

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

Hearing on H.R. 3268, "Government Accountability Office (GAO) Act of 2007"
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I would like to thank Chairman Davis, Ranking Member Marchant, and members of the Subcommittee on Federal Workforce, Postal Service and the District of Columbia for the opportunity to testify on the "Government Accountability Act of 2007" and the role of the Personnel Appeals Board (PAB or Board) of the U.S. Government Accountability Office (GAO). I have served as Chair of the PAB since September 2007, and as a member of the Board since January 2005. This statement presents a broad outline of the Board's structure and processes established pursuant to the GAO Personnel Act of 1980, as amended (GAOPA).

Overview of PAB Structure and Processes

Creation of the PAB

The Personnel Appeals Board is an independent entity. It was established in 1980 as part of a separate personnel system Congress created for GAO pursuant to the GAO Personnel Act. As reflected in the statute's legislative history, the Board's founding grew in large part from concern over the inherent conflict of interest in GAO's role as auditor of executive branch agencies while some of those agencies maintained regulatory responsibility over GAO's personnel system. Both the statute and its legislative history demonstrate an intent to preserve the basic civil service character of employment at GAO, while allowing some additional flexibility in the personnel system and providing relief from the possibility of conflict of interest in auditing agencies that had authority to review GAO employment decisions. The Committee Report accompanying the GAOPA described the "cornerstone" of the statute as the "creation of a GAO Personnel Appeals Board to handle appeals from such matters as adverse actions, prohibited personnel practices, union elections, determination of bargaining units, unfair labor practices and discrimination appeals. . . . In this way the employees of the GAO retain all the rights enjoyed by employees in the executive branch, while at the same time, the conflict of roles is eliminated." H.R. Rep. 96-494, 96th Cong., 1st Sess. at 5-6 (1979).

The GAOPA recognized the many important safeguards GAO employees enjoyed under the Civil Service system and continued those protections in the new independent system under the PAB's jurisdiction. Thus, GAO employees have enjoyed a long and continuous history of coverage under laws designed to protect civil servants, through a system that embodies the merit principles that apply in the executive branch, guards against prohibited personnel practices, prohibits employment discrimination, bans unlawful political activity, and protects employee rights with respect to labor organization.

The dual purposes of the GAO Personnel Act—authorizing the establishment of an independent personnel system and the new PAB to oversee that system—were recognized early in the PAB's history by the United States Court of Appeals for the District of Columbia Circuit, which described the relationship between the two as follows:

Congress sought to solve GAO's conflict of roles problem by granting the GAO broad authority to manage its own workforce. But, at the same time, Congress also sought to guarantee employee rights by establishing an independent, internal board available to enforce and adjudicate those rights.

GAO v. GAO/PAB, 698 F.2d 516, 523 (D.C. Cir. 1983).

The statute also provides for the Board to have both an investigative as well as adjudicative function. In a recent case, the D.C. Circuit upheld the independence of another internal board against a challenge based on the entity having the authority to both investigate and adjudicate labor disputes. *American Federation of Government Employees v. Gates*, 486 F.3d 1316, 1329 (D.C. Cir. 2007), *cert. dismissed*, 2008 U.S. LEXIS 1219 (Feb. 6, 2008).

Statutory and Regulatory Safeguards for the Board's Independence

▶ Selection of Board Members

The GAOPA together with GAO's implementing order establish an inclusive process for providing the Board with experienced and independent members. The statute requires that individuals selected as Board members are not current or former GAO employees; have demonstrated ability, background, training and experience; and are able to devote sufficient time to disposing of cases in an expeditious fashion. Candidates who are recommended by organizations whose members are experienced in adjudicating or arbitrating personnel matters must be considered and GAO employee organizations must be consulted during the selection process. In addition, the statute provides for Congressional participation in the selection process through consultation with

designated members of Congressional committees having legislative jurisdiction over GAO's personnel management system.

GAO's internal Order (2300.4), *Personnel Appeals Board Vacancies*, sets out a detailed process for the appointment of Board members. This involves a wide-ranging distribution of the vacancy announcement, including organizations whose members are experienced in the arbitration or adjudication of personnel matters. A screening panel composed of senior management officials, employee representatives and a Human Capital Office representative determines the best qualified candidates from among the qualified applicants. An interview panel, comprised of screening panel members and including an employee representative, conducts personal interviews and provides the results to the full screening panel. The screening panel recommends one or more candidates to the Comptroller General, who makes an appointment from among the recommendations. The appointment is for a five year non-renewable term that may, under certain circumstances, be extended for up to six months.

In seeking to establish an independent personnel system for GAO employees, the drafters of the GAO Personnel Act were also mindful of the need to maintain the Board's independence from the Agency. As required by statute, the Board selects its own Chair from among the members. 31 U.S.C. §752(a). Cognizant of the concept that the power to remove is incident to and derives from the power to appoint, Congress took the removal authority from the selecting official and placed it with the Board. Under the relevant provision of the statute, which has remained unchanged since the passage of the GAOPA, a majority of the Board may remove a member for inefficiency, neglect or malfeasance, subsequent to the member being given notice and the opportunity for a hearing. 31 U.S.C. §751(d). This "good cause removal constraint" is a judicially recognized indicia of an independent board. *American Federation of Government Employees v. Gates*, 486 F.3d at 1329.

The current Board and immediate past Chair typify the backgrounds of those who have served on the PAB over nearly three decades. A Federal retiree, I bring 36 years of Federal employment law experience to the position of Chair, including service at the National Labor Relations Board (NLRB), U.S. Department of Labor, Federal Labor Relations Council, U.S. Department of State, and as Deputy Executive Director for the U.S. Senate, Office of Compliance. The immediate past Chair, also a Federal retiree, compiled 32 years of employment law experience as a Civil Service Commission hearing officer; an administrative judge, appellate counsel and a manager with the Merit Systems Protection Board (MSPB); and Deputy General Counsel and Regional Director of the Washington, DC Regional Office at the Federal Labor Relations Authority (FLRA). The Vice Chair currently serves as Associate Vice Chancellor for Labor Relations for the Minnesota State Colleges and Universities, and has prior experience as an attorney with the NLRB, an arbitrator for the U.S. Postal Service and its unions, general counsel for the United Electrical, Radio and Machine Workers of America and an attorney advisor for the U.S. Patent and Trademark Office and the MSPB, and Director of Labor Relations and Collective Bargaining for the District of Columbia. The third current member, a Federal retiree with 31 years of experience, served with the Federal Labor

Relations Council and in various capacities with the FLRA from its inception in 1979 until his retirement. He served as Chief Counsel for several FLRA members, represented the FLRA in the United States Supreme Court and various United States Courts of Appeals, and also served as Acting Director of the Collaboration and Alternative Dispute Resolution Office and Assistant General Counsel for Legal Services.

▶ Selection of the PAB General Counsel

Under the GAO Personnel Act, the Chair of the PAB selects an individual to serve as General Counsel of the Board, and the Comptroller General is required to appoint the individual selected by the Board Chair. The statute provides that the General Counsel “serves at the pleasure of” the Chair. 31 U.S.C. §752. Other than the formal, ministerial appointment of the Chair’s selectee, the Comptroller General has no role in the selection or retention of the Board’s General Counsel.

Authority of the Personnel Appeals Board

▶ Adjudication

The Personnel Appeals Board’s authority combines the adjudicatory functions of its executive branch counterparts: the Federal Labor Relations Authority (FLRA); the Merit Systems Protection Board (MSPB); and the Equal Employment Opportunity Commission (EEOC). The GAO Personnel Act charges the PAB with adjudicating disputes, issuing decisions and ordering corrective or disciplinary action, where appropriate, in cases involving employee appeals, prohibited personnel practices, discrimination, and prohibited political activity with respect to GAO and its employees. In addition, the Board has authority over cases involving a decision of an appropriate unit of employees for collective bargaining, the election or certification of such a collective bargaining unit, and resolution of unfair labor practice cases.

The statutory basis of the PAB’s combined enforcement authority over merit system violations, equal employment opportunity infractions, and labor-management relations was also the subject of early review by the United States Court of Appeals for the D.C. Circuit. In the context of a GAO challenge to the Board’s regulations, the Court noted that the GAO Personnel Act created a “hybrid board, with the combined functions of several boards and with a statutory procedural design that is purposely sparse in detail.” *GAO v. GAO/PAB*, 698 F.2d at 531. See also, H.R. Rep. No. 96-494, 96th Cong., 1st Sess. at 5-6 (1979). The decision rejected the argument that the Board was to precisely follow the procedures used by its executive branch counterparts, and concluded that the legislative history demonstrated “a legislative view that combining the functions of the various executive personnel agencies would sufficiently guarantee employees of the GAO the rights and remedies enjoyed by employees in the executive branch. With these substantive protections guaranteed, Congress left to the PAB the discretionary

task of formulating appropriate procedures and a proper role for the General Counsel.”
GAO v. GAO/PAB, 698 F.2d at 531.

Implementing Regulations for Adjudication of Employment Disputes

The GAO Personnel Act authorizes the PAB to “consider and order corrective action” in cases arising from employee appeals of adverse actions, prohibited personnel practices, prohibited political activity, a decision of an appropriate unit of employees for collective bargaining, an election or certification of a collective bargaining representative, a matter appealable under the labor-management relations program (including unfair labor practices), an action involving prohibited discrimination, and any additional issues about GAO personnel that the Comptroller General decides by regulation that the Board should resolve.

Through its implementing regulations, the PAB established a two-tier adjudicatory system. Cases ordinarily are heard in the first instance by a single member serving as administrative judge. An aggrieved party may request reconsideration of an initial decision and/or may appeal the initial decision to the full Personnel Appeals Board. The regulations also provide for *sua sponte* review by the full Board, in the absence of a timely appeal, if a majority of the Board deems it appropriate. A decision of the full Board disposing of a matter is considered a final decision.

Pursuant to the GAO Personnel Act, such final decisions of the Personnel Appeals Board may be appealed to the United States Court of Appeals for the Federal Circuit. 31 U.S.C. §755(a).

Under the Board’s mediation program, either party may request mediation at any stage of the investigatory or adjudicatory process. In addition, Board procedures allow for and encourage settlement at any stage in the process.

▶ Investigation and Prosecution by the PAB Office of General Counsel

The GAO Personnel Act enumerates four distinct functions for the General Counsel of the Personnel Appeals Board:

The General Counsel shall—

- (A) investigate an allegation about a prohibited personnel practice . . . to decide if there are reasonable grounds to believe the practice has occurred, exists, or will be taken by an officer or an employee of the Government Accountability Office;
- (B) investigate an allegation about a prohibited political activity. . . .

- (C) investigate a matter under the jurisdiction of the Board if the Board or a member of the Board request; and
- (D) help the Board carry out its duties and powers. [31 U.S.C. §752(b)(3).]

The Board's implementing regulations further delineate the role of the PAB Office of General Counsel (PAB/OGC) by requiring that the PAB/OGC offer representation to an individual if the investigation leads to the conclusion that "there are reasonable grounds to believe that the charging party's rights" under the GAOPA have been violated. 4 C.F.R. §28.12(d)(1).

In addition to the investigation and prosecution of matters brought by a charging party, the Board's regulations allow the General Counsel to conduct an investigation and, if appropriate, to bring a corrective action proceeding when information comes to his or her attention that suggests that "a prohibited personnel practice may have occurred, exists or is to be taken." (4 C.F.R. §28.131). The Board crafted this regulation to align PAB/OGC procedure more closely with that of the executive branch where allegations of a prohibited personnel practice, standing alone, may be raised by the Office of Special Counsel. The provision authorizes the PAB General Counsel to act in a role similar to that of the Special Counsel by investigating and prosecuting an alleged prohibited personnel practice in the absence of a GAO employee seeking personal relief.

Thus, through the statutory and regulatory scheme, the PAB Office of General Counsel protects the employment rights of GAO employees by performing the investigatory and prosecutorial functions of its executive branch equivalents, including investigation and, where appropriate, prosecution of cases involving allegations of workplace discrimination, prohibited personnel practices, and unfair labor practices.

Recognizing the statutorily defined role for its General Counsel to "decide if there are reasonable grounds to believe" that a prohibited personnel practice is involved in a given case, the Board's regulations prescribe general procedures for the operation of the PAB/OGC consistent with that prosecutorial independence. For example, the Board is not privy to the statement of results of investigation issued by the PAB/GC to the charging party at the close of an investigation, and the regulations prohibit introduction of such statements into evidence. 4 C.F.R. §28.12(c).

An important corollary function of the PAB/OGC's investigative and prosecutorial authority is to provide advice and counseling to employees about their rights under the merit system, equal employment opportunity and labor-management relations statutes.

▶ Oversight of Equal Employment Opportunity at GAO

The GAOPA provides for the Board to have "the same authority over oversight and appeals matters as an executive agency has over oversight and appeals matters." 31 U.S.C. §732(f)(2)(A). Pursuant to that grant of authority, the Board established an

Office of EEO Oversight to conduct studies of GAO's policies, procedures, and practices relating to discrimination in employment. The Board solicits ideas for oversight topics from employee representatives and from the Board's General Counsel, who has significant contact with and input from individual employees. With the recent certification of the GAO Employees Organization, IFPTE, suggestions will also be solicited from elected Union officials at GAO. At the conclusion of its studies, the Board issues evaluative oversight reports containing its findings, conclusions, and recommendations for change to the Agency. The Board's oversight reports are available on the Board's website, www.pab.gao.gov, and current oversight activity is described in the Annual Report of the Personnel Appeals Board, which also is published on the website.

Thus, through both the oversight and adjudicatory functions, the PAB provides an important backstop for the rights of employees within GAO's independent personnel system. The dual functions were noted and endorsed during the mid-1990s by GAO's Acting General Counsel in hearings before the Senate Committee on Governmental Affairs:

Our Personnel Appeals Board functions in two ways: first, it resolves cases that are brought by aggrieved employees, and in that sense it is truly an independent body, favoring neither the employee nor the agency. . . .

In deciding disputes, the Board is commonly viewed at GAO as a fair and impartial body, contributing to an atmosphere that promotes effective employer-employee relations.

There is a whole other role that our Personnel Appeals Board fulfills for us, and that is, it provides oversight of the civil rights laws as they are applied at GAO.

Congressional Coverage Legislation: Applying Laws to Congress, Hearing Before the S. Comm. on Governmental Affairs, 103d Cong., 1st Sess. 53 (June 29, 1994) (Comm. Print 1995) (testimony of Robert P. Murphy).

The mission described by the Acting General Counsel—to provide independent adjudication of employment disputes as well as independent oversight of equal employment opportunity at GAO—guides the Personnel Appeals Board today, as it has over the 28 year history of this institution.

PAB Administrative Matters

Based on a mid-1980s agreement between the Personnel Appeals Board and GAO, the PAB is located outside of the GAO Headquarters building to help ensure in fact and in perception the Board's independence and to guarantee the privacy of employees conducting business with the Board. Since the early 1990s the Board has been on First

Street, NE, with the Board and its Office of General Counsel occupying two adjoining suites. As an independent entity within GAO, the Board receives its funding from the Agency. This includes, in addition to salaries and rent, such things as cutting edge information technology systems, books, supplies, contracting services (e.g., for court reporting), training and travel funding. Early in the Board's existence, GAO and the PAB reached an agreement that the Board would have administrative autonomy from the Agency within the confines of fiscal responsibility. Over the ensuing years the Board has consistently received all the funding and staffing it has required. Because the amount of work that the Board has at any given time is varied, staffing issues are more challenging than they would be in a more traditional office setting. The Board has used a combination of full time, part-time, and intermittent employees over the years. Recently it hired an employee on a three year appointment and, after one year, when the future workload did not appear to be diminishing, the person was converted to permanent.

Thank you for the opportunity to participate in these hearings as changes are considered that may have an impact on the employment rights of individuals at GAO and the enforcement of those rights through the Personnel Appeals Board. The PAB would be pleased to provide any further information that the Subcommittee would find helpful.