

UNITED STATES MERIT SYSTEMS PROTECTION BOARD



FISCAL YEAR 2009 ANNUAL REPORT



JUNE, 2010

FOREWORD

In accordance with section 1206 of Title 5, United States Code, the U.S. Merit Systems Protection Board (MSPB) provides this annual report on its significant actions during fiscal year 2009. This report includes summaries of the most significant Board decisions and court opinions 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 2009 program performance results and financial audit information is included in MSPB's Performance and Accountability Report (PAR). This Annual Report and the PAR as well as other information about the MSPB can be found on MSPB's Web site: www.mspb.gov.

TABLE OF CONTENTS

Fiscal Year in Review	1
Significant trends and issues	1
Adjudication	3
Merit systems studies	4
Legislative and congressional relations update	4
Significant actions of the Office of Personnel Management	5
Board Members and Board Organization	7
Board Members.....	7
Board offices and structure	11
Organization chart	12
Significant Board Decisions and Court Opinions	13
Significant Board Decisions	13
Significant opinions issued by the United States Supreme Court and the United States Court of Appeals for the Federal Circuit	17
Case Processing Statistics.....	21
Summary of Cases Decided by MSPB.....	21
Regional Case Processing.....	22
Headquarters Case Processing	28
Summaries of Merit Systems Studies	31
Managing for Engagement—Communication, Connection, and Courage	31
Addressing Poor Performers and the Law	31
Job Simulations: Trying Out for a Federal Job	32
As Supervisors Retire: An Opportunity for Organizational Change.....	32
Fair and Equitable Treatment: Progress Made and Challenges Remaining	32
<i>Issues of Merit</i> News letter	33
Significant Actions of the Office of Personnel Management	35
OPM Mission and Organization.....	35
Policy and Leadership.....	35
Delivering Agency and Employee Services.....	42
Financial Summary.....	43

FISCAL YEAR IN REVIEW

SIGNIFICANT TRENDS AND ISSUES

The most significant trends or issues affecting the MSPB's mission to protect the Federal merit systems include changes and developments in appeal rights and management flexibilities, changing demographics of the workforce, the Federal budget, and changes in MSPB staff and leadership positions.

CHANGES AND DEVELOPMENTS IN APPEAL RIGHTS AND MANAGEMENT FLEXIBILITIES

In FY 2009, the MSPB received a combined total of 1,072 cases (compared to 533 cases in FY 2008) under two related veterans' rights laws, the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA). The MSPB expects to continue to receive large numbers of cases under these veterans' rights laws as our nation remains engaged in major military conflicts. The MSPB hears a variety of VEOA and USERRA cases. For example, veterans who seek employment in the Federal civil service and are not hired have the right to seek redress for any alleged violation of their veterans' preference rights before the MSPB under the VEOA. In addition, individuals who leave employment in the Federal civil service to serve in the military have the right to reemployment in the Federal civil service and to challenge the terms (or denial) of reemployment before the MSPB under USERRA. Considering the current employment outlook in the private sector, it is reasonable to expect that veterans who have a statutory preference in Federal hiring and those who have the right to reemployment in the Federal civil service will continue to seek to enforce their rights before the MSPB in large numbers.

Additionally, members of both houses of Congress have introduced legislation that, if enacted, would increase the MSPB's caseload in whistleblower appeals as well as increase the complexity of the processing of those appeals. One such bill, S. 372, the Whistleblower Protection Enhancement Act, would allow the MSPB to consider certain new kinds of retaliation claims, remove several existing exceptions to whistleblower protection, create a new category of whistleblowing, bring screeners employed by the Transportation Security Administration within the coverage of the Whistleblower Protection Act, and require that findings be made on certain issues in whistleblower cases that currently are not always made. According to the analysis of S. 372 provided to the Congressional Budget Office by MSPB, the bill is likely to result in 350 additional cases filed in the MSPB's regional offices each year, 225 additional hearings each year, and 64 additional cases filed at MSPB headquarters each year.

During FY 2009, the MSPB and the Office of Compliance signed an interagency Memorandum of Understanding (MOU) whereby the MSPB will provide mediation and hearing services for cases filed under the Congressional Accountability Act (CAA). The Office of Compliance is a non-partisan independent agency within the Legislative Branch that administers and enforces the CAA. Although these activities are not expected to significantly increase MSPB's workload, the MOU is noteworthy in that it extends the MSPB's decision-making authority to not only new cases and new employees, but also to a different branch of government.

The Americans with Disabilities Act (ADA) Amendments Act of 2008 (Public Law 110-325) 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 (and are 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. The EEOC issued proposed regulations in September 2009 implementing the law.

Effective October 1, 2008, the Department of Homeland Security (DHS) rescinded application of 5 CFR 9701, Subparts A-G, of the DHS Human Resources Management System as noted in the Federal Register – 73 FR 58435. DHS took this action pursuant to the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act for 2009 (Public Law 110-329), which barred DHS from using funds appropriated in this act or any other appropriations act for the development, testing, deployment, or operation of any portion of the DHS personnel system. The MSPB subsequently amended its regulations by removing all DHS-specific provisions as noted in the Federal Register – 74 FR 9343. Therefore, all appeals to the MSPB from DHS employees will be adjudicated under the MSPB’s government wide regulations.

In addition, the National Defense Authorization Act (NDAA) for Fiscal Year 2010 (Public Law 111-84) ended the Department of Defense’s National Security Personnel System (NSPS), requiring the Department to transfer all employees and positions from NSPS by January 1, 2012. The NDAA also encourages the Secretary of Defense to propose new personnel flexibilities, and other agencies continue to be interested in additional flexibilities. 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 are free from prohibited personnel practices. Studying these new systems 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 the MSPB’s ability to hire and retain skilled staff all the more critical. The MSPB continues to use technology to improve the effectiveness and efficiency of our work processes. The MSPB has undertaken pilot projects on the development of electronic case files and the use of electronic transcripts. Both projects provide benefits by giving MSPB employees the ability to access files from any computer. Both also provide the advantage of fully searchable records. When fully implemented, parties with internet access will also be able to access and search their case files.

CHANGING DEMOGRAPHICS OF THE FEDERAL WORKFORCE

The American Recovery and Reinvestment Act may result in a considerable amount of hiring by some Federal agencies. It appears that some of this hiring will be under appointing authorities that exclude appeal rights, which may generate some appeals before MSPB arguing to the contrary. Of course, any additional hiring that does grant appeal rights may generate an increased number of appeals as well.

The proportion of retirement-eligible Federal employees 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. As retirements increase, we might expect to see an increase in retirement-based appeals. The FY 2010 NDAA may provide an incentive to Federal employees covered by the Federal Employees Retirement System to retire sooner than they had anticipated due to a provision that allows them to claim service credit toward retirement for their sick leave balance. However, the NDAA also allows full-time Federal employees to end their careers in a part-time status without adversely affecting the amount of their annuity. This may be an incentive for employees to postpone retirement and work in a part-time status.

As the government replaces 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 play out over time. Therefore it is important for the MSPB to continue its efforts to hire and retain skilled adjudicatory, studies, management, and support staff.

THE FEDERAL BUDGET

Irrespective of the hiring that the American Recovery and Reinvestment Act may spur in some agencies, increasing budget pressures may result in a greater potential for other agencies to cut costs by decreasing the size of their workforce, reducing or freezing hiring, or reducing training. Reducing 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.

CHANGES IN MSPB LEADERSHIP POSITIONS AND BOARD MEMBERS

The results and activities contained in this FY 2009 Annual Report were produced under the leadership of Chairman Neil A. G. McPhie and Vice Chairman Mary M. Rose. Although Chairman McPhie's term of appointment ended on March 1, 2009, statutory provisions permitted him to serve up to one additional year or until a new Chairman was sworn in. Susan Tsui Grundmann was sworn in as Chairman of the U.S. Merit Systems Protection Board on November 12, 2009. Anne M. Wagner was sworn in as Vice Chairman on November 12, 2009. As of that date, Mrs. Rose assumed the duties of Member of the Board. We are pleased to provide biographical information about Chairman Grundmann and Vice Chairman Wagner in this report.

The MSPB appointed a new Director of the Office of Appeals Counsel in FY 2009. In early FY 2010, the Director of the Office of Financial and Administrative Management retired, and an Acting Director will lead that office until a permanent Director is selected. In addition, in early FY 2010, Chairman Grundmann appointed a new Executive Director and a new General Counsel.

ADJUDICATION

The MSPB decided appeals and petitions for review (PFRs) in accordance with the laws and regulations governing such appeals. The MSPB issued 7,998 decisions in fiscal year 2009. The regional and field offices 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 programs in the regions, field offices, and headquarters, the Mediation Appeals Program, and the availability of administrative judges (AJs) separately designated for settlement of a case. The MSPB also

conducted outreach to its adjudication customers including agencies, unions, and advocacy groups. In addition, MSPB representatives met with official delegations from Vietnam's Ministry of Home Affairs (similar to our civil service) and from Thailand's Merit System Protection Commission (similar to MSPB) about issues related to merit systems appeals.

This report contains case processing statistics, which include detailed information regarding the type, origin, and disposition of cases processed by the MSPB. This report also contains brief summaries of the most significant Board decisions issued in fiscal year 2009, 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 alternative personnel systems, discrimination, jurisdiction, remedies, retirement, suitability, veterans' rights, and whistleblower protections.

MERIT SYSTEMS STUDIES

The MSPB completed several studies and issued reports on issues such as addressing poor performers in the Federal Government, the utility of job simulations in employee selection, how the role of the supervisor is changing, fair and equitable treatment in the Federal workforce, and performance management practices that drive employee engagement. The MSPB also issued four editions of the *Issues of Merit* newsletter. Newsletter topics included using employee engagement to achieve agency results, employee perceptions about the best career accelerators, how agencies can improve their hiring practices, including embracing social networking, and how agencies can best target their training resources.

LEGISLATIVE AND CONGRESSIONAL RELATIONS UPDATE

The Omnibus Appropriations Act of 2009 (Public Law 111-8) provided FY 2009 appropriations for the Merit Systems Protection Board for \$38,811,000. The appropriated funds included reimbursements from the Civil Service Retirement and Disability Fund not to exceed \$2,579,000 for administrative expenses incurred in connection with the adjudication of retirement appeals.

Former Chairman Neil McPhie conducted a series of meetings with Members and Senators to discuss MSPB's request for reauthorization. Specifically, he met with Representatives Elijah Cummings, Henry Johnson, John Sarbanes, and Darrell Issa. He also met with Senator Roland Burris and with the chief of staff for Representative Gerald Connolly. No legislative action occurred on the request during FY 2009.

By request, the Office of the General Counsel worked extensively with majority and minority staff of the Senate Committee on Homeland Security and Governmental Affairs and with White House and Department of Justice staff to draft proposed amendments to the Whistleblower Protection Act. The bill was introduced by Senator Daniel Akaka as the Whistleblower Protection Enhancement Act of 2009. A bill with the same title, but containing several different provisions, was introduced in the House. Neither bill was enacted in FY 2009.

On July 31, 2009, the President nominated Susan Tsui Grundmann to be a Member and Chairman of the Merit Systems Protection Board. He also nominated Anne Marie Wagner to be a Member of the Board with the designation of Vice Chairman. The MSPB assisted the nominees during the confirmation process including scheduling meetings with Senators on the Senate Committee on Homeland Security and Governmental Affairs and helping to prepare the nominees for their confirmation hearing.

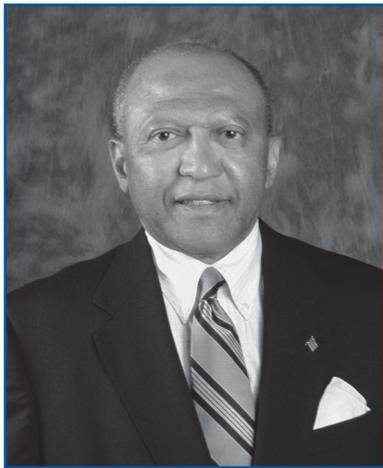
SIGNIFICANT ACTIONS OF THE OFFICE OF PERSONNEL MANAGEMENT

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 changes OPM has made to its mission and organization, including its establishment of a new strategic plan and organizational structure. The MSPB reviewed significant policy and leadership actions of OPM, most notably its efforts to create labor-management forums, manage leadership succession, and target hiring initiatives. Further, the MSPB explored OPM's significant actions related to delivering products and services, such as the expanded employee benefits and support programs and improved background investigation service delivery.

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.



NEIL A. G. McPHIE
Chairman
December 2003 – November 2009

Neil A. G. McPhie served as Chairman of the U.S. Merit Systems Protection Board from December 2003 to November 2009. He was confirmed as Chairman of the Board on November 21, 2004, having 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, and statutory provisions permitted him to serve until our new Chairman was sworn in on November 12, 2009.

Prior to joining the Board, Mr. McPhie 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 U.S. Supreme Court, the U.S. District Court for the District of Columbia, several of the United States circuit courts of appeals, and district courts in Virginia.



MARY M. ROSE
Vice Chairman
January 2006 – November 2009
Board Member
November 2009 to Present

Mary M. Rose was sworn in as a Board Member on December 28, 2005, following her confirmation by the Senate on December 17, 2005. She was designated by President Bush as Vice Chairman of the U.S. Merit Systems Protection Board on January 27, 2006 and served in that role until a new Vice Chairman was sworn in November 2009. Mrs. Rose's appointment as Board Member 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.



SUSAN TSUI GRUNDMANN
Chairman
November 2009 to Present

Susan Tsui Grundmann was nominated by President Barack Obama on July 31, 2009 to serve as a Member and Chairman of the U.S. Merit Systems Protection Board. She was confirmed by the U.S. Senate on November 5, 2009 and sworn in on November 12, 2009. Chairman Grundmann's term expires on March 1, 2016.

Previously, Ms. Grundmann served as General Counsel to the National Federation of Federal Employees (NFFE), which represents 100,000 Federal workers nationwide and is affiliated with the International Association of Machinist and Aerospace Workers. At NFFE, she successfully litigated cases in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia. In 2004, Ms. Grundmann represented NFFE and other labor unions in the statutory "meet and confer" process with officials from the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM), which sought agreement on how to proceed with new DHS personnel regulations. She represented NFFE and the United Department of Defense Workers Coalition, consisting of 36 labor unions, and has served on the Coalition's litigation team in a coordinated response to proposed personnel changes at the Department of Defense (DoD). In addition to DoD employees, Ms. Grundmann represented employees in the Forest Service, Department of Agriculture, Passport Services, Veterans Administration, General Services Administration, and some 25 additional Federal agencies. From 2003 to 2009, she was a regular instructor on Federal sector labor and employment law at the William W. Winpisinger Education Center in Placid Harbor, Maryland. Prior to joining NFFE, Ms. Grundmann served as General Counsel to the National Air Traffic Controllers Association. She began her legal career as a law clerk to the judges of the Nineteenth Judicial Circuit of Virginia, and later worked in both private practice and at the Sheet Metal Workers National Pension Fund. Chairman Grundmann earned her undergraduate degree at American University and her law degree at Georgetown University Law Center.



ANNE M. WAGNER
Vice Chairman
November 2009 to Present

Anne M. Wagner was nominated by President Barack Obama on July 31, 2009 to serve as a Member of the U.S. Merit Systems Protection Board with the designation of Vice Chairman. Her nomination was confirmed by the U.S. Senate on November 5, 2009 and she was sworn in November 12, 2009. Ms. Wagner's term expires on March 1, 2014.

Ms. Wagner comes to the Merit Systems Protection Board after serving as General Counsel of the Personnel Appeals Board of the U.S. Government Accountability Office (GAO). Prior to that, Ms. Wagner was appointed by the U.S. Comptroller General to serve a five-year statutory term as a Member of the GAO Personnel Appeals Board. Ms. Wagner began her career as a staff attorney in the Office of the General Counsel for the General Services Administration, where she primarily handled labor and employment issues. From there, she went on to become an Assistant General Counsel for the American Federation of Government Employees (AFGE), AFL-CIO, the largest Federal sector labor organization representing more than 600,000 Federal and District of Columbia government employees. In her nearly twenty years with AFGE, she led precedent setting litigation and handled cases arising under the full array of laws governing Federal employment. Ms. Wagner graduated from the University of Notre Dame and received her J.D. from the George Washington University, National Law Center. She is admitted to practice law in the District of Columbia, Maryland, and Illinois as well as before various Federal courts, including the U.S. Supreme Court.

BOARD OFFICES AND STRUCTURE

The MSPB has three appointed Board members and approximately 236 employees assigned to headquarters and to its eight regional and field offices located throughout the United States.

The **Board Members** adjudicate the 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 Executive Director. The Board also consists of a Vice Chairman and a Member.

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 MSPB. (The functions of this office are currently performed by administrative law judges at the National Labor Relations Board (NLRB) under a reimbursable interagency agreement.)

The **Office of Appeals Counsel (OAC)** conducts legal research and prepares proposed decisions for the Board in cases where a party petitions for review of an administrative judge's (AJ's) initial decision and in most other cases decided by the Board. The office 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 MSPB headquarters, rules on certain procedural matters, and issues MSPB's decisions and orders for the Board Members. The office serves as MSPB's public information center, coordinates media relations, provides information to the public, operates 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 MSPB's affirmative employment initiatives, advises MSPB's managers and supervisors on these initiatives, and advises and trains all employees on compliance with equal employment opportunity and civil rights laws. It provides informal and formal complaint processes and alternative dispute resolution processes to MSPB employees, former employees, and applicants for employment who allege employment discrimination and also provides similar processes to individuals who allege disability discrimination in their access to the MSPB's programs and activities. The office also reports agency complaints data and workforce demographics to Congress, the Equal Employment Opportunity Commission (EEOC), OPM, and other external stakeholders.

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 National Finance Center for payroll services, the Department of the Treasury Bureau of the Public Debt for accounting services, and the U.S. Department of Agriculture Animal and Plant Health Inspection Service for human resources management services.

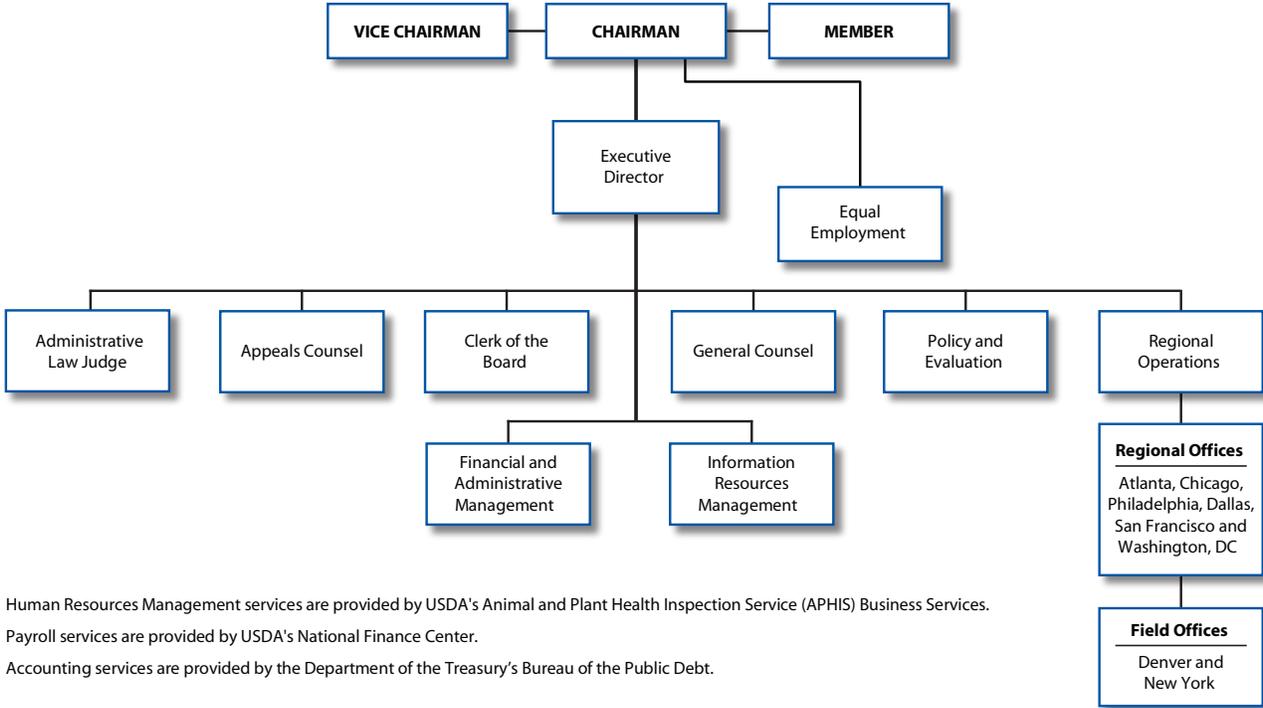
The **Office of the General Counsel (OGC)**, as legal counsel to the MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents the MSPB in litigation and prepares proposed decisions for the Board on compliance and other cases,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

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

The **Office of Policy and Evaluation (OPE)** carries out MSPB’s statutory responsibility to conduct special studies of the civil service and other Federal merit systems. Reports of these studies are sent to the President and the 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. OPE also conducts special projects for the MSPB and has responsibility for preparing MSPB’s program performance plans and reports including those required by the Government Performance and Results Act (GPRA).

The **Office of Regional Operations (ORO)** oversees MSPB’s six regional and two field offices, which receive and process appeals and related cases, and manages 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, well-reasoned, and timely initial decisions.

ORGANIZATION CHART



Human Resources Management services are provided by USDA's Animal and Plant Health Inspection Service (APHIS) Business Services.
 Payroll services are provided by USDA's National Finance Center.
 Accounting services are provided by the Department of the Treasury's Bureau of the Public Debt.

SIGNIFICANT BOARD DECISIONS AND COURT OPINIONS

The MSPB issued a substantial number of noteworthy decisions in FY 2009, a number of which are summarized below. Also included below are brief summaries of a number of significant opinions issued by the United States Court of Appeals for the Federal Circuit as a service to our stakeholders.

SIGNIFICANT BOARD DECISIONS

ALTERNATIVE PERSONNEL SYSTEMS

Edwards v. Department of Homeland Security, 110 M.S.P.R. 243 (2008): The Transportation Security Administration (TSA) is not covered by 5 U.S.C. § 2301(b)(7), which pertains to agency obligations to provide education and training to employees, nor is it covered by 5 U.S.C. § 2302(b)(12), which prohibits actions that would violate laws implementing or directly concerning the merit system principles in section 2301. The TSA is covered by the personnel management system established for the Federal Aviation Administration (FAA) 49 U.S.C. § 40122(g). Section 40122(g) provides that title 5 of the United States Code does not apply to the FAA's personnel management system except for eight specific chapters and sections. 5 U.S.C. §§ 2301(b)(7) and 2302(b)(12) are not among the exceptions.

Roche v. Department of Transportation, 110 M.S.P.R. 286 (2008): An individual employed by the Federal Aviation Administration has a right to appeal an adverse action such as a removal to the Board under 49 U.S.C. § 40122(g) only if he meets the definition of an "employee" under 5 U.S.C. § 7511(a)(1).

Winlock v. Department of Homeland Security, 110 M.S.P.R. 521 (2009): An adverse action appeal brought by an employee of the Transportation Security Administration (TSA) is governed by the TSA Management Directive (MD) 1100.75-3 (Sept. 17, 2004). The TSA is covered by the provisions of the Aviation and Transportation Security Act and the personnel management system authorized by 49 U.S.C. § 40122, except to the extent that the Administrator of the TSA modifies that system as it applies to TSA employees. MD 1100.75-3 modifies the system authorized by section 40122 and requires the TSA to show that its action is for such cause as will promote the efficiency of the service, that there is a nexus between a legitimate government interest and the matter that forms the basis for the action, and that the penalty is "appropriate" taking into account the factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), and any other relevant considerations. Although the TSA directive does not specify the standard of proof the agency must meet before the Board, the applicable standard is preponderance of the evidence. That standard appears at 5 U.S.C. § 7701(c)(1)(B), which remains applicable to the TSA under 49 U.S.C. §§ 114(d) and 40122(g)(2).

DISCRIMINATION

Marshall v. Department of Veterans Affairs, 111 M.S.P.R. 5 (2008): Where an agency has already articulated a non-discriminatory or a non-retaliatory reason for its action, e.g., charged misconduct, there is no need for the Board to determine, when the appellant asserts an affirmative defense of discrimination or retaliation, whether the appellant has established a "prima facie case" of discrimination or retaliation. The inquiry proceeds directly to the ultimate question of whether, upon weighing all of the evidence, the appellant has met her overall burden of proving illegal discrimination or retaliation.

JURISDICTION

Brown v. Department of Defense, 110 M.S.P.R. 593 (2009): In a split decision, the Board Members disagreed regarding whether the Board has jurisdiction to review an agency's designation of a position as non-critical sensitive.

REMEDIES

Sink v. Department of Energy, 110 M.S.P.R. 153 (2008): Where the appellant showed that he retired on a particular date in reliance on misinformation provided by his employing agency, but where he would have been separated for a legitimate reason a few weeks later, the appropriate remedy was to cancel the appellant's retirement, restore him with appropriate back pay and other benefits from the effective date of retirement until the date he would otherwise have been separated from service, and adjust his retirement annuity accordingly.

RETIREMENT

Bleidorn v. Office of Personnel Management, 111 M.S.P.R. 456 (2009): Although an amended qualified domestic relations order (QDRO) was not acceptable for processing as a court order awarding a former spouse survivor annuity, it did constitute a timely filed written election of a former spouse survivor annuity, where the retiree endorsed and approved the QDRO which awards the former spouse the maximum possible former spouse annuity and the amended QDRO was filed with the Office of Personnel Management within two years after the termination of the marriage. 5 U.S.C. §8339(j)(3).

King v. Office of Personnel Management, 112 M.S.P.R. 522 (2009): An agency is required by regulation to advise an employee of his right to apply for disability retirement within one year of being removed when the agency has reason to believe that the basis for removal is related to a medical condition. 5 C.F.R. § 844.202. An agency's failure to provide this notice, standing alone, is not a ground for excusing the individual's failure to apply for disability retirement within the one-year deadline set by statute. 5 U.S.C. § 8453.

Nunes v. Office of Personnel Management, 111 M.S.P.R. 221 (2009): Under 5 U.S.C. § 8339(o), a Civil Service Retirement System annuitant who was married at the time of retirement has an 18-month window after his retirement to elect to reduce his monthly annuity payments for the purpose of providing his spouse with a survivor annuity or to increase his monthly annuity reduction to provide a greater survivor annuity for his spouse. The Office of Personnel Management has an obligation under subsection 8339(o)(6) to inform annuitants of this right of election on an annual basis, and case law holding to the contrary, *Scriffiny v. Office of Personnel Management*, 108 M.S.P.R. 378, ¶ 6 (2008), is overruled.

SUITABILITY

Aguzie v. Office of Personnel Management, 112 M.S.P.R. 276 (2009): In a case of first impression, the Board requested sua sponte briefing on the issue of whether, when the Office of Personnel Management directs the removal of a non-probationary employee on suitability grounds, a subsequent appeal is governed by the suitability regulations at 5 C.F.R. part 731 or the statutory adverse action provisions at 5 U.S.C. ch. 75. The scope of a suitability appeal is narrower than the scope of an adverse action appeal, and it is unclear whether OPM, by regulation, may limit statutory appeal rights.

Upshaw v. Consumer Product Safety Commission, 111 M.S.P.R. 236 (2009): The appellant made a nonfrivolous allegation of jurisdiction that the agency made an appealable constructive negative suitability determination under 5 C.F.R. part 731 by withdrawing a tentative offer of employment after receiving information from a former federal employer that the appellant had been terminated during his probationary period. Because Congress has not granted the Office of Personnel Management (OPM) the authority to issue a retroactive regulation relating to suitability, OPM's revised suitability regulations "effective June 16, 2008," 73 Fed. Reg. 20,149 (2008), could not be given retroactive effect, regardless of OPM's intent, to divest the Board of jurisdiction over pending suitability cases. The suitability regulations in effect at the time of the appellant's non-selection therefore govern in this matter.

VETERANS' RIGHTS

Boctor v. U.S. Postal Service, 110 M.S.P.R. 580 (2009): The Postal Service issued two separate vacancy announcements for the position of sales specialist. One announcement indicated that only applications from career Postal employees would be accepted while a second external recruitment announcement did not contain this restriction. The appellant, a preference eligible who was not a Postal employee, filed his application under the external announcement. The Board determined that the Postal Service violated the appellant's right under the VEOA to compete for the sales specialist position because it did not consider his application when it made a selection using the internal announcement. The Board noted that a preference eligible's right to compete arises when an agency accepts applications from individuals outside its own workforce, "not just when it considers those applications it indicated a willingness to accept."

Downs v. Department of Veterans Affairs, 110 M.S.P.R. 139 (2008): An individual who was discharged from active military duty under "other than honorable conditions" lacks standing to bring an appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA) because USERRA expressly excludes from its coverage those who received such a discharge. 38 U.S.C. § 4304(2). An appellant bringing a USERRA appeal has an unconditional right to a hearing upon request, but that right is triggered only after the appellant establishes jurisdiction. USERRA appeals may be dismissed for lack of jurisdiction, without a hearing, where the uncontested evidence shows that the appellant lacks standing.

Garcia v. Department of Agriculture, 110 M.S.P.R. 371 (2009): The fact that an individual submitted a complaint to the Department of Labor under the Veterans Employment Opportunities Act (VEOA) beyond the statutory deadline is not a jurisdictional bar to a subsequent VEOA appeal to the Board. Where the lateness is not excusable under equitable tolling principles, the Board will deny relief on the merits.

Gingery v. Department of Defense, 112 M.S.P.R. 306 (2009): The agency's use of the Federal Career Intern Program (FCIP) to fill the Auditor position the appellant sought may have violated the appellant's rights as a preference eligible veteran. The FCIP allows an agency to make an "excepted" appointment, without following statutory competitive examination procedures, to a position that is traditionally in the competitive service. It is unclear whether the agency in this case properly excepted the Auditor position from the competitive service, given that such exceptions may be made only as "necessary." 5 U.S.C. § 3302. The case was remanded for briefing.

Graf v. Department of Labor, 111 M.S.P.R. 444 (2009): The Board vacated an initial decision dismissing a VEOA appeal for lack of jurisdiction on the basis that the appellant lacked the specialized experience for the position. This type of analysis goes to the merits of the appellant's claim, rather than to jurisdiction. Nevertheless the Board dismissed the appeal for lack of jurisdiction because the appellant failed to exhaust the Department of Labor's complaint process.

Silva v. Department of Homeland Security, 112 M.S.P.R. 362 (2009): For purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA), an executive agency may be treated as the employer of an individual who was formally employed by a government contractor. *See* 38 U.S.C. § 4303(4)(A) (broadly defining “employer”). If the agency exercised direct control over the contractor to such an extent that the agency effectively prevented the individual’s reemployment following military service, the executive agency may be required to provide relief to the individual.

Weed v. Social Security Administration, 112 M.S.P.R. 323 (2009): The appellant made a viable claim under the Uniformed Services Employment and Reemployment Rights Act by alleging that the agency chose to fill a position under the Federal Career Intern Program (FCIP) in order to avoid advertising widely that it had a vacancy and avoid giving preference to veterans. He also made a viable claim under the Veterans Employment Opportunities Act by alleging that the agency used the FCIP as a means to circumvent his veterans’ preference rights and right to compete for a position. That the appellant did not apply for the position in question was not a bar to either claim.

WHISTLEBLOWER PROTECTIONS

MacLean v. Department of Homeland Security, 112 M.S.P.R. 4 (2009): Where a U.S. Court of Appeals has already made an express determination under 49 U.S.C. § 114(s) that certain matters disclosed by the appellant fall within the definition of “sensitive security information” (SSI) under 49 C.F.R. § 1520.7(j), the Board may not decide for itself, in an appeal within its jurisdiction brought by the appellant, whether the matters really were SSI; instead the Board is bound by the court’s determination. A disclosure that is prohibited by regulations promulgated to safeguard the confidentiality of SSI is a “disclosure prohibited by law” within the meaning of 5 U.S.C. § 2302(b)(8)(A), and, as a result, the individual who made the disclosure is not protected from retaliation.

Wadhwa v. Department of Veterans Affairs, 111 M.S.P.R. 26 (2009): In an IRA appeal, an appellant cannot be collaterally estopped from litigating whether he nonfrivolously alleged he made a protected disclosure when in his prior appeal he failed to prove by preponderant evidence that same disclosure was protected. This is because the legal issues in the two appeals were not identical.

SIGNIFICANT OPINIONS ISSUED BY THE UNITED STATES SUPREME COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ATTORNEY FEES

Ramos v. Department of Justice, 552 F.3d 1356 (Fed. Cir. 2009) A party may apply to the court for fees under the Back Pay Act, rather than solely under the Equal Access to Justice Act (EAJA). A request for fees under the Back Pay Act for services rendered in judicial proceedings must, as in the case of an EAJA request, be directed to the court. The Board does not have authority to grant fees for work done before the Federal Circuit.

DISCIPLINARY ACTION

Doe v. Department of Justice, 565 F.3d 1375 (Fed. Cir. 2009) In the absence of a violation of criminal law, an employing agency is permitted to discipline an employee for off-duty personal conduct only if the conduct affects that agency's ability to perform its responsibilities or if the conduct constitutes a violation of internal regulation. Here the agency's decisions to sustain the charge and to impose the penalty of removal were influenced at least in part by the mistaken assumption that the behavior constituted a violation of criminal law.

Malloy v. United States Postal Service, 578 F.3d 1351 (Fed. Cir. 2009) An employee's mental impairment warrants consideration and weight in assessing the reasonableness of the agency's disciplinary action. Here, the petitioner argued that her mental impairment caused her to act inappropriately and she submitted supporting medical documentation.

EMPLOYMENT DISCRIMINATION

Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn., 129 S.Ct. 846 (2009) Title VII's anti-retaliation provisions extend to an employee who raises discrimination when answering questions during an employer's internal investigation. The Title VII anti-retaliation provision makes it "an unlawful employment practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by this subchapter..." Here, Ms. Crawford described instances of sexual harassment in answering questions during her employer's internal investigation. The Court found that the provisions apply to Ms. Crawford, explaining that "[t]here is, then, no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."

14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (2009) A provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act is enforceable.

Ricci v. DeStefano, 129 S.Ct. 2658 (2009) Before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional, disparate impact, the employer must have a strong basis to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action. Here, the court ruled that the employer did not meet that threshold test when it discarded the results from a promotion examination without strong evidence that the test was deficient and that discarding the results was necessary to avoid violating Title VII's disparate impact provision.

Dedrick v. Berry, 573 F.3d 1278 (Fed. Cir. 2009) The Federal Circuit may not take jurisdiction over a mixed case where a district court has dismissed a plaintiff's discrimination claim and transferred the remaining disability retirement claim to the Federal Circuit for review. Rather, such an appeal is properly heard in the regional circuit court of appeals.

JURISDICTION

Carrow v. Merit Systems Protection Board, 564 F.3d 1359 (Fed. Cir. 2009) While 5 U.S.C. § 7511(a)(1)(C)(ii) requires "current continuous service" to be performed in the same or similar position, it does not require that the positions be within the same agency. Here, the court stated that Mr. Carrow's prior service with the Department of the Army could be combined with his service with the Department of Veterans Affairs in determining whether he had 2 years of current continuous service in an executive agency. The court noted that OPM regulations permit an individual to satisfy the two-year service requirement by combining service with different agencies. The court found that OPM's interpretation was reasonable and that neither the text nor the legislative history of 5 U.S.C. § 7511(a)(1)(C)(ii) evinces any congressional intent to preclude an employee from satisfying the continuity-of-service requirement by tacking on prior service in a different agency.

PERFORMANCE-BASED ACTIONS

Adamsen v. Department of Agriculture, 563 F.3d 1326 (Fed. Cir.), *modified on reh'g*, 571 F.3d 1363 (Fed. Cir. 2009) If an agency significantly alters a previously-OPM-approved performance appraisal system, OPM review of the agency's modifications is necessary to comply with the basic purpose underlying the OPM approval requirement. Here, the court found that neither the administrative record nor the Board's findings enabled the court to determine whether OPM was required to approve the amendments to the employing agency's performance appraisal system or whether it approved the changes in the system under which the removal action was taken against the petitioner. The court found that the Board erred by not addressing what changes the agency made in its performance appraisal plan or whether those changes required OPM approval.

RETIREMENT

Reilly v. Office of Personnel Management, 571 F.3d 1372 (Fed. Cir. 2009) In this disability retirement case, the court held that the Board erred in adopting a categorical rule barring subsequent medical evidence; the court noted that, where proximity in time, lay testimony, or some other evidence provides the requisite link to the relevant period, the subsequent medical evidence can be probative of a prior disability. The court stated that nothing in OPM regulations specified that medical examination or documentation must have occurred prior to retirement.

Lisanti v. Office of Personnel Management, 573 F.3d 1334 (Fed. Cir. 2009), *pet. for cert. filed*, 78 U.S.L.W. 3295 (Oct. 27, 2009) (No. 09-543) The Board has authority to review OPM's reliance on an employing agency's individual retirement record. Although the employing agency must certify an employee's basic pay in his individual retirement record, OPM is required under the Civil Service Retirement System (CSRS) to review the employing agency's legal determination of which categories of income qualify as basic pay. The court found that Congress mandated that CSRS claims be brought through one central channel instead of through various complicated avenues. Here, OPM was required to review the employing agency's interpretation of the term "basic pay." Similarly, the Board was required to review OPM's interpretation of "basic pay," as Congress directed that OPM's actions which affect the "rights or interests of an individual" may be appealed to the Board pursuant to 5 U.S.C. § 8347(d)(1). In fact, Mr. Lisanti's prior attempt to litigate his claims against his employing agency in district court was dismissed for lack of jurisdiction because the OPM-Board-Federal Circuit review process was the exclusive avenue for Mr. Lisanti to pursue his claims.

VETERANS' RIGHTS

Dean v. Consumer Product Safety Commission, 548 F.3d 1370 (Fed. Cir. 2008) An agency's simultaneous use of the competitive process and the merit promotion process is not of itself a violation of veterans' preference. The Federal Circuit held that there was no violation under VEOA because Mr. Dean was given an opportunity to compete for the position and was considered by the agency. With respect to Mr. Dean's USERRA claim, the court found no violation where the agency required both veterans and non-veterans to follow the same procedure and to submit a separate application under each hiring authority. The court noted that any applicant, veteran or non-veteran, who submitted a single application, would have been considered under only one hiring authority.

Gingery v. Department of Defense, 550 F.3d 1347 (Fed. Cir. 2008) An agency must obtain OPM permission to pass over a preference eligible veteran. The Federal Circuit held that OPM's procedures for passing over a preference eligible veteran, as set forth at 5 C.F.R. § 302.401(b), are invalid because they afford less protection than Congress guaranteed to preference eligibles under 5 U.S.C. § 3318. The court observed that 5 C.F.R. § 302.401(b) requires only that an agency (1) record its reasons for passing over the preference eligible and (2) provide, upon request, a copy of those reasons to the preference eligible or his representative. However, 5 U.S.C. § 3318, a competitive service statute which applies to excepted service positions pursuant to 5 U.S.C. § 3320, requires that an agency's appointing authority obtain OPM permission to pass over a preference eligible. In addition, Section 3318(b) provides additional protections for preference eligibles having a compensable service-connected disability of 30 percent or more. The court concluded that 5 C.F.R. § 302.401(b) was invalid because it does not give effect to the unambiguously expressed intent of Congress in enacting 5 U.S.C. §§ 3318 and 3320.

Kirkendall v. Department of the Army, 573 F.3d 1318 (Fed. Cir. 2009) An agency's failure to give credit to a preference eligible applicant's military documents is a violation of the applicant's statutory right to credit for all of the veteran's experience which is material to the position. Here, the hiring agency did not consider Mr. Kirkendall's military documents attached to his application based on its policy of requiring all information to be in a single document. The court held that, by doing so, the agency violated 5 U.S.C. § 3311(2), which guarantees that any experience of a veteran that is material to the position for which the veteran is examined will be credited. The court noted that, at the very least, "credited" means "considered." The court remanded for the Board to craft appropriate relief for Mr. Kirkendall and noted that priority consideration for a future job opening would be an insufficient remedy for the VEOA violation in this case.

WHISTLEBLOWER PROTECTION

Drake v. Agency For International Development, 543 F.3d 1377 (Fed. Cir. 2008) A disclosure alleging that agency personnel became intoxicated while on duty was not a report of a trivial violation, but was an allegation of deliberate and intentional alcohol consumption that would result in a violation of law, rule, or regulation. The court found that the Board erred in ruling that the agency's Foreign Affairs Manual, which identified intoxication on duty as an offense subject to disciplinary action, was not a law, rule, or regulation under the Whistleblower Protection Act. The court further found that the Board erroneously required Mr. Drake to prove that the behavior he observed was in fact caused by intoxication. The court stated that the test is not whether Mr. Drake was able to prove intoxication but whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by Mr. Drake could reasonably conclude that agency personnel were intoxicated and that a violation occurred.

CASE PROCESSING STATISTICS

SUMMARY OF CASES DECIDED BY MSPB

Table 1: FY 2009 Summary of Cases Decided by MSPB

CASES DECIDED IN MSPB REGIONAL/FIELD OFFICES RO/FOS:	
Appeals	6,265
Addendum Cases ¹	584
Stay Requests ²	107
TOTAL Cases Decided in RO/FOs	6,956
Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction ³	15
CASES DECIDED BY THE BOARD:	
Appellate Jurisdiction:	
Petitions for Review (PFRs) – Appeals	850
Petitions for Review (PFRs) – Addendum Cases	111
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings ⁴	2
Court Remands	9
Compliance Referrals	36
EEOC Non-concurrence Cases	1
Arbitration Cases	10
Subtotal – Appellate Jurisdiction	1,019
Original Jurisdiction ⁵	7
Interlocutory Appeals	1
TOTAL Cases Decided by the Board	1,027
TOTAL Decisions (Board, ALJs, RO/FOs)	7,998

¹ Includes 256 requests for attorney fees, 3 requests for compensatory damages (discrimination cases only), 5 requests for consequential damages, 1 request for liquidated damages, 214 petitions for enforcement, 86 Board remand cases, and 19 court remand cases.

² Includes 80 stay requests in whistleblower cases and 27 in non-whistleblower cases.

³ Initial Decisions issued by ALJ. Case type breakdown: 2 Hatch Act cases; 3 Non-Hatch Disciplinary actions; 1 action against a member of the SES; and 9 actions against ALJs.

⁴ 1 case was reopened by the MSPB on its own motion and 1 by request of OPM.

⁵ Final MSPB Decisions – Case type breakdown; 1 request for regulation review, 1 OSC Stay request, 1 Hatch Act case, and 4 actions against ALJs.

REGIONAL CASE PROCESSING

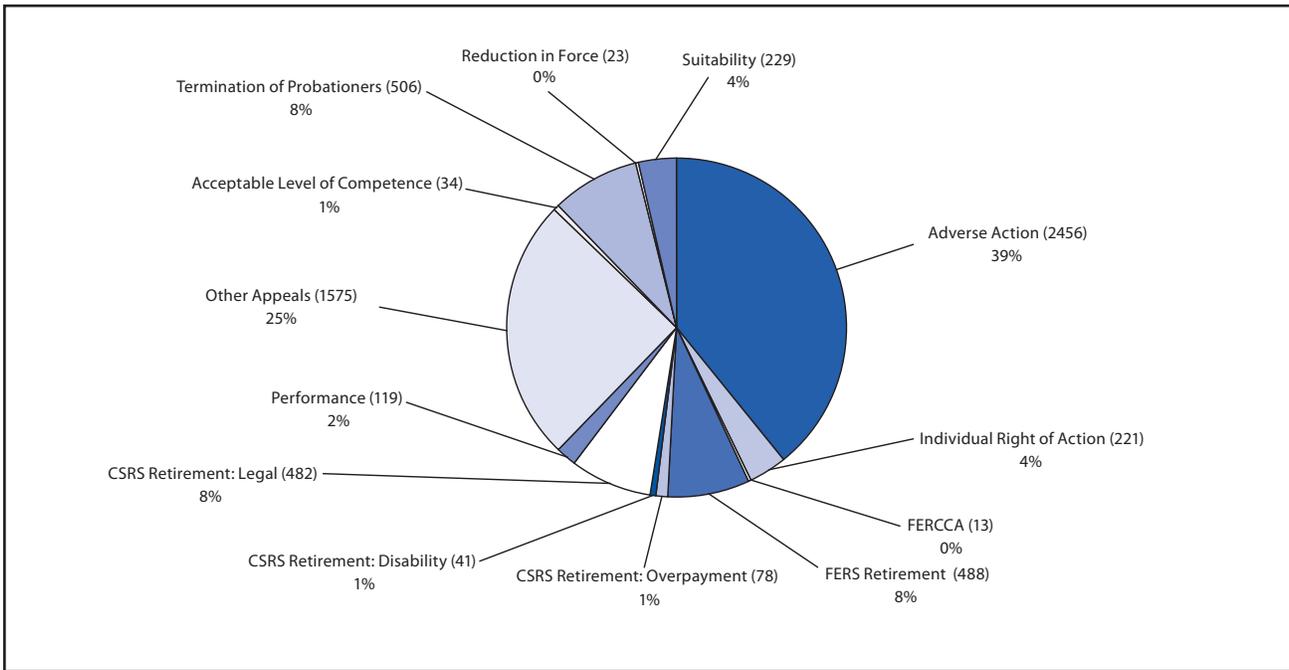
Table 2: Disposition of Appeals Decided in the Regional and Field Offices, by Type of Case

TYPE OF CASE	DECIDED		DISMISSED ¹		NOT DISMISSED ¹		SETTLED ²		ADJUDICATED ²	
	#	#	%	#	%	#	%	#	%	
Adverse Action by Agency	2456	1208	49.19	1248	50.81	806	64.58	442	35.42	
Termination of Probationers	506	468	92.49	38	7.51	36	94.74	2	5.26	
Reduction in Force	23	14	60.87	9	39.13	5	55.56	4	44.44	
Performance	119	24	20.17	95	79.83	65	68.42	30	31.58	
Acceptable Level of Competence (WIGI)	34	19	55.88	15	44.12	12	80.00	3	20.00	
Suitability	229	93	40.61	136	59.39	113	83.09	23	16.91	
CSRS Retirement: Legal	482	233	48.34	249	51.66	10	4.02	239	95.98	
CSRS Retirement: Disability	41	33	80.49	8	19.51	1	12.50	7	87.50	
CSRS Retirement: Overpayment	78	36	46.15	42	53.85	25	59.52	17	40.48	
FERS Retirement	488	253	51.84	235	48.16	93	39.57	142	60.43	
FERCCA	13	8	61.54	5	38.46	2	40.00	3	60.00	
Individual Right of Action	221	158	71.49	63	28.51	34	53.97	29	46.03	
Other	1575	938	59.56	637	40.44	518	81.32	119	18.68	
Total	6265	3485	55.63	2780	44.37	1720	61.87	1060	38.13	

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

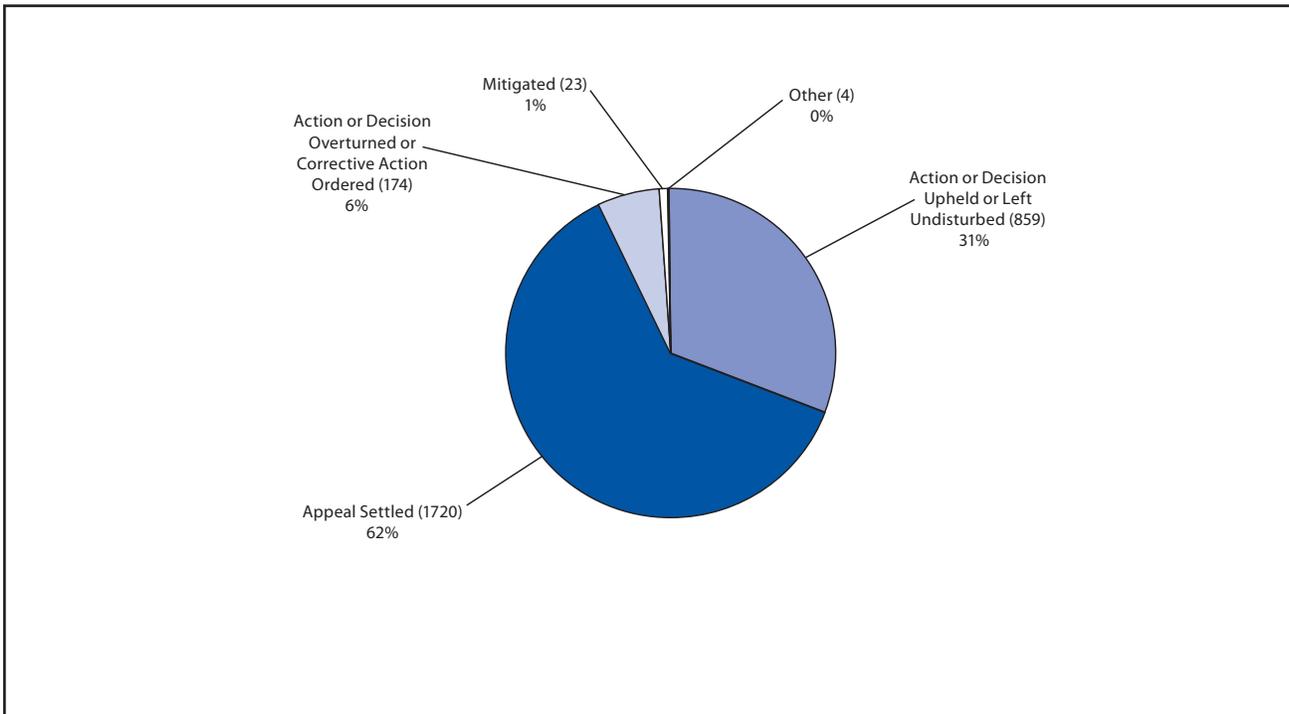
² Percent Settled and Adjudicated are of the number Not Dismissed.

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



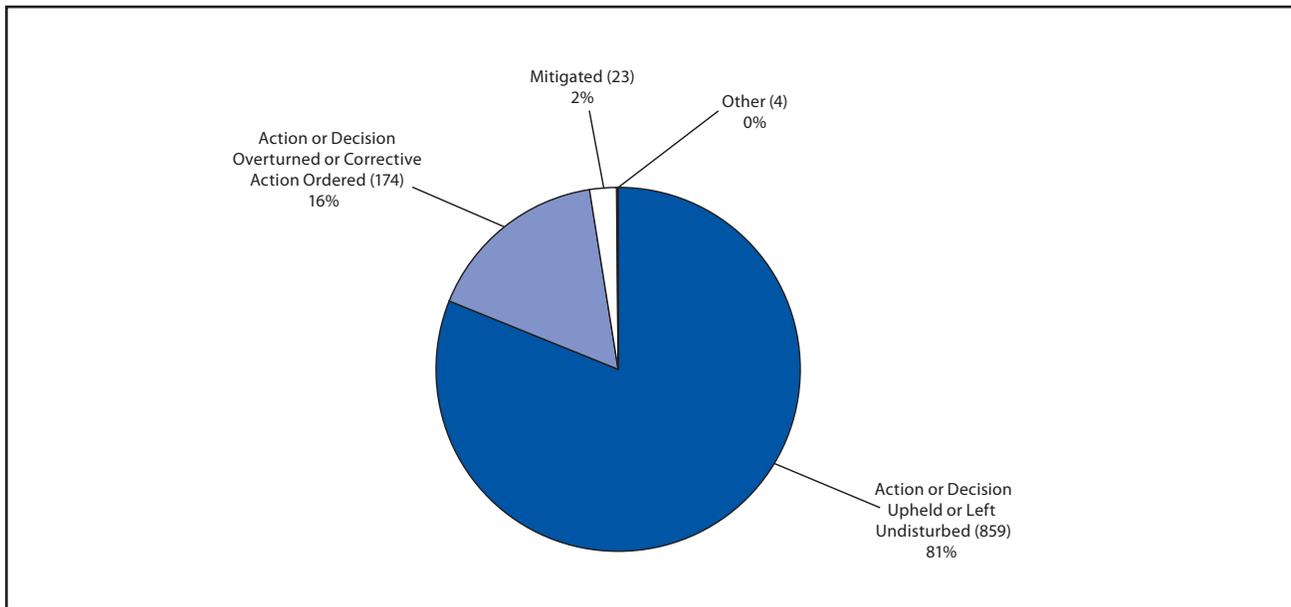
Total Number of Appeals 6,265
(Percentages do not total 100 because of rounding)

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



Total Number of Appeals that were Not Dismissed: 2,780

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



Based on 1,060 appeals adjudicated on the merits
(Percentages do not total 100 because of rounding)

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 Management*	1141		573	50.2	568	49.8	152	26.8	416	73.2
US Postal Service	1048		682	65.1	366	34.9	241	65.8	125	34.2
Veterans Affairs	727		462	63.5	265	36.5	172	64.9	93	35.1
Army	649		263	40.5	386	59.5	341	88.3	45	11.7
Homeland Security	491		247	50.3	244	49.7	166	68.0	78	32.0
Navy	309		171	55.3	138	44.7	101	73.2	37	26.8
Defense	253		123	48.6	130	51.4	93	71.5	37	28.5
Justice	252		162	64.3	90	35.7	53	58.9	37	41.1
Air Force	247		118	47.8	129	52.2	92	71.3	37	28.7
Treasury	240		151	62.9	89	37.1	62	69.7	27	30.3
Agriculture	144		88	61.1	56	38.9	38	67.9	18	32.1
Interior	124		74	59.7	50	40.3	32	64.0	18	36.0
Transportation	112		68	60.7	44	39.3	28	63.6	16	36.4
Health & Human Services	97		49	50.5	48	49.5	40	83.3	8	16.7
Social Security Administration	95		57	60.0	38	40.0	17	44.7	21	55.3
Commerce	60		42	70.0	18	30.0	11	61.1	7	38.9
Labor	59		38	64.4	21	35.6	12	57.1	9	42.9
State	25		15	60.0	10	40.0	8	80.0	2	20.0
General Services Administration	22		10	45.5	12	54.5	9	75.0	3	25.0
Housing & Urban Development	18		8	44.4	10	55.6	8	80.0	2	20.0
National Aeronautics and Space Administration	18		9	50.0	9	50.0	7	77.8	2	22.2
Equal Employment Opportunity Commission	16		10	62.5	6	37.5	2	33.3	4	66.7
Energy	15		7	46.7	8	53.3	8	100.0	0	.0
Government Printing Office	12		7	58.3	5	41.7	2	40.0	3	60.0
Smithsonian Institution	11		6	54.5	5	45.5	4	80.0	1	20.0
Environmental Protection Agency	10		4	40.0	6	60.0	3	50.0	3	50.0
Small Business Administration	6		4	66.7	2	33.3	1	50.0	1	50.0
Education	5		5	100.0	0	.0	0	.0	0	.0
Peace Corps	5		4	80.0	1	20.0	0	.0	1	100.0
Securities & Exchange Commission	5		3	60.0	2	40.0	2	100.0	0	.0
Court Services & Offender Supervision	4		3	75.0	1	25.0	0	.0	1	100.0
Federal Deposit Insurance Corporation	4		2	50.0	2	50.0	1	50.0	1	50.0
Corporation for National & Community Service	3		0	.0	3	100.0	3	100.0	0	.0
Agency for International Development	2		1	50.0	1	50.0	0	.0	1	100.0
Broadcasting Board of Governors	2		1	50.0	1	50.0	0	.0	1	100.0

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

	DECIDED			NOT DISMISSED ¹		SETTLED ²		ADJUDICATED ²	
	#	#	%	#	%	#	%	#	%
Commodity Futures Trading Commission	2	2	100.0	0	.0	0	.0	0	.0
Library of Congress	2	2	100.0	0	.0	0	.0	0	.0
National Archives and Records Administration	2	1	50.0	1	50.0	1	100.0	0	.0
National Credit Union Administration	2	0	.0	2	100.0	0	.0	2	100.0
National Foundation for Arts and the Humanities	2	1	50.0	1	50.0	1	100.0	0	.0
National Labor Relations Board	2	1	50.0	1	50.0	1	100.0	0	.0
Other	2	2	100.0	0	.0	0	.0	0	.0
Postal Rate Commission	2	1	50.0	1	50.0	1	100.0	0	.0
Railroad Retirement Board	2	1	50.0	1	50.0	1	100.0	0	.0
Tennessee Valley Authority	2	2	100.0	0	.0	0	.0	0	.0
Administrative Office of US Courts	1	0	.0	1	100.0	0	.0	1	100.0
American Battle Monuments Commission	1	1	100.0	0	.0	0	.0	0	.0
Armed Forces Retirement Home	1	1	100.0	0	.0	0	.0	0	.0
Consumer Product Safety Commission	1	0	.0	1	100.0	1	100.0	0	.0
Federal Trade Commission	1	1	100.0	0	.0	0	.0	0	.0
Government Accountability Office	1	0	.0	1	100.0	1	100.0	0	.0
Judicial Branch	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 President	1	0	.0	1	100.0	0	.0	1	100.0
Overseas Private Investment Corporation	1	0	.0	1	100.0	1	100.0	0	.0
Pension Benefit Guaranty Corporation	1	0	.0	1	100.0	1	100.0	0	.0
Selective Service System	1	0	.0	1	100.0	1	100.0	0	.0
United States International Trade Commission	1	0	.0	1	100.0	1	100.0	0	.0
TOTAL	6265	3485	55.6	2780	44.4	1720	61.9	1060	38.1

* 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.

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

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

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 Management*	416		315	75.7	96	23.1	1	.2	4	1.0
US Postal Service	125		101	80.8	17	13.6	7	5.6	0	.0
Veterans Affairs	93		77	82.8	9	9.7	7	7.5	0	.0
Army	45		35	77.8	10	22.2	0	.0	0	.0
Homeland Security	78		68	87.2	6	7.7	4	5.1	0	.0
Navy	37		33	89.2	3	8.1	1	2.7	0	.0
Defense	37		34	91.9	3	8.1	0	.0	0	.0
Justice	37		26	70.3	10	27.0	1	2.7	0	.0
Air Force	37		34	91.9	3	8.1	0	.0	0	.0
Treasury	27		24	88.9	2	7.4	1	3.7	0	.0
Agriculture	18		16	88.9	2	11.1	0	.0	0	.0
Interior	18		14	77.8	4	22.2	0	.0	0	.0
Transportation	16		11	68.8	5	31.3	0	.0	0	.0
Health & Human Services	8		7	87.5	1	12.5	0	.0	0	.0
Social Security Administration	21		18	85.7	2	9.5	1	4.8	0	.0
Commerce	7		6	85.7	1	14.3	0	.0	0	.0
Labor	9		9	100.0	0	.0	0	.0	0	.0
State	2		2	100.0	0	.0	0	.0	0	.0
General Services Administration	3		3	100.0	0	.0	0	.0	0	.0
Housing & Urban Development	2		2	100.0	0	.0	0	.0	0	.0
National Aeronautics and Space Administration	2		2	100.0	0	.0	0	.0	0	.0
Equal Employment Opportunity Commission	4		4	100.0	0	.0	0	.0	0	.0
Government Printing Office	3		3	100.0	0	.0	0	.0	0	.0
Smithsonian Institution	1		1	100.0	0	.0	0	.0	0	.0
Environmental Protection Agency	3		3	100.0	0	.0	0	.0	0	.0
Small Business Administration	1		1	100.0	0	.0	0	.0	0	.0
Peace Corps	1		1	100.0	0	.0	0	.0	0	.0
Court Services & Offender Supervision	1		1	100.0	0	.0	0	.0	0	.0
Federal Deposit Insurance Corporation	1		1	100.0	0	.0	0	.0	0	.0
Agency for International Development	1		1	100.0	0	.0	0	.0	0	.0
Broadcasting Board of Governors	1		1	100.0	0	.0	0	.0	0	.0
National Credit Union Administration	2		2	100.0	0	.0	0	.0	0	.0
Administrative Office of the US Courts	1		1	100.0	0	.0	0	.0	0	.0
National Council on Disability	1		1	100.0	0	.0	0	.0	0	.0
Office of Administration, Executive Office of President	1		1	100.0	0	.0	0	.0	0	.0
TOTAL	1060		859	81.0	174	16.4	23	2.2	4	.4

* 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.

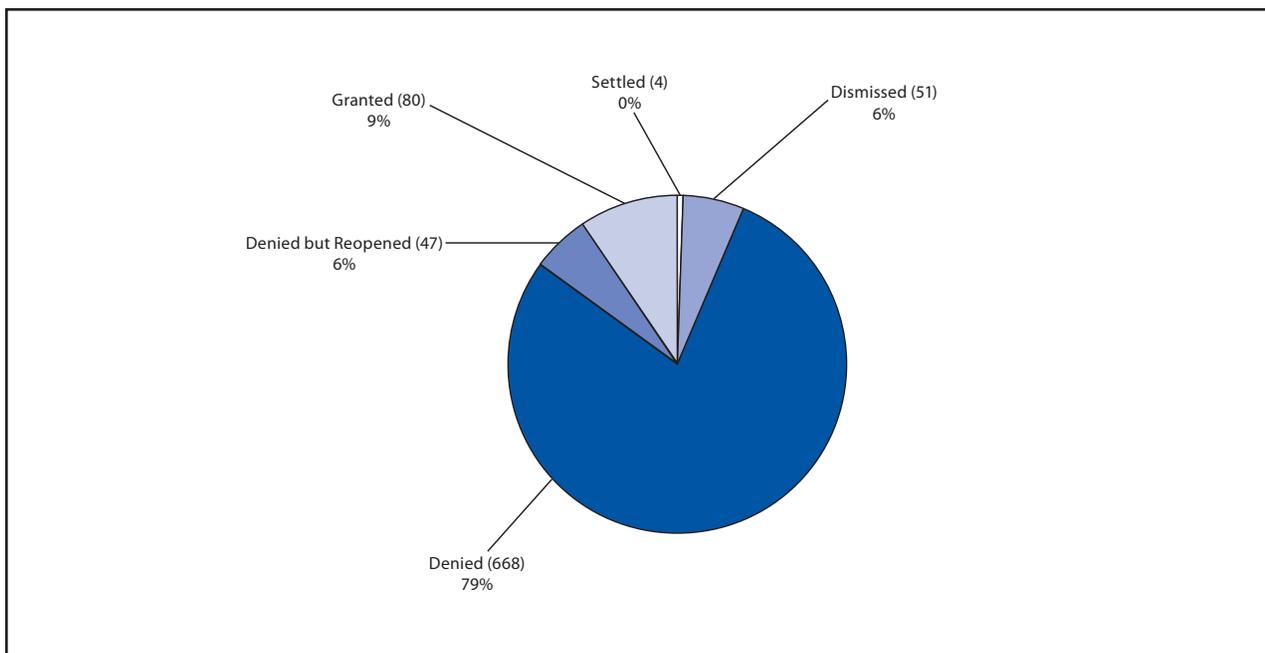
¹ Adjudicated, i.e., not dismissed or settled. Percentages may not total 100 because of rounding.

HEADQUARTERS CASE PROCESSING

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

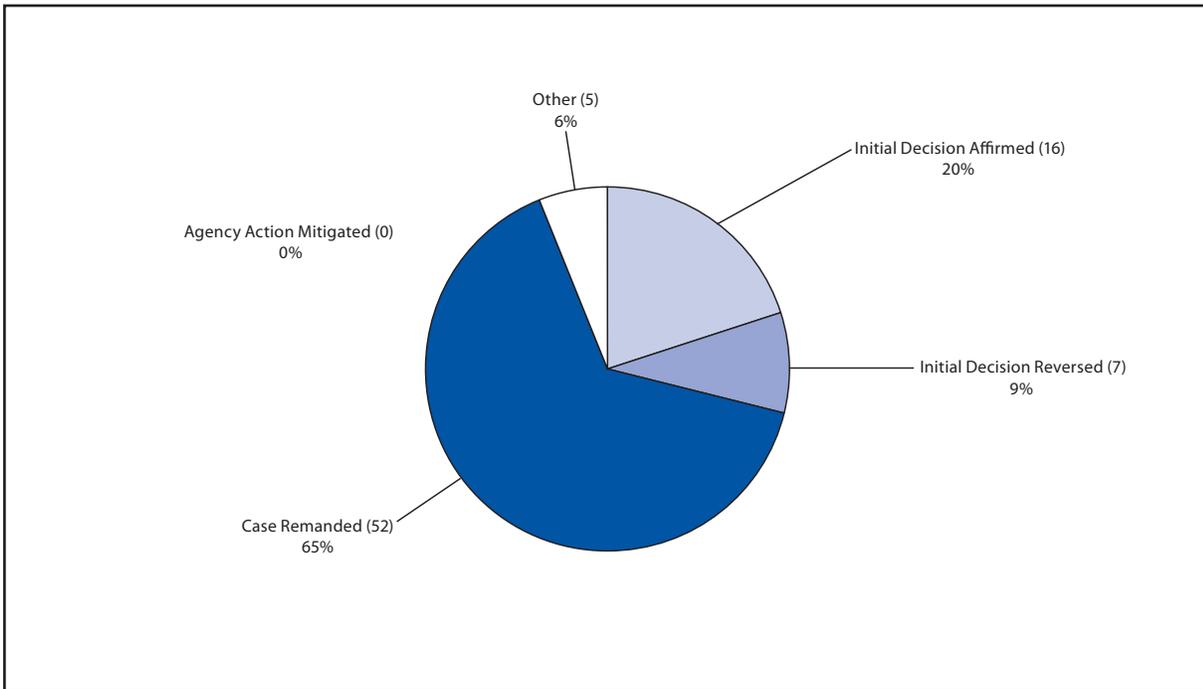
TYPE OF CASE	DECIDED		DISMISSED		SETTLED		DENIED		DENIED BUT REOPENED		GRANTED	
	#	%	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	389		25	6.43	3	.77	309	79.43	23	5.91	29	7.46
Termination of Probationers	40		2	5.00	0	.00	31	77.50	1	2.50	6	15.00
Reduction in Force	3		1	33.33	0	.00	2	66.67	0	.00	0	.00
Performance	21		0	.00	0	.00	20	95.24	1	4.76	0	.00
Acceptable Level of Competence (WIGI)	5		0	.00	0	.00	5	100.00	0	.00	0	.00
Suitability	13		0	.00	0	.00	7	53.85	3	23.08	3	23.08
CSRS Retirement: Legal	84		0	.00	1	1.19	73	86.90	2	2.38	8	9.52
CSRS Retirement: Disability	9		0	.00	0	.00	9	100.00	0	.00	0	.00
CSRS Retirement: Overpayment	7		0	.00	0	.00	4	57.14	0	.00	3	42.86
FERS Retirement	50		4	8.00	0	.00	38	76.00	4	8.00	4	8.00
FERCCA	3		0	.00	0	.00	3	100.00	0	.00	0	.00
Individual Right of Action	63		2	3.17	0	.00	53	84.13	1	1.59	7	11.11
Other	163		17	10.43	0	.00	114	69.94	12	7.36	20	12.27
Total	850		51	6.00	4	.47	668	78.59	47	5.53	80	9.41

Figure 4: Disposition of Petitions for Review of Initial Decisions



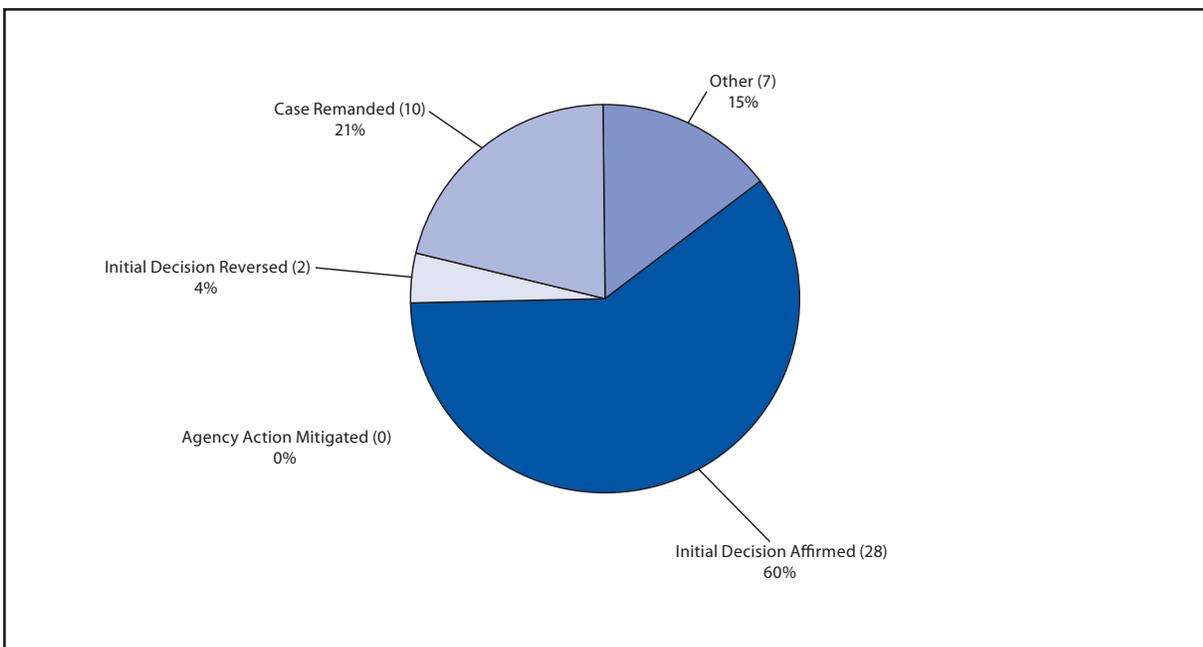
Total Number of Petitions for Review: 850

Figure 5: Disposition of Petitions for Review Granted



Based on 80 Petitions for Review Granted

Figure 6: Disposition of Petitions for Review Denied but Reopened



Based on 47 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 Management*	162	6	3.70	1	.62	131	80.86	8	4.94	16	9.88		
US Postal Service	147	9	6.12	1	.68	117	79.59	9	6.12	11	7.48		
Veterans Affairs	101	5	4.95	2	1.98	77	76.24	7	6.93	10	9.90		
Homeland Security	70	5	7.14	0	.00	55	78.57	3	4.29	7	10.00		
Army	59	2	3.39	0	.00	47	79.66	1	1.69	9	15.25		
Navy	35	2	5.71	0	.00	28	80.00	0	.00	5	14.29		
Treasury	35	3	8.57	0	.00	30	85.71	0	.00	2	5.71		
Justice	29	1	3.45	0	.00	23	79.31	1	3.45	4	13.79		
Defense	27	4	14.81	0	.00	22	81.48	0	.00	1	3.70		
Social Security Administration	24	3	12.50	0	.00	18	75.00	1	4.17	2	8.33		
Agriculture	23	1	4.35	0	.00	13	56.52	9	39.13	0	.00		
Interior	22	0	.00	0	.00	20	90.91	1	4.55	1	4.55		
Air Force	21	1	4.76	0	.00	18	85.71	2	9.52	0	.00		
Transportation	15	2	13.33	0	.00	8	53.33	0	.00	5	33.33		
Health & Human Services	14	1	7.14	0	.00	11	78.57	1	7.14	1	7.14		
Labor	11	1	9.09	0	.00	9	81.82	1	9.09	0	.00		
Commerce	7	1	14.29	0	.00	5	71.43	0	.00	1	14.29		
Equal Employment Opportunity Commission	4	1	25.00	0	.00	3	75.00	0	.00	0	.00		
General Services Administration	4	0	.00	0	.00	3	75.00	0	.00	1	25.00		
National Aeronautics and Space Administration	4	0	.00	0	.00	4	100.00	0	.00	0	.00		
Peace Corps	4	0	.00	0	.00	2	50.00	2	50.00	0	.00		
Education	3	1	33.33	0	.00	2	66.67	0	.00	0	.00		
Housing & Urban Development	3	0	.00	0	.00	3	100.00	0	.00	0	.00		
Government Printing Office	3	0	.00	0	.00	1	33.33	0	.00	2	66.67		
Court Services & Offender Supervision	2	0	.00	0	.00	2	100.00	0	.00	0	.00		
Energy	2	0	.00	0	.00	1	50.00	0	.00	1	50.00		
Environmental Protection Agency	2	0	.00	0	.00	2	100.00	0	.00	0	.00		
Federal Deposit Insurance Corporation	2	0	.00	0	.00	1	50.00	1	50.00	0	.00		
National Credit Union Administration	2	0	.00	0	.00	2	100.00	0	.00	0	.00		
National Science Foundation	2	0	.00	0	.00	2	100.00	0	.00	0	.00		
Other	2	0	.00	0	.00	2	100.00	0	.00	0	.00		
Small Business Administration	2	0	.00	0	.00	2	100.00	0	.00	0	.00		
Broadcasting Board of Governors	1	0	.00	0	.00	1	100.00	0	.00	0	.00		
Commission on Civil Rights	1	1	100.00	0	.00	0	.00	0	.00	0	.00		
Consumer Product Safety Commission	1	0	.00	0	.00	0	.00	0	.00	1	100.00		
Corporation for National and Community Services	1	0	.00	0	.00	1	100.00	0	.00	0	.00		
State	1	0	.00	0	.00	1	100.00	0	.00	0	.00		
Tennessee Valley Authority	1	0	.00	0	.00	1	100.00	0	.00	0	.00		
The White House	1	1	100.00	0	.00	0	.00	0	.00	0	.00		
TOTAL	850	51	6.00	4	.47	668	78.59	47	5.53	80	9.41		

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

SUMMARIES OF MERIT SYSTEMS STUDIES

The MSPB completed several reports and issued four editions of the *Issues of Merit* newsletter. Summaries of the reports and the topics contained in the newsletter are presented below.

MANAGING FOR ENGAGEMENT—COMMUNICATION, CONNECTION, AND COURAGE

In our 2008 report, *The Power of Federal Employee Engagement*, we showed that employee engagement has a strong, positive impact on organizational outcomes in the Federal sector. We found significant correlations between high employee engagement in an agency and key outcomes, including higher scores on the results section of the Program Assessment Rating Tool, reduced use of sick leave, fewer Equal Employment Opportunity complainants, and fewer cases of lost time due to work-related illness and injury.

In *Managing for Engagement – Communication, Connection, and Courage*, we analyzed the results of the 2007 Merit Principles Survey to identify the specific performance management practices that drive employee engagement. Our research indicates that employee engagement is higher in agencies in which senior leaders build trust with employees by aligning their words and actions, communicate openly and frequently with employees, and treat employees as valued business partners. Supervisors in high engagement agencies define clear performance expectations, develop strong working relationships with employees, provide employees with useful feedback, and recognize their contributions. In short, the effort leaders invest in managing their workforce pays off in substantially higher levels of employee engagement and performance.

In the report we provide both employees and Federal leaders with practical, action-oriented suggestions for driving employee engagement and enhancing performance. The recommendations offered can be characterized in three words: communication, connection, and courage. These are the foundation of performance management – communicating openly and honestly with employees, connecting with them as people to build good working relationships, and demonstrating the courage to address and resolve problems.

ADDRESSING POOR PERFORMERS AND THE LAW

The merit system principles state that ‘employees should be retained on the basis of adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.’ In *Addressing Poor Performers and the Law*, we describe the similarities and differences between the two sections of the law that authorize an agency to take an adverse action against a Federal employee for poor performance in the context of this merit principle, and discuss the limited ability of any law to address the underlying challenges for management when taking a performance-based action.

In order to take a performance-based adverse action, supervisors must first engage in performance management. The supervisor is required to articulate a performance expectation, measure it, and document the extent to which the employee has met or failed to meet expectations. A survey conducted by the MSPB found that supervisors who take performance-based actions have difficulty creating standards for performance and documenting how well employees are meeting those standards. In a merit-based system, where employees can only be removed for cause, such tasks are necessary to demonstrate the justification for an adverse action. This report recommends that agencies hire supervisors with the skills and willingness to deal effectively with poor performers; provide those supervisors with training and guidance on how to address poor performance; and then hold the supervisors accountable for dealing with poor performers.

JOB SIMULATIONS: TRYING OUT FOR A FEDERAL JOB

One way agencies can ensure that they are hiring the best candidates is to use good applicant assessment tools. This report explores how job simulations can be used to improve employee selection efforts. A job simulation is an assessment that presents applicants with realistic, job-related situations and documents their behaviors or responses to help determine their qualifications for the job. Job simulations can be an effective tool to evaluate applicant qualifications. They have many advantages, including relatively high levels of validity, better person-to-job fit because of the realistic job preview, a greater degree of fairness, and generally positive applicant perceptions.

However, job simulations may not work in every situation. The potentially high resource cost to develop and administer them is a key drawback. It is important to have a good assessment strategy in place that helps identify which assessment tools will best help them distinguish the most qualified candidates in a given hiring situation. This report identifies a number of factors for agencies to consider when making decisions about their assessment process and presents a practical, 5-step assessment strategy that agencies should consider adopting.

AS SUPERVISORS RETIRE: AN OPPORTUNITY FOR ORGANIZATIONAL CHANGE

This report details how the coming exodus of supervisors presents opportunities for agencies to shape the future supervisory cadre by recognizing and capitalizing on the changing nature of Federal supervision. The MSPB explores how the role of the Federal supervisor is changing and how leaders can select, develop, and manage supervisors who can function effectively in this dynamic environment.

Our research indicates that the Federal workforce can expect large numbers of supervisors to retire soon, particularly those of the baby boom generation. The emergence of a knowledge-based multi-sector workforce, increasing strategic human resources management initiatives, greater supervisory flexibilities, the advent of telework, and the need for enhanced supervisory communications have changed the work place dramatically. As supervisors leave, agencies should take advantage of this opportunity to cultivate supervisors with the knowledge, skills, and abilities to function effectively and even thrive in the modern workplace.

Considering the increasing losses of supervisors and the changing workplace, we offer several recommendations. Agencies should structure work units in light of the job functions, competencies, and the workplace complexities we discuss. Agencies should also consider the mix of supervisors to non-supervisors and give supervisors the time to devote to supervision. Finally, agencies should put in place effective procedures to recruit, select, and develop a diverse supervisory workforce with the knowledge, skills, and abilities needed to promote engagement and drive performance.

FAIR AND EQUITABLE TREATMENT: PROGRESS MADE AND CHALLENGES REMAINING

As the guardian of the merit system principles, the MSPB has a long history of conducting studies to evaluate the “fair and equitable treatment” of all employees, regardless of personal characteristics such as ethnicity/race. This report summarizes longitudinal Federal workforce data, as well as input from employees, to assess the Federal Government’s progress toward achieving a representative workforce and treating all employees fairly.

The results reveal that progress has been made. For example, the Federal workforce has become more diverse, in keeping with the Government's commitment to recruit and retain a workforce from all segments of society. Also, an increasing percentage of Federal employees perceive that they are treated fairly, and a decreasing percentage believe that they have experienced discrimination on factors such as ethnicity/race, gender and age.

Nevertheless, challenges remain in terms of workforce diversity and employee opinions. Minorities are not fully represented at all levels of pay and responsibility. In addition, many employees believe that personnel decisions are often based on factors other than merit, such as favoritism. To address these concerns, the report provides specific actions that agencies and employees can take to help the Federal Government achieve an efficient, effective, and representative workforce.

ISSUES OF MERIT NEWS LETTER

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 2009. 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 using employee engagement to achieve agency results, identifying important career accelerators, implementing alternative discipline, and how agencies can best target their training resources.

Other articles provided insight into issues such as how agencies can improve their hiring practices, including embracing social networking and improving job announcements, what agencies can do to help accommodate disabled employees, and tips on effectively evaluating training. The OPE Director addressed issues such as how to better assess applicants, the limitations of performance standards, and how to use the General Schedule to pay for performance. In addition, we began administering a survey of newsletter readers to obtain feedback on the quality, content, and utility of *Issues of Merit*, which we will use as appropriate to improve the publication.

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 OPM actions of the greatest long-term significance for the Federal civil service from FY 2009. This list is not exhaustive.

OPM MISSION AND ORGANIZATION

OPM Strategic Plan and Reorganization

OPM published a draft strategic plan, *A New Day for Federal Service: Strategic Plan 2010-2015* that outlines its vision, mission, and strategic goals. The plan describes four broad goals: (1) hire the best; (2) respect the workforce; (3) expect the best; and (4) honor service. Supporting strategies include reforming Federal hiring; promoting workforce diversity; improving workforce training and development; increasing the rigor and credibility of individual performance appraisals; strengthening agency leadership; and improving Federal pay and reward systems.

In 2009, OPM announced a major reorganization, which was implemented in January 2010. The new structure has commonalities with preceding structures, but does create some new functions, such as a planning and policy analysis office and an agency and veterans support office.

SIGNIFICANCE

The strategic plan reflects considerable continuity in OPM's goals and priorities, although some emphases (such as an emphasis on partnering with stakeholders) are new. Similarly, the new organizational structure has commonalities with previous OPM configurations. However, the creation of a planning and policy analysis office is noteworthy. Such an office, given sufficient stature and resources, could help OPM develop an integrated, cross-functional approach to HR issues and reforms, and, as needed, evaluate, refine or reconsider its own initiatives.

POLICY AND LEADERSHIP

Creation of Labor-Management Forums

On December 9, 2009, President Obama issued Executive Order 13522. The order establishes a National Council on Federal Labor-Management Relations and department- or agency-level labor management forums, stating that "Management should discuss workplace challenges and problems with labor and endeavor to develop solutions jointly, rather than advise union representatives of predetermined solutions to problems and then engage in bargaining over the impact and implementation of the predetermined solutions."¹ The OPM Director serves as Co-Chair of the Council, and OPM supports the operations of the Council.

¹ Executive Order 13522, Creating Labor-Management Forums to Improve Delivery of Government Services, 74 Fed. Reg. 66203-66206, December 14, 2009.

SIGNIFICANCE

As described in this report, OPM has advocated or supported far-reaching changes in how Federal agencies hire and pay employees, and continues to do so. Yet recent experience also shows that such changes may fall short of expectations or be curtailed if they are mistrusted or opposed by employees or their representatives. The establishment of labor-management forums indicates that OPM may seek broader input and participation from labor unions and employee organizations when developing future proposals for HR reform.

REVIEW PROCEDURES FOR APPOINTMENT OF POLITICAL APPOINTEES TO THE CAREER SERVICE

In a November 2009 memorandum to the Chief Human Capital Officers Council, OPM announced a change in the process for placing a political appointee in a career (non-political) position.² OPM will now review any such placement under title 5, United States Code. Prior to this change, OPM review was limited to a specified period preceding and following a Presidential election, and did not apply to positions in the excepted service.

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. To that end, OPM's action significantly expands the scope of its review process. In our 2008 Annual Report, we noted that OPM's review process did not apply to political appointees being placed in the excepted service, which accounts for an increasing percentage of positions in the Federal civil service. The process now covers excepted service appointments under title 5, although it excludes excepted service appointments under other statutes. OPM does not have direct authority over such appointments, although it might be possible to establish a review process through Executive Order or interchange agreement.

Managing the Executive and Supervisory Workforce

OPM has taken several actions to help agencies manage leadership succession; strengthen Senior Executive Service (SES) recruitment, selection, and management; and improve the training of supervisors and managers.

Establishment of SES program office. In August 2009, OPM announced plans to create a new office to oversee all aspects of SES. The office would provide a “one-stop shop” for position allocation, qualifications review, and certification of candidate development programs and appraisal systems. The new office was formally established early in 2010 as part of an OPM-wide reorganization.

New Methods for SES Selection. OPM completed a pilot project that tested simplified methods for selecting members of the SES. Based on the results of the pilot, OPM refined the methods and offered SES selection workshops to Federal agencies. Agencies may now use processes based on a resume or accomplishment record as alternatives to narratives addressing each of the five Executive Core Qualifications. The OPM workshops also covered vacancy announcement templates and structured interviews.

² Memorandum to the Chief Human Capital Officers Council from John Berry, Director, U.S. Office of Personnel Management, “Subject: Political Appointees and Career Civil Service Positions,” dated November 5, 2009. (Available at <http://www.chcoc.gov/Transmittals/Index.aspx>.)

Regulations on Supervisory, Management, and Executive Development. OPM issued final regulations to implement provisions of the Federal Workforce Flexibility Act related to succession management and supervisory training.³ The regulations require agencies to—

- develop a management succession program;
- train newly-appointed supervisors;
- provide periodic training on topics such as mentoring, performance evaluation, and dealing with poor performance; and
- establish continuing education programs for senior executives, to include an Executive Development Plan (EDP) for each senior executive.

Succession Management Guidance. OPM published *A Guide to the Strategic Leadership Succession Management Model*, which provides tools for identifying key positions for succession planning and reviewing leadership succession plans. The Guide will help agencies meet the newly-established requirement for management succession programs described above.

Supervisory Qualification Guide. OPM issued a supervisory qualification guide that identifies competencies required for successful performance in supervisory positions. Use of the guide is optional, and when filling a supervisory position, agencies must determine which competencies to assess, and what level of proficiency is required.

SIGNIFICANCE:

As noted in our previous Annual Report, good supervisory skills are important to every aspect of human resource management and are critical for fair, effective use of the increased authority and discretion afforded to Federal managers under both title 5 and alternative personnel systems. Recent MSPB research has documented the urgent need to plan for leadership succession and to select and train a new generation of Federal managers.⁴ OPM's initiatives address both issues.

IMPROVING FEDERAL HIRING

Under new leadership, OPM built on previous efforts to improve Federal hiring, such as the End-to-End (E2E) hiring roadmap.

Hiring reform initiative. In June 2009, OPM announced several measures in support of the Administration's plans to reform Federal hiring.⁵ Those measures include requiring individual agencies to: (1) map the hiring process; (2) develop and use streamlined job announcements for top occupations; (3) collaborate with other agencies on process improvement; and (4) work with OPM to notify applicants of the status of their application through USAJOBS. (The OPM's hiring reform initiative continues to make progress in FY 2010 with the expansion of category rating, the elimination of Knowledge, Skill, and Ability essays, and the establishment of shared registers.)

³ See Training; Supervisory, Management, and Executive Development, Final rule, 74 Fed. Reg. 65383-65390 (December 10, 2009), to be codified at 5 CFR Parts 410 and 412.

⁴ See U.S. Merit Systems Protection Board, *As Supervisors Retire: An Opportunity to Reshape Organizations*, Washington, DC, October 2009.

⁵ Memorandum for human resources directors from Nancy H. Kichak, Associate Director, SHRP, U.S. Office of Personnel Management, "Subject: Use of Validated Assessment Tools When Filling Positions in the Competitive Service, ," dated March 6, 2009. (Available at <http://www.chcoc.gov/Transmittals/Index.aspx>.)

Emphasizing Valid Assessment. OPM reminded Federal agencies of their obligation to use valid, job-related assessment tools when filling competitive service positions, emphasizing that “agencies may not replace validated assessments with education requirements because they do not constitute an assessment tool.”⁶

Entry-level Contract Specialist Recruitment and Hiring. In collaboration with the Federal Acquisition Institute and the Office of Federal Procurement Policy, OPM has worked to craft a cross-agency approach to hiring entry-level contract specialists. The approach includes career-centered marketing, “plain language” job announcements, a simplified application and assessment process, and (where appropriate) centralized hiring.⁷

Redesign of USAJOBS Website. Based on research and stakeholder feedback, OPM made significant changes to the USAJOBS website, the Federal Government’s main Internet portal for Federal job opportunities. The redesigned website, which is intended to simplify searching and applying for Federal jobs, was unveiled to the public in January 2010.

Retention of Time in Grade. In March 2009, OPM postponed the effective date of a final regulation that eliminated time in grade⁸ in order to receive and consider additional comments. In August 2009, OPM withdrew that final regulation, stating that “OPM has determined that it would be more productive to consider the merits of the time-in-grade issue as part of a more comprehensive review of pay, performance, and staffing issue[s] that OPM and the Administration are conducting in various contexts than to regulate one isolated issue in a piecemeal fashion.”⁹

SIGNIFICANCE

OPM continues to work within existing law and regulation to make Federal hiring less burdensome for applicants and more timely. Holistic approaches, like that taken for entry-level contract specialists, are promising. They can make the hiring process more applicant-focused, make Federal careers more attractive, and offer economies of scale in marketing and assessment.

Yet OPM also recognizes the limits of incremental improvements and has acknowledged the possible need for further-reaching reforms along lines that MSPB has advocated.¹⁰ We note, however, that recent experience (such as that in the Department of Homeland Security and the Department of Defense) shows that major HR reforms are not accomplished easily, and the development and implementation of such reforms are as important as their substance and intent. Accordingly, OPM appears to be proceeding deliberately, seeking broad input and support for any major reforms.

OPM’s reform initiative is, understandably, emphasizing reductions in applicant burden and time to hire. However, such reforms must not make the application process easier and hiring decisions faster at the expense of fairness, rigor, or quality of hire. It is reassuring that OPM has reminded Federal agencies’ of their obligation to

⁶ Memorandum to the Chief Human Capital Officers Council from John Berry, Director, U.S. Office of Personnel Management, “Subject: Office of Personnel Management Assistance in Meeting Hiring Reform, Employee Satisfaction and Wellness Requirements Contained in the President’s Fiscal Year 2001 Budget and Performance Plans,” dated June 18, 2009. (Available at <http://www.chcoc.gov/Transmittals/Index.aspx>.)

⁷ See Nancy H. Kichak, Associate Director for Strategic Human Resources Policy, U.S. Office of Personnel Management, “Strengthening the Federal Acquisition Workforce: Governmentwide Leadership and Initiatives,” statement before the Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, August 5, 2009.

⁸ “Time in grade” is a provision designed to protect competitive principles and prevent excessively rapid promotion of competitive service General Schedule (GS) employees. Generally, time in grade requires that a competitive service employee serve at least one year at a given GS grade before promotion to the next higher grade level. See 5 CFR 300, Subpart F.

⁹ Time-in-Grade Eliminated, Final rule; withdrawal, 74 Fed. Reg. 40057-40060 (August 11, 2009).

¹⁰ See U.S. Merit Systems Protection Board, *Reforming Federal Hiring: beyond Faster and Cheaper*, Washington, DC, which recommends streamlining and consolidating hiring authorities within a broad, merit-based Governmentwide framework.

use valid assessments such as job simulations, reference checks, and structured interviews, consistent with sound practice and MSPB research.¹¹

We caution that these reforms, although promising, will disappoint unless agencies commit sufficient resources to identifying job requirements, developing effective assessment tools, and effectively managing the hiring process. In fact, streamlining the process for applicants can require more, rather than less, work on the part of hiring agencies.

EMPHASIZING ABILITY IN APPLICANT SCREENING

Competency-Based Qualification Standards. OPM continues to develop competency models and qualification standards for important occupations and functions. Recent issuances include—

- A qualification guide for supervisory positions;
- A competency model for grants management work; and
- A draft qualification standard for administrative and management occupations.

Notably, the draft standard for administrative and management occupations eliminates the requirement for a specific amount of experience to qualify for the first entry level, grade GS-5. Instead, the agency would have to determine that the applicant's training and experience demonstrated sufficient proficiency in four competencies: oral communication, planning and evaluating, problem solving, and writing.

Guidance on Maximum Entry-Age Requirements for Preference Eligibles. Based on an MSPB final decision which found that the agency's failure to waive a maximum age requirement violated the appellant's rights under the Veterans Employment Opportunities Act of 1998,¹² OPM issued a memorandum advising agencies that they must, when filling law enforcement or other positions with a maximum entry age: (1) permit a qualified preference eligible to apply; (2) analyze the position to determine whether age is essential to satisfactory performance; and (3) waive the entry-age requirement, if age is not essential.

SIGNIFICANCE

Using competencies and proficiency levels to screen applicants, instead of criteria such as years of experience and age that are not directly related to job performance, can make Federal hiring more fair, open, and merit-based. For that reason, MSPB has recommended that OPM and agencies move toward competency-based standards and assessment. OPM's actions in this area are consistent with both MSPB recommendations and case law.

¹¹ See, for example, U.S. Merit Systems Protection Board, *Job Simulations: Trying out for a Federal Job*, Washington, DC, September 2009 and U.S. Merit Systems Protection Board, *Reference Checking in Federal Hiring: Making the Call*, Washington, DC, September 2005.

¹² *Isabella v. Department of State and Office of Personnel Management*, 109 M.S.P.R. 453 (2008).

TARGETED HIRING INITIATIVES

Veterans Employment Initiative. Executive Order 13518 assigned OPM a leadership role in efforts to improve recruitment and employment of veterans in the Executive Branch.¹³ OPM actions to that end include:

- Developing a training module for Federal managers and HR staff on the Uniformed Services Employment and Reemployment Rights Act (USERRA);
- Creating a website (www.fedshirevets.gov) to provide a centralized source of information for veterans seeking Federal employment opportunities and for Federal managers and HR staff seeking information and resources related to veterans' employment; and
- Publishing a strategic plan to increase employment of veterans in the Federal Government.¹⁴ The plan's strategies include establishing a veterans employment program office within OPM, creating a resume bank/skills inventory for veterans and transitioning service members, mentoring programs, and annual agency-level reporting on veterans' employment results.

Employment of Persons with Disabilities. OPM announced plans to increase employment of persons with disabilities in the Federal Government, to include online training for Federal hiring officials; a hiring fair for individuals with disabilities; and an interagency task force to identify and share best practices for recruiting and advancing employees with disabilities.

Diversity in the SES. In a memorandum to agency Chief Human Capital Officers, OPM Director John Berry noted that "Our current SES population does not yet reflect the diversity of our Nation or even of the rest of our Federal workforce." To address this situation, the memorandum encourages agencies to expand outreach and recruitment and to examine the composition of their Executive Resource Boards (ERBs).

SIGNIFICANCE

OPM attention to these areas is entirely appropriate. Employment and advancement of veterans in the Federal workforce is public policy; Federal employment of individuals with targeted disabilities has declined;¹⁵ and MSPB research confirms that employment of women and minorities at the highest levels of the career Federal service lags their representation in both the broader Federal workforce and the civilian labor force.¹⁶

Achieving these goals will be challenging. As MSPB has noted, and OPM acknowledges, the merit system principles require agencies to pursue employment goals for targeted groups with care: agencies must be attentive to public policy, diversity, and representation when planning recruitment and evaluating hiring practices, yet assure that Federal managers make hiring decisions solely on the basis of ability, without regard to non-merit factors.

¹³ Executive Order 13518, "Employment of Veterans in the Federal Government," 74 Fed. Reg. 58533-58536, November 9, 2009.

¹⁴ This plan, The Governmentwide Veterans' Recruitment and Employment Strategic Plan for FY 2010-FY 2012, was published in January 2010.

¹⁵ U.S. Equal Employment Opportunity Commission, *Improving the Participation Rate of People with Targeted Disabilities in the Federal Work Force*, Washington, DC, January 2008, p. v.

¹⁶ See U.S. Merit Systems Protection Board, *Fair and Equitable Treatment: Progress Made and Challenges Remaining*, Washington, DC, December 2009.

Increasing diversity in the Federal workforce will require sustained attention and effort. For example, MSPB found that diversity concerns extend beyond the SES to the occupations and grade levels that are the traditional “pipeline” for the SES. Thus, to improve diversity in the SES, agencies must do more than expand recruitment when they announce SES positions; they will also need to examine entry-level recruitment, mentoring and development, and selection for positions of greater responsibility particularly lower-level supervisory positions.

EXPANSION OF BENEFIT, WORK/LIFE, AND EMPLOYEE SUPPORT PROGRAMS

Promotion of telework. In April 2009, OPM announced a plan to increase the availability of, and employee participation in, telework programs. Elements of the plan include an advisory group of agency telework program managers, OPM review of agency telework policies, appeal processes to review the denial of a request for telework or other flexible work arrangements, and training to decrease managerial resistance to telework. (OPM’s support of telework continues in FY 2010 as the agency begins to pilot its own telework initiative known as the Results-Only Work Environment (ROWE).)

Reservist differential pay. OPM issued guidance to implement a law¹⁷ that provides differential pay to Federal employees who are members of the Reserve or National Guard and are called to active duty in the armed services. The intent of the differential is to assure that such employees do not suffer financially as a result of their military service.

Extending leave and benefits coverage. OPM issued regulations clarifying the definitions of “family member” and “immediate relative” for purposes of leave use and administration,¹⁸ ordered agencies to review benefits they offer to employees and assess their availability or extension to same-sex domestic partners,¹⁹ and indicated support for providing health, life, and survivor benefits to the same-sex domestic partners of Federal employees.²⁰

Wellness initiative. Building on the HealthierFeds initiative, OPM announced a Federal employee wellness initiative, requiring agencies to prepare an inventory of wellness programs, activities, and facilities, and to develop and submit, to OPM and OMB, wellness performance goals and supporting action plans.²¹

SIGNIFICANCE

OPM’s actions reflect the Federal Government’s history of supporting work-life balance and military service, both to improve retention and productivity and to serve as a “model employer” for the Nation.

¹⁷ Section 751 of the Omnibus Appropriations Act, 2009 (P.L. 111-8, March 11, 2009), codified at 5 U.S.C. § 5538.

¹⁸ See Absence and Leave; Sick Leave, Proposed rule with request for comments, 74 Fed. Reg. 46934-46937 (September 14, 2009), to be codified at 5 CFR Part 630.

¹⁹ Memorandum to the Chief Human Capital Officers Council from John Berry, Director, U.S. Office of Personnel Management, “Subject: Federal Benefits for Same-Sex Domestic Partners,” dated July 10, 2009. (Available at <http://www.chcoc.gov/Transmittals/Index.aspx>.)

²⁰ Statement of John Berry, Director, U.S. Office of Personnel Management, before the Committee on Homeland Security and Governmental Affairs, United States Senate, on S. 1102, the Domestic Partnership Benefits and Obligations Act of 2009, October 15, 2009. (Available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=d5347e63-e680-4ebf-8b9d-5eb5f8cd5e79.)

²¹ Memorandum to the Chief Human Capital Officers Council from John Berry, Director, U.S. Office of Personnel Management, “Subject: Office of Personnel Management Assistance in Meeting Hiring Reform, Employee Satisfaction and Wellness Requirements Contained in the President’s Fiscal Year 2001 Budget and Performance Plans,” dated June 18, 2009. (Available at <http://www.chcoc.gov/Transmittals/Index.aspx>.)

DELIVERING AGENCY AND EMPLOYEE SERVICES

Reduction in Background Investigation Inventory and Processing Time

OPM announced that it has eliminated a backlog of pending background investigations, and that the time needed to obtain a Top Secret security clearance has been reduced to an average of 72 days in 2009, compared to more than one year in 2005. OPM credited much of the improvement to advances in process and technology.²²

SIGNIFICANCE

The timeliness, quality, and efficiency of investigation services are critical, given their inherent importance and the resources involved. OPM's reported success in background investigations illustrates the ability of technology to improve timeliness and efficiency.

²² OPM press release, "OPM Shortens Federal Investigations Processing Time," September 15, 2009. (Available at www.opm.gov/news/index.aspx.)

FINANCIAL SUMMARY

FISCAL YEAR 2009 FINANCIAL SUMMARY

(dollars in thousands)

BUDGET AUTHORITY \$41,399

Appropriation 38,811

Offsetting Collections 9

Transfer from the Civil Service Retirement and Disability Trust Fund 2,579

OBLIGATIONS INCURRED \$40,844

Personnel Compensation 25,358

Personnel Benefits 5,987

Benefits for Former Employees 4

Travel and Transportation of Persons 586

Transportation of Things 64

Rental, Communications, and Utilities 4,155

Printing and Reproduction 98

Other Contractual Services 3,049

Supplies and Materials 216

Equipment 1,327

U.S. MERIT SYSTEMS PROTECTION BOARD
1615 M STREET, N.W.
WASHINGTON, DC 20419

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE \$300

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FY 2009