

U. S. MERIT SYSTEMS  
PROTECTION BOARD



*Submitted to the President and  
the Congress of the United States*

ANNUAL REPORT FOR FISCAL YEAR 1990



The Chairman



U.S. Merit Systems Protection Board  
1120 Vermont Avenue, NW  
Washington, DC 20419

February 1991

Sirs:

In accordance with 5 U.S.C. 1206, I am pleased to submit the Twelfth Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during Fiscal Year 1990 and includes a special section on our adjudication of cases brought by or on behalf of whistleblowers under the Whistleblower Protection Act of 1989.

During the fiscal year, administrative judges in the Board's regional offices issued almost 7,800 decisions on appeals, including addendum cases. The 3-member bipartisan Board issued decisions on over 1,400 petitions for review of the initial decisions of administrative judges, including addendum cases. In this same period, 97 percent of final Board decisions reviewed by the U.S. Court of Appeals for the Federal Circuit were unchanged.

The Board issued 43 decisions in original jurisdiction cases--complaints brought by the Special Counsel (including Hatch Act cases), Special Counsel stay requests, requests to review a regulation of the Office of Personnel Management, and proposed actions against administrative law judges. This number includes one final Board decision in an agency's proposed furlough of administrative law judges in the event of sequestration.

During the fiscal year, the Board published seven major reports of merit systems studies and OPM oversight reviews. Among these were a report on why employees leave Federal service, a study of efforts by the Office of Personnel Management (OPM) to improve recruitment, and an analysis of OPM's job classification and qualifications systems.

Among the other significant accomplishments of the Board during the fiscal year were the publication of final regulations for the adjudication of whistleblower appeals and the issuance of two new public information publications explaining the Board's jurisdiction and procedures. At Board headquarters, a new hearing room was named in honor of Frances Perkins, former Secretary of Labor and Civil Service Commissioner. The naming of the room reflects the Board's continuing effort to acknowledge the contributions made by great leaders of the past to the advancement of the Federal merit system.

Respectfully submitted,

A handwritten signature in black ink that reads "Daniel R. Levinson". The signature is written in a cursive, flowing style.

Daniel R. Levinson

The President  
The President of the Senate  
The Speaker of the House of Representative

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# Board Mission and Organization

## MISSION

The U.S. Merit Systems Protection Board is an independent, quasi-judicial agency in the Executive branch that serves as the guardian of Federal merit systems. The Board's mission is to ensure that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices. 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 (appellate jurisdiction);
- Hearing and deciding cases brought by the Special Counsel involving alleged abuses of the merit systems, and other cases arising under the Board's original jurisdiction;
- 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
- Providing oversight of the significant actions and regulations of the Office of Personnel Management (OPM) to determine whether they are in accord with the merit system principles.

The Board was established by Reorganization Plan No. 2 of 1978, which was codified by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454. The CSRA, which became effective January 11, 1979, replaced the Civil Service Commission with three new independent agencies: the Office of Personnel Management, which manages the Federal work force; the Federal Labor Relations Authority, which oversees Federal labor-management relations; and the Board.

The Board assumed the employee appeals function 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 CSRA also created the Office of Special Counsel, which investigates allegations of prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Act. Although established as an office of the Board, the Special Counsel has functioned independently as a prosecutor of cases before the Board. In July 1989, the Office of Special Counsel became an independent Executive branch agency.

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

## **BOARD MEMBERS**

### **CHAIRMAN**



DANIEL R LEVINSON became Board Chairman on August 15, 1986, following Presidential nomination and Senate confirmation. 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, for six years, an associate and partner in the Washington, DC law firm of McGuiness & Williams, where he represented primarily private sector management in a wide variety of employment law matters.

### **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 to the Board, 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, DC.

### **MEMBER**



JESSICA L. PARKS took the oath of office as a Member of the Board on May 18, 1990, following nomination by President Bush and confirmation by the Senate. At the time of her appointment, Ms. Parks was Associate Regional Counsel for Litigation and Program Enforcement for the U.S. Department of Housing and Urban Development in Atlanta, Georgia. From 1982 to 1985, she served as an administrative judge in the Board's Atlanta Regional Office. Ms. Parks succeeds Samuel W. Bogley, who served as Member of the Board under a recess appointment by President Reagan from November 23, 1988 until November 22, 1989.

## BOARD ORGANIZATION

The **Chairman, Vice Chairman, and Member** adjudicate the cases brought to the Board. Each heads his/her individual office. The Chairman, by statute, is the chief executive and administrative officer of the Board.

The **Executive Director** manages the operations and programs of the Board's headquarters and regional offices, under authority delegated by the Chairman. This delegation includes 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 reports directly to the Chairman. The **Deputy Executive Director** assists the Executive Director in the management of the Board's operations and programs.

The **Office of Regional Operations** manages the appellate functions of the MSPB regional offices and reviews the quality of initial decisions issued by administrative judges in the regional offices. The 11 MSPB **Regional Offices** are located in Atlanta, Boston, Chicago, Dallas, Denver, New York, Philadelphia, St Louis, San Francisco, Seattle, and Washington, DC. These offices receive and process the initial appeals filed with the Board. Administrative judges in the regional offices have the primary function of adjudicating appeals and issuing fair, timely, and well-reasoned decisions.



*Lucretia F. Myers,  
Executive Director*

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 for final adjudication. It also processes interlocutory appeals of rulings made by administrative judges in 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 research and policy memoranda to the Board on legal issues.

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 decisions and orders in enforcement cases, reviews OPM regulations, and drafts proposed final decisions for the Board in original jurisdiction cases.

The office manages legislative policy, congressional relations, and public affairs functions for the Board. It is also responsible for conducting the Board's ethics program.

The **Office of Administrative Law Judge hears** cases governed by the Administrative Procedure Act and other cases assigned by the Board.

The **Office of the Clerk of the Board** performs the Board's ministerial functions to facilitate timely adjudication. These include receiving and processing petitions for review and actions under the Board's original jurisdiction authority, ruling on certain procedural matters, and issuing the Board's Opinions and Orders. The Clerk is also responsible for the Board's records, mail, correspondence, document security, and reports management programs. The office certifies official records to the courts and Federal administrative agencies, maintains the Board's law library, and administers the Board's Freedom of Information Act, Privacy Act, and Government in the Sunshine Act programs.

The **Office of Policy and Evaluation** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems, including an annual oversight review of the Office of Personnel Management. Reports of these studies are submitted to the President and the Congress, as required by law.

The **Office of Management Analysis** develops and coordinates internal management programs and projects. The office also produces the Board's annual report to the President and the



*Michael W Crum Deputy  
Executive Director*

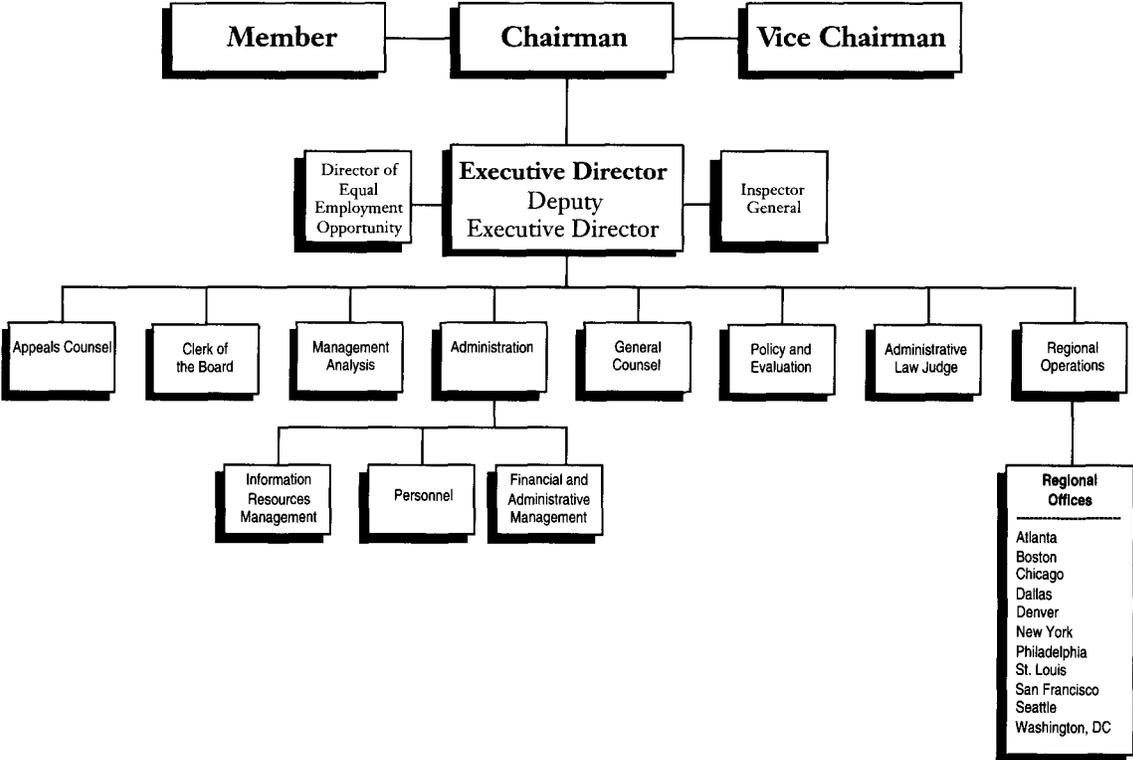
Congress, the annual report on the Board's decisions in appellate and original jurisdiction cases, and public information publications.

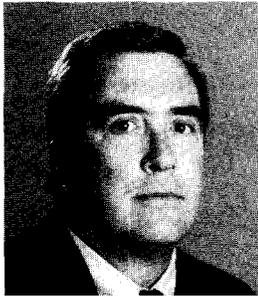
The **Office of Administration** manages the Board's administrative operations. It is made up of three divisions: The **Financial and Administrative Management Division** administers the budget, accounting, procurement, property management, physical security, and general services functions of the Board. The **Personnel Division** manages personnel programs and assists managers, employees, and applicants for employment. It administers staffing, classification, employee relations, performance management, payroll, personnel security, and training functions. The **Information Resources Management Division** develops, implements, and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative responsibilities.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It develops and implements operating guidelines and instructions for the Board's EEO programs, manages the Board's affirmative action programs, evaluates the Board's EEO programs, and prepares reports of findings with recommendations for improvements or corrections. It provides for precomplaint counseling, processes complaints of alleged discrimination, and issues proposed dispositions of such complaints. The office also furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors. The Director, Office of EEO, reports directly to the Executive Director and has direct access to the Chairman on matters of EEO concern.

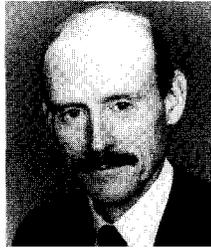
The **Office of the Inspector General** is the Board's internal auditor. The independent Inspector General plans and directs audits, investigations, and internal control evaluations in compliance with the requirements of the Office of Management and Budget and the U.S. General Accounting Office. The 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 Inspector General reports directly to the Executive Director.

**U.S. MERIT SYSTEMS PROTECTION BOARD**





*Mark Kelleher*  
*Director, Office of*  
*Regional Operations*



*R.J. Payne*  
*Regional Director*  
*Atlanta Office*



*William Carroll*  
*Regional Director*  
*Boston Office*



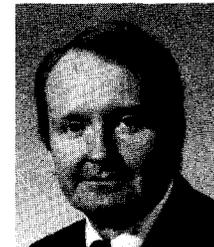
*Martin W. Baumgaertner*  
*Regional Director*  
*Chicago Office*



*Paula A. Latshaw*  
*Regional Director*  
*Dallas Office*



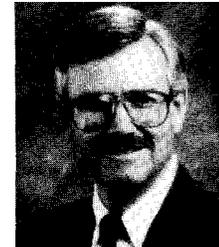
*Gail E. Skaggs*  
*Regional Director*  
*Denver Office*



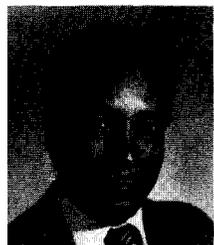
*Sean P. Walsh*  
*Regional Director*  
*New York Office*



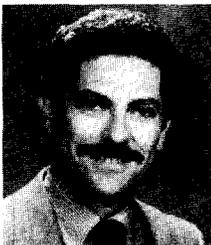
*Lonnie Crawford*  
*Regional Director*  
*Philadelphia Office*



*Earl A. Witten*  
*Regional Director*  
*St. Louis Office*



*Denis Marachi*  
*Regional Director*  
*San Francisco Office*

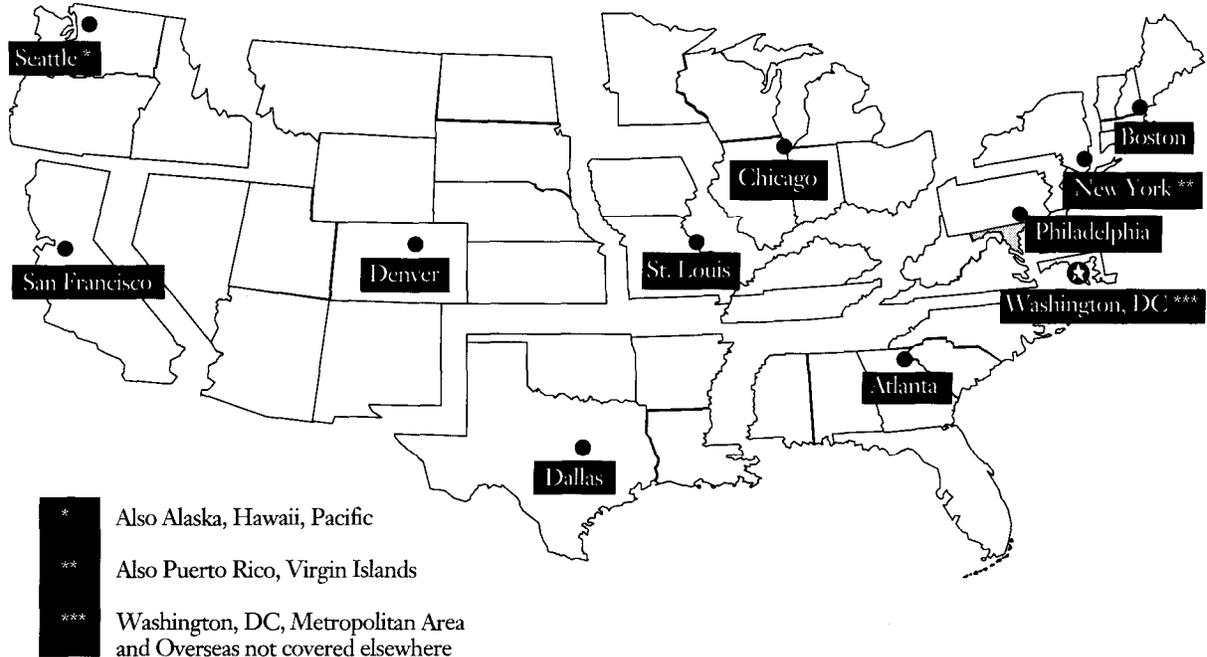


*Carl Berkenwald*  
*Regional Director*  
*Seattle Office*



*P.J. Winzer*  
*Regional Director*  
*Washington, DC Office*

## REGIONAL OFFICE JURISDICTIONS



**Atlanta Regional Office**--Alabama, Florida, Georgia, Mississippi, North Carolina, and South Carolina

**Boston Regional Office**--Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

**Chicago Regional Office**--Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin

**Dallas Regional Office**--Arkansas, Louisiana, Oklahoma, and Texas

**Denver Regional Office**--Arizona, Colorado, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Utah, and Wyoming

**New York Regional Office** New York, Puerto Rico, Virgin Islands, and the following counties in New Jersey: Bergen, Essex, Hudson, Hunterdon, Morris, Passaic, Somerset, Sussex, Union, and Warren

**Philadelphia Regional Office**--Delaware, Pennsylvania, Virginia (except cities and counties served by Washington Regional Office -see below), West Virginia, and the following counties in New Jersey: Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Mercer, Middlesex, Monmouth, Ocean, and Salem

**St. Louis Regional Office**--Iowa, Kentucky, Missouri, and Tennessee

**San Francisco Regional Office** California

**Seattle Regional Office**

Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas

**Washington Regional Office** Washington, DC, Maryland, all overseas areas not otherwise covered, and the following cities and counties in Virginia: Alexandria, Arlington, Fairfax City, Fairfax County, Falls Church, Loudoun, and Prince William

# Highlights of Fiscal Year 1990 Activities

During Fiscal Year 1990, the Board's jurisdiction over Federal employee appeals was expanded for the fourth time in as many years. In August 1990, the Civil Service Due Process Amendments (Public Law No. 101-376) granted approximately 100,000 additional employees in the excepted service the right to appeal agency adverse actions and performance-based actions to the Board. The Ethics Reform Act of 1989 (Public Law No. 101-194) included a new requirement that members of the Senior Executive Service be recertified every three years, beginning in 1991, and granted executives who are denied recertification the right to appeal to the Board. These expansions of jurisdiction followed the establishment of the new individual right of action appeal under the Whistleblower Protection Act of 1989 and the extension to Postal Service supervisors and managers of the right to appeal adverse actions by the Postal Employee Appeal Rights Act of 1987.

Fiscal Year 1990 also marked the Board's first full year of experience in adjudicating cases under the provisions of the Whistleblower Protection Act (Public Law No. 101-12), which took effect on July 9, 1989. The following special section of this report discusses the major issues that arose and the Board's significant decisions in cases covered by the Whistleblower Protection Act.

The final month of the fiscal year saw a large influx of cases from agencies proposing to furlough their administrative law judges. These cases were the result of the anticipated need for government-wide furloughs to meet the requirements of a sequester expected to begin October 1, 1990. Although most Federal employees may not appeal a furlough until after it takes effect, an administrative law judge, by law, must be afforded the opportunity for a hearing and a decision by the Board before a proposed furlough of 30 days or less may be effected. In the last weeks of the fiscal year, the Board received 23 complaints involving proposed furloughs of a total of 1,053 administrative law judges. By the end of the fiscal year, 20 recommended decisions had been issued. The Board issued one final decision covering nine administrative law judges.

In Fiscal Year 1990, administrative judges in the Board's regional offices issued 6,932 decisions on appeals, nearly as many as in the previous fiscal year. This number includes 252 decisions issued on whistleblower appeals—both those brought under the new individual right of action and those otherwise appealable to the Board. The administrative judges also issued 75 decisions on requests for stays of personnel actions and 840 decisions in addendum cases—requests for attorney fees, compliance proceedings, and remands.

The Board's regional offices maintained an already impressive record of case processing timeliness, with an average processing time of 72 days. The Board's self-imposed time standard for the issuance of decisions on appeals is 120 days from receipt of the appeal by the regional office. In Fiscal Year 1990, 99.4 percent of all appeals were decided within 120 days.

The rate of settlement of appeals in Fiscal Year 1990 was 49 percent, the same as in Fiscal Year 1989. This suggests that the settlement rate, which increased dramatically during the fiscal years 1984 through 1988, has stabilized. The use of settlement procedures has resulted in significant cost savings, without impinging on the rights of the parties.

At headquarters, the Board issued decisions on 1,310 petitions for review of initial decisions made by its administrative judges, a 15 percent increase from the previous fiscal year. The Board decided 133 petitions for review of addendum case decisions and issued 5 decisions on interlocutory appeals of administrative judges' rulings on stay requests.

The Board also issued 43 decisions in cases under its original jurisdiction, almost double the number issued in the previous fiscal year. These cases included complaints brought by the Special Counsel, Special Counsel stay requests, a request to review an OPM regulation, and proposed actions against administrative law judges (including the proposed furloughs of administrative law judges).

During Fiscal Year 1990, the Board continued its efforts to ensure well-reasoned decisions both in the regional offices and at headquarters. The standard orders used by the administrative judges in adjudicating cases were updated and rewritten in "plain English" as a part of the Board's continuing commitment to make its procedures more easily understood by persons who are not legal practitioners, and the Appeals Procedures Manual was expanded, updated, and reissued. A The Judges' Handbook Training was provided to administrative judges at the National Judicial College and through in-house programs. Further quality review of the decisions of administrative judges were conducted under the strengthened quality review program launched in 1987. The Board also published its final regulations in the Federal Register under both 5 CFR Part 1201, covering practices and procedures for appellate and original jurisdiction cases, and 5 CFR Part 1209, covering the special provisions applicable to whistleblower appeals.

At headquarters, the Board continued its concentration on issuing precedential decisions in cases involving "major issues." In addition to its groundbreaking interpretations of the Whistleblower Protection Act, the Board added significantly to the case law dealing with recovery of annuity overpayments, performance-based actions taken under 5 U.S.C. Chapter 43, discrimination against employees handicapped by alcohol or drug abuse, and various issues associated with settlements.

During the fiscal year, the Board issued seven reports of merit systems studies and OPM oversight reviews. They included an examination of why employees leave Federal Government service, a study of OPM efforts to improve recruitment for Government service, an analysis of OPM's job

classification and qualifications systems, a report on the Senior Executive Service, and a report on what Federal employees think about "Working for America." The Board also joined with OPM to form the Joint Advisory Committee on Workforce Quality Assessment to review current methods for assessing the quality of the Federal work force and to make recommendations for improvements.



*Jessica L. Parks is sworn in by former Member Dennis M. Devaney. Ms. Parks' husband, Ed Swindell, holds the Bible.*



*Mary Detjen (center) of the Office of Regional Operations makes a point at the 1990 Regional Directors Congerence*

The Board and staff conducted 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 that deal with the agency. During the fiscal year, the Board members, senior headquarters staff, regional office directors, and administrative judges made numerous appearances at meetings, conferences, and training programs. The Board also continued its new series of public information publications with the issuance of "Questions & Answers About Appeals" and "Questions & Answers About Whistleblower Appeals." Both publications proved so popular that a second printing was ordered before the year ended.

In the management area, a number of significant activities contributed to the Board's ability to perform its adjudicatory and studies functions more efficiently and effectively. Work began on the systems development phase of the new automated Case Management System, which is to be made operational in Fiscal Year 1991. The transition to an IBM-AT compatible personal computer environment throughout all Board offices was completed, and the headquarters minicomputer was upgraded. New automated systems were initiated for purchasing, property management, personnel security, time and attendance recording, and Board issuances, resulting in savings in both staff time and costs.

# Adjudication of Whistleblower Cases Under The Whistleblower Protection Act of 1989

## **APPELLATE JURISDICTION CASES**

### ***Provisions of the Whistleblower Protection Act***

During Fiscal Year 1990, the Board had its first opportunity to interpret provisions of the Whistleblower Protection Act of 1989. The new law made appealable many personnel actions that previously could not be appealed directly to the Board by an appellant, but could be brought only through the Office of Special Counsel. This individual right of action (IRA) appeal is an important new right for employees who believe that their agencies have taken

personnel actions against them, or failed to take action, because of their whistleblowing activities. In addition, under the Whistleblower Protection Act, a whistleblower appeal may be based on an agency action that has been proposed or threatened, as well as on an action that an agency has taken or failed to take.

The Whistleblower Protection Act also permits an appellant to seek a stay of a personnel action allegedly based on whistleblowing, without the intervention of the Special Counsel. Under previous law, an employee could only seek a stay through the Special Counsel. If the Special Counsel did not prosecute the case on the employee's behalf, the employee had no further recourse, unless the action was one appealable to the Board under another statute or regulation.

In addition, the new law significantly lowered the degree of proof needed by an employee to support a claim that an action was based on his or her whistleblowing. The legislative history makes it clear that the Congress intended this modification of existing law to make it easier for a whistleblower to gain protection from unwarranted agency action. Thus, the law now prohibits an agency action threatened, proposed, taken, or not taken "because of" an employee's protected activity, instead of "in reprisal for" such activity. The four-part burden of proof requirement appellants formerly had to meet to prove an affirmative defense of retaliation for whistleblowing has been vastly simplified. Under the new law, corrective action will be ordered if the employee shows that the protected activity was a "contributing factor" in the agency's decision to take the action. The agency can avoid this result only by showing "clear and convincing evidence" that it would have taken the same personnel action in the absence of the protected disclosure.

### ***The Board's Implementing Regulations***

During the first year of the Whistleblower Protection Act, the Board gained experience in working with the interim regulations it formulated when the Act first became law. Based on this practical experience, the Board revised both its existing appellate regulations, published at 5 CFR Part 1201, and its regulations specifically addressing appeals and stays under the Act, published at 5 CFR Part 1209. Despite the relatively short period since enactment of the new law, the Board has provided a solid foundation of regulation to guide the parties in the cases that come before it under the Act. The procedures established have proven not only workable, but well suited to the task of carrying out congressional intent.

During this fiscal year, the Board issued a series of precedential decisions defining many of the most important terms of the statute and setting forth the newly applicable burdens of proof and certain parameters for applying them. The construction of statutory terms developed through this case-by-case adjudication is now reflected in the Board's regulations and provides guidance to the parties to future appeals.

### ***Interpretation of the Savings Provision***

One of the first issues facing the Board in applying the Act was the determination of what cases should come under the provisions of the Act. The question was: Did Congress intend to make the protections of the law applicable to all cases pending as of the effective date of the Act or to a more limited category of cases? In two lead decisions, the Board answered that question by finding that the Act was intended to apply only to those cases that arose after the July 9, 1989 effective date of the Act.

*Marshall v. VA,*

CH34438910593 (March 5, 1990)

Citing the Act's savings provision and noting that the language was the same as in the savings provision of the Civil Service Reform Act, the Board found that the two savings provisions should be interpreted in the same manner. Accordingly, the Board found that, under the Whistleblower Protection Act, an action is "pending" as of the date the employee receives the notice of proposed administrative action. By its terms, the Act is inapplicable to administrative proceedings "pending" as of the effective date. The Board thus found that because the action taken against the appellant had been proposed prior to the Act's July 9, 1989 effective date, the Act did not apply even though the action was not effected until after that date. It further noted that this interpretation was consistent with the interpretation of the similar savings provision of the 1987 law extending Board appeal rights to certain Postal Service employees. This interpretation of the savings provision is reflected in the Board's regulations at 5 CFR 1201.191(b).

*Lundberg v. Navy,*

SE07528810298 (February 6, 1990)

More than a year after the initial decision in the appellant's case became final, he filed a petition for review, arguing that he waited to file it until the Whistleblower Protection Act became effective because he had raised a defense of reprisal for whistleblowing and believed that the Act would have a substantial effect on his appeal. The Board found that the Act was inapplicable to the appeal, noting that under the Act's savings provision, because the agency issued its notice of proposed action to the appellant in 1985, the action against him was pending at that time and the Act, therefore, did not apply. The Board found that the appellant failed to exercise diligence or ordinary prudence. He awaited the passage of an Act without knowledge that it would pass, or that if it did, it would apply, and also failed to explain why he waited four months after passage of the Act to file his appeal. The petition for review was dismissed.

### ***Jurisdiction over Individual Right of Action Appeals***

Another issue of first impression addressed by the Board during the fiscal year concerned its jurisdiction over IRA cases. Under the Act, an appellant has the right to seek Board review of actions that are not otherwise appealable to the Board, if he or she asserts that the action was taken because of his or her whistleblowing activity, but only after the Special Counsel has had the opportunity to review the matter. In this decision, the Board adopted a principle of law generally applicable to its cases and ruled that an appellant must present a nonfrivolous allegation of jurisdiction under the Act before he or she is entitled to invoke the Board's process.

*Lozada v. EEOC, NY122190W0110, NY122190S0110 (May 25, 1990)*

The appellant filed an appeal in which she asserted that her supervisor had threatened to demote her in retaliation for prior appeals to the Board. She also requested a stay of the threatened action. The administrative judge dismissed the appeal and stay request for lack of jurisdiction, finding that the matter was not independently appealable to the Board and that the appellant did not have an "individual right of action" to challenge the threat because she had not shown that she had exhausted the procedures of the Office of Special Counsel. The Board agreed and found that the appellant had not raised a nonfrivolous allegation entitling her to a hearing on the jurisdictional issue. It noted that the appellant had not even alleged that she had sought corrective action from the Special Counsel, much less exhausted that procedure, which is a prerequisite to Board jurisdiction where the matter raised is not appealable directly to the Board. The appeal and stay

request were dismissed.

### ***Issues Arising under the Stay Request Provisions***

The Board's early decisions under the Whistleblower Protection Act also addressed questions related to the new right of an individual whistleblower to request a stay of the agency action. In *Gergick v. GSA*, the Board granted the first stay request that properly came to it under the provisions of the Act. The case is significant in the development of the law on whistleblower protections under the Act because in it, the Board defined several terms used in the statute and set forth an analytical framework for reviewing stay requests. Among the issues facing the Board in *Gergick* were whether the appellant had been "threatened" with a personnel action so as to allow him to file a stay request; what he must introduce into the record to show a "substantial likelihood" that he would prevail on the merits of his claim; what he must introduce into the record to show that his protected disclosure was a "contributing factor" in the agency's action; and what type and degree of evidence the agency must introduce to counter the appellant's showings and prove by "clear and convincing evidence" that it would have taken the same action in the absence of the appellant's protected disclosure. The Board gave content to these and other terms in reaching its decision in this case.

*Gergick v. GSA*,

SL122190S0030 (February 28, 1990)

After being denied relief by the Office of Special Counsel, the appellant filed an individual right of action appeal with the Board, contending that he had been threatened with removal when he was served with a "record of inquiry" in which the agency stated that it appeared that he had violated its standards of conduct and that this could result in disciplinary action against him. He asserted that this constituted retaliation for his whistleblowing activities and sought a stay of the threatened action. The administrative judge denied the stay request, finding no substantial likelihood that he would prevail on the merits of his appeal. The matter was certified to the Board as an interlocutory appeal.

As a preliminary matter, the Board found that it would not consider newly submitted evidence, filed after the certification, because 5 CFR 1209.15 requires that evidence demonstrating entitlement to a stay be included in the request for the stay. Turning to the merits, the Board found that the agency's action amounted to a threat under the Whistleblower Protection Act of 1989. In so doing, the Board rejected the agency's argument that because it had not determined to remove the appellant or to take other action against him, it had not "threatened" him. Noting that the right to appeal a threat was a provision added by the Act, the Board stated that although the term had not been defined in the Act, the legislative history indicated that it should be given a fairly broad interpretation and that no actual proposal was necessary. The Board adopted the dictionary definition of "threaten" as consistent with congressional intent. The Board concluded that the record of inquiry in this case constituted a threat. As the Board explained, although the record of inquiry did not refer to a specific disciplinary action contemplated, it had been issued only after the agency compiled a substantial file on the appellant's actions, so the agency's statement that discipline could result indicated more than an insignificant likelihood of discipline. The Board noted, however, that not every record of inquiry or similar notice, standing alone, constitutes a threat.

The Board further concluded that there was a substantial likelihood that the threatened action was a personnel action. Noting that the term "substantial likelihood" was not defined in the Whistleblower Protection Act, the Board broadly defined the term as including "that which is serious as opposed to that which is trivial." The Board also noted that a "personnel action" under the law continues to include "other disciplinary or corrective action." Although the agency did not state the specific discipline contemplated, the Board found the record of inquiry sufficiently threatened a personnel action so that the Board had jurisdiction over the case. Having made these two findings, the Board determined that the appellant had shown that the Board had jurisdiction over his stay request.

With respect to the merits of the stay request, the Board noted that it must consider whether there is a substantial likelihood of success on the merits of an IRA appeal and whether the agency has shown that it would be caused "extreme hardship" should a stay be issued. To prevail, an appellant must show that a disclosure under 5 U.S.C. 2302(b)(8) was a "contributing factor" in the threatened personnel action. The Board noted the legislative history indicating that the "contributing factor" standard was specifically intended by the Congress to be a lower standard than the one that was previously applicable. The Board also noted the legislative history specifically stating that the "contributing factor" burden could be met if the official taking the action knew or had reason to know of the disclosure and acted in such a period of time that a reasonable person could conclude that it was a factor in the personnel action.

In this case, the Board found that the appellant presented evidence that his whistleblowing was a contributing factor in the agency's action. In so doing, the Board noted that the record of inquiry included a specific reference to the appellant's complaints to the Special Counsel and the agency inspector general, so the official obviously knew about at least some of the disclosures. Moreover, the complaints, although not in the record, were consistently characterized as whistleblowing complaints, and the agency did not challenge that characterization. On these facts, the Board found that there was a substantial likelihood that the appellant could show that his whistleblowing complaints were a contributing factor in the threatened action.

The Board then noted that under 5 U.S.C. 1221(E)(2), it cannot order a stay if the agency shows by clear and convincing evidence that it would have threatened to take the action even in the absence of the disclosure. The Board, relying on the legislative history, found that "clear and convincing evidence" is a higher standard than preponderant evidence. The Board also noted that the term has been defined to mean the degree of evidence that will produce "a firm belief or conviction as to the allegations sought to be established."

Reviewing the record of inquiry, the Board found that it set forth four possible bases for discipline. The first was that the appellant continually refused to follow his supervisor's directions, but the directions he allegedly refused to follow were never identified. The second, that he made slanderous and defamatory comments about agency officials, although supported by proof that he made allegations of wrongdoing, was unsupported by any proof that those allegations were slanderous and defamatory. The third was his alleged infringement of his subordinates' right to privacy, but the Board found the only record evidence supportive of this basis to be "weak" Finally, the fourth basis was that the appellant's relationships with supervisors and subordinates were strained, but since there was no contention that the strain arose as a result of his improper acts, the Board found in it no basis for discipline. Given the vague allegations and the insufficiency of the evidence presented by the agency, as well as the proof that the appellant engaged in whistleblowing before the threat was made, the Board found that the agency had not presented clear and convincing proof that it would have taken the action in the absence of the disclosures. The Board, therefore, found a substantial likelihood that the appellant would prevail on the merits and concluded that he was entitled to a stay.

In this regard, the Board emphasized that it was staying only the action threatened, not the investigation into the appropriateness of any such action. The stay was to remain in effect until a final decision on the IRA appeal was issued, or until the Board vacated or modified the stay. If a personnel action had already been effected on the basis of the record of inquiry, the Board ordered that it be cancelled retroactively.

Last, the Board noted that shortly before this decision was issued, the administrative judge issued the initial decision on the IRA appeal, dismissing it as outside the Board's jurisdiction. The Board reopened that appeal on its own motion and allowed the parties to file briefs on it within 30 days. It noted that the issues addressed in that decision that were not raised in the stay request would be addressed in its final decision on the IRA appeal.

### **Other Jurisdictional Issues**

During the fiscal year, the Board also issued two decisions addressing jurisdictional questions created when an agency cancels an appealed action. In *Mulherin v. Air Force* and *Godfrey v. Air Force*, the Board considered whether an agency's cancellation of an appealed action renders it moot and thereby removes the appeal from the Board's jurisdiction. In *Godfrey*, the Board also considered whether a generalized allegation of expected harm was sufficient to provide a basis for the assertion of Board jurisdiction and invoke the broader protections of the Act, or whether a greater degree of specificity was necessary.

*Mulherin v. Air Force*,

BN122189W0212, BN122189W0213 (May 24, 1990)

The administrative judge dismissed the appellant's appeals from a written reprimand and a 5-day suspension because she found that the agency had cancelled those actions and thereby divested the Board of jurisdiction over them under the Whistleblower Protection Act. The Board agreed. It found that the agency completely rescinded the actions and noted that in cases arising under its pre-Act jurisdiction, such rescission returns the employee to the *status quo ante* and divests Board jurisdiction. It found that the same result should obtain under the Act. Although the Act is remedial legislation and should be liberally construed, the Board found that nothing in its terms or legislative history supported a broader reading of the law. The appellant was not left in a worse position as a result of the cancellation than he would have been in if the appeals were adjudicated in his favor. A stay simply would suspend the personnel actions. Here, they were cancelled. Accordingly, the Board dismissed the appeals.

*Godfrey v. Air Force*,

BN122189W0214 (May 24, 1990)

The administrative judge dismissed the appellant's appeal, under the Act, from his reprimand because the agency cancelled the action. For the reasons set forth in *Mulherin*, above, the Board agreed.

The Board further held that the appellant's claim of ongoing harassment, retaliation, and threats provided no basis for assertion of jurisdiction. The appellant sought relief from perceived current and future reprisals, as well as a stay of any undesired personnel actions of any sort. The Board found that these arguments were so lacking in specificity that they neither prevented the appeal from the cancelled reprimand from being moot nor provided an additional basis for appeal. Although noting that its jurisdiction under the Act extends to threatened actions and that a broad interpretation of "threatened" was found proper in *Gergick v. GSA*, the Board found no indication in the law or legislative history that Congress intended to allow an IRA appeal under 5 U.S.C. 1221 "based solely on generalized assertions and fears unsupported by reference to any specific matter." To establish jurisdiction, the Board concluded that an appellant must cite a "threatened, proposed, taken, or not taken 'personnel action.'" As the Board explained, a personnel action includes a broad range of actions, but each is a concrete matter that can be taken or done by an agency, and reviewed and undone by the Board. Except for the cancelled reprimand, the Board found that the appellant had pointed to nothing that could be examined as evidence of a prohibited personnel practice. The appellant's only specific evidence was a reference to discipline meted out to others, which he contended would have been more severe if he had committed the same offense. Absent evidence that he was so disadvantaged, however, the Board found nothing in those generalized assertions that fell within the scope of its broadened jurisdiction under the Act. In these circumstances, the Board dismissed the appeal.

## **ORIGINAL JURISDICTION CASES**

### ***Provisions of the Whistleblower Protection Act***

The Whistleblower Protection Act also revised the procedures governing Special Counsel requests for stays of personnel actions. The procedures apply to Special Counsel requests for stays of actions allegedly based on any prohibited personnel practice, including whistleblowing. The Act allows the Special Counsel to request that the Board order a stay of a personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken or is to be taken as a result of a prohibited personnel practice. Under 5 U.S.C. 1214(b), any member of the Board shall order a stay unless the member determines that the stay would not be appropriate under the circumstances. Unless the stay request is denied, the stay must be granted within three working days of the Special Counsel's request. The Board may extend a stay for any period that it considers appropriate. Before a stay is extended, however, the agency involved must be allowed an opportunity to comment.

Under the new law, the Board may terminate a stay at any time, except that it may not terminate a stay on its own motion or on the motion of the agency involved unless it first provides notice and an opportunity for comment by the Special Counsel and the affected individual. Further, the Board may not terminate a stay on the motion of the Special Counsel unless it first provides notice and an opportunity for comment by the affected individual.

### ***Standards Applicable to Special Counsel Stay Requests***

One of the initial issues raised by the stay provision of the Whistleblower Protection Act was the standard to be applied in determining whether to grant a Special Counsel stay request. In the first decision under the new law, the Vice Chairman determined that a stay would be granted where the facts presented by the Special Counsel supported a reasonable belief that a prohibited personnel practice had occurred and that it would not be inappropriate to grant the stay.

*Special Counsel v. Federal Emergency Management Agency,*  
90 FMSR 5124, 43 M.S.P.R. 527 (1990)

The Office of Special Counsel sought a 45-day stay of the agency's proposed 10-day suspension of Leo Bosner, arguing that it had reasonable grounds to believe that the suspension was ordered in reprisal for Bosner's protected activity. In her decision on the stay request, the Vice Chairman noted that the Special Counsel was then in the process of seeking corrective action on Bosner's behalf with respect to a proposed 5-day suspension in July 1989. Between July and the date on which the 10-day suspension was proposed, Bosner continued his contacts and disclosures. Further, he denied the insubordination on which the suspension was based. The Vice Chairman found that the provision for an initial stay upon motion by the Special Counsel under the Whistleblower Protection Act was virtually identical to the one that was in effect under the Civil Service Reform Act. Further, the legislative history of the Whistle-blower Protection Act made it clear that Congress intended that the initial stay not be difficult to obtain. She concluded, therefore, that the same standard as was previously applied would continue to apply. Finding that the facts presented by the Special Counsel supported a reasonable belief that a prohibited personnel practice had occurred, she concluded that it "would not be inappropriate" to grant the stay while the Special Counsel investigated the matter. Thus, she ordered the stay and directed the agency to allow Bosner to continue to work in his position during its pendency.

### ***Extensions of Stays Granted the Special Counsel***

During the fiscal year, the Board also issued decisions clarifying its discretion to extend stays beyond the initial 45-day period. In deciding requests for extensions of stays, the Board concluded that it is not required to concur in the Special Counsel's determination that there are reasonable grounds to believe that a prohibited personnel practice has occurred, and it would not automatically extend stays. In exercising its discretion, however, the Board would view the record in the light most favorable to the Special Counsel and grant the request if the Special Counsel's prohibited personnel practice claim were not clearly unreasonable.

*Special Counsel v. Federal Emergency Management Agency,*  
90 FMSR 5253, 44 M.S.P.R. 544 (1990)

On request by the Special Counsel for a 90-day extension of the initial stay, the Board granted an extension for 45 days. Under 5 U.S.C. 1214(b)(1)(B), the Board "may" extend a stay issued by a single member "for any period which the Board considers appropriate." This discretionary grant of authority differs from the standard under the predecessor statute in that the Board is no longer required to concur in the Special Counsel's determination that there are reasonable grounds to believe that a prohibited personnel practice has occurred. The Board concluded that under this newly acquired authority, stay extensions would not be automatic. The Board also set guidelines for the exercise of its discretion. The Board ruled that it would view the record in the light most favorable to the Special Counsel and would grant the extension request if the Special Counsel's prohibited personnel practice claim were not clearly unreasonable.

In this case, the Board found that the agency had not demonstrated that the Special Counsel's claim that a prohibited personnel practice occurred was clearly unreasonable. The Board found, however, that the 90-day extension requested by the Special Counsel was too long. Citing the legislative history as evidence that the Congress did not intend stays to be extended for prolonged periods of time, the Board found that an extension of 45 days was appropriate.

*Special Counsel v. Federal Emergency Management Agency,*  
HQ12089010012,  
(July 31, 1990)

The Board previously granted an initial 45-day stay of the 10-day suspension of Leo Bosner, as well as two subsequent extensions. In this action, the Special Counsel requested an indefinite extension of the stay because, she asserted, her investigation revealed evidence that the suspension was taken in retaliation for Mr. Bosner's protected activity. The request was based on 5 U.S.C. 1214(b)(2)(A), under which the Special Counsel provided the agency with the results of the investigation, and her statement that if the agency did not take action to correct the prohibited personnel practice in 30 days, she would seek corrective action before the Board.

The Board denied a further extension because the agency stated that it intended to take no action against Bosner until this matter was concluded. The Board found, therefore, that the extension was not necessary to protect Bosner and noted that Congress did not intend stays to be extended for prolonged periods. In this regard, however, it stated that if the agency reneged on its commitment, the Special Counsel could renew her request

### ***Other Decisions on Special Counsel Stay Requests***

During Fiscal Year 1990, the Special Counsel filed nine initial requests for stays with the Board, all of which were filed on behalf of whistleblowers. The Board applied the standards set forth in the decisions in *Special Counsel v. Federal Emergency Management Agency* in ruling on these stay requests. The number of stay requests filed by the Special Counsel was substantially greater than in the years prior to enactment of the Whistleblower Protection Act. During Fiscal Year 1989, for example, the Special Counsel filed only two stay requests with the Board.

### ***Special Counsel Disciplinary Action***

With respect to the definition of actions allegedly based on whistleblowing and the degree of proof required in a whistleblower case, the Whistleblower Protection Act made the same provisions applicable in Special Counsel cases as apply in appeals by individual whistleblowers. Fiscal Year 1990 saw the first complaint for disciplinary action filed by the Special Counsel under the provisions of the Act. That proceeding, *Special Counsel v. Larry L. Hathaway*, was the subject of a recommended decision by the Administrative Law Judge on August 9, 1990, finding that one of the four counts charged should be sustained. At the end of the fiscal year, the case was pending before the Board. The proceeding will afford the Board its first opportunity to analyze 5 U.S.C. 2302(b)(8), as revised by the Whistleblower Protection Act, in the context of a Special Counsel disciplinary action.

### **CONCLUSION**

As these decisions show, during the Board's first year of practice under the Whistleblower Protection Act, the Board addressed new causes of action and major substantive issues in both appellate and original jurisdiction cases. These decisions defining important statutory terms and establishing the framework for bringing actions under the new law effectuate the intent of the Congress to protect whistleblowers from unwarranted agency action while allowing Federal agencies to operate effectively. For example, although a whistleblower may be granted a stay and an IRA appeal may be won on the basis of a lesser burden of proof, as evidenced by *Gergick*, nonetheless the Board has imposed reasonable limits on the process by assuring that frivolous allegations and those with no asserted foundation in fact do not call forth the full protections of the Act reserved for genuine whistleblowers.

# Adjudication: Appellate Jurisdiction

## **JURISDICTION**

### **APPEALABLE ACTIONS**

Under the CSRA, most Federal employees are entitled to appeal to the Board certain personnel actions taken by Federal agencies. Certain other actions are appealable under OPM regulations. Appealable actions include adverse actions (removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less), performance-based removals or reductions in grade, denials of within-grade increases, certain reduction-in-force actions, denials of restoration-to-duty or reemployment rights, and OPM determinations in employment suitability and retirement matters.

Since the Whistleblower Protection Act became effective on July 9, 1989, additional personnel actions may result in an appeal to the Board under certain circumstances. Included are actions that may be the subject of a prohibited personnel practice complaint to the Special Counsel, such as appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training. Such an action may be appealed to the Board only if the appellant alleges that the action was taken because of his or her whistleblowing, and if the appellant first filed a complaint with the Special Counsel and the Special Counsel did not seek corrective action from the Board.

In the past fiscal year, the Ethics Reform Act of 1989, which requires that members of the Senior Executive Service be recertified every three years beginning in 1991, also broadened the Board's jurisdiction. That law provides that senior executives who are denied recertification have the right to appeal the denial to the Board.

### **ELIGIBLE EMPLOYEES**

The employees and others (e.g., applicants for employment, annuitants in retirement cases) who may appeal specific actions to the Board vary in accordance with the law and regulations governing the specific action. For some actions, classes of employees, such as political appointees, and employees of specific agencies are excluded.

Since the CSRA became effective, employees in the competitive service and preference-eligible employees in the excepted service have had the right to appeal adverse actions to the Board. In 1987, nonpreference-eligible supervisors and managers in the Postal Service gained Board appeal rights for adverse actions.

In the last fiscal year, the Civil Service Due Process Amendments, effective August 17, 1990, extended the right to appeal both adverse actions and performance-based actions to certain employees in the excepted service. The legislation extended appeal rights to excepted service employees—including attorneys, scientists, teachers, clericals, laborers, and others hired non-competitively—who previously could not appeal to the Board unless they were preference-eligibles. To be eligible to appeal, excepted service employees must have completed two years current continuous service in an Executive agency. Employees in certain agencies, including the Postal Service and the intelligence agencies, were excluded from the coverage of this new law. The Office of Personnel Management estimates that approximately 100,000 additional excepted service employees gained appeal rights under the law.

## REGIONAL OFFICES

### APPELLATE PROCEDURES

Appeals to the Board must be filed in writing with the Board regional office having geographic jurisdiction within 20 days of the effective date of the action. Where the notice of action does not set an effective date, the appeal must be filed within 25 days of the date of the notice. In the case of whistle-blower appeals, where the appellant has first complained to the Special Counsel, the Whistle-blower Protection Act provides that the appellant may appeal directly to the Board within 65 days after the date of a written notice from the Special Counsel stating that the office will not seek corrective action. A direct appeal to the Board is also authorized if 120 days have passed since the filing of the complaint with the Special Counsel, and the Special Counsel has not advised the appellant that the office will seek corrective action on his or her behalf.

Under the Whistleblower Protection Act, an appellant may also ask the Board to stay a personnel action allegedly based on whistleblowing. A stay request may be filed when an appellant is eligible to file a whistleblower appeal, and it may be filed before, at the same time as, or after the appeal is filed. Stay requests are also filed in writing with the Board regional office having geographic jurisdiction. By law, stay requests must be decided within 10 days of receipt of the request.

After an appeal has been received, 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 adjudication. 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.

Once jurisdiction and timeliness have been established, the appellant has a right to a hearing on the merits. During a prehearing conference, issues are defined and narrowed, stipulations to undisputed facts are obtained, and bases for settlement are discussed. 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 fully recorded by a court reporter, with copies of the record available to the parties. Once the record is closed, an initial decision is issued by the administrative judge.



*Regional Directors (left to right) Carl Berkenwald (Seattle), William Carroll (Boston), and Earl Witten (St. Louis) at the 1990 Regional Directors Conference*

Certain procedural changes were made by the Board's final regulations under 5 CFR Part 1201 and 5 CFR Part 1209, published during the last fiscal year. Appellants may now file appeals by facsimile, as well as by mail or personal delivery. The previous requirement that an appeal be signed by both the appellant and the appellant's designated representative, if any, has been replaced by a requirement for signature by the appellant or the representative. An original signature is no longer required, in recognition of the fact that only a copy of a signature can be transmitted by facsimile. The same filing requirements apply to stay requests in whistleblower appeals and to petitions for review of initial decisions.

The Board's established policy calls for the administrative judge to issue an initial decision on an appeal within 120 days from the date the appeal was filed. In Fiscal Year 1990, 99.4 percent of all initial appeals were decided within 120 days. The regional offices averaged 72 days to issue these decisions.

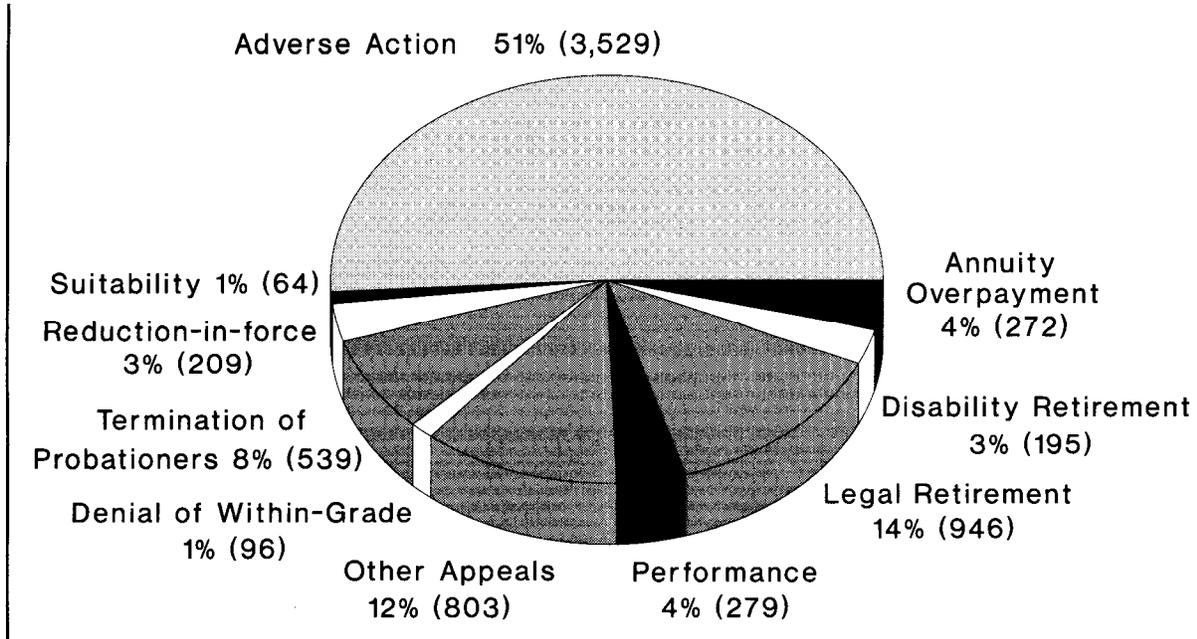
**DECISIONS ISSUED IN FISCAL YEAR 1990**

In Fiscal Year 1990, administrative judges in the Board's regional offices issued 6,932 decisions on appeals. This number includes 252 decisions on whistle-blower appeals-89 on IRA appeals and 163 on appeals of otherwise appealable actions. The administrative judges also issued 75 decisions on stay requests and 810 addendum case decisions, i.e., requests for attorney fees, remands, and compliance (or enforcement) cases.

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

There were 1,969 settlements of initial appeals, or 49 percent of the appeals that were not dismissed for lack of jurisdiction or timeliness and closed during the fiscal year. The Board continues to emphasize alternative dispute resolution procedures because, properly used, they promote equitable settlements that protect the rights of the parties while providing the single most cost-effective means of dispute resolution. Cost savings are achieved principally in salaries, travel expenses, and court reporting fees.

**INITIAL APPEALS BY TYPE OF ACTION**



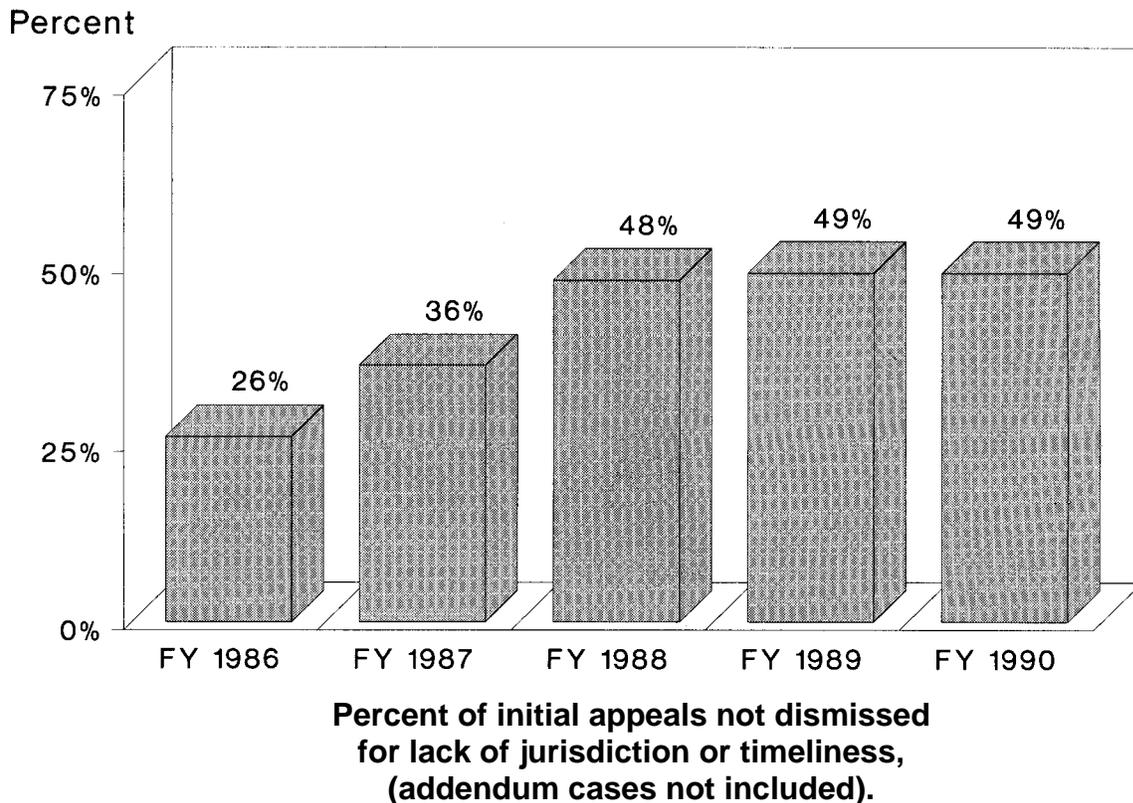
**Total number of initial appeals: 6,932**  
**Percentages do not total 100% due to rounding.**

The Board's administrative judges use the full range of alternative dispute resolution techniques, adapting the special characteristics of different mechanisms to particular cases. For example, the administrative judges facilitate exchanges 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 of the parties, thus facilitating settlement. Because these processes are voluntary, the parties surrender no rights if an agreement is not reached, and the case proceeds to adjudication.

These techniques have resulted in increasingly higher settlement rates over the past several years. The chart below shows settlement rates for the past five fiscal years.

During this fiscal year, the Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, considered legislation to promote the use by Federal agencies of alternative dispute resolution procedures. The Board provided information to the subcommittee about the success of its model settlement initiative and also testified before the subcommittee about its program. The Board's successful use of alternative dispute resolution procedures was noted on the House floor in the debate over legislation designed to encourage use of such procedures.

### SETTLEMENT RATES



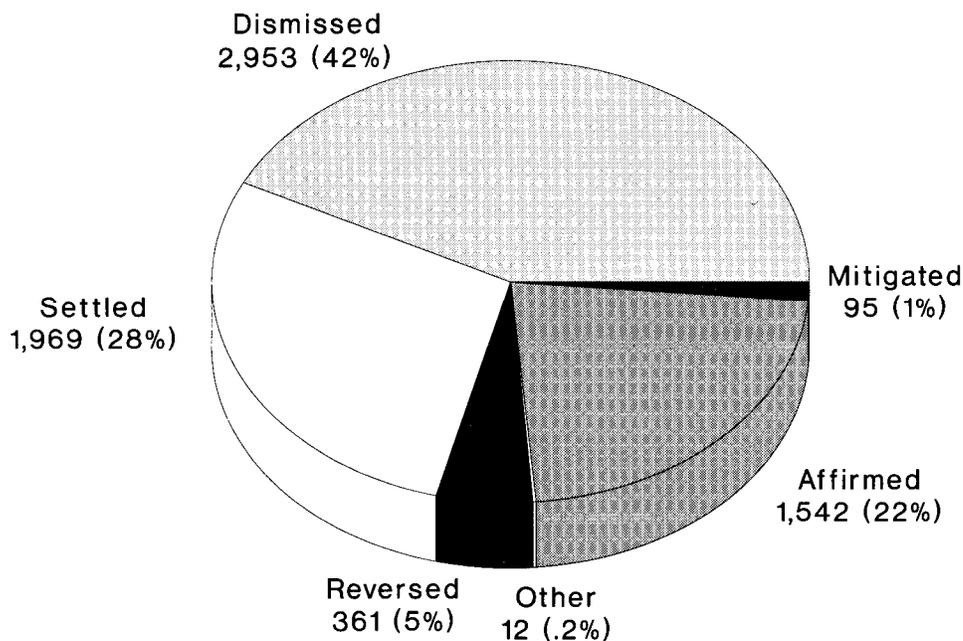
Of the 2,010 appeals that were adjudicated, 1,542, or 77 percent, affirmed the agency action. Decisions in the remaining appeals that were adjudicated included reversals, which overturned the agency action, and mitigations, which reduced or modified the penalty imposed by the agency.

The following chart shows the breakdown by disposition of all appeals decided in Fiscal Year 1990.

When an appellant prevails in an appeal, interim relief is provided pending the outcome of any petition for review, unless the administrative judge determines that interim relief is not appropriate. An exception to interim relief is also available if the administrative judge's decision requires the return of the appellant to the workplace and the agency determines that such a return would be unduly disruptive.

Of the 75 decisions issued on stay requests in Fiscal Year 1990, 8 granted the requested stay. The remaining decisions either dismissed or denied the stay request. More than a third of the stay requests were dismissed because they were filed prematurely, that is, before the appellant was eligible to file an appeal. (Of the 75 decisions, 1 was issued on a stay request where the action was not allegedly based on whistleblowing; the request was dismissed for lack of jurisdiction.)

### DISPOSITION OF INITIAL APPEALS



**Total number of initial appeals: 6,932**  
**Percentages do not equal 100% due to rounding.**



*Regional Directors R.J. Payne (Atlanta) and Paula Latshaw (Dallas) at the 1990 Regional Directors Conference*



*Kathleen McGraw, Administrative judge, in the hearing room of the Atlanta Regional Office*

In addition to the decisions on initial appeals and stay requests issued in Fiscal Year 1990, the regional offices issued decisions in 840 addendum cases. These included 242 requests for attorney fees, 402 enforcement cases alleging that there was not full compliance with a Board decision, and 196 cases remanded to the regional offices. The settlement rate for addendum cases was 42 percent.

### **SIGNIFICANT ACTIVITIES**

During Fiscal Year 1990, in a continuing effort to maintain uniform practices and procedures, the Appeals Procedures Manual used in the Board's regional offices was expanded, updated, and retitled *The Judges' Handbook*. In August 1990, the standard orders used by the administrative judges in the adjudication of cases were updated and rewritten in "plain English" to assist pro se appellants. A procedure was established for proposing and implementing revisions to the standard orders on a regular basis. In addition, the regional offices were given the authority to modify a standard order when it is appropriate under the circumstances of a particular case.

The second round of quality reviews of the decisions of administrative judges under the

quality review program established in 1987 was begun during Fiscal Year 1990. Quality reviews were conducted of the administrative judges in the Denver, San Francisco, and Seattle regional offices. The reviews showed that the judges continue to exhibit high quality in their adjudication of cases.

Many of the administrative judges and members of the staff of the Office of Regional Operations attended courses at the National Judicial College and conferences such as those sponsored by the U.S. Court of Appeals for the Federal Circuit and the Equal Employment Opportunity Commission. The regional offices conducted in-house training programs for the administrative judges and provided on-the-job training for several new judges.

Under the Whistleblower Protection Act of 1989, the Board received authority to delegate subpoena and discovery authority to any employee of the Board. This authority was previously limited to the Board members and the Administrative Law Judge. In Fiscal Year 1990, the Board delegated this authority to the regional directors and permitted redelegation to individual administrative judges. This change has improved the adjudicatory process by eliminating the need for administrative judges to obtain rulings on subpoena and discovery motions from the Board members or the Administrative Law Judge.

In an effort to assist pro se appellants, the Washington Regional Office participated in a program with the legal clinics of three area law schools to make free representation available to Federal employees. The office provides each unrepresented appellant with a listing of the legal clinics and freelawyer-referral services, but does not make any recommendations with respect to whether the appellant should secure representation or which representative to select. The office also provides training in MSPB regulations and procedure to the law students in the program. Approximately 25 appellants obtained representation through the program in the past two years. The participating clinics are those of American University, Howard University, and Columbus Community Legal Services.

*Charles Barenthaler of the Office of Region, Operations*



### **PLANNING FOR FISCAL YEAR 1991**

Because of the Federal budget crisis at the end of the fiscal year, Federal agencies issued notices of possible furloughs to more than one million employees. Based on its statistical analysis of appeal rates, the Board anticipated that 120,000 appeals might be filed if these furloughs were effected. The Board's Office of Regional Operations led a task force in planning for a potential 15-fold increase in the number of annual appeals. The task force developed a plan for the initial processing of the furlough appeals, including a method for counting, organizing, and monitoring the appeals and for reporting on them to headquarters. The task force also worked to develop proposed methods to expedite adjudication of the appeals should governmentwide furloughs actually be effected.

### **HEADQUARTERS**

### **PROCEDURES FOR PETITIONS FOR REVIEW**

An administrative judge's initial decision on an appeal becomes the final decision of the Board unless a party files a petition for review with the Board within 35 days of the date of the initial decision or the Board reopens the case on its own motion. 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 are filed with the Office of the Clerk at 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 consider an initial decision on its own motion.



*William H. DuRoss, III  
Director, Office of Appeals Counsel*

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 (EEOC). The Director of the Office of Personnel Management may intervene or petition the full Board for reconsideration of a final decision and may also seek judicial review of a Board decision involving the interpretation of a civil service law, rule, or regulation affecting personnel management where the Board decision will have a substantial impact on a civil service law, rule, regulation, or policy.

#### **DECISIONS ISSUED IN FISCAL YEAR 1990**



*Robert E. Taylor Clerk of the Board*

The Board issued decisions on 1,443 petitions for review in Fiscal Year 1990, of which 1,310 were filed to review initial decisions on appeals and the remaining 133 were for review of decisions in addendum cases (attorney fees, enforcement, and remands). The Board's decisions on 1,173 of the 1,310 petitions for review of an initial decision (90 percent) left the initial decision unchanged. During Fiscal Year 1990, 97 percent of final Board decisions reviewed by the United States Court of Appeals for the Federal Circuit were unchanged.

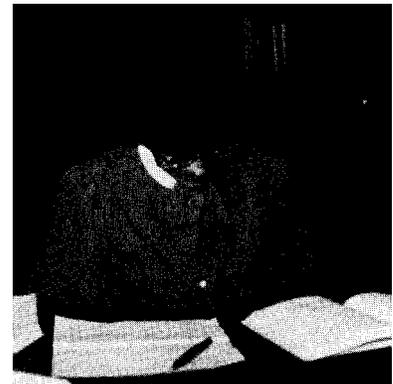
An administrative judge's ruling on a stay request in a whistleblower appeal may be certified to the Board as an interlocutory appeal. In Fiscal Year 1990, the Board issued decisions on five such interlocutory appeals, granting two and denying three.

#### **ISSUES ADDRESSED IN FISCAL YEAR 1990**

The Board has continued to ensure the quality of decisions through its issuance of detailed Opinions and Orders. These precedential decisions can be relied on by the administrative judges in subsequent appeals, and also serve to inform and guide Federal agencies, their employees, and the representatives of both, in taking and challenging appealable actions. The Board also concentrates on the resolution of cases involving "major issues," those that occur with some frequency in employee appeals. Their resolution in one or two appeals, therefore, allows for resolution in many other cases.

During Fiscal Year 1990, the Board set important precedent in several areas of concern to Federal employees and retirees. In a comprehensive series of five cases, the Board thoroughly examined issues related to annuity overpayments. When a Federal annuitant is overpaid by the Office of Personnel Management, its regulations provide that recovery of the overpayment may be waived when collection of the amount would be "against equity and good conscience." In these lead decisions, the Board explored that concept and determined when it would find that waiver was appropriate because of financial hardship, detrimental reliance, and unconscionability.

The Board added significantly to the body of law already developed with respect to performance-based actions taken under 5 U.S.C. Chapter 43. In two cases issued this fiscal year, it reconsidered the requirements of the law and determined the extent to which an agency could take into account an employee's performance both before and after his statutory opportunity to demonstrate acceptable performance.



*Stephanie Conley, Legal Assistant to Vice Chairman Johnson*

The Board addressed several collateral issues related to settlements. It determined an appellant's right to a hearing in connection with his or her petition for attorney fees where the underlying merits issues had not been decided because of a settlement. It also addressed the effect of an undecided allegation of discrimination on an appellant's entitlement to attorney fees. In other cases, the Board addressed the extent of its jurisdiction over appeals from an action taken by the appellant as a result of a settlement agreement entered in an earlier action, its authority to fashion a remedy for a breach of an agreement, and the propriety of long-term administrative leave as a provision of a settlement agreement.

The mixed case area—cases involving both a matter appealable to the Board and an issue of discrimination—was also clarified in many respects this year. The Board dealt with a number of difficult issues such as

the proper remedy for a violation of the nondiscrimination laws concerning alcohol and drug abusers, the degree of accommodation required for such persons, and the extent to which a physical malady must affect an employee's employability before it is considered a "handicap" that may entitle him to accommodation.



*Mary Ann Kane, Special Advisor (left), Calvin M Morrow, Attorney, and Linda L. Bowdoin, Executive Assistant, of Member Parks' staff*



*Emilie Schoenberg, Confidential Assistant, and Danny R. Smith,*

The Board also held a Sunshine Act meeting on a request for reconsideration of the removal of 116 air traffic controllers from the Chicago area who were removed for participation in the 1981 air traffic controller strike.

#### **HEADQUARTERS APPELLATE CASES**

Three types of appellate jurisdiction cases are processed originally at Board headquarters, rather than in a regional office. These are appeals from MSPB employees, appeals involving classified national security information, and petitions to review an arbitrator's award. In the case of appeals from MSPB employees and appeals involving classified security information, the Board's Administrative Law Judge hears the case and issues the initial decision. Unless a petition for review is filed and the Board considers the case, the decision of the Administrative Law Judge becomes the final decision. Decisions in arbitration cases are issued by the Board.

This year marked the implementation of the Board policy that all cases involving classified information relating to national security, whether appellate or original jurisdiction, would be adjudicated by the Administrative Law Judge. One such appeal was adjudicated in Fiscal Year 1990. All rules and regulations governing the handling of classified materials were observed scrupulously, and even the oral hearing was conducted in a secured setting. In this case, the appellant was removed for unsatisfactory performance. The initial decision sustained the agency action. Among the security problems confronted in adjudicating the matter was the fact that the appellant's performance plan—the underlying basis of the action—was classified.

One MSPB employee appeal was decided during the fiscal year. This case, however, was assigned to an administrative law judge at the National Labor Relations Board for adjudication, and a settlement was reached. The Board issued decisions in eight cases involving review of arbitrators' awards.

### **SIGNIFICANT ACTIVITIES**

To further improve adjudicatory processes, headquarters attorneys conducted another series of visits to the regional offices to share current and developing trends in Board law and practice with administrative judges, and to receive the judges' input into how those practices and procedures work when applied in "real-world" situations.

During this fiscal year, the Board completely revised the glossary of its most significant decisions to make it a more comprehensive and up-to-date compilation of Board law. The revised glossary also includes other items to simplify the task of Board attorneys, both in the regional offices and at headquarters, in writing decisions and to make fuller use of the Board's computer and word processing equipment.

### **SPECIAL PANEL**

The Special Panel was established by the Civil Service Reform Act of 1978 as a separate entity to resolve disputes between the Merit Systems Protection Board and the Equal Employment Opportunity Commission in "mixed cases." These are cases that involve both a matter appealable to the Board and an issue of discrimination. 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 1990, the Special Panel dismissed one case for failure to prosecute.

*(See Appendix A for summaries of significant Board decisions issued on appeals during Fiscal Year 1990)*

**STEPS IN PROCESSING INITIAL APPEALS AND PETITIONS FOR REVIEW**

<p><b>Filing of Appeal by Appellant MSPB Regional Office</b></p> <p>Appeal received Appeal acknowledged Appeal entered in Case Tracking System Case file requested from agency Appeal assigned to administrative judge</p> <p>(If appropriate, show cause order issued re: jurisdiction or timeliness)</p> <p>Agency response and case file received Discovery begins Prehearing conference scheduled Notice of hearing issued</p> <p>(If show cause order issued, response received)</p> <p>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</p> <p>If no hearing, close of record set</p> <p>Hearing held Record closed</p>	<p><b>Within 20 days of effective date of agency personnel action</b></p> <p>1-3 days from receipt of appeal</p> <p>10-25 days from receipt of appeal</p> <p>10-60 days from receipt of appeal</p> <p>60-75 days from receipt of appeal</p>
<p>Initial Decision issued</p> <p><b>Filing of Petition for Review (PFR) by Appellant or Agency (OPM or OSC as intervenor) Board Headquarters</b></p> <p>PFR received PFR acknowledged PFR entered in Case Tracking System Case file requested from Regional Office</p> <p>(If appropriate, show cause order issued re: jurisdiction, timeliness, or deficiency of PFR)</p> <p>Response to PFR filed or Cross-PFR filed Case file received</p> <p>(If show cause order issued, response filed)</p> <p>If Cross-PFR received If Extension of Time request received and granted</p>	<p>Within 120 days from receipt of appeal</p> <p><b>Within 35 days of date of Initial Decision</b></p> <p>1-3 days from receipt of PFR</p> <p>Within 25 days of service of PFR</p> <p>Additional 25 days from date of service of Cross-PFR Additional time specified in Order granting EOTI</p>
<p>Final Decision issued</p> <p><b>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)</b></p>	<p>(Board time standard for issuance of Final Decisions is 110 days)</p> <p><b>Within 30 days of the party's receipt of Board Final Decision</b></p>

# Adjudication: Original Jurisdiction

## JURISDICTION

Cases that arise under the Board's original jurisdiction include:

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;

Disciplinary actions brought by the Special Counsel alleging violation of the Hatch Act;

Certain proposed 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 performance-based removals from the Senior Executive Service (SES).

### ORIGINAL JURISDICTION PROCEDURES

Original jurisdiction complaints are filed in writing with the Office of the Clerk at Board headquarters. Employees against whom Hatch Act or other Special Counsel disciplinary action complaints are filed have 35 days to respond and are entitled to a hearing. An administrative law judge against whom an agency proposes an action is also entitled to a hearing. These cases are assigned to the Board's Administrative Law Judge, who issues a recommended decision to the Board for final action.

Special Counsel stay requests and requests for regulation review are decided by the Board. (An initial stay request may be granted by a single Board member.) In SES performance-based removal cases, the Administrative Law Judge holds an informal hearing, but the Board does not issue a decision. The record of the hearing is forwarded to the employing agency, OPM, and the Special Counsel for whatever action may be appropriate.

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

Appeals from Board decisions in Special Counsel cases (other than Hatch Act cases involving state or local employees in federally funded positions) and other original jurisdiction cases are filed with the United States Court of Appeals for the Federal Circuit. In Hatch Act cases involving state or local employees in federally funded positions, the employee may appeal the Board's decision to the appropriate U.S. district court.

## **DECISIONS ISSUED IN FISCAL YEAR 1990**

During Fiscal Year 1990, the Board issued 43 decisions in original jurisdiction cases. Of these, 4 were decisions in proposed actions against administrative law judges, 10 were decisions in

actions filed by the Special Counsel alleging Hatch Act violations, 5 were decisions in other Special Counsel disciplinary actions, 23 were decisions on Special Counsel stay requests (including requests for extensions of stays granted), and 1 was a decision on a request for review of an OPM regulation. Two original jurisdiction addendum cases were decided in Fiscal Year 1990.

In most years since the Board commenced operations in 1979, it has issued about a dozen decisions in original jurisdiction cases. Frequently, these cases involve more than one respondent. For example, one Hatch Act case decided in Fiscal Year 1990 involved 8 respondents, while in Fiscal Year 1989, 10 proposed actions against administrative law judges were consolidated. An increase in the number of administrative law judge cases was the principal reason why the number of Board decisions in original jurisdiction cases increased to 21 in Fiscal Year 1989. The increase in Fiscal Year 1990 was primarily the result of a substantial increase in the number of Special Counsel stay requests.

## **ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES**

Fiscal Year 1991 will see a dramatic increase in the number of respondents affected by the Board's original jurisdiction decisions as a result of agencies' proposed furloughs of administrative law judges to meet the requirements of a sequester that was anticipated to begin October 1, 1990. Unlike other Federal employees, administrative law judges may not be furloughed for 30 days or less until they have first been given the opportunity for a hearing and a decision by the Board. The agency proposing to furlough its administrative law judges first files a complaint with the Board. The Board notifies the affected administrative law judges, who may then respond to the complaint and request a hearing. The Board's Administrative Law Judge issues a recommended decision—after a hearing, if one is requested—and the parties may then file exceptions to the recommended decision prior to issuance of a final decision by the Board. A furlough may be authorized upon a showing of good cause.

In the final weeks of Fiscal Year 1990, the Board received 23 complaints from agencies proposing to furlough a total of 1,053 administrative law judges. Since the furloughs would need to be effected soon after October 1 in the event of a sequester, it was necessary for the Board to adopt expedited procedures to complete the processing of these cases. The time limits for the administrative law judges to respond to the complaint and for the parties to file exceptions to the recommended decision were much shorter than under the Board's normal procedures for such cases. Because the Board's Administrative Law Judge could not be expected to adjudicate all of the cases in the time involved, the Board hired several retired administrative law judges to assist in adjudicating the cases.

In September 1990, 5 hearings were held, and 20 recommended decisions were issued in these cases. By the end of the fiscal year, one final Board decision affecting nine administrative law judges had been issued.

In addition to its final decision in one administrative law judge furlough case, the Board issued three decisions in other cases involving actions against administrative law judges in Fiscal Year 1990. In one of these cases, involving three administrative law judges, the respondents sought to invoke Board jurisdiction by alleging that various management initiatives constructively penalized them by interfering with their judicial independence. The Board found that the management initiatives in no way impacted on the decisional independence of the judges, and, therefore, dismissed the complaints for lack of jurisdiction. The other two administrative law judge cases were settled.

Although administrative law judge disciplinary actions are uncommon, they are significant in the overall civil service scheme when they occur. Therefore, during Fiscal Year 1990, the office of the Administrative Law Judge prepared a digest of statutes, regulations, and cases dealing with disciplinary actions against administrative law judges. The digest is intended as a research tool in the adjudication of such cases.



*Llevellyn M. Fischer General Counsel*

## **HATCH ACT CASES**

Of the 10 Hatch Act decisions issued in Fiscal Year 1990, all but 1 involved state or local government employees in federally funded positions. Five employees were alleged to have violated the Hatch Act by becoming candidates for elective office in partisan elections.

In the most extensive Hatch Act case decided, eight individual respondents were charged with violating the provisions of the Hatch Act that apply to state and local government employees in federally funded positions. The Board found that three of the respondents violated the Hatch Act's prohibitions against coercing other employees to make political contributions, and one of the respondents also violated the Act by running for elective office. The Board found that the penalty of removal was warranted for each of these three respondents. In separate decisions, the Board approved settlement agreements entered into by three of the other respondents, and, in another decision, the Board found that removal of one respondent was not warranted. With respect to the remaining respondent, the Board had dismissed the action during the previous fiscal year on a motion made by the Special Counsel.

One Board decision in a Hatch Act case ordered the withholding of Federal funds from a state agency because the agency had not removed an employee, as ordered by the Board, who had earlier been found to have violated the Hatch Act. In the four other Hatch cases, each involving one respondent, the Board ordered removal of the employee in one, ordered debarment in another, and two of the cases were settled.

## **SPECIAL COUNSEL DISCIPLINARY ACTIONS**

One of the five disciplinary actions brought by the Special Counsel involved a claim of nepotism and was settled upon an admission of guilt, with the respondent being fined \$750. The respondent had committed a prohibited personnel practice by hiring and promoting his niece. Two other Special Counsel disciplinary actions were also settled. In the two remaining cases, one removal and one debarment were ordered.



*Edward J. Reidy  
Administrative Law Judge*

## **SPECIAL COUNSEL STAY REQUESTS**

Decisions were issued on 9 Special Counsel initial requests for stays and on 14 requests by the Special Counsel for extensions of stays that had been granted. Of the nine initial requests, seven were granted by a Board member, one went into effect after three days by operation of law, and one was withdrawn by the Special Counsel. Of the 14 requests for extensions of stays, 12 were granted and 2 were denied. The Special Counsel requested more than one extension in six cases. Of the nine initial stay requests, all were brought by the Special Counsel on behalf of whistle-blowers. Information on the stay requests in whistleblower cases is provided in the special section of this report, "Adjudication of Whistleblower Cases under the Whistleblower Protection Act of 1989."

## **REVIEW OF OPM REGULATION**

The Board decided only one case involving a request for review of an OPM regulation. In that case, the National Treasury Employees Union requested that the Board declare 5 CFR 511.609 invalid. The Board denied the request because it was not shown that the regulation required the commission of a prohibited personnel practice and because any conflict between the regulation and the statute, which provides for exclusive representation in any formal discussion, could be resolved in another forum.

## **ADDENDUM CASES**

An addendum case decision was rendered in an attorney fee request following adjudication of a disciplinary action brought by the Special Counsel. The denial of the request followed Board precedent that there is no legal basis on which to award fees against the Government in disciplinary actions brought by the Special Counsel. The other addendum case decision, a request for compliance, was also denied by the Board.

## **SES PERFORMANCE-BASED REMOVAL**

In addition to the original jurisdiction cases decided by the Board, the Administrative Law Judge held one informal hearing in an SES performance-based removal case. The case involved a career appointee in the Senior Executive Service, who was removed from his position and placed in another civil service position for less than fully successful executive performance.

*(See Appendix B for summaries of significant Board decisions issued in original jurisdiction cases during Fiscal Year 1990)*

# Litigation

## **MONITORED LITIGATION**

During Fiscal Year 1990, the Board monitored over 650 cases involving appeals of decisions issued by the Board under its appellate jurisdiction. These cases are filed in the United States Court of Appeals for the Federal Circuit. Although the agency against which the appeal is filed is the named respondent, and the Department of Justice defends the agency, the Board monitors this litigation closely. Board activities in connection with monitored litigation include evaluating the case to determine if intervention is appropriate, responding to inquiries, assisting in drafting any briefs, preparing a case summary and chronology, and analyzing the published decision.

## **ACTIVE LITIGATION**

The Whistleblower Protection Act of 1989 granted the Board litigation authority to defend its appellate decisions except where the merits of the underlying personnel decision or a request for attorney fees is at issue. Only actions commenced after the effective date of the Whistleblower Protection Act, July 9, 1989, may be litigated by the Board. Eleven such cases were filed during Fiscal Year 1990. This litigation caseload will increase as actions that were begun after the effective date of the Whistleblower Protection Act reach the judicial review stage.

The Board is the named respondent in civil actions appealing decisions issued under its original jurisdiction authority. These cases are also filed in the United States Court of Appeals for the Federal Circuit, except for Hatch Act cases involving employees of state and local governments, which are filed in Federal district courts. These cases typically 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 OPM petitions for review in the Federal Circuit, and administrative litigation arising out of appeals to the Board filed by MSPB employees.

Among the active litigation cases decided in Fiscal Year 1990 were two Federal Circuit decisions in cases that involved complex issues concerning the rights of former spouses to survivor benefits under the Civil Service Retirement Spouse Equity Act of 1984, as amended by the Federal Employees Benefits Improvement Act of 1986. The Federal Circuit affirmed the Board's decisions in these cases.

## **ENFORCEMENT OF SUBPOENAS**

In a case of first impression, the Board sought court enforcement of subpoenas issued by the Special Counsel. This enforcement mechanism for Special Counsel subpoenas was created by the Whistleblower Protection Act. A district court granted the Board's motion to enforce subpoenas issued by the Special Counsel during the course of an investigation in a Whistleblower Protection Act case.

In another district court proceeding, the Board sought enforcement of a subpoena issued by one of its administrative judges. The court dismissed the action after the witness complied with the Board's subpoena.

*(See Appendix C for summaries of the significant litigation activities of the Board during Fiscal Year 1990.)*

# Reviews of OPM Significant Actions and Merit Systems Studies

## THE STATUTORY STUDIES FUNCTION

The Civil Service Reform Act assigned the Board, in addition to its adjudicatory functions, the important responsibilities of reviewing the significant actions of the Office of Personnel Management and conducting studies of the civil service and other merit systems. These oversight functions were vested in the Board to help ensure that the Government would be administered in an effective and efficient manner. The Act included a requirement that the Board report annually to the President and the Congress on whether the significant actions of OPM are in accord with the merit system principles and free of prohibited personnel practices. The Board's legislative mandate with respect to its OPM oversight and studies functions is broad in scope and gives the Board a great deal of discretion in deciding what to review and how to review it.

Typically, the Board solicits potential study topics from a wide variety of sources in developing its OPM oversight and studies agenda. The Board's studies, usually governmentwide in scope, are conducted through a variety of research methods, including mail and telephone surveys, on-site systems reviews, written interrogatories, formal discussions with subject matter experts, computer-based data analysis, and reviews of secondary source material.

## REPORTS ISSUED IN FISCAL YEAR 1990

The Board's reports on the results of its studies are addressed to the President and the Congress, as required by law, but are also reviewed by a large secondary audience of Federal agency officials, employee and public interest groups, labor unions, academicians, and other individuals and organizations with an interest in public personnel administration. During Fiscal Year 1990, the Board issued seven major reports on important civil service issues.

Reports on OPM significant actions issued were:

- OPM's Classification and Qualifications Systems: A Renewed Emphasis, A Changing Perspective – An analysis of OPM's approach to developing standards for determining job classifications and individual qualifications; and
- Attracting and Selecting Quality Applicants for Federal Employment - A study of OPM efforts to improve Government recruitment and an MSPB assessment of OPM proposals to modify the selection process for entry-level jobs in Professional and Administrative Career (PAC) positions.

The other studies issued in Fiscal Year 1990 were:

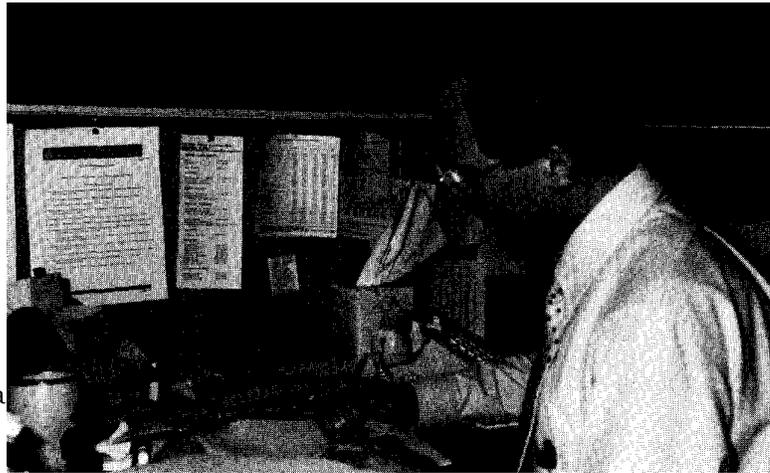
- Delegation and Decentralization: Personnel Management Simplification Efforts in the Federal Government – A study of OPM and agency initiatives to free managers from overly prescriptive personnel rules;
- The Senior Executive Service: Views of Former Federal Executives – A survey of former SES members to determine why they left and their suggestions for improvements to the SES;
- Federal Personnel Management Since Civil Service Reform: A Survey of Federal Personnel Officials – A report on the opinions and perceptions of over 3,500 Federal personnel specialists on various human resource management issues, including whether the expectations of the Federal personnel management system envisioned by the Civil Service Reform Act have been realized;



*Evangeline W Swift  
Director, Policy and Evaluation*

- Why Are Employees Leaving the Federal Government? Results of an Exit Survey – A study of the reasons why employees resigned or retired, based on the results of an MSPB survey of nearly 2,800 Federal employees who left full-time, permanent, white-collar positions during a 3-month period in 1989; and
- Working for America: A Federal Employee Survey – A summary of the responses of nearly 16,000 Federal employees to the 1989 MSPB Merit Principles Survey on a wide variety of issues such as pay, working conditions, and the quality of supervisors, co-workers, and job applicants.

*John Palguta of the Office of Policy and Evaluation*



### **IMPACT OF BOARD STUDIES**

The Board's studies are widely used and referenced by Executive branch agencies and the Congress, as well as by academicians, public interest groups, and others who influence public personnel policies and operations. Each report is typically distributed, largely on request, to more than 2,000 organizations and individuals. Data from the Board's surveys are frequently requested by agencies to support their own or governmentwide improvement efforts. The Board also receives requests for survey data and other information from the General Accounting Office, the Congressional Budget Office, and the Office of Personnel Management

During Fiscal Year 1990, the Board was asked by agencies for specialized data runs relating to both the Merit Principles Survey and the study of why employees leave the Federal Government Of the 22 Federal departments and agencies with employees who responded to the Merit Principles Survey, 17 contacted the Board to request information relating specifically to their agencies. The Board's questionnaire for the study on why employees leave was used by several agencies in the conduct of their internal studies of employee turnover.

The Board's data are used as authoritative sources of information in a wide variety of contexts. They are cited in articles, briefs, GAO reports, congressional testimony, and by Members of Congress on topics such as pay reform, selection processes, and the administration of the SES. Moreover, findings and recommendations from Board reports appear in a variety of forums. For example, GAO cited the Board as an authoritative source in several of its reports, and important provisions of the proposed SES Improvements Act of 1990 are in accord with recommendations in the Board's report on the views of former senior executives.

Over the years, a number of remedial actions have been initiated by Federal agencies in response to actual or potential problems identified through MSPB studies and reports. Considerable media attention has been given to Board studies, and that attention, in turn, has increased their impact by keeping important civil service issues in the public arena and ensuring that the Board's views on these issues are included in the public debate.

## ASSESSING WORK FORCE QUALITY

In addition to its OPM oversight and special studies agenda, the Board has assigned a high priority to assessing the quality of the Federal work force. Following the conference that the Board and OPM co-sponsored in 1989, the two agencies created a Joint Advisory Committee on Federal Workforce Quality Assessment that is made up of distinguished leaders in the field. The committee is co-chaired by the MSPB Director of Policy and Evaluation and the OPM Assistant Director for Research and Development. Its membership includes 25 individuals from a diverse group of Federal agencies, local government, the private sector, academia, labor unions, and professional associations.

The committee held its first meeting on May 1, 1990 in Washington, DC. Members received a briefing on work force quality assessment projects undertaken by OPM and MSPB. The committee discussed the complex factors that must be considered in developing a comprehensive understanding of the level of skills and abilities of the work force and the relationship to the services produced. Future meetings of the advisory committee will focus on methods currently being employed both inside and outside the Federal Government to assess and improve work force quality and existing efforts to collect quality data. The committee intends to suggest alternative models for assessing work force quality and to recommend specific projects to be undertaken by OPM, the Board, and individual agencies to improve—or maintain—the quality of the Federal work force. It will also provide recommendations for continuing efforts to implement a system to provide objective and usable data on the quality of the Federal work force.



*At the meeting of the Committee on Workforce Quality Assessment are (left to right) Evangeline W Swift, Vice Chairman Johnson, and OPM Director Constance Newman.*

*(See Appendix D for summaries of the reports of OPM oversight reviews and merit system studies issued in Fiscal Year 1990)*

# Outreach Activities

The Board's outreach programs to major constituencies continued in Fiscal Year 1990 to enhance its reputation as a fair and impartial adjudicator and as an authoritative source on civil service matters. The Board members and headquarters and regional staff addressed groups, participated in seminars and conferences, conducted training programs, and published articles in order to further an understanding of the Board's policies and procedures and of important issues in Federal personnel law.

## **PERSONAL APPEARANCES, MEETINGS, AND INSTRUCTION**

The regional directors and administrative judges delivered more than 100 speeches at meetings and conferences attended by thousands of participants and engaged in a variety of other outreach activities. The Chicago Regional Office co-hosted a Federal Circuit Bar Conference and a Labor Law Conference. Several administrative judges taught courses at the National Judicial College, and an administrative judge in the Dallas Regional Office was appointed to the faculty of that college. In addition to teaching at the college, the administrative judge co-developed and participated in a live television broadcast providing training to administrative law judges in 20 states.

Headquarters attorneys participated in numerous outreach activities to inform agencies, unions, and other interested segments of the public about the Board, its authorities, jurisdiction, practices, procedures, and significant decisions. Much of the outreach effort in Fiscal Year 1990 was directed towards explaining the provisions of the Whistleblower Protection Act, the Board's implementing regulations, and Board decisions on whistleblower appeals and stay requests covered by the Act.

A delegation from the Board participated in the Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, and Board attorneys spoke at various meetings of the Federal Circuit Bar Association. Staff of the Clerk of the Board provided seminars on "Handling Employee Appeals" in conjunction with the OPM-sponsored SES Candidate Development Program and conducted an Appeal Rights Workshop for postmasters, sponsored by the National Association of Postmasters. Other outreach activities included the OPM Annual Symposium on Labor Relations and Personnel Law, the Small Agency Inspectors General Meeting, and meetings sponsored by the Public Administration Forum, the Public Health Service, the Department of the Navy, the Department of Agriculture, and postal service unions.

In June 1990, the Board, the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, the Office of Personnel Management, and the Office of Special Counsel jointly sponsored the Federal Dispute Resolution Conference. The conference promoted an exchange of ideas and information on successful efforts to improve the processing and resolution of complaints and grievances, and provided supervisors and managers with the skills and knowledge needed to handle employment disputes effectively.

The studies staff participated in various conferences, seminars, and symposia to discuss the results and implications of the Board's special study and OPM oversight work. Sponsoring organizations included the American Society for Public Administration (ASPA), the International Personnel Management Association (IPMA), the IPMA Assessment Council, the Classification and Compensation Society, the National Academy of Science, and OPM's Executive Seminar Centers, among others. In addition, members of the studies staff spoke at several local universities, at the management meetings and conferences of several Federal agencies, and on a local radio interview show.

## REPRESENTATION IN ORGANIZATIONS

The Merit Systems Protection Board is a member of the Small Agency Council, the voluntary association of Federal agencies that employ fewer than 6,000 people. During Fiscal Year 1990, the Board's Deputy Executive Director served on the Council's Executive Committee.

The Inspector General represents the Board on the Coordinating Conference of the President's Council on Integrity and Efficiency (PCIE), the Quarterly Executive Seminars of the PCIE, the Institute of Internal Auditors, the Association of Federal Investigators, and the Directors of Federal Investigations. In addition to membership in these organizations, the Inspector General served on subcommittees and provided various leadership ideas for their training and seminar activities during the fiscal year.

## ARTICLES AND PUBLICATIONS

Three Board attorneys jointly authored an article titled "Federal Employment Decisions of the Federal Circuit in 1988," which was published in the American University Law Review, Summer 1989 edition (published in 1990). Members of the studies staff published four articles in professional journals. These articles were: "Voices of Experience" and "Deja Vu: Return to Written Tests" in the summer issue of Federal Managers magazine, "Why the Next Generation Is Leaving" in the summer issue of The Bureaucrat, and "Meeting Federal Work Force Needs with Regard to Scientists and Engineers: The Role of the U.S. Office of Personnel Management" in a National Research Council publication titled Recruitment, Retention, and Utilization of Federal Scientists and Engineers.

The Board issued its annual report of case decisions to provide detailed information on the decisions issued by the Board and its administrative judges in Fiscal Year 1989. The report included information on initial appeals, petitions for review, and addendum cases. In addition to total numbers, various breakdowns were provided by type of appeal, agency, disposition, and case processing time. For the first time, the report provided information on appeals involving such special interest issues as sexual harassment, agency drug testing, AIDS, and accommodation of employees handicapped by drug and/or alcohol abuse. The report also reviewed Board decisions in cases arising under its original jurisdiction, cases that the Board reopened on its own motion, cases in which OPM requested reconsideration, and discrimination cases that were appealed to the Equal Employment Opportunity Commission.



*Paul D. Mahoney Director,  
Office of Management  
Analysis*

The Board continued its new series of public information publications with the issuance of "Questions & Answers About Appeals" in the fall of 1989 and "Questions & Answers About Whistleblower Appeals" in early 1990. The former publication provides information on the Board's appellate jurisdiction and its procedures for appeals generally, while the latter publication provides information on the special provisions applicable to whistleblower appeals under the Whistleblower Protection Act of 1989. Both publications are intended primarily for Federal employees and are written in a "plain English" question and answer format.

Several thousand copies of these publications were distributed by the Board headquarters and regional offices in outreach activities and in response to individual requests. In late summer 1990, the Board ordered a second printing of each publication, revised to reflect changes made in the Board's final 5 CFR Part 1201 and 5 CFR Part 1209 regulations. Notices for agencies to ride the printing requisitions were published in the Federal Register, and mailings were sent to agency personnel officers and printing officers because of the interest numerous agencies had shown in obtaining the publications in quantity. At the end of the fiscal year, the Board had completed work on a Spanish-language edition of "Questions & Answers About Appeals."

## **FEDERAL EXECUTIVE INSTITUTE**

Executive Director, Lucretia F. Myers was one of only five Presidential Distinguished Rank Award winners selected to participate in the Federal Executive Institute's (FEI) core residential program, Leadership for a Democratic Society. The program addresses the active leadership roles expected of career Federal executives and the democratic values and beliefs underpinning that leadership. Ms. Myers was invited to the FEI to reflect on the nature of leadership, the demands facing today's Federal executive, and the leadership strategies executives apply in their work. She spent a week in residence at FEI in ongoing dialogue with program participants, staff, and faculty. An article on her leadership philosophy was published in the spring issue of The Bureaucrat, the journal for public managers.

## **INTERNATIONAL VISITORS PROGRAM**

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 1990, the Board made presentations to approximately 50 visitors from a number of countries, including the Philippines, Australia, Kenya, Uganda, China, Indonesia, Japan, and India. The visitors included governors, lieutenant governors, heads of agencies, inspectors general, staff directors, and staff attorneys. Many of the individuals visited the Board during a time when their sponsoring countries were in the process of revising their appeals systems or developing an appeals system to implement a new law.

# Administration, Finance, and Human Resources

## ADMINISTRATION IMPROVEMENT OBJECTIVES

During Fiscal Year 1990, the Board continued to enhance management efficiency and effectiveness through its focus on management improvement objectives. To support the strategic planning process, regional and headquarters office directors developed 146 action plans for accomplishing improved operations under one of the four major improvement objectives. These are:

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

These action plans were tracked throughout the fiscal year and resulted in significant systems and program improvements.

## PROGRAM AND MANAGEMENT REVIEWS

The Board conducted Administrative Program and Management Reviews, in accordance with the requirements of OMB Circular No. A-123, in its Boston, Philadelphia, and Washington regional offices, and in the offices of the Director of Administration and the

Information Resources Management Division at headquarters. These reviews cover both administrative management of the office plus program management if the office has delegated responsibility for a program. The reports of these reviews have proven extremely beneficial in improving the quality of administrative and program functions. A 5-year cycle has been established to review all headquarters and regional offices.



*Darrell L. Netherton*  
*Director, Office of Administration*

## AUTOMATED SYSTEMS

Among the significant management improvement efforts were the continued development and expanded application of automated technology throughout all Board programs and administrative systems. The transition to an IBM-compatible personal computer environment throughout the Board was completed. The headquarters minicomputer upgrade needed to support a new relational data base and fourth generation language environment was installed and made operational. Work began on the actual systems development of the new Case Management System, which was 70 percent completed by the end of the fiscal year. The Case Management System will be made operational in Fiscal Year 1991 and includes many enhancements to the existing automated system, such as automated generation of case-related correspondence.

A telecommunications network study was completed, leading to plans for a total replacement of the existing network used to connect the regional offices to headquarters. The new system is expected to result in significant savings over the next three years in terms of reduced equipment and software maintenance costs, and a reduction in regional and headquarters staff time needed to maintain the existing network. In addition, the new network will be much more reliable and will support the data gathering and reporting requirements imposed by the new Case Management System.

The Board implemented a new software program for purchasing that resulted in a decrease in the average processing time for orders from 30 days to less than a week. In addition, record keeping and documentation improved, and customer satisfaction increased. An exhaustive review of the receiving, acceptance, and payment processes resulted in many changes to improve internal controls, ensure timely and accurate vendor payments, and resolve any disputes promptly.

An extensive review of the property management process resulted in a revision of accountability standards and implementation of a new software program. This program provides improved accountability, allows use of state-of-the-art bar coding technology for inventory and reconciliation, and is expected to reduce both labor and dollar costs associated with the property management function.

The Board implemented programs for recording employee time and attendance that resulted in more accurate and timely processing and reduced the amount of staff time required for recording time and attendance. The Board also implemented software for recording travel authorization and vouchers, thus improving the accuracy of travel documents and financial controls, and reducing the time for payment of vouchers from weeks to a few days.



*Atlanta Regional Office*

The Board's system for issuing internal notices and orders—previously a manual, paper-oriented system requiring much personnel intervention and generation of paper—was automated by using an electronic library system resident on the Board's minicomputer to prepare and distribute Board notices and orders. This system now contains an index of all Board notices and orders, with on-line search capability to assist users in finding notices and orders on any subject.

The preparation of monthly graphs representing key case workload information was automated. This reduced the time

needed to prepare the graphs from four days to less than one, thereby providing management with the information needed to correct any problems in a more timely manner.

## **OTHER MANAGEMENT ACTIVITIES**

The Board improved the process for distributing its opinions and orders to commercial publishers, offices, and OPM. Included in the process is a mechanism for identifying significant opinions and orders and sending them to interested users via facsimile. A CD-ROM capability was added to the Board's library in a continuing effort to make this facility "state-of-the-art." All of the Board's Privacy Act systems of records were updated, resulting in a reduction of the number of Privacy Act systems of records from 13 to 8.

A thorough study of the Board's procedures for original jurisdiction cases brought by the Office of Special Counsel was conducted during the fiscal year.

The Special Counsel prosecutes Hatch Act cases before the Board, as well as other disciplinary action against individuals and corrective actions against agencies. The study revealed that the Board offices involved in processing Special Counsel cases have



*Assistant Treasury Secretary, Linda M Combs, assists Chairman Levinson in unveiling the portrait of Frances Perkins at the hearing room dedication.*

efficient and effective procedures in place to ensure that these cases are processed in an orderly and timely fashion.

The Office of the Inspector General completed evaluations of the following Board programs and operations during Fiscal Year 1990: implementation of the Computer Security Act of 1987, administrative and program management reviews of headquarters and regional offices, and fourth quarter spending. The Inspector General also conducted audits of imprest funds maintained by the Board.

In a reorganization at headquarters, the Office of Equal Employment Opportunity, formerly a division of the Office of Administration, was established as a separate office to emphasize the importance of the agency's EEO program. While reporting to the Executive Director, the Director of the office also has direct access to the Chairman on EEO matters.

At Board headquarters, the new Frances Perkins Hearing Room—named in honor of the former Secretary of Labor—was dedicated on January 9, 1990. Ms. Perkins served as Secretary of Labor from 1932 to 1945 and was the first woman appointed to a Cabinet position. In 1946, she was appointed to the Civil Service Commission, the Board's predecessor agency, and served as a commissioner for seven years.



*T Paul Riegert Inspector General*



*Frances C. Perkins portrait*

The naming of the hearing room to honor Frances Perkins is a part of the Board's continuing effort to recall its roots in the Civil Service Commission. The first action in this regard was the addition of the date "1883," the year the Commission was established, to the Board's seal. This action was followed by the naming of the Board's highest award, the Theodore Roosevelt Award, in honor of the former President and Civil Service Commissioner.

## FINANCIAL STATEMENT

The obligations of the Merit Systems Protection Board for Fiscal Year 1990 (October 1, 1989, through September 30, 1990) are shown below:

### 1990 ACTUAL OBLIGATIONS (Thousands of dollars)

#### Direct obligations

Personnel compensation	
Full-time permanent	11,806
Other than full-time permanent	838
Other Personnel compensation	336
Subtotal	12,980
Personnel benefits	1,866
Benefits for former personnel	5
Travel and transportation of persons	458
Transportation of things	107
Rental payment to GSA	1,715
Rental payments to others	49
Communications, utilities, and miscellaneous charges	699
Printing and reproduction	172
Other services	1,195
Supplies and materials	414
Equipment	1,168
Subtotal	20,828
<b>Reimbursable obligations</b>	<b>1,577</b>
<b>Total obligations</b>	<b>22,405</b>



*Connie Shaw of the Financial and Administrative Management Division*

**HUMAN RESOURCES**

**PERSONNEL ACTIVITIES**

The full-time equivalent employment for the Board in Fiscal Year 1990 was 299.

During the fiscal year, the Board evaluated the new Performance Management Plan that had been implemented during the previous fiscal year. As a result of this evaluation, the Board identified a need for continuing training of its managers and streamlining in the performance management area.

The Personnel Division conducted a study to identify workflow and automation improvements needed to provide efficient and effective personnel services to the Board. At the beginning to the study, a Personnel Actions Tracking System was developed to report the status of actions to managers and to analyze workload. Also, a Personnel Security Information System was developed to track and control the processing of actions related to personnel suitability and national security access. This system allows Board staff to determine quickly the status of any investigation for any Board employee.



*Janice Fritts Director,  
Office of Equal Employment Opportunity*

**EEO ACTIVITIES**

The representation of women and minorities in the Board's work force continues to be 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 show: the percentages of female and minority attorneys, as well as the percentage representation of these groups in the Board's work force as a whole.

*Mary Green, Staff Assistant to the  
Executive Director*



**MSPB EMPLOYMENT BY RACE, NATIONAL ORIGIN AND SEX**

Data as of September 30, 1990

	<u>Attorneys</u>	
	No. in Attorney	Percent of Attorney
	<u>Workforce</u>	<u>Workforce</u>
Male	79	59.4
Female	54	40.6
Total	133	100.0
Minority *	25	18.8
Majority	108	81.2
Total	133	100.0
MSPB (Entire Agency)		
Male	131	41.7
Female	183	58.3
Total	314	100.0
Minority*	104	33.1
Majority	210	66.9
Total	314	100.0

\* Excluding White/Female

The Office of Equal Employment Opportunity participated in local and national recruitment conferences during Fiscal Year 1990. Representatives attended two national conferences, one sponsored by Federally Employed Women and the other by Blacks In Government, and distributed materials about the Board's mission and employment opportunities. Recruitment was targeted to increase the Board's representation of minorities, women, and individuals with disabilities.

Board attorneys expended considerable effort, as well, in recruiting campaigns to help the Board meet its goal of recruiting and maintaining a balanced work force. In this regard, the Board has focused on recruiting at minority job fairs and through law school consortia in which a high percentage of minorities are represented. Board representatives participated in the Southeastern Minority Job Fair, the Hispanic Bar Association Placement Day, the Northeastern Minority Job Fair, and "Texas in Washington Day."

## **AWARDS**

In November 1989, the Chairman presented two employees with the Theodore Roosevelt Award. The award was established in late Fiscal Year 1988 to honor Board employees who demonstrate distinguished performance or leadership in support of the Board's mission to protect Federal merit systems through its adjudicatory and studies functions. Lucretia F. Myers, Executive Director, and R.J. Payne, Regional Director of the Atlanta Regional Office, were honored with this award for Fiscal Year 1990.



*Chairman Levinson with Theodore Roosevelt Award winners, Lucretia F. Myers and R.J. Payne*

During Fiscal Year 1990, the Board granted Performance Awards, Quality Step Increases, and Performance Bonuses to over 200 of its employees. In addition, approximately 15 employees were rewarded for performing Special Acts or Services.



*Recipients of the Chairman's Awards for Excellence pose with the Board.*



*Award recipient Sylvia Moore (left) is congratulated by Alicia Pickett at the reception for honorees.*

### **PLANNING FOR A POSSIBLE SEQUESTER**

During the final months of Fiscal Year 1990, the Board developed plans to deal with a possible sequester under the Gramm-Rudman-Hollings Act. Actions taken included

instituting a total hiring freeze and requiring large reductions in non-personnel spending. Even after taking into account the impact of these actions in the new fiscal year, the Board projected that furloughs of up to 22 days for all employees would be necessary in the first quarter of Fiscal Year 1991 to meet the requirements of a sequester. Such furloughs would have a negative impact on all Board operations.

Notices of proposed furloughs were issued to the more than 300 Board employees at the end of August Throughout September, headquarters office directors met at least weekly to review budget and furlough plans, and both headquarters and regional office directors met frequently with their staffs. As management continued planning for various scenarios ranging from no sequester to a sequester for the entire fiscal year, employees were kept advised through notices and electronic mail messages. In the final week of September, all employees were given notices that furloughs could begin in the first week of October. The situation was further complicated at that time by the possibility of a lapse in appropriation. This required instructing all employees in plans to shut down the agency should no appropriation be in place as of October 1.

As discussed in the "Original Jurisdiction" section of this report, the possibility of sequestration had an actual impact on the Board's workload in Fiscal Year 1990 with the filing of complaints by 23 agencies seeking to furlough over 1,000 administrative law judges.

This increase in workload required the Board to hire additional administrative law judges to adjudicate the cases and to make special arrangements for office space, hearing locations, and support services.

In addition, with agencies issuing furlough notices to over one million Federal employees, the Board began planning for the possibility of receiving as many as 120,000 additional appeals in Fiscal Year 1991 should furloughs be effected governmentwide.

# Appendix A

## Significant Board Decisions

### Appellate Jurisdiction Cases

Significant appellate jurisdiction cases decided by the Board during Fiscal Year 1990 included the following:

#### ***Discrimination (Mixed Cases)***

*Miller v. USPS*, PH07528910178 (February 15, 1990)

The Board held that the fact that an impairment forecloses an employee from performing the duties of a particular position does not determine whether the impairment constitutes a "handicapping condition" for purposes of the Rehabilitation Act. The impairment must foreclose the type of employment involved generally to constitute a handicap. In this case, the evidence established that the appellant was unable to work at two of the agency's facilities in her geographic area because of her allergies to dust. She presented no evidence, however, that the allergies would limit her employability in other lines of work in the geographic area. The Board examined relevant court and EEOC decisions, the latter of which were entitled to deference since they constituted an agency's interpretation of its own regulations, and found that these decisions supported the Board's decision that the appellant is not a handicapped person.

*Bolling v. Navy*, SF07528810774 (March 2, 1990)

The appellant was removed for possession of marijuana on agency premises. The Board concluded that, assuming the appellant proved he was addicted to marijuana, the agency was not required to accommodate him because he had not shown that his misconduct was caused by that handicap. The Board reasoned that because the appellant did not show that he was under the influence of marijuana at the time, he, therefore, retained sufficient control over his faculties to know the consequences of his acts. Further, possession of a drug, even one that the person is addicted to, is not so intrinsic to drug addiction that, without more, a causal connection is established. The determination of whether possession is entirely a manifestation of the addiction is to be based on the facts and circumstances of each case, and the Board will not apply a *per se* rule. The Board held, however, that removal was too harsh a penalty for this misconduct and that a 90-day suspension was the maximum reasonable penalty that could be imposed.

*Calton v. Army*, DE07528810362 (April 4, 1990)

After the Board sustained the appellant's removal based on AWOL and intoxication, the EEOC issued a decision disagreeing, finding that the action constituted handicap discrimination. The Board, under its limited standard of review set out in *Ignacio*, concurred in and adopted EEOC's decision. That decision was based on the finding that by not giving the appellant a firm choice between rehabilitation and termination, the agency failed to accommodate him. Based on that ruling, the Board stated that it would henceforth require agencies to provide a "firm choice" between treatment and termination to employees handicapped by alcoholism. Thus, the removal was not sustained. As corrective action, the Board ordered the agency to offer the appellant reemployment in the same or a similar position pending proof of successful completion of rehabilitation and continued abstinence. The offer was to be conditioned on the availability of a position for which the appellant was qualified. If no vacancy existed, the agency was ordered to pay the appellant's salary and benefits until one occurred.

## **Jurisdiction**

*Gordon v. Massachusetts National Guard*, BNO3538910055 (October 27, 1989)

On the issue of jurisdiction over National Guard technicians, the Board noted that it had authority under 38 U.S.C. 2024(d) to examine claims of denial of restoration if the appellant was formerly employed by "an agency." It referenced its earlier decision in *Special Counsel v. Everett*, which found that the National Guard was a hybrid organization, with some Federal and some state components, and noted that in 1968, Congress federalized to a limited extent Guard technicians, who were formerly considered state employees. The Board concluded that Guard technicians are Federal employees who do not work in a Federal agency, and, therefore, found that the appellant could not vindicate any right to restoration before the Board. In this regard, the Board noted that this decision was consistent with its enforcement authority, which is limited to ordering Federal agencies and employees to comply. Here, even if the appellant were a Federal employee, the only person authorized to hire him, the adjutant general, is a state official. It would be incongruous to order the agency to take an action with respect to the appellant and then not have the authority to enforce that order. Finally, the Board noted that although restoration statutes are to be construed liberally, this decision does not constitute a ruling on the appellant's claim to restoration, only on the Board's authority to hear that claim. The Board dismissed the appeal.

*Pangarova v. Army*, AT07528810091 (November 9, 1989)

The appellant was removed for failure to maintain a security clearance after the agency revoked her clearance. The Board found that it lacked authority to review the merits of the security clearance determination, that the agency complied with its regulations when it made attempts to reassign her but found no available positions, and that the removal action was proper. In reaching this conclusion, the Board found that it lacked authority to consider the appellant's allegations of discrimination and reprisal. It noted, in this regard, that the Supreme Court in *Egan v. Department of the Navy* had not distinguished between the merits and affirmative defenses when it defined the Board's scope of review of security-related cases and that, if the Board were to adjudicate such defenses, it would be required to involve itself in the kinds of national security determinations the Court found were properly committed to agency discretion. Noting that it lacks Article 3 review authority over constitutional claims, the Board concluded that it could not review the appellant's claims of discrimination.

*Funk v. Army*, SE07528910001 (March 21, 1990)

The Board announced that it would "require that administrative judges address the issue of Board jurisdiction before dismissing an appeal on procedural or timeliness grounds."

*Raymond v. USPS*, BN07528910058 (April 23, 1990)

The Board held that nonpreference-eligible employees of the Postal Service have no appeal rights under the reduction in force regulations. The Board explained that the Postal Service is an independent establishment, and its employees are not considered employees under 5 U.S.C. 2105 (e). Under 39 U.S.C. 1005, preference-eligible Postal Service employees have the same rights as competitive service employees under Title 5, including RIF appeal rights. There is no provision granting nonpreference-eligible Postal Service employees RIF appeal rights, however. The Board found that OPM's regulations in this regard were a reasonable interpretation of its statutory authority.

*Quackenbush v. Justice*, SF075288C9048 (July 26, 1990)

After the parties settled the case, the appellant filed a petition for enforcement in which he challenged the amount of income tax withheld from his back pay award. The Board noted that it is a tribunal of limited jurisdiction. It concluded that the question of whether the amount of income tax withheld accords with applicable law, rule, or regulation does not fall within the Board's limited jurisdiction. Noting that any relief for the appellant lay in another forum, the Board dismissed the petition for enforcement.

### ***Performance-Based Actions***

*Brown v. VA v. OPM*, AT04328610077 (April 17, 1990)

The Board modified its prior holdings and found that when taking a performance-based action under Chapter 43, an agency may rely on performance deficiencies occurring at any time during the year preceding the notice of proposed action, but only if it can show that the appellant failed to demonstrate acceptable performance or to sustain it after having received a reasonable opportunity to do so. The Board reiterated that if an employee demonstrates acceptable performance under a Performance Improvement Plan (PIP), the agency is precluded from removing or demoting him solely on the basis of his pre-PIP performance. In support of its ruling, the Board relied on 5 U.S.C. 4303(c)(2)(A), which allows a Chapter 43 action to be based on unacceptable performance that occurred within the 1-year period ending on the date of the notice of proposed action. The Board found that the agency should, under this provision, be allowed to argue pre-PIP unacceptable performance if it wishes to present a more complete context for the charged deficiencies during the PIP period. The Board also cited the Federal Circuit's decision in *Martin v. FAA*, in which the court held that the Board must hear and consider evidence of pre-PIP unacceptable performance because a legally sufficient opportunity to improve does not release an employee from the necessity of meeting the terms of his performance plan. Thus, agencies may not use a PIP to reduce or increase the standards of performance established at the beginning of the appraisal period, and the agency may rely solely on PIP performance only if that shows that the employee's performance is unacceptable under his annual performance standards.

The Board then addressed a second issue, how to measure performance during a PIP period when the performance standard at issue is a numerical standard that is set forth on an annual basis. With respect to this issue, the Board held that the normal standard may be prorated unless seasonal or other variations in workload make a proportional standard unfair and inaccurate. Where the workload is fairly constant, an employee should expect that his standard will be prorated during a PIP period. However, the action will be sustained only if the agency shows that the appellant's performance was unacceptable under the annual standards.

*Sullivan v. Navy*, SF04328610843 (April 17, 1990)

The Board addressed the issue of whether an agency may rely on post-PIP performance in taking a Chapter 43 action. It concluded that both 5 U.S.C. 4303(b)(2), which allows the extension of the notice period of a Chapter 43 action, and 5 U.S.C. 4303(d), which allows the retention of an employee who performs acceptably after a PIP but before the notice is issued, support the conclusion that post-PIP performance may not be disregarded for all purposes. Thus, the Board held that an agency may rely generally on instances of unacceptable performance in the same critical element or elements that occur after the successful completion of a PIP. Reliance must be limited to those instances that occur within one year preceding the advance notice of a Chapter 43 action. In those cases where no action is taken because of the improvement, the Board held that an indefinite delay beyond the close of the PIP should not be countenanced, so that the agency may not delay taking action more than one year after the beginning of the PIP. Beyond that date, if performance again fails, a new PIP must be initiated before taking a Chapter 43 action. Because the agency retains the burden of proving that it provided a *bona fide* opportunity to demonstrate acceptable performance, the Board found that if post-PIP performance is relied

on and the employee shows that changed circumstances since the PIP render reliance on that PIP unfair, the agency must rebut that showing. Such circumstances may include the introduction of new technology, procedures, or other work-related factors changing the nature of the work or the way it is performed, as well as revisions to the critical element itself. The Board also noted that although the degree to which the appellant was on notice that he could be adversely affected by poor performance after a successfully-completed PIP may be important in some cases, it is generally no defense to an action to say that had he known he was still being monitored, he would have worked more diligently.

The Board further found that it would not be appropriate to impose a formula for application in determining the weight to be accorded to post-PIP performance. Rather, on a case-by-case basis, where the agency has relied on performance both before and after, as well as during the PIP period, the Board will have to determine whether that showing constitutes substantial evidence of genuinely unacceptable performance under the applicable standard.

### ***Retirement-related Issues***

*Fusco v. OPM*, PH831M8610647 (December 8, 1989)

In this decision, the Board addressed issues related to the recovery of annuity overpayments by OPM. The Board first noted that an appellant has the burden of proof that recovery of an annuity overpayment would be against equity and good conscience, and that he may meet that burden by showing that recovery would cause him financial hardship. Citing 5 CFR 831.1404, the Board noted that financial hardship may be deemed to exist in, but is not limited to, those cases where an appellant needs substantially all of his current income and liquid assets to meet current ordinary and necessary living expenses. The emphasis of the regulation is on the individual's current ability to repay the overpayment, not on his net worth, so that non-liquid assets generally should not be considered in determining the ability to repay. OPM's Policy Guidelines are generally consistent with this, but state that non-liquid assets can be considered if they are so substantial that not considering them offends the conscience, or if the annuitant has converted liquid into non-liquid assets to avoid repayment. A liquid asset is cash or an asset readily convertible into cash with little or no loss in value (checking accounts, savings accounts, CDs, mutual funds, and marketable securities). Non-liquid assets include individual retirement accounts and other similar accounts. Based on the Guidelines, the Board found that generally, the first \$5,000.00 of liquid assets should not be considered as available for recovery.

In determining whether financial hardship would result, the Board compared monthly income and monthly expenses for the entire collection period, giving consideration to anticipated changes in those categories during the scheduled period. Monthly "income" includes income from all sources, including income made by family members for whom the annuitant claims expenses. "Ordinary and necessary living expenses" are those enumerated in 5 CFR 831.1405, but the appellant must still show that the amount of such expenses claimed is reasonable. In addition to the enumerated expenses, the Guidelines provide that miscellaneous expenses may also be considered if a reasonable person would accept the expense as ordinary and necessary. Thus, an appellant must show by substantial evidence that the amount of the enumerated expenses, and the type and amount of the miscellaneous expenses, claimed are comparable to what persons of ordinary prudence would require under similar circumstances. Regardless of the annuitant's accustomed standard of living, the Board stated that it would apply a reasonable person test, but that discrete circumstances particular to individual situations must be taken into account. Total monthly "expenses" therefore, are calculated by adding ordinary and necessary monthly enumerated and miscellaneous expenses plus \$50.00 for emergency expenses, as allowed by the Guidelines. That figure is then subtracted from total monthly income to ascertain the income/expense margin.

Once that margin is established, the Board will consider the appellant's total financial condition to determine whether repayment will cause financial hardship because the annuitant needs substantially all of his current income and liquid assets to meet current ordinary and necessary living expenses and liabilities. The case was remanded to allow the appellant a further opportunity to submit evidence of financial hardship.

In her concurring opinion, the Vice Chairman agreed generally with the reasonable person test, but expressed the view that in applying the test, one factor should be the person's usual standard of living and how long he has maintained it, even if he increased or acquired it as a result of the overpayment.

*Aguon v. OPM*, SF831M8610745 (December 8, 1989)

In this case, the Board examined 5 CFR 831.1403, which provides that regardless of the annuitant's financial circumstances, if he "relinquished a valuable right or changed positions for the worse" because of the notice that payment would be made or the payment itself, he would be entitled to a waiver. The Board adopted the criteria OPM set forth in its Guidelines to establish detrimental reliance: The change or relinquishment must be directly caused by the overpayment or notice that it would be made; it must be detrimental to the overpayment recipient; it must be material (although not necessarily "major"); and it must be irrevocable. The Board found that to ensure that appellants do not profit from waiver on this basis, the waiver is appropriate only in an amount equivalent to the loss the annuitant's relinquishment caused. The appellant must prove his entitlement under these criteria by substantial evidence. Here, the Board found that it would be appropriate to provide the appellant a further opportunity on remand to address this issue with greater specificity.

The Board next considered the appellant's argument that recovery would be unconscionable. Noting that OPM interprets unconscionability as a separate factor warranting waiver, the Board overruled, to the extent necessary, its prior cases suggesting that unconscionability is not separate from financial hardship or detrimental reliance. OPM's Guidelines list as examples of unconscionability "egregious errors and/or delays by OPM." The Board defined the term according to its plain meaning, as "going beyond the bounds of what is customary or reasonable; ridiculously or unjustly excessive; inordinate...contrary to good conscience; inequitable," and emphasized that it is a high standard, so that waiver on the basis of unconscionability should be granted only in exceptional circumstances. The Board held that it would look at the "totality-of-the-circumstances" to determine whether recovery would be unconscionable in any given case. The Board listed as unconscionable cases where OPM's delay in adjusting an annuity was exceptionally lengthy; OPM failed to respond within a reasonable time to an inquiry; OPM failed to act expeditiously to adjust an annuity in the face of specific notice; and/or OPM was otherwise grossly negligent in handling the case.

The Board further ruled that principles of equity require that consideration be given, in this category of cases, to whether the appellant was misinformed by OPM and to the annuitant's personal limitations. Under the Guidelines, unconscionability may be presumed where OPM failed to respond to a request for waiver or reconsideration within four years of the request, and that portion of the overpayment that accrued more than three years prior to the date of the initial overpayment notice, as well as that portion of an overpayment that cannot be recovered (without financial hardship) within six years of the date of first collection, will also be waived on the ground of unconscionability. The Board noted, in this regard, OPM's access to much information about annuitants, and stated that lengthy delays accompanied by other circumstances could also lead to a waiver. The Board ordered that, on remand, the appellant should be provided an opportunity to clarify the state of his health and to argue that, alone or in combination with other factors, it justifies a waiver on the basis of unconscionability.

In her concurring opinion, the Vice Chairman stated that, in the future, where there is a without-fault debtor who experiences a delay as lengthy as the 7-1/2 years here, she would find the annuitant entitled to complete waiver. She also suggested that the two agencies involved, OPM and the Social Security Administration, devise a system to ensure coordination and more expeditious processing.

*Newcomb v. OPM*, SF831M8610210 (December 8, 1989)

The appellant argued that his continued receipt of an unreduced annuity beyond the age at which he was eligible for social security benefits caused him to believe that he was not yet eligible for such benefits, that he did not apply for them, and that he thus relinquished a valuable right. The Board noted that under the Policy Guidelines, to qualify the annuitant for waiver, the relinquishment must be one that he is unable to recover. The Board adopted and applied the provisions of the Guidelines and held that the appellant's continued receipt of unreduced annuity payments did not cause him to relinquish a valuable right. As the Board explained, the earlier one applies for social security benefits, the greater the reduction in those benefits, so that, actuarially, on average a person will receive the same total benefit over his lifetime irrespective of when he applies for it. Thus, the benefit was not irrevocably lost. The Board further noted that waiver on this basis would also be inconsistent with principles of equitable estoppel and detrimental reliance because there was no evidence that OPM intended the appellant to act on its silence as to his eligibility for social security benefits. Nor is there a requirement that OPM or even the Social Security Administration notify a person when he becomes eligible for social security benefits, and there is no allegation that the appellant was misinformed about 5 U.S.C. 8332(j) or that his inquiries on that subject were ignored.

With respect to the appellant's argument on unconscionability, the Board found that because OPM distinguishes between delays of four years or more and those less than four years, and its interpretation is of its own regulations, the Board would defer to the OPM interpretation because it is not plainly erroneous or inconsistent with the law or regulation on which it is based. Although the Guidelines do not preclude waiver where the delay is less than four years, the appellant did not show why the delay here warranted an exception to the general rule. The Board, therefore, affirmed the initial decision as modified by its Opinion and Order.

In her dissenting opinion, the Vice Chairman stated that she would have found that the appellant relinquished a valuable right and that OPM's actuarial argument, accepted by the Board, is only valid for those appellants who live as long as the statistics indicate they will. Because that is not necessarily true in any individual case, she would have found that the appellant was entitled to waiver. She suggested that OPM could eliminate the risk of benefits lost to the appellant by devising a recovery scheme tied to each individual's actuarial lifespan. She also expressed concern over OPM's lengthy delay in adjusting the annuity to reflect the appellant's eligibility for social security benefits and its failure to notify him of the possible change in amount of his annuity to reflect this eligibility. Because OPM is charged by Congress with responsibility for the administration of the retirement system, she stated her belief that it should devise a procedure to assure better coordination between the agencies. Although notification to the appellant at a specific time is not required, it would comport with the principles of good administration.

In his concurring opinion, the Member stated that he shared the Vice Chairman's concern over the lengthy delays experienced by the appellants in these cases and her view that OPM and SSA could better coordinate to avoid such delays in the future.

*Slater v. OPM*, AT831M8610577 (December 8, 1989)

In this decision, the Board rejected the appellant's argument that he was entitled to retain an annuity overpayment in its entirety because OPM did not specifically inform him that he had been overpaid until more than six years after the debt began to accrue. The appellant relied on OPM's "six year rule," which precludes recovery of an overpayment unless a complaint is filed within six years of the date on which the right of legal action accrues. The Board found that the rule applies to voluntary repayment, and here, OPM intends to collect the overpayment through offset of the appellant's annuity payments.

The Board found that the appellant was without fault under the Policy Guidelines' "prompt notification" rule, which provides that an individual who accepts an overpayment, even one he knows is in error, will be found to be without fault where he promptly notifies OPM of the error.

Because the appellant was without fault, the Board went on to determine whether he was entitled to a waiver and found that he was entitled to a partial waiver under the three year "age of debt" rule. Under that rule, it is generally unconscionable to collect that portion of an overpayment that accrued more than three years prior to the initial overpayment notice from OPM. The Board found, however, that the Guidelines also contain a "set aside rule," under which it will not be found unconscionable to collect money that an annuitant receives when he suspected or knew that the payment was erroneous, because he is expected to set the overpaid money aside for recoupment. The Board adopted both rules as reasonable and appropriate. Noting that the appellant acknowledged that after receiving the April 1983 notice, he began setting money aside to cover the anticipated overpayment, the Board concluded that it would not be unconscionable to require repayment of that portion of the debt that arose after the appellant began receiving social security benefits. It found him entitled to waiver of the portion of the debt that accrued prior to the appellant's receipt of those benefits, however, because there is no indication that he knew or suspected that the amount of his annuity was wrong before then.

The Board rejected the appellant's argument that he was entitled to a waiver because he had incurred an increased tax liability as a result of the overpayments. The Board found that, even assuming that the appellant was correct that his total tax burden increased, this would not constitute detrimental reliance because OPM did not mislead the appellant or induce him to change his position. Nor did the increased tax burden constitute unconscionability, the Board found, citing the Federal Circuit's decision in *Day v. OPM*. Finally, the Board found that the appellant was not entitled to waiver on the basis of OPM's delays because he was aware that his annuity should have been reduced as of the time he began receiving social security benefits, he set aside money from that point, and recovery of the part of the debt that accrued prior to that time was waived. As the Board explained, because the delays did not have a substantial adverse impact on the appellant, recovery would not be unconscionable.

The Vice Chairman issued a separate decision, concurring in part and dissenting in part. She agreed with all but the portion of the decision finding that the appellant was not entitled to waiver because he could not show a substantial adverse impact on himself. In her view, adverse impact should only be one factor for consideration in the totality of the circumstances test for unconscionability, and not the determining factor. She would have granted waiver because the appellant acted in a very responsible manner, while OPM, in its delays, acted negligently.

*Derrico v. OPM*, DC831M8610440 (December 8, 1989)

With respect to claims of financial hardship, the Board held that administrative judges should request clarifying information where OPM has not, or where the administrative judge questions the propriety of the claimed expenses or income. Because the annuitant is required to swear to the accuracy of the information provided on the financial resources questionnaire, however, the Board held that unless OPM has questioned the information or it appears unreasonable or incomplete on its face, the appellant should not be required to substantiate his income or expenses. The case was remanded to allow the parties to supplement the record on the issue of financial hardship and for adjudication in accordance with the guidance of *Fusco*.

The Board also addressed its authority to adjust the repayment schedule. It noted that adjustment is not an alternative to waiver, that if a finding of financial hardship can be made, then the appellant is entitled to a waiver. Only if such a finding of financial hardship cannot be made may the administrative judge consider whether the schedule should be adjusted as a result of financial hardship. Because 5 CFR 831.1401 places the issue of adjustment before OPM in every case, the Board found that the issue was properly before the Board in every case as well, even in the absence of a specific request to OPM for adjustment Citing the Guidelines, the Board stated that the determination of financial hardship that must be made to entitle a party to adjustment is "not as strict" as that necessary to establish entitlement to waiver.

Finally, the Board noted OPM's "length-of-recovery" rule, under which a recovery schedule is generally limited to six years, and the amount that cannot be equitably collected in that time is waived. The Board agreed with and adopted that rule. It held, however, that under the Guidelines, a recovery schedule may be longer than six years if the appellant refuses to submit financial information to establish financial hardship. The Board ordered that this rule should be applied by the administrative judge on remand.

The Vice Chairman issued a concurring opinion to express her concern about the length of the delay between the Social Security Administration's notice to OPM that the appellant was eligible for benefits and OPM's action to adjust his annuity. She stated that in the future, she would find such delays excessive and constituting a basis for waiver.

*Markun v. OPM*, DC08318910240 (March 29, 1990)

The issue before the Board in this case was whether an annuitant is entitled to have his annuity calculated on the basis of the salary he was paid at the time of his retirement or on the basis of the salary level he would have received but for the pay cap imposed by 5 U.S.C. 5308. The Board found that under 5 U.S.C. 8415, an annuity is computed at 1 percent of "average pay" multiplied by the individual's total service. Because average pay is defined as basic pay, and basic pay is the rate of pay fixed by law, including the pay cap, that cap must be considered in setting the annuity rate.

Moreover, the Board noted that deductions for the annuity were made as a percentage of the appellant's capped salary throughout his tenure, not of the higher salary he would have received in the absence of 5 U.S.C. 5308.

*Noveloso v. OPM*, SE08318910676 (May 29, 1990)

In this case, the Board considered the distinction between "covered" and "creditable" service. Under 5 U.S.C. 8333, to qualify for an annuity, an employee must complete at least five years of creditable civilian service and must have served at least one of the last two years of Federal service in a covered position. Almost all Federal service is creditable toward service requirements, but covered service is more limited, including only those employees who are "subject to" the Civil Service Retirement Act and must deposit part of their pay into the Civil Service Retirement and Disability Fund. An "employee" is defined in 5 U.S.C. 8331. All employees are covered by the retirement system except those who are specifically excluded by law or by OPM regulation. Temporary or intermittent employees are among those excluded from retirement coverage by 5 CFR 831.201(a), but that exclusion does not in any way affect the creditability of an employee's service. The Board, therefore, overruled earlier decisions that implied that temporary or indefinite appointments do not constitute creditable service.

### **Settlements**

*Miller v. Army*, PH075287A0087 (November 28, 1989)

The Board held that where a hearing is requested in an appeal that was settled before presentation of the evidence "and when a truly informed finding cannot be made concerning the appellant's entitlement to an attorney fee award, an administrative judge should grant the appellant's request for a hearing on the fee award." In so ruling, the Board noted that the statement to the contrary in its earlier decision in *Allen v. USPS* presupposes a developed record,

and so was inapplicable here. The Board then found that the evidence of record in this case did not contain sufficient information to make a reasoned finding on whether the appellant was substantially innocent of the charge against her, because resolution of the issues involved in such a determination would require decisions on credibility. Further, because demeanor is an important component in credibility determinations, a hearing would be necessary. The Board noted that although requiring a hearing on the fees issue seemed inconsistent with the speedy resolution of disputes fostered by settlement, it was not inconsistent with all the purposes of settlement. Moreover, a policy precluding full litigation of the fee issue could discourage settlement. Finally, the Board encouraged administrative judges to remind parties of the advantages of settling the fee issue when the merits issues are settled, noting that parties may have to establish entitlement to fees on the basis of the existing record since there is no absolute right to a hearing on the fee issue.

In a separate opinion, the Chairman agreed that the appellant was the prevailing party but dissented from the remand for a hearing on the attorney fee issue. In his view, the appellant gave up the right to a hearing by agreeing to settle, and the majority opinion allows the fee proceeding to become the principal litigation, contrary to the Supreme Court's admonition in *Hensley v. Eckerhart*.

*Futrell v. Navy*, PH075286A0549 (December 18, 1989)

This case raised a question as to the standard to be applied in determining whether attorney fees should be awarded. The case, which included an allegation of discrimination, settled prior to the issuance of a decision on the merits. The Board held that where the appellant's pleadings, supplemented if necessary by the record as it existed at the time of the Board's decision, disclosed facts that, if proven, could form a *prima facie* case of discrimination, then the appellant was entitled to an award of attorney fees in accordance with the more liberal civil rights standard of 5 U.S.C. 7701(g)(2).

*Byron v. Navy*, SE075285CO276 (December 29, 1989)

The appellant filed a petition for enforcement of a settlement agreement, asserting that the agency's failure to expunge his records as required by the agreement led to an investigation that caused his security clearance to be revoked. The Board noted that the issue was not whether the agency was in compliance, but whether its prior noncompliance led to specific harmful results, i.e., the loss of the appellant's security clearance. It found that the appellant did not meet his burden of proof, but that he presented evidence "strongly suggesting a possible causal connection," which the agency has the burden to rebut, and remanded the case for further findings. The Board stated that if the appellant carried his burden on remand, it would be necessary for the administrative judge to fashion a remedy for the breach. Although its enforcement authority is broad, the Board noted that, under its case law, it would be without authority to order the appellant's security clearance reinstated or to order him restored to his job without it. The Board further noted that its authority to modify the terms of an order or agreement where necessary to fashion a remedy for the harm to a party resulting from the other party's noncompliance would allow the Board to order the agency to place the appellant in another position as equivalent as possible to the position to which it agreed to restore him.

*Danelishen v. USPS*, AT07528910492 (February 6, 1990)

The appellant resigned from his job as a result of the settlement of a grievance over his removal and appealed to the Board, alleging that the resignation was involuntary because the settlement was coerced. The administrative judge dismissed on grounds that the settlement agreement had not been entered into the record. The Board agreed that it had no authority to enforce or invalidate a settlement agreement that had not been entered into the record of a Board appeal. It found, however, that it could consider whether the resignation resulting from it was involuntary, as the appellant claimed.

*Wohschall v. Air Force*, SF07528910359 (February 16, 1990)

The appellant grieved his removal and the parties ultimately settled the grievance for, *inter alia*, the appellant's agreement to resign pursuant to the settlement agreement. He later appealed to the Board. The Board found that it lacked jurisdiction over the claim that the resignation submitted pursuant to the agreement was involuntary. As the Board explained, the appellant could have chosen not to submit his resignation once he believed that the agency was not complying with the agreement. The Board distinguished cases over which it had taken jurisdiction, where the appellant was unaware of an agency breach at the time he submitted his resignation pursuant to a settlement agreement. The Board dismissed the appeal.

*Miller v. DOD*, DE07528810290 (May 24, 1990)

The parties settled the appellant's appeal from his removal. The agreement provided, *inter alia*, that the appellant would be placed on administrative leave for one year and resign thereafter. After seeking advice from the Comptroller General, the Board found that there is no general statutory authorization for excused absence such as administrative leave, and although OPM has placed within agencies' discretion the authorization of administrative leave, OPM has stated that they may, by administrative regulation, place any limitations or restrictions they feel are needed on the use of such leave. The Comptroller General's decisions on this subject have consistently stated that such discretion is for brief periods only, and that where the absence is for a lengthy period, excused absence is not appropriate unless the absence is in connection with furthering a function of the agency. The Comptroller General stated that here the agency's mission would not be furthered by the use of administrative leave as agreed to in the settlement because the agency would be expending appropriated funds without receiving any benefits in return. Absent evidence to the contrary, the Board found that the parties were mutually mistaken as to the lawfulness of the provision at issue and, therefore, set aside the agreement. The initial decision was vacated, and the case was remanded for reinstatement of the appeal. The Board noted that the parties were not thereby precluded from further settlement attempts, including retrospective payment contemplated under the Back Pay Act.

### **Miscellaneous Cases**

*Berkey v. USPS*, SE07528610203 (October 2, 1989)

The Board determined that it would not apply collateral estoppel to arbitrators' decisions on handicap discrimination in Postal Service cases. Because the Postal Service is not subject to 5 U.S.C. 7121, the Board distinguished its decision in *Robinson v. DHHS*.

Citing the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*, the Board held that absent a statutory scheme that forecloses an appellant's right to a trial *de novo* before the Board on a discrimination claim, he retains that right. The Board, therefore, would not give collateral estoppel effect to an arbitrator's decision on the issue of discrimination.

*Dennison v. OPM*, CH08318710189 (November 21, 1989)

The Board found it was appropriate to extend the applicability of the Federal Circuit's decision in *French v. OPM* beyond disability cases to an annuity overpayment case like this because the appellant was represented only by his wife, the record indicated that his condition caused confusion and inability to comprehend these proceedings, and the same kind of fundamental unfairness, as in *French*, might result where the appellant was required to show financial hardship or unconscionability.

*Marbrey v. Justice*, SF07528910381/0687 (May 2, 1990)

In this adverse action appeal, the Board determined that it would not be appropriate to apply the *French* decision to such cases. It noted that *French* involved a disability retirement appeal. Here, unlike a retirement case, the appellant did not bear the burden of proof, the appellant did not claim that he suffered from a mental problem, the record did not contain evidence that he did, and the appellant did not ask for assistance in obtaining representation. Moreover, the Federal Circuit did not indicate that its *French* ruling should be extended beyond the context in which it was made. The Board decided, therefore, that it should not extend the *French* rule to this situation.

*Denny v. Navy*, SF03538810389 (January 19, 1990)

On review of an initial decision concerning the right to immediate restoration of Office of Workers' Compensation Program benefits following termination of those benefits, the Board set forth the burden of proof of entitlement to restoration. The appellant must show that the Board has jurisdiction by proving that he had a compensable injury or recurrence, that his OWCP benefits terminated within one year of the date on which they began based on full recovery from the injury, and that his separation was substantially related to his injury. Once the appellant has met his burden, the agency must show that it complied with the regulations. A claim that full recovery did not occur within one year is a defense to be raised in meeting this burden, as is the argument that the request for restoration was not timely made.

*Burrough v. TVA & OPM*, SL03518810330 (January 19, 1990)

The Board noted that under the Dual Compensation Act, a retired member of the military is not generally considered a preference-eligible for RIF purposes if his service includes "twenty or more years of full-time active service, regardless of when performed but not including periods of active duty for training." It found that the legislative history of the Act showed that it was intended to give a "fresh start" in civilian employment to retired members of the military, without built-in seniority. Under OPM's guidance, even if an employee had not served 20 full years in the military but had been credited with 20 years of service for pension purposes, he would not be considered a preference-eligible for RIF purposes. The Board found that OPM's interpretation was consistent with the legislative history and that its interpretation was entitled to deference. Therefore, the Board deferred to OPM.

*Dunbar v. Navy*, SF07528910445 (February 27, 1990)

On petition for review, the Board reaffirmed its rule that a person is bound by the acts of his representative, but adopted the corollary rule used by courts that the attorney's actions should not be attributed to the client where the client shows that his own diligent efforts to prosecute the suit were, without his knowledge, thwarted by his attorney's deceptions and negligence.

Applying that rule to this case, the Board found that the appellant's statement and the affidavit of his attorney showed that the appellant checked repeatedly on the status of the case, called to remind the attorney of the filing deadline, visited the office in an unsuccessful attempt to mail the appeal himself; and was eventually told that it had been timely mailed. The Board found that the attorney's secretary, although assuring counsel that the appeal was mailed, failed to mail it. Under the circumstances, the attorney misled the appellant, albeit unintentionally, and the appellant was reasonably unaware of the deception. The Board, therefore, found good cause for the untimeliness and remanded the appeal for adjudication.

# Appendix B

## Significant Board Decisions

### Original Jurisdiction Cases

Significant original jurisdiction cases decided by the Board during Fiscal Year 1990 included the following:

#### ***Hatch Act Cases***

*Special Counsel v. Brondyk*, 42 M.S.P.R 333 (1989)

The Board held that a local government employee knowingly violated the provision of the Hatch Act making it unlawful for a covered employee to be a candidate for elective office in a partisan election. In reaching this conclusion, the Board found that the employee was covered by the Hatch Act because his full-time position as executive director of a county department of emergency services was financed by the Federal government and was his principal employment. The Board then determined that the employee's running as a Republican candidate for the office of county sheriff warranted his removal where he persisted in running for office despite the fact that the Office of Special Counsel had warned him not to run and a state official had advised him to consult with an attorney to ensure that he was not violating the Hatch Act, but he had failed to do so.

*Special Counsel v. Fergus*, 44 M.S.P.R 440 (1990)

The Board determined that the executive director of the Eastgate Development and Transportation Agency was an employee covered under the Hatch Act because his principal employment was in connection with an activity financed by Federal funds. The Board approved a settlement that precluded the employee from seeking public employment for a period of 18 months. The Board noted that removal would have been the appropriate penalty had the employee not resigned pursuant to the settlement agreement.

*Special Counsel v. Gallagher, et al.*, 44 M.S.P.R. 57 (1990)

The Special Counsel charged the three respondents with violating those provisions of the Hatch Act that apply to certain state and local government employees. Specifically, the Special Counsel alleged that the respondents violated the Hatch Act by coercing other employees to make political contributions and, in addition, that respondent Gallagher violated the Hatch Act by running for elective office. The Board found that the respondents violated the Hatch Act and that removal was the appropriate penalty. In so finding, the Board noted that the primary factors to be considered in determining whether removal for a Hatch Act violation is appropriate are those that bear on the seriousness of the violation.

*Special Counsel v. Majure*, 43 M.S.P.R. 511 (1990)

The Special Counsel charged a postal employee with engaging in prohibited political activity under the Hatch Act. The Board held that the penalty of removal was not warranted for the employee's successful independent candidacy for mayoral office, and it approved a settlement agreement between the parties under which the employee would receive a 30-day suspension without pay and proceed with a previously filed application for voluntary retirement.

*Special Counsel v. Carter*, HQ12168910043 (July 2, 1990)

The Special Counsel filed a disciplinary action charging the respondent with engaging in prohibited political activity in violation of the Hatch Act during his employment as executive director of the Nashville Housing Authority. The Board held that the term "principal employment" as used in the Hatch Act to define those state or local officers and employees covered by the Hatch Act means principal or primary employment regardless of the public or private nature of the employment. The Board concluded that the respondent was covered by, and had violated, the Hatch Act and restricted him from public employment in the state for 18 months.

### ***Special Counsel Complaints for Disciplinary Action***

*Special Counsel v. Doyle*, 42 M.S.P.R. 376 (1989)

The Special Counsel filed a complaint for disciplinary action against a supervisory employee based on three counts of alleged sexual harassment of female employees. The Administrative Law Judge sustained only one of the three counts. The Special Counsel argued that Count Three should have been sustained. The Board found that because the charge in Count Three involved only a single occurrence directed toward a single individual, it did not constitute severe, pervasive, and frequent harassment sufficient to constitute hostile environment harassment. The Board noted the absence of evidence of serious psychological damage to the female employee or unreasonable interference with her work following her supervisor's sexual advances. The Board adopted the Administrative Law Judge's recommendation on all three counts, but modified the penalty from a fine and a 3-year debarment from Federal employment to just debarment. The reason for the modification of the penalty was the Board's determination that section 1207 of the Civil Service Reform Act, now codified as 5 U.S.C. 1215(a)(3), which defines the Board's sanctioning authority, only allows the imposition of penalties alternatively rather than cumulatively, and that this provision does not permit the Board to impose both a fine and debarment as penalties for sexual harassment.

*Special Counsel v. McDonald* 42 M.S.P.R. 624 (1989)

The Special Counsel charged the respondent with violating 5 U.S.C. 2302(b)(8) by recommending the termination of one employee and the suspension and removal of another in retaliation for whistleblowing. The Board's Administrative Law Judge found the charges proved and recommended that the respondent be removed and debarred from Federal employment for three years. The Board sustained the charge, but determined that it could only impose one of the recommended penalties in light of its decision in *Special Counsel v. Doyle*, because the statute provides alternative, not cumulative, sanctions. The Board concluded that removal was the appropriate penalty. (NOTE: This action commenced prior to the effective date of the Whistleblower Protection Act of 1989 and, therefore, was not covered by the provisions of the Act.)

*Special Counsel v. Doyle, McDonald Endsley, Floersheim and Betten*, 45 M.S.P.R. 43 (1990)

The Special Counsel requested reconsideration of the Board's holding in *Special Counsel v. Doyle* and *Special Counsel v. McDonald* (discussed above) that it lacked authority to impose penalties cumulatively. The other three respondents had entered into settlement agreements involving more than one penalty. After reviewing the legislative history of section 1207 of the Civil Service Reform Act, now codified as 5 U.S.C. 1215(a)(3), the Board concluded that it lacked authority to approve the dual penalty to which the parties had agreed in the settlements. The Board also declined to reconsider its decisions in *Special Counsel v. Doyle* and *Special Counsel v. McDonald*.

*Special Counsel v. Hove*, HQ12169010003 (July 6, 1990)

The Special Counsel brought a disciplinary action, charging that the respondent violated nepotism rules limiting the employment of relatives. The parties agreed to settle the case. The Board found that the agreed-upon penalty of \$750.00 was within the bounds of reasonableness and adopted the agreement.

### ***Proposed Actions Against Administrative Law Judges***

*In re Sannier, et al.*, HQ075218910037 (July 2, 1990)

Three administrative law judges alleged that their employing agency had effectively removed them by taking punitive measures against their office because of its low productivity. The Board dismissed the action, finding that none of the actions allegedly taken constituted interference with the decisional independence of the administrative law judges. The Board also noted that it was without authority to discipline the individuals named by the administrative law judges or to restore the hearing sites and increase the staff in the office in which they work.

### ***Review of Regulations***

*National Treasury Employees Union v. Office of Personnel Management*, HQ12059010008 (July 3, 1990)

The National Treasury Employees Union (NTEU) asked the Board to review the validity of a regulation relating to whether an employee's representative may participate in OPM on-site audits in the course of a classification appeal. The NTEU contended that the regulation conflicted with 5 U.S.C. 7114(a)(2)(A), which sets forth the rights and duties of a labor organization that has been accorded exclusive recognition as the representative of employees in a unit. The Board held that this particular issue could be determined in another forum and that the NTEU failed to establish that a prohibited personnel practice was likely to occur because of the regulation at issue. The Board also noted that striking down the implementation of regulations can be an extremely intrusive remedy.

# Appendix C

## Significant Litigation

Significant litigation involving the Board during Fiscal Year 1990 included the following:

### ***OPM-Initiated Litigation***

*Horner v. Hollander and MSPB*, 895 F.2d 759 (Fed. Cir. 1990)

Mrs. Hollander, the former spouse of an employee who had died while on paid leave, applied for a survivor annuity under the Civil Service Retirement Spouse Equity Act of 1984 (CSRSEA), as amended by the Federal Employees Benefits Improvement Act of 1986, under which a former employee's spouse may qualify for survivor benefits even though the employee had not retired, provided the employee died after becoming "eligible to retire" but before May 7, 1985. Mrs. Hollander contended that her spouse had been eligible for disability retirement when he died, but OPM denied her application because it interpreted the term "eligible to retire" to cover only those employees who qualified for age and service retirement and not those eligible to retire on the basis of disability. The Board reversed OPM's reconsideration decision, holding that OPM's interpretation of the statute was contrary to the plain meaning and purpose of the CSRSEA and remanded the case to OPM to determine whether Mr. Hollander had met the disability retirement requirements, and, if so, whether Mrs. Hollander met the statutory conditions for a survivor annuity.

On review, the Federal Circuit agreed with the Board that the plain meaning of the term "eligible to retire" is "membership in the class of those meeting the requirements for entitlement to retirement benefits" and not merely those already entitled. The court noted that, while deference is due an agency charged with administering a statute, it must reject an interpretation that is inconsistent with the statutory mandate or that frustrates the policy Congress sought to implement. The court concluded that the term "eligible to retire" includes those who were eligible for disability retirement prior to death and affirmed the Board's decision.

*Newman v. Teigeler and MSPB*, 898 F.2d 1574 (Fed. Cir. 1990)

The court affirmed the Board's decision reversing the denial by OPM of the petitioner's application for a survivor annuity. The court agreed with the Board that Teigeler, the former spouse of a deceased annuitant, met all of the requirements for a survivor annuity set forth in the Civil Service Retirement Spouse Equity Act of 1984, as amended by the Federal Employees Benefits Improvement Act of 1986. OPM sought review of the Board's ruling that the "plain meaning" of the statute required finding that a provision denying an annuity to a former spouse who remarried prior to attaining the age of 55 applied only to those who remarried "after September 14, 1978," and, therefore, was not applicable to the petitioner, who remarried before that date. The court found that the statutory language was clear and unambiguous and that the legislative history revealed nothing to indicate the Congress intended anything other than the plain meaning of the words. The court rejected OPM's "absurd results" argument because it found the literal reading furthered congressional intent, and it declined to defer to OPM's interpretation, which it found to be inconsistent with the statute.

*Newman v. Lynch and MSPB*, 897 F.2d 1144 (Fed Cir. 1990) (Petition for rehearing *en banc* pending)

The court reversed the Board's decision declining to reconsider, at the request of OPM, a ruling that the petitioner had articulated a reasonable accommodation of his handicap. Under 5 U.S.C. 7703(d), OPM may seek reconsideration of a Board decision where it determines that the Board has made an error in the interpretation of civil service law that will have a substantial impact. In *Lynch*, the Board held that OPM was not entitled to reconsideration of a determination under the Rehabilitation Act because the Act is a discrimination statute and not a "civil service law" for purposes of 5 U.S.C. 7703(d). The court disagreed, holding that the Board does not have authority to refuse reconsideration under section 7703(d) because it disagrees with the discretionary determinations that OPM is required to make before filing a petition. *In* the court's view, only the court can review OPM's determination. In vacating and remanding the case for the Board to consider OPM's petition, the court did not address the contentions of the respondents and *amid*, including the Equal Employment Opportunity Commission, that matters of discrimination law are outside the scope of the court's jurisdiction under section 7703(d).

### ***Special Counsel-Related Litigation***

*State of Connecticut v. MSPB*, Docket No. 89-6176 (2nd Cir. 1990)

The court affirmed the decision of the U.S. District Court for the District of Connecticut that upheld the Board's finding of Hatch Act violations by two state employees and its order that Federal funds be withheld from the State of Connecticut.

# Appendix D

## Special Studies

The following summaries of special study reports issued by the Board during Fiscal Year 1990 highlight the findings and recommendations in those studies. The reports summarized include those comprising the Board's annual oversight review of the significant actions of the Office of Personnel Management and studies of other merit systems issues.

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

#### ***a. OPM's Classification and Qualifications Systems: A Renewed Emphasis, A Changing Perspective***

There are over two million civilian employees in the Federal civil service. The ability of these employees to carry out the work of the Government successfully is directly related to the effectiveness of the Government's personnel systems. When these systems work properly, the right people get put into the right jobs in a timely way. Although the foundation for these personnel systems is found in law, their practical application is driven by the policy and procedures established by OPM. This report examined OPM's management of two of the Government's most important personnel systems, those that control the classification of positions and the determination of applicant qualifications.

The report concluded that classification standards are not as current as they should be and that the resources currently being devoted to producing classification standards are unlikely to correct that situation. The situation was aggravated by an earlier OPM moratorium on issuing new classification standards. During that moratorium, OPM did not achieve any substantial improvement in the classification system's design. OPM's recent emphasis on the use of generic classification standards has received a mixed reception from agencies, while its generic qualifications standards have been well received. The qualifications rating system, as a whole, appears to be functioning smoothly and effectively.

#### ***b. Attracting and Selecting Quality Applicants for Federal Employment***

This report reviewed the initiatives begun by OPM during Fiscal Year 1988 to improve the Government's ability to attract high-quality applicants for Federal employment. It also assessed recent proposals to modify the selection process for entry-level jobs in Professional and Administrative Career (PAC) positions.

In general, the Board commended OPM for taking the lead in efforts to revitalize the Federal recruitment process. Nevertheless, the Board noted several obstacles that still must be dealt with if the Federal Government is to be viewed as an employer of choice by more individuals.

During Fiscal Year 1988, OPM developed several new proposals designed to streamline and improve the selection process for entry-level Administrative Careers With America (ACWA - formerly termed PAC) positions. In the course of its review, the Board found that these proposals have been generally well received by Federal agencies because they have the potential to increase the timeliness of the selection process. In addition, the combined written examination and Individual Achievement Record offer a formal selection process for many positions where none has existed for several years.

Based on the available research, the Board concluded that the relationship between college grades and job success is not strong enough to justify the use of an across-the-board direct-hire authority based upon grade point averages when tools possessing much greater validity exist. If the Government is unable to recruit or hire qualified persons in certain occupations using the more valid selection instruments, however, MSPB believes it would be appropriate for OPM to grant agencies direct-hire authority for these occupations. If a direct-hire authority is granted, agencies should consider using a combination of alternative selection tools that might include GPA, although GPA should never be used as the sole criterion for selection.

The Board recommended that OPM continue its work to streamline the process by which applicants are certified as eligible for administrative and professional positions using the occupation-specific examinations and the Individual Achievement Record. For maximum effectiveness, OPM should make it as easy as possible for an applicant to arrange to take an exam in a timely manner with results available shortly thereafter.

## **2. MERIT SYSTEMS STUDIES.**

### ***a. Delegation and Decentralization: Personnel Management Simplification Efforts in the Federal Government***

This MSPB study of efforts by OPM and the 21 largest Government departments and agencies to delegate human resources decisions was carried out through a special survey. In addition, the Board surveyed over 3,500 people in the Federal personnel occupations and reviewed policy issuances for the study.

The study concluded that there was broad support for the increased decentralization and delegation of personnel authorities and evidence that the process was increasing effectiveness of personnel decisions. Agencies were particularly pleased with OPM's delegation of recruiting and examining authority, which agencies saw as providing a higher quality candidate in a shorter period of time than before. Most agencies, however, were not pursuing additional delegations of recruiting authority, nor were they planning additional on-campus recruiting for college graduates. Within agencies, additional delegations of authorities to line managers were being contemplated.

The study concluded that increased delegation and decentralization of Federal personnel decisions should be encouraged. In a world in which few "one size fits all" solutions are effective, maximum flexibility, with reasonable safeguards, is desirable. The study recommended that OPM put more emphasis on its own evaluation programs as well as urging agencies to perform more oversight to ensure continued adherence to merit principles.

### ***b. The Senior Executive Service: Views of Former Federal Executives***

This report presented the results of the largest survey ever conducted of former members of the SES. It began by examining the reasons they gave for leaving Government. Inadequate compensation was the most frequently cited reason. Job dissatisfaction also played an important role. More than 40 percent of the former executives reported that they left the Service, in part, because they did not enjoy the work any more and, in part, because their skills were not being used appropriately.

The report also presented the views of former executives regarding the operation of the SES. Seventy percent believed that the Government had not established an appropriate SES compensation system. In addition, more than 40 percent believed that nonmonetary statutory objectives central to the operation of the SES—those aimed at ensuring against improper political interference and arbitrary and capricious actions were also not being met. The survey revealed that substantial percentages of former senior executives held the skills and abilities of noncareer executives in low regard.

The report recommended that agencies undertake efforts to decrease the nonmonetary causes of SES dissatisfaction. Agencies should train their noncareer appointees in the history and constructive objectives of the SES. They should also create career plans that ensure that an executive's knowledge and skills are constantly utilized to the fullest extent possible in order to protect against executives abandoning their SES careers because the work is not interesting, enjoyable, or challenging enough.

### ***c. Federal Personnel Management Since Civil Service Reform: A Survey of Federal Personnel Officials***

Federal personnel specialists reported that many of the expectations for civil service improvements created by the Civil Service Reform Act of 1978 had not yet been realized. This report was based on a 1988 Board survey of 3,500 Federal personnel specialists.

The survey covered such topics as prohibited personnel practices, delegations of authority, performance management programs, recruitment and selection, and various activities of OPM. Although there were some positive findings, the survey respondents believed that further improvements were needed in most areas.

Among the notable positive findings was that fewer than one percent of respondents had observed employees being pressured to contribute to a political campaign or participate in political activity. On the other hand, job selection based on friendship, rather than merit, was observed by 43 percent of the respondents. Only 49 percent believed that protections were adequate for persons who attempted to expose prohibited personnel practices.

While 83 percent of the personnel specialists believed that delegations of authority from OPM to agencies led to improved personnel management, only 60 percent believed the same was true of delegations from agency personnel offices to line managers. Fewer than half believed OPM had been effective in monitoring agency personnel systems to detect abuses. More, however, rated OPM as effective in providing advice and assistance to agencies and in making efforts to simplify and deregulate personnel management.

Few of the respondents believed that the Federal performance management programs had improved productivity or increased organizational effectiveness. They were generally positive, however, about the results of the Federal Equal Opportunity Recruitment Program (FEORP), with 55 percent saying that it had caused their organization to identify and hire qualified women and minority applicants who would not have been recruited otherwise.

### ***d Why Are Employees Leaving the Federal Government? Results of an Exit Survey***

This report examined the reasons Federal employees leave Government service. It was based on an exit survey completed anonymously by nearly 2,800 full-time, permanent, white-collar employees who were in the process of leaving the Government. Over half (54 percent) of the survey respondents were satisfied with their Government jobs, and 61 percent had performance ratings above fully successful. Of all the respondents, less than one-fourth indicated that management had made an effort to keep them from leaving.

For those respondents who resigned, 28 percent cited compensation and advancement reasons as the single most important reason for leaving. The importance of compensation was confirmed by the finding that respondents who resigned to work elsewhere expected to increase their average salary by 26 percent. Organizational and management reasons (e.g., morale, red tape, stress, unfair treatment) and work-related reasons (e.g., poor use of skills, meaningless work) were important secondary reasons for leaving. These reasons, taken together, accounted for 32 percent of the reasons for leaving. Unlike pay, many of these reasons are ones that can be addressed directly by Federal managers.

Retirees left because of concerns about changes to the retirement system (20 percent) and desires to pursue nonwork interests (23 percent). Compensation was not as major a factor for retirees (11 percent), but organizational and management reasons (25 percent), as a group, appeared prominently among the reasons for retiring.

***e. Working for America: A Federal Employee Survey***

This report reflected the attitudes and perceptions of a large random sample (nearly 16,000) of Federal employees who completed MSPB's Merit Principles Survey. The results covered a variety of topics.

For example, some 70 percent of the respondents were satisfied with their jobs and 88 percent found their work meaningful. Nevertheless, only 49 percent said they would recommend working for the Government.

More than 40 percent of the respondents indicated that the quality of applicants for job vacancies (of all types and at all levels) had worsened in the last 4 years. At the same time, 56 percent of the employees leaving the work unit were considered "outstanding performers," while only 36 percent of the new hires were considered "outstanding."

Of the 55 percent of respondents who said they had not changed jobs in the last 3 years, many (40 percent) indicated that the nature of their jobs had changed substantially. About one-third of these employees indicated that they were not receiving the training needed either to keep pace with changes or to learn how to use new technology.

Other questions in the survey asked about prohibited personnel practices, performance management, productivity, the Senior Executive Service, partisan political activity, and drug abuse.