

# **PERSONNEL APPEALS BOARD**



**2019  
ANNUAL  
REPORT**

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## BIOGRAPHIES OF BOARD MEMBERS

**RICHARD S. UGELOW** was appointed to the Board in September 2016, and became Chair of the Board in April 2019, after serving as the Vice Chair since July 2017. Mr. Ugelow recently retired from the faculty of American University Washington College of Law, where he taught clinical legal education and employment discrimination law. Previously he served as a senior trial attorney and Deputy Section Chief in the Employment Litigation Section of the Civil Rights Division of the U.S. Department of Justice from 1973 until 2002. Prior to his employment with the Department of Justice, he served as a Captain in the U.S. Army Judge Advocate General Corps from 1969 until 1973. Among his publications, Mr. Ugelow authored the chapter entitled “I-O Psychology and the Department of Justice” in *Employment Discrimination Litigation, Behavioral, Quantitative, and Legal Perspectives* by Frank J. Landy. He has also served as a moderator and presenter in numerous different forums. Mr. Ugelow earned a Bachelor’s degree from Hobart College in 1965. He received his Juris Doctor (J.D.) degree from American University in 1968 and earned a Master of Laws (LL.M.) degree from Georgetown University in 1974. Mr. Ugelow is a member of the Bars of the District of Columbia, Maryland, and Florida.

**CAROL A. DE DEO** was appointed to the Board in January 2017, and became Vice Chair of the Board in April 2019. Except for a brief period spent in private practice, she worked at the Department of Labor from 1983 to 2009, serving as Deputy Solicitor for

National Operations (highest ranking non-political appointee in the Office of the Solicitor) from 2004 to 2009. Earlier she served as Associate Solicitor for Labor Management Laws, Associate Solicitor for Employee Benefits, Deputy Associate Solicitor for Special Appellate and Supreme Court Litigation, and Deputy Associate Solicitor for Labor-Management Laws. She also worked as a Supervisor in the Appellate Court Branch at the National Labor Relations Board from 1978 to 1983, and as a staff attorney in the Appellate Court Branch and the Office of Appeals from 1973 to 1978. She earned her J.D. from George Washington University (GWU) in 1974, and she received a Bachelor of Arts degree in English from GWU in 1971.

**DAVID P. CLARK** was appointed to the Personnel Appeals Board in April 2014.

Mr. Clark became the Vice Chair of the Board in May 2016 and Chair of the Board in July 2017; he served as Chair until his term ended in April 2019. Mr. Clark received his law degree from American University Washington College of Law in 1997 as well as an M.A. in conflict resolution from American University School of International Service that same year. He began his career as an attorney-adviser to presidential appointees at the Federal Labor Relations Authority. He entered private practice in 2001, where he provides arbitration, mediation, facilitation, and conflict management services to companies, federal agencies, labor unions, and private individuals. As a mediator, Mr. Clark has presided over hundreds of workplace disputes involving employees and management. As an arbitrator, he presides over collective bargaining and other employment matters, as referred by the American Arbitration Association and the Federal Mediation and Conciliation Service, among others. Mr. Clark is a member of

the Bars of New York, New Jersey, and the District of Columbia, and is certified by the Commonwealth of Virginia to practice mediation.

**ROSA M. KOPPEL** was appointed to the Board in April 2017. Ms. Koppel has worked part-time in private practice representing federal and private sector employees in employment law matters since 2014. She served as Solicitor at the Federal Labor Relations Authority (FLRA) between 2008 and 2014, where she led the litigation team in matters before the U.S. Courts of Appeals, Federal District Courts, the Merit Systems Protection Board (MSPB), and the Equal Employment Opportunity Commission (EEOC). She has advised FLRA managers and human resources officials on cases involving Title VII of the Civil Rights Act, the Rehabilitation Act, the Equal Pay Act, the Age Discrimination in Employment Act, and the Family and Medical Leave Act. Previously she worked as the Deputy General Counsel and served as the Acting General Counsel at the MSPB between 2005 and 2008, where she led the team that handles appeals before the U.S. Court of Appeals for the Federal Circuit. Between 1984 and 2005, she worked at the Office of the Comptroller of the Currency (OCC), where she rose from trial attorney and legal advisor to the Assistant Director of the Litigation Division. She led the team that represented the OCC before federal and state courts as well as the MSPB, EEOC, and the General Services Board of Contract Appeals. Ms. Koppel received her J.D. from New York University School of Law in 1981 and her Bachelor's degree in Biology from New York University in 1977.

**BARBARA S. FREDERICKS** was appointed to the Board in January of 2019.

Ms. Fredericks is currently on the faculty of the Graduate School USA in Washington, D.C., teaching courses on topics of administrative law. She is also a consultant on the development of rule of law programs and civil service systems. Ms. Fredericks previously served as Assistant General Counsel for Administration at the U.S. Department of Commerce, responsible for advising management on labor issues and transparency. She also was the Department's chief ethics officer. Ms. Fredericks served on the Montgomery County Ethics Commission, and taught a course on Anticorruption Law and Practices at the Georgetown University Law Center. Earlier in her career, she served as Deputy Assistant General Counsel for Administration at the Department of the Treasury, and as a senior labor counsel at the U.S Postal Service and the National Labor Relations Board. Ms. Fredericks graduated from Boston University School of Law, after obtaining a B.A. at Case Western Reserve University.

**CAROLE W. WILSON** was appointed to the Board in April 2019. Ms. Wilson has served as a Contract Hearing Examiner (unfair labor practice, representation and mediation matters) for the District of Columbia Public Employees Relations Board since 2014. Previously, Ms. Wilson served in various supervisory attorney positions at the Department of Housing and Urban Development (most recently as Senior Counsel; previously as Associate General Counsel for Litigation; Associate General Counsel for Finance and Regulatory Enforcement; Associate General Counsel for Fair Housing;

Associate General Counsel for Human Resources Law; and Senior Attorney for Administrative Law) from 1989-2011. She also served as an Associate General Counsel for the International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers from 1978-1989. Ms. Wilson was the Executive Assistant to the Assistant Secretary for Employment Standards, U.S. Department of Labor, 1977-1978. She also served as an Assistant General Counsel at the National Labor Relations Board. Ms. Wilson earned her J.D. from George Washington University Law School, where she was Managing Editor of the George Washington International Law Review, and her Bachelor's degree in Political Science from Vassar College.



## **PERSONNEL APPEALS BOARD**

Richard S. Ugelow	<i>Chair</i>
Carol A. De Deo	<i>Vice Chair</i>
David P. Clark*	<i>Member</i>
Rosa M. Koppel	<i>Member</i>
Barbara S. Fredericks**	<i>Member</i>
Carole W. Wilson***	<i>Member</i>

## **PERSONNEL APPEALS BOARD STAFF**

Susan P. Inzeo	<i>Executive Director</i>
Vanessa H. Gallagher	<i>Director, EEO Oversight</i>
Sue S. Farley	<i>Solicitor</i>
Kevin P. Wilson	<i>Senior Staff Attorney</i>
Patricia V. Reardon-King	<i>Clerk of the Board</i>
Stuart Melnick	<i>General Counsel</i>
Frank J. Mack	<i>Senior Trial Attorney</i>
Brian Nuterangelo	<i>Senior Trial Attorney</i>
Darian C. Jackson	<i>Paralegal Specialist</i>

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\* David P. Clark's term ended on April 3, 2019.

\*\* Barbara S. Fredericks joined the Board on January 15, 2019.

\*\*\* Carole W. Wilson joined the Board on April 15, 2019.

## CHAPTER 1: THE PERSONNEL APPEALS BOARD

### Section 1: About the PAB

Under the Government Accountability Office Personnel Act of 1980 (GAOPA),<sup>1</sup> the Personnel Appeals Board (PAB or 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, negotiability and unfair labor practices involving employees of the U.S. Government Accountability Office<sup>2</sup> (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.<sup>3</sup>

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

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<sup>1</sup> 31 U.S.C. § 731 *et seq.*

<sup>2</sup> In July 2004, the Agency's name changed from the General Accounting Office to the Government Accountability Office. Pub. L. No. 108-271 (Jul. 7, 2004).

<sup>3</sup> 31 U.S.C. § 732(f)(2)(A).

<sup>4</sup> 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. The PAB has similar jurisdiction to hear and decide matters alleging prohibited personnel practices under 5 U.S.C. § 2302(b). 4 C.F.R. § 28.2(b)(2). The PAB also has similar review and study authority over GAO with regard to assessing the EEO impact of GAO's actions and/or inactions. *See supra*, n.3.

Opportunity Commission (EEOC);<sup>5</sup> and the Federal Labor Relations Authority (FLRA).<sup>6</sup>

The PAB's Office of General Counsel (PAB/OGC) performs the investigatory and prosecutorial functions of its Executive branch equivalents, such as the Office of Special Counsel (OSC)<sup>7</sup> and the EEOC.

The statute provides for a Board comprised of five members who serve five-year, nonrenewable terms. The members serve as the Administrative Judges (AJs) for the PAB. The system is designed to appoint a new member each year so that GAO may have an annual scheduled recruitment process and the Board may function as efficiently as possible with members' terms evenly spread over time.

Candidates for the Board 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 labor or employment law,

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<sup>5</sup> The EEOC ensures that personnel actions affecting employees or applicants for employment in the Executive branch "shall be made free from any discrimination based on race, color, religion, sex (including pregnancy), or national origin." 42 U.S.C. § 2000e-16(a) (Title VII). In addition, the EEOC enforces the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, as amended, and the Genetic Information Nondiscrimination Act, 42 U.S.C. §§ 2000ff *et seq.* The PAB has similar jurisdiction to hear and decide cases alleging discrimination. 4 C.F.R. §§ 28.95-28.99.

<sup>6</sup> The FLRA protects the "rights 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 PAB also has the authority to certify collective bargaining representatives and to adjudicate unfair labor practices. 4 C.F.R. §§ 28.110-28.124.

<sup>7</sup> The OSC investigates and prosecutes allegations of fourteen prohibited personnel practices, with an emphasis on protecting federal whistleblowers. 5 U.S.C. §§ 1214, 2302(b). The Board's General Counsel investigates and prosecutes allegations of prohibited personnel practices. 4 C.F.R. § 28.12.

demonstrated ability to arbitrate or adjudicate complex legal matters, or 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.<sup>8</sup> An interview panel composed of some of the screening panel members, including one employee group member selected by the Employee Advisory Council representatives and one selected by the representatives of the GAO Employees Organization, conducts the personal interviews and reports its results to the full screening panel. The screening 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, generally on an annual basis.

## **Section 2: Board Staff**

The Executive Director manages Board staff and operations. The Board's Solicitor and Senior Staff Attorney advise Board members and the Executive Director on legal matters and provide procedural advice to litigants before the Board. The Director of the Office of Equal Employment Opportunity (EEO) Oversight reviews equal

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<sup>8</sup> 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, a representative from the Human Capital Office, and four representatives selected by the GAO Employees Organization, IFPTE, Local 1921. GAO Order 2300.4, "Personnel Appeals Board Vacancies," ¶ 7 (Nov. 4, 2009).

employment opportunity practices and procedures at GAO and issues evaluative reports that contain the Board's findings, conclusions, and recommendations to the Agency.<sup>9</sup> The Clerk of the Board is responsible for receiving filings, distributing orders and decisions, and maintaining official records.

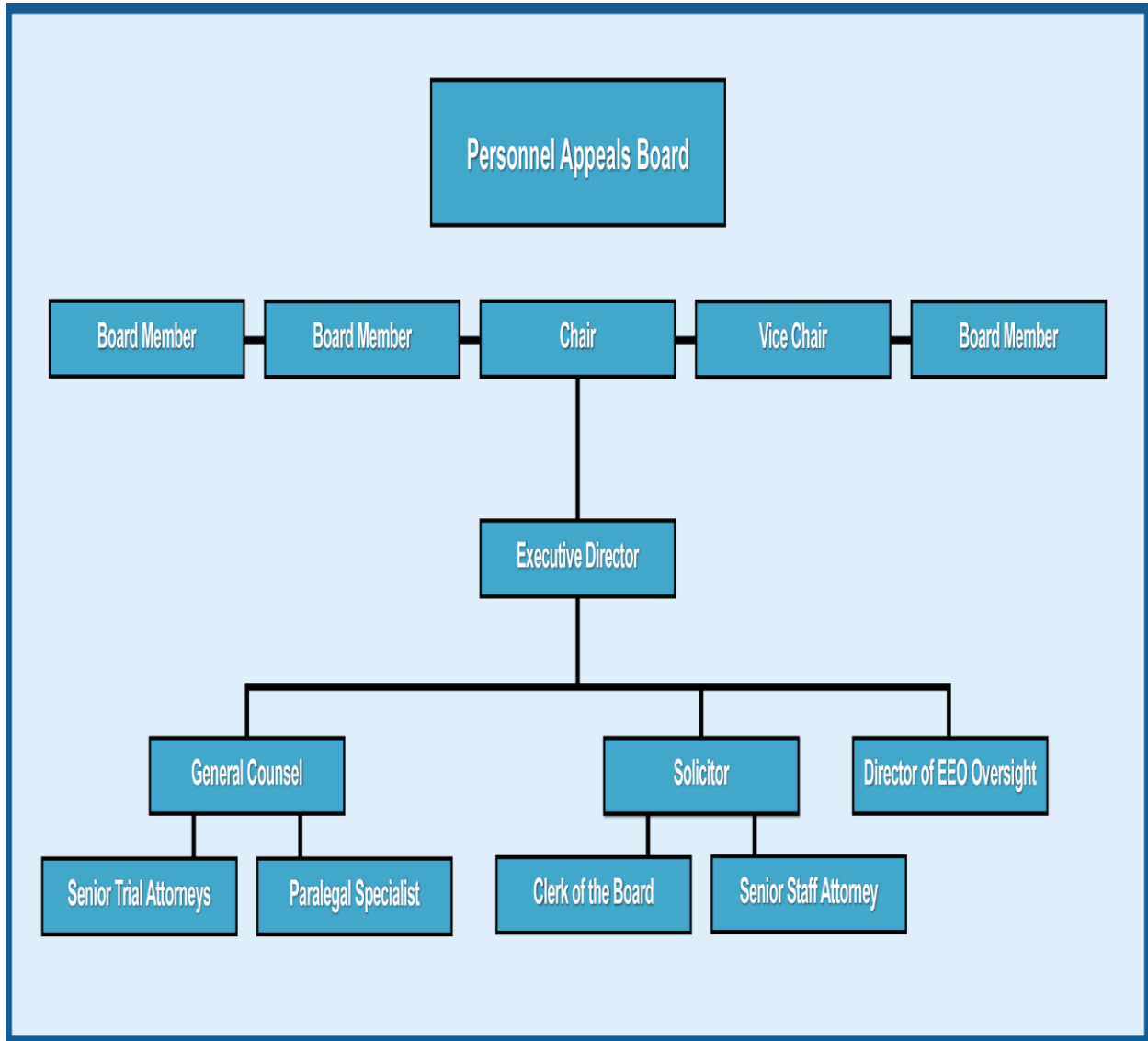
The PAB Office of General Counsel (PAB/OGC) investigates charges of prohibited personnel practices and unfair labor practices filed with its office and, if there is a reasonable basis to believe that a violation of law has occurred, offers to represent the charging party in litigation before the Board. The PAB General Counsel (PAB/GC) supervises the attorneys and paralegal in the conduct of investigations and litigation matters. The Trial Attorneys investigate charges, consult with the General Counsel, and represent employees in litigation before the Board. The Paralegal Specialist assists with PAB/OGC investigations and litigation matters.

Figure 1 on the following page shows the organizational make-up of the Personnel Appeals Board.

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<sup>9</sup> 31 U.S.C. § 732(f)(2)(A); see 4 C.F.R. §§ 28.91 and 28.92.

**Figure 1: PAB Organizational Chart**



## CHAPTER 2: THE BOARD PROCESS

The Board's litigation process is explained in detail in the *Guide to Practice Before the Personnel Appeals Board (Guide to Practice)*;<sup>10</sup> a brief summary follows.

An employee, a group of employees,<sup>11</sup> a labor organization, or an applicant for employment at GAO may file a Petition with the Board seeking review of an 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-management relations issue; (4) an action involving prohibited discrimination;<sup>12</sup> (5) prohibited political activity; and (6) any other personnel

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<sup>10</sup> The *Guide to Practice* is available on the PAB's website: <https://pab.gao.gov>.

<sup>11</sup> The Board can hear and decide cases filed by a group of petitioners as well as actions filed on behalf of a class.

<sup>12</sup> The complete procedures for filing a discrimination complaint with the Agency may be found in GAO Order 2713.2, "Discrimination Complaint Resolution Process" (Dec. 9, 2009) (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, ¶ 4, 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.

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.<sup>13</sup> The Board also plays a role in resolving impasses in collective bargaining, as well as in resolving certain negotiability issues.<sup>14</sup>

## **Section 1: Filing with 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.<sup>15</sup> The

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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 in part (GAO Order 2713.2, ch. 6, ¶ 4), or by filing a civil action in the appropriate federal district court. An individual may also bring their case forward to the PAB when more than 120 days have elapsed since the complaint was filed with O&I and GAO has not issued a final decision.

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.

<sup>13</sup> The Board's *Guide to Labor-Management Relations Practice* is available at <https://pab.gao.gov>.

<sup>14</sup> See GAO Order 2711.1, "Labor-Management Relations" (Aug. 14, 2013); 4 C.F.R. §§ 28.110 –28.124.

<sup>15</sup> See <https://pab.gao.gov> under the link to Charges/Filing



PAB/OGC has authority to investigate charges, and to represent an employee where the General Counsel finds reasonable grounds to believe the charge regarding 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's rejection of the complaint in whole or in part, within 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.<sup>16</sup>

Once an individual charge is filed with the PAB/OGC, the charging party is advised of his/her rights and informed of the Board's mediation program.<sup>17</sup> 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.

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<sup>16</sup> See *supra*, at 5 n.12.

<sup>17</sup> Information about the Board's mediation program can be found on the PAB website at <https://pab.gao.gov>.

Following the investigation, if no settlement occurs, the 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 alone a confidential Statement of Investigation that includes the results of the investigation and the PAB/OGC's conclusions with regard to 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.

## **Section 2: The Board Case Process**

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 the PAB/OGC and no Right to Petition Letter has been issued by the General Counsel, the employee 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 his/her case to the Board.

Upon receipt of a Petition, either a single Board member will be appointed to hear and decide the case or 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 work and conclusions of the PAB/OGC; the Administrative Judge may not know whether the PAB/OGC found reasonable grounds to believe a violation existed in a given case.<sup>18</sup>

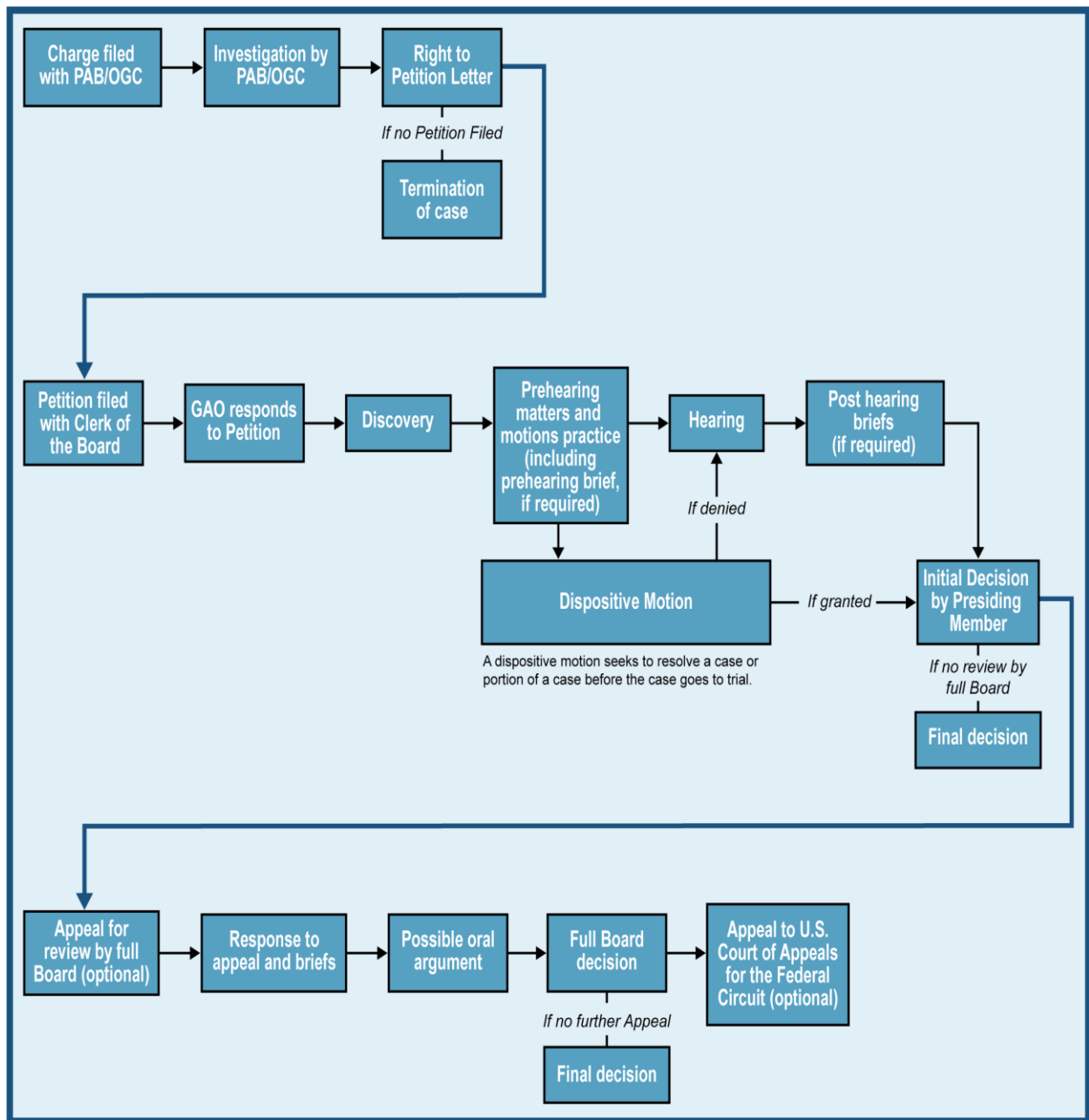
A Board member's decision is final unless: 1) the Board member grants a party's motion to reconsider; 2) the Board, on its own motion, decides to review the initial decision; or 3) a party timely appeals to the Board for full Board review. Final decisions of the full Board, with few exceptions, may be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

The following chart describes the Board process from the time a charge is filed through the completion of all adjudication.

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<sup>18</sup> If a Petition is filed *pro se* or Petitioner is represented by outside counsel, the Board has no information regarding why PAB/OGC is not representing Petitioner. However, if Petitioner is represented by PAB/OGC, presumably under the regulations the General Counsel has determined that there is/are reasonable ground(s) for representation. In any event, Petitioner's representation is not a factor in the Board's final decision.

**Figure 2: Board Process Illustrated**



### **Section 3: PAB Office of General Counsel Authority**

#### **a. PAB/OGC Investigative Authority**

As discussed above, the PAB/OGC 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 the PAB/OGC. In addition to investigations generated by individual or class charges, the PAB/OGC may initiate its own investigations, otherwise known as “corrective actions.”<sup>19</sup> 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. Under this procedure, if an individual brings an allegation to the attention of the 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 a reasonable period, the PAB/OGC may petition the Board to order corrective action.

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<sup>19</sup> 4 C.F.R. § 28.131.

**b. PAB/GC Stay Requests**

The PAB/GC 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 PAB/GC's judgment, may constitute a prohibited personnel practice.<sup>20</sup> If the request for an *ex parte* stay is granted, the General Counsel may later request either a further temporary stay or a permanent stay of the proposed action. A further temporary stay may be granted if the Board member designated by the Chair, or the Board *en banc*, determines that, under all of the circumstances, the interests of justice would be served by providing more time for the PAB/GC to pursue the investigation.<sup>21</sup> 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 denying 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.

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<sup>20</sup> The Board's stay authority does not extend to any reduction in force action. 31 U.S.C. § 753(b).

<sup>21</sup> 4 C.F.R. § 28.133(d).

**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 complaint of the determination and facts to the employee and the Board.<sup>22</sup> The authority to propose disciplinary action includes action for engaging in prohibited political activity.

If, after a hearing, the Board decides discipline is warranted and 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 and GAO Order 2711.1, 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 with 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

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<sup>22</sup> 4 C.F.R. § 28.132.

petition. In addition, the PAB/OGC is responsible for investigating unfair labor practice charges filed with the Board.



## **CHAPTER 3:      ACTIVITY OF THE PAB – 2019**

### **Section 1:   Labor-Management Relations**

The GAO Employees Organization, IFPTE Local 1921 (Union), had four labor-management relations matters before the Board in 2019. Two of those matters were continued from the previous calendar year.

The first labor-management relations matter still pending from 2018 involved a Petition to consolidate two separate bargaining units of the Union—the Analysts Bargaining Unit and the Administrative and Professional Support Staff (APSS) Bargaining Unit. In its Report of Recommendations, the PAB/OGC recommended that the Board: issue a finding that consolidation of the two units was appropriate; order that employees be made aware of their right to request an election on the proposed consolidation, and if 30% of the employees made such a request that an election be held; and order an election for the professional employees to determine whether they wished to be consolidated with non-professional employees. The Agency did not oppose the Petition.

On January 17, 2019, the Board issued a Decision and Order concluding that the proposed Consolidated Unit was an appropriate bargaining unit. The Board found that because both existing bargaining units were already mixed units of professional and non-professional employees, a separate election for the professional employees was not necessary. However, the Board ordered that a notice be posted to allow employees of the proposed consolidated unit to request an election upon a 30% showing of interest. The Notice was posted, but fewer than 30% of the employees requested an

election by the deadline. On March 27, 2019, the Board issued an Order consolidating the Analyst Unit and the APSS Unit into a single Consolidated Bargaining Unit.

The second labor-management relations matter continued from 2018 involved review of a Negotiability Petition regarding transit subsidies. GAO provides employees subsidies for the use of mass transit as outlined in the Collective Bargaining Agreement and GAO Order 2820.1, "Transit Benefit/Headquarters SmartBenefits Program" (Sept. 11, 2008). In this matter, the Union disagreed with the Agency's written declaration of non-negotiability concerning three proposals and contended that all of its proposals on transit subsidies were negotiable. The Agency had implemented a maximum distance limitation, restricting transit benefit subsidies to those portions of a commute that fall within the "local travel area." The Agency asserted that it could not negotiate proposals which were outside the law and that it was not within the law to reimburse employees for long distance commutes. For that reason, GAO viewed the proposals as non-negotiable.

The Union requested that the Board order the Agency to participate in negotiations on the three proposals the Agency deemed non-negotiable: 1) to reimburse employees for commuting to the fullest extent permissible by law; 2) to define the commuting area as any location accessible by qualified mass transit; and 3) to delay implementation of the change in transit benefits until after negotiations were completed. On March 7, 2019, the Administrative Judge (AJ) issued a Decision holding that all the proposals were negotiable. The Agency had conceded that the first proposal was negotiable. The Decision found that the remaining two proposals at issue were negotiable because the Agency was only required to negotiate within the bounds of the

law. The Board ordered GAO to negotiate on the proposals upon request by the Union. The Agency did not appeal the Decision.

The Board received an Unfair Labor Practice (ULP) Petition on June 3, 2019, when the Union asserted that GAO had unilaterally implemented a policy restricting the availability of episodic telework during maternity and/or paternity leave for Professional Development Program (PDP) employees. The Union claimed that GAO failed to notify its employees of the new policy and discriminated against affected employees by discouraging episodic telework because of pregnancy, sex, and family status in violation of GAO Order 2300.5 and the Collective Bargaining Agreement. The Union subsequently filed a Notice of Withdrawal seeking dismissal of the case with prejudice. The AJ granted the request and dismissed the case with prejudice.

On August 14, 2019, a second ULP Petition was filed with the Board. The Union alleged the Agency had refused to participate in negotiations on proposals related to changes in the Agency's transit benefits program in violation of statute and the March 7, 2019 PAB Order on negotiability. In this ULP matter, the Agency's refusal to file a formal response to the Union's Petition resulted in the Union filing a Motion for Default Judgment on September 24, 2019, followed by a Request for Expedited Ruling and Notice of Relevant Development on October 16, 2019. The Board issued an Order to Show Cause on October 21, 2019, ordering the Agency to explain why the Motion for Default Judgment should not be granted because of the Agency's failure to file a formal response to the Motion. The Union subsequently filed a Motion for Sanctions on November 1, 2019. In lieu of a response to the Motions, the Agency submitted a letter stating that it would not be filing any formal responses with the Board. After review of

the matter, the full Board issued a Decision and Order on the Union's Motion for Default Judgment and Motion for Sanctions. In that Decision the Board granted both Motions and ordered the Agency to meet with the Union, issue a Notice to All Employees, retroactively apply transit subsidies, and pay attorney fees. The matter was still before the Board at the close of 2019.

## **Section 2: Employment Case Activity**

### Summary of Cases

In addition to the four labor-management relations cases discussed above in Section 1, there were four employment matters before the Board in 2019. Two of those involved Petitions pending from the previous calendar year.

#### **a. Petitions Before the Board**

The first Petition pending from 2018 was filed by the PAB/OGC on behalf of Petitioner, alleging that the Agency committed prohibited personnel practices in violation of 5 U.S.C. § 2302(b)(12). Petitioner claimed that the Agency would not release a copy of its investigative report regarding her discrimination complaint unless she first signed a non-disclosure agreement (NDA). Petitioner believed this requirement violated GAO Order 2713.2, "Discrimination Complaint Resolution Process" (Dec. 9, 2009). Petitioner also alleged that GAO violated 31 U.S.C. § 732(a) by requiring complainants to sign an NDA prior to receiving their Reports of Investigation without first complying with the

mandatory notice and comment period before implementing such a policy. Petitioner filed a Motion for Summary Judgment requesting that the Board issue an Order directing the Agency to comply with the requirements of GAO Order 2713.2, and provide her with a copy of its investigative report without having to sign an NDA.

On January 10, 2019, the AJ granted Petitioner's Motion for Summary Judgment in part, and denied the Motion in part. A Motion for Partial Reconsideration was timely filed thereafter requesting leave to amend the Petition to include a claim for damages under 5 U.S.C. § 1214(g). GAO did not oppose the Motion, and the AJ granted the Motion allowing Petitioner to amend her Petition. On February 19, 2019, Petitioner filed a Notice of Voluntary Dismissal of Claims for Pecuniary Damages. The AJ dismissed the claims but allowed fifteen days for appeal of the initial decision. There was no further activity on this matter.

The second Petition continued from 2018 and filed by the PAB/OGC alleged that the Agency committed prohibited personnel practices in violation of 5 U.S.C. §§ 2302(b)(9) and (12). Specifically, Petitioner alleged that the Agency denied her education and training opportunities during a detail in violation of GAO Order 2410.1, "Continuing Professional Learning and Development at GAO" (Mar. 6, 2017). She also alleged that the Agency significantly changed her working conditions as reprisal for having engaged in protected activities. The Agency filed a Motion for Summary Judgment arguing that Petitioner failed to establish that a personnel action was taken against her, and even assuming that a personnel action had occurred, Petitioner's protected activity was not a significant factor in the actions taken. On February 1, 2019, the AJ granted the Motion for Summary Judgment and found that Petitioner failed to

establish that a personnel action occurred, because she could not show that she was denied training or education that may reasonably be expected to lead to a promotion or establish a significant change in working conditions. The AJ also denied Petitioner's Request for Discovery under Rule 56(d) because she failed to meet the requirements needed to establish that additional discovery would lead to disputable facts. There was no further action taken on this case.

On November 26, 2019, the PAB/OGC filed a Petition on behalf of Petitioner who claimed that the Agency committed a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(12). The Petitioner claimed that the Agency violated GAO Order 2713.2 when the GAO Office of Opportunity and Inclusiveness (O&I) unilaterally held the investigation of a disability complaint filed by Petitioner in abeyance until the investigation in a separate constructive discharge matter was completed by the PAB/OGC. Petitioner further claimed that O&I modified GAO Order 2713.2 without following the proper notification and comment process. In lieu of a response to the Petition, the Agency filed a Motion to Dismiss the case on the basis that it believed Petitioner failed to allege the necessary elements of the claim under 5 U.S.C. § 2302(b)(12). This case was still pending at the close of 2019.

On December 10, 2019, a Petition was filed by the PAB/OGC on behalf of a Petitioner who alleged that the Agency violated the Americans with Disabilities Act, as amended, 42 U.S.C. §§ 12101-12213, when it denied Petitioner's request for a reasonable accommodation to address his difficulties working in the GAO headquarters building as a result of his allergies and asthma. Petitioner claimed GAO failed to provide an effective reasonable accommodation in the form of a telework arrangement

that would have permitted him to perform the essential functions of his position. In December 2019, a motion to extend the deadlines in this case was filed and granted. At the close of 2019, the case was still in the discovery stage before the Board.

**b. Stay Requests**

There were no *Ex Parte* Requests for Stays filed with the Board and no pending Stays before the Board in 2019.

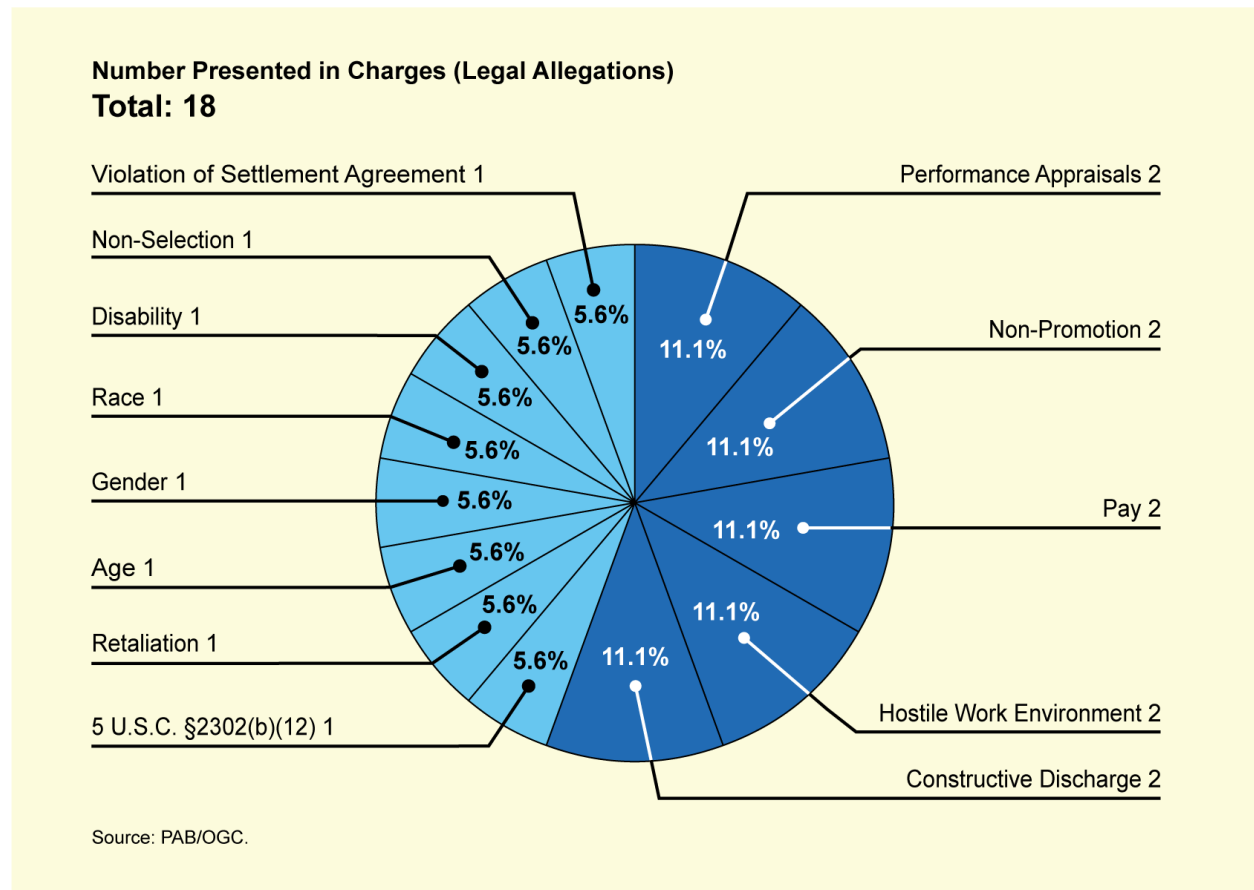
**Section 3: PAB Office of General Counsel Activity**

**a. Case Activity**

**(1) Charges**

From January 1, 2019 through December 31, 2019, eleven charges were filed with the PAB/OGC. Those charges involved eighteen allegations falling into thirteen categories. Figure 3 illustrates a breakdown of the different allegations presented in the charges filed with the PAB/OGC.

**Figure 3: Legal Allegations Presented in Charges**



During 2019, the PAB/OGC had a total of twenty-nine open cases on its docket, including investigation and litigation matters. The PAB/OGC closed a total of twenty-one cases by the end of the calendar year. Of those closed cases, fifteen were investigations and three were litigation matters. At the end of 2019, eight open cases remained on the PAB/OGC docket. The PAB/OGC was involved in a total of six cases that settled during 2019. In those cases, the PAB/OGC settled or facilitated settlement with the parties during the investigation stage.



## ***(2) Litigation***

The PAB/OGC participated in a total of five cases before the Board in 2019. Two of those cases were new Petitions filed with the Board during the year. The first new case the PAB/OGC filed with the Board involved allegations of constructive discharge, disability discrimination, failure to accommodate and prohibited personnel practice. The second case involved reasonable accommodation and telework. Both of the investigations conducted by the PAB/OGC were initiated by employees who filed charges with the PAB/OGC.

The PAB/OGC had three corrective action matters on its case docket during 2019. One corrective action which had been pending from a previous year was initiated to determine if certain promotions on one of the mission teams violated 5 U.S.C. § 2302(b)(12). That investigation was still pending at the close of 2019.

During 2019, the PAB/OGC initiated two new informational corrective action investigations. The first one involved concerns raised by employees on a particular mission team about performance ratings. During the investigation, a settlement agreement was reached. The PAB/OGC monitored compliance with the settlement agreement, and on December 3, 2019, the investigation was closed. No further action was taken. The second corrective action investigation involved allegations of a prohibited personnel practice in a hiring decision on one of the mission teams. At the close of 2019, this matter was still pending.

Under the GAOPA, the PAB/OGC has the authority to propose disciplinary actions if warranted. During this calendar year, PAB/OGC did not propose any disciplinary actions.

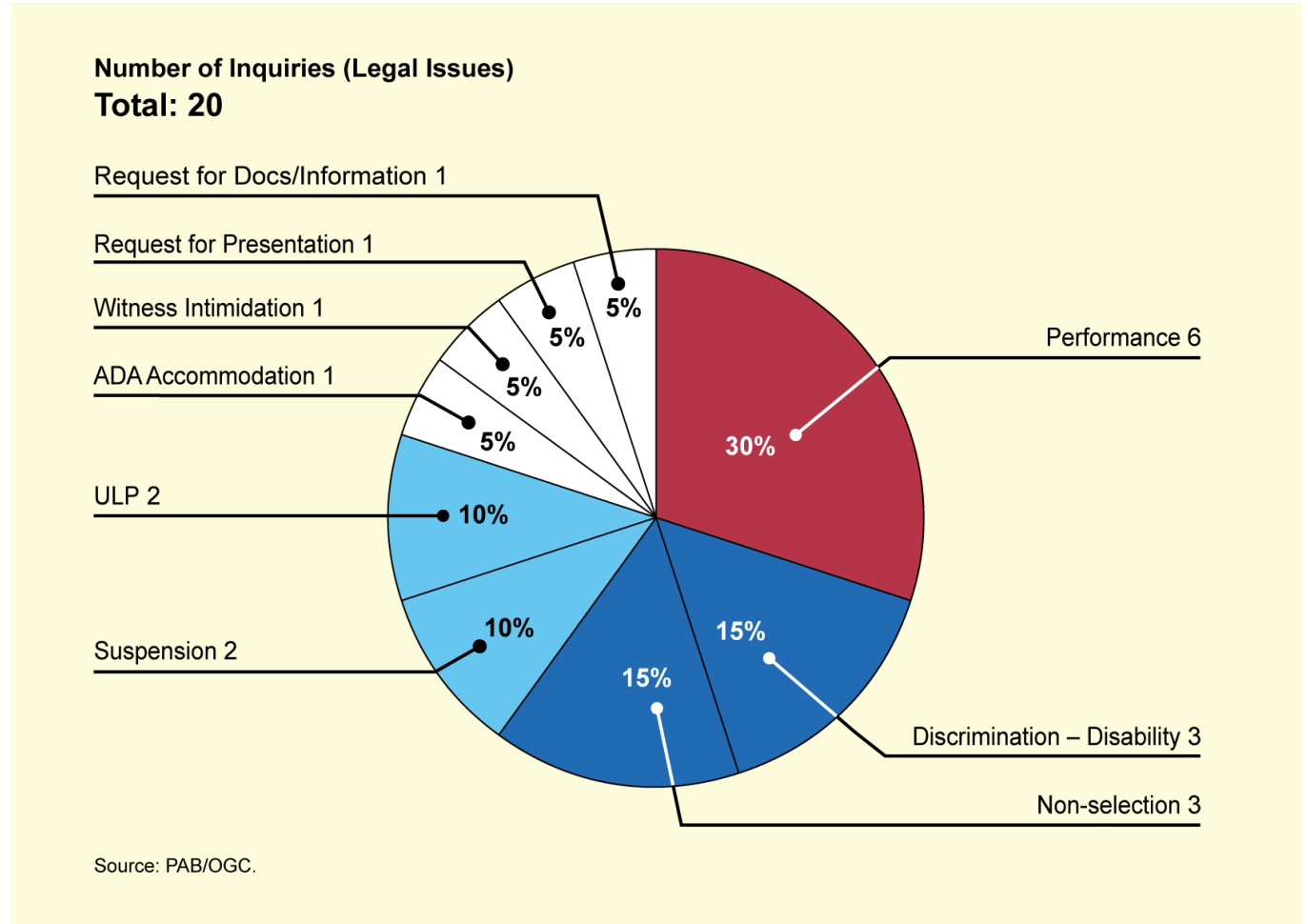
## **b. Other Activity**

During 2019, the PAB/OGC participated in two presentations. The first presentation was an overview of the PAB/OGC's role and how it addresses charges of discrimination and prohibited personnel practices. The second involved a meeting with the Advisory Council for People with Disabilities (ACPD). At that meeting, the PAB/OGC discussed rights and entitlements under various federal employment laws with members and officers of the ACPD.

The PAB/OGC submitted detailed comments on the Board's "Study on Disability and Reasonable Accommodation in the GAO Workforce" in 2019, and submitted material about its processes to be included in the Board's internal Operations Manual. The PAB/OGC did not comment on any proposed revisions to GAO Orders or legislation in 2019.

The PAB/OGC regularly provides information or informal advice to GAO employees about their personnel, labor and equal employment opportunity rights. This is accomplished by responding to informational inquiries received by phone, email, or through in-person meetings. The PAB/OGC fielded twenty informational inquiries during 2019. The types of inquiries and the number by type are shown below in Figure 4.

**Figure 4: Inquiries to PAB/OGC by Legal Issues**



## Section 4: Office of EEO Oversight Activity

The GAO Personnel Act of 1980 authorizes the Personnel Appeals Board to oversee equal employment opportunity at GAO through review and evaluation of GAO's procedures, policies, and practices.<sup>23</sup> To fulfill this mission, the Board established an Office of EEO Oversight to conduct studies of selected issues and prepare evaluative reports that contain its findings, conclusions, and recommendations to the Agency.<sup>24</sup> In 2019, the Board finalized and issued its *Study on Disability & Reasonable Accommodation in the GAO Workforce*.

### Overview of the Americans with Disabilities Act of 1990, as Amended

Modeled after regulations implementing the Rehabilitation Act of 1973, Title I of the Americans with Disabilities Act of 1990 (ADA) allows for administrative claims of workplace discrimination based on disability with protections that extend to GAO employees.<sup>25</sup> Title I of the ADA protects against discrimination on account of a disability during job application procedures, hiring, advancement, and separation procedures, as well as job training and other conditions of employment. The law requires an employer to provide effective reasonable accommodation, upon request, for people with disabilities.

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<sup>23</sup> 31 U.S.C. § 732(f)(2)(A); see applicable regulations at 4 C.F.R. §§ 28.91, 28.92.

<sup>24</sup> The Board's oversight reports can be found at <https://pab.gao.gov> under the link to EEO Oversight.

<sup>25</sup> The Rehabilitation Act of 1973 applies to Executive branch employees.

“Reasonable accommodation,” under the ADA, is an exception made to normal operating procedures that can change the way a person performs his or her job. A person must establish that they have an “actual disability” or a “record of disability” to qualify for reasonable accommodation under the law. Modifications in the workplace through reasonable accommodation may allow equal employment opportunity for people with disabilities to apply for a job, perform the essential functions of their job, enjoy equal access to the benefits and privileges of employment, and meet the normal performance requirements of a position.<sup>26</sup>

In enacting the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), Congress clarified its intention that the term “disabled,” as used in the ADA, should offer protections for people with disabilities similar to those provided for people who were “handicapped,” as previously used in the Rehabilitation Act. This expanded the legal interpretation of eligibility for coverage under the ADA: Focus shifted away from extensive analysis of the actual effect of an individual’s disability, and toward providing accommodation for disability, without regard to the ameliorative effects of mitigating measures. This shift in analysis from the ADAAA allowed more individuals to qualify for protection against discrimination on the basis of disability within the meaning of the ADA. It also increased the number of people for whom the Agency is required by law to provide requested reasonable accommodation.

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<sup>26</sup> Reasonable accommodation is not meant to impose undue hardship on an employer. 42 U.S.C. § 12112.

## Study Objective

The objective of the Board's study was to conduct a legal review of applicable GAO policies, procedures, and practices, to determine whether they are consistent with the Agency's obligations to comply with the requirements of the ADA, a decade after the ADAAA came into effect. The study also aimed to measure GAO's employment of people with disabilities during the fiscal years under study, and compare GAO's numbers with similar data from the federal civilian workforce. At the time the study was conducted, the Executive branch goals for inclusion of qualified people with disabilities in employment, as set by the EEOC, were 12% for people with disabilities and 2% for the subset of people with targeted disabilities.<sup>27</sup>

In this context, the Board reviewed GAO's equal employment opportunity statement, Agency Orders, and Agency workforce plans and reports. The Board also reviewed available GAO personnel data relating to employment of people with disabilities across several fiscal years and compared this data, where possible, to similar figures from the civilian workforce. The Board further reviewed the Agency's process for handling reasonable accommodation requests, as well as personnel data related to such requests across a similar time period, to assess consistency with the law.

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<sup>27</sup> See EEOC Final Rule, 82 Fed. Reg. 654, 677-80 (Jan. 2, 2017) (codified at 29 C.F.R. § 1614.203) (applicable Jan. 3, 2018). A targeted disability is a subset of the larger disability category, which receives attention and recognition based on the theory that qualified individuals with certain targeted disabilities (such as partial or complete paralysis or missing extremities) can face heightened barriers to employment as compared to the larger set of individuals with disabilities in general. See OPM Standard Form 256.

## Findings

The Board's study found that GAO defines "disability" consistently with the broadened interpretation of the definition under the ADA, as amended by the ADAAA.<sup>28</sup> The study also found that the ADAAA is reflected in some GAO policies, procedures, and practices, but several relevant GAO Orders need prompt updating to include reference to the amended law. This could help enhance employee awareness of the protections against disability-based discrimination and better emphasize the Agency's commitment to provide reasonable accommodation to avert discrimination based on disability.

The Board's study also revealed that GAO's employment of people with disabilities falls below Executive branch goals for employment of people with disabilities across the fiscal years under review. The Board recommended that the Agency review and analyze the content of its policies, procedures, and practices to identify ways to be more competitive with other federal agencies in meeting federal goals for inclusion of qualified people with disabilities in employment.

The Board additionally reviewed GAO's structure in place for processing of requests for reasonable accommodation, which is an important step in compliance with the ADA, as amended. Modifications offered through GAO's reasonable accommodation program have involved adjustments to the duties of a job, or to where

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<sup>28</sup> Disability with respect to an individual is "(A) physical or mental impairment that substantially limits one or more major life activities of such an individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." ADAAA § 4(a) (amending 42 U.S.C. § 12102(1)).

or how the tasks of a job are performed.<sup>29</sup> GAO's Reasonable Accommodation Coordinator (RAC) prepares quarterly *Reports on Reasonable Accommodation* to document reasonable accommodation requests and the steps the Agency has taken to provide accommodation in response to those requests. Analysis of the RAC's *Reports on Reasonable Accommodation* across fiscal years 2012-2017 shows an increase in requests for reasonable accommodation by GAO's employees with disabilities from fiscal years 2012-2015, followed by a decline in fiscal year 2016, and an increase again in fiscal year 2017.<sup>30</sup>

Analysis of the data the Agency submitted to the Board for independent review and study across fiscal years 2009-2016 indicates the same general upward trend in the number of requests for reasonable accommodation by GAO employees with disabilities, with a decline occurring in fiscal year 2016. The Board's analysis also shows a general upward trend in requests for reasonable accommodation by separating GAO employees with disabilities across fiscal years 2010-2016. The data further reveal a vacillating upward and downward movement in the number of reasonable accommodation requests at the Agency from new hires across fiscal years 2009-2016.

Under the Agency's governing Order, a matter should be referred to GAO's Accommodation Committee for a final decision if the RAC determines that there is insufficient information to approve a request for reasonable accommodation. Further, if

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<sup>29</sup> Types of reasonable accommodation GAO has provided in the past include, but are not limited to: modifications for vision-related disabilities, hearing-related or communication-related disabilities, mobility or manual disabilities, and cognitive and developmental-related disabilities.

<sup>30</sup> GAO's reported approval rate for reasonable accommodation requests for people with disabilities across fiscal years 2012-2017 was between 75.54% and 88.79%.



the Accommodation Committee cannot reach a unanimous decision, under the Order, the RAC is to submit the request to the Agency's Chief Administrative Officer for a final decision. For complaints arising out of a decision on reasonable accommodation, GAO affords a requester the right to file a discrimination complaint with GAO's Office of Opportunity and Inclusiveness, and in some cases, the requester may also appeal a final decision to the Personnel Appeals Board or file a civil action in federal district court.

### Board Recommendations

The Board's study offered seven recommendations for GAO to enhance compliance with the ADA, as amended by the ADAAA:

- Develop and implement a Disability Plan, similar to plans under development in Executive Branch agencies, incorporating best practices for recruiting, hiring, retaining, and advancing qualified people with disabilities, as well as targeted disabilities, and announce the Agency's goals for employing people with disabilities, as well as targeted disabilities, during Town Hall meetings and through postings to GAO's internal and public websites;
- Undertake steps early in the Agency's recruitment and hiring process to increase awareness of: (a) its goals for hiring and retaining qualified people with disabilities and targeted disabilities; and (b) the extent of its reasonable accommodation program;
- Review and revise GAO policies, procedures, and practices, as necessary, to ensure they accurately describe the process by which people with disabilities may be hired at GAO;
- Increase responsibilities of the Human Capital Office, its Reasonable Accommodation Office, and the Office of Opportunity and Inclusiveness to: (a) strengthen efforts to track and measure progress toward the Agency's goals for hiring and retaining people with disabilities (recommended at 12% for disabilities and 2% for targeted disabilities); (b) request and collect feedback from people with disabilities submitting reasonable accommodation requests to identify opportunities for enhancement of the reasonable accommodation program; (c) report this information to the Comptroller General annually; and (d) consider adding an accounting or statistics professional to the Reasonable

Accommodation Office to assist in this endeavor while retaining confidentiality of disability records;

- Develop and advise the Board of a schedule for review and publication of revisions to GAO Orders relating to employment of people with disabilities and reasonable accommodation to ensure that GAO Orders: (a) timely reflect changes in law affecting the rights of people with disabilities; and (b) afford appropriate opportunity for employees with disabilities to advance;
- Review criteria for approval of reasonable accommodation requests to ensure the focus of review remains on *providing accommodation* (that does not cause undue hardship to the Agency) to qualified people with disabilities (rather than on assessing the level of disability);
- Include a direct link to GAO's Reasonable Accommodation resources on both the Agency's intranet and internet home pages to enhance ease of access to these resources.

The Board's study was specifically tailored to examine the Agency's legal compliance with the ADA, as amended by the ADAAA, which expanded the availability of reasonable accommodation for people with disabilities. The Board believes the Agency's consideration of its recommendations will enhance the work environment at GAO, foster the development and utilization of talent and potential of employees with disabilities, and assist the Agency in its efforts to further workplace goals of diversity, equity, and inclusion. This may serve to strengthen GAO's efforts to create a workplace that protects against disability discrimination, offers reasonable accommodation when appropriate, and allows for greater opportunity for employment of people with disabilities to assist in the Agency's work to improve federal government operations for the benefit of the American people.

## **Section 5: Special Projects**

### **a. Mediation Program**

The Board's mediation program<sup>31</sup> was established to provide employees, applicants, and the Agency a non-litigation avenue for handling disputes. The parties that participate in mediation are given the option to meet separately and/or jointly with a mediator. The mediator is a facilitator who has no power or role to impose a specific resolution, but rather is a skilled neutral trained to assist the parties in resolving their disputes. Participants in mediation explore and discuss alternatives to continuing their dispute, including the goal of reaching a voluntary, mutually satisfactory resolution. Further information about the mediation program can be found on the Board's website. The Board received no mediation requests in 2019.

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<sup>31</sup> See the Board's *Practice Guide to Mediation of Disputes at the Personnel Appeals Board*. The mediation guidelines can also be found on the PAB's website at <https://pab.gao.gov>.

**b. Website Developments**

The Board's website continues to be a valuable resource for information about the PAB.<sup>32</sup> The PAB's most recent Annual Report and EEO oversight studies are available exclusively on the website. In addition, the website allows individuals to research Board decisions by search terms within a decision, and to locate relevant decisions through topic searches. The website is updated regularly to include announcements as well as new decisions.

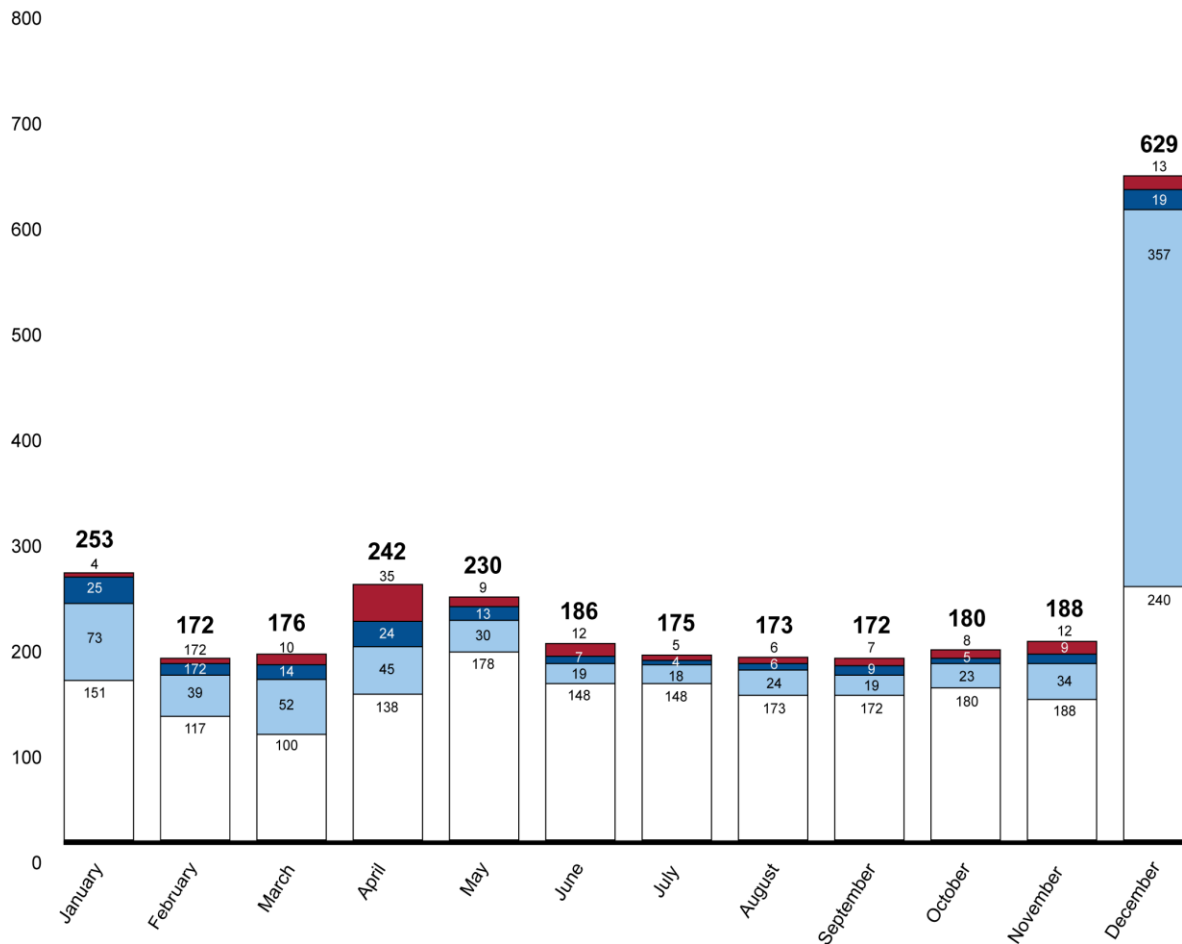
The 2019 statistics for usage of the Board's website represent the number of visitors for the first full calendar year using a new server and website address, which may have affected the number of visitors to the website. Tracking visitors to the PAB website nevertheless continues to be a useful tool for employees and Board staff. The PAB does not collect any personal data when tracking visits to the site. The chart in figure 5 below captures visitors' usage of the PAB website during 2019.

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<sup>32</sup> The website can be found at <https://pab.gao.gov>.

**Figure 5: Website Views in Calendar Year 2019**

Number of Views (Total: 2,776)



**Topics**

- Regulations (Total Views: 126)
- About the PAB (Total Views: 146)
- Decisions (Total Views: 773)
- Home Page (Total Views: 1,771)

Source: PAB/OGC.

**DATA: Website Views**

**c. Other Activity**

***(1) New Members***

As a result of the Agency's selection of two qualified individuals, there were two new appointments to fill two open seats on the Personnel Appeals Board in 2019. These individuals were selected from a considerable pool of qualified candidates. The two new members were sworn-in during separate ceremonies in the first half of 2019. Each will serve for a five-year term.

Swearing-in Ceremony for Barbara S. Fredericks – January 2019



Swearing-in Ceremony for Carole W. Wilson – April 2019



**(2) *The Diversity Hallway Fair***

The Board staff participated in the June 2019 GAO Annual Diversity Hallway Fair. The Board employees hosted an information table to answer questions posed by individuals regarding services the PAB offers to GAO employees and the role the Board plays in resolving employment and labor-management controversies at the Agency. Staff members provided informational handouts and copies of its *Guide to Practice*, *Guide to Mediation*, and *Labor-Management Relations Guide* during this event.