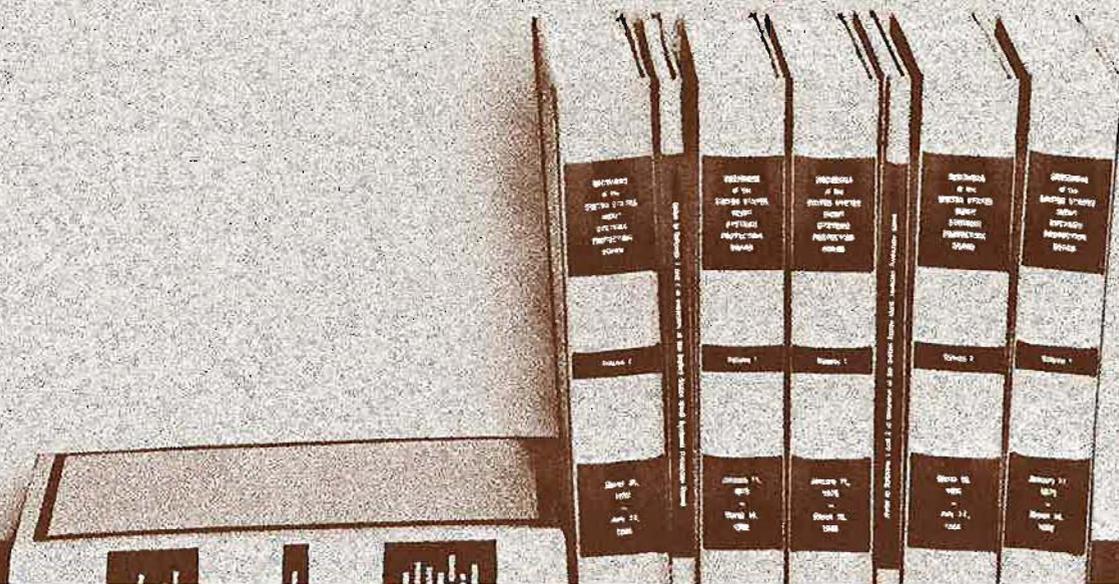
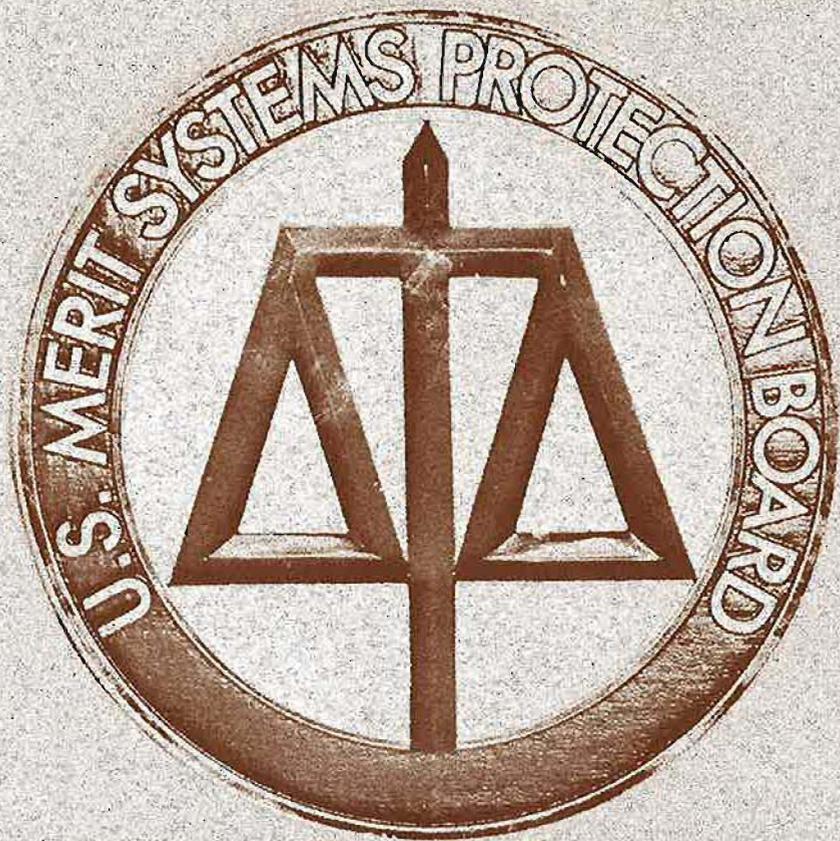




***U.S. Merit Systems  
Protection Board  
Second Annual Report***





MERIT SYSTEMS PROTECTION BOARD  
Washington, D.C. 20419

The Chairwoman

Sirs:

In accordance with Section 202(a) of the Civil Service Reform Act of 1978 (5 U.S.C. § 1209(b)), it is my honor to submit the Second Annual Report of the Merit Systems Protection Board. This Report covers the activities of the Board for Calendar Year 1980.

Respectfully,

A handwritten signature in black ink that reads "Ruth T. Prokop". The signature is fluid and cursive, with a large initial "R".

Ruth T. Prokop

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

Washington, D. C.



# U.S. Merit Systems Protection Board

The U.S. Merit Systems Protection Board is an independent quasi-judicial agency created to protect the federal government's merit system and to ensure the integrity of the federal merit system by ensuring that the merit system is not undermined by agency management.

The Board was established on January 1, 1978 and is the primary authority for the merit system. It is the only federal agency that can hear appeals from federal employees who are adversely affected by the merit system.

The Board is composed of three members: one member appointed by the President, one member appointed by the Senate, and one member appointed by the merit system.



Established by the Civil Service Reform Act of 1978, the Board is the primary authority for the merit system. It is the only federal agency that can hear appeals from federal employees who are adversely affected by the merit system.

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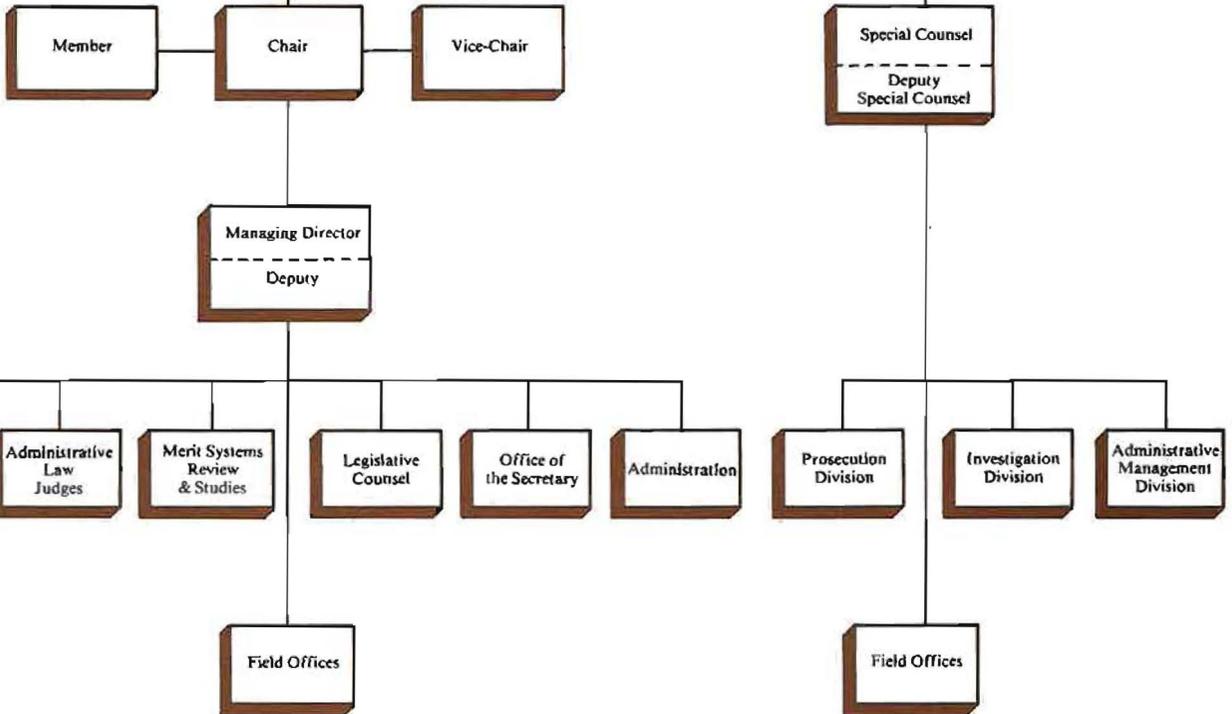
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# U.S. MERIT SYSTEMS PROTECTION BOARD



## Summary

In its second year of operation the Board has devoted itself to expanding and perfecting its systems already in place and implementing new systems which are necessary to carrying out its four major statutory duties. These duties include: adjudicating cases within its jurisdiction; conducting studies of the merit systems; analyzing and reporting on the significant activities of the Office of Personnel Management (OPM); and reviewing the validity of regulations of OPM on their face and as implemented by the agencies.

In 1980 the Board adjudicated several thousand cases, processing the vast majority of them within 20 days. In doing so, it issued a number of significant decisions which carefully construed the provisions of the Civil Service Reform Act. These decisions addressed such important issues as: the basis for awarding attorney fees and the method by which those fees will be computed; the standards of review the Board will impose in considering whether to grant a request for a stay filed by the Special Counsel; and the burden of proof imposed upon an agency in demonstrating that it has properly invoked RIF procedures or that the transfer of an employee is based on legitimate management considerations.

In order to facilitate information retrieval regarding its adjudications, the Board has expended considerable time in establishing a computerized case tracking system. The system, located in the Board's headquarters as well as its eleven field offices enables the Board to immediately locate and identify the status of any case filed with it.

The Board has also taken steps to provide easy access to its opinions by publishing its major decisions in hardback form. The first two volumes of the Board's decisions were just recently issued and others will soon be following. Moreover, a system for identifying and locating opinions relevant to the issue being researched has also been developed. It is hoped that by facilitating access to precedential Board decisions, agencies and appellants alike will better be able to predict and determine the appropriateness of their actions.

Pursuant to its statutory mandate to review the merit systems, the Board has also conducted a number of studies. One major study on sexual harassment was the first of its kind within the federal work place. Other studies on different subjects have emanated from a panel survey system. An analysis of the significant activities of the Office of Personnel Management has been initiated and a report is expected later this year.

Finally, the Board has undertaken several major efforts to implement its statutory mandate to review the regulations of the Office of Personnel Management on their face and as implemented to determine whether they require the commission of a prohibited personnel practice. Several regulation reviews have been initiated. Additionally, the Board has established a regulatory framework for conducting such inquiries.

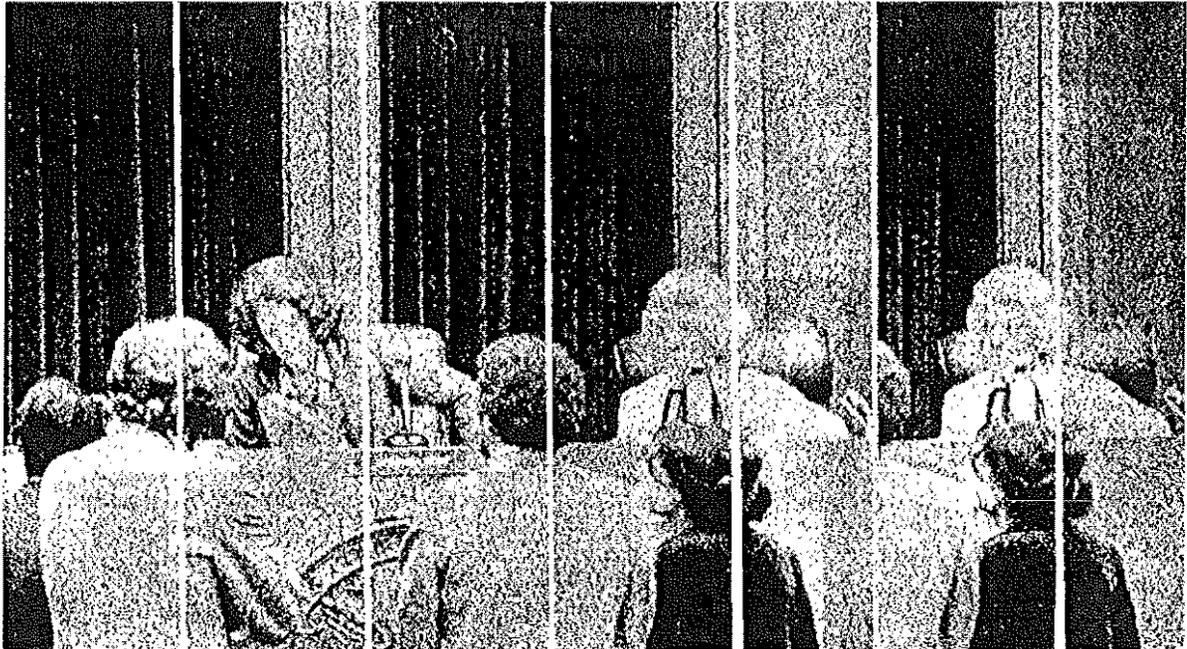


## Introduction

The Merit Systems Protection Board was created pursuant to Reorganization Plan No. 2 of 1978 and the Civil Service Reform Act of 1978 ("the Act"). A quasi-judicial agency, the Board is comprised of a bipartisan three member panel and charged with the duty of acting as the "watchdog" of the federal merit systems. This mandate is implemented by the Board through the fulfillment of its statutory duties under the Act including:

- Adjudicating employee appeals and actions brought by the Special Counsel in a fair and impartial manner;
- Conducting special studies of the merit systems to determine whether they are free from prohibited personnel practices;
- Analyzing and reporting on the significant activities at OPM; and
- Reviewing the regulations issued by OPM, to determine whether they require the commission of prohibited personnel practices, on their face or as implemented by an agency.

Because the Board has such broad powers in reviewing the personnel practices of OPM and of the numerous government agencies within its jurisdiction, Congress took extra cautionary measures to assure that the Board would have that degree of independence necessary to properly exercise its authority. These protections include:



- Guaranteeing the independence of the Board members by providing for nonrenewable terms and permitting removal only under extraordinary circumstances;
- Providing the Board with "bypass" authority by permitting it to make simultaneous submissions of budgets and legislative proposals to Congress and the President, thus eliminating the need for prior approval by the Office of Management and Budget (OMB);
- Permitting the Board to appoint personnel essentially free of approval by the Executive branch; and
- Representing itself in the federal courts except before the Supreme Court.

In the Board's first year of operations, it largely focused upon the completion of three major tasks: (1) developing its organizational structure; (2) obtaining those resources necessary for its operations; and (3) establishing a regulatory framework for adjudications and eliminating a large backlog of cases. As discussed in the Board's First Annual Report, these goals were for the most part achieved:

- Under the direction of the Managing Director a number of operating offices were established to carry out the Board's statutory duties and to enable it to implement functions necessary to the operation of any government agency;
- Funding which was essential to the successful undertaking of the duties of the Board was obtained, including the necessary monies for increasing the number of staff to obtain needed expertise, and those funds required to meet the costs directly imposed by the provisions of the Act which required the availability of a hearing and provision of a transcript in every appeal;
- A regulatory framework for adjudicating cases filed under the Act was quickly put into place and the processing of these new cases immediately commenced. In addition, the sizeable backlog of cases which the Board inherited from the Civil Service Commission was virtually eliminated.

In its First Annual Report the Board predicted that:

Having achieved the primary objective of laying a firm foundation for future growth, we expect this upcoming year to be one of building upon that base. In that respect we look forward to another year of achievement, perhaps of a different sort, but clearly designed to further the ultimate goal of full implementation of civil service reform.

In this second year of operations the Board has seen its prediction become a reality in two respects. First, the Board has expanded and further perfected the systems which were put into place in its initial year. Second, it has established and put into full operation new systems which had not been implemented last year, in large part due to delay in authorization for necessary funding and staffing. Accordingly as predicted, this has been a year of major growth for the Board as more completely discussed in this Report.

# The Board

## APPOINTMENT OF THE BOARD

The three members of the Board are appointed by the President with the advice and consent of the Senate. In order to assure the independence of the Board, the designation of any member as the Chair must be approved by the Senate; members serve a seven year term and may not be reappointed; and members may be removed only under the higher than ordinary standard of inefficiency, neglect of duty or malfeasance in office.

## MEMBERS OF THE BOARD—1980

**RUTH T. PROKOP** (*Chairwoman*) Chairwoman Prokop was appointed to head the new Board by President Jimmy Carter, and was sworn into office on January 15, 1979, just days after the Civil Service Reform Act went into effect. Since early 1977, Prokop had served as the General Counsel of the Department of Housing and Urban Development. Before accepting that post, she was the Senior Counsel to the General Telephone & Electronics Corporation and previously was a partner in a Washington law firm. Prokop's government service had commenced as a member of the staff of then Vice President Lyndon Johnson. Additionally, she served as Legislative Counsel for President Kennedy's Commission on the Status of Women and later for President Johnson's Committee on Consumer Interests. From 1966 to 1969, she was Special Assistant to the Under Secretary of the Department of Housing and Urban Development.





**ERSA H. POSTON** (*Vice-Chair*) Erska H. Poston was sworn in as Vice-Chair of the Board on January 2, 1979. Poston had been a Commissioner of the United States Civil Service Commission since 1977 and became a member of the Board pursuant to the provisions of Reorganization Plan No. 2 which designated the Board as the successor organization to the Civil Service Commission. Prior to becoming a member of the Civil Service Commission, Poston had served as a member of Governor Nelson A. Rockefeller's Cabinet, as President and Member of the New York State Civil Service Commission. During this time she was also Chairperson of the President's Advisory Council on Intergovernmental Personnel Policy established under the Intergovernmental Personnel Act. Prior to accepting this position, she was Director of the New York State Office of Economic Opportunity and Confidential Assistant to Governor Rockefeller. In addition to serving as the Vice-Chair of the Board, Poston, a former U.S. Delegate, 31st Session of the United Nations General Assembly, is the current U.S. Member of the International Civil Service Commission. She has also been the Vice-Presiding Officer of the National Commission on the Observance of International Women's Year and was a Member of the Panama Canal Zone Company of Trustees.



**RONALD P. WERTHEIM** (*Member*) Wertheim was sworn in as the third member of the new Board on October 5, 1979. For ten years prior to that, he was in private law practice with the Washington, D.C. firm of Ginsberg, Feldman, and Bress. During that period, he also served as advisor to the Secretary of Defense for the Law of the Sea Negotiations and Alternate U.S. Representative to the United Nations Conference on the Law of the Sea. From 1966 to 1968, Wertheim served as Peace Corps Director in Northeast Brazil and was the Deputy General Counsel of the Peace Corps from 1964 to 1966. Before joining the Peace Corps, he was an Associate Professor of Law at the University of Virginia and prior to accepting that position, served as Assistant Public Defender in Philadelphia from 1959 to 1961 and was a trial attorney in that city from 1957 to 1959.



## ORGANIZATION OF THE BOARD

The Board is comprised of a number of operating offices which carry out the duties of the organization. While the three-member Board has responsibility for implementing its statutory functions, the Chairwoman, as chief executive officer, is vested with responsibility for its overall operations.

Authority for the day-to-day management of the Board, both in headquarters and its eleven field offices,\* is delegated to the Managing Director by the Chairwoman. The Deputy Managing Director has overall responsibility for the operation of the field offices and reviews the initial decisions of those offices, recommending that the Board reopen cases or take other appropriate action as necessary.

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\*The Board's field offices are located in New York City, Boston, Philadelphia, Atlanta, Dallas, Chicago, St. Louis, Denver, Seattle, San Francisco and the Washington, D.C. area.

The Office of the General Counsel provides legal counsel to the Board and offices of the Board, and represents it in all court actions except the Supreme Court. It also participates in the review of OPM regulations.

The Office of the Legislative Counsel responds to Congressional inquiries, drafts testimony, provides information about the Board to the public and comments on proposed legislation and regulations.

The Office of the Administrative Law judges adjudicates difficult and/or sensitive cases. Additionally, that office has responsibility for ruling on certain discovery motions filed in the Board's field offices as well as requests for subpoenas.

The Office of Merit Systems Review and Studies analyzes and studies the "health" of the merit systems for the purpose of issuing reports required by the Act; participates in the review of OPM regulations; and has the lead role in reviewing the significant activities of OPM.

The Office of Appeals prepares draft opinions and orders for the Board based upon its analysis of both petitions for review from initial decisions rendered in the field, and the records of cases reopened by the Board on its own motion.

The Office of the Secretary serves as the custodian of all the Board's records and is responsible for tracking the progress of its cases. Additionally, this office responds to inquiries for status of cases and requests made under the Freedom of Information and the Privacy Acts.

The Office of Administration is responsible for handling procurements, personnel and budgetary needs of the Board.

The Office of the Special Counsel has independent investigatory and prosecutorial duties and is responsible for bringing certain actions before the Board. This office has seven field offices in addition to its Washington headquarters.

# Fulfillment of the Boards Statutory Duties

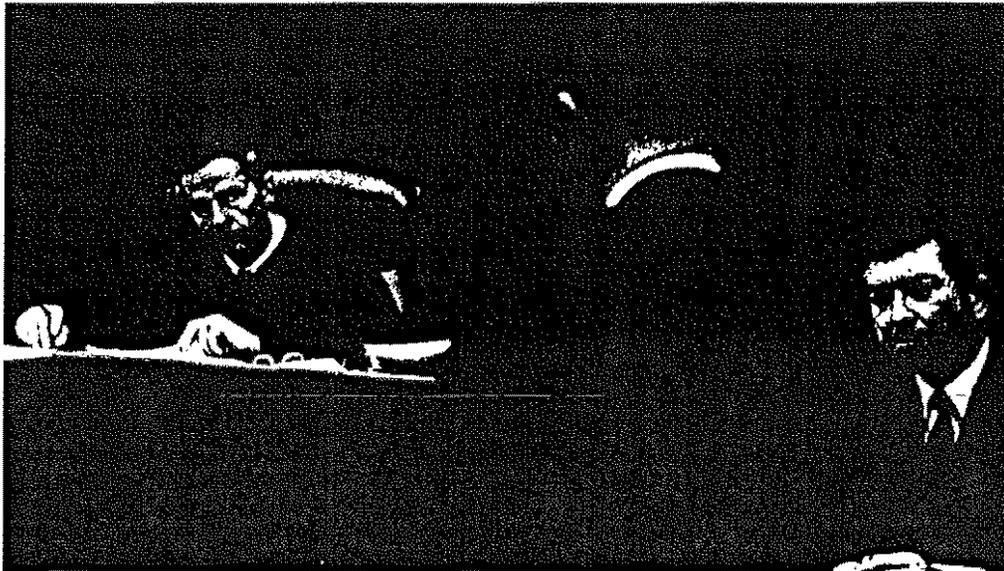
## I. ADJUDICATIONS

The Merit Systems Protection Board shall:

... hear, adjudicate or provide for the hearing or adjudication of all matters within its jurisdiction.

The Board must provide for the adjudication of cases under its two types of jurisdiction: appellate and original.\* The Board has appellate jurisdiction over cases where there has been previous agency action and appeals rights are provided by statute or OPM regulation. The Board has original jurisdiction over cases where no formal agency action has been taken.

\*Under its appellate jurisdiction the Board may hear cases involving: (1) removal or reduction in grade of competitive or preference eligible employees; (2) denial of within-grade step increases; (3) certain actions relating to the Senior Executive Service; (4) actions otherwise appealable to the Board where allegations of discrimination are offered as an affirmative defense ("mixed cases"); (5) determinations relating to disability retirement, and annuities; (6) actions involving reinstatement of preference eligibles and (7) those actions for which jurisdiction is properly granted by OPM. Under its original jurisdiction the Board entertains: (1) Actions brought by the Special Counsel; (2) requests for the informal hearing in cases of persons removed from the SES; (3) employee disciplinary actions under the Federal Employees Flexible and Compressed Work Schedule Act; and (4) actions against administrative law judges.



Adjudication of cases, particularly appeals cases, is by far the most time-consuming activity of the Board and consequently utilizes the greatest proportion of its resources. Of the cases before the Board in 1980, appeals cases represented by far the majority of the Board's adjudications, with original jurisdiction cases comprising less than one-half of 1% of its adjudicatory activities. Translated into real figures, the number of cases received by the Board under its appellate jurisdiction was 6330, while the number of original jurisdiction cases was 30, the majority of which were filed by the Office of Special Counsel.

Moreover, it should be noted that the quality of its adjudications continues to be a high priority of the Board. This focus of attention has been and continues to be based on the clear intent of Congress as expressed in the Act and its legislative history that the Board upgrade the decisions of the former Civil Service Commission, expedite the processing of its cases, and conduct its proceedings on a more judicial basis.

#### A. Appeals Cases

In its first year of operations the Board took many steps to improve the processing of its appeals cases. Included among these were:

- Issuing regulations which clearly set forth the obligations and rights of all parties. Among other things the regulations introduced the use of an appeals form to simplify the process for the employee; imposed a deadline on the agencies 150 days to respond to an appeal; and implemented the new legal concepts embodied in the Act including the use of subpoenas, discovery and application of the new burden of proof standards;
- Establishing a 120-day time limit for the processing of an appeal beginning at the time the appeal is filed and ending when an initial decision is rendered by the presiding official in the Board's field office;
- Requiring that all presiding officials are attorneys;
- Providing training programs to increase the quality of the decision making by presiding officials; and
- Increasing Board review and reopening of cases decided in the field offices for the purpose of correcting errors and issuing precedential decisions interpreting and applying the provisions of the Act.

In no single area of operations has the Board's effort to improve and perfect its systems been more extensive than in the processing of cases under its appellate jurisdiction. Because of the great importance of this multi-faceted endeavor, the activities of the Board in this area are described in detail in the following sections.

#### 1. Major Decisions of the Board

One of the major undertakings of the Board itself has been to take an active role in the issuance of leading decisions in appeals cases. It is the firm policy of the Board that one of the most important services it can provide to agencies, employees and its own presiding officials, is the issuance of precedential opinions applying and interpreting the provisions of the Act. It is only through this method, through the activism of the Board, that all parties will be provided with that guidance necessary to direct their activities. To this end, the Board has issued a number of decisions this year which have purposefully addressed subjects of major importance. These decisions are briefly summarized below. *Pauline J. Brink v. Veterans Administration* (NY831Lo9009-12/5180) In this case, appellant's removal from her position was reversed by the Board's field office, based on a finding that the agency should have known that her conduct may have been caused by mental illness. The Board vacated the initial decision and remanded the case for further findings after setting forth the proper perimeters for an inquiry into this issue. It held that all decisions raising the issues of whether an employee should be ordered to take a psychiatric fitness for duty examination and whether the agency has a duty to accommodate an employee's handicap, must be analyzed in light of what a reasonable person should have known to be the case at the time the removal action was contemplated. The Board also set forth criteria to be considered in undertaking such an evaluation.



• *Marion Allen v. U.S. Postal Service (2 MSPB 582)* In this case, the Board set forth guidance as to when an award of attorney fees is warranted in the interest of justice" as provided by the Act. In doing so, the Board noted that the five examples which are set forth in the legislative history of the Act are circumstances which reflect such instances: where the agency engaged in a prohibited personnel practice; where the action was "clearly without merit" or "wholly unfounded"; where the agency acted in bad faith; where there was "gross procedural error"; or where the agency "knew or should have known that it would not prevail on the merits." Additionally, the Board concluded that while these examples reflect a Congressional expectation that the Board's discretion will normally be exercised where such circumstances exist, it is not limited to these instances in granting fees. Rather, the Board found that circumstances comparable to those found by the federal courts to warrant an award of fees under the "bad faith" exception for such awards in federal litigation may also justify the granting of an award by the Board.



- *William Trowell v. U.S. Postal Service*(NY075209016-7/29/80) In this case, the Board upheld a presiding official's determination that attorney fees were warranted in the interest of justice because the agency knew or should have known that it would not prevail on the merits. In this particular instance the Board concluded that this standard had been met because the agency presented its case so negligently that the action could not possibly have been sustained. The Board also found that the agency's failure to present any evidence in support of its charges bordered on bad faith, a circumstance which also warrants an award of fees.

- *Anthony R. Hodnick v. Federal Mediation and Conciliation Service*(SF531009004-12/8/80) In this case appellant's appeal to the Board's field office was dismissed as moot after the agency notified the presiding official that it retroactively granted the within-grade increase it had previously denied. The presiding official's addendum decision denied an award of attorney fees, finding that appellant was not the prevailing party. The Board disagreed, finding that an appellant is the prevailing party if he or she has obtained all or a significant part of the relief sought in the appeal. The Board further found, however, that if a final decision ordering relief has not been issued by the Board, the relief obtained must be found to be causally related to the initiation of the - appeal before fees may be awarded. In this case, however, the Board ultimately denied the award of fees because appellant had not argued, and the record did not show, circumstances that an award would be in the interest of justice.

- *La'erne Chisolm v. Defense Logistics Agency*(PH075209043-9/24/80) In this case, appellant was removed for fighting while on duty, the same conduct of which he had been found guilty in a criminal proceeding. The presiding official reviewed the evidence in support of the charge and held it insufficient to meet the agency's burden of proof. The Board reversed this finding, holding that the doctrine of collateral estoppel prohibits an appellant-from relitigating the same acts befo'e the Board when he or she had previously been found guilty of them "beyond a reasonable doubt." The Board noted, however, that an appellant would not be denied the opportunity to show that the sustained charges did not support a finding that the agency's action promoted the efficiency of the service.



- *Hilberto Alonzo, et al. v. Department of the Air Force, et al.* (DA075209013-11/24180) In this instance, a consolidated action, the cases before the Board had been dismissed by the presiding officials because each appellant had failed to file an appeal within 20 days after the effective date of the agency action as required by 5 CFR § 1201.22. The delays considered in the cases were one day, four days, and approximately three and one-half months. The Board rescinded the dismissal decisions in two cases and remanded them for further proceedings, but affirmed the dismissal in the third, after setting forth the factors to be considered in determining whether the time limit for filing an appeal should be waived. Such factors include, but are not necessarily limited to: the length of the delay; whether appellant was notified of the time limit or had otherwise been made aware of it; the existence of circumstances beyond the control of the appellant which affected his or her ability to comply with the time limits; the degree to which negligence existed; circumstances showing that any neglect which was involved was excusable; a showing of unavoidable casualty or misfortune; and the extent and nature of the prejudice to the agency which would result from waiver of the time limit. The Board stated that in order for the time limit for filing an appeal to be waived, it was not necessary to show the utter impossibility of meeting the limit, but only that the delay was excusable under the circumstances and that ordinary prudence has been exercised.

- *Grover L. Griffin, et al. v. Department of Agriculture* (2 MSPB 335) In this consolidated action, each appellant had been reassigned, demoted, or separated by a reduction in force (RIF) and had alleged that the RIF was illegal because it had not resulted from a lack of work, but had been created by a contracting out of services. After reviewing relevant precedent, the Board denied the petition for review, finding that the decision to contract out services constitutes a reorganization and therefore is a valid reason for a RIF. Further, the Board stated that it has no authority to review the management considerations which underlie the exercise of agency discretion to take such an action.

- *Jean Hoover Losure v. Interstate Commerce Commission* (2 MSPB 361) In this case, the Board found that the agency's decision to separate appellant by a reduction in force (RIF) in order to "create a credible... program" was not a valid reason for a RIF because the reason was personal to her. Appellant's position had been one of three in an office in which the two other employees were removed for alleged misconduct in which the appellant was not involved. The board held that these circumstances did not, in fact, constitute a reorganization, and reversed the action. In discussing the issues raised, the Board set forth the rule that the burden of proof in demonstrating that RIF procedures have been properly invoked is on the agency. The opinion also discussed how this burden may be met.

- *Donald W. Atwell, et al. v. Department of the Army* (PH075299098-7/25/80) In this case the Board held that an employee whose position is reclassified to a lower grade and who receives the grade and pay retention benefits of 5 U.S.C. §§ 5362 and 5363 may not appeal to the Board either the reclassification or the reduction in grade and/or pay.

- *Theodore W. Hayes v. Tennessee Valley Authority* (AT075209153-12/16180) This decision is the first in which the Board examined an adverse action taken against an employee based on alleged sexual harassment of female subordinates. The employee in this case was charged with creating the appearance of using agency time and property to pursue a personal relationship with a female subordinate employee; misusing government time and property by taking a female subordinate employee on tours of an agency facility in an agency car; making suggestive remarks to female employees even though not directly proposing sexual activity; and showing a female subordinate employee a picture of the body of a naked woman attached to a picture of her head from a photograph appellant had previously taken. The Board sustained the 30-day suspension imposed by the agency.



- *Charles P. Hale v. Department of the Navy* (SF075299037-10122180) This decision represents an early Board interpretation of the alcohol rehabilitation requirements of the law. In this decision the Board held that where the agency advises the employee to seek counseling and rehabilitation, the requirements of the law have been met: it is not necessary that the appellant be directed to accept such services in order for the agency to be in compliance with such requirements.
- *Joseph H. Kling v. Department of Justice* (2 MSPB 620) The significance of this opinion is that it sets forth the factors to be considered in computing the amount of a "reasonable" award of attorney fees, including the time and labor required, the novelty and difficulty of issues, the customary fee for such work in the community, the skills requisite to perform the services properly, awards in similar cases, etc.
- *Jack E. Ketterer v. U.S. Department of Agriculture* (2 MSPB 459) The significant holding in this decision is that in a removal for cause based upon refusal to accept a reassignment, the agency must prove by a preponderance of the evidence that the removal will promote the efficiency of the service, which necessarily includes a demonstration that the decision to reassign was a bona fide determination based on legitimate management considerations. In this case, the Board found that the agency presented evidence which constituted a prima facie case that the reassignment and resulting removal were proper. However, the appellant presented sufficient credible evidence to rebut it, and under such circumstances the agency may come forward with further evidence in order to meet its burden of the service. In this case, when the agency failed to do so its determination could not be sustained.
- *Michael P. O'Donnell v. Department Interior* (2 MSPB 604) In this case, the Board concluded that the award of attorney fees was warranted in the interest of justice where the agency was negligent in bringing the charges against the employee and such negligence was coupled with ill will. Additionally, the Board found that attorney fees could be remitted to the attorney even though his fees were paid for by the appellant's union rather than the appellant. The Board concluded that under applicable case law the fees were nonetheless "incurred" and therefore the union could be reimbursed for its expenditures on behalf of the appellant.
- *Claude Weaver v. Department the Navy* (2 MSPB 297) In this case, appellant appealed the initial decision of the presiding official contending flatly that he had new and material evidence which despite due diligence was not available at the time of the original hearing; the presiding official had made erroneous interpretations of the evidence; and the presiding official was biased in making his decision. The Board rejected the contentions of the appellant in three respects: The first basis was that the appellant had made no showing as to why he had not been able to make available at the time of the hearing the witnesses now proffered. Second, the Board concluded that where issues of credibility of witnesses were concerned, deference should be paid to the determination of the presiding official in the absence of specification of evidence or reasons warranting a review of the presiding official's credibility finding. It is the appellant, not the Board, who must review the record and specifically identify any errors. Third and finally, the Board noted that where an allegation is made that the presiding official is biased, specific reasons to support the charge must be stated. An incorrect ruling by a presiding official without more will not serve as a basis for a charge of bias.

- *Roberto Smith v. Department of Navy* (SF075299010-11/16/80) Appellant in this case was a Vietnam veteran who was appointed to a position of security guard at a California Naval Station under the Veteran's Readjustment Program. He had served in that position less than four months when he was terminated by the agency for unspecified preemployment reasons and without an opportunity to reply. He appealed his removal to the Board where it was dismissed in the Board's field office for lack of jurisdiction, due to the fact that he had served in his position less than one year and therefore had no right to appeal under 5 U.S.C. § 7511. The Board affirmed the decision of the presiding official dismissing for lack of jurisdiction. In doing so, however, it specifically recognized that in the absence of an appeal right the appointment which was intended to be remedial might ultimately cloud the future of the veteran where he or she is not able to challenge what may be an arbitrary dismissal.
- *Samie Barrio v. Department of Justice* (DC752BOO044-6/9/80) Appellant appealed his removal from his position as a criminal investigator for the Drug Enforcement Administration (DEA). Following the filing of his appeal he died and his widow continued prosecution of the case. This case was heard before the Board's Administrative Law Judge, who ultimately reversed the action of the agency and ordered the removal of the appellant cancelled. The determination in this case was not based on the merits of the action. Rather, it was based on the refusal of the DEA to comply with the order to produce certain documents and essential witnesses. The Administrative Law Judge held that the imposition of such sanctions was appropriate "[S]ince the unjustified refusal of the agency affects the fundamental rights of the appellant and the intervenor, as well as the integrity of the Board's process. . . ." An appeal has been filed with the Board in this pre-Reform Act case.

## B. Publication of Board Opinions

Realizing that the issuance of its opinions is of limited value if they are not readily available to all interested parties, the Board has completed a project to publish a comprehensive index and digest of its opinions. The product of this effort is a series of published, hard-bound volumes titled *Decisions of the United States Merit Systems Protection Board*. Through publication of the Board's opinions and design of a comprehensive research system, the Board's employees and the parties appearing before it will enjoy greater facility in researching the rapidly developing case law under the Act.

At the heart of the newly-developed research system is a numerical index containing 17 major topics which encompass the Board's cases. Under each major topic, there are numerous subtopics, breaking down each area for greater ease of research. The major topics were carefully designed to cover all areas within the Board's jurisdiction and to be broad enough to adapt to future developments. Therefore, while the major topics will not change, subtopics can be added as the law develops. As an aid to the researcher, a "scope note" is provided for each major topic, fully explaining its coverage.

Each major topic has been assigned a number, and each subtopic beneath the main topic has an appropriate decimal derived from the main number. The ref ore, for example, the major topic "Constitutionality" is assigned number 2.000000, and subtopics under the main heading are Due Process, 2.100; Criminal Constitutional Considerations, 2.200; First Amendment Freedoms, 2.300; and Right to Privacy, 2.400. In this manner, each topic and subtopic in the index is provided with an appropriate "key number" relating it to the Board's work.



The publication contains three other research tools. The first is a list of decisions of the Board, relating its cases dealing with a specific topic or subtopic to the appropriate key number. The second is a statutory list, relating relevant sections of titles 5 and 29 of the United States Code, including the Act, as well as the Board's regulations and relevant regulations of OPM, appropriately covering the sections' contents. The last

research tool is an alphabetical list of words and phrases, relating an extensive list of key words and phrases in the Reform Act and the case law to appropriate key numbers.

Finally, the new system contains volumes of the Board's decisions, including, where appropriate, the underlying initial decision of the Board's presiding official in the case. As more decisions are issued by the Board, they will be key numbered in accordance with the developed research system, and new volumes will be published. Each decision is to be cited by volume and page.

The volumes of opinions may be obtained from the Superintendent of Documents of the U.S. Government Printing Office (GPO). The Digest, a monthly summary of Board orders will also be available from GPO.

Publication of these decisions is a significant event in affording, for the first time, direct access by federal agencies and employees to the body of civil service case law. Such access, we believe, will enable agencies to make more predictably reliable decisions affecting the rights and interests of federal employees, and also will foster the development of a more coherent and consistently principled body of law in this vital area.

### C. Time Limitations for Processing Cases

As previously indicated, in the first year of its operations the Board established a time limitation for processing cases of 120 days. This means that from the time the appellant files a petition for appeal until the time he or she receives an initial decision from a presiding official located in one of the Board's eleven field Offices, the period of time which elapses should not exceed 120 days.

During the 1980 calendar year, 6330 Reform Act appeals were filed with our eleven field offices. With 963 appeals which remain pending from the previous year, the appeals workload for calendar year 1980 totaled 7293 cases. Of these, 5424 appeals were processed to completion during 1980, and the difference between these figures, 1869, constitutes the number of appeals pending at the end of the 1980 calendar year. This pending workload was 57 cases fewer than that existing at the end of calendar year 1979, despite the receipt of 2658 more cases this year than last. Of the 906 pending cases, 167 were over 120 days old at the end of 1980 and are discussed specifically below. The 120-day time limit for the remaining 739 cases, filed during the latter months of 1980, does not expire until sometime in 1981. It is anticipated that these cases will be completed within 120 days.

There were 5591 appeals submitted to the Board that could have been completed in 1980 within the 120-day processing time. Only 472 of these cases took longer than 120 days to process. Of these 472 cases, 145 were completed within the 30-day period following the 120th day, and only 327 required the Board, pursuant to 5 U.S.C. § 7701(i)(1), to publicly announce a new completion date.

The reasons for the processing delays in the 472 cases are multifold. Temporary staffing and workload problems of professional and support staff were responsible for the largest number, 162, of overage cases. In 46 cases, the 120-day processing limit was exceeded because of problems unique to the processing of appeals from overseas locations. Twenty-eight cases were delayed because of the serious illness or death of a participant. In another 32 appeals, processing was prolonged because of the complexity or sensitivity of the case, coupled with extensive discovery, a lengthy hearing, and a long decision. In 13 cases, the decision was delayed because the transcript was not provided in a timely manner. Eleven cases were delayed because of untimely submission of case files by the agency that had taken the personnel action being appealed. The Board's regulations require agencies to furnish files within 15 days of their receipt of an appellant's petition. Other reasons for delays that affected less than 10 cases include the unavailability of a witness or documentary evidence, word-processing equipment failure, and the filing of interlocutory appeals with the Board.

Thus, during our first two years of operation approximately 94% of our cases were processed to completion within 120 days of the filing of the appeal, demonstrating the Board's good record of processing appeals in the expeditious manner mandated by the 1978 Civil Service Reform Act.



#### D. Development of the Case Tracking System

During this year the Board has succeeded in bringing its case monitoring system from the dark ages into the computer age. In early 1981, the MSPB will complete implementation of its computerized Case Tracking System (CTS) which will facilitate line information on the location and status of any case. The Office of the Secretary will oversee the operation of the system.

CTS was developed to assist the Board with the management of its approximately 10,000 cases per year and to provide current information to members of the Board and staff as to the status of each case. In addition, the system alleviates the reporting burden that was previously imposed on the Board's field offices by providing, automatically, workload statistics, case processing information, and profiles of the Board's caseload.

The system has three basic components. The first is the field office subsystem, which provides each field office with the capability to automatically track and report its cases. The second, the headquarters subsystem, provides analogous capabilities for headquarters organizations. The third part of the system combines all collected data in a central computer in Washington and enables the Board to view all information associated with Board appellate activities either in detailed or summary form.

During the course of 1980, the system was built and implemented in stages. The field office subsystem was completed by the end of March and installation in each of the field offices was completed by mid-May. The headquarters subsystem was complete at the end of August and the task of combining the three separate elements of the system into a smoothly operating, cohesive whole was in its final stages by the end of the year. Concurrent with this effort, data from CTS's predecessor, the manual Appeals Information System, was loaded into the central computer system which will permit the Board also to view information associated with pre-Reform Act appeals.

Equipment problems in the field and at the computer center in Washington have combined to extend the implementation effort into calendar year 1981. However, by mid-January, the interaction between the computer in Washington and the field offices across the country was operating successfully in nine of eleven offices.

It is expected that by early spring, the basic system will become an essential working tool for the operations of the Board. At that time, the Board will have in place a system which will supply numerous types of information associated with cases processed under its appellate jurisdiction, past as well as present.



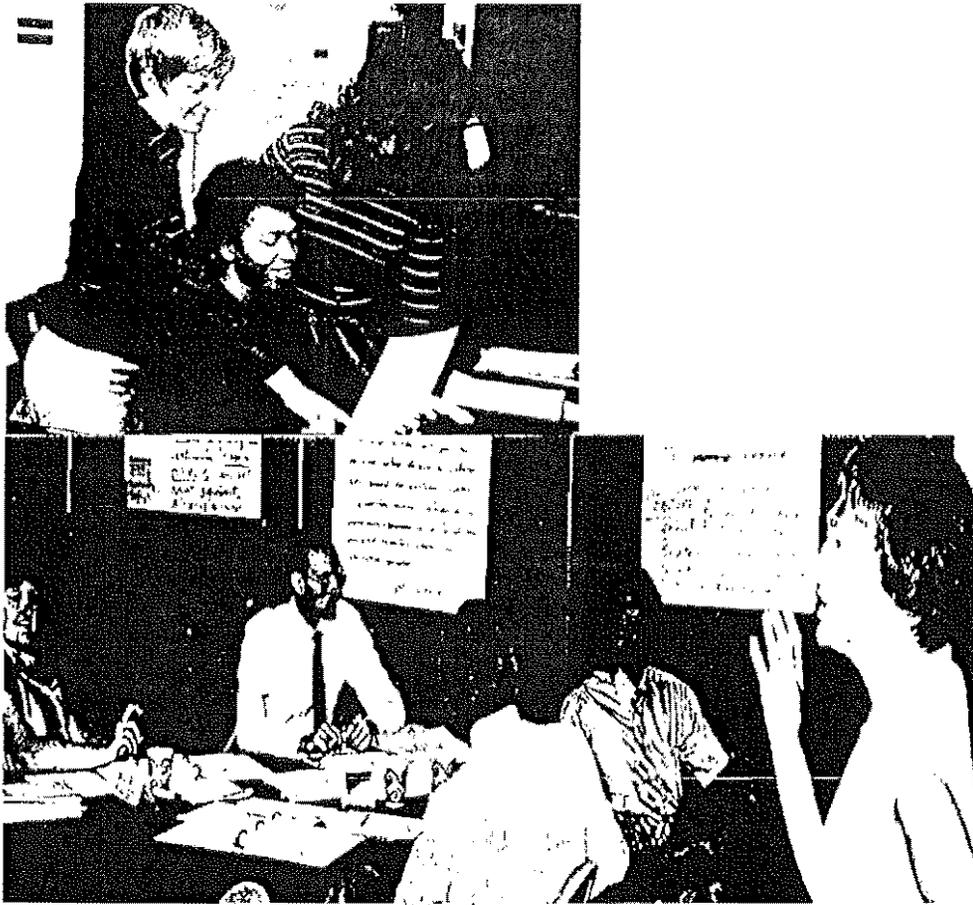
#### E. Training and Supervision of Field Officials

In order to assure the high quality of the adjudicative process, the Board continues to conduct training for its officials in the field and to exercise close supervision of their operations.

In July of 1980, at three regional training conferences, presiding officials were further instructed on appeals processing and adjudication responsibilities pursuant to the Act and the Board's regulations. Many issues were addressed including Prehearing motions and conferences, burdens of proof, issues of jurisdiction, timeliness, credibility determinations, attorney fees, and decision writing. Two representatives of the NAACP Legal Defense and Educational Fund and the Chief Appeals Officer of the Washington, D.C. Field Office provided an overview of the principles of Title VII discrimination law and court cases affecting the Board's processing of "mixed cases" under 5 U.S.C. § 7702. Finally, discussions were held on the issues raised in a difficult hypothetical case in order to prepare the presiding officials more fully for processing real cases involving similar issues.

Plans are in place for further training conferences to be held in 1981.

The Office of the Deputy Managing Director provides continued supervision of the operations of the Board's eleven field offices, comprised of approximately 100 attorneys who serve as presiding officials and 50 administrative support staff. This office has responsibility for the overall operation of the Board's field offices, recommending policy and changes in regulation on matters relating to appeals, and preparing related orders, manuals, and other instructional material for distribution to the field offices. Office staff review initial decisions for quality, timeliness, and compliance with applicable law, regulations, and policy, and conduct on-site evaluations of all aspects of field office operations. In performing these functions, they recommend to the Board, as appropriate, the reopening on its own motion of certain decisions, and take the action necessary to improve the quality of initial decisions and the operations of the field offices. The Office of the Deputy Managing Director is also responsible for identifying training needs and requirements and then providing that training to the Board's presiding officials.



Through the personal efforts of the Board members, the Managing Director and the Deputy Managing Director, one of the most significant achievements in the field offices has been to fill all the positions of Chief Appeals Officer, five of which were vacant at the beginning of 1980. Additionally, the Board sought and received approval from OPM to place these positions in the Senior Executive Service for the seven largest field offices of the Board. The positive impact of filling these positions with highly qualified and experienced managers has already been felt in the increased productivity of each of these offices.

#### **F. Interaction with Other Agencies**

Under the provisions of the Act, the Board, while maintaining its independent role, must frequently work with other agencies to facilitate the processing of appeals.

For example, the Board must provide OPM with copies of all of its decisions and notify it when the interpretation of a law, rule or regulation under its jurisdiction is at issue in a proceeding.

Similarly, the Board has already worked closely with officials from the Equal Employment Opportunity Commission (EEOC) to create and manage a system to provide for the processing of "mixed cases" under U.S.C. § 7702. This effort has been by far the most time-consuming and significant inter-agency issue for the Board in 1980.

During this year, the EEOC has been in the process of proposing new "mixed cases" regulations, and the Board has been assisting in this endeavor. These regulations are extremely important because they determine the procedures to be used by federal employees who allege that prohibited discrimination served as a basis for or

was unlawfully related to certain agency personnel actions.

Under Reorganization Plan No. 1 of 1978, EEOC assumed the adjudicatory function over most discrimination cases previously adjudicated by the Civil Service Commission. However, an employee entitled to an appeal to the Board may also allege unlawful discrimination on the basis of handicapping condition, age, race, sex, religion, color and national origin. A further statutory right to petition the EEOC to review the Board's decision exists in these cases. During 1980, a detailed mechanism was established to enable EEOC to routinely notify the Board when specific case files are needed, and for the Board to forward the requested case files in sufficient time for EEOC to accept or reject an appeal within the 30-day statutory time limit. As of December 1980, petitions had been filed with EEOC to review approximately 200 of the Board's decisions.

A liaison was also established between the Board and EEOC to enable the two agencies to have daily contact with a view toward identifying and addressing any unexpected procedural or substantive issues relating to their joint jurisdiction. Several sessions at staff level were conducted to discuss ongoing matters within the adjudicatory purview of both agencies. These sessions further served to assist staff members in updating their knowledge of substantive interpretation of the anti-discrimination laws. This continuing dialogue should aid in preventing the issuance of conflicting decisions on the same legal issue.

### G. Original jurisdiction Cases

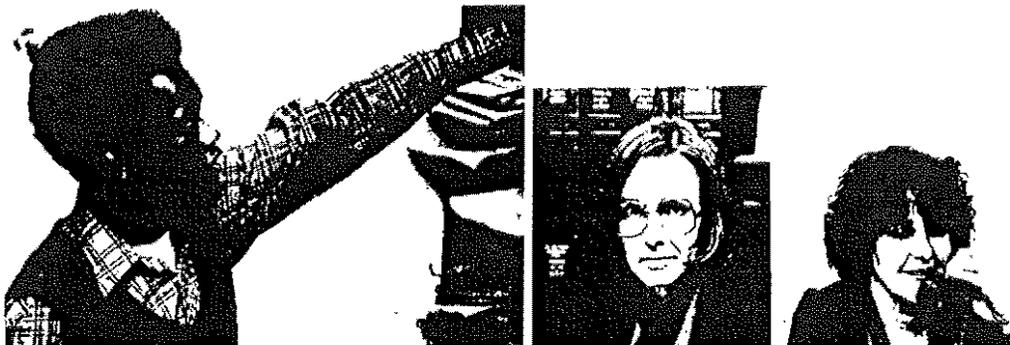
The majority of cases heard by the Board under its original jurisdiction authority are those actions brought by the Special Counsel. However, as previously noted, these cases constitute only a small fraction of the total number of Board adjudications. Nonetheless, because they frequently result in important interpretations of the new provisions of the Act, they are all discussed here.

The cases filed by the Special Counsel this year have basically been of four types: (1) Requests for stays of agency personnel actions believed to be based on prohibited personnel practices; (2) Requests for corrective actions; (3) Requests for disciplinary actions against federal employees; and (4) Hatch Act cases.

#### 1. Stay Requests

Under the provisions of 5 U.S.C. § 1208(a), the Special Counsel may request any member of the Board to order a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken as a result of a prohibited personnel practice. The Board member orders such a stay unless he or she determines that under the facts and circumstances involved, the stay would not be appropriate. If no action is taken on the request within three calendar days after it is filed by the Acting Special Counsel, the stay will become effective under operation of law. Under 5 U.S.C. § 1208(b), upon further request of the Special Counsel, a Board member may extend the original 15-day stay for up to 30 additional days.

Under 5 U.S.C. § 1208(c), the Board may, by majority vote, extend the 15-day stay originally granted for any period of time which the Board deems to be appropriate. However, this extension may be granted only if the Board independently concurs in the determination of the Special Counsel and only after an opportunity is provided for oral or written comment by the Special Counsel and the agency involved.



- *In Re Tariela* In this case the Acting Special Counsel (ASC) requested the stay of the geographical reassignment of two Veterans Administration (VA) hospital administrators on the basis that the personnel action being challenged was taken in reprisal for their disclosures of hospital mismanagement and violations of laws and regulations governing the VA (5 U.S.C. § 2302(b)(8) ("whistleblowing")). The Board granted stays pursuant to 5 U.S.C. § 1208(a), (b), and (c), and extended the "c" stay twice.

- *In Re Veterans Administration [Chamberlain]* In this case, a lawyer in the VA was geographically reassigned and demoted despite the statements of his psychiatrist that the reassignment would be injurious to his mental health. In requesting the stay, the ASC alleged that since VA had offered to rescind the reassignment if Chamberlain dropped the appeal of his demotion, that rescission of the reassignment was a reasonable accommodation under 29 CFR 1613.704 (1980). When Chamberlain refused to drop his appeal and the agency did not rescind its reassignment, the ASC alleged this failure to rescind violated the prohibition in 5 U.S.C. § 2302(b)(1) against discrimination on the basis of handicapping condition and the prohibition in 5 U.S.C. § 2302(b)(9) against taking reprisal against an employee for exercising an appeal right. The Board granted an "a" stay and, after oral argument, a "b" stay. The ASC filed a petition for a "c" stay, but later withdrew it.

- *In Re Carpenter* In this case, an agent of the Bureau of Alcohol, Tobacco and Firearms was demoted and geographically reassigned following his application for workmen's compensation, which contained allegations of mismanagement. In requesting the stays the ASC alleged violations of 5 U.S.C. § 2302(b)(8), which prohibits reprisal on the basis of certain disclosures of information and 5 U.S.C. § 2302(b)(ii) which prohibits the taking or failing to take a personnel action where taking or failing to take such actions violates a law, rule or regulation directly concerning or implementing a merit principle. An "a" stay went into effect by operation of law. After oral argument, the petition for a "b" stay was denied.

- *In Re Kass* In this action a Department of Justice secretary was notified of her removal for inadequate performance after having filed a complaint charging age discrimination. In requesting the stay the ASC alleged that the personnel action was in violation of the prohibition against age discrimination (5 U.S.C. § 2302(b)(i)) and the prohibition against reprisal for the exercise of an appeal right (5 U.S.C. § 2302(b)(9)). The Board granted stays under 5 U.S.C. 1208(a) and (b). The request for a (c) stay, was denied, accompanied by a lengthy explanatory opinion.

Having carefully reviewed the statute and accompanying legislation, the Board set forth the standard of review it will undertake in issuing an "a," "b," and "c" stay. For the "a" stay, the Board stated that it would grant great deference to the determination of the Special Counsel determining "only whether, on their face, the facts and circumstances involved appear to make the stay request so inherently unreasonable that the granting of a stay would be inappropriate."

However, the Board noted that in considering a request for a "b" stay it would conduct a broader inquiry. In such a review it would exercise judgment and discretion in determining whether to extend the stay.

Finally, in considering a request for a "c" stay, the Board stated it would conduct a substantive review of the information provided to it by both the Special Counsel and the agency. It concluded, indicating that a "c" stay would be granted only where there was an "affirmative concurrency by the Board in the "reasonableness of the Special Counsel's determination."

- *In Re Coffield* In this case a coal mine inspector with the Mine Safety and Health Administration was notified of his removal after having made disclosures concerning public health and safety mismanagement and violation of laws and regulations pertaining to mine safety.

In requesting the stay, the ASC alleged the agency had violated the prohibitions against: reprisal for disclosure of certain information (5 U.S.C. § 2302(b)(8)); reprisal for exercising an appeal right (5 U.S.C. § 2302(b)(9)); discrimination on the basis of conduct which does not affect the employee's performance or the performance of those around him (5 U.S.C. § 2302(b)(10)); and taking or failing to take a personnel action if the taking or failing to take such action violates a law, rule or regulation which implements or directly concerns a merit principle (5 U.S.C. § 2302(b)(11)).

The Board granted stays under 5 U.S.C. § 1208(a), (b), and (c). Three "c" stays were issued.

- *In Re Federal Aviation Administration [Cohn]* In this case, a computer programmer was to be removed for unsatisfactory performance. In requesting the stay the ASC alleged that Cohn's poor performance was due to lack of training based on Cohn's inability to travel because of his heart condition. Therefore, the ASC argued that Cohn's removal violated the prohibition against discrimination on the basis of a handicapping condition (5 U.S.C. § 2302(b)(1)).

An "a" stay went into effect by operation of law. The ASC filed a petition for a "b" stay and later withdrew it.

- *In Re U.S. Department of State [Rohmann]* In this case, a passport examiner was scheduled to be geographically reassigned after making disclosures of alleged mismanagement in the Passport Office. In requesting the stay, the ASC alleged that this personnel action violated the prohibition against reprisal for the disclosure of certain information (5 U.S.C. § 2302(b)(8)). The Board denied the petition for an "a" stay. Six months later the ASC submitted a petition containing additional information and obtained stays under 5 U.S.C. § 1208(a), (b) and (c).

- *In Re Munoz* In this case, an equipment technician with the Air Force was removed for allegedly lying in an EEO hearing. In requesting the stay, the ASC alleged that the personnel action violated the prohibitions against discrimination (5 U.S.C. § 2302(b)(1)) and reprisal for the exercise of appeal rights (5 U.S.C. § 2302(b)(9)). The Board granted stays under 5 U.S.C. § 1208(a) and (b). When the ASC requested a "c" stay but failed to state a reason why further extension of the stay was necessary, the Board granted a 10-day "c" stay and denied further extension. The ASC then requested reconsideration; the Board treated this request as a new petition for a "c" stay, and two subsequent "c" stays were issued.

- *In Re Pitchford* In this case, over a three-year period prior to the issuance of Pitchford's notice of proposed removal from his position with the Federal Prison System, he made several disclosures of agency mismanagement, presented appeals and grievances on behalf of himself and, in the capacity of union steward, on behalf of other union members, and took several matters to arbitration. The agency (Bureau of Prisons) proposed his removal for delay in carrying out instructions, insubordination, unprofessional conduct, careless workmanship and continued inefficiency.

In requesting the stay, the ASC alleged that the personnel action was taken in violation of the prohibitions against: reprisal for the disclosure of certain information (5 U.S.C. § 2302(b)(8)); reprisal for the exercise of appeal rights (5 U.S.C. § 2302(b)(9)); discrimination on the basis of conduct which does not affect the employee's performance or the performance of those around him (5 U.S.C. § 2302(b)(10)); and taking or failing to take a personnel action if the taking or failing to take such action violates a law, rule or regulation implementing or directly concerning a merit principle (5 U.S.C. § 2302(b)(ii)).

The Board granted a stay under 5 U.S.C. § 1208(a) and (b) and two stays under 5 U.S.C. § 1208(c).

- *In Re Curtis* In this case, a Railroad Retirement Board employee was ordered to be geographically reassigned, allegedly because he was unable to get along with his fellow employees and after having filed numerous grievances.

The ASC requested a stay alleging that the personnel action was in violation of the prohibition against reprisal for the exercise of an appeal right (5 U.S.C. § 2302(b)(9)).

The Board granted a stay under 5 U.S.C. § 1208(a), but denied the ASC's petition for a stay under 5 U.S.C. § 1208(b).



- *Acting Special Counsel [Spiegel] v. Department of Justice* In this case, a Bureau of Prisons employee, who was active in union affairs, refused to comply with his supervisor's order to return to work on Sunday for an emergency. The employee filed a grievance against his supervisor the next day, for using intimidation and arbitrary action in making the order. The agency proposed his removal for failure to carry out a proper order from his supervisor.

In requesting the stay, the ASC alleged that the proposed removal violated the prohibition against reprisal for the exercise of an appeal right (5 U.S.C. § 2302(b)(9)).

The Board issued stays pursuant to 5 U.S.C. § 1208(a) and (b). On October 27, 1980, the Board dissolved the "V" stay on the motion of the agency, noting that the ASC had no objection to the motion.

- *Acting Special Counsel [Anderson] v. Veterans Administration* In this case, the Veterans Administration's SES Executive Resources Board selected a white employee for promotion over a black employee, despite the black employee's higher ranking.

In requesting the stay, the ASC alleged that the personnel action was in violation of the prohibition against discrimination (5 U.S.C. § 2302(b)(1)) and the prohibition against taking or failing to take a personnel action if the taking or failing to take such action violates a law, rule, or regulation which implements or directly concerns a merit principle (5 U.S.C. 2302(b)(11)).

The Board issued a stay under 5 U.S.C. § 1208(a). The ASC did not request an extension of this stay.

- *Acting Special Counsel [Mortensen] v. Department of the Army* In this case, an Army chemist was notified of the agency's proposal to remove her for insubordination, unsatisfactory performance and misuse of the EEO process.

The ASC alleged that the personnel practice violated the prohibitions against discrimination (5 U.S.C. § 2302(b)(1)) and reprisal for the exercise of an appeal right (5 U.S.C. § 2302(b)(9)).

The Board granted stays under 5 U.S.C. § 1208(a), and (b). Two stays have been issued under 5 U.S.C. § 1208(c).

- *Acting Special Counsel [Yuen] v. Department of Defense* In this case, the employee, an instructor at the Defense Language Institute, wrote to the Commander of the Institute, a local newspaper, and the Secretary of Defense criticizing the management of the Institute as being inept and corrupt. The agency removed him for making false and malicious statements, basing the charge on his letter to the Secretary.

The ASC alleged that the personnel action was in violation of the prohibition against reprisal for the disclosure of certain information (5 U.S.C. § 2302(b)(8)).

The Board granted a stay under 5 U.S.C. § 1208(a). The employee subsequently came to a settlement agreement with the employer and no subsequent stays were requested.

- *Acting Special Counsel [Hoehle] v. Department of the Army* In this case, the employee was convicted in state court of possession of marijuana and sentenced to serve three months in jail. The court approved him for participation in a work release program. The agency did not approve the program and the employee was not released. The agency then removed him for being AWOL while he served his sentence.

In requesting the stay, the ASC alleged that the personnel action violated the prohibition against discrimination on the basis of conduct which does not affect the performance of an employee or the performance of those around him (5 U.S.C. § 2302(b)(10)) and taking or failing to take a personnel action if the taking or failing to take such action violates a law, rule or regulation which implements or directly concerns a merit principle (5 U.S.C. § 2302(b)(11)).

The Board granted stays pursuant to 5 U.S.C. § 1208(a), (b) and (c). A second "c" stay request is pending.

- *Acting Special Counsel [Rawls] v. Department of the Army* In this case, a companion to *Hoehle*, the employee was convicted in state court for possession of marijuana and sentenced to serve three months in jail. The court approved him for participation in a work-release program, but the agency refused to participate in the work release program. The agency then removed him for being AWOL.

In requesting the stay, the ASC alleged that the personnel action occurred as a result of the marijuana conviction, not the AWOL status, and was in violation of the prohibition against discrimination on the basis of conduct which does not affect the performance of an employee or the performance of those around him (5 U.S.C. § 2302(b)(10)); and taking or failing to take a personnel action if the taking or failing to take such action violates a law, rule or regulation which implements or directly concerns a merit principle (5 U.S.C. § 2302(b)(11)).

The Board denied the first "a" stay, then later granted an "a" and "b" stay. The "b" stay request was subsequently withdrawn because the employee had found permanent employment elsewhere.



- **Acting Special Counsel [Enochs] v. Department of the Treasury** In this case, the employee, a Special Agent in the Criminal Investigation Division of the Internal Revenue Service, received a letter of proposed removal and requested to be represented in the removal by a representative of the National Treasury Employees Union (NTEU). The agency refused to allow the union to represent her on the grounds of conflict of interest.

In requesting the stay, the ASC alleged that the agency's refusal to allow the employee to be represented by the union violated the prohibition against taking or failing to take a personnel action if the taking or failing to take such action violates a law, rule or regulation which implements or directly concerns a merit principle (5 U.S.C. § 2302(b)(11)).

The Board denied the first "a" stay without prejudice, for failure to submit any supporting documentation. A second "a" stay petition was denied on the grounds that the agency's denial of representation is not a "personnel action."

- **Acting Special Counsel v. Department of Health and Human Services** This was the second stay petition filed under 5 U.S.C. § 1208(a) on behalf of Nagel. The earlier "a" stay, dated April 4, 1979, was the first stay ever filed before the Board and was requested because Nagel was reassigned by his employer, St. Elizabeth's Hospital.

The 1980 stay was filed when the division to which Nagel had been transferred at St. Elizabeth's Hospital proposed his removal for failure to complete and submit work assignments and refusing to perform other assigned tasks.

In requesting the stay the ASC alleged that Nagel's removal may have been in reprisal for his disclosure of certain information in violation of 5 U.S.C. § 2302(b)(8). The "a" stay went into effect by operation of law.

## 2. Corrective Actions

Under 5 U.S.C. § 1206(c)(1)(A), if after investigation the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, which requires corrective action, the Special Counsel may recommend to the agency that such corrective action be taken. If the agency has not taken the recommended corrective action pursuant to 5 U.S.C. § 1206(c)(1)(B) after a reasonable period, the Special Counsel may request the Board to consider the matter.

The Board may then order such corrective action as it deems appropriate after opportunity for comment by the agency concerned and OPM. Five such actions were filed with the Board this year.

- **In Re Tariela** The ASC petitioned for corrective action on the facts of her earlier stay petitions. The ASC and the agency subsequently settled the case and an order was entered dismissing the action.

- **In Re Coffield** The ASC petitioned for corrective action on the facts of her earlier stay petitions. The action is pending before the Board

- Acting Special Counsel for [Rohrman] v. Department of State The ASC petitioned for corrective action on the facts of her earlier stay petitions. The action is pending before the Board.
- Acting Special Counsel [Munoz] v. Department of the Air Force The ASC petitioned for corrective action on the facts of her earlier stay petitions. The action is pending before the Board.
- Acting Special Counsel v. Small Business Administration The ASC petitioned for corrective action on the basis of the facts of the related disciplinary action, Acting Special Counsel v. Sullivan, MSPB Docket No. HQ120600018. The action is pending before the Board. A discovery order had been issued.

#### Disciplinary Actions

Under 5 U.S.C. § 1206(g), following an investigation, if the Special Counsel determines that a disciplinary action should be taken against any employee who is not a Presidential appointee, a written complaint is prepared against the employee, containing that determination along with a statement of supporting facts and presented to the Board for action. Any employee against whom\* such a complaint has been presented is entitled to certain protections as provided under 5 U.S.C § 1207 including the right to a hearing on the record. A final order of the Board in such an action may impose a disciplinary penalty against the employee including removal, reduction in grade, debarment from federal employment for a period not to exceed five years, suspension, reprimand or the assessment of a civil penalty not to exceed \$1,000. Four such cases have been filed by the Special Counsel this year.

- Acting Special Counsel v. Paul D. Sullivan In this case, the Acting Special Counsel alleged that the recommendations of Paul D. Sullivan, Associate Deputy Administrator for Support Services of the Small Business Administration, that certain District Directors be geographically reassigned, constituted a prohibited personnel practice and accordingly, served as the basis for a proposed disciplinary action. Specifically, the ASC alleged that prohibited personnel practice had been committed because the political affiliation of such District Directors, as well as other political factors were considered in making the recommendation and in implementing such policy in violation of the prohibition against: discrimination on the basis of political affiliation (5 U.S.C. § 2302(b)(1)(E)) soliciting or considering information regarding an individual except where that information addresses the work products, qualifications, performance, or character of said individual (5 U.S.C. § 2302(b)(2)); granting any preference or advantage not authorized by law for the purpose of improving or injuring the prospects of any person for employment (5 U.S.C. § 2302(b)(6)); and taking or failing to take a personnel action where the taking or failing to take such action violates a law, rule or regulation which implements or directly concerns a merit principle (5 U.S.C. 2302(b)(1)).

A hearing before the Board on the merits of this case was scheduled to begin in January of 1981.

- Acting Special Counsel v. Smith In this case, Respondent Smith proposed the removal of Dennis, an employee of the Department of the Navy, who successfully appealed his removal to the Board. The ASC alleges that the personnel action Smith proposed was in violation of the prohibitions against reprisal for the disclosure of certain information (5 U.S.C. S 2302(b)(8)); reprisal for the exercise of appeal rights (5 U.S.C. § 2302(b)(9)); and taking or failing to take a personnel action where the taking or failing to take such action violates a law, rule or regulation implementing or directly concerning a merit principle (5 U.S.C. S 2302(b)(11)). This action is pending before the Board.

- Acting Special Counsel v. Owens In this case, the ASC requested disciplinary action be taken against Owens, who acted as an advisor to Smith in the above-referenced case. The action is pending before the Board.

- Acting Special Counsel v. Farrow This action is also related to the Smith case referenced above. In this instance the ASC alleges that the appraisal conducted of Dennis by Farrow was unfair and issued in retaliation for the subject employee's union activity and disclosures about health and safety.

#### 4. Hatch Act Cases

Under Chapters 15 and 73 of Title 5 of the United States Code, the Special Counsel is authorized to investigate political activities by certain State and local officers and employees and political activities of federal employees and employees of the District of Columbia government. Following such investigations, if the Special Counsel determines there is a basis for doing so, he or she may file a complaint with the Board to take certain disciplinary actions against the employee. The Special Counsel has filed two such cases this year.

## II. Litigation Activities

Under the provisions of the Act certain decisions of the Board may be appealed to the Courts of Appeals, Court of Claims or the district courts. Additionally, judicial appeal rights are available in pre-Reform Act cases. ~ For these reasons litigation represents a substantial portion of the activities of the Board's Office of the General Counsel. Moreover, since judicial approval of Board decisions is very important this function is considered to be extremely significant.~

Because the Board has its own litigation authority it has varying degrees of responsibility in three categories of cases involving the Board: when Board attorneys represent the Board; GO when they assist the Department of Justice in its representation of the Board; and (iii) monitoring appeals of Board decisions where the employing agency, the respondent in the case, is represented by the Department of Justice.

The cases in the first category during 1980 were *Robert J. Frazier, et al. v. MSPB and Department of Justice*, No. 80-1067 (D.C. Cir., filed January 16, 1980); *Robert J. Frazier v. MSPB*, No. 80-1986 (D.C. Cir., filed August 15, 1980); *James B. Hardgrave v. U.S. Department of Interior*, No. 79-2227 (D.C. Cir., filed October 15, 1979); *Cloris E. Frisby, et al. v. IRS, et al.*, No. 80-1422 (D.C. Cir., filed April 18, 1980); and *MSPB v. Mary Eastwood*, No. 80-2970 (D.D.C., filed November 21, 1980).

In *Frazier, et al.*, No. 80-1067, *supra*, (*Frazier I*), four Deputy U.S. Marshals sought judicial review of a Board decision which denied in part a request brought by the Special Counsel pursuant to 5 U.S.C. S 1206(c)(1)(B) seeking to have the deputies allegedly retaliatory transfers set aside. This appeal challenges the Board's interpretation of various provisions of the Reform Act, as well as its fact findings in the case. Fundamental questions were raised concerning the nature of a corrective action proceeding under 5 U.S.C. § 1206(c)(1)(B), including the roles of the Board and the Special Counsel, the appropriate burden of persuasion to be borne by the Special Counsel, and the Board's discretion to conduct an evidentiary hearing in considering the Special Counsel's request. Petitioners also challenge the Board's rulings on the burden of proof with respect to violations of 5 U.S.C. § 2302(b)(8), prohibiting reprisals against employees for disclosure of certain information, and of 5 U.S.C. § 2302(b)(9), prohibiting reprisals for exercise of employee appeal rights. The issues presented are questions of first impression and are significant in construing the Reform Act, which enacted for the first time the provisions whose interpretation is at issue.

In the related case of *Frazier v. MSPB*, No. 80-1986, *supra*, (*Frazier II*), the deputy whose transfer was rescinded by the Board in *Frazier I*, sought judicial review of the Board's subsequent decision denying his request for an award of attorney fees in *Frazier I*. The petition for judicial review, filed August 15, 1980, asks the court to set aside the Board's ruling that 5 U.S.C. § 7701(g) does not authorize the Board to require agency payment of fees in a section 1206 corrective action case. Petitioner's brief was filed December 3, 1980, and Board attorneys subsequently filed a 33-page brief. The Court has directed the Clerk to schedule *Frazier I* and *Frazier II* for oral argument on the same day before the same panel.



In *MSPB v. Eastwood, supra*, the Board filed suit to seek an authoritative clarification of the statutory relationship between the Board and its Special Counsel and of the extent of the Board's administrative and fiscal responsibility for the Special Counsel's activities. The Board also sought preliminary injunctive relief against actions of the Acting Special Counsel inconsistent with administrative and budgetary directives of the Chairwoman, the Board's chief executive and administrative officer under 5 U.S.C. § 1203. Earlier attempts to obtain Congressional resolution of the problems occasioned by the Reform Act's establishment of an officer within the Board having specified authorities to be exercised independent of the Board were unsuccessful, as were efforts to reach an understanding with the Acting Special Counsel concerning the limits of her autonomy. The Board's independence from Executive branch control, specifically intended by Congress, made resolution of this dispute by the President or the Attorney General inappropriate. A decision in this case is pending.

In *Hardgrave v. U.S. Department of the Interior, supra*, the Department of Justice represents the employing agency, the statutory respondent in this appeal of a decision of the Board under 5 U.S.C. § 7701, *Hardgrave v. Department of the Interior*, No. OM-80-0752-8, December 27, 1979. However, because the petition for review raised important questions concerning the Board's interpretation of Chapters 43 and 75 of Title 5 (announced in *Wells v. Harris*, No. RR-80-3, December 17, 1979, and applied in *Hardgrave's* appeal) the Board chose to exercise its litigating authority under 5 U.S.C. § 1205(h) to appear in the case. The Board's Motion to Intervene, filed on June 3, 1980 was granted by the Court on June 27, 1980. Petitioner's brief was filed June 20, 1980, and respondent's brief, on October 10, 1980. On November 19, 1980, Board attorneys filed a Statement in Lieu of Brief for Intervenor, which adopted and expanded respondent's argument on the statutory interpretation questions presented.

In *Frisby, et. al. v. MSPB, supra*, the three petitioners asked the Court to review a Board order denying petitioners' request for reconsideration of its orders remanding their cases to the appropriate field offices for reconsideration in light of *Wells v. Harris, supra*. Board attorneys filed a Motion to Suspend Proceedings in the case on May 28, 1980, because the order appealed was not a final appealable order judicially reviewable under 5 U.S.C. § 7703(a)(1). A reply to petitioner's response in opposition to the motion was filed June 20, 1980. The Court granted the Board's motion on July 7, 1980.

Cases in which administrative proceedings were pending or subject to judicial review on January 11, 1979, the effective date of the Civil Service Reform Act, are governed by the law in effect prior to the Act, under its Savings Clause, 5 U.S.C. § 1101 note. When the Board or its members are parties to such cases, the Department of Justice or the United States Attorney has represented the Board. In several of these cases, however, Board attorneys have assisted the Department or the United States attorney by preparing all or parts of written submissions for the Court or by reviewing drafts of briefs and memoranda. Thus, in *Glover v. Prokop, et al.*, No. 80-731 (D.S.C., filed April 18, 1980), OGC drafted the Answer to the Complaint. (Subsequently, in early 1981, OGC prepared an 11-page Memorandum in Support of Defendant's Cross Motion for Summary judgment urging the Court to affirm the Board's decision to suspend the plaintiff, an Administrative Law judge, for assaultive behavior toward a fellow employee.) In *Oliver v. MSPB*, No. 80-1918 (D.D.C., filed August 1, 1980), Board attorneys prepared several sections of the Board's 31-page Memorandum of Points and Authorities in Support of Motion to Dismiss or in the Alternative for Summary judgment, which was filed November 24, 1980. The complaint seeks a declaratory judgment and \$6 million in damages against the Board members for allegedly denying the plaintiff due process in his appeal out of partisan political and racially discriminatory motives. Board attorneys have also reviewed briefs filed in *Chocallo v. Prokop, et al.*, No. 80-1053 (D.D.C., filed April 25, 1980) and in *Allen v. Henifen*, No. 80-1418 (D.D.C., filed June 9, 1980).

Additionally, Board attorneys monitor other suits seeking review of Board decisions in which the litigation is handled by the Department of Justice either because the case is governed by pre-Reform Act law or because under current law the employing agency is the respondent. Board attorneys monitored 343 such cases during 1980. This monitoring permits the Board attorneys to determine whether the case raised issues of such significance to its performance of its functions that intervention by the Board is warranted. Board attorneys also may advise the litigating attorneys on difficult questions of civil service law or on issues of first impression under the Reform Act. For example, in a number of cases the Board's interpretation of the Reform Act's savings clause has been at issue with respect to whether the Court of Appeals or the District Court has jurisdiction. In 1979, Board attorneys prepared a model memorandum on this issue for use by Justice Department attorneys. The Board's interpretation has now been adopted by all of the circuit courts.

## II. SPECIAL STUDIES

The Merit Systems Protection Board shall:  
... conduct special studies relating to the civil service and to other merit systems in the Executive Branch and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

In conducting its statutorily mandated studies, the Board uses a variety of techniques including survey sampling methods, agency specific case studies, and traditional investigative techniques. In 1980, on behalf of the Board, the Office of Merit Systems Review and Studies (MSRS), initiated several studies utilizing some of these techniques.

### A. Study on Sexual Harassment

In its Congressionally mandated study to determine the extent, if any, of sexual harassment in the federal work force, the Board mailed 23,000 scientifically designed questionnaires to a random sample of the federal work force. To ensure confidentiality, the questionnaires were mailed to participants' home addresses where, it was felt, they would have more privacy in completing the questionnaire.

The questionnaire asked the participants to judge for themselves those activities that they considered to be sexual harassment. The activities listed ranged from sexual teasing and jokes, through pressure for sexual favors to actual or attempted rape or sexual assault. A

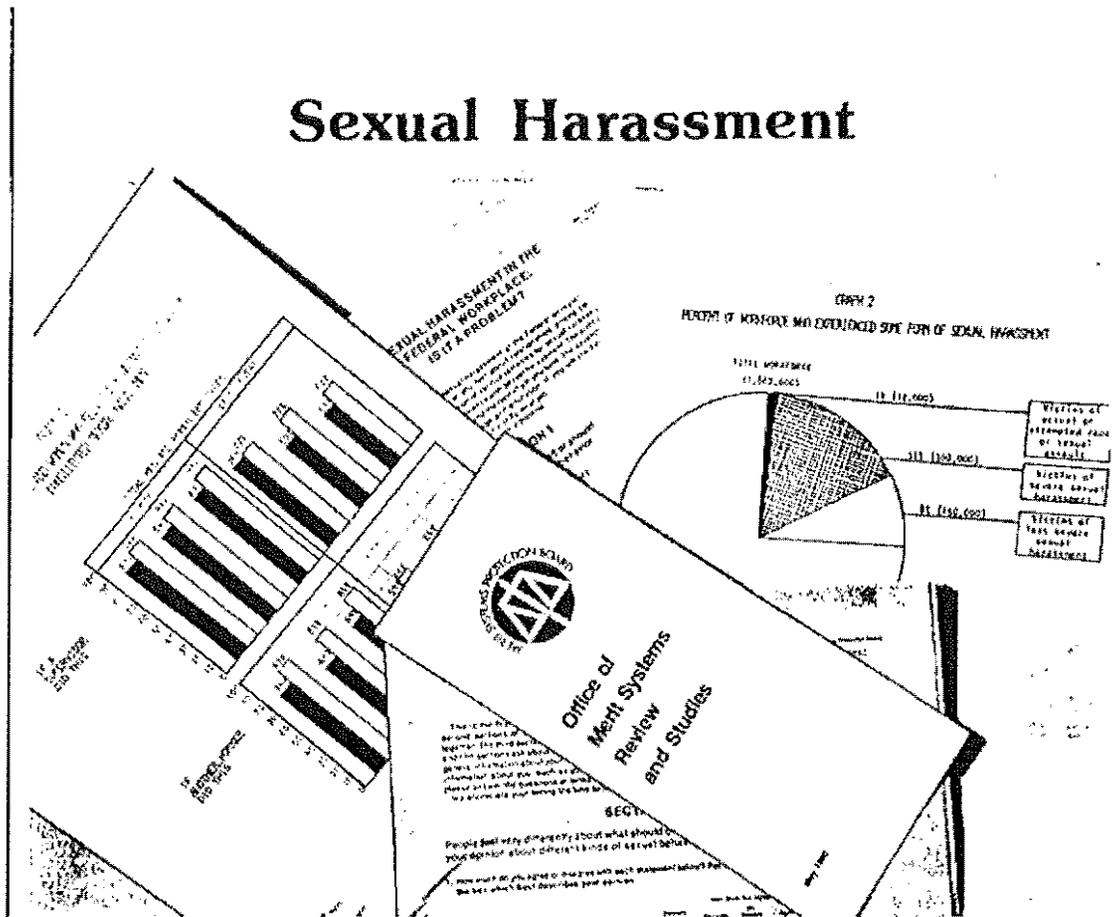
majority of respondents indicated that they thought all of the activities were sexual harassment whether they were done by a supervisor or by a coworker.

With these considerations, the questionnaire further asked participants if they had been victims of any of the sexual harassments listed. The results indicated that 42% of the women in the federal work force had indeed been victims of some form of sexual harassment during the two -year period covered by the questionnaire. Also, some 15% of the men in the federal work force had been victims of sexual harassment, or a total of 162,000 persons.

The rate of return of the questionnaires was 85%, a rate far higher than necessary to assure statistical reliability.



# Sexual Harassment



These preliminary results, along with others, were reported to the Subcommittee on Investigations of the Committee on Post Office and Civil Service of the U.S. House of Representatives in hearings held on September 25, 1980.

After further analysis of the findings, a final report of the study will be issued in early 1981.

## B. Other Studies

In order to utilize its resources, in this year the Board has sought a method for developing indicators of possible merit systems abuse using a much smaller sample of the federal work force. One approach has been to establish scientifically selected, term-appointed, voluntary panels of federal employees. The panels, queried on a regular basis on important issues, will actively involve representatives from all the federal work force in special study activities. The panels give the Board the tools with which to address many subjects quickly and at relatively little expense.

In late 1980, two such surveys were initiated. These studies contacted a random sample of federal employees in an attempt to assess the extent to which merit principles of excellence and fair play are being applied in their work situations. In focusing on members of the Senior Executive Service (SES) and midlevel employees in General Schedule Grades 13 through 15, these studies include both those employees working under newly-established merit pay systems and those who are not. As agencies' merit pay systems become operational over the next year, the studies are expected to provide useful insights as to the impact of these systems on merit principles. In addition, the survey questionnaires were designed to give MSRS an opportunity to develop immediate and specific information on how major provisions of the Civil Service Reform Act are being carried out.

In another major study, the Board mailed over 13,500 questionnaires to a random sample of employees of 15 major federal departments and agencies. This survey sought to determine the degree to which federal employees are aware of instances of governmental inefficiency, fraud, or mismanagement and what, if anything, they have done with that information. The study was also an attempt to determine how aware federal employees are of the channels established within and outside of their own agencies to receive information concerning illegal or wasteful activities. Finally, the survey sought to determine the degree of confidence that federal employees have in the whistleblower protections that are available to them under the Civil Service Reform Act.



The results of these studies will be reported to the President and the Congress once the responses are tabulated and the data analyzed.

Still other analyses are evolving from the study of data bases available throughout the federal government which may provide useful inputs concerning the status of civil service and other merit systems. Using this data, the Board then undertakes studies to analyze the merit performance of the agencies. This information is then used to compare that agency's performance with other agencies and to look at changes in the agency's performance over time.

Another study undertaken by MSRS on a periodic basis is the analysis of the Board's appeal decisions rendered at the field office level. This report is useful to the Board in determining the major policy implications involved in its decisions and actions.

### III. SIGNIFICANT ACTIONS OF THE OFFICE OF PERSONNEL MANAGEMENT

The Merit Systems Protection Board shall:

... review the significant actions of the Office of Personnel Management, including an analysis of whether the actions of the Office of Personnel Management are in accord with merit system principles and free from prohibited personnel practices.

In addition to the statutory directive to conduct general studies of the health of the merit systems, the Board is also directed to study the significant activities of OPM and report to the President and Congress on them.

As a first step in this process, the Board staff developed an exhaustive legislative history of the pertinent sections of the Act, and an analysis of a number of relevant legal issues. On the basis of these analyses a long-range program plan and organizational proposal were developed and approved by the Board and substantial progress has been made in the last quarter of the year toward the preparation of the OPM significant action report.

A review has also been made of OPM documents, Congressional hearings, reports issued by other oversight agencies, and preliminary findings of the Board's special studies teams. On the basis of this review and analysis, critical issues for the 1980 OPM significant action report have been identified. A concept paper has been prepared, establishing the themes and issues to be addressed in the report.

Using the concept paper as a guide, Board staff has developed a set of strategies to gather and analyze information relevant to these issues. In general, these strategies include the following information gathering techniques:

- Briefings for Board staff by OPM staff.
- Written responses by OPM to a follow-up set of detailed written questions.
- Survey by questionnaire of senior personnel officials in the agencies, both in the field and in Washington.
- Personal interviews of selected personnel officers in a range of agencies.
- Discussions with informed and interested groups.

At the writing of this report, the OPM briefings have been conducted and follow-up questions have been delivered to OPM for further response. The survey questionnaire has been designed and is in final stages of pre-testing. A guide for the interviews with personnel officers, and for the discussions with third party groups has been prepared, and those sessions are being scheduled.

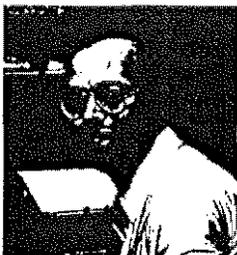
Information gathered by these techniques will be analyzed by the staff, within the framework of its report concept paper. A final report will then be prepared, which the Board expects to send to the Congress and the President by June 1, 1981.

#### IV. REVIEW OF THE REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT

The Merit Systems Protection Board shall:

... review the rules and regulations of the Office of Personnel Management,

Under the provisions of the Act, the Board is charged with the duty of reviewing the rules and regulations of the OPM. This review is conducted to determine whether the regulation on its face or as implemented by any agency would require an employee to commit a prohibited personnel practice. If the Board finds that the regulation or its implementation is invalid then it may require any agency to cease compliance with the regulation and to correct any invalid implementation.



Initiation of the review procedure by the Board may be triggered in one of three ways: on the Board's own motion; at the discretionary granting of a request for review submitted by an interested person; and upon the filing of a written complaint by the Special Counsel requesting the review.

In the end of 1979, the Board issued its first determination in such a case, *Wells, et al. v. Harris et al.* In that instance the Board held that the interim regulations of OPM permitting an agency to remove an employee for unacceptable performance prior to establishing a full performance appraisal system required the commission of a prohibited personnel practice. Therefore the regulation was held to be invalid on its face. Additionally, the Board invalidated the implementation of the regulation by the Social Security Administration and reversed any actions that had resulted from its implementation.

In order to further carry out its duties under this mandate, the Board identified and successfully accomplished two goals in this area. The first of these tasks was to establish a regulatory framework for the processing of regulation review cases. The second was to initiate several regulation reviews.

#### A. Establishing the Regulatory Framework

Certain aspects of OPM regulation review cases are very different in nature from the other adjudications conducted by the Board. For that reason the Board determined it was

necessary to establish a separate regulatory framework for these actions. Accordingly, regulations providing for the adjudication of these cases were prepared by Board staff during 1980. Publication of these regulations for immediate effect will be made in early January of 1981. Because the regulations have interim effect the Board, the agencies and the public will immediately have guidelines under which to operate. However, the Board will also be accepting comments on the regulations with the intent of later publishing final regulations on this subject. This way, there will be no delay in the adjudication of regulation review cases while at the same time there will be an opportunity provided for public input into the process. The regulations set forth important information in several areas including the:

- Method, place and time for filing a request for regulation review;
- Required contents of such a request and response to the request;
- Procedure for the Board's acting upon the request; and
- Content of the Board's order and the method for enforcement.

Additionally, the regulations provide that, where appropriate, the Board's more extensive adjudicatory regulations (as set forth at 5 CFR Part 1201) may be applied. By permitting the application of these regulations, the Board introduces other concepts into the regulation review process such as discovery, subpoenas, attorneys fees, etc.

The utilization of this framework is expected to facilitate and expedite the processing of these cases

#### B. Regulation Review

##### 1. On the Board's own motion

- *5 CFR 432.201(a) and 5 CFR 752.402(a)(2)* This first referenced regulation limits the coverage of 5 U.S.C. S 4303, relating to actions based on unacceptable performance. The second referenced regulation extends the coverage of adverse actions under 5 U.S.C. S 7512 to actions taken on the basis of both performance and misconduct. The issues raised in this regulation review are whether these regulations: (1) deny federal employees substantial rights provided by Chapter 43 of the Act; (2) require the commission of a prohibited personnel practice with respect to employees against whom a reduction in grade or a removal is taken for performance and non-performance related reasons; or (3) deny federal employees an opportunity to demonstrate improved performance before they can be reduced in grade or removed.

- *(In Re reduction in grade or removals for performance and non-performance related issues, Docket No. HQ12058110011)*

- *5 CFR 734.206 and 5 CFR 1001.735-208* This first referenced regulation restricts federal employees from

using federal information in furtherance of a private interest. The second referenced regulation restricts OPM employees from making public disagreements with or criticisms of officials, policies or practices of OPM or other federal agencies in areas relating to OPM's functions. The issues to be addressed in this review are whether these regulations; M prohibit disclosure of information in areas which are protected under 5 U.S.C. S 2302(b)(8); (2) violate the "whistleblower" protections of the Civil Service Reform Act which restrict disclosure of information only in certain instances; or (3) require the commission of a prohibited personnel practice with respect to employees who disclose information which they reasonably believe evidences a violation of law, mismanagement, waste of funds, abuse of authority or a danger to public health or safety. (*In Re disclosure of information, Docket No. HQ 120581100 10*)

- *335 Federal Personnel Manual, Chapter SI-5010*) This provision permits agencies to except from their competitive merit plans, promotions which result from an employee's position being reclassified at a higher grade because of an increase in duties. The issues to be addressed in this review are whether this rule: (1) permits the non-competitive promotion of an employee whose position is upgraded as a result of an increase in duties; (2) permits the granting of prohibited special preferences or advantages in violation of 5 U.S.C. § 2302(b)(6); or discrimination in violation of 5 U.S.C. § 2302(b)(1); or (3) permits the evasion of the Chapter 43 requirement that promotion determinations be based, in part, upon performance appraisals in violation of 5 U.S.C. § 2302(b)(1).

## 2. Review granted on basis of request by interested party

- *5 CFR 752.401(cX9)* This regulation excludes the furlough of seasonal, part-time and intermittent employees from adverse action procedural requirements. The issues to be addressed in this review are whether: (1) the regulation impermissibly restricts, on its face or as implemented, the statutory procedures found at 5 U.S.C. § 7511-7514 (Subchapter 11) with regard to the specific personnel actions at issue or with regard to the class of employees involved; or (2) Subchapter 11 implements or directly concerns the merit principles contained in 5 U.S.C. §§ 2302(b)(2), (6) and (8)(A) so that their violation constitutes a prohibited personnel practice under 5 U.S.C. § 2302(b)(ii).

- (*National Treasury Employees Union v. Jule M. Sugarman, Acting Director, Office of Personnel Management, Docket HQNo. 120500006*)

- *Federal Personnel Manual Supplement 335- 1, Subchapter 56* This rule, as implemented by the Customs Service, has restricted the availability to employees and others of crediting plans used by promotion and selection panels to rate and rank candidates for employment and promotion. The issues to be addressed in this review are whether: (1) the Customs Service arbitrarily refused access to such plans; or (2) in the event that it has, does the arbitrary refusal of access to crediting plans constitute a violation of section 2302(b). (*National Treasury Employees Union v. Jule M. Sugarman, Acting Director, Office of Personnel Management, et al. Docket No. HQ 120500003*)

## 3. Denials of requests for review filed by interested parties

- *5 CFR 771.204* This regulation permits agencies to exclude bargaining unit employees from the coverage of agency grievance systems.

(*Petition of Robert M. Tobias, et al., dated Feb. 7, 1980*)

- *5 CFR 752.401(c)(2)* This regulation excludes actions which entitle employees to grade retention under Part 536 from adverse action procedural requirements.

(*Petition of Robert M. Tobias, et al., dated Feb. 7, 1980 and Federal Personnel Manual Supplement 33 5- 1, Subchapter 56*)

This rule instructs agency personnel to maintain proper security and control over examination materials used to evaluate employees for promotion and internal placement. (*Petition of Vincent L. Comery*, dated Feb. 7, 1980.) The Board will not review this rule on its face. As noted above, however, it will review the implementation of this rule by the Customs Service.

#### 4. Requests for review by the Special Counsel.

The Special Counsel filed no requests for regulation review in calendar year 1980.

### CONCLUSION

The first year of the Board's operations was exciting because of the newness of the agency and the significant challenges which accompanied its fledgling status. Nonetheless, in its initial year the Board was able to establish a firm foundation for growth.

In 1980, the second year of its existence, the Board has enjoyed the productivity resulting from its maturation. Systems which were previously implemented were expanded and improved. New systems were introduced. The accomplishment of both tasks was facilitated and enhanced by staff who are now experienced

and knowledgeable in the duties of the Board. The prediction of last year that this year would be characterized by growth and building has come true. Moreover, it has come true in a manner beneficial to those intended to reap the benefits of civil service reform.

During 1981 the Board expects that it will continue to face new and different challenges. However, it is also the sincere hope of the Board that its accomplishments over the last two years have been such as to create a framework where it can conduct "business as usual" and that the meaning of this term will be the successful, effective, and efficient fulfillment of the Board's statutory duties.

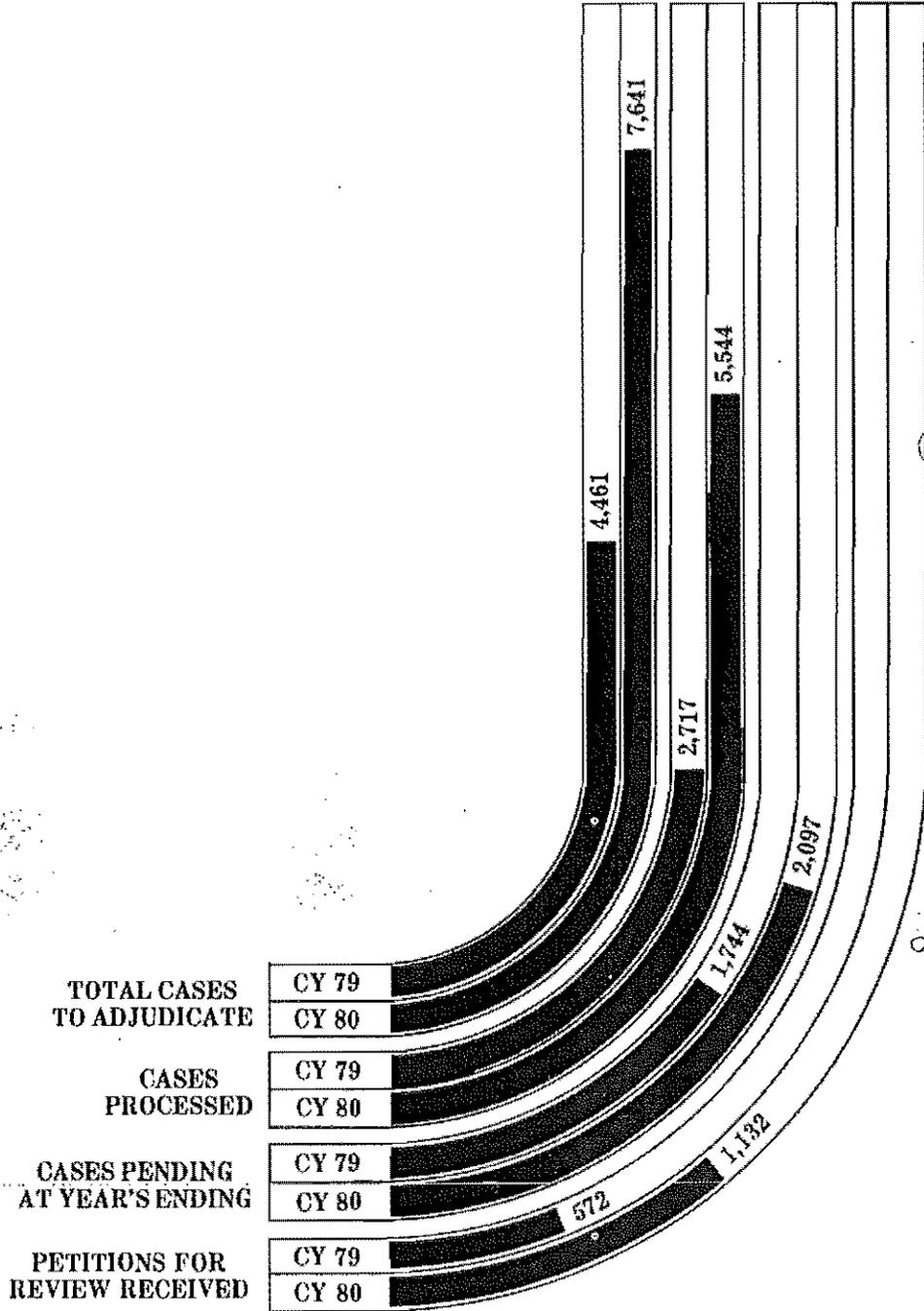


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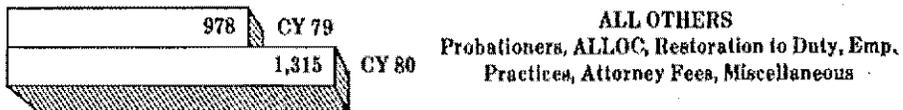
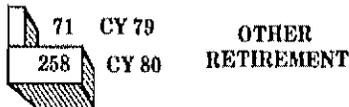
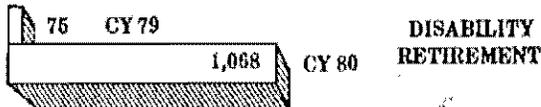
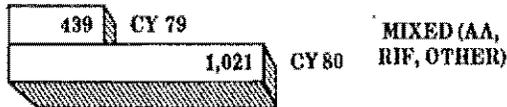
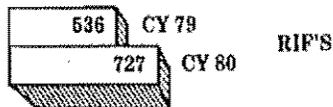
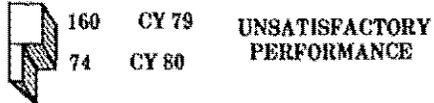
Case Workload Comparison, 1979-80

Cases to Adjudicate, 1979-80

# CASE WORKLOAD COMPARISON 1979/1980



**CASES TO ADJUDICATE**  
1979/1980\*



\* Because the effective date of the Civil Service Reform Act was January 11, 1979, there were no pending Reform Act cases at the beginning of 1979. The figures for 1980 reflect cases filed at the end of 1979 which were adjudicated in 1980.

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