



Annual Report for FY 2016

January 18, 2017

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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) 2016.

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

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Information about MSPB's FY 2016 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 2016-2018. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR) for FY 2016. MSPB's Annual Reports, AFRs, APR-APPs, and Strategic Plans are posted on the '[Agency Plans and Reports](#)' page on MSPB's website, www.mspb.gov, when they are released.

Go to www.mspb.gov to learn more about MSPB's work, sign up for MSPB's 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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U.S. MERIT SYSTEMS PROTECTION BOARD FISCAL YEAR 2016 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) for Fiscal Year (FY) 2016. In FY 2016, MSPB issued a total of 9,794 decisions including 8,602 decisions issued by the regional and field offices, 1,180 decisions issued by the Board, and 12 decisions issued by Administrative Law Judges. While this amount is less than the total decisions issued in 2014 and 2015, which included the bulk of MSPB's decisions on furlough cases, the total number of decisions issued in FY 2016 was higher than the total number of decisions issued in any one year from 2003 to 2013.

Between FY 2012-2016, MSPB issued decisions in 70,811 cases, including decisions issued in approximately 33,186 furlough cases. As of September 30, 2016, we have completed adjudication of over 99.5% of the furlough initial appeals filed as a result of budget sequestration in 2013. The quality of MSPB's decisions remained high, with an average of 95 percent of MSPB cases left unchanged by MSPB's reviewing court over 2014-2016. In early FY 2016, MSPB issued additional decisions under the Veterans Access, Choice, and Accountability Act of 2014. Also in 2016, MSPB issued an interim final rule clarifying that the parties have the right to use MSPB's existing discovery procedures in compliance proceedings. More information about MSPB's adjudication activities in 2016, including case processing statistics and summaries of significant Board decisions and Court opinions, are included in this report.

In FY 2016, MSPB issued three study reports: *The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce*; *Preventing Nepotism in the Federal Civil Service*; and *Training & Development for the Senior Executive Service: A Necessary Investment*. MSPB also published three editions of the *Issues of Merit* newsletter and two noteworthy articles, including one article on reasonable cause for using indefinite suspensions in situations related to potentially criminal behavior. In addition, we successfully administered the 2016 Merit Principles Survey to over 120,000 Federal employees in 24 Federal agencies. This web-based survey met all Federal information technology (IT) and security requirements and will provide data necessary to support several topics on the MSPB research agenda approved in 2015. Summaries of MSPB's studies publications and other studies activities are included in this Annual Report.

In accordance with Section 1206 of MSPB's statute, this Annual Report also includes summaries of the significant actions of the Office of Personnel Management (OPM) and an assessment of the degree to which those actions support the merit principles and a workforce free from prohibited personnel practices (PPPs). That section also discusses some important contextual factors involved in assessing OPM's significant actions.

Despite our successful year, MSPB must be prepared to face external challenges such as potential changes in law and jurisdiction proposed and enacted by the new Congress, possible reductions in Federal appropriations in FY 2018 and beyond, and other potential changes implemented by the new Administration. These changes may affect MSPB's appeals workload beginning in FY 2017. For example, proposed legislation summarized in this document and the FY 2015 Annual Report would expand the Department of Veterans' Affairs (VA) Senior Executive Service (SES) appeal rights and processing changes to all VA employees. These changes would necessarily affect MSPB adjudication of these VA cases which would logically also affect our processing of all non-VA

cases. These proposed changes also emphasize the importance of MSPB's merit systems studies and OPM review functions to ensure that the workforce continues to be managed under the merit principles and free from PPPs.

Internally, approximately 22 percent of MSPB employees agency-wide, including a higher proportion of MSPB's administrative judges (AJs), are eligible to retire in the next two years. We are thankful that Congress recognized MSPB's need for additional resources in FY 2014 and FY 2015, and stabilized those resources in FY 2016. These additional resources were essential to MSPB's ability to adjudicate furlough cases in an efficient manner, and simultaneously perform our other statutory and support functions. We have made progress in stabilizing and improving our IT infrastructure following the IT outage in late June 2015. We appointed an Acting CIO who will lead the efforts to upgrade MSPB's infrastructure and begin the process of planning for and transitioning to new applications for our adjudication, studies, and support functions. These efforts will include support for MSPB's modernization efforts involving e-Adjudication and implementing a stable, secure web-based survey capability. More information about our progress since the outage and our future IT endeavors can found in the MSPB APR-APP for FY 2016-2018.

My term on the Board ended on March 1, 2016. I continued to serve in a one-year hold-over period until my resignation as a Board Member and Chairman, effective January 7, 2017. Pursuant to 5 U.S.C. § 1203(c), Member Mark A. Robbins will assume all executive and administrative authority over the Board effective January 8, 2017. With two vacancies, MSPB will lack a quorum preventing it from considering petitions for review and issuing reports of merit system studies. However, long-standing delegations authorized by Title 5 of the U.S. Code will allow MSPB's AJs in the regional and field offices to continue hearing appeals and issuing initial decisions. And, appellants in the these actions may exercise their right to appeal directly to the U.S. Court of Appeals for the Federal Circuit. Thus, MSPB's adjudicatory process, albeit truncated, will continue.

As always, MSPB's success in FY 2016, and in past years, required the combined efforts of every MSPB office. The expertise, integrity, and dedication of MSPB employees are without equal. It has been an honor and privilege to serve as the Chairman of MSPB. I am confident that MSPB will continue to perform its statutory responsibilities effectively and efficiently in order to ensure a highly-qualified, diverse Federal workforce that is fairly and effectively managed.



Susan Tsui Grundmann,
Chairman
January 6, 2017

INTRODUCTION

This U.S. Merit Systems Protection Board (MSPB) Annual Report for FY 2016 includes summaries of the most significant Board decisions and relevant Court opinions, case processing statistics, summaries of MSPB's merit systems study reports, *Issues of Merit (IoM)* newsletter topics, noteworthy articles, and summaries of the significant actions of the Office of Personnel Management (OPM).¹ The report also contains summaries of the Board's financial status, outreach, and merit systems education activities, legislative and congressional relations activities, international activities, and the internal management challenges, and external factors that affect MSPB's work.

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 independent review and due process to employees and agencies. The CSRA authorized MSPB to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses to testify at hearings, and enforce compliance with final MSPB decisions. MSPB also was granted broad 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.² 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.³ Since the enactment of the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.⁴

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.

¹ 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)).

² 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.

³ Title 5 U.S.C. § 2301 and § 2302, respectively.

⁴ 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. L. No. 101-12, 103 Stat. 16; The Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199; The Veterans Access, Choice and Accountability Act of 2014, Pub. L. No. 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 January 7, 2017

Susan Tsui Grundmann was nominated by President Barack Obama to serve as a Member and Chairman of the MSPB 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 expired on March 1, 2016, and she continued to serve as Chairman until January 7, 2017, under the Board's enabling statute that permits a member to carry over for up to one year, or until a new member is confirmed and sworn in to succeed that member.

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 and Technology Center in Hollywood, 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.



MARK A. ROBBINS
Member, May 2012 to Present

Mark A. Robbins was nominated by President Barack Obama to serve as a Member of the MSPB on December 5, 2011. He was confirmed by the U.S. Senate on April 26, 2012. In January, 2017, in accordance with 5 U.S.C. § 1203(c), Mr. Robbins will perform the functions vested in the Chairman following Susan T. Grundmann's departure. 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 (HR) 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.

The third position on the Board has been vacant since the term of the Vice Chair Anne Wagner expired on March 1, 2015. The President nominated a successor but no action was taken on this nomination by the Senate during the 114th Congress.

MSPB Offices and Their Functions

MSPB is headquartered in Washington, D.C. and has eight regional and field offices located throughout the United States. For FY 2017 the agency requested 235 Full-time Equivalents (FTEs) to conduct and support its statutory duties.

The **Board Members** adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer. The Directors of offices described below 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 (HR), 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 HR services.

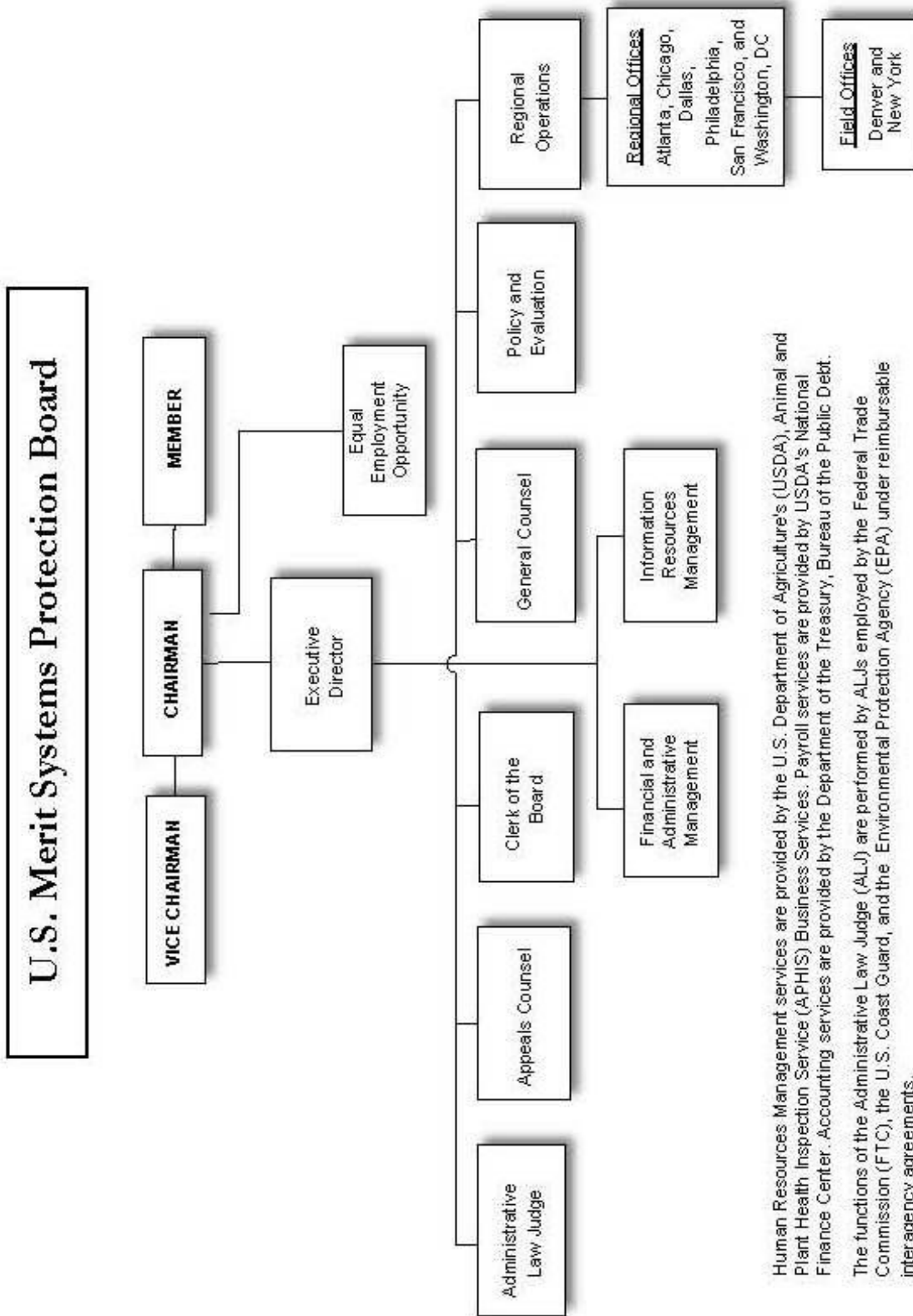
The **Office of the General Counsel**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for the Board 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 is responsible 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.

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FISCAL YEAR 2016 IN REVIEW

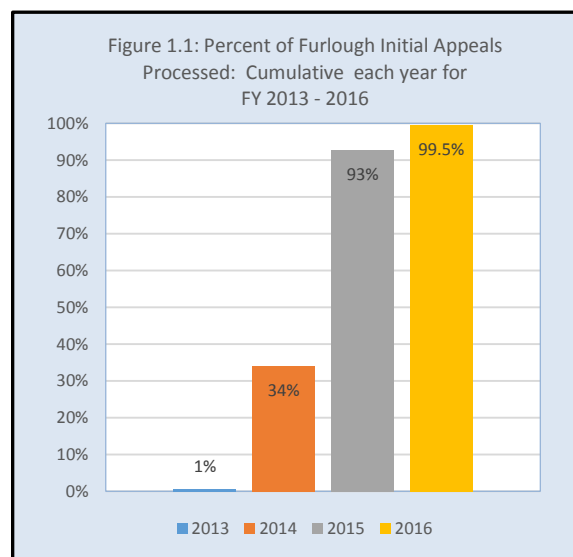
Adjudication

In FY 2016, MSPB processed 9,794 cases. MSPB's AJs in the regional and field offices issued initial decisions in 8,602 cases, including 2,235 furlough appeals. As figure 1.1 indicates, MSPB issued decisions in over 99.5% of the furlough appeals, cumulative beginning in 2013. The regional and field offices closed 5,886 non-furlough appeals. MSPB's Board Members processed 1,180 cases including 1,022 PFRs. This is the second largest number of cases closed by the Board at HQ in the last six years.

MSPB continued to provide alternative dispute resolution options to its customers, including the Mediation Appeals Program (MAP).

Information about whistleblower cases will be available in MSPB's APR-APP for FY 2016-

2018 in accord with The Whistleblower Protection Enhancement Act of 2012 (WPEA).



Statistical information on MSPB's case processing activity is provided in the Case Processing Statistics for FY 2016 [section](#) of this report. Summaries of significant MSPB decisions, and opinions issued by the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court are included in the [section](#) entitled Significant Board Decisions and Court Opinions Issued in FY 2016.

MSPB Regulations

MSPB published its interim final [rule](#) covering discovery in compliance cases on October 30, 2015. The interim final rule amends MSPB's rules of practice and procedure to address the holding in (*Bernard v. Department of Agriculture*, [788 F.3d 1365](#) (Fed. Cir. 2015)) and clarifies that the parties have a right to discovery in such cases under the Board's existing discovery procedures. This new provision also sets a deadline by which initial discovery requests must be filed. As in other Board cases, this deadline may be changed by the AJ.

Merit Systems Studies

In FY 2016, MSPB approved and published three merit system study reports on fair and effective management, nepotism, and training and development for the Senior Executive Service. MSPB also issued three editions of its *Issues of Merit (IoM)* newsletter, and two online articles. MSPB successfully administered the 2016 Merit Principle Survey (MPS) to over 120,000 Federal employees in 24 agencies. Summaries of FY 2016 MSPB merit systems study reports, *IoM* newsletter, noteworthy articles, and other merit systems studies activities are in the Summary of Merit Systems Studies Activity in FY 2016 [section](#) of this report.

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 they conform with MSPs and do not result in PPPs. In FY 2016, MSPB reviewed OPM's new significant actions including: Guidance on the Placement of Political Appointees in the Career Service During the 2016 Presidential Election Period, Strengthening the Senior Executive Service (SES), and Closing Mission-Critical Skills Gaps. MSPB updated the status of previous OPM significant actions and provided the review of OPM's work within the context of significant OPM issues including the changes in OPM Leadership and the National Background Investigation Bureau (NBIB). More information about MSPB's review of OPM significant actions is included in that [section](#) of this report.

Outreach, Merit Systems Education, and References to MSPB's Work

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, and promote stronger merit-based management practices. MSPB outreach also promotes better operation and understanding of the Federal merit system disciplinary and appeals process by sharing information about MSPB processes and its legal precedent. All of these efforts, in turn, help to improve employee and organizational performance, improve service to the American people, and provide value to the taxpayer.

In FY 2016, MSPB staff conducted 117 outreach events with a variety of customers and stakeholders. MSPB staff made presentations to OPM, the American Society for Public Administration, the EEOC's Excel Conference, the Society for Labor and Employee Relations Professionals, and to management, union, and affinity groups. Several MSPB staff participated in live and taped interviews with Federal News Radio. MSPB staff members were invited to present at the Federal Dispute Resolution Conference, National Federation of Federal Employees Convention, and the White House Leadership Development Program.

MSPB's adjudication and studies work, and other activities involving MSPB, were cited over 680 times in at least 135 different print and online sources including wire services, professional and trade publications, textbooks, newspapers, and other media. MSPB study reports were cited in GAO's [report](#) on Federal hiring and OPM's need to improve management and oversight of hiring authorities and in GAO's [report](#) on lessons learned for engaging Millennials and other age groups. Other specific citations of MSPB's work are contained in the legislative summary and merit system studies activity sections of this report.

International Activities

During FY 2016, MSPB hosted representatives from China, India, and Canada to share information about 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 members met with delegations from China and India to provide an overview of the Federal civil service. MSPB staff also met via video-conference with representatives from the Public Service Commission of Canada to discuss veterans' preference issues.

Legislative and Congressional Relations Activity

MSPB Reauthorization Hearing in the House. Chairman Grundmann testified at a [hearing](#) conducted by the House Committee on Oversight and Government Reform (OGR) subcommittee on Government Operations, on December 16, 2015, titled “Merit Systems Protection Board, Office of Government Ethics and Office of Special Counsel Reauthorization.” In January 2016, she submitted responses to follow up questions that she received from the Chairman and Ranking Member of the OGR Subcommittee on Government Operations.

Meeting with House Oversight Subcommittee Chairman, Mark Meadows. Representative Mark Meadows, Chairman of the House Committee on OGR Subcommittee on Government Operations visited MSPB HQ on April 12, 2016. Chairman Meadows met first with the Board Members and members of their staff. He then addressed all MSPB staff and responded to questions. Regional and field offices participated in this event by video teleconference.

Other Congressional Activity. Chairman Grundmann submitted statements for the record for two congressional hearings. First, on November 18, 2015, the Senate Committee on Veterans’ Affairs held a hearing on pending benefits legislation. At the Committee’s request, Chairman Grundmann submitted a statement for the record presenting her views on the Veterans Affairs Retaliation Prevention Act of 2015. Under the provisions of this bill, the VA is required to initiate an adverse action against a supervisory employee who has been found to have engaged in whistleblower retaliation. The supervisory employee would be permitted to appeal to MSPB pursuant to the applicable provisions of Section 713 of title 38, United States Code, which codifies provisions of the Veterans Access, Choice, and Accountability Act of 2014 (“the Choice Act”), Pub. L. No. 113-146.⁵

The Chairman’s [testimony](#) discussed the constitutional defects of the new legislation:

- By permitting the VA to remove tenured Federal employees without any pre-removal notice or an opportunity to respond, and by severely limiting post-removal appeal rights, Section 707 violates an employee’s right to constitutional due process as articulated by the Supreme Court.
- By removing the full Board from the MSPB appellate review process and permitting MSPB AJs to make a final decision binding an executive branch agency which is not reviewable by a presidential appointee, Section 707 violates the Appointments Clause contained in Article II, Section 2 of the United States Constitution.

Second, on June 17, 2016, the Senate Committee on Indian Affairs held a hearing to consider S. 2953, the Indian Health Service (IHS) Accountability Act of 2016. At the Committee’s request, Chairman Grundmann submitted a statement for the hearing record regarding the impact of this legislation on MSPB’s adjudicatory process. As with the previous bill, the statement described possible constitutional defects in the proposed legislation.

In addition to the annual briefing for the House and Senate appropriations subcommittees on the agency’s budget requests, MSPB staff conducted 5 briefings for congressional staff to provide technical assistance regarding proposed and/or pending legislation.

⁵ The Choice Act of 2014 mandates an expedited process wherein the MSPB AJ is required to issue a decision not later than 21 days after the date of the appeal. If an MSPB AJ’s fails to issue a decision within 21 days, the VA Secretary’s decision to either remove or transfer the employee becomes final. The decision in any such appeal is final and not subject to further appeal, either to the three-member Board at MSPB Headquarters in Washington, D.C., or to any federal court.

Legislation that Impacts MSPB or the Civil Service. During FY 2016, MSPB staff members were asked to provide technical assistance to House and Senate staff members regarding several other bills that might impact MSPB's adjudication of appeals or the civil service more generally. One of the most significant bills was S. 2921, the Veterans First Act of 2016 which had bipartisan support from 45 senators. This Act would require MSPB to expedite the adjudication of appeals filed by VA employees (*i.e.*, issue a decision within 90 days), but does not provide that MSPB's decision becomes final if MSPB fails to meet this deadline. MSPB anticipates Congressional action on similar bills in the next Congress. Significant activity in FY 2017 on legislation affecting the civil service or MSPB specifically will be summarized in the FY 2017 Annual Report.

Congressional Citations of MSPB's work. Representative Tammy Duckworth cited MSPB's [study on sexual orientation](#) in a [press release](#) on H.R. 4668. Senate report [114-255](#) on the FY 2017 National Defense Authorization Act (NDAA, S. 2943) [cited](#) MSPB's Veteran Hiring in the Civil Service: Practices and Perceptions [report](#) in relation to terminating the use of a waiver of the required 180 days of retirement before a military member can be hired for a position at DoD.

Nomination of New Board Member. On July 8, 2015, President Obama nominated Mark P. Cohen, Principal Deputy Special Counsel, U.S. Office of Special Counsel, to be a member of the MSPB, with the intent to appoint him as Vice Chairman. MSPB's legislative counsel accompanied nominee Cohen when he met with the minority staff of the Senate Committee on Homeland Security and Governmental Affairs on September 26, 2016, to discuss his responses to their policy questions. Ultimately, no action was taken on this nomination by the Senate.

External Factors and Internal Management Challenges

The categories of, and limited information about, the external factors and internal management challenges that may affect MSPB's work are provided here as context for the other information contained in the Annual Report. More detailed information about MSPB's external factors and internal management challenges can be obtained in the MSPB APR-APP for FY 2016-2018. MSPB's primary internal challenges include human capital issues, and ensuring a stable, secure and viable IT infrastructure to support current mission and administrative functions and its modernization efforts, which include implementing MSPB's e-Adjudication initiative and obtaining a secure, cloud-based survey capability.

Human Capital Issues. Chairman Susan T. Grundmann's term ended March 2016 and she continued to serve as Chairman until her departure on January 7, 2017. In accordance with 5 U.S.C. § 1203(c), Member Mark A. Robbins shall perform the functions vested in the Chairman, as the single remaining Board Member. Without a quorum of at least two confirmed and sworn-in Board Members, MSPB will not be able to issue PFR decisions or publish reports of merit system studies. In addition, 22 percent of MSPB employees will be eligible to retire in the next two years. This includes over 25 percent of the 70 AJs occupying permanent positions, and at least three people in one-deep critical positions.

IT Infrastructure Stability and Modernization. As we reported last year, on June 30, 2015, MSPB experienced a significant disruption of its IT infrastructure resulting in the loss of MSPB's virtual environment as well as the loss of employee working and archived documents. MSPB enlisted the help of an independent contractor to assess the agency's network and infrastructure. William Spencer, then the Clerk of the Board, was appointed as Acting Chief Information Officer (CIO) effective June 27, 2016. More information about the assessment and recommendations of

the independent contractor, status of MSPB's IT infrastructure, progress on improvements during FY 2016, and future IT plans can be found in the APR-APP for FY 2016-2018.

Changes in Law and Jurisdiction. In addition to legislation introduced and reported in last year's [Annual Report](#) that expands the Veterans Affairs' SES appeals procedures, several additional bills were introduced in FY 2016. There is likely to be further action on these or similar bills in the new Congress. MSPB will continue to monitor legislation that affects the merit systems and MSPB's role in protecting merit, and significant legislative activity on these topics will be summarized in the FY 2017 Annual Report. As stated above, to carry out all of MSPB's statutory responsibilities, including issuing decisions at HQ and merit systems study reports, MSPB needs a full quorum of Board Members.

Governmentwide Budget Reductions Beyond FY 2017. It is unclear if other Governmentwide budget reductions will occur in late FY 2017 and beyond. Budget reductions could mean an increase in appeals involving furloughs, reductions in force (RIFs), or early retirements (through Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payment (VSIP)). Legislative changes and budget reductions not only affect our adjudication functions, they also emphasize the need for strong merit studies and OPM review programs to ensure the Federal workforce continues to be managed under the MSPs and free from PPPs.

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CASE PROCESSING STATISTICS FOR FY 2016

Summary of Cases Decided by MSPB

Table 1: FY 2016 Summary of Cases Decided by MSPB

Cases Decided in MSPB Regional and Field Offices	
Appeals	8,121
Addendum Cases ¹	455
Stay Requests ²	26
TOTAL Cases Decided in RO/FOs	8,602
Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction³	12
Cases Decided by the Board	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	1,022
Petitions for Review (PFRs) - Addendum Cases	94
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings ⁴	6
Court Remands	5
Compliance Referrals	21
EEOC Non Concurrence Cases	0
Arbitration Cases	6
Subtotal - Appellate Jurisdiction	1,154
Original Jurisdiction ⁵	24
Interlocutory Appeals	2
TOTAL Cases Decided by the Board	1,180
TOTAL Decisions (Board, ALJs, RO/FOs)	9,794
¹ Includes 83 requests for attorney fees, 161 Board remand cases, 185 compliance cases, 8 court remand cases, 9 requests for compensatory damages (discrimination cases only), 7 requests for consequential damages, and 2 requests for liquidated damages. ² Includes 24 stay requests in whistleblower cases and 2 in nonwhistleblower cases. ³ Initial decisions by ALJs: 1 disciplinary action–non Hatch Act case, 1 Hatch Act case, 3 actions against SES cases, and 7 actions against ALJs. ⁴ These 6 cases were reopened by the Board on its own motion. ⁵ Final Board Decisions: 1 disciplinary action-non Hatch Act, 1 Hatch Act, 3 PFRs of actions against ALJs, 9 requests for regulation review, and 10 requests for stay.	

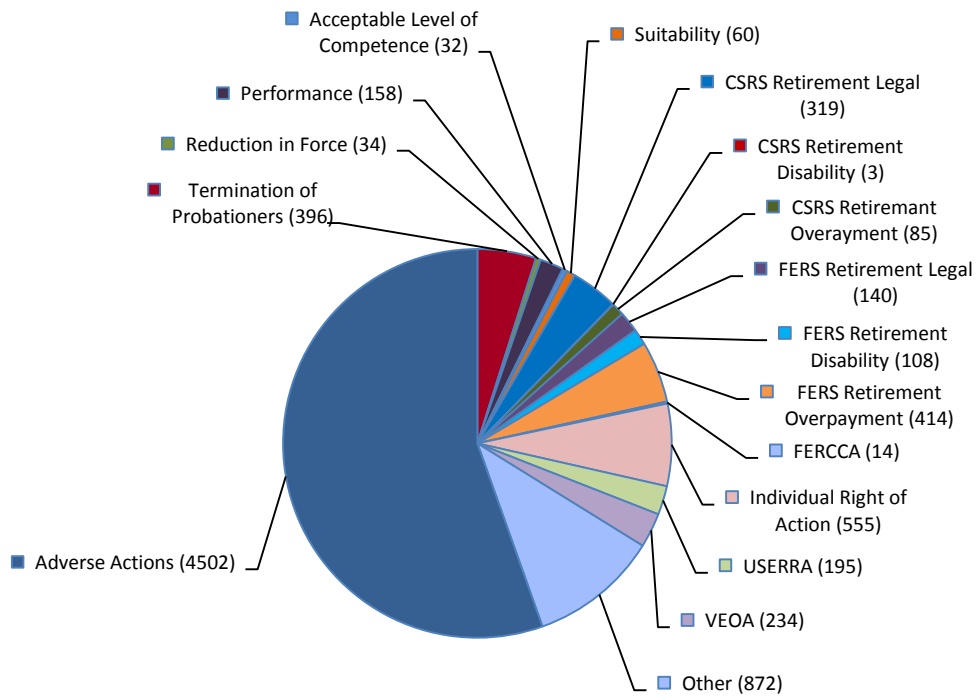
Cases Processed in the Regional and Field Offices

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

Type of Case	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Adverse Action by Agency ³	4,502	1,253	27.83	3,249	72.17	796	24.50	2,453	75.50	
Termination of Probationers	396	367	92.68	29	7.32	25	86.21	4	13.79	
Reduction in Force	34	20	58.82	14	41.18	6	42.86	8	57.14	
Performance	158	36	22.78	122	77.22	75	61.48	47	38.52	
Acceptable Level of Competence (ALOC) ⁴	32	20	62.50	12	37.50	9	75.00	3	25.00	
Suitability	60	23	38.33	37	61.67	26	70.27	11	29.73	
CSRS Retirement: Legal ⁴	319	194	60.82	125	39.18	8	6.40	117	93.60	
CSRS Retirement: Disability	3	2	66.67	1	33.33	0	0.00	1	100.00	
CSRS Retirement: Overpayment	85	38	44.71	47	55.29	32	68.09	15	31.91	
FERS Retirement: Legal ⁴	140	94	67.14	46	32.86	3	6.52	43	93.48	
FERS Retirement: Disability	108	68	62.96	40	37.04	0	0.00	40	100.00	
FERS Retirement: Overpayment	414	146	35.27	268	64.73	175	65.30	93	34.70	
FERCCA ⁴	14	13	92.86	1	7.14	0	0.00	1	100.00	
Individual Right of Action	555	348	62.70	207	37.30	107	51.69	100	48.31	
USERRA	195	77	39.49	118	60.51	28	23.73	90	76.27	
VEOA	234	103	44.02	131	55.98	9	6.87	122	93.13	
Other ⁵	872	817	93.69	55	6.31	39	70.91	16	29.09	
Total	8,121	3,619	44.56	4,502	55.44	1,338	29.72	3,164	70.28	

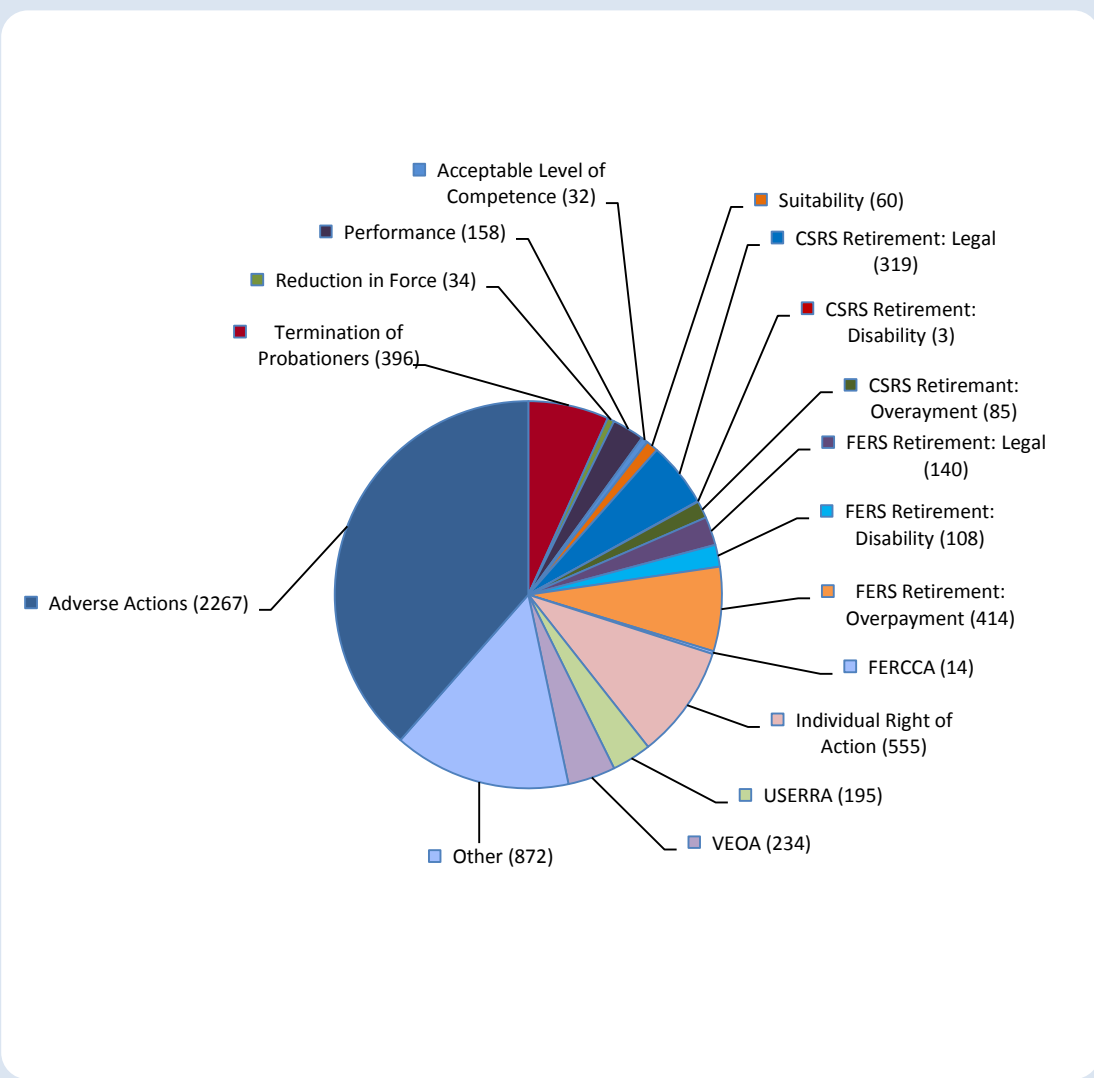
¹ Percent Dismissed and Not Dismissed are of the number Decided.
² Percent Settled and Adjudicated are of the number Not Dismissed.
³ This includes 2,235 furlough appeals decided, 209 dismissed, 2,026 not dismissed, 1 settled, 2,025 adjudicated on the merits.
⁴ An acceptable level of competence (ALOC) means an employee is effectively performing the duties and responsibilities of his or her assigned job, which warrants advancing the employee's rate of pay to the next higher step at the grade of the employee's position. If an employee's performance is not at an ALCO, then the agency may deny his or her within-grade increase (WIGI); Civil Service Retirement System (CSRS); Federal Employees Retirement System (FERS); Federal Erroneous Retirement Coverage Corrections Act (FERCCA).
⁵ "Other" appeals include Restoration to Duty (102), Miscellaneous (703), and additional types, such as Reemployment Priority, Employment Practices, and others.

**Figure 3.1: Type of Appeals Decided in the Regional and Field Offices
(Including furlough appeals)**



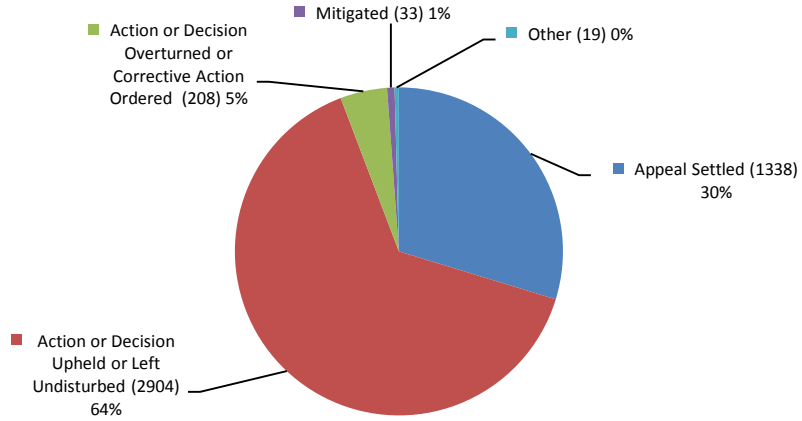
Total Number of Appeals: 8,121

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



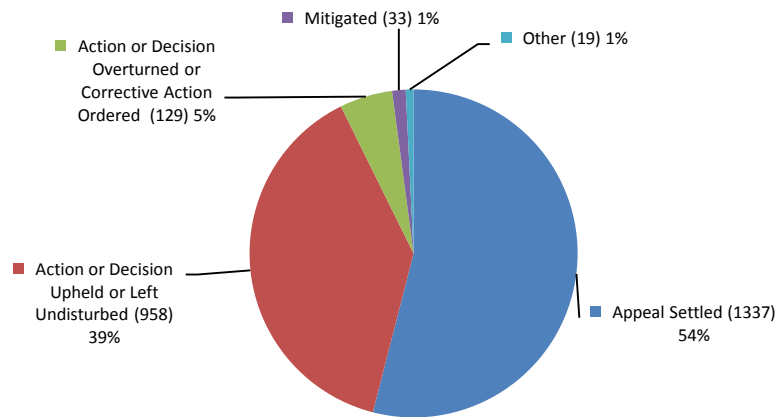
Total Number of Appeals: 5,886

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



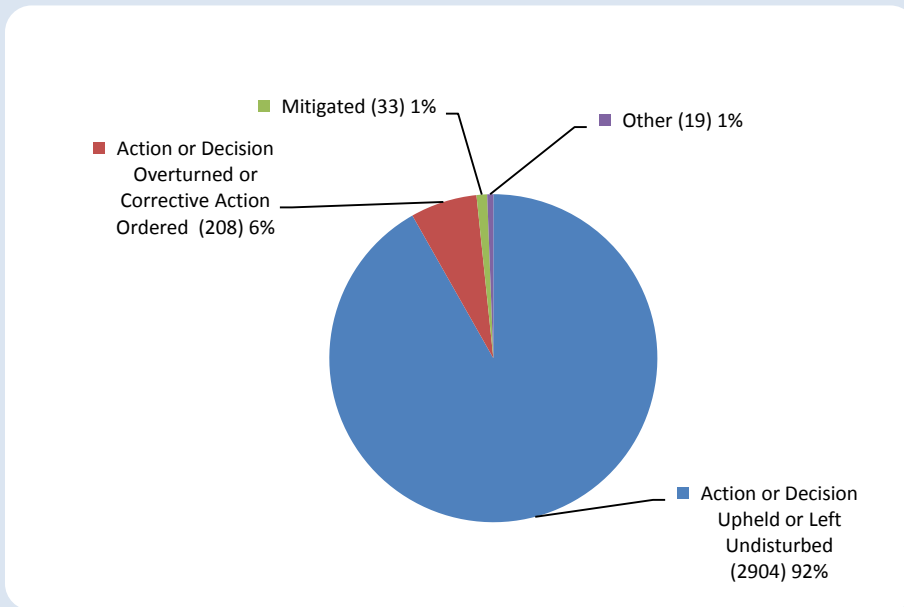
Total Number of Appeals that Were Not Dismissed: 4,502

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



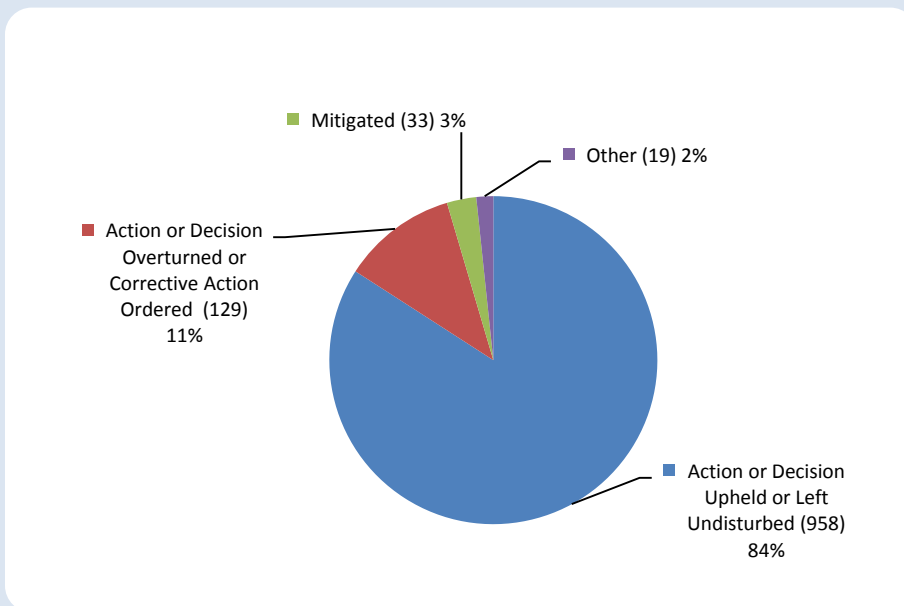
Total Number of Appeals that Were Not Dismissed: 2,476

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



Based on 3,164 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 1,139 Appeals Adjudicated on the Merits

Table 3: Disposition of Appeals by Agency

	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Department of the Army	1,471	408	27.7	1,063	72.3	132	12.4	931	87.6	
Office of Personnel Management ³	1,122	562	50.1	560	49.9	242	43.2	318	56.8	
Department of the Navy	1,089	316	29.0	773	71.0	95	12.3	678	87.7	
Department of Veterans Affairs	962	548	57.0	414	43.0	279	67.4	135	32.6	
Department of Defense	617	206	33.4	411	66.6	48	11.7	363	88.3	
United States Postal Service	571	418	73.2	153	26.8	91	59.5	62	40.5	
Department of the Air Force	500	144	28.8	356	71.2	61	17.1	295	82.9	
Department of Homeland Security	403	243	60.3	160	39.7	93	58.1	67	41.9	
Department of Health and Human Services	210	82	39.0	128	61.0	32	25.0	96	75.0	
Department of Justice	193	120	62.2	73	37.8	37	50.7	36	49.3	
Department of the Treasury	139	84	60.4	55	39.6	41	74.5	14	25.5	
Department of Agriculture	134	70	52.2	64	47.8	41	64.1	23	35.9	
Department of the Interior	134	72	53.7	62	46.3	31	50.0	31	50.0	
Department of Transportation	87	56	64.4	31	35.6	15	48.4	16	51.6	
Social Security Administration	87	51	58.6	36	41.4	15	41.7	21	58.3	
Department of Commerce	59	32	54.2	27	45.8	16	59.3	11	40.7	
Department of Labor	51	34	66.7	17	33.3	10	58.8	7	41.2	
Department of Energy	41	20	48.8	21	51.2	8	38.1	13	61.9	
Department of State	25	15	60.0	10	40.0	3	30.0	7	70.0	
Environmental Protection Agency	25	18	72.0	7	28.0	3	42.9	4	57.1	
Department of Housing and Urban Development	21	14	66.7	7	33.3	5	71.4	2	28.6	
General Services Administration	19	16	84.2	3	15.8	2	66.7	1	33.3	
Small Business Administration	17	9	52.9	8	47.1	3	37.5	5	62.5	
Tennessee Valley Authority	12	8	66.7	4	33.3	0	0.0	4	100.0	
Equal Employment Opportunity Commission	11	6	54.5	5	45.5	3	60.0	2	40.0	
National Aeronautics and Space Administration	10	4	40.0	6	60.0	3	50.0	3	50.0	
Federal Deposit Insurance Corporation	9	4	44.4	5	55.6	2	40.0	3	60.0	
Department of Education	8	4	50.0	4	50.0	3	75.0	1	25.0	
Smithsonian Institution	8	4	50.0	4	50.0	3	75.0	1	25.0	
National Archives and Records Administration	7	5	71.4	2	28.6	2	100.0	0	0.0	
Agency for International Development	6	3	50.0	3	50.0	1	33.3	2	66.7	
Corporation for National and Community Service	6	3	50.0	3	50.0	2	66.7	1	33.3	

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

	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Securities and Exchange Commission	6	3	50.0	3	50.0	3	100.0	0	0.0	
Federal Communications Commission	5	5	100.0	0	0.0	0	0.0	0	0.0	
Export-Import Bank of the United States	4	2	50.0	2	50.0	2	100.0	0	0.0	
Federal Housing Finance Agency	4	2	50.0	2	50.0	1	50.0	1	50.0	
Federal Reserve System	3	2	66.7	1	33.3	0	0.0	1	100.0	
Federal Trade Commission	3	3	100.0	0	0.0	0	0.0	0	0.0	
Armed Forces Retirement Home	2	0	0.0	2	100.0	1	50.0	1	50.0	
Commodity Futures Trading Commission	2	1	50.0	1	50.0	1	100.0	0	0.0	
Court Services and Offender Supervision Agency for District of Columbia	2	1	50.0	1	50.0	1	100.0	0	0.0	
Government Printing Office	2	1	50.0	1	50.0	1	100.0	0	0.0	
International Boundary and Water Commission: U.S. and Mexico	2	0	0.0	2	100.0	2	100.0	0	0.0	
Judicial Branch	2	2	100.0	0	0.0	0	0.0	0	0.0	
Merit Systems Protection Board	2	1	50.0	1	50.0	0	0.0	1	100.0	
National Science Foundation	2	2	100.0	0	0.0	0	0.0	0	0.0	
Nuclear Regulatory Commission	2	0	0.0	2	100.0	0	0.0	2	100.0	
Office of Management and Budget	2	1	50.0	1	50.0	0	0.0	1	100.0	
Overseas Private Investment Corporation	2	0	0.0	2	100.0	1	50.0	1	50.0	
Railroad Retirement Board	2	1	50.0	1	50.0	1	100.0	0	0.0	
Administrative Conference of the United States	1	1	100.0	0	0.0	0	0.0	0	0.0	
Administrative Office of the U.S. Courts	1	1	100.0	0	0.0	0	0.0	0	0.0	
Broadcasting Board of Governors	1	1	100.0	0	0.0	0	0.0	0	0.0	
Defense Nuclear Facilities Safety Board	1	0	0.0	1	100.0	0	0.0	1	100.0	
Executive Office of the President, Office of Administration	1	0	0.0	1	100.0	0	0.0	1	100.0	
Federal Election Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	
Government Accountability Office	1	1	100.0	0	0.0	0	0.0	0	0.0	
Government of the District of Columbia	1	1	100.0	0	0.0	0	0.0	0	0.0	
Inter-American Foundation	1	0	0.0	1	100.0	0	0.0	1	100.0	

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

	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Millennium Challenge Corporation	1	1	100.0	0	0.0	0	0.0	0	0.0	
National Council on Disability	1	1	100.0	0	0.0	0	0.0	0	0.0	
National Credit Union Administration	1	1	100.0	0	0.0	0	0.0	0	0.0	
National Labor Relations Board	1	1	100.0	0	0.0	0	0.0	0	0.0	
Office of Special Counsel	1	1	100.0	0	0.0	0	0.0	0	0.0	
Other	1	1	100.0	0	0.0	0	0.0	0	0.0	
Peace Corps	1	0	0.0	1	100.0	1	100.0	0	0.0	
Pension Benefit Guaranty Corporation	1	0	0.0	1	100.0	1	100.0	0	0.0	
The White House	1	1	100.0	0	0.0	0	0.0	0	0.0	
TOTAL	8,121	3,619	44.6	4,502	55.4	1,338	29.7	3,164	70.3	
¹ Percent Dismissed and Not Dismissed are of the number Decided. ² Percent Settled and Adjudicated are of the number Not Dismissed. ³ 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

	Adjudicated ¹	Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%
Department of the Army	931	836	89.80	90	9.7	5	0.5	0	0.0
Department of the Navy	678	669	98.7	6	0.9	3	0.4	0	0.0
Department of Defense	363	357	98.35	5	1.4	1	0.3	0	0.0
Office of Personnel Management ²	318	244	76.7	49	15.4	7	2.2	18	5.7
Department of the Air Force	295	289	97.97	4	1.4	2	0.7	0	0.0
Department of Veterans Affairs	135	113	83.7	18	13.3	4	3.0	0	0.0
Department of Health and Human Services	96	94	97.92	2	2.1	0	0.0	0	0.0
Department of Homeland Security	67	59	88.1	7	10.4	1	1.5	0	0.0
United States Postal Service	62	49	79.03	9	14.5	4	6.5	0	0.0
Department of Justice	36	34	94.4	2	5.6	0	0.0	0	0.0
Department of the Interior	31	31	100.00	0	0.0	0	0.0	0	0.0
Department of Agriculture	23	19	82.6	3	13.0	0	0.0	1	4.3
Social Security Administration	21	19	90.48	2	9.5	0	0.0	0	0.0
Department of Transportation	16	14	87.5	1	6.3	1	6.3	0	0.0
Department of the Treasury	14	12	85.71	0	0.0	2	14.3	0	0.0
Department of Energy	13	13	100.0	0	0.0	0	0.0	0	0.0
Department of Commerce	11	10	90.91	1	9.1	0	0.0	0	0.0
Department of Labor	7	5	71.4	0	0.0	2	28.6	0	0.0
Department of State	7	7	100.00	0	0.0	0	0.0	0	0.0
Small Business Administration	5	5	100.0	0	0.0	0	0.0	0	0.0
Environmental Protection Agency	4	3	75.00	1	25.0	0	0.0	0	0.0
Tennessee Valley Authority	4	3	75.0	1	25.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	3	3	100.00	0	0.0	0	0.0	0	0.0
National Aeronautics and Space Administration	3	3	100.0	0	0.0	0	0.0	0	0.0
Agency for International Development	2	2	100.00	0	0.0	0	0.0	0	0.0
Department of Housing and Urban Development	2	1	50.0	1	50.0	0	0.0	0	0.0
Equal Employment Opportunity Commission	2	0	0.00	2	100.0	0	0.0	0	0.0
Nuclear Regulatory Commission	2	1	50.0	1	50.0	0	0.0	0	0.0

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

	Adjudicated ¹		Affirmed		Reversed		Mitigated Modified		Other	
	#	%	#	%	#	%	#	%	#	%
Armed Forces Retirement Home	1	100.00	1	100.00	0	0.0	0	0.0	0	0.0
Corporation for National and Community Service	1	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Defense Nuclear Facilities Safety Board	1	100.00	1	100.00	0	0.0	0	0.0	0	0.0
Department of Education	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Executive Office of the President, Office of Administration	1	0.00	0	0.00	0	0.0	1	100.0	0	0.0
Federal Housing Finance Agency	1	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Federal Reserve System	1	100.00	1	100.00	0	0.0	0	0.0	0	0.0
General Services Administration	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Inter-American Foundation	1	100.00	1	100.00	0	0.0	0	0.0	0	0.0
Merit Systems Protection Board	1	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Office of Management and Budget	1	100.00	1	100.00	0	0.0	0	0.0	0	0.0
Overseas Private Investment Corporation	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Smithsonian Institution	1	100.00	1	100.00	0	0.0	0	0.0	0	0.0
TOTAL³	3,164	91.8	2,904	91.8	208	6.6	33	1.0	19	0.6

¹ Adjudicated, i.e., not dismissed or settled.

² 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.

³ Percentages may not total 100 because of rounding.

Cases Processed at Headquarters

For case outcomes, we have provided data both with and without furlough cases. The data without furlough cases is most comparable to case processing data in previous Annual Reports.

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

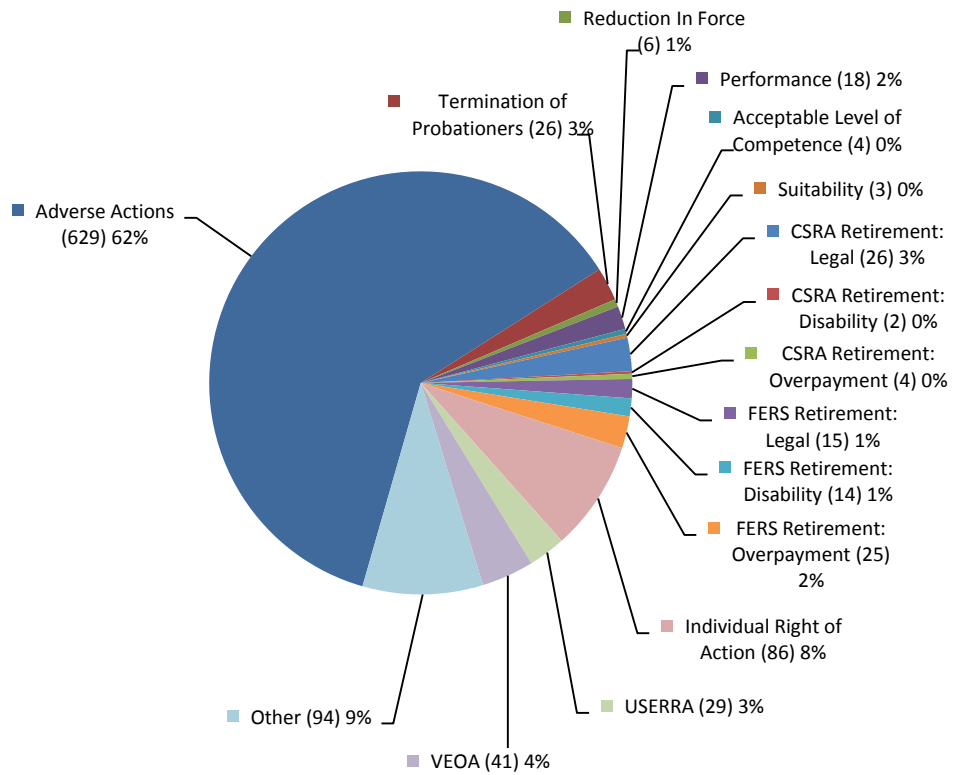
Type of Case	Decided		Dismissed		Settled		Denied		Denied; Further Analysis ¹		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency ²	629		132	20.99	4	0.64	402	63.91	18	2.86	73	11.61
Termination of Probationers	26		1	3.85	0	0.00	23	88.46	0	0.00	2	7.69
Reduction in Force	6		0	0.00	0	0.00	4	66.67	0	0.00	2	33.33
Performance	18		2	11.11	3	16.67	13	72.22	0	0.00	0	0.00
Acceptable Level of Competence (ALOC) ³	4		0	0.00	0	0.00	2	50.00	0	0.00	2	50.00
Suitability	3		0	0.00	0	0.00	3	100.00	0	0.00	0	0.00
CSRS Retirement: Legal ³	26		2	7.69	1	3.85	22	84.62	1	3.85	0	0.00
CSRS Retirement: Disability	2		1	50.00	0	0.00	1	50.00	0	0.00	0	0.00
CSRS Retirement: Overpayment	4		0	0.00	0	0.00	3	75.00	0	0.00	1	25.00
FERS Retirement: Legal ³	15		0	0.00	1	6.67	14	93.33	0	0.00	0	0.00
FERS Retirement: Disability	14		2	14.29	0	0.00	9	64.29	0	0.00	3	21.43
FERS Retirement: Overpayment	25		1	4.00	0	0.00	20	80.00	1	4.00	3	12.00
Individual Right of Action	86		7	8.14	0	0.00	56	65.12	2	2.33	21	24.42
USERRA	29		3	10.34	0	0.00	20	68.97	0	0.00	6	20.69
VEOA	41		0	0.00	0	0.00	33	80.49	0	0.00	8	19.51
Other	94		3	3.19	2	2.13	77	81.91	2	2.13	10	10.64
Total	1,022		154	15.07	11	1.08	702	68.69	24	2.35	131	12.82

¹ "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, and Figures 3.5, 3.5a, 3.7 and 3.7a. 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." Beginning in 2014, the Board will report dispositions of cases that are denied, but in which the Board considers other issues of its own accord as "Denied; Further Analysis."

² This includes 370 furlough appeals decided, 25 furlough appeals dismissed, 212 furlough appeals denied, 2 furlough appeals denied; further analysis, and 31 furlough appeals granted.

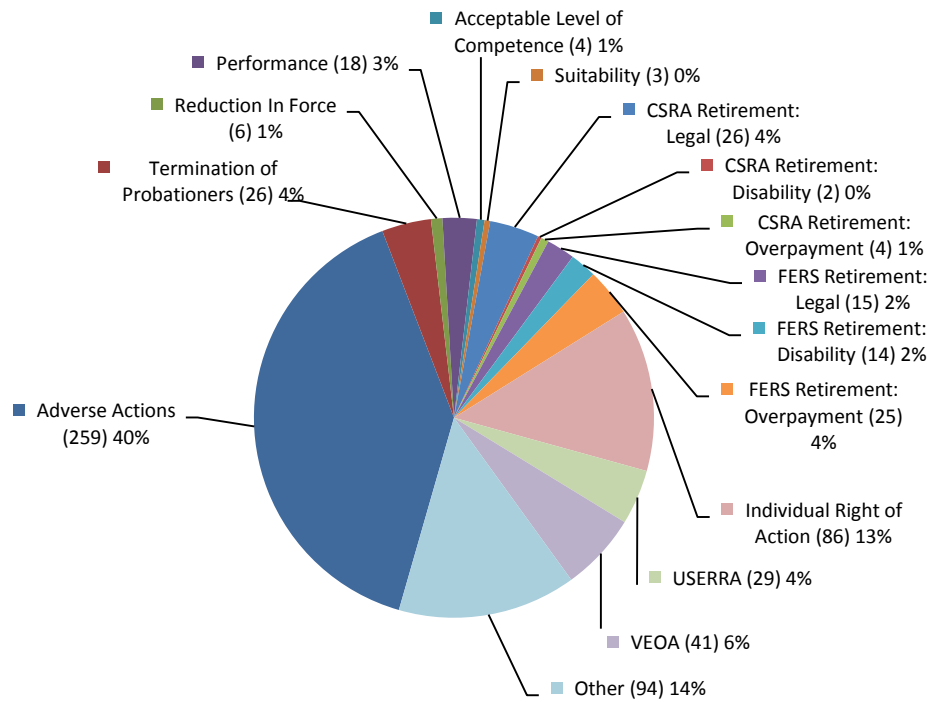
³ An acceptable level of competence (ALOC) means an employee is effectively performing the duties and responsibilities of his or her assigned job, which warrants advancing the employee's rate of pay to the next higher step at the grade of the employee's position. If an employee's performance is not at an ALOC, then the agency may deny his or her within-grade increase (WIGI); Civil Service Retirement System (CSRS); Federal Employees Retirement System (FERS).

Figure 3.4: Types of Petitions for Review (Including furlough appeals)



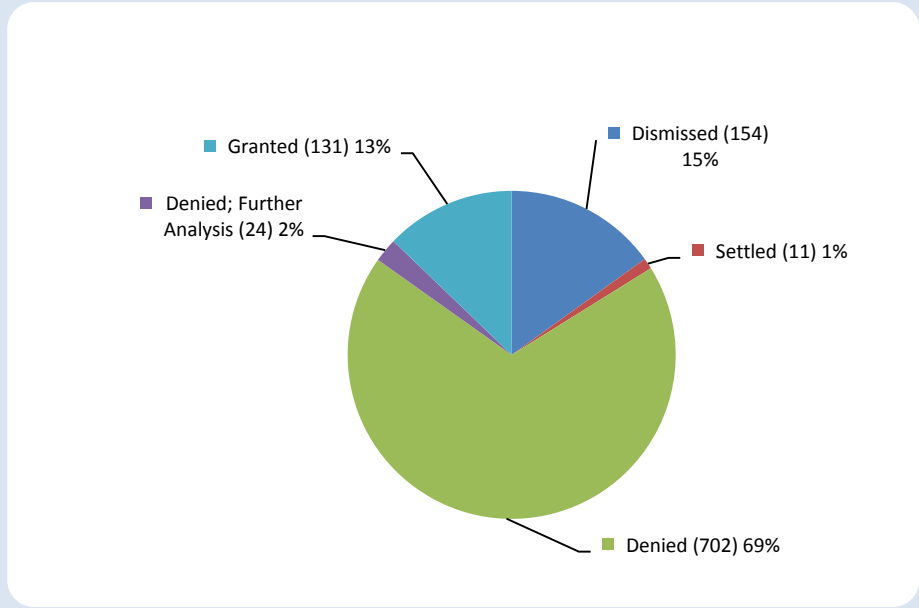
Total Number of PFRs: 1,022

Figure 3.4a: Types of Petitions for Review (Not including furlough appeals)



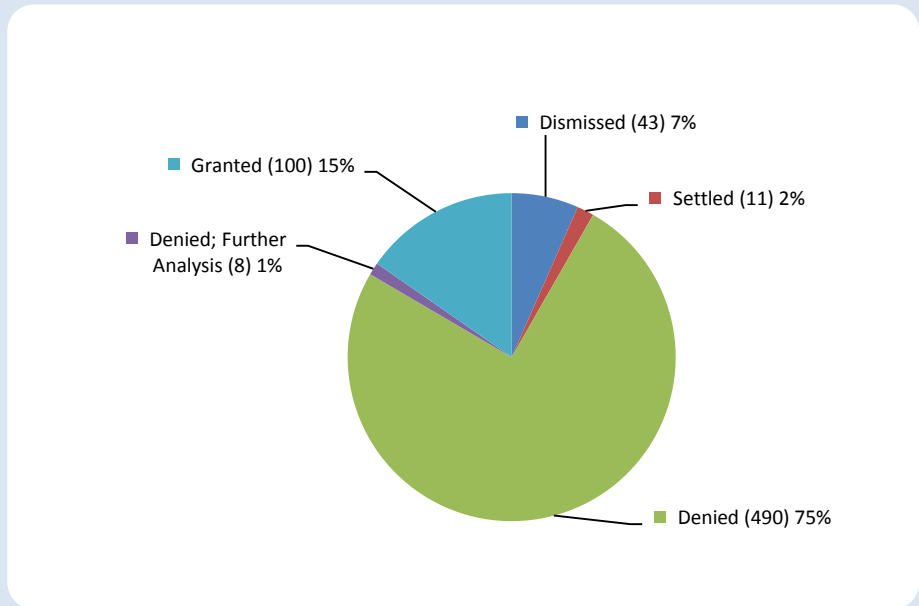
Total Number of PFRs: 652

**Figure 3.5: Disposition of Petitions for Review of Initial Decisions
(Including furlough appeals)**



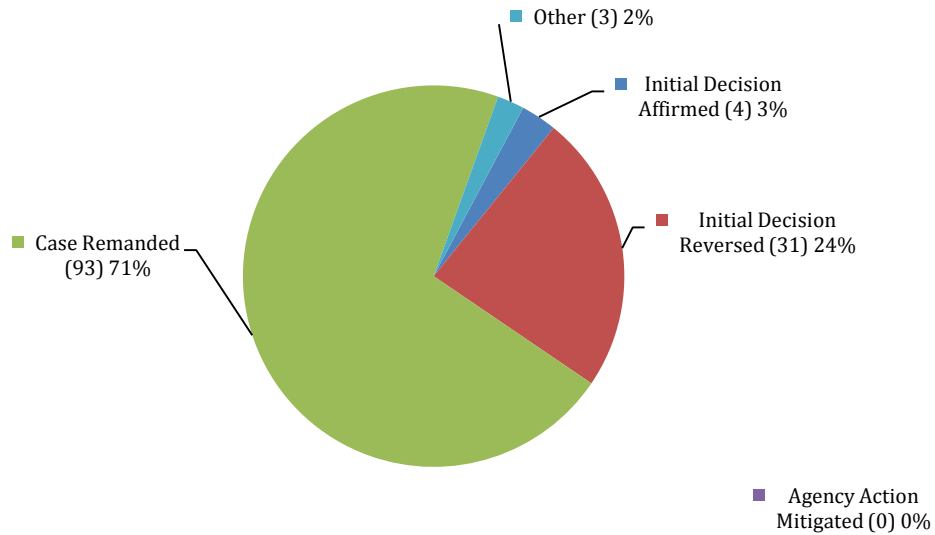
Based on 1,022 Total PFRs

**Figure 3.5a: Disposition of Petitions for Review of Initial Decisions
(Not including furlough appeals)**



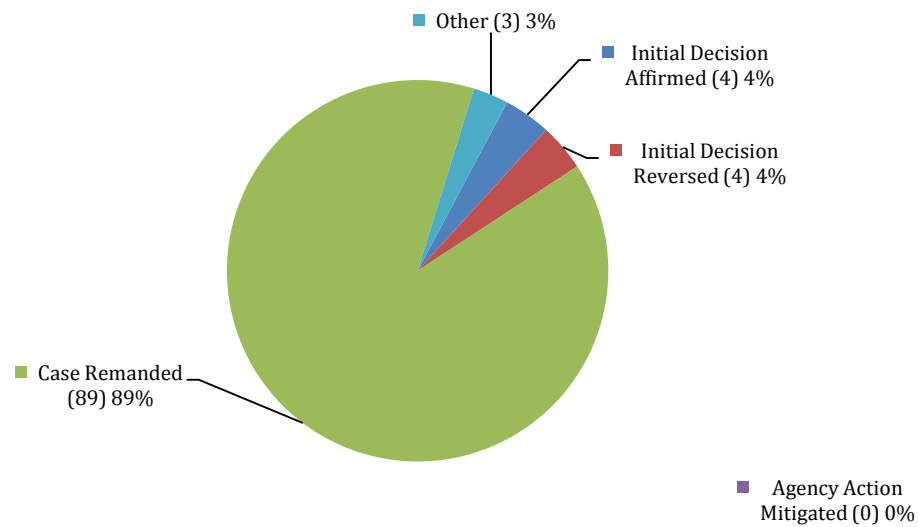
Based on 652 Total PFRs

**Figure 3.6: Disposition of Petitions for Review Granted
(Including furlough appeals)**



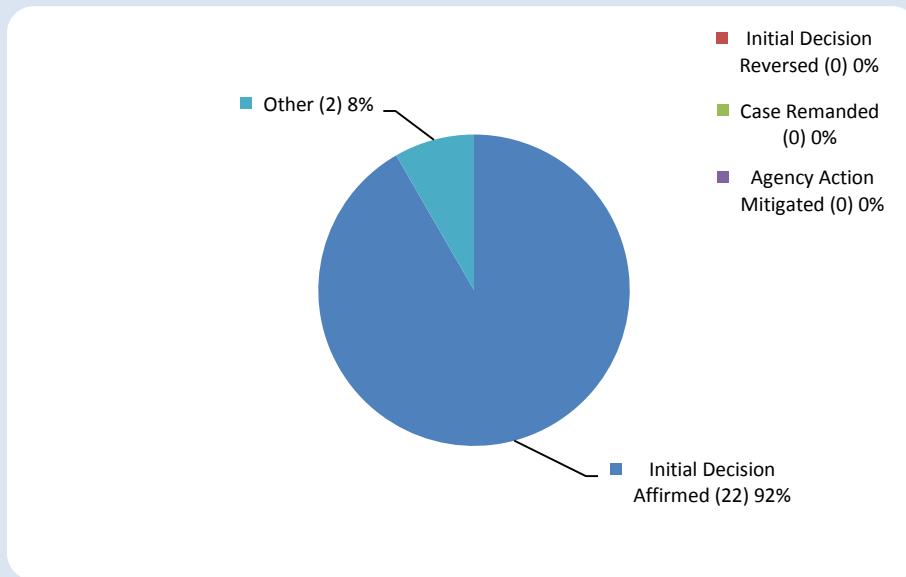
Based on 131 PFRs Granted

**Figure 3.6a: Disposition of Petitions for Review Granted
(Not including furlough appeals)**



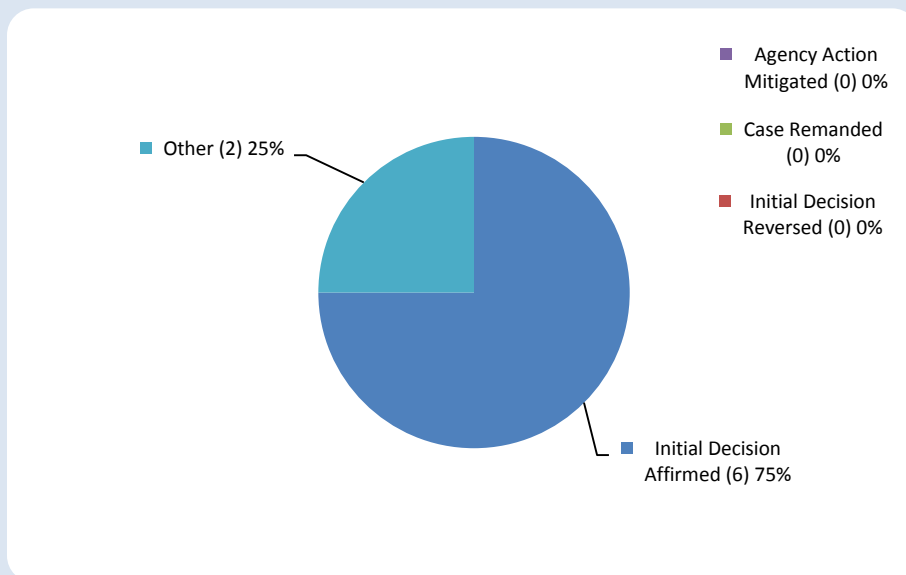
Based on 100 PFRs Granted

Figure 3.7: Disposition of Petitions for Review Denied; Further Analysis (Including furlough appeals)



Based on 24 PFRs Denied; Further Analysis

Figure 3.7a: Disposition of Petitions for Review Denied; Further Analysis (Not including furlough appeals)



Based on 8 PFRs Denied; Further Analysis

Table 6: Disposition of Petitions for Review of Initial Decisions, by Agency¹

	Decided		Dismissed		Settled		Denied		Denied; Further analysis		Granted	
	#	#	%	#	%	#	%	#	%	#	%	
Department of the Army	216	110	50.93	0	0	69	31.94	0	0	37	17.13	
Department of the Navy	169	4	2.37	2	1.183	131	77.51	16	9.47	16	9.47	
Department of Veterans Affairs	87	5	5.75	1	1.149	62	71.26	3	3.45	16	18.39	
Office of Personnel Management	87	6	6.90	2	2.299	70	80.46	2	2.30	7	8.05	
Department of the Treasury	79	1	1.27	1	1.266	75	94.94	0	0	2	2.53	
United States Postal Service	75	1	1.33	0	0	66	88	1	1.333	7	9.33	
Department of Homeland Security	56	6	10.71	2	3.571	39	69.64	0	0	9	16.07	
Department of Defense	41	5	12.2	1	2.439	26	63.41	0	0	9	21.95	
Department of the Air Force	41	1	2.44	0	0	38	92.68	0	0	2	4.88	
Department of Health and Human Services	36	2	5.56	0	0	30	83.33	0	0	4	11.11	
Department of Justice	27	2	7.41	0	0	21	77.78	1	3.704	3	11.11	
Department of the Interior	16	0	0	0	0	13	81.25	0	0	3	18.75	
Department of Transportation	14	2	14.29	0	0	10	71.43	0	0	2	14.29	
Department of Agriculture	13	0	0	1	7.692	9	69.23	0	0	3	23.08	
Social Security Administration	10	1	10	0	0	7	70	0	0	2	20	
Department of Commerce	9	2	22.22	0	0	5	55.56	0	0	2	22.22	
Department of Labor	9	1	11.11	1	11.11	6	66.67	0	0	1	11.11	
Environmental Protection Agency	4	1	25	0	0	2	50	0	0	1	25	
Tennessee Valley Authority	4	0	0	0	0	2	50	0	0	2	50	
Department of Energy	3	0	0	0	0	3	100	0	0	0	0	
Department of State	3	0	0	0	0	1	33.33	1	33.33	1	33.33	
General Services Administration	3	1	33.33	0	0	2	66.67	0	0	0	0	
Small Business Administration	3	0	0	0	0	2	66.67	0	0	1	33.33	
Federal Deposit Insurance Corporation	2	0	0	0	0	1	50	0	0	1	50	
National Aeronautics and Space Administration	2	0	0	0	0	2	100	0	0	0	0	
National Archives and Records Administration	2	0	0	0	0	2	100	0	0	0	0	

¹This table includes both furlough and nonfurlough appeals.

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

	Decided		Dismissed		Settled		Denied		Denied; Further analysis		Granted	
	#	#	%	#	%	#	%	#	%	#	%	
Administrative Conference of the United States	1	1	100	0	0	0	0	0	0	0	0	0
Agency for International Development	1	0	0	0	0	1	100	0	0	0	0	0
Armed Forces Retirement Home	1	0	0	0	0	1	100	0	0	0	0	0
Central Intelligence Agency	1	0	0	0	0	1	100	0	0	0	0	0
Committee for Purchase from People Who Are Blind or Severely Disabled	1	1	100	0	0	0	0	0	0	0	0	0
Department of Education	1	0	0	0	0	1	100	0	0	0	0	0
Equal Employment Opportunity Commission	1	0	0	0	0	1	100	0	0	0	0	0
Merit Systems Protection Board	1	0	0	0	0	1	100	0	0	0	0	0
National Science Foundation	1	0	0	0	0	1	100	0	0	0	0	0
Securities and Exchange Commission	1	1	100	0	0	0	0	0	0	0	0	0
U.S. Tax Court	1	0	0	0	0	1	100	0	0	0	0	0
TOTAL	1,022	154	15.07	11	1.08	702	68.69	24	2.35	131	12.82	

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SIGNIFICANT BOARD DECISIONS AND COURT OPINIONS ISSUED IN FY 2016

Several of the Board's significant decisions issued in FY 2016 are summarized below. As a service to MSPB's stakeholders, we also have provided brief summaries of selected significant opinions issued by the U.S. Court of Appeals for the Federal Circuit.

Significant Board Decisions Issued in FY 2016

Jurisdiction

Martin v. U.S. Postal Service, [2016 MSPB 6](#), 123 M.S.P.R. 189 (2016): The parties entered into a settlement agreement, which provided that the appellant would retire effective July 2011 and the agency would enhance its contributions to her retirement for the 3 previous years. When the Office of Personnel Management (OPM) did not approve the enhanced retirement contributions, the agency reinstated the appellant in October 2012 retroactive to July 2011, and designated the period between July 2011 and October 2012 as leave without pay (LWOP). The appellant filed an appeal seeking back pay for the LWOP period. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a nonfrivolous allegation that she was constructively suspended between July 2011 and October 2012, because her decision to retire in July 2011 was knowing and voluntary. The Board reversed the initial decision, finding that the administrative judge erred in applying case law related to constructive suspension appeals. The Board explained that the term "constructive suspension" is properly reserved for appeals when the appellant alleges that leave that appeared to be voluntary was not; however, in this case, the appellant's retroactive placement in LWOP status for 430 days was not even ostensibly voluntary. Therefore, the Board found, the appellant suffered an actual (versus a constructive) suspension within the Board's jurisdiction. The Board then canceled the suspension, finding that the agency violated the appellant's Fifth Amendment due process rights by suspending her without an opportunity to be heard.

Pirkkala v. Department of Justice, [2016 MSPB 16](#), 123 M.S.P.R. 288 (2016): The agency removed the appellant and informed him that he could challenge his removal either through the negotiated grievance procedure, by filing a Board appeal, or through the equal employment opportunity complaint process. The appellant filed an untimely grievance, which the agency rejected, and his union ultimately declined to proceed with arbitration on his behalf. Several years later, he filed a Board appeal, which the administrative judge dismissed for lack of jurisdiction, finding that the appellant had made a binding election to contest his removal through the negotiated grievance process. On review, the Board found that the appellant's untimely grievance did not constitute a binding election under 5 U.S.C. § 7121(e)(1), which provides that an employee will be deemed to have exercised his option to file a Board appeal or a grievance "at such time as the employee *timely* files a notice of appeal under the applicable appellate procedures or *timely* files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedures, whichever event occurs first." Accordingly, the Board concluded that it had jurisdiction over the appeal, and instead dismissed it as untimely filed.

Kingsley v. U.S. Postal Service, [2016 MSPB 21](#), 123 M.S.P.R. 365 (2016); *Clark v. U.S. Postal Service*, [2016 MSPB 26](#), 123 M.S.P.R. 466 (2016): The appellants in these cases filed appeals alleging that the agency improperly denied them restoration following their partial recovery from a compensable injury. In *Kingsley*, the Board noted that it had recently issued new regulations, effective March 30, 2015, adopting a nonfrivolous allegation standard for establishing jurisdiction over such restoration

appeals. *See* 5 C.F.R. § 1201.57(a)(4), (b). To establish jurisdiction under the new standard, an appellant must make nonfrivolous allegations that: (1) she was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the agency's denial was arbitrary and capricious. In *Clark*, the Board further clarified that to meet the nonfrivolous allegation standard, an appellant must make material and plausible assertions of fact that, if true, could establish that the agency breached its substantive restoration obligations, including any obligations that it voluntarily adopted. A vague, conclusory, or unsupported allegation, such as one that essentially repeats the legal standard, without more, is pro forma and insufficient.

LeMaster v. Department of Veterans Affairs, [2016 MSPB 25](#), 123 M.S.P.R. 453 (2016): The agency terminated the appellant's appointment during his probationary period, citing "conduct issues" relating to the terms of a 2007 court-ordered probation agreement. Under the agreement, the appellant was required to inform any employer or prospective employer of his current conviction and supervision status, and was prohibited from using a computer with access to any online service without the court's prior written approval. The termination notice explained that the appellant failed to disclose that his computer access violated his probation agreement and that his inability to use the agency's computer system prevented him from performing his job duties. On appeal, the appellant argued that the Board had jurisdiction under 5 C.F.R. § 315.806(c) because he was terminated for pre-appointment reasons and he did not receive the procedural protections set forth in 5 C.F.R. § 315.805, which include notice and an opportunity to respond. The administrative judge dismissed the appeal, finding that the termination was based on the appellant's post-appointment conduct. On review, the Board agreed with the appellant that the termination was based at least in part on pre-appointment reasons, i.e., the terms of the probation agreement. Accordingly, the Board found jurisdiction under 5 C.F.R. § 315.806(c) and remanded the case to determine if the agency's failure to provide the procedural protections of 5 C.F.R. § 314.805 was harmful error.

Adverse Action Charges

Ryan v. Department of Homeland Security, [2016 MSPB 7](#), 123 M.S.P.R. 202 (2016): The appellant, whose duties included market research for FEMA-contracted call centers, was also president of a private company, which was considering competing for a call center contract. He emailed his supervisor and an agency ethics officer to advise them of the situation and ask if it presented a conflict of interest. Subsequently, the agency suspended him for two alleged ethics violations: (1) creating the appearance of a conflict of interest; and (2) failing to report his role with the private company and recuse himself from call center market research. Regarding charge (1), the Board found that creating the appearance of an ethical violation requires some action by the employee, and that the company's internal deliberations were insufficient to create the appearance of a conflict of interest. As to charge (2), the Board found that, prior to his email, the appellant's plan to involve his company in bidding for call center contracts had not progressed to the point that he was obliged to notify his supervisor and recuse himself from the market research project. Accordingly, the Board reversed the suspension.

Fargnoli v. Department of Commerce, [2016 MSPB 19](#), 123 M.S.P.R. 330 (2016): The appellant, a Criminal Investigator, was removed on the following charges: (1) unauthorized possession of equipment, specifically, a firearm acquired during his previous employment with the Department of Labor (DOL); (2) conduct unbecoming a law enforcement officer; and (3) lack of candor. The administrative judge sustained all three charges and upheld the removal. On review, the Board found that the first charge was supported by evidence showing that the appellant received the firearm from

the manufacturer for testing in his official capacity with DOL, and that he was not entitled to keep the firearm when he left DOL to take a job with the agency. The Board also sustained the conduct unbecoming charge, but did not sustain the specification that the appellant improperly stored an unauthorized firearm in a Government-owned vehicle, because the policy the agency cited applied only to authorized firearms. As to the third charge, the Board held that a lack of candor charge requires proof of two elements: (1) that the employee gave incorrect or incomplete information; and (2) that he did so knowingly. Because the administrative judge made no finding as to whether the appellant knowingly gave incorrect or incomplete information to agency investigators, the Board remanded the case for the administrative judge to make the necessary credibility determinations on that issue.

Indefinite Suspensions

Henderson v. Department of Veterans Affairs, [2016 MSPB 29](#), 123 M.S.P.R. 536 (2016): The appellant was indicted by a Federal grand jury on 50 counts of making false statements relating to health care matters in violation of 18 U.S.C. § 1035. The agency indefinitely suspended him based on its reasonable belief that he had committed a crime for which a period of imprisonment may be imposed, and the administrative judge sustained the action on appeal. On review, the appellant argued that the indictment alone was insufficient to establish reasonable cause when it was the agency that made the criminal allegations against him and provided the only evidence presented to the grand jury. The Board disagreed, finding that the grand jury indictment was sufficient to meet the reasonable cause requirement even if it was based entirely on evidence and testimony provided by the agency. The Board also rejected the appellant's contention that the agency denied him due process, finding that the information contained in the indictment was sufficiently detailed to provide him a meaningful opportunity to respond to the proposed indefinite suspension.

Furloughs

NV24-KEYPORT2 et al. v. Department of the Navy, [2016 MSPB 14](#), 123 M.S.P.R. 263 (2016): The appellants, who were similarly situated employees at the Naval Undersea Warfare Center (NUWC) Division Keyport, challenged the initial decision that sustained their 6-day furloughs. On review, the appellants argued that the furloughs were not a reasonable management solution to the financial restrictions placed on the agency, because NUWC Division Keyport is a Major Range and Test Facility Base covered under 10 U.S.C. § 129, which applies at the installation level and prohibits certain constraints or limitations on the management of civilian Department of Defense employees, including constraints or limitations in terms of "man years." The Board found that, even if the NUWC Division Keyport was a covered installation, there was no evidence that the furloughs constituted an improper constraint or limitation on the management of civilian personnel in violation of the applicable statute. The deciding official's acknowledgment that the furloughs ultimately restricted or limited the availability of man years did not imply that the management of civilian personnel at the installation level was "subject to" or "managed on the basis of" a constraint or limitation on man years. The Board further found that it was reasonable for the agency to consider its budget holistically, and that its use of overtime was fair and even. Accordingly, the Board sustained the furlough actions.

Whistleblower Protection

Hawker v. Department of Veterans Affairs, [2015 MSPB 62](#), 123 M.S.P.R. 62 (2015): The appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the agency terminated him from his physician position during his probationary period in retaliation for his disclosures regarding

patient care issues. OSC issued a close-out letter notifying the appellant of his right to seek corrective action from the Board, and he filed a timely individual right of action (IRA) appeal. When the appellant failed to respond to the administrative judge's jurisdictional notice, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to nonfrivolously allege the facts necessary to establish his IRA claim. On review, the appellant presented evidence that OSC reopened its investigation pursuant to his request for reconsideration while the appeal was pending before the administrative judge. Based on that evidence, the Board vacated the initial decision and dismissed the appeal without prejudice to refile. The Board held that OSC's decision to reopen its investigation deprived its initial close-out determination of the finality required before an appellant can file an IRA appeal with the Board pursuant to the exhaustion requirement of 5 U.S.C. § 1214(a)(3)(A).

El v. Department of Commerce, [2015 MSPB 64](#), 123 M.S.P.R. 76 (2015): The appellant filed an IRA appeal alleging that the agency terminated him during his trial period and refused to reinstate him in retaliation for disclosing delays in processing claims for reimbursement of his travel expenses. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the claimed disclosure was not sufficiently detailed and specific in that it did not identify a law, rule, or regulation that the agency allegedly violated, and therefore was not a nonfrivolous allegation of a protected disclosure. On review, the Board agreed with that finding, and clarified that under the Whistleblower Protection Enhancement Act (WPEA), vague, conclusory, unsupported, and pro forma allegations of wrongdoing do not meet the nonfrivolous pleading standard needed to establish the Board's jurisdiction over an IRA appeal. The Board found that the appellant nonfrivolously alleged that he made a protected disclosure in a letter to OSC, in which he identified a regulation that the agency may have violated; however, his disclosure could not have been a contributing factor in his termination and the agency's subsequent refusal to reinstate him because the disclosure occurred after those actions. Accordingly, the Board affirmed the initial decision as modified, still dismissing the IRA appeal for lack of jurisdiction.

Corthell v. Department of Homeland Security, [2016 MSPB 23](#), 123 M.S.P.R. 417 (2016): The appellant filed an IRA appeal in which he alleged that the agency retaliated against him based on his protected disclosures and the agency's mistaken belief that he had reported other matters to the agency's Office of Inspector General. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a nonfrivolous allegation that he made a protected disclosure under 5 U.S.C. § 2302(b)(8). On review, the Board affirmed the initial decision as to the alleged protected disclosures, but found that it was a case of first impression as to whether it may consider a request for corrective action under 5 U.S.C. § 1221(a) based on a claim that the agency retaliated against an employee for perceived activity under 5 U.S.C. § 2302(b)(9)(C). In its analysis, the Board reasoned that the statutory language does not specify that the appellant must have actually engaged in the protected activity under § 2302(b)(9)(C), and found that nothing in the legislative history suggests that Congress intended a narrower reading. The Board further noted that it previously had recognized that corrective action may be available for reprisal claims for perceived whistleblowing under 5 U.S.C. § 2302(b)(8), and found that the same rationales that forbid retaliation for perceived whistleblowing also apply to perceived protected activity under § 2302(b)(9)(C). Accordingly, the Board vacated the initial decision and remanded for jurisdictional notice and further adjudication of the appellant's retaliation claim for perceived § 2302(b)(9)(C) activity.

Graves v. Department of Veterans Affairs, [2016 MSPB 24](#), 123 M.S.P.R. 434 (2016): The appellant filed an IRA appeal in which he alleged that the agency terminated his appointment in retaliation for disclosures of gross mismanagement and gross waste of funds, which he made during a grievance

proceeding, and also for his prior testimony before an Administrative Investigative Board (AIB) in support of a coworker who was being investigated for misconduct. On review, the Board affirmed the initial decision that dismissed the appeal for lack of jurisdiction. The Board first found that the appellant failed to make a nonfrivolous allegation that his disclosures were protected under 5 U.S.C. § 2302(b)(8), because they were made solely during the grievance proceeding. The Board also rejected the appellant's contention that his testimony before the AIB was protected activity under § 2302(b)(9)(B), which prohibits retaliation against an employee for testifying for or otherwise lawfully assisting an individual in the exercise of rights referred to in § 2302(b)(9)(A)(i) or (ii), i.e., "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation[.]" Relying on the statutory language and case law interpreting the pre-WPEA version of § 2302(b)(9), the Board concluded that the AIB investigation did not constitute the exercise of an appeal, complaint, or grievance right by the appellant's coworker, because it did not constitute an initial step toward taking legal action against the agency for a perceived violation of employment rights.

Bradley v. Department of Homeland Security, [2016 MSPB 30](#), 123 M.S.P.R. 547 (2016): The administrative judge dismissed the appellant's IRA appeal for lack of jurisdiction, finding that he failed to make a nonfrivolous allegation that his protected disclosures were a contributing factor in the agency's decision not to select him for a promotion. In making that finding, the administrative judge noted that the appellant had not alleged that the members of the selection panel had actual knowledge of his protected disclosures. On review, the Board observed that the knowledge/timing test is not the only way to satisfy the contributing factor element, and noted that the appellant had alleged that senior agency officials with knowledge of his disclosures had conspired with others not to select him for the position. Citing the Federal Circuit's recent decision in *Cabill v. Merit Systems Protection Board*, 821 F.3d 1370 (Fed. Cir. 2016), the Board found that the appellant could meet his jurisdictional burden without specifically identifying which management officials were responsible for the alleged reprisal. The Board explained that, when the personnel action at issue is a nonselection, the evidence concerning who was involved in the selection process, what they knew about the appellant's protected disclosures, and who may have influenced their decision is exclusively within the agency's possession. The Board found that the appellant's allegations sufficed to establish jurisdiction, and remanded the whistleblower case for adjudication on the merits.

Reprisal

Mattison v. Department of Veterans Affairs, [2016 MSPB 27](#), 123 M.S.P.R. 492 (2016): In his appeal of an indefinite suspension action, the appellant claimed that the agency retaliated against him for filing two internal appeals: an Information Security Office appeal alleging that his medical records had been accessed without authorization, and a FOIA request seeking information gathered by police for an investigation. The administrative judge sustained the indefinite suspension action, finding the retaliation claim unproven, and the Board affirmed on review. In doing so, the Board distinguished *Savage v. Department of the Army*, 122 M.S.P.R. 612 (2015), and clarified that retaliation claims under 5 U.S.C. § 2302(b)(9)(A)(ii) that do not involve reprisal for activity protected under Title VII would continue to be analyzed under the standard set forth in *Warren v. Department of the Army*, 804 F.2d 654 (Fed. Cir. 1986). That is, the appellant must show that: (1) he engaged in protected activity; (2) the accused official knew of the activity; (3) the adverse action under review could have been retaliation under the circumstances; and (4) there was a genuine nexus between the alleged retaliation and the adverse action. In this case, the Board found the appellant failed to establish a genuine nexus between his protected activity and the agency's action. Thus, the Board denied the appellant's petition for review and affirmed the administrative judge's decision.

Veterans Employment Opportunity Act of 1998 (VEOA)

Montgomery v. Department of Health & Human Services, [2016 MSPB 8](#), 123 M.S.P.R. 216 (2016): The appellant filed a VEOA appeal alleging that he was denied the right to compete for a job under 5 U.S.C. § 3304(f)(1) when the agency transferred an employee from outside its workforce to a position in the competitive service without first advertising the vacancy. The administrative judge denied the appellant's request for corrective action, finding that the agency could fill the vacancy by any authorized method, and the appellant had not shown that he was qualified for the position. On review, the Board first found that the agency was required to advertise the vacancy before filling it, because 5 U.S.C. § 3304(f)(1) applies to both merit promotion and open competitive examining procedures. The Board further considered the agency's claim that it did not announce the position at issue because, pursuant to an internal standard operating procedure, it "shared" a selection certificate for an advertised vacancy for an allegedly comparable position, for which the appellant applied but was not selected. The Board rejected that argument, finding that an internal agency policy may not override otherwise applicable statutes, including 5 U.S.C. § 3304(f)(1). Because there was a genuine dispute of material fact regarding the appellant's qualification for the position at issue, the Board remanded the case for further adjudication.

Goodin v. Department of the Army, [2016 MSPB 18](#), 123 M.S.P.R. 316 (2016): The appellant, a veteran, was tentatively selected for a clinical social worker position but thereafter failed to produce his transcripts and other documents that were required to complete the agency's credentialing process. OPM denied the agency's passover request and informed the agency that its options were to challenge its decision or "consider/select" the appellant for the position. The Board found that the agency complied with VEOA by continuing to consider the appellant, but that VEOA did not preclude the agency from withdrawing its tentative selection once he was unwilling or unable to produce the documents that all applicants were notified were necessary to complete the credentialing process. The agency was not required to request passover authority from OPM a second time.

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Kitlinski v. Department of Justice, [2015 MSPB 60](#), 123 M.S.P.R. 41 (2015): The appellant filed an appeal in which he alleged that, after he drove his personally owned vehicle to the agency's headquarters to attend a deposition in his Equal Employment Opportunity (EEO) complaint, he discovered a Blackberry device concealed under the hood of his car. He contended that it was the same Blackberry model that the agency used for voice recording and electronic tracking and monitoring. In his USERRA appeal, he alleged discrimination, a hostile work environment, and retaliation based upon the exercise of his USERRA rights. The administrative judge issued an initial decision dismissing the USERRA appeal for lack of jurisdiction. On review, the Board affirmed the initial decision as modified, finding that the appellant failed to nonfrivolously allege that the agency's purported conduct involving the Blackberry was based on his military status or that the agency subjected him to a hostile work environment in violation of USERRA.

Retirement

McDaniel v. Office of Personnel Management, [2015 MSPB 61](#), 123 M.S.P.R. 55 (2015): The appellant's father retired under the Civil Service Retirement System (CSRS) and designated the appellant as the sole beneficiary of any lump-sum benefit payable after his death, which occurred 6 months after he retired. When he died, he was also the father of a minor child, whose mother was his former spouse. OPM issued a reconsideration decision denying the appellant's death benefits application based on her father's Federal service, finding that a lump-sum payment of retirement contributions is not

payable when a former employee has children who are entitled to monthly annuity payments and that, in this instance, the minor child is entitled to such payments. The administrative judge affirmed OPM's reconsideration decision, and the Board affirmed the initial decision. The Board explained that, although designated beneficiaries come first in the order of precedence for receipt of a lump sum under 5 U.S.C. § 8342(c), pursuant to 5 C.F.R. § 831.2003(a), a lump-sum benefit is payable to the survivor in the order of precedence described in that provision only if there is no survivor who is entitled to monthly survivor annuity benefits on the death of the former employee. That condition was not met in this case because the minor child is a survivor who became entitled to monthly survivor annuity benefits upon the death of the appellant's father under 5 U.S.C. § 8341(e)(2).

Miller v. Office of Personnel Management, [2015 MSPB 63](#), 123 M.S.P.R. 68 (2015): Following the appellant's mother's death, OPM erroneously continued to send CSRS annuity payments to the appellant's mother at the assisted living center where she had resided, and the assisted living center then sent the payments to the appellant. OPM subsequently informed the appellant that she was overpaid in CSRS annuity benefits and that it intended to collect the overpayment. The appellant filed a Board appeal of OPM's reconsideration decision denying her request to waive the collection of the overpayment. The administrative judge dismissed the appeal for lack of jurisdiction based on OPM's assertion that it rescinded its reconsideration decision. The Board vacated the initial decision, finding that OPM's rescission of its reconsideration decision did not divest the Board of jurisdiction over this matter because the record indicated that OPM did not intend to issue a new reconsideration decision. Nonetheless, the Board found that it lacked jurisdiction to consider the appellant's waiver request because she failed to show that she had a right or interest to the annuity overpayments under the CSRS. In that regard, the Board noted that the appellant was not a designated survivor annuitant and she did not receive any Federal funds directly, as a representative of her mother's estate, or as a third party with rights under the Federal retirement laws.

Campbell v. Office of Personnel Management, [2016 MSPB 11](#), 123 M.S.P.R. 240 (2016): The appellant challenged OPM's reconsideration decision, which declined to waive collection of an overpayment that resulted when OPM neglected to reduce the appellant's late husband's annuity to account for his survivor benefit election. While the appeal was pending, OPM indicated that it rescinded its decision, and the administrative judge dismissed the appeal for lack of jurisdiction. However, OPM did not refund the \$1,122.30 it withheld from the late husband's basic annuity pursuant to the exigent collection provisions at 5 C.F.R. § 845.205(d)(1), which allow OPM to commence collection proceedings prior to affording administrative review if a delay in collection would "substantially prejudice the Government's ability to collect the debt." Because it was unclear whether the appellant might be entitled to the \$1,122.30 or some portion thereof, the Board vacated the initial decision and remanded the appeal to determine if the appellant had been restored to the status quo ante.

Administrative Law Judges

Jennings v. Social Security Administration, [2016 MSPB 31](#), 123 M.S.P.R. 577 (2016): In an earlier decision (*Jennings I*), the Board found that the agency had good cause to remove the appellant from an administrative law judge position on the grounds that he was in active duty and pay status with the U.S. Army Reserves while simultaneously being paid by the agency. While that case was pending, the agency retroactively placed the appellant on LWOP status for the active-duty period, and notified him of his debt for the resulting salary overpayment. The appellant then filed an appeal in which he alleged that the agency denied him rights and benefits under USERRA, and further argued that his retroactive placement in LWOP status amounted to a reduction in pay and a suspension, which the agency improperly implemented without first filing a complaint with the Board under 5 U.S.C. § 7121 and proving that there was good cause for such actions. The administrative law judge

assigned to the adjudicate this case found that the USERRA claims concerning the previously litigated removal action were barred by *res judicata*, and rejected the appellant's argument that his retroactive placement on LWOP was a reduction in pay or suspension covered by 5 U.S.C. § 7521. She granted relief on some but not all of the remaining USERRA claims. On review, the Board declined the appellant's request to reopen *Jennings I*, and agreed with the administrative law judge that the appellant's USERRA claims concerning his removal were barred by *res judicata*. However, the Board noted that an agency's retroactive placement of an employee on LWOP without the employee's consent may constitute an appealable suspension, even though such an action may not be "disciplinary" in the traditional sense of the word. The Board further observed that, under 5 C.F.R. § 1201.142, an administrative law judge who alleges that an agency took an action in violation of 5 U.S.C. § 7521 may file a complaint with the Board, which will be adjudicated in the same manner as agency complaints seeking actions against administrative law judges. Accordingly, the Board remanded the case with instructions to address the following questions: (1) whether the case involved an action covered by 5 U.S.C. § 7521; and (2) if so, whether there was good cause for the action.

Attorney Fees

Rumsey v. Department of Justice, [2016 MSPB 28](#), 123 M.S.P.R. 502 (2016). This case highlights the differences in analyzing attorney fees cases dealing with whistleblower issues and those decided under 5 U.S.C. § 7701. Unlike fees under section 7701, fees under section 1221 in whistleblowing cases are payable directly to the appellant and there is no "interest of justice" requirement. While one of the appellant's attorneys agreed to represent the appellant for free, the appellant still remained eligible for an award. That the attorney had never before litigated a Board case was considered, and the lodestar was adjusted down for the appellant's limited success (only two of the several claims of retaliation made were supported) but the Board, agreeing with the administrative judge, held that an award of fees for challenging whistleblower retaliation was in the public interest.

Krafsur v. Social Security Administration, [2015 MSPB 55](#), 122 M.S.P.R. 679 (2015): At issue in this case was whether the petitioner, an administrative law judge, was entitled to attorney fees when the Board dismissed the agency's misconduct complaint against him as withdrawn. The Board explained that in proceedings involving actions against administrative law judges under 5 U.S.C. § 7521, it may award attorney fees pursuant to the Equal Access to Justice Act, which requires a petitioner to demonstrate that he is a "prevailing party" to establish entitlement to attorney fees. Under *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), an appellant is considered to have prevailed only if he obtains an enforceable order resulting in a "material alteration of the legal relationship of the parties." Applying this standard, the Board held that the petitioner was not a prevailing party because its final order did not award him any relief on the merits or materially alter the parties' legal relationship, as the order did not prohibit the agency from refileing a new complaint based on the same charges.

Doe v. Pension Benefit Guaranty Corporation, [2015 MSPB 57](#), 123 M.S.P.R. 1 (2015): Previously, the Board reversed the agency's action placing the appellant on enforced leave but did not order the agency to provide the appellant back pay. *Doe v. Pension Benefit Guaranty Corporation*, 117 M.S.P.R. 579 (2012). The appellant subsequently filed a petition for enforcement in which she alleged that the agency improperly failed to provide her with back pay for the time she was on enforced leave. The administrative judge issued a compliance initial decision finding that the agency was in compliance because the Board's decision did not order the agency to pay the appellant back pay. The Board denied the appellant's petition for review of the compliance initial decision but reopened and modified its earlier Opinion and Order in the merits appeal to order the agency to pay the appellant

back pay for when she was on enforced leave. The appellant then petitioned for attorney fees incurred in connection with the petition for enforcement. The Board held that the appellant was not a prevailing party entitling her to an award of attorney fees in the compliance proceeding because she did not achieve any degree of relief in that proceeding. The Board further held that, to the extent that the appellant secured some degree of relief in persuading the Board to reopen its prior Opinion and Order to require the agency to provide back pay, she should seek an award of attorney fees from the administrative judge after the Board issued a final decision in the merits phase of her appeal.

Montalvo v. U.S. Postal Service, [2015 MSPB 56](#), 122 M.S.P.R. 687 (2015): The appellant requested attorney fees incurred in connection with a petition for enforcement of a settlement agreement that resolved his removal appeal. The agreement provided that the appellant could ask that the agency issue retired law enforcement credentials upon his submission of documentation sufficient to establish that he was eligible to receive them. The administrative judge found that the agency breached the agreement by failing to retain a medical professional who was qualified to assess the appellant's mental capacity to carry a concealed firearm, and he ordered the agency to employ one. His finding of noncompliance became final when the agency did not timely file either evidence of compliance or a petition for review, and the matter was referred to the Board for processing under the enforcement provisions of 5 C.F.R. § 1201.183(c). Subsequently, the agency submitted evidence showing that it obtained an assessment of the appellant's mental status from a forensic psychologist, and the Board dismissed the petition for enforcement, finding that the agency complied with the administrative judge's order and thereby cured its breach of the agreement. The appellant then filed a request for attorney fees incurred in connection with the compliance proceedings, and the administrative judge awarded him attorney fees. The agency filed a petition for review, alleging that the appellant was not the prevailing party because an appellant may be deemed a prevailing party only if he obtains an enforceable order resulting in a material alteration of the legal relationship of the parties. The Board rejected this argument, noting that this standard does not apply to attorney fees requests in compliance proceedings, where an appellant may qualify as a prevailing party even in the absence of a Board order finding the agency in noncompliance or an agreement settling compliance matters. The Board further held that, in any event, the appellant did obtain an order finding the agency in noncompliance, which became final when the agency failed to submit evidence of compliance or a petition for review by the final date of the initial decision. The Board's final order dismissing the petition for enforcement did not reverse the finding of noncompliance but, rather, found that the agency subsequently had cured its breach.

Board Procedures

Hess v. U.S. Postal Service, [2016 MSPB 5](#), 123 M.S.P.R. 183 (2016): The appellant filed a removal appeal and raised a claim of whistleblower reprisal. After the agency rescinded the removal, the administrative judge dismissed both the removal action and the whistleblower reprisal claim as moot. On review, the Board found that the administrative judge properly dismissed the removal claim as moot because the agency restored the appellant to the status quo ante by rescinding the removal and returning her to the nonpay status she occupied before her removal. As for the appellant's whistleblower reprisal affirmative defense, the Board noted that a claim of whistleblower reprisal generally is not rendered moot by an agency rescinding the challenged action because of the appellant's entitlement to seek damages and attorney fees. The Board found that this rule did not apply here because, as a Postal Service employee, the appellant was not entitled to any award of attorney fees or damages for alleged whistleblower reprisal under 5 U.S.C. § 1221. Therefore, the Board found, there was no additional relief that the Board could order in connection with the

appellant's claim of whistleblower reprisal should she prevail on the merits of the claim, and the administrative judge properly dismissed the appellant's whistleblower reprisal claim as moot.

Hau v. Department of Homeland Security, [2016 MSPB 33](#), 123 M.S.P.R. 620 (2016): In a prior Board appeal, the appellant alleged that the agency violated USERRA by creating a hostile work environment. During the processing of that appeal, the appellant resigned. The administrative judge in that case denied corrective action, finding that the appellant was not subjected to a hostile work environment based on his military service. The appellant then filed a second USERRA appeal, in which he claimed that his resignation was involuntary because of the same alleged hostile work environment. The administrative judge dismissed the appeal as barred by res judicata. On review, the Board vacated the initial decision and instead dismissed the appeal for lack of jurisdiction. The Board found the appellant's allegation of a constructive discharge was predicated entirely on the previously adjudicated claim that he was subjected to a hostile work environment based on his military service, and that he was collaterally estopped from relitigating that issue. Hence, the Board lacked jurisdiction over the new appeal, because the appellant could not make even a nonfrivolous allegation that the agency denied him retention in employment based on his military service. In reaching that conclusion, the Board overruled *Boechler v. Department of the Interior*, 109 M.S.P.R. 619 (2008), in which it held that a finding that an appellant failed to prove a claim by preponderant evidence did not preclude a finding in a subsequent appeal that he made a nonfrivolous allegation sufficient to establish jurisdiction. The Board found that it would defy logic to proceed to the merits phase of the case when the appellant was barred from presenting any of his arguments on the merits, and that doing so would cause unnecessary costs to the parties, make the Board complicit in the vexation of multiple lawsuits, waste the Board's resources, and potentially lead to inconsistent decisions.

Significant Opinions Issued by the U.S. Courts of Appeals in FY 2016

Cabill v. Merit Systems Protection Board, [821 F.3d 1370](#) (Fed. Cir. 2016): In *Cabill*, the Federal Circuit reversed a Board decision which dismissed the appellant's whistleblower appeal for lack of jurisdiction. The appellant alleged before the Board that he made whistleblowing disclosures during a group meeting with his management, his management team leads, and his project leads but the Board dismissed the appellant's appeal on the basis that his allegation was not sufficiently specific to establish that any of the officials involved in personnel actions taken against him knew of his prior whistleblowing disclosures. The Federal Circuit found that, based on the facts of the appellant's case, his allegation was sufficiently specific and plausible to constitute a nonfrivolous allegation that at least one of the officials charged with retaliating against him attended the group meeting, or knew what the appellant disclosed during the meeting.

Daniels v. Merit Systems Protection Board, [832 F.3d 1049](#) (9th Cir. 2016): In *Daniels*, a decision issued by the U.S. Court of Appeals for the Ninth Circuit pursuant to the "All-Circuit Review" provision of the Whistleblower Protection Enhancement Act of 2012 (WPEA), the Court affirmed the Board's decision, which held that an agency ruling or adjudication, even if erroneous, cannot reasonably be construed as the type of wrongdoing specified in 5 U.S.C. § 2302(b)(8)(A). In its decision, the Ninth Circuit agreed with a Federal Circuit decision which reached the same result (*Meuwissen v. Department of the Interior*, 234 F.3d 9 (Fed. Cir. 2000)) and found that the passage of the WPEA did not supersede *Meuwissen* in this regard. The Ninth Circuit determined that the WPEA affected only the holding from *Meuwissen* that disclosures of information already known are not protected.

De Santis v. Merit Systems Protection Board, [826 F.3d 1369](#) (Fed. Cir. 2016): In 1996, Congress stripped Federal Aviation Administration (FAA) employees of all Board appeal rights, but in 2000, it restored

Board appeal rights for any action that had been appealable to the Board in 1996. In 2013, the FAA hired the appellant, but terminated him 1 month later during his probationary period. The appellant appealed his termination under regulations applicable to competitive-service positions, but the Board dismissed his appeal because his position was in the excepted service. The appellant contended that the FAA should have construed his position as what it would have been classified in 1996, which was in the competitive service. The Federal Circuit disagreed and affirmed the Board's decision, holding that an FAA employee's appeal rights are dictated by what rights the employee's current status would have given him in 1996.

Dean v. Department of Labor, [808 F.3d 497](#) (Fed. Cir. 2015): In *Dean*, the Federal Circuit held that the Board has jurisdiction to consider violations of 5 U.S.C. §§ 3302(1) and 3308 pursuant to section 3330a of VEOA because sections 3302(1) and 3308 are statutes relating to veterans' preference. In so holding, the Federal Circuit affirmed the Board's implicit finding that section 3302(1) is a statute relating to veterans' preference, but reversed the Board's explicit finding that section 3308 is not a statute relating to veterans' preference. The court further determined that the placement of the "Recent Graduate" Wage and Hour Specialist position into the excepted service as part of the Pathways Recent Graduates Program and the program's minimal education requirement of a college degree did not violate the appellant's veterans' preference rights under either section 3302(1) or section 3308, given that there was ample justification in the record showing a rational basis for that educational requirement. The court affirmed the Board's denial of corrective action.

Einboden v. Department of the Navy, [802 F.3d 1321](#) (Fed. Cir. 2015): In *Einboden*, the Federal Circuit affirmed the Board's decision in a furlough appeal. The appellant was a Navy employee whose salary was paid out of working capital funds, not appropriations. The agency furloughed the appellant for no more than 11 days due to sequestration, and he appealed to the Board, claiming that the agency should not have furloughed him because the funding for his position was not subject to sequestration. The Board's decision affirmed the AJ's decision to sustain the furlough, but then-Vice Chairman Wagner dissented, holding that it was reasonable for the Department of Defense to consider its budget situation holistically, rather than to isolate each individual department's situation. The Federal Circuit affirmed the Board's decision, holding that the Navy's decision to furlough the appellant was not shown to be unreasonable, and that the Navy was not obligated to implement sequestration in the same manner as other Department of Defense subagencies.

Hicks v. Merit Systems Protection Board, [819 F.3d 1318](#) (Fed. Cir. 2016): In *Hicks*, the Federal Circuit held that the section of the WPEA that authorized individual right of action (IRA) appeals based on reprisal for activity protected by 5 U.S.C. § 2302(b)(9) did not have retroactive effect. The appellant alleged before the Board that the agency removed her in 1990 due to her filing a prior MSPB appeal regarding previous discipline. The Board dismissed her appeal for lack of jurisdiction based on a finding that in 1990, the Whistleblower Protection Act did not authorize IRA appeals due to reprisal for activity protected by 5 U.S.C. § 2302(b)(9), and that the WPEA, which did authorize such appeals, did not retroactively apply to events that took place before the effective date of its passage. The Federal Circuit agreed, holding that the expansion of IRA appeal rights to include prohibited personnel practices under 5 U.S.C. § 2302(b)(9) did not retroactively apply to events taking place prior to the WPEA's effective date.

Kerrigan v. Merit Systems Protection Board, [833 F.3d 1349](#) (Fed. Cir. 2016): In *Kerrigan*, the Federal Circuit held that 5 U.S.C. § 8128(b) does not bar the Board from reviewing the Department of Labor's (DOL) Office of Workers' Compensation Benefit determinations in whistleblowing appeals. The appellant appealed the DOL's termination of his workers' compensation benefits, alleging that

the DOL terminated those benefits in retaliation for his protected whistleblowing disclosures. The Board found that it lacked jurisdiction over the appeal because 5 U.S.C. § 8128(b) vests with the DOL exclusive jurisdiction over reviewing workers' compensation benefit determinations. The Board also stated that the appellant failed to nonfrivolously allege that his protected whistleblowing disclosures were a contributing factor in the DOL's decision to terminate his benefits. The Federal Circuit agreed that the appellant failed to make a nonfrivolous allegation that his protected whistleblowing disclosures were a contributing factor to the DOL's decision and affirmed the Board's dismissal on this basis, but found that 5 U.S.C. § 8128(b) did not bar the Board's review of the termination of the appellant's workers' compensation benefits.

Lal v. Merit Systems Protection Board, [821 F.3d 1376](#) (Fed. Cir. 2016): In *Lal*, the Federal Circuit reversed the Board's decision dismissing for lack of jurisdiction the appellant's appeal. The appellant was hired under 42 U.S.C. § 209(f), which provides that appointments under the section can be made without regard to the civil service laws. The Board held that this section meant that the appellant lacked the right to appeal in the event that she was removed from the position, but the Federal Circuit disagreed. The court held that, while the section placed the appellant in the excepted service, it did not exempt her from being covered by the Civil Service Due Process Amendments of 1990, which provided appeal rights to certain excepted-service employees.

McCarthy v. Merit Systems Protection Board, [809 F.3d 1365](#) (Fed. Cir. 2016): In *McCarthy*, the Federal Circuit affirmed the Board's denial of the petitioner's motion to reopen his Board appeal. While the petitioner's appeal of his Board decision in a whistleblowing case was pending before the Federal Circuit, the WPEA became effective. The petitioner contended that, prior to the enactment of the WPEA, four disclosures he made in 2009 would not have been considered as protected disclosures, but under the WPEA, they would. As a result, the petitioner requested that the Board reopen his appeal so that the additional four disclosures could be considered in the context of his appeal. The Clerk of the Board denied the petitioner's request in a letter, and he appealed this denial to the Federal Circuit. The court held that, due to the intervening change in governing law, the court could review the Board's denial of the petitioner's request to reopen his appeal, but the court still affirmed the Board's denial of his request because he did not first exhaust his administrative remedies with the Office of Special Counsel concerning the four disclosures.

Perry v. Merit Systems Protection Board, [829 F.3d 760](#) (D.C. Cir. 2016): In *Perry*, the Board initially dismissed the appellant's appeal for lack of jurisdiction, and the petitioner appealed the decision to the D.C. Circuit. The Board then requested that the matter be transferred to the Federal Circuit, because the D.C. Circuit did not have jurisdiction over the petitioner's appeal under the WPEA. The petitioner responded by arguing that because his initial Board appeal alleged discrimination, his case actually should be transferred to District Court pursuant to *Kloeckner v. Solis*, 568 U.S. ___, 133 S. Ct. 596 (2012), in which the Supreme Court held that Federal employees challenging an agency action appealable to MSPB who claim the action was discriminatory should seek review in district court, rather than with the Federal Circuit, regardless of whether the MSPB decided the case on procedural grounds or on the merits. The D.C. Circuit agreed with the Board, finding that because the Board dismissed the petitioner's appeal for lack of jurisdiction, *Kloeckner* did not apply, and the petitioner's appeal must be heard by the Federal Circuit.

Rainey v. Merit Systems Protection Board, [824 F.3d 1359](#) (Fed. Cir. 2016): In *Rainey*, the Federal Circuit affirmed a Board decision dismissing for lack of jurisdiction the appellant's appeal alleging that the Department of State retaliated against him for his refusal to obey an order. The appellant alleged that he did not obey the order because it would have forced him to violate a regulation, but the Board held that the right to disobey a provision of the Whistleblower Protection Act, located at

5 U.S.C. § 2302(b)(9)(D), only protected employees who refused to obey an order that would require them to violate a law, and did not similarly cover violations of rules or regulations. The Federal Circuit agreed with the Board, finding that the term “law” in section 2302(b)(9)(D) refers only to statutes, and not to rules or regulations.

Rosario-Fabregas v. Merit Systems Protection Board, [833 F.3d 1342](#) (Fed. Cir. 2016): In *Rosario-Fabregas*, the Federal Circuit affirmed the Board’s decision establishing a new test to determine whether an employee has been constructively suspended. The appellant alleged in a Board appeal that he was constructively suspended because the agency would not allow him to return to work until he provided sufficient medical documentation. The Board found that, to establish that he was constructively suspended, the appellant needed to show that his absence was involuntary by proving that: (1) he lacked a meaningful choice in the matter; and (2) the agency’s wrongful action deprived him of the meaningful choice. The Board further found that the agency’s refusal to not allow the appellant to return to work without proper medical documentation was not wrongful, and thus dismissed the appeal for lack of jurisdiction. The court agreed with the Board’s holding on both the new test and the application of the test and affirmed the decision.

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SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2016

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 research was cited in a wide range of online and print publications. Notably, MSPB's merit systems studies reports were cited in a number of policy-making sources. The MSPB [report](#) on fair and open competition was cited in the GAO [report](#) regarding the need for OPM to improve oversight of hiring authorities on Federal hiring. MSPB's reports on improving [first level supervision](#) and [employee engagement](#) were cited in a GAO [report](#) on lessons learned for engaging Millennials and other age groups. In Congressional testimony on the floor of the House, Representative Tammy Duckworth [cited](#) MSPB's [report](#) on sexual orientation in the workplace in support of H.R. 4668. The MSPB [report](#) on veterans' hiring was cited in Senate Report [114-25](#) in support of reinstating the rule prohibiting the appointment of a military member to a civilian position within 180 days of their retirement from the military.

During FY 2016, MSPB merit systems studies' staff conducted 21 outreach events with Federal employees, supervisors and managers, agency representatives and attorneys, and international visitors regarding Federal merit systems, the statutory roles of MSPB, and issues, findings, and recommendations from merit system studies and OPM oversight. For example, studies' staff members were invited to present on employee engagement at the Potomac Forum, as well as OPM's Engagement webinar. MSPB studies' staff members were invited to educate the Chief Human Capital Officer (CHCO) Council on the merit system principles and the Federal Asian Pacific American Council (FAPAC) on fair and equitable treatment. Federal News Radio aired several interviews with MSPB studies' staff regarding recently released reports including employee engagement, and SES training.

In FY 2016, MSPB published three merit systems study reports:

- [*The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce*](#)
- [*Preventing Nepotism in the Federal Civil Service*](#)
- [*Training & Development for the Senior Executive Service: A Necessary Investment*](#)

In FY 2016, MSPB published other products, including:

- *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.
- *Noteworthy* – 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. Topics included indefinite suspensions and performance management.

- *Research Highlights* – These are one-page summaries of published MSPB studies. Several *Research Highlights* also have been compiled into a “catalog” of MSPB studies.

Summaries of Reports Released in FY 2016

- [*The Merit System Principles: Guiding the Fair and Effective Management of the Federal Workforce*](#) (September 2016) discusses how well Federal agencies are perceived to be supporting the merit system principles (MSPs) and evaluates agency efforts to educate leaders, supervisors, and employees about the MSPs and how to implement them. MSPB found many employees, at all levels, lack knowledge about how to adhere to the MSPs and avoid prohibited personnel practices (PPPs). That knowledge gap is, at least in part, the consequence of inadequate education. In an MSPB survey of agencies, 20 percent of respondents said that nonsupervisory employees and political appointees receive no systematic training on the MSPs. Accordingly, the report recommends steps to improve MSP education and adherence and provides guidance to promote greater understanding of the MSPs. (All MSPs and PPPs)
- [*Preventing Nepotism in the Federal Civil Service*](#) (June 2016) explains the prohibitions against nepotism in the Federal civil service and steps that agencies and employees can take to protect the service from nepotism. The prohibitions have distinct origins (criminal statute, civil service statute, and regulations governing ethical conduct) and address different, but often overlapping, behaviors. Nevertheless, the measures to avoid impropriety are shared in common: (1) consult with the agency’s ethics advisor; (2) disclose any potential conflict of interest; and (3) seek permission for recusal from an employment matter involving a relative or person in a covered relationship. (Related MSPs: 1, 2, 4, and 8; PPPs: 6, 7, and 10.)
- [*Training & Development for the Senior Executive Service: A Necessary Investment*](#) (December 2015), also summarized in the FY 2015 Annual Report, examines current practices on how career senior executives—who manage major programs and organizations and provide continuity during Presidential transitions—are trained and developed. Unfortunately, the review indicates that the “systematic development” envisioned in the Civil Service Reform Act of 1978 is more vision than reality. To that end, the report contains information to help agencies determine a development strategy that aligns with agency goals and resources and effectively addresses executive’s training needs. In addition, the report discusses common barriers to SES training and offers strategies to mitigate them. (Related MSPs: 4, 5, and 7.)

FY 2016 Noteworthy Articles

MSPB also issued, in electronic form, two shorter documents on topical issues:

- [*Indefinite Suspensions and Potentially Criminal Behavior: Using Reasonable Cause to Act*](#) (May 2016) summarizes agency authority and relevant case law for instances when an employee appears to have engaged in serious criminal conduct. One purpose of this article was to inform current debate over adverse action procedures and protections by educating Federal administrators and policymakers on existing agency authority to address such conduct in a manner that both protects the public interest and comports with an employee’s statutory and Constitutional rights. (Related MSPs: 2, 4, and 5.)

- [*Performance Management Is More than an Appraisal*](#) (December 2015) draws the important but often-overlooked distinction between a formal performance *appraisal* (which is required, on an annual basis, for almost all career Federal employees) and performance *management*, which includes supporting and improving employee performance. One purpose of this publication is to remind Federal agencies and policymakers that necessary efforts to address poor performance should not come at the expense of supporting good employees who perform well. Accordingly, this publication outlines activities, such as providing constructive and future-oriented performance feedback, that are valuable regardless of statutory requirements or the structure of the formal appraisal system.

FY 2016 *Issues of Merit* Newsletter Topics

MSPB published three editions of the *IoM*. Newsletter articles covered topical issues, such as a discussion of the role of the USAJobs job posting system in Federal hiring and perennial concerns about proper understanding and use of the probationary period. The newsletter also addressed a wide range of stakeholders in Federal human capital management. For example, one article outlined high-level concerns about how to effectively formulate and implement HR policy in a decentralized Federal Government, while another provided practitioner-oriented guidance on the appropriate use of screen-out elements (“selective factors”) in an employment examination.

2016 Merit Principles Survey (MPS)

MSPB administered the MPS in July 2016 to over 120,000 Federal employees in 24 agencies. The web-based survey was compliant with all IT and information security requirements. MSPB sought to obtain perceptions and experiences regarding the health of merit in the workplace, occurrence of PPPs, and other topics in support of MSPB’s studies program. The 2016 MPS covered various topics including recruitment, human resource (HR) services, employee engagement, fair treatment and nondiscrimination, retention, sexual and non-sexual harassment, and addressing poor performance.

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SIGNIFICANT ACTIONS OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT IN FY 2016

As required by statute,⁶ MSPB reviews and reports on the significant actions of OPM, including an analysis of whether those actions are in accord with MSPs⁷ and free from PPPs.⁸ OPM's actions broadly affect the Federal workforce, multiple Federal agencies, and 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). A particular OPM action, depending on its nature, has the potential to affect or involve other specific MSPs. Those specific MSPs are noted in the "Significance" section of the action, when appropriate. In addition to tracking OPM's actions in FY 2016, we also requested and received input from OPM on the status of selected significant actions.⁹

Factors Affecting the U.S. Office of Personnel Management

This review should be read in the context of issues and developments that directly affect OPM and can indirectly affect the nature and scope of the OPM policy initiatives that are the primary focus of MSPB's review.

OPM Leadership. As OPM tries to find long-term solutions to Federal HR challenges, it did so in FY 2016 without a confirmed Director or Deputy Director. Since July 2015, OPM has been led by Acting Director Beth F. Cobert, following the resignation of Katherine Archuleta. Ms. Cobert was nominated, but not confirmed, as the permanent OPM Director. In a February 2016 memorandum, the OPM Inspector General stated that Acting Director Cobert was prohibited from serving in that capacity as of the date the President nominated her to serve as the permanent Director because she had not been serving as a "first assistant" at OPM, based on a ruling by the D.C. Circuit in *SW General, Inc. v. National Labor Relations Board* regarding the Federal Vacancies Reform Act.¹⁰ The Inspector General also indicated that the actions Acting Director Cobert had taken during that timeframe were invalid.¹¹ OPM has not had a Deputy Director since 2011.

As OPM continued to respond to the data breaches that were disclosed in 2015, it did so without a permanent Chief Information Officer for much of FY 2016. The CIO who was in place during the data breach retired in February 2016 and a new CIO was named in August 2016.

National Background Investigation Bureau (NBIB). On October 1, 2016 the [NBIB](#) was established as the primary service provider of background investigations for the Federal Government, and replaced OPM's Federal Investigative Service (FIS). Last year, in light of the breach of the systems where background investigations data were stored, the Administration initiated a 90-Day Suitability and Security review. This review was to re-examine reforms to the Federal background investigations process, assess additional enhancements to further secure

⁶ 5 U.S.C. § 1206.

⁷ 5 U.S.C. § 2301.

⁸ 5 U.S.C. § 2302.

⁹ This analysis is not a comprehensive digest of OPM activities, as OPM has many programs and responsibilities that do not directly affect MSPs and PPPs. Also, this summary does not discuss in detail every OPM significant action that was underway or completed in FY 2016. Instead, it should be read in conjunction with previous MSPB reports of OPM's significant actions. If we previously commented on a significant action in progress that was completed in FY 2016 we will not repeat those comments here. Also, where we have commented on operational OPM programs in the past, and no significant changes have been made to those programs, our previous comments remain applicable.

¹⁰ 796 F.3d 67, 74 (D.C. Cir. 2015), *reh'g & reh'g en banc denied* (Jan. 20, 2016).

¹¹ Patrick E. McFarland memorandum for Beth F. Cobert, "[Violation of the Federal Vacancies Reform Act](#)," February 10, 2016. The U.S. Supreme Court has agreed to hear an appeal of a lower court ruling that was the basis of the OPM Inspector General's memorandum (Greg Stohr, "[President's Temporary Appointments Get Top U.S. Court Review](#)," *Bloomberg.com*, June 20, 2016).

information networks and systems, and determine improvements that could be made to the way the Government conducts background investigations for suitability, security, and credentialing.

Following the review, the Administration announced a series of actions to modernize and strengthen the way the Federal Government conducts background investigations for Federal employees, members of the Armed services, and contractors, and to protect sensitive data. These changes included the establishment of NBIB. Unlike with FIS, the Department of Defense will assume the responsibility for the design, development, security, and operation of the background investigations IT systems for NBIB.¹²

Evolution of OPM Structure and Finances. As we noted in our FY 2011 review of OPM significant actions,¹³ the Federal civil service has become much more complex over the past three to four decades. Authorities and flexibilities available under Title 5 of the United States Code have proliferated, as have modifications and alternatives to the Title 5 framework. Yet the employees who work in what are often regarded as OPM's core functions, such as HR policy and agency oversight, account for a diminishing portion of OPM's staff and resources.

Two OPM Program Divisions set HR policy and provide agency oversight,¹⁴ including: (1) offering policy direction and leadership in designing, developing, and implementing Governmentwide HR systems and programs for recruitment, pay, leave, performance management and recognition, employee development, work/life/wellness programs, and labor and employee relations; (2) providing technical support to agencies for the full range of HR management policies and practices, including veterans' employment; (3) evaluating agencies' HR programs; (4) ensuring Federal agency HR programs are effective and meet merit system principles and related civil service requirements; and (5) working directly with Federal agencies to improve or change agency programs that are not in compliance with Federal HR policies and regulations.

Approximately 20 percent (about \$55 million) of OPM's FY 2017 discretionary budget request pertains to these two Program Divisions.¹⁵ OPM's 2017 request of full-time employee equivalents (FTE) for these two Program Divisions is a reduction of what was enacted in 2012 by approximately 16 percent, while OPM's total FTE increased over the same timeframe by approximately 9 percent.¹⁶ OPM's largest source of funding is the \$1.7 billion¹⁷ Revolving Fund which is comprised of fees paid by agencies to OPM for services OPM provides. These services include background investigations, HR services, and related tools and technologies such as USAJobs.¹⁸

Other OPM mission areas are as varied as providing Federal observers to monitor the election process in areas designated by the U.S. Attorney General under the Voting Rights Act of 1965 (as amended),¹⁹ implementing and overseeing the Multi-State Plan Program which was established under the Patient Protection and Affordable Care Act,²⁰ and administering the Civil Service Retirement System and the Federal Employee Retirement System serving 2.5 million Federal retirees and survivors who receive monthly annuity payments.²¹

¹² U.S. Office of Personnel Management, [Congressional Budget Justification Fiscal Year 2017](#), February 2016, p. 233.

¹³ U.S. Merit Systems Protection Board, [Annual Report for FY 2011](#), April 30, 2012, p. 45.

¹⁴ These two Program Divisions are [Employee Services](#) and [Merit System Accountability and Compliance](#).

¹⁵ U.S. Office of Personnel Management, [Congressional Budget Justification Fiscal Year 2017](#), February 2016, pp. 14-15.

¹⁶ See OPM Congressional Budget Justifications for [FY 2013](#) and [FY 2017](#) showing a 2012 FTE enactment of 425.6 for these two Program Divisions and 5,672.6 for OPM and a 2017 FTE request of 357.9 for these two Program Divisions and 6,191.7 for OPM.

¹⁷ U.S. Office of Personnel Management, [Congressional Budget Justification Fiscal Year 2017](#), February 2016, p. 6.

¹⁸ U.S. Office of Personnel Management, [Congressional Budget Justification Fiscal Year 2017](#), February 2016, p. 5.

¹⁹ OPM Program Divisions – [Merit System Accountability and Compliance](#).

²⁰ OPM Program Divisions – [Healthcare and Insurance](#).

²¹ OPM Program Divisions – [Retirement Services](#).

Stakeholders should recognize that attention within the Federal human capital arena often focuses on OPM’s HR policy and leadership—matters such as hiring reform, employee pay and benefits, and performance management and recognition—but that the balance of OPM’s resources are concentrated in other areas.

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

Guidance on the Placement of Political Appointees in the Career Service During the 2016 Presidential Election Period

In January 2016, Acting Director Cobert sent a memorandum to heads of executive agencies and departments reminding them that during this Presidential election year they need to ensure that all personnel actions remain free of political influence and that actions comply with all relevant civil service laws, rules, and regulations. Agencies must seek prior approval from OPM of all competitive and nonpolitical excepted service appointments that involve the appointment or conversion of a current or former political appointee, Schedule C employee, or noncareer SES member.²²

OPM noted that the two most common reasons for denying agency requests have been when the career job appeared to have been created or tailored solely for the benefit of the current or former political appointee, or when competition for the career job was limited inappropriately.²³

As a result of the March 2016 enactment of [Public Law 114-136](#), the Edward “Ted” Kaufman and Michael Leavitt Presidential Transitions Improvements Act, Acting Director Cobert issued a second memorandum on August 11, 2016, regarding political appointees and career civil service positions. Public Law 114-136 requires OPM to provide information about the decisions it issues regarding agency requests to appoint current and recent political appointees to covered civil service positions. It also expands OPM’s pre-appointment review coverage and adds new data reporting requirements. The August memorandum outlined revised procedures necessary to comply with these new requirements.²⁴

Significance

As guarding against undue political influence in the career civil service is a foundational value of the Federal merit systems, ensuring that personnel actions are made without regard to political affiliation relates to a number of MSPs. For instance, MSPs 1 and 8 require, respectively, that selection be based on relative ability, knowledge and skill; and that employees be protected against coercion for partisan political purposes.

Although the number of political appointees that agencies convert to career positions appears to be relatively small, OPM’s efforts in this area remain vital to ensuring that appointments and other personnel actions are made without regard to political affiliation or other nonmerit factors. In June 2010, the Government Accountability Office (GAO) released a review of the conversions of employees from political to career positions during the period from May 2005 to May 2009.²⁵

²² Beth F. Cobert memorandum for Heads of Executive Departments and Agencies, “[Appointments and Awards During the 2016 Presidential Election Period](#),” January 11, 2016.

²³ Beth F. Cobert memorandum for Heads of Executive Departments and Agencies, “[Appointments and Awards During the 2016 Presidential Election Period](#),” Attachment 1, January 11, 2016.

²⁴ Beth F. Cobert memorandum for Heads of Executive Departments and Agencies, “[Political Appointees and Career Civil Service Positions](#),” August 11, 2016.

²⁵ U.S. Government Accountability Office, “[Conversions of Employees from Political to Career Positions, May 2005 – May 2009](#),” GAO-10-688, June 2010.

During that four-year period, GAO found that the 42 departments it reviewed converted 139 individuals from political to career positions. GAO recommended that OPM review only 5 of the 117 conversions that were made at the GS-12 level or higher. In these five cases, GAO noted that agencies may not have adhered to MSPs, followed proper procedures, or may have engaged in PPPs or other improprieties.

A September 2016 GAO report detailed its review of political conversions to career positions for the period January 1, 2010 to October 1, 2015. GAO reviewed 30 agencies and found that 69 individuals had been converted from political appointments to career positions during this timeframe. Agencies implemented 17 of these conversions without receiving prior approval from OPM as required by OPM policy. OPM completed post-appointment reviews of 13 of these 17 conversions—approving 9 and denying 4. Of the four conversions that were not reviewed, OPM or the agency determined that the review was not needed in three cases because the individual was no longer in the career position. A review of the fourth case was ongoing.²⁶

Strengthening the Senior Executive Service (SES)

In December 2015, President Obama issued Executive Order 13714, “[Strengthening the Senior Executive Service](#),” to strengthen the recruitment, hiring, and development of the Federal Government’s senior executives. In addition to establishing the Subcommittee to Strengthen the Senior Executive Service under the President’s Management Council, the executive order outlined a number of requirements, including:

- Increasing the aggregate spending on agency executive awards to 7.5 percent of aggregate agency executive salaries in fiscal year 2017 from the current 4.8 percent.
- Setting the pay of executives who supervise General Schedule (GS) employees to result in executive compensation exceeding the rates of pay of the subordinate GS employees.
- Tasking OPM to review the current Qualifications Review Board (QRB) process to determine alternatives to the lengthy essay requirement for application to executive positions, and to advise agencies about ways to streamline their initial application requirements to SES positions.
- Requiring agency heads to change the way they hire SES members based on the outcome of OPM’s review and guidance it issues.
- Increasing the number of members of the SES who rotate to ensure the mobility of the corps while improving talent development, mission delivery, and collaboration.

During FY 2016, OPM undertook a number of actions to implement Executive Order 13714, including:

- **Rotations.** Issuing guidance to implement the executive rotations requirement of the executive order. OPM’s guidance, which outlines the scope of the various requirements for agency executive rotation plans, is an initial step in assisting agency compliance with the executive order. In addition, OPM will provide agencies continuing support through forums, development of technology to support the agency talent and succession management requirement, and other tools and resources.²⁷ OPM plans to coordinate a

²⁶ U.S. Government Accountability Office, “[Actions are Needed to Help Ensure the Completeness of Political Conversion Data and Adherence to Policy](#),” GAO-16-859, September 2016.

²⁷ Beth F. Cobert memorandum for Heads of Executive Departments and Agencies, “[Executive Order Guidance—Strengthening the Senior Executive Service: Implementing the Executive Rotations Requirement](#),” January 29, 2016.

pilot program in fiscal year 2017 among various agencies to facilitate interagency SES rotations.²⁸

- **Onboarding.** Issuing guidance regarding the executive onboarding requirement of the executive order that agencies shall implement for all executive positions. The guidance outlines the requirements and flexible framework that will guide agencies in providing the critical support to executives throughout their first year of service in new positions.²⁹ In FY 2017, OPM plans to conduct a baseline survey to assess current and future SES onboarding programs and to inform hiring, development, and management of SES personnel. The survey will be initially administered to SES members who onboarded within the past 2 years to establish baseline data.³⁰
- **Hiring Process.** Completing an evaluation of the QRB process and issuing guidance on materials acceptable for QRB consideration, including those that will provide an alternative to the traditional Executive Core Qualifications narrative statement commonly used by agencies for QRB submissions. This guidance also provides information to agencies on streamlining their initial hiring processes and highlights a number of valuable opportunities for training, partnering, and piloting of additional assessments. OPM plans to design and test additional innovations to improve the SES hiring process and the QRB process. These innovations will include developing enhanced leadership assessment methods and alternative methods of documenting executive qualifications during the agency hiring process, and enabling the selection of SES members without the traditional heavy reliance on written materials.³¹
- **FAQs.** Issuing answers to frequently asked questions (FAQs) regarding the executive order. The FAQ guidance will help answer questions that managers, HR staff, and executives may have about implementing the executive order as well as with previous OPM guidance implementing the executive order.³²

Significance

The importance of the SES to overall Federal operations cannot be overstated. The SES was established with the passage of the Civil Service Reform Act (CSRA) of 1978. The CSRA envisioned the SES as a corps of executives who would possess a broad Government perspective and would be capable of serving in multiple leadership positions across Government agencies. The purpose of the SES was “to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality.”³³ The decisions made by members of the SES can have broad implications. Approximately one-third of career senior executives manage more than 200 employees or are responsible for budgets that exceed \$100 million.³⁴

As of September 2015, more than 70 percent of the current members of the SES were eligible for immediate retirement, with an additional 15 percent projected to become retirement-eligible in the next 5 years.³⁵ Given this high rate of possible retirements, improving the SES is an important

²⁸ Based on an August 31, 2016 update from OPM requested by MSPB for this review of OPM significant actions.

²⁹ Beth F. Cobert memorandum for Heads of Executive Departments and Agencies, “[Executive Order Guidance—Strengthening the Senior Executive Service: Implementing the Executive Onboarding Requirement](#),” February 12, 2016.

³⁰ Based on an August 31, 2016 update from OPM requested by MSPB for this review of OPM significant actions.

³¹ Beth F. Cobert memorandum for Heads of Executive Departments and Agencies, “[Executive Order—Strengthening the Senior Executive Service: Guidance on Qualifications Review Board Submission Methods](#),” March 11, 2016.

³² Beth F. Cobert memorandum for Heads of Executive Departments and Agencies, “[Answers to Frequently Asked Questions Regarding the Executive Order to Strengthen the Senior Executive Service](#),” June 28, 2016.

³³ 5 U.S.C. § 3131.

³⁴ U.S. Merit Systems Protection Board, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015, pp. 6-7.

³⁵ MSPB analysis of data from OPM’s Central Personnel Data File, for members of the career and noncareer SES serving under continuing appointments.

endeavor for at least two reasons—it provides a unique opportunity to shape the future of SES membership and framework and it will hopefully entice some current valued members of the SES to stay with the Federal Government as they see these efforts come to fruition.

Previous MSPB research has found that development activities like the rotational assignments outlined by the OPM guidance may improve an employee’s level of engagement³⁶ and may provide executives the opportunities to improve competencies where improvement is needed or to build upon existing strengths.³⁷ Similarly, robust onboarding programs can foster higher levels of employee engagement from an employee’s first day on the job.³⁸ In addition, a sizeable portion (30 percent) of career senior executives report that their development needs are not being met.³⁹ The executive training requirements included as part of OPM’s Executive Onboarding Program Framework can help fill these executive training needs.

Streamlining the executive hiring process and making it easier for applicants to apply is certainly a worthy goal. It is vital, however, that OPM ensure that any new application procedures and executive assessments result in highly qualified individuals being referred to the QRB for consideration. OPM’s ongoing efforts to reform and modernize the SES indirectly relate to all the MSPs given the responsibility of the SES for leading employees and making personnel decisions.

In addition to strengthening the SES through a focus on hiring and development as required by Executive Order 13714, there appear to be other areas where OPM could help agencies strengthen their corps of executives. For instance, results from the latest SES exit survey show that agency work environment and organization culture present persistent challenges to a more effective SES. Results from the exit survey include the following insights:

- Executives exhibited less pride in their agencies and for the SES than in previous iterations of the survey;
- Almost three-quarters (72 percent) of executives who were leaving indicated their agencies made no effort to encourage them to stay; and
- When asked the extent to which a variety of reasons contributed to their leaving the agency, issues with the work environment (e.g., senior leadership, political environment, organizational culture) contributed the most to the decision.⁴⁰

OPM notes in the survey report that agencies may have the power to influence whether high-performing SES members ultimately choose to leave the agency. OPM should consider ways it can help agencies accomplish this goal.

Closing Mission-Critical Skills Gaps

During FY 2016, OPM continued its efforts to assist agencies in closing mission critical skills gaps. In partnership with the CHCO Council, OPM revalidated the need to continue working to close skills gaps in the following Governmentwide high-risk mission critical occupations: Economist; HR Specialist; Auditor; Acquisition; Cybersecurity; and the Science, Technology, Engineering,

³⁶ U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, September 2008, p. 41.

³⁷ U.S. Merit Systems Protection Board, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015, p. 37.

³⁸ U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, September 2008, p. 41.

³⁹ U.S. Merit Systems Protection Board, *Training and Development for the Senior Executive Service: A Necessary Investment*, December 2015, pp. 57-59.

⁴⁰ Beth F. Cobert memorandum for Chief Human Capital Officers and HR Directors, “[Release of the 2016 Governmentwide SES Exit Survey Report](#),” June 15, 2016, [Attachment](#) p. 1. Survey results covered the period from August 2014 through July 2015.

Mathematics (STEM) functional areas. An Occupational Leader representing each Governmentwide mission critical occupation has partnered with a CHCO to develop a strategy to address the root causes for why an occupation has been deemed at risk. In addition, each CHCO has identified their agency-specific mission critical occupations that they will address for skills gap closure.⁴¹

OPM provided training to a number of agencies on how to conduct a root cause analysis, link strategies to address root causes, develop an action plan, and develop outcome-oriented metrics. Agency action plans require agencies to identify which root causes they will be focusing on as well as milestones and metrics.⁴²

Significance

GAO maintains an ongoing program to focus attention on Government operations that are high risk due to their greater vulnerabilities to fraud, waste, abuse, and mismanagement or that are in need of transformation to address economy, efficiency, or effectiveness challenges.⁴³ In 2001, GAO added strategic human capital management to its high-risk list due to a number of shortcomings at multiple agencies involving key elements of modern human capital management.⁴⁴ In 2011, GAO narrowed the scope of the human capital management high-risk area to focus on the most significant challenges that remain in closing agencies' current and emerging critical skills gaps to effectively and efficiently fulfill their missions.⁴⁵

GAO has noted that an agency's skills gap can manifest itself in at least two ways—a staffing gap in which an agency has an insufficient number of individuals to complete its work or a competency gap in which an agency does not have individuals with the proper skills or abilities to successfully accomplish the work.⁴⁶ GAO identified a number of factors related to human capital that threaten the performance of Federal agencies and the closing of critical skills gaps including: a potential wave of employee retirements, current budget and long-term fiscal pressures, declining levels of employee satisfaction, and the changing nature of Federal work, which requires advanced degrees and other skills in many positions.⁴⁷

As OPM works with agencies to develop strategies to close these skills gaps, it should pay careful attention to which of those skills are trainable and which need expanded recruitment efforts. In working to close agency skills gaps, agency leaders should keep in mind that previous MSPB research found that some competencies needed by Federal employees may be more responsive to training than others. Our research indicates that knowledge competencies are highly trainable; language, social, and reasoning competencies are moderately trainable; and motivation and mental style competencies are less trainable. Due to misperceptions about the trainability of various competencies, employees may avoid training that would help them or seek training that might prove to be frustrating and unsuccessful.⁴⁸ Agency leaders should develop strategies to close agency skills gaps only after determining the extent to which skills gaps in their agencies can be closed by training/retraining current employees or which can only be closed by hiring new employees who already possess the necessary skills.

⁴¹ Beth F. Cobert memorandum for Chief Human Capital Officers, "[Closing Skills Gaps: Strategy, Reporting and Monitoring](#)," April 15, 2016.

⁴² Based on an August 31, 2016 update from OPM requested by MSPB for this review of OPM significant actions.

⁴³ U.S. Government Accountability Office, "[High-Risk Series An Update](#)," GAO-15-290, February 2015, p. 1.

⁴⁴ U.S. Government Accountability Office, "[High-Risk Series An Update](#)," GAO-01-263, January 2001, p. 18.

⁴⁵ U.S. Government Accountability Office, "[High-Risk Series An Update](#)," GAO-11-278, February 2011, p. 22.

⁴⁶ U.S. Government Accountability Office, "[OPM and Agencies Need to Strengthen Efforts to Identify and Close Mission-Critical Skills Gaps](#)," GAO-15-223, January 2015, pp. 1-2.

⁴⁷ *Id.*, p. 7.

⁴⁸ U.S. Merit Systems Protection Board, [Making the Right Connections—Targeting the Best Competencies for Training](#), February 2011, pp. i-ii.

OPM’s effort to assist agencies close mission-critical skills gaps relates to the MSPs regarding recruitment of employees (MSP 1), retention of employees (MSP 6), and training employees (MSP 7).

OPM Significant Actions Discussed in Previous MSPB Annual Reports

This section lists selected OPM significant actions discussed in previous MSPB Annual Reports that were completed or remained underway in FY 2016. This year’s report does not discuss these actions in detail because further action or results are pending or 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 which discussed the action.

OPM Action	2016 Status	Year Discussed
Federal hiring	OPM launched the Hiring Excellence Campaign ⁴⁹	2015 ⁵⁰
Human Capital Framework	OPM issued a proposed rule on February 8, 2016 ⁵¹	2011 ⁵²

⁴⁹ Blog by Beth Cobert, “[Bringing Together HR Staff and Hiring Managers to Attract America’s Top Talent](#),” June 23, 2016.

⁵⁰ See U.S. Merit Systems Protection Board, *Annual Report for FY 2015*, February 29, 2016, pp. 56-57, discussing OPM recruitment initiatives related to its Recruitment, Engagement, Diversity, and Inclusion (REDI) Roadmap, a precursor to the current Hiring Excellence Campaign.

⁵¹ [Personnel Management in Agencies](#) (Proposed rule), 81 Fed. Reg. 6,469 (February 8, 2016).

⁵² U.S. Merit Systems Protection Board, *Annual Report for FY 2011*, April 30, 2012, pp. 60-61.

FINANCIAL SUMMARY

Fiscal Year 2016 Financial Summary⁵³
as of
September 30, 2016
(dollars in thousands)

FY 16 Appropriations

FY 2016 Appropriation	\$ 44,490
Civil Service Retirement and Disability Trust Fund	2,345
Total	\$ 46,835

Obligations Charged to FY 2016 Funds

Personnel Compensation	\$ 23,257
Personnel Benefits	6,883
Transportation of Things	3
Travel of Persons	257
Rents, Communications and Utilities	4,057
Printing and Reproduction	2
Other Services	2,413
Supplies and Materials	139
Equipment/Lease Improvements	1,013
Reimbursable Obligations	2,345
Total	\$ 40,369

⁵³ This summary shows financial activity (appropriations and obligations by category) for FY 2016. Additional financial information is available in the [FY 2016 Annual Financial Report](#) available on MSPB's website.

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LIST OF ABBREVIATIONS AND ACRONYMS

AC	Air conditioning
ADA	Americans with Disabilities Act of 1990
ADR	Alternative Dispute Resolution
AFR	Annual Financial Report
AIB	Administrative Investigative Board
AJ	Administrative Judge
ALJ	Administrative Law Judge
APR-APP	Annual Performance Report and Annual Performance Plan
CB	Clerk of the Board
CBPO	Customs and Border Protection
CEU	Continuing Education Units
CFR	Code of Federal Regulations
CHCO	Chief Human Capital Officer Council
CIO	Chief Information Officer
CLE	Continuing Legal Education
CMS/LM	Case Management System/Law Manager
COOP	Continuity of Operations Plan
CSC	Civil Service Commission
CSRA	Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111
CSRS	Civil Service Retirement System
DC	District of Columbia
DCMA	Defense Contract Management Agency
DHS	Department of Homeland Security
DoDI	Department of Defense Instruction
DMS	Document Management System
DoD	Department of Defense
DoI	Department of the Interior
DoL	Department of Labor
DWOP	Dismissal without Prejudice
ED	Executive Director
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
EVS	Federal Employee Viewpoint Survey
FAA	Federal Aviation Administration
FAPAC	Federal Asian Pacific American Council
FAQ	Frequently Asked Questions
FECA	Federal Employees' Compensation Act
FERS	Federal Employees' Retirement System
FEVS	Federal Employee Viewpoint Survey
FIS	Federal Investigative Service
FLRA	Federal Labor Relations Authority
FOIA	Freedom of Information Act
FRCP	Federal Rules of Civil Procedure
FTC	Federal Trade Commission
FTE	Full Time Equivalent
FY	Fiscal Year

GAO	Government Accountability Office
GC	General Counsel
GPRAMA	Government Performance and Results Act Modernization Act of 2010
GS	General Schedule
GSA	General Services Administration
HQ	Headquarters
HR	Human Resources
IHS	Indian Health Service
IoM	<i>Issues of Merit</i>
IRA	Individual Right of Action
IS	Internal Survey
IT	Information Technology
LGBT	Lesbian, Gay, Bisexual, and Transgender
LWOP	Leave without pay
MAP	Mediation Appeals Program
MPS	Merit Principles Survey
MSP	Merit System Principles
MSPB	Merit Systems Protection Board
NBIB	National Background Investigative Bureau
NDAA	National Defense Authorization Act
NFFE	National Federation of Federal Employees
NUWC	Naval Undersea Warfare Center
OAA	Otherwise Appealable Action
OEEEO	Office of Equal Employment Opportunity
OGE	Office of Government Ethics
OGR	House Committee Oversight and Government Reform
OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSC	Office of Special Counsel
PDA	Pregnancy Discrimination Act of 1978
PFE	Petition for Enforcement
PFR	Petition for Review
PIO	Performance Improvement Officer
PPP	Prohibited Personnel Practices
QRB	Qualification Review Board
RFI	Request for Information
RFQ	Request for Quote
RIF	Reduction-in-Force
SES	Senior Executive Service
SLA	Service Level Agreement
STEM	Science, Technology, Engineering, Mathematics
STSO	Supervisory Transportation Security Officer
TBD	To be determined
TSA	Transportation Security Administration
TSO	Transportation Security Officer
USDA	Department of Agriculture
USERRA	Uniformed Services Employment and Reemployment Rights Act
USPS	U.S. Postal Service
VA	Department of Veterans Affairs
VEOA	Veterans Employment Opportunity Act

VERA	Voluntary Early Retirement Authority
VSIP	Voluntary Separation Incentive Plan
VTC	Video Teleconference
WB	Whistleblower
WPA	Whistleblower Protection Act of 1989
WPEA	Whistleblower Protection Enhancement Act of 2012



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