

**1994**

**U.S. Merit Systems  
Protection Board**

Annual Report for Fiscal Year 1994



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



U.S. Merit Systems Protection Board  
Washington, DC

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 Sixteenth Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during fiscal year 1994, including the Federal employee appeals and other cases decided by the Board. The report also describes the initiatives undertaken by the Board to reengineer the agency to improve customer services and implement recommendations of the National Performance Review.

During the fiscal year, the Board's administrative judges decided 8,552 appeals, stay requests, and addendum cases. The 3-member bipartisan Board decided 2,031 cases under its appellate jurisdiction, principally petitions for review (PFRs) of administrative judges' initial decisions. The Board also completed action on 75 cases arising under its original jurisdiction—Hatch Act cases, Special Counsel disciplinary actions, Special Counsel stay requests, proposed actions against administrative law judges, and requests to review regulations of the Office of Personnel Management (OPM).

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 1994, 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 five reports during the fiscal year, including the results of its latest triennial survey of Federal employees, an examination of OPM policies regarding temporary employment, and a report on whistleblowing in the Federal Government.

Respectfully submitted,

Ben L. Erdreich  
Chairman

Jessica L. Parks  
Vice Chairman

Antonio C. Amador  
Member

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## **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 95454, 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 and free of prohibited personnel practices.

### **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 in 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 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.

With respect to adverse actions, which account for almost half of all appeals to the Board, the following categories of employees have appeal rights: (1) employees in the competitive service and excepted service employees with veterans preference (called "preference eligibles") who have completed their probationary period; (2) non-preference eligible employees in the excepted service (excluding those in the Postal Service and certain other agencies) who have completed two years current continuous service in an Executive agency; and (3) non-preference eligible supervisors and managers in the Postal Service.

### *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 *except* 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, 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 also may 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 Action*

The second session of the 103rd Congress considered several measures with direct impact on the Board's jurisdiction, authorities, and adjudicatory procedures. Of these measures, two were approved by the Congress during fiscal year 1994, and a third was passed just prior to adjournment in early October. All were subsequently signed by the President.

*Additional Protections Against Prohibited Personnel Practices* - Most important in terms of its impact was Public Law No. 103424, which reauthorized the Merit Systems Protection Board and the Office of Special Counsel through fiscal year 1997 and made several changes in the statutory provisions applicable to prohibited personnel practices, including extensions of the protections afforded Federal whistleblowers.

The law extends whistleblower protections to employees of Government corporations (as defined at section 9101 of title 31 of the U.S. Code). It extends coverage for all prohibited personnel practices, including actions based on whistleblowing, to employees of the Veterans Health Administration appointed under chapter 73 or 74 of title 38 of the U.S. Code. With respect to all prohibited personnel practices, it adds a new covered personnel action—a decision to order psychiatric testing or examination—and broadens covered personnel actions to include "any other significant change in duties, responsibilities, or working conditions."

When the Board orders corrective action in an appeal brought by a whistleblower, the law requires the Board to order payment of any attorney fees incurred and also permits the Board to order reimbursement of the appellant's medical costs, travel expenses, and "any other reasonable and foreseeable consequential damages." It authorizes the Board to order payment of attorney fees and consequential damages when it orders corrective action in response to a prohibited personnel practice complaint brought by the Special Counsel. The Board may also order payment of attorney fees when an employee prevails in a disciplinary action brought by the Special Counsel.

The law provides a new standard for the issuance of subpoenas in whistleblower cases and clarifies what an appellant must show to prove that whistleblowing was a "contributing factor" in the personnel action being appealed. It also provides that when the Board determines that a current Federal employee may have committed a prohibited personnel practice, that determination must be referred to the Special Counsel for investigation and possible prosecution in a disciplinary action before the Board.

The law provides a new exception to the general rule that a bargaining unit employee affected by a personnel action that is appealable to the Board and also covered by a negotiated grievance procedure (NGP) must pursue a grievance under the NGP. An employee affected by a prohibited personnel practice other than discrimination may elect to pursue a grievance under the NGP, file an appeal with the Board, or seek corrective action from the Special Counsel. Once the employee elects one of these three administrative remedies, the other two are foreclosed. As was the case prior to enactment of Public Law No. 103-424, bargaining unit employees who raise an issue of prohibited discrimination in connection with a covered personnel action may pursue either an appeal to the Board or a grievance under a NGP.

In cases decided by an arbitrator under a NGP, where a prohibited personnel practice is involved, Public Law No. 103-424 authorizes the arbitrator to order the agency to take disciplinary action against the employee or employees who committed the prohibited personnel practice. An employee subject to disciplinary action ordered by an arbitrator has the same right to appeal the action to the Board, and to seek judicial review of the Board's decision, as if the agency had taken the action absent the arbitrator's order.

*Veterans' Reemployment Rights* - Public Law No. 103-353, the "Uniformed Services Employment and Reemployment Rights Act of 1994" (USERRA), strengthens the reemployment rights of both government and private sector employees when they return from military duty. The law gives the Board specific statutory authority to hear appeals involving reemployment rights from Federal employees returning from military duty; previously the Board heard such appeals under regulations promulgated by OPM.

Under USERRA, a Federal employee has several opportunities for an appeal to the Board. When a Federal agency denies an employee returning from military service his or her rights under the Act, the employee may ask the Secretary of Labor for assistance in resolving the matter or may file an appeal directly with the Board. If the employee chooses to ask the Secretary of Labor for assistance and the Secretary is unable to resolve the matter with the agency, the employee then may ask to have the matter referred to the Special Counsel or may file an appeal with the Board. If the employee chooses to have the matter referred to the Special Counsel and the Special Counsel agrees to represent the employee, the Special Counsel is authorized to file an appeal with the Board on the employee's behalf. If the employee chooses to have the matter referred to the Special Counsel and the Special Counsel declines to represent the employee, the employee may then file an appeal with the Board. In addition to permitting the Special Counsel to represent Federal employees in appeals to the Board under the Act, USERRA provides that where the Special Counsel so represents an employee, she may also represent the employee in an appeal of the Board's decision to the Federal Circuit.

*RIF Appeal Rights for Foreign Service Employees* - Public Law No. 103-236, the Foreign Relations Authorization Act, includes an amendment to the Foreign Service Act of 1980 that establishes rights and procedures for reduction-in-force actions affecting Foreign Service employees. The amendment provides Foreign Service employees affected by RIF actions the right to appeal to the Board. The Secretary of State was directed to promulgate regulations governing Foreign Service RIFs, after consultation with the Director of OPM.

Several provisions of these new laws—including the additional covered employees and personnel actions for whistleblower appeals, the availability of consequential damages for prevailing appellants in whistleblower appeals, and the extension of RIF appeal rights to Foreign Service employees—have the potential for increasing the Board's workload. Appeals under these laws also are expected to raise new legal issues that the Board must decide through its case adjudication. As fiscal year 1995 began, the Board and staff were developing new procedures and revising existing procedures to ensure proper implementation of these laws.

## 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, non-renewable 7-year terms.

### CHAIRMAN



**BEN L. ERDREICH** became Board Chairman on July 2, 1993, following his nomination by President Clinton and confirmation by the Senate. His term appointment expires March 1, 2000. Previously, he served for 10 years in the U.S. Congress as the representative of the 6th District of Alabama. He was a member of the Committee on Banking, Finance and Urban Affairs and chaired its Subcommittee on Policy Research and Insurance. Mr. Erdreich was a Member of the Jefferson County (Alabama) Commission from 1974 to 1982. Prior to that, he was a partner in the firm of Cooper, Mitch & Crawford, Attorneys, in Birmingham, Alabama. He served in the Alabama House of Representatives from 1970 to 1974. He is a graduate of Yale University and received his J.D. degree from the

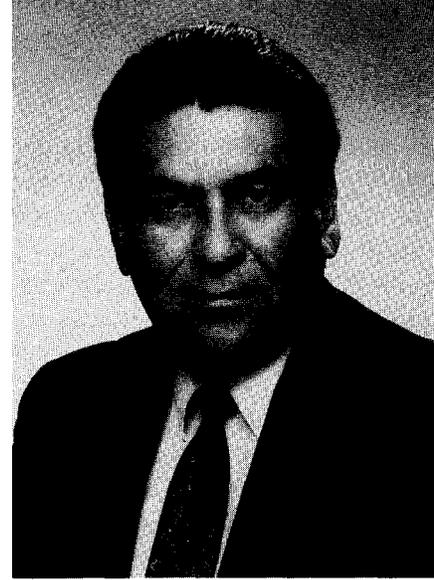
University of Alabama School of Law. He is admitted to the Alabama and District of Columbia bars and is a member of the Federal Circuit, District of Columbia, Alabama, and Birmingham bar associations.

## VICE CHAIRMAN



JESSICA L. PARKS was designated Vice Chairman of the Board by President Clinton on July 30, 1993. Previously, she served as Member of the Board from May 18, 1990, following her nomination by President Bush and confirmation by the Senate. Her term appointment expires March 1, 1995. 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. She is a graduate of Tulane University and received her J.D. degree from the University of Tennessee College of Law. She is admitted to the North Carolina Bar and is a member of the American, Federal, and Federal Circuit bar associations.

## MEMBER



ANTONIO C. AMADOR became Vice Chairman of the Board on November 1, 1990, following his nomination by President Bush and confirmation by the Senate. Currently, he serves as Member of the Board. His term appointment expires March 1, 1997. At the time of his appointment to the Board, 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. He received his law degree from the McGeorge School of Law, University of the Pacific.

## **SPECIAL SECTION: REINVENTING MSPB**

### **INTRODUCTION**

The Merit Systems Protection Board's reengineering initiatives in fiscal year 1994 produced a more efficient organization with a strong commitment to customer service. Board customers—Federal employees, their employing agencies, and the public—benefit from a streamlined civil service appeals process.

The Board reduced headquarters offices from 11 to 7 and improved the supervisor-to-employee ratio. It also realigned its regional office structure, reducing the number of regional offices from 11 to 6. The change reduced management and administrative layers and allowed the Board to direct its resources to adjudicative functions. By the end of fiscal year 1994, the agency had reduced its staff to 286 full-time equivalents (FTE), well below its target level for fiscal year 1995 (298 FTE) and only 11 over the FTE level of 275 targeted for fiscal year 1999.

As part of its reengineering effort, the Board reviewed every office to see where operations could be simplified, managerial layers eliminated, and customer service improved. Despite its leaner look, the MSPB is now equipped to provide better access to its processes and overall better service.

### **EASIER ACCESS TO MSPB INFORMATION**

During fiscal year 1994, the Board began providing the public with immediate, 7-days-a-week self-service access to the most current information about the Board and its procedures through a computer bulletin board. The on-line access through the Federal Bulletin Board, operated by the Government Printing Office, to Board decisions, weekly summaries of cases decided, and summaries of merit systems studies and reviews of OPM significant actions provides an important new source of information about the agency's operations.

*The MSPB Library on the US. Government Printing Office's Federal Bulletin Board can be accessed by computer modem at 202-512-1387 seven days a week. The Federal Bulletin Board can also be accessed via Internet (telnet to wais.access.gpo.gov). User assistance is available from GPO from 8 AM to 4 PM Eastern time, Monday through Friday, by calling 202-512-1524.*

*MSPB also has an Internet e-mail address. Comments or questions regarding MSPB may be sent via Internet to [mspb@mspb.gov](mailto:mspb@mspb.gov).*

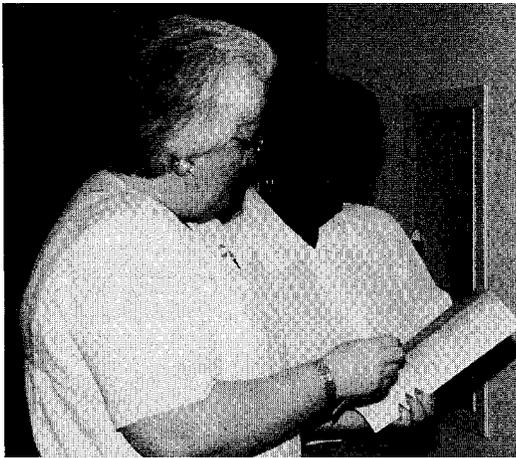
### **EXPANDED SETTLEMENT PROGRAMS**

*Alternative Dispute Resolution Procedures* -Building on its successful experience at the regional office level with settlement of initial appeals, the Board established a program to apply alternative dispute resolution procedures to cases pending before the full Board for review. The Board's program is intended to facilitate the parties' voluntary settlement of their cases. Public policy favors settlement because it avoids costly and unnecessary litigation and encourages the fair and speedy resolution of issues. It also increases the likelihood of the parties reaching a result they find acceptable, an especially valuable benefit in workplace disputes. Although it is too early for a meaningful statistical assessment of the program, the success rate so far has ranged from 20-30 percent. The full Board reviews almost 2,000 cases annually.

*Pilot Settlement Judge Program* - During fiscal year 1994, the Board initiated a pilot program in its regional and field offices to use separate settlement judges in attempting to resolve initial appeals without litigation. Under this program, an appeal is assigned to an

administrative judge for adjudication as usual, but a separate settlement judge works with the parties to try to settle the case. If settlement efforts are not successful, the appeal is adjudicated by the judge assigned to the case.

*Project to Evaluate Settlement Programs* -The Board is participating in a pilot project under the Government Performance and Results Act to evaluate settlement procedures in adjudication. The Board's pilot project, "Utility of Settlement Methods in the Adjudicatory Process," is one of 71 pilot projects selected by the Office of Management and Budget to test strategic planning and performance results measurement. The Board is evaluating the effectiveness of settlement in its adjudicatory process in terms of time and cost savings and customer satisfaction. In its first project report, covering the last half of fiscal year 1994, the Board reported savings of almost \$200,000 in court reporting and travel costs. The next report will address the results of the Board's analysis of customer satisfaction with the settlement process.



*Shelya White and Chuanda Johnson Human Resources Management Division*

#### EASIER CASE PROCESSING PROCEDURES

*Initial Appeals* - Federal employees who are removed or face significant employment actions have more time to file appeals under new Board rules. The Board extended its time limits for filing appeals by 10 days in most cases. The Board also made it easier for appellants to file appeals by changing its regulations to permit filing appeals by commercial overnight delivery service. The Board clarified its interim relief regulations to identify the evidence that an agency must provide to show compliance with an interim relief order.

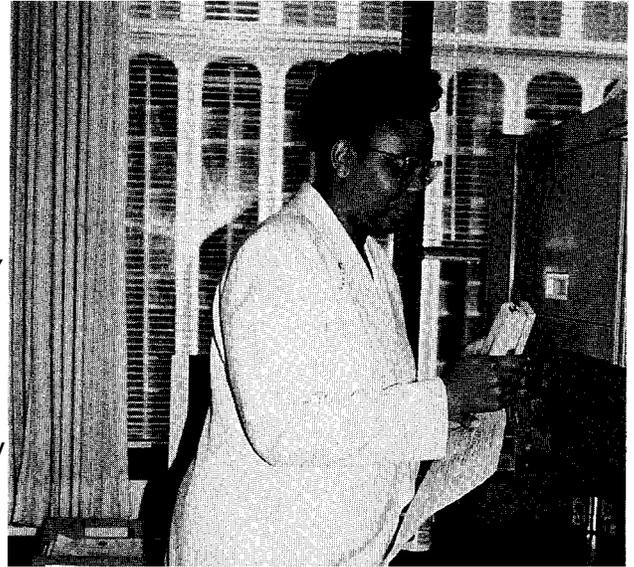
*Petitions for Review* - The Board revised its procedures for handling petitions for review improperly filed. For example, the Clerk of the Board may correct certain omissions, such as a required signature, administratively. Explanations for late-filed petitions for review can be made by filling out a simple form. The Clerk of the Board also provides appellants with a telephone number and the name of an employee who can respond to questions.

#### SIMPLIFIED INTERNAL PROCEDURES

The Board abolished a number of manuals, including a 40-page information security manual, a 20-page mail manual, a 41-page legal style manual, and a 73-page correspondence style manual—a total of almost 175 pages of unnecessary internal regulations. The Board also instituted simplified purchasing procedures; reduced paperwork in handling travel expenses; and centralized the purchases of items commonly used.

## WORKPLACE ISSUES IN STUDIES AGENDA

The Board is focusing its study initiatives on workplace issues particularly related to the National Performance Review goals of streamlining government to be more effective and efficient. Two reports published in fiscal year 1994, *Entering Professional Positions in the Federal Government* and *Temporary Employment: In Search of Flexibility and Fairness*, explore the Federal Government's staffing system and recommend changes to serve the public better, enhance agency mission accomplishment, and allow managers and supervisors to do their jobs more effectively. A study of procedural rules applicable to Federal staffing, currently underway, looks at the impact of overly restrictive rules on the quality and diversity of the Federal workforce and identifies alternatives that will foster hiring and retaining a qualified and diverse workforce. The search for practices to revitalize human resources includes a Board study of innovative practices in state governments that might be applied to the Federal workplace. The Board's study on alternative dispute resolution practices in Federal agencies should further the NPR goal of reducing adversarial confrontations in the Federal workplace.



Vanessa Gray, Office of the Clerk of the Board

## PUTTING CUSTOMERS FIRST

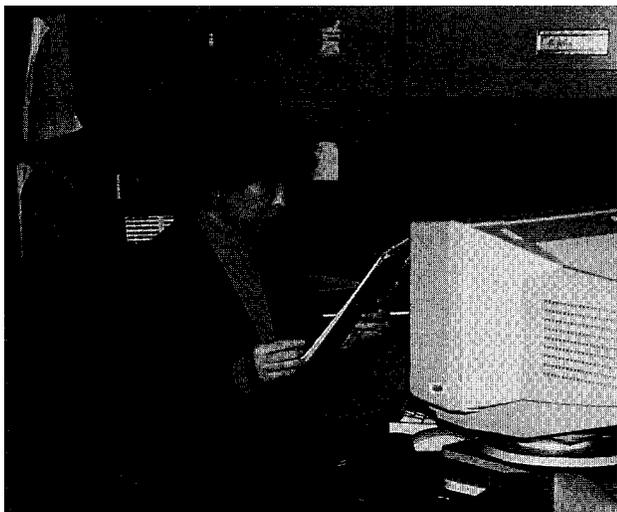
The Board developed Customer Service Standards to assure its customers that they will receive quality service and to assure the public as a whole that the Board is ably promoting and protecting the Federal merit systems. The Customer Service Standards are printed at the end of this publication.

## EMPOWERING EMPLOYEES

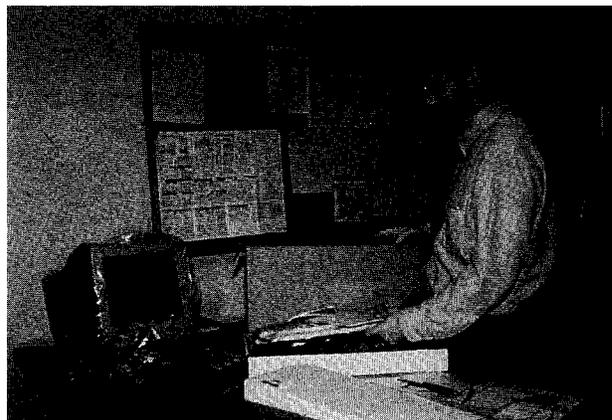
*Reengineering* - MSPB employees at all levels were involved in the restructuring process, and their recommendations were key to the agency's new look. Teams of employees evaluated individual offices—interviewing employees, examining office practices, workflow, management layering, reporting structure, and employee empowerment—and recommended changes. The MSPB Professional Association (the bargaining representative for attorneys) and the Chairman's Council (made up of both supervisory and non-supervisory employees) were also critical to the restructuring process.

*Partnership Council* - The Chairman established an agencywide Partnership Council, a body of 10 members representing the Chairman's office, senior executives, and management, supervisory and nonbargaining unit employees. The Council's statement of purpose sets a broad agenda: "The Council intends to foster MSPB employee participation to the greatest possible degree by incorporating the advice and suggestions of employees at all levels of interest and professional responsibility within the agency. By including representatives of all employee groups, who exemplify a broad spectrum of interest and experience, the Council intends to achieve diversity in employee participation, innovation in perspective, and inclusive agencywide participatory partnership."

*Family-Friendly Work Environment* - The Board extended the availability of alternative and flexible work schedules to employees in all offices of the Board. The agency began an alternative work schedule (AWS) pilot project that allows five offices to make exceptions to agencywide AWS policy, essentially tailoring their AWS programs to meet the needs of their particular offices. The Board also expanded its use of flexiplace to include additional headquarters and regional offices.



*Dinh Chung, Office of the Clerk of the Board*



*William McDermott, Information Resources Management Division*

## **BOARD ORGANIZATION**

The **Chairman, Vice Chairman, and Member** adjudicate the cases brought to the Board. Each has his/her individual office.

The **Chairman**, by statute, is the chief executive and administrative officer of the Board. All office heads report directly to the Chairman.

**The Office of the Administrative Law Judge and Regional Operations** manages the appellate functions of the MSPB regional offices and adjudicates cases governed by the Administrative Procedure Act and other cases assigned by the Board. The six regional offices (including five field offices) receive and process the initial appeals filed with the Board. Administrative judges in the regional and field offices 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 of initial decisions issued by its administrative judges and requests for review of arbitration decisions in certain cases. The office analyzes the petitions, conducts legal research, and submits proposed opinions to the Board for final adjudication. It also conducts the Board's petition for review settlement program, 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 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, manages the Board's records, and administers the Board's Freedom of Information Act, Privacy Act, and Government in the Sunshine Act programs.

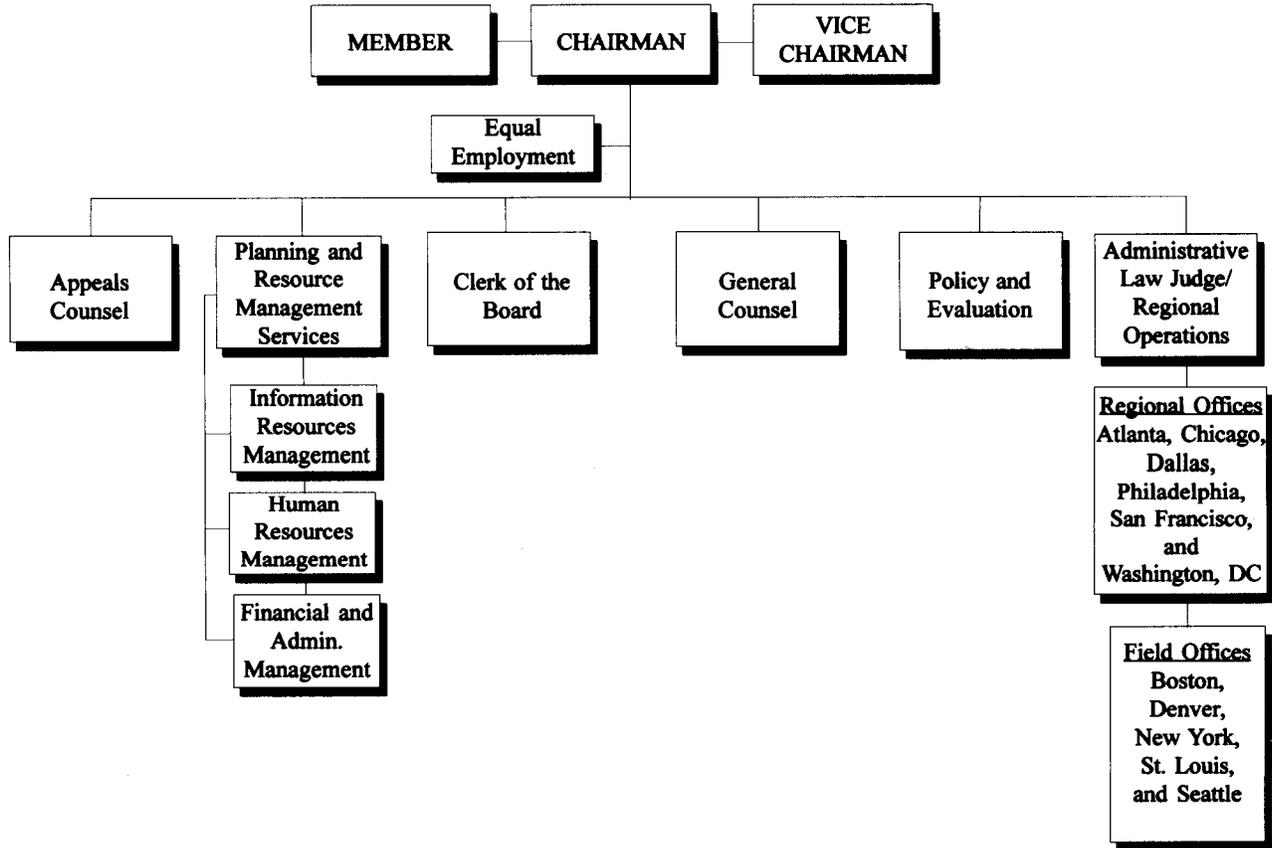
The **Office of the General Counsel**, as legal counsel to the Board, provides advice to the Board and its organizational components on matters of law arising in day-to-day operations. It represents the Board in litigation and prepares proposed decisions and orders for the Board in original jurisdiction cases, compliance referral cases, and other assigned cases. The office coordinates the Board's legislative policy, congressional relations, and public affairs functions, and produces the agency's annual report to the President and the Congress and public information publications. The office also conducts the Board's ethics program and plans and directs audits and investigations.

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 also provides assistance to Federal departments and agencies seeking to improve agency operations through more effective human resources management.

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 Planning and Resource Management Services** coordinates the Board's strategic planning and 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. It also develops and coordinates internal management programs and projects, including review of internal controls agencywide. 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.

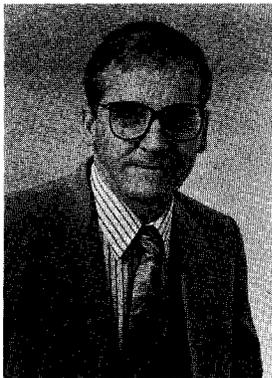
# ORGANIZATION CHART



## REGIONAL OFFICIALS



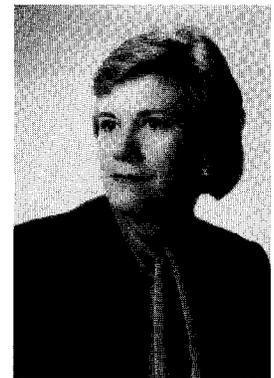
**Paul G. Streb**  
*Administrative Law Judge*



**Thomas J. Lanphear**  
*Regional Director  
Atlanta Office*



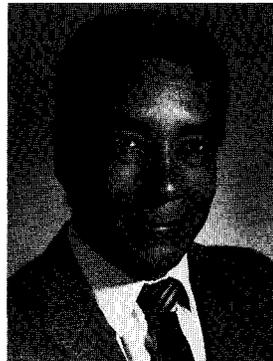
**Martin W. Baumgaertner**  
*Regional Director  
Chicago Office*



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



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



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



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

## REGIONAL AND FIELD OFFICE JURISDICTIONS



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

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

**New York Field 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 Field Office**-- Illinois (Springfield and all locations south), Iowa, Kentucky, Missouri, and Tennessee

**San Francisco Regional Office**-- California

**Seattle Field 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

## **FISCAL YEAR 1994 CASE PROCESSING -STATISTICAL HIGHLIGHTS**

### **KINDS OF APPELLATE JURISDICTION CASES**

The kinds of appellate jurisdiction 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.
- *Request for Compensatory Damages* - A request by an appellant who prevails in a mixed case appeal on the basis of discrimination for payment of compensatory damages under the Civil Rights Act of 1991.
- *Remand* - A case returned to an administrative judge by the Board or court, after an initial decision has been issued, for additional processing and issuance of a new initial decision.

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

Approximately 20 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. In addition, the Board 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. The kinds of appellate jurisdiction 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.
- *Request to Review Stay Ruling* - A request by a party that the Board review an administrative judge's order ruling on a stay request.

-

*Petition to Review Arbitrator's Award* -A request that the Board review an arbitrator's award where the employee has grieved an action appealable to the Board and the employee raises an issue of prohibited discrimination.

- *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.
- *Request for Stay Pending Judicial Review* - A request by a party that an order of the Board be stayed pending judicial review of that order.

## CASES DECIDED BY MSPB IN FY 1994

### Initial Decisions:

Appeals .....	7,530
Addendum Cases <sup>1</sup> .....	912
Stay Requests <sup>2</sup> .....	110
<b>TOTAL</b> .....	<b>8,552</b>

### Board Decisions:

#### Appellate Jurisdiction:

PFRs - Appeals .....	1,696
PFRs - Addendum Cases <sup>1</sup> .....	184
Reviews of Stay Request Rulings .....	1
Requests for Stay of Board Order	
Pending Judicial Review.....	28
Reopenings <sup>3</sup> .....	35
Court Remands .....	29
Compliance Referrals .....	49
EEOC Non-concurrence Cases.....	3
Arbitration Cases.....	6
Subtotal .....	2,031
Original Jurisdiction (see separate report on p. 38).....	75
<b>TOTAL</b> .....	<b>2,106</b>

<sup>1</sup> Includes requests for attorney fees, requests for compensatory damages (discrimination cases only), petitions for enforcement, Board remand cases, and court remand cases.

<sup>2</sup> Includes 82 stay requests in whistleblower cases and 28 in non-whistleblower cases.

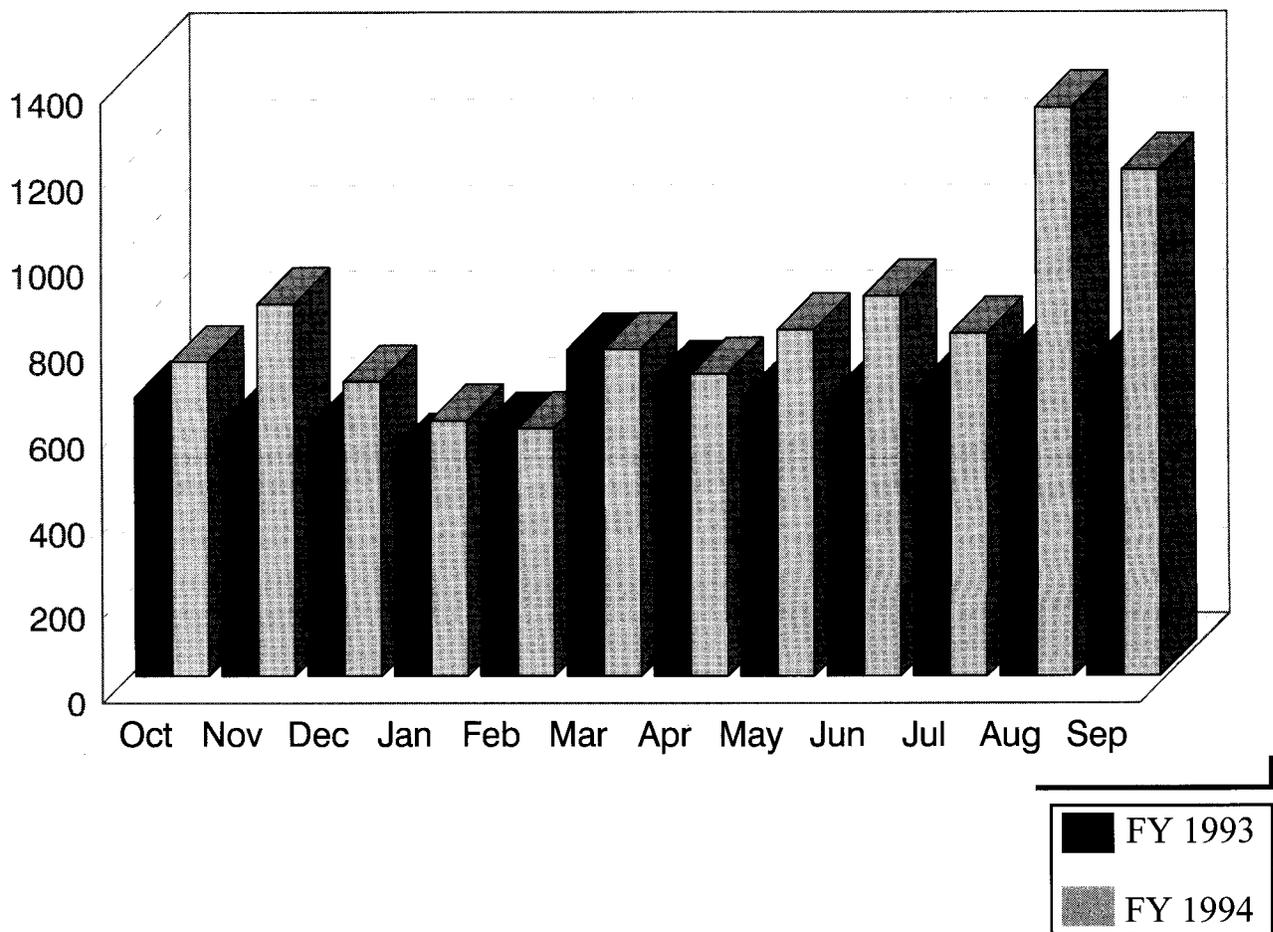
<sup>3</sup> Includes 31 cases reopened by the Board on its own motion and 4 cases where OPM requested reconsideration.

### Regional and Field Offices

• *Case Receipts* - Receipts of new cases in the regional and field offices in fiscal year 1994 were up 27 percent from the previous fiscal year—from 7,844 to 9,965—a 5-year high. RIF and retirement appeals were up significantly. Appeals stemming from the Postal Service restructuring accounted for 16 percent of all receipts of initial appeals during the fiscal year. At the end of the fiscal year, there were 3,245 cases pending in the regional and field offices, an increase of 77.5 percent over the number pending at the end of the previous fiscal year.

### REGIONAL CASE RECEIPTS

Initial Appeals, Addendum Cases, and Stay Requests



**COMPARISON OF MSPB REGIONAL CASE RECEIPTS FISCAL YEARS 1993 AND 1994**

<b>RECEIPTS IN REGIONAL/FIELD OFFICES</b>	<b>FY 1993</b>	<b>FY 1994</b>	<b>% INCREASE</b>
Initial Appeals <sup>1</sup>	6,938	8,775	+ 26.5 %
Addendum Cases <sup>2</sup>	805	1,078	+ 33.9 %
Stay Requests	101	112	+ 10.9 %
<b>TOTAL</b>	<b>7,844</b>	<b>9,965</b>	<b>+ 27.0 %</b>
<b>Included in Initial Appeals Receipts are:</b>			
CSRS Retirement	1,159	1,721	+48.5 %
FERS Retirement	191	279	+ 46.1 %
<b>ALL Retirement</b>	<b>1,350</b>	<b>2,000</b>	<b>+ 48.1 %</b>
<b>RIF <sup>3</sup></b>	<b>464</b>	<b>1,686</b>	<b>+ 263.4 %</b>

<sup>1</sup> Initial Appeals receipts for FY 1994 include 1,391 cases involving Postal Service reorganization.

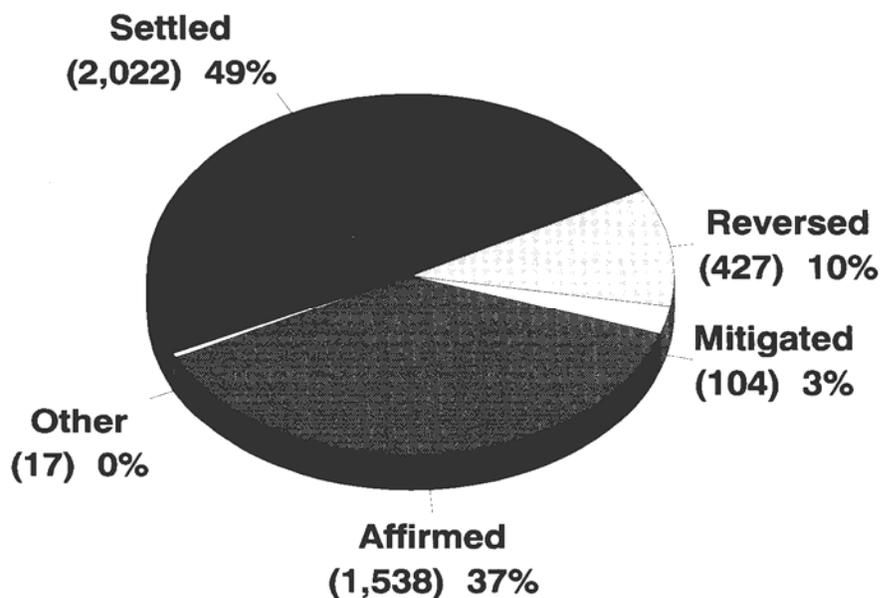
<sup>2</sup> Addendum Case receipts for FY 1994 include 101 cases involving Postal Service reorganization. Addendum Cases include motions for attorney fees, motions for compensatory damages (discrimination cases only), petitions for enforcement, Board remands, and court remands.

<sup>3</sup> RIF appeal receipts for FY 1994 include 1,090 appeals involving Postal Service reorganization. The remainder of the Postal Service reorganization cases received were appeals of other personnel actions, principally adverse actions.

• *Number of Cases Decided* – Administrative judges decided a total of 8,552 cases in FY 1994, an increase of 9.5 percent from the previous fiscal year. Of the cases decided, 7,530 were initial appeals, and 912 were addendum cases. Decisions on initial appeals were up 10 percent from the previous fiscal year, and those in addendum cases were up 7 percent. There were 110 orders ruling on stay requests-82 in whistleblower cases and 28 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.) Decisions on stay requests increased 9 percent.

• *Disposition* - Of the 7,530 initial appeals decided, 3,422 (45 percent) were dismissed. Of the dismissals, 77 percent were for lack of jurisdiction, agency cancellation of the action, or appellant withdrawal of the appeal. Twelve percent were dismissed as untimely, and 11 percent were dismissed without prejudice to later refiling. The accompanying charts show the outcomes of appeals that were not dismissed and the disposition of appeals adjudicated on the merits.

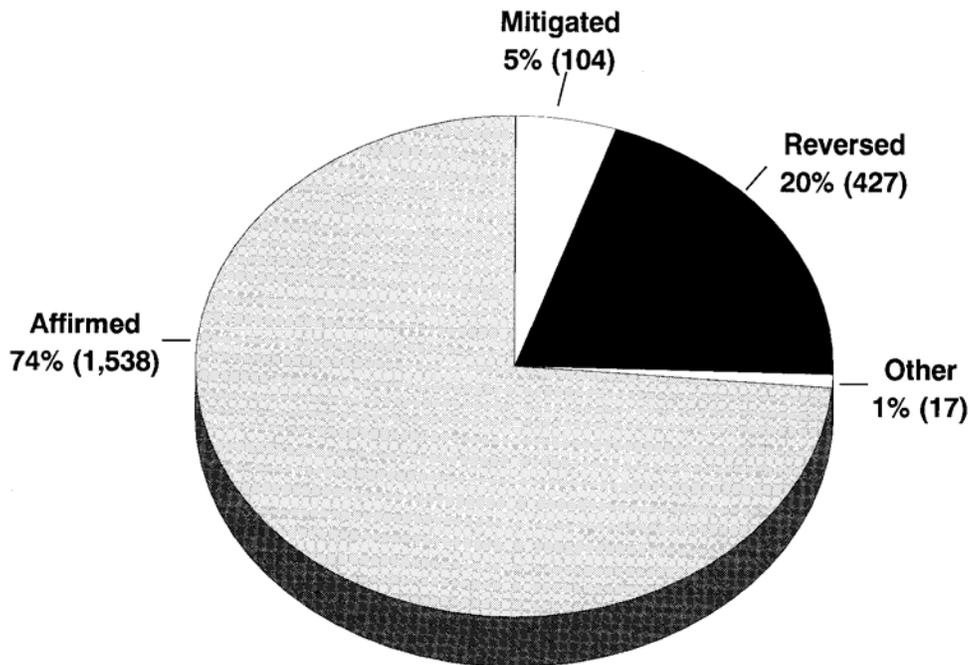
### OUTCOMES OF FY 1994 APPEALS NOT DISMISSED



Based on 4,108 initial appeals not dismissed.

Percentages do not total 100% due to rounding.

**DISPOSITION OF INITIAL APPEALS ADJUDICATED ON THE MERITS IN FY 1994**



Based on 2,086 adjudicated initial appeals.

. *Settlement Rate* - Of the 4,108 appeals that were not dismissed, 2,022 were settled, for an overall settlement rate of 49 percent. The settlement rate for adverse action cases was 65 percent; for performance cases, 72 percent; and for denials of within-grade increases, 76 percent.

. *Relief for Appellants* - Considering the number of appeals settled (2,022) and those in which the agency action was reversed or mitigated (531), appellants received relief in 62 percent of the appeals not dismissed.

**INITIAL DECISIONS IN APPEALS NOT DISMISSED - FY 1994**

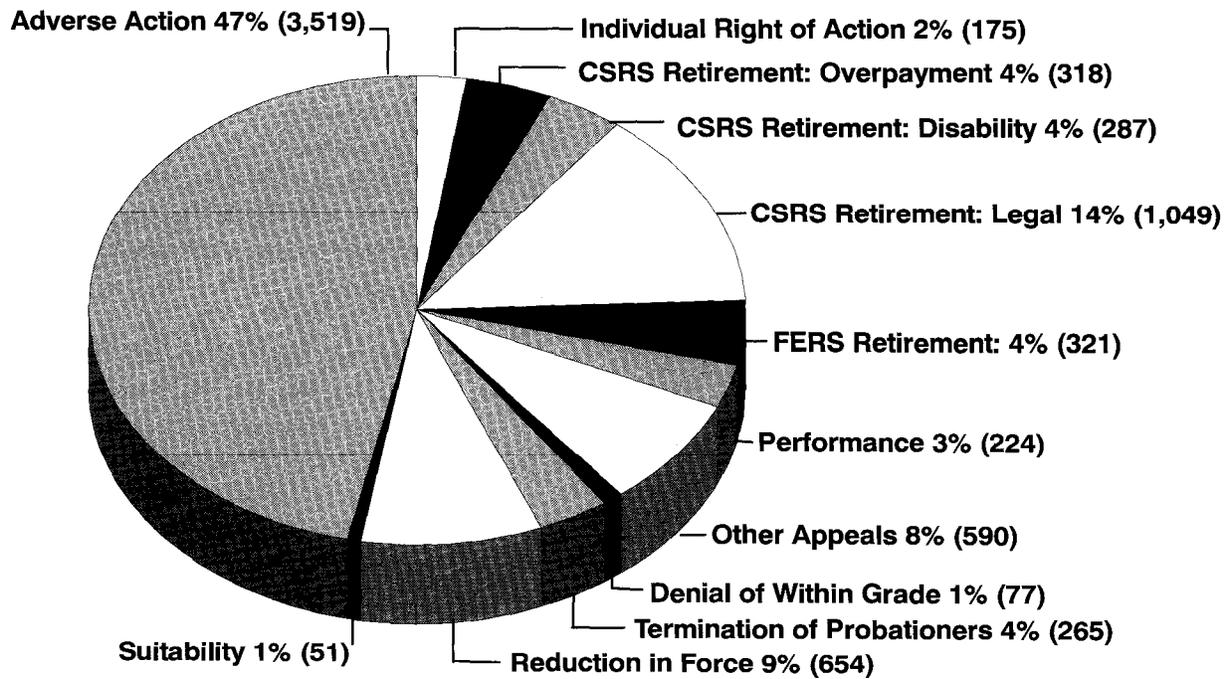
Number Not Dismissed	Relief for Appellant*
4,108	Settled 2,022
	Reversed 427
	<u>Mitigated 104</u>
	2,553 (62.1 %)

\* "Relief for Appellant" means the case was settled, or the initial decision reversed or mitigated the agency action (or corrective action was ordered in an IRA).

• *Processing Time* - The average processing time for initial appeals was 81 days, compared to 79 days in FY 1993. Of the initial appeals decided, 96 percent were decided within 120 days.

• *Types of Actions Appealed* - Of the initial appeals decided, 47 percent were appeals of agency adverse actions, 9 percent were RIF appeals, and 3 percent were appeals of performance-based actions. Retirement cases (both CSRS and FERS) accounted for 26 percent of the total, and the remainder involved other types of agency actions.

### TYPES OF INITIAL APPEALS DECIDED IN FY 1994



**Total Number of Initial Appeals: 7,530**  
**Percentages do not total 100% because of rounding.**

- *Whistleblower Appeals* - There were 487 whistleblower appeals and stay requests decided. Of this number, 175 were individual right of action (IRA) appeals in which the appellant was required to exhaust the procedures of the Office of Special Counsel, 230 were direct appeals to the Board that included an allegation of reprisal for whistleblowing, and 82 were requests to stay an action allegedly based on whistleblowing.
- *Relief for Appellants in Whistleblower Appeals* - Of the 405 whistleblower appeals decided (175 IRA appeals and 230 appeals of otherwise appealable actions), 215 (53 percent) were dismissed. In the other 190 whistleblower appeals, appellants received relief in 126 (66 percent).

### **INITIAL DECISIONS IN WHISTLEBLOWER APPEALS NOT DISMISSED - FY 1994**

Whistleblower Case Type	Number Not Dismissed	Relief for Appellant *
OAs	126	88 (69.8 %)
IRAs	64	38 (59.4 %)
Total	190	126 (66.3 %)

\* "Relief for Appellant" means the case was settled, or the initial decision reversed or mitigated the agency action (or corrective action was ordered in an IRA).

- *Mixed cases* - Allegations of discrimination were raised in 2,052 of the initial appeals decided; however, in 1,693 of those appeals, the discrimination issue was not decided because the case was dismissed (981) or settled (629) or the allegation was withdrawn (83). The remaining 359 mixed case appeals resulted in a finding of no discrimination in 351 (98 percent) and a finding of discrimination in 8 (2 percent). In the mixed cases settled or in which a discrimination issue was decided, appellants received relief—through settlement or reversal or mitigation of the agency action—in 73 percent (727 of 988).

#### *Board Headquarters*

- *Case Receipts* - At headquarters, receipts of petitions for review and other appellate jurisdiction cases were up 15 percent from the previous fiscal year. This was the highest number of cases received in five years.
- *Number of Cases Decided* - The 3-member Board decided a total of 2,031 appellate jurisdiction cases in FY 1994, an increase of 29 percent from the previous fiscal year and also a 5-year high. Of the cases decided, 1,696 were petitions for review of initial decisions on appeals, 184 were petitions for review of initial decisions in addendum cases, and 151 were other appellate

jurisdiction cases. At the end of the fiscal year, despite the record number of receipts, there were 586 appellate cases pending at headquarters, a decrease of 18.5 percent from the number pending at the end of fiscal year 1993.

- *Disposition* - Of the petitions for review of initial decisions on appeals, 8 percent were dismissed, 2 percent were settled, and 59 percent were denied for failure to meet the criteria for review. The Board reviewed the remaining 31 percent—made up of 18 percent denied but simultaneously reopened by the Board and 13 percent granted. Of the decisions in these cases, 54 percent affirmed the initial decision, 14 percent reversed it, 23 percent remanded the case to the administrative judge, and 1 percent mitigated the agency action. In the remaining 8 percent, the case was subject to another disposition.
- *Processing Time* - The average processing time for petitions for review of initial decisions on appeals was 162 days, compared to 131 days in FY 1993. The Board processed 61 percent of these cases in 110 days or less, averaging 80 days. The principal reason for the increase in average processing time was the Board's emphasis on completing the oldest pending cases during the fiscal year. The Board closed more than 150 cases that were one year or longer in process.
- *Other Appellate Cases* - The Board decided 31 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), 4 OPM requests for reconsideration, and 29 court remands. The Board also decided 3 EEOC non-concurrence cases, 49 compliance referrals, 6 petitions to review an arbitrator's award, 1 request to review a stay ruling, and 28 requests for stay of a Board order pending judicial review.

### *Judicial Review*

- The U.S. Court of Appeals for the Federal Circuit reviewed 601 final Board decisions in FY 1994. Of this number, 93 percent were left unchanged (case dismissed or Board decision affirmed). The court affirmed the Board decision in 89 percent of the cases it adjudicated.

## **ADJUDICATION: APPELLATE JURISDICTION**

### **PROCEDURES**

#### *Initial Appeals*

Appeals to the Board must be filed in writing with the regional or field office having geographic jurisdiction within 30 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 35 days of the date of the notice.

After an appeal has been received, the regional or field 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.

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.

Different time limits for filing 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.



**Raphael Ben-Ami, Administrative Judge**

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 (30 or 35 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 or field 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 30 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 30 days after the effective date of the agency action.

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

#### *Petitions for Review*

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 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.

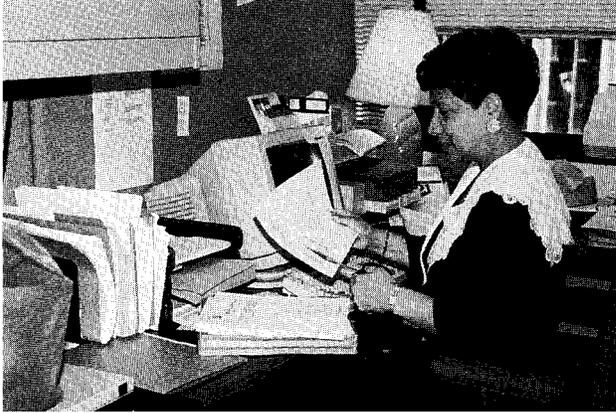
## **SIGNIFICANT ACTIVITIES IN FISCAL YEAR 1994**

### *Decisions in Postal Service Restructuring Cases*

The Board issued its first decisions in cases arising from the 1992-1993 restructuring of the Postal Service in July 1993, ruling that the reorganization constituted a reduction-in-force and that demotions of preference-eligible employees in the reorganization, without the benefit of RIF procedures, must be reversed. (See *Brown v. USPS* and *DiPietro v. USPS*, summarized in the Fiscal Year 1993 Annual Report.) In November 1993, the Director of OPM sought review of the Board's ruling on the Postal Service restructuring by intervening in two cases, *White v. USPS* and *Robinson, Diaz, and Yruegas v. USPS*, pending before the Board on petitions for review from the Postal Service. In late January 1994, at the request of the Postal Service, the Board issued an order (*Korthof, et al, v. USPS*) that stayed proceedings in all of the Postal Service restructuring cases then pending before the Board and in the regional offices, and staying all interim relief orders in cases where initial decisions had been issued, pending issuance of final Board decisions in *White* and *Robinson*. The stay order affected almost 175 cases. The Board subsequently stayed proceedings in additional cases as they were filed.

On June 24, 1994, the Board issued its final decisions in *White v. USPS and OPM* and *Robinson, Diaz, and Yruegas v. USPS and OPM*, affirming its 1993 decisions in *Brown* and *DiPietro* and reversing the agency's demotions of the appellants, all employees with veterans' preference. On June 29, 1994, the Board issued its decision in *Marcoux v. USPS*, an appeal of an adverse action—rather than a RIF—by a Postal Service employee without veterans' preference, and affirmed the administrative judge's initial decision that dismissed the appeal for lack of jurisdiction. On July 15, 1994, the Board issued an order (*Korthof, et al, v. USPS*) lifting the stay of proceedings in all Postal Service restructuring cases pending before the Board and in the regional and field offices, followed by a July 19 order (*Adams, et al, v. USPS*) affirming decisions in those cases where initial decisions had been issued at the time of the January stay order.

The Director of OPM initially filed a petition for review of the Board's *White* and *Robinson* decisions with the U.S. Court of Appeals for the Federal Circuit, but withdrew the petition in early August. Although OPM is the only Federal agency that may seek review of the Board's decisions in the Federal Circuit, the Postmaster General filed a motion for hearing by the court. On August 10, the Postmaster General announced that the motion was being withdrawn and that the Postal Service would abide by the Board's rulings. Previously, the Postal Service had filed a motion to stay the Board's orders pending judicial review, but in view of the agency's subsequent decision not to contest the rulings in court, the Board issued an order dismissing the motion for stay as moot (*Adams, et al, v. USPS*, September 13, 1994).



*Patricia Paige, Office of the Clerk of the Board*

In final decisions issued on September 1, 1994, the Board disposed of approximately 115 pending petitions for review, reversing the Postal Service's actions in most of the cases, based on the *White* and *Robinson* rulings, and affirming the agency actions in the remainder, based on *Marcoux*. On that same date, the Board issued an order (*Robinson, et al, v. USPS*) granting a motion by the Postal Service that the processing of all restructuring appeals in the regional and

field offices be stayed for 30 days—until October 1, 1994—to allow the agency time to comply with the Board's orders. The Board's final significant decision of the fiscal year in these cases was issued on September 23, 1994, in *Dixon, et al, v. USPS*. In this consolidation of 15 petitions for review from employees who had been detailed to placement centers during the Postal Service restructuring, the Board ruled that the details did not constitute demotions by RIF and affirmed the agency's actions.

The extensive news reports of the Board's decisions in the Postal Service restructuring cases prompted many calls for information to the Board's headquarters and regional offices, followed by a substantial increase in receipts of new appeals in the final quarter of the fiscal year. The Board received almost 1,400 appeals arising from the Postal Service restructuring in all of fiscal year 1994, and 1,300 such appeals were pending at the end of the fiscal year. The Board received 101 addendum cases related to the Postal Service restructuring appeals, primarily requests for attorney fees and petitions for enforcement. In addition to the workload represented by these cases for the next fiscal year, the Board expects to continue to be occupied with the Postal Service restructuring cases through related issues, such as the timeliness of appeals that were not filed until after the issuance of the Board's *White* and *Robinson* decisions, the issue of jurisdiction with respect to employees who retired rather than be affected by the restructuring, and questions regarding the agency's compliance with the Board's orders.

## POSTAL SERVICE REORGANIZATION CASES DECIDED BY MSPB IN FY 1994

<b>Initial Decisions on Appeals:</b>	
Dismissed	136
Settled	9
Agency Action Affirmed	2
Agency Action Reversed	81
<b>TOTAL</b>	<b>228</b>
<b>Board Decisions on Petitions for Review:</b>	
Dismissed	3
Settled	3
Granted\Remanded to Administrative Judge	2
Denied	34
Denied\Reopened\Affirmed Initial Decision	119
Denied\Reopened\Vacated Initial Decision	4
<b>TOTAL</b>	<b>166</b>
<b>Board Decisions on Reopenings:</b>	
Affirmed Final Decisions	23
<b>Board Decisions on Motions to Stay Final Orders Pending Judicial Review:</b>	
Dismissed - Moot	28

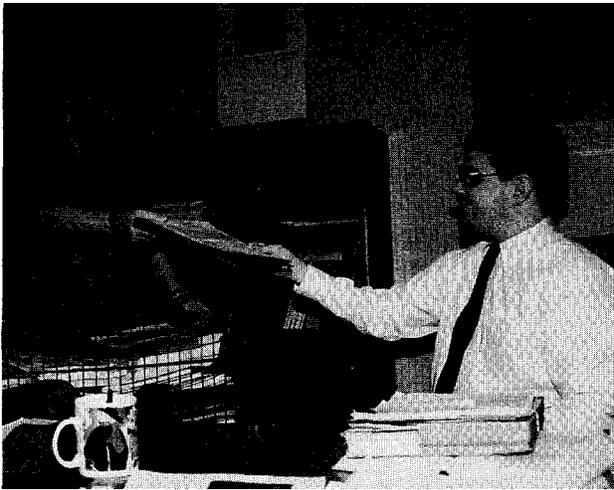
## POSTAL SERVICE REORGANIZATION CASES RECEIVED AND DECIDED BY MSPB IN FY 1994

<b>Initial Appeals:</b>	
Pending 10/1/93	137
Received	1,391
Decided	228
Pending 9/30/94	1,300
<b>Petitions for Review:</b>	
Pending 10/1/93	70
Received	155
Decided	166
Pending 9/30/94	59

## *Significant Issues Addressed*

In decisions issued during fiscal year 1994, the Board continued its development of the law affecting Federal employment, deciding issues following from prior decisions and revisiting and revising the law as appropriate. The year saw the Board further refine the law being developed under the Whistleblower Protection Act. For example, it continued to determine what matters constitute personnel actions that may form the subject of individual right of action appeals and to distinguish between those disclosures under 5 U.S.C. § 2302(b)(8) that come within the scope of the Act and those that fall outside of it because they properly are protected under 5 U.S.C. § 2302(b)(9).

The Board also continued to develop case law in the area of interim relief. It issued decisions addressing the procedures by which it will act on cases raising interim relief issues, the nature of the proof agencies must submit to comply with interim relief orders, and when such proof must be submitted.



*Rosemary Sunseri and Eric Daniels, Office of Appeals Counsel*

The Board expanded its definition of good cause for waiver of its time limits to ensure that its processes would be open and available to all who are entitled to use them; set out the limits of the extent to which agencies may require employees to undergo psychiatric fitness for duty examinations; set forth rules for determining whether a period of absence for medical reasons constitutes enforced leave or a voluntary absence; added further to the law on the scope of accommodation to which a disabled employee is entitled; and issued its first in-depth analysis of the damages provisions in the Civil Rights Act of 1994.

*See Appendix A for summaries of significant Board decisions on appeals issued during fiscal year 1994.*

# Appellate Case Processing

- Approximately 600 Board decisions are filed after Initial Appeal decision becomes final or after three member Board review and decision.

- Approximately 1600 Petitions for Review of Initial Appeals and Addendum Cases filed yearly with the Clerk of the Board. Reviewed by the Office of Appeals Counsel.

- Other Appellate Cases: Enforcement; Equal Employment Opportunity Commission Non-Concurrence; and Arbitration Appeals.

If not settled, hearing, decision or decision on the record. Hearings generally opened to the public.

Adverse decisions on Jurisdiction/Timeliness Petition for Review (PFR) to three member Board.

- Approximately 8,000 Initial Appeals and Addendums yearly.

- Appeal Types: Adverse Action (Removal, Suspension, Demotion); Probationer; Reduction-in-Force; Performance; Within-Grade Denial; Suitability; Retirement; Whistleblower, Attorney Fee, Compliance, Remand, and Compensatory Damages.

**U.S. Court of Appeals for the Federal Circuit**

**U.S. District Court**

**MSPB Three Member Board Decision**

Mixed Cases (Discrimination) can go to Equal Employment Opportunity Commission and then to the U.S. district court, or directly to the district court.

**Pilot Settlement Program**

For selected PFRs, Board attorneys discuss settlement with parties.

**Initial Decision**

After record is closed, the Administrative Judge issues an initial decision.

**Settlement**

If settled, Administrative Judge dismisses the case with issuance of decision, although parties may file a Petition for Review (PFR) with the Board.

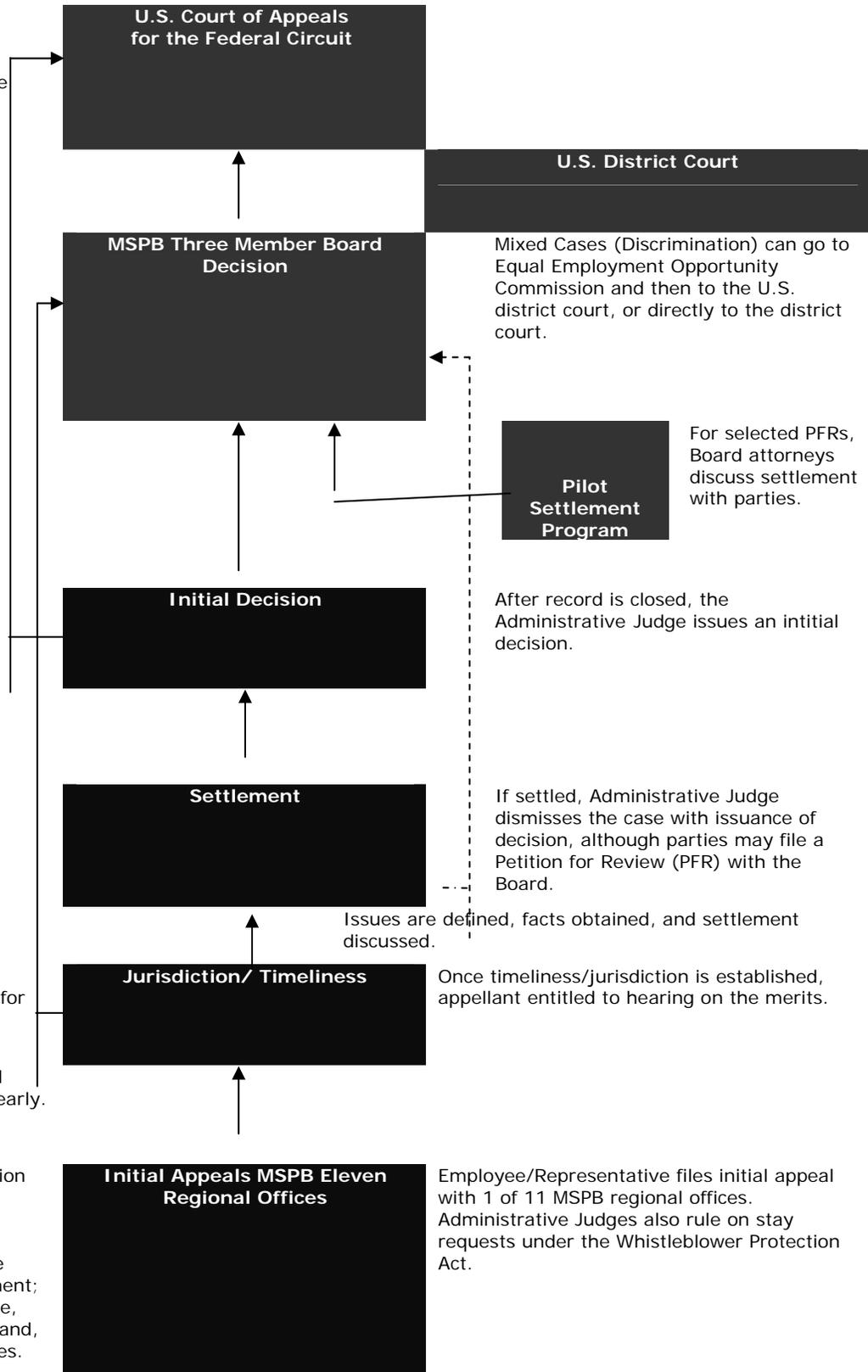
Issues are defined, facts obtained, and settlement discussed.

**Jurisdiction/ Timeliness**

Once timeliness/jurisdiction is established, appellant entitled to hearing on the merits.

**Initial Appeals MSPB Eleven Regional Offices**

Employee/Representative files initial appeal with 1 of 11 MSPB regional offices. Administrative Judges also rule on stay requests under the Whistleblower Protection Act.



## **ADJUDICATION: ORIGINAL JURISDICTION**

### **PROCEDURES AND KINDS OF CASES**

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, as well as Special Counsel corrective action complaints, are assigned to the Board's Administrative Law Judge, who issues a recommended decision to the Board for final action.

Special Counsel stay requests and requests for regulation review are decided by the Board. An initial stay request may be granted by a single Board member, while a request for extension of a stay must be acted on by the full Board. A stay may be terminated by decision of the full Board following a motion by either the Special Counsel or the affected agency.

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. 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 Administrative Law Judge, which is then subject to a petition for review by the Board.

In SES performance-based removal cases, the Administrative Law Judge holds an informal hearing, but the Board does not issue a decision. The record of the hearing is forwarded to the employing agency, OPM, and the Special Counsel for appropriate action.

**ORIGINAL JURISDICTION CASES DECIDED BY MSPB IN FY 1994**

CASE TYPE	NUMBER DECIDED	DISPOSITION
<b>OSC Corrective Actions</b> .....	0	
<b>OSC Disciplinary Actions</b> .....	6	Suspension ordered - 2
- <b>Non-Hatch Act</b> .....		\$1,000 fine ordered - 2
.....		Remanded to ALJ - 1
.....		Dismissed without prejudice - 1
Request for Stay of Board Order.....	2	Denied
Pending Judicial Review		
Petition for Enforcement.....	2	Compliance ordered, then
of Board Order .....		dismissed - compliance found
<b>OSC Disciplinary Actions</b>		
- <b>Hatch Act:</b>		
Federal/DC .....	6	Suspension ordered - 1
.....		Remanded to ALJ - 1
.....		Settled - 4
State/Local .....	18	Removal ordered - 2
.....		Settled - 1
.....		Dismissed - Jurisdiction - 15
Withholding of Funds .....	1	Ordered funds withheld
OPM Request for.....	1	Granted - Affirmed Previous
Reconsideration .....		Decision
Petition for Enforcement .....	1	Dismissed - compliance found of
Board Order		
<b>OSC Stay Requests:</b>		
Initial Requests .....	7	Granted - 6
.....		Operation of law - 1
Requests for Extension .....	20	Granted - 19
of Stay .....		Denied - 1
OSC Motion for Termination .....	3	Granted of
Stay		
Agency Motion for .....	1	Denied
Termination of Stay		
<b>Actions Against ALJs</b> .....	4	Removal authorized - 1
.....		Settled - 3
<b>Requests for Regulation Review</b> .....	3	Denied
<b>TOTAL</b> .....	<b>75</b>	

## **SIGNIFICANT ACTIVITIES IN FISCAL YEAR 1994**

The Board completed action on 75 original jurisdiction cases in fiscal year 1994, more than twice the number in the previous fiscal year (37). The increase was attributable primarily to a significant increase in the number of Special Counsel cases—Hatch Act matters, disciplinary actions, and stay requests. Of the 75 original jurisdiction cases closed, 27 were Hatch Act cases, 10 were other Special Counsel disciplinary actions, 31 were Special Counsel stay requests and related matters, 4 were proposed actions against administrative law judges, and 3 were requests to review an OPM regulation.

### *Hatch Act Cases*

The Board issued decisions in 27 Hatch Act cases during the fiscal year. Six were new cases involving Federal or District of Columbia government employees, 18 were new cases involving state and local government employees who held positions at least partially federally-funded, and the remaining 3 were matters related to Hatch Act decisions issued in prior fiscal years. This compares to 16 such decisions issued during the previous fiscal year.

Of the six cases involving Federal or District of Columbia government employees, four resulted in settlement agreements being reached by the parties, one was remanded to the Administrative Law Judge, and in the remaining case, the Board found a violation of the Hatch Act and ordered a 60-day suspension. In the cases resolved by settlement agreements, the penalties varied. Two settlement agreements resulted in 45-day suspensions, one in a 30-day suspension, and one in a resignation.

In two of the Hatch Act cases involving state and local government employees, the respondents were ordered removed from their positions. There was one settlement resulting in Federal funds equal to two years of the employee's salary at the time of the violation being withheld from the state agency. The remaining 15 cases were consolidated for a single decision, *Special Counsel v. Bissell, et. al., & Public Service Commission of the State of Tennessee*, which dismissed the cases for lack of jurisdiction.

Of the three matters related to Hatch Act decisions issued in prior fiscal years, one resulted in a Board order that Federal funds be withheld from the county agency. Another decision granted OPM's motion for reconsideration, but affirmed the Board's previous decision, as modified, still finding no Hatch Act violation. The final case was a compliance matter, which the Board dismissed, finding that the agency had complied with the Board's order.

### *Special Counsel Disciplinary Actions (non-Hatch Act)*

The Board issued 10 decisions in Special Counsel disciplinary actions during the fiscal year, six in initial cases and four in related matters. In four of the six initial cases, the Board ordered disciplinary action—a 60-day suspension in one, a 90-day suspension in one, and a \$1,000 fine in the remaining two. One disciplinary action was dismissed without prejudice, and the remaining case was remanded to the Administrative Law Judge.

The four decisions in related matters all involved two respondents against whom the Board had ordered disciplinary action. Two of the decisions denied the respondents' motions to stay the Board's order pending judicial review. The remaining two decisions were on compliance matters; the Board first ordered the respondents to comply with the Board's order and then dismissed the cases upon finding compliance.

### *Special Counsel Stay Requests*

A total of 31 Special Counsel stay requests and related matters were processed during the fiscal year, twice the number processed during the previous year. The Special Counsel requested and received seven initial 45-day stays, all brought on behalf of whistleblowers. (Six of the stays were granted by a Board member, and one went into effect by operation of law.)

The Special Counsel subsequently filed 20 requests for extension of a stay and three motions to terminate a stay. All but one of the extension requests were in whistleblower cases. The Board granted all of these requests except one in which the Special Counsel was seeking the fourth extension of a stay. In denying this extension request, the Board found no reasonable grounds for granting the request. Additionally, one termination of a stay was requested by an agency, and the Board denied the request.

### *Actions Against Administrative Law Judges*

Of the four actions against administrative law judges decided by the Board during the fiscal year, three were settled. In the remaining case, the Board authorized the removal of the administrative law judge.

### *Regulation Reviews*

The Board decided three requests for review of an Office of Personnel Management regulation or an agency's implementation of an OPM regulation. Two of the three requests were consolidated for decision, and all of the requests were denied.

*See Appendix B for summaries of significant Board decisions issued in original jurisdiction cases during fiscal year 1994.*

## **LITIGATION**

The Board defends its final decisions involving issues of jurisdiction and procedure before the U.S. Court of Appeals for the Federal Circuit, its primary reviewing court. The Board also defends many of the final decisions issued under its original jurisdiction authority before the Federal Circuit. Other active litigation includes cases in which OPM petitions for review in the Federal Circuit, subpoena enforcement cases, and discrimination cases filed in the various Federal district courts, where the Board is named as a defendant. In fiscal year 1994, the Board defended 200 cases before the Federal Circuit, an 8 percent increase over the number of cases the Board defended in the previous fiscal year.

In fiscal year 1994, the Federal Circuit issued its decision in *King v. Lynch and Merit Systems Protection Board*, resolving a question concerning its jurisdiction to consider an OPM petition for review of the Board's interpretation of discrimination law and the merits of an employee's claim of unlawful discrimination. Agreeing with the Board, the court ruled that it lacked jurisdiction to hear substantive discrimination issues. The decision preserves employees' right to a trial *de novo* on discrimination issues in Federal district courts.

In *Campbell v. Merit Systems Protection Board*, the court affirmed a Board decision disciplining a Federal employee for violating the Hatch Act. Although the employee was listed on the ballot as an independent candidate, the court agreed with the Board that he was not truly independent where he received an endorsement and logistical support from a partisan political party and identified himself with that party in his campaign literature. Accordingly, he could not take advantage of the Hatch Act exception allowing employees to run as independent candidates in partisan elections in certain municipalities.

Also decided by the court during the fiscal year was *King v. Hillen and Merit Systems Protection Board*. Relying on the Supreme Court's intervening decision in *Harris v. Forklift Systems, Inc.*, the court remanded this case for the Board to apply a different standard to the agency's charge that the appellant committed sexual harassment in violation of Title VII of the Civil Rights Act.

The Board also litigated two other noteworthy decisions that were still pending in the Federal Circuit at the end of the fiscal year. In the first case, *Byrd and Rubinstein v. Merit Systems Protection Board*, the Board disciplined employees for giving preferential treatment to an applicant based on political and personal favoritism. In the second case, *King v. Jerome and Merit Systems Protection Board*, the Board dismissed the agency's petition for review from an initial decision reversing the employee's removal, finding that the agency's geographical reassignment of the employee pending full Board review was a bad faith attempt to comply with the interim relief order. (The Board's decision was subsequently reversed by the Federal Circuit, and a petition for rehearing was filed.)

During fiscal year 1994, the Board monitored approximately 700 cases in the Federal Circuit involving appeals of decisions issued by the Board under its appellate jurisdiction. Although the Department of Justice defends the employing agency against whom the appeal is filed, the Board monitors this litigation, evaluating the case to determine if Board intervention is appropriate, responding to inquiries, assisting in drafting briefs, and analyzing the court's decisions in these cases.

*See Appendix C for summaries of other significant litigation activities of the Board during fiscal year 1994.*

## **MERIT SYSTEMS STUDIES AND REVIEWS OF OPM SIGNIFICANT ACTIONS**

### **THE STATUTORY STUDIES FUNCTION**

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 in the Executive Branch. The Board's legislative mandate with respect to its OPM oversight and studies functions focuses on ensuring compliance with the merit system principles and keeping the merit systems free from prohibited personnel practices.

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.

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. The impact of these studies is augmented through an active outreach program consisting of public presentations, on-site and telephone consultations requested by Federal agency officials, and papers and articles published in the professional literature.

### **FISCAL YEAR 1994 STUDIES**

During fiscal year 1994, the Board published five studies of important civil service issues. These studies are:

*Temporary Federal Employment: In Search of Flexibility and Fairness* - A report on the significant actions of the U.S. Office of Personnel Management, examining current and potential changes in temporary employment policy in the Federal Government.

*Working for America: An Update* - A study analyzing the results of the Board's triennial survey of Federal employees about their perspectives on and experiences with the merit principles.

*Entering Professional Positions in the Federal Government* - A study of the key mechanisms by which Federal agencies select employees for professional and administrative positions in grades GS-5 through GS-15, with an emphasis on the impact these mechanisms have on the diversity and quality of the workforce.

*Evolving Workforce Demographics: Federal Agency Action and Reaction* - A report examining several important predictions made in *Workforce 2000* and its Federal Government counterpart, *Civil Service 2000*, to see which changes have actually materialized, which have been overtaken by events, and what Federal agencies are doing to address them.

*Whistleblowing in the Federal Government: An Update* - A study of Federal employees' observations and reports of perceived illegal or wasteful activities in the Federal Government. This survey-based study updates a 1983 Board report on whistleblowing in the Federal Government.

In addition, the following studies were in progress during the fiscal year, and reports were expected to be released during fiscal year 1995:

*Alternative Dispute Resolution in Employment-Related Disputes* - A study of the increasing use of alternative dispute resolution (ADR) techniques by Federal agencies, exploring the relationships between agency use of ADR in employment-related disputes, due process rights of employees, and employee morale.

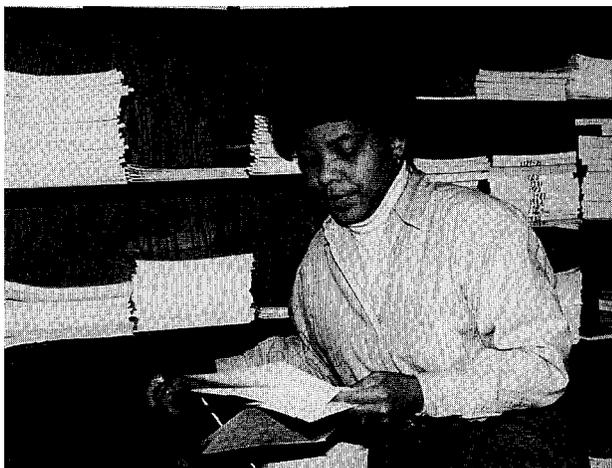
*Looking Like America: Career Advancement of Minorities in the Federal Government* - This study, based on statistical material and employee surveys, seeks to identify perceived and actual barriers to the advancement of minorities within the Federal Government and the means of overcoming those barriers.

*Improving State and Federal Human Resources Management: Shared Needs and Objectives* - This study identifies innovative human resources practices in state governments and discusses their potential applicability to the Federal Government.

*Leadership for Change: Human Resources Development in the Federal Government* - This study looks at the current state of training and development efforts for the Federal workforce and focuses on the challenges for developing the workforce skills of the future.

*Sexual Harassment in the Federal Workplace. Trends, Progress, and Continuing Challenges* - This study analyzes the results of the Board's third survey of Federal employees on the issue of sexual harassment. It updates the Board's 1981 and 1988 surveys on this subject, providing a look at the progress being made to stop sexual harassment in the Federal workplace.

*Accountability for Federal Personnel Management: A Symposium* - A report on the deliberations, conclusions, and recommendations from a Board-sponsored symposium attended by senior policy officials and representatives from congressional offices, employee unions, Federal agencies, professional associations, and academia.



*Annette Johnson, Office of Policy and Evaluation*

## IMPACT OF BOARD STUDIES

The Board's reports and studies continue to have an impact in all major areas of human resources management in the Federal Government. The studies are regularly cited in other publications on human resources and public administration issues, including the report of the National Performance Review and several of the NPR's accompanying reports. The Board's studies are also used as teaching aids in a number of colleges and universities, including American University, the University of Southern California, Indiana University, and the State University of New York at Albany.

The impact, visibility, and credibility of the Board's studies are reflected in frequent and positive media coverage and in the numerous requests for copies of the reports. A more important indicator, perhaps, is the increasing frequency with which the Board's studies are cited as justification for constructive actions taken to improve the civil service system.

The Board's Office of Policy and Evaluation was the 1994 recipient of the Elmer B. Staats Award for Accountability in Government. This award is presented annually by the National Capital Area Chapter of the American Society for Public Administration to the individual or organization that has provided the greatest contribution to the furtherance of accountability for good government. The award citation noted that the office has "helped to redefine boundaries and focus debate with insightful governmentwide examination of such basic issues as the changing roles of OPM and the Federal personnel offices and the effect of current recruitment, examination, and selection practices on Federal workforce quality and diversity...[and] has been a forceful advocate of accountability for effective human resources management consistent with the merit system principles."

*See Appendix D for summaries of the reports published during fiscal year 1994.*



*Office of Policy and Evaluation, recipients of the 1994 Elmer B. Staats Award for Accountability in Government.*

## OUTREACH ACTIVITIES

The Board members, headquarters staff, and regional/field office staff conducted or participated in over 200 outreach activities to major constituencies in fiscal year 1994. 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, public administration, and human resources management. The Board's outreach program also encompasses its publications, published articles, the International Visitors Program, and its participation in interagency organizations.

## PERSONAL APPEARANCES, MEETINGS, AND ARTICLES

Approximately half of the outreach appearances during the fiscal year were made by the regional directors, administrative judges, and headquarters regional operations staff. Audiences for these appearances numbered from 10 to 400, with a combined total audience in the thousands. In addition to conducting mock hearings designed to familiarize participants with Board practices and procedures, regional and field office personnel addressed such topics as significant Board and Federal Circuit decisions, the Whistleblower Protection Act, discrimination cases and firm choice, and the Board's settlement program.

The Board members and headquarters attorneys participated in 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 and Federal Circuit case law, emerging issues at the Board, the appeals process, and alternative dispute resolution.

In Spring 1994, the *Federal Circuit Bar Journal*, published an article by Vice Chairman Parks, "The Merit Systems Protection Board as a Model Forum." The article was a revised version of a speech given by the Vice Chairman at the Federal Circuit Bar Association mini-conference in February 1994.

The Board participated in the annual Federal Circuit Judicial Conference in June 1994 and sponsored a breakout session on Board law. In August 1994, the Board again participated in 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 studies staff participated in 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. In addition to addressing the findings and recommendations of recently issued reports, the studies staff discussed studies in progress, including the latest update of the Board's survey of sexual harassment in the Federal workplace and the glass ceiling as it affects minorities. A number of the outreach appearances focused on topics related to the recommendations of the National Performance Review, including the future of human resources management in the Federal Government. Members of the studies staff also published a number of papers and articles based on the Board's studies. Members of the studies staff also served on NPR task groups focused on such issues as measurements of customer satisfaction, development of alternative guidance to replace the Federal Personnel Manual, and development of new approaches to performance management.



*Alice Begemann and Sylvia Moore, Office of the Clerk of the Board*

## INTERNATIONAL VISITORS PROGRAM

The Board's international visitors program is conducted at Board headquarters by the Board members and staff of the Human Resources Management Division. 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 1994, the Board members and headquarters staff made presentations to approximately 25 visitors from a number of countries, including Zimbabwe, Senegal, Taiwan, Bangladesh, and Japan. Many of these individuals visited the Board at a time when their countries were in the process of developing or revising an appeals system.

## REPRESENTATION IN ORGANIZATIONS

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 is also represented on the Public Employees Roundtable, the President's Council on Management Improvement, and the Interagency Committee on Voluntarism.

Vice Chairman Parks serves as President of Executive Women in Government. She also serves as a Board Member on the Public Employees Roundtable and the Coalition for Effective Change, and is an appointed member of the National Council of the Federal Bar Association.

The Board's Director of Planning and Resource Management Services represents MSPB as a member of the Board of Directors of the National Capital Area Cooperative Administrative Support Units (CASU). This Board coordinates the efforts of agencies to combine their administrative resources to take advantage of economies of scale.

Regional directors, administrative judges, and other personnel in several regional offices serve on the Federal Executive Board (FEB) and FEB committees in their cities. In addition, several regional directors serve as Board members of the CASUs in their cities. Board attorneys are active participants in a number of bar associations, particularly the Federal Circuit Bar Association. Members of the studies staff are actively involved in national "good government" organizations such as the National Academy of Public Administration (NAPA), the American Society for Public Administration (ASPA), and the International Personnel Management Association (IPMA).

## FINANCIAL STATEMENT

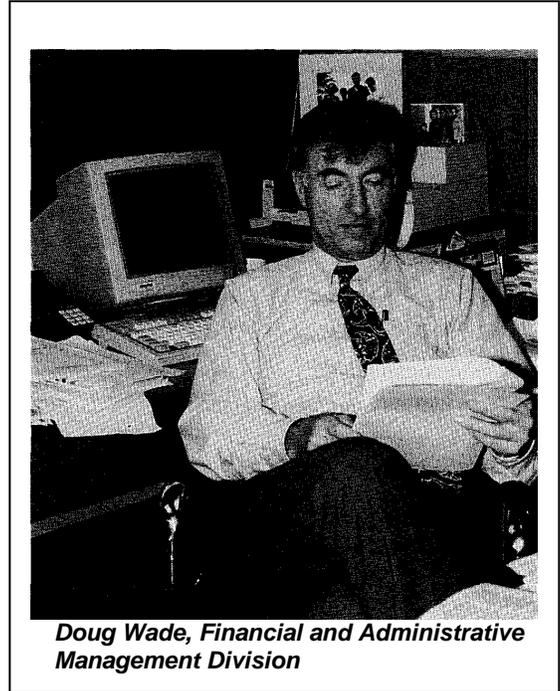
The income and expenses of the Merit Systems Protection Board for fiscal year 1994 (October 1, 1993, through September 30, 1994) are shown below. All figures are in thousands of dollars.

### INCOME

Appropriations	24,674
Reimbursements - Civil Service Retirement & Disability Trust Fund	1,989
Reimbursements - Other (interagency agreement and reimbursable detail)	<u>15</u>
Total income	26,678

### EXPENSES

Direct obligations:	
Personnel compensation	
Full-time permanent	15,493
Other than full-time permanent	1,117
Other personnel compensation	328
Subtotal, personnel compensation	16,938
Personnel benefits	2,813
Benefits - former employees	179
Travel of persons	474
Transportation of things	46
Rental payment to GSA	2,188
Communications, utilities, and miscellaneous charges	438
Printing and reproduction	48
Other services	1,165
Supplies and materials	186
Equipment	<u>140</u>
Subtotal, direct obligations	24,615
Reimbursable obligations	<u>2,004</u>
Total obligations	26,619
 BALANCE	 59



## APPENDIX A - SIGNIFICANT BOARD DECISIONS APPELLATE JURISDICTION CASES

This appendix contains summaries of significant appellate jurisdiction cases decided by the Board during fiscal year 1994.

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.

Board decisions and weekly summaries of significant decisions are available on the Government Printing Office's *Federal Bulletin Board*. Dial 202-512-1387 via computer modem, and go to the MSPB LIBRARY. Assistance is available from GPO by calling 202-512-1524. Certain significant Board decisions are also available on the OPM *Mainstreet* BBS, 202-606-4800.

### WHISTLEBLOWER PROTECTION ACT

*Shively v. Department of the Army*, 59 M.S.P.R. 531 (1993)

Disclosures made as a conduit are protected by 5 U.S.C. § 2302(b)(8) as long as the appellant meets the reasonable belief test of the law as to them.

*Carter v. Department of the Army*, 62 M.S.P.R. 393 (1994)

A reduction in force is a personnel action for purposes of an IRA appeal if it is taken for reasons personal to the employee. An agency's failure to waive qualification requirements for a position in which an employee seeks to be placed during a RIF, resulting in the employee's separation, is also a personnel action. Accordingly, the Board's earlier decision in this appeal, 56 M.S.P.R. 321, which held to the contrary on these issues, was reversed.

*Geyer v. Department of Justice*, 63 M.S.P.R. 13 (1994)

This decision sets the rule on what aspects of an IRA appeal are jurisdictional. The Board held that to establish jurisdiction, the appellant must show by preponderant evidence that he or she made a disclosure under 5 U.S.C. § 2302(b)(8); that the agency took or failed to take, or threatened to take or fail to take, a personnel action after July 9, 1989; and that he or she exhausted the remedy before the Office of Special Counsel. On related matters, the Board also held that communications may be protected even if they are only meant to be helpful or to provide guidance; that the failure of agency officials to recognize that disclosures are covered would not remove them from coverage; and that even if a disclosure discusses matters already known throughout the agency, it may still be protected.

*Caster & Manning v. Department of the Army*, 62 M.S.P.R. 436 (1994)

In this case, the Board applied the test approved by the Federal Circuit in *Eidmann v. MSPB* for use in a Special Counsel disciplinary action against a person accused of committing a prohibited personnel practice under 5 U.S.C. § 2302(b)(8) to an adverse action brought by the employing agency against one of its officials for the same reason. A recommendation to an employee's supervisor that the employee be removed suffices as a basis for a (b)(8) action, even where no action is in fact taken against the employee and the official is not in the employee's chain of command.

*Lewis v. Department of the Army*, 63 M.S.P.R. 119 (1994)

Concluding that it may not adjudicate the merits of a personnel action that is not otherwise appealable to it, the Board reached the question of how deeply it will inquire into the "merits" of such an action in the course of an IRA. It held that it will not decide the case as if it concerned an appealable issue, but that it would review the agency's stated reasons for the action in light of such factors as the bases for the deciding official's assessment of the appellant and what else supports the action.

#### INTERIM RELIEF

*Jerome v. Small Business Administration & Office of Personnel Management*, 59 M.S.P.R. 134 (1993)

On reconsideration, the Board reaffirmed its earlier decision in this appeal and held that to enforce compliance with its interim relief orders, it must examine the *bona fides* of the agency's undue disruption determination if an appellant makes a *prima facie* case of bad faith. Where the appellant makes such a showing, the agency must present evidence to rebut it; a showing that the agency's reason for not returning the appellant to the workplace is pretextual constitutes a showing of bad faith which, if un rebutted, proves noncompliance with the interim relief order. (NOTE: The Board's decision was reversed by the U.S. Court of Appeals for the Federal Circuit. *King v. Jerome & MSPB*, No. 94-3161 (Fed. Cir. 12/7/ 94). The Board filed a petition for rehearing.)

*Edwards v. Department of the Navy*, 62 M.S.P.R. 174 (1994)

When interim relief is erroneously ordered because the appellant has already served the suspension that is the subject of the appeal by the time the initial decision is issued, and the agency attempts to comply by canceling the suspension, the Board will not dismiss its petition for review as moot despite the retroactivity of the relief granted.

*McLaughlin v. Office of Personnel Management & U.S. Postal Service*, 62 M.S.P.R. 536 (1994)

A removal action that was reversed by the administrative judge but then sustained by the Board is effective as of its original effective date, despite the issuance of an interim relief order. The interim relief order ends on the date of issuance of the Board's final decision on a petition for review, whether or not the employee was returned to duty during that period. Termination of interim relief upon the issuance of a final Board decision does not require that the appellant be provided any due process rights at that time.

## BOARD JURISDICTION

*Robinson, et al., v. U.S. Postal Service & Office of Personnel Management*, 63 M.S.P.R. 307 (1994)

*White v. U.S. Postal Service & Office of Personnel Management*, 63 M.S.P.R. 299 (1994)

The Postal Service "restructuring" constitutes a reorganization, and demotions effected by the agency under it are reduction-in-force actions. RIFs are appealable by veterans preference eligibles despite receipt of retained grade and pay, and the acceptance of a job offered at a lower grade after the employee is told that he would not be retained in his position, and with accompanying warnings about the effect of declination, is not voluntary; thus, the acceptance of the job is not made nonappealable for that reason. The decisions also defined a demotion and found that receipt of retained grade and pay may render a demotion nonappealable, but it does not make it other than a demotion.

*Marcoux v. U.S. Postal Service*, 63 M.S.P.R. 373 (1994)

Assignments made during the Postal Service restructuring are in the nature of RIF actions, and as such they cannot be appealed as adverse actions. Thus, non-preference eligibles in the excepted service, who may not appeal RIFs to the Board, may not appeal their assignments during the restructuring.

*Dixon, et al., v. U.S. Postal Service*, 64 M.S.P.R. 445 (1994)

A detail at the same grade, pay, and tenure as the appellant's official position is not appealable. Even if the length of the detail violates the agency's rules, that does not, alone, provide a basis on which the Board may assert jurisdiction. Thus, Postal Service employees who were detailed to placement centers during the 1992-1993 restructuring may not appeal those actions to the Board as RIFs.

*Rivas v. US. Postal Service*, 61 M.S.P.R. 121 (1994)

An appellant's absence from the workplace is involuntary, and therefore a disciplinary suspension within the Board's jurisdiction, where the appellant is placed on enforced leave for more than 14 days pending inquiry into his physical ability to perform. The Board overruled its prior decisions to the contrary when it held that the availability of work within the appellant's restrictions may be relevant to the merits of a decision to suspend an employee, but it is not relevant to the jurisdictional issue. Rather, it found that the dispositive question on jurisdiction is whether the appellant or the agency initiated the absence.

## TIMELINESS

*Sanford v. Department of Defense*, 61 M.S.P.R. 207 (1994)

Where an appellant mistakenly files an appeal with the employing agency and then promptly corrects the error upon learning of it, the appellant has shown good cause for the delay, even where the appellant is represented.

*Gaydon v. U.S. Postal Service*, 62 M.S.P.R. 198 (1994)

The Board adopted the "mailbox rule," generally applied in the law, to nonreceipt by the Board of filings. The rule is that when a properly addressed and stamped letter is shown by preponderant evidence to have been placed in the mail stream in a timely manner, it will be treated as having been filed on that date, even where the Board never received it.

*Rahman v. Office of Personnel Management*, 63 M.S.P.R. 219 (1994)

This decision marks a change in the Board's rules for timeliness in connection with its petition for review procedures. It held that where an appellant does not receive an order from the Clerk of the Board until after the time for reply has passed, the appellant has been prevented by circumstances beyond his or her control from timely filing, and that due diligence is exercised where the appellant files a response within as many days from receipt as the notice originally allowed to file the response.

#### ADVERSE ACTIONS

*Fuller v. Department of the Navy*, 60 M.S.P.R. 187 (1993)

In this decision, the Board set out rules for proof of a self-defense claim. Among other things, it held that to prove a claim of self-defense, an appellant must show that she used only so much force as was reasonably necessary to free herself from an unwanted grasp.

*Harris v. Department of the Air Force*, 62 M.S.P.R. 524 (1994)

The Board here discussed the limits of agency authority to order psychiatric fitness for duty examinations. It held that, under 5 CFR 339.301(e)(1), an agency may order attendance at a psychiatric examination only when a proper physical examination indicates no physical reasons for behavior that may affect the safety of the employee or others, or where medical standards for the job set psychiatric requirements. If neither exception is met, an agency may not discipline an employee for failure to report or cooperate.

#### DISCRIMINATION

*Carter v. Small Business Administration*, 61 M.S.P.R. 156 (1994)

Under the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, to meet its burden once an appellant makes a *prima facie* case of intentional discrimination, an agency need only introduce evidence which, if taken as true, would permit a conclusion that there were nondiscriminatory reasons for its action, even where it failed to prove its charges. The appellant, therefore, must prove not only that the asserted reason was false, but that discrimination was the real reason for the action.

*Johnson v. Defense Logistics Agency*, 61 M.S.P.R. 601 (1994)

Under the Supreme Court's decision in *Price-Waterhouse v. Hopkins*, where an appellant proves by direct rather than circumstantial evidence that membership in a protected category was a substantial factor in the appealed action, the burdens of production and persuasion shift to the agency to show that it had a legitimate motive sufficient, standing alone, to induce it to make the same decision.

*Wilson v. Department of Veterans Affairs*, 63 M.S.P.R. 63 (1994)

The wording changes in the Rehabilitation Act, from variants of "handicap" to those of "disability," were not intended to reflect any definitional changes.

*McConnell v. Department of the Army*, 61 M.S.P.R. 163 (1994)

The requirement to accommodate through reassignment arises when an employee establishes his or her status as a qualified employee with a disability. An agency that receives a request for reassignment to accommodate an employee's disability is entitled to a reasonable period of time to make an independent assessment of the evidence and the need for accommodation. It need not put all other personnel actions on hold while it is doing so, even those involving the position the appellant seeks. Once the appellant shows that he or she is a qualified person with a disability and can perform the essential functions of the job he or she seeks, the agency is entitled to a reasonable period to evaluate its options.

*Hurst v. Department of the Navy*, 61 M.S.P.R. 277 (1994)

In its decision on this case, the Board deferred to the EEOC's position and concluded that an appellant with a disability is entitled to accommodation by reassignment only to components of the agency served by the same appointing authority. The Board modified its precedent accordingly.

*Hocker v. Department of Transportation*, 63 M.S.P.R. 497 (1994)

An appellant who prevails before the Board on a finding of discrimination may recover compensatory damages from an agency pursuant to the Civil Rights Act of 1991, but that law does not provide for punitive damage awards against a Government agency. The CRA will not be applied retroactively. Requests for compensatory damages must be made in connection with the merits appeal and not, for the first time, in a petition for enforcement, except where the failure to comply itself constitutes a separate incident of discrimination. The CRA allows an award based on either intentional discrimination or failure to accommodate a disability; as to the latter, an award will not be made upon a showing by the agency of good faith efforts to accommodate, in consultation with the disabled person.

## DUE PROCESS

*Kriner v. Department of the Navy*, 61 M.S.P.R. 526 (1994)

To assure due process, when an agency indefinitely suspends an employee because the employee lost access to security information or areas, it must ensure that either in the advance notice of the indefinite suspension or in the earlier access denial, the appellant was notified of the cause that led to the access decision and was allowed to respond to it.

## RETIREMENT

*Evans v. Office of Personnel Management*, 59 M.S.P.R. 94 (1993)

5 U.S.C. § 8345(j), awarding annuities to former spouses of Federal employees, was remedial legislation, passed to recognize the contribution of non-working spouses who could not previously have received pension benefits. 5 U.S.C. § 8345(d), allowing waiver of a civil service annuity, was passed for the limited purpose of assuring that an annuitant was not deprived of other annuities because of the size of the annuitant's civil service pension. To interpret the law so as to give effect to both sections, an annuitant may be allowed to waive

only the annuitant's portion of an annuity, not that to which a former spouse is entitled as a result of a court-ordered apportionment.

## SETTLEMENT

*Stipp v. Department of the Army*, 61 M.S.P.R. 415 (1994)

Because the Back Pay Act sets the limit on back pay for all Federal employment cases to which it applies, an agency's settlement promise to pay an amount that is contrary to the Act's requirements is illegal and cannot be enforced, so the agreement must be set aside.

*Wade v. Department of Veterans Affairs*, 61 M.S.P.R. 580 (1994)

A party may challenge the validity of a settlement before the Board, even if it is not entered into the record for enforcement. The Board's earlier decisions to the contrary are overruled.

## ATTORNEY FEES

*Bonggat v. Department of the Navy*, 59 M.S.P.R. 175 (1993)

An appellant who prevails on a whistleblower reprisal claim is entitled to an award of costs incurred directly, in addition to reimbursement for attorney fees. Any prior holdings to the contrary are reversed.

*Whaley v. U S. Postal Service*, 61 M.S.P.R. 340 (1994)

Where there has been noncompliance with a material term of a settlement agreement, entitling an appellant to file a petition for enforcement, the appellant is the prevailing party for fee purposes. The appellant has no burden to prove what the agency would have done to comply with the settlement in the absence of the petition for enforcement. The Board also found that a fee award is warranted in the interest of justice where the agency delayed compliance beyond the date agreed upon in the parties' settlement.

## **APPENDIX B - SIGNIFICANT BOARD DECISIONS ORIGINAL JURISDICTION CASES**

This appendix contains summaries of significant original jurisdiction cases decided by the Board during fiscal year 1994.

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.

Board decisions and weekly summaries of significant decisions are available on the Government Printing Office's *Federal Bulletin Board*. Dial 202-512-1387 via computer modem, and go to the MSPB LIBRARY. Assistance is available from GPO by calling 202-512-1524. Certain significant Board decisions are also available on the OPM *Mainstreet* BBS, 202-606-4800.

### **SPECIAL COUNSEL DISCIPLINARY ACTIONS - OTHER THAN HATCH ACT**

#### *Special Counsel v. Byrd and Rubinstein*, 59 M.S.P.R. 561 (1993)

The Board held that Byrd and Rubinstein committed prohibited personnel practices in violation of 5 U.S.C. § 2203(b)(6) and (b)(11) by giving an applicant for employment an unauthorized preference when they hired her through the use of the agency's temporary limited appointment (TLA) authority, and for violating laws, rules and regulations implementing or directly concerning merit system principles in connection with this hiring action. The Board concluded that the respondents' actions in utilizing the TLA authority had no other purpose but to limit the scope of the competition in order to improve the applicant's chances for employment. The Board also concluded that the respondents' use of the TLA was inappropriate because there was no administrative need for temporary employment for the permanent position the applicant filled. The Board also found that this same hiring action created the appearance of giving preferential treatment in violation of 5 CFR 735.201a(b). Taking into account that Byrd had retired after the complaint was filed, the Board fined Byrd \$1,000 and ordered Rubinstein suspended for 60 days.

#### *Special Counsel v. Brown and Nelson*, 61 M.S.P.R. 559 (1994)

The Office of Special Counsel filed a seven-count disciplinary action complaint against two employees alleging improper handling of an employment application and improper selection for a position. The Board held that: (1) preponderant evidence supported the charge of influencing an applicant to withdraw from competition to injure his employment prospects and to improve the employment prospects of another applicant in violation of 5 U.S.C. § 2302(b)(5); (2) preponderant evidence supported the charge of failing to timely correct regulatory violations concerning the rights of displaced employees in violation of 5 U.S.C. § 2302(b)(11); and (3) preponderant evidence supported the charge of improperly reclassifying a position to improve an employee's chances for appointment to that position in violation of 5 U.S.C. § 2302(b)(6). The Board found that the violations warranted a 90-day suspension for respondent Nelson and a fine of \$1,000 for respondent Brown, who had retired.

## HATCH ACT - STATE AND LOCAL GOVERNMENT EMPLOYEES

*Special Counsel v. Bissell, et. al., & Public Service Commission of the State of Tennessee*, 61 M.S.P.R. 637 (1994)

The Board held that the provisions of 5 U.S.C. § 1501 et seq. (the "State Hatch Act") were not applicable to the Tennessee Public Service Commission (TPSC) and its employees because the TPSC is not an agency or department of the executive branch of the State of Tennessee. Following *Bowsher v. Synar*, 478 U.S. 714 (1986), the Board found that the critical factor to examine in determining to which branch an agency belongs is not what functions that agency performs, but rather which branch of the State government controls the agency and/or how the State has perceived that agency's place in State government. Because the Office of Special Counsel failed to meet its burden to establish Board jurisdiction over the TPSC and its employees, the Board dismissed the case against the agency and 15 employee respondents for lack of jurisdiction.

*Special Counsel v. Murdock & Onondaga County Department of Social Services*, 61 M.S.P.R. 403 (1994)

The respondent, while employed by the state of New York performing duties in connection with federally-funded activities, participated in a partisan election. The Board found that the respondent received four warnings that her candidacy might be a violation of the Hatch Act, but she did not attempt to get a definitive ruling from the Office of Special Counsel, despite her admission that she was aware of the Office. Rather, the respondent stated to her supervisor that she would "take her chances" and run anyway. In these circumstances, the Board found that the respondent's violation warranted removal under 5 U.S.C. § 1505.

*Special Counsel v. Bianchi & Allegheny County Department of Development & Allegheny County Department of Tax Claims and Revenue*, 59 M.S.P.R. 282 (1993)

The Board granted the Special Counsel's request for an order directing the withholding of Federal funds from the Allegheny County, Pennsylvania, Department of Development. In an earlier decision, 57 M.S.P.R. 627 (1993), the Board ordered Allegheny County to remove Mr. Bianchi from his job because he engaged in political activity prohibited by the Hatch Act. Allegheny County declined to remove Mr. Bianchi and moved for a stay pending judicial review. The Board denied the motion for stay and, pursuant to 5 U.S.C. § 1506, ordered the Department of Housing and Urban Development to withhold Federal funds from Allegheny County in an amount equal to two times Mr. Bianchi's annual salary.

## HATCH ACT - FEDERAL GOVERNMENT EMPLOYEES

*Special Counsel v. Narcisse*, 60 M.S.P.R. 294 (1994)

The Board held that the respondent's polling activity did not violate the Hatch Act as it did not constitute taking "an active part in political management or in political campaigns" under 5 U.S.C. § 7324(a)(2). The Board found that the regulations at 5 CFR 733.111-122 superseded Form 1236 of September 1939, defined what is meant as prohibited campaigning, and did not prohibit the respondent's neutral polling for a partisan political organization. The Board also held that the respondent's remarks during a television interview that was not initiated by the respondent were not violative of the Hatch Act.

## OSC STAY REQUESTS AND RELATED CASES

*Special Counsel v. U.S. Fish and Wildlife Service, Department of the Interior (Peitzmeier-Romano)*, 64 M.S.P.R. 413 (1994)

The Board denied the Special Counsel's request for an extension of an initial stay. The stay was initially granted based on the Special Counsel's position that there were reasonable grounds to believe that the agency terminated Ms. Peitzmeier-Romano during her probationary period in violation of 5 U.S.C. §§ 2302(b)(8) and/ or (b)(9). The Board found that the stay extension request was clearly unreasonable as it was based on bare allegations. In addition, the case had been pending for almost eleven months and the initial stay had already been extended three times.

## ACTIONS AGAINST ADMINISTRATIVE LAW JUDGES

*Office of Hearing and Appeals, Social Security Administration v. Whittlesey*, 59 M.S.P.R. 684 (1993)

The Board adopted the Administrative Law Judge's recommended decision finding that the agency showed good cause to remove respondent Whittlesey from his administrative law judge position. The Board found that the agency proved its charges that Whittlesey violated agency rules and a settlement agreement by engaging in unauthorized time and attendance practices. It rejected Whittlesey's contentions that the agency's prohibition against outside legal practice should have been excluded on the ground it was obtained in violation of his constitutional right to privacy. The Board also rejected an age discrimination defense, claims of disparate treatment, and allegations that the MSPB's Administrative Law Judge was biased.

## REGULATION REVIEWS

*Weir v. Office of Personnel Management*, 62 M.S.P.R. 91 (1994)

The petitioner sought review of an Office of Personnel Management regulation and a related Federal Personnel Manual provision assigning preference points to certain preference eligible veterans in examinations for administrative law judge positions. The Board held that an allegedly unauthorized preference which improves the appointment prospects of a class of veterans is insufficient to establish a prohibited personnel practice claim under 5 U.S.C. § 2302(b)(6), which specifies that the unauthorized preference be directed to a "particular person." Because the petitioner failed to make out a prohibited personnel practice claim, the Board declined to exercise its limited jurisdiction to grant review.

*Brooks and Dunn v. Office of Personnel Management*, 59 M.S.P.R. 307 (1993)

In this case the Board held that for purposes of a regulation review, the Federal Personnel Manual is a regulation because it is an "interpretive rule" not subject to publication in the *Federal Register*. The Board then considered OPM's interpretation of 5 U.S.C. § 6303(a)(3)(B), pertaining to service credit for annual leave for military service, as implemented in FPM 296-33, S6-1, 7, 8. That FPM provision construed 5 U.S.C. § 6303(a)(3)(B) as providing that retirees of the uniformed services shall receive service credit for active duty "during a war, or in a campaign or expedition for which a campaign badge has been authorized," to mean only service in World Wars I and II. The Board concluded that petitioners had failed to show that OPM's interpretation of the statutory provision was incorrect and accordingly had failed to show that the FPM provision violates 5 U.S.C. § 2301(b)(2) relating to fair and equitable treatment of Federal employees.

## APPENDIX C - SIGNIFICANT LITIGATION

Significant litigation involving the Board during fiscal year 1994 included the following:

### APPEALABLE ACTIONS

#### *Employment Practice*

*Vesser v. Office of Personnel Management*, 29 F.3d 600 (Fed. Cir. 1994)

The appellant, whose name was removed from the register of eligible administrative law judge candidates because of his annuitant status, was subject to an employment practice within the Board's jurisdiction. The court also found that the appellant was improperly disqualified for appointment as an administrative law judge.

#### *Indefinite Suspension*

*Pararas-Carayannis v. Department of Commerce*, 9 F.3d 955 (Fed. Cir. 1993)

A criminal charge, detailed findings of a criminal investigation, and a grand jury indictment establish reasonable cause to believe that an employee committed a crime for which he may be subject to imprisonment and, therefore, supports an indefinite suspension. An employee's voluntary use of Government property and time to carry on illegal activities establishes a nexus between the misconduct and Government employment.

#### *Discriminatory Statements*

*Holland v. Department of the Air Force*, 31 F.3d 1118 (Fed. Cir. 1994)

A supervisor's statements of a sexist nature, without evidence that the supervisor took a discriminatory personnel action, are insufficient to support a charge that the supervisor violated the agency's EEO policies.

#### *Reemployment Priority*

*Chudson v. Environmental Protection Agency*, 17 F.3d 380 (Fed. Cir. 1994)

An agency may appoint a person who is not on the agency reemployment priority list to a vacant position over a person who is on the list to avoid undue interruption of agency activities pursuant to 5 CFR 330.207(d).

#### *Restoration to Duty Following Military Service*

*Nichols v. Department of Veterans Affairs*, 11 F.3d 160 (Fed. Cir. 1993)

A returning veteran has the right to be restored to the position he left for active military duty or to one with the same seniority, status, and pay.

#### *Security Clearance Issues*

*Brockmann v. Department of the Air Force*, 27 F.3d 544 (Fed. Cir. 1994)

When an employee is removed based on the loss of his or her security clearance and does not raise a colorable constitutional claim, the Board's review is limited to determining whether the employee received procedural due process, as provided by *Department of Navy v. Egan*, 484 U.S. 518 (1988).

## BOARD PROCEDURES & TIMELINESS

### *Interim Relief*

*DeLaughter v. United States Postal Service*, 3 F.3d 1522 (Fed. Cir. 1993)

Where an agency does not return the employee to work in accordance with an order granting interim relief, and does not make a specific determination that it would be unduly disruptive to do so, the Board must dismiss the agency's petition for review for failure to comply with the statutory interim relief provisions.

### *Timeliness*

*Walls v. Merit Systems Protection Board*, 29 F.3d 1578 (Fed. Cir. 1994)

The length of the delay is an important factor to be considered in determining whether good cause for untimely filing is shown; a minimal delay may indicate not only an absence of negligence but also that an appellant demonstrated due diligence and ordinary prudence in filing his or her appeal.

*Loui v. Merit Systems Protection Board*, 25 F.3d 1011 (Fed. Cir. 1994)

Where an agency does not deliver the decision notice to the employee until after the effective date of the personnel action, the employee's time to appeal runs from the date the employee receives the decision letter.

*Anderson v. Department of Justice*, 999 F.2d 532 (Fed. Cir. 1993)

The petitioner's hospitalization and an inability, despite due diligence, to contact his legal representative demonstrated good cause to excuse his untimely filed appeal, which was one day late.

## INDIVIDUAL RIGHT OF ACTION

### *Contributing Factor Analysis*

*Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)

A protected disclosure may contribute impermissibly to a personnel action against a whistleblowing employee even though the official taking the action does not have a retaliatory motive.

## JUDICIAL REVIEW

### *Claims Predating the Civil Service Reform Act / Frivolous Appeals*

*Bergman v. Department of Commerce*, 3 F.3d 432 (Fed. Cir. 1993)

Under the savings clause of the Civil Service Reform Act (CSRA), the U.S. Court of Appeals for the Federal Circuit has jurisdiction over claims pending on January 11, 1979, but none concerning matters that occurred before that date but were not appealed until after that date.

### *Scope of Review*

*Olivares v. Merit Systems Protection Board*, 17 F.3d 386 (Fed. Cir. 1994)

When the Board dismisses a petition for review of an initial decision as untimely, the only issue before the court is the timeliness of the petition for review. The merits of the initial decision are not before the court because the petitioner did not timely seek review from the court within the 30-day time limit specified in 5 U.S.C. § 7703(b)(1).

### JURISDICTION

#### *Choice of Forum*

*Connor v. United States Postal Service*, 15 F.3d 1063 (Fed. Cir. 1994)

The Board lacks jurisdiction over an appeal asserting discrimination where the petitioner, prior to his appeal to the Board, has amended a civil complaint in a U.S. district court to include a cause of action based on the same discrimination claims.

#### *Individual Right of Action*

*Weber v. Department of the Army*, 9 F.3d 97 (Fed. Cir. 1993)

An agency's rejection of an employee's suggestion for improving agency operations is not a personnel action reviewable by the Board in an IRA appeal. It does not constitute a denial of an award, which can serve as the basis for an IRA.

*Ellison v. Merit Systems Protection Board*, 7 F.3d 1031 (Fed. Cir. 1993)

Where an employee's disclosure concerning a personnel action to an agency Inspector General alleges waste, fraud, or abuse under the Whistleblower Protection Act, that disclosure may form the basis of an IRA appeal even if the employee also challenged the same action in a grievance. The Board's jurisdiction in IRA appeals, however, is limited to matters raised before the Office of Special Counsel.

#### *Non-Preference Eligible Postal Service Employees*

*Waldau v. Merit Systems Protection Board*, 19 F.3d 1395 (Fed. Cir. 1994)

To qualify as a management official under 39 U.S.C. § 1005(a), a Postal Service employee need not have final authority to make decisions. The Board erred in limiting the hearing to the jurisdictional ground that the petitioner initially raised.

#### *Probationary Employee*

*Hardy v. Merit Systems Protection Board*, 13 F.3d 1571 (Fed. Cir. 1994)

When an employee takes annual leave, it does not alter his regularly scheduled tour of duty for purposes of determining the end of a probationary period. An agency has discretion to determine whether temporary service is creditable for completing a probationary period as a supervisor or manager.

*Hintz v. Department of the Army*, 21 F.3d 407 (Fed. Cir. 1994).

A person's Federal employment does not commence until the person is appointed to the position and authorized to perform a Federal function. The issuance of a personnel action form (SF-50) is not required to effect a removal.

#### *Retirement in Lieu of Removal*

*Mays v. Department of Transportation*, 27 F.3d 1577 (Fed. Cir. 1994)

Under 5 U.S.C. § 7701(j), an employee does not lose the right to appeal an agency's decision to remove her merely because the employee retired effective the same day that the removal would be effective.

#### *Temporary Employee*

*Anderson v. Merit Systems Protection Board*, 12 F.3d 1069 (Fed. Cir. 1993)

Estoppel cannot be used to satisfy the threshold requirements of jurisdiction and standing. The Board has no jurisdiction over the termination of a temporary appointment unless the appellant meets the definition of an employee under 5 U.S.C. § 7511.

#### *Transfer*

*Brodv. Merit Systems Protection Board*, 11 F.3d 1060 (Fed. Cir. 1993)

An agency's refusal to transfer an employee is not directly appealable to the MSPB, and the agency's alleged improper motivation cannot confer jurisdiction.

### RETIREMENT BENEFITS

#### *Computation of a Former Spouse Annuity*

*Vagg v. Office of Personnel Management*, 1 F.3d 1208 (Fed. Cir. 1993).

Under California law, a former spouse who is awarded a portion of her husband's future annuity when he turns 62 is entitled to a share of his disability annuity, which includes all of the cost of living increases that the annuitant received between the date he retired and the date he turned 62, if his annuity was based on his years of service.

#### *Equitable Estoppel / Notice of Election Rights*

*Belanger v. Office of Personnel Management*, 1 F.3d 1223 (Fed. Cir. 1993)

Equitable estoppel based on alleged Government misconduct will not lie where there is no reasonable reliance. The statutory requirement that OPM notify annuitants annually of their election rights cannot be violated where a former employee dies within a year of his retirement.

#### *Firefighters*

*Perske v. Office of Personnel Management*, 25 F.3d 1014 (Fed. Cir. 1994)

In determining whether an employee's job qualifies as a firefighter position for the purpose of an enhanced retirement annuity, the determinative factor is the actual duties performed, not the position description, job title, or job grading criteria.

### *Spouse Equity Act*

*Sandel v. Office of Personnel Management*, 28 F.3d 1184 (Fed. Cir. 1994)

An employee's former wife cannot qualify for a survivor annuity as the employee's widow under 5 U.S.C. § 8341(b)(1) because she is not the employee's surviving spouse. OPM was not required to notify an employee's former spouse of the statutory deadline to apply for an annuity under the Spouse Equity Act.

*Muwwakkil v. Office of Personnel Management*, 18 F.3d 921 (Fed. Cir. 1994)

OPM has a duty to verify an application for a lump-sum refund of an employee's retirement contributions to ensure that there is no former spouse with an interest in the employee's retirement benefits.

### *Survivor Annuity*

*Wassenaar v. Office of Personnel Management*, 21 F.3d 1090 (Fed. Cir. 1994)

A deceased Federal employee's failure to meet the age requirement for an enhanced retirement annuity at the time of his death does not affect his surviving spouse's entitlement to an enhanced survivor annuity under 5 U.S.C. § 8341(d).

## **APPENDIX D - MERIT SYSTEMS STUDIES AND REVIEWS OF OPM SIGNIFICANT ACTIONS**

### **MERIT SYSTEMS STUDIES**

The following are summaries of the Board's merit systems studies published during fiscal year 1994:

*Working for America: An Update* - This report, published in July 1994, details significant findings from a survey of 13,432 Federal employees regarding work-related issues. The report notes that employees and supervisors believe the quality of the Federal workforce is improving and that the number of employees who would recommend the Government as a place to work has increased significantly. However, substantial numbers of employees feel they are not being treated fairly on the job. The report makes several recommendations and encourages policymakers and managers to consider the survey findings as they seek to implement the recommendations of the National Performance Review.

*Entering Professional Positions in the Federal Government* - This report, published in April 1994, calls attention to the many changes that have occurred over the past 10 years in how the Federal Government attracts and selects employees. The report identifies and analyzes the six primary means through which individuals first enter professional or administrative jobs. Using 1984 and 1992 as comparison years, it highlights the substantial decentralization in staffing that has occurred between those two years. It also examines: (1) possible quality differences among employees selected through the different staffing processes; and (2) the effect of different processes on the percentages of women and minority employees entering the professional and administrative occupations in the Federal workforce.

Key recommendations from this report include: (1) OPM should maintain an oversight program to ensure that staffing programs are achieving desired end results and are operating in accordance with the merit system principles; (2) OPM should assist agencies in developing the best and most cost-effective recruitment and selection processes possible; (3) agencies should continue efforts to make written examinations less time-consuming and cumbersome; (4) the "rule of three" that limits selection in initial hiring to the three top-rated candidates available regardless of the size and relative quality of the applicant pool should be abolished; and (5) the Outstanding Scholar authority that allows noncompetitive hiring of individuals with high grade-point averages should be abolished as the Administrative Careers with America (ACWA) examination is converted to case examining.

*Evolving Workforce Demographics: Federal Agency Action and Reaction* - This report, published in November 1993, examines several of the important predictions of *Workforce 2000* and its Federal Government counterpart, *Civil Service 2000*, to see which of the predicted changes have actually materialized, which have been overtaken by events, and what Federal agencies are doing to address them. Predictions studied include the increasing age and diversity of the workforce. The study finds that Federal agencies, while acknowledging upcoming changes, have not committed significant resources or devised major new human resources initiatives to deal with changing demographics. Rather, agencies are relying on ongoing, established human resources programs to meet the potential challenges arising from demographic changes.

Among the report's recommendations are that Federal agencies should do more to address the motivational and productivity issues related to older workers and should consider shifting emphasis on minority intake to career development of minorities and women already in the Federal workforce.

*Whistleblowing in the Federal Government: An Update* - This report, published in October 1993, updates a 1983 Board study and deals with the identification and reporting of illegal or wasteful activities in the Federal Government. The new study found a slightly lower percentage of employees who said they had observed an illegal or wasteful activity, compared to 1983 findings (18 percent in 1992 versus 23 percent in 1983). Employees were also much more likely to have reported the illegal or wasteful activity (50 percent reported in 1992, and only 30 percent reported in 1983). Unfortunately, the study found a higher percentage of employees in 1992 who believed they had experienced or had been threatened with retaliation for reporting the wasteful or illegal activity than was found in 1983 (37 percent versus 24 percent, respectively).

The report recommends that agencies ensure that employees understand the kinds of activities they should be reporting to management, and how to go about reporting problems they have identified. The report also recommends that agencies work harder to promote non-threatening climates in which sharing information about problems in the workplace is valued and rewarded through positive encouragement, feedback, and problem resolution. Finally, the report recommends that agencies examine their programs for selecting supervisors to ensure that they are selecting a management team with whom employees will feel comfortable sharing information.

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

The following is a summary of the Board's OPM oversight report published during fiscal year 1994:

*Temporary Federal Employment: In Search of Flexibility and Fairness* - This report, published in September 1994, examines the actions of the Office of Personnel Management in Federal hiring policies for temporary employees and discusses the alternatives for temporary employment policy to be considered as part of the projected overhaul of all Federal hiring. The report finds that OPM's policy changes restricting the time limits on temporary appointments and positions are an excellent interim measure to curb abuses of temporary hiring that have been reported. The report goes on to discuss the alternatives for providing managers greater flexibility while ensuring that temporary employees are not abused.

The report recommends that health insurance benefits be extended to all but very short-term temporary employees and that other additional benefits for temporary employees be considered based on their overall length of Federal service. Further, it recommends that managers be allowed to convert temporary employees to permanent status, provided that the temporary employees' functions become permanent and that competitive requirements are met.

## **CUSTOMER SERVICE STANDARDS**

*The Merit Systems Protection Board has two core missions: (1) Adjudication of appeals brought to it under the provisions of law and regulation, and (2) Oversight of the Federal merit systems. These two missions are authorized in the Civil Service Reform Act of 1978.*

*We have established these standards to assure our customers that they receive the quality of service to which they are entitled and to assure the public as a whole that we are ably promoting and protecting the Federal merit systems.*

### **MISSION I — Adjudication of Appeals**

1. We will make our regulations easy to understand and our procedures easy to follow.
  2. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.
  3. We will promptly and courteously respond to customer inquiries.
  4. We will facilitate the settlement of appeals.
  5. We will issue readable decisions based on consistent interpretation and application of law and regulation.
  6. We will issue decisions in initial appeals within 120 days of receipt and within 110 days on petitions for review, except where full and fair adjudication of an appeal requires a longer period.
  7. We will make our decisions readily available to our customers.
- ### **MISSION II — Oversight of the Federal Merit Systems and the U.S. Office of Personnel Management**

1. We will conduct research on topics and issues relevant to the effective operation of the Federal merit systems and the significant actions of the U.S. Office of Personnel Management; perform sound, objective analysis; and where warranted, develop practical recommendations for improvement.
2. We will issue timely, readable reports on the findings and recommendations of our research and make these reports available to all interested individuals and parties.
3. We will enhance the constructive impact of our studies and reports through outreach efforts.

*We will conduct surveys of our customers from time to time to see how well we are meeting these standards. However, if at any time, you have comments or suggestions concerning our service, we invite you to provide feedback to our Chairman, Mr. Ben Erdreich, through the Clerk of the Board, at 1120 Vermont Avenue, NW, Washington, DC 20419, telephone (202) 653-7200, FAX number (202) 653-7130. Electronic mail may be sent over the Internet to [mspb@mspb.gov](mailto:mspb@mspb.gov).*

