June 10, 1997

MEMORANDUM FOR MACOM CIVILIAN PERSONNEL DIRECTORS, CIVILIAN PERSONNEL ADVISORY CENTER DIRECTORS, AND INDEPENDENT REPORTING

ACTIVITY CIVILIAN PERSONNEL OFFICERS

SUBJECT: MSPB Annual Report for Fiscal Year 1996--

Employee Relations Bulletin #87

The attached Employee Relations Bulletin provides information from the annual report of the Merit Systems Protection Board. The report contains FY96 appeal statistics along with a summary of significant Board decisions.

This information should be shared with your employee relations specialists and labor attorneys.

/S/

ELIZABETH B. THROCKMORTON

Chief, Policy and Program

Development Division

Attachment

Issue 87 June 13, 1997

MSPB ANNUAL REPORT FOR FISCAL YEAR 1996

Until FY95, the Merit Systems Protection Board annual reports have included statistics about individual agency results in cases before the board. The FY96 report again does not have statistics for individual agencies. Listed below are aggregate government-wide statistics. For purposes of comparison, we have provided the same statistics for FY94 and FY95.

	#Decided	%Dismissed	%Settled	%Adjudicated
FY94	7,530	45%	27%	28%
FY95	9,594	60%	19%	21%
FY96	7,971	52%	24%	23%

The following represents the results of the cases adjudicated:

	#Adjudicated	%Affirmed	%Reversed	%Mitigated
FY94	2,086	74%	21%	5%
FY95	2,046	62%	32%	5%
FY96	1,814	77%	17%	5%

The report notes that the abnormal results for FY95 were attributable to Postal Service reorganization cases, which were nominal in FY96, so that case processing in FY96 represented a return to more normal levels.

Attached are some excerpts from the FY96 report. Two of these contain summaries of significant MSPB and circuit court of appeals decisions. The third is the Board's customer service standards. Because you are frequent Board customers, we thought you might be interested. You also might be interested in the Board's Internet address: http://www.access.gpo.gov/mspb

NOTE: Attachments retyped from original MSPB report and are subject to typographical errors.

U.S. Merit Systems Protection Board

ADJUDICATION

APPELLATE JURISDICTION

CASES

First Decisions under FMLA and

USERRA

In *Ramey v. U.S. Postal Service*, 70 M.S.P.R. 463 (1996), the Board issued its first decision involving the Family and Medical Leave Act of 1993 (FMLA). In this decision, the Board set out the requirements of the FMLA as they apply to absence-related charges that form the basis for an adverse action.

The Board also issued its first decision interpreting provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), *Petersen v. Department of the Interior*, 71 M.S.P.R. 227 (1996). The decision was issued on an interlocutory appeal certified to the Board by the administrative judge. The Board addressed several issues concerning its jurisdiction over cases brought under USERRA. Among other things, it ruled that even where the appellant is represented by the Special Counsel, and despite the resulting similarities to its original jurisdiction cases, it would process USERRA appeals under its appellate jurisdiction procedures. In addition, it addressed the timeliness of appeals and the applicable burdens of proof under the new law.

ADA - Firm Choice

The Board issued its first decision discussing the Americans with Disabilities Act's amendment to the Rehabilitation Act regarding "firm choice," *Kimble v. Department of the Navy*, 70 M.S.P.R. 617 (1996). Following the lead Equal Employment Opportunity Commission decision on the subject, *Johnson v. Babbitt*, the Board ruled that, as a result of the ADA amendment, an agency is no longer required to provide a "firm choice" before it imposes discipline on an alcoholic employee.

Postal Service Restructuring

In FY 1996, the Board continued to address issues arising from the Postal Service's 1992-1993 nationwide restructuring. In prior years, the Board had ruled that demotions effected in the restructuring constituted reductions in force with respect to preference-eligible employees. In *Sink v. U.S. Postal Service*, 65 M.S.P.R. 628 (1994) and *Unhoch v. U.S. Postal Service*, 66 M.S.P.R. 651 (1995), the Board also ruled on what the Postal Service must do to comply with the Board's reversal of its actions. As a result, the Postal Service effected a reduction-in-force action in July 1995 to comply with the Board's orders.

Issues arising from both the original restructuring and the 1995 compliance RIF occupied the Board during FY 1996. In *Augustus v. U.S. Postal Service*, 69 M.S.P.R. 29 (1995), an appellant, who was given RIF notice in accordance with *Sink*, alleged that the agency's subsequent compliance RIF was not in accordance with RIF regulations. He sought Board review through a petition for enforcement of the Board's order reversing the agency's action in the original restructuring. The Board held that the issues raised in the appellant's petition would properly be considered in an appeal of the compliance RIF, not a petition for enforcement. The Board's decision in *Sink* regarding an appellant's entitlement to RIF procedures only required the agency to give RIF notice or return the appellant to the status quo ante, and here the agency decided to issue a RIF notice. The agency having effected the compliance RIF in July 1995, the Board held that any issue arising out of that action would properly be raised in a separate appeal, not in a petition for enforcement.

In *Kelly v. U.S. Postal Service*, 68 M.S.P.R. 565 (1995), and *Beams v. U.S. Postal Service*, 69 M.S.P.R. 71 (1995), the Board recognized that confusion may have existed regarding what was appropriately brought before the Board in a compliance case or an appeal arising from the

reversal of the demotion action itself, and what had to be encompassed in a new appeal of the July 1995 compliance RIF. To avoid the possibility that such confusion may have deprived appellants of their right to be heard, the Board modified its decision in *Sink v. U.S. Postal Service*, 68 M.S.P.R. 497 (1995), to afford the appellants an additional 30 days in which to file a petition for appeal of the July 1995 compliance RIF.

In *Cooke v. U.S. Postal Service*, 69 M.S.P.R. 259 (1996), the Board ruled that an appellant who had been removed for his failure to report to duty in the job to which he had been assigned in the restructuring was not entitled to the compliance actions applicable to current Postal Service employees. In *Walker v. U.S. Postal Service*, 69 M.S.P.R. 634 (1996), the Board held that an appeal of a 1993 demotion was mooted by the agency's 1995 retroactive reduction-in-force offer. In *Crandall v. U.S. Postal Service*, MSPB Docket No. SF-0351-91-0019-X-1, 69 M.S.P.R. 192 (Table), the Board ruled that where an appellant voluntarily retired before July 1995 the appeal of the compliance RIF was moot. In *Perisho v. U.S. Postal Service*, 69 M.S.P.R. 55 (1995), the Board found mootness as to the appeal of the 1993 restructuring where an appellant rejected an offer during the compliance RIF that would have returned him to his pre-1993 grade level.

Whistleblower Protection Act

The Board continued its development of the law under the Whistleblower Protection Act (WPA). In two cases, the Board addressed the jurisdictional requirement that an appellant who seeks the protection of the Act must have had a reasonable belief in the correctness of his disclosure. Where an appellant knew that his "disclosure" was false when he made it, he was not protected. *Scott v. Department of Justice and Office of Personnel Management*, 69 M. S.P.R. 211 (1995). In *Bump v. Department of the Interior*, 69 M.S.P.R. 354 (1996), the Board held that although an appellant's motive in making a disclosure is not relevant to this issue,

this appellant could not have had a reasonable belief in the correctness of his disclosure because he knew that his supervisor had abandoned the matter by the time that the appellant complained about it.

In two other cases addressing a jurisdictional prerequisite under the WPA—exhaustion of remedy before the Office of Special Counsel—the Board held that by showing that the Special Counsel conducted an investigation of the appellant's charge, the appellant proved that he informed the Board of the precise basis for his charge and characterized it before the two agencies in the same manner. *Casciotta v. Department of the Navy*, 69 M.S.P.R. 589 (1996), and *Lloyd v. Environmental Protection Agency*, 71 M.S.P.R. 671 (1996).

The Board issued significant decisions on the merits of whistleblower appeals, further defining the burdens of proof under the WPA. In *Powers v. Department of the Navy*, 69 M.S.P.R. 150 (1995), the Board held that any weight an agency gives to an appellant's disclosure, alone or in combination with other factors, can satisfy the appellant's burden of proving that his disclosure was a contributing factor in the personnel action taken against him. In *Scott, supra*, the Board ruled that an appellant cannot meet this burden where he knew when he made the disclosures that they were false. In *Geyer v. Department of Justice*, MSPB Docket No. BN-1221-92-0310-B-1 (1996), the Board set forth the test it will apply to determine whether an agency has met its burden of showing by clear and convincing evidence that it would have taken the same personnel action even in the absence of an appellant's protected disclosures. In *Scott*, the Board ruled that in an adverse action appeal the charges are not to be readjudicated under the clear and convincing evidence standard to determine whether the agency met its burden.

The Board set out the test for proving the existence of a "personnel action" where an individual right of action (IRA) appeal is based on a claim of entitlement to promotion through the reclassification of the appellant's position. *Briley v.*

National Archives and Records Administration, 71 M.S.P.R. 211 (1996). It held that a collective bargaining agreement that sets forth an alternative avenue of review does not relieve an appellant from seeking review by the Special Counsel before bringing an IRA appeal to the Board. *Id*. It found that where an arbitration decision is before the Board in an IRA appeal, its merits findings will not be given collateral estoppel effect, although they will be considered in deciding whether the agency met its burden. *Geyer, supra*.

Interim Relief

The Board issued a number of decisions during the fiscal year that clarify the applicability of interim relief where an appellant prevails in the initial decision on an appeal. In *Evono v. Department of Justice*, 69 M.S.P.R. 541

(1996), the Board ruled that where the appellant is receiving benefits from the Office of Workers' Compensation Programs for an employment-related illness or injury, it is not proper to order interim relief. In *Ellshoff v. Department of the Interior*, 69 M.S.P.R. 585 (1996), the Board held that the rule that interim relief is not properly awarded where the appellant currently receives other Government benefits does not apply where his alternative source of income is private employment. In *Burke v. Smithsonian Institution*, 69 M.S.P.R. 407 (1996), the Board ruled that an "undue disruption" determination need not take any particular form and that the agency's failure to inform the appellant that it made such a determination is harmless error.

Retirement

The Board addressed two significant retirement-related matters. In *DoPadre v. Office of Personnel Management*, 69 M.S.P.R. 346 (1996), the Board declared an OPM regulation invalid where it purported to remove Board jurisdiction as to OPM's application of court-ordered survivor annuities. In a series of cases, the Board reexamined the circumstances in which OPM should allow an appellant to make a post-retirement election to include credit for his post-1956 military service in his retirement annuity. *Mopps v. OPM*, 69 M.S.P.R. 314 (1996), *Cox v. OPM*, 69 M.S.P.R. 320 (1996), *Nunez v. OPM*, 69 M.S.P.R. 326 (1996) , and *Jacob v. OPM*, 69 M.S.P.R. 340 (1996).

Arbitration Cases

The Board addressed jurisdictional issues in two cases concerning the arbitration process. In *Hill v. Department of the Army*, 70 M.S.P.R. 196 (1996), the Board set forth the circumstances under which it may assert jurisdiction over a matter normally reserved to the grievance process where the local union that would have represented the appellant is defunct. In *Tetrault v. U.S. Postal Service*, 71 M.S.P.R. 376 (1996), the Board set out the circumstances under which an appellant will not be bound by a union's settlement of an appeal she would have otherwise have been able to bring to the Board.

Adverse Actions

In two cases involving alleged constructive removals due to intolerable conditions, the Board further refined the tests it will apply to claimed constructive removals based on discrimination resulting from the creation of a hostile working environment. In *Markon v. Department of State*, 71 M.S.P.R. 574 (1996), the Board declined to find Title VII standards dispositive of such claims, stating that claims of discrimination and reprisal could only be considered, along with the remaining evidence of record, under the coercion test. If the claims meet that test, they could then constitute affirmative defenses. In *Bates v. Department of Justice*, 70 M.S.P.R. 659 (1996), the Board considered

the case under the Title VII standards for a hostile working environment sexual harassment claim. It found, however, that the appellant did not meet the Title VII standards. Nevertheless, based on those claims and the other evidence, it found that she did show that her working conditions had been made so intolerable that she was forced to resign. On a related matter, the Board ruled that an

appellant proves that his acceptance of a lower graded job was coerced where he accepted the position only because the agency refused to grant him the reasonable accommodation for his disability to which he was entitled. *O'Connell v. U.S. Postal Service*, 69 M.S.P.R. 438 (1996).

In *Barry v. Treasury*, 71 M.S.P.R. 283 (1996), the Board ruled that in drug-related cases, a claim of stress per se is not a factor for consideration in mitigation or otherwise, absent an explanation of its relationship to the misconduct. With respect to mitigation, in *Franklin v. Department of Justice*, 71 M.S.P.R. 583 (1996), the Board ruled that even though a matter raised by the appellant may not be relevant to a decision on the merits of the charges against him, it ma nonetheless be a factor for consideration in mitigation of the penalty.

Board Procedures

Addressing its own procedures, the Board definitively ruled that an appellant has a fundamental right to an in-person hearing if there is a genuine dispute as to any material fact, although a remand will be required only if the error in holding a hearing by telephone had a potentially prejudicial effect. *Evono v. Department of Justice*, 69 M.S. P.R. 541 (1996).

The Board also ruled that it would be unfair to apply collateral estoppel where an appellant previously litigated in another forum matters at issue in an adverse action appeal, where his incentive to litigate had been less than it is before the Board. In that case, *Wildberger v. Small Business Administration*, 69 M.S.P.R. 667 (1996), the Board held that one of the main reasons application of collateral estoppel was inappropriate was the nature of the forums at issue. The forum that previously adjudicated the matter, an internal union tribunal, was not established by opposing parties for the purpose of dispute resolution. The Board, on the other hand, is an independent administrative agency of the United States, established by Congress for the purpose of adjudicating appeals of Federal employees and guarding Federal merit systems.

Changing its rule that the Director of OPM could not request reconsideration of an appeal under

5 U.S.C. § 7703 where OPM was an original party to the appeal, the Board held that such a request is a jurisdictional prerequisite to the Director's right to seek Federal Circuit review of the Board's ruling, and thus would be considered by the Board. *Jackson v. Office of Personnel Management*, 71 M.S.P.R. 405 (1996).

LITIGATION

JUDICIAL REVIEW

The Board defends its final decisions involving issues of its jurisdiction and procedure before the U.S. Court of Appeals for the Federal Circuit, its primary reviewing court. During FY 1996, the Board litigated 98 cases before the Federal Circuit. In addition to these new cases, the Board also litigated 115 cases arising from the U.S. Postal Service restructuring that were filed earlier (see discussion below).

During the fiscal year, the court issued 789 decisions on review of final Board decisions—both initial decisions issued by administrative judges that became final when no petition for review was filed and final decisions of the 3-member board. Of this number, 97 percent left the final Board decision unchanged (case dismissed or Board decision affirmed). The court affirmed the final Board decision in 96 percent of the cases it adjudicated on the merits.

The Board defends appeals of decisions in cases brought by the Special Counsel and decided by the Board under its original jurisdiction authority. All of these cases are appealed to the Federal Circuit, except Hatch Act cases involving employees of state and local governments, which are heard by Federal district courts. Original jurisdiction cases typically involve complex issues such as the extent of the Special Counsel's jurisdiction and novel issues involving prohibited personnel practices and Hatch Act violations.

The Board also litigates appeals of decisions in which the Director of OPM petitions for review in the Federal Circuit because he has determined, in his discretion, that the Board's determination is erroneous and will have a

substantial impact on a civil service law, rule, regulation, or policy directive. Other litigation includes subpoena enforcement cases brought by the Board and discrimination cases where the Board is named as a defendant. These cases are filed in the various Federal district courts.

JUDICIAL REVIEW*OF MSPB DECISIONS, FY 1992-1996

PERCENT OF MSPB DECISIONS UNCHANGED**

Federal Circuit Decisions

* The MSPB's final decisions--either initial decisions of an administrative judge that have become final or the Board's final

decisions--may be appealed to the U.S. Court of Appeals for the Federal Circuit.

**Dismissed or Affirmed

U.S. Merit Systems Protection Board

POSTAL SERVICE

RESTRUCTURING CASES

Following the Federal Circuit's decision in two lead cases involving the Postal Service restructuring, *Krizman v. Merit Systems Protection Board*, 77 F.3d 434 (Fed. Cir. 1996), and *Mueller v. Merit Systems Protection Board*, 76 F.3d 1198 (Fed. Cir. 1996), the Board filed 115 motions for summary affirmance. Of those 115 motions, the court either granted the Board's motion or affirmed the Board's decision in 104 cases. Two cases were remanded for further consideration, two were dismissed, and seven were pending at the end of the fiscal year.

In both *Krizman* and *Mueller*, preference-eligible Postal Service employees claimed that their retirements during the early-out incentive program preceding the restructuring were involuntary because the agency did not inform them that the restructuring would be a reduction in force. The appellants filed their appeals following the Board's determination that preference-eligible Postal Service employees who were demoted during the restructuring were subjected to a RIF. That determination was made some ten months after most of the appellants retired. The Board dismissed the appeals as untimely, finding that the appellants were not entitled to notice of RIF appeal rights because the agency took no RIF action—separation, demotion, or reassignment requiring displacement—against them. The court agreed.

OPM PETITIONS FOR REVIEW

Three OPM petitions for review decided by the Federal Circuit during FY 1996 are significant. In *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996), the court affirmed a number of the Board's decisions holding that an agency may not charge an employee with both misconduct and making false statements regarding the alleged misconduct. The court held

that, consistent with its decision in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1575 (Fed. Cir. 1988), an agency may not charge an employee with falsification or a similar charge on the basis of the employee's denial of another charge or the underlying facts relating to that other charge. The court held that due process requires that an employee be allowed to deny both a charge and the underlying facts without being subject to a falsification charge. The court noted, however, that employees do not otherwise have a right to lie or make false factual statements to an agency, and such false statements made during agency investigations and relating to alleged misconduct may properly be subject to falsification or similar charges. Likewise, denials of charges and related facts may not be considered in determining a penalty.

In *King v. Briggs and Merit Systems Protection Board*, 83 F.3d 1384 (Fed. Cir. 1996), OPM argued that the Board is not permitted to summarily deny an OPM request for reconsideration without specifically addressing the arguments raised in the petition in a published opinion. The court held that it lacks authority to require the Board to

issue a published decision even if public policy would favor such a practice. Further, the court agreed with the Board that while the agency was permitted to appoint, classify, and give pay rates outside the provisions of Title 5, it was not authorized to remove Ms. Briggs without the procedural protections provided in Chapter 75 of Title 5. The court reasoned that Congress chose which aspects of Title 5 it wished to exclude from the position, and provisions not specifically excluded remain applicable.

In *King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996), the court agreed that employees have a right to notice and an opportunity to respond to the reasons their access to classified information is denied before the agency suspends them under 5 U.S.C. § 7513. The court further found that when an agency

suspends an employee under 5 U.S.C. § 7513 based on its suspension of the employee's security clearance, the proposal notice must provide enough detail to allow the employee to make an informed response. Moreover, the court found that the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), does not foreclose Board review of the procedures used by the agency in placing an employee on enforced leave. Merely providing the employee with information that his access to classified information is being suspended, without more, does not provide the employee with sufficient information to make an informed reply to the agency before being placed on enforced leave.

MONITORED LITIGATION

During fiscal year 1996, the Board monitored 739 cases in the Federal Circuit involving appeals of decisions issued by the Board under its appellate jurisdiction. Although the Department of Justice defends the employing agency against whom the appeal is filed, the Board monitors this litigation closely. Board activities in connection with monitored litigation include evaluating the case to determine if Board intervention is appropriate, responding to inquiries, assisting in drafting briefs, and analyzing the court's decision in these cases to determine its applicability and impact.

The U.S. Court of Appeals for the Federal Circuit maintains a Web site at *www.fedcir.gov*, which provides quick

access to two other Web sites that make the court's decisions available.

U.S. Merit Systems Protection Board

CUSTOMER SERVICE STANDARDS

The Merit Systems Protection Board has two core missions: (1) Adjudication of appeals brought to it under the provisions of law and regulation, and (2) Oversight of the Federal merit systems. These two missions are authorized in the Civil Service Reform Act of 1978.

We have established these standards to assure our customers that they receive the quality of service to which they are entitled and to assure the public as a whole that we are ably promoting and protecting the Federal merit systems.

MISSION 1 — Adjudication of Appeals

1. We will make our regulations easy to understand and our procedures easy to follow.

2. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.

3. We will promptly and courteously respond to customer inquiries.

4. We will facilitate the settlement of appeals.

5. We will issue readable decisions based on consistent interpretation and application of law and regulation.

6. We will issue decisions in initial appeals within 120 days of receipt and within 110 days on petitions for review, except where full and fair adjudication of an appeal requires a longer period.

7. We will make our decisions readily available to our customers.

MISSION II — Oversight of the Federal Merit Systems and the U.S. Office of Personnel Management

1. We will conduct research on topics and issues relevant to the effective operation of the Federal merit systems and the significant actions of the U.S. Office of Personnel Management; perform sound, objective analysis; and where warranted, develop practical recommendations for improvement.

2. We will issue timely, readable reports on the findings and recommendations of our research and make these reports available to all interested individuals and parties.

3. We will enhance the constructive impact of our studies and reports through outreach efforts.

We will conduct surveys of our customers from time to time to see how well we are meeting these standards. However, if at any time, you have comments or suggestions concerning our service, we invite you to provide feedback to our Chairman, Mr. Ben Erdreich, through the Clerk of the Board, at 1120 Vermont Avenue, NW., Washington, DC 20419, telephone (202) 653-7200, FAX number (202) 653-7130 Electronic mail may be sent over the Internet to mspb@mspb.gov.