

UNITED STATES MERIT SYSTEMS PROTECTION BOARD



Annual Report

FOR FISCAL YEAR

2008

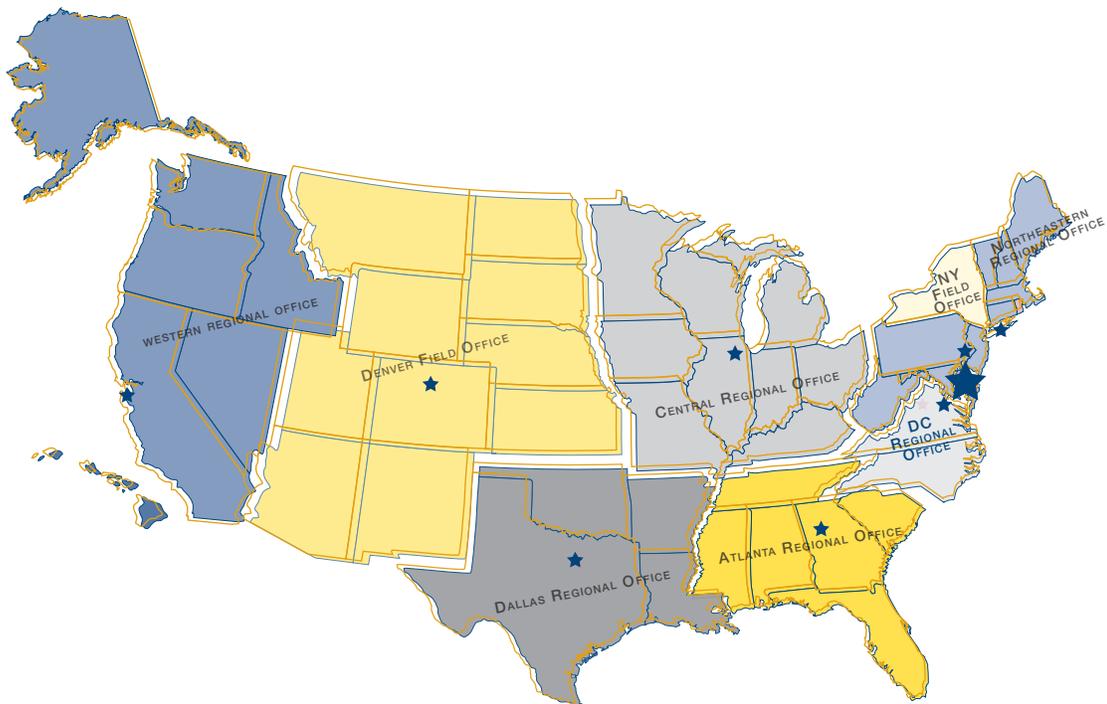


NOVEMBER 17, 2008

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Forward

In accordance with section 1206 of Title 5, United States Code, the Merit Systems Protection Board (MSPB) provides this annual report on its significant actions during fiscal year 2008. This report includes summaries of the most significant Board and court decisions issued during the year, case processing statistics, summaries of MSPB's merit systems studies, summaries of the significant actions of the Office of Personnel Management (OPM), and a summary of MSPB's financial results. In addition, where there have been significant activities since the end of the fiscal year, the report includes updated information as a service to the reader.

Additional information about fiscal year 2008 program performance results and financial audit information is included in MSPB's separate Performance and Accountability Report (PAR). This Annual Report, the PAR, and other information about the MSPB can be found on MSPB's *Web site: www.mspb.gov*.

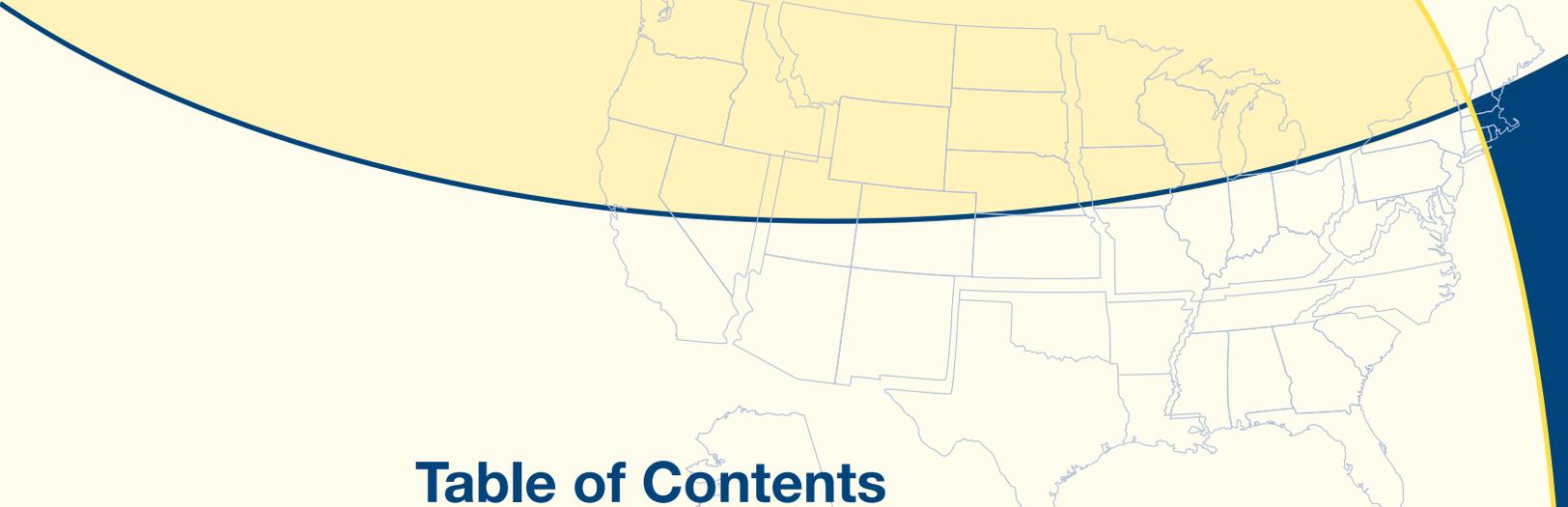


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Fiscal Year 2008 in Review

Protecting merit: Evolving management policies and practices and changing demographics of the workforce

The most significant trends or issues affecting the MSPB's operations include: changes and developments in appeal rights and management flexibilities, changing demographics of the Federal workforce, the Federal budget, and changes in MSPB Board membership and leadership positions.

Changes and developments in appeal rights and management flexibilities

On July 31, 2008, the MSPB and the Transportation Security Administration announced the launch of a new appeals system granting MSPB the authority to adjudicate appeals of alleged incidents of whistleblower reprisal filed by Transportation Security Officers (TSOs) and applicants for those positions. This agreement ensures that these appeals are heard by the MSPB as a neutral third party. TSOs will be assured that their claims of reprisal due to disclosure of serious safety or security concerns, or mismanagement will receive a fair hearing.

On September 30, 2008, the Consolidated Security, Disaster Assistance and Continuing Appropriations Act, 2009, Public Law 110-329 (2008), was signed into law including a provision barring the Department of Homeland Security (DHS) from using any appropriated funds to support its new human resources management system. On October 2, 2008, DHS announced that it was rescinding the operative date of the new system effective October 1, 2008, and was returning all DHS employees covered by the new system to the authorities and provisions of Title 5, U.S.C. that applied prior to its implementation. Therefore, the final rule (73 FR 21019) that the MSPB published on April 18, 2008, revising its regulations for processing appeals arising under the DHS human resources management system is not in effect. All appeals to the MSPB from DHS employees will be adjudicated under MSPB's governmentwide regulations.

Various aspects of the National Security Personnel System (NSPS) continue to be implemented in phases, such as performance-based pay and classification and compensation flexibilities. The MSPB has begun receiving appeals involving pay issues from employees covered by NSPS. However, as a result of the National Defense Authorization Act (NDAA) 2008, workforce shaping, labor management relations, disciplinary actions and employee appeals of adverse actions will now be governed by governmentwide rules. Therefore, MSPB will continue to process adverse action appeals from Department of Defense (DoD) employees based on

existing laws and precedent. Other appeals by DoD employees (e.g., involving whistleblower rights, veterans' rights and administrative retirement decisions) were not changed under NSPS, and will continue to be processed under traditional Title 5 governmentwide rules.

The number of Federal employees who will be managed under new, non-traditional human resources management systems will continue to change. As employees move from traditional Title 5 positions to those governed by more flexible provisions and back again, it is possible that the MSPB could see an increase in its appeals workload as well as increased complexity in the various legal authorities and precedents used to decide these appeals. These changes also emphasize the need for MSPB to continue its study of Federal merit systems and human capital management practices to ensure the systems are operating in accordance with merit system principles and free from prohibited personnel practices. By studying these systems, we may also identify ways to improve the effectiveness and efficiency of Government operations. These changes and developments in appeal rights and management flexibilities will make MSPB's ability to hire and retain skilled staff all the more critical.

The Americans with Disabilities Act (ADA) Amendments Act of 2008 became effective on January 1, 2009. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such impairment, or being regarded as having such an impairment. However, it changes the way these statutory terms should be interpreted. While discrimination claims alone are not appealable to the MSPB, such claims are frequently raised as affirmative defenses to actions that are appealable (thus known as "mixed" cases). The broader interpretation and expanded rights afforded by the ADA Amendments Act will likely make some Board appeals more complex and may encourage additional claims.

Changing demographics of the Federal workforce

The proportion of Federal employees who are eligible for retirement continues to increase. While current economic conditions may delay the retirements of some of these Federal employees, it is still likely that retirements will increase in the next few years. While voluntary decisions to retire are not appealable, the MSPB receives a substantial number of appeals each year from persons who claim that they were forced into retiring or who tried to withdraw their acceptance of a monetary incentive offered under a Voluntary Separation Incentive Program (VSIP). VSIPs are a popular tool when agencies are facing reductions in force. Moreover, any person whose rights or interests under the retirement system are affected by a final decision of the Office of Personnel Management (OPM) has a right to appeal to the Board. As the number of retirements continues to increase, so may these appeals.

As the government replaces these retiring employees with relatively younger, less experienced employees, we are likely to see a decrease in the average age of the workforce. As this occurs, we may expect to see an increase in appeals because less experienced employees typically experience more appealable actions than do more experienced employees. It is not possible to predict exactly how these issues will evolve over time. Therefore it is important for the MSPB to continue its efforts to hire and retain skilled adjudicatory, studies, and management support staff.

During the last several years, the MSPB has experienced an increase in the number of appeals involving veterans rights. As troops have been returning from overseas conflicts for several years, there may be no additional increase in this workload in the short term. However, if greater numbers of troops begin to return there could be a proportionate increase in appeals under the Veterans Employment Opportunities Act of 1998 (VEOA) and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

The Federal Budget

The demands on the Federal budget continue to grow, with significant additional demands tied to the Emergency Economic Stabilization Act of 2008, Public Law 110-343 (2008). As budget pressure increases, there is greater potential that costs may be cut by reducing the size of the Federal workforce, curtailing or freezing hiring, or reducing training. Reducing the size of the workforce may lead to increases in the number of employees who are separated involuntarily through reductions in force. If historical trends are accurate, this will lead to potentially large increases in the number of appeals to the MSPB. Reductions in hiring and workforce training may also have long-term impacts on merit principles such as the efficiency and effectiveness of the workforce. It is important to understand the strategic long-term Federal workforce and merit systems implications of the methods used to control spending.

In addition, it is unclear how other factors related to changing economic conditions may affect the workforce. Employees may behave and perform better in an effort to keep their jobs. On the other hand, employees may experience more workplace conflict and other behavioral and performance issues due to the stress caused by economic conditions over which they have no control. It is not possible to predict exactly how these issues will unfold over time. As noted, given these budgetary pressures, it is essential that the MSPB continue to hire and retain highly qualified employees to perform its adjudicatory, merit system studies and management support functions.

Changes in MSPB Board membership and leadership positions

As described above, it is essential that the MSPB have the right people with the right skills to adjudicate appeals, conduct merit systems studies and support those missions. The MSPB also needs quality managers who can lead our programs now and into the future. In fiscal year 2008, MSPB appointed a new Clerk of the Board, Director of the Office of Policy and Evaluation, and Director of the Washington Regional Office. Plans are also underway to select new Directors for the Offices of Appeals Counsel and Equal Employment Opportunity.

In addition to expert staff and senior managers, the MSPB also needs three confirmed Board members who can review and vote on appeals brought to the MSPB. MSPB currently has two confirmed Board members. Member Barbara Sapin's term ended on March 1, 2008. On March 1, 2009, Chairman Neil A. G. McPhie's term of appointment ended. Statutory provisions permit him to serve one additional year (until March 1, 2010) or until a new Chairman is confirmed by the Senate within that year. Vice Chairman Mary M. Rose's term extends until March 2011.

According to statute, the Board consists of three Board Members who review and issue decisions on cases brought before the Board. If the Board has three Members, it takes the agreement of only two Members to issue a precedential decision. If the Board has two Members, it can issue precedential decisions only if both Members agree. If they disagree, the initial decision becomes the final decision, which is not precedential. If the Board has only one Member, it cannot issue any decisions. It is important, therefore, that the Administration nominate, and the Senate confirm, at least one new Board Member prior to Chairman McPhie's departure. This will ensure that the Board can continue to issue decisions.

Adjudication

The MSPB decided appeals and petitions for review (PFRs) in accordance with the laws and regulations governing such appeals. The MSPB issued 7,903 decisions in fiscal year 2008. The regional, field offices and MSPB headquarters issued timely, high quality initial decisions and MSPB headquarters offices issued timely, high quality decisions in response to PFRs. The MSPB provided a full menu of successful alternative dispute resolution options to its customers, including settlement efforts in the regional and field offices and headquarters; the Mediation Appeals Program; and the availability of administrative judges (AJs) separately designated for settlement of a case. The case processing statistics presented in this report give detailed information regarding the type, origin, and disposition of cases processed by the MSPB.

This report contains brief summaries of the most significant Board decisions published in fiscal year 2008, as well as summaries of significant opinions issued by the United States Court of Appeals for the Federal Circuit during the fiscal year. Significant Board decisions addressed such issues as adverse action appeal rights and charges, arbitration review, alternative personnel systems, attorney fees, Board procedures, discrimination, medical standards, retirement, and veterans' rights.

Merit systems studies

The MSPB completed several studies and issued reports on such issues as hiring upper level employees from outside the Federal Government, the use of various hiring authorities, Federal employee engagement, the use of alternative discipline in Federal agencies, and a longitudinal analysis of prior Merit Principles Surveys. The MSPB issued four editions of the *Issues of Merit* newsletter, which included articles such as how best to use accomplishment records, selective factors, and realistic job previews during the hiring process; how increased employee engagement relates to the retention of retirement-eligible employees; the importance of human capital in the next Presidential Administration; and how Federal agencies can improve their hiring practices and processes. In addition, the MSPB completed the administration of two large Governmentwide surveys, the 2007 Merit Principles Survey and the Career Advancement Survey.

Legislative and congressional relations update

The House and Senate bills to reauthorize the Merit Systems Protection Board (H.R. 3551 and S. 2051, respectively) were not enacted by the adjournment of the 110th Congress. As a result, MSPB will resubmit a request for reauthorization now that the 111th Congress has convened.

The fiscal year 2008 appropriation for the MSPB was enacted on December 26, 2007 as part of H.R. 2764, an omnibus appropriations bill. Upon enactment, Public Law No. 110-161 provided a total funding level of \$40,086,000 for MSPB, which included \$2,579,000 in reimbursements from the Civil Service Retirement and Disability Fund.

The MSPB's Congressional relations activities during fiscal year 2008 included presenting testimony during Congressional hearings and briefings for Congressional committee staff and outreach meetings with congressional staff.

On October 18, 2007, General Counsel Chad Bungard testified at a hearing that was conducted by the Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia on MSPB's role in adjudicating Hatch Act cases. On May 8, 2008, John Crum, Director of the Office of Policy and Evaluation, testified at a hearing on diversity in the Federal workforce that was conducted by the House Subcommittee on Federal Workforce, Postal Service and the District of Columbia. On September 11, 2008, Chairman McPhie testified at a hearing conducted by the House Oversight and Government Reform Subcommittee on the Federal Workforce, Postal Service and the District of Columbia on H.R. 4272, a bill that would exempt State and local officers and government employees in cities and towns with populations of less than 100,000 people from the Hatch Act prohibitions against running for partisan political office.

During fiscal year 2008, the MSPB staff conducted Congressional committee staff briefings on the MSPB's fiscal year 2009 budget request, the agency's procedures for adjudicating administrative law judge (ALJ) disciplinary cases, recruitment and hiring in the Federal government, diversity in the Federal executive workforce and the MSPB regulations for adjudicating appeals filed by employees of the Department of Homeland Security. Further, as part of MSPB's efforts to increase outreach to members of Congress and to be of further assistance to them in their representational and constituent services responsibilities, the Legislative Counsel met with congressional staff of representatives and senators who represent districts or states where MSPB regional and field offices are located. The Legislative Counsel also met with staff to Congressional members of the District of Columbia, Maryland and Virginia local delegations.

Significant actions of the Office of Personnel Management

The MSPB is responsible for providing an independent, nonpartisan review of the actions of the Office of Personnel Management (OPM) to ensure that these actions conform with merit principles and do not result in prohibited personnel practices. The MSPB reviewed the significant policy and leadership actions of OPM including efforts to improve the hiring process, elimination of time in grade requirements, guidance related to the use of the Outstanding Scholar and Bilingual/Bicultural hiring authorities, and the clarification of adverse action rules during probationary and trial periods. The MSPB reviewed OPM's significant compliance and accountability actions including Presidential transition guidance, human capital planning and accountability efforts, actions taken to assist agencies with identifying and developing effective supervisors, and addressing the reprisal against whistleblowers and violations of antidiscrimination laws. The MSPB also reviewed OPM's significant actions related to delivering products and services including reopening the Administrative Law Judge examination and announcing the Senior Executive Service Federal Candidate Development Program.



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. Chairman 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 expired on March 1, 2009. Statutory provisions permit him to serve one additional year (until March 1, 2010) or until a new Chairman is confirmed by the Senate within that year. 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 designated by President Bush as Vice Chairman of the U.S. Merit Systems Protection Board on January 27, 2006. Mrs. Rose was sworn in as a Board Member on December 28, 2005, following her confirmation by the Senate on December 17, 2005. Vice Chairman Rose's appointment will expire on March 1, 2011. Prior to joining the 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. Mrs. 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. Ms. Sapin's term expired on March 1, 2007. She continued to serve as a Board Member until February 29, 2008, pursuant to 5 U.S.C. § 1202(c) of MSPB's enabling statute, which permits a member whose term has expired to continue to serve until a successor has been appointed but no longer than one year after the term has expired. Previously, Ms. Sapin served as Vice Chairman during a recess appointment (January 2001 – December 2001). 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 until the time of her initial appointment to the Board. 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 MSPB is organized according to its statutory missions to adjudicate appeals and conduct merit systems studies, and it has offices that support these missions. In addition to its three appointed Board members, the MSPB has approximately 236 employees assigned to headquarters and to its eight regional and field offices located throughout the United States.

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

The **Office of the Administrative Law Judge (ALJ)** adjudicates and issues initial decisions in corrective 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 (NLRB) under an interagency agreement.)

The **Office of Appeals Counsel (OAC)** conducts legal research and proposes decisions for the Board in cases where parties petition for review of administrative judges' initial decisions and in most other cases decided by the Board. The office conducted the MSPB's petition for review settlement program (in fiscal year 2009 the Office of the General Counsel will conduct this 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 the MSPB headquarters, rules on certain procedural matters, and issues the Board's decisions and orders. The office serves as the MSPB's public information center, coordinates media relations, publishes public information, operates the MSPB'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 MSPB'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 MSPB's equal employment opportunity programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative employment initiatives to MSPB managers and supervisors.

The **Office of Financial and Administrative Management (FAM)** administers the budget, accounting, travel, time and attendance, human resources, procurement, property management, physical security and general services functions of the MSPB. 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 U.S. Department of Agriculture (USDA) National Finance Center for payroll services, the Department of the Treasury Bureau of the Public Debt for accounting services, and USDA's Animal and Plant Health Inspection Service for human resources management services.

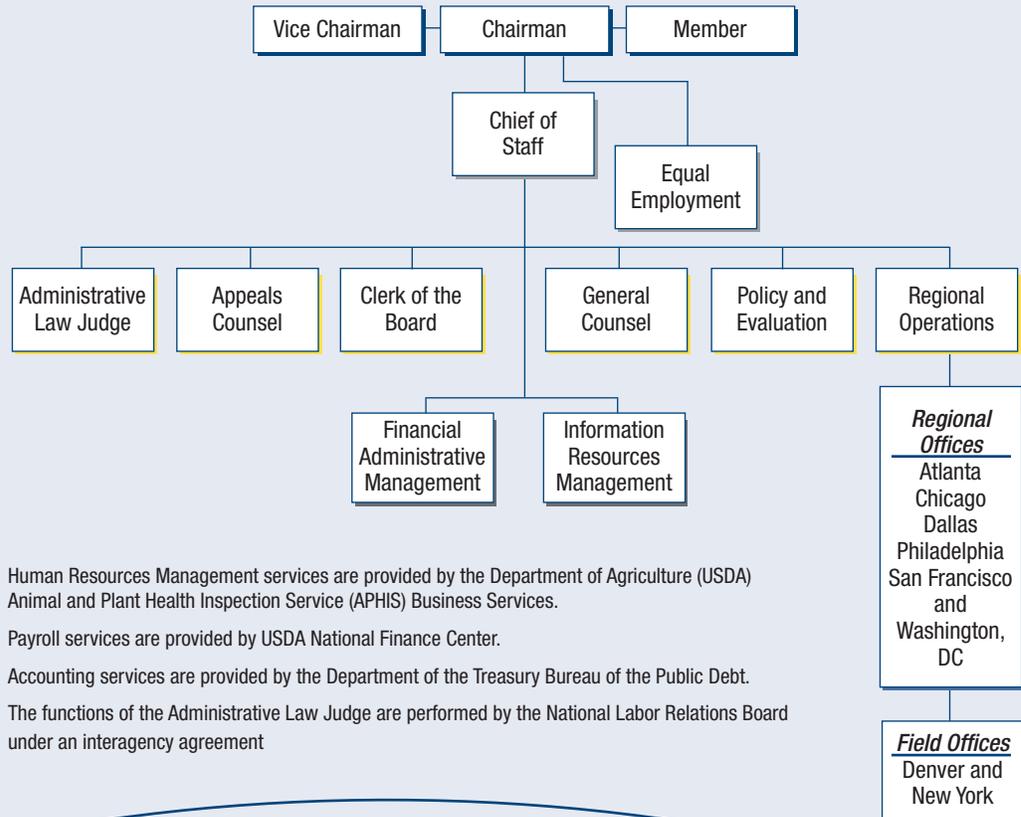
The **Office of the General Counsel (OGC)**, as legal counsel to the MSPB, advises the Board and MSPB offices on a wide range of legal matters arising in day-to-day operations. The office represents the MSPB in litigation; prepares proposed decisions for the Board on compliance cases, requests to review OPM regulations and other assigned cases; and, coordinates MSPB’s legislative policy and congressional relations functions. The office drafts regulations, conducts the MSPB’s ethics program, and plans and directs audits and investigations. The office also provides legal research and other administrative assistance to NLRB administrative law judges.

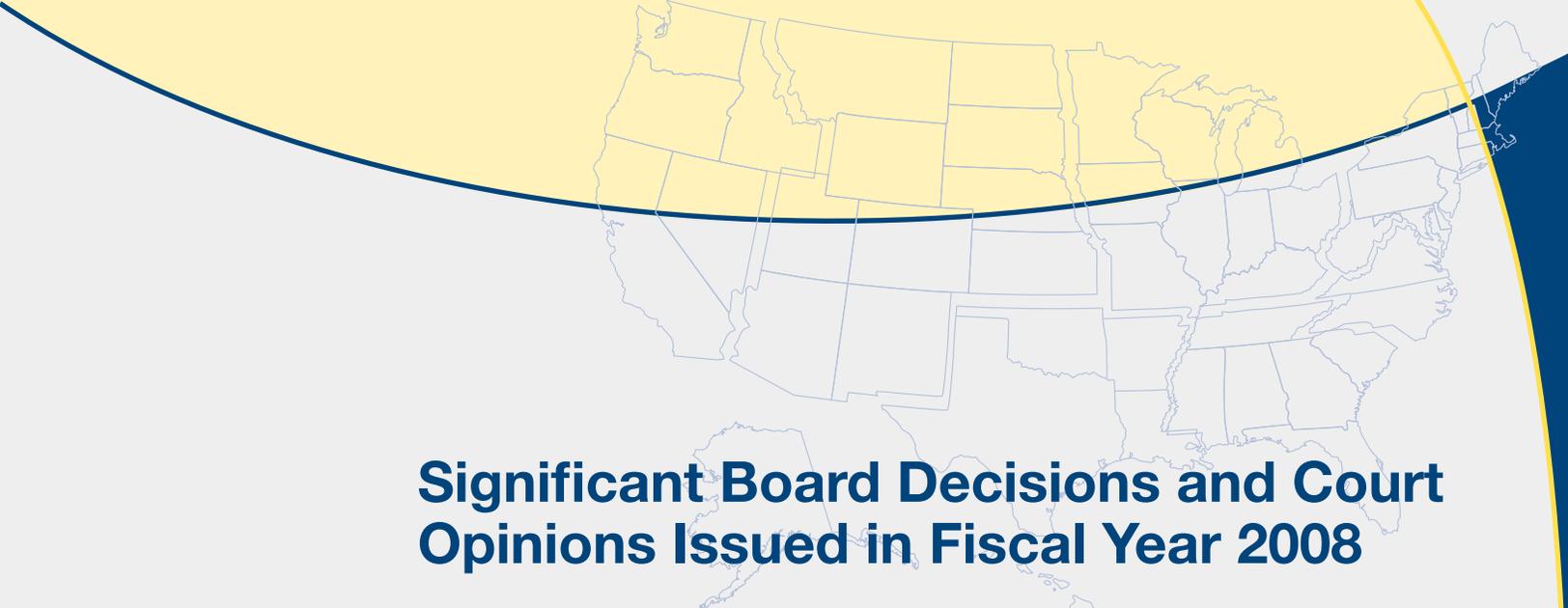
The **Office of Information Resources Management (IRM)** develops, implements, and maintains MSPB’s automated information systems to help the MSPB manage its caseload efficiently and carry out its administrative and research responsibilities.

The **Office of Policy and Evaluation (OPE)** carries out the MSPB’s statutory responsibility to conduct studies of the civil service and other Federal merit systems. Reports of these studies are directed to the President and Congress and are distributed to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office also conducts special projects for the Board and has responsibility for preparing the MSPB’s plans and reports required by the Government Performance and Results Act (GPRA).

The **Office of Regional Operations (ORO)** oversees the MSPB’s six regional and two field offices, which receive and process appeals and related cases, and manages the MSPB’s mediation appeals program (MAP). Administrative judges (AJs) in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.

Organization chart





Significant Board Decisions and Court Opinions Issued in Fiscal Year 2008

The MSPB issued a substantial number of noteworthy decisions in fiscal year 2008, several of which are summarized below. Also included below are brief summaries of many of the significant opinions issued by the United States Court of Appeals for the Federal Circuit as a service to our stakeholders.

Significant Board Decisions

Adverse Action Appeal Rights

Fitzgerald v. Department of the Air Force, 108 M.S.P.R. 620 (2008): The appellant held an excepted-service appointment as a National Guard Technician for nearly a year, and then received a career-conditional appointment in the competitive service without a break in service. The agency terminated the latter appointment after 3 months. On appeal, the agency argued that the appellant was not an “employee” with the right to challenge an adverse action before the Board. The Board disagreed, holding that employment in the excepted service immediately preceding a non-temporary appointment in the competitive service may be used to satisfy the “1 year of current continuous service” required under 5 U.S.C. § 7511(a)(1)(A)(ii) for appeal rights to attach in the competitive service.

Adverse Action Charges

Ryan v. Department of the Air Force, 107 M.S.P.R. 71 (2007): The appellant was absent for extended periods, during much of which he was on sick or annual leave. The agency removed the appellant for “excessive absence.” On appeal, the Board held that in general, an employee cannot be disciplined for using leave approved for unscheduled absences. An exception to that general rule is when an employee makes excessive use of unscheduled leave without pay, but that exception was not satisfied in this case.

Arbitration Review

Fanelli v. Department of Agriculture, 109 M.S.P.R. 115 (2008): The appellant grieved his removal under a negotiated grievance procedure. An arbitrator dismissed the grievance as untimely filed under the deadline set forth in the parties’ collective bargaining agreement (CBA). On review of the arbitration award, the Board clarified earlier precedent and held

that it will set aside an arbitrator's interpretation of a purely procedural provision of a CBA as "failing to draw its essence from the agreement" when the appealing party "establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement." Applying these standards, the Board sustained the arbitration award.

Alternative Personnel Systems

Garofalo v. Department of Homeland Security, 108 M.S.P.R. 169 (2008): The appellant, an employee of the Transportation Security Administration (TSA), challenged his separation in a reduction in force (RIF). The Board ruled that the appellant was entitled to introduce evidence concerning the scoring of structured interviews that affected employees' prospects for retention. In so holding, the Board explained that TSA has statutory authority to modify the government-wide RIF system applicable to its excepted service employees and that TSA's actions in the structured interview process under these special flexibilities would be reviewed for a "clear abuse of discretion." The Board remanded the case to an administrative judge for consideration of additional evidence concerning the structured interview process.

Hart v. Department of Transportation, 109 M.S.P.R. 280 (2008): The appellant, an Air Traffic Controller with the Federal Aviation Administration (FAA), sought to appeal his placement on enforced leave resulting from the FAA's determination that he was temporarily medically disqualified from performing his regular duties. The Board explained that although Congress, in 2000, restored appeal rights for FAA employees that had been eliminated in 1996, the 2000 law did not make the FAA subject to 5 U.S.C. ch. 75. Thus, even though the appellant had the right to appeal his involuntary placement on leave, the FAA was not required to follow ch. 75 procedures when it acted but only had to follow its own internal procedures. The Board remanded the case to an administrative judge for findings on whether the agency followed its own internal procedures.

Attorney Fees

Murphy v. Department of Justice, 107 M.S.P.R. 154 (2007): The appellant, a Reservist, filed an appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA), contending that the agency interfered with his right to use military leave. The agency then took certain actions with regard to the appellant's leave records that it claimed rendered the appeal moot. The appellant argued in reply that the appeal was not moot because he would be entitled to recover attorney fees should he prevail on the merits. The Board first set forth the general rule that an appeal is moot when the appellant has received all of the relief that he could have obtained if the appeal were adjudicated on the merits and he prevailed. The Board then held that a potential claim for attorney fees does not prevent a USERRA appeal from being rendered moot, as USERRA's fee-shifting provision could not be considered part of a claimant's relief on the merits.

Mynard v. Office of Personnel Management, 108 M.S.P.R. 58 (2008): In a 2-1 decision, the Board found that the “prevailing party” standard announced in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), does not apply to preclude an award of attorney fees in the compliance phase of a Board appeal where the appellant’s compliance efforts do not result in an enforceable order or a Board-approved settlement agreement that materially alters the legal relationship of the parties.

Board procedures

Haasz v. Department of Veterans Affairs, 108 M.S.P.R. 349 (2008): Relying in part on documentary evidence, the administrative judge dismissed this appeal brought under the Veterans Employment Opportunities Act (VEOA) for failure to state a claim upon which relief may be granted. On review, the Board held that a “failure to state a claim” disposition is appropriate only if, taking the appellant’s allegations as true and not considering any documentary evidence, as a matter of law he cannot prevail. The Board further held, however, that a VEOA claim may be disposed of without an evidentiary hearing if there is no genuine dispute of material fact. Taking this approach, the Board found in favor of the agency, concluding that under the undisputed facts the agency did not violate any veterans’ preference rules.

Discrimination

Evans v. Department of Homeland Security, 107 M.S.P.R. 484 (2007): The agency removed the appellant from his Air Marshal position for failing to disclose on a pre-employment questionnaire that he was taking a particular prescription medication. On appeal, the Board held in a 2-1 decision that the appellant could not be disciplined for falsifying the questionnaire because it violated the Americans with Disabilities Act’s restrictions on pre-employment medical inquiries. Deferring to guidance from the Equal Employment Opportunity Commission, the Board majority further held that whether the appellant was “disabled” within the meaning of the Americans with Disabilities Act was immaterial.

Medical Standards

Slater v. Department of Homeland Security, 108 M.S.P.R. 419 (2008): The agency removed the appellant based on its determination that he no longer met the medical qualification standards for his Police Officer position. Relying on regulations issued by the Office of Personnel Management, the Board held that to justify disqualification based upon a medical condition alone, “the agency must show that the condition itself is disqualifying, its recurrence cannot be ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm.” The Board overruled earlier case law which suggested that an agency had to show a “high probability of hazard” if the employee were allowed to remain in his position. The Board found that the agency did not meet its burden under the correct test and set aside the appellant’s removal.

Retirement

Fearon v. Office of Personnel Management, 107 M.S.P.R. 122 (2007): The administrative judge affirmed the reconsideration decision of the Office of Personnel Management (OPM) finding that the appellant was not entitled to waiver of recovery of an overpayment

of disability retirement benefits. The Board reversed the initial decision and remanded for further adjudication on the waiver issue, but agreed with the administrative judge that it lacked the authority to adjudicate the appellant's possible entitlement to an adjustment of the recovery schedule. Because the appellant was not receiving an annuity from which installment payments could be deducted, OPM's efforts to recover the overpayment by other means did not affect her rights or interests under the Civil Service Retirement System and were thus outside the scope of the Board's review.

Flannery v. Department of State, 107 M.S.P.R. 441 (2007): The appellant held a series of temporary and intermittent overseas appointments that were not covered by the Federal Employees' Retirement System (FERS) at the time of employment. The 2003 Foreign Relations Authorization Act (FRAA), however, provided that certain individuals who held such appointments could make a deposit to gain FERS service credit. The agency nevertheless denied the appellant's request to make a deposit under this law, on the ground that the appellant had no FERS-covered service. The Board disagreed and found that the appellant was entitled to make a deposit under the plain terms of the 2003 FRAA. Regulations of the Office of Personnel Management suggesting that an individual had to have some FERS-covered service in order to make a deposit were not given effect in this case since they are contrary to the law.

Veterans' Rights

Weed v. Social Security Administration, 107 M.S.P.R. 142 (2007): The Veterans Employment Opportunities Act (VEOA) allows for recovery of "liquidated damages" when an agency commits a "willful" violation of an individual's veterans' preference rights. Construing this language for the first time, and in light of Supreme Court decisions interpreting the term "willful" in related contexts, the Board held that a violation of veterans' preference rules will be considered "willful" under the VEOA's damages provision if the responsible officials acted with "reckless disregard" for the appellant's entitlements.

Gingery v. Department of the Treasury, 110 M.S.P.R. 83 (2008): As a prerequisite to filing an appeal with the Board under the VEOA, an individual must first file a complaint with the Department of Labor (DoL). Interpreting this exhaustion requirement, the Board held that DoL's determination that a complaint has been resolved satisfactorily does not foreclose the complainant from bringing a VEOA appeal before the Board.

Leite v. Department of the Army, 109 M.S.P.R. 229 (2008): The appellant filed this appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA), alleging that the agency violated her right to reemployment following military service by placing her in a GS-13 position upon her return. The appellant claimed that although she held a GS-13 position when she was called up to active military duty, had she not been absent for military duty she would have been promoted to the GS-14 level either competitively or by accretion of duties. The Board denied relief. It held, based on the "escalator principle" that the Supreme Court enunciated in cases arising under earlier reemployment laws, that a retroactive promotion should be granted upon reemployment if it is a "prerequisite of seniority" or if it was a "reasonable certainty" that the servicemember would have been promoted if not absent. The Board found neither test met here.

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

Augustine v. Department of Veterans Affairs, 503 F.3d 1362 (Fed. Cir. 2007)

Under the Veterans Employment Opportunities Act (VEOA), an award of reasonable fees to a prevailing party is mandatory, not discretionary.

Lowder v. Department of Homeland Security, 504 F.3d 1378 (Fed. Cir. 2007)

A federal police officer seeking law enforcement officer (LEO) retirement credit must prove that he occupied a position that primarily required the investigation, apprehension, or detention of criminals or suspects, rather than merely the protection of life or property.

Joseph v. Federal Trade Commission, 505 F.3d 1380 (Fed. Cir. 2007)

Under 5 U.S.C. § 3304(f)(1), specified categories of veterans may not be denied the opportunity to compete for vacant positions for which the agency will accept individuals from outside its own workforce under merit promotion procedures. However, an agency that considers applicants under both competitive examination and merit promotion procedures may select a candidate under the merit promotion procedures without granting veterans preference.

Reid v. Merit Systems Protection Board, 508 F.3d 674 (Fed. Cir. 2007)

A whistleblower's non-frivolous allegation of a reasonable belief that a violation of law, rule, or regulation is imminent is sufficient to confer jurisdiction on the Board under the Whistleblower Protection Act.

Vanieken-Ryals v. Office of Personnel Management, 508 F.3d 1034 (Fed. Cir. 2007)

In determining whether an employee is eligible for disability retirement benefits, OPM must consider all competent medical evidence, including diagnoses based exclusively on an employee's subjective description of symptoms and other indicia of disability.

Chambers v. Department of the Interior, 515 F.3d 1362 (Fed. Cir. 2008)

In considering disclosures directed to public safety, the Board must consider whether the employee disclosed information she reasonably believed evidenced a substantial and specific danger to public safety. Whether a disclosed danger is sufficiently substantial and specific depends upon: (1) the likelihood of harm resulting from the danger, (2) when the alleged harm may occur, and (3) the nature of the harm—the potential consequences.

Baird v. Department of the Army, 517 F.3d 1345 (Fed. Cir. 2008)

An administrative judge abused his discretion in refusing to compel the discovery of agency emails that may have discussed the appropriate penalty for an employee who failed a random drug test.

Johnston v. Merit Systems Protection Board, 518 F.3d 905 (Fed. Cir. 2008)

A whistleblower's motivation for making disclosures and her credibility are issues related to the merits of her claim, not to whether she made non-frivolous allegations sufficient to support jurisdiction.

Parrott v. Merit Systems Protection Board, 519 F.3d 1328 (Fed. Cir. 2008)

Employee's resignation was not an involuntary product of coercion for purposes of determining Board jurisdiction, where the agency allowed the employee only a short time period within which to accept an offer to resign for personal reasons before he would otherwise have received a written notice of proposed removal, since the agency was not obliged to offer that option and having that additional choice could only have been of benefit to him, even though he might have preferred to have that choice remain open for a longer period of time.

Rice v. Merit Systems Protection Board, 522 F.3d 1311 (Fed. Cir. 2008)

Congress denied appeal rights to all employees of the Department of Defense intelligence components except for preference eligibles.

Perkins v. Office of Special Counsel, 522 F.3d 1373 (Fed. Cir. 2008)

The Federal Circuit does not have jurisdiction over a local police officer's appeal because he does not fall within the definition of "employee," as set forth at 5 U.S.C. § 2105. That provision refers to persons who are appointed in the federal civil service, who are engaged in the performance of a federal function under federal authority, or who are subject to the supervision of a federal officer.

Springer v. Adkins, 525 F.3d 1363 (Fed. Cir. 2008)

A federal firefighter who retires on disability under the Federal Employees' Retirement System (FERS) is entitled to receive an annuity using an enhanced annuity formula where such an annuity would be more than the minimum disability annuity, even if he does not satisfy the age and years of service requirements of a basic annuity.

Romero v. Department of Defense, 527 F.3d 1324 (Fed. Cir. 2008)

Although the Board does not have jurisdiction to address the merits of an agency's decision to deny or revoke a security clearance, it does have jurisdiction to consider whether the agency followed the procedures established by the agency's own regulations for the revocation process. In the event that an agency does not follow its own regulations, 5 U.S.C. § 7701(c) (2)(A) provides that an adverse action decision may not be sustained by the Board if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision."

Leighton v. Office of Personnel Management, 529 F.3d 1071 (Fed. Cir. 2008)

The plain language of 5 U.S.C. § 8452 requires that the reduction of a Federal Employees' Retirement System (FERS) disability annuity be calculated based upon the full amount of Social Security Administration (SSA) benefits *prior* to reductions in those SSA benefits for Office of Workers' Compensation Programs compensation.

Lizzio v. Department of the Army, 534 F.3d 1376 (Fed. Cir. 2008)

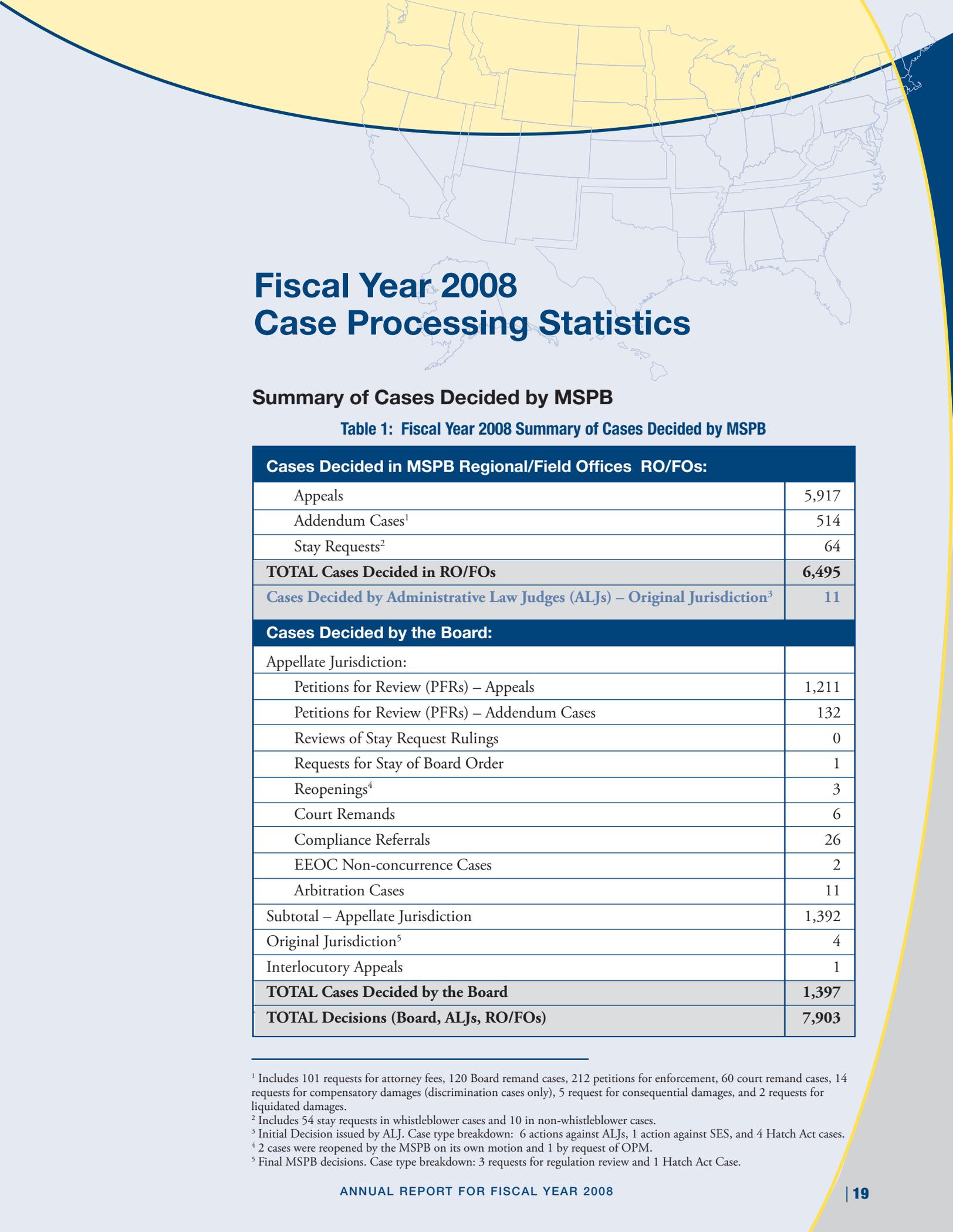
An employee charged with breach of a last chance agreement is entitled to notice of what his alleged breach was, and the Board may not rely on a ground for breach different from the one asserted by the agency in the notice of breach.

Smith v. United States Postal Service, 540 F.3d 1364 (Fed. Cir. 2008)

A regular work schedule is a benefit of employment that is compensable under the Uniformed Services Employment and Reemployment Rights Act.

Greenstreet v. Social Security Administration, 543 F.3d 705 (Fed. Cir. 2008)

The length of a suspension ordered by an arbitrator who mitigates a termination to a suspension is arbitrary when it is based solely on the suspended employee's "time served" awaiting decision.



Fiscal Year 2008 Case Processing Statistics

Summary of Cases Decided by MSPB

Table 1: Fiscal Year 2008 Summary of Cases Decided by MSPB

| Cases Decided in MSPB Regional/Field Offices RO/FOs: | |
|--|--------------|
| Appeals | 5,917 |
| Addendum Cases ¹ | 514 |
| Stay Requests ² | 64 |
| TOTAL Cases Decided in RO/FOs | 6,495 |
| Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction³ | 11 |
| Cases Decided by the Board: | |
| Appellate Jurisdiction: | |
| Petitions for Review (PFRs) – Appeals | 1,211 |
| Petitions for Review (PFRs) – Addendum Cases | 132 |
| Reviews of Stay Request Rulings | 0 |
| Requests for Stay of Board Order | 1 |
| Reopenings ⁴ | 3 |
| Court Remands | 6 |
| Compliance Referrals | 26 |
| EEOC Non-concurrence Cases | 2 |
| Arbitration Cases | 11 |
| Subtotal – Appellate Jurisdiction | 1,392 |
| Original Jurisdiction ⁵ | 4 |
| Interlocutory Appeals | 1 |
| TOTAL Cases Decided by the Board | 1,397 |
| TOTAL Decisions (Board, ALJs, RO/FOs) | 7,903 |

¹ Includes 101 requests for attorney fees, 120 Board remand cases, 212 petitions for enforcement, 60 court remand cases, 14 requests for compensatory damages (discrimination cases only), 5 request for consequential damages, and 2 requests for liquidated damages.

² Includes 54 stay requests in whistleblower cases and 10 in non-whistleblower cases.

³ Initial Decision issued by ALJ. Case type breakdown: 6 actions against ALJs, 1 action against SES, and 4 Hatch Act cases.

⁴ 2 cases were reopened by the MSPB on its own motion and 1 by request of OPM.

⁵ Final MSPB decisions. Case type breakdown: 3 requests for regulation review and 1 Hatch Act Case.

Regional Case Processing

**Table 2: Disposition of Appeals Decided
in the Regional and Field Offices, by Type of Case**

| Type of Case | Decided | Dismissed ¹ | | Not Dismissed ¹ | | Settled ² | | Adjudicated ² | |
|--|-------------|------------------------|--------------|----------------------------|--------------|----------------------|--------------|--------------------------|--------------|
| | # | # | % | # | % | # | % | # | % |
| Adverse Action by Agency | 2778 | 1344 | 48.38 | 1434 | 51.62 | 966 | 67.36 | 468 | 32.64 |
| Termination of Probationers | 364 | 336 | 92.31 | 28 | 7.69 | 28 | 100.00 | 0 | .00 |
| Reduction in Force | 33 | 17 | 51.52 | 16 | 48.48 | 5 | 31.25 | 11 | 68.75 |
| Performance | 121 | 35 | 28.93 | 86 | 71.07 | 48 | 55.81 | 38 | 44.19 |
| Acceptable Level of Competence (WIGI) | 38 | 26 | 68.42 | 12 | 31.58 | 9 | 75.00 | 3 | 25.00 |
| Suitability | 69 | 26 | 37.68 | 43 | 62.32 | 27 | 62.79 | 16 | 37.21 |
| CSRS Retirement: Legal | 558 | 196 | 35.13 | 362 | 64.87 | 9 | 2.49 | 353 | 97.51 |
| CSRS Retirement: Disability | 58 | 34 | 58.62 | 24 | 41.38 | 1 | 4.17 | 23 | 95.83 |
| CSRS Retirement: Overpayment | 96 | 39 | 40.63 | 57 | 59.38 | 38 | 66.67 | 19 | 33.33 |
| FERS Retirement | 483 | 247 | 51.14 | 236 | 48.86 | 72 | 30.51 | 164 | 69.49 |
| FERCCA | 24 | 17 | 70.83 | 7 | 27.17 | 1 | 14.29 | 6 | 85.71 |
| Individual Right of Action | 210 | 155 | 73.81 | 55 | 26.19 | 31 | 56.36 | 24 | 43.64 |
| Other | 1085 | 814 | 75.02 | 271 | 24.98 | 182 | 67.16 | 89 | 32.84 |
| Total | 5917 | 3286 | 55.53 | 2631 | 44.47 | 1417 | 53.86 | 1214 | 46.14 |

¹ Percent Dismissed and Not Dismissed are of the number Decided.

² Percent Settled and Adjudicated are of the number Not Dismissed.

Figure 1: Type of Appeals Decided in the Regional and Field Offices

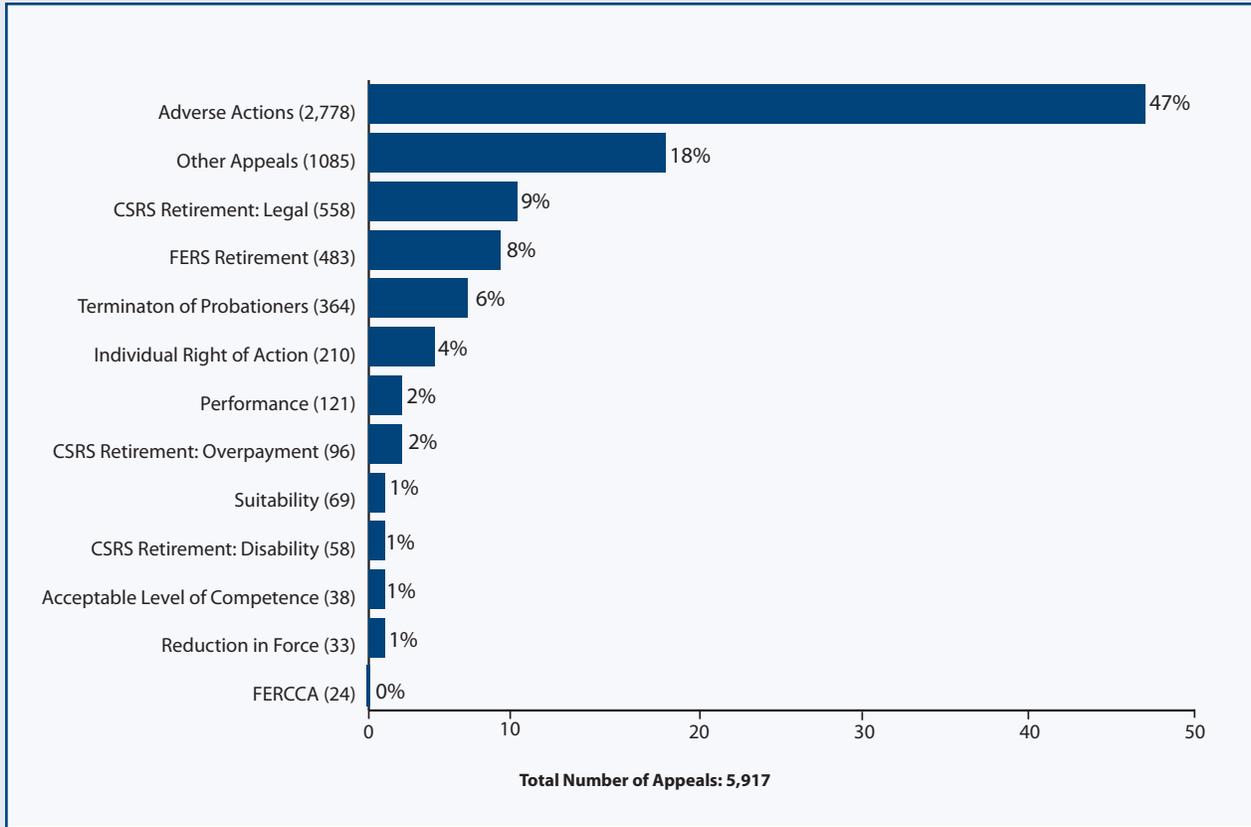


Figure 2: Dispositions: Appeals Not Dismissed by Regional/Field Office

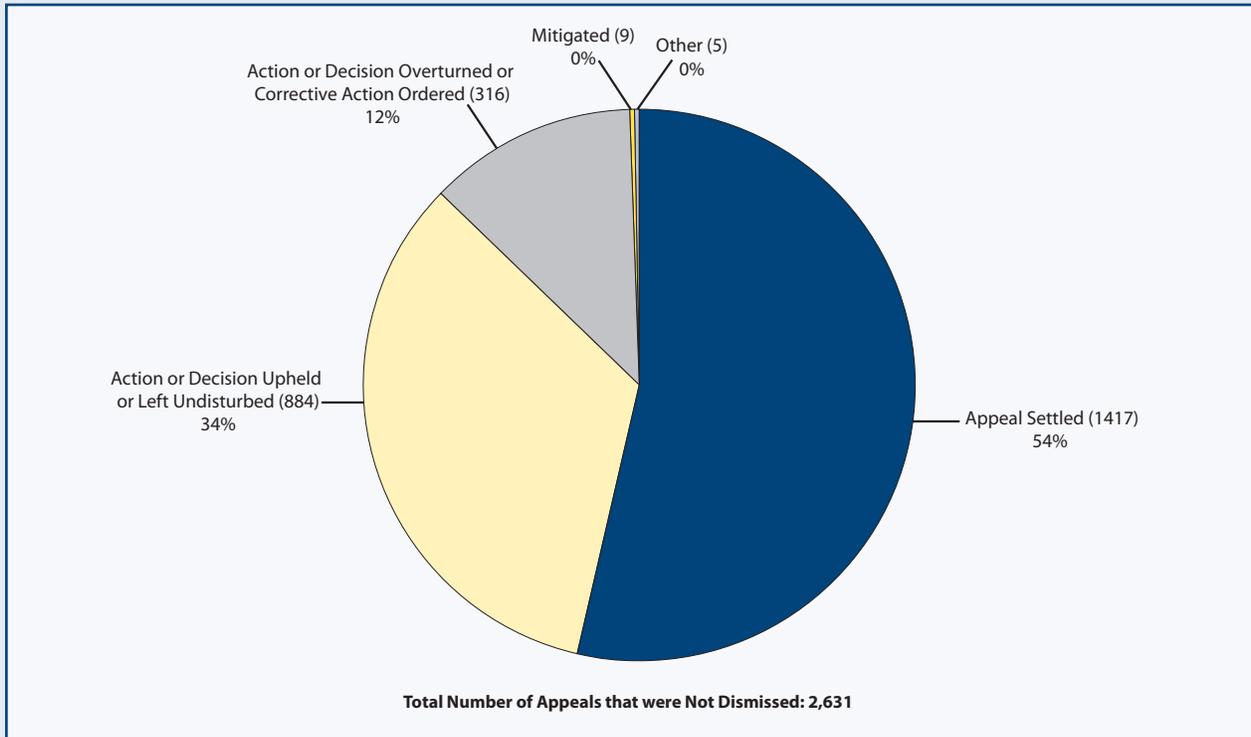


Figure 3: Dispositions: Appeals Not Dismissed or Settled by Regional/Field Office

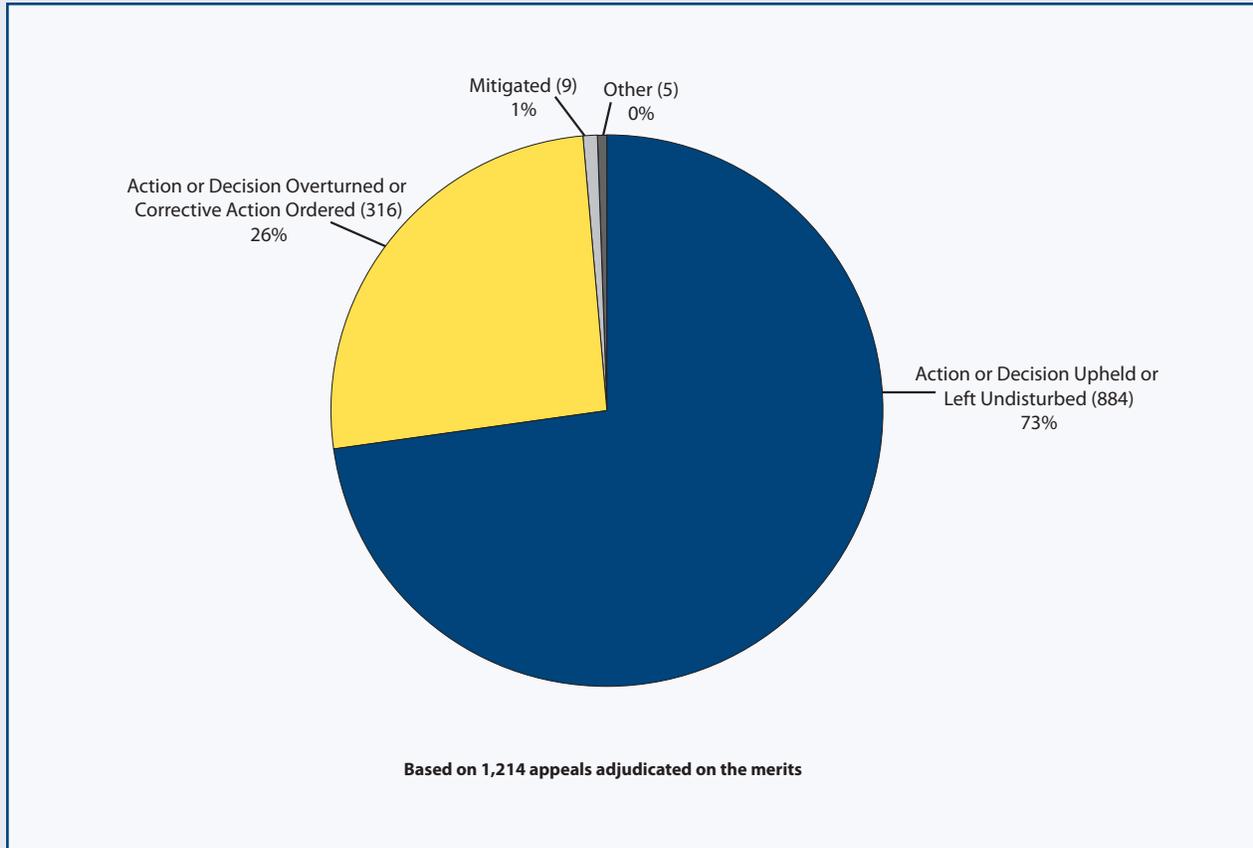


Table 3: Disposition of Appeals in the Regional and Field Offices, by Agency

| | Decided | | Dismissed ¹ | | Not Dismissed ¹ | | Settled ² | | Adjudicated ² | |
|---|---------|---|------------------------|------|----------------------------|------|----------------------|------|--------------------------|------|
| | # | % | # | % | # | % | # | % | # | % |
| Office of Personnel Management³ | 1246 | | 529 | 42.5 | 717 | 57.5 | 144 | 20.1 | 573 | 79.9 |
| US Postal Service | 1107 | | 733 | 66.2 | 374 | 33.8 | 247 | 66.0 | 127 | 34.0 |
| Veterans Affairs | 657 | | 396 | 60.3 | 261 | 39.7 | 195 | 74.7 | 66 | 25.3 |
| Army | 488 | | 240 | 49.2 | 248 | 50.8 | 183 | 73.8 | 65 | 26.2 |
| Homeland Security | 341 | | 212 | 62.2 | 129 | 37.8 | 74 | 57.4 | 55 | 42.6 |
| Navy | 279 | | 151 | 54.1 | 128 | 45.9 | 84 | 65.6 | 44 | 34.4 |
| Treasury | 262 | | 131 | 50.0 | 131 | 50.0 | 93 | 71.0 | 38 | 29.0 |
| Defense | 216 | | 122 | 56.5 | 94 | 43.5 | 66 | 70.2 | 28 | 29.8 |
| Air Force | 206 | | 104 | 50.5 | 102 | 49.5 | 59 | 57.8 | 43 | 42.2 |
| Justice | 169 | | 110 | 65.1 | 59 | 34.9 | 38 | 64.4 | 21 | 35.6 |
| Agriculture | 168 | | 96 | 57.1 | 72 | 42.9 | 46 | 63.9 | 26 | 36.1 |
| Interior | 142 | | 79 | 55.6 | 63 | 44.4 | 47 | 74.6 | 16 | 25.4 |

Table 3: Disposition of Appeals in the Regional and Field Offices, by Agency, (Continued)

| | Decided | | Dismissed ¹ | | Not Dismissed ¹ | | Settled ² | | Adjudicated ² | |
|---|---------|----|------------------------|----|----------------------------|----|----------------------|----|--------------------------|--|
| | # | # | % | # | % | # | % | # | % | |
| Transportation | 131 | 77 | 58.8 | 54 | 41.2 | 29 | 53.7 | 25 | 46.3 | |
| Health & Human Services | 87 | 49 | 56.3 | 38 | 43.7 | 24 | 63.2 | 14 | 36.8 | |
| Social Security Administration | 67 | 34 | 50.7 | 33 | 49.3 | 15 | 45.5 | 18 | 54.5 | |
| Labor | 57 | 42 | 73.7 | 15 | 26.3 | 12 | 80.0 | 3 | 20.0 | |
| Commerce | 42 | 32 | 76.2 | 10 | 23.8 | 6 | 60.0 | 4 | 40.0 | |
| Housing & Urban Development | 37 | 26 | 70.3 | 11 | 29.7 | 5 | 45.5 | 6 | 54.5 | |
| General Services Administration | 25 | 17 | 68.0 | 8 | 32.0 | 4 | 50.0 | 4 | 50.0 | |
| Energy | 23 | 11 | 47.8 | 12 | 52.2 | 7 | 58.3 | 5 | 41.7 | |
| National Aeronautics and Space Administration | 22 | 13 | 59.1 | 9 | 40.9 | 4 | 44.4 | 5 | 55.6 | |
| State | 18 | 10 | 55.6 | 8 | 44.4 | 0 | .0 | 8 | 100.0 | |
| Environmental Protection Agency | 12 | 5 | 41.7 | 7 | 58.3 | 5 | 71.4 | 2 | 28.6 | |
| Education | 11 | 4 | 36.4 | 7 | 63.6 | 2 | 28.6 | 5 | 71.4 | |
| Smithsonian Institution | 10 | 4 | 40.0 | 6 | 60.0 | 6 | 100.0 | 0 | .0 | |
| Court Services & Offender Supervision | 8 | 7 | 87.5 | 1 | 12.5 | 1 | 100.0 | 0 | .0 | |
| Federal Deposit Insurance Corporation | 8 | 6 | 75.0 | 2 | 25.0 | 2 | 100.0 | 0 | .0 | |
| Government Printing Office | 8 | 2 | 25.0 | 6 | 75.0 | 4 | 66.7 | 2 | 33.3 | |
| Equal Employment Opportunity Commission | 7 | 5 | 71.4 | 2 | 28.6 | 2 | 100.0 | 0 | .0 | |
| Small Business Administration | 7 | 6 | 85.7 | 1 | 14.3 | 1 | 100.0 | 0 | .0 | |
| Corporation for National & Community Service | 6 | 4 | 66.7 | 2 | 33.3 | 0 | .0 | 2 | 100.0 | |
| Tennessee Valley Authority | 6 | 5 | 83.3 | 1 | 16.7 | 0 | .0 | 1 | 100.0 | |
| National Archives and Records Administration | 5 | 0 | .0 | 5 | 100.0 | 4 | 80.0 | 1 | 20.0 | |
| Securities & Exchange Commission | 5 | 4 | 80.0 | 1 | 20.0 | 1 | 100.0 | 0 | .0 | |
| Armed Forces Retirement Home | 4 | 1 | 25.0 | 3 | 75.0 | 2 | 66.7 | 1 | 33.3 | |
| Broadcasting Board of Governors | 3 | 1 | 33.3 | 2 | 66.7 | 1 | 50.0 | 1 | 50.0 | |

Table 3: Disposition of Appeals in the Regional and Field Offices, by Agency, (Continued)

| | Decided | | Dismissed ¹ | | Not Dismissed ¹ | | Settled ² | | Adjudicated ² | |
|---|-------------|-------------|------------------------|-------------|----------------------------|-------------|----------------------|-------------|--------------------------|--|
| | # | # | % | # | % | # | % | # | % | |
| Agency for International Development | 2 | 2 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| Commodity Futures Trading Commission | 2 | 0 | .0 | 2 | 100.0 | 2 | 100.0 | 0 | .0 | |
| Consumer Product Safety Commission | 2 | 1 | 50.0 | 1 | 50.0 | 0 | .0 | 1 | 100.0 | |
| Federal Communications Commission | 2 | 1 | 50.0 | 1 | 50.0 | 1 | 100.0 | 0 | .0 | |
| Judicial Branch | 2 | 2 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| National Labor Relations Board | 2 | 2 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| Nuclear Regulatory Commission | 2 | 1 | 50.0 | 1 | 50.0 | 1 | 100.0 | 0 | .0 | |
| Pension Benefit Guaranty Corporation | 2 | 1 | 50.0 | 1 | 50.0 | 0 | .0 | 1 | 100.0 | |
| Commission on Civil Rights | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| Federal Retirement Thrift Investment Board | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| Government Accountability Office | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| National Council on Disability | 1 | 0 | .0 | 1 | 100.0 | 0 | .0 | 1 | 100.0 | |
| National Science Foundation | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| Office of Administration, Executive Office of the President | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| Panama Canal Commission | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| Railroad Retirement Board | 1 | 0 | .0 | 1 | 100.0 | 0 | .0 | 1 | 100.0 | |
| Selective Service System | 1 | 0 | .0 | 1 | 100.0 | 0 | .0 | 1 | 100.0 | |
| The White House | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| Valles Caldera Trust | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 | |
| TOTAL | 5917 | 3286 | 55.5 | 2631 | 44.5 | 1417 | 53.9 | 1214 | 46.1 | |

¹ Percentages in Columns Dismissed and Not Dismissed are of Decided.

² Percentages in Columns Settled and Adjudicated are of Not Dismissed.

³ Most appeals in which OPM is the agency are retirement cases involving decision made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

Table 4: Disposition of Appeals Adjudicated on the Merits in the Regional and Field Offices by Agency

| | Adjudicated ¹ | Affirmed | | Reversed | | Mitigated Modified | | Other | |
|---|--------------------------|----------|-------|----------|------|--------------------|------|-------|-----|
| | # | # | % | # | % | # | % | # | % |
| Office of Personnel Management² | 573 | 320 | 55.8 | 248 | 43.3 | 1 | .2 | 4 | .7 |
| US Postal Service | 127 | 106 | 83.5 | 17 | 13.4 | 4 | 3.1 | 0 | .0 |
| Veterans Affairs | 66 | 60 | 90.9 | 6 | 9.1 | 0 | .0 | 0 | .0 |
| Army | 65 | 59 | 90.8 | 6 | 9.2 | 0 | .0 | 0 | .0 |
| Homeland Security | 55 | 52 | 94.5 | 3 | 5.5 | 0 | .0 | 0 | .0 |
| Navy | 44 | 42 | 95.5 | 2 | 4.5 | 0 | .0 | 0 | .0 |
| Treasury | 38 | 35 | 92.1 | 2 | 5.3 | 1 | 2.6 | 0 | .0 |
| Defense | 28 | 23 | 82.1 | 5 | 17.9 | 0 | .0 | 0 | .0 |
| Air Force | 43 | 38 | 88.4 | 3 | 7.0 | 2 | 4.7 | 0 | .0 |
| Justice | 21 | 19 | 90.5 | 1 | 4.8 | 0 | .0 | 1 | 4.8 |
| Agriculture | 26 | 25 | 96.2 | 1 | 3.8 | 0 | .0 | 0 | .0 |
| Interior | 16 | 12 | 75.0 | 4 | 25.0 | 0 | .0 | 0 | .0 |
| Transportation | 25 | 13 | 52.0 | 12 | 48.0 | 0 | .0 | 0 | .0 |
| Health & Human Services | 14 | 11 | 78.6 | 3 | 21.4 | 0 | .0 | 0 | .0 |
| Social Security Administration | 18 | 18 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Labor | 3 | 3 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Commerce | 4 | 4 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Housing & Urban Development | 6 | 6 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| General Services Administration | 4 | 4 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Energy | 5 | 3 | 60.0 | 2 | 40.0 | 0 | .0 | 0 | .0 |
| National Aeronautics and Space Administration | 5 | 5 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| State | 8 | 8 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Environmental Protection Agency | 2 | 2 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Education | 5 | 4 | 80.0 | 0 | .0 | 1 | 20.0 | 0 | .0 |
| Government Printing Office | 2 | 2 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Corporation for National & Community Service | 2 | 2 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Tennessee Valley Authority | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| National Archives and Records Administration | 1 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |

Table 4: Disposition of Appeals Adjudicated on the Merits in the Regional and Field Offices by Agency, (Continued)

| | Adjudicated ¹ | | Affirmed | | Reversed | | Mitigated Modified | | Other | |
|--------------------------------------|--------------------------|-------------|------------|-------------|------------|-------------|--------------------|-----------|----------|----------|
| | # | % | # | % | # | % | # | % | # | % |
| Armed Forces Retirement Home | 1 | 100.0 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Broadcasting Board of Governors | 1 | .0 | 0 | .0 | 1 | 100.0 | 0 | .0 | 0 | .0 |
| Consumer Product Safety Commission | 1 | 100.0 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Pension Benefit Guaranty Corporation | 1 | 100.0 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| National Council on Disability | 1 | 100.0 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Railroad Retirement Board | 1 | 100.0 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| Selective Service System | 1 | 100.0 | 1 | 100.0 | 0 | .0 | 0 | .0 | 0 | .0 |
| TOTAL | 1214 | 72.8 | 884 | 72.8 | 316 | 26.0 | 9 | .7 | 5 | 5 |

¹ Adjudicated, i.e., not dismissed or settled.

² 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.

Headquarters Case Processing

Table 5: Disposition of Petitions for Review (PFR) of initial Decisions by Type of Case

| | Decided | | Dismissed | | Settled | | Denied | | Denied but Reopened | | Granted | |
|---------------------------------------|-------------|-------------|-----------|-------------|-----------|-------------|------------|--------------|---------------------|-------------|------------|--------------|
| | # | % | # | % | # | % | # | % | # | % | # | % |
| Adverse Action by Agency | 541 | 4.44 | 24 | 4.44 | 10 | 1.85 | 419 | 77.45 | 17 | 3.14 | 71 | 13.12 |
| Termination of Probationers | 39 | .00 | 0 | .00 | 0 | .00 | 34 | 87.18 | 2 | 5.13 | 3 | 7.69 |
| Reduction in Force | 7 | .00 | 0 | .00 | 0 | .00 | 6 | 85.71 | 0 | .00 | 1 | 14.29 |
| Performance | 30 | 6.67 | 2 | 6.67 | 1 | 3.33 | 26 | 86.67 | 0 | .00 | 1 | 3.33 |
| Acceptable Level of Competence (WIGI) | 4 | .00 | 0 | .00 | 0 | .00 | 4 | 100.00 | 0 | .00 | 0 | .00 |
| Suitability | 14 | 7.14 | 1 | 7.14 | 0 | .00 | 13 | 92.86 | 0 | .00 | 0 | .00 |
| CSRS Retirement: Legal | 231 | 1.30 | 3 | 1.30 | 0 | .00 | 208 | 90.04 | 4 | 1.73 | 16 | 6.93 |
| CSRS Retirement: Disability | 14 | .00 | 0 | .00 | 0 | .00 | 9 | 64.29 | 1 | 7.14 | 4 | 28.57 |
| CSRS Retirement: Overpayment | 13 | .00 | 0 | .00 | 1 | 7.69 | 7 | 53.85 | 0 | .00 | 5 | 38.46 |
| FERS Retirement | 80 | 5.00 | 4 | 5.00 | 2 | 2.50 | 60 | 75.00 | 1 | 1.25 | 13 | 16.25 |
| FERCCA | 1 | 100.00 | 1 | 100.00 | 0 | .00 | 0 | .00 | 0 | .00 | 0 | .00 |
| Individual Right of Action | 78 | 1.28 | 1 | 1.28 | 1 | 1.28 | 63 | 80.77 | 6 | 7.69 | 7 | 8.97 |
| Other | 159 | 5.03 | 8 | 5.03 | 1 | .63 | 121 | 76.10 | 14 | 8.81 | 15 | 9.43 |
| Total | 1211 | 3.63 | 44 | 3.63 | 16 | 1.32 | 970 | 80.10 | 45 | 3.72 | 136 | 11.23 |

Figure 4: Disposition of Petitions for Review of Initial Decisions

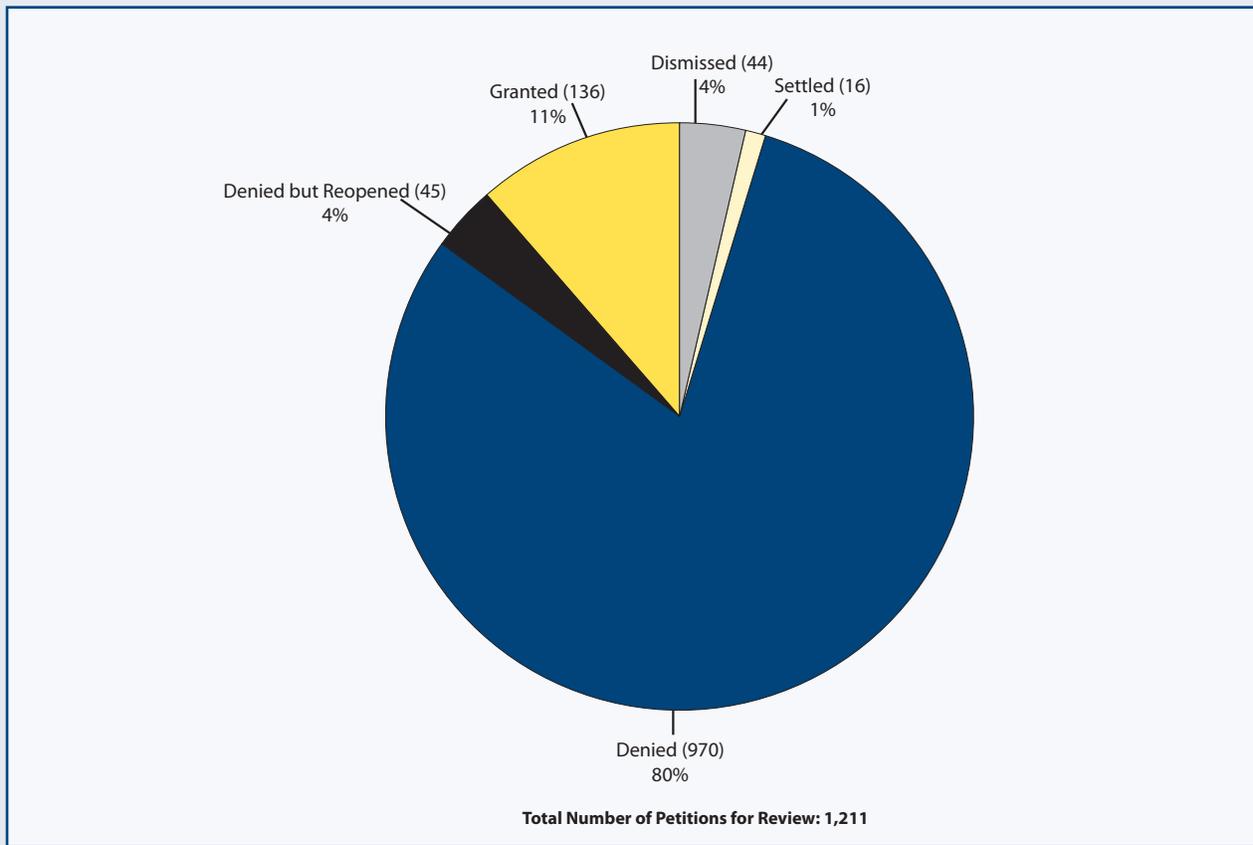


Figure 5: Disposition of Petitions for Review Granted

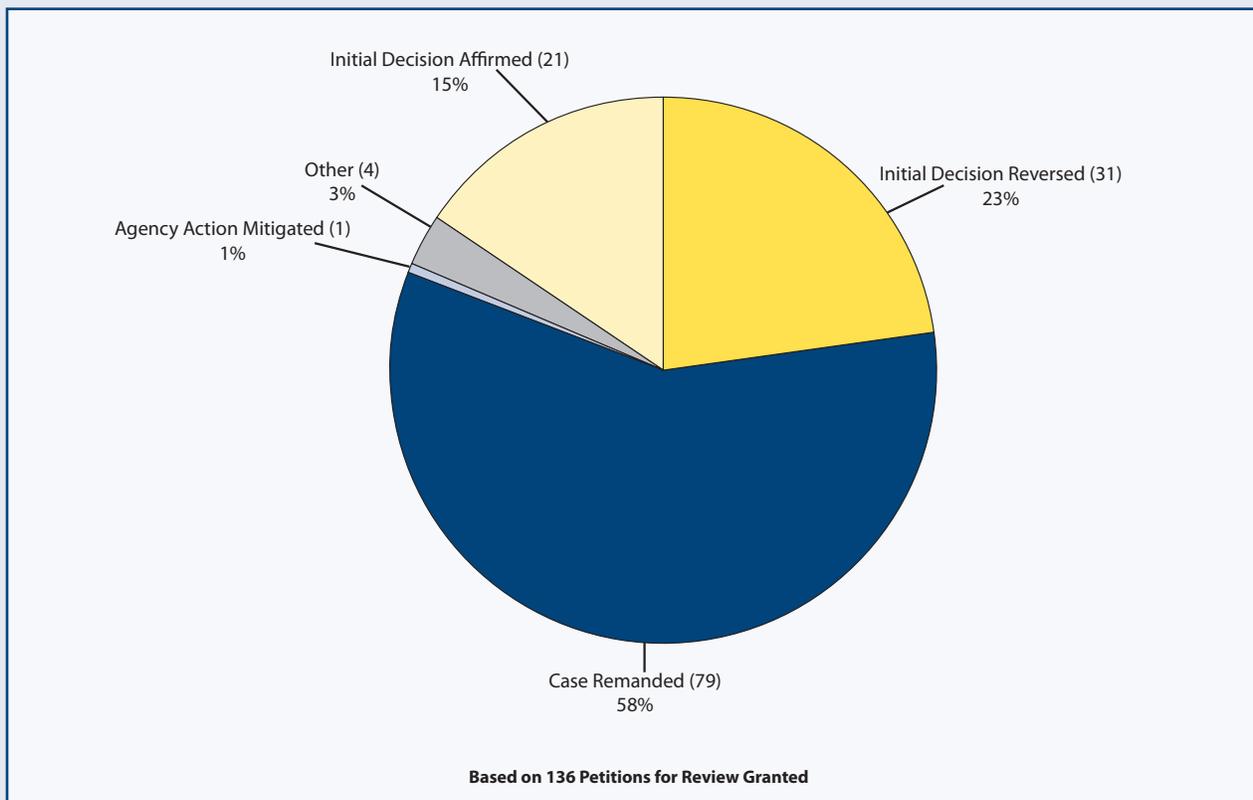


Figure 6: Disposition of Petitions for Review Denied but Reopened

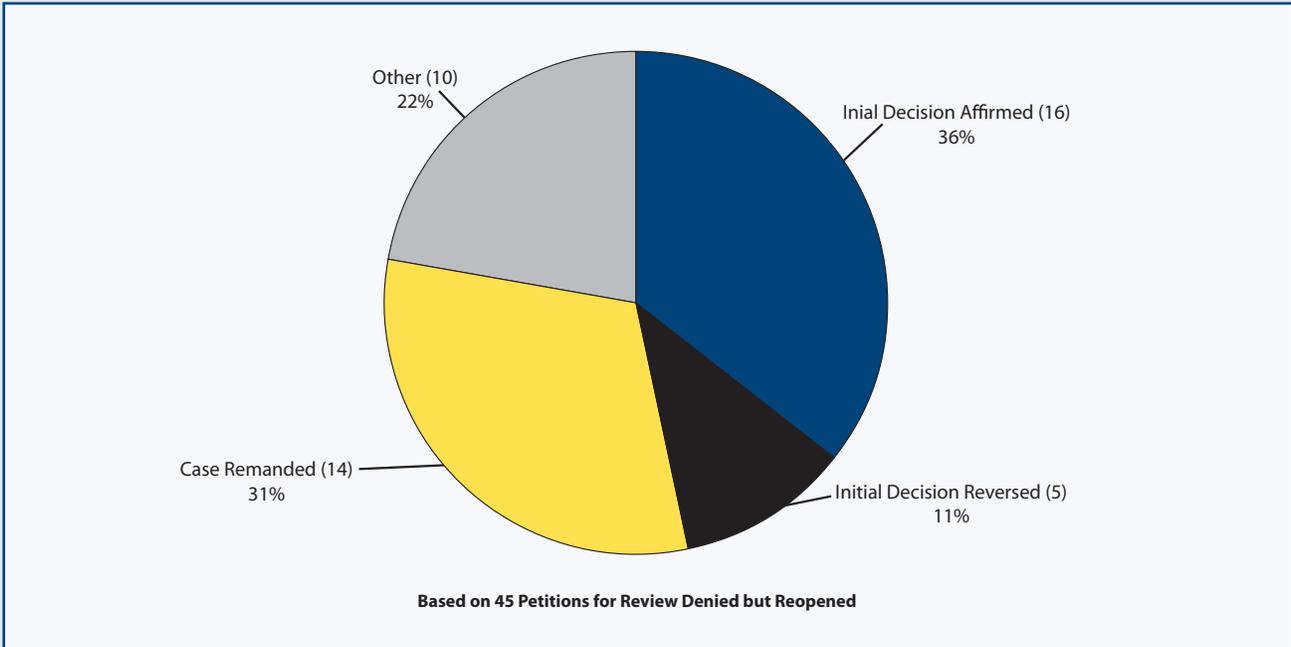


Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency

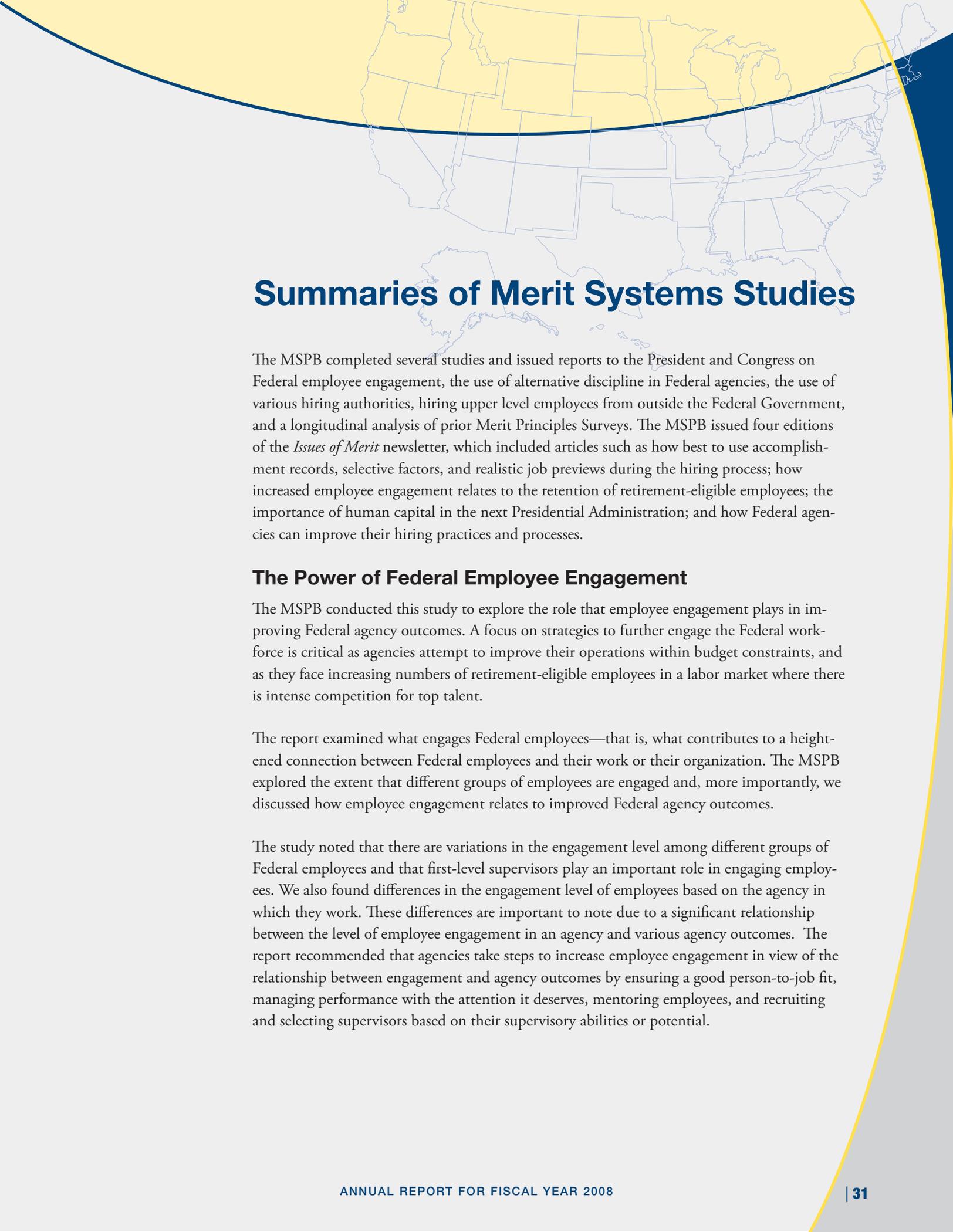
| | Decided | | Dismissed | | Settled | | Denied | | Denied but Reopened | | Granted | |
|---|---------|---|-----------|-------|---------|------|--------|-------|---------------------|-------|---------|-------|
| | # | % | # | % | # | % | # | % | # | % | # | % |
| Office of Personnel Management¹ | 352 | | 8 | 2.27 | 3 | 0.85 | 298 | 84.66 | 7 | 1.99 | 36 | 10.23 |
| US Postal Service | 177 | | 6 | 3.39 | 3 | 1.69 | 141 | 79.66 | 4 | 2.26 | 23 | 12.99 |
| Veterans Affairs | 105 | | 2 | 1.90 | 1 | 0.95 | 92 | 87.62 | 5 | 4.76 | 5 | 4.76 |
| Homeland Security | 73 | | 4 | 5.48 | 2 | 2.74 | 54 | 73.97 | 1 | 1.37 | 12 | 16.44 |
| Army | 65 | | 3 | 4.62 | 1 | 1.54 | 52 | 80.00 | 4 | 6.15 | 5 | 7.69 |
| Navy | 57 | | 1 | 1.75 | 1 | 1.75 | 50 | 87.72 | 1 | 1.75 | 4 | 7.02 |
| Transportation | 49 | | 1 | 2.04 | 1 | 2.04 | 21 | 42.86 | 5 | 10.20 | 21 | 42.86 |
| Air Force | 43 | | 5 | 11.63 | 1 | 2.33 | 29 | 67.44 | 4 | 9.30 | 4 | 9.30 |
| Treasury | 43 | | 0 | 0.00 | 1 | 2.33 | 36 | 83.72 | 0 | 0.00 | 6 | 13.95 |
| Defense | 40 | | 3 | 7.50 | 0 | 0.00 | 34 | 85.00 | 0 | 0.00 | 3 | 7.50 |
| Justice | 31 | | 2 | 6.45 | 0 | 0.00 | 24 | 77.42 | 1 | 3.23 | 4 | 12.90 |
| Agriculture | 26 | | 0 | 0.00 | 0 | 0.00 | 23 | 88.46 | 0 | 0.00 | 3 | 11.54 |
| Interior | 26 | | 0 | 0.00 | 0 | 0.00 | 20 | 76.92 | 4 | 15.38 | 2 | 7.69 |
| Health & Human Services | 22 | | 2 | 9.09 | 0 | 0.00 | 19 | 86.36 | 0 | 0.00 | 1 | 4.55 |
| Social Security Administration | 18 | | 3 | 16.67 | 1 | 5.56 | 11 | 61.11 | 2 | 11.11 | 1 | 5.56 |
| Commerce | 15 | | 1 | 6.67 | 0 | 0.00 | 14 | 93.33 | 0 | 0.00 | 0 | 0.00 |

¹ 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.

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency, (Continued)

| | Decided | | Dismissed | | Settled | | Denied | | Denied but Reopened | | Granted | |
|--|-------------|-------------|-----------|-------------|-----------|-------------|------------|--------------|---------------------|-------------|------------|--------------|
| | # | % | # | % | # | % | # | % | # | % | # | % |
| General Services Administration | 11 | 0.00 | 0 | 0.00 | 0 | 0.00 | 10 | 90.91 | 0 | 0.00 | 1 | 9.09 |
| Labor | 10 | 10.00 | 1 | 10.00 | 1 | 10.00 | 6 | 60.00 | 2 | 20.00 | 0 | 0.00 |
| State | 7 | 0.00 | 0 | 0.00 | 0 | 0.00 | 3 | 42.86 | 1 | 14.29 | 3 | 42.86 |
| National Aeronautics & Space Administration | 7 | 0.00 | 0 | 0.00 | 0 | 0.00 | 7 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| Environmental Protection Agency | 6 | 0.00 | 0 | 0.00 | 0 | 0.00 | 4 | 66.67 | 2 | 33.33 | 0 | 0.00 |
| Education | 5 | 20.00 | 1 | 20.00 | 0 | 0.00 | 4 | 80.00 | 0 | 0.00 | 0 | 0.00 |
| Energy | 4 | 0.00 | 0 | 0.00 | 0 | 0.00 | 4 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| Housing & Urban Development | 4 | 25.00 | 1 | 25.00 | 0 | 0.00 | 3 | 75.00 | 0 | 0.00 | 0 | 0.00 |
| Corporation for National & Community Service | 2 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 50.00 | 0 | 0.00 | 1 | 50.00 |
| Equal Employment Opportunity Commission | 2 | 0.00 | 0 | 0.00 | 0 | 0.00 | 2 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| Pension Benefit Guaranty Corporation | 2 | 0.00 | 0 | 0.00 | 0 | 0.00 | 2 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| Consumer Product Safety Commission | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 | 0 | 0.00 |
| Court Services & Offender Supervision | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| Government Printing Office | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 |
| Judicial Branch | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| National Archives and Records Administration | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| Nuclear Regulatory Commission | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| Panama Canal Commission | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| Small Business Administration | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 | 0 | 0.00 | 0 | 0.00 |
| The World Bank | 1 | 0.00 | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 | 1 | 100.00 | 0 | 0.00 |
| TOTAL | 1211 | 3.63 | 44 | 1.32 | 16 | 0.97 | 970 | 80.10 | 45 | 3.72 | 136 | 11.23 |

Percentages may not total 100 because of rounding.



Summaries of Merit Systems Studies

The MSPB completed several studies and issued reports to the President and Congress on Federal employee engagement, the use of alternative discipline in Federal agencies, the use of various hiring authorities, hiring upper level employees from outside the Federal Government, and a longitudinal analysis of prior Merit Principles Surveys. The MSPB issued four editions of the *Issues of Merit* newsletter, which included articles such as how best to use accomplishment records, selective factors, and realistic job previews during the hiring process; how increased employee engagement relates to the retention of retirement-eligible employees; the importance of human capital in the next Presidential Administration; and how Federal agencies can improve their hiring practices and processes.

The Power of Federal Employee Engagement

The MSPB conducted this study to explore the role that employee engagement plays in improving Federal agency outcomes. A focus on strategies to further engage the Federal workforce is critical as agencies attempt to improve their operations within budget constraints, and as they face increasing numbers of retirement-eligible employees in a labor market where there is intense competition for top talent.

The report examined what engages Federal employees—that is, what contributes to a heightened connection between Federal employees and their work or their organization. The MSPB explored the extent that different groups of employees are engaged and, more importantly, we discussed how employee engagement relates to improved Federal agency outcomes.

The study noted that there are variations in the engagement level among different groups of Federal employees and that first-level supervisors play an important role in engaging employees. We also found differences in the engagement level of employees based on the agency in which they work. These differences are important to note due to a significant relationship between the level of employee engagement in an agency and various agency outcomes. The report recommended that agencies take steps to increase employee engagement in view of the relationship between engagement and agency outcomes by ensuring a good person-to-job fit, managing performance with the attention it deserves, mentoring employees, and recruiting and selecting supervisors based on their supervisory abilities or potential.

Alternative Discipline: Creative Solutions for Agencies to Effectively Address Employee Misconduct

The merit principles require agencies to be effective and efficient in how they use the Federal workforce. This includes the responsibility to address misconduct in a manner that has the greatest potential to prevent further harm to the efficiency of the service. Under the correct circumstances, alternative discipline may be the most effective method for addressing such misconduct. The purpose of this report was to describe the Federal Government's current use of alternative discipline and alternative discipline's potential to help agencies better manage their workforces.

This study found that few agencies take a comprehensive approach to alternative discipline. Rather, its application appears in most cases to involve ad hoc usage by individual managers, with little or no formal guidance from the agency. However, in some rare situations, agencies have set rules that prevent supervisors from being able to make a case-by-case assessment of what approach to discipline may have the greatest potential for success. This report recommended that agencies encourage their supervisors to make greater use of alternative discipline and that they provide more guidance to supervisors on how they can successfully do so.

Federal Appointment Authorities: Cutting Through the Confusion

As Federal employees in the "baby boomer" generation retire, there is the expectation that there will be a large number of new hires brought into the Federal Government in a wide range of occupations and grades. Given this "brain drain," it is important to assess how well the Government is using fair and open practices to recruit a workforce from all segments of society in keeping with the merit principles codified at 5 U.S.C. § 2301.

The purpose of this report was to describe how prevalent exceptions to competitive examining have become and demonstrate the need for supervisors to understand the implications of their use of the alternative hiring authorities.

The research indicated that for white-collar jobs, the use of the competitive examining authority that is open to all qualified applicants is generally declining, while the use of exceptions to fully open competition is proportionally increasing. In fiscal year 2005, more white-collar employees were hired under authorities that permit excluding some qualified applicants than were hired under the traditional competitive examining authority. Our survey results also indicated that many supervisors may not be aware of the implications of their use of these alternative hiring authorities and the specific training and assessment responsibilities that accompany their use.

The MSPB made several recommendations concerning what managers should consider when selecting and appointing a new employee. In particular, the report recommended that agencies ensure that for each hiring authority that is considered or used, supervisors are educated on the requirements of those authorities, so that they fully understand their responsibili-

ties. In addition, agencies should have well-rounded recruitment strategies to ensure that all segments of society are represented. Use of any authority that results in a disproportionate workforce should be balanced with other authorities to ensure a pattern does not develop of hiring from only select groups.

In Search of Highly Skilled Workers: A Study on the Hiring of Upper Level Employees from Outside the Federal Government

Each year, the Government hires tens of thousands of new employees. Traditionally, the vast majority of these new employees were appointed at grades GS-11 and below. However, the number of new hires at grades GS-12 and above has been increasing, especially since fiscal year 2000. This trend is likely to continue as more employees retire, many of whom must be replaced at the higher grade levels to ensure that the Government has the expertise it needs to achieve its missions.

The MSPB studied the senior or journeyman-level specialists, analysts, supervisors and managers, (grades 12-15 in the General Schedule or similar pay plans) to determine whether the Government has been successful in hiring the best-qualified applicants for these jobs in accordance with the merit system principles.

The report noted a number of positive conclusions about the Government's ability to attract highly qualified candidates. Among these were the findings that the Federal Government offers what many new hires want in an employer: job security, workplace flexibility, and challenging work. There were areas, however, where the Government can improve. For example, most new hires and supervisors believed the hiring process was too long and cumbersome. Moreover, one-third of new hires did not apply for another Federal job because they would have had to re-write their application essays or revise their existing essays to describe their knowledge, skills and abilities for the other job.

In order to hire the best applicants, the MSPB recommended that agencies develop a hiring strategy to fill these upper level positions, improve their assessment of job candidates, review their application process to eliminate steps that do not add value, and ensure that human resources professionals provide meaningful feedback to applicants.

The Federal Government: A Model Employer or a Work in Progress?

In this report, the MSPB examined the Federal Government's progress toward becoming a model employer using data from MSPB's Merit Principles Survey, a survey of Federal employees that MSPB has conducted periodically since 1983. The report explored patterns and trends in Federal employees' opinions about their jobs, agencies, and working conditions, and found many positive developments. For example, Federal employees' satisfaction with their pay has increased significantly. Additionally, the percentage of employees who reported experiencing discrimination or retaliation has declined.

However, the report also found areas where improvement is needed. Federal employees consistently reported that their supervisors' technical skills outpaced their managerial skills. Similarly, employees expressed little confidence in the ability of Federal supervisors to exercise personnel authorities fairly and effectively. Also, although differences in Federal employee opinions across lines of ethnicity and race have diminished, minority employees remained more likely to report experiencing unfair treatment or discrimination in the workplace.

The survey results also confirmed that agencies can make a difference. Employee opinions generally varied more across agencies than across lines of ethnicity and race, gender, and age, reinforcing the importance of leadership, organizational culture, and human resources policy and practice within Federal agencies.

The report should help Federal agencies build on their strengths and focus attention on areas for improvement such as employee utilization, the selection and development of Federal supervisors, and performance management.

***Issues of Merit* Newsletter**

The MSPB's *Issues of Merit* newsletter offers insights and analyses on topics related to Federal human capital management—particularly findings and recommendations from MSPB's independent research—to help improve the Government's merit systems. The newsletter's target audience includes Federal policy-makers, managers and executives, human resources professionals, social science researchers, and academics.

The MSPB issued four editions of the *Issues of Merit* newsletter in fiscal year 2008. Each of the four issues included findings from the MSPB's research, articles to help clarify readers' understanding of employment issues, and perspectives from the Director of the Office of Policy and Evaluation (OPE) about specific human capital matters. Articles communicating research findings addressed topics such as increasing supervisors' knowledge of appointing authorities and the increase in satisfaction with federal employment over the last 25 years. Other articles provided insight into issues such as how to use accomplishment records and realistic job previews, how engagement can be used to retain retirement eligible employees, and how selective factors can be a useful tool in selecting quality employees. The OPE Director addressed issues such as how MSPB revamped its hiring process, the importance of adhering to the merit principles, human capital's importance in the next administration, and how agencies can improve their hiring practices and processes.

Merit Principles Survey 2007

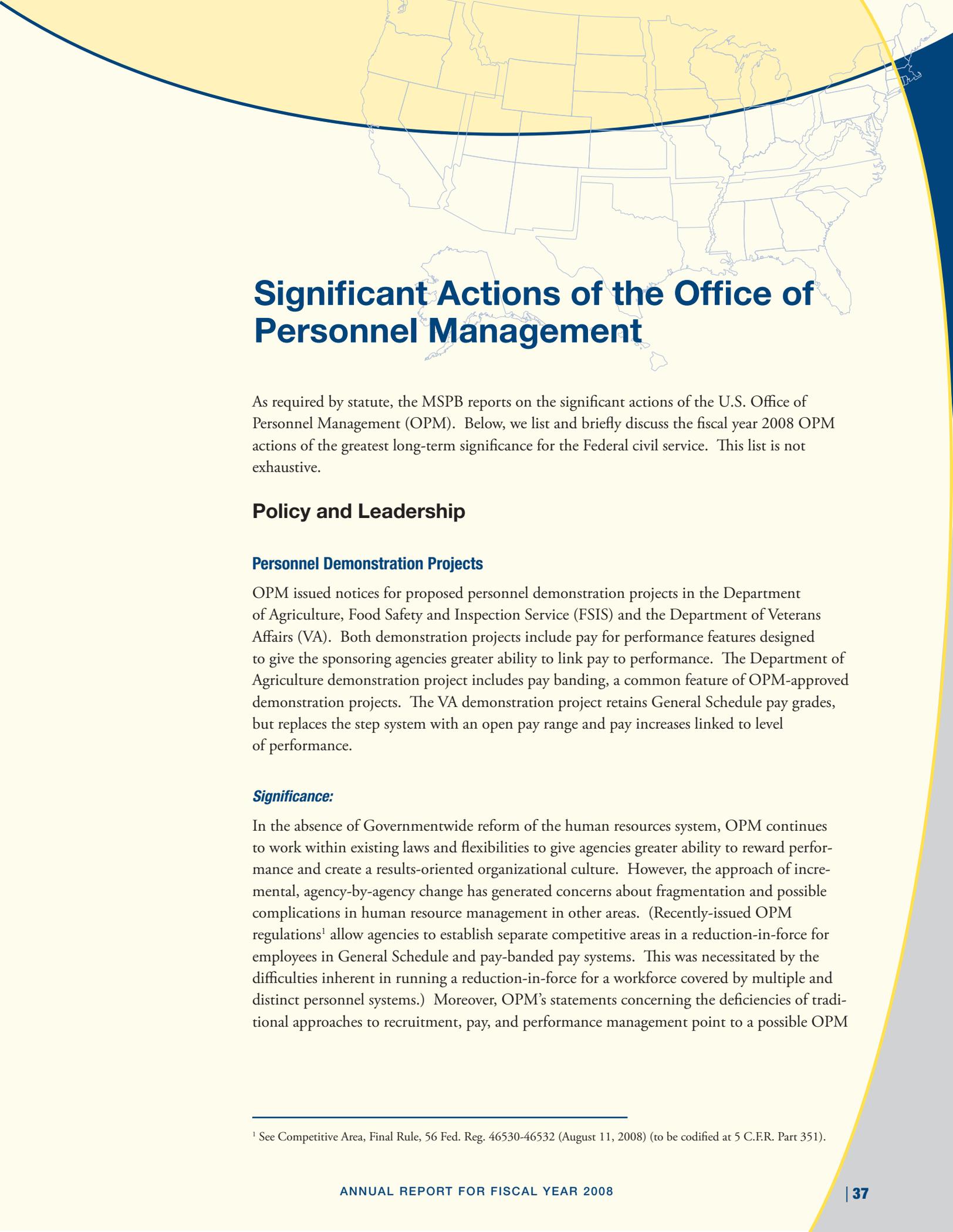
The MSPB has conducted the Governmentwide Merit Principles Survey (MPS) every few years for the past two decades. Each administration of the MPS tracks the incidence of prohibited personnel practices among Federal employees, assesses the degree to which merit principles are followed, and gathers other information to support OPE research studies. OPE completed the administration of the MPS 2007 during fiscal year 2008.

The MPS asked employees, supervisors, and higher level leaders to share their perceptions of the implementation of the merit system in the workplace. The topics addressed included the merit system principles, job satisfaction, supervision, performance management, training and development, and agency leadership. The MPS was administered to 68,789 employees in 28 agencies in the fall of 2007. Sixty percent of these employees responded to the survey. Fourteen of the participating agencies used the MPS to conduct their annual employee survey, required by the National Defense Authorization Act for Fiscal Year 2004. At the beginning of fiscal year 2008 we provided these agencies with reports and raw data files of the annual survey questions.

Career Advancement Survey

As part of the MSPB's research initiative to evaluate how fairly Federal employees feel they are treated in the work place, we developed the Career Advancement Survey. The survey covered a variety of topics, including work satisfaction, career experiences, perceptions of the work environment, pay and performance management, and work/life issues. In fiscal year 2008, the MSPB completed the administration of this survey via the web and paper to a stratified random sample of 11,538 full-time permanent employees in over 30 agencies.

Future reports for the President and the Congress will compare the results of the Career Advancement Survey with similar items on earlier surveys to provide a longitudinal perspective on attitudes within the Federal Government. Findings will also be examined in the context of changes in the composition of the Federal workforce.



Significant Actions of the Office of Personnel Management

As required by statute, the MSPB reports on the significant actions of the U.S. Office of Personnel Management (OPM). Below, we list and briefly discuss the fiscal year 2008 OPM actions of the greatest long-term significance for the Federal civil service. This list is not exhaustive.

Policy and Leadership

Personnel Demonstration Projects

OPM issued notices for proposed personnel demonstration projects in the Department of Agriculture, Food Safety and Inspection Service (FSIS) and the Department of Veterans Affairs (VA). Both demonstration projects include pay for performance features designed to give the sponsoring agencies greater ability to link pay to performance. The Department of Agriculture demonstration project includes pay banding, a common feature of OPM-approved demonstration projects. The VA demonstration project retains General Schedule pay grades, but replaces the step system with an open pay range and pay increases linked to level of performance.

Significance:

In the absence of Governmentwide reform of the human resources system, OPM continues to work within existing laws and flexibilities to give agencies greater ability to reward performance and create a results-oriented organizational culture. However, the approach of incremental, agency-by-agency change has generated concerns about fragmentation and possible complications in human resource management in other areas. (Recently-issued OPM regulations¹ allow agencies to establish separate competitive areas in a reduction-in-force for employees in General Schedule and pay-banded pay systems. This was necessitated by the difficulties inherent in running a reduction-in-force for a workforce covered by multiple and distinct personnel systems.) Moreover, OPM's statements concerning the deficiencies of traditional approaches to recruitment, pay, and performance management point to a possible OPM

¹ See Competitive Area, Final Rule, 56 Fed. Reg. 46530-46532 (August 11, 2008) (to be codified at 5 C.F.R. Part 351).

concern that human capital management—and consequently organizational efficiency and effectiveness—may be substantially impaired in those agencies that must continue to operate under the existing framework of Title 5, United States Code²

Improving the Hiring Process

Recognizing the importance of a rigorous yet timely hiring process to attracting and selecting good employees, OPM has undertaken several initiatives aimed at improving how Federal agencies recruit and assess potential employees. Those initiatives include:

End-to-End Hiring Roadmap. In partnership with the Chief Human Capital Officers Council, OPM issued an “End to End Hiring Roadmap” with the objectives of better integrating various elements of the hiring process and significantly reducing the time between application and job offer.

Support of Federal Agency Recruitment. OPM developed template vacancy announcements for selected high-volume occupations to simplify and standardize the job announcement and application process for both agencies and applicants. OPM has also continued to encourage agencies to analyze and promote jobs using the OPM-developed “career patterns” framework.

Competency-Based Qualification Standards. OPM issued a draft competency-based standard for the information technology specialist occupation and plans to develop competency-based standards for other occupations related to other Governmentwide functions such as financial management and grants management. Competency-based standards require applicants to demonstrate defined levels of proficiency in specific job-related skills (competencies), instead of a specific length and type of work experience.

Assessment Guides. OPM published a *Structured Interview Guide* and information on reference checking to assist agencies in conducting effective interviews and reference checks.

Reciprocity in Suitability Determinations and Investigations. OPM issued final regulations to require Federal agencies to recognize suitability investigations and determinations and to establish criteria for granting reciprocity. Reciprocity has great potential to eliminate duplication of effort and reduce time lost, both before appointment and on the job, while waiting for investigations to be completed or suitability determinations to be made.

Significance:

These initiatives reflect a holistic approach to improving Federal hiring and are broadly consistent with recommendations from previous MSPB research on Federal hiring. When fully implemented, these initiatives should make the Federal hiring process more navigable, rigorous, and timely.

² See Proposed Personnel Demonstration Project; Alternative Personnel Management System for the U.S. Department of Agriculture, Food Safety and Inspection Service, Notice of a proposed demonstration project plan, 73 Fed. Reg. 26436-26451 (May 9, 2008). The introduction to the plan states that “At best, the personnel system that covers USDA and FSIS employees is based on 20th century assumptions about the nature of public service. Although the current Federal personnel management system is based on important core principles, those principles operate in an inflexible, one-size-fits-all system of defining work, hiring staff, managing people, assessing and rewarding performance, and advancing personnel. These inherent weaknesses make support of the FSIS mission complex, costly, and, ultimately, risky from the standpoint of public health.”

Elimination of Time in Grade

OPM issued proposed regulations to eliminate time in grade (TIG), a requirement that employees in the competitive service must serve a prescribed length of time (typically one year) at a given grade level prior to promotion to a higher grade level.

Significance:

The elimination of TIG is consistent with an emphasis on agency flexibility and performance, rather than tenure, as the primary criterion for advancement. Although stakeholders have raised concerns about possible abuse, we note that TIG has never applied in the excepted service, and that the immediate effects of the proposed elimination of TIG will likely be limited, as employees must still meet qualification requirements (which typically require one year of experience at the next lower grade level, or equivalent) to advance.

Report on Agency Use of Hiring Flexibilities

OPM issued a report on Federal agency use of hiring flexibilities. OPM reported an increased use of flexibilities, including category rating (an alternative to the “rule of three”) that MSPB has advocated through previous research. Not surprisingly, OPM also found that users preferred the hiring flexibilities to “regular” hiring processes: “Supervisors, managers, and human resource practitioners who responded to this survey report [that] use of these hiring authorities to fill entry-level positions is more efficient and effective than traditional ranking and selection procedures.”³

Significance:

OPM’s report confirms a continuing increase in agency use of flexibilities within competitive examining as well as broad exceptions to competitive examining, a trend documented in recent MSPB research on Federal hiring.⁴ Although agencies find the flexibilities useful, the scope and extent of their use has raised concerns among Federal employee groups, as evidenced by a legal challenge to the Federal Career Intern Program.⁵ Increasing reliance on exceptions to competitive hiring also raises long-term questions about the role of competitive examination in the Federal service, an issue not addressed in OPM’s report.

Hiring authority guidance

In November 2007, OPM issued a memorandum to Chief Human Capital Officers which strongly advised Federal agencies against further use of the Outstanding Scholar and Bilingual/Bicultural hiring authorities.

Significance:

In September 2006, the MSPB issued a report titled, *Reforming Federal Hiring: Beyond Faster and Cheaper*, which noted that the Outstanding Scholar and Bilingual/Bicultural hiring authorities had caused negative effects and recommended that OPM act to sunset these authorities. In October 2006, the Board issued decisions in *Dean v. Department of Agriculture*, 99 M.S.P.R. 533 (2005), *reconsideration denied*, 104 M.S.P.R. 1 (2006) and *Olson v.*

³ Office of Personnel Management, *Report on Agencies’ Use of Hiring Flexibilities*, May 2008, p. 28.

⁴ See U.S. Merit Systems Protection Board, *Federal Appointing Authorities: Cutting through the Confusion*, Washington, DC, July 2008.

⁵ *NTEU v. Springer*, No 1:07CV00168 (D.D.C., filed January 27, 2007).

Department of Veterans Affairs, 100 M.S.P.R. 322 (2005), *reconsideration denied*, 104 M.S.P.R. 1 (2006) in which the Board determined that the Outstanding Scholar authority (and, by implication, the Bilingual/Bicultural hiring authority), as it was being used, violated veterans' preference requirements. The November 2007 OPM memorandum counseled agencies to discontinue the use of these special hiring authorities.

Clarification of Adverse Action Rules During Probationary and Trial Periods

In February 2008, OPM issued final regulations to address changes in case law that have taken place over the past decade, including those raised in MSPB's 2006 report, *Navigating the Probationary Period After Van Wersch and McCormick*.⁶ OPM's final regulations clarify the adverse action rules already in place as a result of court and Board decisions.

Significance:

At the end of fiscal year 2006, the MSPB issued a report which noted that in 1999 the U.S. Court of Appeals for the Federal Circuit issued a decision that invalidated certain OPM regulations related to trial periods (and later probationary periods), yet OPM's regulations remained unchanged, creating potential difficulties for agencies seeking to have their actions upheld by the MSPB and its reviewing court. OPM's new regulations should help reduce confusion about agencies' obligations when taking adverse actions against employees.

Clarification of Adverse Action Rules Regarding Indefinite Suspension

In September 2008, OPM issued proposed rules to expand the circumstances under which an agency may indefinitely suspend an employee.

Significance:

Traditionally, indefinite suspensions were permitted only when an agency: revoked or suspended a security clearance required for continued employment; had reason to believe that an employee suffered from a medical condition that put himself or others in the workplace at risk or otherwise precluded effective performance; or had probable cause to believe that an employee had committed a crime for which a sentence of imprisonment could be imposed. In 2007, however, the Board suggested that an agency could indefinitely suspend an employee, pending completion of an internal investigation, because the agency suspected that the employee had committed serious misconduct (*Lamour v. Department of Justice*, 106 M.S.P.R. 366). OPM's proposal would codify this rule.

Compliance and Accountability

Presidential Transition Guidance and Review Procedures

Following its standard practice, OPM has taken several actions related to the management of political appointees and members of the Senior Executive Service during the Presidential election period and the following transition. Those actions included (1) issuing the *Presidential Transition Guide to Federal Human Resources Management*; and (2) instituting a require-

⁶ *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999), and *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), *reh'g and reh'g en banc denied*, 329 F.3d 1354 (2003).

ment for OPM review of actions appointing or converting a Schedule C or noncareer SES appointee to a competitive service or career SES position.

Significance:

It is essential to ensure that appointments and other personnel actions to career positions are made without regard to political affiliation or other non-merit factors. In November 2008, OPM indicated that there had been approximately 20 competitive appointments of previous political appointees, and that “OPM has approved the hiring of some political appointees who have competitively applied for positions in the Federal workforce because they were the most qualified.”⁷ We note, however, that the OPM review process does not apply to the excepted service, which accounts for an increasing percentage of positions in the Federal civil service.

Human Capital Planning and Accountability

OPM issued regulations delineating OPM and agency responsibilities for human capital management, including accountability. Under the regulations, agency responsibilities include (1) establishing a human capital plan; (2) assessing human capital management including compliance with merit system principles and using an OPM-approved accountability system; and (3) issuing an annual human capital management report.

Significance:

In the Federal Government’s decentralized system, agency self-assessment and accountability are critical to effective management of human capital and adherence to merit system principles. OPM’s regulation clarifies OPM and agency responsibilities and provides a Governmentwide framework for human capital planning and accountability.

Selection and Development of Federal Supervisors and Managers

OPM has taken several actions to help agencies identify and develop effective supervisors. These actions include issuance of a revised qualification standard for supervisory positions, publication of desired proficiency levels for key leadership competencies, and issuance of proposed regulations requiring agencies to provide for the development of their supervisors, managers, and executives, including training within the year following initial appointment to a supervisory position.

Significance:

Good supervisory skills are essential to every aspect of human resource management, from hiring to performance management, and are particularly important in light of the increased authority and discretion afforded to Federal managers under both Title 5 and alternative personnel systems. However, MSPB research has consistently found that Federal supervisors’ managerial skills lag behind their technical skills. These OPM initiatives can help agencies improve the competence of their supervisors.

Addressing Reprisal Against Whistleblowers and Violations of Antidiscrimination Laws

As required by the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), OPM has conducted a study of agency best practices in taking

⁷ Statement from Kevin Mahoney, Associate Director, Human Capital Leadership and Merit System Accountability, on the hiring of political appointees into career positions, dated November 20, 2008. (Available at www.opm.gov/news/index.aspx.)

disciplinary action when an employee engages in conduct inconsistent with whistleblower protection and antidiscrimination laws and has issued advisory guidelines that Federal agencies may use when taking such action.

Significance:

Protection of whistleblowers and nondiscrimination are major tenets of the Federal civil service. The OPM guidelines are constructive and reinforce the importance of timely leadership action, including holding the responsible individual accountable, when incidents of reprisal or prohibited discrimination occur.

Delivering Products and Services

Administrative Law Judge (ALJ) Examination

In 2007, OPM announced a new ALJ examination and accepted applications from all qualified U.S. citizens. In 2008, OPM reopened the ALJ examination to accept new applications and updated the ALJ register.

Significance:

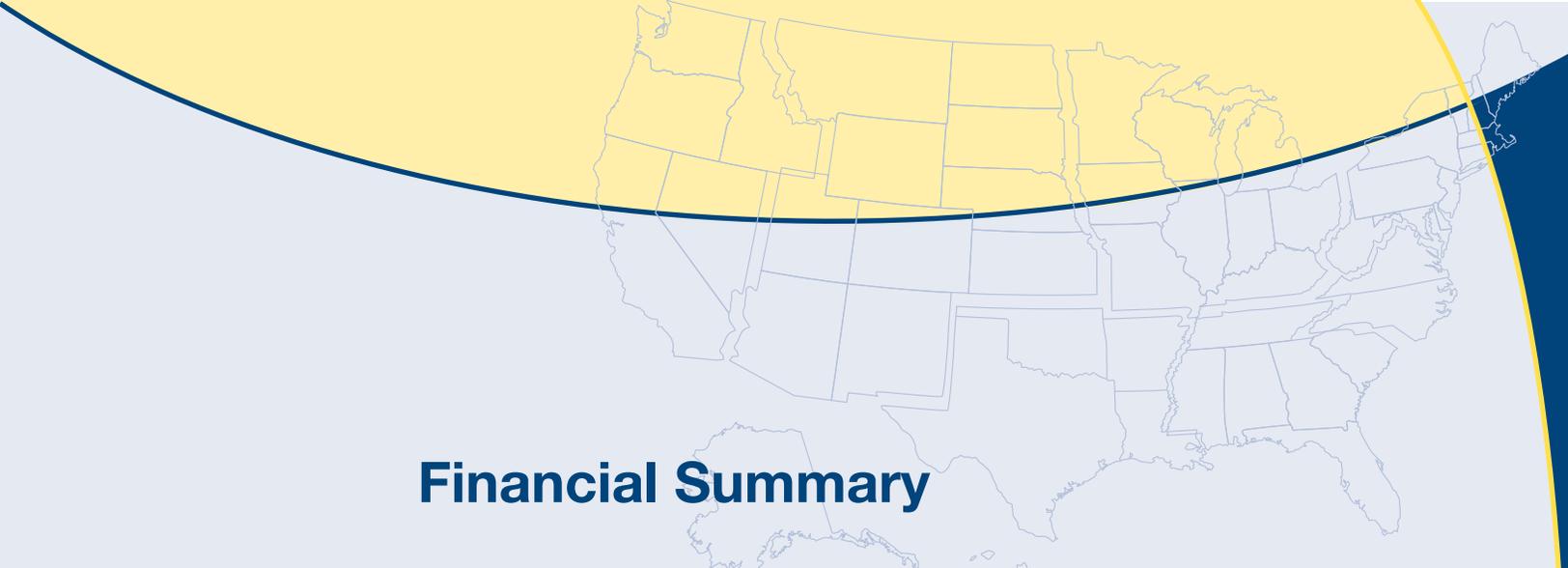
As noted in MSPB's 2007 *Annual Report*, the ALJ population is highly vulnerable to the anticipated retirement wave, both because of its demographics (over 80% of ALJs were 55 years of age or older as of June 2008) and because, until 2007, the ALJ examination had not been open to all U.S. citizens for several years. The availability of an updated register is essential to the Social Security Administration and other agencies that employ ALJs.

Senior Executive Service (SES) Federal Candidate Development Program

OPM announced and accepted applications for its first Senior Executive Service (SES) Federal Candidate Development Program (Fed CDP) since 2005. The Fed CDP is an interagency program that selects high-potential Federal employees through a competitive process and provides them with training and developmental assignments to develop the competencies (Executive Core Qualifications, or ECQs) required for appointment in the SES. Participants who successfully complete the program are eligible for placement in the SES without further competition.

Significance:

The Federal Government has an aging workforce and must prepare for the retirements of many current members of the SES. The Fed CDP could become a valuable component of that preparation. Although agencies can establish their own candidate development programs, this may be impractical for agencies that employ few executives or are facing severe resource constraints. The Fed CDP enables such agencies to address prospective SES vacancies proactively and to provide valuable leadership training and development to high-potential employees at reasonable cost. The interagency approach is also consistent with the vision of the SES as a cadre of versatile, mobile executives. Although only a few agencies offered opportunities through the initial Fed CDP, the program has long-term potential to produce a broader and deeper candidate pool than would be produced by individual agency programs.



Financial Summary

Fiscal Year 2008 Financial Summary (dollars in thousands)

| | |
|---|-----------------|
| Budget Authority | \$40,086 |
| Appropriation | \$37,507 |
| Transfer from the Civil Service Retirement and Disability Trust Fund | 2,579 |
| Obligations Incurred | \$39,655 |
| Personnel Compensation | \$24,888 |
| Personnel Benefits | 5,667 |
| Benefits For Former Employees | 10 |
| Travel and Transportation of Persons | 498 |
| Transportation of Things | 59 |
| Rental, Communications and Utilities | 4,123 |
| Printing and Reproduction | 55 |
| Other Contractual Services | 3,079 |
| Supplies and Materials | 269 |
| Equipment | 955 |
| Land and Structures | 51 |
| <i>Note: Totals may not add due to rounding.</i> | |

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