

Merit Systems Protection Board

Fiscal Year 2006

Annual Report



April 2007

Foreword

In accordance with section 1206 of Title 5 United States Code, the Merit Systems Protection Board (MSPB or the Board) provides this annual report on MSPB's significant actions during FY 2006. This report includes summaries of the most significant Board and court decisions issued during the year, case processing statistics, summaries of MSPB's merit systems studies, summaries of the significant actions of the Office of Personnel Management (OPM), and a summary of MSPB's financial results. In addition, where there have been significant activities since the end of the fiscal year, the report includes updated information as a service to the reader.

Additional information about FY 2006 program performance results and financial audit information is included in MSPB's separate Performance and Accountability Report (PAR). This Annual Report and the PAR as well as other information about the MSPB can be found on MSPB's Web site: www.mspb.gov.

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Merit Systems Protection Board FY 2006 Annual Report

Fiscal Year 2006 in Review

Protecting merit in multiple alternative human capital management systems

The development of alternative human capital management policies and procedures continued to be a significant trend affecting the Federal merit systems in FY 2006. The most recent of these alternative systems are the ones in the Department of Homeland Security (DHS) and the Department of Defense (DoD). The DHS and DoD laws include flexibilities in hiring, performance management, pay, and labor and employee relations. The laws also include provisions to authorize DHS and DoD to alter their appeals and labor management procedures. The regulations promulgated under the DHS and DoD laws have been the subject of litigation and the DoD procedures are currently under review by the U.S. Court of Appeals for the D.C. Circuit.

Regardless of the outcomes of this judicial review, the increase in the number of agency-specific merit systems increases the complexity of MSPB's adjudication work. In addition, the appeals workload could change over time depending on how these new alternative systems are implemented. The increase in the number of alternative management systems also impacts MSPB's merit systems studies function as it increases the need for evaluation of these new procedures. The laws authorizing the flexibilities granted to DHS, DoD and to other agencies in recent years, provide that the Title 5 provisions governing merit system principles and prohibited personnel practices may not be waived, modified, or otherwise affected. Therefore, there will be an even greater need for studies of these new personnel systems to ensure that they operate in accordance with merit principles and are free from prohibited personnel practices.

MSPB performs its role as chief protector of the Federal merit systems in accordance with the determinations made by the Congress and the President. MSPB's experience in independently adjudicating appeals and conducting merit systems studies will continue to provide effective and efficient protection for the Federal merit systems and the rights of individuals within those systems. In this way, MSPB will continue to assure the public of the Government's commitment to merit-based management.

Board membership and MSPB leadership

The President and Congress took actions in early FY 2006 which provided MSPB with a full complement of Board members. On December 17, 2005, the Senate confirmed the President's nomination of Mary M. Rose to serve as a Member of the Board. On January 27, 2006, the President designated Member Rose as Vice Chairman of the Board.

In late FY 2006, the position of Director of the Office of Financial and Administrative Management (FAM) was designated as a Senior Executive Service (SES) position. On September 29, 2006, Charles Roche was selected for the position and appointed to the SES. On October 15, 2006, Chairman McPhie appointed B. Chad Bungard as General Counsel of the Board filling the vacancy created by the retirement of Martha B. Schneider.

Adjudication

MSPB decided appeals and petitions for review (PFRs) in accordance with the laws and regulations governing such appeals. MSPB processed 8,460 cases in FY 2006, slightly more than in FY 2005. The regional and field offices issued timely, high quality initial decisions and MSPB headquarters offices significantly improved case processing timeliness while maintaining the quality of decisions at this level. MSPB provided a full menu of alternative dispute resolution options to its customers. MSPB successfully operates settlement programs at the regional and field offices and at headquarters, with separate settlement judges made available at the regional and field offices. In addition, MSPB successfully operated and expanded its Mediation Appeals Program. The case processing statistics presented in this report give detailed information regarding the type, origin and disposition of cases filed with MSPB.

This report also contains brief summaries of the most significant Board decisions as well as court opinions published in FY 2006. Significant Board decisions addressed such issues as the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), whistleblowing, adverse action appeal rights, the Family and Medical Leave Act (FMLA), MSPB procedures, remedies and retirement. Supreme Court opinions addressed whether the First Amendment protects a government employee from discipline based on speech made pursuant to official duties, and whether Title VII anti-retaliation provisions protects an employee only from actions related to employment that occur at the workplace. Significant Court of Appeals opinions covered the right of Veterans Affairs medical personnel to file individual right of action appeals, retirement benefits, non-selection resulting from cancellation of a vacancy announcement as a personnel action, disability discrimination and protected disclosures related to whistleblowing.

Merit systems studies

MSPB completed eight merit systems studies and issued reports on such issues as pay for performance, managing contracting officer representatives (CORs) to achieve positive contract outcomes, reforming Federal hiring and the impact of *Van Wersch* and *McCormick* on the probationary period. MSPB also published the proceedings from its Symposium on the practice of merit in agencies with management flexibilities beyond the traditional procedures contained in Title 5 USC. MSPB issued four editions of the *Issues of Merit* newsletter which included articles on training of CORs, improving Federal hiring, survey findings on the occurrence of prohibited personnel practices and how merit can be achieved in alternative personnel systems.

Legislative activity

The FY 2006 appropriation for the Board was enacted on November 30, 2005 as part of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act of 2006 (Pub. Law 109-115). The amount appropriated for the Board was \$35,600,000 plus up to \$2,605,000 in reimbursements from the Civil Service Retirement and Disability Fund. This amount was subject to a 1% rescission, which resulted in a \$380,000 reduction in the appropriations amount for FY 2006.

The Board's current authorization expires on September 30, 2007. As required by statute, Chairman McPhie submitted a request for reauthorization along with draft legislation to the House Committee on Government Reform and to the Senate Committee on Homeland Security and Governmental

Affairs on May 15, 2006. In addition to the request for reauthorization, the Chairman requested the enactment of six legislative proposals. These proposals seek: (1) a statutory order of succession for management of the agency; (2) the authority to grant summary judgment; (3) a limited exemption from certain requirements of the Sunshine Act; and (4) three technical corrections to the Board's authorizing statute that clarify the Chairman's authority to make administrative decisions regarding the management of the agency.

The legislative activity for the Board during FY 2006 included conducting briefings for congressional staff, providing testimony during congressional hearings and providing statements for the hearing record where the Chairman was not required to testify in person. In November 2005, Chairman McPhie testified at a hearing before the House Government Reform Subcommittee on the Federal Workforce and Agency Organization entitled, *Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court*. In April 2006, the Chief of Staff, the General Counsel and the Legislative Counsel briefed the majority staff of the House Committee on Homeland Security Subcommittee on Management, Integration & Oversight regarding the implications of the Markey Amendment on the Board's enforcement of the Whistleblower Protection Act. In July 2006, Chairman McPhie testified at a hearing before the House Government Reform Subcommittee on the Federal Workforce and Agency Organization entitled, *Establishing a Commission to Recommend Improvements for the Federal Employees Appeals Process*.

As part of his efforts to increase outreach to members of Congress and to be of further assistance to them in their representational and constituent services duties, the Chairman sent letters of introduction to Congressional members who represent districts and states where Board regional and field offices are located. Additional outreach activities are planned for 2007, particularly in light of the large number of new members who have joined both chambers.

Significant actions of the Office of Personnel Management

MSPB is responsible for providing an independent, nonpartisan review of the actions of OPM to ensure that these actions conform with merit principles and do not result in prohibited personnel practices. MSPB reviewed the significant policy and leadership actions of OPM including guidance on human capital management and continuity of operations related to pandemic influenza, probationary period regulations, the DoD and DHS management systems and SES pay for performance. MSPB reviewed OPM's significant compliance and accountability actions including implementation of the President's Management Agenda, annual survey regulations and the Federal Human Capital Survey. MSPB also reviewed OPM's significant actions related to delivering products and services including providing hiring tools, reducing the security clearance backlog and managing Federal employee benefits programs.

Board Members and Board Organization

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, and confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

Chairman



NEIL A. G. McPHIE was confirmed as Chairman of the U.S. Merit Systems Protection Board on November 21, 2004. Mr. McPhie had served as Acting Chairman since December 10, 2003, when President Bush designated him to be Vice Chairman. He was sworn in as a member of the Board on April 23, 2003, following his recess appointment by President Bush. Chairman McPhie's term expires on March 1, 2009. Prior to joining the Board, he was Senior Assistant Attorney General in the Office of the Attorney General of Virginia. Among other responsibilities, he defended employment discrimination claims brought under Federal law and wrongful discharge claims brought under state law. Previously, he was Executive Director of the Virginia Department of Employment Dispute Resolution (EDR). In that position, he directed implementation of EDR's statewide grievance, mediation, training and consultation programs. He was an Assistant Attorney General in the Office of the Attorney General of Virginia from 1982 to 1988. From 1976 until he joined the Attorney General's Office, he was a Trial and Appellate Attorney in the Office of the General Counsel at the U.S. Equal Employment Opportunity Commission. He received his J.D. degree from Georgetown University Law Center in 1976. He received a B.A. in Economics from Howard University in 1973, graduating magna cum laude. He is a member of Phi Beta Kappa. He is admitted to the bars of the District of Columbia, Virginia, New York and Iowa, the United States Supreme Court, the United States District Court for the District of Columbia, several of the United States circuit courts of appeals, and district courts in Virginia.

Vice Chairman



MARY M. ROSE was designated by President Bush as Vice Chairman of the U.S. Merit Systems Protection Board on January 27, 2006. Mrs. Rose was sworn in as a Board Member on December 28, 2005, following her confirmation by the Senate on December 17, 2005. Vice Chairman Rose's appointment will expire on March 1, 2011. Prior to joining the Board, Mrs. Rose was appointed by the President to serve as Vice Chairman of the Federal Salary Council. She was Chairman of the Federal Prevailing Rate Advisory Committee where she advised the Director of the U.S. Office of Personnel Management on Federal pay, benefits, and other policy issues. Previously, Mrs. Rose served as Deputy Associate Director of the Office of Presidential Personnel at the White House. She served four years as the Elected Clerk of the Circuit Court, Anne Arundel, Maryland. Mrs. Rose has also served as Assistant Director for Executive Administration, Office of Personnel Management; Director of Personnel, White House Personnel Office; and Deputy Undersecretary for Management at the Department of Education. Her private sector experience includes positions as a Consultant with an Annapolis law firm and as a Visiting Fellow with The Heritage Foundation where she recruited, interviewed, and recommended Presidential appointments to the George W. Bush transition team. Mary M. Rose received an R.N. degree from the Bon Secours Hospital School of Nursing, and she completed the Maryland Registered Nurse Recertification Program in May 2000. Mrs. Rose is married to Philip D. Rose, M.D., and has four children.

Member



BARBARA J. SAPIN was confirmed as a Member of the Merit Systems Protection Board on November 21, 2004. Previously, Ms. Sapin served as Vice Chairman during a recess appointment (December 2000 – December 2001). Ms. Sapin’s term expired on March 1, 2007. She continues to serve as a Member pursuant to 5 U.S.C. 1202(c) of MSPB’s enabling statute, which permits a member whose term has expired to continue to serve until a successor has been appointed but no longer than one year after the term has expired. Before joining the Board, Ms. Sapin served in a number of labor and employment law related positions, including General Counsel and Labor Counsel to the American Nurses Association from 1990 to 2001. In addition, Ms. Sapin held several positions at the National Labor Relations Board from 1981 to 1990, including attorney for the Appellate Court Branch in Washington, D.C., field attorney in the Chicago Regional Office, and Senior Counsel to a Board Member. Prior to 1981, Ms. Sapin’s Government service included positions with the Occupational Safety and Health Review Commission and the U.S. Environmental Protection Agency. Ms. Sapin received her B.A. in Psychology from Boston University and a Juris Doctorate from the Columbus School of Law, Catholic University of America. She is admitted to the District of Columbia and Maryland Bars.

Board offices and structure

MSPB is divided into several functional offices organized according to its statutory missions to adjudicate appeals and conduct merit systems studies and the functions required to support these missions. In addition to its three appointed Board members, MSPB has approximately 225 employees assigned to headquarters and to its eight regional and field offices located throughout the United States.

The **Board Members** adjudicate cases brought to MSPB. The **Chairman**, by statute, is the chief executive and administrative officer of MSPB. Office heads report to the Chairman through the Chief of Staff.

The **Office of the Administrative Law Judge (ALJ)** adjudicates and issues initial or recommended decisions on petitions for corrective action and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against administrative law judges, MSPB employee appeals, and other cases assigned by the Board. (The functions of this office are currently performed by administrative law judges at the National Labor Relations Board with staff support from the MSPB headquarters legal offices under an interagency agreement.)

The **Office of Appeals Counsel (OAC)** conducts legal research and prepares proposed decisions for the Board in cases where parties petition for review of administrative judge's initial decisions and in most other cases decided by the Board. The office conducts MSPB's petition for review (PFR) settlement program, prepares proposed decisions on interlocutory appeals of rulings made by judges, makes recommendations on reopening cases 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 (OCB)** receives and processes cases filed at MSPB headquarters, rules on certain procedural matters, and issues the Board's decisions and orders. The office serves as MSPB's public information center, coordinates media relations, publishes public information, operates MSPB's library and on-line information services, and administers the Freedom of Information Act and Privacy Act programs. The office also certifies official records to the courts and Federal administrative agencies, and manages MSPB's records and directives systems, legal research programs, and the Government in the Sunshine Act program.

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

The **Office of Financial and Administrative Management (FAM)** administers the budget, accounting, travel, time and attendance, human resources, procurement, property management, physical security and general services functions of MSPB. It develops and coordinates internal management programs and projects, including review of internal controls agency-wide. It also administers the agency's cross-servicing agreements with the U.S. Department of Agriculture (USDA) National Finance Center for payroll services, the Department of the Treasury Bureau of the Public Debt for accounting services, and the USDA Animal Plant and Health Inspection Services for human resources management services.

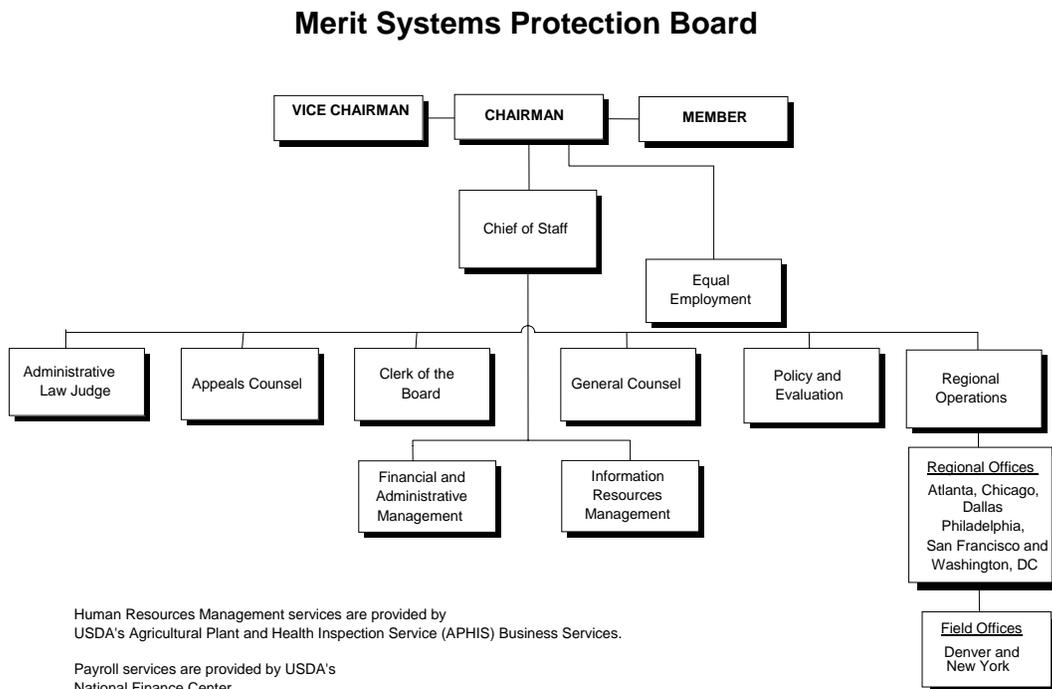
The **Office of the General Counsel (OGC)**, as legal counsel to the Board, provides advice to the Board and MSPB offices on a wide range of legal matters arising in day-to-day operations. The office represents MSPB in litigation, prepares proposed decisions for the Board on compliance cases, requests to review OPM regulations and other assigned cases, and coordinates MSPB's legislative policy and congressional relations functions. The office also drafts regulations, conducts MSPB's ethics program and plans and directs audits and investigations.

The **Office of Information Resources Management (IRM)** develops, implements, and maintains MSPB's automated information systems to help MSPB manage its caseload efficiently and carry out its administrative and research responsibilities.

The **Office of Policy and Evaluation (OPE)** carries out MSPB's statutory responsibility to conduct studies of the civil service and other Federal merit systems. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office also conducts special projects for the Board and has responsibility for preparing MSPB's plans and reports required by the Government Performance and Results Act (GPRA).

The **Office of Regional Operations (ORO)** oversees MSPB's six regional and two field offices, which receive and process appeals and related cases, and manages MSPB's mediation appeals program (MAP). Administrative judges (AJs) in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.

Organization chart



Significant Board decisions and Court opinions issued in FY 2006

MSPB issued a substantial number of noteworthy decisions in fiscal year 2006, several of which are summarized here. The report also includes brief summaries of a number of significant opinions issued by the United States Supreme Court and the United States Court of Appeals for the Federal Circuit.

Significant Board decisions

USERRA/Military Leave Cases

The Board issued several notable decisions concerning employees' claims that their employing agencies violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by improperly charging them military leave on nonworkdays (e.g., weekends and holidays) when those days fell within a period of absence for active military duty or military training in the military reserves or National Guard. The Board has received a large number of appeals of this type following the decision of the U.S. Court of Appeals for the Federal Circuit in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), which held that federal employees had to take military leave under 5 U.S.C. § 6323(a) only for those days spent training with the military reserves on which they were otherwise required to work at their federal jobs.

In *Garcia v. Department of State*, 101 M.S.P.R. 172 (February 27, 2006), the Board held that it has jurisdiction under USERRA, as amended by the Veterans Programs Enhancement Act of 1998, to adjudicate allegations that an agency improperly charged military leave prior to the enactment of USERRA. The Board determined that an agency's improper charging of military leave, which an employee was entitled to receive in connection with absences for purposes of reserve training, was prohibited by the Veterans' Reemployment Rights Act of 1974 (VRRRA), prior to USERRA's enactment. The Board noted that the legislative histories of VRRRA and USERRA indicate that Congress intended for claims under both of these statutes to be subject to the equitable doctrine of laches rather than any statutory limitations period. Further, as part of the Veterans Programs Enhancement Act of 1998, Congress amended USERRA to authorize the Board to adjudicate complaints of USERRA violations without regard to whether the complaint accrued before, on, or after the date that USERRA was enacted. Thus, in keeping with the Congressional intent expressed in the legislative history, and with the spirit of the 1998 amendment to USERRA, the Board found that the only time-barred defense to this type of claim is that of laches, which bars an action when an unreasonable delay in bringing the action has prejudiced the party against whom the action is taken.

In *Harper v. Department of the Navy*, 101 M.S.P.R. 166 (February 27, 2006), the agency argued that 28 U.S.C. § 1658, the "residual" 4-year statute of limitations on the commencement of civil actions arising under an Act of Congress, applied to an appeal under USERRA alleging improper charging of military leave. The Board disagreed and found that 28 U.S.C. § 1658 does not apply to a USERRA claim against a federal agency under 38 U.S.C. § 4324. The Board found that the Veterans Programs Enhancement Act of 1998, which amended USERRA to expressly authorize the Board to hear USERRA claims that accrued more than 4 years prior to the amendment, clearly indicated that Congress did not intend that the Board subject a USERRA claim to the general 4-year statute of limitations at 28 U.S.C. § 1658.

In *Dombrowski v. Department of Veterans Affairs*, 102 M.S.P.R. 160 (May 23, 2006), the Board set forth a specific test for stating a USERRA claim under *Butterbaugh*. The Board explained that the appellant must allege that he was forced to use annual leave, sick leave, or leave without pay (LWOP) as a result of the agency's improper charging of military leave for nonworkdays. Further, the Board clarified that USERRA authorizes the Board to grant two forms of relief: (1) an order requiring an agency to comply with the portion of USERRA that it has violated; and (2) compensation for lost wages or benefits resulting from the USERRA violation. Since the military leave law, 5 U.S.C. § 6323, is not part of USERRA, the Board may not order an agency to comply with section 6323. Rather, the appropriate remedy in such a case is to order compensation for any annual leave, sick leave, or LWOP that the appellant was forced to use as a result of the agency's improper charging of military leave.

In *Jacobsen v. Department of Justice*, 101 M.S.P.R. 134 (February 22, 2006), the Board clarified the appropriate standard for reviewing an appellant's request for an award of attorney fees under USERRA. The Board found that the administrative judge erroneously denied the appellant's request for attorney fees based on the appellant's failure to satisfy the "prevailing party" and the "interest of justice" criteria set forth in 5 U.S.C. § 7701(g)(1), the attorney fee statute generally applicable in Board appeals. The Board held that these criteria cannot be read into USERRA's specific attorney fee provision, 38 U.S.C. § 4324(c)(4), which states that the Board may, in its discretion, award attorney fees, expert witness fees, and other litigation expenses when an appellant obtains a remedial order from the Board for a USERRA violation. On remand, the administrative judge, exercising her discretion under 38 U.S.C. § 4324(c)(4), determined that an award of fees was not appropriate under the circumstances because the appellant achieved only a relatively limited degree of success in relation to the relief originally sought in his appeal. In *Jacobsen v. Department of Justice*, 103 M.S.P.R. 439 (September 22, 2006), the Board affirmed the administrative judge's decision not to award fees given the appellant's limited success. The Board noted that USERRA's attorney fee provision does not set forth any specific factors that the Board must consider in exercising its discretion to award or not to award attorney fees. The Board explained that the factors to be considered will necessarily depend on the facts and circumstances of each individual case.

Whistleblower Cases

In *Fishbein v. Department of Health & Human Services*, 102 M.S.P.R. 4 (April 21, 2006), the Board held that a special consultant employed with the National Institutes of Health could bring an individual right of action (IRA) appeal alleging that he was terminated because of his protected whistleblowing disclosures, even though he was "appointed without regard to the civil-service laws" under 42 U.S.C. § 209(f). The Board found that nothing in section 409(f) expressly exempts appointees under that section from coverage under the Whistleblower Protection Act. Consistent with the Board's practice of liberally construing remedial legislation such as the Whistleblower Protection Act to embrace fairly all cases within its scope, the Board concluded that section 409(f) does not implicitly preclude a section 409(f) appointee, such as the appellant, from bringing an IRA appeal based on his termination from employment if he otherwise meets the statutory requirements for doing so.

In *Wilcox v. International Boundary & Water Commission*, 103 M.S.P.R. 73 (August 10, 2006), the Board addressed the issue of whether an attorney employed as Legal Advisor/General Counsel by the United States section of the International Boundary and Water Commission (IBWC) could bring an IRA appeal against the IBWC alleging retaliation for protected whistleblowing disclosures he made to the Department of State. The Board found that, although the IBWC is deemed an international

organization, that designation does not extend to the United States section as to matters within its exclusive control, supervision, or jurisdiction. The Board concluded that the IBWC is an “agency” for purposes of the Whistleblower Protection Act, and that the appellant met the statutory definitions of an “employee” in a “covered position” who could bring an IRA appeal. Thus, the Board remanded the matter to the regional office for further consideration of the appellant’s claims of whistleblower reprisal.

In *Ang v. Department of State and Department of Homeland Security*, 103 M.S.P.R. 324 (September 11, 2006), the Board determined that a foreign national employee who served in the Foreign Service as a Customs Investigator for the United States Customs Service in Manila, Philippines, was appointed in the “civil service” and was covered by 5 U.S.C. § 2302, which prohibits, among other things, reprisal for protected whistleblowing activity. The Board thoroughly analyzed the record evidence regarding the nature of the appellant’s appointment and found that the appellant was appointed in the “civil service” as that term is defined for purposes of Title 5 of the United States Code. The Board found that the appellant satisfied the statutory definitions of an “employee” in a “covered position” and thus remanded his whistleblower reprisal claim to the regional office for further adjudication.

In *Bloom v. Department of the Army*, 101 M.S.P.R. 79 (February 9, 2006), the Board made clear that an administrative judge should not ordinarily order a party to submit a copy of the decision of the Office of Special Counsel (OSC) discussing the allegations raised in the appellant’s complaint to OSC. The Board emphasized that an IRA appeal is a de novo action and OSC’s characterizations of the appellant’s allegations are not binding on the Board. By statute, and in order to ensure that a whistleblower is not prejudiced in any way by OSC’s decision not to pursue a case, OSC’s decision to terminate its investigation may not be considered in an IRA appeal. Thus, the Board stated that an administrative judge should not ordinarily order a party to submit a copy of OSC’s decision letter discussing the appellant’s allegations, and, if such an order is issued, the administrative judge must explain, on the record, why the letter is necessary and explicitly advise the appellant that the letter is inadmissible without the appellant’s consent.

In *Chambers v. Department of the Interior*, 103 M.S.P.R. 375 (2006), the appellant claimed that her removal from the position of Park Police Chief was taken in retaliation for (among other things) her statements to a newspaper reporter of alleged danger to the public resulting from agency budget and deployment decisions made by executive and legislative officials; she also claimed that her removal violated her First Amendment right to free speech. The Board (with Member Sapin dissenting) upheld the removal, finding that the appellant’s statements were not protected whistleblowing because they were expressions of personal disagreement with legitimate judgments that policymakers made within their spheres of authority; although reasonable minds might differ over the policy decisions at issue, Congress did not intend to extend whistleblower protections to statements such as the appellant’s. The Board also found that the First Amendment did not shield the appellant from discipline because she made her statements pursuant to her official duties and not as a citizen, and because her statements did not come within the First Amendment protections afforded to heads of police departments.

Adverse Action Appeal Rights

The Board issued several significant decisions concerning whether certain individuals met the definition of an “employee” under 5 U.S.C. § 7511(a)(1) and thus could raise adverse action appeals with the Board. In *Gadsden v. Department of State*, 102 M.S.P.R. 79 (May 12, 2006), the Board

addressed whether an individual serving under a competitive service appointment whose appointment has lasted a little more than one year, but whose probationary period was extended because of a 60-day period in LWOP status, can be considered to have “completed 1 year of current continuous service,” thereby rendering him an “employee” with Board appeal rights under 5 U.S.C. § 7511(a)(1)(A)(ii). It is noted that, in *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), *pet. for reh’g en banc denied*, 329 F.3d 1354 (Fed. Cir. 2003), which held that, if an appellant meets the conditions of either subsection (i) or (ii) of 5 U.S.C. § 7511(a)(1)(A), she is an “employee” with Board appeal rights. The Board found that the appellant’s period in LWOP status counted fully toward satisfying the “current continuous service” requirement, even though it did not count fully towards completing his probationary period, since nonpay status while remaining on the rolls does not constitute a “break in service.” Thus, the appellant met the “1 year of current continuous service” requirement and was an “employee” with Board appeal rights under 5 U.S.C. § 7511(a)(1)(A)(ii). The Board reversed the appellant’s removal because the agency’s procedures for effecting his removal did not comport with a tenured employee’s constitutional right to minimum due process of law.

In *Greene v. Defense Intelligence Agency*, 100 M.S.P.R. 447 (November 2, 2005), the Board held that 5 U.S.C. § 7511(a)(1)(B) provides appeal rights to a preference-eligible employee in the excepted service who has completed one year of current continuous service in the same or similar positions, regardless of whether the entire year of service was performed in the same agency from which the employee was separated. The Board remanded for a determination of whether the appellant’s service was “in the same or similar positions.”

In *Thompson v. Department of the Treasury*, 100 M.S.P.R. 545 (December 2, 2005), the Board considered whether the appellant, who had completed 18 years of service with the Department of Agriculture when she accepted a career appointment as a Revenue Officer for the Internal Revenue Service (IRS), relinquished her Board appeal rights by signing a “Notification of Probationary Period Document” on her first day of employment with the IRS. The document stated that the appellant understood that she was serving a probationary period, she relinquished her appeal rights during the probationary period, and she did not waive any appeal rights to which she was entitled by signing the document. The IRS subsequently removed the appellant during her probationary period for reasons arising post-appointment. The Board found that the appellant had no break in service between her employment with the Department of Agriculture and the IRS, and thus she met the definition of an “employee” under 5 U.S.C. § 7511(a)(1)(A)(ii) based on her more than one year of current continuous service under other than a temporary appointment limited to one year or less when the IRS terminated her. The Board further found that the waiver provision in the Notification of Probationary Period Document was unenforceable against her because she received no consideration for the waiver of her Board appeal rights. The appellant already occupied her position with the IRS when she signed the document and there was no evidence that she knowingly or intentionally waived her appeal rights before starting her position with the IRS.

Family and Medical Leave Act

In a decision sustaining the removal for absence without leave of a Licensed Practical Nurse who had a history of discipline related to leave and attendance, *Dias v. Department of Veterans Affairs*, 102 M.S.P.R. 53 (May 11, 2006), the Board addressed whether, in a case such as this, the Family and Medical Leave Act of 1993 (FMLA) supersedes the Board’s doctrine permitting evidence of incapacitation for duty that was never submitted to the agency to be submitted for the first time in a

Board appeal. The Board determined that the FMLA contains its own mechanism for resolving disputes over the adequacy of an employee's medical evidence and that an agency is entitled by statute to require an employee who requests FMLA leave to submit documentation in support of the request "in a timely manner." The Board found no basis for permitting an employee to bypass this statutory mechanism by ignoring the agency's request for medical evidence and then attempting to present evidence to support the leave request for the first time in a Board appeal.

Board Procedures

In *Redd v. U.S. Postal Service*, 101 M.S.P.R. 182 (February 28, 2006), the Board held that an appellant does not have an unconditional right to an evidentiary hearing on a discrimination claim, overruling *Currier v. U.S. Postal Service*, 79 M.S.P.R. 177 (1998). The Board reasoned that an evidentiary hearing would serve no purpose where an appellant does not have relevant, admissible evidence on a disputed fact to present at a hearing. The Board noted that, in similar circumstances, an administrative judge at the Equal Employment Opportunity Commission is authorized to render a decision without an evidentiary hearing when the "material facts" are not "in genuine dispute" and that a discrimination claim in a federal court may be disposed of by summary judgment. The Board found no evidence that Congress intended that the Board must hold an evidentiary hearing when the administrative judge could not reasonably find that the agency committed discrimination. Thus, the Board held that, when the appellant's factual allegations in support of a discrimination claim, taken as true, could not support an inference that the agency's action was a pretext for discrimination, the administrative judge is not required to permit the appellant to attempt to prove his allegations at an evidentiary hearing.

In *Special Counsel v. Department of Homeland Security and Michael Knowles*, 101 M.S.P.R. 505 (April 19, 2006), the Board determined that an employee who allegedly benefited from an agency's prohibited personnel practices was properly allowed to intervene in a corrective action brought by the Special Counsel against the agency for committing prohibited personnel practices. The Board explained that, under its applicable regulations, permission to intervene will be granted where the requester will be affected directly by the outcome of the proceeding and intervention is otherwise appropriate under law. The Board found that the circumstances in this case weighed in favor of permitting intervention, as the employee's motion to intervene was timely, he would be adversely affected by remedies sought by the Special Counsel should they be granted, and participation of all the affected parties now would avoid separate relitigation of the same issues with the potential for inconsistent obligations for the agency and the intervenor.

In *Carey v. Department of the Interior*, 103 M.S.P.R. 534 (2006), the Board (with Member Sapin dissenting) dismissed appeals filed by two employees approximately 10 years after a reduction in force (RIF) that adversely affected them. The appellants argued that the 30-day filing deadline should be extended because they were included in a class complaint of discrimination challenging the RIF that took nearly 10 years to resolve at the agency level. The Board disagreed, finding no indication that the appellants actively participated in the class complaint process or were even aware of it for the first 8 years after the RIF, and no indication that the appellants delayed filing their Board appeals because of the pending class complaint. According to the Board, a timely-filed class complaint of discrimination operates to extend the deadline for filing a Board appeal only for an individual who was a member of the class and who deliberately delayed filing a Board appeal based on a reasonable belief that his or her rights were being pursued in the class complaint process.

Remedies

In *Ivery v. Department of Transportation*, 102 M.S.P.R. 356 (June 22, 2006), the Board addressed whether the Federal Aviation Administration (FAA) is subject to the Back Pay Act and its implementing regulations. The Board had previously reversed the appellant's removal and ordered the agency to retroactively restore the appellant to his Airway Transportation Systems Specialist position with back pay and other benefits under the Back Pay Act. The appellant subsequently filed a petition for enforcement claiming that the agency had not complied with the Board's decision in several respects. The agency argued, among other things, that neither the Back Pay Act nor the back pay provisions of the FAA's personnel management system grant the Board the authority to award back pay in these circumstances. Upon review of the applicable statutes and regulations, the Board agreed with the agency. The Board found that the FAA is authorized to develop its own personnel management system under the Department of Transportation Appropriations Act of 1996, Pub. L. 104-50, § 347, 109 Stat. 436, 460 (1995), as amended by Pub. L. 104-22, § 1, 110 Stat. 876, 876 (1996), which provides, in pertinent part, that the provisions of Title 5 of the United States Code, with certain listed exceptions, do not apply to the FAA personnel management system. The Back Pay Act, 5 U.S.C. § 5596, is not among the listed exceptions. Further, although the FAA has the discretion to adopt, and has adopted, the substance of additional sections of Title 5 for use in its personnel management system, the Board found that the FAA had not adopted the Back Pay Act. The Board also reviewed the back pay regulations for the FAA personnel management system, but found that the back pay provision does not apply to Board appeals. Thus, the Board vacated that portion of its final decision that ordered restoration of pay and benefits under the Back Pay Act.

Retirement

In sustaining the decision of the Office of Personnel Management (OPM) to deny the appellant's application for disability retirement benefits in *Stevenson v. Office of Personnel Management*, 103 M.S.P.R. 481 (September 26, 2006), the Board (with Member Sapin dissenting) found that the fact that the appellant did not apply for disability retirement until after he had been removed for alleged misconduct was a relevant factor that detracted from the force of his application, notwithstanding the fact that, pursuant to a settlement agreement between the appellant and his agency, his removal for misconduct had been canceled and replaced with a removal for medical inability to perform his job. The Board found that both OPM and the Board, in carrying out its statutory responsibility of reviewing an OPM final decision, may disregard a personnel action taken pursuant to a settlement agreement to which OPM was not a party, where the personnel action was an evasive device designed to allow the appellant to qualify for retirement benefits for which he would otherwise have been ineligible.

In *Kimble v. Office of Personnel Management*, 103 M.S.P.R. 175 (2006), the appellant argued that the Office of Personnel Management (OPM) erred in giving effect to a divorce decree that awarded a portion of his retirement benefits to his ex-wife because the decree used terminology under the Employee Retirement Income Security Act (ERISA) and did not conform to OPM's rules governing such orders. The appellant alleged that an OPM paralegal had told him that OPM no longer enforced its rule. The Board held, without making any finding on what the appellant may have been told, that the appellant was entitled to a reviewable decision either applying OPM's rule or explaining why OPM would not apply its rule. The Board noted that there are significant differences between ERISA and the laws governing civil service retirement, and that OPM's rule thus served the

important purpose of ensuring that the divorce court understood those differences. The Board remanded the matter to OPM for a new decision.

Opinions issued by the United States Supreme Court relevant to Board practice

The Supreme Court issued two opinions that set law in situations that the Board regularly addresses. Though these opinions did not review a Board decision, or concern a Federal employee, summaries of the opinions are presented here as a service to the reader.

Garcetti v. Ceballos, 126 S.Ct. 1951 (2006). The First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee's official duties.

Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (2006). Title VII's anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. Rather, the provision covers those employer actions that would have been materially adverse to a reasonable employee or applicant. The employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Significant opinions issued by the United States Court of Appeals for the Federal Circuit

Whistleblower Protection Act

Harding v. Department of Veterans Affairs, 448 F.3d 1373 (Fed. Cir. 2006). Congress expressly granted the Department of Veterans Affairs (DVA) medical personnel appointed under chapter 73 or 74 of Title 38 the right to file individual right of action (IRA) appeals, even if the actions being challenged are subject to the DVA's internal appeals process.

Fields v. Department of Justice, 452 F.3d 1297 (Fed. Cir. 2006). When an employee voluntarily performs follow-up work in further response to an explicitly assigned task, that follow-up work is considered "normal duties through normal channels" and disclosures related to that follow-up work are not protected under the Whistleblower Protection Act.

Ruggieri v. Merit Systems Protection Board, 454 F.3d 1323 (Fed. Cir. 2006). A nonselection for a position may be appealed to the Board in an individual right of action appeal under the Whistleblower Protection Act as a "fail[ure] to take . . . a personnel action," even if the nonselection occurred due to the cancellation of a vacancy announcement and the agency hired no one for the position at that time.

Greenspan v. Department of Veterans Affairs, 464 F.3d 1297 (Fed. Cir. 2006). The Whistleblower Protection Act protects "any" disclosure that an employee reasonably believes evidences misconduct or mismanagement, even if the disclosure is stated in a blunt manner.

Adverse Action Appeals

Garcia v. Department of Homeland Security, 437 F.3d 1322 (Fed. Cir. 2006) (en banc). Employees appealing constructive adverse actions to the Board must prove jurisdiction by a preponderance of the evidence. However, once a claimant makes non-frivolous claims of Board jurisdiction, the

claimant has a right to a jurisdictional hearing. At the hearing, the claimant must prove jurisdiction by a preponderance of the evidence.

Gose v. United States Postal Service, 451 F.3d 831 (Fed. Cir. 2006). Where a letter of removal is silent about the agency's interpretation of its regulation, the existence and application of such an interpretation cannot be established principally by the after-the-fact testimony of agency officials regarding what they had apparently thought but failed to articulate at the relevant time.

Smith v. Department of the Army, 458 F.3d 1359 (Fed. Cir. 2006). An employee who seeks relief from disability discrimination may be entitled to back pay for a period beyond his removal for physical inability to perform the duties of his position even when he has not appealed the removal.

Retirement

Eldredge v. Department of the Interior, 451 F.3d 1337 (Fed. Cir. 2006). An employee was entitled to enhanced retirement benefits for his service in two secondary firefighter positions because his breaks in service from those positions were the result of "involuntary separations;" whether a separation is involuntary turns on the reason for the termination, not whether the employee knew of the possibility of termination at the time he took the job. The court did not defer to relevant provisions of an OPM advisory opinion and its FERS Handbook because those sources of guidance were not issued under formal notice-and-comment rulemaking and were not otherwise persuasive in light of the governing statutes.

Hernandez v. Office of Personnel Management, 450 F.3d 1332 (Fed. Cir. 2006). OPM's annual notice was insufficient to inform annuitant that, after divorce, a written election of survivor benefits was required to grant such benefits to his former spouse. Nevertheless, an inadequate notice only entitles a former spouse to benefits if there is sufficient evidence that the annuitant intended the former spouse to receive such benefits.

Snyder v. Office of Personnel Management, 463 F.3d 1338 (Fed. Cir. 2006). If the operative terms in a divorce court order can "fairly be read as awarding" survivor annuity benefits to a former spouse, then the Board must examine any evidence introduced concerning the marriage parties' intent and the circumstances surrounding the execution of the document to interpret the pertinent clause.

Miscellaneous

Augustine v. Department of Veterans Affairs, 429 F.3d 1334 (Fed. Cir. 2005). Attorneys practicing before the Board are not required to be licensed in the state in which the legal services are rendered; therefore, such a requirement may not be imposed to deny an attorney fees award.

Roberto v. Department of the Navy, 440 F.3d 1341 (Fed. Cir. 2006) and *Sturdy v. Department of the Army*, 440 F.3d 1328 (Fed. Cir. 2006). Reemployment rights are defined by either a reemployment priority list (RPL) or an OPM-approved priority placement program (PPP). An agency's failure to correctly inform an eligible employee of his or her RPL rights in a timely fashion constitutes a violation of the employee's reemployment priority rights that is appealable to the Board.

FY 2006 Case Processing Statistics

Summary of cases decided by MSPB

Table 1: FY 2006 Summary of Cases Decided by MSPB	
Cases Decided in MSPB Regional/Field Offices (RO/FO):	
Initial Appeals	6,558
Addendum Cases ¹	489
Stay Requests ²	63
TOTAL Cases Decided in Regional/Field Offices	7,110
TOTAL Cases Decided by Administrative Law Judges (ALJs) – Original Jurisdiction³	11
Cases Decided by the Board at Headquarters:	
Appellate Jurisdiction:	
Petitions for Review (PFRs) – Appeals	1,162
Petitions for Review (PFRs) – Addendum Cases	98
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	2
Reopenings ⁴	4
Court Remands	8
Compliance Referrals	25
EEOC Non-concurrence Cases	0
Arbitration Cases	7
Subtotal – Appellate Jurisdiction	1,306
Original Jurisdiction ⁵	32
Interlocutory Appeals	1
TOTAL Cases Decided by the Board at Headquarters	1,339
TOTAL Cases Decided by MSPB (Board, ALJs, RO/FOs)	8,460

Footnotes to Table

- 1 Includes 105 requests for attorney fees, 6 requests for compensatory damages (discrimination cases only), 210 petitions for enforcement, 140 Board remand cases, and 28 court remand cases.
- 2 Includes 42 stay requests in whistleblower cases and 21 in non-whistleblower cases.
- 3 Initial Decisions issued by ALJ. Case type breakdown: 1 OSC corrective action, 9 Hatch Act cases and 1 action against an ALJ.
- 4 4 cases were reopened by the Board on its own motion.
- 5 Final Board decisions. Case type breakdown: 11 requests for regulation review, 2 OSC initial stay requests, 12 PFRs in an action against an ALJ, and 7 Hatch Act cases.

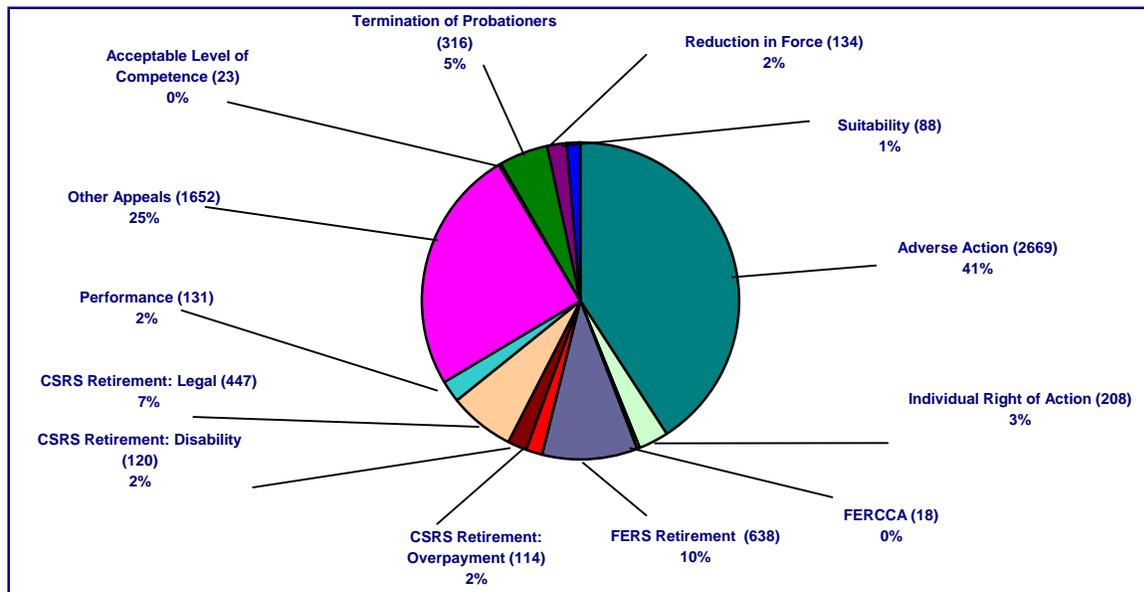
Regional case processing

Type of Case	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
				%	%	%	%	%	%
Adverse Action by Agency	2669	1277	47.9	1392	52.2	888	63.8	504	36.2
Termination of Probationers	316	284	89.9	32	10.1	29	90.6	3	9.4
Reduction in Force	134	88	65.7	46	34.3	22	47.8	24	52.2
Performance	131	35	26.7	96	73.3	59	61.5	37	38.5
Acceptable Level of Competence (WIGI)	23	16	69.6	7	30.4	6	85.7	1	14.3
Suitability	88	27	30.7	61	69.3	40	65.6	21	34.4
CSRS Retirement: Legal	447	206	46.1	241	53.9	7	2.9	234	97.1
CSRS Retirement: Disability	120	77	64.2	43	35.8	3	7.0	40	93.0
CSRS Retirement: Overpayment	114	43	37.7	71	62.3	54	76.1	17	23.9
FERS Retirement	638	313	49.1	325	50.9	97	29.9	228	70.2
FERCCA	18	11	61.1	7	38.9	0	0.0	7	100.0
Individual Right of Action	208	148	71.2	60	28.9	29	48.3	31	51.7
Other	1652	1036	62.7	616	37.3	544	88.3	72	11.7
Total	6558	3561	54.3	2997	45.7	1778	59.3	1219	40.7

1. Percent Dismissed and Not Dismissed are of the number Decided.

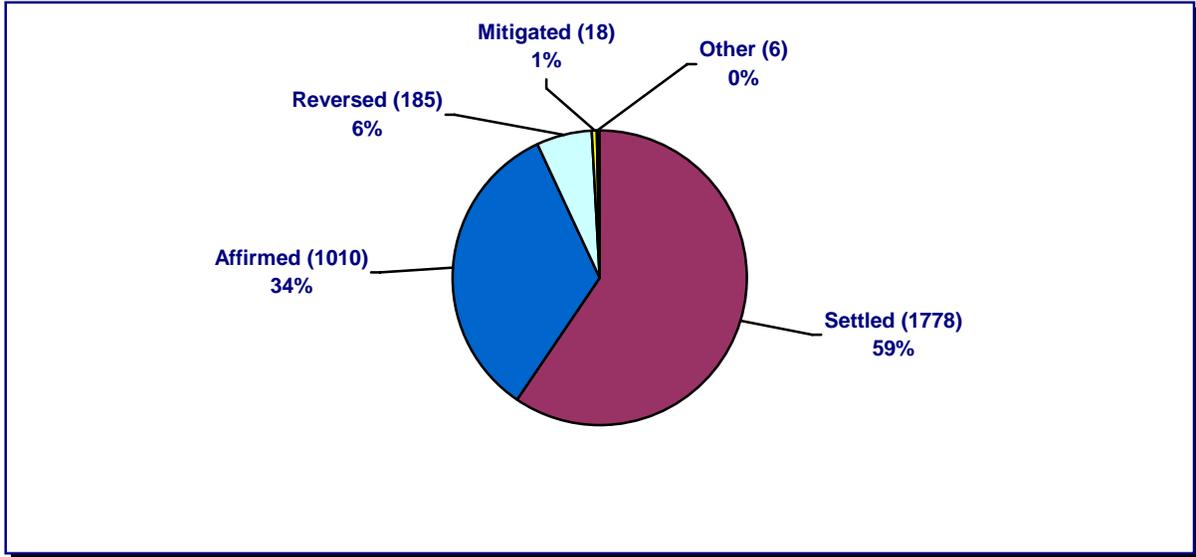
2. Percent Settled and Adjudicated are of the number Not Dismissed.

Figure 1: Type of Initial Appeals Decided in the Regional and Field Offices



Total Number of Appeals: 6,558
(Percentages do not total 100 because of rounding)

Figure 2: Disposition of Initial Appeals that were Not Dismissed



Total Number of Appeals that were Not Dismissed: 2,997

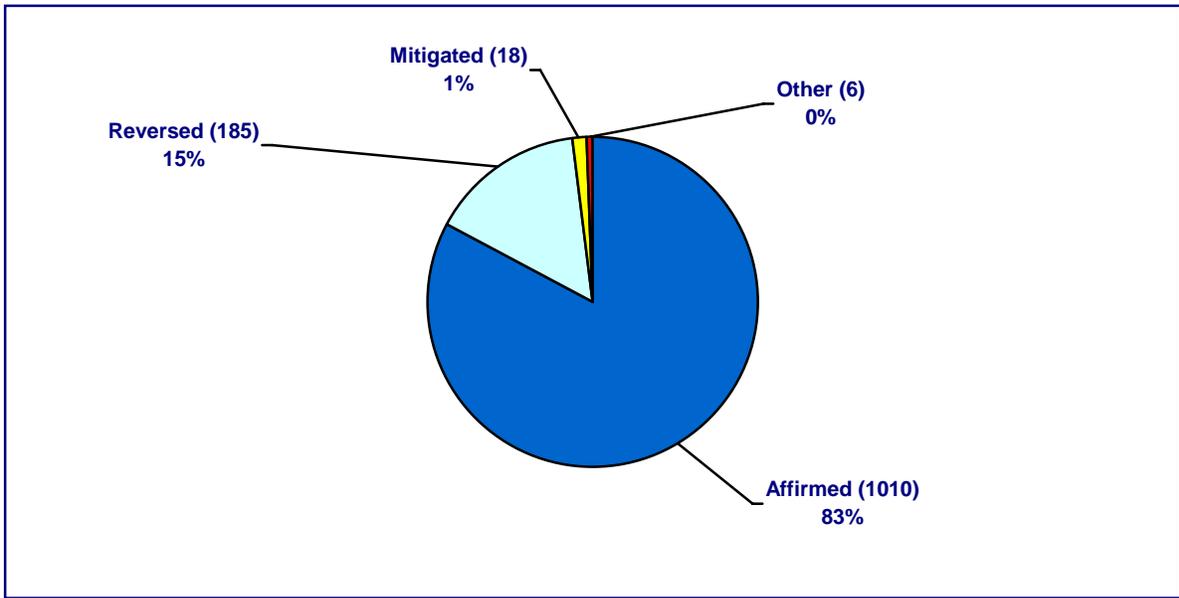


Figure 3: Disposition of Initial Appeals that were Decided on the Merits (i.e., Not Dismissed or Settled)

Based on 1,219 appeals adjudicated on the merits
(Percentages do not total 100 because of rounding)

Table 3: Disposition of Initial Appeals by Agency									
	Decided	Dismissed¹		Not Dismissed¹		Settled²		Adjudicated²	
				%	%		%		%
Office of Personnel Management*	1301	619	47.6	682	52.4	179	26.2	503	73.8
US Postal Service	1001	618	61.7	383	38.3	277	72.3	106	27.7
Army	753	356	47.3	397	52.7	330	83.1	67	16.9
Veterans Affairs	486	289	59.5	197	40.5	126	64.0	71	36.0
Air Force	394	199	50.5	195	49.5	147	75.4	48	24.6
Homeland Security	368	217	59.0	151	41.0	88	58.3	63	41.7
Navy	344	183	53.2	161	46.8	106	65.8	55	34.2
Defense	299	178	59.5	121	40.5	73	60.3	48	39.7
Justice	294	177	60.2	117	39.8	75	64.1	42	35.9
Treasury	261	124	47.5	137	52.5	98	71.5	39	28.5
Agriculture	181	102	56.4	79	43.6	59	74.7	20	25.3
Interior	177	99	55.9	78	44.1	33	42.3	45	57.7
Transportation	161	103	64.0	58	36.0	37	63.8	21	36.2
Health & Human Services	84	52	61.9	32	38.1	25	78.1	7	21.9
Social Security Administration	84	48	57.1	36	42.9	21	58.3	15	41.7
Commerce	50	24	48.0	26	52.0	17	65.4	9	34.6
Labor	48	26	54.2	22	45.8	11	50.0	11	50.0
General Services Administration	48	25	52.1	23	47.9	16	69.6	7	30.4
Housing & Urban Development	25	10	40.0	15	60.0	9	60.0	6	40.0
Education	19	17	89.5	2	10.5	1	50.0	1	50.0
Energy	18	8	44.4	10	55.6	6	60.0	4	40.0
Smithsonian Institution	18	7	38.9	11	61.1	9	81.8	2	18.2
Environmental Protection Agency	16	5	31.3	11	68.8	7	63.6	4	36.4
State	14	9	64.3	5	35.7	4	80.0	1	20.0
Federal Deposit Insurance Corporation	13	7	53.8	6	46.2	0	0.0	6	100.0
National Aeronautics and Space Administration	10	7	70.0	3	30.0	3	100.0	0	0.0
Tennessee Valley Authority	9	7	77.8	2	22.2	0	0.0	2	100.0
Equal Employment Opportunity Commission	8	5	62.5	3	37.5	2	66.7	1	33.3
Government Printing Office	6	3	50.0	3	50.0	2	66.7	1	33.3
Agency for International Development	5	4	80.0	1	20.0	0	0.0	1	100.0
Armed Forces Retirement Home	5	2	40.0	3	60.0	3	100.0	0	0.0
Administrative Office of US Courts	4	4	100.0	0	0.0	0	0.0	0	0.0
Broadcasting Board of Governors	4	3	75.0	1	25.0	1	100.0	0	0.0
Court Services & Offender Supervision	4	0	0.0	4	100.0	2	50.0	2	50.0
Government of the District of Columbia	4	3	75.0	1	25.0	0	0.0	1	100.0

Table 3: Disposition of Initial Appeals by Agency (continued)									
	Decided	Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
				%		%		%	
National Archives and Records Administration	4	2	50.0	2	50.0	1	50.0	1	50.0
Nuclear Regulatory Commission	4	2	50.0	2	50.0	2	100.0	0	0.0
Small Business Administration	4	3	75.0	1	25.0	0	0.0	1	100.0
Corporation for National & Community Service	3	2	66.7	1	33.3	0	0.0	1	100.0
National Mediation Board	3	0	0.0	3	100.0	3	100.0	0	0.0%
Securities & Exchange Commission	3	1	33.3	2	66.7	1	50.0	1	50.0
Commodity Futures Trading Commission	2	1	50.0	1	50.0	0	0.0	1	100.0
Federal Communications Commission	2	1	50.0	1	50.0	1	100.0	0	0.0
National Credit Union Administration	2	0	0.0	2	100.0	0	0.0	2	100.0
Office of Special Counsel	2	1	50.0	1	50.0	1	100.0	0	0.0
Peace Corps	2	2	100.0	0	0.0	0	0.0	0	0.0
American Battle Monuments Commission	1	0	0.0	1	100.0	0	0.0	1	100.0
Consumer Product Safety Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
Federal Housing Finance Board	1	1	100.0	0	0.0	0	0.0	0	0.0
Federal Labor Relations Authority	1	0	0.0	1	100.0	0	0.0	1	100.0
Federal Trade Commission	1	0	0.0	1	100.0	0	0.0	1	100.0
Government Accountability Office	1	0	0.0	1	100.0	1	100.0	0	0.0
International Boundary & Water Commission	1	1	100.0	0	0.0	0	0.0	0	0.0
Office of Administration	1	1	100.0	0	0.0	0	0.0	0	0.0
Other	1	1	100.0	0	0.0	0	0.0	0	0.0
Selective Service System	1	0	00.0	1	100.0	1	100.0	0	0.0
US Tax Court	1	1	100.0	0	0.0	0	0.0	0	0.0
TOTAL	6558	3561	54.3	2997	45.7	1778	59.3	1219	40.7

* Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

¹ Percentages in columns Dismissed and Not Dismissed are of Decided.

² Percentages in columns Settled and Adjudicated are of Not Dismissed.

Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency

	Adjudicated		Affirmed		Reversed		Mitigated Modified		Other	
			%		%		%		%	
Office of Personnel Management	503	381	75.7	118	23.5	1	0.2	3	0.6	
US Postal Service	106	92	86.8	8	7.5	5	4.7	1	0.9	
Army	67	54	80.6	9	13.4	4	6.0	0	0.0	
Veterans Affairs	71	68	95.8	3	4.2	0	0.0	0	0.0	
Air Force	48	38	79.2	10	20.8	0	0.0	0	0.0	
Homeland Security	63	56	88.9	4	6.3	1	1.6	2	3.2	
Navy	55	48	87.3	5	9.1	2	3.6	0	0.0	
Defense	48	45	93.8	2	4.2	1	2.1	0	0.0	
Justice	42	33	78.6	8	19.0	1	2.4	0	0.0	
Treasury	39	35	89.7	3	7.7	1	2.6	0	0.0	
Agriculture	20	17	85.0	3	15.0	0	0.0	0	0.0	
Interior	45	42	93.3	3	6.7	0	0.0	0	0.0	
Transportation	21	15	71.4	5	23.8	1	4.8	0	0.0	
Health & Human Services	7	7	100.0	0	0.0	0	0.0	0	0.0	
Social Security Adm.	15	15	100.0	0	0.0	0	0.0	0	0.0	
Commerce	9	9	100.0	0	0.0	0	0.0	0	0.0	
Labor	11	11	100.0	0	0.0	0	0.0	0	0.0	
General Services Administration	7	7	100.0	0	0.0	0	0.0	0	0.0	
Housing & Urban Development	6	6	100.0	0	0.0	0	0.0	0	0.0	
Education	1	1	100.0	0	0.0	0	0.0	0	0.0	
Energy	4	4	100.0	0	0.0	0	0.0	0	0.0	
Smithsonian Institution	2	1	50.0	1	50.0	0	0.0	0	0.0	
Environment Protection Agency	4	4	100.0	0	0.0	0	0.0	0	0.0	
State	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Deposit Insurance Corporation	6	4	66.7	1	16.7	1	16.7	0	0.0	
Tennessee Valley Authority	2	2	100.0	0	0.0	0	0.0	0	0.0	
Equal Employment Opportunity Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	
Government Printing Office	1	1	100.0	0	0.0	0	0.0	0	0.0	
Agency for International Development	1	1	100.0	0	0.0	0	0.0	0	0.0	
Court Services & Offender Supervision	2	2	100.0	0	0.0	0	0.0	0	0.0	
Government of the District of Columbia	1	1	100.0	0	0.0	0	0.0	0	0.0	

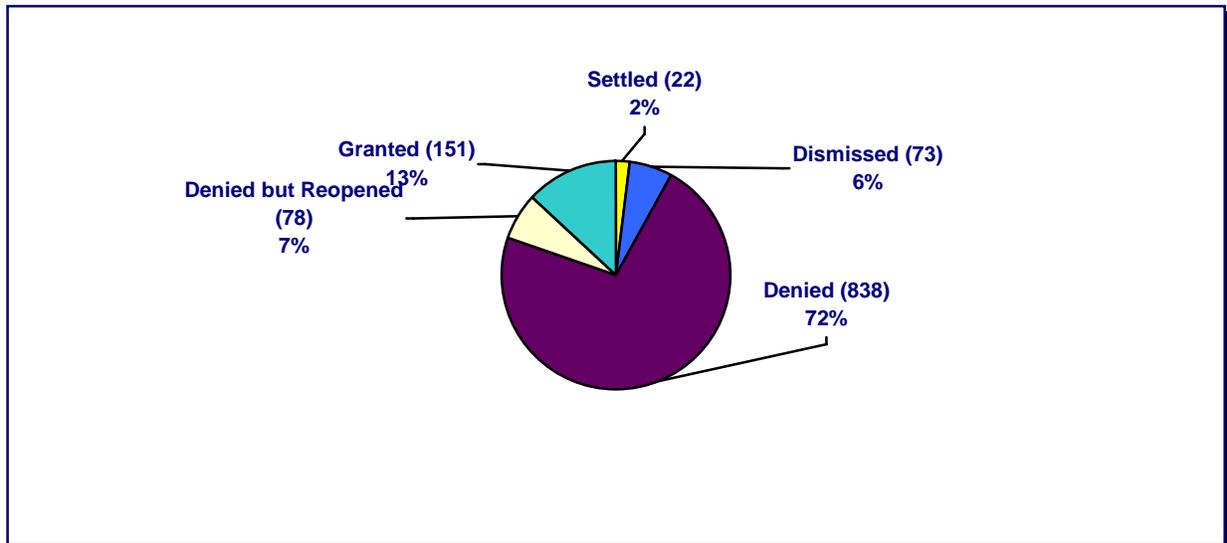
Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency (Cont.)										
	Adjudicated		Affirmed		Reversed		Mitigated Modified		Other	
				%		%		%		%
National Archives and Records Administration	1	1	100.0		0	0.0	0	0.0	0	0.0
Small Business Administration	1	1	100.0		0	0.0	0	0.0	0	0.0
Corporation for National & Community Service	1	0	0.0		1	100.0	0	0.0	0	0.0
Security & Exchange Commission	1	1	100.0		0	0.0	0	0.0	0	0.0
Commodity Futures Trading Commission	1	1	100.0		0	0.0	0	0.0	0	0.0
National Credit Union Administration	2	2	100.0		0	0.0	0	0.0	0	0.0
American Battle Monuments Commission	1	1	100.0		0	0.0	0	0.0	0	0.0
Federal Labor Relations Authority	1	1	100.0		0	0.0	0	0.0	0	0.0
Federal Trade Commission	1	0	00.0		1	100.0	0	0.0	1	0.0
TOTAL	1219	1010	82.9		185	15.2	18	1.5	6	0.5

* Adjudicated, i.e., not dismissed or settled.
Percentages may not total 100 because of rounding.

Headquarters case processing

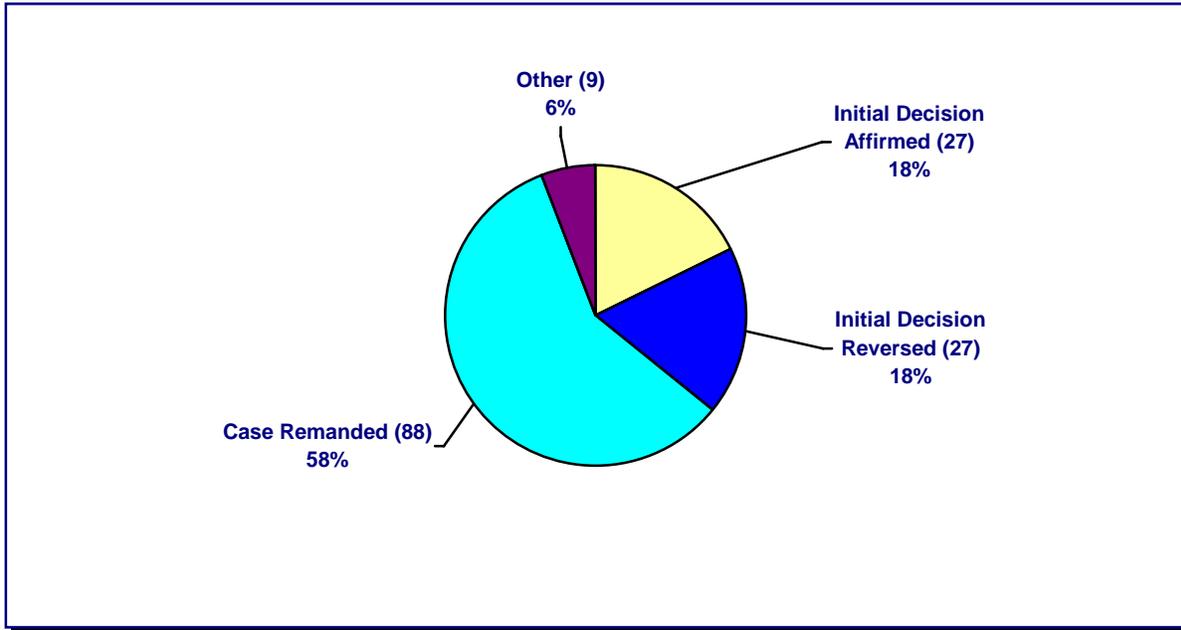
Table 5: Disposition of Petitions for Review (PFR) of Initial Decisions by Type of Case											
Type of Case	Decided	Dismissed		Settled		Denied		Denied But Reopened		Granted	
			%		%		%		%		%
Adverse Action by Agency	504	34	6.8	5	1.0	401	79.6	16	3.2	48	9.5
Termination of Probationers	43	2	4.7	1	2.3	27	62.8	3	7.0	10	23.3
Reduction in Force	26	1	3.9	1	3.9	18	69.2	2	7.7	4	15.4
Performance	43	2	4.7	1	2.3	36	83.7	1	2.3	3	7.0
Acceptable Level of Competence (WIGI)	5	0	0.0	0	0.0	5	100.0	0	0.0	0	0.0
Suitability	11	2	18.2	0	0.0	6	54.6	1	9.1	2	18.2
CSRS Retirement: Legal	99	4	4.0	2	2.0	78	78.8	7	7.1	8	8.1
CSRS Retirement: Disability	28	1	3.6	1	3.6	21	75.0	1	3.6	4	14.3
CSRS Retirement: Overpayment	10	0	0.0	0	0.0	9	90.0	1	10.0	0	0.0
FERS Retirement	93	2	2.2	0	0.0	65	69.9	10	10.8	16	17.2
FERCCA	4	0	0.0	0	0.0	4	100.0	0	0.0	0	0.0
Individual Right of Action	91	4	4.4	1	1.1	63	69.2	7	7.7	16	17.6
Other	205	21	10.2	10	4.9	105	51.2	29	14.2	40	19.5
Total	1162	73	6.3	22	1.9	838	72.1	78	6.7	151	13.0

Figure 4: Disposition of Petitions for Review of Initial Decisions



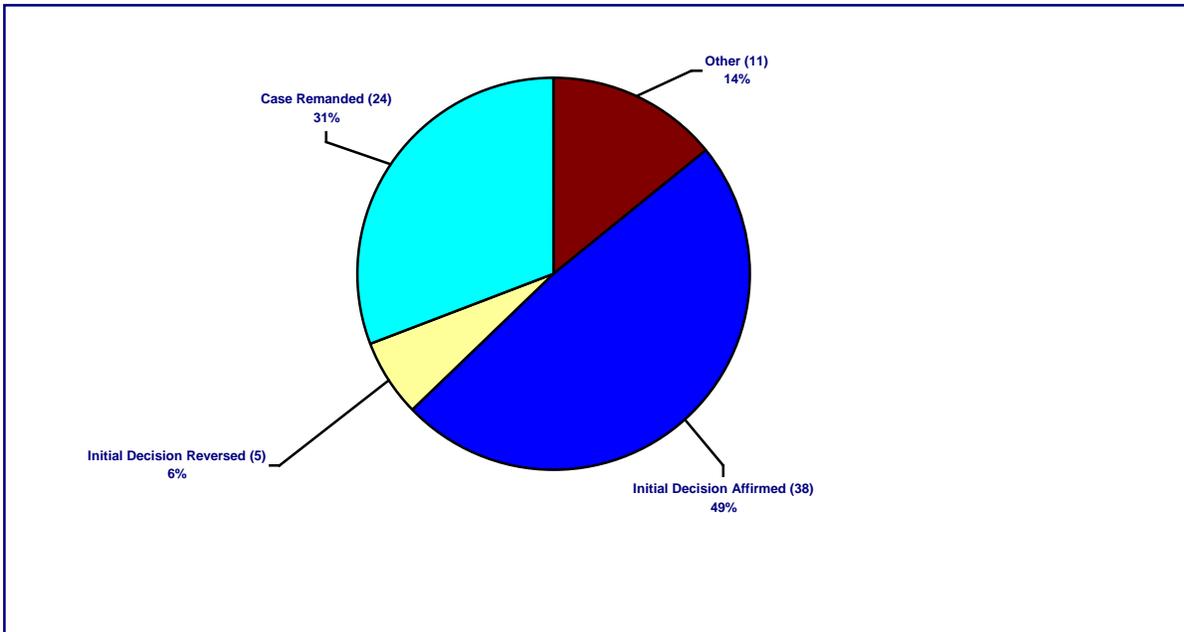
Total Number of Petitions for Review: 1,162

Figure 5: Disposition of Petitions for Review Granted



Based on 151 Petitions for Review Granted

Figure 6: Disposition of Petitions for Review Denied but Reopened



Based on 78 Petitions for Review Denied But Reopened

Table 6: Disposition of Petitions for Review of Initial Decisions by Agency

	Decided		Dismissed		Settled		Denied		Denied But Reopened		Granted	
			%		%		%		%		%	
Office of Personnel Management*	227	7	3.1	3	1.3	168	74.0	19	8.4	30	13.2	
US Postal Service	181	16	8.8	2	1.1	137	75.7	10	5.5	16	8.8	
Veterans Affairs	103	3	2.9	1	1.0	85	82.5	6	5.8	8	7.8	
Air Force	82	6	7.3	1	1.2	51	62.2	13	15.9	11	13.4	
Navy	80	2	2.5	3	3.8	60	75.0	7	8.8	8	10.0	
Army	78	8	10.3	3	3.9	49	62.8	5	6.4	13	16.7	
Homeland Security	67	7	10.5	1	1.5	52	77.6	1	1.5	6	9.0	
Treasury	55	4	7.3	4	7.3	40	72.7	1	1.8	6	10.9	
Defense	48	4	8.3	1	2.1	32	66.7	2	4.2	9	18.8	
Justice	46	3	6.5	2	4.4	29	63.0	3	6.5	9	19.6	
Interior	34	0	0.0	0	0.0	25	73.5	2	5.9	7	20.6	
Agriculture	23	1	4.4	0	0.0	17	73.9	1	4.4	4	17.4	
Transportation	20	2	10.0	0	0.0	12	60.0	3	15.0	3	15.0	
Social Security Administration	20	4	20.0	1	5.0	13	65.0	1	5.0	1	5.0	
Health & Human Services	16	1	6.3	0	0.0	12	75.0	1	6.3	2	12.5	
Labor	11	0	0.0	0	0.0	11	100.0	0	0.0	0	0.0	
Commerce	10	0	0.0	0	0.0	7	70.0	2	20.0	1	10.0	
General Services Administration	10	1	10.0	0	0.0	7	70.0	0	0.0	2	20.0	
State	7	1	14.3	0	0.0	2	28.6	1	14.3	3	43.9	
Energy	6	0	0.0	0	0.0	5	83.3	0	0.0	1	16.7	
Housing & Urban Development	6	0	0.0	0	0.0	5	83.3	0	0.0	1	16.7	
Federal Deposit Insurance Corporation	3	0	0.0	0	0.0	3	100.0	0	0.0	0	0.0	
National Mediation Board	3	0	0.0	0	0.0	0	0.0	0	0.0	3	100.0	
Administrative Office of US Courts	2	1	50.0	0	0.0	1	50.0	0	0.0	0	0.0	
Consumer Product Safety Commission	2	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0	
Environmental Protection Agency	2	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0	
Equal Employment Opportunity Commission	2	0	0.0	0	0.0	1	50.0	0	0.0	1	50.0	
National Aeronautics & Space Administration	2	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0	

* Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.
(Percentages may not total 100 because of rounding.)

Table 6: Disposition of Petitions for Review of Initial Decisions by Agency (Cont.)

	Decided		Dismissed		Settled		Denied		Denied But Reopened		Granted	
			%		%		%		%		%	
Small Business Administration	2	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0	
Smithsonian Institution	2	0	0.0	0	0.0	0	0.0	0	0.0	2	100.0	
Agency for International Development	1	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0	
Court Services & Offender Supervision	1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	
Education	1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	
Government of the District of Columbia	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	
International Boundary & Water Commission	1	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0	
National Credit Union Administration	1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	
Nuclear Regulatory Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	
Office of Government Ethics	1	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0	
Other	1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	
Peace Corps	1	0	0.0	0	0.0	0	0.0	0	0.0	1	100.0	
Securities & Exchange Commission	1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	
Tennessee Valley Authority	1	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0	
TOTAL	1162	73	6.3	22	1.9	38	72.1	78	6.7	151	13.0	

Summaries of Merit Systems Studies

Designing an Effective Pay for Performance Compensation System

As part of a shift away from tenure-based pay increases and towards aligning pay with performance, a growing number of Federal Government agencies are implementing pay for performance compensation systems. However, agencies need to proceed judiciously to lay the groundwork for an effective pay system and to maintain its success over time.

This report summarizes key decision points that should be considered by any agency contemplating a pay for performance compensation strategy. These decisions represent some of the key opportunities for tailoring a pay for performance system to best fit an agency's mission and environment.

In addition, MSPB found that despite the differences that require customization of the pay system, successful pay for performance systems also share certain requirements. Boiled down to the essential elements, for a pay for performance system to be effective, employees must value the reward offered in exchange for performance; understand what performance is expected, believe they can achieve that level of performance, and believe that the agency will follow through on its commitments in exchange for exceptional performance.

To achieve these linkages between pay and performance, the report recommends that an agency ensure it has certain prerequisites, including adequate funding, an effective performance evaluation system, capable supervisors, and a system of checks and balances to preserve fairness, accompanied by regular evaluations to ensure the ongoing success of the pay system.

Contracting Officer Representatives: Managing the Government's Technical Experts to Achieve Positive Contract Outcomes

The volume of contract spending—\$388 billion in fiscal year 2005—demonstrates the importance of developing and managing Federal contracts in ways that will ensure the best contract outcomes and the best return on the taxpayers' dollar. While the Government has modernized its contracting rules and procedures and improved the management of contracting officers who carry out the business aspects of contracting, almost no work has been done to assess agencies' management of contracting officer representatives (CORs). These individuals provide the technical expertise necessary to develop and oversee Government contracts. Even the best-managed contract is not successful if its deliverables fail to meet the technical requirements of the Government.

MSPB's report on CORs provides findings and recommendations based on a survey of CORs from 10 agencies that, in aggregate, spent 90 percent of the Government's contracting dollars. The highly experienced CORs in these agencies reported that just over half of contracts met expectations in terms of the quality, timeliness, completeness and cost of contract deliverables. Somewhat surprisingly, simpler contracts did not have better outcomes.

The study also looked at several aspects of managing CORs. Contrary to regulatory requirements, only 50% of CORs were always formally delegated their authority to work on a particular contract, and 25% of CORs were never formally delegated their authority. In addition, even the most

experienced CORs reported needing significant training, especially training to keep abreast of developments in their technical or functional area.

The report recommends that agencies do a better job of fulfilling the regulatory aspects of managing CORs to include formal delegation of authority, improved COR training, and strategic management of the COR workforce. In addition, agencies need to improve the day-to-day management of CORs. This includes improving COR selection and assignment, involving CORs early in the contracting process, ensuring CORs perform critical pre-award technical contracting tasks, providing enough time for CORs to do their contracting work, and rating CORs on the performance of their contracting work. The report shows that fulfilling the regulatory requirements for managing CORs and managing CORs more effectively were both significantly related to more positive contract outcomes.

Reforming Federal Hiring: Beyond Faster and Cheaper

This perspectives report brings together the key findings and recommendations from MSPB's 25 years of research on hiring issues to help inform hiring reform efforts. The report concludes that the Federal Government needs to do a better job recruiting and assessing applicants, managing the hiring process, and making merit-based decisions. The Government also needs to look at long-term, strategic reform that balances the need for efficient hiring processes with the need to improve the quality of hiring decisions. The report's recommendations focus on how to improve the Government's hiring process and address:

- Improving recruitment to target and attract applicants with the needed skills.
- Improving assessment practices to distinguish high potential candidates from the rest.
- Improving management of the hiring process to ensure agencies have the resources needed to carry out quality hiring practices.
- Improving merit-based decisions to ensure hiring practices do not impede fair and open competition or advancement based solely on relative ability.

Many of the recommendations do not require regulatory change but instead call for agencies to look at hiring with a greater focus on quality, especially in the area of assessment instruments. Overall, reform should preserve the original values of merit-based hiring and divest the system of rules and processes that are unnecessary to support those goals.

Navigating the Probationary Period After *Van Wersch* and *McCormick*

This report discussed two Federal Circuit cases regarding the rights of individuals who may be in a probationary or trial period, but who may be entitled to appeal adverse actions. It contains recommendations to OPM and to Congress regarding the consequences of these court decisions.

In *Van Wersch v. Health and Human Services* (1999), the court addressed the meaning of 5 U.S.C. § 7511(a)(1)(C), which applies to nonpreference-eligible individuals in the excepted service. It held that such an employee could be entitled to appeal an adverse action to the Board even if he were serving a probationary period, as long as he had satisfied the 2-year service requirement of 5 U.S.C. § 7511(a)(1)(C)(ii). Previously, the Board had held that such an employee had no right to appeal and adverse action to the Board if he was serving a probationary period, regardless of whether he had

satisfied that 2-year service requirement. Essentially, the court determined the word ‘or’ separating the two definitions was disjunctive – meaning a person would qualify if he or she met either definition.

In 2002, *McCormick v. Air Force* applied this analysis to 5 U.S.C. § 7511(a)(1)(A), which covers competitive service employees. The court held that an individual in the competitive service who met the 1-year service requirement of 5 U.S.C. § 7511(a)(1)(A)(i) could be entitled to appeal an adverse action to the Board even if he were serving a probationary period. Previously, an individual had to meet both definitions of employee set out in 5 U.S.C. § 7511(a)(1)(A). Following this case, meeting either definition was sufficient for a competitive service employee to qualify for procedural and appeal rights.

These changes created problems for agencies. Following these cases, agencies had to adapt to a new way of looking at the statute. In *Van Wersch*, the court stated, “to the extent that OPM’s regulations are contrary to the proposition that an individual is an ‘employee’ if he or she meets the requirements of either 5 U.S.C. § 7511(a)(1)(C)(i) or (ii), they are invalid.” The court also noted that the “courts are the final authorities on issues of statutory construction.” OPM’s regulations, however, have not been modified.

This report was designed to educate practitioners on the meaning of these two cases, to advise OPM of the apparent inconsistency between the case law and its regulations and to notify Congress of the potential need to modify the language of the law if it has caused an outcome it does not desire.

The Practice of Merit: A Symposium

In support of MSPB’s role to protect the merit systems, the Board held a one-day symposium at the National Press Club in Washington, DC, on how agencies ensure merit when managing their workforce under authorities outside the traditional authorities contained in Title 5 USC. Although DoD and DHS were most recently granted exemptions to some of Title 5’s provisions, there are Federal agencies that have been operating beyond these provisions for some time. Representatives from these agencies shared their experiences with others who are in search of better ways to manage their workforce that also support the merit system principles. The symposium occurred on April 20, 2006 and the proceedings from the symposium will be released shortly.

The Comptroller General of the United States, David Walker, and the Deputy Director of the Office of Personnel Management, Dan Blair, served as keynote speakers. Mr. Walker shared his experiences about how the Government Accountability Office has transformed into a performance-driven organization. He emphasized the importance of a strategic human capital plan, an outcome-oriented infrastructure, credible internal review and external appeals processes, and effective safeguards and accountability. Mr. Blair traced the various changes in the civil service systems from the 1940’s to present, noting how the merit principles have remained a constant throughout these changes. According to Mr. Blair, one of the lessons to be learned from these changes was that when flexibilities are given to agencies, these flexibilities must remain within a coherent framework, which includes the merit system principles and adequate safeguards.

MSPB Chairman Neil A. G. McPhie interviewed Special Counsel Scott Bloch and the Vice Chairman of the Public Employee Roundtable, William Bransford, about protecting employees from prohibited personnel practices. Mr. Bloch and Mr. Bransford noted that equal employment

opportunity and whistleblowing are the most misunderstood prohibited personnel practices, and agreed that educating managers, supervisors and employees of their rights would be key to preserving merit and avoiding prohibited personnel practices.

The symposium also included three panel discussions that focused on how the agencies represented ensure merit in their recruitment and placement, pay management, and performance management practices. Our panel members were officials from the Office of the Director of National Intelligence, the Departments of State, Veterans Affairs, and the Army's Nonappropriated Funds Instrumentality. MSPB also had presenters from the National Institute of Standards and Technology, the Office of the Comptroller of the Currency, the Government Accountability Office, and the U.S. Postal Service.

Our speakers showed that while processes might be different, merit can and does flourish under alternative systems. In addition, the speakers indicated that there is always room for improvement; that their alternative personnel systems were not necessarily exactly right on the first try. The speakers also made clear that people are the most critical success factor in any change initiative. Rules, regulations and processes are necessary, but people make a system work. Educating them about the new personnel system and constantly communicating with them can alleviate fear and earn their trust. Getting employees on board is crucial in any transformation effort.

Accomplishing Our Mission: Results of the Merit Principles Survey 2005

MSPB conducts a periodic Merit Principles Survey (MPS) to elicit the views of Federal employees about the practice of merit in the workplace including working conditions, job satisfaction, and interactions with their coworkers and supervisors. This report discusses the views of Federal employees who participated in the most recent MPS. It summarizes the responses of 36,926 Federal employees who completed this online survey—a representative sample of the 1.8 million full-time, permanent employees of the Federal Government. The report reveals that Federal employees generally believe they are well managed, have jobs that they like, and are highly motivated by the opportunity to help their agencies succeed.

The survey results confirm that employees at all levels are dedicated to ensuring that their agencies achieve their missions, but are concerned about how the Federal Government can maintain a qualified and motivated workforce. The MPS 2005 also found continuing high job satisfaction despite perceptions of less organizational stability and fear of pending changes in the Federal pay system.

The report presents and explores several challenges that agencies face in the workplace. For example, hiring officials are often not satisfied with the applicant pool they must draw from to fill Federal job openings. Employees already on the job would like additional training to do their jobs at a higher level of performance. A large percentage of nonsupervisory employees feel uninformed about performance evaluation, organizational changes, and other issues. Additionally, both supervisors and nonsupervisors report a moderate level of serious conflict in the workplace that may erode the motivation of some employees to succeed.

The good news is that most employees and their supervisors have formed good relationships and are working together to meet these challenges. A primary finding throughout this report is the

importance of trust between employees and their first-line supervisors. This report was completed and submitted for approval near the end of FY 2006. The report was released in March 2007.

***Issues of Merit* Newsletter**

MSPB's *Issues of Merit* newsletter is designed to offer insights and analyses on topics related to Federal human capital management—particularly findings and recommendations from MSPB's independent research—to help improve the Government's merit systems. The newsletter's target audience includes Federal policy-makers, managers and executives, human resources practitioners, social science researchers, and academics.

MSPB issued four editions of the *Issues of Merit* newsletter this year. Each of the four issues included findings from MSPB's research, articles to help clarify readers' understanding of employment issues, and perspectives from the Director of the Office of Policy and Evaluation (OPE) about specific human capital matters. To communicate research findings, newsletter articles addressed topics such as how Contracting Officer Representatives' training relates to better contract outcomes, improving Federal hiring processes by focusing on quality, and findings from the 2005 Merit Principles Survey related to the occurrence of prohibited personnel practices in the Federal workforce. Articles provided insight into issues like due process, whistleblowing, and how agencies should use the probationary period given recent court decisions that counter past practices. The OPE Director addressed issues such as how to improve pay for performance implementation by improving supervisory selection and how merit can be achieved outside traditional personnel rules.

Significant Actions of the Office of Personnel Management (OPM)

As required by statute, MSPB reports on the significant actions of OPM. Below, we list and briefly discuss the OPM actions in these areas that have the greatest long-term implications for the Federal civil service. This list is not, however, by any means exhaustive.

Policy and leadership

Guidance on human capital management and continuity of operations planning related to pandemic influenza

OPM developed policy guidance for Federal agencies and employees regarding human capital management flexibilities and continuity of operations planning criteria related to a potential influenza pandemic. This guidance includes an update of the Telework Guide to provide workplace options to Federal agencies during a potential pandemic.

Significance

The World Health Organization (WHO), as well as other world-wide health officials, has been monitoring a new and severe influenza virus and has urged countries to prepare for the next pandemic to mitigate its impact (WHO, 2005 *Responding to Avian Influenza Pandemic Threat: Recommended Strategic Actions*). If such a pandemic were to strike the United States, it could result in significant shut-downs of Government operations due to illness. OPM's guidance is designed to help agencies protect the health of the Federal workforce and to ensure continuity of operations. Most of the information provided by OPM can also be used to prepare for other emergency situations, such as those the Government experienced on September 11, 2001 and during hurricanes Katrina and Rita.

New personnel systems in the Department of Homeland Security (DHS) and the Department of Defense (DoD)

In 2005, OPM worked with DHS and DoD to issue final regulations for the agencies' new personnel systems. The regulations were issued jointly by OPM and the agency involved. These regulations depart from longstanding Title 5 practice in the areas of pay, performance management, appeal rights and procedures, and collective bargaining. (In the NSPS system there are also certain staffing flexibilities added.)

In 2006, the U.S. Court of Appeals for the District of Columbia struck down the labor relations provisions of the DHS regulations, indicating that they unlawfully curtail collective bargaining rights for employees. The court also addressed the mitigation of penalties standard in the appeal procedures but held that the issue would not be ripe for review until a mitigation of penalty issue arose from implementation of the new procedures.

Significance

The DoD and DHS personnel systems are expected to lay the groundwork for broader civil service reform. The court's decision, therefore, may have implications for further Governmentwide reform efforts. In the more immediate term, the court's decision may also hold implications for DoD's

proposed labor relations reforms. Although the development of these new personnel systems included consultation with employee representatives, the decision by the Court of Appeals indicates that the process used to develop the regulations may not have been sufficient to ensure appropriate employee protections and legal defense. Successful development and implementation of these personnel systems will require sustained effort from DHS, DoD and OPM in order to address the legal issues regarding these systems, to train managers to use these new delegated authorities, and to build employee buy-in which is essential for success.

Raising public awareness of Federal jobs.

To help improve the public's awareness of Federal jobs, OPM launched four television commercials highlighting Federal employees talking about their jobs, and OPM is sponsoring Federal career days at four universities chosen in part because of their commitment to supporting Federal employment opportunities.

Significance

Research by numerous organizations (e.g., the Partnership for Public Service, the National Association of Colleges and Employers and Hart Teeter) indicates that potential applicants, particularly younger college graduates, lack knowledge about Federal jobs, which hampers the Government's recruitment efforts. OPM's efforts to increase awareness may help to address this hurdle. However, OPM needs to ensure that marketing efforts are targeted to appropriate audiences because Federal jobs are still highly competitive and not everyone will qualify for vacant positions.

Guidelines for Managerial Development

OPM released "Guidelines for Managerial Development" to Chief Human Capital Officers. The guidelines address criteria to be met by agency leadership on the issue of management development. This includes a list of minimum requirements that should be part of leadership development programs, and a list of best practices and special considerations concerning managerial development.

Significance

Traditional managerial roles are going to be vitally important to implementing new personnel systems, particularly the new DHS and DoD pay for performance systems. In particular, supervisors and managers need to be adept at selecting employees, communicating with them, evaluating performance, and managing time. Therefore, agencies will need to be especially careful about how they select and develop supervisors to ensure they focus on managerial capabilities rather than technical expertise. The guidelines set forth by OPM could help focus agencies on this requirement, but the guidelines must be put into action by the agencies to be fully effective.

Senior Executive Service (SES) pay for performance system

In 2004, OPM instituted a pay for performance senior executive pay system designed to align executive pay and bonuses with organizational results. In 2006, GAO evaluated the pay system and found that 23 out of 24 certified agencies received provisional certifications. GAO noted that this is not unusual in early stages but urged OPM to monitor the trend to ensure provisional certifications do not become the rule.

Significance

The SES pay for performance system could lay the groundwork for broader civil service reform. Therefore, OPM should continue to pay close attention to the challenges faced during these first few years of implementation, address them as appropriate, and note the lessons learned that can be applied to modernizing the pay and performance management systems of employees at other levels.

Compliance and accountability

Implementation of the President's Management Agenda

OPM continues to evaluate agency performance on the human capital element of the President's Management Agenda (PMA) and seeks to institutionalize a strategic approach to managing human capital. This year, OPM worked with agencies to specifically focus on assessing and improving performance management systems.

Significance

As part of the PMA, 25 out of 26 agencies used the Performance Appraisal Assessment Tool (PAAT) to assess how well their performance appraisal programs support a high performing organization. OPM is analyzing agency submissions and working with agencies to address identified weaknesses in their programs. In general, OPM reports agency progress in key performance areas of the PMA. OPM reports that 81 percent of agencies have performance appraisal systems which link to agency mission, 73 percent have closed critical talent gaps, and the Governmentwide average time-to-hire is 34 days. Although the long-term effects of the PMA are unknown, such efforts to increase attention to workforce needs and to improve agency HR practices are welcome.

Agency annual survey regulations

As part of the National Defense Authorization Act for Fiscal Year 2004, Congress directed each Executive Branch agency to conduct an annual employee survey and post the results on its agency Website. Originally, OPM issued proposed regulations prescribing 28 core questions to be included on all agency surveys. In August 2006, OPM issued the final rule that prescribes a total of 45 questions to be included on all agency surveys.

Significance

As MSPB pointed out in its 2005 Annual Report, there are several potential drawbacks to the annual survey requirement. These include lack of time to administer, analyze and act on survey results; survey fatigue; and lack of resources and expertise needed to carry out an annual survey. With the addition of 17 questions to the original set, the concerns are magnified. Therefore, MSPB reasserts the recommendation for OPM to play a significant role in evaluating the impact the new requirement has on the Government's ability to effectively use surveys.

Federal Human Capital Survey

OPM administered the third round of the Governmentwide Federal Human Capital Survey to more than 400,000 employees.

Significance

The FHCS contained 84 questions developed to gauge employee perceptions regarding the quality of their work environment, including how effectively they are led and managed, what opportunities they have to grow professionally, and whether they feel their contributions are valued. The results should help agencies continue to measure their performance in terms of human capital management. OPM has made this survey instrument capable of meeting the above mentioned annual survey requirement for agencies in the even numbered years starting in 2006.

Delivery of human resources products and services

Providing agencies with hiring tools

OPM is providing agencies with tools to help them assess their hiring needs and processes. In June, it introduced the new Career Patterns approach to hiring which provides agencies with a workforce analytical tool and guide book to assist their workforce planning efforts. In October, it released a “hiring toolkit” Web site that provides case studies, assessment instruments, and other guidance to assist agencies in improving their hiring processes. OPM has also conducted agency training on available hiring flexibilities, showcased successful practices to reduce the time to hire, and developed a “hiring makeover toolkit” to help streamline and reengineer agency hiring processes.

Significance

In the past, some agencies have complained that OPM communication, information-sharing, and guidance is sometimes lacking (see GAO, *Office of Personnel Management: OPM is Taking Steps to Strengthen Its Internal Capacity for Leading Human Capital Reform*). The intended outcome of the initiatives, to improve the Federal hiring processes, are a step in the right direction to communicate with agencies about best practices and provide guidance and interactive tools that may help them improve their hiring processes.

Clearing Security Clearance Backlogs

In February 2005, the background investigations function of the Department of Defense was transferred to OPM—along with a 145,000 case backlog. Through increased staffing and the use of technology, OPM testified that it has managed to reduce that backlog by 90 percent—to just 14,000 cases (as of July 2006). However, a recent GAO report calls into question the timeliness, completeness, and accuracy of Federal background investigations under OPM’s jurisdiction (*DoD Personnel Clearances: Additional OMB Actions are Needed to Improve the Security Clearance Process*).

Significance

With the increased emphasis on homeland security, background investigations have become an especially important part of the hiring process. These investigations are crucial to ensuring that Federal employees and contractors are suitable for holding security clearances or positions of public trust. MSPB reported in a 2000 study that background checks can be a key barrier to timely job offers. The problem only worsened after September 11, 2001, with an increase in agency clearance requests. To deal with the issue, Congress laid out deadlines for completing clearance investigations in the Intelligence Reform and Terrorism Prevention Act of 2004. OPM reports that it is on track to

meet the new requirements, but more oversight may be necessary to ensure that the requirements are met.

Management of Federal Employee Benefit Programs

OPM continued efforts to contain increases in health insurance costs. In fact, premiums for 2007 are expected to rise only 1.8 percent on average—a much smaller rise than in recent years. In addition, OPM has established the new Supplemental Dental and Vision Benefits Program, available to Federal employees, with the first open season occurring in the fall of 2006.

Significance

Employee benefit programs do not have immediate implications for public trust and merit system integrity. Nevertheless, these programs are essential to recruiting and retaining good employees, account for a substantial portion of personnel costs, and have significant long-term fiscal implications.

Financial Summary

Fiscal Year 2006 Financial Summary (dollars in thousands)

Financial Sources

Appropriations	\$35,244
Civil Service Retirement and Disability Trust Fund	2,579
Total Revenue	\$37,823

Obligations Incurred

Personnel Compensation	\$24,107
Personnel Benefits	5,460
Benefits to Former Employees	15
Travel of Persons	492
Transportation of Things	134
Rental Payments	3,256
Communications, Utilities, and Miscellaneous	332
Printing and Reproduction	201
Other Services	2,477
Supplies and Materials	330
Equipment	814
Total Obligations Incurred	\$37,618

Obligated Balance	\$205
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