

ANNUAL REPORT
FISCAL YEAR
1987



UNITED STATES
MERIT SYSTEMS PROTECTION BOARD

A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES BY THE U.S. MERIT SYSTEMS
PROTECTION BOARD

THE CHAIRMAN



1120 Vermont Avenue, N.W.
Washington, D.C. 20419

Sirs:

In accordance with Section 202 (a) of the Civil Service Reform Act of 1978 (5 U.S.C. § 1209 (b)), I am pleased and honored to submit the Ninth Annual Report of the U.S. Merit Systems Protection Board, covering the activities of the Board during Fiscal Year 1987.

This is the first Board Annual Report to display the recently revised seal, which now incorporates the date "1883." That date marks the enactment of the Pendleton Act, which established the merit system and created the Board's predecessor agency, the Civil Service Commission. The addition of this historic date is an important reminder that the Board's guardianship of the merit system serves a long and noble tradition in the annals of Government service.

Respectfully,

Daniel R. Levinson
Daniel R. Levinson

The President of the United States The President of the Senate
The Speaker of the House of Representatives

Washington, DC

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BOARD FACTS AND HIGHLIGHTS

MISSION

The U.S. Merit Systems Protection Board is an independent, quasi-judicial agency, charged by Congress with protecting the integrity of Federal merit systems against prohibited personnel practices, ensuring adequate protection for employees against abuses by agency management, and requiring Executive branch agencies to make employment decisions based on individual merit. The Board has a statutory mandate to adjudicate appeals from personnel actions for the nation's largest employer. It has worldwide jurisdiction, wherever Federal civil servants are found. Additionally, under the Hatch Political Activities Act, it exercises jurisdiction over state and local government employees in Federally-funded positions.

The Board accomplishes its mission by:

- Hearing and deciding employee appeals from agency personnel actions;
- Hearing and deciding cases brought by the Special Counsel involving alleged abuses of the merit systems;
- Conducting studies of the civil service and other merit systems in the Executive branch to determine whether they are free of prohibited personnel practices; and
- Reviewing regulations issued by the Office of Personnel Management to determine whether implementation would result in the commission of a prohibited personnel practice.

The Board was established on January 1, 1979, by Reorganization Plan No. 2 of 1978, and codified by the Civil Service Reform Act of 1978 (CSRA). The Act restructured the Federal Government's personnel administration by distributing functions performed by the Civil Service Commission to four newly-created independent agencies. The Merit Systems Protection Board (MSPB) assumed the appeals functions of the Civil Service Commission, and was given the new responsibilities to perform merit systems studies and to review the significant actions of OPM. The other agencies established by the CSRA are the Office of Personnel Management (OPM), which manages the Federal workforce; the Federal Labor Relations Authority (FLRA), which oversees labor-management relations in the Federal establishment; and the Office of Special Counsel (OSC), which investigates prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Political Activities Act.

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

BOARD MEMBERS

Chairman



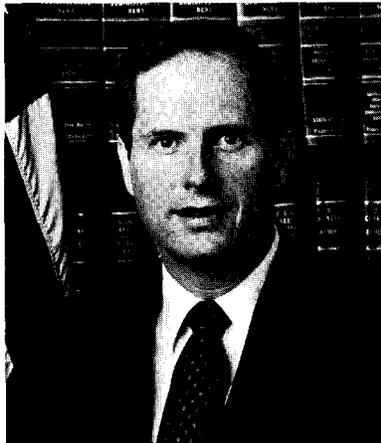
DANIEL R. LEVINSON became Board Chairman on August 15, 1986, following nomination by President Reagan and confirmation by the Senate. At the time of his appointment, Mr. Levinson was General Counsel of the U.S. Consumer Product Safety Commission, a position he had held since March 1985. Previously he served for two years as Deputy General Counsel of the Office of Personnel Management. Prior to joining OPM, Mr. Levinson was a partner in the Washington, D.C. law firm of McGuinness & Williams.

Vice Chairman



MARIA L. JOHNSON was nominated to the Board by President Reagan on March 18, 1983. She was confirmed by the Senate on May 6, 1983, and was designated Vice Chairman on September 19, 1983. From March 1, 1986 to August 15, 1986, Ms. Johnson served as the Board's Acting Chairman. At the time of her appointment, Ms. Johnson was a commercial loan officer with the Security National Bank in Anchorage, Alaska. From 1978 to 1981, she served as an associate with the law firm of Lambert, Griffin & McGovern in Washington, D.C.

Member



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

BOARD ORGANIZATION

The **Chairman**, by statute, is the chief executive and administrative officer of the Board.

The **Executive Director** has authority, as delegated by the Chairman, for management of the Board, including the authority to make final decisions in the areas of personnel management, fiscal management, document security, procurement and contracts, and general administrative support services. The Executive Director oversees program planning and implementation, including supervision of the Board's Regional Offices.

The **Deputy Executive Director for Regional Operations** provides administrative guidance to the Board's Regional Offices, reviews the quality of initial decisions issued by administrative judges in the Regional Offices, and ensures that Board policies and procedures are implemented at the regional level. DEDRO also assists the Executive Director in carrying out general management responsibilities.

The MSPB **Regional Offices** are located in eleven major metropolitan areas throughout the United States: Atlanta, Boston, Chicago, Dallas, Denver, New York, Philadelphia, St. Louis, San Francisco, Seattle and Washington, D.C. These offices receive, process, and adjudicate the initial appeals filed with the Board, and have the primary function of issuing fair, timely, and well-reasoned decisions on all appeals. Almost one-half of the Board's workforce is located in the Regional Offices.

The **Office of the Inspector General** is an independent entity which conducts audits, investigations, and internal control evaluations in compliance with the requirements of the Office of Management and Budget and the U.S. General Accounting Office. The Inspector General evaluates the programs and operations of the Board in order to promote economy and efficiency, to prevent and detect fraud and abuse, and to advise the Chairman and Executive Director of any problems and deficiencies detected.

The **Office of the General Counsel** is legal counsel to the Board. The office provides advice to the Board and its organizational components on matters of law arising in day-to-day operations. It represents the Board in litigation, prepares proposed enforcement decisions and orders, reviews OPM's regulations, and drafts proposed final decisions for the Board in original jurisdiction cases. The office is also responsible for conducting the agency's ethics program.

The **Office of Appeals Counsel** assists the Board in adjudicating petitions for review from initial decisions issued by administrative judges in the Regional Offices. The office receives and analyzes the petitions, researches applicable laws, rules and precedents, and submits proposed opinions to the Board members for their final adjudication. It also processes interlocutory appeals on matters still pending before the Regional Offices, makes recommendations to the Board on motions filed during the review process, makes recommendations on reopening appeals on the Board's own motion, and provides analytical research memoranda to the Board on legal issues.

The **Office of Administrative Law Judge** hears cases governed by the Administrative Procedures Act and other original jurisdiction cases assigned by the Board. This office also renders initial decisions in appellate jurisdiction cases as assigned by the Board, acts on discovery motions, and issues subpoenas.

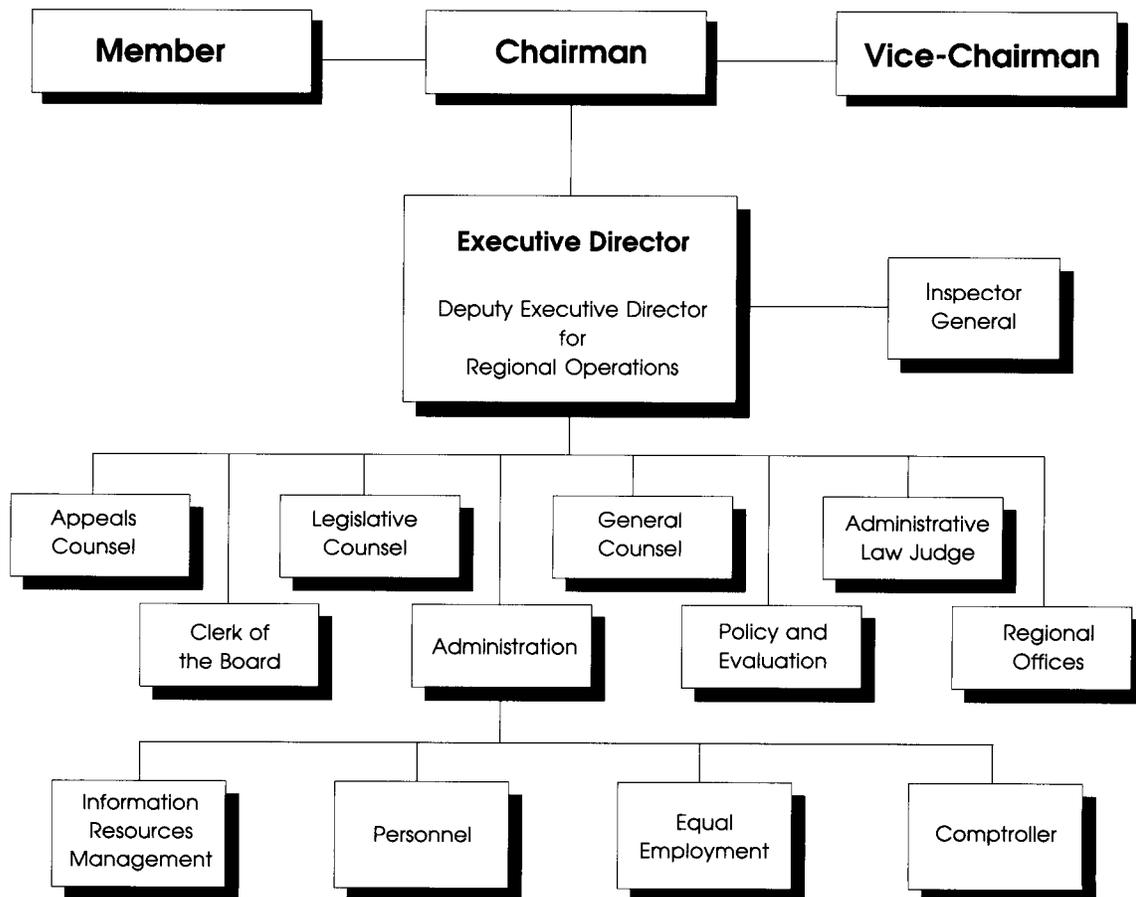
The **Office of Legislative Counsel** manages legislative policy, Congressional relations, and public affairs functions for the Board, including the drafting and coordination of prepared testimony, responses to public and Congressional inquiries, and analyses of proposed legislation. The office also conducts the Board's outreach program and assists in the preparation and distribution of Board publications.

The **Office of Policy and Evaluation** plans and conducts studies of the civil service and other merit systems and produces an annual review and report on the significant actions of the Office of Personnel Management, as required by law. The office also conducts studies focusing on the internal operations of the Board, and plans and coordinates improvements to the overall management of the Board.

The **Office of the Clerk of the Board** performs the ministerial functions of the Board that facilitate timely adjudication, including receiving and processing petitions for review, ruling on certain procedural matters, and distributing the Board's Opinions and Orders. The Clerk is also responsible for the Board's records, correspondence, and reports management programs. This office certifies official records, maintains the Board's library, and provides initial responses to Freedom of Information and Privacy Act requests.

The **Office of Administration** directs and oversees the administrative operations of the Board, and is made up of the following four divisions: The **Comptroller Division** administers the budget, accounting, procurement, property management, and physical security functions of the Board. The **Personnel Division** manages personnel programs and assists managers, employees, and applicants for employment. It administers the staffing, classification, employee relations, performance management, payroll, personnel security, and training functions for the Board. The **Equal Employment Division** implements the Board's equal employment opportunity programs, including developing annual EEO action plans and procedures for processing discrimination complaints. It furnishes advice and assistance on affirmative action initiatives to the Board's offices. The **Information Resources Management Division** develops and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative responsibilities.

U.S. MERIT SYSTEMS PROTECTION BOARD



HIGHLIGHTS OF FISCAL YEAR 1987 ACTIVITIES

In Fiscal Year 1987 the Board's Regional Offices continued to improve an already impressive record of case processing timeliness. Decisions on initial appeals from Federal employees were issued within the Board's established 120-day time standard in 99.8 percent of all cases. The Board's administrative judges issued just over 6,500 decisions on initial appeals. This figure has remained relatively constant from Fiscal Year 1985 through the past fiscal year. Voluntary settlements among the parties to an appeal also continued to increase, rising to 36 percent of the initial appeals which were not dismissed.

At Headquarters, the Board issued decisions on just over 1,600 petitions for review, virtually the same number as in Fiscal Year 1986. The Board also decided 13 cases arising under its original jurisdiction, a slight decline from the number of decisions in the previous fiscal year. Most of the original jurisdiction cases were actions brought by the Office of the Special Counsel, seeking disciplinary action against Federal employees alleged to have committed prohibited personnel practices and prosecuting violations of the Hatch Act.

For the Board, Fiscal Year 1987 was a year of innovation, as well as of achievement. Beginning with the Management Planning Conference held in October 1986, specific "Improvement Objectives" were developed to assist the Board in maximizing use of its resources to accomplish its mission with a high degree of efficiency and effectiveness. These objectives were:

- To ensure the quality of decisions and the adjudicatory process;
- To enhance the merit systems studies and regulation review functions;
- To continue to improve management efficiency and effectiveness; and
- To improve the effectiveness of outreach activities.

As part of the development of a viable strategic plan, each office director in Headquarters and the Regional Offices was required to establish specific action plans in support of one or more of the improvement objectives. Periodic reviews are being conducted to monitor and assess each office's progress in fulfilling its action plan objectives and meeting its milestones.

In the area of case adjudication, the Board has continued to emphasize the need to ensure well-reasoned decisions both in the Regional Offices and at Headquarters. The quality review program of Regional Office initial decisions has been strengthened, uniform jurisprudence has been promoted among the regions, and training of administrative judges has been conducted. At Headquarters the Board has concentrated on issuing precedential decisions in cases involving "major issues," so that these decisions may be utilized in the adjudication of other cases involving similar issues. In addition, fewer short form Orders summarily affirming Regional Office initial decisions have been issued, with a corresponding increase in Board Opinions.

The use of alternative means of dispute resolution to achieve settlement between parties has also been emphasized. The Board's administrative judges have attended the National Judicial College and other training programs to improve their skills in this area, and the rate of settlements reached in cases brought to the Board has continued to increase. The greater use of settlement procedures is expected to result in significant cost savings, especially at the regional level, without impinging on the rights of the parties.

The allocation of additional resources to the office responsible for merit systems studies permitted greater emphasis on the Board's statutory studies function. As a result, work was completed on several studies dealing with important Federal personnel issues. A number of these studies were issued in Fiscal Year 1987 and the others are planned for release in Fiscal Year 1988. This office, which also conducts internal management studies, was retitled the Office of Policy and Evaluation in the realignment of Board offices.

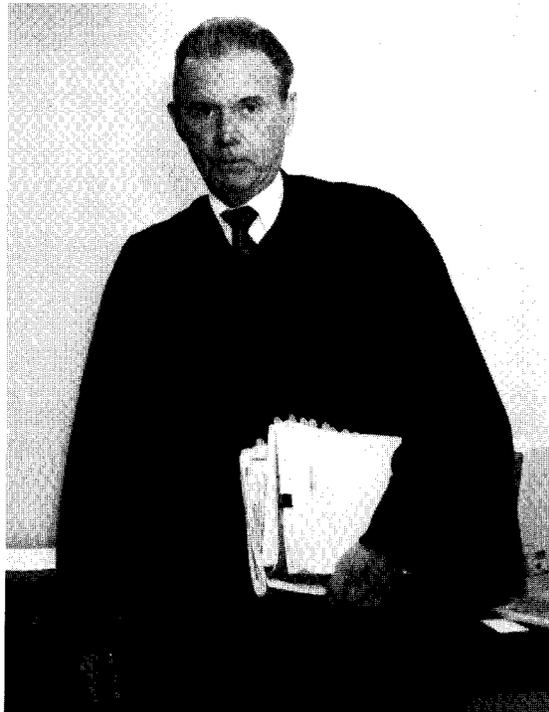
A commitment to realign the Board's Headquarters offices and the jurisdictions of its Regional Offices also developed from the Management Planning Conference. After extensive study to determine the alignment of functions which would best contribute to greater management efficiency and effectiveness, the new organization plan was placed in effect April 1, 1987. The realignment

of the geographic jurisdictions of the Regional Offices was aimed at balancing workload with staff.

At Headquarters, the Executive Director was provided with a deputy to assist in carrying out general management responsibilities, and several offices which had previously reported directly to the Executive Director were combined, resulting in a more streamlined organizational structure. The internal audit function was strengthened by making it an independent office reporting to the Executive Director.

Other management improvement activities have included the continued expansion of the Board's automated systems, the establishment of an automated assignment and correspondence tracking system, the establishment of an automated reports control system, and the development of new and improved written procedures.

The Board has emphasized outreach activities in order to promote a greater understanding of the Board's practices and procedures, and of important issues in Federal personnel law, among the constituencies which deal with the Board. This emphasis is reflected in the number of appearances made by Board members, senior Headquarters staff, and Regional Office directors and administrative judges at meetings, conferences, and training programs. The Board's outreach activities have also included, for the first time, contact with state and local government personnel boards on matters of common interest and concern.



**Chief Administrative Law Judge, Edward
J. Reidy**

APPELLATE FUNCTIONS OF THE BOARD

INITIAL APPEALS

Most Federal employees and applicants for employment are entitled to appeal certain personnel actions taken by Federal agencies. Appealable matters include adverse actions for misconduct, performance-based removals or downgrades, employment suitability and retirement determinations, reductions-in-force, denials of within-grade increases, and denial of restoration to duty or reemployment rights. Appeals must be filed in writing, within 20 days of the personnel action, with the Regional Office having geographic jurisdiction.

After the appeal has been docketed and entered into the case tracking system, the Regional Office issues an order acknowledging receipt of the appeal and raising any questions of timeliness or jurisdiction. The appeal is then assigned to an administrative judge for review. By Board order, the agency is required to provide its evidentiary file to the appellant and the administrative judge. The appellant and the agency then have the opportunity to present additional information for the administrative judge's consideration.

The appellant may also request a hearing. If a hearing is held, each party has the opportunity to call and cross-examine witnesses, present evidence, and make arguments to the administrative judge. Hearings are open to the public and on the record, with copies of the record available to the parties.

Based on the Board's established policy, the administrative judge is required to issue an initial decision within 120 days from the date the appeal was filed. In Fiscal Year 1987, 99.8 percent of all initial appeals were decided within 120 days. The Regional Offices averaged 75 days to issue decisions.

In Fiscal Year 1987 the Board's Regional Offices decided a total of 7,410 cases, of which 6,512 were initial appeals and 898 were addendum cases, i.e., attorney fees, remands, and compliance (or enforcement). Settlements increased to 1,448 or 36 percent of those initial appeals not dismissed for lack of jurisdiction or timeliness and closed during the fiscal year.

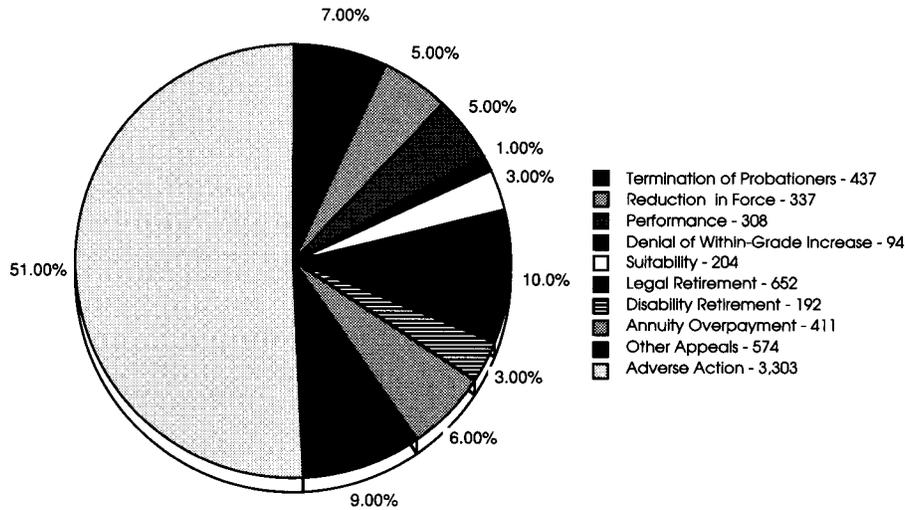
The following table shows the processing times of the initial appeals decided in the Regional Offices during Fiscal Year 1987.

CASE PROCESSING TIMES IN REGIONAL OFFICES

DECISION TIMES (DAYS)	Number of Cases	Percent of Cases	Percent Total
0 - 30	452	6.9	6.9
31 - 60	1,803	27.7	34.6
61 - 90	1,809	27.8	62.4
91 -120	2,433	37.4	99.8
120 + 15	.2	100.0	
TOTAL	6,512		

Fifty-one percent of the initial appeals were adverse action cases. The remaining appeals included retirement-related decisions, terminations of probationary employees, performance actions, reductions-in-force, and other appealable actions. The following chart shows the breakdown of initial appeals by the type of action appealed.

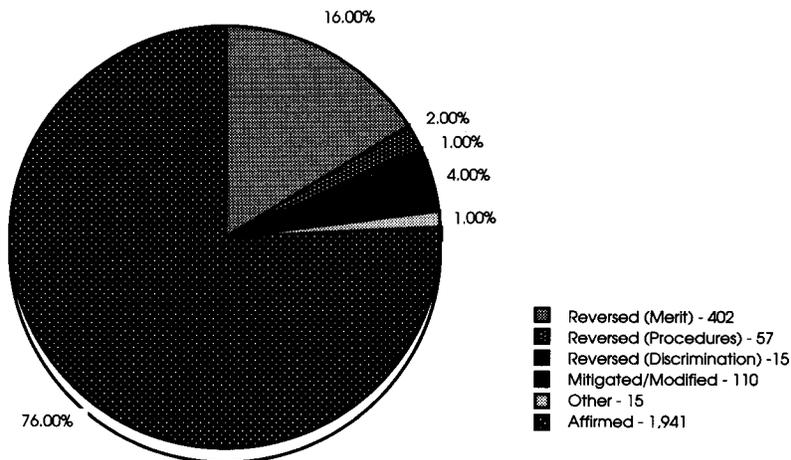
INITIAL APPEALS BY TYPE OF ACTION



TOTAL NUMBER OF INITIAL APPEALS - 6,512

Hearings were held in 24 percent of all initial appeals. Fifty-five percent of appellants were represented by an attorney, union representative, or other person. Of the initial appeals which were adjudicated, 1,941 or 76 percent affirmed the agency action. Decisions on the remaining appeals which were adjudicated included reversals, which overturned the agency action, and mitigations, which reduced or modified the penalty imposed by the agency. The following chart shows the breakdown by disposition of all appeals which were not dismissed or settled.

DISPOSITION OF INITIAL APPEALS



TOTAL NUMBER OF CASES - 2,540

DISPOSITION OF INITIAL APPEALS (CASES NOT DISMISSED) BY AGENCY

Agency	Settled		Affirmed		Reversed		Mitigated/ Modified		Other		Total 100%** #
	#	%	#	%	#	%	#	%	#	%	
OPM*	75	(7)	774	(69)	241	(22)	16	(1)	11	(1)	1,117
Postal Service	435	(56)	235	(30)	67	(9)	32	(4)	2	(—)	771
Navy	184	(41)	221	(49)	32	(7)	14	(3)			451
Army	168	(47)	145	(41)	37	(10)	6	(2)			356
Air Force	106	(41)	129	(49)	16	(6)	9	(3)	1	(—)	261
Veterans											
Administration	116	(56)	70	(34)	13	(6)	7	(3)			206
Justice	64	(51)	42	(33)	11	(9)	9	(7)			126
Defense	36	(37)	50	(51)	9	(9)	3	(3)			98
Treasury	59	(63)	27	(29)	4	(4)	3	(3)			93
HHS	29	(33)	42	(48)	13	(15)	3	(3)			87
Transportation	32	(52)	24	(39)	3	(5)	2	(3)	1	(2)	62
Agriculture	26	(50)	19	(37)	4	(8)	3	(6)			52
Interior	28	(56)	17	(34)	5	(10)					50
GSA	18	(40)	23	(51)	4	(9)					45
Labor	21	(62)	10	(29)	3	(9)					34
Tenn. Valley											
Authority	8	(26)	23	(74)							31
Commerce	7	(27)	17	(65)			2	(8)			26
Energy	3	(17)	15	(83)							18
Comm. on Civil Rights			15	(100)							15
SBA	4	(40)	2	(20)	3	(30)	1	(10)			10
EEOC	2	(22)	5	(56)	2	(22)					9
HUD	2	(25)	5	(63)	1	(13)					8
Education			7	(100)							7
Totals — Remaining Agencies	25	(45)	24	(44)	6	(11)					55
GRAND TOTAL	1,448	(36)	1,941	(49)	474	(12)	110	(3)	15	(—)	3,988

*Office of Personnel Management is "Agency" in retirement cases.

**May not total 100% because of rounding.

On August 18, 1987, President Reagan signed into law Public Law 100-90, which extends MSPB appeal rights to additional U.S. Postal Service (USPS) supervisors and managers who did not previously have recourse to the Board. USPS estimates that the new law will increase the number of its employees eligible to appeal to the Board by 35,000.

ADDENDUM CASES

In addition to the decisions on initial appeals issued in Fiscal Year 1987, the Regional Offices issued decisions in 898 addendum cases. These included requests for attorneyfees, enforcement cases alleging that there has not been full compliance with a decision of the Board or a Regional Office, and cases remanded to the Regional Offices.

The following table shows the number of addendum cases by type.

ADDENDUM CASES

CATEGORY OF APPEAL	FY 1987
Attorney Fees	379
Compliance (Enforcement)	405
Remands	114
Total	898

PETITIONS FOR REVIEW

The Board may grant a petition for review when it is established that the initial decision of the administrative judge was based on an erroneous interpretation of statute or regulation, or that new and material evidence is available that, despite due diligence, was not available when the record was closed. Petitions for review may be filed with the Office of the Clerk in Board Headquarters by either party, or, under certain circumstances, by the Office of Personnel Management or the Office of Special Counsel as an intervenor. The Board also has the discretion to reopen and reconsider an initial decision on its own motion.

The Board's decision on a petition for review constitutes final administrative action. Further appeal may then be available in the United States Court of Appeals for the Federal Circuit or, in cases involving allegations of certain types of discrimination, with a U.S. District Court or the Equal Employment Opportunity Commission. The Director of OPM may intervene or petition the full Board for reconsideration of a final decision, and may also seek judicial reviews of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.

The Board completed action on 1,619 petitions for review in Fiscal Year 1987, of which 1,388 were filed to review initial decisions and the remaining 231 were addendum cases (attorney fees, enforcement and remands). Ninety-one percent of the decisions by the Board left the Regional Office initial decision unchanged (1,262 of 1,388). During Fiscal Year 1987, 94 percent of final Board decisions reviewed by the United States Court of Appeals for the Federal Circuit were unchanged.

The following flow chart demonstrates the various steps in the processing of both initial appeals and petitions for review.

(See Appendix A for summaries of significant Board decisions issued on appeals during Fiscal Year 1987.)

STEPS IN PROCESSING INITIAL APPEALS AND PETITIONS FOR REVIEW

ACTION	TIME FRAME
Filing of Appeal by Appellant	Within 20 days of effective date of agency personnel action
MSPB REGIONAL OFFICE	
Appeal received Appeal acknowledged Appeal entered in Case Tracking Svstem Case file requested from agency Appeal assigned to administrative judge (If appropriate, show cause order issued, re: jurisdiction or timeliness)	1-3 days from receipt of appeal
Agency response and case file received Discovery begins Prehearing conference scheduled Notice of hearing issued (If show cause order issued, response received)	10-25 days from receipt of appeal
Prehearing motions filed and rulings issued Attempts to achieve settlement (various methods) Discovery completed Prehearing conference held (More than one may be held to facilitate settlement) Witnesses identified If no hearing, close of record set	10-60 days from receipt of appeal
Hearing held Record closed	60-75 days from receipt of appeal
Initial Decision issued	Within 120 days from receipt of appeal
<hr/>	
Filing of Petition for Review (PFR) by Appellant or Agency (or OSC or OPM as intervener)	Within 35 days of date of Initial Decision
BOARD HEADQUARTERS	
PFR received PFR acknowledged PFR entered in Case Tracking System Case file requested from Regional Office (If appropriate, show cause order issued re: jurisdiction or timeliness)	1-3 days from receipt of PFR
Response to PFR received or Cross-PFR received Case file received (If show cause order issued, response received)	Within 25 days of date of service of PFR
If Cross-PFR received	Additional 25 days from date of service of Cross-PFR
If Extension of Time request received and granted	Additional time specified in Order granting EOT
Written Decision issued	(Board time standard for issuance of Final Decisions is 110 days)
Filing of appeal with U.S. Court of Appeals for the Federal Circuit (or in discrimination cases, with the appropriate U.S. District Court or EEOC)	Within 30 days of the party's receipt of Board Final Decision

ORIGINAL JURISDICTION FUNCTION OF THE BOARD

The Board has original jurisdiction over certain matters where no formal action has been taken within an agency. These cases include:

- Disciplinary actions brought by the Special Counsel alleging violation of the Hatch Act;
- Corrective and disciplinary actions brought by the Special Counsel against agencies or Federal employees who are alleged to have committed prohibited personnel practices, or to have violated certain civil service laws, rules or regulations;
- Requests for stays of personnel actions alleged by the Special Counsel to result from prohibited personnel practices;
- Certain proposed disciplinary actions brought by agencies against Administrative Law Judges;
- Requests for review of regulations issued by the Office of Personnel Management, or of implementation of OPM regulations by an agency; and
- Informal hearings in cases involving proposed removals from the Senior Executive Service.

Original jurisdiction complaints are filed in writing with the Office of the Clerk at Board Headquarters. Employees against whom Hatch Act, other disciplinary action, or Administrative Law Judge disciplinary action complaints are filed have 30 days to respond and are entitled to a hearing. These cases are assigned to the Office of the Administrative Law Judge, who issues a recommended decision to the Board for final decision. In SES performance removal cases, the Administrative Law Judge holds an informal hearing, but there is no action by the Board. Special Counsel stay requests and requests for regulation review are decided by the Board. Appeals from most original jurisdiction cases are filed with the United States Courts of Appeals.

Two other types of cases, although technically within the Board's appellate jurisdiction, are processed originally at Board Headquarters (rather than in a Regional Office). These are petitions to review an arbitrator's award and appeals from the Board's own employees. Decisions in arbitration cases are issued by the Board. In the case of an appeal from an MSPB employee, the Administrative Law Judge hears the case and issues the initial decision. Unless a PFR is filed, the decision of the ALJ becomes the final decision.

Addendum cases (attorney fees, compliance, and remands) arising out of Board decisions in original jurisdiction cases are also included in the Board's original jurisdiction caseload.

During Fiscal Year 1987, the Board issued decisions in 13 original jurisdiction cases. Of these, four were actions filed by the Special Counsel alleging violation of the Hatch Act, four were other Special Counsel disciplinary actions, and one was a Special Counsel stay request. (The stay request took effect by operation of law, i.e., without action by the Board.) Three cases involved proposed disciplinary actions against Administrative Law Judges and one was a regulation review. In addition to these 13 cases, the Board issued decisions in 3 attorney fee cases arising out of original jurisdiction decisions and in 3 cases remanded by the courts. In one original jurisdiction compliance case, the initial decision of the Administrative Law Judge became final without Board action. The Administrative Law Judge also held informal hearings in two cases involving removal from the Senior Executive Service. The Board decided seven cases involving review of arbitrators' awards.

The following table shows the breakdown of original jurisdiction cases by type of action and provides information on the disposition of these cases.

(See Appendix B for summaries of significant Board decisions issued in original jurisdiction cases during Fiscal Year 1987.)

NUMBER AND DISPOSITION OF ORIGINAL JURISDICTION CASES

FY 1987

TYPE CASE	NO. OF CASES	DISPOSITION
Special Counsel — Disciplinary Actions (other than Hatch Act)	4*	Demotion ordered in 2 cases. Suspension ordered in 1 case. Settlement in 1 case.
Hatch Act Violations	4**	Violation found in all 4 cases. Removal ordered in 2 cases. Suspension ordered in 1 case. Settlement in 1 case.
Special Counsel — Corrective Actions	0	
Special Counsel — Stay Requests	1	Stay went into effect by operation of law.
Actions against Administrative Law Judges	3	Upheld agency action in 1 case. Dismissed 1 case. No jurisdiction in 1 case.
Review of Regulations	1	Denied request to review.
TOTAL	<u>13</u>	

* In addition, 3 decisions were issued in OSC disciplinary action cases remanded to the Board by the courts. Revised penalty in 1 case. Dismissed 2 cases. **

**In one of these cases, a second decision was issued ordering withholding of Federal funds from the employing agency for failure to remove the employee as ordered by the Board.

The Board issued decisions in three attorney fee cases arising out of original jurisdiction cases. The initial decision of the ALJ became final in one original jurisdiction compliance case. The ALJ held hearings in two SES removal cases.

The Board also decided seven arbitration cases. No decisions on appeals from MSPB employees were issued during FY 1987.

SPECIAL PANEL

The Special Panel is a separate entity whose sole purpose is to resolve inconsistencies created when civil service law and discrimination issues intersect. Established by the Civil Service Reform Act of 1978 to resolve disputes between the Merit Systems Protection Board and the Equal Employment Opportunity Commission, the Special Panel consists of one Board Member designated by the MSPB Chairman, one EEOC Commissioner designated by the EEOC Chairman, and a third individual appointed by the President to serve as Chairman of the Special Panel, President Reagan appointed Barbara Mahone as Chairman of the Special Panel on October 18, 1985.

During Fiscal Year 1987 the Special Panel issued one decision in a case alleging handicap discrimination.

(See Appendix C for a summary of this decision.)

LITIGATION

Litigation in which the Board is named as the respondent arises primarily from civil actions appealing decisions issued under the Board's original jurisdiction authority and filed in the various U.S. Courts of Appeal. (A Federal Circuit order issued in 1987 eliminated the Board as a respondent in appeals from attorney fee decisions and cases which the Board had dismissed for lack of jurisdiction or timeliness.)

These cases usually involve complex issues such as the extent of the Special Counsel's jurisdiction and Hatch Act violations. Other active litigation includes discrimination cases filed in the various Federal District Courts, when the Board is a defendant; cases in which the Board intervenes, such as OPM petitions for review in the Federal Circuit; cases where Board employees are sued in their personal capacities for actions taken by them within the scope of their employment; and administrative litigation arising out of appeals to MSPB filed by the Board's own employees.

During Fiscal Year 1987 the Board also monitored over 1,000 cases involving appeals from decisions issued by the Board under its appellate jurisdiction. These cases are filed in the United States Court of Appeals for the Federal Circuit or, in cases involving allegations of discrimination, in the various Federal District Courts. The agency is the named respondent in these cases and is defended by the Department of Justice. Board activities in connection with monitored litigation include responding to inquiries, assisting in the preparation of briefs, preparing a case summary and chronology, preparing a legal evaluation, and performing an analysis of the published court decision.

(See Appendix D for summaries of the significant litigation activities of the Board during Fiscal Year 1987.)

FOCUSING ON THE FUTURE - IMPROVEMENT OBJECTIVES

TO ENSURE THE QUALITY OF DECISIONS AND THE ADJUDICATORY PROCESS

The Board initiated a number of activities in Fiscal Year 1987 to ensure the quality of decisions and the adjudicatory process. Of primary importance was the decision, announced in August 1987, to move toward greater use of "plain English" in its orders and regulations. Approximately 45 percent of the employees whose appeals were decided this year did not have an attorney or other representative. Greater use of "plain English" reduces the possibility of confusion with the appeals process and helps protect the rights of the parties. The initiative also furthers the Board's goal of promoting uniform jurisprudence throughout the regions.

The "plain English" revisions apply to certain Board orders issued by the Regional Office administrative judges during the pendency of an appeal. Included are Acknowledgment Orders, Hearing Orders, and Close of Record Orders. Initial decisions now include standard "plain English" paragraphs explaining the appeal rights of the parties.

The new language explains in simple terms when, where and how initial decisions may be appealed. The revisions also clearly explain proceedings in attorney fee and enforcement cases. In addition, the Board has developed standard instructions to agencies on the materials they are required to provide in response to all appeals.

The Board has established a new system of quality review of the initial decisions issued in the Regional Offices, and presentations have been made to the administrative judges to explain the criteria which are being used in the quality review evaluations. Under this ongoing program, the decisions of all of the administrative judges will be reviewed.

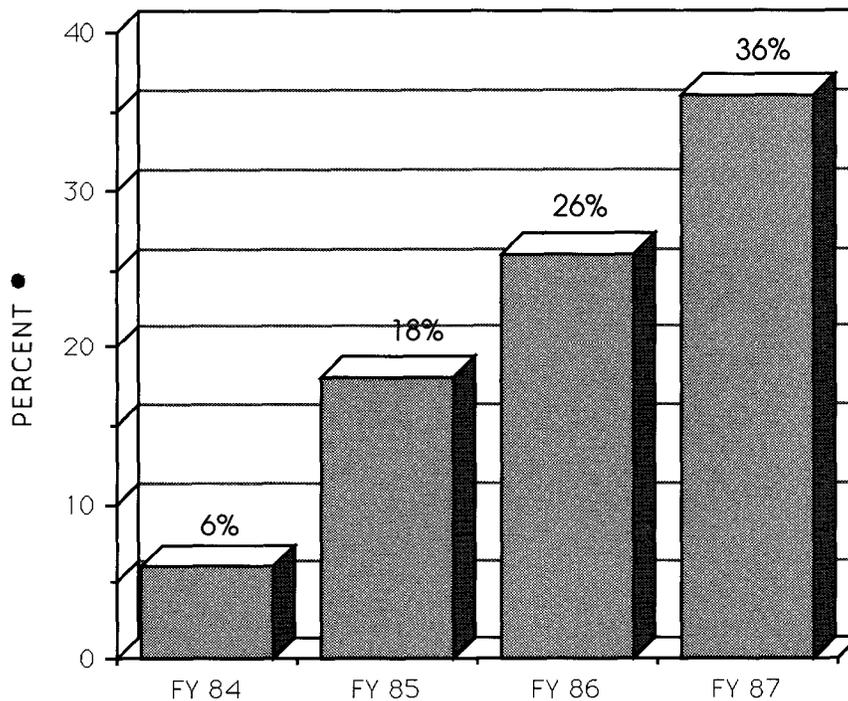
Training has been an important element in the effort to ensure the quality of decisions in the Regional Offices. The administrative judges have attended training programs at the National Judicial College and the Department of Justice Legal Education Institute, in addition to Board-sponsored programs. This training has focused on quality of decisions, uniform jurisprudence, and, especially, alternative means of dispute resolution.



Catherine R. Gibson, Administrative Judge (right), Victoria R. May (left)

The Board continues to emphasize settlement procedures because, properly utilized, they ensure that the rights of the parties are protected and also provide the single most cost-effective means of dispute resolution. The Board's administrative judges utilize a wide variety of dispute resolution techniques. They facilitate an exchange between the parties, suggesting possible solutions and helping the parties reach a voluntary agreement. They make use of the prehearing conference stage of the appeals process to gain an ongoing involvement with the parties, thus facilitating settlement. They also may conduct a mini-trial where the participants present a condensed version of their best arguments and then discuss settlement. Since these processes are voluntary, the parties surrender no rights if an agreement is not reached, and the case can proceed to adjudication.

The rate of settlement of initial appeals in the Board's Regional Offices has increased from 6 percent of cases not dismissed in Fiscal Year 1984 to 36 percent in Fiscal Year 1987.



- Percent of initial appeals not dismissed for lack of jurisdiction or timeliness. (Addendum cases are not included.)



General Counsel, Llewellyn M. Fischer (left), Counsel to the Chairman for Legal Policy, Garry M. Ewing (center), and Deputy General Counsel, Mary L. Jennings (right)

The emphasis on settlement aside, the Board is in the business of adjudicating cases, not forcing parties in a dispute to reach an accommodation. However, alternative means of dispute resolution have the potential to do justice more efficiently than traditional adjudicatory processes. The finality of the agreement and the cost and time savings are strong incentives to the parties to settle their differences. Cost savings are achieved in travel and per diem for the parties, use of hearing facilities, recording hearings, and time of witnesses which would be lost during their absence for a hearing.

The need to ensure the development of well-reasoned jurisprudence has resulted in the Board issuing fewer short form Orders, which summarily deny petitions for review of initial decisions issued by administrative judges in the Regional Offices. Instead, detailed Opinions and Orders are being issued in a greater number of cases. The purpose is to issue decisions on questions of law for which there is no clear authority, even though the outcome in the appeals involved might not change. These precedential decisions can then be relied on by administrative judges in subsequent appeals, eliminating the need for writing their own lengthy rationale for reaching the same conclusions. Such precedential decisions also serve to inform and guide Federal agencies, their employees, and the representatives of both, in taking and defending appealable actions.

The Board has also concentrated on the resolution of cases involving "major issues." Such issues are those that are novel but will occur with some frequency in Board appeals. Their resolution in one or two appeals, therefore, allows for resolution in many other cases.

The Board's staff attorneys devote considerable time to the review of decisions handed down by the Board's chief reviewing court, the Court of Appeals for the Federal Circuit, and prepare policy position papers on the issues raised in these decisions, as well as on other important legal issues. This legal research, which is utilized by the Board in making its decisions, is an important contribution to the high quality of those decisions.

In closed meetings noticed under the Government in the Sunshine Act, the Board addressed groups of cases involving complex, unresolved issues of great importance to Federal employees. Sunshine Act meetings also were held to vote on a large number of relatively uncomplicated cases. Additional meetings have been planned, and the Board is continuing to study the process to determine how it can best be used to expedite its deliberations.



Director, Office of Appeals Counsel, William DuRoss (center), with attorneys John J. Murphy (left) and Lawrence E. Shearer (right)

Improvements in the adjudicatory process and the quality of decisions have also been achieved through the use of automated information technology. A computer research system now allows Board attorneys and support staff to perform computerized legal research and to obtain current information regarding the status of Board and court decisions. This provides the Board with the capacity to ascertain that all case references in decisions reflect the up-to-the-minute status of reported case law. Board attorneys now also use a working glossary of repetitive case citations and simplified standard paragraphs which are repeated in Board decisions.



Clerk of the Board, Robert E. Taylor (left), with attorneys John J. Murphy (center) and Thomas J. Lanphear (right)

TO ENHANCE THE MERIT SYSTEMS STUDIES AND REGULATION REVIEW FUNCTIONS

During Fiscal Year 1987 the Board placed renewed emphasis on its statutory function of conducting reviews and studies of the civil service and other merit systems. Research was completed for five separate reports which together constitute the annual oversight review of the significant actions of the Office of Personnel Management. These reports focus on: (1) entry-level hiring into selected professional and administrative career positions and blue-collar apprentice positions; (2) the revised reduction-in-force (RIF) regulations issued by OPM, which took effect in February 1986; (3) the Performance Management and Recognition System, which creates a link between pay and performance for senior level (GM 13-15) Federal managers and supervisors; (4) performance management, generally - a broad overview of the Federal Government's efforts to integrate performance, pay, and reward systems with mission accomplishment; and (5) the significantly expanded delegation of personnel authority for making temporary appointments. The first two of these reports, "In Search of Merit: Hiring Entry-Level Federal Employees" and "Reduction-in-Force: The Evolving Ground Rules," were issued during the fiscal year. The remainder are to be issued in Fiscal Year 1988.

In addition to these reports on the significant actions of OPM, the Board published a monograph on judicial views of the prosecution of prohibited personnel practices by the Office of the Special Counsel. The annual report on appeals decisions of the Board during Fiscal Year 1986 was also issued.

(See Appendix E for summaries of these reports.)

Substantial work was completed on other studies which will be issued in Fiscal Year 1988, including an update on "Sexual Harassment in the Federal Government," a report on job satisfaction among Federal workers, a report on college recruiting for Federal Government employment, and an overview of the latest Merit Principles Survey of Federal employees. A research agenda was developed for studies to be conducted in Fiscal Year 1988 and beyond, including a series of studies which will have as their theme "A Ten Year Retrospective of the Civil Service Reform Act" and a continuation of the series of reports on the Senior Executive Service.

The program and policy research underlying the Board's studies is carried out by a



Director, Office of Policy and Evaluation, Paul D. Mahoney (center), with staff members Carol Hayashida (left) and John M. Palguta (right)

multi-disciplinary team of personnel specialists, program analysts, and personnel research psychologists. This staff monitors the Federal civil service system for emerging trends and issues related to the basic merit principles and human resources management. Through these efforts, augmented by suggestions from agency officials, public interest groups, employee unions, and concerned individuals, the Board develops its research agenda.

The Board's governmentwide studies are conducted through a variety of research methods, including mail and telephone survey research, on-site systems reviews, written interrogatories, formal round table discussions with subject matter experts, computer-based data analysis, and review of secondary source material. Using these methods, the Board has issued a cost-efficient series of special study reports on a wide variety of topics.

Many of the Board's studies have been "first of their kind," examining subject matters from specific prohibited personnel practices to broad issues affecting the merit systems. Several topics or issues have been reviewed on more than one occasion, allowing the Board to develop time-line data to conduct trend analyses on a variety of issues including the impact of the Civil Service Reform Act.

The Board's studies provide important insights for public policy decision makers concerning civil service matters, and a number of the Board's reports have been quoted as authoritative. The 1981 study of sexual harassment in the Federal Government, for example, is routinely cited as the landmark study of this subject. The Board's 1981 and 1984 studies of "whistleblowing" have been cited by the President, officials in the Executive branch, and Members of Congress. These studies add the Board's expertise to the ongoing debate on important public policy issues dealing with the civil service.

TO CONTINUE TO IMPROVE MANAGEMENT EFFICIENCY AND EFFECTIVENESS

Of primary importance among the initiatives to improve management efficiency and effectiveness was the realignment of Headquarters offices which became effective April 1, 1987. The former title of Managing Director was changed to Executive Director to better reflect the responsibilities of the position. The former Assistant Managing Director for Regional Operations became the Deputy Executive Director for Regional Operations, reflecting both the responsibility to supervise the Regional Offices and a new emphasis on providing assistance to the Executive Director in carrying out general management responsibilities.

The four offices of Personnel, Equal Employment, Comptroller, and Information Resources Management were combined, bringing all of the Board's administrative operations into a single Office of Administration. Previously, each of these offices reported directly to the Executive Director. The new office was able to identify and eliminate duplicative functions and services which had resulted from overlapping authority in the former separate offices. The result is more streamlined and better coordinated administrative support for the Board.

The internal audit function, which had previously resided in the Office of the Comptroller, was made a separate, independent entity, reporting to the Executive Director. The new Office of the Inspector General complies with the requirements of the Office of Management and Budget and of the General Accounting Office. The Board was cited by OMB in its August 1987 Report on Small Agency Compliance with the Requirements of OMB Circular A-73 "Audit of Federal Operations and Programs" as one of the agencies which complied fully with the OMB requirements. The establishment of the Office of the Inspector General demonstrates the Board's commitment to the independence of the audit and investigative functions as a means to improve operating efficiency and productivity.

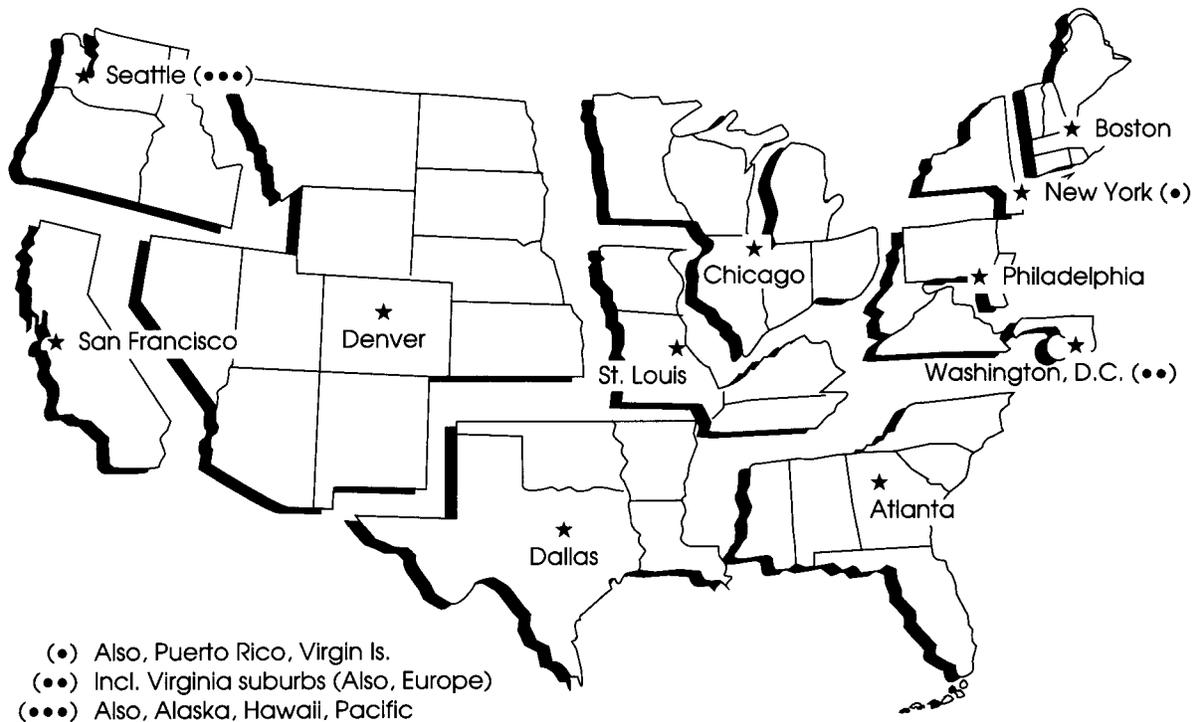


Executive Director, Lucretia F. Myers

The office responsible for carrying out both the merit systems studies and reviews of OPM significant actions, which are required by statute, and internal management analyses was retitled the Office of Policy and Evaluation. Additional personnel were assigned to this office in Fiscal Year 1987, reflecting the Board's increased emphasis on the merit systems studies function. The organizational change, together with the additional resources, has resulted in an office which performs high quality studies of the merit system and OPM significant actions, and also provides valuable support to the Board's management. The latter is particularly important, given the need to evaluate the effectiveness of the various changes in the Board's organization and procedures which have been implemented.

A realignment of the jurisdictions of the Board's Regional Offices was also effected April 1, 1987, in order to better balance workload with staff. The changes primarily affected the East Coast offices and involved reassigning the state of Maryland from the Philadelphia to the Washington, D.C. office, and reassigning several New Jersey counties from the New York to the Philadelphia office.

MSPB REGIONAL OFFICE JURISDICTIONS



In addition to the realignment of jurisdictions, the Board made an informal redistribution of the caseload in two offices through Fiscal Year 1988. Appeals from the states of Kentucky, in the St. Louis office region, and North Carolina, in the Atlanta office region, were temporarily assigned to the Philadelphia office.

In addition to the realignment of Headquarters offices, other management initiatives have focused on strategic planning and delegation of authority. The development of action plans by individual offices has been tied to specific improvement objectives, and the review process has been used to monitor the achievement of objectives and will be used in the future to evaluate the organizational performance of executives and managers. Managers from the Executive Director down the line are held accountable for the successful implementation of their plans in a timely fashion, within available resources, as a measure of their performance.

A key management objective during Fiscal Year 1987 has been to tie the strategic planning process to the immediate and long range budget development, so that the resources necessary to achieve operational goals are reflected in the budget requests submitted by the Board to OMB and the Congress. This initiative ensures that sound business decisions reached in the planning stages will drive budget decisions through an integrated planning/budget process. Managers must be aware of the resource implications of their program planning, and are held accountable for their decisions and their performance in managing those resources.

During Fiscal Year 1987 there was a Board-wide effort to decentralize and delegate to the operating managers greater responsibility to manage their budgets and operating programs in order to increase the financial and operational accountability needed to improve management efficiency.

The Board continued to expand and enhance its automated systems in Fiscal Year 1987. To take advantage of advances in microcomputer technology and enhance management information capabilities, new IBM-AT compatible computers were ordered for delivery in early Fiscal Year 1988. Use of these new personal computers and commercially available software will improve decision-making processes and result in less time spent in preparation of Board documents.

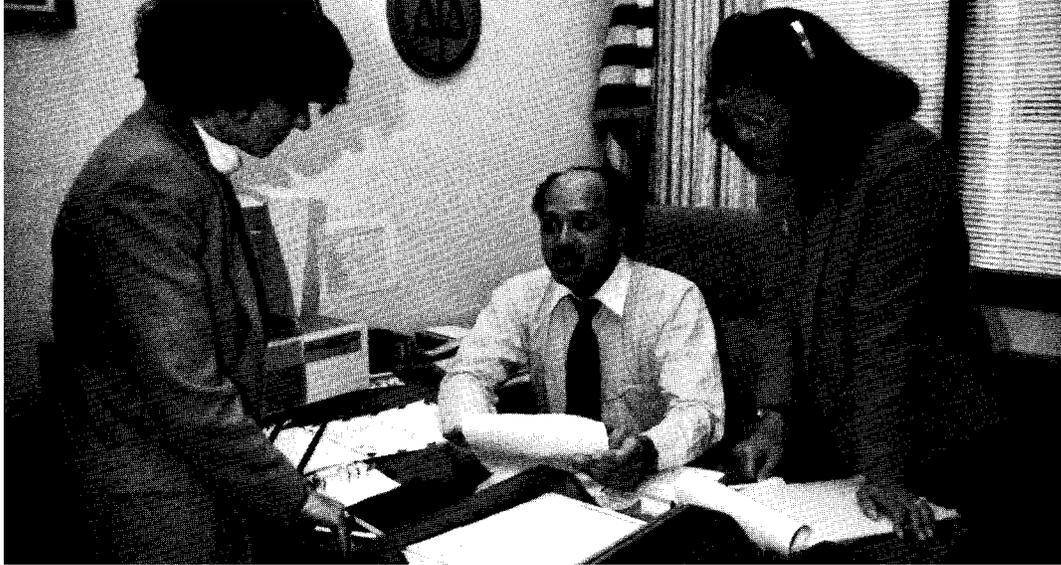
The Board's automated case management systems provide for the monitoring of all initial appeals, petitions for review, and appeal litigation actions, and allow generation of statistical reports on case workload patterns, processing times, and other administrative issues. The systems were enhanced in Fiscal Year 1987 to collect additional case information, and the groundwork was laid to contract for redesign of the systems.

In April 1987 the Board implemented an automated assignment and correspondence tracking system (ACTS) in Headquarters. An automated reports management tracking system (RMTS) was also implemented to maintain an inventory of external reports which the Board is required to produce.

The Board improved its electronic linkage to the National Finance Center (NFC) in Fiscal Year 1987. Time, attendance, and payroll data are sent electronically to the NFC, as well as regular administrative, budget, and personnel information. The Board also began use of the NFC's automated property control system. All capitalized Board property has now been entered into the new system and will be controlled and managed by it. The Board is also participating in an NFC pilot program, the automated purchase order system. Use of this system is expected to reduce errors in data entry at the NFC and to improve the accuracy of the Board's records of its financial obligations.



Director, Office of Administration, Darrell L. Netherton (left), with staff members Stephen M. Beckman (center) and Frank E. Hagan (right)



Clerk of the Board, Robert E. Taylor (center), with staff members Shannon McCarthy (left), and Alicia Columna (right)

TO IMPROVE THE EFFECTIVENESS OF OUTREACH ACTIVITIES

The Board has taken steps to enhance its reputation as a fair and impartial adjudicator through the development of outreach programs to major constituencies. During Fiscal Year 1987 the Board members, Board Headquarters staff, Regional Office directors, and administrative judges addressed groups, participated in seminars and conferences, and conducted training programs in order to further an understanding of the Board's policies and processes, and of important issues in Federal personnel law.

Delegations from the Board participated in the annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit and in Federal Bar Association conferences held in Philadelphia and Boston. An MSPB Breakout Session held at the Judicial Conference featured addresses by Board Member Devaney and senior Board officials. Summaries of Board decisions were distributed to the conference participants, who were public and private sector attorneys, agency representatives, and employee representatives. The Federal Bar Association conferences were especially noteworthy because they provided Chairman Levinson and Board staff the opportunity to address many legal practitioners at a single gathering. Topics included MSPB functions and adjudicatory processes, recent Board decisions, and issues involved in attorney fee cases.

The Board members and Headquarters staff attorneys spoke at a number of meetings of public and private sector attorneys, employee relations professionals, Federal labor relations specialists, agency representatives, employee union representatives, and EEO specialists. Topics included developments in MSPB case law, recent court reviews of Board decisions, MSPB procedures, Federal sector labor relations and labor law, the differences between MSPB and EEOC processes, and legislation affecting Federal personnel law. Among these meetings were an OPM-sponsored Employee and Labor Relations Conference in Virginia Beach, Virginia; a Dispute Resolution Conference jointly sponsored by EEOC and the President's Council on Management Improvement in Bethesda, Maryland; a Labor Law Conference sponsored by the Illinois Institute of Technology - Kent College of Law in Chicago; an EEO Conference on Personnel and EEO Law in Anchorage, Alaska; and meetings of local chapters of the Society of Federal Labor Relations Professionals.



Member Devaney meets with attorneys in San Francisco

Early in Fiscal Year 1987 the Board sponsored a symposium, open to the public, on reductions-in-force. This was the latest in a series of symposia on topical legal issues in such areas as performance-based actions by agencies, attorney fee awards in Board appeals, reasonable accommodation of employees' handicapping conditions, and Board hearings and general adjudication processes.

The Board's special studies staff have also been active in outreach activities, addressing various meetings of agency managers, personnel officers, and psychologists on personnel management topics and such important issues as sexual harassment. Among these meetings were a Nationwide Personnel Officers Conference sponsored by the U.S. Department of the Interior in New Orleans, Louisiana; an American Psychological Association meeting in New York; an EEO training conference in Boston, Massachusetts; and several workshops on the topic of sexual harassment.

Board staff have served as instructors, both in training programs conducted by other agencies and in academic programs, during Fiscal Year 1987. Board attorneys have instructed classes in negotiations training at the

Legal Education Institute of the Department of Justice and in MSPB procedures and "mixed cases" at the OPM Training Center. Academic programs included a special course on MSPB practices and procedures and Federal labor relations at Howard University, taught by Board attorneys. Members of the special studies staff have served as guest lecturers at OPM Executive Seminar Centers and for graduate level seminars in public personnel administration at the University of Southern California.

The Regional Offices have been active in implementing outreach programs. In addition to their participation in the Federal Circuit Judicial Conference and the Federal Bar Association conferences, the regional directors and administrative judges have accepted every opportunity to represent the Board in programs for government personnel officers, Federal employee union personnel, and public and private sector attorneys. During Fiscal Year 1987 the regional directors and administrative judges delivered almost 150 speeches at meetings and conferences attended by more than 8,500 participants.

During the fiscal year the Dallas Regional Office prepared and presented conferences on MSPB law and procedures. These conferences were so well received that they have become the first Board-sponsored conferences approved for continuing legal education credit.

It was also in Fiscal Year 1987 that the Board established a dialogue with a state government personnel Board on matters of common interest and concern. Board representatives spoke before the California State Personnel Board, marking the first time that the Board conducted an outreach activity before one of its state counterparts. Board activities were also discussed with a member of the MSPB of Montgomery County, Maryland.

A continuing activity of particular interest is the Board's international visitors program. Conducted at Board Headquarters by the Chairman and senior staff, this program is responsive to requests from foreign visitors who wish to visit the Board in order to learn about merit system principles and the Board's practices and procedures. During Fiscal Year 1987 the Board made presentations to several visitors from Africa, Canada, and China.

The Board encourages its employees to publish articles on topical issues of government personnel law in academic journals, various legal publications, and trade publications. In Fiscal Year 1987, the Howard University Law School devoted an entire issue of the Howard Law Journal to MSPB law, the result of a collaboration between the journal's staff and several Board staff attorneys and administrative judges.



Legislative Counsel, Paul E. Trayers

FINANCES AND HUMAN RESOURCES

FINANCIAL STATEMENT

The obligations and expenditures of the Merit Systems Protection Board for Fiscal Year 1987 (October 1, 1986, through September 30, 1987) are shown below:

1987 ACTUAL OBLIGATIONS AND EXPENDITURES (Thousands of dollars)

Direct obligations:

Personnel compensation	
Full-time permanent	10,658
Other than full-time permanent	706
Other personnel compensation	<u>155</u>
Subtotal	11,519
Personnel benefits	1,279
Benefits for former employees	46
Travel and transportation of persons.....	412
Transportation of things	63
Rental payment to GSA	1,393
Rental payments to others	53
Communications, utilities, and miscellaneous charges.....	686
Printing and reproduction.....	108
Other services	1,703
Supplies and materials	266
Equipment	<u>1,007</u>
Subtotal	18,535
Reimbursable obligations	<u>1,324</u>
Total obligations	19,859



Office of Administration staff member, Charles Roche (left), and Boston Regional Office Administrative Officer, Maureen Nash-Cole (right)

HUMAN RESOURCES

The full time equivalent employment data as reported in the President's annual budgets reflect a reduction from a peak of 420 in Fiscal Year 1983 to 300 in Fiscal Year 1987, a reduction of almost 29 percent. This reduction demonstrates increases in the Board's case management efficiency and reduced staffing requirements following the elimination of appeals resulting from the Air Traffic Controllers strike of 1981.

The representation of women and minorities in the Board's workforce is impressive. Women and minorities are not clustered in lower grades, and the Board's representation of these groups in professional occupations is high. The following table shows the percentages of female and minority attorneys, as well as the percentage representation of these groups in the Board's workforce as a whole.

MSPB EMPLOYMENT BY RACE, NATIONAL ORIGIN AND SEX

Data as of September 30, 1987

ATTORNEYS

	# in Attorney Workforce	% of Attorney Workforce
Male	87	59.59
Female	<u>59</u>	<u>40.41</u>
Total	146	100.00
Minority*	30	20.55
Majority	<u>116</u>	<u>79.45</u>
Total	146	100.00

MSPB (ENTIRE AGENCY)

	# in Workforce	% of Workforce
Male	132	42.03
Female	<u>182</u>	<u>57.96</u>
Total	314	100.00
Minority*	113	35.99
Majority	<u>201</u>	<u>64.01</u>
Total	314	100.00

*Excluding W/F

As one of six small agencies for which payroll service is provided by the Department of Agriculture, the Board is one of only a handful of Federal agencies which provides annual benefits statements to its employees, according to a report issued by the General Accounting Office in September 1987. Only 10 of the 23 agencies studied by GAO provide employees this valuable service, which is provided routinely by many employers in the private sector.

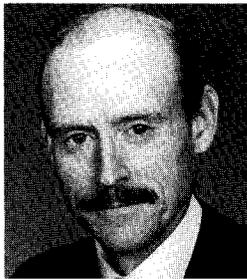


Acting Director, Equal Employment Division, Sara B. Rearden

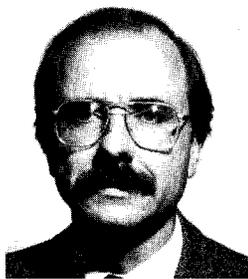
REGIONAL BOARD OFFICIALS



Mark Kelleher
Deputy Executive Director for
Regional Operations



R.J. Payne
Regional Director
Atlanta Office



William Carroll
Regional Director
Boston Office



Martin Baumgaertner
Regional Director
Chicago Office



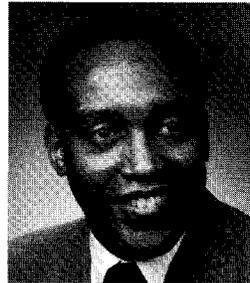
Paula A. Latshaw
Regional Director
Dallas Office



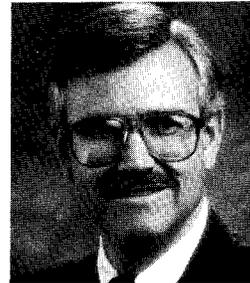
Jack B. Toll
Regional Director
Denver Office



Sean P. Walsh
Regional Director
New York Office



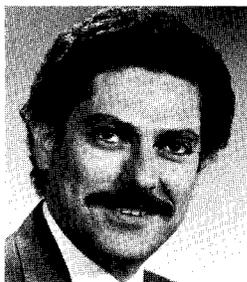
Lonnie Crawford
Regional Director
Philadelphia Office



Earl A. Witten
Regional Director
St. Louis Office



Denis Marachi
Regional Director
San Francisco Office



Carl Berkenwald
Regional Director
Seattle Office



P.J. Winzer
Regional Director
Washington, D.C. Office

APPENDIX A
SIGNIFICANT BOARD DECISIONS
APPELLATE JURISDICTION CASES

Significant appellate jurisdiction cases decided by the Board during Fiscal Year 1987 included the following:

Arbitration Awards

Carr v. Air Force, HQ71218610030 (March 17, 1987)

The appellant requested Board review of the arbitrator's award which sustained his removal. The Board found that the arbitrator misinterpreted the law governing reasonable accommodation and that its decision in *Robinson v. DHHS*, 30 M.S.P.R. 389 (1986), which set the standard of review by the Board of arbitrator's decisions, was intended to be broad enough to allow the Board to consider issues of discrimination law. In *Robinson*, the Board stated that it would set aside an arbitrator's award where the employee establishes error in interpretation of "civil service law, rule, or regulation."

Hinton v. Navy, H071218610021 (March 24, 1987)

The record showed that, although the appellant asserted discrimination in his request for review of the arbitrator's decision on his removal, he had specifically declined to raise that issue to the arbitrator. The Board held that it, therefore, lacked jurisdiction over the case under 5 U.S.C. § 7121.

Attorney Fees

Kent v. OPM, DC831L85A0330 (April 15, 1987)

The Board found that it could look to the legislative history of the attorney fees provision of the CSRA for guidance in retirement and other types of cases. It noted that fees should be awarded only where OPM's action can be found blameworthy in some respect. Because of the differences between adverse action and retirement cases, however, the application of the criteria will differ. The Board found that where OPM's reconsideration decision would not have been reversed without evidence presented during the appeal, it is appropriate to resolve the fee award request on an analysis of the "clearly without merit" category. In making that determination, the Board must consider: 1) whether the appellant was misled by OPM or whether OPM failed to put him on notice of the kind of evidence needed to prevail on reconsideration; 2) the extent to which reversal was based on evidence not presented by the appellant but readily available to OPM; 3) the extent to which the appellant produced evidence that was so compelling that reasonable minds could not differ as to his eligibility for an annuity; and 4) whether OPM's continued refusal to provide the annuity for the appellant prolonged the proceedings. In the last instance, the Board noted that it would award fees only from the point at which the dispositive evidence was submitted. Member Devaney concurred in the result.

Callan v. OPM, AT831L85A0662 (June 10, 1987)

The Board amplified the compelling evidence test set out in *Kent*. It held that it was "a significantly higher standard" than is applicable to the usual "clearly without merit" determination, but that this heavier burden was appropriate because of public policy considerations and the special nature of such appeals. Specifically, appellants in these cases, as distinguished from adverse action and performance-based cases, are seeking a benefit from the Government and are required to prove their case once they are notified of their appeal rights. Thus, this heavier burden will discourage unnecessary proceedings before the Board and the court. The Board noted that the starting point for the inquiry in the compelling evidence test is the initial decision which reversed OPM's reconsideration decision, since the entitlement to fees must be viewed from that vantage point. It noted, however, that the question of whether the evidence of record, given the weight attributed to it in the decision on the merits, meets the compelling evidence standard is a conclusion of law, so that the Board is not bound by the administrative judge's conclusion on the point, which it would be if it were a matter of fact. Member Devaney concurred in the result.

Stephens v. OPM, SF831 L84A9006 (March 23, 1987)

The Board here determined to give retroactive application to the Federal Circuit's decision in

Simmons v. OPM, which concluded that the Board has the authority to award attorney fees to prevailing appellants in retirement cases. It noted that there is a presumption of retroactivity in our law, and that retroactive application would be consistent with the purpose of the CSRA to alleviate the economic burden of the appeal process and with Federal Circuit's precedent. The Board also found that this decision was consistent with Supreme Court guidance in *Chevron Oil Co. v. Huson* because *Simmons* did not overrule clearly established precedent. Moreover, retroactive application would not impose an unreasonable financial burden on OPM because the rule would be applicable to a limited number of appellants.

Woodall v. FERC, DC075282A0678 (April 1, 1987)

The Board held that in determining an award of attorney fees, the backpay amount is not relevant to determining the extent of victory. Rather, the Board must consider whether the action is mitigated or reversed; if mitigated, whether the penalty is major or minor; and the gravity and circumstances of the sustained charges. It next found that the agency's fault or lack of fault should not be the controlling factor in a determination of whether fees are warranted on the basis of gross procedural error. Prior cases implying the contrary were modified.

Lambert v. Air Force, SF075286A0109 (August 14, 1987)

The Board held that the agency's selection of a penalty was part of the "merits" of the case and that an award of fees is warranted where the agency knew or should have known that its choice of penalty would be reversed. It noted that the standard for review of a penalty announced in *Douglas*, i.e., that the Board would mitigate only where it found the penalty to be beyond the limits of reasonableness, meant that where an agency's action is reversed on the basis of its penalty, the agency acted irresponsibly or unreasonably and should know that it would not be sustained. It concluded that fees will generally be awardable under this standard when all of the charges are sustained, but the penalty is mitigated on the basis of evidence which had previously been presented to the agency.

Discrimination

Faulk v. Navy, PH07528610547 (March 2, 1987)

The appellant sought reassignment to a typist position as an accommodation to her handicap. The Board found that while the appellant might be able to perform as a typist after several months to a year of training, she did not now possess the requisite typing skills to qualify her under the published job standards. It concluded that because she was unable to perform an essential function of the job, she was not a qualified handicapped employee as to that job and, thus, no handicap discrimination was found. Member Devaney dissented without opinion.

Sheen v. Air Force, SF07528610363 (March 19, 1987)

The Board found that the agency accommodates an employee by making him aware in general terms that a problem exists and recommending that he participate in a rehabilitation program. It thus rejected establishing a requirement that the employee be offered a "firm choice" between rehabilitation and adverse action.

Marchese v. Navy, PH07528610209 (March 4, 1987)

The Board held that because 5 U.S.C. § 7702(a) requires that the Board decide discrimination issues raised in connection with otherwise appealable matters, its administrative judges should decide an appellant's allegation of discrimination even where the action is overturned on procedural grounds. To the extent that earlier Board cases may be inconsistent, they were overruled.

Enforcement

Redding v. U.S. Postal Service, AT075285C0863 (January 29, 1987)

The appellant was removed for failure to report for a fitness-for-duty examination, and he appealed, claiming that the agency's physician had unilaterally cancelled his appointment. Upon submission of proof of such cancellation, the agency voluntarily rescinded the removal action and reinstated the appellant. The Board dismissed the appellant's appeal of his removal, but retained jurisdiction to insure agency compliance. Thereafter, the appellant filed a petition for enforcement on the ground that the agency failed to award him back pay. The appellant also contended that back pay should be awarded for the period prior to his removal when he was in leave status because of alleged physical inability to perform the duties of his position. The Board held that the appellant could not raise a claim of constructive suspension prior to his removal via a petition for enforcement, but that the agency did not provide concrete and positive evidence that the appellant was unwilling to work during the period after his removal. Thus, the appellant was entitled to back pay during the latter period only.

Dwyer v. U.S. Postal Service, DE075285CO247 (January 28, 1987)

The administrative judge found that the agency had failed to establish that the appellant was emotionally unfit to perform the duties of his position without endangering the health and safety of himself and others, and ordered the agency to reinstate the appellant. After the appellant was reinstated, he filed a petition for enforcement of the initial decision. The Board held that the appellant was entitled to back pay from the effective date of his removal until the date of his reinstatement, including any overtime he would have earned during the period of the erroneous removal, even though he was not on the "overtime desired list"; and that the appellant was entitled to receive sick and annual leave for the period from his removal to the date of the hearing.

Jordan v. U.S. Postal Service, PH075285C0619 (February 25, 1987)

The appellant's appeal of his removal from his postmaster position was dismissed for mootness when the agency represented to the administrative judge that it had withdrawn its notice of proposed removal and canceled the removal action. After the appellant's request for an award of back pay was denied, he filed a petition for enforcement. The Board held that the appellant had a right to back pay from the date of his removal to the date of his reinstatement, and that the appellant had no duty to mitigate damages during the period of his removal in order to be entitled to a back pay award under agency regulations.

Carter v. U.S. Postal Service, CH075285C0654 (July 28, 1987)

The appellant appealed his removal from his city carrier position for physical inability to perform the duties of the position. The Board found that the agency engaged in handicap discrimination, and ordered the agency to cancel its removal action and retroactively restore him to duty. Thereafter, the appellant petitioned for enforcement. The Board held that the agency was required to compute overtime compensation, for purposes of the back pay award, based on the average number of overtime hours worked by full-time, not limited duty, employees at the post office, with regard to the appellant who was reinstated in the former position working only two hours per day, but who was later retroactively restored to full-time status.

Marren v. Department of Justice, DA075285C9010 (August 24, 1987)

The Board held that the agency willfully violated the Board's back pay order by deducting 112 hours during the period of unwarranted removal for reasons related to the appellant's participation in union activities. The Board found the appellant's participation in "internal union business" irrelevant to his entitlement to back pay and benefits, stating that the only legitimate points of inquiry concerning the appellant's activities during the period of his removal are whether he was remunerated for any work he may have performed, and whether he was ready, willing and able to resume his official duties. The Board also found that the agency acted improperly in unilaterally placing the appellant on LWOP because that status may only be granted upon an appellant's request, and the appellant here

never made such a request. The Board referred the matter of the agency's noncompliance to the Special Counsel, and ordered the persons responsible for the agency's noncompliance to appear before the Board to show cause why their salaries should not be withheld for the periods of noncompliance. Because the agency later submitted evidence of compliance, the hearing has been postponed.

Ignacio v. U.S. Postal Service, SF075281C0438 (September 22, 1987)

The appellant petitioned for enforcement of the Special Panel decision in this case, arguing that the agency was in noncompliance because it had reassigned him from his position after his reinstatement and owed him back pay. The appellant had been a letter carrier and was reassigned to a distribution clerk position on reinstatement. The Board rejected the agency's argument that the Special Panel decision required the reassignment. It noted that the Special Panel had adopted EEOC's decision, which referred to the agency's failure to consider accommodations to the appellant's handicap short of reassignment. Moreover, the Board found no "reasonable basis" for the decision of the agency doctor that the appellant was physically unqualified to be a letter carrier, based only on the record, which overturned a decision of an independent examining physician selected by the agency. Finding that the agency's efforts to accommodate the appellant through reassignment came at a time when the appellant had already recovered and, therefore, was not in need of accommodation, the Board concluded that the reassignment did not constitute compliance with the final decision in the case. The Board further held that the appellant's inability to bid on a router position in the carrier craft because he had been placed in the clerk craft was a result of the agency's noncompliance. As to back pay, the agency asserted that, had he not been removed, the appellant would have been reassigned to the clerk craft, so that his back pay should be based on a clerk's salary, not a carrier's. The Board, however, ordered the agency to pay back pay based on the carrier position, which was the appellant's position at the time he was removed. The Board noted that the appellant had met his burden of showing that he was ready, willing, and able to work during the period he was off the rolls. Finally, the Board found that because the agency failed to take action to accommodate the appellant in the carrier craft, and in light of the finding that he was a qualified handicapped person, the appellant proved that he was able to perform in the carrier craft.

Hicks v. U.S. Postal Service, PH035386C0104 (September 18, 1987)

In its final decision, the Board ordered that the appellant be given priority consideration for restoration on the basis of his partial recovery from a compensable injury. When the appellant filed a petition for enforcement, the Chief Administrative Judge held that the agency had complied in all ways but one, i.e., it had not placed his name on a reemployment priority list for Charleston, SC, his last place of residence in the US. The agency then placed his name on the list and offered him a part-time position. At about the same time, the appellant filed objections to the CAJ's Recommended Decision, asserting that he was entitled to back pay and that the agency had earlier offered positions to others. The Board found that the decision did not entitle the appellant to back pay for any period prior to its date of issuance; that the appellant's argument that others had been appointed prior to that date was thus without merit; and that the appellant did not show that he had a right of restoration, as opposed to priority consideration, to his former job. The Board, therefore, denied the appellant's request for review of the Recommended Decision and dismissed the petition for enforcement.

Garibay v. Veterans Administration, SF075285C90101 (September 29, 1987)

The Board affirmed the administrative judge's recommendation that the appellant be found in noncompliance with the Board's order because he had failed to cooperate in the calculation of the amount due and because his actions were fraudulent. The AJ found, and the Board agreed, that the appellant's assertions that he had not earned any income during the period he was off the rolls was not credible in light of the other evidence taken at a hearing on the issue, which indicated that he had worked for his brother-in-law and been paid "under the table." In light of the fraudulent nature of the appellant's acts, the Board found that he should be denied any payment of back wages.

Evidentiary Matters

D'Iorio v. DHUD, BN07528610191 (July 28, 1987)

The Board found that an administrative judge acts properly in requiring the parties to stipulate to matters which are not in dispute, analogizing to Fed.R.Civ.P. 16, which is intended to simplify the issues and eliminate the waste of time at trial. However, the scope of the stipulation may not be expanded beyond the purpose for which it was made. Thus, where the stipulation does not encompass the entire scope of the agency's charges or other relevant issues, a stipulation to a portion of a charge does not foreclose the presentation of evidence on other matters.

Sommer v. Navy, AT03518610588 (August 25, 1987)

The Board held that hearings are required in RIF actions even in the absence of a dispute about a material fact, but that such hearings are subject to the administrative judge's evidentiary rulings on materiality, relevance, and repetitiousness. The Board found that 5 U.S.C. §7701(a), its legislative history that included elimination of Board authority to grant summary judgment, and the Federal Circuit's decision in *Crispin v. Commerce*, 732 F.2d 919 (Fed. Cir. 1984), mandate administrative judges to hold hearings even where there is no dispute about a factual matter. In reaching this result, the Board rejected various arguments, including the assertions that 5 C.F.R. § 351.901 limits employees' rights to hearings in RIF cases, and that hearings under such circumstances would be meaningless and unnecessarily clog the Board's busy docket. The Board also found, however, that where there is no dispute about a material fact, the hearing should consist of an opportunity to present argument, rather than a full evidentiary hearing.

Jurisdiction

Pittman v. Army, DA07528610063 (March 13, 1987)

After considering its decision in *Mosely* and the Federal Circuit's decisions in *Thomas* and *Mercer*, the Board found that the placement of a physically disabled employee on enforced leave by itself does not constitute a suspension when there is no pending inquiry. It stated that no earlier cases intended to include enforced leave actions that could be construed as having been taken to prevent injury or disruption to agency activities. The Board therefore modified an earlier decision to the extent necessary to limit its holding to cases where the employee is placed on enforced leave pending inquiry. It thus held that both the *Mosely* "ready, willing and able" test and its "disciplinary" test apply to enforced leave cases involving physically disabled employees other than those in which the employee is placed on leave pending inquiry. Member Devaney issued a dissenting opinion on April 1, 1987.

Sullivan v. Agriculture, NY315H8610394 (January 30, 1987)

The Board held that while an employee appointed from a civil service register is required to serve a probationary period, prior service may be counted toward its completion when it was: rendered immediately preceding the career-conditional appointment; in the same agency and in the same line of work; and with no more than one break of less than 30 days during it. The Board noted that the determination of whether two positions are in the same line of work is based on the duties of the jobs, and that they are in the same line if they would be in the same competitive level for RIF purposes.

Martinez-Claudio v. VA, NY07528610595 (April 16, 1987)

The Board distinguished creditability of previous service in a temporary position for determining the appeal rights of an excepted service employee from those of a competitive service employee. For the former it is creditable; for the latter it is not. The distinction is based on 5 U.S.C. § 7511, which excludes temporary service for competitive service employees but not for those in the excepted service.

Payne v. Interior, SF07528610581 (March 19, 1987)

The Board held that a RIF action is involuntary because it can only be effected for one of the reasons stated in 5 C.F.R. §351.201(a)(2). Thus, a RIF appeal cannot be defeated on the grounds that it is voluntary because the appellant consented to the action.

Campbell v. DLA, PH07528510172 (November 20, 1986)

The Board determined that an agency is not always required to end an indefinite suspension at the conclusion of the underlying criminal proceedings and upon the issuance of the notice of proposed removal. It set three criteria which must be met in order to continue a suspension under those circumstances: (1) There must be a resolution of the charges, (2) the employee must have been advised of the possibility of further administrative action at the time the suspension was proposed, and (3) the additional action must be initiated within a reasonable time after the conclusion of the criminal matter.

Mosley v. Navy, PH07528510766 (November 20, 1986)

Based on the decision in *Phipps v. DHHS*, 23 M.S.P.R. 486 (1984), *aff'd on other grounds*, 767 F.2d 895, 897 (Fed. Cir. 1985), the Board held that the return of an employee to his regular position from a temporary promotion which lasts more than two years does not require the invocation of adverse action procedures. Thus, an appeal from an employee's return to his official position under those circumstances is not within the purview of its appellate jurisdiction.

Nexus

Kruger, et al. v. Justice and OPM, CH07528510621, 648, 649 (January 8, 1987)

The Board here stated that nexus may be shown (1) through a rebuttable presumption in certain egregious circumstances, (2) by a showing that the conduct adversely affects the appellant's work performance or that of his coworkers, and (3) by a showing that the misconduct adversely affected the agency's mission. It then held that the third nexus showing may be made by proving "that an employee engaged in off-duty misconduct that is directly opposed to the agency's mission." The Board noted that to the extent that its earlier Merritt decision implied that nexus could only be proven by evidence of actual impairment of service efficiency or a rebuttable presumption, it was in error.

Settlements

Rose v. Army, SE075283CO238 (April 21, 1987)

The appellant's case was settled on appeal to the Board. In response to the agency's argument that its representative had no authority to bind it, the Board found no basis for the agency's assertion of limited authority. The attorney of record is deemed to have authority to settle a case absent evidence to the contrary, and the party asserting a lack of authority has a heavy burden which cannot be met by conclusory statements. No agency regulation limiting the representative's authority was cited and the agency has not contended that what it had agreed to do would violate a statute or regulation.

Unacceptable Performance

Fairall v. VA, CH07528310623-1 (March 12, 1987)

The Board construed the court's decision in *Lovshin v. Department of the Navy*, 767 F.2d 826 (Fed. Cir. 1985). It concluded that appellants who are subject to Chapter 75 actions for performance reasons are not entitled to an opportunity to demonstrate acceptable performance prior to the effectuation of the action. It noted portions of the *Lovshin* decision which could be interpreted to the contrary, but found overall that the court did not imply that an opportunity period was required by Chapter 75. It stated that even if *Lovshin* could be interpreted to say that the violation of a merit system principle was, per se, a prohibited personnel practice, neither 5 U.S.C. § 2301(b)(6) nor (b)(7) establishes a right to an improvement period in Chapter 75 cases. Instead, the Board stated that it will

continue to hold that the question of whether such an opportunity was afforded would be relevant in assessing the reasonableness of the penalty because one of the *Douglas* factors is the extent to which the employee is on notice that his deficient performance or conduct may be the basis for an adverse action. Moreover, to the extent that an opportunity period is afforded in a Chapter 75 action, the requirements of Chapter 43 are inapplicable, e.g., that only unsatisfactory (rather than minimally acceptable) performance be the basis for the action or that the improvement period occur prior to the notice of proposed action. The agency may rebut a challenge to its failure to afford an opportunity period or notice of performance deficiencies by showing, among other things, that those deficiencies were willful or that affording the time would have resulted in unreasonable costs or risked the health and safety of others. Member Devaney dissented.

Affifi v. Interior, DC531D8610254 (April 16, 1987)

The Board reversed earlier policy and determined that in mixed ALOC appeals which are appealable to courts in judicial circuits which apply the preponderant evidence test, it would nonetheless apply the substantial evidence test. It held that it is obliged to apply its own view of civil service law in mixed cases, and is bound by the precedent of the Federal Circuit. Moreover, this action will help develop a uniform civil service jurisprudence.

Whistleblowers

Oliver v. DHHS, DC07528610158 (August 13, 1987)

The appellant was removed for failure to follow a direct instruction, disrespectful conduct, and refusal to provide certain information at an agency meeting. With respect to the appellant's allegation that her removal violated 5 U.S.C. § 2302(b)(8), the Board found that the appellant's memoranda addressed matters which (in the strict sense) are entitled to protection because they address perceived inequities in the awarding of grants and a general insensitivity toward minority participants in the program. Other matters of more personal interest to the appellant are also protected. It also held that there was an inference of a retaliatory motive because the targets of the disclosures were the proposing and deciding officials and the charges relied directly on the protected disclosures themselves. However, based on an analysis of the facts, the Board found that a nexus did not exist and that the action was not shown to have been taken in retaliation. In the Board's analysis, the motive to retaliate must be weighed against the gravity of the misconduct charged. Here, the tone and wording of the numerous memoranda are so intemperate and otherwise improper as to warrant discipline. In reaching this conclusion, the Board noted that even in a first amendment analysis, courts hold that constitutional protections may be lost when the content, form, and context of statements are considered. It thus held that the inference of retaliation on the agency's part was outweighed by the gravity of the appellant's misconduct, particularly the manner and means by which she made her disclosures. The removal action was sustained. Member Devaney dissented without opinion.

APPENDIX B

SIGNIFICANT BOARD DECISIONS

ORIGINAL JURISDICTION CASES

Significant original jurisdiction cases decided by the Board during Fiscal Year 1987 included the following:

Special Counsel Cases Hatch Act Cases

Special Counsel v. Biller, et al., HQ12068510018 (February 5, 1987)

The Board found violations of the Hatch Act by three full-time union officials who were on extended leave without pay from their Federal positions, but, because these cases were ones of first impression, did not impose removal penalties. Instead, the Board found that the Administrative Law Judge's recommendation of 60 days' suspension was reasonable. It noted that the respondents were likely to escape any discipline because they did not receive Federal salaries, but ordered that any additional benefits of Federal employment also be denied during the suspension period. Chairman Levinson wrote a separate concurring opinion urging that policymakers reconsider the reasonableness of long-term open-ended LWOP arrangements such as occurred here. Member Devaney wrote a concurring opinion in which he questioned whether the Board could enforce the recommended penalty, agreed that the Hatch Act applies to these respondents, and noted that it is for Congress, not the Board, to change that if it so desires.

Special Counsel v. Kehoe, HQ12068610005 (February 27, 1987)

The Board held that: (1) the Hatch Act applies to covered state employees regardless of their leave status; (2) the Board was not barred under the doctrine of "virtual representation" from ruling on the applicability of the Hatch Act to covered Minnesota state employees on leave status; and (3) Mr. Kehoe's violation of the Hatch Act by running as a candidate for the Minnesota state legislature was of such scope and effect as to warrant removal. Chairman Levinson concurred in a separate opinion.

Special Counsel v. Camillieri, HQ12068610010 (May 12, 1987)

The Board held that an employee of a state government violated the Hatch Act by being a candidate for councilman in a Democratic primary election. The Board found that the employee knowingly violated the Act and that removal was a proper penalty.

Special Counsel v. Camillieri, HQ12068610010 (September 29, 1987)

In this decision of first impression, the Board ordered that the U.S. Department of Health and Human Services withhold funds from the Connecticut Department of Human Resources because it failed to remove Mr. Camillieri for violation of the Hatch Act, as the Board had directed. The Board found that the fact that the agency had appealed the Board's order to the district court did not provide a basis for denying issuance of a withholding order since the court did not order a stay. It also declined to issue a stay of the withholding order, finding that the four-part test for the issuance of a stay had not been met. Finally, it found no basis for delaying 30 days in informing DHHS to withhold the funds, as the state agency had asked.

Special Counsel Cases Disciplinary Actions

Special Counsel v. Russell, HQ12068410016 (February 9, 1987)

Although there was conflicting evidence on nearly all important facts concerning the charges of sexual harassment of subordinate employees, the Board found no reason to substitute its own fact findings for the Chief Administrative Law Judge's determinations. It rejected the respondent's

assertion that only the head of the agency and not the Special Counsel had authority to discipline employees for sexual harassment. It then held that the CALJ did not err in refusing to require one of the victims of harassment to answer interrogatories intended to disclose any possible history of mental illness or addiction, noting that sexual harassment through creation of a hostile environment can be proven without evidence of the psychological effect on the victim if there is evidence that her work was adversely affected, as is true here. The Board, therefore, adopted the CALJ's recommendation that the appellant be demoted from his SES position to the GS-13 level for a period not to exceed 3 years. In a separate opinion dissenting in part, Vice Chairman Johnson would have modified the penalty to assure that during the 3-year period the appellant would not be reemployed as a supervisor at any grade level.

Special Counsel v. Mongan, HQ12068610004 (April 17, 1987)

The Board found that the respondent refused to promote an employee in reprisal for her protected disclosures to the Inspector General's office. The Board noted that two circuit courts have recently questioned - without deciding - the Board's practice of not applying the *Mt. Healthy* test to Special Counsel disciplinary action cases. It therefore applied the test to the facts of this case and concluded that, even if it is applied, the outcome is the same, i.e., the respondent did not establish that he would have taken the action but for his retaliatory motive. The Board concluded that the 60-day suspension recommended by the Administrative Law Judge was reasonable.

Special Counsel v. Ross and Catledge, HQ12068510034 (June 26, 1987)

The Special Counsel charged the respondents with the commission of prohibited personnel practices (5 U.S.C. §2302(b)(4), (5), and (6)) as a result of violations of several regulations. The charges arose from their attempts to secure the withdrawal from competition of other candidates for two jobs which they had created with a current temporary employee in mind. That employee was eventually selected for one of those jobs. In light of the Federal Circuit's limitation of the Special Counsel's authority in *Homer v. MSPB*, the Board determined that it need not decide whether the Special Counsel was authorized to bring charges under 5 C.F.R. § 735.209 because the gravamen of the charges citing those sections is the commission of prohibited personnel practices, which is sufficient to sustain the charges. It found that the respondents' exceptions to the recommended decision of the Chief Administrative Law Judge constituted mere disagreement with his findings of fact and credibility determinations and, therefore, provided no basis for ignoring the recommendations. The Board ordered that Catledge be demoted from GS-11 to GS-9 for a period of at least one year and that Ross, his subordinate, be demoted one grade for a minimum period of one year.

Actions Against Administrative Law Judges

Clerman, et al v. ICC,
HQ75218510022 (September 30, 1987)

The appellants were Administrative Law Judges who, along with all other agency employees, were informed that they were subject to being furloughed for 26 non-consecutive workdays. The actions were taken under RIF procedures. The Board noted that OPM has interpreted 30 calendar days to mean 22 work days when a furlough is not served on consecutive days. Thus, the Board concluded that RIF procedures were properly invoked for this furlough. Since ALJs have only enhanced adverse action protections, but not RIF protections, the Board found no basis for interpreting the word "days" differently in this case. Although the budget problem abated earlier than anticipated, and the furloughs actually lasted only 8 days, which would have constituted an adverse action, the Board held that, in the absence of a showing of bad faith, it would not overturn an agency action because it incorrectly estimated the length of the furlough.

Review of Regulations

In re ... SSA,

HQ12058610020 (September 25, 1987)

The Board rejected AFGE's request that it review the Social Security Administration's implementation of 5 C.F.R. Part 430 by establishing allegedly arbitrary performance standards. The Board based its decision on the fact that there is a substantial likelihood that the issues raised will be reached in a timely fashion through ordinary appeal channels, and the fact that it would not be in the public interest and would harm the operation of the Government for the Board to invalidate portions of the appraisal system on the basis of an incomplete record.

APPENDIX C

SPECIAL PANEL DECISION

During Fiscal Year 1987 the Special Panel issued one decision:

Shoemaker v. Department of the Army (September 2, 1987)

Handicap Discrimination - Accommodation

In a unanimous decision, the Special Panel adopted the Board's decision in this case, which involved a Chapter 43 performance-based removal.

The appellant had been a Federal employee for approximately 24 years when he advised the agency that he intended to apply for disability retirement because of an ocular disability (double vision). Following this notification, the appellant received notice of proposed removal for failure to meet two critical elements of his position. The appellant's most recent performance rating had been "marginally satisfactory."

The appellant's removal was effected by the agency on May 25, 1983, and on May 31, 1983 the appellant was notified by OPM that his disability retirement application was granted. Thereafter, the appellant filed an appeal of his removal with MSPB, contending that his removal was the result of handicap and age discrimination, and that the agency had committed harmful procedural error by failing to hold the removal action in abeyance while his disability retirement application was pending with OPM.

The appellant's removal under Chapter 43 was sustained by the administrative judge, who found that the agency was under no obligation to hold the removal action in abeyance pending OPM's decision on his disability retirement application. The administrative judge also found that the agency was not required to reassign the appellant as an accommodation to his handicap; however, this was prior to the Special Panel decision in *Ignacio v. USPS*, which requires Federal agencies to consider reassignment as a reasonable accommodation for physically handicapped employees.

On review, the EEOC found that the agency's unexplained failure to hold the removal action in abeyance was the result of handicap discrimination. (No age discrimination was found.) When the case was referred to the Board, it disagreed, holding that EEOC's decision had been based solely on its reading of an internal Department of the Army regulation which was inapplicable to Chapter 43 cases and which, additionally, had been superceded by a regulation which contained no provision requiring that removal actions be held in abeyance pending a determination on a disability retirement application. Although the Board agreed with EEOC that under the Special Panel's decision in *Ignacio*, the agency had to consider reassignment, it found that the evidence indicated no positions existed to which the appellant could be reassigned.

The case was referred to the Special Panel for resolution. In its decision, the Panel agreed with the Board that the EEOC's decision was based on its interpretation of the agency's regulation and, therefore, on civil service law. It further found that the agency's regulation did not require that the removal action be held in abeyance. Thus, the Panel deferred to the Board's determination and no handicap discrimination was found.

In their separate concurring opinion, EEOC Chairman Thomas and Board Member Devaney stated that when OPM granted the appellant's application for disability retirement one week after his removal, the agency had the discretion to amend its records to show that he was on sick leave until the effective date of his retirement, and that his separation was by retirement. They noted that the agency's failure to do so resulted in an expenditure of time and money "completely out of proportion to the legal merits of the case."

A P P E N D I X D
SIGNIFICANT LITIGATION

Significant litigation during Fiscal Year 1987 included the following:

Intervention in OPM Initiated Litigation

Homer v. Andrzejewski, 811 F.2d 571 (Fed. Cir. 1987)

The Court found that the Board had improperly invalidated the emergency furlough regulation, which provides that the 30 day advance notice and opportunity to reply normally required prior to a furlough may be dispensed with in certain situations.

Homer v. Acosta, et al.,
803 F.2d 687 (Fed. Cir. 1986)

The Court overturned the Board's decision that service performed under a personal service contract with a Federal agency is creditable toward civil service retirement as long as the individual performs a Federal function and is supervised by a Federal official.

Homer v. Schuck and Washington (Pending Federal Circuit Decision)

The OPM sought review of a Board decision that interpreted the Postal Service's collective bargaining agreement in reaching its determination that certain employees had been furloughed without proper procedures. The Board intervened, arguing that the Court has no jurisdiction over a "mixed case" appeal and that OPM's right to seek judicial review does not encompass disagreements over the interpretation of a collective bargaining agreement.

Homer and Williams v. Merit Systems Protection Board and Wieseman, 815 F.2d 680 (Fed. Cir. 1987)

The Court reversed the Board's decision that the Special Counsel has the authority under 5 U.S.C. § 1206 (e)(1)(D) to investigate and prosecute violations of the Government's ethics laws and regulations.

Homer v. Benedetto (Pending Federal Circuit Decision)

This case involves the issue of whether retirees who ceased working for the Federal Government prior to 1956 but did not become eligible for retirement benefits until after 1966 are entitled to survivor annuity rights under the Civil Service Retirement Act.

Special Counsel - Related Litigation

Filiberti and Dysthe v. MeritSystems Protection Board, 804 F.2d 1504 (9th Cir. 1986)

The Court affirmed the Board's findings that two high-level personnel officers committed a prohibited personnel practice by influencing a disabled veteran applicant to withdraw from competition in order to secure the mistaken appointment of a nonveteran. The Court found that the Board could not modify the penalty levied when one of the personnel officers chose to retire.

Biller and Sombrotto v. Merit Systems Protection Board, (Pending 2nd Circuit decision), and *Blaylock v. Merit Systems Protection Board* (Pending in 11th Circuit)

These cases involve the issue of whether the Board properly found that three union presidents who were on leave without pay violated the Hatch Political Activities Act (Hatch Act) by endorsing Walter Mondale for President, soliciting votes for Mondale, and soliciting funds to be used to support Mondale's candidacy.

State of Connecticut, Department of Human Resources and Wayne Camillieri v. Merit Systems Protection Board (Pending in Connecticut district court)

The State of Connecticut, Department of Human Resources (DHR) and Wayne Camillieri, a State employee, have challenged the Board's decision finding that Camillieri violated the Hatch Act by running in a partisan primary election for city council and that this violation warranted removal. The State has also challenged the Board's related decision, entered as a result of the State's failure to remove Camillieri, ordering the U.S. Department of Health and Human Services to withhold from Federal monies paid to DHR an amount equal to two times Camillieri's salary at the time of his Hatch Act violation.

State of Minnesota, Department of Jobs and Training v. Merit Systems Protection Board (Pending in 8th Circuit)

The district court of Minnesota held that the Board properly found that a state employee, whose employment was in connection with Federal funds and who ran for political office while on leave without pay, had violated the Hatch Act. However, the district court reversed the Board's determination that the employee's violation was willful and warranted removal. The Board appealed the holding concerning the removal to the 8th Circuit.

Attorney Fees

McAlear v. Merit Systems Protection Board, 896 F.2d 1016 (Fed. Cir. 1986)

The Court affirmed the Board's decision finding it had no authority to adjudicate McAlear's claim for attorney fees, whether the claim was against his former client McBeen's employing agency or a settlement fund. McAlear had represented McBeen in a Board appeal until McBeen substituted another attorney for him. Thereafter, McBeen reached a settlement with the agency under which she received \$150,000, agreed to withdraw her motion for fees, and agreed to hold the agency harmless in any action brought by McAlear.

Jurisdiction

Espenschied v. Merit Systems Protection Board, 804 F.2d 1233 (Fed. Cir. 1986)

The Court affirmed the Board's decision that under 5 U.S.C. § 7121(a)(1) the petitioner's exclusive avenue of redress of the denial of his within-grade increase was the negotiated grievance procedure. The Court agreed that the Board did not have jurisdiction, even though the employing agency had informed the petitioner that he could proceed either by appeal to the Board or through the negotiated grievance procedure. The Court also rejected the petitioner's contention that the agency's erroneous instructions with respect to the within-grade denial caused his appeal of his removal to be untimely and affirmed the Board's dismissal of the removal appeal.

Smith v. Merit Systems Protection Board, 813 F.2d 1216 (Fed. Cir. 1987)

The Court affirmed the Board's decision finding no jurisdiction over the Chapter 43 reduction in grade of a National Labor Relations Board (NLRB) excepted service attorney. The Court held that the Office of Personnel Management (OPM) had not conferred jurisdiction on the Board to hear such appeals by approving the NLRB performance appraisal system which indicated that non-preference eligible employees could appeal to the Board. The Court held that under Chapter 43, OPM did not have the authority to extend appeal rights to excepted service employees.

Wilson v. United States Postal Service, 807 F.2d 1577 (Fed. Cir. 1986)

The Court affirmed the Board's decision that a reassignment from one category to another of Postmaster was neither a reduction in pay nor a reduction in grade.

Timeliness

Turner v. Merit Systems Protection Board, 806 F.2d 241 (Fed. Cir. 1986)

The Court affirmed the Board's dismissal of the petitioners' appeals as untimely, finding no basis for the petitioners' asserted belief that the pendency of an appeal from a Board decision denying class certification tolled the time for their individual appeals.

Bacashihua v. Merit Systems Protection Board, 811 F.2d 1498 (Fed. Cir. 1987)

The Court affirmed the Board's finding that the petitioner's appeal of her first removal from the Postal Service was untimely filed. The Court agreed that the petitioner's failure to timely file was based solely on her decision to pursue her contractual grievance of her removal beyond step 3 to arbitration, and not upon any failure of the Postal Service properly to inform her of her right to appeal both to the Board and through the grievance procedure.

APPENDIX E SPECIAL
STUDIES

The following summaries of special study reports released by the Board during Fiscal Year 1987 highlight the findings and recommendations in those studies. The reports summarized include two of the five studies which constitute the annual oversight review of the significant actions of the Office of Personnel Management, the annual analysis of MSPB appeals decisions, and a review of Board and court decisions involving the authority of the Special Counsel to remedy prohibited personnel practices.

1. Reports on the Significant Actions of the Office of Personnel Management (OPM). During Fiscal Year 1987 the Board examined several important civil service issues related to the significant actions of OPM. The results are being published in five separate reports. Two reports, one dealing with hiring entry-level professional and administrative career employees and blue-collar apprentices and the other with the RIF regulations which became effective in February 1986, were released during the fiscal year and are summarized below. Brief comments are provided about the other three reports, which are to be issued in Fiscal Year 1988.

a. In Search of Merit: Hiring Entry-Level Federal Employees. This report is the most recent follow-up to the Board's earlier evaluations of how the Federal Government has selected candidates for entry-level positions since the abolishment of the Professional and Administrative Career Examination (PACE). It examines: (1) entry-level hiring for 118 occupations formerly covered by the PACE; and (2) a new examination for apprentices in various trades and crafts occupations.

Before its elimination, the PACE was the primary competitive examination which permitted the ranking and consideration of hundreds of thousands of applicants for Federal professional and administrative career (PAC) entry-level positions. Because of allegations that the PACE adversely affected certain racial and ethnic groups, however, OPM abolished it under a consent decree in 1982.

A Schedule B (excepted service) PAC appointment authority, under which agencies develop and use their own recruiting and selection procedures, was established by OPM to fill the gap left by the abolishment of the PACE. The Schedule B PAC authority covers positions in former PACE occupations only at GS grades 5 and 7, and, until recently, advancement beyond GS-7 required formal selection under OPM procedures for a GS-9 competitive service position.

As noted in earlier Board reports on this subject, the "competition" has been largely pro forma. The current report finds that through June 1986, approximately 97 percent of all Schedule B PAC employees sought by agencies were selected for the GS-9 competitive service positions. On May 7, 1987, the President issued an Executive Order authorizing noncompetitive conversion of Schedule B employees to GS-9 competitive service positions if the employee's performance warrants it, and if the employee meets minimum qualifications and other requirements established by OPM.

The special Schedule B PAC authority has been exempted by OPM from even those procedures established for the excepted service, and it permits the use of selection procedures that are prohibited for competitive service hiring. Thus, Schedule B PAC employees are recruited, considered, and hired under procedures that do not ensure the same uniform degree of merit that is sometimes required for other excepted service hiring and is mandatory for competitive service hiring. Since employees hired under this Schedule B PAC authority may now be converted noncompetitively into the competitive service, the Board is concerned that hiring under this authority may be inconsistent with Merit System Principle 1. This principle states: *"(R)ecruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity."*

From the perspective of merit systems integrity, it is unfortunate that relatively little progress has been made in developing alternative examinations in the years since the PACE was abolished. Alternative examinations have been developed for only 16 of the occupations formerly covered by the PACE.

While OPM estimates that these 16 occupations collectively accounted for approximately 60 percent of annual entry-level hiring under PACE, there are still over 100 occupations, and a substantial percentage of anticipated hiring needs, without a formal competitive examination vehicle.

This report recommends that OPM accelerate its examination development process to permit elimination of this special Schedule B authority in a timely manner. It also recommends that OPM develop a reasonable and firm timetable for accomplishing this goal and that, pending its accomplishment, OPM take steps to bring the recruitment and selection procedures of the Schedule B PAC authority into closer alignment with competitive service procedures.

In contrast to the concerns expressed over entry-level PAC hiring, the report finds that early results of the use of a new blue-collar apprentice examination suggest that the examination is a success. The examination was developed by OPM and the Department of the Navy, was tested in 1983, and placed into use in March 1984. The examination is administered to applicants for the Federal Government's four-year apprentice program. Between 1,000 and 2,000 new apprentices are hired each year.

Results from the first full year of use of the examination indicate better-quality selections, plus general improvements in the representation of women and minorities among selections. The second full year statistics reflect continued general improvement in the representation of women and minorities. Too little time has passed to tell whether an unacceptably high turnover rate of new hires under the examination used previously will be reduced. If continuing validation testing upholds the early results, this new apprentice examination can be considered successful.

b. Reduction-in-Force: The Evolving Ground Rules. This report examines the RIF regulations which became effective in February 1986, and explains what the regulations changed and what those changes mean to Federal agencies, employees, and the merit systems.

The revised regulations are part of a larger OPM plan to make performance appraisal a key tool in Federal personnel management. A paramount goal of the regulations is to give RIF a stronger merit basis by enhancing the role of performance as an employee retention factor. The new regulations provide additional credit for performance by increasing the weight given to performance ratings in relationship to seniority and allowing credit for the three most recent annual performance ratings.

Other provisions of the regulations place new restrictions on the establishment of competitive areas and competitive levels, limit the number of grades an employee can fall back in displacing other employees at lower grades, eliminate appeal rights when an employee suffers no loss of grade or pay, and exclude from RIF procedures employee downgrades caused by a gradual erosion of duties.

Overall, the new regulations are expected to decrease the disruption to agency programs and to the workforce which are often associated with RIF actions. They increase the likelihood that agencies will be able to keep their better performing, but less senior, employees. Higher performing employees gain the opportunity to have their performance make a real difference in determining how a RIF will affect them. Fewer employees will be affected by a RIF since the "ripple" effect associated with RIF in previous years is moderated by the new regulations.

The study finds that most agency managers view the changes as conceptually sound, but are concerned that the new regulations: (1) increase the administrative burden of conducting a RIF; and (2) depend on the fairness and accuracy of individual performance plans and appraisals of employees. The report notes that the regulations do increase the administrative workload, primarily because of the new requirements for considering performance plans and performance ratings. It also finds that the dependence on performance appraisals is a key potential problem, since there is evidence, both from OPM and from analyses conducted by GAO and MSPB, that agencies have problems with the operational implementation of their performance appraisal systems.

The report states that correction of the problems in implementation of performance appraisal systems is important to all aspects of Federal personnel management, including RIF. It concludes that, if properly applied, the revised regulations will strengthen the merit bases of RIF.

c. The Performance Management and Recognition System: Linking Pay to Performance. This study examines the results, to date, of the Government's linkage between pay and performance for Federal managers and supervisors covered by the Performance Management and Recognition System (PMRS).

d. Performance Management in the Federal Government. This report focuses on performance management programs covering both General Schedule (GS) and Performance Management and Recognition System (PMRS) employees in the Federal Government. The report addresses the underlying concepts of the system and the perceptions of those covered by the system, and relies on responses to the 1986 MSPB Merit Principles Survey of Federal employees.

e. Expanded Temporary Appointment Authority: New Management Flexibilities. This report examines the impact on agency staffing and the merit system of the expanded authority to make and extend temporary appointments, which was granted by OPM at the end of 1984. Under the expanded authority, agencies can make temporary appointments to positions through GS-12 for up to 4 years.

2. Study of MSPB Appeals Decisions for Fiscal Year 1986. This report provides detailed information on appeals decisions issued by the Board and administrative judges in the Regional Offices in Fiscal Year 1986. Information is included on addendum cases arising from appeals which have previously been decided, i.e., attorney fees, enforcement, and remands. In addition to total numbers, various breakdowns are provided by type of appeal, agency, outcome, case processing time, and MSPB regional jurisdiction. Fiscal Year 1986 appeals decisions are placed in the context of decisions issued during the four previous fiscal years (FY1982-1985) in order to develop a five-year trend analysis.

3. The Office of Special Counsel: Judicial Views on Prosecution of Prohibited Personnel Practices. This monograph reviews Board and court decisions issued in the first decade of the Civil Service Reform Act of 1978 (CSRA) which involve the authority of the Office of Special Counsel (OSC) to remedy prohibited personnel practices. The review relies primarily on the five cases in which Federal Circuit Courts of Appeal have reviewed decisions of the Board in actions brought by the Special Counsel. In addition, the review includes a recent series of important cases decided by the U.S. Court of Appeals for the District of Columbia Circuit, concerning OSC jurisdiction over claims not appealable to the Board.

The Office of Special Counsel was established by the CSRA with enforcement of the prohibited personnel practices statute as its principal responsibility. That statute applies to employees with authority to take or recommend "personnel actions" and prohibits the use of such authority for various illegitimate purposes which are inconsistent with merit principles. The definition of "personnel action" is broadly inclusive, encompassing many personnel actions which are not directly appealable to the Board by the employee involved.

To date, only a handful of Board decisions in Special Counsel cases have triggered judicial review. While the CSRA authorizes the Special Counsel to bring several types of actions, court decisions have issued only in appeals from "corrective action" and "disciplinary action" orders. In a corrective action, a final Board order is sought to require an agency to correct a prohibited personnel practice. A disciplinary action asks the Board to impose disciplinary sanctions on employees who have committed prohibited personnel practices or certain other violations within OSC's jurisdiction.

The five cases reviewed in the monograph involve both substantive and procedural issues. In *Frazier v. Merit Systems Protection Board* the court resolved key questions regarding the intended roles of the Special Counsel and the Board under the corrective action provisions of the CSRA. The court agreed with the Board that the adjudicatory role is exclusively the Board's, that OSC has the burden of proving the existence of the alleged prohibited personnel practice by a preponderance of the evidence, and that an evidentiary hearing may appropriately be held to resolve factual disputes.

Frazier is the only reported court decision in an appeal from a Board decision on a Special Counsel corrective action request. The other four court decisions all involved appeals from Board decisions in Special Counsel disciplinary actions brought against individual employees.

In *Homer v. Merit Systems Protection Board*, the Director of OPM challenged the Board's broad interpretation of the OSC's authority to investigate and prosecute an employee's alleged violation of a civil service law, rule, or regulation where the violation did not relate to personnel practices, merit systems abuses, or other matters specifically made subject to OSC jurisdiction. The court reversed the Board, and the result is to leave the policing of ethical violations by high level managers, if not committed in the course of personnel administration, to the agency and OPM.

In *Filiberti v. Merit Systems Protection Board*, the Board invoked its compliance authority in devising a new penalty to prevent the circumvention of the sanction originally imposed in a disciplinary action brought by the Special Counsel. The court reversed, finding that the Board's enforcement authority would not permit it to extend its sanctioning authority beyond the penalties specifically permitted by statute.

In both *Starrett v. Special Counsel* and *Harvey v. Merit Systems Protection Board*, the Board found that the adverse personnel action was a reprisal against an employee who engaged in a protected activity - disclosing information to the press in *Starrett*, and bringing a complaint to the Special Counsel in *Harvey*. In each case the Board relied primarily on testimony by the respondent that he did not believe the employee's allegations and relied on this belief, in part, in taking the action. The courts reversed the Board in these cases, ruling that acting on a belief in the inaccuracy of the contents of a protected disclosure is not the same as acting to punish the fact of the disclosure. The courts' purpose appears to have been to protect the supervisor from discipline for an adverse action based on a reasonable belief that the employee's allegations were false. The effect of the decision is to ensure that supervisors are not disciplined for good faith conduct.

The monograph notes that because of their small number, the court decisions in the Special Counsel corrective and disciplinary action cases do not support many generalizations. However, the cases agree in finding a quasi-prosecutorial role for the Special Counsel, whether in seeking agency correction of prohibited personnel practices or in seeking discipline of supervisors responsible for their commission. The courts have shown a willingness to read OSC authority to remedy prohibited personnel practices broadly, while rejecting an expansive interpretation of that authority with respect to other civil service related matters. In the actions alleging reprisal for protected activity, distinguishing retaliatory from legitimate motivation has presented a difficult challenge.

A series of cases recently decided by the U.S. Court of Appeals for the District of Columbia Circuit have articulated a broad jurisdictional basis for Special Counsel investigations into allegations of prohibited personnel practices. The plaintiffs in these cases were all seeking to have the Federal courts exercise jurisdiction over claims regarding personnel actions which were not appealable to the Board. The courts' dismissals for lack of jurisdiction suggest strongly that OSC can and should investigate matters as diverse as allegations of incorrect classification or performance decisions, or allegations of unfair or arbitrary grievance or reassignment determinations, since such decisions, if they are arbitrary or incorrect, can constitute prohibited personnel practices.

The monograph concludes that if the Special Counsel begins to rely upon the rationale behind the recent series of rulings in the D.C. Circuit cases, and if that reliance receives support from the Board and its reviewing courts, the role of the Special Counsel will have been enlarged, while judicial oversight of Executive Branch personnel decisions will have been more narrowly circumscribed.