



ARMED SERVICES BOARD OF CONTRACT APPEALS  
SKYLINE 6  
5109 LEESBURG PIKE  
FALLS CHURCH VA 22041-3208

November 4, 2021

MEMORANDUM FOR:

UNDER SECRETARY OF DEFENSE (ACQUISITION & SUSTAINMENT)  
ASSISTANT SECRETARY OF THE ARMY (ACQUISITION, LOGISTICS, & TECHNOLOGY)  
ASSISTANT SECRETARY OF THE NAVY (RESEARCH, DEVELOPMENT & ACQUISITION)  
ASSISTANT SECRETARY OF THE AIR FORCE (ACQUISITION)  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR OF THE DEFENSE LOGISTICS AGENCY

SUBJECT: Report of Transactions and Proceedings of the Armed Services Board  
of Contract Appeals for the Fiscal Year Ending September 30, 2021

This report is furnished under paragraph 9 of the Charter of the Armed Services Board of Contract Appeals, revised May 23, 2019. The statistics reflect the adjudication of appeals, petitions for contracting officer final decisions, applications for fees and costs under the Equal Access to Justice Act, and other matters of the Army, Navy, Air Force, Corps of Engineers, Defense Logistics Agency, Defense Contract Management Agency, other Defense agencies, Central Intelligence Agency, National Aeronautics and Space Administration, and the Washing Metropolitan Area Transit Authority.

The following statistics cover the activities of the Board during the reporting period and the current reserve of pending matters:

A Cases Docketed and Reinstated During FY2021 400

1. Source of Cases Docketed FYs 2017-2021

|                | <u>FY17</u> | <u>FY18</u> | <u>FY19</u> | <u>FY20</u> | <u>FY21</u>           |
|----------------|-------------|-------------|-------------|-------------|-----------------------|
| Army           | 138         | 75          | 65          | 81          | 62                    |
| Navy           | 77          | 93          | 90          | 115         | 49                    |
| Air Force      | 48          | 61          | 43          | 49          | 37                    |
| Corps of Eng.  | 161         | 127         | 90          | 164         | 166                   |
| DCMA           | 71          | 68          | 50          | 50          | 30                    |
| DLA            | 21          | 21          | 19          | 20          | 13                    |
| Other Agencies | 8           | 20          | 27          | 8           | 16                    |
| Reinstated     | <u>47</u>   | <u>25</u>   | <u>34</u>   | <u>10</u>   | <u>27<sup>1</sup></u> |
| TOTAL          | 571         | 490         | 418         | 497         | 400                   |

<sup>1</sup> During FY21 this category consisted of 22 Requests for Reconsideration, 2 Board Reinstatements and 3 Remands.

B Cases Disposed During FY2021

391

1. Source of Cases Disposed During FYs 2017-2021

|                                     | <u>FY17</u> | <u>FY18</u> | <u>FY19</u> | <u>FY20</u> | <u>FY21</u> |
|-------------------------------------|-------------|-------------|-------------|-------------|-------------|
| Army                                | 191         | 95          | 104         | 63          | 62          |
| Navy                                | 58          | 108         | 80          | 95          | 68          |
| Air Force                           | 54          | 53          | 52          | 47          | 43          |
| Corps of Eng.                       | 202         | 172         | 159         | 82          | 115         |
| DCMA                                | 132         | 96          | 56          | 45          | 62          |
| DLA                                 | 34          | 25          | 32          | 18          | 26          |
| Other Agencies                      | <u>7</u>    | <u>10</u>   | <u>23</u>   | <u>13</u>   | <u>15</u>   |
| TOTAL                               | 678         | 559         | 506         | 363         | 391         |
| 2. Rule 12 Proceedings <sup>2</sup> | 64          | 20          | 32          | 19          | 15          |

3. Disposition of Disposed Cases

|           |            |            |            |            |            |
|-----------|------------|------------|------------|------------|------------|
| Sustained | 80         | 96         | 73         | 65         | 68         |
| Denied    | 59         | 43         | 81         | 58         | 61         |
| Dismissed | <u>539</u> | <u>420</u> | <u>352</u> | <u>240</u> | <u>262</u> |
| TOTAL     | 678        | 559        | 506        | 363        | 391        |

In FY2021, the Board disposed of 129 cases on the merits. Of those dispositions, 52.7% decisions found merit in whole or in part. The Board dismissed 262 cases. In the majority of cases, a dismissal reflects that the parties have reached settlement.

4. During FY2021, the Board held 34 hearings for a total of 51 days.

C. Cases Pending FYs 2017-2021

|                                      |     |
|--------------------------------------|-----|
| Number of Cases Pending October 2017 | 970 |
| Number of Cases Pending October 2018 | 901 |
| Number of Cases Pending October 2019 | 813 |
| Number of Cases Pending October 2020 | 947 |
| Number of Cases Pending October 2021 | 954 |
| Net Increase in Docket, FY2021       | 9   |

1. Source of Cases Pending October 1, 2021

|      |     |         |
|------|-----|---------|
| Army | 149 | (15.6%) |
| Navy | 159 | (16.7%) |

<sup>2</sup> Board Rule 12, Small Claim Procedures: Expedited (\$50,000 or less/Small Business \$150,000 or less) 120 days for decision: Accelerated (\$100,000 or less) 180 days for decision.

|                |           |               |
|----------------|-----------|---------------|
| Air Force      | 67        | (7.0%)        |
| Corps of Eng.  | 354       | (37.1%)       |
| DCMA           | 127       | (13.3%)       |
| DLA            | 60        | (6.3%)        |
| Other Agencies | <u>38</u> | <u>(3.9%)</u> |
| TOTAL          | 954       |               |

## 2. Status of Cases Pending October 1, 2021

|                            |           |
|----------------------------|-----------|
| Awaiting Complaint         | 53        |
| Awaiting Answer            | 43        |
| Awaiting Election          | 79        |
| Discovery                  | 291       |
| Hearing Set                | 125       |
| Awaiting Transcript/Briefs | 37        |
| Suspended                  | 193       |
| Ready to Write             | 58        |
| ADR Track                  | <u>75</u> |
| TOTAL                      | 954       |

## D. Motions Pending October 1, 2021

|                                      |             |
|--------------------------------------|-------------|
| Dismiss for Failure to Prosecute     | 9           |
| Dismiss for Failure to State a Claim | 20          |
| Dismiss for Lack of Jurisdiction     | 102         |
| Dismiss – Other                      | 74          |
| Dismiss Under Board Rule 18          | 0           |
| Dismiss – Settled/Withdrawn          | 28          |
| Reconsideration                      | 22          |
| Summary Judgment                     | 270         |
| To Strike                            | 79          |
| Other                                | <u>1505</u> |
| TOTAL                                | 2109        |

## E. Board Decisions Appealed to the U.S. Court of Appeals for the Federal Circuit (CAFC)

In FY 2021, the U.S. Court of Appeals for the Federal Circuit (CAFC) docketed 10 appeals from Board decisions and had 13 appeals pending at the close of the fiscal year. During the fiscal year, the CAFC disposed of 8 appeals involving ASBCA decisions, 6 of which were affirmed, and 2 of which were reversed and remanded.

## F. Alternative Dispute Resolution (ADR) During FY2021

36 cases (including 3 off-docket matters) were voluntarily diverted from the regular trial docket to the Board's ADR program. 5 of these cases were settled, with the assistance of the mediator judge, without requiring formal mediation sessions. The remaining 31 were addressed in 19 ADR sessions, totaling 48 days. 27 of these cases were successfully resolved, 3 were unsuccessful, leaving 1 pending at the close of the fiscal year. An additional 62 cases are pending ADR sessions

in FY 2022.

G. Closing Remarks:

Due to the COVID-19 pandemic, all of the Board's employees began working remotely on March 12, 2020 and most employees continue working remotely to date. We had earlier planned to return to the office in September of this year, but now expect that will occur sometime in early 2022. In spite of the challenges presented by the pandemic, the Board has continued to carry out its mission almost seamlessly. This is possible primarily due to two factors. First, the Board had previously contracted for an electronic case management system to replace our antiquated existing system and to expand our capability to work entirely electronically within the office. Shortly before the shutdown occurred, the Board was testing and implementing this new software product. We dramatically accelerated our transition to the new software with the onset of the shutdown and, fortunately, the software was robust enough to provide us with the tools to fully manage the Board's case docket electronically. Second, and more importantly, our employees adapted quickly to the new software and the remote working environment. This required a strong team effort and everyone stepped up, working diligently to make this successful.

The only areas of the Board's workload that have declined during the pandemic are hearings and ADRs. Although we developed a capability to conduct these proceedings remotely and have utilized it for many cases, many litigants have continued to push them forward into the future, presumably in the hope the proceedings could soon be conducted in person. However, since the pandemic has persisted, we are continuing to receive requests for the continued use of remote hearings and ADRs. Given the number of proceedings we have already rescheduled from 2020 and earlier in 2021, I expect a significant upward trend in our hearings and ADR workload during this next fiscal year.



JOHN J. THRASHER  
Chairman