



Personnel Appeals Board

Reasonable Accommodation at GAO



Personnel
Appeals
Board

April 30, 2004

The Honorable David M. Walker
Comptroller General
United States General Accounting Office
Room 7000
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Walker:

Pursuant to the authority granted to it under the General Accounting Office Personnel Act of 1980, the Personnel Appeals Board has statutory responsibility to oversee equal employment opportunity at GAO. In exercise of that authority, the Board is issuing the attached report on reasonable accommodation at GAO. The Board's conclusions and recommendations are contained in the attached report.

Sincerely,

A handwritten signature in cursive script that reads "Anne M. Wagner".

Anne M. Wagner
Chair

attachment

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Personnel Appeals Board and Staff

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ntroduction

BACKGROUND

In 1990, the Personnel Appeals Board (PAB or the Board) issued a report entitled *EEO Oversight Study of GAO's Employment of People With Disabilities*. Among the issues that the report addressed were the accessibility of the General Accounting Office's (GAO or the Agency) facilities, the provision of reasonable accommodation to GAO employees and applicants, recruitment and hiring, supervisory training, and affirmative action for persons with disabilities. The Board's report contained the conclusions it reached in the study as well as 12 very specific recommendations to the Agency to assist in its development of a viable program for persons with disabilities.

In 1993, the Board conducted a follow-up study to determine whether, and to what extent, GAO had implemented the Board's recommendations from the 1990 report. In the follow-up report, issued in January 1994, the Board tracked GAO's responses and activities with respect to each of the 12 recommendations over the three year period since the initial report, concluding that, overall, GAO had complied with nearly all of the recommendations.¹ The Board and Agency management could not agree on one crucial issue, as GAO clearly indicated that it had decided not to follow the Board's recommendation that it establish a database to track reasonable accommodation requests. On behalf of the Agency, the then-Deputy Assistant Comptroller General for Human Resources agreed to consider the matter further even though she stated that Agency management continued to believe that establishment of such a database could "discourage some employees from making a request."² GAO indicated in June 2003 that it does intend to create a centralized database to track requests for reasonable accommodation.³ According to the Agency, the database, which will be maintained by Recruitment and Employment Services in the Human Capital Office (HCO), will include the same information that the Equal Employment Opportunity Commission (EEOC) requires Executive branch agencies to collect.⁴

Since the issuance of the Board's follow-up report, there have been a number of significant Supreme Court decisions⁵ interpreting the Americans with Disabilities Act, which specifically applies to GAO.⁶

¹ *Follow-Up Report to EEO Oversight Study of GAO's Employment of Persons with Disabilities* (hereafter *Follow-Up Report*). Because the earlier study was conducted prior to the passage of the Americans with Disabilities Act of 1990 (ADA) 42 U.S.C. §§12201-14, the follow-up report did not address GAO's policies or practices with respect to the ADA and that law's applicability to various Agency programs.

² Letter from Joan M. Dodaro, Deputy Assistant Comptroller General for Human Resources, GAO, p. 2 (Dec. 14, 1993). The then-President of the Advisory Council for Persons with Disabilities (ACPD) noted that his organization strongly supported the establishment of a database to track reasonable accommodation requests. Memorandum from R. Tim Baden, President, ACPD, p. 4 (Dec. 14, 1993). These communications can be found in the Board's *Follow-Up Report*, Appendices I and II, respectively. The PAB's Office of EEO Oversight reports can be found on the Board's web site, www.pab.gao.gov.

³ Letter from Jesse E. Hoskins, Human Capital Officer, GAO, Attachment 1, p. 10 (June 27, 2003) (Hereafter cited as Hoskins Letter (6/27/03)).

⁴ Information that must be maintained includes: number and types of requests; grade and position; approvals and denials; reasons for denials; processing time for each request; sources of technical assistance, if any, used to identify possible accommodations.

⁵ See, e.g., *Toyota Motor Manufacturing of Kentucky v. Williams*, 534 U.S. 184 (2002); *U.S. Airways v. Barnett*, 535 U.S. 391 (2002); *Chevron USA v. Echazabal*, 536 U.S. 73 (2002)

⁶ 42 U.S.C. §12209(c)(4).

In addition, pursuant to the Rehabilitation Act of 1973,⁷ President Clinton issued Executive Order 13164 in 2000, requiring Executive branch agencies to establish procedures “to facilitate the provision of reasonable accommodation.”⁸ That Order requires agencies to have written procedures for processing requests for reasonable accommodation that are to include the following:

- (1) an explanation that requests may be oral or in writing;
- (2) an explanation of the agency’s procedures for processing a request, including identification of the person who will make the final decision;
- (3) the designation of a time period for granting or denying the request;
- (4) an explanation of the employee’s responsibility to provide appropriate medical information;
- (5) an explanation of the circumstances in which an agency may request supplemental medical information, as well as the right of an agency to have medical information reviewed by an expert of its choice;
- (6) a provision allowing reassignment to be considered as a reasonable accommodation under certain circumstances;
- (7) a provision specifying that a denial of a request should be in writing and include the reasons for the denial;
- (8) a system of recordkeeping to track the processing of requests for reasonable accommodation; and,
- (9) practices that encourage the use of informal dispute resolution to ensure prompt reconsideration of denials of requests.

The EEOC has also issued numerous directives, instructions, and policy and enforcement guidance manuals to assist agencies with disability issues, in general, and in implementing the Executive Order.

GAO Orders 2713.1 and 2713.2 set eeo policy and govern the discrimination complaint process for the Agency, respectively. GAO Order 2306.1, revised in 1999, governs employment of individuals with disabilities; Order 2339.1, Medical Determinations, was revised in 2000, subsequent to Executive Order 13164.

JURISDICTION

With passage of the General Accounting Office Personnel Act of 1980 (GAOPA), Congress gave the Board “. . . the same authority over oversight and appeals matters as an executive agency has over

⁷ 29 U.S.C. §701. GAO has always maintained that the Rehabilitation Act, does not apply to it, citing the non-discrimination language in §791(b): “Each department, agency and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch . . .” (emphasis added). Agency representatives, however, have consistently stated to the Board that GAO has always been guided by the substantive provisions of the Act. *Memorandum* from James F. Hinchman, General Counsel, GAO (Apr. 5, 1990). *Dowd v. GAO*, p. 5; n. 20 at p. 11 (2/24/92).

⁸ Exec. Order No. 13164, 65 F.R. 46565 (2000), *reprinted in* 29 U.S.C. §791. *See also*, 29 U.S.C. §791(g), a 1992 amendment to the Rehabilitation Act that incorporated the employment provisions of the ADA into the Rehabilitation Act so that the ADA provisions could be consistently applied and made applicable to Executive branch employees.

oversight and appeals matters.”⁹ Pursuant to that grant of authority, the Board conducts oversight of GAO employment regulations, procedures and practices relating to laws prohibiting discrimination in employment through a process of review and assessment that the Board performs through the conduct of studies and the preparation of evaluative reports containing its findings, conclusions and recommendations.¹⁰

METHODOLOGY

This study commenced with Board staff submitting written questions and requests for data to the Human Capital Office about how the Agency handles requests for and provides reasonable accommodation to persons with disabilities. In its request, the Board sought information about Agency policies, practices, and processes with respect to reasonable accommodation, as well as specific data on requests that had been fulfilled and those that had been denied. However, due to the fact that the Agency has not yet established a database to track requests for and denials of reasonable accommodation, information provided was anecdotal in nature.

The Board also reviewed Executive Orders, EEOC policy and enforcement guidance documents, and recent case law in the areas of discrimination on the basis of disability and reasonable accommodation.

⁹ 31 U.S.C. §732(f)(2)(A).

¹⁰ 4 C.F.R. §§28.91, 28.92. Recent PAB Office of EEO Oversight reports have included studies of GAO’s Office of Opportunity and Inclusiveness, the Setting of Pay Rates and Probationary Periods at GAO, and Minority Recruitment.

Recent Executive Branch Initiatives

REASONABLE ACCOMMODATION

The Americans with Disabilities Act, a statute designed to eliminate discrimination against persons with disabilities, was enacted in 1990; Title I of that Act prohibits discrimination in employment based on disability.¹¹ To achieve the goal of eradicating disability-based employment discrimination, the Act requires employers to make reasonable accommodations to the “known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”¹² unless the employer can show that the accommodation would impose an undue hardship on the operation of the business in question.¹³ Such accommodations can be defined as the reasonable modification or adjustment of the workplace environment that enables an employee or applicant, who has established that he or she is a person with a disability who is qualified to do a job, to perform the essential functions of the position.¹⁴

Executive Order 12067 gives the responsibility for enforcement of all Federal statutes, Executive orders, regulations and policies relating to equal employment opportunity in the Executive branch of the Federal government to the Equal Employment Opportunity Commission.¹⁵ To execute that mandate as it relates to discrimination based on disability, the EEOC has, over the years, issued a series of directives on reasonable accommodation that are designed to provide guidance to the Federal sector in addressing disability issues and interpreting the Rehabilitation Act of 1973 and the Americans with Disabilities Act.¹⁶ According to the EEOC, providing reasonable accommodation serves two fundamental goals: removing workplace barriers that prevent people with disabilities from performing jobs for which they are qualified and expanding the pool of qualified applicants through affirmative conduct that promotes the employment of people with disabilities.¹⁷

EEOC’s implementing regulations for the Americans with Disabilities Act contain three categories of reasonable accommodations in its seminal definition of the term:

¹¹ 42 U.S.C. §12112(a).

¹² 42 U.S.C. §12112(b)(5)(A). The ADA defines a qualified individual with a disability as an “individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position.” 42 U.S.C. §12111(8).

¹³ Undue hardship means that providing the accommodation would result in significant difficulty or expense to the employer. It also refers to accommodations that would be unduly costly, extensive, substantial or disruptive or that would fundamentally alter the nature of business operations. 29 C.F.R. Pt. 1630 App. §1630.2(p).

¹⁴ Disability is defined as a physical or mental impairment that substantially limits one or more major life activities; having a record of such impairment; or, being regarded as having such impairment. 29 C.F.R. §1630.2 (g)(1)-(3).

¹⁵ Exec. Order No. 12067, 43 F.R. 28967 (1978), *reprinted in* 42 U.S.C. §2000e. In FY 2002, the EEOC received 15,964 charges alleging discrimination on the basis of disability, 18.9% of all charges filed that year. *Charge Statistics From the U.S. Equal Employment Opportunity Commission, FY 1992 Through FY 2002*. In the Federal sector, complaints based on disability comprised 14.9% of all complaints filed in FY 2002.

¹⁶ See *e.g.*, *Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Updated October 2002); *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation* (October 2000); *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* (July 2000); *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (March 1997).

¹⁷ *Policy Guidance on Executive Order 13164*, p.2 (October 20, 2000).

(1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual to perform the essential functions of the position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.¹⁸

There are any number of reasonable accommodations that employers may be required to provide in order to enable a person with a disability to perform certain job functions. The Americans with Disabilities Act contains a non-inclusive list of the most common types of accommodations:

Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.¹⁹

While the ADA establishes the perimeters of the process for enabling people with disabilities to compete in the workplace, the EEOC has fleshed out the details in a series of comprehensive and fact-specific documents that address issues raised by the necessarily flexible, case-by-case approach that this area of the law demands.²⁰ For example, in its *Enforcement Guidance*, the EEOC lays out the steps that an employee must follow when requesting a reasonable accommodation, reminding agencies that requests need not be in writing, do not have to mention the ADA or use the phrase "reasonable accommodation" and, may be made by a third person on behalf of an individual with a disability.²¹

The EEOC also mandates that, subsequent to a request for reasonable accommodation, an employer-initiated dialogue between the employee and appropriate official ensue that, at a minimum, should include a description of the problem caused by the particular workplace barrier and suggestions from both parties about what accommodation may be needed to remove a particular barrier.²² During this period of communication, the burden of determining the most appropriate accommodation rests with the employer; the burden of demonstrating that disability is the reason for an inability to perform essential functions of a

¹⁸ 29 C.F.R. §1630.2(o)(1).

¹⁹ 42 U.S.C. §12111(9)(B).

²⁰ 29 C.F.R. Pt. 1630 App. §1630. ". . . the determination of whether an individual is qualified for a particular position must necessarily be made on a case-by-case basis. No specific form of accommodation is guaranteed for all individuals with a particular disability." *Id.*

²¹ *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, pps. 5-7 (hereafter *EEOC Enforcement Guidance*).

²² *Id.*, p.7.

position is the employee's.²³ Even with an ongoing dialogue, however, the EEOC makes clear that time limits for providing accommodations should be as short as reasonably possible and, if the requested accommodation is simple or straightforward, an employer should, absent undue hardship, provide it immediately.²⁴

In addition, the EEOC's *Enforcement Guidance* explains that the employer is entitled to ask an employee to provide documentation about the disability in question and any functional limitations it imposes, if neither is obvious, and that an employee may be required to secure such documentation from an appropriate health care professional.²⁵ The employer may request documentation or information regarding:

- the nature, severity, and duration of the individual's impairment;
- the activity or activities that the impairment limits;
- the extent to which the impairment limits the individual's ability to perform the activity or activities; and/or
- why the individual requires reasonable accommodation or the particular reasonable accommodation requested, as well as how the reasonable accommodation will assist the individual to apply for a job, perform the essential functions of the job, or enjoy a benefit of the workplace.²⁶

Once it has been established that a reasonable accommodation is necessary to remove a workplace barrier, it is the employer who has the discretion to choose among any number of accommodations as long as the choice is effective. An employer may not force an employee to accept any particular accommodation but if an employee refuses an effective alternative, the employer may be relieved of the burden of providing a reasonable accommodation to that employee. The employer may take cost and burden into account but should give primary consideration to the preference of the individual with a disability.²⁷

Denials of reasonable accommodation requests can be based on undue hardship to the entity or are permitted if there is a significant risk that an individual could pose a direct threat to the health or safety of himself or others.²⁸ In addition, accommodations that violate Federal law or regulations or public policy are not considered to be reasonable.²⁹ Employers do not have to make accommodations when those arrangements would violate the rights of others or result in increased workload to them, or violate the

²³29 C.F.R. Pt. 1630 App. §1630.9

²⁴*Policy Guidance on Executive Order 13164*, p. 9.

²⁵*Id.*, p. 8. The EEOC cautions that a request for medical documentation may not be overbroad. An employer is precluded from requesting documentation that is "unrelated to determining the existence of a disability and the necessity for an accommodation." *Id.*

²⁶*EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, Question 10.

²⁷29 C.F.R. Pt. 1630 App. §1630.9.

²⁸29 C.F.R. Pt. 1630 App. §§1630.2(p), (r). In order to establish a threat of harm, there must be a high probability of substantial harm.

²⁹*See Albertson's v. Kirkingburg*, 527 U.S. 555 (1999) (employer was not required to waive U.S. Department of Transportation vision requirements for truck driver); *Scott v. Beverly Enterprises-Kansas*, 968 F. Supp. 1430 (D. Kan 1997) (employer was not required to allow employee to perform duties without a license that he was precluded from obtaining due to drug use).

terms of a collective bargaining agreement.³⁰ Employers are also not required to provide modifications or items that assist a person with off-the-job activities or that are not job-related.³¹

³⁰See *Anderson v. Coors Brewing Co.*, 181 F.3d 1171 (10th Cir. 1999); *U.S. Airways v. Barnett*, 535 U.S. 391 (2002); *Davis v. Florida Power & Light Co.*, 205 F.3d 1301 (11th Cir.), *cert. denied*, 531 U.S. 927 (2000).

³¹29 C.F.R. Pt. 1630 App. §1630.9.

GAO's Policies and Practices

REASONABLE ACCOMMODATION UNDER GAO ORDER 2306.1

Reasonable accommodation of a disability at GAO is governed by the standards found in GAO Order 2306.1, *Employment of Individuals with Disabilities* which was last revised in October 1999. The stated purpose of the Order is to establish a framework and delineate responsibility within the Agency for the employment of people with disabilities. The 1999 revisions of the Order also reflect provisions of the Americans with Disabilities Act.

Pursuant to Order 2306.1, an employee or applicant with a disability³² has the burden of making job-related needs for an accommodation known to Agency officials.³³ Requests are handled on a case-by-case basis.³⁴ Once a request has been made to a supervisor or the appropriate manager, the Agency must provide a reasonable accommodation that would enable the individual with a disability to perform the job unless such accommodation would impose an undue hardship on GAO operations.³⁵ According to an Agency official, GAO has not claimed the defense of undue hardship when denying a reasonable accommodation to any employee or applicant for employment.³⁶

At GAO, the employee's direct supervisor is responsible for approving requests for reasonable accommodation with the advice and assistance of other relevant management officials in the Counseling Center, the Office of Opportunity and Inclusiveness (O&I) or the Office of General Counsel (OGC). In determining whether to grant or deny a request, GAO takes into consideration the following factors: (1) whether the request is reasonable in light of the facts and circumstances; (2) whether the request presents a nexus to the medical condition the employee asserts; (3) whether the accommodation would be effective if implemented.³⁷ Supervisors and managers at the Agency are precluded from denying such a request unless the Human Capital Officer has reviewed the decision to deny it and concurs with that decision.³⁸

³² At GAO, disability status for eeo record-keeping purposes is based on a self-reporting system. Over the past 10 years, the percentage of GAO employees who report having a disability has consistently been in the 4-5 percent range. In mid-2003, with a total fulltime workforce of 2,991 employees, GAO had 92 employees who reported having a non-severe disability (3.08%) and 29 employees who reported having a severe disability (.97%).

³³ Although there appears to be no official requirement that requests be in writing, an oft-referred to Memorandum from a former Agency official states that, in cases where an employee is requesting special furniture or equipment, the employee should be asked to "write a memo stating what furniture or equipment he/she is requesting and why." *Memorandum: Guidelines on Purchasing Special Furniture and Equipment* from John H. Luke, Deputy Assistant Comptroller General for Human Resources to Heads of Divisions and Offices (Sept. 17, 1996).

³⁴ *Memorandum: Reasonable Accommodations for Persons with Disabilities* from John H. Luke, Deputy Assistant Comptroller General for Human Resources to Heads of Divisions and Offices (May 15, 1996).

³⁵ GAO Order 2306.1 ¶7(a). GAO defines undue hardship as "an action requiring significant difficulty or expense to GAO." *Id.* at ¶4(e). Considerations in determining undue hardship include the cost of the accommodation, the type of work performed, the impact of the accommodation on office operations, and the impact on the ability of other employees to perform their assignments.

³⁶ Hoskins Letter (6/27/03), Attachment 1, p. 3.

³⁷ *Id.*

³⁸ *Id.* at p. 4.

Among the reasonable accommodations enumerated in Order 2306.1 available to GAO employees and applicants are job restructuring; part-time or modified work schedules; reassignment; acquiring or modifying equipment; and, providing qualified readers and interpreters.³⁹ In addition to the accommodations listed in the Order, GAO has reported that a partial list of accommodations it has provided include opening building access to personal assistants; reducing travel for employees; allowing flexiplace for employees with medical conditions; and providing parking. GAO does not maintain a database of requests and denials of requests for reasonable accommodations but reported several illustrative denials to the Board. They included requests for private office space when such space was either not available or inappropriate for the use;⁴⁰ requests for assistance that were personal in nature and not job-related; and requests to switch employees to different supervisors for stress-related reasons.

EXECUTIVE ORDER 13164 AND GAO'S PRACTICES

Executive Order 13164 mandates a number of steps that Executive branch agencies must take to ensure that they have effective written procedures in place for processing requests for reasonable accommodation. Although the Order does not, of course, apply to GAO, the procedures that it calls for provide a comprehensive map for agencies seeking to improve the manner in which they address these requests. The requirements of the Executive Order are bold-faced; GAO's current practices or procedures follow. Each Federal agency in the Executive branch must:

(1) Explain that an employee or job applicant may initiate a request for reasonable accommodation orally or in writing. If the agency requires an applicant or employee to complete a reasonable accommodation request form for recordkeeping purposes, the form must be provided as an attachment to the agency's written procedures.

Currently, GAO Order 2306.1 requires the employee or applicant with a disability to make known or submit their requests for reasonable accommodation to the appropriate official. There is no instruction about how a request should be communicated but GAO accepts either written or oral requests.⁴¹

(2) Explain how the agency will process a request for reasonable accommodation, and from whom the individual will receive a final decision.

At GAO, as Order 2306.1 makes clear, unit management is responsible for considering and granting requests for reasonable accommodation. The Order also provides that ". . . an accommodation can be denied only upon the review and concurrence of the Deputy Assistant Comptroller General for Human Resources."⁴² The Orders do not contain any explanation of specific Agency procedures but Order 2306.1 lays out the responsibilities that each of seven offices has in implementing policies affecting employees with disabilities.⁴³

³⁹ GAO Order 2306.1 ¶7(b)(2).

⁴⁰ The Agency also reported that it has accommodated some of these requests by providing headsets to employees who become distracted in certain office environments and making arrangements for an employee to use the GAO Health Unit in lieu of a private office. Hoskins Letter (6/27/03), Attachment 1, p.8.

⁴¹ Hoskins Letter (6/27/03), Attachment 1, p. 5.

⁴² ¶7(d). The equivalent person in GAO's current management scheme is the Human Capital Officer.

⁴³ The offices are Recruitment, the Training Institute, Personnel, Civil Rights Office, Counseling and Career Development, Information Management and Communications, and General Counsel. Many of those offices have either been re-named or had functions transferred since the Order was last revised in 1999.

(3) Designate a time period during which reasonable accommodation requests will be granted or denied, absent extenuating circumstances. Time limits for decision making should be as short as reasonably possible.

There are no time lines established for processing requests for reasonable accommodation at GAO although the Agency's Human Capital Officer has advised the Board that the Agency tries to respond to all requests "in as timely a manner as possible, given the facts and circumstances of the accommodation request."⁴⁴

(4) Explain the responsibility of the employee or applicant to provide appropriate medical information related to the functional impairment at issue and the requested accommodation where the disability and/or need for accommodation is not obvious.

GAO does not provide guidance to its managers about when to seek medical information from an employee or applicant who has asked for a reasonable accommodation or when to seek permission to speak to a health care provider. Generally, a unit manager will make the decision and may consult with the Human Capital Office (HCO) or the Agency's Office of General Counsel (OGC). Supervisors and managers are provided with a generic letter requesting medical documentation that was developed by the Office of Personnel Management and adopted by GAO. Both the HCO and OGC work with managers to tailor the letter to a particular set of circumstances.⁴⁵

(5) Explain the agency's right to request relevant supplemental medical information if the information submitted does not clearly explain the nature of the disability, or the need for the reasonable accommodation, or does not otherwise clarify how the requested accommodation will assist the employee to perform the essential functions of the job or to enjoy the benefits and privileges of the workplace.

At GAO, generally the Counseling Services staff in HCO's Performance and Learning group or the Agency's contract physician assumes responsibility for interacting with an employee's medical care providers. There are no written guidelines for this process.⁴⁶

(6) Explain the agency's right to have medical information reviewed by a medical expert of the agency's choosing at the agency's expense.

According to GAO, continued interaction with an employee or applicant's health care providers "depends on the nature and severity of the disability and whether there are concerns about the extent to which the accommodation provided is effective, or continues to be effective."⁴⁷ The Agency is not required to inform the employee that a medical expert is reviewing his or her information.⁴⁸

(7) Provide that reassignment will be considered as a reasonable accommodation if the agency determines that no other reasonable accommodation will permit the employee with a disability to perform the essential functions of his or her current position.

⁴⁴ Hoskins Letter (6/27/03), Attachment 1, p.5.

⁴⁵ *Id.* at pps. 5-6.

⁴⁶ *Id.* at p. 6.

⁴⁷ *Id.*

⁴⁸ GAO Order 2339.1 ¶6(b), *Medical Determinations*, (Dec. 1, 2000), allows Agency management to coordinate review of medical documentation with a physician or a practitioner of the same discipline as the one who issued the report in question.

GAO Order 2306.1 provides for reassignment to a vacant position as a possible reasonable accommodation.⁴⁹ The Agency has denied requests for reassignment to a different supervisor based on an employee's alleged stress due to working for a particular supervisor. There were no examples involving a reassignment provided by the Agency in its partial list of accommodation requests it had granted.⁵⁰

(8) Provide that reasonable accommodation denials be in writing and specify the reasons for denial.

According to GAO's Human Capital Officer, denials of requests for reasonable accommodation have been in writing "in most cases" and those that are in writing have included an explanation of the reasons for the denial.⁵¹

(9) Ensure that agencies' systems of recordkeeping track the processing of requests for reasonable accommodation and maintain the confidentiality of medical information received in accordance with applicable laws and regulations.

To date, the Agency has neither a tracking system nor a database. In June 2003, the Agency said that it is in the process of developing a tracking system and database but has not given an expected date for completion.⁵² The EEOC requires Executive branch agencies to maintain databases of reasonable accommodation requests that contain the following information:

- a. the number and types of reasonable accommodations that have been requested in the application process and whether those requests have been granted or denied;
- b. the jobs (occupational series, grade level, and agency component) for which reasonable accommodations have been requested;
- c. the types of reasonable accommodations that have been requested for each of those jobs;
- d. the number and types of reasonable accommodations for each job, by agency component, that have been approved, and the number and types that have been denied;
- e. the number and types or requests for reasonable accommodations that relate to the benefits or privileges of employment, and whether those requests have been granted or denied;
- f. the reasons for denial of requests for reasonable accommodation;
- g. the amount of time taken to process each request for reasonable accommodation; and,

⁴⁹ ¶7(b)(2).

⁵⁰ Hoskins Letter (6/27/03), Attachment 1, p. 8.

⁵¹ *Id.*

⁵² Hoskins Letter (6/27/03), Attachment 1, p.10.

h. the sources of technical assistance that have been consulted in trying to identify possible reasonable accommodations.⁵³

Agency management has informed the Board that GAO's tracking system and database will conform to the EEOC's directives.⁵⁴

Medical information obtained subsequent to a request for an accommodation is not filed nor is it incorporated in the employee's official personnel files.⁵⁵

(10) Encourage the use of informal dispute resolution processes to allow individuals with disabilities to obtain prompt reconsideration of denials of reasonable accommodation. Agencies must also inform individuals with disabilities that they have the right to file complaints in the Equal Employment Opportunity process and other statutory processes, as appropriate, if their requests for reasonable accommodation are denied.

Denials of requests for reasonable accommodation at GAO do not include language notifying the employee or applicant of the right to file a discrimination complaint with the Office of Opportunity and Inclusiveness (O&I) or to participate in GAO's mediation program.⁵⁶

⁵³ *Policy Guidance on Executive Order 13164: Establishing Procedures to Facilitate the Provision of Reasonable Accommodation*, p. 16 (October 20, 2000).

⁵⁴ Hoskins Letter (6/27/03), Attachment 1, p. 10.

⁵⁵ *Id.* Managers and supervisors who receive medical information are instructed, orally, to safeguard it.

⁵⁶ *Id.*

***C*onclusions and Recommendations**

THE BOARD STUDIES

In its 1990 oversight study of the employment of people with disabilities at GAO, the Board concluded that GAO's efforts to promote the employment of people with disabilities was fragmented and inconsistent. With respect to reasonable accommodation specifically, the Board urged GAO to provide information to employees, applicants and supervisors on how to obtain assistance with and advice about the issue and to require training for those charged with carrying out GAO's practices with respect to equal employment opportunity for persons with disabilities.

Just three years later, in its follow-up study, the Board determined that, overall, GAO, which was in compliance with nearly all of the Board's earlier recommendations, had made significant progress in ensuring that the concerns and needs of persons with disabilities were being addressed. At that time, the Board and the Agency were still unable to agree on the issue of establishment of a database to track reasonable accommodation requests. In a recent communication to the Board, however, GAO has indicated that it does intend to create a centralized database to track requests for reasonable accommodation which will be maintained by Recruitment and Employment Services located within the Human Capital Office.

The Board's current study, 10 years after its follow-up report, focuses only on the issue of GAO's policies, practices and procedures with respect to the processing of requests for reasonable accommodation. The Board has concluded that the procedures currently in place for requesting a reasonable accommodation at the General Accounting Office fail to provide adequate explanation of the requirements for making and processing such requests and do not conform to the basic standards to which agencies in the Executive branch are expected to adhere.

Specifically, GAO's internal Orders and guidance do not explain to employees or applicants how requests are to be communicated; do not spell out procedures to be followed; do not establish timelines for the processing of requests; do not provide for training for managers and supervisors in the handling of these requests or medical information they may acquire; do not require that denials of requests be in writing, and, do not notify employees or applicants of their right to file a complaint with O&I if a request is denied.

BOARD RECOMMENDATIONS

For the above-mentioned reasons, the Board makes the following recommendations:

At a minimum, the Agency should immediately undertake to revise GAO Order 2306.1 to describe in detail the steps an employee or applicant should take to initiate a request for a reasonable accommodation, making clear that the request

- (1) does not have to be in writing;
- (2) does not have to contain any particular words or phrases;
- (3) does not have to be made at any prescribed time;
- (4) may be made to a supervisor in the chain of command, O&I or the Human Capital Officer or in the case of an applicant to anyone with whom the applicant came in contact; and,
- (5) may be made by a third party on the employee's or applicant's behalf.

The Order should also inform employees of their rights under the ADA and define commonly-used terms. GAO should designate an office to function as a central clearinghouse for the reasonable accommodation process and to serve as a repository for available Agency resources and potential accommodations.

When a request for reasonable accommodation is denied, the revised Order should mandate that the denial be in writing and that the reasons for the denial be specified. If an alternative accommodation is offered, the notice of the denial should explain the reasons why the Agency believes its accommodation will be effective. The denial letter should also identify the person who made the decision to deny the request. Finally, the notice of the denial must state that the employee or applicant has the right to file an EEO complaint and explain the steps for doing so.

The Board also recommends incorporating mandatory training about reasonable accommodation for supervisors and managers when revising Order 2306.1. Such training should include guidance on how to process requests for reasonable accommodation and enumerate Agency resources that are available to assist employees. Management officials should also be well-versed in the appropriate time and manner in which medical documentation should be asked for and how it is to be handled when it is acquired. In addition, the Agency should provide to all managers, supervisors, and unit heads a list of offices and people who are available to assist in the handling of these requests and delineate the areas of expertise of each of those resources.

Finally, the Board renews its recommendation, first promulgated in its 1990 report and reiterated in its 1994 report, that GAO establish and maintain a database to track requests for reasonable accommodation, as well as approvals and denials of those requests. The information that will be captured by this database will enable GAO management to note the length of time it takes to respond to requests and to determine the reasons for delays if they tend, for example, to recur with certain kinds of requests or within certain offices or units. GAO will also be able to determine whether there are types of accommodations that it cannot provide. The Agency has informed the Board that it is in the process of developing a database that will comply with the requirements that Executive Order 13164 imposes on Executive branch agencies. According to the Human Capital Officer, GAO's database will be maintained by Recruitment and Employment Services, a unit that operates within the Human Capital Office.

CONCLUSION

In 1990, the Board studied GAO's policies and practices with respect to the employment of people with disabilities and determined that they were fragmented and fraught with problems; four years later, the Board's review revealed significant progress in GAO's efforts to ensure that people with disabilities were afforded equal employment opportunities at the Agency.

Ten years after its follow-up study, a sea of significant changes in the law and policy led the Board to decide to look more closely into the area of reasonable accommodation in order to determine whether GAO's practices had evolved and progressed. Unfortunately, the Board found that the Agency lags significantly behind the Executive branch in maintaining written policies and procedures that conform to current law in the area. The Board is confident, however, that the establishment of the long awaited database to track requests for reasonable accommodation coupled with a major overhaul of GAO Order 2306.1 will resolve most, if not all, of the issues that have been raised as concerns in this report.

Response From the Agency



G A O

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

April 1, 2004

Ms. M. Gail Gerebenics
Director, EEO Oversight
Personnel Appeals Board
U.S. General Accounting Office
Suite 560, Union Center Plaza II
Washington, D.C. 20548

Dear Ms. Gerebenics:

This letter is in response to your draft report, Reasonable Accommodation at GAO, issued on March 8, 2004. Consistent with our June 27, 2003 letter, we are continuing our efforts to develop guidelines on the employment of individuals with disabilities. We have developed a draft order and are working with the Office of General Counsel to finalize the order. In addition, accompanying procedures to address information tracking and reporting, as well as other items requiring specific procedural direction, will be included in this document.

If you have specific questions about these initiatives, please feel free to call me on (202) 512-5533 or Phyllis Hughes on (202) 512-2995.

Sincerely yours,



Jesse E. Hoskins
for Chief Human Capital Officer

Response From the Advisory Council For Persons With Disabilities



G A O

Accountability • Integrity • Reliability

United States General Accounting Office
Washington, DC 20548

April 2, 2004

Ms. M. Gail Gerebenics
Director, EEO Oversight
Personnel Appeals Board
Union Center Plaza II – Suite 560
Washington, DC 20548

Dear Ms. Gerebenics:

Thank you for the opportunity to review and comment on the PAB draft report: "Reasonable Accommodation at GAO". The Advisory Council for Persons with Disabilities (ACPD) appreciates the systematic approach taken by the PAB in its review.

The report's conclusions are on target and address many of the deficiencies in GAO's reasonable accommodation process. Although the ACPD agrees with PAB's conclusion, in general, that GAO lags significantly behind the Executive Branch in maintaining written policies and procedures that conform to current law in the area, we are disappointed that the conclusion is not more definitive with respect to the agency's failure to follow the ADA as implemented by the Executive Branch. The ACPD believes that the PAB's findings support a stronger conclusion than a statement that GAO lags behind most executive agencies in implementing this critical mandate. We believe that GAO should be a first class role model agency for other federal agencies in providing reasonable accommodations.

Revision of GAO Order 2306.1 Needed

The ACPD agrees that GAO Order 2306.1 needs extensive revisions and concurs with the recommendations proposed. In addition, the order can include mentioning that the aggrieved employee may consult with the officers of the ACPD.

Although the Executive Branch has moved forward with guidance for the reasonable accommodation process, GAO has not. In December 1999, the Deputy Assistant Comptroller General for Human Resources, speaking at an ACPD annual meeting, stated that GAO would shortly be coming out with revised reasonable accommodation procedures. To date that has not been done. The latest updated GAO Order 2306.1 is October 8, 1999, which is very limited. The order informs employees that GAO will provide reasonable accommodations under certain conditions, but

does not provide guidance for employees who received accommodations that were less effective than what was requested (see below) or whose accommodation requests were denied altogether (EEO appeal rights).

The ACPD suggests that the order also include references to alternative accommodations suggested by management. When an accommodation suggested by management is different from the one the employee requested, the scope of the different accommodation be described and that GAO provide written explanation why the accommodation is substantially equivalent to the requested one in meeting the needs of the employee with a disability. As currently done, apparently only denials of accommodation are recommended to be in writing.

Although reasonable accommodations are considered on case-by-case basis, the GAO order should also mention decisions on accommodation requests should be made and applied consistently. The ACPD is aware of an instance where a formerly denied accommodation request for one employee was later granted when substantially the same request was submitted to new management. Under a rational, policy-based system, the result should be the same no matter who the ultimate decision-maker is.

Accommodation Tracking System

The ACPD is also looking forward to the establishment of the database to track requests for reasonable accommodations – something the ACPD has requested for years. We are relieved that GAO has finally agreed to establish a database to document requests for accommodation, but we are rather appalled that it has taken so long. We hope the PAB recommends that the agency have this in place by a specific date. Without these data, the agency simply cannot know how well it is meeting the needs of its disabled population. Efforts to survey staff and managers should be taken so the database reflects current and recent past employee experience, especially regarding denials. Until the database has been up and running for a while and has sufficient information, GAO management cannot be held accountable for its performance.

Although GAO has agreed to establish an accommodation request tracking system, GAO's record of following through on such commitments is not unblemished. In view of this, the PAB should set measurable performance goals for the agency, and take appropriate action if these goals are not met.

Acknowledging that its inquiry was hindered by the lack of data on accommodation, the PAB review relied on anecdotal evidence. The ACPD questions whether there was any effort made to contact employees with disabilities to get their perspective and experiences. Employees with disabilities are represented through the ACPD, which could have asked its members if they were open to being contacted by the PAB to assist with its work. As far as we know, this did not happen.

While EEOC guidance states that the reasonable accommodation process should involve, after the initial substantiated request, an employer-initiated dialogue between the employee and appropriate official. At a minimum, the dialogue should include 1) a description of the problem caused by a particular workplace barrier and 2)

suggestions from both parties about what accommodation may be needed to remove a particular barrier. During this period of communication, the burden of determining the most appropriate accommodation rests with the employer. It has been our experience that the dialogue does not normally take place. Rather, GAO either says no or ignores accommodation requests, procures the cheapest adaptive equipment or services instead of the most appropriate, effective equipment or service to accommodate the disabled employee, or does not propose alternative solutions.

An alternative to GAO statistics would be to request data from GAO on the number of EEO counseling issues and EEO complaints that included failure to accommodate as an element of the charge. An additional data source would be charges filed with the PAB that included failure to accommodate as an element of the charge.

In the discussion of cases concerning denied accommodations, we wonder why there was no mention of the Gaston case? The cited examples of denials seem trivial, such as a private office or switching supervisors. It is the ACPD's understanding that the Gaston case involved the removal of what had apparently been an informal but successful flextime accommodation, resulting in an employee becoming unable to manage her disability and continue her career.

The report's conclusions are on target and address many of the deficiencies in GAO's reasonable accommodation process. However, they do not address a more basic issue. GAO's EEO processes and appeal rights are not as conspicuous as they should be. Over the years, GAO revamped its EEO organization, and centralized all complaint activities into headquarters. However, there appears to be no information posted about this. In fact, there does not seem to be any posted information or poster that provided information about the EEO process.

Population of GAO Disabled Employees Is Suspect

In the report's footnote #32, it states: "At GAO, disability status for EEO record-keeping purposes is based on a self-reporting system. Over the past 10 years, the percentage of GAO employees who report having a disability has consistently been in the 4-5 percent range. In mid-2003, with a total full-time workforce of 2,991 employees, GAO reported that 92 employees reported having a non-severe disability (3.08%) and 29 employees reported having a severe disability (.97%)."

The ACPD believes that these numbers may be suspect. There is no way to judge the accuracy of the above numbers since GAO does not appear to update records of those employees who are currently disabled. That is, GAO employees who were able-bodied when first hired, became disabled later while employed at GAO. GAO has a form (Form 154) for employees to use to self-identify their disability or disabilities when they were first hired. This form should also be available on the GAO intranet; those who are currently employed and became disabled after they were hired can complete this form. Without a viable mechanism for current disabled GAO employees to self-report their disability or disabilities, GAO has no real idea of its population of disabled employees. Furthermore, how does this population compare with that of other professional service organizations?

Given that there is not a valid reliable census of GAO employees with disabilities, the ACPD believes the PAB should recommend that GAO conduct a census of it people with disabilities to identify the actual population. Further, in revising its policies on reasonable accommodation, GAO should specifically establish procedures for self-reporting of disabilities for both newly hired staff and staff who are current GAO employees.

Accommodation Concerns

The ACPD believes that GAO can improve its ability to accommodate requests at the office-wide level. For example, none of the vans used for team travel or for evening rides to the Metro and parking lots is wheelchair equipped. When a request was made for the next purchased vehicle to be wheelchair equipped, the legal office orally granted the request, but, a year later, it appears that neither the van nor alternative equivalent transportation has yet been procured.

Another issue regards the execution of fire safety protocols for people with mobility impairments. When the fire alarm went off in headquarters in mid-January, 2004, two mobility-impaired employees in wheelchairs went to their designated stairwell with their buddies. They had to wait outside the stairwells because the presence of the wheelchairs inside the stairwells would have blocked other evacuees. Security and Safety never checked the stairwells for mobility-impaired people on their floor, nor did they tell them it was a false alarm. Eventually one of their co-workers called Security and Safety and was informed that the alarm was false. This is a good example where an accommodation is technically in place, but the follow-through is unreliable.

Additional Recommendations

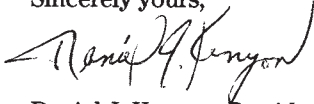
In summary, we respectfully request that the PAB consider adding the following specific recommendations:

- That GAO immediately establish the accommodation database;
- That GAO conduct an agency-wide census of people with disabilities, a confidential survey to ensure that it accurately reflects current population of disabled employees;
- That GAO's revised Order be available for employee comment and, once finalized, be posted prominently on the Human Capital Office web page so employees are well informed about the process;
- That GAO continue to improve in meeting accommodation needs for its disabled employees.

The ACPD would be more than happy to work with the Human Capital Office and any other cognizant GAO office to accomplish these tasks aforementioned.

The ACPD appreciates the opportunity to comment on the PAB's draft report, "Reasonable Accommodations at GAO". If you any comments or questions related to our responses, please feel free to contact me at KenyonD@GAO.gov.

Sincerely yours,



Daniel J. Kenyon, President
Advisory Council for Persons with Disabilities

cc: ACPD Members
Ron Stroman, OOI
Jesse Hoskins, HCO

Board Comments on the ACPD Letter

Board Comments on ACPD Letter

In its comments, the Advisory Council for Persons with Disabilities agreed with the Board's conclusions in the report, generally, and specifically endorsed Board recommendations that GAO Order 2306.1 be extensively revised and that a database to track requests for reasonable accommodation be established and maintained.

In addition, the ACPD requested that the PAB consider four specific recommendations: (1) that GAO immediately establish the accommodation database; (2) that GAO conduct an agency-wide census of people with disabilities through a confidential survey; (3) that GAO's revised Order be available for employee comment, and once finalized, be posted prominently on the Human Capital Office web page; (4) that GAO continue to improve in meeting accommodation needs for its disabled employees.

In response, the Board notes that it has been recommending that the Agency establish and maintain a database to track requests for reasonable accommodation since 1990. In June 2003, the Agency informed the Board that, not only did it no longer object to the database, but that it was in the process of developing one that will comply with all of the requirements to which the Executive branch is subject. The Agency has assured the Board that it will have a database in the very near future.

The ACPD's second point mirrors a Board recommendation first made in 1990. The Board remains committed to its longstanding recommendation that the Agency periodically update its data on employees with disabilities. The Board also believes that educating employees about the purpose of the self-identification data would ensure a more accurate census.

Regarding the ACPD's third point, the Board notes that the Agency routinely makes its draft Orders available for comment and posts them prominently on the Agency's main Intranet page throughout the finalization process.

With respect to the final recommendation, the Board expects that GAO will continue to work to improve the provision of reasonable accommodation. The Board will be periodically monitoring issues relating to the employment of people with disabilities in future studies. As in the past, the monitoring could include a follow-up to this report to determine the status of the Board's recommendations.

The ACPD also raised several issues in its comments that the Board believes require clarification or elucidation. For example, the ACPD questioned whether the Board made any effort to contact employees about their experiences. Because this particular study and report focused on the process of requesting reasonable accommodation and measured GAO's procedures against those of established law and guidance in the area, no interviews were conducted. The ACPD also pointed to the lack of information about the Agency's EEO process, in general. Immediately prior to this report and study, the Board reviewed the procedures and practices that govern the internal discrimination complaint process at GAO. The Board's findings and recommendations with respect to those issues can be found in its report entitled *Study of GAO's Office of Opportunity and Inclusiveness*. The report, issued in February 2004, is available on the Board's web site (www.pab.gao.gov).