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 the patchwork law and regulation system as:

[an] outdated patchwork of statutes and rules built up over almost a century.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. To simplify the conglomeration of statutes under which the vast and unwieldy civil service system of the United States was managed, the Constitution of the United States was amended to base the system on the principle that federal employees who were not removed for incompetence or misconduct because the existing rules and procedures often afforded a refuge for incompetent employees who were found to be inefficient, incompetent, or otherwise unfit for continuing service in the agency. To protect employees from 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.


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CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the "outdated patchwork of statutes and rules built up over almost a century" that was the civil service system, S.Rep.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. 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 agency to the district courts where the agency action was initiated, and to the courts of appeal, for 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), injunctive, see, e.g., Hargett v. Summerfield, 100 U.S.App.D.C. 262, 243 F3d 29 (1957), and declaratory judgment, see, e.g., Camera 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).

Criticism of this "system" of administrative and judicial review was widespread. The general perception was that "appeals processes are designed to delay indefinitely and at great expense the disposition of the issues involved." In each of these sections, Congress dealt explicitly with the situation of nonpreference members of the excepted service, granting them limited, and in some cases conditional, rights. 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).

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's procedural rights in the district court, § 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.

Chapter 75 of the Act governs adverse action taken against employees for the "efficiency of the service," which includes actions of the type taken in this case. Subchapter I of Chapter 75 governs minor adverse action (removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 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 "century" that was the civil service system, 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 dealt explicitly with the situation of nonpreference members of the excepted service, granting them limited, and in some cases conditional, rights.

In subsequent years, an increasing proportion of the federal workforce was classified in the competitive service. As the Commission's management and personnel functions continued to expand, so compelled the need 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;
- To provide incentives and opportunities for managers to improve the efficiency and responsiveness of the Federal Government; and
- 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 "provide [new] protections for employees who disclose illegal or improper Government conduct.

As enacted, the CSRA includes several basic features intended to achieve these ends, which consist of the Act's provisions 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 R. Van Ripper, History of the United States Civil Service (1958); A. Hoogeboom, 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 percent 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 was followed by the CSC’s efforts by helpful regulations 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 Office of Federal 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 (1979) and Sitton v. Mathis (1980). For a history of the legislation creating civil service protections for employees prior to the Reform Act, particularly the Lloyd-LaFalollet 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.]

Krafur 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.

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. § 2302(a)(2). 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.

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).

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 and proceed straight to the Board. 5 U.S.C. § 2302(b)(12). If an employee claims “first-line supervisor” discrimination, he must file a formal charge with the Special Counsel and refer the case to the Merit Systems Protection Board (from which the employee may appeal to the Federal Circuit). Id. §§ 1214(b)(2)(B), 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).

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 in the sun. The development through cases—the occasional decision 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 Introductions 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/Introtomspb%2019%201011.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 federal 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 mishandlings, 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 practices to the job or the level of work to which the action had been made for the purpose of this or her job; to file a corrective action when it 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 what it brings cases before the Board is subject to 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 Taniela, 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 in which the Special Counsel conducts his investigations or prepares his stay petitions. The relationship of the Special Counsel to the Board must 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.

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

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)

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.

Complaint Examining Unit (CEU)

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.

Investigation and Prosecution Division (IPD)

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.

Disclosure Unit (DU)

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 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.
The Board summarizes its adjudication functions and operations in its earned through past military service and conferred by statute. claims by veterans protesting the loss of an employment benefit or preference or as to denial of proper restoration rights following military service; and complain of discrimination by reason of their past or present military service employment benefits; allegations by individuals with military service who 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 is PFRs and other requests 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 the case. The majority disposition of the Board members results in a decision by the Board constituting, in most cases, 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.

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 vacation fees and costs, most often brought by protected whistleblowers.

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 for a refusal or failure to award attorney fees. These cases involve the same employee or agency and are referred to as ‘addendum cases.’ If an addendum case is filed, the Board’s action on the addendum case becomes final, and the case is referred back to the regional or field office that heard the original case for a final decision. If the Board upholds the initial decision, the case is referred back to the regional or field office that heard the original case for a final decision. If the Board upholds the initial decision, the case is referred back to the regional or field office that heard the original case for a final decision. If the Board upholds the initial decision, the case is referred back to the regional or field office that heard the original case for a final decision.
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’s regional 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 decisions may be reversed in whole or in part, and, if the Board deems itself decisionally unaffected by such critique. This was noted in *Azdell v. OPM*, 20 M.S.P.R. 456, 457 (1985): “We do not determine whether to reverse or affirm, but whether the Board’s decision is correct as a matter of law. We cannot review factual determinations that are committed to the agency’s discretion by law, such as the Board’s factual findings and legal analysis. About 67% of those petitions were denied, 2% settled, and the rest were either granted, dismissed for procedural reasons, or the petitions were modified in some way. 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 dockets. 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. 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 § 1201.1. To accomplish this mandate, Congress dictated that the Board be composed of three members, who are not appointed by the same political party, and that each member serve a term of seven years, and the other two members serve terms of three years and one year, respectively. During FY 2014, 876 petitions for review were filed by the Board. Of these, 98 petitions were decided through board adjudication; five appeals were decided through arbitration, which is the process described in Chapter 5; and 773 appeals were decided through settlement, jurisdictional or timeliness dismissals, and the procedural device of resubmission. 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.

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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.

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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 typical cases, it is the Board, not the appellant, that reflects 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 10, and budgetary considerations governing reductions in force and furloughs, discussed in Chapter 10.

The nature of the Board’s review authority was touched up 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 Nari v. Nielson Company Corp. v. Boston & Me. Co., 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 doctrine is inapplicable in such a case “confuses 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 Harne 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 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 applicant 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. Brynum v. Office of Pers. Mgmt., 89 M.S.P.R. 1, 7 (2001). Thus, the question for the Board is whether OPM’s decision is supported by substantial evidence in the record. If the Board determines that the record made before OPM is relevant and is sufficient for a reasonable assessment of the facts, the Board may find the record sufficient to uphold the OPM decision or remand 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) (“[T]he Merit Systems Protection Board reviews de novo whether the agency’s decision was justified.”); 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”); Fucks v. United States, 655 F.2d 1089, 1097 (Ct. Cl. 1981) (“It is the Board’s obligation to consider the case before it in 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. 206–10 (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 apply.”); Zeiss v. Veterans Admin., 8 M.S.P.R. 15, 16–17 (1975). 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 upheld the Commissioner’s assessment, but on a legal theory different from the Commissioner’s. The circuit 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 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. In the latter kind of cases, the Board noted in Adams v. DOC, DC-0752-10-0741-1 (NP 3/4/2011):

[The 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
Civil Service Commission). [Refer to the subsection in Chapter 17, “Deference; interpretation by OPM].

Concurring) (referring to Federal Circuit precedent: “The Board here was not entitled to deference; the deferential standard would not defer to OPM’s interpretation if 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,” “[where the Board] must control its own interpretation 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 Haste 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).

See also Adams v. OPM, 86 F.3d 1574 (Fed. Cir. 1996); Grogan v. OPM, 79 MSPR 1, 5 (1999) (the Board is not bound by OPM’s interpretation where it is not in accord with applicable law and the Board is not required to accept it). In other cases involving reduction in force, suitability terminations, restoration rights for individuals who were improperly terminated, or vacancies, defendants have argued that OPM’s construction of a statute is entitled to substantial deference, the Board and the courts are not bound by such interpretation in all situations. See, e.g., Brown v. OPM, 74 MSPR 380, 384–85 (1998) (the Board’s original jurisdiction under section 1204(f) is not exclusive of the Board’s original jurisdiction under section 1201).

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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); S.C.F.R. ¶ 1201.3(a)(1) (listing adverse actions as falling within the Board’s appellate jurisdiction). We find no citation to Thompson to suggest that the Board review whether an agency other than OPM properly promulgated regulations in determining whether to sustain an adverse action.\[6\]

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 interpret 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 dependent on the presence of statutory language); see 5 U.S.C. § 706(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 I, 121 M.S.P.R. 56, ¶ 9). 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 836 (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. Clouter 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 1, “Statutory, Regulatory Violation; Action Not in Accordance With Law” and in Chapter 17 “Deferee; 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 U.S.C. 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 M.S.P.R. 86, 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);”); Donohue v. Dept. of Navy, PH-0752-13-3010-1 (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 Authority, on issues of personnel management. The Board occasionally informs parties that it will 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, the accommodation is not ripe for consideration under the Board’s authority); EEOC v. U.S. Postal Service, 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).

[The 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 Board need not provide advice.]

[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 interpret the meaning of the term and provide a decision regarding interpretation. 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 sending the Board’s General Counsel an advisory opinion.

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 ALJs 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. Queries 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 application of the retirement laws concerning the law enforcement retirement status of its employees. See Board Memo of February 19, 1979 (probationary employees), Attachment A, ¶ 1. The Board did not issue a decision on the applicability of the laws to the strike because it was not briefed. The Board has also issued opinions relating to the application of the laws to situations involving disabled employees. See Board Memo of November 6, 1976, Attachment A, ¶ 1. The Board has also issued opinions relating to the applicability of the laws to situations involving disabled employees. See Board Memo of November 6, 1976, Attachment A, ¶ 1.
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 memorandum does not indicate an abridgment 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 quarterly allowance as part of a back pay remedy); Cortez v. VA, 27 MSPR 648, 650 (1985) (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, ¶ 9, 2012 MSPB 117 (2012), involving jurisdictional implications of a pay reduction under a consultation 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 Christiansen 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.” Christiansen, 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 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 “judges,” 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 (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 16 regional and 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.msrb.gov/contact/contact.html]:

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@msrb.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@msrb.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, D.C.; Maryland—counties of Montgomery and Prince George’s; North Carolina; Virginia; and all overseas areas not otherwise covered by other Board offices); washingtonregional@msrb.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@msrb.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@msrb.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@msrb.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@msrb.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@msrb.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
  msrb@msrb.gov

V/TDD 1–800–877–8339
1–800–254–4800 (“message line”)
1–800–424–9121 (MSPB Inspector General “hotline” (administered by USDA))


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 AJs, MSPB program appeals, and other cases as 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 online 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 affirmative employment programs. It 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 administrative and agency policy programs. 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 of the General Counsel 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 components. 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 requirements, provided by the Government Performance and Results Act Modernization Act of 2010 (GPRA). 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=12794078&version=1284518&application=ACROBAT. 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 form 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 to the Clerk: 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 FAR Part 1, Subpart 1.201. The Clerk’s Office, 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 forty 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 attorneys, usually GS-13 and GS-14, review 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—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—

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, traditional 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 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 and 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.

   2. Counting Rewrites. Subject to the general requirements in paragraph B.1, an attorney earns two raw cases 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 and 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.1, 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 joins or consolidates 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 arise 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 case 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 case 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 1-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 case 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 = .890

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 * .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 case 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 = .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 Fully Successful: 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:

- Preparing a substantive memorandum containing a LAN-edit rewrite to the Board
- Preparing 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 workday to complete

(c) Non-case-related off-standards time. Management will approve requests for off-standards time for approved, substantial non-case-related activities. Generally, such activities would each reasonably require 1 full workday 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 1 full day or longer
- Details
- Assignments to agency committees or working groups
- Office time in accordance with the Collective Bargaining Agreement
- Serving as an officer or keyworker for the CFC Planning or preparing a major Board-related function, including Unity Day and EEO special emphasis month events, that reasonably requires at least 1 full workday
- 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.I, 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 off-standards 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 in accordance with the 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 case 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 for 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 MSPB 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 Justice 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 dockets 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 a party. The Board may, and usually will, resolve the case without a hearing. The Board grants a request for oral hearing if the judge determines that a hearing is necessary:

(1) To resolve an important issue of credibility;
(2) To resolve an issue of disputed fact;
(3) To resolve an issue of law.

The Board may reopen a case and order a new hearing if the judge determines that a hearing is necessary:

(a) To resolve an important issue of credibility;
(b) To resolve an issue of disputed fact;
(c) To resolve an issue of law.

The Board may dismiss cases for lack of jurisdiction, if determined by the Board.

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/mspbhandbook. Further information on the Board’s procedures can be found at 24 CFR 1201.218 and 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– 1, dated May 27, 1985, regional directors were given the authority to assign up to 12 removal cases to GS-12 AJs, although, based on information and belief, no permanent AJs are now employed at that grade.

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 of decisions, or summaries of decisions, 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 MSPB 18, 19, 1979-78 BNA 468 (1979). In 1975, GS-9 employees appealed to the Board regional offices and make scheduling telephone calls or perform other administrative tasks for AJs.

b. 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.

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 case file from the Board to the ALJ to help ensure that the ALJ has sufficient experience with 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.

Through the PFR process, the Board may and does review cases to agree on a budget and tens of thousands of employees were furloughed. The Board may offer the assistance of a Board

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 apportioned by the Board.

(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 nonrepertitious;

(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;

(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):

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

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 Williams v. DLA, 311 MSPR 607, 610–11 ¶ 10, 2009 MSPR 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, and to order the parties to produce evidence and witnesses whose testimony would be relevant, material, and nonrepertitious.

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 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 AJs 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 engaged in 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 606, 606 n.4 (1991).


The passage of time alone is not sufficient to deny a waiver application. The issue is 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 (1990). 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 MSPR 114 (1981) (the AJ’s failure to follow a procedural requirement, then resentenced the case, was not error). 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).

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 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)). 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. [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.]

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 the records were previously maintained. 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, 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 admit any evidence that had been 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 C.F.R. § 1201.56(b)(2)(i)(A)) (the appellant has the burden of proof, by a preponderance of the evidence, that her resignation was critical in meeting her burden of establishing Board jurisdiction over her appeal). 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 days 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 offer expert or relevant evidence; rule on discovery motions; prepare 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 AJs 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 as a part of 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 Successfully—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 Successfully—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 Successfully—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 AJs