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Source of document: FOIA Request
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U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board

1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; Email: foiahq@mspb.gov

October 6, 2017

SENT VIA E-MAIL

RE: Final Release for Request MSPB-2017-000027

This is the final release to your Freedom of Information Act (FOIA) request to the U.S. Merit Systems Protection Board (MSPB) dated and received December 6, 2016. In your request, you sought a “copy of the MSPB agency briefing materials related to the Presidential transition for Agency Review Teams or Agency Landing Teams. I am primarily interested in records from the time period July 1, 2016 to present.”

We have conducted a comprehensive search and have located records responsive to your request. Portions of the following record are being withheld in part pursuant to FOIA Exemption 5. See 5 U.S.C. § 552(b)(5).

- U.S. Merit Systems Protection Board, A Report to the Transition Team of the President-Elect

FOIA Exemption 5 exempts from disclosure inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

The following supplemental materials were also provided with the above record. With the exception of the sample administrative judge decision, all of the supplemental materials are publically available on the MSPB website and will not accompany this FOIA release.

[MSPB Annual Report for FY 15](#)

[MSPB budget submission for FY 17](#)

[MSPB Annual Performance Results for FY 15 and Annual Performance Plan for FY 16 \(Final\) and FY 17 \(Proposed\)](#)

[MSPB Strategic Plan for FY 14- FY 18](#)

[Sample precedential Board decision](#): *McMillan v. Department of Justice*

Sample administrative judge decision: *Swain v. Office of Personnel Management*

[Sample study report:](#) *The Impact of Recruitment Strategy on Fair and Open Competition for Federal Jobs*

If you have any questions regarding this request, or if you disagree with this disposition, in whole or part, you have the right to seek assistance from the FOIA Public Liaison, appeal the determination, or contact the Office of Government Information Services to participate in dispute resolution services

If you wish to contact the FOIA Public Liaison, you may do so via email to foiahq@mspb.gov or telephone at (202) 254-4475. If you wish to participate in dispute resolution services, you may contact the Office of Government Information Services (OGIS). The contact information for OGIS is as follows:

Office of Government Information Service
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
E-mail at ogis@nara.gov
Telephone at 202-741-5570
Toll free at 1-877-684-6448
Facsimile at 202-741-5769

If you wish to appeal the determination, you may do so by submitting your appeal through FOIAonline or by mailing your appeal to:

Chairman, c/o Clerk of the Board
U.S. Merit Systems Protection Board
1615 M Street, NW
Suite 500
Washington, DC 20419

Your appeal should be identified as a "FOIA Appeal" on both the letter and the envelope, if applicable. It should include a copy of your original request, a copy of this letter and your reasons for appealing this decision. You may also submit your appeal by email to foiahq@mspb.gov or by fax at (202) 653-7130. Your appeal must be filed within ninety (90) days from the date of this letter.

Sincerely,

//signed//

Karin Kelly
Government Information Specialist
U.S. Merit Systems Protection Board

Attachments:

- Sample administrative judge decision: *Swain v. Office of Personnel Management*
- U.S. Merit Systems Protection Board, A Report to the Transition Team of the President-Elect



U.S. Merit Systems Protection Board

A REPORT TO THE TRANSITION TEAM OF THE PRESIDENT-ELECT

NOVEMBER 1, 2016

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Executive Summary

The Merit Systems Protection Board (MSPB or Board) is a small, independent agency whose two main functions are: (1) Adjudicating legal disputes between federal agencies and employees, applicants, and retirees; and (2) studying the health of the government's merit-based employment system. The Board itself is made up of three presidentially-appointed, Senate confirmed members who serve staggered seven-year terms. MSPB's independence is marked by its authority to communicate directly with Congress on matters such as budget and legislation, without prior clearance from the Administration.

The biggest issue facing MSPB is an impending loss of quorum. Currently one Board member's seat is vacant, and a second member is bound by law to separate from the Board no later than February 28, 2017. This means that absent action to seat a new Board member, on March 1, 2017 the Board will be down to one member, thus depriving the Board of the two-member quorum necessary to issue decisions and to conduct other important business. The new President should act expeditiously to fill at least one of the vacant seats on the Board.

The other issues with which a new leader of MSPB must grapple are a mix of externally-generated challenges and internal management matters. Some members of Congress believe that MSPB is an obstacle to the effective management of the government, and for the last three years they have repeatedly proposed bills that would alter MSPB's adjudication process for some segment of the workforce. One such bill became law and was very difficult to implement; more bills along these lines are likely. Although MSPB is not a policymaking body, it needs to be more active in providing technical advice to Congress and the Administration so that any changes that are put into effect are not flawed from the start. At the same time MSPB must be ready to redesign its adjudication process so that it can meet whatever new mandate comes along.

Apart from the external forces that may affect MSPB, a new leader will need to oversee modernization of the agency's business applications, (b) (5) and direct an overhaul of the agency's records-management program.

History, Functions and Structure of the Merit Systems Protection Board

The Civil Service Commission (CSC) was created in 1883, and over time it became the central personnel authority for the executive branch. In 1978, however, the Civil Service Reform Act (CSRA) abolished the CSC and distributed its functions among several newly-created agencies. See Pub. L. No. 95-454, 92 Stat. 1111 (codified throughout title 5, U.S.C.). One of those new agencies, the Office of Personnel Management (OPM), was charged with setting personnel policy, administering benefit programs for federal employees and retirees, and carrying out certain other administrative tasks related to the civil service.

The CSRA also created the MSPB and vested it with two main functions:

- Adjudicating appeals of certain actions affecting federal employees, applicants for federal employment, federal retirees, and applicants for federal retirement benefits; and
- Conducting studies of the federal civil service and reporting to the President and Congress on the extent to which the federal workforce is being managed in accordance with the Merit System Principles and is free of Prohibited Personnel Practices.

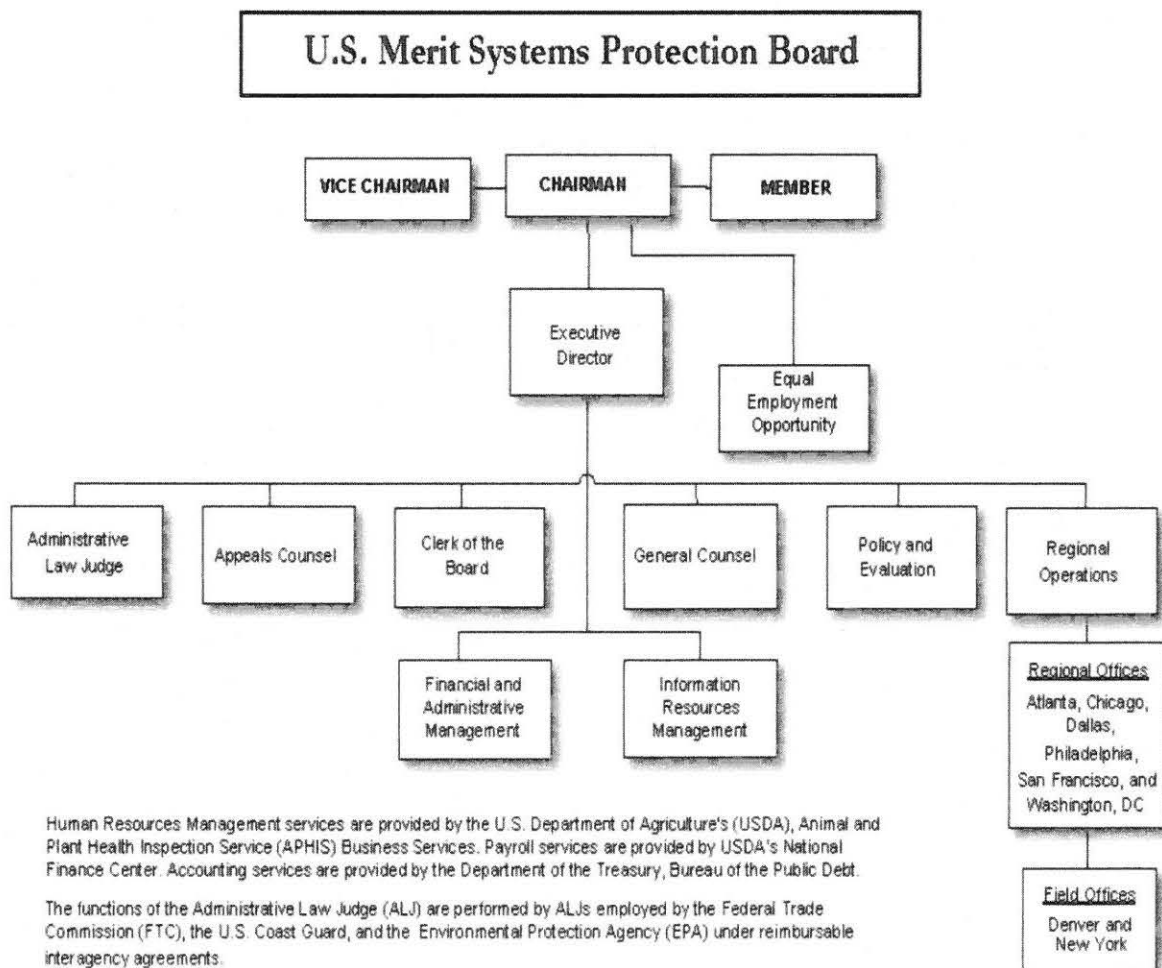
See 5 U.S.C. § 1204(a)(1), (3).

MSPB is an independent agency. As such, it has three important privileges that most executive agencies lack. First, MSPB may submit a budget request to Congress without the need for clearance by the Administration. 5 U.S.C. § 1204(k). Second, MSPB may submit “legislative recommendations” and other information to Congress, without the need for clearance by the Administration. 5 U.S.C. §§ 1204(l), 1205. Third, with the exception of appointments in the career Senior Executive Service (SES), MSPB has the authority to appoint personnel without the “supervision or approval” of OPM. 5 U.S.C. § 1204(j).

The Board consists of three Presidentially-appointed, Senate-confirmed members -- Chairman; Vice Chairman; and Member -- who serve staggered seven-year terms. Not more than two Board members may be adherents of the same political party. See 5 U.S.C. §§ 1201 - 1203. This structure allows for political control of MSPB while providing a measure of stability.

The Chairman is the “chief executive and administrative officer” of the Board. 5 U.S.C. § 1203(a). The authority to adjudicate appeals and issue study reports is held collectively by the Board. 5 U.S.C. § 1204(a).

As of September 30, 2015, MSPB had 228 on-board FTE. Of those FTE: Two were Presidentially-appointed Board members (the Vice Chairman position is vacant); four were non-career SES; two were Schedule C appointees; and the remaining 220 were career employees. About half of MSPB’s employees work at agency headquarters in Washington, D.C., and the other half work in regional and field offices around the country. MSPB’s personnel are organized as shown below.



MSPB's appropriation for FY16 was \$46,835,000. Approximately 77% of MSPB's expenditures go to salary and benefits. MSPB is funded through December 9, 2016 at the FY16 level.

Adjudication

The Board's jurisdiction over federal workplace disputes is not plenary. Rather, the Board has authority to adjudicate an appeal only when jurisdiction over the matter is conferred by statute or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The following is a list of matters that may be appealed to the Board:

- Disciplinary actions (removal; suspension > 14 days; reduction in grade or pay; furlough for < 31 days)
- OPM decisions concerning retirement benefits
- Restoration to duty following a work-related injury
- Action based on poor performance
- Reduction in force (separation, demotion, or furlough > 30 days)
- Employment practices
- Withholding of within-grade pay increase
- OPM negative suitability determination
- Failure to reemploy in civilian position following absence for uniformed service
- Discrimination in civilian employment based on past, present, or future military obligation
- Denial of veterans' preference rights
- Claims of retaliation for whistleblowing
- Actions brought by the Special Counsel under the Hatch Act and other civil service laws
- Certain actions against members of the SES
- Actions against administrative law judges
- Review of OPM regulations

The Board operates much like a two-level court system. The vast majority of appeals are first filed in the Board's regional and field offices,

which are akin to the trial level of a court. The Board has delegated to Administrative Judges (all of whom are attorneys) the authority to hold hearings and issue initial decisions on appeals. A party that is dissatisfied with an initial decision may petition the Board for review of the decision, generating a proceeding that is similar to an appeal in court. The Board members decide petitions for review by majority vote. 5 C.F.R. § 1200.3(a).

In all instances a Board decision is binding on the parties to a dispute. In addition, when the Board chooses to designate a decision as “precedential,” that decision represents authoritative guidance that Administrative Judges, federal managers, employees, and other affected individuals must follow where applicable. *See* 5 C.F.R. § 1201.117(c).

A final Board decision is subject to review in federal court. 5 U.S.C. § 7703. A final Board decision that resolves a claim of prohibited discrimination is subject to review before the Equal Employment Opportunity Commission. 5 U.S.C. § 7702. A Board decision is considered “final” for review purposes when it is issued by the full Board and ends the dispute, or when it is issued by an Administrative Judge and neither party petitions the Board for review within 35 days.

Studies

MSPB’s studies staff consists of industrial organization psychologists, HR experts, two attorneys, and other employees who conduct empirical research into the management of the federal workforce. MSPB also reviews the significant actions of OPM on an annual basis. 5 U.S.C. § 1206. To aid in carrying out the studies function, the CSRA granted MSPB authority to examine OPM’s central personnel files and to obtain additional records from other agencies. 5 U.S.C. § 1204(e)(3). The purpose of MSPB’s studies program is to evaluate the extent to which the federal workforce is being managed in accordance with the Merit System Principles, 5 U.S.C. § 2301, and is free of prohibited personnel practices, 5 U.S.C. § 2302. MSPB reports the results of its studies to Congress and the President. 5 U.S.C. § 1204(a)(3). Whereas the Board has no choice but to decide all appeals within its jurisdiction that parties file, the timing and subject matter of the Board’s studies is discretionary.

Challenges facing MSPB and its new leadership

The following pages describe problems that confront MSPB now and that will persist beyond the inauguration of a new president on January 20, 2017, as well as issues with which MSPB's next leader will have to contend.

Without action, MSPB will lose its quorum

In all likelihood the Board will lose the ability to carry out its most important function -- issuing decisions -- on March 1, 2017. The current Administration and the next one should act to avoid or minimize this potentially paralyzing situation, described below.

As stated above, the Board consists of three Presidentially-appointed, Senate-confirmed members -- Chairman; Vice Chairman; and Member -- who serve staggered seven-year terms. See 5 U.S.C. §§ 1202, 1203. A member may continue to serve beyond the expiration of his or her term until a successor is appointed, but in no event may a member serve for more than one year after the expiration of his or her term. 5 U.S.C. § 1202(b), (c). The current state of the Board is summarized in the following table.

POSITION	STATUS	EXPIRATION OF TERM	LAST DAY INCUMBENT MAY SERVE IF NOT REPLACED	IS A NOMINATION PENDING BEFORE SENATE?
Chairman	Encumbered by Democrat	3/1/16	2/28/17	NO
Vice Chairman	Vacant	n/a	n/a	YES*
Member	Encumbered by Republican	3/1/18	2/28/19	n/a

The Board decides cases by "majority vote." 5 C.F.R. § 1200.3(a). Currently the Board has just two members, which means that in order to decide a case the members must agree. Although this state of affairs is less than ideal, it has not caused great difficulty. Unless there is action to seat a new Board member before March 1, 2017, however, the Board will be left with just one member, because one of the two current members (Chairman Susan Tsui

* On July 8, 2015, President Obama nominated Mark Cohen as a Board member to be designated Vice Chairman. The nomination was referred to the Senate Committee on Homeland Security and Government Affairs.

Grundmann) may not serve beyond February 28, 2017. Such a situation would paralyze MSPB's petition for review process.

It is worth noting that if the Chairman leaves before a new Board member is seated, the remaining member (Member Mark Robbins) would have authority to "perform the functions vested in the Chairman" beginning on March 1, 2017. Thus, administrative tasks such as hiring, executing the agency's budget, and the like, could continue.

Parties to appeals, on the other hand, would be stuck in limbo. Individuals and the government alike would be adversely affected. To take just a few examples, left waiting indefinitely would be individuals who seek: Relief for actions taken in retaliation for whistleblowing; disability benefits denied by OPM; reinstatement to federal jobs from which they were removed; and reasonable workplace accommodations for disabilities. Notably, veterans with claims for violation of their preference in federal hiring or their right to reemployment in a civilian position following absence for military duty would be unable to have their claims resolved while the Board had just one member.

On the government side, agencies seeking to close the books on personnel actions that were appealed to MSPB -- such as discipline taken against VA employees who mistreated veterans -- would see their efforts at accountability stall out. In recent years Congress has shown an increasing interest in having appeals to MSPB resolved expeditiously, yet the likely loss of a quorum at MSPB on March 1, 2016 would have the opposite effect: Drawing out the time for resolution of appeals.

We believe it is unlikely that the Senate will confirm the nomination of Mark P. Cohen as Board Vice Chairman, made 16 months ago, before the end of the current legislative session. It seems even less likely that the current President and the Senate will work together to seat a new Board member in the first 20 days of January, 2017. In 2003 the Board was left with just one member, but that lasted for only a few weeks before the President filled the vacant slot via recess appointment. Since then recess appointments have become more difficult to accomplish. See *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550 (2014).

Given the above, we urge the President-elect to be prepared to nominate someone to fill at least one position on the Board as soon as possible after Inauguration Day. Again, one position on the Board is currently vacant, and the term of one of the two remaining members has expired; thus, at any time

after noon on January 20, 2017, the President could nominate two individuals to serve on the Board, one of whom would be Chairman. If the Board loses its quorum on March 1, 2017, it is imperative that the time period when the Board has just one member be minimized.

MSPB must be prepared to modify its adjudication process

In 2014 the President signed the Veterans Access, Choice, and Accountability Act (VACA) into law. VACA was a response to reports that the employees of the Department of Veterans Affairs (DVA) were mistreating veterans and falsifying medical records. Insofar as is relevant here, VACA provided that when a DVA senior executive appeals a disciplinary action to MSPB: (i) The Administrative Judge must issue a decision in 21 days; (ii) if the Administrative Judge does not meet the 21-day deadline, the agency action becomes final; and (iii) the Administrative Judge's decision is not reviewable by the presidentially-appointed Board members.

It typically takes about 120 days from filing for an Administrative Judge to issue a decision in an appeal that is litigated on the merits. The 21-day deadline for DVA senior executive appeals is unreasonably short, and as a result the appeals that were filed under VACA were very disruptive; MSPB was forced to devote more staff to VACA appeals than are devoted to ordinary appeals, and staff had to neglect their work on other cases.

Moreover, the Department of Justice -- agreeing with the views previously expressed by the Board members before the President approved VACA -- has refused to defend the portion of VACA that precludes review of an Administrative Judge's decision because that provision violates the Appointments Clause of the Constitution. Further, it appears that the provision of VACA that makes DVA's action final if the Administrative Judge fails to meet the 21-day deadline violates the Due Process clause of the Constitution. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Despite VACA's drawbacks, since 2014 members of Congress have introduced multiple bills that would impose tight deadlines on MSPB's adjudication process for other employees in DVA and employees of other agencies. Some of these bills contain provisions of dubious constitutionality, and at least one bill would grant MSPB appeal rights to a large group of employees who currently have no such rights.

There is no reason to believe that the desire of policymakers to place constraints on MSPB's adjudication process has gone away. MSPB must be ready to modify its adjudication process, perhaps drastically, to meet these constraints. It will not be enough to try to shoehorn categories of appeals that have been subject to legislative attention into MSPB's existing process.

MSPB should establish a formal communications program

With increased emphasis on transparency in government operations and ever-growing challenges for the federal workforce, MSPB has a need for a structured and resourced communication program. While the Clerk of the Board, and most recently the Executive Director and General Counsel, have handled public relations on a reactive basis, MSPB does not have a coordinated and resourced program responsible for agency-wide public relations and outreach. Optimally, this program would be responsible for working with *all* offices to stay abreast and knowledgeable of a range of issues, such as sensitive cases, MSPB reports and studies, and education and outreach.

An additional feature of a structured communications program would be to stay abreast of changes to MSPB's adjudication process that may be under consideration and to provide technical information to policymakers so that any legislative changes are effective and constitutional. MSPB is not a policymaking body, and accordingly, it has no institutional view on the wisdom of any particular alteration to the discipline and appeals system. At the same time, however, MSPB has a legitimate interest in ensuring that new civil service laws can be implemented on a practical level and are consistent with the constitution.

MSPB must modernize its core business applications

MSPB's primary case tracking and document management systems are client-server software that are nearing end of life. They are off-the-shelf systems, heavily customized over time to support antiquated paper processes. Therefore, they cannot be upgraded to current technology standards, and they no longer are easily modified to support electronic case processing, as described below. MSPB has initiated a project to replace the three primary case-related systems with a modern, cloud-based, unified solution. The current systems include:

1. Mitrastech (formerly Bridgeway) **LawManager** case management system

LawManager is a system through which MSPB employees track individual cases and case processing performance overall. It is heavily customized to support the unique business processes of MSPB. LawManager produces progress reports against the agency's Annual Performance Plan, as well as additional data on significant matters. It was implemented in FY 2004 to replace the Board's then 13-year old Case Management System. The initial cost of implementing LawManager was approximately \$3.25 million. The ongoing enhancement and support costs are \$150,000 to \$200,000 annually with an additional licensing cost of approximately \$75,000. LawManager is a client-server application that has reached the end of its product life cycle. It will be replaced during the software modernization project scheduled to begin in FY 2017.

2. OpenText eDocs DM document management system

The OpenText Document Management System (DMS) is MSPB's central document repository. It contains the Board's published decisions, initial decisions, final orders, (b) (7)(E)

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electronic case documents, (b) (7)(E)

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MSPB

implemented this system in FY 2000 and annual licensing costs approximately \$25,000. The DMS is a client-server application that has reached the end of its product life cycle. It will be replaced during the software modernization project scheduled to begin in FY 2017.

3. HotDocs document assembly system

HotDocs is a repository of shell documents that are used primarily by MSPB's legal offices to provide parties with information and instructions during the processing of an appeal. MSPB drafts new HotDocs standard documents and revises current ones to ensure that parties are fully informed of the law, their burdens of proof, and the rules that govern their appeals even as changes are made to those statutes, regulations, and policies. MSPB implemented HotDocs in FY 2000 and annual licensing costs approximately \$7,000. HotDocs is a client-server application that has reached the end of its product life cycle. It will be replaced during the software modernization project scheduled to begin in FY 2017.

In addition to these systems, MSPB's **e-Appeal Online** electronic filing system allows the parties to MSPB appeals to file and receive documents from MSPB, and from each other, immediately without the delays and expense of standard delivery methods. About 61% of all appeals and 81% of all pleadings are now filed electronically. The e-Appeal Online system is developed, enhanced, maintained, and hosted by MSPB. e-Appeal Online initially was implemented in FY 2004 for approximately \$800,000. Hosting, maintenance, and development costs from FY 2004 to FY 2010 were approximately \$200,000 annually. Since FY 2010, e-Appeal has been hosted and maintained at MSPB.

MSPB has piloted e-filing and processing to some degree since 2007, including mandatory e-filing for attorneys and agency representatives in the Washington Regional Office and the Denver Field Office. Since March 2016, the Denver Field Office has participated in a 100% electronic case file (ECF) pilot as a proof-of-concept and an opportunity to study changes to the current MSPB process required to support 100% ECFs across the enterprise. ECF business rules will be further defined during the requirements portion of the software modernization project schedule to begin in FY 2017. IRM and the Office of the Clerk of the Board are co-leaders of the ECF effort -- otherwise known as the **e-Adjudication Initiative** -- working with the other MSPB offices.

For the first phase of the software modernization project, IRM has developed a Statement of Work to solicit a vendor to assist with business process documentation and software systems requirements elicitation. Possible next steps would be:

1. Hire a contractor to assist with business process documentation and software systems requirements elicitation.
2. Complete requirements elicitation within six months of project start, resulting in a documented business process narrative, business data flow diagram, requirements documentation, and a Statement of Work for a Request for Proposals for software systems vendors.
3. Select software solution vendor and begin implementation phase of approximately 18 months.

The initial requirements phase of the project is estimated to cost \$150,000.

MSPB must (b) (5)

As explained above, most appeals to MSPB are filed in the regional and field offices, where Administrative Judges issue initial decisions. A party that is dissatisfied with an initial decision may petition the Board members at headquarters for review of that decision.

Regional and field office adjudication

The Board's regional and field offices are the face of the MSPB to the parties to the cases that come before them. Indeed, considering that only about 20% of cases are reviewed at MSPB headquarters, the regional and field offices are the part of MSPB with which most people interact and therefore the ones by which most parties' impressions of the MSPB are formed. For many years the regions maintained not just a reputation for excellence, but also for timeliness, and while the high quality of their decisions has continued, unfortunately timeliness could not be maintained after sequestration led to furloughs. The regional and field offices continue to struggle to recover from the effects of the furloughs, which brought them more than 33,000 appeals -- about five years' worth of work -- in just a few months' time.

The significance of the lasting effects of the furloughs is its harm to the reputation of the MSPB, which has always been seen as the premier adjudicatory agency in the federal government. Although MSPB has resolved almost all of the furlough appeals while still adjudicating a significant number of the other appeals that were filed during and since 2013, a backlog of older cases was created when such a large portion of MSPB's resources was devoted to the furlough appeals. Simply put, the Board's reputation for timely processing has been damaged.

(b) (5)

Headquarters adjudication

The Office of Appeals Counsel (OAC) is the largest single office at the MSPB. It is central to the MSPB's core mission of adjudicating disputes

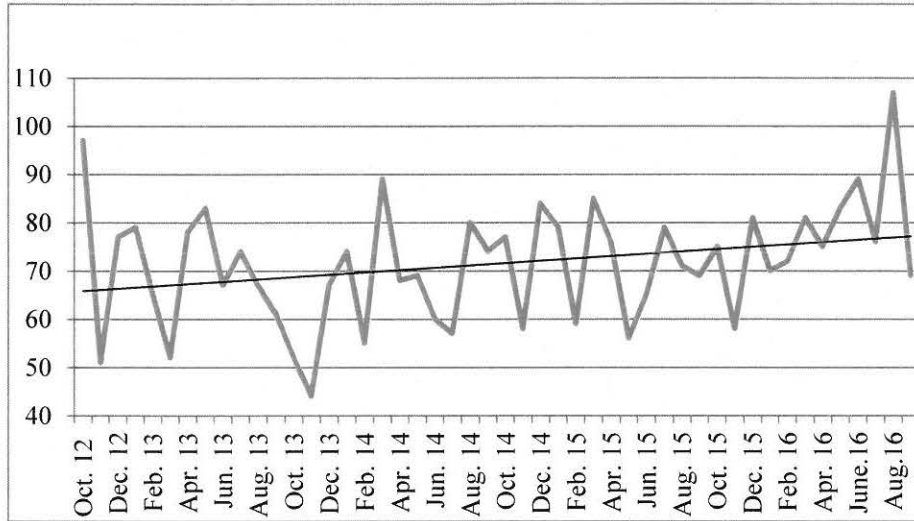
between employees and executive agencies that arise under the civil service laws. OAC's workforce prepares recommended decisions on petitions for review of Administrative Judges' decisions and related matters for consideration by the Board members. It is important to the public and the parties involved in these disputes to avoid lengthy delays in issuing decisions.

(b) (5)

OAC has 34 permanent, full-time employees on its staff, including managers, supervisors, non-supervisory attorneys, administrative staff, and detailees to other Board offices. OAC has traditionally supported the Board members' and other agency offices with attorneys as detailees. In recent years, the number of OAC attorneys on detail has varied from 0 to 8. For much of FY16, OAC had 6 non-supervisory attorneys and 1 supervisory attorney on detail to: the Office of Regional Operations (4 detailees); the Office of the Clerk of the Board (2 detailees); and the Chairman's Office (1 term appointee). New Board members are likely to want detailees from OAC, as they have in the past.

For FY17, the Board has a performance goal for the average case processing time for petitions for review to be 220 days or less. At this time, OAC has an inventory of 262 lead (non-secondary) cases. Average petition for review receipts have increased in recent years, from approximately 71 per month to 78 per month. See Figure 1.

FIGURE 1
MSPB HQ RECEIPTS, FY13 - PRESENT
(excludes secondary cases)



(b) (5)

(b) (5)



MSPB must restructure its records-management program

A robust records management program is required by federal law, serves as a vital element for efficient agency operations, and supports the objectives of MSPB's privacy and disclosure policies. A well-structured program would enable MSPB to have defined processes in place for how and where information -- such as appeal files, personnel records, attorney work product, emails and social media, shared calendars, and MSPB's intranet -- is created, saved, accessed, used, and disposed. While MSPB is taking small steps in the right direction, it currently lacks an agency-wide records and information architecture, which results in lost time and productivity in many areas across the agency and puts MSPB at risk in the privacy arena.

MSPB must migrate its data center to the cloud

As MSPB seeks to modernize its core business applications and shift to paperless work processes, a critical and necessarily interrelated component is migrating MSPB's on-premises data center to the cloud.

In FY 15, following the catastrophic loss of MSPB's virtual environment, a contractor conducted an independent review of MSPB's existing IT infrastructure, virtualization strategy, and operational processes to identify areas for improvement. Among other things, the contractor recommended taking a holistic approach to ensure MSPB's IT systems are effectively and efficiently designed to meet the needs of an organization of its size, budget, and mission. A primary conclusion of the contractor's assessment was that MSPB's data center is incapable of providing the resilience needed to support MSPB's goal of 100% electronic case processing. (b) (7)(E)

MSPB is working to complete an acquisition plan and scope of work to migrate its data center to the cloud. This includes the proof-of-concept migration of a low-risk element of our IT environment to the cloud early in CY 17.

Proposed Next Steps:

1. Complete the acquisition plan, including finalizing the scope of work and request for proposals.
2. Select a vendor and award the contract.
3. Implement the proof-of-concept migration of a low-risk element of our IT environment as phase 1 of this 1-2 year project (which must be closely coordinated with the project to modernize our core business applications).

Based on the contractor's Alternative Hosting Business Case Analysis, the 5-year cost for the project is estimated at \$1.7 million.



U.S. Merit Systems Protection Board

A REPORT TO THE TRANSITION TEAM OF THE PRESIDENT-ELECT

NOVEMBER 1, 2016

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Executive Summary

The Merit Systems Protection Board (MSPB or Board) is a small, independent agency whose two main functions are: (1) Adjudicating legal disputes between federal agencies and employees, applicants, and retirees; and (2) studying the health of the government's merit-based employment system. The Board itself is made up of three presidentially-appointed, Senate confirmed members who serve staggered seven-year terms. MSPB's independence is marked by its authority to communicate directly with Congress on matters such as budget and legislation, without prior clearance from the Administration.

The biggest issue facing MSPB is an impending loss of quorum. Currently one Board member's seat is vacant, and a second member is bound by law to separate from the Board no later than February 28, 2017. This means that absent action to seat a new Board member, on March 1, 2017 the Board will be down to one member, thus depriving the Board of the two-member quorum necessary to issue decisions and to conduct other important business. The new President should act expeditiously to fill at least one of the vacant seats on the Board.

The other issues with which a new leader of MSPB must grapple are a mix of externally-generated challenges and internal management matters. (b) (5)

[REDACTED]

Apart from the external forces that may affect MSPB, a new leader will need to oversee modernization of the agency's business applications, (b) (5)

[REDACTED]

History, Functions and Structure of the Merit Systems Protection Board

The Civil Service Commission (CSC) was created in 1883, and over time it became the central personnel authority for the executive branch. In 1978, however, the Civil Service Reform Act (CSRA) abolished the CSC and distributed its functions among several newly-created agencies. See Pub. L. No. 95-454, 92 Stat. 1111 (codified throughout title 5, U.S.C.). One of those new agencies, the Office of Personnel Management (OPM), was charged with setting personnel policy, administering benefit programs for federal employees and retirees, and carrying out certain other administrative tasks related to the civil service.

The CSRA also created the MSPB and vested it with two main functions:

- Adjudicating appeals of certain actions affecting federal employees, applicants for federal employment, federal retirees, and applicants for federal retirement benefits; and
- Conducting studies of the federal civil service and reporting to the President and Congress on the extent to which the federal workforce is being managed in accordance with the Merit System Principles and is free of Prohibited Personnel Practices.

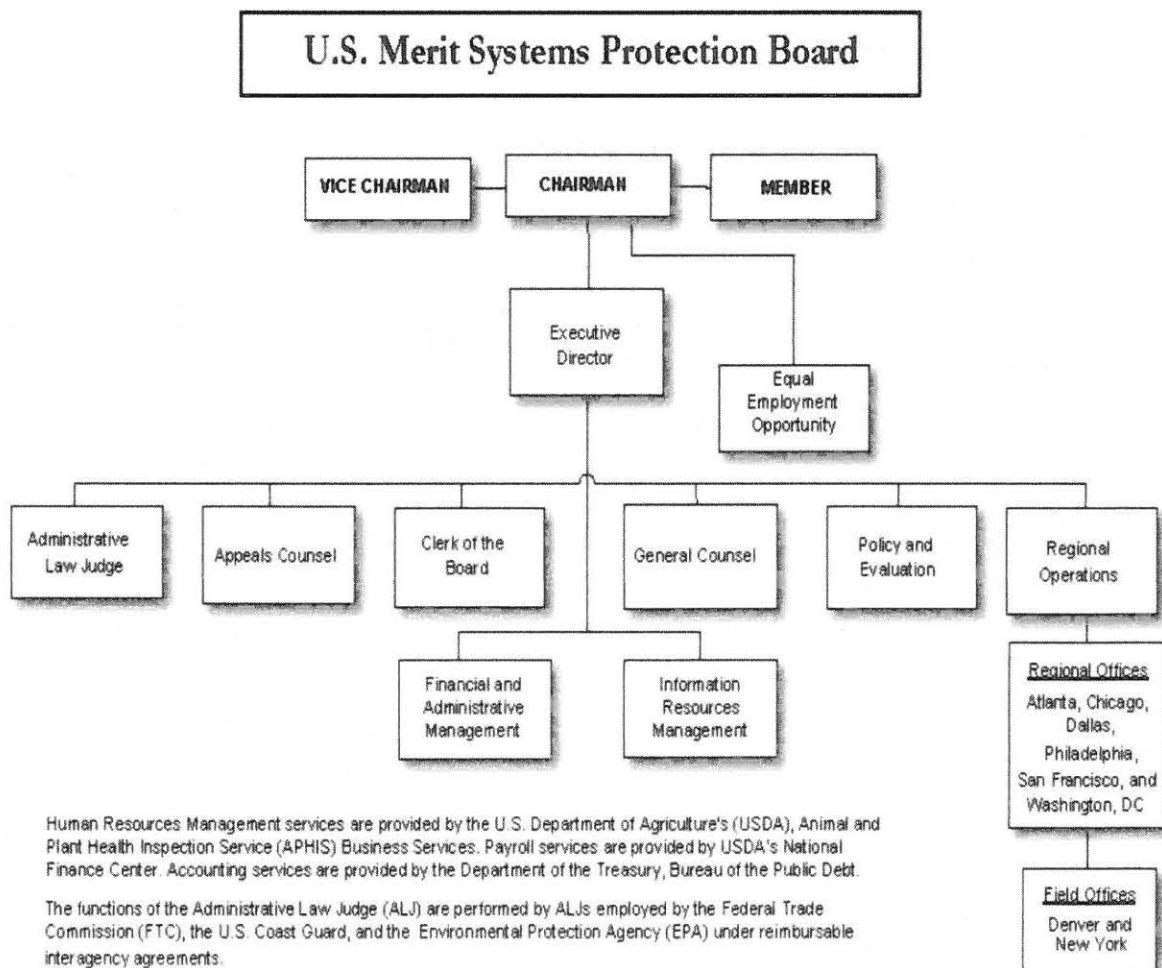
See 5 U.S.C. § 1204(a)(1), (3).

MSPB is an independent agency. As such, it has three important privileges that most executive agencies lack. First, MSPB may submit a budget request to Congress without the need for clearance by the Administration. 5 U.S.C. § 1204(k). Second, MSPB may submit “legislative recommendations” and other information to Congress, without the need for clearance by the Administration. 5 U.S.C. §§ 1204(l), 1205. Third, with the exception of appointments in the career Senior Executive Service (SES), MSPB has the authority to appoint personnel without the “supervision or approval” of OPM. 5 U.S.C. § 1204(j).

The Board consists of three Presidentially-appointed, Senate-confirmed members -- Chairman; Vice Chairman; and Member -- who serve staggered seven-year terms. Not more than two Board members may be adherents of the same political party. See 5 U.S.C. §§ 1201 - 1203. (b) (5)

The Chairman is the “chief executive and administrative officer” of the Board. 5 U.S.C. § 1203(a). The authority to adjudicate appeals and issue study reports is held collectively by the Board. 5 U.S.C. § 1204(a).

As of September 30, 2015, MSPB had 228 on-board FTE. Of those FTE: Two were Presidentially-appointed Board members (the Vice Chairman position is vacant); four were non-career SES; two were Schedule C appointees; and the remaining 220 were career employees. About half of MSPB’s employees work at agency headquarters in Washington, D.C., and the other half work in regional and field offices around the country. MSPB’s personnel are organized as shown below.



MSPB's appropriation for FY16 was \$46,835,000. Approximately 77% of MSPB's expenditures go to salary and benefits. MSPB is funded through December 9, 2016 at the FY16 level.

Adjudication

The Board's jurisdiction over federal workplace disputes is not plenary. Rather, the Board has authority to adjudicate an appeal only when jurisdiction over the matter is conferred by statute or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). The following is a list of matters that may be appealed to the Board:

- Disciplinary actions (removal; suspension > 14 days; reduction in grade or pay; furlough for < 31 days)
- OPM decisions concerning retirement benefits
- Restoration to duty following a work-related injury
- Action based on poor performance
- Reduction in force (separation, demotion, or furlough > 30 days)
- Employment practices
- Withholding of within-grade pay increase
- OPM negative suitability determination
- Failure to reemploy in civilian position following absence for uniformed service
- Discrimination in civilian employment based on past, present, or future military obligation
- Denial of veterans' preference rights
- Claims of retaliation for whistleblowing
- Actions brought by the Special Counsel under the Hatch Act and other civil service laws
- Certain actions against members of the SES
- Actions against administrative law judges
- Review of OPM regulations

The Board operates much like a two-level court system. The vast majority of appeals are first filed in the Board's regional and field offices,

which are akin to the trial level of a court. The Board has delegated to Administrative Judges (all of whom are attorneys) the authority to hold hearings and issue initial decisions on appeals. A party that is dissatisfied with an initial decision may petition the Board for review of the decision, generating a proceeding that is similar to an appeal in court. The Board members decide petitions for review by majority vote. 5 C.F.R. § 1200.3(a).

In all instances a Board decision is binding on the parties to a dispute. In addition, when the Board chooses to designate a decision as “precedential,” that decision represents authoritative guidance that Administrative Judges, federal managers, employees, and other affected individuals must follow where applicable. *See* 5 C.F.R. § 1201.117(c).

A final Board decision is subject to review in federal court. 5 U.S.C. § 7703. A final Board decision that resolves a claim of prohibited discrimination is subject to review before the Equal Employment Opportunity Commission. 5 U.S.C. § 7702. A Board decision is considered “final” for review purposes when it is issued by the full Board and ends the dispute, or when it is issued by an Administrative Judge and neither party petitions the Board for review within 35 days.

Studies

MSPB’s studies staff consists of industrial organization psychologists, HR experts, two attorneys, and other employees who conduct empirical research into the management of the federal workforce. MSPB also reviews the significant actions of OPM on an annual basis. 5 U.S.C. § 1206. To aid in carrying out the studies function, the CSRA granted MSPB authority to examine OPM’s central personnel files and to obtain additional records from other agencies. 5 U.S.C. § 1204(e)(3). The purpose of MSPB’s studies program is to evaluate the extent to which the federal workforce is being managed in accordance with the Merit System Principles, 5 U.S.C. § 2301, and is free of prohibited personnel practices, 5 U.S.C. § 2302. MSPB reports the results of its studies to Congress and the President. 5 U.S.C. § 1204(a)(3). Whereas the Board has no choice but to decide all appeals within its jurisdiction that parties file, the timing and subject matter of the Board’s studies is discretionary.

Challenges facing MSPB and its new leadership

The following pages describe problems that confront MSPB now and that will persist beyond the inauguration of a new president on January 20, 2017, as well as issues with which MSPB's next leader will have to contend.

Without action, MSPB will lose its quorum

In all likelihood the Board will lose the ability to carry out its most important function -- issuing decisions -- on March 1, 2017. The current Administration and the next one should act to avoid or minimize this potentially paralyzing situation, described below.

As stated above, the Board consists of three Presidentially-appointed, Senate-confirmed members -- Chairman; Vice Chairman; and Member -- who serve staggered seven-year terms. See 5 U.S.C. §§ 1202, 1203. A member may continue to serve beyond the expiration of his or her term until a successor is appointed, but in no event may a member serve for more than one year after the expiration of his or her term. 5 U.S.C. § 1202(b), (c). The current state of the Board is summarized in the following table.

POSITION	STATUS	EXPIRATION OF TERM	LAST DAY INCUMBENT MAY SERVE IF NOT REPLACED	IS A NOMINATION PENDING BEFORE SENATE?
Chairman	Encumbered by Democrat	3/1/16	2/28/17	NO
Vice Chairman	Vacant	n/a	n/a	YES*
Member	Encumbered by Republican	3/1/18	2/28/19	n/a

The Board decides cases by "majority vote." 5 C.F.R. § 1200.3(a). Currently the Board has just two members, which means that in order to decide a case the members must agree. (b) (5)

Unless there is action to seat a new Board member before March 1, 2017, however, the Board will be left with just one member, because one of the two current members (Chairman Susan Tsui

* On July 8, 2015, President Obama nominated Mark Cohen as a Board member to be designated Vice Chairman. The nomination was referred to the Senate Committee on Homeland Security and Government Affairs.

Grundmann) may not serve beyond February 28, 2017. Such a situation would paralyze MSPB's petition for review process.

It is worth noting that if the Chairman leaves before a new Board member is seated, the remaining member (Member Mark Robbins) would have authority to "perform the functions vested in the Chairman" beginning on March 1, 2017. Thus, administrative tasks such as hiring, executing the agency's budget, and the like, could continue.

(b) (5) [REDACTED]

(b) (5) [REDACTED]

(b) (5) [REDACTED]

In 2003 the Board was left with just one member, but that lasted for only a few weeks before the President filled the vacant slot via recess appointment. Since then recess appointments have become more difficult to accomplish. See *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550 (2014).

(b) (5) [REDACTED]

(b) (5)



MSPB must be prepared to modify its adjudication process

In 2014 the President signed the Veterans Access, Choice, and Accountability Act (VACA) into law. VACA was a response to reports that the employees of the Department of Veterans Affairs (DVA) were mistreating veterans and falsifying medical records. Insofar as is relevant here, VACA provided that when a DVA senior executive appeals a disciplinary action to MSPB: (i) The Administrative Judge must issue a decision in 21 days; (ii) if the Administrative Judge does not meet the 21-day deadline, the agency action becomes final; and (iii) the Administrative Judge's decision is not reviewable by the presidentially-appointed Board members.

It typically takes about 120 days from filing for an Administrative Judge to issue a decision in an appeal that is litigated on the merits. The 21-day deadline for DVA senior executive appeals is unreasonably short, and as a result the appeals that were filed under VACA were very disruptive; MSPB was forced to devote more staff to VACA appeals than are devoted to ordinary appeals, and staff had to neglect their work on other cases.

Moreover, the Department of Justice -- agreeing with the views previously expressed by the Board members before the President approved VACA -- has refused to defend the portion of VACA that precludes review of an Administrative Judge's decision because that provision violates the Appointments Clause of the Constitution. Further, it appears that the provision of VACA that makes DVA's action final if the Administrative Judge fails to meet the 21-day deadline violates the Due Process clause of the Constitution. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

(b) (5)

(b) (5)

MSPB should establish a formal communications program

With increased emphasis on transparency in government operations and ever-growing challenges for the federal workforce, MSPB has a need for a structured and resourced communication program. While the Clerk of the Board, and most recently the Executive Director and General Counsel, have handled public relations on a reactive basis, MSPB does not have a coordinated and resourced program responsible for agency-wide public relations and outreach. Optimally, this program would be responsible for working with *all* offices to stay abreast and knowledgeable of a range of issues, such as sensitive cases, MSPB reports and studies, and education and outreach.

An additional feature of a structured communications program would be to stay abreast of changes to MSPB's adjudication process that may be under consideration and to provide technical information to policymakers so that any legislative changes are effective and constitutional. MSPB is not a policymaking body, and accordingly, it has no institutional view on the wisdom of any particular alteration to the discipline and appeals system. At the same time, however, MSPB has a legitimate interest in ensuring that new civil service laws can be implemented on a practical level and are consistent with the constitution.

MSPB must modernize its core business applications

MSPB's primary case tracking and document management systems are client-server software that are nearing end of life. They are off-the-shelf systems, heavily customized over time to support antiquated paper processes. Therefore, they cannot be upgraded to current technology standards, and they no longer are easily modified to support electronic case processing, as described below. MSPB has initiated a project to replace the three primary case-related systems with a modern, cloud-based, unified solution. The current systems include:

1. Mitrastech (formerly Bridgeway) **LawManager** case management system

LawManager is a system through which MSPB employees track individual cases and case processing performance overall. It is heavily customized to support the unique business processes of MSPB. LawManager produces progress reports against the agency's Annual Performance Plan, as well as additional data on significant matters. It was implemented in FY 2004 to replace the Board's then 13-year old Case Management System. The initial cost of implementing LawManager was approximately \$3.25 million. The ongoing enhancement and support costs are \$150,000 to \$200,000 annually with an additional licensing cost of approximately \$75,000. LawManager is a client-server application that has reached the end of its product life cycle. It will be replaced during the software modernization project scheduled to begin in FY 2017.

2. OpenText eDocs DM document management system

The OpenText Document Management System (DMS) is MSPB's central document repository. (b) (5)

[REDACTED]

[REDACTED] MSPB implemented this system in FY 2000 and annual licensing costs approximately \$25,000. The DMS is a client-server application that has reached the end of its product life cycle. It will be replaced during the software modernization project scheduled to begin in FY 2017.

3. HotDocs document assembly system

HotDocs is a repository of shell documents that are used primarily by MSPB's legal offices to provide parties with information and instructions during the processing of an appeal. MSPB drafts new HotDocs standard documents and revises current ones to ensure that parties are fully informed of the law, their burdens of proof, and the rules that govern their appeals even as changes are made to those statutes, regulations, and policies. MSPB implemented HotDocs in FY 2000 and annual licensing costs approximately \$7,000. HotDocs is a client-server application that has reached the end of its product life cycle. It will be replaced during the software modernization project scheduled to begin in FY 2017.

In addition to these systems, MSPB's **e-Appeal Online** electronic filing system allows the parties to MSPB appeals to file and receive documents from MSPB, and from each other, immediately without the delays and expense of standard delivery methods. About 61% of all appeals and 81% of all pleadings are now filed electronically. The e-Appeal Online system is developed, enhanced, maintained, and hosted by MSPB. e-Appeal Online initially was implemented in FY 2004 for approximately \$800,000. Hosting, maintenance, and development costs from FY 2004 to FY 2010 were approximately \$200,000 annually. Since FY 2010, e-Appeal has been hosted and maintained at MSPB.

MSPB has piloted e-filing and processing to some degree since 2007, including mandatory e-filing for attorneys and agency representatives in the Washington Regional Office and the Denver Field Office. Since March 2016, the Denver Field Office has participated in a 100% electronic case file (ECF) pilot as a proof-of-concept and an opportunity to study changes to the current MSPB process required to support 100% ECFs across the enterprise. ECF business rules will be further defined during the requirements portion of the software modernization project schedule to begin in FY 2017. IRM and the Office of the Clerk of the Board are co-leaders of the ECF effort -- otherwise known as the **e-Adjudication Initiative** -- working with the other MSPB offices.

For the first phase of the software modernization project, IRM has developed a Statement of Work to solicit a vendor to assist with business process documentation and software systems requirements elicitation. Possible next steps would be:

1. Hire a contractor to assist with business process documentation and software systems requirements elicitation.
2. Complete requirements elicitation within six months of project start, resulting in a documented business process narrative, business data flow diagram, requirements documentation, and a Statement of Work for a Request for Proposals for software systems vendors.
3. Select software solution vendor and begin implementation phase of approximately 18 months.

The initial requirements phase of the project is estimated to cost \$150,000.

MSPB must (b) (5)

As explained above, most appeals to MSPB are filed in the regional and field offices, where Administrative Judges issue initial decisions. A party that is dissatisfied with an initial decision may petition the Board members at headquarters for review of that decision.

Regional and field office adjudication

The Board's regional and field offices are the face of the MSPB to the parties to the cases that come before them. Indeed, considering that only about 20% of cases are reviewed at MSPB headquarters, the regional and field offices are the part of MSPB with which most people interact and therefore the ones by which most parties' impressions of the MSPB are formed. For many years the regions maintained not just a reputation for excellence, but also for timeliness, and while the high quality of their decisions has continued, unfortunately timeliness could not be maintained after sequestration led to furloughs. The regional and field offices continue to struggle to recover from the effects of the furloughs, which brought them more than 33,000 appeals -- about five years' worth of work -- in just a few months' time.

The significance of the lasting effects of the furloughs is (b) (5)

Although MSPB has resolved almost all of the furlough appeals while still adjudicating a significant number of the other appeals that were filed during and since 2013, a backlog of older cases was created when such a large portion of MSPB's resources was devoted to the furlough appeals. (b) (5)

(b) (5)

Headquarters adjudication

The Office of Appeals Counsel (OAC) is the largest single office at the MSPB. It is central to the MSPB's core mission of adjudicating disputes

between employees and executive agencies that arise under the civil service laws. OAC's workforce prepares recommended decisions on petitions for review of Administrative Judges' decisions and related matters for consideration by the Board members. It is important to the public and the parties involved in these disputes to avoid lengthy delays in issuing decisions.

(b) (5)

OAC has 34 permanent, full-time employees on its staff, including managers, supervisors, non-supervisory attorneys, administrative staff, and detailees to other Board offices. (b) (5)

[REDACTED]

For FY17, the Board has a performance goal for the average case processing time for petitions for review to be 220 days or less. (b) (5)

[REDACTED]

FIGURE 1

(b) (5)



FIGURE 2

(b) (5)



(b) (5)



MSPB must (b) (5)

(b) (5)

MSPB must migrate its data center to the cloud

As MSPB seeks to modernize its core business applications and shift to paperless work processes, a critical and necessarily interrelated component is migrating MSPB's on-premises data center to the cloud.

In FY 15, following the catastrophic loss of MSPB's virtual environment, a contractor conducted an independent review of MSPB's existing IT infrastructure, virtualization strategy, and operational processes to identify areas for improvement. Among other things, the contractor recommended taking a holistic approach to ensure MSPB's IT systems are effectively and efficiently designed to meet the needs of an organization of its size, budget, and mission. A primary conclusion of the contractor's assessment was that MSPB's data center is incapable of providing the resilience needed to support MSPB's goal of 100% electronic case processing. (b) (5)

MSPB is working to complete an acquisition plan and scope of work to migrate its data center to the cloud. This includes the proof-of-concept migration of a low-risk element of our IT environment to the cloud early in CY 17.

Proposed Next Steps:

1. Complete the acquisition plan, including finalizing the scope of work and request for proposals.
2. Select a vendor and award the contract.
3. Implement the proof-of-concept migration of a low-risk element of our IT environment as phase 1 of this 1-2 year project (which must be closely coordinated with the project to modernize our core business applications).

Based on the contractor's Alternative Hosting Business Case Analysis, the 5-year cost for the project is estimated at \$1.7 million.