



U.S. Merit Systems Protection Board

**Congressional
Budget
Justification
FY 2023**

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Committee on Appropriations

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The U.S. Merit Systems Protection Board
Congressional Budget Justification
Fiscal Year 2023

Introduction

The U.S. Merit Systems Protection Board's (MSPB) fiscal year (FY) 2023 budget request is \$51,139,000 plus \$2,345,000 to be transferred from the Civil Service Retirement and Disability Fund, for a total FY 2023 budget request of \$53,484,000. This is a \$5,314,000 increase over the FY 2022 enactment for salaries and benefits for MSPB.

As stated in our FY 2022 Congressional Budget Justification, MSPB faces its most dire crisis since it was established by the Civil Service Reform Act of 1978. In the absence of a Board quorum over the past five years (and, beginning March 1, 2019, the first time with no Board members since MSPB's beginning), a petition for review (PFR) backlog of over 3,600 cases has accumulated. MSPB continues to receive a steady stream of new PFRs. Although career staff have drafted recommended decisions for the vast majority of the backlog cases, it will be an immense undertaking for the new Board to consider and vote on such a high volume of cases and will require an increase in staffing levels with corresponding funding to support it.

The quorum was restored on March 4, 2022. Raymond Limon was appointed Vice Chair, and Tristan Leavitt was appointed Member of the Board. President Biden has nominated Cathy Harris to serve as Chair of the Board. We anticipate MSPB's three-member Board will be in place soon. Now that the Vice Chair and Member are onboard, they will begin to hire their own support staff. Historically, each Board member has, at a minimum, hired a chief counsel and a confidential assistant. To complete the Board staff, the Chair will appoint an executive director. These MSPB employees will play a key role in addressing the existing backlog of PFRs along with almost 1,000 new PFRs MSPB expects to receive each year. However, at its current appropriation level, MSPB would need to reduce costs in its operations in order to fund and maintain these key positions.

The COVID-19 pandemic has also negatively affected MSPB's operations. Although MSPB created a policy allowing limited filing by email and encouraged parties to use MSPB's e-Appeal Online electronic filing system, the pandemic has affected MSPB's ability to handle in-office operations, including processing paper appeals and case files. The unprecedented volume of telework has strained MSPB's information technology (IT) and communication services and has slowed the progress of the agency's IT modernization efforts. It has also hampered MSPB's ability to complete the digitization of the PFR backlog, approximately 50% of which consists of paper case files.

Given these constraints, onboarding and training new Board members and their staffs during the ongoing pandemic and then help them operate in a quasi-remote environment will be challenging to the agency. From there, our ability to successfully adjudicate the backlog and return the agency to normal operations will pose the biggest test in MSPB's history. While the stakes for the Federal Government and the merit system are high, with the Board in place and the appropriate staff to support it, MSPB will strive to overcome the challenges set before us and continue protecting the Federal merit systems and the rights of individuals within those systems.

With these significant challenges facing MSPB, holding MSPB's funding level essentially flat—or more disastrously, imposing a cut—would unquestionably have an adverse effect on the agency's ability to protect the Federal merit systems, ensure due process, promote the merit system principles (MSPs), and prevent prohibited personnel practices (PPPs). Thus, MSPB respectfully requests Congress's consideration of this full budget request.

Internal Challenges Affecting MSPB Operations

Lack of Board Quorum

On January 8, 2017, the Board lost its quorum of members. Although agencies and appellants can file PFRs of administrative judges' (AJ) decisions, the Board cannot issue decisions on PFRs and other cases at headquarters (HQ) until it has a quorum. Since the loss of quorum, the number of pending cases at HQ has grown into a backlog of 3,643 as of February 28, 2022. This figure represents about four times the number of PFRs received in a typical year. Now that the quorum is almost fully restored and the Board can issue decisions, history suggests there will be significant additional workload for MSPB. In a typical year, approximately 11% of the Board's PFR decisions are remanded to the AJs for further adjudication. With the arrival of new Board members, whose priorities may differ from those of the previous Board, an above-average percentage of cases may be remanded to the regional and field offices. Moreover, additional remands may occur as the new Board issues regulations and precedent concerning several new statutes that have been enacted during the period MSPB has lacked a quorum.

Similarly, an above-average percentage of the backlog's recommended PFR decisions that already have been drafted by career staff at HQ may require additional revision before issuance by the new Board. It is essential to fully staff MSPB's adjudication functions to address this significant additional workload.

In addition to not issuing Board decisions, without a quorum, MSPB has been unable to release study reports to the President and Congress. MSPB conducts objective, independent research supporting strong merit systems that protect the public's interest in a high-quality, diverse professional workforce managed under the MSPs and free from PPPs. MSPB's research, which is presented in formal reports to the President and Congress, has addressed topics such as hiring practices and authorities, sexual harassment in the Federal workplace, whistleblower protections, managing employee conduct and performance problems, and the effectiveness of the human resources (HR) workforce. A new MSPB research agenda is ready for consideration and approval by the new Board. MSPB's Office of Policy and Evaluation (OPE) has prepared the updated research agenda after soliciting ideas from stakeholders (including Federal employees and supervisors, unions and other employee groups, agency chief human capital officers, and the public) and evaluating those ideas against criteria such as importance, timeliness, and practicality. That research agenda is ready for incoming Board members to consider when they arrive.

The updated research agenda will determine MSPB's studies workload for the next few years, including FY 2023. MSPB's studies program needs to remain fully staffed to carry out that research agenda. Surveys are essential to many of the proposed studies, including those related to the incidence of PPPs and adherence to MSPs. MSPB procured a survey platform to avoid relying on a new contract for each survey, which shortens the timeline for MSPB survey activity and makes each

survey more cost-effective. The research function, in conjunction with MSPB's adjudication of individual appeals, and authority to review Office of Personnel Management (OPM) regulations and significant actions ensures that the Board both oversees Federal merit systems at the systemic level and remedies PPPs on an individual level.

Finally, the absence of a quorum has adversely affected MSPB's ability to promulgate regulations to reflect congressionally mandated changes in the agency's jurisdiction and procedures. The last substantial update to MSPB's regulations was in 2015. Since then, several changes to MSPB's regulations have become necessary to ensure they comply with newly enacted statutes and to reflect improvements in MSPB's procedures. Once a quorum is restored, significant resources will be devoted to updating MSPB's regulations.

Retirement Eligibility and Human Capital Planning

MSPB's enacted budgets for FYs 2014-2021 allowed the agency to sustain a sufficient workforce to perform its statutory functions effectively and efficiently. By the end of FY 2023, nearly 28% of MSPB employees will be eligible to retire. Budget reductions would cause an inability to replace these critical vacancies, which would result in slower case processing times—including processing times mandated by statute and regulation—as well as a reduction in the number, scope, and depth of merit system studies and publications. Such a reduction in MSPB's workforce would also limit the capacity for outreach and education services, which play a key role in ensuring that Federal agencies and their employees understand the Board's role and processes and interact in a timely and responsive way with MSPB. Educating the Federal workforce also improves efficiency and effectiveness throughout the Government by helping agencies understand and act in accordance with MSPs, avoid PPPs, and promote the overall efficiency of the civil service.

MSPB's IT Modernization

In FY 2019, MSPB began modernizing its core business applications, starting with the development of a new cloud-based case management workflow system that is certified by the Federal Risk and Authorization Management Program (or FedRAMP). This updated functionality will replace several legacy systems, including MSPB's e-Appeal Online, document management, and document assembly systems. They are at or nearing end of life and prevent MSPB from achieving 100% electronic adjudication of appeals. Although the project was paused for several months in FY 2020 as we adjusted our operations in response to the pandemic, we have continued to make significant progress toward project completion. The new application is scheduled to go live in March 2023.

In FY 2021, MSPB made plans to modernize all remaining legacy systems, upgrade its network architecture to support a hybrid workforce, increase internet capacity as MSPB transitions to cloud-based services, enhance cybersecurity consistent with Executive Order 14028, and transition business processes and undertake digitization initiatives to comply with the Government's transition to electronic records

External Events Affecting MSPB Operations

There are several external factors that have affected MSPB's operations and will continue to do so, resulting in the need for additional resources.

COVID-19 Pandemic

Like everyone else, the pandemic transformed daily life for MSPB employees over the past 2 years. Employees had to try to balance work and family life in new and more demanding ways, e.g., working while caring for children and others in the home, including overseeing virtual or hybrid schooling, etc. From an operational perspective, employee health and safety has been and remains our priority, and almost every employee continued to work from home fulltime, or nearly so, under maximum telework throughout FY 2021. Shifting or delaying some tasks temporarily helped the agency triage certain duties during the pandemic. That said, the pandemic severely impeded our ability to appropriately staff work that can only be done in-office, such as processing paper appeals and case files. This is especially true at HQ, where about 50% of the PFR backlog consists of voluminous paper case files, although efforts have been underway to convert paper files to electronic files. MSPB officially began reentry in October 2021, although high levels of community transmission have limited in-office staffing capacity pursuant to our COVID-19 Workplace Safety Plan. Ongoing pandemic-related stress, from the uncertainties of COVID-19 itself to the social and psychological isolation many are experiencing, remains an ongoing challenge for employees and agency leaders.

Enactment of New Statutes by Congress

Whistleblower Protection Laws

From the time the Civil Service Reform Act of 1978 established the original 11 PPPs, Congress added only one additional PPP in the ensuing 20 years. In the past seven years, Congress has added two additional PPPs, both of which were prompted by concerns about whistleblower protection. Since the enactment of the Whistleblower Protection Enhancement Act of 2012 (WPEA), appeals filed in the regions and PFRs to the Board involving reprisal for whistleblowing or other activity protected by the WPEA have increased significantly. Twenty-five percent of all PFRs filed in FY 2020 involved such claims.

MSPB's jurisdiction over whistleblowing—even in the absence of an otherwise appealable action—may now extend over many more and varied concerns. Claims of retaliation based on the exercise of a right related to prior whistleblowing activity, assisting another individual in the exercise of any appeal, complaint, or grievance, cooperating with or disclosing information to an agency's inspector general or the Office of Special Counsel (OSC), or for refusing to obey an order that would require the individual to violate a law, rule, or regulation, have been added to MSPB's jurisdiction because of statutory amendments in the past ten years. The National Defense Authorization Act (NDAA) for FY 2020, enacted December 20, 2019, explicitly protects whistleblower disclosures to Congress, including some classified disclosures. This will likely result in more appeals to MSPB, and complications over properly disclosing classified information to Congress also could lead to increased disciplinary actions regarding improper disclosure, causing additional new appeals.

The WPEA also increased the complexity of adjudicating whistleblower cases. Prior to the WPEA, for example, many whistleblower claims failed under then-current case law because the disclosure at issue was made to the alleged wrongdoer or was made in the appellant's normal course of duties. Such findings were made at the first step of a three-step analysis, and thus remaining issues were never adjudicated. Pursuant to the WPEA, such disclosures may now be found to be protected, and the legal analysis proceeds to the second and frequently third steps. Accordingly, a hearing is required in a greater number of cases, and the legal analysis required for whistleblower cases under the WPEA is more complex, time-consuming, and resource intensive.

As part of the WPEA, on a pilot basis, Congress permitted employees with cases involving reprisal for whistleblowing or other activities protected by the WPEA to appeal MSPB's decisions to any Federal circuit court of appeals of competent jurisdiction, rather than only to the U.S. Court of Appeals for the Federal Circuit, as previously had been the case. Congress made the pilot program permanent effective November 26, 2017. Before the pandemic this had increased travel by MSPB attorneys to various circuit courts across the country, and it will likely continue to require additional travel after the pandemic is over.

In addition to increasing the number of MSPB cases, some of the statutory changes in recent years will significantly affect Federal agencies. For example, both the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 and the OSC Reauthorization Act contained provisions mandating proposed discipline for any supervisor found by the head of an agency, OSC, MSPB, an administrative law judge (ALJ), a Federal judge, or an inspector general to have committed whistleblower retaliation. For a first offense the agency must propose a suspension of at least three days, and for a second offense an agency must propose removal. While suspensions of 14 days and under are not otherwise appealable to MSPB, removals are directly appealable. This provision represents a significant transformation in how agencies are required to respond to retaliators. Effective November 16, 2020, OPM issued implementing regulations that likely will have the effect of significantly increasing awareness of and compliance with these provisions throughout Government and increase appeals to MSPB.

Overall, it is probable that both the number and complexity of WPEA-related appeals and PFRs will continue to grow in the coming years, requiring additional resources to adjudicate them.

National Defense Authorization Act for FY 2017 (P.L. 114-328)

The NDAA for FY 2017 contained three provisions that have significantly affected MSPB by increasing appeals to the agency.

Section 512 provides limited appeal rights to dual status military technicians serving in the National Guard. This is a significant change in the law with respect to such employees, who previously had no such rights.

Section 1138 enacted the Administrative Leave Act of 2016 (codified as 5 U.S.C. § 6329b), which expands MSPB's jurisdiction by adding to the possible grounds on which an employee might file an appeal. It makes placement on investigative leave for "not less than 70 workdays" a personnel action under the subsection 8 and 9 whistleblower protections of 5 U.S.C. § 2302(b).

Section 1140 expanded MSPB’s jurisdiction in cases of voluntary separation during a personnel investigation. As codified in 5 U.S.C. § 3322, an employee who voluntarily resigns while under investigation is entitled to file an appeal with MSPB over the notation in their personnel file of an adverse finding resulting from the investigation.

Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017

The Department of Veterans Affairs (VA) Accountability and Whistleblower Protection Act of 2017 changed the requirements for appeals of adverse actions taken against VA employees. It lowers MSPB’s standard of proof for adjudication of VA adverse actions taken under 38 U.S.C. § 714 from preponderant to substantial evidence and requires a MSPB AJ to issue a decision on an appeal of such actions within 180 days. These changes to adjudicating § 714 cases influence the processing of all MSPB cases as schedules must shift to meet this statutory requirement. The law also effectively replaced the Veterans Access, Choice, and Accountability Act of 2014 for VA Senior Executive Service appeals.

Section 714 eliminated MSPB’s authority to mitigate penalties. However, subsequent decisions of the Federal Circuit have found that MSPB must nonetheless review the legality of any agency penalty, including by applying the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981). *See, e.g., Connor v. Department of Veterans Affairs*, 8 F.4th 1319, 1326-27 (Fed. Cir. 2021). If MSPB finds the penalty is not supported by substantial evidence, or if the VA failed to consider the *Douglas* factors in determining the appropriate penalty, the case must be remanded to the VA for a redetermination of the penalty.

The Federal Circuit also found that the burden of proof to be applied by the VA when making its decision in an action taken under § 714 is preponderant evidence, not substantial evidence, necessitating reversal by MSPB when VA fails to apply the correct burden of proof. *See Rodriguez v. Department of Veterans Affairs*, 8 F.4th 1290, 1297-1301 (Fed. Cir. 2021). These two significant changes in the interpretation of a relatively new statute will likely result in many reversals and remands of VA actions taken under § 714.

In addition, the Act contains a provision that is similar to the Government-wide requirement that discipline be proposed for supervisors found to have committed whistleblower retaliation and includes matters such as conducting a negative peer review, opening a retaliatory investigation, or taking a personnel action against an employee relating to participating in an audit or investigation by the Comptroller General, in addition to those listed in 5 U.S.C. § 2302. Although not all VA cases are brought under this law, MSPB has seen an overall increase in the number of VA cases filed since the law took effect.

Other External Factors Leading to Increased Appeals to MSPB

Executive Orders 14020 and 14035

On June 25, 2021, President Biden issued Executive Order 14020, “Establishment of the White House Gender Policy Council,” which establishes a policy to promote diversity and inclusion in the Federal workforce. On the same date, President Biden issued Executive Order 14035, “Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce,” which similarly seeks to attain a Federal workforce that reflects all segments of society. As a result, there could be an increase in

affirmative defenses based on discrimination when appellants believe their agencies have not complied with the letter or intent of these Executive Orders.

Workload Resulting from Reorganizations

Some Federal agencies, such as the U.S. Postal Service, have announced or put into effect reorganization plans. Such changes will potentially cause furloughs, early retirement incentives (Voluntary Early Retirement Authority and Voluntary Separation Incentive Payments), and the increased use of reductions in force (RIFs) by agencies, all of which could lead to an increase in initial appeals and PFRs to MSPB.

Supreme Court Decision and Executive Actions Related to LGBTQ Employment Rights

In *Bostock v. Clayton County, GA*, 140 S. Ct. 1731 (2020), the Supreme Court held that taking adverse employment actions against employees because of their sexual orientation or transgender status constitutes sex discrimination. Previously, discrimination based on either sexual orientation or transgender status had not universally been seen as a violation of Title VII. Separately, on January 25, 2021, President Biden issued Executive Order 13988, which requires that agencies promulgate agency actions (orders, regulations, policies, etc.) that prohibit discrimination on the basis of “gender identity or sexual orientation.” Executive Order 13988 and the holding in *Bostock* open the door for the filing and adjudication of more appeals raising sex discrimination on those bases as affirmative defenses, thus expanding the range of issues MSPB will review in such appeals.

Federal Circuit Decisions Related to Whistleblowing and Performance-based Actions

In *Hessami v. MSPB*, 979 F.3d 1362 (Fed. Cir. 2020), the Federal Circuit made several rulings which increase the likelihood that whistleblowing appeals to MSPB will proceed to a hearing on the merits of a claim. The court held that whether an appellant’s whistleblowing disclosure concerned disputable policy matters does not preclude it from being protected because the WPEA is clear that “policy decisions and disclosable misconduct are not mutually exclusive.”

The court also held that in determining whether an appellant made a nonfrivolous jurisdictional allegation under the WPEA, the Board may not consider evidence introduced by the agency. Instead, it is limited to “evaluating whether the appellant has alleged sufficient factual matter, accepted as true, to state a claim that is plausible on its face.” However, on January 19, 2022, the court issued *Smolinski v. MSPB*, F.4th, 2022 WL 164013 (Fed. Cir. 2022), which held that *Hessami* does not prohibit reliance on certain agency evidence supporting the appellant’s claim to jurisdiction. The conjunction of these two cases will likely require significant analysis by MSPB and the Federal Circuit in the coming months and may result in a higher number of remands from the court, if it determines that MSPB incorrectly interpreted the effect of these cases on whistleblower jurisdiction case law.

In *Santos v. NASA*, 990 F.3d 1355 (Fed. Cir. 2021), the Federal Circuit significantly expanded the potential scope of admissible evidence and discovery in performance-based actions taken under 5 U.S.C. § 4302, holding that when an agency predicates removal on an employee’s failure to satisfy obligations imposed by a performance improvement period (PIP), the agency must further demonstrate that the employee’s performance justified imposing a PIP in the first instance. This will lead to more complex adjudication of performance-based actions before MSPB.

All of these decisions increase the number and complexity of hearings that are conducted in cases involving claims of whistleblowing, and those based on performance under 5 U.S.C. § 4302, and will likely call for additional adjudication resources, including court reporter costs.

Potential Workload Resulting from the COVID-19 Pandemic

As a result of the COVID-19 pandemic, telework was mandated for many Federal agency employees. Now that vaccines are widely available, Federal agencies are grappling with return-to-office policies. OPM and other agencies have issued and are working on additional Government-wide guidance about workplace safety, reentry and post-reentry, the future of telework, and other remote work flexibilities. It is likely that Federal expenditures related to the COVID-19 pandemic will affect the budgets of Federal agencies into the future. While it is impossible to know for sure, agencies may face budget cuts or shortfalls, which may lead to RIFs or furloughs of agency employees. In addition, agencies have had to quickly develop new operational policies during the pandemic. The effect on employees of telework eligibility determinations, reentry and post-reentry plans and policies, safety and security protocols, accountability for health and safety behaviors, and sharing health-related information, for example, could affect merit-based management and the occurrence of PPPs. We may see an increase in whistleblowing (e.g., whistleblowing disclosures may include Government actions affecting the health and safety of the public) and claims of retaliation for whistleblowing related to the pandemic. It is too early to know the degree to which the pandemic's effects on the Federal workplace might increase appeals filed with MSPB; however, we have received appeals related to the pandemic. In the longer-term, MSPB must be prepared to ensure its studies function is able to assess potential impacts of the pandemic on merit-based management and the occurrence of PPPs, among other potential effects.

Workload Resulting from Department of Homeland Security, Transportation Security Agency (TSA) Expansion of Appeal Rights for Transportation Security Officers (TSOs)

In Department of Homeland Security Secretary Alejandro N. Mayorkas's June 3, 2021, memorandum supporting the TSA workforce through improving the TSO employment experience, the Secretary directed a review and evaluation of whether its current standards align with Title 5 personnel protections. Expecting legislation that would provide MSPB appeal rights, TSA began to afford TSO screeners the same or similar appeal rights. On September 13, 2021, MSPB entered into a reimbursable agreement with TSA to adjudicate appeals under their newly established rights, pending legislation that would otherwise increase our non-reimbursable workload.

FY 2023 Budget Request

Appropriation Language

For necessary expenses to carry out functions of the U.S. Merit Systems Protection Board pursuant to Reorganization Plan Number 2 of 1978, the Civil Service Reform Act of 1978, and the Whistleblower Protection Act of 1989 (5 U.S.C. § 5509 note), as amended, including services as authorized by 5 U.S.C. § 3109, rental of conference rooms in the District of Columbia and elsewhere, hire of passenger motor vehicles, and not to exceed \$2,000 for official reception and representation expenses, \$51,139,000 to remain available until September 30, 2024, and in addition \$2,345,000, to remain available until September 30, 2024, for administrative expenses to adjudicate

retirement appeals to be transferred from the Civil Service Retirement and Disability Fund in amounts to be determined by the U.S. Merit Systems Protection Board.

The Board has authority to adjudicate appeals from a final administrative action or order affecting the rights or interests of an individual under 5 U.S.C. § 8347(d) (the Civil Service Retirement System) and 5 U.S.C. § 8461(e) (the Federal Employees' Retirement System). Pursuant to 5 U.S.C. § 8348(a)(3), the Fund is made available, subject to such annual limitation as Congress may prescribe, for any expenses incurred by the Board in the administration of such appeals.

Strategic Goals and Objectives

MSPB's FY 2023 Congressional Budget Justification is based on its Strategic Plan. The agency's performance goals cover the critical components of two strategic goals, and the performance measures support MSPB's ability to manage and report performance over time.

The strategic goals and objectives are:

Strategic Goal 1: Serve the public interest by *protecting* merit system principles and *safeguarding* the civil service from prohibited personnel practices.

Strategic Objectives:

- 1A: Provide understandable, high-quality resolution of appeals, supported by fair and efficient adjudication and alternative dispute resolution (ADR) processes.
 - 1A-RO: Provide understandable, high-quality resolution of initial appeals in the Regional and Field Offices, supported by fair and efficient adjudication and ADR processes.
 - 1A-HQ: Provide understandable, high-quality resolution of appeals at HQ, supported by fair and efficient adjudication and ADR processes.
- 1B: Enforce timely compliance with MSPB decisions.
- 1C: Conduct objective, timely studies of the Federal merit systems and Federal human capital management issues.
- 1D: Review and act upon the rules, regulations, and significant actions of OPM, as appropriate.

Strategic Goal 2: Advance the public interest through *education* and *promotion* of stronger merit systems, *adherence* to merit system principles, and *prevention* of prohibited personnel practices.

Strategic Objectives:

- 2A: Support and improve the practice of merit, adherence to MSPs, and prevention of PPPs in the workplace through successful, targeted outreach and engagement.

- 2B: Advance the understanding of merit, the MSPs, and the PPPs for stakeholders and the public by developing and sharing informational and educational materials and guidance.

Management Objectives

- M1: Lead, manage, and develop employees to ensure a highly qualified, diverse, inclusive, and engaged workforce with the competencies to perform MSPB’s mission and support functions successfully.
- M2: Modernize information technology (IT) to support agency mission and administrative functions.

FY 2023 Request by Object Class

MSPB is requesting \$51,139,000 in FY 2023 appropriated funds for a total budget authority of \$53,484,000, which includes the OPM transfer of \$2,345,000 from the Civil Service Retirement and Disability Fund. With this level of funding, MSPB will be adequately resourced for the long and difficult process of digging out of its case backlog, as well as working toward implementing the Administration’s priorities.

MSPB diligently examined its requirements. Personnel compensation and benefits constitute 82% of MSPB’s budgetary expenses. Approximately 7% of MSPB’s budget authority is for rent to the General Services Administration (GSA) for MSPB office spaces, leaving about 3% for services from other Government agencies (human resources, payroll, accounting, and ALJs), 3% for non-government services, 2% for communications and utilities, and about 3% on all other requirements (travel, printing, facilities maintenance, and general supplies).

Personnel Compensation & Benefits – an increase of \$5,314,000

MOC	Description	FY 2022 Enacted (000)	FY 2023 Request (000)	Increase (decrease) over FY 2022 (000)
11	Personnel Compensation	\$28,173	\$32,222	\$4,049
12	Benefits	\$8,425	\$9,690	\$1,265

Personnel compensation and benefit expenses is the largest component of MSPB’s FY 2023 budget request. During previous budget cycles, MSPB was authorized 235 full-time equivalent (FTE) employees but was not funded to fully support the salaries and benefits of 235 FTEs. Moreover, MSPB’s budget levels remained constant for four years, and during that time there were several mandated pay raises. MSPB has prudently refrained from backfilling certain positions until the Board arrives and has sought other cost savings to accumulate carryover to offset these costs as well as some IT modernization efforts.

Now with the quorum being restored, MSPB will have at least 10 FTEs to fund (for Board members and their support staffs) that it has not had to fund for the past several years. Additionally, having permanent political leadership will allow MSPB to hire for key operations positions it has not backfilled during the absence of a Board quorum, such as Senior Executive Service directors for its Office of Regional Operations (ORO) and OPE. Beyond that, fully addressing the PFR backlog will require funding MSPB at a level that can sustain its 235 authorized FTEs.

Travel & Transportation of Persons – no change

MOC	Description	FY 2022 Enacted (000)	FY 2023 Request (000)	Increase (decrease) over FY 2022 (000)
21	Travel & Transportation of Persons	\$200	\$200	\$0

With the restoration of a quorum and anticipating the resumption of normal operations in the wake of the pandemic, MSPB will experience an increase in travel needs. Travel to support in-person hearings, mediations, training, outreach events, site visits, and interviews for studies, as well as conferences will be required. Moreover, legislative changes have extended jurisdiction over appeals with whistleblower issues to all U.S. circuit courts, thereby requiring MSPB’s attorneys to periodically travel to various Federal courts of appeals to represent the agency. This was rarely required before the enactment of the WPEA.

Transportation of Things – a decrease of \$9,000

MOC	Description	FY 2022 Enacted (000)	FY 2023 Request (000)	Increase (decrease) over FY 2022 (000)
22	Transportation of Things	\$45	\$36	(\$9)

MSPB anticipates a cost savings in freight and courier services as the organization-wide laptop refresh is complete.

Rent, Communications, & Utilities – no change

MOC	Description	FY 2022 Enacted (000)	FY 2023 Request (000)	Increase (decrease) over FY 2022 (000)
23	Rent, Communications & Utilities	\$4,810	\$4,810	\$0

These expenses include rent for MSPB’s HQ, regional and field office space, as well as utilities and telecommunication rentals. The telecommunication costs consist of IT infrastructure and software required to ensure MSPB employees can securely access Government applications and communication services.

Printing – a decrease of \$11,000

MOC	Description	FY 2022 Enacted (000)	FY 2023 Request (000)	Increase (decrease) over FY 2022 (000)
24	Printing	\$75	\$64	(\$11)

MSPB utilizes the Government Publishing Office (GPO) for publishing in the Code of Federal Regulations, photocopy services, and the GPO Express program. MSPB anticipates a decline in printing costs as we increase electronic distribution.

Other Contractual Services – an increase of \$18,000

MOC	Description	FY 2022 Enacted (000)	FY 2023 Request (000)	Increase (decrease) over FY 2022 (000)
25	Other Contractual Services	\$3,270	\$3,288	\$18

This category covers other services, goods and services from Government accounts, maintenance of facilities, and maintenance of equipment. MSPB annually renews interagency agreements with other Government agencies to obtain Government provided goods and services. This category funds accounting, purchasing, and travel services from the Bureau of the Fiscal Service (BFS), personnel services from the U.S. Department of Agriculture’s (USDA) Animal and Plant Health Inspection Service (APHIS), and payroll services from USDA’s National Finance Center (NFC). Moreover, MSPB relies on the U.S. Coast Guard and the Federal Trade Commission for ALJ services.

Interagency agreements enable MSPB to pay for services as required, avoiding additional salary and benefit expenses in these areas of expertise.

Additionally, there are other critical costs covered in this category. Court reporting services are required for adjudicating appeals and fluctuate depending on the complexity and length of hearings. Maintenance of equipment and software costs consist of annually recurring enterprise software renewals, network infrastructure, cyber security enhancements, and implementation of cloud-based technologies.

Supplies & Materials – no change

MOC	Description	FY 2022 Enacted (000)	FY 2023 Request (000)	Increase (decrease) over FY 2022 (000)
26	Supplies & Materials	\$509	\$509	\$0

This category funds electronic subscriptions (e.g., Westlaw and legal research materials) which are critical to MSPB operations. In addition, general office supplies and IT peripheral devices are included in this category.

Equipment – an increase of \$2,000

MOC	Description	FY 2022 Enacted (000)	FY 2023 Request (000)	Increase (decrease) over FY 2022 (000)
31	Equipment	\$318	\$320	\$2

MSPB replaces laptops, copiers, printers, scanners, and telecommunications equipment as it breaks down, is damaged, or reaches end of life. This category includes the cost for non-capitalized software needed by the organization for its statutory research and statistical analysis programs. In addition, the cost for hardcopy legal publications required to support adjudicatory decision-making is included in this category.

Budget Schedule O - Object Classification (thousands of dollars)

	FY 2021 Actual	FY 2022 Enacted	FY 2023 Request	Change
Direct Obligations:				
Personnel Compensation	\$28,752	\$28,173	\$32,222	\$4,049
Civilian Personnel Benefits	8,531	8,425	9,690	1,265
Travel of Persons	3	200	200	0
Transportation of Things	51	45	36	(9)
Rental payments to GSA	1,615	3,600	3,600	0
Rental Payments to Others	167	65	65	0
Communications, Utilities, and Miscellaneous Charges	406	1,145	1,145	0
Printing and Reproduction	20	75	64	(11)
Other Services	960	1,276	1,276	0
Other Purchases of Goods and Services from Government Accounts	2,015	1,650	1,650	0
Maintenance of Facilities	26	75	26	(49)
Maintenance of Equipment and Software	1,206	269	336	67
Supplies & Materials	135	509	509	0
Equipment/Lease Improvement	587	318	320	2
Direct Obligation. . .	44,474	45,825	51,139	5,314
Reimbursable Obligations. . .	2,345	2,345	2,345	0
Total New Obligations. . .	46,819	48,170	53,484	5,314

Budget Schedule Q - Employment Summary

	FY 2021 Actual	FY 2022 Enacted	FY 2023 Request	Change
Direct:				
Civilian full-time equivalent employment	185	220	223	3
Reimbursable:				
Civilian full-time equivalent employment	15	15	12	-3
Total...	200	235	235	0

Over the past three years, MSPB was authorized to staff up to 235 FTEs, which is the minimum staffing level required to execute the agency’s responsibilities with a quorum. Nevertheless, MSPB prudently maintained a relatively flat staffing plan of approximately 200 FTEs to sustain operations without a quorum. The relatively flat budget compelled MSPB to adapt and engage in tradeoffs of agency priorities to ensure the sustainment of effective and efficient operations. However, with the Board’s arrival, we have started backfilling vacant positions with the anticipation of being fully staffed and funded in FY 2023 to concurrently support the mission, strategic goals, and priorities of the agency under a new Board.

Conclusion

The merit system principles are designed to ensure fair treatment of employees, protect employees from misuse of authority, and ensure Federal employees are putting the public interest first. A Federal employee’s removal, suspension of more than 14 days, reduction in grade or pay, and allegations of whistleblower reprisal, among numerous other concerns, are appealable to the Board. Currently, there are at least 3,610 cases awaiting the new Board members that involve people who believe they have been unjustly treated in the Federal workplace or in other areas of MSPB’s jurisdiction. Some of these individuals and their families have been waiting for a verdict for over five years. It is not an exaggeration to say the next two years will be MSPB’s most critical since its establishment in 1978. It faces unprecedented challenges in training new Board members and their staffs, and in reducing the backlog. In light of this, MSPB has taken the greatest care in assessing the resources it needs to truly succeed. MSPB respectfully requests Congress’s support of our FY 2023 request.

About MSPB

MSPB has its origin in the Pendleton Act of 1883, which established the Civil Service Commission (CSC) and a merit-based employment system for the Federal Government. The Pendleton Act was passed after the assassination of President Garfield by a disgruntled Federal job seeker and grew out of the 19th century reform movement to curtail the excesses of political patronage in Government and ensure a stable highly qualified workforce to serve the public. 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 the inherent conflict of interest in the CSC's role as both rule-maker and judge was a principal motivating factor behind the passage of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the CSC with three new agencies: MSPB as the successor to the CSC in its quasi-judicial capacity; OPM to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority to oversee Federal labor-management relations. The CSRA also codified for the first time the values of the merit systems as the MSPs and defined the PPPs.

Board Organization

The Board members are the Chair, Vice Chair, and Member. Board members are nominated by the President, confirmed by the Senate, and serve overlapping, non-renewable seven-year terms. No more than two of the three Board members can be from the same political party. The Board members adjudicate the cases brought before them. By statute, the Chair is the chief executive and administrative officer of MSPB. The office directors report to the Chair through the Executive Director. The agency has its HQ in Washington, D.C., with six regional and two field offices located throughout the United States in which AJs adjudicate cases at the initial appeal level, akin to a trial court.

Providing and Using Administrative Data for Statistical Purposes

MSPB does not have administrative datasets with the potential for statistical use as outlined in Office of Management and Budget Memorandum M-14-06, "Guidance for Providing and Using Administrative Data for Statistical Purposes." However, statistical data can be found in the Board's Annual Reports available at www.mspb.gov. The Annual Report contains summaries of significant opinions issued by MSPB's reviewing courts, case-processing data for initial appeals, and summaries of other merit systems activity including articles posted on MSPB's website. It also contains a review of current OPM issues, and summaries of MSPB's congressional, international, and outreach activities, citations to MSPB work, internal management issues, and the external factors that affect the Board's work.

Adjudication

The majority of cases brought to the Board are appeals of adverse actions—that is, removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less. The next largest number of cases involves appeals of OPM and some agency determinations in retirement matters. Congress has given the Board jurisdiction to hear cases and complaints filed under a variety of other laws, including the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq.*; the Veterans Employment Opportunity Act, 5 U.S.C. § 3330a

et seq.; the Whistleblower Protection Act (WPA), Pub. L. No. 101-12; the WPEA, Pub. L. No. 112-199; the VA Accountability and the Whistleblower Protection Enhancement Act, Pub. L. No. 115-41; the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73; and additional authorities listed in the regulation set out at 5 C.F.R. § 1201.3.

Other types of actions that may be appealed to the Board include performance-based removals or reductions in grade; denials of within-grade salary increases; RIF 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 procedures called for in the law and MSPB's regulations and, after providing a full opportunity to develop the record on all relevant matters including a hearing when appropriate, issues an initial decision. Since March 2020, the regional and field offices have adjusted their processes and procedures to the virtual environment and have continued to adjudicate appeals. 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. When a PFR is filed, the Board's decision on the 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; or, in cases involving allegations of discrimination, to a U.S. district court or the Equal Employment Opportunity Commission (EEOC). In addition, certain cases 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 reached compliance.

In addition to adjudicating cases on the merits, MSPB also provides several ADR services to assist parties in resolving their cases. Use of these services is voluntary, provides the parties more control over the process, and can effectively resolve a case. In addition, resolving a case through ADR procedures can save time and reduce costs to the appellant, their agency, MSPB, and Government-wide as compared to the more formal regulations and procedures involved with adjudication on the merits.

Mediation Appeals Program

The Mediation Appeals Program (MAP) offers the services of the agency's trained and certified mediators as an alternative to the formal appeal processes and procedures of MSPB's regulations. Mediators facilitate a discussion between the parties in a confidential setting to help them identify issues and barriers to an agreement that will aid in resolving their disputes and settling the appeal quickly, economically, and to the benefit of all concerned. Unlike traditional mediation, MAP charges no fees. Both parties must agree to its use before the appeal will be accepted for the MAP process, and both must agree on its resolution before any settlement is concluded. Unlike the traditional appeal process, the parties control the result of the case under the skilled guidance of the mediator, who plays no role in deciding the appeal, should they not reach an agreement. Importantly, because almost all mediations occur near the beginning of adjudication, MAP saves time and money for the Federal employees and agencies who resolve their cases through this process.

Because of these advantages, MAP has become a popular and successful program, as shown by the greater number of cases that have been mediated almost every year since the program's inception. Further, MAP mediators have successfully settled more than half of the appeals referred to mediation. Moreover, even when the case is resolved by an AJ's decision, the mediation process often helps sharpen the parties' focus on the matters truly in dispute and the resolution they seek. When mediators were asking parties to complete evaluations at the end of each mediation, more than 95% stated they would use MAP again. The MAP program was negatively impacted by a November 2020 OPM regulation barring "clean record" settlement agreements (implementing previously revoked Executive Order 13839). While mediators continued to settle a substantial portion of the lower number of appeals referred to MAP, greater time and effort was expended by the mediator and the parties, and the number and percentage of successful settlements decreased. On January 4, 2022, OPM announced its proposed revocation of the 2020 regulations barring clean record settlements. It is unclear when the revocation will take effect.

Merit Systems Studies and OPM Oversight

The Board has the statutory responsibility to conduct studies of the civil service and other merit systems in the executive branch and submit the resulting reports to the President and Congress. The studies support strong and viable merit systems, which protect the public's interest in a high-quality, professional workforce managed under the MSPs and free from PPPs. The studies are based on objective, independent research that assesses and evaluates Federal merit system policies, operations, and practice from a long-term perspective. This function, in conjunction with the agency's adjudication of individual appeals and authority to review OPM regulations, ensures that the Board has the full legal authority necessary to oversee Federal merit systems at the systemic level and to remedy PPPs on an individual level. MSPB studies address the variety of challenges facing the Federal Government in managing its workforce.

Publications Issued between FY 2021 – FY 2022

No study reports have been transmitted to the President and Congress since the loss of quorum in January 2017. However, in addition to regular editions of the *Issues of Merit* newsletter, MSPB's OPE issued the following non-study report publications in the past few years:

Confidence in Ability to Perform Successfully (September 2021) discusses how organizations respond to unforeseen challenges and opportunities and are greatly influenced by how individual Federal workers think about the consequences of their own actions.

Agency Leader Responsibilities Related to Prohibited Personnel Practices (May 2021) discusses selected responsibilities assigned to the heads of Federal agencies by civil service law, such as to promote the prevention of PPPs, to protect whistleblowers, and to be accountable for proper exercise of personal authority. The brief places these responsibilities in the context of the broader goal of a merit-based civil service and outlines the extent to which they can—and in some cases cannot be delegated.

Determining an Acceptable Level of Competence for Step Increases (April 2021) reviews data and practices related to the within grade increase (WGI), a periodic fixed-pay increase that is granted provided that the employee performs at “an acceptable level of competence.” This research brief explores factors that are important to the WGI process, the role of the WGI in addressing under-performance, and some lessons learned for agencies to consider.

Direct-Hire Authority Under 5 U.S.C. § 3304: Usage and Outcomes (February 2021) discusses Federal agency use of direct hire authorities (DHAs): streamlined procedures to appoint new employees without regard to selected merit system and public policy provisions, including ranking and veterans' preference. This research brief then looks more closely at the DHA covered under 5 U.S.C. § 3304(a)(3) which is approved and overseen by OPM. As discussed, although agencies believe that section 3304 DHAs are useful, their vision of the authority's purpose and use appears to differ from OPM's.

The Importance of Job Fit for Federal Agencies and Employees (October 2020) draws on professional literature and selected items from the 2016 MPS to describe three distinct ways employees may fit with their job; discusses how job fit relates to workplace outcomes, such as job satisfaction, employee engagement, performance appraisal ratings, and intention to leave; and to outline actions in areas such as job design, hiring, training, and performance management that might help Federal managers and employees improve job fit.

Other Studies Activity

OPE has prepared an updated research agenda for review and approval by incoming agency leadership and it concluded administering the 2021 MPS in April 2021. This MPS focused on a small set of core topics, anticipating that subsequent surveys will cover topics from a finalized research agenda. Publications based on the 2021 MPS are in progress. MSPB notes that the COVID-19 pandemic may affect both research (e.g., the ability to conduct field work) and findings (e.g., working conditions and employee perceptions of leadership effectiveness and integrity).

Information Technology

MSPB's Office of Information Resources Management (IRM) designs, develops, implements, and maintains the agency's IT infrastructure, systems, and cybersecurity program. IRM's mission is to support the efficient and cost-effective use of IT at MSPB. The long-term vision is to migrate all MSPB business systems to a cloud-based architecture. IRM provides technical and operational support to MSPB to guarantee IT efficiency, effectiveness, compliance, and cybersecurity to enable the agency's mission.

Human Resources

MSPB contracts with USDA's APHIS for selected HR administrative and operational services through an interagency agreement. The agreement is developed between the two agencies and monitored within MSPB's Office of Financial and Administrative Management.

MSPB contracts with Federal Occupational Health (FOH), a service unit within the U.S. Department of Health and Human Services' Program Support Center, to provide basic occupational health services to all its employees throughout the country. In addition, the agency contracts with FOH to offer all employees access to the Employee Assistance Program (EAP). The EAP assists agency employees by providing both prevention and intervention for employee problems, which ultimately improves employee health and functioning, as well as workplace performance. MSPB's agreement with FOH provides for a comprehensive EAP, delivering short-term, problem-focused counseling and a variety of services. While many health and wellness activities and accommodations are not equally available to each employee with respect to workplace or onsite availability of services, the agency does strive to ensure that each employee understands that it fully supports a healthy and safe workplace for all employees.

Additionally, MSPB will engage in robust strategic human capital planning efforts. It is of the utmost importance to MSPB leadership that the agency hires and retains a diverse and highly qualified legal, research, analytical, and administrative workforce to support MSPB's mission now and in the future.

Financial Management

MSPB has initiated cross-servicing agreements with the Treasury Department's BFS for its accounting, financial auditing, purchasing, and travel-related services and support. Since 2002, BFS has processed MSPB's administrative payments and prepared its accounting reports. The Board has received unqualified/unmodified opinions on its audits since the agency has been subject to audits of its financial statements.

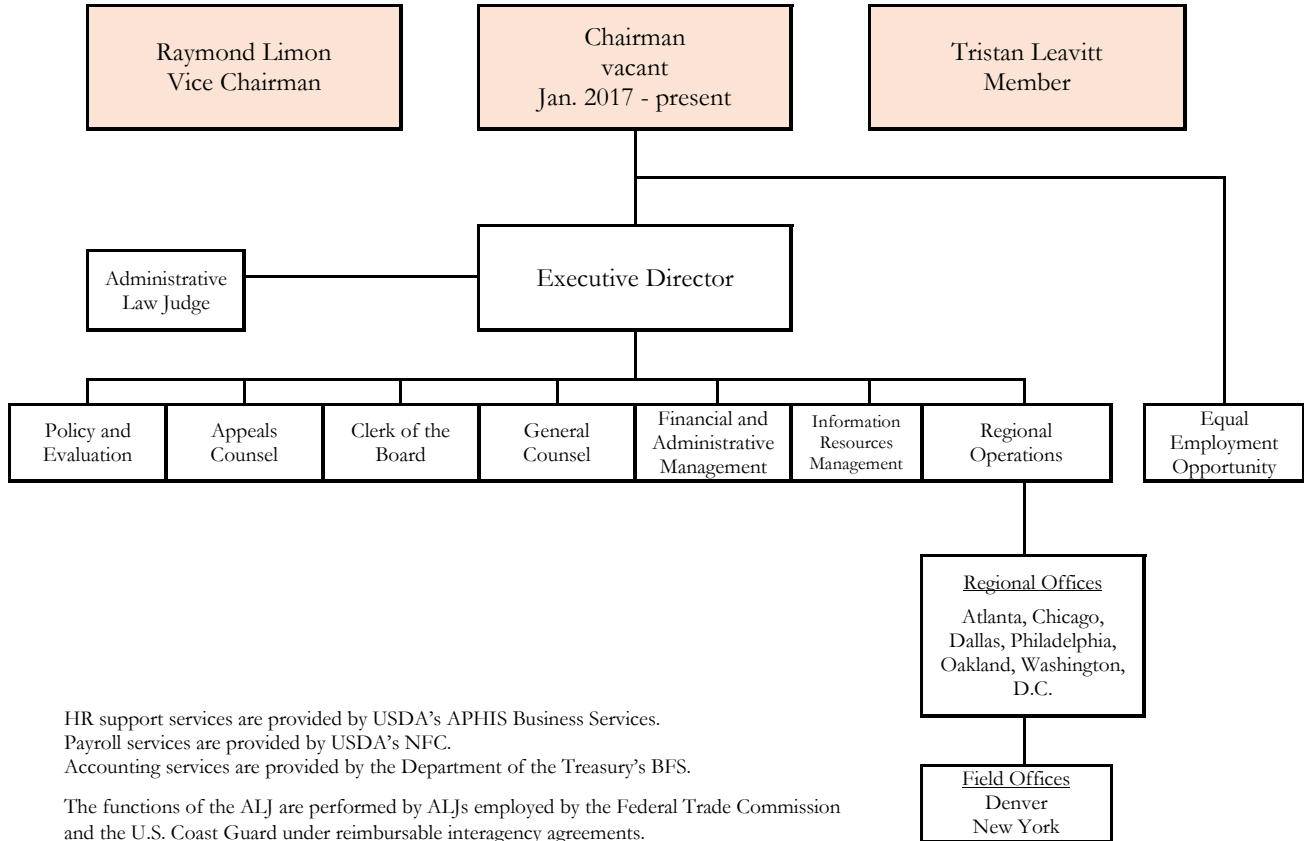
In addition to the agreement in place for personnel services, MSPB contracts with USDA's NFC for processing payroll and payroll-related activities including earnings and leave statements, W-2 information, and debt management. The cross-servicing relationships with these organizations have provided MSPB with timely responses and more accurate processing of information from larger pools of knowledgeable staff than would be possible with a smaller in-house staff alone. BFS, APHIS, and NFC have the resources to stay current with the latest technologies, so they can provide these services more efficiently and economically.

Equal Employment Opportunity

MSPB's Office of Equal Employment Opportunity (OEEO) plans, implements and evaluates the agency's affirmative employment programs and initiatives, advises senior executives, managers and supervisors about these programs and initiatives, oversees diversity and inclusion initiatives, and provides all employees training on rights and remedies available under the anti-discrimination laws and whistleblower protection laws. OEEO provides equal employment opportunity counseling, formal complaint processing, and alternative dispute resolution services to current and former employees, as well as applicants who allege discrimination. OEEO evaluates and reports MSPB's complaint data to Congress, EEOC, OPM, and other external stakeholders, and workforce demographics by occupation and grade to the EEOC. The EEO Director also coordinates MSPB's Diversity and Inclusion Council.

Organization Chart

U.S. Merit Systems Protection Board



HR support services are provided by USDA's APHIS Business Services.

Payroll services are provided by USDA's NFC.

Accounting services are provided by the Department of the Treasury's BFS.

The functions of the ALJ are performed by ALJs employed by the Federal Trade Commission and the U.S. Coast Guard under reimbursable interagency agreements.

List of Abbreviations and Acronyms

ADR	Alternate Dispute Resolution
AJ	Administrative Judge
ALJ	Administrative Law Judge
APHIS	Animal and Plant Health Inspection Service
BFS	Bureau of Fiscal Services
CSC	Civil Service Commission
CSRA	Civil Service Reform Act of 1978
DHA	Direct Hire Authority
EAP	Employee Assistance Program
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
EO	Executive Order
FedRAMP	Federal Risk and Authorization Management Program
FOH	Federal Occupational Health
FTE	Full Time Equivalent
FY	Fiscal Year
GPO	Government Publishing Office
GSA	General Services Administration
HQ	Headquarters
HR	Human Resources
IRM	Information Resource Management
IT	Information Technology
MAP	Mediation Appeals Program
MPS	Merit Principles Survey
MSPs	Merit System Principles

MSPB	Merit Systems Protection Board
NDAA	National Defense Authorization Act
NFC	National Finance Center
OAC	Office of Appeals Counsel
OEEEO	Office of Equal Employment Opportunity
OMB	Office of Management and Budget
OPE	Office of Policy and Evaluation
OPM	Office of Personnel Management
ORO	Office of Regional Operations
OSC	Office of Special Counsel
PFR	Petitions for Review
PIP	Performance Improvement Plan
PPPs	Prohibited Personnel Practices
RIF	Reduction in Force
TSA	Transportation Security Agency
TSO	Transportation Security Officers
USDA	U.S. Department of Agriculture
VA	Department of Veteran Affairs
WGI	Within Grade Increase
WPA	Whistleblower Protection Act
WPEA	Whistleblower Protection Enhancement Act