# Annual Report for FY 2020

## January 19, 2021

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## Foreword

In accordance with section 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this Annual Report (AR) on its significant actions during fiscal year (FY) 2020.

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

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

## MESSAGE FROM THE ACTING CHIEF EXECUTIVE AND ADMINISTRATIVE OFFICER

I am pleased to submit the U.S. Merit Systems Protection Board (MSPB's) Annual Report for fiscal year (FY) 2020. MSPB has been without a quorum since January 2017 and without any Board Members since February 2019, an unprecedented development in MSPB history. Pursuant to MSPB's longstanding Continuity of Operations Plan, I became MSPB's acting chief executive and administrative officer on March 1, 2019.

Without a quorum, MSPB has been unable issue decisions on petitions for review (PFRs) and other cases at headquarters (HQ); the backlog of these cases as of December 31, 2020 was 3,071. MSPB also has been unable publish reports of merit systems studies or promulgate substantive regulations, such as in response to statutory changes by Congress. Without any Board members, MSPB was unable to issue whistleblower stays during Office of Special Counsel (OSC) investigations.

Notwithstanding these significant limitations in authority, MSPB has no shortage of work. MSPB's administrative judges (AJs) continue to review cases filed in the regional and field offices, issuing 5,473 decisions in FY 2020. MSPB staff continue to prepare draft decisions for Board members' consideration in response to the hundreds of PFRs filed in FY 2020. Some have chosen to appeal in federal court rather than through the PFR process, and MSPB continues to regularly appear in court to explain its processes. MSPB also continues to issue research briefs and regular newsletters, and is preparing to administer the next Governmentwide Merit Principles Survey in FY 2021.

Most recently, MSPB and its employees, like everyone in America and around the world, has had to confront the challenges of the COVID-19 pandemic. Fortunately, most of MSPB's work can be accomplished remotely, and we have adjusted our processes and policies to enable and support our customers and employees in response to the pandemic. MSPB employees have risen to the many challenges the pandemic has brought, both in terms of their work and their health and well-being. Due to the extraordinary efforts of our employees, MPSB has continued to perform critical mission and support functions since the pandemic and National Emergency were declared in March 2020, and will continue to do so. I am proud and humbled by their commitment and service to our work in protecting the merit system and the Federal workforce despite these unprecedented challenges.

While MSPB employees have been remarkably focused in continuing the agency's work despite the challenges, there is no question we look forward to the arrival of new Board members. In order to fully perform its mission and successfully face new challenges that lie ahead, MSPB needs a Board quorum.

I am a firm believer in the value of the merit system, which has served the United States well since its adoption nearly 140 years ago this week. Merit system principles ensure taxpayers receive the benefit of their tax dollars being used to employ the most qualified employees. This ensures civil servants have the skills necessary to ensure the smooth functioning of government and to provide the work and customer service taxpayers deserve. Applying the merit system principles and conscientiously avoiding prohibited personnel practices also ensures fair treatment of whistleblowers, who can further help identify and prevent waste, fraud, abuse, and mismanagement. These principles of good government are key to the healthy functioning of the public institutions upholding America's representative democracy. They can only be abandoned at high cost to our country. Thus, I am honored to have been able to serve alongside the MSPB employees who work every day to ensure their protection.

Tristan L. Leavitt
General Counsel/Acting Chief Executive and
Administrative Officer
January 19, 2021

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## INTRODUCTION

This MSPB Annual Report for FY 2020 includes adjudication case processing statistics for the regional and field offices, summaries of court opinions relevant to MSPB's work, summaries of MSPB's merit systems studies activity, and summaries of the significant actions of the Office of Personnel Management (OPM).[1] The report also contains summaries of MSPB's financial status, outreach and education activities, legislative and congressional relations activities, and international activities. The report briefly references the most significant internal management challenges and external factors that affect MSPB's work; thorough descriptions are included in the Annual Performance Report (APR) for FY 2020. MSPB's ARs usually contain headquarters (HQ) case processing statistics and summaries of significant MSPB Board decisions. This information is not provided in this report because, due to the lack of quorum, there were no HQ decisions on MSPB appeals issued in FY 2020.

### About MSPB

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

### MSPB's Mission and Vision

**Mission**

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

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

## Board Members

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

## Board Quorum and Status of Board Member Nominations

In the spring of 2018, the President nominated Dennis D. Kirk as Board Chairman, and Julia A. Clark as Board Member. However, the nominees were not confirmed prior to the adjournment of the 115th Congress. On January 16, 2019, the President resubmitted the nominations for consideration by the 116th Congress. On April 30, 2019, the President nominated B. Chad Bungard to serve as a Board Member. The nominees were not confirmed prior to the adjournment of the 116th Congress. On January 3, 2020, the President nominated Dennis D. Kirk as a Board Member.

## 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 2020 the agency was authorized to employ 235 full-time equivalents to conduct and support its statutory duties.

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

The **Office of the Administrative Law Judge (ALJ)** adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. In FY 2020, the functions of this office were performed under interagency agreements by ALJs at the Federal Trade Commission (FTC) and the U.S. Coast Guard.

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

The **Office of the Clerk of the Board** receives and processes cases filed at MSPB HQ, rules on certain procedural matters, and issues Board decisions and orders. It serves as MSPB's public information center, coordinates media relations, operates MSPB's library and online information services, and administers the Freedom of Information Act (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 EEO programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB's managers and supervisors.

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

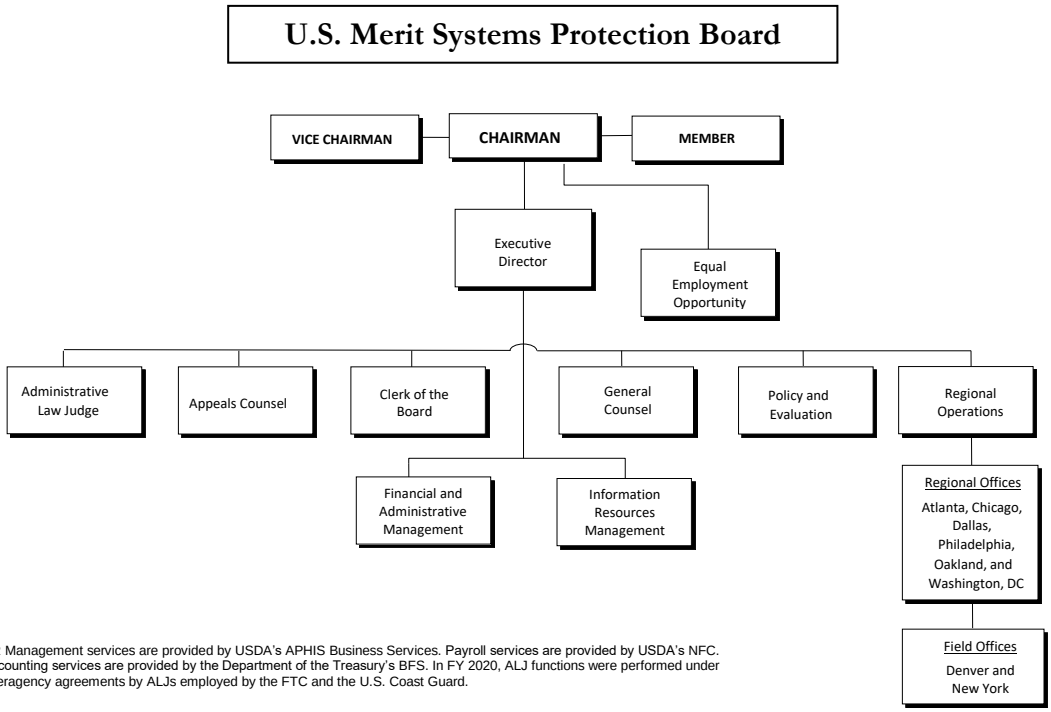
The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for the Board to enforce a final MSPB decision or order, in response to requests to review OPM regulations, and for other assigned cases; conducts the agency's PFR settlement program; and coordinates the agency's legislative policy and congressional relations functions. The office also drafts regulations, administers MSPB's ethics program, performs the inspector general function, and plans and directs audits and investigations.

The **Office of Information Resources Management** develops, implements, and maintains MSPB's automated information technology systems, infrastructure, enterprise hardware and software applications, and cybersecurity programs to help MSPB manage its caseload efficiently and carry out its administrative and research responsibilities.

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

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

## MSPB Organizational Chart




HR Management services are provided by USDA's APHIS Business Services. Payroll services are provided by USDA's NFC. Accounting services are provided by the Department of the Treasury's BFS. In FY 2020, ALJ functions were performed under interagency agreements by ALJs employed by the FTC and the U.S. Coast Guard.

## FISCAL YEAR 2020 IN REVIEW

### Adjudication

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

In FY 2020, MSPB processed 5,473 cases in the ROs and FOs, including addendum cases and stay requests. ALJs issued 17 decisions. As of the end of FY 2020, MSPB had 2,942 PFRs pending at HQ. Statistical information on MSPB's case processing activity for the ROs/FOs is provided in the section on Case Processing Statistics for FY 2020. In accordance with the WPEA, information about FY 2020 whistleblower cases will be available in MSPB's APR for FY 2020, which will be posted on MSPB's website at www.mspb.gov.

As a service to its stakeholders, MSPB is also providing summaries of significant opinions relevant to the Board's work that were issued in FY 2020 by the U.S. Court of Appeals for the Federal Circuit (CAFC) and other Federal courts. Those summaries are provided in the section on Significant Opinions Issued by the Courts. The opinions cover topics such as adverse actions, attorney fees, constructive action, due process, and USERRA.

### Merit Systems Studies

In FY 2020, due to the lack of quorum, MSPB did not publish any research reports of merit systems studies. MSPB's studies program released three editions of its *Issues of Merit* (*IoM)* newsletter. It also released two research briefs on the Federal human resources (HR) workforce and the importance of job fit, summaries of which are contained in the Summary of Merit Systems Studies Activity section of this report.

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

In accordance with statute, MSPB's annual report must contain a review of OPM's significant actions and an assessment of the degree to which the actions support merit and prevent PPPs. The FY 2020 review includes OPM's significant actions related to improving applicant assessment, HC reviews, and the appointment of political appointees into the career service. However, the lack of quorum limits the scope of MSPB's review of significant actions of OPM under 5 U.S.C. 1206. More information about MSPB's review of significant OPM actions is included in that section of this report.

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

MSPB's education and outreach efforts are designed to enhance the understanding of the concept of merit, ensure that MSPs are applied consistently throughout the Government, reduce the likelihood of PPPs, and promote stronger merit-based management practices. MSPB outreach also promotes better understanding and operation of the Federal merit system disciplinary and appeals process by sharing information about MSPB processes and its legal precedents. All of these efforts, in turn, help to improve employee and organizational performance, improve service to the American people, and provide value to the taxpayer.

In FY 2020, MSPB staff conducted 76 outreach events with a variety of customers and stakeholders. Many were virtual events due to the pandemic. In addition to many local events, MSPB staff presented at several nationwide conferences, such as the Federal Dispute Resolution conference, the Federal Circuit Bar Association, and the Chicago-Kent College of Law's annual Federal Sector Labor Relations and Labor Law Program. Notably, MSPB was invited to speak with Office of Management and Budget (OMB) officials about the state of the Federal HR workforce, and with congressional staff about sexual harassment.

MSPB's adjudication and studies work, and other activities involving MSPB, were cited over 450 times in 119 different print and online sources. Significant citations for policy-makers include references to MSPB's studies on sexual harassment in the Government Accountability Office's (GAO) report and testimony about sexual harassment at the Department of Veterans Affairs (VA); a bipartisan, bicameral congressional letter to VA about sexual harassment; references to sexual harassment studies and case law in a briefing report by the U.S. Commission on Civil Rights; and an MSPB studies report on Adverse Actions cited in the CAFC decision in *Sayers v. VA*. More information about references to MSPB's work and its outreach and education activities can be found in the APR for FY 2020.

**International Activities**

During FY 2020, MSPB hosted an official from Japan's National Personnel Authority (NPA) who is responsible for public sector personnel management. The discussion covered employment of persons with disabilities, reasonable accommodation, bullying in the Federal workplace, and employment of elderly individuals. The information presented in the meeting will be used as part of NPA's research efforts to help address some of their concerns regarding these issues.

**Legislative and Congressional Relations Activity**

During FY 2020, MSPB staff monitored and analyzed legislative activity relevant to MSPB's jurisdiction and adjudication of appeals. Brief descriptions of relevant bills are provided below.

**National Defense Authorization Act (NDAA) for FY 2020**.[5] NDAA Section 5721 amended 5 U.S.C. § 2302(b)(8) by adding a new subparagraph (C), making it a prohibited personnel practice for any employee take, direct others to take, recommend, or approve any personnel action with respect to any employee or applicant because of certain disclosures to Congress or congressional committees.

Several pieces of legislation were pending at the end of FY 2020. The **Elijah E. Cummings Federal Employee Antidiscrimination Act of 2019 (H.R. 135)**[6] would strengthen Federal employee antidiscrimination protections by imposing stronger penalties for Federal agencies and agency employees found to have committed prohibited discrimination. The Act also adds the Office of Special Counsel (OSC) to a list of entities that must be excluded from coverage of non-disclosure agreements. The House passed H.R. 135 on January 15, 2019, and on December 16, 2019, the bill was reported out of the Senate Committee on Homeland Security and Governmental Affairs with an amendment in the nature of a substitute, and placed on the Senate Legislative Calendar.[7]

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[5] Pub. L. 116-92, enacted December 19, 2019, *available at* https://www.congress.gov/116/plaws/publ92/PLAW-116publ92.pdf.

[6] 116th Cong. (2019), *available at* https://www.congress.gov/116/bills/hr135/BILLS-116hr135rs.pdf.

[7] The text of this bill was also included in William M. (Mac) Thornberry NDAA for FY 2021 (H.R. 6395), 116th Cong. (2020), *available at* https://www.congress.gov/bill/116th-congress/house-bill/6395/text. The House passed H.R. 6395 on July 21, 2020, and it was placed on the Senate Legislative Calendar on August 5, 2020.

**Merit Systems Protection Board Empowerment Act of 2020 (H.R. 7864)**.[8] This bill would reauthorize MSPB for a period of five years (FY 2021-2025). It would also require OPM to assist MSPB's Office of Policy and Evaluation in conducting surveys, and require training in whistleblower law for MSPB AJs.[9]

**Whistleblower Protection Improvement Act of 2020 (H.R. 7935)**.[10] This bill would strengthen protections for Federal whistleblowers, including providing them with the right to file a claim in Federal district court.[11]

**Federal Employee Access to Information Act (H.R. 7936, S. 4438)**.[12] This bill would prohibit retaliation against Federal employees for seeking information under FOIA. On September 16, 2020, the bill was reported out as amended by the House Committee on Oversight and Reform.

**Pregnant Workers Fairness Act (H.R. 2694)**.[13] This bill would expand employment protections for pregnant women (in both the private and Federal sectors) by requiring pregnancy to be treated like a disability for reasonable accommodation purposes within the employment context. The House passed H.R. 2694 on September 17, 2020.

**Hatch Act Accountability Act (H.R. 8363, Title X)**.[14] This bill would amend the Hatch Act to permit OSC to conduct any investigation into prohibited political activity it considers necessary, regardless of whether it received an allegation, and to assess a civil penalty of up to $50,000 against a "political appointee" for a Hatch Act violation if the President does not take action against the appointee within 90 days of receiving OSC's notice of the violation. The bill provides that a fined political appointee may request a hearing from OSC and may seek judicial review of the resulting final decision, but has no right of appeal to MSPB. This bill was introduced in the House on September 23, 2020, as part of the Protecting Our Democracy Act (H.R. 8363).

**Reducing Nefarious Crimes Act (H.R. 8111)**.[15] This bill would amend the Hatch Act to increase the possible penalties for a violation from a 5-year debarment from Federal employment to a 7-year debarment, and from a maximum civil penalty of $1,000 to $50,000, and to specify that an on-duty Federal employee may not engage in political activity while on the White House grounds. This bill was introduced in the House on August 25, 2020.

**H.R. 5560**.[16] This bill would amend 5 U.S.C. chapter 77 to permit MSPB to review an agency action arising from a determination that an employee or applicant for employment is ineligible to hold a sensitive position if the position does not require a security clearance or access to classified

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[8] 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr7864/BILLS-116hr7864ih.pdf.

[9] The text of this bill was also included in the Protecting Our Democracy Act (H.R. 8363, Title VIII, Subtitle B), 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr8363/BILLS-116hr8363ih.pdf.

[10] 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr7935/BILLS-116hr7935ih.pdf.

[11] The text of this bill was also included in the Protecting Our Democracy Act (H.R. 8363, Title VIII, Subtitle A), 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr8363/BILLS-116hr8363ih.pdf.

[12] 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr7936/BILLS-116hr7936ih.pdf.

[13] 116th Cong. (2019), *available at* https://www.congress.gov/116/bills/hr2694/BILLS-116hr2694eh.pdf.

[14] The text of this bill was included in the Protecting Our Democracy Act (H.R. 8363, Title X), 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr8363/BILLS-116hr8363ih.pdf.

[15] 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr8111/BILLS-116hr8111ih.pdf.

[16] 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr5560/BILLS-116hr5560ih.pdf.

information and the action is otherwise appealable. The bill would legislatively overturn the Federal Circuit's decision from *Kaplan v. Conyers*, 733 F.3d 1148, 1150 (Fed. Cir. 2013), in which the Court limited MSPB's ability to review Federal agency decisions on eligibility to hold sensitive positions that do not involve access to classified information. This bill was introduced in the House on January 8, 2020.

**Rights for Transportation Security Officers Act of 2019 (H.R. 1140)**.[17] This bill would provide Title 5 rights to Transportation Security Administration employees. The bill was passed in the House on March 5, 2020.

**Other Congressional Activity.** MSPB staff conducted eight briefings for congressional staff during FY 2020. In addition to the annual budget briefing for House and Senate Appropriations Committees' staff, MSPB briefed staff from the House Committee on Oversight and Reform, the House Administration Committee, the Senate Committee on Homeland Security and Governmental Affairs, the Senate Finance Committee, and the congressional delegation for the state of Delaware. Briefing topics in FY 2020 included MSPB's general adjudicative process, Federal employee access to information, the potential impact of the Supreme Court's ruling in *Lucia v. Securities and Exchanges Commission* on the MSPB, and reports of discrimination within VA.

### Internal Management Challenges and External Factors

There are a number of internal management challenges currently facing MSPB. The most significant internal issue affecting MSPB is the lack of quorum of Board members (also considered an external factor beyond MSPB's control). Other significant internal challenges that could affect MSPB's ability to carry out its mission include other HC issues and information technology stability, cybersecurity, and modernization. The novel coronavirus (COVID-19) pandemic is an external factor that presents internal challenges for MSPB. Other than the lack of quorum and the pandemic, significant external trends or issues affecting MSPB's ability to carry out its mission include changes in law, jurisdiction and appeals processes, Government reform, budget challenges, and workforce reshaping. This year, there was also a Supreme Court decision involving employment rights that could affect MSPB's workload. More detailed information about MSPB's internal challenges and external factors can be found in the MSPB APR for FY 2020.

[17] 116th Cong. (2020), *available at* https://www.congress.gov/116/bills/hr1140/BILLS-116hr1140eh.pdf.

## CASE PROCESSING STATISTICS FOR FY 2020

### 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. Therefore, there are no FY 2020 case processing statistics for HQ.

**Table 1: FY 2020 Summary of Cases Decided by MSPB**

| Cases Decided in MSPB Regional and Field Offices | |
|---|---|
| Appeals | 5,265 |
| Addendum Cases[1] | 184 |
| Stay Requests[2] | 24 |
| **TOTAL Cases Decided in RO/FOs** | **5,473** |
| **Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction[3]** | **17** |
| **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] | 0 |
| Interlocutory Appeals | 0 |
| **TOTAL Cases Decided by the Board** | **0** |
| **TOTAL Decisions (Board, ALJs, RO/FOs)** | **5,490** |

[1] Includes 67 requests for attorney fees, 90 compliance cases, 13 court remand cases, 12 requests for compensatory damages (discrimination cases only), and two (2) requests for consequential damages.
[2] Includes 15 stay requests in whistleblower cases and nine (9) in non-whistleblower cases.
[3] Initial Decisions by ALJs. Case type breakdown: four (4) Disciplinary Action - Hatch Act cases, four (4) Actions Against Senior Executive Service (SES) cases, and eight (8) Actions Against ALJs.
[4] Final board decisions.

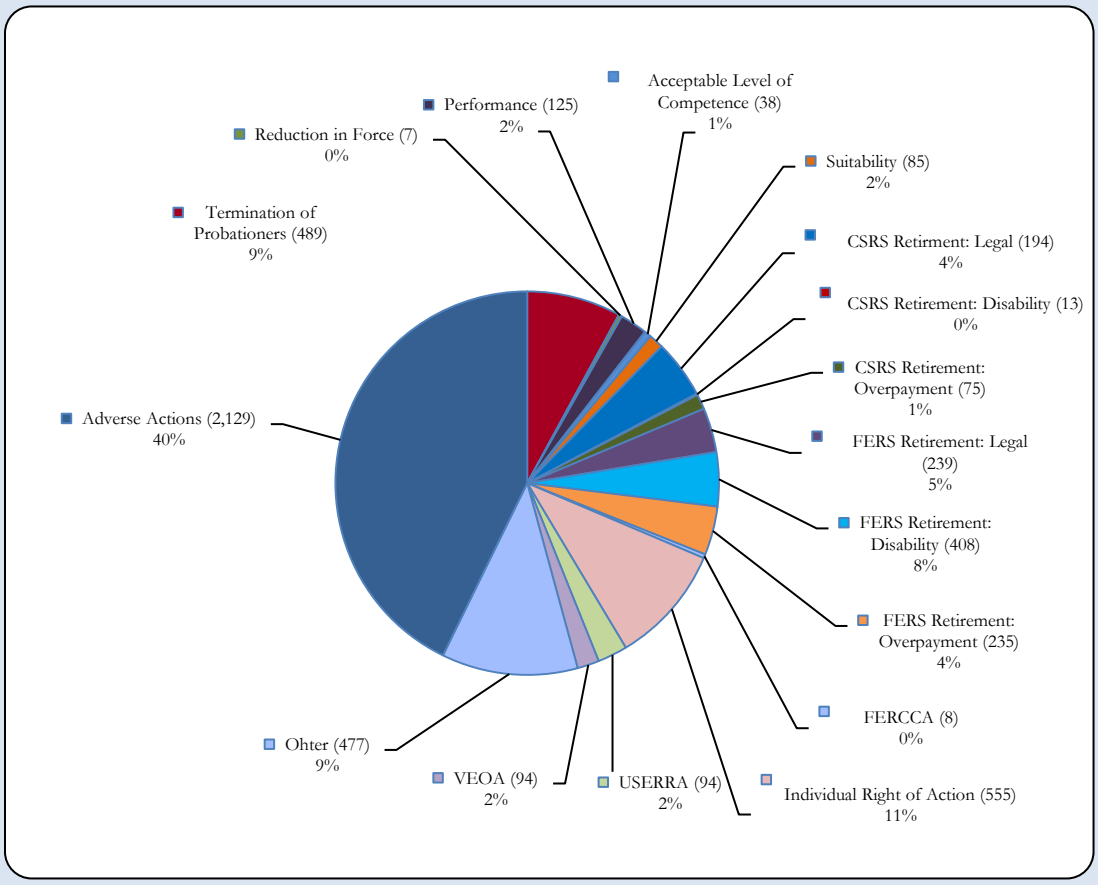
## Cases Processed in the Regional and Field Offices

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

| | Decided | Dismissed[1] | | Not Dismissed[1] | | Settled[2] | | Adjudicated[2] | |
|---|---|---|---|---|---|---|---|---|---|
| **Type of Case** | # | # | % | # | % | # | % | # | % |
| Adverse Action by Agency | 2,129 | 1,240 | 58.24 | 889 | 41.76 | 427 | 48.03 | 462 | 51.97 |
| Termination of Probationers | 489 | 467 | 95.50 | 22 | 4.50 | 15 | 68.18 | 7 | 31.82 |
| Reduction in Force | 7 | 4 | 57.14 | 3 | 42.86 | 1 | 33.33 | 2 | 66.67 |
| Performance | 125 | 57 | 45.60 | 68 | 54.40 | 36 | 52.94 | 32 | 47.06 |
| Acceptable Level of Competence (ALOC)[3] | 38 | 31 | 81.58 | 7 | 18.42 | 3 | 42.86 | 4 | 57.14 |
| Suitability | 85 | 38 | 44.71 | 47 | 55.29 | 36 | 76.60 | 11 | 23.40 |
| CSRS Retirement: [4] Legal | 194 | 128 | 65.98 | 66 | 34.02 | 7 | 10.61 | 59 | 89.39 |
| CSRS Retirement: Disability | 13 | 13 | 100.00 | 0 | 0.00 | 0 | 0.00 | 0 | 0.00 |
| CSRS Retirement: Overpayment | 75 | 42 | 56.00 | 33 | 44.00 | 22 | 66.67 | 11 | 33.33 |
| FERS Retirement:[4] Legal | 239 | 168 | 70.29 | 71 | 29.71 | 2 | 2.82 | 69 | 97.18 |
| FERS Retirement: Disability | 408 | 303 | 74.26 | 105 | 25.74 | 0 | 0.00 | 105 | 100.00 |
| FERS Retirement: Overpayment | 235 | 126 | 53.62 | 109 | 46.38 | 69 | 63.30 | 40 | 36.70 |
| FERCCA[4] | 8 | 5 | 62.50 | 3 | 37.50 | 1 | 33.33 | 2 | 66.67 |
| Individual Right of Action | 555 | 359 | 64.68 | 196 | 35.32 | 119 | 60.71 | 77 | 39.29 |
| USERRA | 94 | 63 | 67.02 | 31 | 32.98 | 13 | 41.94 | 18 | 58.06 |
| VEOA | 94 | 55 | 58.51 | 39 | 41.49 | 7 | 17.95 | 32 | 82.05 |
| Other[5] | 477 | 454 | 95.18 | 23 | 4.82 | 17 | 73.91 | 6 | 26.09 |
| **Total** | **5,265** | **3,553** | **67.48** | **1,712** | **32.52** | **775** | **45.27** | **937** | **54.73** |

[1] Percent Dismissed and Not Dismissed are of the number Decided.
[2] Percent Settled and Adjudicated are of the number Not Dismissed.
[3] ALOC means an employee is effectively performing the duties and responsibilities of his or her assigned job, which warrants advancing the employee's rate of pay to the next higher step at the grade of the employee's position. If an employee's performance is not at an ALOC, then the agency must under most circumstances, deny his or her within-grade increase.
[4] Civil Service Retirement System (CSRS); Federal Employees Retirement System (FERS); and Federal Erroneous Retirement Coverage Corrections Act (FERCCA).
[5] "Other" appeals include Restoration to Duty, Miscellaneous, Reemployment Priority, Employment Practices, and others.

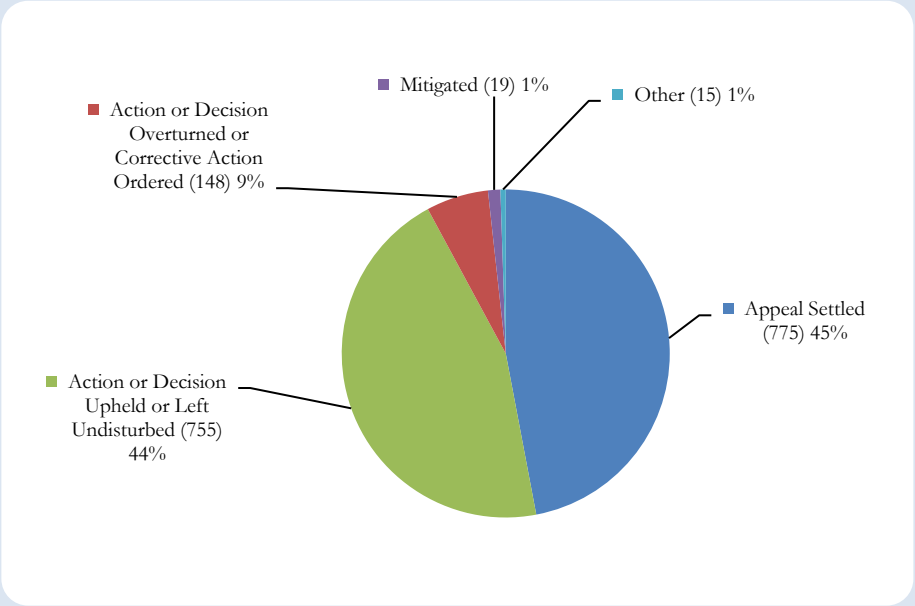
**Figure 1: Type of Appeals Decided in the Regional and Field Offices**




**Total Number of Appeals: 5,265**

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

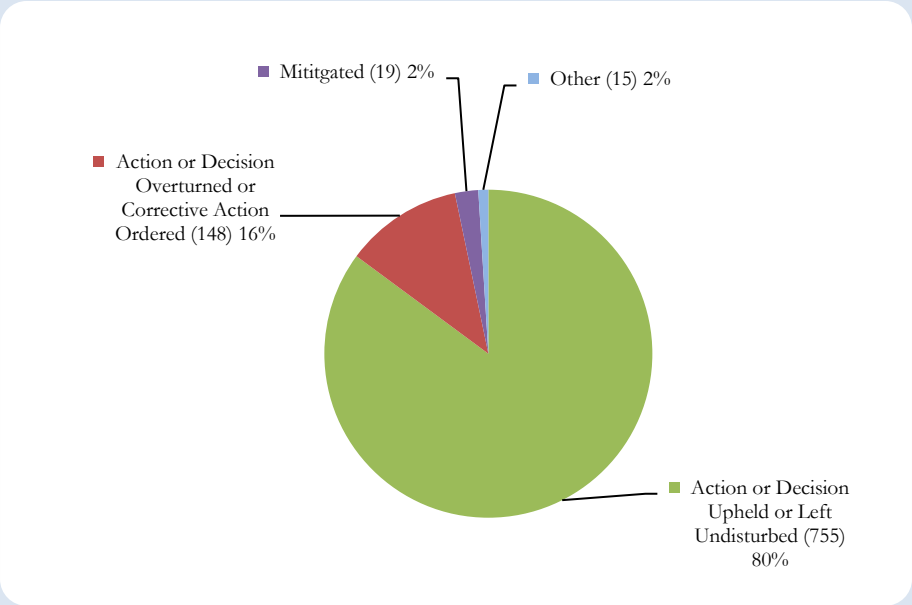
**Figure 2: Dispositions of Initial Appeals Not Dismissed by Regional/Field Offices**




**Total Number of Appeals that Were Not Dismissed: 1,712**

Percentages are rounded to add to 100%.

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




**Based on 937 Appeals Adjudicated on the Merits**

Percentages are rounded to add to 100%.

## Table 3: Disposition of Appeals by Agency

| | Decided | Dismissed[1] | | Not Dismissed[1] | | Settled[2] | | Adjudicated[2] | |
|---|---|---|---|---|---|---|---|---|---|
| **Agency** | # | # | % | # | % | # | % | # | % |
| Office of Personnel Management[3] | 1213 | 792 | 65.3 | 421 | 34.7 | 136 | 32.3 | 285 | 67.7 |
| Department of Veterans Affairs | 793 | 553 | 69.7 | 240 | 30.3 | 98 | 40.8 | 142 | 59.2 |
| Department of the Army | 436 | 303 | 69.5 | 133 | 30.5 | 65 | 48.9 | 68 | 51.1 |
| United States Postal Service | 434 | 300 | 69.1 | 134 | 30.9 | 84 | 62.7 | 50 | 37.3 |
| Department of the Navy | 346 | 227 | 65.6 | 119 | 34.4 | 62 | 52.1 | 57 | 47.9 |
| Department of Homeland Security | 305 | 205 | 67.2 | 100 | 32.8 | 32 | 32.0 | 68 | 68.0 |
| Department of Defense | 253 | 167 | 66.0 | 86 | 34.0 | 44 | 51.2 | 42 | 48.8 |
| Department of the Air Force | 222 | 129 | 58.1 | 93 | 41.9 | 46 | 49.5 | 47 | 50.5 |
| Department of Justice | 214 | 115 | 53.7 | 99 | 46.3 | 69 | 69.7 | 30 | 30.3 |
| Department of the Treasury | 159 | 117 | 73.6 | 42 | 26.4 | 23 | 54.8 | 19 | 45.2 |
| Department of Health and Human Services | 158 | 157 | 99.4 | 1 | 0.6 | 0 | 0.0 | 1 | 100.0 |
| Department of Agriculture | 130 | 77 | 59.2 | 53 | 40.8 | 28 | 52.8 | 25 | 47.2 |
| Department of Transportation | 94 | 72 | 76.6 | 22 | 23.4 | 11 | 50.0 | 11 | 50.0 |
| Department of Commerce | 87 | 60 | 69.0 | 27 | 31.0 | 13 | 48.1 | 14 | 51.9 |
| Department of the Interior | 84 | 41 | 48.8 | 43 | 51.2 | 22 | 51.2 | 21 | 48.8 |
| Social Security Administration | 75 | 56 | 74.7 | 19 | 25.3 | 7 | 36.8 | 12 | 63.2 |
| Department of Labor | 36 | 24 | 66.7 | 12 | 33.3 | 2 | 16.7 | 10 | 83.3 |
| Department of Housing and Urban Development | 24 | 17 | 70.8 | 7 | 29.2 | 3 | 42.9 | 4 | 57.1 |
| General Services Administration | 23 | 15 | 65.2 | 8 | 34.8 | 4 | 50.0 | 4 | 50.0 |
| Department of Energy | 22 | 13 | 59.1 | 9 | 40.9 | 5 | 55.6 | 4 | 44.4 |
| Department of State | 14 | 12 | 85.7 | 2 | 14.3 | 1 | 50.0 | 1 | 50.0 |
| Smithsonian Institution | 14 | 12 | 85.7 | 2 | 14.3 | 0 | 0.0 | 2 | 100.0 |
| Environmental Protection Agency | 12 | 8 | 66.7 | 4 | 33.3 | 3 | 75.0 | 1 | 25.0 |
| Equal Employment Opportunity Commission | 12 | 9 | 75.0 | 3 | 25.0 | 2 | 66.7 | 1 | 33.3 |
| Federal Deposit Insurance Corporation | 8 | 3 | 37.5 | 5 | 62.5 | 1 | 20.0 | 4 | 80.0 |
| National Archives and Records Administration | 8 | 3 | 37.5 | 5 | 62.5 | 2 | 40.0 | 3 | 60.0 |

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

| | Decided | Dismissed[1] | | Not Dismissed[1] | | Settled[2] | | Adjudicated[2] | |
|---|---|---|---|---|---|---|---|---|---|
| **Agency** | # | # | % | # | % | # | % | # | % |
| Small Business Administration | 8 | 5 | 62.5 | 3 | 37.5 | 0 | 0.0 | 3 | 100.0 |
| Department of Education | 7 | 6 | 85.7 | 1 | 14.3 | 0 | 0.0 | 1 | 100.0 |
| Armed Forces Retirement Home | 6 | 6 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Broadcasting Board of Governors | 6 | 4 | 66.7 | 2 | 33.3 | 0 | 0.0 | 2 | 0.0 |
| Securities and Exchange Commission | 6 | 2 | 33.3 | 4 | 66.7 | 3 | 75.0 | 1 | 25.0 |
| Architectural and Transportation Barriers Compliance Board | 5 | 5 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| National Science Foundation | 5 | 3 | 60.0 | 2 | 40.0 | 1 | 50.0 | 1 | 50.0 |
| Office of Special Counsel | 5 | 5 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| National Aeronautics and Space Administration | 4 | 3 | 75.0 | 1 | 25.0 | 1 | 100.0 | 0 | 0.0 |
| Court Services and Offender Supervision Agency for the District of Columbia | 3 | 1 | 33.3 | 2 | 66.7 | 2 | 100.0 | 0 | 0.0 |
| Export-import Bank of the United States | 3 | 1 | 33.3 | 2 | 66.7 | 2 | 100.0 | 0 | 0.0 |
| Government Publishing Office | 3 | 2 | 66.7 | 1 | 33.3 | 1 | 100.0 | 0 | 0.0 |
| National Credit Union Administration | 3 | 2 | 66.7 | 1 | 33.3 | 1 | 100.0 | 0 | 0.0 |
| Nuclear Regulatory Commission | 3 | 3 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Selective Service System | 3 | 3 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Tennessee Valley Authority | 3 | 3 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Executive Office of the President, Office of Administration | 2 | 2 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Federal Housing Finance Agency | 2 | 2 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Federal Reserve System | 2 | 2 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Administrative Office of the U.S. Courts | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Central Intelligence Agency | 1 | 0 | 0.0 | 1 | 100.0 | 0 | 0.0 | 1 | 100.0 |
| Consumer Product Safety Commission | 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** | # | # | % | # | % | # | % | # | % |
| Corporation for National and Community Service | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Federal Communications Commission | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Federal Election Commission | 1 | 0 | 0.0 | 1 | 100.0 | 0 | 0.0 | 1 | 0.0 |
| International Boundary and Water Commission: U.S. and Mexico | 1 | 0 | 0.0 | 1 | 100.0 | 0 | 0.0 | 1 | 0.0 |
| Judicial Branch | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Merit Systems Protection Board | 1 | 0 | 0.0 | 1 | 100.0 | 1 | 100.0 | 0 | 0.0 |
| Railroad Retirement Board | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| **Total** | **5,265** | **3,553** | **67.5%** | **1,712** | **32.5%** | **775** | **45.3%** | **937** | **54.7%** |

[1] Percent Dismissed and Not Dismissed are of the number Decided.
[2] Percent Settled and Adjudicated are of the number Not Dismissed
[3] Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the CSRS and FERS retirement systems.
Note: Percentages may not total 100% due to rounding.

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

| | Adjudicated[1] | Affirmed | | Reversed | | Mitigated Modified | | Other | |
|---|---|---|---|---|---|---|---|---|---|
| **Agency** | # | # | % | # | % | # | % | # | % |
| Office of Personnel Management[2] | 285 | 210 | 73.7 | 59 | 20.7 | 1 | 0.4 | 15 | 5.3 |
| Department of Veterans Affairs | 142 | 113 | 79.6 | 29 | 20.4 | 0 | 0.0 | 0 | 0.0 |
| Department of Homeland Security | 68 | 63 | 92.6 | 3 | 4.4 | 2 | 2.9 | 0 | 0.0 |
| Department of the Army | 68 | 57 | 83.8 | 10 | 14.7 | 1 | 1.5 | 0 | 0.0 |
| Department of the Navy | 57 | 47 | 82.5 | 9 | 15.8 | 1 | 1.8 | 0 | 0.0 |
| United States Postal Service | 50 | 40 | 80.0 | 5 | 10.0 | 5 | 10.0 | 0 | 0.0 |
| Department of the Air Force | 47 | 38 | 80.9 | 7 | 14.9 | 2 | 4.3 | 0 | 0.0 |
| Department of Defense | 42 | 32 | 76.2 | 9 | 21.4 | 1 | 2.4 | 0 | 0.0 |
| Department of Justice | 30 | 25 | 83.3 | 4 | 13.3 | 1 | 3.3 | 0 | 0.0 |
| Department of Agriculture | 25 | 19 | 76.0 | 5 | 20.0 | 1 | 4.0 | 0 | 0.0 |
| Department of the Interior | 21 | 18 | 85.7 | 3 | 14.3 | 0 | 0.0 | 0 | 0.0 |
| Department of the Treasury | 19 | 19 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Department of Commerce | 14 | 13 | 92.9 | 0 | 0.0 | 1 | 7.1 | 0 | 0.0 |
| Social Security Administration | 12 | 12 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Department of Transportation | 11 | 10 | 90.9 | 0 | 0.0 | 1 | 9.1 | 0 | 0.0 |
| Department of Labor | 10 | 9 | 90.0 | 1 | 10.0 | 0 | 0.0 | 0 | 0.0 |
| Department of Energy | 4 | 4 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Department of Housing and Urban Development | 4 | 2 | 50.0 | 2 | 50.0 | 0 | 0.0 | 0 | 0.0 |
| Federal Deposit Insurance Corporation | 4 | 4 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| General Services Administration | 4 | 2 | 50.0 | 1 | 25.0 | 1 | 25.0 | 0 | 0.0 |
| National Archives and Records Administration | 3 | 3 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Small Business Administration | 3 | 2 | 66.7 | 1 | 33.3 | 0 | 0.0 | 0 | 0.0 |
| Broadcasting Board of Governors | 2 | 2 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Smithsonian Institution | 2 | 2 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Central Intelligence Agency | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Department of Education | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |

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

| | Adjudicated[1] | Affirmed | | Reversed | | Mitigated Modified | | Other | |
|---|---|---|---|---|---|---|---|---|---|
| **Agency** | # | # | % | # | % | # | % | # | % |
| Department of Health and Human Services | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Department of State | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Environmental Protection Agency | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Equal Employment Opportunity Commission | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| Federal Election Commission | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| International Boundary and Water Commission: U.S. and Mexico | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| National Science Foundation | 1 | 0 | 0.00 | 0 | 0.0 | 1 | 100.0 | 0 | 0.0 |
| Securities and Exchange Commission | 1 | 1 | 100.0 | 0 | 0.0 | 0 | 0.0 | 0 | 0.0 |
| **Total** | **937** | **755** | **80.6** | **148** | **15.8** | **19** | **2.0** | **15** | **1.6** |

[1] Adjudicated, i.e., not dismissed or settled.
[2] Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the CSRS and FERS retirement systems.
Note: Percentages may not total 100 because of rounding.

## Cases Processed at Headquarters

The lack of quorum prevented MSPB from issuing any decisions from HQ during FY 2020. Therefore, there are no HQ case processing statistics contained in this AR. At the end of FY 2020, MSPB had 2,942 PFR cases pending at HQ. It may be useful to note that MSPB closed 18 PFR cases by order of the Clerk of the Board under the 2018 Policy regarding withdrawal of PFRs by authority of the Clerk.

## SIGNIFICANT COURT OPINIONS ISSUED IN FY 2020

Although the Board did not issue any decisions in FY 2020, as a service to MSPB's stakeholders, below are brief summaries of significant opinions issued by the CAFC and other Federal circuit courts in appeals of MSPB cases, and by the Supreme Court in cases that could impact MSPB case law.

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

#### Annuities/Service Computation

*Montelongo v. Office of Personnel Management*, 939 F.3d 1351 (Fed. Cir. 2019): MSPB affirmed OPM's denial of the petitioner's application for a civil service annuity under FERS on the ground that he did not have "at least 5 years of civilian service creditable under section 8411," as required by 5 U.S.C. § 8410. The court affirmed MSPB's decision, agreeing that the petitioner's time as a student cadet at the U.S. Military Academy at West Point was "military service," not "civilian service" that could be counted towards the 5 years of creditable civilian service required to be eligible for a FERS retirement annuity.

#### National Guard Technicians

*Dyer v. Department of the Air Force*, 971 F.3d 1377 (Fed. Cir. 2020): The court held that, notwithstanding amendments enacted by Congress in the 2017 NDAA, the Board does not have jurisdiction to review a state adjutant general's termination of a dual-status National Guard technician where the technician had been separated from the National Guard. In the NDAA, Congress stated that dual-status technicians "under certain circumstances" may appeal adverse actions to MSPB. The NDAA also stated, however, that such appeal rights do not extend beyond the state adjutant general "when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components...." The court determined that the petitioner's termination from dual-status employment as a result of his separation from the National Guard concerns "fitness for duty in the reserve components." Based on this determination, the court held that the AJ erred by finding jurisdiction to consider whether the petitioner had failed to maintain a condition of employment, akin to the type of Board review in cases where an adverse action is taken for failure to maintain a security clearance. The court stated that security clearance cases are inapposite because the petitioner's termination was not "for cause," but rather compelled by statute. The court therefore vacated the Board's decision and remanded with instructions to dismiss the petitioner's appeal for lack of jurisdiction.

#### Removal/Errors in Appointment

*Avalos v. Department of Housing and Urban Development*, 963 F.3d 1360 (Fed. Cir. 2020): Upon determining that the agency had improperly appointed the petitioner to a competitive service position without OPM approval, OPM instructed the agency to "regularize" the appointment. After conducting its own review, the agency concluded that it could neither certify that the petitioner's appointment met all merit and fitness requirements, nor find a separate non-competitive appointment authority. Accordingly, the agency removed the petitioner from his position before the end of his probationary period. The petitioner appealed his removal to MSPB, which found jurisdiction over the appeal and affirmed the agency's action. The Federal Circuit agreed with MSPB's finding of jurisdiction, rejecting the agency's arguments that the improprieties of the petitioner's appointment rendered his appointment invalid and divested him of MSPB appeal rights.

The court also rejected the agency's argument that the petitioner lacked MSPB appeal rights because he had not completed his probationary period, finding that the petitioner had the required 1 year of "current continuous service," including his Level III Senior Executive service, immediately preceding his agency appointment to satisfy the definition of an employee with MSPB appeal rights under 5 U.S.C. § 7511(a)(1)(A)(ii). On the merits, the court found that substantial evidence supported MSPB's determination that the agency could not reasonably certify that the petitioner's appointment was free from political influence and affirmed the removal. The court further found that any error arising from MSPB's failure to address whether the petitioner's removal promoted the efficiency of the service was harmless and that the agency's legitimate interest in removing the appearance of political influence in the appointment promoted the efficiency of the service. Finally, the court found no reversible error in MSPB's consideration of agency testimony to establish that removal, rather than seeking a variation from OPM, was required to regularize the appointment given the wide discretion afforded to the agency in determining what type of adverse action is necessary to promote the efficiency of the service as long as the decision bears some nexus to the reason for the adverse action.

**Removal/Fitness for Duty & Due Process**

*Ramirez v. Department of Homeland Security*, 975 F.3d 1342 (Fed. Cir. 2020): The petitioner challenged through arbitration the agency's decision to remove him from his position on the ground that he was unfit for duty following two psychiatric evaluations, both of which were inconclusive as to his ability to safely carry a service weapon and one of which recommended that he be restricted from a weapon-carrying position due to his "lack of full cooperativeness" during the evaluation. After the hearings, the arbitrator issued an interim award finding that the conclusions of the agency's medical witnesses fell "technically short of preponderantly proving" that the petitioner was unfit for duty and ordering him to undergo another psychiatric evaluation. The petitioner appealed the interim award to the Federal Circuit, which determined that it lacked jurisdiction because the award was not yet final. After the petitioner completed the arbitrator-ordered psychiatric evaluation, the arbitrator issued a final award affirming the petitioner's removal and denying his request to order the agency to produce the psychological assessments underlying the psychiatric evaluations. The petitioner appealed the final award to the Federal Circuit. The court disagreed with the petitioner's first argument that the arbitrator exceeded his authority by ordering a new psychiatric evaluation and reconsidering the merits of his removal after issuing the interim award, holding that an arbitrator does not lose the authority to further consider an issue by announcing an interim finding when, as here, the award expressly defers a final decision on that issue pending the availability of additional evidence. However, the court agreed with the petitioner's second argument that the agency violated his due process rights by not providing him the psychological assessments underlying the psychiatric examinations, holding that when an agency relies, directly or indirectly, on the results of a psychological assessment in justifying an employee's removal, the agency must provide the employee with a meaningful opportunity to review and challenge the data, analysis, and results of that assessment. Because the petitioner was denied this opportunity, the court vacated the final award and remanded the matter to the arbitrator for further proceedings. The court declined to address what remedies would be acceptable if the parties discovered on remand that the relevant evidence was no longer available, noting that this determination should be made by the arbitrator in the first instance.

**Removal/Performance (Chapter 43)**

*Harris v. Securities and Exchange Commission*, 972 F.3d 1307 (Fed. Cir. 2020): The petitioner was removed for unsatisfactory performance and alleged in part that her removal was motivated by race discrimination and retaliation for previous Equal Employment Opportunity Commission (EEOC)

complaints. Because the petitioner waived her discrimination allegations before the court, the court held that it had jurisdiction over what would have otherwise been a mixed case. The court rejected the Government's argument that the petitioner could not argue that her performance improvement plan (PIP) was pretextual or that her termination was predetermined without returning the appeal to mixed case status, finding that the petitioner remained free to press any argument not based on claims of prohibited discrimination or retaliation. The court further rejected the Government's argument that the petitioner's pending district court appeal – which alleged violations of Federal antidiscrimination laws arising from a variety of allegedly adverse actions by agency management preceding her termination, some of which were included in her Federal Circuit brief – belied her waiver of discrimination claims in the instant case. Rather, the court found that her district court case did not allege anything related to her removal or seek reinstatement as relief for her allegations. Therefore, that case did not diminish the Federal Circuit's authority to hear the instant case, minus the discrimination claims. Reviewing her appeal on the merits, the court rejected the petitioner's arguments that her PIP standards were not reasonable, that her removal was predetermined, and that she was not given an opportunity to improve. The court concluded that the record supported the AJ's determination that the agency substantiated its chapter 43 removal, despite the petitioner's claims of pretext.

**Removal/38 U.S.C. § 714**

*Sayers v. Department of Veterans Affairs*, 954 F.3d 1370 (Fed. Cir. 2020): The court held that Congress did not authorize 38 U.S.C. § 714 to be applied retroactively. By requiring the Board to apply a substantial evidence standard in reviewing a removal decision, instead of the preponderant evidence standard normally required for misconduct removals under 5 U.S.C. § 7701(c), and by preventing any mitigation of the penalty, Section 714 affects employees' substantive rights to relief from improper removal. Therefore, this falls into the category of cases in which there is a presumption against statutory retroactivity. *See Landgraf v. USI Film Prods.,* 511 U.S. 244, 271 (1994). Because the conduct forming the grounds for the petitioner's removal took place before enactment of the law, the court vacated his removal and remanded to the Board for further proceedings. The court also held that Section 714 authorizes the Board to review the entire "decision" taken by the VA, including the choice of penalty. Section 714's integration with Title 5 shows that the Board must ensure that the VA's decision, including the choice of penalty, accords with the law; but because the statute prohibits mitigation, if the Board finds the penalty is not supported, it must reverse the adverse action. Finally, the court rejected the petitioner's argument that the VA improperly applied a substantial evidence rather than a preponderant evidence standard for removal, finding that section 714 leaves the proper standard to the VA's discretion.

**Settlement Agreement – Breach**

*Sanchez v. Department of Veterans Affairs*, 949 F.3d 734 (Fed. Cir. 2020): The petitioner filed an MSPB petition for enforcement of a 16-year old settlement agreement, under which he had been assigned to work at a clinic under a compressed work schedule of 10 hours per day, 4 days a week. He alleged that the agency's unilateral alteration of his schedule to work 8.5 hours per day, 5 days a week, breached the settlement agreement. The MSPB AJ denied his petition for enforcement. The Federal Circuit affirmed, rejecting the petitioner's claim that because the agreement did not include a time limit, he was entitled to maintain the compressed schedule as long as he worked at the clinic. The court held that where a contract is silent as to duration, it is ordinarily treated not as operative in perpetuity but as operative for a reasonable time. What is "reasonable" is determined by the circumstances that existed at the time the contract was entered into. The court further held that without a fixed termination date, the agreement remains in force until its purpose is accomplished or impracticable. Under the facts at hand, the court found that the purpose of the settlement agreement was to relocate the petitioner to

mitigate his exposure to the allegedly hostile work environment at his original work site. The court determined that a 16-year period was a reasonable time for the alleged hostilities against the petitioner to dissipate; that the petitioner failed to meet his burden to show that the hostilities persisted after a 16-year period; and that the Board correctly dismissed the petition for enforcement because the petitioner failed to satisfy his ultimate burden to prove a breach of the contract.

**Suitability**

*Ricci v. Merit Systems Protection Board*, 953 F.3d 753 (Fed. Cir. 2020): The court held that OPM suitability regulations do not provide the Board authority to review a "de facto" or "constructive" debarment. The court first found that OPM regulations specify that a "debarment" occurs when, after evaluating the suitability criteria listed in 5 C.F.R. § 731.202(b), "an agency finds an applicant or appointee unsuitable" and "for a period of not more than 3 years from the date of the unfavorable suitability determination, den[ies] that person examination for, and appointment to, either all, or specific covered, positions within that agency." Second, the court noted that, when OPM promulgated its current regulations in 2008, it specifically rejected pre-2008 Board case law holding that the Board can exercise jurisdiction over "constructive" suitability actions. In its Federal Register notice, OPM stated that MSPB case law was premised upon an "incorrect reading of the authority that OPM conferred upon the Board." Third, the court stated that, regardless of the impact that non-selection for a specific position may have on an applicant's ability to secure future Federal employment, the Board is only vested with authority to review actions designated as appealable under any law, rule, or regulation. Finally, the court rejected the petitioner's novel argument that the Board's interpretation of "debarment" as excluding de facto debarment violates the Administrative Procedure Act (APA) because it "is a substantive rule that should have been promulgated through notice and comment procedures." The court held that the Board did not engage in "rulemaking," but instead applied OPM suitability regulations when adjudicating the case before it. The court noted that most Board adjudications, including this one, are specifically excluded from APA coverage. The court affirmed the Board's final decision, which dismissed for lack of jurisdiction.

**Timeliness**

*Buffkin v. Dept. of Defense*, 957 F.3d 1327 (Fed. Cir. 2020): The court reviewed an appeal of an arbitrator's decision in a removal case. The arbitrator had ruled that the appeal was untimely because the union did not invoke arbitration within 20 days of the end of mediation in the appeal, as required by the collective bargaining agreement. The court first reversed the arbitrator's holding that Federal Labor Relations Authority precedent should apply to the appeal, holding instead that MSPB precedent applies. Next, the court found that the end of the grievance procedure actually occurred at the conclusion of the parties' 2015 mediation, rather than at the conclusion of their 2012 mediation, as the arbitrator had held. Therefore, according to the contract's provision, arbitration should have been invoked within 20 days of the conclusion of the mediation in 2015. Because arbitration was invoked in 2014, it was not too late under the agreement. The court further found that the agency's conduct and past practice indicated that it did not think the request for arbitration was untimely. The court next considered the agency's argument that the union's invocation of arbitration was actually premature. The court found that the issue of timeliness was procedural rather than jurisdictional. However, the court remanded the case to the arbitrator to consider whether the union's premature invocation of arbitration was effective.

## USERRA

*McGuffin v. Social Security Administration*, 942 F.3d 1099 (Fed. Cir. 2019): As a preference-eligible employee, the petitioner had a one-year probationary period. When the Social Security Administration (SSA) began considering whether to terminate him, a senior attorney advised management that the petitioner must be terminated within his first year so that he does not accrue MSPB appeal rights, while a non-preference eligible employee could be terminated at any time during her two-year trial period. The Federal Circuit found that this was evidence of discriminatory motive under the USERRA because the timeline for obtaining MSPB appeal rights was intertwined with the petitioner's prior military service. "If employers could discriminate against veterans based on this one-year timeline, then what Congress created as a benefit to veterans for their service—a shortened timeframe for obtaining CSRA protection—could be turned against the veterans by employers." Consequently, the court held that the petitioner's preference-eligible veteran status was a substantial factor in the SSA's decision to terminate him during his probationary period, just four days before his one-year employment anniversary at the SSA. The court further determined that the SSA did not meet its burden of showing that it had a valid reason to terminate the petitioner during his probationary period. The court reversed the Board's decision that USERRA was not violated and remanded for determination of an appropriate remedy. Subsequently, the court denied the Government's petition for rehearing *en banc*.

## Whistleblowing/Court Jurisdiction & Discrimination Claims

*Young v. Merit Systems Protection Board*, 961 F.3d 1323 (Fed. Cir. 2020): The Federal Circuit held that an individual right of action (IRA) appeal cannot be a mixed case under *Perry v. Merit Systems Protection Board*, 137 S.Ct. 1975 (2017), because *Perry* applies to only petitions for review of adverse action appeals under 5 U.S.C. §§ 7701 and 7702. The court held that the Board's jurisdiction in an IRA appeal is limited to the whistleblowing allegations, and does not include review of discrimination claims. The court found that the petitioner's claims of Title VII violations do not fall within the scope of section 2302(b)(8) and are therefore not proper subjects for inclusion in an IRA appeal on that ground. The court further held that claims of retaliation for filing equal employment opportunity (EEO) complaints are covered by section 2302(b)(9)(A)(ii), and not remediable by an IRA appeal to the Board. Thus, despite the petitioner's discrimination claims, the Board properly adjudicated her case as an IRA and the court had jurisdiction over her judicial appeal. After finding that it had jurisdiction over the appeal, the court affirmed the AJ's decision dismissing the IRA appeal for lack of jurisdiction, agreeing that the petitioner did not make a non-frivolous allegation of jurisdiction with regard to her claims of time and attendance violations, because they were conclusory and lacked specificity. The court also rejected the petitioner's claims that the agency's alleged failure to accommodate her disabilities constituted a substantial danger to public health or safety within the meaning of section 2302(b)(8), finding that such actions posed a danger to the petitioner's health, not to public health. Finally, the court found that the petitioner's remaining allegations were not exhausted with the OSC.

## Whistleblowing/Knowledge-Timing Test

*Potter v. Department of Veterans Affairs*, 949 F.3d 1376 (Fed. Cir. 2020): The petitioner alleged that the agency retaliated against her for whistleblowing by, among other things, canceling a job vacancy for which she had applied. The AJ determined that the petitioner did not meet her burden of showing, under the knowledge-timing test, that her protected disclosures contributed to the alleged reprisal. On appeal to the Federal Circuit, the parties agreed that the AJ's fact finding related to this alleged reprisal was not supported by substantial evidence. The court found that the record clearly showed

that the VA Medical Center chief of staff, who had withdrawn the job posting, had knowledge of the petitioner's whistleblowing because she had sent him an email and he had responded to her email. The court therefore vacated the AJ's determination that the petitioner did not make a prima facie case that her whistleblowing was a contributing factor to the agency's nonselection for the withdrawn vacancy announcement. The court remanded to the Board with instructions to consider whether the petitioner presented evidence sufficient to satisfy the knowledge-timing test, or if the petitioner otherwise presented evidence sufficient to demonstrate a prima facie case of whistleblower reprisal.

**Whistleblowing/Merits Analysis (Carr Factors)**

*Cerulli v. Dept. of Defense*, 817 Fed. Appx. 964 (Fed. Cir. 2020): The petitioner, a Fire Protection Inspector, requested leave to avoid a coworker who had previously made a threat of violence in the workplace. After the petitioner repeatedly expressed concerns about coming to work when the coworker was present, locked himself in his office, and armed himself with a paring knife, his supervisor ordered him to undergo a fitness for duty examination. The petitioner did not attend his scheduled fitness examination, but attended one the following month, during which he was cleared for duty. The agency proposed a 30-day suspension for failing to attend the initial examination, which was mitigated to a 10-day suspension. The petitioner filed an IRA appeal alleging that the examination and suspension were in retaliation for his email expressing safety concerns about his coworker. The AJ found that he had made a protected disclosure and had established that his disclosure was a contributing factor in the agency's personnel actions, but the agency had proven by clear and convincing evidence that it would have taken the same disciplinary actions notwithstanding the disclosure. Analyzing the factors in *Carr v. Soc. Sec. Amin.*, 185 F.3d 1318 (Fed. Cir. 1999), the court held that the AJ reasonably found that the agency proved by clear and convincing evidence that it would have taken the same personnel actions in the absence of the protected disclosure. The court further held that any failure by the AJ to find that he made additional protected disclosures was harmless, because the agency did not rely on the repeated nature of the disclosures to justify its personnel actions. The court disagreed that the petitioner's conduct could not be separated from the content of his disclosures, noting that the WPA does not require that an adverse action be based on facts completely separate and distinct from protected disclosures. Therefore, the court affirmed the AJ's decision.

*Higgins v. Department of Veterans Affairs*, 955 F.3d 1347 (Fed. Cir. 2020). The petitioner, a VA employee, filed an IRA appeal of his suspension for using disrespectful language towards his supervisor and his subsequent removal for disruptive behavior and use of profane language. The AJ found that the petitioner established a prima facie whistleblower defense, determined that the petitioner failed to establish that the agency had a motive to retaliate, and concluded that the agency would have removed the petitioner even in the absence of the protected whistleblower activity. After the AJ sustained the suspension and removal, the petitioner appealed the decision to the Federal Circuit. On appeal, the petitioner asserted that the AJ failed to consider his medical evidence of post-traumatic stress disorder (PTSD) or whether the suspension and removal were reasonable. The court determined that, although the AJ's analysis of the petitioner's PTSD was cursory, the AJ properly balanced the petitioner's PTSD with the severity of his misconduct and the other *Douglas* factors (*Douglas v. Veterans Administration, 5 M.S.P.R. 280, 305 (1981)*), and that PTSD was one of several factors considered by the agency and MSPB. The court also determined that the AJ properly did not apply a per se rule that a person suffering from mental illness is always responsible for his conduct. Contrary to the claim made by the petitioner, the court concluded that the AJ did not abuse his discretion by excluding witnesses whose testimony was irrelevant and/or redundant, and affirmed the AJ's decision upholding the petitioner's removal.

**Whistleblowing/Retaliatory Investigation**

*Sistek v. Dep't of Veteran Affairs*, 955 F.3d 948 (Fed. Cir. 2020): Addressing whether an agency investigation of an employee can be a retaliatory action under the WPA, the court found that such investigations in and of themselves do not qualify as personnel actions. The petitioner made numerous disclosures of alleged improper agency practices to the inspector general, and later he was a subject of an investigation into an unrelated matter that led to a letter of reprimand. He filed an OSC complaint and then an MSPB appeal. The AJ dismissed the appeal, finding that an investigation is not a covered personnel action under the WPA. On appeal, the court noted that the WPEA rejected proposals to add retaliatory investigations as covered actions and provided instead only additional relief when the employee prevailed on related covered actions. The petitioner claimed that the alleged retaliatory investigation was a covered personnel action because it was a significant change in working conditions, as recognized in *Russell v. Department of Justice*, 76 M.S.P.R. 317 (1997). The court acknowledged that an investigation that created a hostile work environment could qualify on that ground, but found that here, the investigation leading to a reprimand was routine and did not reach the level of a hostile work environment. The court also distinguished this case from the facts in *Russell*, where the investigation was so closely intertwined with a covered action as to be found a pretext to search for a basis to retaliate against a whistleblower, while in this case the investigation was initiated by an official who was unaware of the petitioner's whistleblowing.

**Significant Opinions Issued by Other Circuit Courts**

*Baca v. Department of the Army*, 973 F.3d 1140 (10th Cir. 2020): The petitioner was removed from his position as Supervisory Engineer pursuant to charges of conduct unbecoming a Federal employee; interfering with an agency investigation; abusive, offensive, disgraceful or inflammatory language; and lack of candor. At MSPB, the petitioner alleged as affirmative defenses to the removal that he was removed in reprisal for whistleblowing and for filing an EEO complaint. MSPB affirmed the agency's decision based on the charges of conduct unbecoming a Federal employee and abusive, offensive, disgraceful or inflammatory language. The petitioner appealed MSPB's decision to the Tenth Circuit, which affirmed. The court first determined that the All Circuit Review Act gave it jurisdiction to review MSPB appeals when whistleblower reprisal is raised as an affirmative defense to an adverse action, as opposed to being raised via an IRA appeal. The court further determined that, because the petitioner waived his discrimination claim before the court, it retained jurisdiction to review the petitioner's claim. Regarding the merits, the court first agreed with the AJ's conclusion that the petitioner's attempts to intimidate a witness into providing a statement on behalf of a third party did not constitute lawfully assisting an individual in the exercise of that individual's assault complaint within the definition of 5 U.S.C. § 2302(b)(9). The court then affirmed the AJ's remaining finding that the petitioner's complaint regarding the assault of his co-worker did not constitute protected whistleblowing activity, because substantial evidence supported the AJ's conclusion that the petitioner could not have reasonably believed the incident happened as he described it.

*Delgado v. Department of Justice*, 979 F.3d 550 (7th Cir. 2020): The petitioner, a special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives, filed an IRA appeal with MSPB in 2014, alleging 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 Board dismissed that appeal for lack of jurisdiction based on its finding that he 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 further held that the petitioner had provided sufficient information to qualify as a protected disclosure of a violation of law. Upon remand, the AJ adjudicated the petitioner's original appeal alongside a new appeal filed by the petitioner, in which he alleged that the agency denied him additional promotion opportunities based on his disclosing the same information about the law enforcement incident to other individuals. In both the remanded and new appeals, the AJ denied the petitioner's requests for corrective action, finding that the petitioner failed to prove by preponderant evidence that he reasonably believed he disclosed a violation of law when disclosing the law enforcement incidents. The petitioner appealed both decisions to the Seventh Circuit, where the court again reversed the AJ's findings. Starting with the petitioner's disclosures, the court found that, because it already determined in the first *Delgado* decision that the petitioner's disclosures regarding the law enforcement incident were protected whistleblower disclosures, the law of the case doctrine required that the AJ apply this finding to the petitioner's two appeals involving those disclosures. The court then addressed the personnel actions the petitioner alleged were reprisal for his disclosures. The court found that the AJ had already found that his disclosures were a contributing factor to the agency's failure to promote him in 2014 for his first appeal, and that the petitioner had introduced sufficient evidence to establish that his disclosures were a contributing factor to the agency's failure to select him for two separate positions in 2016 for his second appeal. The court further found that, while the AJ did not make a determination as to whether the agency proved by clear and convincing evidence that it would have taken the same personnel actions in the absence of the petitioner's disclosures, the record was sufficiently established to allow the court to make such a determination. On this point, the court found that the agency failed to meet its burden. As a result, the court vacated the decision in both appeals, found for the petitioner, and remanded the matter for a calculation of damages.

*Punch v. Bridenstine, et al.*, 945 F.3d 322 (5th Cir. 2019): The petitioner was removed from her Program Analyst position for unacceptable performance. She initially appealed her removal to MSPB, alleging that her removal was discriminatory based on her race, color, sex, and age. She subsequently filed a discrimination complaint with her agency's EEO office (EEO Complaint 1), alleging that her "unacceptable" performance rating, her placement on a performance improvement plan, and her proposed removal were also based on discrimination. In February 2016, MSPB issued a decision affirming the petitioner's removal and finding the petitioner failed to prove her affirmative defense of discrimination. In March 2016, the petitioner appealed MSPB's decision to the EEOC (EEO Complaint 2) pursuant to mixed case procedures. In April 2016, the petitioner also appealed MSPB's decision to the Federal Circuit. In May 2016, the petitioner filed a complaint regarding the charges of EEO Complaint 1 in the Southern District of Texas. In April 2017, the Federal Circuit determined that, because the petitioner's appeal involved discrimination claims, her appeal should be transferred to the Southern District of Texas. At the Southern District of Texas, a magistrate judge found that the petitioner's complaint related to EEO Complaint 2 involved the same set of facts as her transferred complaint, and thus consolidated the two matters. Analyzing the two cases together, the magistrate judge determined that the complaint related to EEO Complaint 2 must be dismissed, because the petitioner filed her MSPB appeal regarding the removal before filing EEO Complaint 2, and thus was precluded by the CSRA's election of remedies provisions. The magistrate judge then found that, because the petitioner filed her Federal Circuit appeal 58 days after the issuance of MSPB's decision, she failed to meet the 30-day statutory deadline for district court complaints and therefore was untimely in district court, requiring dismissal of that complaint, as well. The district court judge adopted the magistrate judge's recommended disposition, and the Fifth Circuit affirmed. The Fifth Circuit found that the petitioner improperly attempted to bifurcate the case by filing claims in different fora over different aspects of the case. The court agreed with other circuits that

bifurcation of Federal employment claims is not allowed, and held that the first choice the petitioner made to file her appeal with MSPB was a binding, irrevocable election. The court further held that, since the petitioner's complaint included claims of discrimination, her request for judicial review of MSPB decision was required to be filed within 30 days of MSPB's decision. Because she did not file her appeal with the Federal Circuit until 58 days after MSPB's decision issued, her request was untimely filed and therefore properly dismissed.

**Decisions by the Supreme Court That Could Affect MSPB Case Law**

**Title VII/Sex Discrimination**

*Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (June 15, 2020): In a 6-3 decision addressing appellate decisions in the Second, Sixth, and Eleventh Circuits, the Supreme Court held that firing an employee because the employee is gay or transgender violates Title VII of the Civil Rights Act of 1964. The Second Circuit had held that the termination of a skydiving instructor because he was gay violated Title VII. The Eleventh Circuit had held that a county's dismissal of a child welfare services coordinator because he was gay did not violate Title VII. The Sixth Circuit had held that firing a funeral director and embalmer who announced that she would be transitioning and living as a woman violated Title VII. The Supreme Court framed the question as "whether an employer can fire someone simply for being homosexual or transgender," and noted that when an employer fires someone for traits or actions that it would not question in members of a different sex, then the necessary and undistinguishable role played by sex in that decision is exactly what Title VII prohibits. Dismissing arguments that Title VII did not specifically address sexual orientation or gender identity, the Court reasoned that discrimination against lesbian, gay, bisexual, and transgender employees "necessarily entails discrimination based on sex; the first cannot happen without the second." The opinion also noted that basing the interpretation of a law that Congress had passed on subsequent but failed legislative efforts to amend Title VII to expressly include sexual orientation and gender identity was "particularly dangerous."

**Federal Sector Age Discrimination/Burden of Proof**

*Babb v. Wilkie,* 140 S.Ct. 1168 (April 6, 2020): In an 8-1 decision authored by Justice Alito, which reversed a decision by the Eleventh Circuit Court of Appeals, the Supreme Court ruled that 29 U.S.C. § 633a(a), the Federal-sector provision of the Age Discrimination in Employment Act (ADEA) of 1967, demands that personnel actions be untainted by any consideration of age, but that but-for causation is important in determining the extent of the available remedies. The opinion relied on the plain language of the statute which states that personnel actions affecting Federal employees "shall be made free from any discrimination based on age." This language is different from other discrimination statutes, including the part of the ADEA that applies to the private sector, which typically prohibit employers from making employment decisions "because of" protected characteristics. The Supreme Court has consistently interpreted statutes using the "because of" formulation as requiring but-for causation to establish liability. The Court dismissed the Government's policy argument that it would be "anomalous to hold the Federal Government to a stricter standard than other employers," emphasizing other areas of the law where the Government is held to stricter non-discrimination standards. Turning to the key question of remedies, the majority noted that plaintiffs unable to establish that unlawful discrimination was the but-for cause of an adverse employment action would not be entitled to relief such as hiring, reinstatement, back pay and compensatory damages.

## SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2020

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

MSPB's research and publications were cited at least 80 times during FY 2020, in diverse outlets such as national and specialty newspapers, online newsletters, radio, and publications from good Government groups. Notable examples include citations to MSPB's studies on sexual harassment in GAO's report and testimony about sexual harassment at VA; a bipartisan, bicameral congressional letter to VA about sexual harassment; references to sexual harassment studies and case law in a briefing report by the U.S. Commission on Civil Rights; and an MSPB studies report on Adverse Actions cited in the CAFC's decision in *Sayers v. VA*.

During FY 2020, MSPB also conducted 8 outreach events related to studies work that ranged from the presentation of data related to sexual harassment behaviors and types of harassment for a Department of the Treasury Inspector General report and data related to discrimination at VA. Other events included meetings and interviews to discuss MSPB's research briefs.

### Publications Issued

MSPB did not issue any formal reports to the President and Congress under 5 U.S.C. § 1204(a)(3) because of the continued lack of quorum. However, MSPB published three editions of its *IoM* newsletter, which included articles on various topics such as pay equity, delegated examining unit certification, telework, supervisory training, professional isolation, recruitment, and survey response rates. In addition, MSPB published one research brief in FY 2020 and one in early FY 2021.

*The State of the Federal HR Workforce: Changes and Challenges* (May 2020) presents findings from MSPB's study of Federal HR offices and staff to—

- Discuss how the role of HR has changed over the past 25 years.
- Examine the expectations that customers of Federal HR staff have for the HR function.
- Describe barriers to making HR offices and HR staff more consultative.

*The Importance of Job Fit for Federal Agencies and Employees* (October 2020) draws on professional literature and selected items from the 2016 Merit Principles Survey (MPS) to—

- Describe three distinct ways employees may fit with their jobs. Specifically, their knowledge, skills, and abilities may match those required by the job; their daily material and psychological needs may be fulfilled by the job; or the job may align with their core beliefs about who they are or who they want to be.
- Discuss how job fit relates to workplace outcomes such as job satisfaction, employee engagement, performance appraisal ratings, and an employee's intent to leave.
- Outline actions in areas such as job design, hiring, training and development, and performance management that might help Federal managers and employees improve job fit.

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

As required by statute,[18] MSPB reviews and reports on the significant actions of OPM, including an analysis of whether those actions are in accord with MSPs and free from PPPs.[19] OPM's actions may broadly affect the Federal workforce, multiple Federal agencies, and applicants for Federal jobs. Each of OPM's actions listed below has the potential to impact the effectiveness and efficiency of the Federal workforce (MSP 5) or fair and equitable treatment in a variety of contexts (MSP 2). Depending on the nature of a particular OPM action, it has the potential to affect or involve other specific MSPs. Additional MSPs that may be affected by a particular OPM action are noted in the discussion of each action. In addition to tracking OPM's actions in FY 2020, MSPB requested and received input from OPM on the status of selected significant actions.[20]

### OPM Leadership and Context

#### *OPM Leadership*

For the first half of FY 2020, OPM was led by Director Dale Cabaniss, who was confirmed by the Senate on September 11, 2019. Director Cabaniss resigned on March 17, 2020. For the remainder of the fiscal year, OPM Deputy Director Michael Rigas served as acting director. For the six-year period beginning in January 2015 and ending in December 2020, OPM was led by seven different individuals, four in an acting capacity[21] and three who were nominated by the President and confirmed by the Senate.[22]

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

Long-term trends (such as delegation to agencies and the increasing number of agency-specific personnel authorities) and recent developments (such as proposals to restructure OPM[23] and the interchange of OPM and OMB officials[24]) have affected how Federal Government HR policy is formulated and communicated. This makes it more difficult to understand the respective roles of central management and employing agencies, and to fully comprehend the intent and direction of policy changes.

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[18] 5 U.S.C. § 1206.

[19] 5 U.S.C. § 2301 and 5 U.S.C. § 2302, respectively.

[20] This analysis is not a comprehensive digest of OPM activities, as OPM has many programs and responsibilities that do not directly affect MSPs and PPPs. Also, this summary does not discuss in detail every OPM significant action that was underway or completed in FY 2020. Instead, it should be read in conjunction with previous MSPB reports of OPM's significant actions. If we previously commented on a significant action in progress that was completed in FY 2020 we will not repeat those comments here. Also, when we have commented on operational OPM programs in the past, and no significant changes have been made to those programs, MSPB's previous comments remain applicable.

[21] Beth Cobert, Kathleen McGettigan, Margaret Weichert, and Michael Rigas.

[22] Katherine Archuleta, Dr. Jeff T.H. Pon, and Dale Cabaniss.

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

[24] For example, OPM's Deputy Director, serving concurrently as Acting Director, also serves concurrently as the Acting Deputy Director for Management at OMB as well as the Acting Federal Chief Information Officer at OMB.

### *Congressionally-Mandated Study of OPM*

The NDAA for FY 2020, Pub. L. 116-92 (December 20, 2019), required the director of OPM to contract with the National Academy of Public Administration (NAPA) to conduct a study addressing a number of elements with respect to OPM and to report findings and recommendations from the study. The Act prohibited any restructuring of OPM to occur until 180 days after the final report is submitted to Congress. The Act gives NAPA one year to complete the study.[25] OPM and NAPA finalized the contract for the study in March 2020.[26]

The required elements to be addressed in the study include:[27]

- The statutory mandates assigned to OPM and the challenges associated with the execution of those mandates.
- The non-statutory functions, responsibilities, authorities, services, systems, and programs performed or executed by OPM, OPM's justification for carrying out these functions, and the challenges associated with these functions.
- The means, options, and recommended courses of action for addressing the challenges OPM faces in carrying out its statutory mandates and non-statutory functions, including an analysis of the benefits, costs, and feasibility of each option and the effect of each on labor-management agreements.
- A timetable for the implementation of options and recommended courses of action.
- Statutory or regulatory changes necessary to execute any course of action recommended.
- The methods for involving, engaging with, and receiving input from other Federal agencies, departments, and entities potentially affected by any change in the structure, functions, responsibilities, authorities of OPM that may be recommended.
- The views of identified stakeholders, including other Federal agencies, departments, and entities; non-Federal entities or organizations representing customers or intended beneficiaries of OPM's functions, services, systems, or programs; and such individual customers and intended beneficiaries.

### *Internal OPM Reorganization*

In August 2020, OPM launched a new Human Capital Data Management and Modernization (HCDMM) Directorate. HCDMM was established to enhance the collection, utilization, and accessibility of the HC management data that can provide insights and support decision-making for Federal agencies across Government. To support an OPM enterprise-wide approach, the directorate will consolidate human and financial resources that were previously part of Federal Data Solutions (within the Office of the Chief Information Officer), the Office of Strategy and Innovation Data Analysis Group, and the HR Line of Business.[28]

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[25] § 1112 of Pub. L. 116-92.

[26] Nicole Ogrysko, "With the contract finalized, NAPA's congressionally-mandated OPM study is underway," Federal News Network, March 31, 2020. Also see NAPA's United States Office of Personnel Management Independent Assessment website.

[27] §§ 1112(b)(3)(A) through (G) of Pub. L. 116-92.

[28] OPM Press Release, OPM Announces New Human Capital Modernization Directorate, August 4, 2020.

### *Activities Related to the COVID-19 Pandemic*

As did other Federal agencies, OPM worked to continue its missions and functions impacted by the pandemic. As the Federal Government's central HR agency, OPM has a unique role in helping Federal agencies gauge and address the effects of COVID-19 on Federal employees and workplaces. Beginning in February 2020, OPM issued numerous memoranda and other publications containing guidance for agencies to better respond to the pandemic. The guidance described a number of pertinent HR flexibilities and procedures to continue Government operations while helping to slow the spread of the virus. The guidance can be accessed at OPM's Coronavirus website.

As noted below, because of the operating and workforce stresses the pandemic created for OPM and agencies across the Federal Government, OPM suspended HC review activities during the fiscal year and also delayed fielding the 2020 Federal Employee Viewpoint Survey (FEVS) until later in the fiscal year.[29]

## New Significant Actions

### *Improving Applicant Assessment*

On June 26, 2020, Executive Order (EO) 13932 on *Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates* was released. EO 13932, drawing on the principle that Federal hiring should be based on merit, argues that the best way to achieve that is through skills- and competency-based assessments. Specifically, the EO contends that, when making hiring decisions, the Federal Government relies too much on educational attainment and too little on direct assessment of candidates' actual skills. To remedy this deficiency and to modernize Federal hiring, OPM will: (1) review and revise job classification and qualification standards to eliminate unnecessary degree requirements, and (2) improve the use of assessments in the Federal hiring process to focus on those that measure applicant skills rather than relying on self-reported information and level of education. OPM issued its plan and timeline to implement the EO 13932[30] in July 2020, and it issued for agency comment a list of the occupational series with positive education requirements in September 2020.[31]

*Significance*

There are a number of MSPs and PPPs that relate to hiring and applicant assessment. For example, MSP 1 requires that recruitment be from qualified individuals to achieve a workforce representative of society, and MSP 2 notes that applicants should receive fair and equitable treatment. PPP 1 prohibits discrimination for or against any applicant for employment, and PPP 4 prohibits influencing a person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

The practical effects of EO 13932's policy change, on both applicants and hiring decisions, will depend greatly on how much agency practices change. Although OPM establishes general

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[29] See: (a) OPM Memorandum for Heads of Executive Departments and Agencies, *2020 Federal Employee Viewpoint Survey Delay*, March 31, 2020; (b) OPM Memorandum for Heads of Executive Departments and Agencies, *2020 Office of Personnel Management Federal Employee Viewpoint Survey*, June 25, 2020; and (c) OPM Memorandum for Heads of Executive Departments and Agencies, *2020 Federal Employee Viewpoint Survey Delay*, July 9, 2020.

[30] OPM Memorandum for Heads of Executive Departments and Agencies, *Implementation of EO 13932; Determining Qualifications and the Use of Assessment Tools When Filing Positions*, July 31, 2020.

[31] OPM Memorandum for Chief Human Capital Officers, *Draft General Schedule Qualifications Policy – EO 13932; Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates*, September 25, 2020.

qualification/entry requirements and general rules and processes for competitive examination, agencies have delegated authority to apply those requirements, rate and rank applicants, and select among applicants. For example, even in the absence of a requirement for a degree or specific education to *qualify* for a position, a hiring manager might prefer to consider or hire individuals with a degree or particular credentials. MSPB does not know the extent to which agencies or managers hold or act on such preferences. However, MSPB's research has found that agencies do often use assessments that are not the best predictors of performance. In July 2018, MSPB published the perspectives brief, *Improving Federal Hiring Through Better Assessment*, which summarizes MSPB's research in this area and discusses the features of good assessment, the types of assessments agencies typically use (self-reported information and education level are quite popular), and steps agencies can take to improve their assessment processes.

In response to MSPB's annual query to OPM regarding its significant actions, OPM noted that it will be developing a number of tools to help agencies with the implementation and change management process, as well as conducting focus groups with agency subject matter experts to gather data related to agencies' current use of assessments. Implementation is key to improving applicant assessment. Developing good assessments takes expertise and funding—something many agency HR offices do not have. OPM does have a program—USA Hire—that already has validated assessment tools for a multitude of Federal occupations at most grade levels. Unfortunately, the assessments are only available on a reimbursable basis, and are relatively expensive for some agencies. Given the EO's push to improve hiring, this seems like an ideal time for OPM to explore how it can help make assessments more accessible to agencies that do not have the resources to develop them on their own.

### *Human Capital Reviews (HCRs)*

In FY 2019, as part of its statutory responsibility for assessing whether Federal agencies manage their HC programs effectively and efficiently, OPM began conducting HCRs with all Chief Human Capital Officers Act agencies to discuss Governmentwide issues, agency-specific initiatives and topics of interest, and opportunities for OPM and agencies to improve and modernize Federal HC management.[32]

In March 2020, OPM released the FY 2019 Human Capital Reviews Report.[33] As noted in the report, HCRs provide a mechanism for helping agencies determine whether their HC management and programs support agency goals. Agencies have an opportunity, during the HCR, to be candid with OPM about significant challenges experienced in achieving goals and provide OPM with an understanding of how strategic HC management is contributing to mission accomplishment.

In the report, OPM noted that a number of significant challenges for agencies surfaced during the HCRs, which bear out OPM's need to examine issues in partnership with agency HC leaders. Among these challenges are:

- Administering compensation and benefits that lack flexibility.
- Identifying and closing skills gaps.
- Providing continuous learning and employee development.
- Recruiting and retaining employees.

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[32] OPM Memorandum for Agency Heads, *Human Capital Reviews*, December 11, 2019; and OPM Memorandum for Heads of Executive Departments and Agencies, *Human Capital Reviews*, February 13, 2019.

[33] OPM Memorandum for Heads of Executive Departments and Agencies, *FY 2019 Human Capital Review Summary Report*, March 31, 2020.

- Adopting shared services and advanced systems.
- Implementing effective performance management systems.
- Adopting robotic process automation and artificial intelligence.
- Advancing HC data analytics.
- Achieving a strategic HC management evaluation system.

In March 2020 OPM announced that it would not be conducting HC Review activities in FY 2020 to give agency leadership more time to focus on issues related to COVID-19.[34]

*Significance*

As noted in the review of OPM's significant actions in 2019, agency HC management programs must be efficient and effective in order to support the MSPs and to avoid PPPs.[35] Therefore, OPM's attention to improving those agency programs also underpins each of the MSPs and helps deter PPPs. These current efforts (generally prescribed by 5 CFR part 250 subpart B) to standardize, evaluate, and review agency HC programs are essential to the functioning of the merit system. As the areas identified for improvement by OPM run the gamut of the management of Federal HR, MSPB focuses on OPM's findings regarding the functioning of Federal agency HC programs.

Two of the major initiatives that agencies identified as promising to improve their HR operations were robotic process automation (RPA) and a shared services approach to consolidate HR functions. Agencies expressed excitement about the potential for RPA to handle purely transactional work that will free employees in HR, and other occupations, to focus their expertise and energy on more complex (and therefore more enriching) work. Agencies are also aware that the adoption of RPA and similar technologies will help the HR community move to higher value work and increase capacity within the HR function overall.[36]

Some agencies are using a shared services approach to consolidate functions, including HR, while others are in the early stages of standing up an HR shared services capability. One agency is moving in the opposite direction, departing from its existing shared services business model.[37] In any event, most agencies viewed consolidating data, functions, and physical offices as challenges.

Neither HR process automation nor shared services is new, and these two initiatives have usually gone hand-in-hand. With advancements in technology, the National Performance Review of the early to mid-1990's envisioned that HR offices and HR specialists would become strategic business partners. A strategic business partner would understand the organization's mission and be part of the management team, having a "seat at the table" to analyze organizational problems, develop proactive solutions, and share accountability for organizational results.[38]

The advent of electronic personnel records and electronic HR systems made it possible to deliver many HR services remotely, enabling agencies to centralize or consolidate many HR functions, as led by OPM's HR Line of Business initiative. During this time, agencies hoped that eliminating human labor from HR processes would both enable HR offices to shrink while maintaining service

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[34] OPM Memorandum for Heads of Executive Departments and Agencies, *Human Capital Reviews in FY 2020*, March 20, 2020.

[35] MSPB, *Annual Report for FY 2019*, January 31, 2020, p. 33.

[36] OPM, *Fiscal Year 2019 Human Capital Reviews Report*, March 2020, p. 8.

[37] OPM, *Fiscal Year 2019 Human Capital Reviews Report*, March 2020, p. 9.

[38] MSPB, *The State of the Federal HR Workforce: Changes and Challenges*, May 2020, p. 2.

levels and help HR staff spend more time providing valuable consulting services and less time processing paper.[39] As noted in 2005, shared services might provide a chance for agencies to divest themselves of routine work and focus their resources on a more consultative, strategic role. Fundamental change in some areas of Federal HR management, particularly hiring, however, is still required to attain the simplified, standardized, and functional processes needed for shared service initiatives to realize their full potential.[40]

While noting that technology continually changes and presents new possibilities, it is striking that agencies are still seeking ways—now using RPA—to enable HR staff to focus on more complex work and to increase capacity within the HR function. In addition, there are trade-offs to be considered when moving to a consolidated or shared services HR model. Physical proximity is relevant to the vision of HR specialists as strategic business partners. To be effective in that role, HR staff must understand the mission of the serviced organization and the challenges that line managers face in recruiting, selecting, developing, and managing people. This requires HR staff to establish strong relationships with the managers they support.[41]

In the 2016 MPS, MSPB asked managers about the location of their servicing HR office. Although approximately one-third of supervisors receive HR services from within their own building (onsite), most reported that HR staff are offsite. The days when a manager could walk down the hall and discuss HR questions and issues in person are apparently over. By the same token, most HR staff can no longer routinely meet face-to-face with their client managers or organizations.[42]

The HR staff we interviewed generally believed that their customers would be more satisfied with the service they provide if the HR staff were onsite. These perceptions are supported by our survey of agency leaders, as 66 percent of supervisors were satisfied to some extent or to a great extent with staffing actions when their HR staff was located in their building. That figure was only 53 percent among managers whose HR staff was located outside of the local commuting area.[43]

Beyond satisfaction with services, MSPB also found that agency supervisors and managers have more positive views of their HR staff when they are co-located. Across the various HR disciplines, supervisors and managers were more likely to agree that their servicing HR staff was knowledgeable, hard-working, responsive, and effective when they were on-site rather than located remotely.[44]

### *Guidance on the Appointment of Political Appointees into the Career Service during the 2020 Presidential Election Period*

In September 2020, OPM issued a memorandum to remind agency heads of the need to ensure all personnel actions remain free of political influence or other improprieties during the presidential election period.[45] Specifically, the memorandum noted that agencies must seek prior approval from OPM before appointing a current or recent political appointee to a competitive or non-political excepted service position at any level. A former or recent political appointee is someone who held a

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[39] MSPB, *The State of the Federal HR Workforce: Changes and Challenges*, May 2020, p. 3.

[40] MSPB, *Annual Report Fiscal Year 2005*, April 2006.

[41] MSPB, *The State of the Federal HR Workforce: Changes and Challenges*, May 2020, p. 6.

[42] MSPB, *The State of the Federal HR Workforce: Changes and Challenges*, May 2020, p. 6.

[43] MSPB, *The State of the Federal HR Workforce: Changes and Challenges*, May 2020, p. 6.

[44] MSPB, *The State of the Federal HR Workforce: Changes and Challenges*, May 2020, pp. 7-8.

[45] OPM Memorandum for Heads of Departments and Agencies, *Appointments and Awards During the 2020 Presidential Election Period*, September 22, 2020.

political appointment covered by OPM's policy within the previous five-year period. OPM reviews these proposed appointments to ensure they comply with merit system principles and applicable civil service laws. In addition, OPM will continue to conduct merit staffing reviews of proposed career SES selections that involve a current or former political, Schedule C or non-career SES appointee before such cases are formally presented to a Qualifications Review Board.[46]

*Significance*

Guarding against undue political influence in the career civil service is a foundational value of the Federal merit systems, and ensuring that personnel actions are made without regard to political affiliation relates to a number of MSPs. For instance, MSPs 1 and 8 require, respectively, selection based on relative ability, knowledge and skill; and that employees be protected against coercion for partisan political purposes.

Although the number of political appointees that agencies place in career positions appears to be relatively small, OPM's efforts in this area remain vital to ensuring that appointments and other personnel actions are made without regard to political affiliation or other non-merit factors. In June 2010, GAO released a review of the conversions of employees from political to career positions during the period from May 2005 to May 2009.[47] During that four-year period, GAO found that the 42 departments it reviewed converted 139 individuals from political to career positions. GAO recommended that OPM review only 5 of the 117 conversions that were made at the GS-12 level or higher. In these five cases, GAO noted that agencies may not have adhered to MSPs, followed proper procedures, or may have engaged in PPPs or other improprieties.

An August 2017 GAO report detailed its review of political conversions to career positions for the period January 1, 2010 to March 17, 2016. GAO reviewed the 30 Departments and Agencies who had requested at least one conversion during this period. OPM denied 21 requests for varying reasons, such as bypassing qualified veterans, and referred 9 denied cases to OSC. Of the 78 approved requests, agencies followed through and converted 69 political appointees to career positions. During the period, agencies completed 7 conversions without obtaining OPM approval; OPM completed post-appointment reviews for 4 of these 7 conversions, denying all 4. For each of the 4 denied cases, the agencies undertook various remedies, such as re-advertising positions, in response to OPM's concerns. OPM did not complete a review for the 3 other conversions because the appointees were no longer in the career positions to which they were converted.[48]

As discussed earlier in this Annual Report, in a recent decision, *Avalos v. Department of Housing and Urban Development*, the U.S. Court of Appeals for the Federal Circuit emphasized the importance of avoiding even the appearance of political impropriety when hiring, and reminded agencies and managers that there are consequences for failing to follow rules and observe merit system principles.[49]

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[46] OPM Memorandum for Heads of Departments and Agencies, *Appointments and Awards During the 2020 Presidential Election Period*, Attachment: *Guidelines on Processing Certain Appointments and Awards During the 2020 Election Period*, September 22, 2020.

[47] GAO, *Conversion of Employees from Political to Career Positions May 2005 – May 2009*, GAO-10-688, June 28, 2010.

[48] GAO, *Actions Needed to Improve Documentation of OPM Decisions on Conversion Requests*, GAO-17-674, September 27, 2017. Other GAO work in this area includes: *Actions are Needed to Help Ensure the Completeness of Political Conversion Data and Adherence to Policy*, GAO-16-859, September 30, 2016.

[49] Also see, MSPB, "Hiring Political Appointees Into Career Positions," *Issues of Merit*, September 2020, p. 6.

## MSPB FINANCIAL SUMMARY

**Fiscal Year 2020 Financial Summary**
**as of**
**September 30, 2020**
(dollars in thousands)

**FY 2020 Appropriations**

| | |
|---|---|
| FY 2020 Appropriation | $ 44,490 |
| Civil Service Retirement and Disability Trust Fund | 2,345 |
| **Total** | $ 46,835 |

**Obligations Charged to FY 2020 Funds**

| | |
|---|---|
| Personnel Compensation | $ 24,549 |
| Personnel Benefits | 7,908 |
| Travel of Things | 89 |
| Travel of Persons | 49 |
| Rents, Communications and Utilities | 3,782 |
| Printing and Reproduction | 35 |
| Other Services | 2,849 |
| Supplies and Materials | 79 |
| Equipment | 1,524 |
| Reimbursable Obligations | 246 |
| **Total** | $ 41,110 |

## LIST OF ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| ADEA | Age Discrimination in Employment Act |
| AFR | Annual Financial Report |
| AJ | Administrative judge |
| ALJ | Administrative law judge |
| ALOC | Acceptable Level of Competence |
| APA | Administrative Procedure Act |
| APHIS | USDA's Animal and Plant Health Inspection Service |
| AR | Annual Report |
| BFS | Treasury's Bureau of the Fiscal Service |
| CAFC | Court of Appeals for the Federal Circuit |
| CSRA | Civil Service Reform Act of 1978 |
| CSRS | Civil Service Retirement System |
| EEI | Employee Engagement Index |
| EEO | Equal employment opportunity |
| EEOC | Equal Employment Opportunity Commission |
| EO | Executive Order |
| FERS | Federal Employees Retirement System |
| FERCCA | Federal Erroneous Retirement Coverage Corrections Act |
| FEVS | Federal Employee Viewpoint Survey |
| FOs | Field offices |
| FOIA | Freedom of Information Act |
| FTC | Federal Trade Commission |
| FY | Fiscal year |
| GAO | Government Accountability Office |
| GPRAMA | Government Performance and Results Act Modernization Act of 2010 |
| HC | Human Capital |
| HCR | Human Capital Reviews |
| HQ | Headquarters |
| HR | Human resources |
| H.R. | House of Representatives (usually followed by a bill number) |
| *IoM* | *Issues of Merit* |
| IRA | Individual right of action |
| MPS | Merit principles survey |
| MSPs | Merit system principles |
| MSPB | Merit Systems Protection Board |
| NDAA | National Defense Authorization Act |
| NFC | USDA's National Finance Center |
| NPA | Japan's National Personnel Authority |
| OMB | Office of Management and Budget |
| OPE | MSPB's Office of Policy and Evaluation |
| OPM | Office of Personnel Management |
| OSC | Office of Special Counsel |
| PFR | Petition for review |
| PIO | Performance Improvement Officer |
| PIP | Performance Improvement Plan |
| PPPs | Prohibited personnel practices |

| | |
|---|---|
| ROs | Regional offices |
| SES | Senior Executive Service |
| U.S.C. | United States Code |
| USDA | Department of Agriculture |
| USERRA | Uniformed Services Employment and Reemployment Rights Act of 1994 |
| VA | Department of Veterans Affairs |
| VEOA | Veterans Employment Opportunities Act of 1998 |
| WPA | Whistleblower Protection Act of 1989 |
| WPEA | Whistleblower Protection Enhancement Act of 2012 |

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