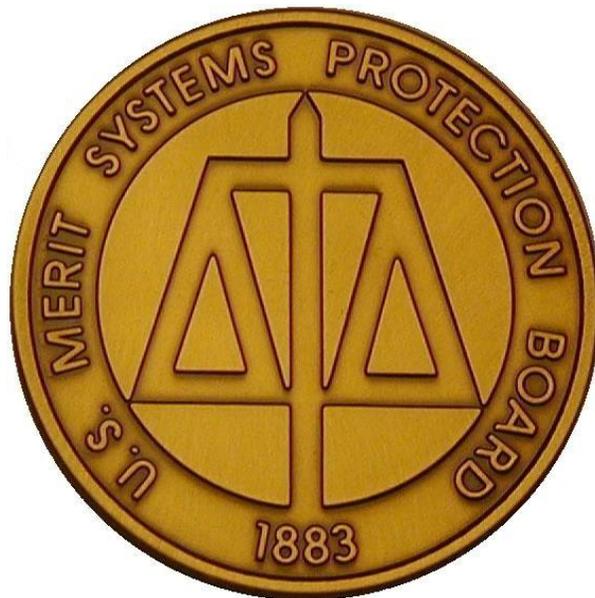


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**United States**  
**Merit Systems Protection Board**



**Annual Report for FY 2011**

**April 2012**

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## Foreword

In accordance with section 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) provides this annual report on its significant actions during fiscal year (FY) 2011. This report includes summaries of the most significant Board decisions, relevant opinions issued by our reviewing courts during the year, case processing statistics, summaries of MSPB's merit systems studies, and a summary of MSPB's financial results. The report also contains a review of OPM significant actions and whether those actions are in accord with merit system principles and free from prohibited personnel practices. The review of OPM significant actions conducted under 5 U.S.C. § 1206 is not, and should not be construed as, an advisory opinion (which is prohibited under 5 U.S.C. § 1204(h)). In addition, where there have been significant MSPB activities since the end of the fiscal year, the report includes updated information as a service to the reader.

Additional information about FY 2011 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 MSPB can be found on MSPB's website: [www.mspb.gov](http://www.mspb.gov).

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# U.S. Merit Systems Protection Board

## Fiscal Year 2011 Annual Report

### Introduction

In accordance with section 1206 of Title 5, United States Code, this annual report provides information on MSPB's significant actions during FY 2011. This report includes summaries of the most significant Board decisions and relevant 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. The report also contains a review of the Board's legislative and congressional relations activities, a summary of international activities, a review of internal management issues, and a review of external factors that affect our work. When there have been significant activities or events since the end of the FY, the report includes updated information as a service to our stakeholders.

### About MSPB

The U.S. Merit Systems Protection Board has its origin in the Pendleton Act of 1883 which was passed following the assassination of President Garfield in 1881 by a frustrated Federal job seeker. The Pendleton Act created the Civil Service Commission (CSC) and provided the foundation for improvements in Government efficiency and effectiveness by helping to ensure that a stable, highly qualified Federal workforce, free from partisan political pressure, was available to provide effective service to the American people.

Over time, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate employee appeals. Concern over the inherent conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind the passage of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the CSC with three new agencies: MSPB as the successor to the Commission; the Office of Personnel Management (OPM) to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority to oversee Federal labor-management relations.<sup>1</sup>

MSPB inherited the adjudication functions of the CSC by providing due process to employees and agencies as an independent, third-party adjudicatory authority for employee appeals of adverse actions and retirement decisions. Since the CSRA, Congress has given jurisdiction to MSPB to hear cases and complaints filed under a variety of other laws.<sup>2</sup> MSPB was given the authority to develop its adjudicatory processes and procedures, issue

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<sup>1</sup> Bogdanow, M., and Lanphear, T., History of the Merit Systems Protection Board, Journal of the Federal Circuit Historical Society, Volume 4, 2010.

<sup>2</sup> Including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat. 16; 5 U.S.C. § 4304; 5 U.S.C. § 7513; and those set out at 5 C.F.R. § 5 Code of Federal Regulations (C.F.R.) § 1201.3.

subpoenas, call witnesses, and enforce compliance with final MSPB decisions. MSPB was also given broad new authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues. In addition, MSPB was given the authority and responsibility to review and act on the regulations of OPM and review and report on the significant actions of OPM.<sup>3</sup>

## Board Members

The bipartisan Board consists of the Chairman, Vice Chairman, and Board Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms. The Board Members adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer of MSPB.



### **SUSAN TSUI GRUNDMANN**

**Chairman**

**November 2009 to Present**

Susan Tsui Grundmann was nominated by President Barack Obama to serve as a Member and Chairman of the U.S. Merit Systems Protection Board on July 31, 2009. 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 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 Service, 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.

<sup>3</sup> Pursuant to Title 5 U.S.C. § 1204(f), MSPB may on its own motion, or at the request of other parties, review and declare invalid OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a Prohibited Personnel Practice (PPP). Pursuant to 5 U.S.C. § 1206, MSPB is also responsible for annually reviewing and reporting on the significant actions of OPM.

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 to serve as a Member of the U.S. Merit Systems Protection Board with the designation of Vice Chairman on July 31, 2009. 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 came 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 of 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.



**MARY M. ROSE**  
**Vice Chairman**  
**January 2006 – November 2009**  
**Board Member**  
**November 2009 to March 1, 2012**

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 November 2009 when a new Vice Chairman was sworn in. Mrs. Rose's appointment as Board Member expired on March 1, 2011. In accordance with statute Mrs. Rose continued to serve as a Member of the Board until March 1, 2012.

Prior to joining the Board, Mrs. Rose was appointed by President Bush 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 County, 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.

## **Board Offices and Their Functions**

The agency is divided into seven headquarters offices in Washington, DC, and eight regional and field offices located throughout the United States. The agency is currently authorized to employ 226 Full-time Equivalents (FTEs) to conduct and support its statutory duties. The Office Directors report to the Chairman through the Executive Director.

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 ALJs, MSPB employee appeals, and other cases assigned by MSPB. The functions of this office are currently performed by ALJs at the National Labor Relations Board (NLRB), the Federal Communications Commission (FCC), and the Environmental Protection Agency (EPA) under interagency agreements.

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board for cases in which a party files a Petition for Review (PFR) of an initial decision issued by an Administrative Judges (AJ) and in most other cases decided by the Board. The office prepares proposed decisions on interlocutory appeals of rulings made by AJs, makes recommendations on reopening cases on the Board's own motion, and provides research, policy memoranda and advice to the Board on legal issues.

The **Office of the Clerk of the Board** receives and processes cases filed at MSPB headquarters, rules on certain procedural matters, and issues MSPB decisions and orders. The office serves as MSPB's public information center, coordinates media relations, produces public information publications, operates MSPB's library and on-line information services, and administers the Freedom of Information Act (FOIA) and Privacy Act programs. The office also certifies official records to the courts and Federal administrative agencies, and manages MSPB's records systems, legal research systems, and the Government in the Sunshine Act program.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates MSPB's equal employment opportunity programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB's managers and supervisors.

The **Office of Financial and Administrative Management** administers the budget, accounting, travel, time and attendance, human resources, procurement, property management, physical security, and general services functions of MSPB. It develops and coordinates internal management programs, including review of agency internal controls. It also administers the agency's cross-servicing agreements with the U.S. Department of Agriculture (USDA), National Finance Center for payroll services, U.S. Department of the Treasury, Bureau of the Public Debt for accounting services, and USDA's Animal and Plant Health Inspection Service for human resources management services.

The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; prepares proposed decisions for the Board to enforce a final MSPB decision or order, in response to requests to review OPM regulations, and for other

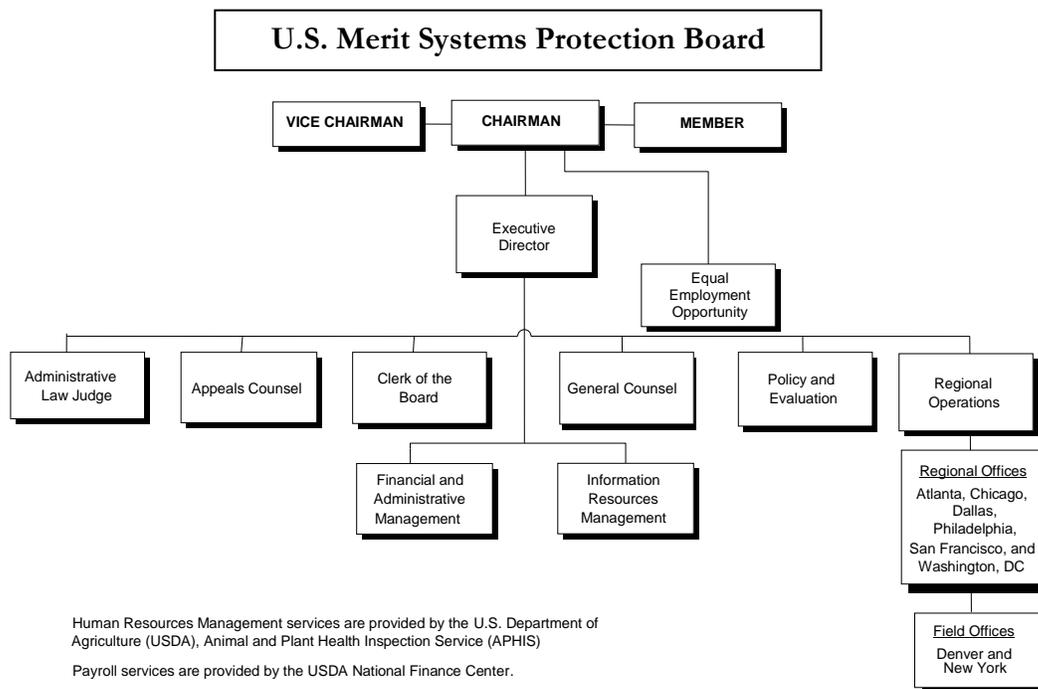
assigned cases; conducts the agency’s PFR settlement program; and coordinates the agency’s legislative policy and congressional relations functions. The office drafts regulations, conducts MSPB’s ethics program, performs the Inspector General function, and plans and directs audits and investigations.

The **Office of Information Resources Management** 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** 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. The office reviews and reports on the significant actions of OPM. The office also conducts special projects and program evaluations for the agency and has responsibility for preparing MSPB’s strategic and performance plans and performance reports required by the Government Performance and Results Act Modernization Act of 2010 (GPRAMA).

The **Office of Regional Operations** oversees the agency’s six regional and two field offices, which receive and process appeals and related cases. It also manages MSPB’s Mediation Appeals Program (MAP). 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 the U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS)  
 Payroll services are provided by the USDA National Finance Center.  
 Accounting services are provided by the Department of the Treasury, Bureau of the Public Debt.  
 The functions of the Administrative Law Judge are performed by the Federal Communications Commission (FCC), the U.S. Coast Guard, and the Environmental Protection Agency (EPA) under a reimbursable interagency agreement.

## Fiscal Year in Review

### Adjudication

MSPB issued over 8,200 decisions in FY 2011, about 4 percent more than the 7,863 decisions issued in FY 2010. Headquarters and the regional and field offices continued to issue high quality initial decisions with 98% of cases left unchanged by MSPB's reviewing court. However, the processing times for initial appeals and PFRs were slower than our targets for FY 2011. 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. MSPB also continued its extensive outreach to its adjudication stakeholders including agencies, unions, and advocacy groups that it initiated in FY 2010.

The agency continued its efforts to improve the transparency of its adjudication processes and decisions at headquarters. In early FY 2011, the Board heard oral arguments in *Aguznie, et al. v. Office of Personnel Management*, a set of cases involving the application of Title 5, U.S.C., Chapter 75 to cases in which OPM initiated removal of tenured employees based on suitability grounds.<sup>4</sup> The Board requested amicus briefs in several other cases and expects to continue to request amicus briefs and/or to hear oral arguments in cases that have Governmentwide impact on the Federal civil service and the merit systems. The Board continued to issue expanded explanations of its decisions in non-precedential final orders on PFRs and has made these orders available on the MSPB website. The additional information improves understanding of the Board's decisions by the parties, is lauded by our reviewing Court, and available for others to promote understanding of our process and improve future appeals. MSPB is also proceeding with a complete revision of its adjudication regulations (CFR Parts 1201, 1208 and 1209) including extensive outreach to stakeholders.

This Annual Report contains case processing statistics, including detailed information about the type, origin, and disposition of cases processed by MSPB. This report also contains brief summaries of the most significant Board decisions issued in FY 2011 which addressed such issues as adverse actions, jurisdiction, retirement, discrimination, veterans' rights, whistleblower protection, compliance, due process and harmful procedural error, performance-based actions, penalties, attorney fees, and Board procedures. In addition, the report includes summaries of significant opinions relevant to our work issued during FY 2011 by the U.S. Court of Appeals for the Federal Circuit and by the U.S. Supreme Court.

### Merit Systems Studies

MSPB completed four external reports addressing a variety of topics, including barriers to Federal employee whistleblowing, managing telework more effectively, employee

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<sup>4</sup> On December 13, 2011, the Board heard oral arguments in a set of Postal Service cases involving restoration of employees injured on the job and the Board's jurisdiction over such appeals. Additional information about this issue is included in the discussion of the external factors that affect our work. The Board's decision in this case will be summarized in the FY 2012 Annual Report. For the convenience of our readers, we provide a link to information about the oral argument and the decision at [Latham et al v. United States Postal Service](#).

perceptions of Prohibited Personnel Practices (PPPs), and the ambitions and achievements of women in the Federal Government, as well as the FY 2010 MSPB Annual Report. MSPB also published the Finalized 2011-2013 Research Agenda, which describes the research plans for MSPB's next three-year research cycle. MSPB completed four editions of the *Issues of Merit* newsletter and posted five original articles on the new studies flash feature on the studies webpage. Summaries of MSPB study reports and newsletter topics are provided later in this report.

MSPB studies continued to be referenced by policy makers and in professional literature, legislation, and the media. Interviews about several MSPB studies were conducted on Federal News Radio. MSPB Reports were used by Senate staff to draft legislation on improving the hiring and training of Federal supervisors; in the Chief Information Officer's Council (CIOC) report on managing the information technology workforce; and in the Australian Government's *State of the Service* Report. The MSPB website recorded over 96,000 accesses to 72 MSPB reports, and over 13,500 accesses to 35 editions of the *Issues of Merit* newsletter.

### **Review of the Significant Actions of the Office of Personnel Management**

MSPB is responsible for providing an independent, nonpartisan review of the significant actions of OPM to ensure that these actions conform with Merit System Principles (MSPs) and do not result in PPPs. MSPB reviewed OPM's recruitment, assessment and hiring policy actions, including updating four elements of the Administration's Federal Hiring Reform initiative, the latest update to USAJOBS, and candidate qualification requirements. MSPB reviewed performance and recognition actions, including certification of Senior Executive Service (SES) performance appraisal systems, OPM's Performance Appraisal Assessment Tool, and guidance on expenditures on individual awards. MSPB also reviewed other policy actions such as those related to overseeing compliance with civil service law and regulation, guidance on incorporating telework into Federal Government dismissal and closure procedures, training evaluation, the development of HR University, and several affirmative employment initiatives. Finally, MSPB reviewed OPM's significant actions related to the delivery of benefits and services, including background investigations and retirement benefits. More information about OPM's significant actions is included later in this report.

### **Transparency, Outreach, and Merit Systems Education**

In addition to the adjudication transparency efforts discussed above, MSPB continued in FY 2011 to enhance outreach and education about the concept of merit, MSPs, and PPPs through online activities, such as through the MSP of the Month and PPP of the Month sections on MSPB's website, which are the most visited pages and the most accessed documents on MSPB's website. MSPB continues to experience increases in the number of followers of its Twitter account (@USMSPB), and the number of downloads of our mobile applications (for the iPhone and Android). MSPB continues to conduct outreach with our customers, stakeholders, and sister agencies on the merit systems, MSPs, and PPPs, our adjudication processes and decisions, and our studies' findings and recommendations. These education and outreach efforts help enhance the understanding of merit, ensure that MSPs are consistently applied throughout the Government, reduce the likelihood of PPPs, promote better management practices, and strengthen employee engagement. This in turn

improves employee and organizational performance, improves service to the American people, and provides value to the taxpayer.

### **Review of MSPB International Activities**

MSPB has participated in a number of international activities that are designed to help educate participants about the U.S. civil service. This year, MSPB hosted numerous meetings at MSPB headquarters to educate representatives from foreign governments about the role of merit in the civil service and portray the advantages of equitable treatment in managing a public workforce. MSPB officials met with dignitaries from different provinces in China on seven occasions, hosted the President and Chief Human Resources official for the Canadian Public Service Commission, and met with a delegation from South Korea to discuss the use of telework in the Federal Government. MSPB also supported the Federal Circuit Court's goal of increasing international outreach by providing speakers for events such as the Bench and Bar and Judicial conferences.

### **Legislative and Congressional Relations**

On July 11, 2011, the House Ways and Means Subcommittee on Social Security and the House Judiciary Subcommittee on Courts, Commercial and Administrative Law held a joint oversight hearing on the role of ALJs at the Social Security Administration (SSA). During the July 11, 2011 hearing, panel members and other witnesses made several references to MSPB's role in the process for disciplining ALJs. Chairman Grundmann submitted a statement for the hearing record that clarified MSPB's process for adjudicating ALJ discipline cases and the agency's processing times for those matters.

MSPB officials and staff held several briefings with House and Senate appropriations staff to discuss the FY 2011 budget request and impacts of continuing resolutions. Under the Full Year Continuing Appropriations Act for 2011, MSPB was subject to the 0.2% cut applied to all discretionary appropriations. However, while most other agencies sustained substantial funding reductions, MSPB was among the few agencies that were held to FY 2010 levels.

MSPB officials also met with Senate Committee staff to consult about MSPB's new Strategic Plan. Senate Committee staff complimented MSPB's broader strategic goals and objectives, especially strategic goal 2 involving MSPB efforts to influence policy, improve the practice of merit in the workplace and improve the understanding of merit. In particular, Committee staff supported the importance of providing educational guidance and standards to improve the understanding of merit systems and MSPs as a critical method of protecting and strengthening merit because the MSPs, unlike the PPPs, are not actionable. Committee staff also suggested that MSPB consider doing an after-action review of a major OPM regulatory change to help guide future review of OPM regulations. They were also complimentary of the breadth of external issues MSPB cited as affecting its appeals workload and other statutory functions, especially in light of the high proportion of MSPB AJs who will be retirement eligible in the next 2-3 years. Other than conducting an after-action review of a major OPM regulatory change, which we will do as part of the Annual Performance Plan for FY 2012, Senate Committee staff feedback did not require changes in the MSPB Strategic Plan.

The House and the Senate introduced separate bills titled *Whistleblower Protection Enhancement Act of 2011*, to amend the Whistleblower Protection Act (S. 743 and H.R. 3289). Both bills are similar to legislation introduced in previous sessions of Congress; both expand the protections afforded to whistleblowers, remove the exclusive jurisdiction of the Court of Appeals for the Federal Circuit to review Board decisions, and provide summary judgment authority to MSPB. One of the differences between the two bills is that the Senate bill provides for jury trials, while the House bill does not. The Senate bill was favorably reported out of the Senate Committee on Homeland Security and Governmental Affairs. No congressional action was taken on the House bill beyond referral to the House Committees on Oversight and Government Reform, House Committees on Homeland Security and House (Permanent Select) Committee on Intelligence.

## Internal Management Programs

MSPB continued to focus on improving internal management to ensure the delivery of mission and achievement of goals. Additional information about our internal management results, including human resources, EEO, financial management, and information technology, can be obtained in the [MPSB FY 2011 PAR](#). We continue to strive to be a model merit-based Federal agency. Because the mission of MSPB mirrors the mission of the Government itself regarding MSPs and PPPs, we intend to lead by example through our “Walking the Talk” initiative. By “walking the talk,” our daily practices demonstrate that guidance from MSPB is cost-effective, beneficial, and realistic. To help managers and employees understand and implement this initiative, MSPB continued to employ four management concepts:

- **Resource Alignment:** Recognizing the agency’s full potential relies on the careful alignment of agency resources. As fiscal environments tighten, MSPB places greater importance on the administration of assets and funding to ensure that we set priorities appropriately and facilitate mission delivery without unnecessary expense.
- **Fostering Innovation:** It is a priority for MSPB to continue to embrace the opinions of employees, stakeholders, and critics through demonstrated openness and a commitment to listen in order to encourage participation in agency processes and policies. In addition to stakeholder outreach, MSPB provides opportunities for employee involvement in agency policy development through participation in Executive Committee subcommittees.
- **Minimizing Risk:** Managing risk to ensure successful mission delivery remains a top priority to lessen the effects of uncertainty on programs, apply resources appropriately to minimize adverse events, and maximize the realization of beneficial opportunities. For these reasons, MSPB broke away from its past practice of single-year budgeting to incorporate short- and long-term goals and contingencies that will shape future operations.
- **Full Engagement:** Employee engagement is an integral part of MSPB’s management efforts. Engagement assists with the identification of issues before they become larger problems. It can also improve operations, maximize resources, reduce bureaucracy, and help attract and retain the best workers.

In FY 2011, MSPB also made considerable progress in the development of its new Strategic Plan for FY 2012-2016. The draft plan included an updated agency mission statement, a new

vision statement, new organizational values, new more outcome-oriented strategic goals covering all MSPB statutory functions, and revised long-term measures. These changes more thoroughly reflect MSPB's broader role in protecting merit and preventing PPPs as intended by the CSRA. MSPB consulted a wide range of customers and stakeholders on the draft plan. Most comments complimented the revised mission and new vision and values statements and supported the Plan's higher-level strategic goals and objectives. Comments suggested clarification and inclusion of additional detail about MSPB and its origin; our customers, partners, and stakeholders; our jurisdiction; the different merit systems we protect beyond those defined in Title 5; the scope of individuals and organizations we affect; and the value we bring to the workforce, Federal agencies, and the public.

MSPB's Annual Performance Plan (APP) for FY 2012-2013 was developed beginning in FY 2011 based on our new Strategic Plan. The APP includes more balanced measures that track incremental progress toward our strategic goals. In addition, MSPB developed a new internal management plan that strengthens our focus on effective and efficient management of people, money, information technology and services, and other internal processes and procedures. Successfully implementing these new plans will better protect merit systems, increase adherence to MSPs, and prevent or reduce PPPs which will ultimately result in better Federal management, improved Federal employee and agency performance, better service to the public, and increased value to American taxpayers.<sup>5</sup>

### **Significant External Trends and Issues**

The most significant external trends or issues affecting MSPB's ability to carry out its mission to protect the Federal merit systems include changes in law and jurisdiction, changes in management and employee flexibilities, veterans' rights and changing demographics of the workforce, and continued pressure on the Federal budget.

**Changes in law and jurisdiction.** One example of changes in law and jurisdiction, involves implementation of the Postal Service's National Reassessment Project (NRP). Most Postal Service non-preference eligible employees do not have the right to appeal an adverse action to MSPB. However, appeals from NRP-related actions raise issues concerning the restoration to duty statute and regulations, which cover a much broader category of employees. Of note, on December 13, 2011, the Board heard oral arguments in *Latham et al v. U.S. Postal Service*, a set of cases involving restoration rights of employees suffering work-related injuries and the Board's jurisdiction over such cases. In this case, the Board affirmed the Postal Service's obligation, based on its own rules, to restore employees who have been injured on the job to available work that is medically suitable, and the Board affirmed that MSPB has jurisdiction over appeals involving this issue.<sup>6</sup> To the degree that more injured Postal Service employees are denied restoration under the NRP, MSPB expects to continue to see an increasing number of restoration to duty appeals from Postal Service employees. Depending on how this case is interpreted, it could increase the number of restoration to duty appeals to the Board from other Federal agencies.

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<sup>5</sup> Although officially released in February 2012, the MSPB Strategic Plan, a summary of stakeholder comments on our strategic plan and the Annual Performance Plan for FY-2012-2013 are available at [www.mspb.gov](http://www.mspb.gov).

<sup>6</sup> The Board's decision in *Latham et al v. U.S. Postal Service* will be summarized in the FY 2012 Annual Report, but is linked here as a service to our stakeholders.

Changes in law, appeal rights, and appellate jurisdiction also increase the importance of MSPB's statutory responsibility to promote merit and educate employees, supervisors, managers, and leaders on the merit systems, MSPs, PPPs, and MSPB appellate procedures, processes, and case law. Education on these issues, promoting merit, and sharing important information about appeals procedures will improve workforce management over time and reduce the cost of appeals to agencies, appellants, and the Government.

**Changes in Management and Employee Flexibilities.** Changes in management flexibilities could involve employees in single agencies such as those in the Department of Defense (DoD) National Security Personnel System (NSPS). The National Defense Authorization Act (NDAA) for FY 2010 (Public Law 111-84) required DoD to transfer all employees and positions from NSPS by January 1, 2012. The repeal of the NSPS and the transfer of employees from it is likely to increase MSPB's workload as former NSPS employees may appeal what they claim to be improper reduction in pay or grade ("downgrading") when shifted back to their old pay system. Of note, in January, 2012, the Board released its decision in *Arrington v. Department of the Navy*, in which it found that the transfer of the appellant from the NSPS resulted in her being improperly downgraded to GS-13, when prior to her participation in the NSPS she had been a GS-14 employee, and that under the facts of the case, this constituted an appealable reduction in grade.<sup>7</sup> This ruling may increase MSPB's workload if other transferees—of whom there are roughly 226,000—appeal to the MSPB making similar allegations.

Management flexibilities may also be directed through administrative actions such as Presidential Executive Orders. For example, President Obama issued Executive Order 13562 in December, 2010, establishing the Pathways Program. The Pathways Program creates a set of excepted service appointing authorities tailored to ease and encourage recruitment, hiring, development, and retention of students and recent graduates. The Pathways Program formally acknowledges a long-standing interest of Federal agencies and Federal managers—the ability to hire high-quality college graduates into professional and administrative occupations. It is unknown what impact the Pathways Program will have on hiring and management or if it will succeed in its goals. We note that OPM has proposed Pathways Program regulations and plans to issue final regulations in 2012. Final regulations could differ considerably from the proposed regulations. More information about the Pathways program is contained in the Review of OPM Significant Actions section of this report. MSPB plans to closely follow the evolution and implementation of these programs.

Federal management flexibilities also emphasize the need for MSPB to continue its study of Federal merit systems and human capital management practices to ensure the flexibilities are implemented and operated in accordance with MSPs and are free from PPPs. Flexibilities and other changes in human resource management policies issued through OPM regulation make it imperative that MSPB strengthen its ability to exercise its statutory authority to review OPM regulations. Reviewing OPM regulations can save the Government in direct costs such as those associated with transferring employees in and out of more flexible systems that are later terminated, and in indirect costs associated with negative employee

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<sup>7</sup> The Board's decision in *Arrington v. Department of the Navy* will be summarized in the FY 2012 Annual Report but is linked here for the conveniences of our readers.

perceptions of the new system and possible reductions in morale. Finally, changes in management flexibilities also increase the importance of MSPB's role in promoting and educating employees and the public about the merit system, MSPs, and PPPs.

### **Veterans' Rights and Changing Demographics of the Federal Workforce.**

Veterans may file appeals with MSPB under various laws including Veterans' preference in hiring for competitive service positions (5 U.S.C. § 3304(f)(1)), the Uniformed Services Employment and Reemployment Rights Act (USERRA; 38 U.S.C. § 4301 *et seq.*), and the Veterans Employment Opportunities Act (VEOA; 5 U.S.C. § 3309 *et seq.*). 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 VEOA. VEOA provides a means of redress for any violation of an individual's rights under any statute or regulation relating to veterans' preference. Under USERRA, individuals who left 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 MSPB. USERRA also gives the right to challenge discrimination against an individual based on military service or the obligation to perform military service, and protection against reprisal for the exercise of any of the rights granted by USERRA. MSPB expects to continue to receive a significant number of cases under these veterans' rights laws as more military members return from engagement in military conflicts.

The proportion of retirement-eligible Federal employees continues to increase. As the economy continues to improve, retirements will likely increase in the next few years. As retirements increase, we might expect to see an increase in retirement appeals. If Congress changes the retirement program, such as increasing the required level of employee contributions to their annuity, or changing the calculations for the annuity (such as basing the annuity on the average high five years instead of the average high three years) for current retirement-eligible employees, the Government could experience a surge in retirements, followed by a surge in retirement appeals to MSPB. Changes in Federal retirement such as the new authority that phases in the opportunity for employees in the Federal Employees Retirement System (FERS) to claim service credit toward retirement for their sick leave balance, and the potential to allow full-time Federal employees to phase their retirements or work in part-time status, may alter retirement rates, and thus may impact retirement appeals. As the government replaces retiring employees with relatively younger, less experienced employees, there is likely to be a decrease in the average age of the workforce. As this occurs, we may see an increase in appeals because less experienced employees typically experience more appealable actions than do more experienced employees.

In addition to changes in workforce demographics, Government work has continued to shift from administrative processing, to knowledge-based work. Federal human resources management systems, many designed in the 1940s and 1950s, do not have the flexibility needed to manage a knowledge-based workforce effectively. Various issues, including recruitment and hiring, performance management and pay, and training and development need to be addressed to improve and maintain a diverse workforce of highly engaged and motivated employees who can perform agency missions and serve the public. At the same time, MSPs, fair treatment, and freedom from discrimination and from PPPs must be ensured. Improvements are also needed in the selection and training of supervisors and

managers who must use the existing management systems to manage a modern workforce and achieve results for the public. These changes emphasize the need for a strong merit systems studies function and increased focus on promoting and educating employees and the public about the merit systems, MSPs, and PPPs.

**The Federal Budget.** Governmentwide actions to decrease Federal budgets include pay freezes, severe limitations in employee awards (for performance, special acts, quality step increases, or other purposes), and limits on within grade increases. The recently enacted freeze in Federal pay may increase retirement and adversely impact employee morale and productivity. At the same time, freezing pay may also shift employees' attention to performance appraisal systems and ratings, which could in turn increase appeals to MSPB. Budget reductions may also increase agency use of furloughs (involuntary temporary release from duty without pay), reductions in force (RIF) to decrease the size of the workforce, hiring delays or freezes, and reductions in training and development to save money. Reducing the workforce may lead to increases in the number of employees who are demoted or separated involuntarily through RIF. Historical trends indicate that increasing RIFs would lead to potentially large increases in the number of appeals to MSPB.

Freezing employee pay and possible reductions in hiring and workforce training may also have long-term impacts on MSPs such as the efficiency and effectiveness of the workforce. Employees may perform better and refrain from misconduct 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. Reductions or long delays in hiring and/or reductions in workforce training may also impact the efficiency and effectiveness of the workforce in terms of loss of expertise and workforce capacity to carry out the mission, from which it could take years to recover. Emphasis on merit systems studies is important to continue studying the impact of these workforce changes on adherence to MSPs and avoidance of PPPs. It is also important to promote merit and educate the workforce, especially managers and leaders, about how to adhere to MSPs and to avoid PPPs when making management decisions such as those related to reducing the workforce.

## Significant Board Decisions and Court Opinions Issued During FY 2011

MSPB issued a number of noteworthy decisions in FY 2011, several of which are summarized below. Brief summaries of selected significant opinions issued by the United States Court of Appeals for the Federal Circuit and the United States Supreme Court are also provided as a service to our stakeholders.

Several significant decisions issued by the Board during the early part of FY 2011 were summarized in the Annual Report for FY 2010 ([pages 20-22](#)):

- *Conyers and Northover v. Department of Defense*, [2010 MSPB 247](#) and [2010 MSPB 248](#), 115 M.S.P.R. 572 and 115 M.S.P.R. 451 (employees occupying non-critical sensitive positions who did not have access to classified information were not subject to the limited scope of Board review set forth in *Department of the Navy v. Egan*, [484 U.S. 518](#), 530-31 (1988));
- *Aguzie and Barnes v. Office of Personnel Management*, [2011 MSPB 10](#), 116 M.S.P.R. 64 (when OPM directs an agency to remove a tenured employee pursuant to its authority under 5 C.F.R. part 731, the removal action is subject to the requirements of 5 U.S.C. chapter 75 subchapter II, including the Board appeal rights guaranteed under 5 U.S.C. § 7513(d));
- *Dean and Evans v. Office of Personnel Management/ Department of Veterans Affairs*, [2010 MSPB 213](#), 115 M.S.P.R. 157 (agencies violated the appellants' veterans' preference rights by using the Federal Career Intern Program); and
- *Chambers v. Department of the Interior*, [2011 MSPB 7](#), 116 M.S.P.R. 17 (finding that the agency retaliated against the appellant for disclosing safety concerns to the Washington Post and ordering her reinstatement as Chief of the U.S. Park Police)

### Significant Decisions Issued by the Board

#### Jurisdiction

*Maibaum v. Department of Veterans Affairs*, [2011 MSPB 18](#), 116 M.S.P.R. 234: Service with the Postal Service may be tacked to service with an Executive agency to meet the definition of "employee" under [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#), i.e., "a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions – (i) in an Executive agency; or (ii) in the United States Postal Service." The Board had previously held that the term "an Executive agency" may refer to more than one agency, and that service in multiple Executive agencies may be combined in order to satisfy the 1-year current continuous service requirement.

*Rivera v. Department of Homeland Security*, [2011 MSPB 57](#), 116 M.S.P.R. 429: Because a Federal Career Intern Program appointment automatically terminates upon its expiration unless the agency takes affirmative steps to extend the appointment or convert it to the competitive service, such termination does not constitute an appealable adverse action.

*Vaughan v. Department of Agriculture*, [2011 MSPB 61](#), 116 M.S.P.R. 493: The Board modified the standard governing when a claim of involuntary disability retirement will constitute a removal within the Board’s jurisdiction. In most such cases, the Board will continue to apply the standard that, to be entitled to a jurisdictional hearing, an appellant must nonfrivolously allege that: (1) An accommodation was available between the time the appellant’s medical condition arose and the date of his separation that would have allowed him to continue his employment; (2) the appellant communicated to the agency his desire to continue working but that his medical limitations required a modification of his working conditions or duties; and (3) the agency failed to provide him the requested accommodation. Under some limited circumstances, however, the Board will apply the standard that applies to other alleged involuntary retirements, i.e., a showing that the retirement resulted from misinformation or deception by the agency or was the product of coercion by the agency. The latter standard applied here, where the appellant alleged that the agency created a discriminatory, hostile work environment, which not only led to intolerable working conditions, but which caused or exacerbated the medical conditions underlying his disability retirement.

#### Whistleblower Protections

*Parikh v. Department of Veterans Affairs*, [2011 MSPB 1](#), 116 M.S.P.R. 197: The Board found that the appellant established that his removal was taken in reprisal for protected whistleblowing disclosures and ordered the agency to restore him to employment. The agency had removed the appellant from his position as a staff physician at a Veterans Administration Medical Center based on a charge of unauthorized release and disclosure of private and protected patient information. The appellant admitted that a letter he sent to senators and congressmen contained confidential patient information, but contended that it was protected because he was disclosing “a substantial and specific danger to public health or safety” within the meaning of [5 U.S.C. § 2302\(b\)\(8\)](#). Although the Board found that some of the appellant’s disclosures were not protected because they were “specifically prohibited by law [the Privacy Act],” it found that other disclosures were not prohibited by law, and constituted protected disclosures of a substantial and specific danger to public health or safety. The Board found that some of the disclosures were not prohibited by the Health Insurance Portability and Accountability Act (HIPAA), which generally prohibits healthcare providers from disseminating confidential patient information, because the Senators and Congressmen to whom the disclosures were made fell within the statutory exception for disclosures to a “health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions.” These disclosures were similarly not prohibited by the Privacy Act, which generally prohibits an agency from disclosing medical records without the written authorization of the individuals to whom the records pertain, because the disclosures fell with the exception for disclosures to congressional committees with jurisdiction over the matters disclosed. Although the agency argued that the appellant’s disclosures violated an agency handbook, the Board found that the handbook does not constitute a “law” within the meaning of the statute.

*Stiles v. Department of Homeland Security*, [2011 MSPB 28](#), 116 M.S.P.R. 263: Although it ultimately found that the appellant’s disclosure was not protected because the disclosure was part of the appellant’s normal duties and reported through normal channels, the Board reversed the administrative judge’s reliance on *Meunissen v. Department of the Interior*, [234 F.3d 9](#) (Fed. Cir. 2000), in determining that a disclosure was not protected because the agency was

already aware of the matter disclosed. The Board noted that it had distinguished *Meuwissen* in *Askew v. Department of the Army*, [88 M.S.P.R. 674](#) (2001). A key aspect of the *Meuwissen* holding was the public nature of the information disclosed, and the *Meuwissen* court had relied on legislative history relating to the Civil Service Reform Act, whereas the legislative history of the Whistleblower Protection Act, passed 11 years later, rejected the notion that an individual who communicates wrongdoing that is “not concealed” or “already known” should not be protected from retaliation.

*Usharauli v. Department of Health & Human Services*, [2011 MSPB 54](#), 116 M.S.P.R. 383: Scientists holding appointments under [42 U.S.C. § 209\(g\)](#), which are made “without regard to the civil-service laws,” may bring individual right of action appeals if they are “covered employees” within the meaning of [5 U.S.C. §§ 1221\(a\)](#) and [2105\(a\)](#).

*Voorbis v. Department of Homeland Security*, [2011 MSPB 67](#), 116 M.S.P.R. 538: To disclose what he believed were misleading statements by a Denver District Attorney running for governor about plea bargaining practices with respect to illegal immigrants charged with crimes, the appellant, a Criminal Investigator with the Bureau of Immigration and Customs Enforcement, ran searches in government databases and disclosed that information to the campaign of the candidate running against the District Attorney. The agency removed him on misconduct charges, including unauthorized queries on an official government database and unauthorized disclosure of information. The Board found that the appellant failed to prove his affirmative defense of retaliation for protected whistleblowing. The plea bargaining practices disclosed related to a city official, not a Federal government official, and could not be said to implicate the reputation and good name of the Federal government.

*Ingram v. Department of the Army*, [2011 MSPB 71](#), 116 M.S.P.R. 525: The Board reversed the remand initial decision finding, contrary to the administrative judge, that the appellant established his claim of reprisal for protected whistleblowing on the merits, and that the agency had failed to establish by clear and convincing evidence that it would have taken the personnel actions at issue absent the protected disclosures. The Board therefore ordered corrective action. The appellant had reported to his supervisors that a program manager was about to engage in conduct contrary to the agency’s regulations in connection with a proposed medical simulation training event. In reversing the administrative judge’s finding that the appellant failed to establish that he had a reasonable belief that he was disclosing a violation of regulation, the Board noted, among other things, that before making the disclosure, the appellant had obtained an opinion from the agency’s legal department stating that allowing the event to proceed with videotaping and photography would violate agency ethical regulations and possibly compromise the trade secrets of agency contractors.

*MacLean v. Department of Homeland Security*, [2011 MSPB 70](#), 116 M.S.P.R. 562: The Board upheld an initial decision which sustained the appellant’s removal from his Federal Air Marshal (FAM) position on a charge of disclosing Sensitive Security Information (SSI) for disclosing to the media a Transportation Security Administration directive suspending overnight missions by FAMs during a period when a hijacking alert was in effect. The Board affirmed his removal, finding that MacLean was not a whistleblower because his disclosure was “specifically prohibited by law.” Under the regulations in effect at the time of the disclosure, information relating to the deployment of FAMs was included within the definition of Sensitive Security Information (SSI). The Board emphasized that it was not

ruling that any regulation that meets certain conditions should be accorded the full force and effect of law, such that a disclosure in violation of the regulation would be construed as “prohibited by law” within the meaning of 5 U.S.C. § 2302(b)(8). The appellant’s disclosure of SSI was “specifically prohibited by law” because the regulation that he violated was promulgated pursuant to an explicit Congressional mandate that required the agency to prohibit such disclosures.

*McCarthy v. Department of Veterans Affairs*, [2011 MSPB 74](#), 116 M.S.P.R. 594: The Board reaffirmed its longstanding position that the Whistleblower Protection Act does not mandate any particular sequence for trying the elements of a whistleblower case and that, in appropriate cases, once the Board determined it has jurisdiction, the Board may first address the agency’s affirmative defense that it would have taken the same action in the absence of a disclosure, and then, if necessary, turn to the question of whether the appellant established a prima facie whistleblower claim. Under the circumstances of this case, however, where the circumstantial evidence bearing on retaliatory motive includes the substance of the appellant’s allegedly protected activity as well as the extent to which the deciding official was aware of it, the Board found it necessary to adjudicate both the merits of the appellant’s prima facie case as well as the agency’s affirmative defense. The Board found that the agency established by clear and convincing evidence that it would have terminated the appellant’s employment in the absence of any protected disclosures.

#### Due Process of Law/Harmful Procedural Error

*Pickett v. Department of Agriculture*, [2011 MSPB 58](#), 116 M.S.P.R. 439; *Thomas v. U.S. Postal Service*, [2011 MSPB 62](#), 116 M.S.P.R. 453; *Lopes v. Department of the Navy*, [2011 MSPB 63](#), 116 M.S.P.R. 470; *Gray v. Department of Defense*, [2011 MSPB 64](#), 116 M.S.P.R. 461: In each of these cases, the agency’s deciding official had considered matters not included in the notice of proposed adverse action in determining the penalty to be imposed. The Board found that this was improper in light of the Federal Circuit’s decision in *Ward v. U.S. Postal Service*, [634 F.3d 1274](#) (Fed. Cir. 2011). Prior to *Ward*, the Board had held that where an ex parte communication does not relate to the charge itself, but relates instead to the penalty, it would not consider the error to be a denial of the constitutional right to due process, and that the Board would remedy the error by doing its own analysis of the penalty factors. In *Ward*, the court expressly overruled this approach and held that if the employee has not been given “notice of any aggravating factors supporting an enhanced penalty,” an ex parte communication with the deciding official regarding such factors may constitute a due process violation. If the ex parte communication introduced “new and material information” to the deciding official such that the communication “is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances,” then a due process violation will be found (634 F.3d at 1279-80). If a constitutional violation has occurred, the adverse action must be reversed and the individual is entitled to a new constitutionally correct procedure. Even if a due process violation has not occurred, the Board will consider whether the agency has committed harmful procedural error. The Board clarified that this analysis applies to all new and material information considered by the deciding official, regardless of whether the deciding official received it via ex parte communication.

## Veterans' Rights

*Jarrard v. Social Security Administration*, [2010 MSPB 207](#), 115 M.S.P.R. 397, *aff'd*, [No. 2011-3050](#) (Fed. Cir. Jan. 13, 2012): Agencies are not required to comply with the passover provisions of [5 U.S.C. § 3318](#) when making selections for Attorney Advisor positions in the Federal government. Section 3318 only applies to certificates issued under section [3317\(a\)](#). Because Attorney Advisor positions are in Schedule A of the excepted service and are not subject to an examination within the meaning of [5 U.S.C. § 3313](#), applicants for them are not placed on a certificate of eligibles within the meaning of section 3317(a).

*Williams v. Department of the Air Force*, [2011 MSPB 19](#), 116 M.S.P.R. 245: Liquidated damages for willful violation of the Veterans Employment Opportunities Act (VEOA) under [5 U.S.C. § 3330c\(a\)](#) are in addition to damages for lost wages or benefits, and are for the same amount. In other words, where an employee has lost wages and benefits because of a willful violation of his veterans' preference rights, he is entitled to a "double" back pay award.

*Burroughs v. Department of the Army*, [2011 MSPB 30](#), 115 M.S.P.R. 656: The Board analogized the exhaustion requirement under VEOA to the exhaustion requirement for individual right of action appeals, finding that the purpose of the exhaustion requirement is to afford the Department of Labor the opportunity to conduct an investigation that might lead to corrective action before involving the Board in the case. Accordingly, the Board lacks jurisdiction to adjudicate claims that were not raised before the Department of Labor.

*Harellson v. U.S. Postal Service*, [2011 MSPB 3](#), 115 M.S.P.R. 378: The Board held that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not support a discrimination claim brought under a disparate impact theory of recovery.

## Employment Discrimination

*Southerland v. Department of Defense*, [2011 MSPB 91](#), 117 M.S.P.R. 56: A mixed motive analysis is not appropriate in disability discrimination claims arising under the Americans with Disabilities Act Amendments Act of 2008 (ADAAA); the claimant must show that the agency would not have taken the adverse action "but for" his actual or perceived disability. (The Board previously ruled in *Brott v. General Services Administration*, [2011 MSPB 52](#), 116 M.S.P.R. 410, that the "but for" standard applies to cases governed by the law in effect prior to the effective date of the ADAAA.) This Opinion and Order clarified the proper analysis of a claim of disability discrimination in light of the EEOC's recently issued regulations implementing the ADAAA. The new law and regulations liberalized the definition of disability and made significant changes to the analysis of these claims. In particular, when an appellant is not challenging an agency's failure to provide a reasonable accommodation, the claim should be analyzed under the "regarded as" prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity.

## Board Procedures

*Wynn v. U.S. Postal Service*, [2010 MSPB 214](#), 115 M.S.P.R. 146: When an appellant raises an affirmative defense, whether by checking a box in the appeal form, identifying an affirmative defense by name such as "race discrimination," "harmful procedural error," etc., or by

alleging facts that reasonably raise such an affirmative defense, the administrative judge must address the affirmative defense(s) in any close of record order or prehearing conference summary and order. If an appellant expresses the intention to withdraw such an affirmative defense, the close of record order or prehearing conference order must, at a minimum, identify the affirmative defense, explain that the Board will no longer consider it when deciding the appeal, and give the appellant an opportunity to object to withdrawal of the affirmative defense. In the absence of evidence establishing that an appellant has withdrawn or abandoned his affirmative defenses, administrative judges are required to apprise an appellant of the applicable burdens of proving a particular affirmative defense, as well as the kind of evidence the appellant is required to produce to meet his burden.

*Thomas v. Department of the Treasury*, [2010 MSPB 224](#), 115 M.S.P.R. 224, and *Mojarro v. U.S. Postal Service*, [2010 MSPB 225](#), 115 M.S.P.R. 433: Although an administrative judge has wide discretion to dismiss an appeal without prejudice in the interests of fairness, due process, and administrative efficiency, the judge must exercise that discretion in a manner consistent with Board policy, including the policy that cases be adjudicated expeditiously. When an administrative judge dismisses a case without prejudice, he or she must set a date certain for refiling rather than leaving the refiling date open or ambiguous.

*Berkner v. Department of Commerce*, [2011 MSPB 27](#), 116 M.S.P.R. 277: At issue in this case was whether the appellant's statement to her union representative that she might kill herself and other employees was privileged, such that the union representative could not testify about the appellant's statement. The Board acknowledged decisions by the Federal Labor Relations Authority (FLRA) holding that communications between employees and union representatives are generally protected as privileged. The cases in which the FLRA has recognized the privilege were factually distinguishable from this case, in that the agency was seeking, under threat of discipline, to require disclosure of confidential information and the union representatives objected to being interrogated. Here, the union representative voluntarily reported the appellant's comments to the agency's labor relations department. The Board sustained the appellant's removal.

*Encarnado v. Office of Personnel Management*, [2011 MSPB 37](#), 116 M.S.P.R. 301: At issue was whether the appellant could make a deposit under the Civil Service Retirement System (CSRS) for service with the Department of the Navy, when a previous Board proceeding had determined that the appellant was not entitled to a retirement annuity for the same service. The Board dismissed the appeal on res judicata (claim preclusion) and collateral estoppel (issue preclusion) grounds. Res judicata precludes a party from relitigating not only issues that were raised in the prior appeal, but also issues that could have been raised in the prior appeal, as long as they involve the same cause of action and resulted in a valid, final judgment on the merits. The second appeal involved the same cause of action, as the appellant acknowledged that his goal in bringing the "deposit" appeal was to receive a retirement annuity for the same years of service at issue in the first appeal. Although the appellant may not have raised his entitlement to make a deposit to the CSRS in the earlier appeal, he could have done so. Under the doctrine of collateral estoppel, the appellant was precluded from relitigating the Board's determination in the first appeal that his Federal service with the Navy was not CSRS-covered service.

*Williams v. U.S. Postal Service*, [2011 MSPB 53](#), 116 M.S.P.R. 377: The Board clarified that an appellant's failure to exercise basic due diligence in complying with Board orders remains a viable basis for dismissing an appeal for failure to prosecute, in addition to such dismissal when an appellant has exhibited bad faith or evidenced an intent to abandon the appeal.

### Compliance

*Shelton v. Environmental Protection Agency*, [2010 MSPB 216](#), 115 M.S.P.R. 177: The Board acknowledged an inconsistency in existing case law, with some decisions stating that the appellant bears the burden of proving that the agency breached the settlement agreement, whereas others state that the agency bears the burden of proving that it did not breach the settlement agreement. In order to show that he is the prevailing party in the compliance phase of the proceedings, an appellant must establish that the agency materially breached the Board enforceable order or settlement agreement at issue. Although the appellant bears the ultimate burden of proving the agency's noncompliance, the agency bears the burden of producing relevant, material, and credible evidence of its compliance.

### Adverse Action Charges

*McCauley v. Department of the Interior*, [2011 MSPB 59](#), 116 M.S.P.R. 484: An excessive absences charge may include sick leave, annual leave, leave without pay (LWOP), and absence without leave, but may not include leave under the Family and Medical Leave Act. A required element of proof for an excessive absences charge is that "the employee was absent for compelling reasons beyond his or her control so that agency approval or disapproval was immaterial because the employee could not be on the job." If an agency grants LWOP to an appellant even though the appellant had failed to provide requested documentation to support the request, the agency did not know whether the appellant was able to report to work, and this element of the charge was not proved.

### Performance-Based Actions

*Adamsen v. Department of Agriculture*, [2011 MSPB 49](#), 116 M.S.P.R. 331: The issue in this chapter 43 removal case was whether the agency proved by substantial evidence that the Office of Personnel Management (OPM) approved the revised performance appraisal system under which the appellant was removed. An agency must request and obtain approval from OPM when it makes significant changes to a previously approved performance appraisal system. "Substantial evidence" requires "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Here, the agency did not produce a document issued by OPM approving the revised performance appraisal system, and the Board found that an unsworn declaration from a human resources specialist who was not employed at the time of the change, and which did not explain the factual basis for her statement that OPM approved the agency's performance appraisal system, did not constitute substantial evidence.

### Penalty

*Raco v. Social Security Administration*, 2011 MSPB 87, 117 M.S.P.R. 1: In this appeal, the agency removed the appellant on a charge of conduct unbecoming a Federal employee because of

22 discrepancies between the time she recorded on her credit hours form and the time that she actually departed work. Of the 22 discrepancies, 19 involved increments of time of less than 5 minutes, and the agency admitted that clocks in the workplace were not synchronized. The administrative judge mitigated the penalty to a 30-day suspension after sustaining only 3 of the 22 specifications of misconduct. The Board agreed with the agency that it had proved all of the specifications of the charge, but determined that the agency improperly weighed the *Douglas* factors in determining the penalty. In particular, the Board found that the *de minimis* nature of 19 of the 22 specifications rendered unpersuasive the agency's contention that the charged misconduct was a serious offense, that the appellant's 20 years successful service was a mitigating factor, that the fact that the appellant mounted a defense to the charge did not indicate a lack of remorse or failed to admit wrongdoing, and that the penalty of removal was disparate compared to other employees who had engaged in similar conduct. Accordingly, the Board further mitigated the penalty to a 14-day suspension.

### Attorney Fees

*Baldwin v. Department of Veterans Affairs*, [2010 MSPB 221](#), 115 M.S.P.R. 413: At issue in this case was whether the appellant was a "prevailing party" for attorney fees purposes even though the Board had not decided the merits of the underlying adverse action. In its final decision in the underlying appeal, the Board found that the appellant established that his resignation was involuntary because it was based on agency misinformation. The Board ordered a return to the status quo ante, which meant that the appellant would be restored to employment, but subject to the agency's decided removal action. The appellant petitioned for attorney fees, even though the propriety of the removal action had not been determined. The Board held that the appellant is a prevailing party because its decision on the merits resulted in a material alteration of the legal relationship between the parties, and that attorney fees were warranted in the interest of justice because the agency committed gross procedural error that prolonged the appellant's ability to exercise his statutory right to file a Board appeal of the underlying removal action.

*Discroll v. USPS*, [2011 MSPB 80](#), 116 M.S.P.R. 662: The Board clarified the rules governing the entitlement to attorney fees when an appellant prevails on some claims and during some phases of the litigation, but not others. Relying on Board precedent, the administrative judge found that, because the appellant was a prevailing party with respect to the initial decision, but not with respect to her petition for review, she was not entitled to an award of attorney fees for the time spent on the unsuccessful petition. Overruling contrary precedent, the Board stated that it does not determine prevailing party status on a line-item basis. An appellant is, or is not, a prevailing party in the case as a whole, and whether she may be deemed a prevailing party depends on the relief ordered in the Board's final decision. Here, the appellant was a prevailing party with respect to the underlying appeal as a whole. The Board further held that the administrative judge erred in disallowing some hours before calculating the lodestar amount based on the limited nature of the appellant's success. The first task is to take the hours reasonably spent on the litigation multiplied by a reasonable hourly fee, which results in a "lodestar" amount. Excluded in this phase are hours for which the prevailing party failed to provide adequate documentation, and hours that were not reasonably expended. In the second phase, the lodestar may be adjusted upward or downward based on other considerations, including the crucial factor of the "results obtained."

## Suitability

*Scott v. Office of Personnel Management*, [2011 MSPB 50](#), 116 M.S.P.R. 356: OPM does not have the authority under part 731 to make suitability determinations or to take or direct suitability actions against an individual based solely on conduct occurring after his admission into the competitive service.

## Restoration to Duty

*Gallo v. Department of Transportation*, [2011 MSPB 6](#), 116 M.S.P.R. 1: This case required the Board to construe the language of [5 U.S.C. § 8151\(a\)](#) regarding the rights of an employee who has recovered from a compensable injury: “In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.” Gallo had suffered a work-related injury in 1995 while working as an operational Air Traffic Control Specialist (ATCS). While “indefinitely incapacitated” from working as an ATCS, she accepted a position in 1996 to a different position at the same grade level. When she fully recovered from her injury in 2000, she accepted an appointment as a supervisory ATCS. She argued that her pay in the new position was lower than it would have been had she remained in her operational ATCS position during her recovery, and claimed entitlement to the higher rate of pay under section 8151(a). A majority of the Board, Vice Chairman Wagner dissenting, found that the appellant did not “resume employment” within the meaning of the statute because she continued working for the government throughout the period of her compensable injury. The majority found that, even if the appellant had resumed employment with the Federal government within the meaning of § 8151(a), she would not be entitled to the increased compensation she seeks because such relief was not a right or benefit based upon length of service.

## Significant Opinions Issued by the U.S. Court of Appeals for the Federal Circuit

### Disciplinary Actions

*Long v. Social Security Administration*, [635 F.3d 526 \(Fed. Cir. 2011\)](#): The Board’s interpretation of the “good cause” standard for disciplinary action against an ALJ as encompassing conduct that “undermines public confidence in the administrative adjudicatory process” is entitled to *Chevron* deference because the Board was given exclusive rulemaking and adjudicatory authority under 5 U.S.C. § 7521. Such an undermining of confidence occurs where the conduct creates doubts in the ALJ’s ability to carry out his responsibilities or raises concerns that the ALJ’s behavior will reflect poorly on the agency and its adjudicatory process.

### Evidence

*Tudor v. Department of Treasury*, [639 F.3d 1362 \(Fed. Cir. 2011\)](#): The great deference owed to an AJ’s credibility determination in resolving conflicting testimony is irrelevant if the testimony in question is not in conflict.

### Jurisdiction

*Carrow v. Merit Systems Protection Board*, [626 F.3d 1348 \(Fed. Cir. 2010\)](#): A failure by an employing agency to advise a new employee of the terms of his appointment does not create appeal rights for positions as to which Congress has not given the Board jurisdiction. The court declined to approve or disapprove of the Board's *Park/Exum* line of cases, which held that an employing agency must inform an employee of the effect of a change in tenure when the employee relinquishes an appointment having appeal rights to accept another appointment within the same agency that lacks such appeal rights.

*Chadwell v. Merit Systems Protection Board*, [629 F.3d 1306 \(Fed. Cir. 2010\)](#): In order for an OPM rule to constitute an employment practice that is appealable to the Board under 5 C.F.R. § 300.101, the rule must have a substantive or merits-based effect on the applicant's eligibility for selection.

*Bennett v. Merit Systems Protection Board*, [635 F.3d 1215 \(Fed. Cir. 2011\)](#): Pursuant to 38 U.S.C. § 7802(e), Veterans Canteen Services employees are excluded from the right to appeal to the Board.

#### Timeliness

*Turman-Kent v. Merit Systems Protection Board*, [657 F.3d 1280 \(Fed. Cir. 2011\)](#): The Board did not abuse its discretion by requiring Ms. Turman-Kent to provide medical evidence accounting for the entirety of her six-year period of delay in filing her petition for review with the Board.

#### Veterans' Rights

*Erickson v. U.S. Postal Service*, [636 F.3d 1353 \(Fed. Cir. 2011\)](#): USERRA's five-year limit on an employee's absence from civilian service provides a distinct termination point for reemployment rights. The enactment of that statutory period makes it reasonable to assume that, absent clear evidence to the contrary, employees who have not exceeded that period do not intend to abandon their civilian positions.

#### Constitutional Claims

*Ward v. U.S. Postal Service*, [634 F.3d 1274 \(Fed. Cir. 2011\)](#): Ex parte communications that introduce "new and material information," whether material to the merits of the underlying charge or material to the penalty to be imposed, violate due process.

### Significant Opinions Issued by the U.S. Supreme Court

#### Constitutional Claims

*Borough of Duryea v. Guarnieri*, [131 S.Ct. 2488 \(U.S. 2011\)](#): A government employer's retaliatory actions against an employee do not give rise to liability under the Petition Clause of the First Amendment unless the employee's petition relates to a matter of public concern. A petition filed under an internal grievance procedure in many cases will not seek to communicate to the public or advance a political or social point of view beyond the employment context.

*National Aeronautics & Space Administration v. Nelson*, [131 S.Ct. 746 \(U.S. 2011\)](#): The government may collect personal information during background checks on contractors. The government's interests as employer and proprietor in managing its internal operations, combined with the protections against public dissemination provided by the Privacy Act, satisfy any interest in avoiding disclosure that may arguably have its roots in the Constitution.

#### Discrimination

*Wal-Mart Stores v. Dukes*, [131 S.Ct. 2541 \(U.S. 2011\)](#): A plaintiff class in a Title VII action cannot be certified unless the party seeking class certification can prove that the class has common questions of law or fact. The conceptual gap between an individual's discrimination claim and the existence of persons who have suffered the same injury must be bridged by significant proof that an employer operated under a general policy of discrimination.

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## Case Processing Statistics

### Summary of Cases Decided by MSPB

**Table 1: FY 2011 Summary of Cases Decided by MSPB**

<b>Cases Decided in MSPB Regional and Field Offices</b>	
Appeals	6,543
Addendum Cases <sup>1</sup>	535
Stay Requests <sup>2</sup>	86
<b>TOTAL Cases Decided in RO/FOs</b>	<b>7,164</b>
<b>Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction<sup>3</sup></b>	<b>14</b>
<b>Appellate Jurisdiction:</b>	
Petitions for Review (PFRs) – Appeals	849
Petitions for Review (PFRs) – Addendum Cases	97
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings <sup>4</sup>	14
Court Remands	6
Compliance Referrals	28
EEOC Non-concurrence Cases	0
Arbitration Cases	5
<b>Subtotal – Appellate Jurisdiction</b>	<b>999</b>
Original Jurisdiction <sup>5</sup>	23
Interlocutory Appeals	2
<b>TOTAL Cases Decided by the Board<sup>6</sup></b>	<b>1,024</b>
<b>TOTAL Decisions (Board, ALJs, RO/FOs)</b>	<b>8,202</b>

<sup>1</sup> Includes 92 requests for attorney fees, 129 Board remand cases, 296 petitions for enforcement, 4 court remand cases, 11 requests for compensatory damages (discrimination cases only), and 3 requests for consequential damages.

<sup>2</sup> Includes 66 stay requests in whistleblower cases and 20 in non-whistleblower cases.

<sup>3</sup> Initial Decisions issued by ALJ. Case type breakdown: 6 actions against ALJs, 2 actions against a member of the SES, 5 Hatch Act cases, and 1 corrective action brought against an agency.

<sup>4</sup> Includes 7 cases reopened by the Board on its own motion and 7 cases where OPM requested reconsideration.

<sup>5</sup> Final Board decisions. Case type breakdown: 9 OSC stay requests, 4 PFRs in Hatch Act cases, 8 PFRs in actions against an ALJ, and 2 requests for regulation review.

<sup>6</sup> In addition to the 1,022 cases closed by the Board with a final decision, there were 2 interlocutory appeals decided by the Board in FY 2011. Interlocutory appeals typically raise difficult issues or issues not previously addressed by the Board.

## Regional Case Processing

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

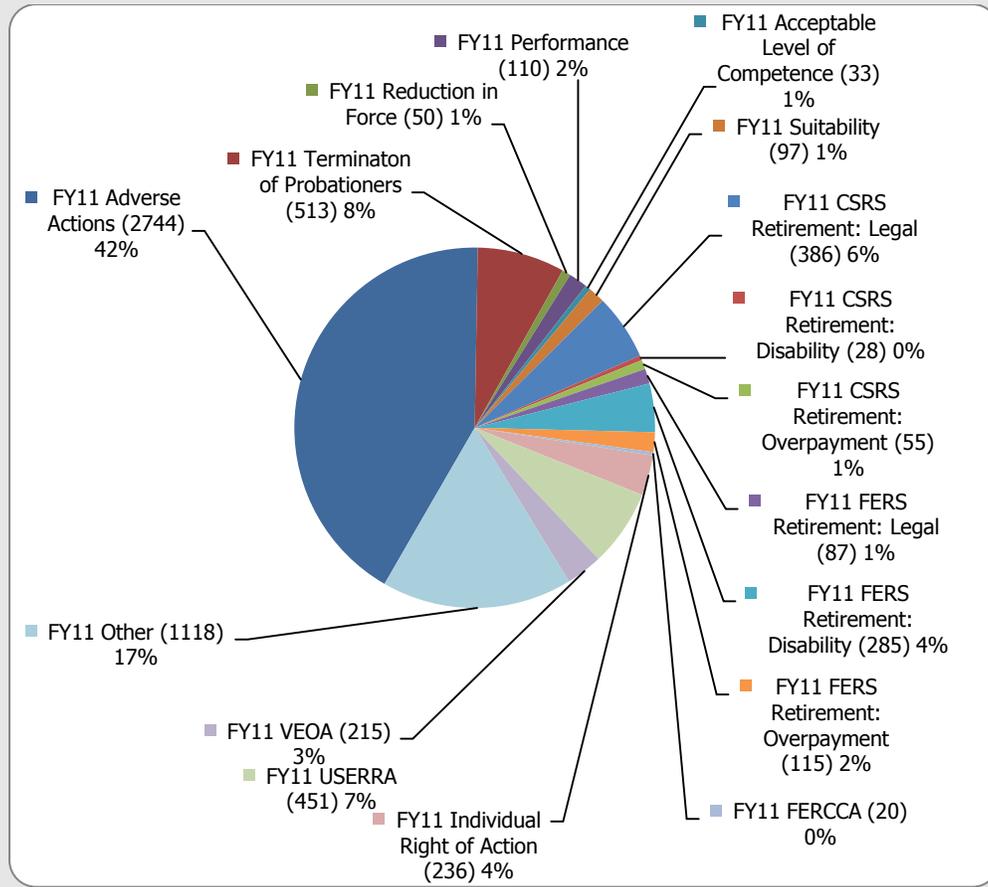
Type of Case	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	#	%	#	%	#	%	#	%	
Adverse Action by Agency	2744	1373	50.04	1371	49.96	932	67.98	439	32.02	
Termination of Probationers	513	466	90.84	47	9.16	38	80.85	9	19.15	
Reduction in Force	50	37	74.00	13	26.00	6	46.15	7	53.85	
Performance	110	32	29.09	78	70.91	58	74.36	20	25.64	
Acceptable Level of Competence (WIGI)	33	18	54.55	15	45.45	12	80.00	3	20.00	
Suitability	97	58	59.79	39	40.21	26	66.67	13	33.333	
CSRS Retirement: Legal	386	179	46.37	207	53.63	2	0.97	205	99.03	
CSRS Retirement: Disability	28	20	71.43	8	28.57	1	12.50	7	87.50	
CSRS Retirement: Overpayment	55	28	50.91	27	49.09	19	70.37	8	29.63	
FERS Retirement: Legal	87	47	54.02	40	45.98	5	12.50	35	87.50	
FERS Retirement: Disability	285	215	75.44	70	24.56	4	5.71	66	94.29	
FERS Retirement: Overpayment	115	39	33.91	76	66.09	50	65.79	26	34.21	
FERCCA	20	10	50.00	10	50.00	1	10.00	9	90.00	
Individual Right of Action	236	173	73.31	63	26.69	41	65.08	22	34.92	
USERRA	451	158	35.03	293	64.97	261	89.08	32	10.92	
VEOA	215	136	63.26	79	36.74	13	16.46	66	83.54	
Other <sup>3</sup>	1118	920	82.29	198	17.71	160	80.81	38	19.19	
<b>Total</b>	<b>6543</b>	<b>3909</b>	<b>59.74</b>	<b>2634</b>	<b>40.26</b>	<b>1629</b>	<b>61.85</b>	<b>1005</b>	<b>38.15</b>	

<sup>1</sup> Percent Dismissed and Not Dismissed are of the number Decided.

<sup>2</sup> Percent Settled and Adjudicated are of the number Not Dismissed.

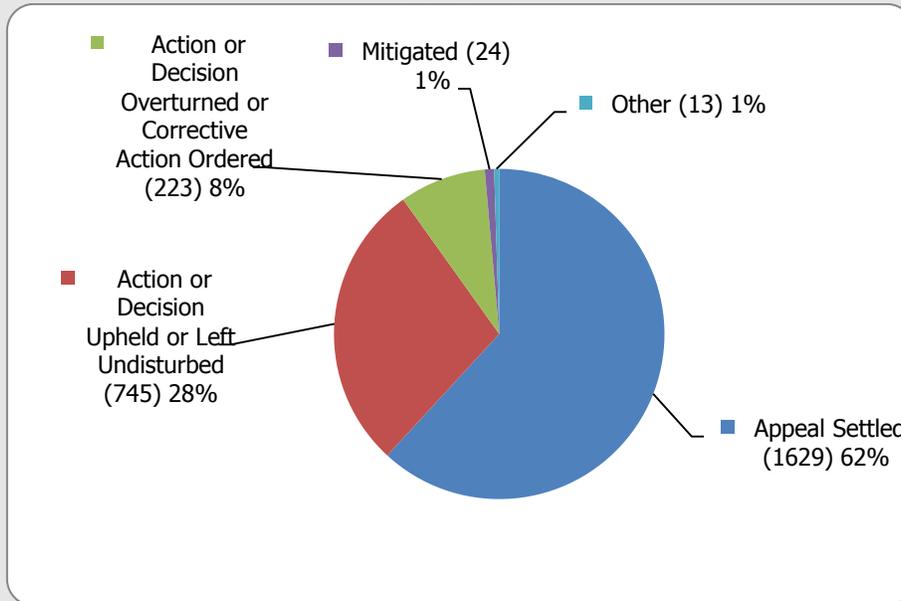
<sup>3</sup> "Other" appeals include Restoration of Duty (554), Miscellaneous (472) and additional types such as Reemployment Priority, Employment Practices, and others.

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



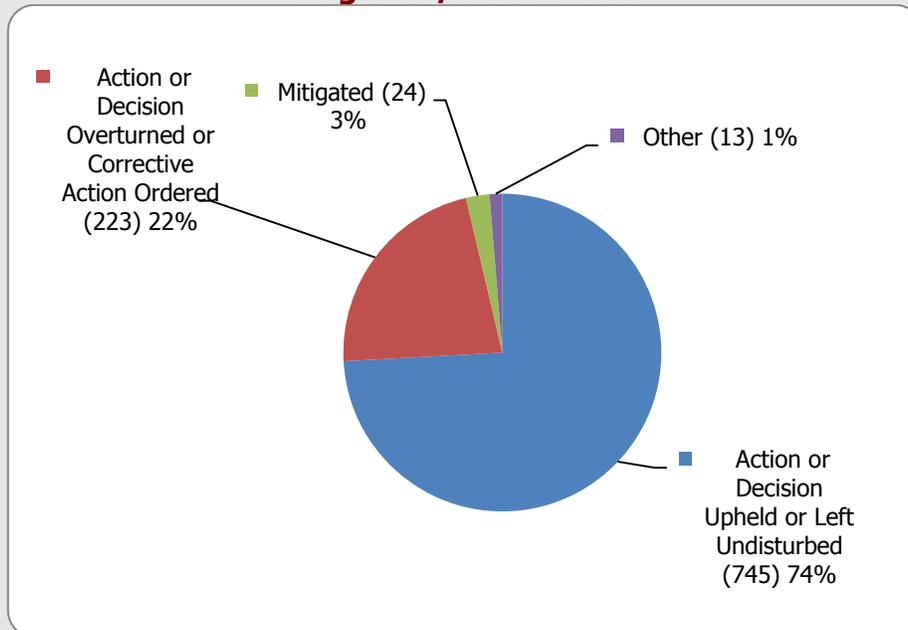
**Total Number of Appeals: 6,543**

**Figure 2: Dispositions: Appeals Not Dismissed by Regional and Field Offices**



Total Number of Appeals that were Not Dismissed: 2,634

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



Based on 1,005 appeals adjudicated on the merits

**Table 3: Disposition of Initial Appeals by Agency**

Agency	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	#	%	#	%	#	%	#	%	
US Postal Service	1427	974	68.3	453	31.7	340	75.1	113	24.9	
Office of Personnel Management <sup>3</sup>	1012	560	55.3	452	44.7	99	21.9	353	78.1	
Veterans Affairs	685	408	59.6	277	40.4	207	74.7	70	25.3	
Army	619	313	50.6	306	49.4	227	74.2	79	25.8	
Air Force	387	213	55.0	174	45.0	142	81.6	32	18.4	
Homeland Security	376	215	57.2	161	42.8	88	54.7	73	45.3	
Navy	375	210	56.0	165	44.0	98	59.4	67	40.6	
Defense	272	165	60.7	107	39.3	61	57.0	46	43.0	
Treasury	198	131	66.2	67	33.8	43	64.2	24	35.8	
Justice	193	122	63.2	71	36.8	42	59.2	29	40.8	
Agriculture	166	101	60.8	65	39.2	48	73.8	17	26.2	
Interior	125	65	52.0	60	48.0	47	78.3	13	21.7	
Health & Human Services	114	76	66.7	38	33.3	27	71.1	11	28.9	
Transportation	97	59	60.8	38	39.2	24	63.2	14	36.8	
Social Security Administration	86	52	60.5	34	39.5	17	50.0	17	50.0	
Commerce	83	48	57.8	35	42.2	29	82.9	6	17.1	
Labor	60	35	58.3	25	41.7	20	80.0	5	20.0	
General Services Administration	36	24	66.7	12	33.3	10	83.3	2	16.7	
Housing & Urban Development	27	14	51.9	13	48.1	10	76.9	3	23.1	
Energy	25	16	64.0	9	36.0	6	66.7	3	33.3	
State	24	15	62.5	9	37.5	5	55.6	4	44.4	
Small Business Administration	17	13	76.5	4	23.5	3	75.0	1	25.0	
Federal Deposit Insurance Corporation	14	10	71.4	4	28.6	3	75.0	1	25.0	
Environmental Protection Agency	11	5	45.5	6	54.5	3	50.0	3	50.0	
Government Printing Office	11	5	45.5	6	54.5	3	50.0	3	50.0	
Smithsonian Institution	11	3	27.3	8	72.7	6	75.0	2	25.0	
Education	9	7	77.8	2	22.2	0	0.0	2	100.0	
Tennessee Valley Authority	9	9	100.0	0	0.0	0	0.0	0	0.0	
Equal Employment Opportunity Commission	8	6	75.0	2	25.0	2	100.0	0	0.0	
National Aeronautics and Space Administration	7	3	42.9	4	57.1	3	75.0	1	25.0	
Armed Forces Retirement Home	6	5	83.3	1	16.7	0	0.0	1	100.0	
National Archives and Records Administration	5	0	0.0	5	100.0	5	100.0	0	0.0	
Agency for International Development	4	1	25.0	3	75.0	2	66.7	1	33.3	
Commodity Futures Trading Commission	4	3	75.0	1	25.0	1	100.0	0	0.0	
National Labor Relations Board	4	1	25.0	3	75.0	1	33.3	2	66.7	
Broadcasting Board of Governors	3	1	33.3	2	66.7	2	100.0	0	0.0	
Consumer Product Safety Commission	3	0	0.0	3	100.0	1	33.3	2	66.7	
Judicial Branch	3	3	100.0	0	0.0	0	0.0	0	0.0	

Agency	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	%	#	%	#	%	#	%	#	%
Nuclear Regulatory Commission	3	33.3	1	66.7	2	66.7	1	50.0	1	50.0
Pension Benefit Guaranty Corporation	3	100.0	3	0.0	0	0.0	0	0.0	0	0.0
Administrative Office of the US Courts	2	100.0	2	0.0	0	0.0	0	0.0	0	0.0
Court Services and Offender Supervision	2	50.0	1	50.0	1	50.0	1	100.0	0	0.0
Federal Communications Commission	2	100.0	2	0.0	0	0.0	0	0.0	0	0.0
International Boundary & Water Commission	2	0.0	0	100.0	2	100.0	1	50.0	1	50.0
Securities & Exchange Commission	2	50.0	1	50.0	1	50.0	0	0.0	1	100.0
Chemical Safety Hazard Investigation Board	1	0.0	0	100.0	1	100.0	0	0.0	1	100.0
CIA	1	100.0	1	0.0	0	0.0	0	0.0	0	0.0
Corporation for National and Community Service	1	100.0	1	0.0	0	0.0	0	0.0	0	0.0
Executive Residence at the White House	1	100.0	1	0.0	0	0.0	0	0.0	0	0.0
Federal Emergency Management Agency	1	100.0	1	0.0	0	0.0	0	0.0	0	0.0
Federal Retirement Thrift Investment Board	1	0.0	0	100.0	1	100.0	1	100.0	0	0.0
Office of Management and Budget	1	100.0	1	0.0	0	0.0	0	0.0	0	0.0
Other	1	100.0	1	0.0	0	0.0	0	0.0	0	0.0
Overseas Private Investment Corporation	1	100.0	1	0.0	0	0.0	0	0.0	0	0.0
Peace Corps	1	100.0	1	0.0	0	0.0	0	0.0	0	0.0
Railroad Retirement Board	1	0.0	0	100.0	1	100.0	0	0.0	1	100.0
<b>TOTAL</b>	<b>6543</b>	<b>59.7</b>	<b>3909</b>	<b>40.3</b>	<b>2634</b>	<b>40.3</b>	<b>1629</b>	<b>61.8</b>	<b>1005</b>	<b>38.2</b>

<sup>1</sup> Percentages in Columns Dismissed and Not Dismissed are of Decided.

<sup>2</sup> Percentages in Columns Settled and Adjudicated are of Not Dismissed.

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

**Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency**

Agency	Adjudicated <sup>1</sup>		Affirmed		Reversed		Mitigated Modified		Other	
	#	%	#	%	#	%	#	%	#	%
Office of Personnel Management	353		245	69.4	97	27.5	0	0.0	11	3.1
US Postal Service	113		77	68.1	33	29.2	3	2.7	0	0.0
Army	79		63	79.7	16	20.3	0	0.0	0	0.0
Homeland Security	73		60	82.2	10	13.7	2	2.7	1	1.4
Veterans Affairs	70		55	78.6	11	15.7	3	4.3	1	1.4
Navy	67		50	74.6	13	19.4	4	6.0	0	0.0
Defense	46		34	73.9	11	23.9	1	2.2	0	0.0
Air Force	32		25	78.1	6	18.8	1	3.1	0	0.0
Justice	29		18	62.1	8	27.6	3	10.3	0	0.0
Treasury	24		21	87.5	2	8.3	1	4.2	0	0.0
Agriculture	17		14	82.4	3	17.6	0	0.0	0	0.0
Social Security Administration	17		14	82.4	1	5.9	2	11.8	0	0.0
Transportation	14		8	57.1	3	21.4	3	21.4	0	0.0
Interior	13		11	84.6	2	15.4	0	0.0	0	0.0
Health & Human Services	11		9	81.8	2	18.2	0	0.0	0	0.0
Commerce	6		5	83.3	1	16.7	0	0.0	0	0.0
Labor	5		4	80.0	1	20.0	0	0.0	0	0.0
State	4		4	100.0	0	0.0	0	0.0	0	0.0
Housing & Urban Development	3		3	100.0	0	0.0	0	0.0	0	0.0
Energy	3		2	66.7	1	33.3	0	0.0	0	0.0
Environmental Protection Agency	3		3	100.0	0	0.0	0	0.0	0	0.0
Government Printing Office	3		3	100.0	0	0.0	0	0.0	0	0.0
General Services Administration	2		2	100.0	0	0.0	0	0.0	0	0.0
Smithsonian Institution	2		2	100.0	0	0.0	0	0.0	0	0.0
Education	2		2	100.0	0	0.0	0	0.0	0	0.0
National Labor Relations Board	2		0	0.0	2	100.0	0	0.0	0	0.0
Consumer Product Safety Commission	2		1	50.0	0	0.0	1	50.0	0	0.0
Small Business Administration	1		1	100.0	0	0.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	1		1	100.0	0	0.0	0	0.0	0	0.0
National Aeronautics and Space Administration	1		1	100.0	0	0.0	0	0.0	0	0.0
Armed Forces Retirement Home	1		1	100.0	0	0.0	0	0.0	0	0.0
Agency for International Development	1		1	100.0	0	0.0	0	0.0	0	0.0
Nuclear Regulatory Commission	1		1	100.0	0	0.0	0	0.0	0	0.0
International Boundary & Water Commission	1		1	100.0	0	0.0	0	0.0	0	0.0

**Table 4 continued**

	Adjudicated <sup>1</sup>		Affirmed		Reversed		Mitigated Modified		Other	
	#	%	#	%	#	%	#	%	#	%
Securities & Exchange Commission	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Chemical Safety Hazard Investigation Board	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Railroad Retirement Board	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Tennessee Valley Authority	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Equal Employment Opportunity Commission	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
National Archives and Records Administration	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Commodity Futures Trading Commission	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Broadcasting Board of Governors	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Judicial Branch	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Pension Benefit Guaranty Corporation	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Administrative Office of the US Courts	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Court Services and Offender Supervision	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Federal Communications Commission	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
CIA	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Corporation for National and Community Service	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Executive Residence at the White House	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Federal Emergency Management Agency	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Federal Retirement Thrift Investment Board	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Office of Management and Budget	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Other	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Overseas Private Investment Corporation	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
Peace Corps	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0
<b>TOTAL</b>	<b>1005</b>	<b>74.1</b>	<b>745</b>	<b>22.2</b>	<b>223</b>	<b>2.4</b>	<b>24</b>	<b>1.3</b>	<b>13</b>	<b>1.3</b>

<sup>1</sup> Adjudicated, i.e., not dismissed or settled.

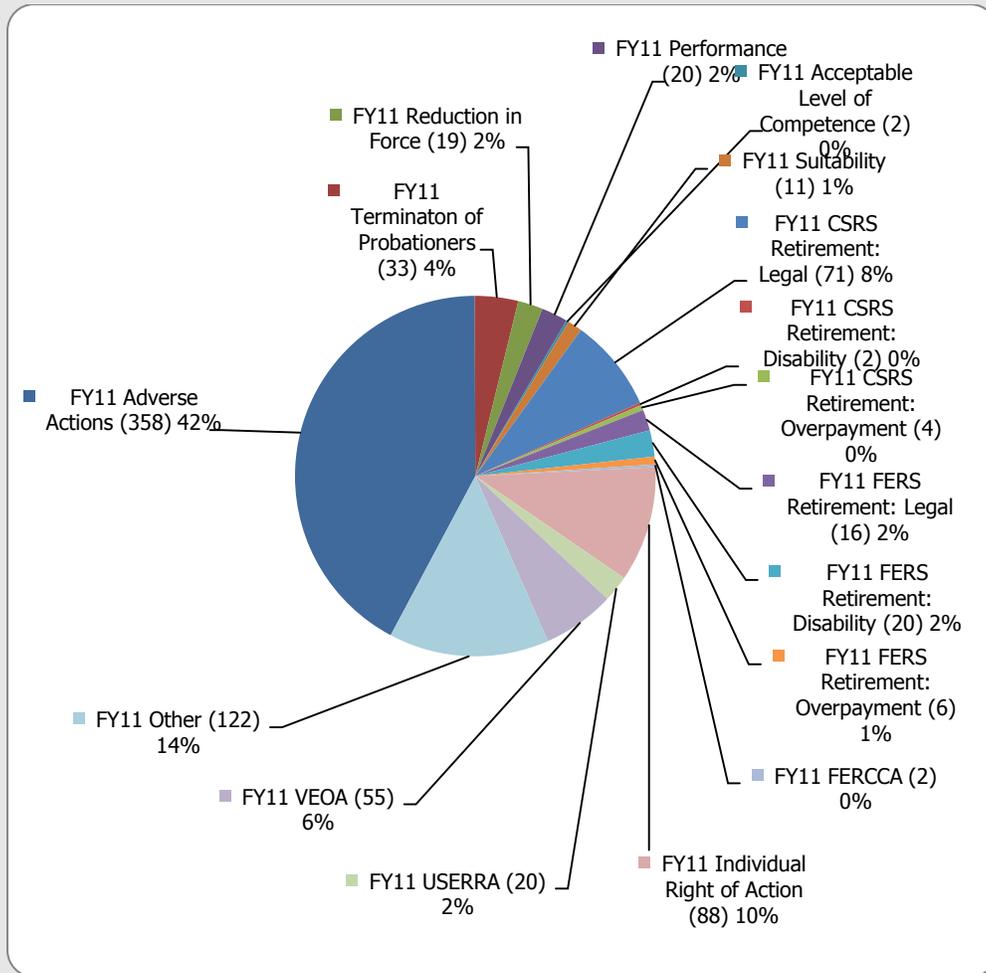
<sup>2</sup> Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System. Percentages may not total 100 because of rounding.

## Headquarters Case Processing

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

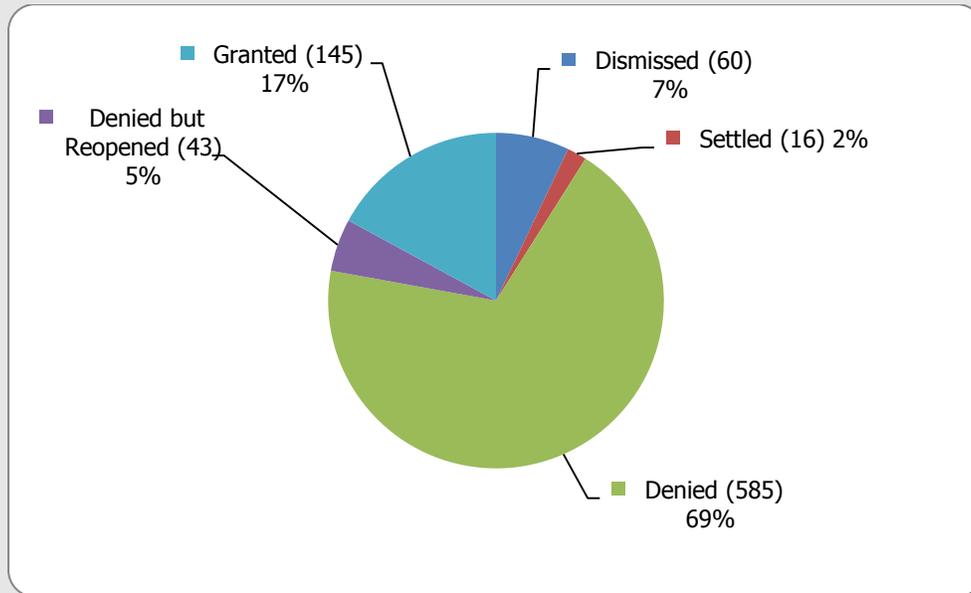
Type of Case	Decided			Dismissed		Settled		Denied		Denied But Reopened		Granted	
	#	#	%	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	358	30	8.38	6	1.68	239	66.76	18	5.03	65	18.16		
Termination of Probationers	33	0	0.00	0	0.00	30	90.91	1	3.03	2	6.06		
Reduction in Force	19	1	5.26	4	21.05	14	73.68	0	0.00	0	0.00		
Performance	20	0	0.00	0	0.00	16	80.00	1	5.00	3	15.00		
Acceptable Level of Competence (WIGI)	2	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00		
Suitability	11	1	9.09	1	9.09	7	63.64	0	0.00	2	18.18		
CSRS Retirement: Legal	71	7	9.86	0	0.00	52	73.24	2	2.82	10	14.08		
CSRS Retirement: Disability	2	0	0.00	0	0.00	1	50.00	0	0.00	1	50.00		
CSRS Retirement: Overpayment	4	0	0.00	0	0.00	1	25.00	0	0.00	3	75.00		
FERS Retirement: Legal	16	1	6.25	0	0.00	10	62.50	1	6.25	4	25.00		
FERS Retirement: Disability	20	1	5.00	0	0.00	16	80.00	0	0.00	3	15.00		
FERS Retirement: Overpayment	6	1	16.67	0	0.00	2	33.33	0	0.00	3	50.00		
FERCCA	2	0	0.00	0	0.00	1	50.00	0	0.00	1	50.00		
Individual Right of Action	88	1	1.14	1	1.14	60	68.18	4	4.55	22	25.00		
USERRA	20	1	5.00	0	0.00	16	80.00	0	0.00	3	15.00		
VEOA	55	5	9.09	2	3.64	37	67.27	4	7.27	7	12.73		
Other	122	11	9.02	2	1.64	81	66.39	12	9.84	16	13.11		
<b>Total</b>	<b>849</b>	<b>60</b>	<b>7.07</b>	<b>16</b>	<b>1.88</b>	<b>585</b>	<b>68.90</b>	<b>43</b>	<b>5.06</b>	<b>145</b>	<b>17.08</b>		

**Figure 4: Types of Petitions for Review (PFR)**



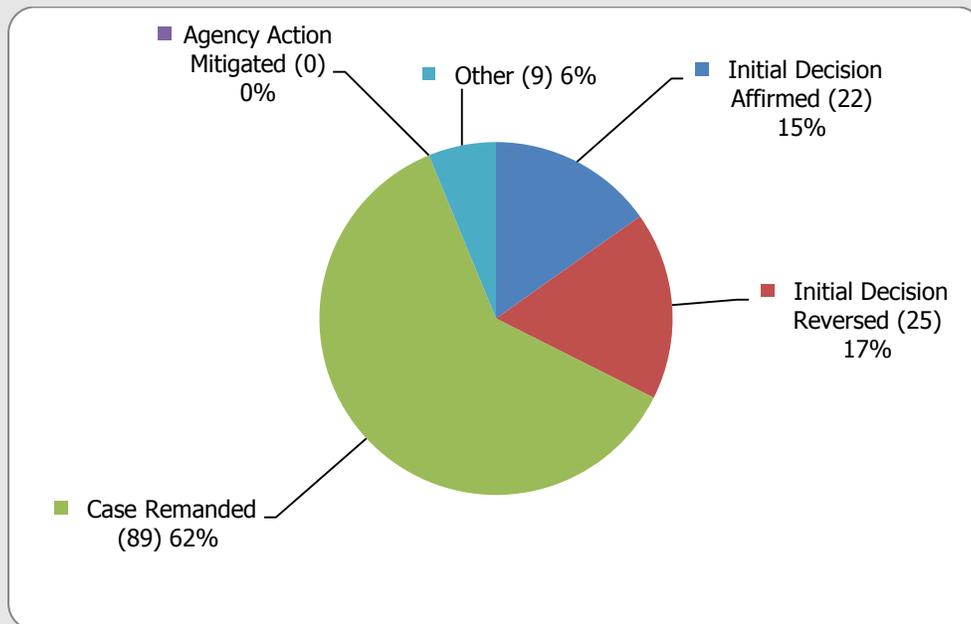
**Total Number of Petitions for Review (PFR): 849**

**Figure 5: Disposition of Petitions for Review of Initial Decisions**



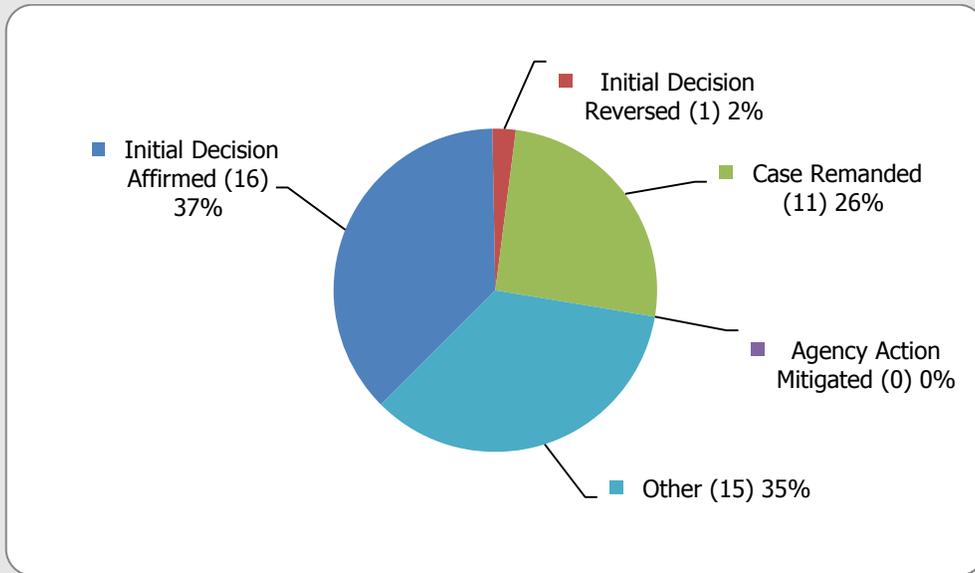
Total Number of PFRs: 849

**Figure 6: Disposition of Petitions for Review Granted**



Based on 145 PFRs Granted

**Figure 7: Disposition of Petitions for Review Denied but Reopened**



Based on 43 PFRs Denied but Reopened

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

	Decided		Dismissed		Settled		Denied		Denied But Reopened		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
US Postal Service	192	8.85	17	8.85	7	3.65	125	65.10	15	7.81	28	14.58
Office of Personnel Management <sup>1</sup>	123	8.94	11	8.94	0	0.00	83	67.48	3	2.44	26	21.14
Veterans Affairs	112	6.25	7	6.25	2	1.79	81	72.32	7	6.25	15	13.39
Army	58	12.07	7	12.07	1	1.72	37	63.79	2	3.45	11	18.97
Homeland Security	57	7.02	4	7.02	2	3.51	39	68.42	1	1.75	11	19.30
Navy	42	0.00	0	0.00	1	2.38	34	80.95	0	0.00	7	16.67
Treasury	42	7.14	3	7.14	0	0.00	35	83.33	1	2.38	3	7.14
Defense	34	5.88	2	5.88	0	0.00	23	67.65	1	2.94	8	23.53
Air Force	29	6.90	2	6.90	2	6.90	19	65.52	3	10.34	3	10.34
Justice	24	0.00	0	0.00	0	0.00	18	75.00	1	4.17	5	20.83
Agriculture	17	5.88	1	5.88	1	5.88	11	64.71	0	0.00	4	23.53
Transportation	16	0.00	0	0.00	0	0.00	11	68.75	0	0.00	5	31.25
Health & Human Services	15	6.67	1	6.67	0	0.00	10	66.67	0	0.00	4	26.67
Social Security Administration	13	15.38	2	15.38	0	0.00	9	69.23	2	15.38	0	0.00
Commerce	11	0.00	0	0.00	0	0.00	9	81.82	1	9.09	1	9.09
Labor	11	9.09	1	9.09	0	0.00	5	45.45	1	9.09	4	36.36
Interior	7	0.00	0	0.00	0	0.00	2	28.57	1	14.29	4	57.14
Housing & Urban Development	6	16.67	1	16.67	0	0.00	3	50.00	0	0.00	2	33.33
State	5	20.00	1	20.00	0	0.00	4	80.00	0	0.00	0	0.00
Environmental Protection Agency	3	0.00	0	0.00	0	0.00	2	66.67	0	0.00	1	33.33
International Boundary and Water Commission	3	0.00	0	0.00	0	0.00	1	33.33	0	0.00	2	66.67
National Aeronautics and Space Administration	3	0.00	0	0.00	0	0.00	2	66.67	1	33.33	0	0.00
National Labor Relations Board	3	0.00	0	0.00	0	0.00	3	100.00	0	0.00	0	0.00
Agency for International Development	2	0.00	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
Commodity Futures Trading Commission	2	0.00	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
Equal Employment Opportunity Commission	2	0.00	0	0.00	0	0.00	1	50.00	1	50.00	0	0.00
Federal Deposit Insurance Corporation	2	0.00	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
General Services Administration	2	0.00	0	0.00	0	0.00	1	50.00	0	0.00	1	50.00
Government Printing Office	2	0.00	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
Small Business Administration	2	0.00	0	0.00	0	0.00	1	50.00	1	50.00	0	0.00
Broadcasting Board of Governors	1	0.00	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Chemical Safety Hazard Investigation Board	1	0.00	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Consumer Product Safety Commission	1	0.00	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00

<i>Table 6 continued</i>	Decided		Dismissed		Settled		Denied		Denied But Reopened		Granted	
	#	#	%	#	%	#	#	#	#	%	#	
Education	1	0	0.00	0	0.00	0	0.00	1	100.00	0	0.00	
Energy	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00	
Federal Housing Finance Board	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00	
Peace Corps	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00	
Railroad Retirement Board	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00	
Smithsonian Institution	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00	
<b>TOTAL</b>	<b>849</b>	<b>60</b>	<b>7.07</b>	<b>16</b>	<b>1.88</b>	<b>585</b>	<b>68.90</b>	<b>43</b>	<b>5.06</b>	<b>145</b>	<b>17.08</b>	

<sup>1</sup> 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

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.

### [Blowing the Whistle: Barriers to Federal Employees Making Disclosures](#)

This report compares data from Merit Principles Surveys conducted in 1992 and 2010 to describe the extent to which perceptions of retaliation against Federal employees who report wrongdoing remain a serious problem. The data shows that since 1992, the percentage of employees who perceive any wrongdoing has decreased; and for those who perceive wrongdoing, the frequency with which they observe the wrongdoing has also decreased. However, among those individuals who indicated that they reported wrongdoing and were identified as the source of the report, perceptions of retaliation remained a serious problem with approximately one-third of such respondents in both 1992 and 2010 perceiving threats and/or acts of reprisal.

The report also shows that many employees remain unaware of rights and remedies available under whistleblower protection laws, despite the No Feat Act's mandate that agencies provide training on that subject. Additionally, the survey results from 1992 and 2010 indicate that if an agency creates a culture where its employees believe that management wants to be told about wrongdoing and will address issues raised by employees, then employees are more likely to notify management when they see a problem. The report also contained data that supports why agencies should do more to ensure that employees receive quality training about how they can disclose wrongdoing and how they can exercise their rights if they perceive that they have experienced retaliation for whistleblowing activities.

### [Telework: Weighing the Information, Determining an Appropriate Approach](#)

This report couples survey data from Federal employees and supervisors with other information to provide a holistic picture of the key benefits, concerns, and implementation considerations that organizations should weigh in determining how to integrate telework into their overall business strategy. The study confirms that telework can result in many benefits for organizations and employees alike. Further, and of critical importance, the findings indicate that the benefits of telework can occur while maintaining productivity and performance if telework is managed appropriately.

A key step that organizations must take in implementing an effective telework program is ensuring that supervisors have the necessary skills and support to manage performance in a telework environment. Good performance management skills will be critical for enabling supervisors to make wise decisions about using telework in their work units and ensuring fair treatment of teleworkers and nonteleworkers. In addition, organizational leadership must foster a culture that is conducive to telework, and ensure that a well thought-out technology infrastructure is in place, allowing access to necessary business tools and continuity in work unit dynamics. Flexibility in perspective about telework is necessary, as is continuous evaluation of the effectiveness of telework in each work environment. These elements are critical to realizing the benefits of telework and mitigating concerns.

### *Prohibited Personnel Practices: Employee Perceptions*

The PPPs are a series of proscribed actions, codified at 5 U.S.C. § 2302(b), the commission of which can lead to an official being reprimanded, suspended, demoted, fired, fined, and/or debarred from Federal employment. In this report MSPB describes what each PPP means as a practical matter, how frequently Federal employees perceive each practice occurring, and the consequences for an agency when its employees believe that management is committing one or more PPPs.

Relying upon data from Merit Principles Surveys conducted between 1992 and 2010, the report explains that perceptions of many PPPs are at an 18-year low. However, the report also demonstrates that agencies should be vigilant to prevent the occurrence of PPPs, or even the perception that PPPs are taking place. Specifically, the survey data shows that the more PPPs that an employee perceives, the less likely the employee is to be engaged. The report reminds agencies to ensure that personnel decisions are based on the best information available and are merit-based. Being as transparent as possible about the decision-making process—both in advance and following a decision—can help dispel suspicions that improper motives played a role in the process.

### *Women in the Federal Government: Ambitions and Achievements*

This report assesses the treatment and advancement of women in the Federal Government, based on analyses of workforce data and Federal employee perceptions of their experiences and career advancement in the Federal Government. Much has changed for the better since MSPB's 1992 report, *A Question of Equity: Women and the Glass Ceiling in the Federal Government*. For example, women now hold approximately 30 percent of positions in the Senior Executive Service, a marked improvement from only 11 percent in 1990. Within the Federal Government, differences between women and men in education and experience continue to diminish. Fewer women report that they are subjected to discrimination or stereotypes, reflecting progress toward a workplace in which employees are selected, rewarded, and advanced solely on the basis of their abilities and accomplishments.

Although this progress is commendable, women remain less likely than men to be employed in high-paying occupations and supervisory positions. Continuing occupational differences between women and men may complicate efforts to recruit a diverse workforce and limit women's opportunities for career development and advancement. Discrimination on the basis of sex, although less frequent, has not yet completely disappeared from Federal workplaces.

Therefore, agencies must continue efforts to recruit and advance qualified women, pay close attention to fairness in areas such as work assignment and training that can have long-term effects on an employee's performance and promotability, and remain vigilant against prohibited discrimination. The report also found that Federal employees have considerable influence over their own careers, beginning with initial decisions about education and occupation. Accordingly, the report includes recommendations for Federal employees who seek advancement within the Federal service.

## [MSPB Finalized 2011-2013 Research Agenda](#)

MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate Federal merit systems policies, operations, and practices. Our studies are typically Governmentwide in scope and take a long-term perspective on merit and effective human capital management. The prospective nature of the studies function, in conjunction with MSPB's adjudication of individual appeals and our authority to review human resources regulations, enables MSPB to fulfill its role as guardian of Federal merit systems and ensure the workforce is well managed and free from Prohibited Personnel Practices.

MSPB published the 2011-2013 Research Agenda, which describes the potential research topics MSPB's Office of Policy and Evaluation (OPE) may undertake during the next three-year research cycle. The report has three major sections. The first section describes the outreach activities used to gather research suggestions from OPE stakeholders and the general public. This section also provides an overview of the process used to formulate OPE's research agenda from this input. The second section describes the 8 major OPE research projects currently in progress. The final section describes the 29 new research topics included in the 2011-2013 research agenda.

## [Issues of Merit Newsletter](#)

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.

MSPB issued four editions of the *Issues of Merit* newsletter in fiscal year 2011. Each edition included findings from MSPB's research, information to help clarify readers' understanding of employment issues, and the OPE Director's perspectives on specific human capital matters. Articles related to specific MSPB studies addressed topics such as employee engagement, the use of telework in the Federal Government, setting proper expectations for training, the status and advancement of women in the Federal Government, favoritism, and employee perceptions related to the prohibited personnel practices.

Other articles provided insight into issues such as how to incorporate choice into reward systems, utilizing affinity groups to further employee career goals, using social networking in the hiring process, the difference between employee satisfaction and engagement, and involving managers more in the hiring process. The OPE Director addressed issues such as developing plans for disability hiring, OPM's work in improving applicant assessment procedures, how to make strategic hiring decisions, and engagement strategies for tough economic times.

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## Significant Actions of the Office of Personnel Management

As in our 2010 Annual Report, we discuss significant actions of OPM in two distinct areas: human capital management policy and delivery of benefits and services. This year's review differs from previous reviews in two respects in order to reflect MSPB's increased emphasis on its responsibility to review OPM significant actions as part of its authority to protect Federal merit systems. First, a broader range of actions is discussed, including selected actions or efforts that were initiated before FY 2011. Second, we provide additional information to help stakeholders place OPM and its significant actions in a broader context.

### OPM in Context

**Evolution of OPM Structure and Finances.** OPM, like MSPB, was created by the Civil Service Reform Act of 1978 (CSRA). One objective of the CSRA was to make HR policy in the Federal Government more responsive to public concerns, Presidential leadership, and agency human capital needs. That objective continues to this day, as do most of the major functions performed by OPM when it was established in 1979, such as developing Governmentwide HR policy, overseeing Federal agency use of delegated authorities, providing staffing services, and administering the Federal employee retirement and health benefit programs.

However, OPM and its environment have changed greatly over the past three decades. For example, employment examinations that were once conducted by OPM staff with appropriated funds have been decentralized and delegated to agencies. At the same time, the Federal civil service has become much more complex. Authorities and flexibilities available under Title 5 of United States Code have proliferated, as have modifications and alternatives to the Title 5 framework.<sup>8</sup> Yet the employees who work in what are often regarded as OPM's core functions, such as HR policy and agency oversight, account for a diminishing portion of OPM's staff and resources.<sup>9</sup> Stakeholders should recognize that attention often focuses on OPM's HR policy and leadership—matters such as hiring reform, employee pay and awards, and telework—but that the balance of OPM's resources are concentrated in other areas.<sup>10</sup>

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<sup>8</sup> Modifications include personnel demonstrations projects and alternative personnel systems which are created under the authority of Title 5 of United States Code; alternatives include personnel systems created wholly or partially outside that framework, such as the excepted service personnel system in the Department of Transportation, Federal Aviation Administration.

<sup>9</sup> See U.S. Office of Personnel Management, [Congressional Budget Justification and Performance Budget for FY 2012](#). This document shows funding requested or projected by source (e.g., appropriation, trust fund, and revolving fund), strategic goal, and major organization. The Employee Services organization has responsibility for policy leadership in the areas of hiring, pay, and employee relations; the Merit System Audit and Compliance organization has responsibility for oversight of agency management of human capital.

<sup>10</sup> *Id.* To illustrate, OPM's 2012 Congressional Budget Justification requested approximately \$230 million in discretionary funds, of which approximately \$130 million would be drawn from trust funds to support their administration (primarily retirement and health benefits). In contrast, OPM estimated that revolving fund obligations (e.g., HR services, background investigations, and other agency-funded activities) would exceed \$1.8 billion. Approximately 750 full-time employee equivalents (FTE) would be supported by direct appropriations, while approximately 3,500 FTE would be supported by revolving funds.

**Reliance on Information Technology.** The Office of Personnel Management is the Federal Government’s central human resources agency. OPM’s name and mission make it easy to overlook the fact that OPM’s missions entail stewardship over vast financial resources. For example, OPM manages the Federal employee retirement trust fund and the Federal Employee Health, Life, and Long-term Care Insurance Programs. OPM also conducts suitability and security investigations for all civilian employees in all agencies. OPM’s success depends not only on its expertise and leadership in HR policy. To carry out its various statutory functions effectively, OPM must also rely on specialized databases and information technology systems, such as:

- USAJOBS—an Internet portal used to advertise Federal jobs and store vacancy and applicant information;
- e-QIP (Electronic Questionnaires for Investigations Processing)—online tools used to support the collection and processing of information needed to conduct background investigations;
- EHRI (Enterprise Human Resource Integration)—a collection of systems used to support workforce analysis, personnel recordkeeping (including Official Personnel Folders), and compensation and benefits administration throughout the Federal workforce; and
- HCDW (Health Claims Data Warehouse)—a data warehouse used to support administration and improvement of the Federal Employee Health Benefits Program.

These systems operate on a massive scale and often contain sensitive information, making it critical that they be well-designed and properly administered. Also, given continuing advances in information technology and the anticipated expansion of OPM’s responsibilities, OPM’s reliance on such systems is certain to increase. Consequently, OPM’s ability to manage IT projects and systems is critical to its success. It is unlikely the framers of the Civil Service Reform Act viewed technology management as a core or critical function of OPM, but it has clearly become one. Stakeholders should recognize the importance of information technology—and the ability to manage that technology—when allocating functions and resources to OPM.

## **Recruitment, Assessment, and Hiring Policy Actions**

**Update to the President’s Hiring Reform Initiative.** Below, we update four elements of the Administration’s Federal hiring reform initiative, which is being led by OPM; reducing time to hire, streamlining the application process, improving the quality of hires, including the ASSESS pilot, and the proposed Pathways program.<sup>11</sup>

### **Reducing Time to Hire**

Building on recent OPM efforts to reduce hiring times,<sup>12</sup> the President’s memorandum directs Federal agencies to measure time to hire and reduce the time

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<sup>11</sup> President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Subject: Improving the Federal Recruitment and Hiring Process, May 11, 2010.

<sup>12</sup> For example, [OPM’s End-to-End \(E2E\) Hiring Initiative](#) included a road map that established the goal of hiring employees in 80 or fewer calendar days, as measured by the time elapsed between the initiation of a hiring action to an official offer of employment

needed to fill positions in mission-critical positions. OPM reported a significant reduction in average time to hire, from 122 days in Fiscal Year 2009 to 105 days in Fiscal Year 2010.

### *Significance*

These results reflect commendable progress and illustrate that much can be done to eliminate unnecessary steps and “dead time” from Federal hiring processes. Nevertheless, a fast hiring decision should not be confused with a good hiring decision. OPM has recognized the need to improve the quality of applicant assessment and the resulting selections, but such improvement will require greater levels of effort and innovation than other aspects of hiring reform.

### **Streamlining Initial Application**

The hiring reform initiative contains two requirements designed to make it easier to submit an initial application for a Federal job. First, agencies are to allow application through submission of a resume and/or cover letter. Second, agencies may not require applicants to submit knowledge, skill, and ability (KSA) narratives as part of the initial application.

An OPM review of a sample of recent job postings indicates that agency compliance with these aspects is now commonplace. Among announcements reviewed, 92 percent of announcements permitted application through a resume and/or basic application form, and 97 percent did not require narrative descriptions of specific KSAs as part of the initial application.<sup>13</sup> That reflects great change, as the requirement for a KSA narrative was commonplace prior to the initiative.

### *Significance*

OPM’s goal of simplifying application procedures is laudable: comprehensible and reasonable application requirements are essential to fair, open, and effective hiring. Application via submission of a resume is a common and widely accepted convention in private sector employment, especially for jobs in the professional and administrative occupations, which account for a majority of Federal jobs. Wider acceptance of resumes may also be beneficial from a recruiting perspective—recent enhancements to USAJOBS may make resumes more useful as a marketing tool for job applicants and a source of potential applicants for agency recruiters.

However, it remains unclear how agencies should use resumes, in either the initial or latter stages of the hiring process. President Obama’s memorandum instructs agencies to accept resumes, but neither the memorandum nor OPM guidance make clear whether resumes should be central, peripheral, or largely irrelevant to screening, referral, and selection decisions. In our view, the answer(s) to these questions are far from obvious.

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<sup>13</sup> [OPM report](#) of progress on hiring reform as of July 2011.

Hiring reform does not eliminate some fundamental differences between Federal sector and private sector hiring. Federal hiring must meet standards, including high levels of objectivity, fairness, and transparency and (typically) compliance with veterans' preference, that are demanding and unforgiving. Such standards are difficult to reconcile with a primary reliance on resumes to evaluate applicants' minimum or relative qualifications. Research shows that self-reported, unstructured descriptions of training, experience, and accomplishments<sup>14</sup>—such as those contained in resumes—are a poor basis for identifying the applicants who are most likely to perform well on the job.<sup>15</sup>

Consequently, superficial conformance to private sector norms could result in frustration for both applicants and agencies. For example, applicants who apply for a Federal position with one-page resumes that highlight professional accomplishments, without explicit reference to the underlying competencies and behaviors, may find that they fare poorly in comparison to applicants who submit resumes that more closely resemble a traditional Federal job application. Similarly, an agency that relies on resumes to document an applicant's quality of experience or level of proficiency may find that many of the submitted resumes lack the necessary levels of detail and specificity. Such frustrations are especially likely to occur when agencies use occupational questionnaires (questionnaires that ask applicants to evaluate and report their possession of job-specific education, experience, and skills) to screen and sort applicants for Federal jobs, and the use of such questionnaires is now widespread.<sup>16</sup> Conversely, an applicant could spend considerable time tailoring a resume to a specific position, only to find that such effort was wasted because agency staff made little use of resumes to screen or rank candidates.

Accordingly, OPM guidance on how resumes should (and should not) be used in “reformed” hiring processes could be helpful. MSPB recognizes that OPM cannot shoulder this burden alone, as application and assessment procedures can vary both across and within Federal agencies. Moreover, the primary responsibility for determining and communicating the purpose of a resume in any given job competition remains, as it must, with the employing Federal agency.

### **Improving Quality of Hire, the ASSESS Pilot Program and Shared Registers**

Another aspect of hiring reform, which has been overshadowed by procedural changes such as simplifying application requirements and reducing time to hire, is improving the quality of those hired. Progress in this area, although difficult to measure,<sup>17</sup> has been less rapid than progress in other areas. Managerial involvement,

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<sup>14</sup> MSPB expects structured assessments of training and experience (T&E) to retain a central role in much hiring. Accordingly, MSPB is currently conducting research on T&E assessments in the hiring process and plans to discuss the proper role and conduct of such assessments in an upcoming report.

<sup>15</sup> A brief explanation of why this is so can be found in U.S. Merit Systems Protection Board, *A Call to Action: Improving Selection of First-Level Supervisors*, Washington, DC, May 2010, pp. 11-13.

<sup>16</sup> Indeed, a visitor who selects “Elimination of Written Essays (KSAs)” heading on the home page of [OPM's hiring reform web site](#) will find links to material on “How to Convert a Crediting Plan to an Occupational Questionnaire” and “How to Write an Occupational Questionnaire.”

<sup>17</sup> We note that the measure used—managerial satisfaction with referrals—is subjective and may be influenced by factors unrelated to hiring reform, such as the types of positions filled in a given period.

another element of hiring reform, has some potential to improve hiring outcomes through better identification of hiring criteria, more effective interviewing, and better selection decisions. However, material improvement will require more than incremental change to existing hiring processes. One example of such innovation is the ASSESS platform, which OPM developed and piloted in 2011.

In April 2011, OPM began a pilot test of ASSESS, an integrated, technology-based approach for assessing applicants for entry-level positions in selected commonly-filled occupations such as accountant.<sup>18</sup> Notable features of ASSESS include:

- Unproctored online assessments, which can be completed at a time and location convenient to the applicant;
- Adaptive assessments, in which the items presented depend on the applicant's responses to prior items, and the assessment ends once a good measurement of the applicant's ability has been obtained. Compared to traditional assessments, high-quality adaptive assessments can be less burdensome for applicants and more valid (i.e., be more accurate and reliable);
- An emphasis on proficiency. ASSESS directly evaluates basic competencies (such as writing and mathematical reasoning) rather than relying on descriptions of training or experience as indirect indicators of ability; and
- Portability. An applicant who completes the ASSESS battery for a given position can use the results to apply for other positions that use the same assessments.

In August 2011, OPM [announced the establishment of shared registers](#) for entry-level budget analyst and information technology specialist positions in selected locations. The positions covered were chosen based on a previous experiment with shared registers and feedback from the Chief Human Capital Officers Council. The shared registers appear to use assessments similar or identical to those used in ASSESS. Use of the shared registers is voluntary, but an agency that requests a referral from a shared register is not to conduct a concurrent competitive examination under delegated authority.<sup>19</sup>

### *Significance*

As of November 2011, the status and results of the ASSESS pilot had not been publicized. Thus, key outcomes such as the demographic characteristics of the applicants, referrals, and selectees; management perceptions of candidate quality; performance of hires; and agency and applicant acceptance remain unknown. Nevertheless, OPM's leadership in this area is welcome. Indeed, ASSESS implements a recommendation that MSPB has made repeatedly in recent years: that OPM sponsor the development of assessment tools that are more valid (i.e., better able to predict job performance) and cost-effective than those that Federal agencies typically

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<sup>18</sup> This summary is based on a March 2011 OPM briefing on ASSESS to MSPB staff and an OPM-issued fact sheet made available to media in April 2011.

<sup>19</sup> U.S. Office of Personnel Management, "[OPM Registers: Agency Guidance.](#)"

use.<sup>20</sup> The ASSESS pilot also incorporates other research-based recommendations that MSPB has made, including the use of competency-based assessments<sup>21</sup> and the judicious use of nontraditional assessments such as job simulations.<sup>22</sup>

ASSESS could be among the most substantive and far-reaching of OPM's hiring reform initiatives, because it has the potential to:

- Streamline hiring for covered positions, for both applicants and agencies, to a much greater extent than can be achieved through incremental changes such as replacing KSA narratives with occupational questionnaires;
- Make hiring more fair and merit-based, by improving the quality of applicant assessment and the resulting selections;
- Increase the use of competitive examining. In recent years, Federal agencies have increasingly turned to alternatives to competitive examination, such as the now-defunct Outstanding Scholar Program and the Federal Career Intern Program,<sup>23</sup> to fill entry-level positions in professional and administrative occupations. Even when such alternatives are properly authorized, their use can become problematic when they supplant rather than supplement competitive examining;<sup>24</sup> and
- Reduce or eliminate the need for exceptions to competitive examining, such as the proposed Recent Graduates Program,<sup>25</sup> that are grounded in concerns about the conduct of competitive examining, rather than the concept of competitive examining.

As discussed above, ASSESS offers great potential to improve the Federal hiring process and its outcomes. However, there are several potential barriers to the long-term adoption and success of ASSESS, which include:

- Acceptance by Federal agencies. The standardized, centralized nature of ASSESS—which is integral to both its validity and its potential efficiencies for applicants and agencies—may be unattractive to Federal agencies and Federal managers who are accustomed to the direct control over assessment criteria and assessment methods afforded them under decentralized delegated examining. We note that OPM has declared its intent to partner with Federal agencies during and after the pilot, and that the pilot agencies include some

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<sup>20</sup> U.S. Merit Systems Protection Board, *Attracting the Next Generation: A Look at Federal Entry-Level New Hires*, Washington, DC, January 2008, pp. 55-57.

<sup>21</sup> U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, Washington, DC, July 2006, pp. 17-18 and 50-51.

<sup>22</sup> OPM's fact sheet on the ASSESS pilot indicates that the job simulations will take the form of on-the-job scenarios that are presented to the applicant, who then selects a response or course of action.

<sup>23</sup> U.S. Merit Systems Protection Board, *Attracting the Next Generation: A Look at Federal Entry-Level New Hires*, Washington, DC, January 2008, pp. 10-15.

<sup>24</sup> *Id.* at p. 53 and U.S. Merit Systems Protection Board, *Federal Appointment Authorities: Cutting Through the Confusion*, Washington, DC, June 2008, pp. 11 and 32.

<sup>25</sup> See Excepted Service, Career and Career-Conditional Employment; and Pathways Programs, Action: Proposed rule with request for comments, 76 FR 47495-47514, August 5, 2011. We make no judgment here on whether the proposed Recent Graduates Program is a "necessary [exception]...from the competitive service" under 5 U.S.C. § 3302.

of the largest Federal agencies, including DoD, the Department of Veterans Affairs, and the Department of Agriculture. OPM's collaborative approach bodes well for future acceptance and adoption of ASSESS.

- Use by Federal agencies. Centralized lists<sup>26</sup> of applicants, such as those created under ASSESS and the shared registers initiative, can quickly become “stale” if few selections are made. That can lead to a cycle in which the quality and quantity of applicants declines because high-quality applicants accept other offers or choose not to apply, seeing few prospects for interviews or job offers, and managers refuse to use, or even request, referrals from the centralized list because they believe the referrals will be unpromising.<sup>27</sup>

### **Proposal to Establish the Pathways Program**

In August 2011, as directed by the President,<sup>28</sup> OPM issued [proposed regulations](#) to establish the Pathways Programs, a set of excepted service appointing authorities geared to students or recent graduates of formal educational programs.<sup>29</sup> Specifically, the proposed regulations would create Schedule D of the excepted service, comprising “positions...for which the competitive service requirements make impracticable the adequate recruitment of sufficient numbers of students attending qualifying educational institutions or individuals who have recently completed qualifying educational programs.” Schedule D would initially consist of three appointing authorities, collectively referred to as the Pathways Programs:

- *An Internship Program.* This program would replace the current Student Temporary Employment Program (STEP) and the Student Career Experience Program (SCEP), programs designed to allow agencies to provide current students with relevant work experience and, in the case of SCEP, a noncompetitive means of entry into the competitive civil service;
- *A Recent Graduates Program.* This program would cover individuals who have recently completed a qualifying educational program (typically, but not exclusively, a four-year degree) and serve as the successor to the Federal Career Intern Program; and
- *A Presidential Management Fellows Program.* This program essentially continues the existing Presidential Management Fellows (PMF) Program, a centralized, OPM-administered program targeted to graduate students.

These authorities would enable agencies to make time-limited excepted appointments of eligible individuals, with the potential for noncompetitive conversion to the competitive service. Our discussion below focuses on the establishment of Schedule D and the Recent Graduates Program.

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<sup>26</sup> These lists are often referred to as inventories or registers.

<sup>27</sup> This risk is minimal under a one-time case examination, in which an agency establishes a list of applicants to immediately fill specific vacancies.

<sup>28</sup> President Barack Obama, Executive Order 13562, “Recruiting and Hiring Students and Recent Graduates,” December 27, 2010.

<sup>29</sup> Excepted Service, Career and Career-Conditional Employment; and Pathways Programs, Action: Proposed rule with request for comments, 76 FR 47495-47514, August 5, 2011.

## *Significance*

The proposal to create Schedule D formally acknowledges a long-standing interest of Federal agencies and Federal managers: hiring high-quality college graduates into professional and administrative occupations. To accommodate that interest, Schedule D interprets the authority granted to the President under 5 U.S.C. § 3302 to provide for “necessary exceptions of positions from the competitive service” quite broadly. In particular, Schedule D—its reference to “positions” notwithstanding—would be distinct from the other schedules of the excepted service in its focus on persons. As noted above, Schedule D would except positions from the competitive service for the express purpose of appointing a particular type of individual: a student or recent graduate.<sup>30</sup>

Exceptions from competitive examining that are grounded in characteristics of the individuals appointed, rather than the characteristics of the job being filled, are not unprecedented.<sup>31</sup> However, the question of whether 5 U.S.C. § 3302 authorizes exceptions to competitive examination that are person-based, rather than position-based, has been raised but not resolved.

The Recent Graduates Program is OPM’s effort to simplify the recruitment and appointment of recent graduates in a manner consistent with Title 5, United States Code. In recent years, much of this recruitment had been accomplished through the Federal Career Intern Program (FCIP), which was discontinued following an MSPB decision which found that FCIP was not an authorized appointing authority.<sup>32</sup> Although the Recent Graduates Program differs in many important ways from FCIP, there are also substantial similarities. Below, we briefly summarize issues associated with the FCIP and how the proposed regulations address them.

- Proper authorization. Statute provides that Federal officials may fill vacancies through any authorized means.<sup>33</sup> The Pathways Programs would be established under 5 U.S.C. § 3302, which permits only “necessary exceptions of positions from the competitive service.” In 2010, MSPB held that the FCIP, as implemented, did not meet that standard.<sup>34</sup> The proposed regulations describe the steps that OPM took to evaluate the hiring of students and recent graduates, culminating in a conclusion that barriers exist to such hiring that are best addressed through exceptions to competitive examining.
- Fair and open competition. The FCIP did not require any particular method of complying with the merit system principle of fair and open competition, such as the public notice (a posting on USAJOBS) required for competitive

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<sup>30</sup> *Id.*

<sup>31</sup> One example is the Schedule A authority at 5 CFR § 213.3102(u), which permits noncompetitive appointment of individuals with certain disabilities.

<sup>32</sup> See [Dean v. Office of Personnel Management](#), 115 M.S.P.R. 157 (2010).

<sup>33</sup> One of the management rights enumerated at 5 U.S.C. § 7106(C) is to “make selections for appointments from—(i) among properly ranked and certified candidates for promotion; or (ii) any other appropriate source.”

<sup>34</sup> See [Dean v. Office of Personnel Management](#), 115 M.S.P.R. 157 (2010).

examinations. In the proposed regulations, OPM has established transparency as a core value of the Pathways Program and indicated that it plans to require that agencies formally advertise opportunities under the Recent Graduates Program. Clearly, OPM's intent is to assure that any interested member of the public can learn of such opportunities.

- Use of competitive examining. One concern associated with FCIP was that it in some instances had effectively replaced competitive examining as a means of external hiring. The proposed regulations clearly state that the Pathways Programs are to be a supplemental, rather than primary, means of filling positions. To that end, OPM has declared its intent to monitor agency use of the Pathways authorities and retained authority to limit use if necessary.
- Compliance with veterans' rights. Veterans of the U.S. military may have specific rights when agencies fill positions, including the right to compete for a Federal job and adherence to veterans' preference provisions.<sup>35</sup> Veterans' preference will apply when making appointments under the Recent Graduates Program (as it did under FCIP).

We note that the Pathways Programs are proposed. OPM has announced its plan to issue final regulations in 2012, and the final regulations could differ considerably from the proposed regulations. MSPB plans to closely follow the evolution and implementation of these programs.

**Update to USAJOBS.** OPM announced USAJOBS 3.0, a major update to the Federal Government's main employment portal. Planned enhancements included improved search functions, integration of appointment eligibility data into the applicant profile,<sup>36</sup> and the ability for agencies to search applicant profiles and resumes.

### *Significance*

USAJOBS is used by Federal agencies to announce job opportunities and by job applicants to search and apply for Federal jobs, and is integral to merit-based hiring throughout the Federal Government. For example, in support of the first merit system principle, which requires "fair and open competition which assures that all receive equal opportunity,"<sup>37</sup> OPM requires that Federal agencies announce examinations for competitive service positions on USAJOBS.<sup>38</sup> USAJOBS is also a critical component of the Administration's

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<sup>35</sup> See OPM's *VetGuide* for an overview of [veterans' preference in appointments](#) and the [right to compete](#) under the Veterans Employment Opportunities Act. We note that these provisions do not apply to all appointments and placements. For example, veterans' preference does not apply to appointments in the Senior Executive Service. The "right to compete" under VEOA (5 U.S.C. §3304(f)) does not apply to excepted service positions, or to competitive positions where an agency elects not to accept applications from individuals outside its own workforce under merit promotion procedures.

<sup>36</sup> Action: 60-Day Notice and request for comments, 76 F.R. 36581, June 22, 2011. This notice indicates OPM's intent to "Add basic eligibility questions to the applicant profile...that will allow applicants to self-identify (subject to subsequent verification by the appointing agency) as eligible for certain special hiring authorities."

<sup>37</sup> 5 U.S.C. § 2301(b)(1).

<sup>38</sup> 5 C.F.R. § 330.103-106, issued on November 3, 2010 at 75 FR 67589.

hiring reform initiative,<sup>39</sup> providing the platform for elements of that initiative such as acceptance of resumes and applicant notification at specified stages of the hiring process. Thus, a user-friendly, functional USAJOBS will be an essential component of merit-based hiring for the foreseeable future.

Nevertheless, policymakers and stakeholders should be realistic about the ability of USAJOBS or other technology tools to make Federal hiring more applicant-friendly, open, fair, timely, or transparent. Many of the challenges that Federal agencies and applicants face, including the variety and complexity of the legal authorities that can be used to hire a Federal employee, are not rooted in technology.

USAJOBS 3.0 was launched in October 2011, after the end of fiscal year 2011. As of December 2011, it appears that OPM has addressed the problems that arose following the launch and achieved acceptable system functionality. MSPB will monitor the progress of USAJOBS 3.0 and if warranted, discuss continued progress in the 2012 Annual Report.

**Applicant Qualification Requirements.** This section includes review of qualification regulations, and competency-based qualification standards.

#### **Proposed Regulations on Qualification Requirements**

OPM issued proposed regulations to revise its regulations governing qualification requirements for appointment to competitive service positions.<sup>40</sup> Major provisions of the proposed regulations include:

- Requiring agencies that conduct delegated examining to establish a procedure for applicants to appeal the agency's qualification determination; and
- Discontinuing printed publication of the *Operating Manual: Qualification Standards for General Schedule (or Equivalent) Positions*<sup>41</sup> in favor of online publication on OPM's website.

#### *Significance*

Qualification standards outline minimum requirements for education, experience, and proficiency that an individual must meet to be placed in a position. Thus, their format and content directly affect Federal job application processes (because an applicant is usually required to demonstrate that they meet qualification requirements), the fairness and openness of Federal job competitions, and the quality of individuals referred for and appointed to Federal positions.

The requirement for an agency-level appeal process is a logical extension of agency accountability for hiring processes and outcomes under delegated authority. We note that agency willingness to staff and administer such a function is unknown, and that

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<sup>39</sup> President Barack Obama, "[Memorandum for the Heads of Executive Departments and Agencies, Subject: Improving the Federal Recruitment and Hiring Process](#)," May 11, 2010.

<sup>40</sup> Action: Proposed rule, 76 F.R. 38326—38328, June 30, 2011.

<sup>41</sup> *Id.* This is OPM's proposed title for the manual, to replace the current title of [Operating Manual: Qualification Standards for General Schedule Positions](#).

unsuccessful applicants may have concerns about the objectivity and independence of an agency-administered appeal process.

The transition from a printed handbook to an online handbook will have the benefit of disseminating OPM guidance widely, quickly, and economically. However, it remains essential that OPM publish, maintain, and archive guidelines such as the *Operating Manual: Qualification Standards for General Schedule (or Equivalent) Positions* in a manner consistent with their importance and application. As noted, the *Operating Manual* is not merely advice to Federal agencies; agency compliance is mandatory for covered positions and personnel actions;<sup>42</sup> and agency interpretation and application of those guidelines may be subject to appeal, OPM oversight, and third-party review.<sup>43</sup> Therefore, we encourage OPM to (1) provide comprehensive content through the planned web page (to include previous versions of the *Operating Manual* and the periods for which those versions were effective) and (2) make the *Operating Manual* available in formats amenable to use in administrative or judicial proceedings.

### **Issuance of Competency-Based Qualification Standards**

OPM issued [draft qualification standards](#) for four occupations in the accounting and budget occupational group. The draft standards, which were developed in cooperation with the Chief Human Capital Officers Council, describe required general competencies (attributes such as reading comprehension, interpersonal skills and the level of proficiency required at successive General Schedule grade level).

#### *Significance*

Competency-based qualification standards shift applicant assessment toward measurement of proficiency from measurement of attributes such as education and experience. Although measurement of proficiency can be technically challenging, MSPB believes that competency-based standards and assessments can be, when properly implemented, fairer to applicants and more valid than traditional training and experience-based standards and assessments. Accordingly, MSPB has recommended that OPM develop and issue competency-based qualification standards,<sup>44</sup> and OPM continues to do so.

**Summary of Recruitment, Assessment, and Hiring Reform Policy Actions: The Limits of Administrative Action.** We conclude our discussion of OPM actions related to Federal hiring reform with observations on the limits of administrative action and the need for broader reform. Very simply, even well-intentioned efforts cannot do much to make

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<sup>42</sup> For example, the proposed regulation would establish a provision at 5 CFR § 338.301(b) to reinforce Federal agency responsibility to “ensure that applicants meet all applicable eligibility and qualification requirements for consideration and appointment to a competitive service position.”

<sup>43</sup> See, for example, *Kirkendall v. Department of the Army*, 573 F.3d 1318 (Fed. Cir. 2009), in which the court reviewed and overturned an agency’s determination that an applicant lacked the requisite specialized experience to qualify for a position with the agency.

<sup>44</sup> U.S. Merit Systems Protection Board, [Making the Right Connections: Targeting the Best Competencies for Training](#), Washington, DC, February 2011, pp. 47-48 and U.S. Merit Systems Protection Board, [Identifying Talent Through Technology: Automated Hiring Systems in Federal Agencies](#), Washington, DC, August 2004, pp. 79-80.

competitive service hiring simpler and more transparent in the absence of fundamental—that is, statutory—reforms. Clearly, continued efforts to update and maintain USAJOBS and other components of the Federal Government’s hiring infrastructure are important. For example, the enhancement to USAJOBS that integrates eligibility data into the applicant profile may be particularly helpful to applicants who can be appointed under special hiring authorities<sup>45</sup> such as the Veterans Employment Opportunities Act (VEOA)<sup>46</sup> and to agencies that seek to make greater use of such authorities to speed hiring and support various public policy goals related to Federal employment. However, such integration simply acknowledges and accommodates the complexity of hiring employees under the existing system. It does not, and cannot, simplify the laws and regulations that govern Federal hiring. Nor can it assure that open, competitive examinations play a central role in the recruitment and hiring of new Federal employees.

Similarly, requirements to simplify the initial application process and reduce time to hire have not made the processes or decisions underlying Federal hiring less demanding. For example, the requirement for fair and open competition remains. In practice, that means that a Federal agency may be obliged to consider many more applicants for a single vacancy than a private sector employer might consider necessary or sensible. We make this observation not to fault the requirement for fair and open competition—a merit system principle and a fundamental value of Federal service—but to note that full adherence to merit system principles is not free. Also, because Federal agencies typically can choose among a variety of appointing authorities when filling a competitive service positions, action to fill a single vacancy may involve several parallel hiring processes, rather than a single process. Moreover, those processes often have differing rules for eligibility, consideration, and selection. Thus, complexity and administrative burden, for both applicants and agencies, are not solely the products of ill-conceived or poorly administered hiring processes. To a considerable extent, they are an unavoidable consequence of agency efforts to “fill a vacancy in the competitive service by any method authorized” within the system as it currently exists. That is why MSPB has called for collaborative development of a Governmentwide framework for Federal hiring reform, grounded in the merit system principles, and a consolidation of appointing authorities.<sup>47</sup>

## Performance and Recognition Policy Actions

**SES Performance Appraisal Systems.** Since 2004, OPM has overseen the certification of SES performance appraisal systems.<sup>48</sup> Agencies must obtain certification—demonstrate to the satisfaction of OPM and OMB that their SES appraisal system makes “meaningful

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<sup>45</sup> The enhancement would enable applicants to indicate their eligibility for these authorities and would enable agencies to search for applicants with such eligibility. USAJOBS also permits applicants to store and submit documentation of eligibility.

<sup>46</sup> VEOA is only one of the many hiring authorities established by statute or regulation. See U.S. Merit Systems Protection Board, *Federal Appointment Authorities: Cutting Through the Confusion*, for a description of the provisions of some of the more commonly-used alternatives to competitive examination. We note that one of the authorities discussed in this report, the FCIP, has been discontinued.

<sup>47</sup> U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, Washington, DC, July 2006, pp. 50-51.

<sup>48</sup> 5 C.F.R. Part 534, Subpart D. In addition to OPM approval, certification requires concurrence OMB.

distinctions based on relative performance”—to increase SES salaries above level III of the Executive Schedule.<sup>49</sup> Regulation outlines nine certification requirements, which include:

- Accountability for performance management of subordinates;
- Alignment of SES performance plans with organizational goals;
- An emphasis on measurable results when evaluating SES performance and assigning performance ratings;
- Conduct, communication, and integration (into SES appraisals and awards) of assessments of organizational performance; and
- Differentiation in the structure of the appraisal system and in the ratings assigned.<sup>50</sup>

As of April 2011, 46 SES systems had a current certification,<sup>51</sup> including every major department and agency.<sup>52</sup> OPM also [announced](#) that a workgroup chartered by the President’s Management Council (PMC) had recommended the standardization of SES performance management systems across the Federal Government, and that the PMC would sponsor the design of such a system.

### *Significance*

Although SES certification is not new, it remains important as a mechanism for initiating and sustaining effective performance management at the highest levels of the career Federal service. Certification is also important because it can set the stage for improvements in performance management and recognition throughout the organization. A credible, valid, and rigorous appraisal system for senior agency leaders is valuable preparation—and perhaps even a precondition—for improving performance appraisal at lower levels of the organization and for extending pay for performance systems to first-level supervisors and front-line employees.

The increase in the number of certified systems suggests that Federal agencies have made substantial progress in improving SES performance appraisal practices and outcomes. Nevertheless, more than half the certified systems have received only provisional certification, suggesting that progress remains incomplete. Data also indicate that much remains to be done. For example, meaningful differentiation in ratings is still more common in theory than in practice. Federal agencies have indeed moved toward appraisal systems that have two or more levels associated with acceptable or better performance.<sup>53</sup> However, full use of those levels in the manner intended remains elusive. For example, at the end of fiscal

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<sup>49</sup> *Id.* With certification, the maximum rate of basic pay (i.e., annual salary exclusive of awards) for a member of the SES is level II of the Executive Schedule (\$179,700 for 2011) instead of level III of the Executive Schedule (\$165,300).

<sup>50</sup> 5 C.F.R. § 430.404.

<sup>51</sup> These include provisional (one-year) and full (two-year) certifications. Provisional certification indicates that an agency has designed, but not yet fully implemented, an appraisal system that meets the certification criteria. Certification requirements and processes are described at 5 CFR § 430, Subpart D.

<sup>52</sup> OPM reported a total of 84 certified systems at this date, including systems covering senior level employees and Offices of Inspector General, which are distinct from departmental SES systems.

<sup>53</sup> Based on analysis of data from OPM’s Central Personnel Data File, 88 percent of employees in the career SES were rated under such appraisal systems at the end of fiscal year 2010, compared to 74 percent at the end of fiscal year 2004.

year 2010, approximately half of senior executives under five-level systems were rated at the highest level (level 5), while fewer than ten percent were rated at the middle level (level 3), which is intended to denote “fully successful” performance.<sup>54</sup>

**The Performance Appraisal Assessment Tool (PAAT).** In 2010, OPM established “expect the best” as one of its four broad strategic goals—ensuring that Federal employees are fully accountable, fairly appraised, and have the tools, systems, and resources to perform at the highest levels to achieve superior results. This goal builds on the “results oriented performance culture system” that has been an element of OPM’s [Human Capital Assessment and Accountability Framework](#) (HCAAF) since its inception. One aspect of this goal is helping agencies develop and implement sound performance appraisal systems. Since 2006, OPM has used its Performance Appraisal Assessment Tool (PAAT) to evaluate Federal agencies’ non-SES performance appraisal systems. The PAAT:

- Evaluates systems on 10 characteristics of effective appraisal systems, such as alignment of performance plans with organizational goals; a focus on results (not only behaviors); credible measures; distinctions in levels of performance (the presence and use of multiple rating levels, beyond satisfactory and unsatisfactory); and consequences (basing personnel decisions on appraisals);
- Provides agencies with feedback to assist them in improving the appraisal system, in support of fostering a results-oriented performance culture; and
- Establishes a cycle for monitoring and continuous improvement of appraisal systems.

Progress is evident, if slower than hoped. In Fiscal Year 2010, OPM reported that 28 percent of employees in CHCO agencies were covered by systems that earned a PAAT score of 80 or higher (out of 100 points), just short of its goal of 30 percent—but well above the 4 percent reported in Fiscal Year 2007.<sup>55</sup>

### *Significance*

OPM recognizes the need to improve employee performance evaluation, which is critical for reasons beyond job performance that include:

- Employee engagement—a heightened connection between employees and their work or organization. MSPB research has found a clear relationship between levels of employee engagement and organizational outcomes in Federal agencies, and indicates that one driver of employee engagement is the opportunity to perform well at work.<sup>56</sup> Good performance management practices such as providing clear direction, appropriate resources and autonomy, and constructive feedback are necessary to that opportunity;<sup>57</sup>

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<sup>54</sup> Source: Central Personnel Data File, September 2010. Data for career senior executives under appraisal systems with three levels of acceptable or better performance who had a current rating of record.

<sup>55</sup> U.S. Office of Personnel Management, [Fiscal Year 2010 Annual Performance Report](#), pp. 30-31.

<sup>56</sup> U.S. Merit Systems Protection Board, [The Power of Federal Employee Engagement](#), Washington, DC, September 2008, pp. 2-3 and 7-10.

<sup>57</sup> U.S. Merit Systems Protection Board, [Managing for Engagement: Communication, Connection, and Courage](#), Washington, DC, July 2009, pp. 21-29.

- Ensuring proper and efficient use of salary and award monies. The third merit principle states that “recognition should be provided for excellence in performance” and the sixth merit principle states that “employees should be retained on the basis of the adequacy of their performance.” Those principles require a means of identifying excellent and poor performance that can withstand public and, potentially, judicial scrutiny; and
- Establishing a basis for retention, pay, and recognition that is credible to employees, citizens, and institutional stakeholders. Equitable treatment of employees, in pay and other personnel matters, is required by the merit system principles and critical to morale and productivity. However, determining pay solely on the basis of job duties, time in the position, or other mechanical criteria will not suffice; consideration must also be given to individual and organizational performance.

As reported by OPM, many employees still work under performance evaluation systems that fall well short of ideal. However, stakeholders should recognize that effective performance management is difficult, in both the private and public sectors, and that lasting improvement will not be achieved quickly or easily. OPM’s continued attention to this issue, and its efforts to collaborate with agencies and employee representatives,<sup>58</sup> reflects an appropriately long-term approach to this issue.

**Guidance on Awards Expenditures.** In June 2011, OPM and OMB issued joint guidance that establishes budgetary limits on awards for fiscal years 2011 and 2012.<sup>59</sup> The guidance restricts aggregate expenditures at the agency level to five percent of aggregate salaries for employees in senior-level pay systems (including the Senior Executive Service) and one percent of aggregate salaries for all other employees.<sup>60</sup> Within those limits, agencies remain free to determine the number and amount of awards granted; the guidance does not establish limits on individual awards beyond those that already exist in statute or regulation.<sup>61</sup>

### *Significance*

The guidance reflects present fiscal conditions, and continuing concerns about agency use of awards and the integrity of the performance appraisal systems that often serve as a basis for

<sup>58</sup> For example, the [Federal Council on Labor-Management Relations](#), which is co-chaired by OPM, established a workgroup that has made recommendations on improving employee performance management.

<sup>59</sup> John Berry, Director, U.S. Office of Personnel Management and Jeffrey Zients, Deputy Director for Management & Chief Performance Officer, U.S. Office of Management & Budget, “Memorandum for Heads of Executive Departments and Agencies, Subject: Guidance on Awards for Fiscal Years 2011 and 2012,” CPM 2011-10, June 10, 2011.

<sup>60</sup> OPM previously informed agencies to anticipate a reduction in Presidential Rank Awards (PRAs) for members of the Senior Executive Service. See John Berry, Director, U.S. Office of Personnel Management, “Memorandum for Heads of Executive Departments and Independent Agencies, Inspectors General and Council of the Inspectors General on Integrity and Efficiency, Subject: Fiscal Year 2011 Presidential Rank Awards Program,” April 26, 2011. Although the reduction affects relatively few employees, because of the limited size of the SES and statutory restrictions on the number of PRAs, we also note that pay for performance—to include PRAs—is an integral feature of the SES.

<sup>61</sup> *Id.* The guidance informs agencies that they are to honor collective bargaining obligations and instructs agencies to provide for “equitable distribution between managers/supervisors and non-supervisory employees.”

determining award recipients and amounts. Accordingly, the guidance calls on agencies to “adopt more rigorous employee performance management processes that incorporate consistent supervisor communication and feedback, establish accountability at all levels, and provide transparent and credible appraisal systems.”

MSPB shares OPM’s and OMB’s concerns about the fairness, rigor, and credibility of employee appraisal processes and outcomes, and has long recommended that Federal agencies act to improve both their performance evaluation systems<sup>62</sup> and the selection, development, and accountability of the supervisors and managers who are responsible for using those systems.<sup>63</sup> MSPB also recognizes the need for judicious use of reward and recognition authorities, consistent with the merit system principles that call for efficient and effective use of the Federal workforce and high standards of concern for the public interest. However, the merit principles also state that “appropriate incentives and recognition should be provided for excellence in performance.”<sup>64</sup> In this regard, the guidance illustrates challenges to recognizing excellence and promoting a performance-based culture in the Federal Government, especially in times of fiscal austerity. For example, even high-performing organizations with sound performance appraisal systems will have a reduced ability to reward the individuals who contributed to that performance. We also note that the award limitations provide little incentive for agencies to improve their performance management processes or strengthen accountability.

## Other Policy Initiatives

**Compliance With Civil Service Law and Regulation.** OPM has the responsibility and authority to oversee Federal agency compliance with civil service law and regulation and to evaluate agency management of human capital.<sup>65</sup> Much of that oversight is accomplished through agency self-evaluation using the [HCAAF](#), a set of OPM-established standards and systems.<sup>66</sup> In August 2011, OPM issued [proposed regulations](#) to modify the HCAAF.<sup>67</sup>

The modifications would retain the five systems of the current HCAAF,<sup>68</sup> while giving agencies greater flexibility in implementing the framework. For example, much of the

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<sup>62</sup> U.S. Merit Systems Protection Board, *Managing for Engagement: Communication, Connection, and Courage*, Washington, DC, July 2009, pp. 66-75.

<sup>63</sup> U.S. Merit Systems Protection Board, *Call to Action: Improving First-Level Supervision of Federal Employees*, Washington, DC, May 2010, pp. i-vi and U.S. Merit Systems Protection Board, *Designing an Effective Pay for Performance Compensation System*, Washington, DC, January 2006, p. 38.

<sup>64</sup> 5 U.S.C. § 2301(b)(3).

<sup>65</sup> See 5 C.F.R. Part 5 (the civil service rules outlining OPM’s regulatory and enforcement authority) and 5 C.F.R. Part 250 (rules outlining agency human capital authorities and responsibilities, and OPM’s role in relation to those responsibilities).

<sup>66</sup> Application of the HCAAF culminates in a Human Capital Management Report (HCMR) to be submitted to OPM. OPM’s [Merit Systems Accountability and Compliance](#) (MSAC) organization reviews those reports and monitors agency compliance with HCAAF requirements. MSAC staff may support agency self-evaluations or, when necessary, conduct independent audits and evaluations.

<sup>67</sup> U.S. Office of Personnel Management, “Personnel Management in Agencies, Action: Proposed rule,” 76 FR 47516, August 5, 2011.

<sup>68</sup> The five systems are strategic alignment, leadership and knowledge management, results-oriented performance culture, talent management, and accountability. The HCAAF is an appendix to 5 CFR § 250.

detailed information in the current HCAAF would be treated as guidance and the proposed regulations would also eliminate the requirement that agencies maintain a human capital plan (although requirements commonly met through a human capital plan, such as alignment and talent management, would remain in effect). The regulations would also differentiate between CHCO agencies and non-CHCO agencies, in recognition of the legal and practical distinctions, such as the availability of staff and resources, between the two types of agencies.<sup>69</sup>

### *Significance*

Especially in a decentralized environment, OPM oversight of agency human resource management is important to assure compliance with specific laws and regulations as well as broader merit system principles. That oversight continues to evolve. The proposed changes are based on OPM's experience with the HCAAF, including agency feedback, and an attempt to strike a balance between flexibility and structure. OPM notes, rightly, the need to allow agencies to "focus their human capital activities on those initiatives that offer the most organizational benefits." Yet we note that the merit system principles and laws and regulations that govern the civil service also impose requirements that Federal agencies and Federal managers may view as irrelevant to, or inconsistent with, their immediate interests. For that reason, OPM standards and monitoring remain essential. MSPB will continue to track OPM policy in this area, and has identified OPM oversight as a topic of future research in its recently-published MSPB [research agenda](#).<sup>70</sup>

**Telework as Part of Federal Government Dismissal and Closure Procedures.** In December 2010, OPM issued guidance that formally incorporates telework into dismissal and closure procedures for the Federal Government in the Washington, D.C. area.<sup>71</sup> The guidance adds the option of unscheduled telework to existing provisions such as unscheduled leave and delayed arrival. A March 2011 update to that guidance emphasizes that unscheduled telework can be used flexibly when circumstances warrant.<sup>72</sup>

Although the policy focuses on discretionary *ad hoc* telework, OPM's policy also contemplates mandatory telework: "Further, under OPM's new policy for unscheduled telework, agencies...should consider modifying or renegotiating current telework policies to require any employee with a telework agreement to work on a day when the Government declares emergency dismissal and closure procedures irrespective of whether that employee was previously scheduled to telework."<sup>73</sup>

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<sup>69</sup> OPM uses these terms to distinguish agencies that are required by the Chief Human Capital Officers Act to have a Chief Human Capital Officer (CHCO) from agencies that are not.

<sup>70</sup> U.S. Merit Systems Protection Board, [2011-2013 Research Agenda](#), Washington, DC, March 2011, p. 20.

<sup>71</sup> John Berry, Director, U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies, "Subject: Washington, DC, Area Dismissal and Closure Procedures," December 15, 2010.

<sup>72</sup> John Berry, Director, U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies, "Subject: Update to Washington, DC, Area Dismissal and Closure Procedures," March 3, 2011.

<sup>73</sup> U.S. Office of Personnel Management, "Washington, DC, [Area Dismissal and Closure Procedures](#)," p. 4, accessed November 2011.

## Significance

OPM's actions reflect the increasing feasibility, acceptance, and prevalence of telework. The guidance encouraging telework during inclement weather and other disruptive events should enhance Federal agencies' ability to serve the public interest, by providing a way to sustain organizational operations and individual productivity when conditions are not conducive to routine commuting or on-site work. The guidance also marks a continuing shift in the perception and use of telework, from a practice that benefits primarily employees or the community (e.g., by reducing traffic congestion and energy use) to a practice that is necessary for maintaining the continuity and efficiency of Federal Government operations.

**Training Evaluation.** In January 2011, OPM issued a *Training Evaluation Field Guide (Field Guide)* to assist Federal agencies in evaluating training programs and activities.<sup>74</sup> Noteworthy features of the *Field Guide* include:

- Collaborative development. The *Field Guide* was developed with input from an interagency working group and highlights best practices from 15 Federal agencies; and
- Flexibility in measurement. For example, the *Field Guide* recognizes that it is not always feasible or practical to evaluate costs and benefits in terms of dollars, and allows agencies to define the objectives of training in terms of expectations and measure “return on expectation” instead of “return on investment.”<sup>75</sup>

## Significance

The *Field Guide* could help agencies justify necessary investments in employee training and development and make the best possible use of training resources that are likely to become increasingly scarce in coming years. MSPB has encouraged agencies to evaluate training effectiveness, beyond superficial measures such as attendee satisfaction with training content and delivery, and recommended that OPM provide tools to assist agencies in such evaluation.<sup>76</sup>

OPM and MSPB have recognized that training evaluation methods that are unduly complex or costly are unlikely to be adopted, particularly when staff and budgets are limited.<sup>77</sup> OPM's collaboration with Federal agencies and the *Field Guide's* emphasis on best practices should increase the likelihood that agencies will adopt appropriate and effective training evaluation methods.

**Development of HR University.** In collaboration with the Chief Human Capital Officers (CHCO) Council, OPM has developed HR University (HRU), a centralized online training

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<sup>74</sup> U.S. Office of Personnel Management, [Training Evaluation Field Guide](#).

<sup>75</sup> The *Field Guide's* approach is adapted from a widely-used model of training evaluation. See J.D. Kirkpatrick and W.K. Kirkpatrick, *Training on Trial*, AMACOM, New York, NY, 2010.

<sup>76</sup> U.S. Merit Systems Protection Board, [Making the Right Connections: Targeting the Best Competencies for Training](#), Washington, DC, February 2011, p. 48 and U.S. Merit Systems Protection Board, [Leadership for Change: Human Resource Development in the Federal Government](#), Washington, DC, July 1995, pp. 36-38 and 46.

<sup>77</sup> U.S. Merit Systems Protection Board, [Leadership for Change: Human Resource Development in the Federal Government](#), Washington, DC, July 1995, pp. 20-22.

resource center for the Federal human resources community.<sup>78</sup> The stated objectives of HRU include:

- Increasing the competence of the Federal HR workforce;
- Serving as a repository of training courses and other developmental resources;
- Establishing a set of core competencies for Federal HR professionals, covering roles ranging from technical specialist to strategic partner and leader; and
- Reducing the costs of HR training through Governmentwide resource sharing.

The first phase of HRU was rolled out in February 2011 and provides:

- An online course catalog that includes selected HR-related courses offered by OPM, other Federal agencies, and vendors;
- Direct access to the online courses, some available at no cost;
- Descriptions of HR career paths to guide training and career development; and
- Guidance on how to develop the competencies expected of an HR professional.

To professionalize the Federal HR occupation, a future phase of HRU will include a certification program that links core competencies to the HR course curriculum.

### *Significance*

A high-performing Federal HR workforce is essential for Federal agencies to manage their workforces in a fair, effective, and legally compliant manner. However, demands on the Federal HR workforce have increased while HR staff and resources have remained unchanged or declined.<sup>79</sup> Moreover, there is continuing concern about the ability of Federal HR professionals to fulfill their roles,<sup>80</sup> as reflected in the CHCO Council’s strategic goal of “support[ing] and sponsor[ing] continued development and implementation of Government-wide HR tools to improve the selection, assessment, and development of the Federal HR profession.”<sup>81</sup>

Although the utilization and effects of HRU—in particular, improvements in the knowledge and competence of Federal HR employees—remain unknown, HRU has great potential to support that improvement in a cost-effective manner. Features such as centralized development of courses and online delivery of courses could yield substantial economies of scale and reductions in cost of attendance. Such efficiencies are particularly important given the fiscal constraints that Federal agencies are facing.

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<sup>78</sup> This description is based on information from the HRU website, [www.hru.gov](http://www.hru.gov).

<sup>79</sup> U.S. Merit Systems Protection Board, *The U.S. Office of Personnel Management in Retrospect: Achievements and Challenges After Two Decades*, Washington, DC, December 2001, pp. 7-8 and U.S. Merit Systems Protection Board, *Reforming Federal Hiring: Beyond Faster and Cheaper*, Washington, DC, September 2006, pp. 42-43.

<sup>80</sup> See, for example, U.S. Merit Systems Protection Board, *Federal Personnel Offices: Time for Change?*, Washington, DC, July 1993, pp. 28-33 for a discussion of issues related to the skills of Federal HR employees. See also Stephen Losey, “HR Overhaul at USDA nets big benefits,” *Federal Times*, May 13, 2011, accessed via [www.federaltimes.com](http://www.federaltimes.com), which describes a restructuring of that department’s HR function in response to problems with HR service and staff capability.

<sup>81</sup> “CHCO Council Strategic Goals for 2010,” accessed at [www.chcoc.gov/stratgoals.aspx](http://www.chcoc.gov/stratgoals.aspx) in November 2011.

## Affirmative Employment Initiatives

OPM actions in support of public policies and Administration initiatives related to affirmative employment and fair treatment include:

- Issuance of [model strategies for recruiting and hiring people with disabilities](#);<sup>82</sup> creation of a requirement for agencies to develop a plan for increasing the employment of people with disabilities;<sup>83</sup> and establishment of a resume bank<sup>84</sup> of individuals with disabilities who are eligible for noncompetitive appointment;<sup>85</sup>
- Launching the [Hispanic Council on Federal Employment](#).<sup>86</sup> The Council is to advise the Director of OPM on matters related to the recruitment, hiring, retention and advancement of Hispanics in the Federal workplace;
- Continued efforts to increase the Federal employment of veterans;<sup>87</sup>
- Publication of [guidance on the employment of transgender persons](#);<sup>88</sup> and
- Establishment of an Office of Diversity and Inclusion.

### *Significance*

These actions respond to continuing concerns in Federal employment: the proportion of Federal employees with disabilities has declined in recent years; employment of Hispanics in the Federal workforce continues to lag that in the civilian labor force; the transition from military to civilian employment, which includes successfully navigating the application and interview process, can be challenging for veterans despite their service and skills;<sup>89</sup> and

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<sup>82</sup> John Berry, Director, U.S. Office of Personnel Management, “Memorandum for Heads of Executive Departments and Agencies, Subject: Model Strategies for Recruitment and Hiring of People with Disabilities as Required under Executive Order 13548,” November 8, 2010.

<sup>83</sup> *Id.*

<sup>84</sup> See Christine M. Griffin, Deputy Director, U.S. Office of Personnel Management, “Memorandum for Chief Human Capital Officers, Subject: Database of Candidates with Disabilities,” March 25, 2011.

<sup>85</sup> 5 C.F.R. § 213.3102(u) authorizes agencies to appoint, without competition, job-ready individuals who have certain disabilities.

<sup>86</sup> U.S. Office of Personnel Management, “[Hispanic Council on Federal Employment, Action: Establishment of advisory committee](#),” 76 F.R. 4742-01, January 26, 2011.

<sup>87</sup> These efforts include supporting the interagency Veterans Employment Council, which announced the May 2011 launch of a military-to-Federal occupation translator, and a commitment to develop a veterans resume bank with a target date of September 2011 (as of November 2011, from OPM’s [online strategic plan](#)).

<sup>88</sup> John Berry, Director, U.S. Office of Personnel Management, “[Memorandum for Heads of Executive Departments and Agencies, Subject: Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace](#),” May 27, 2011. The guidance is also [available online](#).

<sup>89</sup> See, for example, Kaitlin Madden, “Getting hired after the military,” [cnn.com](#), November 21, 2011. We note that OPM recognized this challenge, as evidenced by the goals and tasks described in the [portion of its online strategic plan related to veterans employment](#). We further note that [OPM-published reports on veterans’ employment](#) suggest that actions to promote the employment of veterans have been successful and that Federal agencies recognize—perhaps to a much greater extent than most non-Federal employers—the value of military skills and experience.

agencies have sought OPM guidance on matters related to the employment of transgender persons.<sup>90</sup>

## Delivery of Benefits and Services

**Conducting Background Investigations.** OPM reported that it met its targets for the timeliness and quality of background investigations. For FY 2010, OPM completed over 2 million investigations<sup>91</sup> and reported that its inventory of pending cases was at its lowest level<sup>92</sup> since February 2005.<sup>93</sup>

### *Significance*

Thorough, high-quality investigations are essential to ensure that individuals who hold positions of heightened sensitivity are qualified to do so.<sup>94</sup> Timeliness is also important, both to minimize the time that critical positions go unfilled and to minimize the loss of applicants who cannot or will not endure unnecessarily prolonged preemployment checks. OPM's reported results indicate that it has done well to manage this function.

**Adjudicating Retirement Benefits.** For Fiscal Year 2010, OPM reported a substantial increase in both retirement claims processing time and in the number of pending claims.<sup>95</sup> OPM noted some short-term contributors to these results, but has also acknowledged that the deterioration in timeliness also reflects longer-term factors, including workforce trends (such as an aging Federal workforce and an increase in early retirements as agencies restructure), staff losses, an increase in retirements under the Federal Employees Retirement Systems (FERS), and failure of a modernization initiative to deliver anticipated efficiencies.<sup>96</sup>

### *Significance*

Retirement benefits are not a merit system issue in a strict sense. However, the delivery of retirement benefits does have implications for the efficient and effective management of the

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<sup>90</sup> *Id.* We note that the need for guidance and education is reinforced by *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), in which a legislative branch agency was found to have committed sex discrimination in withdrawing an offer of employment to a transgender person.

<sup>91</sup> Investigations may be performed by OPM staff or by contractors working under OPM standards.

<sup>92</sup> U.S. Office of Personnel Management, [Fiscal Year 2010 Annual Performance Report](#), pp. 25-26.

<sup>93</sup> OPM reported progress in reducing the backlog transferred from the Department of Defense shortly after receipt, as noted in MSPB's 2006 Annual Report. At that time, however, the Government Accountability Office had expressed concerns about the accuracy and completeness of investigations (U.S. Government Accountability Office, *DOD Personnel Clearances: Additional OMB Actions are Needed to Improve the Security Clearance Process*, GAO-06-1070, September 2006). The OPM Director subsequently [asked that members of Congress request an update](#) to that report, believing that those concerns had been adequately addressed (U.S. Office of Personnel Management, "OPM Requests New GAO Report on Background Investigations," news release dated September 17, 2007).

<sup>94</sup> Here, we use the term "sensitivity" broadly, to encompass responsibility for matters such as national security, public health and safety, and private or confidential information.

<sup>95</sup> U.S. Office of Personnel Management, *Fiscal Year 2010 Annual Performance Report*, pp. 37-39.

<sup>96</sup> *Id.* and [testimony of John Berry](#), Director, U.S. Office of Personnel Management, to the U.S. House of Representatives, Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy, "Back to the Basics: Is OPM Meeting its Mission?," November 15, 2011.

Federal workforce.<sup>97</sup> OPM's ability to deliver timely, accurate retirement benefits directly affects former Federal employees and their families, and indirectly affects public trust in government, agencies' ability to recruit employees and restructure their workforces, and the credibility and effectiveness of OPM leadership in other areas.

For these reasons, the deterioration in timeliness and the increasing inventory of pending claims are of great concern. Furthermore, some pressures on the retirement function—such as an aging workforce, agency restructuring, and the increasing prevalence of retirements under FERS—are almost certain to intensify. In 2010, OPM established the strategy of “develop[ing] a 21<sup>st</sup> century customer focused retirement processing system.”<sup>98</sup> Execution of this strategy depends directly on OPM's ability to develop and manage complex information technology systems,<sup>99</sup> and the history of OPM's previous initiative to modernize retirement processing shows that the challenges are formidable.<sup>100</sup>

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<sup>97</sup> 5 U.S.C. §2301(b)(5) states that “The Federal work force should be used efficiently and effectively.”

<sup>98</sup> U.S. Office of Personnel Management, *A New Day for Federal Service: Strategic Plan 2010-2015*, p. 17.

<sup>99</sup> U.S. Government Accountability Office, “OPM Retirement Modernization: Longstanding Information Technology Management Weaknesses Need to Be Addressed,” GAO-12-226T, November 15, 2011, pp. 5-10.

<sup>100</sup> See [testimony of Patrick E. McFarland](#), Inspector General, U.S. Office of Personnel Management, to the U.S. House of Representatives, Subcommittee on Federal Workforce, U.S. Postal Service and Labor Policy, “Back to the Basics: Is OPM Meeting its Mission?,” November 15, 2011.

## Financial Summary

### Fiscal Year 2011 Financial Summary

(dollars in thousands)

#### Financial Sources

Appropriations	\$ 40,258
Civil Service Retirement and Disability Trust Fund	2,579
Reimbursements	20
FY 10 Carryover Funds	573

**Total Financial Sources** \$ 43,430

#### Obligations Incurred

Personnel Compensation	\$ 24,454
Personnel Benefits	6,435
Benefits for former Personnel	3
Travel of Things	49
Travel of Persons	305
Rental Payments	3,300
Communications, Utilities, and Miscellaneous	698
Printing and Reproduction	93
Other Services	2,942
Supplies and Materials	157
Equipment	1,144
Leasehold Improvements	6
Adjustments of PY funds	52
FY 10 Carryover Obligations	388
Reimbursable Obligations	2,588

**Total Obligations Incurred** \$ 42,614

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