The background features a large, faint, embossed illustration of a courtroom scene. In the center, a judge in a black robe sits on a high bench, presiding over a group of people seated at a long table. To the right, a scale of justice is visible. The entire scene is rendered in a light, golden-brown tone against a textured, parchment-like background.

PERSONNEL

APPEALS

BOARD

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BIOGRAPHIES OF BOARD MEMBERS

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 and Chair in September 2011. 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 (FLRA) 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.

SUSAN R. WINFIELD was appointed to the Personnel Appeals Board in August 2010. Ms. Winfield is a graduate of the University of Pennsylvania and Boston College Law School. Ms. Winfield began her career as an Associate Attorney with a private law firm in Boston, MA. She began her government career as a staff attorney in the Criminal Division at the Department of Justice and later became an Assistant U.S. Attorney in the Office of the United States Attorney in Washington, D.C. In 1984, she was appointed to be an Associate Judge of the

District of Columbia Superior Court where she served in the Civil, Criminal and Family Divisions. She retired from the court in 2005 and currently serves occasionally as a Senior Judge. In addition, Ms. Winfield serves as a mediator and arbitrator at the Attorneys Mediation Services, Inc. She is also serving as a member at the Foreign Service Grievance Board and as a Hearing Officer at the Office of Compliance. Since 1984, Ms. Winfield has held and served in many other roles, e.g., an adjunct professor, a lecturer, consultant, mentor and trainer. She is a member of the District of Columbia and Massachusetts Bars.

JOHN L. BRAXTON was appointed to the Board in February 2011. Mr. Braxton is a Senior Judge of the Court of Common Pleas of Philadelphia County. He has been a member of the Pennsylvania bar for over 40 years, and he has an accomplished career of public service in law, business, and financial administration. Mr. Braxton has developed expertise in commercial and economic development within heavily-regulated industries including banking and insurance. He also has built a record of success in directing long-term strategic business planning and managing executive-level responsibilities in both the private and public sectors. Mr. Braxton served as Chair of the Board of Berean Federal Savings Bank from 1999 to 2003. He also served as Chair of the Bank's Investment Committee. In addition, Mr. Braxton served as Chair of the Audit Committee of Intellisource Group, Inc. which was a publicly held corporation. From 1991-1996, Mr. Braxton served as Chair of the Board of the Philadelphia

Commercial Development Corporation. From 1975-1978, he served as a member of the Pennsylvania Minority Business Development Authority.

Mr. Braxton earned his undergraduate degree from Penn State University as well as a commission as a Second Lieutenant in the U.S. Army. Once he completed his military service, Braxton went on to earn a law degree from Howard University School of Law. He retired in 1995, but was recalled to serve on the Court of Common Pleas of Delaware, Bucks and Montgomery Counties in Pennsylvania.

WILLIAM E. PERSINA was appointed to the Personnel Appeals Board in June 2011. Mr. Persina is in private law practice, providing representation and consulting services to federal agencies and unions in the areas of employment and labor law. Mr. Persina's practice has involved litigation before such administrative agencies as the U.S. Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority (FLRA), and the U.S. Equal Employment Opportunity Commission (EEOC). He also sits as the Attorney Public Member on the District of Columbia Police and Fire Retirement and Relief Board, which decides disability retirement issues for District of Columbia first responders. Prior to entering private practice, Mr. Persina served as senior litigation counsel and Solicitor for the FLRA, in a career spanning almost 27 years with that agency. While in the Solicitor's Office, Mr. Persina represented the agency in federal courts, including the Supreme Court of the United States. He also gave legal advice to the FLRA's presidential appointees. Mr. Persina also served the

FLRA in other high level positions, such as Acting Deputy General Counsel and Acting Chief Counsel to former FLRA Chairman and Member Donald Wasserman. Mr. Persina received his law degree, with honors, from the National Law Center of the George Washington University, in 1972. He received his undergraduate degree from the School of Industrial and Labor Relations, Cornell University, in 1968. Mr. Persina is admitted to practice in the District of Columbia. He is a member of the District of Columbia Bar, Labor and Employment Law Section.

MARY E. LEARY was appointed to the Board in April 2006, elected Vice Chair in September 2007, and then Chair in August 2009, a position she held through September 2011; her term ended in October 2011. 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 served 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.

PERSONNEL APPEALS BOARD

Steven H. Svartz	Chair
Susan R. Winfield	Vice Chair
John L. Braxton*	Member
William E. Persina*	Member
Mary E. Leary*	Member
Beth L. Don	Executive Director
M. Gail Gerebenics*	Director, EEO Oversight
Susan P. Inzeo	Solicitor
Sue S. Farley	Senior Staff Attorney
Patricia V. Reardon-King	Clerk of the Board
Stuart Melnick	General Counsel
Frank J. Mack	Senior Trial Attorney
Brian Nuterangelo	Senior Trial Attorney
Darian C. Jackson	Paralegal Specialist

* John L. Braxton joined the Board in February 2011.

* William E. Persina joined the Board in June 2011.

* Mary E. Leary left the Board in October 2011.

* M. Gail Gerebenics retired on January 1, 2011.

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, which are 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. For a period of time, the Board operated with a quorum of three members. Now, the Board is on schedule to operate with its original composition of five members by 2013. 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 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 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 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.

Section 2: Board Staff

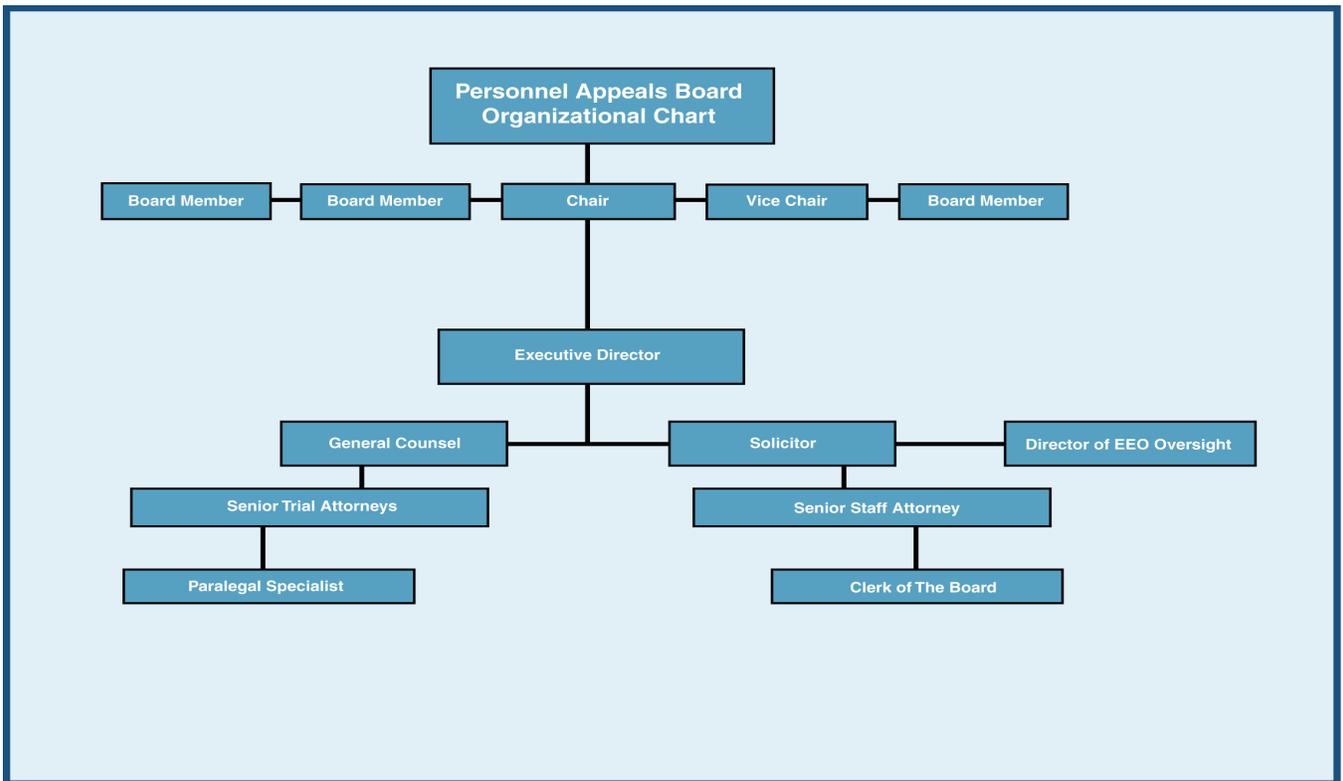
The Board's Executive Director manages Board staff and Board operations. The Board's Solicitor and Senior Staff Attorney advise Board members and the Executive Director on legal matters and provide procedural advice to litigants before the Board. The Board's Director of EEO Oversight reviews equal employment 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) investigates charges filed with the Office and, if there are reasonable grounds to

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 Employees 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.

believe that a violation of law has occurred, offers to represent the employee or applicant for employment in litigation before the Board. Figure 1 below shows the current make-up of the Personnel Appeals Board.

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 PAB*,¹⁰ a brief summary follows.

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

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 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

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.

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.

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.

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, 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.

¹³ The Board's *Guide to Labor Management Relations Practice* is available at www.pab.gao.gov.

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.

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 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

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

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

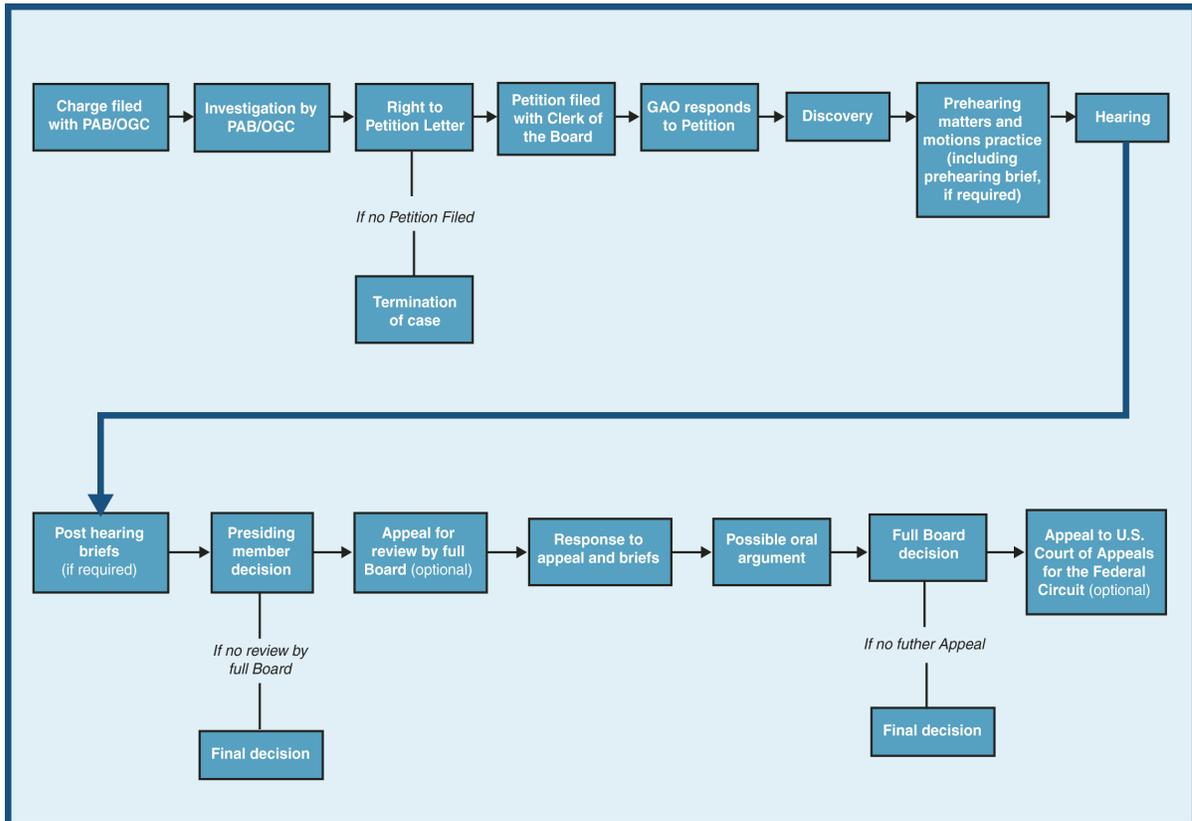
A Petition must be filed with the Board within 30 calendar days after service of the Right to Petition Letter from the PAB/OGC. Alternatively, if 180 days have elapsed from the filing of a charge with PAB/OGC and no Right to Petition Letter has been issued by the General Counsel, the employee may “opt 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 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 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 2: 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 “corrective actions.”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

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).

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

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 – 2011

Section 1: Labor-Management Relations

Three Labor-Management Relations matters came before the Board in 2011.

The first Labor-Management case filed in 2011 related to a memorandum issued by the Comptroller General (CG) which found that several provisions of a recently negotiated Collective Bargaining Agreement, that had been agreed to by both the Agency and the Union, were nonnegotiable for a variety of reasons. The Union filed a Motion for Extension of Time to File a Negotiability Appeal to allow time for the Agency and the Union to engage in negotiations on the rejected provisions. The Agency did not oppose the request, and this Motion was granted. No further appeals were filed and the matter was dismissed.

The second Labor-Management Relations matter involved a provision in the Memorandum of Agreement (MOA) between the Agency and the Union which recognized the right of bargaining unit members to file prohibited personnel practice complaints with the PAB. The Comptroller General issued a memorandum disapproving the MOA because it conflicted with the PAB's regulations regarding its jurisdiction as found in 4 CFR §28.2(c)(2). That

regulation written in 1993 stated that if the negotiated grievance procedure permits the employee to grieve a personnel action, the employee could not appeal the personnel action to the PAB unless it involved discrimination, performance-based reduction in grade or removal, or adverse action cases. The Union filed a Petition claiming that the regulation relied upon by the CG was inconsistent with the law governing the Executive Branch. The Merit Systems Protection Board (MSPB) had changed its regulations in 1994 (pursuant to Congress amending 5 U.S.C. §7121) to allow bargaining unit employees to elect to raise any prohibited personnel practice claim within MSPB's jurisdiction either to the MSPB or through the parties' negotiated grievance procedure. The Union requested that the PAB declare the provision in the MOA negotiable and enforceable. The Administrative Judge, finding that the Board regulation as written was contrary to law and thus not enforceable, concluded that the MOA should be given full effect. The AJ also recommended that the Board take appropriate action to revise the regulation as soon as practicable.²¹

The third Labor-Management Relations matter of 2011 involved two Representation Petitions and a Clarification Petition. On March 4, 2011, a Representation Petition was filed with the PAB Office of General Counsel by GAO Employees Organization, International Federation of Professional and Technical Engineers (IFPTE). This Petition sought an election to determine if an appropriate unit of Administrative Professional and Support Staff (APSS)

²¹ The Board subsequently published a Notice of interim rule with request for comments in the Federal Register. See 76 FR 76873 (Dec. 9, 2011). That rule became final on March 15, 2012 (77 FR 15233). The rule changed the regulation and it now provides that bargaining unit employees may raise any prohibited personnel practice claim either with the PAB or through the parties' negotiated grievance procedure. 4 CFR §28.2(c)(2).

employees wanted to be represented for the purpose of collective bargaining by IFPTE as an exclusive representative. Two subsequent Petitions were filed jointly by IFPTE and GAO. The second filing was a Clarification Petition. The Petition sought to preserve Written Communication Analysts (WCAs) in the Analyst Bargaining unit of GAO that was certified by the PAB in 2007. The third filing was a Petition for Election which sought to schedule an election for Visual Communication Analysts (VCAs) and Lead Communication Analysts (LCAs), to determine whether they wanted to be included in the bargaining unit of analysts that was certified in 2007.

A preliminary determination was made that the IFPTE had met the 30 percent showing of interest on the APSS petition as required under 4 C.F.R. §28.113(a)(7).

On March 14, 2011, the PAB General Counsel met with representatives from IFPTE and GAO to review procedures, standards, and timeframes governing the processing of the Petition. Pursuant to 4 C.F.R. §28.114, a 10-day notice period started on March 21, 2011.

An e-mail announcement was sent to employees informing them of IFPTE's Petition to represent APSS employees. In addition a Notice was posted on GAO's intranet and physically posted throughout GAO headquarters. The purpose of the Notice was to identify permanent employees who would be included in the proposed unit and to identify those who would be excluded from the proposed unit, such as confidential employees, supervisors or management officials.

The parties met again on April 13, 2011, to further discuss which employees would be included in the bargaining unit. After further communication, on May 18, 2011, the parties agreed on additional employees to be excluded and agreed to schedule interviews of the remaining disputed employees. After numerous employee interviews, on August 10, 2011, the parties advised PAB/OGC that they had agreed on a list of employees who should be excluded from the APSS bargaining unit. On October 14, 2011, the parties jointly filed with PAB/OGC an Amended Petition for Representation Election requesting that the APSS bargaining unit exclude all Communication Analysts (Visual, Written, and Lead).

The PAB/GC submitted a Report of Recommendations to the PAB on November 14, 2011. The Report recommended that the Board conduct two elections, one for eligible APSS employees to determine whether they would like to be represented as a unit for purposes of exclusive representation by the GAO Employees Organization, IFPTE, and one for eligible VCA and LCA employees to determine whether they would like to be represented as part of the Analysts Bargaining Unit for purposes of exclusive representation by the GAO Employees Organization, IFPTE. The Report also recommended that the Clarification Petition be granted and that the 2007 certification of the Analysts Bargaining Unit be amended to preserve the WCAs as part of that bargaining unit.

Upon review of the General Counsel's Report, the Board Chair scheduled a conference to address the process with respect to the matters raised in the Report, as well as to discuss dates for the election. During the conference it was

determined that additional Notice needed to be provided to all employees affected by the three pending Petitions. The parties also discussed the dates and other matters related to the election process. On December 30, 2011, the Board issued an Order addressing the two Representation Petitions. The Order stated that the two consent elections would be conducted concurrently on February 8, 2012 and outlined the procedures which would be used for those elections, including times for absentee voting and voting by mail for field office employees.

At the end of 2011, the filing regarding the Clarification Petition was still pending.

Section 2: Case Activity

a. Petitions Before the Board

The Board had a total of 50 Petitions before it in 2011. Thirty-seven of the Petitions from 2009 were consolidated in the interest of judicial economy because they had similar issues. Two cases from 2008 and one from 2009 were on appeal. Three of the cases were pending from 2010 with one on appeal to the full Board.

Cases Pending Before the Board as of January 1, 2011

In a case continued from 2009, a 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. A hearing was held in the case in May 2009. During the preparation of travel arrangements for Petitioner to attend the hearing, an issue arose on the reimbursement of travel expenses. A decision was issued in April 2010 that found Petitioner had not proven discrimination based on race or retaliation and that Petitioner had not provided sufficient legal basis for travel reimbursement. An appeal was timely filed regarding the issue of travel reimbursement for Petitioner. In 2011, the Board issued a decision affirming the AJ's conclusion that the Petitioner failed to establish that reimbursement of his travel expenses was authorized by law.

In another case pending from 2009, a 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 further 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 which claimed that the Agency committed a prohibited personnel practice when it appraised her performance for FY 2009. The cases were consolidated in the interest of judicial economy since the alleged actions and alleged responsible officials were common to both cases. The parties filed Cross Motions for Partial Summary Judgment and, in August 2009, the Administrative Judge granted the Agency's Motion for Partial Summary

Judgment; Petitioner's Motion for Partial Summary Judgment was denied. A hearing was held in September and November 2009. The parties filed their post-hearing briefs in the Spring of 2010. A decision was issued in early 2011 finding that the Agency did not commit any prohibited personnel practices. Petitioner filed and subsequently withdrew an appeal of the Initial Decision.

In another 2009 filing, a Petitioner requested Board review of 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. 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 new policy. In September 2009, the Government Accountability Act of 2008, Pub.L. No. 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 claim also brought by former employees who retired or left the Agency prior to enactment of the GAO Act of 2008. The Petitioners and GAO filed dispositive motions seeking an Order deciding all or part of the case, prior to an

evidentiary hearing. In March 2010, a decision was issued granting Petitioner's Motion for Summary Judgment on the 2006 claim; granting GAO's Motion to Dismiss for lack of standing with respect to Petitioners who were not employed with GAO on the effective date of the pay action; and granting GAO's Motion to Dismiss without prejudice for the remaining 2006 and 2007 claims. Following that decision, the parties requested a stay of appeal while they pursued settlement. A Motion for Conditional Class Certification was filed for purposes of settlement. A settlement agreement was reached in October 2010 resolving all claims brought in the class action and subject to Board approval upon completion of the Fairness Hearing. The Board approved the proposed settlement agreement after determining that the agreement was fair and appropriate. During 2011, under the Judge's direction, the parties worked with the relevant agencies to ensure compliance with the settlement agreement. The matter was not fully resolved by the end of 2011.

A case from 2010 involved allegations that the Agency committed prohibited personnel actions when four individuals from another Federal agency were appointed to GAO's Human Capital Office staff. A Petitioner alleged that there were no vacancy announcements or opportunities for current GAO employees to compete for promotion or placement into the four positions. Petitioner believed that three of the four individuals were not eligible for a non-competitive appointment. The Initial Decision dismissed the Petition for lack of standing, because Petitioner did not allege that he was adversely affected by the Agency's action. An appeal of the Initial Decision was pending before the Board

at the end of 2010. In 2011, the Board issued a final decision affirming that Petitioner had no standing.

In another 2010 case, a Petition alleged that GAO committed prohibited personnel practices when the Petitioner was not selected as a PT-III Budget Analyst when two vacancies were filled. Petitioner claimed that unauthorized preferential treatment was given to one of the applicants (*i.e.*, advising the applicant on actions to take to improve the applicant's prospects for selection), and that GAO discriminated against her because she challenged her performance appraisals and was outspoken. Petitioner further believed that by not selecting her GAO failed to comply with the merit system requirement that selections be based on relative ability, knowledge and skills, in violation of the GAOPA, GAO Order 2335.1 and GAO Order 2335.6. An evidentiary hearing was held in 2011. Post-hearing briefs were filed and a decision was pending at the end of 2011.

Cases Filed in 2011

A 2011 Petitioner alleged that GAO violated her rights under the Americans with Disabilities Act and under the GAO Personnel Act. Petitioner claimed that the ratings in her performance evaluations were lowered because of her disabilities. Petitioner had been given an Opportunity Period. However, her condition worsened and the Agency proposed her removal from her position. She subsequently requested a reasonable accommodation. The Agency

ultimately decided to remove her. The Petition was withdrawn due to a settlement of Petitioner's claims.

In another case filed in 2011, a former employee of GAO alleged that starting in 1994, she was subjected to a pattern of retaliation and a retaliatory hostile environment based on her having engaged in protected activity. She further alleged that in 2003, the Agency forced her to retire in retaliation for her having engaged in protected activity. Specifically, in 1993 and 1994, she had raised with an Agency official a claim that GAO was violating the Equal Pay Act, *inter alia*, by paying her male counterparts more to perform work at the same level. She alleged that, shortly after her raising these issues, she was subjected to a hostile environment based on her gender including being prevented from competing for promotions. Discovery in this matter was extended several times because the personnel actions were remote in time and many of the persons involved in the case were no longer employed at GAO. The time for discovery was also extended due to Petitioner's medical circumstances and was still continuing at the end of 2011.

Another case filed in 2011 involved a Petitioner who alleged that GAO violated the Americans with Disabilities Act when it removed him from his position because of his hearing disability. He also claimed that the Agency violated the GAO Personnel Act. Prior to the close of discovery, Petitioner withdrew his Petition.

Two employees filed separate Petitions alleging that actions taken by GAO violated their rights under the GAO Personnel Act. Specifically, Petitioners

alleged that GAO gave unauthorized preferential treatment to an applicant and improved his prospects for being hired. The two Petitions were consolidated to allow for efficient litigation since the claims were identical and arose from the same set of facts. The Agency then filed a Motion to Dismiss asking that the Board either dismiss the Petitions without prejudice or, in the alternative, stay proceedings until the Agency had an opportunity to take remedial actions that would respond to Petitioners' claims regarding the selection process. Upon completion of those actions, GAO intended to file a motion to dismiss with prejudice. Subsequent to taking the remedial actions, the Agency filed a Motion to Dismiss. Petitioners did not oppose the dismissals but requested that the Petitions be dismissed without prejudice in order to ensure that the Agency's remedial actions were sufficient. The Administrative Judge granted the Motion to Dismiss without prejudice. No further action was taken in this case.

The last case filed in 2011 involved a Petitioner who filed on behalf of herself and other similarly situated individuals. Petitioner claimed that the Agency violated the GAO Personnel Act when it refused to provide such individuals with minimum pay increases to which they were entitled pursuant to 31 U.S.C. §§732(c)(j). In Petitioner's case, she had voluntarily transferred to a lower Banded position in 2009 and signed a memorandum stating that she would continue to receive the rate of basic pay that she was receiving prior to her move to a lower Band. She was advised that she would not receive a pay increase, including an annual increase, until the maximum of the lower band reached her current salary. In 2010, the Comptroller General authorized the payment of

salary adjustments to most of the GAO employees whose work performance was at a satisfactory level. Petitioner's work performance was at a satisfactory level, but she did not receive a minimum percentage pay increase. Petitioner alleged that this denial of a pay increase was in violation of the GAOPA. The Agency filed a Motion for Leave to file a Motion to Dismiss and to Stay Discovery. The Administrative Judge granted the stay request in part and allowed Petitioner time to respond to the Agency's Motion. Petitioner then filed a Motion for Summary Judgment. The Agency subsequently filed its Motion to Dismiss. Shortly thereafter, Petitioner filed a Motion for Voluntary Dismissal. The Administrative Judge in the case granted the Motion and the case was dismissed.

b. Stay Requests

The PAB/OGC filed one Request for *ex parte* stay with the Board in 2011. The Chair stayed the individual's removal from employment for 30 days to allow time for PAB/OGC to investigate the allegations that the Agency discriminated against Petitioner based on disability including a failure to provide reasonable accommodation and that the Agency committed other prohibited personnel practices. The PAB/OGC sought a further temporary stay of 30 days which the Agency opposed. The Board granted the request to allow time for completion of PAB/OGC's investigation. Petitioner also filed a Petition with the Board. The PAB/OGC then filed a request for permanent stay which GAO opposed. The Chair extended the temporary stay for another 30 days to allow for consideration of the issues raised by the permanent stay request, and ordered a limited

evidentiary hearing and oral argument. After the hearing, the parties filed a Joint Motion to Stay Proceedings to allow time to memorialize and complete their agreement in principle resolving the underlying dispute. The Motion was granted. After two additional Joint Motions to Stay, the parties settled Petitioner's claims and the matter was dismissed.

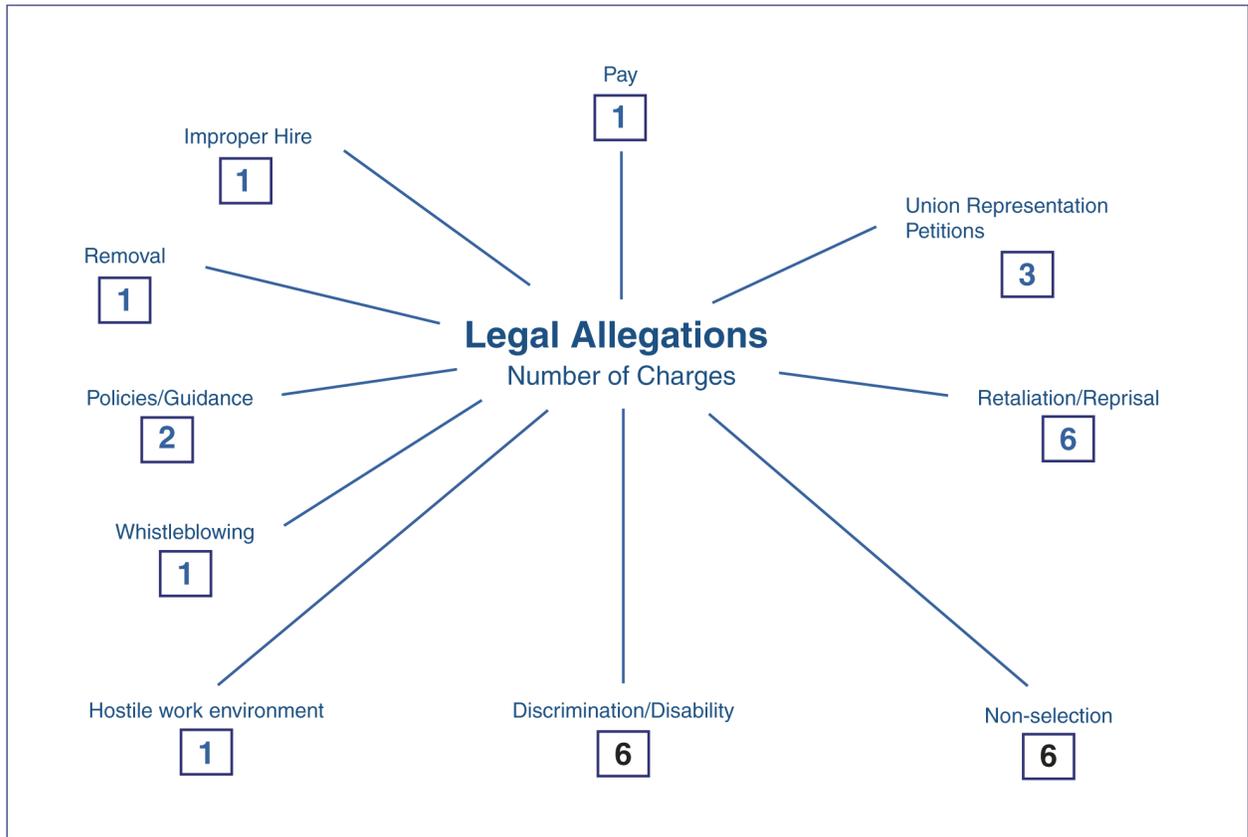
Section 3: PAB Office of General Counsel Activity

a. Case Activity

(1) Charges

There were 25 new charges filed with the PAB/OGC from January 1, 2011 through December 31, 2011. These charges involved allegations concerning: union representation petitions, whistleblowing, removal, non-selection, discrimination/disability, hostile work environment, policies/guidance, pay, an improper hire and retaliation/reprisal. Figure 3 shows the breakdown of the legal allegations presented in charges filed with the General Counsel's office.

Figure 3: Legal Allegations



During 2011, the PAB/OGC had a total of 35 open charges on its investigative case docket and closed 12 of the charges during the year. The PAB/OGC had 23 open cases on its docket with involvement in one Labor Management matter at the end of 2011. The PAB/OGC also settled a total of 39 cases in 2011 with 37 of those cases remaining open before the Board for compliance with the settlement agreement.

(2) Litigation

The PAB/OGC participated in 48 cases before the Board, filing 7 new Petitions.

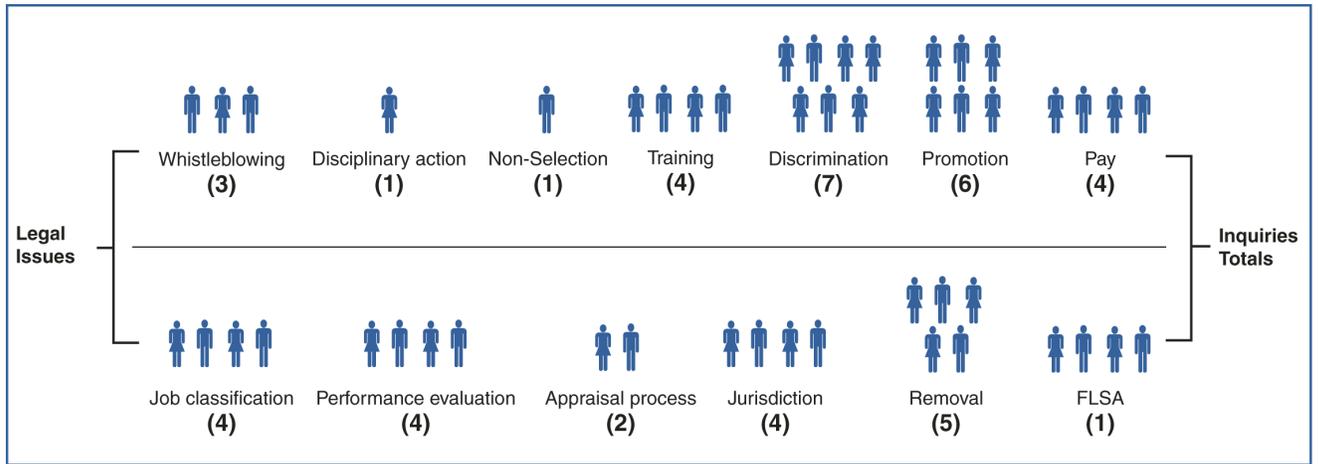
Most of the GAO investigations conducted by the Office of General Counsel were initiated by charges filed by employees. PAB/OGC initiated one corrective action investigation in 2011 regarding an allegation of improper hires at GAO. After PAB/OGC concluded its investigation, it issued a report to GAO. GAO agreed with the PAB/OGC's findings and recommendations, and agreed to implement the recommended corrective actions.

In its corrective action report PAB/OGC recommended that a GAO official be disciplined and that the Agency reconstruct four vacancies. The Agency agreed with the recommendation to suspend the official; as a result, there was no need to prosecute a disciplinary action before the PAB. The Agency later entered into a settlement agreement with the official and the official is no longer employed at GAO.

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 informational inquiries received either by phone or an in-person meeting. The General Counsel's office fielded 46 informational inquiries during 2011. The types of inquiries and the number by type are shown below.

Figure 4 : Types of Inquiries



The General Counsel did not participate in other activities or outside engagements in 2011. In addition, PAB/OGC did not comment on any proposed GAO Order. However, as discussed in detail in the section on Special Projects, *infra*, an attorney in the General Counsel’s office has been elected to lead the Legislative Branch Employment Dispute Resolution Council.

Section 4: Office of EEO Oversight Activity

The GAO Personnel Act directs the Personnel Appeals Board to oversee equal employment opportunity at GAO through review and evaluation of GAO’s procedures, policies, practices.²² To fulfill this mandate, the Board established an Office of EEO Oversight to assist it in conducting studies of selected issues and preparing evaluative reports that contain its findings and conclusions, as well

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

as its recommendations to the Agency. In 2011, the Board published its report on the study of Asian Americans and Pacific Islanders at GAO. The Board will be working on its study of older workers at the Agency once a new Oversight Director is hired.²³ The Board also approved a proposal to study the Americans with Disabilities Act Amendments of 2008 (ADAA) and GAO's multidimensional response to the statutory changes.

Study of Asian Americans and Pacific Islanders at GAO

In 2010, the Board began its study of Asian Americans and Pacific Islanders at GAO which was prompted by the Board noting, in other studies, that AAPI employees at GAO are well-represented across the Bands within the analyst population but entry into the Senior Executive Service (SES) has been, and continues to be, problematic. The Board has also taken heed of sporadic spikes in the separations of Asian American females from GAO. In addition, the Agency's 2009 Workforce Diversity Plan noted that diversity of leadership at GAO is a concern, generally, for employee groups and was specifically noted by the Asian American Liaison Group (AALG).

Based on those factors, the Board decided to consider the history of employment of Asian Americans at GAO over the past two decades, in an attempt to identify what factors have affected their career trajectories, either positively or negatively, within GAO. In addition, the Board surveyed the Asian

²³ The Board's oversight reports can be found at www.pab.gao.gov under the link to EEO Oversight.

American population at GAO, as well as a random sample of the rest of the workforce for comparison purposes.²⁴

The Board used the survey to elicit perceptions about GAO's culture or organizational factors that have either limited or fostered employment opportunities and/or career advancement for AAPI staff at GAO. The survey was structured in a way to allow demographic comparisons at a number of levels beyond race, gender and national origin so that the Board was able to review results within categories such as pay bands and time at the Agency.

The Board's report on Asian Americans and Pacific Islanders was published in October 2011. The Board concluded that there has been some progress of Asian Americans at the Agency over the past two decades; their presence has tripled; and they have doubled their ranks at the Band III level. The Asian Americans have some of the highest level performance scores for those under 40 and are promoted at a higher rate than their participation in the GAO workforce. While the Asian American population seemed satisfied with their careers and has had an increase in the SES area at GAO from 2.8% to 4.7% (accounted for by only two persons moving into the SES) since 1991, a pattern shows that Asian Americans separate at a rate much higher than any other demographic group.

The Board made recommendations in the report based on the information gathered. The first recommendation was for the Agency to collect more data relating to separations by fine tuning its exit questionnaire to get detailed

²⁴ The Board entered into a contract with Leadership & Talent Management Solutions at the U.S. Office of Personnel Management (OPM) to develop and administer its survey.

responses about an employee's decision to separate. Knowing where a non-retiring employee is going might help the Agency strategically retain more of the AAPI staff, a group that resigns at levels higher than any other group. The Board also urged the Agency to consider hiring diverse talent outside the government at the mid-level and above. This would also help the Agency's diversity profile in supervisory and management employees and might positively affect employees' views about equal opportunity for advancement.

The Board further recommended that the Agency review AAPI's participation rate in the career development and mentoring programs to see if it shows that they are not participating at a level proportionate to their participation in the workforce. If it discloses a low level of participation, a further review would be needed to determine if it stems from a lack of interest or is derived from a perception of a lack of opportunity.

The Agency should review its application and selection process and determine why the AAPI population has not increased in the feeder pool despite having high credentials. The Agency should review how senior level assignments are made and if AAPI staff are given an opportunity to demonstrate leadership and management skills.

The Board also suggested that the Agency consider the promotion information available to Band IIs and Band IIIs regarding moving to the SES level and whether that information provides a sufficient roadmap to those interested in advancing. In addition, the Board suggested that there should be a focus on regional offices and mission teams where AAPI employees are concentrated.

Last, if it is not in practice, the Agency should review mission teams and regional offices when evaluating promotion and representation data by band level.

Study of Older Workers at GAO

The Office of Oversight had begun a study of the engagement and retention of older workers at GAO that was, in large part, premised on the 2007 OPM projections on retirement. Given the now unlikelihood of a retirement tsunami, the Board decided to revise its project proposal in order to undertake a more relevant study of older employees in the GAO workforce. This report has been delayed until the Oversight position is filled.

Reasonable Accommodation

The Board will commence its study, at a later date, on the sweeping changes in the law as they apply to GAO, following the Americans with Disabilities Act Amendments of 2008 (ADAA). These amendments were enacted by Congress in response to a series of Supreme Court decisions that narrowly construed sections of the original Americans with Disabilities Act and eliminated protection for many individuals that Congress intended to be covered by that Act. The study will begin after an Oversight Director is on board.

Section 5: Special Projects

a. Mediation Program

The Board's mediation program continued to provide employees and 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 one mediation request. Shortly after mediation ended, the parties settled the case.

b. Website Developments

The website²⁵ continues to be an invaluable resource for information about the Board. The Board's website is now more user-friendly, including a more informative home page. A directional map has been added that will assist individuals with their travel to the PAB from anywhere within the Washington, D.C. area. A separate section explains the mediation process. The Annual Report is available exclusively on the website. The PAB website now allows individuals to research decisions by search terms within the decision. The website is updated regularly to include announcements as well as new decisions.

In the past, statistical information has shown that over the years the use of the Board's website has been on a steady rise. However, due to changes by

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

GAO's Office of Information Systems Technology Services in their tracking of website usage, we are unable to provide this data. We hope to work with them to provide this information in the future.

c. Legislative Branch Employment Dispute Resolution Council

Since September 25, 2008, the Personnel Appeals Board has been a member of the Legislative Branch Employment Dispute Resolution Council (LBEDRC). This Council grew out of comments of members of the Committee on Appropriations (House Report 109-139) accompanying the Appropriations Bill for FY 2006. The Committee suggested: 1) the establishment of a Council to engage in collaborative efforts to explore and implement improvements in efficiency and effectiveness, as well as reduction of redundancies; and 2) that the Council be guided by a charter like the Administrative Officers Council and the Legislative Branch Financial Managers.

Various PAB employees have represented the PAB at these quarterly meetings. For the past three years, a PAB/OGC attorney and the Clerk of the Board have been the main PAB representatives. The PAB/OGC attorney is currently serving a two year term as Chair of the Council. His term will expire in December 2012.

d. PAB Relocation to GAO Main Headquarters

The Board and its Office of General Counsel relocated to the main building on March 19, 2012. The PAB is located in suite 1566 and the PAB/OGC is in suite 1562.