

**United States**  
**Merit Systems Protection Board**



**Annual Report for FY 2014**

**May 29, 2015**

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## Foreword

In accordance with section 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this annual report on its significant actions during fiscal year (FY) 2014.

We invite customers and stakeholders to send comments to improve the MSPB Annual Report to:

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U.S. Merit Systems Protection Board  
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Email: [mspb@mspb.gov](mailto:mspb@mspb.gov) (to the attention of the PIO)  
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Information about MSPB's FY 2014 program performance results (as required under the Government Performance and Results Act Modernization Act) is available in the Annual Performance Report and Annual Performance Plan (APR-APP) for FY 2014-2016. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR). MSPB Annual Reports, AFRs, APR-APPs, and Strategic Plans are posted on MSPB's website, [www.mspb.gov](http://www.mspb.gov), when they are released.

Go to [www.mspb.gov](http://www.mspb.gov) to learn more about MSPB's work, sign up for our adjudication or studies listservs, follow us on twitter([@USMSPB](https://twitter.com/USMSPB)), or download the MSPB app (for Android or iPhone).

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## Table of Contents

	Page
<b>Message from the Chairman .....</b>	<b>1</b>
<b>Introduction.....</b>	<b>3</b>
About MSPB.....	3
MSPB's Mission and Vision .....	3
Board Members .....	4
MSPB Offices and Their Functions.....	5
MSPB Organizational Chart.....	8
<b>Fiscal Year 2014 in Review .....</b>	<b>9</b>
Adjudication .....	9
MSPB Regulations.....	10
Merit Systems Studies.....	10
The Significant Actions of the Office of Personnel Management.....	11
Outreach and Merit Systems Education.....	11
International Activities.....	11
Legislative and Congressional Relations Activity.....	12
Internal Management Activities and Challenges .....	12
Significant External Trends and Issues.....	14
<b>Case Processing Statistics for FY 2014 .....</b>	<b>17</b>
Summary of Cases Decided by MSPB.....	17
Cases Processed in the Regional and Field Offices .....	18
Cases Processed at Headquarters.....	28
<b>Significant Board Decisions and Court Opinions Issued in FY 2014 .....</b>	<b>35</b>
Significant Board Decisions Issued in Fiscal Year 2014.....	35
Significant Opinions Issued by the U.S. Court of Appeals for the Federal Circuit.....	45
Significant Board Decisions and Court Opinions Issued in early FY 2015.....	45
<b>Summary of Merit Systems Studies Activity in FY 2014 .....</b>	<b>47</b>
Summaries of Reports Released in FY 2014.....	48
Summaries of Reports Released in Early FY 2015 .....	49
FY 2014 <i>Issues of Merit</i> Newsletter Topics .....	49
Updating the Merit Systems Studies Research Agenda for FY 2015 - 2018.....	50
2015 Merit Principles Survey.....	50
MSPB Cloud-based Survey Platform .....	50
<b>Significant Actions of the U.S. Office of Personnel Management in FY 2014 .....</b>	<b>51</b>
<b>Financial Summary.....</b>	<b>57</b>

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# U.S. MERIT SYSTEMS PROTECTION BOARD

## FISCAL YEAR 2014 ANNUAL REPORT

### MESSAGE FROM THE CHAIRMAN

I am pleased to submit this Annual Report of the significant actions of the U.S. Merit Systems Protection Board (MSPB) in FY 2014. As an independent, quasi-judicial agency, MSPB's mission is to protect the Federal Merit Systems Principles, and ensure a workforce free of Prohibited Personnel Practices (PPPs).

As a third party adjudicator of appeals, MSPB reviews appeals based on law and legal precedent and ensures fairness and due process in a more efficient manner than can be accomplished separately by every Federal agency. In FY 2014, MSPB issued a record-setting 17,466 decisions, an unprecedented 130 percent increase in the number of appeals issued in FY 2013. The significant increase in the number of decisions issued was a direct result of the filing of over 30,000 furlough appeals in FY 2013. I also am proud to report that by the end of April 2015, MSPB had issued decisions in almost 70 percent of initial furlough appeals, and in over 43 percent of the petitions for review (PFRs) of furlough appeals filed with the Board at headquarters.

In addition to adjudicating appeals, MSPB completed a multi-year effort to revise and update its adjudication regulations. We also continued to provide alternative dispute resolution services that give the parties a more active role in reaching a mutually acceptable resolution of their differences than what may be achievable through adjudication on the merits. For example, our mediation appeals program (MAP) maintained its settlement rate of over 60%, even though fewer MAP cases closed in FY 2014 due to the resources needed to process furlough cases.

MSPB's merit systems studies provide recommendations based on objective scientific research that improve the practice of merit in the workplace, reduce PPPs, and improve employee engagement. In FY 2014, MSPB issued study reports on topics including the role of training and experience in hiring, understanding perceptions of favoritism, sexual orientation in the workplace, and practices and perceptions in veteran hiring. In addition, MSPB made significant progress on completing its studies research agenda for FY 2015-2018. Summaries of these reports, two reports issued in early FY 2015 on veterans' employment redress laws and fair and open competition, and other studies activities are included in this Annual Report.

Implementation of the Veterans Access, Choice, and Accountability Act of 2014 has already affected MSPB. This law gives the Secretary of the Department of Veterans Affairs (VA) more flexibility in removing or demoting VA senior executives (SES) and changes the way MSPB processes VA SES appeals. The law stipulates that the MSPB Administrative Judge (AJ) must issue a decision on a VA SES case within 21 days of the filing of the appeal with MSPB. In addition, the decision issued by the AJ is final, with no additional appeal or review permitted by the full MSPB Board at headquarters, or by the Courts, a review right afforded

to other Federal executives and employees guaranteed by Federal statute and legal precedent. In our experience, the MSPB AJs assigned to the VA SES appeals we have received so far, and a team of other MSPB legal staff members, have had to delay other adjudication work in order to meet the 21-day deadline.

Despite our successful year, MSPB faces external challenges including smaller Federal budgets, the return of sequestration, and increasing Federal retirements that may increase the number of appeals we receive in FY 2016 and beyond. These factors also emphasize the importance of our merit systems studies and OPM review functions in order to ensure that the workforce continues to be managed under the merit principles and free from PPPs.

Internally, 20 percent of MSPB employees and 30 percent of our AJs are eligible to retire in the next two years. We are thankful that Congress recognized our need for additional resources in FY 2014 and FY 2015 with an increase in our appropriations, which allowed us to increase the number of on-board employees at the end of FY 2014 by 12 percent. These resources were essential to our ability to adjudicate furlough and non-furlough cases in an efficient manner, and simultaneously perform our other statutory and support functions. In addition, we bid a fond farewell to Vice Chairman Anne Wagner in February 2015, and the President has not announced a nominee for the third Board Member.

The overwhelming influx of furlough appeals required considerable changes to our processes, our IT systems and infrastructure, and made it clear that we need to shift from paper to electronic adjudication and records management. This shift will provide significant efficiencies in the long-run, but will require initial and sustained investment to ensure a successful transition. We also need a secure, cloud-based survey platform to support our merit systems studies and customer service survey needs effectively and efficiently. MSPB must be able to sustain its human and budgetary resources in order to perform its work in the future.

Our success in FY 2014 required the combined efforts of every MSPB office and employee. Their expertise and dedication is without equal and my fellow Board Members and I are proud to work with them to achieve our mission.



Susan Tsui Grundmann,  
Chairman

## INTRODUCTION

This U.S. Merit Systems Protection Board (MSPB) Annual Report for FY 2014 includes summaries of the most significant Board decisions and relevant Court opinions, case processing statistics, summaries of MSPB's merit systems study reports and *Issues of Merit (IoM)* newsletter topics, and summaries of the significant actions of the Office of Personnel Management (OPM).<sup>1</sup> The report also contains summaries of the Board's financial status, outreach and merit systems education activities, legislative and congressional relations activities, international activities, internal management issues, and the external factors that affect MSPB's work. When there have been significant activities or events since the end of FY 2014, the report includes updated information as a service to MSPB's stakeholders.

### About MSPB

MSPB was created by the Civil Service Reform Act of 1978 (CSRA) to carry on the function of the Civil Service Commission to adjudicate employee appeals thus providing due process to employees and agencies. The CSRA authorized MSPB to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses, and enforce compliance with final MSPB decisions. MSPB also was granted broad new authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues. In addition, MSPB was given the authority and responsibility to review and act on OPM's regulations and review and report on OPM's significant actions.<sup>2</sup> The CSRA also codified for the first time the values of the Federal merit systems as the merit system principles (MSPs) and delineated specific actions and practices as the prohibited personnel practices (PPPs) that were proscribed because they were contrary to merit system values.<sup>3</sup> Since the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.<sup>4</sup>

### MSPB's Mission and Vision

#### Mission:

*To Protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices.*

#### Vision:

*A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people.*

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<sup>1</sup> The review of OPM significant actions conducted under 5 U.S.C. § 1206 is not, and should not be construed as, an advisory opinion (which is prohibited under 5 U.S.C. § 1204(h)).

<sup>2</sup> Pursuant to 5 U.S.C. § 1204(f), MSPB may on its own motion, or at the request of other parties, review and declare invalid OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a prohibited personnel practice. Pursuant to 5 U.S.C. § 1206, MSPB also is responsible for annually reviewing and reporting on OPM's significant actions.

<sup>3</sup> Title 5 U.S.C. § 2301 and § 2302, respectively.

<sup>4</sup> Including the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act (WPA), Pub. Law. No. 101-12, 103 Stat. 16; The Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. Law 112-199; The Veterans Access, Choice and Accountability Act of 2014, Pub. Law 113-146; 5 U.S.C. § 4304; 5 U.S.C. § 7513; and those set out at 5 C.F.R. § 1201.3.

## Board Members

The bipartisan Board consists of the Chairman, Vice Chairman, and Board Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, nonrenewable 7-year terms.



### **SUSAN TSUI GRUNDMANN**

#### **Chairman**

**November 2009 to Present**

Susan Tsui Grundmann was nominated by President Barack Obama to serve as a Member and Chairman of the U.S. Merit Systems Protection Board on July 31, 2009. She was confirmed by the U.S. Senate on November 5, 2009, and sworn in on November 12, 2009. Chairman Grundmann's term expires on March 1, 2016.

Previously, Ms. Grundmann served as General Counsel to the National Federation of Federal Employees (NFFE), which represents 100,000 Federal workers nationwide and is affiliated with the International Association of Machinist and Aerospace Workers. At NFFE, she successfully litigated cases in the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia. In 2004, Ms. Grundmann represented NFFE and other labor unions in the statutory "meet and confer" process with officials from the Department of Homeland Security (DHS) and OPM, which sought agreement on how to proceed with new DHS personnel regulations. She represented NFFE and the United Department of Defense Workers Coalition, consisting of 36 labor unions, and served on the Coalition's litigation team in a coordinated response to proposed personnel changes at the Department of Defense (DoD). In addition to DoD employees, Ms. Grundmann represented employees in the Forest Service, Department of Agriculture, Passport Service, Veterans Administration, General Services Administration, and some 25 additional Federal agencies. From 2003 to 2009, she was a regular instructor on Federal sector labor and employment law at the William W. Winpisinger Education Center in Placid Harbor, Maryland. Prior to joining NFFE, Ms. Grundmann served as General Counsel to the National Air Traffic Controllers Association. She began her legal career as a law clerk to the judges of the Nineteenth Judicial Circuit of Virginia, and later worked in both private practice and at the Sheet Metal Workers National Pension Fund. Chairman Grundmann earned her undergraduate degree at American University and her law degree at Georgetown University Law Center.



### **ANNE M. WAGNER**

#### **Vice Chairman**

**November 2009 to February 28, 2015**

Anne M. Wagner was nominated by President Barack Obama to serve as a Member of the U.S. Merit Systems Protection Board with the designation of Vice Chairman on July 31, 2009. Her nomination was confirmed by the U.S. Senate on November 5, 2009, and she was sworn in November 12, 2009. Although Ms. Wagner's term expired on March 1, 2014, she continued to serve in her position until March 1, 2015 in accordance with MSPB's governing statute, which specifies that a member may remain on the Board for a period of one additional year, or until a successor is confirmed, whichever occurs first.

Ms. Wagner came to the Merit Systems Protection Board after serving as General Counsel of the Personnel Appeals Board of the U.S. Government Accountability Office (GAO). Prior to that, Ms. Wagner was appointed by the U.S. Comptroller General to serve a five-year statutory term as a Member of the GAO Personnel Appeals Board. Ms. Wagner began her career as a staff attorney in the Office of the General Counsel of the General Services Administration, where she primarily handled labor and employment issues. From there, she went on to become an Assistant General Counsel for the American Federation of Government Employees (AFGE), AFL-CIO, the largest Federal sector labor organization representing more than 600,000 Federal and District of Columbia government employees. In her nearly 20 years with AFGE, she led precedent-setting litigation and handled cases arising under the full array of laws governing Federal employment. Ms. Wagner graduated from the University of Notre Dame and received her J.D. from the George Washington University, National Law Center. She is admitted to practice law in the District of Columbia, Maryland, and Illinois as well as before various Federal Courts, including the U.S. Supreme Court.



**MARK A. ROBBINS**  
**Member**  
**May 2012 to Present**

Mark A. Robbins was nominated by President Barack Obama to serve as a Member of the Merit Systems Protection Board on December 5, 2011. He was confirmed by the U.S. Senate on April 26, 2012. Mr. Robbins' term expires on March 1, 2018.

At the time of his nomination, Mr. Robbins was the General Counsel of the U.S. Election Assistance Commission. In that capacity, Mr. Robbins worked to certify elections systems and maintain information on the best practices of conducting elections. He previously served as a Senior Rule of Law Advisor for the State Department in Babil Province, Iraq. Mr. Robbins also served as Executive Director of the White House Privacy and Civil Liberties Oversight Board between 2006 and 2008 and as General Counsel of the Office of Personnel Management from 2001 to 2006. He worked in private practice as a litigation attorney in Los Angeles, California, between 1988 and 2000, and in the White House Office of Presidential Personnel from 1984 to 1988. He began his career as a legislative assistant to two members of the U.S. House of Representatives, where, among other issues, he covered the Federal civil service and human resources management. Mr. Robbins earned both his undergraduate and law degrees from George Washington University. He is a member of the California and District of Columbia bars. In 2013, in recognition of his extensive professional involvement and continued leadership in public administration, Mr. Robbins was elected as a Fellow of the National Academy of Public Administration.

## **MSPB Offices and Their Functions**

MSPB is headquartered in Washington, D.C. and has eight regional and field offices located throughout the United States. The agency is currently authorized to employ 226 Full-time Equivalents (FTEs) to conduct and support its statutory duties. Of note, MSPB appropriations supported an increase in the number of positions on-board at the end of FY 2014 to 219, a 12 percent increase over the 196 positions on-board at the end of FY 2013.

The **Board Members** adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer. The Office Directors report to the Chairman through the **Executive Director**.

The **Office of the Administrative Law Judge (ALJ)** adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. The functions of this office currently are performed under interagency agreements by ALJs at the Federal Trade Commission (FTC), the Coast Guard, and the Environmental Protection Agency (EPA).

The **Office of Appeals Counsel** conducts legal research and prepares proposed decisions for the Board to consider for cases in which a party files a Petition for Review (PFR) of an initial decision issued by an Administrative Judge (AJ) and in most other cases to be decided by the Board. The office prepares proposed decisions on interlocutory appeals of AJs' rulings, makes recommendations on reopening cases on the Board's own motion, and provides research, policy memoranda, and advice on legal issues to the Board.

The **Office of the Clerk of the Board** receives and processes cases filed at MSPB headquarters (HQ), rules on certain procedural matters, and issues Board decisions and orders. It serves as MSPB's public information center, coordinates media relations, operates MSPB's library and on-line information services, and administers the Freedom of Information Act (FOIA) and Privacy Act programs. It also certifies official records to the Courts and Federal administrative agencies, and manages MSPB's records systems, website content, and the Government in the Sunshine Act program.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates MSPB's equal employment opportunity programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB's managers and supervisors.

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

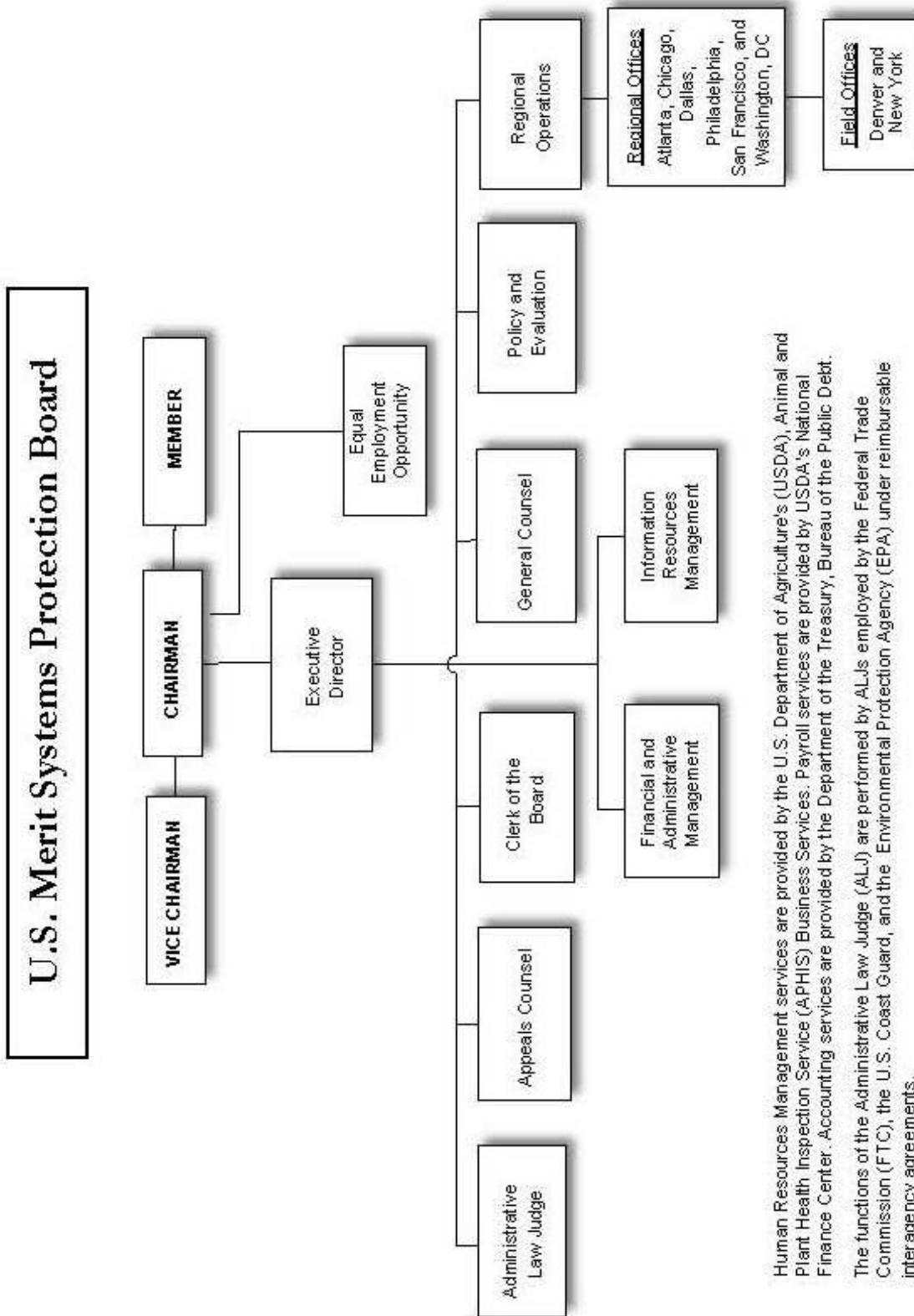
The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for the Board to enforce a final MSPB decision or order, in response to requests to review OPM regulations, and for other assigned cases; conducts the agency's PFR settlement program; and coordinates the agency's legislative policy and congressional relations functions. The office also drafts regulations, conducts MSPB's ethics program, performs the Inspector General function, and plans and directs audits and investigations.

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

The **Office of Policy and Evaluation** carries out MSPB's statutory responsibility to conduct special studies of the civil service and other Federal merit systems. Reports of these studies are sent to the President and the Congress and are distributed to a national audience. The office provides information and advice to Federal agencies on issues that have been the subject of MSPB studies. The office also carries out MSPB's statutory responsibility to review and report on the significant actions of OPM. The office conducts special projects and program evaluations for the agency and has responsibility for coordinating MSPB's performance planning and reporting functions required by the Government Performance and Results Act Modernization Act of 2010 (GPRAMA).

The **Office of Regional Operations** oversees the agency's six regional and two field offices, which receive and process appeals and related cases. It also manages MSPB's Mediation Appeals Program (MAP). AJs in the regional and field offices are responsible for adjudicating assigned cases and for issuing fair, well-reasoned, and timely initial decisions.

# MSPB Organizational Chart



Human Resources Management services are provided by the U.S. Department of Agriculture's (USDA), Animal and Plant Health Inspection Service (APHIS) Business Services. Payroll services are provided by USDA's National Finance Center. Accounting services are provided by the Department of the Treasury, Bureau of the Public Debt. The functions of the Administrative Law Judge (ALJ) are performed by ALJs employed by the Federal Trade Commission (FTC), the U.S. Coast Guard, and the Environmental Protection Agency (EPA) under reimbursable interagency agreements.

## FISCAL YEAR 2014 IN REVIEW

### Adjudication

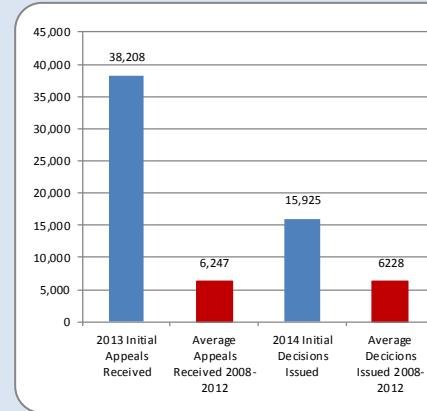
FY 2014 was another significant year for MSPB. Still reeling from over 32,000 appeals filed in FY 2013 by employees furloughed due to budget sequestration, MSPB issued 17,466 decisions in FY 2014, more than a 130% increase over the total number of decisions issued in FY 2013. MSPB's AJs issued 16,354 initial decisions, including 11,109 initial decisions on individual furlough appeals. To put this into context, Figure 1.1 shows the number of initial appeals received in FY 2013, and the number of initial decisions issued in FY 2014 compared to the averages for 2008-2012, respectively. MSPB's Board Members issued 1,101 decisions including 876 decisions on PFRs of initial decisions.<sup>5</sup>

After docketing all of the furlough appeals in FY 2013, MSPB began adjudicating initial furlough appeals in early FY 2014. By the end of FY 2014, MSPB had adjudicated just over 11,100 initial furlough appeals, approximately 34 percent of the total received. MSPB is proud to report that through the end of April 2015, MSPB has issued decisions in over 22,500 initial furlough appeals, nearly 70 percent of the total. Of those processed through April 2015 about 20 percent were dismissed for a variety of reasons including for lack of jurisdiction or timeliness, withdrawn, cancelled, or dismissed without prejudice. Of those dismissed, about 70 percent were withdrawn by appellants or cancelled due to failure to prosecute. Of the appeals not dismissed, over 99 percent were adjudicated on the merits—meaning that less than 1 percent of furlough appeals were settled—a far smaller portion than is normally resolved through settlement. Of the appeals adjudicated on the merits, 99.5 percent of the initial decisions affirmed the furlough action taken by the agency and 0.5 percent were reversed on the merits.

As of the end of April 2015, over 2,200 PFRs of individual furlough initial decisions had been filed with MSPB HQ, and almost 950 decisions had been issued on PFRs of furlough cases. Processing furlough PFRs present a unique set of challenges in that there can be multiple permutations in their forms. For example, a designated representative may file a single PFR on behalf of all or some appellants from a particular consolidation. Conversely, only 1 or 2 pro se appellants from a consolidation may file a PFR immediately after the issuance of the initial decision. Initial processing of furlough PFRs takes considerable legal review to resolve these issues and determine the best strategy for efficient and effective processing.

Statistical information on MSPB's case processing activity is contained later in this report in the section entitled "[Case Processing Statistics for FY 2014](#)," starting on page 17. For initial appeals decisions, overall data are presented both including and not including furlough appeals. Summaries of significant MSPB decisions, and opinions issued by the Court of Appeals for the Federal Circuit

Figure 1.1: Comparative Data on Number of Initial Appeals Received and Processed

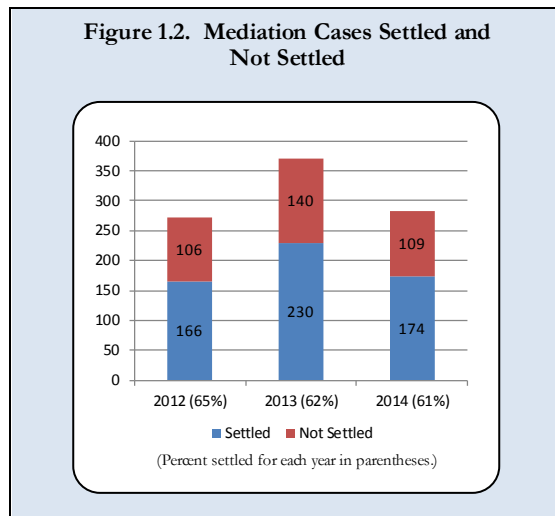


(Not including addendum appeals.)

<sup>5</sup> As a result of the Government Shutdown in October 2013, MSPB was [closed](#) for business, and the majority of MSPB employees were furloughed, with the exception of the three Board Members and very limited emergency staff. This Government Shutdown, on the heels of receiving tens of thousands of furlough appeals, delayed the final resolution of cases filed with MSPB.

and the U.S. Supreme Court are included in the section entitled “[Significant Board Decisions and Court Opinions Issued in FY 2014](#),” starting on page 35. This section also includes summaries of selected significant Board decisions and Court opinions issued in early FY 2015 for the convenience of MSPB’s stakeholders.

MSPB continued to provide alternative dispute resolution options to its customers including the Mediation Appeals Program (MAP). This program, a [description](#) of which is provided on MSPB’s website, was started as a pilot program in 2002 and has grown to include several hundred cases per year. The program provides an opportunity for the parties, with the assistance of a mediator who will not be involved in the adjudicating the case, to craft a resolution of their dispute that best meets their needs and that may encompass outcomes beyond the limits of possible outcomes available to the AJ under statute. Although fewer mediation cases were closed in FY 2014 due to the resources needed to process furlough cases, the success rate of the program continues to be strong. Figure 1.2 shows the number of closed mediation cases settled and not settled each year, as well as the mediation success rate (settlement reached as an immediate result of mediation, or settled after the case returns to adjudication).



For the first time since 2005, the Board participated in a Special Panel with the EEOC to adjudicate a mixed case involving both merit system and equal employment opportunity issues.<sup>6</sup> The decision issued by the Special Panel, *Alvara v. Department of Homeland Security*, is summarized in the section on [Significant Board Decisions](#).

## MSPB Regulations

In November 2013, MSPB gave public notice that began the formal rule-making process to revise its regulations related to how jurisdiction is established over Board appeals. On April 3, 2014, after notice and comment, MSPB published a proposed rule to amend its jurisdiction regulations. The final [regulations](#) covering our jurisdiction were published on January 28, 2015. The publication of this final regulation concerning MSPB’s jurisdiction concludes a process of overhauling MSPB’s regulations that began in 2011.

## Merit Systems Studies

In FY 2014, MSPB approved and published four new merit system study reports, issued three editions of its *Issues of Merit (IoM)* newsletter, and made considerable progress in updating its research agenda for FY 2015-2018. Summaries of FY 2014 MSPB merit systems study reports, *IoM* newsletter topics, and the process used to develop the new research agenda are included in this report in the section

<sup>6</sup> In a case appealable to the Board that involves an allegation of discrimination (a "mixed case"), an appellant may ask the EEOC to review the Board's final decision on the discrimination issue. If the EEOC disagrees with the Board's decision on the discrimination issue, the case is returned to Board. If the Board does not adopt the EEOC decision, then the case is referred to a Special Panel made up of a Chairman, who is appointed by the President, one member of the Board, and one EEOC commissioner. The Special Panel issues the final decision in the case, which then may be appealed to an appropriate U.S. district court. See 5 U.S.C. 7702; 5 C.F.R. 1201.171-.175.

entitled “[Summary of Merit Systems Studies Activity in FY 2014](#)” beginning on page 47. For the convenience of our stakeholders, that section also includes summaries of two merit systems study reports approved and issued in early FY 2015.

## **The Significant Actions of the Office of Personnel Management**

In accordance with 5 U.S.C. § 1206, MSPB is responsible for reviewing the significant actions of OPM to ensure that these actions conform with MSPs and do not result in PPPs. In FY 2014, MSPB reviewed OPM’s new significant actions including implementation of the Hatch Act Modernization Act and phased retirement, Governmentwide strategies on gender pay equality and veterans recruitment and employment. MSPB updated OPM’s progress on significant actions summarized in previous annual reports. More information about MSPB’s review of OPM significant actions is included in that [section](#) of this report, beginning on page 51.

## **Outreach and Merit Systems Education**

MSPB’s education and outreach efforts are designed to enhance the understanding of merit, ensure that MSPs are applied consistently throughout the Government, reduce the likelihood of PPPs, promote better management practices, and strengthen employee engagement. This in turn helps to improve employee and organizational performance, improve service to the American people, and provide value to the taxpayer.

In FY 2014, MSPB staff conducted over 100 outreach events with customers, stakeholders, and sister agencies on the merit systems, MSPs, PPPs, MSPB’s adjudication processes and decisions, and its studies’ findings and recommendations. For example, MSPB staff presented on MSPB procedures and legal precedent at the Federal Dispute Resolution Conference and to the Society of Federal Labor and Employee Relations Professionals. MSPB staff also presented merit systems study findings and recommendations to the Society for Industrial and Organizational Psychology and the American Psychological Association. Presentations were also made to over 12 law schools and Bar Associations, nine good government, management, union, and affinity groups, and over 25 Federal agencies. Several presentations by MSPB staff resulted in continued education credits for participants. MSPB staff, including the Chairman, were also part of nine (9) interviews with Federal News Radio on issues ranging from legal issues to results from MSPB studies.

MSPB posted several educational documents on its website including information about the new VA SES legislation (see below), guidance on pro bono representation, the merit systems studies research agenda, updating MSPB’s jurisdiction regulations, and furlough appeals. In FY 2014, MSPB had over 634,000 visits to web pages related to training and education. The MSP and PPP of the month continue to be among the most visited webpages and the most accessed documents on MSPB’s website.

## **International Activities**

During FY 2014, MSPB hosted visitors from other countries to educate them on the organization of the Federal civil service, MSPB’s structure and functions, and its role in fostering adherence to the MSPs and protecting employees and applicants from PPPs. MSPB staff met with a delegation from Indonesia to discuss that country’s efforts at government reform, a delegation from China to discuss performance management, promotion, supervision, and discipline, and a delegation from Japan to discuss the employment and advancement of women in the Federal workforce. MSPB staff also provided information to researchers in the Philippines and Korea to assist them in their work.

## Legislative and Congressional Relations Activity

**Veterans Access, Choice, and Accountability Act of 2014.** MSPB was impacted by significant legislation in FY 2014. The Veterans Access, Choice, and Accountability Act of 2014 (H.R. 3230) was signed into law on August 7, 2014 (Public Law No: 113-146). Section 707 of the Act made significant changes to existing law by allowing the Secretary of Veterans Affairs greater flexibility in terminating or demoting Senior Executive service and changing the manner in which appeals of those actions are handled by MSPB.

As it related to MSPB, the new law provides that: (1) removed or demoted SES employees must appeal to the MSPB within 7 days of the removal/demotion; (2) MSPB AJs must issue a decision on the appeal within 21 days of receipt of the appeal; (3) the Secretary's removal/demotion decision is final if the MSPB AJ fails to issue a decision on the appeal within 21 days; and (4) the decision of the MSPB AJ is final and no appeal to the Board Members or Court is permitted.

Notably, MSPB Board Members sent a [letter](#) to the President expressing concerns about the constitutionality of removing Board Members from the adjudication of appeals under section 707 of the new law. On August 21, 2014, MSPB also issued a [final rule](#) amending its rules of practice and procedure (5 CFR Part 1210) to conform to the changes in the law. Additional information about the VA legislation related to managing its SES employees is available on the MSPB website.

**Whistleblower Protection Enhancement Act (WPEA) All Circuit Review.** The All Circuit Review Extension Act (H.R. 4197) was signed into law on September 26, 2014 (Public Law No. 113-170). This law extends the period (from 2 to 5 years) that appeals of MSPB whistleblower decisions can be brought in any Federal circuit court as provided in the WPEA.

**MSPB Chairman's Testimony of Whistleblower Rights.** On September 9, 2014, Chairman Grundmann testified at a hearing convened by the House Committee on Oversight and Government Reform Subcommittee on Federal Workforce, U.S. Postal Service, and the Census entitled: Examining the Administration's Treatment of Whistleblowers. The Chairman's testimony can be accessed at: <http://oversight.house.gov/hearings/>.

## Internal Management Activities and Challenges

**Human Capital.** In FY 2014, Congress recognized MSPB's financial needs as it relates to adjudicating the historic level of appeals due to the sequestration furloughs from FY 2013. As a result, MSPB was able to fill 41 permanent positions, including 35 adjudication positions. Being able to fill long-vacant positions has allowed MSPB to more efficiently process and adjudicate the massive number of furlough appeals. As such, as of April 2015, MSPB has adjudicated over two-thirds of individual furlough initial appeals.

However, over 20 percent of MSPB employees, including almost 30 percent of MSPB AJs, are eligible to retire in the next two years. Inasmuch as it takes 2-3 years for adjudication professionals to reach journey-level performance, it is important that MSPB be able to, at a minimum, maintain its level of FTE in the adjudication positions.

During FY 2014 and early FY 2015, the Chairman appointed individuals to fill vacant positions as Regional Director/Chief Administrative Judge in three regional offices: Dallas, San Francisco and Chicago. Additionally, the Chairman appointed the Director of the Office of Policy and Evaluation.

As mentioned earlier in this report, Vice Chairman Anne Wagner's appointment expired on February 28, 2015. MSPB HQ will continue to issue PFR and original jurisdiction decisions voted on by Chairman Grundmann and Board Member Robbins. President Obama has not announced a nominee for the third Board Member.

**MSPB Studies Program and Cloud-based Survey Platform.** MSPB made progress in FY 2014 on obtaining a secure, cloud-based survey platform to conduct research and customer service surveys. However, MSPB's ability to improve the collection of important customer service information and to conduct program evaluation currently is competing for fewer existing resources. Resource limits also affect MSPB's ability to maintain its review of OPM rules, regulations, and significant actions and to conduct outreach, especially if it involves travel or extensive preparation or staff time, which takes the participants away from their other work.

**Information Technology and e-Adjudication.** The arrival of tens of thousands of furlough appeals at MSPB in FY 2013 and the continued processing/adjudication of these appeals throughout FY 2014 and into FY 2015 has highlighted the need to make significant changes and improvements to MSPB's IT infrastructure. Again, in MSPB's FY 2014, MSPB is grateful that Congress recognized the impact the record level of furlough appeals had on our IT system.

In addition to making major improvements to our IT infrastructure, the furlough appeals also highlighted the need for MSPB to shift from paper to electronic processing of appeals (internally and externally) and to electronic records management. In FY 2014, MSPB began significant work on transitioning to 100 percent electronic adjudication (e-Adjudication) and electronic records management. This project will yield important potential improvements in efficiency, but will require a significant and sustained initial investment of resources.

Transitioning to 100 percent e-Adjudication will allow MSPB to process cases more efficiently and comply with Federal records management directives requiring that agencies convert records to electronic format. MSPB needs to identify, procure, and implement additional systems, components, and processes and integrate them with our existing systems to convert to e-adjudication as well as develop and document that process and related procedures, and provide the necessary training to our staff. In FY 2014, MSPB issued a Request for Information (RFI) seeking initial information from the vendor community and is currently reviewing the responses received from the RFI. The e-Adjudication project will be a multi-year effort and the total costs are unknown at this point.

**2014 Federal Employee Viewpoint Survey.** MSPB employees continue to report high levels of commitment to the agency's mission. However, employee ratings from the Federal Employee Viewpoint Surveys (FEVS) on having the resources needed to accomplish the mission dropped significantly in 2012 and 2013. In FY 2014, the proportion of employees who *agreed* they had the resources they needed rose. However, it was still lower than the proportion who *disagreed* that they had the resources they needed. MSPB will continue to focus on strong internal management, communication, and other strategies to mitigate the impact of fewer resources. In fact, results from MSPB's Internal Survey administered in September and October showed improvements in most areas of communication and on employee perceptions of inclusion issues. However, absent stable funding, these strategies will not be sufficient to address current and anticipated resource issues, process the thousands of furlough appeals remaining from FY 2013, and continue to perform its other statutory functions effectively and efficiently.

## Significant External Trends and Issues

The most significant external issues affecting MSPB's ability to carry out its mission to protect the Federal merit systems include past budget reductions and the expected return of sequestration in FY 2016; increasing retirements of Federal employees; and changes in law and jurisdiction. MSPB is committed to performing its functions to the best of its ability and to justifying and requesting the resources necessary to carry out its responsibilities. Thankfully, recent enacted appropriations for MSPB have allowed MSPB to rebuild its workforce, address mission requirements, and prepare for the future. Stable and timely resources in future years will be required to allow MSPB to continue to perform its statutory functions effectively and efficiently.

### **Budget reductions, sequestration, and related consequences such as furlough appeals.**

Budget sequestration in FY 2013 has had lasting effects on MSPB. In FY 2013, sequestration led to the filing of in over 32,000 furlough appeals with MSPB, a workload that MSPB is still processing in FY 2015. Through FY 2014, MSPB made additional improvements and changes to our IT infrastructure, IT systems, and adjudication processes to process furlough appeals. In terms of IT customer service, the overall number of IT help-desk tickets (from both internal and external users) was 30 percent higher in FY 2014.

If Governmentwide sequestration is implemented as expected in FY 2016 and beyond, agencies may again use furloughs to manage their reduced resources. Agencies also may begin to use reductions in force (RIFs) to permanently decrease or restructure their workforces. Taken together, furloughs and RIFs could lead to significantly more appeals filed with MSPB in FY 2016 and beyond. Notably, RIF appeals are typically much more complicated to adjudicate than furlough appeals.

In addition to preparing for a larger number of appeals, continued emphasis on merit systems studies is important to ensure adherence to MSPs and avoidance of PPPs by Federal agencies. It also is important to promote merit and educate the workforce, especially managers and leaders, about how to adhere to MSPs and to avoid PPPs when making management decisions such as those related to reducing the workforce.

**Increasing retirements of Federal employees.** According to a 2014 report by the Government Accountability Office, the proportion of retirement-eligible Federal employees is increasing and by September 2017, nearly 600,000 (about 31 percent) will be eligible to retire Governmentwide.<sup>7</sup> However, according to a representative from the Thrift Savings Board, the average age at which Federal are eligible to retire is about 55 years old, but the average retirement age of Federal employees is about 61 years old.<sup>8</sup> Although Federal employees do not usually retire immediately when they become eligible, data indicate that Federal retirements are increasing. OPM data indicate that an average of over 118,000 new annuitants (CSRS and FERS retirees only, not including postal service employees or military members) were added to the Annuity Roll Processing Systems each year between 2012-2014.<sup>9</sup> This is over 35,000 annuitants on average added per year than the average number added in the preceding three year period (2009-2011), and at least 24,000 more added on average per year than the average added for any other earlier sequential three-year period beginning in 2000.

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<sup>7</sup> Government Accountability Office, Federal Workforce: Recent Trends in Federal Civilian Employment and Compensation (GAO-14-215), January 2014.

<sup>8</sup> Federal News Radio, *Feds ride the money, benefits wave longer than expected*, April 29, 2015; [www.federalnewsradio.com/?nid=38&query=benefits+wave+longer&cx=11&y=5](http://www.federalnewsradio.com/?nid=38&query=benefits+wave+longer&cx=11&y=5)

<sup>9</sup> Office of Personnel Management, Retirement Statistics, (for 2000-2013), at [www.opm.gov/retirement-service/retirement-statistics](http://www.opm.gov/retirement-service/retirement-statistics), and data by email for 2014.

As retirements increase, we expect to see an increase in retirement appeals. Indeed, MSPB has had slight increases each year in the number of retirement initial appeals received beginning in 2011. OPM's backlog of retirement claims varies considerably, but it has generally gone down since 2012, thus increasing the number of retirement decisions that may be appealable to MSPB.<sup>10</sup>

Sequestration and repeated furloughs may add to the number of retirements as employees retire rather than work under conditions of persistent resource uncertainty. Several recent statutory changes in Federal retirement programs also may affect the rate of Federal retirements. For example, the opportunity for employees covered by FERS to claim service credit toward retirement for their sick leave balance,<sup>11</sup> and the authority to allow full-time Federal employees to phase their retirements or work in part-time status,<sup>12</sup> may alter retirement rates and thus may affect the number of retirement appeals. Proposed legislation to base annuities on the average high-five instead of the average high-three salary years,<sup>13</sup> especially if applied to current retirement-eligible employees, could lead to a surge in retirements, followed by a surge in retirement appeals filed with MSPB.

**Changes in law and jurisdiction.** In FY 2014, Congress enacted the Veterans Access, Choice, and Accountability Act of 2014, which, among other things, changes the appeal rights of members of the Senior Executive Service (SES) at the Department of Veterans Affairs (VA) and the manner in which MSPB adjudicates those appeals. In particular, the Act stipulates that VA SES appeals must be adjudicated by MSPB AJs within 21 days, without subsequent review by the full MSPB Board. In our experience, to meet this timeline and to ensure each party is afforded due process and full and fair adjudication, the MSPB AJ assigned to the case, as well as a team of other MSPB legal staff members, have had to suspend processing of almost all other adjudicatory work. This has effectively slowed the processing of other cases in the regional and field offices adjudicating the VA cases. The FY 2014 increase in adjudicatory staff in the regional and field offices and at HQ was fortuitous as these additional staff contributed, at least indirectly, to the resources necessary for MSPB to comply with the 21-day statutory requirement. In compliance with the new VA law, MSPB provided [information](#) to Congress about how MSPB is implementing changes required in the VA law. This information is available on MSPB's website at [www.mspb.gov](http://www.mspb.gov).

Although enacted in early FY 2013, the WPEA continues to affect how MSPB processes cases. The WPEA provides additional rights to whistleblowers and those who engage in other protected activity in the Federal Government. The law expands the scope of protected disclosures, MSPB's whistleblower jurisdiction, and the options for granting corrective action. The law also permits review of MSPB decisions in whistleblower cases by multiple appellate courts. These changes have increased the complexity of MSPB's processing of whistleblower claims. Expanded jurisdiction and increased complexity are likely to lead to more and lengthier hearings on whistleblower cases. MSPB has observed an increase in the number of whistleblower individual right of action (IRA) appeals filed with MSPB, and the law may lead to more addendum appeals (e.g., claims for compensatory and other damages or for attorney's fees) for whistleblower cases. The WPEA also requires MSPB to track and report more detailed information about whistleblower cases in its performance reports. MSPB needs additional permanent resources to enable it to meet the requirements of the WPEA. Information about FY 2014 whistleblower appeals is contained in MSPB's Annual Performance Report ([APR-APP](#)) for FY 2014 - 2016.

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<sup>10</sup> See current retirement claims processing statistics at [www.opm.gov/about-us/budget-performance/strategic-plans/retirement-processing-status.pdf](http://www.opm.gov/about-us/budget-performance/strategic-plans/retirement-processing-status.pdf)

<sup>11</sup> [www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/sick-leave-general-information/](http://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/sick-leave-general-information/)

<sup>12</sup> [www.opm.gov/retirement-services/phased-retirement/](http://www.opm.gov/retirement-services/phased-retirement/)

<sup>13</sup> Government Employee Pension Reform Act of 2015, at [www.congress.gov/bill/114th-congress/house-bill/1230](http://www.congress.gov/bill/114th-congress/house-bill/1230)

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## CASE PROCESSING STATISTICS FOR FY 2014

### Summary of Cases Decided by MSPB

**Table 1: FY 2014 Summary of Cases Decided By MSPB**

Cases Decided in MSPB Regional and Field Offices	
Appeals <sup>1</sup>	15,925
Addendum Cases <sup>2</sup>	389
Stay Requests <sup>3</sup>	40
<b>TOTAL Cases Decided in RO/FOs</b>	<b>16,354</b>
<b>Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction<sup>4</sup></b>	<b>11</b>
Cases Decided by the Board	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	876
Petitions for review (PFRs) - Addendum Cases	131
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	1
Reopenings <sup>5</sup>	5
Court Remands	6
Compliance Referrals	46
EEOC Non-concurrence Cases	3
Arbitration Cases	14
<b>Subtotal - Appellate Jurisdiction</b>	<b>1,082</b>
Original Jurisdiction <sup>6</sup>	10
Interlocutory Appeals	9
<b>TOTAL Cases Decided by the Board</b>	<b>1,101</b>
<b>TOTAL Decisions (Board, ALJs, RO/FOs)</b>	<b>17,466</b>

<sup>1</sup> Includes 11,109 decisions issued on furlough appeals.

<sup>2</sup> Includes 80 requests for attorney fees, 112 Board remand cases, 185 petitions for enforcement, 8 court remand cases, 2 requests for compensatory damages (discrimination cases only), and 2 requests for consequential damages.

<sup>3</sup> Includes 32 stay requests in whistleblower cases and 8 in nonwhistleblower cases.

<sup>4</sup> Initial Decisions by ALJ. Case type breakdown: 2 Disciplinary Action – Non-Hatch Act, 1 Hatch Act case, 2 Action Against SES, and 6 Actions Against ALJs.

<sup>5</sup> Includes 4 cases reopened by the Board on its own motion and 1 request for reconsideration by OPM.

<sup>6</sup> Final Board Decisions. Case Type Breakdown: 3 OSC stay requests, 1 Petition for Rulemaking, 1 PFR of a Hatch Act case, 2 PFRs of Actions Against ALJs, and 3 requests for regulation review.

## Cases Processed in the Regional and Field Offices

*Note regarding furlough appeals and case processing statistics.* Because of the large numbers of furlough initial appeals processed in FY 2014, we are including charts displaying initial appeals outcomes both with and without furlough cases. Pie charts without furlough appeal data are more comparable to similar charts from previous Annual Reports. Additional information may be foot-noted in the charts.

**Table 2: Disposition of Appeals Decided in the Regional and Field Offices, by Type of Case**

Type of Case	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	#	%	#	%	#	%	#	%	
Adverse Action by Agency <sup>3</sup>	13,127	3,277	24.96	9,850	75.04	692	7.03	9,158	92.97	
Termination of Probationers	268	242	90.30	26	9.70	25	96.15	1	3.85	
Reduction in Force	36	22	61.11	14	38.89	7	50.00	7	50.00	
Performance	147	41	27.89	106	72.11	80	75.47	26	24.53	
Acceptable Level of Competence (WIGI)	33	23	69.70	10	30.30	8	80.00	2	20.00	
Suitability	53	26	49.06	27	50.94	14	51.85	13	48.15	
CSRS Retirement: Legal	321	198	61.68	123	38.32	4	3.25	119	96.75	
CSRS Retirement: Disability	18	15	83.33	3	16.67	0	0.00	3	100.00	
CSRS Retirement: Overpayment	71	36	50.70	35	49.30	22	62.86	13	37.14	
FERS Retirement: Legal	132	93	70.45	39	29.55	1	2.56	38	97.44	
FERS Retirement: Disability	155	124	80.00	31	20.00	0	0.00	31	100.00	
FERS Retirement: Overpayment	164	70	42.68	94	57.32	68	72.34	26	27.66	
FERCCA	18	12	66.67	6	33.33	0	0.00	6	100.00	
Individual Right of Action	318	211	66.35	107	33.65	65	60.75	42	39.25	
USERRA	133	57	42.86	76	57.14	60	78.95	16	21.05	
VEOA	129	81	62.79	48	37.21	6	12.50	42	87.50	
Other <sup>4</sup>	802	755	94.14	47	5.86	41	87.23	6	12.77	
<b>Total<sup>5</sup></b>	<b>15,925</b>	<b>5,283</b>	<b>33.17</b>	<b>10,642</b>	<b>66.83</b>	<b>1,093</b>	<b>10.27</b>	<b>9,549</b>	<b>89.73</b>	

<sup>1</sup> Percent Dismissed and Not Dismissed are of the number Decided.

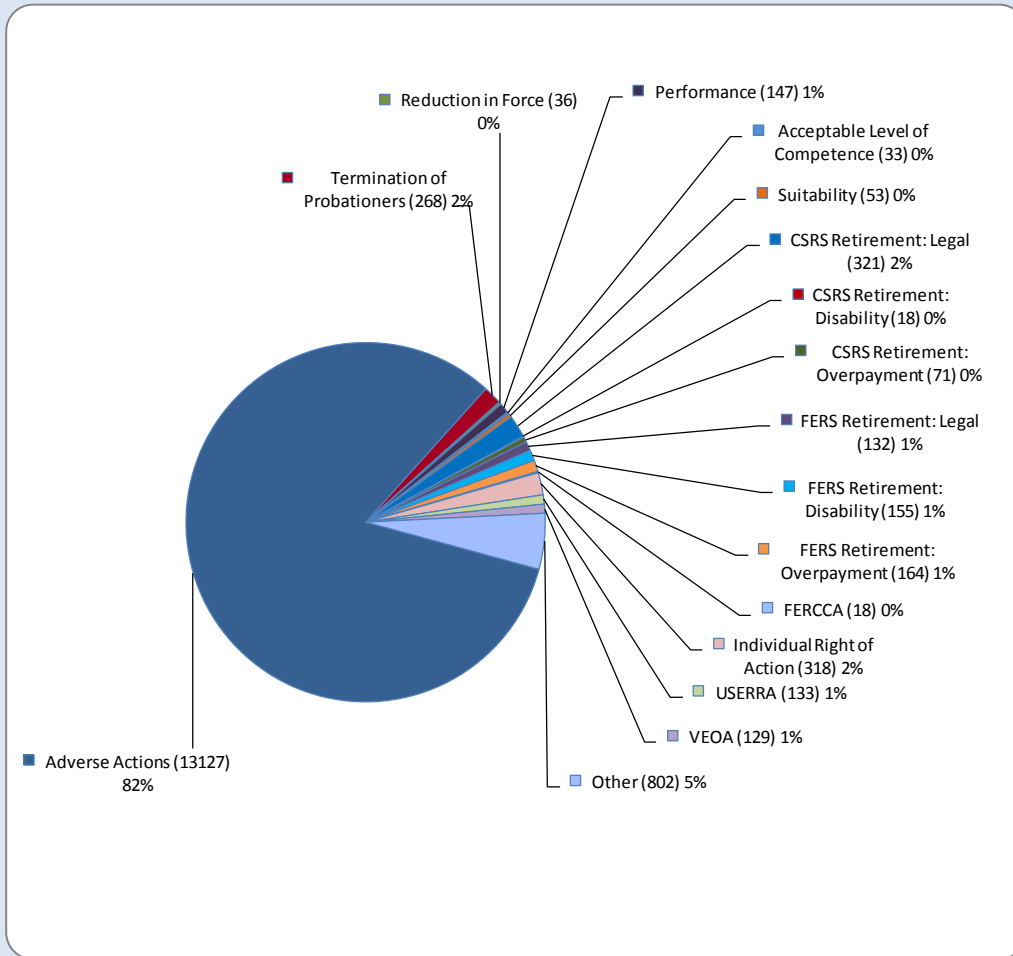
<sup>2</sup> Percent Settled and Adjudicated are of the number Not Dismissed.

<sup>3</sup> **Not** counting furlough appeals, the number of **adverse action** cases decided is 2,018, the number dismissed is 1,025, the number not dismissed is 993, the number of cases settled is 668, and the number of cases adjudicated on the merits is 325.

<sup>4</sup> "Other" appeals include Restoration to Duty (131), Miscellaneous (511), and additional types such as Reemployment Priority, Employment Practices, and others.

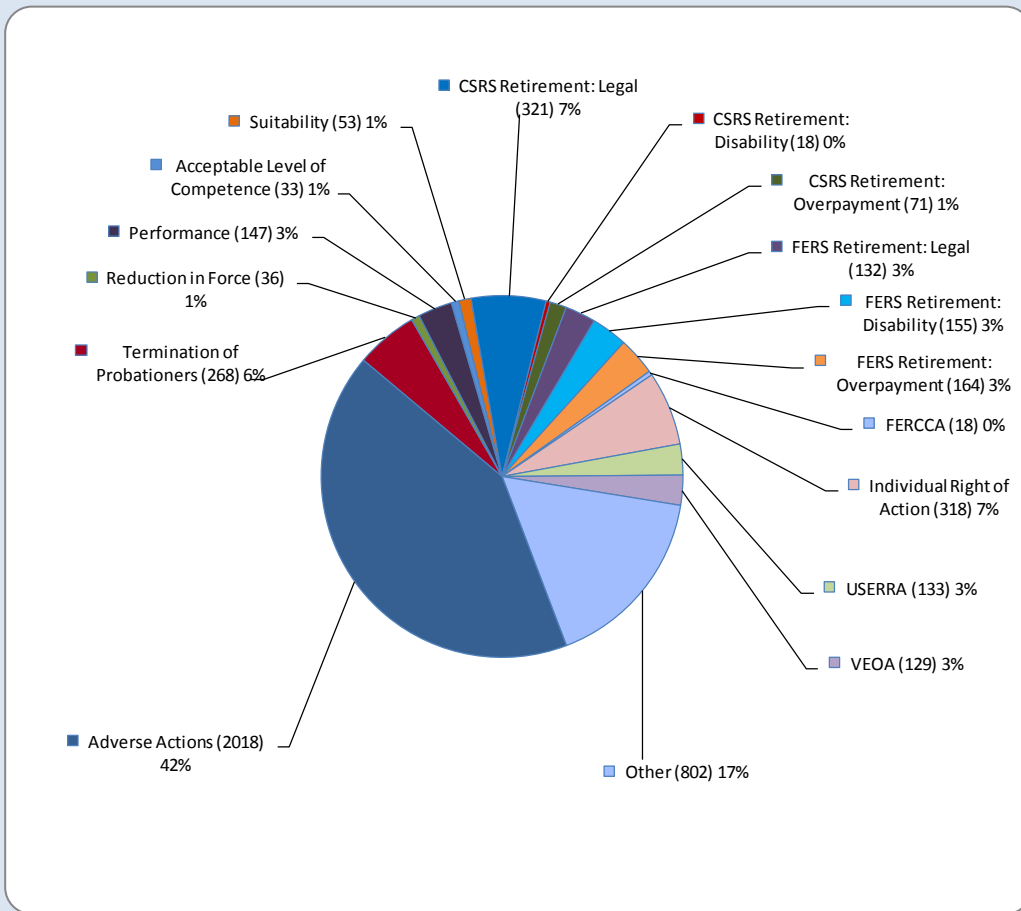
<sup>5</sup> **Not** counting furlough appeals the **total** number of cases decided is 4,816, the number dismissed is 3,031, the number not dismissed is 1,785, the number settled is 1,069, and the number adjudicated on the merits is 716.

**Figure 3.1: Type of Appeals Decided in the Regional and Field Offices**



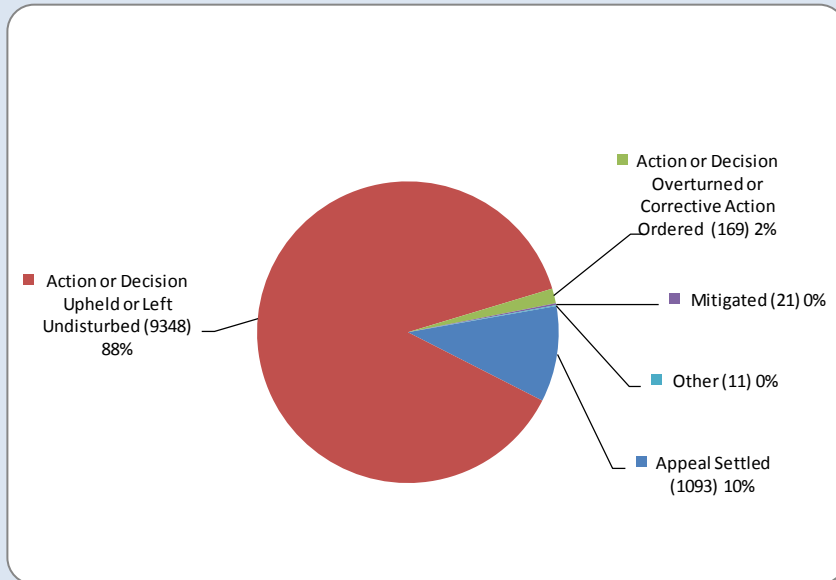
Total Number of Appeals: 15,925

**Figure 3.1a: Type of Appeals Decided in the Regional and Field Offices  
(Not including furlough appeals)**



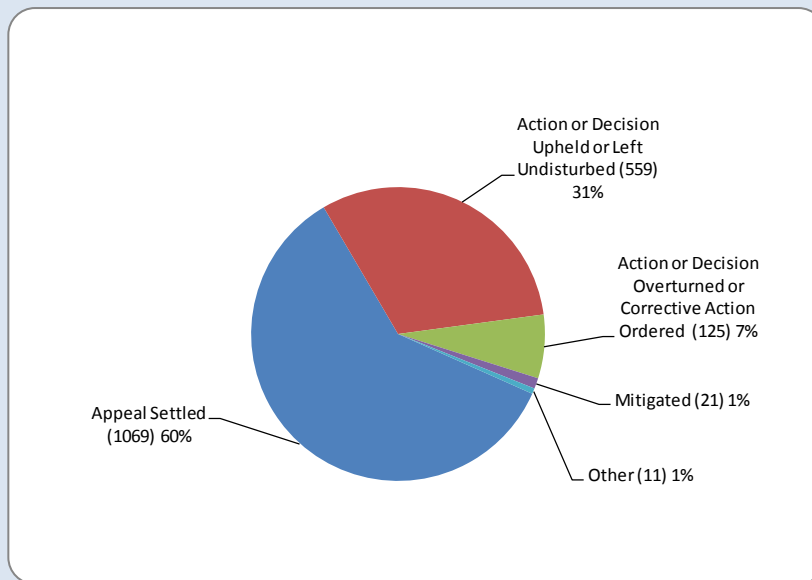
Total Number of Appeals: 4,816

**Figure 3.2: Dispositions: Initial Appeals Not Dismissed by Regional/Field Offices**



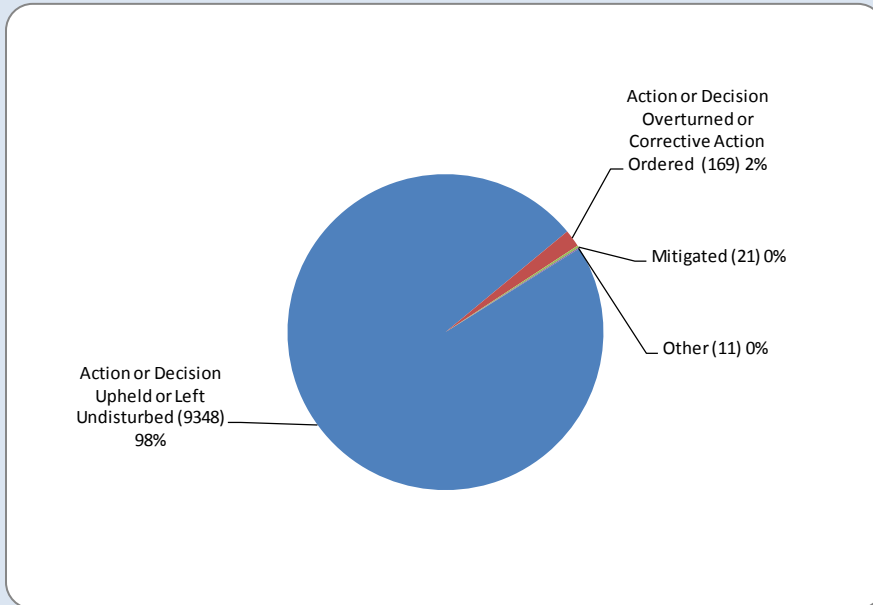
Total Number of Appeals that were Not Dismissed: 10,642

**Figure 3.2a: Dispositions: Initial Appeals Not Dismissed by Regional/Field Offices (Not including furlough appeals)**



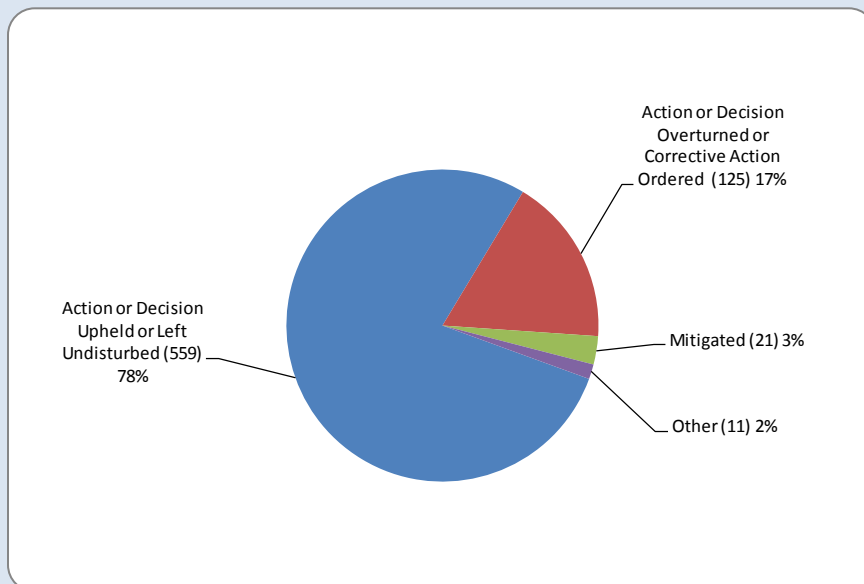
Total Number of Appeals that were Not Dismissed: 1,785

**Figure 3.3: Dispositions: Initial Appeals Not Dismissed or Settled by Regional/Field Office**



Based on 9,549 Appeals Adjudicated on the Merits

**Figure 3.3a: Dispositions: Initial Appeals Not Dismissed or Settled by Regional/Field Office (Not including furlough appeals)**



Based on 716 Appeals Adjudicated on the Merits

**Table 3: Disposition of Appeals by Agency<sup>1</sup>**

	Decided		Dismissed <sup>2</sup>		Not Dismissed <sup>2</sup>		Settled <sup>3</sup>		Adjudicated <sup>3</sup>	
<b>Agency</b>	<b>#</b>	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>	
Department of the Navy	5,134	726	14.1	4,408	85.9	89	2.0	4,319	98.0	
Department of the Army	4,929	1,297	26.3	3,632	73.7	144	4.0	3,488	96.0	
Department of the Air Force	1,067	362	33.9	705	66.1	85	12.1	620	87.9	
Department of Defense	1,030	514	49.9	516	50.1	56	10.9	460	89.1	
Office of Personnel Management <sup>4</sup>	875	531	60.7	344	39.3	106	30.8	238	69.2	
Department of Veterans Affairs	697	449	64.4	248	35.6	175	70.6	73	29.4	
United States Postal Service	621	447	72.0	174	28.0	124	71.3	50	28.7	
Department of Homeland Security	291	171	58.8	120	41.2	62	51.7	58	48.3	
Department of the Treasury	148	81	54.7	67	45.3	35	52.2	32	47.8	
Department of Housing and Urban Development	145	65	44.8	80	55.2	6	7.5	74	92.5	
Department of Justice	139	102	73.4	37	26.6	17	45.9	20	54.1	
Department of Agriculture	126	68	54.0	58	46.0	42	72.4	16	27.6	
Department of the Interior	114	68	59.6	46	40.4	33	71.7	13	28.3	
Department of Health and Human Services	112	81	72.3	31	27.7	20	64.5	11	35.5	
Department of Transportation	90	49	54.4	41	45.6	23	56.1	18	43.9	
Social Security Administration	55	39	70.9	16	29.1	8	50.0	8	50.0	
Department of Commerce	50	30	60.0	20	40.0	15	75.0	5	25.0	
Department of Labor	49	37	75.5	12	24.5	5	41.7	7	58.3	
Department of State	38	25	65.8	13	34.2	10	76.9	3	23.1	
Department of Energy	35	21	60.0	14	40.0	10	71.4	4	28.6	
General Services Administration	18	9	50.0	9	50.0	5	55.6	4	44.4	
Equal Employment Opportunity Commission	16	5	31.3	11	68.8	0	0.0	11	100.0	
Environmental Protection Agency	13	6	46.2	7	53.8	3	42.9	4	57.1	
Small Business Administration	13	9	69.2	4	30.8	2	50.0	2	50.0	
Tennessee Valley Authority	11	8	72.7	3	27.3	1	33.3	2	66.7	
National Aeronautics and Space Administration	10	9	90.0	1	10.0	1	100.0	0	0.0	
National Archives and Records Administration	7	5	71.4	2	28.6	1	50.0	1	50.0	
Securities and Exchange Commission	7	6	85.7	1	14.3	1	100.0	0	0.0	
Agency for International Development	6	4	66.7	2	33.3	0	0.0	2	100.0	
Smithsonian Institution	5	3	60.0	2	40.0	2	100.0	0	0.0	
National Credit Union Administration	4	4	100.0	0	0.0	0	0.0	0	0.0	

**Table 3: Disposition of Appeals by Agency (Cont.)**

Agency	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	%	#	%	#	%	#	%	#	%
National Labor Relations Board	4	75.0	3	75.0	1	25.0	0	0.0	1	100.0
National Science Foundation	4	25.0	1	25.0	3	75.0	2	66.7	1	33.3
Broadcasting Board of Governors	3	66.7	2	66.7	1	33.3	1	100.0	0	0.0
Federal Communications Commission	3	66.7	2	66.7	1	33.3	1	100.0	0	0.0
Federal Reserve System	3	100.0	3	100.0	0	0.0	0	0.0	0	0.0
Government Printing Office	3	66.7	2	66.7	1	33.3	1	100.0	0	0.0
Judicial Branch	3	100.0	3	100.0	0	0.0	0	0.0	0	0.0
Nuclear Regulatory Commission	3	66.7	2	66.7	1	33.3	0	0.0	1	100.0
Pension Benefit Guaranty Corporation	3	100.0	3	100.0	0	0.0	0	0.0	0	0.0
Armed Forces Retirement Home	2	50.0	1	50.0	1	50.0	1	100.0	0	0.0
Corporation for National and Community Service	2	100.0	2	100.0	0	0.0	0	0.0	0	0.0
Merit Systems Protection Board	2	50.0	1	50.0	1	50.0	1	100.0	0	0.0
Office of Special Counsel	2	100.0	2	100.0	0	0.0	0	0.0	0	0.0
Selective Service System	2	50.0	1	50.0	1	50.0	1	100.0	0	0.0
Administrative Office of the U.S. Courts	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Architect of the Capitol	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Central Intelligence Agency	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Committee for Purchase from People Who Are Blind and Severe Handicapped	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Consumer Product Safety Commission	1	0.0	0	0.0	1	100.0	0	0.0	1	100.0
Court Services and Offender Supervision Agency for DC	1	0.0	0	0.0	1	100.0	1	100.0	0	0.0
Federal Election Commission	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Inter-American Foundation	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
M. K. Udall Scholarship & Excellence in National Environ. Policy Foundation	1	0.0	0	0.0	1	100.0	1	100.0	0	0.0

**Table 3: Disposition of Appeals by Agency (Cont.)**

Agency	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	%	#	%	#	%	#	%	#	%
National Council on Disability	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Occupational Safety and Health Review Commission	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Office of National Drug Control Policy	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Other	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Railroad Retirement Board	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
<b>TOTAL</b>	<b>15,925</b>	<b>33.2</b>	<b>5,283</b>	<b>66.8</b>	<b>10,642</b>	<b>10.3</b>	<b>1,093</b>	<b>89.7</b>	<b>9,549</b>	<b>89.7</b>

<sup>1</sup> This table includes all appeals, both furlough and nonfurlough cases.

<sup>2</sup> Percent Dismissed and Not Dismissed are of the number Decided.

<sup>3</sup> Percent Settled and Adjudicated are of the number Not Dismissed.

<sup>4</sup> Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System.

**Table 4: Disposition of Initial Appeals Adjudicated on the Merits  
By Agency<sup>1</sup>**

Agency	Adjudicated <sup>2</sup>		Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%	
Department of the Navy	4,319	4,298	99.5	17	0.4	4	0.1	0	0.0	
Department of the Army	3,488	3,436	98.5	51	1.5	1	0.0	0	0.0	
Department of the Air Force	620	609	98.2	9	1.5	2	0.3	0	0.0	
Department of Defense	460	457	99.3	3	0.7	0	0.0	0	0.0	
Office of Personnel Management <sup>3</sup>	238	179	75.2	46	19.3	2	0.8	11	4.6	
Department of Housing and Urban Development	74	74	100.0	0	0.0	0	0.0	0	0.0	
Department of Veterans Affairs	73	60	82.2	10	13.7	3	4.1	0	0.0	
Department of Homeland Security	58	49	84.5	6	10.3	3	5.2	0	0.0	
United States Postal Service	50	37	74.0	11	22.0	2	4.0	0	0.0	
Department of the Treasury	32	31	96.9	1	3.1	0	0.0	0	0.0	
Department of Justice	20	17	85.0	1	5.0	2	10.0	0	0.0	
Department of Transportation	18	17	94.4	1	5.6	0	0.0	0	0.0	
Department of Agriculture	16	14	87.5	2	12.5	0	0.0	0	0.0	
Department of the Interior	13	12	92.3	1	7.7	0	0.0	0	0.0	
Department of Health and Human Services	11	9	81.8	1	9.1	1	9.1	0	0.0	
Equal Employment Opportunity Commission	11	10	90.9	1	9.1	0	0.0	0	0.0	
Social Security Administration	8	7	87.5	1	12.5	0	0.0	0	0.0	
Department of Labor	7	6	85.7	1	14.3	0	0.0	0	0.0	
Department of Commerce	5	4	80.0	1	20.0	0	0.0	0	0.0	
Department of Energy	4	4	100.0	0	0.0	0	0.0	0	0.0	
Environmental Protection Agency	4	3	75.0	1	25.0	0	0.0	0	0.0	
General Services Administration	4	3	75.0	1	25.0	0	0.0	0	0.0	
Department of State	3	3	100.0	0	0.0	0	0.0	0	0.0	
Agency for International Development	2	2	100.0	0	0.0	0	0.0	0	0.0	
Small Business Administration	2	1	50.0	0	0.0	1	50.0	0	0.0	
Consumer Product Safety Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Deposit Insurance Corporation	1	0	0.0	1	100.0	0	0.0	0	0.0	
National Archives and Records Admin	1	0	0.0	1	100.0	0	0.0	0	0.0	

**Table 4: Disposition of Initial Appeals Adjudicated on the Merits  
By Agency (Cont.)**

Agency	Adjudicated <sup>2</sup>		Affirmed		Reversed		Mitigated Modified		Other	
	#	%	#	%	#	%	#	%	#	%
National Labor Relations Board	1	0.0	0	0.0	1	100.0	0	0.0	0	0.0
National Science Foundation	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Nuclear Regulatory Commission	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
<b>TOTAL</b>	<b>9,549</b>	<b>97.9</b>	<b>9,348</b>	<b>1.8</b>	<b>169</b>	<b>0.2</b>	<b>21</b>	<b>0.1</b>	<b>11</b>	<b>0.1</b>

<sup>1</sup> This table contains all appeals, both furlough and nonfurlough cases.

<sup>2</sup> Adjudicated on the Merits, i.e., not dismissed or settled.

<sup>3</sup> Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System. Percentages may not total 100 because of rounding.

## Cases Processed at Headquarters

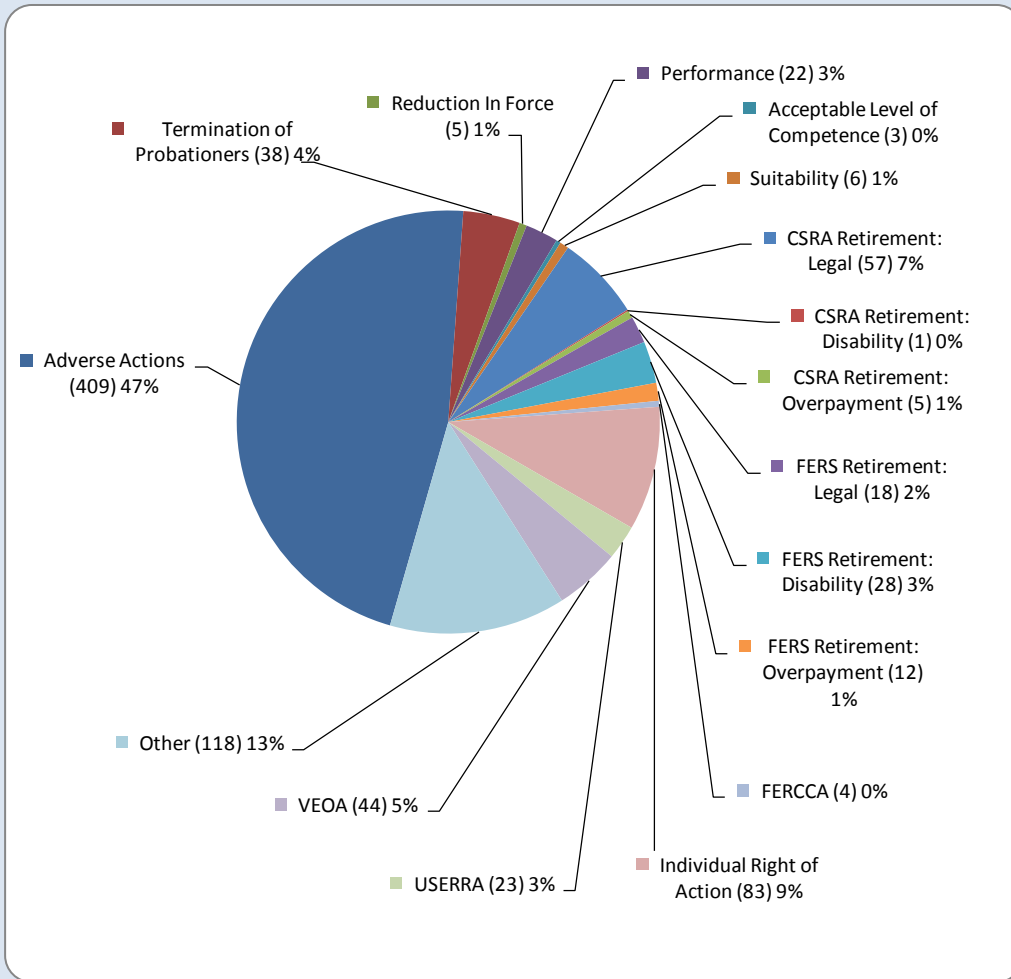
The case processing data for PFR decisions may include a few furlough cases.

**Table 5: Disposition of Petitions for Review (PFR) of Initial Decisions by Type of Case**

Type of Case	Decided		Dismissed		Settled		Denied		Denied; Further Analysis <sup>1</sup>		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	409		29	7.09	5	1.22	283	69.19	14	3.42	78	19.07
Termination of Probationers	38		4	10.53	0	0.00	29	76.32	0	0.00	5	13.16
Reduction in Force	5		3	60.00	0	0.00	1	20.00	1	20.00	0	0.00
Performance	22		3	13.64	0	0.00	15	68.18	1	4.55	3	13.64
Acceptable Level of Competence (WIGI)	3		0	0.00	0	0.00	3	100.00	0	0.00	0	0.00
Suitability	6		2	33.33	0	0.00	4	66.67	0	0.00	0	0.00
CSRS Retirement: Legal	57		1	1.75	0	0.00	47	82.46	1	1.75	8	14.04
CSRS Retirement: Disability	1		0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
CSRS Retirement: Overpayment	5		0	0.00	0	0.00	5	100.00	0	0.00	0	0.00
FERS Retirement: Legal	18		0	0.00	0	0.00	13	72.22	2	11.11	3	16.67
FERS Retirement: Disability	28		0	0.00	0	0.00	21	75.00	0	0.00	7	25.00
FERS Retirement: Overpayment	12		0	0.00	0	0.00	11	91.67	0	0.00	1	8.33
FERCCA	4		0	0.00	0	0.00	2	50.00	0	0.00	2	50.00
Individual Right of Action	83		2	2.41	2	2.41	55	66.27	1	1.20	23	27.71
USERRA	23		0	0.00	0	0.00	10	43.48	2	8.70	11	47.83
VEOA	44		2	4.55	0	0.00	36	81.82	2	4.55	4	9.09
Other	118		1	0.85	0	0.00	91	77.12	1	0.85	25	21.19
<b>Total</b>	<b>876</b>		<b>47</b>	<b>5.37</b>	<b>7</b>	<b>0.80</b>	<b>627</b>	<b>71.58</b>	<b>25</b>	<b>2.85</b>	<b>170</b>	<b>19.41</b>

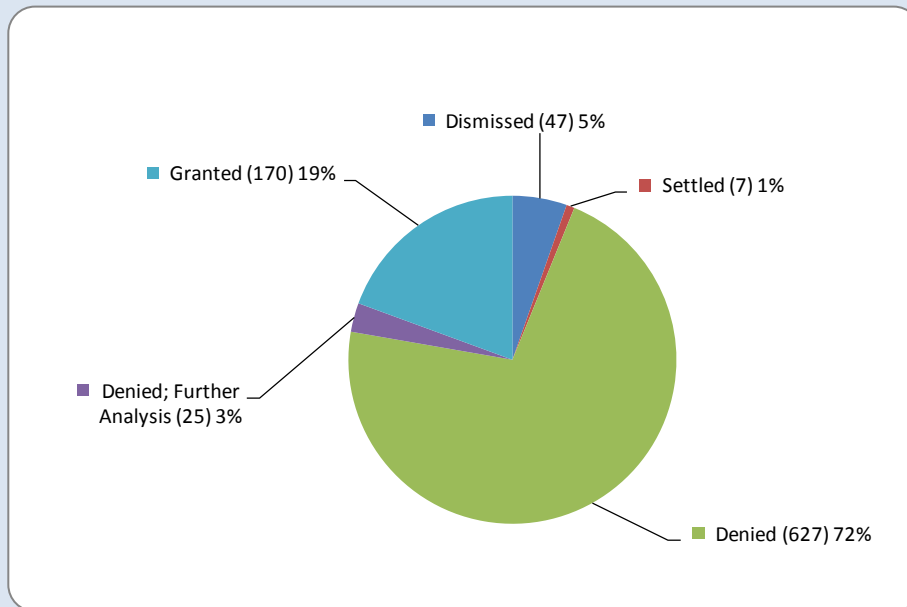
<sup>1</sup> "Denied; Further Analysis" includes cases denied on the basis of the issues raised in the PFR, but in which the Board has considered an issue *sua sponte*, i.e., of the Board's own accord (5 C.F.R. § 1201.117(a)). This definition applies also to Table 6, Figure 5 and Figure 7. Historically, when the Board denied a party's PFR, but upon review of a case, chose to analyze additional issues, this was described as "reopening the appeal on its own motion under 5 C.F.R. § 1201.118," and the description used in the Annual Report was "Denied But Reopened." In 2012, the Board amended its regulation at 5 C.F.R. § 1201.118 to state that "reopening" only applies to instances in which the Board has already issued a final order or the initial decision has become the Board's final decision by operation of law. The Board refrains from using the term "reopening" in adjudicating a petition for review unless it is taking action to reopen a closed matter. Accordingly, the Board will continue to report dispositions of cases that are Denied, but in which the Board considers other issues of its own accord as "Denied; Further Analysis."

**Figure 3.4: Types of Petitions for Review (PFRs)**



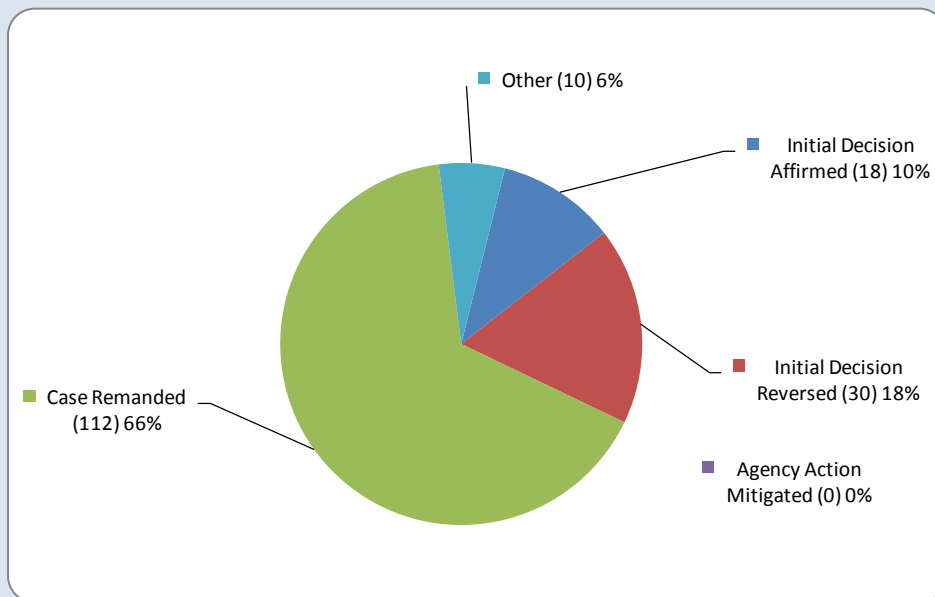
Total Number of Petitions for Review (PFR): 876

**Figure 3.5: Disposition of Petitions for Review of Initial Decisions**



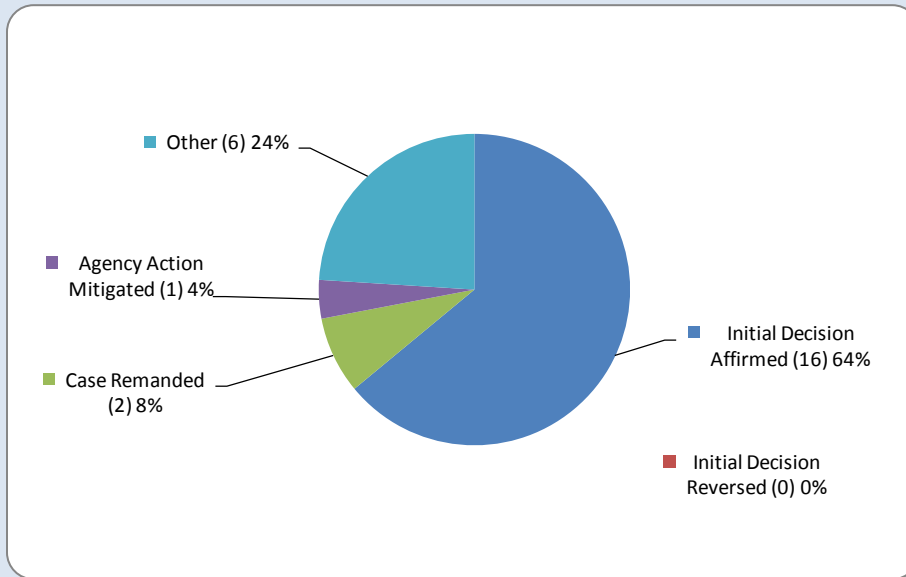
Based on 876 Total PFRs

**Figure 3.6: Disposition of Petitions for Review Granted**



Based on 170 PFRs Granted

**Figure 3.7: Disposition of Petitions for Review Denied; Further Analysis**



Based on 25 PFRs Denied; Further Analysis

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

	Decided		Dismissed		Settled		Denied		Denied; Further Analysis		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
Office of Personnel Management <sup>1</sup>	126		1	0.79	0	0.00	101	80.16	2	1.59	22	17.46
United States Postal Service	124		4	3.23	2	1.61	94	75.81	4	3.23	20	16.13
Department of Veterans Affairs	98		8	8.16	1	1.02	70	71.43	3	3.06	16	16.33
Department of the Army	98		7	7.14	0	0.00	68	69.39	3	3.06	20	20.41
Department of Homeland Security	55		2	3.64	0	0.00	40	72.73	3	5.45	10	18.18
Department of Defense	48		4	8.33	1	2.08	27	56.25	2	4.17	14	29.17
Department of the Navy	45		5	11.11	1	2.22	25	55.56	2	4.44	12	26.67
Department of the Air Force	43		5	11.63	0	0.00	25	58.14	2	4.65	11	25.58
Department of Justice	33		1	3.03	0	0.00	19	57.58	2	6.06	11	33.33
Department of the Treasury	25		1	4.00	0	0.00	18	72.00	0	0.00	6	24.00
Department of the Interior	24		0	0.00	0	0.00	22	91.67	0	0.00	2	8.33
Department of Agriculture	21		2	9.52	0	0.00	14	66.67	0	0.00	5	23.81
Social Security Administration	20		2	10.00	0	0.00	14	70.00	0	0.00	4	20.00
Department of Transportation	18		1	5.56	1	5.56	13	72.22	0	0.00	3	16.67
Department of Health and Human Services	17		0	0.00	0	0.00	16	94.12	0	0.00	1	5.88
Department of Commerce	15		0	0.00	0	0.00	11	73.33	0	0.00	4	26.67
Department of Housing and Urban Development	11		1	9.09	0	0.00	10	90.91	0	0.00	0	0.00
Department of Labor	10		2	20.00	0	0.00	8	80.00	0	0.00	0	0.00
Department of Energy	7		0	0.00	0	0.00	7	100.00	0	0.00	0	0.00
Department of State	6		0	0.00	0	0.00	4	66.67	0	0.00	2	33.33
Federal Deposit Insurance Corporation	4		0	0.00	0	0.00	3	75.00	1	25.00	0	0.00
Environmental Protection Agency	3		0	0.00	1	33.33	1	33.33	0	0.00	1	33.33
Department of Education	2		0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
General Services Administration	2		0	0.00	0	0.00	1	50.00	0	0.00	1	50.00
Government of the District of Columbia	2		0	0.00	0	0.00	1	50.00	0	0.00	1	50.00
National Aeronautics and Space Admin	2		0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
National Credit Union Administration	2		0	0.00	0	0.00	2	100.00	0	0.00	0	0.00

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

	Dismissed		Settled		Denied		Denied; Further Analysis		Granted	
	#	%	#	%	#	%	#	%	#	%
Small Business Administration	2	0.00	0	0.00	0	0.00	1	50.00	1	50.00
Agency for International Development	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Corporation for National and Community Service	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Equal Employment Opportunity Commission	1	100.00	0	0.00	0	0.00	0	0.00	0	0.00
Federal Mediation and Conciliation Service	1	0.00	0	0.00	0	0.00	0	0.00	1	100.00
Federal Trade Commission	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Inter-American Foundation	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
National Archives and Records Administration	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
National Council on Disability	1	0.00	0	0.00	0	0.00	0	0.00	1	100.00
National Science Foundation	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Nuclear Regulatory Commission	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Office of National Drug Control Policy	1	0.00	0	0.00	0	0.00	0	0.00	1	100.00
Pension Benefit Guaranty Corporation	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Smithsonian Institution	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00
<b>TOTAL</b>	<b>876</b>	<b>5.37</b>	<b>47</b>	<b>0.80</b>	<b>627</b>	<b>71.58</b>	<b>25</b>	<b>2.85</b>	<b>170</b>	<b>19.41</b>

<sup>1</sup> Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System and the Federal Employees Retirement System. Percentages may not total 100 because of rounding.

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## SIGNIFICANT BOARD DECISIONS AND COURT OPINIONS ISSUED IN FY 2014

Several of the Board's noteworthy decisions issued in FY 2014 are summarized below. As a service to our stakeholders, we also have provided brief summaries of selected significant opinions issued by the U.S. Court of Appeals for the Federal Circuit. This section also includes summaries of selected significant Board decisions and Court Opinions issued in early FY 2015.

### Significant Board Decisions Issued in Fiscal Year 2014

#### Due Process

*Massey v. Department of the Army*, [2013 MSPB 80](#), 120 M.S.P.R. 226 (2013): The agency removed the appellant for medical inability to perform the duties of her position. On appeal, the Board reversed the removal on the ground that the agency violated the appellant's right to minimum due process. The appellant submitted a timely request to present an oral reply to the proposed removal, but the deciding official issued the decision removing the appellant without responding to her request. Under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985), due process requires that an employee have the "opportunity to present reasons, either in person or in writing, why [a] proposed action should not be taken."

#### Jurisdiction

*Boudreault v. Department of Homeland Security*, [2013 MSPB 91](#), 120 M.S.P.R. 372 (2013): At issue in this interlocutory appeal was whether the Board has jurisdiction over an appeal by an appellant who unknowingly lost his Board appeal rights as a result of accepting a new appointment within the same agency. In *Yeressian v. Department of the Army*, 112 M.S.P.R. 21 (2009), and *Exum v. Department of Veterans Affairs*, 62 M.S.P.R. 344 (1994), the Board held that, if the appellant would not have accepted the new appointment had he been properly informed of the loss of appeal rights, he is deemed not to have accepted the new appointment and to have retained the rights incident to his former appointment. In *Carrow v. Merit Systems Protection Board*, 626 F.3d 1348 (Fed. Cir. 2010), in which an individual lost his Board appeal rights as a result of accepting a new position with a different Federal agency, the Federal Circuit held that the individual lacked appeal rights to the Board because he was not an "employee" within the meaning of 5 U.S.C. § 7511, regardless of whether he knew and consented to the loss of appeal rights. A majority of the Board, with Member Robbins dissenting, affirmed the continuing validity of the *Exum/Yeressian* line of cases, finding that the Federal Circuit's decision in *Carrow* did not disturb the Board's holdings in *Exum* and *Yeressian*.

*Jonson v. Federal Deposit Insurance Corporation*, [2014 MSPB 22](#), 121 M.S.P.R. 56 (2014): At issue before the Board on interlocutory appeal were several rulings in the removal appeal of an agency employee charged with defalcation of obligations that he owed to FDIC-insured institutions. The agency removed the appellant pursuant to 12 C.F.R. part 336, subpart B for failure to meet the minimum standards for employment with the FDIC. A majority of the Board, with Member Robbins dissenting, held that the agency had the authority to promulgate regulations governing employee conduct; the agency was required to obtain the approval of the U.S. Office of Government Ethics (OGE) before promulgating these regulations but failed to do so; and the Board has jurisdiction to review the appellant's removal. (Member Robbins agreed with the majority of the Board regarding the latter ruling.) The Board reversed the appellant's removal because it was based on regulations that were promulgated without OGE approval.

*Jones v. Department of Energy*, [2013 MSPB 102](#), 120 M.S.P.R. 430 (2013): The appellant filed a request for review of an arbitration decision affirming her removal and raised an equal employment opportunity retaliation claim for the first time with the Board. Under 5 C.F.R. § 1201.155(c) of the Board's revised regulations that became effective November 13, 2012, the Board does not have jurisdiction over a request for review of an arbitrator's decision in which the appellant raises, for the first time with the Board, a claim of discrimination in connection with the underlying action if such allegations could have been raised in the negotiated grievance procedure. The Board found that the governing collective bargaining agreement allowed for discrimination claims to be raised in the course of a grievance proceeding. Because the appellant did not do so, the Board dismissed her request for review of the arbitrator's decision for lack of jurisdiction.

*Okello v. Office of Personnel Management*, [2014 MSPB 2](#), 120 M.S.P.R. 498 (2014): For several years, the appellant unsuccessfully attempted to obtain a final decision from OPM regarding his alleged Federal Employees' Retirement System (FERS) annuity overpayment. The appellant filed a Board appeal regarding the matter after receiving an OPM letter stating that the amount of his annuity was incorrect and that he would soon receive another letter with the correct annuity amount. OPM moved to dismiss the appeal for lack of jurisdiction on the basis that its letter was not a final, appealable decision and indicated that such a decision would be forthcoming. The AJ dismissed the appeal for lack of jurisdiction, finding that OPM's letter was not a final decision and that OPM still intended to issue such a decision. On review, the Board noted that, under 5 U.S.C. § 8461(e)(1), it has jurisdiction to review an administrative action or order affecting an individual's under FERS. The Board found that, under the totality of the circumstances, OPM's failure to act on this matter constitutes an appealable administrative action affecting the appellant's rights under FERS and that it therefore has jurisdiction over this appeal. The Board found that OPM's representation that it still intended to issue a further decision in this matter would normally weigh significantly against the Board taking jurisdiction over the appeal; however, in light of the facts of the case, the Board had little confidence that OPM would follow through with its stated intention. Accordingly, the Board remanded the appeal for adjudication on the merits.

### **Adverse Action Charges**

*Fox v. Department of the Army*, [2014 MSPB 6](#), 120 M.S.P.R. 529 (2014): The appellant sought Board review of an initial decision that sustained her removal for inability to perform the duties of her position and work a regular schedule. In her analysis of the inability to perform charge, the AJ cited *Slater v. Department of Homeland Security*, 108 M.S.P.R. 419 (2008), for the proposition that, in order to remove an employee for physical inability to perform, the agency must show that the disabling condition is disqualifying, its recurrence cannot be ruled out, and the position's duties are such that a recurrence would pose a reasonable probability of substantial harm. The Board held that *Slater* does not govern this appeal because the appellant did not occupy a position with medical standards or physical requirements or subject to medical evaluation programs. To establish a charge of physical inability to perform in such circumstances, the agency must establish that the appellant's medical condition prevents her from being able to safely and efficiently perform the core duties of her position, i.e., the fundamental job duties of the position. Applying this standard, the Board found that the agency proved that the appellant's medical condition rendered her unable to safely and efficiently perform all of the core duties of her position.

*Clemens v. Department of the Army*, [2014 MSPB 14](#), 120 M.S.P.R. 616 (2014): The appellant filed a Board appeal challenging his removal for physical inability to perform the essential duties of his position. The AJ, in an initial decision issued before the Board issued its decision in *Fox*, applied the analysis set forth in *Slater* and reversed the appellant's removal. The AJ found that the agency did not

prove that the appellant was medically disqualified from performing his duties or that there was a reasonable probability of substantial harm. The Board reversed the initial decision and sustained the removal, finding that the *Slater* analysis does not apply because the appellant did not hold a position with medical standards or physical requirements subject to medical evaluation programs. Applying the *Fox* analysis, the Board found that the appellant was unable to perform the core duty of verbal communication as a result of injuries from a stroke and, therefore, the agency proved the charge.

*Hollingsworth v. Department of the Air Force*, [2014 MSPB 56](#), 121 M.S.P.R. 397 (2014): The agency removed the appellant on a charge of tardiness, based on several instances of absence without official leave (AWOL). The Board analogized the tardiness charge with an AWOL charge and found to prove a charge of tardiness, the agency must show that: (1) the employee was scheduled for duty; (2) the employee was late for duty for the time charged; and (3) either the employee's absence was not authorized or his leave request was properly denied. Applying this test, the Board did not sustain the removal.

### **Constructive Suspension**

*Bean v. U.S. Postal Service*, [2013 MSPB 96](#), 120 M.S.P.R. 397 (2013): For more than two years, the agency accommodated the appellant's medical condition by scheduling him to work the day shift. After the agency reassigned the appellant to the swing shift, which required him to work into the night in contravention of his physician's recommendations, the appellant began taking a large amount of leave. The AJ dismissed the appellant's constructive suspension appeal for lack of jurisdiction without a hearing, finding that the appellant's choice between working after dark and taking leave was perhaps unpleasant but nevertheless voluntary. In making this finding, the AJ relied on *Johnson v. U.S. Postal Service*, 110 M.S.P.R. 679 (2009), in which the Board held that an appellant's continued absence was voluntary where he was faced with the choice between taking leave and returning to work outside of his medical restrictions. On review, the Board overruled *Johnson* and held that, assuming that the jurisdictional requirements of 5 U.S.C. Chapter 75 are met, proof of the following establishes Board jurisdiction over involuntary leave constructive suspension claims: (1) the appellant lacked a meaningful choice, and (2) this was because of the agency's improper actions. Applying this standard, the Board found that the appellant had made a nonfrivolous allegation that he was subjected to an appealable constructive suspension because he alleged that (1) he was compelled to take leave because his only alternative was to work after dark, in violation of his doctor's orders, and (2) the agency forced him into this untenable position by improperly taking him off the day shift and otherwise failing to accommodate his condition; and these allegations, if proven, could establish that the appellant lacked a meaningful choice in the matter and that it was the agency's improper actions that deprived him of that choice. Accordingly, the Board remanded the appeal for further development of the record and a jurisdictional hearing.

*Abbott v. U.S. Postal Service*, [2014 MSPB 47](#), 121 M.S.P.R. 294 (2014): The agency placed the appellant on enforced leave because there was no available work within her medical restrictions. The AJ dismissed her appeal for lack of jurisdiction, finding that the appellant failed to show that the agency's action constituted a constructive suspension. On review, the Board clarified that, under *Pittman v. Merit Systems Protection Board*, 832 F.2d 598 (Fed. Cir. 1987), an agency's placement of an employee on enforced leave for more than 14 days constitutes an appealable suspension and is not "constructive." The Board overruled its prior decisions that adjudicated such appeals using the jurisdictional framework for constructive suspensions.

## Retirement

*Resnick v. Office of Personnel Management*, [2013 MSPB 89](#), 120 M.S.P.R. 356 (2013): In this case the Board interpreted 5 U.S.C. § 8336(e), which provides that an employee who is separated from service after completing 25 years of service as an air traffic controller (ATC) or after becoming 50 years of age and completing 20 years of service as an ATC is entitled to an annuity. The appellant resigned from his position as an ATC at age 45 with more than 23 years of creditable service in that position. Shortly before his 50<sup>th</sup> birthday, the appellant applied for an immediate Civil Service Retirement System (CSRS) retirement. OPM denied his application, finding that he was not entitled to an immediate annuity under 5 U.S.C. § 8336(e) because he was younger than 50 years of age when he separated from service. The appellant argued that he became entitled to an immediate annuity under section 8336(e) upon turning 50 years of age, even though he had already separated from service, because he had over 20 years of service as an ATC when he resigned. The Board agreed with OPM, finding that the plain language of 5 U.S.C. § 8336(e) requires that an employee reach 50 years of age and complete 20 years of service as an ATC before separating from service in order to qualify for an immediate retirement.

*Clark v. Office of Personnel Management*, [2013 MSPB 95](#), 120 M.S.P.R. 440 (2013): The appellant, a CSRS annuitant, filed a Board appeal challenging OPM's denial of his wife's request to waive her future entitlement to a survivor annuity pursuant to 5 U.S.C. § 8345(d), which provides that an individual entitled to an annuity under CSRS may decline to accept the annuity by a signed waiver filed with OPM and that the waiver may be revoked in writing at any time. In *Worley v. Office of Personnel Management*, 86 M.S.P.R. 237 (2000), the Board held that, under section 8345(d), an individual who files a waiver of her entitlement to a survivor annuity under CSRS after the death of the annuitant could terminate her entitlement to a survivor annuity as long as the waiver expressly states that it is irrevocable and is done before she files for a survivor annuity claim. In *Mulroy v. Office of Personnel Management*, 92 M.S.P.R. 404 (2002), and *Shelley v. Office of Personnel Management*, 88 M.S.P.R. 224 (2001), the Board extended the *Worley* holding to apply to cases such as this, in which the annuitant, whose annuity was reduced to provide a survivor benefit, is still alive and the waiver's purpose is to permit the restoration of an unreduced annuity payable to the annuitant. In *Clark*, the Board overruled these decisions, agreeing with OPM that section 8345(d) does not authorize an individual to make an irrevocable waiver. Based on the legislative history and language of section 8345(d), the Board concluded that Congress did not intend to authorize an irrevocable waiver in this provision. Therefore, the appellant's wife may not waive her entitlement to a survivor annuity so that the appellant can receive an unreduced retirement annuity.

*Conner v. Office of Personnel Management*, [2014 MSPB 26](#), 120 M.S.P.R. 670 (2014): The appellant disputed OPM's calculation of a lump sum credit under 5 U.S.C. § 8342, alleging that her late mother was in pay status for the 9 years preceding her retirement, although her Individual Retirement Records (IRRs) indicated that she was in a nonpay status due to a compensable injury. Following *Lisanti v. Office of Personnel Management*, 573 F.3d 1334 (Fed. Cir. 2009), and *Billinger v. Office of Personnel Management*, 206 F.3d 1404 (Fed. Cir. 2000), the Board overruled its decisions and found that it had authority to consider the appellant's challenge to the accuracy and completeness of the IRR.

## Whistleblower Protection

*Nasuti v. Department of State*, [2014 MSPB 12](#), 120 M.S.P.R. 588 (2014): This case was before the Board on remand from the Federal Circuit. The appellant contended that the agency terminated his employment because he made a protected whistleblowing disclosure alleging that substandard and inadequate body armor was being supplied to State Department employees en route to Iraq. The

Federal Circuit asked the Board to decide whether section 101 of the Whistleblower Protection Enhancement Act of 2012 (WPEA), which broadened the scope of protected disclosures under the Whistleblower Protection Act (WPA), applies retroactively and, if so, whether the appellant had alleged a protected disclosure under the new statute. The Board answered both questions in the affirmative, concluding that section 101 of the WPEA applied to this case, and that, under section 101, there was no requirement that the employee make a disclosure to a person who is in a position to remedy the matter disclosed. The Board further found that, even prior to the enactment of section 101 of the WPEA, the WPA did not preclude the appellant's disclosure from being protected.

*Hugenberg v. Department of Commerce*, [2013 MSPB 92](#), 120 M.S.P.R. 381 (2013): The appellant, who held a temporary appointment as a Local Census Office Manager, filed an Individual Right of Action (IRA) appeal alleging that the agency terminated him in retaliation for protected whistleblowing disclosures. One of the appellant's disclosures was a letter dated three days prior to his termination, which he sent to the agency's Office of Inspector General and Census Bureau Director. The AJ found that the letter could not have been a contributing factor in the appellant's termination because he failed to demonstrate that the letter was received and disseminated prior to his termination. The Board found that, because there was no evidence showing when the agency received the copy of the letter sent to the Director, it was unable to determine whether the letter was a contributing factor in the appellant's termination, and it remanded the appeal for further proceedings on this issue.

*Mudd v. Department of Veterans Affairs*, [2013 MSPB 90](#), 120 M.S.P.R. 365 (2013): The appellant filed an IRA appeal alleging, inter alia, that the agency took personnel actions against her in reprisal for filing a grievance. Such reprisal is a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). The WPEA expanded the scope of 5 U.S.C. § 2302(b)(9) to include: (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation: (i) with regard to remedying a violation of 5 U.S.C. 2302(b)(8); or (ii) other than with regard to remedying a violation of 5 U.S.C. § 2302(b)(8). The Board held that the WPEA extended its jurisdiction to claims arising under 5 U.S.C. § 2302(b)(9)(i) but not to those arising under 5 U.S.C. § 2302(b)(9)(ii). The Board found that, because the appellant's grievance did not concern remedying an alleged violation of 5 U.S.C. § 2302(b)(8), it lacked jurisdiction to consider the appellant's claim of reprisal for her grievance in the context of this appeal.

*Benton-Flores v. Department of Defense*, [2014 MSPB 60](#), 121 M.S.P.R. 429 (2014): The appellant was terminated from her position as a teacher during her probationary period, and alleged in an IRA appeal that she was terminated in reprisal for making protected disclosures under the WPEA. The appellant's protected disclosures related to the safety of the students in her school but did not cite the specific law, rule, or regulation that was violated by the disclosed conduct. The Board held that protected disclosures covered under 5 U.S.C. 2302(b)(8) do not need to cite to a specific law, rule, or regulation being violated, and are covered provided that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the disclosed action violated one or more of the 5 categories listed in 5 U.S.C. § 2308(b)(8).

*Carney v. Department of Veterans Affairs*, [2014 MSPB 62](#), 121 M.S.P.R. 446 (2014): The appellant filed an IRA appeal, claiming that his two suspensions were reprisal for assisting a coworker in a grievance. The Board held that the WPEA gave it jurisdiction to hear claims of reprisal for assisting coworkers in a grievance proceeding, and overruled its prior cases (*Wooten v. Department of Health and Human Services*, 54 M.S.P.R. 143 (1992), and *Rubendall v. Department of Health and Human Services*, 101 M.S.P.R. 599 (2006)) that held the opposite.

## Board Procedures

*Kavalienskas v. Department of the Treasury*, [2014 MSPB 4](#), 120 M.S.P.R. 509 (2014): At issue in this interlocutory appeal was whether the appellant was prohibited by the doctrines of collateral estoppel and judicial estoppel from challenging the charge that formed the basis of his removal because of his earlier entry into a pretrial diversion program based on the same charge. One of the requirements for the application of collateral estoppel is that the issue raised in the current appeal was actually litigated in the prior action. Because the appellant did not plead guilty and he was not convicted in conjunction with his entry into the pretrial diversion program, the issue of whether he committed the underlying misconduct was not actually litigated. Therefore, collateral estoppel did not apply. As for judicial estoppel, the purpose of this doctrine is to preserve the integrity of the judicial process by precluding a party from contradicting a tribunal's determination in another proceeding when the determination was based on the position taken by the party in that case. This purpose is not implicated when a prior action ends in settlement without a disposition by the court because there is no judicial acceptance of the party's prior position. The Board found that the pretrial diversion agreement is akin to a settlement and judicial estoppel therefore did not apply.

## USERRA

*Beck v. Department of the Navy*, [2014 MSPB 3](#), 120 M.S.P.R. 504 (2014): The appellant filed a Board appeal alleging that the agency violated USERRA by not selecting him for a position. In support of his claim, he alleged that the selecting official had made derogatory statements to him concerning his enlisted status in the U.S. Armed Forces and selected a less qualified civilian candidate. The AJ dismissed the appeal for lack of jurisdiction, finding that the appellant's contention that the selecting official had spoken disparagingly of his prior military rank, even if true, could not be reasonably interpreted as a nonfrivolous allegation that he had lost a benefit of employment due to his membership or performance of services in the uniformed service. The Board reversed the initial decision and remanded the case for adjudication on the merits. To establish Board jurisdiction over a USERRA discrimination claim, the appellant need only allege that: (1) he served in the military, (2) he was denied initial employment, reemployment, retention in employment, promotion, or a benefit of employment, and (3) the denial was due to his military service. The relative weakness of the appellant's factual allegations should not serve as the basis for dismissing the appeal for lack of jurisdiction. Here, the appellant served in the military, he was not selected for a position, and he alleged that his nonselection was due to his prior military service and his qualifications were superior to the selectee, who was a nonveteran. These allegations are sufficient to establish jurisdiction under the Board's expansive pleading standard for USERRA claims.

*Burroughs v. Department of the Army*, [2013 MSPB 93](#), 120 MSPR 392 (2013): The AJ denied the appellant's request for corrective action in this USERRA appeal, finding that the appellant failed to show that his uniformed service was a motivating factor in his nonselection. The Board agreed with this finding but determined that, in addition to raising a claim under 38 U.S.C. § 4311(a), the appellant also raised a retaliation claim under 38 U.S.C. § 4311(b), which the AJ failed to consider. The Board held that the same test that applies to claims involving section 4311(a) also applies to claims under section 4311(b), which prohibits activity protected by USERRA. Thus, just as an agency violates section 4311(a) if it would not have taken the action at issue but for the appellant's uniformed service, an agency likewise violates section 4311(b) if it would not have taken the action but for the appellant's protected activity. The Board remanded the appeal to afford the appellant the opportunity to prove his retaliation claim.

*Rassenfoss v. Department of the Treasury*, [2014 MSPB 68](#), 121 M.S.P.R. 512 (2014): The appellant took leave from January 2010 until March 2011 to serve in the military. Accordingly, the agency did not give him a performance appraisal for the period from December 2009 through November 2010 but instead designated him as “not ratable.” As a result, he did not receive a quality step increase for that year, and he filed a request for corrective action under USERRA. In a 2-1 decision, the Board overruled its prior decisions in *West v. Department of the Air Force*, 117 M.S.P.R. 24 (2011), and *Leite v. Department of the Army*, 109 M.S.P.R. 229 (2011), and held that the “escalator principle” may apply to discretionary as well as nondiscretionary benefits if the benefit was reasonably certain to have accrued absent military service. In his dissenting opinion, Member Robbins questioned whether an employee could ever be assumed with reasonable certainty to have achieved a specific level of performance but for his absence for an entire rating cycle.

## **VEOA**

*Miller v. Federal Deposit Insurance Corporation*, [2014 MSPB 31](#), 121 M.S.P.R. 88 (2014): The appellant, a preference-eligible veteran, alleged that the agency had violated VEOA by failing to give proper weight to his valuable experience, including his military experience, in determining that he was not qualified for an associate professor position. The Board held that, although a preference-eligible veteran is entitled under 5 U.S.C. § 3311(2) to have a broad range of experiences considered when applying for a position, the Board is limited to assessing whether the agency considered all of the valuable experience material to the position and may not reevaluate the merits of the agency’s ultimate determination that the veteran is not qualified.

*Modeste v. Department of Veterans Affairs*, [2014 MSPB 44](#), 121 M.S.P.R. 254 (2014): The AJ found that the agency violated the appellant’s right to compete under 5 U.S.C. § 3304(f)(1) when it failed to consider his application for a temporary position, not-to-exceed 2 years. On review, the agency contended that VEOA applies only when filling permanent, competitive service positions. The Board rejected the agency’s argument and clarified that § 3304(f)(1) provides a preference eligible or veteran a right to compete for any vacant position for which the agency solicits applications from individuals outside its own workforce under merit promotion procedures.

## **Penalties**

*Davis v. U.S. Postal Service*, [2013 MSPB 100](#), 120 M.S.P.R. 457 (2013): The appellant was removed based on a charge of unacceptable conduct in violation of the agency’s zero-tolerance policy and other rules and regulations. The AJ sustained the appellant’s removal, finding, inter alia, that the comparators identified by the appellant were not similarly-situated employees. The Board affirmed the initial decision as modified, finding that another employee who had received a letter of warning for unacceptable conduct was similarly situated to the appellant for the purpose of establishing disparate penalties; however, the agency proved that it had a legitimate reason for the difference in treatment between these two employees. The Board explained that, unlike the misconduct of the comparator employee, the appellant’s misconduct placed employees in fear for their safety and violated the agency’s zero-tolerance policy. In addition, the comparator employee had many more years of service than did the appellant. The Board also noted that an agency is not foreclosed from proffering evidence that the penalty for a certain offense was too lenient in the past. The Board found that the deciding official credibly testified that he was unfamiliar with the comparator employee or the circumstances of his discipline but that he would have removed the comparator employee if he had been the deciding official in that case.

*Brown v. Department of the Interior*, [2014 MSPB 40](#), 121 M.S.P.R. 205 (2014): The Board held that, where an agency removes an employee for physical inability to perform the essential functions of her position, the *Douglas* factors are not relevant in assessing the reasonableness of the penalty because the action is nondisciplinary and does not involve any alleged misconduct on the part of the appellant. The Board further held that, in determining the reasonableness of the penalty, the agency need not consider reassignment as an alternative to removal where the employee refuses to cooperate with the agency in its attempts to determine the extent of her physical limitations.

## National Security Determinations

*Schedar v. Department of the Air Force*, [2014 MSPB 5](#), 129 M.S.P.R. 516 (2014): The appellant was indefinitely suspended pending a decision by the agency's Personnel Security Appeals Board (PSAB) on his appeal of the Central Adjudication Facility (CAF) decision to revoke his security clearance. The Board found that, under Department of Defense regulation 5200.2-R, the agency could not take an adverse action based on a personnel security determination before providing the appellant certain procedural protections, including a statement of the reasons for the unfavorable administrative action, the opportunity to respond to the CAF, a written decision from the CAF, the opportunity to appeal to the PSAB, and a written decision from the PSAB. Because the appellant had not received the final PSAB decision when he was indefinitely suspended, the Board found harmful procedural error and reversed the action. In a related case, *Ulep v. Department of the Army*, 120 M.S.P.R. 579 (2014), the Board found that the agency committed harmful error when it indefinitely suspended the appellant based on the informal suspension of his security clearance without first providing the procedures similarly set forth at 32 C.F.R. § 154.56(b).

*Buelna v. Department of Homeland Security*, [2014 MSPB 45](#), 121 M.S.P.R. 262 (2014): The appellant was indefinitely suspended based on the suspension of his security clearance, and the AJ sustained the action. On review, the Board considered the effect of the Federal Circuit's decision in *Gargiulo v. Department of Homeland Security*, 727 F.3d 1181 (Fed. Cir. 2013), on the appellant's due process claim. The Board first reaffirmed that, while an employee has no property interest in a security clearance, the Board may review whether the agency provided due process rights as to the adverse action itself. Next, the Board considered the factors set forth at *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine the specific requirements of due process. Modifying its previous decisions in *McGriff v. Department of the Navy*, 118 M.S.P.R. 89 (2012), and similar cases, the Board held that, where an agency provides a hearing before indefinitely suspending an employee based on the suspension of his security clearance, the Board may rely on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in determining whether the employee received a meaningful opportunity to respond. In *Loudermill*, the Court explained that the opportunity to respond is important for two reasons: (1) to resolve any factual disputes; and (2) "in such cases" where the appropriateness or necessity of the penalty is in doubt, to provide the employee "a meaningful opportunity to invoke the discretion of the decision maker." The Board clarified that, for purposes of responding to the charge, due process does not require an opportunity to contest the merits of the clearance suspension. Concerning the penalty, the Board held that, if there are viable alternatives to the proposed action, due process requires that the employee be afforded an opportunity to invoke the discretion of a deciding official with authority to select such alternatives. However, the Board explained, due process does not require that the deciding official consider alternatives that are prohibited, impracticable, or outside management's purview. The Board majority further held that, whereas 5 U.S.C. § 7513 requires that the employee receive notice of the reasons underlying the clearance determination, due process requires such notice only to the extent those reasons are considered in determining the penalty. In her concurring opinion, Vice Chairman Wagner expressed her view that the notice requirement of due process is no less stringent than the notice requirement under 5 U.S.C. § 7513.

*Flores v. Department of the Army*, [2014 MSPB 46](#), 121 M.S.P.R. 287 (2014): The appellant was removed based on the loss of his eligibility to occupy a sensitive position. Following *Buelna v. Department of Homeland Security*, 121 M.S.P.R. 262 (2014), the Board held that it had authority to review whether due process was provided regarding the removal action. However, the Board determined that the appellant had waived his due process right to a meaningful response by declining to respond to the proposal notice. The Board further found that a traditional *Douglas* factors analysis was inappropriate because, absent a statute or regulation providing the appellant a substantive right to reassignment, the Board lacked authority to review whether reassignment was available as an alternative to removal.

*Munoz v. Department of Homeland Security*, [2014 MSPB 66](#), 121 M.S.P.R. 483 (2014): The agency indefinitely suspended the appellant based on the revocation of his security clearance. In affirming the action, the Board distinguished *Schmedar v. Department of the Air Force*, 120 M.S.P.R. 516 (2014), finding that Department of Homeland Security procedures did not preclude the agency from taking an adverse action prior to the issuance of a final decision by the Security Appeals Board. The Board further held that a traditional *Douglas* factors analysis was inapplicable because the indefinite suspension was not a sanction or penalty and also because the Board lacked authority to review whether reassignment would have been feasible.

*Brown v. Department of Defense*, [2014 MSPB 74](#), 121 M.S.P.R. 584 (2014): The appellant, an employee of the Defense Finance and Accounting Service (DFAS), was removed based on the denial of his eligibility to occupy a sensitive position. The AJ reversed the action, finding, inter alia, that the appellant was denied due process because the deciding official did not have discretion to weigh the *Douglas* factors or take any action but removal. On review, the Board found that the appellant failed to establish a due process violation because he did not identify any viable alternatives to removal. In particular, the Board found that, because all DFAS positions are classified as noncritical sensitive, and the denial of eligibility was final, any alternative to removal that would have retained the appellant in his position, reassigned him to another position within DFAS, or indefinitely assigned him to nonsensitive duties, was either prohibited, impracticable, or outside management's purview.

## Furloughs

*Gajdos v. Department of the Army*, [2014 MSPB 55](#), 121 M.S.P.R. 361 (2014): The appellant, who was furloughed due to the sequester, argued that he was deprived of due process because the deciding official did not have authority to reverse the course of the proposed furlough. In a 2-1 decision, the Board found that the agency satisfied the requirements of due process. Citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Board considered the following factors to determine what process was due: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards; and (3) the government's interest. Regarding the first factor, the Board noted that a furlough is a temporary deprivation although it is likely to cut off subsistence income and prevent one from obtaining other gainful employment. Concerning the second factor, the Board found a low risk for an erroneous deprivation given (a) that the agency's procedures ensured the appellant was not within a furlough exception; (b) the nondisciplinary nature of a furlough; and (c) the agency's broad discretion to make policy decisions in conducting furloughs. Finally, the Board found that the government's interest was strong because requiring the Secretary of Defense to consider and answer all proposed furloughs, as the appellants suggested, would have added a significant administrative burden. In her dissenting opinion, Vice Chairman Wagner disagreed with the majority's view that furloughs are subject to less stringent due process requirements than other adverse actions.

*In re Tinker AFSC/DP v. Department of the Air Force*, [2014 MSPB 51](#), 121 M.S.P.R. 385 (2014): The appellants, who had been furloughed as a result of the sequester, argued on appeal that the agency did not treat similar employees with fairness and equity because it had exempted so-called “safe haven” employees who had been evacuated due to a natural disaster. The AJ certified for interlocutory review her rulings that: (1) the agency’s decision not to furlough the “safe haven” employees should be analyzed as part of the agency’s burden of proving that its furlough determinations were made in a fair and even manner; and (2) neither 5 U.S.C. § 5523 nor OPM’s implementing regulations precluded the inclusion of “safe haven” employees in an agency-wide furlough. The Board affirmed the AJ’s ruling as to issue (1) but found that whether a statute or regulation precluded the agency from furloughing “safe haven” employees is not determinative of whether the agency treated its employees in a fair and even manner. Rather, in deciding whether the agency’s decision not to furlough certain employees was based on legitimate management reasons, the question is whether the agency reasonably believed that it was precluded from furloughing that group of employees.

## **Hatch Act**

*Special Counsel v. Lewis*, [2014 MSPB 33](#), 121 M.S.P.R. 109 (2014): The Board observed that, under the Hatch Act Modernization Act of 2012, removal is no longer the presumptive penalty for Hatch Act violations. Accordingly, the Board held that it must conduct an independent *Douglas* factors analysis in determining the appropriate penalty for the respondent’s violation. The Board overruled its prior decisions in which it held that the respondent bears the burden of establishing why the penalty of removal should not be imposed.

## **Discrimination: Decision Reached by the Special Panel**

*Alvara v. Department of Homeland Security*, [2014 MSPB 77](#) (Spec. Pan.), WL 2014 823775: The appellant was removed from the Customs and Border Protection Officer (CBPO) position on a charge of physical inability to meet the conditions of his employment due to his medical condition (sleep apnea). He had requested that the agency accommodate his position by exempting him from the night shift and overtime, but the agency denied that request because it viewed working rotational shifts and overtime as an essential function of the CBPO position. On appeal, the appellant contended that the agency committed disability discrimination when it denied his accommodation request. Relying on *Bouffard v. Department of Homeland Security*, EEOC Appeal No. 0120065257 (EEOC Jan. 16, 2008), the Board found that the ability to work rotating shifts and overtime was an essential function of the CBPO position and that the appellant’s inability to perform that function meant he was not a qualified individual with a disability. The EEOC then reversed the Board’s order, finding that the EEOC’s *Bouffard* decision was wrongly decided. The EEOC reasoned that an employee’s schedule and attendance is not an essential function but merely a method by which an essential function is accomplished. The Board reaffirmed its previous decision and certified the case to the Special Panel. *Alvara v. Department of Homeland Security*, 121 M.S.P.R. 453 (2014). In a 2-1 decision, the Special Panel deferred to the EEOC’s decision. Citing *Ignacio v. U.S. Postal Service*, 30 M.S.P.R. 471 (Spec. Pan. 1986), the Panel found that deference was appropriate because the EEOC did not rely on any civil service law, rule, or regulation, and there was a reasonable basis for EEOC’s determination that the Board’s interpretation of discrimination law was incorrect. In her dissent, Vice Chairman Wagner, as a member of the Special Panel, expressed her view that *Ignacio* was incorrectly decided and that the Special Panel should have reached the merits of the dispute even though the EEOC did not explicitly rely on civil service law. The Vice Chairman further would have found that EEOC’s decision was contrary to Board precedent concerning adverse actions based on physical inability to perform and time and attendance deficiencies and that the categorical exclusion of time and attendance requirements as

essential functions is contrary to statutory provisions within Title 5 and the CSRA that give agencies the primary authority to determine the essential functions of a position.

## Significant Opinions Issued by the U.S. Court of Appeals for the Federal Circuit

### Misconduct

*Nguyen v. Department of Homeland Security*, [737 F.3d 711](#) (Fed. Cir. 2013): The petitioner was suspended in 2008 for making false statements during a police investigation. Two years later, the United States Attorney's Office deemed the petitioner impaired – based on the 2008 misconduct – from testifying in court or swearing out complaints. As a result, the petitioner was demoted to a different position. The court held that the petitioner was not subjected to “double punishment” based on the same misconduct.

### Adverse Action

*Mitchell v. Merit Systems Protection Board*, [741 F.3d 81](#) (Fed. Cir. 2014): The court held that the petitioner was deemed an “employee” under 5 U.S.C. § 7511 and therefore had appeal rights to the Board. 5 U.S.C. § 7511(a)(1)(C)(ii) defines an “employee” as an “individual in the excepted service . . . who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under *other than a temporary appointment limited to 2 years or less.*” (emphasis added). Examining that statutory language and the language of 5 C.F.R. § 213.104(a), the court determined that the petitioner – who had worked as an Assistant United States Attorney for approximately 2 years and 7 months, including the time it took for the agency to complete her background check – satisfied the statutory and regulatory requirements of an “employee” and therefore had Board appeal rights upon her termination.

### Jurisdiction

*Biggers v. Department of the Navy*, [745 F.3d 1360](#) (Fed. Cir. 2014): The court held that the Board does not have the authority to hear a back pay claim from an employee who was indefinitely suspended due to the suspension of his or her security clearance.

### Benefits

*Devlin v. Office of Personnel Management*, [767 F.3d 1285](#) (Fed. Cir. 2014): The court held that, although the spouse of a federal employee may be entitled to Basic Employee Death Benefits upon the federal employee's death, the spouse's estate may not apply for those benefits on her behalf.

## Significant Board Decisions and Court Opinions Issued in early FY 2015

### Adverse Action Charges

*Prouty and Weller v. General Services Administration*, [2014 MSPB 90](#), 122 M.S.P.R. 117 (2014): The appellants appealed their removals from their positions as Regional Commissioners after the agency's Office of the Inspector General issued a report finding excessive spending occurred at the agency's 2010 Western Regional Conference. The Board reversed the removals, holding that while the decisions made in planning and carrying out the conference reflected “a level of extravagance that [has] no place in government,” the agency failed to prove that either appellant knew, or had reason to know, of the planning decisions.

*Goeke and Bottini v. Department of Justice*, [2015 MSPB 1](#), 122 M.S.P.R. 69 (2015): The appellants appealed their suspensions based on allegations that they committed professional misconduct during the criminal prosecution of a United States Senator. During the agency's disciplinary process, the agency violated its internal disciplinary rules by substituting a new proposing official for the original official. The original official had determined that discipline was not warranted. The Board reversed the suspensions, finding that the agency's decision to change the proposing official was a harmful procedural error because it led to discipline harsher than otherwise would have occurred.

### **Whistleblower Protection**

*Webb v. Department of the Interior*, [2015 MSPB 6](#) (2015): The appellant alleged that he was subjected to several adverse personnel actions because he wrote a position paper advocating for a different proposed agency organizational restructuring and because he sent e-mails expressing concern with certain proposed agency changes. The Board denied his request for corrective action, holding that he did not make any protected disclosures. The Board stated that general philosophical or policy disagreements with agency decisions or actions do not constitute protected disclosures unless there is a reasonable belief that the disclosure evidences one of the categories of wrongdoing set forth in 5 U.S.C. § 2302(b)(8)(A).

*Department of Homeland Security v. MacLean*, [574 S. Ct. 913](#), (U.S. 2015): The appellant was removed from his Federal Air Marshal position after disclosing sensitive security information regarding the cancellation of agency missions to an MSNBC reporter. The appellant alleged that his disclosure was protected whistleblowing activity, but the Board held that his disclosures were not protected because they were specifically prohibited by law. The Federal Circuit reversed, holding that the statute cited by the Board did not expressly prohibit employee disclosures. The Supreme Court then affirmed the Federal Circuit. The Court held that 5 U.S.C. § 2302(b)(8) only excludes disclosures specifically prohibited by law, and not disclosures prohibited by rule or regulation. The Court further held that the disclosure was not specifically prohibited by law and instead was prohibited only by regulation. The Court then remanded the matter back to the Board, and the appeal is currently pending in the Western Regional Office pending further adjudication.

### **Veterans Employment**

*Dean v. Department of Labor*, [2015 MSPB 22](#) (2015): The appellant appealed his non-selection for the position of "Recent Graduate" wage and hour specialist through the Pathways Recent Graduates Program, alleging that it violated his veterans' preference rights under the Veterans Employment Opportunities Act by imposing a minimum requirement of a college degree. The Board held that there was ample justification in the record showing a rational basis for establishing a minimum education requirement for the position, and thus that the Pathways Recent Graduates Program's minimum educational requirement did not violate Mr. Dean's preference rights.

### **Furloughs**

*Einboden v. Department of the Navy*, [2015 MSPB 26](#) (2015): The appellant appealed his furlough due to sequestration, claiming that he should not have been furloughed because his salary was paid out of working capital funds, not appropriated funds. The Board affirmed the furlough, holding that the furlough was a reasonable management solution to the financial restrictions placed on the agency. The Board further stated that it was reasonable for the agency to consider its budget situation holistically, rather than to isolate individual departments' budgets.

## SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2014

In addition to adjudicating appeals, MSPB is charged with conducting studies of the civil service and merit systems. MSPB's high-quality, objective merit systems studies provide value by assessing current management policies and practices, identifying innovative and effective merit-based management policies and practices, and making recommendations for improvements. These factors also help reduce the occurrence and costs of PPPs that negatively affect agency and employee performance. Overall, this benefits American taxpayers in terms of decreased Governmentwide costs and increased confidence that the Government is doing its job and appropriately managing the workforce.

MSPB studies continue to be referenced in print and on-line professional literature and the media such as the International Public Management Association for Human Resources (IPMA-HR) HR News, Government Executive, Public Manager, Fed Week, the Washington Post, and several wire services. MSPB's work was also cited in Congressional actions in FY 2014. It is not uncommon for MSPB study reports to be cited or have impact long after publication. For example, Congress cited MSPB's 2008 report, *The Power of Employee Engagement*, in its request for GAO to study Federal employee morale and engagement and the House Committee on Oversight and Government Reform noted the relevance of MSPB's 2009 report, *Addressing Poor Performers and the Law*, to improving the management of Federal employees.<sup>14</sup>

During FY 2014, MSPB staff conducted dozens of outreach presentations and media interviews about a variety of MSPB studies. For example, MSPB staff members were invited to present research findings before audiences of Federal employees, supervisors, and manager at events sponsored by agencies such as the EEOC, OPM and FLRA, as well as by employee affinity groups, unions, and professional organizations. Federal News Radio broadcast several interviews with MSPB staff regarding recently released reports.

In FY 2014, MSPB approved and published four new merit systems study reports.

- [\*Evaluating Job Applicants: The Role of Training and Experience in Hiring\*](#)
- [\*Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism\*](#)
- [\*Sexual Orientation and the Federal Workplace: Policy & Perception\*](#)
- [\*Veteran Hiring in the Civil Service: Practices and Perceptions\*](#)

These four reports are summarized below. This Annual Report also includes summaries of two merit systems study reports approved and issued in early FY 2015.

- [\*Veterans' Employment Redress Laws in the Federal Civil Service\*](#)
- [\*The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs\*](#)

In addition to studies, MSPB also publishes other materials that help educate Federal leaders about the merit systems. These materials are available at [www.mspb.gov/studies](http://www.mspb.gov/studies), and the content of the 2014 editions of the newsletter is summarized below.

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<sup>14</sup> Record of the Congressional Hearing may be found at, <http://oversight.house.gov/hearing/federal-governments-general-schedule-gs-viable-personnel-system-future/>.

- *Issues of Merit (IoM)* newsletters – Newsletters inform Federal leaders, employees, and stakeholders about merit systems and Federal management issues and practices through articles that discuss current MSPB research and reports, noteworthy agency practices, and Federal HR policies and initiatives.
- *Individual, electronic articles* – These articles on selected merit systems or workforce management topics are posted on the MSPB website at a time or in a format the *IoM* does not readily accommodate.
- *Research Highlights* – These are one-page summaries of published MSPB studies. Several *Research Highlights* have also been compiled into a “catalog” of MSPB studies.
- *Mini-briefings* – Short presentations about selected MSPB studies.

## Summaries of Reports Released in FY 2014

### Evaluating job Applicants: The Role of Training and Experience in Hiring

This [report](#) discusses the advantages and disadvantages of using training and experience (T&E) assessments to gauge an individual’s qualifications for a Federal job and provides recommendations for the most effective use of such assessments. Insights for this report were obtained from research and practice in the field of assessment, and from MSPB survey data. This report synthesizes multiple perspectives on the advantages and challenges of T&E assessments, describes the role they can play in Federal hiring, and assists Federal agencies and hiring managers in using T&E assessments appropriately.

### Preserving the Integrity of the Federal Merit Systems: Understanding and Addressing Perceptions of Favoritism

This [report](#) summarizes the findings of MSPB’s research into employee perspectives regarding how prevalent they believe that favoritism is within the Federal merit systems, how and when favoritism occurs, and the potential impacts on individuals and organizations. Further, this report examines potential reasons underlying perceptions of favoritism and outlines steps that Federal agency leaders and supervisors can take to ensure that decisions are merit-based and untainted by personal favoritism and discusses what Federal employees can do to help them successfully compete for advancement and recognition in a merit system.

### Sexual Orientation and the Federal Workplace: Policy & Perception

The Office of Personnel Management interprets the tenth PPP, which bars discrimination in Federal personnel actions based on conduct that does not adversely affect job performance, to prohibit sexual orientation discrimination. As this prohibition has neither been specifically expressed in statute nor affirmed in judicial decision, it has been subject to alternate interpretations.

This [report](#) examines Federal employees’ perceptions of workplace treatment based on sexual orientation, reviews how Federal workplace protections from sexual orientation discrimination have evolved, and considers what actions might be taken to communicate or clarify those protections. Lesbian, gay, bisexual, and transgender (LGBT) Federal employees’ perceptions of the workplace, as measured by OPM’s Federal Employee Viewpoint Survey, are generally less positive than those of their colleagues. However, in some agencies for at least some workplace issues, LGBT employees’ perceptions were as positive as those of other employees. This suggests that Federal agencies may be able to create more inclusive cultures, supporting the MSPs’ vision of fair and equitable treatment of all employees and efficient and effective use of the workforce.

## **Veteran Hiring in the Civil Service: Practices and Perceptions**

This [report](#) describes the laws and regulations for hiring veterans into the civil service and documents their complexity. The consequences of that complexity include administrative burden, opacity for applicants and employees, and the potential for the perception, or reality, of error or manipulation. The report also reviews the history and implementation of 5 U.S.C. § 3326, a provision designed to oversee the hiring of recently retired service members into civilian positions in the Department of Defense (DoD) to promote open competition. That oversight has been absent for many years, during which time DoD has hired more than 40,000 retired service members into civilian positions with little or no break in service.

## **Summaries of Reports Released in Early FY 2015**

### **Veterans' Employment Redress Laws in the Federal Civil Service**

This [report](#) describes the statutes and pertinent case decisions for two laws designed to protect the employment rights of veterans in the civil service: (1) the Veterans Employment Opportunities Act of 1998 (VEOA); and (2) the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). VEOA is designed to provide a redress procedure for preference eligibles and certain veterans who believe that an agency has not treated them in accord with Federal employment laws and regulations designed to reward particular types of military service. USERRA is designed to address discrimination based on military service and to ensure service members can resume their civilian careers when their military service is completed. The report explains the procedures that a veteran, preference eligible, or service member must follow to obtain relief if a Federal agency has violated the individual's employment rights under either of these laws and provides a useful table highlighting the similarities and differences between VEOA and USERRA procedures.

### **The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs**

The first MSP of fair and open competition for filling jobs in the Federal Government is a longstanding and fundamental element of the Federal merit systems. This [report](#) examines how factors such as a proliferation of hiring authorities and the decentralization of the Federal hiring process affect the idea and implementation of this MSP, and how the complexities of Federal civil service laws, regulations, and practices make it difficult to define what constitutes "fair and open competition."

### **FY 2014 *Issues of Merit* Newsletter Topics**

MSPB issued three editions of *Issue of Merit (IoM)* during FY 2014 and posted three articles on selected Federal human capital management issues to MSPB's studies web page. *IoM* and website articles informed readers about published and ongoing MSPB research to support management of the Federal workforce in a manner consistent with the s. FY 2014 *IoM* articles covered topics such as the relationship between organizational and individual performance, the implications of hiring authority for workforce diversity, employee and employer obligations regarding reasonable accommodation, action learning, and employee perceptions of agency receptivity to disclosures of wrongdoing. Additionally, FY 2014 *IoM* articles provided a synopsis of the ongoing revision of the merit systems studies research agenda and MSPB's FY 2013 adjudication activities. The wide range of topics acknowledges the wide-ranging interests and concerns of *IoM* readers and MSPB stakeholders.

## Updating the Merit Systems Studies Research Agenda for FY 2015 - 2018

In FY 2014, MSPB reviewed and updated its merit systems studies research agenda. The research agenda guides MSPB in conducting objective, nonpartisan studies that assess and evaluate Federal merit systems policies, operations, and practices. 5 U.S.C. § 1204(a)(3). The goal of the review was a research agenda that addresses both continuing imperatives, such as achieving a workforce free of prohibited personnel practices, and contemporary issues, such as making the best possible use of advances in technology and the impact of policy changes on the Federal workforce. The updated agenda was developed through an open and deliberative process that included a [call for ideas](#) and input from interested citizens, a public meeting at which the Board Members and key stakeholders discussed the proposed agenda, and formal approval by the Board. The [final research agenda](#) for 2015-2018 was approved by the Board Members in January 2015 and published in February 2015.

### 2015 Merit Principles Survey

In 2015, MSPB is preparing to administer its next Merit Principles Survey (MPS) to obtain Federal employees' perceptions and experiences regarding the health of merit in the workplace, occurrence of PPPs, and other topics in support of MSPB's studies program.

### MSPB Cloud-based Survey Platform

MSPB is continuing its efforts to acquire its own secure, cloud-based survey platform. The platform will provide two essential capabilities: (1) scientifically sound, technologically sophisticated, and timely design and administration of surveys to support merit systems studies; and (2) efficient and effective collection of customer service and customer satisfaction feedback to support MSPB's strategic objectives and performance goals. Additional benefits of the survey platform include:

- Increased value for the money;
- Reduced Contracting workload, risk, and lead time;
- More efficient use of MSPB program, administrative, and IT staff time;
- Increased Federal agency and Federal employee acceptance; and
- Simplified compliance with Federal IT policies and security requirements.

MSPB studies staff and MSPB's Performance Improvement Officer (PIO) worked with the Department of Interior National Business Center to begin procurement of a cloud-based, secure survey platform. These efforts are continuing in FY 2015.

## SIGNIFICANT ACTIONS OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT IN FY 2014

As required by statute, MSPB reviews and reports on the significant actions of OPM including an analysis of whether OPM's actions are in accord with MSPs (5 U.S.C. § 2301) and free from PPPs (5 U.S.C. § 2302). OPM's actions broadly affect the Federal workforce, multiple Federal agencies, or applicants for Federal jobs. Almost all of OPM's actions have the potential to impact the effectiveness and efficiency of the Federal workforce (MSP 5) and/or fair and equitable treatment in a variety of contexts (MSP 2). Depending on the nature of a particular OPM action, it has the potential to affect or involve other specific MSPs and/or PPPs. Brief information about the additional MSPs and/or PPPs that may be affected by a particular OPM action is included in the 'significance' section following each action.<sup>15</sup>

### New Significant Actions of the U.S. Office of Personnel Management

#### Final Rule Implementing the Hatch Act Modernization Act of 2012

The Hatch Act<sup>16</sup> was enacted in 1939 to, in part, limit the political activities of Federal employees. Employees covered by the Hatch Act may not use their official authority to influence or affect an election and may not knowingly help in political fundraising, run for partisan elective office, knowingly solicit or discourage political activity by persons with certain business before the agency, or engage in political activity on Government time or using Government resources. In addition, employees at certain agencies are forbidden from taking any active part in political management or political campaigns.<sup>17</sup> The eighth MSP states that Federal employees should be protected against coercion for partisan political purposes and also prohibits them from using their official authority or influence to interfere with or affect the result of an election or a nomination for election.<sup>18</sup>

The Office of Special Counsel (OSC) investigates violations of the Hatch Act and may bring charges of violations before MSPB, which decides whether a violation has occurred and, if so, determines the penalty. The Hatch Act Modernization Act of 2012<sup>19</sup> was signed into law by President Obama on December 28, 2012. OPM issued a final rule in May 2014 to incorporate into its regulations regarding political activity the amendments to the Hatch Act added by the Hatch Act Modernization Act of 2012.<sup>20</sup>

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<sup>15</sup> This summary of OPM's most significant actions or initiatives focuses on those actions that have the most potential to affect one or more of the MSPs or PPPs, rather than serving as a comprehensive digest of OPM activities. In addition to its Federal human capital management policymaking role, OPM also is assigned functions that do not relate to MSPs or PPPs (such as its responsibilities under the Patient Protection and Affordable Care Act). OPM also provides services to Federal agencies that are not included in this review (such as conducting employee background investigations and processing retirement claims). If a significant OPM action was discussed in a previous MSPB Annual Report, and no significant changes have been made to those programs, our previous comments remain applicable. Therefore, this summary should be read in conjunction with previous MSPB reports of OPM's significant actions.

<sup>16</sup> Public Law No. 76-252.

<sup>17</sup> Senate Report No. 112-211 (2012).

<sup>18</sup> 5 U.S.C. § 2301(b)(8).

<sup>19</sup> Public Law No. 112-230.

<sup>20</sup> Political Activity—State or Local Officers or Employees; Federal Employees Residing in Designated Localities; Federal Employees (Final Rule), 79 Fed. Reg. 25,483 (May 5, 2014).

### *Significance*

In part, the Hatch Act Modernization Act of 2012 modified the penalty structure for violations of the Hatch Act to mirror the range of penalties authorized for other disciplinary actions. Prior to the Hatch Act Modernization Act of 2012, Federal employees who were found to have violated the Hatch Act were removed from office unless MSPB unanimously found that the violations did not warrant termination. In those cases, the employees were suspended for at least 30 days without pay. Under the modified penalty structure enacted in 2012, a Federal employee who violates the Hatch Act is subject to a range of disciplinary actions. These actions include removal from Federal service, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, reprimand, or a civil penalty not to exceed \$1,000.

According to Special Counsel Carolyn Lerner, the previous penalty structure was overly restrictive and may have deterred agencies from referring potential violations of the Hatch Act to OSC. Pursuant to these regulations, in adjudicating Hatch Act violations, the Board will be able to consider the severity of the violation and other aggravating or mitigating factors, as it does with other disciplinary matters.<sup>21</sup>

### **Final Rule Implementing Phased Retirement**

In August 2014, OPM issued regulations to implement the phased retirement program,<sup>22</sup> as required by the Moving Ahead for Progress in the 21<sup>st</sup> Century Act of 2012.<sup>23</sup> Phased retirement allows an employee to work 50 percent of the time (part-time) and receive 50 percent of his or her annuity as a precursor to full retirement.<sup>24</sup> The main purpose of phased retirement is to enhance the mentoring and training of employees who will be replacing more experienced retiring employees.<sup>25</sup> The ability to participate in a phased retirement program will undoubtedly persuade some retirement-eligible Federal employees to remain on the job longer than they otherwise would have, reducing the impact of the loss of their expertise on agency operations. Phased retirement is related to the fifth and seventh MSPs, which require the Federal workforce be used efficiently and effectively, and that Federal employees be provided effective education and training where such education and training will result in better individual and organizational performance, respectively.<sup>26</sup>

### *Significance*

According to the Government Accountability Office (GAO), 14 percent of permanent career Federal employees were eligible to retire at the end of FY 2012. By the end of FY 2017, GAO estimates that that percentage will increase to 31 percent.<sup>27</sup> As the number of Federal employees who are eligible to retire continues to grow, it will become increasingly important to find effective ways to facilitate the transfer of their institutional knowledge to less experienced workers. Phased retirement is one tool that may be useful in accomplishing this goal. However, nothing has prevented agencies in the past from establishing robust mentoring programs that involve

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<sup>21</sup> Office of Special Counsel's [website](http://osc.gov) (osc.gov) and Senate Report No. 112-211 (2012).

<sup>22</sup> Phased Retirement (Final Rule), 79 Fed. Reg. 46,608 (August 8, 2014).

<sup>23</sup> Public Law No. 112-141 § 100121(d).

<sup>24</sup> Katherine Archuleta Memorandum for Heads of Executive Departments and Agencies, "Phased Retirement Guidance," August 7, 2014 ([www.chcoc.gov/transmittals](http://www.chcoc.gov/transmittals)).

<sup>25</sup> Phased Retirement (Final Rule), 79 Fed. Reg. 46,608 (August 8, 2014).

<sup>26</sup> 5 U.S.C. § 2301(b)(5) and (b)(7).

<sup>27</sup> U.S. Government Accountability Office, "Recent Trends in Federal Civilian Employment and Compensation," GAO-14-215, January 2014.

experienced employees, or those nearing retirement, to facilitate knowledge transfer or assist less experienced workers as they advance in their careers.

OPM's regulations require that "phased retirees" must spend at least 20 percent of their working hours in mentoring activities; OPM's accompanying guidance states that agencies *should* consider an employee's willingness and ability to meet this mentoring requirement when approving an employee's request to enter phased retirement. However, an authorized agency official defines exactly what "mentoring activities" are and has the power to waive the mentoring requirement in the event of an "emergency or unusual circumstance."<sup>28</sup>

OPM intends to release a substantial amount of guidance designed to assist agencies with implementing phased retirement.<sup>29</sup> Such guidance should highlight the main purpose of phased retirement, which is to assist agencies with knowledge management and preparing the next generation of Federal employees for success.<sup>30</sup> Agencies should institute proper controls to ensure that purpose is fulfilled.

### **Governmentwide Strategy on Gender Pay Equality**

In May 2013, the President issued a memorandum to advance pay equality in the Federal Government.<sup>31</sup> The memorandum directed OPM to develop a Governmentwide strategy to address any gender pay gap that may exist in the Federal workforce. Among the steps that OPM was to undertake were to: (1) Analyze whether changes to the General Schedule (GS) pay system would assist in addressing any gender pay gap; (2) propose guidance to agencies to promote greater transparency regarding starting salaries; and (3) recommend additional actions that should be undertaken to narrow any gender pay gap. The memorandum also instructed Federal agencies to provide OPM a range of information and analyses on their specific pay-setting policies and practices to facilitate the development of the Governmentwide strategy.

In April 2014, OPM issued the *Governmentwide Strategy on Advancing Pay Equality in the Federal Government*, finding that while many of the Government's policies and practices already support gender pay equality, there is more work to be done.<sup>32</sup> OPM found no evidence in its analysis that changes to the GS pay system would assist in narrowing any gender pay gap. It pledged to work with agencies to ensure that agency-specific GS equivalent-level salary tables or rate ranges are made available to job candidates on its website and to promote greater transparency regarding starting salaries. OPM already posts other pay tables for pay systems that it administers.

OPM proposed the following actions to address the gender pay gap:

1. Work with agencies to clarify the range of GS pay-setting flexibilities and share best practices on setting starting salaries in gender-neutral ways;

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<sup>28</sup> Phased Retirement (Final Rule), 79 Fed. Reg. 46,625 (August 8, 2014) and Katherine Archuleta Memorandum for Heads of Executive Departments and Agencies, "Phased Retirement Guidance," August 7, 2014, Attachment: Employment as a Phased Retiree (Guidance), p. 4 ([www.chcoc.gov/transmittals](http://www.chcoc.gov/transmittals)).

<sup>29</sup> OPM statement in response to an MSPB query regarding fiscal year 2014 OPM significant actions.

<sup>30</sup> Katherine Archuleta Memorandum for Heads of Executive Departments and Agencies, "Phased Retirement Guidance," August 7, 2014, Attachment: Employment as a Phased Retiree (Guidance), ([www.chcoc.gov/transmittals](http://www.chcoc.gov/transmittals)).

<sup>31</sup> Memorandum of May 10, 2013, Advancing Pay Equality in the Federal Government and Learning from Successful Practices, 78 Fed. Reg. 28,717 (May 15, 2013).

<sup>32</sup> Katherine Archuleta Memorandum for Heads of Executive Departments and Agencies, "Governmentwide Strategy on Gender Pay Equality in the Federal Government," April 10, 2014 ([www.chcoc.gov/transmittals](http://www.chcoc.gov/transmittals)).

2. Develop guidance for agencies to use to conduct analyses of pay by gender and review their starting salary trends, pay-setting flexibilities, and promotion data;
3. Explore the need to conduct Governmentwide statistical analyses to better understand gender-based pay trends;
4. Share best practices with agencies and develop recruiting and outreach strategies for increasing female populations in occupations where they are currently underrepresented; and
5. Develop guidance for agencies on the possibility of changing the work schedule of positions, including the feasibility of establishing more positions as part-time job sharing positions.

### *Significance*

As the Presidential memorandum stated, unjust pay disparities are not only detrimental to women, families, and the economy, but providing equal pay for work of equal value is stated as the third MSP.<sup>33</sup> OPM found that the gender pay gap has shrunk dramatically over the past 30 years. Much of the remaining pay gap can be explained by differences in the distribution of males and females across occupational categories. However, OPM could not rule out the possibility that discriminatory influences played a role in this occupational distribution.

MSPB's 2011 report, *Women in the Federal Government: Ambitions and Achievements*, noted that although the Federal Government has made considerable progress in its employment of women, progress toward full equality is not yet complete. That report found that women remained less likely than men to be employed in high-paying occupations and supervisory positions. This is partially due to continuing occupational differences between women and men in the Federal workplace as well as in the broader civilian labor force. OPM's plan for sharing best practices and developing recruiting and outreach strategies for increasing female populations in occupations where they are currently underrepresented (science, technology, engineering, mathematics, and other nontraditional jobs) can help increase female representation with these important occupations.

As noted in our 2011 report, the existence of a gender pay gap is not purely, or even primarily, a women's issue. Effective, merit-based human resources practices -- including outreach and recruitment, workplace fairness, and effective supervision -- matter to everyone and can yield positive dividends in workforce quality and organizational performance. All employees and all segments of the American public benefit from workplaces that are representative of all segments of society and fully utilize and recognize the talents of every employee.

### **Governmentwide Veterans Recruitment and Employment Strategic Plan**

Executive Order 13518 assigned OPM a leadership role in efforts to improve recruitment and employment of veterans in the executive branch.<sup>34</sup> Among other responsibilities, the executive order directed OPM to develop a *Governmentwide Veterans Recruitment and Employment Strategic Plan* that was to be updated every three years. In April 2014, OPM released the latest strategic plan covering fiscal years 2014 through 2017.<sup>35</sup> The strategic plan emphasizes five focus areas to improve the

1. Ensure Federal leaders advocate the value and importance of hiring veterans;
2. Assist veterans to better align their skills with Federal employment opportunities;

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<sup>33</sup> 5 U.S.C. § 2301(b)(3).

<sup>34</sup> Executive Order 13518, "Employment of Veterans in the Federal Government," 74 Fed. Reg. 58,533 (Nov. 13, 2009).

<sup>35</sup> OPM News Release, "Veterans Employment Council Discusses Strategy to Increase Employment and Retention of Veterans in Federal Government," April 29, 2014 ([www.opm.gov/news/releases/](http://www.opm.gov/news/releases/)).

3. Improve the opportunity for veterans to successfully find Federal employment;
4. Ensure hiring officials are keenly aware of the value veterans bring in meeting mission objectives and that veterans view the Federal Government as an employer of choice; and
5. Ensure that all interested parties receive accurate and consistent information regarding the Federal employment of veterans.

### *Significance*

Executive Order 13518 sets Administration policy for promoting employment opportunities for veterans within the executive branch consistent with MSPs. As the focus on employing veterans increases, so does the importance of agencies properly balancing that important public policy with the competing MSP of making selections for Federal employment after fair and open competition while assuring all receive equal opportunity.<sup>36</sup> The focus placed on hiring veterans has helped increase the proportion of the Government's new hires who are veterans; in 2009, 24 percent of new hires were veterans, and by 2013, 31 percent of new hires were veterans.<sup>37</sup> The importance of the policy of granting veterans' preference in Federal employment is reflected in the fact that it is a PPP for a Federal official to violate a veterans' preference requirement.<sup>38</sup>

The *Governmentwide Veterans Recruitment and Employment Strategic Plan* also attempts to ensure that all agency practices and policies promote a zero tolerance of violations of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). USERRA is a Federal law designed to ensure that those who have served in uniform are not disadvantaged in their civilian careers because of their service; promptly reemployed in their civilian jobs upon their return from duty; and not discriminated against in employment based on past, present, or future military service.<sup>39</sup> Under USERRA, Federal employees may file appeals with MSPB regarding certain agency actions that involve reemployment, discrimination, and reprisal claims.

As noted in MSPB's 2014 report, *Veteran Hiring in the Civil Service: Practices and Perceptions*, laws and regulations granting preference to veterans in Federal hiring have grown complex and may invite opportunities for misperceptions, confusion, or intentional abuses. Any effort aimed at educating agencies on the requirements of veterans' preference laws and at educating veterans regarding their rights based on those laws is welcome.

### **OPM Significant Actions Underway or Completed**

This section lists selected OPM significant actions discussed in previous MSPB Annual Reports that were completed or underway in FY 2014. This year's report does not discuss these actions in detail because: (1) Further action or results are pending; or (2) the intent and significance of the final action is essentially unchanged from the (previously reviewed) proposed action. The table below lists the action, its current status, and the previous MSPB Annual Report(s) which discussed the action. MSPB intends to monitor actions in progress and will discuss those, as appropriate, in future Annual Reports or merit systems studies.

<sup>36</sup> 5 U.S.C. § 2301(b)(1).

<sup>37</sup> U.S. Office of Personnel Management, *Governmentwide Veterans Recruitment and Employment Strategic Plan FY 2014—FY 2017*, April 2014, p. 2; and OPM News Release, "Veterans Employment Recruitment Council Discusses Strategy to Increase Employment and Retention of Veterans in Federal Government," April 29, 2014 ([www.opm.gov/news/releases/](http://www.opm.gov/news/releases/)).

<sup>38</sup> 5 U.S.C. § 2302(b)(11).

<sup>39</sup> 38 U.S.C. § 4301.

OPM Action	2014 Status	Year(s) Discussed
Nondiscrimination Provisions	Final regulations issued in July 2014. <sup>40</sup>	2013
Extension of Certain Benefits to Same-Sex Spouses of Federal Employees and Their Families	OPM continued to extend Federal benefits in response to the June 2013 Supreme Court ruling that portions of the Defense of Marriage Act were unconstitutional. <sup>41</sup>	2012, 2013
Proposed Rules for Designation of National Security Positions	Further action (e.g., final rule or withdrawal) is pending as of November 2014.	2013
Pathways Programs	Many agencies have established Pathways Programs; several have expressed concerns about program effectiveness. <sup>42</sup> OPM has not publicly proposed any changes to the program in response to these concerns.	2011, 2012
Goals-Engagement-Accountability-Results (GEAR) Pilot	Pilot programs at five agencies continue in anticipation of Governmentwide adoption. In response to a <a href="#">GAO evaluation</a> of the GEAR framework, OPM has stated its intent to work with the CHCO Council to identify tools and measures to assess GEAR's implementation. <sup>43</sup>	2012

<sup>40</sup> Nondiscrimination Provisions (Final Rule), 79 Fed. Reg. 43,919 (July 29, 2014).

<sup>41</sup> Elaine Kaplan Memorandum for Heads of Executive Departments and Agencies, "Family and Medical Leave Act (FMLA) Coverage of Same-Sex Spouses," October 21, 2013 ([www.chcoc.gov/transmittals](http://www.chcoc.gov/transmittals)); Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Expanding Coverage of Children; Federal Flexible Benefits Plan: Pre-Tax Payment of Health Benefits Premiums: Conforming Amendments (final rule), 78 Fed. Reg. 64,873 (October 30, 2013); Family and Medical Leave Act; Definition of Spouse (Proposed rule), 79 Fed. Reg. 35,497 (June 23, 2014); and Civil Service Retirement System and Federal Employees Retirement System; Notice to Surviving Same-Sex Spouses of Deceased Federal Annuitants, Employees, or Former Employees Who Died Prior to June 26, 2013 (Notice), 79 Fed. Reg. 57,589 (September 25, 2014).

<sup>42</sup> Partnership for Public Service, *Embracing Change: CHCOs Rising to the Challenge of an Altered Landscape* (2014), pp. 2, 16-17.

<sup>43</sup> U.S. Government Accountability Office, *Federal Employees: Opportunities Exist to Strengthen Performance Management Pilot*, GAO-13-755, November 2013, pp. 11-14.

## FINANCIAL SUMMARY

### Fiscal Year 2014 Financial Summary<sup>44</sup> as of September 30, 2014 (dollars in thousands)

#### FY 14 Appropriations

FY 2014 Appropriation	\$ 42,740
Civil Service Retirement and Disability Trust Fund	2,345
<b>Total</b>	<b>\$ 45,085</b>

#### Obligations Charged to FY 2014 Funds

Personnel Compensation	\$ 22,211
Personnel Benefits	6,194
Travel of Things	87
Travel of Persons	322
Rents, Communications and Utilities	4,364
Printing and Reproduction	114
Other Services	2,122
Supplies and Materials	190
Equipment/Lease Improvements	926
Reimbursable Obligations	2,345
<b>Total</b>	<b>\$ 38,875</b>

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<sup>44</sup> This summary shows financial activity (appropriations and obligations by category) for FY 2014. Additional Financial Information is available in the FY 2014 [Annual Financial Report](#) available on our website.



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