CHAPTER 1

MSPB Structure and Jurisdiction

I. REFORM ACT

A. CAPSULE HISTORY

The 1978 Civil Service Reform Act was enacted in response to the belief of legislators and the President that the civil service was awash with employees who were not removed for incompetence or misconduct because the existing disciplinary system was too cumbersome. *See The Other Side of the Merit Coin: Removals for Incompetence in the Federal Service* (MSPB 1982). A Senate report described prior civil service legislation as:

> [a]n outdated patchwork of statutes and rules built up over almost a century. Federal management practices are antiquated in comparison with the current state of the managerial art. Research and experimentation concerning the management practices is virtually nonexistent. (1978 USCCAN pp. 2723, 2725.)

Romero v. Dept. of Army, 708 F.2d 1561, 1563 (10th Cir. 1983), observed:

> The Civil Service Reform Act of 1978 undertook to rewrite, revise and simplify the conglomeration of statutes under which the vast and unwieldy civil service system of the United States was managed.… [T]he complex rules and procedures often afforded a refuge for incompetent and inefficient employees and made it "almost impossible to remove those who were not performing."… The 1978 Act sought to remedy this condition by providing procedures whereby the agencies could more efficiently manage their operations, including the discipline or removal of employees who were found to be inefficient, incompetent, or otherwise unfit for continuing service in the agency. To protect employees from an abuse of agency action, the MSPB, a neutral body, was created. Pursuant to established rules and regulations, the MSPB was authorized to conduct hearings to determine the validity of an agency's action affecting the tenure of a civil servant's employment.

The Supreme Court intoned in *Fausto v. United States*, 484 U.S. 439, 444–46 (1988):

> A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the "outdated patchwork of statutes and rules built up over almost a century" that was the civil service system, S.Rep. No. 95-969, p. 3 (1978), U.S.Code Cong. & Admin.News 1978, p. 2723. Under that pre-existing system, only veterans enjoyed a statutory right to appeal adverse personnel action to the Civil Service Commission (CSC), the predecessor of the MSPB. 5 U.S.C. § 7701 (1976 ed.). Other employees were afforded this type of administrative review by Executive Order. Exec. Order No. 11491, § 22, 3 CFR 874 (1966-1970 Comp.), note following 5 U.S.C. § 7301 (1976 ed.) (extending CSC review to competitive service employees). Still others, like employees in respondent's classification, had no right to such review. As for appeal to the courts: Since there was no special statutory review proceeding relevant to personnel action, *see* 5 U.S.C. § 703, employees sought to appeal the decisions of the CSC, or the agency decision unreviewed by the CSC, to the district courts through the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus, *see, e.g., Taylor v. United States Civil Service Comm'n*, 374 F.2d 466 (CA9 1967), injunction, *see, e.g., Hargett v. Summerfield*, 100 U.S.App.D.C. 85, 243 F.2d 29 (1957), and declaratory judgment, *see, e.g., Camero v. McNamara*, 222 F. Supp. 742 (ED Pa.1963). *See generally* R. Vaughn, *Principles of Civil Service Law* § 5.4, p. 5–21, and nn. 13–17 (1976) (collecting cases). For certain kinds of personnel decisions, federal employees could maintain an action in the Court of Claims of the sort respondent seeks to maintain here. *See, e.g., Ainsworth v. United States*, 185 Ct. Cl. 110, 399 F.2d 176 (1968).
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> Criticism of this "system" of administrative and judicial review was widespread. The general perception was that "appeals processes [were] so lengthy and complicated that managers [in the civil service] often avoid[ed] taking disciplinary action" against employees even when it was clearly warranted. S.Rep. No. 95-969, at 9, U.S.Code Cong. & Admin. News 1978, p. 2731. With respect to judicial review in particular, there was dissatisfaction with the "wide variations in the kinds of decisions… issued on the same or similar matters," *id*., at 63, U.S.Code Cong. & Admin. News 1978, p. 2785, which were the product of concurrent jurisdiction, under various bases of jurisdiction, of the district courts in all Circuits and the Court of Claims. Moreover, as the Court of Appeals for the District of Columbia Circuit repeatedly noted, beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational. *See Polcover v. Secretary of Treasury*, 155 U.S.App.D.C. 338, 341–342, 477 F.2d 1223, 1226–1228 (1973).
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> Congress responded to this situation by enacting the CSRA, which replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration. *See* S.Rep. No. 95-969, at 4. Three main sections of the CSRA govern personnel action taken against members of the civil service. In each of these sections, Congress deals explicitly with the situation of nonpreference members of the excepted service, granting them limited, and in some cases conditional, rights.
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> Chapter 43 of the CSRA governs personnel actions based on unacceptable job performance. It applies to both competitive service employees and members of the excepted service. 5 U.S.C. § 4301. It provides that before an employee can be removed or reduced in grade for unacceptable job performance certain procedural protections must be afforded, including 30 days' advance written notice of the proposed action, the right to be represented by an attorney or other representative, a reasonable period of time in which to respond to the charges, and a written decision specifying the instances of unacceptable performance. § 4303(b)(1). Although Congress extended these protections to nonpreference members of the excepted service, it denied them the right to seek either administrative or judicial review of the agency's final action. Chapter 43 gives only competitive service employees and preference eligible members of the excepted service the right to appeal the agency's decision to the MSPB and then to the Federal Circuit. § 4303(e).
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> Chapter 23 of the CSRA establishes the principles of the merit system of employment, § 2301, and forbids an agency to engage in certain "prohibited personnel practices," including unlawful discrimination, coercion of political activity, nepotism, and reprisal against so-called whistleblowers. § 2302. Nonpreference excepted service employees who are not in positions of a confidential or policymaking nature are protected by this chapter, § 2302(a)(2)(B), and are given the right to file charges of "prohibited personnel practices" with the Office of Special Counsel of the MSPB, whose responsibility it is to investigate the charges and, where appropriate, to seek remedial action from the agency and the MSPB. § 1206.
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> Chapter 75 of the Act governs adverse action taken against employees for the "efficiency of the service," which includes action of the type taken here, based on misconduct. Subchapter I governs minor adverse action (suspension for 14 days or less), §§ 7501–7504, and Subchapter II governs major adverse action (removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less), §§ 7511-7514. In each subchapter, covered employees are given procedural protections similar to those contained in Chapter 43, §§ 7503(b), 7513(b), and in Subchapter II covered employees are accorded administrative review by the MSPB, followed by judicial review in the Federal Circuit. §§ 7513(d), 7703. The definition of "employee[s]" covered by Subchapter II (major adverse action) specifically includes preference eligibles in the excepted service, § 7511(a)(1)(B), but does not include other members of the excepted service. The Office of Personnel Management is, however, given authority to extend coverage of Subchapter II to positions in the excepted service that have that status because they have been excluded from the competitive service by OPM regulation. § 7511(c).

In words as eloquent as the topic allows, D.C. Circuit Judge Bazelon summarized the statute and the administrative structure it created, *Frazier v. MSPB*, 672 F.2d 150, 153–56 (D.C. Cir. 1982):

> The CSRA constituted the first comprehensive reform of the federal civil service system since passage of the Pendleton Act in 1883. A product of the nineteenth century progressive movement, the Pendleton Act had sought to replace the 'spoils system,' under which the President could dispense federal jobs as rewards for political patronage, with a 'merit system' that would base selection and promotion of most civil servants on competence. The Pendleton Act also established a Civil Service Commission charged both with protecting the merit principle and with managing the federal bureaucracy.
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> In subsequent years, an increasing proportion of the federal workforce was classified in the competitive service. As the Commission's management functions grew more complex, it was also compelled to elaborate a wide variety of merit system rules without guidance from Congress. Delay and inefficiency increasingly characterized the procedures required to discipline unsatisfactory employees. At the same time, several celebrated episodes suggested that efforts by employees to call attention to government waste and fraud were often inhibited by the threat of retaliatory personnel actions. The dual responsibility of the Civil Service Commission for management and merit protection seemed to pose a barrier against mitigating these problems.

In 1978, these and other concerns led President Carter to propose legislation that would significantly restructure the civil service. Among the legislative objectives identified by the President in his message to Congress were:

> To strengthen the protection of legitimate employee rights;
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> To provide incentives and opportunities for managers to improve the efficiency and responsiveness of the Federal Government; [and]
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> To reduce the redtape and costly delay in the present personnel system[.]

Another important purpose of the proposals, as noted by the legislation's Senate manager, Senator Ribicoff, was to '[p]rovide[ ] new protections for employees who disclose illegal or improper Government conduct.'

As enacted, the CSRA includes several basic features intended to achieve these goals. Title I of the Act consists of the first statutory expression of the merit system principles that have evolved since the creation of the Civil Service Commission. In addition to detailing the requirement that personnel decisions rest on evaluations of competence, Title I announces a statutory policy of protecting whistleblowers.…

Title I also defines a variety of 'prohibited personnel practices' including actions taken in retaliation for whistleblowing, section 2302(b)(8), and those taken as a reprisal 'for the exercise of any appeal right granted by any law, rule, or regulation,' section 2302(b)(9).

Title II of the CSRA abolishes the Civil Service Commission and replaces it with two new agencies, the MSPB and the Office of Personnel Management (OPM). The OPM, headed by a single director responsible to the President, supervises the administration of the civil service. The MSPB, an independent agency consisting of three members, is charged with protecting the merit system principles and adjudicating conflicts between federal workers and their employing agencies. *See* sections 1201–05. The Act also establishes…an independent Special Counsel responsible for investigating and prosecuting prohibited personnel practices, employment discrimination, unlawful political activities, arbitrary withholding of information requested under the Freedom of Information Act, and any other violations of law within the federal civil service.…

NTEU v. MSPB, 743 F.2d 895, 899 n.1 (D.C. Cir. 1984), provided historical perspective:

> For comprehensive histories of the American civil service, *see* P. Van Riper, *History of the United States Civil Service* (1958); A. Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement*, 1865–1883 (1961); C. Fish, *The Civil Service and the Patronage* (1904). The modern civil service was born with the passage of the Civil Service Act of 1883 (Pendleton Act), ch. 27, 22 Stat. 403 (codified as amended in scattered sections of 5, 18 & 40 USC). That Act was precipitated by public disapproval of the "spoils system," a civil service policy intended to facilitate the removal of inefficient government personnel, but which instead resulted in wholesale turnovers of personnel in many parts of the government after every election defeat. *See* Note, *Federal Employment The Civil Service Reform Act of 1978—Removing Incompetents and Protecting "Whistle Blowers,"* 26 Wayne L. Rev. 97, 98 (1979). The Pendleton Act set up a Civil Service Commission empowered to limit political pressures on jobholders and to promulgate rules on various personnel matters, including competitive examinations for positions. As originally passed, however, the Act covered only about 10% of government employees, created few limits on removal powers, and gave no procedural protections to employees. *See* Note, *supra*, at 99. Over the next several decades, attempts to remedy these defects rendered the procedures allowed federal employees to appeal adverse actions time-consuming and complex. *Id*. at 99–105. The CSRA attempted to solve these problems without sacrificing the procedural protections developed in the twentieth century.

See Polcover v. Secretary of Treasury, 477 F.2d 1223 (D.C. Cir. 1973) (criticizing the pre-Reform Act system of duplicative judicial review of Civil Service Commission decisions by district courts and appellate courts).

The Board described its evolution in its "Congressional Budget Justification For Fiscal Year 2013":

> MSPB has its origin in the Pendleton Act of 1883, which was passed following the assassination of President James A. Garfield by a disgruntled Federal job seeker. The Pendleton Act created the Civil Service Commission (CSC), which implemented the use of competitive examinations to support the appointment of qualified individuals to Federal positions in a manner based on merit and free from partisan political pressure. This improved Government effectiveness and efficiency by helping to ensure that a stable, highly qualified Federal workforce was available to provide effective service to the American people. 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 this conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind enactment 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; the Office of Personnel Management (OPM) to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority (FLRA) to oversee Federal labor-management relations. The CSRA also codified for the first time the values of the merit systems as MSPs [Merit System Principles] and defined PPPs [prohibited personnel practices].

Structural reforms accomplished by the Act were also described in *Atwell v. MSPB*, 670 F.2d 272, 278–79 (D.C. Cir. 1981). *Barnhart v. Devine*, 771 F.2d 1515 (D.C. Cir. 1985), considering the availability of mandamus jurisdiction to secure review of position classification, provides further extensive commentary on the evolution of the Reform Act and the role of the Special Counsel. For discussion of the effective date of the Reform Act and for construction of the CSRA "savings provision," § 902 of the Statute, refer to *Mathis v. Dept. of Air Force*, 8 MSPR 19, 22–25 (1981); *see* 5 CFR 1201.191(a) (2016). For a history of the legislation creating civil service protections for employees prior to the Reform Act, particularly the Lloyd-LaFollette Act and the Pendleton Act, refer to *Arnett v. Kennedy*, 94 S. Ct. 1633 (1974).

The Whistleblower Protection Act of 1989 (WPA) significantly amended the Reform Act by requiring more aggressive prosecution by the Office of Special Counsel of cases involving the prohibited personnel practice of whistleblowing reprisal and by creating an "Individual Right of Action" appeal to MSPB for employees victimized by whistleblowing reprisal. Whistleblower protections were extended and redefined by the 2012 Whistleblower Protection Enhancement Act, discussed in Chapter 13. [See "Whistleblowing Reprisal" in Chapter 13 for a detailed discussion of the WPA.]

Krafsur v. Davenport, 736 F.3d 1032, 1034–35 (6th Cir. 2013), described adverse actions and prohibited personnel practices—frequent subjects of MSPB litigation:

> Before Congress enacted the Civil Service Reform Act in 1978, a jumble of statutes and executive orders governed the resolution of federal employees' complaints about the workplace. The Act replaced this patchwork with a coherent system of administrative and judicial review. The new system handles all "personnel actions," a capacious term defined to include appointments, transfers, any "disciplinary or corrective action," "any…significant change in duties, responsibilities, or working conditions," and much else besides. 5 U.S.C. § 2302(a)(2). The extent of available review turns on the severity of the personnel action and the rank of the employee.
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> Generally speaking, the Act divides covered actions into two categories: adverse actions and prohibited personnel practices. *See Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.). Adverse actions are the most serious the government may take against its employees. For administrative law judges, these include removal, suspension, reduction in grade, reduction in pay and some furloughs. 5 U.S.C. § 7521. The Act entitles an employee facing an adverse action to a formal hearing before the Merit Systems Protection Board and if necessary an appeal to the Federal Circuit. *Id*. §§ 7521, 7703.
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> Prohibited personnel practices are less serious than adverse actions. The Act defines this category broadly. It includes violations of "any law, rule, or regulation implementing, or directly concerning,…merit system principles," *id*. § 2302(b)(12), which in turn entitle employees to "fair and equitable treatment in all aspects of personnel management," to insist upon "proper regard for…constitutional rights," and to prohibit "arbitrary action," *id*. § 2301(b). An employee faced with a prohibited personnel practice must first complain to the Office of Special Counsel. If the Special Counsel concludes that "there are reasonable grounds to believe that a prohibited personnel practice has occurred," he *must* report his conclusion to the agency. *Id*. § 1214(b)(2)(B). If the agency fails to take corrective action, the Special Counsel *may* refer the case to the Merit Systems Protection Board (from which the employee may appeal to the Federal Circuit). *Id*. §§ 1214(b)(2)(C), 1214(c). But if the Special Counsel concludes that the complaint lacks merit, or if he declines to refer the case to the Board, the employee is out of luck. A court may not review the Special Counsel's decisions unless the Counsel "has declined to investigate a complaint at all." *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 493 (6th Cir. 2011).
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> This description does not begin to capture the Act's many intricacies. Anyone who reads through the Act will encounter more types of covered actions and more channels of administrative or judicial review. Even within the category of prohibited personnel practices, the Act makes some exceptions. If an employee alleges discrimination because of race or sex, for example, the Act allows him to bypass the Special Counsel procedure and to sue in district court under the civil rights laws. 5 U.S.C. § 2302(d). Or if an employee alleges retaliation for whistleblowing or "for refusing to obey an order that would require [him] to violate a law," the Act allows him to bypass the Special Counsel procedure and to go straight to the Board. *Id*. §§ 1221(a), 2302(b)(9).

After more than 30 years of its existence, opinions on Board operations are

mixed. Agencies find the Board supportive of its decisions but not supportive enough to avoid statutory initiatives—including those involving the departments of Homeland Security, Defense, and, most recently, Veterans Affairs—that, at least for a time, either pulled a whole range of actions away from Board review or considerably reduced the Board's discretion to affect actions that could be appealed by employees of those agencies. Uncomfortable with the Board's traditional deference to managerial choices of penalties in adverse actions, unions avoid the Board when possible, entrusting cases of significance to labor arbitrators who traditionally require greater justification than the Board for severe disciplinary penalties. Those employees who cannot avoid the Board use it, but the Board has no supportive constituency among federal employees. Some appellants find the Board favoring procedural defaults against them. Few agencies suffer the same fate—agencies do not seek relief from the Board and agencies are almost always represented by counsel. Appellants are unrepresented by counsel in about 60% of the Board's docket.

To its credit, the Board, at the urging of the Federal Circuit, now requires its administrative judges (AJs) to inform appellants (most of whom are unrepresented) of what they are supposed to demonstrate to establish that a case was timely filed, that a case is within the Board's jurisdiction and, for cases timely filed and properly before the Board, what proof is required to establish elements of the case. The Board expedites litigation through electronic filing procedures and through settlement and mediation programs discussed in Chapter 16.

Over the many years of its existence, the Board may focus of one area of the law, then another. Disability discrimination issues, complexities of government reorganizations, analysis of reprisal claims, the impact of government fiscal measures on the civil service, and national security concerns, have all had their months or years of development through case law—that focus magnified on occasion by a leading decision of the Federal Circuit or Supreme Court that changes the direction of the law. And, too, because Board members are political appointees, have limited terms, and varying backgrounds, the perspective of Board members changes over time. Those changes are reflected in the development of decisions. Dissenting opinions from one year may become the majority position in another. [Refer to the Board's website presentation, *An Introduction to the Merit Systems Protection Board,* for a powerpoint outline of the history and some basic law concerning charges and penalties adjudicated by the Board, at http://www.mspb.gov/media/introtomspb/Intro%20to%20MSPB%20Oct%2019%202011.pdf; a video presentation is found at http://www.mspb.gov/training/introtomspbvideo.htm.]

B. OFFICE OF SPECIAL COUNSEL

Before reaching the organization, jurisdiction, and procedures of the Board, we comment on the Office of Special Counsel, whose operations are described in Chapter 13. The 2011 Office of Special Counsel Annual Report summarizes its mission:

> OSC is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting covered employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. The agency also supports covered federal employees and applicants by providing a secure channel for disclosures by them of wrongdoing in government agencies; enforces and provides advice on Hatch Act restrictions on political activity by government employees; and enforces employment rights secured by USERRA for federal employees who serve their nation in the uniformed services.

The Special Counsel, appointed by the President and confirmed by the Senate, serves as an investigator and prosecutor of statutorily-defined prohibited personnel practices. *Layser v. USDA*, 8 MSPR 381, 383 (1981) (the relationship of the OSC to the Board was analogized to that of a prosecuting attorney to a court). OSC also serves as a government-wide clearinghouse referring to agency inspectors general allegations received by OSC of agency mismanagement, waste, fraud, violations of law, and other abuses. Hatch Act prosecutions are exclusively the province of OSC. *See Sims v. District of Columbia Gov't*, 7 MSPR 45, 48 (1981); *Special Counsel v. DeMeo*, 77 MSPR 158, 163–71 (1997) (discussing the evolution of the Hatch Act and statutory amendments). [More information on OSC organization, functions, and the processing of prohibited personnel practice allegations is found in Chapter 13 under the subheading "Cases Brought by OSC."]

The Board summarized the functions of OSC in *Marren v. DOJ*, 51 MSPR 632, 637 n.4 (1991):

> The functions of the OSC are: To conduct prohibited personnel practice investigations to see whether employee complaints of improper management actions are valid; to use the results of these investigations to seek corrective action from the agency and, if the agency fails to take the action, from the MSPB; to seek injunctive relief, known as a stay, that will restore an employee who alleges to be a victim of prohibited personnel practice to his or her job while a corrective action petition is being prepared or being considered; to prosecute disciplinary action complaints against Federal employees who engage in prohibited personnel practices, who violate orders of the MSPB, or who violate statutes related to the merit system, such as the Hatch Act; and to screen whistleblowing disclosures and order agency investigations of the substance of the allegations. *See* 5 USC 1206.

According to the FY 2015 OSC Budget Justification, the organization's budget is about $21,000,000 and it operates with about 122 employees. OSC acts with autonomy. It has its own budget and offices. OSC is neither controlled by the Board nor is it considered a component of the Board's organization, although when it brings cases before the Board it must follow Board regulations. OSC became an independent agency, with an independent budget, as a result of Pub. L. No. 101–12 (April 10, 1989). OSC operates independently from agencies that it monitors. OSC is not required to provide the agency-employer a chance to investigate the charges before bringing disciplinary charges against an employee. *Special Counsel v. Filiberti*, 27 MSPR 498, 506 (1984). The Board does not control OSC investigatory procedures. *In re Tariela*, 1 MSPR 155, 157 n.5, 1 MSPB 151 (1979), explained:

> [T]he Special Counsel acts under his own statutory authority, 5 USC 1206, 1208. The Board has no authority to supervise or direct the manner in which the Special Counsel conducts his investigations or prepares his stay petitions. The relationship of the Special Counsel to the Board may best be analogized to that of a prosecuting attorney to a court.…

The 2012 Whistleblower Protection Enhancement Act provided authority to OSC to file *amicus* briefs in court under Section 113 of that statute, codified to 5 USC 1212(h):

> (1) The Special Counsel is authorized to appear as *amicus curiae* in any action brought in a court of the United States related to section 2302(b)(8) or (9), or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) or (9) and the impact court decisions would have on the enforcement of such provisions of law.
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> (2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described under subsection (a).

OSC's 2013 Annual Report provides an organizational snapshot:

> Internal Organization
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> OSC is headquartered and has one of its field offices in Washington, D.C., and three additional field offices located in Dallas, TX; Detroit, MI; and Oakland, CA. The agency includes a number of program and support units.
>
> Immediate Office of the Special Counsel (IOSC)
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> The Special Counsel and her immediate staff are responsible for policy-making and the overall management of OSC, including supervision of each of OSC's program areas. This encompasses management of the agency's congressional liaison and public affairs activities, and coordination of its outreach program, which promotes government-wide compliance with agencies' statutory obligation to inform employees about their rights under whistleblower protection laws.
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> Complaints Examining Unit (CEU)
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> This unit is the intake point for all complaints alleging prohibited personnel practices. CEU normally screens approximately 2,500 such complaints each year, but last year that number spiked to almost 3,000. Attorneys and personnel-management specialists conduct an initial review of complaints to determine if they are within OSC's jurisdiction and, if so, whether further investigation is warranted. The unit refers qualifying matters for alternative dispute resolution (ADR) to the ADR Unit or to the Investigation and Prosecution Division (IPD) for further investigation, possible settlement, or prosecution. Matters that do not qualify for referral to ADR or IPD are closed.
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> Investigation and Prosecution Division (IPD)
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> If ADR is unable to resolve a matter, it is referred to IPD, which is comprised of the four field offices, and is responsible for conducting investigations of prohibited personnel practices. IPD attorneys determine whether the evidence is sufficient to establish that a violation has occurred. If it is not, the matter is closed. If the evidence is sufficient, IPD decides whether the matter warrants corrective action, disciplinary action, or both. If a meritorious case cannot be resolved through negotiation with the agency involved, IPD may bring an enforcement action before the MSPB.
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> Disclosure Unit (DU)
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> This unit receives and reviews disclosures from federal whistleblowers. DU recommends the appropriate disposition of disclosures, which may include referral to the head of the relevant agency to conduct an investigation and report its findings to the Special Counsel or closure without further action. If a disclosure is referred, the Special Counsel reviews the agency's investigative report to determine whether it is complete and appears reasonable. She then forwards her determination, the report itself, and any comments by the whistleblower to the President and responsible congressional oversight committees.

Hatch Act Unit (HAU)

This unit investigates complaints of unlawful political activity by government employees under the Hatch Act, and represents OSC in seeking disciplinary actions before the MSPB. In addition, the HAU is responsible for providing legal advice on the Hatch Act to the public at large.

USERRA Unit

This unit resolves employment discrimination complaints by veterans, returning National Guard members and reservists, and members of the uniformed services under the Uniformed Services Employment & Reemployment Rights Act. This unit also reviews USERRA cases referred by the Department of Labor (DOL) for prosecution and represents claimants before the MSPB. Under a second, three-year Demonstration Project, the USERRA Unit also investigates more than half the federal USERRA cases filed with DOL.

Alternative Dispute Resolution Unit (ADR)

This unit supports OSC's operational program units. Matters that are appropriate for mediation are referred by IPD and the USERRA Unit. Once referred, an OSC ADR specialist contacts the affected employee and agency. If both parties agree, OSC conducts a mediation session led by OSC-trained mediators who have experience in federal personnel law.

Office of General Counsel

This office provides legal advice and support in connection with management and administrative matters, defense of OSC interests in litigation filed against the agency, management of the agency's Freedom of Information Act, Privacy Act, and ethics programs, and policy planning and development.

Administrative Services Division

This division manages OSC's budget and financial operations, and accomplishes the technical, analytical, and administrative needs of the agency. Component units are the Budget, Finance and Procurement Branch, Human Resources and Document Control Branch, and the Information Technology Branch.

II. MSPB ORGANIZATION AND ADMINISTRATIVE OPERATION

Parker v. DLA, 1 MSPR 505, 518, 1 MSPB 489 (1980), described the Board's adjudicatory functions:

> First, the Board is not a Court of Appeals but rather is itself an administrative establishment within the Executive Branch, albeit one exercising independent quasi-judicial functions. It is the Board's decision, not the agency's, that constitutes an "adjudication," 5 USC 1205(a)(1), which must be articulated in a reasoned opinion providing an adequate basis for review by a Court of Appeals.… The mere fact that the agency's decision is appealable to the Board does not limit the Board's scope of review to that of an appellate court, nor does it transform the agency's decision into one that must meet adjudicatory standards which will facilitate appellate review. In enacting the Civil Service Reform Act, Congress found it already difficult to take and sustain adverse personnel decisions in the federal bureaucracy; requiring agency managers to write judicial opinions justifying each such decision would make them well nigh impossible.

The Board adjudicates cases at several levels; cases come to the Board in several ways. Most cases originate as appeals from actions taken against employees or directly affecting their interests, e.g., removals, long-term suspensions, demotions, personnel actions resulting from reductions in force, and determinations by the Office of Personnel Management concerning annuity entitlements. Some appeals come to the Board after first traversing another adjudication system, examples being actions that are otherwise within the Board's jurisdiction but are first considered through the agency EEO process or through a collectively bargained grievance and arbitration process. Other cases start out as complaints rather than as appeals from agency actions: disciplinary or corrective action complaints by OSC; complaints against administrative law judges by their employing agencies; Individual Right of Action cases brought by whistleblowers who assert the retaliatory loss of employment benefits; allegations by individuals with military service who complain of discrimination by reason of their past or present military service or as to denial of proper restoration rights following military service; and claims by veterans protesting the loss of an employment benefit or preference earned through past military service and conferred by statute.

The Board summarizes its adjudication functions and operations in its *Congressional Budget Justification for FY 2015*:

> The majority of the cases brought to the MSPB 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. The MSPB also receives a significant number of appeals under three important statutory authorities, the Whistleblower Protection Enhancement Act of 2012 (WPEA), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and the Veterans Employment Opportunities Act of 1998 (VEOA). Other types of actions that may be appealed to the MSPB 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.
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> An appellant files an appeal with the appropriate MSPB regional or field office having geographical jurisdiction. An AJ in the office assures that the parties receive the due process procedures called for in the MSPB's regulations and, after providing a full opportunity to develop the record on all relevant matters, including at a hearing in many cases, issues an initial decision. Unless a party files a PFR with the Board, the initial decision becomes final 35 days after issuance. Any party, or OPM or the Office of Special Counsel, may petition the full Board in Washington to review the initial decision. The Board's decision on a PFR constitutes the final administrative action on the appeal. In appellate cases, 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 (Federal Circuit) or, in cases involving allegations of discrimination, to a U.S. district court or the Equal Employment Opportunity Commission. In addition, for a two-year period starting on the effective date of the WPEA, certain cases involving protected whistleblowing disclosures and activity may be appealed to the Federal Circuit or the other Circuit Courts of Appeals.
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> If a party believes that the other party is not complying with an MSPB order or MSPB-approved settlement agreement, the party can file a Petition for Enforcement with the regional or field office that issued the initial decision. If the AJ finds compliance, that constitutes an initial decision and the party may file a PFR with the MSPB. If the AJ finds non-compliance, the non-complying party is ordered to comply and may either do so or file a PFR with the MSPB. Additional types of addendum cases, that is those that result from successful initial appeals, involve requests for attorney fees where the appellant is the prevailing party and requests for damages under laws that allow for such claims.
>
> In addition to adjudicating cases on the merits, the Board also provides alternative dispute Resolution (ADR) services to assist parties in resolving the case. Use of these services is voluntary, provides the parties more control of the process and can results 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 associated with the more formal regulations and procedures involved with adjudication on the merits. The MSPB provides opportunities for the parties to settle initial appeals filed in the regional offices and to settle PFR filed at headquarters. The MSPB also offers trained mediators (at no charge to the parties) who can facilitate confidential discussions between the parties to aid in addressing issues and barriers to agreement and reaching a settlement to which both parties agree. The parties control the results under the guidance of the mediator who plays no role in deciding the appeal.

Throughout the *Guide*, reference is made to "appeals" brought by individuals. But other terminology creeps into our text because other terms were applied in years past that distinguished appeals (challenges to adverse actions or reductions in force), and petitions for remedial action (Individual Right of Action cases brought by protected whistleblowers and VEOA or USERRA cases brought to protect individuals against discrimination or loss of employment benefits on the basis of their military status or veterans preference entitlements), a distinction discussed in *Bodus v. Dept. of Air Force*, 82 MSPR 508, 516 ¶¶ 15–16 (1999). Now, unless the Board is considering a complaint by the Office of Special Counsel seeking disciplinary or corrective action, an agency complaint seeking disciplinary action against an administrative law judge, a request for review of an arbitrator's award, or a specialized proceeding involving review of employment practices, we will speak of appeals in this *Guide*.

Most, but not all, of the Board's cases are appeals initially considered and heard by administrative judges (AJs) in regional and field offices throughout the nation. The AJ's decision, known as an "initial decision," may be appealed through a "petition for review" (PFR) to the Board's headquarters, a process described in Chapter 5. The PFR triggers a record review by attorneys at the Board's headquarters offices in Washington. That review unit is known as the Office of Appeals Counsel (OAC). OAC recommendations are forwarded to the three Board members, each of whom has a small staff of attorneys who may review those recommendations and who advise the Board member concerning the disposition of the case. Supplied with the recommendations of OAC and his or her own staff, each Board member votes on the disposition of a petition for review. The majority disposition of the Board members results in a decision by the Board constituting, in most cases, the final administrative determination of the Board. The Board may, however, decide that further work on the case is required by the AJ and, when that occurs, the Board remands

the appeal to the regional or field office with instructions for the AJ to follow in the subsequent remand adjudication. Some cases, generally complaints by OSC, complaints against administrative law judges, and requests for review of arbitration awards (a process described in Chapter 5) originate with the Board headquarters establishment rather than at the regional or field office level. OSC complaints and agency complaints against ALJs are referred by the Board to an administrative law judge (ALJ), whose decision is subject to review by the Board in the same manner as an initial decision by an AJ. Board final decisions may be reviewed, depending on the nature of the case and the nature of the claims or defenses asserted, by EEOC, the United States Court of Appeals for the Federal Circuit, in U.S. district courts, or on appeal from a district court or in whistleblowing cases in either the Federal Circuit or in a regional circuit court of appeals. To say the judicial review scheme is complex is no overstatement. It is discussed in Chapters 17.

The Board describes its appellate processes in "Appellant Questions and Answers," http://www.mspb.gov/appeals/appellantqanda.htm, and "Information sheets" on various types of Board appeals and procedures are on the Board website. http://www.mspb.gov/appeals/infosheets.htm. Regulations governing the conduct of open and closed Board meetings ("Sunshine Act") are found at 5 CFR 1206.7 (2016). Board regulations describing Board organization and practice are found at 5 CFR Parts 1200, 1201, 1203, 1208, 1209, and 1210.

By the numbers, in FY 2016, 8,602 cases were decided in the field by AJs; 1,180 in the central office by the Board. In FY 2013, 6,340 cases were decided in the regional and field offices, compared with 6,523 cases in FY 2012. The increase from 2013 to 2016 was in part the result of furlough cases initiated resulting from a 2013 budget sequestration and from an increased number of whistleblowing and VEOA or USERRA cases. During FY 2014, 876 petitions for review were decided by the Board. 952 cases were decided through petitions for review or other mechanisms at Board headquarters in FY 2013, compared with 1,024 cases decided in FY 2012. For FY 2013, 47% of the Board's cases were adverse actions, followed by about 18% retirement-related matters, 8% VEOA and USERRA cases, 6% probationary terminations, and 2% performance cases. Of the regional docket, for FY 2016, the Board reported 54% of the cases not involving furloughs settled. We are informed that in FY 2016, 3,164 appeals were adjudicated on the merits in the regions. With 65 or so AJs, that is about four cases a month per AJ. The difference in the total docket in the regions and the number of cases adjudicated to a result is accounted for principally by settlements, jurisdictional or timeliness dismissals, and the procedural device of a dismissal without prejudice that takes a case off the docket subject to later redocketing.

Of the 1,022 petitions for review decided in FY 2016, 154 were dismissed, 11 settled, 702 were denied, 131 were granted, and 24 were denied with further analysis. About 67% of those petitions were denied, 2% settled, and the rest were either granted, dismissed for procedural reasons, or the petitions were denied but the Board reopened the cases to modify the case analysis but not the result. When petitions were granted or cases reopened, the most common modification in the outcome of the case was a remand to the AJ for further consideration.

The Federal Circuit reviews MSPB decisions in all cases other than those involving discrimination allegations (except for a few whistleblower reprisal cases that can be taken to regional circuit appellate courts). For FY 2013, the court had a caseload of 1,259 appeals. Of those about 213 were from the MSPB—about 17% of the docket. The percentage of the Circuit's cases involving MSPB appeals decreases over time. Of the docketed cases, for FY 2012, but 7% resulted in remands or reversals. [See Chapter 17 for further discussion of the Federal Circuit and judicial review of Board decisions.]

Board jurisdiction is statutory, although the statutory scheme permits the Board to review some cases arising under regulations of the Office of Personnel Management. Board regulations governing adjudication are found at 5 CFR Parts 1200, 1201, 1203, 1208, 1209, and 1210, discussed throughout this Guide. The Federal Rules of Evidence and the Federal Rules of Civil Procedure are occasionally referred to by the Board, but they are not binding on the Board.

A. IMPARTIAL ADJUDICATION

The Board, although composed of political appointees, is supposed to function as an adjudicator attentive only to the record and the arguments of parties, intervenors, and *amici*. Member Susanne Marshall emphasized the importance of due process, rather than the political process, in a concurring opinion in *Azdell v. OPM*, 87 MSPR 133, 172–73 ¶¶ 1–5 (2000), involving some congressional correspondence to the Board during litigation over the validity of a testing scheme applied to candidates for ALJ positions:

> While I agree with the Opinion and Order's result and rationale, I write separately to express my great concern over a procedural issue that arose in this case. While the petition for review in this appeal was pending before the Board, two members of Congress directed unsolicited letters to then-Chairman Ben Erdreich, expressing their opinions on the merits of this appeal. The Office of the Clerk of the Board placed those letters into the official record, served the letters on the parties to this appeal, and provided the parties with an opportunity to respond to them.
>
> These letters are troubling for several reasons. First, these submissions were not made in accordance with the Board's procedures. Our regulations provide a structured system for enabling interested persons or organizations to become parties to, or participants in, Board appeals at different stages of the proceedings, including entering at the petition for review stage of those appeals. 5 CFR §§ 1201.22, 1201.25, 1201.34, 1201.114. Such parties, intervenors, or amici may participate in an appeal in accordance with the rules governing a hearing, and the submission of evidence and argument, including the requirement of serving submissions on all of the parties. 5 CFR §§ 1201.26(b)(2), 1201.114(h). These procedures produce the record upon which the Board's decision must rest exclusively. 5 CFR §§ 1201.54(e) [now 1201.53(e)], 1201.58 [now 1201.59], 1201.114(i).
>
> The Congressional letters at issue do not satisfy any of these requirements. Further, while those submissions may not have technically violated the Board's prohibitions against *ex parte* communications, because the Congressmen do not meet the regulatory definition of an "interested party," these letters directed solely to our former Chairman concerning the merits of a pending appeal certainly challenge the spirit of the *ex parte* prohibition. 5 CFR §§ 1201.101–1201.103.
>
> More troubling, these letters raise the specter of impermissible political influence, that could undermine the perception of a full, fair, and impartial adjudication, which is the cornerstone of the employee rights we protect. *See Frampton v. Department of the Interior*, 811 F.2d 1486, 1489 (Fed. Cir. 1987). Congress created the Board as an independent quasi-judicial body with the responsibility of ensuring that all Federal agencies follow Federal merit systems practices. *See* 5 CFR § 1200.1. To accomplish this mandate, Congress dictated that the Board be composed of three members, all appointed by the President, with the advice and consent of the Senate, and each serving an independent seven-year term. Congress further provided that not more than two of the Board members could be adherents of the same political party, and that a Board member could be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 5 USC §§ 1201, 1202. Congress chose this structure to insulate the Board from political pressure and to avoid violations of the merit principles. S. Rep. No. 95–969, at 6–7 (1978), *reprinted in* 1978 USCCAN 2723, 2728–29.
>
> While the letters at issue were no doubt well-intended, they are capable of being viewed by some as creating the appearance of political pressure, thereby contravening Congressional intent. As a Board member, I have the responsibility of remaining independent of any such influence, or even the appearance of such influence, and I decide every case only on the basis of the evidence and arguments of the parties, intervenors, and amici who have participated in a Board appeal in accordance with our regulations. I, therefore, write separately to expressly indicate that I did not consider the arguments raised in the letters from the two Congressmen that have been included in the appeal file, or any responses by the parties relative to those letters. Instead, I made my decision in this case based upon the facts, the arguments submitted by the parties, intervenors, and the *amicus curiae*, and the controlling legal authorities.

On occasion, decisions of the Board provoke congressional comment. The Board deems itself decisionally unaffected by such critique. This was noted in *Special Counsel v. Starrett*, 28 MSPR 372, 375 (1985):

> We hold with regard to the due process arguments contained in the motion for reconsideration that the Board's impartiality and/or appearance of impartiality was not compromised by statements made by a member of Congress while this case was under consideration. Isolated comments made by a single legislator, even if critical of the Recommended Decision and/or the Board, do not and did not rise to a level of undue Congressional interference with the performance of the judicial functions of the Board. *See Gulf Oil Corporation v. Federal Power Commission*, 563 F.2d 588 (3rd Cir. 1977) ("incidental intrusions by two or three members" of Congress into decisional process did "not seriously influence the Commission"); *Pillsbury v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966) (over 100 references to pending case during Congressional hearings, which focused "directly and substantially upon the mental decisional processes" of the Commission constituted undue interference.) The respondents are not, as they allege, "mere political pawns"; they are senior government officials who committed serious violations of law and who, for their own purposes, are seeking to impugn the decisional process by leaps of imagination and mischaracterizations of fact.

But, we are told, the Board may weigh practical and public policy considerations in reaching its decisions concerning interim relief. *See McLaughlin v. OPM*, 62 MSPR 536, 555 (1994).

1. *De Novo* Review of Agency Actions

The Board reviews agency actions for their correctness under law, rule, regulation, and, of course, Board and judicial precedent. As a practical matter, that means the agency must prove its case—the correctness of its decision—

when it has the burden of proof, and when the appellant has the burden of proof, the same rule applies. The Board weighs the evidence before it rather than assessing whether the party with the burden of proof simply made a reasonable assessment of the facts. The Board may make a different legal assessment of the significance of the facts than that made by the agency, for the Board reviews legal issues *de novo*. That does not mean that the Board can change the nature of the case before it or alter the charges against the appellant in the typical adverse action appeal, but the Board may assess the legal implications of the case or charges against the appellant according to its own interpretation of the law rather than through deference to the legal analysis of the agency whose decision is under review. There are a couple types of agency determinations that generally receive deference from the Board: penalty determinations when charges are sustained, a matter discussed in Chapter 7; budgetary considerations governing reductions in force and furloughs, discussed in Chapter 10.

The nature of the Board's review authority was touched upon in an appeal from an OPM retirement decision, *Licausi v. OPM*, 350 F.3d 1359, 1363–65 (Fed. Cir. 2003):

> Ms. Licausi's second argument is that the administrative judge improperly upheld OPM's decision on a different ground from the one on which OPM based its ruling. She contends that OPM's decision was based on its conclusion that she did not prove that she continued to suffer from the same medical condition that had led to her initial retirement, while the administrative judge's decision was based on her failure to establish that her condition prevented her from rendering useful and efficient service in her former position. By upholding OPM's decision on a different ground, Ms. Licausi argues, the Merit Systems Protection Board violated the principle set forth in the Supreme Court's decisions in *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943), and *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1947).
>
> The *Chenery* cases stand for the proposition that "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." 332 U.S. at 196. That principle has long been applied to judicial review of agency action. *See Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 420 (1992); *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). This court has declined to apply the rule of *Chenery* to Merit Systems Protection Board review of a personnel action by another executive agency, however, noting that the argument that the *Chenery* rule applies generally to Board review of agency action "confuse[s] the assigned roles of the Board, itself part of the administrative agency structure, and the courts." *Huber v. Merit Sys. Prot. Bd.*, 793 F.2d 284, 287 (Fed. Cir. 1986). Yet even if the principles underlying *Chenery* apply to Merit Systems Protection Board review of certain kinds of agency action, *see Horne v. Merit Sys. Prot. Bd.*, 684 F.2d 155, 157–58 (D.C. Cir. 1982), it is clear that those principles do not apply to Merit Systems Protection Board review of OPM disability retirement determinations.[1]
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> > [1] The Board has referred indirectly to the *Chenery* doctrine in several cases involving Board review of agency disciplinary proceedings to support its holding that the Board may not uphold an agency disciplinary decision on the basis of misconduct different from the misconduct with which the employee was charged in the proceedings before the agency. *See Hernandez v. Dep't of Educ.*, 42 M.S.P.R. 61, 71 (1989); *Gottlieb v. Veterans Admin.*, 39 M.S.P.R. 606, 609 (1989). Although that principle has frequently been recognized by this court and the Board, it is not so much an application of the *Chenery* doctrine as an application of the due process principle that a person must be given notice of the charge on which the action against him is based. *See O'Keefe v. U.S. Postal Serv.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002); *Lachance v. Merit Sys. Prot. Bd.*, 147 F.3d 1367, 1371–72 (Fed. Cir. 1998); *Shaw v. Dep't of the Air Force*, 80 M.S.P.R. 98, 106–07 (1998).
>
> The Merit Systems Protection Board has statutory authority to review OPM decisions in CSRS disability cases under 5 U.S.C. § 8347(d)(1), which provides (with an exception inapplicable here) that OPM disability decisions may be appealed to the Board "under procedures prescribed by the Board." As directed by statute, the Board has established procedures governing such appeals. In particular, the Board has promulgated 5 C.F.R. § 1201.56(a)(2) [now 5 CFR § 1201.56(b)(2)(ii)], which provides as follows: "In appeals from reconsideration decisions of the Office of Personnel Management involving retirement benefits, if the appellant has filed the application, the appellant has the burden of proving, by a preponderance of the evidence, entitlement to the benefits." That regulation makes clear that the appeal proceeding before the Board constitutes a *de novo* proceeding, quite different from the kind of limited review prescribed by section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, for judicial review of administrative action. *See Spradlin v. Office of Pers. Mgmt.*, 84 M.S.P.R. 279, 283 (1999) ("appellants in disability retirement cases are…entitled to a *de novo* hearing before the Board"); *Chavez v. Office of Pers. Mgmt.*, 6 M.S.P.R. 404, 413 (1981) (in a disability retirement appeal, the Board must "consider *de novo* all the relevant evidence presented by both parties, whether offered at a hearing or transmitted as part of the administrative record").
>
> As the Board has explained, it is the "ultimate decision maker" in a disability retirement appeal. *Bynum v. Office of Pers. Mgmt.*, 89 M.S.P.R. 1, 7 (2001). Thus, the question for the Board is not whether OPM's decision is supported by substantial evidence or otherwise should be upheld or rejected based on the record made before OPM. Instead, the parties are free to introduce new evidence, including live testimony, bearing on the question whether the retiree is entitled to benefits, and the Board is required to decide the case on the basis of all the evidence before it. *Morgan v. U.S. Postal Serv.*, 48 M.S.P.R. 607, 610–11 (1991) ("The Board has rejected the notion that its scope of review is limited to consideration of the administrative record established before the agency."); *Stewart v. Office of Pers. Mgmt.*, 8 M.S.P.R. 289, 294 (1981) ("[T]he Board is both authorized and mandated…to consider *de novo* all available evidence."). If the Board is persuaded that the employee has met his or her burden of showing entitlement to benefits, the Board will direct that benefits be awarded; otherwise, it will sustain the denial of benefits.[2] Because the Board engages in *de novo* consideration of the eligibility issue, it is not confined to either upholding OPM's decision on the ground invoked by OPM or remanding to OPM for further proceedings. *See Grumman Data Sys. Corp. v. Widnall*, 15 F.3d 1044, 1047 (Fed. Cir. 1994) ("Under *de novo* review, a board may consider the analysis developed by the agency…or produce and consider its own analysis.").
>
> > [2] The principles that apply to the Board's disability determinations parallel those applicable to Board review of adverse agency actions covered by 5 U.S.C. § 7513. On an appeal from such an adverse agency action, the Board reviews *de novo* whether the agency's decision was justified. *See Brook v. Corrado*, 999 F.2d 523, 528 (Fed. Cir. 1993) ("The MSPB reviews *de novo* the merits of an agency's decision to take adverse action against an employee."); *Jackson v. Veterans Admin.*, 768 F.2d 1325, 1329 (Fed. Cir. 1985) (the "appeal" to the Merit Systems Protection Board "requires a *de novo* determination of the facts"); *Fucik v. United States*, 655 F.2d 1089, 1097 (Ct. Cl. 1981) ("It is the Board's obligation to consider the cases before it *de novo* without regard to any decision by the agencies that have gone before it."); *Pardo v. Dep't of the Army*, 10 M.S.P.R. 206, 208–10 (1982); *Zeiss v. Veterans Admin.*, 8 M.S.P.R. 15, 16–17 (1981).
>
> In light of the Board's obligation to make an independent determination as to eligibility, its decisions in retirement disability cases fall outside the reach of the *Chenery* doctrine for reasons given in *Chenery* itself, as the Board's decisions do not involve review of "a determination or a judgment that an administrative agency [OPM in this case] alone is authorized to make." *Chenery*, 332 U.S. at 196; *see Fomby-Denson v. Dep't of the Army*, 247 F.3d 1366, 1373 (Fed. Cir. 2001) ("When the new ground is not one solely committed to the administrative agency, the *Chenery* doctrine does not compel a remand to permit the agency to make an initial decision on that ground."); *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1101 (Fed. Cir. 1996). The appropriate Supreme Court analogy is therefore not *Chenery*, but *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). In that case, the Commissioner of Internal Revenue assessed a tax deficiency against the taxpayer, who sought a redetermination by the Board of Tax Appeals. The Board of Tax Appeals upheld the Commissioner's assessment, but on a legal theory different from the Commissioner's. The court of appeals concluded that the Board of Tax Appeals was free to sustain the assessment on a different legal theory, because the taxpayer's burden in the Board of Tax Appeals was to show that the assessment was erroneous on any proper theory. The Supreme Court agreed. It explained that "if the Commissioner was right in his determination, the Board properly affirmed it, even if the reasons which he had assigned were wrong." 302 U.S. at 246.
>
> In this case, by analogy, the Merit Systems Protection Board was free to sustain OPM's decision on a different ground because Ms. Licausi was required to show, in *de novo* proceedings before the Board, that she was eligible for disability retirement benefits. We therefore reject her argument that the Board's decision must be reversed because its conclusion that she had failed to prove that she was unable to render useful and efficient service in her position was based on a different rationale from the one that OPM invoked in denying her request for reinstatement.

Although the Board may, or may not, defer to agency interpretations of their own regulations, depending on the circumstances, the Board is bound by the precedential decisions of the Federal Circuit, its reviewing court, and by decisions of the Supreme Court. As to the latter class of cases, the Board noted in *Adams v. DOD,* DC-0752-10-0741-I-1 (NP 3/4/2011):

> [T]he Board is bound by the decisions of the Supreme Court and lacks the authority to ignore a controlling case. *See Jaffree v. Board of School*

Commissioners of Mobile County, 459 U.S. 1314, 1316 (1983) (Powell, Circuit J., holding that "[u]nless and until" the Supreme Court "reconsiders [its previous] decisions," lesser courts are "obligated to follow them"); *see also Principe v. U.S. Postal Service*, 100 M.S.P.R. 66, ¶ 7 (2005) (holding that any Board reservations on an issue would be "beside the point" when the Board is bound by its reviewing court's decisions); *see also Adams v. Department of Defense*, 371 F. App'x 93, 95 (Fed. Cir.), *cert. denied*, 131 S. Ct. 292 (2010).

See Cobert v. Miller, 800 F.3d 1340, 1349 (Fed. Cir. 2015) (Judge Wallach concurring) (referring to Federal Circuit precedent: "The Board here was not empowered to reject controlling law."); *Fitzgerald v. Hampton*, 467 F.2d 755, 766 (D.C. Cir. 1972) (noting the quasi-judicial nature of hearings of the predecessor Civil Service Commission). [Refer to the subsection in Chapter 17, "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts" and the subsection in Chapter 4, "*De Novo* Review."]

a. Deference to OPM Regulations

OPM regulations are of particular significance in cases involving reductions in force, suitability terminations, restoration rights for individuals who received workers compensation, and claims arising under the retirement laws. Annuity entitlement appeals constitute about 15% of the Board's docket. The retirement system, established by statute, is implemented by OPM regulations and by OPM decisions applying those statutes and regulations. The Board tends to defer to OPM's regulatory scheme unless it is inconsistent with statute. [Retirement and restoration rights appeals are discussed in Chapter 14.]

OPM regulations receive deference if they reasonably apply statutes within the jurisdiction of OPM, as *Fitzgerald v. DOD*, 80 MSPR 1, 10–11 (1998), involving regulations established by OPM to consider challenges to agency determinations concerning entitlement to retirement status as a law enforcement officer, explained:

> The starting point of every case involving statutory construction must be the language of the statute itself. *Todd v. Department of Defense,* 63 MSPR 4, 7 (1994), *aff'd,* 55 F.3d 1574 (Fed. Cir. 1995). Where that language is clear, it must control absent a clearly expressed legislative intention to the contrary. *Id*. Where a statute is ambiguous, however, the interpretation of an agency charged with administration of the statute is entitled to deference. *DeJesus v. Office of Personnel Management,* 63 MSPR 586, 592 (1994), *aff'd,* 62 F.3d 1431 (Fed. Cir. 1995) (Table). As the Supreme Court held in *Chevron*, 467 U.S. at 843, where a statute is silent or ambiguous with respect to a specific issue, the question for a reviewing court is whether the agency's answer is based on a permissible construction of the statute. *See also Bain v. Office of Personnel Management*, 978 F.2d 1227, 1231 (Fed. Cir. 1992) (an agency's interpretation of a statute need not be the only reasonable one in order for it to survive a challenge).
>
> We agree with the assertion of the appellants on review and NTEU in its *amicus* brief that the FERS statute does not include a deadline for requesting a determination as to LEO status. Nevertheless, we do not read into the absence of such a deadline a congressional intent to allow such requests to be filed at any time. Nor do we find anything in the legislative history cited by legal counsel for the parties or amici that suggests Congress intended that there be no regulatory time limit for making requests for LEO retirement coverage or that there be a regulatory time limit different from that set forth in section 842.804(c). Although the appellants assert that under 5 USC § 8461(c), OPM shall adjudicate "all claims" under the provisions of chapter 84 administered by OPM, not just claims found to be timely by OPM, this provision does not necessarily prevent OPM from establishing regulatory time limits for filing such claims. "Adjudication" of a claim may include, for example, a finding by OPM or the Board that the claim was untimely filed under a regulatory time limit. In short, we find that the statute is silent with respect to the establishment of a regulatory time limit for requesting a determination on LEO retirement coverage.
>
> When the legislative delegation to an agency on a particular question is implicit, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron*, 467 U.S. at 844. Here, Congress authorized OPM to prescribe regulations to carry out the provisions of 5 USC chapter 84 administered by OPM. 5 USC § 8461(g). Pursuant to this statutory authority, OPM promulgated 5 CFR § 842.804(c). *See* 57 Fed. Reg. 32,685, 32,689 (1992); 52 Fed. Reg. 2068, 2069 (1987). We may not, therefore, substitute our own construction of the statute for a reasonable interpretation by OPM.

See Aralar v. OPM, 99 MSPR 118, 120–21 ¶ 7 (2005) ("OPM's interpretation of a statute that Congress charges it to administer, such as the retirement statute at issue here, is normally entitled to great deference….However, the agency's interpretation is not entitled to deference where it conflicts with the plain language of the statute."); *Martin v. Dept. of Air Force*, 79 MSPR 380, 384 (1998) (deferring to OPM's interpretation of the Back Pay Act, a statute within OPM's administrative responsibility); *Pagum v. OPM*, 66 MSPR 599, 602 (1995) ("An agency's interpretation of a statute it is charged to administer is entitled to considerable weight, especially where there are no compelling reasons to conclude that such an interpretation is erroneous or unreasonable."); *Brown v. OPM*, 65 MSPR 380, 383–84 (1994) (the Board recites as to its deference to OPM: when Congress leaves a statutory gap for an agency to fill, there is an express delegation to the agency to elucidate the provision; if the agency exercises that authority, its construction should be given considerable weight; *post hoc* rationalizations by an agency will not create a statutory interpretation deserving of deference; the Board will not defer to OPM policy when it fails to provide meaningful guidance or substantial evidence of a consistent policy, either internally applied or publicly announced); *cf. Rogers v. OPM*, 83 MSPR 154, 157–58 ¶ 7 (1999) (restating the principles of statutory construction and administrative interpretation); *Bell v. OPM*, 79 MSPR 1, 5 (1998) ("The starting point for every case involving statutory construction must be the language of the statute itself"; "[w]here the statutory language is clear, it must control, absent a clearly expressed legislative intent to the contrary."); *Huizar v. OPM*, 19 MSPR 256, 258 (1984) (restating the rules governing the interpretation of statutory language with aids to construction and regard to the purpose sought by the legislation).

Deference to OPM interpretations is not unfettered. Under *Jeffrey v. OPM*, 28 MSPR 81, 85 n.6 (1985):

> While it is true that an agency's interpretation of a statute it must enforce or effectuate through the promulgation of regulations is generally entitled to substantial deference, the Board and the courts are not bound by such interpretation in all situations. *See, e.g., Obremski v. OPM and Merit Systems Protection Board,* 699 F.2d 1263 (D.C. Cir. 1983) (the court need not accept the agency's interpretation where it is poorly reasoned or not in accord with applicable law) and *Hastie v. Department of Agriculture, [*24 MSPR 64 (1984)] (the Board is not bound by OPM's interpretation where circumstances are sufficient to outweigh the deference otherwise due it). In the absence of supportive legislative history and for the reasons stated above, the Board declines to give OPM's view dispositive weight. *See Donaldson v. Department of Labor, [*27 MSPR 293 (1985)] (pursuant to 5 USC §§ 1205 and 7701, the Board retains final authority to decide all matters which properly come before it and to enforce compliance with its decisions despite OPM's administrative authorities).

[Refer to the section in Chapter 17 "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts."]

b. Consideration of Agency Regulations

The Board may be required to consider the validity of an agency regulation (or its implementation) that is challenged during the course of an appeal, and that opportunity was presented when the FDIC terminated an employee for violation of a regulation, a "minimum fitness regulation," requiring employees to honor debts to FDIC-insured "depository institutions," in *Jonson v. FDIC*, 122 MSPR 454, 459–60 ¶¶ 7–10, 2015 MSPB 36 (2015) (following remand, *Jonson v. FDIC*, PH-0752-13-0236-B-1 (NP 9/20/2016), on earlier interlocutory appeal, *Jonson v. FDIC*, 121 MSPR 56, 2014 MSPB 22 (2014) (dissent by Member Robbins) (*Jonson I*)):

> FDIC argues that we exceeded the scope of our authority when we invalidated its minimum fitness regulations. According to FDIC, the Board's authority is limited to review of Office of Personnel Management (OPM) regulations, as provided in 5 U.S.C. § 1204(f). We disagree with FDIC that we invalidated its minimum fitness regulations. We also find unpersuasive FDIC's reliance on decisions that address the scope of the Board's original jurisdiction under section 1204(f), because this appeal arises under the Board's appellate jurisdiction.
>
> In *Jonson I*, we found that the adverse action was taken pursuant to regulations that FDIC promulgated without concurrence from OGE. *Jonson I*, 121 M.S.P.R. 56, ¶¶ 10, 16. Therefore, we found the regulations to be "not in accordance with law." *Id.*, ¶ 17 (citing 5 U.S.C. § 7701(c)(2)(C) (providing that an adverse action may not be sustained if it is "not in accordance with law")). We did not make a finding that the regulations were invalid.[5]
>
> [5] Although we stated in *Jonson I* that the minimum fitness regulations were "invalidly promulgated," we did not intend to infer by that statement that we were invalidating the regulations. *Jonson I*, 121 M.S.P.R. 56, ¶ 17.
>
> FDIC argues that our "authority to review regulations is limited to that which is provided by 5 U.S.C. § 1204(f)." (citing *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400 (2012); *Thompson v. Office of Personnel Management*, 87 M.S.P.R. 184 (2000); *Ramsey v. Office of Personnel Management*, 87 M.S.P.R. 98 (2000)). The Board has two types of jurisdiction, original and appellate. 5 C.F.R. § 1201.1. The Board's original jurisdiction includes, in pertinent part, review of rules and regulations issued by OPM to declare such provisions invalid on their face or invalidly implemented by any agency. 5 U.S.C. § 1204(a)(4), (f)(2); *Thompson*, 87 M.S.P.R. 184, ¶ 7; 5 C.F.R. § 1203.1. In *Thompson*, the Board found that its original jurisdiction does not include the authority to determine whether OPM followed the proper procedures in issuing its regulations. 87 M.S.P.R. 184, ¶ 8 (citing 5 U.S.C. § 1204). In contrast, in the instant appeal, our authority arises

from our appellate jurisdiction under chapter 75 of Title 5. 5 U.S.C. § 7512(1) (including removals among adverse actions appealable to the Board); *Samble v. Department of Defense*, 98 M.S.P.R. 502, ¶ 11 (2005) (finding that the involuntary separation of an appellant who met the statutory definition of employee with adverse action appeal rights fell within the Board's appellate jurisdiction); 5 C.F.R. § 1201.3(a)(1) (listing adverse actions as falling within the Board's appellate jurisdiction). We find unpersuasive FDIC's citation to *Thompson* to suggest that we cannot review whether an agency other than OPM properly promulgated regulations in determining whether to sustain an adverse action.[6]

> [6] We are likewise unpersuaded by the agency's citation to *Ramsey*. (citing *Ramsey*, 87 M.S.P.R. 98, ¶ 10 (finding that a challenge to an OPM regulation that merely repeated statutory language failed because the Board does not have authority under section 1204(f) to review a statutory provision)).

We also are not persuaded by FDIC's arguments that the Board lacks authority to invalidate regulations under the Administrative Procedures Act (APA). (citing *Latham*, 117 M.S.P.R. 400, ¶¶ 18–19 (holding that the Board does not have jurisdiction under the APA to review OPM regulations to determine whether they exceed the statutory grant of authority, but going on to discuss the Board's authority to address whether a regulation improperly expands Board jurisdiction because the Board's jurisdiction is always before it)); *see* 5 U.S.C. § 706(2)(C) (granting reviewing courts the authority under the APA to "hold unlawful and set aside agency action… in excess of statutory…authority"). We did not review the minimum fitness regulations under the APA and did not invalidate them in any event. Rather, we declined to follow them as they concerned this adverse action appeal. *Jonson I*, 121 M.S.P.R. 56, ¶¶ 9, 17.

Jonson added, as to deference to an Office of Government Ethics interpretation of the FDIC regulation, 122 MSPR 454, 461–62 ¶ 13, 2015 MSPB 36 (2015) (following remand, *Jonson v. FDIC*, PH-0752-13-0236-B-1 (NP 9/20/2016)):

> The new OGE declaration responds to our *Jonson I* decision. The declaration states that "OGE concurrence was not required under 12 U.S.C. § 1822(f)(2)" for the minimum fitness regulations. As a matter of comity and cooperation, we defer to OGE's determination that FDIC was not required to obtain its approval before promulgating the minimum fitness regulations. Comity is the discretionary practice of forums to recognize each other's acts. BLACK'S LAW DICTIONARY 303 (9th ed. 2009); *see Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951) (observing that it is proper for the court to refer to an administrative forum a matter that falls within its authority both as a matter of comity and to avoid conflict). Based on policy considerations of comity and cooperation with the Equal Employment Opportunity Commission (EEOC) as a coequal tribunal, the Board has previously exercised its discretion to defer to EEOC's procedural determinations regarding whether an appellant made a valid election between the Board and equal employment opportunity processes. *Gomez-Burgos v. Department of Defense*, 79 M.S.P.R. 245, ¶ 10 (1998) (observing that the Board and EEOC are coequal in the mixed-case process); *cf. Cloutier v. U.S. Postal Service*, 89 M.S.P.R. 411, ¶ 6 (2001) (deferring to the employing agency's determination that a discrimination complaint was untimely). This deference is based on the recognition of EEOC's major responsibility for the equal employment opportunity process and a desire not to frustrate EEOC's goals. *Dawson v. U.S. Postal Service*, *45 M.S.P.R. 194*, 197 (1990). Similarly, we find here that OGE is primarily responsible for oversight of the ethical standards of federal employees. *See Special Counsel v. Nichols*, 36 M.S.P.R. 445, 455 (1988) (recognizing that OGE is the agency primarily responsible for developing rules and regulations pertaining to conflicts of interest and standards of conduct). Our prior finding in *Jonson I* is contrary to OGE's determination that its concurrence in the minimum fitness regulations was not required and could create confusion. Therefore, we find this situation one in which it is appropriate to defer.

[Refer to the subsections in Chapter 11, "Statutory, Regulatory Violation; Action Not in Accordance With Law" and in Chapter 17 "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts."]

2. Prohibition Against Advisory Opinion; Internal Guidance; Request for Advisory Opinion

The Board decides cases before it. The Board is statutorily prohibited from issuing advisory opinions. Under 5 USC 1204(h):

> The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

See Hillen v. Dept. of Army, 54 MSPR 58, 66–67 (1992) ("The Board's decision does not address this portion of the regulation because its interpretation is not necessary to a decision in this case. Here the agency charged that the appellant's conduct had the effect of creating a hostile and intimidating environment. The Board is empowered to decide the cases before it, and it is prohibited by statute from issuing advisory opinions. 5 U.S.C.A. § 1204(h) (West Supp. 1991)."); *Donahue v. Dept. of Navy*, PH-0752-13-3010-I-1 (NP 6/17/2014) ("Moreover, the Board may not issue an advisory opinion regarding any potential future action taken by an agency. *See* 5 U.S.C. § 1204(h)"); *Labonte v. VA*, 53 MSPR 668, 670 (1992) ("a decision by the Board on the issue of jurisdiction where there is no matter in controversy would be tantamount to an advisory opinion, which the Board is precluded from issuing").

The prohibition harkens to the days before the Reform Act, when the Civil Service Commission furnished advisory opinions to other agencies, notably the Federal Labor Relations Council, on issues of personnel law. The Board occasionally informs parties that it will not consider findings made by an AJ that were beyond the jurisdiction of that AJ, for those findings "may be deemed a prohibited advisory opinion." *See Ruggieri v. USPS*, 71 MSPR 323, 325 (1996) (As to the scope of a waiver agreement in a settlement agreement, "[t]he Board is not authorized to give advisory opinions on matters which are not before it."); *Sims v. USPS*, 10 MSPR 607, 609 (1982) (if the appellant does not raise a claim of reasonable accommodation beyond the bare assertion of disability discrimination, the MSPB will not adjudicate the question of accommodation because the Board is prohibited from issuing advisory opinions); *cf. McLaughlin v. OPM*, 62 MSPR 536, 559 (1994) ("for the chief administrative judge to comment and make findings on issues which he lacked jurisdiction may be deemed a prohibited advisory opinion").

The Board declined to provide advice, absent a concrete dispute, concerning the meaning of a settlement in *Rodriguez v. DHHS*, DC-1221-11-0406-C-1 (NP 8/2/2012):

> [T]he appellant seeks a response to her request for an explanation and interpretation of the settlement agreement clause that bars the appellant from seeking or accepting a position with the agency for two years following the agreement. Because the appellant is not contesting the Compliance Initial Decision, and there is no error in the administrative judge's finding that the agency is in compliance with the settlement agreement, the appellant has provided no basis for further review.
>
> Moreover, the appellant's request for an interpretation of this clause in the settlement agreement is not ripe for consideration because the appellant does not allege that the agency has breached this term or that the agreement is otherwise invalid based on this term. The Board is prohibited by statute from issuing advisory opinions. 5 U.S.C. § 1204(h). Because the appellant is not contesting this term, the Board may not issue a decision providing advice or guidance regarding its meaning. *See Winston v. Department of the Treasury*, 114 M.S.P.R. 594, ¶¶ 7–9 (2010) (the Board does not have authority to issue an advisory opinion regarding whether an agency could terminate an employee based on an alleged breach of a settlement agreement, but could only review the action after the agency took it).

Although the law prohibits advisory opinions, the Board makes pronouncements that sound advisory. One agency obtained a declaratory opinion under the retirement laws concerning the law enforcement retirement status of its employees after the agency received an unfavorable ruling from OPM. *Dept. of State v. OPM*, 22 MSPR 404, 408 (1984); *cf. USDA v. Palmer*, 68 MSPR 586, 589 (1995) (while disclaiming issuance of advisory opinion, the Board opined as to a scenario that might lead to its jurisdiction over a furlough of ALJs). The Board reached out, *sua sponte*, to correct a nondispositive error by an AJ for "instructional purposes." *See McIntire v. FEMA*, 55 MSPR 578, 582 (1992).

The Board's General Counsel and its Office of Appeals Counsel provide legal guidance of a general nature within the Board. Those issuances are advisory, but the Board does not serve as personnel advisor to other agencies involved in personnel adjudication. It is possible for AJs to obtain some higher-level guidance. Board Memo 165 of July 20, 1981, from the Deputy Managing Director to the regions, stated:

> Presiding Officials [administrative judges] should at all times feel free to raise questions concerning Board Orders. Inquiries regarding the consistency of decisions, the application or interpretation of law in a particular case, or possibly the failure to consider certain issues or facts should, after discussion with the Regional Director, be brought to the attention of the Deputy Managing Director. This office will then seek clarification from the Board.

The Air Traffic Controller cases, involving appeals by controllers fired for participating in a strike against FAA, produced an issue bearing upon the independence of AJs. A legal memo was issued by the Board's General Counsel advising AJs of legal conclusions concerning a number of issues, including whether removal was required for striking; whether official notice of the strike was appropriate; whether the Board had authority to pass on questions of constitutionality of statutes; whether First Amendment rights of the strikers were violated; and whether the strike was justified by disputes over pay, safety, and working conditions. The legal memo was accompanied by a transmittal memo stating that AJs were not obligated to follow the analysis and were responsible for conducting their own research. The controllers challenged the memo as an advisory opinion in violation of 5 USC 1205(g) (subsequently renumbered as 5 USC 1204(h)). *Campbell v. Dept. of Transp.*, FAA, 735 F.2d 497, 501 (Fed. Cir. 1984), determined that the Board's General Counsel

was, under 5 CFR 1200.10(b)(5), responsible for providing legal advice to the Board, staff and field offices and "that some presiding officials adopted part of the language from the memoranda does not indicate an abdication of their responsibilities or dictation of result by the General Counsel's Office." The court interpreted the statutory prohibition against advisory opinions to encompass the issuance of advisory opinions to the public as guides to future conduct. *See Eng v. Dept. of Transp.*, 18 MSPR 220, 222 (1983) (an OGC memo was not an *ex parte* communication since it was not from an "interested party" within the meaning of 5 CFR 1201.101).

Although the Board is not supposed to give unofficial advice, it may request advisory opinions. Under 5 USC 1204(e)(1)(A), any Board member may "request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management." The Board occasionally requests an advisory opinion from OPM on the meaning or application of one of its regulations. The Board obtained advice from the General Accounting Office (Comptroller General) pertaining to back pay computations and entitlements. *See*, *e.g.*, *Miller v. DOD*, 45 MSPR 263, 267 (1990) (advisory opinion from GAO concerning the validity of a provision in settlement granting the appellant a one-year period of administrative leave); *Greco v. Dept. of Army*, 30 MSPR 288, 290 (1986) (a question of whether the Back Pay Act authorizes a living quarters allowance as part of a back pay remedy); *Cortez v. VA*, 27 MSPR 648, 650 (1985) (an advisory opinion concerning the recoupment through a settlement agreement of withdrawn retirement contributions). [Refer to the subsection of Chapter 16, "Referral to Comptroller General," for discussion of advisory opinions solicited in connection with issues pertaining to agency compliance with Board remedial orders.]

The Board solicited an advisory opinion from the OPM Director on an issue of disability annuity coverage, even though OPM was a party to the case. Although 5 USC 1204(e)(1) permits the Board to solicit an advisory opinion from OPM, the Board did not explain the utility of an advisory opinion from the same party that was briefing the case. *See Bracey v. OPM*, 83 MSPR 400, 406 ¶ 11–12 (1999). The Board may find OPM advisory opinions instructive, but not binding, according to *Solamon v. Dept. of Commerce*, 119 MSPR 1, 4 ¶ 9, 2012 MSPB 117 (2012), involving jurisdictional implications of a pay reduction under a demonstration project:

> As an initial matter, we note that the interpretation of 5 U.S.C. § 4703 contained in OPM's advisory opinion does not have the force of law and, therefore, does not warrant deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Rather, it is "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that OPM's interpretation has the "power to persuade." *Christensen*, 529 U.S. at 587 (quoting *Skidmore*). We find OPM's interpretation of 5 U.S.C. § 4703 to be persuasive and therefore entitled to *Skidmore* deference.

B. CUSTOMER SERVICE STANDARDS

The Board, as an executive branch entity, exists to promote the public interest. The Board maintains "Customer Service Standards" [http://www.npmhul310.org/mspb_files/Intro_MSPB.pdf]:

1. We will make our regulations easy to understand and our procedures easy to follow.
2. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.
3. We will promptly and courteously respond to customer inquiries.
4. We will facilitate the settlement of appeals.
5. We will issue readable decisions based on consistent interpretation and application of law and regulation.
6. We will issue decisions in initial appeals within 120 days of receipt and within 110 days on petitions for review, except where full and fair adjudication of an appeal requires a longer period.
7. We will make our decisions readily available to our customers.

C. ORGANIZATION

The MSPB is an independent, quasi-judicial federal administrative agency established under the Civil Service Reform Act of 1978, 5 USC 1201. Its functions and organization are principally established at 5 USC 1201–1206 and implemented by the Board's published regulations. The Board consists of a Chairman, a Vice Chair, and a third Member, each appointed by the President and confirmed by the Senate. No more than two members may be adherents of the same political party; they serve nonrenewable seven-year terms and they can be removed for inefficiency, neglect of duty, or malfeasance in office. The Chairman is the chief executive and administrative officer of the Board. *See* 5 CFR 1200.1–.2 (2016). The Chairman is generally responsible for determining matters pertaining to Board organization and personnel policies. The Board as a whole determines regulations governing its adjudication practices and procedures. *See* 8/3/87 Memo from MSPB General Counsel to MSPB Chairman. The Board is authorized to employ approximately 226 full time equivalent personnel at its headquarters, six regional and two field offices. Its budget is in the neighborhood of $45 million.

The Board operates through a Washington, D.C., headquarters office and a field organization. Adjudication authority is delegated by the Board and its Chairman to other headquarters officials and to 60–70 Board administrative judges (usually referred to as "judge," or AJ, in this *Guide*), employed at the Board's regional and field offices. An administrative law judge (ALJ) (selected through OPM competitive procedures rather than through the direct appointment process used to employ administrative judges) hears cases under the Hatch Act (the 1939 Act to Prevent Pernicious Political Activity, as amended), OSC disciplinary complaints, cases against ALJs, appeals of actions taken against MSPB employees, and other cases assigned to an ALJ by the Board. The Board once employed an ALJ for these cases but now contracts for the services of an ALJ through the one of several agencies with ALJs with time to spare and an odd interest in the peculiarities of our shared legal endeavor.

Regional and field administrative and adjudicatory operations are conducted under the general supervision of the Director, Office of Regional Operations. There are now six regional and two field offices of the Board. The geographical boundaries and points of contact for the MSPB field organization are, taken from the Board's website [http://www.mspb.gov/contact/contact.htm]:

1. Atlanta Regional Office, 401 W. Peachtree Street, N.W., 10th Floor, Atlanta, Georgia 30308–3519, Phone: (404) 730–2751; Fax: (404) 730–2767 (Alabama; Florida; Georgia; Mississippi; South Carolina; and Tennessee); atlanta@mspb.gov.
2. Central Regional Office, 230 South Dearborn Street, 31st Floor, Chicago, Illinois 60604–1669, Phone: (312) 353–2923; Fax: (312) 886–4231 (Illinois; Indiana; Iowa; Kansas City, Kansas; Kentucky; Michigan; Minnesota; Missouri; Ohio; and Wisconsin); chicago@mspb.gov.
3. Washington D.C. Regional Office, 1901 S. Bell Street, Suite 950, Arlington, Virginia 22202, Phone: (703) 756–6250; Fax: (703) 756–7112 (Washington, DC; Maryland—counties of Montgomery and Prince George's; North Carolina; Virginia; and all overseas areas not otherwise covered by other Board offices); washingtonregion@mspb.gov.
4. Northeastern Regional Office, 1601 Market Street, Suite 1700, Philadelphia, Pennsylvania 19103, Phone: (215) 597–9960; Fax: (215) 597–3456 (Connecticut; Delaware; Maine; Maryland—except the counties of Montgomery and Prince George's; Massachusetts; New Hampshire; New Jersey—except the counties of Bergen, Essex, Hudson, and Union; Pennsylvania; Rhode Island; Vermont; and West Virginia); philadelphia@mspb.gov.
5. Dallas Regional Office, 1100 Commerce Street, Room 620, Dallas, Texas 75242–9979, Phone: (214) 767–0555; Fax: (214) 767–0102 (Arkansas; Louisiana; Oklahoma; and Texas); dallas@mspb.gov.
6. Western Regional Office, 201 Mission Street, Suite 2310, San Francisco, California 94105–1831, Phone: (415) 904–6772; Fax: (415) 904–0580 (Alaska; California; Hawaii; Idaho; Nevada; Oregon; Washington; and Pacific overseas areas); sanfrancisco@mspb.gov.
7. New York Field Office, 26 Federal Plaza, Room 3137–A, New York, New York 10278–0022, Phone: (212) 264–9372; Fax: (212) 264–1417 (New Jersey—counties of Bergen, Essex, Hudson, and Union; New York; Puerto Rico; and Virgin Islands); newyork@mspb.gov.
8. Denver Field Office, 165 South Union Blvd., Suite 318, Lakewood, Colorado 80228–2211, Phone: (303) 969–5101; Fax: (303) 969–5109 (Arizona; Colorado; Kansas—except Kansas City; Montana; Nebraska; New Mexico; North Dakota; South Dakota; Utah; and Wyoming); denver@mspb.gov.

For the headquarters establishment, inquiries may be directed to:

> Merit Systems Protection Board
> 1615 M Street, NW
> Washington, DC 20419–0002
>
> Phone: 202–653–7200
> Fax: 202–653–7130
> mspb@mspb.gov
> V/TDD 1–800–877–8339
> 1–800–254–4800 ("message line")
> 1–800–424–9121 (MSPB Inspector General "hotline" [administered by USDA])
>
> Clerk of the Board: phone: 202–653–7200; facsimile: 202–653–7130
>
> Equal Employment Opportunity: phone: 202–254–4405; facsimile: 202–653–7130
>
> General Counsel: phone: 202–653–7171; facsimile: 202–653–6203

Contact information changes for Board offices at the headquarters and regional or field offices. Check the website or call the Board's Clerk at 202-653-7200 to determine where to obtain the information you need.

A description of Board organization is taken from the FY 2016 Annual Report:

> MSPB Offices and Their Functions
>
> MSPB is headquartered in Washington, D.C. and has eight regional and

field offices located throughout the United States. For FY 2017 the agency requested 235 Full-time Equivalents (FTEs) to conduct and support its statutory duties.

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

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

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

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

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

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

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

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

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

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

Board organization is described in "Organization Functions & Delegations of Authorities" (April 2011). http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1279407&version=1284518&application=ACROBAT (last visited October 31, 2016).

The Department of Agriculture Office of Inspector General serves as the MSPB IG to keep things regular and lawful. Complaints to the IG may be submitted to the inspector.general@mspb.gov, or by hotline at 800-424-9121 or by mail to the Board's office at 1615 M St., NW, Washington, DC 20419. Review of several years of IG complaints, released by the Board through a FOIA response, shows that many complaints are protests of disciplinary or other personnel actions of individuals who are employed by agencies throughout the government; a few complaints are against individual MSPB AJs alleged to have shown bias or improperly processed some component of a Board appeal; some complaints are of waste or mismanagement by agencies other than the MSPB and would properly be presented to OSC or inspectors general of the agencies implicated by the assertions. No complaints in the sampled group were of waste or mismanagement in MSPB programs.

An Executive Committee (XCOM) that includes the principal staff leadership makes recommendations on budget, programs, and operations to the Board's chairman and executive director.

Regular practitioners before the Board will have frequent contact with AJs at the regional and field offices and occasional contact with the headquarters Office of the Clerk through petitions for review, responses, and related pleadings reviewed by the Office of Appeals Counsel and the Board members and their staff lawyers.

The Board's website has organizational and contact information for Board officials and regional and field offices, at www.mspb.gov.

1. Clerk

The Clerk's Office (formerly the Office of the Secretary) was renamed to parallel the functions of the Clerk of the Court of Appeals for the Federal Circuit, the Board's reviewing court for most cases. The MSPB Clerk receives petitions for review of initial decisions from the regional and field offices. The Clerk also processes Freedom of Information Act (FOIA) and Privacy Act requests, manages Board records, maintains the Board's headquarters docket, distributes copies of Board decisions and publications, controls the Board's on-line information services (website, listserve, and e-filing systems), operates the Board's library, and directs the Board's records, reports, legal research, and correspondence control programs, opens the mail, collects the faxes, and answers the phones. The Clerk's office provides assistance to those who ask for it. Requests for extensions of deadlines for PFRs or responses should always be in writing and requests should be submitted prior to the deadline in proper format with a sworn explanatory declaration. *See* 5 CFR 1201.114 (2016). There is a big difference between getting a deadline extended and a missed deadline excused. Refer to Chapter 5 for information on the regulatory deadlines for PFRs. Address inquiries the Clerk to:

Clerk
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419–0002

(202) 653–7200
mspb@mspb.gov
V/TDD 1–800–877–8339
1–800–254–4800 ("message line")
Fax (202) 653–7130

The Clerk is delegated the authority to dismiss PFRs that are clearly beyond the Board's jurisdiction. The Clerk is delegated some authority to control pleadings arriving at the Board, including rejection of nonconforming pleadings (done with notice permitting refiling of proper pleadings within a set deadline. *See Morris v. Dept. of Navy*, 123 MSPR 662, 668 n. 8, 2016 MSPB 37 (2016) ("Although 5 C.F.R. § 1201.43 is phrased in terms of sanctions an administrative judge may order, the Board itself is empowered to issue orders. *See* 5 U.S.C. § 1204. The Board has delegated to the Office of the Clerk of the Board the authority to sign and issue orders disposing of procedural matters, such as those at issue in the instant case. MSPB Organization Functions and Delegations of Authority at 8–9 (April 2011)." http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1279407&version=1284518&application=ACROBAT).

2. Office of Appeals Counsel

Quietly working at the Board's headquarters offices in Washington, D.C., are lawyers who review cases brought to the Board by PFRs of initial (regional or field office) decisions or through requests to reopen decided cases. This group of thirty to so lawyers, collectively known as the Office of Appeals Counsel (OAC), reviews case records and appellate briefs and drafts recommended decisions for review by Board members (and the attorneys on each member's staff) on petitions for review (PFRs) of initial decisions issued by Board AJs in the regional and field offices, in original jurisdiction cases, and in other cases assigned by the Board. [The "PFR Process" is described in Chapter 5.] The OAC lawyers, usually GS-13 and GS-14, review the initial decisions of the AJs, often GS-15s. The lawyers in OAC and the AJs are in the same labor union. OAC also

prepares recommendations concerning interlocutory and arbitration appeals, evaluates PFRs from initial decisions of the Board's contract ALJs, reviews stay requests from the Office of Special Counsel, processes court remands and OPM requests for reconsideration, establishes special briefing schedules, and considers requests for time extensions and motions for intervention, consolidation, and joinder of cases. Notwithstanding their bargaining unit solidarity, some decisions from the Board, drafted by OAC attorneys (perhaps revised by Board members or their own legal assistants), are openly critical of the work product (initial decisions) of their AJ colleagues.

OAC does not issue final Board decisions. That is the function of the Board members who review, with the assistance of their staff legal advisors, OAC draft decisions or recommendations. After OAC reviews a case, it prepares an "analytical memorandum" providing a discussion for the Board members of the relevant issues presented by the PFR. Accompanying the memo is a recommended Board order and opinion. A "decision sheet" is used by Board members to indicate by check marks and initials whether they adopt, reject, or seek to modify the proposed opinion and order. The decision sheets are available through FOIA or the Privacy Act. As a result of a 2000 change in the Board's Privacy Act records systems descriptions, OAC analytical memoranda are no longer accessible by appellants through the Privacy Act, although, with a sufficiently tailored description, they may be available under FOIA if they have been retained when the FOIA request arrives at the Board. When the Board issues a final decision, the Clerk mails it or places it on the e-filing system, and the decision is usually issued under the name of the Clerk, although from time to time Board members issue decisions under their own names.

Reprinted below are recent performance standards for attorneys working in the Office of Appeals Counsel. They are placed here to give a better understanding, albeit indirectly, of how the Board's review process works—as expressed from the vantagepoint of the employee in OAC. The standards also provide an example of how the Board, with its knowledge of performance cases and the requirements of performance standards, attempts to establish objective performance standards for its OAC lawyers. The standards are:

PERFORMANCE STANDARDS FOR ATTORNEY ADVISERS (GENERAL) IN THE OFFICE OF APPEALS COUNSEL

1. Preparation of Recommended Decisions—Legal Analysis (Critical):

Unacceptable:

—Incorrect and/or incomplete identification of legal and/or factual issues.

—Lack of consideration of relevant facts, evidence, or appropriate authority.

—Incorrect or incomplete analysis of issues involved.

Note: Repeated minor deficiencies and/or occasional major deficiencies may warrant an "unacceptable" rating under this element.

Fully Successful:

—Appropriate recognition of facts, Board precedent, and other legal authorities.

—Correct identification of factual and legal issues.

—Thorough, correct, and logical analysis of issues presented for resolution.

Exceeds Fully Successful:

—Superior research efforts are, for the most part, self-initiated.

—Legal analysis is comprehensive and supported by comparisons and analogies, where appropriate.

—Almost no re-direction of research or analysis.

2. Preparation of Recommended Decisions—Legal Writing (Critical):

Unacceptable:

—Poor organization and/or readability.

—Frequent errors in grammar, spelling, and/or punctuation.

—Frequent errors in citation form.

—Frequent errors in format, including errors in case caption, additional order language, compliance language, and/or certificate of service.

Note: Repeated minor deficiencies and/or occasional major deficiencies may warrant an "unacceptable" rating under this element.

Fully Successful:

—Concise discussion of material facts and relevant law.

—Good organization: Clear and readable.

—Errors in grammar, spelling, and punctuation are infrequent and minor and do not detract, to a meaningful degree, from the readability of the written product in most cases.

—Compliance with the Uniform Citation Style Manual, the Board's Style Manual, and its Legal Style Manual in most cases.

—Proper format usage.

Exceeds Fully Successful:

—Written work is skillfully crafted, with almost no errors in grammar, spelling, and punctuation.

—Excellent organization: Superior clarity and readability.

3. Productivity (Critical):

A. Rating

Unacceptable: Produces at a rate of fewer than 48 raw cases per year.

Minimally Successful: Produces at a rate of 48 to 53 raw cases per year.

Fully Successful: Produces at a rate of 54 to 59 raw cases per year.

Exceeds Fully Successful: Produces at a rate of 60 to 65 raw cases per year.

Outstanding: Produces at a rate of 66 or more raw cases per year.

B. Counting raw cases.

1. *General Rule*. Generally, an attorney earns a raw case by preparing a written, recommended decision with accompanying memorandum that is forwarded to the Board for a vote. The raw case includes all, work integral to the production of the case. including the issuance of orders to show cause. At the end of the rating period, a case that has not been forwarded out of the office for a vote will be counted as a raw case for the ending rating period if, by close of business on the last day of the rating period: (1) the attorney has submitted a draft recommended decision with accompanying memorandum for the requisite supervisory review, and (2) the supervisor subsequently determines that the ease was substantially complete by the end of the rating period, i.e., acceptable for forwarding with minimal or no revision. The decision whether a case is substantially complete is within the sole discretion of OAC management.

2. *Counting Rewrites*. Subject to the general requirements in paragraph B. I, an attorney earns a raw case by preparing a written recommended decision with accompanying memorandum in response to a rewrite instruction other than a LAN-edit. An attorney will not earn a raw case or be taken "off standards" for work done in response to a rewrite instruction when the Associate Director determines that the original recommended disposition was clearly in error under the law as it existed when the recommendation was made or when the factual analysis was materially inadequate. The Associate Director's determination may be appealed to the Director within 7 calendar days. The Director's decision shall be final.

3. *Counting Consolidated and Joined Cases*. Subject to the general requirements in paragraph B.I. an attorney earns two raw cases by preparing a recommended decision that joins or consolidates two separate cases pending at headquarters for decision. When an attorney recommends joining or consolidating three or more cases for decision, the Associate Director will determine whether the attorney should be deemed to have produced multiple cases or whether the attorney should be placed "off standards" for time reasonably spent on the cases (see paragraph C.3(b)). The attorney may appeal that determination to the Director within 7 calendar days. The Director's decision shall be final. In making this determination, management will consider the amount of work reasonably required to prepare the recommended decision, the number of cases involved, and any other pertinent factors. Generally, cases that arrive joined or consolidated from the regions will be counted as one raw case; however, Associate Directors may decide whether any adjustments are necessary on a case-by-case basis. The Associate Director's determination may be appealed to the Director within 7 calendar days. The Director's decision shall be final.

C. Adjustments to Annual Production Requirements.

1. *Base work year.* The annual raw ease production requirements set forth in paragraph A are based on a 1,887 hour work year. This hourly figure is based on the Office of Personnel Management's computation of a 2,087 hour work year less 80 hours for the 10 federal holidays and 120 hours for general administrative time (see paragraph C.3(d)). The annual raw case production requirement for each attorney will be adjusted for leave usage and off-standards time as set forth in paragraphs C.2 and C.3.

2. *Leave adjustment.* An attorney's annual raw ease production requirement will be reduced hour for hour for all

approved annual leave, sick leave, administrative leave, leave without pay, and military leave taken during the rating period.

Example #1: Assume an attorney who is on standards for the entire I-year rating period takes 160 hours of annual leave. 40 hours of sick leave, and 8 hours of administrative leave during the rating period. The annual raw ease production requirements for that attorney will be reduced by a proration factor computed as follows:

Proration factor =(1,887-160-40-8)/1,887

Proration factor 1,679/1,887

Proration factor = .890

Thus, that attorney would need to earn the following number of raw eases, computed by multiplying the annual raw case production requirement by the proration factor:

Minimally Successful: 48 raw cases * .890 =43 raw cases

Fully Successful: 54 raw cases * .890 = 48 raw cases

Exceeds Fully Successful: 60 raw cases * .890=53 raw cases

Outstanding: 66 raw cases * .890 = 59 raw cases

3. *Off-standards time adjustment*.

(a) An attorney's annual raw ease production requirement will be reduced hour for hour to account for off-standards time approved by OAC management. An attorney must request the approval of his or her Associate Director for off-standards time within 2 weeks of performing the work forming the basis of the off-standards request. Untimely requests will not be considered unless there are extenuating circumstances justifying the delay. Whenever possible, an attorney should notify his or her Associate Director in advance before beginning such an activity requiring an off-standards time adjustment. The Associate Director may approve an attorney's request for off-standards time, partially approve the request, or deny the request. The attorney may appeal the Associate Director's decision to the Director within 7 calendar days. The Director's decision shall be final.

Example #2: Assume that the attorney described in Example #1 in paragraph C.2 above also accrued 50 hours of approved off-standards time in addition to the leave described in Example #1. That attorney's annual raw case production requirements would be reduced by a proration factor computed as follows:

Proration Factor= (1,887-160-40-8-50)/1,887

Proration Factor= 1,629/1,887

Proration Factor = .863

Thus, that attorney would need to earn the following number of raw cases, computed by multiplying the annual raw case production requirement by the proration factor:

Minimally Successful: 48 raw cases * .863 41 raw cases

Fully Successful: 54 raw cases * .863 =47 raw cases

Exceeds FS: 60 raw cases .863 =52 raw cases

Outstanding: 66 raw cases * .863 = 57 raw cases

(b) Case-related off-standards time. Attorneys may request off-standards time for the following case-related activities for which a raw case is not earned:

Preparation of a substantive memorandum returning a LAN-edit rewrite to the Board

Preparation of a memorandum in response to a request for an advisory opinion from a Board member

Preparation of a concurring. dissenting. or separate opinion prepared at a Board member's request

Preparation of a decision that consolidated or joined more than 2 cases (see paragraph B.3)

Preparation of a recommended decision and accompanying memorandum in a case that reasonably requires more than 80 hours to complete; the term "excess case hours" is defined as those hours in excess of 80 hours reasonably expended to prepare a case for which attorneys may request off-standards time

Preparation of a response to a reconsideration request that reasonably requires more than 1 full work day to complete

(c) *Non-case-related off-standards time*. Management will approve requests for off-standards time for approved, substantial noncase-related activities. Generally, such activities would each reasonably require 1 full work day or more to complete. Whenever possible, an attorney should notify his or her Associate Director in advance before beginning such an activity. If not made in advance, the request should be made as soon as possible after beginning the activity and at the latest within 2 weeks of completing the activity. The type of activities that could justify off-standards time includes, but is not limited to, the following:

Job-related training lasting I full day or longer

Details

Assignments to agency committees or working groups

Official time in accordance with the Collective Bargaining Agreement

Serving as an officer or keyworker for the CFC

Planning or preparing a major Board function, including Unity Day and EEO special emphasis month events, that reasonably requires at least I full work day

Attendance at the agency's legal conference

Preparation for and participation in agency outreach events

Acting as an Associate Director

(d) *General Administrative Time Allowance*. Off-standards time will not be approved for staff meetings and other relatively brief Board-related activities. As set forth above in paragraph C.l, the 1,887 hour base work year incorporates an allowance for each attorney of 120 hours for general administrative time. This allowance covers work time spent throughout the year on administrative matters for which the attorney does not earn a raw case credit or accrue off-standards time. The type of activities covered by this general administrative time allowance includes but is not limited to the following:

Staff meetings

Reviewing e-mails

Completing time and attendance reports

Attending agency events. such as Unity Day, CFC events, holiday parties. LEO/Diversity events, and "Meet & Greets" with other agencies

Recreation Association or Holiday Party Planning Committees

Job-related training lasting less than 1 work day, for instance: Annual Computer Security Training, No Fear Act Training, Westlaw seminars, and outside seminars and presentations

Short-form orders prepared pursuant to rewrite instructions

Routine LAN-edit review

Routine reconsideration requests

Other relatively brief Board-related activities

D. Quarterly Assessments.

During each quarter of the performance year, each attorney must meet at least 20% of the annual raw case production requirement at the Fully Successful level (prorated for leave usage and off-standards time in accordance with paragraph C). Failure to meet the 20% requirement in any quarter may result in the attorney being counseled on performance. Failure to meet the 20% requirement in two consecutive quarters in a discrete performance year shall result in the attorney being placed on a Performance Improvement Plan following the second consecutive quarter. Nothing in this paragraph limits management's authority under any law or regulation to promptly address performance issues. Management is not required to wait until the end of the annual rating period to place the attorney on a Performance Improvement Period. Regardless of whether his or her performance fails to meet the 20% requirement in two consecutive quarters in a discrete performance year, an attorney who fails to meet the Minimally Successful production standard (prorated for leave usage and offstandards time in accordance with paragraph C) at the close of the annual rating period shall be placed on a Performance Improvement Plan.

E. New Attorneys.

Newly hired attorneys shall not be held to case production standards

for their first year, but they are expected to progress during the first year (with due consideration given to prior experience and training) so that by the end of their first year they are producing at the rate contemplated by the production element set forth in paragraph A.

F. Allowances for unusual circumstances

Management may exercise its discretion to raise an attorney's productivity rating computed tinder tile formula set forth above in paragraphs A-C when the computed rating does not accurately reflect the attorney's overall productivity during the rating period. Management may take into account such factors as the relative difficulty of the attorney's ease work during the rating period given the employee's grade and whether the attorney's reasonable and efficient work on special projects, non-case related assignments, and/or an unusually difficult mix of assigned cases during the rating period adversely affected the attorney's overall rate of production. If the attorney believes that such circumstances existed during any quarter, the attorney shall so advise their Associate Director and the Deputy Director in writing within 2 weeks after the close of the quarter. Management will note in writing whether there were unusual circumstances in that quarter that might justify an adjustment at the close of the rating period if not counterbalanced by mitigating circumstances during the remainder of the rating period. The attorney may appeal the decision of the Deputy Director within 7 calendar days. The Director's decision on the appeal shall be final.

4. Professional Relationships and Diversity (Critical):

—Maintains courteous and cooperative relationships with managers, supervisors, colleagues, support staff and, if applicable, external contacts; demonstrates courtesy, patience, and a willingness to be helpful to the public; keeps appropriate matters confidential.

—Demonstrates respect for diversity in the work place based on race, color, religion, national origin, age, sexual Orientation, gender, and/or the existence of a disabling condition. This respect is demonstrated toward supervisors, coworkers, and customers, both internal and external.

Unacceptable:

—Fails to demonstrate, to a severe or pervasive degree, professionalism, courtesy, respect, or fairness in dealing with others; or

—Frequently fails to respond to written and/or oral communications in a timely manner; or

—Frequently fails to advise supervisor of sensitive cases (e.g., cases involving complex, unique, or high-profile issues) in a timely manner; or

—Participates in prohibited *ex parte*, communications; or

—Otherwise fails, to a significant degree, to perform duties represented by "Fully Successful" standards.

Fully Successful: To meet this performance level, the employee must generally meet each of the following requirements (as determined by the supervisor through direct observation and/or discussion with customers and/or peers):

—Demonstrates professionalism, courtesy, respect, and fairness in dealing with others; and

—Willingly helps others by sharing information and skills in ways that contribute to their work; and

—Responds to written and/or oral, communications in a timely manner; and

—Keeps supervisor fully informed as to sensitive cases (e.g., cases involving complex, unique; or high-profile issues); and

—Participates in no *ex parte* communications; and

—Performs duties in a bias-free manner that:

—Promotes a cooperative, productive, harmonious, and enjoyable work place; and

—Reflects fairness, cooperation, and respect for diversity among supervisors, co-workers, and customers, both internal and external.

Exceeds Fully Successful: To meet this performance level, the employee must meet the "Fully Successful" standard described above and meet at least one of the criteria described below:

—Exhibits professionalism, courtesy, respect, and fairness in dealing with all people in difficult or tense situations; or

—Provides suggestions, anticipates problems, or assists in the constructive resolution of issues related to the promotion of a diverse workplace; or

—Promotes collegial relationships with others inside and outside the agency; or

—Recognizes and acts upon opportunities to share information, products, and skills with others and takes the initiative to, help others; or

—Prepares and/or presents outreach materials well; or

—Successfully develops and/or provides internal training to other employees and/or external training to customers; or

—Writes work-related article(s) of publishable quality.

5. General Administration (Non-Critical):

Unacceptable:

—Frequently fails to follow proper procedure for assuring control of case files and documents submitted in connection with the appellate process; or

—Frequently fails to maintain accurate records of cases assigned, including the identification of pertinent computer disks or

—Frequently fails to submit, or frequently submits inaccurate, case transmittal slips that are used to assure timely and appropriate data entry into case-tracking system.

Fully Successful:

—Assures timely and proper data entry into case-tracking system in most cases.

Exceeds Fully Successful:

—Meets Fully Successful standard described above; and

—Provides appropriate comments, recommendations, and advice regarding Board and office operations and policies; or

—Volunteers, or indicates a willingness, to assume additional duties relating to the general administration of the office.

If our readers understand the OAC productivity standards, they should apply for employment with the Board.

D. ADMINISTRATIVE JUDGES

The Board's definition of a "judge" (usually referred to as an AJ) is broadly stated under 5 CFR 1201.4 (2016):

> (a) *Judge*. Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including the Board or any member of the Board, or an administrative law judge appointed under 5 U.S.C. 3105 or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge.

Only one member of the Board's corps of AJs will constitute, for most litigants, the "judge" and the most significant and most visible point of contact with the Board, for the assigned AJ is entrusted with development of the appeal record and the issuance of an initial decision that, if challenged through a petition fo review, leads to the Board's final administrative disposition of the appeal at the headquarters level. If the initial decision is not challenged or reopened at the initiative of the Board (a rare occurrence), it becomes the final decision of the Board, still subject to further review by the EEOC or the courts.

1. Delegations of Authority

Case adjudication is entrusted by the Board to regional or field office chief administrative judges (AKA regional directors or CAJs) and, in turn by delegation, to approximately 65 administrative judges (AJs) (before 1989 referred to as presiding officials) who function as hearing officers. The corps of AJs is assisted by legal technicians and paralegals. AJs are excepted service attorney examiners—civil servants, like the appellants whose cases they assess—hired without competitive examination. They have no real independence in the sense of the type of tenure granted to administrative law judges under the Administrative Procedure Act. AJs function with practical independence, however, for their credibility determinations ordinarily receive deference from the Board and their initial decisions are generally not subject to formal review or revision at the regional or field office level. Because OPM regulations preclude the use of the title "judge" in any position other than administrative law judge—and the region and field office Board employees are not ALJs—the Board characterizes "administrative judge" as a "working title," as opposed to an official title. *See Lively v. Dept. of Navy*, 31 MSPR 318, 320 n.1 (1986). Nonetheless, the title of the Board's examiners gradually evolved to that of "judge," and that honorific is codified in the Board's regulations. 5 CFR 1201.4(a) (2016). Legislation facilitating removal of SES members employed by the Department of Veterans Affairs, Section 707 of the Veterans' Access to Care through Choice, Accountability, and Transparency Act of 2014, Public Law 113–146, rewrites the ordinary MSPB appellate processes for the covered executives; that section makes explicit reference to "administrative judge," so it looks as though the title of administrative judges moved from honorific to statutory. AJs are supervised by a regional office or field office director, referred to as a chief administrative judge (CAJ). Regional directors are members of the Senior Executive Service who may, or may not, decide their own docket of cases or participate as settlement judges or mediators.

The AJ is a hearing officer and legal analyst whose job is to assemble a record

and produce what is called an "initial decision." That initial decision becomes a final MSPB decision only by inaction, e.g., when no petition for review is filed and the initial decision becomes final through the passage of time, or by affirmative review, e.g., when a PFR is filed or when the Board reopens a case on its own motion or that of party. [The processing of PFRs and reopening petitions is described in Chapter 5 under the subheading "PFR Process."] The significant deference to the AJ is the regard the Board usually, although not always, gives to his or her determinations concerning the credibility of witnesses. *See Billingsley v. USPS*, 4 MSPR 368, 370, 4 MSPB 428 (1980). Through the PFR process, the Board may and does review *de novo* the legal analysis of the AJ. [See Chapters 5 under the subheading "Credibility Findings" and Chapter 17 under the subheading "Credibility" for further discussion of resolution of credibility issues.]

According to the Board's FY1986 budget request, each AJ should be annually assigned approximately 90 cases. The normal workload of an AJ has been publicly stated to be from 20–25 cases at a time (Internal Board Memo of 1/10/84), but as the Board acquires increasing adjudication responsibilities through statutory enlargements of its jurisdiction, and as the Board's hiring authority is limited by occasionally static or declining budgets, AJs' caseloads may occasionally increase to 30–35 cases at a time. During the course of a year, an AJ could be assigned 100-150 or more appeals. There are some exceptional years when AJs' dockets skyrocket: the massive discharge of striking air traffic controllers years ago, huge Postal Service reorganizations leading to reductions in force every few years, and, recently, a year when Congress failed to agree on a budget and tens of thousands of employees were furloughed. In the ordinary course of business, many appeals are quickly dismissed as untimely or clearly beyond the Board's jurisdiction. Some cases are dismissed without prejudice to their refiling, and that process can occur more than once in the life of some cases. An AJ may hold several hearings a month or go for a month or two without a hearing. Board hearings tend to be shorter than hearings before other adjudicators, e.g., EEOC, or in the civil courts. A typical Board hearing lasts a day or two.

Cases are assigned to AJs according to the complexity of the case and according to the experience, ability, and workload of the AJ. The regional chief administrative judge ensures that AJs receive a variety of cases so that they develop their skills in different areas of Board law. If cases are too complex or sensitive for AJs in a particular region, the CAJ may request Headquarters to assign the case to an administrative law judge or to an AJ from another office. The Board may assign a AJ to work from the Headquarters Office of Regional Operations to adjudicate complex appeals that would otherwise be resolved in a regional or field office. The delegation and assignment procedure governing the caseload of AJs follows the statutory scheme permitting the Board to hear cases or to designate employees to hear cases. *Schaffer v. MSPB*, 751 F.2d 1250, 1254 (Fed. Cir. 1985).

a. Administrative Law Judges Adjudicating Specialized Cases

Some cases, by requirement of statute, regulation, or Board practice, are heard by administrative law judges whose selection process is governed by OPM examination processes. Cases heard by ALJs include actions brought before the MSPB by the Office of Special Counsel—Hatch Act complaints under 5 USC 1502 (state and local government employees) and 5 USC 7323–24 (federal employees); disciplinary action complaints under 5 USC 1215; and corrective action complaints under 5 USC 1214—and proposed actions against administrative law judges under 5 USC 7521. The ALJs also hear cases involving appeals by MSPB employees.

In times past the Board employed an ALJ or two. Now the Board contracts with other agencies to use their ALJ to decide a Board case, e.g., an ALJ from the Coast Guard or EPA. Under these MOUs with agencies supplying ALJs, counting the time from the receipt by the contracted ALJ of the case file from the MSPB, the cases are to be resolved by the ALJ by decision or otherwise within 120 days for cases involving MSPB employees, 180 days for OSC corrective actions, and 210 days for other types of cases. The contracting agencies benefit because Board cases may stabilize the workload of those agencies' ALJ units. Arguably, the practice of using ALJs from other agencies saves the Board money that would be otherwise spent on the salary of an ALJ of its own (ALJ salaries exceed those of GS-15 administrative judges). But the practice also results in cases of complexity being heard by ALJs with no experience in civil service law or Board practice. The Board may offer the assistance of a Board employee to provide information to the ALJ on matters of law or practice without compromising the decisional independence of the ALJ. As a matter of economy, given the considerable amount the Board pays other agencies for ALJ rental, and as a matter of consistency in Board adjudication, the Board may wish to consider obtaining its own ALJ and assigning to that judge cases that require adjudication by an ALJ along with other appeals otherwise assigned to an AJ.

2. *Judges' Handbook*

AJs follow provisions of the Reform Act, other federal personnel statutes, law developed by the Board, the Federal Circuit and EEOC, a *Judges' Handbook* containing standing policies and procedures applicable to processing appeals at the regional and field office level, and various manuals, orders, and instructions issued by Headquarters to convey policy and procedural guidance. The Board's system of internal directives, extensive during the early years of the Board and trimmed down over time, undergoes occasional amendment. We touch upon some of the directives throughout the *Guide*. Those interested in learning more about the Board's internal guidance should download the *Judges' Handbook* from the Board's Internet site: http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=-242182&application=ACROBAT. A FOIA request to the Board should be used to secure a copy of the most recent index to Board Orders or to obtain any of the orders cited in this *Guide*.

The *Judges' Handbook*, frequently quoted in this *Guide*, is limited in its effect. Chapter 1 of the *Judges' Handbook* explains that:

> This handbook is designed to provide supplemental guidance to the Board's regulations. The procedures in this handbook are not mandatory, and adjudicatory error is not established by failure to comply with a provision of this handbook.

See Gregory v. Dept. of Army, 114 MSPR 607, 616 ¶ 22, 2010 MSPB 175 (2010) ("the Handbook is not mandatory and failure to apply its provisions does not establish adjudicatory error").

a. Qualifications of Administrative Judge

5 USC 7701(b)(1) requires that Board employees—at least those entrusted with removal cases—have experience hearing appeals. On July 26, 1979, the Board delegated authority for the hearing of removal cases to AJs at or above GS-13, with a caveat that GS-13 AJs decide removal cases only when there are insufficient higher-graded AJs within the regions to hear removals and only when the assignment of a case to a GS-13 AJ takes into account the sensitivity and complexity of a case as well as the qualifications of the AJ. By memo R85–2 of February 15, 1985, regional directors were given the authority to assign removal cases to GS-12 AJs, although, based on information and belief, no permanent AJs are now employed at that grade. The memo noted that those employees should not be given removal cases unless they demonstrate that they have "sufficient experience and adequate abilities to handle such cases." AJs may be assisted by "legal technicians" who maintain case files and perform some research, and who may assist in preliminary drafts of initial decisions, memoranda, or orders. Interns, often law students, appear at Board regional offices and make scheduling telephone calls or perform other administrative tasks for AJs.

There are few disputes concerning the qualifications of AJs. In one challenge, the Board reversed decisions on several employee appeals and remanded them to the regional offices because the assigned AJ lacked sufficient grade to handle the cases under the Board's internal guidelines. *In re Stumbaugh*, 1 MSPR 18, 19, 1 MSPB 17 (1979). Another case affirmed that an AJ with four-and-a-half years of experience, involving 300 appeals, properly adjudicated a removal case. *Grayson v. SSA*, 5 MSPR 73, 74, 5 MSPB 146 (1981). *Dancer v. USPS*, 21 MSPR 214, 216 (1984), noted:

> The presiding official…served five years as a general attorney in the federal service, conducting litigation before administrative law judges and federal court judges, prior to joining the Board as a GS-13 attorney-examiner in 1980.… [She] was clearly qualified to preside over this case.

Abarr v. Dept. of Transp. (Fed. Cir. 1986 NP No. 85–1172), *aff'g Abarr v. Dept. of Transp.*, 16 MSPR 572, 574 (1983) (addressing the July 26, 1979 delegation), determined that, as to a contention that the AJ was inexperienced, a generalized allegation did not show bias or incompetence and that the appellant did not demonstrate a prejudicial effect on his substantive rights as a result of the alleged lack of experience. The Board dismissed a challenge to the experience of an AJ who allegedly took no notes during a hearing. *Rhoads v. Dept. of Treasury*, 12 MSPR 115, 119 (1982). [See Chapter 3 under the subheadings "Conduct of Hearing; Responsibilities of Judge" and "Disqualification of Judge" for cases discussing challenges to the competency of judges.]

3. Regulatory Responsibilities

Board regulations define the role of the AJ at 5 CFR 1201.41 (2016):

> (a) *Exercise of authority*. Judges may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate.
>
> (b) *Authority*. Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges' powers include, but are not limited to, the authority to:
>
> (1) Administer oaths and affirmations;
>
> (2) Issue subpoenas under § 1201.81 of this part;
>
> (3) Rule on offers of proof and receive relevant evidence;
>
> (4) Rule on discovery motions under § 1201.73 of this part;
>
> (5) After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary:
>
> (i) To resolve an important issue of credibility;

(ii) To ensure that the record on significant issues is fully developed; or

(iii) To otherwise ensure a fair and just adjudication of the case.

(6) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum, and exclude any disruptive persons from the hearing;

(7) Exclude any person from all or any part of the proceeding before him or her as provided under § 1201.31(d) of this part;

(8) Rule on all motions, witness and exhibit lists, and proposed findings;

(9) Require the parties to file memoranda of law and to present oral argument with respect to any question of law;

(10) Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material, and nonrepetitious;

(11) Impose sanctions as provided under § 1201.43 of this part;

(12) Hold prehearing conferences for the settlement and simplification of issues;

(13) Require that all persons who can be identified from the record as being clearly and directly affected by a pending retirement-related case be notified of the appeal and of their right to request intervention so that their interests can be considered in the adjudication;

(14) Issue any order that may be necessary to protect a witness or other individual from harassment and provide for enforcement of such order in accordance with subpart F;

(15) Issue initial decisions; and

(16) Determine, in decisions in which the appellant is the prevailing party, whether the granting of interim relief is appropriate.

The *Judges' Handbook* adds, at Chapter 10, section 14(c), clarifying § 1201.41(b)(10):

> An AJ has the authority to order the parties to produce evidence and witnesses whose testimony would be relevant, material, and nonrepetitious.

The AJ's jurisdiction ends with the issuance of an initial decision, although limited jurisdiction remains over two procedural matters: (1) correction of a transcript; (2) vacation of an initial decision, prior to the time a PFR is filed, to accept a settlement agreement into the record. 5 CFR 1201.112 (2016). Before issuing the initial decision, the AJ may correct his own erroneous ruling and reopen the hearing, if necessary, to issue a correct ruling. *Williams v. DLA*, 34 MSPR 54, 57–58 (1987). After the AJ issues an initial decision, he or she may not reopen or reinstate the appeal (other than to refile an appeal that was dismissed without prejudice to its refiling).

Only the Board may reopen or reinstate an appeal when there is a final Board decision (including an initial decision that has become final by the passage of time). *See Gibson-Michaels v. FDIC*, 111 MSPR 607, 610–11 ¶ 10, 2009 MSPB 129 (2009). After the initial decision is issued, a procedural or substantive error can only be corrected if the Board reopens the case on its own initiative or at the behest of a party who files a petition for review or a petition to reopen the case. [Discussed in Chapter 5 under the subheading "Petition for Review; Reconsideration."] On occasion, an AJ may recognize that an error has been made after an initial decision has been issued. The AJ may then suggest to the Board that the decision be reopened and remanded to the AJ for correction of the error.

An AJ may reacquire a case to consider a remand or, after a decision has become final, to consider an enforcement petition, to adjudicate a counsel fee petition, or to entertain a request for consequential or compensatory damages if there has been a finding of whistleblowing reprisal or discrimination.

Submissions to the AJ after the issuance of an initial decision are often referred by the AJ to the MSPB Clerk to determine whether the submission should be treated as a petition for review or as a request to reopen an appeal. [See Chapter 5, subheading "Procedure on Remand," discussing remands; and Chapter 16, subheadings "MSPB Review of Compliance Initial Decision" and "Enforcement" concerning enforcement petitions; Chapter 15, subheading "Statutory and Regulatory Basis for Fees," reviewing counsel fee cases; Chapter 13, subheading "Statutory and Regulatory Requirements and Limitations," considering whistleblower appeals; and Chapter 12 evaluating cases involving allegations of discrimination.]

a. Waiver of Procedural Regulations

Many decisions of the Board involve procedural regulations, principally found at 5 CFR Part 1201, that guide or govern AJ's and Board adjudications. These regulations are important. It is also important to understand that AJs and other Board officials have the authority to waive regulations for good cause.

Waivers pertaining to procedural elements of Board litigation will ordinarily be governed by specific regulations governing the timeliness of filings and more generally by 5 CFR 1201.12 (2016):

> *Revocation, amendment, or waiver of rules*.
>
> The Board may revoke, amend, or waive any of these regulations. A judge may, for good cause shown, waive a Board regulation unless a statute requires application of the regulation. The judge must give notice of the waiver to all parties, but is not required to give the parties an opportunity to respond.

The circumstances permitting waiver of regulatory deadlines were described in *Zimmerman v. OPM*, 80 MSPR 512, 515 ¶ 6 (1999):

> There are three possible bases for waiving a regulatory deadline: (1) the regulation itself may specify circumstances under which the deadline should be waived; (2) an agency may be equitably estopped from enforcing a regulatory deadline if it engages in affirmative misconduct; or (3) an agency's failure to provide notice of election rights and corresponding deadlines may warrant a waiver of the filing deadline, if such notice is required by statute or regulation. *Speker v. Office of Personnel Management*, 45 MSPR 380, 385 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991) (Table), and *modified on other grounds by Fox v. Office of Personnel Management*, 50 MSPR 602, 606 n.4 (1991).

See Owens v. OPM, 76 MSPR 543, 547 (1997) (restating waiver criteria).

The passage of time alone is not sufficient to deny a waiver application. The issues are justification for the delay and actual prejudice to the other party, as the Board implied in *Miller v. OPM*, 54 MSPR 581, 585 (1992), discussing the equitable doctrine of laches:

> Laches is a "fairness" doctrine by which relief is denied to one who has unreasonably and inexcusably delayed in the assertion of a claim, when such delay results in prejudice to the other party. *See Hoover v. Department of the Navy*, 957 F.2d 861, 862 (Fed. Cir. 1992); *Nuss v. Office of Personnel Management*, 49 MSPR 139, 141 (1991). Both unreasonable delay and prejudice must be proved to establish the defense; prejudice may not be presumed from the length of a claimant's delay. *Cornetta v. United States*, 851 F.2d 1372, 1380 (Fed. Cir. 1988).
>
> After concluding that the appellant had unreasonably delayed for twelve years in seeking a final agency ruling on her 1976 application for death benefits, the administrative judge stated: "The prejudice to the agency is obvious. With the passage of so much time, the identification of potential witnesses is impossible." The administrative judge identified no evidence, however, to support her conclusion that the identification of witnesses would be impossible, and we find no such evidence in the record. We therefore conclude that the administrative judge improperly presumed the existence of prejudice from the length of the delay, and that she erred in finding that the appellant's claim was barred by laches. This error does not require reversal of the initial decision, however, because it did not affect the outcome of the appeal. *See Panter v. Department of the Air Force*, 22 MSPR 281, 282 (1984).

If an AJ sets a deadline and then waives it, the Board will not disturb the AJ's procedural ruling unless the AJ abused his authority, with resultant substantial prejudice to a party. *See Butler v. Defense Commissary Agency*, 77 MSPR 631, 634 (1998) (the AJ waived the deadline for appellant's jurisdictional submission); *cf. Karapinka v. Dept. of Energy*, 6 MSPR 124, 127, 6 MSPB 114 (1981) (the AJ's failure to follow regulation, then requiring the issuance of an initial decision within 25 days from closing the record, was a deviation from the best procedure but not a reversible error). [See Chapters 2, subheading "MSPB Treatment of Timeliness Issues," and 5, subheading "Procedure on Late Submission," for discussion of waivers of time limits applicable to appeals and petitions for review.]

It does not occur with frequency, but the Board occasionally finds that AJs abuse their discretion relative to motions, e.g., requests for extension of the time, that they deny, *Owens v. DHS*, 97 MSPR 629, 631–62 ¶¶ 6–8 (2004), providing an example:

> Although administrative judges have substantial discretion to rule on motions, *see* 5 C.F.R. § 1201.41, a request for an extension of time may be granted for good cause shown, *see* 5 C.F.R. § 1201.55(c). "Good cause" is an elastic concept that rests upon principles of equity and justice. *See Roberson v. Department of Health and Human Services*, 24 M.S.P.R. 240, 241–42 (1984) (citing *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 183–84 (1980)). In applying this concept, the Board has held that a "common sense" approach must dictate whether good cause has been established. *Id.* Consistent with this precedent, we shall apply a common sense approach here.
>
> As set forth above, the record shows that the appellant requested an extension of time to respond to the jurisdictional issue so that she could travel from Atlanta, Georgia, where she now lives, to northern Virginia, where she was previously employed, to retrieve documents she had put in storage. Although her initial request failed to state how much additional time she required, her reconsideration request stated that she needed at least 30 days. The AJ correctly observed that such extensions impact adjudicatory efficiency. However, adjudicatory efficiency should also be balanced against an appellant's opportunity to have her appeal fully and fairly adjudicated. *See Starkey v. Department of the Air Force*, 3 M.S.P.R. 289, 292–93 (1980). The Board has held, with regard to requests

for a continuance, that such requests should generally be granted where there is no indication of a lack of due diligence on the part of the party requesting a delay and no showing that a delay would prejudice the other party. *See Roberson,* 24 M.S.P.R. at 242.

In this case, the record does not indicate any lack of diligence on the part of the appellant, her request for an extension of 30 days was reasonable, and there is no evidence to suggest that the agency would have been prejudiced by such a delay. Further, the appellant's ability to submit supporting documents may have affected the outcome of her case. The AJ ordered the appellant to file evidence and argument to prove that her resignation was within the Board's jurisdiction, and the Federal Circuit has stated that non-frivolous allegations of jurisdiction must be supported by affidavits or other evidence, *see Dick v. Department of Veterans Affairs*, 290 F.3d 1356, 1361 (Fed. Cir. 2002); *see also Dorrall v. Department of the Army*, 301 F.3d 1375, 1380 (Fed. Cir. 2002) ("Non-frivolous allegations cannot be supported by unsubstantiated speculation in a pleading submitted by petitioner."). Therefore, the appellant's ability to present evidence in support of her allegations regarding the involuntary nature of her resignation was critical in meeting her burden of establishing Board jurisdiction over her appeal. *See* 5 C.F.R. § 1201.56(a)(2)(i) [now 5 CFR § 1201.56(b)(2)(i)(A)] (the appellant has the burden of proof, by a preponderance of the evidence, with respect to issues of jurisdiction). Consequently, we find that, in the circumstances presented, the appellant showed good cause for an extension of time to respond to the jurisdictional issue and that the AJ abused her discretion in failing to grant her request.

b. Judges' Position Description, Performance Standards

AJs are civil servants, the same as the employees whose appeals they adjudicate. Like those employees, AJs have position descriptions and performance standards. The position descriptions for the GS-14 and GS-15 AJs who adjudicate the bulk of Board appeals are similar, with slight differences in supervisory and mentoring responsibilities. For the GS-15 AJ, a Board generic position description assigns the following duties:

Introduction

As an Administrative Judge (AJ) of the U.S. Merit Systems Protection Board, the incumbent hears and decides appeals from Federal employees, applicants for Federal employment, and Federal annuitants concerning any matter over which the Board has appellate jurisdiction. Those matters for which an appeal right is granted by statute or regulation include (but are not limited to) the following: Reductions in grade or removals for unacceptable performance; removals, reductions in grade or pay, suspensions for more than 14 day or furloughs for 30 days or less for cause that will promote the efficiency of the service; removals, or suspensions for more than 14 days, of career appointees in the Senior Executive Service (SES); reduction-in-force actions affecting career appointees in the SES; denials of within-grade increases for general schedule employees; determinations affecting the rights or interests of individuals or of the United States under the Civil Service Retirement System or the Federal Employees Retirement System; negative suitability determinations; terminations during probationary periods or during the first year of veterans readjustment appointments; terminations during managerial or supervisory probationary periods; separations, reductions in grade, or furloughs for more than 30 days in connection with reductions in force; furloughs of SES career appointees; and failures to restore former employees following military service or following partial or full recovery from compensable injuries. Appeals also may involve allegations of reprisal for "whistleblowing," either as an Individual Right of Action or as an affirmative defense raised in connection with an otherwise appealable matter, as well as allegations of discrimination and/or other prohibited personnel practices. (Most Executive Branch employees may appeal to the Board, as may many employees of the U.S. Postal Service and the Tennessee Valley Authority.)

Major Duties

The AJ's principal duty is to adjudicate appeals. As part of this process, the AJ must perform the following: Conduct prehearing and status conferences in order to explore the possibility of settlement and to narrow and simplify the issues in the case; advise the parties with regard to their respective burdens of proof, duties and responsibilities; oversee the discovery process; advise the parties with respect to settlement negotiations and provide them with help in facilitating that process; conduct hearings (including convening the hearing as appropriate, regulating the course of the hearing, maintaining decorum, and excluding any person from the hearing for good reason); and issue initial decisions. In order to accomplish these tasks, the AJ has the authority to: Administer oaths and affirmations; issue subpoenas; rule on offers of proof and receive relevant evidence; rule on discovery notions; resolve important credibility issues; and ensure that the record is fully developed and that each case is fairly adjudicated in every respect. The AJ also rules on all motions, witness lists, and proposed exhibits. The AJ may require the parties to file memoranda of law and to present oral arguments with respect to any question of law, order the production of evidence and the appearance of witnesses, impose sanctions, issue stays and protective orders, enforce orders and settlement agreements, and grant interim relief and attorney fees to prevailing appellants.

The AJ also may serve as a mentor, with responsibility for providing technical and administrative guidance to lower-graded attorneys. In addition, when designated by the Chief AJ, the incumbent may serve as a lead AJ for appeals resulting from new legislation or expanded Board jurisdiction, and in other extraordinary circumstances.

A significant portion of the AJ's time is devoted to the processing and adjudication of cases involving complex fact situations and "cases of first impression" requiring unique legal analyses. Appeals may cover a broad spectrum of unrelated areas of the law (e.g., criminal law, family law, or corporate law). A single case also may involve the application of multiple areas of the law.

Cases involve substantial motion practice and novel arguments and/or fact patterns. Resolution of the issues requires great skill in making credibility determinations, distilling facts, distinguishing legal applications, and imposing sanctions, and at times requires extensive research and analysis and obtaining and evaluating expert testimony or information on controversial topics. Resolution of issues may require the development of new law.

The AJ has significant discretion in managing his/her caseload in accordance with Board policy concerning quality, production, and timeliness. To the degree that it can be determined at the outset of the case, the incumbent routinely will be assigned the most complicated and sensitive cases in the office.

Because the AJ's initial decisions may be expected to form the bases for subsequent precedential Board and court decisions, they can affect the government-wide operations of departments and agencies. In this way, the incumbent's initial decisions may affect the efficient functioning of the Federal service, both on short- and long-term bases. Depending on the result of the case, initial decisions also can have significant and lasting effects on the careers and retirements of the affected individuals. An appellant may appeal an initial decision directly to the U.S. Court of Appeals for the Federal Circuit or, when issues of prohibited discrimination are involved, to the appropriate U.S. district court.

Supervision and Guidance Received

The incumbent works under the general supervision of a Chief AJ (Regional Director), who assigns cases without preliminary instructions, other than an occasional general discussion of unusual or significant issues and background information in appropriate cases. The incumbent is independently responsible for carrying out all case processing and adjudication activities, and retains signatory authority for his/her assigned cases. The incumbent's decisions in complex cases are reviewed prior to issuance. In the vast majority of those cases, decisions are reviewed only for conformance with Board policy.

AJs' performance standards show what the Board, as an employer, considers important for a AJ who seeks retention and advancement in grade. Noted here are generic performance standards used for judges at the GS-13 to GS-15 levels. The standards emphasize settlement and quantity of adjudication. Reprinted are standards that assess fully successful performance:

ELEMENT I: QUALITY OF DECISIONS (CRITICAL)

Fully Successful—Performance that generally reflects the following:

1. Proper identification of all material legal and factual issues;
2. Appropriate recognition and consideration of relevant facts, evidence, and authority bearing on issues;
3. Proper and thorough analysis of the issues;
4. Good organization and readability;
5. Appropriate citation and application of statutory and regulatory authorities, controlling Federal case law, and Board precedent;
6. Compliance with "A Uniform System of Citation" and Board policy in citation, format, and style; and
7. Only occasional errors in grammar, spelling, and punctuation.

ELEMENT II: PRODUCTION (CRITICAL)

Fully Successful—Performance that reflects the following:

85 to 100 decisions issued per year, unless good cause is shown.

ELEMENT III: CASE MANAGEMENT (CRITICAL)

This element concerns record development, settlement, timeliness and case management excluding hearing management.

Fully Successful—Performance that generally reflects the following:

1. 95% of all decisions issued within the relevant time limits unless good cause shown (i.e., except when beyond the AJ's