U.S. Merit Systems Protection Board

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

MSPB History

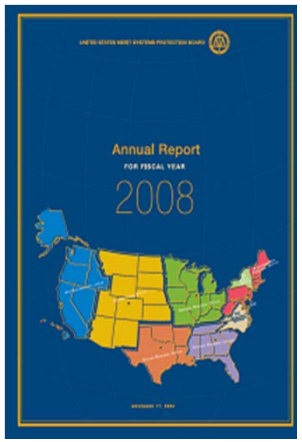
Passage of the Civil Service Act of 1883 marked the beginning of the merit system in Federal service, creating the U.S. Civil Service Commission and guaranteeing a merit-based, professional workforce free from political patronage.

The Civil Service Reform Act of 1978 abolished the Civil Service Commission and divided its functions among 3 agencies:

- Merit Systems Protection Board (MSPB) – Conducts neutral adjudication and independent, nonpartisan Government-wide studies
- Office of Personnel Management (OPM) – Manages the human resources function for the Executive Branch
- Office of Special Counsel (OSC) – Investigates and prosecutes allegations of prohibited personnel practices (PPPs), with emphasis on protecting Federal government whistleblowers

Related Agencies – Equal Employment Opportunity Commission (EEOC) and Federal Labor Relations Authority (FLRA)

MSPB Mission



To protect the Federal merit systems and the rights of individuals within those systems, through:

- Adjudication and enforcement
  - Creating a body of legal precedent
  - Ensuring merit principles and employee rights through individual appeals
- Governmentwide studies of merit systems
- Regulatory review

Adjudication and Enforcement

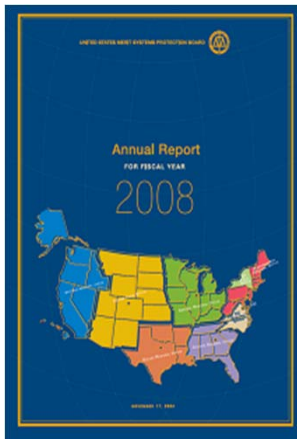
"The Merit Systems Protection Board shall –

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of the subsection and enforce compliance with any such order …"

Title 5, United States Code, Section 1204 (a)

Adjudication and Enforcement



Original Jurisdiction

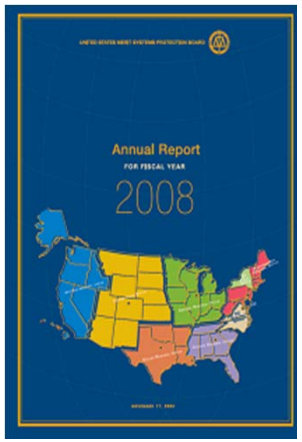
- Petitions brought by OSC for disciplinary or corrective action in connection with an alleged PPP or Hatch Act violation
- Actions against Administrative Law Judges
- Requests for review of arbitration awards
- Informal hearings for Senior Executives removed for performance reasons
- Review of regulations promulgated by OPM for a possible prohibited personnel practice

Adjudication and Enforcement

Appellate Jurisdiction

- Adverse actions
- Performance-based actions
- Reduction in force actions
- Suitability actions
- Failure to restore or improper restoration following compensable injury claims
- Challenges to employment practices
- Denials of within-grade increase
- Claims for Federal retirement benefits

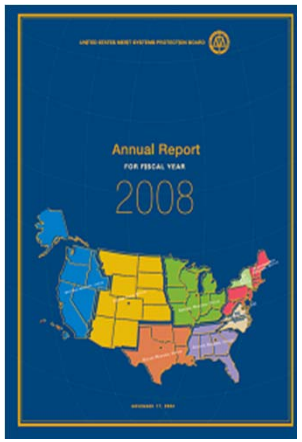
Adjudication and Enforcement



Specialized Jurisdiction

- Retaliation claims (individual right of action) under the Whistleblower Protection Act
- Claims for violation of reemployment rights or of discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA)
- Claims for violation of veterans' preference rules or the right to compete under the Veterans Employment Opportunities Act (VEOA)

Adjudication and Enforcement



Initial Appeals Process for Federal Employee

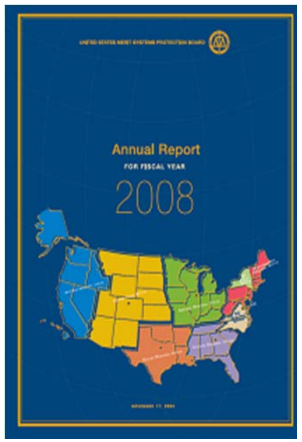
- Appeal filed in Regional office
- Administrative Judge (AJ) assigned
- Appeal acknowledged
- Mediation/settlement offered
- Discovery conducted
- Pre-hearing conference held
- Hearing conducted
- Initial Decision issued

Adjudication and Enforcement

Second Level Review by MSPB Board

- Petition for Review (PFR) of Initial Decision filed at Headquarters
- PFR received by the Clerk of the Board
- PFR certified to Office of Appeals Counsel or Office of General Counsel
- Legal research conducted
- Decision recommendation made to Board Members
- Case reviewed independently by each Board Member
- Decision reached and issued by the Clerk

Adjudication and Enforcement



Post–MSPB Judicial Review

- Board decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit
- Board decisions involving issues of discrimination (“mixed cases”) may be brought to the U.S. District Court
- Decisions of the Court of Appeals may be appealed to the U.S. Supreme Court

Adjudication and Enforcement

Statistics

- 6,265 cases adjudicated in FY 2009 in Regional & field offices (average of 83 days per case)
- 850 cases adjudicated in FY 2009 at HQ (average of 94 days per case)
- 6% of final Board decisions were appealed to the U.S. Court of Appeals for the Federal Circuit. 92% of the Board's decisions were upheld.

Merit Systems Studies

"The Merit Systems Protection Board shall … conduct from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected …"

Title 5, United States Code, Section 1204 (a)(3)

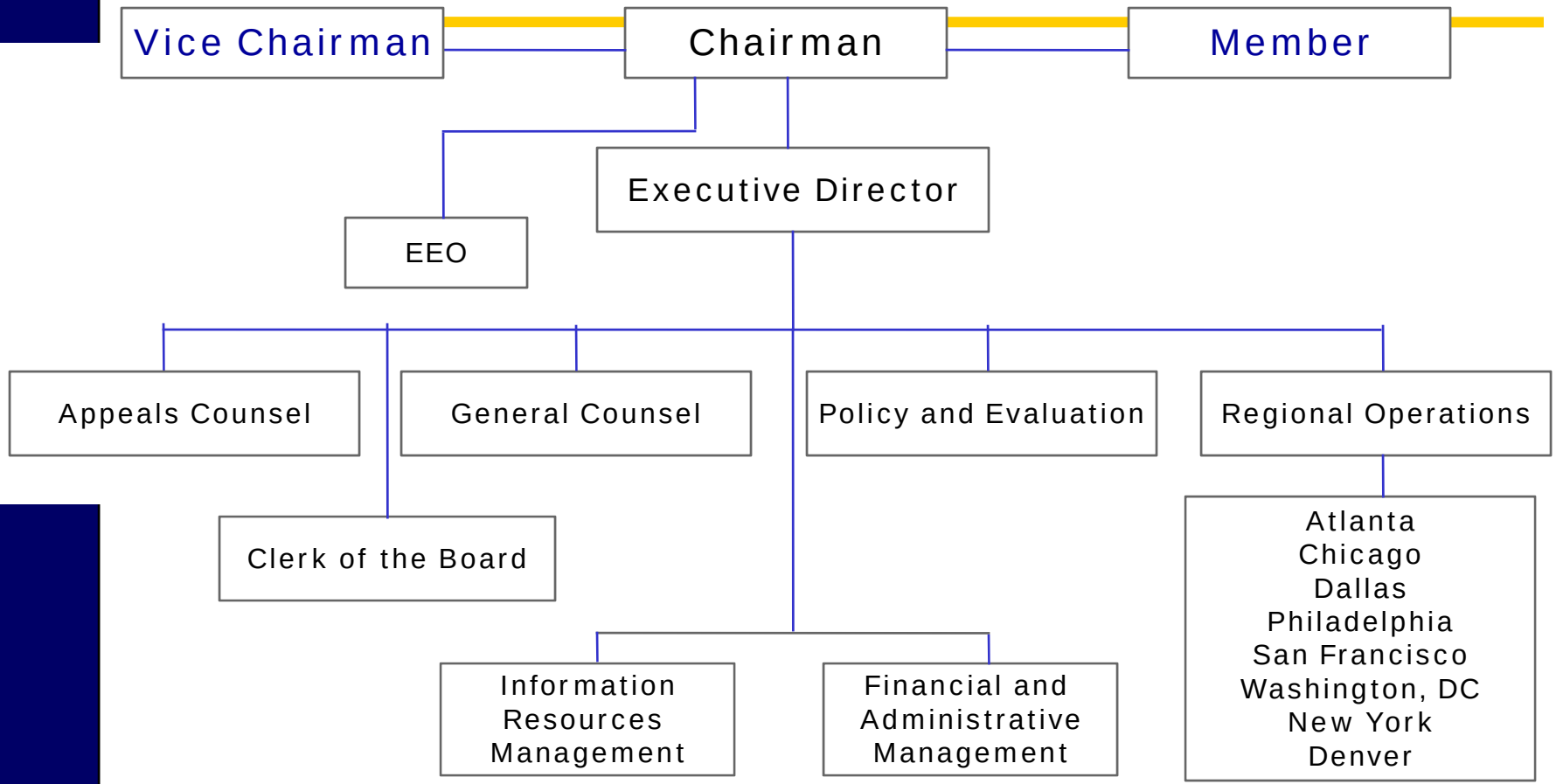
Conduct governmentwide, merit-based studies to protect the merit system by assessing its health, ensuring its effectiveness, improving its operations, and promoting growth and viability.

Sample of MSPB Studies

www.mspb.gov/studies

- Managing for Engagement – Communication, Connection, and Courage
- Beyond Faster and Cheaper: Improving Federal Hiring
- The Federal Government: A Model Employer or a Work in Progress?
- Using Structured Interviews to Assess Potential
- A Call to Action: Creating Better Federal Managers
- Fair and Equitable Treatment: Progress Made and Challenges Remaining
- Help Wanted: A Review of Federal Vacancy Announcements
- As Supervisors Retire: An Opportunity to Reshape Organizations
- Addressing Poor Performers and the Law

Organizational Structure



Office of the Administrative Law Judge

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 administrative law judges, MSPB employee appeals, and other cases assigned by the MSPB.

The functions of this office are currently performed by ALJs at the National Labor Relations Board (NLRB) under a reimbursable interagency agreement. MSPB's Office of the General Counsel provides administrative assistance to NLRB ALJs to MSPB-related cases under the MSPB/ NLRB interagency agreement.

Office of Appeals Counsel

The Office of Appeals Counsel (OAC) conducts legal research and prepares decision proposals for the Board in cases when a party petitions for Board review of an AJ decision, and other Board decisions.

- Approximately 40 career civil service attorneys and staff
- In most cases, OAC prepares either:

  A Final Order affirming the AJ's decision below;

  A Modified Final Order affirming the decision below; or

  A precedential Opinion & Order modifying the decision below.
- OAC handles 1000 – 1600 cases per year
- OAC ordinarily processes cases in order of receipt at HQ

Office of the Clerk of the Board

The Office of the Clerk of the Board (OCB) receives and processes cases filed at MSPB headquarters, rules on certain procedural matters, and issues Board decisions and orders.

- Approximately 14 career civil service employees with expertise in law, case processing, records management, and program analysis
- Serves as MSPB's public information center, coordinates media relations, produces public information, operates the MSPB library and on-line services, and administers the Freedom of Information (FOIA) and Privacy Act programs
- Certifies official records to the courts and Federal administrative agencies
- Manages MPSB's records and directives systems, legal research programs, and the Government in the Sunshine Act program

Office of Equal Employment Opportunity

The Office of Equal Employment Opportunity (EEO) plans, implements, and evaluates MSPB's affirmative employment initiatives, advises MSPB managers and supervisors on these initiatives, and advises and trains all employees on compliance with equal employment opportunity and civil rights laws.

- Provides informal and formal complaint processes and alternative dispute resolution processes to MSPB employees, former employees, and applicants for employment who allege employment discrimination and also provides similar processes to individuals who allege disability discrimination in their access to MSPB's programs and activities
- Reports agency complaints data and workforce data to Congress under provisions of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), and to the Equal Employment Opportunity Commission (EEOC) under Management Directive 715 (MD-715), OPM, and other external stakeholders

Office of Financial and Administrative Management

The Office of Financial and Administrative Management (FAM) conducts human resource, budget, facility, procurement, contracting, financial management, and administrative support services in direct support of the Board's mission.

- Administrative support services include printing, travel, supply, time and attendance, training, purchase/travel card and transit subsidy programs, safety and security, property, accounts receivables and payables, mail, and other support services.
- 13 career civil service employees provide support to senior leaders, managers, and other employees.
- Manages $44 million annual budget, all contracting and procurement services, and all administrative services.

Office of the General Counsel

The Office of the General Counsel (OGC) provides a host of legal services to the Board. Staffed by 14 attorneys and 2 paralegal specialists, OGC performs the following functions:

- Provides legal advice on a broad range of issues, including labor and employment advice;
- Defends the Board's decisions involving jurisdiction in the U.S. Court of Appeals for the Federal Circuit;
- Drafts certain types of Board decisions, including those pertaining to enforcement of final Board decisions and settlement agreements, and FOIA appeals;
- Represents the Board and its officials in the courts and before administrative agencies;
- Conducts the Board's ethics program;
- Coordinates and develops the Board's legislative policy and strategy;
- Drafts and coordinates the issuance of Board regulations;
- Conducts the Petition for Review Settlement program; and
- Oversees the Board's activities by performing Inspector General functions.

Office of Information Resources Management

The Office of Information Resources Management (IRM) develops, implements, and maintains MSPB's automated information systems to help the agency manage its caseload efficiently, and carry out its administrative and research responsibilities.

- Major systems supported include e-Appeal online filing, Case Management System, Document Management System, Document Assembly, Intranet Portal, and agency Office Calendar
- E-Appeal has been recognized by WebContent.gov and Government Computing News. 40% of cases are filed electronically.
- IRM handles approximately 6500 support tickets per year, 3600 from internal customers, and 2900 from external customers

Office of Policy and Evaluation

The Office of Policy and Evaluation (OPE) conducts independent, nonpartisan, cutting-edge research that supports merit system values, enhances human resources management, and ensures the public's interest in a Government free from prohibited personnel practices.

- Approximately 11 employees with extensive experience in human resources management, social science research, and data analysis
- Publishes at least 6 special study reports per year and 4 editions of the *Issues of Merit* newsletter
- Conducts extensive outreach to Congress, Federal agencies, affinity groups, non-profit and professional organizations, and academia
- Major lines of research include: Fair Treatment, Recruitment and Selection, Employee Engagement, performance management, managing the supervisory workforce, and avoiding prohibited personnel practices

Office of Regional Operations

The Office of Regional Operations (ORO) oversees MSPB's 6 regional and 2 field offices which receive and process appeals and related cases, and manages MSPB's Mediation Appeals Program (MAP).

- Approximately 60 career civil service Administrative Judges (AJs) assure all parties receive a full and fair opportunity to be heard and receive a fair, well-reasoned, and timely initial decision.
- In FY 2005 - 2009, 33,578 appeals were decided (an average of over 6,700 per year) in an average of 81.25 days. 57% of the appeals that were not dismissed were settled.
- Provides national outreach that presents detailed information to all practitioners.

Contacting MSPB

www.mspb.gov

By Phone
(202) 653-7200 or (800) 209-8960

By Mail
U.S. Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

E-Appeal Online
https://e-appeal.mspb.gov

Open.gov
www.mspb.gov/open

MSPB Decisions ListServ
Click on MSPB Decisions tab on the homepage and the “Subscribe to the MSPB Decisions ListServ” link on the left margin. The ListServ sends MSPB Case Reports, Federal Register Notices, and press releases via e-mail.

MSPB ADJUDICATION AND ALTERNATIVE DISPUTE RESOLUTION

OPM FORUM

April 21, 2010

Deborah M. Miron, Director of Regional Operations
Chief Administrative Judge

U.S. Merit Systems Protection Board

REGIONAL OPERATIONS

- Atlanta Regional Office
- Chicago Regional Office
- Dallas Regional Office
- Northeastern Regional Office in Philadelphia
- - New York Field Office
- Western Regional Office in San Francisco
- -Denver Field Office
- Washington Regional Office

FUNCTIONS IN REGIONS

- ADJUDICATION: From FY 2005 through FY 2009, there were 33,578 appeals, an average of over 6,700 per year, decided in an average of 81 days in the regions.
- OUTREACH: ORO and the regions have provided hundreds of expert outreach presentations to practitioners on both sides of appeals.
- SETTLEMENT: Discussions assisted by the AJ, a Settlement Judge, or by a trained and certified Mediator in the MSPB's Mediation Appeals Program (MAP).

MEDIATION APPEALS PROGRAM (MAP)

- Started as a pilot in 2002
- FY 2004 – 23 cases mediated
- FY 2006 – 109 cases mediated
- FY 2009 – 173 cases mediated, 62% settled including cases settled on return to adjudication.
- Already in the first half of FY 2010 – 130 cases mediated, 57% settled.

- Voluntary Program: both parties must agree to mediate

- Surveys: 95% of participants would use MAP again

Initial Appeal Process

Agency Takes Action
Employee Files Appeal
Acknowledgement Order
Discovery
Settlement Discussions
Prehearing Conference
Hearing
Initial Decision

Due Process Basic Requirements

- **5 U.S.C. § 7513**
- An employee subject to an adverse action, (i.e. Removal, Suspension for more than 14 days, Reduction in Grade or Pay or more, Furlough for 30 days or less) to:

- **(1)** at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

- **(2)** a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

Notice of Proposed Action

- The Notice of Proposed Action must inform the employee of his or her right to review the material relied upon to support the charges in the notice.

Employee Response to a Notice of Proposed Action

- Employees are entitled to a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he or she is otherwise in an active duty status.
- The Agency must designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action.
- NOTE: The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations.

Agency Decision

- In arriving at its decision, the agency shall not consider any reasons for action other than those specified in the notice of proposed action.
- It shall consider any answer of the employee and/or his or her representative made to a designated official and any medical documentation furnished by the employee or his/her designated physician.
- The agency shall deliver the notice of decision to the employee at or before the time the action will be effective, and advise the employee of appeal rights.

Ex Parte Communication

- A deciding official may receive, consider, and weigh evidence from ex parte sources, subject to constitutional due process requirements of fair notice to the employee of the information obtained and an opportunity for the employee to respond to that information. *Amar v. Dept. of Treasury*, 89 MSPR 505 (2001)

- *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999)-in order to invalidate the disciplinary process, *ex parte* contacts with the deciding official must "introduce new and material information to the deciding official."

Ex Parte Communication continued

Three part test:

- Whether the *ex parte* communication introduces "cumulative" information or new information
- Whether the employee knew of the error and had a chance to respond to it, and
- Whether the *exp parte* communciations were of the type likely to result in undue pressure on the deciding official

Do's and Don'ts for Agency File

- Do timely prepare
- Do redact if appropriate
- Do organize: Index, tab, and paginate the entire agency file and any evidence submitted with prehearing submissions
- Don't leave out important documents, e.g., SF-50's
- Don't include unnecessary or irrelevant documents
- Do check that documents are in original form free of highlighting or stray markings

THANK YOU FOR YOUR ATTENTION!

MSPB HEADQUARTERS ADJUDICATION

OPM FORUM

April 21, 2010

James M. Read

Director, Office of Appeals Counsel

U.S. Merit Systems Protection Board

MSPB Headquarters Processing

- In FY09, MSPB received 1036 cases at HQ
- Average HQ case processing time in FY09 = 94 days
- In FY10 (first half), MSPB received 530 cases at HQ
- Most HQ cases are Petitions for Review of decisions issued by Administrative Judges
- Small number of HQ cases are one of the following:
  - Petition by OSC for corrective or disciplinary action for an alleged PPP
  - Action against an ALJ
  - Request for review of OPM regulation
  - Request for review of arbitration award

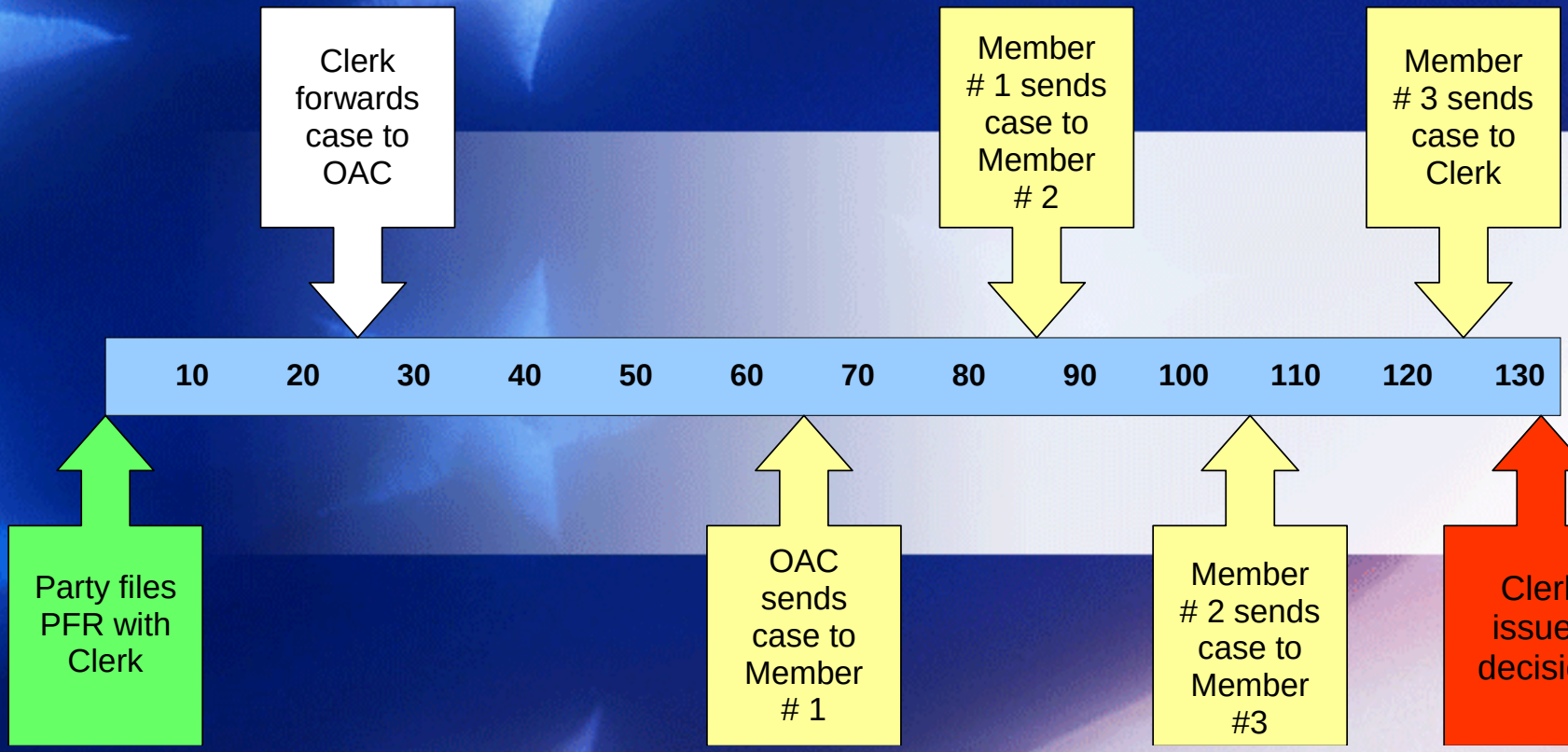
MSPB Headquarters Processing

In PFR cases, the full Board reviews the factual findings and legal conclusions of the Administrative Judge (AJ). In most cases, the Board will issue either:

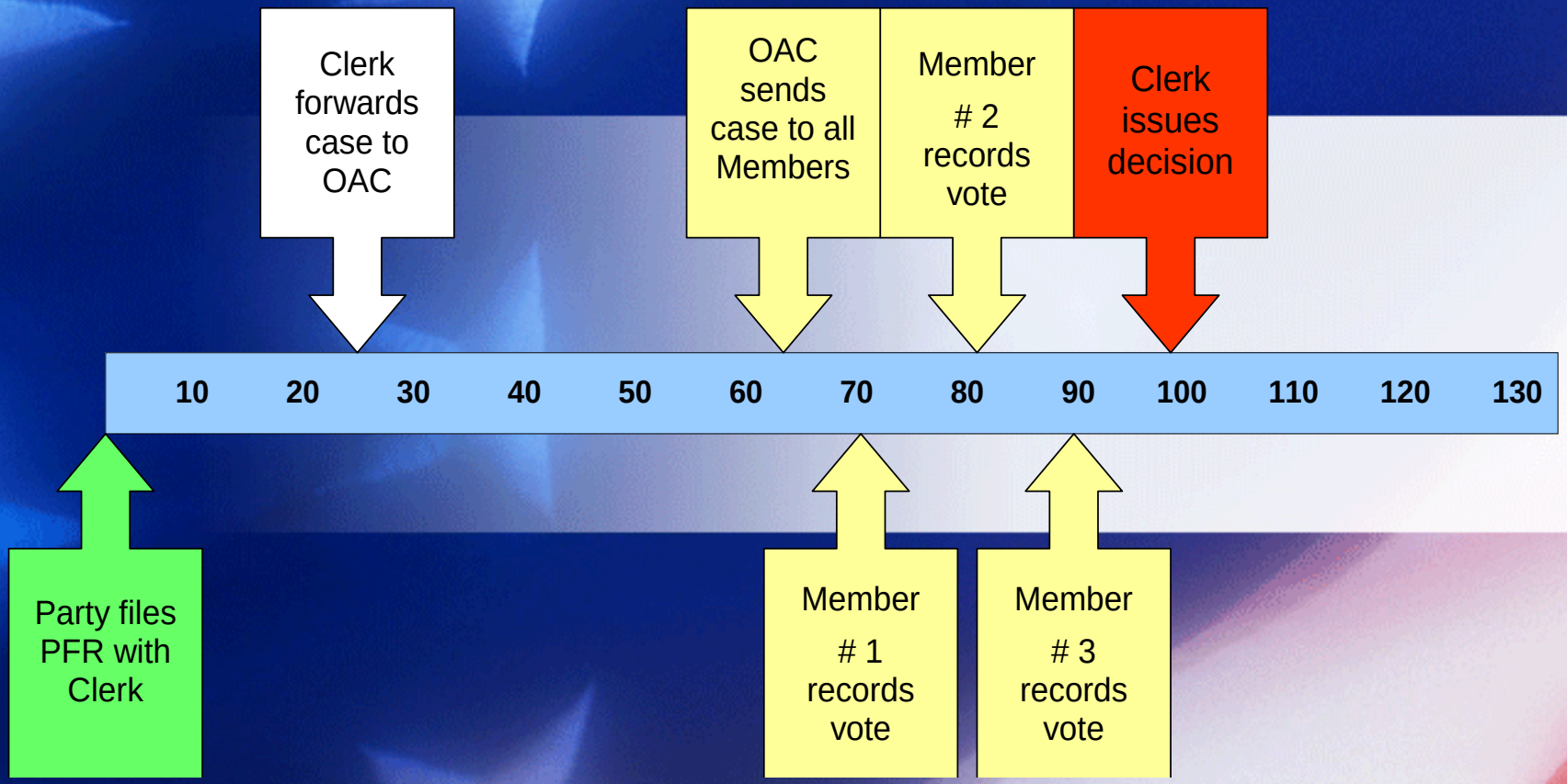
- A non-precedential order summarily affirming the AJ's decision; or
- A substantive precedential decision modifying the AJ's decision in some way

Recently the Board began adding case-specific material to Final Orders

HQ Case Processing Timeline (in days)
SERIAL



HQ Case Processing Timeline (in days)
SIMULTANEOUS



OPM and MSPB: Roles & responsibilities

OPM

Policy; administration; oversight

MSPB

Neutral adjudication; special studies

OPM and MSPB: Roles & responsibilities

- OPM may:
  - Intervene as a matter of right in an MSPB case
  - Seek reconsideration of a final Board decision
  - Seek judicial review of an MSPB decision on behalf of the government
- MSPB may:
  - Seek an advisory opinion from OPM concerning an OPM regulation
  - Review OPM regulations to guard against PPPs

Adverse action appeal rights coverage

The right to appeal an adverse action is conferred on --

"an individual in the competitive service –

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less."

5 U.S.C. § 7511(a)(1)(A)

Adverse action appeal rights coverage

McCormick v. Air Force, 307 F.3d 1339 (Fed. Cir. 2002): An individual in the competitive service who was serving a probationary period at the time of her separation nevertheless has appeal rights under § 7511(a)(1)(A)(ii), so long as she completed one year of current continuous service under other than a temporary appointment limited to one year or less.

Adverse action appeal rights coverage

Fitzgerald v. Air Force, 108 M.S.P.R. 620 (2008): Employment in the excepted service immediately preceding a non-temporary appointment in the competitive service may be used to satisfy the "1 year of current continuous service" requirement for competitive-service appeal rights under section 7511(a)(1)(A)(ii).

Payano v. Dep't of Justice, 100 M.S.P.R. 74 (2005): Continuous service in different positions and different agencies may be combined to meet the "1 year of current continuous service" requirement for appeal rights under section 7511(a)(1)(A)(ii).

Adverse action charges

Basic Principles

The MSPB may not split a charge into independent charges that are mere elements of the original charge and then sustain one of the newly-formulated charges; the agency must prove all elements of the charge. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (1992).

The MSPB may not uphold an adverse action based on a charge that the agency could have brought, but did not. *Nazelrod v. Department of Justice*, 54 M.S.P.R. 461, 466 (1992), *aff'd sub nom. King v. Nazelrod*, 43 F.3d 663 (Fed. Cir. 1994)

Adverse action charges

Two approaches to charging

1. General charge, e.g., "Unacceptable Conduct," with supporting factual narrative.
2. Specific charge with either (a) implied established elements, *e.g.*, "AWOL"; "Theft," or (b) elements set out in the charge itself, *e.g.*, "Consuming alcohol while on duty and in uniform in view of the public."

Otero v. U.S. Postal Service, 73 M.S.P.R. 198 (1997)