U.S.Merit Systems Protection Board

First Annual Report

U.S. Merit Systems Protection Board, Washington, D.C. 20419

US Merit Syste
Protection Boa

Ruth T. Prokop,
Chairwoman

Ersa H. Poston,
Vice-Chair

Ronald P. Wertheim
Member

Annual Report

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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 First Annual Report of the Merit Systems Protection Board. This Report covers the activities of the Board for Calendar Year 1979.

Respectfully,

Ruth T. Prokop

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

Washington , D.C.

Introduction

In an effort to ensure that a principal campaign promise was realized, early in 1978 President Jimmy Carter transmitted to Congress the first major proposal for reform of the civil service in nearly a century. The President's bill represented the culmination of efforts of a task force of more than 100 career civil servants who had spent seven months reviewing, analyzing, and drawing conclusions about the civil service system. Based on the findings of that study, which took into account both the weaknesses and strengths of the existing civil service system, the President's legislative proposal recommended sweeping changes designed to improve its operation and restore the confidence of the citizenry in its effectiveness.

As outlined by the President, the proposed legislation would incorporate provisions designed to achieve the following objectives:

- strengthen the protection of legitimate employee rights;
- provide incentives and opportunities for managers to improve the efficiency and responsiveness of the Federal work force;
- reduce red tape and costly delay in the personnel system;
- promote equal employment opportunity; and
- improve labor-management relations.

Under the proposal, primary responsibility for carrying out these goals would be vested in three new entities: the Merit Systems Protection Board (the Board); the Office of Personnel Management (OPM); and the Federal Labor Relations Authority (FLRA).

The first two of these organizations would be created by vesting the functions of the Civil Service Commission in the Board and OPM. Significantly, this would eliminate the conflict of interest that was inherent in having a single entity serve as both rulemaker and adjudicator. As a result the former Civil Service Commission would become the Board and OPM would be established as a new agency.

As further specified in the President's proposal, the Board would be a bipartisan, three member, quasi-judicial agency structured to "guarantee independent and impartial protection" through the fair and objective adjudication of employee appeals. The Office of the Special Counsel would be established to investigate and prosecute abuses of the merit systems and to bring meritorious cases before the Board for final adjudication and determination. While located within the

Board, it would be separated from the Board's adjudicatory functions in order to enable it to conduct its operations independently.

In contrast, OPM would "be the center for personnel administration," but would have no prosecutorial or adjudicatory powers. Instead, it would be responsible for assisting the Executive branch in carrying out its day to day personnel functions.

Finally, the FLRA would take over the functions of the former Federal Labor Relations Council and would absorb related duties from the Assistant Secretary for Labor Relations of the Department of Labor. Like the Board, the FLRA would be an independent, quasi-judicial agency.

Congress demonstrated no reluctance in taking up the proposal. The time for reform had come. Using the draft bill offered by the President as a comprehensive base upon which to build, Congress expended substantial energy conceptualizing, drafting and revising the reform package. In considering the Administration's bill, members of the jurisdictionally responsible House and Senate committees collectively held 25 days of hearings, heard testimony from almost 300 witnesses, attended 17 markup sessions, and participated in five days of debate preceding passage. The Conference Committee then spent considerable time reconciling the two proposals. The legislation was given final approval by Congress in the first week of October and was signed into law by President Carter on October 13, 1978.

In January of 1979, when the Board officially came into being, it was a substantially different entity from the one originally envisioned under the President's proposal. Through the provisions of the Civil Service Reform Act of 1978 ("the Act") Congress added measures which significantly strengthened the powers of the agency and guaranteed its independence. Moreover, Congress vested additional duties in the Board to further its function as "watchdog" of the Federal merit systems.

In order to assure its freedom from improper restraint or pressure, Congress provided that:

- members of the Board who have a seven year nonrenewable term can be removed only under the higher than ordinary standard of inefficiency, neglect of duty, or malfeasance in office;
- budgetary submissions and legislative proposals of the Board would be made simultaneously to Congress and the President, thus eliminating the need to obtain prior Executive branch approval;
- appointment of personnel by the Board would be essentially independent of Executive branch approval; and

- the Board would represent itself in all litigation except before the Supreme Court.

The Act imposed new duties on the Board including the authority to:

- review the regulations of OPM to determine whether they require the commission of prohibited personnel practices on their face or as implemented;
- analyze and report on significant OPM activities, and
- conduct special studies of the merit systems to determine their freedom from prohibited personnel practices.

With the addition of these significant duties to its major function of adjudicating employee appeals and actions brought by the Special Counsel, the new Merit Systems Protection Board found itself facing a substantial task during its infancy stage of early 1979.

Charged with the duty of establishing the new Board were its three members: Chairwoman Ruth T. Prokop, Vice-Chair Ersa H. Poston, and Member Ronald P. Wertheim.

Chairwoman Prokop, appointed by President Carter to head the Board, was sworn in on January 15, 1979. No newcomer to Government service, she had previously served as General Counsel of the Department of Housing and Urban Development. Prior to that position, Prokop served as Senior Counsel to the General Telephone & Electronics Corporation and as a partner in a major Washington law firm. Prokop commenced her Government career on the staff of Vice-President Lyndon B. Johnson. She then 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.

The Vice-Chair of the Board, Ersa H. Poston, was sworn in on January 2, 1979. Former United States Civil Service Commissioner since 1977, Poston transferred to the Board under provisions of Reorganization Plan No. 2, approved by Congress in 1978. Prior to her entry into Federal service, she served as President and Member of the New York State Civil Service Commission, a Cabinet post. During this period, she was Chairperson of the President's Advisory Council on Intergovernmental Personnel Policy (Intergovernmental Personnel Act of 1970). Previously, Poston was Director of the New York State Office of Economic Opportunity and Confidential Assistant to Governor Nelson A. Rockefeller.

Poston, a U.S. Delegate, 31st Session of the United Nations General Assembly, is the current U.S. Member on the International Civil Service Commission. Additionally, she has served as Vice-Presiding Officer, National Commission on the Observance of International Women's Year and Member, Panama Canal Zone Board of Trustees.

The third Member of the Board, Ronald P. Wertheim, was sworn into office on October 5, 1979. For ten years prior to that he was in private law practice with the firm of Ginsburg, Feldman, and Bress in Washington, D.C. During that time 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. Mr. Wertheim served as Deputy General Counsel of the Peace Corps from 1964 to 1966 and as Peace Corps Director in Northeast Brazil from 1966 to 1968. He was a trial attorney in Philadelphia from 1957 to 1959, and served as Assistant Public Defender in that city from 1959 to 1961. Before joining the Peace Corps, he was an Associate Professor of Law at the University of Virginia.

Establishing the System

Upon entering office in January of 1979, the first item of business facing the Chairwoman, in her capacity as chief executive officer, was to create a workable, functioning agency. Given the circumstances surrounding the creation of the Board, this was no easy task.

As a result of the unfavorable division of resources of the former Civil Service Commission and the inadequate budgetary allocations provided to the Board, it commenced its existence unorganized, understaffed and underfinanced. Clearly, this situation had to be turned around if the new agency was to carry out its statutory duties successfully.

Accordingly, the Chairwoman immediately assessed the most pressing needs of the Board in order to take steps to meet this challenge. As a result, she identified three priorities: First the Board had to design and implement a strong, viable organizational structure; second, it had to obtain the support essential for its operations by obtaining adequate funds, staff and space; and, third, it had to develop a regulatory framework for processing cases.

A. The Organizational Structure

Turning first to the task of structuring the new organization, the Chairwoman established a series of operating offices. Authority for day to day management both in headquarters and in eleven field offices was vested in a Managing Director who reports directly to the Chairwoman. A number of other offices were developed to reflect the Board's quasi-judicial role. For example, an Office of the General Counsel was established to provide legal advice to the Board, an extremely important function given the necessity of interpreting and applying the new Act as well as conforming the activities of the Board to the laws generally applicable to Government agencies. An Office of Special Decisions was established to undertake responsibility for drafting significant Board decisions. An Office of Appeals was vested with the responsibility for preparing and presenting proposed opinions and orders to the Board when it undertook a review of a decision made in the field. An Office of the Secretary was established to serve as the Board's equivalent to the Clerk's Office in a Federal court. That office was assigned custodianship over all Board records and empowered to oversee and track cases. An Administrative Law Judge was assigned to hear cases of particular difficulty or sensitivity and to render a recommended decision whichwas subject to the review of the Board.

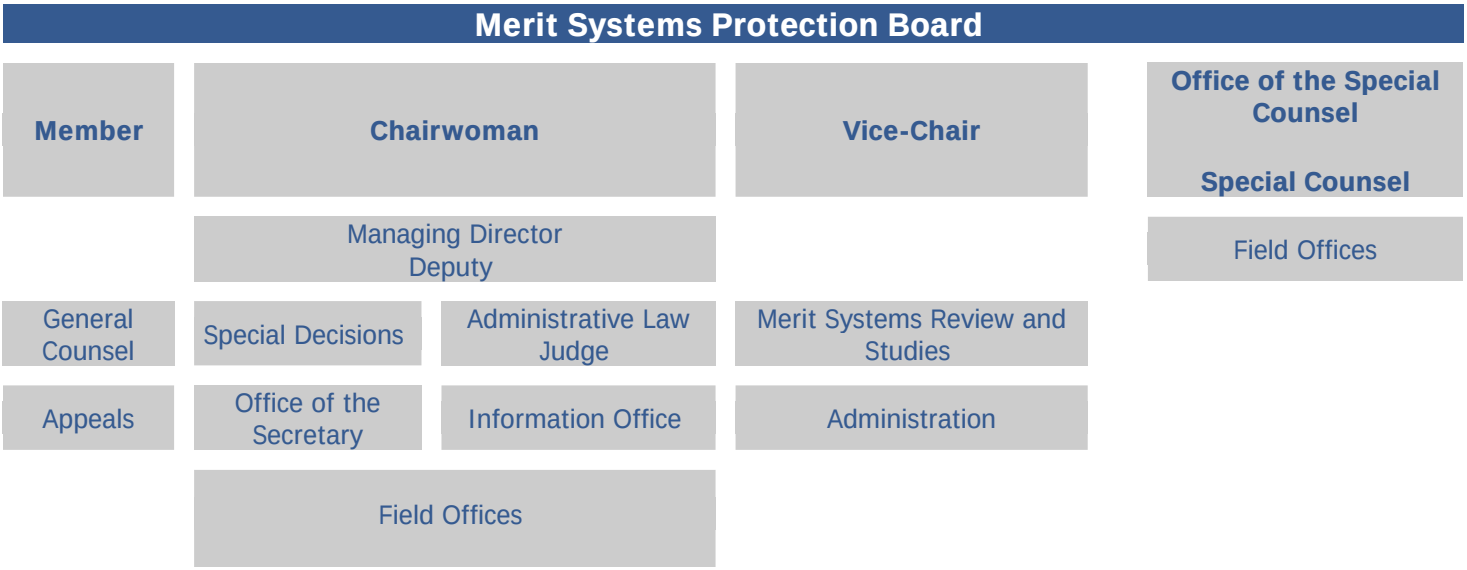
In order to carry out the Board's new adjudicatory duty of identifying and studying areas of systemic abuse of the merit systems, the Chairwoman established an Office of Merit Systems Review and Studies. The Office of the Special Counsel, although included as part of the Board's organizational structure, does not report to the Board, given its independent prosecutorial and investigative functions.

An Office of Administration was established to handle procurements, personnel, travel and other day to day needs of the Board. An Information Office was also placed into operation to communicate and explain the Board's activities to the public.

Most appeals cases originate and are decided initially in the Board's eleven field offices.[1] Those field offices are composed of a Chief Appeals Officer who exercises primary administrative and substantive authority over the operations of the office; presiding officials who hear and initially decide cases; and support

personnel. The field offices range in size from five to twenty-five persons and the Chief Appeals Officer reports to the Chairwoman through the Managing Director.

As it emerged over the course of the year, the Board structure developed along the lines indicated by the accompanying chart.



B. Resources

Because no organizational structure, regardless of how carefully planned, could operate without adequate resources, much Board attention and effort was directed toward obtaining essential funding, staff, and space beyond that which had originally been allocated to it.

This undertaking was of particular concern given the substantial change in the operations of the Board between the time the Reform Act was originally proposed by the President and the time it was translated into statutory mandate. Under the President's legislative proposal, the Board had significantly fewer duties than those it was ultimately charged with, including, for example, the obligation to review OPM regulations, conduct merit systems studies and comply

with the new adjudicatory requirements that were added by the Act.

For example, certain requirements for processing employee appeals which had not been included in the Administration's bill were incorporated in the Act as it emerged from the Congress. While the initial proposal contemplated that the vast majority of employee appeals would be decided by reviewing the record of the agency action, the statute mandated that employees be afforded a hearing in every case. This and other related adjudicatory requirements imposed substantial burdens on the Board in processing cases arising under the new Act. In addition, the Board was faced with an overwhelming backlog of pre-Act cases which had been filed with but not processed by its predecessor agency. This backlog impeded the Board in its efforts to adjudicate the new cases.

The cumulative effect of these factors was to create an entity which was far more complex than the one originally conceived. Obviously, in light of its expanded functions and duties, the new agency required a concomitant increase in resources. Unfortunately, however, the resources allocated to the Board were based upon the initial proposals, leaving it in the untenable position of being unable to carry out fully its statutory duties. The Office of the Special Counsel found itself similarly situated. For this reason immediate action had to be taken to obtain adequate resources.

1. Funds

In undertaking to obtain the necessary financial resources, the Board found its authority to submit budget requests directly to the Congress to be essential.

Utilizing that provision immediately in the first part of the year, the Board presented supplemental budget requests and explained directly to the House and Senate Appropriations Committees why the original budget had been inadequate. The Board received unusual support in its efforts from Elmer Staats, Comptroller General of the United States, who reported to Congress that:

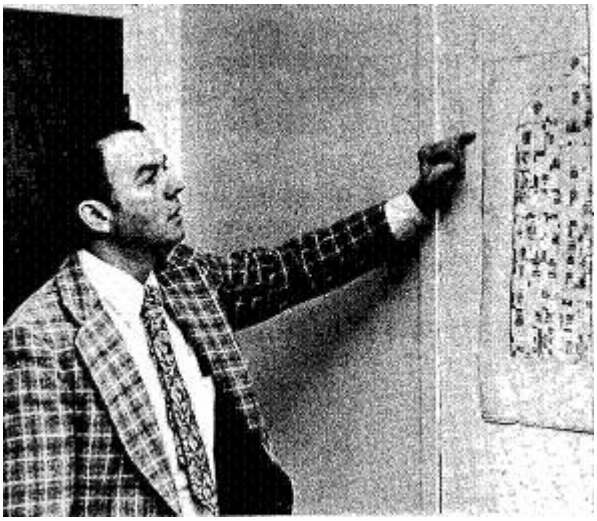
> . . . with their present staffing and funding, the Board and particularly the Special Counsel do not have adequate resources to establish full operations and effectively carry out the duties and responsibilities assigned to them under the Civil Service Reform Act. As a result, the intent of the legislation cannot be achieved . . .

The Congress concurred. For Fiscal Year 1979 (January 1, 1979 to September 30, 1979), the Board originally had received $5.8 million from Civil Service Commission funds plus $400,000 for pay raises and a second $400,000 from trust fund reimbursements--a total of $6.6 million. It requested and received an additional $1 million.

For Fiscal Year 1980, the Board had been allocated $9 million in the President's budget. It requested and received an additional $3 million.

The Office of Special Counsel had begun the Fiscal Year 1979 with $600,000. It requested and received an additional $800,000.

For Fiscal Year 1980, the Office of Special Counsel had received $2 million in the President's budget. It sought and received an additional $2.5 million. These additional funds permitted the Board the financial resources to get under way with the implementation of its statutory duties.



2. Staff

The staffing of the Board had suffered the same fate as its funding. No staff had been allocated for its additional functions or the increased duties involved in carrying them out.

Moreover, the personnel inherited from the Civil Service Commission either were insufficient in number or lacked the requisite skills to staff any single functional unit established under the Board's new organizational scheme. Therefore, new staff had to be recruited to fill in the "holes" in the organizational structure.

Because the Board was charged with carrying out the adjudicatory aspects of the former Civil Service Commission, some 175 employees of the former Appeals Review Board and Federal Employee Appeals Authority were transferred to the Board. However, although these two units were transferred intact, the mandates of the new Act called for new skills and qualifications which were not available without supplemental staff and large-scale training, even in these areas where the functions of the old Civil Service Commission were very similar to those of the new Board.

For these reasons, the Board asked Congress to increase its authorized staff from 289 positions to 382. The Office of Special Counsel requested an increase from 19 to 140. Congress acceded to both requests. The Board took advantage of this increase in staffing authority, and filled its positions as quickly as possible.

Since the Board's major activity involves adjudication, the Board necessarily concentrated on hiring lawyers to serve as presiding officials, and to staff the Offices of Special Decisions, Appeals, and the General Counsel. Some came from private practice, some from other agencies, resulting in a mix of experience, freshness, knowledge, and originality. There was a concentrated effort to retain

able personnel with experience in the former civil service system, and to balance that technical expertise with individuals having broad experience in Government service or in the private sector. This infusion of new blood, together with the pool of experience that existed at the time the reorganization plan came into effect, has enabled the Board to undertake efforts to raise the qualifications standards for presiding officials with a minimum of stress, dislocation, and temporary lessening of efficiency.

Efforts were also made to fill out the Board's administrative staff. The Board hired mail clerks, a procurement clerk, a management analyst and an accountant who were placed within the appropriate units of the new organization.

The hiring for these new positions, throughout the Board, but particularly at the managerial level, demonstrated the Board's commitment to equal employment opportunity. Of the Board's senior personnel, 55 percent are men, 45 percent are women, and 25 percent are minorities.

3. Space

While the Board was successful in accomplishing its first-year goals with regard to funding and staff, the same is not true with regard to its efforts to obtain adequate space for operations. From the beginning, space has been one of the most difficult problems facing the Board, and has remained the most vexing since it continually requires time and energy which should go into other pursuits.

When the Board came into existence, it had no space of its own. Instead, it inherited the Civil Service Commission's overflow office space in the Matomic Building located at 1717 H Street, N.W., in Washington, D.C. Under standard General Services Administration allotments, the Board is entitled to 56,00 square feet of space. Yet it has been provided with only 44,000 square feet, a shortage of more than 21 percent. Moreover, not only is the amount of the space inadequate, but it is seriously below acceptable standards and is ill-suited to the Board’s functions. These inadequacies have led to several serious deficiencies in the Board's capacity to operate properly:

- The Office of Special Counsel does not have a separate room for interviewing employees with assured privacy, nor adequate facilities to secure confidential files;
- the Board has no conference room;
- there are no appropriate rooms for conducting public hearings, and the Board has had to make ad hoc arrangements to use other facilities--the Court of Claims and the National Labor Relations Board hearing rooms--on a case-by-case basis;

- there is no room in which the Board can hear and consider cases presented to it by its appeals staff;
- inadequate load-bearing floors have barred the installation of an adequate library; and
- antiquated and inefficient facilities for heating, cooling, lighting, and operating machines have adversely affected efficiency and employee health and morale, have caused serious accidents, and continually pose safety problems.

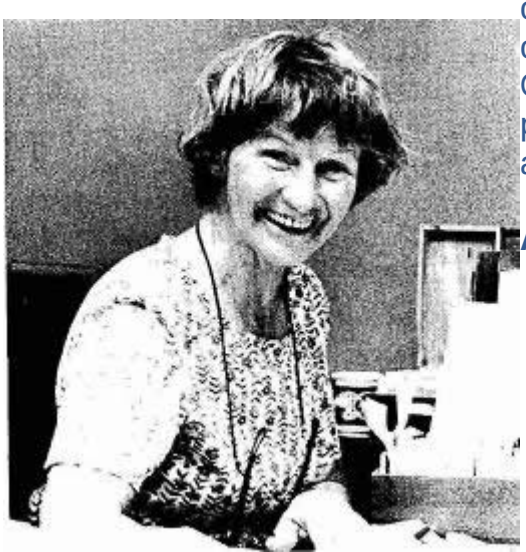
During the past year, the Board has constantly been engaged in negotiations with the General Services Administration for acceptable space. Although fruitless thus far, these negotiations continue.

C. Regulatory Framework

As its first substantive task, the Board undertook to promulgate regulations to govern the processing of the steady but increasingly heavy flow of cases arising under the new system. Because the statute contemplated an immediate change in the quality and efficiency of the processing system, eight days after the effective date of the Act, interim regulations were drafted and published in the Federal Register. Subsequently, after providing an opportunity for comments on proposed regulations and making suitable amendments, the Board published final regulations on June 29, 1979. Those regulations accommodated the statutory directive that the Board processes be more judicial in concept subject to review in a court of appeals rather than, as previously, in Federal district court. The new adjudicatory process contemplates a combination of fairness and speed, and the regulations are designed to comport with those dual goals.

First Year Activities

In this first year, a great deal of time has been devoted to administrative and procedural tasks calculated to provide the Board with a firm foundation for future growth. The success of these efforts, however, has also enable the Board to implement and carry out its substantive duties under the Act. This is reflected in the substantial headway the Bo has made this year, particularly in the processing of employee appeals as well as in the areas of Special Counsel adjudication, review of OPM regulations, and the studies and planning initiated by Merit Systems Review and Studies.



A. Appeals

The adjudication of employee appeals has been a dual-faceted challenge for the Board: how to eliminate the large backlog of inherited pre-Act cases while simultaneously processing in a timely and legally satisfactory fashion, new cases brought under the Act. While initially this problem was somewhat overwhelming, a statistical review of the Board's activities over this year demonstrates that it was not insurmountable.

When the Board came into being in January 1979, there was a backlog in the appeals system of almost 5,000 pre-Act cases. By the end of the year, a total of 8,672 old system cases had been received, which would have been well over a full year's work, even if there had been no new cases. Nonetheless, by the beginning of 1980 only 1,159 of these remained--a reduction of 87 percent in old system cases.

During the course of 1979, the Board also received over 3,600 new system cases, brought pursuant to the provisions of the new Act. By the end of the year over 2,700 of these appeals had been processed within the specified time limit--a success record of 98 percent.2

Among the most notable characteristics of the Board's regulations were the following:

- The introduction of an appeals form designed to make it easier for employees to use the system while obtaining that information necessary for the Board's processing of the appeal;
- the imposition of a deadline of 15 days for agencies to file a response to an appeal, eliminating the inordinate delays experienced under the old system;
- the provision for sanctions by the presiding official where a party inexcusably fails to meet the requirements of the Board in processing a case; and
- the implementation of new legal concepts embodied in the Act, such as discovery, the use of subpoenas, and application of new burden of proof standards.

Under the new procedures, cases must be processed in an expeditious fashion. The statute prescribed a 120-day processing period for all "mixed" cases--i.e., cases involving allegations of discrimination. The Board, on its own motion, undertook to apply that processing period to all appeals. Consequently, the regulations provide that an employee must file an appeal of any final adverse action taken by an agency within 20 days of the effective date of the action. The appeal must be filed in one of the Board's eleven field offices, depending on where the employee was working at the time the action was taken.

Within 15 days after an agency receives notice of the appeal, it must submit a response to the Board. As provided by the statute, the employee has the right to a hearing on the appeal. Before the hearing commences, discovery may be undertaken and a list of witnesses must be submitted and approved by the presiding official. Any requests for delays in the hearing will be denied unless good cause for delay can be demonstrated. Following the hearing the presiding official must issue an initial decision, usually within 25 days after the closing of the record.

The initial decision of the presiding official becomes the final decision of the Board 35 days after its issuance. However, either the agency or the appellant may request reconsideration by the Board itself during that 35-day period if dissatisfied with the decision. The filing of a petition for review with the Board will stop the decision from becoming effective until the Board takes action upon the case. Additionally, even where neither of the parties appeal the action, the Board itself may reopen the case. This reopening process will also stop the decision from becoming final until the Board takes action on it. Once the decision of the Board is final it may be appealed to the United States Court of Appeals or Court of Claims.

The statute, however, dictates a somewhat different procedure for a "mixed" case (i.e., a case where discrimination is alleged as a defense to an adverse action). Once such an appeal is filed, the Board may or may not consider it immediately, depending on whether a discrimination complaint or grievance has been filed with the agency. If a complaint or grievance initially has been filed with the agency, the Board will not consider the case until there has been an agency decision on the matter or 120 days. have passed since the filing. If no such complaint has been filed, the Board will adjudicate the appeal immediately. When the decision of the Board becomes final in a "mixed" case, the appellant may appeal the action either to the Equal Employment Opportunity Commission (EEOC) or to the Federal district court. In the first instance, following further

action by the EEOC, the Board and a Special Panel, the appellant may still appeal the case to the Federal district court.

In subjecting most Board decisions to review in the Court of Appeals rather than trial de novo or review of the record in the district court, Congress charged the Board with the duty of upgrading the quality of its decisions. The Board has taken several steps to meet this Congressional mandate.

First, it has taken action to assure that all its presiding officials will be attorneys.

Second, a training program has been undertaken to assist the presiding officials in developing the legal precision necessary to improve the decision-making process.

Finally, the Board itself has reopened 10 percent of the cases decided in the field for the purpose of correcting errors in those cases and establishing important precedents.

The Board's Office of Merit Systems Review and Studies has conducted a limited study of the new system cases processed in 1979 to discern any useful trends or patterns in the adjudications. Almost 1,200 decisions rendered by the field offices in the first nine months of this year were subject to such an analysis. While the nature of this analysis has been too limited to provide a basis for any major conclusions, some of the factors emerging from the review warrant discussion.

Of the decisions analyzed, over 60 percent were adverse actions based upon unacceptable conduct while only two percent were based upon unacceptable performance. In almost half of the cases, the employee's appeal was dismissed without a review on the merits for reasons such as lack of jurisdiction, failure to make a timely filing, etc. Of those cases adjudicated on the merits, the employee's appeal was sustained in its entirety or in part in approximately 20 percent of the cases.

The Atlanta field office accounted for the largest percentage of appeals filed (18 percent) and Seattle, the smallest (13 percent). Four of the eleven field offices--Atlanta, Philadelphia, San Francisco, and Washington--accounted for almost two-thirds of the appeals filed.

Seven out of ten appeals were from actions originating in four agencies--the Army, Postal Service, Navy, and Veterans Administration.

The reversal rate was approximately the same for both males and females, for all age brackets, and for both veterans and non-veterans. The more years of service, the higher the reversal rate. The reversal rate also increased with the GS

rating. For those employees with GS ratings of 1 to 4, the reversal rate was 8 percent For those employees with GS ratings of 13 and above, it was 34 percent.

In the cases where an action was heard on its merits, the employee was represented in 76 percent of the cases by an organization (labor, civil rights, or veterans).

It is anticipated that studies of this nature will be an ongoing project for the Board. Such analysis should enable the Board to identify areas of concern in a number of ways. For example, it may be used as an internal management tool for identifying a particular problem in case processing within a given field office. Alternatively, it can be used as a tool for determining whether there is a recurring problem within one agency, with certain types of actions, or among certain groups of employees.

This effort should be assisted substantially when the Board implements its computerized case tracking system. This system will replace the previous haphazard manual method of docketing, filing, and tracking appeals which made it difficult, if not impossible, to identify the location and status of any appeal. Computer terminals in the 11 field offices will submit data into the system on a daily basis, thus keeping the information base up-to-date. The Office of the Secretary will be charged with the duty of overseeing the operation of the system. Additional responsibilities which will facilitate the processing of cases include control of correspondence, publication and dissemination of decisions, and the certification and authentication of records.

The necessity of having a modem system to track cases is underscored by the growing trend of appellants to file petitions for review of field office decisions. During 1979, as employees became more familiar with the Board's procedures, the number of petitions for review grew. Of the 653 petitions for review filed in 1979, almost half of them were filed in the last quarter of the year.

The increased number of appeals from the decisions of presiding officials in the field does impose a heavier workload on the three-member Board and its staff. However, the Board welcomes this development because it views very seriously the Congressional directive that the Board, unlike its predecessor, should be an active adjudicator.

For this reason, each week the Board considers and takes action upon petitions for review, as well as cases pending before it. Presentation of the major issues under consideration is made by staff members who then receive Board directives and guidance in drafting opinions for final Board approval. Moreover, the Board members themselves frequently prepare significant opinions from start to finish, clearly reflecting the fact that the Board members always give personal attention to matters before them.

This "activism" is of particular importance in these early months of the Board's existence, because it is essential that the Board render precedential decisions interpreting and applying the new provisions of the Act. If it does not, both employees and management will be left without the guidance necessary to direct their actions.

For this reason, in considering appeals the Board has attempted to render decisions addressing significant issues raised under the new Act. One such opinion was issued in the case of *William E. Parker v. Defense Logistics Agency.* This case involved an agency action denying an employee a periodic within-grade step salary increase because his work was not of an acceptable level of competence--a negative "ALOC" determination.

In his appeal filed with the Board's field office in 1979, the employee alleged that the agency proceedings against him involved two "harmful errors"--i.e., defects in agency procedures that compromised the employee's rights. The Board's presiding official disagreed, but identified two other procedural errors which he held to have been harmful, and on that basis decided in favor of the appellant. The Board reopened the case on its own initiative in order to establish in a precedential fashion the following legal principles:

> 1. The appellant (employee) bears the burden of establishing that the agency committed procedural error in the action taken against him/her, and that such error was harmful.
>
> 2. In reviewing ALOC cases, the Board is not limited to the administrative record developed during the agency's proceedings, but may engage in further fact-finding where such is necessary to serve the ends of justice.
>
> 3. The standard of proof in such cases is that of "substantial evidence."

Decisions of this nature, those which have a far-reaching impact on many appeals cases before the Board, are expected to be issued in the future as the Board continues to interpret and apply the provisions of the new Act.

B. Office of Special Counsel

As stated in the "Findings and Statement of Purpose" of the Act, one of the policies adopted by Congress in enacting the legislation was that:

> Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices.

One of the methods by which Congress sought to implement this policy was by establishing the Office of the Special Counsel. Under the provisions of the Act, the Special Counsel is vested with the authority to investigate allegations of prohibited personnel practices, prosecute those who commit them, and seek corrective action.

In order to carry out this task the Special Counsel may bring cases before the Board for final adjudication, In this respect, the relationship of the Board and the Special Counsel is somewhat analogous to that of a court and a prosecutor. The Special Counsel makes no adjudicative determinations, but acts as an investigator and prosecutor in preparing and bringing matters before the Board. The Special Counsel acts with complete independence, determining which cases to terminate, which to settle and which to bring before the Board. The Board, on the other hand, can institute no such actions, but consistent with judicial principles, has the final responsibility for approving or disapproving the recommendations of the Special Counsel.

In its first year, the Board considered two types of Special Counsel actions.

The first involved requests for stays of personnel actions under 5 U.S.C. §1208. This provision authorizes the Special Counsel to seek an order from the Board staying an agency personnel action for periods of 15 or 30 days or other period as determined to be appropriate by the Board. The Special Counsel makes such a request when there is reason for him/her to believe the personnel action is based on a prohibited personnel practice. During the Board's first year, the Special Counsel requested 22 stays in cases involving allegations of prohibited personnel practices; 16 were granted.

The nature of the alleged prohibited personnel practices has varied. Several stay requests have been based on reprisal for "whistleblowing" activities. Some have alleged prohibited discrimination, while others have alleged reprisal for exercise of appeal rights.

The second type of cases which the Special Counsel has brought before the Board has been requests for corrective action under 5 U.S.C. §1206(c)(I)(B). The only such action in which the Board issued a final determination was *In the*

Matter of Robert J. Frazier, et at. v. Benjamin R. Civiletti, Attorney General of the United States, et al. This case was the first major action involving the "whistleblower" provisions of the new Act. Those provisions make it a prohibited personnel practice to take reprisal against an employee for disclosing agency wrongdoing. The *Frazier* case involved four deputy marshals of the U.S. Marshals Service, an entity within the Justice Department. The four deputies alleged that they were being transferred from the Atlanta, Georgia office in reprisal for their complaints to Senator Herman E. Talmadge and Representative Wyche Fowler about problems in that office. They also claimed that the transfers were in reprisal for their involvement in equal employment opportunity activities.

The case first arose when representatives of the American Federation of Government Employees, AFL-CIO (AFGE) asked the Office of the Special Counsel to investigate the situation in Atlanta. The Special Counsel subsequently asked the Board to order a 15-day stay of the transfer actions. The stay was granted and then was extended for 30 days.

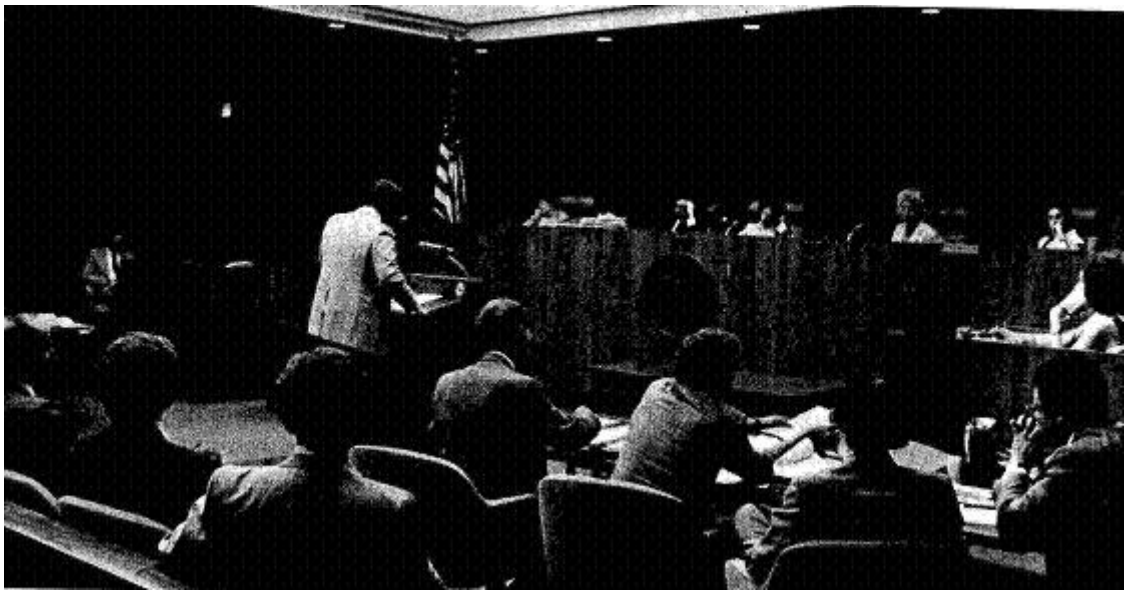
During this time, the Special Counsel finished his investigation and submitted a report to the Justice Department, concluding that the transfers were indeed based on prohibited personnel practices and recommending that the proposed reassignments be rescinded. When the Attorney General disagreed with the conclusions of the report and declined to comply with its recommendations, the Special Counsel filed a petition for corrective action with the Board.

In making its determination on the case, the Board decided several important procedural and substantive issues. First, it concluded that it was obligated to make its own findings of fact rather than being bound by those made by the Special Counsel. Second, it concluded that the burden of proof should rest with the Special Counsel and that, in conformance with existing case laws in comparable areas of administrative adjudication, the applicable standard was preponderance of the evidence. 'The Special Counsel," opined the Board, "as the entity asserting the need for corrective action, certainly is the proponent in the proceeding now before the Board, and properly must bear the burden of proof."

Substantively, the Board addressed the question of whether the proper nexus had been shown between the acts of the employee and the claimed reprisal by the agency. With regard to the whistleblower allegations, the Board held that "the proponent must demonstrate that a protected disclosure was made and that retaliation resulted." It concluded, however, that the Special Counsel had not shown that the individuals who ordered the deputies transferred did so because of their communications to Senator Talmadge and Representative Fowler.

With regard to the allegations that the transfers were in reprisal for equal employment opportunity activities, the Board found that such a nexus had been demonstrated as to one of the deputies who was:

> ... subjected to systematic threats and harassment in retaliation for his EEO activities from the time he became an EEO counselor in 1974 through his transfer in January of 1979 . . . (these activities] were known to and considered by the management review team in recommending his transfer.



As a result, the Board permitted the transfer of three of the deputies but not the fourth. It did, however, issue a wide-ranging order for corrective action in the case, seeking to remedy some of the problems in the Atlanta office that had been revealed during the hearing. This order required that:

- all Marshals Service employees be reminded of the statutory responsibility of the service to carry out equal employment responsibilities;
- an equal employment opportunity counselor be appointed for the Marshals' Atlanta office; and
- the Marshals Service file periodic reports with the Board on pending equal employment cases.

The case has been appealed to the United States Court of Appeals for the District of Columbia by AFGE, and is now pending, in that Court.

C. Review of Significant Activities and Regulations of OPM

Under 5 U.S.C. §1209(b) the Board is directed to review, analyze, and report annually on the significant actions of OPM for the purpose of determining whether they are in accord with merit system principles and free from prohibited personnel practices. During its first year, the Board has focused on developing the capacity to undertake this function. Activities beyond the planning stage have been minimal, however, because the resources to carry out this duty were not included in the Board's initial budget. However, plans to implement this duty are now under way, and assuming requested funding is received, the Board's affirmative review of OPM activities on a systematic basis will be a principal program element in calendar year 1980.

Despite the severe limitations imposed on its activities for calendar year 1979, however, the Board, through its review of OPM regulations, has been able to oversee one significant activity of that agency: implementation of the performance appraisal system under Chapter 43 of the Act.

That review, conducted pursuant to the Board's specific authority under 5 U.S.C. §1205(e) is for the purpose of determining whether the regulations of OPM, on their face or as implemented, require the commission of a prohibited personnel practice. The Board may conduct such a review on the basis of a petition from an interested party, a complaint from the Special Counsel, or on its own motion.

During the first year, one petition for such review was filed and granted by the Board. The case, known as *Thomas Wells, et al. v. Patricia Roberts Harris, Secretary of Health, Education and Welfare, et al.,* was initiated by AFGE, which petitioned the Board to review certain regulations of OPM and their implementation by the Social Security Administration (SSA). The regulations in question were those implementing Chapter 43 of the Act, entitled "Performance Appraisal." Prior to passage of the Act, adverse actions against employees required that the agency demonstrate that the action was for the "efficiency of the service" and that it was supported by a preponderance Of the evidence. To make it easier for agencies to act against inefficient employees, Congress changed the law to allow demotions or removals for "unacceptable performance" if supported by substantial evidence, a less stringent standard in law than the preponderance standard. In addition, the Congress outlined an elaborate procedure for evaluating the employee's performance known as a "performance appraisal system."

AFGE challenged the fact that both the OPM regulations and the SSA implementation of those regulations provided that action could be taken against an employee under the facilitated procedures prior to establishing a performance appraisal system. It asserted that development of the system was the *quid pro quo* for the new procedures. OPM and SSA disputed this contention alleging that

Congress had not restricted use of the new procedures to those employees who had been evaluated under the new system.

The Board ruled against OPM and SSA, holding that a full appraisal system must be in operation before an action could be taken against an employee under the less stringent standards. The Board rested its decision largely upon the legislative history of the Act, concluding that Congress intended a single interrelated framework to be used for promotions, pay increases and awards as well as adverse actions. Therefore, it was required that adverse actions under Chapter 43 of the Act must be based on an analysis of the employee's performance as provided under such appraisal systems.

However, the decision gave the agencies some flexibility in establishing performance standards and the major components of the appraisal system, noting that agencies were limited only by the requirement that objective criteria be used in formulating the standards. The Board also held that, until a full performance appraisal system is in place, adverse actions can be taken under Chapter 75 of the Act which would require the application of the old "efficiency of the service" and "preponderance of the evidence" standards.

D. Merit Systems Review and Studies (MSRS)

This office operates as the "conscience" of the civil service system. Through special studies of the Federal civil service and other merit systems in the executive branch, and through its review of the rules, regulations, and significant actions of OPM, it studies and reports to the President and the Congress on the "health" of the Federal merit systems, seeking to ensure that the principles of fairness embodied in the Civil Service Reform Act are being systematically applied.

Because MSRS lacked necessary staff and funds until near the close of the fiscal year, it was not fully operational for most of the year. However, it began to set its goal long before it obtained funding. Working relationships were developed with individuals who had a special interest in the equity and fairness of the civil service system. As a means of eliciting reaction to its plans and operating policy, MSRS invited leaders in the fields of public administration and personnel management evaluation to a late fall symposium. Prior to the meeting, MSRS staff had developed a concept paper that was distributed at the symposium. That paper set out five functional areas of MSRS activity: review of OPM's significant actions, agency investigations, quantitative studies, topical studies, and legislative recommendations. The paper also served as a focus of discussion and as a basis for the exchange of ideas.

As concepts emerged, it was clear that the very broad special studies mandated under the Act, combined with finite resources, dictated that MSRS approach studies and projects selectively. Topics for the studies must be chosen not only to produce studies which would be bias-free, definitive, and reliable indicators of Federal civil service problems, but which would also identify ways in which those problems could be addressed.

In developing its staff, MSRS sought multidisciplinary personnel; it received more than 400 applications from which seven professionals were selected. MSRS also developed an independent survey research and information processing capability, considered central to its ability to produce definitive studies.

As the fiscal year closed, MSRS had begun two studies--a quantitative study of CSRA appeals decisions rendered by the field offices in Fiscal Year 1979, and a Congressionally mandated study of sexual harassment.

In studying sexual harassment, MSRS is seeking to determine not only the extent of the problem in the Federal workplace, but also its impact on productivity. MSRS staff reviewed existing literature and surveys on the subject and found that no scientifically constructed survey on sexual harassment had ever been conducted within the Federal workplace. The survey which MSRS plans to send to 20,000 Federal employees in Fiscal Year 1980 will be the foundation for the first definitive study ever conducted on the subject.

In the first formative months, MSRS also sought a method for developing indicators of possible merit systems abuse. One approach has been to establish scientifically selected, term appointed, voluntary panels of Federal employees. The panels, queried on a regular basis on salient issues, would actively involve representatives from all the Federal work force in special study activities. Such panels would give MSRS the tools with which to address many subjects quickly and at relatively little expense. MSRS expects to begin using this approach in Fiscal Year 1980.

Relationship with FLRA, OPM, and EEOC

To coordinate and effectuate civil service reform, the Board has established formal and informal working relationships with FLRA, OPM, and EEOC. While recognizing the necessary independence of each agency, lines of communication have been set up not only to achieve a more consistent resolution of Federal workplace-related controversies, but also to appraise the statutory jurisdictional overlap and to monitor the parallel activity that exists between them. Very early in the Board's operations, Chairwoman Prokop met OPM Director, Alan K. Campbell, FLRA Chairman Ronald W. Haughton, and EEOC Chair, Eleanor Holmes Norton, to establish a dialogue in areas of common concern. Since then,

representatives of the Board and the other agencies have conferred numerous times on issues of mutual interest.

The Board has coordinated its efforts with those of the FLRA on a continuing basis. At the staff level it has held meetings with FLRA personnel to discuss areas of significant activity by both agencies. While these efforts have been primarily of an informal nature, it is anticipated that the Board's interaction with FLRA will by necessity increase as issues raised before the Board interrelate with and have implications for labor-management relations.

A similar relationship has been developed with OPM. Such interaction provides due recognition of the fact that the Board is called upon to rule on the validity of certain actions of OPM. However, it also implements the statutory provisions which call for a working relationship between the two entities.

For example, as required under the Act, the Board must provide OPM copies of all its decisions, including the initial decisions rendered in the field offices. Similarly, the Board is required to notify OPM when the interpretation of a law, rule or regulation under its jurisdiction is at issue in a proceeding. It must also work with OPM to obtain information for its studies and keep it apprised of certain other actions it takes. In a less formal context the Board has sought to establish ongoing staff contact with OPM for purposes of training Board personnel in OPM's significant areas of activity.

The Board has also worked closely with EEOC in implementing the respective duties allocated to each entity under the Act. This coordination became necessary very early in the year in order to implement a transfer of adjudicatory functions from the Civil Service Commission to the EEOC pursuant to Reorganization Plan No. 1 of 1978. That transfer required that certain cases previously adjudicated by the Civil Service Commission be turned over to the EEOC. However, many of these cases had already been substantially processed by the Civil Service Commission and to transfer them midstream would have been unfair to the parties and would have caused a total loss of the work already completed. Accordingly, through an agreement worked out by the two agencies, on March 27, 1979, EEOC delegated authority to issue decisions on these cases (approximately 240 in number) to the Board. In a similar vein, some of the backlogged cases raised matters which were appealable to the Board under the Reform Act. On August 28, 1979, the two agencies, by joint regulation, created a delegation of authority from EEOC to MSPB to issue preliminary decisions in these cases. This has substantially reduced the adjudicative logjam and permitted EEOC to concentrate its efforts on resolving cases involving issues not cognizable by the Board.

Looking to the future, arrangements are being worked out which will permit the establishment of procedures for the two agencies to process "mixed" cases i.e., those cases where discrimination is alleged as a defense to an adverse action. In these cases the Act vests the Board with initial decision-making responsibility over claims of discrimination raised in appeals, however, the employee may appeal the Board's decision to the EEOC or to the district court.

The Board has worked informally at the staff level to coordinate all regulatory efforts in this area with EEOC prior to publishing for comment, and EEOC has reciprocated.

Conclusion

In its first year of existence, the work of the Board has been largely dedicated towards meeting the three objectives established early in its operations: to implement a strong organizational structure; to obtain adequate resources to carry out its statutory duties; and to develop a regulatory framework for processing cases.

For the most part, each of these goals has been achieved. Moreover, the Board has had the opportunity to interpret and apply many important provisions of the Act, resulting in the issuance of several significant precedential decisions. For these reasons, the Board views this first year, characterized by productivity and accomplishment, to be a most successful one for this new agency.

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.

Endnotes:

1The Board's field offices are located in Philadelphia, Boston, New York City, Atlanta, Denver, Dallas, Chicago, St. Louis, San Francisco, Seattle, and the Washington, D.C. area.

2 Approximately 950 of these cases were filed within the last few months of the year. The time limit for processing will not expire until some time in 1980, accordingly, they are not considered in this calculation.