



# **Annual Report for FY 2019**

**January 31, 2020**

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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) submits this Annual Report (AR) on its significant actions during fiscal year (FY) 2019.

We invite customers and stakeholders to send comments to improve MSPB's ARs to:

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Email: [mspb@mspb.gov](mailto:mspb@mspb.gov) (to the attention of the PIO)  
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Information about MSPB's FY 2019 program performance results (as required under the Government Performance and Results Act Modernization Act of 2010 (GPRAMA)) is available in the Annual Performance Report and Annual Performance Plan (APR-APP) for FY 2019-2021. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR) for FY 2019. MSPB's ARs, AFRs, APR-APPs, and Strategic Plans (SPs) are posted on the [Agency Plans and Reports](#) page on MSPB's website ([www.mspb.gov](http://www.mspb.gov)) when they are released.

Go to [www.mspb.gov](http://www.mspb.gov) to learn more about MSPB's work, sign up for MSPB's adjudication or studies listservs, or follow us on Twitter [@USMSPB](#).

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# U.S. MERIT SYSTEMS PROTECTION BOARD

## FISCAL YEAR 2019 ANNUAL REPORT

### MESSAGE FROM THE ACTING CHIEF EXECUTIVE AND ADMINISTRATIVE OFFICER

I am pleased to submit the U.S. Merit Systems Protection Board (MSPB's) Annual Report for FY 2019. Having reached the end of his term on February 28, 2018, Vice Chairman and Acting Chairman Mark Robbins' carry-over year expired on February 28, 2019, leading to the first time in MSPB history without any Board members. Pursuant to MSPB's Continuity of Operations Plan, I became MSPB's acting chief executive and administrative officer on March 1.

During this unprecedented period, MSPB faced many of the same uncertainties it has since losing a Board quorum in January 2017. MSPB had already been unable issue decisions in petitions for review (PFRs) and other cases at headquarters (HQ), such as enforcing MSPB decisions; the backlog of these cases at the time of this report's publication numbers 2,529. MSPB had also already been unable publish reports of merit systems studies or promulgate substantive regulations, such as in response to statutory changes by Congress. With the departure of Acting Chairman Robbins, MSPB lost the authority to issue whistleblower stays when requested by the Office of Special Counsel (OSC).

Nevertheless, in most areas MSPB's workload has remained the same. MSPB's administrative judges (AJs) continue to review cases, issuing 5,112 decisions in FY 2019. MSPB staff continue to prepare draft decisions for Board member consideration in response to the hundreds of PFRs filed in FY 2019. Some have chosen to appeal in federal court rather than through the PFR process, and MSPB has continued to regularly appear in court to explain its processes. MSPB has also continued to issue research briefs and regular newsletters. On top of this, MSPB has used this time to re-evaluate its procedures and regulations, looking for improvements.

While MSPB employees have been remarkably focused in continuing the agency's work despite the challenges, there is no question we look forward to the arrival of new Board members. Three nominees have been favorably recommended in committee and are awaiting consideration on the Senate's Executive Calendar, including a new nominee this year, B. Chad Bungard, who previously served as MSPB's General Counsel from 2006 to 2010. In order to fully perform its mission and successfully face new challenges that lie ahead, MSPB needs a Board quorum.

The merit system plays a key role in the effective functioning of the Federal Government. When properly applied, merit system principles ensure taxpayers receive the benefit of their tax dollars being used to employ the most qualified employees, who can in turn provide the work and the customer service taxpayers deserve. This is something all Americans have a stake in. Applying the merit system principles and conscientiously avoiding prohibited personnel practices also ensures fair treatment of whistleblowers, who can further help identify and prevent waste, fraud, abuse, and mismanagement. MSPB employees have dedicated themselves to advancing this mission, and it is a privilege to serve alongside them.

Tristan L. Leavitt  
General Counsel  
January 31, 2020

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## INTRODUCTION

This MSPB Annual Report for FY 2019 includes adjudication case processing statistics for the regional and field offices, summaries of court opinions relevant to MSPB's work, summaries of MSPB's merit systems studies activity, and summaries of the significant actions of the Office of Personnel Management (OPM).<sup>1</sup> The report also contains summaries of MSPB's financial status, outreach and education activities, legislative and congressional relations activities, and international activities. In addition, the report includes a brief review of the internal management challenges and external factors that affect MSPB's work to provide a context for the other information in the report. MSPB's annual reports usually contain HQ case processing statistics and summaries of significant MSPB Board decisions. This information is not provided in this report because, due to the lack of quorum, there were no HQ decisions on MSPB appeals issued in FY 2019.

### About MSPB

MSPB was created by the Civil Service Reform Act (CSRA) to carry on the adjudication functions of the Civil Service Commission, thus providing independent review and due process to employees and agencies. The CSRA authorized MSPB to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses to testify at hearings, and enforce compliance with final MSPB decisions. MSPB also was granted broad 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 OPM's regulations, and to review and report on OPM's significant actions.<sup>2</sup> The CSRA also codified for the first time the values of the Federal merit systems as the merit system principles (MSPs). The Act also proscribed, as contrary to MSPs, specific actions and practices as the prohibited personnel practices (PPPs).<sup>3</sup> Since the enactment of the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.<sup>4</sup> More information about MSPB's jurisdiction can be found in the agency SP located on [www.mspb.gov](http://www.mspb.gov).

### MSPB's Mission and Vision

#### Mission

*To protect the merit system principles and promote an effective Federal workforce free of prohibited personnel practices.*

#### Vision

*A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people.*

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<sup>1</sup> 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)).

<sup>2</sup> Pursuant to 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. Pursuant to 5 U.S.C. § 1206, MSPB also is responsible for annually reviewing and reporting on OPM's significant actions.

<sup>3</sup> Title 5 U.S.C. § 2301 and § 2302, respectively.

<sup>4</sup> Including the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act of 1989 (WPA), Pub. L. 101-12, 103 Stat. 16; the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. 112-199; and other laws listed in this and previous ARs.

## 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, nonrenewable 7-year terms.



### **MARK A. ROBBINS**

**Vice Chairman and acting Chairman, January 2017 to March 2019  
Member, May 2012 to January 2017**

Mark A. Robbins was nominated by President Barack Obama on December 5, 2011 to serve as a Member of the Merit Systems Protection Board for a term of seven years, and was confirmed by the U.S. Senate on April 26, 2012. On January 23, 2017, President Donald Trump designated Mr. Robbins Vice Chairman. Pending re-establishment of a Board quorum, Mr. Robbins performed the functions vested by Title 5 in the Office of Chairman for the remainder of his Board service.

Mr. Robbins' term ended on March 1, 2018 following which he served a one-year statutory carryover year. On December 20, 2018, President Trump issued a memorandum directing Mr. Robbins to serve concurrently as OPM General Counsel, a position he held from 2001 to 2006.

At the time of his nomination, Mr. Robbins was the General Counsel of the U.S. Election Assistance Commission. He previously served as a Senior Rule of Law Advisor for the State Department in Babil Province, Iraq, where he was awarded the U.S. Army's Commander's Award for Civilian Service. Mr. Robbins also served as Executive Director of the White House Privacy and Civil Liberties Oversight Board between 2006 and 2008. Prior to his initial service at OPM, he worked in private practice as a litigation attorney in Los Angeles, California between 1988 and 2000, and in the White House Office of Presidential Personnel from 1984 to 1988. Mr. Robbins began his career as a Legislative Assistant to two Los Angeles area Members of Congress, covering, among other things, civil service and Federal human resources management issues.

Mr. Robbins earned his undergraduate and law degrees from George Washington University. He is a member of the California and District of Columbia bars. In recognition of his extensive professional involvement and continued leadership in public administration, in 2013 Mr. Robbins was elected as a Fellow of the National Academy of Public Administration.

## **Board Quorum and Status of Board Member Nominations**

On January 16, 2019, the President re-nominated Dennis D. Kirk to be a Board Member and Chairman and Julia Akins Clark to be a Board Member. On February 13, 2019, the Senate Committee on Homeland Security and Governmental Affairs voted to advance those nominations to the full Senate. On April 30, 2019, the President nominated B. Chad Bungard to fill the third vacancy on the Board as a Member with the designation of Vice Chairman. The Committee voted in favor of his nomination on June 19, 2019. If confirmed, Ms. Clark's term would expire March 1, 2021, Mr. Kirk's term would expire March 1, 2023, and Mr. Bungard's term would expire on March 1, 2025. All three nominations are pending a vote by the full Senate.

## MSPB Offices and Their Functions

MSPB is headquartered in Washington, D.C. and has six regional offices (ROs) and two field offices (FOs) located throughout the United States. For FY 2019 the agency requested funding for 235 full-time equivalents to conduct and support its statutory duties.

The **Board members** adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer. The Director of the Office of Equal Employment Opportunity (EEO) reports directly to the Chairman; otherwise, the directors of the offices described below 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. In FY 2019, the functions of this office were performed under interagency agreements by ALJs at the Federal Trade Commission (FTC) and the U.S. Coast Guard.

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

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

The **Office of Equal Employment Opportunity** plans, implements, and evaluates MSPB's EEO 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 (HR), 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-agency servicing agreements with the Department of Agriculture's (USDA) National Finance Center (NFC) for payroll services, the Department of the Treasury's Bureau of Fiscal Service (BFS) for accounting services, and USDA's Animal and Plant Health Inspection Service (APHIS) for HR 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; coordinates the review of OPM rules and regulations; 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 also

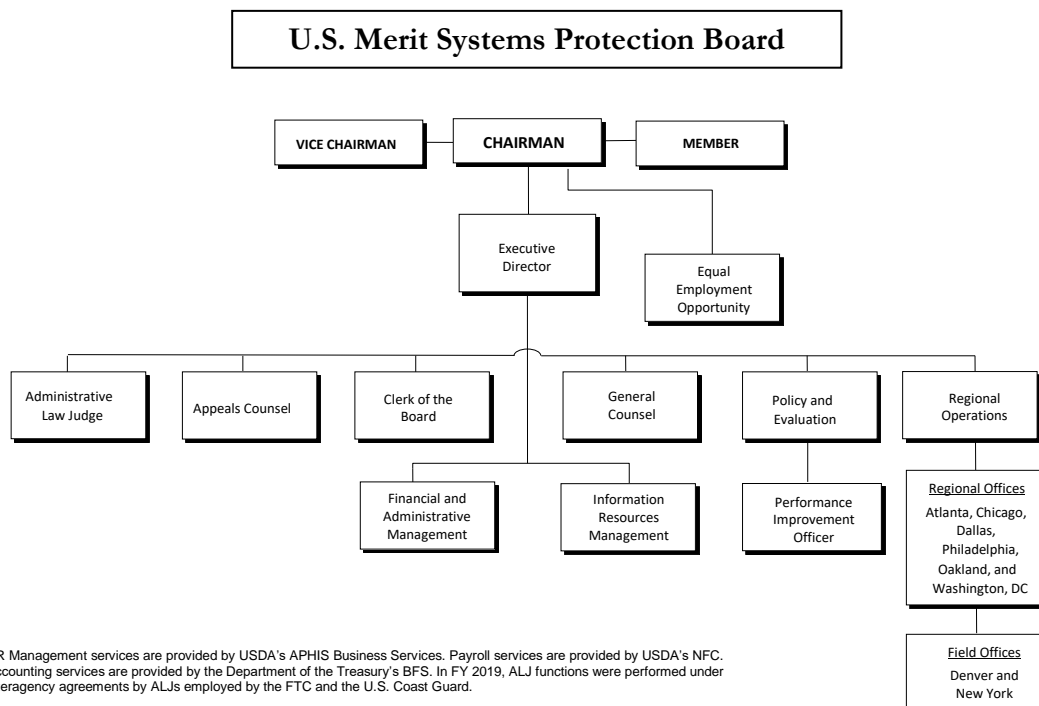
drafts regulations, administers MSPB’s ethics program, performs the inspector general function, and plans and directs audits and investigations.

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

The **Office of Policy and Evaluation (OPE)** carries out MSPB’s statutory responsibility to conduct special studies of the civil service and other Federal merit systems. Reports of these studies are sent to the president and the Congress and are distributed to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office also carries out MSPB’s statutory responsibility to review and report on the significant actions of OPM. The office conducts special projects and program evaluations for the agency and is responsible for coordinating MSPB’s performance planning and reporting functions required by GPRAMA.

The **Office of Regional Operations (ORO)** oversees the agency’s six regional offices and two field offices, which receive and process initial appeals and related cases. It also manages MSPB’s Mediation Appeals Program. AJs in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair, well-reasoned, and timely initial decisions.

### MSPB Organizational Chart



HR Management services are provided by USDA’s APHIS Business Services. Payroll services are provided by USDA’s NFC. Accounting services are provided by the Department of the Treasury’s BFS. In FY 2019, ALJ functions were performed under interagency agreements by ALJs employed by the FTC and the U.S. Coast Guard.

## FISCAL YEAR 2019 IN REVIEW

### Adjudication

MSPB has lacked a quorum of Board members since January 2017, thus preventing MSPB from issuing final decisions in PFRs and other cases at HQ, including decisions in enforcement cases and in cases requesting review of OPM regulations. Therefore, this AR does not contain summaries of significant decisions issued by the Board, or case processing statistics for PFRs issued by HQ.

In FY 2019, MSPB processed 5,112 cases in the regional and field offices, including addendum and stay requests. MSPB's AJs in the regional and field offices issued decisions in 4,893 initial appeals. ALJs issued six decisions. MSPB's Acting Chairman, Mark Robbins, granted two stay requests before his departure in March 2019, but, as stated earlier, no decisions on PFRs or other cases were issued from HQ. As of the end of FY 2019, MSPB had 2,378 PFRs pending at HQ. Statistical information on MSPB's case processing activity for the ROs/FOs is provided in the Case Processing Statistics for FY 2019 [section](#) of this report. In accordance with the Whistleblower Protection Enhancement Act of 2012 (WPEA), information about FY 2019 whistleblower cases will be available in MSPB's APR-APP for FY 2019-2021. The APR-APP is available on MSPB's website at [www.mspb.gov](http://www.mspb.gov).

As a service to our stakeholders, MSPB is also providing summaries of significant opinions relevant to the Board's work that were issued in FY 2019 by the U.S. Court of Appeals for the Federal Circuit (CAFC) and other appellate courts. Those summaries are provided in the Significant Opinions Issued by the Courts [section](#) of this report. The opinions cover topics such as adverse actions, attorney fees, constructive action, due process, and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Summaries of opinions on whistleblower issues issued by the CAFC and by the U.S. Court of Appeals for the First Circuit are also included.

### Merit Systems Studies

In FY 2019, MSPB did not publish any reports of merit systems studies due to the lack of quorum. MSPB's studies program released three editions of its *Issues of Merit (IoM)* newsletter. It also released four articles or briefs on probationary practices, PPPs, unacceptable employee performance, and emotionally laborious work. Summaries of FY 2019 *IoM* newsletters, research and perspective briefs, and other articles are contained in the Summary of Merit Systems Studies Activity [section](#) of this report.

### The Significant Actions of the Office of Personnel Management

In accordance with statute, MSPB's annual report must contain a review of OPM's significant actions and an assessment of the degree to which the actions support merit and prevent PPPs. The FY 2019 review includes OPM's significant actions in relation to agency human capital programs, hiring, workforce shaping, work-life programs, and employee performance management and rewards. More information about MSPB's review of significant OPM actions is included in that [section](#) of this report.

### Outreach, Merit Systems Education, and References to MSPB's Work

MSPB's education and outreach efforts are designed to enhance the understanding of the concept of merit, ensure that MSPs are applied consistently throughout the Government, reduce the likelihood

of PPPs, and promote stronger merit-based management practices. MSPB outreach also promotes better operation and understanding of the Federal merit system disciplinary and appeals process by sharing information about MSPB processes and its legal precedents. All of these efforts, in turn, help to improve employee and organizational performance, improve service to the American people, and provide value to the taxpayer.

In FY 2019, MSPB staff conducted over 130 outreach events with a variety of customers and stakeholders. MSPB staff presented at the Federal Dispute Resolution conference, the American Society for Public Administration's annual conference, the Federal Circuit Bar Association's MSPB Summit, the International Personnel Assessment Council's annual conference, the Equal Employment Opportunity Commission's (EEOC) Examining Conflicts in Employment Law conference, and the Chicago-Kent School of Law's Federal Sector Labor Relations and Labor Law Conference.

MSPB's adjudication and studies work, and other activities involving MSPB, were cited over 700 times in at least 129 different print and online sources. Significant citations include a [letter](#) from the House Committee on Veterans' Affairs to the Secretary of the Department of Veterans Affairs (VA); a Congressional Research Service (CRS) Report entitled [Merit Systems Protection Board \(MSPB\): A Legal Overview](#); and from the MITRE Corporation's [Report: Symposium on the Federal Workforce for the 21<sup>st</sup> Century](#). More information about references to MSPB's work and its outreach and education activities can be found in the APR-APP for FY 2019-2021.

## International Activities

During FY 2019, MSPB hosted an official from Japan to educate him on U.S. Federal civil service policy and practice in specific areas, including hiring of individuals with disabilities, bullying and harassment in the workplace and agency preventive or response measures, and employment of older workers. MSPB also received visitors from Armenia and Brazil to discuss the MSPs, PPPs, current issues, new initiatives, and MSPB's jurisdiction and decision making process. MSPB developed a month-long professional fellowship program funded by the U.S. State Department, in which the AJ assigned to ORO hosted and supervised a visiting government official from the Republic of Armenia for discussions with various Board offices and employees regarding MSPB law and procedures for safeguarding the merit principles in the U.S. Federal Government. The AJ subsequently participated in a corresponding outbound project, spending ten days in Armenia, conducting presentations and exchanging ideas with government officials, academics, and representatives of non-profit organizations about fostering a merit-based civil service.

## Legislative and Congressional Relations Activity

MSPB staff monitored and analyzed several bills that might affect MSPB's jurisdiction and the agency's adjudication of appeals. Brief descriptions of some of these bills are provided here.

**S. 396 and H.R. 1235.**<sup>5</sup> These bills would have extended the holdover period for an MSPB Board member for one additional year under limited circumstances. The House bill, introduced as the MSPB Temporary Term Extension Act, would have applied only to then-Vice Chairman Mark Robbins and would not have applied to future Board members. The House passed H.R. 1235 on

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<sup>5</sup> S. 396, 116th Cong. (2019), available at <https://www.congress.gov/116/bills/s396/BILLS-116s396is.pdf>; MSPB Temporary Term Extension Act, H.R. 1235, 116th Cong. (2019), available at <https://www.congress.gov/116/bills/hr1235/BILLS-116hr1235rfs.pdf>.

February 25, 2019, while the Senate bill remains before the Senate Committee on Homeland Security and Governmental Affairs.

**Interim Stay Authority to Protect Whistleblowers Act (H.R. 2530).**<sup>6</sup> This bill would (1) provide authority to a single Board member to exercise authority regarding stays of personnel actions in the absence of a Board quorum,<sup>7</sup> and (2) provide authority to MSPB's General Counsel to exercise authority regarding stays of personnel actions in the absence of any Senate-confirmed Board members at the agency. The House Committee on Oversight and Reform reported H.R. 2530 to the House floor on June 12, 2019. It was included in the version of National Defense Authorization Act (NDAA) for FY 2020 passed by the House on July 12, 2019,<sup>8</sup> but was removed in conference from the version of the NDAA that was ultimately signed into law on December 20, 2019.<sup>9</sup>

**Merit Systems Protection Board Reauthorization Act of 2019 (H.R. 3357).**<sup>10</sup> This bill would reauthorize MSPB for a period of five years (FY 2020-2024). It would also: (1) require the MSPB to establish and collect filing fees from appellants; (2) permit the Board to grant motions for summary judgment; (3) limit the Board's mitigation authority; (4) require that an agency's action be sustained if supported by substantial evidence (a change to the current standard, which requires that an action based on unacceptable performance be supported by substantial evidence but an action based on misconduct be supported by preponderant evidence); (5) bar appeals from employees who have been placed on emergency furlough; (6) permit reappointment of Board members; and (7) amend the VA Accountability and Whistleblower Protection Act of 2017, 38 U.S.C. § 714, to clarify that appeals under that statute are to MSPB rather than to an MSPB AJ.

**Modern Employment Reform, Improvement and Transformation (MERIT) Act of 2019 (H.R. 3348<sup>11</sup> and S. 1898<sup>12</sup>).** This bill would make a number of changes to Federal personnel law. Those changes that would impact the MSPB's mission include the: (1) elimination of MSPB appeal rights for emergency furloughs which are defined as a furlough resulting from a lapse in appropriations; (2) creation of MSPB appeal rights regarding an agency's decision to reduce the annuity of an employee who is convicted of a felony for which an adverse action is or would have been taken; (3) creation of MSPB appeal rights regarding an agency's order directing an employee or former employee to repay all or a portion of an award or bonus when the agency head has determined that the employee or former employee has engaged in misconduct or unsatisfactory performance prior to the payment of the award or bonus; and (4) extension of the probationary period for Senior Executive Service (SES) and competitive service employees to two years. For competitive service employees, the bill would also require that an affirmative determination be made if the employee is to be retained beyond completion of the probationary period, which affords "employee" status to the retained employee that provides appeal rights should an adverse action be taken in the future.

**Other Congressional Activity.** MSPB staff conducted two briefings for congressional staff during this fiscal year. In addition to the annual House and Senate Appropriations Committee staff briefing on the agency's FY 2020 budget request, MSPB staff briefed staff from the House Committee on

<sup>6</sup> 116th Cong. (2019), available at <https://www.congress.gov/116/bills/hr2530/BILLS-116hr2530ih.pdf>.

<sup>7</sup> A single Board member may grant a stay or extend a stay in the absence of a quorum under 5 U.S.C. § 1214(b)(1)(B).

<sup>8</sup> H.R. 2500, 116th Cong. § 1115 (2019).

<sup>9</sup> See National Defense Authorization Act for FY 2020, Pub. L. No. 116-92, 133 Stat. 1198.

<sup>10</sup> 116th Cong. (2019), available at <https://www.congress.gov/116/bills/hr3357/BILLS-116hr3357ih.pdf>.

<sup>11</sup> 116th Cong. (2019), available at <https://www.congress.gov/116/bills/hr3348/BILLS-116hr3348ih.pdf>.

<sup>12</sup> 116th Cong. (2019), available at <https://www.congress.gov/116/bills/s1898/BILLS-116s1898is.pdf>.

Oversight and Reform, the House Committee on Veterans Affairs, and the Senate Committee on Homeland Security and Governmental Affairs. Briefing topics in FY 2019 included MSPB's Merit Principles Survey (MPS), its research into sexual harassment in the Federal Government, MSPB's stay authority, and new disciplinary provisions for supervisors committing retaliation, codified at 5 U.S.C. § 7515 by the NDAA for FY 2018.<sup>13</sup>

On February 28, 2019, the House Subcommittee on Government Operations held an oversight hearing titled [Effects of Vacancies at the Merit Systems Protection Board](#). The areas of focus included: (1) the impact of Board vacancies on MSPB operations; (2) the consequences of having no Board members; and (3) any impact on the political independence of the MSPB in light of the acting MSPB Chairman's dual appointments as MSPB Board member and OPM General Counsel. Acting Chairman Mark Robbins testified at the hearing.

On July 23, 2019, the House Committee on Veterans' Affairs Subcommittee on Oversight and Investigations held a hearing titled [Learning from Whistleblowers at the Department of Veterans Affairs](#). Tristan Leavitt, MSPB's General Counsel and Acting Chief Executive and Administrative Officer, testified at the hearing regarding MSPB's role in adjudicating whistleblower appeals.

## Internal Management Challenges and External Factors

The most significant internal management challenge currently facing MSPB is the lack of quorum of Board members. Other significant internal challenges that could affect MSPB's ability to carry out its mission include other human capital issues and information technology (IT) stability, security, and modernization. The most critical external factors are changes in law and jurisdiction, and Governmentwide reform. Limited information about these external factors and internal management challenges is provided here as context for the other information contained in the report. Detailed information about MSPB's external factors and internal management challenges is available in MSPB's APR-APP for FY 2019-2021.

**Lack of Board Quorum.** MSPB has been without a quorum of Board members since January 8, 2017. Additionally, MSPB has been without any Presidentially-appointed Senate-confirmed Board members since March 1, 2019. The lack of quorum has led to a backlog of PFRs and other cases at HQ awaiting Board decisions. This backlog totaled 2,378 cases at the end of September 2019, and it is growing every day. The lack of quorum also prevents MSPB from releasing reports of merit systems studies and promulgating certain regulations to accompany congressional changes in MSPB's jurisdiction or processes. The status of Board nominations appears on page four (4) of this document.

**Other Human Capital Challenges.** In addition to the lack of quorum, MSPB is affected by the retirement eligibility of its workforce, the Supreme Court's decision in *Lucia, et al. v. Securities and Exchange Commission* (138 S. Ct. 2044 (2018)), and the May 2018 Executive Orders (EOs) [13836](#), [13837](#), and [13839](#).<sup>14</sup> Over 35 percent of all MSPB employees, including over 47 percent of permanent AJs and adjudication managers involved with processing initial appeals, are eligible to retire between the end of FY 2019 and the end of 2022. It is also challenging to ensure continued expertise when employees in critical, one-deep positions depart the agency through retirement or

<sup>13</sup> Pub. L. No. 115-91 §1097(e) (2017).

<sup>14</sup> Exec. Order No. 13,836, Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, 83 Fed. Reg. 25,329 (May 25, 2018); Exec. Order No. 13,837, Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use, 83 Fed. Reg. 25,335 (May 25, 2018); and Exec. Order No. 13,839, Promoting Accountability and Streamlining Removal Procedures Consistent with Merit Systems Principles, 83 Fed. Reg. 25,343 (May 25, 2018).



transfer. *Lucia* has the potential to affect MSPB from both an adjudicatory and operational standpoint. MSPB hears appeals of adverse actions taken against ALJs under 5 U.S.C. § 7521, and MSPB case law regarding ALJs may be affected by *Lucia*. In addition, some parties have raised *Lucia* challenges regarding MSPB's AJs. If *Lucia* challenges regarding MSPB AJs are sustained, appellants who raised successful challenges may be entitled to new proceedings before an officer appointed in conformity with the Appointments Clause of the Constitution. The EOs require MSPB to renegotiate with its professional association provisions of the collective bargaining agreement (CBA) that are inconsistent with the requirements and priorities set forth in the orders. MSPB also must conform its non-CBA performance management guidance and practice.

**IT Infrastructure Stability and Modernization.** MSPB is focused on ensuring it has the IT infrastructure and the IT and information services expertise to execute its mission and modernize its systems, including implementing 100 percent electronic adjudication and obtaining a viable, secure, cloud-based survey capability. In FY 2019, we selected a contractor to design and implement the new core business applications and began configuration of the e-Appeal and initial appeals processing components. We expect to complete implementation of core business applications and related IT modernization projects by the end of calendar year 2021. In FY 2019, MSPB procured a secure, FedRAMP certified survey application to support its merit systems studies program and its internal and external customer surveys. The next step includes finalizing the requirements to use the application for Governmentwide surveys.

**Changes in Law, Jurisdiction, and Process.** Several statutory changes have occurred in the last few years. However, we have been unable to promulgate substantive adjudicatory regulations in response to these changes in law due to the lack of quorum. No new legislation was enacted in FY 2019 that impacts MSPB's adjudicatory or studies functions. Information about the status of pending legislation affecting MSPB is available in the legislative and congressional activities section of this report. EO 13839 may significantly affect MSPB's case processing due to its prohibition on agencies entering into "clean record" and other similar settlement agreements. The settlement rate dropped over 6 percent from FY 2017 compared to FY 2019 (53.36 percent compared to 47.02 percent, respectively). Reducing the percentage of cases that settle likely will increase the percentage of cases requiring a hearing, and adjudication is more complex now in general. EOs 13836 and 13837 could also lead to an increase in case receipts and may result in fewer appellants who are represented by unions on appeal.

**Governmentwide Reform and Potential Budget Reductions Beyond FY 2018.** In March 2019, the Office of Management and Budget (OMB) Published *Celebrating One Year of Progress: The President's Management Agenda Anniversary Report*, which includes specific accomplishments in the year since the President's Management Agency was published.<sup>15</sup> In July 2019, OMB published *One Year Update: Reform Plan and Reorganization Recommendations*.<sup>16</sup> Agencies are already beginning to implement their respective reform plans. Certain actions that may be taken by agencies as part of these reform efforts are likely to have an effect on MSPB's workload. For example, actions such as reductions in force and certain retirement actions are appealable to MSPB.

In addition to the possible impact on MSPB's adjudication workload and complexity, changes in law are likely to require changes in MSPB procedures, and possibly the need for additional MSPB resources. Changes in law and Government reform also emphasize the importance of MSPB's responsibility to conduct studies of Federal merit systems and review OPM's significant actions to ensure that the Federal workforce continues to be managed in accordance with MSPs and free from

<sup>15</sup> Executive Office of the President of the United States, March 20, 2019, at <https://www.performance.gov/PMA-celebrating-one-year-of-progress>.

<sup>16</sup> Executive Offices of the President of the United States, July 30, 2019, at <https://www.performance.gov/one-year-update-reform-reorg>.

PPPs. These changes increase the importance of MSPB's 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. These outreach and educational functions improve workforce management over time and may reduce the time and cost of processing appeals for agencies, appellants, and the Government as a whole.

## CASE PROCESSING STATISTICS FOR FY 2019

### Summary of Cases Decided by MSPB

Since January 8, 2017, MSPB has not had a quorum, which is required to issue final decisions on PFRs and other cases filed at HQ (except for actions taken on stay requests). Therefore, other than stay requests, there are no case processing statistics for HQ.

**Table 1: FY 2019 Summary of Cases Decided by MSPB**

Cases Decided in MSPB Regional and Field Offices	
Appeals	4,893
Addendum Cases <sup>1</sup>	190
Stay Requests <sup>2</sup>	29
<b>TOTAL Cases Decided in RO/FOs</b>	<b>5,112</b>
<b>Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction<sup>3</sup></b>	<b>6</b>
Cases Decided by the Board	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	0
Petitions for Review (PFRs) - Addendum Cases	0
Reviews of Stay Request Rulings	0
Requests for Stay of Board Orders	0
Reopenings	0
Court Remands	0
Compliance Referrals	0
EEOC Non-concurrence Cases	0
Arbitration Cases	0
<b>Subtotal - Appellate Jurisdiction</b>	<b>0</b>
Original Jurisdiction <sup>4</sup>	2
Interlocutory Appeals	0
<b>TOTAL Cases Decided by the Board</b>	<b>2</b>
<b>TOTAL Decisions (Board, ALJs, RO/FOs)</b>	<b>5,120</b>
<sup>1</sup> Includes 43 requests for attorney fees, one (1) board remand case, 109 compliance cases, 20 court remand cases, 12 requests for compensatory damages (discrimination cases only), and five (5) requests for consequential damages. <sup>2</sup> Includes 21 stay requests in whistleblower cases and eight (8) in non-whistleblower cases. <sup>3</sup> Initial Decisions by ALJ. Case type breakdown: one (1) Disciplinary Action - Hatch Act case, three (3) Actions Against SES cases, and two (2) Actions Against ALJs. <sup>4</sup> Final board decisions: two (2) requests for stay brought by OSC.	

## Cases Processed in the Regional and Field Offices

**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	2,092	1,132	54.11	960	45.89	488	50.83	472	49.17	
Termination of Probationers	388	370	95.36	18	4.64	13	72.22	5	27.78	
Reduction in Force	14	10	71.43	4	28.57	2	50.00	2	50.00	
Performance	113	41	36.28	72	63.72	37	51.39	35	48.61	
Acceptable Level of Competence (ALOC) <sup>3</sup>	29	14	48.28	15	51.72	10	66.67	5	33.33	
Suitability	61	28	45.90	33	54.10	22	66.67	11	33.33	
CSRS Retirement: <sup>4</sup> Legal	240	149	62.08	91	37.92	6	6.59	85	93.41	
CSRS Retirement: Disability	6	4	66.67	2	33.33	0	0.00	2	100.00	
CSRS Retirement: Overpayment	62	28	45.16	34	54.84	23	67.65	11	32.35	
FERS Retirement: <sup>4</sup> Legal	183	127	69.40	56	30.60	5	8.93	51	91.07	
FERS Retirement: Disability	223	166	74.44	57	25.56	0	0.00	57	100.00	
FERS Retirement: Overpayment	201	93	46.27	108	53.73	70	64.81	38	35.19	
FERCCA <sup>4</sup>	16	12	75.00	4	25.00	0	0.00	4	100.00	
Individual Right of Action	490	346	70.61	144	29.39	71	49.31	73	50.69	
USERRA	123	54	43.90	69	56.10	40	57.97	29	42.03	
VEOA <sup>5</sup>	90	51	56.67	39	43.33	9	23.08	30	76.92	
Other <sup>6</sup>	562	541	96.26	21	3.74	16	76.19	5	23.81	
<b>Total</b>	<b>4,893</b>	<b>3,166</b>	<b>64.70</b>	<b>1,727</b>	<b>35.30</b>	<b>812</b>	<b>47.02</b>	<b>915</b>	<b>52.98</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.

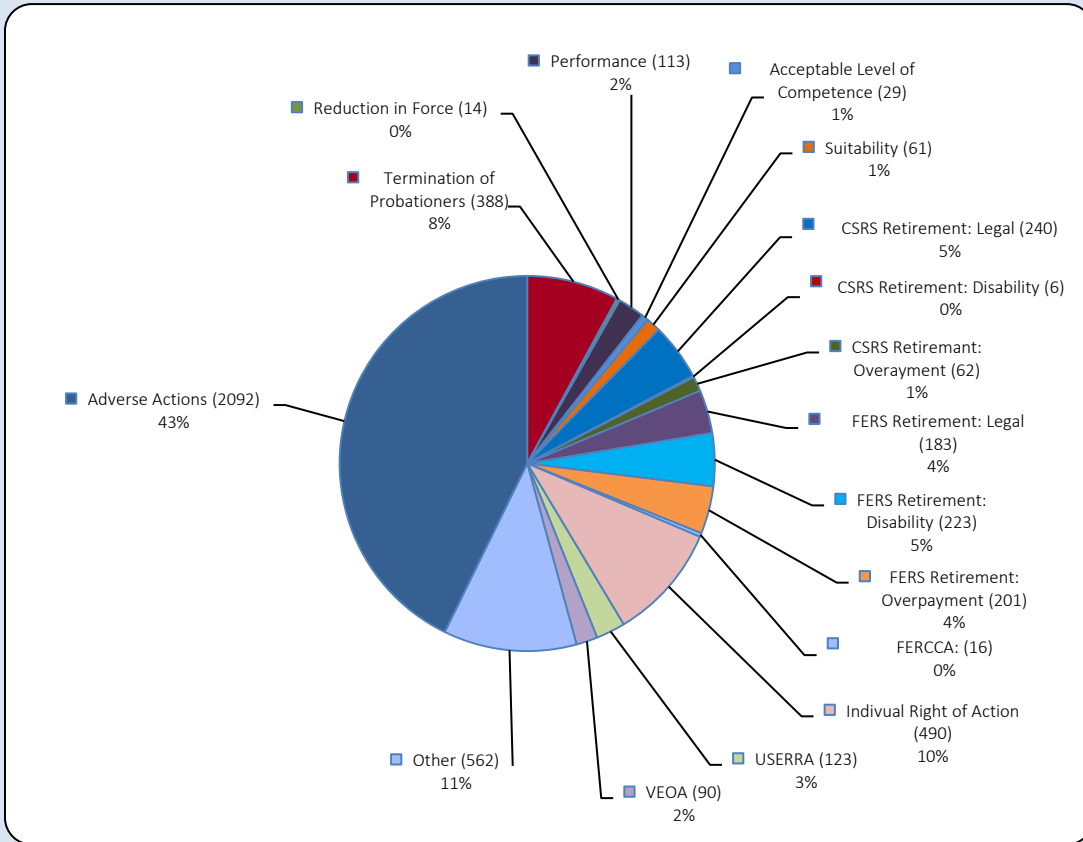
<sup>3</sup> ALOC means an employee is effectively performing the duties and responsibilities of his or her assigned job, which warrants advancing the employee's rate of pay to the next higher step at the grade of the employee's position. If an employee's performance is not at an ALOC, then the agency must under most circumstances, deny his or her within-grade increase.

<sup>4</sup> Civil Service Retirement System (CSRS); Federal Employees Retirement System (FERS); and Federal Erroneous Retirement Coverage Corrections Act (FERCCA).

<sup>5</sup> The Veterans Employment Opportunity Act of 1998 (VEOA).

<sup>6</sup> "Other" appeals include Restoration to Duty (43), Miscellaneous (466), and additional types such as Reemployment Priority, Employment Practices, and others.

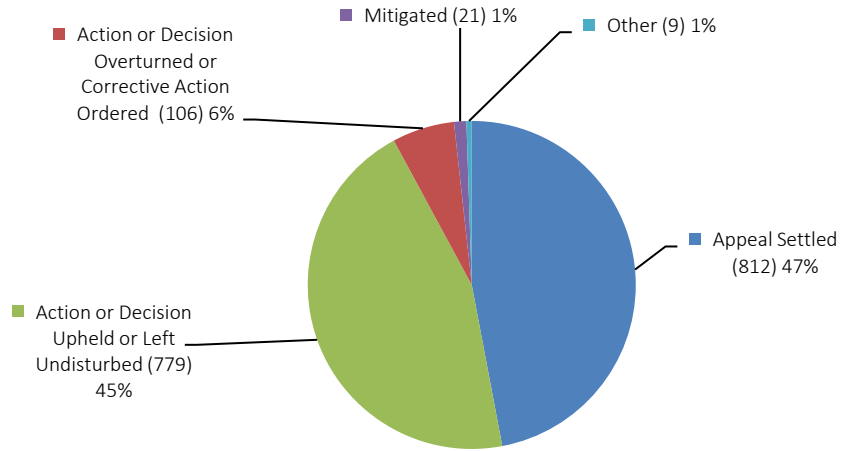
**Figure 1: Type of Appeals Decided in the Regional and Field Offices**



Total Number of Appeals: 4,893

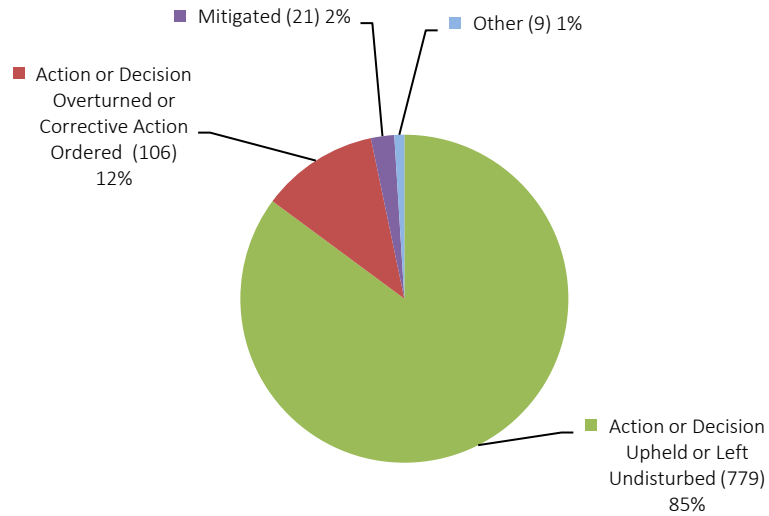
Note, some percentages display as "0" due to rounding.

**Figure 2: Dispositions of Initial Appeals Not Dismissed by Regional/Field Offices**



Total Number of Appeals that Were Not Dismissed: 1,727

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



Based on 915 Appeals Adjudicated on the Merits

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

Agency	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	%	#	%	#	%	#	%	#	%
Office of Personnel Management <sup>3</sup>	970	61.0	592	39.0	378	39.0	124	32.8	254	67.2
Department of Veterans Affairs	830	67.6	561	32.4	269	32.4	108	40.1	161	59.9
United States Postal Service	514	65.2	335	34.8	179	34.8	131	73.2	48	26.8
Department of the Army	443	66.6	295	33.4	148	33.4	79	53.4	69	46.6
Department of the Navy	327	67.9	222	32.1	105	32.1	62	59.0	43	41.0
Department of Homeland Security	278	66.5	185	33.5	93	33.5	37	39.8	56	60.2
Department of Defense	219	62.6	137	37.4	82	37.4	33	40.2	49	59.8
Department of the Air Force	216	66.7	144	33.3	72	33.3	39	54.2	33	45.8
Department of Justice	165	62.4	103	37.6	62	37.6	30	48.4	32	51.6
Department of the Treasury	130	62.3	81	37.7	49	37.7	21	42.9	28	57.1
Department of Health and Human Services	123	71.5	88	28.5	35	28.5	20	57.1	15	42.9
Department of Agriculture	102	52.0	53	48.0	49	48.0	21	42.9	28	57.1
Department of the Interior	95	55.8	53	44.2	42	44.2	30	71.4	12	28.6
Social Security Administration	84	72.6	61	27.4	23	27.4	8	34.8	15	65.2
Department of Transportation	78	65.4	51	34.6	27	34.6	12	44.4	15	55.6
Department of Commerce	55	50.9	28	49.1	27	49.1	13	48.1	14	51.9
Department of Labor	32	68.8	22	31.3	10	31.3	6	60.0	4	40.0
Department of Energy	23	60.9	14	39.1	9	39.1	3	33.3	6	66.7
Department of Housing and Urban Development	23	65.2	15	34.8	8	34.8	3	37.5	5	62.5
Department of State	19	68.4	13	31.6	6	31.6	3	50.0	3	50.0
Smithsonian Institution	18	61.1	11	38.9	7	38.9	2	28.6	5	71.4
General Services Administration	10	40.0	4	60.0	6	60.0	6	100.0	0	0.0
National Aeronautics and Space Administration	10	50.0	5	50.0	5	50.0	2	40.0	3	60.0
Tennessee Valley Authority	10	90.0	9	10.0	1	10.0	1	100.0	0	0.0
Equal Employment Opportunity Commission	9	88.9	8	11.1	1	11.1	0	0.0	1	100.0
Environmental Protection Agency	8	62.5	5	37.5	3	37.5	0	0.0	3	100.0

**Table 3: Disposition of Appeals by Agency (cont.)**

Agency	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	#	%	#	%	#	%	#	%	
Federal Deposit Insurance Corporation	8	5	62.5	3	37.5	0	0.0	3	100.0	
National Archives and Records Administration	8	3	37.5	5	62.5	4	80.0	1	20.0	
Office of Special Counsel	7	7	100.0	0	0.0	0	0.0	0	0.0	
Armed Forces Retirement Home	6	6	100.0	0	0.0	0	0.0	0	0.0	
Court Services and Offender Supervision Agency for DC	6	6	100.0	0	0.0	0	0.0	0	0.0	
Small Business Administration	6	6	100.0	0	0.0	0	0.0	0	0.0	
Department of Education	4	3	75.0	1	25.0	1	100.0	0	0.0	
Government Publishing Office	4	1	25.0	3	75.0	3	100.0	0	0.0	
Securities and Exchange Commission	4	1	25.0	3	75.0	2	66.7	1	33.3	
Agency for International Development	3	2	66.7	1	33.3	0	0.0	1	100.0	
Federal Election Commission	3	2	66.7	1	33.3	0	0.0	1	100.0	
Federal Housing Finance Agency	3	3	100.0	0	0.0	0	0.0	0	0.0	
National Credit Union Administration	3	3	100.0	0	0.0	0	0.0	0	0.0	
Nuclear Regulatory Commission	3	1	33.3	2	66.7	2	100.0	0	0.0	
Broadcasting Board of Governors	2	1	50.0	1	50.0	0	0.0	1	100.0	
Corporation for National and Community Service	2	0	0.0	2	100.0	1	50.0	1	50.0	
Export-import Bank of the United States	2	0	0.0	2	100.0	2	100.0	0	0.0	
Library of Congress	2	2	100.0	0	0.0	0	0.0	0	0.0	
Millennium Challenge Corporation	2	1	50.0	1	50.0	1	100.0	0	0.0	
National Labor Relations Board	2	1	50.0	1	50.0	0	0.0	1	100.0	
Railroad Retirement Board	2	1	50.0	1	50.0	0	0.0	1	100.0	
The White House	2	2	100.0	0	0.0	0	0.0	0	0.0	



**Table 3: Disposition of Appeals by Agency (cont.)**

Agency	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	%	#	%	#	%	#	%	#	%
Architect of the Capitol	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Architectural and Transportation Barriers Compliance Board	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Chemical Safety Hazard Investigation Board	1	0.0	0	0.0	1	100.0	1	100.0	0	0.0
Commission on Civil Rights	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Consumer Product Safety Commission	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Election Assistance Commission	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Executive Office of the President, Office of the Administration	1	0.0	0	0.0	1	100.0	1	100.0	0	0.0
Federal Mediation and Conciliation Service	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Federal Retirement Thrift Investment Board	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
International Boundary and Water Commission: U.S. and Mexico	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Judicial Branch	1	0.0	0	0.0	1	100.0	0	0.0	1	100.0
Merit Systems Protection Board	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
National Science Foundation	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
National Transportation Safety Board	1	0.0	0	0.0	1	100.0	0	0.0	1	100.0
Office of Management and Budget	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Office of the Director of National Intelligence	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
St. Lawrence Seaway Development Corporation	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Other	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
<b>Total</b>	<b>4,893</b>	<b>64.7</b>	<b>3,166</b>	<b>35.3</b>	<b>1,727</b>	<b>812</b>	<b>47.0</b>	<b>915</b>	<b>53.0</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> Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the CSRS and FERS administrator.

**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 <sup>2</sup>	254	216	85.04	30	11.8	0	0.0	8	3.1
Department of Veterans Affairs	161	144	89.44	17	10.6	0	0.0	0	0.0
Department of the Army	69	52	75.36	10	14.5	7	10.1	0	0.0
Department of Homeland Security	56	48	85.71	5	8.9	3	5.4	0	0.0
Department of Defense	49	45	91.84	3	6.1	1	2.0	0	0.0
United States Postal Service	48	33	68.75	12	25.0	3	6.3	0	0.0
Department of the Navy	43	35	81.40	6	14.0	2	4.7	0	0.0
Department of the Air Force	33	29	87.88	3	9.1	1	3.0	0	0.0
Department of Justice	32	27	84.38	5	15.6	0	0.0	0	0.0
Department of Agriculture	28	21	75.00	5	17.9	1	3.6	1	3.6
Department of the Treasury	28	27	96.43	1	3.6	0	0.0	0	0.0
Department of Health and Human Services	15	13	86.67	2	13.3	0	0.0	0	0.0
Department of Transportation	15	13	86.67	1	6.7	1	6.7	0	0.0
Social Security Administration	15	13	86.67	1	6.7	1	6.7	0	0.0
Department of Commerce	14	12	85.71	2	14.3	0	0.0	0	0.0
Department of the Interior	12	11	91.67	0	0.0	1	8.3	0	0.0
Department of Energy	6	5	83.33	1	16.7	0	0.0	0	0.0
Department of Housing and Urban Development	5	5	100.00	0	0.0	0	0.0	0	0.0
Smithsonian Institution	5	5	100.00	0	0.0	0	0.0	0	0.0
Department of Labor	4	4	100.00	0	0.0	0	0.0	0	0.0
Department of State	3	3	100.00	0	0.0	0	0.0	0	0.0
Environmental Protection Agency	3	3	100.00	0	0.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	3	2	66.67	1	33.3	0	0.0	0	0.0
National Aeronautics and Space Administration	3	3	100.00	0	0.0	0	0.0	0	0.0
Agency for International Development	1	1	100.00	0	0.0	0	0.0	0	0.0
Broadcasting Board of Governors	1	1	100.00	0	0.0	0	0.0	0	0.0

**Table 4: Disposition of Initial Appeals Adjudicated on the Merits  
by Agency (cont.)**

Agency	Adjudicated <sup>1</sup>	Affirmed		Reversed		Mitigated/ Modified		Other	
	#	#	%	#	%	#	%	#	%
Corporation for National and Community Service	1	1	100.00	0	0.0	0	0.0	0	0.0
Equal Employment Opportunity Commission	1	1	100.00	0	0.0	0	0.0	0	0.0
Federal Election Commission	1	1	100.00	0	0.0	0	0.0	0	0.0
Judicial Branch	1	1	100.00	0	0.0	0	0.0	0	0.0
National Archives and Records Administration	1	1	100.00	0	0.0	0	0.0	0	0.0
National Labor Relations Board	1	0	0.00	1	100.0	0	0.0	0	0.0
National Transportation Safety Board	1	1	100.00	0	0.0	0	0.0	0	0.0
Railroad Retirement Board	1	1	100.00	0	0.0	0	0.0	0	0.0
Securities and Exchange Commission	1	1	100.00	0	0.0	0	0.0	0	0.0
<b>Total</b>	<b>915</b>	<b>779</b>	<b>85.1</b>	<b>106</b>	<b>11.6</b>	<b>21</b>	<b>2.3</b>	<b>9</b>	<b>1.0</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 CSRS and FERS administrator. Percentages may not total 100 because of rounding.

### Cases Processed at Headquarters

Other than two stay requests (see Table 1), the lack of quorum prevented MSPB from issuing any decisions from HQ during FY 2019. Therefore, there are no further HQ case processing statistics contained in this AR. At the end of FY 2019, MSPB had 2,378 PFR cases pending at HQ. However, 24 cases were withdrawn in FY 2019 under a new procedure begun in May 2018. These withdrawals were not Board decisions so they are not included in HQ case processing statistics.

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## SIGNIFICANT COURT OPINIONS ISSUED IN FY 2019

As stated earlier, due to the lack of quorum, the Board did not issue any significant decisions in FY 2019. As a service to MSPB's stakeholders, we have provided brief summaries of significant opinions issued by the CAFC and one by the U.S. Court of Appeals for the First Circuit in a whistleblower case.

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

#### Adverse Action Charges/Drug Related

*Hansen v. Department of Homeland Security*, [911 F.3d 1362](#) (Fed. Cir. 2018): After the petitioner failed a random drug test, the agency proposed his removal for “positive test for illegal drug use—marijuana.” The deciding official considered the petitioner’s justification that he had inadvertently ingested the marijuana but found the explanation unconvincing and sustained his removal. The petitioner appealed his removal to MSPB, which affirmed the agency’s action, and the petitioner appealed to the CAFC. The court agreed with the AJ that the petitioner occupied a position subject to random drug testing, that the agency did not need to prove intent to establish the charge of “positive test for illegal drug use—marijuana,” and that the undisputedly positive test result sufficed to prove the charge. The court further found that the agency did not need to prove intent to establish that the petitioner’s conduct affected the efficiency of the service or that his removal was reasonable, although the court acknowledged that the Board must consider evidence of inadvertence in assessing the reasonableness of the penalty. The court held that, while evidence regarding the absence of intent may be relevant to rebut the agency’s showing of nexus or the reasonableness of the penalty, it is the employee’s burden to come forward with such rebuttal evidence. The court found that the AJ properly applied this framework and found no error in his conclusion that the petitioner failed to persuasively rebut the Government’s showing of nexus or its choice of penalty. The court declined to consider the petitioner’s challenges to the random drug testing that he raised for the first time on review.

#### Attorney Fees

*American Federation of Government Employees Local 3599 v. EEOC*, [920 F.3d 794](#) (Fed. Cir. 2019): The court, which reviews arbitration decisions under the same standard of review as Board decisions, vacated the arbitrator’s denial of attorney fees in connection with a successful arbitration. The court explained that, although it affords “great deference to the Board (or an arbitrator standing in the place of the Board) on questions of entitlement to attorney fees,” the adjudicator must provide a sufficient explanation for his decision. Here, the arbitrator failed to provide any explanation in support of his decision to deny attorney fees. The court observed that, although the entitlement to attorney fees in a particular case could be so clear that the court could affirm or reverse the denial of fees in the absence of an explanation from the adjudicator as to why he denied the fee award, such as when no application of the relevant factors could justify the opposite result, this was not such a case. Accordingly, the court remanded the attorney fee issue to the arbitrator, directing him to include “a statement of reasons for whatever decision [he] reaches.” The court also noted that, although an arbitrator may not revise his merits decision as a basis for denying attorney fees, a decision on a fee award need not be limited to the factual findings and conclusions contained in the merits decision.

## Constructive Actions

*Jenkins v. MSPB*, [911 F.3d 1370](#) (Fed. Cir. 2019): The CAFC held that when an agency has rescinded an effectuated removal action during the pendency of an appeal, eliminated all references to the action from the employee's official personnel file, and substituted retirement as the reason for the separation, the appeal of the removal is rendered moot. Under these circumstances, the court held that 5 U.S.C. § 7701(j) is inapplicable. Section 7701(j) provides that the Board, "in determining the appealability . . . of any case involving a removal from the service," may not consider "an individual's status under any retirement system established by or under Federal statute." The court reasoned that once the removal action has been fully rescinded, the case no longer involves a removal and § 7701(j) does not apply. The court found that substantial evidence supported the Board's finding that the petitioner voluntarily retired and that his retirement was not the product of misinformation or coercion.

## Due Process

*Boss v. Department of Homeland Security*, [908 F.3d 1278](#) (Fed. Cir. 2018): During arbitration regarding the petitioner's 15-day suspension based on three charges, the deciding official conceded that he had considered three documents related to the first charge that had not been provided to the petitioner or the union. The arbitrator found that the deciding official's consideration of the *ex parte* information constituted a due process violation and vacated the first charge. However, he found that the second and third charges were not affected by the due process violation, sustained those charges, and mitigated the penalty to a 10-day suspension. The petitioner appealed the arbitration decision to the CAFC, and the court, which reviews arbitration decisions in the same manner as Board decisions, affirmed the decision. The court held that the constitutional due process analysis should be applied on a charge-by-charge basis, explaining that when an agency charges an employee with multiple offenses, the adjudicator may address the merits of charges that were unaffected by the due process violation and need not set aside the entire action on due process grounds. The court acknowledged its holding in *Stone v. Federal Deposit Insurance Corporation*, 179 F.2d 1368 (Fed. Cir. 1999), that a procedural due process violation due to *ex parte* communications requires a new constitutionally correct procedure and is not subject to the harmless error test. The court clarified that such a violation would only prevent an adjudicator from analyzing whether the agency would have disciplined the employee for the defective charge in the absence of the procedural defect, and not from sustaining an adverse action based on other charges unaffected by the due process violation. The court distinguished Board cases that had found that a due process violation requires reversal of the entire action without any consideration of the merits of the charges, explaining that those cases were either single-charge cases or cases in which the due process error had infected all of the charges.

*Do v. Department of Housing and Urban Development*, [913 F.3d 1089](#) (Fed. Cir. 2019): The agency demoted and suspended the petitioner for "negligence of duty" in hiring and later promoting an employee who did not possess a college degree, which the agency claimed was required for the positions at issue. The petitioner appealed the demotion and suspension to the Board. The AJ found that a college degree was not required for the positions and that the employee alternatively could qualify for the positions with combination of education and experience. Nevertheless, she affirmed the agency's actions, finding that the petitioner was negligent because she failed to investigate whether the employee met the alternative qualification requirements for the positions. The petitioner appealed the decision to the CAFC, which reversed the initial decision and remanded the matter for further adjudication. The court found that, although the Board is required to limit its review of an agency's action to the grounds specified in the proposal notice and relied upon by the deciding

official, the AJ sustained the agency's action on the basis of an alternative theory that did not appear anywhere in the notice or the deciding official's decision. The court found that the AJ's departure from the agency's decision was "significant" and constituted a violation of the petitioner's due process rights, as she did not receive notice and an opportunity to respond to this alternative theory. The court rejected the agency's harmless error arguments, finding that even if it applied a harmless error test here, there was no basis to conclude that the errors were harmless.

*Hornseth v. Department of the Navy*, [916 F.3d 1369](#) (Fed. Cir. 2019): The agency suspended the petitioner's access to classified information and, because he could not perform the essential functions of his position without such access, indefinitely suspended him. The petitioner appealed his indefinite suspension to the MSPB, which affirmed the agency's action, and the petitioner appealed to the CAFC. The court found that the AJ properly sustained the charge, agreeing that a security clearance was required for the petitioner's position, that it was revoked, and that the procedures set forth in 5 U.S.C. § 7513(b) were satisfied because the petitioner received notice, had an opportunity to respond and be represented, and was provided with a written decision with reasons. The court also agreed with the AJ that the deciding official's *ex parte* communications with HR following the petitioner's response to the proposed action did not violate the petitioner's due process rights because they were cumulative and did not introduce new information. However, the court disagreed with the AJ's determination that to comport with due process, the deciding official must be able to take or recommend alternative agency action based on the employee's reply. The court found that an employee has a right to be transferred to a non-sensitive position *only* if that right is conferred by a statute or regulation and held that, because no alternative position was authorized here, the AJ erred in finding that the deciding official was required to be able to direct or recommend alternative placement. Nonetheless, the court concluded that this error was harmless because the petitioner received all of the procedural protections provided by law. The court acknowledged that a deciding official must have the authority to act on behalf of the agency but found that the requirement was met here because, pursuant to the Navy instructions regarding adverse decisions, the designated official had authority to either make or recommend a decision on the proposed action.

*Robinson v. Department of VA*, [923 F.3d 1004](#) (Fed. Cir. 2019): The petitioner, a senior management official in Phoenix, was removed from his VA position following an inspector general investigation and a Senate committee hearing on the topic of mismanagement of veterans' health care at the Phoenix facility. The day before the agency issued the proposal to remove him, the Deputy VA Secretary was quoted in *The New York Times* to the effect that he was disappointed it had taken so long to remove the petitioner and other executives responsible for mismanagement. The petitioner appealed to the MSPB, which sustained his removal. The CAFC affirmed the MSPB's findings and penalty determination. The court considered the petitioner's due process arguments, including that he was not given an opportunity to respond to the proposed removal before it was discussed in a press article. The court agreed that the reported statements by the Deputy VA Secretary were "troublesome" but did not disturb the MSPB's credibility findings, which credited the Deputy VA Secretary's testimony that *The New York Times* had misquoted him and that he did not predetermine the outcome of the case. The court also noted that the removal decision showed that the Deputy VA Secretary considered the petitioner's response – and, indeed, dismissed one of the specifications as a result of the petitioner's response – and thus the due process requirements of pre-termination notice and an opportunity to be heard were satisfied.

## Removal Pursuant to Title 38

*Cerwonka v. Department of VA*, [915 F.3d 1351](#) (Fed. Cir. 2019): The agency employed the petitioner as a Clinical Psychologist in Louisiana, and he was licensed to practice psychology in both Louisiana and New York. After the Louisiana State Board of Examiners of Psychologists revoked his license for cause, the agency removed him from his position pursuant to 38 U.S.C. § 7402(f), which provides that a person may not be employed as a psychologist if he is licensed in more than one state and any of those states terminates his license for cause. The petitioner appealed his removal to the MSPB, which affirmed the removal, and the petitioner appealed to the CAFC. The court found that 38 U.S.C. § 7402(f) controlled the petitioner's removal and that the agency therefore was not required to comply with 5 U.S.C. Chapter 75 standards in effecting his removal, i.e., by addressing nexus and the reasonableness of the penalty. Rather, the court found, under 38 U.S.C. § 7402(f), the agency was required to remove the petitioner once one of his state licenses was removed for cause, and it was not permitted to consider other factors or to exercise any discretion. Accordingly, the court found that the agency's action here complied with 38 U.S.C. § 7402(f). Regarding the petitioner's contention that his removal was unjustified because his Louisiana license has been reinstated, the court found that the express terms of 38 U.S.C. § 7402(f) compelled his removal at the time his license was revoked and did not permit the agency to consider subsequent events or to impose a lesser penalty. The court found no merit to the petitioner's remaining arguments regarding his retaliation affirmative defense and procedural errors by the agency and AJ.

## Timeliness

*Kerr v. MSPB*, [908 F.3d 1307](#) (Fed. Cir. 2018): The CAFC held that the petitioner demonstrated good cause to waive the nearly 10-year untimeliness of her MSPB appeal because she had a reasonable basis for thinking that the district court could resolve her whistleblower claims along with her mixed-case claims. The court reversed the Board's decision dismissing the petitioner's appeal as untimely and remanded for further proceedings. The court determined that the petitioner reasonably relied on a 10th Circuit decision that held that a whistleblower claim could be decided in the first instance by a district court. The court stated that filing a case in the wrong forum can be excused when a claimant actively pursued her remedies by filing the defective pleading within the statutory period. The court found that good cause was further supported by the defectiveness of the notice in the petitioner's employing agency's Final Agency Decision, which "did not warn the petitioner that she would waive her non-discriminatory claim by failing to file at the MSPB." The court stated that it was reasonable for the petitioner to continue litigating her case all the way to the Supreme Court given the split between the 9th and 10th circuits on whether a district court could review a whistleblower claim that had not been reviewed administratively (despite the fact that the petitioner was litigating her case in the 9th Circuit). Finally, the court rejected the argument that the petitioner made an election when she chose to file in district court. The court stated that the petitioner was merely seeking review of her whistleblower claim in the first instance, not a second chance to relitigate the claim. The court held that election of remedies has no application when the elected remedy is not available in the selected forum.

## USERRA/Exclusion of Evidence

*Sharpe v. Department of Justice*, [916 F.3d 1376](#) (Fed. Cir. 2019): The petitioner, a GS-13 Drug Enforcement Administration agent and a reservist in the Navy until 2008, applied for 14 GS-14 positions over several years and was placed on the Best Qualified List for each, but was never selected. He challenged the 14 non-selections before the MSPB, alleging that the agency discriminated against him in violation of USERRA by relying on the recommendations of his



supervisor, whom he alleged was hostile toward reservists. Before the MSPB, the petitioner sought to introduce an email sent by another supervisor to a different reservist who had also filed a USERRA claim. The petitioner's supervisor was copied on this email. The email had the subject line, "You are a coward..." and the text stated, "I do not know how to phrase it any other way... Do NOT ever contact me again." The MSPB excluded the email from the proceedings as irrelevant, and denied the petitioner's request for corrective action on the ground that he failed to show that his reservist status was a substantial or motivating factor in the non-selections. The CAFC reversed, finding that the AJ abused his discretion by excluding the email and preventing the petitioner from questioning his supervisor about it. The court held that his supervisor's response to the email was relevant, and that his supervisor should have been allowed to discuss the email as foundation for that relevant testimony.

### **Whistleblowing/Merits Analysis Using *Carr* Factors**

*Siler v. Environmental Protection Agency*, [908 F.3d 1291](#) (Fed. Cir. 2018): The petitioner was removed from his position of Special Agent pursuant to charges of engaging in conduct unbecoming a criminal investigator, improperly using a Government computer for outside business, and failing to report an outside business. The petitioner alleged that he was removed in reprisal for whistleblowing. The MSPB affirmed the removal. During the course of the MSPB litigation, the petitioner sought the production of emails related to drafts of his proposed removal, but the agency asserted that the documents were protected by the attorney-client privilege. The court found that because the agency made no actual showing of why the documents should be considered privileged, the MSPB improperly denied the petitioner's request for production of those documents. The court additionally found that the MSPB erred when determining whether the agency had proven by clear and convincing evidence that it would have removed the petitioner even if he had not made whistleblowing disclosures. The court held that the MSPB incorrectly analyzed *Carr* factor three regarding how the agency treated comparators who were not whistleblowers, by instead assessing how the agency treated comparators who were whistleblowers. *See Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999). The court further held that the MSPB incorrectly found that the agency's lack of evidence of non-whistleblower comparators favored the agency.

*Smith v. General Services Administration*, [930 F.3d 1359](#) (Fed. Cir. 2019): The petitioner was removed from his position of Senior Financial Advisor for failing to comply with an IT policy, failing to follow supervisory instructions, and disrespectful conduct toward a supervisor. The petitioner alleged that he was removed in reprisal for whistleblowing. The MSPB affirmed the agency's decision on the basis that the agency proved by clear and convincing evidence that it would have removed the petitioner even absent his whistleblowing activity. The court reversed and remanded the MSPB's decision, holding that the MSPB's decision applied an incorrect standard by improperly conflating whether the removal was justified and whether the removal would have been effected absent whistleblower activity. The court further held that the MSPB failed to properly analyze factors two (strength of agency motive to retaliate) and three (evidence that the agency takes action against similarly-situated non-whistleblowers) of the *Carr* analysis relevant to the determination of whether the agency proved by clear and convincing evidence that it would have removed the appellant absent any whistleblowing activity. *See Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999). Additionally, with respect to the MSPB's decision to sustain the charges against the petitioners, the court held that the affirmance of the charges of failing to comply with IT policy and failure to follow supervisory instructions were not supported by substantial evidence. For the IT policy charge, the court found that the agency failed to prove the agency's IT policy requiring employees to remove personal identity verification (PIV) security cards from their computers applied to the petitioner, a quadriplegic who lacked the ability to remove his PIV security card. For

the supervisory instruction charge, the court found that the agency failed to produce any evidence that its instruction to the petitioner not to work on weekends was a valid agency policy.

### **Significant Opinions in Whistleblower Appeals Issued by Other Circuit Courts**

*Mount v. Department of Homeland Security*, [937 F.3d 37](#) (1st Cir. 2019): The First Circuit held that the WPA only requires that a complainant include a sufficient factual basis for the Office of Special Counsel (OSC) to investigate rather than the overly-stringent exhaustion requirement the court believed had been applied by MSPB. The Board had rejected Mr. Mount’s claim that his supervisors “perceived” him as engaging in protected whistleblowing activity based on a finding that his OSC complaint did not allege facts that would put OSC on notice of the perceived whistleblower claim. The First Circuit held that the exhaustion language in the Whistleblower Protection Act (WPA) was simple and brief and should not be read “in a way that drastically conditions the rights that the WPA seeks to protect and makes it harder for whistleblowers to obtain relief.” The court found that the WPA’s legislative history supported this view. The court stated that it believed the correct approach is to interpret the WPA’s exhaustion requirement consistent with the exhaustion schemes of the Federal Tort Claims Act and Title VII of the Civil Rights Act. The court also pointed to Board decisions where the Board applied less stringent formulations of the exhaustion requirement. The court concluded that “it is unnecessary for an employee to correctly label the cause of action or legal theory behind his claim for it to be deemed exhausted before the OSC,” so long as there is a sufficient basis for OSC to investigate. The court remanded to the Board for further proceedings consistent with its opinion.

## SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2019

In addition to adjudicating appeals, MSPB is charged with conducting studies of the civil service and merit systems. MSPB's high-quality, objective studies provide value by assessing current management policies and practices, identifying innovative and effective merit-based approaches to current workplace issues, and making recommendations for improvements. Overall, this benefits American taxpayers in terms of decreased Governmentwide costs and increased confidence that the Government is doing its job and appropriately managing the workforce.

OPE's research and publications were cited at least 73 times during FY 2019, in diverse outlets such as national and specialty newspapers, online newsletters, radio, and publications from good Government groups. Notably, during FY 2019 information in OPE publications was explicitly relied upon in OPM's new hiring guidance; in a letter from the House Veterans' Affairs Committee to VA leadership; in a report from the USDA Inspector General; in testimony before the U.S. Commission on Civil Rights; and in a report from the CRS to the House Committee on Oversight and Reform. These references show that the voice of MSPB's studies program has a broad reach among officials with high-level oversight, investigative, and policy-setting responsibilities.

During FY 2019, OPE also conducted 15 outreach events. These events ranged from presentations on sexual harassment for Government Accountability Office (GAO) staff, congressional staff, and HR officials; recounting the history and structure of the civil service agencies for an HR career development program; workshops for supervisors aimed at improving employee performance; and educating international visitors about the career civil service system in the United States.

### Publications Issued

MSPB did not issue any formal reports to the President and Congress under 5 U.S.C. § 1204(a)(3) because of the continued lack of quorum. However, OPE published three editions of its [Issues of Merit newsletter](#), which included articles on various topics such as direct-hire authority, veterans' rights in Federal employment, the performance appraisal process, locality pay, and assessing applicants. In addition, OPE published four research briefs.

- [Improving Federal Leadership Through Better Probationary Practices](#) (May 2019) discusses policy and agency practice related to supervisory and managerial probationary periods. Recognizing that supervision is a distinctive and important responsibility, civil service law provides for a probationary period for new supervisors and managers. This publication examines how the supervisory and managerial probationary periods are being used by agencies, identifies barriers to using them more effectively, and outlines steps that agencies can take to improve Federal leadership through better probationary practices.
- [The Perceived Incidence of Prohibited Personnel Practices](#) (June 2019) presents data on employee experience or observation of the 14 PPPs enumerated in civil service law. The report documents an increase since 2010 in the percentage of employees who believe they have experienced or observed a PPP and discusses how PPPs, whether perceived or actual, can damage leadership's credibility and employee commitment.
- [Remedying Unacceptable Employee Performance in the Federal Civil Service](#) (June 2019) discusses how Federal supervisors address the issue of unacceptable employee performance. Data indicate that Federal supervisors often try several different measures, but that no measure is consistently successful. The brief outlines reasons why certain measures might work or

prove unavailing, and outlines steps that agencies can take to both remediate performance and to prevent unsatisfactory performance that is grounded in sub-optimal hiring practices or bad job fit.

- [\*Managing Employees to Perform Emotionally Laborious Work\*](#) (July 2019) discusses the prevalence and effects of emotional labor—the requirement to display and manage emotions to perform work. Such labor is common and essential in many public service organizations, such as those that provide human services or respond to crises. Using data from MSPB’s 2016 MPS, the brief discusses how some employees’ need to conceal or feign emotions on the job can contribute to emotional fatigue, reduced performance, and decreased retention. The brief outlines measures that some Federal agencies have taken to help employees prepare for and recover from emotional labor.

### **Other Studies Activity**

MSPB last updated its studies research agenda in early 2015. In FY 2019, OPE solicited ideas from stakeholders for another update of the research agenda. OPE vetted and refined ideas from the hundreds of suggestions received and compiled a list of 40 proposed topics, which comprise both new areas of study and subjects that build on previous research. The next steps are consultation with the Vice Chairman and Member (once confirmed), followed by review, possible modification, and approval of the final agenda by the Chairman (once confirmed).

MSPB acquired a secure web-based survey platform during FY 2019. The new system must be subjected to a security assessment and the Chief Information Officer (CIO) must grant an authority to operate before MSPB can field a survey directed to employees of other agencies. Obtaining survey data is a critical source of information for many topics on the research agenda, and a project with a long lead-time. OPE’s tentative plan is to conduct a large survey in calendar year 2020, with the precise timing (4<sup>th</sup> quarter of FY 2020 or 1<sup>st</sup> quarter of FY 2021) to be determined.

## SIGNIFICANT ACTIONS OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT

As required by statute,<sup>17</sup> MSPB reviews and reports on the significant actions of OPM, including an analysis of whether those actions are in accord with MSPs and free from PPPs.<sup>18</sup> OPM's actions broadly affect the Federal workforce, multiple Federal agencies, and applicants for Federal jobs. Each of OPM's actions listed below have the potential to impact the effectiveness and efficiency of the Federal workforce (MSP 5) or fair and equitable treatment in a variety of contexts (MSP 2). Depending on the nature of a particular OPM action, it has the potential to affect or involve other specific MSPs. Additional MSPs that may be affected by a particular OPM action are noted in the discussion of each action. In addition to tracking OPM's actions in FY 2019, we requested and received input from OPM on the status of selected significant actions.

### OPM Leadership and Context

For most of FY 2019, OPM was led by an acting director. Jeff T. H. Pon resigned as OPM Director at the beginning of the fiscal year (on October 5, 2018), and Dale Cabaniss began her tenure as OPM Director at the end of the fiscal year (on September 16, 2019). In FY 2018, the Administration proposed a restructuring of OPM that included moving its policy functions to the Executive Office of the President and transferring its operational activities to other agencies.<sup>19</sup> MSPB's review of FY 2018 OPM significant actions discussed this proposal.<sup>20</sup> During FY 2019, OPM's National Background Investigations Bureau (NBIB) was transferred to the Department of Defense's Defense Counterintelligence and Security Agency.<sup>21</sup>

These developments clearly have implication for "significant actions of OPM." First, it is much easier to identify priorities, develop policy proposals, and undertake new initiatives with a permanent director in place. Second, although there is widespread belief that many aspects of Federal HR policy and workforce management need updating or reform, there is little apparent consensus among policymakers and stakeholders about the specifics of such reform. In this environment, OPM leadership is important to articulate the need for change and shepherd reforms through legislation, regulation, and implementation.

MSPB's FY 2018 review of OPM significant actions did not discuss specific OPM initiatives or actions in detail. Instead, to mark the 40<sup>th</sup> anniversary of the CSRA, it considered some of the overarching themes that have emerged from previous MSPB reviews of OPM actions, policies, and operations. Therefore, this FY 2019 review may include OPM actions that occurred in FY 2018. OPM's FY 2019 significant actions that MSPB reviewed generally fell within five categories: (1) agency human capital programs, (2) hiring, (3) workforce shaping, (4) work-life programs, and (5) employee performance management and rewards.

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<sup>17</sup> 5 U.S.C. § 1206.

<sup>18</sup> 5 U.S.C. § 2301 and 5 U.S.C. § 2302, respectively.

<sup>19</sup> OMB, *Delivering Government Solutions in the 21st Century—Reform Plan and Reorganization Recommendations*, July 2018, p. 16.

<sup>20</sup> See MSPB, *Annual Report for FY 2018*, February 28, 2019, pp. 28-36.

<sup>21</sup> Government Executive, *The Pentagon Has Officially Taken Over the Security Clearance Process*, October 2, 2019. The NDAA for FY 2018 transferred the background investigations performed by NBIB for the Department of Defense (DoD) from NBIB to DoD ([§ 925\(b\) of Public Law 115-91](#)). The Administration announced its intention to transfer the remaining background investigations volume to DoD in July 2018 (see OMB, *Delivering Government Solutions in the 21st Century—Reform Plan and Reorganization Recommendations*, July 2018, pp. 115-117).

## Agency Human Capital Programs

OPM has recently undertaken a number of actions related to the operation of agency human capital programs. Among them are:

- Developing and maintaining the Federal Human Capital Business Reference Model (HCBRM);
- Developing evaluation system standards to discern the impact of human capital management on agency mission accomplishment; and
- Developing the framework to conduct agency human capital reviews.

**Federal Human Capital Business Reference Model.** The [HCBRM](#) defines the end-to-end lifecycle of Federal Government human capital management to assist agency HR specialists in performing their functions, and is an initial step in establishing a common experience for all employees concerning delivery of HR operations and services.<sup>22</sup> The HCBRM is composed of 15 functions and 54 sub-functions that represent the statutorily required activities the Government must perform to establish and manage a world-class workforce. Among these are five OPM-specific Governmentwide functions including Federal human capital leadership (regulation, policy, and service delivery); Federal oversight and evaluation; Federal vetting (suitability and fitness, credentialing, and background investigations); Federal benefits; and Federal retirement.

**Evaluation System Standards.** The evaluation system standards measure the impact of human capital management on mission accomplishment, which is a critical step towards improving organizational performance. The five standards are:

- Leadership involvement. Agency leadership fully supports and adequately resources the agency's evaluation system to ensure organizational performance is monitored, adjustments are made when necessary, and human capital programs operate within merit system principles.
- Communication. Internal agency leadership communication ensures cross-organizational collaboration towards achieving mission objectives, informing decision-making, eliminating redundancies, and assessing progress towards achieving organizational goals.
- Data driven decision-making. Data connects human capital management practices to business outcomes and organizational goals to provide baseline information for comparing actual program results with established performance goals.
- Assessment. The agency assesses all human capital framework systems to help accomplish strategic goals, and to ensure human capital policies, programs, and practices are efficient and effective, meet MSPs, and maintain regulatory compliance.
- Formal and documented. The agency has a policy that describes how the evaluation system operates and will serve as a roadmap for implementation.<sup>23</sup>

**Human Capital Reviews (HCRs).** HCRs are annual discussions between agency leadership and leaders from OPM's Employee Services (policy), Merit Systems Accountability and Compliance (oversight), and Human Resources Solutions (products and services) organizations. HCRs are envisioned to be an interactive dialogue leveraging OPM's partnership to identify and share successful practices, identify root causes of issues, develop solutions, and highlight crosscutting

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<sup>22</sup> OPM Memorandum for Chief Human Capital Officers, [Federal Human Capital Business Reference Model](#), November 3, 2017.

<sup>23</sup> OPM Memorandum for Human Resources Directors, [Evaluation System Standards](#), March 26, 2018.

organizational challenges within agencies.<sup>24</sup> A number of critical success factors have been identified that will be benchmarked through the HCR process, including alignment of agency goals and priorities with the human capital framework; identification of risks, barriers, and challenges; human capital operating plan goal attainment; agency support for the Federal Workforce Priorities Report; performance measurement; and closure of skills gaps.<sup>25</sup>

### *Significance*

Agency human capital management programs must be efficient and effective in order for virtually all of the MSPs to be upheld and the PPPs to be avoided. Therefore, OPM's attention to improving those agency programs also underpins each of the MSPs and helps deter the PPPs. These current efforts (generally prescribed by [5 CFR part 250 subpart B](#)) to standardize, evaluate, and review agency human capital programs are essential to the functioning of the merit system.

There are several issues that OPM and policymakers should consider when structuring and implementing an oversight and compliance program, which include:

- Agency incentives and the limits of self-monitoring. The MSPs, laws, and regulations that govern the civil service may impose requirements that Federal agencies and Federal managers may view as irrelevant to, or inconsistent with, their immediate interests. Agencies may be (understandably) disinclined to devote substantial attention or staff resources to HR compliance and monitoring—particularly when such efforts could reveal deficient personnel practices or decisions.
- The limits of focusing on strategic alignment and broad results. Such a perspective is necessary to ensure that HR policies are functional and that HR authorities are used to achieve broader organizational outcomes. However, some abuses—such as reprisal against a whistleblower, favoritism, and manipulation or circumvention of an employment examination—are likely to be isolated occurrences. Yet even isolated instances of deliberate abuse can be extremely harmful. An effective oversight program must recognize this and, in some instances, include review and control processes that may be labor-intensive and intrusive.
- OPM's structure and finances. As MSPB has previously noted, there is a continuing tension between OPM's leadership and oversight roles and its role as a provider of products and services. OPM was authorized by law to recover the costs of providing services in the areas of recruitment, assessment, staffing, and training and management assistance. This cost recovery model gives OPM the incentive to acquire customers for its products and services—who are also the same agencies that OPM evaluates for adherence to merit principles and compliance with law and regulation.<sup>26</sup>

## **Hiring**

There are a number of MSPs and PPPs that relate to hiring. For example, the first MSP requires that recruitment be from qualified individuals to achieve a workforce representative of society, and the second MSP notes that applicants should receive fair and equitable treatment. The first PPP prohibits discrimination for or against any applicant for employment, and the fourth PPP prohibits

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<sup>24</sup> OPM Memorandum for Heads of Agencies and Departments, *Human Capital Reviews*, February 13, 2019.

<sup>25</sup> OPM Memorandum for Human Resources Directors, *Human Capital Review Guidance*, June 25, 2018.

<sup>26</sup> MSPB, *Annual Report for Fiscal 2004*, March 2005; and *Annual Report for Fiscal Year 2018*, February 2019, p. 31.

influencing a person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

OPM recently has taken a number of actions with respect to hiring within the Federal Government. These include granting direct hire authority for certain positions,<sup>27</sup> an update to the Delegated Examining Operations Handbook,<sup>28</sup> and revitalizing the delegated examining certification program.<sup>29</sup> Two additional actions, however, may have a broader impact on the Federal Government's hiring activities: guidance issued to improve hiring using effective assessment strategies and a study on the use of excepted service hiring authorities, which are discussed below.

**Guidance on Improving Hiring.** In a September 2019 memorandum, OPM provided guidance that agencies can use to improve outcomes in Federal hiring.<sup>30</sup> While noting that OPM and OMB are collaborating with agencies to examine broader reforms to the hiring process, the memorandum offered the following guidance related to minimum qualifications, assessments, and subject matter experts to enable simple and strategic hiring.

**Minimum Qualifications.** Agencies should write minimum qualification requirements clearly and accurately to enable raters to screen out applicants lacking minimum experience or education from further consideration at the outset of the process. OPM suggested that agencies address the actual competencies needed to perform the work successfully when screening applicants for minimum qualifications. After determining minimum qualifications, applicants should then be assessed to make sure they have the required level of proficiency in key competencies to be successful in the position.

**Assessments.** Agencies should use effective assessments to identify qualified candidates who are actually capable of effectively performing the duties of the position. Agencies should reexamine available assessment techniques and methods, and identify the best tools to assess applicants to make meaningful distinctions and determine highly qualified talent.

**Subject Matter Experts (SMEs).** Agencies should use SMEs possessing diverse backgrounds and experiences to work with HR to determine whether applicants are qualified. SMEs can conduct structured interviews to determine the most highly qualified candidates, as well as help HR identify and document the competencies and proficiency levels required to perform essential functions of the job. OPM recommended that HR practitioners collaborate with their HR policy office and hiring managers to determine the appropriate types of positions and stages of the hiring process to involve SMEs.

### *Significance*

For a long time, MSPB has been a strong advocate for emphasizing quality of hire over speed or cost of hire, and for investing in quality assessment. This guidance is consistent with those themes, and as we noted in [Improving Federal Hiring Through Better Assessment](#),<sup>31</sup> recent hiring reform efforts,

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<sup>27</sup> See OPM Memoranda for Heads of Departments and Agencies, [Announcing Government-wide Direct Hire Appointing Authorities](#), October 11, 2018; and for Heads of Agencies and Departments CHCOs and CIOs, [Delegation of Direct-Hire Appointing Authority for IT Positions](#), April 5, 2019.

<sup>28</sup> OPM Memorandum for Human Resources Directors, [Update of the Delegated Examining Operations Handbook](#), June 14, 2019.

<sup>29</sup> OPM Memorandum for Chief Human Capital Officers, [Launch of the Revitalized Delegated Examining Certification Program](#), July 24, 2019.

<sup>30</sup> OPM Memorandum for Heads of Executive Departments and Agencies, [Improving Federal Hiring through the use of Effective Assessment Strategies to Advance Mission Outcomes](#), September 13, 2019.

<sup>31</sup> OPM Memorandum for Heads of Executive Departments and Agencies, [Improving Federal Hiring through the use of Effective Assessment Strategies to Advance Mission Outcomes](#), September 13, 2019.



while helping to improve the applicant experience, may have made it more difficult for agencies to evaluate applicant qualifications.

This initiative differs from recent hiring reform efforts in some notable ways. First, it focuses on the substance of the hiring process, rather than particular mechanics (such as appointing authorities or the once-common requirement that applicants submit narrative descriptions of job-related abilities with their initial applications). Second, the guidance is accompanied and illustrated by operating models—agency initiatives that integrated elements of the guidance into actual recruitment and hiring efforts in a coherent, integrated way. Those models have particular value, because they demonstrate that the guidance, if thoughtfully used, can yield real improvements; help agencies think about hiring improvement systematically; and reinforce the fact that improvement will likely require investment.

OPM’s recommendations will help move agencies in the right direction, but there are additional steps that agencies, OPM, and Congress can take to ensure that agencies are able to hire the talent needed to deliver the Federal Government’s critical missions. We outlined these steps in an October 2019 MSPB Perspective, [Building on OPM’s Hiring Improvement Memo](#),<sup>32</sup> and they include: (1) getting the right people involved; (2) defining good job qualifications; (3) using valid assessments; and (4) making assessments more accessible to agencies.

As discussed, these seemingly obvious steps also are longstanding challenges. For some steps, such as involvement and qualifications, the causes—and solutions—lie with agencies and in better strategy and execution. Assessment and access to assessments is more complicated. Developing and defending assessments is complex and costly, and many agencies lack the expertise and resources for that endeavor. Many agencies also lack the resources to acquire and deploy externally-developed assessments, such as those available under OPM’s USA Hire program. Here, it may be necessary for Congress to act—e.g., providing OPM with budgetary resources to make USA Hire and other assessments more affordable—to make substantial and lasting improvements.<sup>33</sup>

**Governmentwide Study of Excepted Service Hiring Authorities.** In July 2018, OPM released the study *Excepted Service Hiring Authorities: Their Use and Effectiveness in the Executive Branch*.<sup>34</sup> The excepted service provides a more flexible approach to hiring to support agency mission needs when it is “impracticable” to apply traditional competitive examining methods. The purpose of the study was to assess the extent to which agencies use Title 5 excepted service hiring authorities; the effectiveness of these hiring policies and practices; and compliance with related laws and regulations. Two major findings of the report are that agencies do not consistently comply with some of the requirements under excepted service hiring, and that agencies do not use some of the flexibilities permitted under excepted service hiring.

Compliance. OPM was not able to fully determine if agencies are adhering to the merit system principles and relevant public policies because of a lack of documentation. For instance, about half of the recruitment actions OPM reviewed contained only the resume of the selectees and no information on other applicants, specific recruitment sources used, or even information about how selectees were identified. This makes it difficult to ascertain if agencies are adhering to the intent of

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<sup>32</sup> MSPB, [Building on OPM’s Hiring Improvement Memo](#), October 2019.

<sup>33</sup> See MSPB, [Federal Appointing Authorities: Cutting Through the Confusion](#), October 2019; MSPB, [Identifying Talent through Technology—Automated Hiring Systems in Federal Agencies](#), August 2004, and MSPB, [Evaluating Job Applicants: The Role of Training and Experience in Hiring](#), January 2014.

<sup>34</sup> OPM Memorandum for Chief Human Capital Officers, [OPM Special Study—Excepted Service Hiring Authorities: Their Use and Effectiveness in the Executive Branch](#), July 18, 2018.

the merit principles associated with fair and open competition and the fair and equitable treatment of all applicants.

In addition, OPM found that many agencies had not established required policies for several excepted service hiring operations. For instance, only 56 percent of the agencies included in OPM's policy review had developed guidelines describing how they handle applications for excepted service hiring; only 40 percent had policies for how to apply priority reemployment rights; and only half had a documented process for granting veterans' preference. Lack of documentation and policies make it difficult to determine not only compliance with hiring rules and adherence to merit, but also whether agencies are implementing "more strategic, innovative, and targeted recruitment activities" than they could under competitive examining.

Flexibilities. OPM found that agencies were not using the vast majority of excepted service hiring authorities available to them. Specifically, 92 percent of excepted service appointments made between FYs 2012–2016 used 11 of the 51 legal authorities. Low-use and non-use of a large number of authorities may indicate an opportunity to streamline the number of hiring authorities available to agencies. This finding echoes MSPB's recommendation to streamline and consolidate competitive hiring authorities to make the process more transparent and understandable, found in MSPB's 2006 report [\*Reforming Federal Hiring: Beyond Cheaper and Faster\*](#).<sup>35</sup>

Another area where agencies do not make optimal use of excepted flexibilities is in defining qualifications. The purpose of excepted authorities is to allow agencies to create the most practical assessment tools and methods when hiring for those positions. In fact, agencies are required to use agency-unique qualification standards or modified OPM standards to fit their specific needs for many positions. However, OPM found that a large number of agencies are simply applying established OPM qualification standards. MSPB pointed out in the report [\*Identifying Talent through Technology—Automated Hiring Systems in Federal Agencies\*](#)<sup>36</sup> that using generic qualification standards and specialized experience definitions for competitive hiring reduce the ability to identify the best-qualified applicants. The ability to create unique standards was intended to help overcome this challenge.

### *Significance*

We previously [\*recommended\*](#)<sup>37</sup> that agencies should properly prepare HR staff and hiring managers by ensuring they have the training and expertise to carry out their hiring responsibilities and hold them accountable for those responsibilities. Going forward, OPM noted they will use the results from their report to identify topics for training and guidance on excepted service hiring for HR staff and hiring managers.

OPM's findings demonstrate that excepted service hiring has many of the same issues seen in competitive service hiring, despite the fact that these authorities are intended to make hiring simpler and more tailored to the needs of the agency. More and more, it seems, agencies are asking for hiring flexibilities that exempt them from competitive service hiring requirements. OPM's report indicates, however, that even when hiring flexibilities exist, agencies are not necessarily using them, and when they do, they are not necessarily using them properly.<sup>38</sup>

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<sup>35</sup> MSPB, [\*Reforming Federal Hiring: Beyond Cheaper and Faster\*](#), September 2006.

<sup>36</sup> MSPB, [\*Identifying Talent through Technology—Automated Hiring Systems in Federal Agencies\*](#), August 2004.

<sup>37</sup> MSPB, [\*Reforming Federal Hiring: Beyond Cheaper and Faster\*](#), September 2006.

<sup>38</sup> MSPB, "OPM Studies Excepted Service Hiring," [\*Issues of Merit\*](#), September 2019, p. 3.

## Workforce Shaping

OPM undertook a number of initiatives to reshape the Federal workforce to improve employee performance and to improve services to the American people. In addition to MSP 5, these initiatives relate to MSP 3 (which states that “appropriate incentives and recognition should be provided for excellence in performance”) and MSP 6 (which states that employees “should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards”). Among the workforce shaping initiatives recently undertaken were the *2018 Federal Workforce Priorities Report* and reshaping and reskilling tools to help agencies prepare for the workforce of the future.

**2018 Federal Workforce Priorities Report.** In February 2018, OPM released the *2018 Federal Workforce Priorities Report*.<sup>39</sup> The report was established by [5 CFR 250 subpart B](#), which was effective in April 2017. Its development was also in response to GAO’s recommendation to develop a Governmentwide human capital strategic plan.<sup>40</sup> The report communicates key Governmentwide human capital priorities and recommends strategies to help inform agency strategic and human capital planning. OPM requests that agencies align their human capital management strategies to support the Federal Workforce Priorities Report, as demonstrated in their human capital operating plans. OPM asked agencies to select two of the six published priorities that they will support until the issuance of the next report in 2021.<sup>41</sup>

The six workforce priorities are:

- Succession planning and knowledge transfer. Conduct succession planning activities to retain and transfer institutional knowledge, as workforce reshaping efforts are undertaken.
- Deploying communication tools. Adopt tools that allow employees to easily connect, communicate, and collaborate with one another regardless of geographic location.
- Securing technological solutions for human capital analysis. OPM will seek to acquire or develop enterprise technological solutions to assist the Federal human capital community with human capital analysis.
- Expanding employee development opportunities. Provide employees with ample opportunities for continuous professional growth and skill development.
- Bolstering employee recognition programs. Administer robust programs to appropriately recognize and reward employees who demonstrate high levels of performance and significantly contribute to achieving organizational goals.
- Enhancing productivity through a focus on employee health. Encourage employees to engage in physical fitness activities during time spent commuting and being at work.

**Reshaping and Reskilling Tools.** In May 2019, OPM released a memorandum that transmitted three tools to help agencies reshape and reskill the Federal workforce.<sup>42</sup> These tools include:

- The Executive Playbook for Workforce Reshaping, which helps senior leaders with informed, strategic decision making based on data;
- The Reskilling Toolkit, which assists HR professionals, managers, and employees as they design reskilling and upskilling opportunities based on employee strengths; and

<sup>39</sup> OPM Memorandum, *2018 Federal Workforce Priorities Report*, February 7, 2018.

<sup>40</sup> GAO, *Strategies to Help Agencies Meet Their Mission in an Era of Highly Constrained Resources*, GAO-14-168, May 2014.

<sup>41</sup> Future workforce priorities reports will be published in the first February of a Presidential term.

<sup>42</sup> OPM Memorandum, *Reshaping and Reskilling Tools to Help Agencies Prepare for the Workforce of the Future*, May 22, 2019.

- Guidance for Change Management in the Federal Workforce, which provides practical advice for leaders and managers as they plan for changes that align agency culture, values, people, and behaviors to encourage the desired results.

According to OPM, these tools will help guide Federal leaders and managers as they make strategic decisions to modernize the way Government functions, support HR professionals and managers as they design and implement reshaping and reskilling/upskilling strategies, and provide employees with pathways to progress in their Federal service careers.

### *Significance*

These activities occurred within the context of earlier workforce reshaping efforts that we discussed in the FY 2017 AR. As we noted then, any reshaping of the workforce should take place in accordance with the MSPs and be free from PPPs.<sup>43</sup> Indeed, each of the documents referenced above states that agency activities associated with these efforts must be carried out consistent with the MSPs.

Not every issue facing the Federal workforce can be a top priority. Still, although hiring and recruitment was identified as a contributor to key challenges in the workforce, it was not identified as a priority—or as something OPM should take the lead to fix or for agencies to focus on. Similarly, the oft-maligned pay and position classification systems were not identified as workforce priorities and neither was increasing the diversity of the workforce.

MSPB research has found a relationship between higher levels of employee engagement and improved Federal agency outcomes.<sup>44</sup> Agency leadership should realize that employee engagement might suffer during workforce reshaping efforts simply due to employee fears of changes that may or may not be planned in the workplace. Management should be as transparent as possible regarding any planned workplace changes and should effectively communicate to employees what the changes are and why they are occurring.

Enhancing or changing the skills of the workforce is a viable way to close current and emerging skills gaps. GAO has focused attention on the importance of closing skills gaps in the Federal workforce for a number of years.<sup>45</sup> The length of time that this issue has been categorized as a high-risk-area by GAO may point to the fact that systemic issues rather than intransigence on OPM's or agencies' part need to be overcome. For example, some of the first employees trained via the [Federal Cybersecurity Reskilling Academy](#) have found that the possession of that credential does not automatically qualify them for cybersecurity positions at the same pay grade they were at prior to entering the Academy.<sup>46</sup> Whether or not this was a foreseeable outcome, issues to consider with reskilling include:

- What should the Government's obligation be to those who have completed an accredited reskilling program—in terms of promised salary in the new field or a promised position at all?
- What is the proper place of reskilling among other strategies to close skills gaps (such as pipeline creation and maintenance, more agile hiring, etc.)?

<sup>43</sup> MSPB, *Annual Report for FY 2017*, January 19, 2018, p. 45.

<sup>44</sup> MSPB, *The Power of Federal Employee Engagement*, September 2008.

<sup>45</sup> See, for example, GAO, *High Risk Series An Update*, GAO-11-278, February 2011, p. 22.

<sup>46</sup> Margaret Weichert speech to the Federal Workforce and Management Summit, *Training, Reskilling, and Developing the Workforce: Insights from the Office of Management and Budget*, October 9, 2019.

- How best to ingrain skills gap identification and closure into the ongoing fabric of agency management?
- How to ensure that reskilling efforts target those areas that are, in fact, successfully trainable?<sup>47</sup>
- How to ensure that those selected for retraining are chosen through a fair and open process that is based on merit?

## Work-Life Programs

In March 2018, OPM released the key findings of its 2017 Federal Work-Life Survey.<sup>48</sup> OPM's analysis of the survey indicated that there is a significant relationship between participation in work-life programs and optimal organizational performance, retention, and job satisfaction. OPM noted that these outcomes emphasize the value of work-life programs as strategic tools that support organizational effectiveness. At the same time, however, OPM also stated that there are opportunities for improvement through expanding support and reducing barriers to utilizing work-life programs.

GAO has recommended that OPM help agencies determine the value of their telework programs by providing clarifying guidance on options for developing supporting data for benefits and costs associated with agency telework programs.<sup>49</sup> MSPB also recommended that OPM consider conducting a Governmentwide cost-benefit analysis of the various work-life programs to understand fully how they contribute to improved agency outcomes and the retention of valued employees. Alternatively, OPM should at least assist agencies in conducting cost-benefit analyses to identify the true worth of these strategic business practices.<sup>50</sup> In July 2019, OPM released the *Work-Life Program Evaluation Guide* to help agencies with developing strategies to capture the benefits and costs associated with the use of work-life programs.<sup>51</sup>

### *Significance*

Previous MSPB research found a relationship between higher levels of employee engagement and improved Federal agency outcomes. Specifically, in agencies where more employees were more engaged better program results were produced, employees used less sick leave, fewer employees filed EEO complaints, and there were fewer cases of workplace injury or illness.<sup>52</sup>

Although work-life programs are likely to contribute to higher levels of employee engagement, it is important to quantify the costs associated with these programs as well as the benefits that they bring to agencies through higher levels of employee engagement and improved outcomes for the taxpayer. Through such transparent analysis the availability (or non-availability) of certain work-life programs can be defended to agency managers, supervisors, and employees.

Prior to the OPM guidance designed to help agencies develop strategies to capture the benefits and costs associated with the use of work-life programs, some agencies had either curtailed employee

<sup>47</sup> Previous MSPB research found that some competencies may be more responsive to training than others. Knowledge competencies are highly trainable; language, social, and reasoning competencies are moderately trainable; and motivation and mental style competencies are less trainable. See, MSPB, *Making the Right Connections—Targeting the Best Competencies for Training*, February 2011.

<sup>48</sup> OPM Memorandum, *Federal Work-Life Survey Results*, March 6, 2018.

<sup>49</sup> GAO, *Federal Telework—Better Guidance Could Help Agencies Calculate Benefits and Costs*, GAO-16-551, July 2016.

<sup>50</sup> MSPB, *Annual Report for FY 2017*, January 19, 2018, p. 48.

<sup>51</sup> OPM Memorandum, *Work-Life Program Evaluation Guide—Evidence-Based Strategies to Capture the Benefits and Costs*, July 16, 2019.

<sup>52</sup> MSPB, *The Power of Federal Employee Engagement*, September 2008.

telework programs or announced they were considering limiting them.<sup>53</sup> It is unclear how these decisions regarding telework relate to the OPM guidance or whether they were made based on OPM's suggested cost-benefit analysis or some other methodology.

## Employee Performance Management and Rewards

In addition to MSP 5, OPM initiatives in these areas relate to MSP 3 and MSP 6. Among these initiatives in FY 2019 were guidance to improve employee engagement and guidance on awards and performance management.

**Guidance to Improve Employee Engagement.** In October 2018, OPM released guidance in support of the President's Management Agenda Cross-Agency Priority Goal 3 to improve performance management and engagement.<sup>54</sup> According to Cross-Agency Priority Goal 3, each agency is to identify its bottom 20 percent organizational scorers on the Federal Employee Viewpoint Survey's (FEVS) Employee Engagement Index (EEI). Agencies are then to target a 20 percent improvement on this survey-based measurement in those organizational units by the end of 2020.<sup>55</sup>

### *Significance*

As we have stated in the past, continued OPM and agency attention to Federal employee engagement is appropriate. It is important, however, that policymakers and stakeholders recognize the limits as well as the value of employee engagement and its measures.<sup>56</sup>

First, it is plausible that any management attention directed at improving the workplace, agency leadership, or employee morale should have some positive effect on agency operations. It remains unclear, however, what effect improvements in the FEVS EEI will have on agency outcomes. Because OPM notes that the FEVS EEI does not directly measure employee engagement—although it covers most, if not all, of the conditions likely to lead to employee engagement<sup>57</sup>—it is uncertain that improvements in the index would result in positive agency outcomes. It is also unclear whether past improvements in the FEVS EEI have been accompanied with actual improvements to agency outcomes.

Second, although agency leaders can influence the work environment and other drivers of employee engagement, they are far from the only factors that affect an employee's level of engagement as measured by instruments such as the FEVS. In the short term, in particular, indicators of employee satisfaction and engagement can be greatly affected by externally-directed changes in policy, budget, or structure. Also, it may be necessary for agency leaders to undertake, in the long-term public or agency interest, actions that are disruptive to both organizations and individuals.<sup>58</sup> In such situations, effective leadership could result in short-term decreases, rather than increases, in employee engagement.

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<sup>53</sup> See, for example, Government Executive, "[Agencies that Cut Telework Took a Beating in Annual Employee Survey](#)," October 30, 2018, describing the Departments' of Agriculture and Education telework curtailment. See also Government Executive, "[Survey: Five in Six HHS Employees May Consider Leaving if Telework is Restricted](#)," July 18, 2019.

<sup>54</sup> OPM Memorandum for Chief Human Capital Officers, [President's Management Agenda Cross-Agency Priority Goal 3: Improve Performance Management and Engagement](#), October 4, 2018.

<sup>55</sup> Office of Management and Budget, President's Management Agenda, [Key Milestones—Improve Employee Performance Management and Engagement](#).

<sup>56</sup> MSPB, [Annual Report for FY 2015](#), February 29, 2016, pp. 57-58.

<sup>57</sup> See for example, OPM, [2012 Federal Employee Viewpoint Survey Results Government Management Report](#), p. 12.

<sup>58</sup> See MSPB, [Managing Public Employees in the Public Interest](#), January 2013, pp. 15-17, for discussion of the perceived necessity for Federal leaders to make difficult or potentially controversial decisions such as eliminating obsolete or unnecessary functions or positions.

Finally, employees themselves must be active participants in their own engagement. For example, “pride in one’s work” ultimately requires an individual willing to produce outstanding results and a personal understanding of the importance of those results to the American people.<sup>59</sup> For these reasons, although executives should be accountable for efficient and effective use of the workforce and for taking steps to understand and sustain employee engagement, it may be counterproductive to hold agencies or individual executives accountable for a particular increase (or decrease) in any measure of employee engagement, regardless of its source.

**Guidance on Awards and Performance Management.** In July 2019, OPM released two memoranda regarding awards and applying rigor to the performance management process.<sup>60</sup> OPM suggested that agencies develop performance standards that are sufficiently specific so that they provide firm benchmarks toward which employees can aim their performance and that are not susceptible to a performance action based on whim instead of considered judgment.

Agency performance management programs (among other things) form a basis for rewarding excellence in employee performance and reinforce a high-performing organization culture. As effective awards programs support the retention of high-performing employees, OPM instructed agencies to allocate awards in a manner that provides meaningfully greater rewards to top performers, and make meaningful distinctions between employees where performance is concerned. It also encouraged agencies to reexamine the way they distribute awards. Currently, most awards are tied to a formal, annual performance rating. OPM noted that the ongoing use of awards and recognition throughout the year, however, is particularly important as agencies address workforce challenges and look for opportunities to reward and recognize high-performing employees and those with talent critical to mission achievement.

### *Significance*

Too often, the annual performance management process boils down to short exchanges to inform employees of their rating and obtain a signature. Does the process help improve performance, identify poor performers, motivate employees to do a better job, or recognize top performers? Responses to MSPB’s 2016 merit principles survey (MPS) suggest that the answer to those questions is “no.” Less than two-thirds (63 percent) of respondents felt that their appraisal was an accurate reflection of their performance, while only 55 percent agreed that the standards used to appraise their performance are appropriate. That is not an overwhelming endorsement of the exercise.<sup>61</sup>

Federal workforce data from 2017 suggests that the annual performance rating does not do a good job of making distinctions in employee performance. Over 99 percent of all permanent, full-time employees received at least a fully successful rating. For those agencies with 5-level appraisal systems, about 75 percent of employees were rated in the top two levels. Even in systems with only three levels, where the top rating should be reserved for the top performers, almost half were rated at the top level. Also, MPS results show that supervisors do not find the appraisal to be particularly helpful in managing development, promotions, retention, or dealing with poor performers.<sup>62</sup>

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<sup>59</sup> Pride in one’s work is almost universally recognized as an indicator or outcome of employee engagement. See, for example, GAO, [Federal Workforce: Preliminary Observations on Strengthening Employee Engagement During Challenging Times](#), GAO-15-529T, April 16, 2015; and MSPB, [The Power of Federal Employee Engagement](#), September 2008.

<sup>60</sup> OPM Memorandum for Executive Departments and Agencies, [Guidance on Awards for Employees and Agency Workforce Fund Plan](#), July 12, 2019; and OPM Memorandum for Heads of Executive Departments and Agencies, [Applying Rigor in the Performance Management Process and Leveraging Awards Programs for a High-Performing Workforce](#), July 12, 2019.

<sup>61</sup> MSPB, “Get Ready, It’s Performance Appraisal Time,” [Issues of Merit](#), September 2019, p. 3.

<sup>62</sup> MSPB, “Get Ready, It’s Performance Appraisal Time,” [Issues of Merit](#), September 2019, p. 3.

Differences between the ideal and actual practice of performance appraisal, and broader questions about the value of the process, are not unique to the Federal Government. Nevertheless, these results suggest that Federal agencies may need to reconsider both the purpose(s) of performance evaluation, and how they are conducting performance evaluation. Some issues that agencies (and employees) might consider include the following:

- The degree to which its performance appraisal emphasizes consequences or learning, and personnel actions (such as ratings and awards) or work actions (such as accomplishing goals or changing behaviors);
- The frequency and focus of communication, particularly the communication between the employee and supervisor;
- The degree to which the organization relies on the performance elements and standards, and individual supervisors, to provide feedback to employees;
- The degree to which the organization relies on formal, extrinsic rewards (such as pay raises or performance awards) to recognize and motivate excellence; and
- Whether and how technology is used to help managers and employees plan and measure performance, both inside and outside the formal appraisal process.



## FINANCIAL SUMMARY

**Fiscal Year 2019 Financial Summary**  
as of  
**September 30, 2019**  
(dollars in thousands)

### **FY 2019 Appropriations**

FY 2019 Appropriation	\$ 44,490
Civil Service Retirement and Disability Trust Fund	2,345
<b>Total</b>	<b>\$ 46,835</b>

### **Obligations Charged to FY 2019 Funds**

Personnel Compensation	\$ 23,618
Personnel Benefits	7,397
Travel of Things	82
Travel of Persons	137
Rents, Communications and Utilities	4,872
Printing and Reproduction	39
Other Services	2,833
Supplies and Materials	96
Equipment	619
Reimbursable Obligations	2,345
<b>Total</b>	<b>\$ 42,038</b>

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## LIST OF ABBREVIATIONS AND ACRONYMS

AFR	Annual Financial Report
AJ	Administrative judge
ALJ	Administrative law judge
ALOC	Acceptable Level of Competence
APHIS	USDA’s Animal and Plant Health Inspection Service
APR-APP	Annual Performance Report and Annual Performance Plan
AR	Annual Report
BFS	Treasury’s Bureau of Financial Services
CAFC	Court of Appeals for the Federal Circuit
CBA	Collective bargaining agreement
CIO	Chief Information Officer
CRS	Congressional Research Service
CSRA	Civil Service Reform Act of 1978
CSRS	Civil Service Retirement System
DoD	Department of Defense
EI	Employee Engagement Index
EEO	Equal employment opportunity
EEOC	Equal Employment Opportunity Commission
EO	Executive Order
FERS	Federal Employees Retirement System
FERCCA	Federal Erroneous Retirement Coverage Corrections Act
FEVS	Federal Employee Viewpoint Survey
FOs	Field offices
FTC	Federal Trade Commission
FY	Fiscal year
GAO	Government Accountability Office
GPRAMA	Government Performance and Results Act Modernization Act of 2010
HCBRM	(Federal) Human Capital Business Reference Model
HCR	Human Capital Reviews
HQ	Headquarters
HR	Human resources
<i>IoM</i>	<i>Issues of Merit</i>
IRA	Individual right of action
IT	Information technology
MPS	Merit principles survey
MSPs	Merit system principles
MSPB	Merit Systems Protection Board
NBIB	National Background Investigations Bureau
NDAA	National Defense Authorization Act
NFC	USDA’s National Finance Center
OMB	Office of Management and Budget
OPE	MSPB’s Office of Policy and Evaluation
OPM	Office of Personnel Management
ORO	MSPB’s Office of Regional Operations
OSC	Office of Special Counsel
PFR	Petition for review
PIO	Performance Improvement Officer

PIV	Personal identity verification
PPPs	Prohibited personnel practices
ROs	Regional offices
SES	Senior Executive Service
SME	Subject matter experts
SP	Strategic Plan
U.S.C.	United States Code
USDA	Department of Agriculture
USERRA	Uniformed Services Employment and Reemployment Rights Act of 1994
VA	Department of Veterans Affairs
VEOA	Veterans Employment Opportunities Act of 1998
WPA	Whistleblower Protection Act of 1989
WPEA	Whistleblower Protection Enhancement Act of 2012



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