Congressional Research Service

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Before

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

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on

"Government Accountability Office (GAO) Act of 2007"

Chairman Davis and Members of the Subcommittee:

My name is Curtis Copeland. I am here today to discuss certain issues related to the implementation of the new pay system at the Government Accountability Office (GAO). As requested, my testimony reviews (1) statements by the Comptroller General during Congress's deliberations on the GAO Human Capital Reform Act of 2004 (P.L. 108-271) that GAO employees who met performance expectations would receive annual across-the-board pay adjustments; (2) the question of the Comptroller General's legal authority to withhold annual pay adjustments to some of those employees in 2006 and 2007; and (3) the financial implications of the Comptroller General's decisions for GAO employees.

Before addressing those issues, in the interest of transparency, I need to tell you that I worked at GAO for more than 23 years — from September 1980 until January 2004. I moved to CRS more than six months before the GAO Human Capital Reform Act of 2004 was enacted. At GAO, I worked on a variety of issues, including federal personnel management, ethics in government, and regulatory reform.

Annual Pay Adjustments and "Meets Expectations" Ratings

The record indicates that the Comptroller General stated on several occasions during the deliberations on the GAO Human Capital Reform Act that GAO employees who performed at or above a "meets expectations" level on all relevant ratings dimensions (described as "competencies" at GAO) would receive annual adjustments to their base pay. These statements were made in writing and orally to congressional committees, individual Members, and GAO employees. For example:

- At a July 16, 2003, hearing on GAO's human capital reform proposal before the House Government Reform Committee's Subcommittee on Civil Service and Agency Organization, the Comptroller General said in his written statement that, in developing the proposal, GAO's Executive Committee had adopted several recommendations from GAO employees, one of which was "the commitment to guarantee annual across the board purchase power protection and to address locality pay considerations to all employees rated as performing at a satisfactory level or above (i.e., meeting expectations or above) absent extraordinary economic circumstances or severe budgetary constraints." He went on to say that GAO planned to satisfy that commitment through a GAO Order rather than through legislative language, and that he had "committed to our employees that I would include this guarantee in my statement here today so that it could be included as part of the legislative record."[1] In his written statement, the Comptroller General reiterated that "if GAO is granted this authority, all GAO employees who perform at a satisfactory level will receive an annual base pay adjustment composed of purchase power protection and locality based pay increases absent extraordinary economic conditions or severe budgetary constraints."[2] A table included in the appendix to the Comptroller General's written statement said the annual across-the-board increase to base pay would be provided "for all satisfactory performers." A footnote to the table said that, "absent extraordinary economic conditions or serious budgetary constraints, all GAO staff rated as performing at a satisfactory level (i.e., meeting expectations or higher) can expect to receive at a minimum an annual adjustment designed to protect purchasing power (e.g., the Consumer Price Index) and address differences in compensation ranges by localities."[3]

- In response to a question from Representative Chris Van Hollen at the July 16, 2003, hearing, the Comptroller General said, "I have made it clear that, as long as employees are performing at the meets expectation level or better, then they will be protected against inflation." He said the only exception would be "extraordinary economic conditions, like deflation or

[1] U.S. General Accounting Office, *GAO: Additional Human Capital Flexibilities Are Needed*, GAO-03-1024T (July 16, 2003), p. 10, available at [http://www.gao.gov/new.items/d031024t.pdf].

[2] Ibid., p. 17.

[3] Ibid., pp. 28-29.

hyperinflation or serious budgetary constraints."[4] Representative Van Hollen then said, "Let me make sure I understand what you were just saying. You have provided an assurance that except under extraordinarily bad budget scenarios, for example, a situation much worse than anything we're encountering even today, and things are pretty bad today — that you would assure that employees who are meeting the minimal expectation would receive a COLA and locality pay; is that right?" The Comptroller General then said, "Yes, and we would have a different method. But yes, they would receive protection against erosion of purchasing power due to inflation, and some consideration of locality at a minimum."[5]

- Christopher A. Keisling, a member of the GAO Employee Advisory Council, also testified at the July 16, 2003, House subcommittee hearing. In his written statement, Mr. Keisling said the Comptroller General had made several commitments to GAO employees that had tempered their concerns, including a statement that "employees who are performing adequately will be assured of some annual increase that maintains spending power. He outlined his assurance in GAO's weekly newsletter for June 30th that successful employees will not witness erosion in earning power and will receive an annual adjustment commensurate with locality-specific costs and salaries." Mr. Keisling went on to say that "To the extent that these steps are taken, overall employee opinion of the changes should improve because much of the concern has focused on making sure that staff who are performing adequately do not witness economic erosion in their pay."[6]

- GAO's human capital reform legislation (H.R. 2751) was introduced in the House of Representatives on the same day as the subcommittee hearing (July 16, 2003). The House Government Reform Committee's November 19, 2003, report on the legislation included the views of the minority members of the committee, who said that the Comptroller General "has assured GAO employees that anyone performing satisfactory work will receive at least a cost of living adjustment."[7] H.R. 2751 passed the House on February 25, 2004.

- On September 16, 2003, the Senate Committee on Governmental Affairs held a hearing on pending GAO human capital legislation (S. 1522, which

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[4] U.S. Congress, House Committee on Government Reform, Subcommittee on Civil Service and Agency Organization, *GAO Human Capital Reform: Leading the Way*, hearing, 108th Cong., 1st sess. (Washington: GPO, 2003), p. 78.

[5] Ibid.

[6] U.S. General Accounting Office, *GAO's Proposed Human Capital Legislation: View of the Employee Advisory Council*, GAO-03-1020T, July 13, 2003, p. 9, available at [http://www.gao.gov/new.items/d031020t.pdf].

[7] U.S. Congress, House Committee on Government Reform, *GAO Human Capital Reform Act of 2003*, report to accompany H.R. 2751, 108th Cong., 1st sess., H.Rept. 108-380 (Washington: GPO, 2003), p. 23, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr380.108.pdf].

had been introduced in the Senate on July 31, 2003). In his written statement, the Comptroller General recommended passage of the legislation, and said that although GAO employees had expressed strong concerns about the initial proposal, "those concerns have been reduced considerably by the clarifications, changes, and commitments I have made."[8] He included a copy of his July 16, 2003, testimony as an appendix to his written statement, in which he said that one such commitment was "to guarantee annual across the board purchase power protection and to address locality pay considerations to all employees rated as performing at a satisfactory level or above (i.e., meeting expectations or above) absent extraordinary economic circumstances or severe budgetary constraints."[9] GAO's Employee Advisory Council did not testify at this hearing, but provided a statement for the record that was virtually the same as its testimony before the House subcommittee two months earlier.[10]

- During the September 16, 2003, hearing, Senator Thomas Carper asked the Comptroller General how employees could be ensured protection against inflation in a pay for performance system. The Comptroller General said that "for the 97-plus percent of our employees who are performing at an acceptable level or better, . . . we will protect them against inflation at a minimum."[11]

- The Senate Committee on Governmental Affairs, in its December 9, 2003, report on the GAO human capital reform legislation, said that the committee had "received a commitment from the Comptroller General that, absent extraordinary circumstances or serious budgetary constraints, employees or officers who perform at a satisfactory level will receive an annual base-pay adjustment designed to protect their purchasing power."[12] S. 1522 passed the Senate on June 24, 2004, and was enacted into law on July 7, 2004.

Several other descriptions of GAO's new pay system addressed this issue as well. For example, a set of questions and answers provided to GAO employees in June 2003 stated that "GAO will, absent extraordinary economic conditions or serious budgetary constraints, provide all GAO staff who are rated as performing at a satisfactory level (i.e., meets

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[8] U.S. General Accounting Office, *GAO: Transformation, Challenges, and Opportunities*, GAO-03-1167T (Sept. 16, 2003), p. 33, available at [http://www.gao.gov/new.items/d031167t.pdf].

[9] Ibid., p. 60.

[10] U.S. General Accounting Office, *GAO's Proposed Human Capital Legislation: Views of the Employee Advisory Council*, GAO-03-1162T (Sept. 16, 2003), pp. 9-10, available at [http://www.gao.gov/new.items/d031162t.pdf].

[11] U.S. Congress, Senate Committee on Governmental Affairs, *Oversight of GAO: What Lies Ahead for Congress' Watchdog?*, hearing, 108th Cong., 1st sess. (Washington: GPO, 2003), pp. 19-20.

[12] U.S. Congress, Senate Committee on Governmental Affairs, *GAO Human Capital Reform Act of 2003*, report to accompany S. 1522, 108th Cong., 1st sess., S.Rept. 108-216 (Washington: GPO, 2003), p. 9, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:sr216.108.pdf].

expectations or higher) both across the board and performance-based annual pay adjustments."[13] Using almost identical language, a GAO official testifying after enactment of the GAO Human Capital Reform Act in July 2004 said, "GAO will, absent extraordinary economic conditions or serious budgetary constraints, provide all GAO staff whose performance is at a satisfactory level both across-the-board, and, as appropriate, performance-based annual pay adjustments."[14]

In addition, documents that have been on GAO's website for some time continue to suggest that employees performing satisfactorily can expect an annual pay adjustment. For example, a description of the GAO Human Capital Reform Act's provisions states that the act "establishes a compensation system that places greater emphasis on job performance while protecting the purchasing power of employees who are performing acceptably."[15] GAO's *Human Capital Strategic Plan: Fiscal Years 2004-2006* states that, under the Human Capital Reform Act, "all GAO employees who perform at a satisfactory level will receive an annual base pay adjustment composed of purchase power protection and locality-based pay considerations absent extraordinary economic circumstances or severe budgetary constraints."[16]

Some GAO Employees Received No Annual Pay Increases

Some GAO employees who were rated as having met or exceeded performance expectations did not receive an annual across-the-board pay increase in 2006 or 2007.[17] In 2008, however, GAO has announced that all employees with at least a "meets expectations" rating will receive the same annual pay adjustment as General Schedule (GS) employees in Washington, DC.

The 2006 Pay Adjustment. GAO noted in its response to questions after a March 10, 2006, hearing by the House Committee on Appropriations on GAO's FY2007 appropriation that of the 1,829 GAO analysts and specialists who were assessed for

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[13] U.S. General Accounting Office, "Additional Human Capital II Questions and Answers (Second Set: June 27, 03)," p. 3, provided to CRS by House Committee on Government Reform staff. The same document (p. 4) also said "The Comptroller General has stated that, absent extraordinary economic conditions or serious budgetary constraints, all GAO staff who are rated as performing at the satisfactory level (i.e., meets expectations or higher) can expect to receive an annual adjustment designed to protect purchasing power (e.g., the Consumer Price Index "CPI") and address differences in competitive compensation by varying localities. Based on the results of last year's performance appraisal process, over 97 percent of GAO's analysts met this standard."

[14] Statement of J. Christopher Mihm, Managing Director, Strategic Issues, U.S. Government Accountability Office, *Human Capital: Building on the Current Momentum to Transform the Federal Government*, GAO Report GAO-04-976T (July 20, 2004), p. 18.

[15] Available at [http://www.gao.gov/about/namechange.html].

[16] U.S. Government Accountability Office, *The Human Capital Strategic Plan: Fiscal Years 2004-2006*, p. 9, available at [http://www.gao.gov/htext/d041063sp.html].

[17] As discussed in more detail later, changes in GAO employees' annual compensation can be changes to their base pay (referred to here as the "annual pay adjustment") or "performance-based compensation," which may be provided in terms of base pay or as a lump sum bonus that does not count toward employees' base pay. Employees who did not receive annual pay adjustments in 2006 or 2007 may have received some form of performance-based pay.

performance-based compensation and actually on board on the effective date of the pay adjustments, 308 employees (approximately 17%) did not receive GAO's 2.6% across-the-board permanent pay increases in January 2006.[18] Of these 308 employees, 14 were in Band III (roughly GS-15 equivalent); five were in Band IIB (GS-14); 236 were in Band IIA (GS-13); and 53 were in Band I (GS-7 through GS-12).[19] According to GAO, all 308 employees had performance ratings of "meets expectations" or better on all relevant competencies during the rating period.

Another of the post-hearing questions in March 2006 cited the Comptroller General's statements at the House subcommittee hearing on July 16, 2003, assuring "purchase power protection" raises to all GAO employees who met expectations, absent extraordinary economic circumstances or severe budgetary constraints. Given these statements, the questioner asked why these 308 GAO employees who "met expectations" were not given an across-the-board pay increase. In response, GAO said the Comptroller General's statements to Congress in 2003 were "accurate at the time," but said "there have been significant subsequent events that have altered the Comptroller General's views on whether and when employees should receive pay adjustments."[20] GAO said the most significant of these events was the completion of a pay study by the Watson Wyatt Worldwide consulting firm, which indicated that certain employees were already paid more than what should be the maximum pay for their positions.[21] As a result, 53 Band I and 236 Band IIA employees did not receive the 2.6% annual adjustment to their base pay in January 2006 because, according to the Watson Wyatt study, they were already paid more than the maximum salaries for their bands (at the time, $75,900 for Band I and $101,600 for Band IIA).

However, some employees at the Band IIB and Band III levels did not receive the 2.6% annual increase in January 2006 because of a change in GAO policy — not because the Watson Wyatt pay study indicated they were paid more than the market rate for their band. According to that policy, for employees who were paid less than the maximum rate of their

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[18] The average GS permanent pay increase in January 2006 was 3.19%, and the increase in Washington, DC, was 3.44%.

[19] "Final Questions and Answers Submitted for the Record as Part of GAO's 2007 Appropriation Hearing," Mar. 27, 2006, provided to CRS by House Committee on Government Reform staff. GAO adopted a three-band pay system in 1989, and divided the middle band into Band IIA and Band IIB in late 2005 for the 2006 pay cycle. For more on this action, see U.S. Government Accountability Office, *Band II Restructuring* (GAO Order 2900.3), Nov. 4, 2005.

[20] Ibid., p. 2.

[21] GAO and Watson Wyatt defended the reliability of this study. The study, however, has also been criticized as faulty in several respects. See testimony of Charles H. Fay, Professor of Human Resource Management and Chair of the Human Resource Management Department, Rutgers University School of Management and Labor Relations, before Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, House Committee on Government Oversight and Reform; and the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Senate Committee on Homeland Security and Governmental Affairs, May 22, 2007, which is available at [http://federalworkforce.oversight.house.gov/documents/20070522162122.pdf]. Problems cited included (1) the non-involvement of GAO employees in the study, (2) the use of off-the-shelf surveys that "are unlikely to have captured the appropriate market data" and that came from too few organizations, and (3) the use of inconsistent data cuts in developing benchmark medians.

band, but more than a "speed bump" rate (established at about the 75% point of the bands, based on the Watson Wyatt results), their ability to receive an annual pay increase was also based on their performance appraisals relative to those of other GAO employees in their team and band. For Band IIB employees, their rating had to be in the top 50% of their cohort; for Band III employees, their rating had to be in the top 80% of their cohort.[22] As a result, five Band IIB employees received no annual adjustment to their base pay because they were paid more than the Band IIB speed bump ($118,000), and they were not in the top 50% of appraisal scores for their band and team. Similarly, 14 Band III employees received no annual pay adjustment because they were paid more than the Band III speed bump ($129,800), and they were not in the top 80% of appraisal averages for their band and team.

PAB Cases. In September 2006, 12 of the employees who had been assigned to Band IIA and had not received the January 2006 annual pay adjustment filed a petition with the GAO Personnel Appeals Board (PAB) alleging that their reassignment from Band II to Band IIA was a violation of the GAO Personnel Act. Each of the 12 petitioners also challenged the legality of GAO Order 2540.3 (which put in place the GAO annual adjustment and performance-based compensation system) and the FY2005 Performance-Based Compensation Guide for Analysts, Specialists, and Investigators.

On April 5, 2007, shortly before the case was scheduled to be heard, GAO agreed to a settlement of all 12 appeals, retroactively placing the petitioners into Band IIB effective January 8, 2006 (the start of the 2006 pay year), with full back pay, including appropriate retirement contributions and interest.[23] As a result of this settlement, the number of employees who did not receive the January 2006 annual pay increase fell to 296 (308 minus 12). In the wake of the April 2007 settlement, about 270 other GAO employees with at least "meets expectations" performance ratings who did not receive the 2006 annual pay increase also filed appeals with the PAB. Those cases are pending before the PAB.

The 2007 Pay Adjustment. In January 2007, GS employees received an average permanent pay increase (base pay plus locality pay) of 2.24%; employees in the Washington, DC, pay area received an increase of 2.64%. Most GAO employees received an annual base pay adjustment of 2.4%.[24] Because of a delay in the passage of its appropriation bill, GAO delayed the implementation of its annual pay increase until February 18, 2007, the start of the fourth pay period of the year.

Some employees at the Band I and Band IIA levels with at least "meets expectations" performance ratings did not receive the 2007 across-the-board pay increase because they were still considered to be paid in excess of applicable market pay rates. Other GAO employees at the Band IIB level did not receive the 2007 increase because (1) they were paid

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[22] U.S. Government Accountability Office, *Pay Administration in the Analyst Performance-Based Compensation System*, Order 2540.3 (June 12, 2006).

[23] One of the petitioners separated from GAO in 2006, so her back pay was calculated from January 8, 2006, until the date of her separation.

[24] In GAO, the annual adjustment is the same regardless of location, but the size of the performance-based compensation differs by location. GAO has established five geographic salary zones, with the Washington, DC, zone serving as the baseline. For example, performance-based compensation for employees in Zone 1 (Norfolk, Huntsville, and Richand) is 8% lower than in Washington, whereas employees in Zone 5 (San Francisco) receive 11% more than in Washington.

above the Band IIB speed bump; and (2) even though they received at least "meets expectations" ratings, they were not in the top 50% of appraisal scores for their band and team. In contrast, all Band III employees with at least "meets expectations" ratings received the across-the-board pay increase in 2007 because the Comptroller General decided in late 2006 to eliminate the speed bump for Band III.[25] Taken together, a total of 138 GAO analysts and specialists at the Band I, Band IIA, and Band IIB levels did not receive any of the 2007 across-the-board increase. Another 66 analysts and specialists at these levels received only partial across-the-board increases (because full increases would have caused them to exceed applicable GAO pay caps).[26] All of these employees had at least "meets expectations" performance ratings on all applicable competencies.

On May 8, 2007, the International Federation of Professional and Technical Engineers (IFPTE) filed a petition with the PAB to start the process to organize and represent certain GAO employees. In September 2007, GAO employees voted to approve union representation by IFPTE. It was reported that one main reason for the establishment of a union at GAO was the Comptroller General's decision to deny annual pay adjustments to employees with at least "meets expectations" performance ratings.[27]

The 2008 Pay Adjustment. In January 2008, GS employees received an average annual pay increase (base pay plus locality pay) of 3.5%; employees in the Washington, DC, pay area received an increase of 4.49%. The pay increases took effect on January 6, 2008. On February 8, 2008, GAO announced that it had reached tentative agreement with the IFPTE union's interim council that all GAO employees performing at the "meets expectations" level or better on all competencies would receive no less than a 4.49% increase in permanent pay — irrespective of whether employees' pay was over applicable pay caps or speed bumps.[28] GAO also indicated that the pay increases would be made retroactive to January 6, 2008. GAO employees subsequently approved the tentative agreement.

Comptroller General's Authority to Deny Annual Adjustments

The second issue that the Subcommittee asked CRS to address was the legal authority of the Comptroller General to deny annual pay adjustments to some GAO employees with at least "meets expectations" performance ratings in 2006 and 2007. Section 3(a) of the

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[25] U.S. Government Accountability Office, *Pay Administration in the Analyst-Performance-Based Compensation System*, Order 2540.3.

[26] In addition, one non-analyst administrative professional and support staff (APSS) employee received no across-the-board adjustment, and 12 APSS employees received only partial adjustments. All of these employees also had "meets expectations" performance ratings, or better.

[27] See, for example, Brittany R. Ballenstedt, "GAO analysts vote for union representation," *Government Executive*, Sept. 20, 2007, available at [http://www.govexec.com/story_page.cfm?articleid=38085], which said the push to unionize at GAO was partly in response to "the elimination of cost-of-living increases for many, and the labeling of some analysts as overpaid relative to the market."

[28] The annual adjustment increase was 3.5% for all staff who at least meet expectations, subject to salary maximums and the Band II speed bump. The performance-based compensation budget factor was 2.75% for all covered staff who meet expectations, subject to salary maximums and the Band IIB speed bump. Maximum salary ranges increased by 4.5%, and minimum salary ranges increased by 3.5%.

GAO Human Capital Reform Act amended 31 U.S.C. § 732(c) to state that the "basic rates of officers and employees of the Office shall be adjusted annually to such extent as determined by the Comptroller General." The statute (31 U.S.C. § 732(c)(3), as amended) indicates that the Comptroller General "shall consider" six factors in making his determination:

> (A) the principle that equal pay should be provided for work of equal value within each local pay area; (B) the need to protect the purchasing power of officers and employees of the Office, taking into consideration the Consumer Price Index or other appropriate indices; (C) any existing pay disparities between officers and employees of the Office and non-Federal employees in each local pay area; (D) the pay rates for the same levels of work for officers and employees of the Office and non-Federal employees in each local pay area; (E) the appropriate distribution of agency funds between annual adjustments under this section and performance-based compensation; and (F) such other criteria as the Comptroller General considers appropriate, including, but not limited to, the funding level for the Office, amounts allocated for performance-based compensation, and the extent to which the Office is succeeding in fulfilling its mission and accomplishing its strategic plan.

The statute also provides that an adjustment "shall not be applied in the case of an officer or employee whose performance is not at a satisfactory level, as determined by the Comptroller General for purposes of such adjustment."

In his testimony before this subcommittee on May 22, 2007, the Comptroller General said the following:

> First and foremost, I know that some are concerned that I did not follow through on certain assurances I made in 2003 during consideration of GAO's Human Capital Reform Act, namely, that we would provide across-the-board pay adjustments to GAO employees who received at least a "meets expectations" rating. In late 2004, after we received the market based pay study, we were faced with the reality that some of our employees were paid above market levels. This fact was not known when I testified in 2003. In retrospect, we should have advised the Congress and others sooner that we did not view my prior statements as applying to employees who were paid above market levels. I am sorry that we did not do that; however, the fact remains that I did not believe then, nor do I believe now, that it would be appropriate or equitable to provide across-the-board pay increase to employees who are paid above market levels. The very notion that one would provide across-the-board pay adjustments to those paid above market is, in my opinion, fundamentally inconsistent with the very premise of a market-based pay system and the concept of equal pay for work of equal value.[29]

The Comptroller General also said that his decisions to deny the 2006 and 2007 annual pay adjustments to certain GAO employees with "meets expectations" ratings or better were "fully consistent with the principles and criteria that were under consideration in July 2003, when I testified, and that were enacted into law in July 2004."[30] In information provided to CRS by GAO, the agency said the GAO Human Capital Reform Act provided the Comptroller General with broad discretion to determine if an employee should receive an

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[29] U.S. Government Accountability Office, *United States Government Accountability Office: Status of GAO's Human Capital Transformation Efforts*, GAO-07-872T, May 22, 2007, p. 4.

[30] Ibid., p. 5.

adjustment. GAO maintained that as long as the six factors were considered, the Comptroller General was authorized to determine the appropriate annual adjustments, including the option of providing no adjustment to all or certain employees. GAO also said that the flexibilities provided in the statute under section 3(a) permitted the Comptroller General to establish criteria for determining whether Band IIB and Band III employees who were at or above the speed bumps would receive a pay adjustment.

Other witnesses at the May 2007 hearing offered a different perspective, some concluding that the Comptroller General had exceeded his legal authority. For example, the General Counsel of the PAB said that if the 12 cases filed with the board had gone to a hearing, she "intended to argue that the elimination of petitioners' annual adjustment was contrary to Pub.L. 108-271 [the GAO Human Capital Reform Act of 2004]. This claim presented a question of law that turned upon a straightforward reading of the statutory language and an examination of its legislative history."[31] In her view, because the statute (1) stated that annual pay rates "shall be adjusted" by the Comptroller General, and (2) indicated which GAO employees should not receive annual pay adjustments (those whose performance did not meet expectations), the Comptroller General could not deny other GAO employees the annual pay adjustment. She also said the legislative history of the statute indicated that Congress believed that all GAO employees with at least a "meets expectations" rating would receive the annual pay adjustment.

A legislative attorney from the American Law Division within CRS testified that if a court were asked to determine whether GAO's actions were permissible, it would first consider whether Congress had spoken directly on this issue. After reviewing the language of the statute and its legislative history, CRS stated that, while the Comptroller General could determine whether an employee's performance had met expectations, and could decide the amount of any annual pay adjustment, "The statutory language of section 3(a) [of the GAO Human Capital Reform Act of 2004] and the section's legislative history appear to illustrate clear congressional intent to have a pay adjustment in the form of an increase in basic pay rates for all officers and employees who perform at a satisfactory level."[32] For further information on these issues, the Committee may contact our American Law Division.

Financial Implications for GAO Employees

The third issue that CRS was asked to address was the financial implications of the Comptroller General's decisions in 2006 and 2007 to withhold the annual pay adjustment to

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[31] Statement of Anne M. Wagner, General Counsel, Personnel Appeals Board, GAO, before the Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, House Committee on Government Oversight and Reform; and the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Senate Committee on Homeland Security and Governmental Affairs, May 22, 2007, p. 22, available at [http://federalworkforce.oversight.house.gov/documents/20070523130124.pdf].

[32] Statement of Jon Shimbukuro, Legislative Attorney, American Law Division, Congressional Research Service, before the Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia, House Committee on Government Oversight and Reform; and the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Senate Committee on Homeland Security and Governmental Affairs, May 22, 2007, p. 5, available at [http://federalworkforce.oversight.house.gov/documents/20070522162003.pdf].

certain GAO employees with at least "meets expectations" performance ratings. As noted previously, GAO employees in Band I and Band IIA who were already being paid in excess of the new maximum rate for their band were not eligible for the annual pay adjustments authorized for other GAO employees in January 2006 or February 2007.[33] These employees, under the system then in place, could receive no annual pay adjustment until the maximum rate for their band increased to a point above the employees' current salary. Likewise, GAO employees in Band IIB were not eligible for the 2006 or 2007 annual pay increases if their salaries were already over the "speed bump" for the band and if their performance ratings — even though they were at least "meets expectations" on all competencies — were in the lower half of all other Band IIBs in their teams.[34] These employees would not be eligible for annual pay increases until their performance improved compared to others at their band level in their team, or the speed bump increased to a point above the employees' current salary.[35]

Similarly, GAO employees in Band III were not eligible for the 2.6% annual pay increase in January 2006 if their pay was over the speed bump for the band and their performance rating — although at or above "meets expectations"on all competencies — was in the bottom 20% of all other Band IIIs in their team.[36] However, the annual pay increases for certain Band III employees with at least "meets expectations" ratings were not withheld in 2007. As noted earlier, in late 2006, GAO revised its compensation order and eliminated the speed bump for Band III; as a result, all Band III employees with at least a "meets expectation" performance rating were eligible for the annual across-the-board pay increase provided in February 2007.[37]

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[33] In 2006, Band I employees who were paid more than what the Watson Wyatt data indicated should be the maximum rate for their band ($75,900) could receive a $1,000 lump sum bonus if they were in the top 20% of performers; otherwise, they received no bonus or annual adjustment. In 2007, Band I employees received all of their performance-based compensation as a lump sum bonus. As discussed later, Band IIA employees in 2006 who were paid more than the maximum rate for Band IIA ($101,600) but less than the transition rate ($118,700) could receive up to 50% of their performance-based compensation as base pay; the remaining 50% was not provided as either base pay or a lump sum bonus. If paid at or above the transition rate, they could receive a $1,000 lump sum bonus if they were in the top 20% of performers. In 2007, Band IIA employees could receive 100% of their performance-based compensation as base pay, up to the transition cap, with the remainder provided as a bonus.

[34] In 2006 and 2007, Band IIB employees who were paid more than the "speed bump" and whose performance, even though it met or exceeded performance expectations, was in the bottom 50% of all Band IIBs in their team, could receive 100% of their performance-based compensation only as a lump sum bonus.

[35] GAO notified CRS that both the maximum rate of the bands and the speed bumps will be increased using factors that the GAO Human Capital Reform Act requires the Comptroller to consider, including the need to protect the purchasing power of officers and employees of the Office. Between 2006 and 2007, the rate of increase was about 3%.

[36] In 2006, Band III employees who were paid more than the speed bump and whose performance met or exceeded expectations but who were in the bottom 20% of all Band IIIs in their team could receive 100% of their performance-based compensation only as a lump sum bonus. In 2007, the speed bump was removed for Band III, so all Band III employees were eligible for both the annual adjustment and performance-based compensation.

[37] U.S. Government Accountability Office, *Pay Administration in the Analyst-Performance-Based*

(continued...)

Salary and Pension Effects. Even though all GAO employees with at least a "meets expectation" rating will receive a 2008 across-the-board pay increase of at least 4.49% (subject to the statutory cap at GS-15, step 10), without a change in policy, the pay and the retirement annuities of GAO employees who did not receive the 2006 adjustment, the 2007 adjustment, or both adjustments will be permanently affected by the Comptroller General's decision to freeze their annual pay increases. Perhaps the best way to illustrate this effect is through a hypothetical example.

As shown in **Table 1**, if a GAO Band II employee in Washington, DC, making $110,000 per year in 2005 was placed in Band IIA, the employee would not have been eligible for the 2.6% annual pay adjustment that GAO gave to other employees because the maximum pay rate for that band in January 2006 was $101,600. However, the "capped" Band IIA employee could have received up to 50% of her performance-based compensation in 2006 as base pay.[38] For example, as **Table 1** indicates, if the capped employee was eligible to receive $2,000 in performance-based compensation in January 2006 (slightly higher than the average for Band IIA employees that year), she would have received a $1,000 increase in base pay, raising her annual salary to $111,000 for 2006. In contrast, as the table shows, if the employee's pay was not capped and she had received the 2.6% annual adjustment for 2006 as well as the performance-based compensation that counted toward base pay, her salary would have increased by $3,860 ($2,860 annual increase plus $1,000 in performance-based compensation) to $113,860 in January 2006.

[37] (...continued)
Compensation System, Order 2540.3.

[38] The cap applicable to performance-based pay for Band IIA employees in Washington, DC, was the "transition cap" of $118,700. In 2006, Band IIA employees who were paid less than the transition cap could receive up to 50% of their performance-based compensation as an adjustment to their base pay. The other 50% plus any PBC amounts in excess of the transition cap were lost.

Table 1: Salary Differences Between Hypothetical Capped and Uncapped GAO Employees: 2006, 2007, and 2008

	Capped Employee	Uncapped Employee	Salary Difference
2005 Annual Salary	$110,000	$110,000	0
2006 Annual Adjustment (2.6%)	0	$2,860	-----
2006 Performance-Based Compensation as Base Pay (50% of $2,000)	$1,000	$1,000	-----
2006 Annual Salary	$111,000	$113,860	$2,860
2007 Annual Adjustment (2.4%)	0	$2,733	-----
2007 Performance-Based Compensation as Base Pay (100% of $2,000)	$2,000	$2,000	-----
2007 Annual Salary	$113,000	$118,593	$5,593
2008 Adjustment (4.49% guaranteed floor)	$5,074	$5,325	-----
2008 Annual Salary	$118,074	$123,918	$5,844
Cumulative Salary (2006, 2007, and 2008)	$342,074	$356,371	$14,297

Note: For this analysis, CRS assumed $2,000 in performance-based compensation in 2006 and 2007. Although the GAO annual adjustment in 2008 was 3.5%, the 4.49% guaranteed floor was provided to employees with "meets expectations" ratings whose combined annual adjustment plus performance-based compensation was less than 4.49%.
Source: CRS analysis.

Table 1 depicts a similar scenario in 2007. Although the Band IIA maximum pay rate increased by about 3% in 2007 (to $104,700), the Band IIA employee earning $111,000 in 2006 was still ineligible to receive the annual pay adjustment that other GAO employees received that year (2.4%) because her salary was still above the cap. In 2007, Band IIA employees could receive up to 100% of their performance-based compensation as additions to base pay, as long as they were paid less than the applicable performance-based compensation cap.[39] Therefore, if the employee's performance-based compensation was

[39] The "transition" cap for Band IIA employees remained at $118,700. Therefore, beginning in 2007, all Band IIA employees who were paid less than the cap could receive 100% of their performance-based compensation as base pay. Any performance-based compensation in excess of the transition cap was provided to employees as a one-time bonus. Band I employees who were over the cap and Band IIB employees who were over the speed bump could only receive their performance-based (continued...)

$2,000 that year, her annual salary would have increased to $113,000 for 2007. On the other hand, if the employee had received the annual adjustment as well as the performance-based compensation as base pay, her annual salary (building on the increases provided in 2006) would have increased to $118,593.

Finally, if the employee who did not receive the 2006 or 2007 annual pay adjustments received the negotiated minimum 2008 adjustment of 4.49%, her annual salary would have gone to $118,074 for 2008. In contrast, if the employee had received the full annual and performance-based pay adjustments to her base pay for all three years, her annual salary for 2008 would have been $123,918 — $5,844 more than the employee who had not received the 2006 and 2007 annual pay adjustments. By the end of 2008, the capped employee who did not receive annual pay adjustments in 2006 or 2007 will have forgone a cumulative total of $14,297 in annual salary ($2,860 plus $5,593 plus $5,844).

The capped employee's annual retirement pension would also be affected by the forgone salary increases in 2006 and 2007. As shown in **Table 2** below, if the employee retired at the end of 2008, her "high-three" average salary would be $4,765 less than if she had received the 2006 and 2007 adjustments, and her annual pension (assuming that she retired under the Civil Service Retirement System (CSRS) with exactly 30 years of service) would be $2,680 less. Assuming that the employee draws her pension for 20 years, the cumulative pension difference (not including cost of living increases that will likely be provided during this period to maintain the annuity's original purchasing power) would be $53,600. This difference, when added to the $14,297 cumulative difference in income described above, would yield a total differential over the full 23-year period of $67,897.

Table 2: Pension Differences Between Hypothetical Capped and Uncapped GAO Employees

	Capped Employee	Uncapped Employee	Difference
"High-Three" Average Salary	$114,025	$118,790	$4,765
Annual CSRS Pension (56.25% of High-Three Average)	$64,139	$66,819	$2,680
Cumulative Pension for 20 years	$1,282,780	$1,336,380	$53,600

Note: The pension calculations assume the employee was in CSRS and retired with exactly 30 years of service. The cumulative pension figures do not include any cost of living increases.
Source: CRS analysis.

The effects of not receiving the 2006 and 2007 annual pay adjustments are similar for GAO employees at other band levels. For example, a Band I employee earning $80,000 in 2005 would appear to forgo more than $10,000 in salary between 2006 and 2008, and her pension would be nearly $2,000 per year less than if she had received the 2006 and 2007

[39] (...continued)
compensation as a one-time bonus.

annual pay adjustments given to other GAO employees. Band III employees appear to be least affected, because the speed bump was removed for their band in 2007, and they were allowed to receive the annual pay increase that year.

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Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.