

U.S. Merit Systems Protection Board



Equity Action Plan

*Executive Order 13985: Advancing Racial
Equity and Support for Underserved
Communities Through the Federal
Government*

Executive Summary

Background & Mission: The U.S. Merit Systems Protection Board (MSPB) was established by the Civil Service Reform Act of 1978, Public Law 95-454. It is an independent, quasi-judicial agency of the executive branch that protects the Federal merit systems. MSPB carries out its statutory authority and responsibility by (1) adjudicating appeals filed by employees, applicants, and annuitants; (2) conducting Federal merit system studies; and (3) providing an independent, nonpartisan review of the significant actions and regulations of the Office of Personnel Management (OPM) to ensure these actions conform with merit system principles (MSPs) and do not result in prohibited personnel practices (PPPs).

Adjudication is the agency's most resource-intensive function and the process with the broadest effect on equity and accessibility. Adjudication includes processing the following appeal types: appeals of adverse personnel actions involving Federal agencies and their employees; contested determinations by OPM affecting individuals' rights and interests under the Civil Service Retirement System or the Federal Employees Retirement System; challenges from applicants for employment who believe an employment practice has been applied to them that violates a basic requirement in 5 CFR § 300.103; veterans claiming their preference rights have been violated during the hiring process, citing anti-veteran discrimination or failure to restore based on their military status; and appeals from purported whistleblowers.

How MSPB is Unique: MSPB serves appellants from all segments of society, including individuals who belong to underserved communities that have been denied equitable treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. However, MSPB does not directly serve the general public in the traditional sense. Federal employees, annuitants, veterans, and purported whistleblowers in the Federal workplace must opt to challenge actions and decisions effected by other Federal agencies, sometimes after exhausting administrative remedies elsewhere. The adjudication process is not automatic, and appellants, having been advised of their rights and provided MSPB contact information and instructions, seek to challenge another agency's actions or decisions. This is a way in which MSPB differs from typical Federal agencies: MSPB cannot predict which persons among the Federal workforce, Federal annuitants, veterans, or applicants for Federal employment will request its services or to target for outreach. MSPB effectively is the last stop in several processes out of its own control, and the other agencies handling those processes that potentially bring appellants to MSPB are required by regulation to inform them about their appeal rights and give them MSPB's contact information. National advertisement, outreach, and broad promotion of MSPB's unique role and function is not an effective way to ensure that the persons who may need the agency's services are aware of them, unlike more well-known Federal functions, services, and roles.

The population of persons MSPB serves overall may be relatively small, but the avenue for potential redress of adverse agency decisions is particularly important to Federal employees, Federal annuitants and their dependents, veterans, and applicants for Federal employment. Many

Federal employees allege discriminatory animus on Title VII or Rehabilitation Act bases as a reason behind the personnel actions they are appealing. Many annuitants and persons challenging benefits determinations by OPM are elderly, live in rural areas, and may have little formal education, and some of them are not Federal employees themselves, but rather spouses and children of deceased or incapacitated Federal employees and veterans. The limited population eligible for, and in need of, adjudicatory services relies on MSPB as the recourse for review of decisions that threaten their livelihood. If MSPB did not exist, Federal agencies could effect adverse actions without an oversight authority to prevent abuses, PPPs, and whistleblower reprisal. Considering MSPB's small size and budget, it provides outsized value to the Federal workforce, Federal agencies, and the American taxpayer. MSPB's effective and efficient adjudication of appeals, enforcement of its decisions, objective merit systems studies, and review of OPM regulations and significant actions adds value and saves money by improving the quality of the workforce providing services to the public, strengthening adherence to MSPs, and preventing PPPs.

Our Approach to Equity: Since MSPB is not seeking to increase appeals activity generally—as most persons in the United States do not have standing and do not need to file these types of appeals in the first place—our equity model is instead to (1) look inwardly at the adjudication policies, processes, and internal training to minimize unconscious bias on the part of employees carrying out MSPB's mission; (2) improve communication with appellants and the Federal workforce; (3) remove accessibility barriers for persons with disabilities; and (4) mitigate barriers for persons potentially without internet access, without higher education, and potentially without financial resources (including personal time) to expend on the appeals process.

Summary of Early Efforts & Accomplishments

Originally, MSPB planned to perform statistical analyses to measure equity regarding the rates of persons from potentially underserved communities requesting adjudication of adverse personnel actions and thereby assess baseline equity measures in adjudication outcomes. The goal of such analyses would be to ensure that certain groups are not consistently opting out of the appeals process, abandoning it at rates higher than other groups, or prevailing in their appeals at rates that fall below statistically probable levels. However, the lack of record-level, demographic data makes such relational analyses impossible. Until there is a collection vehicle¹ for the full spectrum of demographic data from customers and at least few years of data to analyze, statistical analyses remain out of reach. MSPB included a suggestion in its 90-Day Equity Plan that OPM and OMB develop a survey collection tool for such data. However, the Equal Employment Opportunity Commission (EEOC) has since indicated that this type of effort is now underway among EEOC, OPM, and OMB; therefore, MSPB has removed that recommendation from its plan. Ordinarily, agencies start with an extensive body of data for analysis, and for MSPB, this would not just be descriptive data about our appellants, but other important data

¹ MSPB, like other agencies, is challenged by the lack of a standardized, comprehensive demographic survey tool approved by the Office of Management and Budget (OMB)—a form comparable to Standard Forms 181, “Ethnicity and Race Identification,” and 256, “Self-Identification of Disability”—that includes diversity and inclusion categories in addition to those on the aforementioned Standard Forms, i.e., religion, (specific) national origin, sexual orientation, gender identification, and community type (for statistical socioeconomic/area designation to identify urban, suburban, and rural communities, using census code designations rather than creating a new system).

sources associated with that demographic data (e.g., survey results, focus group trends, etc.) to cross-tabulate against descriptive data variables, or comparable agencies' bodies of data and barrier analysis conclusions, or any other quantitative information. That body of data is the starting place for meaningful, fact-based barrier analysis.

Since then, MSPB participated in several OMB-sponsored roundtable discussions and has taken up various additional ideas for equity initiatives. As a direct result, MSPB replaced the plan for statistical analyses with a plan to proceed directly to unconscious bias, cultural sensitivity, and disability etiquette training for administrative judges, general attorneys, and paralegals involved in adjudication processes to minimize potential, attitudinal barriers from which, like everyone else, we are not immune. Since we are unable to point to statistical triggers that indicate any inequity in outcomes of appeal processes, we are left with speculation about potential barriers that might exist, and among the three types of barriers typically defined for the purpose of civil rights analyses (institutional or structural, attitudinal, and physical), attitudinal barriers are the most difficult to diagnose or prove. Direct evidence is rare. Attitudinal barriers involve any actions or beliefs that are not stated, obvious, or quantifiable. Lacking any data related to the equity groups defined in Executive Order (EO) 13985, the agency recognized that unconscious bias, cultural sensitivity, and disability etiquette training has not been widely offered or required for employees. MSPB is now following best-practice advice related to ensuring that all persons in the agency are aware that implicit biases can exist. These biases can affect not just outcomes of any type of process or Government service, but also affect the perceptions of the persons served—not just about the agency providing the service, but about the Federal Government generally. Two disability etiquette training sessions have already taken place, and two-thirds of the agency attended. The third session will take place in March 2022. Also, our initial equity assessment focused primarily on the readability and electronic accessibility of MSPB's online resources rather than a comprehensive vetting of them to update our website content, and MSPB's Equity Team has broadened the focus. This effort will help ensure that the most current case law relevant to persons of color, LGBTQ+ persons, and persons with disabilities is reflected in the resources available to appellants on MSPB's public website.

The January 2021 Presidential Memorandum on “Tribal Consultation and Strengthening Nation-to-Nation Relationships” also reinforced our decision to add cultural sensitivity and unconscious bias training to the agency's Equity Action Plan. MSPB conducts hearings on issues relevant to persons in American Indian tribes and interacts with witnesses who are indigenous persons. In August, the Chief Administrative Judge in our Denver Field Office attended a Federal Executive Board Tribal Affairs Panel discussion on tribal consultation and other topics. The panelists included Federal employees from various agencies engaged in tribal programming, and the event was educational and prompted additional ideas for us. For example, we will consider developing a tribal outreach or consultation policy and consulting with Tribal Nations on their civil service systems, where they may exist or if they are interested in establishing them.

MSPB has a longstanding policy and practice of offering draft copies of the Board's strategic plans to external stakeholders. We identified approximately 70 entities that are consistent participants and interest groups in MSPB appeals and merit studies or are otherwise national partners with shared interests in upholding merit principles and human capital, civil rights, and whistleblower laws and policies. These stakeholders are typically provided with a copy of the

plan and given an opportunity to make suggestions and communicate their viewpoints and current concerns to the agency during the drafting process. During the last cycle, the agency's Performance Improvement Officer (PIO) asked stakeholders to provide perceptions about the agency's strengths and weaknesses, etc., and a new Strategic Plan for Fiscal Year (FY) 2022-2026 was created with that input. MSPB focused on affinity groups and experts to provide input on strategic goals, priorities, performance metrics, etc. Included were groups such as Blacks in Government, Disabled American Veterans, Federal Asian Pacific Affinity Council, and the Society of American Indian Government Employees (SAIGE). MSPB involved its EEO Director in expanding the current list of stakeholders, and its PIO and EEO Director are planning to invite some affinity groups to meet with MSPB and discuss our strategic and equity plans in 2022.

Equity Action Plan Elements

#1: Program/policy: Appeals Adjudication—Equitable Treatment

MSPB is reviewing its adjudicatory function to identify the potential for inequity in the appeals process, to help ensure that all Federal employees and others with appeal rights are served without bias, including individuals who belong to underserved communities, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; LGBTQ+ persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. MSPB employees involved with adjudication require consistent training about potential barriers to equal opportunity for persons in these groups, barriers which may lessen the quality of their customer experience and unwittingly affect their outcomes in the process. MSPB's adjudication function intersects with numerous other Federal agencies and their components that are parties to appeals, and in certain appeals, the Board's work intersects with the work of the Office of Special Counsel (OSC), OPM, EEOC, the Department of Justice (DOJ), and Federal courts. Absent issuing corrective action after adjudication, MSPB has little, if any, control over the actions of employees at other agencies and the adverse decisions issued by these other Federal agencies. Therefore, MSPB is only able to assess its own potential barriers to equity. In the absence of data to indicate that attitudinal barriers may potentially exist, we will increase the variety and frequency of civil rights training internally.

The decision to focus on unconscious bias and cultural sensitivity also was a consideration based on the Presidential Memorandum on "Tribal Consultation and Strengthening Nation-to-Nation Relationships." MSPB conducts hearings on issues relevant to persons in American Indian tribes and interacts with witnesses who are indigenous persons; therefore, ensuring effective communication and minimizing bias is a key equity concern in these matters.

Action 1: To mitigate potential, attitudinal barriers to equity, MSPB is adding a requirement for periodic unconscious bias, cultural sensitivity, and disability etiquette training for administrative judges, general attorneys, and paralegals involved in adjudication processes. Moreover, this training is open to all MSPB employees. Two disability etiquette training sessions have already taken place, and two-thirds of the agency attended. The third session will take place in March 2022. MSPB's goal is to provide sessions of unconscious bias, sensitivity, and etiquette training annually, with more than 85% of employees participating. The EEO Director will take

responsibility for ensuring that the goal is met, with MSPB's regional and field offices and headquarters employees involved in planning and execution.

Action 2: We will explore the ways we interact with Tribal Nations and how we can be more supportive of them in our work. For example, we will consider how our outreach efforts on MSPB's mission and processes could be extended to tribal communities and to include tribal consultation, and a Chief Administrative Judge will be responsible for briefing recommendations to MSPB's Equity Team by September 1, 2022. We also will screen agency actions for potential tribal implications. Finally, we contacted SAIGE for stakeholder input as part of our current strategic planning process, and we will schedule meetings with them and other affinity groups to discuss these issues and outreach opportunities.

Action 3: The EEO Director added a question to the agency's exit interview survey to offer departing employees an opportunity to comment on the extent to which they believe MSPB is serving appellants from all segments of society, especially those historically underserved. On an ongoing basis, feedback regarding the agency's performance serving its customers will be part of routine analyses and briefings, as trends may become evident.

#2: Program/policy: Appeals Adjudication—Accessibility

MSPB is reviewing its adjudicatory function to identify and improve, wherever needed, access in the appeals process. This will help ensure that all Federal employees and others with appeal rights, regardless of demographic factors, are aware of and avail themselves of the appeal process if they are eligible to do so, particularly including individuals who belong to historically underserved communities, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; LGBTQ+ persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. Persons in these populations may not be availing themselves of the appeal process; or, when they do so, barriers to equal opportunity to participate may exist which may lessen the quality of their customer experience and may unwittingly affect their outcomes in the process. MSPB's adjudication function intersects with numerous other Federal agencies and their components that are parties to appeals, and in certain appeals, the Board's work intersects with the work of OSC, OPM, EEOC, DOJ, and Federal courts.

Action 1: MSPB is examining all elements of the appeals process to eliminate barriers such as unnecessarily complicated or unclear instructions for filing appeals and in routine issuances, inaccurate or outdated online resources, a complaints process (for appellants to seek review of their appeal experiences) that may need more clarity, and long-needed modernization of core adjudication applications (which is underway but not yet implemented).

The greatest hindrance to data-driven approaches to MSPB's Equity Action Plan is the dearth of record-level demographic data. Such data does not exist for statistical analyses to detect adverse impact on specific demographic groups. The agency was able to assess the types of appeals that come before it, and to determine that although it is possible to make certain demographic conclusions about appellants based on appeal type—for example, appeals filed by veterans and annuitants are likely filed by persons who are older, socioeconomically disadvantaged, or have

disabilities as compared to other appellant groups—record-level information to associate specific demographic information with individual appeals for the vast majority of appeals does not exist.

Action 2: MSPB will follow the progress of EEOC, OPM, and OMB in their development of an approved tool to survey appellants for demographic information. Specific metrics and baseline goals related to survey responses will be developed. Similarly, metrics related to process analysis will be developed, once record-level data pools are sufficient for detection of adverse impact on focal groups as compared with majority groups—for example, when it is possible to determine whether low-income, older, or less-highly-educated appellants abandon the process at earlier stages than appellants in other groups, or whether appellants in historically underserved communities express dissatisfaction with the appeal process at rates that are out of step with majority groups to a statistically significant extent.

MSPB is assessing alternate means of determining where accessibility barriers to equal participation may lie. Coincident to this planning process, the agency recently launched a new public website. The layout follows the General Services Administration’s (GSA) structure developed with participation and guidance from the Access Board and Section 508 Community of Practice. This redesign ensures a more accessible, easily navigated experience for users with vision and dexterity disabilities. In June and July 2021, administrative judges in MSPB’s regional and field offices reviewed the agency’s online descriptions of the MSPs and the PPPs and revised them where they were outdated. For example, pre-*Bostock* references to differences in theories of discrimination and alternative processes were updated, which is helpful to LGBTQ+ persons.

While emphasizing electronic filing and online resources in the adjudication of appeals, MSPB must remain vigilant in observing plain language principles and guidelines when providing online instructions. The agency receives most of its appeals electronically, through its e-Appeal Online system. Appellants are not required to compile and submit paper copies of documents or mail letters. Given the nature of MSPB’s work we do not have a specific Limited English Proficiency (or LEP) program, because the agency almost never serves people who do not speak English fluently enough to participate. English fluency is a requirement for Federal employment and the armed services. For the rare occasions MSPB deals with the family members of a deceased or incapacitated Federal employee who may not speak English, the MSPB AJ’s handbook contains a protocol for procuring translation for documents and hearings, in its “Foreign Languages” section.

Action 3: The agency is committing to fully reviewing our website’s adjudication content by September 30, 2022. Also, a forthcoming webpage will include guidance more clearly articulating how the agency addresses allegations of bias during the appeals process and will provide step-by-step information about how to register a complaint. In FY 2020, MSPB demonstrated its commitment to serving persons with disabilities by creating a new position and hiring its first Accessibility Program Manager. Fortifying MSPB’s Section 508 compliance and program accessibility was necessary to have its policies and procedures better reflect the agency’s profile, mission, and culture. This individual works principally on external civil rights matters.

Action 4: A draft of an entirely new policy and procedure, for conducting accessibility reviews related to electronic and information technology is currently circulating for comments. The agency uses the Department of Homeland Security’s “Trusted Tester” framework as a tool for assessing compliance of electronic and information technology with Section 508 and has discussed the need to develop a method by which external accommodations for appellants will be tracked more closely. The Accessibility Program Manager is also involved in reviewing and testing our new adjudication application as it is being developed to ensure that accessibility considerations and requirements are incorporated along the way. Ongoing guidance and consultation are provided by the Accessibility Program Manager to adjudicatory staff to ensure ongoing efforts to accommodate persons with disabilities. Further agency guidance and support will be issued in 2022.

#3: Program/policy: Appeals Adjudication—Internal Equity to Support External Equity

MSPB is looking at internal equity to support external equity. EEOC Management Directive (MD) 715 reports indicate that MSPB is employing persons in EEOC’s defined demographic groups in numbers approximating their employment availability in our country. However, the goal of EO 13985 goes beyond ensuring that agencies are not potentially violating civil rights laws; it promotes the goal of having agencies more closely resemble American society overall. MSPB’s initiatives incorporate elements of EO 14035, “Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce,” so that the agency’s compliance efforts for both EOs complement one another wherever possible. The agency’s MD-715 conclusions indicate no internal barriers for employees, but two external barriers (non-EEO; non-civil rights barriers) exist in that (1) white men have the highest employment availability in the nation in the attorney field, and (2) because half of the agency’s employees are in Washington, D.C., rather than equally spread throughout the country, most of its own demographic employment availability is based in one of the most expensive locations.

Action 1: MSPB is committing to advertising vacancies with minority bar associations more effectively, to ensure that appellants will have the opportunity to engage with a diverse cohort of administrative judges and to build trust in the adjudication process and outcomes.

#4: Program/policy: Procurement/Purchasing/Contracting

Our review of MSPB’s purchasing policies and practices was not a fruitful area for equity assessment and identification of barriers. The agency’s established procurement policies and procedures follow current requirements in the Federal Acquisition Regulation (FAR), to which all agencies must adhere. MSPB does not conduct extensive purchasing of supplies and furniture that other, larger agencies require to maintain operations. MSPB does not administer grants and does not produce measurable/significant excess property and electronics for donation. Therefore, considering these facts, we conclude there are no discernible barriers here.

MSPB’s primary source for supplies (after assessing on-hand stock and inventory) is GSA Advantage. GSA Advantage is structured to prioritize and present search results from disadvantaged, minority, women-owned, and disability-staffed businesses. For services, MSPB is required to assess those on the procurement list maintained by the “Committee for Purchase from

People Who Are Blind or Severely Disabled.” Commercial sources located by other, FAR-required means also prioritize results for disadvantaged businesses. MSPB’s EEO Office, for example, located its contractor for EEO investigations in this manner, and the contract is fulfilled by a women-owned, small business in the Midwest, in an economically depressed statistical area. If MSPB identifies any significant procurement opportunities, equity priorities will be considered.

Conclusion

Persons throughout the MSPB workforce are eager to participate in these Action Plan activities, and we anticipate positive feedback from our employees given the strong message of the agency’s commitment to equity as evidenced by this assessment and planning process. As for any discernible, “immediate, tangible improvements in people’s lives that [we] anticipate,” no widespread societal impacts are evident, since the agency’s primary mission is already so oriented to inclusion, diversity, equity, civil rights, and compliance principles. Our efforts to date and plans going forward to implement additional employee training, reach out to affinity groups, obtain feedback from our employees, update the adjudication content on MSPB’s website, make standard orders and documents more accessible, establish a more comprehensive Accessibility Program, broaden the reach of our vacancy announcements, and continuing to look for ways to statistically measure potential inequities, are the agency’s most immediate and far-reaching.