

PERSONNEL
APPEALS
BOARD



2009 Annual Report

TABLE OF CONTENTS

BIOGRAPHIES OF BOARD MEMBERS	3
CHAPTER 1: THE PERSONNEL APPEALS BOARD.....	7
Section 1: About the PAB.....	7
Section 2: Board Staff.....	9
CHAPTER 2: THE BOARD PROCESS	10
Section 1: Filing with PAB Office of General Counsel	11
Section 2: Case Activity Before the Board.....	13
Section 3: Other PAB Office of General Counsel Authority	15
a. PAB/OGC Investigative Authority	15
b. PAB/OGC Stay Requests	16
c. Disciplinary Proceedings.....	17
d. Labor-Management Relations	17
CHAPTER 3: ACTIVITY OF THE PAB – 2009	18
Section 1: Labor-Management Relations	18
Section 2: Case Activity for GAO.....	19
a. Petitions Before the Board	19
b. Request for Statement of Policy or Guidance.....	24
c. Stay Request.....	25
Section 3: Board Case Activity for the Library of Congress	25
Section 4: PAB Office of General Counsel Activity	25
a. Case Activity	25
b. Other Activity and Employee Contacts.....	26

Section 5: Office of EEO Oversight Activities27

Section 6: Special Projects30

a. Mediation Program30

b. Website Developments30

BIOGRAPHIES OF BOARD MEMBERS

MARY E. LEARY was appointed to the Board in April 2006, elected Vice Chair in September 2007, and Chair in August 2009. Ms. Leary is a graduate of Southwest Minnesota State University and the Howard University School of Law. She began her career as a field attorney with the National Labor Relations Board and served as an attorney advisor with the NLRB in Washington, D.C. As an arbitrator for the U.S. Postal Service and its unions from 1988 to 1992, Ms. Leary decided numerous cases involving discipline, discharge, and contract interpretation. She served as General Counsel for the United Electrical, Radio and Machine Workers of America from 1992 to 1997, where she handled a wide array of cases arising under personnel and labor laws, and has litigated cases in federal courts including the U.S. Supreme Court. Ms. Leary was an attorney advisor for the U.S. Patent and Trademark Office, handling labor and employment law cases, and the Merit Systems Protection Board, drafting decisions for cases on appeal. She was appointed the Director of Labor Relations and Collective Bargaining for the District of Columbia, where she oversaw the development of a comprehensive labor relations program. Ms. Leary currently serves as Associate Vice Chancellor for Labor Relations for the Minnesota State Colleges and Universities. She is a member of the South Dakota Bar, as well as the Bars of numerous U.S. Courts of Appeals, District Courts, and the U.S. Supreme Court.

STEVEN H. SVARTZ, a graduate of the Massachusetts Institute of Technology and Georgetown University Law Center, was appointed to the Board in January 2007. He became Vice Chair of the Board in August 2009. He retired from the federal government in June 2006 with 31 years of service. After starting his career with the Federal Labor Relations Council, he served in various capacities with the Federal Labor Relations Authority from its inception in 1979 until his retirement. He represented the FLRA in the U.S. Supreme Court and various U.S. Courts of Appeals. In addition, he served as Chief Counsel for several FLRA members, Acting Director of the Collaboration and Alternative Dispute Resolution Office, and Assistant General Counsel for Legal Services. He is a member of the District of Columbia Bar, the U.S. Supreme Court Bar, and the bars of other federal courts.

PAUL M. CORAN was appointed to the Personnel Appeals Board in January 2005, elected Vice Chair in September 2005, served as Chair from September 2007 until August 2009, and is currently a member. Mr. Coran is a graduate of Northeastern University and Boston College Law School. He retired from the federal government with 33 years of service in July 2001. Mr. Coran engaged in the practice of employment law throughout his career, serving consecutively at the National Labor Relations Board, U.S. Department of Labor, Federal Labor Relations Council and U.S. Department of State. Following his retirement and until August 2004, he served as Deputy Executive Director for the U.S. Senate, Office of Compliance. During his career, Mr. Coran represented management,

employees, and labor organizations; conducted mediations; and also performed impartial adjudication functions in both the Executive and Legislative branches. He was a regular contributor to the American Bar Association's Annual Employment Law Report for a number of years. Mr. Coran is a member of the Massachusetts Bar.

PERSONNEL APPEALS BOARD

Mary E. Leary	Chair
Steven H. Svartz	Vice Chair
Paul M. Coran	Member
Beth L. Don	Executive Director
M. Gail Gerebenics	Director, EEO Oversight
Susan P. Inzeo	Solicitor
Sue Sung Farley	Senior Staff Attorney
Patricia V. Reardon-King	Clerk of the Board
Anne M. Wagner*	General Counsel
Frank J. Mack	Senior Trial Attorney
Brian Nuterangelo**	Senior Trial Attorney
Darian C. Jackson	Legal Information Assistant

* Anne M. Wagner left her position as General Counsel in November 2009. The position is vacant at the present time.

** Brian Nuterangelo joined the Office of General Counsel staff in October 2009.

CHAPTER 1: THE PERSONNEL APPEALS BOARD

Section 1: About the PAB

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

The PAB's authority combines the adjudicatory functions of its Executive branch counterparts: the Merit Systems Protection Board (MSPB);⁴ the Equal Employment Opportunity Commission (EEOC);⁵ and the Federal Labor Relations

¹ 31 U.S.C. §731 *et seq.*

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

³ 31 U.S.C. §732(f)(2)(A).

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

⁵ The EEOC ensures that personnel actions that affect employees or applicants for employment in the Executive branch "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. §20003-16(a) (Title VII). In addition, EEOC enforces the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*, and the Americans with

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

The statute provides for a Board comprised of five members who serve five-year, nonrenewable terms. The Board, which currently operates with a quorum of three members, is on schedule to resume its composition of five members by 2013. Thereafter, by allowing a new member to be appointed in the first month of each year, GAO will be able to have a yearly scheduled recruitment process and the Board will be able to function more efficiently as an institution.

Candidates are sought through a process that includes advertising and recruitment efforts that focus on organizations whose members are experienced in the adjudication or arbitration of personnel matters. Applicants are expected to have expertise or litigation experience in the area of federal personnel law, demonstrated ability to arbitrate or adjudicate complex legal matters, or experience at a senior level position in resolving complex legal matters.

Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* The Personnel Appeals Board has similar jurisdiction to hear and decide cases alleging discrimination. 4 C.F.R. §§28.95-28.99.

⁶ The FLRA protects the "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 Personnel Appeals Board also has the authority to certify collective bargaining representatives and to adjudicate unfair labor practices. 4 C.F.R. §§28.110-28.124.

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

GAO establishes a screening panel to review applications for Board member positions and identify the best qualified candidates.⁸ An interview panel composed of some of the screening panel members, including one member of the Employee Advisory Council (EAC) and one representative of the GAO Employee's 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.

Section 2: Board Staff

The Board's Executive Director manages Board staff and Board 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 Board's Director of EEO Oversight reviews equal employment opportunity practices and procedures at GAO and drafts evaluative reports that contain the Board's findings, conclusions, and recommendations to the Agency.⁹ The Clerk of the Board is responsible for receiving filings, distributing Board orders and decisions, and maintaining the Board's official records. The PAB Office of General Counsel (PAB/OGC)

⁸ 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 Employee's Organization, IFPTE, Local 1921 (Union). GAO Order 2300.4, ¶7 (11/04/09).

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

investigates charges filed with the Office and, if there are reasonable grounds to believe that a violation of law has occurred, offers to represent the employee or applicant for employment in litigation before the Board.

CHAPTER 2: THE BOARD PROCESS

The Board's litigation process is explained in detail in the *Guide to Practice Before the PAB*;¹⁰ a brief summary follows.

An employee, a group of employees,¹¹ a labor organization, or an applicant for employment at GAO may file a Petition with the Board seeking review of Agency action or inaction that adversely affected them. Such a Petition may arise from: (1) a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of not more than 30 days; (2) a prohibited personnel practice; (3) an unfair labor practice or other covered labor relations issue; (4) an action involving prohibited discrimination;¹² (5) prohibited political

¹⁰ The *Guide to Practice* is available at the PAB's website: www.pab.gao.gov.

¹¹ The Board can hear individual Petitions as well as class actions.

¹² 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.

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

In addition to its litigation activity, the Board is authorized to conduct representation proceedings at GAO, including determining appropriate bargaining units of GAO employees, conducting elections to determine whether employees in any such units wish to select a labor organization to represent them in collective bargaining, and certifying an organization so selected as the designated exclusive bargaining representative.¹³ The Board also plays a role in resolving impasses in collective bargaining, as well as in resolving certain negotiability issues.¹⁴

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.¹⁵ The PAB/OGC has the authority to investigate and to represent employees where the General Counsel finds reasonable grounds to believe the charge regarding alleged violations of the law over which the Board has jurisdiction.

An individual may seek relief from the PAB by filing a charge with the PAB Office of General Counsel within 30 days of receipt of GAO's final decision or dismissal of the complaint in whole or part (GAO Order 2713.2, ch. 6, ¶4) or by filing a civil action in Federal district court.

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.

¹³ The Board's new *Guide to Labor Management Relations Practice* will be available at www.pab.gao.gov in July 2010.

¹⁴ See GAO Order 2711.1, "Labor Management Relations," ¶14 (Apr. 27, 2001); 4 C.F.R. §§28.110-28.124.

¹⁵ See www.pab.gao.gov, under the link to Charges/Filing.

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

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

Once an individual charge is filed with the PAB/OGC, the charging party is advised of his/her rights and informed of the Board's mediation program.¹⁶ The PAB/OGC then conducts an independent investigation of the matters raised in the charge to determine whether there are reasonable grounds to believe that the employee's rights under the GAOPA have been violated. This process may include obtaining documents and taking oral statements from persons with knowledge of the circumstances that are involved in the allegations.

Following the investigation, and if no settlement occurs, PAB/OGC issues a Right to Petition Letter notifying the charging party that the investigation has been completed and that he/she has the right to file a Petition with the Board

¹⁶ Information about the Board's mediation program can be found on the website at www.pab.gao.gov.

seeking a review of the Agency action or inaction. The PAB/OGC also issues to the charging party a confidential Report of Investigation that includes the results of the investigation and the PAB/OGC's conclusions with regard to the legal and factual issues.

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

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

Section 2: Case Activity Before the Board

A Petition must be filed with the Board within 30 calendar days after service of the Right to Petition Letter from the PAB/OGC. Alternatively, if 180 days have elapsed from the filing of a charge with PAB/OGC and no Right to Petition Letter has been issued by the General Counsel, the employee may "opt

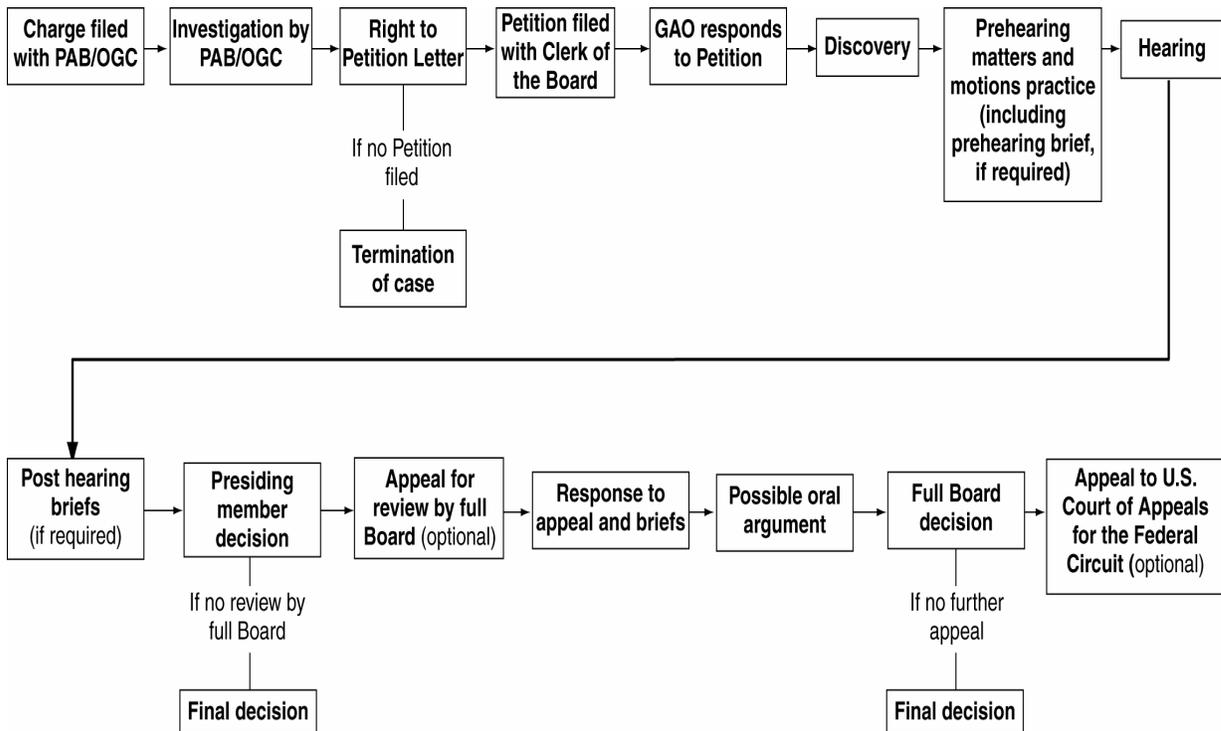
out” of the investigation and file a Petition with the Board. An employee who chooses that route foregoes the opportunity to have the General Counsel present the case to the Board.

Upon receipt of a Petition, the Chair may either appoint a single Board member to hear and decide the case or determine that the Board will hear the case *en banc* (by all Board members). The Petition to the Board is not a challenge to or review of the conclusions of the PAB/OGC, but a fresh consideration of the Petitioner’s claims. The Board does not have access to the investigative work and conclusions of the PAB/OGC; the administrative judge does not know whether the PAB/OGC found reasonable grounds to believe a violation existed in a given case.

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

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

Figure 1: Board Process Illustrated



Section 3: Other PAB Office of General Counsel Authority

a. PAB/OGC Investigative Authority

As discussed above, the PAB Office of General Counsel is authorized to conduct independent investigations into matters raised and presented in charges filed by GAO employees or applicants for employment. This investigative authority represents the vast majority of investigations conducted by PAB/OGC. In addition to investigations generated by individual or class charges, PAB/OGC may initiate its own investigations, otherwise known as informational or GC

investigations.¹⁷ 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 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, PAB/OGC may petition the Board to order corrective action.

b. PAB/OGC Stay Requests

PAB/OGC may request that the Board issue an *ex parte* temporary stay, not to exceed 30 calendar days, of any proposed personnel action that, in the General Counsel's judgment, may constitute a prohibited personnel practice.¹⁸ If the request for an *ex parte* stay is granted, the General Counsel may 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, or Board *en banc*, determines that under all of the circumstances the interests of justice would be served by providing more time for PAB/OGC to pursue the investigation.¹⁹ 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

¹⁷ 4 C.F.R. §28.131.

¹⁸ The Board's stay authority does not extend to any reduction in force action. 31 U.S.C. §753(b).

¹⁹ 4 C.F.R. §28.133(d).

practice against the nature and gravity of any harm that could flow to each side from granting or denial of the stay. The Board may grant or deny the requested stay based upon the pleadings, require further briefing and/or oral argument, or conduct an evidentiary hearing on the request for further stay.

c. Disciplinary Proceedings

The PAB General Counsel is authorized to initiate a disciplinary action against an employee when it is determined after an investigation, that such action is warranted. In such cases, the PAB/GC will provide a written summary of the determination and facts to the employee and the Board.²⁰ The authority to propose disciplinary action includes action for engaging in prohibited political activity.

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

d. Labor-Management Relations

Through the Board's regulations, the PAB/OGC is authorized to play a major role in the process when a labor organization, an employee or group of employees, or GAO files a representation petition. The General Counsel reviews the representation petition and coordinates with the parties before preparing a report for the Board which may recommend approval of appropriate agreements

²⁰ *Id.* at §28.132.

reached during consultation of the parties, dismissal of the petition as being without merit, or issuance of a notice of hearing to dispose of unresolved issues raised in the petition. In addition, the PAB Office of General Counsel is responsible for investigating unfair labor practice charges filed with the Board.

CHAPTER 3: ACTIVITY OF THE PAB – 2009

Section 1: Labor-Management Relations

Since the Certification of Representation to GAO and IFPTE in 2007, the Board has received many general inquiries from the Union representatives on issues such as impasse, negotiation procedures, and proposals for upcoming oversight studies. In response to the number of inquiries being made and to facilitate use of the Board processes where appropriate, the Board is working on a *Guide to Labor-Management Relations Before the Board*, as a companion to its *Guide to Practice Before the Personnel Appeals Board*, which is geared to employment law. The *Guide to Labor-Management Relations Before the Board* is being designed to help employees, Union members, the Agency and applicants with labor-management issues and the relevant Board processes. The Guide will be available on the PAB's website in mid-2010.

Section 2: Case Activity for GAO

a. Petitions Before the Board

The Board had a total of 52 cases before it in 2009 which included seven cases from 2008 with two on appeal to the full Board. In addition, the Board retained one case on appeal from calendar year 2007. The 2009 docket also included 44 new Petitions, thirty-seven of which were consolidated in the interest of judicial economy, because they had similar issues and each one alleged that GAO violated the GAO Personnel Act, 31 U.S.C. §731 *et seq.* There were three evidentiary hearings held by the Administrative Judges during 2009.

Cases Pending from Previous Calendar Years

In early 2009, an Administrative Judge ruled on a dispositive motion filed in a case in which a Petitioner had alleged that he was given a lower performance rating in FY 2002 than he would have received if he had fewer than five years of GAO service. The Administrative Judge found that the Petitioner had produced no evidence concerning his supervisor's evaluation of his performance, and thus, the Agency's evidence that the employee's appraisal was based solely on the application of the employee's performance standards remained un rebutted. Accordingly, the Agency was awarded summary judgment. The Petitioner timely filed an appeal to the full Board on the summary judgment decision and the denial of his request for class certification in late 2008. A decision on the appeal was still pending at the close of the calendar year.

In a case filed in 2008, the Petitioner alleged that his rights were violated when GAO attempted to recover a student loan payment that it had inadvertently made on his behalf pursuant to the Student Loan Repayment Act. The case was dismissed for lack of jurisdiction on the basis that no personnel action was involved; rather, the matter involved the Agency's efforts to recoup an erroneous payment. The Petitioner filed a timely appeal in February 2009, followed by two Motions for Sanctions. Upon consideration of the submissions, the Board upheld the Administrative Judge's decision in favor of the Agency on the student loan repayment claim and also ruled in the Agency's favor on the requests for sanctions.

In the second case pending from 2008, Petitioner alleged that GAO discriminated against her based on her race and age, and retaliated against her for her involvement in protected activity. She also alleged that GAO denied her promotion to a Band II Analyst position because she received a "below expectations" rating on one of her competencies during an out-of-cycle performance appraisal. Petitioner claimed that she had not been informed of deficiencies in her job performance and was not given training, mentoring or feedback. She further claimed that the Agency discriminated against her by not giving her performance awards. A hearing was held at the end of 2008. In May 2009, a decision was issued, finding that Petitioner had failed to prove by a preponderance of the evidence that GAO discriminated against her or committed any prohibited personnel practices. Petitioner timely filed an appeal to the full

Board in June 2009; and at the end of the calendar year the appellate decision was still pending.

In the third case continued from 2008, Petitioner alleged that he had been discriminated against because of his race, color, sex, disability and sexual preference. He further claimed he was subjected to a hostile work environment and retaliated against for his involvement in protected activity. A hearing was held in February 2009 and a decision was still pending in this case at the close of the calendar year.

In another case pending from 2008, Petitioner alleged that he was discriminated against based on his race and age when he was not selected for a GS-15 position that a Hispanic male received who had been acting in that position. He further alleged that the Agency committed a prohibited personnel practice because the Hispanic male had been pre-selected for the position; Petitioner claimed that by posting the position during the December holidays, the Agency attempted to prevent him from applying. The Administrative Judge denied GAO's Motion for Partial Summary Judgment in December 2008, and a hearing was scheduled for March 2009.

Another 2008 Petitioner alleged that GAO committed prohibited personnel practices when it only considered her performance subsequent to placement in Band IIB and not the entire performance year in completing her annual appraisal. She claimed that her performance after placement in Band IIB was not measured by assessing her actual performance against her performance standards. Finally, she alleged that she was subjected to a hostile work environment in

retaliation for having engaged in protected activity. This case was consolidated with a subsequent case Petitioner filed in 2009. A hearing was held in September 2009. At the close of 2009, the parties were preparing their post-hearing briefs for filing in March 2010.

In another case pending from 2008, Petitioner alleged that he was discriminated against based on his race and retaliated against for participating in protected activity when he received a letter of reprimand for conduct unbecoming a Federal employee. The case was tried in May 2009. At the close of calendar year 2009, this case was still pending.

The last case pending from 2008 was an *ex parte* stay request. A 30-day temporary stay was granted in December 2008. This was an internal matter which was investigated by a substitute General Counsel, pursuant to 4 C.F.R. §28.17.

2009 Cases Before the Board

The first Petition filed with the Board in 2009 was a request for the Board to review certain actions taken by GAO that Petitioner believed violated her rights and the rights of others similarly situated when GAO implemented a new policy that eliminated annual pay adjustments for employees whose pay exceeded the maximum rates for their Band level, as outlined in the “FY 05 Performance Based Compensation (PBC) Guide for Analysts, Specialists and Investigators.”

Petitioner, who had satisfactory performance in 2005, was denied the 2.6% upward adjustment for 2006 because her annual pay exceeded the compensation limits for her position in accordance with the PBC Guide. By

September 2009, the Government Accountability Act of 2008, Pub.L. 110-323 (GAO Act of 2008), was signed into law and a lump sum payment was to be made to certain employees to compensate them for not receiving the full pay increase in 2006 and/or 2007. Petitioner and other employees who left the Agency prior to passage of the GAO Act of 2008 were not covered by its terms. Petitioner requested retroactive adjustments to pay rates, retirement and other benefits as well as a lump sum payment for back pay with interest. This case was consolidated in June 2009 with 36 other Petitions on the same subject, also brought by former employees who retired or left the Agency prior to the enactment of the Act of 2008. In mid-October 2009, the Petitioners and GAO filed dispositive motions seeking an Order deciding all or part of the case, prior to an evidentiary hearing. The consolidated case was still pending before the Board at the close of 2009.

In another 2009 case, a *pro se* Petitioner requested that the Board review GAO pay policies that she believed deprived her of equal pay for work of equal value. The case was dismissed with prejudice at Petitioner's request prior to a hearing.

Another 2009 Petitioner alleged that the Agency engaged in prohibited personnel practices including issues related to her performance evaluation and failure to provide reasonable accommodation for her handicapping condition. The parties settled the claims and the case was dismissed.

In the last case filed in 2009, the Petitioner claimed that his performance appraisal was improperly lowered because the Agency only considered his performance appraisal after placement into Band IIB rather than for the entire appraisal cycle. Petitioner further alleged that his performance review ratings were devalued and that he was subjected to a retaliatory and hostile work environment because he engaged in protected activities. This case was in the early discovery stage at the end of 2009.

An internal case was filed against the Board in 2009. The administrative process was completed and the matter is pending in Federal District Court.²¹

b. Request for Statement of Policy or Guidance

The PAB/OGC filed a Petition requesting a statement of policy or guidance as to whether GAO may refuse to process a travel voucher for a retired GAO employee to attend a hearing in his case which involved allegations of prohibited personnel practices brought by PAB/OGC on Petitioner's behalf. In making the arrangements for travel for Petitioner, the General Counsel was informed that the Agency could not authorize the expenditure of travel funds because Petitioner was no longer employed at GAO. The evidentiary hearing on Petitioner's claim was held in May 2009. The request for a statement of policy or guidance was still pending at the end of December 2009.

²¹ See 4 C.F.R. §28.17, Internal Petitions of Board Employees.

c. Stay Request

There was one *Ex Parte* Request for an Initial Stay filed with the Board requesting the Board to issue a thirty (30) day stay of the Agency's proposed decision to terminate an employee to allow sufficient time to investigate the circumstances surrounding the proposed removal. A joint motion was filed requesting that the Board forego a ruling on the motion for permanent stay. The parties settled the claims raised and the case was dismissed with prejudice.

Section 3: Board Case Activity for the Library of Congress

The Interagency Agreement with GAO, the Board, and LOC for a pilot program giving the Board authority to hear certain LOC cases was still in effect up until September 30, 2009. During that time, there were no cases undergoing counseling or investigation with the PAB/OGC or hearings before the Board.

Section 4: PAB Office of General Counsel Activity

a. Case Activity

(1) Charges

There were two new charges filed with the PAB/OGC from January 1, 2009 through December 31, 2009. These charges involved allegations concerning pay and performance issues, as well as a proposed removal from employment. During that period, PAB/OGC had a total of 46 open cases. In the interest of saving Federal funds, 37 of the cases with similar issues were consolidated into one case. Another case from 2009 was consolidated with an earlier case filed with the Board in 2008. The PAB/OGC filed one amended Petition and two appeals with the Board during calendar year 2009.

In 2009, the PAB/OGC had a total of 282 open charges on its investigative case docket and closed 231 of the charges during the year. The PAB/OGC settled one case during 2009 after a Petition was filed with the Board.

(2) Litigation

The PAB/OGC participated in 46 cases before the Board. PAB/OGC filed 41 Petitions with the Board and one Amended Petition. The PAB/OGC settled two cases during calendar year 2009. The issues presented in the 46 cases related to the following: removals; performance ratings, promotions, pay, disability discrimination and retaliation.

Most of the GAO investigations conducted by the Office of General Counsel were initiated by charges filed by employees. PAB/OGC did initiate an informational investigation in 2009, but no disciplinary proceedings were initiated during the year.

b. Other Activity and Employee Contacts

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

Section 5: Office of EEO Oversight Activities

The GAO Personnel Act directs the Board to oversee equal employment at GAO through review and evaluation of GAO's procedures, policies, and practices.²² To fulfill this mandate, the Board established an Office of EEO Oversight to assist in conducting studies of selected issues and preparing evaluative reports that contain its findings and conclusions, as well as recommendations to the Agency.²³ During 2009, the Board completed its study and a draft of its report on the retention of new employees; began a study of recruiting, retaining, and reclaiming older workers; and approved a study on the Senior Executive Service (SES) at GAO.

Study of Retention Rates

The Board embarked on a study of retention rates at GAO in order to identify whether there are any cultural, environmental, or organizational factors at GAO that could lead to a disproportionate number of members of any protected class leaving the Agency early in their tenures

The Board's study involved data collection on hiring and separations which included gathering information on a unit and office basis, by position/job category and by race, sex, national origin, disability and age in order to discern whether any patterns having EEO consequences emerged. The Board also examined GAO's retention efforts, as well as those of other Federal agencies and private sector institutions. Finally, the Board reviewed the responses to the

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

²³ The Board's EEO Oversight reports can be found at www.pab.gao.gov.

GAO Employee Exit Questionnaire which is sent to every employee who leaves GAO. In the Fall of 2009, as is its practice, the Board circulated the draft report to the Agency, PAB/OGC, the Union, and the Employee Advisory Council for comment.

Study on Recruiting, Retaining, & Reclaiming Older Workers

In a 2007 report, the Office of Personnel Management (OPM) projected that almost one-third of the full-time permanent workforce would leave Federal employment within the next five years. Like other agencies, GAO began succession planning to ensure that it would be able to adequately compensate for the gaps in necessary skills and institutional knowledge that are likely consequences of the anticipated mass retirements. In addition, in its most recent Strategic Plan, GAO made the implementation of strategies to retain the knowledge and expertise of retirement eligible senior employees a key Agency objective.

Based on those factors, the Board undertook a study to attempt to identify whether there are any barriers to the engagement and retention of older workers at GAO. The study entailed a thorough review of GAO's internal practices and procedures, as well as various Executive Branch initiatives, including the use of personnel and hiring flexibilities, aimed at increasing employment opportunities for older workers in the Federal workforce. During the study and the initial drafting of the report, a widespread economic downturn led to many older workers delaying retirement plans, rendering the anticipated retirement tsunami considerably less threatening than originally thought. At the end of 2009, the

Board was considering either narrowing the focus of the original study or retooling the project proposal in order to undertake a more useful study of older employees in the workforce.

Study of the Senior Executive Service (SES) at GAO

Late in 2009, the Board approved a study of the SES at GAO, which had not been the subject of in-depth Board study since 1998. In its aforementioned 2009 study of retention rates at GAO, among the issues the Board looked at was diversity in the supervisory and management ranks of the Agency. As part of that report, the Board compared the SES at GAO in 1997 to the SES in 2009 and observed that with the exception of white females, over the last 12 years, not a great deal of progress has been made in the overall diversity in the SES corps at GAO. Those observations led the Board to conclude that further study of the SES at GAO was both warranted and timely.

In its study, the Board is focusing on the developmental or feeder pool for the SES, which, at GAO means Band III analysts, specialists, and attorneys, and APSS managers for some vacancies. The analysis of the data relevant to that pool allows a comparison of the representation of employees, by race, gender, national origin, age and disability, in the Agency as a whole, in the pool of those eligible to apply for SES positions, and in the pool of those internal candidates who actually applied for SES vacancies. In addition, the report compares the SES employees at GAO to those working in similarly sized Executive branch agencies and the Executive branch, as a whole. The study was complete and the report was in the drafting stage at the conclusion of 2009.

Section 6: Special Projects

a. Mediation Program

The Board's mediation program continues to provide employees or applicants, the Agency, and their representatives, if any, an opportunity to meet separately and/or jointly with a mediator, *i.e.*, a skilled neutral trained to assist them in resolving their disputes. The mediator is a facilitator who has no power or role to impose a specific resolution. Parties to the mediation explore and discuss alternatives to continuing their dispute, including the goal of reaching a voluntary, mutually satisfactory resolution. This year the Board processed two mediation requests. One resulted in settlement and the other mediation request resulted in the parties returning to the PAB/OGC charge process.

b. Website Developments

The website,²⁴ currently in its 7th year, has continued to be an invaluable resource for information about the Board. Statistical information has shown that over the years the use of the Board's website has been on a steady rise. In 2009 the website was visited by approximately 650 individuals per month. Once on the site, individuals researched various sections such as information about the PAB, Board decisions and regulations, and how to contact PAB staff.

The Board's website is now more user-friendly, including a more informative home page. A separate section explains the mediation process. The Annual Report is available exclusively on the website. The PAB website

²⁴ The website can be found at www.pab.gao.gov.

now allows individuals to research decisions by topic. We anticipate adding a directional map on the site that will assist individuals with their travel to the PAB from anywhere within the Washington, D.C. area. The website is updated regularly to include announcements as well as new decisions.

Figure 2 shows the number of visits to the Board’s website this year, as well as the variety of usage within the site.

Fig 2 – Web Hits 2009

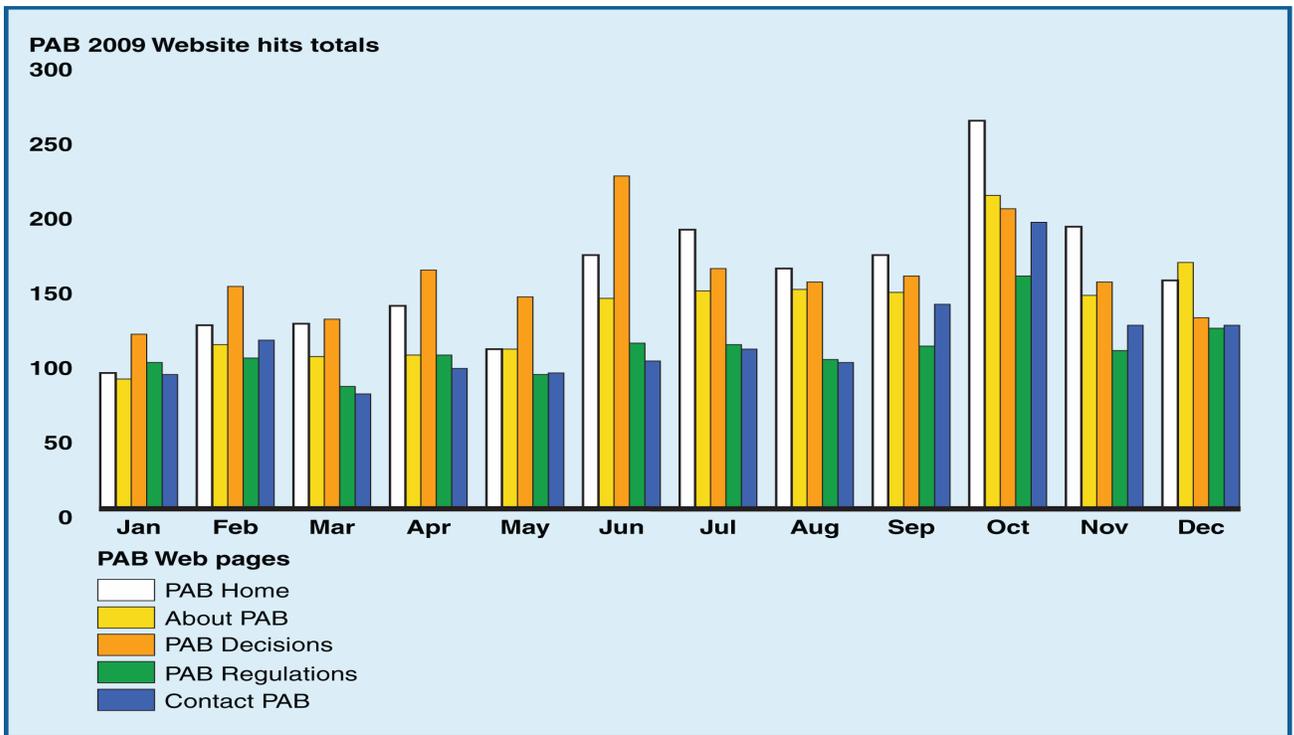


Figure 3 shows a two-year comparison of the usage on the site and it reflects a modest increase in usage between 2008 and 2009.

Fig 3 – Comparison Web Hits for 2008 & 2009

