Annual Report for FY 2018

February 28, 2019

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Foreword

In accordance with section 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this Annual Report on its significant actions during fiscal year (FY) 2018.

We invite customers and stakeholders to send comments to improve MSPB' annual reports to:

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Information about MSPB's FY 2018 program performance results (as required under the Government Performance and Results Act Modernization Act of 2010 (GPRAMA)) is available in the Annual Performance Report and Annual Performance Plan (APR-APP) for FY 2018-2020. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR) for FY 2018. 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 2018 ANNUAL REPORT

MESSAGE FROM THE VICE CHAIRMAN

I am pleased to submit the U.S. Merit Systems Protection Board (MSPB's) Annual Report for 2018. This has been a time of prolonged uncertainty for MSPB, but also of continued success. For the first time in its history, MSPB was without a quorum for the entire fiscal year. MSPB was unable to release decisions in petition for review (PFR) and other cases at headquarters (HQ), publish reports of merit systems studies, and promulgate substantive regulations in response to Congressional changes. Even so, MSPB has continued to receive appeals at HQ and draft decisions on PFRs and other HQ cases that will await review and voting by new members when a quorum is restored. MSPB also has continued to adjudicate appeals and issue initial decisions in the regional and field offices, conduct merit systems studies research, and carry out its other administrative and support functions.

The President nominated three individuals to serve as Chairman, Vice Chairman, and Board member in the spring of 2018. A confirmation hearing for the nominees was held in July 2018. The nominees were not confirmed by the Senate prior to the adjournment of the 115th Congress. On January 16, 2019, the President resubmitted the nominations for consideration by the 116th Congress. Subsequently, the nomination for the Vice Chairman was withdrawn. On February 13, 2019, the remaining two nominees were favorably voted out of committee for consideration on the floor of the Senate. My term expires at the end of February 2019. Subsequent to that time, if there are no new confirmed Board members, MSPB will continue operations under its continuity of operations plan (COOP). Under the COOP, the MSPB General Counsel will become the agency's acting chief executive and administrative officer.

Despite the lack of quorum, MSPB issued 5,469 decisions in FY 2018, including 5,447 decisions issued by the regional and field offices, 11 decisions issued by administrative law judges, and 11 determinations regarding requests for stays. MSPB published three editions of the *Issues of Merit* newsletter and four articles or research briefs. In accordance with section 1206 of MSPB's statute, this Annual Report also includes summaries of the significant actions of the Office of Personnel Management (OPM). Given the many changes at OPM this year, that section focuses on an overview of OPM since it was established under the Civil Service Reform Act of 1978.

MSPB must be prepared to face external challenges such as potential changes in law and jurisdiction proposed and enacted by Congress. However, due to uncertainty in the Board's political leadership, MSPB may be unable to fully implement any new responsibilities that could arise from such changes.

MSPB's success in FY 2018, and in past years, is a result of the dedication of MSPB's employees, who have continued to remain focused on the agency's mission to protect the merit system principles and promote an effective Federal workforce free from prohibited personnel practices.

Mark A. Robbins,
Vice Chairman
February 28, 2019

INTRODUCTION

This U.S. Merit Systems Protection Board (MSPB) Annual Report for fiscal year (FY) 2018 includes adjudication case processing statistics for the regional and field offices, summaries of court opinions relevant to MSPB's work, summaries of MSPB's merit systems studies activity, and summaries of the significant actions of OPM.[1] The report also contains summaries of the Board's financial status, outreach and education activities, legislative and congressional relations activities, and international activities. In addition, the report includes a brief review of the internal management challenges and external factors that affect MSPB's work to provide a context for the other information in the report. MSPB's annual reports usually contain HQ case processing statistics and summaries of significant MSPB Board decisions. This information is not provided in this report because, due to the lack of quorum, there were no HQ decisions issued in FY 2018.

About MSPB

MSPB was created by the CSRA to carry on the adjudication functions of the Civil Service Commission (CSC), 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) that were proscribed because they were contrary to merit system values.[3] Since the enactment of the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.[4]

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 the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat. 16; the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199; and other laws listed in this and previous Annual Reports.

Board Members

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

MARK A. ROBBINS
Vice Chairman and acting Chairman, January 2017 to 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. On January 23, 2017, President Donald Trump designated Mr. Robbins Vice Chairman. His term expired on March 1, 2018, and he is presently serving pursuant to a one-year statutory holdover period. Until a quorum is restored or his term expires, Mr. Robbins performs 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.

Currently, there are two vacant Board member positions and the MSPB lacks a quorum which prevents it from issuing decisions in PFRs and other cases at HQ and issuing reports of merit systems studies. It also prevents the Board from promulgating substantive regulations in response to changes enacted by Congress. The President nominated three individuals to serve as Chairman, Vice Chairman and Board member of MSPB in the spring of 2018. A hearing was held for these nominees in July 2018. The nominees were not confirmed by the full Senate before the adjournment of the 115th Congress. On January 16, 2019, the President resubmitted these nominations for consideration by the 116th Congress. Subsequently, the nomination of the Vice Chairman was withdrawn. On February 13, 2019, the remaining two nominees were favorably voted out of committee for consideration on the floor of the Senate.

MSPB Offices and Their Functions

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

The **Board Members** adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer. The Director of the Equal Employment Opportunity (EEO) Office reports directly to the Chairman; otherwise the Directors of the offices described below report to the Chairman through the **Executive Director (ED)**.

The **Office of the Administrative Law Judge (ALJ)** adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. In FY 2018, the functions of this office were performed under interagency agreements by ALJs at the Federal Trade Commission (FTC), the Coast Guard, and the Environmental Protection Agency (EPA).

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 MSPB HQ, rules on certain procedural matters, and issues Board decisions and orders. It serves as MSPB's public information center, coordinates media relations, operates MSPB's library and on-line information services, and administers the Freedom of Information Act (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's (USDA), National Finance Center for payroll services, U.S. Department of the Treasury's, Bureau of Fiscal Service for accounting services, and USDA's Animal and Plant Health Inspection Service for HR services.

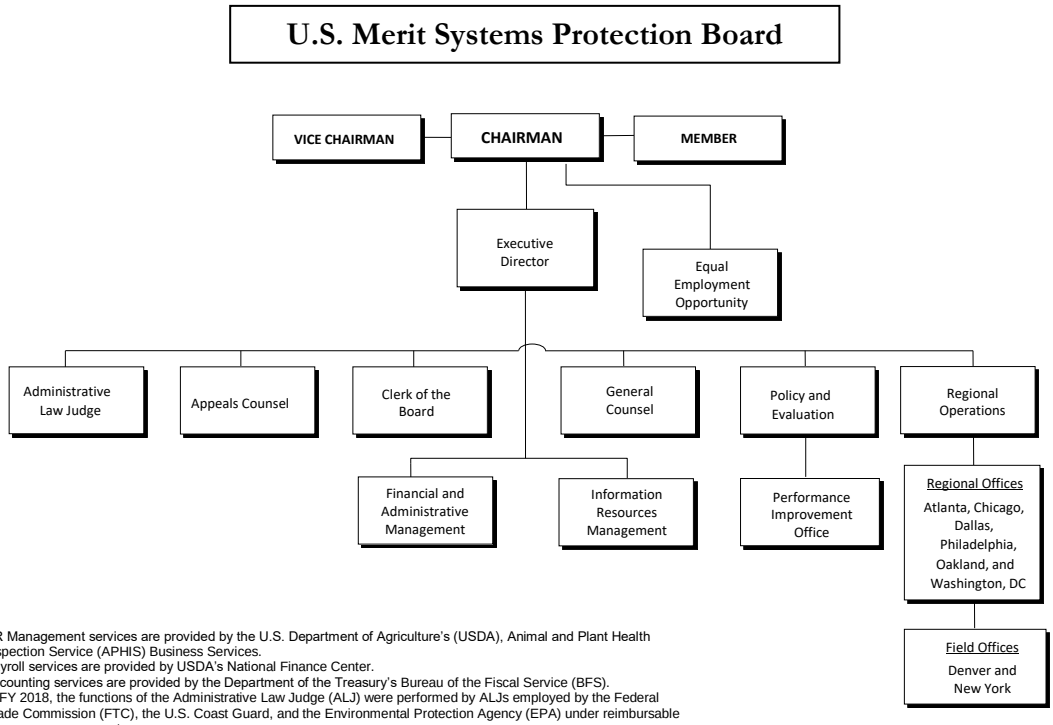
The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for the Board to enforce a final MSPB decision or order, in response to requests to review OPM regulations, and for other assigned cases; conducts the agency's PFR settlement program; and coordinates the agency's legislative policy and congressional relations functions. The office also drafts regulations, 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 technology 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 the significant actions of OPM. The office conducts special projects and program evaluations for the agency and is responsible for coordinating MSPB's performance planning and reporting functions required by GPRAMA.

The **Office of Regional Operations** oversees the agency's six regional offices and two field offices, which receive and process initial appeals and related cases. It also manages MSPB's Mediation Appeals Program (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



HR 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's Bureau of the Fiscal Service (BFS).
In FY 2018, the functions of the Administrative Law Judge (ALJ) were 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.

FISCAL YEAR 2018 IN REVIEW

Adjudication

Beginning on January 8, 2017, Mark A. Robbins became MSPB's only Board member and Acting Chairman. Since that date, including all of FY 2018, MSPB has lacked a quorum of Board members, thus preventing MSPB from issuing final decisions in PFRs and other cases at HQ, including enforcement decisions and those requesting review of OPM regulations. Therefore, this Annual Report does not contain summaries of significant decisions issued by the Board, or case processing statistics for PFRs issued by HQ.

In FY 2018, MSPB processed 5,447 cases in the regional and field offices including addendum and stay requests. MSPB's AJs in the regional and field offices issued decisions in 5,134 initial appeals. ALJs issued 11 decisions. MSPB's Acting Chairman granted 11 stay requests, but, as stated earlier, no decisions in PFRs or other cases were issued from HQ. As of the end of FY 2018, MSPB had approximately 1,800 PFRs pending at HQ, and had drafted decisions for Board member review and action in over 1,500 of these cases. Statistical information on MSPB's case processing activity for the ROs/FOs is provided in the Case Processing Statistics for FY 2018 section of this report. In accordance with the WPEA, information about FY 2018 whistleblower cases will be available in MSPB's APR-APP for FY 2018-2020. The APR-APP is available on MSPB's website at www.mspb.gov.

As a service to our stakeholders, MSPB is also providing summaries of significant opinions relevant to the Board's work that were issued in FY 2018 by the U.S. Court of Appeals for the Federal Circuit (CAFC) and other appellate courts. Those summaries are provided in the Significant Opinions Issued by the Courts section of this report. The opinions cover topics such as annuity determinations, adverse actions, jurisdiction, untimely filing, and USERRA. Summaries of opinions on whistleblower issues issued by the CAFC and the 4th, 7th, and 9th Circuit Courts are also included.

Merit Systems Studies

In FY 2018, MSPB did not publish any reports of merit systems studies due to the lack of quorum. MSPB's studies program released 3 editions of its *Issues of Merit (IoM)* newsletter including an entire issue reflecting on the civil service 40 years after passage of the CSRA. It also released articles and briefs on sexual harassment in the Federal workplace, improving Federal hiring through better assessments, building blocks for better performance management, and the role of feedback, autonomy, and meaningfulness on employee performance behaviors. Summaries of FY 2018 *IoM* newsletters, research and perspective briefs, and other articles are contained in the Summary of Merit Systems Studies Activity section of this report.

The Significant Actions of the Office of Personnel Management

In accordance with statute, MSPB's annual report must contain a review of OPM significant actions and an assessment of the degree to which the actions support merit and prevent PPPs. This year, we have chosen to mark the 40th anniversary of the CSRA with a summary of proposed changes and policy directions that OPM has outlined, including discussion of OPM's purpose, funding, focus, and activities. 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 operation and understanding of the Federal merit system disciplinary and appeals process by sharing information about MSPB processes and its legal precedents. All of these efforts, in turn, help to improve employee and organizational performance, improve service to the American people, and provide value to the taxpayer.

In FY 2018, MSPB staff conducted 137 outreach events with a variety of customers and stakeholders. MSPB staff made presentations at the Federal Circuit Judicial Conference, and to the Department of Defense, American Federation of Government Employees, Society for Industrial and Organizational Psychology, American Bar Association, ABC affiliate (WJLA) "Government Matters" program, and to other management, union, and affinity groups.

MSPB's adjudication and studies work, and other activities involving MSPB, were cited over 600 times in at least 136 different print and online sources including wire services, professional and trade publications, textbooks, newspapers, and other media. Significant citation sources include two reports by the Government Accountability Office (GAO); posts and letters by selected U.S. senators and representatives; OPM's UnlockTalent.gov website; the National Academy of Sciences, Engineering and Medicine; the National Academy of Public Administration; and the American Psychological Association. More information about references to MSPB's work and its outreach and education activities can be found in the APR-APP for FY 2018-2020.

International Activities

During 2018, MSPB hosted an official from Armenia to educate her on the organization of the Federal civil service, MSPB's structure and functions, and its role in fostering adherence to the MSPs and protecting employees and applicants from PPPs. MSPB staff members met with officials from Canada to exchange information about civil service issues relevant to each country.

Legislative and Congressional Relations Activity

During FY 2018, MSPB staff monitored or analyzed over 30 bills that might impact MSPB's jurisdiction, the agency's adjudication of appeals, or Federal workforce management issues relevant to MSPB's work. Brief descriptions of some of these bills are provided here. In addition, MSPB's Vice Chairman and staff assisted the nominees for MSPB Chairman, Vice Chairman, and Board Member during the nomination and hearing process.

National Defense Authorization Act (NDAA) for FY 2018 (H.R. 2018). In addition to reauthorizing the Office of Special Counsel (OSC) for a period of five years, section 1097 of the Act enhances whistleblower protections for Federal employees and expands agency responsibilities for providing such protections. With respect to the MSPB, the Act permits OSC to petition MSPB to order corrective action, including fees, costs, or damages reasonably incurred by an employee due to an investigation of the employee by an agency, if the investigation by an agency was commenced, expanded or extended in retaliation for a disclosure or protected activity described in section 2302(b)(8) or subparagraphs (A)(i), (B), (C), or (D) of section 2302(b)(9).[5]

[5] Enacted December 12, 2017; Pub L. 115-91.

All Circuit Review Act (H.R. 2229). This Act amends Title 5 of the U.S.C. to provide permanent authority for judicial review by all Federal circuit appellate courts of certain MSPB decisions relating to retaliation for whistleblower and certain other protecting activity, retroactive to November 27, 2017.[6]

Presidential Nominees to the Merit Systems Protection Board. On March 12, 2018, the President nominated Dennis D. Kirk to be a member and Chairman of MSPB, and Andrew F. Maunz to be a member of the Board, with a designation as Vice Chairman. On June 20, 2018, the President nominated Julia A. Clark to be a member of the Board. The Senate Committee on Homeland Security and Governmental Affairs conducted a confirmation hearing for all three nominees on July 19, 2018. No final action was taken by the Senate to confirm the nominees prior to the adjournment of the 115th Congress. On January 16, 2019, the President resubmitted these nominations for consideration by the 116th Congress. Subsequently, the nomination for Mr. Maunz was withdrawn. On February 13, 2019, the remaining two nominees were favorably voted out of committee for consideration on the floor of the Senate.

Other Congressional Activity. MSPB staff conducted three briefings for congressional staff during FY 2018. The first briefing was the annual staff briefing on the agency's FY 2019 budget request. The second briefing was conducted for the majority staff of the Senate Committee on Homeland Security and Governmental Affairs regarding the MSPB Merit Principles Survey (MPS). The third briefing was conducted for staff of the House Committee on Veterans' Affairs regarding MSPB's research on sexual harassment in the Federal workplace. MSPB submitted two reports to Congress regarding appeals for which MSPB could not issue decisions within the 180-day timeframe required by 38 U.S.C. § 714(d).

Internal Management Challenges and External Factors

Detailed information about MSPB's external factors and internal management challenges can be obtained in the MSPB APR-APP for FY 2018-2020. Limited information about the external factors and internal management challenges that may affect MSPB's work are provided here as context for the other information contained in the report. The most significant internal management challenge affecting MSPB is the lack of quorum of Board members. Other significant internal challenges that could affect MSPB's ability to carry out its mission include other human capital (HC) issues and information technology (IT) stability, security and modernization. The most critical external factors are changes in law and jurisdiction and Governmentwide reform.

Presidential Nominations to the Board and Restoration of Board Quorum. MSPB has been without a quorum of Board members since January 8, 2017. The lack of a quorum has prevented MSPB from performing basic mission functions—primarily issuing HQ decisions on PFRs and other cases from HQ, issuing final reports of merit systems studies, and promulgating regulations. As of the end of FY 2018, MSPB had approximately 1,800 PFRs pending at HQ plus another several original jurisdiction cases.

The President nominated three individuals to serve as Chairman, Vice Chairman and Board member of MSPB in the spring of 2018. A confirmation hearing was held for these nominees in July 2018. The nominees were not confirmed by the full Senate prior to the adjournment of the 115th Congress. On January 16, 2019, the President resubmitted these nominations for consideration by the 116th Congress. Subsequently, the nomination for the Vice Chairman was withdrawn. On February 13, 2019, the remaining two nominees were favorably voted out of committee for

[6] Enacted July 7, 2018; Pub. L. 115-195.

consideration on the floor of the Senate. Acting Chairman Robbins' term expires at the end of February 2019. On March 1, 2019, if there are no new confirmed Board members, MSPB will continue operations under its COOP, and the MSPB General Counsel will become the agency's acting chief executive and administrative officer.

Other Human Capital Issues. Twenty-five percent of MSPB employees will be eligible to retire in the next two years. This includes over 35 percent of AJs and their managers (in the ROs/FOs and in ORO) involved in initial appeals. Other HC issues include the Supreme Court's recent decision in *Lucia v. Securities and Exchange Commission*, relating to the appointment of ALJs, and the three Executive Orders (EOs) issued by the President on May 25, 2018, which impose new requirements on the agency regarding revising disciplinary and performance procedures and approving union official time. In addition, MSPB has had a series of Acting Directors in key leadership roles including Acting Chief Information Officer (CIO), Acting Clerk of the Board, Acting General Counsel, and Acting Budget Officer. MSPB's Executive Director, Procurement Officer, and EEO Director recently departed the agency. The Acting CIO is now also the Acting Executive Director, and we have an acting EEO Director. We were pleased to welcome a new General Counsel in mid-October 2018, and a new Budget Officer in January 2019. We are in the process of recruiting for a new CIO, EEO Director, and Procurement Officer. Replacing the Executive Director will await the arrival of a new Chairman.

IT Infrastructure Stability and Modernization. MSPB has improved the stability and viability of its IT infrastructure. MSPB also has made significant progress on obtaining new core business applications to support 100 percent e-Adjudication and on obtaining a secure web-based survey capability to support merit systems studies and customer service surveys. These initiatives will continue to require resources and leadership commitment to ensure effective procurement and implementation.

Changes in Law, Jurisdiction, and Process. In addition to the NDAA for FY 2018 and the All Circuit Review Act (described under the section on Legislative activity), there was considerable activity in FY 2018 implementing the NDAA for FY 2017, which was summarized in the FY 2017 Annual Report. Also occurring in FY 2018, but summarized in the FY 2017 Annual Report, was the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, which defined a new 14th PPP. These laws will likely affect MSPB's case processing by creating additional and more complex appeals filed with MSPB. Finally, the new EOs also may affect the MSPB's case processing, most notably through a new prohibition on agencies entering into settlement agreements that "erase, remove alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records…". In addition to the potential impact on adjudication, these changes emphasize the importance of a strong, viable merit systems studies and OPM review program to ensure the changes are implemented in ways that protect MSPs and prevent PPPs.

Governmentwide Reform and Potential Budget Reductions Beyond FY 2018. Government reform efforts continued in FY 2018. On March 20, 2018, the Office of Management and Budget (OMB) published the *President's Management Agenda*[7], and on June 21, 2018, OMB published *Delivering Government Solutions in the 21st Century: Reform Plan and Reorganization Recommendations*.[8] These plans outline Governmentwide changes as well as specific changes in several Government organizations affecting a variety of Government services. Many of these changes may involve workforce changes and budget reductions that could mean an increase in appeals involving furloughs, reductions in force (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

[7] https://www.whitehouse.gov/wp-content/uploads/2018/03/Presidents-Management-Agenda.pdf.

[8] https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf.

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.

CASE PROCESSING STATISTICS FOR FY 2018

Summary of Cases Decided by MSPB

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

Table 1: FY 2018 Summary of Cases Decided by MSPB

Cases Decided in MSPB Regional and Field Offices	
Appeals	5,134
Addendum Cases[1]	280
Stay Requests[2]	33
TOTAL Cases Decided in RO/FOs	**5,447**
Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction[3]	**11**
Cases Decided by the Board	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	0
Petitions for review (PFRs) - Addendum Cases	0
Reviews of Stay Request Rulings	0
Requests for Stay of Board Orders	0
Reopenings	0
Court Remands	0
Compliance Referrals	0
EEOC Non-concurrence Cases	0
Arbitration Cases	0
Subtotal - Appellate Jurisdiction	**0**
Original Jurisdiction[4]	11
Interlocutory Appeals	0
TOTAL Cases Decided by the Board	**11**
TOTAL Decisions (Board, ALJs, RO/FOs)	**5,469**

[1] Includes 62 requests for attorney fees, 13 board remand cases, 164 compliance cases, 18 court remand cases, 18 requests for compensatory damages (discrimination cases only), 3 requests for consequential damages, and 2 reopenings by the Board pursuant to 5 U.S.C. §7701(e)(1).
[2] Includes 25 stay requests in whistleblower cases and 8 in non-whistleblower cases.
[3] Initial Decisions by ALJ. Case type breakdown: 1 Disciplinary Action - Hatch Act case, 2 Actions Against SES cases, and 8 Actions Against ALJs.
[4] Includes 11 requests for stays brought by OSC.

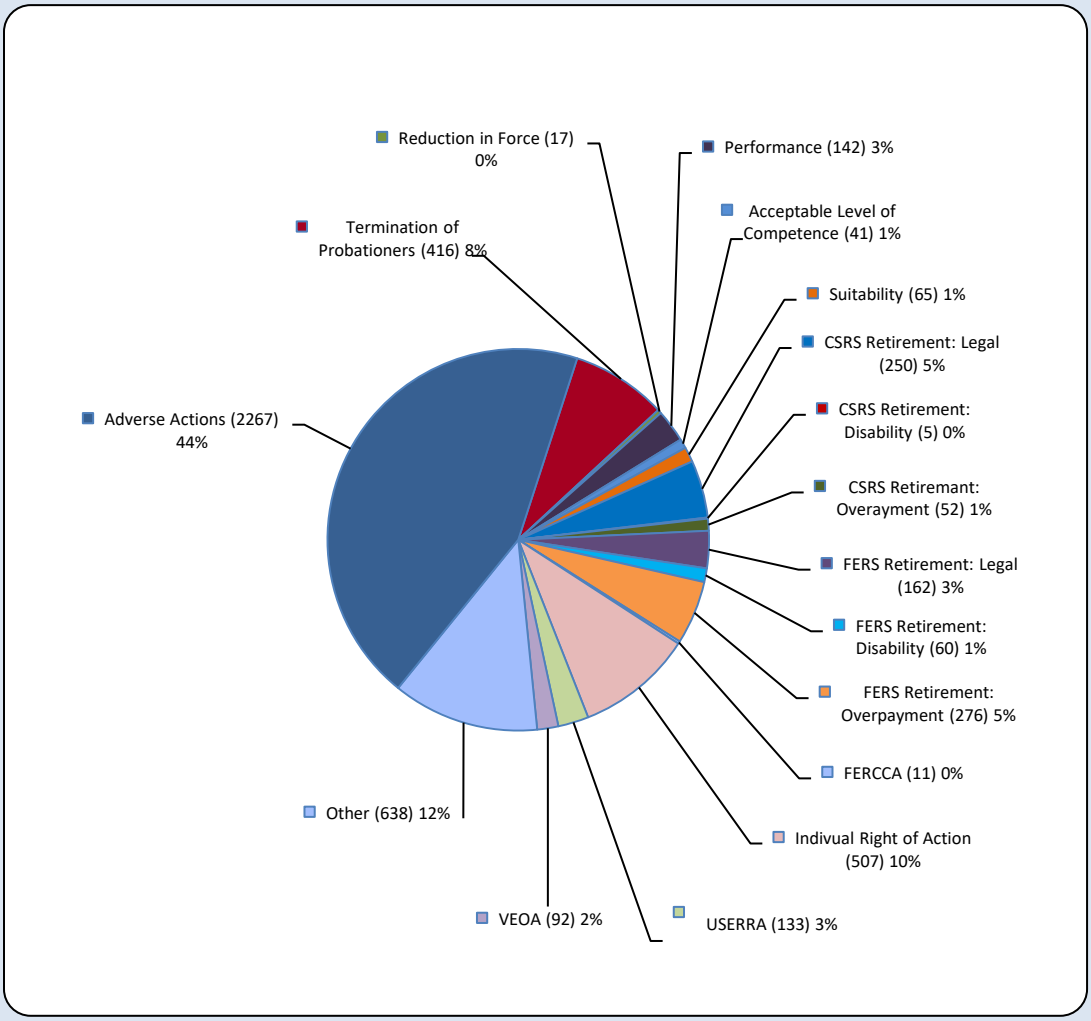
Cases Processed in the Regional and Field Offices

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

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Type of Case	#	#	%	#	%	#	%	#	%
Adverse Action by Agency	2,267	1,073	47.33	1,194	52.67	681	57.04	513	42.96
Termination of Probationers	416	390	93.75	26	6.25	24	92.31	2	7.69
Reduction in Force	17	10	58.82	7	41.18	3	42.86	4	57.14
Performance	142	46	32.39	96	67.61	61	63.54	35	36.46
Acceptable Level of Competence (ALOC)[3]	41	31	75.61	10	24.39	6	60.00	4	40.00
Suitability	65	31	47.69	34	52.31	26	76.47	8	23.53
CSRS Retirement: Legal[4]	250	133	53.20	117	46.80	10	8.55	107	91.45
CSRS Retirement: Disability	5	2	40.00	3	60.00	0	0.00	3	100.00
CSRS Retirement: Overpayment	52	28	53.85	24	46.15	14	58.33	10	41.67
FERS Retirement: Legal[4]	162	103	63.58	59	36.42	4	6.78	55	93.22
FERS Retirement: Disability	60	42	70.00	18	30.00	0	0.00	18	100.00
FERS Retirement: Overpayment	276	132	47.83	144	52.17	90	62.50	54	37.50
FERCCA[4]	11	5	45.45	6	54.55	0	0.00	6	100.00
Individual Right of Action	507	337	66.47	170	33.53	69	40.59	101	59.41
USERRA	133	70	52.63	63	47.37	44	69.84	19	30.16
VEOA	92	38	41.30	54	58.70	4	7.41	50	92.59
Other[5]	638	606	94.98	32	5.02	22	68.75	10	31.25
Total	**5,134**	**3,077**	**59.93**	**2,057**	**40.07**	**1,058**	**51.43**	**999**	**48.57**

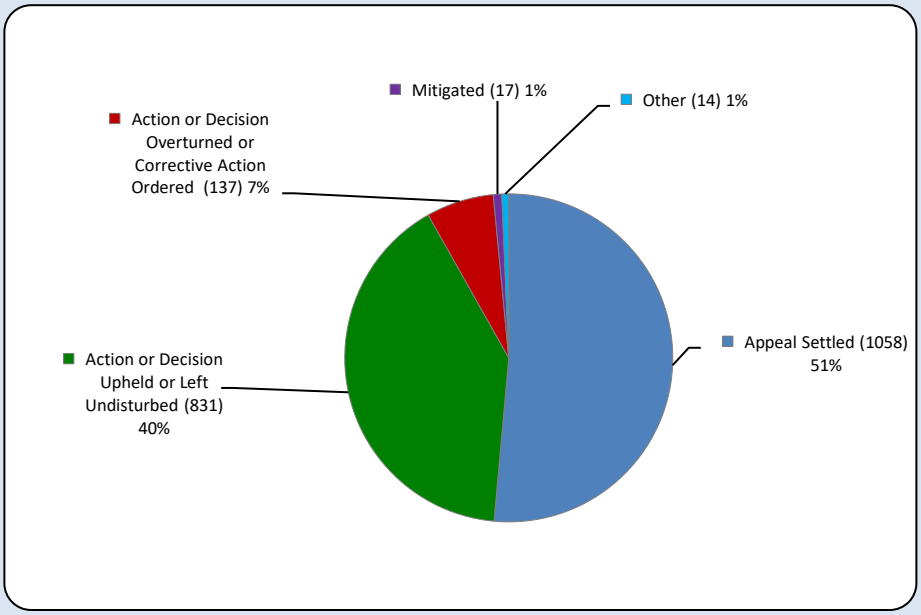
[1] Percent Dismissed and Not Dismissed are of the number Decided.
[2] Percent Settled and Adjudicated are of the number Not Dismissed.
[3] ALOC means an employee is effectively performing the duties and responsibilities of his or her assigned job, which warrants advancing the employee's rate of pay to the next higher step at the grade of the employee's position. If an employee's performance is not at an ALOC, then the agency 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 (65), Miscellaneous (519), and additional types such as Reemployment Priority, Employment Practices, and others.

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



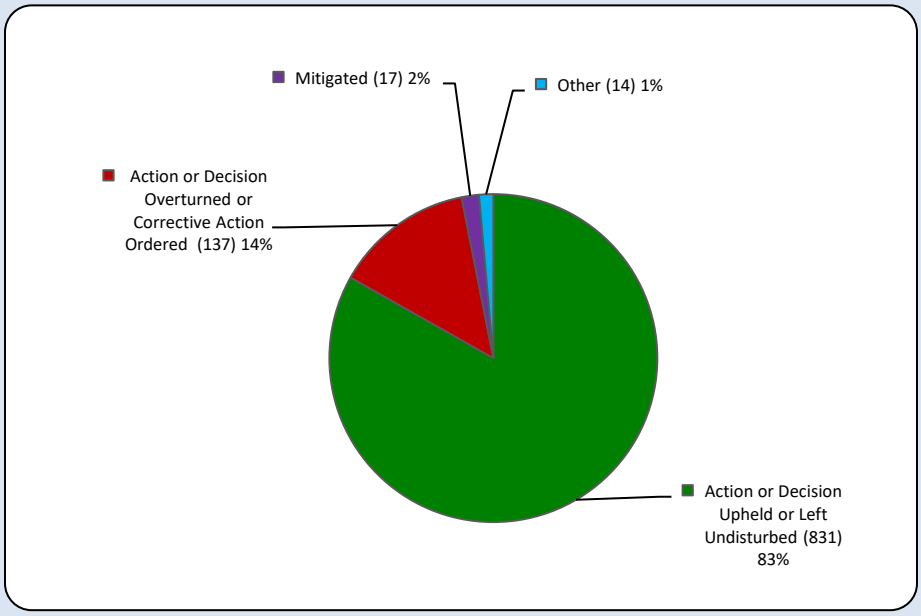
Total Number of Appeals: 5,134

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



Total Number of Appeals that Were Not Dismissed: 2,057

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



Based on 999 Appeals Adjudicated on the Merits

Table 3: Disposition of Appeals by Agency

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Agency	#	#	%	#	%	#	%	#	%
Department of Veterans Affairs	1,080	632	58.5	448	41.5	229	51.1	219	48.9
Office of Personnel Management[3]	843	457	54.2	386	45.8	137	35.5	249	64.5
United States Postal Service	464	303	65.3	161	34.7	97	60.2	64	39.8
Department of the Army	451	283	62.7	168	37.3	98	58.3	70	41.7
Department of Homeland Security	339	197	58.1	142	41.9	71	50.0	71	50.0
Department of the Navy	339	210	61.9	129	38.1	72	55.8	57	44.2
Department of Defense	250	155	62.0	95	38.0	47	49.5	48	50.5
Department of Justice	197	117	59.4	80	40.6	49	61.3	31	38.8
Department of the Air Force	185	110	59.5	75	40.5	46	61.3	29	38.7
Department of the Treasury	141	89	63.1	52	36.9	30	57.7	22	42.3
Department of Agriculture	127	62	48.8	65	51.2	42	64.6	23	35.4
Department of the Interior	113	75	66.4	38	33.6	22	57.9	16	42.1
Department of Transportation	90	59	65.6	31	34.4	12	38.7	19	61.3
Department of Health and Human Services	85	61	71.8	24	28.2	17	70.8	7	29.2
Social Security Administration	76	46	60.5	30	39.5	14	46.7	16	53.3
Department of Commerce	66	41	62.1	25	37.9	11	44.0	14	56.0
Department of Housing and Urban Development	32	24	75.0	8	25.0	3	37.5	5	62.5
General Services Administration	28	18	64.3	10	35.7	6	60.0	4	40.0
Department of Labor	23	18	78.3	5	21.7	4	80.0	1	20.0
Department of Energy	21	8	38.1	13	61.9	9	69.2	4	30.8
Environmental Protection Agency	20	13	65.0	7	35.0	4	57.1	3	42.9
National Aeronautics and Space Administration	18	12	66.7	6	33.3	4	66.7	2	33.3
Smithsonian Institution	17	7	41.2	10	58.8	10	100.0	0	0.0
Department of State	16	13	81.3	3	18.8	2	66.7	1	33.3

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

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Agency	#	#	%	#	%	#	%	#	%
Small Business Administration	14	9	64.3	5	35.7	2	40.0	3	60.0
Tennessee Valley Authority	12	7	58.3	5	41.7	3	60.0	2	40.0
Securities and Exchange Commission	10	6	60.0	4	40.0	1	25.0	3	75.0
Government Publishing Office	9	3	33.3	6	66.7	3	50.0	3	50.0
Equal Employment Opportunity Commission	7	3	42.9	4	57.1	0	0.0	4	100.0
Federal Deposit Insurance Corporation	7	3	42.9	4	57.1	2	0.0	2	0.0
Export-Import Bank of the United States	6	3	50.0	3	50.0	3	100.0	0	0.0
Department of Education	5	2	40.0	3	60.0	1	33.3	2	66.7
Federal Housing Finance Agency	4	4	100.0	0	0.0	0	0.0	0	0.0
National Credit Union Administration	4	0	0.0	4	100.0	3	0.0	1	0.0
Agency for International Development	3	2	66.7	1	33.3	1	100.0	0	0.0
Armed Forces Retirement Home	3	3	100.0	0	0.0	0	0.0	0	0.0
Corporation for National and Community Service	3	2	66.7	1	33.3	0	0.0	1	100.0
National Archives and Records Administration	3	1	33.3	2	66.7	2	100.0	0	0.0
Central Intelligence Agency	2	1	50.0	1	50.0	0	0.0	1	100.0
Federal Reserve System	2	2	100.0	0	0.0	0	0.0	0	0.0
Office of Special Counsel	2	2	100.0	0	0.0	0	0.0	0	0.0
Office of the Director of National Intelligence	2	2	100.0	0	0.0	0	0.0	0	0.0
United States International Trade Commission	2	1	50.0	1	50.0	1	0.0	0	0.0
Administrative Conference of the United States	1	1	100.0	0	0.0	0	0.0	0	0.0
Architect of the Capitol	1	1	100.0	0	0.0	0	0.0	0	0.0
Committee for Purchase from People Who Are Blind or Severely Disabled	1	1	100.0	0	0.0	0	0.0	0	0.0

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

	Decided	Dismissed[1]		Not DIsmissed[1]		Settled[2]		Adjudicated[2]	
Agency	#	#	%	#	%	#	%	#	%
Election Assistance Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
Federal Communications Commission	1	0	0.0	1	100.0	0	0.0	1	100.0
Federal Mediation and Conciliation Service	1	1	100.0	0	0.0	0	0.0	0	0.0
Nuclear Regulatory Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
Office of Government Ethics	1	1	100.0	0	0.0	0	0.0	0	0.0
Office of Management and Budget	1	0	0.0	1	100.0	0	0.0	1	0.0
Overseas Private Investment Corporation	1	1	100.0	0	0.0	0	0.0	0	0.0
Pension Benefit Guaranty Corporation	1	1	100.0	0	0.0	0	0.0	0	0.0
Selective Service System	1	1	100.0	0	0.0	0	0.0	0	0.0
The White House	1	1	100.0	0	0.0	0	0.0	0	0.0
	5,134	**3,077**	**59.9**	**2,057**	**40.1**	**1,058**	**51.4**	**999**	**48.6**

[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 CSRS and FERS administrator.

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]	249	194	77.91	40	16.1	1	0.4	14	5.6
Department of Veterans Affairs	219	185	84.47	30	13.7	4	1.8	0	0.0
Department of Homeland Security	71	65	91.55	6	8.5	0	0.0	0	0.0
Department of the Army	70	55	78.57	15	21.4	0	0.0	0	0.0
United States Postal Service	64	46	71.88	14	21.9	4	6.3	0	0.0
Department of the Navy	57	52	91.23	4	7.0	1	1.8	0	0.0
Department of Defense	48	40	83.33	7	14.6	1	2.1	0	0.0
Department of Justice	31	28	90.32	2	6.5	1	3.2	0	0.0
Department of the Air Force	29	27	93.10	2	6.9	0	0.0	0	0.0
Department of Agriculture	23	17	73.91	5	21.7	1	4.3	0	0.0
Department of the Treasury	22	20	90.91	1	4.5	1	4.5	0	0.0
Department of Transportation	19	14	73.68	5	26.3	0	0.0	0	0.0
Department of the Interior	16	15	93.75	1	6.3	0	0.0	0	0.0
Social Security Administration	16	15	93.75	0	0.0	1	6.3	0	0.0
Department of Commerce	14	13	92.86	0	0.0	1	7.1	0	0.0
Department of Health and Human Services	7	7	100.00	0	0.0	0	0.0	0	0.0
Department of Housing and Urban Development	5	5	100.00	0	0.0	0	0.0	0	0.0
Department of Energy	4	4	100.00	0	0.0	0	0.0	0	0.0
Equal Employment Opportunity Commission	4	3	75.00	1	25.0	0	0.0	0	0.0
General Services Administration	4	4	100.00	0	0.0	0	0.0	0	0.0
Environmental Protection Agency	3	3	100.00	0	0.0	0	0.0	0	0.0
Government Publishing Office	3	1	33.33	1	33.3	1	33.3	0	0.0
Securities and Exchange Commission	3	3	100.00	0	0.0	0	0.0	0	0.0
Small Business Administration	3	3	100.00	0	0.0	0	0.0	0	0.0
Department of Education	2	1	50.00	1	50.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	2	2	100.00	0	0.0	0	0.0	0	0.0
National Aeronautics and Space Administration	2	1	50.00	1	50.0	0	0.0	0	0.0
Tennessee Valley Authority	2	1	50.00	1	50.0	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	
	#	#	%	#	%	#	%	#	%
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
Department of Labor	1	1	100.00	0	0.0	0	0.0	0	0.0
Department of State	1	1	100.00	0	0.0	0	0.0	0	0.0
Federal Communications Commission	1	1	100.00	0	0.0	0	0.0	0	0.0
National Credit Union Administration	1	1	100.00	0	0.0	0	0.0	0	0.0
Office of Management and Budget	1	1	100.00	0	0.0	0	0.0	0	0.0
TOTAL	**999**	**831**	**83.2**	**137**	**13.7**	**17**	**1.7**	**14**	**1.4**

[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 CSRS and FERS administrator.
Percentages may not total 100 because of rounding.

Cases Processed at Headquarters

Due to the lack of quorum, MSPB did not issue any decisions from HQ during FY 2018, other than 11 stay requests (see Table 1). Therefore, other than determinations on 11 stay requests, there are no HQ case processing statistics contained in this Annual Report. At the end of FY 2018, MSPB had about 1,800 PFR cases pending at HQ, and over 1,500 PFR decisions that had been drafted by career staff and are awaiting review and action by new Board members when a quorum is restored.

SIGNIFICANT COURT OPINIONS ISSUED IN FY 2018

Due to the lack of quorum, the Board did not issue any significant decisions in FY 2018. As a service to MSPB's stakeholders, we have provided brief summaries of significant opinions issued by the CAFC, or by other circuit courts in whistleblower cases.

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

Due Process

Villareal v. Bureau of Prisons, 901 F.3d 1361 (Fed. Cir. 2018): The arbitrator's decision sustaining the petitioner's removal from Federal service was appealed directly to the CAFC, which applies Board precedent to such appeals. The Court affirmed the arbitrator's decision, rejecting the petitioner's various due process claims. Of particular note, the Court rejected the claim that a change in deciding officials violated due process; that the agency violated the prohibition on *ex parte* communications established in *Stone v. Federal Deposit Insurance Corporation*, 170 F.3d 1368 (Fed. Cir. 1999) when the warden did not disclose a "timing experiment" he had conducted into the content and length of petitioner's telephone calls; and that the length of time it took for the agency to remove him—1,265 days—violated due process. Although the Court found this delay "patently unreasonable" and noted that extreme delay could vitiate an agency decision if it was prejudicial, the Court found that the petitioner had not raised this claim of prejudice before the arbitrator, and therefore was precluded from raising it for the first time on appeal.

Annuity Determinations

Miller v. Office of Personnel Management, 903 F.3d 1274 (Fed. Cir. 2018): A retired Federal employee appealed the MSPB's determination that three periods of his Government service—during which he was concurrently in military and civilian pay status—were not creditable for purposes of calculating his CSRS annuity because 5 U.S.C. § 8332(c)(2) generally prohibits an employee from receiving both civilian and military service credit for the same period. The Court reversed in part, concluding that "the bar of § 8332(c)(2) is directed to the situation in which a retired Federal employee seeks to have his or her creditable civilian service 'include credit for [a] period of military service' for purposes of the calculation of his or her civil service retirement annuity. In other words, the bar comes into play when a civil service annuitant seeks to increase his or her annuity by adding to his or her creditable civilian service military service time for which the annuitant is receiving military retirement pay. The bar does not come into play when a civil service annuitant does not seek to 'include credit for [a] period of military service' but, rather, only seeks credit for a period of civilian service for purposes of his or her annuity."

Adverse Action Charges

Henderson v. Department of Veterans Affairs, 878 F.3d 1044 (Fed. Cir. 2017): The petitioner was indefinitely suspended from his position as a Program Analyst after he was indicted on charges of making false statements related to health care matters. The Federal Circuit affirmed the Board's determination that the grand jury indictment provided the agency reasonable cause to believe that the petitioner was guilty of a crime punishable by imprisonment. The Court noted that, although an agency must ordinarily provide an employee with 30 days' advance written notice of an indefinite suspension, an opportunity to contest the action and be represented by counsel, and a written decision, there is a "crime exception" to that rule. Under that exception, an agency may suspend an

employee with less than 30 days' notice if it has reasonable cause to believe he has committed a crime for which a sentence of imprisonment may be imposed. The Court rejected the petitioner's arguments that the agency had improperly "procured" the grand jury indictment by giving evidence at the grand jury proceeding, instead finding that the grand jury was an independent body that had determined that there was probable cause to believe that the petitioner had committed a crime punishable by imprisonment. The Court further held that an indictment for a crime for which a sentence of imprisonment may be imposed will as a general rule provide reasonable cause for an agency to believe the employee has committed such a crime. An agency may also, in appropriate circumstances, rely on an arrest warrant coupled with additional factual material culled from a criminal complaint and supporting allegations to establish reasonable cause. The Court rejected the petitioner's argument that the Department of Veterans Affairs had an obligation to further investigate before suspending him following the indictment, noting that doing so may have improperly interfered with the criminal proceedings. Finally, the Court rejected the petitioner's due process claims, finding that the indictment contained detailed information about the charges against him, giving him the ability to respond competently to the charges.

Holton v. Department of the Navy, 884 F.3d 1142 (Fed. Cir. 2018): An employee appealed the MSPB's decision sustaining his removal after he tested positive for a prohibited substance. The Court affirmed, holding that post-accident drug testing of Federal employees without a warrant is constitutionally permissible if there is reasonable suspicion that an employee's actions or failure to act caused or contributed to an accident or unsafe practice, judged by the scope of the employee's job duties and using an objective standard of reasonable suspicion. The Court also held that the agency's failure to provide written notice of post-accident testing until two days after the accident was harmless error; a police desk journal of the accident was sufficient to meet the police report requirement of the agency's regulation authorizing post-accident drug testing; and the fact that the official who decided to remove the employee from employment for testing positive was the same individual who granted permission to administer the test did not violate the employee's procedural due process rights.

Morrison v. Department of Navy, 876 F.3d 1106 (Fed. Cir. 2017): The petitioner retired after the agency initiated removal proceedings against him. The Board affirmed the AJ's decision finding that the petitioner involuntarily retired, but remanded the case for the AJ to determine whether status quo ante relief required the agency to determine if and when the petitioner would have been removed had he not retired. This determination would decide whether the petitioner was entitled to reinstatement and back pay. The Court dismissed the appeal for lack of jurisdiction, holding that the Board's decision was not a "final decision" or "final order" for purposes of court review. The Court held that the Board's order modifying the AJ's decision as to the remedy was not a final order because it did not dispose of the entire action. Because it was not the case that the Board's decision left nothing for the agency to do but execute judgment, it was not a final order for review purposes.

Jurisdiction

Williams v. Merit Systems Protection Board; *Winns v. Merit Systems Protection Board*, 892 F.3d 1156 (Fed. Cir. 2018): The CAFC affirmed the Board's dismissal of two separate appeals that were paired together as companion cases at the Court. Both cases addressed the continuing validity of the Board's 1984 decision, *Roden v. Tennessee Valley Authority*, 25 M.S.P.R. 363 (1984), in which the Board held that an individual who worked in a series of disconnected temporary appointments could qualify as an "employee" under 5 U.S.C. § 7511 based on a "continuing employment contract" theory, thereby entitling that individual to Board appeal rights he would not otherwise have. The Court ultimately agreed with the Board's conclusion that *Roden* was no longer good law because an OPM regulation

issued after *Roden*, 5 C.F.R. § 752.402, abrogated the "continuing employment contract" theory. As a result, the Court held that neither petitioner had Board appeal rights. Additionally, the Court considered a separate theory, advanced only by Mr. Williams, which asserted that Mr. Williams should have had Board appeal rights pursuant to the Board's decision in *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344 (1994), which held that an employee could retain his appeal rights from a prior position if the agency failed to inform him that his change in position might result in a loss of appeal rights. The Board held that the *Exum* rule did not apply to Mr. Williams, but the Federal Circuit overruled *Exum*, holding that an agency's failure to inform an employee of the consequences of a voluntary transfer cannot confer Board appeal rights on an employee in a position which by statute has no appeal rights.

Untimely Filing Before the Court

Federal Education Association – Stateside Region, Karen Graviss v. Department of Defense, 898 F.3d 1222 (Fed. Cir. 2018): In a precedential opinion issued in 2016, the Court held that the agency violated the petitioner's due process rights during her removal proceedings. The Court subsequently granted rehearing en banc. Shortly before the en banc oral argument, it came to the Court's attention that the petition for review appeared to have been filed untimely from the arbitrator's decision. After dissolving the en banc court, the original panel considered the timeliness standard to be applied to appeals of arbitration decisions. The Court held that the standard is identical to that applied to appeals from MSPB decisions; that under this rule, articulated most recently in *Fedora v. Merit Systems Protection Board*, 848 F.3d 1013 (Fed. Cir. 2017), the petitioner's appeal was untimely from the date the arbitrator "issued notice" of his decision pursuant to 5 U.S.C. § 7703(b)(1); and that the time bar is jurisdictional, thus preventing the Court from hearing the petitioner's appeal. The Court vacated the original decision reversing the agency's action and dismissed the appeal for lack of jurisdiction. Judge Plager dissented on the ground that the time bar is not jurisdictional.

Note: On September 20, 2018, the petitioner filed a motion for rehearing en banc. The Court ordered a response, and the defendant filed their response on October 22, 2018. On December 3, 2018, the Court denied rehearing and rehearing en banc.

USERRA

Lentz v. Merit Systems Protection Board, 876 F.3d 1380 (Fed. Cir. 2017): The petitioner filed an appeal with the Board asserting a constructive discharge based on the coercive effect of various retaliatory and discriminatory actions, including violations of the USERRA. The AJ bifurcated this appeal into *Lentz I*, designated an involuntary resignation claim under Chapter 75, and *Lentz II*, designated a complaint under USERRA. In *Lentz I*, the AJ limited the proceeding to allegations other than violations of USERRA and dismissed the appeal based on a determination that the petitioner failed to non-frivolously allege a discriminatory and retaliatory hostile work environment so coercive that he had no choice but to resign. This decision was not appealed to the Court. In *Lentz II*, the AJ limited the proceeding to claims based on discrimination or adverse actions taken because of protected USERRA activity, finding that collateral estoppel barred relitigation of the issues addressed in *Lentz I*. In *Lentz II*, the AJ found the petitioner failed to make non-frivolous allegations that he was compelled to resign due to USERRA-based discrimination or reprisal. The full Board upheld the AJ's application of collateral estoppel and affirmed the initial decision on the USERRA issues. On appeal from *Lentz II*, the CAFC found the AJ improperly separated the petitioner's two appeals, noting that this resulted in the Board never addressing the totality of the evidence bearing on the petitioner's involuntariness claims. Because of the two errors of improper bifurcation and failure to consider the totality of the evidence, the Court vacated the Board's decision and remanded

for determination of the merits of the petitioner's appeal upon consideration of all of the circumstances.

O'Farrell v. Department of Defense, 882 F.3d 1080 (Fed. Cir. 2018): An employee of the Department of Defense (DoD) and military reservist appealed the MSPB's dismissal of his claim that DoD failed to grant him military leave for active military service in violation of USERRA, specifically 5 U.S.C. § 6323(b), which grants up to twenty-two days of additional paid leave for any military reserve member who is ordered into full-time active duty status "in support of a contingency operation as defined in [10 U.S.C. § 101(a)(13)]." The MSPB held that § 6323(b) requires that "a specific contingency operation . . . be identified in military orders when an employee is activated under 10 U.S.C. § 12301(d) in order for the employee to be entitled to [twenty-two] days of additional military leave under [§] 6323(b)." The Court reversed, holding that "(1) 'in support of' includes indirect assistance to a contingency operation; (2) 'contingency operation' includes a military operation that results in service members being called to active duty under any provision of law during a national emergency; (3) upon request, a service member is entitled to additional leave as long as leave is 'appropriate' under the circumstances; and (4) the service member's request for additional leave need not take any particular form or use any particular language[, but] they must demonstrate that their call to active duty was 'in support of a contingency operation,' as properly construed."

Whistleblower Issues

Parkinson v. Department of Justice, 874 F.3d 710 (Fed. Cir. 2017) (en banc): A preference-eligible employee appealed an MSPB decision sustaining his removal from the Federal Bureau of Investigation (FBI) for lack of candor, obstruction, fraud, and on-duty unprofessional conduct. The Court initially sustained in part and reversed and remanded in part, finding that the MSPB improperly precluded the employee from raising whistleblower reprisal as an affirmative defense pursuant to 5 U.S.C. § 7701(c)(2)(C). The Department of Justice petitioned for en banc review to determine whether preference-eligible FBI employees can raise whistleblower reprisal as an affirmative defense at the MSPB. On rehearing en banc, the Court reversed itself and held that MSPB does not have jurisdiction to hear preference-eligible FBI employees' claims for whistleblower reprisal because: (1) the broad not-in-accordance-with-law affirmative defense at § 7701(c)(2)(C) cannot swallow the specific whistleblower reprisal affirmative defense at § 7701(c)(2)(B) from which FBI employees are statutorily exempted; and (2) 5 U.S.C. § 2303 requires all FBI employees to bring claims of whistleblower reprisal to the Attorney General.

Collateral Estoppel

Bryant v. Merit Systems Protection Board, 878 F.3d 1320 (Fed. Cir. 2017): In this case under USERRA, the CAFC held that the Board properly dismissed the petitioners' appeals for lack of jurisdiction given that the petitioners' allegations were wholly precluded by collateral estoppel. The Court noted that the petitioners did not argue that the Board erred in overruling its precedent, which held that an earlier decision in which an appellant did not prevail on the merits does not preclude a finding that he made a nonfrivolous allegation establishing jurisdiction in a subsequent appeal. The Court stated that this case "illustrates the flaw in the Board's now-overruled precedent" because the petitioners would have been entitled to a second hearing on identical USERRA appeals where they would not have been able to present any new content.

Significant Opinions in Whistleblower Appeals Issued by Other Circuit Courts

Delgado v. Merit Systems Protection Board, 880 F.3d 913 (7th Cir. 2018): The petitioner, a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives, alleged that the agency retaliated against him after he informed his supervisors that he suspected a coworker provided an inaccurate report about a law enforcement incident and then testified inaccurately about that incident in a Federal criminal trial. The petitioner initially brought his claim to OSC, but OSC closed his case file without taking action based on its determination that he did not allege a violation of law, rule, or regulation. The petitioner then filed his Individual Right of Action appeal with the Board, where his appeal was dismissed for lack of jurisdiction because the Board found that the petitioner failed to demonstrate that he exhausted his administrative remedies for his claim by first providing OSC with a sufficient basis to pursue an investigation that could lead to corrective action. The Seventh Circuit reversed the Board's decision and remanded the matter to the Board for further consideration, disagreeing with the Board's conclusions about the amount of information and evidence necessary to establish exhaustion of a claim with OSC. The Court found that the petitioner satisfied his exhaustion requirement by providing OSC with sufficient information to permit OSC to understand that he was alleging retaliation for his disclosure of a violation of law by his coworker.

Note: On June 19, 2018, the Court denied the Board's petition for rehearing en banc and issued an amended opinion addressing the Board's petition.

Duggan v. Department of Defense, 883 F.3d 842 (9th Cir. 2018): The Court affirmed the MSPB's decision sustaining various actions against the petitioner, including a 10-day suspension, a poor performance rating, and revocation of his ability to telework. The Board held that the petitioner proved he made protected disclosures that were a contributing factor to the challenged actions, but that the agency proved by clear and convincing evidence that it would have taken the actions absent the disclosures. The Court adopted the CAFC's test on the clear and convincing evidence standard set forth in *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), and affirmed the Board's holding in this regard. The Court further adopted the CAFC's holdings in *Watson v. Department of Justice*, 64 F.3d 1524 (Fed. Cir. 1995), and *Greenspan v. Department of Veterans Affairs*, 464 F.3d 1297 (Fed. Cir. 2006), regarding the propriety of disciplining an employee for the way in which he communicates a protected disclosure. In *Watson*, the CAFC held that the WPA does not require that an adverse action be based on facts entirely separate and distinct from the protected disclosures. The Court quoted *Greenspan*'s statement that "wrongful or disruptive conduct is not shielded by the presence of a protected disclosure," as well as its caveat that an employer may not punish a whistleblower for being blunt or critical of management when making such a disclosure. Finally, the Court affirmed the Board's holding that the AJ acted within his discretion in excluding certain evidence and witness testimony.

Flynn v. Securities and Exchange Commission, 877 F.3d 200 (4th Cir. 2017): The Court affirmed in part and reversed in part the MSPB's decision sustaining the petitioner's removal. The petitioner alleged that prior to his removal, he had made protected disclosures relating to his office's procedures for adjudicating cases, which he claimed violated two Securities and Exchange Commission (SEC) rules: Rule 900(a), regarding processing cases within seven months of filing absent unusual circumstances; and Rule 900(b), regarding the SEC General Counsel's obligation to specifically apprise the Commission of cases that are not completed within 30 days of the timelines set forth in Rule 900(a). The Court affirmed the MSPB's holding that the petitioner failed to show that his Rule 900(a) disclosure was protected, holding that the petitioner could not reasonably have believed that he was disclosing a violation of a rule because the deadlines set forth in Rule 900(a) plainly were not mandatory. The Court reversed the MSPB's holding that the petitioner did not make a protected

disclosure regarding Rule 900(b), finding that the MSPB AJ did not actually analyze this claim. The Court remanded this claim for adjudication in the first instance by the AJ.

Johnen v. Merit Systems Protection Board, *et al.*, 882 F.3d 1171 (9th Cir. 2018): Petitioner alleged his termination was in reprisal for his protected whistleblower complaints, specifically one complaint with the agency's Inspector General (IG) and a second raised with a supervisor alleging nepotism. The Board found that the petitioner failed to prove by preponderant evidence that his IG complaint was a contributing factor to his termination, and further held that it lacked jurisdiction over his alternative theory of reprisal regarding his nepotism claim because he did not first exhaust that claim with OSC. The petitioner challenged the Board's decision at the Ninth Circuit, and the Ninth Circuit affirmed the decision in part. The Court affirmed the Board's finding that the petitioner failed to prove that his IG complaint was a contributing factor to his termination. The Court further held that, because the Board's decision addressed the merits of at least one of the petitioner's claims, the petitioner's employing agency, the Department of the Army, was the only proper respondent. Finally, the Court held that the fact that the Board decision was issued by only two members did not deprive the petitioner of due process at the Board.

Note: The Court issued a nonprecedential supplemental memorandum in *Johnen v. Merit Systems Protection Board*, *et al.*, 713 F..App'x. 678 (9th Cir. 2018), which remanded the case to the Board for further consideration of the nepotism claim, finding that he provided sufficient information to OSC to meet the exhaustion requirement regarding that claim.

SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2018

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.

In FY 2018, MSPB did not publish any merit systems study reports due to the lack of a quorum. Instead, other products were released including:

- *Other Publications* – These electronic publications on selected merit systems or workforce management topics are posted on the MSPB website at a time or in a format the *IoM* does not readily accommodate. Topics included sexual harassment, assessments, performance behaviors, and performance management.
- *Issues of Merit* (*IoM*) newsletters – Newsletters inform Federal leaders, employees, and stakeholders about merit principles and Federal hiring issues and practices through articles that discuss current MSPB research and reports, noteworthy agency practices, and Federal HR policies and initiatives.

Other Publications

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

- *Building Blocks for Effective Performance Management* (October 2017) uses selected data from MSPB's 2016 MPS to discuss foundational elements of good employee performance management. Those elements include supervisory training in performance management, relevant and measureable performance goals, and sufficient resources to enable employees to succeed. The relative strength or weakness of those elements (as gauged by responses to related survey questions) was positively correlated with positive organizational outcomes such as a perceived lower incidence of poor performance, better ability to identify and address poor performance, and stronger accountability for poor performance.

- *Update on Sexual Harassment in the Federal Workplace* (March 2018) provides an overview of Federal employee perceptions of sexual harassment in the workplace, based on MSPB's 2016 MPS and previous MSPB surveys. This Research Brief describes three distinct forms of sexual harassment—gender harassment, unwanted sexual attention, and sexual coercion—and presents estimates of the percentage of Federal employees who experienced one or more types of harassment in the two years preceding the survey. Data show that sexual harassment continues to be a problem in Federal workplaces: approximately 1 in 7 employees experienced such a behavior, and the rate of reported harassment was much higher among women (20.9%) than men (8.7%). Although progress has been made in reducing sexual harassment within the Federal Government, it is also clear that continued efforts are needed to educate employees, improve confidence in reporting and resolution processes, and hold employees who commit sexual harassment accountable for their misconduct.

- *Improving Federal Hiring Through Better Assessment* (July 2018) combines previous MSPB research on applicant assessment and recent research on OPM's USA Hire program to identify 10 important factors for agencies to consider when selecting and investing in assessments. Those factors include improving—and not simply automating or accelerating—the hiring process; attaining a comprehensive evaluation of applicant's job-related abilities; and integration with the agency's recruiting and staffing system. This Perspectives Brief also reiterates the business case for Congress to appropriate funds to OPM for the development, validation, and administration of Governmentwide applicant assessments.

- *The Roles of Feedback, Autonomy, and Meaningfulness in Employee Performance Behaviors* (August 2018) uses selected data from MSPB's 2016 and 2010 MPSs to build on previous MSPB research on employee engagement and motivation. Decades of social science research show that knowledge-based workers are more likely to think creatively and be motivated to perform well when provided a balance of feedback and autonomy. Feedback can help employees to see the importance of their work and help them know what efforts are more likely to lead to success. This Research Brief discusses the roles of feedback from supervisors, autonomy, and meaningful work and demonstrates their relationship to positive employee performance behaviors.

Issues of Merit Newsletter Topics

MSPB published three *IoM* newsletter editions that covered topics including sexual harassment, probationary periods, employee engagement, emotional labor, and performance appraisals. The Office of Policy and Evaluation Director's column addressed critical issues such as the importance of having a central personnel authority and how to rethink the administration of Federal employee surveys. The third issue of the year focused on the 40th anniversary of the CSRA and highlighted MSPB's research related to major facets of the Act, to include merit-based pay, dealing with poor performers, whistleblower protections, the SES, and decentralized hiring.

SIGNIFICANT ACTIONS OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT[9]

Forty years ago, President Carter signed the Civil Service Reform Act of 1978 (CSRA) into law. This legislation was the most significant reform of the Federal personnel system since the Pendleton Act of 1883, almost 100 years earlier. The CSRA's purpose was to improve efficiency, accountability, and performance in Government during a time when the public was dissatisfied with and did not trust Government.

One part of the CSRA was a reorganization plan that restructured the institutions responsible for administering Federal personnel programs. Prior to 1978, the CSC played multiple, often conflicting, roles in administering the personnel system and protecting employees' rights in that system.[10] The CSRA divided those responsibilities among four agencies:

- OPM develops and administers personnel policies and programs;
- MSPB adjudicates individual employee appeals, conducts studies of merit systems, and reviews OPM's significant actions;
- OSC (originally housed in MSPB and now a separate agency) investigates and prosecutes cases involving PPPs; and
- The Federal Labor Relations Authority (FLRA) oversees Federal labor-management relations.

The CSRA also codified the MSPs (5 U.S.C. § 2301(b)) and PPPs (5 U.S.C. § 2302(b)) to provide foundational values for civil service policy and practice, to help leaders and employees make good personnel decisions, and prevent conduct that undermines merit and confidence in Government. In addition, the CSRA directed MSPB to review OPM's significant actions to ascertain whether they are in accord with the MSPs and free from PPPs, and to publish the findings from that review in its MSPB annual report.[11]

To mark the 40th anniversary of the CSRA, our analysis of OPM significant actions this year differs from previous years. This review will summarize briefly policy directions that OPM has outlined and proposed changes to OPM's structure and functions, but it will not discuss specific OPM initiatives or actions in detail. Instead, to provide a perspective on those directions and OPM's role and capacity to advocate and implement major changes to civil service policy, this review will consider some of the overarching themes that have emerged from previous MSPB reviews of OPM actions, policies, and operations.

OPM's Purpose

The CSRA established OPM to be the administration's voice on HR matters as well as the Government's leader in Federal HR management. Transforming the Government's central personnel agency from a bipartisan commission to an executive agency headed by a single presidential appointee was seen as a way to stimulate reform of the Federal civil service by putting

[9] This Annual Report, including this section on review of OPM significant actions, was prepared prior to President Trump's December 20, 2018 Memorandum directing Vice Chairman Mark A. Robbins to serve concurrently as Member of the MSPB and OPM General Counsel, and Mr. Robbins' appointment as OPM General Counsel by OPM Acting Director Margaret Weichert on January 4, 2019.

[10] MSPB, "The CSRA, 40 Years Later," *Issues of Merit*, August 2018, p. 1.

[11] 5 U.S.C. § 1206.

HR policymaking into the hands of appointees who would be more responsive to the administration and its goals than the CSC had been, given its divided responsibility and accountability.[12]

Specifically, the CSRA enumerated a number of actions and roles for OPM, as follows:

- Delegate HR management authorities to Federal agencies;
- Operate an oversight program that would ensure that agencies' use of those authorities was consistent with the MSPs; and
- Lead the civil service system through active improvement efforts in areas such as research and demonstration projects, and develop Governmentwide policy for critical HR areas, such as recruitment and retention of highly qualified employees, performance management, and equal employment opportunity.[13]

In short, the framers of the CSRA envisioned the new OPM as the Federal Government's central agency for HR management. OPM's first director, Alan K. (Scotty) Campbell, put it this way: OPM was "to serve as the President's principal agent for managing the Federal workforce…performing for the President the same role relative to personnel management that [the OMB] does for financial management."[14] Contrary to this vision, however, some observers have asserted that financial issues and results-based measurement have, in practice, overshadowed people issues, and that (by extension) OMB's perspective on workforce and HR issues has overshadowed that of OPM.[15]

The apparent, if unintended, consequence is a diminution of OPM's stature.[16] In response, in 2001 MSPB urged policymakers to give more weight to OPM's role and perspective when management of HR was at issue. MSPB recommended that "Federal policymakers should take full advantage of the wealth of experience, professionalism, and wisdom about Federal HR that OPM brings to the process by paying special heed to OPM's advice on decisions affecting Federal workers and the Federal workplace."[17] The role of OPM has never become as extensive as was envisaged by the CSRA,[18] however, for reasons that fall into two broad areas—funding and focus.

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[12] MSPB, *The U.S. Office of Personnel Management in Retrospect—Achievement and Challenges After Two Decades*, Washington, D.C., December 2001, p. 3.

[13] MSPB, *U.S. Office of Personnel Management and the Merit System: A Retrospective Assessment*, Washington, D.C., June 1989, p. 3.

[14] Brook, Douglas A., "Merit and the Civil Service Reform Act," *The Future of Merit—Twenty Years After the Civil Service Reform Act*, edited by James P. Pfiffner and Douglas A. Brook, The Woodrow Wilson Center Press, 2000, p. 3.

[15] See, for example, Ingraham, Patricia W. and Moynihan, Donald P., "Evolving Dimensions of Performance from the CSRA Onward," *The Future of Merit—Twenty Years After the Civil Service Reform Act*, edited by James P. Pfiffner and Douglas A. Brook, The Woodrow Wilson Center Press, 2000, p. 118; citing, for example, Federal Managers' Financial Integrity Act of 1982, Chief Financial Officers Act of 1990, Government Performance and Results Act of 1993, Government Management Reform Act of 1994, Paperwork Reduction Act of 1995, Clinger-Cohen Act of 1996, as noted on pp. 122-123. The Government Performance and Results Act Modernization Act of 2010 may also be relevant here.

[16] Ingraham, Patricia W. and Moynihan, Donald P., "Evolving Dimensions of Performance from the CSRA Onward," *The Future of Merit—Twenty Years After the Civil Service Reform Act*, edited by James P. Pfiffner and Douglas A. Brook, The Woodrow Wilson Center Press, 2000, p. 118.

[17] MSPB, *The U.S. Office of Personnel Management in Retrospect—Achievement and Challenges After Two Decades*, Washington, D.C., December 2001, p. 16.

[18] Ingraham, Patricia W. and Moynihan, Donald P., "Evolving Dimensions of Performance from the CSRA Onward," *The Future of Merit—Twenty Years After the Civil Service Reform Act*, edited by James P. Pfiffner and Douglas A. Brook, The Woodrow Wilson Center Press, 2000, p. 118.

OPM's Funding

MSPB has repeatedly identified OPM's lack of adequate funding as a hindrance to its policy leadership. For instance, in our 10-year OPM retrospective report we noted that OPM's staff size at that time was approximately three-fourths of what it was when the CSRA was passed. Although some of that decrease could be explained by increased efficiencies, we noted that OPM appeared less able to meet the multiple demands placed upon it. Coupled with a series of internal reorganizations and changes in priority, we concluded that the decrease in staff had damaged OPM's capacity to evaluate and develop policy, and that OPM was often left reacting to events rather than anticipating, planning for, or influencing them.[19]

The National Performance Review. In MSPB's 20-year OPM retrospective report, we noted that lack of resources was a chronic problem at OPM. The staff reductions and deregulation that were central to the goals of the 1993 National Performance Review (NPR) had dramatic effects on OPM's staffing and role.[20] NPR called for the maximum deregulation, delegation, and decentralization of HR management possible. It envisioned OPM's primary role as a consultant—a change that would require OPM to reorganize and downsize.[21] In 1993, OPM had over 6,000 employees and in 2000, it had just under 3,000 employees. We noted at the time that some of those reductions were accomplished through OPM divesting itself of its investigations and training operations, but all OPM functional areas experienced some reductions in personnel.[22]

The NPR's vision of a less-directive OPM, and the accompanying decrease of staff resources during this era forced OPM into different ways of doing business. Many functions that OPM had performed were delegated to agency HR offices, while others were privatized. OPM delegated these responsibilities to the agencies, most notably regarding recruiting and examining, during a time the agencies themselves also experienced staff and budget cuts that affected their HR programs. Federal HR staffing levels dropped by 21 percent between 1993 and 1997, with some agency HR workforces being cut by as much as 40 percent. In addition, much of the work that OPM had traditionally done to assist agencies in operating and improving their HR programs remained within OPM's purview but was no longer available to agencies as a free service. Organizations within OPM that once gave agencies help with a range of HR issues in the normal course of their work had to pay their own way by selling those services to agencies.[23]

In 2002, we noted that OPM's workforce had been significantly downsized and much of its work had been shifted from appropriated funds toward fee-for-service. OPM had also transferred a wide array of operating responsibilities to agencies through delegation and decentralization. At the time we noted "OPM has not maintained its expertise and ability to provide the tools agencies need to carry out these delegations. OPM has also not been able to provide guidance on what constitutes better human capital management practices or provide tools to help agencies make that transition. OPM's present level and source of funding and mode of operation are not compatible with

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[19] MSPB, *U.S. Office of Personnel Management and the Merit System: A Retrospective Assessment*, Washington, D.C., June 1989, p. 4.

[20] MSPB, *The U.S. Office of Personnel Management in Retrospect—Achievement and Challenges After Two Decades*, Washington, D.C., December 2001, p. 7.

[21] NPR, *Office of Personnel Management*, Accompanying Report of the National Performance Review, September 1993, pp. 1, 12.

[22] MSPB, *The U.S. Office of Personnel Management in Retrospect—Achievement and Challenges After Two Decades*, Washington, D.C., December 2001, p. 7.

[23] *Ibid.*

successful performance of these core functions. These core services should be provided by adequate appropriated funds and not on a fee-for-service basis."[24]

The Fee-For-Service Model. MSPB noted in 2004 that there was a continuing tension between OPM's leadership and oversight roles and its role as a provider of products and services. OPM was authorized by law to recover the costs of providing services in the areas of recruitment, assessment, staffing, and training and management assistance.[25] This cost recovery goal created an incentive for OPM to seek customers for its products and services—an incentive that may not in all ways fit well with OPM's responsibility for overseeing agencies' adherence to merit principles and compliance with law and regulation.[26]

OPM's fee-for-service model has at least two other problematic aspects. First, many agencies, particularly smaller agencies, do not have the necessary resources to invest either in OPM's services or in the development of their own applicant assessment tools, for example. This limitation creates a system that divides agencies into the "haves" and "have-nots," causing an imbalance in the quality of applicant assessment tools being used throughout Government.[27] Second, agency oversight (reviewing agency adherence to the MSPs, laws, and regulations) and program evaluation (assessing the effectiveness of Federal agency HR management practices) are both necessary for a healthy civil service. OPM's exercise of compliance or inspection functions may result in conflicts of interest, especially when the agency programs it inspects rely on or are the result of products and services OPM has sold the agency.[28]

In 2011, we noted that much had changed since the passage of the CSRA. For example, employment examinations that were once conducted by OPM staff with appropriated funds had been decentralized and delegated to agencies. At the same time, the Federal civil service had become much more complex. Authorities and flexibilities available under Title 5 of the United States Code had proliferated, as had modifications and alternatives to the Title 5 framework. Yet, we noted, the employees who worked in what were often regarded as OPM's core functions, such as HR policy and agency oversight, accounted for a diminishing portion of OPM's staff and resources. We concluded that stakeholders should recognize that attention within the Federal human capital arena often focused on OPM's HR policy and leadership—matters such as hiring reform, employee pay and benefits, and performance management and recognition—but that the balance of OPM's resources were concentrated in other areas.[29]

Figure 1 shows the small percentage of OPM's FTEs associated with Governmentwide HR policy innovation and leadership (Employee Services) and oversight of agency HR programs (Merit System Accountability and Compliance (MSAC)). These two organizations comprise less than five percent of OPM's FY 2019 FTEs, while OPM's fee-for-service HR organization (HR Solutions) comprises

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[24] MSPB, *Making the Public Service Work—Recommendations for Change*, Washington, D.C., September 2002, p. 17.

[25] MSPB, *Annual Report for Fiscal Year 2004*, March 2005. Payments for OPM's services are consolidated under OPM's revolving fund which was first established by Congress in 1952 to allow CSC (OPM's predecessor) to recover the costs of conducting background investigations for other Federal agencies (Pub. L. 82-375). In 1969, Congress authorized use of the revolving fund to finance reimbursable training courses for Federal agencies (Pub. L. 91-189). In 1996, Congress expanded revolving fund activities to cover HR management services performed at the request of Federal agencies (Pub. L. 104-208); H.R. Rep No. 113--268, November 15, 2013, p. 2.

[26] MSPB, *Annual Report for Fiscal Year 2004*, March 2005.

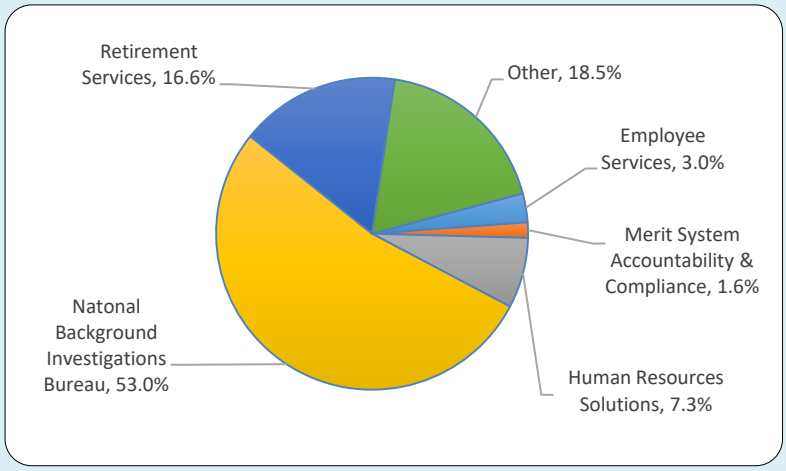
[27] MSPB, *Reforming Federal Hiring—Beyond Faster and Cheaper*, September 2006, p. 26. See also MSPB, Perspectives Brief: "Improving Federal Hiring Through Better Assessment," July 2018, p. 14; and MSPB, "Let's Not Forget a Vital Benefit of Having a Central Personnel Authority," *IoM*, January 2018, p. 3.

[28] MSPB, *Making the Public Service Work—Recommendations for Change*, Washington, D.C., September 2002, pp. 17-18.

[29] MSPB, *Annual Report for Fiscal Year 2011*, April 2012, p. 45; also MSPB, *Annual Report for Fiscal Year 2016*, January 2017, pp. 54-55.

just over seven percent. Each is dwarfed, however, by the combination of other OPM activities, including background investigations (National Background Investigations Bureau (NBIB)), Retirement Services, and other activities.

Figure 1: Proportion of FY 2019 OPM FTE by office[30]



OPM's Focus

Over the years, MSPB has described the dichotomy that exists in some of OPM's roles that may complicate its efforts to achieve its mission and may be a source of confusion to some of its stakeholders. Summarized here are some of the potentially competing values and roles that OPM must balance.

Impartiality and Advocacy. First and foremost, the CSRA gave OPM dual roles: to be a fair and impartial leader of a Federal civil service rooted in the MSPs, and to be an advocate of administration policies by aiding the President in preparing such civil service rules as the President prescribes, as well as otherwise advising the President on actions which may be taken to promote an efficient civil service.[31]

In 2001, MSPB noted "OPM must balance its roles, making decisions that are in the best interests of Federal HR and the merit system, while at the same time, doing what is consistent with the Administration's plans for the civil service. We are always hopeful that what is in the best interest of a merit-based civil service aligns with an administration's vision for Federal HR management. Realistically, however, the two will occasionally conflict when goals and ideals are translated into programs and policies. When this happens, OPM faces its most thorny challenges and toughest decisions. We believe that OPM has done fairly well at achieving this balance. However, to solve the serious problems that still exist in the civil service system, successive administrations and the OPM

[30] OPM, "Congressional Budget Justification and Annual Performance Plan," February 2018, pp. 29-35. FTE equal the total number of compensable hours worked divided by 2,080 hours in a working year.

[31] MSPB, *The U.S. Office of Personnel Management in Retrospect—Achievement and Challenges After Two Decades*, Washington, D.C., December 2001, p. 14.

leaders they appoint will need to commit and recommit to finding ways to achieve their objectives while also seeking the best interests of a merit-based public service."[32]

A recent complicating factor in OPM's efforts to lead the Federal civil service has been the lack of confirmed political leadership within OPM. OPM did not have a confirmed Director between July 2015 and March 2018. It did not have a confirmed Deputy Director between 2011 and 2018. OPM's most recent Director, confirmed in March 2018, resigned in early October 2018 at which time an Acting Director was named. This means that in a span of nine months, OPM has had three different leaders, two Acting Directors and one Director confirmed by the Senate.

Delegation and Oversight. Second, the CSRA charged OPM with maintaining a centralized presence over Federal HR issues while enabling it to decentralize many personnel management authorities to levels as near as possible to program operations in the agencies.[33] In fact, the concepts of delegation and oversight were central to the reform legislation. Congress intended that OPM provide agencies with greater delegations of personnel authority, but it also expected OPM to closely monitor those delegated authorities in order to protect the health of the merit systems.[34] The envisioned combination of extensive delegation and close monitoring—and the broader vision that Federal agencies would be effectively held accountable for using delegated personnel authorities properly, on both an individual and systemic level—has proven difficult to achieve.

MSPB has cautioned that the authority that OPM delegates to agencies must not be abdications—OPM should closely monitor the ability of each agency to manage the delegations in a manner consistent with the MSPs. In addition, delegations should be accompanied with the necessary support structure or guidance to help agencies use the delegations.[35] While generally pleased to have the added flexibility and control that went with delegated authorities, a theme that emerged among Federal HR officials early on was a concern that OPM might be "dumping" responsibility on their laps without providing the needed resources or support.[36] As noted, in 2002 MSPB reiterated the concern that OPM has not maintained its expertise and ability to provide the tools agencies need to carry out the responsibilities that OPM has delegated to them.[37]

Service Delivery and Policy Leadership. Lastly, OPM was given critical core functions by the CSRA yet, as mentioned above, much of OPM's resources are targeted to other areas. MSPB has stated that OPM should concentrate—or should be allowed to concentrate—on the core roles of: [38]

- Providing Governmentwide policy leadership, including identifying, proposing, developing, and implementing Governmentwide changes in laws and regulations governing HR management;

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[32] MSPB, *The U.S. Office of Personnel Management in Retrospect—Achievement and Challenges After Two Decades*, Washington, D.C., December 2001, pp. 14-15.

[33] Ink, Dwight, "What was Behind the 1978 Civil Service Reform?" *The Future of Merit—Twenty Years After the Civil Service Reform Act*, edited by James P. Pfiffner and Douglas A. Brook, The Woodrow Wilson Center Press, 2000, p. 44.

[34] MSPB, *U.S. Office of Personnel Management and the Merit System: A Retrospective Assessment*, Washington, D.C., June 1989, pp. 2-3.

[35] MSPB, *U.S. Office of Personnel Management and the Merit System: A Retrospective Assessment*, Washington, D.C., June 1989, p. 6.

[36] MSPB, *U.S. Office of Personnel Management and the Merit System: A Retrospective Assessment*, Washington, D.C., June 1989, p. 9.

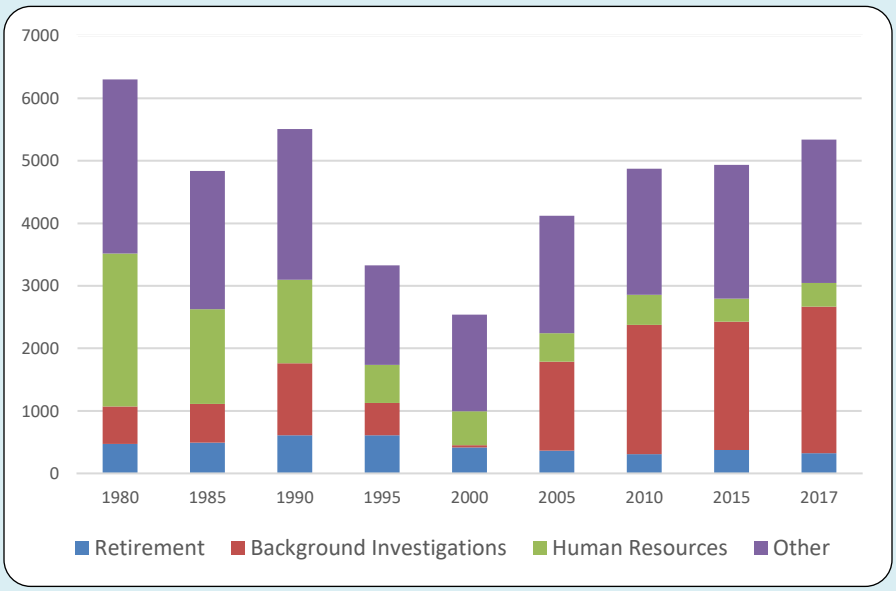
[37] MSPB, *Making the Public Service Work—Recommendations for Change*, Washington, D.C., September 2002, p. 17.

[38] MSPB, *Making the Public Service Work—Recommendations for Change*, Washington, D.C., September 2002, pp. 17-19. There are programs where Governmentwide standards and conventions are desirable (e.g., employee benefits and information systems) and others where a single agency acting for the Federal Government can provide more expertise, economies of scale, and accountability (e.g., retirement, training, and health benefits). The important point is that one agency should manage these programs. If that agency is OPM, these programs should not diminish OPM's focus on the core functions listed above.

- Identifying and promoting good human capital practices and developing effective tools to facilitate these practices and ensuring all agencies have access to these tools; and
- Reviewing agency adherence to laws, regulations, and MSPs while assessing the effectiveness of Federal and agency human capital programs and practices.

Instead, a good portion of OPM's resources and funding are targeted to other areas. For instance, as illustrated in Figure 2, the number and proportion of OPM employees who are in HR occupations has dramatically declined since the early 1980s. HR occupations comprised 39 percent of OPM's workforce in 1980 but only 7 percent in 2017.

Figure 2: OPM's Workforce by Major Occupation/Function, Permanent Full-Time Employment[39]



OPM's Activities

Policy Initiatives and Proposals. In FY 2018 OPM proposed or initiated a number of policy changes including proposals regarding hiring[40] and employee benefits.[41] OPM also provided guidance for implementing executive orders to: promote accountability and streamline removal procedures;[42] abolish labor-management forums;[43] ensure transparency, accountability, and efficiency

[39] MSPB analysis of OPM's Enterprise HR Integration/Statistical Data Mart. Categorized on the basis of occupational series.

[40] Letter from Dr. Jeff T. H. Pon, OPM Director, to The Honorable Paul D. Ryan, Speaker, U.S. House of Representatives, March 28, 2018.

[41] Letter from Dr. Jeff T. H. Pon, OPM Director, to The Honorable Paul D. Ryan, Speaker, U.S. House of Representatives, May 4, 2018.

[42] Memorandum from Dr. Jeff T. H. Pon, OPM Director, for Heads of Executive Departments and Agencies, "Guidance for Implementation of Executive Order 13839—Promoting Accountability and Streamlining Removal Procedures Consistent with MSPs," July 5, 2018. See also Memorandum from Dr. Jeff T. H. Pon, OPM Director, for Heads of Executive Departments and Agencies, "Updated Guidance Related to Enjoinment of Certain Provisions of Executive Orders 13836, 13837, and 13839," August 29, 2018.

[43] Memorandum from Kathleen M. McGettigan, Acting OPM Director, for Heads of Executive Departments and Agencies, "Guidance for Implementation of Executive Order 13812," December 13, 2017.

in taxpayer-funded union time use;[44] develop efficient, effective, and cost-reducing approaches to Federal sector collective bargaining;[45] and place ALJs in the excepted service and abolish the ALJ examination and central competitive service ALJ register.[46] OPM granted new direct hire appointing authorities for a variety of scientific, technical, engineering, mathematics and cybersecurity and related positions where severe shortages of candidates have been identified and/or critical hiring needs have been identified.[47]

It is too soon to know how these proposals and initiatives might affect the civil service in daily matters such as recruitment, motivation, and retention, or affect the enduring and fundamental vision of adherence to the MSPs and avoidance of PPPs. Nevertheless, these actions indicated that OPM appeared more active in FY 2018 in proposing and developing—as opposed to administering or implementing—policy ideas and initiatives related to Federal human capital management.

Proposal for the Restructuring of OPM. In FY 2018, the Administration proposed a restructuring of OPM that included moving its policy functions to the Executive Office of the President to elevate OPM's core strategic mission and transferring its operational activities to other agencies.[48] The proposal notes that the vast majority of OPM's workforce and budget are dedicated to operational activities, such as administering the retirement and health benefits programs. Only a small portion of OPM's resources are dedicated to policy and oversight activities such as hiring, performance management, compensation, merit system compliance, and labor relations. The proposal concludes that to address the failings of the civil service system—which has not been overhauled since the CSRA or earlier[49]—requires an optimized OPM management structure that is centrally situated, can view the Federal workforce holistically, and is free to focus on core strategic and policy concerns.[50]

The proposal states that OPM's policy functions as located within the Executive Office of the President would modernize the approach to HR policy with a core focus on: strategy and innovation, workforce and mission achievement, senior talent and leadership management, and total compensation and employee performance. OPM's current operational functions would be either combined with existing units of the General Services Administration (retirement services, healthcare and insurance, and HR solutions) or transferred to the DoD (background investigations performed by NBIB). The placement of other OPM offices and functions will be determined at a later date.[51]

The NDAA for FY 2018 transferred the background investigations performed by NBIB for DoD from NBIB to DoD.[52] This transfer comprises 70 percent of NBIB's background investigation

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[44] Memorandum from Dr. Jeff T. H. Pon, OPM Director, for Heads of Executive Departments and Agencies, "Guidance for Implementation of Executive Order 13837—Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use," July 5, 2018.

[45] Memorandum from Dr. Jeff T. H. Pon, OPM Director, for Heads of Executive Departments and Agencies, "Guidance for Implementation of Executive Order 13836—Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining," July 5, 2018.

[46] Memorandum from Dr. Jeff T. H. Pon, OPM Director, for Heads of Executive Departments and Agencies, "Executive Order—Excepting Administrative Law Judges from the Competitive Service," July 10, 2018.

[47] Memorandum from Margaret M. Weichert, Acting OPM Director, for Heads of Departments and Agencies, "Announcing Government-wide Direct Hire Appointing Authorities," October 11, 2018.

[48] OMB, *Delivering Government Solutions in the 21st Century—Reform Plan and Reorganization Recommendations*, July 2018, p. 16.

[49] Some important Government management structures predate the CSRA. For example, the General Schedule pay schedule and the system of classifying positions based on their duties and responsibilities were established by the Classification Act of 1949 (Pub. L. 81-429). The hiring system has not fundamentally changed since the Veterans' Preference Act of 1944 (Pub. L. 78-359).

[50] OMB, *Delivering Government Solutions in the 21st Century—Reform Plan and Reorganization Recommendations*, July 2018, p. 51.

[51] OMB, *Delivering Government Solutions in the 21st Century—Reform Plan and Reorganization Recommendations*, July 2018, p. 53.

[52] § 925(b) of Public Law 115-91.

volume. The Administration has announced its intention to also transfer the remaining 30 percent of NBIB's background investigations volume to DoD.[53]

It is too soon to know which other aspects of the restructuring proposal will be implemented, how they will be implemented, or how they will affect either OPM services or the development and implementation of HR policies. Our initial review, however, reveals that as noted earlier in this review, MSPB has advocated for an OPM that is able to focus on providing policy leadership and identifying and promoting good human capital practices while developing effective tools to facilitate those practices. By separating OPM's operational activities from its policy arm the current proposal to restructure OPM appears to accomplish the policy focus MSPB has supported.

The CSRA created OPM as an advocate of administration policies. It created MSPB with a three-member bipartisan Board serving fixed, non-renewable, seven-year terms, to retain the critical element of independence in the oversight of the civil service and the merit systems.[54] The director of President Carter's Personnel Management Project has stated that he considered the creation of MSPB and the OSC to be the cornerstone of the Project's proposals. He added that "Congress would never have enacted the CSRA without the promise of a strong and vigorous MSPB that Congress believed could discover and correct abuse on a timely basis."[55] He noted, however, that "[n]o administration has regarded MSPB as sufficiently important to deserve decent funding. Neither has Congress. Appropriations committees have not shared the original concept of the oversight committees regarding the need for a counterweight to a politically motivated OPM."[56]

In addition to its adjudicatory functions, MSPB's role as counterweight to OPM is performed through:

- Conducting special studies relating to the civil service and to report to the President and Congress as to whether the public interest in a civil service free of PPPs is being adequately protected,[57]
- Reviewing OPM rules and regulations,[58] and
- Analyzing whether the actions of OPM are in accord with MSPs and free from PPPs.[59]

Depending on how much of the proposal to restructure OPM comes to pass and how that restructuring is accomplished, these MSPB missions will likely become more important. Successfully accomplishing these missions will provide an independent perspective on OPM's (or any successor organization's) leadership and oversight to ensure OPM's actions are consistent with sound HR management practices and the MSPs.

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[53] OMB, *Delivering Government Solutions in the 21st Century—Reform Plan and Reorganization Recommendations*, July 2018, pp. 115-117.

[54] MSPB, *The U.S. Office of Personnel Management in Retrospect—Achievement and Challenges After Two Decades*, Washington, D.C., December 2001, p. 1.

[55] Ink, Dwight, "What was Behind the 1978 Civil Service Reform?" *The Future of Merit—Twenty Years After the Civil Service Reform Act*, edited by James P. Pfiffner and Douglas A. Brook, The Woodrow Wilson Center Press, 2000, p. 49.

[56] Ink, Dwight, "What was Behind the 1978 Civil Service Reform?" *The Future of Merit—Twenty Years After the Civil Service Reform Act*, edited by James P. Pfiffner and Douglas A. Brook, The Woodrow Wilson Center Press, 2000, p. 53.

[57] 5 U.S.C. § 1204(a)(3).

[58] 5 U.S.C. § 1204(a)(4).

[59] 5 U.S.C. § 1206.

FINANCIAL SUMMARY

Fiscal Year 2018 Financial Summary
as of
September 30, 2018
(dollars in thousands)

FY 18 Appropriations

FY 2018 Appropriation	$ 44,490
Civil Service Retirement and Disability Trust Fund	2,345
Total	$ 46,835

Obligations Charged to FY 2018 Funds

Personnel Compensation	$ 22,110
Personnel Benefits	6,732
Transportation of Things	90
Travel of Persons	190
Rents, Communications and Utilities	4,308
Printing and Reproduction	45
Other Services	3,862
Supplies and Materials	124
Equipment/Lease Improvements	602
Reimbursable Obligations	2,345
Total	$ 40,408

LIST OF ABBREVIATIONS AND ACRONYMS

AFR	Annual Financial Report
AJ	Administrative Judge
ALJ	Administrative Law Judge
APR-APP	Annual Performance Report and Annual Performance Plan
CIO	Chief Information Officer
CSC	Civil Service Commission
CSRA	Civil Service Reform Act of 1978
CSRS	Civil Service Retirement System
DoD	Department of Defense
ED	Executive Director
EEO	Equal Employment Opportunity
FOIA	Freedom of Information Act
FTE	Full Time Equivalent
FY	Fiscal Year
GAO	Government Accountability Office
GC	General Counsel
GPRAMA	Government Performance and Results Act Modernization Act of 2010
HC	Human Capital
HQ	Headquarters
HR	Human Resources
IoM	*Issues of Merit*
IRA	Individual Right of Action
IT	Information Technology
MAP	Mediation Appeals Program
MPSs	Merit Principles Survey
MSP	Merit System Principles
MSPB	Merit Systems Protection Board
NDAA	National Defense Authorization Act
OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSC	Office of Special Counsel
PFR	Petition for Review
PIO	Performance Improvement Officer
PPPs	Prohibited Personnel Practices
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 Opportunities Act of 1998
VERA	Voluntary Early Retirement Authority
VSIP	Voluntary Separation Incentive Plan
WPA	Whistleblower Protection Act of 1989
WPEA	Whistleblower Protection Enhancement Act of 2012

U.S. Merit Systems Protection Board
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