CHAPTER 1

MSPB STRUCTURE AND JURISDICTION

I. REFORM ACT

A. CAPSULE HISTORY

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

"an outdated patchwork of statutes and rules built up over almost a century.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 complex rules and procedures often afforded a refuge for incompetent and inefficient employees and made it "almost impossible to remove those who were not performing."... The 1978 Act sought to remedy this condition by providing procedures whereby the agencies could more efficiently manage their operations, including the discipline or removal of employees who were found to be inefficient, incompetent, or otherwise unable to continue service in the agency. To protect employees from abuse of agency action, the MSPB, a neutral body, was created. Pursuant to established rules and regulations, the MSPB was authorized to conduct hearings to determine the validity of an agency's action affecting the tenure of a civil servant's employment."


"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CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the outdated patchwork of statutes and rules built up over almost a century" that was the civil service system, S.Rep.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 right of administrative review by Executive Order. Exec. Order No. 11491, § 22, 3 CCR 874 (1966-1970 Comp.), note following 5 U.S.C. § 7301 (1976 ed.) (extending CSC review to competitive service employees). Still others, like employees in respondent's classification, had no right to such review. As for appeals 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 agencies to the district courts. The administrative decisions appealed by the CSC, to the district courts through the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus, see, e.g., Taylor v. United States Civil Service Comm'n, 374 F.2d 466 (CA9 1967), injunction, see, e.g., Hargett v. Summerfield, 100 U.S.App.D.C. 84, 243 F.2d 29 (1957), and declaratory judgment, see, e.g., McNamara v. McMurray, 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 [were] so lengthy and complicated that managers [in the civil service] often avoided taking disciplinary action" against employees even when it was clearly warranted. S.Rep. No. 95-969, at 9, U.S.Code Cong. & Admin. News 1978, p. 2731. With respect to judicial review in particular, there was dissatisfaction with the "wide variations in the kinds of decisions... issued on the same or similar matters," id., at 63, U.S.Code Cong. & Admin. News 1978, p. 2785, which were the product of concurrent jurisdiction, under which the agencies based their decisions in the district courts in all Courts and the Court of Claims. Moreover, as the Court of Appeals for the District of Columbia Circuit repeatedly noted, beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational. See Polcove v. Secretary of Treasury, 155 U.S.App.D.C. 338, 341–342, 477 F.2d 1223, 1226–1228 (1973).

Congress responded to this situation by enacting the CSRA, which replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration. See S.Rep. No. 95-969, at 4. Three main sections of the CSRA govern personnel action taken against members of the civil service. In each of these sections, Congress deals explicitly with the situation of nonpreference members of the excepted service, granting them limited, and in some cases conditional, rights. 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 of the CSRA, § 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 action of the type taken in this suit, based on unsatisfactory performance, § 7511. Subchapter II governs 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 remedies of the MSPB, followed by judicial review in the Federal Circuit. §§ 7513(d), 7703. The definition of "employee[s]" covered by Subchapter II (major adverse action) specifically includes preference eligibles in the excepted service, § 7511(a)(1)(B), but does not include other members of the excepted service. The Office of Personnel Management is, however, given authority to extend coverage of Subchapter II to positions in the excepted service that have that status because they have been excluded from the competitive service by OPM regulation. § 7511(c).

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

"The CSRA constituted the first comprehensive reform of the federal civil service system since passage of the Pendleton Act in 1883. A product of the nineteenth century progressive movement, the Pendleton Act had sought to replace the 'spoils system,' under which the President could dominate all federal jobs. Instead, the CSRA created a 'merit system' that would base selection and promotion of most civil servants on competence. The Pendleton Act also established a Civil Service Commission charged both with protecting the merit principle and with managing the federal bureaucracy.

In subsequent years, an increasing proportion of the federal workforce was classified in the competitive service. As the Commission's management functions multiplied, it became compelled to elaborate a wide variety of merit system rules without guidance from Congress. Delay and inefficiency increasingly characterized the procedures required to discipline unsatisfactory employees. At the same time, several celebrated episodes suggested that efforts by employees to call attention to government waste and fraud were often inhibited by the threat of retaliatory personnel actions. The dual responsibility of the Civil Service Commission for management and merit protection seemed to pose a barrier against mitigating these problems."
In 1978, these and other concerns led President Carter to propose legislation that would significantly restructure the civil service. Among the legislative objectives identified by the President in his message to Congress were:

- To strengthen the protection of legitimate employee rights;
- To provide incentives and opportunities for managers to improve the efficiency and responsiveness of the Federal Government;[and]
- To reduce the red tape 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 purposes. First, the Act consists of two parts: (1) a series of statutory expansions on 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 2101–05. The Act also establishes an independent Special Counsel responsible for investigating and prosecuting prohibited personnel practices, employment discrimination, unlawful political activities, arbitrary withholding of information requested under the Freedom of Information Act, and any other violations of law within the federal civil service....

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

For comprehensive histories of the American civil service, see P. Van Ripper, *History of the United States Civil Service* (1958); A. Hooenboom, *Outlawing the Spools: 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 “spoil 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 civil service commission empowered to issue regulations to control political pressures on jobholders and to promulgate rules on various personnel matters, including competitive examinations for positions. As originally passed, however, the Act covered only about 10% of government employees, created few limits on removal powers, and gave no procedural protections to employees. See *Note, supra,* at 99. Over the next several decades, attempts to remedy these defects rendered the procedures allowed federal employees to appeal adverse actions time-consuming and complex. Id. at 99–105. The CSRA attempted to solve these problems without sacrificing the procedural protections developed in the twentieth century.

**See Polcover v. Secretary of Treasury,* 477 F.2d 1223 (D.C. Cir. 1973) (criticizing 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 1979.”

MSPB has its origin in the Pendleton Act of 1883, which was passed following the assassination of President James A. Garfield by a disgruntled Federal job seeker. The Pendleton Act created the Civil Service Commission (CSC), which implemented the use of competitive examinations to support the appointment of qualified individuals to Federal positions in a manner based on merit and free from partisan political pressure. This improved Government effectiveness and efficiency by helping to ensure that a stable, highly qualified Federal workforce was available to provide effective service to the American people. Over time, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate appeals. Concern over this conflict of interest in the CSC’s role as both rule-maker and judge was a principal motivating factor behind enactment of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the CSC with three new agencies: MSPB as the successor to the Commission; the Office of Personnel Management (OPM) to serve as the President’s agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority (FLRA) to oversee Federal labor-management relations. The CSRA also codified for the first time the values of the merit systems as MSPs (Merit System Principles) and defined PPPs (prohibited personnel practices).

Structural reforms accomplished by the Act were also described in *Atwell v. MSPB,* 670 F.2d 272, 278–79 (D.C. Cir. 1981). *Barnhart v. Devine,* 771 F.2d 1515 (D.C. Cir. 1985), considering the availability of mandamus jurisdiction to secure review of position classification, provides further extensive commentary on the evolution of the Reform Act and the role of the Special Counsel. For discussion of the effective date of the Reform Act and for construction of the CSRA “savings provision,” § 902 of the Statute, refer to *Mathis v. Dept. of Army,* 739 F.2d 22–25 (Fed. Cir. 1984) (en banc). A history of the legislation creating civil service protections for employees before the Reform Act, particularly the Lloyd-LaFollette Act and the Pendleton Act, consider *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. (Refer to Chapter 13, “Whistleblowing Reprisal,” for detailed discussion of the WPA and later whistleblowing legislation.)

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

Before Congress enacted the Civil Service Reform Act in 1978, a jumble of statutes and executive orders governed the resolution of federal employees’ complaints about the workplace. The Act replaced this patchwork with a coherent system of administrative and judicial review. The new system handles all “personnel actions,” a capacious term defined to include appointments, transfers, any “disciplinary or corrective action,” and “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. § 7521. The Act entitles an employee facing an adverse action to a formal hearing before the Merit Systems Protection Board and if necessary an appeal to the Federal Circuit. Id. §§ 7521, 7703.

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 prohibited personnel practices have occurred,” the OSC 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 intracies. 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 a number of distinctions. If an employee is accused of race or sex, for example, the Act allows him to bypass the Special Counsel procedure and to sue in district court under the civil rights laws. 5 U.S.C. § 2302(d). Or if an employee alleges retaliation for whistleblowing or “for refusing to obey an order that would require [him] to violate a law,” the Act allows him to bypass the Special Counsel procedure and to go straight to the Board. Id. §§ 1221(a), 2302(b)(9).
After more than three decades 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 pull a whole range of actions away from Board review or considerably reduce 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 believe the Board favors procedural defaults against them, that law agencies suffer through the Board’s delays, but allegations of disfavor and 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, due process, penalty analysis, and national security issues have all reemerged over the years of ongoing case law—that focus magnified on occasion by a leading decision of the Federal Circuit or Supreme Court that changes the direction of the law. And, too, because Board members are political appointees, have limited terms, and varying backgrounds, the perspective of Board members, as reflected by their decisions, changes over time. Dissenting opinions from one year may become the majority position in another. [Refer to the Board’s website presentation, An Introduction to the Merit Systems Protection Board, for a powerpoint outline of the history and some basic law concerning charges and penalties adjudicated by the Board, at http://www.mspb.gov/media/mediatromos/mpsb%20in%202019%201%202011.pdf; a video presentation is at http://www.mspb.gov/training/mediatromosmpsvideo.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 2015 Office of Special Counsel Annual Report summarizes its mission:

OSC was established on January 1, 1979, when Congress enacted the Civil Service Reform Act (CSRA). Under the CSRA, OSC at first operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (MSPB or the Board). Congress directed that OSC would: (1) receive and investigate complaints from federal employees alleging prohibited personnel practices; (2) receive and investigate complaints regarding the political activity of federal employees and covered state and local employees, and provide advice on restrictions imposed by the Hatch Act on political activity by covered government employees; and (3) receive and investigate disclosures from federal employees about wrongdoing. Additionally, OSC, when appropriate, file petitions for corrective and or disciplinary action with the Board in prohibited personnel practices and Hatch Act cases.

... OSC is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting covered employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. The agency also supports covered federal employees and applicants by providing a secure channel for disclosures by them of wrongdoing in government agencies; enforces and provides advice on Hatch Act restrictions on political activity by government employees; and enforces employment rights secured by USAERRA 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 the investigating and prosecutor of statutory-defined prohibited personnel practices. Layser v. USDA, 8 MSPR 381, 383 (1981) (the relation of OSC and the Board was analogized to that of a prosecuting attorney to a court). OSC also serves as a government-wide clearinghouse referring to agency inspectors general allegations received by OSC of agency mismanagement, waste, fraud, violations of law, and other abuses. Hatch Act prosecutions are exclusively within the province of OSC. See 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 in Chapter 13, “Cases Brought by OSC.”) The Board summarized the functions of OSC, Marren v. DOJ, 51 MSPR 632, 637 n.4 (1991):

The functions of the OSC are: To conduct prohibited personnel practice investigations to see whether employee complaints of improper management actions are valid; to use the results of these investigations to seek corrective action from the agency and, if the agency fails to take the action, from the MSPB; to seek injunctive relief, known as a stay, that will restore an employee who alleges to be a victim of prohibited personnel practice to any losses he or she may have suffered; to prepare and file petition for 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, due process, penalty analysis, and national security issues have all reemerged over the years of ongoing case law—that focus magnified on occasion by a leading decision of the Federal Circuit or Supreme Court that changes the direction of the law. And, too, because Board members are political appointees, have limited terms, and varying backgrounds, the perspective of Board members, as reflected by their decisions, changes over time. Dissenting opinions from one year may become the majority position in another. [Refer to the Board’s website presentation, An Introduction to the Merit Systems Protection Board, for a powerpoint outline of the history and some basic law concerning charges and penalties adjudicated by the Board, at http://www.mspb.gov/media/mediatromos/mpsb%20in%202019%201%202011.pdf; a video presentation is at http://www.mspb.gov/training/mediatromosmpsvideo.htm.]

T]he Special Counsel acts under his own statutory authority, 5 USC 1206, 1208. The Board has no authority to supervise or direct the manner in which the Special Counsel conducts his investigations or prepares his stay petitions. The relationship of the Special Counsel to the Board may best be analogized to that of a prosecuting attorney to a court. The 2012 Whistleblower Protection Enhancement Act provided authority to OSC to file amicus briefs in court under Section 113 of that statute, codified to 5 USC 1212(h):

(1) The Special Counsel is authorized to appear as amicus curiae in any action brought in a court of the United States related to section 2302(b) (8) or (9), or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) (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 2019 Budget Justification provides an organizational snapshot: Office of Special Counsel’s Internal Organization OSC is headquartered in Washington, D.C. It has three field offices located in Dallas, Texas; Detroit, Michigan; and Oakland, California. The agency includes a number of program and support units.

Immediate Office of Special Counsel (IOSC). The Special Counsel and the IOSC staff are responsible for policy-making and overall management of OSC. This encompasses management of the agency’s congressional liaison and public affairs activities.

Complaints Examining Unit (CEU). This unit is the intake point for all complaints alleging prohibited personnel practices. In FY 2017, CEU screened 3,828 complaints. 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 questions regarding matters for which it has referred 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 a matter merits further investigation and does not qualify for ADR, or ADR is unable to resolve a matter, it is referred to IPD. This unit is comprised of IPD headquarters and three field offices, and it 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 of wrongdoing 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 to report
its findings to the Special Counsel, or closure without further action. Unit
attorneys review each agency report of investigation to determine
its sufficiency and reasonableness; the Special Counsel then sends its
determination, the report, and any comments by the whistleblower to the
President and responsible congressional oversight committees, and these
are posted online.
Retaliation and Disclosure Unit (RDU)
This unit handles hybrid cases in which a single complainant alleges both
a whistleblower disclosure and retaliation. RDU performs the full range of
actions in these cases, including the referral of whistleblower disclosures
to agencies and the investigation and prosecution of related retaliation
claims, where appropriate.
Hatch Act Unit (HAU)
OSC investigates and resolves complaints of unlawful political activity by
Government employees under the Hatch Act, and may seek corrective
and disciplinary action informally as well as before the MSPB. In addition,
OSC is responsible for providing advisory opinions on the Hatch Act to
Government employees and the public at large. OSC’s outreach and
education makes employees and agencies aware of their rights and
responsibilities under the Hatch Act.
USERRA Unit
OSC enforces the Uniformed Services Employment and Reemployment
Rights Act for civilian Federal employees. DOL investigates and attempts
to resolve the complaint but if that is not successful, the claimant may
directly appeal to the MSPB. OSC may seek corrective action for violations of USERRA before the
MSPB. OSC also provides outreach and education to veterans and
agencies on their rights and responsibilities under USERRA.
Alternative Dispute Resolution Unit (ADR)
This unit supports OSC’s operational program units. CEU, IPD, and the
USERRA Unit refer matters that are appropriate for mediation. Once
referred, an OSC ADR specialist will contact the affected employee and
agency. If both parties agree, OSC conducts one or more mediation
sessions, led by OSC-trained mediators, who have experience in Federal
personnel law.
Diversity, Outreach and Training
The Diversity, Outreach and Training Unit facilitates coordination with
and assistance to agencies in meeting the statutory mandate of 5 U.S.C.
§ 2302 (c). This provision requires that Federal agencies inform their
workforces, in consultation with OSC, about the rights and remedies
available to them under the whistleblower protection and prohibited
personnel practice provisions of the Whistleblower Protection Act. OSC
designed and implements a five-step educational program, the 2302(c)
Certification Program. Unit staff provide Government-wide training
related to 2302(c). OSC provides formal and informal outreach sessions,
including making materials available on the agency website. This unit
also helps develop and implement training programs for OSC’s internal
staff, in order to meet compliance requirements.
Office of General Counsel
This office provides legal advice and support in connection with
management and administrative matters, defense of OSC interests in
litigation filed against the agency, management of the agency’s ethics
programs, and policy planning and development.
Administrative Services Division
Components of this unit are Finance, Human Capital, Administrative
Services, Office of the Clerk, and Information Technology.
Information on OSC operations, procedures, and organization is found at the
II. MSPB ORGANIZATION AND ADMINISTRATIVE OPERATION
The 1978 Civil Service Reform Act created three administrative agencies: the
MSPB, the Federal Labor Relations Authority, and the Office of Special Counsel.
The Office of Special Counsel is an associated reorganization plan transferred to EEOC from the Civil Service
Commission (replaced by the Office of Personnel Management) responsibility for
regulating and adjudicating federal sector EEO complaints. The MSPB—
the focus of this Guide—is a independent federal agency in the Executive
Branch. It is not a court. Its decisions may be reviewable in courts established
under Article III of the federal constitution. Parker v. DLA, 1 MSPR 505, 518, 1
MSPB 489 (1980), described the Board’s adjudicatory functions:
First, the Board is not a Court of Appeals but rather is itself an
administrative establishment within the Executive Branch, albeit one
exercising independent quasi-judicial functions. It is the Board’s decision,
not the agency’s, that constitutes an “adjudication,” 5 USC 1205(a)(1),
which must be articulated in a reasoned opinion providing an adequate
basis for review by a Court of Appeals…. The mere fact that the agency’s
decision is appealable to the Board does not limit the Board’s scope of
review to that of an appellate court, nor does it transform the agency’s
decision into one that must meet adjudicatory standards which will
facilitate appellate review. In enacting the Civil Service Reform Act, Congress found it already difficult to take and sustain adverse personnel
decisions in the federal bureaucracy; requiring agency managers to write
judicial opinions justifying each such decision would make them well
nigh impossible.
The Board adjudicates cases at several levels; cases come to the Board in several ways. Most cases originate as appeals from actions taken against
Government employees and the public at large. The Board, in adjudicating
such cases, including the referral of whistleblower disclosures to
agencies and the investigation and prosecution of related retaliation
claims, where appropriate.
The Board summarizes its operations in its FY 2019 Congressional Budget
Justification:
The majority of the cases brought to the Board are appeals of adverse
to remove, suspensions of more than 14 days, reductions in
grade or pay, and furloughs of 30 days or less.
The next largest number of cases involves appeals of OPM and some
agency determinations in personnel matters. The Board has
has had to provide a collectively bargained grievance and arbitration process.
Other cases start out as complaints rather than as appeals from agency
actions: disciplinary or corrective action complaints by OSC; complaints
against administrative law judges by their employing agencies; Individual
Right of Action cases brought by whistleblowers who assert the retaliatory
loss of employment benefits; allegations by individuals with military service
who complained of discrimination because 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 or denial of an employment benefit
or preference earned through past military service and conferred by statute.
The Board summarizes its operations in its FY 2019 Congressional Budget
Justification:
The majority of the cases brought to the Board are appeals of adverse
actions—that is, removals, suspensions of more than 14 days, reductions in
grade or pay, and furloughs of 30 days or less.
The next largest number of cases involves appeals of OPM and some
agency determinations in personnel matters. The Board has
has had to provide a collectively bargained grievance and arbitration process.
In addition to adjudicating cases on the merits, the Board also provides Alternative Dispute Resolution (ADR) services to assist parties in resolving the case. Use of these services is voluntary, provides the parties with more control over the process and can result in effective resolution of a case. In addition, resolving a case through ADR procedures can save time and reduce costs to the appellant, agency, and MSPB associated with the more formal process of adjudication on the merits.

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 before 2013 that characterized the appointed and career employees. A sample is the phrase “ ajudicator attentive only to the record and the arguments of parties,” The Board, although composed of political appointees, is to function as an independent quasi-judicial body with the responsibility of ensuring that all Federal agencies follow Federal merit systems practices. See 5 CFR § 1201.101. Congress and the Federal Circuit reviews MSPB decisions in cases other than those involving discrimination allegations (except for a few whistleblower reprisal cases brought to the MSPB—about 17% of the docket. The percentage of the Circuit’s cases involving MSPB appeals decreases over time. For the last quarter of 2018, Board cases amounted to about 7% of the court’s docket—but that number is below what would be expected because of the backlog of PFRs undetermined at the Board. The Board is undertaking the lack of a quorum in 2017 and 2018, continuing into 2019. Of the docketed cases, for FY 2012, but 7% resulted in remands or reversals. That is an affirmation rate of more than 90%. [Refer to Chapter 17 for further discussion of the Federal Circuit and judicial review of Board decisions.]

Board jurisdiction is statutory, although the statutory scheme permits the Board to review some cases arising under regulations of the Office of Personnel Management. Board regulations governing adjudication are at 5 CFR Parts 1200, 1201, 1203, 1208, 1209, and 1210, discussed throughout this Guide. The Federal Rules of Evidence and the Federal Rules of Civil Procedure are occasionally referred to by the Board, but they are not binding on the Board. The Board describes its appellate processes in “Appellant Questions and Answers,” http://www.mspb.gov/appeals/appellantqanda.htm., and “Information sheets” on various types of Board appeals and procedures are on the Board website. http://www.mspb.gov/appeals/infoheets.htm. Regulations governing the conduct of open and closed Board meetings (“Sunshine Act”) are at 5 CFR 1206.7 (2018).

A. IMPARTIAL JUDICATURE

The Board, although composed of political appointees, is to function as an independent quasi-judicial body with the responsibility of ensuring that all Federal agencies follow Federal merit systems practices. See 5 CFR § 1201.101. Congress and the Board jurisdiction is statutory, although the statutory scheme permits the Board to review some cases arising under regulations of the Office of Personnel Management. Board regulations governing adjudication are at 5 CFR Parts 1200, 1201, 1203, 1208, 1209, and 1210, discussed throughout this Guide. The Federal Rules of Evidence and the Federal Rules of Civil Procedure are occasionally referred to by the Board, but they are not binding on the Board. The Board describes its appellate processes in “Appellant Questions and Answers,” http://www.mspb.gov/appeals/appellantqanda.htm., and “Information sheets” on various types of Board appeals and procedures are on the Board website. http://www.mspb.gov/appeals/infoheets.htm. Regulations governing the conduct of open and closed Board meetings (“Sunshine Act”) are at 5 CFR 1206.7 (2018).

The Congressional letters at issue do not satisfy any of these requirements. Further, while those submissions may not have technically violated the 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.

The 1949 Act also denies the Board jurisdiction over litigation against the United States. 5 U.S.C. § 7706(a). 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 § 1201.101. To accomplish this mandate, Congress dictated that the Board be composed of three members, all appointed by the President, with the advice and consent of the Senate. Each member serves an independent seven-year term. Congress further provided that not more than two of the Board members could be adherents of the same political party, and that a Board member could not...
be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 5 USC §§ 1201, 1202. Congress chose this structure to insulate the Board from political pressure and to avoid violations of the merit principles. S. Rep. No. 95–969, at 6–7 (1978), reprinted in 1978 USCCAN 2723, 2728–29.

While the letters at issue were no doubt well-intended, they are capable of being viewed by some as creating political pressure, thereby contravening Congressional intent. As a Board member, I have the responsibility of ensuring independence of any such influence, or even the appearance of such influence, and I decide every case based on the basis of the evidence and arguments of the parties, intervenors, and amici who have participated in a Board appeal in accordance with our regulations. I, therefore, write separately to expressly indicate that I did not consider the arguments raised in the letters from the two Congressmen that have been included in the appeal file, or any responses by the parties relative to those letters. Instead, I made my decision in this case based upon the facts, the arguments submitted by the parties, intervenors, and the amicus curiae, and the controlling legal authorities.

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

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

But, we are told, the Board may weigh practical and public policy considerations in reaching its decisions concerning interim relief. See McLaughlin v. OPM, 62 MSPR 336, 355 (1994).

1. De Novo Review of Agency Actions

The Board reviews agency actions for their correctness under law, rule, regulation, and, of course, Board and judicial precedent. As a practical matter, that means the agency must prove its case—the correctness of its decision—when it has the burden of proof, and when the appellant has the burden of proof, the same rule applies. The Board weighs the evidence before it rather than assessing whether the party with the burden of proof simply made a reasonable assessment of the facts. The Board may make a different legal assessment of the significance of the facts than that made by the agency, for the Board reviews legal issues of fact.

The nature of the Board’s review authority was touched on in an appeal from the decision of the agency whose decision is reviewed. That does not mean that the Board reviews legal issues of fact.

The Board engages in de novo consideration of the eligibility issue, it is not confined to either uphold OPM's decision on the ground invoked by OPM or remanding to OPM for further proceedings. See Grumman Data Sys. Corp. v. Widnall, 15 F.3d 1044, 1047 (Fed. Cir. 1994) (“Under de novo review, a board may consider an analysis developed by the agency...and produce and consider its own analysis.”)

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. Corado, 999 F.2d 523,
Adams v. DOD, 799 F.3d 1325, 1329 (Fed. Cir. 1998) (the "appeal" to the Merit Systems Protection Board "requires a de novo determination of the facts"); Fucik v. United States, 655 F.2d 1089, 1097 (Ct. Cl. 1981) ("it is the Board's obligation to consider the cases before it de novo without regard to any decision by the agencies that have gone before it"); Pardo v. Dept of the Army, 10 M.S.P.R. 206, 208–10 (1982); Zeiss v. Veterans Admin., 8 M.S.P.R. 15, 16–17 (1981).

In light of the Board's obligation to make an independent determination as to eligibility, its decisions in retirement disability cases fall outside the reach of the Chenery doctrine for reasons given in Chenery itself, as the Board's decisions do not involve review of "a determination or a judgment that an administrative agency [OPM in this case] alone is authorized to make:"); Chenery, 332 U.S. at 196; see Fomby-Denson v. Dept of the Army, 247 F.3d 1323, 1373 (Fed. Cir. 2001) (the Board committed to the administrative administrative, the Chenery doctrine does not compel a remand to permit the agency to make an initial decision on that ground"); Koyo Seiko Co. v. United States, 95 F.3d 1094, 1101 (Fed. Cir. 1996). The appropriate Supreme Court analogy is therefore not Chenery, but Helvering v. Gowran, 302 U.S. 238, 245 (1937). In that case, the Commissioner of Internal Revenue assessed a tax deficiency against the taxpayer, who sought a redetermination by the Board of Tax Appeals. The Board of Tax Appeals upheld the Commissioner's assessment, but on a legal theory different from the Commissioner's. The court of appeals concluded that the Board of Tax Appeals was free to sustain the assessment on a different legal theory, because the taxpayer's burden in the Board of Tax Appeals was to show that the assessment was erroneous on any proper theory. The Supreme Court agreed. It explained that "if the Commissioner was right in his determination, the Board properly affirmed it, even if the reasons which he had assigned were wrong.") 302 U.S. at 246.

In this case, by analogy, the Merit Systems Protection Board was free to sustain OPM's decision on a different ground because Ms. Licausi was required to show, in de novo proceedings before the Board, that she was "entitled to receive disability retirement benefits, to the extent the evidence revealed to the Board 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 agencies' interpretations of their regulations, deciding on the circumstances, the Board is bound by the precedential decisions of the Federal Circuit, its reviewing court, and by its own regulations, depending on the circumstances, the Board is bound by the procedural decisions of the Federal Circuit, its reviewing court, and by decisions of the Supreme Court. As to the latter class of cases, the Board noted, Adams v. DOD, DC-0752-10-0741-1-1 (NP 3/4/2011):

[T]he Board is bound by the decisions of the Supreme Court and lacks the authority to ignore a controlling case. See Jaffee v. Board of School Commissioners of Mobile County, 459 U.S. 1314, 1316 (1983) (Powell, Circuit J., holding that "[u]nless and until" the Supreme Court "reconsiders[its] interpretation of the regulations, the Board is obligated to follow[the Supreme Court's] decision"); cf. also Principio v. U.S. Postal Service, 100 M.S.P.R. 66, ¶ 7 (2005) (holding that any Board reservations on an issue would be "beside the point" when the Board is bound by its reviewing court's decisions); see also Adams v. Department of Defense, 371 F. App'x 93, 95 (Fed. Cir.), cert. denied, 131 S. Ct. 292 (2010).

See Cobert v. Miller, 800 F.3d 1340, 1349 (Fed. Cir. 2015) (Judge Wallach concurring) (stating that "the Board should be free to adopt the interpretation of an agency's regulations, or to decline to adopt it, without a court's prior approval"; cf. Kovel v. United States, 66 F.3d 755, 766 (D.C. Cir. 1997) (noting the quasi-judicial nature of hearings of the predecessor Civil Service Commission). [Refer to Chapter 17, "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts" and Chapter 4, "De Novo Review."]

a. Deference to OPM Regulations

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

OPM regulations receive deference if they reasonably apply statutes within the jurisdiction of OPM, as Fitzgerald v. DOD, 80 M.S.P.R. 1, 10–11 (1998), involving regulations established by OPM to consider challenges to agency determinations concerning entitlement to retirement status as a law enforcement officer, explained: The starting point of every case involving statutory construction must be the language of the statute itself. Todd v. Department of Defense, 63 M.S.P.R. 4, 7 (1994), aff'd, 55 F.3d 1574 (Fed. Cir. 1995). Where that language is clear, it must control absent a clearly expressed legislative intention to the contrary. Id. Where a statute is ambiguous, however, the interpretation of an agency charged with administration of the statute is entitled to deference. DeJesus v. Office of Personnel Management, 63 MSPR 586, 592 (1994), aff'd, 62 F.3d 1431 (Fed. Cir. 1995) (Table. As the Supreme Court held in Chevron, 467 U.S. at 843, where a statute is silent or ambiguous with respect to a specific issue, the question for a reviewing court is whether the agency's answer is based on a permissible construction of the statute. See also Bain v. Office of Personnel Management, 978 F.2d 1227, 1231 (Fed. Cir. 1992) (an agency's interpretation of a statute need not be the only reasonable one in order for it to survive a challenge).

We agree with the assertion of the appellants on review and NTEU in its amicus brief that the FERS statute does not include a deadline for requesting a determination as to LEO status. Nevertheless, we do not now adopt the absence of such a deadline a congressional intent to allow such requests to be filed at any time. Nor do we find anything in the legislative history cited by legal counsel for the parties or amici that suggests Congress intended that there be no regulatory time limit for making requests for LEO retirement coverage or that there be a regulatory time limit different from that set forth in section 842.804(c).

Although the appellants assert that under 5 USC § 8461(c), OPM shall adjudicate "all claims" under the provisions of chapter 84 administered by OPM, not just claims found to be timely by OPM, this provision does not necessarily prevent OPM from establishing regulatory time limits for filing such claims. "Adjudication" of a claim may include, for example, a finding by OPM or the Board that the claim was untimely filed under a regulatory time limit different from that suggested by the statute.

When the legislative delegation to an agency on a particular question is implicit, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by an administrator of an agency. Chevron, 467 U.S. at 844. Here, Congress authorized OPM to prescribe regulations to carry out the provisions of 5 USC chapter 84, but did not set forth a statutory authority. OPM promulgated 5 CFR § 842.804(c). See 57 Fed. Reg. 32,685, 32,689 (1992); 52 Fed. Reg. 2068, 2069 (1987). We may not, therefore, substitute our own construction of the statute for a reasonable interpretation by OPM.

See Aralar v. OPM, 99 MSPR 118, 120–21 ¶ 7 (2005) ("OPM's interpretation of a statute that Congress charges it to administer, such as the retirement statute at issue here, is normally entitled to great deference. However, the agency's interpretation is not entitled to deference where it conflicts with the plain language of the statute."); Martin v. Dept. of Air Force, 79 MSPR 380, 384 (1998) (deferring to OPM's interpretation of the Back Pay Act, a statute within OPM's administrative responsibility); Pagum v. OPM, 66 MSPR 599, 602 (1995) ("An agency's interpretation of a statute it is charged to administer is entitled to considerable weight, especially where there are no compelling reasons to depart from an interpretation by an experienced and experienced"); Brown v. OPM, 65 MSPR 380, 383–84 (1994) (the Board recites as to its deference to OPM: when Congress leaves a statutory gap for an agency to fill, there is an express delegation to the agency to elucidate the provision; in the agency exercises that authority, its construction should be given considerable weight; "post hoc" rationalizations by an agency will not create a statutory interpretation of the statute described by the agency; the Board will defer to OPM unless it fails to provide meaningful guidance or substantive 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. If the language of the statute is clear, it must control, absent a clearly expressed legislative intent to the contrary."); Huizar v. OPM, 19 MSPR 256, 258 (1984) (restating the rules governing the interpretation of statutory language with aids to construction and regard to the purpose sought by the legislation).

Deference to OPM interpretations is not unfettered. 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 deference, the Board cannot bound itself to OPM's interpretation by such interpretation in all situations. See, e.g., Obremski v. OPM and Merit Systems Protection Board, 699 F.2d 1263 (D.C. Cir. 1983) (the court need not accept the agency's interpretation where it is poorly reasoned or not in accord with applicable law) and Hastie v. Department of Agriculture, 24 MSPR 64 (1984) (the Board is not bound by OPM's interpretation where circumstances are sufficient to outweigh the deference otherwise due it). In the absence of an indication that Congress intended the reasons stated above, the Board declines to give OPM's view dispositive weight. See Donaldson v. Department of Labor, 272 MSPR 293 (1985) (pursuant to 5 USC § 1205 and 7701, the Board retains final authority to decide all
b. Consideration of Agency Regulations

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

FDIC argues that we exceeded the scope of our authority when we invalidated its minimum fitness regulations. According to FDIC, the Board’s authority is limited to review of Office of Personnel Management (OPM) regulations, as provided in 5 U.S.C. § 1204(f). We disagree with FDIC that we invalidated its minimum fitness regulations. We also find unpersuasive FDIC’s reliance on decisions that address the scope of the Board’s original jurisdiction under section 1204(f), because this appeal arises under the Board’s appellate jurisdiction.

In Jonson I, we found that the adverse action was taken pursuant to regulations that FDIC promulgated without concurrence from OGE. Jonson I, 121 M.S.P.R. 56, ¶¶ 10, 16. Therefore, we found the regulations to be “not in accordance with law.” Id., ¶ 17 (citing 5 U.S.C. § 7701(c)(2) (C) providing that an adverse action may not be sustained if it is “not in accordance with law”). We did not make a finding that the regulations were invalid.[5]

[5] Although we stated in Jonson I that the minimum fitness regulations were “invalidly promulgated,” we did not intend to infer by that statement that we were invalidating the regulations. Jonson I, 121 M.S.P.R. 56, ¶ 17.

FDIC argues that our “authority to review regulations is limited to that which is provided by 5 U.S.C. § 1204(f).” (citing Latham v. U.S. Postal Service, 117 M.S.P.R. 400 (2012); Thompson v. Office of Personnel Management, 87 M.S.P.R. 184 (2000); Ramsey v. Office of Personnel Management, 87 M.S.P.R. 98 (2000)). The Board has two types of jurisdiction, original and appellate. 5 C.F.R. § 1201.1. The Board’s original jurisdiction includes, in pertinent part, review of rules and regulations issued by OPM to declare such provisions invalid on their face or invalidly implemented by any agency. 5 U.S.C. § 1204(a)(4), (f)(2); Thompson, 87 M.S.P.R. 184, ¶ 7; 5 C.F.R. § 1203.1. In Thompson, the Board found that its original jurisdiction does not include the authority to determine whether OPM followed the proper procedures in issuing its regulations. 87 M.S.P.R. ¶ 8 (citing 5 U.S.C. § 1204). In contrast, in the instant appeal, our authority arises from our appellate jurisdiction under chapter 75 of Title 5. 5 U.S.C. § 7512(1) (including removals among adverse actions appealable to the Board); Samble v. Department of Defense, 98 M.S.P.R. 502, ¶ 11 (2005) (finding that the involuntary separation of an appellant who met the statutory definition of employee with adverse action appeal rights was appealable to the Board within the Board’s appellate jurisdiction); 5 C.F.R. § 1201.3(a)(1) (listing adverse actions as falling within the Board’s appellate jurisdiction). We find unpersuasive FDIC’s citation to Thompson to suggest that we cannot review whether an agency other than OPM properly promulgated regulations in determining whether to sustain an adverse action.[6]

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

We also are not persuaded by FDIC’s arguments that the Board lacks authority to invalidate regulations under the Administrative Procedures Act (APA). (citing Latham, 117 M.S.P.R. 400, ¶¶ 18–19 (holding that the Board does not have jurisdiction under the APA to review OPM regulations to determine whether an agency followed the statutory grant of authority, but the Board can determine whether an agency followed the regulations).)

Rather, we concluded that the Board had authority to invalidate the minimum fitness regulations, and concluded on the merits of the challenge that the regulations exceeded the authority that the Board was vested with under 5 U.S.C. § 706(2)(C) (granting reviewing courts the authority improperly under the APA to “hold unlawful and set aside agency action…in excess of statutory…authority”). We did not find the minimum fitness regulations for the APA, and did not invalidate the minimum fitness regulations for 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.


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

[Refer to Chapter 11, “Statutory, Regulatory Violation; Action Not in Accordance With Law” and Chapter 17 “Defence; 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 shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

See Hillen v. Dept. of Army, 54 MSPR 58, 66–67 (1992) (“The Board’s decision does not address this portion of the regulation because its interpretation is not necessary to a decision in this case. Here the agency charged that the appellant’s conduct had the effect of creating a hostile and intimidating environment. The Board is empowered to decide the cases before it, and it is prohibited by statute from issuing advisory opinions. 5 U.S.C.A. § 1204(h) (West Supp. 1991).”); Donahue v. Dept. of Navy, 117 M.S.P.R. 400 (2012); Ramsey v. Office of Personnel Management, 87 M.S.P.R. 98 (2000). The Board found that its original jurisdiction does not provide the authority to determine whether the Board’s appellate jurisdiction was appealable to the Board within the Board’s appellate jurisdiction); 5 C.F.R. § 1201.3(a)(1) (listing adverse actions as falling within the Board’s appellate jurisdiction). We find unpersuasive FDIC’s citation to Thompson to suggest that we cannot review whether an agency other than OPM properly promulgated regulations in determining whether to sustain an adverse action.[6]

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The new OGE declaration responds to our Jonson I decision. The declaration states that “OGE concurrence was not required under 12
in the settlement agreement is not ripe for consideration because the appellant does not allege that the agency has breached this term or that the agreement is otherwise invalid based on this term. The Board is prohibited by statute from issuing advisory opinions. 5 U.S.C. § 1204(h). Because the appellant is not contesting this term, the Board may not issue a decision providing advice or guidance regarding its meaning. See *Winston v. Department of the Treasury*, 114 M.S.P.R. 594, ¶¶ 7–9 (2010) (the Board does not have authority to issue advisory opinions concerning 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. *Deputy Chief, U.S. Department of Justice, 22 MSPR 404, 408* (1984); cf. *USDA v. Palmer*, 68 MSPR 586, 589 (1995) (while dismissing issuance of advisory opinion, the Board opined as to a scenario that might lead to its jurisdiction over a furlough of ALJs). The Board reached out, *sua sponte*, to correct a nondispositive error by an AJ for “instructural purposes.” See *Mcintire v. FEMA*, 55 MSPR 578, 582 (1992).

The Board’s General Counsel and a half-Office of Appeals Counsel provided legal guidance of a general nature within the Board. Those interpretations 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. Inquiries regarding the consistency of decisions, the application or interpretation of law in a particular case, or possibly the failure to consider certain issues or facts should, after discussion with the Regional Director, be brought to the attention of the Deputy Managing Director. This office will then seek clarification from the Board.

The Air Traffic Controller cases, involving appeals by controllers fired for participating in a strike against FAA, produced an issue bearing upon the independence of AJs. A legal memo was issued by the Board’s General Counsel advising Board and regional officials concerning the continuing issue of whether removal was required for striking; whether official notice of the strike was appropriate; whether the Board had authority to pass on questions of constitutionality of statutes; whether First Amendment rights of the strikers were violated; and whether the strike was justified by disputes over pay, safety, and working conditions. The legal memo was accompanied by a transmittal memo stating that AJs were not obligated to follow the analysis and were responsible for conducting their own research. The court in *Campbell v. Dept. of Transp.*, FAA, 735 F.2d 497, 501 (Fed. Cir. 1984), determined that the Board’s General Counsel, was under 5 CFR 1200.10(b)(5), responsible for providing legal advice to the Board, staff and field offices and “that some presiding officials adopted part of the language of the OGM memo and opined that the Board had 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 USC 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 prohibited by statute from OPM.” The Board obtained an advisory opinion concerning the recoupment through a living quarters allowance as part of a back pay remedy; *Greco v. Dept. of Army*, 30 MSPR 250, 251, 254 (1987) (an advisory opinion concerning the validity of an agreement); *Bracey v. OPM*, 83 MSPR 400, 406

11–12 (1999). The Board may find OPM advisory opinions instructive, but not binding, according to *Solomon v. Dept. of Commerce*, 119 MSPR 1, ¶¶ 9, 9, 2012 MSPR 117 (2012), involving jurisdictional implications of a pay reduction under a demonstration project:

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

B. ORGANIZATION

MSPB is an independent, quasi-judicial federal administrative agency established under the Civil Service Reform Act of 1978, 5 USC 1201. Its functions and organization are principally established at 5 USC 1201–1206 and implemented by the Board’s published regulations. The Board consists of a Chairman, a Vice Chair, and a third Member, each appointed by the President and confirmed by the Senate. No more than two members may be adherents of the same political party; they serve nonrenewable seven-year terms, and they can be removed by the President “only for inefficiency, neglect of duty, or malfeasance in office.” 5 USC 1202(d). Of passing interest, for the Board’s sister agency, the Federal Labor Relations Authority, also established under the 1978 CSRA, members may be removed by the President “only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.” 5 USC 7104(d).

The Board members do not get due process?

The Chairman is the chief executive and administrative officer of the Board. See 5 CFR 1200.1–2 (2018). The Chairman is generally responsible for determining matters pertaining to Board organization and personnel policies. The Board as a whole determines regulations governing its adjudications practices and procedures. See 3/87 Memo from MSPB General Counsel to MSPB Chairman. The Board is authorized to employ approximately 226 full time equivalent personnel at its headquarters, six regional and two field offices. Its budget is in the neighborhood of $45 million.

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

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

1. Atlanta Regional Office, 401 W. Peachtree Street, N.W., 10th Floor, Atlanta, Georgia 30308–3519, Phone: (404) 730–2751; Fax: (404) 730–2767 (Alabama; Florida; Georgia; Mississippi; South Carolina; and Tennessee);

2. Central Regional Office, 230 South Dearborn Street, 31st Floor, Chicago, Illinois 60604–1669, Phone: (312) 353–2923; Fax: (312) 886–4231 (Illinois; Indiana; Iowa; Kansas City, Kansas; Kentucky; Michigan; Minnesota; Missouri; Ohio; and Wisconsin); chicago@mspb.gov.

3. Washington D.C. Regional Office, 1901 S. Bell Street, Suite 950, Arlington, Virginia 22202, Phone: (703) 756–6250; Fax: (703) 756–7112 (Washington, D.C.; Maryland—counties of Montgomery and Prince George’s; North Carolina—Crestview; and all overseas areas not otherwise covered by other Board offices); washingtonregion@mspb.gov.

4. Northeastern Regional Office, 1601 Market Street, Suite 1700, Philadelphia, Pennsylvania 19103, Phone: (215) 597–9960; Fax: (215) 597–3456 (Connecticut; Delaware; Maine; Maryland—except the counties of Montgomery and Prince George’s; Massachusetts; New Hampshire; New Jersey—except the counties of Bergen, Essex, Hudson, and Union; Pennsylvania; Rhode Island; Vermont; and West Virginia); philadelphia@mspb.gov.

5. Dallas Regional Office, 1100 Commerce Street, Room 620, Dallas, Texas 75242–9979, Phone: (214) 767–0555; Fax: (214) 767–0102 (Arkansas; Louisiana; Oklahoma; and Texas); dallas@mspb.gov.
1. We will make our regulations easy to understand and our procedures easy to follow.
2. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.
3. We will promptly and courteously respond to customer inquiries.
4. We will facilitate the settlement of appeals.
5. We will issue readable decisions based on consistent interpretation and application of law and regulation.
6. We will issue decisions in initial appeals within 120 days of receipt and within 110 days on petitions for review, except where full and fair adjudication of an appeal requires a longer period.
7. We will make our decisions readily available to our customers.
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 usual reviewing court. 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, research, 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 before the deadline in proper format with a sworn explanatory declaration. See 5 C.F.R. § 1201.114 (2018). 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 to:

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

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

The Clerk is delegated the authority to dismiss PFRs that are clearly beyond the Board's jurisdiction. The Clerk is delegated some authority to control pleadings arriving at the Board, including rejection of nonconforming pleadings (done with notice Permitting refile of proper pleadings within a set deadline). See Morris v. Dept. of Navy, 123 MSPR 662, 668 n.8, 2016 MSPB 37 (2016) (“Although 5 C.F.R. § 1201.43 is phrased in terms of sanctions an administrative judge may order, the Board itself is empowered to issue orders. See 5 U.S.C. § 1204. The Board has delegated to the Office of the Clerk of the Board the authority to sign and issue orders disposing of procedural matters, such as those at issue in the instant case. MSPB Organization Functions and Delegations of Authority at 8–9 (April 2011).” [Refer to the Organization Functions directive at https://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 thirty to so lawyers, collectively known as the Office of Appeals Counsel (OAC), who review case records and appellate briefs and who draft 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.] OAC lawyers also prepare recommendations concerning interlocutory and arbitration appeals, evaluate PFRs from Board decisions of the Board's contract AJs, review PFRs from the Office of Special Counsel, process court remands and OPM requests for reconsideration, establish special briefing schedules, and, along with staff in the Clerk's office, consider requests for time extensions and motions for intervention, consolidation, and case joinder. The OAC lawyers, usually GS-13s and GS-14s, review the initial decisions of the AJs, often GS-15s. OAC lawyers and AJs are in the same bargaining unit, represented by the same labor union. 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 issues raised 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 or have rewritten the proposed opinion and order. The decision sheets are available through FOIA or the Privacy Act. Following a 2000 change in the Board's Privacy Act records systems descriptions, OAC analytical memoranda are no longer ordinarily accessible by appellants through the Privacy Act.

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. Board decisions issued at the headquarters level are posted on its website, www.mspb.gov.

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—expressed from the vantage point of an OAC attorney. The standards also provide an example of how the Board, with its knowledge of performance cases and the requirements of performance standards, establishes objective performance standards to assess the quality, quantity, and timeliness of OAC lawyers' efforts. The standards are:

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

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

Unacceptable:
—Incorrect and/or incomplete identification of legal and/or factual issues.
—Lack of consideration of relevant facts, evidence, or appropriate authority.

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.

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

Unacceptable:
—Poor organization and/or readability.
—Frequent errors in grammar, spelling, and punctuation.
—Frequent errors in citation form.

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.

3. Productivity (Critical):

A. Rating

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

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

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

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

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

B. Counting raw cases

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

2. Counting Rewrites. Subject to the general requirements in paragraph B.1, an attorney earns a raw case by preparing a written recommended decision with accompanying memorandum in response to a rewrite instruction other than a LAN-edit. An attorney will not earn a raw case or be taken "off standards" for work done in response to a rewrite instruction when the Associate Director determines that the original recommended disposition was clearly in error under the law as it existed when the recommendation was made or when the factual analysis was materially inadequate. The Associate Director's determination may be appealed to the Director within 7 calendar days. The Director's decision shall be final.

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 = \( \frac{1,887 - 160 - 40 - 8}{1,887} \)

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 \( \times .863 = 41 \) raw cases
Fully Successful: 54 raw cases \( \times .863 = 47 \) raw cases
Exceeds FS: 60 raw cases \( \times .863 = 52 \) raw cases
Outstanding: 66 raw cases \( \times .863 = 57 \) raw cases

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

- Preparation of a substantive memorandum returning a LAN-edit rewrite to the Board
- Preparation of a memorandum in response to a request for an advisory opinion from a Board member
- Preparation of a concurring, dissenting, or separate opinion prepared at a Board member's request
- Preparation of a decision that consolidated or joined more than 2 cases (see paragraph B.3)
- Preparation of a recommended decision and accompanying memorandum in a case that reasonably requires more than 80 hours to complete; the term "excess case hours" is defined as those hours in excess of 80 hours reasonably expended to prepare a case for which attorneys may request off-standards time
- Preparation of a response to a reconsideration request that reasonably requires more than 1 full work day to complete

(c) Non-case-related off-standards time. Management will approve requests for off-standards time for approved, substantial noncase-related activities. Generally, such activities would each reasonably require 1 full work day or more to complete. Whenever possible, an attorney should notify his or her Associate Director in advance before beginning such an activity 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.

Proration Factor = \( \frac{1,887 - 160 - 40 - 8 - 50}{1,887} \)

C. Adjustments to Annual Production Requirements.

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

2. Leave adjustment. An attorney's annual raw ease production requirement will be reduced hour for hour for all approved annual leave, sick leave, administrative leave, leave without pay, and military leave taken during the rating period. Example #1: Assume an attorney who is on standards for the entire 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 ease production requirements for that attorney will be reduced by a proration factor computed as follows:

Proration factor = \( \frac{1,887 - 160 - 40 - 8}{1,887} \)

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 \( \times .863 = 41 \) raw cases
Fully Successful: 54 raw cases \( \times .863 = 47 \) raw cases
Exceeds FS: 60 raw cases \( \times .863 = 52 \) raw cases
Outstanding: 66 raw cases \( \times .863 = 57 \) raw cases

3. Off-standards time adjustment.

(a) An attorney's annual raw ease production requirement will be reduced hour for hour to account for off-standards time approved by OAC management. An attorney must request the approval of his or her Associate Director for off-standards time within 2 weeks of performing the work forming the basis of the off-standards request. Untimely requests will not be considered unless there are extenuating circumstances justifying the delay. Whenever possible, an attorney should notify his or her Associate Director in advance before beginning such an activity requiring an off-standards time adjustment. The Associate Director may approve an attorney's request for off-standards time, partially approve the request, or deny the request. The attorney may appeal the Associate Director's decision to the Director within 7 calendar days. The Director's decision shall be final.
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by mitigating circumstances during the remainder of the rating period adversely affected the attorney’s overall rate of production. Management may take into account such factors as the relative productivity rating computed under the formula set forth above.

F. Allowances for unusual circumstances

Management may exercise discretion to raise an attorney’s productivity rating computed under 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 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 workplace 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:
The authority of Board judges is generally outlined by 5 CFR 1201.41 (2018): under Board regulations that implement 5 USC 7703. Under 5 CFR 1200.10, the administrative judge receives his or her authority to adjudicate appeals stated under 5 CFR 1201.4 (2018): The Board’s definition of a “judge” (usually referred to as an AJ) is broadly designated as administrative judges in the regional and field offices. They are especially qualified to carry out the functions of the Board. Any member of the Board may adjudicate cases, but few do. Adjudication is entrusted by delegation under 5 USC 1204(b)(1) to any designated “employee of the Board” who “may administer oaths, examine witnesses, take depositions, and receive evidence.” And under 5 USC 7701(b)(1), The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title 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.

The Board has employed a couple administrative law judges in past years, but now, when an ALJ is required (e.g., to provide a hearing to an ALJ whose removal is sought by that ALJ’s employing agency), the ALJ is obtained through contract with another federal agency that has a permanent corps of ALJs for its own adjudications—a loaner judge. The ordinary appeal is heard by an “other employee” designated to hear such cases, except in removal cases, the case is heard by an “employee experienced in hearing appeals.” Those “other employees” are administrative judges, as designated and authorized by Board regulations. The only statutory references to MSPB administrative judges appear in 2017 legislation modifying appellate rights of Department of Veterans Affairs personnel, 38 USC 714, 731. Those employees “experienced in hearing appeals” need not be attorneys, but they are. The Board’s policy is to entrust adjudication to attorney-examiners designated as administrative judges in the regional and field offices. (Refer to later in this chapter, “Judges’ Position Description, Performance Standards.”) The Board’s definition of a “judge” (usually referred to as an AJ) is broadly stated under 5 CFR 1201.4 (2018):

(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 USC 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.

The administrative judge receives his or her authority to adjudicate appeals under Board regulations that implement 5 USC 7703. Under 5 CFR 1200.10 (2018):

(c) Regional and Field Offices. The Board has regional and field offices located throughout the country (See Appendix II to 5 CFR part 1201 for a list of the regional and field offices). Judges in the regional and field offices hear and decide initial appeals and other assigned cases as provided for in the Board’s regulations.

Under 5 CFR 1201.4(a) (2018), “judge” is defined as:

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 USC 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.

The authority of Board judges is generally outlined by 5 CFR 1201.41 (2018):

(a) Exercise of authority. Judges may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate.

(b) Authority. An administrative law judge shall conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges’ powers include, but are not limited to, the authority to:

1. Administer oaths and affirmations;
2. Issue subpoenas under § 1201.81 of this part;
3. Rule on offers of proof and receive relevant evidence;
4. Rule on discovery motions under § 1201.73 of this part;
5. After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary:
   (i) To resolve an important issue of credibility;
   (ii) To ensure that the record on significant issues is fully developed; or
   (iii) To otherwise ensure a fair and just adjudication of the case.
6. Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum, and exclude any disruptive persons from the hearing;
7. Exclude any person from all or any part of the proceeding before him or her as provided under § 1201.31(d) of this part;
8. Rule on all motions, witness and exhibit lists, and proposed findings;
9. Require the parties to file memoranda of law and to present oral argument with respect to any question of law;
10. Order the production of evidence and the appearance of witnesses whose testimony would be relevant, material, and nonrepetitious;
11. Impose sanctions as provided under § 1201.43 of this part;
12. Hold prehearing conferences for the settlement and simplification of issues;
13. Require that all persons who can be identified from the record as being clearly and directly affected by a pending retirement-related case be notified of the appeal and of their right to request intervention so that their interests can be considered in the adjudication;
14. Issue any order that may be necessary to protect a witness or other individual from harassment and provide for enforcement of such order in accordance with subpart F;
15. Issue initial decisions; and
16. Determine, in decisions in which the appellant is the prevailing party, whether the granting of interim relief is appropriate.

The term “administrative judge” is scattered throughout 5 CFR Part 1201, outlining other authorities and responsibilities of AJs. 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 (PFR), leads to the Board’s final administrative disposition of the appeal at the hearing officers level. If the initial decision is not challenged by PFR 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 in court.

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 standing 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 AJs—the Board characterizes “administrative judge” as a “working title,” as opposed to an official title. See Lively v. Dept. of Navy, 31 MSPR 318, 320 n.1 (1986). Nonetheless, the title of the Board’s examiners gradually evolved to that of “judge,” and that honorific is codified in the Board’s regulations. 5 CFR 1201.4(a) (2018). Legislation facilitating removal of SES members employed by the Department of Veterans Affairs, Section 707 of the Veterans’ Access to Care through Choice, Accountability, Transparency Act of 2014, Public Law 113–146, rewrites the ordinary MSPB appellate processes for the covered executives; that section makes explicit reference to “administrative judge,” so it looks as though the title of administrative judge segued from honorific to statutory and, like love, it is here to stay. AJs are supervised by the regional office or field office director, referred to as a chief administrative judge (CAJ). Regional directors are members of the Senior Executive Service who may, or may not, decide their own docket of cases or participate as settlement judges or mediators.

The AJ is a hearing officer and legal analyst whose job it 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 PFR is filed and the initial decision becomes final through the passage of the regulatory time limit for
filings a PFR, or by affirmative review, e.g., when a PFR is filed or when the Board
reopens a case on its own motion or that of party. [The processing of PFRs and
reopening petitions is described in Chapter 5, “PFR Process.”] The
significant deference to the AJ is the regard the Board usually, although not always,
gives to his or her determinations concerning witness credibility. See Billingsley v.
USPS, 4 MSPR 368, 370, 4 MSPB 428 (1980). Through the PFR process, the Board
may and does review de novo the legal analysis of the AJ. [Refer to Chapters
5, “Credibility Findings” and Chapter 17, “Credibility” for further discussion of
resolution of credibility issues.]

According to the Board’s FY1986 budget request, each AJ should be annually
assigned approximately 90 cases. The normal workload of an AJ has been
publicly stated to be from 20–25 cases at a time (Internal Board Memo of
1/10/84), but as the Board acquires increasing adjudication responsibilities
through statutory enlargements of its jurisdiction, and as the Board’s hiring
authority is limited by occasionally static or declining budgets, AJs’ caseloads
may be reduced or increased from 30–35 cases a year to a docket of 15 cases a year,
an AJ could be assigned 100-150 or more appeals. There are some exceptional
years when AJs’ dockets skyrocket: the massive discharge of striking air
traffic controllers years ago, huge Postal Service reorganizations leading to
reductions in force every few years, and, recently, a year when Congress failed
to agree on a budget and tens of thousands of employees were furloughed.
In the ordinary course of business, many appeals are quickly dismissed as
untimely or clearly beyond the Board’s jurisdiction. Some cases are dismissed
without prejudice to their refiling, and that process can occur more than
once in the life of some cases. An AJ may hold several hearings a month or
go a month or two without a hearing. Board hearings tend to be shorter than
hearings before other adjudicators, e.g., EEOC, or in the civil courts. A typical
Board hearing lasts a day or two.

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

a. Administrative Law Judges Adjudicating Specialized Cases

Some cases, by requirement of statute, regulation, or Board practice, are
heard by administrative law judges whose selection process is governed by
OPM examination processes. Cases heard by AJs include actions brought
before the Board 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;
corrective 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 AJ or two. Now the Board contracts
with other agencies to use their AJ or ALJs to decide a Board case, e.g., an AJ from
the Coast Guard or EPA. Under MOUs with agencies supplying ALJs, counting
the time from the receipt by the contracted AJ of the case file from the MSPB,
the cases are to be resolved by the AJ 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’ AJ or ALJs.
Arbitrarily using AJs or ALJs to decide Board cases prevents Board
money that would be otherwise spent on the salary of an AJ of its own (AJL’s
salaries exceed those of GS-15 administrative judges). But the practice may
result in cases of complexity being heard by ALJs with no experience in
civil service law or Board practice. The Board may offer the assistance of a Board
employee to provide information to the AJ on matters of law or practice
without compromising the decisional independence of the AJ. See
Counsel v. Eubanks, 76 MSPR 405, 418–19 & n.3 (1997) (referring to “needed
support staff or making editorial suggestions.”). As a matter of economy, given
the considerable amount the Board pays to other agencies for AJL rental,
and as a matter of consistency in Board adjudication, the Board may wish to
consider obtaining its own AJL and assigning to that judge cases that require
adjudication by an AJL along with other appeals otherwise assigned to an AJ.

b. Judges’ Handbook; Internal Guidance

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 on 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/msbprecarchivewdov.aspx?docnum=241913&version=242182-
application=ACROBAT. A FOIA request to the Board should be used to secure
a copy of the most recent index to Board Orders or to obtain any of the orders
cited in this Guide. The Board does not publicly state when internal orders are
established, modified, deleted, or institutionally ignored. References to those
orders and manuals in this Guide should be checked for currency by a call to
the Clerk’s office or a FOIA request.

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”).

3. Qualifications, Performance Standards for
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 it is determined that an AJ is familiar with the sensitivity and
complexity of a case as well as the qualifications of the AJ. By memo R85–
2 of February 15, 1985, regional directors were given the authority to assign
removal cases to GS-12 AJs, although, based on information and belief, no
permanent AJs are now employed at that grade. The memo noted that those
employees should not be given removal cases unless they demonstrate that
they have “sufficient experience and adequate abilities to handle such cases.”
AJs may be assisted by law clerks or “legal technicians” who maintain case
files and perform some research, and who may assist in preliminary drafts
of initial decisions, memoranda, or orders. Interns, often law students, appear
at Board regional offices and make scheduling telephone calls or perform other
administrative tasks for AJs.

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

The presiding officer…served five years as a general attorney in the
federal service, conducting litigation before administrative law judges and
federal court judges. Prior to joining the Board as a judge, he had a day as an
attorney in a civil case in 1980…. [She] was clearly qualified to preside over this case.

Abarr v. Dept. of Transp. (Fed. Cir. 1986 NP No. 85–1172), aff’g Abarr v. Dept. of
Transp., 16 MSPR 572, 574 (1983) (addressing the July 26, 1979 delegation),
determined that, as to a contention that the AJ was inexperienced, a
generalized allegation did not show bias or incompetence and that the
appellant did not demonstrate a prejudicial effect on his substantive rights
resulting from his AJ’s alleged lack of experience. The Board dismissed a
challenge to the experience of an AJ who allegedly took no notes during a
3, “Conduct of Hearing; Responsibilities of Judge” and “Disqualification of Judge,” for cases discussing challenges to the competency of judges.]

a. 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 relatively
recent Board generic position description describes 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.)

Duties and Responsibilities

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; require relevant evidence; rule on discovery motions; resolve important credibility issues; and ensure that the record is fully developed and that each case is fairly adjudicated in every respect. The AJ also rules on all motions, witness lists, and proposed exhibits. The AJ may require the parties to file memoranda of law and to present oral arguments with respect to any question of law, order the production of evidence and the appearance of witnesses, impose sanctions, issue stays and protective orders, enforce orders and settlement agreements, and grant interim relief and attorney fees to prevailing appellants.

The AJ also may serve as a mentor, with responsibility for providing technical and administrative guidance to lower-graded attorneys. In addition, when designated by the Chief AJ, the incumbent may serve as the lead AJ for appeals resulting from new legislation or expanded Board jurisdiction, and in other extraordinary circumstances. A significant portion of the AJ’s time is devoted to record 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, distinguishing facts, distinguishing legal applications, and imposing sanctions, and at times requires extensive research and analysis and obtaining and evaluating expert testimony or information on controversial topics. Resolution of issues may require the development of new law.

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

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

Supervision and Guidance Received

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

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

ELEMENT I: QUALITY OF DECISIONS (CRITICAL)

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

ELEMENT II: PRODUCTION (CRITICAL)

Fully Successful—Performance that reflects the following:
85 to 100 decisions issued per year, unless good cause is shown.

ELEMENT III: CASE MANAGEMENT (CRITICAL)

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

Fully Successful—Performance that generally reflects the following:
1. 95% of all decisions issued within the relevant time limits unless good cause shown (i.e., except when beyond the AJ’s control or when due process or substantial cost savings require longer processing time); for cases subject to a Congressional reporting requirement, 95% must be issued within 11-20 fewer days than the statutory requirement and the rest must be issued within the statutorily required number of days;
2. Appeals records which contain few significant, unjustified time gaps in scheduling/conducting conferences, hearings, etc.;
3. Required prehearing/status conferences which routinely comply with Board policy regarding such conferences, i.e., conferences are used to narrow and clarify the pertinent issues; to focus on obtaining stipulations of facts; to ascertain any affirmative defenses; etc.;
4. Effective use of prehearing/status conferences to engage parties in settlement activities; and adherence to Board case law and policy regarding settlement activities;
5. Timely preparation and issuance of prehearing/status conferences orders or summaries, which properly set forth the issues, the burdens of proof, and rulings made during the conference;
6. Appeals records which are complete, e.g., contain documentation of all rulings, significant actions, and submissions by the parties;
7. Orders which are clear, effective, and legally sufficient;
8. Resolutions of motions for discovery that are timely, appropriate, and adequately documented in the record; or
9. No prohibited ex parte communications.

ELEMENT IV: HEARINGS (CRITICAL)

Fully Successful—Performance that generally reflects the following:
1. Sound familiarity, at the start of the hearing, with the case and the law and precedent relevant to the issues;
2. Controlled focus of the hearing to ensure that only relevant and material matters, which are not unduly repetitious, are addressed;
3. Appropriate, prompt, clear, and consistent rulings on motions and objections;
4. Reasonable time frames for the presentation of testimony and evidence;
5. No prohibited ex parte communications; and
6. Development of a complete, clear, and concise record of the hearing.
ELEMENT V: PUBLIC CONTACTS/WORKING RELATIONSHIPS (CRITICAL)

1. Conducts all communications and contacts with parties, co-workers, and others in a courteous, fair, professional, and ethical manner; maintains appropriate control of proceedings, even when faced with boisterous or obstreperous conduct; displays appropriate judicial demeanor and behavior which strikes a balance between the dignity of the position and the need to accomplish an efficient, effective hearing and adjudication; avoids bias or actions giving the appearance of bias; treats others without regard to race, color, religion, sex, national origin, age, disability, political affiliation, marital status, or sexual orientation;
2. Timely responses to telephone calls and correspondence;
3. Active support to the Board's stated policy initiatives.

b. Regional Director (Chief Administrative Judge) Position Description and SES Performance Plan

MSPB regional directors are chief administrative judges. Like their subordinates, the chief judges adjudicate cases, issue initial decisions, and assist in settlement discussions. One can tell something of the goals of an organization by considering the criteria used to rate executives. For the Board field organization (regional and field offices), the regional directors are members of the Senior Executive Service. We start with a relatively recent position description:

Senior Executive Position
U.S. Merit Systems Protection Board
Regional Office
Regional Director

Introduction

The U.S. Merit Systems Protection Board was established by Reorganization Plan No. 2, effective January 1, 1978, as an independent agency, to administer the functions and discharge the regulatory authorities under the Civil Service Reform Act of 1978.

The Board is composed of three members appointed for seven-year terms by the President, by and with the advice of the Senate, with no more than two members of the same political party. One member is designated, by the President to be Chair of the Board and another member, to be the Vice Chair.

The statutory authority and functions of the Board are concerned with protecting the rights of individual Federal employees and assessing whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.

This includes adjudicating appeals from personnel actions affecting the rights of individuals within the Federal Civil Service; ordering corrective action, as appropriate, and enforcing compliance; adjudicating disciplinary actions against Federal employees for violations of the laws, rules, and regulations covering the Federal merit system, granting stays in proposed action in appropriate cases when requested to do so by the Special Counsel; reviewing and determining the validity of regulations of the Office of Personnel Management as they pertain to prohibited personnel practices set forth in section 2302 of the Civil Service Reform Act; and conducting special studies of the Civil Service and other merit systems to assess adherence to merit principles free from prohibited personnel practices.

Under the law, the U.S. Merit Systems Protection Board has legal authorities unique to regulatory agencies generally and certainly to executive agencies overall. Board members and the Special Counsel, though Presidential appointees, may be removed only for inefficiency, neglect of duty, or malfeasance in office. Generally, the quasi-judicial character of the Board makes it essentially, in one aspect at least, an Administrative Court, reasonably construed at the District Court level since appeals from its actions go directly to the Courts of Appeal, rather than to District Courts.

The Board also handles its litigation in the Appeals Court with its own attorneys, rather than going through the attorneys of the Department of Justice as done by other agencies.

The express intent of Congress to assure that the Federal Service is being adequately protected from the execution of prohibited personnel practices is specifically carried forth (1) in the further authority given the Board to invalidate any action of the Office of Personnel Management it considers in violation of the intent of the law and (2) with the statutory mandate to conduct independent studies of all merit systems in the executive branch, and report to the President and Congress their findings, conclusions, and recommendations.

Duties and Responsibilities

The incumbent is responsible for managing a major regional office of the U.S. Merit Systems Protection Board. As the Regional Director, incumbent is independently responsible for rendering final administrative appeals decisions and orders on individual cases coming before the Board. Decisions and rulings may have major political, social, and economic impact on the Federal Government and the public and may have major impact on the functions of such other agencies as the Equal Employment Opportunity Commission, the Office of Personnel Management, the Federal Labor Relations Authority, and the Office of Special Counsel.

To carry out these responsibilities, the incumbent oversees the activities of a workforce of about 13 to 15 professionals (Attorney-Examiners) and three to six administrative, technical and clerical support personnel. Furthermore, the incumbent: (1) directs all activities of the office; (2) is held responsible and accountable for the success of the work of the office; (3) monitors the progress of the office toward its goals and periodically evaluates and makes adjustments; and (4) performs the following duties and responsibilities:

- Determines program goals and develops plans for the office to meet those goals;
- Determines resources needs, allocates resources, and accounts for their effective use;
- Coordinates activities with those of headquarters and the other regional offices;
- Recommends to higher management changes in program emphasis and operating guidelines;
- Devises general personnel management policy matters affecting the regional office and with personnel actions affecting key employees, or those involving serious repercussion;
- Delegates authority to subordinate supervisors and holds them responsible for the performance of their staff functions;
- Assigns appeals cases to presiding officials capable of issuing quality decisions that are consistent with controlling law, rules and regulations;
- Trains and develops attorneys/examiners to reach the full performance level;
- Is responsible for the timely processing of all appeals received by the regional office in accordance with time standards established by the Board;
- Is responsible for carrying out an affirmative action/equal employment opportunity program within the regional office, assuring that the fundamental purposes and objectives of the Board's action plan are met to the fullest extent possible. Is also responsible for assessing and implementing the program within the office, particularly in such areas as employment, training, work assignments, awards, details, and promotion;
- Supervises the activities of Attorney-Examiners, GS-11 through 15, who conduct formal administrative hearings.

Personal Contacts

Incumbent is the Board's chief contact with U.S. Attorneys, Members of Congress and their staffs, attorneys and representatives of individual appellants and labor organizations, public interest groups, and veterans' organizations relative to appellate matters within his/her areas of jurisdiction.

Qualifications Required

A sound general knowledge of the organization, policies, and procedures of the Federal Government and an intimate knowledge of personnel laws, regulations, policies and procedures, as well as the decisions rendered by the courts, by the Board, and by successor agencies in areas of the office's jurisdiction.

Analytical ability to apply laws, rules, and regulations to fact situations, and to communicate clearly, orally and in writing.

Must have a law degree and be a member of the bar of a State or the District of Columbia.

Must be able to manage an organization and supervise personnel.

Other Significant Factors

Incumbent, as a member of the Senior Executive Service, must be mobile and is subject to reassignment or detail to other positions and locations.

Supervisory Controls

Incumbent performs under the very general direction of the Director of Regional Operations and actions are subject only to periodic, cursory review for conformance to Board policy. Incumbent's decisions become final unless a successful appeal is made to the Board or to the Courts.

U.S. Merit Systems Protection Board

The larger regional offices, each headed by a Regional Director (SES position), typically employ 13 to 15 Attorney-Examiners as well as four or five Legal Clerks and other clerical support staff. The Attorney-Examiner positions range from GS-905-12 through GS-905-15, with the number of positions in each grade level dependent upon the workload and the complexity of the cases assigned.