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Before

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

The Committee on Homeland Security and Governmental Affairs
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
United States Senate

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on

"GAO Personnel Reform: Does it Meet Expectations?"

Chairman Davis, Chairman Akaka, and Members of the Subcommittees:

My name is Jon Shimabukuro. I am a Legislative Attorney with the American Law Division of the Congressional Research Service, and I thank you for the opportunity to testify today on personnel reform at the Government Accountability Office ("GAO").

In January 2006, approximately 308 GAO analysts and specialists were denied annual pay adjustments. Although these analysts and specialists were reportedly performing at a "meets expectations" evaluation level or better during the applicable rating period, the adjustments were denied based on the establishment of new maximum pay rates for some of the employees, and the application of additional performance criteria for other employees with salaries at or above a specified rate. My testimony today will focus on the statutory authority for the denials. In particular, my testimony will examine two sections of the GAO Human Capital Reform Act of 2004 ("GAO Reform Act")[1] that have been identified as arguably providing the Comptroller General with the authority to deny the annual pay adjustments. Section 3 of the GAO Reform Act addresses annual pay adjustments. Section 4 of the GAO Reform Act discusses pay retention.

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[1] Pub. L. No. 108-271, 118 Stat. 811 (2004).

The affected GAO analysts and specialists occupied positions in various pay bands at the agency. In 1989, when the pay bands were first established, three pay bands were formed: Band I, Band II, and Band III. In 2005, Band II was split into two categories: Band IIA and Band IIB. New maximum rates of basic pay were established for Band I and Band IIA employees that were lower than the previous maximum rates for Band I and Band II. Pay adjustments were denied to Band I and Band IIA employees whose salaries were in excess of the new maximum rates of basic pay for the bands.

Pay adjustments for Band IIB and Band III employees were denied in January 2006 based on whether the salaries of these employees were at or above specified rates or "speed bumps" established by GAO and whether the employees' job performance met additional performance criteria. The speed bumps were set between the market median or competitive pay rates for positions covered by the pay range and the maximum rates for the band. In general, the speed bumps were set at the 75th percentile of the pay range. Band IIB employees whose salaries were at or above the speed bump were required to be in the top 50 percent of the appraisal averages for Band IIB employees in their band and team. Band III employees whose salaries were at or above the speed bump were required to be in the top 80 percent of appraisal averages in their band and team to receive the adjustment.

Section 3(a) of the GAO 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." 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;
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> (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;
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> (C) any existing pay disparities between officers and employees of the Office and non-Federal employees in each local pay area;
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> (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;
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> (E) the appropriate distribution of agency funds between annual adjustments under this section and performance-based compensation; and
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> (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.

31 U.S.C. § 732(c)(3) 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 information provided to CRS by GAO, the agency cited section 3(a) of the GAO Reform Act as providing the Comptroller General with broad discretion to determine if an

employee should receive an 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 noted that the "flexibilities" under section 3(a) permitted the Comptroller General to establish the criteria for determining whether Band IIB and Band III employees who were at or above the speed bumps would receive a pay adjustment.

If a court was asked to determine whether GAO's actions were permissible, it would likely apply a two-part test that is used to evaluate an agency's interpretation of its statute.[2] First, a court would consider whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, the court "must give effect to the unambiguously expressed intent of Congress," and that is the end of the matter.[3] If, however, Congress has failed to directly address the question at issue, and the statute is silent or ambiguous, the court will attempt to determine if the agency's actions are based on a permissible construction of the statute. If the agency's interpretation is reasonable, the court may not substitute its own construction of the statutory provision. However, deference is not owed to the agency's actions if they construe a statute in a way that is contrary to congressional intent or frustrates congressional policy.

In applying the first part of the two-part test, a reviewing court would likely begin by examining the language of the applicable statute.[4] Section 3(a) indicates that so long as an officer or employee is performing at a satisfactory level, his basic pay rate "shall be adjusted annually to such extent as determined by the Comptroller General." The terms "shall" and "adjust" are of particular note. General principles of statutory construction construe the term "shall" to be imperative or mandatory.[5] The use of the term "shall" in section 3(a), rather than the generally permissive "may," would seem to strongly suggest that some kind of adjustment is required by the section.

The term "adjust" is most commonly defined to mean "to bring to a more satisfactory state."[6] While this definition alone would seem to suggest that an adjustment provided under section 3(a) should be positive or involve some form of a rate increase, the association of the annual pay adjustments with satisfactory performance appears to confirm that the adjustments are not meant to involve a reduction in the basic rates of employees or have no effect on those rates when employees are performing satisfactorily. Section 3(a) indicates that "an adjustment . . . shall not be applied in the case of any officer or employee whose performance is not at a satisfactory level . . ." General principles of statutory construction dictate that each statutory part or section may not be considered in a vacuum, but must be

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[2] *See* Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984).

[3] *Id.* at 843.

[4] *See* INS v. Phinpathya, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that in all cases involving statutory construction, our starting point must be the language employed by Congress . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (internal quotation marks omitted).

[5] *See* 1A Sutherland Statutes and Statutory Construction, § 25:4 (Norman J. Singer ed., 2002) ("Unless the context otherwise indicates the use of the word 'shall' . . . indicates a mandatory intent.").

[6] Webster's Third New Int'l Dictionary 27 (1986).

interpreted in reference to the statute as a whole.[7] Thus, upon consideration of section 3(a) in its entirety, it seems unlikely that the basic pay rate of an officer or employee who is performing satisfactorily was intended to be adjusted downward or not at all. Under section 3(a), it appears that only employees whose performance is not at a satisfactory level will be ineligible for an adjustment. However, while section 3(a) appears to require some change in an officer or employee's basic pay rate to "a more satisfactory state" for performance at a satisfactory level, the section permits the Comptroller General to determine the extent or amount of the adjustment.

The legislative history of section 3(a) further illustrates Congress's understanding that a pay increase would be available so long as a GAO officer or employee was performing satisfactorily. In House Report 108-380, which accompanied the GAO Reform Act, minority members of the Committee on Government Reform stated: "Section 3 gives the Comptroller General discretion over annual pay raises for GAO employees. Mr. Walker has assured GAO employees that anyone performing satisfactory work will receive at least a cost of living adjustment."[8] Similarly, in Senate Report 108-216, which accompanied the Senate version of the GAO Reform Act, the Committee on Governmental Affairs noted: "The Committee also 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."[9]

The language of section 3(a) and the legislative history of the section, considered together, appear to generally support the position that a pay adjustment would be required for officers and employees who perform at a "satisfactory level." Section 3(a) does permit the Comptroller General to determine when performance is "satisfactory." In fact, the Comptroller General seems to have relied on this authority to establish the additional performance criteria for Band IIB and Band III employees. However, requiring these employees to meet specified percentage thresholds to be eligible for a pay adjustment is arguably questionable given the common understanding of the term "satisfactory" and the Comptroller General's previous statements.

The term "satisfactory" has been defined to mean "sufficient to meet a condition or obligation."[10] Based on this definition, an employee who performs at a "meets expectations" evaluation level would seem to be performing at a satisfactory level. According to various sources, a "meets expectations" rating was considered to be a good rating at the agency.

Moreover, the availability of a pay adjustment for performance at a "meets expectations" evaluation level was discussed by the Comptroller General at a hearing before the House Subcommittee on Civil Service and Agency Organization following the

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[7] *See* 2A Sutherland Statutes and Statutory Construction, *supra* note 5, § 46:05 (explaining that each part or section of a statute should be construed "in connection with every other part or section so as to produce a harmonious whole.").

[8] H.Rep. No. 108-380, at 23, *reprinted in* 2004 U.S.C.A.A.N. 744, 756.

[9] S. Rep. No. 108-216, at 9.

[10] Webster's Third New Int'l Dictionary 2017 (1986).

introduction of the GAO Reform Act in 2003.[11] The Comptroller General maintained that a pay adjustment would be available "as long as employees are performing at the meets expectation level or better."[12] While the Comptroller General did indicate that GAO would consider differences in compensation rates by locality, he confirmed that "any amount that otherwise wouldn't be across the board would be an increase in base pay; it wouldn't be a bonus or a one-time payment, it would be an increase in base pay."[13] According to the Comptroller General, only extraordinary economic conditions, such as serious budgetary constraints, would prevent the adjustments.

The statutory language of section 3(a) 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. Because of the existence of such congressional intent, consideration of whether GAO's actions are based on a permissible construction of the statute is not needed.

Section 4 of the GAO Reform Act amended 31 U.S.C. § 732(c) to require the Comptroller General to prescribe regulations under which a GAO officer or employee would be entitled to pay retention. Pay retention shall be available if,

> as a result of any reduction-in-force or other workforce adjustment procedure, position reclassification, or other appropriate circumstances as determined by the Comptroller General, such officer or employee is placed in or holds a position in a lower grade or band with a maximum rate of basic pay that is less than the rate of basic pay payable to the officer or employee immediately before the reduction in grade or band.

Under 31 U.S.C. § 732(c)(5)(A), as amended, the regulations shall provide for the continued receipt of the basic rate before the reduction in grade or band until such time as the retained rate becomes less than the maximum rate for the grade or band of the position held by the officer or employee.

In GAO's 2006 report on the implementation of the GAO Reform Act, the agency maintained that during fiscal year 2006, 329 employees were covered by the pay retention requirements of section 4.[14] GAO noted that 250 of these employees were "above the pay range maximum for Band IIA."[15] If section 4 did apply, it would seem possible to assert that pay adjustments may not be available to a covered employee until his retained rate became "less than the maximum rate for the grade or band of the position held" by such employee.

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[11] *See GAO Human Capital Reform: Leading the Way*, 108th Cong., 1st Sess. 78 (2003) (statement of David M. Walker, Comptroller Gen., U.S. Gov't Accountability Off.).

[12] *Id.*

[13] *Id.*

[14] U.S. Gov't Accountability Off., 2006 Rept. On GAO's Use of Provisions in the GAO Personnel Flexibilities Act of 2000 and the GAO Human Capital Reform Act of 2004 (GAO-07-289SP) (2006), *available at* http://www.gao.gov/new.items/d07289sp.pdf.

[15] *Id.*

In subsequent information provided to CRS by GAO, the agency indicated that its identification of section 4 was misplaced.[16] The pay retention protections provided under section 4 are invoked only when an officer or employee is demoted to a position in a lower grade or band. GAO confirmed that none of the affected employees were reduced in grade or band. Without this kind of demotion, section 4 would seem to be inapplicable.

Mr. Chairmen, that concludes my prepared statement. I would be pleased to answer any questions that you or other Members of the Subcommittees may have relating to my areas of expertise.

[16] *See* GAO Responses to CRS Questions, U.S. Gov't Accountability Off. (May 10, 2007) (on file with author).