



An Introduction to the Merit Systems Protection Board

Fall 2007



U.S. MERIT SYSTEMS PROTECTION BOARD

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The Board's Mission

The mission of the Merit Systems Protection Board is:

To protect Federal merit systems and the rights of individuals within those systems.

MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals and by conducting merit systems studies. In addition, MSPB reviews the significant actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit.

Background

The Board's mission is rooted in the Pendleton Act, passed by Congress in 1883, which established the Civil Service Commission and a merit-based employment system for the Federal Government. The Pendleton Act grew out of the 19th century reform movement to curtail the excesses of political patronage in Government. Initially, the Civil Service Commission focused on rules for merit selection. During the first half of the 20th century, however, the Commission developed into an omnibus personnel agency, overseeing a full range of employment issues, as well as resolving employee appeals of agency adverse personnel actions.

Concern over the inherent conflict of interest in the Commission's role as both rulemaker and judge was a principal motivating force behind the enactment by Congress of the Civil Service Reform Act (CSRA) in 1978. The Act replaced the Civil Service Commission with three new independent agencies: the MSPB, which assumed the employee appeals functions of the Commission and was given new oversight responsibilities to perform merit systems studies; the Office of Personnel Management, which manages the Federal

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work force; and the Federal Labor Relations Authority, which oversees Federal labor-management relations.

The CSRA also created the Office of Special Counsel, which investigates allegations of prohibited personnel practices, prosecutes violators of civil service rules and regulations, and enforces the Hatch Political Activities Act. The Special Counsel became an independent Executive branch agency in 1989.

The Members of the MSPB

The bipartisan Board consists of a Chairman, a Vice Chairman, and a Member, with no more than two of its three members from the same political party. Board members are appointed by the President and confirmed by the Senate, serve overlapping, nonrenewable 7-year terms, and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

If you wish to send e-mail to the Board, the address is mspb@mspb.gov. You may also obtain information by writing: U.S. Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419-0001 or calling (202) 653-7200. You may also call toll free and leave a message at **1-800-209-8960**.

Please see [MSPB at Your Fingertips](#) at the end of this publication to find out how to locate Board decisions, case summaries, press releases, addresses of MSPB regional and field offices, and other information about the Board.

The Merit Systems Principles

The CSRA, for the first time, codified (5 U.S.C. § 2301) the basic merit principles governing Federal personnel management. Summarized, they are:

- Recruiters should seek to achieve a work force made up of qualified people from all segments of society, and selection

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and promotion should be based solely on merit, after fair and open competition.

- All employees and applicants should be treated fairly, without discrimination, and with proper regard for their privacy and constitutional rights.
- Equal pay should be provided for work of equal value, with appropriate consideration for the rates paid by private sector employers. Appropriate incentives and recognition should be provided for excellent performance.
- Employees should maintain high standards of integrity, conduct, and concern for the public interest.
- The Federal work force should be used efficiently and effectively.
- Retention should be based on performance, inadequate performance should be corrected, and employees who cannot or will not improve their performance to meet required standards should be separated.
- Employees should receive effective education and training in order to achieve better organizational and individual performance.
- Employees should be protected against partisan politics and may not use their offices for partisan political purposes.
- Employees who legally disclose information evidencing wrongdoing (known as "whistleblowing"), should be protected from reprisal. A "whistleblower" provides information he or she reasonably believes evidences:
 - A violation of any law, rule or regulation;
 - Gross mismanagement;
 - A gross waste of funds;
 - An abuse of authority;
 - A substantial and specific danger to public health; and,
 - A substantial and specific danger to public safety.

Prohibited Personnel Practices

The CSRA (5 U.S.C. § 2302) also set forth prohibited personnel practices that, when engaged in, are a basis for disciplinary action against responsible agency officials. The Board does not have jurisdiction over alleged prohibited personnel practices and Federal employees should contact the [Office of the Special Counsel](#). However, an employee who appeals a personnel action to the Board may raise the *affirmative defense* that the action resulted from a prohibited personnel practice. Summarized, the prohibited personnel practices are:

- Discriminating on the basis of race, color, religion, sex, national origin, age, disability, marital status, or political affiliation;
- Soliciting or considering statements concerning a person who is being considered for a personnel action unless the statement is based on personal knowledge and concerns the person's qualifications and character;
- Coercing the political activity of any person, or taking any action as a reprisal for a person's refusal to engage in political activity;
- Deceiving or willfully obstructing anyone from competing for employment;
- Influencing anyone to withdraw from competition for any position to help or hurt anyone else's employment prospects;
- Giving unauthorized preferential treatment to any employee or applicant;
- Nepotism;
- Taking or failing to take, or threatening to take or failing to take, a personnel action because of an individual's legal disclosure of information evidencing wrongdoing ("whistleblowing");

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- Taking or failing to take, or threatening to take or failing to take, a personnel action because of an individual's exercising any appeal, complaint, or grievance right; testifying or lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right; cooperating with or disclosing information to an agency Inspector General or the Special Counsel; or refusing to obey an order that would require the individual to violate a law;
- Discriminating on the basis of personal conduct that does not adversely affect the performance of an employee or applicant or the performance of others, except that an employee or applicant's conviction of a crime may be taken into account in determining suitability or fitness; and
- Taking or failing to take any other personnel action if the act or omission would violate any law, rule, or regulation implementing or directly concerning the merit system principles.
- An additional prohibited personnel practice -- *for purposes of disciplinary action only* – is violating a veterans' preference provision in connection with a personnel action.

MSPB Appellate Jurisdiction

The CSRA authorized the Board to hear appeals of various agency actions, including appeals previously heard by the Civil Service Commission and appeals arising from new causes of action created by the CSRA. Certain other actions may be appealed to the Board under OPM regulations. Since a principal purpose of the CSRA was to streamline Federal personnel management, *Congress did not make all personnel actions appealable to the Board. Some actions that are not appealable to the Board may be appealable to OPM or may be covered by agency grievance procedures.*

Actions that May Be Appealed to the Board

The majority of the cases brought to the Board are appeals of agency adverse actions--that is, removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. Appeals of OPM determinations in retirement matters are also a major category of appeals. 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, OPM 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.

Special procedures may be required where the employee alleges discrimination in connection with an action otherwise appealable to the Board (a "mixed case").

While the Board has jurisdiction over mixed case appeals, the employee, if dissatisfied with the final decision of the Board, may ask the Equal Employment Opportunity Commission (EEOC) to review the Board's decision in regard to the Board's findings concerning claims of discrimination. If the EEOC and the Board cannot reach agreement, the case is referred to the Special Panel for final resolution. (The Special Panel is made up of a Chairman appointed by the President, one member of the Board appointed by the MSPB Chairman, and one member of the Commission appointed by the EEOC Chairman.) In order for the Board to review a discrimination complaint, the discrimination must be related to an action that is appealable to the Board. Otherwise, discrimination complaints should be pursued through the agency's internal procedures and then to the EEOC.

The Board also hears complaints of alleged violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans Employment Opportunities Act (VEOA), and complaints from White House employees of alleged violations of civil rights and employment laws under the Presidential and Executive Office Accountability Act.

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If a personnel action involves a *prohibited personnel practice*, regardless of whether the action is otherwise appealable to the Board, *the employee may file a complaint with the [Office of Special Counsel](#)*, asking that the Special Counsel seek corrective action from the Board. Under the Whistleblower Protection Act of 1989, an individual who alleges that a personnel action was taken, or not taken, or threatened, because of "whistleblowing" may seek corrective action from the Board directly if the Special Counsel does not seek corrective action on his or her behalf. Please see [Questions and Answers About Whistleblower Appeals](#) for more specific information on whistleblowing claims.

Additional jurisdictional issues arise when the employee is a member of a bargaining unit that has a *negotiated grievance procedure* covering any of the actions that may be appealed to the Board. In such instances, *the employee normally must pursue a grievance through the negotiated grievance procedure*. There are *three exceptions* to this general rule, however:

- When the action is an adverse action under Title 5, Chapter 75 of the United States Code or a performance-based action under Title 5, Chapter 43 of the United States Code;
- When the employee raises an issue of prohibited discrimination in connection with the action; and
- When the employee alleges that the action was the result of a prohibited personnel practice other than discrimination.
- If any of these exceptions applies, the employee has the choice of using the negotiated grievance procedure or filing an appeal with the Board, but may not do both. (Under the terms of some union contracts, Postal Service employees may be able to pursue a grievance under the negotiated grievance procedure and also file an appeal with the Board.)

Employees Who May Appeal to the Board

For the Board to have jurisdiction over any appeal of a personnel action, *it must possess jurisdiction over both the action and the employee filing the appeal.* Whether employees are eligible to appeal specific actions depends on the law and regulations governing those actions.

- Generally, employees who may appeal adverse actions and performance-based actions are those in the competitive service who have completed a probationary period and those in the excepted service (other than the Postal Service) with at least two years continuous service.
- Postal Service employees who may appeal adverse actions are preference-eligible employees with at least one year of continuous service and certain Postal Service supervisors, managers, and employees engaged in personnel work.
- Probationary employees have limited appeal rights. They may appeal a termination based on political affiliation or marital status, and if the termination was based on conditions arising before employment, they also may appeal on the grounds that the termination was not in accordance with regulations.
- Employees and annuitants may appeal OPM decisions affecting entitlements under the retirement systems.
- Certain actions, such as OPM suitability determinations and OPM employment practices, may be appealed by applicants for employment.
- In some cases, classes of employees, such as political appointees, are excluded.
- Employees of specific agencies, such as the intelligence agencies and the General Accountability Office, are excluded with respect to certain actions.

An appellant files an appeal with the appropriate MSPB regional or field office having geographical jurisdiction. An administrative judge in the regional or field office issues an initial decision.

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Unless a party files a petition for review with the Board, the initial decision becomes final 35 days after issuance. Any party, or OPM or the Special Counsel, may petition the full Board to review the initial decision. The Board's decision on a petition for review is final and constitutes final administrative action.

A listing of addresses of [MSPB regional and field offices](#) is available on the MSPB Website.

MSPB Original Jurisdiction

Cases that arise under the original jurisdiction of the Board include:

- Disciplinary actions brought by the Special Counsel alleging a violation of the Hatch Act;
- Corrective and disciplinary actions brought by the Special Counsel against agencies or Federal employees who are alleged to have committed prohibited personnel practices, or to have violated certain civil service laws, rules or regulations;
- Requests for stays of personnel actions alleged by the Special Counsel to result from prohibited personnel practices;
- Certain proposed actions brought by agencies against administrative law judges;
- Requests for review of regulations issued by OPM or of implementation of OPM regulations by an agency; and
- Informal hearings in cases involving proposed performance-based removals from the Senior Executive Service.

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While the number of original jurisdiction cases that come before the Board is small, these cases often involve systemic issues with broad implications for both employees and agencies.

The relationship of the Special Counsel to the Board is like that of a prosecutor to a judge; the Special Counsel prosecutes cases before the Board. If, after an investigation, the Special Counsel determines that there are reasonable grounds to believe that a violation has occurred or may occur, the Special Counsel may bring a corrective action against an agency. The Special Counsel may bring a disciplinary action against an employee alleged to have committed a violation. The Special Counsel may also seek a stay of a personnel action if there are reasonable grounds to believe that the action was taken, or is about to be taken, as a result of a prohibited personnel practice.

The *Board's choice of remedies or corrective actions* depends on the type of case before it. In corrective action cases, the Board may order the agency to take the necessary steps to correct the prohibited personnel practices or pattern of such practices. In disciplinary actions other than those involving Hatch Act violations, the Board may order the employee's removal, reduction in grade, suspension, reprimand, debarment from Federal employment for a period not to exceed five years, or a fine up to \$1,100. In Hatch Act cases involving Federal or District of Columbia government employees, the Board may order removal of the employee or, if the Board unanimously finds that removal is not warranted, it may order a suspension of not less than 30 days. In Hatch Act cases involving state or local government employees, the Board may determine only whether the employee's removal is warranted.

Most original jurisdiction cases are processed at Board headquarters. Special Counsel disciplinary actions and actions against administrative law judges are heard by an Administrative Law Judge. Special Counsel corrective actions and Senior

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Executive Service (SES) performance-based removal cases may be assigned to an Administrative Law Judge or to a judge in a regional or field office. In Special Counsel corrective and disciplinary actions, and in actions against administrative law judges, an initial decision is issued, and any party may petition the Board to review the decision. The Board acts on Special Counsel stay requests and petitions to review OPM regulations. In Senior Executive Service performance-based removal cases, there is no action by the Board and any recommendation issued is not binding on the agency.

Judicial Review

Final Board decisions may be appealed to the United States Court of Appeals for the Federal Circuit. The only exceptions are:

- Hatch Act cases involving state or local government employees, which may be appealed to a U.S. district court, and
- Cases involving allegations of discrimination--Appellants may appeal the Board's decision to the *United States Court of Appeals for the Federal Circuit*, to a U.S. district court, or to the Equal Employment Opportunity Commission. An appellant who files an appeal of a mixed case with the Court of Appeals for the Federal Circuit waives his or her right for court review of discrimination issues.

The Director of OPM may petition the full Board for reconsideration of a final decision and may also seek judicial review of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.

Merit Systems Studies

The CSRA made the Board responsible for conducting special studies of the civil service and other merit systems. In carrying out this responsibility, the Board provides a neutral, independent assessment of the health of the merit systems. The Board's reports on the results of its studies are addressed to the President and the Congress. The reports provide a long-range strategic planning mechanism for human resources issues. They are reviewed by a large secondary audience of Federal agency officials, employee and public interest groups, labor unions, academicians, and other individuals and organizations with an interest in public personnel administration.

The Board's studies, usually government-wide in scope, are conducted through a variety of research methods, including mail and telephone based survey research, on-site systems reviews, written interrogatories, formal discussions with subject matter experts, computer-based data analysis, and reviews of secondary source materials.

The Board's first merit system study, undertaken in response to a specific request from Congress, was to determine the extent and effect of sexual harassment in the Federal workplace. That landmark 1981 study was updated in 1988 and 1995 reports that also received widespread attention. The Board has administered the Merit Principles survey periodically since 1983 to determine the views of Federal employees on a wide variety of civil service issues.

Over the years, the Board has reported the good news--and the bad--on a range of issues critical to the operation of a merit system. The Board has taken an in-depth look at issues such as the Government's recruiting and selection processes, the quality of the work force, performance management, work force diversity, supervisory selection, employee development, temporary employees, and poor performers. On these and other issues, the MSPB has established benchmarks that are used to guide the inquiries of others both within and outside the Government.

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Reports on OPM significant actions have reviewed the revised OPM regulations that make performance a more significant factor in reduction-in-force actions, the impact on the merit principles of the Schedule B hiring authority for entry-level professional and administrative career employees, the expanded authority for agencies to make temporary appointments, and the operation of Federal performance management programs.

In light of increasing decentralization of personnel authorities, recent Board studies are focusing on providing practical recommendations concerning issues that are particularly relevant to Federal employees and managers. This back-to-basics approach is intended to enhance the ability of the Executive branch to recruit, select, motivate, and manage a highly qualified work force.

In addition to its reports and OPM oversight reviews, the Board produces a periodic newsletter, *Issues of Merit*, which advocates merit systems and human capital management reform efforts and gives practical advice for human resources professionals, and present specific analyses of ongoing studies.

MSPB At Your Fingertips

Regional and Field Offices

A listing of MSPB regional and field offices is available at the MSPB Website. You may contact those offices to file an appeal or if you have questions or need additional information.

Headquarters

For information on filing a petition for review with the Board, you may contact the Clerk of the Board, U.S. Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419-0001. You may send e-mail to Board Headquarters at mspb@mspb.gov, or by calling (202) 653-7200. You also may call, toll free, and leave a message at 1-800-209-8960.

Board Regulations

The Board's regulations are located in Title 5 of the Code of Federal Regulations (CFR) at 5 CFR, Chapter II, Parts 1200 through 1210 (5 CFR Part 1200). They are available on the MSPB website as well as at any Board office, agency libraries, agency personnel or administrative offices, and most public libraries. [Part 1201](#) describes the Board's appellate procedures and requirements. [Part 1208](#) describes the special provisions applying to USERRA and VEOA cases, and [Part 1209](#) describes the special provisions applying to "whistleblower" cases.

How to Access Information about the Board on its Website

Board decisions, Board regulations, forms for filing appeals or petitions for review, Office of Policy and Evaluation reports, a listing of regional and field offices and their geographic jurisdictions, and background information about the MSPB are available on the MSPB Website.

Customer Service Standards

MISSION I -- Adjudication of Appeals

1. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.
2. We will issue decisions in initial appeals and on petitions for review within the time standards stated in our annual Performance Plan.
3. We will issue readable decisions based on consistent interpretation and application of law and regulation.
4. We will make our regulations easy to understand and our procedures easy to follow.
5. We will promptly and courteously respond to customer inquiries.
6. We will facilitate the settlement of appeals.
7. We will make our decisions readily available to our customers.

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MISSION II -- Oversight of the Federal Merit Systems

1. We will conduct research on topics and issues relevant to the effective operation of the Federal merit systems; perform sound, objective analysis; and where warranted, develop practical recommendations for improvement.
2. We will issue timely, readable reports on the findings and recommendations of our research and make these reports available to all interested individuals and parties.
3. We will enhance the constructive impact of our studies and reports through outreach efforts.

We will conduct surveys of our customers from time to time to see how well we are meeting these standards. However, if you have comments or suggestions concerning our service, we invite you to provide feedback at any time to the Board through the Clerk of the Board, at 1615 M Street, NW, Washington, DC 20419, telephone **(202) 653-7200**, FAX number **(202) 653-7130**.

Electronic mail may be sent over the Internet to mspb@mspb.gov. TTY users, please use the Federal Relay Service at **1-800-877-8339** to contact the Clerk of the Board.

The Board's telephone number for complaints concerning fraud, waste, and mismanagement in agency programs is **(800) 424-9121**.

Because the Board is prohibited by law from giving advisory opinions, Board personnel may not discuss with you the merits of any appeal you or another party may bring to the Board. However, Board personnel will be pleased to answer any questions you may have about Board procedures and the processing of appeals.

U.S. Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419-0001, (202) 653-7200, Toll Free 1-800-209-8960, V/TDD 1-800-877-8339 (Federal Relay Service)
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