Annual Report for FY 2017

January 19, 2018

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Foreword

In accordance with title 5, United States Code (U.S.C.) § 1206, the U.S. Merit Systems Protection Board (MSPB) submits this annual report on its significant actions during fiscal year (FY) 2017.

We invite customers and stakeholders to send comments to improve the MSPB Annual Report to:

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Information about MSPB's FY 2017 program performance results (as required under the Government Performance and Results Act Modernization Act) is available in the Annual Performance Report and Annual Performance Plan (APR-APP) for FY 2017-2019. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR) for FY 2017. MSPB's Annual Reports, AFRs, APR-APPs, and Strategic Plans are posted on the 'Agency Plans and Reports' 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 2017 ANNUAL REPORT

MESSAGE FROM THE VICE CHAIRMAN

I am pleased to submit the U.S. Merit System Protection Board's (MSPB's) Annual Report for fiscal year (FY) 2017. The most critical issue facing MSPB is the lack of a quorum of Board members, which began on January 8, 2017. Lacking a quorum prevents MSPB from issuing decisions on petitions for review and other cases at headquarters, and publishing reports of merit systems studies. In addition, without a quorum, MSPB cannot promulgate new regulations in response to Congressional changes in our jurisdiction or processes. Even so, MPSB continues to receive cases at headquarters and I continue to vote on the draft decisions prepared by our legal staff. Under long-standing delegations authorized by title 5 of the United States Code, MSPB's administrative judges in our regional and field offices continue to process initial appeals, hold hearings, and issue decisions. MSPB analysts continue to conduct research and draft merit systems studies reports, and we continue to carry out our administrative functions. Since January 8, 2017, I have served as Acting Chairman of the Board, and was honored to be designated Vice Chairman by President Trump on January 23, 2017. My official term ends on March 1, 2018. MSPB's statute allows one additional year of service beyond that date, pending confirmation of a successor. However, until a quorum is restored, MSPB will not be able to exercise its full responsibilities to protect merit, including additional responsibilities recently enacted by Congress.

In FY 2017, MSPB issued 6,028 total decisions, including 5,811 decisions by MSPB's regional and field offices, 207 decisions by the Board at headquarters, and 10 decisions by administrative law judges. The number of decisions issued at headquarters is the total finalized during the slightly more than three months of the prior to Chairman Grundmann's departure. As of December 31, 2017, there were approximately 750 cases pending before the Board members, and the number of cases grows each week. This is the largest inventory of cases at headquarters awaiting member action in our history. It constitutes the largest number of cases awaiting action at the start of the future Board members' service. These cases include regular petitions for review and other cases such as enforcement cases, requests for review of regulations of the Office of Personnel Management, and original jurisdiction cases. This report includes summaries of significant Board decisions and opinions issued by our reviewing Courts and case processing data for the regional and field offices and for headquarters. The case processing data for headquarters cases are provided for transparency, but the figures for FY 2017 will not be comparable to previous years because of the shorter period of time reflected in these data.

In early FY 2017 when the Board had a quorum, MSPB issued one study report entitled *Adverse Actions: A Compilation of Articles*. Currently, we have two reports ready for review and publication once a full quorum is restored. Consistent with a schedule adopted in 2013, we continue to produce additional reports, which also await review by new Board members. MSPB also published three editions of the *Issues of Merit* newsletter and three *Noteworthy* articles including articles on addressing misconduct, disciplinary actions, and effective management under the merit system principles. Summaries of MSPB's studies publications and other studies activities are included in this Annual Report. In accord with section 1206 of MSPB's statute, this Annual Report includes summaries of the significant actions of the Office of Personnel Management, and an assessment of the degree to which those actions support the merit principles and a workforce free from prohibited personnel practices.

Although the biggest challenge MSPB faces currently is the lack of a quorum, MSPB also must be prepared to face external factors such as changes in law and jurisdiction, and Governmentwide reorganization leading to budget and workforce reductions. These changes could impact our appeals workload, and emphasize the need for a strong merit systems studies program. We also have internal challenges including the number of employees eligible to retire and the need to improve and modernize our information technology and information services functions. These issues are briefly summarized here. Due to a lack of a quorum, the Board may be unable to fully address all of these issues.

Despite the challenges we face, MSPB employees continue to focus on our mission to protect the merit system principles and promote an effective workforce free of prohibited personnel practices.

Mark A. Robbins
Vice Chairman
January 19, 2018

INTRODUCTION

This U.S. Merit Systems Protection Board (MSPB) Annual Report for FY 2017 includes summaries of the most significant Board decisions and relevant Court opinions, case processing statistics, summaries of MSPB's merit systems study reports, *Issues of Merit* (*IoM*) newsletter topics, noteworthy articles, and summaries of the significant actions of the Office of Personnel Management (OPM).[1] The report also contains summaries of the Board's financial status, outreach, and merit systems education activities, legislative and congressional relations activities, and the internal management challenges and external factors that affect MSPB's work.

About MSPB

MSPB was created by the Civil Service Reform Act of 1978 (CSRA) to carry on the function of the Civil Service Commission to adjudicate employee appeals, thus providing independent review and due process to employees and agencies. The CSRA authorized MSPB to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses to testify at hearings, and enforce compliance with final MSPB decisions. MSPB also was granted broad authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues. In addition, MSPB was given the authority and responsibility to review and act on OPM's regulations and 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 delineated specific actions and practices as the prohibited personnel practices (PPPs), which are proscribed because they are contrary to merit system values.[3] Since the CSRA's enactment, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.[4]

MSPB's Mission and Vision

Mission

To protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices.

Vision

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

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[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] Including, among others, the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; Whistleblower Protection Act (WPA), Pub. L. 101-12, 103 Stat. 16; Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. 112-199, as amended by the "Follow the Rules Act," Pub. L. 115-40; Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. 115-41; authority for one Board member to extend OSC stay requests, Pub. L. 115-42; Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. 115-73; 5 U.S.C. § 4304; 5 U.S.C. § 7513; and those set out at 5 C.F.R. § 1201.3.

Board Members

The bipartisan Board consists of the Chairman, Vice Chairman, and Board Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, nonrenewable 7-year terms.

MARK A. ROBBINS
Vice Chairman, January 2017 to Present
Member, May 2012 to January 2017

Mark A. Robbins was nominated by President Barack Obama on December 5, 2011, to serve as a Member of the Merit Systems Protection Board and was confirmed by the U.S. Senate on April 26, 2012. President Donald Trump designated Mr. Robbins Vice Chairman on January 23, 2017. His term expires on March 1, 2018. Pending re-establishment of a Board quorum, Mr. Robbins will perform the functions vested by title 5 in the Office of the Chairman.

At the time of his nomination, Mr. Robbins was the General Counsel of the U.S. Election Assistance Commission. He previously served as a Senior Rule of Law Advisor for the State Department in Babil Province, Iraq, where he was awarded the U.S. Army's Commander's Award for Civilian Service. Mr. Robbins also served as Executive Director of the White House Privacy and Civil Liberties Oversight Board between 2006 and 2008 and as General Counsel of the Office of Personnel Management from 2001 to 2006. He worked in private practice as a litigation attorney in Los Angeles, California, between 1988 and 2000, and in the White House Office of Presidential Personnel from 1984 to 1988. Mr. Robbins began his career as a Legislative Assistant to two Los Angeles area Members of Congress, covering, among other things, civil service and Federal management issues.

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

SUSAN TSUI GRUNDMANN
Chairman, November 2009 thru January 7, 2017

Susan Tsui Grundmann was nominated by President Barack Obama to serve as a Member and Chairman of the MSPB on July 31, 2009. She was confirmed by the U.S. Senate on November 5, 2009, and sworn in on November 12, 2009. Chairman Grundmann's term expired on March 1, 2016, and she continued to serve as Chairman until January 7, 2017, under the Board's enabling statute that permits a member to remain for up to one year, or until a new member is confirmed and sworn in to succeed that member.

Previously, Ms. Grundmann served as General Counsel to the National Federation of Federal Employees (NFFE), which represents 100,000 Federal workers nationwide and is affiliated with the International Association of Machinist and Aerospace Workers. At NFFE,

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

Currently, there are two vacant member positions and the Board lacks a quorum, which prevents it from issuing decisions in petitions for review (PFRs) and other cases at headquarters (HQ) and issuing reports of merit systems studies. It also prevents the Board from promulgating regulations in response to changes enacted by Congress.

MSPB Offices and Their Functions

MSPB is headquartered in Washington, D.C. and has eight regional and field offices located throughout the United States. For FY 2018 the agency requested 235 Full-time Equivalents to conduct and support its statutory duties.

The **Board Members** adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer. The EEO Director reports to the Chairman. Directors of other offices described below report to the Chairman through the **Executive Director**.

The **Office of the Administrative Law Judge** (ALJ) adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. The functions of this office currently are performed under interagency agreements by ALJs at the Federal Trade Commission, the Coast Guard, and the Environmental Protection Agency.

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 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 HQ, rules on certain procedural matters, and issues Board decisions and orders. It serves as MSPB's public information center, coordinates media relations, operates MSPB's library and on-line information services, and

administers the Freedom of Information Act (FOIA) 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 equal employment opportunity programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB's managers and supervisors.

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

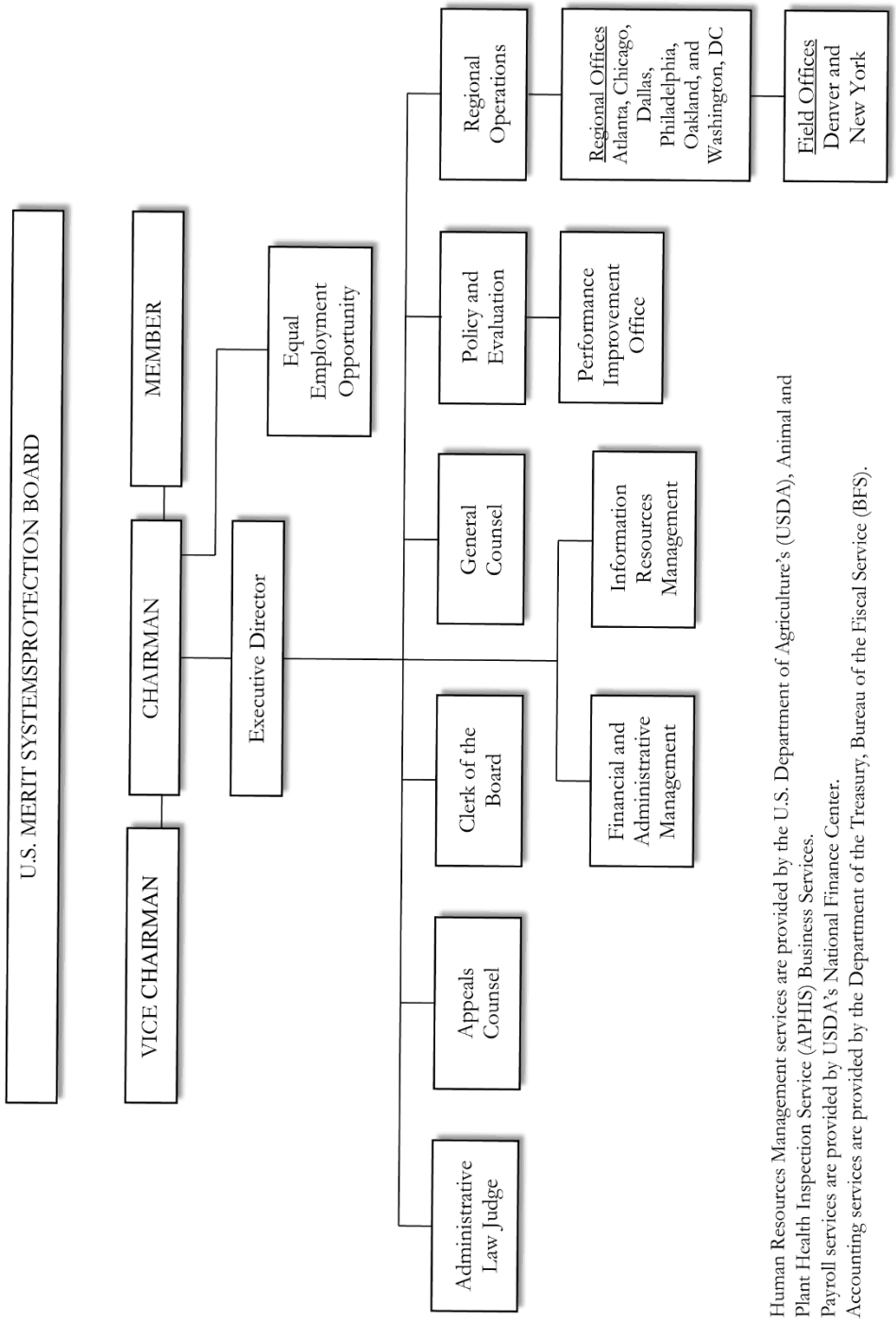
The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of rules and regulations of the Office of Personnel Management (OPM); 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, conducts MSPB's ethics program, performs the Inspector General function, and plans and directs audits and investigations.

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

The **Office of Policy and Evaluation** carries out MSPB's statutory responsibility to conduct special studies of the civil service and other Federal merit systems. Reports of these studies are sent to the President and the Congress and are distributed to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office also carries out MSPB's statutory responsibility to review and report on OPM's significant actions. 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 the Government Performance and Results Act Modernization Act of 2010 (GPRAMA).

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

MSPB Organizational Chart



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

The functions of the Administrative Law Judge (ALJ) are performed by ALJs employed by the Federal Trade Commission (FTC), the U.S. Coast Guard, and the Environmental Protection Agency (EPA) under reimbursable interagency agreements.

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FISCAL YEAR 2017 IN REVIEW

Adjudication

As previously mentioned, MSPB does not have a quorum of Board Members, which began when former Chairman Susan Tsui Grundmann departed on January 7, 2017. The lack of a quorum prevents the Board from issuing final decisions in PFRs and other cases filed at HQ, such as requests for enforcement and for review of OPM regulations. This report includes case processing statistics for initial appeals and PFRs at HQ. However, due to the lack of a quorum for most of this FY, HQ case processing statistics represent only slightly over one-quarter of the past year. Therefore, these data are not comparable to HQ case processing statistics in prior Annual Reports which covered data over the entire fiscal years.

In FY 2017, MSPB processed 6,028 cases. MSPB's AJs in the regional and field offices issued initial decisions in 5,811 cases including decisions in 5,406 initial appeals. MSPB's Board Members processed 207 cases including 145 PFRs. MSPB continued to provide alternative dispute resolution options to its customers, including the MAP. Information about whistleblower cases will be available in MSPB's APR-APP for FY 2017 – FY 2019 in accord with the Whistleblower Protection Enhancement Act of 2012 (WPEA).

Statistical information on MSPB's case processing activity is provided in the Case Processing Statistics for FY 2017 section of this report. Information for HQ cases in this section covers approximately 3 months of data because there was no quorum of Board members to vote on and issue PFR and other HQ decisions from early January 2017 to the end of September 2017. Summaries of significant MSPB decisions, and opinions issued by the U.S. Court of Appeals for the Federal Circuit, other Circuit Courts, and the U.S. Supreme Court are included in the section entitled Significant Board Decisions and Court Opinions Issued in FY 2017.

MSPB Regulations

In 2017, Congress enacted the Department of Veterans' Affairs Accountability and Whistleblower Protection Act of 2017, amended the WPEA by the "Follow the Rules Act," and authorized that when MSPB lacks a quorum, a single Board member can extend Office of Special Council (OSC) stay requests. Because the Board lacks a quorum, it has not been able to promulgate necessary regulations to implement these new authorities.

Merit Systems Studies

In FY 2017, MSPB approved and published one merit system study reports on adverse actions. MSPB also issued three editions of its *Issues of Merit* (*IoM*) newsletter, and three online articles. Summaries of FY 2017 MSPB merit systems study reports, *IoM* newsletter, Noteworthy articles, and other merit systems studies activities are located in the Summary of Merit Systems Studies Activity in FY 2017 section of this report.

The Significant Actions of the Office of Personnel Management

In accord with 5 U.S.C. § 1206, MSPB is responsible for reviewing the significant actions of OPM to ensure that they conform with MSPs and do not result in PPPs. In FY 2017, MSPB reviewed OPM's new significant actions including: Final Rule Regarding the Annual Employee Survey Requirement

and the 2017 Federal Employee Viewpoint Survey (FEVS), Reforming the Federal Government and Reshaping the Federal Civilian Workforce, Framework for the Continuing Development of Federal Senior Executives, and Governmentwide Survey of Federal Work-Life Programs. MSPB updated the status of previous OPM significant actions and provided the review of OPM's work within the context of significant OPM issues including the changes in OPM Leadership. More information about MSPB's review of OPM significant 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 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 operations and understanding of the Federal merit system disciplinary and appeals process by sharing information about MSPB processes and its legal precedent. 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 2017, MSPB staff conducted 138 outreach events with a variety of customers and stakeholders. MSPB staff presented at the OPM Research Summit, the Federal Dispute Resolution conference, several other conferences, several Federal departments and agencies, the Chief Learning Officer Council, Government Accountability Office, and to management, union, and affinity groups. MSPB's Director of the Office of Policy and Evaluation participated in a series of meetings between OMB and Federal agencies to clarify OMB's expectations for agency responses to OMB Memorandum M-17-22.

MSPB's adjudication and studies work, and other activities involving MSPB, were cited over 600 times in at least 150 different print and online sources including wire services, professional and trade publications, textbooks, newspapers, and other media. Several MSPB merit system study reports were cited in the Appendix to OMB Memorandum M-17-22 entitled *"Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce,"* and the Congressional Research Service report entitled "*Federal Government Employment: Veterans' Preference in Competitive Examining*." Other specific citations of MSPB's work are contained in the legislative summary and merit system studies activity sections of this report.

Legislative and Congressional Relations Activity

Legislation that Impacts MSPB or the Civil Service. During FY 2017, MSPB staff reviewed over 50 bills that might impact MSPB's jurisdiction, adjudication processes, or the Federal civil service in general. The following bills would affect the adjudicatory function of the Board.

National Defense Authorization Act (NDAA) of 2017 (S. 2943). Enacted on December 23, 2016, this statute contains several provisions that affect MSPB jurisdiction.[5] One provision grants MSPB appeal rights to dual status military technicians when the appeal concerns certain activities (*e.g.*, reductions is force (RIFs), adverse actions, and other unspecified activities) that occurred when the technician was not in military pay status and when the issue does not involve fitness for duty in the reserve component. Another provision grants MSPB appeal rights to a former employee to challenge an agency's decision to place a notation of an adverse investigative or administrative finding in his or her official personnel file. The NDAA also made changes to the definitions and limits of administrative

[5] The NDAA for FY 2017, Pub. L. 114-328 § 512 (gives appeal rights to military technicians), § 1111 (repeals 180-day waiver).

leave applicable to all Federal employees. The law also repeals the waiver of the 180-day waiting period after retirement before retired members of the armed forces may be appointed to DoD civilian positions. The Senate Report 114-25 for the repeal of the 180-day waiver cites MSPB's report on veterans' hiring entitled, *Veteran Hiring in the Civil Service: Practices and Perceptions*.

Follow the Rules Act (H.R. 657). This bill amends 5 U.S.C. § 2302 to expand the prohibited personnel practice established in 2302(b)(9)(D) (the so-called "right to disobey" provision) to include the right to disobey orders that violate rules and regulations (as opposed to only statutes). This effectively overrules the U.S. Court of Appeals for the Federal Circuit's decision in *Rainey v. MSPB*, 824 F.3d 1359 (Fed. Cir. 2016), which held, based on the canons of statutory construction, that a federal employee has no right to disobey an order he or she believes violates a federal regulation.[6]

Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (S. 1094). This bill eliminates MSPB appeal rights for Senior Executive Service (SES) employees of the Department of Veterans Affairs (VA) who have been suspended, demoted, or removed from Federal service for performance or misconduct. The bill retains MSPB appeal rights for non-SES employees under an expedited review process. MSPB AJs are required to issue decisions within 180 days after the appeal is filed. The AJ's decision may be appealed to the three-member Board. The bill does not limit the amount of time the Board may take to issue a decision. The Board's decision may be appealed to the U.S. Court of Appeals for the Federal Circuit.[7]

Authority to provide for extensions of OSC stay requests under 5 U.S.C. § 1214 when MSPB lacks a quorum or Board members. The legislation provides authorization, in the event that MSPB lacks a quorum, for any remaining member of the Board who has been confirmed by the Senate, to grant an extension of a stay of a personnel action upon request by OSC.[8]

The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017. This law creates a 14th PPP prohibiting access to medical records of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in PPPs 1 through 13. In addition, this law (1) requires agency heads to propose disciplinary action against supervisors who have engaged in Whistleblower retaliation, (2) provides certain whistleblower protections to probationary Federal employees, (3) provides guidelines to enhance Federal employee awareness of Federal whistleblower protections, and (4) enhances access of information by the OSC.[9]

Other Congressional Activity. Vice Chairman Robbins submitted a statement for the hearing conducted by the Senate Committee on Indian Affairs on S. 1250, the Restoring Accountability in the Indian Health Service Act of 2017, which was held on June 13, 2017. This bill was similar to S. 2953 which was introduced during the previous session of Congress and for which former Chairman Grundmann submitted a hearing statement last year. As was the case with the previous bill, Vice Chairman Robbins' statement described possible constitutional defects with S. 1250.

MSPB staff conducted two briefings for congressional staff during this fiscal year. The first briefing was the annual staff briefing on the agency's budget request. The second briefing was conducted at the request of minority staff of the Senate Judiciary Committee regarding civil service protections available to Federal employees.

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[6] Pub. L. 115-40, June 14, 2017.

[7] Pub. L. 115-41, June 23, 2017.

[8] Pub. L 115-42, June 27, 2017.

[9] Pub. L.115-73, October 26, 2017

External Factors and Internal Management Challenges

General information about the external factors and internal management challenges that may affect MSPB's work is provided here as context for the other information contained in the Annual Report. More detailed information about the external factors and internal management challenges that effect MSPB's work can be obtained in the MSPB APR-APP for FY 2017 – FY 2019. MSPB's primary internal challenges include human capital issues, and ensuring a stable, secure and viable IT infrastructure to support current mission and administrative functions and its modernization efforts, which include implementing MSPB's e-Adjudication initiative and obtaining a secure, cloud-based survey capability. The major external factors include changes in law and jurisdiction and Governmentwide reform including possible Governmentwide budget and workforce reductions.

Human Capital Issues. Chairman Susan Tsui Grundmann's term ended March 2016 and she continued to serve as Chairman until her departure on January 7, 2017. On January 8, 2017, and pending re-establishment of a Board quorum, Mr. Robbins will perform the functions vested by Title 5 in the Office of the Chairman. On January 23, 2017, President Donald J. Trump designated Mark A. Robbins, as Vice Chairman of the Board. Vice Chairman Robbins' 7-year term will expire on March 1, 2018. Without a quorum of at least two confirmed and sworn-in Board Members, MSPB is not be able to issue decisions on PFRs and other cases at HQ or publish reports of merit system studies. In addition, 22 percent of MSPB employees will be eligible to retire in the next two years. This includes over 25 percent of the 70 AJs and managers in the regional and field offices occupying permanent positions, and several employees serving in one-deep critical positions.

IT Infrastructure Stability and Modernization. In FY 2016, MSPB enlisted the help of an independent contractor to assess the agency's network and infrastructure. MSPB continues to focus on providing a stable and viable IT infrastructure that supports MSPB's mission and administrative functions, and implementing IT modernization initiatives. More detailed information about the status of MSPB's IT infrastructure, progress on improvements during FY 2017, and future IT modernization plans can be found in the APR-APP for FY 2017 – FY 2019.

Changes in Law and Jurisdiction. In addition to legislation reported in last year's Annual Report and reported in the legislative section of this year's report, several other bills were introduced in FY 2017. There is likely to be further action on these or similar bills in the new Congress. MSPB will continue to monitor legislation that affects the merit systems and MSPB's role in protecting merit, and significant legislative activity on these topics will be summarized in the FY 2018 Annual Report. As stated above, to carry out all of MSPB's statutory responsibilities, including issuing decisions at HQ and merit systems study reports, MSPB needs a quorum of Board Members.

Governmentwide Budget Reductions. The Administration's Government Reform efforts[10] will likely lead to Governmentwide budget and workforce reductions beginning as early as late FY 2018, and increasing in later years. Workforce reductions could mean an increase in appeals involving furloughs, RIFs, or early retirements through Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payment (VSIP). Legislative changes and budget reductions not only affect our adjudication functions, they also emphasize the need for strong merit studies and OPM review programs to ensure the Federal workforce continues to be managed under the MSPs and free from PPPs.

[10] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-22.pdf.

CASE PROCESSING STATISTICS FOR FY 2017

Summary of Cases Decided by MSPB

As of January 8, 2017, MSPB did not have a quorum, which is required to issue final decisions in PFRs and other cases filed at HQ. The data associated with HQ cases in the charts and graphs below consist of approximately 3 months of data, and are not comparable to HQ data reported in previous Annual Reports which included data for full fiscal years. Also note that percentages in the following tables and charts may not add to 100% due to rounding.

Table 1: FY 2017 Summary of Cases Decided by MSPB

Cases Decided in MSPB Regional and Field Offices (RO/FOs)	
Appeals	5,406
Addendum Cases[1]	378
Stay Requests[2]	27
TOTAL Cases Decided in RO/FOs	**5,811**
Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction[3]	**10**
Cases Decided by the Board at Headquarters	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	145
Petitions for Review (PFRs) - Addendum Cases	32
Reviews of Stay Request Rulings	0
Requests for Stay of Board Orders	0
Reopenings[4]	1
Court Remands	4
Compliance Referrals	5
EEOC Non-concurrence Cases	0
Arbitration Cases	1
Subtotal - Appellate Jurisdiction	**188**
Original Jurisdiction[5]	18
Interlocutory Appeals	1
TOTAL Cases Decided by the Board	**207**
TOTAL Decisions (Board, ALJs, RO/FOs)	**6,028**

[1] Includes 88 requests for attorney fees, 85 Board remand cases, 174 compliance cases, 6 court remand cases, 18 requests for compensatory damages (discrimination cases only), 6 requests for consequential damages, 1 request for liquidated damages.

[2] Includes 15 stay requests in whistleblower cases and 12 in non-whistleblower cases.

[3] Initial Decisions by ALJs. Case type breakdown: 1 Disciplinary Action – Non-Hatch Act case, 1 Hatch Act case, 2 Actions Against SES cases, and 6 Actions Against ALJs.

[4] Includes 1 case reopened by the Board on its own motion.

[5] Final Board Decisions: 1 Disciplinary Action – Non-Hatch Act and 17 Requests for Stay.

Cases Processed in the Regional and Field Offices

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

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Type of Case	#	#	%	#	%	#	%	#	%
Adverse Action by Agency	2,177	976	44.83	1,201	55.17	714	59.45	487	40.55
Termination of Probationers	386	361	93.52	25	6.48	24	96.00	1	4.00
Reduction in Force	18	9	50.00	9	50.00	5	55.56	4	44.44
Performance	160	36	22.50	124	77.50	77	62.10	47	37.90
Acceptable Level of Competence (ALOC)[3]	37	22	59.46	15	40.54	7	46.67	8	53.33
Suitability	85	41	48.24	44	51.76	33	75.00	11	25.00
CSRS Retirement: Legal[4]	309	178	57.61	131	42.39	3	2.29	128	97.71
CSRS Retirement: Disability	6	3	50.00	3	50.00	0	0.00	3	100.00
CSRS Retirement: Overpayment	64	25	39.06	39	60.94	24	61.54	15	38.46
FERS Retirement: Legal[4]	123	84	68.29	39	31.71	1	2.56	38	97.44
FERS Retirement: Disability	70	48	68.57	22	31.43	1	4.55	21	95.45
FERS Retirement: Overpayment	427	178	41.69	249	58.31	174	69.88	75	30.12
FERCCA[4]	25	15	60.00	10	40.00	1	10.00	9	90.00
Individual Right of Action	558	355	63.62	203	36.38	105	51.72	98	48.28
USERRA	137	81	59.12	56	40.88	15	26.79	41	73.21
VEOA	149	67	44.97	82	55.03	10	12.20	72	87.80
Other[5]	675	633	93.78	42	6.22	30	71.43	12	28.57
Total	**5,406**	**3,112**	**57.57**	**2,294**	**42.43**	**1,224**	**53.36**	**1,070**	**46.64**

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

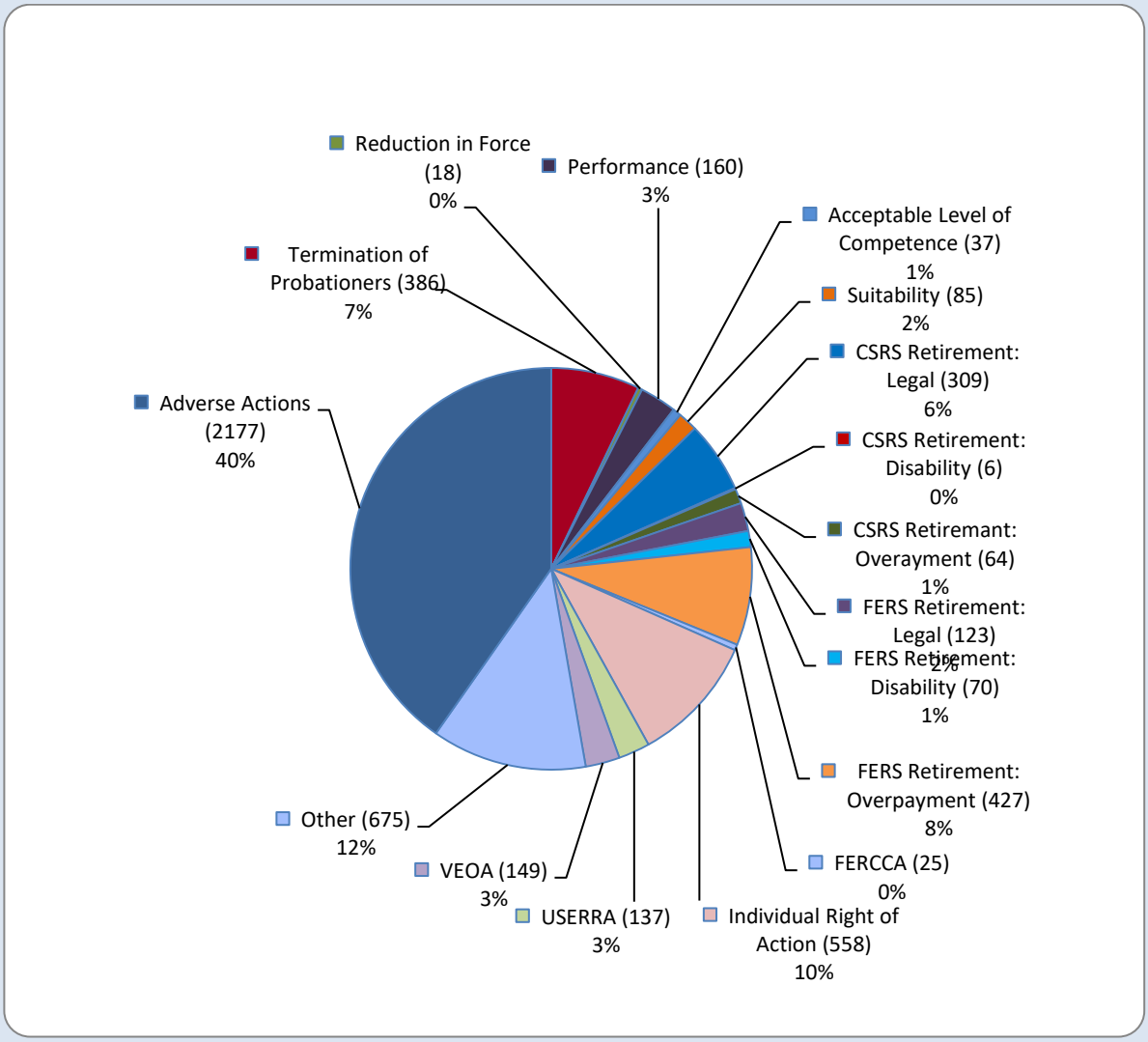
[2] Percent Settled and Adjudicated are of the number Not Dismissed.

[3] An acceptable level of competence (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 may deny his or her within-grade increase (WIGI).

[4] Civil Service Retirement System (CSRS); Federal Employees Retirement System (FERS); Federal Erroneous Retirement Coverage Corrections Act (FERCCA).

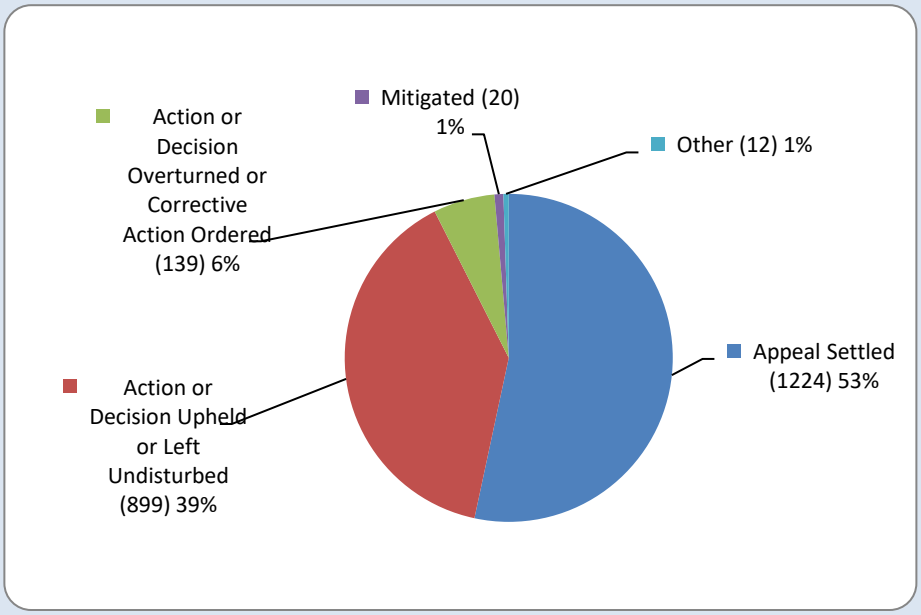
[5] "Other" appeals include Restoration to Duty (57), Miscellaneous (557), and additional types such as Reemployment Priority, Employment Practices, and others.

Figure 3.1: Type of Appeals Decided in the Regional and Field Offices



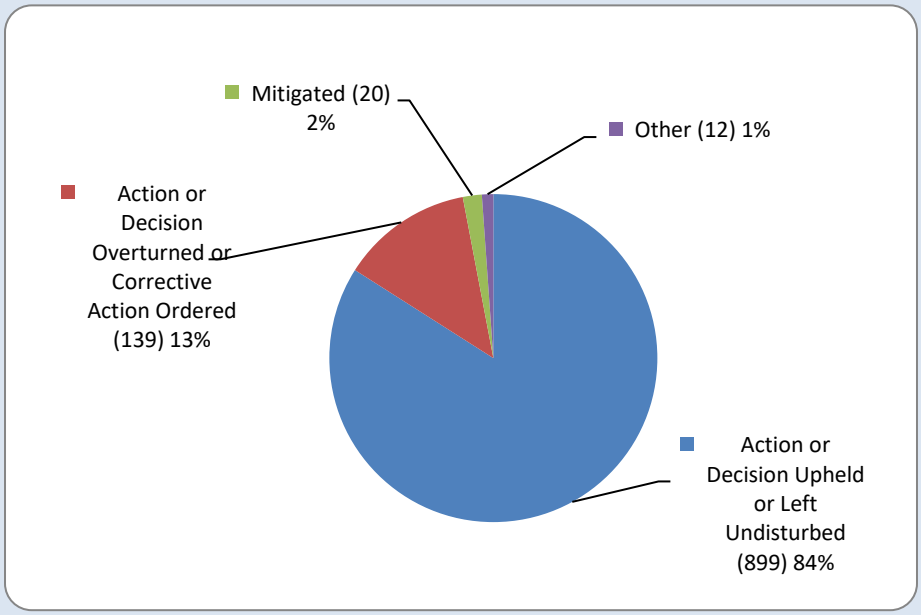
Total Number of Appeals: 5,406

Figure 3.2: Dispositions: Initial Appeals Not Dismissed by Regional/Field Offices



Total Number of Appeals Not Dismissed: 2,294

Figure 3.3: Dispositions: Initial Appeals Not Dismissed or Settled by Regional/Field Office



Based on 1,070 Appeals Adjudicated on the Merits

Table 3: Disposition of Appeals by Agency

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Agency	#	#	%	#	%	#	%	#	%
Office of Personnel Management[3]	1049	536	51.1	513	48.9	228	44.4	285	55.6
Department of Veterans Affairs	896	577	64.4	319	35.6	187	58.6	132	41.4
Department of the Army	499	252	50.5	247	49.5	106	42.9	141	57.1
United States Postal Service	493	324	65.7	169	34.3	118	69.8	51	30.2
Department of Homeland Security	364	208	57.1	156	42.9	77	49.4	79	50.6
Department of the Navy	325	177	54.5	148	45.5	88	59.5	60	40.5
Department of Defense	244	142	58.2	102	41.8	58	56.9	44	43.1
Department of the Air Force	208	112	53.8	96	46.2	57	59.4	39	40.6
Department of Justice	194	105	54.1	89	45.9	47	52.8	42	47.2
Department of the Treasury	188	107	56.9	81	43.1	46	56.8	35	43.2
Department of Agriculture	125	70	56.0	55	44.0	37	67.3	18	32.7
Department of Health and Human Services	119	64	53.8	55	46.2	24	43.6	31	56.4
Department of the Interior	112	68	60.7	44	39.3	25	56.8	19	43.2
Social Security Administration	98	59	60.2	39	39.8	18	46.2	21	53.8
Department of Transportation	91	62	68.1	29	31.9	17	58.6	12	41.4
Department of Commerce	70	38	54.3	32	45.7	20	62.5	12	37.5
Department of Energy	45	21	46.7	24	53.3	13	54.2	11	45.8
Department of Labor	41	36	87.8	5	12.2	3	60.0	2	40.0
Department of Housing and Urban Development	32	20	62.5	12	37.5	5	41.7	7	58.3
Department of State	27	18	66.7	9	33.3	5	55.6	4	44.4
General Services Administration	25	14	56.0	11	44.0	9	81.8	2	18.2
Environmental Protection Agency	19	13	68.4	6	31.6	3	50.0	3	50.0
Tennessee Valley Authority	17	10	58.8	7	41.2	6	85.7	1	14.3
Equal Employment Opportunity Commission	10	9	90.0	1	10.0	1	100.0	0	0.0
Federal Communications Commission	10	4	40.0	6	60.0	4	66.7	2	33.3
Securities and Exchange Commission	10	9	90.0	1	10.0	0	0.0	1	100.0
National Aeronautics and Space Administration	9	5	55.6	4	44.4	2	50.0	2	50.0

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

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Agency	#	#	%	#	%	#	%	#	%
Small Business Administration	9	4	44.4	5	55.6	1	20.0	4	80.0
Federal Deposit Insurance Corporation	8	7	87.5	1	12.5	1	100.0	0	0.0
Office of Special Counsel	6	6	100.0	0	0.0	0	0.0	0	0.0
Smithsonian Institution	6	5	83.3	1	16.7	1	100.0	0	0.0
Department of Education	5	2	40.0	3	60.0	1	33.3	2	66.7
Federal Reserve System	5	4	80.0	1	20.0	0	0.0	1	100.0
Broadcasting Board of Governors	4	4	100.0	0	0.0	0	0.0	0	0.0
Court Services and Offender Supervision Agency for the District of Columbia	4	0	0.0	4	100.0	3	75.0	1	25.0
National Archives and Records Administration	4	3	75.0	1	25.0	0	0.0	1	100.0
Armed Forces Retirement Home	3	1	33.3	2	66.7	1	50.0	1	50.0
Export-Import Bank of the United States	3	2	66.7	1	33.3	1	100.0	0	0.0
National Labor Relations Board	3	0	0.0	3	100.0	3	100.0	0	0.0
Administrative Office of the U.S. Courts	2	2	100.0	0	0.0	0	0.0	0	0.0
Central Intelligence Agency	2	1	50.0	1	50.0	0	0.0	1	100.0
Corporation for National and Community Service	2	1	50.0	1	50.0	0	0.0	1	100.0
Government Publishing Office	2	2	100.0	0	0.0	0	0.0	0	0.0
International Boundary and Water Commission: U.S. and Mexico	2	1	50.0	1	50.0	1	100.0	0	0.0
National Council on Disability	2	0	0.0	2	100.0	2	100.0	0	0.0
National Credit Union Administration	2	1	50.0	1	50.0	1	100.0	0	0.0
Railroad Retirement Board	2	1	50.0	1	50.0	1	100.0	0	0.0
American Battle Monuments Commission	1	0	0.0	1	100.0	1	100.0	0	0.0
Denali Commission	1	0	0.0	1	100.0	1	100.0	0	0.0
Federal Housing Finance Agency	1	1	100.0	0	0.0	0	0.0	0	0.0

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

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Agency	#	#	%	#	%	#	%	#	%
Federal Mediation and Conciliation Service	1	1	100.0	0	0.0	0	0.0	0	0.0
Judicial Branch	1	1	100.0	0	0.0	0	0.0	0	0.0
National Science Foundation	1	0	0.0	1	100.0	0	0.0	1	100.0
Overseas Private Investment Corporation	1	0	0.0	1	100.0	1	100.0	0	0.0
Special Inspector General for Afghanistan Reconstruction	1	0	0.0	1	100.0	0	0.0	1	100.0
St. Lawrence Seaway Development Corporation	1	1	100.0	0	0.0	0	0.0	0	0.0
United States International Trade Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
Total	**5,406**	**3,112**	**57.6**	**2,294**	**42.4**	**1,224**	**53.4**	**1,070**	**46.6**

[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 FERS retirement systems.

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

	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
Agency	#	#	%	#	%	#	%	#	%
Office of Personnel Management[2]	285	216	75.79	56	19.6	2	0.7	11	3.9
Department of the Army	141	131	92.91	6	4.3	4	2.8	0	0.0
Department of Veterans Affairs	132	110	83.33	20	15.2	1	0.8	1	0.8
Department of Homeland Security	79	68	86.08	9	11.4	2	2.5	0	0.0
Department of the Navy	60	48	80.00	7	11.7	5	8.3	0	0.0
United States Postal Service	51	44	86.27	7	13.7	0	0.0	0	0.0
Department of Defense	44	37	84.09	6	13.6	1	2.3	0	0.0
Department of Justice	42	34	80.95	7	16.7	1	2.4	0	0.0
Department of the Air Force	39	34	87.18	4	10.3	1	2.6	0	0.0
Department of the Treasury	35	31	88.57	3	8.6	1	2.9	0	0.0
Department of Health and Human Services	31	27	87.10	4	12.9	0	0.0	0	0.0
Social Security Administration	21	21	100.00	0	0.0	0	0.0	0	0.0
Department of the Interior	19	16	84.21	3	15.8	0	0.0	0	0.0
Department of Agriculture	18	18	100.00	0	0.0	0	0.0	0	0.0
Department of Commerce	12	12	100.00	0	0.0	0	0.0	0	0.0
Department of Transportation	12	10	83.33	2	16.7	0	0.0	0	0.0
Department of Energy	11	10	90.91	1	9.1	0	0.0	0	0.0
Department of Housing and Urban Development	7	7	100.00	0	0.0	0	0.0	0	0.0
Department of State	4	3	75.00	1	25.0	0	0.0	0	0.0
Small Business Administration	4	4	100.00	0	0.0	0	0.0	0	0.0
Environmental Protection Agency	3	2	66.67	1	33.3	0	0.0	0	0.0
Department of Education	2	0	0.00	1	50.0	1	50.0	0	0.0
Department of Labor	2	2	100.00	0	0.0	0	0.0	0	0.0
Federal Communications Commission	2	2	100.00	0	0.0	0	0.0	0	0.0

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

	Adjudicated[1]	Affirmed		Reversed		Mitigated Modified		Other	
Agency	#	#	%	#	%	#	%	#	%
General Services Administration	2	2	100.00	0	0.0	0	0.0	0	0.0
National Aeronautics and Space Administration	2	2	100.00	0	0.0	0	0.0	0	0.0
Armed Forces Retirement Home	1	1	100.00	0	0.0	0	0.0	0	0.0
Central Intelligence Agency	1	1	100.00	0	0.0	0	0.0	0	0.0
Corporation for National and Community Service	1	1	100.00	0	0.0	0	0.0	0	0.0
Court Services and Offender Supervision Agency for the District of Columbia	1	1	100.00	0	0.0	0	0.0	0	0.0
Federal Reserve System	1	1	100.00	0	0.0	0	0.0	0	0.0
National Archives and Records Administration	1	1	100.00	0	0.0	0	0.0	0	0.0
National Science Foundation	1	0	0.00	0	0.0	1	100.0	0	0.0
Securities and Exchange Commission	1	1	100.00	0	0.0	0	0.0	0	0.0
Special Inspector General for Afghanistan Reconstruction	1	1	100.00	0	0.0	0	0.0	0	0.0
Tennessee Valley Authority	1	0	0.00	1	100.0	0	0.0	0	0.0
Total	**1,070**	**899**	**84.0**	**139**	**13.0**	**20**	**1.9**	**12**	**1.1**

[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 FERS retirement systems.

Cases Processed at Headquarters

This information includes approximately 3 months of data (October 1, 2016 thru January 7, 2017) due to a lack of a quorum. These data are presented for transparency but are not comparable to HQ data from previous annual reports.

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

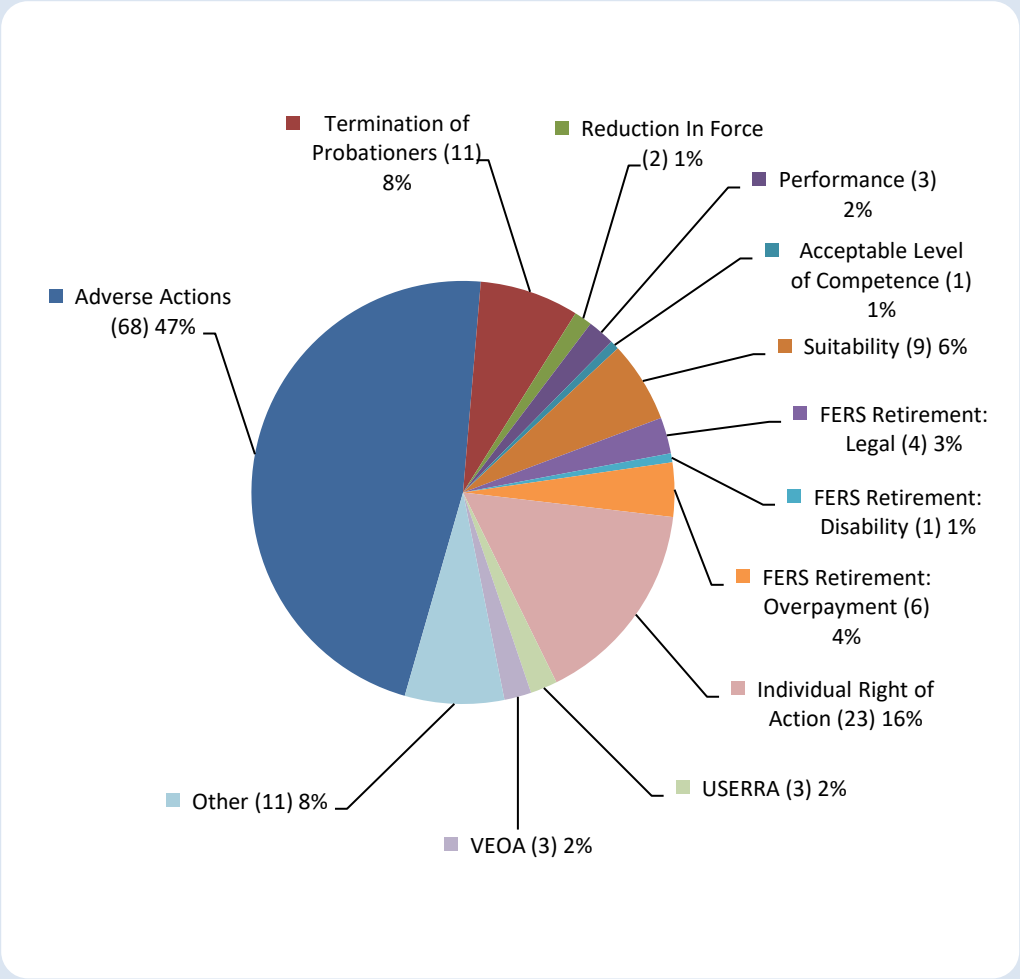
	Decided	Dismissed		Settled		Denied		Denied; Further Analysis[1]		Granted	
Type of Case	#	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	68	7	10.29	1	1.47	49	72.06	4	5.88	7	10.29
Termination of Probationers	11	0	0.00	0	0.00	10	90.91	0	0.00	1	9.09
Reduction in Force	2	0	0.00	0	0.00	1	50.00	0	0.00	1	50.00
Performance	3	0	0.00	0	0.00	3	100.00	0	0.00	0	0.00
Acceptable Level of Competence (ALOC)[2]	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Suitability	0	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00
CSRS Retirement: Legal[3]	9	1	11.11	0	0.00	6	66.67	0	0.00	2	22.22
CSRS Retirement: Disability	0	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00
CSRS Retirement: Overpayment	0	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00
FERS Retirement: Legal[3]	4	1	25.00	0	0.00	2	50.00	0	0.00	1	25.00
FERS Retirement: Disability	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
FERS Retirement: Overpayment	6	0	0.00	0	0.00	5	83.33	0	0.00	1	16.67
FERCCA[3]	0	0	0.00	0	0.00	0	0.00	0	0.00	0	0.00
Individual Right of Action	23	2	8.70	3	13.04	17	73.91	0	0.00	1	4.35
USERRA	3	1	33.33	0	0.00	0	0.00	1	33.33	1	33.33
VEOA	3	0	0.00	0	0.00	2	66.67	0	0.00	1	33.33
Other	11	1	9.09	0	0.00	9	81.82	0	0.00	1	9.09
Total	**145**	**13**	**8.97**	**4**	**2.76**	**106**	**73.10**	**5**	**3.45**	**17**	**11.72**

[1] "Denied; Further Analysis" includes cases denied on the basis of the issues raised in the PFR, but in which the Board has considered an issue *sua sponte,* i.e., of the Board's own accord (5 C.F.R. § 1201.117(a)). This definition applies also to Table 6, and Figures 3.5 and 3.7. Historically, when the Board denied a party's PFR, but upon review of a case, chose to analyze additional issues, this was described as "reopening the appeal on its own motion under 5 C.F.R. § 1201.118," and the description used in the Annual Report was "Denied But Reopened." In 2012, the Board amended its regulation at 5 C.F.R. § 1201.118 to state that "reopening" only applies to instances in which the Board already has issued a final order or the initial decision has become the Board's final decision by operation of law. The Board refrains from using the term "reopening" in adjudicating a PFR unless it is taking action to reopen a closed matter. Accordingly, the Board will continue to report dispositions of cases that are denied, but in which the Board considers other issues of its own accord as "Denied; Further Analysis."

[2] An acceptable level of competence (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 ALCO, then the agency may deny his or her within-grade increase (WIGI).

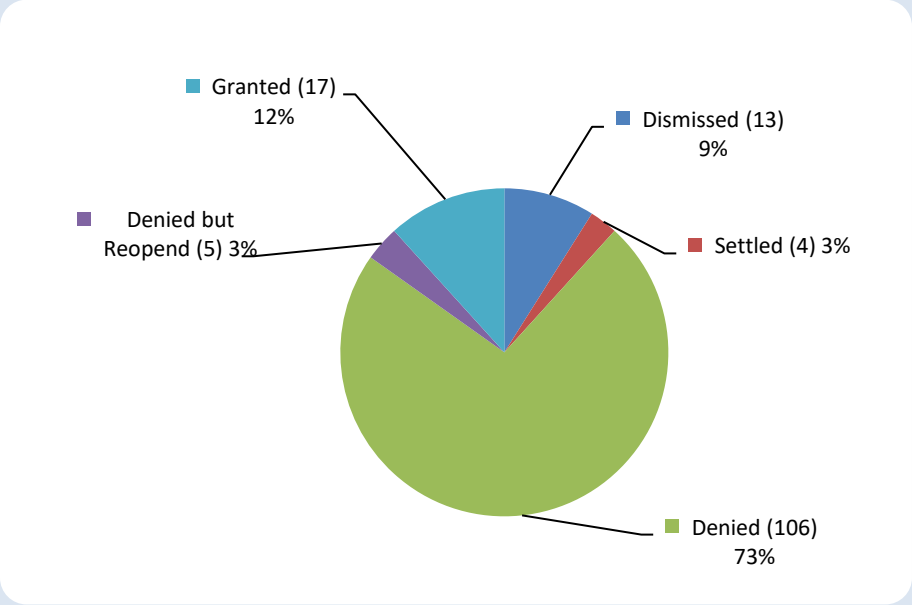
[3] Civil Service Retirement System (CSRS); Federal Employees Retirement System (FERS); Federal Erroneous Retirement Coverage Corrections Act (FERCCA).

Figure 3.4: Types of Petitions for Review



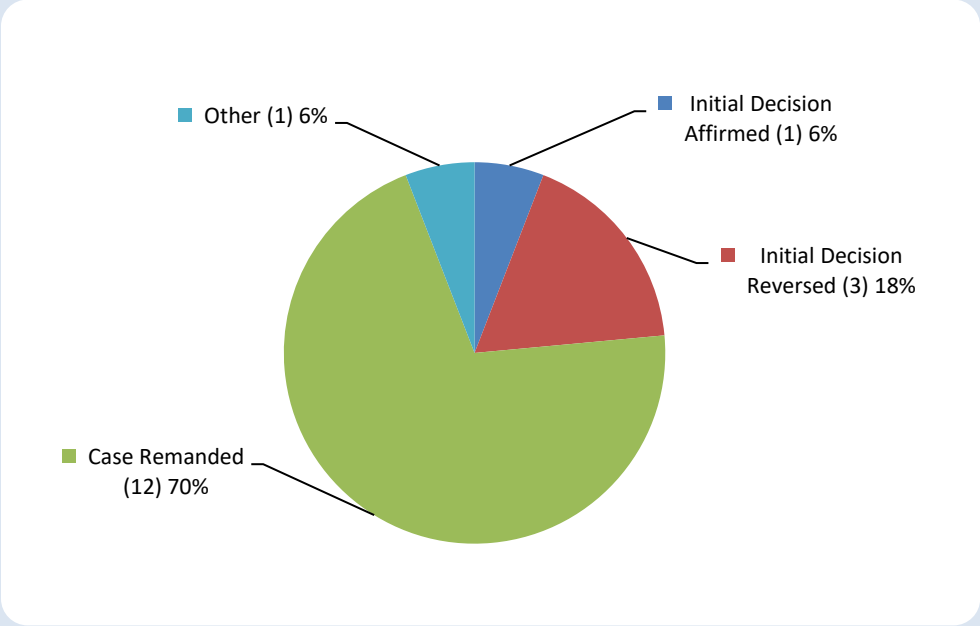
Total Number of PFRs: 145

Figure 3.5: Disposition of Petitions for Review of Initial Decisions



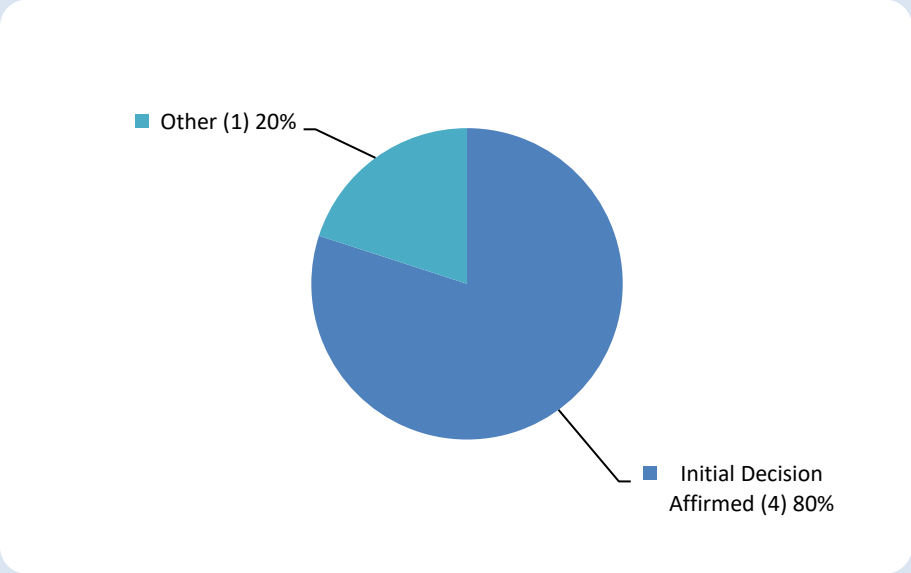
Based on 145 Total PFRs

Figure 3.6: Disposition of Petitions for Review Granted



Based on 17 PFRs Granted

Figure 3.7: Disposition of Petitions for Review Denied; Further Analysis



Based on 5 PFRs Denied; Further Analysis

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

	Decided	Dismissed		Settled		Denied		Denied; Further Analysis		Granted	
Agency	#	#	%	#	%	#	%	#	%	#	%
Office of Personnel Management	21	2	9.52	0	0.00	15	71.43	0	0.00	4	19.05
United States Postal Service	19	2	10.53	0	0.00	14	73.68	1	5.26	2	10.53
Department of Veterans Affairs	17	3	17.65	0	0.00	11	64.71	0	0.00	3	17.65
Department of the Interior	13	1	7.69	0	0.00	11	84.62	1	7.69	0	0.00
Department of the Navy	10	0	0.00	0	0.00	7	70.00	1	10.00	2	20.00
Department of Defense	9	0	0.00	0	0.00	8	88.89	0	0.00	1	11.11
Department of the Air Force	9	0	0.00	1	11.11	7	77.78	0	0.00	1	11.11
Department of the Army	9	0	0.00	0	0.00	8	88.89	1	11.11	0	0.00
Department of Homeland Security	8	1	12.50	0	0.00	6	75.00	0	0.00	1	12.50
Department of Agriculture	4	1	25.00	0	0.00	2	50.00	1	25.00	0	0.00
Department of Justice	4	0	0.00	0	0.00	3	75.00	0	0.00	1	25.00
Social Security Administration	4	1	25.00	2	50.00	1	25.00	0	0.00	0	0.00
Department of Energy	3	0	0.00	0	0.00	3	100.00	0	0.00	0	0.00
Department of the Treasury	3	1	33.33	1	33.33	1	33.33	0	0.00	0	0.00
Department of Health and Human Services	2	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
Department of Transportation	2	1	50.00	0	0.00	0	0.00	0	0.00	1	50.00
Corporation for National and Community Service	1	0	0.00	0	0.00	0	0.00	0	0.00	1	100.00
Department of Commerce	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Department of Labor	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Environmental Protection Agency	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Federal Reserve System	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
General Services Administration	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
National Aeronautics and Space Administration	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
National Science Foundation	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Total	**145**	**13**	**8.97**	**4**	**2.76**	**106**	**73.10**	**5**	**3.45**	**17**	**11.72**

SIGNIFICANT BOARD DECISIONS AND COURT OPINIONS ISSUED IN FY 2017

Several of the Board's significant decisions issued in FY 2017 are summarized below. As a service to MSPB's stakeholders, we also have provided brief summaries of selected significant opinions issued by the U.S. Court of Appeals for the Federal Circuit, other Circuit Courts, and the Supreme Court.

Significant Board Decisions Issued in FY 2017

Jurisdiction

Winns v. U.S. Postal Service, 2017 MSPB 1, 124 M.S.P.R. 113 (2017): At issue in this case was the meaning of the term "current continuous service" for purposes of 5 U.S.C. § 7511(a)(1)(B), which provides that the Board has jurisdiction over the adverse action appeal of a preference-eligible Postal Service employee who has completed 1 year of current continuous service in the same or similar positions. The appellant, a preference eligible, held a series of four temporary appointments with the agency. Each appointment was for less than a year and the first three appointments were followed by a break in service of at least several days. The agency terminated the appellant from his fourth temporary appointment for alleged misconduct after 9 months of service. The AJ dismissed the appellant's termination appeal for lack of jurisdiction, finding that the appellant did not have 1 year of current continuous service at the time of his termination. On review, the appellant argued that he had Board appeal rights under the "continuing employment contract" theory set forth in *Roden v. Tennessee Valley Authority*, 25 M.S.P.R. 363, 367-68 (1984), which involved circumstances similar to those present here. In *Roden*, the Board found that the agency had effectively entered into a continuing employment contract with the appellant and, therefore, despite several breaks, his service was "continuous" within the meaning of § 7511(a)(1)(B). In assessing whether *Roden* was still good law, the Board noted that, after *Roden* was issued, OPM promulgated 5 C.F.R. § 752.402, which defines "current continuous service" as a period of employment or service immediately preceding an adverse action without a break in Federal civil employment of a workday. Thus, under 5 C.F.R. § 752.402, neither the employee's service in *Roden*, nor the appellant's service at issue in this appeal, qualify as "current continuous service." The Board found that OPM's definition of "current continuous service" was consistent with the ordinary meaning of that term, which appears to preclude breaks in service, and that OPM's interpretation of section 7511(a)(1)(B) was reasonable. Accordingly, the Board agreed with the AJ's finding that it lacks jurisdiction over this appeal, and it overruled *Roden* and subsequent decisions relying on *Roden* to find that an appellant may establish "current continuous service" for purposes of section 7511(a)(1)(B) under a "continuing employment contract" theory, despite a break in service of a workday.

Settlement

Bruhn v. Department of Agriculture, 2016 MSPB 42, 124 M.S.P.R. 1 (2016): After the agency issued a decision to remove the appellant for growing marijuana, the parties entered a last-chance agreement (LCA). Under its terms, the appellant agreed to serve a 45-day suspension for his alleged misconduct and the agency agreed to hold the removal in abeyance for 2 years, pending the appellant's satisfactory completion of the LCA, which required him to refrain from engaging in any misconduct and to abide by all Federal and state laws during the 2-year period. The agreement further provided that, if the agency discovered that the appellant had engaged in any misconduct during that period, it could remove him immediately, and that he waived his right to appeal or contest any such removal. The agency subsequently removed the appellant pursuant to the agreement upon learning that he had marijuana growing in his garage. On appeal, the appellant argued that the LCA was unlawful because it allowed both a suspension and a removal for the same misconduct. The AJ rejected this

argument, found that the LCA was valid, and dismissed the appeal for lack of jurisdiction based on the appellant's waiver of his appeal rights in the LCA. On review, the Board noted that, outside the context of a settlement agreement, it has long held that an agency cannot impose a disciplinary action more than once for the same misconduct. However, the Board explained, LCAs serve the important public policy of avoiding unnecessary litigation and encouraging the speedy resolution of issues, and the incorporation of some discipline into the agreement makes it more likely that the agency will consider entering into the agreement because the employee will not escape all punishment for the charged offense. The Board therefore agreed with the AJ's finding that the appellant's removal for the same misconduct that served as the basis for a 45-day suspension was permissible, and it affirmed the initial decision.

Delorme v. Department of the Interior, 2017 MSPB 2, 124 M.S.P.R. 123 (2017) (See below, listed under "Compliance" section).

Discrimination

Gardner v. Department of Veterans Affairs, 2016 MSPB 36, 123 M.S.P.R. 647 (2016): The appellant filed a removal appeal and asserted affirmative defenses of discrimination and retaliation. The AJ affirmed the removal. In denying the appellant's race and sex discrimination and equal employment opportunity (EEO) reprisal affirmative defenses, the AJ applied the evidentiary standards set forth in *Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶ 42-43, 51 (2015). In *Savage*, the Board stated that, when an appellant asserts an affirmative defense of discrimination or retaliation under 42 U.S.C. § 2000e-16, she must first show by preponderant evidence that the prohibited consideration was a motivating factor in the contested personnel action. The Board further stated that, to meet this burden, an appellant may rely on direct evidence or any of the following three types of circumstantial evidence either alone or in combination: pretext, comparator, or "convincing mosaic." *Savage* also overruled prior Board decisions to the extent that they held that, to establish such a claim using circumstantial evidence, an appellant must provide evidence showing a "convincing mosaic" of discrimination or retaliation against her.

While the appellant's petition for review was pending before the Board, the U.S. Court of Appeals for the Seventh Circuit issued *Ortiz v. Werner Enterprises, Inc.,* 834 F.3d 760 (7th Cir. 2016). In *Ortiz,* the Seventh Circuit clarified that the phrase "convincing mosaic" was not meant to impose a new, separate legal requirement or to serve as a legal test. The court also held that, instead of sorting evidence into different piles, labeled "direct" and "indirect," and evaluating each type of evidence differently, all evidence belongs in a single pile and must be evaluated as a whole.

In light of *Ortiz*, the Board modified the initial decision to clarify that *Savage* does not require AJs to separate "direct" from "indirect" evidence and to proceed as if such evidence were subject to different legal standards, nor does it require appellants to demonstrate a "convincing mosaic" of discrimination or retaliation. Instead, the Board explained, all evidence must be evaluated as a whole in determining whether the appellant has met her initial burden to show a motivating factor. The Board found that the AJ satisfied this standard, as she did not disregard evidence because it was not direct or indirect, nor did she treat the term "convincing mosaic" as a legal requirement. Rather, the Board found, the AJ properly considered the evidence as a whole in finding that the appellant failed to prove that discrimination or retaliation was a motivating factor in her removal. Accordingly, the Board affirmed the initial decision as modified.

Reprisal

Elder v. Department of the Air Force, 2016 MSPB 41, 124 M.S.P.R. 12 (2016): The appellant filed a removal appeal and claimed that the agency retaliated against him for filing an earlier Board appeal and two petitions for enforcement of the settlement agreement that resolved his prior appeal. In his earlier appeal, the appellant raised a whistleblower retaliation claim under 5 C.F.R. § 2302(b)(8). Reprisal for filing a Board appeal that includes such a claim is prohibited under 5 U.S.C. § 2302(b)(9)(A)(i). The AJ reversed the removal and granted corrective action, finding that the agency did not prove its charges and that it had retaliated against the appellant for his prior Board activity. In analyzing the reprisal claim, the AJ applied the general reprisal standard set forth in *Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). On review, the Board modified the initial decision, explaining that the *Warren* standard is inapplicable to claims that allege reprisal under 5 U.S.C. § 2302(b)(9)(A)(i). Instead, those claims must be analyzed under the burden-shifting standards set forth in 5 U.S.C. § 1221(e). In such cases, the appellant must first establish that he engaged in protected activity that was a contributing factor in the personnel action at issue. If he does so, the burden of persuasion shifts to the agency to prove by clear and convincing evidence that it would have taken the same action absent the appellant's protected activity. Applying this standard, the Board found that the appellant met his burden to prove that he engaged in protected activity that was a contributing factor in his removal; however, the agency failed to meet its clear and convincing burden. Accordingly, the Board denied the agency's petition for review and ordered corrective action.

Hess v. U.S. Postal Service, 2016 MSPB 40, 124 M.S.P.R. 40 (2016): The appellant filed an appeal of her removal, raising affirmative defenses of sex and disability discrimination, reprisal for EEO activity, and whistleblower reprisal. The Board reversed the AJ's ruling that the Board lacks authority to award compensatory damages, vacated the order that stayed the proceedings below, and returned the appeal to the regional office for further adjudication. The Board found that its decision in *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015) does not alter its practice of awarding compensatory damages and thus the appeal was not moot because the agency's rescission of the removal action did not afford the appellant all of the relief available.

Veterans Employment Opportunity Act of (VEOA)

Montgomery v. Department of Health & Human Services, 2016 MSPB 8,123 M.S.P.R. 216 (2016): The appellant filed a VEOA appeal alleging that he was denied the right to compete for a job under 5 U.S.C. § 3304(f)(1) when the agency transferred an employee from outside its workforce to a competitive-service position without first advertising the vacancy. The AJ denied the appellant's request for corrective action, finding that the agency could fill the vacancy by any authorized method, and the appellant had not shown that he was qualified for the job. On review, the Board first found that the agency was required to advertise the vacancy before filling it, because 5 U.S.C. § 3304(f)(1) applies to both merit promotion and open competitive examining procedures. The Board further considered the agency's claim that it did not announce the positon at issue because, pursuant to an internal standard operating procedure, it "shared" a selection certificate for an advertised vacancy for an allegedly comparable position, for which the appellant applied but was not selected. The Board rejected that argument, finding that an internal agency policy may not override otherwise applicable statutes, including 5 U.S.C. § 3304(f)(1). Because there was a genuine dispute of material fact regarding the appellant's qualification for the job at issue, the Board remanded the case for further adjudication.

National Security Determinations

Palafox v. Department of the Navy, 2016 MSPB 43, 124 M.S.P.R. 54 (2016): The appellant was indefinitely suspended based on the suspension of his access to classified information, and the AJ sustained the action. On review, the Board considered the appellant's claim that the agency denied him due process, which requires that an employee being deprived of his property interest be given a meaningful opportunity to respond to the proposed action. As to the facts underlying the proposed indefinite suspension, the Board found that the agency provided the appellant due process by informing him of the basis for the indefinite suspension, i.e., that his position required access to classified information and his access to classified information had been suspended. The Board further found that the agency complied with the procedural requirements of 5 U.S.C. § 7513 by informing him of the specific reasons for the suspension of his access to classified information. Concerning the penalty, the Board rejected the appellant's argument that he was denied a meaningful opportunity to persuade the deciding official to reassign him instead of imposing the proposed indefinite suspension because reassignment would have been inconsistent with agency policy. The Board explained that due process does not require that a deciding official consider alternatives that are prohibited, impracticable, or outside management's purview. The Board also rejected the appellant's argument that he was denied due process regarding the suspension of his access to classified information. The Board found that terminating the appellant's access to classified information did not implicate due process because it is well settled that employees do not have a liberty or property interest in access to classified information. Therefore, the Board affirmed the initial decision.

Retirement

Pierotti v. Office of Personnel Management, 2016 MSPB 46, 124 M.S.P.R. 103 (2016): The appellant challenged OPM's reconsideration decision, which declined to waive collection of an overpayment that resulted when he received both workers' compensation and disability retirement benefits covering the same period of time. The AJ affirmed OPM's reconsideration decision, finding that the appellant was not eligible for a waiver of the collection of the overpayment because he did not show that he was without fault, and that he was not eligible for an adjustment of the recovery schedule because he did not show that making payments at the rate scheduled by OPM would cause him financial hardship. On review, the Board affirmed the initial decision as modified. The Board agreed with the AJ that the appellant was not without fault, and was thus ineligible for a waiver, because he accepted payments that he knew or should have known were erroneous. The Board further found, however, that collecting the overpayment at the rate scheduled by OPM would cause the appellant financial hardship, and it modified the collection schedule to $5 per month because the appellant's monthly expenses exceeded his monthly income.

Timeliness

Little v. U.S. Postal Service, 2017 MSPB 5, 124 M.S.P.R. 183 (2017): The appellant filed a formal EEO complaint with the agency, which issued a final agency decision (FAD) finding no merit to his discrimination claims. The appellant filed a Board appeal 31 days after the FAD was delivered to his post office box. Under 5 C.F.R. § 1201.154(b), such an appeal must be filed within 30 days after the appellant receives the FAD. The appellant argued that his appeal was timely filed because he did not actually receive the FAD until he checked his post office box 3 days after the FAD was delivered. The AJ dismissed the appeal on jurisdictional grounds without reaching the timeliness issue. On review, the Board explained that, under a prior version of 5 C.F.R. § 1201.154(b), the filing period began to run from the date of the appellant's actual receipt of the FAD; however, under the Board's

revised regulations that became effective November 13, 2012, the date of receipt is determined according to the standard set forth at 5 C.F.R. § 1201.22(b)(3), which provides for constructive receipt in certain circumstances. As an example, 5 C.F.R. § 1202.22(b)(3) provides that an appellant who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision. The Board found that, under 5 C.F.R. § 1201.22(b)(3), the appellant constructively received the FAD on the day that it was delivered to his post office box and his appeal was thus untimely filed by 1 day. Accordingly, the Board vacated the initial decision and dismissed the appeal as untimely filed.

Compliance

Delorme v. Department of the Interior, 2017 MSPB 2, 124 M.S.P.R. 123 (2017): The appellant filed a Board appeal challenging her termination and the parties entered into a settlement agreement while jurisdiction was still unresolved. The agreement provided that it would be entered into the Board's record and that it would be an enforceable contract between the parties. The AJ accepted the agreement into the record for the limited purpose of memorializing that the appeal was withdrawn as part of an agreement. After the appeal was dismissed, the appellant filed a petition for enforcement (PFE), alleging that the agency had violated the agreement. The AJ dismissed the PFE, finding that the agreement was not enforceable by the Board because the question of whether the Board had jurisdiction over the underlying matter appealed had not yet been decided.

On review, the Board noted that, prior to *Shaw v. Department of the Navy*, 39 M.S.P.R. 586, (1989), an AJ was not required to determine that the Board had jurisdiction over the underlying matter appealed before accepting a settlement agreement into the record for enforcement purposes. The Board added that requirement in *Shaw* based on its determination that, in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, Congress expressed an intent to provide the Board with authority to settle cases, but only those over which it has jurisdiction.

Citing the decision of the U.S. Court of Appeals for the Federal Circuit in *King v. Reid*, 59 F.3d 1215, 1218-19 (Fed. Cir. 1995), the Board found that *Shaw* misread the Board's statutory enforcement authority regarding settlement agreements. In *King*, the Federal Circuit found that once a case has been dismissed pursuant to a settlement agreement, whether the Board's jurisdiction previously had been established over the underlying matter appealed is irrelevant to subsequent enforcement of the agreement, as the dismissal of the appeal ends any jurisdiction the Board once might have had over the matter. In these circumstances, the Federal Circuit explained, the Board retains jurisdiction over a settlement agreement made part of the record pursuant to its power under 5 U.S.C. § 1204(a)(2) to enter and enforce its own orders. The Board found that, per *King*, in a case in which the parties have settled before a jurisdictional determination is made, the Board retains jurisdiction under section 1204(a)(2) to enforce the settlement agreement if it has been entered into the record for that purpose. Therefore, the Board overruled *Shaw* and its progeny to the extent that they required that jurisdiction be established over the underlying matter appealed before a settlement agreement could be accepted into the record and enforced by the Board. Accordingly, the Board vacated the compliance initial decision and remanded the appeal for further adjudication.

Board Procedures

Morris v. Department of the Navy, 2016 MSPB 37, 123 M.S.P.R. 662 (2016): The appellant filed a PFR that exceeded the page limit set forth at 5 C.F.R. § 1201.114(h). The Clerk's Office provided the appellant the opportunity to perfect his PFR by submitting a petition that complied with the Board's regulations. He again submitted a petition that exceeded the page limit and the Clerk's Office gave

him another chance to perfect the petition. When the appellant filed a petition that exceeded the page limit a third time, the Clerk's Office advised him that he had a final opportunity to submit a petition that complied with 5 C.F.R. § 1201.114(h) and that, if he failed to do so, the Board could impose appropriate sanctions, including possibly dismissing his PFR with prejudice. Notwithstanding this warning, the appellant again filed a petition that exceeded the page limit. The Board dismissed the PFR with prejudice as a sanction for failure to prosecute. The Board noted that the sanction of dismissal with prejudice is appropriate when necessary to serve the ends of justice and should be imposed only when: (1) a party has failed to exercise due diligence in complying with Board orders; or (2) a party has exhibited negligence or bad faith in its efforts to comply. Applying this standard, the Board found that, by repeatedly failing to comply with the Board's regulations and the clear directions provided by the Clerk's Office, the appellant failed to exercise due diligence. The Board further found that the continual misogynistic invective that the appellant used in describing his dealings with the female staff in the Clerk's Office showed bad faith. The Board concluded that, by his actions, the appellant failed to prosecute his PFR and that dismissal with prejudice was therefore appropriate.

Damages

Weed v. Social Security Administration, 2016 MSPB 45, 124 M.S.P.R. 71 (2016): In a claim for liquidated damages, the Board agreed with the AJ that the agency did not willfully violate the appellant's veterans' preference rights by not complying with the Board's order to reconstruct the hiring process. A violation is willful under 5 U.S.C. § 3330c(a) when the agency either knew or showed reckless disregard for whether its conduct was prohibited. Reconstructing the selection process may be appropriate when it is unknown whether a veteran would have been selected for a position. But reconstruction is not required when it is clear that the agency would have selected the veteran absent the VEOA violation. Here, the agency determined that it would have been obligated to select the appellant for any of the four positions at issue, and it made him a job offer within 30 days of the Board's order. Under these circumstances, the record did not establish that the agency knew or showed a reckless disregard of whether its offer of one of the positions at issue, as opposed to reconstructing the selection process, could be considered a violation of a statute or regulation relating to veterans' preference. The Board agreed with the AJ that the Board is not authorized under VEOA to award consequential damages or front pay as remedies.

Significant Opinions Issued by the U.S. Courts of Appeals for the Federal Circuit in FY 2017

Due Process

Federal Education Association & Graviss v. Department of Defense, 841 F.3d 1362 (Fed. Cir. 2016): The Federal Circuit reversed an arbitrator's decision, which sustained the petitioner's removal and rejected her argument that the agency violated her due process rights by not disclosing an email urging her termination at an earlier stage of the removal proceedings. The Court rejected the agency's argument that the factors set forth in *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368 (Fed. Cir. 1999), did not apply because the alleged ex parte communication occurred before removal proceedings were brought against the petitioner. The Court saw no distinction between pre- and post-initiation communications if an ex parte communication happens when a disciplinary proceeding is still only being contemplated, explaining that the risk of creating undue pressure in such circumstances is just as great when ex parte contact occurs before, as when it happens after, proceedings begin.

Note: On October 13, 2017, the Court vacated its decision in *Graviss* and ordered a rehearing en banc.

Jurisdiction

Lee v. Merit Systems Protection Board, 857 F.3d 874 (Fed. Cir. 2017): The petitioner, a former appointee under the Federal Career Intern Program (FCIP), challenged a Board decision dismissing for lack of jurisdiction the appeal of her termination from Federal service. The Federal Circuit affirmed the Board's dismissal, holding that the agency's decision not to convert an FCIP intern to the competitive service is not an "adverse action" appealable to the Board, *see* 5 C.F.R. § 1201.3(a)(1), because the implementing regulations clearly explain that interns have no right to further Federal employment after their appointments expire. The Court also disagreed with the petitioner's argument that Executive Order 13,162, which created the FCIP, required that she be converted to the competitive service, given that the order states that competitive service *may* be granted to a successful intern, not that it *shall* be granted.

Banks v. Merit Systems Protection Board, 854 F.3d 1360 (Fed. Cir. 2017): The petitioner resigned after being notified that she would be terminated before her probationary period ended. On appeal, she argued that she involuntarily resigned and that her previous 3 years of service with the U.S. Postal Service (USPS) qualified as prior Federal service entitling her to Board appeal rights of her alleged constructive removal. The Board upheld the AJ's dismissal of the appeal for lack of jurisdiction, finding that the petitioner was not an "employee" under 5 U.S.C. § 7511(a)(1) and that her service with the USPS did not provide her with appeal rights because the USPS is not an "executive agency" under 5 U.S.C. § 7511(a)(1)(C)(ii). The Federal Circuit affirmed the Board's decision, agreeing that the petitioner was still serving a probationary period when she resigned, and that her prior service with the USPS did not qualify as "current, continuous service" in an Executive agency for purposes of Board appeal rights. The Court noted that the USPS is an "independent establishment of the executive branch of the Government of the United States," *see* 39 U.S.C. § 201, rather than an "Executive department" or "Government corporation" as defined by 5 U.S.C. §§ 101 and 103. The Court held that, because the USPS does not fall into any of the categories defining "independent establishment" in 5 U.S.C. § 104, the petitioner's prior service with the USPS did not qualify her as an employee with appeal rights.

Adverse Action Charges

Cleaton v. Department of Justice, 838 F.3d 1126 (Fed. Cir. 2016): The Board affirmed the removal of a Correctional Officer terminated pursuant to 5 U.S.C. § 7371, which mandates the removal of any law enforcement officer convicted of a felony. Under that statute, any appeal of such a removal is limited to whether: (a) the employee is a law enforcement officer; (b) the employee was convicted of a felony; and (c) the conviction was overturned on appeal. 5 U.S.C. § 7321(e)(2). Here, the petitioner pled no contest to a criminal felony charge as part of a plea deal. As a result, he alleged in his Board appeal that he was not actually "convicted," as defined by the statute. He also argued that, even if he were deemed to have been convicted of a felony under the initial plea agreement, that agreement was withdrawn and revised, thereby nullifying the conviction. The Federal Circuit affirmed the Board's decision, finding that: (1) although the felony at issue was a matter of Virginia state law, the definition of what constitutes a "conviction" under a Federal statute is a question of Federal law; (2) for purposes of the statute, an individual is "convicted" "once guilt has been established whether by plea or by verdict and nothing remains to be done except pass sentence"; and (3) the petitioner did not prove his claim that his plea agreement was withdrawn; instead, it was merely revised to add a misdemeanor charge and to reflect that a finding of guilt would be withheld while he served his probation and that the charges would be dismissed if he successfully completed his probation. Thus, because the state court found the petitioner guilty after he pled no contest to a felony offense, which

had not been overturned on appeal, the Court upheld the Board's finding that the petitioner was convicted of a felony for purposes of section 7371(b) and sustained his removal.

Furloughs

Snyder v. Department of the Navy, 854 F.3d 1366 (Fed. Cir. 2017): The petitioner, a Navy employee, was furloughed while working on a project supporting Lockheed Martin. The agency denied requests from Lockheed Martin and the petitioner asking that she and certain other employees be exempted from the furlough. On appeal to the Board, the petitioner argued that the Navy improperly denied the requests because her work for Lockheed Martin should have been exempted. She claimed, among other things, that she was not paid out of Government-appropriated funds and so her furlough did not assist in reducing the budgetary shortfall. The AJ found she was properly furloughed, and the Board issued a split-vote decision, thereby leaving the AJ's decision in place. The Federal Circuit affirmed the AJ's decision, holding that: (1) the AJ's analysis addressed the petitioner's specific claims and was sufficient; (2) regardless of the exact source of the petitioner's salary, the agency had flexibility to furlough her under a "holistic" approach to budget management because preserving money from the program funding her salary would permit it to meet higher priority needs; and (3) there was a sufficient nexus between the decision to furlough her and the sequestration.

Calhoun v. Department of the Army, 845 F.3d 1176 (Fed. Cir. 2017): The Federal Circuit affirmed the Board's decision to uphold the furlough action in this case. The Court held that, although the petitioner contended that her budget proposals would have averted furloughs, the Board correctly declined to second guess agency management and spending decisions in applying the efficiency of the service standard. The Court agreed with the Board's finding that no due process violation occurred here because the record reflected that the deciding official did in fact receive and review the petitioner's written reply, including her budgetary proposals, prior to issuing the notice of decision. The Court also determined that the deciding official's role was limited to resolving whether the decision to furlough the petitioner was proper and, notwithstanding the petitioner's argument to the contrary, she was not deprived of a "meaningful reply" because the deciding official lacked the authority to determine if her budget proposals to avert the furlough were feasible.

Whistleblower Protection

Miller v. Department of Justice, 842 F.3d 1252 (Fed. Cir. 2016): The Federal Circuit reversed the Board's decision, which held that the petitioner's disclosures about financial improprieties and industrial sabotage at a factory on a medium-security prison facility were protected, and that, by virtue of the knowledge/timing test, they were a contributing factor in his reassignment. The Board also found that the agency showed by clear and convincing evidence that it would have reassigned the petitioner notwithstanding his disclosures, and so the Board denied his request for corrective action. After weighing the three factors set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1326 (Fed. Cir. 1999), the Court reversed, disagreeing with the Board's finding that the agency carried its burden to prove independent causation by clear and convincing evidence, and remanded for further adjudication.

Retirement

Boyd v. Office of Personnel Management, 851 F.3d 1309 (Fed. Cir. 2017): OPM found that the petitioner was overpaid when she began receiving Social Security benefits and OPM did not immediately reduce her disability retirement benefits. The petitioner asked OPM for a waiver and submitted a completed Financial Resources Questionnaire (FRQ) in which she detailed her financial

conditions. OPM then advised her that she needed to provide an updated FRQ so OPM could determine whether to waive the overpayment. She did not furnish an updated FRQ and OPM denied her waiver request. On appeal, she did not respond to an AJ's order directing her to produce evidence and argument to support her waiver claim. The record contained only the first page of her waiver request, which did not include her responses to the questionnaire. The AJ determined that the petitioner was "not without fault" in the overpayment because she failed to set aside the Social Security checks she received, despite an OPM notice telling her that she should do so. On review, the Board affirmed the AJ's decision. The Federal Circuit vacated the Board's decision, holding that (1) OPM's "set aside" requirement does not apply to individuals who do not know or suspect that the overpayment does not belong to them, and (2) for such "unknowing individuals," financial hardship can serve as a basis for finding that recovery of the overpayment is against equity and good conscience. The Court observed that the record was incomplete on the issue of whether the petitioner knew or suspected that she had been overpaid, and the Court instructed the Board on remand to resolve that question.

USERRA

Kitlinski v. Merit Systems Protection Board, 857 F.3d 1374 (Fed. Cir. 2017): In this USERRA appeal, the petitioner argued that, after he drove his personally owned vehicle to the agency's headquarters to attend a deposition in his EEO complaint, he discovered a Blackberry device concealed under the hood of his car. He asserted that the Blackberry was the same model that the agency used for voice recording and electronic tracking and monitoring. He argued that the agency's actions created four separate causes of action. The AJ dismissed the appeal for lack of jurisdiction. The Board affirmed the initial decision as modified, finding that the petitioner failed to nonfrivolously allege that the agency's alleged conduct was based on his military status or that the agency subjected him to a hostile work environment in violation of USERRA. As to three of the four causes of action, the Federal Circuit found that: (1) the agency's purported placement of a Blackberry in the petitioner's car and its actions during its investigation did not represent a discrete act of discrimination under USERRA because these actions were not denials of a "benefit of employment"; (2) the petitioner failed to make a nonfrivolous allegation that he was subjected to a hostile work environment based on his military service because he never actually alleged that the hostile work environment was based on his military service; and (3) neither the placement of the Blackberry nor the investigation constituted discrete acts of reprisal under USERRA. The Court therefore affirmed the Board's decision as to those three causes of action. As to the fourth cause of action, the petitioner's retaliatory hostile work environment claim, the Court granted the Board's request for a remand to permit review of that claim.

National Security Determinations

Wilson v. Department of the Navy, 843 F.3d 931 (Fed. Cir. 2016): The petitioner challenged his removal to the Board, arguing that the revocation of his security clearance, as well as the resultant removal, was due to discrimination based on his uniformed service. The Board affirmed the removal, finding that the agency provided the petitioner with the procedural protections of 5 U.S.C. § 7513(b), the agency was not obligated to reassign him to a position that did not require a security clearance, and the Board was precluded from determining whether the security clearance determination was based on his uniformed service. The petitioner appealed to the Court, which affirmed. The Court found that, although the petitioner argued that USERRA authorizes review of security clearance determinations, under well-settled Supreme Court precedent, neither the Court nor the Board could determine whether discrimination was the reason for a security clearance revocation.

Penalties

Purifoy v. Department of Veterans Affairs, 838 F.3d 1367 (Fed. Cir. 2016): The Federal Circuit vacated a Board order, which reversed an AJ's decision to mitigate a removal to a 40-day suspension, finding that the Board's analysis improperly omitted a review of certain relevant penalty factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). The Court stated that the Board must afford special deference to an AJ's demeanor-based credibility determinations, even if demeanor is not specifically discussed. The Court discarded the Board's substitution of the AJ's credibility determinations that were made without an adequate rationale, and remanded for further proceedings.

Timeliness

Fedora v. Merit Systems Protection Board, 848 F.3d 1013 (Fed. Cir. 2017): The Federal Circuit reaffirmed that the 60-day deadline for filing a PFR with the Court is a jurisdictional rule not subject to equitable tolling. The Court found that the governing Supreme Court precedent was *Bowles v. Russell*, 551 U.S. 205 (2007), and that other recent decisions from the Supreme Court holding that some statutory deadlines are not jurisdictional, such as *Henderson v. Shinseki*, 562 U.S. 428 (2011), did not apply to Article III courts. The Court dismissed the PFR in this case because it was not timely filed.

Note: On January 16, 2018, the U.S. Supreme Court denied a petition for certiorari in *Fedora*.

Gallegos v. Merit Systems Protection Board, 844 F.3d 1340 (Fed. Cir. 2016): The Board dismissed as untimely filed the petitioner's petition for enforcement, in which he asked the Board to order the agency to correct a Standard Form (SF) 50—as the agency had promised it would do pursuant to the parties' settlement agreement. The Board also determined that good cause did not exist for the untimely filing because the petitioner did not show that he acted with due diligence, given that he failed to maintain a copy of the parties' settlement agreement and did not check the SF 50 reflecting that his removal was expunged (as per the settlement), when he received the documents. The Court affirmed.

Attorney Fees

Rumsey v. Department of Justice, 866 F.3d 1375 (Fed. Cir. 2017): In this attorney fees matter, the Board awarded fees to two of the three attorneys that represented the petitioner during the course of her proceedings before the Board. The Board did not award any fees to one of the attorneys, however, partly because the petitioner herself questioned some of that attorney's billing records. The Federal Circuit held that the mandatory language of the whistleblower statute's fees provision, *see* 5 U.S.C. § 1221(g)(1)(B), mandates that a petitioner who is a prevailing party is entitled to attorney fees and costs, even if, as here, the supporting documentation is in some way deficient. The Court reversed the Board's decision and remanded for further proceedings, including a review of the billable records.

Constitutionality of a Statute

Helman v. Department of Veterans Affairs, 856 F.3d 920 (Fed. Cir. 2017): The Deputy Secretary of the Department of Veterans Affairs removed the petitioner from her position under the Veterans Access, Choice and Accountability Act, 38 U.S.C. § 713, a measure adopted by Congress in part to expedite the removal of Department of Veterans Affairs executives based on misconduct or gross incompetence. An AJ sustained two of the three charges against the petitioner and affirmed her

removal. The petitioner filed a PFR with the Board. However, the Board, citing section 713(e)(2), pointed out that Congress, in passing the then-new law, specifically precluded the full Board from reviewing AJs' decisions under the Act, and thus the Board refused to take any further action on her appeal. The petitioner then petitioned to the Federal Circuit, asking the Court to review the constitutionality of the statute governing her removal and the process afforded to her under that law. The Court held that the Act impermissibly vested significant authority in the Board's AJs in violation of the Appointments Clause. Without reaching the issue of whether AJs are "inferior Officers" for purposes of the Appointments Clause, the Court nevertheless concluded that the power to affirm or overturn a removal decision by the Secretary of Veterans Affairs is significant and therefore the portions of section 713 that expressly pertain to the finality of the AJs' decision are invalid. The remedy, the court held, was for the invalid portions of the statute to be severed and to permit Board review of the AJ's decision in this case. The Court remanded for the full Board to adjudicate the petitioner's PFR, including her due process arguments if she chose to renew them.

Significant Opinions in Whistleblower Appeals Issued by the Other Circuit Courts in FY 2017

Acha v. Department of Agriculture, 841 F.3d 878 (10th Cir. 2016): The agency terminated the petitioner during his probationary period and he alleged that the termination was due to his protected disclosures to the Inspector General and his direct supervisor about violations of the Federal acquisition rules. In his OSC complaint, however, he cited only his disclosure to the Inspector General. Before the Board, he argued that he included in his OSC complaint information about his disclosure to his supervisor, but did not expressly allege to OSC that he was terminated on this basis because, at the time he filed his OSC complaint, disclosures made to supervisors in the normal course of duty were not protected. (This rule was subsequently changed by the Whistleblower Protection Enhancement Act.) The Board held that, by including information about the disclosure to his supervisor, the petitioner had exhausted this alleged protected disclosure before OSC, even though the allegation was not explicit. The Board thus found he had established jurisdiction, but denied corrective action on the merits. The Tenth Circuit reversed the Board's jurisdictional determination, holding that the petitioner did not raise his claim about the disclosure to his supervisor sufficiently clearly before OSC to allow OSC to pursue an investigation. Merely including information about the claim was not sufficient. His failure to explicitly allege that he was terminated due to this disclosure was fatal to the exhaustion issue and thus to the Board's jurisdiction. In making this determination, the 10th Circuit Court cited the U.S. Court of Appeals for the Federal Circuit's decision in *McCarthy v. Merit Systems Protection Board*, 809 F.3d 1365 (Fed. Cir. 2016).

Significant Opinions Issued by the U.S. Supreme Court in FY 2017

Perry v. Merit Systems Protection Board, 582 U.S. , 137 S. Ct. 1975 (2017): In *Perry*, the Board dismissed the petitioner's appeal for lack of jurisdiction, and told him that, if he was dissatisfied with the Board's decision, he could seek judicial review with the Federal Circuit. The petitioner, however, sought review in the D.C. Circuit. The Board then requested that the matter be transferred to the Federal Circuit, because the D.C. Circuit did not have jurisdiction under the Whistleblower Protection Enhancement Act. The petitioner responded by arguing that because his initial Board appeal alleged discrimination, his case actually should be transferred to District Court pursuant to *Kloeckner v. Solis*, 568 U.S. _, 133 S. Ct. 596 (2012), in which the Supreme Court held that Federal employees challenging an agency action appealable to the Board who claim the action was discriminatory should seek review in District Court, rather than with the Federal Circuit, regardless of whether the Board decided the case on procedural grounds or on the merits. The D.C. Circuit

agreed with the Board, finding that because the Board dismissed the petitioner's appeal for lack of jurisdiction, *Kloeckner* did not apply, and so the Federal Circuit must hear the petitioner's appeal. The petitioner challenged that ruling to the Supreme Court. A majority of the Supreme Court held that the proper review forum when the Board dismisses a mixed case on jurisdictional grounds is the District Court.

SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2017

In addition to adjudicating appeals, MSPB is charged with conducting studies of the civil service and merit systems. MSPB's high-quality, objective merit systems studies provide value by assessing current management policies and practices, identifying innovative and effective merit-based management policies and practices, and making recommendations for improvements. These factors also help reduce the occurrence and costs of PPPs that negatively affect agency and employee performance. 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.

During FY 2017, the Office of Policy and Evaluation (OPE) conducted 35 outreach events. These events ranged from consultation with agency staff and members of the public on MSPB research methods, to formal presentations at conferences (e.g., presentations at the June 2017 OPM Research Summit on employee engagement and addressing poor performance), and gatherings of stakeholders and practitioners (such as a briefing on nepotism to ethics advisors at the Department of Health and Human Services). The OPE Director also accompanied OMB and OPM staff to provide guidance to the 16 largest departments and agencies in complying with the human capital elements of OMB Memorandum M-17-22.[11]

OPE research and publications were cited at least 59 times during FY 2017, in outlets such as national newspapers, specialty publications, testimony to Congress, and OMB guidance to agencies. A 2014 MSPB study appears to be the origin of a provision in the NDAA for FY 2017 that eliminates DoD's authority under 5 U.S.C. § 3326 to waive, during a national emergency, a longstanding restriction on the appointment of recently-retired military officers to the career civil service. In *Veteran Hiring in the Civil Service: Practices and Perceptions*, MSPB reported that a state of national emergency had existed since September 2001 and that DoD had appointed more than 40,000 retired officers to civil service positions in DoD under that waiver during this period. MSPB noted that this outcome appeared inconsistent with Congressional intent in enacting 5 U.S.C. § 3326 to ensure that positions in the career civil service were established and filled on the basis of merit, and to maintain employment opportunities for highly qualified civilians. Congress concurred with this assessment and acted accordingly.[12]

In FY 2017, MSPB published one merit systems study report:

- *Adverse Actions: A Compilation of Articles*

Two study reports are awaiting review and approval but cannot proceed until MSPB has a quorum of Board members.

MSPB also published other products, including:

- *Issues of Merit* (*IoM*) newsletters – Newsletters inform Federal leaders, employees, and stakeholders about merit principles and Federal hiring issues and practices through articles

[11] OMB Memorandum M-17-22, "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce," April 12, 2017.

[12] The Senate Report 114-25 for the repeal of the 180 waiver cites MSPB's report on veterans' hiring entitled *Veteran Hiring in the Civil Service: Practices and Perceptions*.

that discuss current MSPB research and reports, noteworthy agency practices, and Federal HR policies and initiatives.

- *Noteworthy Articles* – These articles on selected merit systems or workforce management topics are posted on the MSPB website at a time or in a format the *IoM* newsletter does not readily accommodate. Topics this year included misconduct, effective management, and disciplinary actions.

Summaries of Reports Released in FY 2017

- *Adverse Actions: A Compilation of Articles* (December 2016) provides an overview of key aspects of the civil service system's process for taking an adverse action for reasons such as misconduct or poor performance. Its purpose is to inform policymakers (such as Members of Congress) and practitioners (such as agency managers and HR specialists) about key principles and provisions about an important and much-criticized aspect of civil service policy and Federal HR management.

FY 2017 Noteworthy Articles

MSPB also issued, in electronic form, three shorter documents on topical issues:

- *Addressing Misconduct in the Federal Civil Service: Management Perspectives* presents information about managers' knowledge of the discipline and appeals system, how they use that system, and what forces may create barriers to action. The publication was intended for policymakers who may be considering changes to the discipline and appeals system.
- *The Merit System Principles: Keys to Managing the Federal Workforce*, is based on the 2016 report *The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce* and recently updated content on the Merit System Principles page of the MSPB website. The guide's purpose is to help agency leaders and managers better understand the core values of the career civil service and how to lead employees in a manner consistent with those values. OPE received many requests for copies of this guide and learned that OPM plans to use the guide in a supervisory course offered by its Eastern Management Development Center.
- *Federal Employee Review Processes for Major Disciplinary Actions* is an annotated diagram of avenues of appeal of an adverse action, which was used in presentations to OMB and agencies about adverse action procedures and protections.

FY 2016 *Issues of Merit* Newsletter Topics

MSPB published three *IoM* newsletter editions on topics such as misconduct and penalties, making a difference at work, stewardship and the MSPs, effective hiring, engagement, emotional exhaustion, sexual harassment trends, and Federal HR offices.

SIGNIFICANT ACTIONS OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT IN FY 2017

As required by statute,[13] MSPB reviews and reports on the significant actions of OPM, including an analysis of whether those actions are in accord with MSPs[14] and free from PPPs.[15] OPM's actions broadly affect the Federal workforce, multiple Federal agencies, and applicants for Federal jobs. Each of OPM's actions listed below have the potential to impact the effectiveness and efficiency of the Federal workforce (MSP 5) and/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 that action's "*Significance*" section. In addition to tracking OPM's actions in FY 2017, we requested and received input from OPM on the status of selected significant actions.[16]

OPM Leadership

OPM describes its Governmentwide mission areas as follows:

- Developing and implementing effective and relevant human resources solutions to build an engaged, productive, and high-performing workforce;
- Assisting agencies to recruit, hire, and retain the most qualified candidates for Federal service;
- Advising and assisting agencies on strategic human resources management;
- Developing effective compensation, work/life, and benefits packages;
- Monitoring merit-based human resources practices so that all Federal employees operate in a fair and discrimination-free environment;
- Promoting recruitment practices that help agencies draw from the rich diversity of the American workforce;
- Ensuring executive branch agencies' accountability for compliance with the MSPs and Federal laws and regulations, including veterans' preference;
- Ensuring the suitability, trustworthiness, and/or eligibility for national security positions for Federal applicants, employees, appointees, active duty military personnel, and contractor staff by conducting background investigations which are used as a basis for these determinations by Federal agencies, and regulating the Governmentwide suitability program;
- Administering retirement, health benefits, long-term care and life insurance, dental, and vision, and flexible spending account programs for Federal employees, retirees, and their beneficiaries and maintaining the integrity of these programs; and
- Advancing the goals of the Patient Protection and Affordable Care Act by overseeing the delivery of high quality, affordable health insurance coverage to Americans in need of such coverage.[17]

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[13] 5 U.S.C. § 1206.

[14] 5 U.S.C. § 2301.

[15] 5 U.S.C. § 2302.

[16] 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 2017. Instead, it should be read in conjunction with previous MSPB reports of OPM's significant actions. If we previously commented on a significant action in progress that was completed in FY 2017 we will not repeat those comments here. Also, when we have commented on operational OPM programs in the past, and no significant changes have been made to those programs, our previous comments remain applicable.

[17] *OPM Strategic Plan FY 2014-2018*, p. 3.

In addition, in 2017 OPM played an integral role in high-profile Administration initiatives including the Federal hiring freeze,[18] plans to reduce the size of the Federal workforce, and efforts to maximize Federal employee performance.[19] Congress also continued to show interest in the Federal hiring process.[20] In 2017, OPM performed its functions without a confirmed Director or Deputy Director. In fact, OPM has not had a confirmed Director since July 2015, and has not had a confirmed Deputy Director since 2011. Nominations were made by President Trump in September 2017 for OPM Director[21] and in June 2017 for OPM Deputy Director.[22]

New Significant Actions of OPM

- *December 2016 Final Rule Regarding the Annual Employee Survey (AES) Requirement and the 2017 Federal Employee Viewpoint Survey (FEVS)*

The NDAA for Fiscal Year 2004[23] required each executive agency to conduct an annual survey of its employees. The purpose of the survey was to assess leadership and management practices that contribute to agency performance and employee satisfaction with (1) leadership policies and practices, (2) work environment, (3) rewards and recognition, (4) professional development and growth, and (5) the opportunity to contribute to achieving organizational mission. The Act required OPM to issue regulations prescribing the survey questions that should appear on the annual employee survey. In addition, the law required agencies to make annual survey results available to the public and post the results on their Websites. OPM issued final regulations in August 2006 identifying 45 specific questions to be included on the annual employee survey.[24]

To modernize the FEVS, OPM issued proposed regulations in February 2016 to reduce the number of specifically prescribed survey questions in the regulation from 45 to 11.[25] OPM's December 2016 final rule included 5 additional questions that had been included in past versions of the FEVS.[26] Therefore, OPM's new regulations require 16 questions to satisfy the statute's AES requirement.

The FEVS includes the 16 required annual employee survey questions, eliminating the burden for each individual agency to administer its own survey.[27] The FEVS includes each of these required questions among the 98 questions that appear on the FEVS every year—84 questions cover a variety of workplace topics and there are 14 demographic questions.[28]

Significance

Employee surveys are an important way to measure a variety of workforce-related issues. They can help organizations explore what they are and are not doing well. They also give employees the

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[18] Presidential Memorandum of January 23, 2017, Hiring Freeze, 82 Fed. Reg. 8,493 (January 25, 2017).

[19] OMB Memorandum M-17-22, "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce," April 12, 2017.

[20] Eric Katz, "Lawmakers Task Trump Administration with Overhauling Federal Hiring," Government Executive, July 14, 2017.

[21] Nominations Received, 115th Cong., 1st sess., *Congressional Record* 163 (September 6, 2017): D 923.

[22] Nominations Received, 115th Cong., 1st sess., *Congressional Record* 163 (June 26, 2017): D 699.

[23] Pub. L. 108-136 § 1128.

[24] Personnel Management in Agencies—Employee Surveys (Final rule), 71 Fed. Reg. 49,979 (August 24, 2006).

[25] Personnel Management in Agencies (Proposed rule), 81 Fed. Reg. 6,469 (February 8, 2016).

[26] Personnel Management in Agencies (Final rule), 81 Fed. Reg. 89,363 (December 12, 2016).

[27] Personnel Management in Agencies (Proposed rule), 81 Fed. Reg. 6,471 (February 8, 2016).

[28] OPM, *2016 Federal Employee Viewpoint Survey Technical Report*, p. 4.

opportunity to express their opinions about the workplace, which can foster a greater sense of employee engagement. As a research organization, MSPB's OPE relies heavily on employee surveys to produce its studies of merit systems and the Federal workforce. OPE has administered its Merit Principles Survey 10 times since 1983 to a representative sample of the Federal workforce to track a variety of workplace issues of interest to the Congress and President. In addition, OPE conducts smaller-scale surveys that address specific topics of interest to get a better understanding of how well the Government is managing its workforce in adherence to MSPs.

OPE has, however, also voiced concerns about the use of employee surveys and the need for survey administrators to minimize their possible negative consequences.[29] Such concerns have included: (1) ensuring that survey results are used to make meaningful organizational changes; (2) not allowing enough time between survey administrations for organizations to administer the survey, to analyze the survey results, to act on the results, and to evaluate those actions; and (3) possible survey fatigue among employees who may tire of filling out surveys.

Ensuring survey results are used to make meaningful organizational changes. There could be many reasons why employees perceive organizations fail to use survey results to make meaningful changes. These reasons may range from organizations lacking the will or expertise to effect positive change, to their inability to influence external forces or alter external constraints. In addition, even when organizations are able to use survey results to make positive organizational changes, employees may be unaware that their input was the seed from which that change grew. Whatever the reason, if employees perceive that their past survey input has not been used to make positive changes, they may become reluctant to continue providing that input.

In 2017, OPM administered the FEVS for the eighth consecutive year, so we can assume that by now employees have an informed opinion of how their organizations use the FEVS results. Only 42 percent of the employees who responded to the FEVS item, "I believe the results of this survey will be used to make my agency a better place to work," actually agreed with that statement.[30] This may not, however, provide the full picture regarding employee views on the positive use of FEVS data. If we assume that employees who do not think their organizations will use survey data to make positive changes are less likely to respond to surveys, it may also be instructive to examine the number of employees who did not bother to fill out the survey. Eighty-two percent of Federal employees to whom the 2017 FEVS was sent either did not respond, said they did not know, or did not agree that the results of the survey would be used to make their agency a better place to work.[31]

In addition, agency managers may not be aware if changes in FEVS scores are statistically significant—that is, whether the change is meaningful and not due to random chance. The Government Accountability Office (GAO) has noted that without understanding whether changes are statistically significant, managers may take action based on data that has limited meaning. For example, a manager might assume an annual increase in employee engagement scores meant specific

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[29] See, for example: (a) MSPB, "Employee Surveys: Don't Let Your Good Surveys Go Bad," *Issues of Merit*, January, 2006, p. 2; (b) *Merit Systems Protection Board Annual Report for Fiscal Year 2005*, "Significant Actions of the Office of Personnel Management," April 2006; (c) *Merit Systems Protection Board Annual Report for Fiscal Year 2006*, "Significant Actions of the Office of Personnel Management," April 2007, p. 39; (d) MSPB, *Managing for Engagement—Communication, Connection, and Courage*, July, 2009, p. 71; (e) MSPB, "From Input to Impact: Using Survey Results," *Issues of Merit*, January, 2012, p. 5; and (f) MSPB, "What Makes A 'Best Place to Work?'" *Issues of Merit*, February, 2013, p. 2.

[30] OPM, *2017 Federal Employee Viewpoint Survey Report by Agency*, p. 121.

[31] The 2017 FEVS was sent to 1,068,151 Federal employees and 486,105 responded (see *2017 Federal Employee Viewpoint Survey Governmentwide Management Report*, p. 1); 292,419 respondents selected "Disagree," "Strongly Disagree," "Neither Agree nor Disagree," or "Do Not Know" to FEVS item 41, "I believe the results of this survey will be used to make my agency a better place to work" (see *2017 Federal Employee Viewpoint Survey Report by Agency*, p. 121).

management efforts were successful when they were not, or assume an annual decline in scores meant specific efforts were not successful and abandon those efforts too soon.[32] It is unlikely that management action based on survey results that are not statistically significant will result in meaningful organizational change.

Not allowing enough time between survey administrations. Among the reasons that employees may perceive their survey input is not being used to make their agencies a better place to work may be that organizations simply do not have enough time to act on one year's survey results before the next year's survey is fielded. When agencies evaluate survey data, they typically implement improvement strategies to address problem areas. However, it may take more than one year to experience change as a result of those strategies. If agencies try to assess or judge the results based on annual survey responses instead of longer term trends, they could reach misleading conclusions. As GAO has noted, organizational improvement takes time and does not neatly follow the FEVS survey cycle; change may involve several efforts and effects are seen at different points in time.[33]

OPM's December 2016 final regulation specified 16 survey questions that it believed covered the areas required by statute. It would be difficult for Federal agencies to analyze survey results, determine what courses of action should be taken to improve survey results, and analyze how those changes affected the workplace every year for 16 survey items—but this is not the task that Federal agencies have to undertake. The FEVS asks Federal employees 84 non-demographic questions every year about the workplace and OPM produces a number of reports regarding agency-level survey results. Agencies are therefore pressed to act on any FEVS item that is perceived to be deficient, whether the item relates to the areas identified in the statute or not.

Possible survey fatigue. The FEVS has been administered to between 500,000 and 1,500,000 Federal employees over the past eight years. In 2014, 2015, and 2016 it was sent to over 800,000 employees and in 2017 to over 1,000,000. In 2017 OPM also administered the Federal Work-Life Survey to 200,000 Federal employees[34] and administered the Federal Employee Benefits Survey to 40,000 employees during the Fall of 2017.[35]

From 2004-2010 OPM administered a Governmentwide survey every other year.[36] The response rates for these biennial surveys were all over 50 percent, with the highest response rate achieved in 2006—57 percent. Since 2011, when the FEVS became an annual endeavor, the response rates have been just under 50 percent, with the lowest response rate realized in 2017—45.5 percent.[37]

OPM should consider periodically assessing whether these potential negative consequences are having an actual effect on the FEVS or the annual survey required by statute. If so, changes to the FEVS process may be warranted or recommendations should be made to Congress regarding the annual survey requirement.

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[32] GAO, *Additional Analysis and Sharing of Promising Practices Could Improve Employee Engagement and Performance*, July 2015, GAO-15-585, p. 26.

[33] Ibid., p 18.

[34] OPM Work-Life Announcements and News, Federal Work-Life Survey, December 20, 2016.

[35] OPM Memorandum, 2017 Federal Employee Benefits Survey, August 29, 2017.

[36] The Federal Human Capital Survey (FHCS, the predecessor to the FEVS) was administered in 2004, 2006, and 2008; the FEVS was first administered in 2010.

[37] Sample size and response rates for the FHCS and the FEVS can be found in each year's survey report at OPM's FEVS website.

- *Reforming the Federal Government and Reshaping the Federal Civilian Workforce*

The Administration took a number of steps in 2017 to reshape the Federal workforce including instituting a hiring freeze;[38] proposing to eliminate funding for programs that are unnecessary, outdated, or not working;[39] and developing a plan to reorganize executive branch agencies.[40] Among the activities that OPM completed that relate to these workforce reshaping initiatives were the issuance of a workforce reshaping handbook,[41] administrative furlough guidance,[42] and performance management guidance and successful practices that support maximizing employee performance.[43]

The workforce reshaping handbook provides assistance to agencies that are considering and/or undergoing some type of reshaping (e.g., reorganization, management-directed reassignment, furlough, transfer of function, and RIF). The handbook provides agencies with guidance, options, and, where necessary, specific operational procedures designed to ensure that reshaping efforts comply with merit system laws and regulations. It notes that the first step that management must take to prepare for workforce reshaping is to develop, review, analyze, and prioritize mission requirements. The handbook presents different options for minimizing or avoiding RIFs while also providing guidance on the RIF regulations.

An administrative furlough is a planned event by an agency which is designed to absorb reductions necessitated by downsizing, reduced funding, lack of work, or budget situations other than a lapse in appropriations. The administrative furlough guidance provides a number of questions and answers regarding many aspects of administrative furloughs for agencies and employees.

OPM's performance management guidance is designed to help agencies develop, apply, and implement performance appraisal systems that maximize employee performance through the effective implementation of the five components of the performance management process: (1) planning work and setting expectations and goals; (2) monitoring progress and performance continually; (3) developing an employee's ability to perform in his or her current position; (4) rating periodically to summarize performance; and (5) rewarding performance.

Significance

As noted in the OPM guidance, any effective workforce reshaping effort should be rooted in the effective accomplishment of each agency's mission. It should also be carried out in accordance with the MSPs and free from PPPs.

MSPB research has found a relationship between higher levels of employee engagement and improved Federal agency outcomes.[44] Agency leadership should realize that employee engagement may suffer during workforce reshaping efforts simply due to employee fears of changes that may or may not be planned in the workplace. Management should be as transparent as possible regarding

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[38] Presidential Memorandum of January 23, 2017, Hiring Freeze, 82 Fed. Reg. 8,493 (January 25, 2017).

[39] OMB, *America First—A Budget Blueprint to Make America Great Again*.

[40] Executive Order 13781, *Comprehensive Plan for Reorganizing the Executive Branch*, March 13, 2017; and OMB Memorandum M-17-22, "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce," April 12, 2017.

[41] OPM, *Workforce Reshaping Operations Handbook—A Guide for Agency Management and Human Resources Offices*, March 2017.

[42] OPM, *Guidance for Administrative Furloughs*, March 2017.

[43] OPM Memorandum for HR Directors, "Performance Management Guidance and Successful Practices in Support of Agency Plans for Maximizing Employee Performance," July 17, 2017.

[44] MSPB, *The Power of Federal Employee Engagement*, September 2008.

any planned workplace changes and should effectively communicate to employees what the changes are and why they are occurring.

A focus on improving agency performance management practices is well-warranted as our research has shown that every positive performance management practice we reviewed is more widely used in agencies with higher level of employee engagement than in agencies with lower level of employee engagement.[45]

- *Framework for the Continuing Development of Federal Senior Executives*

In July 2017, OPM released the *Framework for the Continuing Development of Federal Senior Executives*, the result of a partnership between OPM and the Federal Chief Learning Officers Council.[46] Coupled with OPM's *Supervisory and Managerial Frameworks and Guidance*, the latest framework is intended to assist senior agency leaders with effective talent management and succession planning efforts and to assist agency instructional designers and training managers to chart leadership development. The framework incorporates mandatory training, recommended key leadership behaviors, developmental objectives, and developmental opportunities at each specific stage of an executive's lifecycle of learning.

Significance

The importance of the Senior Executive Service (SES) to overall Federal operations cannot be overstated. The SES was established with the passage of the CSRA of 1978. The CSRA envisioned the SES as a corps of executives who would possess a broad Government perspective and would be capable of serving in multiple leadership positions across Government agencies. The purpose of the SES was "to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality."[47] The decisions made by members of the SES can have broad implications. Approximately one-third of career senior executives, each manage more than 200 employees or are responsible for budgets that exceed $100 million.[48]

In our 2015 report on the training and development of members of the SES, we noted that investment in executive training and development can yield substantial returns in the form of higher performance. However, at that time, there appeared to be no systematic way that senior executives were trained and developed. In some agencies, the training and development of career senior executives was managed centrally, in some it was managed locally, and in others it was a combination of the two. The number and types of training offered executives varied widely across agencies and perhaps between units within the same agency. In addition, we found that only half of career senior executives had completed an executive development plan to guide their developmental activities as stipulated by regulation.[49] It appears that OPM's new framework should help address these shortcomings.

Our 2015 report also found that a sizeable portion (30 percent) of career senior executives indicated that their developmental needs were not met. The main reasons given were the inability to take time away from the job and lack of funding. While executives are responsible for their own development,

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[45] MSPB, *Managing for Engagement—Communication, Connection, and Courage*, July 2009.

[46] OPM Memorandum, "Framework for the Continuing Development of Federal Senior Executives," July 27, 2017.

[47] 5 U.S.C. § 3131.

[48] MSPB, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015, pp. 6-7.

[49] MSPB, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015, p. i.

agencies are also responsible for providing the tools that enable success—including training. Formalizing what is expected of both executives and agencies regarding executive development via the new framework may help executives receive the development they require.[50]

Although improved development of Federal executives is necessary and welcome, agencies should recognize the limitations of training. Merely attending training courses does not guarantee that executives have acquired the competencies those courses purport to impart. Additionally, some competencies needed to excel as a Federal executive—such as motivation and mental style competencies—may not be well-suited to development through training.[51] Accordingly, Federal agencies should maintain sound programs for selecting executives and take appropriate action when an executive is unable or unwilling to adequately carry out required responsibilities.

In addition to MSP 5, efforts to improve the training and development of Federal executives relate to MSP 7 which states that employees should be provided effective education and training in cases where better organizational and individual performance would result.

- *Governmentwide Survey of Federal Work-Life Programs*

In October 2016, Acting OPM Director Beth Cobert announced that OPM would administer a Federal Work-Life Survey in early 2017.[52] The aim of the survey was to support OPM's continuing efforts to develop and sustain an engaged, innovative, and productive Federal workforce. The survey is also part of OPM's commitment to supporting agencies as outlined in the June 23, 2016, Presidential Memorandum, "Enhancing Workplace Flexibilities and Work-Life Programs."[53]

In early 2017, OPM fielded the Federal Work-Life Survey to nearly 200,000 employees as an opportunity to:

- Support agencies in their efforts to implement and expand the use of work-life programs and workplace flexibilities to recruit and retain talent and improve productivity;
- Promote evidence-based decision-making through evaluation of the relationship between work-life programs and their intended outcomes (e.g., increased employee engagement, performance, improved health, reduced absenteeism, improved retention);
- Obtain employee perspectives to identify barriers that may unnecessarily restrict the use of work-life programs; and
- Support individual agencies in understanding employee needs and behaviors in order to build more effective programs.[54]

The response rate for OPM's 2017 Federal Work-Life Survey was 38 percent.[55] As noted earlier in this review of OPM significant actions, this low response rate could indicate growing Federal employee fatigue with responding to surveys.

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[50] MSPB, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015, pp. i-ii.

[51] MSPB, *Making the Right Connections: Targeting the Best Competencies for Training*, February 2011.

[52] OPM Memorandum, "Governmentwide Assessment of Federal Work-Life Programs," October 25, 2016.

[53] Presidential Memorandum of June 23, 2014, "Enhancing Workplace Flexibilities and Work-Life Programs," 79 Fed. Reg. 36,625 (June 27, 2014).

[54] Status of OPM significant actions provided by OPM to MSPB, September 6, 2017.

[55] Status of OPM significant actions provided by OPM to MSPB, September 6, 2017.

OPM is currently analyzing the survey data to create a summary and agency specific reports, which OPM anticipates will be issued in FY 2018. OPM will use the findings to: support agencies in policy development and successful implementation; facilitate cost-saving opportunities for partnership, collaboration, and learning; and establish Governmentwide policies and guidance.

Significance

OPM states that the primary goal of the survey was to determine the value of work-life programs as a strategic agency business practice and to address the following broad research questions across the Government and within agencies:

- Are Federal work-life programs meeting the current and future needs of employees?
- Are Federal work-life programs accessible and used by employees?
- Are Federal work-life programs effective in producing intended outcomes?
- What are the barriers that unnecessarily restrict the use of Federal work-life programs?[56]

Efforts to effectively use work-life programs to increase employee engagement and help retain valued employees is laudable. Previous MSPB research found a relationship between higher levels of employee engagement and improved Federal agency outcomes. Specifically, in agencies where more employees were more engaged better program results were produced, employees used less sick leave, fewer employees filed equal employment opportunity complaints, and there were fewer cases of workplace injury or illness.[57] Our subsequent research established the importance of effective performance management processes,[58] job design, and rewards in improving employee engagement.[59]

As part of its analysis, OPM should consider conducting a Governmentwide cost-benefit analysis of the various work-life programs to fully understand how they contribute to improved agency outcomes and the retention of valued employees. Alternatively, OPM could assist the various agencies to conduct individual cost-benefit analyses to identify the true worth of these strategic business practices.

[56] Status of OPM significant actions provided by OPM to MSPB, September 6, 2017.

[57] MSPB, *The Power of Federal Employee Engagement*, September 2008.

[58] MSPB, *Managing for Engagement—Communication, Connection, and Courage*, July 2009.

[59] MSPB, *Federal Employee Engagement—The Motivating Potential of Job Characteristics and Rewards*, December 2012.

FINANCIAL SUMMARY

Fiscal Year 2017 Financial Summary
as of September 30, 2017
(dollars in thousands)

FY 2017 Appropriations

FY 2017 Appropriation	$ 44,786
Civil Service Retirement and Disability Trust Fund	2,345
Total	$ 47,131

Obligations Charged to FY 2017 Funds

Personnel Compensation	$ 23,195
Personnel Benefits	7,017
Transportation of Things	28
Travel of Persons	281
Rents, Communications and Utilities	4,521
Printing and Reproduction	50
Other Services	2,746
Supplies and Materials	139
Equipment/Lease Improvements	776
Reimbursable Obligations	2,345
Total	$ 41,097

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LIST OF ABBREVIATIONS AND ACRONYMS

ADA	Americans with Disabilities Act of 1990
ADR	Alternative Dispute Resolution
AFR	Annual Financial Report
AJ	Administrative Judge
ALJ	Administrative Law Judge
APR-APP	Annual Performance Report and Annual Performance Plan
CB	Clerk of the Board
CEU	Continuing Education Units
CFR	Code of Federal Regulations
CHCO	Chief Human Capital Officer Council
CIO	Chief Information Officer
CSC	Civil Service Commission
CSRA	Civil Service Reform Act of 1978,
CSRS	Civil Service Retirement System
DHS	Department of Homeland Security
DMS	Document Management System
DoD	Department of Defense
DoI	Department of the Interior
DoL	Department of Labor
DWOP	Dismissal without Prejudice
ED	Executive Director
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
FEVS	Federal Employee Viewpoint Survey
FERS	Federal Employees' Retirement System
FLRA	Federal Labor Relations Authority
FOIA	Freedom of Information Act
FY	Fiscal Year
GAO	Government Accountability Office
GC	General Counsel
GPRAMA	Government Performance and Results Act Modernization Act of 2010
HQ	Headquarters
HR	Human Resources
IoM	*Issues of Merit*
IRA	Individual Right of Action
IS	Internal Survey
IT	Information Technology
MAP	Mediation Appeals Program
MPS	Merit Principles Survey
MSP	Merit System Principles
MSPB	Merit Systems Protection Board
NDAA	National Defense Authorization Act
OEEO	Office of Equal Employment Opportunity
OGE	Office of Government Ethics
OGR	House Committee Oversight and Government Reform
OMB	Office of Management and Budget

OPM	Office of Personnel Management
OSC	Office of Special Counsel
PFR	Petition for Review
PIO	Performance Improvement Officer
PPP	Prohibited Personnel Practices
RFQ	Request for Quote
RIF	Reduction-in-Force
SES	Senior Executive Service
USDA	Department of Agriculture
USERRA	Uniformed Services Employment and Reemployment Rights Act
VA	Department of Veterans Affairs
VEOA	Veterans Employment Opportunity Act
VERA	Voluntary Early Retirement Authority
VSIP	Voluntary Separation Incentive Plan
WB	Whistleblower
WPA	Whistleblower Protection Act of 1989
WPEA	Whistleblower Protection Enhancement Act of 2012

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