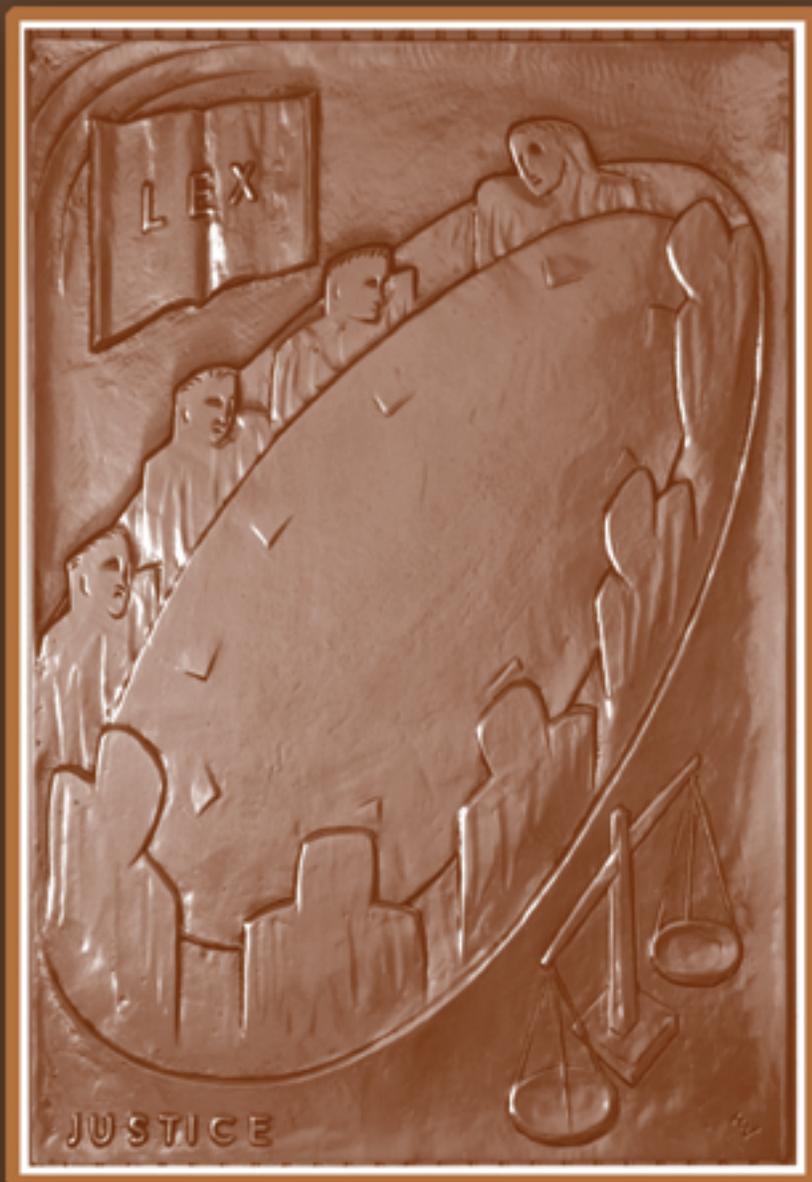


Personnel
Appeals
Board



STUDY OF
GAO'S OFFICE OF
OPPORTUNITY AND
INCLUSIVENESS



Personnel
Appeals
Board

February 20, 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 GAO's Office of Opportunity and Inclusiveness. The Board's conclusions and recommendations are contained in the attached report.

Sincerely,

Anne M. Wagner
Chair

attachment

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Figure 1: Complaint Processing Data, FY 1999 through FY 2002

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Background

In 1995, the Personnel Appeals Board (PAB or the Board) issued a report entitled *GAO's Discrimination Complaint Process and Mediation Program*. In its report, the Board took an in-depth look at the operation of the discrimination complaint process at the U.S. General Accounting Office (GAO or the Agency) from the initial contact with a counselor in the Civil Rights Office (CRO) through the issuance of the Agency's final decision. Based upon its review of GAO's process and the standards set out in the Equal Employment Opportunity Commission's (EEOC) regulations and directives, the Board made seven specific recommendations about the complaint process to the Agency that were designed to improve or fine-tune its system for resolving complaints of discrimination. In the same study and report, the Board also evaluated GAO's mediation program and made five recommendations to conform that program to widely accepted standards in use for alternative dispute resolution programs.

Prior to the issuance of the 1995 report, the Deputy Assistant Comptroller General for Human Resources announced, in pre-publication comments, that the Agency was taking immediate steps to implement eight of the Board's 12 recommendations and would

take the remaining four "under advisement."¹ In addition, GAO Order 2713.2, *Discrimination Complaint Process*, was revised in 1997 to address, in part, Board recommendations.

In 1998, the Board issued a follow-up report, in which it tracked the Agency's compliance with the Board's recommendations. By that time, the Agency had amended GAO Order 2713.2 to comply with two more of the Board's recommendations.²

In 2001, the name of the Civil Rights Office was changed to the Office of Opportunity and Inclusiveness (O&I) and its role in Human Capital programs and initiatives, both inside and outside the Agency, was expanded beyond the complaint processing, mediation, and affirmative action planning functions of its predecessor office. The Office currently plays a role in GAO's recruitment efforts, personnel operations, and training programs, and its Managing Director is designated as a "stakeholder"³ in any and all GAO projects that have an equal employment opportunity (eeo) or human capital component. The Managing Director also serves as a Key Effort Manager⁴ for certain selected strategic objectives in GAO's Human Capital initiatives.

¹ The remaining four areas concerned timeframes for final Agency decisions; the supervisory channel for the Director of CRO; the role of the Legal Services section of the Office of General Counsel in reviewing draft Agency decisions; and, appeal rights for breach of settlement agreements. Letter from John H. Luke, Deputy Assistant Comptroller General for Human Resources, (Oct. 5, 1995), printed in *GAO's Discrimination Complaint Process and Mediation Program*, Appendix II, p.35.

² Order 2713.2 was amended to provide for an appeal to the PAB for specific implementation of the terms of a settlement agreement (Ch. 7(2)(c)) and to set a 90-day time limit for the issuance of final Agency decisions.

³ GAO defines a stakeholder in a project as one "whose skills or knowledge is necessary to ensure quality work and its timely completion." GAO protocols require that stakeholders be involved from the initiation of a project and that they "participate in designing the engagement, including developing its methodology, collecting or analyzing information, developing the message, and drafting the product." *GAO's Engagement Management Process*, Glossary of GAO Terms, available at <http://gaoweb/> (GAO Intranet), *Guidance*, EAGLE (Electronic Assistance Guide for Leading Engagements) (last modified on Feb. 3, 2003).

⁴ At GAO, a key effort is a body of work that supports a performance goal. *Id.*, Glossary of GAO Terms. In this instance, the O&I Director works to further the Agency's Performance Goal 4, "Maximize the Value of GAO by Being a Model Federal Agency and a World-Class Professional Services Organization," *Strategic Plan, 2002-2007* (June 2002).

Jurisdiction

The General Accounting Office Personnel Act of 1980 (GAOPA) authorizes the Board to conduct oversight of GAO regulations, procedures and practices relating to laws prohibiting employment discrimination.⁵ The Board's regulations specify that the oversight function be carried out through a process of review and evaluation⁶ that the Board performs through the conduct of studies and the preparation of reports containing its findings, conclusions and recommendations.

Methodology

The Board's study of O&I began with a review of all relevant GAO orders, policy

statements, and internal memoranda relating to O&I and its functions during the time period covered by the study (January 1, 1999 through April 30, 2003). Board staff also requested data on complaints filed with or processed or dismissed by the Office, the number of people contacting the Office, as well as the number of mediations, informal resolutions, investigations, and settlements for the time period of January 1, 1999 through March 31, 2002. In addition, Board staff conducted interviews with O&I staff and the Managing Director of O&I; reviewed current EEOC policy and directives concerning complaint processing in the Federal sector; and reviewed past Board publications and recommendations on discrimination complaint processing at GAO.

⁵ 31 U.S.C. §732(f)(2)(A). See also 4 C.F.R. §§28.91, 28.92.

⁶ *Id.* at §28.92(b).

The Discrimination Complaint Process

GAO Order 2713.2 sets forth the procedures by which GAO employees may pursue discrimination complaints with the Civil Rights Office. In January 2001, the Comptroller General created the Office of Opportunity and Inclusiveness that subsumed the functions of the Civil Rights Office. The Order, which has not been updated since December 2, 1997, still contains the nomenclature of and references to the Civil Rights Office.⁷

Pre-Complaint Process

a) Coverage Afforded

Pursuant to Chapter 3 of GAO Order 2713.2, a GAO employee or applicant for employment with GAO may file an individual or class complaint of employment discrimination on the basis of race, color, religion, sex, national origin, disability, age, or retaliation for protected activity under Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act (ADA), or the Equal Pay Act or the Age Discrimination in Employment Act (ADEA)⁸ as appropriate.

On June 25, 1999, the Comptroller General issued a Memorandum directing that employees be given “the right to file a complaint with the Civil Rights Office when they believe discrimination has occurred based upon their sexual orientation.” GAO Order 2713.2 has not been revised to afford employees that right.

A number of other GAO orders were revised in 2001 and 2002, however, to indicate that

employees do have a right to file a complaint with O&I if they believe they have been discriminated against based on “race, color, religion, sex, national origin, age, disability, or sexual orientation, or retaliation for activities protected by the anti-discrimination statutes.”⁹ However, because GAO Order 2713.2 has not been revised to reflect this right, it would appear that employees do not have the option to file a discrimination complaint based on sexual orientation through O&I. It should also be noted that even if GAO Order 2713.2 is revised to include discrimination complaints based on sexual orientation, employees will not have the right to pursue their complaints beyond GAO’s administrative process because sexual orientation is not covered under the anti-discrimination statutes. In the Executive Branch, the fact that Title VII of the Civil Rights Act does not prohibit such discrimination precludes the EEOC from handling discrimination complaints based on sexual orientation.

The Office of Personnel Management (OPM) has determined that discrimination based on sexual orientation is a prohibited personnel practice.¹⁰ Similarly, a GAO employee or applicant may file a charge alleging a prohibited personnel practice based on an allegation of discrimination because of sexual orientation with the PAB/OGC.

b) Timeframes

An employee or applicant with a discrimination complaint has 45 days from the date of the discriminatory act or, if a personnel action, from the effective date of the action to

⁷ GAO Order 130.1.26, *Civil Rights Office*, remains in effect, as well, and was last updated on December 23, 1997. That Order describes the organization, mission, functions and responsibilities of the CRO.

⁸ ADA, 42 U.S.C. §§12112-14; Equal Pay Act, 29 U.S.C. §206(d); ADEA, 29 U.S.C. §§631, 633a. Other definitions of discrimination in the Order are consistent with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16.

⁹ See, e.g., GAO Order 2771.1, *Administrative Grievance Procedure* (December 3, 2001); Order 2432.1, *Dealing with Unacceptable Performance* (November 14, 2002), Order 2751.1, *Discipline* (May 21, 2001), Order 2752.1, *Adverse Actions* (July 23, 2001); and, Order 2711.1, *Labor-Management Relations* (April 27, 2001).

¹⁰ Prohibited personnel practices are defined at 5 U.S.C. §2302(b). See also, *Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee’s Rights*, U.S. Office of Personnel Management.

contact a civil rights counselor.¹¹ The 45-day time limit may be extended by the Director of the Civil Rights Office if the complainant can demonstrate that he or she did not know and reasonably should not have known that the discriminatory act occurred.¹² If an employee is affected by a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days, the employee may file a charge directly with the PAB without going to the CRO.

c) Counseling

At the initial counseling session, the CRO counselor is required to advise the employee in writing of (1) his or her right to file a notice of intent to sue under the ADEA; (2) duty to mitigate damages; (3) administrative and court timeframes; (4) limitation that like or related issues raised in pre-complaint counseling or mediation are the only matters that may be alleged in a subsequent complaint filed with GAO; and (5) the requirement to keep GAO informed of his or her current address. The counselor is also to discuss the mediation program and facilitate the informal resolution of the complaint through informal discussions with management officials involved.

The counselor is to conduct the final interview with the employee within 30 days of the initial counseling session.¹³ If the matter is not resolved the employee shall be informed in writing of the right to file a discrimination complaint. The notice will inform the person of the right to file a discrimination complaint within 15 days of receipt of the notice; the appropriate official with whom to file a complaint; the complainant's duty to ensure

that CRO is informed immediately if the complainant retains counsel or a representative; and the right to file a class complaint.

The civil rights counselor must not do anything to prevent the employee from filing a complaint. During the initial consultation and before the counselor attempts to resolve the matter the counselor may not reveal the employee's identity to anyone without the employee's permission. Within 15 days of the filing of the complaint, the counselor shall submit a written report to the CRO Director concerning the issues discussed and actions taken during counseling.

d) Dismissal

The Order enumerates the instances in which the CRO must dismiss a complaint or a portion of a complaint, e.g., failure to state a claim or stating a claim already pending before or already decided by the CRO, failure to comply with applicable time limits, the complaint is the basis of a charge that the complainant has filed with the PAB Office of General Counsel pursuant to Chapter 6, paragraph 4 of this Order,¹⁴ or alleging a matter not raised in pre-complaint counseling or mediation.

Chapter 5, paragraph of Order 2713.2 also allows for the Director of CRO to make a decision to dismiss a complaint that is the basis of a charge pending before the PAB's Office of General Counsel (PAB/OGC) in which the complainant is a party. The Order does not provide the bases for the exercise of discretionary dismissal.

¹¹ The EEOC has held that initiating contact with any agency official logically connected to the eeo process and exhibiting an intent to begin the eeo process satisfies the criterion of eeo counselor contact. *Kinan v. Dep't. of Defense*, EEOC No. 05990249 (May 6, 1999); *Floyd v. National Guard Bureau*, EEOC No. 05890086 (June 22, 1989).

¹² Ch. 3(1)(a)(2). The time may also be extended "for other good cause shown."

¹³ Prior to the end of the 30-day period, the employee may agree in writing to postpone the final interview and extend the counseling period for an additional 30 days. If the employee agrees to mediation, the complaint process can be extended up to 60 days.

¹⁴ That portion of GAO Order 2713.2 provides that an individual may file with the PAB/OGC: (1) within 30 days of receipt by the charging party of GAO's final decision or dismissal of a whole or a portion of the complaint; or (2) anytime after 120 days have elapsed from the date the complaint was filed provided that GAO has not issued a final decision.

The CRO is required to notify the complainant if his or her complaint or a portion of the complaint is dismissed and set forth the appeal rights and provide the reason for the dismissal.

Investigation

Pursuant to chapter 3, section 6, of GAO Order 2713.2, the Civil Rights Office is to develop a complete and impartial factual report upon which to make determinations regarding the issues raised in the written complaint.¹⁵ The complainant and involved management officials are required to produce any documentary or testimonial evidence that the investigator deems necessary. Investigators are authorized to administer oaths. If the complainant or management officials fail to respond fully and in a timely manner to requests for documents, the investigator may recommend that the Comptroller General or designee draw an adverse inference from the requested information, consider the matters to which the requested information pertains to be established in favor of the opposing party, issue a decision fully or partially in favor of the opposing party, and/or take other appropriate actions.

The Order requires that the CRO attempt to finish its investigation within 180 days of the filing of the individual complaint. Upon completion, CRO must so notify the complainant and provide him or her with a copy of the investigative file. The complainant is also to be notified that he or she has 30 days of receipt of the investigative file to note any deficiencies.

Final Decision

Paragraph 8(a) of chapter 3 of Order 2713.2 requires that the Comptroller General, or his designee, issue a final decision no later than 90 days after the complainant receives a copy of the investigative file. The final decision must contain a notice of final Agency action with a determination of whether discrimination was found. The decision must also include information regarding the complainant's rights, *i.e.* applicable time requirements, the right to file a lawsuit in a U.S. district court or to file a charge with the PAB/OGC. The CRO may extend the time frame for issuing a final decision for up to 60 days if conciliation is attempted.

Civil Actions and PAB Appeals

A complainant has a choice of filing a civil action in a United States Federal district court or filing a charge with the PAB/OGC. The complainant may file an action in Federal district court within 90 days of receiving GAO's final decision or dismissal of his or her complaint if a petition has not been filed with the PAB or after 180 days has elapsed from the date the complaint was filed if no final decision has been issued and a petition has not been filed with the PAB.

The complainant can also file a charge with the PAB/OGC within 30 days of receipt by the charging party of GAO's final decision or dismissal of a whole or portion of the complaint; or anytime after 120 days have elapsed from the date the complaint was filed provided that GAO has not issued a decision.¹⁶

¹⁵ As was the case with the CRO, O&I discrimination complaint investigations are conducted by contractors. Interview with Ronald A. Stroman, Managing Director, O&I, April 16, 2003.

¹⁶ An employee terminated as a result of a Reduction in Force (RIF) may file an appeal raising discrimination issues relating to the RIF action directly with the PAB without first filing a complaint with O&I or a charge with the PAB/OGC. See 4 C.F.R. §28.13.

Mediation

At GAO, a mediation program¹⁷ is available to individuals who want to resolve any work related concerns, including complaints not covered under the anti-discrimination statutes.¹⁸ Participation in mediation does not preclude pursuit of other administrative proceedings such as the grievance process. Timeframes for other administrative proceedings are extended until the end of the mediation if resolution is not reached. In discrimination complaints, mediation extends the pre-complaint stage for 60 days from the date of the initial mediation session.

At the initial mediation session the mediator must advise the complainant in writing of his/her rights and obligations including, *inter alia*, the discrimination complaint process, duty to mitigate damages, and administrative and court timeframes.

The mediation program is voluntary for GAO managers as well as complainants; either party may terminate the mediation at any time. The complainant does not waive any rights by participating in mediation. The process requires that a mediator not disclose any information communicated to him or her in confidence during the mediation, although the parties may agree as to what matters will not be disclosed. The mediator is not to be called as a witness in any administrative or court proceeding nor are any materials prepared by the mediator to be used as evidence in any proceeding.

Remedies

When GAO finds discrimination in an individual case, relief may include placement in the position the person would have occupied or a substantially equivalent position; backpay; attorneys' fees; and, any other appropriate relief sought. If the parties resolve the complaint, any settlement or mediated agreement knowingly and voluntarily agreed upon by the parties, reached at any stage of the complaint process, shall be binding on both parties. If the complainant believes that GAO has failed to comply with the terms of a settlement, a mediated agreement, or a final decision, the complainant shall notify the Director, CRO, in writing of the alleged noncompliance within 30 days of its occurrence. The Order directs the CRO to make a determination about whether there has been noncompliance and to notify the complainant in writing. The complainant may appeal a finding by the CRO to the PAB for specific implementation of the terms of the agreement.

Class Complaints

The procedure for filing a class eeo complaint varies slightly from that of an individual complaint. An employee who wishes to file a class complaint must still follow the same procedures as an individual would in the pre-complaint processing as described in Chapter 3, paragraph 1 of GAO Order 2713.2.

¹⁷ GAO Order 2713.2, ch.2.

¹⁸ For example, a person who believes he or she has been discriminated against due to his or her sexual orientation may seek mediation, even though he or she cannot file an eeo complaint under GAO Order 2713.2 and has no remedies under Title VII.

A class complaint must be signed by the class agent and by the representative. A class agent is a member of the class who acts for the class during the processing of the class complaint. The class representative must be an attorney and must enter his or her appearance and certify that he or she will fairly and adequately protect the class interests.

The complaint must also identify the policy or practice adversely affecting the class, as well as the specific action or matter affecting the class agent. The complaint must be filed with CRO no later than 15 days after the agent's receipt of the notice of right to file a class complaint.

After receipt of a class complaint, the CRO will forward the complaint, along with the copy of the civil rights counselor's report and any other information regarding the timeliness or other relevant circumstances related to the complaint, to an outside administrative judge (AJ) or hearing examiner. The AJ may recommend dismissal of the complaint or any portion of the complaint for any of the reasons listed in chapter 3, paragraph 5, or because it does not meet the prerequisites of a class complaint found in Chapter 4, paragraph 1(b) of Order 2713.2 or the additional prerequisites found in the Federal Rules of Civil Procedure. If the class complaint does not meet certain requirements, the AJ shall give the class agent 15 days to address the issues raised. The AJ will also allow the class agent and the Agency's representative to file a brief on the issue of class certification.

The administrative judge shall prepare a

written recommendation on whether to accept or dismiss a complaint. This recommendation with the complaint file shall be forwarded to the CRO. The Comptroller General or designee shall accept, reject or modify the recommendation.

The administrative judge shall set a date for hearing.¹⁹ The AJ shall have the power to regulate the conduct of the hearing, limit the number of witnesses, and exclude any person from a hearing for any conduct or misbehavior that obstructs the hearing. The rules of evidence are not strictly applied, but the AJ does have authority to exclude all irrelevant or repetitious evidence.

If a party believes that some or all material facts are not in genuine dispute, that party may, at least 15 days before the hearing date or at such earlier time as is required by the AJ, file a statement with the AJ setting forth the fact or facts that are not in dispute and referring to the parts of the record relied on to support the statement. The filing party shall serve the statement on the opposing party. The opposing party may file an opposition within 15 days of receipt of the statement. After considering the submissions, the AJ may limit the hearing to the remaining issues in dispute or issue findings and recommendations without a hearing, or make any other appropriate ruling. The AJ may also independently make determinations that some or all facts are not in dispute, after giving notice to the parties and providing them an opportunity to respond.

¹⁹ Under Board regulations, the parties do not have a right to a hearing on a Petition in class actions filed with the PAB. 4 C.F.R. §28.97(d). The Board may order a hearing upon a showing of good cause as to why an evidentiary hearing is necessary.

The AJ shall give the CRO a report of recommended findings and conclusions, including a recommended decision. If he or she determines that there is no relief for the class, the AJ shall determine whether a finding of individual discrimination is warranted, and if so, he or she shall recommend appropriate relief.

Final Action

After receiving the report of findings and recommendations, the CG or designee shall issue a final Agency decision, which shall accept, reject or modify the recommended decision. If GAO rejects or modifies the recommended decision, it shall include specific reasons for its actions. A final decision on a class complaint shall be binding on all members of the class and GAO. The final decision shall inform the class agent of the right to file a charge with the PAB Office of General Counsel or to file a civil action.

Resolution

The complaint may be resolved by agreement of the GAO representative and the class agent at any time as long as the agreement is fair and reasonable. The CRO

shall notify all class members about the resolution and shall state the relief, if any, GAO will grant. Within 30 days of the date of the notice, any member of the class may petition the Director of CRO to vacate the resolution because it benefits only the class agent or is otherwise not fair and reasonable. If the administrative judge determines that the resolution is not fair and reasonable, he or she shall recommend to the CG or designee that the resolution be vacated and that another class member who is eligible to be the class agent replace the original class agent. A decision that the resolution is not fair and reasonable vacates any agreement between the class agent and the GAO representative.

Petition for PAB Review

A Petition to review GAO's disposition of the class complaint may be submitted to the Board within 20 days of receipt of GAO's determination of whether to cancel or reject the class complaint, to accept the class action but with modifications if the agent is not satisfied or to resolve the complaint if resolution is not satisfactory to the agent. A Petition may also be filed if more than 180 days have elapsed since the complaint was filed and no final decision has been issued.

Recent O&I Activity

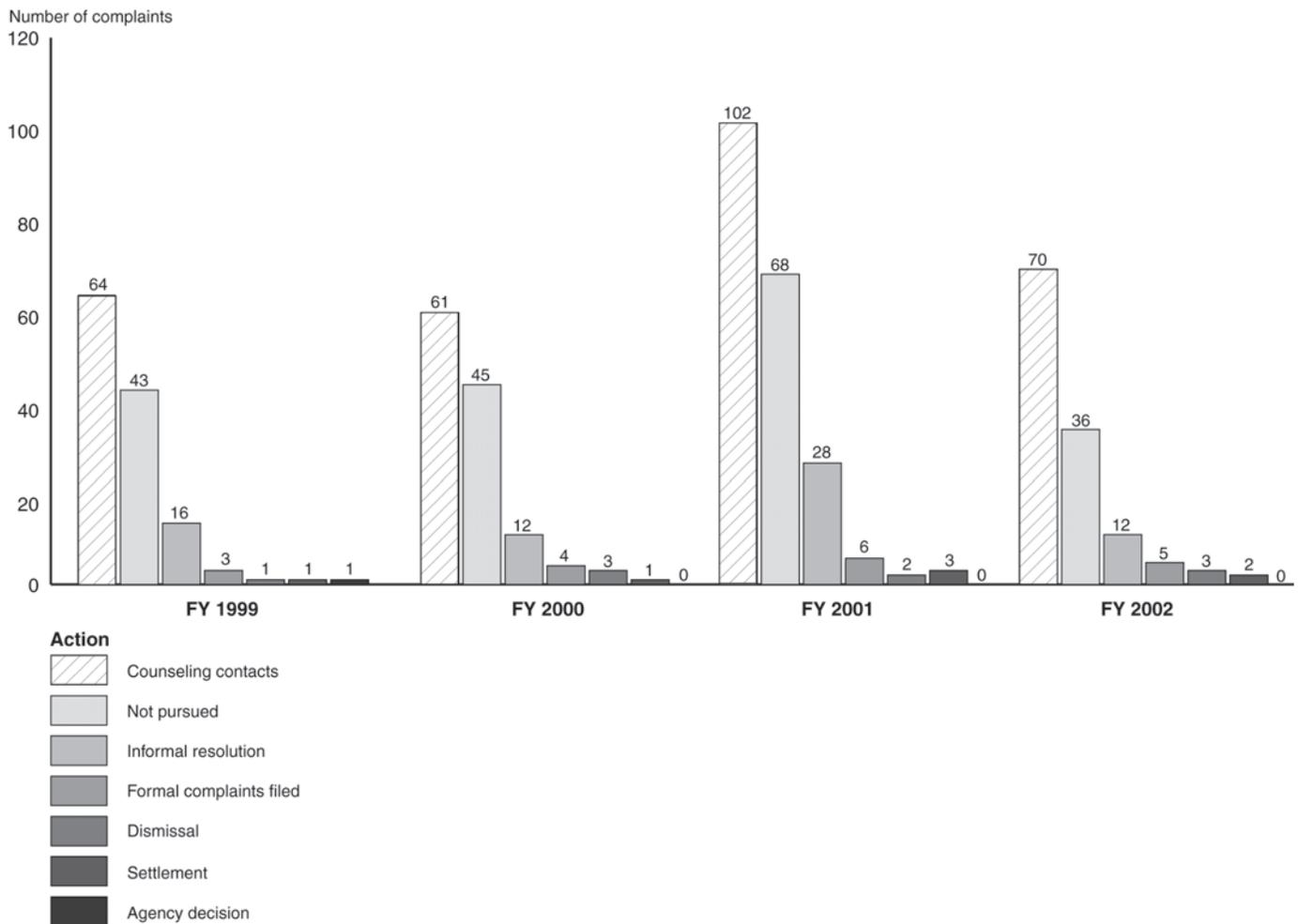
Complaint Processing Information

Although only 18 formal complaints have been filed with the CRO/O&I in the past four fiscal years, during the same period of time, the

Office had 297 counseling contacts with employees. Of those, 192 (65%) decided not to pursue their complaints; 68 (23%) of the complaints were resolved informally.

Thus far, those 18 formal complaints have resulted in nine dismissals,²⁰ seven settlements, and one final Agency decision.²¹

Figure 1: Complaint Processing Data FY 1999 through FY 2002



²⁰ Formal complaints are dismissed when the complainant files a charge with PAB/OGC or files a civil action in Federal District Court. A complaint may also be dismissed if it fails to state a claim; if it was not filed in a timely manner; if it alleges a matter that was not raised in pre-complaint counseling or is not within the jurisdiction of O&I; or if the complainant, at any time, fails to prosecute the complaint. GAO Order 2713.2, ch. 3, §5.

²¹ In comparison, the data provided to the Board in its earlier report shows that, of the 72 formal complaints filed between FY 88 and FY 94, 21 (29%) were informally resolved and final Agency decisions were issued in 38 (53%) of the cases. GAO Discrimination Complaint Process and Mediation Program, p.11 (1995).

During the same period of time, 17 employees entered the mediation program. Of those, 14 completed the program; five filed a formal complaint subsequent to the termination of mediation.

Other O&I Initiatives

GAO Order 2713.2 charges the Director of CRO with, among others, the responsibility for “evaluating the effectiveness of GAO’s program for equal employment opportunity and reporting to the ACG for Operations with recommendations on any improvement or correction needed . . .” and “recommending changes in programs and procedures designed to eliminate discriminatory practices and improve GAO’s program for equal employment opportunity.”²² To fulfill those mandates, the

current Managing Director of O&I has broadened the scope of the Office’s functions to reflect a pro-active approach to equal employment opportunity. Currently, he reviews all human capital practices and procedures; provides oversight of the performance appraisal, promotion, and pay-for-performance systems; reviews decisions affecting the composition of best qualified lists, awards, quality step increases, promotions, reasonable accommodations, benefits, assignments, discipline, and terminations; and, plays an active role in GAO’s recruitment efforts.²³ The Managing Director and his staff have also been involved in training activities relating to sexual harassment, reasonable accommodation, and alternative dispute resolution through participation in the design and presentation of the courses.²⁴

²² Ch. 1, ¶¶(1), (2).

²³ To assist in the tracking of information relevant to these categories, O&I has recently added a statistician to its staff. Interview with Ronald A. Stroman, Managing Director, O&I, April 16, 2003; *GAO’s Management News*, Vol. 29, No. 37, p.1 (week of June 17-21, 2002).

²⁴ *Memorandum* from Ronald A. Stroman thru Jesse E. Hoskins, Human Capital Officer, July 15, 2002.

PAB Recommendations: Past and Present²⁵

Compliance with Prior PAB Recommendations

In 1998, the Board issued a follow-up report devoted to a review of Agency compliance with its previous recommendations about the discrimination complaint process and the mediation program at GAO. In the follow-up report, the Board commended the Agency for its prompt attention to the recommendations and for its commitment to ongoing evaluation of the process.

At the time of the publication of the follow-up report, only two of the Board's recommendations for the discrimination complaint process from its 1995 report had not been implemented by the Agency. In their entirety, they read:

The Director of the Civil Rights Office should report directly to the Comptroller General, or if a designee is desired, to the Assistant Comptroller General for Operations. The Deputy Assistant Comptroller General for Human Resources should not be one of the reviewers of draft final agency decisions of discrimination complaints.²⁶

If the agency elects to have draft final agency decisions reviewed by the Office of General Counsel, those reviews should be assigned to a functional unit within the Office of General Counsel apart from that unit which later represents the agency in subsequent legal proceedings on the same complaint before the PAB or in court.²⁷

The first recommendation addresses the prior situation at GAO where the Director of the Civil Rights Office reported to the Deputy Assistant Comptroller General for Human Resources who supervised the Personnel Office and also reviewed final Agency decisions in complaints filed with CRO.²⁸ Currently at GAO, the Managing Director of O&I reports directly to the Comptroller General. Although this structural change comports with the Board's recommendations, GAO Order 2713.2 has not been revised to reflect the new reporting scheme.

Underlying this recommendation was the appearance of a conflict of interest that one person was overseeing both the development of personnel policies and the process where complaints regarding the implementation of those policies are raised. This appearance of a conflict of interest arose because of the close supervisory connection between the eeo and personnel supervisory chains, both of which led to the Assistant Comptroller General for Operations through the Deputy Assistant Comptroller General for Human Resources.

While the current structure seems to have changed the appearance of a conflict of interest, the Managing Director of O&I now has additional duties that include substantial

²⁵ It is the Board's practice to provide the Agency and the Board's Office of General Counsel with a draft of its oversight reports for comment prior to publication. In this instance, both GAO's Human Capital Officer and the PAB's General Counsel submitted letters and/or comments about the Board's recommendations. The HCO's letter included a request for an interview to discuss the report before it was finalized. During the course of a meeting with the HCO, Board staff and the HCO found that a number of disagreements with Board recommendations were not substantive but had to do more with procedure or timing. This section of the report has been annotated to reflect actions on the part of the Agency that directly address Board concerns as described in the HCO's written comments, as well as in his interview with the Board's Executive Director and Director of EEO Oversight. In addition, the PAB/OGC's letter pointed to two issues that the Board determined should be reflected in its recommendations. This section of the report also reflects the PAB/OGC's suggestions.

²⁶ Current equivalent designations at GAO are: Director, Civil Rights Office = Managing Director, Office of Opportunity and Inclusiveness; Assistant Comptroller for Operations = Chief Operating Officer; Deputy Assistant Comptroller General for Human Resources = Human Capital Officer.

²⁷ It is the Agency's Office of General Counsel to which this recommendation refers. Legal Services and Ethics (LS&E) is the functional unit within OGC that advises Agency management; represents the Agency in legal proceedings; and, reviews final Agency decisions.

²⁸ Although GAO Order 2713.2 places ultimate responsibility for the discrimination complaint process with the Assistant Comptroller General for Operations, in the past that responsibility had been delegated to the Deputy Assistant Comptroller General for Human Resources. Interview with Nilda Aponte, Director, CRO, May 17, 1995 (cited in the PAB's oversight study and report, *GAO's Discrimination Complaint Process and Mediation Program*, p.12 (1995)).

advisory and hands-on participation in the Agency's human capital practices and procedures, thus renewing some of the concerns expressed in earlier Board reports.²⁹

The EEOC has published a manual, popularly known as MD 110, that provides guidance to Federal agencies in the development of equal employment programs, including complaint processing procedures.³⁰ That manual cautions:

Agencies must avoid conflicts of position or conflicts of interest as well as the appearance of such conflicts. For example, the same agency official(s) responsible for executing and advising on personnel actions may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint processes. Those processes often challenge the motivations and impacts of personnel actions and decisions. In order to maintain the integrity of the EEO investigative and decision making processes, those functions must be kept separate from the personnel function.³¹

Ideally, the Board suggests that consideration be given to the creation of a separate complaint unit in which assigned staff would devote their time exclusively to the processing of discrimination complaints. The unit would be part of O&I for administrative purposes only and unit staff would have no responsibility for human capital or personnel issues in the Agency.³² The separation of the functions would go a long way toward dispelling any notion of an appearance of a conflict, while fostering growth in the dynamic

program that O&I has developed with its proactive and wide-ranging approach to equal employment at GAO.³³

The second recommendation, addressing the role of the Legal Services and Ethics unit of the Office of General Counsel and its role in the issuance of final agency decisions, has not been implemented. Although only one final Agency decision has been issued in the past four years, the Board remains concerned about OGC's role in the process and suggests that, when GAO Order 2713.2 is revised, another unit of OGC or legal officer within the Agency be given the review function. Prior to the issuance of this report, the Agency advised the Board that, henceforth, "if Legal Services has had a substantive role in the action under review, that office will not exercise any review function over the decision involving such action."³⁴

Current Recommendations

The Board recommends that GAO Order 2713.2 be revised as soon as possible.³⁵

Any revision to Order 2713.2 should include a definition of what constitutes contact with an eeo counselor. The EEOC, for example, has taken the position that the initiation of contact with any Agency official logically connected to the eeo process coupled with the demonstrable

²⁹ The Managing Director of O&I, with varying degrees of involvement, oversees the performance appraisal, promotion, and pay-for-performance systems; reviews decisions affecting the composition of best qualified lists, awards, quality step increases, promotions, reasonable accommodations, benefits, assignments, discipline, and terminations; and is active in the recruitment and hiring processes.

³⁰ *Equal Employment Opportunity Management Directive 110* (hereafter MD 110), The U.S. Equal Employment Opportunity Commission (Nov. 9, 1999).

³¹ MD 110, Ch. 1, p.2.

³² The Managing Director is involved in the issue identification phase of the complaint process and reviews counseling strategies with staff on a weekly basis. *Memorandum* from Ronald A. Stroman thru Jesse E. Hoskins, Human Capital Officer, July 15, 2002.

³³ The Agency does not believe that creation of a separate unit is warranted due to the very small number of formal discrimination complaints filed (4.5 per year) and that any appearance of a conflict of interest is mitigated because GAO contracts out all of its discrimination investigations. Letter from Jesse E. Hoskins, Human Capital Officer (Aug. 21, 2003) (Hereafter Hoskins letter (8/21/03) and Interview with Jesse E. Hoskins (Oct. 9, 2003) (Hereafter Hoskins interview).

³⁴ Hoskins letter (8/21/03).

³⁵ The Board has been advised that the O&I and GAO's Office of General Counsel are in the process of revising the Order. Hoskins interview.

intent to begin the process satisfies the criterion of “eeo counselor contact.”³⁶ The Board urges the drafters of the revised Order to consider adding the more expansive language of the EEOC that applies to the Executive branch.³⁷

The Board also recommends incorporating mandatory annual training for eeo counselors when revising Order 2713.2. In its 1998 follow-up report, the Board recommended that eeo counselors be given “prompt initial training and further updated training on at least an annual basis.” This is consistent with the EEOC’s requirement in MD 110 that new counselors receive a minimum of 32 hours and all eeo counselors receive at least eight hours of continuing EEO counseling training every year.³⁸ The Agency has agreed to make basic and annual training a requirement for eeo counselors and will be amending GAO Order 0130.1.26 to so reflect it.³⁹

In addition, the Board recommends that the Agency ensure that it has a sufficient number of eeo counselors immediately accessible for employees including those in the field offices and that the names of those counselors appear in the GAO organizational phone book.⁴⁰

In cases in which an employee has been the subject of an adverse or performance-based

action⁴¹ that he or she alleges was due in whole or in part to discrimination, the employee may file a charge directly with PAB/OGC and raise the discrimination claim in the course of PAB proceedings or file a complaint of discrimination with O&I before proceeding to PAB/OGC.⁴² If an employee chooses the latter course, chapter 6 of GAO Order 2713.2 provides that the employee may file a charge with the PAB/OGC if a final Agency decision has not been issued within 120 days. For clarity, the Board suggests that this language also appear in chapter 3, ¶2(b) of the Order.⁴³

Currently, ¶5.b of GAO Order 2713.2 gives the CRO Director the discretion to dismiss a complaint or a portion of a complaint that is the basis of a Charge before the PAB/OGC. The Board recommends that GAO add guidelines to the provision on discretionary dismissal that are similar to those in the Federal sector regulations governing the Executive branch. In the Executive branch, the complainant must elect to pursue the non-eeo process and the agency must inform and advise complainants of their respective rights under the discrimination complaint process and the MSPB appeal process to ensure that any such election is knowing and voluntary.⁴⁴

³⁶ See *infra.*, footnote 11.

³⁷ The Agency has indicated to the Board that O&I “has a very liberal interpretation of what constitutes contact with an EEO counselor.” Under its definition, any contact, by telephone, e-mail, or in person with anyone in the office constitutes contact. In addition, O&I’s forthcoming web site will identify all of the Agency counselors. Hoskins letter (8/21/03).

³⁸ MD 110, Ch. 2, §II (A), (B). The Agency has stated that while not in an order, it is the practice for all eeo counselors to take the EEOC’s 32 hour basic training course as well as the 8 hour annual counselor training. Hoskins letter (8/21/03)

³⁹ Hoskins letter (8/21/03). Order 0130.1.26, still entitled “Civil Rights Office”, describes the mission, responsibilities, and functions of the Office.

⁴⁰ In a letter to the Board, the PAB’s General Counsel’s pointed to the fact that the July 15, 2003 GAO Organizational Telephone Directory lists only one eeo counselor for the entire Agency. The most current directory (August 15, 2003) continues to list just the one counselor. Letter from Janice Reece, General Counsel, Personnel Appeals Board, August 14, 2003 (hereafter Reece letter (8/14/03)).

⁴¹ These include removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs of not more than 30 days.

⁴² Order 2713.2 Ch. 3, ¶2(a), (b).

⁴³ O&I is currently preparing handouts for employees that summarize the complaint process. The Board has been assured that the handouts will adequately explain this option to complainants. Hoskins letter (8/21/03).

⁴⁴ 29 C.F.R. §1614.302(2)(b).

Adoption of similar guidelines would optimize the Agency's opportunity to resolve disputes in-house.⁴⁵

The Board also suggests that O&I survey those contacting the Office about eeo matters and track the reasons that 65 percent of those contacting O&I are deciding not to file complaints.⁴⁶

Finally, the Board recommends that Order 2713.2 not be amended to include complaints of discrimination based on sexual orientation. Unlike other complainants, applicants and employees who file such discrimination complaints will not have the right to pursue their claims beyond GAO's administrative process because sexual orientation is not covered under the anti-discrimination statutes.

However, as is the case in the Executive branch, a GAO employee or applicant may seek redress by filing a charge alleging a prohibited

personnel practice based on an allegation of discrimination because of sexual orientation. At GAO, such a prohibited personnel practice charge would be filed with the PAB/OGC and, subsequent to a hearing before the Board, the case could be appealed to the U.S. Court of Appeals for the Federal Circuit.

If, however, the Agency adds discrimination on the basis of sexual orientation to GAO Order 2713.2, the Board recommends that the revision contain explanatory language that makes clear that the appeal options for such complainants are more limited than for those alleging discrimination on other bases. The revision should also explain the option of filing a charge with the PAB/OGC alleging a prohibited personnel practice based on discrimination because of sexual orientation and inform employees of the more extensive appeal rights that they would be entitled to under those circumstances.

⁴⁵ The PAB/OGC proposes eliminating the discretionary dismissal provision of Order 2713.2. The Board suggests that the Agency substantially revise the section by incorporating standards for dismissal of these cases. (Reece letter (8/14/03).

⁴⁶ O&I is in the process of developing a customer satisfaction survey that will be provided to everyone who contacts the office. According to the Agency, "[t]hese surveys will allow us to evaluate how successfully we are meeting the needs of our clients." Hoskins letter (8/21/03). It is hoped that an effective survey will shed light on why employees drop out of the internal Agency process.

Both the Agency and the Board's Office of General Counsel provided written comments to the Board on a draft of the report on the Office of Opportunity and Inclusiveness. The Agency's letter, sent by the Human Capital Officer, included a request for an interview to discuss the report before it was finalized. The report was annotated to reflect actions on the part of the Agency that directly addressed Board concerns as described in the HCO's written comments, as well as in his interview with the Board's Executive Director and Director of EEO Oversight. In addition, the General Counsel's letter pointed to two issues that the Board determined should be reflected in its recommendations. After the report was revised, both the Agency and the Board's Office of General Counsel were afforded the opportunity to submit further comments; neither exercised that option.

Summary of the Agency's Comments

In its written and oral comments, the Agency indicated that it agreed with the Board that GAO Order 2713.2 should be revised and staff is currently at work on the revisions. The Agency also agreed to remove the Legal Services unit of OGC from the final agency decision review process if that unit had any prior substantive role in the action under review; to require annual training for EEO counselors; to provide a customer satisfaction survey to everyone contacting O&I; and, to clearly identify all Agency EEO counselors on the forthcoming O&I web site. In addition, GAO informed the Board that O&I is in the process of preparing a handbook for employees that will summarize the complaint process and

address the Board's concern that some issues involving timing at stages during the process are not clearly laid out in the current Orders.

The Board and the Agency do not agree on two issues. The Agency does not believe that a separate unit to handle discrimination complaints should be established in O&I to dispel any notion of the appearance of a conflict. The Agency also disagrees with the Board about how complaints of discrimination based on sexual orientation should be handled at GAO.

Summary of the PAB/OGC's Comments

In her written comments to the Board, the PAB's General Counsel noted that she agreed with the Board's recommendations. In addition, she asked the Board to consider asking GAO to ensure that there are a sufficient number of EEO counselors accessible to GAO employees and that the names of those counselors appear in the Agency's organizational phone book. The General Counsel also pointed out that the director of O&I currently has the discretion to dismiss a complaint that is the basis of a charge pending before the PAB/OGC. Consistent with discrimination complaint processing in the Executive Branch, she requested that the Board recommend eliminating that discretionary authority.

The Board is in agreement with the General Counsel on the first issue she raised and, as to the second issue, suggests that the Agency incorporate standards for dismissal in Order 2713.2.

