



U.S. Merit Systems Protection Board

**Congressional
Budget
Justification
FY 2021**

Submitted to the
Committee on Appropriations

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Table of Contents

Introduction	1
Internal Challenges Affecting MSPB Operations.....	2
External Events Affecting MSPB Operations.....	4
FY 2021 Budget Request	8
Appropriation Language.....	8
Strategic Goals and Objectives.....	8
FY 2021 Request by Object Class.....	9
Schedule O Object Classification.....	13
Schedule Q Employment Summary	14
About MSPB	14
Board Organization.....	14
Providing and Using Administrative Data for Statistical Purposes.....	14
Adjudication	15
Mediation Appeals Program	16
Merit Systems Studies and OPM Oversight	16
Publications Issued in FY 2018 and FY 2019	17
Other Studies Activity.....	18
Information Technology.....	18
Human Resources	18
Financial Management	19
Equal Employment Opportunity	19
Organization Chart.....	20

The U.S. Merit Systems Protection Board
Congressional Budget Justification
Fiscal Year 2021

Introduction

The U.S. Merit Systems Protection Board (MSPB) values the President's commitment to fiscal discipline and reducing the national debt. In examining MSPB's fiscal year (FY) 2021 budgetary needs, and after considering the significant internal and external factors affecting the agency, MSPB is exercising its statutory budget authority by submitting a bypass request. MSPB requests that it continue to be funded at the FY 2020 enacted level of \$46,835,000, which includes a \$2,345,000 transfer from the Office of Personnel Management's (OPM) Civil Service Retirement and Disability Fund. Additionally, MSPB requests to retain two-year budget authority permitting funds to remain available until September 30, 2022. This request is in lieu of the FY 2021 President's Budget Request of \$42,154,000, including \$2,345,000 from OPM's Civil Service Retirement and Disability Fund, to expire at the end of fiscal year 2021.

In preparing the FY 2021 request, MSPB performed a thorough review of its resource needs. Because personnel costs are the largest component of MSPB's budget, a reduction in the agency funding level, if enacted, would result in critical position reductions. This would have a direct impact on MSPB's mission, contributing to a significant increase in processing time for initial appeals and petitions for review (PFR), impeding the ability to conduct special studies of the civil service, and severely limiting MSPB's ability to provide outreach and education services.

Funding reductions would have a particularly dire impact given several internal factors currently affecting MSPB's operations. Those include the current lack of a quorum of Board members, which has resulted in a growing PFR backlog; an ongoing information technology (IT) modernization; and a large percentage of retirement-eligible MSPB employees, making human capital planning more important now than ever.

In addition to these significant internal factors affecting MSPB, there are also several external factors that have affected MSPB's funding needs and are likely to continue to do so. External factors include laws enacted by Congress; Executive Order 13839, which has resulted in fewer settlements and may lead to increased hearings and, thus, longer case processing times and additional work for MSPB's administrative judges; and Government-wide reorganizations and budget reductions, resulting in additional workload.

Given all of these factors, reductions to MSPB's current funding level would have a direct adverse impact on the agency's ability to protect the Federal merit systems, ensure due process, promote Government-wide merit system principles (MSPs), and prevent prohibited personnel practices (PPPs). Therefore, MSPB is requesting that its funding level for FY 2021 be held at the FY 2020 level and that it retain its two-year budget authority.

MSPB appreciates the appropriations it has received over the last several years, and that Congress recognizes the unique challenges MSPB faces.

Internal Challenges Affecting MSPB Operations

As referenced above, MSPB recognizes the financial challenges facing the Government and the increasing pressure to cut Federal spending. In addition to the immediate and direct negative impact that a \$2,336,000 reduction in funding and the removal of two-year spending authority would have on MSPB operations, there are a number of internal challenges outlined below impacting MSPB's operations.

Lack of Board Quorum

On January 8, 2017, the Board lost its quorum of members.¹ Although agencies and appellants can file PFRs of administrative judges' (AJ) decisions with the Board, the Board cannot issue decisions on PFRs unless it has a quorum. Since the loss of quorum, the number of pending PFR appeal cases has grown into a significant backlog. As of January 31, 2020, 2,586 PFRs are pending at MSPB headquarters.²

Once a quorum is restored, and the Board can issue decisions again, historical precedent suggests there will be significant additional workload for MSPB. Historically, 11% of the Board's PFR decisions in a typical year are remanded to the AJs, which results in further adjudication. With the arrival of new Board members, whose priorities may differ from those of the previous Board, an above-average percentage of cases may be remanded to the AJs in the regional and field offices. Moreover, additional remands may result as the new Board issues regulations and precedent concerning several new statutes that have become law during the period MSPB has lacked a quorum. For all of these reasons, an above-average percentage of recommended decisions drafted by career staff also may require additional revision prior to issuance at the headquarters level, which would further divert resources from adjudication of newly-filed PFRs.

In addition to not issuing decisions that require Board or member vote, MSPB cannot release study reports when a quorum is not present. MSPB conducts objective, independent research supporting strong merit systems that protect the public's interest in a high-quality, diverse professional workforce managed under the MSPs and free from PPPs. Subject to the approval of the Board members, MSPB research, summarized in formal reports to the President and Congress, is expected to address topics such as sexual harassment in the Federal workplace, whistleblower protections, dealing with poorly-performing employees, and the effectiveness of the human resources (HR) workforce. In addition, MSPB's research agenda, which was last revised in 2015, is in need of another update. MSPB solicited ideas for studies from Federal employees and supervisors, unions and other employee groups, agency Chief Human Capital Officers, other stakeholders, and the public in May 2019. MSPB will have a proposed list of research topics for the new Board members to consider when they arrive.

The updated research agenda will determine MSPB's studies workload for the next few years, including FY 2021. MSPB's studies program needs to remain fully staffed so that it can be

¹ MSPB has been without any Board members since March 1, 2019. The President's Board nominees are currently pending before the U.S. Senate, and the agency continues to operate under its Continuity of Operations Plan, under which MSPB's General Counsel serves as the agency's acting chief executive and administrative officer.

² During this period, MSPB has been able to process 39 requests to withdraw PFRs in certain limited circumstances. The vast majority of appellants have opted to wait for adjudication of their PFRs by a new Board.

responsive to the priorities of the new Board members. Some of the studies that are likely to be undertaken when the new Board members arrive will require conducting surveys. MSPB has procured its own survey platform in order to avoid relying on a new contract for each survey, which should shorten the timeline for MSPB survey activity and make each survey more cost-effective. The research function, in conjunction with MSPB's adjudication of individual appeals and authority to review Office of Personnel Management (OPM) regulations and significant actions, ensures that the Board both oversees Federal merit systems at the systemic level and remedies PPPs on an individual level.

Finally, the absence of a quorum has impacted MSPB's ability to promulgate regulations to reflect congressionally-mandated changes in the agency's jurisdiction and procedures. The last substantial update to MSPB's regulations was in 2015. Since then, a number of changes to MSPB's regulations have become necessary to ensure they are in compliance with newly-enacted statutes; as well as, to drive or reflect improvements in MSPB's procedures. Once a quorum is regained, significant resources will need to be devoted to the process of updating MSPB's regulations.

Retirement Eligibility and Human Capital Planning

MSPB received enacted budgets for FYs 2014-2019 that allowed the agency to build and sustain a sufficient workforce to perform its statutory functions effectively and efficiently. Yet nearly 30% of MSPB employees, including approximately 40% of AJs and adjudication managers involved with processing initial appeals are eligible to retire by the end of FY 2021 (through 2022, the percentages increase to 35% and 47%, respectively). Budget reductions would result in an inability to backfill these and other critical vacancies, which would slow case processing times—including processing times mandated by statute and regulation. Such a reduction in MSPB's workforce would also limit the capacity for outreach and education services, which play a key role in the effectiveness and efficiency of MSPB's adjudication and studies functions by ensuring agencies understand the Board's role and processes and interact in a timely and responsive way with MSPB. Similar benefits accrue to various professional groups to whom MSPB has presented outreach programs. MSPB's outreach services also improve efficiency and effectiveness throughout the Federal Government by helping agencies understand and act in accordance with MSPs, avoid PPPs, and ensure the overall efficiency of the civil service.

MSPB's IT Modernization

In FY 2019, MSPB began modernizing its core business applications, starting with developing a new case management workflow system to process and track each initial appeal and PFR filed with the agency. This updated functionality would replace MSPB's e-Appeal Online system and modernize the agency's document management and document assembly capabilities. The new system would replace several legacy systems for these functions, which are at or nearing end-of-life and prevent MSPB from achieving 100% electronic adjudication of appeals. The implementation of the new applications is scheduled to continue through FY 2020 and into FY 2021 as MSPB retires legacy systems and introduces a new survey platform, refreshes laptops, implements Windows 10, and modernizes telephone and video conferencing systems (both of which are important cost-saving resources in adjudication of initial appeals). In addition, MSPB would be able to decommission most of its on-premises data center, since the modernized applications will be in the cloud. The agency will increase internet bandwidth to support cloud adoption. However, modernization would

have to be completely halted if MSPB's two-year spending authority is revoked and a budget cut is imposed, as funding resources would be reallocated for personnel costs.

External Events Affecting MSPB Operations

There are several external factors that have impacted and could further affect MSPB's operations in the future, resulting in the need for additional resources.

Enactment of Statutes by Congress

Whistleblower Protection Laws

From the time the Civil Service Reform Act of 1978 established the original eleven PPPs, Congress added only one additional PPP in the ensuing twenty years.³ In the past seven years, Congress has added two additional PPPs, both of which were prompted by concerns for whistleblower protection.⁴ Since the enactment of the Whistleblower Protection Enhancement Act of 2012 (WPEA), whistleblower appeals adjudicated in the regions and PFRs to the Board have increased significantly.⁵ In fact, 22% of all PFRs filed in FY 2019 involved whistleblower claims.

One reason for this increase is regular expansions in the scope of whistleblower protections over the past several years.⁶ Most recently, the National Defense Authorization Act (NDAA) for FY 2020, enacted December 20, 2019, explicitly protected whistleblower disclosures to Congress, including some classified disclosures.⁷ This will likely result in more appeals to MSPB, as well as more cases proceeding through the jurisdictional stage to hearings on the merits.⁸ Confusion over how to

³ 5 U.S.C. § 2302(b)(11), codified by the Veterans Employment Opportunities Act of 1998, Pub. L. No. 105-339, 112 Stat. 3182, 3187 (1998).

⁴ The Whistleblower Protection Enhancement Act of 2012 established a 13th PPP (5 U.S.C. § 2302(b)(13)), implementing or enforcing any nondisclosure policy, form, or agreement lacking a specific paragraph, which makes reference to whistleblower protections. Pub. L. No. 112-199, 126 Stat. 1465, 1467 (2012). This codified a longstanding appropriations rider introduced by Senator Chuck Grassley in 1988. See S. Rep. No. 112-155, at 16 (2012). The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 established as a 14th PPP (5 U.S.C. § 2302(b)(14)) accessing the medical records of another employee or applicant for employment "as a part of, or otherwise in furtherance of, any conduct described" in the other PPPs listed at 5 U.S.C. § 2302(b), such as whistleblower retaliation. Pub. L. No. 115-73, 131 Stat. 1235, 1236 (2017). This was a response to reports that VA employees were accessing the medical records of VA whistleblowers in an attempt to discredit them as a form of retaliation. See S. Rep. No. 115-44, at 8-9 (2017).

⁵ According to MSPB's Annual Reports from FY 2008 through FY 2012 (pre-WPEA enactment), the Board adjudicated an average of 67 IRA PFRs each of those fiscal years. Although MSPB has lacked a quorum since January 2017, and thus has been unable to issue decisions on PFRs, receipts of IRA PFRs can be tracked. As reported in MSPB's APR-APP for FY 2018-2020, MSPB received 116 IRA PFRs in FY 2018. Similarly, the regions adjudicated an average of 562 IRA cases per year from FY 2008 through FY 2012, and 716 per year from FY 2013 through FY 2018, a 27% increase.

⁶ For example, in just 2017 alone Congress enacted the Follow the Rules Act, Pub. L. No. 115-40, 131 Stat. 861 (2017); the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017; and the Office of Special Counsel Reauthorization Act, passed as part of the National Defense Authorization Act for FY 2018, Pub. L. No. 115-91, 131 Stat. 1283, 1615 (2017).

⁷ Pub. L. No. 116-92, § 5721 (2019).

⁸ Federal employees' right to provide information to Congress has been protected since the Lloyd-LaFollette Act, passed as Section 6 of the Postal Service Appropriations Act of 1912 (Pub. L. No. 336, 37 Stat. 539, 555 (1912)) and recodified by the CSRA as 5 U.S.C. § 7211. Thus, even if a communication to Congress did not disclose "any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" (5 U.S.C. § 2302(b)(8)(B)), it might constitute a violation of the 12th PPP, "taking or failing to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles." 5 U.S.C. § 2302(b)(12). However, Congress has only authorized individual right of action (IRA) appeals—appeals brought to MSPB after exhausting the OSC process but without OSC's continued involvement—for the explicit anti-retaliation PPPs, (b)(8) and (b)(9)(A)(i), (B), (C), or (D). 5 U.S.C. § 1221(a). The amendment of (b)(8) to add Congress now covers those disclosures under the IRA provisions and simplifies the analysis required to find jurisdiction.

properly disclose classified information to Congress could also lead to increased improper disclosure disciplinary actions and resulting new appeals.

The WPEA also increased the complexity of adjudicating whistleblower cases. Prior to the WPEA, many whistleblower claims failed under then-current case law because the disclosure at issue was made to the wrongdoer or was made in the appellant's normal course of duties. Such findings were made at the first step of a three-step analysis, and thus additional issues were never adjudicated. Pursuant to the WPEA, such disclosures may now be found to be protected, and the legal analysis proceeds to the second and frequently third steps. Accordingly, a hearing is required in a greater number of cases, and the legal analysis required for whistleblower cases under the WPEA is lengthier, more complex, and more time-consuming.

Overall, it is probable that both the number and complexity of WPEA-related appeals and PFRs will continue to grow in the coming years, requiring additional resources to adjudicate them.

Expanded Judicial Appeal of Whistleblower Claims

As part of the WPEA, on a pilot basis, Congress permitted employees with cases involving whistleblower reprisal or other activities protected by the WPEA to appeal MSPB's decisions to any Federal circuit court of appeals of competent jurisdiction, rather than only to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), as previously had been the case. Congress subsequently extended the pilot before making it permanent on July 7, 2018.⁹ This has complicated adjudication of WPEA-covered appeals at the regional and PFR levels because rather than being bound to follow legal precedent from one court—the Federal Circuit—MSPB is now potentially bound to follow the legal precedent from multiple Federal circuit courts, which may conflict with one another. The enactment of permanent all-circuit review has complicated MSPB's defense of its decisions in these courts, in addition to requiring periodic travel by MSPB attorneys to various venues across the country.

Discipline for Whistleblower Retaliation

Both the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and the Office of Special Counsel (OSC) Reauthorization Act contained provisions mandating proposed discipline for any supervisor found by the head of an agency, OSC, MSPB, an ALJ, a Federal judge, or an inspector general to have committed whistleblower retaliation.¹⁰ For a first offense the agency must propose a suspension of at least three days, and for a second offense an agency must propose removal.¹¹ While suspensions of 14 days and under are not otherwise appealable to MSPB, removals are. This provision represents a significant transformation in how agencies are required to respond to retaliators. On September 17, 2019, OPM issued proposed implementing regulations that will have the likely effect of significantly increasing awareness of and compliance with the provision throughout Government, in turn increasing appeals to MSPB.¹²

⁹ All Circuit Review Extension Act, Pub. L. No. 113-170, 128 Stat. 1894 (2014); All Circuit Review Act, Pub. L. No. 115-195, 132 Stat. 1510 (2018).

¹⁰ Codified at 5 U.S.C. § 7515.

¹¹ 5 U.S.C. § 7515(b)(1).

¹² Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions, 84 Fed. Reg. 48,794, 48,797 (Sept. 17, 2019) (to be codified at 5 C.F.R. pt. 752 subpt. A).

Administrative Leave Act of 2016

The Administrative Leave Act of 2016, enacted as part of the NDAA for FY 2017, expanded MSPB's jurisdiction by adding to the possible grounds on which an employee might file an appeal.¹³ It makes placement on investigative leave for "not less than 70 workdays" a personnel action. The new law also gave MSPB jurisdiction over an additional personnel action. Under 5 U.S.C. § 3322(a) and (c), if an employee who is under investigation resigns prior to the investigation's resolution, and the investigation results in an adverse finding about that employee, the agency head must make a permanent notation about the adverse finding in the employee's official personnel file. While still a relatively little-known provision, because this notation mechanism is mandatory and appealable, it is likely that over time numerous additional appeals and PFRs will result from this statute. The Act also provides appeal rights to dual status employees of the National Guard whose separation results from certain causes of action. This is a significant change in the law with respect to such employees and likewise, will result in additional appeals and PFRs, requiring additional resources.

Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017¹⁴

This law essentially replaced the Veterans Access, Choice, and Accountability Act of 2014 for purposes of the Department of Veterans Affairs (VA) Senior Executive Service appeals. It also changed the requirements for appeals of adverse actions taken against VA employees under this law, including how MSPB processes those appeals. Among the Act's other significant changes, it lowers the standard of proof for VA adverse actions taken under 38 U.S.C. § 714 from preponderant to substantial evidence and may eliminate MSPB's ability to mitigate penalties (an issue the Board has been unable to decide due to lack of quorum). The Act also contains a provision that is similar to the Government-wide requirement that discipline be proposed for supervisors found to have committed whistleblower retaliation, but expands the definition of what MSPB has previously viewed as a covered personnel action from those listed in 5 U.S.C. § 2302 to include matters like conducting a negative peer review, opening a retaliatory investigation, or taking a personnel action against an employee relating to participating in an audit or investigation by the Comptroller General. Overall, MSPB has seen an increase in the number of VA cases filed in MSPB's regional and field offices since this law took effect.

Other External Factors

Executive Order 13839, "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles"

Section 5 of the May 25, 2018 Executive Order (EO) 13839, "Ensuring the Integrity of Personnel Files," states:

Agencies shall not agree to 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, including an employee's Official Personnel Folder and

¹³ Pub. L. No. 114-328, 130 Stat. 2000, 2460 (2016).

¹⁴ Pub. L. No. 115-41, 131 Stat. 862 (2017).

Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action.

On September 17, 2019, OPM issued proposed regulations further implementing this provision.¹⁵ The restriction disallows not only “clean record” settlements (i.e., settlements in which the appellant resigns in return for the agency removing from the appellant’s record documentation of the adverse personnel action the appellant suffered), but also any settlement agreement in which an action is mitigated, changed to a no-fault reason, or in any way changed or corrected without admission of error by the agency. The provision limits the potential for reaching an agreement and settling cases on terms both parties might otherwise find appropriate. This decreases the number of settlements parties before the MSPB will reach and likely will increase the number of hearings and the amount of related processing AJs will have to conduct in those cases that otherwise may have settled.

Workload Resulting from Reorganizations

Several Federal agencies have announced or put into effect reorganization plans. Such changes will potentially cause furloughs, early retirement incentives (Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payment (VSIP)), and the increased use of reductions in force (RIFs) by agencies, all of which would lead to an increase in appeals and PFRs because such actions may be appealed to MSPB.

¹⁵ Probation on Initial Appointment to a Competitive Position, Performance-Based Reduction in Grade and Removal Actions and Adverse Actions, 84 Fed. Reg. 48,794, 48,796 (Sept. 17, 2019) (to be codified at 5 C.F.R. § 432.108).

FY 2021 Budget Request

Appropriation Language

For necessary expenses to carry out functions of the U.S. Merit Systems Protection Board pursuant to Reorganization Plan Number 2 of 1978, the Civil Service Reform Act of 1978, and the Whistleblower Protection Act of 1989 (5 U.S.C. § 5509 note), as amended, including services as authorized by 5 U.S.C. § 3109, rental of conference rooms in the District of Columbia and elsewhere, hire of passenger motor vehicles, direct procurement of survey printing, and not to exceed \$2,000 for official reception and representation expenses, \$44,490,000, to remain available until September 30, 2022, and in addition not to exceed \$2,345,000, to remain available until September 30, 2022, for administrative expenses to adjudicate retirement appeals to be transferred from the Civil Service Retirement and Disability Fund in amounts to be determined by the U.S. Merit Systems Protection Board.

The Board has authority to adjudicate appeals from a final administrative action or order affecting the rights or interests of an individual under 5 U.S.C. § 8347(d) (the Civil Service Retirement System) and 5 U.S.C. § 8461(e) (the Federal Employees' Retirement System). Pursuant to 5 U.S.C. § 8348(a)(3), the Fund is made available, subject to such annual limitation as Congress may prescribe, for any expenses incurred by the Board in the administration of such appeals.

Strategic Goals and Objectives

MSPB's FY 2021 Congressional Budget Justification is structured based on the Board's Strategic Plan. The agency's performance goals cover the critical components of two strategic goals, and the performance measures support the Board's ability to manage and report performance over time.

The strategic goals and objectives are:

Strategic Goal 1: Serve the public interest by *protecting* Merit System Principles and *safeguarding* the civil service from prohibited personnel practices.

Strategic Objectives:

1A: Provide understandable, high-quality resolution of appeals supported by fair and efficient adjudication and alternative dispute resolution (ADR) processes.

1B: Enforce timely compliance with MSPB decisions.

1C: Conduct objective, timely studies of the Federal merit systems and human capital management issues.

1D: Review and act upon the rules, regulations, and significant actions of the Office of Personnel Management, as appropriate.

Strategic Goal 2: Advance the public interest through *education* and *promotion* of stronger merit systems, *adherence* to merit system principles, and *prevention* of prohibited personnel practices.

Strategic Objectives:

2A: Inform, promote, and/or encourage actions by policy-makers, as appropriate, that strengthen Federal merit systems laws and regulations.

2B: Support and improve the practice of merit, adherence to MSPs, and prevention of PPPs in the workplace through successful outreach.

2C: Advance the understanding of the concept of merit, the MSPs, and the PPPs through the use of educational standards, materials, and guidance established by MSPB.

FY 2021 Request by Object Class

MSPB’s FY 2021 bypass request of \$46,835,000 includes the OPM transfer of \$2,345,000 from the Civil Service Retirement and Disability Fund and reflects no increase in funding as compared to the FY 2019 and FY 2020 enacted levels. With this level of funding, the Board will continue to maintain quality services in support of the agency functions and have the ability to continue to meet the goals and objectives of the strategic plan in an effective and efficient manner. Any reductions will significantly impact MSPB’s ability to meet its mission in protecting the MSPs and promoting an effective Federal workforce free of PPPs.

A discussion of changes from the FY 2020 Enacted level is outlined below:

Personnel Compensation & Benefits – an increase of \$920,000

MOC	Description	FY 2020 Enacted (000)	FY 2021 Request (000)	Increase (decrease) over FY 2020 (000)
11	Personnel Compensation	\$27,600	\$28,320	\$720
12	Benefits	\$8,200	\$8,400	\$200

Approximately 80% of MSPB’s funding is for personnel compensation and benefit costs, which make up the largest percentage of the agency’s budget submission. The increase in funding represents pay raise, cost of living increase, and the cost to maintain the 235 FTE staffing level. Any reduction in resources would result in a reduction in workforce, which would affect MSPB’s ability to maintain a highly qualified workforce at the requested FTE level.

Travel & Transportation of Persons – no change

MOC	Description	FY 2020 Enacted (000)	FY 2021 Request (000)	Increase (decrease) over FY 2020 (000)
21	Travel & Transportation of Persons	\$200	\$200	\$0

Since travel costs have stabilized over the past three years due to increased efforts to use video teleconferencing, MSPB is reflecting no change. Although there is less need for AJs to travel to hearing sites located a considerable distance from the various regional and field offices, this funding will be needed to support Board members’ travel needs. Historically, Board members make regional and field office visits, attend mission-related conferences, and request that regional directors periodically attend meetings at headquarters. Additionally, as a result of the WPEA and the passage of the All Circuit Review Act, which extends to all U.S. circuit courts jurisdiction over appeals covered by the WPEA, MSPB’s attorneys have periodically been required to travel to various Federal courts of appeals to represent the agency—something that was rarely required before the enactment of the WPEA. MSPB cannot predict or control the number of court-ordered hearings or oral arguments that might require travel.

Transportation of Things – no change

MOC	Description	FY 2020 Enacted (000)	FY 2021 Request (000)	Increase (decrease) over FY 2020 (000)
22	Transportation of Things	\$45	\$45	\$0

This category covers freight related costs and various courier services.

Rent, Communications, & Utilities – a decrease of \$1,084,000

MOC	Description	FY 2020 Enacted (000)	FY 2021 Request (000)	Increase (decrease) over FY 2020 (000)
23	Rent, Communications & Utilities	\$4,209	\$3,125	(\$1,084)

The agency makes rental payments to the General Services Administrations (GSA) for office space at MSPB’s Washington, D.C. headquarters, as well as all regional and field offices. With the award of the new lease agreement for headquarters, MSPB was granted reduced rent during the first year of the agreement, resulting in a savings for that period.

Printing – no change

MOC	Description	FY 2020 Enacted (000)	FY 2021 Request (000)	Increase (decrease) over FY 2020 (000)
24	Printing	\$75	\$75	\$0

Two Government Publishing Office printing programs (copying case files and printing the *Issues of Merit* newsletters) are used by MSPB.

Other Contractual Services – a decrease of \$135,000

MOC	Description	FY 2020 Enacted (000)	FY 2021 Request (000)	Increase (decrease) over FY 2020 (000)
25	Other Contractual Services	\$3,633	\$3,498	(\$135)

This object class includes the Agency’s Reimbursable Service Agreements (RSA) with the U.S. Treasury Department’s Bureau of Fiscal Service (BFS) for accounting, purchasing, and travel-related services; the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS) for personnel services; and the National Finance Center (NFC) for payroll services. Other RSAs included in this object class fund are agreements with the U.S. Coast Guard and Federal Trade Commission for services of administrative law judges (ALJs), as well as agreements with the National Archives and Records Administration for records storage.

Additionally, this category includes court reporting services, employee training, IT hardware and software maintenance renewals, software license renewals, operation and maintenance of non-IT equipment, and miscellaneous services. MSPB anticipates cost savings on equipment maintenance.

Supplies & Materials – an increase of \$334,000

MOC	Description	FY 2020 Enacted (000)	FY 2021 Request (000)	Increase (decrease) over FY 2020 (000)
26	Supplies & Materials	\$175	\$509	\$334

An increase of \$334,000 in supplies & materials is requested to meet inflationary increases for FY 2021, as well as the increased costs of electronic subscriptions (e.g., Westlaw and legal research materials) and IT cloud services (e.g., Microsoft Office 365 and Azure, and Listserv subscriptions).

Equipment – a decrease of \$35,000

MOC	Description	FY 2020 Enacted (000)	FY 2021 Request (000)	Increase (decrease) over FY 2020 (000)
31	Equipment	\$353	\$318	(\$35)

In the past, MSPB was able to replace equipment such as servers, laptops, copiers, printers, scanners, and video teleconferencing equipment that was damaged or end of life. As a result of budget restrictions and IT modernization, MSPB is decreasing the equipment line item by \$35,000. However, MSPB will allocate funding to replace equipment as it breaks down or exceeds its useful life.

Budget Schedules - Schedule O - Object Classification (In Thousands of Dollars)

	FY 2019 Actual	FY 2020 Enacted	FY 2021 Request	Change
Direct Obligations:				
Personnel Compensation	\$25,890	\$27,600	\$28,320	\$720
Civilian Personnel Benefits	8,146	8,200	8,400	200
Travel of Persons	153	200	200	0
Transportation of Things	89	45	45	0
Rental payments to GSA	3,833	3,284	2,200	(1,084)
Rental Payments to Others	160	65	65	0
Communications, Utilities, and Miscellaneous Charges	928	860	860	0
Printing and Reproduction	38	75	75	0
Other Services	1,618	1,425	1,425	0
Other Purchases of Goods and Services from Government Accounts	1,839	1,650	1,650	0
Maintenance of Facilities	174	35	35	0
Maintenance of Equipment	750	523	388	(135)
Supplies & Materials	102	175	509	334
Equipment/Lease Improvement	1,714	353	318	(35)
Direct Obligation. . .	\$45,434	\$44,490	\$44,490	\$0
Reimbursable Obligations. . .	2,345	2,345	2,345	0
Total New Obligations. . .	\$47,779	\$46,835	\$46,835	\$0

Schedule Q - Employment Summary

	FY 2019 Actual	FY 2020 Enacted	FY 2021 Request	Change
Direct:				
Civilian full-time equivalent employment	190	220	220	0
Reimbursable:				
Civilian full-time equivalent employment	<u>15</u>	<u>15</u>	<u>15</u>	<u>0</u>
Total. . .	205	235	235	0

About MSPB

MSPB has its origin in the Pendleton Act of 1883, which established the Civil Service Commission (CSC) and a merit-based employment system for the Federal Government. The Pendleton Act was passed after the assassination of President Garfield by a disgruntled Federal job seeker and grew out of the 19th century reform movement to curtail the excesses of political patronage in Government and ensure a stable highly-qualified workforce to serve the public. Over time, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate appeals. Concern over the inherent conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind the passage of the CSRA. The CSRA replaced the CSC with three new agencies: MSPB as the successor to the CSC in its quasi-judicial capacity; OPM to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority to oversee Federal labor-management relations. The CSRA also codified for the first time the values of the merit systems as the MSPs and defined the PPPs.

Board Organization

The Board members are the Chairman, Vice Chairman, and Board Member. Board members are nominated by the President, confirmed by the Senate, and serve overlapping, non-renewable seven-year terms. No more than two of the three Board members can be from the same political party. The Board members adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer of MSPB. The Office Directors report to the Chairman through the Executive Director. The agency has its headquarters in Washington, D.C., with six regional and two field offices located throughout the United States in which AJs adjudicate cases at the initial appeal level, akin to a trial court.

For FY 2020, the agency was funded at 235 FTEs to conduct and support its statutory duties.

Providing and Using Administrative Data for Statistical Purposes

MSPB does not have administrative datasets with the potential for statistical use as outlined in OMB Memorandum M-14-06, "Guidance for Providing and Using Administrative Data for Statistical Purposes." However, statistical data can be found in the Board's Annual Reports and are available at www.mspb.gov. The Annual Report contains summaries of significant opinions issued by

MSPB's reviewing courts, case-processing data for initial appeals, and summaries of other merit systems activity including articles posted on MSPB's website. It also contains a review of current OPM issues, and summaries of MSPB's congressional, international, and outreach activities, citations to MSPB work, internal management issues, and the external factors that affect the Board's work.

Adjudication

The majority of the cases brought to the Board are appeals of adverse actions—that is, removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. The next largest number of cases involves appeals of OPM and some agency determinations in retirement matters. Congress has given the Board jurisdiction to hear cases and complaints filed under a variety of other laws, 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. § 3330a *et seq.*; the Whistleblower Protection Act (WPA), Pub. L. No. 101-12; the WPEA, Pub. L. No. 112-199; the DVA Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41; the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73; and additional authorities listed in the regulation set out at 5 C.F.R. § 1201.3.

Other types of actions that may be appealed to the Board include: performance-based removals or reductions in grade; denials of within-grade salary increases; RIF actions; suitability determinations; OPM employment practices (the development and use of examinations, qualification standards, tests, and other measurement instruments); denials of restoration or reemployment rights; and certain terminations of probationary employees.

An appellant files an appeal with the appropriate MSPB regional or field office having geographical jurisdiction. An AJ in the office ensures that the parties receive the due process procedures called for in the law and MSPB's regulations and, after providing a full opportunity to develop the record on all relevant matters, issues an initial decision. Unless a party files a PFR with the Board, the initial decision becomes final 35 days after issuance. Any party, OPM, or OSC may petition the full Board in Washington, D.C. to review the initial decision. When a PFR is filed, the Board's decision on the PFR constitutes the final administrative decision on the appeal.

The Board's final decision, whether it is an initial decision of an AJ that has become final or the Board's decision on a PFR, may be appealed to the U.S. Court of Appeals for the Federal Circuit; or, in cases involving allegations of discrimination, to a U.S. district court or the Equal Employment Opportunity Commission (EEOC). In addition, certain cases involving allegations of reprisal for whistleblowing may be appealed to any of the U.S. circuit courts of appeals with competent jurisdiction.

If a party believes that the other party is not complying with an MSPB order or a settlement agreement entered into the record for MSPB enforcement, the party can file a petition for enforcement with the regional or field office that issued the initial decision. Once the AJ issues an initial decision, which may find compliance, non-compliance, or partial compliance, depending on the number of issues raised, either party may file a PFR with the full Board. Additionally, even if neither party files a PFR of an initial decision finding non-compliance, MSPB's regulations require that the case be referred to the full Board to ensure that the non-complying party has reached compliance.

In addition to adjudicating cases on the merits, MSPB also provides several ADR services to assist parties in resolving their cases. Use of these services is voluntary, provides the parties more control of the process, and can result in effective resolution of a case. In addition, resolving a case through ADR procedures can save time and reduce costs to the appellant, agency, MSPB, and Government-wide as compared to the more formal regulations and procedures involved with adjudication on the merits.

Mediation Appeals Program

The Mediation Appeals Program (MAP) offers the services of the agency's trained and certified mediators as an alternative to the formal appeal processes and procedures of MSPB's regulations. Mediators facilitate a discussion between the parties in a confidential setting to help them identify issues and barriers to an agreement that will aid in resolving their disputes and settling the appeal quickly, economically, and to the benefit of all concerned. Unlike traditional mediation, MAP charges no fees. Both parties must agree to its use before the appeal will be accepted for the MAP process, and both must agree on its resolution before any settlement is concluded. Unlike the traditional appeal process, the parties control the result of the case under the skilled guidance of the mediator, who plays no role in deciding the appeal, should accord not be reached. Importantly, because almost all mediations occur near the beginning of adjudication, MAP saves time and money for the Federal employees and agencies who resolve their cases through this process.

Because of these advantages, MAP has become a popular and successful program, as shown by the fact that a greater number of cases have been mediated almost each year since the program's inception. Further, MAP mediators had been successfully settling more than half of the appeals referred to mediation, but as noted above, EO 13839 has adversely affected settlements. While mediators continue to settle a substantial portion of the lower number of appeals now being referred to MAP, greater time and effort must be expended by the mediator and the parties, and the number and percentage of successful settlements have decreased. Nevertheless, even where the case is resolved by an AJ's decision, the mediation process often helps sharpen the parties' focus on the matters truly in dispute and the resolution they seek. When mediators were asking parties to complete evaluations at the end of each mediation, more than 95% stated they would use MAP again.

Merit Systems Studies and OPM Oversight

The Board has the statutory responsibility to conduct studies of the civil service and other merit systems in the Executive Branch and submit the resulting reports to the President and Congress. The studies support strong and viable merit systems, which protect the public's interest in a high quality, professional workforce managed under the MSPs and free from PPPs. The studies are based on objective, independent research that assesses and evaluates Federal merit system policies, operations, and practice from a long-term perspective. This function, in conjunction with the agency's adjudication of individual appeals and authority to review human resource regulations, ensures that the Board has the full legal authority necessary to oversee Federal merit systems at the systemic level and to remedy PPPs on an individual level. MSPB studies address the variety of challenges facing the Federal Government in managing its workforce.

Publications Issued in FY 2018 and FY 2019

No study reports have been transmitted to the President and Congress since the loss of quorum in early 2017. However, in addition to regular editions of the *Issues of Merit* newsletter, MSPB's Office of Policy and Evaluation (OPE) issued the following non-study report publications:

Managing Employees to Perform Emotionally Laborious Work (July 2019) uses data from the 2016 Merit Principles Survey (MPS) which indicates that when employees need to hide their emotions, or pretend to feel other emotions, it has a relationship to emotional fatigue, a lower intent to remain in the position, fewer good performance behaviors, lower performance appraisal results, and reduced engagement. But, what can agencies do to reduce the need to pretend or hide emotions when the work itself is emotional? This brief uses examples from current agency practices to answer that question.

Remedying Unacceptable Performance in the Federal Civil Service (June 2019) explains that for decades, the Federal Government has been seeking useful means to address the issue of Federal employees whose performance at work is unacceptable. But, why do some employees perform badly, and how effective are various approaches in bringing about the necessary improvements in performance? This brief answers those questions and discusses what agencies can do about those answers.

The Perceived Incidence of Prohibited Personnel Practices (June 2019) describes the 14 PPPs with potential consequences for offenders who commit a PPP, examines whether agencies are truly preventing PPPs, and explains the consequences for the effectiveness of the civil service if employees believe that PPPs are allowed to occur. This research brief uses data from the 2016 MPS to discuss respondents' perceptions that they have seen a PPP and the relationship between such perceptions and their views of a variety of workplace issues.

Improving Leadership Through Better Probationary Practices (May 2019) observes that when used properly, the probationary period is one of the most valid predictors of future success and can help ensure that the Federal Government has a cadre of the most qualified, competent leaders. This perspectives brief examines how the supervisory and managerial probationary periods are being used by agencies, identifies what barriers exist to using them more effectively, and builds on prior MSPB research to discuss what steps agencies can take to improve Federal leadership through better probationary practices.

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.

Improving Federal Hiring Through Better Assessment (July 2018) summarizes MSPB research on applicant assessment, identifies 10 factors for agencies to consider when investing in better assessment, reiterates the business case for Congress to appropriate funds to OPM for the development and

administration of Government-wide applicant assessments, and presents information and agency perspectives on OPM's USA Hire assessment suite.

Update on Sexual Harassment in the Federal Workplace (March 2018) summarizes Federal employee perceptions of sexual harassment in the workplace, based on MSPB's 2016 MPS and previous MSPB surveys. In advance of a full report on the topic, this research brief presents preliminary findings on the incidence of sexual harassment and how employees respond to harassment. This publication has resulted in numerous requests from Federal agencies and Congress for additional information on MSPB's research methods and results.

Building Blocks for Effective Performance Management (October 2017) presents selected results from the 2016 MPS on the topic of performance management. The key finding is that organizations that believe they have the "building blocks" for performance—adequately trained supervisors, sufficient resources, and usable performance standards and measures—are more likely to report a lower incidence of poor or substandard performance and more likely to have success in identifying and correcting such performance.

Other Studies Activity

OPE has gathered ideas from stakeholders for an updated research agenda, with the aim of presenting a proposed agenda to new agency leadership when they arrive. In addition, OPE staff is doing preliminary work in preparation for a Government-wide survey in 2020.

Information Technology

MSPB's primary mission is to provide for independent, non-partisan adjudication of appeals of personnel actions for Federal employees. Generally, about 50% of appeals filed with the agency are from *pro se* appellants—employees representing themselves. All appellants (represented or not) are expected to file an appeal and to respond to orders in a timely manner or risk having their cases dismissed. The Board's current electronic filing system, e-Appeal Online, allows Federal agencies and appellants access to party filings and Board issuances through e-Appeal as soon as they are filed or issued. Parties who elect to file electronically through e-Appeal receive email notification of orders and issuances from MSPB instantaneously, rather than having to wait for service by regular mail. The e-Appeal system will be replaced by a new e-filing system as part of the modernization efforts in FY 2021, with enhanced capabilities for external and internal users.

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

Human Resources

MSPB contracts with the U.S. Department of Agriculture's APHIS for selected HR administrative and operational services through an interagency agreement. The agreement is developed between the two agencies and monitored within MSPB's Office of Financial and Administrative Management.

MSPB contracts with Federal Occupational Health (FOH), a service unit within the U.S. Department of Health and Human Services' Program Support Center, to provide basic occupational health services to all of its employees throughout the country. In addition, the agency contracts with FOH to offer all employees access to the employee assistance program (EAP). The EAP assists the agency in addressing productivity issues by providing both prevention and intervention for employee problems, which ultimately improves employee health and functioning, as well as workplace performance. The Board's agreement with FOH provides for a comprehensive EAP, delivering short-term, problem-focused counseling and a variety of services. While many health and wellness activities and accommodations are not equally available to each Board employee with respect to workplace or onsite availability of services, the agency does strive to ensure that each employee understands that it fully supports a healthy and safe workplace for all employees.

Financial Management

MSPB has initiated cross-servicing agreements with the Treasury Department's BFS for its accounting, financial auditing, purchasing, and travel-related services and support. BFS has processed MSPB's administrative payments and prepared its accounting reports since FY 2002. The Board has received unqualified/unmodified opinions on its audits since the agency has been subject to audits of its financial statements.

In addition to the agreement in place for personnel services, MSPB contracts with USDA's NFC for processing of payroll and payroll-related activities including earnings and leave statements, W-2 information, and debt management. The cross-servicing relationships with these organizations have provided MSPB with timely responses and more accurate processing of information from larger pools of knowledgeable staff than would be possible with a smaller in-house staff alone. BFS, APHIS, and NFC have the resources to stay current with the latest technologies, so they can provide these services more efficiently and economically.

Equal Employment Opportunity

MSPB's Office of Equal Employment Opportunity (OEEO) plans, implements and evaluates the agency's affirmative employment programs and initiatives, advises senior executives, managers and supervisors about these programs and initiatives, and provides all employees training on rights and remedies available under the anti-discrimination laws and whistleblower protection laws. OEEO provides equal employment opportunity counseling, formal complaint processing, and alternative dispute resolution services to current and former employees, as well as applicants who allege discrimination. OEEO also resolves and processes complaints filed by individuals who allege discrimination based on disability in their access to MSPB programs and activities. OEEO evaluates and reports MSPB's complaint data workforce demographics by occupation and grade to Congress, the EEOC, OPM, and other external stakeholders.

Organization Chart

