incurred, and travel expenses.

The Board in *Bartels v. U.S. Postal Service*, 98 M.S.P.R. 280 (March 14, 2005), followed its decision in *Lloyd v. Small Business Administration*, 96 M.S.P.R. 518 (2004), finding that Board jurisdiction over a constructive removal appeal is established only upon proof of a constructive removal, and not merely by the assertion of a non-frivolous constructive removal claim. *Bartels* is noteworthy because it was issued by two of the Board's three current members, who expressed the view taken in the concurring opinion of then-Acting Chairman McPhie in *Lloyd*, and asked the U.S. Court of Appeals for the Federal Circuit to clarify its case law and determine whether *Cruz v. Department of the Navy*, 934 F.2d 1240 (Fed. Cir. 1991) (en banc), remains good law, or whether, as the two Board members would prefer, the full court will adopt the reasoning of the panel decision in *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 689 (Fed. Cir. 1992). In *Spruill*, the court found that the Board should take jurisdiction on a "well-pleaded complaint" based on a non-frivolous allegation of jurisdiction.

In another case involving jurisdiction, the Board in *Ellefson v. Department of the Army*, 98 M.S.P.R. 191 (February 28, 2005),

following the reasoning in *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144 (Fed. Cir. 1999), and *McCormick v. Department of the Air Force*, 307 F.3d 1339 (2002), *pet. for reh'g en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003), held that, if an appellant in the competitive service meets the condition of either subsection (i) or (ii) of 5 U.S.C. § 7511(a)(1)(A), he is an "employee" with Board appeal rights. The Board noted that § 7511(a)(1)(A)(ii) refers only to "current continuous service," with no requirement that such service must be in the same or similar positions, as set forth in subsections (B) and (C), and that the court in *McCormick* apparently did not construe "current continuous service" as requiring such service to be in the "same or similar positions." Thus, the Board held that current continuous service need not be in the same or similar positions in order for an individual in the competitive service to qualify as an "employee" under 5 U.S.C. § 7511(a)(1)(A)(ii). It also held that for competitive service employees, "current continuous service" means a period of employment or service immediately preceding an adverse action without a break in federal civilian employment of a workday.

Another case influenced by the court's decision in *McCormick, Gutierrez v. Department of the Treasury*, 99 M.S.P.R. 141 (July 12, 2005), decided an issue that had not previously been addressed, namely, whether an individual serving under a competitive service appointment as a seasonal employee whose appointment lasted more than one year, but who actually only worked for ten months due to periods in a nonduty, nonpay status, can be considered to have completed one year of current continuous service, thereby rendering her an "employee" with Board appeal rights under 5 U.S.C. § 7511(a)(1)(A)(ii). The Board found that, under that set of facts, the appellant was an "employee" because 5 C.F.R. §§ 340.401 and 340.402 provide that there is no break in Federal civilian employment when a seasonal employee is placed in a nonduty, nonpay status. Thus, a seasonal employee who is in a probationary period as a result of the extension of her probationary period for time spent in a nonpay, nonduty status

nonetheless meets the definition of an employee under § 7511(a)(1)(A)(ii) if she was on the rolls for more than one year. The Board reversed this appellant's termination because she did not receive the Constitutional minimum due process right to respond prior to her separation.

In a third decision applying *McCormick*, the Board in *Porter v. Department of Defense*, 98 M.S.P.R. 461 (March 25, 2005), affirmed the administrative judge's determination that the appellant was an "employee" with appeal rights from an adverse action and that her resignation amounted to a constructive removal. The Board noted that, under *McCormick*, an individual who is not an "employee" under 5 U.S.C. § 7511(a)(1)(A)(i) is nevertheless an "employee" if she meets the definition at 5 U.S.C. § 7511(a)(1)(A)(ii). It then rejected the argument, advanced by the agency, that *McCormick* should not be applied to the instant action because that action was appropriate and in accordance with the law when the appellant resigned. The Board found that *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), not *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), controls on the issue of retroactive application of a new court decision, and that under *Harper*, although *McCormick* announced a new rule of law, because the court applied that rule to the parties before it, all courts are obligated to treat it as "retroactive." As to the evidence that the appellant was informed of the agency's requirement that she serve a probationary period and accepted the position nonetheless, the Board held that, even if the appellant agreed to a period of probation, that would not change her status under *McCormick*. The Board found that, because the appellant was an "employee" but was told she was a probationer and would have no appeal rights to the Board from a termination, she relied on misleading information when she resigned. Accordingly, her resignation was involuntary and thus appealable.

Fourth and finally, the Board issued *Johnson v. Department of Veterans Affairs*, 99 M.S.P.R. 362 (August 12, 2005), which addressed the application of *McCormick* to temporary employees. The Board held that, when an appellant does not

have the type of appointment referred to in 5 U.S.C. § 7511(a)(1)(A)(i), because temporary appointees are not required to serve “a probationary or trial period,” she must have the requisite one year of current continuous service required by subsection (A)(ii) in order to have Board appeal rights. Otherwise, an unreasonable outcome would result because every temporary appointee would have tenure – the right to be removed only for cause and a right of appeal – beginning on the first day of work.

The Board in *Fulks v. Department of Defense*, 100 M.S.P.R. 228 (September 30, 2005), re-examined an issue that had become clouded over time. Specifically, the Board reaffirmed earlier decisions finding that mitigated penalties are inappropriate when they are “determined by accident,” i.e., by reference to the length of time taken by the appeal or other administrative review process, even if the adjudicators considered factors identified in *Douglas* as relevant to the penalty. To the extent that prior Board decisions were inconsistent with this reasoning, they were overruled. Because the arbitrator in this case had imposed a time-served suspension of over twenty months, his penalty setting was flawed, so the Board did not defer to it in mitigating the penalty to a 120-day suspension.

Lee and Wellein v. Department of Justice, and *Collins v. Department of Agriculture v. Department of Justice*, 99 M.S.P.R. 256 (July 15, 2005), arose as a result of the court’s decision in *Butterbaugh v. Department of Justice*, 336 F.3d 1332, 1343 (Fed. Cir. 2003), which held that federal employees had to take military leave under 5 U.S.C. § 6323(a) only for those days spent training with the military reserves on which they were otherwise required to work at their federal jobs. These cases arising under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) were certified as interlocutory appeals of the administrative judge’s ruling that the Back Pay Act, 5 U.S.C. § 5596(b)(4), limits the appellants’ recovery to compensation for losses incurred no more than six years before the date they filed their appeals. The Board, however, found that neither the Barring Act of 1940, 31 U.S.C. § 3702, nor OPM’s regulations implementing it,

limits the appellants' potential recovery in these appeals, and that the Back Pay Act also does not limit such recovery because USERRA itself provides authority to grant the relief sought, namely, compensation for "any loss of wages or benefits" caused by a violation of a substantive provision of USERRA.

In *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (August 5, 2005), the question presented was "whether the agency violated the appellant's veterans' preference rights under 5 U.S.C. §§ 3302, 3304(b) when it used the Outstanding Scholar Program, the product of a consent decree in a Title VII lawsuit [Luevano Consent Decree, 1981 WL 402614 (1981); *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981)(court order approving decree)] to select a nonpreference eligible who had not taken an examination for the position in question, rather than the appellant, a veteran, who was found qualified for the position under a competitive examination process." The Board answered the question in the affirmative. Absent specific legislation or Executive Order, rights accrue under the Veterans Employment Opportunities Act of 1998 when a statute "relating to veterans' preference" is violated; 5 U.S.C. § 3304(b), which provides that an individual may be appointed in the competitive service only if he has passed an examination or is specifically excepted from examination, "relat[es] to veterans preference" rights. Despite its role in advancing the goals of Title VII, the *Luevano* consent decree did not purport to create an exception that supersedes veterans' preference rights under the competitive process, so that the Outstanding Scholar Program cannot be relied upon to avoid the competitive examination process when veterans' rights are at issue, absent specific legislation or Executive Order, and the Board found no such specific exception. The Board further held that the appropriate remedy under 5 U.S.C. § 3303c is not retroactive appointment, but for the agency to comply with the applicable law. An award of compensation is to be made under the statute only if the person whose rights were violated would have been hired by the agency in the absence of that violation.

The Board in *Koehler v. Department of the Air Force*, 99 M.S.P.R. 82 (June 28, 2005), overruled the holding of *Crickard*

v. Department of Veterans Affairs, 92 M.S.P.R. 625 (2002), and similar cases that, absent a showing of good cause, an administrative judge may not hold a video hearing over the appellant's objection when the administrative judge will have to make credibility determinations. In so holding, the Board noted that, while under 5 U.S.C. § 7701(a)(1) an appellant who was subjected to an action that is appealable to the Board has "the right ... to a hearing for which a transcript will be kept," the statute does not mandate an unlimited entitlement to an in-person hearing. Videoconference hearings are less costly and still allow an appellant to "appear before" an administrative judge. The Board ruled that, subject to a case-by-case review for abuse of discretion, administrative judges may hold videoconference hearings in any case, regardless of whether the appellant objects. As to this appellant's request for an in-person hearing, which was based on her claim that the administrative judge was briefly out of camera range when she testified, the Board concluded that this failed to show that she was denied a fair and just adjudication when her hearing was held by videoconference.

In *Rawls v. U.S. Postal Service*, 98 M.S.P.R. 98 (December 1, 2004), the Board held that, while a valid indefinite suspension must have an ascertainable end, there is no basis for holding that an agency's failure to identify a condition subsequent explicitly in its decision notice warrants reversal of the suspension. Rather, the condition may be implicit from the circumstances of the case and the reason for the imposition of the suspension. The Board did not resolve whether the condition-subsequent requirement was substantive or procedural, holding that no harmful error was shown under the circumstances of the case.

In *Harding v. Department of Veterans Affairs*, 98 M.S.P.R. 296 (March 14, 2005), the Board (with Ms. Sapin dissenting) held that a physician, registered nurse, or other medical professional employed under the Department of Veterans Affairs' special appointing authorities, who is subjected to a major adverse action (such as removal) based on performance, has no right to appeal to the Board claiming that the action

was taken in retaliation for his or her whistleblowing. For the Board to take jurisdiction over such a case would interfere with the internal DVA body that Congress intended to have exclusive authority to consider administrative challenges to performance-based actions against DVA medical professionals.

Finally, in *Clavin v. U.S. Postal Service*, 99 M.S.P.R. 619 (September 14, 2005), the appellant brought an appeal claiming that the Postal Service violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), following his absence from civilian employment for active military duty. The parties seemed to disagree over just what part of USERRA covered the appellant's claim, and the Board took the opportunity to reiterate some important distinctions that had apparently become unclear. The Board explained that it can consider two main kinds of cases under USERRA: (i) Reemployment cases, in which the employee claims that an agency has not met its statutory obligations to return him to his former position or one of like seniority, status, and pay, following his absence from civilian employment to perform uniformed service; and (ii) what have come to be known by the shorthand label as "discrimination" cases, in which the appellant claims that an agency has taken one of seven actions specified in USERRA (e.g., denial of initial employment; denial of a promotion; retaliation) because of his performance of uniformed service or a related reason. The Board stated that these two kinds of cases differ in significant ways. First, an individual's rights under the reemployment provisions of USERRA do not depend on the motivation for an agency's action (or inaction), whereas an essential element of a discrimination claim is that the contested agency decision was based on an improper motivation. Second, in a reemployment case the agency bears the burden of proving that it met its statutory obligations, whereas in a discrimination case the appellant bears the burden of proof on the merits, and if that burden is met the agency can avoid relief by showing that it would have taken the same action in the absence of the improper motivation.

[Decision issued by the Special Panel](#)

In *Boots v. U.S. Postal Service*, 98 M.S.P.R. 268 (March 10, 2005), the appellant was removed from his position as a Tractor-Trailer Operator for medical inability to perform the essential duties of his position. The agency found him to be medically disqualified for a commercial driver's license under the regulations promulgated by the Federal Motor Carrier Safety Administration, U.S. Department of Transportation (DOT), in 49 C.F.R. part 391, and accompanying DOT guidance. The administrative judge affirmed the agency's action and found the appellant's claim of disability discrimination unsupported. The Board denied his petition for review of that initial decision, but on review, the Equal Employment Opportunity Commission (EEOC) disagreed, holding instead that the Postal Service was not bound by the DOT regulations, and that it should have conducted an individualized assessment of the appellant to determine whether he posed a direct threat that could not be eliminated or reduced by reasonable accommodation. It therefore remanded the case to the Board. In its decision, the Board found that EEOC misinterpreted civil service law in holding that the Postal Service's compliance with DOT regulations concerning the qualifications for a commercial driver's license was strictly voluntary. An agency is obligated to conform to the procedures it adopted, and here the Postal Service had adopted the DOT rules, as it was authorized to do. The case was therefore certified to the Special Panel pursuant to 5 U.S.C. § 7702(d)(1). In its decision, *Boots v. U.S. Postal Service*, 100 M.S.P.R. 513 (Spec. Pan. June 23, 2005), a majority of the Panel, with Board Chairman McPhie dissenting, adopted the EEOC's position. Using *Ignacio v. U.S. Postal Service*, 30 M.S.P.R. 471 (Spec. Pan. 1986), as guiding precedent, the Panel noted the limited circumstances in which the Board may disagree with EEOC. Contrary to the Board, it held that whether an agency is bound by the regulations it adopts may be a matter of general administrative law, but it is not inherently a matter of civil service law; that EEOC's decision did not, in fact, involve an interpretation of civil service law; and that it was not so unreasonable that it violated civil service law. Rather, although there is room for disagreement on the merits, a reasonable

basis for the EEOC decision does exist. Thus, the Panel ruled that EEOC's decision must prevail.

Significant opinions issued by the United States Court of Appeals for the Federal Circuit

***Czarkowski v. Merit Systems Protection Board*, 390 F.3d 1347 (Fed. Cir. Nov. 8, 2004)** Only the President or his lawful delegate may exempt an agency's employees from whistleblower review rights upon an explicit determination that the agency has as its principal function foreign intelligence or counter-intelligence activities.

***Conyers v. Merit Systems Protection Board*, 388 F.3d 1380 (Fed. Cir. Nov. 9, 2004), cert. denied, 125 S.Ct. 1360 (2005)** The Board does not have jurisdiction to adjudicate appeals from TSA screeners.

***White v. Department of the Air Force*, 391 F.3d 1377 (Fed. Cir. Dec. 15, 2004)** To show that a lawful agency policy constitutes 'gross mismanagement,' as that term is used in 5 U.S.C. § 2302(b)(8) and in the context of disclosures regarding agency policy, means such serious errors by the agency that a conclusion that the agency erred is not debatable among reasonable people. The Whistleblower Protection Act does not require that whistleblowers establish gross mismanagement by irrefragable proof.

***Moravec v. Office of Personnel Management*, 393 F.3d 1263 (Fed. Cir. Dec. 22, 2004); *Dowling v. Office of Personnel Management*, 393 F.3d 1260 (Fed. Cir. Dec. 22, 2004)** Active duty military service may not be counted toward a civilian annuity if the employee intended to make a career in the military after he left his civilian job. Congress' intent in enacting USERRA was to encourage non-career military service as opposed to career military service.

***Langston v. Office of Personnel Management*, 395 F.3d 1349 (Fed. Cir. Jan. 26, 2005)** Dependent children seeking student benefits under the Federal Employees' Retirement System

meet the “in residence” requirement if they are enrolled in a “full-time course of study” that requires some form of attendance at the learning institution.

Carson v. Department of Energy, 398 F.3d 1369 (Fed. Cir. March 1, 2005) A petition for enforcement is barred by claim preclusion when the claims could have been litigated as part of an earlier enforcement petition. Further, an enforcement petition cannot exceed the scope of relief awarded by the final decision in a successful individual right of action appeal.

Folio v. Department of Homeland Security, 402 F.3d 1350 (Fed. Cir. April 5, 2005) The Board has a broader scope of review in suitability determinations than merely reviewing the facts underlying the charges. The Board’s review of an agency’s suitability determination includes an evaluation of all of the criteria set forth at 5 C.F.R. § 731.202.

McEntee v. Merit Systems Protection Board, 404 F.3d 1320 (Fed. Cir. April 15, 2005), *cert. denied*, 126 S.Ct. 381 (2005) A federal employee’s participation in a nonpartisan election is presumed to be permissible under the Hatch Act. However, that presumption may be rebutted by evidence showing that partisan politics actually entered the campaign of a candidate (e.g., when a candidate and a major political party act in concert with each other).

Oja v. Department of the Army, 405 F.3d 1349 (Fed. Cir. April 28, 2005) The 60-day time limit for appealing an MSPB decision to the Federal Circuit is not subject to equitable tolling.

Tunik v. Merit Systems Protection Board, 407 F.3d 1326 (Fed. Cir. May 11, 2005) The Board may not repeal by adjudication its rule recognizing an action for “constructive” removal of administrative law judges because the rule was adopted pursuant to notice and comment rulemaking under the Administrative Procedures Act.

***Johnston v. Office of Personnel Management*, 413 F.3d 1339 (Fed. Cir. June 28, 2005), *modified*, 430 F.3d 1376 (Fed. Cir. Nov. 30, 2005)** The 1-year deadline for filing a disability retirement application after an employee has been separated may be waived if the agency has failed to provide notice that the employee has been terminated for medical reasons.

***Baker v. Department of Transportation*, 418 F.3d 1369 (Fed. Cir. Aug. 16, 2005)** It was harmful error for the Board not to consider the employee's challenge to the propriety of his discharge from a substance abuse treatment facility where his successful completion of the treatment program would have entitled him to retain his position at the agency.

***Thompson v. Merit Systems Protection Board*, 421 F.3d 1336 (Fed. Cir. Aug. 25, 2005), *petition for cert. filed* (U.S. Nov. 30, 2005) (No. 05-7916)** Only federal employees -- not contractors or employees of contractors -- have appeal rights to the Board. Even if a petitioner had been successful in obtaining a security clearance, he would have remained an employee of a contractor and would not have met the statutory definition of "employee."

***Stanley v. Department of Justice*, 423 F.3d 1271 (Fed. Cir. Sept. 9, 2005)** United States Trustees are excluded from the definition of "employee" pursuant to 5 U.S.C. § 7511(b) and, therefore, are not entitled to appeal to the Board from their dismissal.

FY 2005 Case Processing Statistics

Summary of cases decided by MSPB

Cases Decided in MSPB Regional/Field Offices RO/FOs:	
Appeals	6,337
Addendum Cases ¹	429
Stay Requests ²	58

TOTAL Cases Decided in RO/FOs	6,824
Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction³	23
Cases Decided by the Board:	
Appellate Jurisdiction:	
Petitions for Review (PFRs) – Appeals	1,383
Petitions for Review (PFRs) – Addendum Cases	130
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	2
Reopenings ⁴	4
Court Remands	8
Compliance Referrals	31
EEOC Non-concurrence Cases ⁵	2
Arbitration Cases	9
Subtotal – Appellate Jurisdiction	1,569
Original Jurisdiction ⁶	13
Interlocutory Appeals	11
TOTAL Cases Decided by the Board	1,593
TOTAL Cases Decided (Board, ALJs, RO/FOs)	8,440

FOOTNOTES TO TABLE

1. Includes 107 requests for attorney fees, 4 requests for compensatory damages (discrimination cases only), 3 requests for consequential damages (whistleblower cases only), 212 petitions for enforcement, 89 Board remand cases, and 14 court remand cases.
2. Includes 38 stay requests in whistleblower cases and 20 in non-whistleblower cases.
3. Initial Decisions issued by ALJ. Case type breakdown: 2 OSC corrective actions, 2 non-Hatch Act disciplinary actions; 14 Hatch Act cases; and 5 actions against ALJs.
4. In the absence of a petition for review, 2 cases were reopened by the Board on its own motion and OPM requested reconsideration in 2 cases.
5. Includes one Special Panel decision.
6. Final Board decisions. Case type breakdown: 6 OSC initial stay requests, 3 PFRs in an action against an ALJ, 1 request for regulation review, and 3 Hatch Act cases.

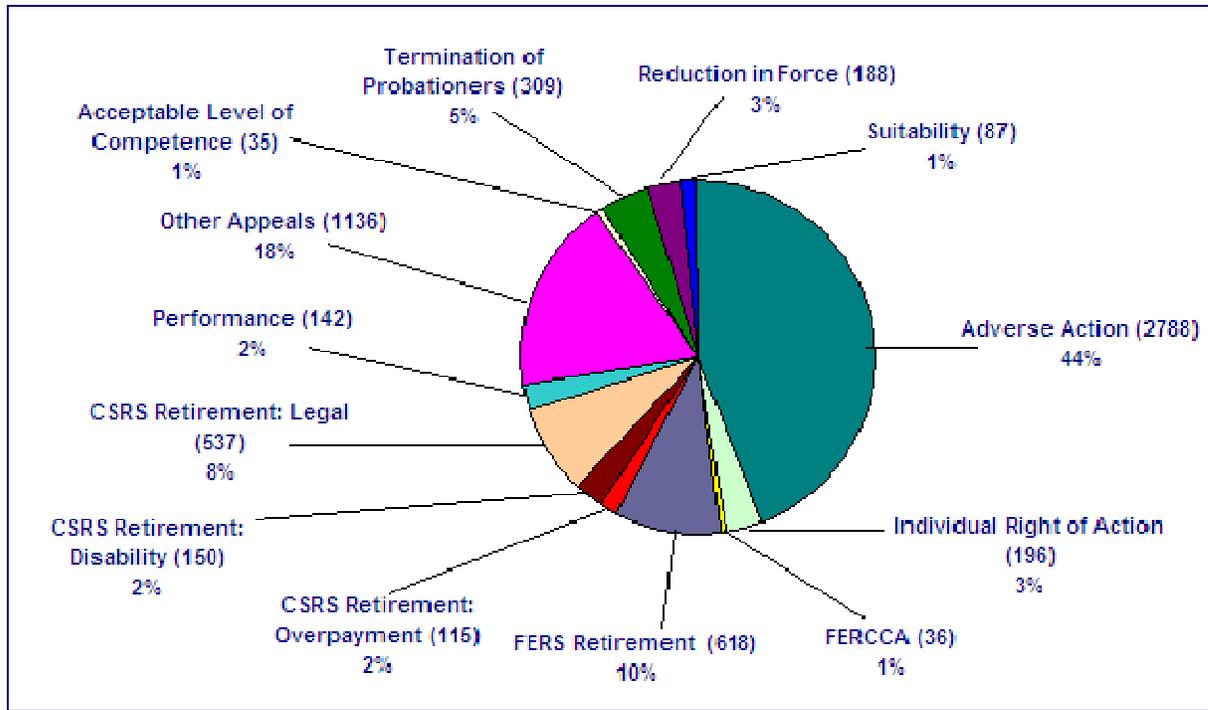
Regional case processing

DISPOSITION OF INITIAL APPEALS DECIDED IN FY 2005 BY TYPE OF CASE

Type of Case	Decided	Dismissed	Not Dismissed		Settled	Adjudicated			
Adverse Action by Agency	2788	1268	45%	1520	55%	1018	67%	502	33%
Termination of Probationers	309	277	90%	32	10%	29	91%	3	9%
Reduction in Force	188	144	77%	44	23%	20	45%	24	55%
Performance	142	29	20%	113	80%	73	65%	40	35%
Acceptable Level of Competence (WIGI)	35	16	46%	19	54%	14	74%	5	26%
Suitability	87	26	30%	61	70%	37	61%	24	39%
CSRS Retirement: Legal	537	224	42%	313	58%	15	5%	298	95%
CSRS Retirement: Disability	150	81	54%	69	46%	3	4%	66	96%
CSRS Retirement: Overpayment	115	33	29%	82	71%	50	61%	32	39%
FERS Retirement	618	295	48%	323	52%	93	29%	230	71%
FERCCA	36	23	64%	13	36%	2	15%	11	85%
Individual Right of Action	196	142	72%	54	28%	28	52%	26	48%
Other	1136	791	70%	345	30%	268	78%	77	22%
Total	6337	3349	53%	2988	47%	1650	55%	1338	45%

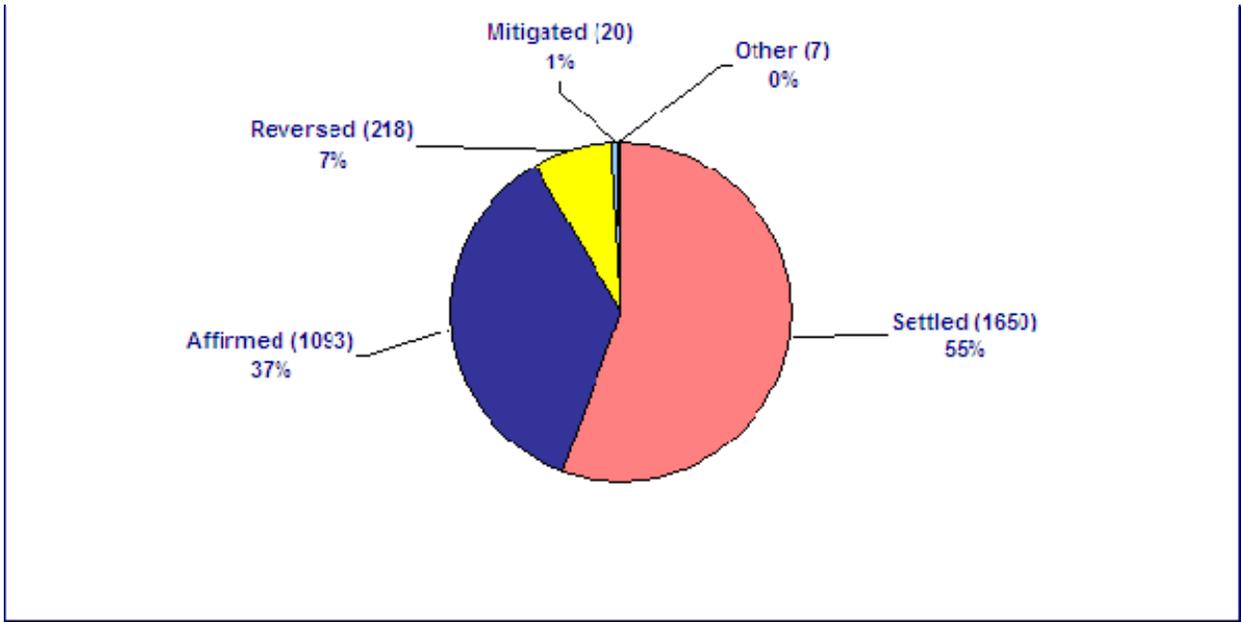
1. Dismissed and Not Dismissed columns are percentages of Decided column.
2. Settled and Adjudicated columns are percentages of Not Dismissed column.

TYPES OF INITIAL APPEALS DECIDED IN FY 2005 [[Text](#)]



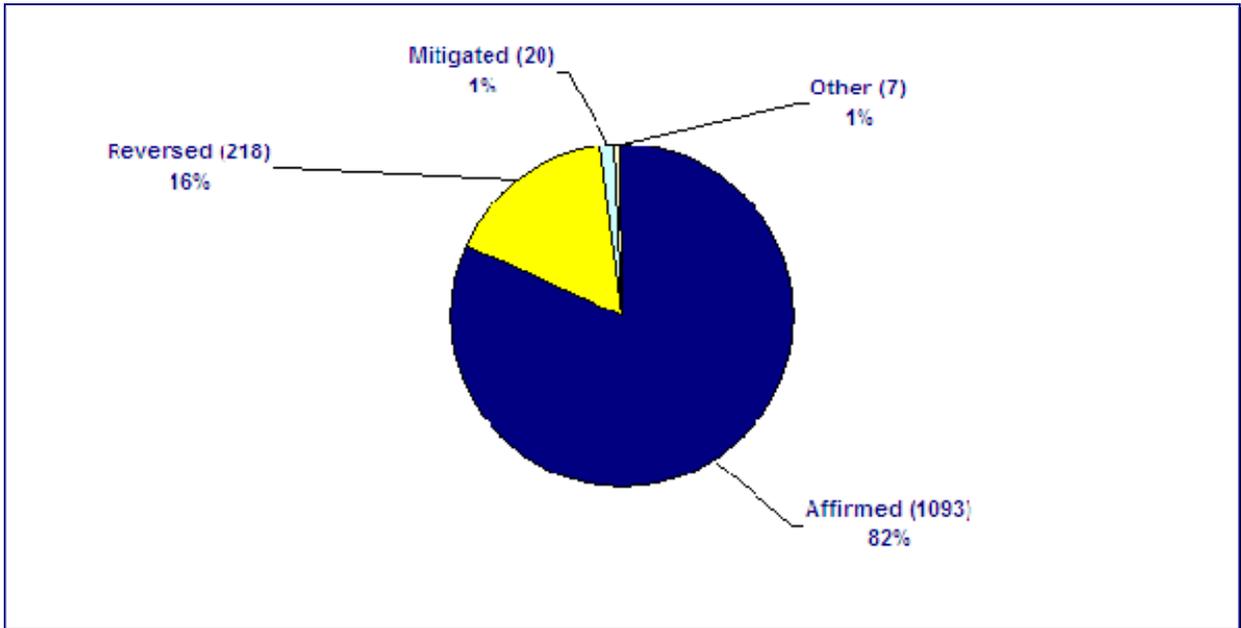
Total Number of Appeals: 6,337 (Percentages do not total 100 because of rounding)

DISPOSITION OF INITIAL APPEALS IN FY 2005 THAT WERE NOT DISMISSED [\[Text\]](#)



Total Number of Appeals that were Not Dismissed: 2,988

DISPOSITION OF INITIAL APPEALS ADJUDICATED ON THE MERITS [\[Text\]](#) (i.e., Not Dismissed or Settled) IN FY 2005



Based on 1,338 appeals adjudicated on the merits

INITIAL APPEALS DECIDED IN FY 2005 BY AGENCY									
	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
OPM*	1341	576	43.0%	765	57.0%	165	21.6%	600	78.4%
US Postal Service	965	581	60.2%	384	39.8%	272	70.8%	112	29.2%
Veterans Affairs	618	385	62.3%	233	37.7%	161	69.1%	72	30.9%
Army	550	275	50.0%	275	50.0%	206	74.9%	69	25.1%
Homeland Security	376	212	56.4%	164	43.6%	101	61.6%	63	38.4%
Navy	351	182	51.9%	169	48.1%	98	58.0%	71	42.0%
Justice	292	136	46.6%	156	53.4%	101	64.7%	55	35.3%
Treasury	274	136	49.6%	138	50.4%	92	66.7%	46	33.3%
Interior	262	162	61.8%	100	38.2%	48	48.0%	52	52.0%
Air Force	258	138	53.5%	120	46.5%	66	55.0%	54	45.0%
Defense	253	143	56.5%	110	43.5%	81	73.6%	29	26.4%
Agriculture	180	96	53.3%	84	46.7%	65	77.4%	19	22.6%
Transportation	108	63	58.3%	45	41.7%	28	62.2%	17	37.8%
Health & Human Services	80	45	56.3%	35	43.8%	24	68.6%	11	31.4%
Social Security Adm.	65	32	49.2%	33	50.8%	21	63.6%	12	36.4%
Labor	62	32	51.6%	30	48.4%	18	60.0%	12	40.0%
Commerce	49	20	40.8%	29	59.2%	23	79.3%	6	20.7%
Housing & Urban Dev.	33	14	42.4%	19	57.6%	18	94.7%	1	5.3%
Smithsonian Institution	25	8	32.0%	17	68.0%	15	88.2%	2	11.8%
General Service Adm.	22	14	63.6%	8	36.4%	3	37.5%	5	62.5%
Energy	19	8	42.1%	11	57.9%	6	54.5%	5	45.5%
NASA	16	10	62.5%	6	37.5%	5	83.3%	1	16.7%
State	15	9	60.0%	6	40.0%	3	50.0%	3	50.0%
Securities & Exchange Com	12	9	75.0%	3	25.0%	3	100.0%	0	0.0%
TVA	12	4	33.3%	8	66.7%	0	0.0%	8	100.0%
EPA	11	6	54.5%	5	45.5%	5	100.0%	0	0.0%
SBA	11	7	63.6%	4	36.4%	0	0.0%	4	100.0%
EEOC	9	2	22.2%	7	77.8%	2	28.6%	5	71.4%
Court Services & Offender Supervision	7	2	28.6%	5	71.4%	4	80.0%	1	20.0%
Adm. Office of US Courts	6	6	100.0%	0	0.0%	0	0.0%	0	0.0%
Other	5	4	80.0%	1	20.0%	1	100.0%	0	0.0%
Education	4	4	100.0%	0	0.0%	0	0.0%	0	0.0%
Export-Import Bank of US	4	2	50.0%	2	50.0%	2	100.0%	0	0.0%
NARA	4	2	50.0%	2	50.0%	2	100.0%	0	0.0%
Armed Forces Retirement Home	3	3	100.0%	0	0.0%	0	0.0%	0	0.0%
FDIC	3	0	0.0%	3	100.0%	3	100.0%	0	0.0%
Fed Retirement Thrift Investment Bd	3	3	100.0%	0	0.0%	0	0.0%	0	0.0%
Gov Printing Office	3	2	66.7%	1	33.3%	1	100.0%	0	0.0%
Peace Corps	3	3	100.0%	0	0.0%	0	0.0%	0	0.0%
African Dev. Foundation	2	1	50.0%	1	50.0%	1	100.0%	0	0.0%
Agency for Int'l Dev.	2	2	100.0%	0	0.0%	0	0.0%	0	0.0%

Consumer Product Safety Com.	2	2	100.0%	0	0.0%	0	0.0%	0	0.0%
Corp for Nat'l & Community Serv	2	2	100.0%	0	0.0%	0	0.0%	0	0.0%
Nat'l Credit Union Adm.	2	0	0.0%	2	100.0%	2	100.0%	0	0.0%
Office of Gov Ethics	2	0	0.0%	2	100.0%	1	50.0%	1	50.0%
Broadcasting Board of Governors	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Fed Mediation & Conciliation Service	1	0	0.0%	1	100.0%	1	100.0%	0	0.0%
Federal Trade Commission	1	0	0.0%	1	100.0%	1	100.0%	0	0.0%
Gov of the District of Columbia	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Government Accountability Office	1	0	0.0%	1	100.0%	0	0.0%	1	100.0%
Int'l Boundary & Water Com	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
MSPB	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Nat'l Foundation for the Arts	1	0	0.0%	1	100.0%	1	100.0%	0	0.0%
NLRB	1	0	0.0%	1	100.0%	0	0.0%	1	100.0%
Nat'l Mediation Board	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Office of Special Counsel	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
TOTAL	6337	3349	52.8%	2988	47.2%	1650	55.2%	1338	44.8%

Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Percentages in columns "Dismissed" and "Not Dismissed" are of "Decided."

Percentages in columns "Settled" and "Adjudicated" are of "Not Dismissed."

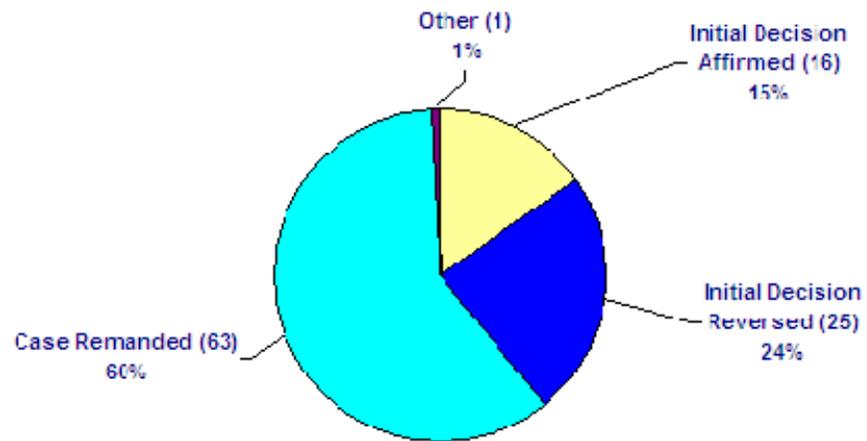
	INITIAL APPEALS ADJUDICATED* IN FY 2005 BY AGENCY								
	Adjudicated	Affirmed		Reversed		Mitigated Modified		Other	
OPM	600	462	77.0%	132	22.0%	1	0.2%	5	0.8%
US Postal Service	112	89	79.5%	16	14.3%	7	6.3%	0	0.0%
Veterans Affairs	72	62	86.1%	8	11.1%	2	2.8%	0	0.0%
Army	69	63	91.3%	5	7.2%	1	1.4%	0	0.0%
Homeland Security	63	54	85.7%	8	12.7%	0	0.0%	1	1.6%
Navy	71	60	84.5%	11	15.5%	0	0.0%	0	0.0%
Justice	55	44	80.0%	9	16.4%	2	3.6%	0	0.0%
Treasury	46	40	87.0%	5	10.9%	1	2.2%	0	0.0%
Interior	52	45	86.5%	7	13.5%	0	0.0%	0	0.0%
Air Force	54	51	94.4%	3	5.6%	0	0.0%	0	0.0%
Defense	29	25	86.2%	1	3.4%	2	6.9%	1	3.4%

Agriculture	19	18	94.7%	1	5.3%	0	0.0%	0	0.0%
Transportation	17	14	82.4%	3	17.6%	0	0.0%	0	0.0%
Health & Human Services	11	9	81.8%	2	18.2%	0	0.0%	0	0.0%
Social Security Adm.	12	10	83.3%	1	8.3%	1	8.3%	0	0.0%
Labor	12	11	91.7%	1	8.3%	0	0.0%	0	0.0%
Commerce	6	6	100.0%	0	0.0%	0	0.0%	0	0.0%
Housing & Urban Dev.	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Smithsonian Institution	2	1	50.0%	1	50.0%	0	0.0%	0	0.0%
General Service Adm.	5	2	40.0%	1	20.0%	2	40.0%	0	0.0%
Energy	5	2	40.0%	2	40.0%	1	20.0%	0	0.0%
NASA	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
State	3	3	100.0%	0	0.0%	0	0.0%	0	0.0%
TVA	8	7	87.5%	1	12.5%	0	0.0%	0	0.0%
SBA	4	4	100.0%	0	0.0%	0	0.0%	0	0.0%
EEOC	5	5	100.0%	0	0.0%	0	0.0%	0	0.0%
Court Services & Offender Supervision	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Office of Gov. Ethics	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Gov Accountability Office	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
Nat'l Labor Relations Board	1	1	100.0%	0	0.0%	0	0.0%	0	0.0%
TOTAL	1338	1093	81.7%	218	16.3%	20	1.5%	7	0.5%

ADJUDICATED means adjudicated on the merits, i.e., not dismissed or settled. Percentages may not total 100 because of rounding.

Headquarters case processing

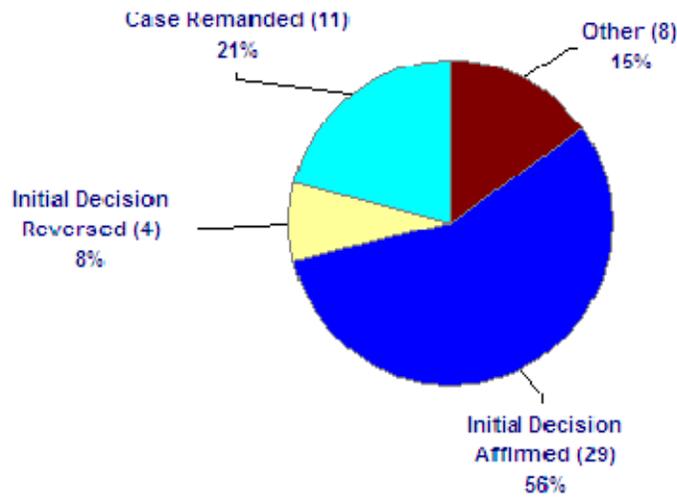
Type of Case	DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DECIDED IN FY 2005 BY TYPE OF CASE											
	Decided	Dismissed	Settled	Denied	Denied But Reopened	Granted						
Adverse Action by Agency	638	32 5.0%	12 1.9%	533 83.5%	18 2.8%	43 6.7%						
Termination of Probationers	52	1 1.9%	0 0.0%	41 78.9%	5 9.6%	5 9.6%						
Reduction in Force	32	2 6.3%	0 0.0%	26 81.3%	0 0.0%	4 12.5%						
Performance Acceptable	33	2 6.1%	0 0.0%	27 81.8%	0 0.0%	4 12.1%						
Level of Competence (WIGI)	7	114.3%	114.3%	4 57.1%	0 0.0%	1 14.3%						
Suitability	23	417.4%	0 0.0%	16 69.6%	1 4.4%	2 8.7%						
CSRS Retirement: Legal	164	6 3.7%	3 1.8%	137 83.5%	6 3.7%	12 7.3%						
CSRS Retirement:	29	0 0.0%	0 0.0%	25 86.2%	2 6.9%	2 6.9%						



DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DENIED BUT REOPENED IN FY 2005

[\[TEXT\]](#)

Bases on 52 Petitions for Review Denied but Reopened



	PETITIONS FOR REVIEW DECIDED IN FY 2005 BY AGENCY											
	Decided	Dismissed	Settled	Denied	Denied But Reopened	Granted						
OPM*	311	12	3.9%	3	1.0%	260	83.6%	13	4.2%	23	7.4%	
US Postal Service	239	16	6.7%	3	1.3%	199	83.3%	5	2.1%	16	6.7%	
Veterans Affairs	111	6	5.4%	3	2.7%	91	82.0%	5	4.5%	6	5.4%	
Army	97	7	7.2%	5	5.2%	72	74.2%	7	7.2%	6	6.2%	
Navy	90	1	1.1%	3	3.3%	75	83.3%	4	4.4%	7	7.8%	
Air Force	74	10	13.5%	4	5.4%	53	71.6%	1	1.4%	6	8.1%	
Homeland Security	66	6	9.1%	1	1.5%	49	74.2%	4	6.1%	1	9.1%	
Justice	60	4	6.7%	1	1.7%	46	76.7%	1	1.7%	8	13.3%	
Treasury	58	1	1.7%	0	0.0%	45	77.6%	4	6.9%	8	13.8%	
Defense	54	4	7.4%	0	0.0%	44	81.5%	2	3.7%	4	7.4%	
Interior	39	4	10.3%	0	0.0%	32	82.1%	1	2.6%	2	5.1%	
Agriculture	33	3	9.1%	2	6.1%	24	72.7%	1	3.0%	3	9.1%	
Transportation	32	1	3.1%	3	9.4%	26	81.3%	0	0.0%	2	6.3%	
Social Security Adm.	16	1	6.3%	0	0.0%	13	81.3%	1	6.3%	1	6.3%	
Health & Human Serv	13	2	15.4%	0	0.0%	11	84.6%	0	0.0%	0	0.0%	
Commerce	12	0	0.0%	0	0.0%	9	75.0%	0	0.0%	3	25.0%	
Housing & Urban Dev.	12	0	0.0%	0	0.0%	12	100.0%	0	0.0%	0	0.0%	
Labor	11	0	0.0%	0	0.0%	11	100.0%	0	0.0%	0	0.0%	
Energy	7	1	14.3%	1	14.3%	2	28.6%	1	14.3%	2	28.6%	
SBA	6	0	0.0%	0	0.0%	5	83.3%	0	0.0%	1	16.7%	
EPA	5	0	0.0%	0	0.0%	5	100.0%	0	0.0%	0	0.0%	
General Service Adm.	5	1	20.0%	1	20.0%	3	60.0%	0	0.0%	0	0.0%	
State	4	0	0.0%	0	0.0%	3	75.0%	1	25.0%	0	0.0%	

Adm. Office of US Courts	3	0	0.0%	0	0.0%	3	100.0%	0	0.0%	0	0.0%
EEOC	3	0	0.0%	0	0.0%	2	66.7%	0	0.0%	1	33.3%
Gov Printing Office	3	1	33.3%	0	0.0%	2	66.7%	0	0.0%	0	0.0%
TVA	3	0	0.0%	0	0.0%	3	100.0%	0	0.0%	0	0.0%
Agency for International Dev	2	0	0.0%	0	0.0%	2	100.0%	0	0.0%	0	0.0%
Securities & Exchange Comm	2	0	0.0%	0	0.0%	2	100.0%	0	0.0%	0	0.0%
American Battle Monuments Comm	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
CIA	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Consumer Product Safety Comm	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Court Services & Offender	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Education	1	0	0.0%	0	0.0%	0	0.0%	1	100.0%	0	0.0%
FDIC	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Gov of the District of Columbia	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Gov Accountability Office	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
MSPB	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
NASA	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Office of Special Counsel	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
Smithsonian Inst	1	0	0.0%	0	0.0%	1	100.0%	0	0.0%	0	0.0%
TOTAL	1383	81	5.9%	30	2.2%	1115	80.6%	52	3.8%	105	7.6%

Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System. Percentages may not total 100 because of rounding.

Summaries of Merit Systems Studies

The Probationary Period: A Critical Assessment Opportunity

This report discusses the role of the probationary period as an assessment tool and how it is being used in the Federal Government. Additionally, it contains recommendations to improve the effectiveness of the probationary period.

The probationary period is one of the more effective assessment tools available to determine if an individual should be granted a permanent appointment to the civil service. However, it is only as effective as its use. In response to a survey we conducted, we found that some supervisors would not choose to select their probationer if they could do the selection over. However, more than half of these same supervisors intended to allow the individuals to become tenured Federal employees.

We also found that some agencies treated probationers as if they were fully appointed employees. In these agencies, the procedures to remove probationers were the same as the procedures that are required for fully appointed employees. Supervisors told us that this burden, and a lack of support from their agency, often caused them to retain problem probationers. Agencies also neglected to communicate the importance of the probationary period. Many supervisors did not receive training or guidance on the probationary period, and a third of surveyed probationers informed us they were not aware of the probationary period before they began work. In addition, we found that the length of the probationary period, currently 1 year, may not be sufficient for trainee and similar positions where it can take more time to demonstrate the full range of skills necessary for success.

The report recommended that agencies create a culture in which the probationary period is taken seriously and is used to determine who should—and should not—receive an appointment. The report also recommended that Congress consider amending the law to permit longer probationary periods.

Building a High-Quality Workforce: The Federal Career Intern Program

The Federal Career Intern Program was established in July 2000 by Executive Order 13162. The purpose of the program is to “attract exceptional men and women to the Federal workforce ...and prepare them for careers in analyzing and

implementing public programs." Under this program, agencies can hire as many interns as they need for two-year internships at the GS-5, 7, or 9 level. Through this program, agencies can create a pipeline of individuals at various stages of proficiency who will be available to fill positions that will be vacated by those who will retire. Career interns are hired in the excepted service and can be converted noncompetitively into the competitive service if they successfully complete the program. As an alternative to the Government's traditional hiring method, the competitive examining process, the FCIP has relatively few eligibility and procedural requirements, giving agencies flexibility in recruiting, assessing, and selecting candidates. Nevertheless, agencies hiring under the FCIP must still comply with merit system principles as well as veterans' preference and equal employment opportunity rules.

Our study served as an early look at the process agencies use to recruit, assess, and select interns and to determine how effective the program is in providing agencies with a steady stream of qualified employees who are ready to advance and assume greater responsibilities. We used three major sources of information for this study. First, we used OPM's Central Personnel Data File to find the demographics of career interns; second, we sent an interrogatory to agencies' human resources office staff to find their views and experiences about the program; and third, we surveyed career interns and their supervisors to determine the effectiveness of the program in meeting their needs.

Based on our findings, the program has had an auspicious beginning. The number of FCIP hires dramatically increased from about 400 in fiscal year 2001 to over 7,000 in 2004. Further, our survey of career interns and their supervisors shows that both groups have positive views and experiences about the program. However, our study found that agencies relied on limited tools to recruit applicants to the program, used weak pre-hire assessment tools, and failed to use the internship as a trial period to correct for weak assessment tools, and some did not provide training and development activities to career interns as required. To maximize the value

of the FCIP, we recommended that agencies improve the way they recruit and assess applicants to the program. For example, agencies can meet the “fair and open” requirement of the merit systems principles by using more varied recruitment tools to ensure that interested applicants are given the opportunity to apply and to effectively use the internship as a trial period to assess performance and convert only those interns who are fully fit and qualified for duty. We also recommended that OPM provide clearer guidance to agencies, including guidance regarding the role of the trial period during the internship. And we recommended that OPM more fully exercise its oversight role to ensure that agencies observe the merit principles, veterans’ preference, and equal opportunity rules when implementing the FCIP.

Reference Checking in Federal Hiring: Making the Call

OPE completed a best practices review and report about reference checking. This report has been published and distributed to the President and Congress, as well as to many practitioners who conduct and do research about reference checking.

The reference checking report contains guidance for reference checkers, for reference providers, and for Federal job applicants who use references. It dispels several misconceptions about the legal constraints on checking references in the public sector. Key recommendations in the report include:

- **Federal agencies should conduct reference checks for all hires.**
- **Agencies should increase standardization of the reference checking process and provide training in doing this effectively.**
- **There should be increased applicant responsibility for making the reference checking process work.**
- **Agencies should use the “Declaration for Federal Employment” (OF-306) form early in the application**

process to set applicant expectations that references will be checked.

- Agencies should review their "fair use" policies for performance records to ensure that the records can be consulted by supervisors when providing reference information for former employees.

During FY 2006, OPE will make a number of presentations to agencies and HR professionals to encourage use of the best practices we have identified in this report.

[The 2005 merit principles survey](#)

MSPB has conducted the MPS every 3-5 years for the past two decades. Each administration of the MPS tracks the incidence of prohibited personnel practices among Federal employees, assesses the degree to which merit principles are followed, and gathers information to support OPE research studies. OPE conducted preparatory work for the MPS during FY 2004 and administered the survey during FY 2005.

The MPS 2005 was the first MPS administered via the World Wide Web. Nearly 37,000 full-time civilian Federal employees completed the MPS 2005. The participants were randomly sampled from 14 agencies and represent viewpoints of employees at the non-supervisory, team leader/supervisor, and manager/SES levels. OPE worked closely with OPM and representatives from other agencies to obtain a representative sample of email addresses, coordinate survey administration with OPM to avoid overlap with the Federal Human Capital Survey, and respond to concerns raised by participants in the MPS. During the summer and fall of 2005, data gathering was completed for the MPS. OPE is currently analyzing the data from this survey and preparing a report for release by the end of FY 2006.

Significant Actions of the Office of Personnel Management

As required by statute, MSPB reports on the significant actions of OPM. The Board is presenting in the Annual Report a

summary of the significant actions by OPM with the greatest long-term implications on merit systems.

The past few years have seen some of the greatest changes in Federal human capital management since the Civil Service Reform Act of 1978. Accordingly, OPM has taken many actions in response to legislative action and as the President's agent for Federal human resources management. Below, we list and briefly discuss the OPM actions with the greatest long-term implications for the Federal civil service. This list is not, however, by any means exhaustive.

OPM policy initiatives

New personnel systems in the Department of Homeland Security (DHS) and the Department of Defense (DoD)

Final regulations have been issued for the DHS and DoD personnel systems. The regulations were issued jointly by OPM and the agency involved. These systems, although established under Title 5, United States Code, depart from longstanding Title 5 practice in the areas of pay, performance management, appeal rights and procedures, and collective bargaining.

Significance

The DoD and DHS personnel systems are expected to lay the groundwork for broader civil service reform. Although the development of these systems included consultation with employee representatives, there has been concern over how these systems will affect employee pay, bargaining rights, and appeal procedures. The implementation of many of the components of these systems has been delayed because of these concerns. In addition, the labor relations and employee appeals components of both systems have been barred from implementation by recent court decisions (*NTEU v. Chertoff*, 05-201, (D.D.C. Oct. 7, 2005) and *AFGE v. Rumsfeld*, 05-2183, (D.D.C. Feb. 27, 2006)). Successful implementation of these systems will require sustained effort from DHS, DoD and OPM in order to address the legal issues regarding these systems, to

train managers to use these new delegated authorities, and to build employee buy-in which is essential for success.

Proposals for Governmentwide civil service reform

OPM has developed and circulated draft legislation for Governmentwide civil service reform. The draft legislation, referred to as the Working for America Act (WFAA), would give agencies access to practices such as pay banding under a Governmentwide framework.

Significance

Agency-level personnel reforms, including those at DHS and DoD, have given selected agencies flexibilities unavailable to Federal agencies operating under normal provisions of Title 5. That has raised concerns about “fragmentation” of the civil service – a counterproductive divergence in Federal agency human resources (HR) policies and practices. WFAA attempts to address this problem, providing agencies with greater flexibility, while retaining a Governmentwide framework for managing and overseeing HR.

Emphasis on hiring flexibilities

Over the past year, OPM has encouraged agencies to use available hiring flexibilities to improve the efficiency of Federal hiring. OPM has pushed agencies to employ faster hiring models (30-day hiring model for senior executives and 45-day hiring model for employees). It has also encouraged agencies to use flexibilities such as category rating, the Federal Career Intern Program (FCIP), direct hire, and veteran hiring appointments.

Significance

Since the Federal merit system was established, the Government has added rules, regulations, and even shortcuts in an attempt to make the hiring process more efficient and sometimes more effective. What has resulted, however, is a

long, complex process that too often makes it difficult to hire the best person for the job. Ultimately, the current hiring system frequently does not work in the best interests of applicants, mission accomplishment, or the public. The time may be right to achieve significant reform by re-thinking what Federal hiring should look like—and pursuing additional legal and regulatory changes to that end—rather than emphasizing existing flexibilities.

Implementation of the Notification and Federal Employee Antidiscrimination and Retaliation Act

OPM issued proposed regulations to implement the notification and training provisions of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (NO FEAR Act).

Significance

The NO FEAR Act is intended to reduce illegal discrimination by strengthening Congressional oversight, increasing agency accountability, and improving compliance with the law. The President has delegated to OPM responsibility for several requirements of the Act, making OPM leadership essential to the Act's implementation. One pending requirement is a study of best practices related to disciplinary actions taken against Federal employees who engage in illegal discrimination. OPM issued proposed regulations pertaining to this planned study in January 2006.

[Actions related to OPM oversight](#)

Implementation of the President's Management Agenda

OPM continues to evaluate agency performance on the human capital element of the President's Management Agenda (PMA). Currently, OPM seeks to institutionalize a strategic approach to managing human capital, reflected in its goal of "[m]oving agencies beyond scoring and into active, comprehensive, and continuous improvement of human capital management."

Significance

Agencies have improved their scores in the human capital area, and OPM reports that 14 of 26 PMA agencies have significantly reduced skills gaps in mission-critical occupations. Although the long-term effects of the PMA and the human capital scorecard remain unknown, such efforts to increase attention to workforce needs and to improve agency HR practices are welcome.

Agency annual survey requirement regulations

As part of the National Defense Authorization Act for Fiscal Year 2004, Congress directed each executive agency to conduct an annual employee survey and post the results on its agency Website. In September 2005, OPM issued proposed regulations that prescribe 28 core questions to be included on all agency surveys and how agencies will be expected to report their annual data.

Significance

There are several potential drawbacks to the annual survey requirement. First, an annual requirement may not allow sufficient time to administer, analyze, and act on the results between survey administrations. Second, annual surveys may cause survey fatigue, in which employees will tire in filling them out. Finally, many agencies may lack the resources and expertise needed to carry out an annual survey. Therefore, in addition to proposing regulations for what questions agencies will ask and how agencies will report the annual data, OPM needs to play a significant role in evaluating the impact the new requirement has on the Government's ability to effectively use surveys.

Oversight of agency use of delegated authorities

OPM continued its oversight of agency delegated examining units (organizations that evaluate and refer applicants for jobs in the Federal competitive service) and evaluated its agency

compliance program using the Program Assessment and Rating Tool (PART).

Significance

OPM clearly recognizes the importance of oversight of agency management of human resources, including compliance with law and regulation. OPM's Human Capital Assessment and Accountability Framework (the document that contains the standards used to evaluate agency performance on the human capital component of the PMA) establishes the expectation that agencies conduct risk analyses to identify problems that jeopardize organizational integrity and develop measures to evaluate compliance with legal requirements. However, OPM reports that only two agencies have established internal compliance systems. Also, OPM's compliance-related performance indicators address only delegated examining, veterans' preference (a statutory requirement, rather than a merit principle), and pay and classification appeals. Given the scarcity of functioning agency-level compliance programs, the relevance of merit system principles to all aspects of HR management, and increasing agency flexibility in areas such as pay and performance management, these performance indicators seem somewhat narrow in scope.

[Actions related to other Governmentwide programs](#)

Merger with the Department of Defense's Defense Security Services

In February 2005, the investigative function of the Department of Defense was transferred to OPM. The purpose of this consolidation is to improve the efficiency of Governmentwide background investigations and help reduce the backlog of Federal background investigations. In particular, the merger is hoped to reduce duplication, increase economies of scales, and enable better clearance reciprocity among agencies.

Significance

With the increased emphasis on homeland security, background investigations have become an especially important part of the hiring process. These investigations are crucial to ensuring that Federal employees and contractors are suitable for holding security clearances or positions of public trust. MSPB reported in a 2000 study that background checks are a key barrier to timely job offers. This problem goes as far back as 1981 when the General Accounting Office (GAO, now the Government Accountability Office) first reported on delays in processing clearance requests at the Department of Defense. The problem only worsened after September 11, 2001, with an increase in agency clearance requests, a backlog of up to 500,000 cases, and upwards of one year to complete many investigations.

GAO reported in June 2005 that the transfer of functions actually appeared to be hindering the process of granting clearances rather than helping it (GAO-05-842T). However, the Director of OPM and the Office of Management and Budget's Deputy Director for Management testified before Congress in November 2005 that the consolidation, along with other security reforms recently enacted, were beginning to ease the backlog.

Selection of shared service providers under the Human Resources Line of Business initiative

In April 2004, OPM was designated the managing partner for the HR LOB initiative. In August 2005, OPM selected five agencies to be shared service center providers as part of the Human Resources Line of Business (HR LOB) initiative. The purpose of the HR LOB is to allow agencies to obtain HR products and services through shared service centers to: (1) improve human capital management, (2) achieve operational efficiencies in HR management systems, (3) reduce HR administrative costs, and (4) improve customer service.

Significance

This line of business approach allows for economies of scale among agencies. For instance, if an agency needs to build a new HR system or faces a major upgrade, it could contract out its HR needs to a shared-services provider. In addition, having a set number of service providers could enable the Government to standardize HR business functions and processes. Ultimately, OPM projects saving taxpayers \$1.1 billion over the next 10 years.

This initiative presents a number of implications for the HR community. The Government is looking at how to use its resources more efficiently and effectively, and the tasks that HR performs may be affected. This may be a good chance for agencies to divest themselves of routine, non-mission related HR work and focus their resources on a more consultative, strategic role. In addition, standardizing some of our basic HR processes will help the Government streamline its currently complex HR system. However, fundamental change in some areas of Federal HR management, particularly hiring, is needed to attain the simplified, standardized, and functional processes needed for the HR LOB initiative to realize its full potential.

Management of Federal Employee Benefit Programs

OPM continued efforts to contain increases in health insurance costs, promote work/life programs, and implement a dental/vision benefits program. OPM has also established a performance goal of “[e]nsuring the competitiveness of Federal benefits” and commissioned a benefits benchmarking study that compares Federal employee benefit programs with those provided by other employers.

Significance

Employee benefit programs do not have immediate implications for public trust and merit system integrity. Nevertheless, these programs are essential to recruiting and retaining good employees, account for a substantial portion of personnel costs, and have significant long-term fiscal implications.

At present, OPM has no explicit goals or performance measures for “modernizing” or greatly altering Federal employee benefit programs. However, OPM’s benchmarking study is to be followed by “an independent evaluation of ... Federal benefits programs,” after which OPM may consider changes to benefit programs. Proposals for significant change are not inconceivable, in light of continuing changes to benefits in the private sector, the anticipated retirement of many Federal employees, and concerns about Federal Government finances.

Financial Summary

Fiscal Year 2005 Financial Summary (dollars in thousands)	
Financial Sources	
Appropriations	\$34,400
Civil Service Retirement and Disability Trust Fund	2,605
Total Revenue	\$37,005

Obligations Incurred	
Personnel Compensation	\$22,810
Personnel Benefits	5,169
Benefits to Former Employees	10
Travel of Persons	581
Transportation of Things	175
Rental Payments	3,028
Communications, Utilities, and Miscellaneous	247
Printing and Reproduction	225

Other Services	3,014
Supplies and Materials	384
Equipment	1,096
Total Obligations Incurred	\$36,739
Obligated Balance	\$266

Text Alternatives

Pie Chart 1 Type of Initial Appeals Decided in FY 2005 -- Pie chart shows that of a total of 6,337 appeals, adverse action cases accounted for 2,788 or 44%; suitability cases accounted for 87 or 1%; reduction in force cases accounted for 188 or 3%; termination of probationers cases accounted for 309 or 5%; acceptable level of competence cases accounted for 35 or 1%; other appeal cases accounted for 1,136 or 18%; performance cases accounted for 142 or 2%; CSRS retirement (legal) cases accounted for 537 or 8%; CSRS Retirement (disability) cases accounted for 150 or 2%; CSRS retirement (overpayment) cases accounted for 115 or 2%; FERS retirement cases accounted for 618 or 10%; FERCCA cases accounted for 36 or 1%; and individual right of action cases accounted for 196 or 3%.

Pie Chart 2 Disposition of Initial Appeals in FY 2005 That Were Not Dismissed -- Pie chart shows that of the 2,988 cases that were not dismissed, 1,093 or 37% were affirmed; 218 or 7% were reversed; 20 or 1% were mitigated; 1,650 OR 55% were settled; and, 7 (less than 1%) were other.

Pie Chart 3 Disposition of Initial Appeals Adjudicated on the Merits -- Pie chart shows that of the 1,338 appeals adjudicated on the merits, 1,093 or 82% were affirmed; 218 or 16% were

reversed; 20 or 1% were mitigated; and, 7 or 1% were other.

Pie Chart 4 Disposition of Petitions for Review of Initial Decisions on Appeals Decided in FY 2005 -- Pie chart shows that of 1,383 petitions for appeal, 1,115 or 80% were denied; 52 or 4% were denied but reopened; 105 or 8% were granted; 30 or 2% were settled; and, 81 or 6% were dismissed.

Pie Chart 5 Disposition of Petitions for Review of Decisions on Appeals Granted in FY 2005 -- Of the 105 petitions for review granted, 29 or 56% were affirmed; 4 or 8% were reversed; 11 or 21% were remanded; and, 8 or 15% were other.

Pie Chart 6 DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL DECISIONS ON APPEALS DENIED BUT REOPENED IN FY 2005 -- Of the 52 petitions for review that were denied but reopened, 63 or 60% were remanded; 25 or 24% were reversed; 16 or 15% were affirmed; and, 1 or 1% were other.