



Annual Report

for FY 2023

May 1, 2024

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Foreword

In accordance with § 1206 of Title 5, United States Code (U.S.C.), the U.S. Merit Systems Protection Board (MSPB) submits this Annual Report (AR) on its significant actions during fiscal year (FY) 2023.

We invite customers and stakeholders to send comments to improve MSPB's ARs to:

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Information about MSPB's FY 2023 program performance results (as required under the Government Performance and Results Act Modernization Act of 2010 (GPRAMA)) is available in the Annual Performance Report and Annual Performance Plan (APR-APP) for FY 2023-2025. Financial accountability and audit information is included in MSPB's Annual Financial Report (AFR) for FY 2023. MSPB's ARs, AFRs, and GPRAMA documents are posted on the [Plans, Budget & Performance](#) page on MSPB's website (www.mspb.gov) when they are released.

Go to www.mspb.gov to learn more about MSPB's work, sign up for MSPB's adjudication or studies listservs, or follow us on X (formerly Twitter) [@USMSPB](#).

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U.S. MERIT SYSTEMS PROTECTION BOARD

FISCAL YEAR 2023 ANNUAL REPORT

MESSAGE FROM THE CHAIRMAN

I am pleased to submit MSPB's Annual Report for FY 2023 in accordance with 5 U.S.C. § 1206. Following the five-year lack of a quorum of Board members, MSPB resumed its full range of statutory responsibilities on March 3, 2022, including deciding cases at agency headquarters (HQ) and issuing merit systems studies reports. In FY 2023, MSPB continued to focus on reducing the inherited inventory which accumulated when the Board was unable to vote on any petitions for review (PFRs) of initial decisions, although MSPB continued processing initial appeals and issuing decisions in the regional and field offices (RO/FOs).

I was honored to join the Board on June 1, 2022, as a Member and thereafter as Vice Chairman and Acting Chairman until I was confirmed as Chairman by the U.S. Senate on March 6, 2024, and sworn in as such on March 14, 2024. I am proud to serve with Vice Chairman Raymond A. Limon, who previously held the roles of MSPB's Vice Chairman and Acting Chairman, and with MSPB's dedicated employees. Working to quickly process an unprecedented volume of pending cases during MSPB's significant information technology (IT) modernization efforts, which coincided with reduced staffing levels, proved to be particularly challenging for the agency. I offer my deep and sincere appreciation for the contributions of all MSPB employees, managers, and leaders whose efforts are reflected in this report.

In FY 2023, MSPB's administrative judges (AJs) issued 4,572 decisions, including addendum cases and stay requests. During FY 2023, MSPB also decided 1,484 cases at HQ, reducing the inherited inventory to 1,884 cases (approximately half of the original inherited inventory of 3,793 cases). MSPB expects to resolve the remaining inventory cases in FY 2024 and FY 2025. Case processing statistics for the cases decided in the RO/FOs and at HQ are provided in the Case Processing Statistics for FY 2023 section. MSPB issued 38 precedential decisions at HQ, some of which are summarized in the Significant Decisions Issued by the Board section of this report. We have also included a summary of Significant Court Opinions Issued in FY 2023 covering Significant Decisions Issued by the U.S. Court of Appeals for the Federal Circuit (CAFC) and Significant Decisions Issued by Other Circuit Courts on issues relevant to MSPB's jurisdiction and substantive case law, as well as a section on Potentially Relevant Decisions by the Supreme Court.

During FY 2023, MSPB issued three editions of its *Issue of Merit (IoM)* newsletter and published reports regarding sexual harassment in Federal workplaces and perceptions of prohibited personnel practices (PPPs). The Summary of Merit Systems Studies Activity in FY 2023 provided additional details. The section on the Review of the U.S. Office of Personnel Management summarized our work reviewing the rules, regulations, and significant actions of the Office of Personnel Management (OPM).

As we look forward to the confirmation of a third Board member to restore the Board to its full complement, Vice Chairman Limon and I are committed to working with all MSPB employees and our stakeholders to accomplish our mission to protect merit system principles (MSPs) and promote a workforce free from PPPs.

Cathy A. Harris
Chairman
May 1, 2024

INTRODUCTION

This MSPB Annual Report for FY 2023 includes adjudication case processing statistics for the RO/FOs and for HQ; summaries of significant Board cases and court opinions relevant to MSPB's work; summaries of MSPB's merit systems studies activity; and a summary of MSPB work reviewing the rules, regulations, and significant actions of OPM.¹ The report also contains information about MSPB's financial status, outreach and education activities, and legislative and congressional relations activities. The report briefly references the most significant internal management challenges and external factors that affect MSPB's work; more complete descriptions are included in the [APR-APP for FY 2023-2025](#).

About MSPB

MSPB was created by the Civil Service Reform Act of 1978 (CSRA) to continue the adjudication functions of the Civil Service Commission, thus providing independent review and due process to employees and agencies. The CSRA authorized MSPB to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses to testify at hearings, and enforce compliance with final MSPB decisions. MSPB also was granted broad authority to conduct independent, objective studies of the Federal merit systems and Federal human capital (HC) management issues. In addition, MSPB was given the authority and responsibility to review and act on OPM's regulations, and to review and report on OPM's significant actions.² The CSRA also codified for the first time the values of the Federal merit systems as MSPs, and proscribed, as contrary to MSPs, specific actions and practices as PPPs.³ Since the enactment of the CSRA, Congress has given MSPB jurisdiction to hear cases and complaints filed under a variety of other laws.⁴ More information about MSPB's jurisdiction can be found in the agency's [Strategic Plan](#) at www.mspb.gov.

MSPB's Mission and Vision

Mission *To protect the merit system principles and promote an effective Federal workforce free of prohibited personnel practices.*

Vision *A highly qualified, diverse Federal workforce that is fairly and effectively managed, providing excellent service to the American people.*

¹ The review of OPM significant actions conducted under 5 U.S.C. § 1206 is not, and should not be, construed as an advisory opinion (which is prohibited under 5 U.S.C. § 1204(h)).

² Pursuant to 5 U.S.C. § 1204(f), MSPB may, on its own motion, or at the request of other parties, review and declare invalid OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a prohibited personnel practice. Pursuant to 5 U.S.C. § 1206, MSPB also is responsible for annually reviewing and reporting on OPM's significant actions.

³ Title 5 U.S.C. § 2301 and § 2302, respectively.

⁴ These include the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. § 3309 *et seq.*; the Whistleblower Protection Act of 1989 (WPA), Pub L. 101-12, 103 Stat. 16; the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. 112-199; and other laws listed in this and previous ARs.

Board Members

The bipartisan Board consists of the Chairman, Vice Chairman, and Board Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, nonrenewable 7-year terms.



Cathy A. Harris: Chairman, March 2024 to present; Vice Chairman and Acting Chairman, June 2022 to March 2024

Cathy A. Harris was confirmed by the Senate on May 25, 2022, and sworn into her duties as a member of the Board on June 1, 2022. She was designated Vice Chairman on June 6, 2022. On March 6, 2024, her separate Chairman nomination was confirmed by the U.S. Senate, and she was sworn in as Chairman on March 14, 2024. Previously, Ms. Harris was co-manager of the firm of Kator, Parks, Weiser & Harris, PLLC, in Washington, DC. She served as the Chair of the firm's Sexual Harassment and LGBT Practice sections. Ms. Harris has practiced employment law, including before MSPB, for over two decades. She has extensive experience in the litigation and settlement of Federal sector employment class actions and has represented individual employees and Federal agencies. Ms. Harris

graduated from the George Washington University Law School in Washington, DC, with honors in 1997, where she was a member and editor on the George Washington Law Review. She received the Michael D. Cooley award for most successfully maintaining her compassion, vitality, and humanity during law school and was elected to give the salutatory address at commencement. Ms. Harris received her undergraduate degree from Brown University in 1994. Prior to joining Kator, Parks, Weiser & Harris, PLLC, she was an Assistant District Attorney in the New York County District Attorney's Office. Ms. Harris also served as an Adjunct Professor at the George Washington University Law School from 2001 to 2004.

Raymond A. Limon: Vice Chairman, March 2024 to present; Board Member, June 2022 to March 2024; Vice Chairman and Acting Chairman, March 2022 to June 2022

Raymond A. Limon was confirmed by the Senate on March 1, 2022, and sworn into his duties as a member of the Board on March 4, 2022. He subsequently served as Vice Chairman and Acting Chairman between March 2022 and June 2022, when Ms. Harris was confirmed as a member of the Board and designated Vice Chairman. From June 2022 to March 10, 2024, Mr. Limon continued to serve as a Board Member. On March 11, 2024, Mr. Limon was again designated by President Biden as Vice Chairman of MSPB. Prior to his service with MSPB, Mr. Limon served as the Deputy Assistant Secretary for Human Capital and Diversity and the Chief Human Capital Officer (CHCO) and was a career member of the Senior Executive Service (SES) at the Department of the Interior (DOI).

His Directorate managed DOI's strategic human capital policies and procedures, Human Resources (HR) evaluations and oversight programs, occupational safety and health programs, and employee development and leadership programs, all of which served DOI's more than 70,000 employees in more than 350 occupations and 2,400 locations. Before joining DOI, Mr. Limon led



the State Department's Civil Service HR Management office. He also served as the CHCO at the Corporation for National and Community Service (e.g., AmeriCorps, VISTA, Senior Corps, etc.) and chaired the Small Agency HR Council, representing approximately 100 Federal agencies and organizations. Earlier, Mr. Limon was an attorney at OPM's Office of General Counsel, specializing in employment litigation and regulatory reviews; and served as OPM's Director of the Office of Administrative Law Judges (ALJs), managing the Government-wide personnel system for ALJs. He received his J.D. from Indiana University, Bloomington and is a former Peace Corps Volunteer (Honduras).

Status of Board Member Nomination

Board Member Tristan L. Leavitt departed MSPB at the end of his term in February 2023. On July 11, 2023, President Biden nominated Henry J. Kerner as Member. After a nomination hearing on November 30, 2023, Mr. Kerner was reported favorably out of the Senate Committee on Homeland Security and Governmental Affairs (HSGAC) and placed on the Senate calendar. His nomination was returned to the President at the end of the 1st session of the 118th Congress. On January 8, 2024, the nomination was sent to the Senate, and on January 17, 2024, it was reported favorably out of HSGAC and placed on the Senate calendar.

MSPB Offices and Their Functions

MSPB is headquartered in Washington, DC, and has six ROs and two FOs located throughout the United States. For FY 2023, the agency was authorized to employ 235 full-time equivalents (FTEs) to conduct and support its statutory duties. However, the agency was funded at a level sufficient to support only 190 FTEs.

The **Board members** adjudicate the cases brought to the Board. The Chairman, by statute, is the chief executive and administrative officer. The Director of the Office of Equal Employment Opportunity (EEO) reports directly to the Chairman; otherwise, the directors of the offices described below report to the Chairman through the **Executive Director**.

The **Office of the Administrative Law Judge (ALJ)** adjudicates and issues initial decisions in corrective and disciplinary action complaints (including Hatch Act complaints) brought by the Special Counsel, proposed agency actions against ALJs, MSPB employee appeals, and other cases assigned by MSPB. In FY 2023, the functions of this office were performed under interagency agreements by ALJs at the Federal Trade Commission (FTC) and the U.S. Coast Guard.

The **Office of Appeals Counsel (OAC)** 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 AJ and in most other cases to be decided by the Board. The office prepares proposed decisions on interlocutory appeals of AJs' rulings; makes recommendations on reopening cases on the Board's own motion; and provides research, policy memoranda, and advice on legal issues to the Board.

The **Office of the Clerk of the Board (OCB)** 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 online information services, and administers the Freedom of Information Act and privacy 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 (EEO)** plans, implements, and evaluates MSPB's EEO 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 EEO Director also coordinates MSPB's Diversity and Inclusion Council.

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

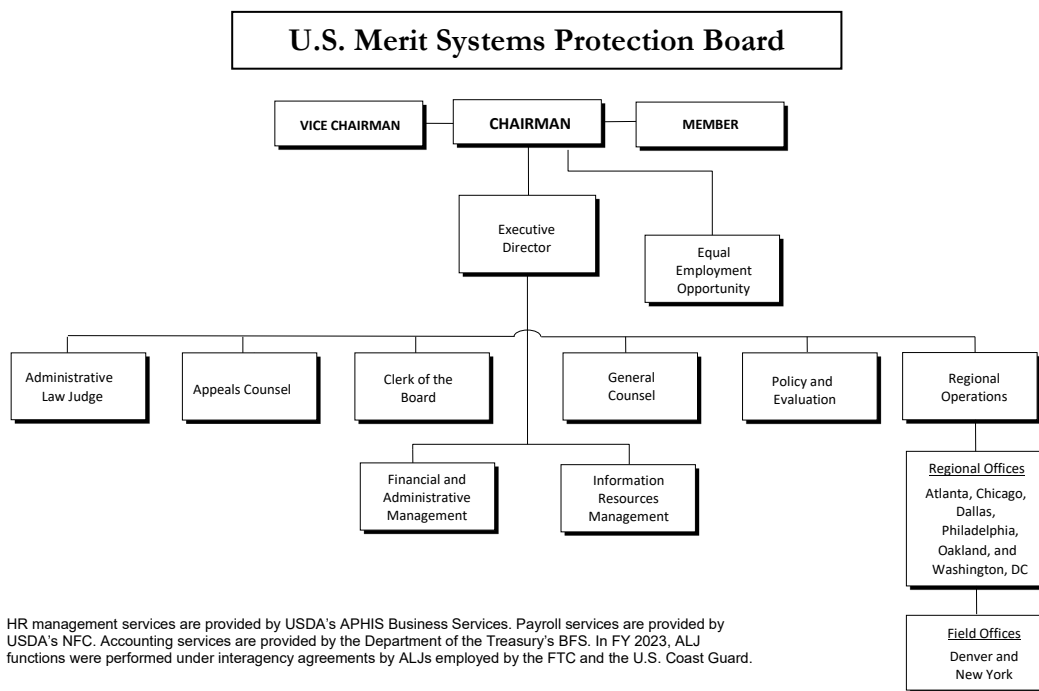
The **Office of the General Counsel (OGC)**, as legal counsel to MSPB, advises the Board and MSPB offices on a wide range of legal matters arising from day-to-day operations. The office represents MSPB in litigation; prepares proposed decisions for the Board to enforce certain final MSPB decisions or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

The **Office of Information Resources Management (IRM)** develops, implements, and maintains MSPB's IT systems and enterprise applications, and manages MSPB's cybersecurity program. These services help MSPB manage its caseload efficiently and carry out its administrative and research responsibilities.

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

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

MSPB Organizational Chart



FISCAL YEAR 2023 IN REVIEW

Adjudication

In FY 2023, 4,572 cases were decided in the RO/FOs, including addendum cases and stay requests, and ALJs issued 11 decisions. Between October 1, 2022, and September 8, 2023,⁵ the Board at HQ decided 1,484 cases. Statistical information on MSPB's case processing activity for the RO/FOs and at HQ is provided in the section Case Processing Statistics for FY 2023.⁶

The Board issued a number of precedential decisions, some of which are summarized in the section on Significant Decisions Issued by the Board in FY 2023. Precedential Board decisions involved topics such as performance-based actions, actions under 38 U.S.C. § 714, penalty determination, medical inability to perform, election of remedies, interim relief, and whistleblower protections. We have also provided summaries of significant opinions relevant to the Board's work that were issued in FY 2023 by the Supreme Court, the CAFC, and other Federal appellate courts. Those summaries are provided in the section on Significant Court Opinions Issued in FY 2023. The opinions cover topics such as the Appointments Clause of the Constitution, differential pay, removal, due process, and whistleblowing.

⁵ On August 4, 2023, MSPB announced the implementation of its new e-Appeal system. The transition to the new system required downtime beginning on September 9, 2023. The new e-Appeal was implemented on October 16, 2023. As such, the fiscal year ended on September 8, 2023, for reporting purposes.

⁶ In accordance with the WPEA, information about FY 2023 whistleblower cases is available in MSPB's APR-APP for FY 2023-2025, which is posted on MSPB's website at www.mspb.gov.

Merit Systems Studies

In FY 2023, MSPB published two reports, one research brief, and three editions of its *Issues of Merit (IoM)* newsletter. Summaries of publications and other studies-related activities are contained in the Summary of Merit Systems Studies Activity section of this report.

Review of the Office of Personnel Management

MSPB has authority to review the rules, regulations, and significant actions of OPM, and information about these reviews is provided in the Review of the U.S. Office of Personnel Management section of this report. In accordance with statute, MSPB's annual report must contain a review of OPM's significant actions and an assessment of the degree to which these actions support MSPs and prevent PPPs. Therefore, this portion of the report also includes a Review of OPM Significant Actions, covering topics such as proposed regulations for upholding civil service protections and MSPs when employees involuntarily transfer from the competitive service to the excepted service or within the excepted service; leadership on Diversity, Equity, Inclusion, and Accessibility (DEIA) initiatives; Fair Chance to Compete for Jobs Act of 2019 final regulations; OPM's Skills-Based Job Qualifications Initiative; and Closing Skills Gaps Closeout Report. Legal review of OPM rules and regulations is carried out through the adjudication function. These reviews are rare, and noteworthy information about this function is provided in the Review of Rules and Regulations of OPM section of this report.

Outreach, Merit Systems Education, and References to MSPB's Work

MSPB's education and outreach efforts are designed to enhance the understanding of the concept of merit, ensure that MSPs are applied consistently throughout the Government, reduce the likelihood of PPPs, and promote stronger merit-based management practices. MSPB outreach also promotes better understanding and operation of the Federal merit system disciplinary and appeals process by sharing information about MSPB processes and its legal precedents. All of these efforts, in turn, help improve employee and organizational performance, improve service to the American people, and provide value to the taxpayer and are summarized in the Summary of Merit Systems Studies Activity in FY 2023.

In FY 2023, MSPB staff conducted 129 outreach events with a variety of customers and stakeholders. Events were both in-person and virtual on topics such as merit systems and merit-based management; Federal disciplinary policies; MSPB regulations, procedures, results, and legal precedent; and results of merit systems studies. Events were conducted with Federal executive branch departments and agencies, Federal court organizations, Federal Executive Boards, affinity groups, and a variety of legal groups (bar and other attorney associations, national institutes, and law schools). MSPB presented at major legal and research conferences such as the Federal Dispute Resolution conference, Federal Circuit Bar Association events, and the Chicago-Kent College of Law's annual Federal Sector Labor Relations and Labor Law Program. During FY 2023, MSPB also hosted an official delegation from the Ghana Public Services Commission (PSC) to discuss workforce management issues, MSPs, PPPs, and MSPB's jurisdiction and decision-making process.

MSPB's work and other activities were cited over 300 times in over 60 different print and online sources. Several significant citations of studies work are included in the Merit Systems Studies section of this report. Additional information about MSPB's outreach and education activities and references to its work can be found in MSPB's APR-APP for FY 2023-2025.

Legislative and Congressional Relations Activity

During FY 2023, MSPB staff monitored and analyzed legislative activity relevant to MSPB's jurisdiction and adjudication of appeals.⁷

As in past years, the National Defense Authorization Act (NDAA), the annual Department of Defense policy bill, has been the primary vehicle for new laws affecting civilian employee policy and often also impacting MSPB. On December 23, 2022, the James. M. Inhofe NDAA for FY 2023 ([Pub. L. 117-263](#)) was enacted, providing an avenue for Federal Bureau of Investigation (FBI) employees to bring whistleblower reprisal claims to MSPB. Such claims previously were exclusively subject to an internal FBI appeals process. Section 5304 of the NDAA provides an FBI employee who alleges reprisal for protected whistleblower activities the right to appeal a final determination or corrective action order to MSPB under 5 U.S.C. § 1221. It also allows for an appeal to MSPB under § 1221 if no final determination or corrective action order has been made or issued within 180 days of the FBI's receipt of the allegation of reprisal. By expanding MSPB's whistleblowing jurisdiction to include employees not previously eligible to file appeals under § 1221, this change likely will increase the number of complex cases adjudicated by the Board.

Other Congressional/Legislative Activity

MSPB staff conducted five briefings for congressional staff during FY 2023. In addition to the annual budget briefings and introductory briefings for staff of the House and Senate Appropriations Committees, MSPB briefed staff from the Senate Judiciary and the House Oversight and Reform (now Oversight and Accountability) committees on then-pending legislation providing MSPB appeal rights to FBI whistleblowers. MSPB staff also briefed the HSGAC Majority Counsel on cybersecurity matters.

Internal Management Challenges and External Factors

Significant internal challenges in FY 2023 that affected MSPB's ability to carry out its mission included the inherited inventory of PFRs at HQ caused by the lack of a quorum of Board members, inadequate staffing, especially regarding adjudication and merit systems studies, and IT modernization. External challenges included changes in law, jurisdiction, and appeals processes. More detailed information about MSPB's internal challenges and external factors can be found in [MSPB's APR-APP for FY 2023-2025](#).

⁷ Bills that expired at the end of the 118th Congress are not summarized here.

CASE PROCESSING STATISTICS FOR FY 2023⁸

Summary of Cases Decided by MSPB

Table 1: FY 2023 Summary of Cases Decided By MSPB

Cases Decided in MSPB Regional and Field Offices	
Appeals	4,135
Addendum Cases ¹	416
Stay Requests ²	21
TOTAL Cases Decided in RO/FOs	4,572
Cases Decided by Administrative Law Judges (ALJs) - Original Jurisdiction³	11
Cases Decided by the Board	
Appellate Jurisdiction:	
Petitions for Review (PFRs) - Appeals	1,252
Petitions for review (PFRs) - Addendum Cases	118
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings	6
Court Remands	2
Compliance Referrals	67
EEOC Non-concurrence Cases	2
Arbitration Cases	7
Subtotal - Appellate Jurisdiction	1,454
Original Jurisdiction ⁴	29
Interlocutory Appeals	1
TOTAL Cases Decided by the Board	1,484
TOTAL Decisions (Board, ALJs, RO/FOs)	6,067
¹ Includes 101 requests for attorney fees, 117 compliance cases, 16 court remand cases, 145 Board remand cases, 29 requests for compensatory damages (discrimination cases only), and 8 requests for consequential damages. ² Includes 16 stay requests in whistleblower cases and 5 in non-whistleblower cases. ³ Initial Decisions by ALJ. Case type breakdown: 1 Disciplinary Action - Hatch Act case, 2 Actions Against SES, and 8 Proposed Actions Against ALJs. ⁴ Final Board Decisions. Case type breakdown: 6 Requests for Regulation Review, 9 Requests for Stay (OSC Filed), 1 Disciplinary Action - Hatch Act, and 13 Proposed Actions Against ALJ's.	

⁸ As noted earlier, for reporting purposes, the fiscal year effectively ended on September 8, 2023.

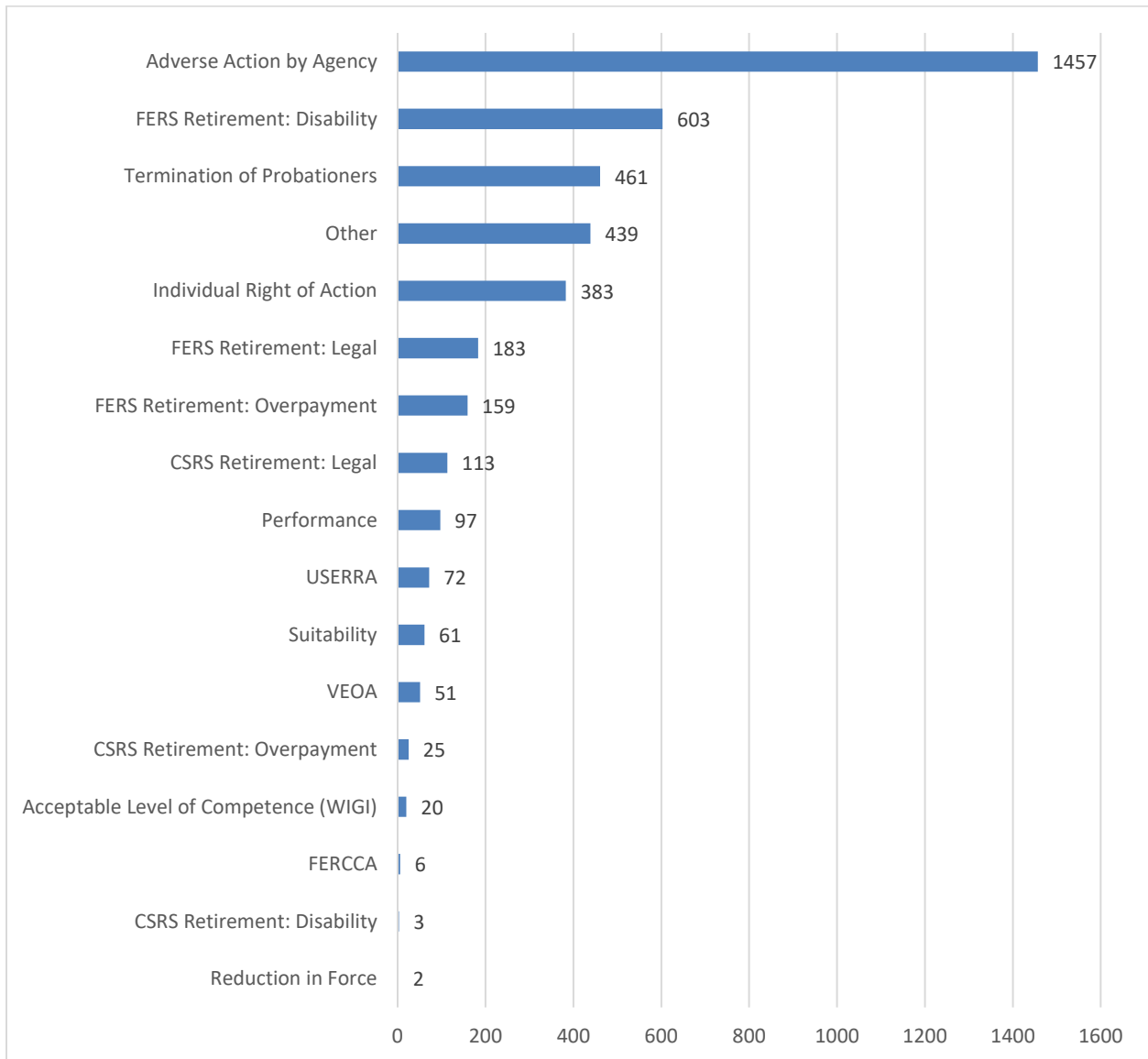
Cases Processed in the Regional and Field Offices

Table 2: Disposition of Appeals Decided in the Regional and Field Offices, by Type of Case

Type of Case	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Adverse Action by Agency	1,457	704	48.3	753	51.7	465	61.8	288	38.3	
Termination of Probationers	461	432	93.7	29	6.3	28	96.6	1	3.5	
Reduction in Force	2	1	50.0	1	50.0	1	100.0	0	0.0	
Performance	97	25	25.8	72	74.2	48	66.7	24	33.3	
Acceptable Level of Competence (ALOC) ³	20	11	55.0	9	45.0	2	22.2	7	77.8	
Suitability	61	29	47.5	32	52.5	24	75.0	8	25.0	
CSRS Retirement: Legal	113	73	64.6	40	35.4	0	0.0	40	100.0	
CSRS Retirement: Disability	3	3	100.0	0	0.0	0	0.0	0	0.0	
CSRS Retirement: Overpayment	25	8	32.0	17	68.0	11	64.7	6	35.3	
FERS Retirement: Legal	183	132	72.1	51	27.9	2	3.9	49	96.1	
FERS Retirement: Disability	603	559	92.7	44	7.3	1	2.3	43	97.7	
FERS Retirement: Overpayment	159	80	50.3	79	49.7	55	69.6	24	30.4	
FERCCA	6	2	33.3	4	66.7	0	0.0	4	100.0	
Individual Right of Action	383	261	68.2	122	31.9	61	50.0	61	50.0	
USERRA	72	41	56.9	31	43.1	20	64.5	11	35.5	
VEOA	51	31	60.8	20	39.2	3	15.00	17	85.00	
Other ⁴	439	423	96.4	16	3.6	11	68.75	5	31.25	
Total	4,135	2,815	68.0	1,320	31.9	732	55.5	588	44.6	

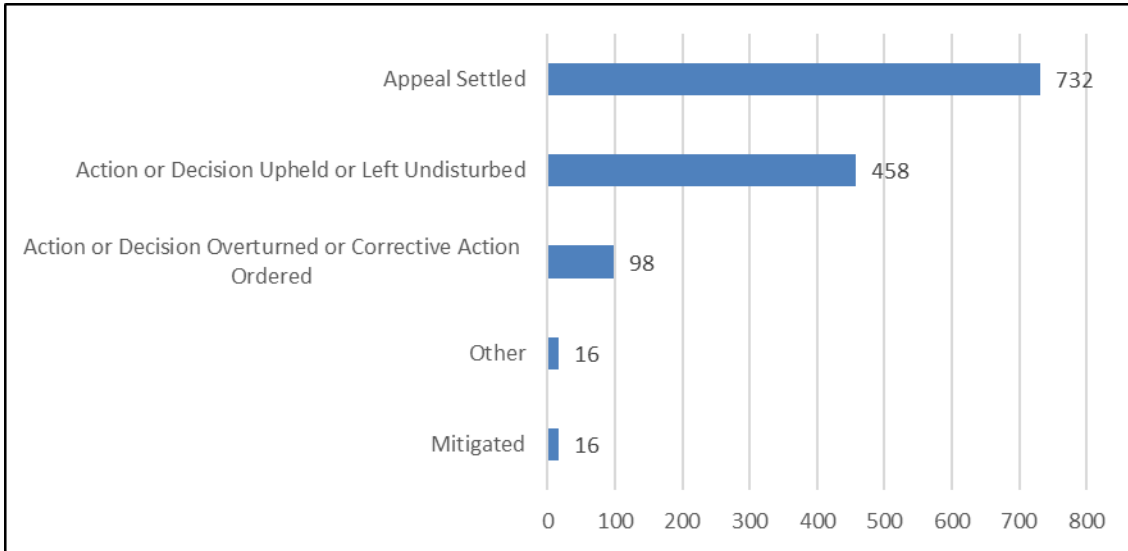
¹ Percent Dismissed and Not Dismissed are of the number Decided.
² Percent Settled and Adjudicated are of the number Not Dismissed.
³ ALOC means an employee is effectively performing the duties and responsibilities of his or her assigned job, which warrants advancing the employee's rate of pay to the next higher step at the grade of the employee's position. If an employee's performance is not at an ALOC, then the agency must, under most circumstances, deny his or her within-grade increase.
⁴ "Other" appeals include Restoration to Duty (26), Miscellaneous (359), and additional types such as Reemployment Priority, Employment Practices, and others.

Figure 1: Type of Appeals Decided in the RO/FOs



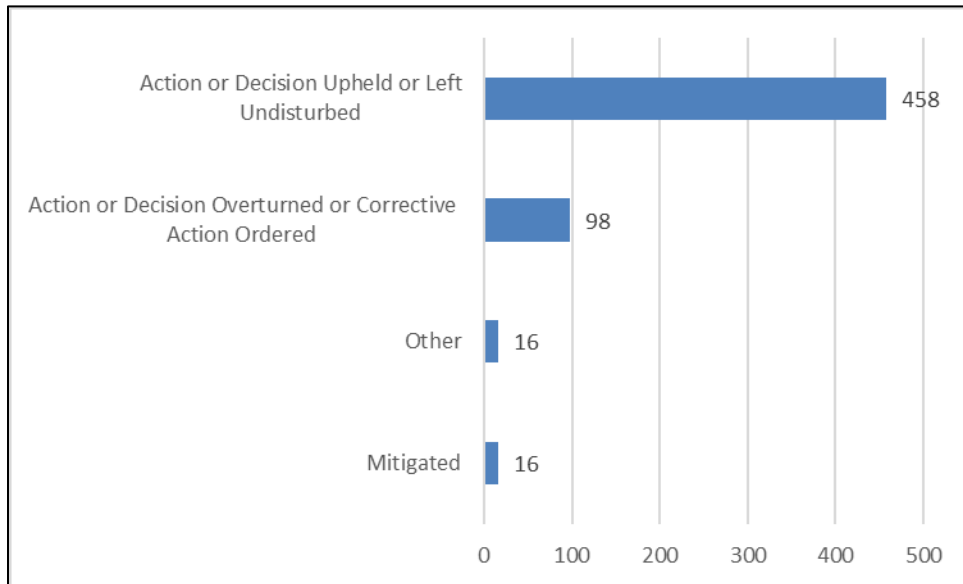
Total Number of Appeals: 4,135

Figure 2: Dispositions of Initial Appeals Not Dismissed by RO/FOs



Total Number of Appeals that were Not Dismissed: 1,320

Figure 3: Dispositions of Initial Appeals Not Dismissed or Settled by RO/FOs



Based on 588 Appeals Adjudicated on the Merits

Table 3: Disposition of Appeals by Agency
(in descending order by number of decided appeals)

	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Office of Personnel Management ³	1,114	859	77.1	255	22.9	87	34.1	168	65.9	
Department of Veterans Affairs	522	352	67.4	170	32.6	102	60.0	68	40.0	
Department of the Army	334	212	63.5	122	36.5	84	68.9	38	31.1	
United States Postal Service	322	209	64.9	113	35.1	81	71.7	32	28.3	
Department of the Navy	286	185	64.7	101	35.3	60	59.4	41	40.6	
Department of Defense	232	160	69.0	72	31.0	42	58.3	30	41.7	
Department of Homeland Security	207	115	55.6	92	44.4	48	52.2	44	47.8	
Department of the Treasury	159	122	76.7	37	23.3	24	64.9	13	35.1	
Department of Justice	154	87	56.5	67	43.5	32	47.8	35	52.2	
Department of the Air Force	144	97	67.4	47	32.6	25	53.2	22	46.8	
Department of Health and Human Services	109	72	66.1	37	33.9	25	67.6	12	32.4	
Department of Agriculture	108	65	60.2	43	39.8	18	41.9	25	58.1	
Department of the Interior	83	43	51.8	40	48.2	30	75.0	10	25.0	
Social Security Administration	65	52	80.0	13	20.0	6	46.2	7	53.8	
Department of Commerce	64	37	57.8	27	42.2	12	44.4	15	55.6	
Department of Transportation	45	28	62.2	17	37.8	9	52.9	8	47.1	
Department of Labor	29	21	72.4	8	27.6	6	75.0	2	25.0	
Department of Energy	16	13	81.3	3	18.8	3	100.0	0	0.0	
Equal Employment Opportunity Commission	15	8	53.3	7	46.7	3	42.9	4	57.1	
Department of State	14	9	64.3	5	35.7	3	60.0	2	40.0	
General Services Administration	13	9	69.2	4	30.8	3	75.0	1	25.0	
Department of Housing and Urban Development	11	8	72.7	3	27.3	1	33.3	2	66.7	
National Aeronautics and Space Admin	10	8	80.0	2	20.0	2	100.0	0	0.0	
Small Business Administration	9	7	77.8	2	22.2	1	50.0	1	50.0	
Environmental Protection Agency	6	1	16.7	5	83.3	4	80.0	1	20.0	
Government Publishing Office	6	5	83.3	1	16.7	1	100.0	0	0.0	
Agency for International Development	5	3	60.0	2	40.0	2	100.0	0	0.0	
Department of Education	5	2	40.0	3	60.0	2	66.7	1	33.3	
Federal Deposit Insurance Corporation	5	2	40.0	3	60.0	1	33.3	2	66.7	

Table 3: Disposition of Appeals by Agency (continued)
(in descending order by number of decided appeals)

	Decided		Dismissed ¹		Not Dismissed ¹		Settled ²		Adjudicated ²	
	#	#	%	#	%	#	%	#	%	
Securities and Exchange Commission	4	2	50.0	2	50.0	2	0.0	0	0.0	
Smithsonian Institution	4	1	25.0	3	75.0	1	33.3	2	66.7	
Federal Housing Finance Agency	3	1	33.3	2	66.7	2	100.0	0	0.0	
National Credit Union Administration	3	2	66.7	1	33.3	1	100.0	0	0.0	
U.S. Agency for Global Media	3	2	66.7	1	33.3	0	0.0	1	0.0	
Corporation for National and Community Service	2	2	100.0	0	0.0	0	0.0	0	0.0	
Federal Reserve System	2	0	0.0	2	100.0	1	50.0	1	50.0	
International Boundary and Water Comm: U.S. and Mexico	2	0	0.0	2	100.0	2	100.0	0	0.0	
National Archives and Records Admin	2	1	50.0	1	50.0	1	100.0	0	0.0	
National Mediation Board	2	1	50.0	1	50.0	1	100.0	0	0.0	
National Science Foundation	2	2	100.0	0	0.0	0	0.0	0	0.0	
Office of Special Counsel	2	2	100.0	0	0.0	0	0.0	0	0.0	
Architectural and Transportation Barriers Compliance Board	1	1	100.0	0	0.0	0	0.0	0	0.0	
Armed Forces Retirement Home	1	0	0.0	1	100.0	1	0.0	0	0.0	
Court Services and Offender Supervision Agency for DC	1	1	100.0	0	0.0	0	0.0	0	0.0	
Executive Office of the President, Office of Administration	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Mediation and Conciliation Service	1	1	100.0	0	0.0	0	0.0	0	0.0	
Federal Permitting Improvement Steering Council	1	0	0.0	1	100.0	1	100.0	0	0.0	
National Foundation for the Arts and the Humanities	1	0	0.0	1	100.0	1	100.0	0	0.0	
National Transportation Safety Board	1	0	0.0	1	100.0	1	100.0	0	0.0	
Office of the Director of National Intelligence	1	1	100.0	0	0.0	0	0.0	0	0.0	
Peace Corps	1	1	100.0	0	0.0	0	0.0	0	0.0	
Pension Benefit Guaranty Corporation	1	1	100.0	0	0.0	0	0.0	0	0.0	
Postal Rate Commission	1	1	100.0	0	0.0	0	0.0	0	0.0	
TOTAL	4,135	2,815	68.1	1,320	31.9	732	55.5	588	44.5	

¹ Percent Dismissed and Not Dismissed are of the number Decided.

² Percent Settled and Adjudicated are of the number Not Dismissed.

³ Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS).

Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency

	Adjudicated ¹		Affirmed		Reversed		Mitigated/ Modified		Other	
	#	%	#	%	#	%	#	%	#	%
Office of Personnel Management ²	168		126	75.0	30	17.9	0	0.0	12	7.1
Department of Veterans Affairs	68		54	79.4	9	13.2	2	2.9	3	0.0
Department of Homeland Security	44		37	84.1	4	9.1	3	6.8	0	0.0
Department of the Navy	41		39	95.1	1	2.4	1	2.4	0	0.0
Department of the Army	38		27	71.1	9	23.7	2	5.3	0	0.0
Department of Justice	35		25	71.4	7	20.0	3	8.6	0	0.0
United States Postal Service	32		26	81.3	4	12.5	1	3.1	1	3.1
Department of Defense	30		17	56.7	12	40.0	1	3.3	0	0.0
Department of Agriculture	25		21	84.0	4	16.0	0	0.0	0	0.0
Department of the Air Force	22		20	90.9	2	9.1	0	0.0	0	0.0
Department of Commerce	15		13	86.7	2	13.3	0	0.0	0	0.0
Department of the Treasury	13		9	69.2	3	23.1	1	7.7	0	0.0
Department of Health and Human Services	12		9	75.0	3	25.0	0	0.0	0	0.0
Department of the Interior	10		6	60.0	4	40.0	0	0.0	0	0.0
Department of Transportation	8		7	87.5	1	12.5	0	0.0	0	0.0
Social Security Administration	7		6	85.7	0	0.0	1	14.3	0	0.0
Equal Employment Opportunity Commission	4		3	75.0	0	0.0	1	25.0	0	0.0
Department of Housing and Urban Development	2		0	0.0	2	100.0	0	0.0	0	0.0
Department of Labor	2		2	100.0	0	0.0	0	0.0	0	0.0
Department of State	2		1	50.0	1	50.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	2		2	100.0	0	0.0	0	0.0	0	0.0
Smithsonian Institution	2		2	100.0	0	0.0	0	0.0	0	0.0
Department of Education	1		1	100.0	0	0.0	0	0.0	0	0.0

Table 4: Disposition of Initial Appeals Adjudicated on the Merits by Agency (continued)

	Adjudicated ¹		Affirmed		Reversed		Mitigated/Modified		Other	
	#	%	#	%	#	%	#	%	#	%
Environmental Protection Agency	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
Federal Reserve System	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
U.S. Agency for Global Media	1	100.0	1	100.0	0	0.0	0	0.0	0	0.0
TOTAL	588	77.9	458	77.9	98	16.7	16	2.7	16	2.7

¹ Adjudicated, i.e., not dismissed or settled. As a reminder, the data represent cases decided between October 1, 2022, and September 8, 2023. Therefore, these data are not comparable to full-year results contained in other ARs.
² Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of CSRS and FERS.
 Percentages may not total 100 because of rounding.

Cases Processed at Headquarters

Table 5: Disposition of PFRs of Initial Decisions by Type of Case

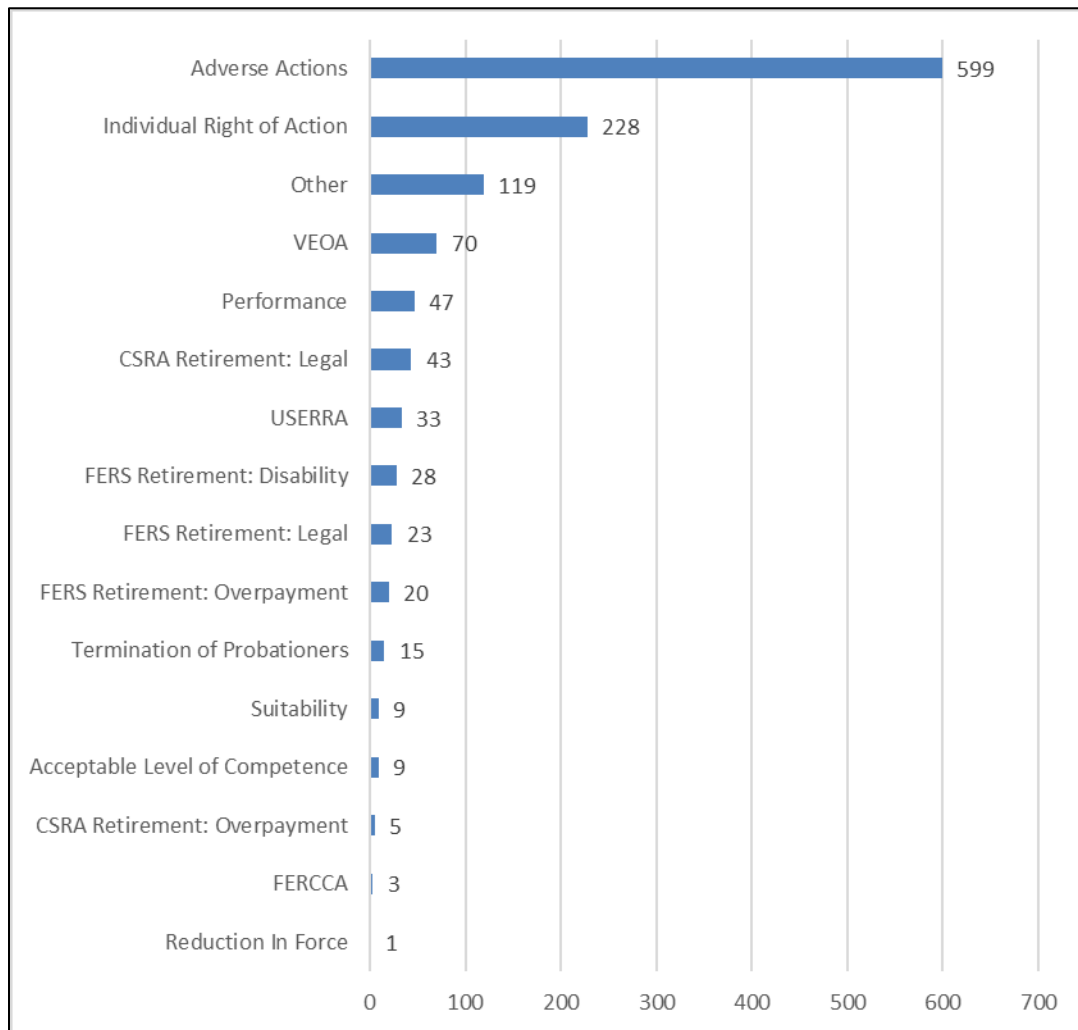
Type of Case	Decided		Dismissed		Settled		Denied		Denied; Further Analysis ¹		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
Adverse Action by Agency	599	6.2	37	6.2	58	9.7	410	68.5	5	0.8	89	14.9
Termination of Probationers	15	0.0	0	0.0	1	6.7	11	73.3	0	0.0	3	20.0
Reduction in Force	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Performance	47	10.6	5	10.6	2	4.3	13	27.7	0	0.0	27	57.5
Acceptable Level of Competence (ALOC) ²	9	11.1	1	11.1	0	0.0	6	66.7	0	0.0	2	22.2
Suitability	9	0.0	0	0.0	0	0.0	8	88.9	0	0.0	1	11.1
CSRS Retirement: Legal	43	7.0	3	7.0	1	2.3	32	74.4	0	0.0	7	16.3
CSRS Retirement: Overpayment	5	0.0	0	0.0	0	0.0	4	80.0	0	0.0	1	20.0
FERS Retirement: Legal	23	4.4	1	4.4	0	0.0	19	82.6	0	0.0	3	13.0
FERS Retirement: Disability	28	3.6	1	3.6	0	0.0	20	71.4	0	0.0	7	25.0
FERS Retirement: Overpayment	20	5.0	1	5.0	1	5.0	11	55.0	1	5.0	6	30.0
FERCCA	3	0.0	0	0.0	0	0.0	3	100.0	0	0.0	0	0.0
Individual Right of Action	228	7.9	18	7.9	20	8.9	124	54.4	1	0.0	65	2.9
USERRA	33	12.12	4	12.12	0	0.00	23	69.7	0	0.0	6	18.2
VEOA	70	7.14	5	7.14	1	1.4	54	77.1	3	4.3	7	10.0
Other ³	119	3.36	4	3.36	7	5.9	98	82.4	0	0.0	10	8.4
Total	1,252	6.39	80	6.39	91	7.27	837	66.85	10	0.80	234	18.69

¹ Denied; Further Analysis includes cases denied on the basis of the issues raised in the PFR, but which the Board has considered an issue *sua sponte*, i.e., of the Board's own accord ([5 C.F.R. § 1201-117\(a\)](#)). This definition applies also to Table 6 and Figures 4, 5, and 7.

² ALOC means an employee is effectively performing the duties and responsibilities of his or her assigned job, which warrants advancing the employee's rate of pay to the next higher step at the grade of the employee's position. If an employee's performance is not at an ALOC, then the agency must, under most circumstances, deny his or her within-grade increase.

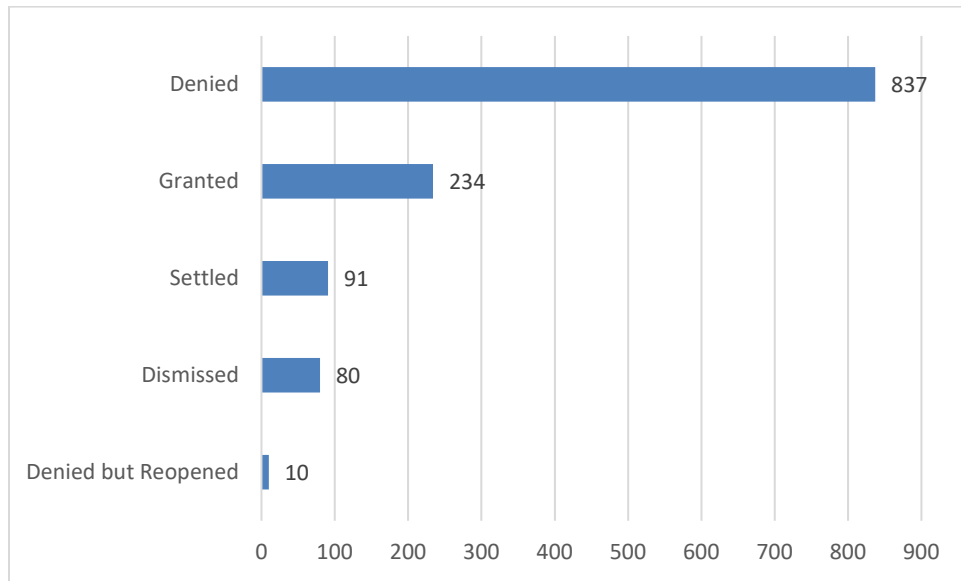
³ Includes cases such as restoration cases, short suspension cases, and miscellaneous cases.
Percentages may not total 100 due to rounding.

Figure 4: Types of PFRs



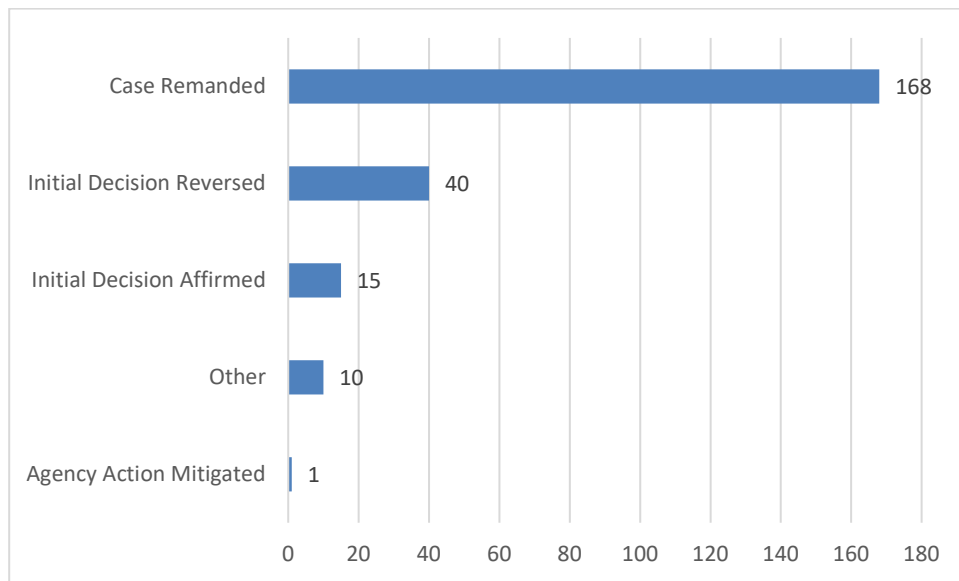
Total Number of PFRs: 1,252

Figure 5: Disposition of PFRs of Initial Decisions



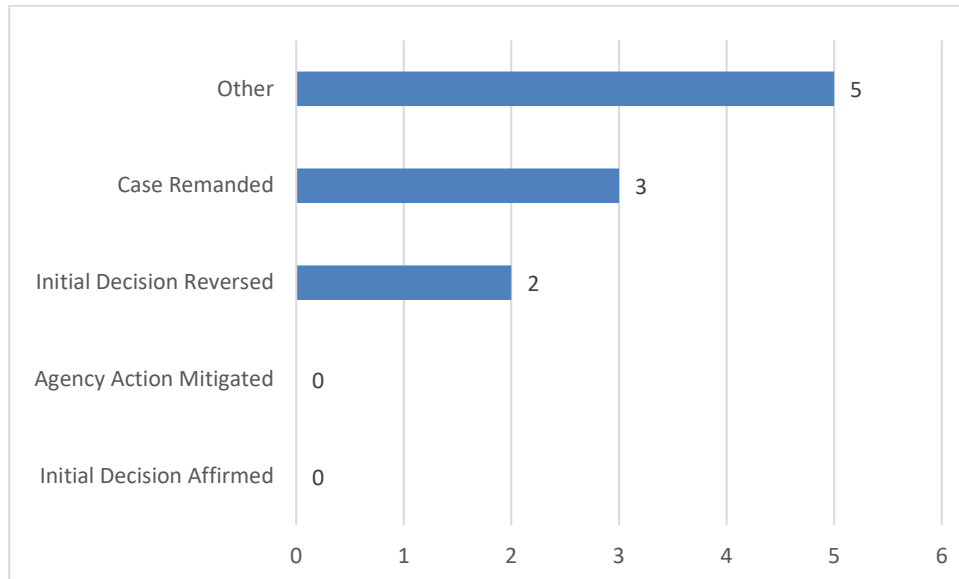
Total Number of PFRs: 1,252

Figure 6: Disposition of PFRs Granted



Based on 234 PFRs Granted

Figure 7: Disposition of PFRs Denied: Further Analysis



Based on 10 PFRs Denied; Further Analysis

“Other” includes forwarding the case for docketing of new claims and/or vacating the initial decision.

Table 6: Disposition of PFRs of Initial Decisions, by Agency

	Decided		Dismissed		Settled		Denied		Denied; Further Analysis ¹		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
Department of Veterans Affairs	252		15	6.0	46	18.3	143	56.8	1	0.4	47	18.7
Office of Personnel Management ²	127		6	4.7	2	1.6	95	74.8	1	0.8	23	18.1
Department of the Army	126		6	4.8	10	7.9	82	65.1	1	0.8	27	21.4
United States Postal Service	106		2	1.9	3	2.8	84	79.3	1	0.9	16	15.1
Department of Homeland Security	97		11	11.3	7	7.2	61	62.9	0	0.0	18	18.6
Department of Defense	88		7	8.0	2	2.3	66	75.0	1	1.1	12	13.6
Department of the Navy	64		5	7.8	8	12.5	39	60.9	0	0.0	12	18.8
Department of Justice	50		6	12.0	2	4.0	36	72.0	1	2.0	5	10.0
Department of the Air Force	44		2	4.6	2	4.6	26	59.1	1	2.3	13	29.6
Department of the Interior	41		3	7.3	2	4.9	27	65.9	1	2.4	8	19.5
Department of the Treasury	38		2	5.3	0	0.0	28	73.7	1	2.6	7	18.4
Department of Agriculture	33		1	3.0	1	3.0	21	63.6	0	0.0	10	30.3
Department of Health and Human Services	25		2	8.0	1	4.0	18	72.0	1	4.0	3	12.0
Department of Transportation	23		1	4.4	0	0.0	17	73.9	0	0.0	5	21.7
Social Security Administration	22		3	13.6	0	0.0	15	68.2	0	0.0	4	18.2
Department of Commerce	20		2	10.0	2	10.0	11	55.0	0	0.0	5	25.0
Department of Labor	11		1	9.1	1	9.1	6	54.6	0	0.0	3	27.3
Environmental Protection Agency	11		2	18.2	0	0.0	6	54.6	0	0.0	3	27.3
National Aeronautics and Space Admin	8		0	0.0	0	0.0	7	87.5	0	0.0	1	12.5
Department of State	7		0	0.0	0	0.0	5	71.4	0	0.0	2	28.6
Department of Housing and Urban Development	6		0	0.0	0	0.0	4	66.7	0	0.0	2	33.3
Department of Energy	5		0	0.0	0	0.0	5	100.0	0	0.0	0	0.0
Equal Employment Opportunity Commission	5		0	0.0	0	0.0	5	100.0	0	0.0	0	0.0
Office of Special Counsel	5		0	0.0	0	0.0	5	100.0	0	0.0	0	0.0
Small Business Administration	5		0	0.0	0	0.0	4	80.0	0	0.0	1	20.0
Department of Education	4		1	25.0	0	0.0	1	25.0	0	0.0	2	50.0

Table 6: Disposition of PFRs of Initial Decisions, by Agency (continued)

	Decided		Dismissed		Settled		Denied		Denied; Further Analysis ¹		Granted	
	#	%	#	%	#	%	#	%	#	%	#	%
General Services Administration	4	0.0	0	0.0	0	0.0	2	50.0	0	0.0	2	50.0
Securities and Exchange Commission	3	66.7	2	66.7	0	0.0	0	0.0	0	0.0	1	33.3
Federal Communications Commission	2	0.0	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0
Federal Deposit Insurance Corporation	2	0.0	0	0.0	0	0.0	1	50.0	0	0.0	1	50.0
Federal Reserve System	2	0.0	0	0.0	0	0.0	1	50.0	0	0.0	1	50.0
Nuclear Regulatory Commission	2	0.0	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0
Tennessee Valley Authority	2	0.0	0	0.0	0	0.0	2	100.0	0	0.0	0	0.0
Administrative Conference of the United States	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Agency for International Development	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Armed Forces Retirement Home	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Committee for Purchase from People Who Are Blind and Severely Disabled	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Federal Labor Relations Authority	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Federal Trade Commission	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Government Publishing Office	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Government of the District of Columbia	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
National Archives and Records Admin	1	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
National Science Foundation	1	0.0	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0
Other	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
Selective Service System	1	0.0	0	0.0	0	0.0	1	100.0	0	0.0	0	0.0
TOTAL	1,252	6.4	80	6.4	91	7.3	837	66.9	10	0.8	234	18.7

¹ Denied; Further Analysis includes cases denied on the basis of the issues raised in the PFR, but which the Board has considered an issue *sua sponte*, i.e., of the Board's own accord (5 C.F.R. § 1201-117(a)). This definition applies also to Table 5 and Figures 4, 5, and 7.

² Most appeals in which OPM is the agency are retirement cases involving decisions made by OPM as the administrator of CSRS and FERS.

SIGNIFICANT DECISIONS ISSUED BY THE BOARD IN FY 2023

Actions Against Administrative Law Judges (ALJs)

Jarboe v. Department of Health & Human Services, 2023 MSPB 21: The Board determined that a sitting ALJ may not bring a constructive removal appeal under 5 U.S.C. § 7521. Because the respondent had not been reassigned or separated from his ALJ position, the Board dismissed his appeal for lack of jurisdiction.

Jarboe v. Department of Health & Human Services, 2023 MSPB 22: The Board affirmed the initial decision that found good cause for the respondent's removal and clarified that under 5 U.S.C. § 7521, the Board does not "select" or make the "choice" of penalty. Rather, the employing agency retains discretion to take the Board-approved action, impose a lesser sanction, or take no action at all, overruling prior decisions wherein it stated that the Board selects or chooses the penalty, including *Social Security Administration v. Long*, 113 M.S.P.R. 190, ¶ 47 (2010), *aff'd*, 635 F.3d 526 (Fed. Cir. 2011), and *Social Security Administration v. Steverson*, 111 M.S.P.R. 649, ¶ 18 (2009), *aff'd*, 383 F. App'x 939 (Fed. Cir. 2010).

Levinson v. Social Security Administration, 2023 MSPB 20: The Board found good cause to remove the respondent under 5 U.S.C. § 7521(a) and clarified that when it finds good cause, it does not bind a petitioner agency to take the proposed action but merely authorizes it to do so, thereby overruling prior decisions to the extent that its findings suggested that the Board takes, or directs an employing agency to take, an action against an ALJ under 5 U.S.C. § 7521.

Actions Under 38 U.S.C. § 714

Davis v. Department of Veterans Affairs, 2022 MSPB 45: The Board expanded upon its prior holding in *Wilson v. Department of Veterans Affairs*, 2022 MSPB 7, concluding that the procedures of 5 U.S.C. § 7702 and the Board's implementing regulations apply when an appellant raises for the first time in his Board appeal allegations that the agency violated equal employment opportunity statutes.

Ledbetter v. Department of Veterans Affairs, 2022 MSPB 41: For actions under 38 U.S.C. § 714, the Board found that the following circumstances justify a waiver of a filing deadline: (1) the statute or regulation itself specifies circumstances in which the time limit will be waived; (2) an agency's affirmative misconduct precludes it from enforcing an otherwise applicable deadline under the doctrine of equitable estoppel unless the application of equitable estoppel would result in the expenditure of appropriated funds in contravention of statute; or (3) an agency's failure to provide a mandatory notice of election rights warrants the waiver of the time limit for making an election.

Election of Remedy

Brookins v. Department of the Interior, 2023 MSPB 3: Generally, when an employee is covered by a collective bargaining agreement that includes within-grade increase denials in its negotiated grievance procedures, those procedures are the employee's exclusive remedy. 5 U.S.C. § 7121(a)(1). Under the CSRA as originally enacted, the only exception allows for Board appeals in cases where the employee alleges that he has been affected by a PPP under 5 U.S.C. § 2302(b)(1), i.e., prohibited discrimination. 5 U.S.C. § 7121(d). Here, the Board recognized that in 1994, Congress amended 5 U.S.C. § 7121 by adding a new subsection (g), which provides another exception for cases in which employees allege that they have been affected by a PPP other than under 5 U.S.C. § 2302(b)(1), overruling prior cases to the extent they held otherwise.

Requena v. Department of Homeland Security, 2022 MSPB 39: Pursuant to 5 U.S.C. § 7121(g), an employee subjected to an action appealable to the Board who alleges that the contested action was

taken in reprisal for whistleblowing may elect to pursue a remedy through only one of the following remedial processes: (1) an appeal to the Board under 5 U.S.C. § 7701; (2) a grievance filed under an applicable negotiated grievance procedure; or (3) a complaint seeking corrective action from the Office of Special Counsel (OSC). Generally, whichever option the appellant selects first is a binding election. In this case, the Board clarified that supervisors and management officials are excepted from the election of remedies provision of 5 U.S.C. § 7121(g) and overruled several prior Board decisions to the contrary.

Interim Relief

Schmitt v. Department of Veterans Affairs, 2022 MSPB 40: The Board held that the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 precludes an award of interim relief. The Board found that Congress expressly precluded an appellant who appealed a removal under § 714 from receiving pay or benefits of employment until the issuance of a final decision by the CAFC and that this timeframe spans the period during which interim relief would apply. 38 U.S.C. § 714(d)(7).

Stewart v. Department of Transportation, 2023 MSPB 18: The Board found that the AJ lacked the authority to address interim relief in an erratum. When an appellant prevails in an adverse action appeal under 5 U.S.C. § 7701 but the initial decision is silent on the issue of interim relief, an agency is required to provide interim relief by operation of the statute. While an AJ is expected to address interim relief in the initial decision, an AJ's failure to do so does not relieve the agency of its statutory interim relief obligation. Regardless of whether an initial decision contains or omits a required statement on interim relief, the Board will exercise its discretionary authority to dismiss an agency's petition or cross-petition for review for failure to provide interim relief in light of all the relevant facts and circumstances.

Medical Inability to Perform

Haas v. Department of Homeland Security, 2022 MSPB 36: The Board recognized that 5 C.F.R. § 339.206 provides that an employee may not be removed from a position subject to medical standards "solely on the basis of medical history," which the Board interpreted to mean that the only basis for concluding that an employee is medically unable to perform the core duties of his position is the fact that his medical records reflect that, at some time in the past, he was classified as having, was examined for, or was treated for the medical condition or impairment in question. The Board clarified that the proper standard for removing an employee from a position with medical standards based on a current medical condition requires that the agency prove either a nexus between the employee's medical condition and observed deficiencies in his performance or conduct, or a high probability, given the nature of the work involved, that his condition may result in injury to himself or others, overruling prior cases to the extent that they applied 5 C.F.R. § 339.206 to charges of medical inability when the appellant was removed based on his current medical condition or impairment.

Penalty Determination

Chin v. Department of Defense, 2022 MSPB 34: The Board found that the AJ correctly sustained the larceny charge against the appellant for taking approximately \$5.00 worth of food from the cafeteria without paying for it. However, it did not defer to the agency's penalty selection, explaining that, under the case law of the Board and the CAFC, the de minimis nature of a theft may be a significant mitigating factor when the appellant has a satisfactory work record and no prior discipline. The Board found that the deciding official failed to properly consider these or other relevant mitigating factors under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), and determined that the appellant's 30 years of discipline-free service, his satisfactory work record, including after the

incident, the de minimis nature of the theft, and the fact that the appellant did not have custody or control over the stolen items as part of his official duties were relevant mitigating factors. The Board concluded that, under the circumstances, the maximum reasonable penalty was a 90-day suspension.

Thomas v. Department of the Army, 2022 MSPB 35: The Board agreed that the AJ properly sustained the charge of conduct unbecoming a supervisor where the appellant was charged with: (1) repeatedly making unwanted and inappropriate comments to his female subordinate employees that made them uncomfortable; and (2) spending a significant amount of time in his office with a female subordinate employee, alone and with his door closed, engaging in personal conversations in a manner that could be construed as favoritism. The Board disagreed with the AJ's decision to mitigate the penalty, finding that removal was appropriate due to the seriousness of the appellant's misconduct because his behavior was divisive, made subordinates uncomfortable, poisoned the working environment, and contributed to an employee's decision to resign. The Board determined his misconduct to be exceptionally serious due to his role as a supervisor and his position as a Supervisory Human Resources Specialist.

Restoration Following a Work-related Injury

Desjardin v. U.S. Postal Service, 2023 MSPB 6: The Board found that the agency violated the appellant's restoration rights under 5 C.F.R. § 353.301(d) because it failed to conduct a proper search for vacant positions within the local commuting area. When the Board finds that an agency has violated 5 C.F.R. § 353.301(d), the proper remedy is for the agency to conduct an appropriate search of the local commuting area retroactive to the date of the appellant's request for restoration and to consider him for any suitable vacancies. An appellant may be entitled to backpay only if the agency's retroactive search uncovers a position to which it could have restored him. The Board will adjudicate discrimination and retaliation claims as affirmative defenses and not as "independent claims" in connection with denials of restoration over which it has jurisdiction.

Whistleblower Protection

Abernathy v. Department of the Army, 2022 MSPB 37: The Board declined to overturn its precedential decisions in *Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 8-12 (2010), and *Greenup v. Department of Agriculture*, 106 M.S.P.R. 202, ¶ 8-9 (2007), and found that the appellant's disclosures, which he made when working as a contractor, were not excluded from whistleblower protection simply because he was neither a Federal employee nor an applicant for Federal employment when he made them. The Board stressed that its finding was applicable to any individual who makes a whistleblowing disclosure at any time before becoming a Federal employee or applicant for employment. The Board recognized that a new statutory provision, 5 U.S.C. § 2302(f)(1)(F), comports with its precedent on this topic but declined to determine its applicability in this case as it was not material to the outcome.

Fisher v. Department of the Interior, 2023 MSPB 11: The Board clarified that, under 5 U.S.C. § 2302(b)(9)(C), any disclosure of information to OSC or an agency's Office of Inspector General is protected regardless of its content as long as such disclosure is made in accordance with applicable provisions of law. When the events at issue in this appeal took place, 5 U.S.C. § 2302(b)(9)(D) made it a PPP to take an action against an employee for "refusing to obey an order that would require the individual to violate a law," which the CAFC held extended only to orders that would require an individual to take an action barred by statute. *Rainey v. Merit Systems Protection Board*, 824 F.3d 1359, 1361-62, 1364-65 (Fed. Cir. 2016). While this matter was pending before the Board, the Follow the Rules Act (FTRA) was enacted, amending § 2302(b)(9)(D) by inserting after "law" the words "rule, or regulation." The Board determined that the FTRA does not apply retroactively. Accordingly, the Board held that the appellant's claims that the agency retaliated against him for refusing to obey

orders that would require him to violate agency rules or regulations are outside the scope of pre-FTRA 5 U.S.C. § 2302(b)(9)(D).

Salazar v. Department of Veterans Affairs, 2022 MSPB 42: The Board found that the NDAA for FY 2018 modified 5 U.S.C. § 2302(f)(2) to clarify that disclosures made in the normal course of duties are subject to a higher burden of proof only if the employee's principal job function is to regularly investigate and disclose wrongdoing, and that this clarification applies retroactively. Because the appellant's principal job function was not to regularly investigate and disclose wrongdoing, the "extra proof requirement" in § 2302(f)(2) should not have been applied. Instead, disclosures made in the normal course of duties of an employee whose principal job function is not to regularly investigate and disclose wrongdoing fall under 5 U.S.C. § 2302(b)(8).

SIGNIFICANT COURT OPINIONS ISSUED IN FY 2023

As a service to MSPB's stakeholders, we have provided brief summaries of significant opinions issued by the CAFC and other Federal appellate courts in appeals of MSPB cases, and by the Supreme Court in cases that are potentially relevant to MSPB.

Significant Opinions Issued by the U.S. Court of Appeals for the Federal Circuit

Constitution/Appointments Clause

McIntosh v. Dep't of Defense, et al., [53 F.4th 630](#) (Fed. Cir. 2022): The CAFC held that the Board's statutory structure did not provide AJs with the authority necessary to render them principal officers. The court declined to consider the appellant's argument that the AJ was an inferior officer because the appellant had waived it; but found that even if the AJs were inferior officers, the Board had issued an order ratifying their appointments that remedied any Appointments Clause issues. Finally, the court affirmed the Board's decision sustaining the removal.

Differential Pay

Kluge v. Department of Homeland Security, [60 F.4th 1361](#) (Fed. Cir. 2023): The appellant was a commissioned officer in the U.S. Army Reserve and a civilian employee of the Department of Homeland Security (DHS) who was ordered to active duty for approximately 7 months in 2011. He filed an appeal seeking the recovery of differential pay for himself and similarly situated service members. The court affirmed MSPB's final order denying class certification, holding that the Board is not bound by all the criteria in Federal Rule of Civil Procedure 23.

Nordby v. Social Security Administration, [67 F.4th 1170](#) (Fed. Cir. 2023): The appellant, an Army Reservist who was called to active duty under section 12301(d), challenged under USERRA the agency's denial of his request for differential pay under 5 U.S.C. § 5538(a) to account for the pay difference between his military and civilian compensation. The CAFC affirmed the AJ's dismissal of the appeal for failure to state a claim, agreeing that the appellant was not entitled to differential pay under 5 U.S.C. § 5538(a) because the statute authorizes differential pay only to those ordered to active duty under 10 U.S.C. § 12304b or a provision of law referred to in 10 U.S.C. § 101(a)(13)(B).

Removal/Due Process

Rueter v. Department of Commerce, [63 F. 4th 1357](#) (Fed. Cir. 2023): The appellant was removed for misconduct and argued that the agency violated his due process rights by engaging in *ex parte* communications about his case. On appeal, citing *Stone v. Fed. Deposit Ins. Corp.*, 179 F.3d 1368 (Fed. Cir. 1999), the court reaffirmed that the introduction of new and material information via *ex parte* communications to a deciding official deprives an employee of the guarantee of due process.

Finding that the Board had correctly applied the *Stone* factors and that for each challenged communication either no new and material information was provided to the deciding officer or the communications were not of the type likely to result in undue pressure on the deciding officer, the court affirmed the Board's decision.

Whistleblowing/Reasonable Belief

Edenfield v. Department of Veterans Affairs, [54 F.4th 1357](#) (Fed. Cir. 2022): In this IRA appeal, the AJ found that the appellant did not make a protected disclosure. The CAFC held that the appellant's disclosure was protected because the definition at issue was "ambiguous at best," and both parties' interpretations were reasonable. The court also found that the AJ should not have considered the information and explanation that the appellant received after he made his disclosure. The court emphasized that, when considering whether a purported whistleblower has a reasonable belief, the Board must look to the information that would have been available or ascertainable by a disinterested observer at the time of the disclosure. Thus, the court reversed and remanded the appeal for further proceedings.

Significant Opinions Issued by Other Circuit Courts

Mixed Cases/Exhaustion of Administrative Remedies

Crowe v. Dep't of the Army, [74 F.4th 1011](#) (9th Cir. 2023): The appellant filed with MSPB discrimination claims regarding his removal and filed through his agency's EEO process other discrimination claims involving issues preceding his removal. Although he attempted to combine these claims in a single district court appeal, the district court held that he failed to exhaust the pre-removal claims (brought through the EEO process) because he did not consolidate them with his removal claim at the Board. Following the briefing, including an amicus brief by MSPB, the 9th Circuit held, in pertinent part, that because MSPB lacked statutory authority to hear the pre-removal claims, the appellant was not required to exhaust them before MSPB.

Mixed Cases/Judicial Appeal Deadlines

Robinson v. DHS OIG, [71 F.4th 51](#) (D.C. Cir. 2023): Overruling its longstanding precedent in *King v. Dole*, 782 F.2d 274 (D.C. Cir. 1986), the court held that the mixed-case 30-day judicial filing deadline set forth in 5 U.S.C. § 7703(b)(2) is a nonjurisdictional claims-processing rule. The court further held that as a nonjurisdictional claims-processing rule, the deadline could be subject to equitable tolling. The court declined to apply equitable tolling under the circumstances of the petitioner's case, however, and affirmed the district court's order dismissing the case as untimely filed.

Whistleblowing/Knowledge-Timing Test & Carr Factors

Mikhaylov v. Department of Homeland Security, [62 F.4th 862](#) (4th Cir. 2023): The appellant alleged that the agency suspended him in retaliation for certain protected disclosures. On appeal, the court affirmed the AJ's findings and adopted the *Carr* factors, which the CAFC and MSPB have long used to evaluate whether an agency has carried its evidentiary burden to show that it would have taken the same personnel action in the absence of the appellant's whistleblowing.

Potentially Relevant Decisions by the Supreme Court

Axon Enterprise, Inc. v. FTC, [143 S.Ct. 890](#) (2023): Petitioners filed suit in different district courts, bringing constitutional separation of powers challenges regarding their agency-level proceedings. Both district courts dismissed the claims on jurisdictional grounds, holding that the applicable statutes required that constitutional challenges be raised through the relevant agency review schemes. The Supreme Court held that the relevant statutory review schemes did not require the

constitutional claims to be brought first to the agencies under the existing *Thunder Basin* review scheme (which set forth a three-prong test for making this determination: (1) whether precluding district court jurisdiction could foreclose all meaningful judicial review of the claim; (2) whether the claim is wholly collateral to the statute’s review provisions; and (3) whether the claim is outside the agency’s expertise).

Ohio Adjutant General’s Department v. FLRA, [143 S.Ct. 1193](#) (2023): In this case involving Federal Labor Relations Authority (FLRA) jurisdiction, the Supreme Court held that the Ohio National Guard and Adjutant General act as a Federal agency when they hire and supervise dual-status technicians who work in both civilian and military roles for the National Guard. The Court noted the unique status of dual-status technicians, who serve as civilian employees when assisting the National Guard but who also, as a condition of that employment, must maintain membership in the National Guard and wear a uniform while working. The Court held that state adjutants general act on behalf of an agency of the Federal Government, the Department of Defense, with respect to their supervision of civilian technicians, and, therefore, are subject to FLRA’s authority to enforce the rights and obligations of Federal civilian employees.

SUMMARY OF MERIT SYSTEMS STUDIES ACTIVITY IN FY 2023

In addition to adjudicating appeals, MSPB is charged with conducting studies of the civil service and merit systems. MSPB's high-quality, objective studies provide value by assessing current management policies and practices, identifying innovative and effective merit-based approaches to current workplace issues, and making recommendations for improvements. Overall, this benefits American taxpayers by decreasing Government-wide costs and increasing confidence that the Government is doing its job and appropriately managing the workforce.

Publications Issued

Issues of Merit Newsletter

MSPB published 3 newsletter editions with articles on a variety of HC topics covering 7 MSPs and all 14 PPPs. Newsletter topics included preventing PPPs, suggested practices for hiring and performance appraisals, and supporting the HR workforce.

Merit Systems Studies Reports

MSPB completed two study reports in FY 2023, [*Perceptions of Prohibited Personnel Practices: An Update*](#) and [*Sexual Harassment in Federal Workplaces: Understanding and Addressing the Problem*](#), and one research brief, [*Sexual Harassment in Federal Workplaces: 2021 Update*](#).

Perceptions of Prohibited Personnel Practices: An Update summarizes data from surveys conducted in 2010, 2016, and 2021 to track the prevalence of PPPs. OPE tracks employee perceptions related to PPPs in response to 5 U.S.C. § 1204, which instructs MSPB to “report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected.” This report updated our 2011 report and 2019 research brief on the state of PPPs in Federal workplaces. Twenty-nine percent of employees reported that they either observed or experienced at least one PPP. Discrimination based on race, sex, and age are consistently perceived more frequently than the other bases for discrimination. Compared to the 2010 survey baseline, PPP perceptions increased in 2016, but most PPPs returned in 2021 to near their baselines. The two exceptions are perceptions of: (1) discrimination based on political affiliation, and (2) coercion of political activity, both of which have doubled since 2010. The report explained the negative effects that this may have on recruitment, retention, and employee engagement, making a business case for addressing PPPs.

Sexual Harassment in Federal Workplaces: Understanding and Addressing the Problem evaluates the prevalence of sexual harassment in Federal workplaces and Federal agency efforts to prevent and respond to such harassment. This study presents results from MSPB's 2016 Merit Principles Survey (MPS), which indicated that approximately 21% of women and almost 9% of men responding to the MPS had experienced one or more forms of sexual harassment during the preceding two years, with rates varying by agency. The 2021 update provided additional information from MSPB's 2021 MPS and found that 18% of women and 8% of men indicated on the survey that they had experienced sexual harassment within the prior two years.

MSPB Surveys Administered

In FY 2023, MSPB administered the Federal HR Workforce Survey to almost 35,000 HR specialists and assistants in 20 Federal agencies. The survey was conducted from February through June 2023.

The purpose of the survey was to learn about the professional experiences of HR specialists and assistants so MSPB can identify strategies to improve HR capabilities and better support HR staffs Government-wide. MSPB is in the process of analyzing the data for distribution as part of the upcoming report on “Preparing the HR Workforce for the Present and Future.”

Merit Systems Studies Outreach and External References

During FY 2023, MSPB studies staff conducted nine outreach events with Federal organizations and the White House Council on Gender Policy regarding sexual harassment and fair and equitable treatment research. MSPB’s merit systems studies publications or survey data were referenced more than 45 times in over 15 sources, including online sources, scientific research journals, a book, and a Government Accountability Office (GAO) report. Notable citations to MSPB’s studies work include a GAO report, [*VA Equal Employment Opportunity: Increased Attention Needed to Improve Program Effectiveness*](#) and academic articles in public policy journals.

REVIEW OF THE U.S. OFFICE OF PERSONNEL MANAGEMENT

As required by statute,⁹ MSPB reviews and reports on the significant actions of OPM, including an analysis of whether those actions are in accord with MSPs and free from PPPs.¹⁰ This annual analysis is based on those OPM activities that the Board determines are significant¹¹ and is a general review of the policies and effectiveness of OPM, not an investigation of the internal operation of OPM and its employees.¹² In addition, MSPB has authority to review OPM rules and regulations upon request, or on its own motion, to determine if the regulations or the implementation of the regulations would cause a person to commit a PPP.¹³

Review of OPM's Significant Actions

To determine OPM's significant actions¹⁴ for FY 2023, OPE identified key sources¹⁵ to review and documented potential significant actions from that assessment. OPE also communicated with OPM, asking it to submit what it considered to be its most significant actions. From a pool of nearly 200 potential significant actions, OPE narrowed the list to 10 significant actions based on criteria related to adhering to the definition of a significant action, being a well-defined initiative, and having evidence of impact or potential impact on MSPs and/or PPPs. Actions were not included if they were too new or too recently implemented to judge the potential impact on MSPs/PPP. Following additional research and analysis, OPE finalized a list of five significant actions and noted their implications for MSPs and PPPs.¹⁶ Below is a discussion of OPM's FY 2023 significant actions and those we are actively monitoring in FY 2024.

[Upholding Civil Service Protections and Merit System Principles](#): Proposed Regulations

On September 18, 2023, OPM proposed a rule primarily intended to reinforce and clarify civil service protections related to the involuntary movement of Federal employees and positions from the competitive service to the excepted service or from one excepted service schedule to another. The intent of the rule is to “clarify and reinforce longstanding civil service protections and merit system principles,” including employee due process and appeal rights. The proposed rule also describes procedures agencies must follow before and when moving employees or positions from the competitive service to the excepted service or between excepted service schedules. The rule establishes new MSPB appeal rights in connection with such movement if the movement is involuntary and the moving agency asserts that moved employees will lose previously accrued due process protections.

As written, the proposed rule has the potential to strengthen adherence to MSPs and PPPs by: treating employees fairly and equitably without regard to political affiliation (MSP 2); ensuring the

⁹ 5 U.S.C. § 1206.

¹⁰ 5 U.S.C. § 2301(b) and 5 U.S.C. § 2302(b), respectively.

¹¹ Committee on Conference, *Civil Service Reform Act of 1978, Conference Report to Accompany S. 2640*, 95th Cong., 2nd Sess., 1978, H. Rept. No. 95-1717, p. 133.

¹² Senate Committee on Governmental Affairs, *Civil Service Reform Act of 1978, Report to Accompany S. 2640*, 95th Cong., 2nd Sess., 1978, S. Rept. No. 95-969, p. 32.

¹³ 5 U.S.C. § 1204(a)(4) and 5 U.S.C. § 1204(f)(1-4)

¹⁴ An OPM significant action is defined as an activity performed by OPM that has broad impact on how the Federal Government manages the workforce. Significant actions can consist of regulations, rules, policies, programs, guidance, consultative services, oversight activities, or other major activities performed by OPM. They can be actions that are proposed, in progress, or completed. The actions may originate from a third party, such as the Office of Management and Budget, but require OPM to play a significant role in the implementation or oversight of the activities.

¹⁵ The sources reviewed to identify significant actions were the Federal Register, OPM's website, and CHCO transmittals.

¹⁶ Research on implications for MSPs and PPPs included regulatory and policy analyses; literature reviews of peer-reviewed research, public policy research, and media sources; and requests from MSPB to OPM for data and other information.

Federal workforce is used efficiently and effectively (MSP 5); retaining employees on the basis of performance (MSP 6); protecting employees against coercion for partisan political purposes (MSP 8); prohibiting discrimination against an employee or applicant based on political affiliation (PPP 1); and prohibiting attempts to coerce employees' political activity or retaliate against them for such activity (PPP 3).

The short-term impact of this rule change is that it provides a strong statement from the chief HR agency and personnel policy manager of the Federal Government supporting a merit-based, nonpartisan workforce and presents the legal impediments to divesting Federal employees of their due process rights. The long-term impact is less clear given that we cannot predict whether such schedule changes will be attempted in future years. In addition, we do not know if there will be attempts to repeal the regulations by a new administration.

Leadership on DEIA Initiatives

Diversity, equity, inclusion, and accessibility in the Federal workforce are priorities for the Administration. OPM undertook several initiatives in FY 2023 to support these priorities and establish a national strategy for DEIA in the Federal Government. The most significant actions were to launch the [Chief Diversity Officers Executive Council](#); release the first annual Government-wide [Diversity, Equity, Inclusion, and Accessibility Annual Report](#); create a new DEIA Federal Employee Viewpoint Survey index; and host two national DEIA-related events to build toward Government-wide DEIA training.

Consistent with the MSPs, these activities attempt to improve the Government's ability to recruit from qualified individuals to achieve a workforce from all segments of society (MSP 1); treat applicants and employees in a fair and equitable manner (MSP 2); ensure the Federal workforce is used efficiently and effectively (MSP 5); and protect against discrimination (PPP 1).

OPM's activities support Executive Order (EO) 14035, *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce*, issued on June 25, 2021. The EO asserts that mounting evidence shows that diverse, equitable, inclusive, and accessible workplaces are higher-performing organizations. Therefore, the EO directs OPM to take steps to ensure the Federal Government is a model for diversity, equity, inclusion, and accessibility, where all employees are treated with dignity and respect. While it will take time to measure the long-term impact of OPM's DEIA activities, its leadership role in organizing the Federal community around DEIA are significant steps in ensuring adherence to the MSPs and avoidance of PPPs.

[Fair Chance to Compete for Jobs Act of 2019](#): Final Regulations

On October 2, 2023, OPM implemented [regulations](#) regarding the Fair Chance to Compete for Jobs Act of 2019, applying so-called "ban-the-box" policies in the Federal hiring process. With a few exceptions, the new regulations prohibit Federal agencies and contractors from asking about an applicant's criminal history until after a conditional employment offer has been made. In addition, the regulations establish a process for handling complaints related to potential violations. The intent of the change in policy is to eliminate the initial barriers for those with a criminal history, focus the hiring process on applicant abilities and qualifications, and ultimately expand the talent pool.

After the conditional offer is made, candidates complete the Declaration for Federal Employment (i.e., OF-306), which asks standardized questions about past convictions and ongoing charges. The employer can still withdraw the conditional job offer, if warranted, based on the suitability review.

In alignment with MSPs, this policy emphasizes recruiting candidates based on their skills and potential (MSP 1) and promoting equitable treatment across all applicants (MSP 2). Additionally, it addresses critical PPPs by seeking to eliminate discrimination based on non-merit factors (PPP 4) and preventing biases, particularly against veterans (PPP 8). By adopting this approach, the Act contributes to building a diverse and inclusive Federal workforce, more representative of the broader society.

Research on effects of similar “ban-the-box” policies in various states and municipalities has shown a trend in reducing biases against those with a criminal history during the initial stages of hiring. Studies indicate that delaying background checks increases the likelihood that individuals with criminal records will receive job offers.¹⁷ The immediate effect of the Act is intended to strengthen fair hiring practices across Federal agencies by focusing on qualifications rather than criminal history. In the long term, it is anticipated to lead to a more balanced and diverse Federal workforce by removing the “litmus test” of criminal history and allowing decisionmakers to evaluate each candidate more fully without automatically excluding individuals with criminal histories before reaching the suitability review stage. Given the potential far-reaching impacts of this legislation, it is essential for OPM to continuously monitor effects on Federal hiring practices.

OPM’s Skills-Based Job Qualifications Initiative

In 2023, OPM introduced an [updated handbook](#) as part of the Federal Workforce Competency Initiative, marking a shift towards skills-based qualifications in Federal hiring. This initiative, which focuses on job-related skills over traditional educational credentials, was informed by feedback from over 90,000 Federal employees and supervisors. The handbook serves as a guide for agencies in workforce planning, recruitment, and hiring.

The initiative aligns with key MSPs by emphasizing recruitment based on ability and potential (MSP 1) and ensuring fair and equitable treatment of candidates (MSP 2). It also addresses PPPs by reducing biases related to educational background (PPP 4), thus promoting a more inclusive Federal workforce and enhancing diversity (PPP 8).

There is research indicating that skills-based hiring, as endorsed by both the Administration and a 2020 executive order, can effectively place talent and retain high performers. Case studies from various sectors, including healthcare, have shown a reduction in turnover rates, suggesting similar positive outcomes for the Federal workforce.¹⁸ The initiative's broader societal implications include increasing inclusivity in Federal recruitment, ensuring fairer representation, and reducing unintentional biases.

The immediate outcome of this initiative is the introduction of the updated handbook, guiding agencies in workforce competencies. Long-term, it aims to reshape Federal recruitment, making it

¹⁷ Shimizu, S. (2018). Beyond the box: Safeguarding employment for arrested employees. *Yale L&J*, 128, 226; Shoag, D., & Veuger, S. (2021). Ban-the-box measures help high-crime neighborhoods. *The Journal of Law and Economics*, 64(1), 85-105.

¹⁸ Škrinarić, B. Competence-based approaches in organizational and individual context. *Humanities and Social Science Communications*, 9, 28 (2022). <https://doi.org/10.1057/s41599-022-01047-1>; Fuller, J., Langer, C., & Sigelman, M. (2022). Skills-based hiring is on the rise. *Harvard Business Review*, 111; Cantrell, S., Griffiths, M., Jones, R., & Hiipakka, J. (2022). The skills-based organization: a new operating model for work and the workforce. *Deloitte Insights*, Sep, 8.

more inclusive and equitable, potentially increasing employee retention and participation of disadvantaged groups.

Closing Skill Gaps Closeout Report

On October 27, 2022, OPM released the [Closing Skills Gaps Closeout Report](#). From 2016 to 2020, OPM collaborated with Chief Human Capital Officers (CHCO) Council agencies to close agency-specific and Government-wide skills gaps in high-risk mission critical occupations (MCOs). The results should support the Government's ability to recruit and select qualified individuals (MSP 1) in high-risk MCOs. They also help ensure the Federal workforce is used efficiently and effectively (MSP 5) by closing skills gaps.

OPM and the participating agencies identified 37 agency-specific and 5 Government-wide high-risk MCOs for gap closure. Due to the collaborative effort, OPM's report indicates great progress in addressing those MCOs. The efforts resulted in 86% of CHCO agencies having mitigated one or more high-risk MCO factors. The Government-wide MCOs saw similar success, with the removal of two Government-wide high-risk MCOs (i.e., 0511-Auditor and 0110-Economist). OPM acknowledges that there is more work to be done, but this effort helped develop a structure around closing skill gaps, including a 4-year cycle of the closing skills gaps initiative.

Monitoring for FY 2024

As part of MSPB's review of OPM's significant actions, we identified several initiatives OPM started in FY 2023 that were in the preliminary stages of development. These are items MSPB will continue to monitor in the future, in addition to new initiatives for FY 2024. They include the following:

- Hiring modernization efforts, including pooled hiring through shared certificates;
- Response to hiring needs in Science, Technology, Engineering, and Mathematics (STEM) occupations, including evaluating the impact of the Federal rotational cyber workforce program and the final regulations regarding STEM term appointments;
- Leadership on Federal Future of Work initiatives;
- Issuance of a validated artificial intelligence competency model to support talent acquisition;
- Proposed rule on the Pathways Program;
- Proposed rule for the "Rule of Many," a new, congressionally mandated system for scoring and ranking Federal job applicants; and
- Recently finalized regulation.

Review of the Rules and Regulations of OPM

MSPB has authority to review OPM rules and regulations upon request, or on its own motion, to determine if the regulations or the implementation of the regulations would cause a person to commit a PPP.¹⁹ These rare requests are processed under HQ adjudication procedures for original jurisdiction cases. In FY 2023, one case requesting review of OPM regulations was received, and six such cases were decided, including all but one of the cases that had been pending at the end of FY 2022. There were two regulation review cases pending at the end of FY 2023, including the case filed in FY 2023 and a case filed in FY 2018.

¹⁹ 5 U.S.C. § 1204(a)(4) and 5 U.S.C. Section 1204(f)(1-4).

MSPB FINANCIAL SUMMARY

Fiscal Year 2023 Financial Summary as of September 30, 2023 (dollars in thousands)

Financial Sources

FY 2023 Appropriation	\$ 49,655
Civil Service Retirement and Disability Trust Fund	2,345

Total Financial Sources **\$ 52,000**

Obligations Charged to FY 2023

Personnel Compensation	\$ 27,652
Personnel Benefits	9,667
Travel of Things	9
Travel of Persons	148
Rents, Communications and Utilities	5,085
Printing and Reproduction	25
Other Services	4,092
Supplies and Materials	59
Equipment	716
Reimbursable Obligations	249

Total Obligations Incurred **\$ 47,702**

LIST OF ABBREVIATIONS AND ACRONYMS

AFR	MSPB Annual Financial Report
AJ	Administrative judge
ALJ	Administrative law judge
ALOC	Acceptable level of competence
APHIS	USDA’s Animal and Plant Health Inspection Service
APR-APP	MSPB’s Annual Performance Report and Annual Performance Plan
AR	Annual Report
BFS	Treasury’s Bureau of the Fiscal Service
CAFC	U.S. Court of Appeals for the Federal Circuit
CHCO	Chief Human Capital Officer
CSRA	Civil Service Reform Act of 1978
CSRS	Civil Service Retirement System
DEIA	Diversity, Equity, Inclusion, and Accessibility
DHS	Department of Homeland Security
DOI	Department of the Interior
EEO	Equal employment opportunity
EEOC	Equal Employment Opportunity Commission
FAM	MSPB’s Office Financial and Administrative Management
FBI	Federal Bureau of Investigation
FERS	Federal Employees Retirement System
FERCCA	Federal Erroneous Retirement Coverage Corrections Act
FLRA	Federal Labor Relations Authority
FOs	MSPB’s field offices
FTC	Federal Trade Commission
FTRA	Follow the Rules Act
FY	Fiscal year
GAO	Government Accountability Office
GPRAMA	Government Performance and Results Act Modernization Act of 2010
HC	Human capital
HQ	MSPB’s headquarters
HR	Human resources
HSGAC	Senate Homeland Security & Governmental Affairs Committee
<i>IoM</i>	MSPB’s <i>Issues of Merit</i> newsletter
IRA	Individual right of action
IRM	MSPB’s Office of Information Resources Management
IT	Information technology
MCO	Mission Critical Occupation
MPS	MSPB’s Merit Principles Survey

MSPs	Merit system principles
MSPB	Merit Systems Protection Board
NDAA	National Defense Authorization Act
NFC	USDA's National Finance Center
OAC	MSPB's Office of Appeals Counsel
OCB	MSPB's Office of the Clerk of the Board
OGC	MSPB's Office of General Counsel
OPE	MSPB's Office of Policy and Evaluation
OPM	Office of Personnel Management
ORO	MSPB's Office of Regional Operations
OSC	Office of Special Counsel
PFR	Petition for review
PIO	Performance Improvement Officer
PPPs	Prohibited personnel practices
ROs	MSPB's regional offices
SES	Senior Executive Service
STEM	Science, Technology, Engineering, and Mathematics
U.S.C.	United States Code
USDA	Department of Agriculture
USERRA	Uniformed Services Employment and Reemployment Rights Act of 1994
VA	Department of Veterans Affairs
VEOA	Veterans Employment Opportunities Act of 1998
WIGI	Within-grade increase
WPA	Whistleblower Protection Act of 1989
WPEA	Whistleblower Protection Enhancement Act of 2012



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