I. REFORM ACT
A. CAPSULE HISTORY

The 1978 Civil Service Reform Act was enacted in response to the belief of Congress and the President that the civil service was awash with employees who were not removed for incompetence or misconduct because the existing disciplinary system was too cumbersome. See The Other Side of the Merit Coin: Removals for Incompetence in the Federal Service (MSPB 1982). A Senate report described prior civil service legislation as: [a]n outdated patchwork of statutes and rules built up over almost a century. Federal management practices are antiquated in comparison with the current state of the managerial art. Research and experimentation concerning the management practices is virtually nonexistent. (1978 USCCAN pp. 2723, 2725.)

The MSPB's Strategic Plan for FY 2020–2024 (Feb. 10, 2020) provides some history of the Reform Act and formation of the Board:

**Historical significance.** Understanding the origin of MSPB and the role it plays in ensuring effective human capital management in the Federal Government requires a brief review of the history of our Nation's Federal civil service. From the earliest days of our Government through the early 1880s, the Federal civil service operated under a patronage or “spoils system.”[1] Federal employees were appointed based on their support of a President's election campaign and political beliefs. There were no requirements that such appointees be suitable for Federal service or have the qualifications to perform particular Federal jobs. As administrations changed, large numbers of Federal employees were replaced with new employees appointed by the new administrations. At various times, the Capital was besieged with thousands of office seekers who believed they were owed a Federal job based on their political support of the President. Over time, this practice contributed to an unstable workforce lacking the necessary qualifications to perform its work, which in turn adversely affected the efficiency and effectiveness of the Government and its ability to serve the American people.

The inherent weaknesses of the patronage system and its impact on Government effectiveness were recognized by concerned individuals and groups resulting in various reform movements. However, there was little momentum for change until President James A. Garfield was assassinated in 1881 by a disgruntled Federal job seeker. A large public outcry for civil service reform ensued, which led to the enactment of the Pendleton Act in 1883. The Pendleton Act created the Civil Service Commission (CSC) and tasked it with monitoring a merit-based civil service which used competitive examinations to support the appointment of qualified individuals to Federal positions. This contributed to improving Government efficiency and effectiveness by helping to ensure that a stable, highly qualified Federal workforce, free from partisan political pressure, was available to serve the American people.

Following passage of the Pendleton Act, laws were enacted and actions undertaken that established the principle of "promoting the efficiency of the civil service" as the standard for removing a Federal employee. These laws and actions also granted preference for hiring military veterans, established a more transparent process for removing veterans from Federal jobs, and extended the veterans' job protections to other civil servants.[2] The CSC was given additional authority to oversee the removal of Federal employees and to adjudicate employees' appeals of their removal.[3] Although the CSC made several internal changes to better manage the appeals process, it became clear over time that the CSC could not properly manage its own affairs, and simultaneously set managerial policy, protect the merit systems, and adjudicate appeals of actions Federal agencies took against employees. Concern over the inherent or perceived conflicts of interest in the CSC's role as both rule-maker and adjudicator of appeals was a principal motivating factor behind the enactment of the Civil Service Reform Act of 1978 (CSR A).[4]

The CSRA replaced the CSC with three new agencies: MSPB as the successor to the CSC, with an Office of Special Counsel (OSC) situated within MSPB to investigate and prosecute alleged PPPs; [5] 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.[6]


**[2]** The Lloyd La Follette Act of 1912; the Veterans Preference Act passed in 1917. Still others, like employees in respondent's classification, had no right to appeal adverse actions and were managed in accordance with MSPs and in a manner free from PPPs. (1978 USCCAN pp. 2723, 2725.)

The Whistleblower Protection Act of 1989 established OSC as a separate agency.

MSPB’s role and functions. During congressional hearings on the CSRA before its passage in 1978, the role and functions of MSPB were described during testimony by various members of Congress: “[MSPB] will assume principal responsibility for safeguarding merit principles and employee rights” and be “charged with ensuring adherence to merit principles and laws” and with “safeguarding the effective operation of the merit principle and practice.”[7] MSPB inherited the CSC's adjudication functions and provides due process to employees as an independent, third-party adjudicatory authority for employee appeals of adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions. For matters within its jurisdiction, the CSRA gave MSPB the statutory authority to develop its adjudicatory processes and procedures, issue subrogation, call witnesses and enforce compliance with MSPB decisions. The CSRA also gave MSPB broad authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues, to ensure that Federal employees are managed in accordance with MSPs and in a manner free from PPPs. In addition, MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of OPM. MSPB may, on its own motion or at the request of other parties, review and potentially overturn OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a PPP. MSPB also is responsible for annually reviewing and reporting on OPM's significant actions and the degree to which the actions may affect adherence to MSPs and avoidance of PPPs.[8] In summary, the CSRA granted MSPB the statutory authority and responsibility to adjudicate employee appeals, enforce compliance with MSPB decisions, conduct objective studies of Federal merit systems and human capital management issues, and review and take appropriate action on OPM's rules, regulations, and significant actions. Appendix A contains additional information about MSPB’s jurisdiction, scope and impact, and customers and stakeholders.


**[4]** Title 5 United States Code (U.S.C.) §§ 1204(f) and 1206 of the 1978 Reform Act, *Romero v. Dept. of Army*, 708 F.2d 1561, 1563 (10th Cir. 1983), explained:

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


Still others, like employees in respondent's classification, had no right to such review. As for appeal to the courts: Since there was no special
statutory review proceeding relevant to personnel action, see 5 U.S.C. § 703, employees sought to appeal the decisions of the CSC, or the agency decision unreviewed by the CSC, to the district courts through the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus, see, e.g., Taylor v. United States Civil Service Comm'n, 374 F.2d 466 (CA9 1967), injunctive, see, e.g., Hargett v. Summerfield, 100 U.S. App. D.C. 85, 243 F.2d 29 (1957), and declaratory judgment, see, e.g., Murphy v. McNamara, 222 F. Supp. 742 (ED Pa.1963). See generally R. Vaughn, Principles of Civil Service Law § 5.4, p. 5–21, and nn.13–17 (1976) (collecting cases). For certain kinds of personnel decisions, federal employees could maintain an action in the Court of Claims of the sort respondent seeks to maintain here. See, e.g., Ainsworth v. United States, 185 Ct. Cl. 110, 399 F.2d 176 (1968).

Criticism of this “system” of administrative and judicial review was widespread. The general perception was that “appeals processes [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 various bases of jurisdiction, of the district courts in all Circuits and the Court of Claims. Moreover, as the Court of Appeals for the District of Columbia Circuit repeatedly noted, beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational. See Polcov 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 those sections, Congress dealt explicitly with the situation of nonpreference members of the excepted service, granting them limited, and in some cases conditional, rights. Chapter 43 of the CSRA governs personnel actions based on unacceptable job performance. It applies to both competitive service employees and members of the excepted service. 5 U.S.C. § 4301. It provides that before an employee can be removed or reduced in grade for unacceptable job performance, certain procedural protections must be afforded the employee. If the employee presents 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 reprimal against so-called whistleblowers. § 2302. Nonpreference excepted service employees who are not in positions of a confidential or policymaking nature are protected by this chapter, § 2302(a)(2)(B), and are given the right to file charges of “prohibited personnel practices” with the Office of Special Counsel of the MSPB, whose responsibility it is to investigate the charges and, where appropriate, to seek remedial action from the agency and the MSPB. § 2026.

Chapter 75 of the Act governs adverse action taken against employees for the “efficiency of the service,” which includes action of the type specified in § 4303(b)(1), based on misconduct. Subchapter I governs minor adverse action (suspension for 14 days or less), §§ 7501–7504, and Subchapter II governs major adverse action (removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less), §§ 7511–7514. In each chapter, covered employees are given the procedural protections similar to those contained in Chapter 43, §§ 7503(b), 7513(b), and in Subchapter II covered employees are accorded administrative review by the MSPB, followed by judicial review in the Federal Circuit. §§ 7513(d), 7703. The definition of “employee[s]” covered by Subchapter II (major adverse action) specifically includes preference eligibles in the excepted service, § 7511(c)(1)(B), whereas the other provisions include other descendants of the excepted service. The Office of Personnel Management is, however, given authority to extend coverage of Subchapter II to positions in the excepted service that have that status because they have been excluded from the competitive service by OPM regulation, § 7511(c).

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

The CSRA constituted the first comprehensive reform of the federal civil service system since passage of the Pendleton Act in 1883. A product of the nineteenth century progressive movement, the Pendleton Act had sought to replace the ‘spoils system,’ under which the President could dispense federal jobs as rewards for political patronage, with a ‘merit system’ that would base hiring on qualifications and promotion on merit. The Act also established the Civil Service Commission to employ and promote Federal servants on the merit system. 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 grew more complex, it was also compelled to elaborate a wide variety of merit system rules without guidance from Congress. Delay and inefficiency in the agency investigative process, the procedural procedures required to discipline unsatisfactory employees. At the same time, several celebrated episodes suggested that efforts by employees to call attention to government waste and fraud were often inhibited by the threat of retaliatory personnel actions. The dual responsibility of the Civil Service Commission for management and merit protection seemed to pose a barrier against mitigating these problems.

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

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

Another important purpose of the proposals, as noted by the legislation’s Senate manager, Senator Ribicoff, was to ‘[p]rovide . . . new protections for employees who disclose illegal or improper Government conduct.’ As enacted, the CSRA includes several basic features intended to achieve these objectives. Title I of the Act consists of the first statutory expression of the merit system principles that have evolved since the creation of the Civil Service Commission. In addition to detailing the requirement that personnel decisions rest on evaluations of competence, Title I announces a statutory policy of protecting whistleblowers. . . . Title I also defines a variety of ‘prohibited personnel practices’ including actions taken in retaliation for whistleblowing, section 2302(b)(8), and those taken as a reprisal for the exercise of any appeal right granted by a 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 1501–05. 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. Hoogboomlen, Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865–1883 (1961); C. Fish, The Civil Service and the Patronage (1904). The modern civil service was born with the passage of the Civil Service Act of 1883 (Pendleton Act), ch. 27, 22 Stat. 403 (codified as amended in scattered sections of 5, 18 & 40 USC). That Act was precipitated by public disapproval of the ‘spoils system,’ a civil service policy intended to facilitate the removal of inefficient government personnel, but which instead resulted in wholesale turnovers of personnel in many parts of the government after every election defeat. See Note, Federal Employment The Civil Service Reform Act of 1978—Removing Incompetents and Protecting “Whistle Blowers,” 26 Wayne L. Rev. 97, 98 (1979). The Pendleton Act set up a competitive service to limit political pressures on jobholders and to promulgate rules on various personnel matters, including competitive examinations for positions. As originally passed, however, the Act covered only about 10% of government employees, created few limits on removal powers, and gave no procedural protections to employees. See Note, supra, at 99. Over
the next several decades, attempts to remedy these defects rendered the procedures allowed federal employees to appeal adverse actions time-consuming and complex. Id. at 99–105. The CSRA attempted to solve these problems without sacrificing the procedural protections developed in the twentieth century.

See Polcove 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 2013.”

MSPB has its origin in the Pendleton Act of 1883, which was passed following the assassination of President James A. Garfield by a disgruntled Federal job seeker. The Pendleton Act created the Civil Service Commission (CSC), which implemented the use of competitive examinations to support the appointment of qualified individuals to Federal positions in a manner based on merit and free from partisan political pressure. This improved Government effectiveness and efficiency by helping to ensure a stable and 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 “saving provisions,” see § 902 of the Statute, refer to Mathis v. Dept. of Air Force, 8 MSPR 19, 22–25 (1981); see 5 C.F.R. 1201.191(a) (2019). For a history of the legislation creating civil service protections for employees before the Reform Act, see Chapter 2 of this guide.

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 straight to the Board. 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. 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,” changes in grade, any “significant change in duties, responsibilities, or working conditions,” and much else besides. 5 U.S.C. § 7320(a)(2). The extent of available review turns on the severity of the personnel action and 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 adverse actions, the employee can seek immediate review and appeal to the Merit Systems Protection Board and to courts.

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 administering the Merit Systems Protection Act,” id. § 2302(b)(12), which in turn entitles employees to “fair and equitable treatment in all aspects of personnel management,” to insist upon “proper regard for…constitutional rights,” and to prohibit “arbitrary action,” id. § 2301(b). An employee faced with a prohibited personnel practice must first complain to the Office of Special Counsel. If the Special Counsel concludes that “there are reasonable grounds to believe that a prohibited personnel practice has occurred,” he must report his conclusion to the agency. Id. § 1214(b)(2)(B). If the agency fails to take corrective action, the Special Counsel may refer the case to the Merit Systems Protection Board (from which the employee may appeal to the Federal Circuit). Id. §§ 1214(b)(2)(C), 1214(c). But if the Special Counsel concludes that the complaint lacks merit, or if he declines to refer the case to the Board, the employee is out of luck. A court may not review the Special Counsel’s decisions unless the Counsel “has declined to investigate a complaint at all.” Carson v. U.S. Office of Special Counsel, 633 F.3d 487, 493 (6th Cir. 2011).

This description does not begin to capture the Act’s many intricacies. Anyone who reads through the Act will encounter more types of covered actions and more channels of administrative or judicial review. Even within the category of prohibited personnel practices, the Act makes some exceptions. If an employee alleges discrimination because of race or sex, for example, the Act allows him to bypass the Special Counsel 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), 1220(b)(9).

After more than four decades of its existence, opinions on Board operations are mixed. Agencies find the Board supportive of their 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 taken by the agencies. Unions find the Board supportive enough to avoid statutory initiatives—including those involving 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 or appellate courts. Generally speaking, the Board’s focus on national security concerns, have all had their months or years of development through case law—that focus magnified on occasion by a leading decision of the Federal Circuit or Supreme Court that changes the direction of the law. And, too, because Board members are political appointees, have limited terms, and varying backgrounds, the perspective of Board members, as reflected by their decisions, changes over time. Dissenting opinions from one year may become the majority position in another. See Merit Systems Protection Board: A Legal Overview (Congressional Research Service, March 25, 2019). [Refer to the Board’s website presentation, An Introduction to the Merit Systems Protection Board, for a powerpoint outline of the history and some basic law concerning charges and penalties adjudicated by the Board, at http://www.mspb.gov/media/introtomspb/introtot%20o%20MSPB%20Oct%2019%202011.pdf; a video presentation is at http://www.mspb.gov/training/introtomspbvideo.htm.]

B. OFFICE OF SPECIAL COUNSEL

Before reaching the organization, jurisdiction, and procedures of the Board, we comment on the Office of Special Counsel, whose operations are described in Chapter 13. The 2012 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 disclosures from federal whistleblowers about government
wrongdoing. Additionally, OSC, when appropriate, filed 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; provides advice on Hatch Act restrictions on political activity by government employees; and enforces employment rights secured by USERRA for federal employees who serve their nation in the uniformed services.

The Special Counsel, appointed by the President and confirmed by the Senate, serves as an investigator and prosecutor of statutorily-defined prohibited personnel practices. Layser v. USDA, 8 MSPR 381, 383 (1981) (the relation of OSC and the Board was an analog of that of a prosecutor to a court). OSC also serves as a government-wide clearinghouse referring to agency inspectors general allegations received by OSC of agency mismanagement, waste, fraud, violations of law, and other abuses. Hatch Act prosecutions are exclusively the province of OSC. See Sims v. District of Columbia Gov’t, 7 MSPR 45, 48 (1981); Special Counsel v. DeMeo, 77 MSPR 158, 163–71 (1997) (discussing the evolution of the Hatch Act and statutory amendments). (More information on OSC organization, functions, and the processing of prohibited personnel practice allegations is 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 his or her job while a corrective action petition is being prepared or being considered; to prosecute disciplinary action complaints against Federal employees who engage in prohibited personnel practices, who violate orders of the MSPB, or who violate statutes related to the merit system, such as the Hatch Act; and to screen whistleblowing disclosures and order agency investigations of the substance of the allegations. See 5 USC 1206.

According to the FY 2019 and 2020 OSC Budget Justifications, the organization’s budget is about $26,000,000 and it operates with about 150 employees. OSC acts with autonomy. It has its own budget and offices. OSC is neither controlled by the Board nor is it a component of the Board’s organization, although when it brings cases before the Board it must follow Board regulations. OSC becomes an independent agency by the Board's charter, and it is not a component of the Board. The Board summarized the functions of OSC, Marren v. DOJ, 51 MSPR 632, 637 n.4 (1991):

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

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

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

(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 2020 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 (OSC)

The Special Counsel and his immediate staff are responsible for policy-making and the overall management of OSC, including supervision of each of OSC’s program areas. This encompasses management of the agency's congressional liaison and public affairs activities as well as coordination of its outreach program. The latter includes promoting federal agencies' compliance with the employee information requirement at 5 U.S.C. § 2302(c). 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, ethics programs, policy planning, and development.

Case Review Division (CRD)

The new Case Review Division, which commenced operations on October 1, 2018, serves as the initial point of intake for all PPP and disclosure allegations. This unit screens all new allegations to ensure that PPPs and disclosures are directed to the appropriate units. CRD also closes out certain categories of PPP allegations under the new authorities. CRD received in the Reauthorization Act of 2017: those which are duplicative (5 U.S.C. § 1214(a)(6)(A)(ii)), filed with the MSPB (§ 1214(a)(6)(A)(ii)), outside of OSC’s jurisdiction (§ 1214(a)(6)(A)(ii)), or more than three years old (§ 1214(a)(6)(A)(ii)).

Investigation and Prosecution Division (IPD)

The newly-expanded Investigation and Prosecution Division (IPD) is comprised of attorneys and investigators at OSC’s headquarters and three field offices. IPD receives PPP allegations from the Case Review Division and determines whether the evidence is sufficient to establish that a violation has occurred. If the evidence is insufficient, the matter is closed. If the evidence is sufficient, IPD decides whether the matter warrants corrective action, disciplinary action, or both. IPD works closely with OSC’s Alternative Dispute Resolution Unit in appropriate cases. If a meritorious case cannot be resolved through negotiation with the agency involved, IPD may bring an enforcement action before the MSPB.

 Disclosure Unit (DU)

This unit receives and reviews disclosures from federal whistleblowers. DU recommends the appropriate disposition of disclosures, which may include referral to the head of the relevant agency to conduct an investigation and report its findings to the Special Counsel, informal referral to the Office of Inspector General (OIG) or general counsel of the agency involved, or closure without further action. Unit attorneys review each agency report of investigation to determine its sufficiency and reasonableness. The Special Counsel then sends the report, along with any comments by the whistleblower, to the President and appropriate congressional oversight committees. OSC also posts the report and whistleblower comments in its public file.

Retaliation and Disclosure Unit (RDU)

This unit reviews related PPP complaints and disclosures submitted by the same complainant. The assigned RDU attorney serves as the single OSC point of contact for both filings, performing a similar function to the IPD and DU attorneys. Where appropriate, attorneys investigate PPP complaints, obtain corrective or disciplinary actions, and refer disclosures for investigation. RDU attorneys also refer cases to ADR.

Hatch Act Unit (HAU)

This unit enforces and investigates complaints of unlawful political activity by government employees under the Hatch Act of 1939 and represents OSC in seeking disciplinary actions before the MSPB. In addition, the Hatch Act Unit is responsible for providing advisory opinions on the Hatch Act to federal, state, and local employees, as well as to the public at large.

USERRA Unit

OSC enforces the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for civilian federal employees. OSC may seek corrective action for violations of USERRA and 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, mediating appropriate matters where both the affected employee and agency consent to ADR. ADR is equipped to negotiate global settlements of OSC and other claims, for example resolving PPP and Title VII discrimination claims stemming from the same personnel action.

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 whistleblower protection and prohibited personnel practice provisions of the Whistleblower Protection Act. OSC designed and implements a five-step educational program, the 2302(c)
CHAPTER 1  GUIDE TO MSPB LAW AND PRACTICE

II. MSPB ORGANIZATION AND ADMINISTRATIVE OPERATION

The 1978 Civil Service Reform Act created a group of administrative agencies: the MSPB, the Federal Labor Relations Authority, the Office of Special Counsel, and the Office of Personnel Management. 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 an 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.

But other terminology creeps into our text because other terms were applied in years past that distinguished appeals (challenges to adverse actions or reductions in force) and petitions for remedial action (Individual Rights of Action cases brought by protected whistleblowers, and VEOA or USEERRA cases brought to protect individuals against discrimination or loss of employment benefits). The term "complaint," for example, has been replaced by "occupational dispute," "administrative law judge," "arbitrator," or "lawyer," yet we continue to refer to the Board as a "complaint" body because the term is well established in our history and literature. The Board's cases are discussed as a "complaint" body in the U.S. Code and in the Equal Employment Opportunity Commission (EEOC). In addition, cases solely involving allegations of reprisal for whistleblowing may be appealed to any of the U.S. Circuit Courts of Appeals with competent jurisdiction.

Throughout the Guide, reference is made to "appeals" brought by individuals. But other terminology creeps into our text because other terms were applied in years past that distinguished appeals (challenges to adverse actions or reductions in force) and petitions for remedial action (Individual Rights of Action cases brought by protected whistleblowers, and VEOA or USEERRA cases brought to protect individuals against discrimination or loss of employment benefits). The term "complaint," for example, has been replaced by "occupational dispute," "administrative law judge," "arbitrator," or "lawyer," yet we continue to refer to the Board as a "complaint" body because the term is well established in our history and literature. The Board's cases are discussed as a "complaint" body in the U.S. Code and in the Equal Employment Opportunity Commission (EEOC). In addition, cases solely involving allegations of reprisal for whistleblowing may be appealed to any of the U.S. Circuit Courts of Appeals with competent jurisdiction.

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

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, denials of within-grade salary increases; reduction-in-force actions; suitability determinations; OPM employment practices (the development and use of examinations, qualification standards, tests, and other measurement instruments); denials of restoration or reemployment rights; and certain terminations of probationary employees.

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

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

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

Cases come to the Board in several ways. Most cases originate as appeals from actions taken against employees or directly affecting their interests, e.g., removals, suspensions, suspensions, demotions, personnel actions resulting from misconduct, or reductions in pay and grade; denials of within-grade salary increases; reduction-in-force actions; suitability determinations; OPM employment practices (the development and use of examinations, qualification standards, tests, and other measurement instruments); denials of restoration or reemployment rights; and certain terminations of probationary employees.

The Board summarizes its operations in its FY 2020 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 furloughs of 30 days or less. The next largest number of cases involves appeals of OPM and some agency determinations in retirement matters. Compensable OPM and agency determinations include BBA cases and complaints filed under a variety of other laws to include the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 et seq.; the Veterans Employment Opportunity Act (VEOA), 5 U.S.C. § 3303a et seq.; the Whistleblower Protection Act (WPA) Pub. L. No. 101-12, 103 Stat. 16; the WPEA, Pub. L. No. 119-199; the EEOC Freedom of Information Act (FOIA) disclosure and other related OPM complaints and complaints against administrative law judges by their employing agencies; Individual Right of Action cases brought by whistleblowers who assert the retaliatory loss of employment benefits; allegations by individuals with military service who complain of discrimination 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 annuity entitlement. Some appeals come to the Board in several ways. Most cases originate as appeals from actions taken against employees or directly affecting their interests, e.g., removals, suspensions, demotions, personnel actions resulting from misconduct, or reductions in pay and grade; denials of within-grade salary increases; reduction-in-force actions; suitability determinations; OPM employment practices (the development and use of examinations, qualification standards, tests, and other measurement instruments); denials of restoration or reemployment rights; and certain terminations of probationary employees.

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As detailed in that regulation, other types of actions that may be appealed to the Board include: performance-based removals or reductions in
EEOC, the United States Court of Appeals for the Federal Circuit, in U.S. district courts, or on appeal from a district court or in whistleblower cases in either the Federal Circuit or in a regional circuit court of appeals. To say the judicial review scheme is complex is no overstatement. It is discussed in Chapters 17. By the numbers, in FY 2019, 5,134 cases were decided in the field by AJs. In FY 2013, 6,340 cases were decided in the regional and field offices, compared with 6,523 cases in FY 2012. The increase from 2013 to 2016 was in part the result of furlough cases initiated resulting from a 2013 budget sequestration and from the full review of Board-issued and Board-approved regulations. During FY 2014, 876 petitions for review were decided by the Board. 952 cases were decided through petitions for review or other mechanisms at Board headquarters in FY 2013, compared with 1,024 cases decided in FY 2012. The Board lost its quorum in January 2017 and since that time there have been no petitions for review decided (or other decisions) at the Board headquarters level. For FY 2013, 47% of the Board’s cases were adverse actions, followed by about 21% adverse actions that also included some form of remedy. About 20% were disciplinary actions, 8% cases that are associated with the provisions of the EEOC and USCCR, 4% of the cases were probate, and 57% were cases that were associated with a reimbursement of court fees. The impact of the Board’s loss of quorum has been to reduce the number of cases heard, with over 2,000 fewer cases being heard in FY 2017 compared with FY 2016. Board appeals were decided more rapidly in 2017, with about a 50% increase in the number of appeals heard in FY 2017 compared with FY 2016. The Board’s backlog of cases was reduced by about 3,000 cases in FY 2017 compared with FY 2016. The Board’s backlog of cases was reduced by about 3,000 cases in FY 2017 compared with FY 2016. The Board’s backlog of cases was reduced by about 3,000 cases in FY 2017 compared with FY 2016. The Board’s backlog of cases was reduced by about 3,000 cases in FY 2017 compared with FY 2016. The Board’s backlog of cases was reduced by about 3,000 cases in FY 2017 compared with FY 2016.

The distribution of cases has not much varied over the years—with the exception of a massive number of furlough appeals in 2014 and 2015. We are informed that in FY 2016, 3,164 appeals were adjudicated on the merits in the regions. With 65 or so AJs, that is about four cases a month per AJ. This reflects the large number of cases in the docket in the regions and the number of cases adjudicated to a result is accounted for principally by settlements, jurisdictional or timeliness dismissals, and the procedural device of a dismissal without prejudice that takes a case off the docket subject to later redocketing. Of the 1,022 petitions for review decided in FY 2016, 154 were dismissed, 11 settled, 702 were denied, 131 were granted, and 24 were denied with further consideration. As a result of the loss of a quorum, in early 2017 the Board stopped issuing draft decisions from its central office (based on petitions for review or challenges of AJs), except for interlocutory issues and certifications for appeals. With the presence of three Board members, the Board functioned through 2018 and into 2020. As of early 2020, with PFRs arriving at the Board at a clip of 50–60 per month, there are a few less than 2,500 PFRs pending—not surprisingly—more than three years of accumulated petitions for review, since the regions have continued issuing initial decisions at their usual rate, and as appeals have continued to be filed at the regions at their usual rate from discipline, performance, whistleblower, retirement, and other types of matters within the Board’s jurisdiction. The Federal Circuit reviews MSPB decisions in all cases other than those involving discrimination allegations (except for a few whistleblower reprisal cases that are taken to regional circuit appellate courts). For FY 2013, the court had 1,259 appeals. Of those about 213 from 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 circuit’s cases—below what would be expected because of the backlog of PFRs undecided at the Board resulting from the lack of a quorum in 2017 through 2020. Of the docketed cases, for FY 2012, 7% resulted in remands or reversals. That is an affirmation rate of more than 90%. [Refer to Chapter 17 for 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” of Board appeals and procedures, are on the Board website. http://www.mspb.gov/appeals/infoSheets.htm. Regulations governing the conduct of open and closed Board meetings (“Sunshine Act”) are at 5 CFR 1206.7 (2019).

A. IMPARTIAL ADJUDICATION

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

While I agree with the Opinion and Order’s result and rationale, I write separately to express my great concern over a procedural issue that arose in this case. While the petition for review in this appeal was pending before the Board, two members of Congress directed unsolicited letters to then-Chairman Ben Erdreich, expressing their opinions on the merits of this appeal. The Office of the Clerk of the Board placed those letters into the official record, served the letters on the parties to this appeal, and provided the parties with an opportunity to respond to them.

These letters are troubling for several reasons. First, these submissions were not made in accordance with the Board’s procedures. Our regulations provide a structured system for enabling interested persons or organizations to become parties to, or participants in, Board appeals at different stages of the proceedings, including entering at the petition for review stage of those appeals. 5 CFR §§ 1201.22, 1201.25, 1201.34, 1201.114. Fourth parties, amici curiae, may file an appeal in accordance with the rules governing a hearing, and the submission of evidence and argument, including the requirement of serving submissions on all of the parties. 5 CFR §§ 1201.26(b)(2), 1201.114(h).

These procedures produce the record upon which the Board’s decision must rest exclusively. 5 CFR §§ 1201.54(e) (now 1201.53(e)), 1201.58 (now 1201.55), 1201.114(i).

The Congressional letters at issue do not satisfy any of these requirements. Further, while those submissions may not have technically violated the Board’s prohibitions against ex parte communications, because the Congressmen do not meet the regulatory definition of an “interested party,” these letters directed solely to our former Chairman concerning the merits of a pending appeal certainly challenge the spirit of the ex parte prohibition. 5 CFR §§ 1201.101–1201.106.

More troubling, these letters were a clear signal of impermissible political influence, that could undermine the perception of a full, fair, and impartial adjudication, which is the cornerstone of the employee rights we protect. See Frampton v. Department of the Interior, 811 F.2d 1486, 1489 (Fed. Cir. 1987). Congress created the Board as an independent quasi-judicial body with the responsibility of ensuring that all Federal agencies follow federal merit systems practices. See 5 CFR § 1200.1. To accomplish that goal, Congress mandated that the Board be composed of three members, all appointed by the President, with the advice and consent of the Senate, and each serving an independent seven-year term. Congress further provided that not more than two of the Board members could be adherents of the same political party, and that a Board member could be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 5 U.S.C. § 1201.22 (2018) (repealed 2021). The Board’s structure was designed to insulate the Board from political pressure and to avoid violations of the merit principles. See 5 U.S.C. §§ 95–969, at 6–7 (1978), reprinted in 1978 USCCAN 2723, 2728–29.

While the letters at issue were no doubt well-intended, they are capable of being viewed by some as creating the appearance of political pressure, thereby contravening Congressional intent. As a Board member, I have the responsibility of remaining independent of any such influence, or even the appearance of such influence, and I decide every case only on the basis of the evidence and arguments of the parties, intervenors, and amici who have participated in a Board appeal in accordance with our regulations. I, therefore, write separately to expressly indicate that I did not consider the arguments raised in the letters from the two Congressmen that have been included in the appeal file, or any responses by the parties regarding those letters on the record. This is in case the clear presentation of facts, 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, 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 where this case was under consideration. Isolated comments made by a single legislator, even if critical of the Recommended Decision and/or the Board, do not and did not rise to a level of undue Congressional interference with the performance of the judicial functions of the Board. See Gulf Oil Corporation v. Federal Power Commission, 563 F.2d 588 (3rd Cir. 1977) (“incidental intrusions by two or three members” of Congress into decisional process “did not seriously influence the Commission”); Pillsbury v. Federal Trade Commission, 354 F.2d 952 (5th Cir. 1966) (over 100 references to pending case during Congressional hearings, which focused “directly and substantially upon the mental decisional processes” of the Commission constituted undue interference.) The respondents are not, as they allege, “mere political pawns”; they are senior or government officials who committed serious violations of law and who, for their own purposes, are seeking to impugn the decisional process by leaps of imagination and mischaracterizations of fact.

But, we are told, the Board may weigh practical and public policy considerations in reaching its decisions concerning interim relief. See McLaughlin v. OPM, 62 MSPR 536, 555 (1994).
The nature of the Board’s review authority was touched on in an appeal from discussed in Chapter 10. Budgetary considerations governing reductions in force and furloughs, determinations when charges are sustained, a matter discussed in Chapter 7; and, of course, Board and judicial precedent. As a practical matter, the Merit Systems Protection Board has statutory authority to review OPM’s decision to retire a person to the benefits. That regulation makes clear that the appeal proceeding before the Board constitutes a de novo proceeding, quite different from the kind of limited review prescribed by section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, for judicial review of administrative action. See Spradlin v. Office of Pers. Mgmt., 84 M.S.P.R. 279, 283 (1999) ("appellants in disability retirement cases are... entitled to a de novo hearing before the Board"); Chavez v. Office of Pers. Mgmt., 6 M.S.P.R. 404, 413 (1981) (in a disability retirement appeal, the Board must "...consider de novo all available evidence"). If the Board is persuaded that the employee has met his or her burden of showing entitlement to benefits, the Board will direct that benefits be awarded; otherwise, it will sustain the denial of benefits. Because the Board engages in de novo consideration of the eligibility issue, it is not enough merely to uphold OPM’s decision; the Board must be satisfied that the retiree is entitled to benefits, and the Board is required to decide the case on the basis of all the evidence before it. Morgan v. U.S. Postal Serv., 48 M.S.P.R. 607, 610–11 (1991) ("The Board has rejected the notion that its scope of review is limited to consideration of the administrative record established before the agency"); Stewart v. Office of Pers. Mgmt., 8 M.S.P.R. 289, 294 (1981) ("...the Board is both authorized and mandated...to consider de novo all available evidence"). If the Board is persuaded that the employee has met his or her burden of showing entitlement to benefits, the Board will direct that benefits be awarded; otherwise, it will sustain the denial of benefits. Because the Board engages in de novo consideration of the eligibility issue, it is not enough merely to uphold OPM’s decision; the Board must be satisfied that the retiree is entitled to benefits, and the Board is required to decide the case on the basis of all the evidence before it. Morgan v. U.S. Postal Serv., 48 M.S.P.R. 607, 610–11 (1991) ("The Board has rejected the notion that its scope of review is limited to consideration of the administrative record established before the agency"); Stewart v. Office of Pers. Mgmt., 8 M.S.P.R. 289, 294 (1981) ("...the Board is both authorized and mandated...to consider de novo all available evidence").
decisions of the Supreme Court. As to the latter class of cases, Adams v. DOD, DC-0752-10-0741-1 (NP 3/4/2011), noted:

[The Board is bound by the decisions of the Supreme Court and lacks the authority to ignore a controlling case. See Jaffe v. Board of School Commissioners of Mobile County, 459 U.S. 1314, 1316 (1983) (Powell, Circuit J., holding that “[u]nless and until” the Supreme Court “reconsiders [its] previous decisions,” lesser courts are “obligated to follow them”); see also Principe v. U.S. Postal Service, 100 M.S.P.R. 66 ¶ 7 (2005) (holding that any Board interpretation of a statute “beside the point, that 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 (2011).

See Cobert v. Miller, 800 F.3d 1340, 1349 (Fed. Cir. 2015) (Judge Wallach concurring) (referring to Federal Circuit precedent: “The Board here was not empowered to reject controlling law”); Fitzgerald v. Hampton, 467 F.2d 755, 766 (D.C. Cir. 1972) (noting the quasi-judicial nature of hearings of the predecessor Civil Service Commission). (Refer to Chapter 17 “Deferee; 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.

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See Jeffrey v. OPM, 80 F.3d 80, 95 n.6 (1995):

While it is true that an agency’s interpretation of a statute it must enforce or effectuate through the promulgation of regulations is generally entitled to substantial deference, the Board and the courts are not bound by such interpretation in all situations. See, e.g., Obermisky v. OPM and Merit Systems Protections Board, 699 F.2d 1263 (D.C. Cir. 1983) (the court need not defer to an agency’s interpretation where it is purely rational or not in accord with applicable law) and Houst v. Department of Agriculture, 24 MSPR 64 (1984) (the Board is not bound by OPM’s interpretation where circumstances are sufficient to outweigh the deference otherwise due it). In the absence of supportive legislative history and for the reasons stated above, the Board declines to give OPM’s view dispositive weight. See Johnson v. Department of the Army, 58 MSPR 496, 498–99, ¶¶ 7–10, 2015 MSPB 36 (2015) (following remand, Johnson v. FDIC, PH-0752-13-0236-B-1 (NP 9/20/2016), on earlier interlocutory appeal, Johnson v. FDIC, 121 MSPR 56, 2014 MSPB 22 (2014) (dissent by Member Robbins) (Jonson I)).

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

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

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

FDIC argues that our “authority to review regulations is limited to that which has been promulgated 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)(1), (f)(2); Thompson v. OPM, 87 M.S.P.R. 184, ¶ 7; 5
C.F.R. § 1203.1. In Thompson, the Board found that its original jurisdiction does not include the authority to determine whether OPM followed the proper procedures in issuing its regulations. 87 M.S.P.R. 184, ¶ 8 (citing 5 U.S.C. § 1204). In contrast, in the instant appeal, our authority arises from our appellate jurisdiction under chapter 75 of Title 5. 5 U.S.C. § 7512(1) (including removals among adverse actions appealable to the Board); Samble v. Department of Defense, 98 M.S.P.R. 502, ¶ 11 (2005) (finding that the involuntary separation of an appellant who met the statutory definition of employee with adverse action appeal rights fell within the Board's appellate jurisdiction); 5 C.F.R. § 1201.3(a)(1) (listing adverse actions as falling within the Board's appellate jurisdiction). We find unpersuasive FDC'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.

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


The new OGE declaration responds to our Jonson I decision. The declaration states that "OGC concurrence was not required under 12 U.S.C. § 2222(f)(2) for the minimum fitness regulations. As a matter of comity and cooperation, we defer to OGE's determination that FDC 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 a coequal and independent agency both as a matter of comity and to avoid conflict). Based on policy considerations of comity and cooperation with the Equal Employment Opportunity Commission (EOEO) 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 EEOC for employment opportunity processes. Gomez-Burgos v. Department of Defense, 79 M.S.P.R. 245, ¶ 10 (1998) (observing that it is proper for the court to refer to EEOC'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, "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts."]

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

The Board decides cases before it. The Board is statutorily prohibited from issuing advisory opinions. Under 5 USC 1204(h): The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

See Hillen v. Dept. of Army, 54 MSPR 58, 66–67 (1992) ("The Board's decision does not address this portion of the regulation because its interpretation is not necessary to a decision in this case. Here the agency charged that the appellant's conduct had the effect of creating a hostile and intimidating environment. The Board is empowered to decide the cases before it, and it is prohibited by statute from issuing advisory opinions. 5 U.S.C.A. § 1204(h) (West Supp. 19911); Donahue v. Dept. of Navy, PH-0752-13-3010-1 (NP 6/17/2014) ("Moreover, the Board may not issue an advisory opinion regarding any matter that has already been decided by the Board, AS 7512(1) (including removals among adverse actions appealable to the Board); Samble v. Department of Defense, 98 M.S.P.R. 502, ¶ 11 (2005) (finding that the involuntary separation of an appellant who met the statutory definition of employee with adverse action appeal rights fell within the Board's appellate jurisdiction); 5 C.F.R. § 1201.3(a)(1) (listing adverse actions as falling within the Board's appellate jurisdiction). We find unpersuasive FDC'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.

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

Jonson added, as to deference to an Office of Government Ethics interpretation of the FDC regulation, 122 MSPR 454, 461–62 ¶ 13, 2015 MSPB 36 (2015) (following remand, Jonson v. FDC, PH-0752-13-0236-B-1 (NP 9/20/2016)): The new OGE declaration responds to our Jonson I decision. The declaration states that "OGC concurrence was not required under 12 U.S.C. § 2222(f)(2) for the minimum fitness regulations. As a matter of comity and cooperation, we defer to OGE's determination that FDC 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 a coequal and independent agency both as a matter of comity and to avoid conflict). Based on policy considerations of comity and cooperation with the Equal Employment Opportunity Commission (EOEO) 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 EEOC for employment opportunity processes. Gomez-Burgos v. Department of Defense, 79 M.S.P.R. 245, ¶ 10 (1998) (observing that it is proper for the court to refer to EEOC'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, "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts."]

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

The Board decides cases before it. The Board is statutorily prohibited from issuing advisory opinions. Under 5 USC 1204(h): The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

See Hillen v. Dept. of Army, 54 MSPR 58, 66–67 (1992) ("The Board's decision
transmittal memo stating that AJs were not obligated to follow the analysis and were responsible for conducting their own research. The controllers challenged the memo as an advisory opinion in violation of 5 USC 1205(g) (subsequently renumbered as 5 USC 1204(h)). Campbell v. Dept. of Transp., FAA, 735 F.2d 497, 501 (Fed. Cir. 1984), determined that the Board’s General Counsel was under 5 CFR 120.10(b)(S), responsible for providing legal advice to the Board, staff and field offices and “that some presiding officials adopted part of the language from the memorandum without an indication of their responsibilities or dictation of result by the General Counsel’s Office.” The court interpreted the statutory prohibition against advisory opinions to encompass the issuance of advisory opinions to the public as guides to future conduct. See Eng v. Dept. of Transp., 18 MSPR 220, 222 (1983) (an OGC memo was not an ex parte communication since it was not from an “interested party” within the meaning of 5 CFR 1201.101).

Although the Board is not supposed to give unofficial advice, it may request advisory opinions. Under 5 USC 1204(e)(1)(A), any Board member may “request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.” The Board occasionally requests an advisory opinion from OPM on the meaning or application of one of its regulations. The Board obtained advice from the General Accounting Office (Comptroller General) pertaining to back pay computations and of its regulations. The Board interpreted the statutory prohibition against advisory opinions to encompass the issuance of advisory opinions to the public as guides to future conduct. See Eng v. Dept. of Transp., 18 MSPR 220, 222 (1983) (an OGC memo was not an ex parte communication since it was not from an “interested party” within the meaning of 5 CFR 1201.101).

The Board solicited an advisory opinion from the OPM Director on an issue of disability annuity coverage, even though OPM was a party to the case. Although 5 USC 1204(e)(1) permits the Board to solicit an advisory opinion from OPM, the Board did not explain the utility of an advisory opinion from the same party that was briefing the Board in the case. See 45 MSPR 263, 267 (1990) (advisory opinion from OPM concerning the validity of a provision in settlement granting the appellant a one-year period of administrative leave); Greco v. Dept. of Army, 30 MSPR 288, 290 (1986) (a question of whether the Back Pay Act authorizes a living quarters allowance as part of a back pay remedy); Cortez v. VA, 27 MSPR 648, 650 (1988) (an advisory opinion concerning the recoupment through a settlement agreement of withdrawn retirement contributions). [Refer to Chapter 16, “Referral to Comptroller General,” for advisory opinions solicited as to issues pertaining to agency compliance with Board remedial orders.]

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As an initial matter, we note that the interpretation of 5 U.S.C. § 4703 contained in OPM’s advisory opinion does not have the force of law and, therefore, does not warrant deference under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). See Christensen v. Harris County, 529 U.S. 576, 587 (2000). Rather, it is “entitled to respect” under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), but only to the extent that OPM’s interpretation has the “power to persuade.” Christensen, 529 U.S. at 587 (quoting Skidmore). We find OPM’s interpretation of § 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 can be removed by the President “only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office.” 5 USC 1202(d). Of passing interest, at 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(b). Do Board members get no due process?

The Chairman is the chief executive and administrative officer of the Board. See 5 CFR 1200.1–2 (2019). The Chairman is generally responsible for determining matters pertaining to Board organization and personnel policies. The Board as a whole determines regulations governing its adjudication practices and procedures. See 8/3/87 Memo from MSPB General Counsel to MSPB Chairman. The Board is authorized to employ approximately 226 full time equivalent personnel at its headquarters, six regional and two field offices. Its budget is in the neighborhood of $45 million.

The Board operates through a Washington, D.C., headquarters office, and seven regional and field offices. Its budget is in the neighborhood of $45 million. 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 is headquartered in Washington, D.C. and has six regional offices (ROs) and two field offices (FOs) located throughout the United States. For FY 2019 the agency requested 235 full-time equivalents (FTEs) to conduct and support its statutory duties.

For the headquarters establishment, inquiries may be directed to:

- Merit Systems Protection Board
  1615 M Street, NW
  Washington, DC 20419-0002
  Phone: 202-653-7200
  Fax: 202-653-7130
  mspb.gov

- V/TDD 1-800-877-8339
- 1-202-254-4800 (“message line”)
- 1-800-424-9121 (MSPB Inspector General “hotline” [administered by USDA])


Contact information changes for Board offices at the headquarters and regional or field offices. Check the website or call the Board’s Clerk at 202-653-7200 to determine where to obtain the information you need.
The Office of the Administrative Law Judge (ALJ) adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. In FY 2018, the functions of this office were performed under interagency agreements by ALJs at the Federal Trade Commission (FTC), the Coast Guard, and the Environmental Protection Agency (EPA). The Office of Appeals Counsel conducts legal research and prepares proposed decisions for the Board to consider for cases in which a party files a PFR of an initial decision issued by an administrative judge (AJ) and in most other cases to be decided by the Board. The office prepares proposed decisions on interlocutory appeals of AJ’s rulings, makes recommendations on reopening cases on the Board’s own motion, and provides research, policy memoranda, and advice on legal issues to the Board.

The Office of the Clerk of the Board receives and processes cases filed at MSPB HQ, rules on certain procedural matters, and issues Board decisions and orders. It serves as MSPB’s public information center, coordinates media relations, operates MSPB’s library and on-line information services, and administers the Freedom of Information Act (FOIA) and Privacy Act programs. It also certifies official records to the courts and Federal administrative agencies, and manages MSPB’s records systems, website content, and the Government in the Sunshine Act program. The Office of Equal Employment Opportunity plans, implements, and evaluates MSPB’s equal employment opportunity programs. It processes complaints of alleged discrimination brought by agency employees and provides advice and assistance on affirmative employment initiatives to MSPB’s managers and supervisors. The Office of Financial and Administrative Management administers the budget, accounting, travel, time and attendance, human resources (HR), procurement, property management, physical security, and general services functions of MSPB. It develops and coordinates internal management programs, including review of agency internal controls. It also administers the agency’s cross-agency servicing agreements with the U.S. Department of Agriculture’s (USDA), National Finance Center for payroll services, U.S. Department of the Treasury’s, Bureau of Fiscal Service for accounting services, and USDA Animal and Plant Health Inspection Service for HR services.

The Office of the General Counsel, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; coordinates the review of OPM rules and regulations; prepares proposed decisions for the Board to enforce a final MSPB decision or order, in response to requests to review OPM regulations, and for other assigned cases; conducts the agency’s PFR settlement program; and coordinates the agency’s legal support for OPM. The office also drafts regulations, conducts MSPB’s ethics program, performs the Inspector General function, and plans and directs audits and investigations. The Office of Information Resources Management develops, implements, and maintains MSPB’s automated information technology systems to help the agency manage its caseload efficiently and carry out its administrative and research responsibilities.

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

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


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

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

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

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

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

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

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, maintains Board records, maintains the Board’s headquarters directory, distributes copies of Board decisions and publications, controls the Board’s on-line information services (website, listserv, and e-filing systems), operates the Board’s library, and directs the Board’s records, reports, legal research, and correspondence control programs, opens the mail, collects the faxes, and answers the phones. The Clerk’s office provides assistance to those who ask for it. Requests for extensions of deadlines for PFRs or responses should always be in writing and requests should be submitted before the deadline in proper format with a sworn explanatory declaration. See 5 CFR 1201.114 (2019). 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 at:

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 granting refiling of proper pleadings within a set deadline). See Morris v. Dept. of Navy, 123 MSPB 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” (April 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 attorneys also prepare recommendations concerning interlocutory and arbitration appeals, evaluate PFRs from initial decisions of the Board's contract. ALJs, review stay requests 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 joiner. 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 a “final decision 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 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 of how the Board's review process works—expressed from the vantagepoint 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.
     - Incorrect or incomplete analysis of issues involved.

   - **Note:** Repeated minor deficiencies and/or occasional major deficiencies may warrant an “unsatisfactory” rating under this element.

   - **Fully Successful:**
     - Appropriate recognition of facts, Board precedent, and other legal authorities.
     - Correct identification of factual and legal issues.
     - Thorough, correct, and logical analysis of issues presented for resolution.

   - **Exceeds Fully Successfully:**
     - Superior research efforts are, for the most part, self-initiated.
     - Legal analysis is comprehensive and supported by comparisons and analogies, where appropriate.
     - Almost no re-direction of research or analysis.

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

   - **Unacceptable:**
     - Poor organization and/or readability.
     - Frequent errors in grammar, spelling, and/or punctuation.
     - Frequent errors in citation form.
     - Frequent errors in formatting, including errors in case caption, additional order language, compliance language, and/or certificate of service.

   - **Note:** Repeated minor deficiencies and/or occasional major deficiencies may warrant an “unsatisfactory” rating under this element.

   - **Fully Successful:**
     - Concise discussion of material facts and relevant law.
     - Good organization: Clear and readable.
     - Errors in grammar, spelling, and punctuation are infrequent and minor and do not detract, to a meaningful degree, from the readability of the written product in most cases.
     - Compliance with the Uniform Citation Style Manual, the Board's Style Manual, and its Legal Style Manual in most cases.
     - Proper format usage.

   - **Exceeds Fully Successfully:**
     - Written work is skillfully crafted, with almost no errors in grammar, spelling, and punctuation.
     - Excellent organization: Superior clarity and readability.

3. Productivity (Critical):

   - **A. Rating**
     - **Unacceptable:** Produces at a rate of fewer than 48 raw cases per year.
     - **Minimally Successful:** Produces at a rate of 48 to 53 raw cases per year.
     - **Fully Successful:** Produces at a rate of 54 to 59 raw cases per year.
     - **Exceeds Fully Successful:** Produces at a rate of 60 to 65 raw cases per year.
     - **Outstanding:** Produces at a rate of 66 or more raw cases per year.

   - **B. Counting raw cases.**
     - **1. General Rule.** Generally, an attorney earns a raw case by preparing a written, recommended decision with accompanying memorandum that is forwarded to the Board for a vote. The raw case includes all work integral to the production of the case, including the issuance of orders to show cause. At the end of the rating period, a case that has not been forwarded out of the office for a vote will be counted as a raw case for the ending rating period if, by close of business on the last day of the rating period: (1) the attorney has submitted a draft recommended decision 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.

     - **2. Counting Consolidated and Joined Cases.** 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.

     - **3. Counting Consolidated and Joined Cases.** Subject to the general requirements in paragraph B.1, an attorney earns two raw cases per year by preparing a recommendation that joins or consolidates two separate cases pending at headquarters for decision. When an attorney recommends joining or consolidating three or more cases for decision, the Associate Director will determine whether the attorney should be deemed to have produced multiple cases or whether the attorney should be placed “off standards” for time reasonably spent on the cases (see paragraph C.3(b)). The attorney may appeal that determination to the Director within 7 calendar days. The Director's decision shall be final. In making this determination, management will consider the amount of work reasonably required to prepare the recommended decision, the number of cases involved, and any other pertinent factors. Generally, cases that arrive joined or consolidated from the regions will be counted as one raw case; however, Associate Directors may decide whether any adjustments are necessary on a case-by-case basis. The Associate Director's determination may be appealed to the Director within 7 calendar days. The Director's decision shall be final.

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

2. Leave adjustment. An attorney’s annual raw case production requirement will be reduced by hour for hour for all approved annual leave, sick leave, administrative leave, leave without pay, and military leave taken during the rating period.

Example #1: Assume an attorney who is on standards for the entire I-year rating period takes 160 hours of annual leave, 40 hours of sick leave, and 8 hours of administrative leave during the rating period. The annual raw case 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 * .890 = 43 raw cases
- Fully Successful: 54 raw cases * .890 = 48 raw cases
- Exceeds Fully Successful: 60 raw cases * .890 = 53 raw cases
- Outstanding: 66 raw cases * .890 = 59 raw cases

3. Off-standards time adjustment.

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

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

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

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 * .863 = 41 raw cases
- Fully Successful: 54 raw cases * .863 = 47 raw cases
- Exceeds Fully Successful: 60 raw cases * .863 = 52 raw cases
- Outstanding: 66 raw cases * .863 = 57 raw cases

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

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

- Job-related training lasting I full day or longer
- Details
- Assignments to agency committees or working groups
- Official time in accordance with the Collective Bargaining Agreement
- Serving as an officer or keyworker for the CFC
- Planning or preparing a major Board function, including Unity Day and EEO special emphasis month events, that reasonably requires at least I full work day
- Attendance at the agency’s legal conference
- Preparation for and participation in agency outreach events
- Acting as an Associate Director

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

- Staff meetings
- Reviewing e-mails
- Completing time and attendance reports
- Attending agency events. such as Unity Day, CFC events, holiday parties. LEO/Diversity events, and “Meet & Greets” with other agencies
- Recreation Association or Holiday Party Planning Committees
- Job-related training lasting less than 1 work day, for example: Annual Computer Security Training, No Fear Act Training, Westlaw seminars, and outside seminars and presentations
- Short-form orders prepared pursuant to rewrite instructions
- Routine LAN-edit review
- Routine reconsideration requests
- Other relatively brief Board-related activities

D. Quarterly Assessments.

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

E. New Attorneys.

Newly hired attorneys shall not be held to case production standards for their first year, but they are expected to progress during the first year (with due consideration given to prior experience and training) so that by the end of their first year they are producing at the rate contemplated by the production element set forth in paragraph A.

F. Allowances for unusual circumstances

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

4. Professional Relationships and Diversity (Critical):

—Maintains courteous and cooperative relationships with managers, supervisors, colleagues, support staff and, if applicable, external contacts; demonstrates courtesy, patience, and a willingness to be helpful to the public; keeps appropriate matters confidential.
—Demonstrates respect for diversity in the work place based on race, color, religion, national origin, age, sexual Orientation, gender, and/or the existence of a disabling condition. This respect is demonstrated toward supervisors, coworkers, and customers, both internal and external.

Unacceptable:
—Fails to demonstrate, to a severe or pervasive degree, professionalism, courtesy, respect, or fairness in dealing with others; or
—Frequently fails to respond to written and/or oral communications in a timely manner; or
—Frequently fails to advise supervisor of sensitive cases (e.g., cases involving complex, unique, or high-profile issues) in a timely manner; or
—Participates in prohibited ex parte communications; or
—Otherwise fails, to a significant degree, to perform duties represented by “Fully Successful” standards.

Fully Successful: To meet this performance level, the employee must generally meet each of the following requirements (as determined by the supervisor through direct observation and/or discussion with customers and/or peers):
—Demonstrates professionalism, courtesy, respect, and fairness in dealing with others; and
—Willingly helps others by sharing information and skills in ways that contribute to their work; and
—Responds to written and/or oral, communications in a timely manner; and
—Keeps supervisor fully informed as to sensitive cases (e.g., cases involving complex, unique; or high-profile issues); and
—Participates in no ex parte communications; and
—Performs duties in a bias-free manner that:
—Promotes a cooperative, productive, harmonious, and enjoyable work place; and
—Reflects fairness, cooperation, and respect for diversity among supervisors, co-workers, customers, and management, both internal and external.

Exceeds Fully Successful: To meet this performance level, the employee must meet the “Fully Successful” standard described above and meet at least one of the criteria described below:
—Exhibits professionalism, courtesy, respect, and fairness in dealing with all people in difficult or tense situations; or
—Provides suggestions, anticipates problems, or assists in the constructive resolution of issues related to the promotion of a diverse workplace; or
—Promotes collegial relationships with others inside and outside the agency; or
—Recognizes and acts upon opportunities to share information, products, and skills with others and takes the initiative to, help others; or
—Prepares and/or presents outreach materials well; or
—Successfully develops and/or provides internal training to other employees and/or external training to customers; or
—Writes work-related article(s) of publishable quality.

5. General Administration (Non-Critical):

Unacceptable:
—Frequently fails to follow proper procedure for assuring control of case files and documents submitted in connection with the appellate process; or
—Frequently fails to maintain accurate records of cases assigned, including the identification of pertinent computer disks or
—Frequently fails to submit, or frequently submits inaccurate, case transmittal slips that are used to assure timely and appropriate data entry into case-tracking system.

Fully Successful:
—Assures timely and proper data entry into case-tracking system in most cases.
Exceeds Fully Successful:
—Meets Fully Successful standard described above; and
—Provides appropriate comments, recommendations, and advice regarding Board and office operations and policies; or
—Volunteers, or indicates a willingness, to assume additional duties relating to the general administration of the office.

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

C. ADMINISTRATIVE JUDGES

Board members need not be lawyers; some members have had a quite different professional education and career before arriving at the Board. The requirement to be a Board member is expressed at 5 USC 1201: “The Board shall be composed of individuals who, by demonstrated ability, background, training, or experience 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 later in this chapter to “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 (2019):

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

The administrative judge receives his or her authority to adjudicate appeals under Board regulations that implement 5 USC 7703. Under 5 CFR 1200.10 (2019): (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 Board’s 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.

The authority of Board judges is generally outlined by 5 CFR 1201.41 (2019): (a) Exercise of authority. Judges may exercise authority as provided in paragraphs (b) and (c) of this section on their own motion or on the motion of a party, as appropriate. (b) Authority. Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. They will have all powers necessary to that end unless those powers are otherwise limited by law. Judges’ powers include, but are not limited to, the authority to: (1) Administer oaths and affirmations; (2) Issue subpoenas under § 1201.81 of this part; (3) Rule on offers of proof and receive relevant evidence; (4) Rule on discovery motions under § 1201.73 of this part; (5) After notice to the parties, order a hearing on his or her own initiative if the judge determines that a hearing is necessary: (i) To resolve an important issue of credibility; (ii) To ensure that the record on significant issues is fully developed; or (iii) To otherwise ensure a fair and just adjudication of the case. (6) Convene a hearing as appropriate, regulate the course of the hearing, maintain decorum, and exclude any disruptive persons from the hearing; (7) Exclude any person from all or any portion 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 at the headquarters 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 or, under limited circumstances, reopening by the Board.

Because AJs’ decisions are subject to review by the MSPB through a petition for review from a party, and they are subject to reopening by the Board, the appointment scheme for AJs appears to be valid—without the need for their presidential appointment and Senate confirmation. The matter of when administrative adjudicators are “principal officers” rather than “inferior officers” of the United States is complex, but the review authority of the Board over AJ decisions appears to leave the AJs federal civil servants removable for cause and properly appointed to hear appeals without a presidential appointment process. Compare Lucia v. SEC, 138 S. Ct. 2044 (2018) with Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019).

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 serve 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 hear. They are promoted without competitive examination. They have no real independence in the sense of the type of tenure granted to administrative law judges under the Administrative Procedure Act. AJs function with practical independence, however, for their credibility determinations ordinarily receive deference from the Board and their initial decisions are generally not subject to formal review or revision at the regional or field office level. Because OPM regulations preclude the use of the title “judge” in any position other than the 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 1201.44(a) (2019). Legislation facilitating removal of SES members employed by the Department of Veterans Affairs, Section 707 of the Veterans’ Access to Care through Choice, Accountability, and Transparency Act of 2014, Public Law 113-146, revises the ordinary MSPB appellate processes for the covered executives; that section makes explicit reference to “administrative judge,” 38 USC 714, 731, 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 chief administrative officer, referred to as a chief administrative law 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 filing a PFR, or by, if appropriate, review of the Board. If a PFR is filed or the Board reopens a case on its own motion or that of a 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 resolve de novo the legal analysis of the AJ. [Refer to Chapters 5, “Credibility Findings” and Chapter 17, “Credibility.”]

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 increase from the regulatory case limit of 35 to 30–35 cases or even as high as 40 cases at a time. At the start of a year, an AJ could be assigned 100–150 or more appeals. There are some exceptional years when AJs’ dockets skyrocket: the massive discharge of striking air traffic controllers years ago, huge Postal Service reorganizations leading to reductions in force, 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 agencies. 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 agencies, e.g., EEOC, or in the civil courts. A typical Board hearing lasts a day or two.

Cases (often referred to as “appeals” in the Guide) 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 appeals so that they develop their skills in different areas of Board law. Regional chief judges (chief administrative judges, or “CAJs”) can hear and decide appeals, and many do; 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 an administrative law judge or to an AJ from another office. The Board may assign a AJ to work from the Headquarters Office of Regional Operations to adjudicate complex appeals, 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
a. Administrative Law Judges Adjudicating Specialized Cases

Some appeals, by requirement of statute, regulation, or Board practice, are heard by administrative law judges whose selection process for many years was governed by OPM competitive examination processes. Under E.O. 13843 (July 10, 2020) the Board’s general authority to appoint ALJs under excepted service appointment authority and OPM is no longer involved in the examination process. See OPM Memorandum “Executive Order—Excepting Administrative Law Judges from the Competitive Service” https://chocgov/content/executive-order—excepting-administrative-law-judges-competitive-service. Additional information on the current appointment process for ALJs is found at https://www.opm.gov/services-for-agencies/administrative-law-judges/?url=EO-13843-Guidance. Cases heard by ALJs include actions brought before the MSPB by the Office of Special Counsel (Hatch Act complaints under 5 USC 1502 (state and local government employees) and 5 USC 7323–24 (federal employees); disciplinary action complaints under 5 USC 1215; and corrective action complaints under 5 USC 1214), and proposed actions against administrative law judges under 5 USC 7521. ALJs also hear cases involving appeals by MSPB employees.

In times past the Board employed an ALJ or two. Now the Board contracts with other agencies to use one of their ALJs to decide a Board case, e.g., an ALJ from the Coast Guard or EPA. Under MOUs with agencies supplying ALJs, counting the time from the receipt by the contracted ALJ of the case file from the MSPB, the cases are to be resolved by the ALJ by decision or otherwise within 120 days for cases involving MSPB employees, 180 days for OSC corrective actions, and 210 days for other types of cases. The contracting agencies benefit because Board cases may stabilize the workload of those agencies’ ALJs. Arguably, the practice of using ALJs from other agencies saves the Board money that would be otherwise spent on the salary of an ALJ of its own (ALJ salaries exceed those of GS-15 administrative judges). But the practice 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 ALJ on matters of law or practice without compromising the decisional independence of the ALJ. See Special 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 ALJ rental, and as a matter of consistency in Board adjudication, the Board may wish to consider obtaining its own ALJ and assigning to that judge cases that require adjudication by an ALJ along with other appeals otherwise assigned to an AJ. See 5 CFR 930.207(c) (2019).

2. Judges’ Handbook; Internal Guidance

ALJs 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 for 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 culled over time, undergoes occasional amendment. We touch on some of the directives throughout the Handbook, and an otherwise appealable matter, as well as allegations of discrimination and complexity of a case as well as the qualifications of the AJ. By memo RBS-2 of February 15, 1985, regional directors were given the authority to assign removal cases to GS-12 ALJs, although, based on information and belief, no permanent ALJs 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.” ALJs may be assisted by law clerks or “legal technicians” who maintain case files 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 ALJs.

There are few disputes concerning the qualifications of ALJs. 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 Stumphou, 1 MSPB 17 (1979). The Board reversed with four-and-a-half years of experience, involving 300 appeals, properly adjudicated a removal case. Grayson v. SSA, 5 MSPB 73, 74, 5 MSPB 146 (1981). Dancer v. USPS, 21 MSPR 214, 216 (1984), noted:

The presiding official...served five years as a general attorney in the federal service, conducting litigation before administrative law judges and federal court judges, prior to joining the Board as a GS-13 attorney-appeal in 1980. ... (She) was clearly qualified to preside over this case. Abarr v. Dept. of Transp. (Fed. Cir. 1986, No. 85-1172), affg 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 the AJ’s alleged inexperience. The Board dismissed a challenge to the experience of an AJ who allegedly took no notes during a hearing. Rhoads v. Dept. of Treasury, 1 MSPR 15 (11982). (Refer to Chapter 3, “Conduct of Hearing; Responsibilities of Judge,” and “Disqualification of Judge,” for decisions discussing challenges to the competency of judges.)

a. Judges’ Position Description, Performance Standards

ALJs are civil servants, the same as the employees whose appeals they adjudicate. Like those employees, ALJs have position descriptions and performance standards. The position descriptions for the GS-14 and GS-15 ALJs 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 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, separations, or part 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 may perform the following: Conduct prehearing conferences 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, and


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 AJ’s at or above GS-13, with a caveat that GS-13 AJ’s decide removal cases only when there are insufficient higher-graded AJ’s within the regions to hear removals and only when the assignment of a case to a GS-13 AJ takes into account the sensitivity