



U.S. Merit Systems Protection Board

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**Congressional  
Budget  
Justification  
FY 2020**

Submitted to the  
Committee on Appropriations

March 2019

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**The U.S. Merit Systems Protection Board**  
**Congressional Budget Justification**  
**Fiscal Year 2020**

**Introduction**

Over the last year, the U.S. Merit Systems Protection Board (MSPB or Board) has worked to improve the effectiveness and long-term impact of its missions function in response to the Office of Management and Budget's (OMB) memorandum M-17-22, "Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce." After considering the significant internal and external factors affecting the agency, MSPB exercises its statutory budget authority to submit this bypass request for fiscal year (FY) 2020 of \$46,835,000, which includes a \$2,345,000 transfer from the Office of Personnel Management's (OPM) Civil Service Retirement and Disability Fund. This request is in lieu of the President's Budget Request for FY 2020 of \$42,265,500, including \$2,345,000 from OPM's Civil Service Retirement and Disability Fund.

The increase of \$4,569,500 from the President's Budget Request accurately funds our authorized full-time equivalents (FTE), and provides the level necessary for critical functions and comprehensive human capital planning, and a modest increase in related object classes. The requested increase accurately reflects MSPB's funding needs to address operational and management priorities ranging from personnel to modernizing our information technology (IT). Additionally, this increase incorporates base adjustments and built-in changes for the increase in civilian pay and 2% increase for domestic inflation.

If the President's Budget Request of \$42,265,500—which represents a 10% cut to our FY 2019 funding level—is enacted, MSPB will have to cut its workforce since personnel costs represent approximately 80% of our budget. Additionally, this will affect performance results for: (1) average processing time for both initial appeals and petitions for review (PFR); (2) the scope and number of merit system studies produced; (3) MSPB's review of OPM's significant actions and rules and regulations; (4) conducting outreach; (5) internal program evaluation; (6) our ability to conduct surveys in support of merit systems studies and reports, obtaining customer feedback; (7) our critical IT modernization efforts; and (8) a potential relocation of our Washington, D.C. Headquarters as a result of lease expiration. All of these issues are overshadowed by the backlog of approximately 2,000 PFRs before the Board due to the lack of quorum since January 2017.

**Internal Challenges Affecting MSPB Operations**

As referenced above, MSPB recognizes the financial challenges facing our Government and the increasing pressure to cut Federal spending. In addition to the immediate and direct negative impact a 10% cut in appropriations will have on MSPB's operations, there are a number of internal challenges impacting MSPB's operations.

*Impact of MSPB Lack of Quorum of Board Members*

At the time of this request, MSPB is without Board Members following the expiration of Vice Chairman Mark A. Robbins' term at the end of February 2019. The President's nominees for Chairman and Member are pending with the U.S. Senate. The agency continues to operate under its

Continuity of Operations Plan, and MSPB's General Counsel is the agency's acting chief executive and administrative officer. Since January 2017, MSPB has been without a quorum of Board Members. Although agencies and appellants can file PFRs of administrative judges' (AJ) decisions with the Board, by law the Board is prohibited from issuing decisions on PFRs unless it has a quorum. Historically, when a quorum is present the Board issues on average approximately 90 PFR decisions each month. When the Board lost its quorum on January 8, 2017, there were 528 cases (PFRs, PFR addendum cases, and original jurisdiction cases) pending at MSPB Headquarters; since that time, and as of February 1, 2019, 1,535 additional cases (PFRs, PFR addendum cases, and original jurisdiction cases) were filed at MSPB Headquarters. Therefore, even if the Board was to have a quorum today, there would be 2,041<sup>1</sup> PFRs, PFR addendum cases, and original jurisdiction cases pending at MSPB Headquarters, for which 1,725 have proposed decisions drafted by career staff and are ready for action by the Board Members. Importantly, once a quorum is restored and the Board can issue decisions again, we anticipate significant additional workload for MSPB based on past precedent. Historically, a percentage of the Board's PFR decisions in a typical year are remands to the AJs, which will result in further adjudication. Additionally, with the arrival of new Board Members whose priorities may differ from those of the previous Board, there likely will be a period when a higher-than-normal percentage of proposed decisions are returned to the Office of Appeals Counsel, whose staff drafts proposed PFR decisions, for additional review or action.

Moreover, the Board cannot release study reports to the President and Congress without a quorum or promulgate regulations to reflect congressionally-mandated changes in our jurisdiction or procedures. MSPB conducts objective, independent research that supports strong merit systems that protect the public's interest in a high quality, diverse professional workforce managed under the MSPs and free from PPPs. This respective function, in conjunction with MSPB's adjudication of individual appeals and authority to review OPM regulations, ensures that the Board oversees Federal merit systems at both the systemic and individual levels.

MSPB research, summarized in formal reports to the President and Congress, addresses the full range of issues in managing the Federal workforce, such as recruitment and selection, employee engagement, supervision, performance management, adverse actions, and fair and equitable treatment of Federal employees.

#### *Impact on MSPB's Human Capital Planning*

MSPB received enacted budgets for FY 2014-2019 that allowed it to build and sustain a stable and sufficient workforce to perform its statutory functions effectively and efficiently. Although the Board has been able to develop the workforce, nearly 25% of MSPB employees, including approximately 36% of our AJs and adjudication managers involved with processing initial appeals, are eligible to retire in the next two years. Budget reductions will result in our inability to backfill these and other critical vacancies, which will contribute to the slowing of case processing times. In addition, we will be limited in our ability to provide the outreach and education services that are essential to the effectiveness and efficiency of our adjudication and studies functions.

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<sup>1</sup> During this period, the Board has been able to process parties' requests to withdraw their PFRs in certain limited circumstances and stay requests from the Office of Special Counsel. As a result, the Board processed 22 cases during the period since it lost its quorum.

### *Impact of Modernizing MSPB's Information Technology*

In FY 2019, MSPB will begin modernizing its core business applications, e.g., developing a new case management workflow system to process and track each initial appeal and PFR filed with the agency. This updated functionality will replace MSPB's e-Appeal Online system and modernize our document management and document assembly capabilities. The new system will replace legacy systems for these functions, which are at or nearing end-of-life and prevent MSPB from achieving 100% electronic adjudication of appeals. The implementation of the new applications will continue through FY 2020 as we operate our legacy systems in parallel with the modernized applications prior to cutover. In addition, this will allow us to decommission most of our on-premises data center since our modernized applications will be in the cloud. Finally, we will prepare for a lifecycle refresh of laptop computers and peripherals in FY 2019 to coincide with the sunset of Windows 7 and the need to upgrade our operating system to realize the capabilities of our new core business applications.

### **External Events Affecting MSPB Operations**

There are several external matters that have occurred and may occur which have impacted and could further impact MSPB's operations in the future, which will require additional resources.

### **Impact on MSPB – Enactment of Congressional Legislation**

#### *Whistleblower Protection Enhancement Act (WPEA)*

Since the enactment of the WPEA in FY 2013, individual right of action (IRA) appeals adjudicated in the regions and PFRs to the Board have increased significantly.<sup>2</sup> In fact, 25% of all PFRs filed in FY 2018 involved claims covered by the WPEA. The WPEA also increased the complexity of adjudicating whistleblower cases. Prior to the WPEA, many whistleblower claims failed because the disclosure at issue was made to the wrongdoer or was made in the appellant's normal course of duties. Such findings were made at the first step of a three-step analysis, and thus simplified adjudication of the issues. Pursuant to the WPEA, however, such disclosures are now protected, and the legal analysis must proceed to the second and frequently third steps. Accordingly, a hearing is required in a greater number of cases and the legal analysis required for whistleblower cases under the WPEA is lengthier, more complex, and more time-consuming. Further expansions of employee rights under the WPEA have been enacted by Congress, as described below. It is probable that the number of WPEA-related cases on appeal and PFRs will continue to grow in the coming years.

#### *National Defense Authorization Act for FY 2017*

The National Defense Authorization Act (NDAA) for FY 2017 expanded MSPB's jurisdiction. It enacted the Administrative Leave Act of 2016, adding to the possible grounds on which an employee might file an appeal based on reprisal for whistleblowing because it makes placement on investigative leave for "not less than 70 work days" a personnel action. The new law also gave MSPB jurisdiction over an additional personnel action. Under 5 U.S.C. § 3322(a) and (c), if an

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<sup>2</sup> According to MSPB's Annual Reports from FY 2008 through FY 2012 (pre-WPEA enactment), the Board adjudicated an average of 67 IRA PFRs each of those fiscal years. Although MSPB has lacked a quorum since January 2017, and thus has been unable to issue decisions on PFRs, we have nonetheless tracked receipts of IRA PFRs. As reported in MSPB's APR-APP for FY 2017-2019, in FY 2017, MSPB received 147 IRA PFRs. Similarly, the regions adjudicated an average of 562 whistleblower cases per year from FY 2008 through FY 2012, and 716 per year in FY 2013 through FY 2018, a 27% increase.

employee who is under investigation resigns prior to the investigation's resolution, and the investigation results in an adverse finding about that employee, the agency head must make a permanent notation about this in the employee's official personnel file. Because this notation mechanism is mandatory and appealable, it is anticipated that numerous additional appeals and PFRs will result each year from this statute. The Act also provides appeal rights to dual status employees of the National Guard whose separation results from certain causes of action.

#### *Follow the Rules Act*

In 2017, Congress enacted the Follow the Rules Act. Prior to this Act, the general rule was that an employee must first comply with an order and then, if the individual disagrees with it, register their complaint or grievance later (except in certain limited circumstances, such as when obedience would cause them irreparable harm, or the order would require them to violate a law). The Follow the Rules Act now permits an employee to refuse to obey an order that would require them to violate a law, rule, or regulation. This includes agency-specific rules and regulations, and it is anticipated that this will be the subject of a great deal of litigation when agencies attempt to discipline employees for refusing to obey an order.

#### *Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017*

The Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, among other things, created a 14<sup>th</sup> prohibited personnel practice over which MSPB has jurisdiction in whistleblower reprisal cases—it prohibits access to the medical records of another employee or applicant for employment “as a part of, or otherwise in furtherance of, any conduct described” in the other prohibited personnel practices listed in the 5 U.S.C. § 2302(b). A claim that access was made in furtherance of conduct described at (b)(8) and (b)(9) (except (b)(9)(ii)) would allow for MSPB review. Further, this law requires agency heads to propose disciplinary action against supervisors who are found to have engaged in whistleblower retaliation. Disciplinary action against the retaliating individual may lead to more appeals and PFR filings with MSPB.

#### *Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017*

In 2017, Congress enacted the Department of Veterans Affairs (DVA) Accountability and Whistleblower Protection Act of 2017 (2017 DVA Act). This law essentially replaced the Veterans Access, Choice, and Accountability Act of 2014 for purposes of the DVA's Senior Executive Service appeals and changed the requirements for appeals of adverse actions taken against DVA employees, including how MSPB processes those appeals. Among the Act's other significant changes, it lowers the standard of proof for all DVA adverse actions from preponderant to substantial evidence and may eliminate MSPB's ability to mitigate penalties. Lowering its burden of proof and removing the possibility of mitigation would significantly increase the DVA's chances of prevailing in MSPB appeals, which may lead it to take more appealable actions, in turn increasing appeals and PFRs from DVA employees.

Further, 38 U.S.C. § 731(a) provides for mandatory disciplinary actions against supervisory DVA employees “whom the Secretary, an AJ, the [MSPB], Office of Special Counsel (OSC), an adjudicating body provided under a union contract, a Federal judge, or the Inspector General of the Department determines committed a prohibited personnel action.” MSPB has jurisdiction over suspensions of more than 14 days, demotions, or removals taken under 38 U.S.C. § 731(a). For the purposes of this new basis for taking adverse actions against DVA supervisory employees, the Act also expands the definition of what MSPB has previously viewed as a covered personnel action from

those listed in 5 U.S.C. § 2302 to include matters like conducting a negative peer review, opening a retaliatory investigation, or taking a personnel action against an employee relating to participating in an audit or investigation by the Comptroller General. As a result, DVA may take more disciplinary actions against supervisors and managers, which may lead to more initial appeals and PFRs filed with MSPB.

#### *National Defense Authorization Act for Fiscal Year 2018*

Numerous additions to MSPB's jurisdiction were made in the OSC reauthorization section of the NDAA for FY 2018. Section 1097(c)(1)(A) expands protected activity under 5 U.S.C. § 2302(b)(9)(C) from cooperating with or disclosing information to an agency's Inspector General to now include "any other component responsible for internal investigation or review." Further, pursuant to § 1097(c)(1)(B), disclosures made before an individual is appointed or applied for a position are now protected (5 U.S.C. § 2302(f)(1)(F)). Accordingly, more whistleblower reprisal appeals and PFRs will likely result.

#### *All Circuit Review Act of 2018*

As part of the WPEA, on a pilot basis, Congress permitted appellants with cases involving whistleblower reprisal or other activities protected by the WPEA to appeal MSPB's decisions to any Federal circuit court with competent jurisdiction, rather than to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) alone, as had been the case previously. On July 7, 2018, and retroactive to November 26, 2017, Congress made permanent the authorization for appellants to file petitions for judicial review of MSPB's decisions in WPEA-covered cases with any Federal circuit court with competent jurisdiction. This will complicate adjudication of WPEA-covered appeals at the regional and PFR levels because rather than being bound to follow legal precedent from one court—the Federal Circuit—MSPB is now subject to being bound to follow the legal precedent from multiple Federal circuit courts, which may conflict with one another.

#### *Summary of Statutory Changes Affecting the Board*

In summary, we believe that, in light of the external factors outlined above, the new Board Members can realistically expect to receive approximately 1,200 new PFRs in FY 2020 (not including the cases that are already before the Board) and that the number and complexity of appeals received in the regional and field offices may also increase. To be prepared to face these challenges while maintaining the balance between high quality and timely decisions, it will be crucial to ensure that there is a sufficient number of AJs and Headquarters adjudication staff (who draft the proposed PFR decisions for the Board Members) who have the necessary competencies, knowledge, and training to perform their work efficiently. Additionally, these many statutory changes make it essential to have a strong studies program to ensure that the Federal workforce continues to be managed under the MSPs and free from PPPs.

### **Impact on MSPB – Workload Resulting from Government-wide Budget Reductions**

It is unclear whether Government-wide budget reductions will occur in FY 2020 and beyond. If they do, the budget decrease will potentially cause furloughs, early retirement incentives (Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payment (VSIP)), and the increased use of reductions in force (RIFs) by agencies, all of which would lead to an increase in appeals and PFRs because such actions may be appealed to MSPB. In addition, MSPB could be looking at the same scenario if we are held to a 10% budget reduction from our FY 2019

appropriation level. This will have a devastating impact on MSPB's ability to meet the goals outlined in our Strategic Plan and Annual Performance Plan for FY 2020.

### **Impact on MSPB – Increase in Federal Employee Retirements**

Among other changes in the demographics of the Federal workforce, the number of Federal employees eligible to retire, and the number of employees being added to the retirement rolls are increasing. As noted in the MSPB Annual Performance Report-Annual Performance Plan (APR-APP) for FY 2018-2020, the number of retirement appeals filed with MSPB rose each year from 2011 to 2015. OPM's retirement claims are up nearly 16% from FY 2017, which means our appeals and PFRs for retirement cases will likely increase as OPM processes those retirements.

### **Impact on MSPB – Presidential Executive Orders**

#### *Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles*

Under Executive Order (EO) 13839, "agencies shall not agree to erase, remove, alter, or withhold from another agency any information about a civilian employee's performance or conduct in that employee's official personnel records, including an employee's Official Personnel Folder and Employee Performance File, as part of, or as a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action." The quoted provision of EO 13839 appears to disallow not only "clean record" settlements, i.e., settlements in which the appellant resigns in return for the agency removing from the appellant's record documentation of the adverse personnel action the appellant suffered, but also any settlement agreement in which an action is mitigated, changed to a no-fault reason, or in any way changed or corrected without admission of error by the agency. Clearly, that provision drastically limits the potential for reaching agreement and settling cases on terms both parties might otherwise find appropriate. This will decrease the number of settlements the parties before MSPB might reach and increase the number of hearings and the amount of related processing AJs will have to conduct in those cases that otherwise may have settled.

## **FY 2020 Budget Request**

### **Appropriation Language**

For necessary expenses to carry out functions of the U.S. Merit Systems Protection Board pursuant to Reorganization Plan Numbered. 2 of 1978, the Civil Service Reform Act of 1978, and the Whistleblower Protection Act of 1989 (5 U.S.C. § 5509 note), as amended, including services as authorized by 5 U.S.C. § 3109, rental of conference rooms in the District of Columbia and elsewhere, hire of passenger motor vehicles, direct procurement of survey printing, and not to exceed \$2,000 for official reception and representation expenses, \$44,490,000, to remain available until September 30, 2021, and in addition not to exceed \$2,345,000, to remain available until September 30, 2021, for administrative expenses to adjudicate retirement appeals to be transferred from the Civil Service Retirement and Disability Fund in amounts to be determined by the U.S. Merit Systems Protection Board.

The Board has authority to adjudicate appeals from a final administrative action or order affecting the rights or interests of an individual under 5 U.S.C. § 8347(d) (the Civil Service Retirement System) and 5 U.S.C. § 8461(e) (the Federal Employees' Retirement System). Pursuant to 5 U.S.C. § 8348(a)(3), the Fund is made available, subject to such annual limitation as Congress may prescribe, for any expenses incurred by the Board in the administration of such appeals.

### **Strategic Goals and Objectives**

Our FY 2020 Congressional Budget Justification is structured on the basis of the Board's Strategic Plan. The agency's performance goals cover the critical components of two strategic goals, and our performance measures support the Board's ability to manage and report performance over time. The strategic goals and objectives are:

#### **Strategic Goal 1: Serve the public interest by protecting Merit System Principles and safeguarding the civil service from Prohibited Personnel Practices.**

##### **Strategic Objectives:**

1A: Provide understandable, high-quality resolution of appeals supported by fair and efficient adjudication and alternative dispute resolution (ADR) processes.

1B: Enforce timely compliance with MSPB decisions.

1C: Conduct objective, timely studies of the Federal merit systems and Federal human capital management issues.

1D: Review and act upon the rules, regulations, and significant actions of the Office of Personnel Management, as appropriate.

#### **Strategic Goal 2: Advance the public interest through *education* and *promotion* of stronger merit systems, *adherence* to Merit System Principles, and *prevention* of Prohibited Personnel Practices.**

**Strategic Objectives:**

2A: Inform, promote, and/or encourage actions by policy-makers, as appropriate, that strengthen Federal merit systems laws and regulations.

2B: Support and improve the practice of merit, adherence to MSPs, and prevention of PPPs in the workplace through successful outreach.

2C: Advance the understanding of the concept of merit, the MSPs, and the PPPs through the use of educational standards, materials, and guidance established by MSPB.

**FY 2020 Request by Object Class**

MSPB’s FY 2020 request of \$46,835,000 includes the OPM transfer of \$2,345,000 from the Civil Service Retirement and Disability Fund and reflects no increase in funding as compared to the FY 2019 enacted level. With this level of funding, the Board will continue to maintain quality services in support of the agency functions and have the ability to continue to meet the goals and objectives of the strategic plan in an effective and efficient manner. Any reductions will significantly impact MSPB’s ability to meet its mission in protecting the MSPs and promoting an effective Federal workforce free of PPPs.

As a result of OMB’s memorandum M-17-22, which requires Federal agencies to recognize savings, MSPB has worked diligently to identify and/or address reforms to reduce costs. In meeting the requirement of this guidance, adequately funding the Board is critical to protecting the Federal merit systems, ensuring due process, promoting the MSPs and preventing PPPs Government-wide.

A discussion of our changes from the FY 2019 Enacted level is outlined below:

***Personnel Compensation & Benefits – an increase of \$1,150,000***

<b>MOC</b>	<b>Description</b>	<b>FY 2019 Enacted (000)</b>	<b>FY 2020 Request (000)</b>	<b>Increase (decrease) over FY 2019 (000)</b>
11	<b>Personnel Compensation</b>	<b>\$27,000</b>	<b>\$27,960</b>	<b>\$960</b>
12	<b>Benefits</b>	<b>\$7,700</b>	<b>\$7,890</b>	<b>\$190</b>

Approximately 80% of MSPB’s funding is for personnel compensation and benefit expenses, which make up the largest amount of our budget request. The increase of funding represents the cost to maintain the 235 FTE staffing level. As MSPB recognizes the increasing pressure to reduce costs, our flat-line budget request incorporates proposed Federal pay increases. Any reduction in personnel compensation and benefit resources will adversely affect our ability to hire and maintain a highly qualified workforce. The 235 FTE level is necessary to perform the mission-critical work of the agency.

***Travel & Transportation of Persons – no change***

<b>MOC</b>	<b>Description</b>	<b>FY 2019 Enacted (000)</b>	<b>FY 2020 Request (000)</b>	<b>Increase (decrease) over FY 2019 (000)</b>
21	Travel & Transportation of Persons	\$280	\$280	\$0

As travel costs have stabilized over the past three years due to our increased efforts to use video teleconferencing, no change is requested in MSPB’s budget request. There is still a need for AJs to travel to hearing sites located a considerable distance from the various regional offices. Additionally, as a result of the WPEA and the passage of the All Circuit Review Act, which extends to all U.S. circuit courts, jurisdiction over appeals covered by the WPEA, MSPB’s attorneys may be required to travel to various Federal courts of appeals to represent the agency—something that was rarely required before the enactment of the WPEA. We have little control over the number of hearings or oral arguments that might require travel.

***Transportation of Things – no change***

<b>MOC</b>	<b>Description</b>	<b>FY 2019 Enacted (000)</b>	<b>FY 2020 Request (000)</b>	<b>Increase (decrease) over FY 2019 (000)</b>
22	Transportation of Things	\$35	\$35	\$0

This category covers freight related costs and various courier services.

***Rent, Communications, & Utilities – a decrease of \$181,000***

<b>MOC</b>	<b>Description</b>	<b>FY 2019 Enacted (000)</b>	<b>FY 2020 Request (000)</b>	<b>Increase (decrease) over FY 2019 (000)</b>
23	Rent, Communications & Utilities	\$4,465	\$4,284	(\$181)

The agency makes rental payments to the General Services Administrations (GSA) for office space in our Washington, D.C. Headquarters; as well as all of our regional and field offices. Our request includes an \$181,000 decrease based on projected decrease in the Headquarters’ rent costs.

*Printing – no change*

<b>MOC</b>	<b>Description</b>	<b>FY 2019 Enacted (000)</b>	<b>FY 2020 Request (000)</b>	<b>Increase (decrease) over FY 2019 (000)</b>
24	<b>Printing</b>	\$75	\$75	\$0

Two Government Publishing Office (GPO) printing programs (copying case files and printing our *Issues of Merit* newsletters) are used by MSPB. Though the expense is minimal, it is essential to the work of the agency and is specifically designed for MSPB.

*Other Contractual Services – a decrease of \$247,000*

<b>MOC</b>	<b>Description</b>	<b>FY 2019 Enacted (000)</b>	<b>FY 2020 Request (000)</b>	<b>Increase (decrease) over FY 2019 (000)</b>
25	<b>Other Contractual Services</b>	\$3,685	\$3,438	(\$247)

This object class includes the Agency's Reimbursable Service Agreements (RSA) with the U.S. Treasury Department's Bureau of Fiscal Service (BFS) for accounting, purchasing, and travel-related services; our RSA with the U.S. Department of Agriculture Animal and Plant Health Inspection Service (APHIS) for personnel services; and the National Finance Center (NFC) for payroll services. Other RSAs included in this object class fund are Administrative Law Judges (agreements with the U.S. Coast Guard and Federal Trade Commission) as well as agreements with the National Archives and Records Administration for records storage.

Additionally, this category includes court reporting services, employee training, IT hardware and software maintenance renewals, software license renewals, operation and maintenance of non-IT equipment, and miscellaneous services. Our request includes a decrease of \$247,000 in other contractual services resulting from IT applications transitioning to the cloud, along with minimal savings through our interagency agreements.

*Supplies & Materials – an increase of \$25,000*

<b>MOC</b>	<b>Description</b>	<b>FY 2019 Enacted (000)</b>	<b>FY 2020 Request (000)</b>	<b>Increase (decrease) over FY 2019 (000)</b>
26	Supplies & Materials	\$150	\$175	\$25

An increase of \$25,000 in supplies & materials is being requested to meet the inflationary increases in FY 2020.

*Equipment – a decrease of \$747,000*

<b>MOC</b>	<b>Description</b>	<b>FY 2019 Enacted (000)</b>	<b>FY 2020 Request (000)</b>	<b>Increase (decrease) over FY 2019 (000)</b>
31	Equipment	\$1,100	\$353	(\$747)

In the past, MSPB was able to replace equipment such as servers, laptops, copiers, printers, scanners, and video conferencing equipment that was damaged or end of life. As a result of budget restrictions, IT modernization, MSPB is decreasing the equipment line item by \$747,000. However, MSPB will allocate funding to replace equipment as it breaks down or exceeds its useful life.

**Budget Schedules - Schedule O - Object Classification (In Thousands of Dollars)**

	<b>FY 2018 Actual</b>	<b>FY 2019 Enacted</b>	<b>FY 2020 Request</b>	<b>Change</b>
Direct Obligations:				
Personnel Compensation	\$26,605	\$27,000	\$27,960	\$960
Civilian Personnel Benefits	7,793	7,700	7,890	190
Travel of Persons	189	280	280	0
Transportation of Things	43	35	35	0
Rental payments to GSA	3,664	3,925	3,625	(300)
Rental Payments to Others	60	65	65	0
Communications, Utilities, and Miscellaneous Charges	531	475	594	119
Printing and Reproduction	35	75	75	0
Other Services	1,458	1,425	1,313	(112)
Other Purchases of Goods and Services from Government Accounts	1,651	1,650	1,494	(156)
Maintenance of Facilities	9	35	35	0
Maintenance of Equipment	304	575	596	21
Supplies & Materials	110	150	175	25
Equipment/Lease Improvement	985	1,100	353	(747)
<b>Direct Obligation. . .</b>	<b>\$43,437</b>	<b>\$44,490</b>	<b>\$44,490</b>	<b>\$0</b>
Reimbursable Obligations. . .	2,345	2,345	2,345	0
<b>Total New Obligations. . .</b>	<b>\$45,782</b>	<b>\$46,835</b>	<b>\$46,835</b>	<b>\$0</b>

## Schedule Q - Employment Summary

	FY 2018 Actual	FY 2019 Enacted	FY 2020 Request	Change
Direct:				
Civilian full-time equivalent employment	199	220	220	0
Reimbursable:				
Civilian full-time equivalent employment	<u>15</u>	<u>15</u>	<u>15</u>	<u>0</u>
<b>Total. . .</b>	<b>214</b>	<b>235</b>	<b>235</b>	<b>0</b>

### About MSPB

MSPB has its origin in the Pendleton Act of 1883, which established the Civil Service Commission (CSC) and a merit-based employment system for the Federal Government. The Pendleton Act was passed after the assassination of President Garfield by a disgruntled Federal job seeker and grew out of the 19<sup>th</sup>-century reform movement to curtail the excesses of political patronage in Government and ensure a stable highly qualified workforce to serve the public. Over time, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate appeals. Concern over the inherent conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind the passage of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the CSC with three new agencies: MSPB as the successor to the Commission; OPM to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority to oversee Federal labor-management relations. The CSRA also codified for the first time the values of the merit systems as the MSPs and defined PPPs.

### Board Organization

The **Board Members** are the Chairman, Vice Chairman, and Board Member. Board Members are nominated by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms. No more than two of the three Board Members can be from the same political party. The Board Members adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer of MSPB. The Office Directors report to the Chairman through the Executive Director. The agency has its Headquarters in Washington, D.C. with six regional and two field offices located throughout the United States in which AJs adjudicate cases at the first level, akin to a trial court.

For FY 2019 the agency was funded at 235 Full-time Equivalents (FTEs) to conduct and support its statutory duties.

### Providing and Using Administrative Data for Statistical Purposes

MSPB does not have administrative datasets with the potential for statistical use as outlined in OMB M-14-06, "Guidance for Providing and Using Administrative Data for Statistical Purposes." However, statistical data can be found in the Board's Annual Reports and are available at [www.mspb.gov](http://www.mspb.gov). MSPB's FY 2018 Annual Report contains summaries of significant opinions issued

by our reviewing courts, case processing data for initial appeals, and summaries of other merit systems activity including articles posted on MSPB's website. It also contains a review of current OPM issues, and summaries of MSPB's congressional, legislative, international, and outreach activities, citations to our work, internal management issues, and the external factors that affect the Board's work.

## **Adjudication**

The majority of the cases brought to the Board are appeals of adverse actions—that is, removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. The next largest number of cases involves appeals of OPM and some agency determinations in retirement matters. Congress has given the Board jurisdiction to hear cases and complaints filed under a variety of other laws to include the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3330a *et seq.*; the Whistleblower Protection Act (WPA) Pub. Law. No. 101-12, 103 Stat. 16; the WPEA, Pub. Law 112-199; the DVA Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41; the NDAA for FY 2017, Pub. L. No. 114; the NDAA for FY 2018, Pub. L. No. 115-91, 131; the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73; and additional authorities listed in the regulation set out at 5 C.F.R. § 1201.3.

As detailed in that regulation, other types of actions that may be appealed to the Board include: performance-based removals or reductions in grade; denials of within-grade salary increases; reduction-in-force actions; suitability determinations; OPM employment practices (the development and use of examinations, qualification standards, tests, and other measurement instruments); denials of restoration or reemployment rights; and certain terminations of probationary employees.

An appellant files an appeal with the appropriate MSPB regional or field office having geographical jurisdiction. An AJ in the office ensures that the parties receive the due process procedures called for in the law and the Board's regulations and, after providing a full opportunity to develop the record on all relevant matters, issues an initial decision. Unless a party files a PFR with the Board, the initial decision becomes final 35 days after issuance. Any party, OPM, or OSC, may petition the full Board in Washington, D.C. to review the initial decision. The Board's decision on a PFR constitutes the final administrative decision on the appeal.

The Board's final decision, whether it is an initial decision of an AJ that has become final or the Board's decision on a PFR, may be appealed to the U.S. Court of Appeals for the Federal Circuit; or, in cases involving allegations of discrimination, to a U.S. district court or the Equal Employment Opportunity Commission (EEOC). In addition, cases solely involving allegations of reprisal for whistleblowing may be appealed to any of the U.S. Circuit Courts of Appeals with competent jurisdiction.

If a party believes that the other party is not complying with an MSPB order or a settlement agreement entered into the record for MSPB enforcement, the party can file a Petition for Enforcement with the regional or field office that issued the initial decision. Once the AJ issues an initial decision, which may find compliance, non-compliance, or partial compliance, depending on the number of issues raised, either party may file a PFR with the full Board. Additionally, even if neither party files a PFR of an initial decision finding non-compliance, MSPB's regulations require

that the case be referred to the full Board to ensure that the non-complying party has reached compliance.

In addition to adjudicating cases on the merits, MSPB also provides several Alternative Dispute Resolution (ADR) services to assist parties in resolving their cases. Use of these services is voluntary, provides the parties more control of the process, and can result in effective resolution of a case. In addition, resolving a case through ADR procedures can save time and reduce costs to the appellant, agency, MSPB, and Government-wide as compared to the more formal regulations and procedures involved with adjudication on the merits.

### **Mediation Appeals Program**

The Mediation Appeals Program (MAP) offers the services of the agency's trained and certified mediators as an alternative to the formal appeal processes and procedures of MSPB's regulations. Mediators facilitate a discussion between the parties in a confidential setting to help them identify issues and barriers to agreement that will aid in resolving their disputes and settling the appeal quickly, economically, and to the benefit of all concerned. Unlike traditional mediation, MAP charges no fees. Both parties must agree to its use before the appeal will be accepted for the MAP process, and both must agree on its resolution before any settlement is concluded. Unlike the traditional appeal process, the parties control the result of the case under the skilled guidance of the mediator, who plays no role in deciding the appeal, should accord not be reached. Importantly, because almost all mediations occur near the beginning of adjudication, MAP saves time and money for the Federal employees and agencies who resolve their cases through this process.

Because of these advantages, MAP has become a popular and successful program, as shown by the fact that a greater number of cases have been mediated almost each year since the program's inception. MAP mediators are successfully settling more than half of the appeals referred to mediation. Even where the case is resolved by an AJ's decision, the mediation process often helps sharpen the parties' focus on the matters truly in dispute and the resolution they seek. When mediators were asking parties to complete evaluations at the end of each mediation, more than 95% stated they would use MAP again.

AJs also discuss settlement with the parties to the cases assigned to them for adjudication, and act as settlement judges for parties to cases assigned to other AJs who prefer that option, but MAP mediations are sought far more often than are settlement judges.

### **Merit Systems Studies and OPM Oversight**

The Board has the statutory responsibility to conduct studies of the civil service and other merit systems in the Executive Branch and submit the resulting reports to the President and Congress. The studies support strong and viable merit systems, which protect the public's interest in a high quality, professional workforce managed under the merit system principles and free from prohibited personnel practices. The studies are based on objective, independent research that assesses and evaluates Federal merit system policies, operations, and practice from a long-term perspective. This prospective function, in conjunction with the agency's adjudication of individual appeals and our authority to review human resource regulations, ensures that the Board has the full legal authority necessary to oversee Federal merit systems at both the systemic and individual level.

MSPB studies address the variety of challenges facing the Federal Government in managing its workforce.

### **Publications Issued in FY 2017 and FY 2018**

No study reports have been published since the loss of quorum in early 2017, as MSPB practice has been to issue reports under the signature of a quorum of the Board Members. However, in addition to regular editions of the *Issues of Merit* newsletter, MSPB's Office of Policy and Evaluation has issued:

*The Roles of Feedback, Autonomy, and Meaningfulness in Employee Performance Behaviors* (August 2018) uses selected data from MSPB's 2016 and 2010 Merit Principles Surveys (MPSs) to build on previous MSPB research on employee engagement and motivation. Decades of social science research show that knowledge-based workers are more likely to think creatively and be motivated to perform well when provided a balance of feedback and autonomy. Feedback can help employees to see the importance of their work and help them know what efforts are more likely to lead to success. This Research Brief discusses the roles of feedback from supervisors, autonomy, and meaningful work and demonstrates their relationship to positive employee performance behaviors.

*Improving Federal Hiring Through Better Assessment* (July 2018) summarizes MSPB research on applicant assessment, identifies 10 factors for agencies to consider when investing in better assessment, reiterates the business case for Congress to appropriate funds to OPM for the development and administration of Government-wide applicant assessments, and presents information and agency perspectives on OPM's USA Hire assessment suite.

*Update on Sexual Harassment in the Federal Workplace* (March 2018) summarizes Federal employee perceptions of sexual harassment in the workplace, based on MSPB's 2016 MPS and previous MSPB surveys. In advance of a full report on the topic, this research brief presents preliminary findings on the incidence of sexual harassment and how employees respond to harassment in advance of a full report on the topic. This publication has resulted in numerous requests from Federal agencies and Congress for additional information on MSPB's research methods and results.

*Building Blocks for Effective Performance Management* (October 2017) presents selected results from the 2016 MPS on the topic of performance management. The key finding is that organizations that believe they have the "building blocks" for performance—adequately trained supervisors, sufficient resources, and usable performance standards and measures—are less likely to report a lower incidence of poor or substandard performance and more likely to have success in identifying and correcting such performance.

*Adverse Actions: A Compilation of Articles* (January 2017) discusses selected aspects of the Title 5 system for taking adverse action (i.e., suspension, demotion, or removal) for reasons of conduct or performance. This compilation outlines, in a format geared to policymakers and practitioners, key concepts such as due process and nexus and important considerations such as the labeling of charges, assuring the independence and discretion of the deciding official, and preventing and rectifying procedural errors.

*The Merit System Principles: Keys to Managing the Federal Workforce* (January 2017) provides an orientation to the MSPs for policymakers and officials who will manage civil service employees, such as non-career Presidential appointees. This publication draws on both Office of Policy and Evaluation research and MSPB decisions to explain and illustrate the nine MSPs to help Federal officials exercise personnel authority responsibly and lead Federal employees fairly and effectively.

*Addressing Misconduct in the Federal Civil Service: Management Perspectives* (December 2016) presents information about managers' knowledge of the discipline and appeals system, how they use that system, and what forces may create barriers to action. The publication was intended for policymakers who may be considering changes to the discipline and appeals system.

## **Reports Prepared for Board Member Review**

*Improving Federal Leadership Through Better Probationary Practices* examines how the supervisory and managerial probationary periods are being used by agencies. The probationary period allows agencies to observe a new hire's performance before finalizing the appointment. When used properly, the probationary period can help ensure that the Federal Government has qualified and competent leaders. MSPB found that agencies rarely use the probationary period to take action against unsuccessful leaders. Some of the identified barriers can be addressed by changing agency practices, such as extending the length of probationary periods, which can be done at the agency head's discretion. Others, however, do not have easy solutions. Therefore, the most effective way to improve the cadre of new supervisors is to reduce the likelihood of making a bad hire in the first place, including improving hiring, employee development, and supervisory preparation. (Related MSPs: 2, 5, 6, and 7.)

*Perceptions of Prohibited Personnel Practices: An Update.* The PPPs are a series of proscribed actions, codified at 5 U.S.C. § 2302(b), which were augmented in 2010 and 2017. This report presents data from the successive MSPs, which show that employee perceptions of PPPs have increased since 2010. Notably, only 54% of respondents in 2016 indicated that they had observed no PPPs, compared to 78% in 2010. The report also presents survey data related to the 13<sup>th</sup> PPP concerning non-disclosure agreements (NDAs), with many employees indicating that their agency's NDAs did *not* include the required language about whistleblowing rights. (Related MSPs: 1, 2, 4, 8, and 9.)

*Preventing and Remedying Poor Performance in the Federal Civil Service.* This report discusses causes of poor performance (as defined in Chapter 43 of Title 5), the effectiveness of various methods to improve poor performance, and the ability of agencies to remove poor performers from positions in which they are not meeting requirements. Key findings are that poor performance often has roots in selection, placement, or employee commitment, and (consequently) that common measures to improve performance, such as clarifying expectations and coaching, often do not succeed. (Related MSPs: 2, 4, 5, 6, 7, and 8.)

Several studies from the published research agenda are also in progress, in various stages of research or drafting.

## **Information Technology**

MSPB's primary mission is to provide for independent adjudication of appeals of personnel actions for Federal employees. Generally, about 50% of appeals filed with the agency are from *pro se* appellants—employees representing themselves. All appellants (represented or not) are expected to file an appeal and to respond to orders in a timely manner or risk having their cases dismissed. The Board's electronic filing system, e-Appeal Online, allows Federal agencies and appellants instant access to party filings and Board issuances through e-Appeal as soon as they are filed or issued. Parties who elect to file electronically through e-Appeal receive email notification of orders and issuances from MSPB instantaneously, rather than having to wait for service by regular mail.

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

## **Human Resources**

MSPB contracts with the U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS) for selected human resources (HR) administrative and operational services through an interagency agreement. The agreement is developed between the two agencies and monitored within MSPB's Office of Financial and Administrative Management, which is located in Headquarters. The services listed in the agreement are not meant to be all-inclusive and the two agencies work together in a mutually cooperative manner to handle HR issues that arise that may not be specifically addressed in the interagency agreement.

MSPB contracts with Federal Occupational Health (FOH), a service unit within the U.S. Department of Health and Human Services' Program Support center, to provide basic occupational health services to all of its employees throughout the country. In addition, the Agency contracts with FOH to offer all of its employees access to the employee assistance program (EAP). The EAP assists the agency in addressing productivity issues by providing both prevention and intervention for employee problems, which ultimately improves employee health and functioning, as well as workplace performance. The Board's agreement with FOH provides for a comprehensive EAP, delivering short-term, problem-focused counseling and a variety of services. While many health and wellness activities and accommodations are not equally available to each Board employee with respect to workplace or onsite availability of services, the agency does strive to ensure that each employee understands that it fully supports a healthy and safe work place for all employees.

## **Financial Management**

MSPB has initiated cross-servicing agreements with U.S. Department of Treasury, Bureau of the Fiscal Service (BFS) for its accounting, financial auditing, purchasing, and travel-related services and support. BFS has processed our administrative payments and prepared our accounting reports since FY 2002. The Board has received unqualified/unmodified opinions on its audits since the agency has been subject to audits of its financial statements.

MSPB also has an agreement in place with APHIS for personnel services and the USDA National Finance Center (NFC) for processing of payroll and payroll-related activities including earnings and leave statements, W-2 information, and debt management. Our cross-servicing relationships with

these organizations have provided MSPB with timely responses and more accurate processing of information from larger pools of knowledgeable staff than would be possible with smaller in-house staff. BFS, APHIS, and NFC have the resources to stay current with the latest technologies, so they can provide these services more efficiently and economically.

### **Equal Employment Opportunity**

MSPB's Office of Equal Employment Opportunity (OEEO) plans, implements and evaluates the agency's affirmative employment programs and initiatives, advises senior executives, managers and supervisors about these programs and initiatives and provides all employees training on rights and remedies available under the anti-discrimination laws and whistleblower protection laws. OEEO provides equal employment opportunity counseling, formal complaint processing, and alternative dispute resolution services to current and former employees as well as applicants who allege discrimination. OEEO also resolves and/or processes complaints filed by individuals who allege discrimination based on disability in their access to MSPB programs and activities. OEEO evaluates and reports MSPB's complaint data workforce demographics by occupation and grade to Congress, the EEOC, OPM and other external stakeholders.

# Organization Chart

