

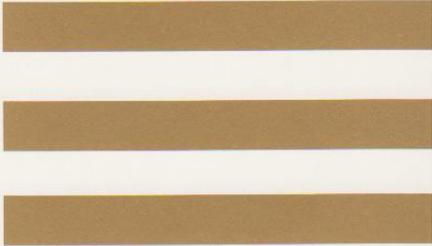


U.S. MERIT SYSTEMS
PROTECTION BOARD

ANNUAL REPORT FOR
FISCAL YEAR 1992



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





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

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

Sirs:

In accordance with 5 U.S.C. 1206, we are pleased to submit the Fourteenth Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during Fiscal Year 1992. It also incorporates statistical information that previously would have been included in the annual Study of Cases Decided by the Board. That study henceforth will be published every three years, and, in the interim years, the Annual Report will include expanded case processing statistical data.

During the fiscal year, the Board's administrative judges issued 8,371 decisions on appeals, stay requests, and addendum cases. The 3-member bipartisan Board issued 1,894 decisions on petitions for review (PFRs) of administrative judges' decisions and in other appellate cases. In spite of an increased workload, the Board continued to complete old cases, while at the same time processing newly-received cases. As a result, the Board reduced its pending PFR workload by 24 percent, from 769 at the beginning of Fiscal Year 1992 to 584 at the end of the fiscal year.

The Board also issued 16 decisions in cases arising under its original jurisdiction. These included Hatch Act cases, Special Counsel stay requests, requests to review regulations of the Office of Personnel Management (OPM), a proposed action against an administrative law judge, and addendum cases.

The Board's decisions continue to be upheld by the U.S. Court of Appeals for the Federal Circuit to a significant extent. Of the final Board decisions reviewed by the Court in Fiscal Year 1992, 93 percent were unchanged by the Court's decisions.

With respect to its statutory mission to conduct studies of the merit systems and to review the significant actions of OPM, the Board published four reports and issued a fifth report jointly with OPM during the fiscal year. Two of the Board's reports and the joint report with OPM dealt with workforce quality issues. The Board also completed four other studies, with reports released early in Fiscal Year 1993.

As a special feature, this Annual Report includes a review of the Board's alternative dispute resolution (ADR) initiatives. The Board has been a pioneer among Federal agencies in its use of ADR and has maintained a settlement rate of approximately 50 percent (of cases not dismissed) for the past five years.

Respectfully submitted,

Daniel R. Levinson
Chairman

Antonio C. Amador
Vice Chairman

Jessica L. Parks
Member

U.S. Merit Systems Protection Board

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U.S. MERIT SYSTEMS PROTECTION BOARD

VISION STATEMENT

To promote and protect, by deed and example, the Federal merit principles
in an environment of trust, respect and fairness.

Adopted 1992

U.S. Merit Systems Protection Board

BOARD MISSION AND JURISDICTION

MISSION

The U.S. Merit Systems Protection Board (MSPB) was established by the Civil Service Reform Act of 1978 (CSRA), Public Law No. 95-454, as a successor agency to the Civil Service Commission. It 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 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.

JURISDICTION

Appellate Jurisdiction

The agency actions that Federal employees may appeal to the Board 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 (RIF) actions, denials of restoration to duty or reemployment rights, and removals from the Senior Executive Service (SES) for failure to be recertified. Determinations by OPM in employment suitability and retirement matters are also appealable to the Board.

When an issue of prohibited discrimination is raised in connection with an appealable action, the Board has jurisdiction over both the appealable action and the discrimination issue. Such appeals are termed "mixed cases." In these cases, an appellant may ask the Equal Employment Opportunity Commission (EEOC) to review the final decision of the Board. If the EEOC disagrees with the Board's decision on the discrimination issue, the case is returned to the Board. The Board may concur with EEOC, affirm its previous decision, or affirm its previous decision with modifications. If the Board does not concur with the EEOC decision, the case is referred to the Special Panel for a final decision. (The Special Panel is composed of a Chairman appointed by the President, one member of the Board, and one EEOC commissioner.)

Under the Whistleblower Protection Act of 1989 (WPA), personnel actions that are not normally appealable to the Board may result in the right to a Board appeal under certain circumstances. Included are 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.

For the Board to have jurisdiction over an appeal, it must possess jurisdiction over both the action and the individual filing the appeal. The employees and others (e.g., applicants for employment, annuitants in retirement cases) who may appeal specific actions 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, non-preference-eligible supervisors and managers in the Postal Service gained Board appeal rights for adverse actions.

Under the 1990 Civil Service Due Process Amendments, approximately 100,000 additional employees in the excepted service gained the right to appeal both adverse actions and performance-based actions to the Board. To be eligible to appeal, these excepted service employees must have completed two years current continuous service in an Executive agency. Employees in certain entities, including the Postal Service, the Federal Bureau of Investigation, and the intelligence agencies, are excluded from the coverage of this law.

Original 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.

Judicial Review

With two exceptions, judicial review of final Board decisions in both appellate and original jurisdiction cases lies in the U.S. Court of Appeals for the Federal Circuit. Board decisions in "mixed cases" may be appealed to the appropriate U.S. district court. (A Special Panel decision also may be appealed to the appropriate U.S. district court.) If review of all issues but the discrimination issue is requested, however, a "mixed case" appellant may elect review by the Federal Circuit. In Hatch Act cases involving state or local government employees in federally-funded positions, judicial review lies first in the U.S.

district courts and then in the regional courts of appeals.

The Director of OPM may petition the Board for reconsideration of a final decision. The Director may also seek judicial review in the Federal Circuit of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.

Legislative Impact on Board Jurisdiction

The Congress expanded the Board's jurisdiction significantly between 1987 and 1990. The Postal Employee Appeal Rights Act of 1987, the Whistleblower Protection Act of 1989, and the Civil Service Due Process Amendments in 1990 either added new appealable actions or extended appeal rights to additional classes of employees. In addition, a provision of the Ethics Reform Act of 1989 added a new right for career members of the SES to appeal a removal from the SES for failure to be recertified.

In Fiscal Year 1992, the Congress enacted the Senior Executive Service Improvements Act, Public Law No. 102-175, which allows the Board to mitigate penalties in SES misconduct cases, as it can in adverse action cases involving non-SES employees. Although the Congress enacted no new legislation during the fiscal year that would expand the jurisdiction of the Board, it continued to consider such legislation. A number of bills that would impact the Board's caseload and its procedures were also considered.

Of particular interest was legislation introduced in both the House and Senate to reform the equal employment opportunity (EEO) complaint process for Federal employees. These bills (H.R. 3613 and S. 2801), which were not enacted, would have eliminated the current "mixed case" procedure by providing that employees bringing discrimination complaints in connection with appealable actions elect either MSPB or EEOC procedures (or, in appropriate cases, a negotiated grievance procedure). There would no longer have been authority for EEOC to review a final Board decision, and the Special Panel would have been eliminated.

The legislation also would have established procedures to ensure that those found to have intentionally discriminated were subject to sanctions. Under the bill, where intentional discrimination was found, a copy of the order or judgment would have been transmitted to the Special Counsel, who would have then been required to investigate the matter and bring a disciplinary action before the Board if there were reasonable grounds to believe a prohibited personnel practice had been committed.

In May of 1992, the House passed H.R. 4384, technical amendments to the Civil Service Due Process Amendments, which would have restored adverse action appeal rights to employees of the Veterans Health Administration (VHA). These employees were excluded from coverage when the Civil Service Due Process Amendments were enacted in 1990. H.R. 4384 would have provided rights only to those VHA employees who had appeal rights in effect on August 16, 1990, the day before the Civil Service Due Process Amendments were enacted, and it would generally have applied to personnel actions taking effect on or after the date of enactment. H.R. 4384 was referred to the Senate Government Affairs Committee, but no action was taken before the Senate adjourned.

Among other legislation considered by the Congress that would have affected the Board were Hatch Act reform bills and bills to extend the protections of the WPA, including extending coverage to employees of Government corporations and making the use of psychiatric exams as reprisal for whistleblowing a covered personnel action. The measure to extend Board appeal rights to civilian technicians in the National Guard was once again introduced in the House, but died in committee.

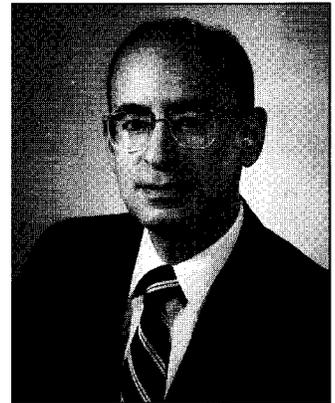
The Board anticipates that the Congress will continue to consider legislation affecting its jurisdiction and procedures. In addition, downsizing of the Federal Government and budget pressures on agencies, to the extent that they result in involuntary separations of employees from Federal service, are expected to result in an increased number of appeals to the Board.

BOARD MEMBERS

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, nonrenewable 7-year terms.

CHAIRMAN

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

ANTONIO C. AMADOR joined the Board as Vice Chairman on November 1, 1990, following his nomination by President Bush and confirmation by the Senate. At the time of his appointment, Mr. Amador was Deputy Director, Program Review Branch, Employment Development Department of the State of California. Previously, he served as Director of the California Youth Authority, as Chairman of the Youthful Offender Parole Board in California, and as a police officer in the Los Angeles Police Department. Mr. Amador received his law degree from the McGeorge School of Law, University of the Pacific.



MEMBER

JESSICA L. PARKS took the oath of office as a Member of the Board on May 18, 1990, following her 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. Previously, she was Agency Counsel for the Craven County Department of Social Services in New Bern, North Carolina. She has also been in private practice in Jacksonville, North Carolina and was an associate in the firm of Bowers and Sledge in New Bern.



BOARD ORGANIZATION

OFFICES OF THE BOARD

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.

OFFICE OF THE CHAIRMAN

The **Office of Equal Employment Opportunity** plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

The **Office of the General Counsel**, as legal counsel to the Board, 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 and prepares proposed decisions and orders for the Board in original jurisdiction cases and other assigned cases. The office manages legislative policy and congressional relations functions and conducts the Board's ethics program.

The **Office of the 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 of any deficiencies detected.

OFFICE OF THE EXECUTIVE DIRECTOR



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.

Lucretia F. Myers, Executive Director

The **Office of Regional Operations** manages the appellate functions of the 11 MSPB regional offices, which receive and process the initial appeals filed with the Board, and reviews the quality of initial decisions issued by the Board's administrative judges. The administrative judges have the primary function of adjudicating appeals and issuing fair, timely, and well-reasoned decisions.

The **Office of Appeals Counsel** assists the Board in adjudicating petitions for review from initial decisions issued by the administrative judges. The office analyzes the petitions, conducts legal research, and submits proposed opinions to the Board for final adjudication. It also processes interlocutory appeals of rulings made by administrative judges, 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 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** receives and processes cases filed with the Board, rules on certain procedural matters, and issues the Board's Opinions and Orders. The office also 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 annual oversight reviews of the Office of Personnel Management. Reports of these studies are directed to the President and the Congress.

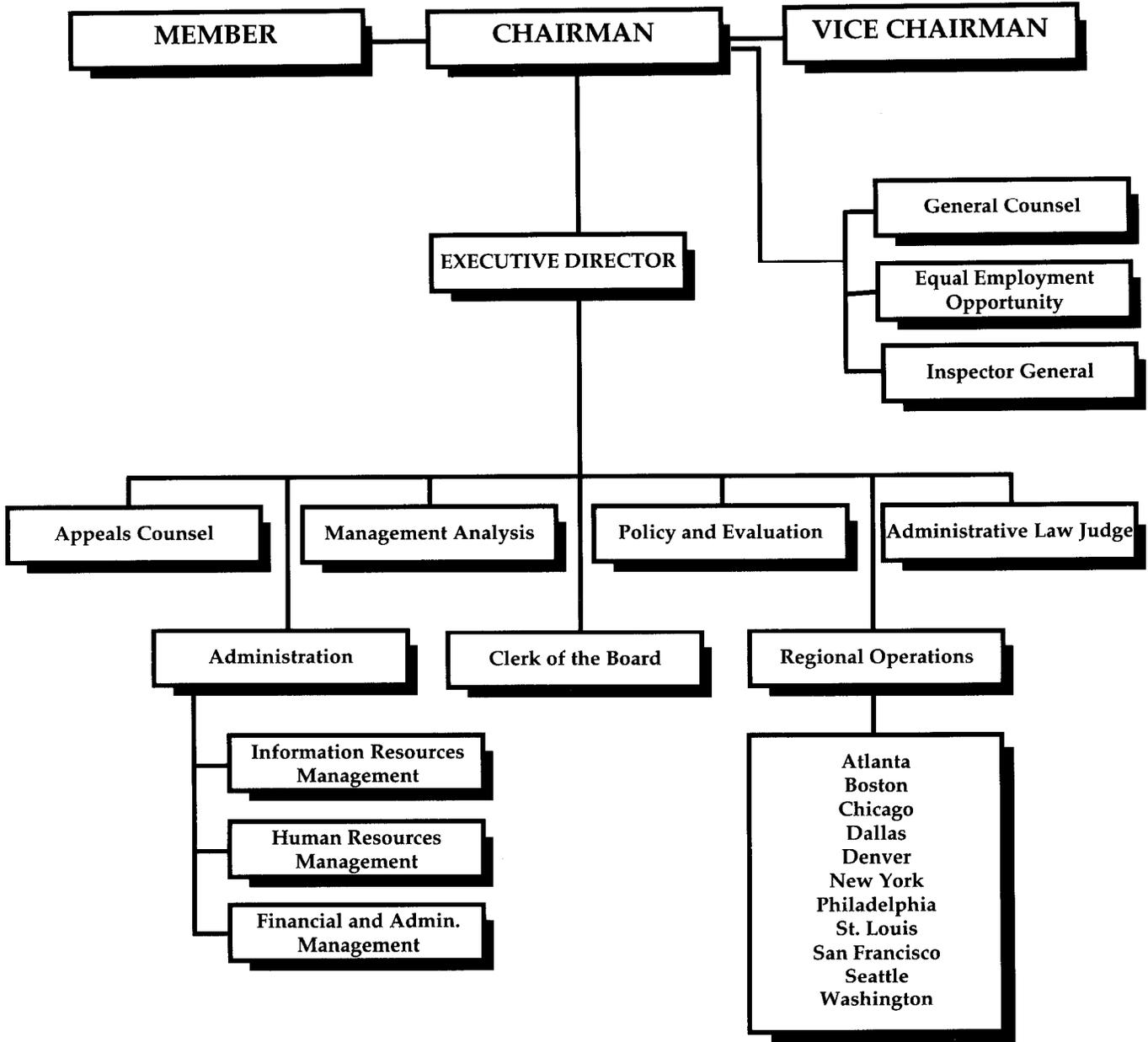
The **Office of Management Analysis** develops and coordinates internal management programs and projects, including administrative and program management reviews of Board offices. The office manages the Board's public affairs program and produces the agency's annual report to the President and the Congress, the triennial study of cases decided, and public information publications. The office also performs case data analysis and internal studies.



Michael W. Crum, Deputy Executive Director

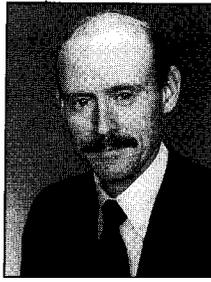
The **Office of Administration** manages the Board's administrative operations. It is made up of three divisions: The **Financial and Administrative Management Division** administers the budget, accounting, procurement, property management, physical security, and general services functions of the Board. The **Human Resources Management 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 and research responsibilities.

U.S. MERIT SYSTEMS PROTECTION BOARD

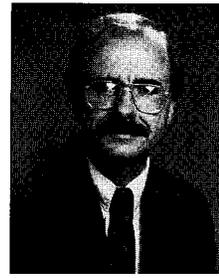




Thomas J. Lanphear
*Director, Office of
Regional Operations*



R. J. Payne
*Regional Director
Atlanta Office*



William Carroll
*Regional Director
Boston Office*



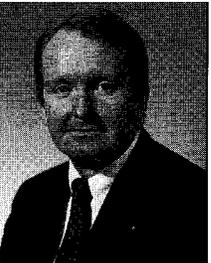
Martin W. Baumgaertner
*Regional Director
Chicago Office*



Paula A. Latshaw
*Regional Director
Dallas Office*



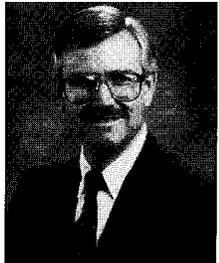
Gail E. Skaggs
*Regional Director
Denver Office*



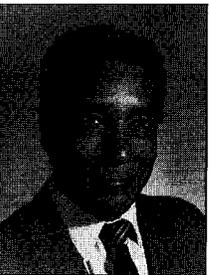
Sean P. Walsh
*Regional Director
New York Office*



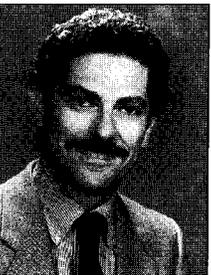
Lonnie Crawford
*Regional Director
Philadelphia Office*



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



Denis Marachi
*Regional Director
San Francisco Office*

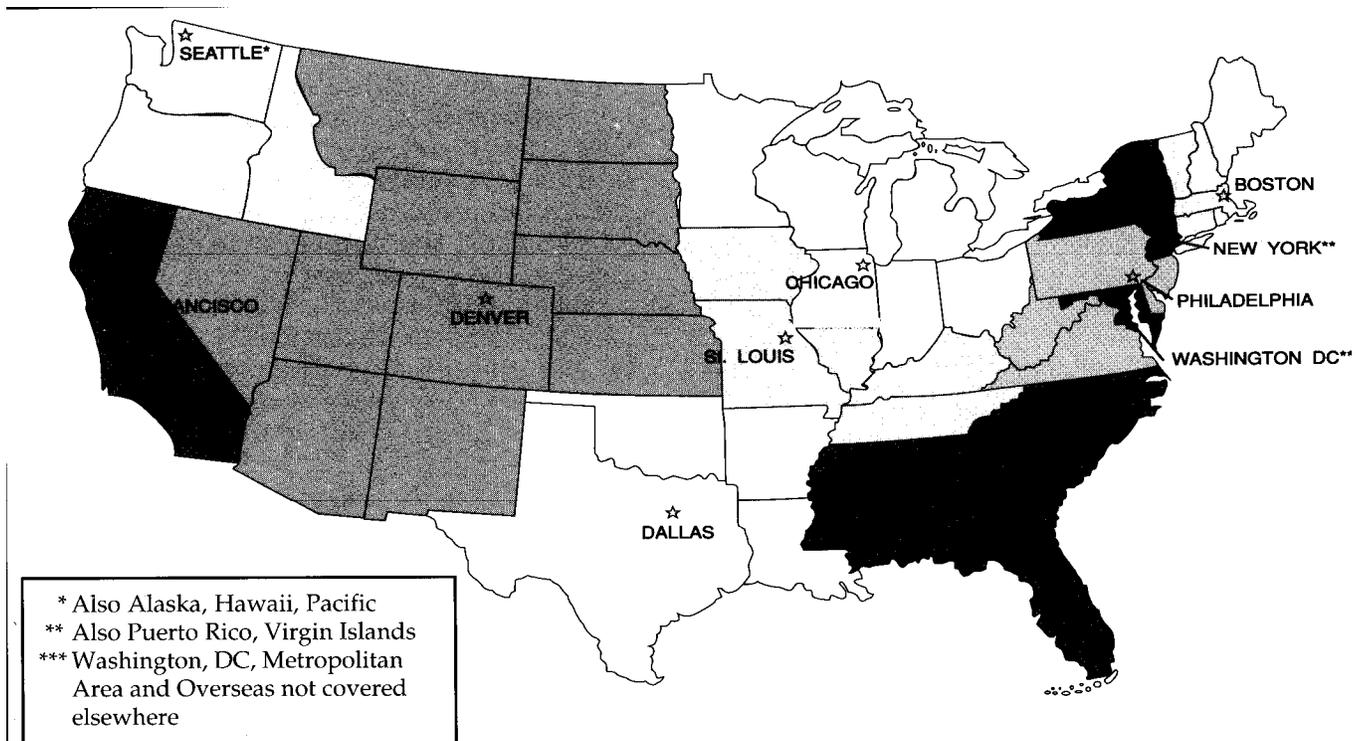


Carl Berkenwald
*Regional Director
Seattle Office*



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 (all locations north of Springfield), 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 -- Illinois (Springfield and all locations south), 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

SPECIAL FEATURE: MSPB AND ALTERNATIVE DISPUTE RESOLUTION

The Civil Service Reform Act of 1978 granted the Board authority to "provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board." The relevant legislative history stated that suitable forms of conciliation, mediation, arbitration, and other methods mutually agreeable to the parties could be used. It explained that this would give the Board the opportunity to experiment with and develop efficient and effective alternatives for resolving disputes concerning appealable matters.

One of the first efforts by the Board in exercising this legislative authority to engage in ADR was the introduction of the Appeals Arbitration Procedure (AAP) in March 1983, which subsequently evolved into the Voluntary Expedited Appeals Procedure (VEAP). Under VEAP, the parties would waive certain rights in exchange for receiving an expedited decision from the Board. The Board found that the VEAP was an extremely successful learning vehicle. It showed that there was a demand for a less formal adjudicatory system and that speedy adjudication could be achieved without sacrificing due process. However, the Board also recognized the attractiveness of using a greater variety of ADR techniques, which would encourage administrative judges to be innovative in settling cases. Accordingly, in 1987, the Board discontinued the VEAP in favor of a flexible and informal approach to ADR. The approach employed since that time allows administrative judges to use the techniques developed in the VEAP experiment to achieve settlement of appeals brought under the Board's formal appeals procedure.

The Board implemented its ADR program by undertaking an extensive and on-going training effort in ADR and settlement for its administrative judges. Administrative judges employ a variety of ADR techniques in handling cases, including prehearing conferences, mediation, settlement negotiations, conciliation, facilitation, and, on occasion, mini-trials. Under the Board's ADR procedures, absent some unusual circumstance, at least one prehearing conference for settlement and simplification of issues is required. The parties may agree to waive the prohibition against ex parte communications during settlement discussions. In addition, the Board requires that a representative of a party at a prehearing conference have authority to settle the case or have immediate access to someone who does.

Other than the required prehearing conference, the Board has not mandated any single or formal procedure for dispute resolution. Rather, it leaves to the discretion of its administrative judges the ADR techniques to be applied in any particular case. However, the Board has adopted a policy favoring settlement, and its procedures require administrative judges to focus the parties' attention on settlement at the very beginning of an appeal. The Board has found that its administrative judges' familiarity with and skill in using a number of ADR techniques have been key factors in the success of its program.

The use of ADR benefits both the parties and the Government. The Board's reliance on ADR procedures has generally resulted in faster, less expensive case processing. Cost savings are achieved principally in salaries, travel expenses, and court reporting fees. In addition to the savings in time and money achieved by consensual resolution of disputes, the parties and public may also benefit by avoiding what is often acrimonious litigation that may damage the relationship between the agency and its employees. The settlement process is generally a positive one and often results in a solution that satisfies both parties.

In addition, settlement may have the following advantages for the parties: It eliminates the element of surprise at the outcome of the case; it places the parties in control of the case; it can involve more options and address more than one administrative or judicial appeal; it can obtain a better resolution for both parties than a decision from the administrative judge, who is limited to finding in favor of one party on the matter before the Board; and it can prevent the anxiety of proceeding with a hearing. Finally, because the settlement process is voluntary, the parties surrender no rights if an agreement is not reached. The case then proceeds to adjudication.

With the use of ADR techniques, the Board's rate of settlement has increased. In Fiscal Year 1984, the first year for which settlement statistics are available, the settlement rate was six percent of cases that were not dismissed. The following year, the rate increased to 18 percent. By Fiscal Year 1988, the rate had risen to 48 percent, and it has held steady at around 50 percent since that time. The success of the Board's settlement program is a major reason why it has been able to manage its caseload efficiently in the face of expanding jurisdiction and without substantial increases in appropriations.

The Board's settlement program is also consistent with the civil justice reform proposals released by the Council on Competitiveness in August 1991 and the subsequent Executive Order 12778, "Civil Justice Reform," issued by President Bush on October 23, 1991. The executive order applied many of the reform proposals advanced by the Council to Federal agencies and, among other things, called on agencies that adjudicate administrative claims to engage in ADR. Because of its longstanding commitment to ADR, the Board had already implemented many of the recommendations contained in the Council's proposals and the President's Executive Order by the time they were issued. Furthermore, the Board's experience with its ADR program showed that the recommendations could yield the positive results anticipated by the President and the Council.

KINDS OF CASES AND HIGHLIGHTS OF CASES DECIDED IN FY 1992

KINDS OF CASES

Virtually all initial appellate jurisdiction cases are adjudicated by administrative judges in the Board's regional offices. Under a new pilot program, however, a small number of appeals and related cases are assigned to headquarters attorneys, who act as administrative judges and issue initial decisions in these cases. In addition, certain appeals may be assigned to the Office of the Chief Administrative Law Judge for issuance of initial decisions. The kinds of cases in which the Board's administrative judges issue initial decisions or orders are:

- *Appeal (or Initial Appeal)* - A request by an appellant that the Board review an agency action.
- *Stay Request* - A request that the Board order a stay of an agency action (authorized only where the appellant alleges that the action was or is to be taken because of whistleblowing).
- *Motion for Attorney Fees* - A request by an appellant who prevails in an appeal that the Board order the agency to pay the appellant's attorney fees.
- *Petition for Enforcement* - A request by a party to an appeal that the Board enforce its final decision.
- *Remand* - A case returned by the Board to an administrative judge, after an initial decision on an appeal has been issued, for additional processing and issuance of a new initial decision.

Attorney fee cases, petitions for enforcement, and remands, as a group, are termed "addendum cases" by the Board.

Approximately 22 percent of initial appeals decided result in the filing of a petition for review at Board headquarters. Initial decisions in addendum cases and orders issued on stay requests are also subject to review by the Board. The kinds of appellate cases in which the Board issues final decisions or orders are:

- *Petition for Review* - A request by a party that the Board review an initial decision of an administrative judge. A petition for review may be filed with respect to an initial decision on an appeal or in an addendum case.
- *Interlocutory Appeal of Stay Order* - A request by a party, certified to the Board by an administrative judge, that the Board review the administrative judge's order ruling on a stay request.
- *Reopening on the Board's Own Motion* - A case that the Board reopens on its own motion, to reconsider either an initial decision of an administrative judge or a final Board decision.
- *OPM Request for Reconsideration* - A request by the Director of OPM that the Board reconsider a final decision.
- *Court Remand* - A case returned to the Board by a court, after an appellant or the Director of OPM has sought judicial review of a final Board decision, for issuance of a new decision. Also, a case returned by a court where the Board has requested remand.
- *EEOC Non-concurrence* - A mixed case returned to the Board by the EEOC, after an appellant has sought EEOC review of a Board decision, in which the EEOC does not concur with the Board decision on the discrimination issue.

- *Compliance Referral* - A case referred to the Board by an administrative judge for enforcement of a final Board decision, upon the administrative judge's finding that a party is not in compliance.

The Board also has authority to review an arbitrator's award when the subject of the grievance is an action appealable to the Board and the grievant raises a discrimination issue in connection with the action. Petitions to review an arbitrator's award are filed at Board headquarters, and decisions are issued by the Board. Attorney fee requests and petitions for enforcement related to Board decisions in arbitration cases are referred to a headquarters or regional office for issuance of an initial decision, which is then subject to a petition for review by the Board.

The Board issues final decisions in initial cases that arise under its original jurisdiction—Special Counsel complaints, Special Counsel stay requests, proposed actions against administrative law judges, and requests to review OPM regulations. With respect to attorney fee requests and petitions for enforcement related to Board decisions in Special Counsel and administrative law judge cases, an initial decision is issued by the Chief Administrative Law Judge, which is then subject to a petition for review by the Board. Other kinds of cases that may arise from Board decisions in original jurisdiction cases include OPM requests for reconsideration, court remands, and compliance referrals.

In one kind of original jurisdiction case, the law provides that there is no decision by the Board (or any of the Board's judges). This is the SES performance-based removal case, in which an informal hearing is held by the Chief Administrative Law Judge, but there is no action by the Board.

HIGHLIGHTS OF CASES DECIDED IN FY 1992

Appellate Jurisdiction - Initial Decisions and Orders

- *Number of Decisions Issued* - Administrative judges issued a total of 8,371 decisions in FY 1992. Of these, 7,294 were initial decisions on appeals and 980 were initial decisions in addendum cases. There were 97 orders ruling on stay requests—76 in whistleblower cases and 21 in non-whistleblower cases. (Stay requests are authorized in whistleblower cases only. Appellants, however, sometimes file stay requests in cases in which no whistleblower issues are involved.)
- *Processing Time* - The average processing time for initial appeals was 79 days, compared to 74 days in FY 1991. Of the initial appeals decided, 97 percent were decided within 120 days.
- *Disposition* - Of the initial appeals decided, 44 percent were dismissed, 28 percent were settled, and 28 percent were adjudicated on the merits. Of those adjudicated on the merits, 74 percent affirmed the agency action and 19 percent reversed it. In the remaining 7 percent, the penalty was mitigated, the action was modified, or there was another disposition.
- *Settlement Rate* - The rate of settlement of cases not dismissed was 50 percent. The settlement rate for adverse action cases was 65 percent; for performance cases, 67 percent; and for denials of within-grade increases, 74 percent.
- *Types of Actions Appealed* - Of the initial appeals decided, 50 percent were appeals of agency adverse actions, 8 percent were RIF appeals, and 3 percent were appeals of performance-based actions. Retirement cases (both CSRS and FERS) accounted for 19 percent of the total, and the remainder were based on other types of agency actions.
- *Whistleblower Appeals* - There were 579 whistleblower appeals and stay requests decided. Of this number, 221 were individual right of action (IRA) appeals in which the appellant was required to exhaust the procedures of the Office of Special Counsel, 282 were direct appeals to the Board that included an allegation of reprisal for whistleblowing, and 76 were requests to stay an action allegedly based on whistleblowing.

- *Mixed Cases* - Allegations of discrimination were raised in 2,073 of the initial appeals decided; however, the allegation was withdrawn in 1,296 of those appeals. The remaining 777 mixed case appeals resulted in a finding of no discrimination in 768 and a finding of discrimination in 9.

Appellate and Original Jurisdiction - Final Board Decisions and Orders

- *Number of Decisions Issued* - The 3-member Board issued a total of 1,910 decisions in FY 1992. Of these, 1,612 were decisions on petitions for review of initial decisions on appeals, 187 were decisions on petitions for review of initial decisions in addendum cases, 95 were decisions in other appellate jurisdiction cases, and 16 were decisions in original jurisdiction cases.
- *Processing Time* - The average processing time for petitions for review of initial decisions on appeals was 165 days, compared to 220 days in FY 1991. The Board processed 70 percent of these cases in 110 days or less, averaging 80 days.
- *Disposition* - Of the petitions for review of initial decisions on appeals, 9 percent were dismissed, 80 percent were denied, and 11 percent were granted. Of those granted, 23 percent affirmed the initial decision, 34 percent reversed it, and 34 percent remanded the case to the administrative judge. In the remaining 9 percent, the initial decision was modified or vacated, or the case was subject to another disposition.
- *Other Appellate Cases* - The Board issued 2 decisions in cases that it reopened on its own motion (excluding decisions on petitions for review where the Board denied the petition but simultaneously reopened the case), 3 on OPM requests for reconsideration, and 12 on court remands. The Board also issued 2 decisions in EEOC non-concurrence cases, 64 in compliance referrals, and 10 on petitions to review an arbitrator's award.
- *Original Jurisdiction Cases* - Of the 16 original jurisdiction case decisions, 5 were Hatch Act cases brought by the Special Counsel, 2 were Special Counsel stay requests, 1 was a proposed action against an administrative law judge, 4 were requests to review an OPM regulation, and 4 were attorney fee, enforcement, or other cases arising from Board decisions in original jurisdiction cases.

Judicial Review

- Of the 694 final Board decisions reviewed by the U.S. Court of Appeals for the Federal Circuit in FY 1992, 93 percent were left unchanged (case dismissed or Board decision affirmed). The Court affirmed the Board decision in 90 percent of the cases it adjudicated.

ADJUDICATION: APPELLATE JURISDICTION

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 agency 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.

Different time limits apply to appeals of actions allegedly based on whistleblowing, where the appellant has first filed a complaint with the Special Counsel. An appellant *must* file with the Special Counsel first if the complaint is based on an action that is not otherwise appealable to the Board and may file with the Board *only* after exhausting the procedures of the Office of Special Counsel. Appeals that reach the Board in this way are termed "individual right of action" or "IRA" appeals.

An IRA appeal may be filed with 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.

Where an appeal includes a whistleblower allegation and is based on an action that is otherwise appealable to the Board, the appellant may file directly with the Board or may first file a complaint with the Special Counsel. If the appellant chooses to file directly with the Board, the time limits for filing are the same as for all other direct appeals to the Board (20 or 25 days, depending on the kind of action). If the appellant chooses to file with the Special Counsel first, the time limits for filing with the Board are the same as for an IRA appeal. In either case, such an appeal is termed an "otherwise appealable action" or "OAA" appeal.

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 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.

With respect to mixed cases, if an appellant has first filed a discrimination complaint with the agency, the appellant may file an appeal with the Board within 20 days after receipt of the agency's decision. If the agency has not resolved the discrimination complaint within 120 days of its filing, the appellant may file an appeal with the Board at any time after the 120-day time limit expires. If an appellant elects to file a mixed case appeal with the Board without first filing a discrimination complaint with the agency, the appeal must be filed within 20 days after the effective date of the agency action.

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 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. Under certain circumstances, the appellant may have a right to a hearing on the issues of jurisdiction and timeliness.

Once jurisdiction and timeliness have been established, the appellant has a right to a hearing on the merits. During prehearing conferences, issues are defined and narrowed, stipulations to undisputed facts are obtained, and the possibility of settlement is 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, which generally are open to the public, are fully recorded, with copies of the record available to the parties. Once the record is closed, an initial decision is issued by the administrative judge.

Appeals involving classified national security information and appeals from MSPB employees are assigned to the Chief Administrative Law Judge at headquarters for adjudication. The Chief Administrative Law Judge hears these cases and issues an initial decision.

An 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.

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. 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, the agency must nevertheless restore the appellant to pay and benefits status. When an agency files a petition for review of an initial decision that provided interim relief to the appellant, the agency must furnish evidence that it has provided appropriate interim relief. If such evidence is not provided, the Board will dismiss the petition for review.

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. The Board's decision on a petition for review constitutes the final administrative action.

FISCAL YEAR 1992 ACTIVITIES -REGIONAL OFFICES

Regional office receipts of new cases in Fiscal Year 1992 remained at essentially the same level as in the previous fiscal year. This levelling off, however, followed several years of increases, including a 13 percent increase in receipts of initial appeals from Fiscal Year 1990 to Fiscal Year 1991.

If Fiscal Year 1992 is compared to Fiscal Year 1987, the year in which the significant expansions of Board jurisdiction began, regional office receipts of new cases increased by 17 percent. During that same period, the average number of cases per administrative judge, based on case receipts, increased from 105 to 139, an increase of almost one-third.

The number of initial decisions issued in Fiscal Year 1992-8,371—was virtually the same as in the previous fiscal year. Decisions on initial appeals declined, while decisions both in addendum cases and on stay requests increased. The increase in addendum case decisions was particularly notable-26 percent.



Fourth National Administrative Judges' Conference, San Diego, California, September 14-18, 1992

Some regional offices experienced significant increases in Fiscal Year 1992. The Seattle office, for example, adjudicated approximately twice the number of IRA appeals as in Fiscal Year 1991. In addition, a much higher percentage of these appeals were adjudicated on the merits, rather than being dismissed on various other grounds. Similarly, the Atlanta and Philadelphia offices experienced a significant increase in allegations of reprisal for whistleblowing.

The San Francisco office received a greater number of RIF appeals. Because of the large number of military facilities that are slated for closure in California, the office expects this trend to accelerate in Fiscal Year 1993. Continuing a trend noted in the previous fiscal year, the Boston office experienced a high percentage of Postal Service cases.

In order to manage its increased caseload and maintain the high quality of its adjudicatory process, the Board established eight new administrative judge positions in the regional offices and began to fill those positions in the spring of 1992. The Board also established nine temporary support positions in the regional offices.

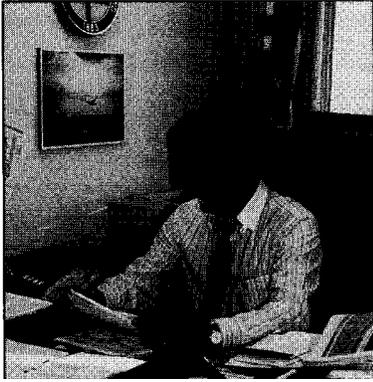
The Board continued to review the quality of initial decisions issued by its administrative judges. A quality review team made an on-site evaluation visit to the Chicago regional office. In addition, in-depth reviews of initial decisions issued in the Chicago, New York, and Philadelphia regional offices were conducted.

FISCAL YEAR 1992 ACTIVITIES -HEADQUARTERS

Decisions issued by the Board on petitions for review of initial decisions, both on appeals and in addendum cases, increased 6 percent in Fiscal Year 1992. Receipts of new petitions for review were up 3 percent.

In spite of an increased workload, the Board continued to complete old cases, while at the same time processing newly-received cases. As a result, the Board reduced its pending PFR workload by 24 percent, from 769 at the beginning of Fiscal Year 1992 to 584 at the end of the fiscal year.

In decisions issued during Fiscal Year 1992, the Board continued to develop its case law under the Whistleblower Protection Act, dealing primarily with questions of jurisdiction and issues related to interim relief. The Board also issued important precedential decisions dealing with questions of timeliness of filing, reasonable accommodation of a handicapping condition, and the award of attorney fees where the parties have entered into a contingency fee agreement.



Robert E. Taylor, Clerk of the Board

Among the initial appeals decided by the Chief Administrative Law Judge was the first case arising from the non-recertification of a career member of the SES. The initial decision affirmed the action of the agency in removing the appellant from the SES and placing him in a GS-15 position on the grounds that his performance did not demonstrate the excellence required to meet the goals of the SES. (*Kampschorr v. National Transportation Safety Board*, DC-359C-92-0290-I-1, July 23, 1992.)

See Appendix A for statistical information on cases decided by the Board during Fiscal Year 1992.

See Appendix B for summaries of significant Board decisions on appeals issued during Fiscal Year 1992.

STEPS IN PROCESSING INITIAL APPEALS AND PETITIONS FOR REVIEW

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

ADJUDICATION: 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 also has 35 days to respond and is entitled to a hearing. These cases are assigned to the Board's Chief 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, while a request for extension of a stay must be acted on by the full Board.

In SES performance-based removal cases, the Chief 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.

Other cases included in the Board's original jurisdiction caseload include requests for attorney fees, petitions for enforcement, compliance referrals, court remands, and OPM requests for reconsideration arising out of Board decisions in original jurisdiction cases.

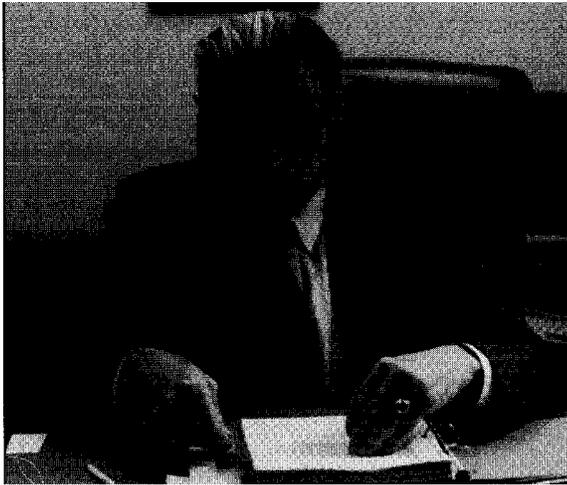
FISCAL YEAR 1992 ACTIVITIES

The Board issued a total of 16 decisions in original jurisdiction cases in Fiscal Year 1992. This number included five decisions in Hatch Act cases, compared to none the previous fiscal year. There was also a significant increase in the number of Hatch Act cases received, and 13 such cases were pending at the end of the fiscal year. Continuing the trend noted in earlier years, the majority of these cases involved state or local government employees in federally-funded positions.

In two of the Hatch Act cases decided, *Special Counsel v. Mahnke* and *Special Counsel v. Winkler*, the Board found that the respondents had violated the Hatch Act and that the circumstances of the cases warranted their removal. In *Special Counsel v. Narcisse*, the Board found that the respondent did not violate the Hatch Act and dismissed the complaint. In the two other cases, the Board adopted settlement agreements entered into by the Special Counsel and the respondents.

During the fiscal year, the Board decided one Special Counsel stay request and one request for an extension of that stay. The Special Counsel brought the initial stay request on behalf of an employee who had made a disclosure protected under the WPA, and the Chairman granted the stay request. The Special Counsel later requested an extension of the stay, which was granted by the Board.

Two other Board decisions concerned agency compliance with a Board order granting the Special Counsel's request for a stay of a personnel action in the previous fiscal year. One of these decisions found the agency in noncompliance with the Board's order and ordered compliance. The other found that the agency had brought itself into compliance and dismissed the case as moot.



Edward J. Reidy, Chief Administrative Law Judge

Only one administrative law judge case was decided in Fiscal Year 1992. The action was brought by an administrative law judge alleging constructive removal by his agency. The Board dismissed the case because the complainant did not show that the agency action constituted a removal over which the Board has jurisdiction.

The single administrative law judge case decided in Fiscal Year 1992 is in marked contrast to the previous fiscal year, when the Board decided 27 such cases. The vast majority of those were the result of agencies' proposed furloughs of over 1,000 administrative law judges to meet the requirements of a sequester that was anticipated to begin October 1, 1990. The decrease in the number of administrative law judge cases in the past fiscal year represents a return to a more normal level.

During the fiscal year, the Board decided four requests for review of an OPM regulation or an agency's implementation of an OPM regulation. The Board dismissed two of these cases for lack of jurisdiction. In one of these cases, the petitioner requested review of an internal Postal Service regulation, but did not assert that this regulation was an implementation of an OPM regulation. In the other case, the petitioner challenged an implementation of a regulation which occurred prior to the effective date of the Civil Service Reform Act. The Board dismissed the third case for failure to follow the Board's procedures in filing a request for review. Finally, the Board dismissed one case because the petitioner failed to allege that the regulation required an employee to commit a prohibited personnel practice.

One of the cases arising out of a final Board decision in an original jurisdiction case was a petition for attorney fees related to an agency's proposed furlough of its administrative law judges. Because the Board had dismissed the proposed furlough action after the Congress passed the Omnibus Budget Reconciliation Act, the Board denied the request for attorney fees, finding that the administrative law judges were not prevailing parties and the agency's proposed furlough action was substantially justified.

The final original jurisdiction decision issued in Fiscal Year 1992 resulted from an earlier Board decision on a Special Counsel disciplinary action complaint. In its decision on that complaint, the Board found that the respondent had engaged in a prohibited personnel practice and imposed a 30-day suspension. The respondent filed a motion for a stay of the Board's final order, pending the outcome of his appeal to the United States Court of Appeals for the Federal Circuit. Although the Board held that it had the authority to grant such a motion under appropriate circumstances, it did not do so in this case.

The 16 original jurisdiction decisions issued in Fiscal Year 1992 represents a substantial decrease from the 51 decisions issued during Fiscal Year 1991. This decrease, however, is primarily the result of the large number of administrative law judge furlough actions decided in Fiscal Year 1991.

See Appendix C for summaries of significant Board decisions issued in original jurisdiction cases during Fiscal Year 1992.

LITIGATION

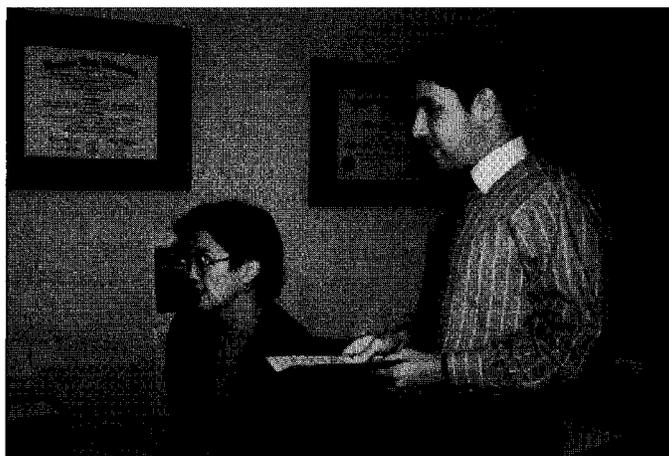
Fiscal Year 1992 marked the Board's third year litigating cases under a provision of the Whistleblower Protection Act that gave the Board an expanded role in defending its decisions before its primary reviewing court, the U.S. Court of Appeals for the Federal Circuit. Under the WPA, the Board defends its decisions in all Federal Circuit cases except those involving the merits of the underlying personnel action or a request for attorney fees. In Fiscal Year 1992, the Board defended 151 cases before the Federal Circuit, a 50 percent increase over the number of cases the Board defended in the previous fiscal year.

The Board also defends appeals of final decisions issued under its original jurisdiction authority. All of these cases are appealed to the Federal Circuit, except Hatch Act cases involving employees of state and local governments, which are heard by Federal district courts. Original jurisdiction cases typically involve complex issues such as the extent of the Special Counsel's jurisdiction and novel issues involving prohibited personnel practices and Hatch Act violations. Other active litigation includes cases in which OPM petitions for review of a Board decision in the Federal Circuit.

This fiscal year, Board attorneys defended the Board's decisions in three Special Counsel cases where the Board had disciplined management officials for taking retaliatory action against employees because of their protected whistleblowing disclosures. (See *Special Counsel v. Hathaway*, *Special Counsel v. Eidmann*, and *Special Counsel v. Marple*, summarized in the Board's FY 1991 Annual Report.) These cases raised complex issues of first impression under the WPA.

During Fiscal Year 1992, the Board monitored approximately 800 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 Department of Justice defends the employing agency against whom the appeal is filed, the Board monitors this litigation closely. Board activities in connection with monitored litigation include evaluating the case to determine if Board intervention is appropriate, responding to inquiries, and analyzing the court's decisions in these cases.

See Appendix D for summaries of the significant litigation activities of the Board during Fiscal Year 1992.



Martha B. Schneider, Assistant General Counsel and Eric Flores, Attorney, Office of General Counsel

MERIT SYSTEMS STUDIES AND REVIEWS OF OPM SIGNIFICANT ACTIONS

The CSRA assigned the Board, in addition to its adjudicatory functions, the responsibilities of reviewing the significant actions of OPM and conducting studies of the civil service and other merit systems. 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 latitude 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 materials.

**Charles Friedman, *Senior Research Analyst* and
Paul van Rijn, *Senior Research Psychologist*, Office
of Policy and Evaluation**

The Board's reports on the results of its studies are addressed to the President and the Congress, as required by law, and also are made available to 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 1992, the Board released four reports on important civil service issues and issued a fifth report jointly with OPM. The Board also completed work on two other merit systems studies and two reports on OPM significant actions. These latter reports were to be released early in Fiscal Year 1993.

The reports released in Fiscal Year 1992 were:

Balancing Work Responsibilities and Family Needs: The Federal Civil Service Response - A study of selected employee benefits, the roles of Federal agencies in fostering such benefits, and ways the Government can improve its performance as a "model employer" in the work and family benefits area. (Note: This report was summarized in the Board's FY 1991 Annual Report.)

To Meet the Needs of the Nations: Staffing the U.S. Civil Service and the Public Service of Canada - A study of the differences in merit staffing in the national civil services of the United States and Canada, including issues such as pay and labor-management policies and practices.

Federal First-Line Supervisors: How Good Are They? - A survey conducted to assess quality levels of current first-line supervisors in the Federal Government from their own perspectives and the perspectives of second-level supervisors and nonsupervisory employees.

Workforce Quality and Federal Procurement: An Assessment - A study of the Federal procurement workforce and the work it performs, an area of growing concern that is particularly important to the efficient operation of the Federal Government.

Federal Workforce Quality: Measurement and Improvement - A report to the Director of OPM and the Chairman of the MSPB, containing the findings and recommendations of the Advisory Committee on Federal Workforce Quality Assessment, a panel jointly sponsored by OPM and MSPB.

The reports to be released early in FY 1993 were:

A Question of Equity: Women and the Glass Ceiling in the Federal Government - A study examining career advancement in the Government and whether there are barriers that account for the underrepresentation of women in senior-level jobs.



Katherine Naff, *Research Analyst*, Office of Policy and Evaluation

Civil Service Evaluation: The Role of the U.S. Office of Personnel Management - A study of the role of OPM's personnel management evaluation (PME) program in providing oversight of personnel management in Federal agencies.

Federal Blue Collar Employees: A Workforce In Transition - A study of the people and systems that make up the Federal crafts and trades workforce, analyzing important issues from the perspectives of line managers, employees, personnel offices, and unions.

Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change - A study of OPM's accomplishments in promoting and overseeing research programs and demonstration projects under the authority granted by the CSRA.

The Board's studies have become influential in the field of public administration and are especially respected within the human resources management community. The reports are widely used and referenced by the Congress and Federal agencies, as well as by academicians and public interest groups, who influence public personnel policies and operations. Data from the Board's surveys are frequently requested by agencies to help with their management improvement efforts. Data are also requested by the General Accounting Office, the Congressional Budget Office, and the Office of Personnel Management.

Numerous requests were received for the joint MSPB-OPM report on measuring Federal workforce quality, including a request from the National Advisory Council on the Public Service (the successor to the Volcker Commission) for copies for its members. The Board's report on the quality of Federal first-line supervisors had a significant impact on the public policy debate over the possibly declining quality of the Federal workforce. Several agencies used findings from the Board's report for training their own supervisors. Other agencies adapted the survey questionnaire to assess the training needs of their first-line supervisors.

The Board's report on the quality of the Federal procurement workforce was praised by the General Services Administration, and the Office of Management and Budget (OMB) publicly endorsed the study and its findings, stating that the report constituted a significant effort that can help guide procurement improvement efforts throughout the Government. Not only did OMB disseminate the report to all agency procurement executives, but through its Office of Federal Procurement Policy, it joined MSPB in conducting a follow-up study to identify the specific measures needed to improve the procurement process.

Officials of the OPM Career Entry Group requested a briefing and discussion concerning the study of the Canadian Public Service, the first time OPM has so reacted to a Board report. Within Canada, the report was used to support legislative changes such as introduction of "career ladder" promotions into their civil service.

The report on balancing work responsibilities and family needs was cited in numerous professional periodicals and in the media and was discussed at some length in a Congressional hearing. The Board distributed over 4,000 copies of the report to individuals, organizations, and agencies in both the public and private sectors. A number of Federal agencies requested copies in bulk in order to distribute the report to key officials within their organizations.

There was considerable pre-publication interest among a broad group of individuals and organizations in the Board's report on women and the glass ceiling in the Federal Government. OPM showed pre-publication interest in the Board's study of Federal blue-collar employees, in such areas as blue-collar training needs and inclusion of blue-collar employees in OPM guidance and regulations. Also, the Board's recommendations concerning blue-collar pay reform were expected to be cited by OPM in support of their proposed strategy for blue-collar pay reform.

See Appendix E for summaries of the reports released or completed during Fiscal Year 1992.

OUTREACH ACTIVITIES

The Board members and headquarters and regional staff conducted or participated in approximately 240 outreach activities to major constituencies in Fiscal Year 1992, an average of almost one activity for each working day. These activities included addressing groups, participating in seminars and conferences, and conducting training programs designed to further an understanding of the Board's policies and procedures, developments in Board case law, and important issues in Federal personnel law. The Board's outreach program also encompasses its participation in interagency organizations, publications and published articles, and the International Visitors Program.



Board Member Parks and Supreme Court Justice David H. Souter at the spring meeting of the Federal Bar Association's National Council, on which Member Parks serves.

PERSONAL APPEARANCES, MEETINGS, AND INSTRUCTION

Of particular note was the presentation of mock MSPB hearings several times during the fiscal year. Developed by Board attorneys to illustrate dramatically the procedures followed in a hearing, the presentation of both the appellant's and the agency's cases, rulings by the administrative judge, and various legal issues, the mock hearings developed at headquarters were presented to the Federal Circuit Bar Association and, for the second consecutive year, at the Federal Dispute Resolution Conference. At the end of the fiscal year, the second mock hearing was videotaped at Board headquarters for use in future outreach activities. In addition, mock hearings were developed and presented at the annual outreach sessions for practitioners held by the Dallas, Denver, and Washington regional offices and at meetings of the Public Administration Forum in Chicago, San Francisco, and Washington.

During the fiscal year, the regional directors and administrative judges made over 120 outreach appearances before thousands of participants. In addition to comprehensive training sessions on Board practices and procedures, the Board's regional personnel addressed such topics as alternative dispute resolution, effective advocacy at MSPB hearings, sexual harassment, whistleblower protection, handicap discrimination, and RIF appeals.

The Philadelphia regional office cosponsored with the Federal Bar Association a symposium on MSPB law, sexual harassment, and the Civil Rights Act of 1991. The "Seminar on Recent Board Law" presented by the San Francisco regional office was approved for credit by the State Bar of California Committee on Minimum Continuing Legal Education. The St. Louis regional office was asked by the U.S. Army Civilian Appeals Review Authority to train its investigators in settlement techniques.

The Board members and headquarters attorneys participated in over 50 outreach activities to inform agencies, employee unions, private practitioners, and other interested parties about the Board, its authorities, jurisdiction, practices, and procedures. Topics addressed included recent developments in Board case law, cases decided under the WPA, mixed cases, and sexual harassment.

The Board participated in the annual Federal Circuit Judicial Conference by sponsoring a breakout session on Board law, moderated by the Board's General Counsel and Acting General Counsel. In August 1992, the Board again cosponsored the Federal Dispute Resolution Conference with EEOC, OPM, the Federal Labor Relations Authority (FLRA), the Federal Mediation and Conciliation Service (FMCS), and the Office of Special Counsel. The Board presented a mini-track at the conference that included the mock hearing.

Several attorneys made presentations on the WPA and Board case law under the Act at the Justice Department's Legal Education Institute (LEI) in Washington. Presentations were made at the Public Administration Forum on "Effective Advocacy at the Merit Systems Protection Board Hearings" and at the Overseas Education Association on "Practice Before the Merit Systems Protection Board."

The studies staff participated in over 60 conferences, seminars, and symposia to discuss human resources management issues and to report on the results and implications of the Board's studies and reviews of OPM significant actions. Among the topics addressed were sexual harassment, the glass ceiling, balancing work and family responsibilities, and various workforce quality issues.



In May of 1992, MSPB again participated in the celebration of Public Service Recognition Week, sharing a booth on the Mall with FLRA. The Chairman attended the opening ceremony and fielded questions and gave out information in the MSPB booth.

Chairman Daniel R. Levinson greets the public at the 1992 Public Service Recognition Week.

REPRESENTATION IN ORGANIZATIONS

In February 1992, Lucretia F. Myers, MSPB Executive Director, was appointed a member of the International Civil Service Commission by the United Nations General Assembly. The 15-member Commission, made up of individuals with substantial executive experience in public administration, regulates and coordinates the conditions of service of more than 50,000 U.N. employees serving at some 600 duty stations worldwide.

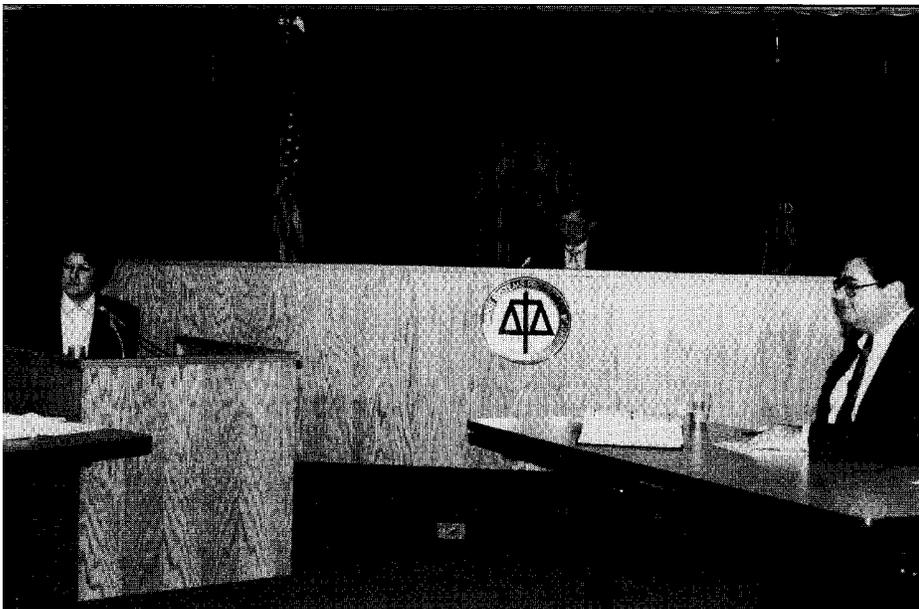
The Merit Systems Protection Board is an active participant in the Small Agency Council (SAC), a voluntary association of Federal agencies that employ fewer than 6,000 people. The Board's Deputy Executive Director serves on the SAC Executive Committee, providing executive-level direction, guidance, and coordination in representing the more than 90 participating small agencies. The Board is also represented in the Public Employees Roundtable, the President's Council on Management Improvement, and the Interagency Committee on Voluntarism. The Board's Inspector General represents the agency on the President's Executive Council on Integrity and Efficiency.

The Board's Director of Administration represents MSPB as a member of the Board of Directors of the National Capital Area CASU (Cooperative Administrative Support Units). This Board coordinates the efforts of agencies to combine their administrative resources to take advantage of economies of scale. In addition, several regional directors serve as Board members of CASUs in their cities.

Several regional directors, administrative judges, and other personnel in the regional offices serve on the Federal Executive Board (FEB) and FEB committees in their cities. During Fiscal Year 1992, the regional directors of the Board's St. Louis and Denver offices served as Chairman and Vice Chairman, respectively, of the FEB in those cities. Regional directors and administrative judges also participated in various programs, including the Federal Women's Program and the Fiscal Year 1992 American Society for Public Administration Awards Program.

PUBLICATIONS AND ARTICLES

In spring 1992, the Board issued its annual report on case decisions, which provided detailed statistical information on the decisions issued by the Board and its administrative judges in Fiscal Year 1991. (Note: Henceforth, this study will be published every third year.) 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.



MSPB Mock Hearing

The report on case decisions also provided information on appeals involving such special interest issues as whistleblowing, sexual harassment, agency drug testing, AIDS, and accommodation of employees handicapped by drug and/or alcohol abuse. The report 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.

During the fiscal year, the Chairman published an article, "Quayle Law Reforms and the MSPB," in *The Federal Circuit Bar Journal* (Fall 1991) and completed an article on the impact of the Federal Circuit on Board law for publication in the law review of George Mason University. Board Member Parks published an article, "Creative Settlement Strategies," in *The Army Lawyer* (September 1992). A senior attorney authored a law review article, "An Overview of the Whistleblower Protection Act of 1989," which was published in the Spring 1992 issue of *The Federal Circuit Bar Journal*. Board staff, who are regular contributors to this journal, prepared quarterly summaries of significant Federal Circuit decisions for publication in the journal.

Members of the studies staff published nine articles in professional journals, including *The Federal Circuit Bar Journal*, *The Public Manager*, and various publications of organizations in the public administration and human resources management fields. The articles covered a range of subjects, including the Board reports on workforce quality assessment, quality of first-line supervisors, work and family benefit programs, and the glass ceiling.

INTERNATIONAL VISITORS PROGRAM

The Board's international visitors program is conducted at Board headquarters by the Board members and senior staff. The program is responsive to requests from foreign visitors who wish to learn about merit system principles and the Board's practices and procedures. During Fiscal Year 1992, the Board and headquarters staff made presentations to approximately 45 visitors from a number of countries, including Taiwan, Bangladesh, the Netherlands, and Japan. The Board also arranged for visitors to meet with Board regional office staff.

The visitors included governors, lieutenant governors, heads of agencies, inspectors general, staff directors, and attorneys. Many of these individuals visited the Board during a time when their countries were in the process of developing or revising an appeals system. The visitors expressed particular interest in the type of issues that the Board addresses in its decisions and the adjudication of appeals by the Board's regional offices.

ADMINISTRATION, FINANCE, AND HUMAN RESOURCES

ADMINISTRATION

During Fiscal Year 1992, the Board continued to enhance management efficiency and effectiveness through its focus on management improvement objectives. The four major improvement objectives 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.

During the fiscal year, the Board conducted Administrative Program and Management Reviews, in accordance with the requirements of OMB Circular No. A-123, in the Atlanta and St. Louis regional offices and in the offices of the Chairman, Appeals Counsel, and Clerk of the Board at headquarters. These reviews, conducted on a 5-year cycle, cover both administrative management of the office plus program management if the office has delegated responsibility for a program. A review was conducted during the fiscal year of headquarters controls for handling classified information, and a followup evaluation of the Board's use of automated legal research systems was performed to review improvements made in response to the Fiscal Year 1990 review.



Darnell Mallory, *Office Automation Assistant*, Robert W. Lawshe, *Director*, Richard A. Dorr, *Chief, Support Services*, and Rachel T. Campbell, *Budget Analyst - Financial and Administrative Management Division*

The Inspector General audited the Board's travel program, time and attendance program, Diner's Club program, and imprest funds at headquarters and in five regional offices. During the fiscal year, the Inspector General responded to 12 hotline complaints, all from individuals outside the agency.

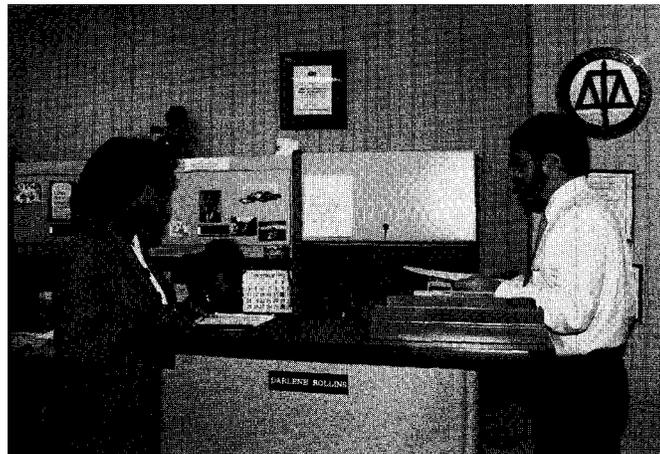
Significant enhancements were made to the automated Case Management System (CMS) to provide automated generation of case documents such as acknowledgement orders, address sheets, certificates of service, hearing orders, and case file indexes. Other enhancements included improved documentation and on-line HELP, as well as new reports generated by the system. The minicomputer center was enhanced to provide unattended backup of the computer center and the local area network.

The Board continued to upgrade its personal computer capabilities by installing upgraded word processing software and by introducing more advanced software to assist administrative staff in performing financial management activities. The agency held computer security training for all employees and implemented a virus detection program that enabled the agency to avoid computer virus infections.

Also during this fiscal year, headquarters attorneys began using a local area network that links the attorneys' personal computers to each other and to a fileserver. Because the network also connects them with the central computer, each attorney now has access to the automated case management system and to electronic mail. In addition to allowing for the revision of documents more easily and maintaining final recommendations in a central location, the system expedites researching legislative histories of statutes and the provisions of Federal regulations. The system also allows for the central storage, maintenance, and ready access to a "glossary" or compilation of frequently-cited Board and court decisions.

A number of administrative initiatives were undertaken that resulted in improved operating efficiency and cost savings. Additional personnel in the regional offices were accommodated through remodelling and addition of office space. The telecommunications network was expanded to provide access to the National Finance Center over FTS 2000 and also to accommodate the additional regional office staff. The property system was automated with barcode labels applied to all accountable property. Two pilot projects, use of ATM cards for travel advances and third party drafts for small purchases, were implemented to reduce administrative costs. Finally, Prompt Payment Act interest charges were reduced dramatically.

Darlene Rollins, *Student Aide*, Teresa Jefferson, *Computer Programmer/Analyst*, William McDermott, *Chief, User Services & Operations* - Information Resources Management Division



FINANCIAL STATEMENT

The income and expenses of the Merit Systems Protection Board for Fiscal Year 1992 (October 1, 1991, through September 30, 1992) are shown below. All figures are in thousands of dollars.

INCOME	
Appropriations	23,320
Reimbursements -	1,850
Civil Service Retirement & Disability Trust Fund	
Reimbursements - Other	60
(interagency agreement and reimbursable detail)	
Total income	25,230
EXPENSES	
Direct obligations:	
Personnel compensation	
Full-time permanent	13,780
Other than full-time permanent	1,163
Other personnel compensation	302
Subtotal, personnel compensation	15,245
Personnel benefits	2,327
Benefits - former employees	5
Travel of persons	524
Transportation of things	63
Rental payment to GSA	2,026
Rental payments to others	49
Communications, utilities, and miscellaneous charges	548
Printing and reproduction	128
Other services	1,211
Supplies and materials	291
Equipment	826
Subtotal, direct obligations	23,243
Reimbursable obligations	1,910
Total obligations	25,153
BALANCE	77

HUMAN RESOURCES

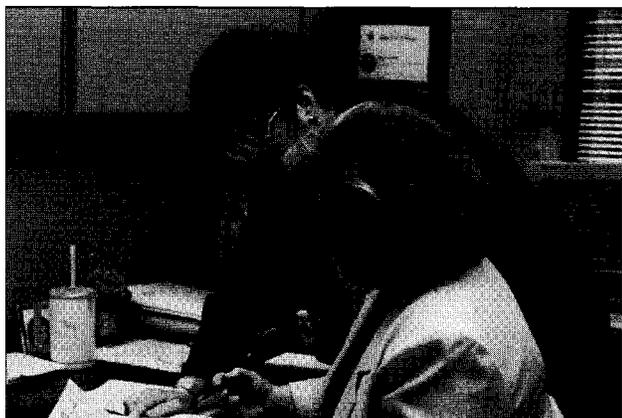
The full-time equivalent (FTE) employment for the Board in Fiscal Year 1992 was 314. The Board established eight new administrative judge positions and nine temporary support positions in the regional offices and filled them during the fiscal year. In the previous fiscal year, the FTE was 302.

In addition to establishing the new administrative judge positions, the Board launched a pilot project in which certain attorneys at headquarters acted as administrative judges for some cases. This cross-training permitted the headquarters attorneys to develop skills in conducting hearings and writing initial decisions and also served to reduce the regional office workload slightly.

The Board's Fourth Annual Administrative Judges' Conference was held in San Diego in September 1992. The purpose of the conference was to promote consistency in the application of Board processes and to provide an opportunity for the administrative judges to discuss difficult legal issues and approaches for addressing those issues. Administrative judges from the regional offices participated in training sessions with staff from the Washington headquarters and heard presentations from speakers on such subjects as sexual harassment, civil rights, the Hatch Act, retirement issues, stress management for judges, practicing before the Board, and civil justice reform.

A number of the Board's administrative judges completed courses at the National Judicial College (NJC) and Harvard Law School. In addition, one administrative judge continued to serve as a faculty member of the NJC. Administrative judges from the San Francisco Regional Office attended the National Association of Women Judges 1991 Conference and the Women in Law Conference.

The representation of women and minorities in the Board's workforce 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 shows the percentages of female and minority attorneys, as well as the percentage representation of these groups in the Board's workforce as a whole.



Mary Lincoln, *Personnel Management Specialist* and Joyce Pieritz, *Personnel Management Specialist - Human Resources Management Division*

MSPB EMPLOYMENT BY MALE/ FEMALE AND MINORITY/ MAJORITY

<u>Attorneys</u>			<u>MSPB (Entire Agency)</u>		
	<u>No. in Attorney Workforce</u>	<u>Percent of Attorney Workforce</u>		<u>No. in Workforce</u>	<u>Percent of Workforce</u>
Male	83	57.2	Male	124	40.4
Female	<u>62</u>	<u>42.8</u>	Female	<u>183</u>	<u>59.6</u>
Total	145	100.0	Total	307	100.0
Minority *	28	19.3	Minority *	101	32.9
Majority	<u>117</u>	<u>80.7</u>	Majority	206	<u>67.1</u>
Total	145	100.0	Total	307	100.0

* Excluding White/Female -- Data as of September 30, 1992

In January 1992, the Chairman presented the Theodore Roosevelt Award, the Board's highest honor, to Denis Marachi, Regional Director/Chief Administrative Judge of the San Francisco Regional Office. The award was established in 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.

At the annual awards ceremony, 30 other Board employees were honored with the Chairman's Awards for Excellence, and 18 employees received Community Service Awards. Over 200 employees who received Performance Awards, Quality Step Increases, Performance Bonuses, and Special Act or Service Awards during the previous fiscal year were also honored.

In Fiscal Year 1992, as in the previous fiscal year, Board employees were honored by the Combined Federal Campaign of the National Capital Area with The Winner's Circle Award. The award, established in 1991, recognizes agencies that achieve a new record high in the dollar amount of contributions. Board employees were also recognized, for the second consecutive year, with the Honor Roll Award and Minute Man Flag presented by the Department of the Treasury for achievement in signing up new savers in the U.S. Savings Bonds campaign.



Eleventh Annual Honor Award Winners

Denis Marachi, *Chief Administrative Judge*, San Francisco Regional Office, Theodore Roosevelt Award recipient, January 15, 1992



APPENDIX A - CASE PROCESSING STATISTICS

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Types of Initial Appeals Decided in FY 1992

Disposition of Initial Appeals Decided in FY 1992

Dispositions of Initial Appeals Adjudicated on the Merits in FY 1992 Disposition of Initial Appeals Decided by Type of Case in FY 1992 Disposition of Initial Appeals Adjudicated by Type of Case in FY 1992 Initial Appeals Decided in FY 1992 by Selected Agencies

Case Processing Timeliness in FY 1992

Time to Process Initial Appeals by Case Type in FY 1992

Time to Process Initial Appeals by Disposition Type in FY 1992 Nine-Year Trend in Settlement Rates, FY 1984 - FY 1992

Settlement Rates by Type of Initial Appeal Decided in FY 1992

Dispositions of Whistleblower Initial Appeals and Stay Requests Decided, FY 1990 - FY 1992 Initial Appeals With Allegations of Discrimination Decided in FY 1992 Types of Discrimination Alleged in Initial Appeals Decided in FY 1992 Disposition of Requests for Attorney Fees Decided in FY 1992 Disposition of Compliance Requests Decided in FY 1992

Disposition of Remands Decided in FY 1992

Disposition of Remands Adjudicated in FY 1992

Total Board Cases Decided, FY 1992

Petitions for Review of Initial Appeals Decided in FY 1992

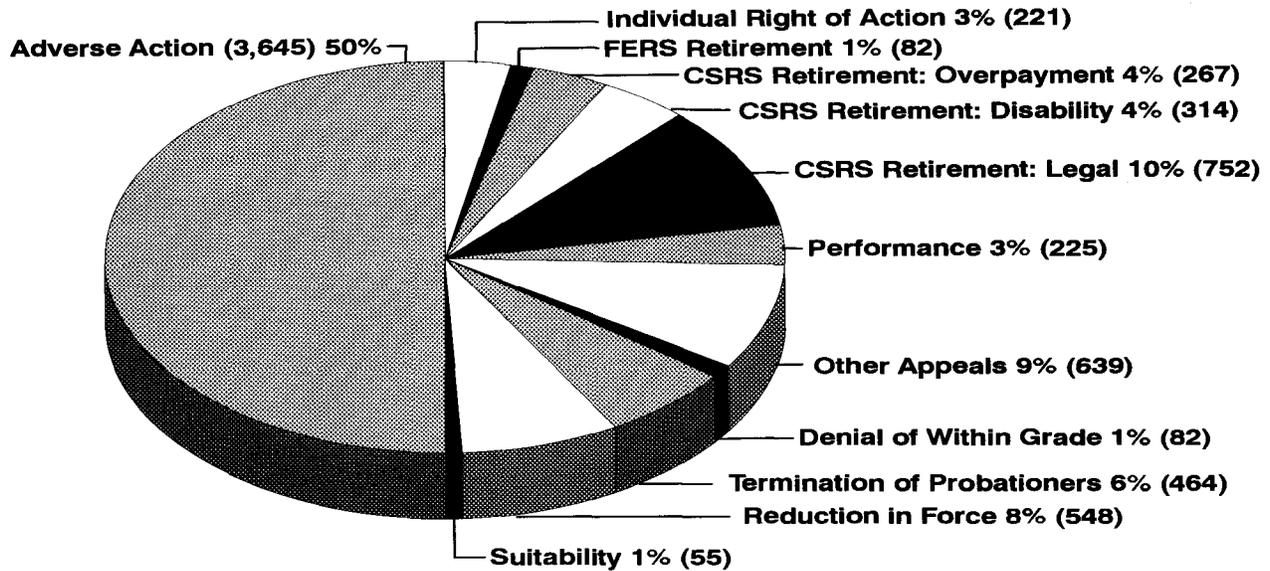
Disposition of Petitions for Review of Initial Appeals Granted in FY 1992

Dispositions of Whistleblower Petitions for Review of Initial Appeals and Stay Requests Decided in FY 1992

Petitions for Review of Initial Appeals with Allegations of Discrimination Decided in FY 1992 Dispositions of Petitions for Review of Requests for Attorney Fees, Compliance Requests, and Remands Decided in FY 1992

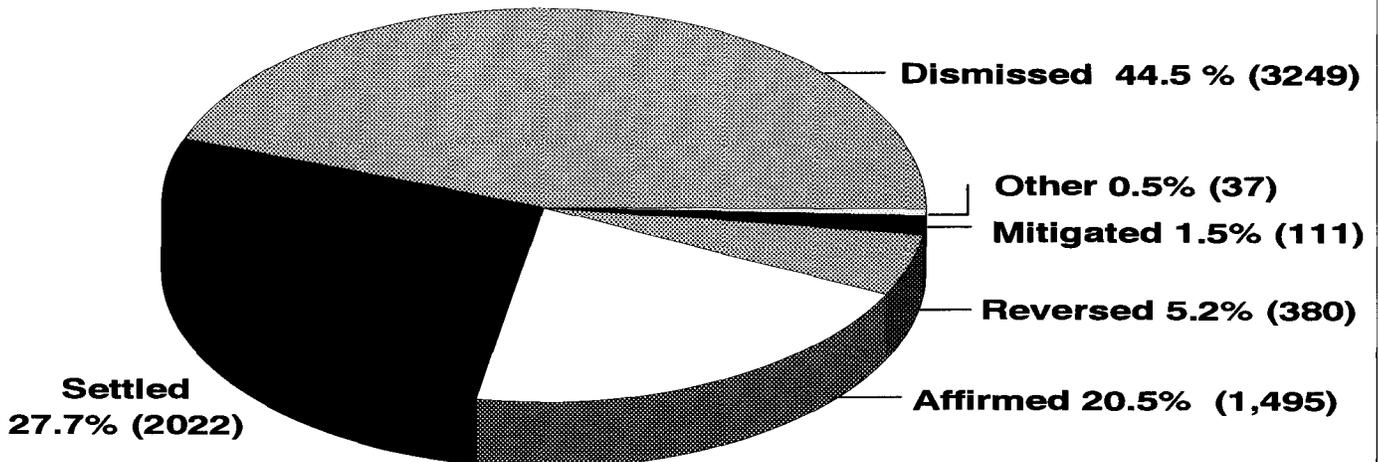
NOTE: In tables of "Dispositions" of initial appeals, whistleblower cases, attorney fee requests, compliance requests, and remand cases, the number of cases decided is first divided into cases "Dismissed" and "Not Dismissed." Cases "Settled" and "Adjudicated" are then expressed as percentages of cases "Not Dismissed." The term "Adjudicated" refers to cases that are adjudicated on the merits.

TYPES OF INITIAL APPEALS DECIDED IN FY 1992



Total Number of Initial Appeals: 7,294

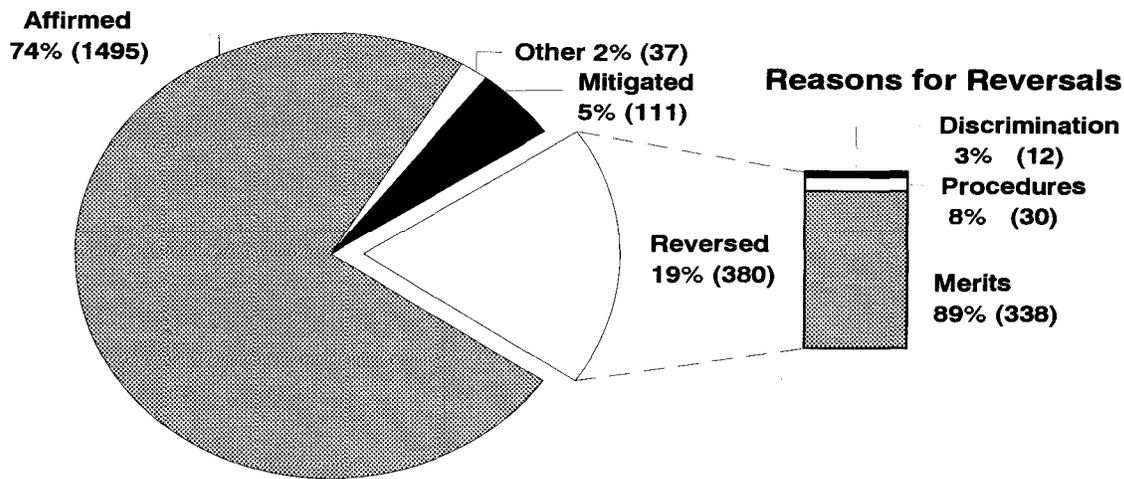
DISPOSITION OF INITIAL APPEALS DECIDED IN FY 1992



Total number of initial appeals: 7,294

Percentages do not total 100% because of rounding.

DISPOSITIONS OF INITIAL APPEALS ADJUDICATED ON THE MERITS IN FY 1992



Based on 2,023 adjudicated initial appeals.

DISPOSITION OF INITIAL APPEALS DECIDED BY TYPE OF CASE IN FY 1992

Type of Case	Decided		Dismissed		Not Dismissed		Settled		Adjudicated	
	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	3645	50%	1301	36%	2344	64%	1528	65%	816	35%
Termination of Probationers	464	6%	440	95%	24	5%	20	83%	4	17%
Reduction in Force	548	8%	248	45%	300	55%	90	30%	210	70%
Performance	225	3%	38	17%	187	83%	126	67%	61	33%
Denial of Within-Grade	82	1%	40	49%	42	51%	31	74%	11	26%
Suitability	55	1%	15	27%	40	73%	28	70%	12	30%
CSRS Retirement: Legal	752	10%	217	29%	535	71%	16	3%	519	97%
CSRS Retirement: Disability	314	4%	122	39%	192	61%	46	24%	146	76%
CSRS Retirement: Overpayment	267	4%	83	31%	184	69%	55	30%	129	70%
Individual Right of Action	221	3%	144	65%	77	35%	41	53%	36	47%
Other	721	10%	601	83%	120	17%	41	34%	79	66%
Total	7294	100%	3249	45%	4045	55%	2022	50%	2023	50%

DISPOSITION OF INITIAL APPEALS ADJUDICATED BY TYPE OF CASE IN FY 1992

Type of Case	Adjudicated		Affirmed		Reversed		Mitigated		Other	
	#	#	%	#	%	#	%	#	%	
Adverse Action by Agency	816	581	71%	139	17%	95	12%	1	0%	
Termination of Probationers	4	3	75%	1	25%	0	0%	0	0%	
Reduction in Force	210	200	95%	10	5%	0	0%	0	0%	
Performance	61	39	64%	22	36%	0	0%	0	0%	
Denial of Within-Grade	11	4	36%	6	55%	0	0%	1	9%	
Suitability	12	12	100%	0	0%	0	0%	0	0%	
CSRS Retirement: Legal	519	441	85%	64	12%	0	0%	14	3%	
CSRS Retirement: Disability	146	78	53%	62	42%	0	0%	6	4%	
CSRS Retirement: Overpayment	129	66	51%	44	34%	14	11%	5	4%	
Individual Right of Action	36	20	56%	6	17%	0	0%	10	28%	
Other	79	51	65%	26	33%	2	3%	0	0%	
Total	2023	1495	74%	380	19%	111	5%	37	2%	

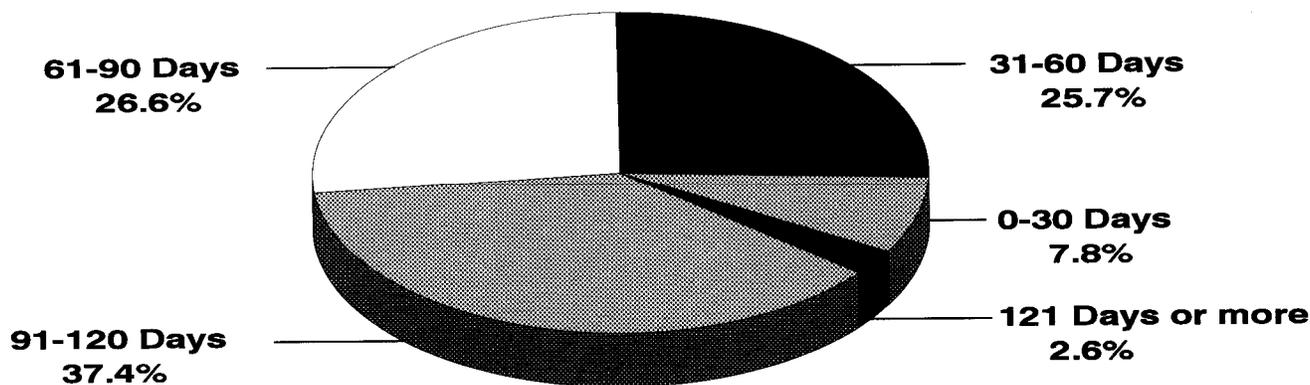
NOTE. Percentages may not add to 100 due to rounding.

INITIAL APPEALS DECIDED IN FY 1992 BY SELECTED AGENCIES

	Decided		Dismissed		Not Dismissed		Settled		Adjudicated		Affirmed		Reversed		Mitigated /Other	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Postal Service	1515		671	44%	844	56%	563	67%	281	33%	187	66%	51	18%	43	15%
OPM	1469		467	32%	1002	68%	135	14%	867	86%	634	73%	192	22%	41	5%
Navy	938		466	50%	472	50%	288	61%	184	39%	147	80%	25	14%	12	6%
Army	633		283	45%	350	55%	201	57%	149	43%	109	73%	34	23%	6	4%
VA	490		270	55%	220	45%	140	64%	80	36%	61	76%	12	15%	7	9%
Air Force	398		170	43%	228	57%	133	58%	95	42%	68	72%	17	18%	10	11%
Treasury	290		162	56%	128	44%	82	64%	46	36%	37	80%	7	15%	2	4%
Justice	273		162	59%	111	41%	64	58%	47	42%	35	74%	9	19%	3	6%
Defense	234		95	41%	139	59%	85	61%	54	39%	39	72%	9	17%	6	11%
TVA	160		74	46%	86	54%	16	19%	70	81%	69	99%	1	1%	0	0%
Agriculture	141		63	45%	78	55%	56	72%	22	28%	17	77%	2	9%	3	14%
Interior	128		58	45%	70	55%	52	74%	18	26%	16	89%	0	0%	2	11%
Transportation	125		56	45%	69	55%	38	55%	31	45%	15	48%	10	32%	6	19%
HHS	107		53	50%	54	50%	40	74%	14	26%	11	79%	3	21%	0	0%
GSA	63		37	59%	26	41%	17	65%	9	35%	6	67%	1	11%	2	22%
Labor	45		20	44%	25	56%	15	60%	10	40%	9	90%	0	0%	1	10%
Commerce	41		28	68%	13	32%	9	69%	4	31%	4	100%	0	0%	0	0%
HUD	32		17	53%	15	47%	9	60%	6	40%	6	100%	0	0%	0	0%
Smithsonian	26		15	58%	11	42%	10	91%	1	9%	1	100%	0	0%	0	0%
SBA	24		10	42%	14	58%	9	64%	5	36%	4	80%	1	20%	0	0%
FDIC	22		8	36%	14	64%	6	43%	8	57%	8	100%	0	0%	0	0%
EPA	17		10	59%	7	41%	5	71%	2	29%	2	100%	0	0%	0	0%
Energy	17		9	53%	8	47%	5	62%	3	38%	1	33%	1	33%	1	33%
GPO	16		6	38%	10	62%	8	80%	2	20%	1	50%	0	0%	1	50%
NASA	12		4	33%	8	67%	4	50%	4	50%	3	75%	1	25%	0	0%
EEOC	11		7	64%	4	36%	4	100%	0	0%	0	0%	0	0%	0	0%
FEMA	11		1	9%	10	91%	5	50%	5	50%	0	0%	3	60%	2	40%
Other	56		27	48%	29	52%	23	79%	6	21%	5	83%	1	17%	0	0%
Total	7294		3249		4045		2022		2023		1495		380		148	

NOTE: Percentages may not add to 100 due to rounding.

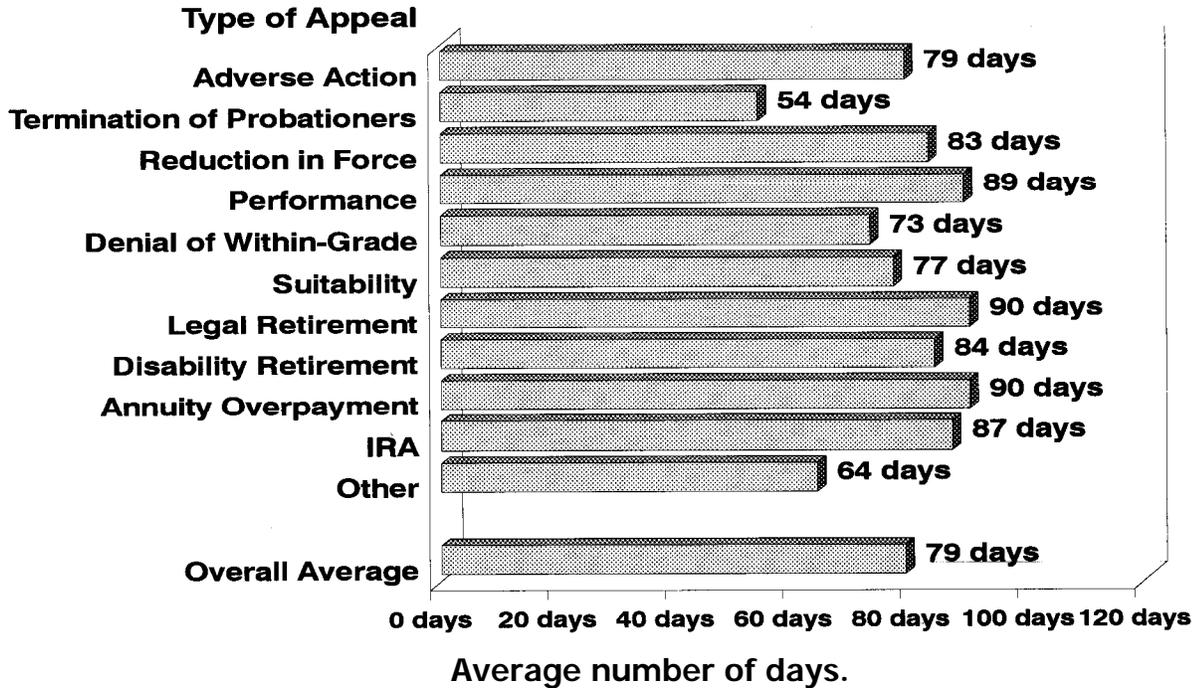
CASE PROCESSING TIMELINESS IN FY 1992



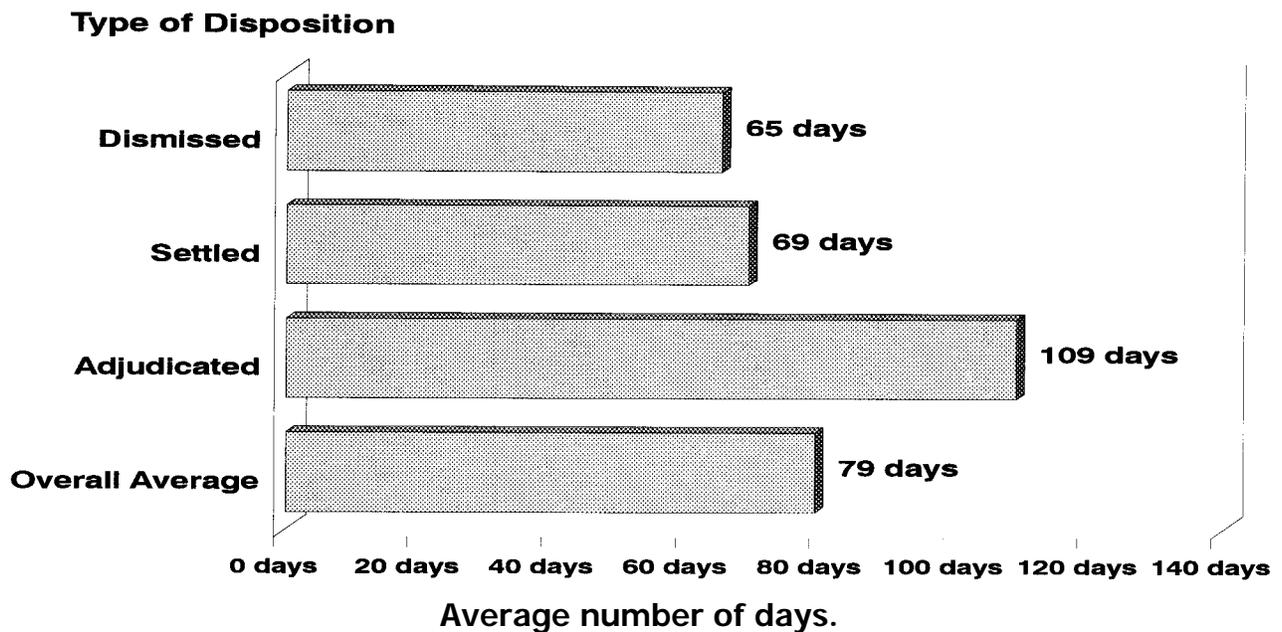
FY 1992

Initial Appeals (excluding requests for stays, attorney fee requests, compliance requests, and remands)

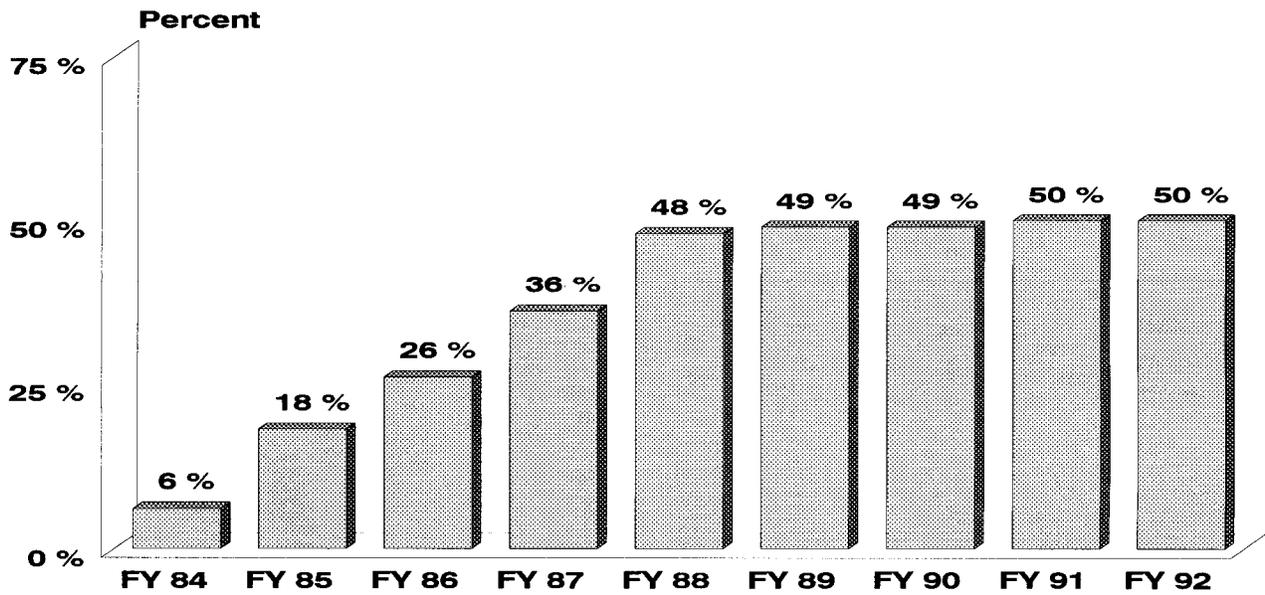
TIME TO PROCESS INITIAL APPEALS RV CASE TYPE TN FY 1992



TIME TO PROCESS INITIAL APPEALS BY DISPOSITION TYPE IN FY 1992

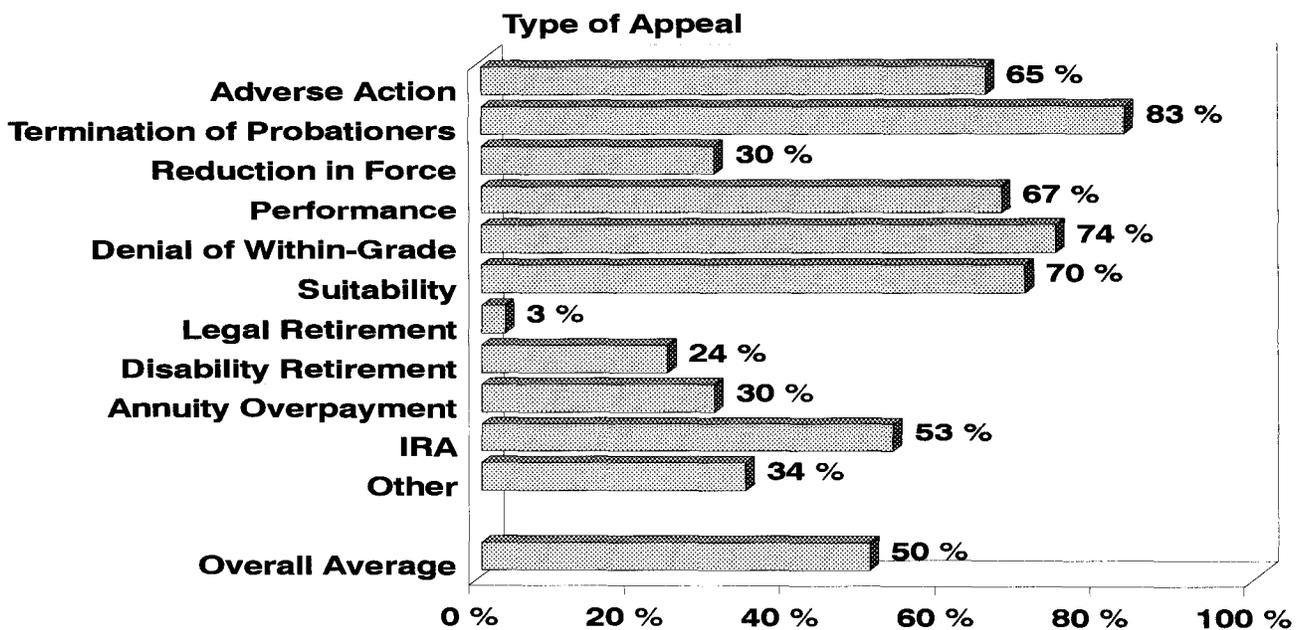


NINE-YEAR TREND IN SETTLEMENT RATES, FY 1984-FY 1992



Percentage of initial appeals not dismissed for lack of jurisdiction or timeliness

SETTLEMENT RATES BY TYPE OF INITIAL APPEAL DECIDED IN FY 1992



Percentage of initial appeals not dismissed for lack of jurisdiction or timeliness

DISPOSITIONS OF WHISTLEBLOWER INITIAL APPEALS AND STAY REQUESTS DECIDED, FY 1990-FY1992

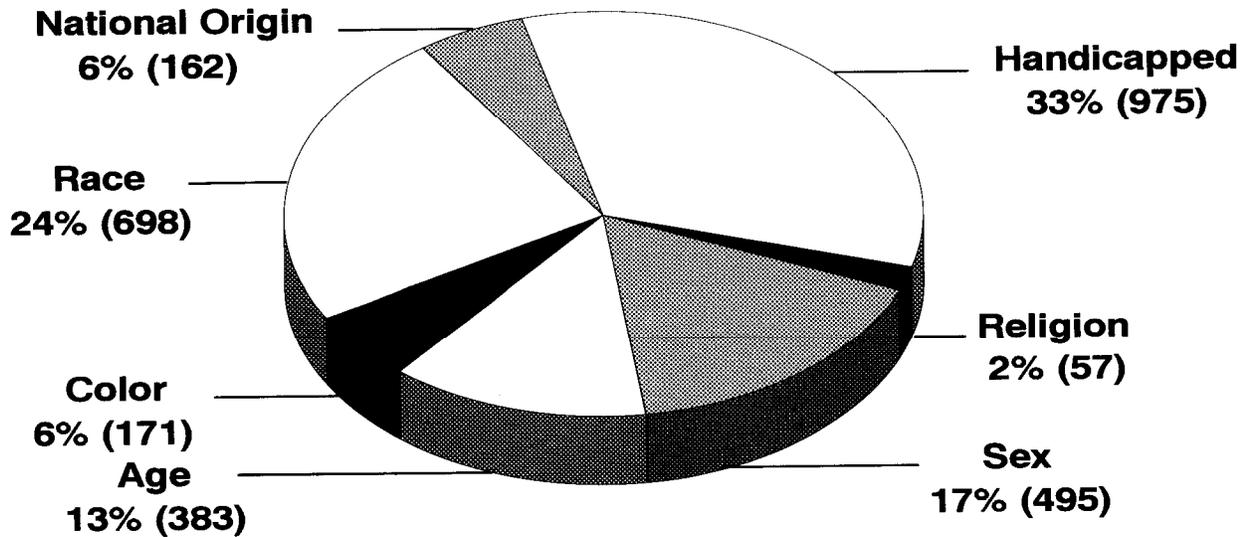
Fiscal Year	Decided		Dismissed		Not Dismissed		Settled		Adjudicated	
	#		#	%	#	%	#	%	#	%
<u>Individual Right of Action (IRA)</u>										
FY 1990	89		71	80%	18	20%	11	61%	7	39%
FY 1991	196		125	64%	71	36%	49	69%	22	31%
FY 1992	221		144	65%	77	35%	41	53%	36	47%
<u>Otherwise Appealable Action (OAA)</u>										
FY 1990	163		84	52%	79	48%	43	54%	36	46%
FY 1991	275		141	51%	134	49%	78	58%	56	42%
FY 1992	282		131	46%	151	54%	81	54%	70	46%
<u>Request for Stay on IRA or OAA</u>										
FY 1990	74		16	22%	58	78%	1	2%	57	98%
FY 1991	73		12	51%	61	49%	0	0%	61	100%
FY 1992	76		16	21%	60	79%	3	5%	57	95%

Note: The individual Right of Action (IRA) appeal was created by the Whistleblower Protection Act of 1989. In this kind of case, the individual is subject to a personnel action and claims that the action was taken because of his or her whistleblowing, but the action is *not* one that is directly appealable to the Board. In an IRA, the individual can appeal to the Board *only if, after* having first filed a complaint with the Office of the Special Counsel, either the Special Counsel does *not* seek corrective action on the individual's behalf or 120 days pass with no action by the Office of Special Counsel. In the Otherwise Appalable Action (OAA) appeal, the individual is subject to a personnel action that is directly appealable to the Board, and the Individual claims that the action was taken because of his or her whistleblowing. A Request for a Stay can be filed with the Board In connection with an IRA or an OAA. A stay orders the agency to suspend the personnel action being appealed.

INITIAL APPEALS WITH ALLEGATIONS OF DISCRIMINATION DECIDED IN FY 1992

	Number	Percent
Total Initial Appeals Decided	7,294	100%
Cases without Allegations of Discrimination	<u>-5,221</u>	<u>-72%</u>
Cases with Allegations of Discrimination	2,073	28%
Cases in which Allegations were Withdrawn	<u>-1,296</u>	<u>-18%</u>
Total Mixed Cases Decided	777	11%
Cases in which Discrimination was Found	9	1%
Cases in which Discrimination was not Found	768	99%

**TYPES OF DISCRIMINATION ALLEGED IN INITIAL APPEALS DECIDED IN
FY 1992**



Percentage based on 2,941 allegations.
Percentages do not total 100% because of rounding.

DISPOSITION OF REQUESTS FOR ATTORNEY FEES DECIDED IN FY 1992

Decided	Dismissed		Not Dismissed		Settled		Adjudicated		Fees Granted		Fees Not Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
355	43	12%	312	88%	179	57%	133	43%	100	75%	33	25%

DISPOSITION OF COMPLIANCE REQUESTS DECIDED IN FY 1992

Decided	Dismissed		Not Dismissed		Settled		Adjudicated		Compliance Found		Compliance Not Found		Other	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
444	121	27%	323	73%	90	28%	233	72%	175	75%	55	24%	3	1%

DISPOSITION OF REMANDS DECIDED IN FY 1992

Decided	Dismissed		Not Dismissed		Settled		Adjudicated	
	#	%	#	%	#	%	#	%
181	49	27%	132	73%	47	36%	85	64%

DISPOSITION OF REMANDS ADJUDICATED IN FY 1992

Adjudicated		Affirmed		Reversed		Mitigated/ Modified/ Other		Attorney Fee Granted/		Attorney Fee Not Granted/ Compliance Not Found	
#	%	#	%	#	%	#	%	#	%	#	%
85	64%	51	60%	13	15%	5	6%	14	16%	2	2%

* **NOTE: MSPB** refers to attorney fee requests and compliance requests as addendum cases because they are filed subsequent to the initial appeal and are directly related to an initial appeal. Cases remanded to an administrative judge are also included in addendum cases; decisions on initial appeals, attorney fee requests, and compliance requests may all be remanded. Percentages may not add to 100 due to rounding.

TOTAL BOARD CASES DECIDED, FY 1992

Type of Case/Activity	Number
<u>APPELLATE JURISDICTION CASES</u>	
Petitions for Review (PFR's) -- Initial Appeals	1,612
Petitions for Review (PFR's) -- Addendum Cases	187
Reopenings/Court Remands	17
Reviews of Stay Rulings	2
Subtotal	1,818
Compliance Referrals	64
EEOC Non-Concurrence	2
Appeals of Arbitration Awards	10
Subtotal	76
<u>ORIGINAL JURISDICTION CASES</u>	
Actions brought by Special Counsel - Hatch	5
Actions Against Administrative Law Judges	1
OSC Stay Requests	2
Addendum Cases	4
Review of Regulations	4
Subtotal - Original Jurisdiction Cases	16
<u>TOTAL BOARD CASELOAD</u>	1,910

NOTE. The Board holds hearings for performance-based removals from the SES although no decisions are Issued. In FY 1992, no hearings were held.

PETITIONS FOR REVIEW OF INITIAL APPEALS DECIDED IN FY 1992

Type of Case	Decided		Dismissed		Denied		Granted	
	#	%	#	%	#	%	#	%
Adverse Action by Agency	769	50%	99	13%	559	73%	111	14%
Termination of Probationers	63	6%	2	3%	58	92%	3	5%
Reduction in Force	87	8%	3	3%	83	95%	1	1%
Performance	62	3%	7	11%	51	82%	4	6%
Denial of Within-Grade	18	1%	2	11%	14	78%	2	11%
Suitability	7	1%	0	0%	7	100%	0	0%
CSRS Retirement: Legal	250	10%	18	7%	215	86%	17	7%
CSRS Retirement: Disability	58	4%	4	7%	43	74%	11	19%
CSRS Retirement: Overpayment	37	4%	0	0%	32	86%	5	14%
Individual Right of Action	76	3%	6	8%	55	73%	15	20%
Other	185	10%	8	4%	169	91%	8	4%
Total	1612	100%	149	9%	1286	80%	177	11%

DISPOSITION OF PETITIONS FOR REVIEW OF INITIAL APPEALS GRANTED IN FY 1992

Type of Case	Granted	AJ Affirmed		AJ Reversed		Remanded		Other	
		#	%	#	%	#	%	#	%
Adverse Action by Agency	111	31	28%	39	35%	34	31%	7	6%
Termination of Probationers	3	2	67%	0	0%	1	33%	0	0%
Reduction in Force	1	0	0%	0	0%	1	100%	0	0%
Performance	4	1	25%	0	0%	3	75%	0	0%
Denial of Within-Grade	2	0	0%	0	0%	2	100%	0	0%
CSRS Retirement: Legal	17	2	12%	11	65%	3	18%	1	6%
CSRS Retirement: Disability	11	0	0%	6	55%	2	18%	3	27%
CSRS Retirement: Overpayment	5	2	40%	0	0%	2	40%	1	20%
Individual Right of Action	15	0	0%	3	20%	9	60%	3	20%
Other	8	2	25%	1	12%	4	50%	1	12%
Total	177	40	23%	60	34%	61	34%	16	9%

NOTE. Approximately 22% of initial decisions end in the filing of a PFR by the appellant or the agency. As the previous chart notes, of all PFR's of initial appeals filed in FY 1992, 9% (n=149) were dismissed and 80% (n=1286) were denied. The remaining 11% (n=177) were granted. The term "AJ" stands for administrative judge. Percentages may not add to 100 due to rounding.

DISPOSITIONS OF WHISTLEBLOWER PETITIONS FOR REVIEW OF INITIAL APPEALS AND STAY REQUESTS DECIDED IN FY 1992

Appeal Category	Decided		Dismissed/ Denied		Granted		Affirmed		Reversed		Remanded		Other	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Individual Right of Action	76		61	80%	15	20%	0	0%	3	20%	9	60%	3	20%
Otherwise Appealable Action	88		77	87%	11	12%	4	36%	2	18%	4	36%	1	9%
Review of Stay Ruling	2		2	100%	0	0%	--	--	--	--	--	--	--	--

NOTE. Percentages may not add to 100 due to rounding.

PETITIONS FOR REVIEW OF INITIAL APPEALS WITH ALLEGATIONS OF DISCRIMINATION DECIDED IN FY 1992

	Number	Percent
Total Petitions for Review Decided	1,612	100%
Cases without Allegations of Discrimination	<u>-1,074</u>	<u>-67%</u>
Cases with Allegations of Discrimination	538	33%
Cases in which Allegations were Withdrawn	<u>-224</u>	-14%
Total Mixed Cases Decided	314	19%
Cases in which Discrimination was Found	10	3%
Cases in which Discrimination was not Found	304	97%

**DISPOSITIONS OF PETITIONS FOR REVIEW OF REQUESTS FOR
ATTORNEY FEES, COMPLIANCE REQUESTS, AND REMANDS DECIDED
IN FY 1992**

Type of Case	Decided		Dismissed		Denied		Granted	
	#	%	#	%	#	%	#	%
Request for Attorney Fees	52		2	4%	26	50%	24	46%
Compliance Request	67		7	10%	50	75%	10	15%
Remand	68		2	3%	56	82%	10	15%
Total	187		11	6%	132	71%	44	24%

NOTE. MSPB refers to PFR's of attorney fee requests and compliance requests as PFR's of addendum cases. PFR's of cases remanded to an administrative judge are also included in PFR's of addendum cases. Percentages may not add to 100 due to rounding.

APPENDIX B - SIGNIFICANT BOARD DECISIONS APPELLATE JURISDICTION CASES

This appendix contains summaries of significant appellate jurisdiction cases decided by the Board during Fiscal Year 1992,

Board decisions are published in West Publishing Company's *United States Merit Systems Protection Board Reporter*, The M.S.P.R. citations below are to that publication.

WHISTLEBLOWER PROTECTION ACT Preface

The Whistleblower Protection Act (WPA) prohibits agencies from taking, threatening to take, or failing to take personnel actions against employees who disclose information concerning Government wrongdoing. In deciding whether the Board has the authority or jurisdiction to consider an employee's claim of reprisal for whistleblowing in an individual right of action (IRA) appeal, and, therefore, the authority to order corrective relief, the Board must first find three things: (1) that the agency took a "personnel action," as defined by the WPA, against the employee, (2) that the employee first sought relief from the Office of Special Counsel, and (3) that the employee reasonably believed that the information disclosed concerned "a violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." If the Board finds these three things, it can then consider the appellant's claim that the agency took the personnel action against him or her in reprisal for whistleblowing.

Jurisdiction - Protected Activity

Von Kelsch v. Department of Labor, DC122190W0525 (November 25, 1991) 51 M.S.P.R, 378 (1991)

The Board concluded that the act of filing a workers' compensation claim is protected under the CSRA, but not under the WPA. As a result, the Board held that it lacks jurisdiction over an allegation of reprisal for filing such a claim in an IRA appeal. The Board held, however, that it may still consider such a claim as an affirmative defense in the context of an otherwise appealable action.

Santillan v. Department of the Air Force, DE122191W0331 (April 6, 1992) 53 M.S.P.R. 487 (1992)

With respect to the employee's Privacy Act request for correction of his allegedly falsified personnel records, the Board held that he had a civil remedy under the Privacy Act for any agency failure to grant his request for correction. The Board concluded that the employee's disclosure of the alleged falsification in his Privacy Act request, therefore, was not protected under the WPA.

Wooten v. Department of Health and Human Services, SF122190W0740 (May 21, 1992) 54 M.S.P.R, 143 (1992)

Alleged reprisal for performing union representational duties by presenting grievances and unfair labor practice charges is protected by the CSRA, which prohibits reprisal for "testifying for or otherwise lawfully assisting any individual in the exercise of any" complaint, appeal, or grievance right. The Board held, therefore, that such an allegation may not form the basis of an IRA appeal.

Jurisdiction - "Personnel Action"

Caddell v. Department of Justice, AT122191W0681 (January 31, 1992) 52 M.S.P.R. 529 (1992)

The Board decided in this case that an order to undergo a fitness for duty examination is not a "personnel action" under the WPA. The appellant's argument that the order meets the statutory definition because it was disciplinary and was imposed in retaliation for his whistleblowing, would render every agency action allegedly made in reprisal for whistleblowing the proper subject of an IRA appeal. In the Board's view, Congress cannot have intended this result.

Wagner v. Environmental Protection Agency, DC122190W0655 (November 21, 1991) 51 M.S.P.R. 326 (1991)

The Board concluded that neither an agency's removal of an employee from coverage under a compressed work schedule nor an agency's requiring an employee to report to an acting supervisor constitutes a "personnel action" under the WPA.

Slake v. Department of the Treasury, CH122190W0568 (March 2, 1992) 53 M.S.P.R. 207 (1992)

The Board held that issuance of a vacancy announcement is not a "personnel action," but nonselection for the vacancy is. Conversely, the Board held that it has no jurisdiction over the cancellation of a vacancy announcement.

Kochanoff v. Department of the Treasury, NY344392004511, NY1221920044W1 (July 21, 1992) 54 M.S.P.R. 517 (1992)

The Board held that, unlike the regular evaluation of an employee's performance under 5 U.S.C. Chapter 43, the evaluation of an employee's qualifications for promotion is not a "personnel action," Changing an employee's work shift also falls outside the scope of "personnel actions," the Board ruled,

Coverage

Duda v. Department of Veterans Affairs, CH122190W0634 (November 26, 1991) 51 M.S.P.R. 444 (1991)

The Board held that the WPA protects an employee who has not made a protected disclosure where a personnel action is allegedly taken against him because of his relationship with an employee who has made such a disclosure. The Board based this holding on the following considerations: (1) the WPA prohibits taking action against "any" employee because of "an" employee's disclosure; (2) the purpose of the Act was to encourage whistleblowers and strengthen the protections afforded them; and (3) such a holding would be consistent with court interpretations of other statutes.

Defenses

Marren v. Department of Justice, DAI22190W0432 (December 13, 1991) 51 M.S.P.R. 632 (1991)

The Board concluded, with respect to the appellant's allegation of discrimination, that its authority in IRA appeals does not extend beyond the whistleblower issues and that it may take corrective action in such cases only where the appellant is the victim of retaliation for whistleblowing activities. The Board pointed out that an employee who believes that he has been discriminated against may seek EEOC review of his complaint where the Board lacks jurisdiction over the appealed matter,

Timeliness

Wood v. Department of the Air Force, AT1221920335W1 (July 31, 1992) 54 M.S.P.R. 587 (1992)

The Board held that an IRA appeal under the WPA must be filed within 65 days of the date of issuance of the Special Counsel's letter notifying the employee of the termination of its investigation. Although the statutory language is somewhat ambiguous, the Board reasoned, the regulatory language allowing 65 days is clear. The Board found further that the statutory and regulatory language permits no waiver of the filing deadline based on a showing of good cause. The Board declined to consider whether the deadline can be waived based on equitable estoppel or equitable tolling, however, electing to wait for cases in which those issues are directly raised.

Merits Issues

McClellan v. Department of Defense, NY122190W0254 (February 26, 1992) 53 M.S.P.R. 139 (1992)

Here, the Board rejected the contention that the appellant must prove actual knowledge of the protected disclosure on the part of the acting agency officials in order to prove reprisal for whistleblowing. The Board held that the legislative history of the WPA allows for the possibility that agency officials may be held culpable where they had only constructive knowledge of a protected disclosure. The Board found it unnecessary to elaborate on the constructive knowledge issue, though, because there was sufficient circumstantial evidence that the agency official knew of the appellant's protected disclosure in this case.

INTERIM RELIEF

Ginocchi v. Treasury, DC31518910527 (February 19, 1992) 53 M.S.P.R. 62 (1992)

The Board first held that an order of interim relief is appropriate in most adverse action cases, but that the administrative judge must make an individual determination in each case in which an appellant prevails. The Board ruled that it would not look behind an agency's determination that returning an appellant to the position he encumbered would be unduly disruptive. Finding that "presence" has a broader meaning than "return," the Board ruled that an agency may comply with an interim relief order by returning the prevailing appellant to his position with altered or restricted duties, or assigning him to a different position, so long as the appellant receives the pay and benefits of his former position. The Board stated that it would apply a "bad faith" test to an agency's determination that, although an appellant's return to his former position would be unduly disruptive, his presence performing other duties would not be. Finally, the Board ruled that an appellant who asserts that the agency is not in compliance with an interim relief order may move for dismissal of the agency's petition for review; the Board will not entertain a petition for enforcement of an interim relief order.

McLaughlin v. United States Postal Service, BN07529010188 (August 18, 1992) 55 M.S.P.R. 192 (1992)

The Board held that an agency, in granting interim relief to a prevailing appellant, does not necessarily have to include overtime pay. The Board reasoned that, because the assignment of overtime work is typically discretionary with the agency, it is not payable as a term and condition of employment under law, rule, or regulation. If a collective bargaining agreement or binding agency policy requires the payment of overtime, however, the agency must include overtime pay in granting interim relief.

Cassity v. Office of Personnel Management, SE831M9110075 (August 6, 1992) 55 M.S.P.R. 25 (1992)

In this annuity overpayment case in which the appellant prevailed, the Board held that it lacks the authority to order interim relief in retirement appeals generally because neither the plain language of the statute, nor its legislative history, suggests that interim relief is applicable to such cases.

TIMELINESS OF PLEADINGS AND OTHER SUBMISSIONS

Raphel v. Department of the Army, DA07529010417 (October 18, 1991) 50 M.S.P.R. 614 (1991)

In this case, the Board expanded its consideration of evidence regarding timeliness of filing based on postmark. Board regulations state that where submissions bear postmarks, the postmark date is the filing date. Under the Federal Rules of Civil Procedure, however, a paper is "mailed" when it is placed in a properly addressed envelope and deposited with a U.S. post office or in a post office mailbox. Under this rule, the date that an item is actually placed in the mail stream is the mailing date. Thus, despite the postmark, a party must be allowed to present evidence that the submission was actually placed in the mail stream before the filing deadline and, therefore, was timely filed. In these circumstances, if an affidavit or sworn statement filed by a party is unrebutted by the opposing party and is not inherently incredible, the Board may find the submission timely.

Jude v. Department of the Treasury, DC07529110232 (December 13, 1991) 52 M.S.P.R. 5 (1991)

Here, the Board adopted the rule that the automatic dating of a facsimile transmission when it is made proves the filing date, although it may not have been date stamped as received until the next day.

Davis v. Department of the Air Force, AT04329110297 (November 21, 1991) 51 M.S.P.R. 246 (1991)

Under the Soldiers' and Sailors' Civil Relief Act of 1940, the running of the appeal period is automatically halted from the date on which the appellant enters military service until the date on which he is released from military duty. The Board found that this provision applies to time limits that are not just statutes of limitation but also jurisdictional prerequisites. The Board concluded that the appellant, as a member of the Air Force, even though a reservist, was entitled to the advantage of the statute.

ADVERSE ACTION CHARGES

Criminal Misconduct

Nazelrod v. Department of Justice, SL07528910448 (October 2, 1991) 50 M.S.P.R. 456 (1991)

The Board in this case overruled earlier case law on proof of theft. Where an agency specifically charges an employee with theft, the Board held, it must prove by preponderant evidence the elements of that crime, namely, the taking and possession of another's property in a manner inconsistent with the owner's rights and benefits, with an intent to permanently deprive the owner of the possession or use of his property. In a subsequent decision issued on July 1, 1992, the Board reaffirmed this ruling upon request for reconsideration by the Office of Personnel Management. See 54 M.S.P.R. 461 (1992).

Prior Record

Lewis v. Department of the Air Force, DE07528910199 (December 3, 1991) 51 M.S.P.R. 475 (1991)

In addition to the current charges against the appellant, the Board considered the appellant's past disciplinary record on which the agency had relied in imposing the penalty of removal. That the misconduct for which the prior discipline was imposed was unrelated in nature to the action on appeal, the Board majority found, does not require that it be discounted. The Chairman's dissent in this case went to the merits of the charges.

HANDICAP DISCRIMINATION Accommodation

McQueen v. Department of Justice, DC07528910031 (April 10, 1992) 53 M.S.P.R. 530 (1992)

The Board held that where an appellant is employed by a component of an agency—here, for example, the Immigration and Naturalization Service, which is part of the Department of Justice—he is entitled to accommodation of his handicap by consideration for reassignment throughout the agency, not just the component. Nonetheless, each component part of an agency generally has a mission that is separate from the other components, as well as separate appointing authority, budget, and employee allocation. The Board concluded, therefore, that reassignment across components will cause an undue burden in most cases. This gives rise to a presumption of undue burden where the appellant seeks accommodation by reassignment to a different component. The appellant may rebut that presumption, however, by showing that the agency would suffer no undue burden or by showing that the agency's claim of undue burden is actually a pretext for handicap discrimination.

Gumper v. Department of Justice, SF0752910545B1 (August 26, 1992) 55 M.S.P.R. 173 (1992)

Further developing its precedent in *McQueen v. Justice*, the Board ruled here that the agency's obligation to accommodate an employee's handicapping condition by reassignment is nonetheless limited geographically to the commuting area where the employee is currently assigned. The Board was guided in this ruling by an EEOC regulation scheduled to take effect on October 1, 1992.

RESTORATION TO DUTY

Farrell v. Department of Justice, CH07528810420 (October 9, 1991) 50 M.S.P.R. 504 (1991)

The Board found that the appellant was partially recovered from a work-related compensable injury and, therefore, his employing "agenc[y] must make every effort to restore" him to work, according to the circumstances of his case, under 5 C.F.R. 353.306. In the context of this regulation, the Board held that the word "agency" means all component parts of an agency and not just the component for which the appellant formerly worked. The Board held further, however, that the appellant was not entitled to nationwide consideration for restoration, but only within his commuting area. In so holding, the Board overruled its 1985 decision in *Withers v. Air Force*.

SETTLEMENT

Kelley v. Department of the Air Force, DE075286C0942 (October 29, 1991) 50 M.S.P.R. 635 (1991)

The Board held in this case that, unlike a Board decision, a settlement agreement provision calling for the "cancellation" of an agency action on appeal does not necessarily require the award of back pay. In future cases, the Board will not interpret the term "cancelled" to include entitlement to back pay and related benefits. If the intent of the parties entering into the agreement is to include the right to back pay, the terms of the agreement must specifically spell out that right.

Cardoza v. Department of Justice, DE075289CO301 (March 6, 1992) 53 M.S.P.R. 264 (1992)

The parties here agreed that the agency had breached their settlement agreement by providing negative oral statements about the appellant's performance to prospective employers. The Board held that, although it could not grant damages in place of the wages the appellant would have earned if he had gotten one of the jobs, it would order the agency to comply with the settlement terms. The Board rejected the appellant's claim for the addition to the settlement of a safeguard against a future similar breach because the Board is without authority to modify the parties' contract unilaterally. The Board noted, however, that the appellant may request that his original appeal be reinstated because of the breach,

Paderick v. OPM, PH083189A9094 (June 26, 1992) 54 M,S,P.R, 456 (1992)

The Board announced in this case that henceforth it would interpret a settlement that provides that it is a "full and final settlement of all matters" in the appeal as constituting a waiver of the right to move for the payment of attorney fees. In so announcing, the Board overruled prior precedent.

BACK PAY AND COMPLIANCE ISSUES

Davis v. Department of the Navy, PH075286C0117 (October 1, 1991) 50 M.S.P.R. 592 (1991)

The Board held that the issue of handicap discrimination can be addressed for the first time in connection with a petition for enforcement of a Board order. It noted that normally the appellant is entitled to back pay in a case only if he was ready, willing, and able during the period of the unjustified adverse action to work in his job, but, where the appellant has raised an allegation of handicap discrimination, the inquiry is broadened to include whether he is able to work in his position or another position to which he could have been reassigned as a reasonable accommodation,

Dobratz v. Department of Health & Human Services and OPM, DC04328810188 (January 31, 1992) 53 M,S.P.R, 9 (1992)

The Board held that where an employee qualifies for discontinued service retirement only because of a Chapter 43 performance-based removal that the Board has subsequently reversed, the legal basis for the retirement is terminated, The fact of retirement, therefore, cannot divest the Board of authority to enforce its decision to reinstate the appellant. Thus, the Board ruled, an agency's argument that it cannot reinstate him because of the retirement is without merit,

Maddox v. General Services Administration, DA0432870276C1 (March 13, 1992) 53 M.S.P.R. 288 (1992)

Board precedent recognizes a distinction between a petition for enforcement of a Board order and a petition for enforcement of a settlement agreement. In complying with a settlement agreement, the agency need not serve notice of compliance. The Board ruled that a petition for enforcement of a settlement agreement, therefore, must be filed within a reasonable period of time after the appellant discovers the asserted noncompliance.

ATTORNEY FEES

Mitchell v. Department of the Navy, PH075287A0252 (November 7, 1991) 51 M.S.P.R. 103 (1991)

The Board announced here its new ruling that a determination of whether an award of attorney fees is warranted in the interest of justice must be made based on the existing record in an appeal. The Board also announced, over the Chairman's dissent, its new ruling that a fee award may be ordered under the more generous Title VII standards only where the Board has made a finding of prohibited discrimination. Both announcements overruled prior Board case law.

Lopez v. United States Postal Service, DE075290A0402 (June 10, 1992) 54 M.S.P.R. 230 (1992)

The Board reiterated in this case that the relevant market rate is normally based on the place where the case was heard, but higher rates in effect where out-of-town counsel practices can be paid if there are compelling reasons, or if it was reasonably necessary, for the appellant to employ the out-of-town counsel. The absence of local attorneys with specialized expertise is one such compelling reason. The appellant bears the burden of proof on this point. Once the appellant presents evidence relating to the reasonableness of his fee request, the burden of production shifts to the agency to show the unreasonableness of the appellant's claim.

Pecotte v. Department of the Air Force, SF075289A0340 (August 25, 1992) 55 M.S.P.R. 165 (1992)

The Board reconsidered its rulings on the award of attorney fees where the parties have entered into a contingency fee agreement. In view of the Supreme Court's decision in *City of Burlington v. Dague*, _____ U.S. ___, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992), regarding statutes that allow for the award of reasonable fees against the Federal Government, the Board found that it can no longer enhance an attorney fee award where the relevant market provided for an upward adjustment for contingency cases as a class.

Chin v. Department of the Treasury, PH0752890168A1 (September 8, 1992) 55 M.S.P.R. 84 (1992)

In the context of a motion for attorney fees under 5 U.S.C. 7701(g)(2), where a U.S. district court had found that the agency discriminated against the appellant, the Board ruled that an appellant is entitled to reimbursement for reasonable out-of-pocket expenses incurred personally by him in accordance with the Civil Rights Act standard.

BOARD PROCEDURES

Dismissal Without Prejudice

Thomas v. Department of Veterans Affairs, CH07529110191 (November 19, 1991) 51 M.S.P.R. 218 (1991)

Because of the importance of a hearing to the appellant in the statutory scheme, the Board found that, as a matter of policy, an administrative judge should not grant an agency's request for dismissal of an appeal without prejudice to refiling the appeal within a specified period of time. Where the delay is for the agency's benefit, the appellant should not face the additional burden of refiling or otherwise reinstating his appeal. If the circumstances warrant, a continuance should be granted instead.

Moore v. Department of Treasury, SL07529110273 (January 13, 1992) 52 M.S.P.R. 362 (1992)

The Board found here that the administrative judge's dismissal of an indefinite suspension appeal without prejudice to its refiling after criminal proceedings end is error. An indefinite suspension is appropriate despite the pendency of criminal proceedings because it is based only on reasonable cause, not proven misconduct.

Dismissal for Failure to Prosecute

Wright v. Department of Treasury, AT07529110724 (March 6, 1992) 53 M.S.P.R. 244 (1992)

The Board held in this case that the sanction of dismissal for failure to prosecute an appeal is appropriate only when a party has failed to exercise the basic due diligence expected in complying with an order or has exhibited negligence or bad faith in its efforts to comply. Good faith efforts falling short of full compliance must be considered.

Hearing Waiver by Failure to Appear

Berry v. Department of Veterans Affairs, NY07529010467 (November 19, 1991) 51 M.S.P.R. 317 (1991)

The Board held here that, when an appellant fails to appear for his requested hearing, but his representative does appear, the administrative judge should give the representative a choice of proceeding with the hearing, having a decision rendered on the written record, or requesting a continuance. The presence of the appellant's representative and his witnesses in this case weighed against finding that the appellant had waived his right to a hearing under the Federal Circuit Court's decision in *Callahan*, 746 F.2d 1556, 1559 (Fed. Cir. 1984).

APPENDIX C - SIGNIFICANT BOARD DECISIONS

ORIGINAL JURISDICTION CASES

This appendix contains summaries of significant original jurisdiction cases decided by the Board during Fiscal Year 1992.

Board decisions are published in West Publishing Company's *United States Merit Systems Protection Board Reporter*. The M.S.P.R. citations below are to that publication.

SPECIAL COUNSEL DISCIPLINARY ACTIONS - HATCH ACT

Special Counsel v. Mahnke, CB1216910004T1 (April 23, 1992) 54 M.S.P.R. 13 (1992)

The Board held that when a party designation appears with the name of a candidate in an election, that candidate represents the party within the meaning of the Hatch Act, and the election is, therefore, a partisan election. The Board further held that the petitioner, a local employee in a federally-funded position, violated the Hatch Act by participating as a candidate in a partisan election for alderman. The Board examined the seriousness of the respondent's violation, together with all the mitigating and aggravating factors, including the fact that he had received a warning from the Special Counsel after he participated in a partisan election in 1988, and concluded that the circumstances warranted the respondent's removal.

Special Counsel v. Narcisse, CB1216910025T1 (Nov. 20, 1991) 51 M.S.P.R. 222 (1991)

The Board held that a Federal employee's part-time employment conducting telephone voter preference polls, without soliciting votes, did not constitute participating in a partisan political campaign in violation of the Hatch Act. The Board also determined that the respondent's statement of support made during a television interview at the polling organization's office, which was not arranged or approved by any campaign organization, was not made in concert with an organized campaign. Rather, the Board held that the respondent was merely expressing her personal opinion concerning the candidates, a right protected by the Hatch Act. Finding that the Special Counsel failed to prove the charges against the respondent, the Board dismissed the complaint.

Special Counsel v. Winkler, CB1216910003T1 (June 9, 1992) ** M.S.P.R. ** (1992)

The Board held that, in deciding whether a violation of the Hatch Act warrants removal, a respondent's cessation of the violative activity may be considered as a mitigating factor, but will not necessarily be the determinative factor. The Board found that the respondent violated the Hatch Act by running as a Democratic candidate for alderman in 1989. The Board held that the fact that the respondent ceased his violation by not running for reelection was a factor to consider in mitigation, but, given the seriousness of the respondent's violation and the need to effectuate the purpose of the Hatch Act, that factor would not justify a decision not to impose a penalty. The Board concluded that the respondent's violation of the Hatch Act warranted removal.

SPECIAL COUNSEL STAY REQUESTS - WHISTLEBLOWER PROTECTION ACT

Special Counsel v. Department of the Air Force, CB1208920017U1 (May 27, 1992) ** M.S.P.R. *** (1992)

The Special Counsel requested a stay of the removal of an employee, alleging that there were reasonable grounds to believe the removal was ordered in reprisal for the employee's protected disclosure. The Chairman found that it would not be inappropriate under these circumstances to stay the action and granted the stay.

Special Counsel v. Department of the Air Force, CB1208920017U2 (July 9, 1992) ** M.S.P.R. *** (1992)

The Special Counsel requested that the Board extend the stay granted in the above case for 120 days. The Special Counsel described the present state of her investigation and stated that the case was unusually complex and would require investigation into activities over a 3-year period. The Board, viewing the record in the light most favorable to the Special Counsel, determined that the Special Counsel's prohibited personnel practice claim was not unreasonable and granted the 120-day extension.

PROPOSED ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES

In re Stephens, CB7521910010T1 (January 30, 1992) 52 M.S.P.R. 522 (1992)

The Board held that an unsupported, nonspecific claim that an agency seeks improperly to interfere with an administrative law judge's judicial independence is insufficient to invoke Board jurisdiction. The petitioner claimed that the agency, by requiring his attendance at an instructional program, sought to interfere with his judicial independence and, therefore, was constructively removing him. The Board found that the petitioner did not demonstrate that the required instruction was calculated to interfere with his impartial exercise of the judicial function. Determining that the petitioner failed to proffer evidence to show he was making a non-frivolous allegation of constructive removal, the Board dismissed the claim for lack of jurisdiction.

ADDENDUM DECISIONS

Special Counsel v. Department of the Air Force, CB1214910028C1 (November 25, 1991) 51 M.S.P.R. 412 (1991)

In this case, the Board held that when it orders a stay of a personnel action, the agency must maintain the employee in duty status and allow the employee to pursue the duties of her position. Here, the agency returned the employee to duty only after assigning her to a new duty station and placing her in compensatory time status. The Board found that the language of the stay order requiring the agency to maintain the employee in duty status was clear and unambiguous, and that the agency disregarded this order and altered the status quo. On these and other grounds, the Board found the agency in noncompliance and ordered the agency to reinstate the employee's compensatory time. The agency complied with this order, and the Board then dismissed the case as moot. See *Special Counsel v. Department of the Air Force*, CB1214910028C1 (January 13, 1992), 52 M.S.P.R. 125 (1992) (Table).

National Labor Relations Board v. Boyce, CB7521910027A1 (November 18, 1991) 51 M.S.P.R. 295 (1991)

The Board held that attorney fees may be awarded to an administrative law judge who prevails in an action brought before the Board by an agency seeking authorization of a proposed personnel action. Here, the personnel action was a proposed furlough to meet the requirements of a sequester anticipated to begin October 1, 1990. After the threat of sequester was removed, the Board granted the agency's motion to withdraw the complaint and dismissed the case with prejudice. In regard to the respondents' motion for attorney fees, the Board held that the respondents were not prevailing parties because the relief they obtained was not causally related to the Board proceeding, but to action by the Congress. The Board also found that fees were not warranted because the agency's proposed furlough action was substantially justified, given the President's sequester order and the Gramm-Rudman-Hollings Act. Accordingly, the Board denied the motion for attorney fees.

APPENDIX D - SIGNIFICANT LITIGATION

Significant litigation involving the Board during Fiscal Year 1992 included the following:

RETIREMENT BENEFITS FOR FORMER SPOUSES

Newman v. Love, 962 F.2d 1008 (Fed. Cir, 1992)

When the two petitioners in this case were divorced from their respective retired Federal employee spouses, the divorce decrees provided that property division issues would be determined at a later date. The petitioners were subsequently awarded future survivor annuity benefits in their property settlements, but OPM found these settlements ineffective as a basis for a survivor annuity, citing its regulation that prohibits any property division after an initial divorce decree from being effective as a basis for an award of a former spouse annuity. The Board reversed OPM's determination on the grounds that its regulation was contrary to the plain meaning of the statute. The court held that the petitioners' property settlement orders were not prohibited "modifications" because they were the first orders dividing the marital property and did not change, alter, or limit anything. The court, therefore, agreed with the Board's decision that the petitioners were entitled to future survivor annuities as former spouses.

TIMELINESS

Mendoza v. Merit Systems Protection Board, 966 F.2d 650 (Fed. Cir. 1992)(*in banc*)

In an *in banc* decision, the United States Court of Appeals for the Federal Circuit upheld the Board's decision dismissing the petitioner's appeal as untimely. The petitioner, who was five weeks late in filing her appeal to the Board of an OPM retirement decision, asserted that her appeal was late because she was "very old and sickly." The Board's administrative judge ordered the petitioner to address the timeliness issue, she did not respond, and OPM moved to dismiss for untimeliness. The administrative judge then issued a second order directing the petitioner to submit "evidence and argument" concerning her delay in filing her appeal. She again failed to respond, and the Board dismissed the appeal for untimeliness. She petitioned the court for review, and it reversed the Board in a panel decision.

The Board requested reconsideration and suggested rehearing *in banc*. A divided panel denied the request for reconsideration; however, the court *in banc* granted rehearing and affirmed the Board's decision with one judge dissenting. The court noted that the only evidence in the record supporting the petitioner's claim of old age and sickness was a document stating that she was born in 1925. The court held she failed at "her peril" to respond to the Board's order requesting evidence. It held, therefore, that she failed to show good cause for her untimely filed appeal, and the administrative judge, therefore, did not abuse her discretion by dismissing the appeal,

WHISTLEBLOWER PROTECTION ACT -JURISDICTION AND EXHAUSTION OF REMEDIES

Knollenberg v. Merit Systems Protection Board, 953 F.2d 623 (Fed. Cir. 1992)

In this case of first impression under the WPA, the court affirmed the Board's decision dismissing the petitioner's appeal for lack of jurisdiction, agreeing with the Board's determination that the petitioner had not first presented a basis for corrective action to the Special Counsel, as required by the Act. When the petitioner filed an IRA appeal with the Board, he alleged that his employing agency, the Department of the Navy, had not selected him for a position because of his protected whistleblowing disclosures. The Board dismissed the appeal for lack of jurisdiction, finding that he had not raised the alleged retaliatory nonselection before the Special Counsel. See *Knollenberg v. Department of the Navy*, 47 M.S.P.R. 92, 97 (1991). The court agreed, finding that, before the Special Counsel, the petitioner did not tie his nonselection to allegations of reprisal for whistleblowing. The court found, therefore, that he did not meet the exhaustion requirement of the WPA.

WHISTLEBLOWER PROTECTION ACT -SAVINGS PROVISION AND STANDARD OF PROOF

Eidmann v. Merit Systems Protection Board, No. 913587 (Fed. Cir., September 4, 1992) (petition for reh'g filed September 17, 1992)

In this case, a Special Counsel disciplinary action, the Board ordered discipline imposed on the petitioner for taking a personnel action because of an employee's whistleblowing. The court affirmed the Board's decision, while reversing the Board's ruling on the standard to be applied in determining the relationship between the protected disclosure and the personnel action. The court first affirmed the Board's determination that the provisions of the WPA apply because the administrative proceeding was not "pending," under the terms of the Act's savings clause, until the Special Counsel filed the complaint with the Board, and that date was after the effective date of the WPA.

The Board had ruled that the new "contributing factor" standard of the WPA applies to disciplinary actions brought by the Special Counsel under 5 U.S.C. 1215 as well as to corrective actions brought under 5 U.S.C. 1214. The court disagreed, reasoning that, because the Congress specifically changed the standard under 1214, but not under 1215, the Special Counsel must continue to show in disciplinary action complaints that the protected disclosure was a "significant factor" in the decision to take the personnel action. The court concluded, however, that, although the Board adopted the wrong standard, it reached the right result because the evidence was sufficient to meet the higher "significant factor" standard.

ADVERSE ACTIONS - JUDICIAL SANCTIONS FOR FRIVOLOUS APPEALS

McEnergy v. Merit Systems Protection Board,
963 F.2d 1512 (Fed. Cir. 1992), *reh'g denied* (July 23, 1992)

The court affirmed the Board's decision dismissing the petitioner's appeal for lack of jurisdiction and concluded that the appeal was frivolous. Before the Board, the petitioner contended that his reassignment constituted a reduction in grade and pay. Although he received the same salary before and after his reassignment, he asserted that the Postal Service had constructively reduced his pay because his former peers received a pay increase. He also contended that his assignment to a position of lesser responsibilities was a reduction in grade. The Board rejected these claims.

On review, the court concluded that the Board properly interpreted Federal Circuit and Claims Court precedents in dismissing the petitioner's appeal. The Court found that under *Garbacz v. United States*, 656 F.2d 628 (Ct. Cl. 1981), the petitioner suffered no pay reduction because a reduction must be ascertainable at the time of the personnel action, not at some future date. The court determined that the petitioner's failure to distinguish *Garbacz* and other controlling case law in his briefs was inexcusable and warranted sanctions. Also inexcusable, the court said, was his attempt to escape the effect of precedent by presenting inconsistent characterizations of the facts. The court held the petitioner and his counsel jointly and severally liable for the Government's costs and damages of \$500.

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ADVERSE ACTIONS - INDEFINITE SUSPENSIONS

Dunnington v. Department of Justice,
956 F.2d 1151 (Fed. Cir. 1992), *reh'g denied* (May 5, 1992)

The court affirmed the Board's decision, 45 M.S.P.R. 305 (1990), which held that the agency had reasonable cause to suspend the petitioner indefinitely from his position as a border patrol agent on the basis of criminal complaints and warrants of arrest against him for alleged sexual abuse of children. The Board concluded that, although an arrest, standing alone, may not meet the reasonable cause standard, an arrest pursuant to a warrant may be sufficient because warrants generally are based on a magistrate's finding of probable cause. The court agreed that the suspension action met the statutory standard. It declined to hold, however, that the issuance of an arrest warrant based on probable cause, standing alone, satisfied the reasonable cause standard. The court reasoned that warrants are typically issued *ex parte* and are often based on information supplied by confidential informants. However, the court found that the agency relied not only on the warrant but also on "additional factual material culled from the [criminal] complaints and supporting allegations..."

APPENDIX E - MERIT SYSTEMS STUDIES AND REVIEWS OF OPM SIGNIFICANT ACTIONS

The following are summaries of the Board's reviews of OPM significant actions and merit systems studies released during Fiscal Year 1992 or completed for release early in Fiscal Year 1993.

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

Balancing Work Responsibilities and Family Needs: The Federal Civil Service Response - This report was summarized in the Board's FY 1991 Annual Report.

Civil Service Evaluation: The Role of the U.S. Office of Personnel Management - This study reviewed the role of the OPM personnel management evaluation (PME) program in providing oversight of personnel management in Federal agencies. Although the Board found that the regulatory compliance aspects of the program had improved since the last Board review, it found that significant additional program initiatives were needed. These initiatives need to address the means to link personnel management practices to agency mission accomplishment, including convincing managers of the value of the evaluation process in identifying solutions to their human resources management problems. Further, much more needs to be done to assist agencies in creating personnel management evaluation programs that identify and meet managers' needs.

The Board recommended that OPM undertake initiatives to improve their written guidance on agency PME programs and that a number of communications initiatives to agency PME staffs and managers be undertaken. The report also recommended that OPM consider the joint development of a model agency personnel management evaluation program that would develop techniques and approaches that could be exported to other agencies. Finally, the Board recommended that PME be made a part of agencies' internal management controls.

Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change - This report reviewed OPM's accomplishments in promoting and overseeing research programs and demonstration projects under the authority granted by the CSRA. The study found that the authority has been a viable tool in making changes in Federal personnel management policies and systems. As an example, results from various pay studies conducted or commissioned by OPM, as well as results from various demonstration projects, were used, in part, to formulate some provisions of the Federal Employees Pay Comparability Act and to develop the Administrative Careers With America examination,

The report concluded, however, that the effectiveness of the authority is weakened by some structural, procedural, and other obstructions. To make the authority a more effective catalyst for change, the Board recommended that OPM be more proactive by promoting research programs and demonstration projects and simplifying the project approval process. To encourage agencies to participate, OPM should take fuller advantage of its authority to request appropriations to fund agencies that assist OPM in carrying out such projects. Moreover, strong OPM leadership would be enhanced if Congress would consider streamlining the legal requirements and expanding the use of demonstration projects.

MERIT SYSTEMS STUDIES

To Meet the Needs of the Nations: Staffing the U.S. Civil Service and the Public Service of Canada - This study examined differences between the national civil services of the United States and Canada in merit staffing, pay, and labor-management relations. The report concluded that recruiting efforts in the United States might be improved by adapting some of the Canadian practices for use in the U.S. Civil Service.

With respect to outside hires, for example, the central staffing agency in Canada refers a list of well-qualified candidates to the manager, who then participates in ranking the candidates and must select the top-ranked candidate. By contrast, U.S. candidates are referred in rank order by either OPM or an agency examining office, and the manager, who may not participate in the ranking, must select from among the top three available candidates. For internal hires, the Canadian ranking panel functions about the same as for outside hires. Again, the Canadian manager participates in the ranking process and must select the top-ranked candidate, in contrast with U.S. managers, who may select any of the referred candidates but may not participate in the ranking process. Unlike the U.S. system, the Canadian system permits only rare use of "career ladder" advancement, so that virtually every movement upward within the system is through competition.

Canadian managers have broad authority to determine which employees will be retained following a reduction in force. U.S. managers, however, operate within a closely prescribed system that limits their ability to determine which employees will be in which jobs after a down-sizing. The greater authority of Canadian managers is balanced by greater opportunity for employees to challenge the managers' decisions through the appeals process. The U.S. system provides its employees fewer opportunities to challenge the decisions, and relies on more restrictive rules to protect employees from unfair management decisions.

Federal First-Line Supervisors: How Good Are They? - This study examined the quality of first-line supervisors in the Federal Government. Results of surveys indicated that although the quality of supervisors was generally seen as fairly high, there were differences in how positively the various groups surveyed viewed first-line supervisors. The supervisors themselves viewed their performance much more positively than did second-level supervisors and nonsupervisory employees. These differences in perceptions were found not only for ratings of task performance, but also for ratings of abilities and overall effectiveness.

Of 118 possible supervisory tasks included on the surveys, 14 were rated by at least 85 percent of first-line and second-level supervisors as being important to success to either a considerable or great extent. These tasks included not only *what* a supervisor does (such as planning work and establishing priorities), but also *how* the supervisor does it (such as being consistent and fair in dealing with employees). While ratings of supervisors on these 14 tasks were fairly positive overall, there were some disturbing findings. For example, although all first-line supervisors thought they did an acceptable or better job of setting a good example for employees, almost one out of four nonsupervisory employees (23 percent) disagreed, and 8 percent of the second-level supervisors also disagreed.

The Board suggested that agencies: (1) re-examine their procedures for selecting supervisors in the first place to ensure that these procedures are resulting in selection of individuals highly qualified for these difficult jobs, and (2) use training needs assessment information to tailor their training and development programs to best meet the needs of individual supervisors.

Workforce Quality and Federal Procurement: An Assessment - This study, an analysis of data obtained through four surveys of affected groups, revealed that, for the most part, the current members of the Federal procurement workforce believed that they were well qualified to perform their jobs. Nevertheless, most employees also said that they needed additional training in a variety of areas. Their supervisors, although positive about the capabilities of their subordinates, also thought that there was considerable room for improvement and that their subordinates needed additional training.

Their clients believed that contract specialists perform some aspects of their jobs well, but these same clients were not entirely satisfied with the quality of the service they received. Senior executives were concerned about the timeliness of some procurement actions. Many did not believe that the procurement process was particularly responsive to the needs of their organizations. In their view, and the view of private sector vendors, the procurement process has become so complicated that the complexities may exceed the capabilities of the contract specialists who must administer the system.

The report recommended that: (1) contract specialists be better trained to make good business decisions and to provide customer-oriented support for their clients; (2) that contract specialists be encouraged by their supervisors to be more creative in responding to customer needs efficiently without compromising the integrity of the system; and (3) the overly complicated procurement process be vastly simplified to enable the users to improve the efficiency of Government procurement,

Federal Workforce Quality: Measurement and Improvement - The report of the Advisory Committee on Federal Workforce Quality Assessment, jointly established by the Board and OPM in 1990, During its 2-year term, the committee, composed of public and private sector executives, union officials, and academicians, met to study the Federal Government's assessment program and to provide advice on how it could be improved.

The committee concluded that the Government has not experienced the decline in worker quality that had been feared by many. At the same time, the panel found room for improvement in the way the Government measures quality and offered a number of suggestions for refining the assessment process as well as for improving workforce quality in general.

A major recommendation of the committee was that the Government define and deal with workforce quality in a way that takes into account the complexity of the subject. This means recognizing the interaction of individual worker attributes, the environmental factors that affect work and workers, the processes that organizations use to do their jobs, and the results of the employees' and the organization's efforts.

The committee called for all Federal department and agency heads to identify their customers and to set standards for the quality of the services provided them. The Committee also recommended that a council be formed to coordinate the many workforce assessment projects currently underway in Federal agencies.

A Question of Equity: Women and the Glass Ceiling in the Federal Government - This study examined career advancement in the Federal Government and whether there are barriers that account for the underrepresentation of women in senior-level jobs. The Board found that such barriers do exist and have resulted in women being promoted fewer times over the course of their careers than men with comparable education and experience. The Board also found that reliance on traditional criteria for evaluating job commitment and advancement potential have often had an adverse impact on women. Some women reported that they experience stereotyping that cast doubts on their competence.

The report concluded that the imbalance in the percentage of women in higher grades can be corrected through concerted action, The Board recommended that: (1) the Government reaffirm its commitment to equal employment opportunities and that agencies make special efforts to increase the representation of women in senior positions; (2) women take full advantage of opportunities to increase their competitiveness and demonstrate their abilities, and the agencies make these opportunities available; (3) managers seek to curtail, within themselves and their organizations, any expressions of stereotypes or attitudes that may create an environment hostile to the advancement of women, and evaluate the criteria they may be using to evaluate employees' potential for advancement; and (4) agencies conduct their own assessment of barriers to advancement for women.

Federal Blue Collar Employees: A Workforce In Transition - This study examined the people and systems that make up the Federal crafts, trades, and labor force, analyzing important issues from the perspectives of line managers, employees, personnel offices, and unions.

Little attention has been focused on the one out of every six Federal civilian employees who are "blue collar" employees. Yet three out of four of the 5,753 employees who were separated from their jobs in FY 1991 were blue collar employees, mostly in the Defense Department. Despite the decrease in their numbers, the importance of the blue-collar employees who remain will increase as defense spending shifts from procurement of new systems to maintenance and upgrading of existing systems.

The report concluded that blue-collar employees are confronted by unique problems and unresolved issues that need to be addressed apart from their white-collar colleagues. For example, over half of blue-collar employees are at the top step of their grade, with little room or expectation for advancement; and, although the blue-collar pay system provides most blue-collar employees a rate of pay higher than the prevailing local rate, successive pay caps have resulted in an average pay gap of 9.6 percent between Federal blue-collar and comparable private sector pay rates.

Surveys of and interviews with blue-collar employees indicated that, in addition to concerns about downsizing, low morale, and pay, many feel treated as second-class citizens in their organizations. They believe the quality of their supervisors and performance appraisal systems needs to be improved, and they expressed a need for more training. Although 34 percent of the Federal blue-collar workforce consists of minority group members, compared to 22 percent minority group members in the national workforce, Hispanics remain underrepresented, and women comprise just 10 percent of the Federal blue-collar workforce.

The report encouraged Federal policymakers and managers to consider blue-collar employees in proposed programs, policies, and regulations, and to address the issues that most concern these employees. It further recommended that OPM continue to develop and implement a strategy for phasing out the pay cap and for more closely aligning blue- and white-collar pay-setting practices.