

# U.S. MERIT SYSTEMS PROTECTION BOARD

SIXTH ANNUAL REPORT

# The U.S. Merit Systems Protection Board

Herbert E. Ellingwood, Chairman  
Maria L. Johnson, Vice Chair  
Dennis M. Devaney, Member





**Letter of Transmittal**

MERIT SYSTEMS PROTECTION BOARD  
Washington, D.C. 20419

The Chairman

Sirs:

In accordance with Section 202(a) of the Civil Service Reform Act of 1978(5 U.S.C. Sec. 1209 (b)), it is my honor to submit the Sixth Annual Report of the Merit Systems Protection Board. This Report covers the activities of the Board for Calendar Year 1984.

Respectfully,

A handwritten signature in black ink that reads "Herbert E. Ellingwood". The signature is written in a cursive style with a large initial "H".

Herbert E. Ellingwood

The President  
of the United  
States The President of the Senate  
The Speaker of the House  
of Representatives  
Washington, D.C.

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# I. Introduction

The U.S. Merit Systems Protection Board was created pursuant to Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act of 1978 ("the Act"). An independent judicial agency, the Board is comprised of a bipartisan, Presidentially appointed, three-member panel and charged with acting as the "watchdog" of the Federal merit systems. This mandate is implemented by:

- Adjudicating employee appeals and actions brought by the Special Counsel in a fair and impartial manner;
- Conducting special studies of the merit systems to determine whether they are free from prohibited personnel practices;
- Analyzing and reporting on the significant activities of the Office of Personnel Management (OPM); and
- Reviewing the regulations issued by OPM to determine whether they require the commission of prohibited personnel practices.

Because the Board has broad powers in reviewing the personnel practices of OPM and the numerous government agencies within its jurisdiction, Congress took extra measures to assure that the Board would have that degree of independence necessary to properly exercise its authority. These protections include:

- Guaranteeing the independence of the Board members by providing for non-renewable terms and permitting removal only under extraordinary circumstances;
- Providing the Board with authority to make simultaneous submissions of budgets and legislative proposals to Congress and the President, thus eliminating the need for prior approval by the Office of Management and Budget (OMB);
- Permitting the Board to appoint personnel essentially free of approval by the executive branch; and
- Representing itself in the Federal courts except before the Supreme Court.

The Board consists of 11 trial-level regional offices and an appellate forum at its headquarters in Washington, D.C. The Board employs over 350 staff and has a budget of over \$20 million. In its first five years, the Board has received over 65,000 appeals and petitions for review. Board decisions have been sustained by the U.S. Court of Appeals in over 94% of the cases decided by the court.

## II. The Board Members

The three Board Members are appointed by the President with the advice and consent of the Senate. In order to ensure the independence of the Board, the designation of any member as Chairman must be approved by the Senate; Members serve a seven-year term and may not be reappointed; and Members may be removed only under an extraordinary standard of inefficiency, neglect of duty, or malfeasance in office.



Herbert E. Ellinawood

**Herbert E. Ellingwood** was appointed by President Reagan to be the Board's second Chairman on December 14, 1981. At the time of his appointment, Ellingwood was serving as Deputy Counsel to the President. Prior to his White House position, he was in private law practice with the firm of Caldwell & Toms in Sacramento, California. From 1975 to 1979, Ellingwood was Special Assistant Attorney General for California and was Legal Affairs Secretary to Governor Reagan from 1969 to 1974.

**Maria L. Johnson** was nominated by President Reagan to the Board on March 18, 1983, and was confirmed by the Senate on May 6. Johnson was designated Vice-Chair on September 19, 1983. At the time of her appointment, she was a commercial loan officer with the Security National Bank in Anchorage, Alaska. From 1978 to 1981, she was an Associate Attorney with the firm of Lambert, Griffin & McGovern in Washington, D.C.



Maria L. Johnson



Dennis M. Devaney

**Dennis M. Devaney** was nominated by President Reagan to be Member of the Board on August 4, 1982, and confirmed by the Senate on August 20, 1982. At the time of his appointment, Devaney was in private law practice in Washington, D.C. with the firm of Tighe, Curhan and Piliero. From 1977 to 1979, Devaney was Counsel for the Food Marketing Institute and from 1975 to 1977, he served as Assistant General Counsel for the U.S. Brewers Association.

### III. Organization of the Board

The Merit Systems Protection Board is comprised of a number of operating offices which carry out the duties of the organization, and is presided over by the three-member Board. The Chairman, as Chief Executive Officer, is vested with responsibility for its overall operations.

Authority for the day-to-day management of the Board, both in headquarters and its eleven regional offices, is delegated to the **Managing Director** by the Chairman.

The **Assistant Managing Director for Regional Operations** coordinates procedures and reviews the quality of the adjudications of the regional offices.

The **Assistant Managing Director for Management** formulates, plans, and coordinates improvements to the overall management of the agency.

The **Office of General Counsel** provides legal counsel to the Board and offices of the Board, and represents it in most court actions.

The **Office of Appeals Counsel** drafts final decisions for the Board based on petitions for review of initial decisions rendered in the regions, and the records of cases reopened by the Board on its own motion.

The **Office of Legislative Counsel** represents the agency before the Congress and the public, prepares various publications, and provides the agency with audio-visual and graphic arts services.

The **Office of Administrative Law Judges** adjudicates special cases including actions concerning the Hatch Political Activities Act, and hears disciplinary cases and proposed removals of administrative law judges as well as proceedings initiated by the Special Counsel. This office also has jurisdiction over, and issues orders in response to, motions for subpoenas and discovery filed in the Board's regional offices.

The **Office of Merit Systems Review and Studies** reviews Governmentwide personnel policies and practices to ensure that they are in accord with merit system principles. The office also conducts annual oversight reviews of OPM and participates in the review of OPM-issued rules and regulations. The office's findings are reported to Congress and the President and made available to the public.

The **Office of the Clerk**, reorganized this year and formerly known as the Office of the Secretary, processes all

petitions to the Board. The Board has delegated to the Clerk of the Board responsibility for ruling on certain procedural matters relating to case adjudication, publishing and distributing Board orders and opinions, making initial determinations on Freedom of Information and Privacy Act requests, authenticating official records, and keeping the official minutes of Board meetings. The Office of the Clerk also has the duties of overseeing the law library, maintaining documents and a reading room for the public, and publishing regular summaries of significant decisions.

**The Office of the Comptroller**, established in 1983, directs and coordinates the financial and administrative services functions of the Board.

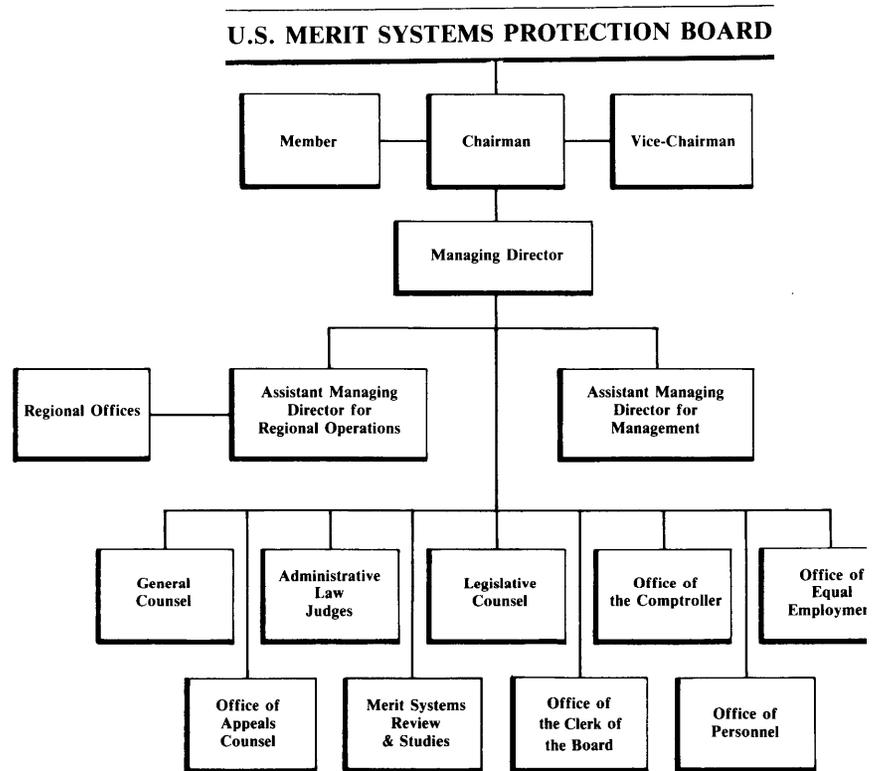
**The Office of Personnel** is responsible for managing the internal personnel programs of the Board. The Office provides personnel assistance to management, employees, and applicants for employment.

The **Office of Equal Employment** develops and monitors the implementation of the Board's equal employment opportunity programs and policies.

**The Special Counsel**

The **Office of Special Counsel** has independent investigatory and prosecutorial authority and is responsible for bringing certain actions before the Board. The Special Counsel is required by 5 U.S.C. § 1206(m) to submit his own annual report to the Congress; therefore, this report will not address Special Counsel activities except as they pertain to Board orders and decisions.

The year was, however, significant for the relationship between these two entities. In July, Board Chairman Ellingwood and Special Counsel K. William O'Connor announced jointly their agreement to administer separately the two operations, effective October 1, 1984, thus ending a period in which there had been some shared administrative functions.



## IV. Summary of 1984

This Was, for the Board, a year of achievement, utilizing to the fullest its personnel resources and innovative management techniques; a year, according to Chairman Herbert Ellingwood, in which this Board was able to concentrate on its work and demonstrate just how well it could do its job. "In short," said Ellingwood, "it was a year in which this agency proved its excellence and took giant strides on the path to being the government's model judicial agency."

"What is central to the issue of the administration of justice," noted the Chairman late in 1984, "is the ability of the tribunal, whether state or Federal court or administrative body, to process its caseload efficiently and effectively and to articulate the law in a coherent, instructive way. Tribunals need not only to reason well, but also to insure a sound stewardship of their public resources. It is in this regard that I believe that the Board has become a model judicial agency for both the Federal ad-judicatory systems and for court and state tribunals nationwide."

The record of the Merit Systems Protection Board is one of accomplishment, coming back from a difficult period to master a workload that, to some, would have seemed insurmountable. Through reliance on an ongoing strategic planning effort, the Board, in 1984, examined all procedures critical to its primary functions. The purpose of the review was to ensure not only the efficient use of its resources on a daily operational basis, but also the establishment of a management framework which will be durable and practical in the years ahead. Central to this review was its steadfast commitment to the stewardship of the merit systems.

The Board met many tight, self-imposed deadlines while maintaining quality control. 1984 was a year in which the Board:

- virtually eliminated case backlogs for the first time in its history;
- made major automated improvements to payroll and personnel management systems;
- implemented an alternative appeals process which reduces time and costs in the adjudication of routine non-precedential appeals;
- developed in-house training programs for agency attorneys who hold hearings in the regional offices;
- expanded and refined an automated case tracking system;
- began a major space reduction effort to effect major savings in ongoing rent payments for Board office space;
- continued to strengthen its management staff through a series of in-house management seminars.

## **Backlog Eliminated**

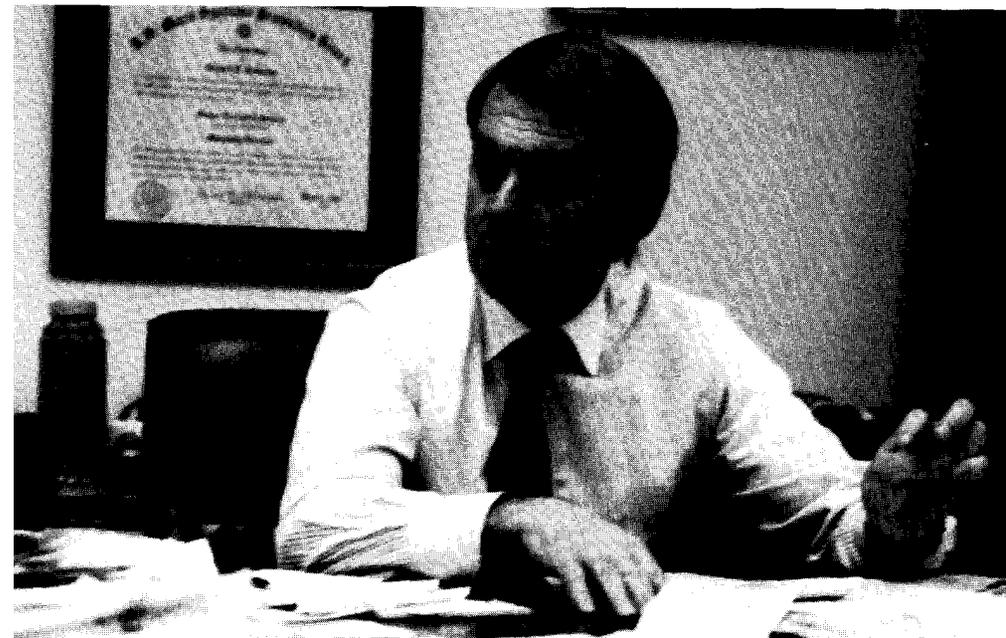
The Merit Systems Protection Board, by adopting new methods and computer technology, has virtually eliminated its case backlog in the regions and at headquarters. At the time of its founding only six years ago, the Board inherited an accumulation of pending Federal employee appeals from the Civil Service Commission. Then, late in 1981, as a result of the Air Controllers' strike, it received another 11,000 appeals in addition to an already burgeoning workload. Elimination of this backlog had been a major planning objective for 1983-84.

In the regions, the caseload was reduced to fewer than 1,500, which is considered a normal inventory, and over 99% of the appeals were adjudicated within the Board's 120-day time limit.

In headquarters, the Office of Appeals Counsel, which proposes final opinions based upon petitions for review (PFR's) from regional office decisions for the Board's consideration, reduced its caseload from 1,511 cases at the beginning of FY 1984 to fewer than 400 by the end of the year. The Board Members also reduced their caseload from 929 to under 300 cases—and announced that they would be consistently issuing final appeals decisions within 110 days of the filing of a PFR.

## **Payroll and Personnel System Improved**

The Board in 1984 converted its personnel, payroll, accounting and administrative payments system from the combination of in-house and Department of Interior Systems to the USDA's National Finance Center. The conversion required that, in a very short period of time, equipment be purchased and installed, personnel trained, and all personnel payroll and accounting be restructured and transferred to the new integrated data base.



The conversion provides the Board with a fully integrated and automated personnel, payroll, and administrative payments system that is able to produce data on work measurement, personnel, and finances. In preparation for this transition, the Board's management staff completed a major review and update of the personnel, payroll, and accounting records.

### **Expedited Appeals System Fully Implemented**

While the appeals backlog challenged the Board to process cases under a formal legal system, the Board was not content simply to make that system, by itself, work more efficiently.

Instead, the Board developed and implemented a Voluntary Expedited Appeals Procedure (VEAP), which, since its introduction, has applied Board precedent to routine cases while saving the Board up to 40% of its typical regional costs per appeal. Decisions in these cases are issued in 60 days—one-half the normal case processing time. Furthermore, agencies realized savings of over 30% in witness fees, per diem, and travel costs.

This innovative system requires the parties to confer on facts and legal issues, and of ten involves the Board's presiding officials as third party facilitators. Under VEAP the Board requires parties to make a good-faith effort to file a pleading called a Joint Appeals Record. This document fosters an exchange of pleadings and an agreement as to the facts and issues in dispute.

The presiding official may facilitate settlement discussion at the joint request of the parties. The Joint Appeals Record and the involvement of the presiding official helps create an environment which appears to enhance the likelihood of a voluntary settlement. Experience to date demonstrates that more than twice as many expedited appeals will result in settlement when compared to similar cases filed under the formal procedure.

At year's end, the Board received an independent professional study of VEAP. Based upon the recommendations from that study the Board announced plans to proceed with nationwide implementation of the Voluntary Expedited Appeals Procedure.

## **Case Tracking System Implemented**



Central to many of the accomplishments and the expeditious reduction of the backlogs of 1982 and 1983 was the development of the Board's state-of-the-art case tracking system.

Developed largely in-house under the auspices of the Office of the Assistant Managing Director for Management, the case tracking system was phased in over more than 2 years. In July 1984, an order was issued implementing the system Board-wide, and mandating the end of all manual case tracking records.

The case tracking system captures information relative to an appeal, and records all major events in its processing. Constantly updated, this information is immediately available to all of the Board's offices. Such timely and specific information offers management many more options in coping with a fluctuating workload. It allows better allocation of resources and avoids many potential problems and backlogs.

In addition, the system automatically issues regular reports to each Regional Director as well as senior Board officials at headquarters. In the regions the reports provide detailed and summary information concerning all cases for which a region is responsible. At headquarters, the system provides reports containing detailed information on all appeals in the agency.

The Board is required to report to Congress about appeals that are not decided within 120 days. This system has allowed the Board to keep that Congressional report minimal.

## **Space Reduction Program Begun**

In accordance with the Administration's efforts to reduce the amount of leased space occupied by the Federal Government, MSPB instituted a space reduction program that will reduce Board office space from 94,549 square feet to 77,448. Implementation of the space reduction began in 1984, and will be completed in 1985.

## V. The Adjudicatory Framework

Adjudication of appeals constitutes the major activity of the Merit Systems Protection Board.

Five Board offices besides the Board itself are directly involved in the adjudicatory work: the regional offices, the Office of Appeals Counsel, the Office of Administrative Law Judges, the Office of General Counsel, and the Office of the Clerk of the Board.

### **A. Regional Offices**

Adjudication of cases generally begins with the filing of an appeal in one of the Board's eleven regional offices. Prior to the large influx of ATC appeals in 1981, these offices had prided themselves on being able to process over 98% of their appeals within the 120 day limit set by the Board. To conquer the backlog the regions not only had to process the overdue appeals, but also had to adjudicate the large number of new appeals that continued to be filed. The February 1, 1984 declaration that the backlog had been eliminated was, therefore, an historic one.

In 1984 hearings were held in 35% of all cases adjudicated, a 5% increase over the previous year. This translated into 3,121 hearings held during the fiscal year, with a total of 7,805 decisions being issued.

In an additional effort to increase effectiveness, emphasis was placed on enhancing the professional skills of the Board's presiding officials. Between May and August all presiding officials were provided supplementary training in hearing management. The training included video presentations depicting challenging circumstances that might arise during a hearing, followed by group discussions on effective management of those situations.

Several regional offices developed the capability to tape-record their own hearings. This not only increased efficiency, it also served as a cost-cutting measure; in years past the Board has spent as much as \$1.5 million on transcription and court reporter fees.

### **B. Office of the Clerk of the Board**

Decisions issued by the regions become final after 35 days. During that time either party, the Office of Personnel Management, or the Special Counsel may petition the Board to review this initial decision. The Board may also review the decision on its own initiative.

Petitions for review pleadings and motions are received and processed in the Office of the Clerk (formerly the Office of the Secretary). With the incorporation of several legal duties, the role of the Office of the Clerk is modeled after that of an appellate court.

In 1984 the Office of the Clerk eliminated its case backlog and reduced its time for processing PFR's from 45 days to 35. The implementation of more efficient processing techniques has allowed the office to continue to meet this new standard in over 95% of cases, despite a staff reduction.

Another accomplishment for 1984 was the completion of a physical inventory of over 11,000 ATC case records required for court litigation.

A major addition was the implementation of a program called *Early Alert*, which summarizes and transmits significant Board decisions to all Board offices within hours, via electronic mail. A full-text copy is subsequently dispatched within 24 hours. This program has enabled presiding officials nationwide to maintain proficiency regarding final Board orders.

Finally, in addition to publishing volume 13 of *Decisions of the U.S. Merit Systems Protection Board*, the Office of the Clerk improved and expanded the *Digest*, a monthly summary of noteworthy Board actions, to include expedited appeals and significant litigation cases. Subscriptions to the *Digest* increased from 5,221 to 6,200 in 1984.

### C. Office of Appeals Counsel

The Office of Appeals Counsel (OAC) has the primary responsibility for analyzing petitions for review and researching and drafting final opinions and orders for the Board Members' consideration.

OAC also met its production goals in 1984. At the beginning of the fiscal year, the Office had a large backlog of non-ATC petitions, largely due to the concentration of resources that had been necessary the previous year to complete the adjudication of petitions for review involving 5,701 controllers. Because of the increased activity in the Board's regional offices already described, OAC faced the prospect of a year in which large numbers of new petitions would be received.

To meet this challenge, the office developed a comprehensive plan to systematically process the increased receipts while reducing the backlog. Staff resources were realigned and redirected, new staff members were given comprehensive training, and administrative changes were made to better utilize the new case tracking system to maximize its usefulness to OAC. Additionally, new methods of case processing were developed and a more effective work flow system was instituted.

Even though receipts were high, the productivity of the Office of Appeals Counsel increased and the backlog was substantially reduced while the high quality of the opinions was maintained.

#### **D. Office of Administrative Law Judges**

The Office of the Administrative Law Judges (OALJ), adjudicates certain special categories of cases. These involve such matters as prohibited political activities by Government employees (Hatch Act violations), disciplinary proceedings against administrative law judges, complex or sensitive appeals filed in the regional offices and assigned to it by the Board, and prohibited personnel practice matters based upon a complaint filed by the Special Counsel.

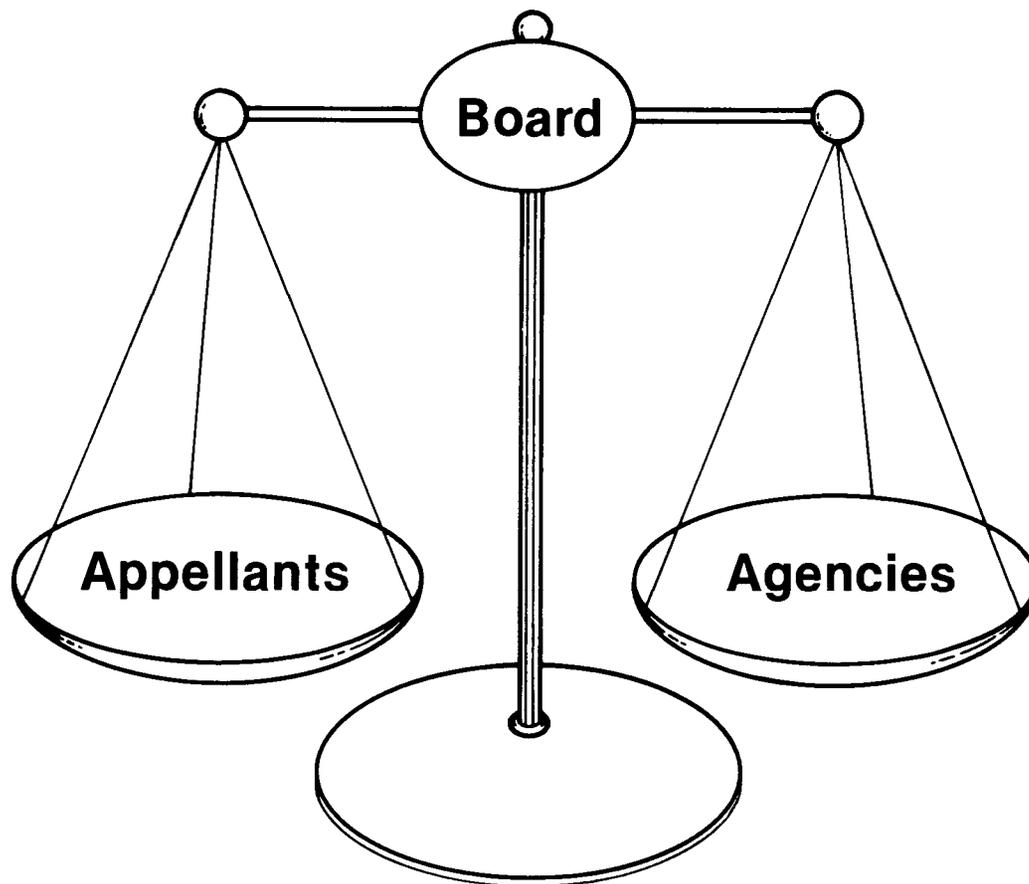
Decisions of the Board's Administrative Law Judges in original jurisdiction cases (i.e., all cases not involving appeals from agency actions) are recommended decisions to the full Board for final action. Unlike initial decisions, recommended decisions do not become final and must be acted upon by the full Board.

Another function of the OALJ is to issue subpoenas and orders involving motions for discovery filed by parties involved in regional cases. This year, the OALJ ruled on approximately 800 motions for discovery and subpoenas.

#### **E. Office of General Counsel**

As legal advisor to the Board, the Office of General Counsel (OGC) provides a variety of legal services to the Board and its offices. Areas in which OGC made significant contributions to the Board's overall mission in 1984 include: original jurisdiction cases; appellate jurisdiction cases involving designated issues; litigation; cases with equal employment opportunity issues, referred as to "mixed cases"; regulation reviews affecting the Federal work force; labor-management relations; Government ethics and agency obligations under The Government in The Sunshine Act, the Freedom of Information Act and the Privacy Act.

In addition, the Office of General Counsel was frequently called upon to advise the Board on precedential and significant legal issues arising in employee appeals.



## **VI. Major Appeals Issues**

The Board has a major responsibility to examine thoroughly issues that come before it in appeals and to provide agencies, employees and its own presiding officials with precedent-setting opinions applying and interpreting the provisions of the Civil Service Reform Act.

This year, as in previous years, the Board issued a number of decisions addressing and interpreting subjects of significance that will be used as precedent in future appeals. A brief discussion of some of the most significant decisions issued by the Board in 1984 follows.

### **A. Appellate Jurisdiction Cases**

Most cases coming to the Board Member, stem from requests by either an appellant or at agency in the form of Petitions for Review to examine a presiding official's decision. The PFR's must be based on specific legal grounds not mere disagreement with a regional office decision.

#### **Chapter 43 Appeals**

Among the most important appeals opinions issued by the Board was a group of decisions issued in late 1984 that together provided comprehensive analysis of several important issues arising under Chapter 43 of title 5 of the U.S. Code.

Chapter 43 is the provision of the Civil Service Reform Act of 1978 that addresses the area of removal, demotion, and other remedial actions taken against Federal employees for performance-related reasons. Chapter 43 was included in the Reform Act to clarify the authority of Federal managers to demote or remove poor performers after providing them with certain rights not available under other sections of the law.

Because Chapter 43 actions have to be based upon a new performance appraisal system that agencies were not required to have in place until October of 1981, the law relating to Chapter 43 had not been developed to the extent that has the law with respect to the disciplining of employees for conduct-related reasons. Chapter 43 had been little used until recently for the removal or demotion of poor performers.

The Board's six lead decisions interpreting Chapter 43 specified when agencies would have to use Chapter 43 and interpreted several key provisions of the new law. Prior to deciding these appeals, the Board publicly solicited briefs addressing many of the issues.

## Chapter 43 Appellate Decisions

### **Modification of Penalty in Performance Appeals**

-- In *Lisiecki v. Federal Home Loan Bank Board*, the Board ruled that it has no authority to review an agency's selection of removal or demotion in performance cases. The Board distinguished performance appeals from conduct related appeals in which the Board had the option of modifying the penalty if it is found to be unreasonable.

**Burden of Proof Standard** -- In *Griffin v. Department of the Army*, the Board held that an agency must prove by substantial evidence that the performance appraisal system relied on to take the personnel action had been approved by the Office of Personnel Management.

**Opportunity to Improve** -- The Board also found in *Sandland v. General Services Administration* that agencies must prove by substantial evidence that employees were provided an opportunity to demonstrate acceptable performance before removing or demoting them under Chapter 43.

**Absolute Performance Standards** -- In *Callaway v. Department of the Army*, the Board held that an agency abuses its discretion when it establishes an absolute performance standard requiring courtesy as a critical element. Such absolute standards, the Board stated, may be appropriate only in situations where an employee's failure to meet the performance standard once would result in "death, injury, breach of security, or great monetary loss."

Where the Board finds such abuse of discretion in the creation of performance standards, it will reverse the agency action without considering the specific performance that prompted the action.



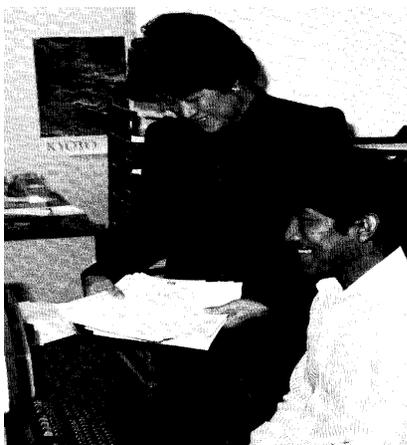
**Components of Critical Elements** -- In *Shuman v. Department of Treasury*, the Board examined an employee removal based upon unacceptable performance of some, but not all, of the components of one critical element. In this appeal, the Board ruled that the burden is on the agency to present substantial evidence that the appellant's performance warranted an unacceptable rating on the element as a whole, based on the employee's failure to perform some components of that element adequately.

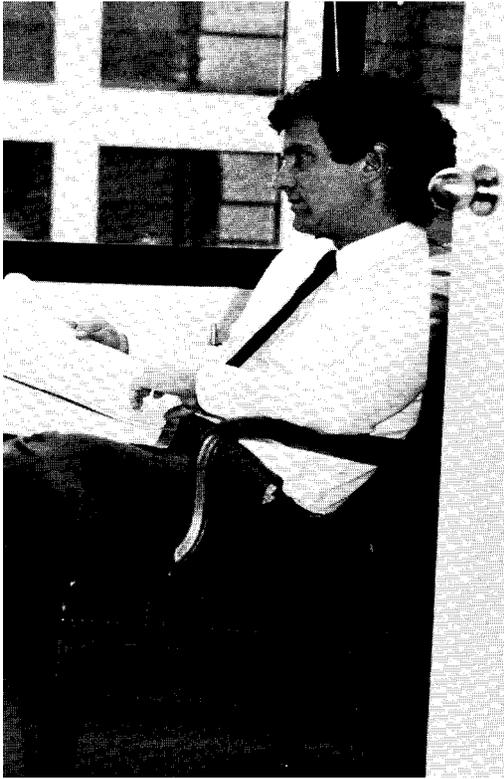
**Use of Chapter 43** -- In *Gende v. Department of Justice*, the Board held that as of October 1, 1981, Chapter 43 was the exclusive statutory avenue available to agencies seeking to demote or remove employees for poor performance, with certain limited exceptions. The Board allowed 30 days for agencies to reconsider any personnel actions they may have pending that are not in accord with this ruling. This decision was reversed by the Federal Circuit. See *Lovshin v. Navy*, no. 84-1002, 9-21-85.

### **Other Significant Appellate Decisions**

**Workers Compensation and AWOL** -- *Stith v. Housing and Urban Development*, DC07528310194, (6-18-84). The Board found that a grant of worker's compensation by the Department of Labor's Office of Worker's Compensation negates an agency's charge of absence without leave throughout the period of time for which such compensation is provided. This decision was reversed by the Federal Circuit. See *Lovshin v. Navy*, no. 84-1002, 9-21-85.

**Temporary Appointment and Procedural Rights** -- *Carter v. Department of the Army*, DE07528210248, (1-23-84). The Board found that employees serving under temporary appointment pending establishment of a register (TAPER Appointments) are considered employees and upon termination of appointment beyond 1 year, are afforded the procedural rights granted other employees under the Civil Service Reform Act.





**Retirement Credit** -- *Acosta, etal v. OPM*, DC08318010060, (1-20-84). The Board held that all Federal service is creditable for retirement and other purposes even though some of the service is not in a traditional position covered by other civil service laws. In this case, the employees showed that they were employees under contract entered into with government officials, and that their services were authorized and called for the performance of a Federal function.

**Reemployment Rights After Injury** -- *Emelio v. United States Postal Service*, DCO353811880, (7-9-84). The Board held that priority consideration after recovery from a compensable injury requires that an employee in good standing at the time of his injury be placed on a priority list and reemployed when a vacancy occurs, absent egregious conduct.

**Misconduct and Nexus** -- *Johnson v. Department of Health and Human Services*, PH07528110407, (8-17-84). An agency has the burden of establishing nexus, which is a connection between misconduct and the efficiency of the service. In this case, the Board declared that an agency can rely on a presumption of nexus which may arise in certain egregious circumstances.

**RIF's and Vacancies** -- *Baker v. Department of Commerce*, SE03518210038, (2-22-84). The Board determined that reduction-in-force regulations did not require agencies to fill vacant positions.

**Attorney Fees** -- *Gerlach v. Federal Trade Commission*, DC07528010020ADD, (4-19-84). The Board concluded that the information contained in attorney fee arrangements had an important bearing on the prevailing market rate, and therefore, the terms of such agreements must be submitted with any fee request.





**Summary Dismissal Motions** -- *Naekel v. Department of Transportation*, DE07528210125, (5-23-84). The Board held that a presiding official may appropriately grant an appellant's motion for summary dismissal during hearing if the presiding official decides that the agency has not established a prima facie case. However, the Board noted that it would be inappropriate to grant an agency motion without affording the appellant an opportunity to contest the action.

**Back Pay Awards** -- *Robinson v. Department of the Army*, SF07528310135, (6-12-84). The Board held that it will exercise authority to award back pay when appropriate under 5 U.S.C. § 5596(b)(1) when it reverses an agency action.

**Enforcement** -- *Spezzaferro, et al. v.*

*Federal Aviation Administration*, BN075281- F0717COMP, (10-25-84). The Board held that it has the authority to adjudicate the merits of petitions for enforcement which allege agency error in compliance with a final Board order.

**Agency Transfer of Functions** -- *Certain Former Community Service Administration Employees, Adams, et al v. Department of Health and Human Services*, AT03518210251, (6-18-84). The Board set forth the criteria to be used for determining whether functions performed by one agency have transferred to another agency and examined the propriety of the identification methods contained in the transfer of function regulations.

**Free Speech** -- *Oskow v. Office of Personnel Management*, SF07528210950, (12-18-84). The Board held that First Amendment protections do not require an agency to tolerate action which it reasonably believes disrupts the office, undermines supervisory authority, and destroys close working relationships within an organization.

**Protected Speech and Grievances** -- *Kennedy v. Department of the Army*, PH07528110483, (7-17-84). The Board set forth an analysis of whether statements made by an employee during a grievance proceeding were protected statements and could form the basis of disciplinary action.

**Suspensions Based upon Criminal Charges** -- *Covarrubias v. Department of the Treasury*, DA07528310171, (10-3-84). The Board held that if an employee is acquitted or receives a dismissal of criminal charges which served as the basis of an indefinite suspension, the agency may initiate disciplinary action on the underlying conduct or reinstate the employee. Reinstatement may entitle the employee to back pay for the entire period of suspension.

**Furlough Regulations** -- *Hastie v. Department of Agriculture* DA07528210615, (11-1-84). The Board found that OPM's emergency furlough regulations are inconsistent with the provisions of the Civil Service Reform Act and concluded that actions based on those regulations were not in accordance with law.

**SES and RIF** -- *Facer v. Department of Energy*, DC03518310289, (11-9-84). The Board held that the restriction of 5 U.S.C. § 3596, prohibiting the removal of an SES employee before the expiration of at least 120 days after a change in administration, did not apply to a separation taken under the reduction-in-force procedures.

*Oxley v. Department of Commerce* DC03518310771, (11-15-84). The Board held that application of an agency's SES RIF regulations was subject to the same type of review accorded an agency's application of RIF regulations generally.

**FLRA Comity** -- *Gragg v. Department of the Air Force*, DA07528310484, (11-20-84). The Board found that a removal action could not be sustained where the basis of that action was an agency policy which was in direct contravention of an FLRA decision.



## B. Original Jurisdiction Cases

Cases under the Board's original jurisdiction include complaints against administrative law judges by their employing agency and actions brought by the Special Counsel.

### Complaints Against Administrative Law Judges

An administrative law judge (ALJ) may not be subjected to an adverse action unless the Board finds the employing agency has established good cause for taking action after an opportunity for a hearing on the record.

In 1984, the Board issued six decisions on agency requests to discipline administrative law judges. The Board's decisions addressed several major legal issues which are of significant precedential importance.

**Performance and Productivity Standards -- *Social Security Administration v. Goodman*, HQ75218210015.** The Board held that an action may be taken against an ALJ for poor performance, and that ALJ's could be held to productivity standards. In Goodman's case, however, the Board found that SSA failed to prove that his productivity was unacceptably low.

**Good Cause-- *Social Security Administration v. Davis*, HQ75218210026.** The Board expanded upon its holding in Goodman and held that the "efficiency of the service" standard is not applicable in section 7521 cases. The Board held that "good cause" is a separate and distinct standard. Based upon the nature and effect of the conduct involved in Davis, the Board adopted the recommended decision determining that respondent's lewd and lascivious conduct constituted good cause and authorized Davis' removal.



**Judicial Independence** -- *Social Security Administration v. Brennan*, HQ7521820010, and *Social Security Administration v. Manion*, HQ75218210008. The Board considered the issue of whether an ALJ may refuse to comply with instructions that arguably interfere with his ability to hold full and fair hearings and to render complete and impartial decisions. In its decisions, the Board addressed the extent to which ALJ's are subject to management supervision.

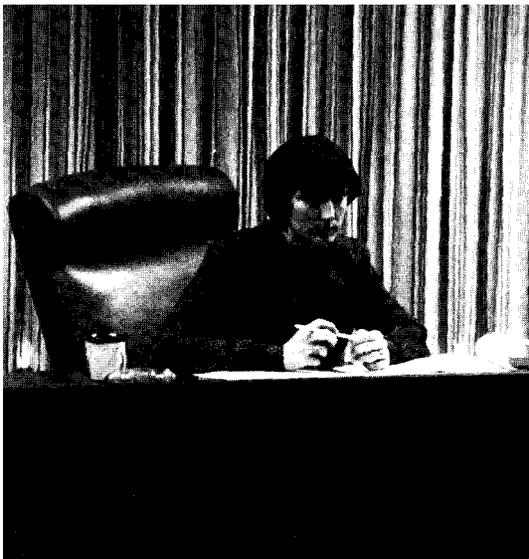
*Brennan*, like *Goodman*, included a low productivity issue. The Board concluded that the agency did not prove that the productivity of Brennan was unacceptably low. In *Brennan*, the Board also held that an ALJ was not immune from appropriate supervision and remanded the case for a further assessment of the record in light of the Board's decision on that issue.

In *Manion*, the Board authorized a 30-day suspension of Manion for insubordination for refusing to set hearings for assigned cases because of a disagreement on administrative matters. In reaching this decision, the Board found that agencies must have the right to discipline ALJ's who refuse or fail to follow instructions that do not interfere with their judicial independence, and that ALJ's must comply with reasonable management requirements that do not affect the ability to carry out their judicial functions. This decision was affirmed by the Federal Circuit Court of Appeals recently.

**Good Cause**-- *Social Security Administration v. Glover*, HQ75218210025. The Board held that verbal abuse of a staff typist, disrespect of the ALJ in charge, and offensive, intemperate, and ill-considered remarks about the administrative officer made to her subordinate constitutes good cause for a 120-day suspension. The Board also found that a single relatively harmless statement about a staff member made in a judicial opinion was not good cause for discipline. The Board held that because the statement was relatively harmless, it did not require a balancing of the agency's or the public's interest in the administrative process against the ALJ's qualified right to be free from interference in the performance of his judicial functions.

In *Glover*, the Board articulated its prerogative in an ALJ disciplinary action to determine the penalty to be imposed in the exercise of its authority under section 7521. The Board adopted the criteria for reviewing penalties imposed upon agencies in appeals cases (*Douglas v. Veterans Administration*, 5 MSPB 313 (1981)) as a guideline in its choice of penalty.

**Misuse of Government Vehicle** -- *Social Security Administration v. Haley*, HQ75218210052. The Board found good cause to discipline Haley for improper use of a government vehicle in violation of statute (31 U.S.C. § 638a(c)(2), now codified at 31 U.S.C. § 1349(b)). Haley did not contest the charge and agreed to the minimum 30-day penalty required by the statute he violated. The Board also distinguished its penalty authorities under section 7521 in disciplinary actions against ALJs, section 1207 in Special Counsel disciplinary actions for non-Hatch Act matters, and sections 7325 and 1505 in Special Counsel actions for violations of the Hatch Act.



### **Actions Initiated By Special Counsel**

The majority of cases heard by the Board under its original jurisdiction authority are actions brought by the Special Counsel. The number of cases increased sharply this fiscal year and may be divided generally into three types: (1) requests for stays of agency personnel actions alleged to be based on prohibited personnel practices; (2) requests for disciplinary actions against federal employees for alleged violations of the Civil Service Reform Act; and (3) complaints against Federal and certain State and local employees for allegedly engaging in unlawful political activity contrary to the Hatch Act.

#### *Stay Requests*

Under the provisions of 5 U.S.C. § 1208(a), the Special Counsel may request a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken as a result of a prohibited personnel practice. Any Board member may order such a stay unless he or she determines that, under the facts and circumstances pleaded, the stay would not be appropriate. If no action is taken on the request within 3 working days after it is filed by the Special Counsel, the stay becomes effective by operation of law. Under 5 U.S.C. § 1208(b), upon further request of the Special Counsel, a Board member may extend the original 15-day stay for up to 30 additional days. Under 5 U.S.C. § 1208(c), the Board may extend the period of a stay if a majority of the Board concurs in the determination of the Special Counsel, but only after an opportunity is provided for comment by the agency involved.

The Board considered requests for stays of personnel actions in a number of cases in 1984. Two of those cases concerned the Federal Mediation and Conciliation Service and the Department of Commerce.

**Retaliation** -- *Special Counsel v. Federal Mediation and Conciliation Service*[O'Sullivan], HQ12088410004. The Special Counsel requested a stay of an employee's removal because it appeared that the employee's performance-based removal was in retaliation for information provided by the employee to two FMCS officials and thus violated 5 U.S.C. § 2302(b)(8). The Board granted stays pursuant to 5 U.S.C. § 1208(a) and (b).

**Discrimination** -- *Special Counsel v. Department of Commerce* [Beyer], HQ12088410025. The Special Counsel requested a stay of the proposed removal of a probationary employee in the Department's International Trade Administration. The Special Counsel alleged that the agency's action was motivated by discrimination based on the employee's political affiliation in violation of 5 U.S.C. § 2302(b)(1)(E) and 5 U.S.C. § 2302(b)(10). The Board granted three stays, the last of which was still in force at year's end.

### **Disciplinary Actions—Non-Hatch Act**

**Monetary Penalties** -- In *Special Counsel v. Verrot*, HQ12068310014, Verrot admitted he committed a prohibited personnel practice by influencing an individual to withdraw from competition to improve the prospects of another person for appointment to the announced position. The Special Counsel recommended a 60-day suspension without pay and a \$1,000 fine as the penalty, to which Verrot agreed. The Board followed the recommendation of the presiding administrative law judge to approve the agreement. This was the first case in which the Board imposed monetary penalties under the provisions of 5 U.S.C. § 1207(b). In addition, the Board adopted the precedent of ordering the Special Counsel to report to the Board on the employing agency's compliance.

**Removal for Retaliation and Discrimination** -- In *Special Counsel v. Harvey*, the Board found that Harvey, a Senior Executive Service member, had retaliated and discriminated against a subordinate SES member in clear violation of the law. The Board ordered Harvey removed from the SES and reduced to a GS-14 without supervisory authority for a total of 3 years.



## Disciplinary Actions—Hatch Act

The Special Counsel is authorized to enforce the Hatch Political Activities Act, and to investigate the political activities of those Federal, state and local government employees covered by that act.

As a result of complaints brought by the Special Counsel for Hatch Act violations, in fiscal year 1984 the Board issued ten final decisions in Hatch Act cases, the most important of which are discussed below.



**Statutory Requirement of Penalty** -- In *Special Counsel v. Morgan*, HQ01268210028, the Board held that if it finds a violation of the Hatch Act by a Federal employee and determines unanimously that removal is not warranted, the statute requires a minimum penalty of a 30-day suspension. The Board held that Morgan had violated the Act, and imposed a 30-day suspension as set out in a settlement agreement. The Board denied Morgan's separate request that he be allowed to serve the 30-day suspension on days selected by his supervisor. The Board held that the statute limited the Board's authority to impose suspensions to consecutive days only.

**Mitigation** -- In *Special Counsel v. Chidlow*, HQ12068410002, *Special Counsel v. Sims*, HQ12068210011, *Special Counsel v. West*, HQ12068210030, *Special Counsel v. Winfield*, HQ12068210029, *Special Counsel v. Willett*, HQ12068210029, the Board upheld the Special Counsel by finding violations of the Hatch Act, but ordered the individuals in these separate appeals suspended rather than removed because their violations were not flagrant.

**Authorization of Attorney Fee** -- In *Special Counsel v. Saldana*, HQ120600020, the Board accepted an administrative law judge's recommendation to dismiss the Special Counsel's complaint charging Saldana with violating the Hatch Act, but held that Congress had not authorized attorney fee awards to the prevailing employee in a Hatch Act disciplinary action.

**Candidacy for Elective Office** -- In *Special Counsel v. Mahone*, HQ12068310025, the Board found that Mahone, a state employee, violated the Hatch Act by actively campaigning for partisan elective office. The Board held that the violation warranted her removal. Mahone was aware of the Act's prohibition of her candidacy and was on notice specifically that her candidacy was unlawful even though her campaign was conducted after work hours and on weekends.



### **Discovery Rights**

In *re Subpoena Addressed to the Office of Special Counsel*, [Martin] HQ12008310019, Martin, who appealed from her removal by the Air Force, petitioned the Board to enforce a subpoena issued by a Board administrative law judge in connection with discovery preliminary to the hearing of her appeal.

The subpoena commanded the Office of Special Counsel to make available to her its investigative file concerning complaints she previously had lodged with the Office regarding alleged prohibited personnel practices by the Air Force. Claiming executive privilege, investigative privilege, and work product privilege, the Office of Special Counsel resisted production of the investigative file.

The Board rejected several claims of executive and investigative privilege because the Special Counsel did not personally make the requests, but did protect from disclosure "work product" documents prepared by or for attorneys in the Office during its investigation of Martin's complaints.

Based on an "in camera" inspection, the Board found 29 documents protected by the work product privilege and ordered the Office of Special Counsel to make the remaining 148 documents available for inspection and copying.

### **C. Requests for Reconsideration by the Office of Personnel Management**

As part of its appellate jurisdiction, the Board may accept from the Director of the Office of Personnel Management requests for reconsideration of its final orders. Under 5 U. S. C. § 7703(d), the Director may petition the Board to reconsider a final order if the Director determines at his discretion that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. Under the law, the Director must either participate in a Board proceeding or file a petition for reconsideration and have it denied before he can file a petition for review of a Board order in court.

***Reconsideration of Penalty*** -- In *Burns v. Department of Transportation*, SE075281F0498, the Board held that the Director of OPM is not entitled to reconsideration of a decision reducing a penalty because such a decision does not involve the interpretation of a civil service law, rule, or regulation. The Board also held that the Director is not entitled to reconsideration on an issue that was not decided in the original adjudication. The Board found that since the issue had not been decided, the decision could not have a substantial impact.

***Reconsideration of Regional Office Opinion*** -- In *Grant v. Department of Treasury*, AT07528110699, the Board held that when a petition for review is summarily denied and the initial decision becomes the final decision of the Board, OPM has no right to petition for reconsideration pursuant to 5 U.S.C. § 7703(d). Because the Board does not consider an initial decision that becomes final to be precedential, there can be no substantial impact on civil service law, rule, regulation or policy directive.

***Amending Charges and Seeking Stays During Reconsideration*** -- In *Alfaro v. Department of Transportation*, NY075281F0428, the Board held that OPM has no authority to request reconsideration to challenge the presiding official's denial of the employing agency's request to amend charges at the hearing. The Board also held in that when OPM petitions the Board to reconsider a decision, OPM rather than the employing agency is the proper party to apply for a stay pending reconsideration.

## **D. Mixed Cases**

"Mixed cases" include one or more allegations of prohibited discrimination raised in connection with an action appealable to the Board.

Following a Board decision in a mixed case, an appellant may petition the Equal Employment Opportunity Commission for review. In the event EEOC disagrees with the Board decision, the case may be remanded to MSPB for further deliberation. The EEOC remanded nine of these cases during fiscal year 1984.

The most significant issues relating to mixed cases continue to concern the extent of Federal agency responsibility to make reasonable accommodation to a qualified handicapped individual under the Rehabilitation Act. Questions concerning handicapped employees were the major issues in cases that were remanded to the Board by the EEOC during 1984.

***Handicap Accommodation*** -- In *Alvarado v. U.S. Postal Service*, SL07527990002, EEOC Petition No. 03830052, Alvarado, a mail handler with the Postal Service, was removed from his position for failure to meet his required work schedule because he had a permanent physical impairment. The Board agreed with the EEOC's conclusion that Alvarado was a "qualified handicapped" person and that the agency failed to make reasonable accommodation for him because it did not consider whether the mail handler position could be modified or otherwise restructured. The Board found it unnecessary to address whether reassignment was a reasonable accommodation. Although the EEOC considered the issue, the Board concluded that the evidence adequately supported a finding that the agency failed adequately to attempt reasonable accommodation by means other than reassignment.

***Handicap Discrimination*** -- In *Click v. Department of Health and Human Services*, PH03518110396, EEOC Petition No. 03820132, the Board agreed with the conclusion of the EEOC that the agency's reduction-in-force action directed against Click, a GS-2 Clerk, was improperly motivated by a discriminatory animus toward Click's handicap.

In addition to adjudicating the mixed cases remanded to the Board by the EEOC pursuant to 5 U.S.C. § 7702, the Board adjudicated several hundred mixed cases during fiscal year 1984 by initial decisions issued from regional offices and by Board decisions on petitions for review of initial decisions.

The Board continues to maintain an effective working relationship with the EEOC through the Board's liaison officer. This relationship was instrumental in resolving several procedural and substantive issues relating to mixed cases.

## E. Litigation

The Board's litigation program accelerated rapidly during this fiscal year as a result of landmark decisions of the U.S. Court of Appeals for the Federal Circuit. In January, the court ruled for the Board in *Hopkins v. Department of Justice*, 725 F.2d 1368 (1984). The court held that the Board, not the employing agency, is the respondent in cases the Board decides on jurisdictional or other threshold issues. In June, the court held in *Peterson v. Department of Energy*, 737 F.2d 1020 (1984), that the Board is the proper respondent in attorney fee cases. As a result of these decisions, the Board represented itself in some 225 additional cases in the Federal Circuit.

Tight organization and planning enabled the Board to absorb the large increase in the litigation workload without significant increases in funding or staff. New litigation processing procedures and model motions, briefs, and other documents were developed.

In other areas of litigation, the Board successfully responded to the first attempt by the Office of Personnel Management to obtain Federal Circuit review of a final Board decision. OPM is the only Federal agency which has statutory authority to seek judicial review of a Board decision. In *Devine v. Portlock*, Fed. Cir. No. 84546, OPM sought review of a "mixed" case involving issues of discrimination, over which the Federal Circuit lacked jurisdiction. However, OPM initially contended that the case did not involve issues of discrimination. Following the filing of the Board's brief, OPM withdrew its appeal.

The year also saw the Supreme Court grant the first petition for certiorari in a Board case. The Court agreed to hear *Linhahl v. Office of Personnel Management*, 718 F.2d 391 (Fed. Cir. 1983), 52 U.S.L.W. 3906 (June 19, 1984), a case in which the Federal Circuit disagreed with the Board's position on disability retirement issues. The Supreme Court's decision upheld the position taken by the Board in the Federal Circuit, that limited judicial review of the Board's disability retirement decisions is available and that the Federal Circuit has jurisdiction to review such decisions under 5 U.S.C. § 7703(b)(1).



The number of court cases that the Board monitored in 1984 rose by about 50 percent, going from 400 to over 600. Through monitoring, the Board keeps abreast of issues in cases it has decided but in which it is not the respondent.

#### **F. Regulation Review**

Pursuant to 5 U.S.C. § 1205(c), the Board is required to review OPM rules and regulations and their implementation in order to prevent the commission of prohibited personnel practices. In fiscal year 1984, the Board evaluated an OPM rule that excluded from agency grievance systems disputes concerning "career ladder" promotions. In *Joseph v. Devine*, HQ12058110067, the Board held that OPM violated section 1205(e) by expanding the scope of grievance exemptions beyond those contained in the personnel regulations without following the requirements of the Administrative Procedure Act.

## VII. Work of the Office of Merit Systems Review and Studies

The Board is required by law to conduct special studies to determine if the merit system is being adequately protected, to review the significant actions of OPM, and to report its findings to the President and Congress. The Office of Merit Systems Review and Studies (MSRS) has responsibility for performing these functions.

In addition to conducting survey research, the MSRS research agenda includes activities such as workshops or seminars and on-site system reviews at selected agencies. In 1984 MSRS prepared a number of major reports:

### **A. The 1984 Report on the Senior Executive Service**

This report analyzed the SES from the perspective of both the current and the retired or resigned executive in order to determine if the program's essential purposes had been effectively achieved in the 5-year period since its implementation. The report analyzed data gathered from two surveys conducted by MSRS during 1983: the Merit Principles Survey, and an SES Telephone Survey that contacted career executives who had either retired or resigned from Government.

### **B. Blowing the Whistle in the Federal Government: a Comparative Analysis of 1980 and 1983 Survey Findings**

This report conveys the results of a 1982 survey of Federal employees regarding their knowledge of fraud, waste, and abuse affecting their agencies and whether they were able to report such activities free from reprisal. The report also compares these results with similar data gained in a 1980 MSPB survey.

### **C. Significant Actions of the Office of Personnel Management: a Labor-Management Dialogue**

This monograph is a summary of a roundtable discussion sponsored by MSRS on November 3, 1983. OPM officials and officials from the National Treasury Employees Union and the National Federation of Federal Employees served as panelists and responded to questions from members of the Federal personnel community asking them to identify the three most significant accomplishments of OPM in 1982 and 1983, and the three priority actions OPM and Congress should take to improve the merit system.

### **D. Significant Actions of the Office of Personnel Management During 1983**

This statutory report examined programs and policies initiated by OPM during 1983, and some related 1984 actions to determine whether or not they resulted in the promotion of merit principles and the prevention of prohibited personnel practices.

Information for this report was derived from several sources: written comments in response to detailed information requests sent to OPM's Director and to agency heads at the 21 largest Federal departments and independent agencies; follow-up interviews conducted with agency officials; OPM briefings held with the MSRS study team on the various programs analyzed in the report; reviews of studies by the General Accounting Office, OPM, and the Grace Commission, as well as other public and private research organizations; responses of 7,861 Federal executive branch employees to a nationwide MSRS "Merit Principles Survey;" and responses to a nationwide OPM "Federal Employee Attitude Survey."

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