



# **Annual Report**

**for FY 2022**

**April 18, 2023**

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## Foreword

In accordance with § 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this Annual Report (AR) on its significant actions during fiscal year (FY) 2022.

We invite customers and stakeholders to send comments to improve MSPB's ARs to:

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Performance Improvement Officer (PIO)  
Office of Policy and Evaluation  
U.S. Merit Systems Protection Board  
1615 M Street, NW  
Washington, DC 20419  
Email: [mspb@mspb.gov](mailto:mspb@mspb.gov) (to the attention of the PIO)  
Toll Free: 1-800-209-8960  
Fax: 202-653-7130

Information about MSPB's FY 2022 program performance results (as required under the Government Performance and Results Act Modernization Act of 2010 (GPRAMA)) is available in the Annual Performance Report and Annual Performance Plan (APR-APP) for FY 2022-2024. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR) for FY 2022. MSPB's ARs, AFRs, and GPRAMA documents are posted on the [Plans, Budget & Performance](#) page on MSPB's website ([www.mspb.gov](http://www.mspb.gov)) when they are released.

Go to [www.mspb.gov](http://www.mspb.gov) to learn more about MSPB's work, sign up for MSPB's adjudication or studies listservs, or follow us on Twitter [@USMSPB](#).

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# U.S. MERIT SYSTEMS PROTECTION BOARD

## FISCAL YEAR 2022 ANNUAL REPORT

### MESSAGE FROM THE ACTING CHAIRMAN

I am pleased to submit MSPB's Annual Report for FY 2022 in accordance with 5 U.S.C. § 1206. FY 2022 was an important year for MSPB with restoration of a quorum on March 4, 2022, and a full Board on June 1, 2022. MSPB is now able to fulfill its full range of statutory responsibilities, including deciding cases at agency headquarters (HQ) and issuing merit systems studies reports. Prior to March 4, the agency was led by Tristan L. Leavitt in his role as Acting Chief Executive and Administrative Officer. Between March 4 and May 31, Raymond A. Limon served as MSPB's Vice Chairman and Acting Chairman. I am proud and humbled to follow in their footsteps and serve as Vice Chairman and Acting Chairman. FY 2022 was a period of profound change for MSPB including restoration of a quorum, resumption of all statutory Board functions, several agency and leadership changes, and the continuing effects of the pandemic. I offer my deep and sincere appreciation for the contributions of all MSPB employees, managers, and leaders whose efforts are reflected in this report.

Both prior to the restoration of a quorum and since, MSPB's administrative judges (AJs) continued to review cases filed in the regional and field offices (RO/FOs), issuing 4,867 decisions in FY 2022. Between March 4 and September 30, 2022, MSPB decided 528 cases at HQ, reducing the inherited inventory to 3,265 cases. Case processing statistics for the cases decided in the RO/FOs and at HQ are summarized in the case processing section of this report. MSPB issued several precedential decisions at HQ, most of which are summarized in the significant Board decisions section of this report. As a service to our readers, we also include a summary of decisions and opinions issued by the U.S. Court of Appeals for the Federal Circuit (CAFC) and other circuit and district courts on issues relevant to our jurisdiction.

MSPB issued three editions of its *Issue of Merit (IoM)* newsletter and published an updated merit systems studies research agenda for FY 2022-2026, which contains important areas and topics for its studies work over the next four years, including those identified as priorities of the new Board members. Other merit systems studies activities are summarized in that section of this report. This report also contains a summary of our work in reviewing the rules, regulations, and significant actions of the Office of Personnel Management (OPM).

Beyond the internal changes described above, MSPB employees continued to confront the challenges of the COVID-19 pandemic. Even though a large part of MSPB's work can be accomplished through telework, MSPB has increased in-office work. This has improved the effectiveness and efficiency of our work, especially on tasks that are better performed in the office, such as working with paper appeals and supporting the work of the new Board. We have also begun to return to more routine face-to-face hearings for initial appeals.

We are sad to bid farewell but pleased to offer best wishes to Tristan Leavitt, who departed MSPB at the end of his term in February 2023. We hope a nomination for his position will be forthcoming from the White House and Senate confirmation will follow for the new Board Member. In the meantime, Member Limon and I are committed to working with all MSPB employees to accomplish our mission to protect merit system principles (MSPs) and promote a workforce free from prohibited personnel practices (PPPs).



Cathy A. Harris  
Acting Chairman  
April 18, 2023

## INTRODUCTION

This MSPB Annual Report for FY 2022 includes adjudication case processing statistics for the RO/FOs and for HQ; summaries of significant Board cases and court opinions relevant to MSPB's work; summaries of MSPB's merit systems studies activity; and a summary of MSPB work reviewing the rules, regulations and significant actions of OPM.<sup>1</sup> The report also contains information about MSPB's financial status, outreach and education activities, legislative and congressional relations activities, and international activities. The report briefly references the most significant internal management challenges and external factors that affect MSPB's work; more complete descriptions are included in the APR-APP for FY 2022-2024.

### About MSPB

MSPB was created by the Civil Service Reform Act (CSRA) to continue the adjudication functions of the Civil Service Commission, 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 (HC) management issues. In addition, MSPB was given the authority and responsibility to review and act on OPM's regulations, and to review and report on OPM's significant actions.<sup>2</sup> The CSRA also codified for the first time the values of the Federal merit systems as MSPs, and proscribed, as contrary to MSPs, specific actions and practices as PPPs.<sup>3</sup> Since the enactment of the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.<sup>4</sup> More information about MSPB's jurisdiction can be found in the agency's Strategic Plan at [www.mspb.gov](http://www.mspb.gov).

### MSPB's Mission and Vision

**Mission** *To protect the merit system principles and promote an effective Federal workforce free of prohibited personnel practices.*

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

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

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

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

<sup>4</sup> These include the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act of 1989 (WPA), Pub. L. 101-12, 103 Stat. 16; the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. 112-199; and other laws listed in this and previous ARs.

## 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.



### **Cathy A. Harris: Vice Chairman and Acting Chairman June 2022 to Present**

Cathy A. Harris was confirmed by the Senate on May 25, 2022, and sworn into her duties as a member of the Board on June 1, 2022. She was designated Vice Chairman on June 6, 2022, and currently is the Acting Chairman. Prior to that Ms. Harris was co-manager of the firm of Kator, Parks, Weiser & Harris, PLLC, in Washington, DC. She served as the Chair of the firm's Sexual Harassment and LGBT Practice sections. Ms. Harris has practiced employment law, including before MSPB, for over two decades. She has extensive experience in the litigation and settlement of Federal sector employment class actions and represented individual employees and Federal agencies. Ms. Harris graduated from the George Washington University Law School in Washington, DC with

honors in 1997, where she was a member and editor on the George Washington Law Review. She received the Michael D. Cooley award for most successfully maintaining her compassion, vitality, and humanity during law school and was elected to give the salutatory address at commencement. Ms. Harris received her undergraduate degree from Brown University in 1994. Prior to joining Kator, Parks, Weiser & Harris, PLLC, she was an Assistant District Attorney in the New York County District Attorney's Office. Ms. Harris also served as an Adjunct Professor at the George Washington University Law School from 2001 to 2004. She resides in Silver Spring, Maryland with her wife and daughter.

### **Raymond A. Limon: Board Member June 2022 to present; Vice Chairman and Acting Chairman March 2022 to June 2022**

Raymond A. Limon was confirmed by the Senate on March 1, 2022, and sworn into his duties as a member of the Board on March 4, 2022. Prior to that, Mr. Limon served as the Deputy Assistant Secretary for Human Capital and Diversity and the Chief Human Capital Officer (CHCO) and was a career member of the Senior Executive Service (SES) at the Department of the Interior (DOI). His Directorate managed DOI's strategic human capital policies and procedures, HR evaluations and oversight programs, occupational safety and health programs, and employee development and leadership programs, all of which served DOI's more than 70,000 employees in more than 350 occupations and 2,400 locations. Before joining DOI, Mr. Limon led the State Department's Civil Service Human Resources (HR) Management office. He also served as the CHCO at the Corporation for National and Community Service (e.g., AmeriCorps, VISTA, Senior Corps, etc.) and chaired the Small Agency HR Council, representing approximately 100 Federal agencies and organizations. Earlier, Mr. Limon was an attorney at OPM's Office of General Counsel, specializing in employment litigation and regulatory reviews; and served as OPM's



Director of the Office of Administrative Law Judges (ALJs), managing the government-wide personnel system for ALJs. He received his J.D. from Indiana University, Bloomington and is a former Peace Corps Volunteer (Honduras).



**Tristan L. Leavitt: Board Member March 2022 to March 2023; MSPB Acting Chief Executive and Administrative Officer April 2019 to March 2022**

Tristan L. Leavitt was confirmed as a Member of MSPB on March 1, 2022. At the time, Mr. Leavitt had served as MSPB's General Counsel since October 2018, and, in the absence of Senate-confirmed Board members, as the agency's Acting Chief Executive and Administrative Officer since March 2019. He had also served for over two years as a Government Member of the Administrative Conference of the United States.

Before coming to MSPB, Mr. Leavitt served for a year and a half at the Office of Special Counsel (OSC) as the Principal Deputy Special Counsel, including time as Acting Special Counsel. His leadership at OSC contributed to exposing waste, fraud, and abuse throughout the Federal government, such as identifying \$32 million in missing equipment at a U.S. Naval facility. Prior to OSC, he worked for eight years on Capitol Hill, conducting congressional investigations of government waste, fraud, and abuse and handling various transparency and accountability legislative issues. His experience included four years on Senator Chuck Grassley's Senate Judiciary Committee staff, where he helped expose government misconduct such as Operation Fast and Furious, the gunwalking scheme that armed Mexican drug cartels and the murderers of a U.S. Border Patrol agent. He also worked for two and a half years on Chairman Jason Chaffetz's House Oversight and Government Reform Committee staff, where he led investigations into the Federal Bureau of Investigation (FBI), the Department of State, the U.S. Secret Service, and more. Prior to law school, he began his career working for an individual member of the House of Representatives handling veterans' affairs, pro-life, and religious freedom issues. During law school, he clerked for the Republican National Committee and for the law firm Steptoe & Johnson in Charleston, West Virginia.

Mr. Leavitt received his B.A. from Brigham Young University and his J.D. from Georgetown University Law Center. He and his wife Brittany Atkinson Leavitt are the proud parents of five children.

### **Board Quorum and Status of Board Member Nominations**

On March 4, 2022, MSPB's quorum was restored with the swearing in of Raymond A. Limon and Tristan L. Leavitt as Board Members. Between March 1, 2019, and March 3, 2022, MSPB operated in accordance with its continuity of operations plan, under which Mr. Leavitt, as MSPB's General Counsel, served as the agency's Acting Chief Executive and Administrative Officer.<sup>5</sup> Between March 4 and June 1, 2023, Mr. Limon served as MSPB Vice Chairman and Acting Chairman. On June 1, 2022, Cathy A. Harris was sworn in as Board member and, on June 6, 2022, designated by President Biden as Vice Chairman; she is now MSPB's Acting Chairman.<sup>6</sup> On February 28, 2023,

<sup>5</sup> MSPB was without a quorum of Board members for over five years (from January 8, 2017, through March 3, 2022), and without any presidentially appointed, Senate-confirmed Board members between March 1, 2019, and March 3, 2022.

<sup>6</sup> Ms. Harris' nomination as Chairman was returned to the President at the end of the 117<sup>th</sup> Congress. On January 3, 2023, the President renominated her as Chairman, and her nomination was referred to the Senate Committee on Homeland Security and

Mr. Leavitt departed MSPB upon completion of his term as Board Member, resulting in a vacancy for MSPB's third Board member.

## **MSPB Offices and Their Functions**

MSPB is headquartered in Washington, DC, and has six ROs and two FOs located throughout the United States. For FY 2022, the agency was authorized to employ 235 full-time equivalents 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 Director of the Office of Equal Employment Opportunity (EEO) reports directly to the Chairman; otherwise, the directors of the 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. In FY 2022, the functions of this office were performed under interagency agreements by ALJs at the Federal Trade Commission (FTC) and the U.S. Coast Guard.

The **Office of Appeals Counsel (OAC)** 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 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 (OCB)** receives and processes cases filed at MSPB 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 online information services, and administers the Freedom of Information Act and privacy 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 (EEO)** plans, implements, and evaluates MSPB's EEO 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 EEO Director also coordinates MSPB's Diversity and Inclusion Council.

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

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Governmental Affairs. On March 15, 2023, her nomination was reported favorably out of committee and is pending before the Senate.

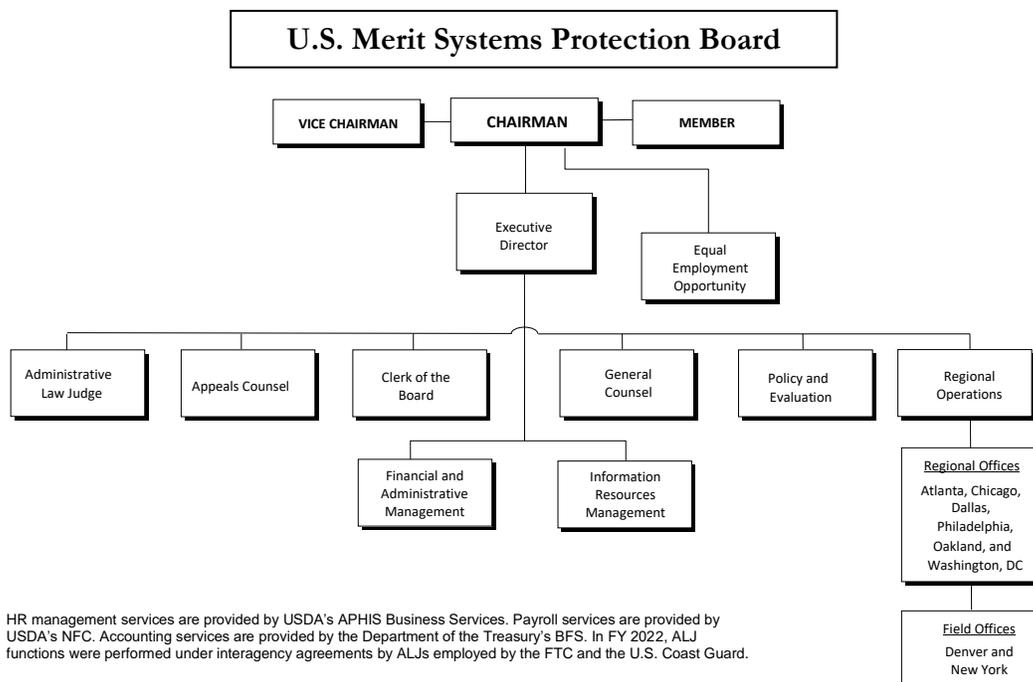
The **Office of the General Counsel (OGC)**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for 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, administers MSPB’s ethics program, performs the inspector general function, and plans and directs audits and investigations.

The **Office of Information Resources Management (IRM)** develops, implements, and maintains MSPB’s information technology (IT) systems and enterprise applications, and manages MSPB’s cybersecurity program. These services help MSPB manage its caseload efficiently and carry out its administrative and research responsibilities.

The **Office of Policy and Evaluation (OPE)** carries out MSPB’s statutory responsibility to conduct 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 GPRAMA.

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

### MSPB Organizational Chart



## FISCAL YEAR 2022 IN REVIEW

### Adjudication

In FY 2022, 4,867 cases were decided in the ROs/FOs, including addendum cases and stay requests, and ALJs issued nine (9) decisions. MSPB's quorum was restored on March 4, 2022, and a full Board was in place on June 1, 2022. Between March 4 and the end of FY 2022 (September 30, 2022), the Board at HQ decided 528 cases. Statistical information on MSPB's case processing activity for the RO/FOs and at HQ is provided in the [section](#) on Case Processing Statistics for FY 2022.<sup>7</sup>

The Board issued a number of new precedential decisions, many of which are summarized in the [section](#) on Significant Decisions Issued by the Board in FY 2022. Precedential Board decisions involved topics such as jurisdiction, performance-based actions, penalty, actions under 5 U.S.C. § 714, affirmative defenses, restoration to employment, discrimination, whistleblower protections, Special Counsel actions, and Board procedures. As a service to its stakeholders, MSPB also provides summaries of significant opinions relevant to the Board's work that were issued in FY 2022 by the CAFC (or Federal Circuit) and other Federal courts. Those summaries are provided in the [section](#) on Significant Court Opinions Issued in FY 2022. The opinions cover topics such as annuity, back pay, removal, due process (Chapter 75, and 38 U.S.C. § 714), and whistleblowing (*Carr* factors, jurisdiction, and substantial evidence).

### Merit Systems Studies

In FY 2022, MSPB published its new merit systems studies research agenda and three editions of its *IaM* newsletter. MSPB also posted 2021 Merit Principles Survey (MPS) data and data documentation to [Data.gov](#) and on the MSPB [website](#). Summaries of publications and other studies-related activities are contained in the Summary of Merit Systems Studies Activity [section](#) of this report.

### Review of the Office of Personnel Management

MSPB has authority to review the rules, regulations, and significant actions of OPM, and information about these reviews is provided in the Review of OPM [section](#) of this report. In accordance with statute, MSPB's annual report must contain a review of OPM's significant actions and an assessment of the degree to which the actions support merit and prevent PPPs. The OPM review section includes reviews of OPM's significant actions related to skill-based hiring, SES pipeline, telework, collective bargaining, and the Federal Workforce Priorities Report. Review of OPM rules and regulations is carried out through the adjudication function. These reviews are rare, and noteworthy information about this function is provided in 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 the concept 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 understanding and operation of the Federal merit system disciplinary and appeals process by sharing information about MSPB processes and its legal precedents. All of these efforts, in turn, help

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<sup>7</sup> In accordance with the WPEA, information about FY 2022 whistleblower cases is available in MSPB's APR-APP for FY 2022-2024, which is posted on MSPB's website at [www.mspb.gov](http://www.mspb.gov).

improve employee and organizational performance, improve service to the American people, and provide value to the taxpayer.

In FY 2022, MSPB staff conducted 112 outreach events with a variety of customers and stakeholders. Events were a mix of in-person and virtual events on topics such as merit systems and merit-based management; Federal disciplinary policies; MSPB regulations, procedures, results, and legal precedent; and results of merit systems studies. Events were conducted with Federal executive branch departments or agencies, congressional organizations, Federal court organizations, Federal Executive Boards, good government and affinity groups, and a variety of legal groups (bar and other attorney associations, national institutes, law schools). MSPB also presented at major legal and research conferences such as the Federal Dispute Resolution conference, Federal Circuit Bar Association events, and the Chicago-Kent College of Law's annual Federal Sector Labor Relations and Labor Law Program.

MSPB's work and other activities were cited over 550 times in over 113 different print and online sources. Several significant citations of studies work are included in the Merit Systems Studies [section](#) of this report. Additional information about MSPB's outreach and education activities and references to its work can be found in MSPB's APR-APP for FY 2022-2024.

### **Legislative and Congressional Relations Activity**

During FY 2022, MSPB staff monitored and analyzed legislative activity relevant to MSPB's jurisdiction and adjudication of appeals.<sup>8</sup>

As in past years, the National Defense Authorization Act (NDAA), the annual Department of Defense (DOD) policy bill, has been the primary vehicle for new laws affecting civilian employee policy and often also impacting MSPB. The NDAA for FY 2022 (Pub. L. 117-81) has two provisions with potential bearing on MSPB operations. Section 1105 amends the guidelines for reductions in civilian positions at DOD (10 U.C.S. § 1597(e)) by changing the determination criteria for employee separation from being "primarily on the basis of performance" to "account[ing] for employee performance ... among other factors as determined by the Secretary." It is unclear how this change will be interpreted by MSPB and other tribunals. Section 1106 repeals the two-year probationary period for Title 10 employees, returning to the prior one-year requirement. This repeal, effective December 31, 2022, will provide MSPB appeal rights to DOD civilian employees who have completed one year of service and thus may lead to a slight increase in MSPB's caseload.

On December 23, 2022, the James. M. Inhofe NDAA for FY 2023 ([Pub. L. 117-263](#)) was enacted into law, providing an avenue for FBI employees to make whistleblower reprisal claims to MSPB, which previously were exclusively subject to an internal FBI appeals process. Section 5304 of the NDAA provides an FBI employee who alleges reprisal for protected whistleblower activities with the right to appeal a final determination or corrective action order to MSPB under 5 U.S.C. § 1221. It also allows for an appeal to MSPB under § 1221 if no final determination or corrective action order has been made or issued within one-hundred eighty (180) days of the FBI being notified of the allegation of reprisal. By expanding MSPB's whistleblowing jurisdiction to include employees not previously eligible to file appeals under 5 U.S.C. § 1221, this change likely will increase the number of complex cases adjudicated by the Board.

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<sup>8</sup> Bills that expired at the end of the 117th Congress are not summarized here.

On December 29, 2022, President Biden signed the Consolidated Appropriations Act for Fiscal Year 2023 (Pub. L. No: [117-328](#)), which contained two provisions potentially affecting MSPB as an employer: the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act. The PWFA adopts the same meaning of “reasonable accommodation” and “undue hardship” as used in the Rehabilitation Act, which applies to Federal employees and incorporates standards from the Americans with Disabilities Act and describes employer obligations in responding to requests based on a physical or mental condition related to pregnancy, childbirth, and associated medical conditions. It also provides that an employer cannot require an employee to take paid or unpaid leave as an accommodation if another reasonable accommodation is available. As under the Rehabilitation Act, employers are not required under the PWFA to provide employees with a desired accommodation where an alternative and effective reasonable accommodation is available. The PUMP for Nursing Mothers Act expands existing obligations under the Fair Labor Standards Act to provide nursing employees with reasonable break times to express breast milk for a year after the child’s birth and describes specific requirements for lactation rooms. The PUMP for Nursing Mothers Act covers all employees. This new legislation will affect Federal management practices; disputes arising from these provisions could become material elements in appeals and mixed EEO cases.

**Other Congressional Activity.** MSPB staff conducted nine briefings for congressional staff during FY 2022. In addition to the annual budget briefings and introductory briefings for staff of the House and Senate Appropriations Committees, MSPB briefed staff from individual House Members’ offices, the Senate Majority Leader’s office, the Senate Judiciary Committee, and the Senate Homeland Security and Governmental Affairs Committee. Briefing topics included technical support for legislative language to allow FBI whistleblowers access to MSPB, legislative language to allow intelligence community employees access to MSPB, the Whistleblower Protection Improvement Act (H.R. 2988), and the nomination process for the three Board members.

### **Internal Management Challenges and External Factors**

The most significant internal issue affecting MSPB is reduction of the HQ inherited case inventory now that a quorum is restored. Other significant internal challenges that could affect MSPB’s ability to carry out its mission include issues such as retirement eligibility, especially of those involved in adjudication and merit systems studies, and IT stability, cybersecurity, and implementation of its new, modernized electronic appeal system. The COVID-19 pandemic and adjusting to a hybrid working environment is an external factor that continues to present challenges for MSPB. Additional significant external trends or issues affecting MSPB’s ability to carry out its mission include changes in law, jurisdiction, and appeals processes; Government-wide reform; and workforce reshaping. More detailed information about MSPB’s internal challenges and external factors can be found in MSPB’s APR-APP for FY 2022-2024.

## CASE PROCESSING STATISTICS FOR FY 2022

### Summary of Cases Decided by MSPB

Data for cases decided in the RO/FOs reflect cases processing throughout the entire FY. At the outset of FY 2022, MSPB lacked a quorum; therefore, data for cases processed at HQ reflect only cases decided from March 4 through September 30, 2022. For this reason, HQ case processing data will not be comparable to HQ case processing data in prior ARs.

**Table 1: FY 2022 Summary of Cases Decided by MSPB**

Cases Decided in MSPB RO/FOs	Number of cases
Appeals	4,241
Addendum Cases <sup>1</sup>	214
Stay Requests <sup>2</sup>	31
<b>TOTAL Cases Decided in RO/FOs</b>	<b>4,486</b>
<b>Cases Decided by ALJs - Original Jurisdiction<sup>3</sup></b>	<b>9</b>
<b>Cases Decided by the Board</b>	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	428
Petitions for review (PFRs) - Addendum Cases	48
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings	2
Court Remands	6
Compliance Referrals	25
EEOC Non-concurrence Cases	0
Arbitration Cases	3
<b>Subtotal - Appellate Jurisdiction</b>	<b>512</b>
Original Jurisdiction <sup>4</sup>	12
Interlocutory Appeals	4
<b>TOTAL Cases Decided by the Board</b>	<b>528</b>
<b>TOTAL Decisions (Board, ALJs, RO/FOs)</b>	<b>5,023</b>
<sup>1</sup> Including: 61 requests for attorney fees, 88 Compliance cases, 27 court remand cases, 17 Board remand case, 18 requests for compensatory damages (discrimination cases only), and 3 requests for consequential damages. <sup>2</sup> Including: 24 stay requests in whistleblower cases and 7 in non-whistleblower cases. <sup>3</sup> Including: 3 Disciplinary Action - Hatch Act cases and 6 Actions Against ALJs. <sup>4</sup> Including: 2 Petitions for Rulemaking, 5 Requests for Stay (OSC Filed), 1 Disciplinary Action - Hatch Act case, 1 Disciplinary Action - Non-Hatch Act case, and 3 Actions Against ALJ's.	

## Cases Processed in the Regional and Field Offices

**Table 2: Disposition of Appeals Decided in the RO/FOs by Type of Case**

Type of Case	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	#	%	#	%	#	%	#	%	
Adverse Action by Agency	1,633	884	54.13	749	45.87	463	61.82	286	38.18	
Termination of Probationers	424	397	93.63	27	6.37	22	81.48	5	18.52	
Reduction in Force	8	4	50.00	4	50.00	2	50.00	2	50.00	
Performance	127	60	47.24	67	52.76	41	61.19	26	38.81	
Acceptable Level of Competence (ALOC) <sup>3</sup>	29	25	86.21	4	13.79	4	100.00	0	0.00	
Suitability	62	33	53.23	29	46.77	22	75.86	7	24.14	
CSRS <sup>4</sup> Retirement: Legal	122	77	63.11	45	36.89	4	8.89	41	91.11	
CSRS Retirement: Disability	4	3	75.00	1	25.00	0	0.00	1	100.00	
CSRS Retirement: Overpayment	38	16	42.11	22	57.89	11	50.00	11	50.00	
FERS <sup>4</sup> Retirement: Legal	190	138	72.63	52	27.37	6	11.54	46	88.46	
FERS Retirement: Disability	357	299	83.75	58	16.25	0	0.00	58	100.00	
FERS Retirement: Overpayment	208	121	58.17	87	41.83	60	68.97	27	31.03	
FERCCA <sup>4</sup>	7	6	85.71	1	14.29	0	0.00	1	100.00	
Individual Right of Action	429	285	66.43	144	33.57	83	57.64	61	42.36	
USERRA	86	54	62.79	32	37.21	17	53.13	15	46.88	
VEOA	49	30	61.22	19	38.78	0	0.00	19	100.00	
Other <sup>5</sup>	468	447	95.51	21	4.49	19	90.48	2	9.52	
<b>Total</b>	<b>4,241</b>	<b>2,879</b>	<b>67.88</b>	<b>1,362</b>	<b>32.12</b>	<b>754</b>	<b>55.36</b>	<b>608</b>	<b>44.64</b>	

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

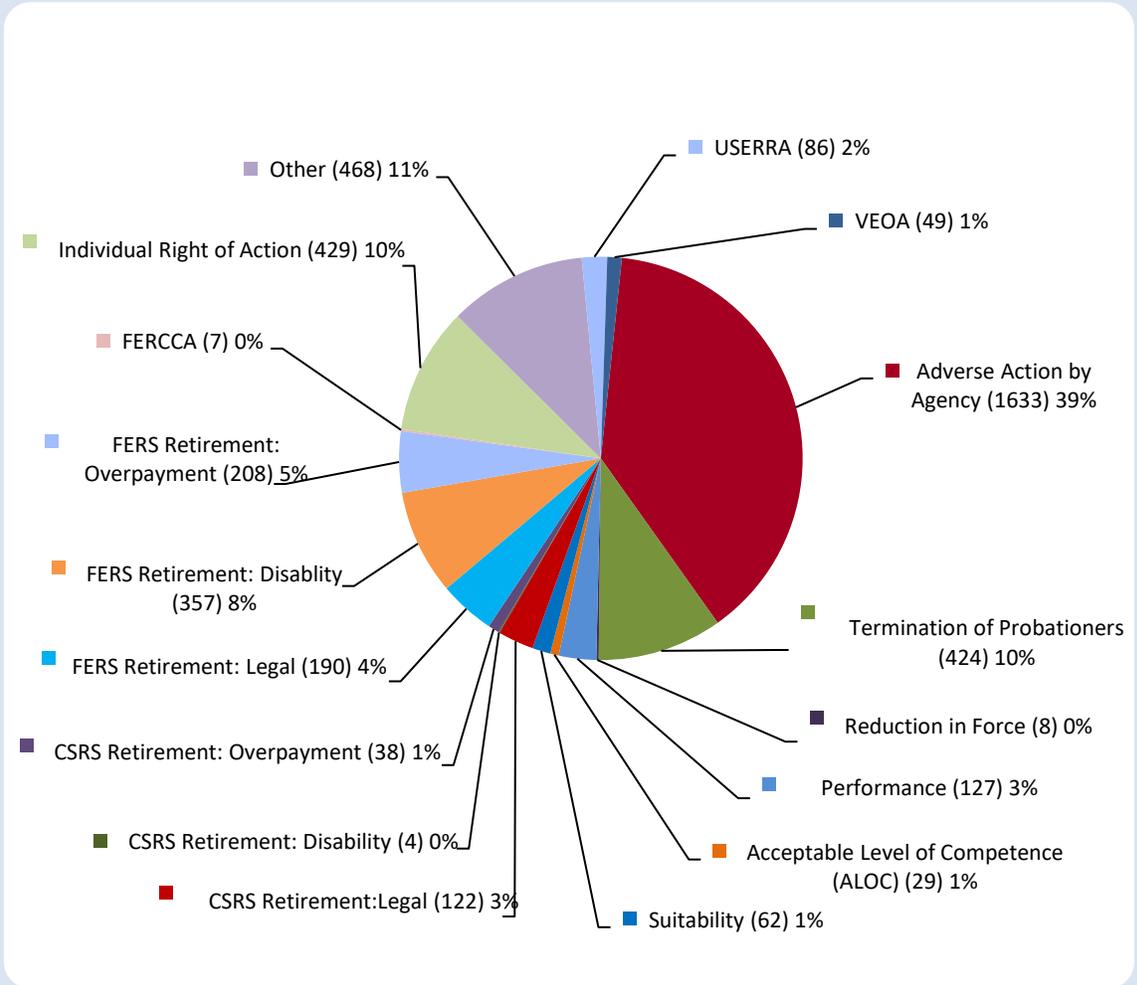
<sup>2</sup> Percent Settled and Adjudicated are of the number Not Dismissed.

<sup>3</sup> 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 must, under most circumstances, deny his or her within-grade increase.

<sup>4</sup> Civil Service Retirement System (CSRS); Federal Employees Retirement System (FERS); and Federal Erroneous Retirement Coverage Corrections Act (FERCCA).

<sup>5</sup> "Other" appeals include Restoration to Duty (24), Miscellaneous (380), and additional types such as Reemployment Priority, Employment Practices, and others.

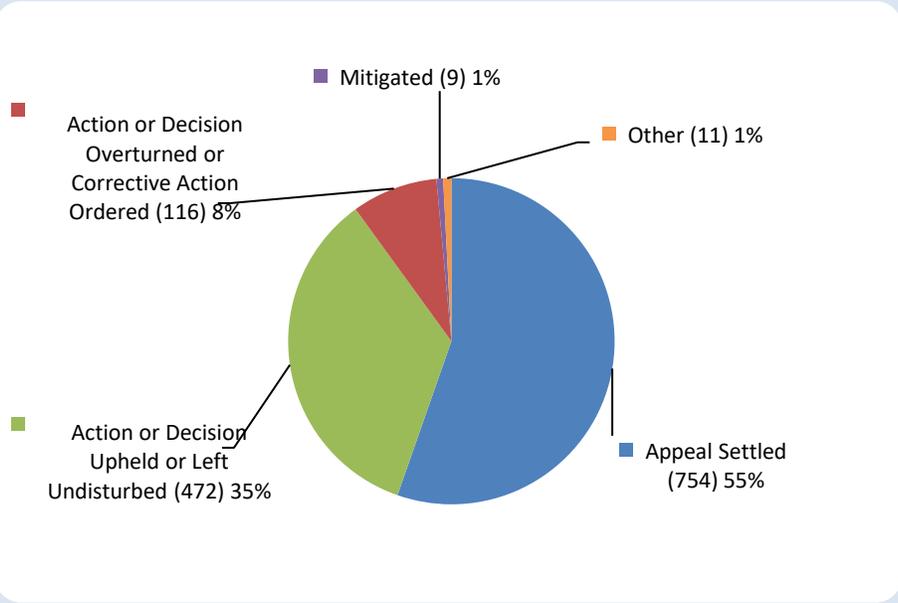
**Figure 1: Type of Appeals Decided in the RO/FOs**



**Total Number of Appeals: 4,241**

Note: Some percentages display as “0” due to rounding; percentages are rounded to add to 100%.

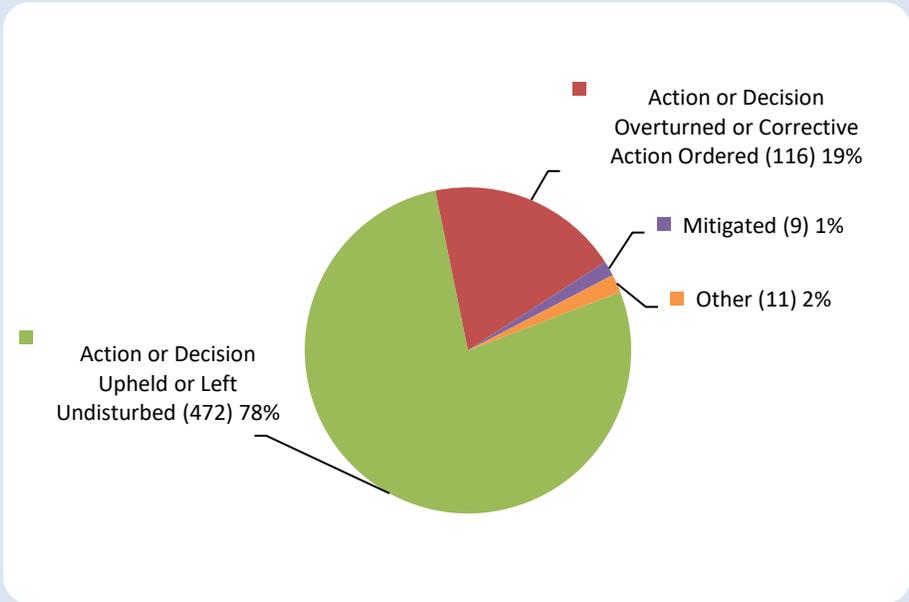
**Figure 2: Dispositions of Initial Appeals Not Dismissed by RO/FOs**



**Total Number of Appeals that Were Not Dismissed: 1,362**

Percentages are rounded to add to 100%.

**Figure 3: Dispositions of Initial Appeals Not Dismissed or Settled by RO/FOs**



**Based on 608 Appeals Adjudicated on the Merits**

Percentages are rounded to add to 100%.

**Table 3: Disposition of Appeals by Agency**  
(in descending order by number of decided appeals)

	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	#	%	#	%	#	%	#	%	
Office of Personnel Management <sup>3</sup>	943	657	69.7	286	30.3	101	35.3	185	64.7	
Department of Veterans Affairs	545	370	67.9	175	32.1	110	62.9	65	37.1	
Department of the Army	405	271	66.9	134	33.1	90	67.2	44	32.8	
United States Postal Service	364	239	65.7	125	34.3	92	73.6	33	26.4	
Department of the Navy	291	190	65.3	101	34.7	54	53.5	47	46.5	
Department of Homeland Security	264	168	63.6	96	36.4	43	44.8	53	55.2	
Department of Defense	201	138	68.7	63	31.3	40	63.5	23	36.5	
Department of the Air Force	197	124	62.9	73	37.1	48	65.8	25	34.2	
Department of Health and Human Services	184	143	77.7	41	22.3	32	78.0	9	22.0	
Department of Justice	183	129	70.5	54	29.5	22	40.7	32	59.3	
Department of the Treasury	132	93	70.5	39	29.5	21	53.8	18	46.2	
Department of Agriculture	91	52	57.1	39	42.9	23	59.0	16	41.0	
Department of the Interior	81	52	64.2	29	35.8	18	62.1	11	37.9	
Social Security Administration	68	51	75.0	17	25.0	8	47.1	9	52.9	
Department of Commerce	54	36	66.7	18	33.3	9	50.0	9	50.0	
Department of Transportation	52	38	73.1	14	26.9	11	78.6	3	21.4	
Department of Labor	38	24	63.2	14	36.8	7	50.0	7	50.0	
Equal Employment Opportunity Commission	16	15	93.8	1	6.3	1	100.0	0	0.0	
National Aeronautics and Space Administration	12	6	50.0	6	50.0	3	50.0	3	50.0	
Department of State	11	9	81.8	2	18.2	1	50.0	1	50.0	
Environmental Protection Agency	11	9	81.8	2	18.2	0	0.0	2	100.0	
Department of Energy	9	6	66.7	3	33.3	2	66.7	1	33.3	
Department of Housing and Urban Development	8	4	50.0	4	50.0	3	75.0	1	25.0	
Department of Education	7	4	57.1	3	42.9	1	33.3	2	66.7	
Small Business Administration	7	5	71.4	2	28.6	0	0.0	2	100.0	
Selective Service System	6	5	83.3	1	16.7	0	0.0	1	100.0	
Office of Special Counsel	5	5	100.0	0	0.0	0	0.0	0	0.0	
Agency for International Development	4	4	100.0	0	0.0	0	0.0	0	0.0	
Federal Deposit Insurance Corporation	4	2	50.0	2	50.0	1	50.0	1	50.0	
Federal Reserve System	4	3	75.0	1	25.0	1	0.0	0	0.0	

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

	Decided		Dismissed <sup>1</sup>		Not Dismissed <sup>1</sup>		Settled <sup>2</sup>		Adjudicated <sup>2</sup>	
	#	#	%	#	%	#	%	#	%	
General Services Administration	4	2	50.0	2	50.0	2	100.0	0	0.0	
National Archives and Records Administration	4	2	50.0	2	50.0	2	100.0	0	0.0	
Government Publishing Office	3	2	66.7	1	33.3	0	0.0	1	100.0	
Central Intelligence Agency	2	2	100.0	0	0.0	0	0.0	0	0.0	
Development Finance Corporation	2	1	50.0	1	50.0	1	100.0	0	0.0	
Federal Housing Finance Agency	2	1	50.0	1	50.0	0	0.0	1	0.0	
International Boundary and Water Commission: U.S. and Mexico	2	2	100.0	0	0.0	0	0.0	0	0.0	
National Credit Union Administration	2	0	0.0	2	100.0	0	0.0	2	100.0	
Nuclear Regulatory Commission	2	2	100.0	0	0.0	0	0.0	0	0.0	
Other (Non-agency)	2	2	100.0	0	0.0	0	0.0	0	0.0	
Pension Benefit Guaranty Corporation	2	1	50.0	1	50.0	1	100.0	0	0.0	
Railroad Retirement Board	2	2	100.0	0	0.0	0	0.0	0	0.0	
Securities and Exchange Commission	2	2	100.0	0	0.0	0	0.0	0	0.0	
U.S. Agency for Global Media	2	0	0.0	2	100.0	2	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	
African Development Foundation	1	0	0.0	1	100.0	1	0.0	0	0.0	
Architect of the Capitol	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Labor Relations Authority	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Trade Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	
Merit Systems Protection Board	1	0	0.0	1	100.0	1	0.0	0	0.0	
Millennium Challenge Corporation	1	0	0.0	1	100.0	1	0.0	0	0.0	
National Labor Relations Board	1	1	100.0	0	0.0	0	0.0	0	0.0	
National Science Foundation	1	1	100.0	0	0.0	0	0.0	0	0.0	
Smithsonian Institution	1	0	0.0	1	100.0	1	0.0	0	0.0	
Tennessee Valley Authority	1	0	0.0	1	100.0	0	0.0	1	0.0	
<b>Totals</b>	<b>4,241</b>	<b>2,879</b>	<b>67.9</b>	<b>1,362</b>	<b>32.1</b>	<b>754</b>	<b>55.4</b>	<b>608</b>	<b>44.6</b>	
<sup>1</sup> Percent Dismissed and Not Dismissed are of the number Decided. <sup>2</sup> Percent Settled and Adjudicated are of the number Not Dismissed <sup>3</sup> Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the CSRS and FERS administrator.										

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

Agency	Adjudicated <sup>1</sup>		Affirmed		Reversed		Mitigated Modified		Other	
	#	#	%	#	%	#	%	#	%	
Office of Personnel Management <sup>2</sup>	185	133	71.9	44	23.8	0	0.0	8	4.3	
Department of Veterans Affairs	65	52	80.0	10	15.4	1	1.5	2	0.0	
Department of Homeland Security	53	45	84.9	5	9.4	3	5.7	0	0.0	
Department of the Navy	47	38	80.9	9	19.1	0	0.0	0	0.0	
Department of the Army	44	32	72.7	10	22.7	2	4.5	0	0.0	
United States Postal Service	33	23	69.7	9	27.3	1	3.0	0	0.0	
Department of Justice	32	24	75.0	7	21.9	1	3.1	0	0.0	
Department of the Air Force	25	23	92.0	2	8.0	0	0.0	0	0.0	
Department of Defense	23	18	78.3	5	21.7	0	0.0	0	0.0	
Department of the Treasury	18	17	94.4	1	5.6	0	0.0	0	0.0	
Department of Agriculture	16	12	75.0	3	18.8	0	0.0	1	6.3	
Department of the Interior	11	9	81.8	2	18.2	0	0.0	0	0.0	
Department of Commerce	9	7	77.8	2	22.2	0	0.0	0	0.0	
Department of Health and Human Services	9	8	88.9	1	11.1	0	0.0	0	0.0	
Social Security Administration	9	7	77.8	1	11.1	1	11.1	0	0.0	
Department of Labor	7	6	85.7	1	14.3	0	0.0	0	0.0	
Department of Transportation	3	2	66.7	1	33.3	0	0.0	0	0.0	
National Aeronautics and Space Administration	3	3	100.0	0	0.0	0	0.0	0	0.0	
Department of Education	2	2	100.0	0	0.0	0	0.0	0	0.0	
Environmental Protection Agency	2	2	100.0	0	0.0	0	0.0	0	0.0	
National Credit Union Administration	2	2	100.0	0	0.0	0	0.0	0	0.0	
Small Business Administration	2	2	100.0	0	0.0	0	0.0	0	0.0	
Department of Energy	1	1	100.0	0	0.0	0	0.0	0	0.0	
Department of Housing and Urban Development	1	1	100.0	0	0.0	0	0.0	0	0.0	
Department of State	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Deposit Insurance Corporation	1	0	0.0	1	100.0	0	0.0	0	0.0	
Federal Housing Finance Agency	1	1	100.0	0	0.0	0	0.0	0	0.0	
Government Publishing Office	1	0	0.0	1	100.0	0	0.0	0	0.0	
Selective Service System	1	1	100.0	0	0.0	0	0.0	0	0.0	
Tennessee Valley Authority	1	0	0.0	1	100.0	0	0.0	0	0.0	
<b>TOTAL</b>	<b>608</b>	<b>472</b>	<b>77.6</b>	<b>116</b>	<b>19.1</b>	<b>9</b>	<b>1.5</b>	<b>11</b>	<b>1.8</b>	

<sup>1</sup> Adjudicated, i.e., not dismissed or settled.  
<sup>2</sup> Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the CSRS and FERS administrator.

## Cases Processed at Headquarters

As a reminder, these data represent cases decided between March 4 and September 30, 2022. Therefore, these data are not comparable to full-year results contained in other ARs.

**Table 5: Disposition of PFRs of Initial Decisions by Type of Case**

Type of Case	Decided		Dismissed		Settled		Denied		Denied; Further Analysis <sup>1</sup>		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	134		7	5.22	31	23.13	68	50.75	6	4.48	22	16.42
Termination of Probationers	56		5	8.93	3	5.36	37	66.07	2	3.57	9	16.07
Reduction in Force	3		0	0.00	0	0.00	3	100.00	0	0.00	0	0.00
Performance	17		0	0.00	5	29.41	3	17.65	0	0.00	9	52.94
Acceptable Level of Competence (ALOC) <sup>2</sup>	1		0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Suitability	2		0	0.00	1	50.00	1	50.00	0	0.00	0	0.00
CSRS <sup>3</sup> Retirement: Legal	19		3	15.79	2	10.53	10	52.63	0	0.00	4	21.05
CSRS Retirement: Disability	3		0	0.00	0	0.00	3	100.00	0	0.00	0	0.00
CSRS Retirement: Overpayment	5		1	20.00	1	20.00	0	0.00	1	20.00	2	40.00
FERS <sup>3</sup> Retirement: Legal	8		0	0.00	0	0.00	6	75.00	0	0.00	2	25.00
FERS Retirement: Disability	17		0	0.00	0	0.00	15	88.24	0	0.00	2	11.76
FERS Retirement: Overpayment	13		2	15.38	2	15.38	8	61.54	0	0.00	1	7.69
FERCCA <sup>3</sup>	1		1	100.00	0	0.00	0	0.00	0	0.00	0	0.00
Individual Right of Action	58		2	3.45	16	27.59	26	44.83	4	6.90	10	17.24
USERRA	9		0	0.00	2	22.22	4	44.44	0	0.00	3	33.33
VEOA	37		2	5.41	2	5.41	28	75.68	0	0.00	5	13.51
Other	45		4	8.89	8	17.78	26	57.78	2	4.44	5	11.11
<b>Total</b>	<b>428</b>		<b>27</b>	<b>6.31</b>	<b>73</b>	<b>17.06</b>	<b>239</b>	<b>55.84</b>	<b>15</b>	<b>3.50</b>	<b>74</b>	<b>17.29</b>

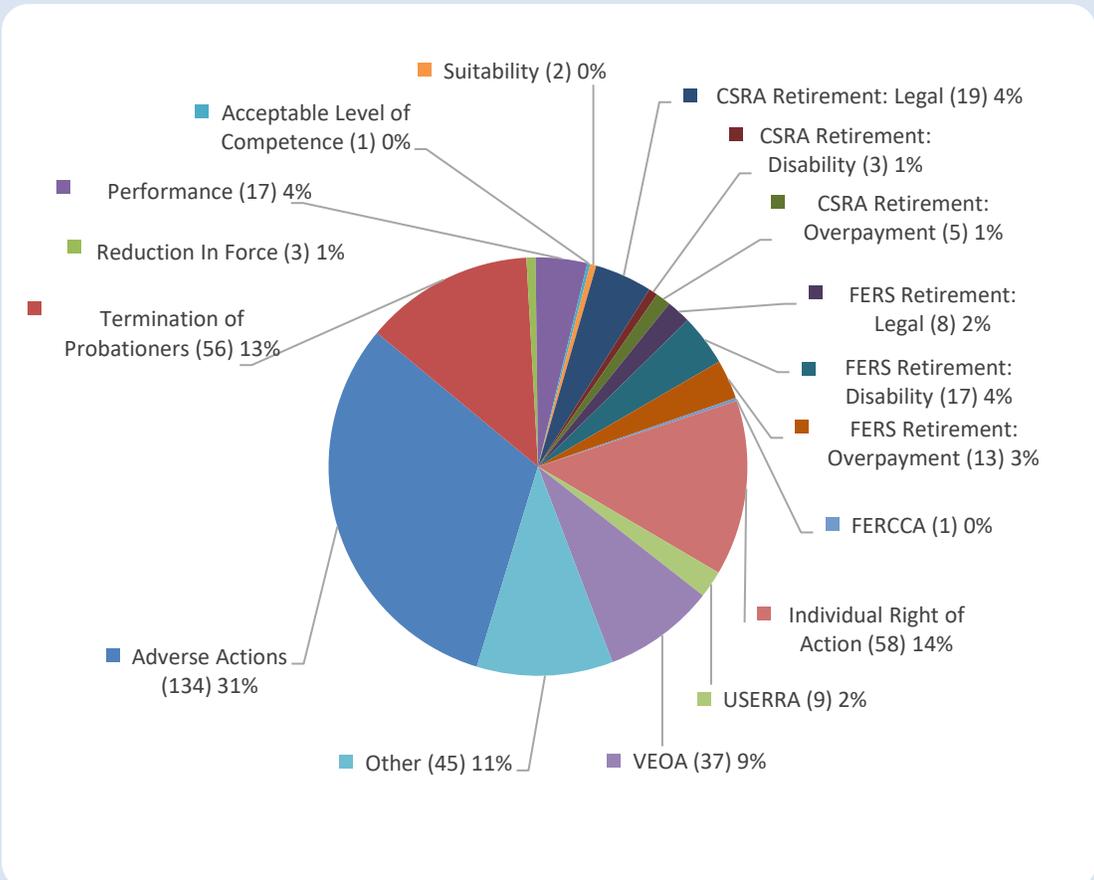
<sup>1</sup> Denied; Further Analysis includes cases denied on the basis of the issues raised in the PFR, but which the Board has considered an issue *sua sponte*, i.e., of the Board's own accord ([5 C.F.R. § 1201-117\(a\)](#)). This definition applies also to Table 6 and Figures 4, 5, and 7.

<sup>2</sup> 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 must, under most circumstances, deny his or her within-grade increase.

<sup>3</sup> CSRS; FERS; and FERCCA.

Totals may not add to 100% due to rounding.

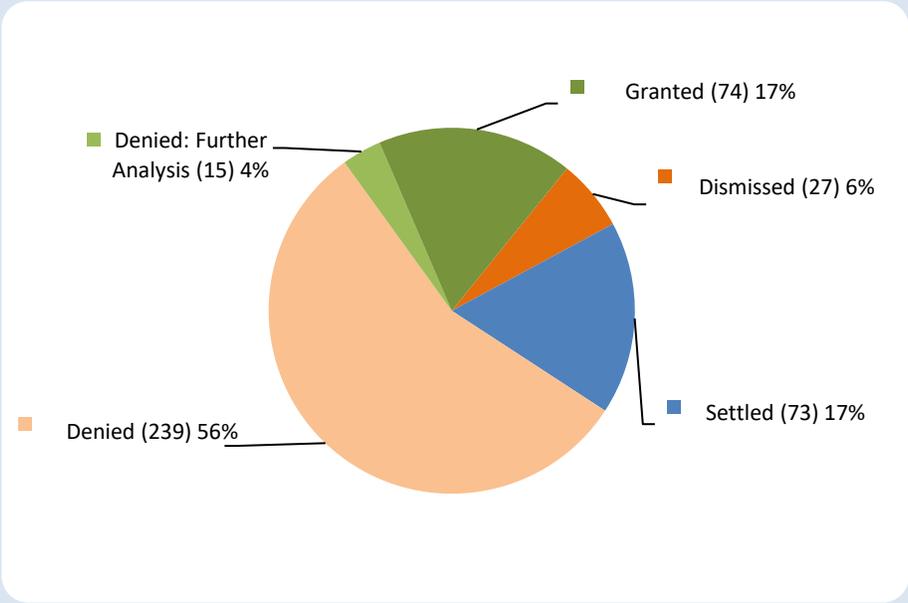
**Figure 4: Types of PFRs**



**Total Number of PFRs: 428**

Note: Some percentages display as “0” due to rounding; percentages are rounded to add to 100%.

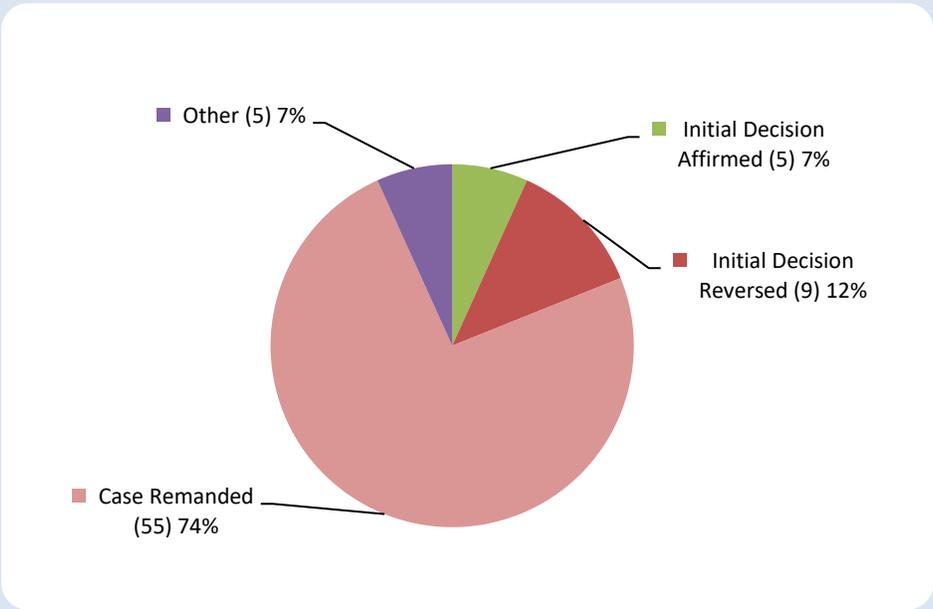
**Figure 5: Dispositions of PFRs**



**Total Number of PFRs 428**

Percentages are rounded to add to 100%.

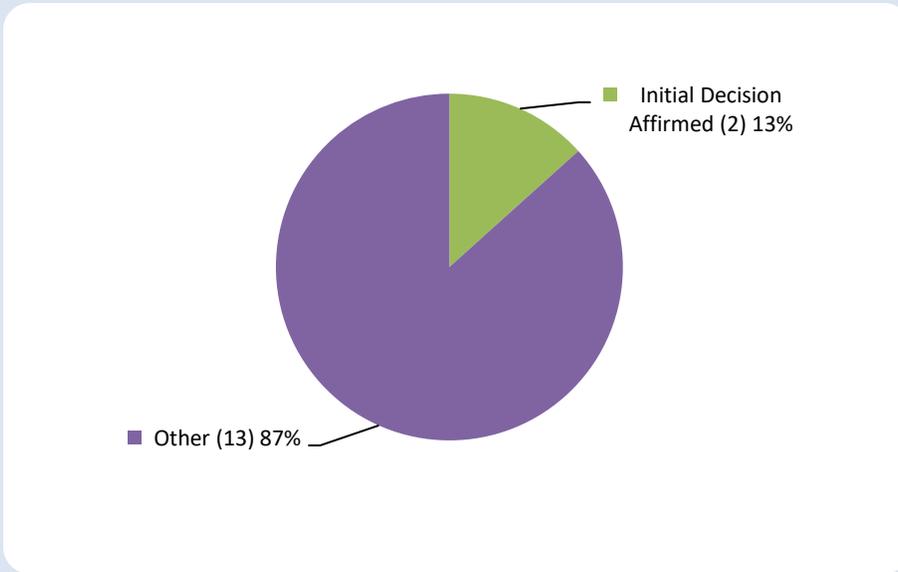
**Figure 6: Dispositions of PFRs Granted**



**Based on 74 PFRs Granted**

Percentages are rounded to add to 100%.

**Figure 7: Dispositions of PFRs Denied: Further Analysis**



**Based on 15 PFRs Denied; Further Analysis**

Percentages are rounded to add to 100%.

“Other” includes forwarding the case for docketing of new claims and/or vacating the initial decision.

**Table 6: Disposition of PFRs of Initial Decisions, by Agency**

Agency	Decided		Dismissed		Settled		Denied		Denied; Further Analysis <sup>1</sup>		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
Office of Personnel Management <sup>2</sup>	67	8.96	6	8.96	6	8.96	43	64.18	1	1.49	11	16.42
Department of Veterans Affairs	65	7.69	5	7.69	16	24.62	30	46.15	4	6.15	10	15.38
United States Postal Service	43	6.98	3	6.98	6	13.95	22	51.16	3	6.98	9	20.93
Department of the Army	38	5.26	2	5.26	8	21.05	21	55.26	2	5.26	5	13.16
Department of the Navy	30	6.67	2	6.67	6	20.00	19	63.33	0	0.00	3	10.00
Department of Defense	23	0.00	0	0.00	2	8.70	17	73.91	0	0.00	4	17.39
Department of Health and Human Services	21	0.00	0	0.00	1	4.76	16	76.19	2	9.52	2	9.52
Department of Homeland Security	21	4.76	1	4.76	8	38.10	5	23.81	1	4.76	6	28.57
Department of the Air Force	18	11.11	2	11.11	1	5.56	10	55.56	0	0.00	5	27.78
Department of the Treasury	16	6.25	1	6.25	4	25.00	10	62.50	0	0.00	1	6.25
Department of Labor	12	0.00	0	0.00	1	8.33	9	75.00	1	8.33	1	8.33
Department of Commerce	10	20.00	2	20.00	0	0.00	6	60.00	0	0.00	2	20.00
Department of the Interior	10	0.00	0	0.00	4	40.00	2	20.00	0	0.00	4	40.00
Social Security Administration	9	11.11	1	11.11	0	0.00	6	66.67	0	0.00	2	22.22
Department of Housing and Urban Development	7	0.00	0	0.00	1	14.29	5	71.43	0	0.00	1	14.29
Department of Justice	7	0.00	0	0.00	2	28.57	5	71.43	0	0.00	0	0.00
Department of Agriculture	6	16.67	1	16.67	2	33.33	1	16.67	0	0.00	2	33.33
Department of Transportation	4	0.00	0	0.00	1	25.00	1	25.00	1	25.00	1	25.00
Department of State	3	33.33	1	33.33	0	0.00	1	33.33	0	0.00	1	33.33
Executive Office of the President, Office of Administration	3	0.00	0	0.00	1	33.33	1	33.33	0	0.00	1	33.33
Department of Energy	2	0.00	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
Environmental Protection Agency	2	0.00	0	0.00	0	0.00	2	100.00	0	0.00	0	0.00
Government Publishing Office	2	0.00	0	0.00	2	100.00	0	0.00	0	0.00	0	0.00
Central Intelligence Agency	1	0.00	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Equal Employment Opportunity Commission	1	0.00	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00
Federal Deposit Insurance Corporation	1	0.00	0	0.00	1	100.00	0	0.00	0	0.00	0	0.00

**Table 6: Disposition of PFRs of Initial Decisions, by Agency**

	Decided		Dismissed		Settled		Denied		Denied; Further Analysis <sup>1</sup>		Granted	
	#	#	%	#	%	#	%	#	%	#	%	
Federal Housing Finance Agency	1	0	0.00	0	0.00	0	0.00	0	0.00	1	100.00	
General Services Administration	1	0	0.00	0	0.00	0	0.00	0	0.00	1	100.00	
Office of Management and Budget	1	0	0.00	0	0.00	0	0.00	0	0.00	1	100.00	
Other (Non-agency)	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00	
Pension Benefit Guaranty Corporation	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00	
Small Business Administration	1	0	0.00	0	0.00	1	100.00	0	0.00	0	0.00	
<b>TOTAL</b>	<b>428</b>	<b>27</b>	<b>6.31</b>	<b>73</b>	<b>17.06</b>	<b>239</b>	<b>55.84</b>	<b>15</b>	<b>3.50</b>	<b>74</b>	<b>17.29</b>	

<sup>1</sup> Denied; Further Analysis includes cases denied on the basis of the issues raised in the PFR, but 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 5 and Figures 4, 5, and 7.

<sup>2</sup> Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the CSRS and FERS administrator..

## SIGNIFICANT DECISIONS ISSUED BY THE BOARD IN FY 2022

### Actions Under 38 U.S.C. § 714

*Wilson v. VA*, [2022 MSPB 7](#): At issue in this case was the deadline for filing a Board appeal for an action taken pursuant to the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (VA Accountability Act), 38 U.S.C. § 714. Although the VA Accountability Act includes a 10 business day deadline for filing a Board appeal, it is silent as to the procedures and timeliness requirements for employees who file mixed-case complaints of discrimination followed by appeals to the Board. On November 27, 2017, the agency demoted the appellant pursuant to § 714. In its demotion decision, the agency informed the appellant that he could, among other things, appeal directly to the Board within 10 business days or seek EEO counseling with the agency within 45 days, followed by a formal EEO complaint. Within 4 days after receiving the agency's decision, the appellant amended a pending EEO complaint to include his demotion. After the agency failed to issue a final decision, the appellant filed a Board appeal on November 14, 2018. The AJ found the appeal timely and, after holding a hearing, reversed the demotion action, finding that the agency failed to prove the charge by substantial evidence. On review, the Board agreed with the AJ that the appeal was timely, but it clarified the legal basis for such a finding. The Board held that the VA Accountability Act and 5 U.S.C. § 7702, the statute providing for mixed-case appeal rights, could coexist. Applying various statutory construction principles, the Board reasoned, among other things, that the VA Accountability Act was silent as to mixed-case appeals, did not reveal a clear and manifest intent to repeal the time limits addressed in 5 U.S.C. § 7702, and was not the more specific statute regarding the time limits and procedures for filing appeals that include discrimination claims. Accordingly, the Board held that the appellant timely filed his appeal pursuant to 5 U.S.C. § 7702(e)(2), which was not foreclosed by the time limit set forth in 38 U.S.C. § 714(c)(4)(B).

### Affirmative Defenses

*Thurman v. USPS*, [2022 MSPB 21](#): The appellant filed a Board appeal challenging his removal, which the AJ sustained. Although the appellant indicated on his initial appeal form that he was raising an affirmative defense of retaliation for prior protected activity, the AJ did not address such a claim in the initial decision, nor was the appellant's affirmative defense listed in the prehearing conference summary as an issue to be decided. Although not raised by the appellant on review, the Board clarified the factors it will consider in determining whether a previously raised affirmative defense has been effectively waived or abandoned by the appellant. The Board overruled *Wynn v. USPS*, 115 M.S.P.R. 146 (2010), and similar cases to the extent they held that the Board must always remand a case for consideration of an affirmative defense if an AJ has failed to comply with certain procedural requirements. Instead, the Board held that it will consider whether an appellant has demonstrated his intent to continue pursuing his affirmative defense and whether he conveyed that intent after filing the appeal by analyzing the following nonexhaustive list of factors: (1) the thoroughness and clarity with which the appellant raised an affirmative defense; (2) the degree to which the appellant continued to pursue the affirmative defense in the proceedings below after initially raising it; (3) whether the appellant objected to a summary of the issues to be decided that failed to include the potential affirmative defense when specifically afforded an opportunity to object and the consequences of the failure were made clear; (4) whether the appellant raised the affirmative defense or the AJ's processing of the affirmative defense claim in the petition for review; (5) whether the appellant was represented during the course of the appeal before the AJ and on petition for review, and, if not, the level of knowledge of Board proceedings possessed by the appellant; and (6) the likelihood that the presumptive abandonment of the affirmative defense was the product of confusion, or misleading or incorrect information provided by the agency or the Board. The

applicability and weight of each factor should be determined on a case-by-case basis. Applying the factors, the Board held that the appellant abandoned his affirmative defense and there was no basis to remand the appeal for additional proceedings.

## **Board Procedures**

*McClenning v. Department of the Army*, [2022 MSPB 3](#): The AJ issued an initial decision affirming the appellant's removal. After the issuance of the initial decision, the U.S. Supreme Court decided *Lucia v. Securities & Exchange Commission (SEC)*, 138 S. Ct. 2044 (2018), in which it held that SEC ALJs qualified as Officers of the United States subject to the Appointments Clause of the U.S. Constitution, and their appointments by SEC staff members, rather than the Commission itself, violated the Appointments Clause. On petition for review, the appellant argued for the first time that the initial decision should be reversed because, as in *Lucia*, the AJ was not properly appointed under the Appointments Clause.

The Board held that the appellant did not timely raise her Appointments Clause challenge before the AJ and, therefore, consistent with the Board's existing regulations and long-standing precedent, failed to preserve the issue for review. The Board reasoned that *Lucia* did not specifically define what constitutes a timely challenge to an appointment and noted that several Federal courts have held that parties forfeit Appointments Clause claims that are not properly raised before the adjudicating agency. The Board distinguished a more recent case concerning Social Security Administration (SSA) disability proceedings, *Carr v. Saul*, 141 S. Ct. 1352 (2021), in which the Court held that SSA claimants are not required to exhaust Appointments Clause claims before SSA to preserve them for judicial review. The Board found that *Carr* does not control when parties raise an Appointments Clause issue before the Board because, among other things, the Board, unlike SSA, has established regulations and precedent on administrative exhaustion, and the Board's proceedings are far more adversarial than SSA disability proceedings and, thus, ripe for imposing issue exhaustion requirements. Accordingly, the Board concluded that generally an appellant must raise an Appointments Clause challenge to the appointment of an AJ before the close of the record on the initial appeal for the allegation to be timely raised and considered on petition for review. Given its timeliness finding, the Board declined to reach the issue of whether the Board's method of appointing AJs violated the Appointments Clause.

## **Discrimination**

*Martin v. USPS*, [2022 MSPB 22](#): The appellant filed an appeal alleging that the agency had constructively suspended him and discriminated against him on the basis of his disability after the agency refused to permit him to return to work because it found his psychologist's note permitting him to return to work with no restrictions did not state whether the appellant was a threat to himself or others. The AJ dismissed the appeal for lack of jurisdiction finding that the appellant failed to show that he was constructively suspended because the agency had a reasonable basis to request additional medical documentation from the appellant before returning him to work. On review, the Board reversed the appellant's constructive suspension on due process grounds and found that the appellant established his disability discrimination claim. The Board found that the agency constructively suspended the appellant by imposing wrongful conditions for returning to work. The Board further found that the agency violated the Rehabilitation Act by requiring the appellant to provide documentation showing that he was not a danger to himself or others. Under the Americans with Disabilities Act, the standards of which have been incorporated by reference into the Rehabilitation Act, an agency may require a medical examination or make a medical inquiry regarding whether an employee is an individual with a disability or as to the nature or severity of the

disability only when such inquiry or examination “is shown to be job-related and consistent with business and business necessity.” The Board deferred to the Equal Employment Opportunity Commission’s (EEOC’s) implementing regulations and guidance, which state that an inquiry or medical examination may be job-related and consistent with business necessity if an employer “has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.” Under the circumstances, the Board found that the agency lacked a reasonable belief that the appellant presented a direct threat because the mere fact that an employee’s absence is related to a mental health condition does not constitute objective evidence that he is likely to be violent or do harm. The Board also found that the station manager did not have objective and reliable evidence that the appellant was likely to be violent based on her knowledge that the appellant had unspecified difficulties with a particular supervisor in the past and that working with that supervisor contributed to the appellant’s anxiety disorder or the fact that the station manager had heard that the appellant and his supervisor were involved in an altercation on his last day at work.

*Pridgen v. Office of Management & Budget (OMB)*, [2022 MSPB 31](#): The appellant filed an appeal of her performance-based removal and raised affirmative defenses of discrimination based on her race, color, and disability, as well as retaliation for her prior EEO and whistleblowing activity. After holding a hearing, the AJ affirmed the appellant’s removal and found that she failed to prove any of her affirmative defenses. On review, the Board reversed the appellant’s removal because the agency failed to prove that the appellant’s performance was unacceptable in a critical element. Regarding the appellant’s affirmative defenses, the Board remanded, in part, for further findings after clarifying the applicable standards as follows.

The Board held that claims of discrimination and retaliation under Title VII in the Federal sector, as well as disability discrimination claims under the Rehabilitation Act, may be proved through either the motivating factor or the but-for causation standard. An appellant may prove discrimination by various methods, which can be sufficient by themselves or can be used together, including the following: (1) direct evidence; (2) circumstantial evidence, which may include (a) convincing mosaic evidence, i.e., evidence of “suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn,” (b) comparator evidence, or (c) evidence that the agency’s stated reason for its action is unworthy of belief, a mere pretext for discrimination (i.e., the burden-shifting standard under *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 802-04 (1973)); or (3) some combination of direct and indirect evidence. The Board also found that *McDonnell Douglas* articulated an orderly way to evaluate the evidence as it bears on the critical question of discrimination and overruled *Savage v. Department of the Army*, 122 M.S.P.R. 612, paragraph 46 (2015), to the extent it held that the *McDonnell Douglas* framework has no application to Board proceedings.

Regarding claims of retaliation for engaging in activity protected by the Rehabilitation Act, the Board held that such claims must be proved by the but-for causation standard. The Board overruled *Southerland v. DOD*, 119 M.S.P.R. 566, ¶ 20 (2013), to the extent that it held that a lesser causation standard was applicable.

## **Jurisdiction**

*Moncada v. Executive Office of the President, Office of Administration (OA)*, [2022 MSPB 25](#): This appeal concerned the Board’s 5 U.S.C. chapter 75 jurisdiction over an action taken against an employee in

the competitive service. On review, the Board rejected the agency's argument that the Board lacked jurisdiction over the appellant's removal appeal because chapter 75 appeal rights apply only when the action is taken by an agency as defined under 5 U.S.C. § 105 as "an Executive department, a Government Corporation, and an independent establishment." The Board held that, under the plain language of 5 U.S.C. § 7513(d), the key jurisdictional requirements for a chapter 75 appeal are that an appellant was an "employee" under 5 U.S.C. § 7511(a)(1) who was subjected to an appealable adverse action under chapter 75. Neither 5 U.S.C. chapter 75 nor the Board's regulations define the term "agency" or otherwise indicate that a covered action may be appealed only when it has been taken by some "agency." The Board acknowledged that the statute excludes individuals whose positions are in certain agencies but found that the OA was not specifically excluded. The Board further rejected the agency's argument that the appellant was exempt from the definition of employee under 5 U.S.C. § 7511(b)(3), which carves out an exception for individuals whose appointment is made by the President. The Board found that individuals like the appellant who are employed by OA have not necessarily been "appointed" by the President, noting that 3 U.S.C. § 107(b)(2), on which the agency relied, authorized the President to "employ" such individuals as distinct from appointing such individuals. Accordingly, the Board found that it had jurisdiction over the appeal because the appellant met the definition of "employee," and a removal is an appealable adverse action.

## Penalty

*Singh v. U.S. Postal Service (USPS)*, [2022 MSPB 15](#): The AJ affirmed the appellant's demotion. On review, the Board considered the appellant's claim that the AJ erred in denying his motion to compel discovery related to the consistency of the penalty imposed on employees for the same or similar offenses. The Board held that the AJ did not abuse her discretion in denying the appellant's motion to compel discovery regarding the treatment of employees agency-wide who had engaged in similar misconduct. In so finding, the Board clarified the legal standard for analyzing disparate penalty claims.

The Board acknowledged that its recent disparate penalty precedent represented a departure from the standard set forth in *Douglas v. VA*, 5 M.S.P.R. 280, 305-306 (1981), which called for comparison of penalties "imposed upon other employees for the same or similar offenses." Thus, the Board overruled cases in which it previously found that broad similarity in misconduct between the appellant and the comparator was sufficient to shift the burden to the agency to explain the difference in treatment, including the following: *Figueroa v. Department of Homeland Security (DHS)*, 119 M.S.P.R. 422 (2013); *Villada v. USPS*, 115 M.S.P.R. 268 (2010); *Woebecke v. DHS*, 114 M.S.P.R. 100 (2010); and *Lewis v. VA*, 113 M.S.P.R. 657 (2010). The Board also overruled cases that held that the disparate penalty analysis should extend beyond the same or similar offenses, including *Portner v. Department of Justice (DOJ)*, 119 M.S.P.R. 365, ¶¶ 2-6, 9, 16-22 (2013), and *Boucher v. USPS*, 118 M.S.P.R. 640, ¶¶ 2-13, 20-29 (2012). The Board clarified that, in assessing an agency's penalty determination, the relevant inquiry is whether the agency knowingly and unjustifiably treated employees differently. The Board also reiterated that the consistency of the penalty is simply one of many factors to consider in assessing the reasonableness of the penalty and, although the fact that a comparator employee received a less severe penalty should be considered in favor of mitigating the penalty, mitigation is not required in all such cases. In assessing whether an individual is a proper comparator, the Board held that comparators should be limited to those employees whose misconduct and/or other circumstances closely resemble those of the appellant and, although a comparator need not always be in the same work unit or under the same supervisor, in most cases, employees from another work unit or supervisory chain will not be proper comparators.

## Performance-based Actions

*Lee v. VA*, [2022 MSPB 11](#): The appellant filed an appeal of her performance-based removal under 5 U.S.C. chapter 43. The AJ affirmed the removal. The AJ applied the Board’s legal standard at the time, which did not require an agency to prove that an employee was performing unacceptably before being given an opportunity to demonstrate acceptable performance under a performance improvement plan (PIP). While the appellant’s petition for review was pending before the Board, the Federal Circuit issued *Santos v. National Aeronautics & Space Administration*, 990 F.3d 1355 (Fed. Cir. 2021). In *Santos*, the Federal Circuit held that, to support an adverse action under chapter 43, an agency must justify placing an employee on a PIP by showing that the employee’s performance was unacceptable before the PIP. In light of *Santos*, the Board modified the standard applicable to chapter 43 actions and required the agency to prove the following by substantial evidence: (1) OPM approved its performance appraisal system and any significant changes thereto; (2) the agency communicated to the appellant the performance standards and critical elements of her position; (3) the appellant’s performance standards are valid under 5 U.S.C. § 4302(c)(1); (4) the appellant’s performance during the appraisal period was unacceptable in one or more critical elements; (5) the agency warned the appellant of the inadequacies in her performance during the appraisal period and gave her an adequate opportunity to demonstrate acceptable performance; and (6) after an adequate improvement period, the appellant’s performance remained unacceptable in at least one critical element. The Board found that the standards set forth in *Santos* apply to all pending cases, regardless of when the events took place, and remanded the appeal to the AJ to make findings under the modified standard.

## Restoration Following a Work-related Injury

*Cronin v. USPS*, [2022 MSPB 13](#): The AJ dismissed the appellant’s restoration appeal for lack of jurisdiction because the appellant failed to nonfrivolously allege that the agency acted arbitrarily and capriciously in denying her request for restoration as an employee who had partially recovered from compensable injury. On review, the Board affirmed the initial decision as modified to clarify the jurisdictional elements for a restoration claim as to a partially recovered employee. The Board held that a denial of restoration is arbitrary and capricious if, and only if, the agency failed to meet its obligations under 5 C.F.R. § 353.301(d), which requires an agency to search the local commuting area for vacant positions to which the partially recovered employee can be restored and to consider the employee for such positions. Although an agency may undertake restoration efforts beyond those required in the regulation, its failure to comply with such self-imposed obligations cannot itself constitute a violation of § 353.301(d) and render a denial of restoration “arbitrary and capricious” for purposes of establishing Board jurisdiction under 5 C.F.R. § 353.304(c). Thus, the Board overruled *Latham v. USPS*, 117 M.S.P.R. 400 (2012), and other cases, which held that the Board had jurisdiction over appeals concerning the denial of restoration to partially recovered individuals when the denial resulted from the agency violating its own internal rules that exceeded the requirement set forth in 5 C.F.R. § 353.301(d). The Board further overruled *Latham* to the extent it suggested that a claim of unlawful discrimination or reprisal for protected activity could serve as an alternative means of showing that a denial of restoration was arbitrary and capricious. The Board reasoned that determining whether an agency met its obligations under § 353.301(d) will turn on whether it made every effort to restore a partially recovered employee in the local commuting area, according to the circumstances in each case. If an agency makes that effort but is unsuccessful, the denial of restoration is not arbitrary and capricious, and its lack of success cannot be attributed to any improper motive. If an agency fails to comply with § 353.301(d), the resulting denial of restoration is arbitrary and capricious, and no further analysis of the agency’s motive is required.

## Special Counsel Actions

*Coffman v. OSC and DHS*, [2022 MSPB 18](#): In April 2014, OSC sought disciplinary action against the petitioner pursuant to 5 U.S.C. § 1215. The ALJ assigned to the case found that OSC failed to prove any of the counts in its complaint and declined to impose disciplinary action against the petitioner. The Board affirmed the ALJ's decision. Thereafter, the petitioner filed a motion for attorney fees. The ALJ issued an addendum initial decision, finding that OSC, rather than the appellant's employing agency, DHS, was responsible for paying the petitioner's fees because the 2011 version of 5 U.S.C. § 1204(m)(1) required the payment of fees by the "agency involved." On review, the Board held that, pursuant to the WPEA and its amendment to 5 U.S.C. § 1204(m), the employee's employing agency, not OSC, was responsible for paying the attorney fees. The Board noted that effective December 27, 2012, Congress, via the WPEA, made a significant change to § 1204(m)(1) when it struck the term "agency involved" and replaced it with "agency where the prevailing party was employed." The Board further found that, although OSC began its investigation of the petitioner and the petitioner incurred fees in 2011 prior to the effective date of the WPEA, the operative event was the date that OSC filed its complaint on April 8, 2014, which occurred well after the effective date of the WPEA. Accordingly, the Board found that the 2012 version of § 1204(m)(1) controlled.

## Whistleblower Protection

*Chambers v. DHS*, [2022 MSPB 8](#): The Board clarified the procedural and substantive requirements that an appellant exhaust his administrative remedies before OSC prior to filing an individual right of action (IRA) appeal with the Board. The Board held that the substantive exhaustion requirements are met when an appellant has provided OSC with a sufficient basis to pursue an investigation. Before the Board, an appellant may demonstrate exhaustion through his initial OSC complaint, correspondence with OSC, or through other sufficiently reliable evidence such as an affidavit or declaration attesting that the appellant raised with OSC the substance of the facts in the appellant's Board appeal. An appellant may also give a more detailed account of their whistleblowing activities before the Board than they did to OSC. Regarding the procedural requirements, the Board disagreed with the AJ that an appellant is required to respond to OSC's report containing its proposed findings of fact and legal conclusions, citing the permissive language in 5 U.S.C. § 1214(a)(1)(D) that an individual "may submit written comments about the report" to OSC. Rather, to satisfy the procedural exhaustion requirements, an appellant must show that either (1) OSC has notified him that it terminated its investigation and no more than 60 days have elapsed since such notification was provided to him; or (2) 120 days have elapsed since he sought corrective action before OSC, and he has not been notified by OSC that it would seek corrective action on his behalf.

*Edwards v. Department of Labor*, [2022 MSPB 9](#): The appellant filed an IRA appeal alleging that he was reassigned in reprisal for his complaints that the agency was discriminating against employees based on their race. In particular, the appellant raised with his supervisors their alleged failure to provide opportunities and assignments to African American employees because of their race and disclosed their alleged discrimination when they refused to promote one of the appellant's subordinates to a vacant supervisory position. The appellant also filed complaints of systemic race discrimination against African American employees with the agency's EEO office. On review, the Board affirmed the AJ's finding that the appellant failed to nonfrivolously allege the type of retaliation that could form the basis of an IRA appeal under 5 U.S.C. § 1221, i.e., a prohibited personnel practice as described under 5 U.S.C. § 2302(b)(8) or § 2302(b)(9)(A)(i), (B), (C), or (D).

The Board held that disclosures of race discrimination are not covered under 5 U.S.C. § 2302(b)(8); rather, the proper forum for claims of retaliation for filing an EEO complaint is the EEOC. The Board overruled the following Board decisions to the contrary: *Armstrong v. DOJ*, 107 M.S.P.R. 375 (2007), and *Kinan v. DOD*, 87 M.S.P.R. 561 (2001). The Board also held that the appellant failed to nonfrivolously allege that his EEO complaints constituted protected activity under 5 U.S.C. § 2302(b)(9)(A)(i) or § 2302(b)(9)(B). Such sections prohibit retaliation against an employee for: (1) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation, with regard to remedying a violation of § 2302(b)(8), and (2) testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation, *respectively*. Regarding § (b)(9)(A)(i), the appellant's EEO complaints did not seek to remedy an alleged violation of § 2302(b)(8); rather, the appellant sought to remedy purported reprisal for matters covered by Title VII. Regarding § (b)(9)(B), the appellant's complaints did not constitute lawful assistance because there was no indication in the record that the employees who were allegedly discriminated against had filed any appeal, complaint, or grievance. Accordingly, the Board affirmed the initial decision dismissing the appeal for lack of jurisdiction, noting that this complaint more properly belongs before the EEOC under Title VII itself.

*Marvell v. VA*, [2022 MSPB 33](#): The appellant filed a removal appeal and alleged that the agency's decision constituted reprisal for his having filed leave requests under the Family and Medical Leave Act of 1993 (FMLA) and an Office of Workers' Compensation Programs (OWCP) claim. The Board reversed the AJ's ruling that the appellant's FMLA leave requests and OWCP claim constituted protected activity. The Board found that neither the appellant's FMLA leave request nor his OWCP claim constituted protected activity under 5 U.S.C. § 2302(b)(9) because they did not constitute an initial step toward taking legal action against an employer for the perceived violation of an employee's rights. The Board overruled its prior decisions in *Doe v. USPS*, 95 M.S.P.R. 493, paragraph 11 (2004), and *Crumph v. VA*, 114 M.S.P.R. 224, paragraphs 10-13 (2010), to the extent they held that an FMLA leave request or OWCP claim constitutes protected activity. Nonetheless, the Board considered his arguments to the extent they could form the basis of another affirmative defense, such as a violation of 5 U.S.C. § 2302(b)(10), which makes it a prohibited personnel practice to "discriminate for or against any employee or applicant for employment on the basis of conduct which does not affect the performance of the employee or applicant or the performance of others." But the Board found he did not prove that the removal was in retaliation for his FMLA requests or OWCP claim.

*Skarada v. VA*, [2022 MSPB 17](#): The appellant filed an IRA appeal alleging that the agency subjected him to a significant change in duties and working conditions, including subjecting him to a hostile work environment, in reprisal for his protected disclosures. On review, the Board found that the appellant established jurisdiction over his appeal but that he failed to prove by preponderant evidence that he was subjected to a covered personnel action. The Board held that to amount to a "significant change" personnel action under 5 U.S.C. § 2302(a)(2)(A)(xii), an agency action must have a significant impact on the overall nature or quality of an employee's working conditions, responsibilities, or duties. The Board further held that, in determining whether an appellant has suffered a significant change in his duties, responsibilities, or working conditions, the Board must consider the alleged agency actions both collectively and individually and that the significant change personnel action should be interpreted broadly to include harassment and discrimination that could have a chilling effect on whistleblowing or otherwise undermine the merit system.

The Board found that the appellant raised a nonfrivolous allegation of a significant change in duties or responsibilities based on his allegations that his chain of command directed him to stop attending leadership meetings and performing extra duties and excluded him from the interview and hiring process for two new hires to his service. The Board further held that the appellant raised a nonfrivolous allegation of a significant change in working conditions based on the cumulative effect of his allegations that his chain of command harassed him and subjected him to a hostile work environment by, among other things, excluding him from meetings and conversations, subjecting him to multiple investigations, accusing him of fabricating data and of a Privacy Act violation, refusing his request for a review of his position for a possible upgrade, yelling at him on three occasions, and failing to provide him the support and guidance needed to successfully perform his duties. However, the Board found that the appellant did not establish by preponderant evidence that he was subjected to a personnel action. The Board held that the appellant's exclusion from meetings and the interview and hiring process did not constitute a significant change in his duties or responsibilities because the record did not establish that these apparent collateral duties and responsibilities constituted a significant part of his duties and responsibilities. The Board also held that the agency's actions, collectively or individually, did not constitute harassment to such a degree that his working conditions were significantly and practically impacted. Accordingly, the Board denied the appellant's request for corrective action.

*Spivey v. DOJ*, [2022 MSPB 24](#): The appellant filed an IRA appeal alleging that the agency accused her of wrongdoing and subjected her to an investigation in reprisal for her protected disclosure and activity. In particular, the agency investigated allegations that the appellant had provided false information or lacked candor when she reported that a dog handler had violated agency procedure by not having his dog on a leash. The agency informed the appellant that it had concluded that she lacked candor in her report but that it would not take any action against her. On review, the Board affirmed the AJ's finding that the appellant failed to nonfrivolously allege that she was subjected to a personnel action. First, regarding the agency's conclusion that the appellant had provided false information, the Board held that an allegation of wrongdoing alone, without any ensuing disciplinary or adverse action, or threat of disciplinary or adverse action, does not constitute a personnel action. Next, the Board held that the AJ properly found that the appellant failed to nonfrivolously allege that she was subjected to a personnel action due to the agency's investigation. The Board reasoned that an investigation itself is not a personnel action, and there were no allegations that, if proven, could have established that the investigation amounted to a threat to take a personnel action or was pretext for gathering evidence to use to retaliate against the appellant. Finally, the Board affirmed the AJ's finding that the appellant failed to nonfrivolously allege that the investigation amounted to a significant change in working conditions because the appellant's allegations that she participated in an interview and prepared an affidavit did not evidence a practical or significant effect on the overall nature and quality of her working conditions.

## SIGNIFICANT COURT OPINIONS ISSUED IN FY 2022

As a service to MSPB's stakeholders, we have provided brief summaries of significant opinions issued in FY 2022 by the Federal Circuit and other Federal appellate or district courts in appeals of MSPB cases or on issues that affect MSPB adjudication responsibilities. There were no decisions issued by the U. S. Supreme Court in cases that could impact MSPB case law.

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

#### Annuity

*Klipp v. DHS*, [34 F.4th 1326](#) (Fed. Cir. 2022): The appellant appealed a Board decision denying his request for retroactive law enforcement officer (LEO) retirement coverage. The court reversed and remanded the Board's decision, holding that the Board did not properly analyze whether 50 percent or more of the appellant's actual duties were LEO duties under *Crowley v. U.S.*, 398 F.3d 1329 (Fed. Cir. 2005). The court stated that *Crowley* prescribes two major factors to consider in determining whether LEO status should be conferred based on actual duties: physical vigorousness and hazardousness. The court found that the Board did not adequately address the appellant's actual duties in a way that would enable appellate court review. The court found that the Board failed to separately discuss the question of vigorousness in addition to addressing hazardousness, as required by *Crowley*. The court found that the Board also erred by relying on position descriptions as evidence of the appellant's actual duties, rather than separately addressing actual duties. The court found that *Crowley* required two independent findings: first, an assessment based on position description evidence alone; and, if that finding is adverse to the employee, a second assessment based solely on evidence of actual duties. The court further found that the Board made seemingly contradictory findings as to the appellant's actual duties, stating both that the duties were of an emergency or temporary nature and that he frequently and regularly performed them. Therefore, the court vacated and remanded the decision for further proceedings, recommending that the case be consolidated with the appellant's other pending Board appeal.

#### Annuity/5 U.S.C § 7702(a)(1)/Appellate Jurisdiction

*Ash v. OPM*, [25 F.4th 1009](#) (Fed. Cir. 2022): The appellant appealed OPM's denial of his application for disability retirement benefits to MSPB, alleging that the denial was based on racial discrimination and his participation in protected activity. MSPB affirmed OPM's decision, and the appellant sought judicial review in the Federal Circuit. The Federal Circuit held that the petition for judicial review raised a "mixed case" over which it lacked jurisdiction because an OPM decision that adversely affects retirement rights or benefits is a personnel action appealable to MSPB, and the appellant alleged discrimination. Accordingly, the court transferred the petition for judicial review to a U.S. District Court.

#### Back Pay

*Brown v. General Services Administration (GSA)*, [2022 WL 2354499](#) (Fed. Cir. 2022): The appellant alleged that the agency violated the settlement agreement in her underlying case because she had not received her back pay within 30 days of signing the agreement. The parties contested the meaning of the settlement term requiring that the agency "initiate payment" within 30 days. The court found that the Board did not err in reading the term "initiate" to mean "taking steps to initiate payment." Because the agency took steps within the 30-day period to initiate payment, the court held that the agency did not materially breach the settlement agreement, and that the Board properly dismissed

the petition for enforcement as moot. Judge Chen dissented, finding that the plain language of the settlement agreement required the agency to do something more than merely take steps to initiate payment: it required the agency to initiate the transfer of payment within a set time, not to merely take internal and preliminary steps to initiate payment. Judge Chen further would have found that, even under the majority's interpretation of the agreement, the agency breached its duty to pay the appellant in a reasonable time because the appellant did not receive her payment until 93 days after the agreement was executed.

### **Removal/Due Process**

*Johnson v. Department of the Air Force*, [50 F.4th 110](#) (Fed. Cir. 2021): The appellant filed a grievance challenging the agency's decision to remove him from his firefighter position after he tested positive for oxycodone and oxymorphone on a random drug test. At the arbitration hearing, the deciding official testified that, in deciding to remove the appellant, he consulted his wife (a nurse) and his brother-in-law (a nurse practitioner) and that they "confirmed that the likelihood of" the appellant's explanation that he tested positive on the random drug test because he accidentally took his mother's pills was "slim to none." The arbitrator denied the appellant's grievance and affirmed his removal. The appellant appealed the arbitration decision to the Federal Circuit. The court found that the deciding official engaged in impermissible ex parte communications that violated the appellant's due process rights because the two medical professional family members' opinions regarding the credibility of the appellant's explanation for the positive drug test constituted new and material information to which the appellant had not been given a chance respond. In addition, the court found that due process required the appellant to have an opportunity to respond to the opinions of the medical professional family members because it is "constitutionally impermissible to allow a deciding official to receive additional material information that may undermine the objectivity required to protect the fairness of the process," and family members are "arguably the most influential people in anyone's life." The court remanded the matter to the arbitrator to determine the appropriate remedy.

### **Removal/Chapter 75**

*Coy v. Department of the Treasury*, [43 F.4th 1334](#) (Fed. Cir. 2022): The AJ reversed the appellant's removal on procedural grounds and ordered the agency to provide him interim relief if a petition for review was filed. Both the agency and the appellant filed petitions for review with the full Board, and the agency restored the appellant to a non-duty employed status as interim relief. While the petitions for review were pending, the agency removed the appellant a second time based on the same charges and specifications. The appellant appealed the second removal on the merits and did not allege that the second removal involved the same procedural defects as the first removal. The AJ sustained the second removal, noting that the agency was permitted to initiate a second removal action while a petition for review of the first removal action remained pending. On appeal to the Federal Circuit, the court affirmed the Board's decision, finding that the second removal was permissible while the first removal was still pending before the Board because the second removal cured the procedural deficiency of the first removal and did not evade the first decision. The court further found that the AJ did not abuse her discretion in finding that the appellant's transmittal of confidential employee personnel data to non-agency counsel in response to discovery requests in another appeal matter constituted "personal use" as used in the specifications to the charge.

*Valles v. Department of State*, [17 F.4th 149](#) (Fed. Cir. 2021): Despite the appellant's 2018 fully successful performance appraisal, in 2019 the agency proposed and effected his removal on four charges of misconduct occurring between July 2018 and February 2019. The AJ found that the

agency proved all the charges and established a nexus between the misconduct and the agency's ability to carry out its mission. The AJ found no inconsistency between the 2018 favorable evaluation and the charges because the issue was misconduct, not performance. The AJ determined that the agency considered the relevant *Douglas* factors and upheld the removal penalty as reasonable. On appeal, the court held that misconduct and performance overlap, and agreed with the appellant that the Board should have considered the prior successful performance appraisal. However, it found that the Board's disregard of the appraisal was not reversible error and that the appellant failed to meet his burden to show that considering it would likely have led to a different result. The court noted that at the agency and before the Board, the appellant did not dispute that any of the charged misconduct occurred. The court also noted that a number of the specifications of misconduct occurred after the evaluation period. With respect to the penalty, the court also found that the appellant failed to show harmful error, citing the deciding official's thorough analysis of the *Douglas* factors and the Board's recognition of the repetitive nature of the misconduct. Thus, the court concluded that the Board's decision was supported by substantial evidence and affirmed the decision.

### **Removal/38 U.S.C. § 714**

*Bannister v. VA*, [26 F.4th 1340](#) (Fed. Cir. 2022): The VA proposed to remove the appellant for conduct unbecoming a Federal employee. The agency then issued a decision mitigating the proposed penalty to a 30-day suspension, stating that the charges against the appellant were supported by substantial evidence. The appellant appealed her suspension to MSPB, and an AJ issued an initial decision affirming the suspension, also finding that the charges were supported by substantial evidence. The appellant then appealed the AJ's decision to the Federal Circuit, arguing that the court's 2021 *Rodriguez* decision required that the agency's proposed discipline be supported by a preponderance of the evidence before the agency could issue the discipline, and that the substantial evidence standard under 38 U.S.C. § 714 only applies to MSPB's review of agency decisions. The court agreed, holding that it was error for the agency to apply a substantial evidence standard in determining whether to issue its suspension to the appellant. The court thus vacated and remanded the part of the Board's decision addressing whether the agency proved its charge.

*Bryant v. VA*, [26 F.4th 1344](#) (Fed. Cir. 2022): The VA proposed to remove the appellant for conduct unbecoming a Federal employee. The agency then issued a decision sustaining the proposed removal, stating that the charges against the appellant were supported by substantial evidence. The agency's final decision did not, however, reference whether the agency performed a *Douglas* factor analysis when determining whether to remove the appellant. The appellant appealed his removal to MSPB, and an AJ issued an initial decision affirming the removal, also finding that the charges were supported by substantial evidence. The AJ's decision also did not discuss the *Douglas* factors. The appellant appealed to the Federal Circuit, arguing that the court's 2021 *Rodriguez* decision required that the agency's proposed discipline be supported by a preponderance of the evidence before the agency could issue the discipline, and that the substantial evidence standard under 38 U.S.C. § 714 only applies to the Board's review of agency decisions. The appellant also argued to the court that its 2021 *Connor* decision required that both the agency and the Board engage in a *Douglas* factor analysis prior to rendering a decision. The court agreed with both arguments. The court found that the agency's determination was in error because the deciding official used a substantial evidence, rather than a preponderance of the evidence, standard in determining whether the charges were proved. The court also held that the decision's lack of a *Douglas* factor analysis meant that the penalty analysis was legally erroneous. The court thus vacated those portions of MSPB's decision and remanded the matter back to MSPB for further consideration.

## Whistleblowing/ *Carr* Factors

*Rickel v. Department of the Navy*, [31 F.4<sup>th</sup> 1358](#) (Fed. Cir. 2022): The appellant was removed from his position as Assistant Chief of Training for the First Coast Navy Fire and Emergency Services in the Department of the Navy based on a charge of failure to follow instructions. The appellant appealed his removal to the Board, arguing that the removal was in reprisal for his protected whistleblower disclosures. During the Board hearing, neither party advanced any evidence regarding *Carr* factor 3, i.e., the treatment of similarly situated employees who did not engage in protected whistleblowing activity. Before the court, the appellant argued that the agency's failure to produce any evidence showing *Carr* factor 3 weighed in favor of the agency meant that the agency could not establish by clear and convincing evidence that it still would have removed the appellant in the absence of his protected whistleblower disclosures. The court disagreed. The court held that there is no requirement that an agency produce evidence for each of the three *Carr* factors, and that the absence of evidence in support of any *Carr* factor is not necessarily fatal to an agency's case. The court declined to create such a production requirement for the agency and affirmed the appellant's removal.

## Whistleblowing/Jurisdiction

*Knapp v. MSPB*, [2021 WL 5352874](#) (Fed. Cir. 2021): The appellant was a civilian employed by the Army as a Victim Advocate for cases of sexual assaults and harassment. In reporting such violations, she emailed classified information over unclassified networks, which is referred to as spillage. In response, Army Special Operation Command officials ordered removal of her computer, suspended her security clearance, placed her on administrative leave, and proposed her indefinite suspension from duty and pay status. Ms. Knapp then filed a complaint with OSC, alleging that she made several whistleblowing disclosures, and, shortly thereafter, she was accused of spillage and indefinitely suspended from duty and pay status. After OSC terminated its investigation, she filed an appeal with the Board, alleging several reprisal actions by the agency. The AJ dismissed her appeal for lack of jurisdiction, finding that Ms. Knapp's allegations arose from the agency's finding that she mishandled classified actions and that he was precluded from reviewing allegations of reprisal when such claims relate to agency determinations regarding security clearances. On appeal, the court noted the Supreme Court's holding in *Egan* that the Board does not have authority to review the substance of an underlying security clearance determination while reviewing an adverse action because the granting or revoking of such a decision is a judgment call exclusively retained by the executive branch. Because all the personnel actions against the appellant related to her access to classified information and spillage, and thus fell within the ambit of *Egan*, the court found it could not provide the relief she seeks.

*Smolinski v. MSPB*, [23 F.4<sup>th</sup> 1345](#) (Fed. Cir. 2022): The appellant, Dr. Smolinski, was a Lieutenant Colonel in the Army who worked as a visiting provider at an Army hospital. The appellant's wife, Mrs. Smolinski, submitted a patient complaint regarding her care at the hospital that made its way to the hospital's commander. Subsequently, the hospital's commander allegedly behaved inappropriately towards Mrs. Smolinski at a hospital holiday party. The couple testified regarding this misconduct during a formal investigation. After the Army withdrew a job offer to Dr. Smolinski, he alleged that the Army retaliated against him for his wife's patient complaint, his testimony in the internal investigation, and his OSC complaints. MSPB dismissed the appeal because it found that Dr. Smolinski had not made a nonfrivolous allegation that these statements were protected disclosures. The Federal Circuit affirmed MSPB's decision in part, as to the conclusions that the allegations about Mrs. Smolinski's patient complaint did not contain sufficient factual matter to state a plausible claim that it was a protected disclosure and that Dr. Smolinski had failed to

preserve his claims that the Army had retaliated against him for his OSC complaints. Regarding the investigation testimony, however, the court examined the content of Dr. Smolinski's testimony (which he had referenced but not included in his OSC complaints) and ruled that he had made a nonfrivolous allegation that his testimony disclosed both an abuse of authority and a violation of law, rule, or regulation. The court held that the hospital commander's alleged sexual harassment of Mrs. Smolinski and verbal harassment of Dr. Smolinski were abuses of authority under 5 U.S.C. § 2302(b)(8) because the commander was Dr. Smolinski's superior officer, the alleged unwanted touching and verbal harassment affected Mrs. Smolinski and Dr. Smolinski's rights, and the commander's alleged misconduct was unrelated to the Army's mission. The court further ruled that the commander's alleged misconduct could constitute a violation of laws, rules, or regulations because statute and regulations prohibit Army members from engaging in bullying, harassment, and unwanted sexual comments and gestures. The court also held that the Board could exercise jurisdiction over Dr. Smolinski's allegations that the Army had retaliated against him for participating in the internal investigation under 5 U.S.C. § 2302(b)(9).

### **Whistleblowing/Substantial Evidence**

*Standley v. Department of Energy (DOE)*, [26 F.4th 937](#) (Fed. Cir. 2022): The appellant, who was a general engineer employed by DOE, brought an IRA appeal after he was not selected for several director positions at the agency. He alleged that the non-selections were retaliation for his opposition to the DOE's efforts to defund and cease work on a space-based nuclear detection program. The Board denied corrective action because it found that the appellant had not proven that the agency perceived him as a whistleblower. On appeal to the Federal Circuit, the appellant argued that the Board failed to consider certain evidence that the DOE perceived his activities to be protected and that the DOE had acted fraudulently. The Federal Circuit affirmed the Board's decision because each of the AJ's factual findings were supported by substantial evidence, notwithstanding that a hypothetical trier of fact could have reasonably reached different conclusions based on the record evidence.

### **Significant Opinions Issued by Other Circuit Courts**

*Manivannan v. DOE*, [42 F. 4th 163](#) (3d Cir. 2022): A former scientist for DOE, who had resigned his employment, filed a lawsuit asserting Privacy Act and Federal Tort Claims Act violations stemming from the agency's disclosure of records to state prosecutors, alleged negligence in conducting an internal investigation, and refusal to return his personal property. The magistrate judge dismissed his claims for lack of subject matter jurisdiction, finding them precluded by the CSRA. In a precedential decision, the Third Circuit reversed and remanded in part, rejecting the government's claim that the CSRA bars Federal courts from exercising jurisdiction over any claim arising in the Federal employment context. Instead, the court found that the CSRA only precludes a court from addressing an otherwise reviewable claim if that claim challenges an employment matter covered by the statute. The court found that Congress carefully defined the types of actions subject to the CSRA's review scheme, to include specific covered personnel actions. The court cited *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), for the proposition that whether the CSRA prevents a Federal action turns on the type of the employee and the challenged employment action. Accordingly, the court agreed that the claims based on the agency's internal investigation were precluded by the CSRA, as the internal investigation qualified as a personnel action. The court found that the remaining claims, including allegations of collusion between an agency lawyer and state prosecutors and a refusal to return the appellant's personal property, were not personnel actions covered by the CSRA, and, therefore, those claims were not precluded by the CSRA. The court therefore affirmed the magistrate judge's dismissal of the claims tethered to employment conduct

covered by the CSRA and reversed as to the claims based on the agency's alleged cooperation with state prosecutors and failure to return the appellant's property. The court remanded for the magistrate judge to consider whether the remaining claims could withstand the arguments made in the government's motion to dismiss.

*Zachariasiewicz v. DOJ*, [48 F.4th 237](#) (4<sup>th</sup> Cir. 2022): The appellant filed an MSPB appeal alleging that the agency failed to select him for numerous promotions and subjected him to a hostile work environment because of his sex, race, whistleblowing disclosures, and prior equal employment opportunity activity. The AJ dismissed the discrimination and EEO reprisal claims for lack of jurisdiction in the absence of an otherwise appealable action but found MSPB jurisdiction over the appellant's exhausted whistleblower reprisal claims as an IRA appeal. Once 120 days had passed without a decision being issued, the appellant attempted pursue his claims in U.S. district court pursuant to 5 U.S.C. § 7702(e)(1)(B), which allows an individual to file a civil action in U.S. district court under listed antidiscrimination statutes if MSPB has not rendered a judicially reviewable decision on his mixed-case appeal within 120 days from the date of filing. However, the district court found that it lacked jurisdiction over the appellant's claims because they did not involve any "serious adverse action" directly appealable to MSPB and, therefore, did not amount to a mixed case appealable to the Federal district courts. *Zachariasiewicz v. DOJ*, 395 F. Supp. 3d 734 (E.D. Va. 2019). On appeal, the Fourth Circuit agreed that the district court lacked jurisdiction over the appeal as a mixed-case appeal, explaining that an IRA appeal cannot form the basis of a mixed-case appeal because the claims are not directly appealable to MSPB and instead first must be exhausted before OSC. Nonetheless, the Fourth Circuit remanded the matter to the district court for it to consider in the first instance whether it could entertain the appellant's discrimination claims under Title VII instead of as a mixed-case appeal.

## SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2022

In addition to adjudicating appeals, MSPB is charged with conducting studies of the civil service and merit systems. MSPB's high-quality, objective studies provide value by assessing current management policies and practices, identifying innovative and effective merit-based approaches to current workplace issues, and making recommendations for improvements. Overall, this benefits American taxpayers in terms of decreased Government-wide costs and increased confidence that the Government is doing its job and appropriately managing the workforce.

### Publications Issued

#### *Issues of Merit* Newsletter

MSPB published three newsletter editions with articles on a variety of HC topics covering a combined total of 8 MSPs and 3 PPPs. Newsletter topics included workplace aggression, reforming Federal hiring, hiring students and recent graduates, transitioning back to the office, using retirement to retain talent, the effect of competencies on agency culture, what has changed in the HR field, stay interviews, using subject matter experts to prevent perceptions of favoritism, recruitment apps, post-survey action planning, creating an ethical work environment, identifying why Federal employees want to quit, rehiring retired employees, and college recruitment.

### Merit Systems Studies Reports

MSPB completed two study reports this FY, one of which (*U.S. Merit Systems Protection Board Research Agenda 2022-2026*) was published prior to the end of the FY. The other study report (*Sexual Harassment in Federal Workplaces: Understanding and Addressing the Problem*) was submitted for Board approval in FY 2022 and published in the first quarter of FY 2023.

The report entitled [\*U.S. Merit Systems Protection Board Research Agenda 2022-2026\*](#) articulates a research agenda that broadly defines the topics that MSPB considers most important and promising for study in the near term. MSPB conducted extensive stakeholder outreach to inform this effort, including email invitations; a website survey; a press release; a Federal Register notice; and interviews with a wide variety of targeted stakeholders, including CHCOs. Over 300 ideas were received and rated on centrality, timeliness, ambition, and practicality. Forty-four topics across six major areas of research were selected to drive MSPB research through 2026: defending merit; building an effective workforce; recruitment and hiring; pay and performance management; supervision and leadership; and OPM oversight. A press release, social media posting, emails to stakeholders, and an article for the September *IoM* newsletter were used to disseminate the research agenda.

The report entitled [\*Sexual Harassment in Federal Workplaces: Understanding and Addressing the Problem\*](#) was drafted in FY 2022 and published in early FY 2023. This report evaluates the prevalence of sexual harassment in Federal workplaces and Federal agency efforts to prevent and respond to such harassment. This study presents results from MSPB's 2016 MPS, which indicates that approximately 21% of women and almost 9% of men responding to the MPS had experienced one or more forms of sexual harassment during the preceding two years, with rates varying by agency.

### Merit Principles Survey and Other Surveys Administered

The [2021 MPS](#) dataset and data documentation were published on the MSPB website with links on [Data.Gov](#) added in September 2022. In addition to the dataset, to assist analysts, a series of documents were published including: 2021 MPS Design and Methodology; Fact Sheet for Federal

Agencies; Fact Sheet for Federal Employees; Summary of Survey Items; 2021 Survey Instrument; and Data Dictionary/Codebook. Information and data from the 2021 MPS are also available at [www.mspb.gov/foia/SurveyData.htm](http://www.mspb.gov/foia/SurveyData.htm).

MSPB finalized the design and instrument for an HR Workforce Survey in preparation for implementation in FY 2023. The purpose of the survey is to learn about the professional experiences of HR specialists and assistants so MSPB can identify strategies to improve HR capabilities and better support HR staffs Government-wide. The survey is intended to go to all permanent, full-time, civilian HR specialists (0201 series) and assistants (0203 series) who work in Cabinet-level agencies and independent agencies with more than 10,000 employees.<sup>9</sup>

### **Merit Systems Studies Outreach and External References**

During FY 2022, MSPB studies staff conducted three outreach events with Federal organizations about studies research briefs and the merit systems, in general. In FY 2022, MSPB's merit systems studies publications or use of survey data were referenced more than 30 times in over 20 sources. They included trade print or online sources, online newsletters, scientific research journals or conference presentations, a printed book, congressional testimony, Government Accountability Office (GAO) reports, and good government groups. Notable citations to MSPB's studies work include GAO reports on [direct hiring in future emergencies](#) and on [sexual harassment in the VA](#); academic articles in public policy journals citing the use of 2016 MPS data or published merit systems study reports; and the Partnership for Public Service's report, [Trustworthy: Increasing Civil Servants' Trust at Work](#), citing four separate study reports.

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<sup>9</sup> Administration of the HR Workforce Survey began on February 27, 2023.

## REVIEW OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT

As required by statute,<sup>10</sup> MSPB reviews and reports on the significant actions of OPM, including an analysis of whether those actions are in accord with MSPs and free from PPPs.<sup>11</sup> As Congress intended, this annual analysis is based on those OPM activities that the Board decides are significant,<sup>12</sup> and is a general review of the policies and effectiveness of OPM, not an investigation of the internal operation of OPM and its employees.<sup>13</sup> In addition, MSPB has authority to review OPM rules and regulations upon request, or on its own motion, to determine if the regulations or the implementation of the regulations would cause a person to commit a PPP.<sup>14</sup>

### Review of OPM Significant Actions

OPM's actions may broadly affect the Federal workforce, multiple Federal agencies, and applicants for Federal jobs. Each of OPM's actions listed below has the potential to impact the effectiveness and efficiency of the Federal workforce ([MSP 5](#)) or fair and equitable treatment in a variety of contexts ([MSP 2](#)). Depending on the nature of a particular OPM action, it has the potential to affect or involve other specific MSPs. Additional MSPs that may be affected by a particular OPM action are noted in the discussion of each action.<sup>15</sup>

This review comments on OPM's leadership and context, specifically the continued existence of a Senate-confirmed OPM Director and OPM's new Strategic Plan. Commenting on pertinent OPM management issues is necessary to describe the environment in which OPM's mission offices operate. In the past, we have commented on such issues as OPM's funding and focus, organization structure, reliance on IT, and lack of Senate-confirmed leadership. OPM significant actions undertaken in FY 2022 that we comment on below relate to: skills-based hiring, the SES pipeline, telework, collective bargaining, and the Federal Workforce Priorities Report.

### OPM Leadership and Context

**OPM Director.** During FY 2022, OPM Director Kiran Ahuja began her second year as OPM Director. Stable political leadership is critical for OPM to identify priorities, develop policy proposals, and undertake new initiatives. Such leadership is also essential to define and justify core civil service values and policies; articulate the need for changes in Federal HR policies or workforce management priorities; and shepherd those changes or priorities through the legislative, regulatory, and implementation processes.

**OPM Strategic Plan for Fiscal Years 2022-2026.** OPM released its [Strategic Plan for FYs 2022-2026](#) in March 2022. The plan contains four strategic goals that articulate what OPM aspires to achieve by executing its mission:

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<sup>10</sup> 5 U.S.C. § 1206.

<sup>11</sup> 5 U.S.C. § 2301(b) and 5 U.S.C. § 2302(b), respectively.

<sup>12</sup> Committee on Conference, *Civil Service Reform Act of 1978, Conference Report to Accompany S. 2640*, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 1978, H. Rept. No. 95-1717, p. 133.

<sup>13</sup> Senate Committee on Governmental Affairs, *Civil Service Reform Act of 1978, Report to Accompany S. 2640*, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 1978, S. Rept. No. 95-969, p. 32.

<sup>14</sup> 5 U.S.C. § 1204(a)(4) and 5 U.S.C. § 1204(f)(1-4) at <https://www.govinfo.gov/content/pkg/USCODE-2011-title5/html/USCODE-2011-title5-partII-chap12-subchapI-sec1204.htm>

<sup>15</sup> 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 2022. Instead, it should be read in conjunction with previous MSPB reviews of OPM's significant actions.

- Position the Federal Government as a model employer.
- Transform OPM’s organizational capacity and capability to better serve as the leader in Federal HC management.
- Create a human-centered customer experience by putting the needs of OPM’s customers at the center of OPM’s workforce services, policy, and oversight.
- Provide innovative and data-driven solutions to enable agencies to meet their missions.

The major management priorities and challenges that OPM identified are outlined in the second goal above to transform OPM’s organizational capacity and capability to better serve as the leader in Federal HC management:

- Build the skills of the OPM workforce and attract skilled talent.
- Improve OPM’s relationships and standing as the HC management thought leader.
- Improve OPM’s program efficacy through comprehensive risk management and contract monitoring across the agency.
- Establish a sustainable funding and staffing model for OPM that better allows the agency to meet its mission.
- Modernize OPM IT by establishing an enterprise-wide approach, eliminating fragmentation, and aligning IT investments with core mission requirements.
- Promote a positive organizational culture where leadership drives an enterprise mindset, lives the OPM values, and supports employee engagement and professional growth.

OPM has [stated](#) that it, along with its partners in OMB and across the Administration, is poised to build on its role as a strategic leader for Federal HC management and policy. Through its strategic plan, OPM will focus on targeted efforts that span a range of critical elements within the agency, including people, resources, IT, and customer service, to be of greatest service to the American people. Specific areas of focus include:

- Positioning the Federal Government as a model employer;
- Driving a data-driven approach to recruitment, assessment, and hiring strategies that strengthen and support diversity, equity, inclusion, and accessibility across the Federal Government;
- Improving data collection, use, and sharing to support agencies in promoting a more equitable, engaged, and empowered workforce that champions unionized voices;
- Supporting Federal agencies by attracting early career talent;
- Equipping Federal workers with the ability to build new skills; and
- Developing a strategic vision for the Federal Government to improve the future of work informed by the lessons learned during the pandemic.

OPM’s [Strategic Plan for FYs 2022-2026](#) differs from its previous Strategic Plan in a number of ways. For example, OPM’s [Strategic Plan for FYs 2018-2022](#) had as its first goal to transform hiring, pay, and benefits across the Federal Government.

One objective under the first goal of OPM’s new Strategic Plan (positioning the Federal Government as a model employer) includes OPM developing a “government-wide vision and strategy and implement[ing] policies and initiatives that embrace the future of work and position the federal government as a model employer with respect to hiring, talent development, competitive pay, benefits, and workplace flexibilities.” The performance measures associated with this objective

include the percentage of “CHCOs who report they have the necessary guidance and resources from OPM to inform their future of work planning” and “find the services from OPM to inform their future of work planning helpful.” In sum, OPM’s Strategic Plan goals appear to be in accord with MSPs and free from PPPs.

## New Significant Actions

### Skills-Based Hiring

In June 2020, President Trump signed Executive Order (EO) 13932, [Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates](#). EO 13932, drawing on the principle that Federal hiring should be based on merit, argues that the best way to achieve that is through skills- and competency-based assessments. Specifically, the EO contends that, when making hiring decisions, the Federal Government relies too much on educational attainment and too little on direct assessment of candidates’ actual skills. To remedy this deficiency and to modernize Federal hiring, OPM was instructed to: (1) review and revise job classification and qualification standards to eliminate unnecessary degree requirements, and (2) improve the use of assessments in the Federal hiring process to focus on those that measure applicant skills rather than relying on self-reported information and level of education.

The EO required OPM to work with agency heads to ensure that, within 180 days of the EO, agencies assess job candidates in a manner that does not solely rely on educational attainment. OPM issued its plan and timeline to implement EO 13932 in July 2020,<sup>16</sup> and, two months later, it issued a list of the occupational series with positive education requirements for agency comment.<sup>17</sup> OPM twice extended the date for final implementation of the requirements of the EO, ultimately to December 31, 2022.<sup>18</sup>

OPM issued final guidance regarding EO 13932, including an updated “General Schedule Qualifications Operating Manual;” “Qualifications, Assessment, and Hiring Frequently Asked Questions;” and a new “Guide to Better Occupational Questionnaires,” in May, 2022.<sup>19</sup> This guidance noted that the Biden-Harris Administration fully supports expanding skills-based hiring for Federal jobs, which helps hiring managers focus on what job candidates know how to do, not where they learned it. The guidance noted that all relevant skills for the role at hand should be valued, whether they are learned in the classroom, on the job, or on one’s own.

### Significance

There are a number of MSPs and PPPs that relate to hiring and applicant assessment. For example, [MSP 1](#) requires that recruitment be from qualified individuals to achieve a workforce representative of society, and [MSP 2](#) notes that applicants should receive fair and equitable treatment. [PPP 1](#) prohibits discrimination for or against any applicant for employment, and [PPP 4](#) prohibits

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<sup>16</sup> OPM Memorandum for Heads of Executive Departments and Agencies, [Implementation of EO 13932: Determining Qualifications and the Use of Assessment Tools When Filing Positions](#), July 31, 2020.

<sup>17</sup> OPM Memorandum for CHCOs, [Draft General Schedule Qualifications Policy – EO 13932: Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates](#), September 25, 2020.

<sup>18</sup> See OPM Memoranda for Heads of Executive Departments and Agencies: [Interim Guidance – E.O. 13932: Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates](#), May 7, 2021; and [Updated Interim Guidance – E.O. 13932: Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates](#), December 29, 2021.

<sup>19</sup> OPM Memorandum for Heads of Executive Departments and Agencies, [Guidance Release – E.O. 13932: Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates](#), May 19, 2022.

influencing a person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

The practical effects of EO 13932's policy change, on both applicants and hiring decisions, will depend greatly on how much agency practices change. Although OPM establishes general qualification/entry requirements and general rules and processes for competitive examination, agencies have delegated authority to apply those requirements, rate and rank applicants, and select among applicants. For example, even in the absence of a requirement for a degree or specific education to qualify for a position, a hiring manager might prefer to consider or hire individuals with a degree or particular credentials. MSPB does not know the extent to which agencies or managers hold or act on such preferences. However, MSPB's research has found that agencies do often use assessments that are not the best predictors of performance.

For many years MSPB has urged agencies to use valid applicant assessments to help ensure that Federal employees are selected based on their ability to perform the job and not on other non-merit factors.<sup>20</sup> Hiring based on ability rather than other factors ensures that agencies can carry out their missions to best serve the public. MSPB has noted in the past that agencies have relied heavily on evaluations of training and experience (T&E) (including resumes, occupational questionnaires, and educational level) to determine applicant qualifications. In a previous MSPB survey of Federal HR staff, 40 percent said that their agencies used educational level "to a great extent" to assess applicants.<sup>21</sup>

Agencies commonly use T&E assessments because they are inexpensive to develop, widely available, and relatively convenient to administer. T&E assessments often look at the quantity—rather than the quality—of training or experience that an applicant possesses. They also tend to rely on self-reported information to determine applicants' level of expertise. Due to these factors, T&E assessments are usually less accurate than assessments designed to more directly measure expertise, such as job tests or simulations. This means agencies are often using less valid assessments that are not good predictors of future job performance. To the extent that EO 13932 and OPM's implementing guidance reduces agency reliance on less valid assessments, such as educational attainment, better outcomes should be achieved in agency hiring.

We note that the EO states that agencies should not rely *solely* on educational attainment in assessing job applicants. MSPB has long recommended that agencies use a multiple-hurdle approach when evaluating job candidates. This type of approach can help avoid poor selection by using a set of relatively valid assessment procedures to manage the candidate pool and narrow the field of qualified candidates. This means that when agencies pair less-valid T&E assessments with other, more valid methods, better results will be achieved.

Ideally, assessment procedures should be selected and sequenced based on cost and benefit. Methods that are less costly to administer should be used in the beginning stage of the assessment process when the candidate pool is largest. Methods that are more costly to administer should be used toward the end of the process when fewer applicants need to be assessed. The multiple-hurdle approach may take more time, effort, and money than just reviewing T&E or conducting an unstructured interview. If conducted properly, the multiple-hurdle approach can increase selecting officials' ability to predict the job success of an applicant. This should increase the quality of the hire

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<sup>20</sup> See MSPB, [Improving Federal Hiring through Better Assessment](#), July 2018; MSPB, [Evaluating Job Applicants: The Role of Training and Experience in Hiring](#), January 2014; and MSPB, [Reforming Federal Hiring—Beyond Faster and Cheaper](#), September 2006.

<sup>21</sup> MSPB, [The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs](#), January 2015, p. 22.

and decrease the costs associated with a poor performer (e.g., training, adverse actions, re-recruiting for the position).

However, money and resources remain a fundamental hurdle to fulfilling the requirements of EO 13932 and OPM's implementing guidance. MSPB believes there is a more optimal way to ensure that agencies have access to high-quality assessments. Over 20 years ago we noted that "[a]gencies vary widely in their ability to develop and apply good...assessment instruments. Agencies with little in-house expertise in this field, and little or no discretionary money to pay OPM or anyone else for the needed expertise, are at a distinct disadvantage."<sup>22</sup> In sum, OPM's implementing guidance appears to be in accord with MSPs and free from PPPs.

## SES Pipeline

In March 2022, OPM released the "Executive Women in Motion (EWIM): Pathways to the SES Toolkit."<sup>23</sup> This program promotes the advancement of both women and men in the SES through interagency mentoring, collaboration, and knowledge-sharing sessions that are designed to increase employees' interest in pursuing a career in the SES. In collaboration with agencies and senior leaders, OPM developed the EWIM toolkit to provide guidance and templates for agencies to host EWIM sessions independently with general consultation from OPM. The EWIM program is a leadership education and recruitment strategy implemented by OPM to encourage all senior employees with leadership potential to pursue a career path in the SES.

### *Significance*

For a list of MSPs and PPPs that relate to hiring and assessment within the SES, see the "Significance" section in the Skills-Based Hiring discussion, above. According to OPM, as of June 2021, there were a total of 8,025 SES members: 63 percent were male (5,055) and 37 percent were female (2,970). OPM hopes that agency hosting of programs such as EWIM will help expand opportunities to increase diversity among Federal senior leaders. Programs such as the EWIM can increase interest among senior Federal employees to pursue employment in the SES. In sum, we find that the EWIM is in accord with MSPs and free from PPPs.

MSPB research suggests that to increase the diversity of the SES, there are issues that need to be addressed long before agencies attempt to entice senior Federal employees to pursue employment in the SES. Over the years, the differences between women and men in important characteristics such as education and experience in the Federal workplace have diminished. That trend, combined with a continued interest in career advancement among women in the Federal Government, bodes well for future gains in the representation of women in the SES. Much credit is due to agency efforts to recruit and advance women, to reduce the incidence of prohibited discrimination, to provide greater flexibility in work arrangements, and to focus on contributions and skills—rather than on indirect and unreliable indicators of performance and dedication, such as time spent in the office or irrelevant factors such as marital status and family responsibilities—when evaluating and promoting employees.<sup>24</sup>

Still, progress toward full equality, as evidenced by the SES gender representation presented above, is far from complete. MSPB research has shown that, first, occupational differences persist between

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<sup>22</sup> MSPB, *Assessing Federal Job Seekers in a Delegated Examining Environment*, December 2001, p. 31; and MSPB's Research Brief, *Improving Federal Hiring through Better Assessment*, July 2018.

<sup>23</sup> OPM Memorandum for CHCOs, *Executive Women in Motion (EWIM): Pathways to the SES Toolkit*, March 17, 2022.

<sup>24</sup> MSPB, *Women in the Federal Government: Ambitions and Achievements*, May, 2011.

women and men in both American society and Federal workplaces. Such occupational differences can complicate recruitment and create glass walls—barriers to movement across organizations, functions, or occupations—within the Federal workforce, resulting in different opportunities for women and men even if they are comparable in terms of years of experience and performance. Second, agencies have increased their use of external hiring and upper-level hiring to fill positions in professional and administrative occupations. For a variety of reasons, women are generally less likely to be hired when an agency fills a position through external (as opposed to internal) recruitment or fills a position at a higher level instead of at the entry level.

The glass ceiling in the Federal Government—those invisible systemic barriers to the advancement of women to senior executive positions—cannot be shattered in a single blow. It can only be dismantled over time, through the merit-based hiring and advancement of individual employees. However, there are limits to what Federal agencies can or should do to help employees succeed in their jobs and careers. Advancement to the highest levels requires dedication and effort from the employee, not only to perform well in the current position, but also to set career goals, identify and pursue developmental and promotional opportunities, and acquire and sharpen the competencies needed to compete successfully for those opportunities.

MSPB has recommended several actions that have special relevance to the employment and advancement of women: encouraging entry into occupations where there are issues of underrepresentation, or gender balance; assuring that employees have the qualifications (e.g., competencies, relevant job skills, or experience) needed for short- and long-term job success; and recruiting and preparing employees for higher-level jobs, either in a technical contributor or supervisory/leadership capacity.

MSPB’s recommendations are organized into the following categories:

- Recruitment and Selection—actions to generate interest in Federal careers, build diverse and qualified applicant pools, and select employees who are likely to perform well, both in the short and long term.
- Development—actions to help employees develop competencies required for entry or advancement, through on-the-job learning, classroom training, or other means.
- Communication and Support—actions to educate employees on requirements for job success and advancement, help employees identify career goals, and provide employees with feedback on their performance, strengths, and developmental needs.
- Mentoring and Networking—actions to help employees establish relationships that can advance their development and careers.

The original vision of the SES was that leadership skills would be the primary requirement for entry. This vision was consistent with research that suggests technical skills become less important as individuals ascend the organizational hierarchy. Our research has shown, however, that technical skills also are needed for many SES positions.<sup>25</sup> In a previous survey of career members of the SES, less than one-fourth (21 percent) agreed that their positions could be filled using just the Executive Core Qualifications (ECQs) without requiring additional technical qualifications.<sup>26</sup> This perception is supported by findings from a previous analysis of all permanent annual career SES vacancy

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<sup>25</sup> MSPB, *Training and Development for the SES: A Necessary Investment*, December 2015, p. 12.

<sup>26</sup> OPM has identified five ECQs: Leading Change, Leading People, Results Driven, Business Acumen, and Building Coalitions. The ECQs are required for entry to the SES and are used by many departments and agencies in selection, performance management, and leadership development for management and executive positions.

announcements. Approximately 80 percent of the announcements required applicants to describe at least one technical competency in addition to the ECQs to be considered qualified for the position.

While technical credibility is a competency under one of the ECQs, almost one-quarter (23 percent) of career senior executives consider a major portion (at least 46 percent or more) of their work to be of a technical/professional nature. Perhaps this divide between the original vision of the SES and current practice occurs because the work environment has changed since the SES was created. For instance, the types of work performed in the Federal Government have become increasingly knowledge-based, which may result in a continued need for possessing specialized technical skills or advanced education to effectively lead others performing such work. It could also be that SES members lack appropriate staff and must perform technical work themselves.

In any event, one way to address this divide may be for OPM to provide agencies with improved tools and flexibilities to better leverage SES and senior leader/scientific or technical (SL/ST) allocations, distinguishing the SES pipeline for those pursuing senior leadership positions from the SL/ST pipeline for those interested in providing senior technical expertise. This would solidify the SES pipeline's focus on leadership competencies while providing agencies the flexibility to address pressing technical challenges through SL/ST appointments, creating a win-win for agencies and a broader spectrum of candidates, alike.<sup>27</sup>

## Telework and Hybrid Workplaces

**Updated Telework Guidance.** In November 2021, OPM released the *2021 Guide to Telework and Remote Work in the Federal Government: Leveraging Telework and Remote Work in the Federal Government to Better Meet Our Human Capital Needs and Improve Mission Delivery*.<sup>28</sup> This updated guidance replaced telework guidance OPM published ten years earlier and provides agencies with practical resources and information to help contextualize the continued evolution of telework as a critical workplace flexibility. The guide is made up of two distinct parts that include (1) an overview of telework arrangements, laws, agency roles and responsibilities, and guidance to develop telework policies, and (2) a review of implications, considerations, and strategies for the appropriate use of remote work arrangements.

**Performance Management in Hybrid Workplaces.** In February 2022, OPM issued tips for managing performance in a hybrid workplace.<sup>29</sup> A hybrid workplace refers to a workplace that incorporates a mix of employees who are working in the office and those who are working from other locations. The dramatic increase in the number of Federal employees teleworking and working remotely during the COVID-19 pandemic demonstrated the need for agencies to be equipped to manage both in-person and teleworking employees' performance equitably and effectively. To support agencies in preparing for the workforce of the future, OPM issued these performance management tips for a "hybrid" workplace. OPM noted that effective performance management requires engagement and commitment from individuals at all levels of an agency. As such, the performance management tips were tailored to assist non-supervisory employees, supervisors, and leadership throughout the various phases of the performance management cycle. OPM stated that the workforce of the future will rely heavily on technology to facilitate effective communication and

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<sup>27</sup> See <https://www.opm.gov/policy-data-oversight/senior-executive-service/scientific-senior-level-positions/>

<sup>28</sup> OPM Memorandum for Heads of Executive Departments and Agencies, [2021 Guide to Telework and Remote Work in the Federal Government](#), November 12, 2021.

<sup>29</sup> OPM Memorandum for HR Directors, [Issuance of Performance Management Tips for a Hybrid Workplace](#), February 2, 2022.

collaboration between employees and supervisors, and provided considerations for how to leverage technology to support a hybrid workplace were also provided.

### *Significance*

Telework policies relate to the efficient and effective use of the Federal workforce ([MSP 5](#)). In addition, Federal employee performance management in any context relates to employees being advanced based on their relative knowledge, skill, and ability ([MSP 1](#)), fair and equitable treatment ([MSP 2](#)), Federal employees being retained based on the adequacy of their performance ([MSP 6](#)), and that employees should be provided effective training in cases where it would result in better organizational and individual performance ([MSP 7](#)).

In June 2021, OMB, OPM, and GSA released memorandum M-21-25, requiring agencies to submit a phased plan for reentry into the physical workspace, as well as for the post-reentry work environment. The guidance noted the expectation that decisions in these areas will be equitable and grounded in values that empower, respect, and galvanize the Federal workforce, while reflecting and emphasizing trust and accountability for the American people they serve. Agencies may also leverage issues such as telework as tools in their broader strategies for talent recruitment and retention.<sup>30</sup> Additional guidance issued by OPM in July 2021 suggested that agencies start reassessing work schedules and frequency of telework based upon their experiences during the pandemic and reestablish them in a way that best meets mission needs.<sup>31</sup>

MSPB's report, [Telework: Weighing the Information, Determining an Appropriate Approach](#), discussed issues and considerations that organizations should weigh when deciding how to integrate telework into their business strategies and operations. Many of the themes from the 2011 report continue to be relevant to today's circumstances. The report discussed the various benefits and challenges telework can have for individual employees, as well as the overall organization. Below are some of the key issues agencies should consider as they identify how telework and other workplace flexibilities may be used to support their missions in the post-pandemic workplace.

Managers and supervisors should recognize that the optimal approach to telework will continue to evolve over time and may evolve differently within different work units. As part of their analysis, agencies may wish to consider supervisor and manager feedback, work quality and productivity measures, their own return-to-work surveys, and results of the annual Federal Employee Viewpoint Survey (FEVS) to make informed decisions about post-pandemic telework.

Agency leaders must also ensure that supervisors are prepared for their role and can manage teleworkers and non-teleworkers effectively. Supervisors must have effective performance management skills to make sound decisions about telework eligibility and continuing its use, and to ensure fair treatment of teleworkers and non-teleworkers. Objective performance management practices can help supervisors exercise good and fair judgment and make decisions based on employee merit. OPM guidance related to managing performance in hybrid workplaces can help with this.

Employees also have an important role to play in agency telework programs. They should honestly assess their own work habits and preferred routines to participate in the discussion with their agency about what level of telework, if any, is right for them. Not all employees or jobs are

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<sup>30</sup> OPM Memorandum for Executive Departments and Agencies (M-21-25), [Integrating Planning for A Safe Increased Return of Federal Employees and Contractors to Physical Workplaces with Post-Reentry Personnel Policies and Work Environment](#), June 10, 2021.

<sup>31</sup> OPM Memorandum for CHCOs, [Additional Guidance on Post-Reentry Personnel Policies and Work Environment](#), July 23, 2021.

suitable for telework. Employees who telework should maintain their performance and fully engage with their supervisors, coworkers, customers, and other relevant parties.

As we noted in a previous newsletter article, the use of post-pandemic telework may increase or decrease in Federal organizations based on the experience they gained with this workplace flexibility during the pandemic. To determine what level of telework is appropriate, agencies should carefully review a variety of indicators, including organizational data on employee productivity and performance during the period of maximum telework. Such important considerations should not be left solely to individual desires or beliefs that office productivity automatically improves when more employees are physically in the workspace, or, conversely, that teleworking does not have any negative impacts on individual or organizational performance and efficiency.<sup>32</sup> In sum, OPM's telework guidance and tips are in accord with MSPs and free from PPPs.

## Collective Bargaining

On April 26, 2021, President Biden signed [EO 14025](#), *Worker Organizing and Empowerment*, to encourage worker organizing and collective bargaining. In 2022, OPM issued guidance to implement EO 14025 that included:

- Actions agencies can take related to the hiring and on-boarding process in support of the President's goals to encourage worker organizing and collective bargaining. This guidance is related to actions Federal agencies can take to encourage worker organizing and collective bargaining consistent with the requirements of the Federal Service Labor-Management Relations Statute (FSLMRS) (5 U.S.C. Chapter 71).<sup>33</sup>
- Evaluating actions executive branch agencies can take to help promote worker organizing and collective bargaining consistent with the requirements of the FSLMRS. This guidance addressed some actions agencies can take related to the hiring and on-boarding process.<sup>34</sup>
- Guidance to agencies of statutory requirements regarding management actions during any union organizing.<sup>35</sup>
- Guidance to agencies regarding the processing of bargaining unit employee requests related to payroll deductions for labor organization dues.<sup>36</sup>
- Guidance to address some actions agencies can take related to increasing union access and ability to communicate with bargaining unit employees.<sup>37</sup>

### *Significance*

It will be some time until the results of these initiatives are known, but they appear to be in accord with MSPs and free from PPPs. We note, however, that the intent—substantive involvement of employees and their representatives in work matters to improve productivity and delivery of services—is consistent with MSPB research on employee engagement and organizational

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<sup>32</sup> MSPB, *IoM*, “Post-Pandemic Telework: An Epidemic of Efficiency?,” September 2021, p. 2.

<sup>33</sup> OPM Memoranda for Heads of Executive Department and Agencies, [Guidance on Implementation of EO 14025: Highlighting Bargaining Unit Employee Rights to Join a Union and Other Rights](#), October 20, 2021.

<sup>34</sup> OPM Memoranda for Heads of Executive Department and Agencies, [Highlighting Bargaining Unit Employee Rights in the Hiring and On-boarding Process](#), October 20, 2021.

<sup>35</sup> OPM Memoranda for Heads of Executive Department and Agencies, [Guidance on Implementation of EO 14025: Highlighting Requirements During Union Organizing](#), April 12, 2022.

<sup>36</sup> OPM Memoranda for Heads of Executive Department and Agencies, [Guidance on Implementation of EO 14025: Highlighting Requirement to Timely Process Requests for Payroll Deductions for Labor Organization Dues](#), April 12, 2022.

<sup>37</sup> OPM Memoranda for Heads of Executive Department and Agencies, [Guidance on Implementation of EO 14025: Highlighting Union Rights to Access and Communicate with Bargaining Unit Employees](#), April 12, 2022.

performance. MSPB has found that employee engagement (a heightened connection to work and the organization) is correlated with organizational performance and other positive outcomes.<sup>38</sup> One component of employee engagement is a positive work environment, which includes cooperation and employee involvement in work decisions. Thus, positive labor-management relationships could potentially increase employee engagement in addition to yielding visible improvements in operations.

## Federal Workforce Priorities Report

In May 2022, OPM released the second *Federal Workplace Priorities Report* (FWPR) in accordance with the revised Title 5, Code of Federal Regulations, Part 250 subpart B, which was effective April 2017.<sup>39</sup> OPM established the FWPR in regulation in response to recommendations in the GAO report, [Human Capital: Strategies to Help Agencies Meet Their Missions in an Era of Highly Constrained Resources \(GAO-14-168\)](#). In that report, GAO recommended that OPM strengthen coordination and leadership of Government-wide HC issues. One of two key supporting actions was the development of a Government-wide HC strategic plan. Building upon this idea, OPM committed to developing a report that establishes Government-wide HC priorities based upon current and emerging workforce challenges.

The FWPR, however, is not intended to serve as a plan that obligates the HC community to specific actions, timeframes, and measures of success. Rather, the [President’s Management Agenda](#) (PMA) and Cross-Agency Priority Goals create a process for establishing such Government-wide requirements and highlight needed workforce reforms (e.g., “Strengthening and Empowering the Federal Workforce”). The FWPR, instead, communicates key Government-wide HC priorities intended to inform agency strategic and HC planning. Agencies are required to align their HC management strategies to support the FWPR, as demonstrated in HC Operating Plans.

OPM identified eight priorities in areas that, when addressed, it believes will spur productivity and organizational success, and align with Administration priorities. Four of the priorities are assigned the label of “Primary,” and the remaining four priorities are assigned the label of “Enabling.” The enabling priorities will have a direct impact on successful implementation of the primary priorities. In addition, the enabling priorities are critical for designing visionary strategies, identifying metrics for success, and measuring progress over the next four years. The enabling priorities are foundational for future success and critical to sound HC Management. OPM requires that agencies focus their efforts on two primary priorities but recognizes that they will need to use the concepts espoused by the enabling priorities to maximize their success. The eight priorities are:

### Primary Priorities

- Leveraging Technology and Modernizing IT Processes
- Recruitment, Succession Planning, and Knowledge Transfer
- Enhancing Employee Experience, Fostering Employee Well-Being, and Building a Diverse and Inclusive Workforce
- Fostering an Agile Organization and the Growth Mindset

### Enabling Priorities

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<sup>38</sup> See MSPB, [The Power of Federal Employee Engagement](#), Washington, DC, September 2008. In addition to better programmatic results, Federal agencies with higher levels of employee engagement experienced lower rates of sick leave use and equal employment opportunity complaints than did agencies with lower levels of employee engagement.

<sup>39</sup> OPM Memorandum for HR Directors, [2022 Federal Workforce Priorities Report](#), May 10, 2022.

- Enhancing Customer Experience
- Leveraging Data as a Strategic Asset
- Preparedness and Resilience
- Developing an Agency Foresight Capability

### *Significance*

As we noted in our 2019 review of OPM's significant actions that addressed the first edition of the FWPR, not every issue facing the Federal workforce can be a top priority. Still, although hiring and recruitment was identified as a contributor to key challenges in the workforce, it was not identified as a Federal workforce priority at that time, and neither was building a diverse and inclusive workforce.<sup>40</sup> As the 2022 FWPR includes these two topics, it correctly signals their importance to the future of an effective Federal workforce. This is in accord with MSPs and free from PPPs.

In the FWPR, OPM presents a number of promising practices regarding each Primary and Enabling Priority that are already underway, led either by the Administration or by various agencies. The promising practices are mini–case studies that should give agencies some ideas on how they can focus their efforts with respect to each priority.

OPM acknowledges that agencies are working on a host of Federal workforce priorities, which are set by numerous issuances from the Administration, including the PMA, the President's budget, and numerous executive orders and regulatory requirements. Agencies also work through strategic HC issues through their strategic planning process, the development of their HC Operating Plans, implementing recommendations from GAO, and in response to OPM HC Reviews. We look forward to seeing how OPM organizes, consolidates, and communicates information to stakeholders and tracks the impact of these initiatives.

### **Review of the Rules and Regulations of OPM**

MSPB has authority to review OPM rules and regulations upon request, or on its own motion, to determine if the regulations or the implementation of the regulations would cause a person to commit a PPP.<sup>41</sup> These rare requests are processed under HQ adjudication procedures for original jurisdiction cases. In FY 2022, no cases requesting review of OPM regulations were received, and none were decided. There were six regulation review cases pending at the end of FY 2022, including one case filed in FY 2015, one case filed in FY 2017, two cases filed in FY 2018, and two cases filed in FY 2021. In October 2022, the Board issued a ruling on the review request filed in FY 2015. It is expected that considerable progress will be made in FY 2023 on the remaining review requests.

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<sup>40</sup> MSPB, *Annual Report for FY 2019*, January 31, 2020, p. 38.

<sup>41</sup> 5 U.S.C. § 1204(a)(4) and 5 U.S.C. Section 1204(f)(1-4) at <https://www.govinfo.gov/content/pkg/USCODE-2011-title5/html/USCODE-2011-title5-partII-chap12-subchapI-sec1204.htm>

## MSPB FINANCIAL SUMMARY

### Fiscal Year 2022 Financial Summary as of September 30, 2022 (dollars in thousands)

#### Financial Sources

FY 2022 Appropriation	\$45,825
Civil Service Retirement and Disability Trust Fund	2,345
<b>Total Financial Sources</b>	<b>\$ 48,170</b>

#### Obligations Charged to FY 2022

Personnel Compensation	\$23,820
Personnel Benefits	8,553
Travel of Things	7
Travel of Persons	32
Rents, Communications and Utilities	3,764
Printing and Reproduction	25
Other Services	4,808
Supplies and Materials	174
Equipment	592
Reimbursable Obligations	2,345
<b>Total Obligations Incurred</b>	<b>\$44,120</b>

## LIST OF ABBREVIATIONS AND ACRONYMS

AFR	MSPB Annual Financial Report
AJ	Administrative judge
ALJ	Administrative law judge
ALOC	Acceptable level of competence
APHIS	USDA's Animal and Plant Health Inspection Service
APR-APP	MSPB's Annual Performance Report and Annual Performance Plan
AR	Annual Report
BFS	Treasury's Bureau of the Fiscal Service
CAFC	U.S. Court of Appeals for the Federal Circuit
CHCO	Chief Human Capital Officer
COVID-19	Novel coronavirus
CSRA	Civil Service Reform Act of 1978
CSRS	Civil Service Retirement System
DHS	Department of Homeland Security
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of the Interior
ECQ	Executive Core Qualifications
EEO	Equal employment opportunity
EEOC	Equal Employment Opportunity Commission
EO	Executive Order
EWIM	Executive Women in Motion
FAM	MSPB's Office Financial and Administrative Management
FBI	Federal Bureau of Investigation
FERS	Federal Employees Retirement System
FERCCA	Federal Erroneous Retirement Coverage Corrections Act
FEVS	Federal Employee Viewpoint Survey
FMLA	Family Medical Leave Act
FOs	MSPB's field offices
FSLMRS	Federal Service Labor-Management Relations Statute
FTC	Federal Trade Commission
FWPR	Federal Workplace Priorities Report
FY	Fiscal year
GAO	Government Accountability Office
GPRAMA	Government Performance and Results Act Modernization Act of 2010
GSA	U.S. General Services Administration
HC	Human capital
HQ	MSPB's headquarters

HR	Human resources
<i>IoM</i>	MSPB's <i>Issues of Merit</i> newsletter
IRA	Individual right of action
IRM	MSPB's Office of Information Resources Management
IT	Information technology
LEO	Law enforcement officer
MPS	MSPB's Merit Principles Survey
MSPs	Merit system principles
MSPB	Merit Systems Protection Board
NDAA	National Defense Authorization Act
NFC	USDA's National Finance Center
OA	Executive Office of the President, Office of Administration
OAC	MSPB's Office of Appeals Counsel
OCB	MSPB's Office of the Clerk of the Board
OGC	MSPB's Office of General Counsel
OPE	MSPB's Office of Policy and Evaluation
OMB	Office of Management and Budget
OPM	Office of Personnel Management
ORO	MSPB's Office of Regional Operations
OSC	Office of Special Counsel
OWCP	Office of Workers' Compensation Programs
PFR	Petition for review
PIO	Performance Improvement Officer
PIP	Performance Improvement Plan
PMA	President's Management Agenda
PPPs	Prohibited personnel practices
PUMP Act	Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act
PWFA	Pregnant Workers Fairness Act
ROs	MSPB's regional offices
SEC	Securities and Exchange Commission
SES	Senior Executive Service
SL/ST	Senior Leader or Scientific or Technical positions
SSA	Social Security Administration
T&E	Training and experience
U.S.C.	United States Code
USDA	Department of Agriculture
USERRA	Uniformed Services Employment and Reemployment Rights Act of 1994
USPS	U.S. Postal Service
VEOA	Veterans Employment Opportunities Act of 1998
WPA	Whistleblower Protection Act of 1989
WPEA	Whistleblower Protection Enhancement Act of 2012



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