CHAPTER 1

MSPB Structure and Jurisdiction

I. REFORM ACT

A. CAPSULE HISTORY

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

> [a]n outdated patchwork of statutes and rules built up over almost a century. Federal management practices are antiquated in comparison with the current state of the managerial art. Research and experimentation concerning the management practices is virtually nonexistent. (1978 USCCAN pp. 2723, 2725.)

Kean v. Stone, 926 F.2d 276, 282 (3rd Cir. 1991), noted:

> The Civil Service Reform Act of 1978 was responsive to the joint perception of Congress and the executive branch that the Civil Service Commission—which had since 1932 exercised statutory dominion over the personnel practices of the burgeoning federal establishment—had such a broad panoply of frequently disharmonious responsibilities that it was not fulfilling any of them in optimal fashion. A particular concern was the conflation, under a single Commission, of (1) the duty to advise and supervise federal agencies in the performance of their personnel functions, and (2) the duty to adjudicate grievances of federal employees challenging agency personnel actions. The proposed legislative solution—accomplished in the Civil Service Reform Act—was to "abolish the Civil Service Commission," and to establish in its place "two new agencies…(1) The Office of Personnel Management, charged with personnel management and agency advisory functions, and (2) the Merit Systems Protection Board, charged with insuring adherence to merit system principles and laws." S. Rep. No. 95-969, 95th Cong.2d Sess. 5, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2723, 272.

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

> *Historical significance*. Understanding the origin of MSPB and the role it plays in ensuring effective human capital management in the Federal Government requires a brief review of the history of our Nation's Federal civil service. From the earliest days of our Government through the early 1880s, the Federal civil service operated under a patronage or "spoils system."[1] Federal employees were appointed based on their support of a President's election campaign and political beliefs. There were no requirements that such appointees be suitable for Federal service or have the qualifications to perform particular Federal jobs. As administrations changed, large numbers of Federal employees were replaced with new employees appointed by the new administrations. At various times, the Capital was besieged with thousands of office seekers who believed they were owed a Federal job based on their political support of the President. Over time, this practice contributed to an unstable workforce lacking the necessary qualifications to perform its work, which in turn adversely affected the efficiency and effectiveness of the Government and its ability to serve the American people.
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> [1] Bogdanow, M., and Lanphear, T., *History of the Merit Systems Protection Board*, Journal of the Federal Circuit Historical Society, Vol. 4, 2010, pp. 109–110.
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> The inherent weaknesses of the patronage system and its impact on Government effectiveness were recognized by concerned individuals and groups resulting in various reform movements. However, there was little momentum for change until President James A. Garfield was assassinated in 1881 by a disgruntled Federal job seeker. A large public outcry for civil service reform ensued, which led to the enactment of the Pendleton Act in 1883. The Pendleton Act created the Civil Service Commission (CSC) and tasked it with monitoring a merit-based civil service which used competitive examinations to support the appointment of qualified individuals to Federal positions. This contributed to improvements in Government efficiency and effectiveness by helping to ensure that a stable, highly qualified Federal workforce, free from partisan political pressure, was available to serve the American people.
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> Following passage of the Pendleton Act, laws were enacted and actions undertaken that established the principle of "promoting the efficiency of the civil service" as the standard for removing a Federal employee. These laws and actions also granted preference for hiring military veterans, established a more transparent process for removing veterans from Federal jobs, and extended the veterans' job protections to other civil servants.[2] The CSC was given additional authority to oversee the removal of Federal employees and to adjudicate employees' appeals of their removal.[3] Although the CSC made several internal changes to better manage the appeals process, it became clear over time that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate appeals of actions Federal agencies took against employees. Concern over the inherent or perceived conflicts of interest in the CSC's role as both rule-maker and adjudicator of appeals was a principal motivating factor behind the enactment of the Civil Service Reform Act of 1978 (CSRA).[4] The CSRA replaced the CSC with three new agencies: MSPB as the successor to the Commission, with an Office of Special Counsel (OSC) situated within MSPB to investigate and prosecute alleged PPPs; [5] the Office of Personnel Management (OPM) to serve as the President's agent for Federal workforce management policy and procedure; and the Federal Labor Relations Authority (FLRA) to oversee Federal labor-management relations.[6]
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> [2] The Lloyd LaFollette Act of 1912; the Veterans Preference Act of 1944, as amended; and Executive Order 10,988.
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> [3] Bogdanow, M., and Lanphear, T., *History of the Merit Systems Protection Board,* Journal of the Federal Circuit Historical Society, Vol. 4, 2010, pp, 111–112.
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> [4] *Ibid*. p. 113.
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> [5] *Ibid*. p. 114.
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> [6] The Whistleblower Protection Act of 1989 established OSC as a separate agency.
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> *MSPB's role and functions*. During congressional hearings on the CSRA before its passage in 1978, the role and functions of MSPB were described during testimony by various members of Congress: "[MSPB] will assume principal responsibility for safeguarding merit principles and employee rights" and be "charged with ensuring adherence to merit principles and laws" and with "safeguarding the effective operation of the merit principles in practice."[7] MSPB inherited the CSC's adjudication functions and provides due process to employees as an independent, third-party adjudicatory authority for employee appeals of adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions. For matters within its jurisdiction, the CSRA gave MSPB the statutory authority to develop its adjudicatory processes and procedures, issue subpoenas, call witnesses, and enforce compliance with MSPB decisions. The CSRA also gave MSPB broad authority to conduct independent, objective studies of the Federal merit systems and Federal human capital management issues, to ensure that Federal employees are managed in accordance with MSPs and in a manner free from PPPs. In addition, MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of OPM. MSPB may, on its own motion or at the request of other parties, review and potentially overturn OPM regulations if such regulations, or the implementation of such regulations, would require an employee to commit a PPP. MSPB also is responsible for annually reviewing and reporting on OPM's significant actions and the degree to which the actions may affect adherence to MSPs and avoidance of PPPs.[8] In summary, the CSRA granted MSPB the statutory authority and responsibility to adjudicate employee appeals, enforce compliance with MSPB decisions, conduct objective studies of Federal merit systems and human capital management issues, and review and take appropriate action on OPM's rules, regulations, and significant actions. Appendix A contains additional information about MSPB's jurisdiction, scope and impact, and customers and stakeholders.
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> [7] Legislative History of the Civil Service Reform Act of 1978. Committee on Post Office and Civil Service, House of Representatives, March 27, 1979, Vol. 2 (pp. 1469–1470).
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> [8] Title 5 United States Code (U.S.C.) §§ 1204(f) and 1206

Board operations are described in a set of powerpoints presented by Board officials: https://www.opm.gov/policy-data-oversight/employee-relations/training/presentationmspbpolicypractice.pdf.

Of the 1978 Reform Act, *Romero v. Dept. of Army*, 708 F.2d 1561, 1563 (10th Cir. 1983), explained:

> The Civil Service Reform Act of 1978 undertook to rewrite, revise and simplify the conglomeration of statutes under which the vast and unwieldy civil service system of the United States was managed.… [T]he complex rules and procedures often afforded a refuge for incompetent and inefficient employees and made it "almost impossible to remove those who were not performing."… The 1978 Act sought to remedy this condition by providing procedures whereby the agencies could more efficiently manage their operations, including the discipline or removal of employees who were found to be inefficient, incompetent, or otherwise

unfit for continuing service in the agency. To protect employees from an abuse of agency action, the MSPB, a neutral body, was created. Pursuant to established rules and regulations, the MSPB was authorized to conduct hearings to determine the validity of an agency's action affecting the tenure of a civil servant's employment.

The Supreme Court intoned, *United States v. Fausto*, 484 U.S. 439, 444–46, 108 S. Ct. 668 (1988):

> A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the "outdated patchwork of statutes and rules built up over almost a century" that was the civil service system, S. Rep. No. 95-969, p. 3 (1978), U.S. Code Cong. & Admin. News 1978, p. 2723. Under that pre-existing system, only veterans enjoyed a statutory right to appeal adverse personnel action to the Civil Service Commission (CSC), the predecessor of the MSPB. 5 U.S.C. § 7701 (1976 ed.). Other employees were afforded this type of administrative review by Executive Order. Exec. Order No. 11491, § 22, 3 CFR 874 (1966–1970 Comp.), note following 5 U.S.C. § 7301 (1976 ed.) (extending CSC review to competitive service employees). Still others, like employees in respondent's classification, had no right to such review. As for appeal to the courts: Since there was no special statutory review proceeding relevant to personnel action, *see* 5 U.S.C. § 703, employees sought to appeal the decisions of the CSC, or the agency decision unreviewed by the CSC, to the district courts through the various forms of action traditionally used for so-called nonstatutory review of agency action, including suits for mandamus, *see, e.g., Taylor v. United States Civil Service Comm'n*, 374 F.2d 466 (CA9 1967), injunction, *see, e.g., Hargett v. Summerfield*, 100 U.S. App. D.C. 85, 243 F.2d 29 (1957), and declaratory judgment, *see, e.g., Camero v. McNamara*, 222 F. Supp. 742 (ED Pa.1963). *See generally* R. Vaughn, *Principles of Civil Service Law* § 5.4, p. 5–21, and nn. 13–17 (1976) (collecting cases). For certain kinds of personnel decisions, federal employees could maintain an action in the Court of Claims of the sort respondent seeks to maintain here. *See, e.g., Ainsworth v. United States*, 185 Ct. Cl. 110, 399 F.2d 176 (1968).
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> Criticism of this "system" of administrative and judicial review was widespread. The general perception was that "appeals processes [were] so lengthy and complicated that managers [in the civil service] often avoid[ed] taking disciplinary action" against employees even when it was clearly warranted. S. Rep. No. 95-969, at 9, U.S. Code Cong. & Admin. News 1978, p. 2731. With respect to judicial review in particular, there was dissatisfaction with the "wide variations in the kinds of decisions… issued on the same or similar matters," *id*., at 63, U.S. Code Cong. & Admin. News 1978, p. 2785, which were the product of concurrent jurisdiction, under various bases of jurisdiction, of the district courts in all Circuits and the Court of Claims. Moreover, as the Court of Appeals for the District of Columbia Circuit repeatedly noted, beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational. *See Polcover v. Secretary of Treasury*, 155 U.S. App. D.C. 338, 341–342, 477 F.2d 1223, 1226–1228 (1973).
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> Congress responded to this situation by enacting the CSRA, which replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration. *See* S. Rep. No. 95-969, at 4. Three main sections of the CSRA govern personnel action taken against members of the civil service. In each of these sections, Congress deals explicitly with the situation of nonpreference members of the excepted service, granting them limited, and in some cases conditional, rights.
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> Chapter 43 of the CSRA governs personnel actions based on unacceptable job performance. It applies to both competitive service employees and members of the excepted service. 5 U.S.C. § 4301. It provides that before an employee can be removed or reduced in grade for unacceptable job performance certain procedural protections must be afforded, including 30 days' advance written notice of the proposed action, the right to be represented by an attorney or other representative, a reasonable period of time in which to respond to the charges, and a written decision specifying the instances of unacceptable performance. § 4303(b)(1). Although Congress extended these protections to nonpreference members of the excepted service, it denied them the right to seek either administrative or judicial review of the agency's final action. Chapter 43 gives only competitive service employees and preference eligible members of the excepted service the right to appeal the agency's decision to the MSPB and then to the Federal Circuit. § 4303(e).
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> Chapter 23 of the CSRA establishes the principles of the merit system of employment, § 2301, and forbids an agency to engage in certain "prohibited personnel practices," including unlawful discrimination, coercion of political activity, nepotism, and reprisal against so-called whistleblowers. § 2302. Nonpreference excepted service employees who are not in positions of a confidential or policymaking nature are protected by this chapter, § 2302(a)(2)(B), and are given the right to file charges of "prohibited personnel practices" with the Office of Special Counsel of the MSPB, whose responsibility it is to investigate the charges and, where appropriate, to seek remedial action from the agency and the MSPB. § 1206.
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> Chapter 75 of the Act governs adverse action taken against employees for the "efficiency of the service," which includes action of the type taken here, based on misconduct. Subchapter I governs minor adverse action (suspension for 14 days or less), §§ 7501–7504, and Subchapter II governs major adverse action (removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less), §§ 7511–7514. In each subchapter, covered employees are given procedural protections similar to those contained in Chapter 43, §§ 7503(b), 7513(b), and in Subchapter II covered employees are accorded administrative review by the MSPB, followed by judicial review in the Federal Circuit. §§ 7513(d), 7703. The definition of "employee[s]" covered by Subchapter II (major adverse action) specifically includes preference eligibles in the excepted service, § 7511(a)(1)(B), but does not include other members of the excepted service. The Office of Personnel Management is, however, given authority to extend coverage of Subchapter II to positions in the excepted service that have that status because they have been excluded from the competitive service by OPM regulation. § 7511(c).

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

> The CSRA constituted the first comprehensive reform of the federal civil service system since passage of the Pendleton Act in 1883. A product of the nineteenth century progressive movement, the Pendleton Act had sought to replace the 'spoils system,' under which the President could dispense federal jobs as rewards for political patronage, with a 'merit system' that would base selection and promotion of most civil servants on competence. The Pendleton Act also established a Civil Service Commission charged both with protecting the merit principle and with managing the federal bureaucracy.
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> In subsequent years, an increasing proportion of the federal workforce was classified in the competitive service. As the Commission's management functions grew more complex, it was also compelled to elaborate a wide variety of merit system rules without guidance from Congress. Delay and inefficiency increasingly characterized the procedures required to discipline unsatisfactory employees. At the same time, several celebrated episodes suggested that efforts by employees to call attention to government waste and fraud were often inhibited by the threat of retaliatory personnel actions. The dual responsibility of the Civil Service Commission for management and merit protection seemed to pose a barrier against mitigating these problems.
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> In 1978, these and other concerns led President Carter to propose legislation that would significantly restructure the civil service. Among the legislative objectives identified by the President in his message to Congress were:
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> > To strengthen the protection of legitimate employee rights;
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> > To provide incentives and opportunities for managers to improve the efficiency and responsiveness of the Federal Government; [and]
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> > To reduce the redtape and costly delay in the present personnel system[.]
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> Another important purpose of the proposals, as noted by the legislation's Senate manager, Senator Ribicoff, was to '[p]rovide[ ] new protections for employees who disclose illegal or improper Government conduct.'
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> As enacted, the CSRA includes several basic features intended to achieve these goals. Title I of the Act consists of the first statutory expression of the merit system principles that have evolved since the creation of the Civil Service Commission. In addition to detailing the requirement that personnel decisions rest on evaluations of competence, Title I announces a statutory policy of protecting whistleblowers.…
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> Title I also defines a variety of 'prohibited personnel practices' including actions taken in retaliation for whistleblowing, section 2302(b)(8), and those taken as a reprisal 'for the exercise of any appeal right granted by any law, rule, or regulation,' section 2302(b)(9).
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> Title II of the CSRA abolishes the Civil Service Commission and replaces it with two new agencies, the MSPB and the Office of Personnel Management (OPM). The OPM, headed by a single director responsible to the President, supervises the administration of the civil service. The MSPB, an independent agency consisting of three members, is charged with protecting the merit system principles and adjudicating conflicts between federal workers and their employing agencies. *See* sections 1201–05. The Act also establishes…an independent Special Counsel responsible for investigating and prosecuting prohibited personnel practices, employment discrimination, unlawful political activities, arbitrary withholding of information requested under the Freedom of Information Act, and any other violations of law within the federal civil service.…

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

> For comprehensive histories of the American civil service, *see* P. Van Riper, *History of the United States Civil Service* (1958); A. Hoogenboom, *Outlawing the Spoils: A History of the Civil Service Reform Movement*, 1865–1883 (1961); C. Fish, *The Civil Service and the Patronage* (1904). The modern civil service was born with the passage of the Civil Service Act of 1883 (Pendleton Act), ch. 27, 22 Stat. 403 (codified as amended in scattered sections of 5, 18 & 40 USC). That Act was precipitated by public disapproval of the "spoils system," a civil service policy intended to facilitate the removal of inefficient government personnel, but which instead resulted in wholesale turnovers of personnel in many parts of the government after every election defeat. *See* Note, *Federal Employment The Civil Service Reform Act of 1978—Removing Incompetents and Protecting "Whistle Blowers,"* 26 Wayne L.Rev. 97, 98 (1979). The Pendleton Act set up a Civil Service Commission empowered to limit political pressures on jobholders and to promulgate rules on various personnel matters, including competitive examinations for positions. As originally passed, however, the Act covered only about 10% of government employees, created few limits on removal powers, and gave no procedural protections to employees. *See* Note, *supra*, at 99. Over the next several decades, attempts to remedy these defects rendered the procedures allowed federal employees to appeal adverse actions time-consuming and complex. *Id*. at 99–105. The CSRA attempted to solve these problems without sacrificing the procedural protections developed in the twentieth century.

See Manivannan v. Dept. of Energy, 42 F.4th 163 (3rd Cir. 2022) (describing scope of judicial review of actions affecting federal employees before and after the Reform Act).

The Board described its evolution in its "Congressional Budget Justification For Fiscal Year 2013":

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

Structural reforms accomplished by the Act were also described in *Atwell v. MSPB*, 670 F.2d 272, 278–79 (D.C. Cir. 1981). *Barnhart v. Devine*, 771 F.2d 1515 (D.C. Cir. 1985), considering the availability of mandamus jurisdiction to secure review of position classification, provides further extensive commentary on the evolution of the Reform Act and the role of the Special Counsel. *See Feds for Medical Freedom v. Biden*, 30 F.4th 503 (5th Cir. 2022) (dissent by Judge Barksdale) (rejecting suit for injunction against E.O. 14043, mandating Covid-19 vaccinations for executive branch employees, subject to medical and religious exceptions; discussing the comprehensive review scheme of the CSRA and the adequacy of administrative challenges through MSPB or OSC of personnel actions resulting from failure to accept vaccination, with availability of review of constitutional issues in the Federal Circuit); *cf. Polcover v. Secretary of Treasury*, 477 F.2d 1223 (D.C. Cir. 1973) (criticizing pre-Reform Act system of duplicative judicial review of Civil Service Commission decisions by federal district and appellate courts). For discussion of the effective date of the Reform Act and for construction of the CSRA "savings provision," § 902 of the Statute, refer to *Mathis v. Dept. of Air Force*, 8 MSPR 19, 22–25 (1981); *see* 5 CFR 1201.191(a) (2025). For a history of the legislation creating civil service protections for employees before the Reform Act, particularly the Lloyd-LaFollette Act and the Pendleton Act, consider *Arnett v. Kennedy*, 94 S. Ct. 1633 (1974).

The Whistleblower Protection Act of 1989 (WPA) significantly amended the Reform Act by requiring more aggressive prosecution by the Office of Special Counsel of cases involving the prohibited personnel practice of whistleblowing reprisal and by creating an "Individual Right of Action" appeal to MSPB for employees victimized by whistleblowing reprisal. Whistleblower protections were extended and redefined by the 2012 Whistleblower Protection Enhancement Act, discussed in Chapter 16. [Refer to Chapter 16, "Whistleblowing Reprisal," for detailed discussion of the WPA and later whistleblowing legislation.]

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

> Before Congress enacted the Civil Service Reform Act in 1978, a jumble of statutes and executive orders governed the resolution of federal employees' complaints about the workplace. The Act replaced this patchwork with a coherent system of administrative and judicial review. The new system handles all "personnel actions," a capacious term defined to include appointments, transfers, any "disciplinary or corrective action," "any…significant change in duties, responsibilities, or working conditions," and much else besides. 5 U.S.C. § 2302(a)(2). The extent of available review turns on the severity of the personnel action and the rank of the employee.
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> Generally speaking, the Act divides covered actions into two categories: adverse actions and prohibited personnel practices. *See Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.). Adverse actions are the most serious the government may take against its employees. For administrative law judges, these include removal, suspension, reduction in grade, reduction in pay and some furloughs. 5 U.S.C. § 7521. The Act entitles an employee facing an adverse action to a formal hearing before the Merit Systems Protection Board and if necessary an appeal to the Federal Circuit. *Id*. §§ 7521, 7703.
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> Prohibited personnel practices are less serious than adverse actions. The Act defines this category broadly. It includes violations of "any law, rule, or regulation implementing, or directly concerning,…merit system principles," *id*. § 2302(b)(12), which in turn entitle employees to "fair and equitable treatment in all aspects of personnel management," to insist upon "proper regard for…constitutional rights," and to prohibit "arbitrary action," *id*. § 2301(b). An employee faced with a prohibited personnel practice must first complain to the Office of Special Counsel. If the Special Counsel concludes that "there are reasonable grounds to believe that a prohibited personnel practice has occurred," he *must* report his conclusion to the agency. *Id*. § 1214(b)(2)(B). If the agency fails to take corrective action, the Special Counsel *may* refer the case to the Merit Systems Protection Board (from which the employee may appeal to the Federal Circuit). *Id*. §§ 1214(b)(2)(C), 1214(c). But if the Special Counsel concludes that the complaint lacks merit, or if he declines to refer the case to the Board, the employee is out of luck. A court may not review the Special Counsel's decisions unless the Counsel "has declined to investigate a complaint at all." *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 493 (6th Cir. 2011).
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> This description does not begin to capture the Act's many intricacies. Anyone who reads through the Act will encounter more types of covered actions and more channels of administrative or judicial review. Even within the category of prohibited personnel practices, the Act makes some exceptions. If an employee alleges discrimination because of race or sex, for example, the Act allows him to bypass the Special Counsel procedure and to sue in district court under the civil rights laws. 5 U.S.C. § 2302(d). Or if an employee alleges retaliation for whistleblowing or "for refusing to obey an order that would require [him] to violate a law," the Act allows him to bypass the Special Counsel procedure and to go straight to the Board. *Id*. §§ 1221(a), 2302(b)(9).

After more than four decades of its existence, opinions on Board operations are mixed. Agencies find the Board supportive of their decisions but not sufficiently supportive to avoid statutory initiatives—including those involving the departments of Homeland Security, Defense, and, most recently, Veterans Affairs—that, at least for a time, either pull a whole range of actions away from Board review or considerably reduce the Board's discretion to affect actions appealed by employees of those agencies. Uncomfortable with the Board's traditional deference to managerial choices of penalties in adverse actions, unions avoid the Board when possible, entrusting cases of significance to labor arbitrators who traditionally require greater justification than the Board for severe disciplinary penalties. Those employees who cannot avoid the Board use it, but the Board has no supportive constituency among federal employees. Some appellants believe the Board favors procedural defaults against them. Few agencies suffer the same fate, but agencies do not seek relief from the Board and agencies are almost always represented by counsel. Appellants are unrepresented by counsel in about 60% of the Board's docket.

To its credit, the Board, at the urging of the Federal Circuit, now requires its administrative judges (AJs) to inform appellants (many of whom are unrepresented) of what they are supposed to demonstrate to establish that an appeal was timely filed, that the appeal is within the Board's jurisdiction and, for appeals timely filed and properly before the Board, what proof is required to establish elements of the case. The Board expedites litigation through electronic filing procedures and resolution through settlement and mediation programs discussed in Chapter 20.

Over the many years of its existence, the Board may focus on one area of the law, then another. Disability discrimination issues, complexities of government

reorganizations, analysis of reprisal claims, the impact of government fiscal measures on the civil service, due process, penalty analysis, and national security concerns, have all had their months or years of development through case law—that focus magnified on occasion by a leading decision of the Federal Circuit or Supreme Court that changes the direction of the law. And, too, because Board members are political appointees, have limited terms, and varying backgrounds, the perspective of Board members, as reflected by their decisions, changes over time. Dissenting opinions from one year may become the majority position in another. *See Merit Systems Protection Board: A Legal Overview* (Congressional Research Service, March 25, 2019). [Refer to the Board's website presentation, *An Introduction to the Merit Systems Protection Board,* for a powerpoint outline of the history and some basic law concerning charges and penalties adjudicated by the Board, at http://www.mspb.gov/media/introtomspb/Intro%20to%20MSPB%20Oct%2019%202011.pdf; a video presentation is at https://www.mspb.gov/appeals/training/introtomspbvideo.htm.]

B. OFFICE OF SPECIAL COUNSEL

Before reaching the organization, jurisdiction, and procedures of the Board, we comment on the Office of Special Counsel, whose operations are described throughout Chapter 16, "Prohibited Personnel Practices." OSC receives allegations of statutorily-defined prohibited personnel practices and the Uniformed Services Employment and Reemployment Rights Act of 1994, investigates those allegations or refers them to agencies for further investigation, may seek stays from MSPB of prohibited personnel actions or threats of actions, and it may seek corrective action before the Board of prohibited personnel practices and prosecute to the Board disciplinary cases against federal employees alleged to be responsible for prohibited personnel practices or Hatch Act (political activity) violations. OSC attempts to settle some cases with agencies before they advance to MSPB litigation.

The 2015 Office of Special Counsel Annual Report summarizes its mission:

> OSC was established on January 1, 1979, when Congress enacted the Civil Service Reform Act (CSRA). Under the CSRA, OSC at first operated as an autonomous investigative and prosecutorial arm of the Merit Systems Protection Board (MSPB or the Board). Congress directed that OSC would: (1) receive and investigate complaints from federal employees alleging prohibited personnel practices; (2) receive and investigate complaints regarding the political activity of federal employees and covered state and local employees, and provide advice on restrictions imposed by the Hatch Act on political activity by covered government employees; and (3) receive disclosures from federal whistleblowers about government wrongdoing. Additionally, OSC, when appropriate, filed petitions for corrective and or disciplinary action with the Board in prohibited personnel practices and Hatch Act cases.
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> OSC is an independent federal investigative and prosecutorial agency. Its primary mission is to safeguard the merit system in federal employment by protecting covered employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing. The agency also supports covered federal employees and applicants by providing a secure channel for disclosures by them of wrongdoing in government agencies; enforces and provides advice on Hatch Act restrictions on political activity by government employees; and enforces employment rights secured by USERRA for federal employees who serve their nation in the uniformed services.

The Special Counsel, appointed by the President and confirmed by the Senate, serves as an investigator and prosecutor of statutorily-defined prohibited personnel practices. *Layser v. USDA*, 8 MSPR 381, 383 (1981) (the relation of OSC and the Board was analogized to that of a prosecuting attorney to a court). OSC also serves as a government-wide clearinghouse referring to agency inspectors general allegations received by OSC of agency mismanagement, waste, fraud, violations of law, and other abuses. Hatch Act prosecutions are exclusively the province of OSC. *See Sims v. District of Columbia Gov't*, 7 MSPR 45, 48 (1981); *Special Counsel v. DeMeo*, 77 MSPR 158, 163–71 (1997) (discussing the evolution of the Hatch Act and statutory amendments). OSC assists in review or resolution of USERRA disputes and prosecution of Hatch Act complaints. [More information on OSC organization, functions, and the processing of prohibited personnel practice allegations is in Chapter 16, "Cases Brought by OSC"; "Uniformed Service Employment and Reemployment Rights Act" is discussed in this chapter.]

The Board summarized OSC's functions, *Marren v. DOJ*, 51 MSPR 632, 637 n.4 (1991):

> The functions of the OSC are: To conduct prohibited personnel practice investigations to see whether employee complaints of improper management actions are valid; to use the results of these investigations to seek corrective action from the agency and, if the agency fails to take the action, from the MSPB; to seek injunctive relief, known as a stay, that will restore an employee who alleges to be a victim of prohibited personnel practice to his or her job while a corrective action petition is being prepared or being considered; to prosecute disciplinary action complaints against Federal employees who engage in prohibited personnel practices, who violate orders of the MSPB, or who violate statutes related to the merit system, such as the Hatch Act; and to screen whistleblowing disclosures and order agency investigations of the substance of the allegations. *See* 5 USC 1206.

According to the FY 2023 OSC Budget Justifications, the organization's budget is about $30,000,000 and it operates with about 140 employees. OSC acts with autonomy. It has its own budget and offices. OSC is neither controlled by the Board nor is it a component of the Board's organization, although when it brings cases before the Board it must follow Board regulations. OSC became an independent agency, with an independent budget, through Pub. L. No. 101-12 (April 10, 1989). OSC operates independently from agencies that it monitors. OSC is not required to provide the agency-employer a chance to investigate charges before OSC brings a disciplinary action against an employee. *Special Counsel v. Filiberti*, 27 MSPR 498, 506 (1984). The Board does not control OSC investigatory procedures, *In re Tariela*, 1 MSPR 155, 157 n.5, 1 MSPB 151 (1979):

> [T]he Special Counsel acts under his own statutory authority, 5 USC 1206, 1208. The Board has no authority to supervise or direct the manner in which the Special Counsel conducts his investigations or prepares his stay petitions. The relationship of the Special Counsel to the Board may best be analogized to that of a prosecuting attorney to a court.…

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

> (1) The Special Counsel is authorized to appear as *amicus curiae* in any action brought in a court of the United States related to section 2302(b)(8) or (9), or as otherwise authorized by law. In any such action, the Special Counsel is authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) or (9) and the impact court decisions would have on the enforcement of such provisions of law.
>
> (2) A court of the United States shall grant the application of the Special Counsel to appear in any such action for the purposes described under subsection (a).

OSC's 2023 Budget Justification provides an organizational snapshot:

> *Office of Special Counsel's Internal Organization*
>
> OSC is headquartered in Washington, D.C. We also have a significant staffing presence in Dallas, Detroit, and Oakland, formerly the locations of three physical offices whose leases OSC decided not to continue in FY 2021, following an efficiency review. As a result, OSC continues to maintain a small, physical office in Oakland for Field Office leadership, and both Dallas and Detroit continue to operate as virtual Field Offices. The agency includes several program and support units described below:
>
> *Immediate Office of Special Counsel (IOSC)*
>
> The Special Counsel and his immediate staff are responsible for policy-making and the overall management of OSC, including supervision of each of OSC's programmatic areas. This office encompasses management of the agency's congressional liaison and public affairs activities.
>
> *Office of General Counsel*
>
> This office provides legal advice and support in connection with management and administrative matters, defense of OSC interests in litigation, ethics programs, policy planning, and development.
>
> *Case Review Division (CRD)*
>
> This division serves as the initial intake point for all PPP and disclosure allegations. CRD screens all new allegations to ensure that PPPs and disclosures are directed to the appropriate OSC component. CRD also closes allegations that are duplicative, filed with MSPB, outside of OSC's jurisdiction, or untimely.
>
> *Investigation and Prosecution Division (IPD)*
>
> The Investigation and Prosecution Division is comprised of attorneys and investigators at OSC's headquarters and three field offices. IPD receives PPP allegations from the Case Review Division and determines whether the evidence is sufficient to establish that a violation has occurred. If the evidence is insufficient, the matter is closed. If the evidence is sufficient, IPD decides whether the matter warrants corrective action, disciplinary action, or both. IPD works closely with OSC's Alternative Dispute Resolution Unit in appropriate cases. If a meritorious case cannot be resolved through negotiation with the agency involved, IPD may bring an enforcement action before the MSPB.
>
> *Disclosure Unit (DU)*
>
> This unit receives and reviews disclosures from federal whistleblowers. DU recommends the appropriate disposition of disclosures, which may include referral to the head of the relevant agency to conduct an investigation and report its findings to the Special Counsel, informal referral to the Office of Inspector General (OIG) or General Counsel of the agency involved, or closure without further action. Unit attorneys review each agency report of investigation to determine its sufficiency and reasonableness. The Special Counsel then sends the report, along with

any comments by the whistleblower, to the President and appropriate congressional oversight committees. OSC also posts the report and whistleblower comments in its public file.

Retaliation and Disclosure Unit (RDU)

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

Hatch Act Unit (HAU)

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

USERRA Unit

OSC enforces the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for civilian federal employees. OSC may seek corrective action for violations of USERRA and provides outreach and education to veterans and agencies on their rights and responsibilities under USERRA.

Alternative Dispute Resolution Unit (ADR)

This unit supports OSC's operational program units, mediating appropriate matters where both the affected employee and agency consent to ADR. ADR is equipped to negotiate global settlements of OSC and other claims, for example resolving PPP and Title VII discrimination claims stemming from the same personnel action.

Diversity, Outreach and Training

This unit facilitates coordination with and assistance to agencies in meeting the statutory mandate of 5 U.S.C. § 2302(c). This provision requires that federal agencies inform their workforces, in consultation with OSC, about the rights and remedies available to them under the whistleblower protection and PPP provisions of the Whistleblower Protection Act. OSC designed and implemented a five-step educational program, the Section 2302(c) Certification Program. Unit staff also provide related training government-wide. OSC provides formal and informal outreach, including making materials available on the agency website. This unit also helps develop and implement training programs for OSC's staff, in order to meet compliance requirements.

Operations Division

The Operations Division manages OSC's budget and financial operations and oversees the agency's technical, analytical, records, and administrative needs. Component units are the Budget and Finance Office, Human Capital Office, Administrative Services Office, Information Technology Office, and Office of the Clerk. Procurement operations as well as travel are included under the Budget and Finance Office.

The Clerk's Office leads several functional areas, including Freedom of Information Act (FOIA), Privacy Act, Controlled Unclassified Information, and records management. In FY 2021, the Clerk's Office processed 169 FOIA closures, which reduced the FOIA backlog by 33 percent from the end of FY 2020. At the end of FY 2021, OSC's FOIA backlog stood at only 14. In addition, OSC has not received any new lawsuits.

OSC's Privacy Program also has published a system of records notice (SORN) for reasonable accommodations, and finalized the agency's regulations, which are pending approval with OMB. Further, in FY 2021, the Records Management team also successfully transferred nearly 3,800 cases to the National Archives and Records Administration (NARA) for the preservation and documentation of government records. Lastly, in terms of records management, OSC transitioned to paperless recordkeeping as of February 2021.

Information on OSC operations, procedures, and organization is found at its website, www.osc.gov. OSC regulations are at 5 CFR Parts 1800–50.

II. BOARD ORGANIZATION AND ADMINISTRATIVE OPERATION

The 1978 Civil Service Reform Act created a group of administrative agencies: the MSPB, the Federal Labor Relations Authority, the Office of Special Counsel, and the Office of Personnel Management. An associated presidential reorganization plan transferred to EEOC from the Civil Service Commission (replaced by the Office of Personnel Management) responsibility for regulating and adjudicating federal sector EEO complaints. The MSPB—the focus of this *Guide*—is an independent federal agency in the Executive Branch. It is not a court. Its decisions may be reviewable in courts established under Article III of the federal constitution. *Parker v. DLA*, 1 MSPR 505, 518, 1 MSPB 489 (1980), described the Board's adjudicatory functions:

> First, the Board is not a Court of Appeals but rather is itself an administrative establishment within the Executive Branch, albeit one exercising independent quasi-judicial functions. It is the Board's decision, not the agency's, that constitutes an "adjudication," 5 USC 1205(a)(1), which must be articulated in a reasoned opinion providing an adequate basis for review by a Court of Appeals.… The mere fact that the agency's decision is appealable to the Board does not limit the Board's scope of review to that of an appellate court, nor does it transform the agency's decision into one that must meet adjudicatory standards which will facilitate appellate review. In enacting the Civil Service Reform Act, Congress found it already difficult to take and sustain adverse personnel decisions in the federal bureaucracy; requiring agency managers to write judicial opinions justifying each such decision would make them well nigh impossible.

Cases, often referred to as appeals, come to the Board in several ways. Most cases originate as appeals from actions taken against employees or directly affecting their interests, e.g., removals, long-term suspensions, demotions, personnel actions resulting from reductions in force, and determinations by the Office of Personnel Management concerning annuity entitlements. Some appeals come to the Board after first traversing another adjudication system, examples being actions that are otherwise within the Board's jurisdiction but are first considered through the agency EEO process or through a collectively bargained grievance and arbitration process. Other cases start out as complaints rather than as appeals from agency actions: disciplinary or corrective action complaints by OSC; complaints against administrative law judges by their employing agencies; Individual Right of Action cases brought by whistleblowers who assert the retaliatory loss of employment or its benefits; allegations by individuals with military service who complain of discrimination because of their past or present military service or as to denial of proper restoration rights following military service; and claims by veterans protesting the loss or denial of an employment benefit or preference earned through past military service and conferred by statute.

The Board summarizes its operations in its FY 2022 *Congressional Budget Justification*:

> 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, 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 without interruption. 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 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 of the process, and can result in effective resolution of a case. In addition, resolving a case through ADR procedures can save time and reduce costs to the appellant, their agency, MSPB, and Government-wide as compared to the more formal regulations and procedures involved with adjudication on the merits.

Throughout the *Guide*, reference is made to "appeals" brought by individuals. But other terminology creeps into our text because other terms were applied in years past that distinguished appeals (challenges to adverse actions or reductions in force) and petitions for remedial action (Individual Right of Action cases brought by protected whistleblowers, and VEOA or USERRA cases brought to protect individuals against discrimination or loss of employment benefits based on their military status or veterans preference entitlements), a distinction discussed in *Bodus v. Dept. of Air Force*, 82 MSPR 508, 516 ¶¶ 15–16 (1999). Now, unless the Board is considering a complaint by the Office of Special Counsel seeking disciplinary or corrective action, an agency complaint seeking disciplinary action against an administrative law judge, a request for review of an arbitrator's award, or a specialized proceeding involving review of employment practices, we will speak of appeals in this *Guide*.

Most, but not all, of the Board's cases are appeals initially considered and heard by administrative judges (AJs) in regional and field offices throughout the nation. When the Board was first established, the Board's regional adjudicators, who are classified as attorney examiners, were called presiding officials. Times changed. Now the attorney examiners are titled administrative judges, and we will refer to them as AJs or judges in this *Guide*. The AJ's decision, known as an "initial decision," may be appealed through a "petition for review" (PFR) to the Board's headquarters, a process described in Chapter 7. The PFR triggers a record review by attorneys at the Board's headquarters offices in Washington. That review unit is known as the Office of Appeals Counsel (OAC). OAC recommendations are forwarded to the three Board members, each of whom has a small staff of attorneys who may review those recommendations and who advise the Board member concerning disposition of the case. Supplied with the recommendations of OAC and his or her own staff, each Board member votes on the disposition of a petition for review. The majority disposition of the Board members results in a decision by the Board constituting, in most cases, the final administrative determination of the Board. The Board may, however, decide that further work on the case is required by the AJ and, when that occurs, the Board remands the appeal to the regional or field office with instructions for the AJ to follow in the subsequent remand adjudication. Some cases, generally complaints by OSC, complaints against administrative law judges, and requests for review of arbitration awards (a process described in Chapter 7), originate at the Board headquarters establishment rather than at the regional or field office level. OSC complaints and agency complaints against ALJs are referred by the Board to an administrative law judge (ALJ), whose decision is subject to review by the Board in the same manner as an initial decision by an AJ. Board final decisions may be reviewed, depending on the nature of the case and the nature of the claims or defenses asserted, by EEOC, the United States Court of Appeals for the Federal Circuit, in U.S. district courts, or on appeal from a district court or in whistleblowing cases in either the Federal Circuit or in a regional circuit court of appeals. To describe the judicial review scheme as complex is no overstatement. It is discussed in Chapter 24. A graphical overview of the MSPB and judicial review process is provided by the Board. https://www.mspb.gov/appeals/files/Review_Process.pdf.

By the numbers, in FY 2020, 5,265 cases were decided by AJs in the regional and field offices; for FY 2019, 5,134 cases were decided by AJs. In FY 2013, 6,340 cases were decided in the regional and field offices, compared with 6,523 cases in FY 2012. During FY 2016, the Board decided 1,154 petitions for review. During FY 2014, 876 petitions for review were decided by the Board. 952 cases were decided through petitions for review or other mechanisms at Board headquarters in FY 2013, compared with 1,024 cases decided in FY 2012. Comprising a politically appointed and senatorially confirmed chair, vice chair, and a member, the Board lost its quorum in January 2017. The quorum was restored in March 2022. In the interim, there were no petitions for review decided (or other decisions) at the Board headquarters level.

For FY 2020, about 42% of appeals at the regions involved adverse actions, 3% were performance cases or step-increase denials, and 11% of the docket involved Individual Right of Action (whistleblower) appeals. For FY 2013, 47% of the Board's appeals were adverse actions, followed by about 18% retirement-related matters, 8% VEOA and USERRA cases, 6% probationary terminations, and 2% performance cases. Of the regional docket, for FY 2020 the Board reported 48% of the appeals settled that were not dismissed. We are informed that in FY 2020, 937 appeals were adjudicated on the merits in the regions. With 60 or so AJs, that is about a couple appeals a month per AJ that survive to the point of hearing and adjudication. AJs spend a lot of time considering timeliness or jurisdictional issues that may lead to dismissals, along with discovery disputes or other procedural issues, and many AJs are active in settlement efforts.

Of the 1,022 petitions for review decided in FY 2016, 154 were dismissed, 11 settled, 702 were denied, 131 were granted, and 24 were denied with further analysis. About 67% of those petitions were denied, 2% settled, and the rest were either granted, dismissed for procedural reasons, or the petitions were denied but the Board reopened the cases to modify the case analysis but not the result. When petitions were granted or cases reopened, the most common modification in the outcome of the case was a remand to the AJ for further consideration. As a result of the loss of a quorum, in early 2017 the Board stopped issued final decisions from its central office (based on petitions for review from initial decisions of AJs). The absence of a quorum persisted through March 2022. At the beginning of 2022, with PFRs arriving at the Board at a clip of 50–60 per month, there were about 3,500 PFRs pending—four years of accumulated petitions for review. (The regions have continued issuing initial decisions at their usual rate on their usual sources of appeals.)

The Federal Circuit reviews MSPB decisions in all cases other than those involving discrimination allegations (except for a few whistleblower reprisal cases that are taken to regional circuit appellate courts). For FY 2013, the court had 1,259 appeals. Of those about 213 were from the MSPB—about 17% of the docket. The percentage of the Circuit's cases involving MSPB appeals decreases over time. For FY 2020, 130 MSPB cases were taken to the Circuit, less than 10% of that court's total new cases—but that number is below what would be expected because of the backlog of PFRs undecided at the Board resulting from the lack of a quorum in 2017 and continuing through March 2022. The court's chart of appeals filed though September of 2023 shows an increase in appeals from the Board, up to about 230, or 16% of the docket. Of the docketed cases, for FY 2012, but 7% resulted in remands or reversals. That is an affirmation rate of more than 90%. Many cases are dismissed because the filing fees is not paid, required documents are not filed, or the case is in the wrong court (generally cases with EEO claims; they are usually transferred to district courts). [Refer to Chapter 24 for Federal Circuit and judicial review of Board decisions.]

Board jurisdiction is statutory, although the statutory scheme permits the Board to review some cases arising under regulations of the Office of Personnel Management. Board regulations governing adjudication are at 5 CFR Parts 1200, 1201, 1203, 1208, 1209, and 1210, discussed throughout this *Guide*. The Federal Rules of Evidence and the Federal Rules of Civil Procedure are occasionally referred to by the Board, but they are not binding on the Board. The Board describes its appellate processes in "Appellant Questions and Answers," http://www.mspb.gov/appeals/appellantqanda.htm, and "Information sheets" on various types of Board appeals and procedures are on the Board website. http://www.mspb.gov/appeals/infosheets.htm. Regulations governing the conduct of open and closed Board meetings ("Sunshine Act") are at 5 CFR 1206.7 (2025).

A. IMPARTIAL ADJUDICATION

The Board, although composed of political appointees—who review initial decisions of nonpolitical AJs—is an adjudicator attentive only to the record and the arguments of parties, intervenors, and *amici*. Member Susanne Marshall emphasized the importance of due process, rather than the political process, in a concurring opinion in *Azdell v. OPM*, 87 MSPR 133, 172–73 ¶¶ 1–5 (2000), involving congressional correspondence to the Board during litigation over the validity of a testing scheme applied to candidates for ALJ positions:

> While I agree with the Opinion and Order's result and rationale, I write separately to express my great concern over a procedural issue that arose in this case. While the petition for review in this appeal was pending before the Board, two members of Congress directed unsolicited letters to then-Chairman Ben Erdreich, expressing their opinions on the merits of this appeal. The Office of the Clerk of the Board placed those letters into the official record, served the letters on the parties to this appeal, and provided the parties with an opportunity to respond to them.
>
> These letters are troubling for several reasons. First, these submissions were not made in accordance with the Board's procedures. Our regulations provide a structured system for enabling interested persons or organizations to become parties to, or participants in, Board appeals at different stages of the proceedings, including entering at the petition for review stage of those appeals. 5 CFR §§ 1201.22, 1201.25, 1201.34, 1201.114. Such parties, intervenors, or amici may participate in an appeal in accordance with the rules governing a hearing, and the submission of evidence and argument, including the requirement of serving submissions on all of the parties. 5 CFR §§ 1201.26(b)(2), 1201.114(h). These procedures produce the record upon which the Board's decision must rest exclusively. 5 CFR §§ 1201.54(e) [now 1201.53(e)], 1201.58 [now 1201.59], 1201.114(i).
>
> The Congressional letters at issue do not satisfy any of these requirements. Further, while those submissions may not have technically violated the Board's prohibitions against *ex parte* communications, because the Congressmen do not meet the regulatory definition of an "interested party," these letters directed solely to our former Chairman concerning

the merits of a pending appeal certainly challenge the spirit of the *ex parte* prohibition. 5 CFR §§ 1201.101–1201.103.

More troubling, these letters raise the specter of impermissible political influence, that could undermine the perception of a full, fair, and impartial adjudication, which is the cornerstone of the employee rights we protect. *See Frampton v. Department of the Interior*, 811 F.2d 1486, 1489 (Fed. Cir. 1987). Congress created the Board as an independent quasi-judicial body with the responsibility of ensuring that all Federal agencies follow Federal merit systems practices. *See* 5 CFR § 1200.1. To accomplish this mandate, Congress dictated that the Board be composed of three members, all appointed by the President, with the advice and consent of the Senate, and each serving an independent seven-year term. Congress further provided that not more than two of the Board members could be adherents of the same political party, and that a Board member could be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 5 USC §§ 1201, 1202. Congress chose this structure to insulate the Board from political pressure and to avoid violations of the merit principles. S. Rep. No. 95-969, at 6–7 (1978), *reprinted in* 1978 USCCAN 2723, 2728–29.

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

Board decisions occasionally provoke congressional comment. The Board deems itself decisionally unaffected by such critique, *Special Counsel v. Starrett*, 28 MSPR 372, 375 (1985):

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

But, we are told, the Board may weigh practical and public policy considerations in reaching its decisions concerning interim relief. *See McLaughlin v. OPM*, 62 MSPR 536, 555 (1994); *cf. Confederacion De Asociaciones Agricolas v. United States*, 32 F.4th 1130 (Fed. Cir. 2022) (appeal from Trade Court: considering degree of permissible political influence on agency decisionmaking).

1. *De Novo* Review of Agency Actions

The Board reviews agency actions for their correctness under law, rule, regulation, and Board and judicial precedent reviewed in our *Guide*. That means the agency must prove its case—the correctness of its decision—when it has the burden of proof, and when the appellant has the burden of proof, the same rule applies. The Board weighs the evidence before it rather than assessing whether the party with the burden of proof made a reasonable assessment of the facts (with the exception of whistleblowers' disclosures, measured under a reasonable belief standard, discussed in Chapter 16). Board review is *de novo* (albeit deferential to agencies in performance-based actions, discussed in Chapter 12, and deferential to agency penalty determinations, discussed in Chapter 10, when adverse action charges are proved).

The *de novo* nature of Board adjudication was summarized, *Gagliardo v. Dept. of Transp.*, DC-0752-15-0117-I-1 (NP 1/13/2023):

> Contrary to the appellant's assertion, the Board need not consider the evidence an agency had before it when it proposed or effected an action because a Board appeal is a *de novo* review of the agency's evidence, and the Board will decide whether that evidence supports the charge. *See Barrett v. Department of the Interior*, 54 M.S.P.R. 356, 365 (1992); *see also Jackson v. Veterans Administration*, 768 F.2d 1325, 1329 (Fed. Cir. 1985) (requiring a *de novo* determination of the facts in a Board appeal). Thus, to have its action sustained, the agency must present preponderant evidence before the Board. *See* 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(b)(1)(ii). The appellant has not, therefore, shown that the agency needed to show that the proposing and deciding officials had preponderant evidence in support of the action when they decided to take their respective actions. In any event, the thoroughness or lack of thoroughness of an agency investigation of alleged misconduct is not a proper basis for not sustaining an agency's charge. *Uske v. U.S. Postal Service*, 60 M.S.P.R. 544, 550 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995).

Although the Board may, or may not, defer to agencies' interpretations of their own regulations, the Board is bound by the precedential decisions of the Federal Circuit, its reviewing court, and by decisions of the Supreme Court. As to the latter class of decisions, *Adams v. DOD,* DC-0752-10-0741-I-1 (NP 3/4/2011), noted:

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

See Cobert v. Miller, 800 F.3d 1340, 1349 (Fed. Cir. 2015) (Judge Wallach concurring) (referring to Federal Circuit precedent: "The Board here was not empowered to reject controlling law."); *Fitzgerald v. Hampton*, 467 F.2d 755, 766 (D.C. Cir. 1972) (noting the quasi-judicial nature of hearings of the predecessor Civil Service Commission); *cf. Muego v. Dept. of Labor*, PH-3330-22-0069-I-1 (NP 8/16/2023) ("The Board's regulations reserve to it the authority to consider any issue in an appeal before it. *McClenning v. Department of the Army*, 2022 MSPB 3, ¶ 16; 5 C.F.R. § 1201.115(e). Thus, although not raised by the agency, we exercise our authority to consider whether the administrative judge erred by granting corrective action. "). [Refer to Chapter 24, "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts," and Chapter 4, "*De Novo* Hearing," and to Chapter 5, "*De Novo* Review."]

a. Deference to OPM Regulations

OPM regulations are of particular significance in cases involving reductions in force, suitability terminations, restoration rights for individuals who received workers compensation, probationers' terminations, and claims arising under the retirement laws. Annuity entitlement appeals constitute about 15% of the Board's docket. The retirement system, established by statute, is implemented by OPM regulations and by OPM decisions applying those statutes and regulations. The Board defers to OPM's regulatory scheme unless it is inconsistent with statute. [Retirement and restoration rights appeals are discussed in Chapter 17 and Chapter 18.]

At least through 2025, OPM regulations received deference if they reasonably apply statutes within the jurisdiction of OPM, as explained by *Fitzgerald v. DOD*, 80 MSPR 1, 10–11 (1998), involving regulations established by OPM to consider challenges to agency determinations concerning entitlement to law enforcement retirement status:

> The starting point of every case involving statutory construction must be the language of the statute itself. *Todd v. Department of Defense,* 63 MSPR 4, 7 (1994), *aff'd,* 55 F.3d 1574 (Fed. Cir. 1995). Where that language is clear, it must control absent a clearly expressed legislative intention to the contrary. *Id*. Where a statute is ambiguous, however, the interpretation of an agency charged with administration of the statute is entitled to deference. *DeJesus v. Office of Personnel Management,* 63 MSPR 586, 592 (1994), *aff'd,* 62 F.3d 1431 (Fed. Cir. 1995) (Table). As the Supreme Court held in *Chevron*, 467 U.S. at 843, where a statute is silent or ambiguous with respect to a specific issue, the question for a reviewing court is whether the agency's answer is based on a permissible construction of the statute. *See also Bain v. Office of Personnel Management*, 978 F.2d 1227, 1231 (Fed. Cir. 1992) (an agency's interpretation of a statute need not be the only reasonable one in order for it to survive a challenge).
>
> We agree with the assertion of the appellants on review and NTEU in its *amicus* brief that the FERS statute does not include a deadline for requesting a determination as to LEO status. Nevertheless, we do not read into the absence of such a deadline a congressional intent to allow such requests to be filed at any time. Nor do we find anything in the legislative history cited by legal counsel for the parties or amici that suggests Congress intended that there be no regulatory time limit for making requests for LEO retirement coverage or that there be a regulatory time limit different from that set forth in section 842.804(c). Although the appellants assert that under 5 USC § 8461(c), OPM shall adjudicate "all claims" under the provisions of chapter 84 administered by OPM, not just claims found to be timely by OPM, this provision does not necessarily prevent OPM from establishing regulatory time limits for filing such claims. "Adjudication" of a claim may include, for example,

a finding by OPM or the Board that the claim was untimely filed under a regulatory time limit. In short, we find that the statute is silent with respect to the establishment of a regulatory time limit for requesting a determination on LEO retirement coverage.

When the legislative delegation to an agency on a particular question is implicit, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. *Chevron*, 467 U.S. at 844. Here, Congress authorized OPM to prescribe regulations to carry out the provisions of 5 USC chapter 84 administered by OPM. 5 USC § 8461(g). Pursuant to this statutory authority, OPM promulgated 5 CFR § 842.804(c). *See* 57 Fed. Reg. 32,685, 32,689 (1992); 52 Fed. Reg. 2068, 2069 (1987). We may not, therefore, substitute our own construction of the statute for a reasonable interpretation by OPM.

See Lesko v. United States, 161 F.4th 1352 (Fed. Cir. 2025) (*en banc*) (dissent by Judges Stoll, Reyna, Cunningham and Stark) (applying recent Supreme Court decisions; deferring to OPM regulations implementing the Federal Employees Pay Act of 1945); *Aralar v. OPM*, 99 MSPR 118, 120–21 ¶ 7 (2005) ("OPM's interpretation of a statute that Congress charges it to administer, such as the retirement statute at issue here, is normally entitled to great deference…. However, the agency's interpretation is not entitled to deference where it conflicts with the plain language of the statute."); *Martin v. Dept. of Air Force*, 79 MSPR 380, 384 (1998) (deferring to OPM's interpretation of the Back Pay Act, a statute within OPM's administrative responsibility); *Pagum v. OPM*, 66 MSPR 599, 602 (1995) ("An agency's interpretation of a statute it is charged to administer is entitled to considerable weight, especially where there are no compelling reasons to conclude that such an interpretation is erroneous or unreasonable."); *Brown v. OPM*, 65 MSPR 380, 383–84 (1994) (the Board recites as to its deference to OPM: when Congress leaves a statutory gap for an agency to fill, there is an express delegation to the agency to elucidate the provision; if the agency exercises that authority, its construction should be given considerable weight; *post hoc* rationalizations by an agency will not create a statutory interpretation deserving of deference; the Board will not defer to OPM policy when it fails to provide meaningful guidance or substantial evidence of a consistent policy, either internally applied or publicly announced); *cf. Rogers v. OPM*, 83 MSPR 154, 157–58 ¶ 7 (1999) (restating the principles of statutory construction and administrative interpretation); *Bell v. OPM*, 79 MSPR 1, 5 (1998) ("The starting point for every case involving statutory construction must be the language of the statute itself"; "[w]here the statutory language is clear, it must control, absent a clearly expressed legislative intent to the contrary."); *Huizar v. OPM*, 19 MSPR 256, 258 (1984) (restating the rules governing the interpretation of statutory language with aids to construction and regard to the purpose sought by the legislation).

In what should have been a precedential decision, *Bennett v. OPM*, SF-0842-23-0375-I-1 (NP 2/24/2025), seemingly abandoned deference to OPM statutory interpretations as it remanded an appeal to an AJ to determine the meaning of a statute relating to service credit for time covered by a withdrawal of retirement contributions:

> After the administrative judge issued the initial decision, the U.S. Supreme provisions in title XIX of subtitle A of the NDAA, and the Court's decision in Court issued its opinion in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). In *Loper Bright*, the Supreme Court concluded that courts may not defer to agency rules and regulations interpreting statutes. 603 U.S. at 412–13. Instead, they must exercise "independent judgment." *Id*. at 412. An implementing agency's legal interpretation of a statute concerning an area within the agency's expertise may be persuasive to a court based on a variety of factors, including if it was issued contemporaneously with the statute and the agency has consistently followed the same interpretation. *Id*. at 385–88, 394, 402 (citing *Skidmore v. Swift & Co*., 323 U.S. 134, 137–40 (1944) (explaining that the weight a court will give the interpretation of an official of the statute he is charged with enforcing "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control")).
>
> In addition to the question of the weight to give OPM's temporal limit on the NDAA's amendment to 5 U.S.C. § 8424(a), statutory principles regarding retroactivity are at play here. *See Edwards v. Department of Labor*, 2022 MSPB 9, ¶¶ 31-33 (applying the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), to determine whether to give a statutory amendment retroactive effect), *aff'd*, No. 22-1967 (Fed. Cir. July 7, 2023). Here, 5 U.S.C. § 8424(a) is silent as to whether it applies to events occurring before its enactment. NDAA § 1904, which enacted the amendment to 5 U.S.C. § 8424(a), is also silent. Section 1904 was one of five provisions in subtitle A of title XIX of the NDAA. Three of those provisions provided that they were effective "on or after the date of enactment" which, as mentioned above, was October 28, 2009. Pub. L. No. 111-84, §§ 1901(c), 1902(b), 1903(b), 123 Stat. at 2615-16. In the remaining provision, Congress specified the dates of qualifying service. Pub. L. No. 111-84, § 1905(b), 123 Stat. at 2617-18. In sum, Congress's silence as to the scope of its amendment to 5 U.S.C. § 8424(a), its differing treatment of other provisions in title XIX of subtitle A of the NDAA, and the Court's decision in *Loper Bright* raise concerns regarding the weight the Board should accord to OPM's determination to exclude the appellant from the benefit of receiving service credit for his refunded FERS service. Because the record is not developed on this issue, we remand the case to the regional office for a determination. On remand, the administrative judge should advise the parties of the standards applicable to this matter under *Landgraf* and *Loper Bright* and provide the parties with an opportunity to present relevant evidence and argument.

See Logan v. DHS, 2025 MSPB 4 (2025) (citing *Loper Bright* to support diminished deference to OPM regulations).

Before 2025, deference to OPM interpretations was not unfettered, *Jeffrey v. OPM*, 28 MSPR 81, 85 n.6 (1985):

> While it is true that an agency's interpretation of a statute it must enforce or effectuate through the promulgation of regulations is generally entitled to substantial deference, the Board and the courts are not bound by such interpretation in all situations. *See, e.g., Obremski v. OPM and Merit Systems Protection Board,* 699 F.2d 1263 (D.C. Cir. 1983) (the court need not accept the agency's interpretation where it is poorly reasoned or not in accord with applicable law) and *Hastie v. Department of Agriculture*, [24 MSPR 64 (1984)] (the Board is not bound by OPM's interpretation where circumstances are sufficient to outweigh the deference otherwise due it). In the absence of supportive legislative history and for the reasons stated above, the Board declines to give OPM's view dispositive weight. *See Donaldson v. Department of Labor*, [27 MSPR 293 (1985)] (pursuant to 5 USC §§ 1205 and 7701, the Board retains final authority to decide all matters which properly come before it and to enforce compliance with its decisions despite OPM's administrative authorities).

[Refer to Chapter 24 "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts."]

b. Consideration of Agency Regulations

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

> FDIC argues that we exceeded the scope of our authority when we invalidated its minimum fitness regulations. According to FDIC, the Board's authority is limited to review of Office of Personnel Management (OPM) regulations, as provided in 5 U.S.C. § 1204(f). We disagree with FDIC that we invalidated its minimum fitness regulations. We also find unpersuasive FDIC's reliance on decisions that address the scope of the Board's original jurisdiction under section 1204(f), because this appeal arises under the Board's appellate jurisdiction.
>
> In *Jonson I*, we found that the adverse action was taken pursuant to regulations that FDIC promulgated without concurrence from OGE. *Jonson I*, 121 M.S.P.R. 56, ¶¶ 10, 16. Therefore, we found the regulations to be "not in accordance with law." *Id.*, ¶ 17 (citing 5 U.S.C. § 7701(c)(2)(C) (providing that an adverse action may not be sustained if it is "not in accordance with law")). We did not make a finding that the regulations were invalid.[5]
>
> [5] Although we stated in *Jonson I* that the minimum fitness regulations were "invalidly promulgated," we did not intend to infer by that statement that we were invalidating the regulations. *Jonson I*, 121 M.S.P.R. 56, ¶ 17.
>
> FDIC argues that our "authority to review regulations is limited to that which is provided by 5 U.S.C. § 1204(f)." (citing *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400 (2012); *Thompson v. Office of Personnel Management*, 87 M.S.P.R. 184 (2000); *Ramsey v. Office of Personnel Management*, 87 M.S.P.R. 98 (2000)). The Board has two types of jurisdiction, original and appellate. 5 C.F.R. § 1201.1. The Board's original jurisdiction includes, in pertinent part, review of rules and regulations issued by OPM to declare such provisions invalid on their face or invalidly implemented by any agency. 5 U.S.C. § 1204(a)(4), (f)(2); *Thompson*, 87 M.S.P.R. 184, ¶ 7; 5 C.F.R. § 1203.1. In *Thompson*, the Board found that its original jurisdiction does not include the authority to determine whether OPM followed the proper procedures in issuing its regulations. 87 M.S.P.R. 184, ¶ 8 (citing 5 U.S.C. § 1204). In contrast, in the instant appeal, our authority arises from our appellate jurisdiction under chapter 75 of Title 5. 5 U.S.C. § 7512(1) (including removals among adverse actions appealable to the Board); *Samble v. Department of Defense*, 98 M.S.P.R. 502, ¶ 11 (2005) (finding that the involuntary separation of an appellant who met the statutory definition of employee with adverse action appeal rights fell within the Board's appellate jurisdiction); 5 C.F.R. § 1201.3(a)(1) (listing adverse actions as falling within the Board's appellate jurisdiction). We

find unpersuasive FDIC's citation to *Thompson* to suggest that we cannot review whether an agency other than OPM properly promulgated regulations in determining whether to sustain an adverse action.[6]

> [6] We are likewise unpersuaded by the agency's citation to *Ramsey*. (citing *Ramsey*, 87 M.S.P.R. 98, ¶ 10 (finding that a challenge to an OPM regulation that merely repeated statutory language failed because the Board does not have authority under section 1204(f) to review a statutory provision)).

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

Jonson added, as to deference to an Office of Government Ethics interpretation of the FDIC regulation, 122 MSPR 454, 461–62 ¶ 13, 2015 MSPB 36 (2015) (following remand, *Jonson v. FDIC*, PH-0752-13-0236-B-1 (NP 9/20/2016)):

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

[Refer to Chapter 14, "Statutory, Regulatory Violation; Action Not in Accordance With Law" and Chapter 24, "Deference; Interpretation of Statutes, Regulations, Labor and Other Contracts."]

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

The Board decides cases. The Board is statutorily prohibited from issuing advisory opinions. Under 5 USC 1204(h):

> The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

See Hillen v. Dept. of Army, 54 MSPR 58, 66–67 (1992) ("The Board's decision does not address this portion of the regulation because its interpretation is not necessary to a decision in this case. Here the agency charged that the appellant's conduct had the effect of creating a hostile and intimidating environment. The Board is empowered to decide the cases before it, and it is prohibited by statute from issuing advisory opinions. 5 U.S.C.A. § 1204(h) (West Supp. 1991)."); *Donahue v. Dept. of Navy*, PH-0752-13-3010-I-1 (NP 6/17/2014) ("Moreover, the Board may not issue an advisory opinion regarding any potential future action taken by an agency. *See* 5 U.S.C. § 1204(h)"); *Labonte v. VA*, 53 MSPR 668, 670 (1992) ("a decision by the Board on the issue of jurisdiction where there is no matter in controversy would be tantamount to an advisory opinion, which the Board is precluded from issuing").

The prohibition harkens to the days before the Reform Act, when the Civil Service Commission furnished advisory opinions to other agencies, notably the Federal Labor Relations Council, on issues of personnel law. The Board occasionally informs parties that it will not consider findings made by an AJ that were beyond the jurisdiction of that AJ, for those findings "may be deemed a prohibited advisory opinion." *See Sims v. USPS*, 10 MSPR 607, 609 (1982) (if the appellant does not raise a claim of reasonable accommodation beyond the bare assertion of disability discrimination, the MSPB will not adjudicate accommodation because the Board is prohibited from issuing advisory opinions); *cf. McLaughlin v. OPM*, 62 MSPR 536, 559 (1994) ("for the chief administrative judge to comment and make findings on issues which he lacked jurisdiction may be deemed a prohibited advisory opinion").

The Board declined to provide advice, without a concrete dispute, on the meaning of a settlement, *Rodriguez v. DHHS*, DC-1221-11-0406-C-1 (NP 8/2/2012):

> [T]he appellant seeks a response to her request for an explanation and interpretation of the settlement agreement clause that bars the appellant from seeking or accepting a position with the agency for two years following the agreement. Because the appellant is not contesting the Compliance Initial Decision, and there is no error in the administrative judge's finding that the agency is in compliance with the settlement agreement, the appellant has provided no basis for further review.
>
> Moreover, the appellant's request for an interpretation of this clause in the settlement agreement is not ripe for consideration because the appellant does not allege that the agency has breached this term or that the agreement is otherwise invalid based on this term. The Board is prohibited by statute from issuing advisory opinions. 5 U.S.C. § 1204(h). Because the appellant is not contesting this term, the Board may not issue a decision providing advice or guidance regarding its meaning. *See Winston v. Department of the Treasury*, 114 M.S.P.R. 594, ¶¶ 7–9 (2010) (the Board does not have authority to issue an advisory opinion regarding whether an agency could terminate an employee based on an alleged breach of a settlement agreement, but could only review the action after the agency took it).

See Ruggieri v. USPS, 71 MSPR 323, 325 (1996) (as to the scope of a waiver agreement in a settlement agreement, "[t]he Board is not authorized to give advisory opinions on matters which are not before it.").

Although the law prohibits advisory opinions, the Board makes pronouncements that sound advisory. One agency obtained a declaratory opinion under the retirement laws concerning the law enforcement retirement status of its employees after the agency received an unfavorable ruling from OPM. *Dept. of State v. OPM*, 22 MSPR 404, 408 (1984); *cf. USDA v. Palmer*, 68 MSPR 586, 589 (1995) (while disclaiming issuance of advisory opinion, the Board opined as to a scenario that might lead to its jurisdiction over a furlough of ALJs). The Board reached out, *sua sponte*, to correct a nondispositive error by an AJ for "instructional purposes." *See McIntire v. FEMA*, 55 MSPR 578, 582 (1992). *But see Suchak v. OPM*, DA-0841-16-0017-I-2 (NP 8/11/2022) ("Although the appellant requests that the Board verify his eligibility for restoration of his annuity, or his eligibility to a new annuity, in the event that he is separated from the Navy the Board is not authorized to issue a declaratory order or an advisory opinion in these circumstances. *See* 5 U.S.C. § 1204(h); *Blaha v. Office of Personnel Management*, 108 M.S.P.R. 21, ¶ 11 (2007).").

The Board's General Counsel and its Office of Appeals Counsel provide legal guidance of a general nature within the Board. Their issuances are advisory, but the Board does not serve as personnel advisor to other agencies involved in personnel adjudication. It is possible for AJs to obtain some higher-level guidance. Board Memo 165 of July 20, 1981, from the Deputy Managing Director to the regions, stated:

> Presiding Officials [administrative judges] should at all times feel free to raise questions concerning Board Orders. Inquiries regarding the consistency of decisions, the application or interpretation of law in a particular case, or possibly the failure to consider certain issues or facts should, after discussion with the Regional Director, be brought to the attention of the Deputy Managing Director. This office will then seek clarification from the Board.

The Air Traffic Controller cases, involving appeals by controllers fired for participating in a strike against FAA, produced an issue bearing on the independence of AJs. A legal memo was issued by the Board's General Counsel advising AJs of legal conclusions on a number of issues, including whether removal was required for striking; whether official notice of the strike was appropriate; whether the Board had authority to pass on questions of constitutionality of statutes; whether First Amendment rights of the strikers were violated; and whether the strike was justified by disputes over pay, safety, and working conditions. The legal memo was accompanied by a transmittal memo stating that AJs were not obligated to follow the analysis and were responsible for conducting their own research. The controllers challenged the memo as an advisory opinion in violation of 5 USC 1205(g) (subsequently renumbered as 5 USC 1204(h)). *Campbell v. Dept. of Transp.*, FAA, 735 F.2d 497, 501 (Fed. Cir. 1984), determined that the Board's General Counsel was, under 5 CFR 1200.10(b)(5), responsible for providing legal advice to the

Board, staff and field offices and "that some presiding officials adopted part of the language from the memoranda does not indicate an abdication of their responsibilities or dictation of result by the General Counsel's Office." The court interpreted the statutory prohibition against advisory opinions to encompass the issuance of advisory opinions to the public as guides to future conduct. *See Eng v. Dept. of Transp.*, 18 MSPR 220, 222 (1983) (an OGC memo was not an *ex parte* communication since it was not from an "interested party" within the meaning of 5 CFR 1201.101).

Although the Board is not supposed to give advisory opinions, it may request them. Under 5 USC 1204(e)(1)(A), any Board member may "request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management." The Board occasionally requests an advisory opinion from OPM on the meaning or application of one of its regulations. The Board obtained advice from the General Accounting Office (Comptroller General) on back pay computations and entitlements. *See*, *e.g.*, *Miller v. DOD*, 45 MSPR 263, 267 (1990) (advisory opinion from GAO on the validity of a provision in settlement granting the appellant a one-year period of administrative leave); *Greco v. Dept. of Army*, 30 MSPR 288, 290 (1986) (whether the Back Pay Act authorizes a living quarters allowance as part of a back pay remedy); *Cortez v. VA*, 27 MSPR 648, 650 (1985) (recoupment through a settlement agreement of withdrawn retirement contributions). [Refer to Chapter 22, "Referral to Comptroller General," for advisory opinions solicited as to issues pertaining to agency compliance with Board remedial orders.]

The Board solicited an advisory opinion from the OPM Director on disability annuity coverage, even though OPM was a party to the appeal. Although 5 USC 1204(e)(1) permits the Board to solicit an advisory opinion from OPM, the Board did not explain the utility of an advisory opinion from the same party that was briefing the appeal. *See Bracey v. OPM*, 83 MSPR 400, 406 ¶ 11–12 (1999). The Board may find OPM advisory opinions instructive, but not binding, according to *Solamon v. Dept. of Commerce*, 119 MSPR 1, 4 ¶ 9, 2012 MSPB 117 (2012), involving jurisdictional implications of a pay reduction under a demonstration project:

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

B. ORGANIZATION

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

The Chairman is the chief executive and administrative officer of the Board. *See* 5 CFR 1200.1–.2 (2025). The Chairman is generally responsible for determining matters pertaining to Board organization and personnel policies. The Board as a whole determines regulations governing its adjudication practices and procedures. *See* 8/3/87 Memo from MSPB General Counsel to MSPB Chairman. The Board employs approximately 235 full time equivalent personnel at its headquarters, six regional and two field offices. Its budget is in the neighborhood of $45 million.

The Board operates through a Washington, D.C., headquarters office and a field organization. Adjudication authority is delegated by the Board and its Chairman to other headquarters officials and to 60–70 Board administrative judges (usually referred to as "judge," or AJ, in this *Guide*), employed at the Board's regional and field offices. An administrative law judge (ALJ) hears cases under the Hatch Act (the 1939 Act to Prevent Pernicious Political Activity, as amended), OSC disciplinary complaints, cases against ALJs, appeals of actions taken against MSPB employees, and other cases assigned to an ALJ by the Board. ALJs are appointed under statutory procedures that differ from the excepted-service appointment procedures for AJs. The Board once employed an ALJ for these cases but now contracts for the services of an ALJ through the one of several agencies with permanently-appointed ALJs who have time to spare and an odd interest in the peculiarities of our shared legal endeavor.

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

1. Atlanta Regional Office, 401 W. Peachtree Street, N.W., 10th Floor, Atlanta, Georgia 30308-3519, Phone: (404) 730-2751; Fax: (404) 730-2767 (Alabama; Florida; Georgia; Mississippi; South Carolina; and Tennessee); atlanta@mspb.gov.
2. Central Regional Office, 230 South Dearborn Street, 31st Floor, Chicago, Illinois 60604-1669, Phone: (312) 353-2923; Fax: (312) 886-4231 (Illinois; Indiana; Iowa; Kansas City, Kansas; Kentucky; Michigan; Minnesota; Missouri; Ohio; and Wisconsin); chicago@mspb.gov.
3. Washington D.C. Regional Office, 1615 M Street, NW, Washington, DC 20419, Phone: (703) 756-6250; Fax: (703) 313-2031 (Washington, DC; Maryland—counties of Montgomery and Prince George's; North Carolina; Virginia; and all overseas areas not otherwise covered by other Board offices); washingtonregion@mspb.gov.
4. Northeastern Regional Office, 1601 Market Street, Suite 1700, Philadelphia, Pennsylvania 19103, Phone: (215) 597-9960; Fax: (215) 597-3456 (Connecticut, Delaware, Maine, Maryland (except Montgomery and Prince George's counties), Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands, and West Virginia)); philadelphia@mspb.gov. [The New York field office, part of the regional office in Philadelphia, was closed on October 1, 2024.]
5. Dallas Regional Office, 1100 Commerce Street, Room 620, Dallas, Texas 75242-9979, Phone: (214) 767-0555; Fax: (214) 767-0102 (Arkansas; Louisiana; Oklahoma; and Texas); dallas@mspb.gov.
6. Western Regional Office, 1301 Clay Street, Suite 1380N, Oakland, California 94612-5217, Phone: (510) 273-7022; Fax: (510) 273-7136 (Alaska; California; Hawaii; Idaho; Nevada; Oregon; Washington; and Pacific overseas areas); WesternRegionalOffice@mspb.gov.
7. Denver Field Office, 165 South Union Blvd., Suite 318, Lakewood, Colorado 80228-2211, Phone: (303) 969-5101; Fax: (303) 969-5109 (Arizona; Colorado; Kansas—except Kansas City; Montana; Nebraska; New Mexico; North Dakota; South Dakota; Utah; and Wyoming); denver@mspb.gov.

For the headquarters establishment, inquiries may be directed to:

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

Phone: 202-653-7200

Fax: 202-653-7130

mspb@mspb.gov

V/TDD 1-800-877-8339

202-254-4800 ("message line")

1-800-424-9121; 202-869-9984 (MSPB Inspector General "hotline" [administered by USDA]); inspector.general@mspb.gov

Clerk of the Board: phone: 202-653-7200; facsimile: 202-653-7130

Equal Employment Opportunity: phone: 202-254-4405; facsimile: 202-653-7130

General Counsel: phone: 202-653-7171; facsimile: 202-653-6203

Contact information changes for Board offices at the headquarters and regional or field offices. Check the website or call the Board's Clerk at 202-653-7200 to determine where to get the information you need.

A description of Board organization is taken from its FY 2022 Annual Report:

> MSPB Offices and Their Functions
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> MSPB is headquartered in Washington, DC, and has six ROs and two FOs located throughout the United States. For FY 2022, the agency was authorized to employ 235 full-time equivalents to conduct and support its statutory duties.
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> 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.
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> 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 2022, the functions of this office were performed under interagency agreements by ALJs at the Federal Trade Commission (FTC) and the U.S. Coast Guard.
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> The Office of Appeals Counsel (OAC) conducts legal research and prepares proposed decisions for the Board to consider for cases in which