



Annual Report for FY 2021

February 18, 2022

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Foreword

In accordance with § 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) 2021.

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

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Information about MSPB's FY 2021 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 2021-2023. Financial accountability and audit information is included in MSPB's Annual Financial Report for FY 2021. MSPB's ARs and GPRAMA documents are posted on the [Plans, Budget and Performance](#) page on MSPB's website (www.mspb.gov) when they are released.

Go to 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 20201 ANNUAL REPORT

INTRODUCTION

This MSPB Annual Report for FY 2021 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).¹ The report also contains summaries of MSPB's financial status, outreach and education activities, legislative and congressional relations activities, and international activities. The report briefly references the most significant internal management challenges and external factors that affect MSPB's work; thorough descriptions are included in the APR-APP for FY 2021-2023. Headquarters (HQ) case processing statistics and summaries of significant MSPB Board decisions are not provided in this report because the lack of quorum prevented issuance of decisions at HQ.

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 (HC) 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.² The CSRA also codified for the first time the values of the Federal merit systems as the merit system principles (MSPs), and proscribed, as contrary to MSPs, specific actions and practices as the prohibited personnel practices (PPPs).³ Since the enactment of the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.⁴ More information about MSPB's jurisdiction can be found in the agency's Strategic Plan located at 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.

¹ 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)).

² 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.

³ Title 5 U.S.C. § 2301 and § 2302, respectively.

⁴ These include 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.

Vision

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

Board Members

The bipartisan Board consists of the Chair, Vice Chair, 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.

Board Quorum and Status of Board Member Nominations

President Trump's nominations of Dennis D. Kirk as Board Chairman and B. Chad Bungard and Julia A. Clark as Board Members expired at the end of the 116th Congress. At the beginning of the 117th Congress, President Trump nominated Mr. Kirk as a Board Member, but his nomination was withdrawn by President Biden on February 4, 2021. On June 24, 2021, President Biden nominated Cathy Ann Harris to be a member and Chair of the MSPB and Raymond A. Limon to be a member of the MSPB with the designation of Vice Chair. On September 13, 2021, President Biden nominated Tristan Leavitt as the third Board member. On September 22, 2021 the Senate Committee on Homeland Security and Governmental Affairs held a nomination hearing for the three nominees. On October 6, 2021, the nominees were reported favorably out of committee and the nominations were placed on the Senate calendar. On January 3, 2022, the Senate returned Ms. Harris's nomination to the President; she was renominated on January 4, 2022, and again reported favorably out of committee on February 2, 2022. We hope the remaining necessary actions will be taken to ensure the Board's quorum is restored early in calendar year 2022.

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 2021, the agency was authorized to employ 235 full-time equivalents to conduct and support its statutory duties.

The **Board members** adjudicate the cases brought to the Board. The Chair, by statute, is the chief executive and administrative officer. The Director of the Office of Equal Employment Opportunity (EEO) reports directly to the Chair; otherwise, the directors of the offices described below report to the Chair 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 2021, 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 administrative judge (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 online 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 EEO Director also coordinates MSPB's Diversity and Inclusion Council.

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 reviewing 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 the Fiscal Service (BFS) for accounting services, and USDA's Animal and Plant Health Inspection Service (APHIS) for HR services.

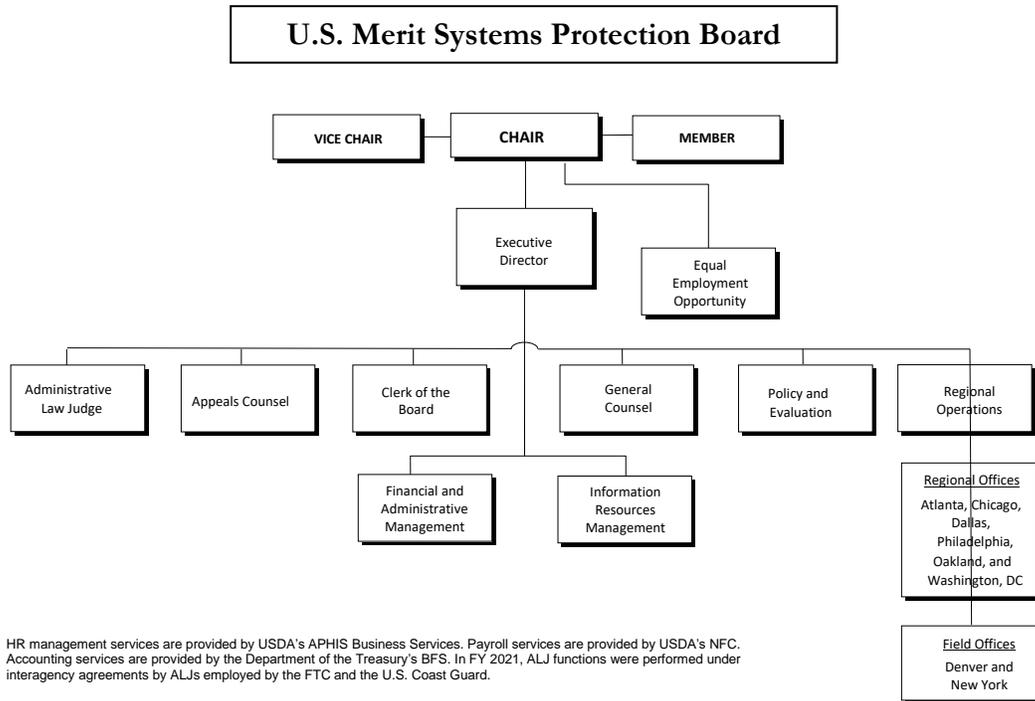
The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for the Board 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 (IG) function, and plans and directs audits and investigations.

The **Office of Information Resources Management** develops, implements, and maintains MSPB's information technology (IT) systems and enterprise applications, and manages MSPB's cybersecurity program. These services help MSPB 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 ROs and two FOs, which receive and process initial appeals and related cases. It also manages MSPB's Mediation Appeals Program. AJs in the RO/FOs are responsible for adjudicating assigned cases and for issuing fair, well-reasoned, and timely initial decisions.

MSPB Organizational Chart



FISCAL YEAR 2021 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. Of note, as of the end of FY 2021, MSPB had 3,465 cases pending at HQ.

In FY 2021, MSPB processed 4,867 cases in the ROs/FOs, including addendum cases and stay requests. ALJs issued 12 decisions. Statistical information on MSPB's case processing activity for the RO/FOs is provided in the [section](#) on Case Processing Statistics for FY 2021. In accordance with the WPEA, information about FY 2021 whistleblower cases will be available in MSPB's APR-APP for FY 2021-2023, which will be posted on MSPB's website at www.mspb.gov.

As a service to its stakeholders, MSPB also provides summaries of significant opinions relevant to the Board's work that were issued in FY 2021 by the U.S. Court of Appeals for the Federal Circuit (CAFC or Federal Circuit) and other Federal courts. Those summaries are provided in the [section](#) on Significant Court Opinions Issued in FY 2021. The opinions cover topics such as probationary periods, removals, Senior Executive Service (SES) rights, whistleblowing, and USERRA.

Merit Systems Studies

In FY 2021, due to the lack of quorum, MSPB did not publish any research reports of merit systems studies. MSPB's studies program released three editions of its *Issues of Merit (IoM)* newsletter. It also released five research briefs on topics ranging from direct hire authority, acceptable level of competence, agency leader responsibilities related to PPPs, confidence in ability to perform, and job fit. In addition, MSPB successfully administered the 2021 Merit Principles Survey (MPS) to more agencies than it did for the 2016 MPS and with a shorter time to prepare and launch the survey after final approval of survey content. Summaries of publications, surveys, and other studies-related activities 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 2021 review includes OPM's significant actions related to previous executive orders (EOs), the 2021 presidential transition, and streamlining Federal hiring. In addition, this section discusses context issues including OPM leadership, the National Academy of Public Administration's (NAPA's) mandated report on OPM and OPM's response to that report, and the COVID-19 pandemic. The lack of quorum limits the scope of MSPB's review of OPM's significant actions. 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 understanding and operation 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 2021, MSPB staff conducted 138 outreach events with a variety of customers and stakeholders. Most were virtual events due to the pandemic. MSPB staff presented at several nationwide conferences, such as the Federal Dispute Resolution conference, the Federal Circuit Bar Association, and the Chicago-Kent College of Law’s annual Federal Sector Labor Relations and Labor Law Program. Notably, MSPB was invited to confer with Office of Management and Budget (OMB) officials about hiring assessments using subject matter experts and structured interviews.

MSPB’s work and other activities were cited over 520 times in 92 different print and online sources. Several significant citations of studies work are included in the Merit Systems Studies [section](#) of this report, and additional information about MSPB’s outreach and education activities and references to its work can be found in MSPB’s APR-APP for FY 2021-2023.

International Activities

During FY 2021, MSPB’s General Counsel/Acting Chief Executive and Administrative Officer, Acting Executive Director, Acting OPE Director, and Acting ORO Director met virtually with the Merit Protection Commissioner of Australia, the Commission’s Executive Director, and other Commission staff members. The discussion included information about the two systems and the roles of the Commission and MSPB. Most of the discussion involved protecting merit and adjudication of employee appeals with interest expressed by the representatives from Australia in MSPB’s studies program, a function that the Commission does not have.

Legislative and Congressional Relations Activity

During FY 2021, MSPB staff monitored and analyzed legislative activity relevant to MSPB’s jurisdiction and adjudication of appeals. Brief descriptions of relevant bills are provided below.

As in past years, the annual National Defense Authorization Act (NDAA), the annual “must pass” Department of Defense (DOD) policy bill, has been the primary vehicle for new laws affecting civilian employee policy and often also impacting MSPB. The **NDAA for FY 2021**⁵ has continued that trend with the following two provisions. § 1137 amended the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 Amendments by requiring Federal agencies to track discrimination complaints from start to finish and allowing the Equal Employment Opportunity Commission (EEOC) to refer to the Office of Special Counsel (OSC) discrimination cases in which an agency failed to take appropriate action. Sections 1131 to 1138 enacted the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020, which substantially upgraded the incentive process in whistleblower cases and allows—and in certain cases requires—legal representation for whistleblowers. Of note, the **NDAA for FY 2022**⁶ has two provisions with potential bearing on MSPB operations. Section 1108 would repeal the two-year probationary period for DOD employees, as defined in 10 U.S.C. Section 1599e, leaving most probationary periods for DOD employees at one year. Section 1109 would increase the diversity and inclusion reporting for members of the armed services and civilian employees at DOD.

⁵ Pub. L. 116-283, enacted January 1, 2021. Available at <https://www.congress.gov/116/bills/hr6395/BILLS-116hr6395enr.pdf>.

⁶ Pub. L. 117-81, enacted December 27, 2021. Available at <https://www.congress.gov/bill/117th-congress/senate-bill/1605/text>.

Several pieces of legislation were pending at the end of FY 2021 which would affect MSPB if enacted into law.

Merit Systems Protection Board Empowerment Act of 2021 (H.R. 1224).⁷ This bill would reauthorize MSPB for five years, require Federal agencies to cooperate with and provide information to MSPB in support of Federal employee surveys for MSPB studies, and require whistleblower training for MSPB employees who hear whistleblower cases. H.R. 1224 was favorably reported out of the House Oversight and Reform Committee on June 29, 2021.

Merit Systems Protection Board Authorization Act of 2021 (H.R. 1922).⁸ This bill would reauthorize MSPB for five years; require that MSPB charge a filing fee for claims and appeals; allow for summary judgment decisions in MSPB cases; limit mitigation in certain cases; change the evidentiary burden to sustain an agency decision to being supported by substantial evidence; limit appeals on furloughs; provide for reappointment of Board members; and clarify the authority of MSPB to hear and decide cases under the Veterans Affairs Accountability and Whistleblower Protection Act of 2017. H.R. 1922 is pending before the House Oversight and Reform and the House Veterans' Affairs Committees.

Whistleblower Protection Improvement Act of 2021 (H.R. 2988).⁹ This bill would require that an agency IG issue a determination of whether to investigate a finding by OSC of retaliation against a whistleblower; provide for a right for whistleblowers to contact Congress; prohibit the disclosure of a whistleblower's identity; provide IG whistleblowers an alternative reporting option in certain cases; prohibit retaliatory referrals to IGs; allow for prevailing parties to receive attorney fees; and extend whistleblower protections to the Public Health Service, National Oceanic and Atmospheric Administration and noncareer appointees to the SES. It would also require prevailing Federal employees before MSPB be made whole, i.e., restore or conduct all training, seniority, and promotions as if nothing had happened; classify as appealable adverse actions that are subject to certain procedural requirements personnel actions involving furloughs of more than 14 days but less than 30 days and furloughs of 13 days or less that are not due to funding lapses; and codify protections for disclosures of censorship related to research, analysis, and technical information. H.R. 2988 was favorably reported out of the House Oversight and Reform Committee on June 29, 2021.

Preventing a Patronage System Act of 2021 (H.R. 302).¹⁰ This bill would prohibit competitive service positions from being classified as excepted service positions, unless such positions are placed in Schedules A through E. It would also prohibit transfer of excepted service positions into positions other than Schedules A through E. H.R. 302 was favorably reported out of the House Oversight and Reform Committee on May 25, 2021.

Pregnant Workers Fairness Act (H.R. 1065).¹¹ This bill would expand protections for pregnant persons by treating pregnancy, childbirth, and related medical conditions as disabilities for the purpose of determining reasonable accommodations. H.R. 1065 passed the House of Representatives on June 14, 2021.

⁷ <https://www.congress.gov/117/bills/hr1224/BILLS-117hr1224ih.pdf>.

⁸ <https://www.congress.gov/117/bills/hr1922/BILLS-117hr1922ih.pdf>.

⁹ <https://www.congress.gov/117/bills/hr2988/BILLS-117hr2988ih.pdf>.

¹⁰ <https://www.congress.gov/117/bills/hr302/BILLS-117hr302ih.pdf>.

¹¹ <https://www.congress.gov/117/bills/hr1065/BILLS-117hr1065rfs.pdf>.

Other Congressional Activity. MSPB staff conducted fifteen (15) briefings for congressional staff during FY 2021. In addition to the annual budget briefings for staff of the House and Senate Appropriations Committees, MSPB briefed staff from the House Committee on Oversight and Reform and the Senate Homeland Security and Government Affairs Committee. Briefing topics included the Hatch Act, the nomination process for Board nominees, the impact of a continued lack of quorum, and the potential effect on MSPB of the Supreme Court's ruling in *Lucia v. Securities and Exchanges Commission* and related cases.

Internal Management Challenges and External Factors

There are a number of internal management challenges currently facing MSPB. The most significant internal issue affecting MSPB is the lack of quorum of Board members (also considered an external factor beyond MSPB's control). Other significant internal challenges that could affect MSPB's ability to carry out its mission include other HC issues and IT stability, cybersecurity, and modernization. The COVID-19 pandemic is an external factor that presents internal challenges for MSPB. Other than the lack of quorum and the pandemic, significant external trends or issues affecting MSPB's ability to carry out its mission include changes in law, jurisdiction and appeals processes, Government reform, budget challenges, and workforce reshaping. More detailed information about MSPB's internal challenges and external factors can be found in MSPB's APR-APP for FY 2021-2023.

CASE PROCESSING STATISTICS FOR FY 2021

Summary of Cases Decided by MSPB

Since January 8, 2017, MSPB has not had a quorum, which is required to issue decisions on PFRs and other cases at HQ. Therefore, there are no FY 2021 case processing statistics for HQ.

Table 1: FY 2021 Summary of Cases Decided by MSPB

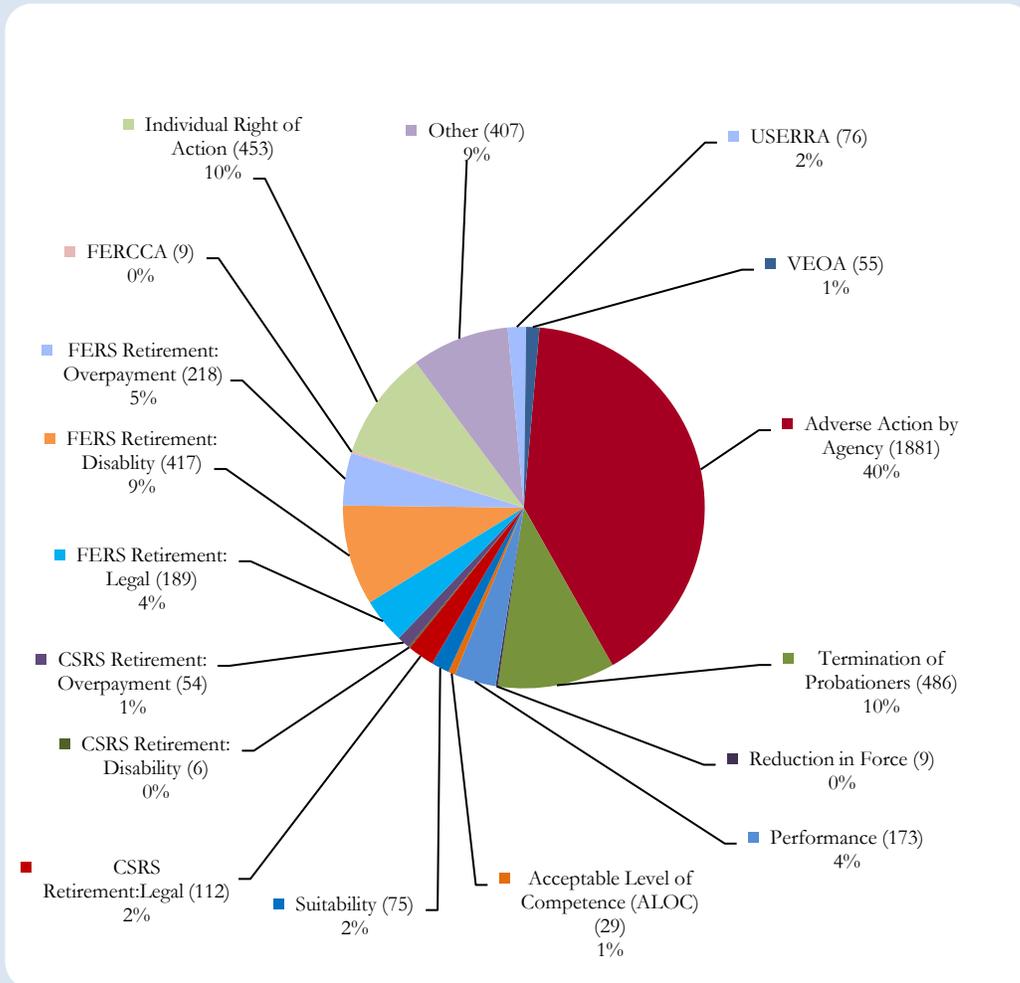
Cases Decided in MSPB Regional and Field Offices	
Appeals	4,649
Addendum Cases ¹	197
Stay Requests ²	21
TOTAL Cases Decided in RO/FOs	4,867
Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction³	12
Cases Decided by the Board⁴	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	0
Petitions for Review (PFRs) - Addendum Cases	0
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings	0
Court Remands	0
Compliance Referrals	0
EEOC Non-concurrence Cases	0
Arbitration Cases	0
Subtotal - Appellate Jurisdiction	0
Original Jurisdiction ⁵	0
Interlocutory Appeals	0
TOTAL Cases Decided by the Board	0
TOTAL Decisions (Board, ALJs, RO/FOs)	4,879
¹ Includes 58 requests for attorney fees, 106 compliance cases, 18 court remand cases, 1 Board remand case, 10 requests for compensatory damages, and 4 requests for consequential damages. ² Includes 19 stay requests in whistleblower cases and 2 in non-whistleblower cases. ³ Initial Decisions by ALJs include: 3 Disciplinary Action - Hatch Act cases, 3 Actions Against SES cases, and 6 Actions Against ALJs. ⁴ MSPB closed 17 PFR cases by order of the Clerk of the Board under its 2018 policy on withdrawing PFRs. ⁵ Final Board Decisions.	

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 ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Adverse Action by Agency	1,881	1,023	54.39	858	45.61	436	50.82	422	49.18	
Termination of Probationers	486	471	96.91	15	3.09	14	93.33	1	6.67	
Reduction in Force	9	4	44.44	5	55.56	3	60.00	2	40.00	
Performance	173	87	50.29	86	49.71	49	56.98	37	43.02	
Acceptable Level of Competence (ALOC) ³	29	21	72.41	8	27.59	6	75.00	2	25.00	
Suitability	75	34	45.33	41	54.67	29	70.73	12	29.27	
CSRS ⁴ Retirement: Legal	112	69	61.61	43	38.39	0	0.00	43	100.00	
CSRS Retirement: Disability	6	4	66.67	2	33.33	0	0.00	2	100.00	
CSRS Retirement: Overpayment	54	30	55.56	24	44.44	14	58.33	10	41.67	
FERS ⁴ Retirement: Legal	189	140	74.07	49	25.93	1	2.04	48	97.96	
FERS Retirement: Disability	417	301	72.18	116	27.82	1	0.86	115	99.14	
FERS Retirement: Overpayment	218	123	56.42	95	43.58	61	64.21	34	35.79	
FERCCA ⁴	9	8	88.89	1	11.11	0	0.00	1	100.00	
Individual Right of Action	453	303	66.89	150	33.11	74	49.33	76	50.67	
USERRA	76	40	52.63	36	47.37	19	52.78	17	47.22	
VEOA	55	32	58.18	23	41.82	4	17.39	19	82.61	
Other ⁵	407	392	96.31	15	3.69	13	86.67	2	13.33	
Total	4,649	3,082	66.29	1,567	33.71	724	46.20	843	53.80	
<p>¹ Percent Dismissed and Not Dismissed are of the number Decided. ² Percent Settled and Adjudicated are of the number Not Dismissed. ³ 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. ⁴ Civil Service Retirement System (CSRS); Federal Employees Retirement System (FERS); and Federal Erroneous Retirement Coverage Corrections Act (FERCCA). ⁵ "Other" appeals include Restoration to Duty, Miscellaneous, Reemployment Priority, Employment Practices, and others.</p>										

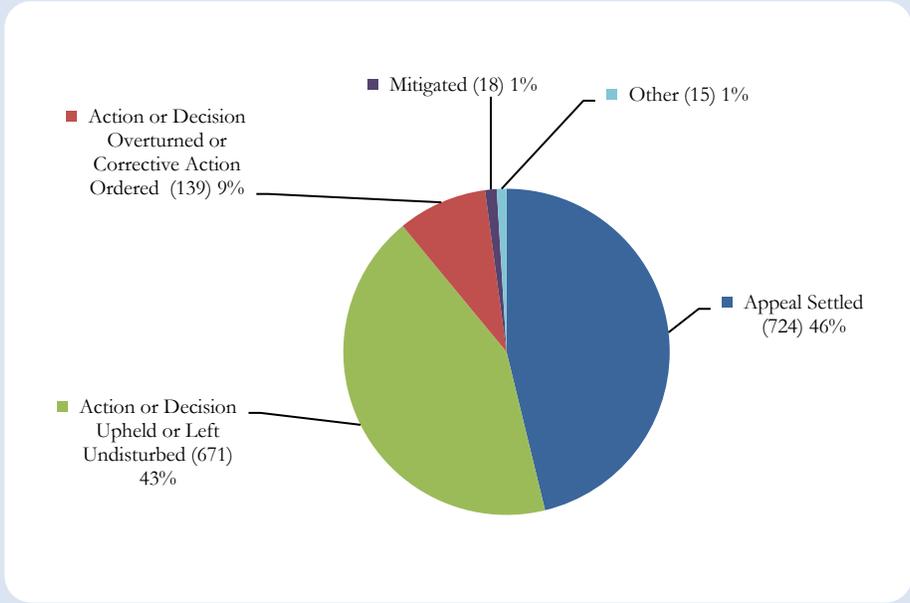
Figure 1: Type of Appeals Decided in the Regional and Field Offices



Total Number of Appeals: 4,649

Note: Some percentages display as “0” due to rounding; percentages are rounded to add to 100%.

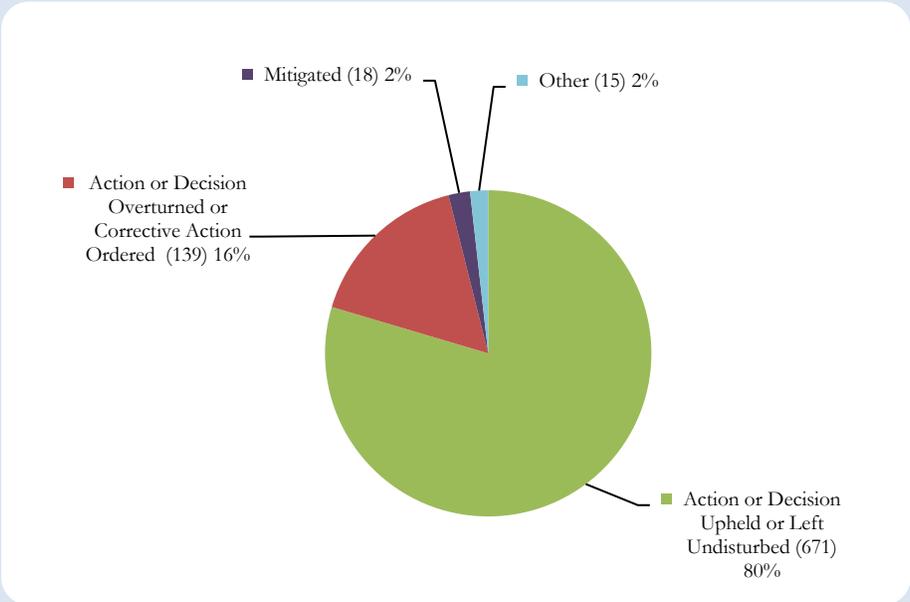
Figure 2: Dispositions of Initial Appeals Not Dismissed by Regional and Field Offices



Total Number of Appeals that Were Not Dismissed: 1,567

Percentages are rounded to add to 100%.

Figure 3: Dispositions of Initial Appeals Not Dismissed or Settled by Regional and Field Offices



Based on 843 Appeals Adjudicated on the Merits

Percentages are rounded to add to 100%.

Table 3: Disposition of Appeals by Agency
(in descending order by number of decided appeals)

Agency	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Office of Personnel Management ³	1,045	682	65.3	363	34.7	103	28.4	260	71.6	
Department of Veterans Affairs	679	443	65.2	236	34.8	120	50.8	116	49.2	
Department of the Army	403	262	65.0	141	35.0	81	57.4	60	42.6	
United States Postal Service	396	267	67.4	129	32.6	90	69.8	39	30.2	
Department of the Navy	329	219	66.6	110	33.4	46	41.8	64	58.2	
Department of Homeland Security	259	144	55.6	115	44.4	56	48.7	59	51.3	
Department of Defense	200	136	68.0	64	32.0	33	51.6	31	48.4	
Department of the Air Force	190	124	65.3	66	34.7	29	43.9	37	56.1	
Department of Justice	166	121	72.9	45	27.1	20	44.4	25	55.6	
Department of Health and Human Services	165	156	94.5	9	5.5	5	55.6	4	44.4	
Department of Agriculture	141	89	63.1	52	36.9	27	51.9	25	48.1	
Department of the Treasury	132	96	72.7	36	27.3	20	55.6	16	44.4	
Social Security Administration	91	67	73.6	24	26.4	8	33.3	16	66.7	
Department of the Interior	90	59	65.6	31	34.4	15	48.4	16	51.6	
Department of Commerce	89	60	67.4	29	32.6	12	41.4	17	58.6	
Department of Transportation	48	23	47.9	25	52.1	8	32.0	17	68.0	
Department of Labor	27	14	51.9	13	48.1	6	46.2	7	53.8	
Department of Housing and Urban Development	21	14	66.7	7	33.3	3	42.9	4	57.1	
Department of Energy	17	6	35.3	11	64.7	7	63.6	4	36.4	
Equal Employment Opportunity Commission	17	16	94.1	1	5.9	0	0.0	1	100.0	
Department of State	12	4	33.3	8	66.7	5	62.5	3	37.5	
General Services Administration	11	3	27.3	8	72.7	5	62.5	3	37.5	
Environmental Protection Agency	10	7	70.0	3	30.0	3	100.0	0	0.0	
Small Business Administration	10	8	80.0	2	20.0	0	0.0	2	100.0	
Federal Deposit Insurance Corporation	9	4	44.4	5	55.6	2	40.0	3	60.0	
Department of Education	8	6	75.0	2	25.0	0	0.0	2	100.0	

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

	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
Agency	#	#	%	#	%	#	%	#	%	
Government Publishing Office	7	5	71.4	2	28.6	0	0.0	2	100.0	
Smithsonian Institution	7	4	57.1	3	42.9	2	66.7	1	33.3	
Agency for International Development	6	4	66.7	2	33.3	2	100.0	0	0.0	
Broadcasting Board of Governors	6	3	50.0	3	50.0	3	100.0	0	0.0	
National Aeronautics and Space Administration	6	2	33.3	4	66.7	1	25.0	3	75.0	
Court Services and Offender Supervision Agency for DC	5	4	80.0	1	20.0	1	100.0	0	0.0	
Nuclear Regulatory Commission	4	2	50.0	2	50.0	0	0.0	2	100.0	
U.S. Agency for Global Media	4	2	50.0	2	50.0	1	50.0	1	50.0	
Armed Forces Retirement Home	3	0	0.0	3	100.0	3	100.0	0	0.0	
Federal Retirement Thrift Investment Board	3	3	100.0	0	0.0	0	0.0	0	0.0	
National Archives and Records Administration	3	2	66.7	1	33.3	0	0.0	1	100.0	
Office of Special Counsel	3	2	66.7	1	33.3	1	100.0	0	0.0	
Architectural and Transportation Barriers Compliance Board	2	1	50.0	1	50.0	1	100.0	0	0.0	
Corporation for National and Community Service	2	1	50.0	1	50.0	1	100.0	0	0.0	
Executive Office of the President, Office of Administration	2	2	100.0	0	0.0	0	0.0	0	0.0	
Federal Mediation and Conciliation Service	2	1	50.0	1	50.0	1	100.0	0	0.0	
National Credit Union Administration	2	1	50.0	1	50.0	0	0.0	1	100.0	
Selective Service System	2	2	100.0	0	0.0	0	0.0	0	0.0	
Tennessee Valley Authority	2	1	50.0	1	50.0	0	0.0	1	100.0	
Committee for Purchase from People Who Are Blind or Severely Disabled	1	1	100.0	0	0.0	0	0.0	0	0.0	
Consumer Product Safety Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	
Denali Commission	1	0	0.0	1	100.0	1	100.0	0	0.0	

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

Agency	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Development Finance Corporation	1	0	0.0	1	100.0	1	100.0	0	0.0	
Federal Communications Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Housing Finance Agency	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Reserve System	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Trade Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	
Millennium Challenge Corporation	1	1	100.0	0	0.0	0	0.0	0	0.0	
National Labor Relations Board	1	1	100.0	0	0.0	0	0.0	0	0.0	
Other	1	1	100.0	0	0.0	0	0.0	0	0.0	
Peace Corps	1	1	100.0	0	0.0	0	0.0	0	0.0	
Securities and Exchange Commission	1	0	0.0	1	100.0	1	100.0	0	0.0	
Total	4,649	3,082	66.3	1,567	33.7	724	46.2	843	53.8	
<p>¹ Percent Dismissed and Not Dismissed are of the number Decided. ² Percent Settled and Adjudicated are of the number Not Dismissed. ³ Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the CSRS and the FERS retirement systems.</p>										

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

Agency	Adjudicated ¹	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
Office of Personnel Management ²	260	193	74.2	54	20.8	1	0.4	12	4.6
Department of Veterans Affairs	116	94	81.0	19	16.4	0	0.0	3	2.6
Department of the Navy	64	54	84.4	9	14.1	1	1.6	0	0.0
Department of the Army	60	48	80.0	8	13.3	4	6.7	0	0.0
Department of Homeland Security	59	51	86.4	7	11.9	1	1.7	0	0.0
United States Postal Service	39	30	76.9	7	17.9	2	5.1	0	0.0
Department of the Air Force	37	29	78.4	6	16.2	2	5.4	0	0.0
Department of Defense	31	25	80.6	4	12.9	2	6.5	0	0.0
Department of Agriculture	25	21	84.0	4	16.0	0	0.0	0	0.0
Department of Justice	25	19	76.0	4	16.0	2	8.0	0	0.0
Department of Commerce	17	15	88.2	2	11.8	0	0.0	0	0.0
Department of Transportation	17	17	100.0	0	0.0	0	0.0	0	0.0
Department of the Interior	16	11	68.8	5	31.3	0	0.0	0	0.0
Department of the Treasury	16	13	81.3	2	12.5	1	6.3	0	0.0
Social Security Administration	16	14	87.5	2	12.5	0	0.0	0	0.0
Department of Labor	7	7	100.0	0	0.0	0	0.0	0	0.0
Department of Energy	4	4	100.0	0	0.0	0	0.0	0	0.0
Department of Health and Human Services	4	4	100.0	0	0.0	0	0.0	0	0.0
Department of Housing and Urban Development	4	4	100.0	0	0.0	0	0.0	0	0.0
Department of State	3	3	100.0	0	0.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	3	2	66.7	1	33.3	0	0.0	0	0.0
General Services Administration	3	3	100.0	0	0.0	0	0.0	0	0.0
National Aeronautics and Space Administration	3	2	66.7	0	0.0	1	33.3	0	0.0
Department of Education	2	1	50.0	1	50.0	0	0.0	0	0.0

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

Agency	Adjudicated ¹		Affirmed		Reversed		Mitigated Modified		Other	
	#	%	#	%	#	%	#	%	#	%
Government Publishing Office	2		1	50.0	1	50.0	0	0.0	0	0.0
Nuclear Regulatory Commission	2		0	0.0	2	100.0	0	0.0	0	0.0
Small Business Administration	2		2	100.0	0	0.0	0	0.0	0	0.0
Equal Employment Opportunity Commission	1		1	100.0	0	0.0	0	0.0	0	0.0
National Archives and Records Administration	1		0	0.0	1	100.0	0	0.0	0	0.0
National Credit Union Administration	1		1	100.0	0	0.0	0	0.0	0	0.0
Smithsonian Institution	1		1	100.0	0	0.0	0	0.0	0	0.0
Tennessee Valley Authority	1		0	0.0	0	0.0	1	100.0	0	0.0
U.S. Agency for Global Media	1		1	100.0	0	0.0	0	0.0	0	0.0
Total	843		671	79.6	139	16.5	18	2.1	15	1.8

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

² Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the CSRS and the FERS retirement systems.

Note, percentages may not total 100 because of rounding.

SIGNIFICANT COURT OPINIONS ISSUED IN FY 2021

As stated earlier, due to the lack of quorum, the Board did not issue any decisions in FY 2021. As a service to MSPB's stakeholders, we have provided brief summaries of significant opinions issued by the CAFC and other Federal appellate courts in appeals of MSPB cases. There were no decision issues by the Supreme Court in FY 2021 in cases that could affect MSPB case law.

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

Probationary Period/Demotion During Supervisory Probation Period

Mouton-Miller v. MSPB, [985 F.2d 864](#), [errata](#) (Fed. Cir. 2021): The court held that 5 U.S.C. § 3321 applies only to employment in the competitive service. It found that the statute provides that a probationary supervisory employee whose performance is found wanting may be returned to the employee's previous, lower-graded, nonsupervisory position without any appeal right. The petitioner, who was demoted by the Department of Homeland Security under this provision, alleged the statute did not apply to her because her immediately prior excepted service supervisory probation should have been tacked onto her competitive service supervisory probation, with the result that she had completed probation and should have an appeal right. The court rejected her argument because the statute's wording and implementing regulations make clear that excepted service supervisory probation cannot be counted toward completion of a competitive service supervisory probation period.

Removal/Chapter 43

Santos v. National Aeronautics and Space Administration, [990 F.3d 1355](#) (Fed. Cir. 2021): The petitioner appealed his performance-based removal to MSPB, arguing that it was retaliatory, discriminatory, and violated USERRA. An AJ sustained the removal and found that the petitioner did not establish any of his affirmative defenses. In a matter of first impression, the court held that the plain language of 5 U.S.C. § 4302(c)(6), which provides that an agency may reassign, reduce in grade, or remove employees who "continue to have unacceptable performance" during the performance improvement period (PIP), requires that an agency justify its decision to place an employee on the PIP in the first place if the PIP leads to a performance-based removal. Thus, in an appeal of a performance-based removal following a PIP, the agency must prove by substantial evidence that the employee's unacceptable performance "continued," i.e., that it was unacceptable before the PIP and remained so during the PIP. As the AJ did not consider the petitioner's allegation that he never should have been placed on a PIP, the court found that she abused her discretion. The court therefore vacated and remanded this issue, directing the AJ on remand to determine whether the agency established that the petitioner performed unacceptably prior to being placed on the PIP. The court also vacated and remanded the AJ's findings regarding USERRA because the propriety of the agency's decision to place the petitioner on a PIP in the first place is related to one of the *Sheehan* factors (the validity of the agency's proffered reason for its action) that MSPB must consider in assessing whether a discriminatory motivation may be reasonably inferred in a USERRA appeal. The court directed the AJ on remand to apply the *Sheehan* factors and to conduct additional fact finding concerning the petitioner's pre-PIP performance and his supervisor's motivations for initiating the PIP.

Removal/Chapter 75

Holmes v. United States Postal Service, [987 F.3d 1042](#) (Fed. Cir. 2021): The petitioner was removed from his position as a City Carrier pursuant to charges of “Unacceptable conduct/purchase and/or possession of an Illegal Drug While on the Clock and in Uniform.” The agency discovered the petitioner’s misconduct via video surveillance and removed seven other employees for the same misconduct. When confronted with the charges, the petitioner invoked his Fifth Amendment right to remain silent and declined to answer any questions concerning the surveillance videos. After receiving his proposed removal, the petitioner declared his desire to apologize to management for making a “little mistake,” but did not provide further details regarding his actions. After his removal, the petitioner chose to file an appeal with MSPB, whereas five of the other seven removed individuals instead sought review of their removals through arbitration. At MSPB, the AJ affirmed the agency’s removal based on the agency’s evidence and witness testimony. When making his decision, the AJ weighed the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), and determined that multiple *Douglas* factors supported the penalty of removal. The petitioner appealed MSPB’s decision to the CAFC and the court affirmed. The petitioner first argued that the agency did not have sufficient evidence to prove its charges, stating that the agency failed to introduce the evidence necessary to prove similar charges in a criminal context. The court rejected this theory, holding that the agency only needed to prove its charges by a preponderance of the evidence, instead of by the higher beyond a reasonable doubt standard necessary for criminal charges. The petitioner also argued that the penalty of removal was too high based on the charges, because the five individuals who chose to go to arbitration had their removals mitigated to suspensions, and the sixth *Douglas* factor required the agency to treat all employees consistently in penalty determination. The court also denied this argument, finding that MSPB was not required to follow the decision of the arbitrator, and that a different outcome resulting in adjudication by a separate tribunal did not warrant reversal. The court further noted that the evidence before MSPB was not actually identical to the evidence before the arbitrators, because the individuals who chose arbitration admitted to their charges whereas the petitioner refused to do so, and this refusal constituted a failure to take responsibility for his actions.

Vestal v. Department of the Treasury, [1 F.4th 1049](#) (Fed. Cir. 2021): The petitioner was an Internal Revenue Agent with the Internal Revenue Service facing a suspension. To prepare her defense against the suspension, the petitioner sent an unredacted taxpayer record containing confidential taxpayer information to her attorney, who was not authorized to receive such information. The petitioner allegedly believed that the attorney-client privilege protected the disclosure from being unauthorized. The agency removed the petitioner for unlawfully disclosing taxpayer information to an unauthorized person, and she appealed the removal to MSPB. The AJ sustained the agency’s chosen penalty of removal based upon the *Douglas* factors, including the harmful impact of unauthorized disclosures of taxpayer information on taxpayer confidence, the petitioner’s training that taxpayer information was to be held “sacrosanct,” the intentionality of the unauthorized disclosure, and the petitioner’s prior suspension. On appeal to the court, the petitioner argued that the penalty of removal was too severe because the unauthorized disclosure was not “willful,” as the petitioner had acted under a mistaken belief that the disclosure would not be considered unauthorized. The court held that the petitioner’s “removal was properly predicated on her intention to disclose the information to her attorney and did not depend on whether she knew that the disclosure was wrong,” consistent with the agency’s penalty guidelines, which permit removal for an intentional unauthorized disclosure and do not require a showing of willfulness. The court further found no error in the AJ’s factual findings or the weight the AJ gave the individual factors. Accordingly, the court affirmed the petitioner’s removal.

Removal/38 U.S.C. § 714

Harrington v. Department of Veterans Affairs (VA), [981 F.3d 1356](#) (Fed. Cir. 2020): The court held the petitioner's removal by the VA pursuant to its authority under 38 U.S.C. § 714 must be vacated in light of the court's decision in *Sayers v. VA*, 954 F.3d 1370 (Fed. Cir. 2020). In *Sayers*, the court held that: (1) the proper interpretation of § 714 requires MSPB to review the entire decision below, including the reasonableness of the penalty, and (2) § 714 does not apply retroactively to conduct occurring before its enactment. Consistent with *Sayers*, the court held that the § 714 action brought against the petitioner was improper because the only remaining charges against him depend on conduct predating the enactment of § 714. The court vacated the petitioner's removal and remanded to MSPB with instructions to remand the case to the VA.

Brenner v. VA, [990 F.3d 1313](#) (Fed. Cir. 2021): The VA removed the appellant from his attorney position, pursuant to 38 U.S.C. § 714, based on failure to meet performance standards. An AJ upheld the removal, and in doing so held that MSPB is prohibited by § 714 from reviewing the reasonableness of the penalty. The court reversed the AJ's finding that MSPB is unable to review the reasonableness of the penalty, citing *Sayers* (Fed. Cir. 2020). The court held, quoting *Sayers*, that under § 714, the AJ and MSPB must "review for substantial evidence the entirety of the VA's removal decision—including the penalty—rather than merely confirming that the record contains substantial evidence that the alleged conduct leading to the adverse action actually occurred." The court held that, if MSPB concludes that the VA's removal decision is unsupported by substantial evidence, MSPB should remand to the VA for further proceedings. The court also distinguished its holding in *Lisiecki v. Merit Systems Protection Board*, 769 F.2d 1558 (Fed. Cir. 1985), which interpreted language in Chapter 43 similar to that in § 714. The court noted that "the reasoning undergirding *Lisiecki* arises from the specific circumstances of [C]hapter 43 adverse actions," which have both "a narrow focus" and other procedural protections "not applicable to § 714." Finally, the court held that MSPB erred in applying § 714 retroactively to conduct that had occurred prior to its effective date.

Connor v. VA, [8 F.4th 1319](#) (Fed. Cir. 2021): The appellant was removed from the VA under 38 U.S.C. § 714, based on 27 specifications of misconduct. The AJ sustained only one, but held it was the most serious, and credited the testimony of the VA that this specification alone would have merited removal. The AJ accordingly sustained the removal. The VA argued before the court that the AJ erred in considering the *Douglas* factors because § 714's prohibition on mitigating the penalty eliminated the need to apply the factors. The court disagreed, holding that the *Douglas* factors are pertinent to review of the penalty, not just mitigation of the penalty. The court expressly held, as a continuation of its holdings in *Sayers* and *Brenner*, that the VA and MSPB must apply the *Douglas* factors in § 714 cases when selecting and reviewing the penalty. The court went on to affirm MSPB's determinations regarding the specification it sustained.

Rodriguez v. VA, [8 F.4th 1290](#) (Fed. Cir. 2021): The appellant was removed from his position with the VA pursuant to 38 U.S.C. § 714, based on disruptive behavior toward a patient, conduct unbecoming a Federal supervisor, and lack of candor. The AJ sustained the removal and found that, under § 714, MSPB could not mitigate the penalty imposed by the VA. The court reversed the AJ's finding that "substantial evidence" was the appropriate standard of review to apply in determining whether an employee has engaged in misconduct that justifies discipline under § 714. Distinguishing between "standard of review" and "burden of proof," the court held that the appropriate burden of proof for the VA's actions taken pursuant to § 714 is the preponderance of the evidence. The court also rejected the conclusion that § 714's prohibition on mitigating penalties deprives MSPB of any power to review penalties imposed under that section, finding instead that MSPB retains both the

authority to review penalties for substantial evidence and the power to strike down the imposition of a penalty that is arbitrary, capricious, an abuse of discretion, or not in accordance with law. Accordingly, MSPB must also ensure that the VA considered the relevant factors under *Douglas* in imposing its penalty. Because the AJ did not make such a determination, the court reversed the AJ's decision on that issue. The court rejected the appellant's constitutional challenges to his removal, including that he was denied due process by the VA's internal procedures; that the "substantial evidence" standard of review violates the Appointments Clause because MSPB lacks the ability to review the penalty; and that MSPB's AJs have not been properly appointed for purposes of the Appointments Clause. With regard to the last issue, the court found the record insufficient to address whether the AJs had been properly appointed under the Appointments Clause. Finally, the court rejected the appellant's claim that AJs exercise unconstitutional authority because of the absence of a Board quorum, finding that the delay in adjudication caused by the current absence of a Board quorum does not render the statutory adjudicative scheme constitutionally suspect.

Removal/NIH Policy

Braun v. Department of Health & Human Services, [983 F.3d 1295](#) (Fed. Cir. 2020): The petitioner, who was a tenured research doctor at the National Institutes of Health (NIH), was removed "for cause" (negligence in the performance of duties) pursuant to § L(1) of the NIH Policy on Performance Management, Disciplinary Actions and Administrative Removals for Title 42 Employees (NIH Policy) after an audit found that he routinely failed to keep records on the human subjects in his research studies. The petitioner appealed his removal to MSPB, arguing that his poor performance did not constitute "cause" under § L(1) of the NIH Policy as a matter of law and that his removal should have been conducted pursuant to § H(1) of the NIH Policy, which provides that "[t]enured scientists must undergo the de-tenuring process before a performance-based action may be taken against them." The AJ sustained the NIH's charge of negligence in the performance of duties, found the petitioner had received prior notice of the charge against him, concluded the petitioner's misconduct came within § L(1) regarding "for cause" removals, and upheld the removal. On appeal, the court affirmed the AJ's decision and held that "[s]ection L(1)'s provision allowing removal 'for cause' . . . neither requires de-tenuring nor excludes all job-performance-based removals," both because § L(1) defines "cause" in relevant part as "scientific misconduct" and because the NIH Policy "echoes" the statutory scheme for removals set forth in Chapters 43 and 75, which both permit performance-based removals. The court further held that the notice of proposed removal had been adequate to notify the petitioner of the charged misconduct, that the NIH had not committed any harmful procedural error regarding his removal, and that the petitioner had forfeited his argument that the NIH had engaged in disparate treatment by removing him for serious and continuing protocol violations.

Senior Executive Service Rights

Esparraguera v. Department of the Army, [981 F.3d 1328](#) (Fed. Cir. 2020): The court held that MSPB cannot review the performance-based removal of a SES employee in an informal hearing under 5 U.S.C. § 3592. Instead, under § 3592 MSPB acts as a "ministerial record-developing adjunct" to the employing agency, enabling the SES employee to enter her arguments and evidence into the record for the employing agency's ultimate consideration. Given that MSPB does not have jurisdiction to review the removal itself, the court held that there is no "final order or decision" of MSPB that provides the court with jurisdiction under 5 U.S.C. § 7703. The court therefore dismissed for lack of jurisdiction. The court's holding is consistent with MSPB's regulation at 5 C.F.R. § 1201.145, which states "There is no right under 5 U.S.C. § 7703 to appeal the agency's action or

any action by the judge or the Board in cases arising under § 1201.143(a) of this part.” Because the court lacked jurisdiction, it did not consider the petitioner’s due process arguments.

USERRA/Differential Pay Under 5 U.S.C. § 5538(a)

Adams v. Department of Homeland Security, [3 F.4th 1375](#) (Fed. Cir. 2021): The petitioner, who was employed as an HR specialist with U.S. Customs and Border Patrol (CBP), was also a member of the Arizona Air National Guard. From April to September 2018, the petitioner served three periods of military service with the National Guard, consisting of an annual training session and two military personnel appropriation tours. The petitioner requested differential pay from CBP for each of the three service periods and was denied because the agency determined that the petitioner’s service did not qualify for differential pay under 5 U.S.C. § 5538(a), which requires that the employee serve “pursuant to a call to active duty that meets the statutory definition of [‘]contingency operation.[’]” The petitioner appealed to MSPB, alleging that the denial of differential pay violated USERRA. The AJ concluded that the denial did not violate USERRA because the petitioner had not provided evidence that his military service was a motivating factor in the denial. The court held that the AJ erred because under the case law, a claimant who is seeking benefits that are only available to military members is not required to show that the claimant’s military service was a substantial motivating factor for the challenged action under USERRA; rather, the claimant need only show that he or she was denied a benefit of employment. However, the court affirmed the AJ’s conclusion that the CBP had not violated USERRA because none of the petitioner’s periods of service constituted “active duty” service or “contingency operations” as defined by statute.

USERRA/Nonselection

Beck v. Department of the Navy, [997 F.3d 1171](#) (Fed. Cir. 2021): The court held that the totality of the record showed that the Navy’s preselection determination was not supported by substantial evidence and that, under USERRA, preselection can only buttress an agency’s personnel decision to hire a less qualified individual when the preselection is not tainted with discriminatory intent, as it was here. The court held that MSPB erred in upholding the petitioner’s non-selection regardless of his superior prior military record as contrary to 38 U.S.C. § 4311, and it affirmed in part and reversed in part MSPB’s decision denying the petitioner’s request for corrective action.

Whistleblowing/Jurisdiction

Hessami v. Department of VA, [979 F.3d 1362](#) (Fed. Cir. 2020): The court clarified that a summary judgment standard does not apply to MSPB’s determination of its jurisdiction under the Whistleblower Protection Act (WPA). The court held that MSPB instead must apply a nonfrivolous allegation standard analogous to the well-pleaded complaint rule. The court stated that when evaluating MSPB’s jurisdiction over a whistleblower appeal, the question of whether the appellant has nonfrivolously alleged protected disclosures must be determined based on whether the employee alleged sufficient factual matter, accepted as true, to state a claim that is plausible on its face. MSPB may not deny jurisdiction by crediting the agency’s interpretation of the evidence as to whether the alleged disclosures fell within the protected categories or whether the disclosures were a contributing factor to an adverse personnel action. Applying these principles, the court determined that the petitioner made nonfrivolous allegations that she had made protected disclosures of gross mismanagement, a gross waste of funds, and a substantial and specific danger to public health. The court vacated MSPB’s decision and remanded for further proceedings.

Significant Opinions Issued by Other Circuit Courts

Fuerst v. Secretary of the Air Force, [978 F.3d 269](#) (6th Cir. 2020): In an initial decision the AJ denied the petitioner’s petition for enforcement of a prior Board order. The petitioner appealed the compliance decision to Federal district court, which dismissed her appeal for lack of jurisdiction. The Sixth Circuit affirmed the district court’s decision. The court explained that only mixed cases—i.e., appeals involving an adverse agency action directly appealable to MSPB and a claim that the adverse action was based on discrimination prohibited by a Federal statute—may be appealed to Federal district courts and that enforcement actions do not constitute such an appealable action. Thus, the court concluded that enforcement actions cannot be mixed cases and that the petitioner must seek judicial review of MSPB’s compliance decision in the CAFC pursuant to 5 U.S.C. § 7702(b)(1)(A).

Marcato v. United States Agency for International Development, [11 F.4th 781](#) (D.C. Cir. 2021): The petitioner was removed from her position as a management analyst within the agency’s Office of IG based on multiple charges of misconduct related to an ongoing investigation by the agency into her former employer, along with violations of the agency’s communications protocol. The petitioner appealed that removal to MSPB, alleging that her removal was reprisal for her having made protected whistleblower disclosures. The AJ affirmed the removal, finding that the petitioner committed the charged offenses and that her removal promoted the effective functioning of the agency. Addressing her whistleblower reprisal charge, the AJ held that the petitioner’s disclosures may have been a contributing factor in the agency’s decision to remove the petitioner, but the agency proved by clear and convincing evidence that it still would have removed the petitioner in the absence of the protected disclosures. The petitioner appealed that decision to the D.C. Circuit, and the court affirmed MSPB’s decision. The court first held that it had jurisdiction to hear the petitioner’s appeal, because 5 U.S.C. § 7703(b)(1)(B) granted the court jurisdiction to hear the disposition of whistleblower retaliation claims raised as affirmative defenses under the CSRA. The court then affirmed the AJ’s determination that the agency proved by clear and convincing evidence that it would have removed the petitioner even in the absence of any protected disclosures. In its decision, the court considered the three factors enumerated in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999), and found the AJ’s decision was supported by substantial evidence.

Decisions by the Supreme Court That Could Affect MSPB Case Law

None.

SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2021

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.

Publications Issued

MSPB did not issue any formal reports to the President and Congress in FY 2021 under 5 U.S.C. § 1204(a)(3) because of the continued lack of quorum. However, MSPB published three editions of its [IoM newsletter](#), which included articles on various topics such as pay equity, recruitment and hiring, telework, online training, disability retirement, performance management, and supportive work environments. MSPB published five research briefs in FY 2021, which are summarized below.

- [*Confidence in Ability to Perform Successfully*](#) (September 2021) examines Federal employees' confidence in ability to perform successfully (CAPS), an MPS-derived measure that gauges the degree to which employees believe their actions determine their success on the job. Governmentwide survey results show a relationship between CAPS and how employees think about career paths, work tasks, task outcomes, work-related competencies, and engagement. The brief also presents implications of CAPS for managing work and employee counseling and development.
- [*Agency Leader Responsibilities Related to Prohibited Personnel Practices*](#) (May 2021) discusses selected responsibilities assigned to the heads of Federal agencies by civil service law, to promote the prevention of PPPs, the protection of whistleblowers, and accountability for proper exercise of personal authority. The brief places these responsibilities in the context of the broader goal of a merit-based civil service and outlines the extent to which they can—and in some cases cannot—be delegated.
- [*Determining an Acceptable Level of Competence for Step Increases*](#) (April 2021) reviews data and practices related to the within-grade increase (WGI), a periodic fixed pay increase that is granted provided that the employee performs at “an acceptable level of competence.” This research brief explores factors that are important to the WGI process, the role of the WGI in addressing under-performance, and some lessons learned for agencies to consider.
- [*Direct-Hire Authority Under 5 U.S.C. § 3304: Usage and Outcomes*](#) (February 2021) explores the overall usage of direct hire authorities and then looks more closely at the authority that is covered under 5 U.S.C. § 3304(a)(3) and is approved and overseen by OPM. Specifically, the brief examines what the § 3304 authority is, the extent to which it is used, the outcomes achieved, and the reported advantages and disadvantages of its use. The brief also notes that Federal agencies desire greater flexibility in selecting among applicants under this authority than OPM believes appropriate or permissible under the statute.
- [*The Importance of Job Fit for Federal Agencies and Employees*](#) (October 2020) draws on professional literature and selected items from the 2016 MPS to describe three distinct ways employees may fit with their jobs including: how their knowledge, skills, and abilities may match those required by the job; how their daily material and psychological needs may be fulfilled by the

job; or how the job may align with their core beliefs about who they are or who they want to be. The research brief also discusses how job fit relates to workplace outcomes such as job satisfaction, employee engagement, performance appraisal ratings, and an employee's intent to leave, and outlines actions in areas such as job design, hiring, training and development, and performance management that might help Federal managers and employees improve job fit.

In addition, OPE has maintained two documents in a state of readiness for review and approval by an incoming Board. Those documents are a report on a 2016-2017 study of sexual harassment in Federal workplaces and a new research agenda for merit system studies.

Merit Principles Survey and Other Surveys Administered

The Qualtrics survey application (or platform) was successfully used to conduct the 2021 MPS, which went to more agencies than in 2010 and 2016, and with a shorter time to prepare and launch the survey after final approval of survey content than in 2016. Information and data from the 2021 MPS are available at www.mspb.gov/foia/SurveyData.htm, and data from the 2021 MPS will support at least three research projects.

MSPB also administered two surveys to external stakeholders to gather input on strategic planning and seven internal surveys, including the annual all-employee internal survey, a survey to gather strategic planning information from MSPB employees, and a pandemic reentry pulse survey. The platform was also used as a secure method to collect attestation of employee COVID-19 vaccination status. Several external adjudication customer service surveys have been transferred to the new survey application so this platform will host all major MSPB surveys in the future.

Outreach and References to Merit Systems Studies

During FY 2021, MSPB studies staff conducted seven outreach events with Federal agencies, media, and an international organization about studies research briefs and the merit systems in general. MSPB was also invited twice to confer with OMB officials about hiring assessments using subject matter experts and structured interviews

In FY 2021, MSPB's research and publications were cited in diverse outlets such as national and specialty newspapers, online newsletters, radio, and publications from good government groups. Notable examples include citations to MSPB's studies in OPM's final [regulations](#) on Probation, Performance-Based Reduction in Grade, and Removal Actions; [testimony](#) by Anne Joseph O'Connell to the House Subcommittee on Government Operations; the NAPA [report](#) on its review of OPM; Government Accountability Office reports on sexual harassment, employee engagement, and gender pay differences; and a [letter](#) from the House Committee on Oversight and Reform to President Biden calling for nominations of MSPB Board members.

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

As required by statute,¹² 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.¹³ OPM's actions may broadly affect the Federal workforce, multiple Federal agencies, and applicants for Federal jobs. Each of OPM's actions listed below has 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 2021, MSPB requested and received input from OPM on the status of selected significant actions.¹⁴

OPM Leadership and Context

Confirmation of a New OPM Director

Kiran Ahuja was confirmed by the U.S. Senate as OPM Director on June 22, 2021. In the six years prior to Director Ahuja's confirmation, OPM was led by seven different individuals: four in an acting capacity¹⁵ and three who were nominated by the President and confirmed by the Senate.¹⁶ Stable leadership is critical for OPM to identify priorities, develop policy proposals, and undertake new initiatives. Such leadership is also essential to define and justify core civil service values and policies, articulate the need for changes in Federal HR policies or workforce management priorities, and shepherd those changes or priorities through the legislative, regulatory, and implementation processes.

Issuance of Congressionally Mandated Study of OPM

In FY 2018, President Trump proposed restructuring OPM by moving its policy functions to the Executive Office of the President and transferring its operational activities to other agencies, primarily the General Services Administration (GSA). The FY 2020 NDAA (Pub. L. 116-92, December 20, 2019) prohibited any restructuring until after NAPA conducted an independent study of OPM. The Act tasked NAPA with assessing OPM's statutory and non-statutory functions, identifying associated challenges, and recommending actions to address those challenges.

NAPA issued its [report](#) of that study in March 2021. The report identified several cross-cutting challenges that affect OPM's ability to effectively lead Federal HC management, which included the following:

- Myriad authorities governing Federal HC;
- Lack of sustained leadership and focus, as evidenced by recurrent turnover of OPM directors and deputy directors;
- Limited use of data and data analytics to inform policy;

¹² 5 U.S.C. § 1206.

¹³ 5 U.S.C. § 2301(b) and 5 U.S.C. § 2302(b), respectively.

¹⁴ This analysis is not a comprehensive digest of OPM activities, as OPM has many programs and responsibilities that do not directly affect MSPs and PPPs. Also, this summary does not discuss in detail every OPM significant action that was underway or completed in FY 2021. Instead, it should be read in conjunction with previous MSPB reports of OPM's significant actions.

¹⁵ Beth Cobert, Kathleen McGettigan, Margaret Weichert, and Michael Rigas.

¹⁶ Katherine Archuleta, Dr. Jeff T.H. Pon, and Dale Cabaniss.

- Outdated IT that has resulted in enterprise and operational risks; and
- Fiscal and staffing constraints that have impaired staff capacity and technological capability.

NAPA also expressed concern about the increasingly directive role of OMB in HC management, believing that it created confusion over which agency leads HC policy and seemed contrary to the intent of the CSRA. NAPA concluded that the problems identified by the Administration’s restructuring proposal would not be resolved by transferring OPM functions to OMB and GSA.

MSPB has previously highlighted many of these issues, and the NAPA report cited several OPE publications that have addressed (1) OPM as an institution, (2) OPM’s fee-for-service model, and (3) the Government’s HR workforce.

OPM as an institution. The NAPA report referenced MSPB retrospective studies on OPM from [1989](#) and [2001](#) as well as [MSPB Annual Reports](#) from 2016-2019 to help detail:

- The tensions inherent in OPM’s dual responsibilities to advocate for and execute Administration priorities and goals and ensure protection of MSPs;
- OPM’s funding and staffing challenges, from the 1980 change in Administration shortly following implementation of the CSRA to the recent (2015-2020) decline in funding and staffing of OPM’s core missions of developing HC policy and overseeing agency compliance with civil service law and MSPs;
- A reactive approach to policy development, rather than the proactive approach envisioned by the CSRA, reflected in OPM often issuing regulations and policy guidance in response to laws or EOs rather than pursuing a legislative or regulatory agenda based on an independent assessment of Federal workforce needs and relevant HR research and practices;
- The conflict of interest that may arise when OPM offers both fee-based services to help Federal agencies implement OPM-developed policies and guidance, and oversees agency compliance with law and OPM policy; and
- The dilution of the role that the CSRA established for OPM as the HR management advisor to the President.

OPM’s fee-for-service model. NAPA referred to an MSPB brief and newsletter article¹⁷ to highlight the idea that services and assistance related to OPM’s core mission should be provided to agencies without charge rather than on a fee-for-service basis. For example, all agency HR staff involved in delegated examining activities are required to be certified by OPM. OPM charges for a training program to prepare staff for the certification test, and HR staff in some agencies are reportedly not taking the training because of lack of funds. NAPA also noted MSPB’s recommendation that OPM provide no-cost or low-cost support to enhance agencies’ ability to assess applicants on the basis of ability or potential, recommending that OPM work with Congress and agencies to further explore opportunities to increase no-cost assistance and services to strengthen Federal HC management capabilities.

The HR workforce. NAPA cited a recent MSPB research brief¹⁸ to emphasize the following points:

- The complexity of HR laws and regulations has inhibited transformation of Federal HR offices and staff;

¹⁷ MSPB, [Building on OPM’s Hiring Improvement Memo](#) (2019) and *IoM*, “[OPM’s Revitalized Delegated Examining Certification Program](#)” (2020).

¹⁸ MSPB, [The State of the Federal HR Workforce: Changes and Challenges](#) (2020).

- Federal HR staff skill levels vary across Federal Government and systematic training to develop these skills is lacking; and
- There is no comprehensive view of the capacity of the Federal HR workforce.

NAPA also highlighted the IT management challenges OPM faces, ranging from the 2015 breach of Federal employee data to the continuing problems updating its internal and Governmentwide systems. The centrality of IT to OPM’s success was noted in MSPB’s Annual Report for FY 2011:

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

NAPA Recommendations

The NAPA report offered many recommendations regarding OPM and its future to achieve the following objectives:

- Reaffirm and broaden OPM’s role as an independent entity and leader for Federal civilian HC management;
- Refocus OPM to make it a state-of-the-art organization that can elevate and support HC across the Federal enterprise;
- Reorient OPM’s policy development approach toward a proactive, systematic model that streamlines the Federal HC management system;
- Improve OPM’s oversight programs, shifting from a compliance-oriented approach to a strategic, risk-based framework;
- Promote OPM’s role in strategic HC management by assisting agencies in implementing Federal HC laws, regulations, and policy guidance and improving Federal HC staff training;
- Enable and realize the untapped potential of Federal HC data and data analytics to support better workforce management;
- Transform OPM’s HC technology platforms and enhance the experience of OPM’s customers and employees; and
- Enable more strategic and sustainable funding to support OPM’s mission performance.

OPM’s Response

In its [response](#) to the NAPA study, OPM accepted the spirit and much of the substance of NAPA’s analysis. OPM noted that the NAPA study identified a clear need for OPM as the “independent, enterprise-wide human capital agency and steward of the merit system principles.” The study also broadly affirmed the importance of a strong, independent, and forward-leaning OPM to meet the modern HC management needs of the Federal Government. OPM firmly agreed with this role for the agency and views the general direction and tenor of the NAPA study recommendations as a valuable guide in that direction.

OPM accepted or conditionally accepted nearly all of NAPA’s specific recommendations¹⁹ and its response included: (1) a detailed description of OPM’s strategies to implement the recommendations, where appropriate, via the draft objectives and strategies incorporated into OPM’s FY 2022-2026 Strategic Plan; and (2) a high-level estimate of the resources required for full implementation.

Activities Related to the COVID-19 Pandemic

For a second year, along with other Federal agencies, OPM worked to continue its missions and functions while impacted by the pandemic. As the Federal Government’s central HR agency, OPM is uniquely able to help Federal agencies gauge and address the effects of COVID-19 on Federal employees and workplaces. In that capacity, OPM—

- Issued dismissal and closure procedures applicable during maximum telework;²⁰
- Extended the use of the excepted service Schedule A hiring authority to appoint staff needed in response to the pandemic;²¹ and
- Established a new category of emergency paid leave for some Federal employees based on certain COVID-19-related qualifying circumstances.²²

OPM also issued guidance on post-reentry personnel policies and work environment,²³ recognizing that the pandemic may have permanently changed employee expectations and employer policies and that practices adopted for short-term reasons might have long-term value. Accordingly, OPM has encouraged agencies to consider a post-pandemic “future of work” that is markedly different from the pre-pandemic past.

It remains to be seen how forcefully OPM will press agencies to change workplaces and work arrangements, or how aggressively OPM itself will identify or pursue changes to civil service policies that may be needed to afford agencies and employees greater flexibility in when, where, and how work is done. For instance, a fundamental assumption underlying most Federal Government pay systems with a locality pay component is that an employee’s worksite is fixed. Also, many provisions related to work time and premium pay were expressly designed to limit an agency’s ability to freely direct or allow an employee to work “anytime, anywhere.”

New Significant Actions

Activities Related to Previous Executive Orders

On October 21, 2020, President Trump signed EO 13957, “Creating Schedule F in the Excepted Service.”²⁴ Pursuant to 5 U.S.C. § 3302, the EO excepted from competitive hiring and adverse action procedures jobs with a confidential, policy-determining, policy-making, or policy-advocating

¹⁹ In most instances, a conditional acceptance was driven by statutory, resource, or implementation factors.

²⁰ OPM Memorandum for Heads of Executive Departments and Agencies, Washington, DC, [Area Dismissal and Closure Procedures during COVID-19 “Maximum Telework.”](#) February 10, 2021.

²¹ OPM Memorandum for Heads of Executive Departments and Agencies, Washington DC, [Extension of the Coronavirus Schedule A Hiring Authority](#), March 29, 2021.

²² OPM Memorandum for Heads of Executive Departments and Agencies, Washington DC, [COVID-19 Emergency Paid Leave](#), April 29, 2021.

²³ OPM Memorandum for Chief Human Capital Officers, [Additional Guidance on Post-Reentry Personnel Policies and Work Environment](#), July 23, 2021.

²⁴ EO 13957 of October 21, 2020, [Creating Schedule F in the Excepted Service](#), 85 Fed. Reg. 67,631 (October 26, 2020).

character. The EO also required that each executive agency complete within 90 days a preliminary review of which positions should be moved from the competitive service to Schedule F of the excepted service, with a complete review within 210 days and an annual review thereafter. OPM issued guidance to assist agency heads in completing their preliminary review within the 90-day deadline.²⁵ However, EO 13957 was not fully implemented before being revoked by EO 14003, which President Biden signed January 22, 2021. Consistent with EO 14003, OPM rescinded its previous guidance regarding Schedule F in March 2021.²⁶

In its information request to OPM for this review, MSPB asked about past OPM actions related to EO 13957 and views on any future actions that might be needed. OPM described playing a supporting role, such as developing and distributing a spreadsheet for agencies to use when conducting a preliminary review of positions for placement under Schedule F and a template for requesting approval for placing positions into Schedule F. On future actions, OPM responded that “since [S]chedule F was promulgated and then revoked through presidential rulemaking, without any regulatory action by OPM, OPM has rescinded all related guidance, and no employees were ever moved to Schedule F, OPM has determined that no further action is necessary to implement the rescission of EO 13957.”

Significance

Schedule F utilized criteria (“confidential, policy-determining, policy-making, or policy-advocating”) codified in statute by the CSRA,²⁷ which slightly expanded upon the language of the executive order establishing Schedule C of the excepted service.²⁸ In theory these had long been understood as hallmarks of the excepted service.²⁹ Yet a Governmentwide Executive Branch assessment of which particular positions met this criteria had not occurred since approximately 1956, when the Civil Service Commission completed a three-year review to determine which particular positions should be categorized under the newly-created Schedule C.³⁰ Since that time both the number and responsibilities of Federal civil service employees have expanded dramatically. Accordingly, the recategorization into Schedule F of large numbers of positions “not normally subject to change as a result of a Presidential transition,” with the accompanying changes in competitive hiring and adverse action procedures, would in practice have constituted the most significant change to the Federal merit systems in decades.

Although Schedule F was abolished before its implementation in practice, it seems likely that debate over the purpose, role, and composition of the career civil service will continue. Indeed, it is clear

²⁵ OPM Memorandum for Heads of Executive Departments and Agencies [sic] CHCOs and HR Directors, [Instructions on Implementing Schedule F](#), October 23, 2020.

²⁶ OPM Memorandum for Heads of Executive Departments and Agencies, [Guidance for Implementation of Executive Order 14003 – Protecting the Federal Workforce](#), March 5, 2021.

²⁷ 5 U.S.C. § 2302(a)(2)(B)(i) and § 7511(b)(2).

²⁸ EO 10440 of March 31, 1953, Amendment of Civil Service Rule VI, 18 Fed. Reg. 1,823 (April 2, 1953).

²⁹ Following its reclassification review under Schedule C, the Civil Service Commission noted: “From the very beginning of the civil service system in 1883, it has been recognized that certain types of positions should not be a part of the civil service merit system. These include: Policy-making positions [and] [p]ositions which involve a close personal and confidential relationship between the occupant and the head of the agency or one of his policy-making officials.” United States Civil Service Commission, 73d Annual Report: Fiscal Year Ended June 30, 1956, 25. For example, Rule XIX of the first Civil Service Rules, promulgated by President Chester Arthur on May 7, 1883, excepted from examination “[t]he confidential clerk or secretary of any head of a department or office.” Excepted positions were subsequently organized into Schedule A or Schedule B of the excepted service by EO 209 (March 20, 1903) and EO 1180 (March 23, 1910), respectively.

³⁰ For a general overview of the subsequent history, see OPM Special Study, [Excepted Service Hiring Authorities: Their Use and Effectiveness in the Executive Branch](#), July 2018, 1-3.

that some policymakers and legislators have sharply divergent views of how the civil service should be staffed and managed. Whatever direction future policymaking and legislating takes, OPM should take an active role in shaping the conversation. As outlined in previous discussions of OPM's significant actions, the CSRA was intended to establish OPM as the Federal Government's central agency for HR management.

Presidential Transition

OPM addressed several presidential transition-related matters during FY 2021 through measures that include the following:

- Issuance of a 2020 Presidential Transition Guide to inform Federal agency officials with transition responsibilities of the rules and policies that govern (1) the departure and appointment of political appointees and (2) the treatment of career Federal employees (especially members of the SES) during a transition period.³¹
- A moratorium on SES qualifications review board (QRB) cases following the actual or announced departure of the head of an agency.³²
- Authorities to make temporary appointments to certain Schedule C and SES positions to support Administration and agency transition.³³
- Guidance on pay and benefits for noncareer appointees who resign on Inauguration Day (reminding agencies of existing policies regarding pay, work scheduling, leave, and benefits under Title 5 of the U.S. Code).³⁴
- A reminder of the special provisions that must be followed when an agency appoints any current or former political appointee to a permanent civil service position or makes a time-limited appointment that allows for noncompetitive conversion to a permanent appointment.³⁵

Significance

As OPM noted in the transmittal for its Transition Guide, the core values and principles of merit-based civil service remain in force during periods of presidential transition. Citizens depend on Federal employees to continue the work of the Federal Government without interruption, and it is vital that transitions be transparent. One MSP that is particularly relevant during a presidential transition is MSP 8, which requires officials to protect employees against arbitrary action, personal favoritism, or coercion for partisan political purposes.³⁶

The actions described above support the MSPs and the broader purposes of ensuring that the work of the Federal Government continues without interruption and that the transition-related personnel actions are appropriately transparent, compliant, and merit-based. OPM has historically taken these

³¹ OPM Memorandum for Heads of Departments and Agencies, [2020 Presidential Transition Guide](#), December 21, 2020.

³² OPM Memorandum for Agency Heads and Human Capital Officers, [Governmentwide Moratorium on SES Qualifications Review Board \(QRB\) Cases – Presidential Election Year 2020](#), January 8, 2021.

³³ OPM Memorandum for Heads of Departments and Agencies, [Temporary Transition Schedule C Authority and Temporary Transition SES Appointment Authorities](#), January 12, 2021. Also see, OPM Memorandum for Heads of Departments and Agencies, [Amendment to Temporary Transition SES Appointment Authorities](#), March 8, 2021.

³⁴ OPM Memorandum for Human Resources Directors, [Pay and Benefits for Noncareer Appointees Who Resign on Inauguration Day](#), January 17, 2021.

³⁵ OPM Memorandum for Chief Human Capital Officers, [Political Appointees and Career Civil Service Positions](#), February 22, 2021.

³⁶ 5 U.S.C. § 2301 (b)(8).

actions shortly after a presidential election, and this pattern was followed promptly, with one exception discussed below.

During the previous two presidential transitions where a new President was elected, OPM placed a moratorium on QRB cases in December.³⁷ (The text box provides an overview of the purpose and function of QRBs.) After the 2020 presidential election, OPM did not place a moratorium on QRB cases until January 8, 2021.³⁸ It is unclear whether any agencies appointed career SES during this additional period, which could impact the ability of incoming agency heads in the new Administration to make their own decisions concerning hiring and executive resources.

The Role of QRBs in SES Selection

Civil service law and regulation require that a candidate must have their executive qualifications certified by a QRB before appointment to the career SES.*

QRB review is intended to provide an independent and objective assessment of candidates' qualifications and ensure that the hiring process is merit based and results in the selection of executives with the qualifications "responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality," as required by 5 U.S.C. § 3131.

QRBs are composed of volunteer member of the SES across the Federal Government. To promote efficiency and consistency, OPM establishes a roster of trained QRB members who serve on a quarterly basis on three-member QRB panels.

* 5 U.S.C. § 3393(c) and 5 CFR § 317.502.

Streamlining Federal Hiring

OPM's hiring-related actions during FY 2021 included issuing new regulations that authorize agencies to select and reinstate certain former Federal employees without competition to fill vacancies at any grade level, without regard to the grade of any previous position held.³⁹ Prior to this new regulation, an agency could noncompetitively reinstate an individual only to a position at a grade level that was no higher than the grade level of the individual's previous position in the competitive service.

OPM stated that this change removes barriers to reinstating Federal employees who have already competed for a Federal position, and that facilitating the return of individuals who have gained valuable skills and experience outside the Federal Government advances the civil service's goal of an effective and efficient Government.

Significance

There are several MSPs and PPPs relevant to hiring. For example, MSP 1 requires that recruitment be from qualified individuals to achieve a workforce representative of society, and MSP 2 notes that applicants should receive fair and equitable treatment. PPP 1 prohibits discrimination for or against any applicant for employment; PPP 4 prohibits influencing a person to withdraw from competition to improve another person's prospects; and PPP 6 prohibits granting a person any unauthorized preference or advantage in an employment competition.

³⁷ After the 2016 presidential election, the moratorium was effective on December 7, 2016 (see OPM Memorandum for Agency Heads and Chief Human Capital Officers, [Governmentwide Moratorium on SES Qualifications Review Board \(QRB\) Cases](#), November 18, 2016). After the 2008 presidential election, the moratorium was effective on December 19, 2008 (see OPM Memorandum for Chief Human Capital Officers, [Moratorium on Senior Executive Service \(SES\) Qualifications Review Board \(QRB\) Cases](#), December 19, 2008).

³⁸ OPM Memorandum for Agency Heads and Chief Human Capital Officers, [Governmentwide Moratorium on Senior Executive Service \(SES\) Qualifications Review Board \(QRB\) Cases—Presidential Election Year 2020](#), January 8, 2021.

³⁹ [Promotion and Internal Placement](#) (Final rule), 86 Fed. Reg. 30,375 (June 8, 2021).

Although the regulation exempts certain placements from requirements for formal competition, it seems unlikely that it will significantly reduce adherence to MSPs or increase the risk of PPPs. Reinstatements account for only a small portion of new hires (between 3 and 4 percent in recent years), and agencies must still meet several requirements related to open competition and merit-based selection.⁴⁰ Additionally, OPM plans to assess agency use of this new flexibility after it has been in operation for one year, either through its ongoing work or a focused evaluation. Nevertheless, continued incremental changes to competitive hiring policies are likely to make the system more complex for hiring managers and HR specialists.⁴¹

⁴⁰ *Ibid.* Requirements to place an individual noncompetitively include (1) public notice of the vacancy; (2) consideration of certain other categories of external applicants; and (3) a formal conclusion that the individual is the candidate with the highest relative level of knowledge, skills, and experience.

⁴¹ See MSPB, [The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs](#) (January 2015) and [Reforming Federal Hiring—Beyond Faster and Cheaper](#) (January 2006).

MSPB FINANCIAL SUMMARY

Fiscal Year 2021 Financial Summary as of September 30, 2021 (dollars in thousands)

Financial Sources

FY 2021 Appropriation	\$ 44,490
Civil Service Retirement and Disability Trust Fund	2,345
Total Financial Sources	\$ 46,835

Obligations Charged to FY 2021

Personnel Compensation	\$ 25,223
Personnel Benefits	8,531
Travel of Things	51
Travel of Persons	3
Rents, Communications and Utilities	2,188
Printing and Reproduction	20
Other Services	4,207
Supplies and Materials	135
Equipment	587
Reimbursable Obligations	76
Total Obligations Incurred	\$ 41,021

LIST OF ABBREVIATIONS AND ACRONYMS

AJ	Administrative judge
ALJ	Administrative law judge
ALOC	Acceptable level of competence
APA	Administrative Procedure Act
APHIS	USDA’s Animal and Plant Health Inspection Service
APR-APP	MSPB’s Annual Performance Report and Annual Performance Plan
AR	Annual Report
BFS	Treasury’s Bureau of the Fiscal Service
CAFC	U.S. Court of Appeals for the Federal Circuit
CAPS	Confidence in ability to perform successfully
CBP	U.S. Customs and Border Patrol
COVID-19	Novel coronavirus
CSRA	Civil Service Reform Act of 1978
CSRS	Civil Service Retirement System
DOD	Department of Defense
EEO	Equal employment opportunity
EEOC	Equal Employment Opportunity Commission
EO	Executive Order
FERS	Federal Employees Retirement System
FERCCA	Federal Erroneous Retirement Coverage Corrections Act
FOs	Field offices
FTC	Federal Trade Commission
FY	Fiscal year
GPRAMA	Government Performance and Results Act Modernization Act of 2010
GSA	U.S. General Services Administration
HC	Human capital
HQ	Headquarters
HR	Human resources
H.R.	House of Representatives (usually followed by a bill number)
IG	Inspector General
<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
NAPA	National Academy of Public Administration
NDAA	National Defense Authorization Act
NIH	National Institutes of Health
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

PIP	Performance Improvement Plan
PPPs	Prohibited personnel practices
ROs	Regional offices
SES	Senior Executive Service
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
WGI	Within-grade increase
WPA	Whistleblower Protection Act of 1989
WPEA	Whistleblower Protection Enhancement Act of 2012



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