

**Before the
Senate Subcommittee on Oversight of Government Management, the Federal Workforce,
and the District of Columbia
and the
House Subcommittee on the Federal Workforce, Postal Service, and the District of
Columbia**

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Good morning, Chairman Akaka, Chairman Davis, and members of the subcommittees. At your request, I am here today to address questions you may have regarding the efforts by the Government Accountability Office (GAO) to restructure its mid-level analyst corps, commonly known as Band II. As a preliminary matter, however, I would appreciate the opportunity to address my role and that of the Personnel Appeals Board with regard to this matter.

In 1980, Congress enacted the Government Accountability Office Personnel Act (GAOPA), and in doing so, established the Personnel Appeals Board with jurisdiction to adjudicate adverse actions, discrimination complaints and prohibited personnel practices, among other things. Final PAB decisions are appealable to the United States Court of Appeals for the Federal Circuit. To date, the Board has issued over a hundred decisions, only a small number of which have been appealed to the Circuit. And, in twenty-seven years, the PAB has been reversed fewer than a handful of times.

The GAOPA and the Board's implementing regulations define the role of the Board's Office of General Counsel. Specifically, the Office investigates charges filed by GAO employees or applicants alleging a violation of their employment rights. Where reasonable

grounds exist to believe that such a violation has occurred, the General Counsel offers to represent the individual in adjudicating the claim before the PAB. The employee may accept the offer, or decline and proceed to the Board *pro se* or with a representative of his or her choosing. If reasonable grounds do not exist and the General Counsel does not offer to represent, the individual may still proceed to the Board with his/her claims.

The Personnel Appeals Board Office of General Counsel (PAB/OGC) has no role in the creation or implementation of policy at GAO other than to comment on proposed Agency orders. More importantly, PAB/OGC does not adjudicate claims and thus does not make findings as such. Rather, the purpose of the investigations conducted by the General Counsel is solely to determine whether to offer representation to the charging party based on a relatively low threshold of whether there are reasonable grounds to believe that a violation has occurred, rather than on the much higher test applied by the Board when ruling upon the claim.

In February 2006, fifteen GAO employees who had been in the Band II analyst and specialist force timely filed individual charges with the PAB General Counsel's Office challenging their alleged recent demotions as a result of GAO's recent restructuring of the single Band II into Band IIA and Band IIB. Three of these individuals thereafter decided to pursue discrimination claims with the GAO's Office of Opportunity and Inclusiveness and thus the PAB/OGC investigation into their charges was held in abeyance. Upon investigating the remaining twelve charges, I determined that reasonable grounds existed to believe that the individuals' employment rights had been violated and, therefore, offered to represent them before the Personnel Appeals Board.

Thus, the PAB/OGC filed petitions on behalf of the twelve Band IIA individuals challenged the legality of several aspects of the GAO restructuring process and the specific placement decisions. After filing these petitions, my Office moved to consolidate the cases for processing before the Board.

The Subcommittees have asked me to provide a written statement regarding the Band II cases that were scheduled for hearing before the Personnel Appeals in April 2007. The following describes in detail the factual and legal assertions made by the PAB/OGC on behalf of the petitioners. However, as stated above, the PAB General Counsel does not make “findings” insofar as that term implies a determination of fact based upon adjudication of relevant evidence. While I firmly believe that the evidence and law supporting the claims set forth in the petitions would have carried the day if the cases went to a hearing, their settlement prior to trial meant that the Board did not have the opportunity to make findings of fact and conclusions of law with regard to the matters at issue. With that said, I can summarize for you what I believe the record would have shown with regard to GAO’s restructuring of the Band II analyst and specialist workforce.

The PAB/OGC was prepared to show that GAO improperly demoted the twelve petitioners. As a threshold matter, we would have demonstrated that the alleged “reassignments” were adverse actions triggering the substantive or procedural due process protections set forth in 5 U.S.C. §7513, made applicable to GAO through 31 U.S.C. §731.¹ Under GAO Order 2752.1, ch. 3(1)(d), such adverse actions include reductions in band and pay. A reduction in band is defined as an “involuntary change of an employee...to a lower pay band,” and a reduction in pay means “the involuntary reduction of an employee’s pay.” GAO Order 2752.1, ch.1(4). Pay is

¹ Alternatively, we were prepared to argue that the “reassignments” were constructive demotions.

defined as “the basic pay rate set by the Comptroller General for a position before any deductions and additional compensation, such as overtime.” The petitioners’ placement from Band II to Band IIA constituted both a reduction in band and pay.

Specifically, the Band II, formed in 1989, merged the former GS-13 and GS-14 analysts and specialists. The restructuring effectively reinstated the two grade/pay classifications with the Band IIB being the GS-14 and the Band IIA being the GS-13. Thus, for analysts, such as one of the petitioners, who were, in fact, at the GS-14 grade level prior to the formation of the Band in 1989, placement into the Band IIA effected a demotion to the GS-13 equivalent Band IIA position. Similarly, other petitioners with considerable years of service at GAO and at the top of the Band II or GS-14 equivalent, reassignment to the Band IIA or GS-13 equivalent likewise constituted a demotion. A further indication that the placement from Band II to Band IIA was a demotion is that the competencies and duties previously encompassed within the Band II were ultimately assigned to Band IIB,² effectively making the Band IIA a lower band level than the Band II.

Furthermore, the PAB/OGC was prepared to argue that placement into Band IIA also meant a reduction in pay because it resulted in petitioners being denied the annual adjustment to their basic salary to which they were otherwise entitled. While acknowledging cases holding that pay and grade retention preclude finding that an action constitutes a demotion, we were

² The “Developing People” and “Investing Resources” competencies had previously been validated for the Band II analyst position by Personnel Decisions Research Incorporated (PDRI) under a contract with GAO. GAO chose not to apply them to the Band II, however, due to the so-called “bimodal” response to these competencies in the PDRI job survey. See “Talking Points for Band IIA/B Restructuring Analysts Community Town Hall Meeting.” (Aug. 5, 2005)

prepared to argue that these cases are distinguishable on the grounds that pay retention, without an annual cost of living adjustment, results in a real reduction in the basic rate of pay.

Because these reductions in band level and pay constituted adverse actions, had these cases gone to trial, GAO would have been required to prove by a preponderance of the evidence that they were taken for such cause as promotes the efficiency of the service. The term “cause” in the context of federal personnel law is normally defined as misconduct or poor performance. Here, there was no allegation that the petitioners engaged in misconduct. Nor can it be said that they demonstrated unacceptable performance given that their ratings for the relevant time period were all at “meets expectations” and above.

Rather, in May, 2005, GAO issued a Project Plan (Plan) for restructuring the Band II Analysts/Specialists into two pay bands designated Band IIA and Band IIB. The stated purpose of the proposed restructuring was to move GAO to a more market-based and performance oriented classification and compensation system that would result in “equal pay for work of equal value over time.”

The record in this case would show that the decision to restructure the Band II was made by the Comptroller General (CG), David Walker. The GAO Executive Committee (members at the time included David Walker, Gene Dodaro, Chief Operating Officer (COO), Tony Gamboa (then-General Counsel), and Sallyanne Harper, Chief Administrative Office (CAO)) was responsible for providing guidance throughout the Band II restructuring project development and for making final policy decisions.

Prior to the proposed restructuring, GAO operated under a performance-based compensation system that provided for pay distinctions based on performance. Despite the PAB/OGC’s repeated requests during the investigation and discovery for documented evidence

that the existing Band II structure deprived employees of equal pay for work of equal value over time, GAO failed to produce any such evidence. Additionally, most of the Managing Directors interviewed during the course of the investigation stated that they had not perceived any inadequacies with the existing system and had not conveyed any dissatisfaction with it to Mr. Walker or the Executive Committee prior to the restructuring.

In their depositions, members of the GAO Executive Committee and other GAO officials involved with the Band II restructuring alternately attributed the basis for the restructuring decision to a 2000 study by Personnel Decisions Research Inc. (PDRI) and the Watson Wyatt compensation study in 2004. However, upon examination, neither study demonstrated the need to split Band II.

In 2000, GAO contracted with PDRI to develop a competency-based performance, appraisal, pay and promotion system. GAO's statement of work contemplated that this objective would be carried out in three phases: (1) develop competencies that reflect the knowledge, attributes and skill that GAO staff should possess to succeed in fulfilling GAO's mission; (2) develop a validated "world-class performance appraisal system; and (3) develop validated promotion and pay systems that "should allow for a significant role for management judgment in making both promotion and pay decisions." *See* GAO Purchase Order 200073.

In an effort to validate the competencies that it had devised as part of its contract, PDRI surveyed employees to determine the relevance of the related work activities to effective performance. Of those who responded, 22.6% of Band IIs indicated that the "developing people" competency was not relevant, while 21.7% of them indicated that the "investing resources" competency was not relevant to their performance. GAO officials referred to these

survey results as the “bimodal” response, which they repeatedly cited as the evidence which lead them to conclude that there were two distinct positions within Band II warranting the split.

Consequently, according to a subsequent PDRI report, at the time of the survey, “it was hypothesized that the differences may be explained by [sic] examining the data separately for those who functioned as individual contributors versus those who functioned as engagement leaders or Analysts in Charge.” See *U.S. Government Accountability Office: Impact of GAO Initiatives on the Content Validity of the Analyst and Specialist Competency Model and Performance Management System*, Technical Report No. 538 (May 2006) at 2. However, “at the time of the original analyses, ...data had not been collected that would enable determination of membership in these two groups, making it impossible to test this hypothesis.” *Id.* There is no evidence that, at that time, GAO undertook or contracted for a more thorough analysis of the survey to determine the cause for the allegedly bimodal result as to the two aforementioned competencies. It is clear, therefore, that the 2000 PDRI study did not compel GAO to the conclusion that the Band II analyst level in fact comprised two separate and distinct positions.

In February, 2004, GAO entered into another contract with PDRI to obtain “continuous improvement of GAO’s competency-based performance management system for Analysts/Specialists.” See GAO Purchase Order 2004201 at 7 (*Statement of Work*). Two years later, GAO modified the contract to request PDRI’s “assistance in reanalyzing the job analysis data used to validate the Analysts and Specialists Competency Model to verify that the Developing People and Investing Resources competencies are relevant to the Band IIBs.” See *Statement of Work* supporting Modification No. 4 of GAO Purchase Order 2004201. In so doing, GAO stated its belief that the so-called bimodal response to the earlier survey “was *further* indication that there were two types of Band IIs—those who primarily functioned as engagement leaders and those who

primarily functioned as individual contributors” and noted its assumption “that those indicating that these two competencies were relevant to their work were primarily the engagement leaders.” *Id.* (emphasis added). However, GAO failed to identify or produce any documented evidence, either pre- or post- the PDRI survey, that there were in fact “two types of Band IIs.”

Although information regarding employee “membership in these two groups” was not available at the time of the original survey, PDRI stated that, in the interim, “GAO collected data as to whether or not respondents had served as engagement leaders or individual contributors.” See PDRI’s Technical Report No. 538 at 2. PDRI did not indicate how GAO collected this information. Nevertheless, its Report states that of 1208 Band II respondents to the 2000 survey, 767 were Analysts-in-Charge³ and 441 were not AICs.

The fact that 63% of the original survey respondents were Analysts-in-Charge (AICs) substantially undercuts GAO’s assumption that the “bimodal” response demonstrated the presence of two distinct positions within the Band II. In addition, however, upon reanalysis, the percentage of AICs who responded that the eleven enumerated work activities under the Developing People and Investing Resources competencies were not relevant was also considerable, in no case lower than 10% and in some instances reaching as high as 30% and 37%. In fact, in subsequently validating these competencies for the Band IIB, PDRI concluded that only eight of the eleven work activities identified in the survey would be appropriate.

The GAO Executive Committee has likewise cited the work performed by Watson Wyatt relating to GAO’s compensation system as a compelling factor in the decision to split the Band II Analyst/Specialist force. Specifically, they stated in depositions that the Watson Wyatt study confirmed that there were two distinct positions within the Band II. However, this claim is at

³ At GAO, an analyst-in-charge (AIC) is responsible for leading the engagement.

odds with Watson Wyatt's own characterization of its study set forth in a briefing provided by Watson Wyatt to the Executive Committee on October 29, 2004. *See Government Accountability Office, Executive Committee Briefing: Compensation Design Options* (Oct. 29, 2004). Among the design characteristics that Watson Wyatt identified as originating with the Executive Committee was that "[t]he difference between Band 2 'leaders' and 'individual contributors' should be recognized." *Id.* at 5. The evidence thus indicates that Watson Wyatt designed its study presuming the existence of two separate positions at the Band II level pursuant to the Executive Committee's direction, rather than independently discerning such a bifurcation in the Band after examination of the GAO workforce.

In sum, absent any documented evidence demonstrating that the structure of the Band II Analyst/Specialist in fact deprived employees of "equal pay for work of equal value over time," GAO would not be able to show that the petitioners' demotions were for such cause as promotes the efficiency of the service. Absent such a showing, the demotions would not have been sustained.

In addition, the PAB/OGC was prepared to show that the restructuring process deprived petitioners of the procedural due process mandated by 5 U.S.C. §7513. In support of that claim, we would have presented evidence that in May, 2005, GAO issued its Project Plan (Plan) for Restructuring the Band II Analysts/Specialists. The Plan contemplated two phases with the following goals: (I) develop and provide proposals to the Executive Committee regarding the roles, responsibilities and competencies of the Band IIA and IIB positions and (II) identify the criteria and devise the process for making the initial placements into Band IIB.

The two phases of the Plan were to be carried out sequentially by task teams, consisting primarily of GAO Directors. Although members of the Employee Advisory Council⁴ were also assigned to the teams, Band II analysts and specialists were not otherwise invited to be part of the task teams. GAO employees were subsequently told that the task teams developed a proposal outlining the roles, responsibilities and competencies applicable to Band IIA and B. *See* “Talking Points for Band IIA/B Restructuring Analysts Community Town Hall Meeting” (August 5, 2005). In fact, however, Susan Kladiva, the Project leader working under the close direction of the Executive Committee, provided the teams with prepared drafts of proposals that defined the roles, responsibilities and competencies of the Band IIA and IIB positions, as well as the criteria and process for the restructuring.⁵

The task teams conducted numerous focus groups allegedly consisting of randomly selected employees from throughout GAO. Participants were not given copies of the straw proposals in advance or even at the meetings.

⁴ GAO's Employee Advisory Council (EAC) was established by the Comptroller General to serve as an advisory body to him and other senior executives.

⁵ Writing to the Executive Committee regarding these so-called “straw” proposals, Ms. Kladiva stated that “[f]or the analysts and specialists, we stayed close to what we can related to the validated competencies and performance standards for Developing People and Investing Resources. I think these additional competencies-with their related work activities and standards-give us a clear basis for defining what a “2b” does in a way that is distinguished from a “2a.” *See* Email from Susan Kladiva to Executive Committee (May 26, 2005). Yet, later, in dismissing employee concerns that these competencies were inherently Band III functions, GAO stated that “[b]ecause both competencies were validated for Band II, we believe they apply to the Band IIB pay range.” *See Talking Points for Band IIA/B Restructuring Analysts Community Town Hall Meeting.* (Aug. 5, 2005)

Phase I concluded in mid-July 2005 with the posting of the proposals relating to roles, responsibilities and competencies of the Band IIB and a “town hall meeting” led by the Executive Committee. Phase II concluded in September with the posting of the restructuring criteria and process proposals and a town hall meeting in September 2005.

On September 27, 2005, GAO posted a document on its intranet website titled “Band II Restructuring roles and responsibilities for Senior Analysts in the IIA and IIB pay ranges...” GAO also indicated that it had posted “straw proposals” regarding the criteria and process for the Band II restructuring on the GAO intranet on September 23, 2005. GAO’s announcement indicated that it had posted the proposals for a 30-day comment period ending October 24, 2005.

On October 7, 2005, prior to the expiration of the comment period, GAO posted Draft Order 2900.3 containing what it characterized as the “latest” version of the “roles and responsibilities” factor to be used in the Band IIB selection, as well as additional information about the straw proposals regarding the other criteria and placement. Among the allegedly “clarifying details and minor revisions” in the Draft Order was the shift to the use of standardized rating scores (SRS), rather than appraisal averages, for determining eligibility for initial placement into Band IIB.

On October 26, 2005, GAO changed the period for commenting on the Band IIB standards to November 3, 2005 “in order to properly consider comments prior to the Band II restructuring.” On November 3, 2005, David Walker held a “special CG chat” to provide an “overview of decisions related to the Band II restructuring, and key information on the design and implementation of GAO’s new compensation system.”

On November 4, 2005, a day after the close of the comment period, GAO issued Order 2900.3 captioned “Band II Restructuring” (Order) establishing the policy and procedures for

restructuring the then-unified Band II analysts and specialists into two separate pay categories: Band IIA and Band IIB. On November 8, 2005, GAO announced a change to the eligibility requirements contained in the promulgated Order as well as to the meeting schedule for the centralized panels. *See* GAO Order 2900.3, ch. 1(1).

To be eligible to apply for Band IIB placement under GAO Order 2900.3, an employee was required to meet one of three criteria: (1) meet certain minimum requirements with regard to his/her SRS for FY 2003-2005. The SRS is based on a formula devised by GAO using standard deviation principles to assess an employee's ratings relative to those of all Band II employees on his/her mission team⁶, or (2) been converted from a GS-14 position to the Band II on June 15, 1989, or (3) been appointed to GAO after June 15, 1989 and held a GS-14 or equivalent position in the federal government prior to appointment. *See* GAO Order 2900.3, ch. 2(2)(a)-(e). The SRS of a Band II employee who was not working in a mission team was determined by comparison to ratings of Band II employees in "small offices," such as the Congressional Relations, Field Operations, and Human Capital Office. *See* GAO Order 2900.3, ch. 2(4)(b).

On November 7, 2005, GAO's Human Capital Office (HCO) notified Band II staff by email of their eligibility or ineligibility to be considered for placement in Band IIB. Of 1238 Band II employees, 670 were found to have met the basic eligibility requirements.

⁶The work performed by the GAO's analyst workforce takes place, for the most part, within the following thirteen mission teams: Acquisition and Sourcing Management (ASM); Applied Research and Methods (ARM); Defense Capabilities and Management (DCM); Education, Workforce and Income Security (EWIS); Financial Management and Assurance (FMA); Financial Markets and Community Investment (FMCI); Health Care (HC); Homeland Security and Justice (HSJ); Information Technology (IT); International Affairs and Trade (IAT); Natural Resources and Environment (NRE); Physical Infrastructure (PI); Strategic Issues (SI).

Employees who did not meet the basic eligibility requirements could nevertheless request a “special eligibility determination” by submitting a “written business case” identifying: (1) reasons why the employee should be considered and (2) any unique circumstances that should be considered. *See* GAO Order 2900.3, ch.2(3)(a). The Order provided for consideration of these requests by a panel of senior executives, which consisted of the following staff directors: Jesse Hoskins (HCO); Timothy Bowling, Quality and Continuous Improvement (QCI); Helen Hsing Strategic Planning and External Liaison (SPEL); and Ben Nelson (QCI). Employees seeking special eligibility had to submit their requests by November 9, 2005 and were to be notified of the panel’s decision by November 14, 2005. Of the 108 employees who sought a special eligibility determination, the panel approved 96 for eligibility to apply for the Band IIB.⁷

GAO further found as eligible an additional 28 employees who did not have the requisite ratings for FY2003-2005 but could demonstrate qualification based on directly related outside experience. In total, 794 (64% of all Band IIs) were allowed to apply for placement into Band IIB.⁸ GAO required that all employees seeking placement in Band IIB submit an application no

⁷Ninety-four of the 96 individuals deemed eligible under this provision applied for Band IIB. Only five were selected.

⁸ In addition, GAO Order 2900.3 provided that all employees in job series 347 (Analyst) and 511 and 510 (Auditors and Accountants) throughout GAO, and job series 2210 and 1150 (IT Specialists) in the IT team would be presumed to be analysts - as opposed to specialists -for purposes of the restructuring. *See* Order 2900.3, ch. 4(1)(a). However, it also provided that employees could seek review of this classification. *See Id.* at ch.4(2). Employees wishing to challenge their classification had four days – until November 9, 2005 – within which to submit their request. Employees were to be notified of GAO’s decision regarding their classification appeal by November 14, 2005. An employee who was not satisfied with the decision had only two days - until November 16, 2005 - within which to seek reconsideration, the decision on which was to be issued by November 18, 2005.

later than November 21, 2005. Only 757 of those deemed eligible submitted applications for placement into Band IIB.

The GAO restructuring Order 2900 stated that eligible employees would be assessed for placement into Band IIB on three factors: (1) roles and responsibilities, i.e., whether the employee had actually been performing the roles and responsibilities of the IIB pay range to a significant degree and on a recurring basis; (2) past performance, i.e., had the employee consistently demonstrated strong relative performance as a Band II employee, and (3) performance potential, i.e., did the employee have the ability to immediately perform at the “meet expectations” level in “Developing People” and “Investing Resources.” *See* GAO Order 2900.3, ch. 2(8)(a)-(c). None of these three selection criteria had been validated prior to the implementation of the restructuring.

As to the decision-making process, the Order provided for a “unit consultation” wherein each Managing Director was to meet with the team’s Directors to obtain input with regard to each applicant within the team. *See* GAO Order 2900.3, ch. 2(10). In preparation for the unit consultation, the participants were given binders (“notebooks”) containing the applications, performance ratings, standardized rating scores and averages, and Mission Assignment Tracking System (MATS) data for each applicant employee from that team. Based on a review of the data contained in the notebooks and input from the Directors, the Managing Director was to form a “yes,” “no” or “unsure” preliminary recommendation regarding the placement of each applicant from the team into Band IIB. *Id.* The unit consultation meetings between the team Managing Directors and Directors took place between November 22 and December 1, 2005.

In addition, each Managing Director served as a panel member on a Centralized Panel (Panel) consisting of at least two other Managing Directors. *See* GAO Order 2900.3, ch. 2(11).

Each Managing Director was required to review the data contained in the prepared notebooks for each of the employee applicants from the other teams represented on his/her Centralized Panel, and, based on this paper review, make a similar preliminary recommendation of “yes,” “no” or “unsure.” *Id.*

There were five Centralized Panels structured by teams:

Panel 1: Homeland Security and Justice (HSJ), National Resources and Environment (NRE), and Physical Infrastructure (PI)

Panel 2: Education, Workforce, and Income Security (EWIS), Financial Markets and Community Investment (FMCI), and Health Care (HC)

Panel 3: Acquisition and Sourcing Management (ASM), Defense Capabilities Management (DCM), International Affairs and Trade (IAT)

Panel 4: Financial Management and Assurance (FMA), Information Technology (IT), and Strategic Issues (SI)

Panel 5: Small Offices

See GAO Order 2900.3, ch. 2(11)(b). In addition, a sixth Centralized Panel consisting of all Managing Directors whose teams employed specialists was convened to assess the specialists.

See GAO Order 2900.3, ch. 2(12).

Under the Order, Panel members were to meet and discuss whether their preliminary recommendations as to each employee were appropriate. *See* GAO Order 2900.3, ch. 2(11)(b). They were authorized to change their preliminary recommendations, but if they were unable to reach agreement with regard to selecting the employee for the Band IIB, the employee was to remain in the “unsure” category. *Id.* The Chief Operating Officer and Chief Administrative Officer served as chair and vice chair, respectively, of the Panels, but were not to serve as panel members. *Id.* After receiving recommendations from the Panel, the COO and CAO were to make a joint preliminary determination as to whether an employee should be placed in Pay Band

IIB. *See* GAO Order 2900.3, ch. 2(11)(c). Thereafter, the GAO Human Capital Office (HCO) and Office of Opportunity and Inclusiveness (OOI) were to review the preliminary determinations of the COO and CAO and provide input prior to any final determinations. *See* GAO Order 2900.3, ch. 2(11)(d).

The Centralized Panels met between December 6 and 9, 2005. Gene Dodaro (COO) and Sallyanne Harper (CAO) led and facilitated the Panel discussions of the employee applicants.

The Order identified ten characteristics respectively for the Band IIB analyst and specialist “roles and responsibilities” criterion. *See* Order 2900.3, Appendix I. Yet, as is clear from their deposition testimony as well as their notes made contemporaneously with the restructuring decisions, Mr. Dodaro and Ms. Harper relied almost entirely on the number of hours analysts worked as an Analyst-in-Charge (AIC) on engagements and on the risk level of the engagements. With regard to specialists, the defining factor was the number of different engagements that the individual worked on simultaneously. However, during the FY 2003-2005 time period, GAO employees were not informed that failure to work significant hours as an AIC would be the basis for demotion in the future. In any event, assignment as the AIC on an engagement was within management’s discretion and not within the control of individual analysts or specialists.

Furthermore, we believe that the record would show that the emphasis on the “risk” level of the engagements as a deciding factor was contrived. According to a number of GAO officials, a “high risk” designation signified primarily that the engagement was to be overseen by the highest levels at GAO. Such a designation, however, did not necessarily reflect the substantive significance or complexity of the engagement, but instead, might reflect other reasons for

management's attention, such as the engagement's political sensitivity, for example, over which the analyst/specialist had no control.⁹

As to the second criterion relating to "past performance," employees were assessed based on their standardized rating scores, their SRS averages, and their annual performance ratings from the three previous annual rating cycles, FY 2003-2005. However, again, during the FY 2003-2005 time period, GAO employees were not informed, and had no reason otherwise to anticipate, that ratings of "meets expectations" and above might nevertheless be the basis for future demotion. Furthermore, the PAB/OGC was prepared to question GAO's reliance on the appraisals as the bases for the demotions in light of evidence obtained through the investigation and discovery that at least some GAO managers lowered and manipulated individual ratings under pressure to achieve an artificial dispersion in the ratings.

Moreover, the PAB/OGC's analysis of employees' standardized ratings scores and averages indicated that these did not in fact capture meaningful distinctions in employee performance as claimed by GAO. Rather, our review of the relevant data for all Band IIB applicants revealed a number of anomalies with regard to the SRS, and particularly the SRS averages, that called into question the reliability of this information as grounds for the restructuring decisions.¹⁰

⁹ Moreover, GAO derived the information concerning AIC hours and risk levels from its Mission and Assignment Tracking System (MATS), which evidence showed was not always accurate.

¹⁰ While preparing for litigation of the Band II cases, we met with two statisticians to determine whether to retain the services of a professional to assess GAO's approach to standardizing ratings. Soon after obtaining the necessary authority to contract with one of them for the purposes of analyzing GAO ratings data, the PAB/OGC entered into settlement negotiations with GAO. Thereafter, we did not take any further action to enter into a contract for a statistical analysis of the ratings data.

The record would also show that in making their preliminary determinations, the COO and CAO applied new “interpretative” standards for determining employee selection into the Band IIB. Furthermore, in the case of approximately 56 employees, including two petitioners, they declined to follow the Panel’s recommendation approving selection for Band IIB and instead rejected the applications. With approximately five others, they did not follow the Panel’s recommendation rejecting the applications, and instead approved the employees’ selection for Band IIB. In approximately two cases for which the Panel indicated that it was unsure, the COO and CAO approved the placement into Band IIB, whereas with approximately twelve others, including another petitioner, they rejected the applicants for Band IIB.

Thereafter, Managing Directors notified employees of the final decisions between December 16 and 23, 2005. Employees were given until January 13, 2006 to seek “feedback” regarding the decisions. Employees who were not placed into Band IIB could also request reconsideration from the Comptroller General (CG). *See* GAO Order 2900.3, ch. 2(13)(b). Under the terms of the Order, the CG was to review each request and the information considered by the Panel. *Id.* The Order did not, however, provide the standard to be applied by the CG in reconsidering the decision not to place the employee into Band IIB. The Order did not notify employees of their right to be represented during the feedback or reconsideration process. It warned employees that the CG would not consider objections to the restructuring policy or process.

Employees who sought reconsideration were not told that the CG might rely on information beyond the scope of their application. In fact, Mr. Walker sought and relied upon employee information and data that went beyond the three-year period contemplated by the

Order. In one instance, for example, a petitioner who sought reconsideration and met with Mr. Walker was completely surprised that the CG was relying on pre-2003 performance data in his reconsideration. Had he known, he could have come to the meeting prepared to address those issues.

Approximately nineteen individuals who sought reconsideration from Mr. Walker were approved for placement into Band IIB. These included employees who had been recommended, as well as those who had been rejected by, the Centralized Panels for inclusion in the Band IIB. In addition, five individuals whom the COO and the CAO rejected and who did not seek reconsideration were also placed into Band IIB upon reconsideration. Ten of the twelve petitioners sought reconsideration from Mr. Walker. None were granted.

Ultimately, 433 Band II employees (35% of all Band IIs) were placed into Band IIB and the remaining 324, including the twelve petitioners, were placed into Band IIA. The effective date of the placement decisions was January 8, 2006.

Prior to the issuance of GAO Order 2900.3, employees in Pay Band II were subject to the same minimum and maximum pay, adjusted by geographical location. On January 20, 2006, GAO issued a revised Order 2540.3, which, *inter alia*, eliminated annual pay adjustments for Band IIA employees whose pay exceeded the maximum pay rate for Band IIA. On February 8, 2006, GAO issued the *FY 05 Performance-Based Compensation (PBC) Guide for Analysts, Specialists and Investigators (Guide)* which was intended to supplement GAO Order 2540.3. Appendix 2 to the *Guide* set forth the pay ranges for Band IIA and Band IIB for each geographical zone. The pay range minimums and maximums applicable to Band IIA were significantly lower than those applicable to Band IIB.

The *Guide* provided that any portion of the GAO-wide 2.6% annual pay adjustment that exceeded the maximum rate of pay for Band IIA would be “lost.” *Guide* at 6. In addition, it provided that any Band IIA employee whose salary in December 2005 was in excess of the Band IIA maximum rate was covered by the Band IIA Transition provisions. *Guide* at 7. These provisions stipulated that any Band IIA whose salary was in excess of the Band IIA maximum rate would not receive the 2.6% annual pay adjustment, would receive only 50% of their Performance-Based Compensation (PBC) bonus as a permanent salary increase up to the IIA transition salary range maximum, and not receive any of the remaining portion of the PBC as a performance bonus.

As a result of their placement into Band IIA, eleven of the twelve petitioners were denied the 2006 annual pay adjustments and received only part of the performance-based compensation to which they were entitled.

Based on the foregoing, the PAB/OGC was prepared to argue that GAO did not accord petitioners the requisite 30-day notice and meaningful opportunity to respond to GAO’s decision to demote them. Specifically, GAO notified employees of their Band IIB eligibility status on November 7, 2005. Employees who wanted to avoid placement into Band IIA had only until November 21, 2005 to make their case through written application. Having been informed on December 16, 2005 of their demotions, they were given only until January 13, 2006 to seek feedback from their Managing Directors, who were not the decision-makers and did not have the authority to alter the decision. The Order 2900.3 did not provide for any opportunity for employees to respond, either orally or in writing, to the COO and CAO. Petitioners were given an opportunity to seek reconsideration from Mr. Walker. However, they were not notified as to

the standards and additional evidence that Mr. Walker would rely upon in making his decision. They were also precluded from raising any challenge to the process.

The PAB/OGC was further prepared to show that the petitioners' demotions must be overturned in the face of the numerous harmful errors made in the course of relying upon and applying procedures used in restructuring. *See* 5 U.S.C. §7701(c)(2). These included:

1. Failure to notify GAO analysts and specialists prior to, or during, the FY 2003-2005 appraisal years that performance at a "meets expectation" level could lead to demotion;
2. Failure to notify GAO analysts and specialists prior to, or during, the FY 2003-2005 appraisal years that work activity outside of the Analyst-in-Charge role during this period could lead to demotion;
3. Failure to validate the criteria used in the placement process;
4. Inconsistent application of the selection criteria and ongoing revision of the criteria during the course of the restructuring;
5. Reliance on information not identified in GAO Order 2900.3;
6. Reliance on faulty data from the Mission and Assignment Tracking System (MATS);
7. Reliance on the standardized rating scores and SRS averages;
8. Lack of notice to employees with regard to the actual standards and procedures used in the reconsideration process; and,
9. Inconsistent application of standards and procedures in the reconsideration process;

In addition, based upon the facts described above, the PAB/OGC was prepared to show that the Band II restructuring violated Pub.L. 108-271, §9. Specifically, we would have argued that GAO Order 2900.3 established a system to appraise GAO employees that did not meet the requirements of 5 U.S.C. §4302 as required by 31 U.S.C. §732(d)(1) in that

1. GAO did not encourage meaningful employee participation in establishing standards used in restructuring Band II. *See* 5 U.S.C. §4302(a)(2);

2. GAO did not adopt standards that permitted, to the maximum extent feasible, the accurate evaluation of job performance on the basis of objective criteria related to the job in question for each employee or position affected by the Band II restructuring;
3. GAO did not evaluate employees for purposes of restructuring on basis of the standards used to evaluate their performance during the three previous years;
4. GAO did not communicate Band II restructuring standards with sufficient advance notice to permit GAO employees an opportunity to conform their work history and performance to avoid demotion to Band IIA; and,
5. GAO's restructuring did not include effective transparency and accountability measures to ensure that its management was fair, credible, and equitable as required by Pub.L. 108-271, §9. Specifically, there was no transparency and accountability in
 - a. GAO's *post hoc* reliance on employee performance and work activity during FY 2003-2005 appraisal years;
 - b. a policy that performance at a "meets expectation" level could lead to demotion;
 - c. determination that AIC responsibilities and online work would be so critical in assessing analysts for restructuring purposes;
 - d.. emphasis on the risk level associated with engagement;
 - e. formulation of the GAO workforce analysis, competitive pay rates and market-based survey conducted by PDRI and/or Watson Wyatt;
 - f. manipulation of ratings;
 - g. calculation of the SRS scores;
 - h. the application and ongoing revision of the selection criteria during the restructuring; and,
 - i. the standards and procedures used in the Band II restructuring reconsideration process.

We also intended to argue that the elimination of petitioners' annual adjustment was contrary to Pub.L. 108-271. This claim presented a question of law that turned upon a straightforward reading of the statutory language and an examination of its legislative history.

In addition, we submit that the record would have shown that petitioners' reassignments into Band IIA violated 5 U.S.C. §2302(b)(12). The elements of that cause of action required a showing of (1) a personnel action (2) that violated a law rule or regulation (3) which implements or directly concerns a merit systems principle. Each of these elements would have been met here. First, the reassignments are plainly personnel actions within the meaning of §2302(b)(12). Second, for the reasons discussed above, the reassignments violated Pub.L 108-271 §§3 and 9. Third, the cited statutory provisions plainly implemented or directly concerned merit system principles of equal pay for equal work, protection against arbitrary action, and due process rights.

Finally, assuming *arguendo* that the Board found the Band IIB restructuring process to be consistent with law, the PAB/OGC was prepared to show that the petitioners met the criteria as stated in Order 2900.3.

