

2007
PERSONNEL APPEALS BOARD

Annual Report

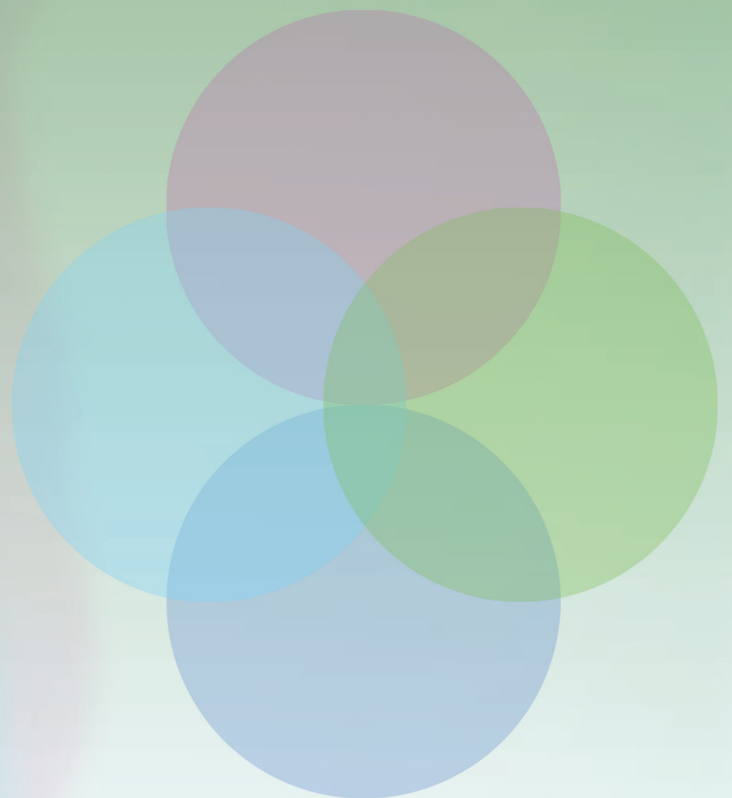


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BIOGRAPHIES OF BOARD MEMBERS

PAUL M. CORAN was appointed to the Personnel Appeals Board in January 2005, elected Vice Chair in September 2005, and Chair in 2007. Mr. Coran is a graduate of Northeastern University and Boston College Law School. He retired from the federal government with 33 years of service in July 2001. Mr. Coran engaged in the practice of employment law throughout his career, serving consecutively at the National Labor Relations Board, U.S. Department of Labor, Federal Labor Relations Council, and U.S. Department of State. Following his retirement and until August 2004, he served as Deputy Executive Director for the U.S. Senate, Office of Compliance. During his career, Mr. Coran represented management, employees, and labor; conducted mediations; and also performed impartial adjudication functions in both the Executive and Legislative branches. He was a regular contributor to the American Bar Association's Annual Employment Law Report for a number of years. Mr. Coran is a member of the Massachusetts Bar.

MARY E. LEARY was appointed to the Board in 2006 and is a graduate of Southwest Minnesota State University and the Howard University School of Law. Ms. Leary began her career as a field attorney with the National Labor Relations Board and served as an attorney advisor with the NLRB in Washington, D.C. As an arbitrator for the U.S. Postal Service and its unions from 1988 to 1992, Ms. Leary decided numerous cases involving discipline, discharge, and contract interpretation. She served as general counsel for the United Electrical, Radio and Machine Workers of America from 1992 to 1997, where she handled a wide array of cases arising under personnel and labor laws, and has litigated cases in federal courts including the U.S. Supreme Court. Ms.

Leary was an attorney advisor for the U.S. Patent and Trademark Office, handling labor and employment law cases, and the Merit Systems Protection Board, drafting decisions for cases on appeal. She was appointed the Director of Labor Relations and Collective Bargaining for the District of Columbia, where she oversaw the development of a comprehensive labor relations program. Ms. Leary currently serves as Associate Vice Chancellor for Labor Relations for the Minnesota State Colleges and Universities. She is a member of the South Dakota Bar, as well as the Bars of numerous U.S. Courts of Appeals, District Courts, and the U.S. Supreme Court.

STEVEN H. SVARTZ, a graduate of the Massachusetts Institute of Technology and Georgetown University Law Center, was appointed to the Board in January 2007. He retired from the federal government in June 2006 with 31 years of service. After starting his career with the Federal Labor Relations Council, he served in various capacities with the Federal Labor Relations Authority from its inception in 1979 until his retirement. He represented the FLRA in the U.S. Supreme Court and various U.S. Courts of Appeals. In addition, he served as Chief Counsel for several FLRA members, Acting Director of the Collaboration and Alternative Dispute Resolution Office, and Assistant General Counsel for Legal Services. He is a member of the District of Columbia Bar, the U.S. Supreme Court Bar, and other federal courts.

MICHAEL W. DOHENY was appointed to the Board in 2002, elected Vice Chair in fiscal year 2003, and Chair in fiscal year 2004. He is a graduate of St. Francis DeSales College in Milwaukee, Wisconsin and the Catholic University Columbus School of Law. Mr. Doheny retired after 32 years with the federal government in October 2001. He started his federal employment with the former Civil Service Commission as a hearing officer adjudicating equal employment opportunity (EEO) complaints and adverse action appeals. Mr. Doheny was an administrative judge, appellate counsel, and a manager with the Merit Systems Protection Board. He also served as Deputy General Counsel and Regional Director of the Washington, D.C. Regional Office at the Federal Labor Relations Authority. Mr. Doheny is an arbitrator on the panel of the Federal Mediation and Conciliation Service and is certified as a mediator by the State of Virginia. Mr. Doheny's term expired in September 2007.

PERSONNEL APPEALS BOARD

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|-------------------|------------|
| Paul M. Coran | Chair* |
| Michael W. Doheny | Chair** |
| Mary E. Leary | Vice Chair |
| Steven H. Svartz | Member |

PERSONNEL APPEALS BOARD STAFF

| | |
|--------------------------------|-------------------------|
| Beth L. Don | Executive Director |
| M. Gail Gerebenics | Director, EEO Oversight |
| Susan P. Inzeo | Solicitor |
| Sue Sung Farley | Senior Staff Attorney |
| Patricia V. Reardon-King | Clerk of the Board |
| Anne M. Wagner | General Counsel |
| Diane R. Williams | Senior Trial Attorney |
| Frank J. Mack | Senior Trial Attorney |
| Darian C. Jackson Assistant | Legal Information |

* Mr. Coran served as Vice Chair until September 2007.

** Mr. Doheny served as Chair until his term expired in September 2007.

CHAPTER 1: THE PERSONNEL APPEALS BOARD

Section 1: About the PAB

Under the Government Accountability Office Personnel Act of 1980 (GAOPA),¹ the Personnel Appeals Board (PAB or the Board) is charged with adjudicating disputes, issuing decisions, and ordering corrective or disciplinary action, when appropriate, in cases alleging prohibited personnel practices, discrimination, prohibited political activity, and unfair labor practices involving employees of the U.S. Government Accountability Office² (GAO or the Agency), a Legislative branch agency. The GAOPA also authorizes the Board to oversee GAO's employment regulations, procedures, and practices relating to anti-discrimination laws.³

The PAB's authority combines the adjudicatory functions of its Executive branch counterparts: the Merit Systems Protection Board (MSPB);⁴ the Equal Employment Opportunity

Commission (EEOC);⁵ and the Federal Labor Relations Authority (FLRA).⁶ The Board's Office of General Counsel (PAB/OGC) performs the investigatory and prosecutorial functions of its Executive branch equivalents at the Office of Special Counsel (OSC)⁷ and the EEOC.

The statute provides for a Board comprised of five members who serve five-year, nonrenewable terms.⁸ Candidates are sought through a process that includes advertising and recruitment efforts that focus on organizations whose members are experienced in the adjudication or arbitration of personnel matters. Applicants are expected to have expertise or litigation experience in the area of federal personnel law, demonstrated ability to arbitrate or adjudicate complex legal matters, or

⁵ The EEOC ensures that personnel actions that affect employees or applicants for employment in the Executive branch "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. §2000e-16(a) (Title VII). In addition, EEOC enforces the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* The Personnel Appeals Board has similar jurisdiction to hear and decide cases alleging discrimination. 4 C.F.R. §§28.95-28.99.

⁶ The FLRA protects the "right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." 5 U.S.C. §7101. The Personnel Appeals Board also has the authority to certify collective bargaining representatives and to adjudicate unfair labor practices.

⁷ The OSC investigates and prosecutes allegations of twelve prohibited personnel practices, with an emphasis on protecting federal whistleblowers. 5 U.S.C. §§1214, 2302(b). The Board's General Counsel investigates allegations of prohibited personnel practices. 4 C.F.R. §28.12. The Board has jurisdiction to hear and decide cases involving prohibited personnel practices under 5 U.S.C. §2302(b). 4 C.F.R. §28.2(b)(2).

⁸ The Board currently operates with a quorum of three members.

¹ 31 U.S.C. §731 *et seq.*

² In July 2004, the Agency's name was changed from the General Accounting Office. Pub.L. No. 108-271 (Jul. 7, 2004).

³ 31 U.S.C. §732(f)(2)(A).

⁴ The MSPB was "created to ensure that all Federal government agencies follow Federal merit systems practices. The Board does this by adjudicating Federal employee appeals of agency personnel actions, and by conducting special reviews and studies of Federal merit systems." 5 C.F.R. §1200.1.

experience at a senior level position in resolving complex legal matters.

GAO establishes a screening panel to review applications for Board member positions and identify the best qualified candidates.⁹ An interview panel composed of some of the screening panel members, including one member of the Employee Advisory Council (EAC), conducts the personal interviews and reports its results to the full screening panel. The panel recommends one or more of the candidates to the Comptroller General who makes an appointment to the Board after considering the recommended candidates. The Board members elect their own Chair and Vice Chair.

records. The PAB Office of General Counsel (PAB/OGC) investigates charges filed with the office and, if there is reasonable cause to believe that a violation of law has occurred, offers to represent the employee or applicant for employment before the Board.

Section 2: Board Staff

The Board's Executive Director manages Board staff and Board operations. The Board's Solicitor and Staff Attorney advise Board members and the Executive Director on legal matters and provide procedural advice to litigants before the Board. The Board's Director of EEO Oversight reviews equal employment opportunity practices and procedures at GAO and drafts evaluative reports that contain the Board's findings, conclusions, and recommendations to the Agency.¹⁰ The Clerk of the Board is responsible for receiving filings, distributing Board orders and decisions, and maintaining the Board's official

⁹ The voting members of the screening panel are three senior management officials designated by the Comptroller General. The nonvoting members are three representatives selected by the Comptroller General's Employee Advisory Council and a representative from the Human Capital Office. GAO Order 2300.4, ¶7 (8/30/05).

¹⁰ 31 U.S.C. §732(f)(2)(A); see applicable regulations at 4 C.F.R. §§28.91 and 28.92. The Board's EEO Oversight reports can be found at the PAB's website: www.pab.gao.gov.

CHAPTER 2: THE BOARD PROCESS

The Board's litigation process is explained in detail in the *Guide to Practice Before the PAB*;¹¹ a brief summary follows.

An employee, a group of employees,¹² a labor organization, or an applicant for employment at GAO may file a Petition with the Board seeking review of Agency action or inaction that adversely affected them. Such a Petition may arise from: (1) a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of not more than 30 days; (2) a prohibited personnel practice; (3) an unfair labor practice or other covered labor relations issue; (4) an action involving prohibited

discrimination;¹³ (5) prohibited political activity; and (6) any other personnel issues that the Comptroller General, by regulation, determines that the Board should hear.

In addition to its litigation activity, the Board is authorized to conduct representation proceedings at GAO, including determining appropriate bargaining units of GAO employees, conducting elections to determine whether employees in any such units wish to select a labor organization to represent them in collective bargaining, and certifying an organization so selected as the designated exclusive bargaining representative.

¹³ The complete procedures for filing a discrimination complaint may be found in GAO Order 2713.2, "Discrimination Complaint Resolution Process" (May 21, 2007) (hereafter GAO Order 2713.2). At GAO, the discrimination complaint process begins when the employee consults with a civil rights counselor in the Agency's Office of Opportunity and Inclusiveness (O&I).

Such contact must occur within 45 calendar days of the alleged incident. If the matter cannot be resolved, the employee may file a formal written complaint with O&I within 15 days of receipt from the counselor of notice of the right to file a complaint. The Director of O&I can either accept or dismiss the complaint. (See GAO Order 2713.2, ch. 3, ¶5, for reasons why a complaint may be dismissed).

If the complaint is accepted, it is investigated and a report of the investigation is submitted to the Director of O&I. If the complaint cannot be resolved through negotiation with GAO management, the Director submits a recommended decision to the Comptroller General who issues a final Agency decision.

An individual may seek relief from the PAB by filing a charge with the PAB Office of General Counsel within 30 days of receipt of GAO's final decision or dismissal of the complaint in whole or part. GAO Order 2713.2, ch. 6, ¶4. An individual may also file with the PAB/OGC anytime after 120 days have elapsed from the date the complaint was filed provided that GAO has not issued a final decision. *Id.*

The PAB's review is *de novo*, which means that the PAB will review all the facts and issues and render a decision independent of the final Agency decision, if there is one.

¹¹ The *Guide* is available at the PAB's website: www.pab.gao.gov.

¹² The Board can hear individual petitions as well as class actions.

Section 1: Charge Filing with the PAB Office of General Counsel

At GAO, an employee, group of employees, or an applicant for a job may file a charge with the PAB Office of General Counsel to initiate the Board process.¹⁴ The PAB/OGC has the authority to investigate and to prosecute alleged violations of the law over which the Board has jurisdiction.

A charge that does not involve discrimination may be filed with the PAB/OGC within 30 calendar days after the effective date of the underlying personnel action or within 30 calendar days after the charging party knew or should have known of the action.

An individual may file a charge involving alleged discrimination with the PAB/OGC either within 30 calendar days after receipt of the Agency rejection of the complaint in whole or in part, 30 calendar days after receipt of the Agency's final decision, or when more than 120 days have elapsed since the complaint was filed and GAO has not issued a final decision.

Once an individual charge is filed with the PAB/OGC, the charging party is advised of his/her rights and the Board's mediation program. The PAB/OGC then conducts an independent investigation of the matters raised in the charge to determine whether there are reasonable grounds to believe that the employee's rights under the GAOPA have been violated. This process may include obtaining documents and taking oral statements from persons with knowledge of the circumstances that are involved in the allegations.

Following the investigation, and if no settlement occurs, PAB/OGC issues a Right to Petition Letter notifying the charging party that the investigation has been completed and that he/she has the right to file a Petition with the Board seeking a review of the Agency action or inaction. The PAB/OGC also issues to the charging party a confidential Report of Investigation that includes the results of the investigation and the PAB/OGC's conclusions with regard to the legal and factual issues.

If the General Counsel concludes that reasonable grounds exist to believe that a violation of the law has occurred, the General Counsel will offer to represent the charging party in an evidentiary hearing before the Board at no expense to the employee. If the offer of representation is accepted, the PAB/OGC assumes responsibility for the entire case even if the employee has retained private counsel.

If the PAB General Counsel concludes that there are no reasonable grounds to support a claim, the charging party retains the right to file a Petition with the Board and request an evidentiary hearing. A petitioner may represent him/herself or retain private counsel, if he or she chooses, before the Board.

¹⁴ See www.pab.gao.gov under the link to Charges/Filing.

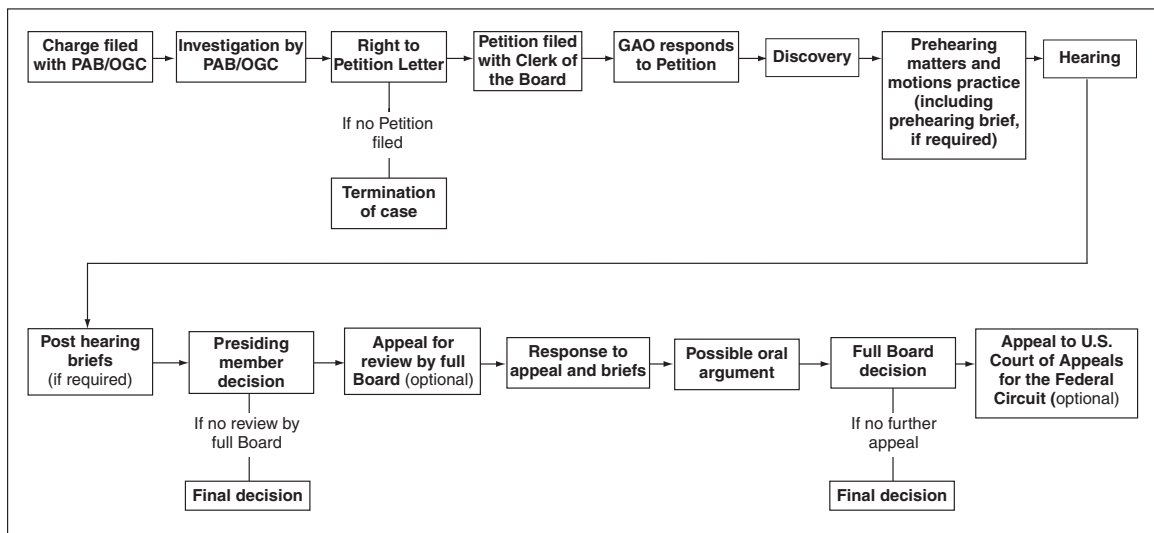
Section 2: Filing a Petition with the Board¹⁵

A Petition must be filed with the Board within 30 calendar days after service of the Right to Petition Letter from the PAB/OGC. Alternatively, if 180 days have elapsed from the filing of a charge with PAB/OGC and no Right to Petition Letter has been issued by the General Counsel, the employees may “opt out” of the investigation and file a Petition with the Board. An employee who chooses that route foregoes the opportunity to have the General Counsel present the case to the Board.

work and conclusions of the PAB/OGC; the administrative judge does not know whether the PAB/OGC found reasonable cause to believe a violation existed in a given case.

A Board member’s decision is final unless: (1) the Board member grants a party’s motion to reconsider; (2) the Board, on its own motion, decides to review the initial decision; or (3) a party appeals to the Board for full Board review. Final decisions of the Board, with few exceptions, may be appealed to the U.S. Court of Appeals for the Federal Circuit.

Figure 1: Board Process Illustrated



Upon receipt of a Petition, the Chair may either appoint a single Board member to hear and decide the case or determine that the Board will hear the case *en banc* (by all Board members). The Petition to the Board is not a challenge to or review of the conclusions of the PAB/OGC, but a fresh consideration of the Petitioner’s claims. The Board does not have access to the investigative

¹⁵ The chart above shows the process of cases once a charge is filed.

Section 3: Other PAB Office of General Counsel Authority

a. PAB/OGC Investigative Authority

The PAB Office of General Counsel is authorized to conduct independent investigations into matters raised and presented in charges filed by GAO employees or applicants for employment. This investigative authority represents the vast majority of investigations conducted by PAB/OGC. Upon the conclusion of an investigation, a confidential summary is forwarded to the complainant, detailing whether or not PAB/OGC finds sufficient evidence of reasonable grounds to believe that a violation of the law has occurred or is about to occur. The Agency and the Board are notified that the investigative phase is closed; they do not have access to the conclusions contained in the confidential summary.

In addition to investigations generated by individual or class charges, PAB/OGC may initiate its own investigations, otherwise known as informational or GC investigations.¹⁶ The General Counsel may initiate an investigation when information comes to his or her attention suggesting that a prohibited personnel practice has occurred, is occurring, or will occur, regardless of whether a charge has been filed. If an individual brings an allegation to the attention of PAB/OGC, that individual may remain anonymous.

If, during the informational investigation, it is determined that there are sufficient grounds to believe that a violation of the law has occurred or is about to occur, the PAB/OGC will contact the Agency with its findings and recommendation. If the recommendation is not followed within

¹⁶ 4 C.F.R. §28.131.

a reasonable period, PAB/OGC may petition the Board to order corrective action.

b. PAB/OGC Stay Requests

PAB/OGC may request that the Board issue an *ex parte* temporary stay, not to exceed 30 calendar days, of any proposed personnel action that, in the General Counsel's judgment, may constitute a prohibited personnel practice. If the request for an *ex parte* stay is granted, the General Counsel may request either a further temporary stay or permanent stay of the proposed action. A further temporary stay may be granted if the Board member, or Board *en banc*, determines that under all of the circumstances the interests of justice would be served by providing more time for PAB/OGC to pursue the investigation.¹⁷ In considering a request for a permanent stay, the Board balances the evidence as to whether the proposed personnel action arises out of a prohibited personnel practice against the nature and gravity of any harm that could flow to each side from granting or denial of the stay. The Board may grant or deny the requested stay based upon the pleadings, require further briefing and/or oral argument, or conduct an evidentiary hearing on the request for further stay. When PAB/OGC seeks a stay of a personnel action, it conducts an investigation into the allegations of prohibited personnel practices.

c. Disciplinary Proceedings

The PAB General Counsel is authorized to initiate a disciplinary action against an employee when it is determined, after an investigation, that such action is warranted. In such cases, the PAB/GC will provide a written summary of the determination and facts to the employee and the Board.¹⁸ The authority to

¹⁷ 4 C.F.R. §28.133(d).

¹⁸ *Id.* at §28.132.

propose disciplinary action includes action for engaging in prohibited political activity.

After a hearing, the Board decides whether discipline is warranted and what punishment is appropriate. The Board may order removal, reduction in grade, debarment from GAO employment, reprimand, or an assessment of civil penalty not to exceed \$1,000. Judicial review of the Board's final order may be obtained in the U.S. Court of Appeals for the Federal Circuit.

d. Labor-Management Relations

Through the Board's regulations, the PAB/OGC is authorized to play a major role in the process when a labor organization, an employee or group of employees, or GAO files a representation petition. The General Counsel reviews the representation petition and coordinates with the parties before preparing a report for the Board which may recommend approval of appropriate agreements reached during consultation of the parties, dismissal of the petition as being without merit, or issuance of a notice of hearing to dispose of unresolved issues raised in the petition. In addition, the PAB Office of General Counsel is responsible for investigating unfair labor practice charges filed with the Board.

CHAPTER 3: ACTIVITY OF THE PAB – 2007

Section 1: Labor-Management Relations Activity

On May 8, 2007, a Representation Petition was filed with the PAB Office of General Counsel by GAO Employees Organization, International Federation of Professional and Technical Engineers (IFPTE). The Petition sought "an election to determine if an appropriate unit of employees of the Government Accountability Office (GAO or Agency) wish to be represented for the purpose of collective bargaining by an exclusive representative."¹⁹ A preliminary determination was made that the IFPTE had met the 30 percent showing of interest required under 4 C.F.R. §28.113(a)(7).

The PAB General Counsel met with representatives from IFPTE and GAO on May 9, 2007, to review procedures, standards, and timeframes governing the processing of the Petition. Pursuant to 4 C.F.R. §28.114, a 10-day notice period started on May 14, 2007.

An e-mail announcement was sent to employees informing them of IFPTE's Petition with a link to the official Notice posted on GAO's intranet. The purpose of the Notice was to identify permanent employees who would be included in the proposed unit and to identify those who would be excluded from the proposed unit, such as probationers, confidential employees, management officials, supervisors, and security and safety employees.

¹⁹ *Report of Recommendations to the Personnel Appeals Board by the PAB General Counsel, June 22, 2007, p. 1.*

On May 30, 2007, IFPTE representatives met again with the PAB/GC, primarily to discuss whether Band IIB employees were supervisors, whether probationary employees should be excluded, and to identify confidential employees for purposes of determining the appropriate bargaining unit. The parties reconvened in June to identify areas of agreement and narrow areas of dispute.

The PAB/GC submitted a *Report of Recommendations* to the PAB on June 22, 2007. The Report recommended that the Board set a hearing to resolve the issue concerning the appropriate bargaining unit, specifically the supervisory status of Band IIB employees and whether probationary employees should be excluded. In addition, there remained question as to the confidential status of certain employees.

Upon review of the General Counsel's Report, the Board Chair issued a Notice of Representation Hearing on June 25, 2007, calling for such a hearing on July 17, 2007. A prehearing conference was convened on July 3, 2007, for the Board Chair to outline hearing procedures and explore possible stipulations.

During that conference, it became clear that the parties would not be ready for a hearing on July 17, 2007; a new hearing date was set for August 27, 2007. The parties were instructed to meet and work together to narrow the issues for hearing. In the meantime, GAO filed a Response to the General Counsel's Report of Recommendations, clarifying its stance on several points raised in the Report of Recommendations. The PAB also prepared and issued a Statement of Standard Procedures in Representation Hearings before Administrative Judges at the Personnel Appeals Board.

At the request of IFPTE and GAO, a conference with the Board Chair was held on July 18, 2007, where the parties represented that they had reached agreement to hold an election and worked with the Board Chair to hammer out the details of their agreement. The parties completed and signed a Consent Election Agreement on July 23, 2007, providing for a representation election to be conducted by the Personnel Appeals Board staff. The Board issued an Order Approving the Consent Election on July 23, 2007, outlining the appropriate unit,²⁰ the purpose of the election, and explaining that headquarters employees would vote in person on September 19, while field employees would vote by mail ballots to be returned by that date. On August 2, 2007, the Board issued an Order Revising the Consent Election for purposes of setting guidelines for submitting lists of eligible voters. GAO and IFPTE were provided with draft forms and notices to review for comment in preparation for the election. On August 13, 2007, the PAB sent an announcement via e-mail to GAO employees regarding the Union Representation Election, and posted the formal Notice of Election on the GAO intranet.

Board staff conducted training sessions for election observers during this time. Mail ballots were sent on August 23, 2007 to GAO field office employees and to GAO headquarters employees on continuous approved travel status

²⁰ The bargaining unit was defined to consist of all permanent employees of the Government Accountability Office (GAO) assigned to a position currently covered by the Analyst Performance-Based Compensation System (PE) and whose designated level is Band I or Band II, including those designated as Band IIA and Band IIB and all probationary employees in the Professional Development Program who are in these bands and pay system. The unit does not include confidential employees, employees in Security and Safety, and supervisors or management officials, e.g., Band III employees and above.

or continuous approved leave (e.g., military, annual, or sick leave) from August 23 through September 19. Absentee ballots were cast in person at headquarters on seven days between August 28 and September 18, 2007. On September 19, 2007, members of the bargaining unit voted throughout the day from 6 a.m. to 7 p.m. Immediately following the close of the election, the PAB counted the ballots to determine the results while representatives from GAO and IFPTE observed the count. Upon completion of the ballot counting, the Board announced that GAO employees had elected to have GAO Employees Organization, IFPTE, serve as their exclusive representative for purposes of collective bargaining.

Pursuant to Board regulations, on September 27, 2007 the Board Chair issued a Certification of Representation to GAO and IFPTE.

Section 2: Board Case Activity for the Government Accountability Office (GAO)

During calendar year 2007 five new GAO cases were filed with the Board, in addition to several cases continued from 2006. One evidentiary hearing was held involving a GAO employee. The Board members addressed a number of issues relating to twenty cases and appeals before them individually and collectively. In addition to issuing numerous procedural orders, Board members disposed of substantive motions in pending cases, and handled one stay request filed by the PAB/OGC.

a. Petitions before the Board

Band II Split Consolidated Cases

In early 2007, the Board began to process the twelve related cases filed within a 2-day period in September 2006. Although each case was filed individually with unique issues, they all had similar issues related to the newly created Band IIA and IIB analyst classifications. The twelve cases were consolidated in the interests of justice and efficiency of process. However, each Petitioner had the burden of proving why he/she met the criteria for placement into Band IIB instead of Band IIA. The Petitioners in these cases had alleged that GAO committed prohibited personnel practices in the restructuring process, because they were now subject to restrictions on annual pay and pay adjustments, reduced pay cap and other pay limitations. The Petitioners requested Board review of the restructuring of the Band II employees into two categories (Band IIA and IIB) which resulted in Petitioners being placed in the Band IIA category.

The PAB/OGC sought remedies for all the Petitioners involved. In April 2007, a settlement of claims was reached by the parties and the cases were withdrawn with prejudice.

Other Cases Continued from 2006

There were three cases filed during the last two months of 2006 that were processed in calendar year 2007. In the first case, the Petitioner alleged that the Agency committed prohibited personnel practices by inaccurately evaluating his job performance. The Petitioner also alleged that the Agency retaliated against him for previously exercising his appeal rights. In early 2007 the case was in the discovery process. Several status conferences were held and dates set for hearing. As a result of

the Petitioner's failure to meet required deadlines, an Order to Show Cause why the case should not be dismissed for failure to prosecute was issued on December 13, 2007; no response was received. On December 26, the Administrative Judge issued an Order dismissing the case with prejudice.

In the second case filed late in 2006, the PAB/OGC represented a Petitioner who alleged that the Agency's denial of his advancement to Band IIB constituted a prohibited personnel practice. The Petition challenged the methods used by the Agency to determine placement into Band IIB. An evidentiary hearing was held and the parties reached a settlement agreement prior to the due date for post-hearing briefs. The case was, therefore, dismissed with prejudice.

In the last case filed in 2006 and processed in 2007, the Petitioner, who had worked previously in the federal government, alleged that GAO had made an error when it placed him in the Federal Employee Retirement System (FERS) instead of the Civil Service Retirement System (CSRS) and that he was entitled to compensation for the resulting reduction in his retirement benefits. After a thorough review of all the facts and supporting documents, the Administrative Judge found that the PAB lacked jurisdiction over this matter.

2007 Cases

In the first case of 2007, the Petitioner alleged that the Agency discriminated against her because of her disability by failing to provide a reasonable accommodation. Petitioner also believed that the Agency retaliated against her for engaging in protected activity when she was removed from high level assignments. The case was dismissed before hearing based on a settlement agreement.

The second 2007 case involved denial of a promotion to the GS-12 position while the individual was employed as a writer-editor at GAO. Petitioner further alleged that GAO committed a prohibited personnel practice and discriminated against her on the bases of race and age. Late in 2007 the Agency filed a partial motion to dismiss or in the alternative partial motion for summary judgment. That motion was pending at the end of the year, with a hearing scheduled for February 2008.

In the third case, the Petitioner challenged performance ratings and certain other actions taken by the Agency, alleging discrimination and prohibited personnel practices. The Petitioner believed that in 2002, GAO gave lower average performance appraisal scores to male Band I employees, employees over the age of 40 in the Band I group, and employees who suffered from some type of disability. This resulted in the Petitioner and employees with similar characteristics receiving lower pay than other Band I employees. The Petitioner also alleged that GAO assigned lower appraisal scores to individuals in field offices and employees with over five years of experience at the time of a performance appraisal. GAO's motion to dismiss this matter was pending at the close of 2007.

On the last day of 2007, a new case was filed with the Board. In this case, the Petitioner alleged that GAO committed certain prohibited personnel practices when it reassigned her to the Band IIA category, effectively resulting in a constructive demotion and reduction in pay in violation of her rights under the GAO Personnel Act. Petitioner believed that she should have been placed in the Band IIB category based upon her assignments and performance during the relevant period. The Agency stated that Petitioner did not meet the

requirements for strong relative past performance to qualify for initial placement in Band IIB.

b. Stay Request

The PAB/OGC filed one Request for *ex parte* stay with the Board in 2007. The Chair stayed the individual’s removal from employment for 30 days to allow time for PAB/OGC to investigate the charges concerning improper evaluation and discrimination based on disability. The PAB/OGC sought a further temporary stay of 30 days, which the Agency opposed. The Board Chair denied the request and the stay of removal expired. No further action was filed with the Board on this case in 2007.

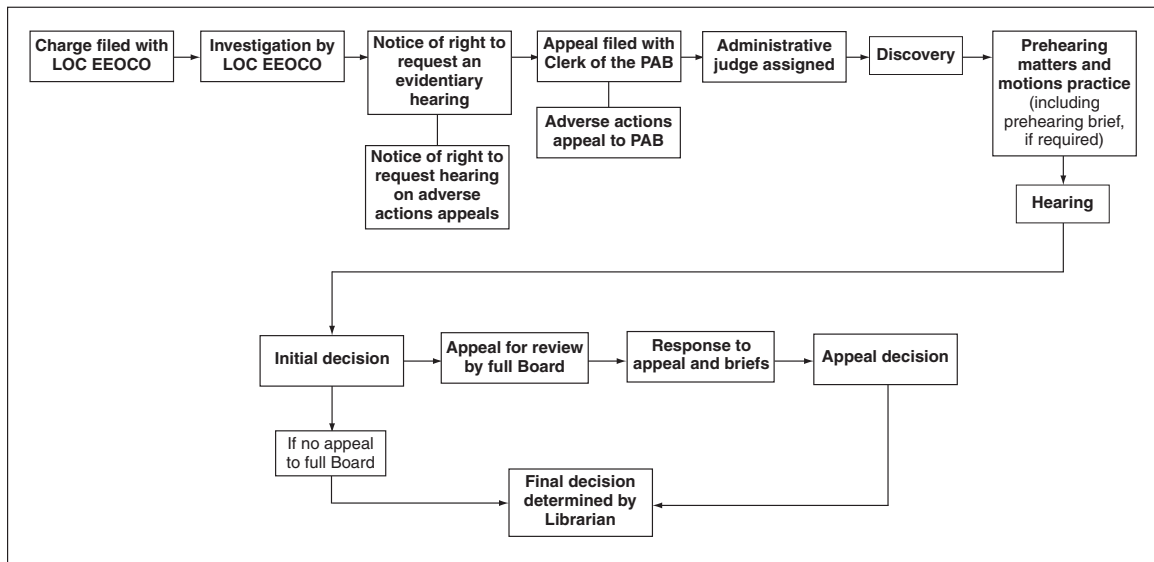
Section 3: Board Case Activity for the Library of Congress (Library or LOC)

During calendar year 2007, GAO, the Board, and LOC continued their Interagency Agreement establishing a pilot program giving the Board authority to hear certain LOC cases. Since this program began, eight cases have been processed by the Board. The LOC case handling process is slightly different from the Board’s process for GAO cases (see chart below).

During 2007 PAB staff members handled several counseling and investigative requests from employees at the Library of Congress. Most of these counseling matters have not yet found their way to the PAB hearing process.

Early in 2007, the full Board issued its first appellate decision in a case from the Library of Congress. The PAB affirmed the Administrative Judge’s conclusion that the individual had not

Figure 2: LOC Case Process



been constructively discharged nor discriminated against in connection with a charge of Absence Without Leave (AWOL) and a related memorandum. The full Board also found that there had been no discrimination or retaliation against the individual following her reinstatement pursuant to a successful challenge to a removal action, thereby reversing the conclusions of the Administrative Judge on these issues.

Another LOC case, involving a 2006 appeal of a removal, was dismissed for failure to prosecute shortly before the scheduled hearing in 2007. The Administrative Judge took this step after issuing a Notice to Show Cause why the case should not be dismissed for failure to prosecute based upon repeated failure to observe deadlines and filing requirements.

In another LOC removal case, a Board Administrative Judge conducted an evidentiary hearing; a decision was still pending at the close of 2007.

One new case from the Library of Congress involving a challenge to a suspension was brought before the Board in 2007. Prior to the scheduled hearing, the Administrative Judge dismissed the case with prejudice, following the employee's filing of a Notice of Withdrawal and Dismissal of Appeal.

Section 4: PAB Office of General Counsel Activity

a. Case Activity

There were 284 new cases filed with the PAB/OGC from January 1, 2007 through December 31, 2007. The PAB/OGC had a total of 307 open cases during that period. The PAB/OGC closed 16 cases during calendar year 2007. The PAB/OGC docket included ten cases under investigation from the Library of Congress during calendar year 2007. Six of the ten cases were filed in 2007 and two LOC cases were closed during the year.

NEW CHARGES LEGAL ISSUES

| | |
|-------------------------------------|-----|
| COLA (Cost of Living Adjustment) | 263 |
| Reclassification | 1 |
| Pay | 2 |
| Performance | 2 |
| Speed Bump | 2 |
| Promotion | 1 |
| Placement into Band IIA | 2 |
| Rating System | 2 |
| Removal | 2 |
| Hostile Work Environment | 1 |
| Benefits | 1 |
| LOC | 5 |

The PAB/OGC pursued corrective action in six cases before the Board. PAB/OGC filed two new Petitions with the Board and sought one *ex parte* stay of an employee's removal in 2007. The PAB/OGC settled three cases during calendar year 2007. The issues presented in the six cases related to the following:

ISSUED PRESENTED

| |
|---|
| Band II Restructuring |
| Removals |
| Discrimination concerning Promotion |
| Discrimination concerning Americans with Disabilities Act (ADA) |

All of the GAO and LOC investigations conducted by the Office of General Counsel were initiated by charges filed by employees. PAB/OGC did not initiate any informational investigations in calendar year 2007, nor did it initiate any disciplinary proceedings.

b. Employee Contacts

In addition to its investigative and prosecutorial authority, the PAB/OGC also provides information or informal advice to employees about their personnel and equal employment rights. This is accomplished by responding to questions about diverse issues such as personnel actions, performance appraisals, grievances, and the complaint process, as well as presentations to GAO employee groups to update them on recent changes in the law and Board procedures.

The PAB/OGC responded to 105 requests for information or informal advice during calendar year 2007. The requests involved the following issues shown in the table below.

INFORMATIONAL INQUIRIES

| | |
|--------------------|----|
| Suspension | 2 |
| Labor Organization | 24 |
| Discrimination | 11 |
| Promotion | 11 |
| Performance | 15 |
| Removal | 6 |
| Pay (COLA) | 35 |
| Transfer | 1 |

c. Other Activity

The PAB Office of General Counsel often submits written comments on proposed GAO-initiated changes to GAO orders and policies, and on PAB draft reports, to ensure that the protection of rights afforded employees under the GAO Personnel Act is fully considered. On January 16, 2007, the Office submitted comments on the Board's EEO Oversight Report, *The Employment of Hispanics at GAO*.

On May 22, 2007, the Board's General Counsel testified before the Joint Hearing of the House Subcommittee on Federal Workforce, Postal Service and the District of Columbia and the Senate Subcommittee on Government Management, the Federal Workforce, and the District of Columbia, concerning the legal challenge to the restructuring of the Band II analyst workforce at GAO. On June 13, 2007, the PAB/OGC provided follow-up submissions to Senator Daniel K. Akaka regarding her testimony.

Section 5: Office of EEO Oversight Activity

The GAO Personnel Act directs the Board to oversee equal employment opportunity at GAO through review and evaluation of GAO's procedures, policies, and practices.²¹ To fulfill this mandate, the Board established an Office of EEO Oversight to help it conduct studies of selected issues and prepare evaluative reports that contain its findings and conclusions, as well as recommendations to the Agency.²² During the past 12 months, the Board's Office of EEO Oversight completed work on the Board's study of *The Employment of Hispanics at GAO*, and worked on a study of the operations of the Agency's Office of Opportunity and Inclusiveness and the No FEAR Act. The Office continued to monitor HCO's use of its newly-designed survey instrument for separating employees which will provide data to the Board in its upcoming study of retention at the Agency.

a. Employment of Hispanics at GAO

During the early part of 2007, the Board issued a report on *The Employment of Hispanics at GAO*. The report covered the recent history of Hispanics at GAO and in the federal government, and noted that Hispanics were still the only underrepresented minority group in the federal government.

The study pointed out that GAO has made efforts to increase the representation of Hispanics by doubling the number of Hispanic-Serving Institutions at which it recruits, providing an internship program through

²¹ 31 U.S.C. §732(f)(2)(A); see applicable regulations at 4 C.F.R. §§28.91 and 28.92.

²² The Board's EEO Oversight reports can be found at www.pab.gao.gov.

the Hispanic Association of Colleges and Universities, and reaching out to professional organizations that serve Hispanics. Further, GAO has utilized its direct hire authority to bring on Hispanic employees, and has taken steps to make managers accountable for diversity and staff development.

The Board made several recommendations, including that GAO establish a direct correlation between the work to be performed and advanced educational requirements, and that the Agency review skill set requirements to determine if prior job experience can be substituted for advanced degrees. The Board suggested that the Agency begin to contact faculty and counselors at secondary schools with a high number of Hispanic students and emphasize the internship opportunities that GAO has to offer.

Further, because the Agency has not had any real success in developing viable Hispanic candidates for its Senior Executive Service (SES), the Board recommended that GAO make efforts to ensure that there are enough Hispanic candidates in the pool for Bands IIB and III vacancies.

Lastly, the Board suggested that the Agency's Office of Opportunity and Inclusiveness (O&I) issue either an annual or biennial report similar to that of the Federal Equal Opportunity Recruitment Program to determine the success they are having with Hispanic employment.

b. Study of the Office of Opportunity and Inclusiveness

At GAO, the processing of cases in which an employee or applicant for employment alleges discrimination begins at the Agency's Office of Opportunity and Inclusiveness, which provides the threshold for Board jurisdiction over complaints of

discrimination. With few exceptions, charges alleging prohibited discrimination may be filed with the PAB's Office of General Counsel only after the employee or applicant has filed a complaint with O&I and either a final Agency decision has been issued, the complaint has been rejected, or more than 120 days have elapsed since the complaint was filed. Because of the critical role of O&I and its predecessor, the Civil Rights Office (CRO), in the discrimination complaint process, the Board has, on several occasions throughout the years, focused on the operations of those offices through its mandate to oversee equal employment opportunity at GAO and has issued several reports containing its findings and recommendations for improving the complaint process.²³

In 2002, Congress enacted The Notification and Federal Employee Antidiscrimination and Retaliation Act²⁴ (No FEAR Act) in order to hold federal agencies financially accountable for violations of discrimination and whistleblower protection laws and to strengthen notification and reporting requirements. Under the provisions of the No FEAR Act, agencies are required to use a number of training techniques to ensure that employees and managers are aware of their respective responsibilities, rights and remedies and to post information about their discrimination complaint activity collected pursuant to the No FEAR Act with comparative data for multiple years.

²³ *GAO's Discrimination Complaint Process and Mediation Program* (1995); *Follow-Up Report: GAO's Discrimination Complaint Process and Mediation Program* (1998); *Study of GAO's Office of Opportunity and Inclusiveness* (2004); *The State of Equal Employment Opportunity at GAO in the 21st Century*, pp. 40-43, 46-47 (2005).

²⁴ 5 U.S.C. §2301 note.

At GAO, O&I is responsible for collecting that data and posting quarterly reports of discrimination complaint activity. Board staff has been regularly reviewing GAO's No FEAR Act data as it is posted and, in 2007, the Board determined that it was time to begin a systematic review of the results from the first five years of reporting. The Board also decided to review O&I's compliance with recent recommendations to ascertain whether they had been implemented in whole or in part.

At the end of 2007, the study and draft report on O&I were being readied for Board review and consideration of findings and recommendations. Subsequently, in keeping with its long held practice, the Board will provide copies of its draft report to GAO, PAB/OGC, and employee groups.

c. Study of Retention Rates

In 2006 the Board began a two year study on the retention rates of GAO employees from an equal employment opportunity perspective. Because of the scope and information required for this study, it will be completed some time in 2008. Much of the data that this report will rely on is from the exit survey given to employees separating from GAO. The PAB and HCO staff worked together on refining the exit survey in order to increase participation rates. The report will look at whether there are organizational, cultural, and environmental factors at GAO that have led to a disproportionate number of members of any protected class leaving the Agency early in their tenures.

Section 6: Special Projects

a. Mediation Program

The mediation program has been in place for over a year. This program provides an opportunity for employees or applicants, the Agency, and their representatives, if any, to meet separately and/or jointly with a mediator, *i.e.*, a skilled neutral trained to assist them in resolving their disputes. The mediator is a facilitator who has no power or role to impose a specific resolution. Parties to the mediation explore and discuss alternatives to continuing their dispute, including the goal of reaching a voluntary, mutually satisfactory resolution.

In 2007 one case was withdrawn and one settled as a result of mediation. Information about the program is available on the PAB's website.

b. Website Developments

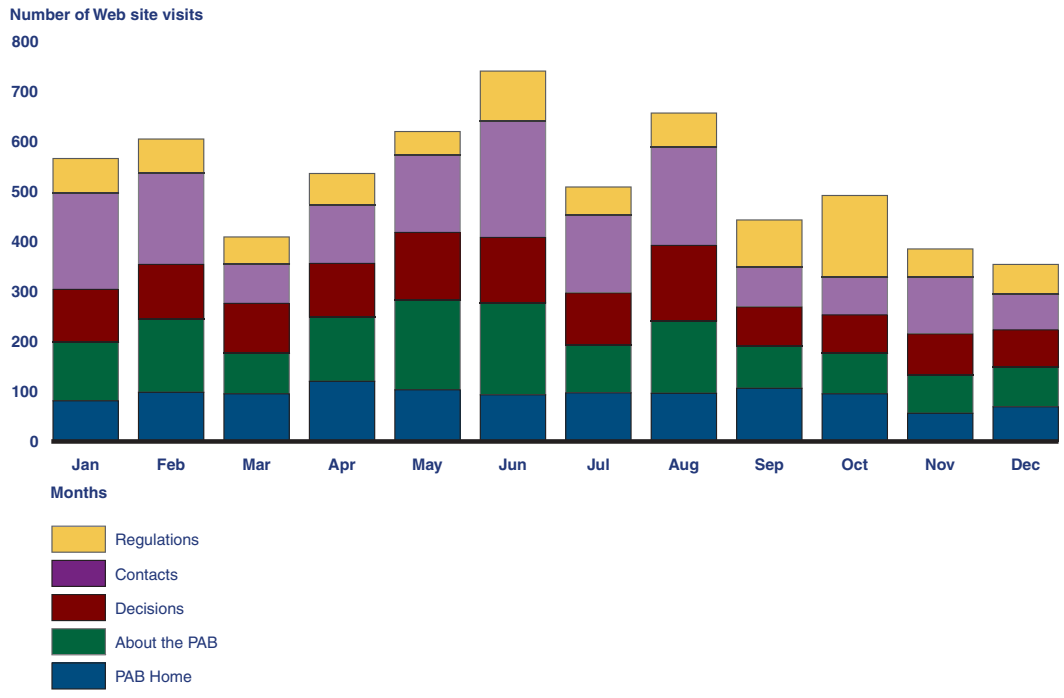
The website,²⁵ currently in its fifth year, has continued to be an invaluable resource for information about the Board. The Board has gathered statistical information on the use of its website. On average the Board's website was visited by approximately 526 individuals per month. Once on the site, individuals went to various sections such as the information about the PAB, Board decisions and regulations, and how to contact the PAB staff.

During 2007 the Board took on the project of developing a more user-friendly website, as well as designing a more attractive and informative home page. A new section was developed for mediation. The Board is working to develop the capacity to research its decisions by topic on the website.

The website is updated regularly to include announcements as well as new decisions, including LOC decisions. The Annual Report is available exclusively on the website. The following figure shows the number of visits to the Board's website this year, as well as usage within the site.

²⁵ The website can be found at www.pab.gao.gov.

Figure 3: Web Site Statistics



Source: Personnel Appeals Board 2007 data.