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## **MSPB Loses Only Remaining Board Member Amid Massive Backlog Of Cases**

As of March 1, 2019, the Merit Systems Protection Board (MSPB) has no Board members for the first time since it became an agency in 1979, making things even more uncertain for the thousands of federal employees who have been waiting years for the Board to issue decisions. This development coincides with the Board's issuance of its annual report for FY 2018 on February 28, 2019, providing an update regarding the Board's massive backlog of cases.<sup>1</sup>

The only current Board member, Vice Chairman and acting Chairman Mark A. Robbins, is leaving his seat effective February 28, 2019, following a one year holdover of his six-year term as a Board member that expired on March 1, 2018.<sup>2</sup> Vice Chairman Robbins issued the Board's annual report before his departure, stating that 2018 was "a time of prolonged uncertainty for MSPB, but also of continued success."<sup>3</sup>

The success referenced by Vice Chairman Robbins is the 5,447 cases processed by its regional and field offices, which resulted in the issuance of 5,134 decisions on initial appeals.<sup>4</sup> Even without any Board members, MSPB regional and field offices can continue to accept, process, and decide cases. The "prolonged uncertainty" for the Board is the result of the lack of a quorum of members.

The MSPB has been without a quorum (three Board members) since January 8, 2017, when it dropped down to a single Board member, Vice Chairman Robbins.<sup>5</sup> Without a quorum, the Board cannot perform many of its functions, including promulgating rules and issuing decisions on appeals from rulings of its administrative judges, known as petitions for review (PFR). The Board currently has approximately 1,800 pending PFRs.<sup>6</sup>

In the spring of 2018, President Donald Trump named three nominees to serve as Chairman, Vice Chairman and Board member, and Congress held a full hearing on the nominees in July 2018.<sup>7</sup> The nominees were not confirmed by the full Senate before the adjournment of the 115<sup>th</sup>

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<sup>1</sup> See Annual Report for FY 2019, available at <https://www.mspb.gov/publicaffairs/annual.htm>.

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> Passman & Kaplan, PC, *Developments at the MSPB, FY 2018 Annual Report*, available at <https://www.passmanandkaplan.com/blog/2019/02/developments-at-the-mspb-fy-2018-annual-report.shtml>.

<sup>6</sup> Annual Report for FY 2019 at 8.

<sup>7</sup> *Id.* at 1.



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Congress, so the President resubmitted these nominations for congressional consideration.<sup>8</sup> On February 13, 2019, the remaining two nominees were favorably voted out of committee for consideration on the floor of the Senate.<sup>9</sup> It is unclear when, if ever, these nominees will be confirmed as Board members, further extending the period during which federal employees must wait for PFR decisions.

Following Vice Chairman Robbins' departure, the MSPB will continue operations under its continuity of operations plan (COOP), allowing its regional and field offices to continue operations.<sup>10</sup> Under the COOP, the MSPB General Counsel will become the agency's acting chief executive and administrative officer.<sup>11</sup>

### **Conclusion**

The MSPB has been without a quorum, and thus unable to decide petitions for review of Administrative Judge decisions, for over two years. With its final remaining member departing effective February 28, 2019 and the existence of only two nominees mired in the confirmation process, federal employees waiting for the resolutions of PFRs face an indefinite delay of any relief to which they are entitled.

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*