

Personnel Appeals Board

Celebrating 35 Years



Annual Report
2015



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BIOGRAPHIES OF BOARD MEMBERS

WILLIAM E. PERSINA was appointed to the Personnel Appeals Board in June 2011. Mr. Persina became the Vice Chair of the Board in September 2013 and he became Chair in October 2014. Mr. Persina is a labor arbitrator specializing in public sector labor and employment law issues, in addition to his service with the Personnel Appeals Board. Mr. Persina is also a Presiding Member on the Foreign Service Grievance Board, which arbitrates grievances involving labor and employment law issues for Foreign Service employees. From 2012 to 2015 he served as the Chairman of the District of Columbia Office of Employee Appeals, which decides adverse personnel action appeals of District government employees, and he is a former member of the District of Columbia Police and Fire Retirement Board. Prior to beginning his arbitration practice Mr. Persina was in private law practice, providing representation and consulting services to federal agencies and unions in the areas of employment and labor law before such administrative agencies as the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority (FLRA), and the U.S. Equal Employment Opportunity Commission (EEOC). Before 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 FLRA in federal courts, including the Supreme Court of the United States. He also gave legal advice to the FLRA's presidential

appointees. 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.

ROBERT F. HERMANN was appointed to the Personnel Appeals Board in January 2012. Mr. Hermann became the Vice Chair in October 2014. Mr. Hermann has practiced law for 43 years, focusing on labor and employment law in both the public and private sectors. He has worked as a neutral, as an advocate for management and as an advocate for employees in all areas of employment law. From 1991 to 2015 he was a partner in the Westfield, New Jersey firm of Hermann & Bateman. From 1988 to 1991 he was in private practice in New York City. From 1975 to 1988, Mr. Hermann handled employment law matters as an attorney with the Office of the Chief Counsel, Internal Revenue Service. From 1978 to 1988, he was Assistant Regional Counsel for the Internal Revenue Service's North Atlantic Region, based in New York City. Mr. Hermann began his career in Washington, D.C. in 1973 as an attorney with the Federal Labor Relations Council, the predecessor to the Federal Labor Relations Authority. Mr. Hermann is a 1970 graduate of Cornell University's School of Industrial and Labor Relations and a 1973 graduate of the Cornell Law School. He is a member of the New York and New Jersey State Bars, 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. She became Vice Chair of the Board in September 2011 and served as Chair from July 2012 until September 2013. 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, Massachusetts. 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 private mediator and arbitrator. 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., adjunct professor, lecturer, consultant, mentor and trainer. She is a member of the District of Columbia and Massachusetts Bars. Ms. Winfield's five-year term as a Board Member ended in August of 2015.

JOHN L. BRAXTON was appointed to the Board in February 2011. Mr. Braxton was elected Vice Chair of the Board in July 2012 and became the Chair of the Board in September 2013. His term as Chair ended in October 2014. 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 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 is 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, Mr. 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.

DAVID P. CLARK was appointed to the Personnel Appeals Board in April 2014. Mr. Clark received his law degree from the American University's Washington College of Law in 1997 and received a M.A. in conflict resolution from the

American University's School of International Service that same year. He began his career as an attorney-adviser to presidential appointees at the Federal Labor Relations Authority. In 2001, he went into private practice, where he provides arbitration, mediation, facilitation, and conflict management services to companies, federal agencies, labor unions, and private individuals. As a mediator, Mr. Clark has presided over hundreds of workplace disputes involving employees and management. As an arbitrator, he presides over collective bargaining and other employment matters, as referred by the American Arbitration Association and the Federal Mediation and Conciliation Service, among others. Mr. Clark is a member of the State Bar Associations of New York, New Jersey, and the District of Columbia, and is certified by the Commonwealth of Virginia to practice mediation.

PERSONNEL APPEALS BOARD

Williams E. Persina	Chair
Robert F. Hermann	Vice Chair
Susan R. Winfield*	Member
John L. Braxton	Member
David P. Clark	Member
Susan P. Inzeo**	Executive Director
Vanessa H. Gallagher	Director, EEO Oversight
Sue S. Farley***	Solicitor
Kevin P. Wilson****	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

*Susan R. Winfield's term expired in August 2015.

**Susan P. Inzeo became Executive Director in October 2015 upon the retirement of the former Executive Director, Beth L. Don.

***Sue S. Farley became the Solicitor in October 2015.

****Kevin P. Wilson was hired as Senior Staff Attorney in December 2015.

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

¹ 31 U.S.C. §731 *et seq.*

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

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). The PAB also has similar review and study authority over GAO with regard to assessing the EEO impact of GAO's actions and/or inactions. See, *supra*, n. 3.

Employment Opportunity Commission (EEOC);⁵ and the Federal Labor Relations 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. The system is designed for the appointment of a new member each year so that GAO may have an annual scheduled recruitment process and the Board may function as efficiently as possible with members' terms evenly spread over time.

Candidates for the Board are sought through a process that includes advertising and recruitment efforts that focus on organizations whose members are experienced in the adjudication or arbitration of personnel matters.

Applicants are expected to have expertise or litigation experience in the area of federal personnel law, demonstrated ability to arbitrate or adjudicate complex

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 (including pregnancy), or national origin." 42 U.S.C. §2000e-16(a) (Title VII). In addition, EEOC enforces the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.*, Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101 *et seq.*, as amended, and the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§2000ff *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 thirteen 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.

legal matters, or experience at a senior level position in resolving complex legal matters.

GAO establishes a screening panel to review applications for Board member positions and identify the best qualified candidates.⁸ An interview panel composed of some of the screening panel members, including one employee group member selected by the Employee Advisory Council (EAC) representatives and one selected by the representatives of the GAO Employees Organization, conducts the personal interviews and reports its results to the full screening panel. The screening panel recommends one or more of the candidates to the Comptroller General, who makes an appointment to the Board after considering the recommended candidates. The Board members elect their own Chair and Vice Chair.

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 Office of Equal Employment Opportunity (EEO) Oversight reviews equal employment opportunity practices and procedures at GAO and issues evaluative reports that contain the Board's

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, "Personnel Appeals Board Vacancies" ¶7 (Nov. 4, 2009).

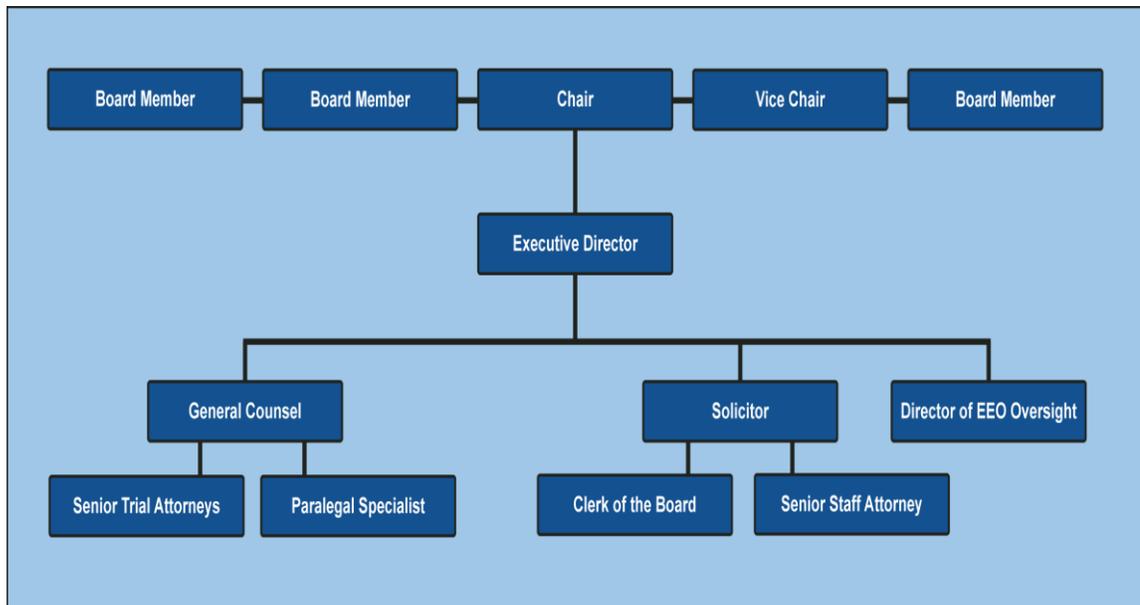
findings, conclusions, and recommendations to the Agency.⁹ The Clerk of the Board is responsible for receiving filings, distributing Board orders and decisions, and maintaining the Board's official records.

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

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

Figure 1 below shows the organizational 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 Personnel Appeals Board (Guide to Practice)*;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

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

¹¹ The Board can hear and decide cases filed by individual petitioners as well as actions filed on behalf of a class.

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 them in collective bargaining, and certifying an organization so selected as the designated exclusive bargaining representative.¹³ The Board also plays a role in

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 the appropriate 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 *Guide to Labor-Management Relations Practice* is available at www.pab.gao.gov.

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 charges, 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's rejection of the complaint in whole or in part, within 30 calendar days after receipt of the Agency's final decision, or when more than 120 days have elapsed since the complaint was filed and GAO has not issued a final decision.

¹⁴ See GAO Order 2711.1, "Labor-Management Relations," (Aug. 14, 2013); 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 alone a confidential Statement 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.¹⁷

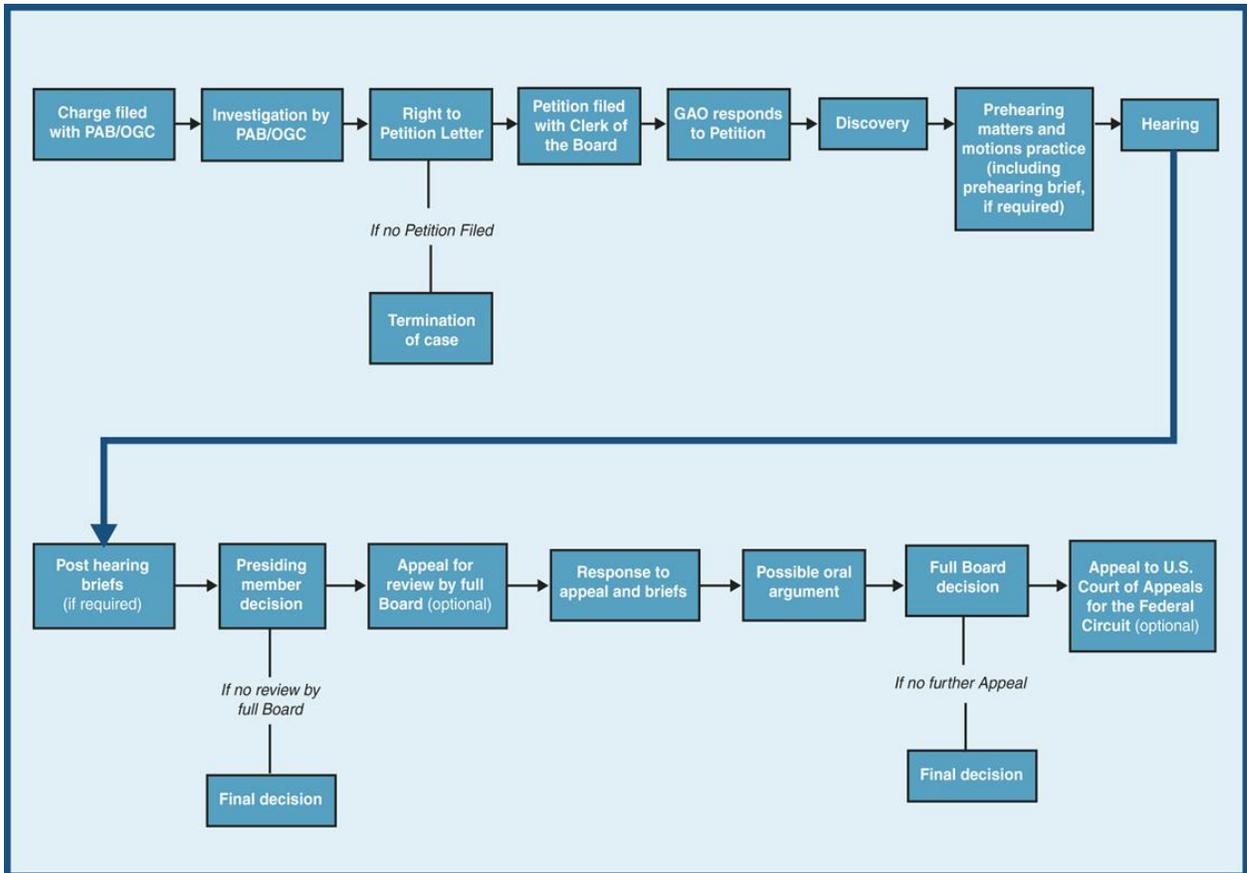
A Board member’s decision is final unless: 1) the Board member grants a party’s motion to reconsider; 2) the Board, on its own motion, decides to review

¹⁷ If a Petition is filed pro se or Petitioner is represented by outside Counsel, the Board has no information regarding why PAB/OGC is not representing Petitioner. However, if Petitioner is represented by PAB/OGC, the only information the Board assumes is that the GC has determined that there is/are reasonable ground(s) for representation. In any event, Petitioner’s representation is not a factor in the Board’s final decision.

the initial decision; or 3) a party timely 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.”¹⁸ 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, 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.

¹⁸ 4 C.F.R. §28.131.

b. PAB/OGC Stay Requests

The PAB/GC may request that the Board issue an *ex parte* temporary stay, not to exceed 30 calendar days, of any proposed personnel action that, in the PAB/GC's judgment, may constitute a prohibited personnel practice.¹⁹ If the request for an *ex parte* stay is granted, the General Counsel may later request either a further temporary stay or a permanent stay of the proposed action. A further temporary stay may be granted if the Board member, designated by the Chair, or 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.²⁰ In considering a request for a permanent stay, the Board balances the evidence as to whether the proposed personnel action arises out of a prohibited personnel practice against the nature and gravity of any harm that could flow to each side from granting or 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

¹⁹ The Board's stay authority does not extend to any reduction in force action. 31 U.S.C. §753(b).

²⁰ 4 C.F.R. §28.133(d).

of the determination and facts to the employee and the Board.²¹ 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 United States Court of Appeals for the Federal Circuit.

d. Labor-Management Relations

Through the Board's regulations, PAB/OGC is authorized to play a major role in the process when a labor organization, an employee or group of employees, or GAO files a representation petition. The General Counsel reviews the representation petition and coordinates with the parties before preparing a report for the Board, which may recommend approval of appropriate agreements reached during consultation with the parties, dismissal of the petition as being without merit, or issuance of a notice of hearing to dispose of unresolved issues raised in the petition. In addition, the PAB Office of General Counsel is responsible for investigating unfair labor practice charges filed with the Board.

²¹ *Id.* at §28.132.

CHAPTER 3: ACTIVITY OF THE PAB – 2015

Section 1: Labor-Management Relations

There were two labor-management relations matters before the Board in 2015. The first matter involved a bargaining impasse and the second matter involved clarification of a bargaining unit of employees. A brief description follows.

On April 20, 2015 the GAO Employees Organization, IFPTE Local 1921, filed a Notice and Request for Information. This request involved an impasse that had been reached during the negotiations concerning Performance-Based Compensation (PBC) and the two components of increases added to GAO employees' base salary – the “across-the-board” increase and the performance-based compensation. The impasse issues arose because agreement could not be reached regarding the amount of the PBC budget factor percentage for 2015 and how the budget factor percentage should be allocated between Standard Adjustment Factor (SAF) and Top Performer Increase (TPI). The parties participated in two days of mediation; the ultimate outcome was a ratified agreement approved by the Comptroller General. The matter before the Board was dismissed as a result of the resolution reached by the parties.

On May 4, 2015, the PAB/OGC submitted a Report of Recommendations to the PAB regarding the GAO Employees Organization, IFPTE Local 1921 Petition for Clarification of a Unit (Analyst) previously certified by the PAB. The Union sought to add employees who are “temporary and/or term employees with an expectation of continued employment beyond 90 days” to the bargaining unit.

The Union contended that the bargaining unit was described to include “permanent” employees because at the time of the original election in 2007, there were no temporary or term employees at GAO. While the matter was under investigation by the PAB/OGC, the Union and Agency agreed that both temporary and term employees who serve for 120 days or greater are subject to performance evaluations and eligible for adjustments and merit-based pay increases. In addition, those employees share a community of interest with other bargaining unit employees. The PAB/OGC analysis agreed with the parties and recommended the appropriate Clarification of Unit. The matter was referred back to the parties for the posting of appropriate Notice to employees.

Upon further review of the proposed certification language, the Board noted that the parties had previously created a separate Communication Analyst Performance Based Compensation System (CS) that was not identified on the then-current certification on record with the Board. The parties submitted follow-up materials addressing this matter, and the PAB/GC submitted a Follow-up Report of Recommendations explaining that the new CS System is coterminous with the previous designation of Communication Analysts within the Analysts Bargaining Unit and that this substituted descriptive language constitutes a technical change to preserve that status of these employees in the Bargaining Unit—rather than a substantive change to the definition of covered employees.

The Board approved the recommendations of the PAB/OGC and issued an amended and clarified certification of the Analysts Bargaining Unit on September 16, 2015. The new certification expressly includes employees “who

have an expectation of continued employment of at least 120 days,” as well as employees in the Communication Analyst Performance-Based Compensation System.

Section 2: Employment Case Activity

There were six (6) employment matters before the Board in 2015 including two requests that the Board issue a stay of personnel action. At the beginning of 2015, there were two Petitions still before the Board from previous years—one case pending from 2011 and one case pending from 2014. In the case pending from 2011, the Board issued a decision that was appealed to the United States Court of Appeals for the Federal Circuit. One Petition before the Board in 2015 was closed because the parties reached settlement, leaving two matters still pending on the Board’s docket at the close of 2015.

a. Petitions Before the Board

Summary of Cases

In one case still pending before the Board from 2014, a former employee of GAO claimed she was subjected to a long-term pattern of retaliation and a retaliatory hostile work environment based on her having engaged in various protected activities since 1993. She further alleged that in 2003, the Agency forced her to retire in retaliation for her protected activity. In July 2013, a decision was issued on the Agency’s Motion for Summary Judgment. The Administrative Judge (AJ) found that the allegations raised by the Petitioner were not supported by the facts as presented and granted the Agency’s Motion for

Summary Judgment in full. The Petitioner filed an appeal of the AJ's decision to the full Board. On April 1, 2015, the AJ's decision was affirmed with two members upholding the AJ's initial decision and two members dissenting. The Petitioner then filed a timely appeal of the *en banc* decision of the Board with the U.S. Court of Appeals for the Federal Circuit, where the matter is currently under review.

In another case from the previous year still pending before the Board in 2015, Petitioner claims that GAO committed prohibited personnel practices under 5 U.S.C. §§2302(b)(8) and (b)(12). Petitioner alleges that the Agency engaged in whistleblower retaliation: 1) by conducting an investigation into his conduct regarding the safeguarding of investigative material and his time and attendance reports; and 2) by subsequently issuing him a memorandum of counseling. Petitioner claims that these actions were taken in retaliation after he sent an e-mail to his supervisor concerning a possible violation of law, rule or regulation under 5 U.S.C. §2302(b)(8). He claims that the e-mail constituted a "protected disclosure." The Agency filed a Motion to Dismiss the Petition on the basis that it was untimely and because it failed to state a claim upon which relief could be granted. In particular, the Agency argued that Petitioner's e-mail was not a "protected disclosure," and that neither the investigation into Petitioner's conduct, nor the manner in which the investigation was conducted, were personnel actions. The Agency also argued that the counseling memorandum was not a personnel action that could support a whistleblower claim.

The Administrative Judge issued a decision granting the Motion in part, and denying it in part. The AJ granted the Agency's Motion to Dismiss, without prejudice, regarding the manner in which the investigation was conducted. The AJ denied the Agency's Motion because there was insufficient evidence to determine whether the Petition was timely filed under the circumstances and whether the actual investigation was a personnel action covered under 5 U.S.C. §2302(b)(8). The AJ also concluded there was sufficient evidence to show that Petitioner's e-mail constituted a "protected disclosure" under 5 U.S.C. §2302(b)(8) to allow the case to proceed. A hearing was held on the matter in October 2015 and the post-hearing briefs were filed in December 2015. The case was still pending at the end of the year.

In a related case, on January 15, 2015, PAB/OGC filed a Petition for Disciplinary Action against a manager pursuant to 4 C.F.R. §28.132(a)(2) on the basis of alleged misconduct. PAB/OGC alleged that the manager violated 5 U.S.C. §2302(b)(8) when he threatened to take a personnel action against an employee because the employee disclosed information protected under the Whistleblower Protection Act. The PAB/OGC alleged that in retaliation for this disclosure, the manager issued a letter of counseling alleging that the employee provided inaccurate or misleading T&A information and failed to safeguard investigative materials. The Board decided to hold this case in abeyance pending the resolution of the related case before the Board.

In the second Petition filed with the Board in 2015, Petitioner alleged that GAO conducted unlawful employment practices in violation of 42 U.S.C. §2000e

et seq, and 5 U.S.C. §2302(b)(9)(A) and (C). Petitioner claimed that GAO retaliated against him for having engaged in protected activity when he raised concerns that his supervisor's rating of his job performance was discriminatory and retaliatory. Petitioner stated that GAO took a number of actions and inactions in violation of Petitioner's rights when it: 1) increased the number of subordinates Petitioner supervised while Petitioner's equivalent co-worker supervisory responsibilities for subordinates decreased; 2) assigned work to employees under Petitioner's supervision without Petitioner's knowledge; 3) excluded Petitioner from interviews of candidates for a position Petitioner would supervise; 4) blocked Petitioner's access to an essential database to perform duties; 5) reassigned Petitioner to a position with no supervisory and policy-making duties; and 6) relocated Petitioner from his office on the seventh floor to an office on the first floor. The parties obtained a stay of proceedings late in the discovery process in order to pursue settlement. Their discussions resulting in resolution of the case, and the AJ dismissed the matter with prejudice on August 11, 2015.

b. Stay Requests

The Board received two *Ex Parte* Requests for an Initial Stay under section 4 C.F.R. §28.133(a) of its regulations during 2015. In both cases, the Board granted the requested thirty-day stays to allow time for the PAB/OGC to investigate.

In February 2015, the PAB/OGC filed an *Ex Parte* Request for Stay on behalf of an employee to stay the proposed termination of his employment with GAO. The employee had been notified, in a meeting at which he was represented by a Union representative, that his employment would be terminated effective the next day. The employee contended that GAO's termination of his employment was based on his handicapping condition, which limited his ability to sleep, concentrate, think, and work.

The employee had made a request to GAO's Reasonable Accommodation Coordinator to help him identify reasonable accommodations that would better enable him to perform the essential functions of his position. He believed the response embodied "illusory in nature" accommodations that provided no greater flexibility for him to perform the essential functions of his position and therefore he believed they were ineffective. No follow-up requests for stays were requested in this matter.

Another *Ex Parte* Request for Stay was filed with the Board on September 17, 2015. The PAB/OGC filed the Request on behalf of an Analyst in the Professional Development Program (PDP) at GAO to halt the proposed termination of her employment. The stay was requested to allow time to investigate the employee's allegation that GAO committed a prohibited personnel practice and discriminated against her based on her race and religion. While the employee was still in her probationary period, the PAB/GC requested time to investigate whether GAO had followed proper procedures for removal as outlined in GAO Order 2751.1, Discipline and Adverse Actions. Upon review of the *Ex*

Parte Request for Stay and the circumstances of the pending request, the Board Chair concluded that the PAB/OGC met the burden required under 4 C.F.R. §28.133(a) and granted the *Ex Parte* Request for Stay for thirty (30) days to provide the PAB/OGC time to investigate the allegations. No requests for additional stays were filed in this matter.

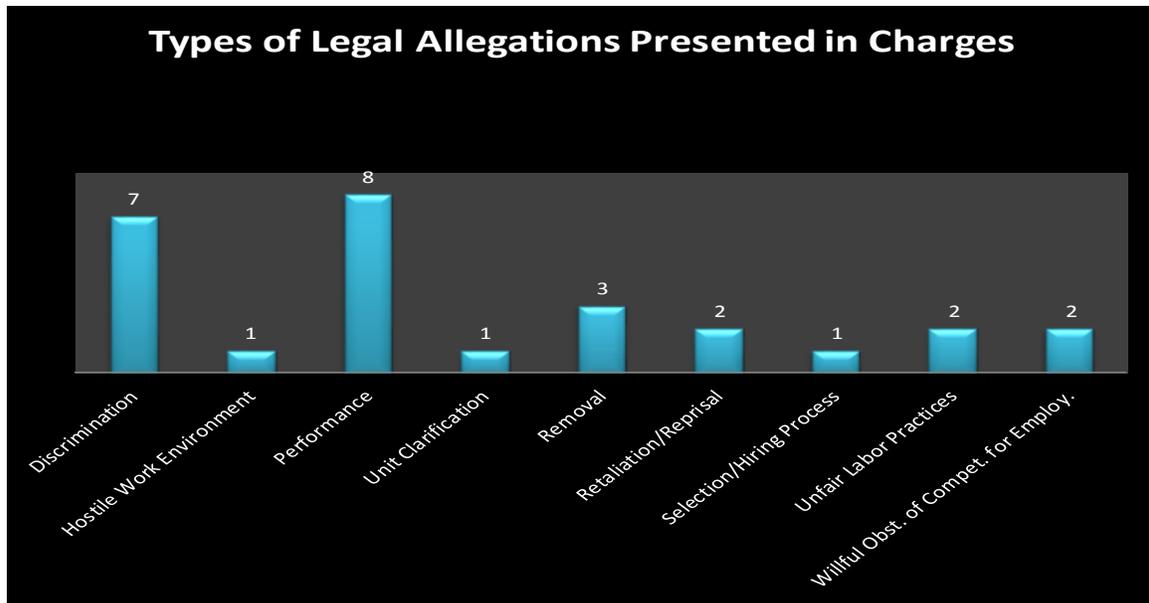
Section 3: PAB Office of General Counsel Activity

a. Case Activity

(1) Charges

There were eighteen new charges filed with PAB/OGC from January 1, 2015 through December 31, 2015. Figure 3 shows the breakdown of the different legal allegations presented in charges filed with that office.

Figure 3: Legal Allegations Presented in Charges



Source: PAB/OGC

During 2015, PAB/OGC had a total of twenty-eight (28) open charges on its investigative case docket including those filed before 2015. The office closed eighteen (18) of the charges during the year, leaving ten (10) open cases at the end of 2015. The PAB/OGC settled four cases in 2015; two were litigation matters and two were settled during the investigative stage.

(2) Litigation

PAB/OGC participated in six (6) cases before the Board including two *Ex Parte* Requests for Initial Stay in 2015. Most of the investigations conducted by the PAB Office of General Counsel were initiated by charges filed by employees. During calendar year 2015, the PAB/OGC filed one proposed disciplinary action for violation of the Whistleblower Protection Act of 1989 and the Whistleblower Protection Enhancement Act of 2012. That proposed disciplinary action was still pending before the Board at the close of 2015.

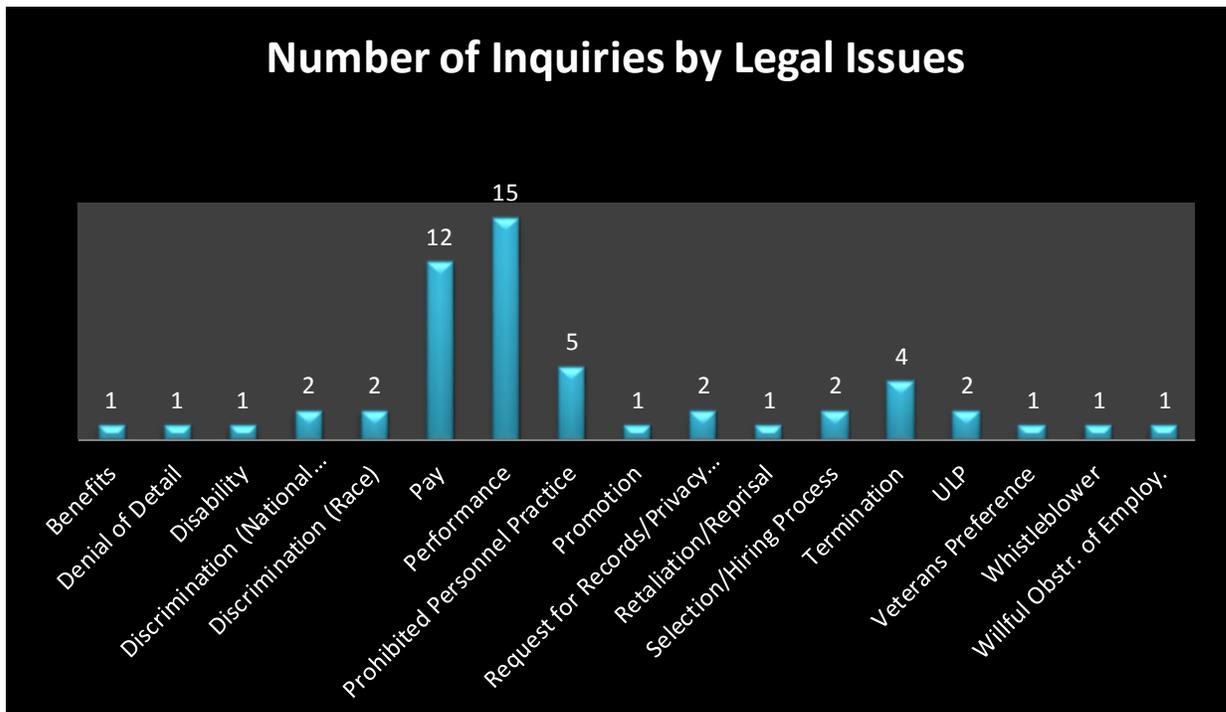
b. Other Activity

In addition to its investigative and litigation activity, the PAB/OGC gave a presentation to new employees in GAO's Human Capital Office and a general presentation to members of the Union on prohibited personnel practices and the role of the Personnel Appeals Board. In addition, the PAB/OGC responded to some unique inquiries during calendar year 2015, such as: 1) a FOIA request for information concerning PAB cases; 2) a request from the Administrative

Conference of the United States concerning consolidated cases; and 3) a Privacy Act request for documents relating to a charge filed with PAB/OGC.

The PAB/OGC regularly provides information or informal advice to GAO employees about their personnel and equal employment opportunity rights. This is accomplished by responding to informational inquiries received either by phone, e-mail or through an in-person meeting. The General Counsel’s office fielded fifty-four (54) informational inquiries during 2015. The types of inquiries and the number by type are shown below.

Figure 4: Number of Inquiries by Legal Issues



Source: PAB/OGC

Section 4: Office of EEO Oversight Activity

The GAO Personnel Act of 1980 directs the Personnel Appeals Board to oversee equal employment opportunity 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 it in conducting studies of selected issues and preparing evaluative reports that contain its findings and conclusions, as well as its recommendations to the Agency.²³

In 2015, the Personnel Appeals Board finalized and issued its *Study on Age in the GAO Workforce*. This study offers an evaluation of the extent to which older employees at GAO, defined as those age 40 or older, have shared in equal employment opportunity at the Agency. The Board's study reviewed selected GAO policies, procedures, and practices to ascertain whether they protect against age discrimination in the Agency's workforce. The study also reviewed a set of GAO personnel data from calendar years 2000-2012 and compared it, where possible, to a set of data on the federal civilian workforce from the United States Office of Personnel Management. The Board's study analyzed Agency adherence to the standards set forth in its directives across this time period in four areas: 1) new hires; 2) part-time work schedules; 3) retirements; and 4) promotions.²⁴

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

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

²⁴ The study did not include a review and analysis of data relating to employee appraisals and performance based compensation under the Agency's Competency Based Performance System (CBPS) implemented at the Agency in fiscal year 2013.

The Board's study revealed that GAO has taken numerous affirmative steps to promote an inclusive workplace free from age discrimination. The study also identified areas where the Agency can further enhance its commitment and efforts towards creating a workplace free from age discrimination. The Board's study included four recommendations for the Agency's consideration. They are:

- 1) review recruitment and selection practices to determine whether the Agency can make hiring opportunities more accessible to applicants age 40 or older;
- 2) increase visibility of the option for staff to work on a part-time schedule, especially for employees age 40 or older;
- 3) consider adopting phased retirement to allow employees who are eligible to retire to work on part-time schedules, while beginning to draw a portion of their retirement benefits; and
- 4) continue to monitor, track, and evaluate promotion and performance appraisal data to ensure that an employee's age is not a relevant factor in assessing promotion potential.

The Agency's consideration of these recommendations will serve to strengthen GAO's efforts to create a workplace free from age discrimination.

Additionally, the Office of EEO Oversight continued the Board's work on potential future studies on: 1) GAO's procedures, policies, and practices as they relate to the Americans with Disabilities Act, as amended by the Americans with Disabilities Act Amendments Act of 2008; and 2) the Agency's implementation of Title II of the Genetic Information Nondiscrimination Act of 2008.

Section 5: Special Projects

a. Mediation Program

The Board's mediation program²⁵ was established to provide employees, applicants and the Agency another avenue for handling disputes. The parties that participate in mediation are given the option 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. Further information about the mediation program can be found on the Board's website. The PAB Office of General Counsel used the mediation process to settle two litigation matters which resulted in cost saving for the Agency as well as an efficient avenue for resolving certain employment disputes filed with its Office.

b. Website Developments

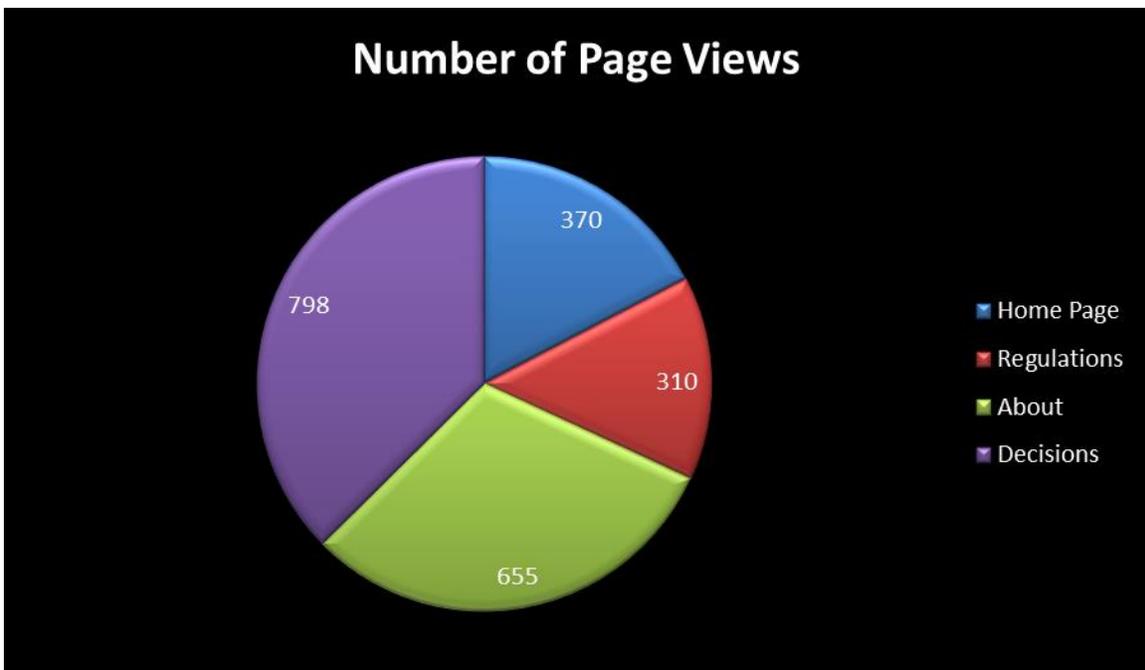
The website²⁶ continues to be a valuable resource for information about the PAB. The Annual Report and EEO Oversight Reports are available exclusively on the website. The PAB website also allows individuals to research Board decisions by search terms within the decision. The website is updated regularly to include announcements as well as new decisions.

²⁵ See the Board's *Practice Guide to Mediation of Disputes at the Personnel Appeals Board*. The mediation guidelines can also be found on the PAB's website at www.pab.gao.gov.

²⁶ The website can be found at www.pab.gao.gov.

Since 2013, the Board has been tracking the number of visitors to its website. With help from GAO’s Information Systems and Technology Services and using Google Analytics, the Board can see a pattern of usage on the website over time. While gathering this information, no personal data is collected when tracking visits. The information provided in the chart below shows the use of the Board’s website in 2015.

Figure 5: Number of views of PAB website



c. Other Activity

FOIA Request

In 2015 the Board received two informational inquiries requesting records for each case filed since the creation of the Board. The request was forwarded to the GAO Audit Policy and Quality Assurance (APQA) office. This office is

responsible for responding to FOIA requests for the Agency and performs the reviews and redactions of documents prior to release to the public. Some of the information requested from the PAB was already published and available to the public.



Board's 35th Anniversary

The Board celebrated its 35th Anniversary in combination with the retirement of its first Executive Director, Beth L. Don, in October 2015. Over the years, the Board has fulfilled its role and responsibilities as established by Congress when it passed the General Accounting Office Personnel Act of 1980 (GAOPA), 31 U.S.C. §731 *et seq.* The GAOPA created an independent personnel system for GAO and established the Personnel Appeals Board to oversee that system. The Board has adjudicated and issued decisions in over 250 cases. In addition, the Board has conducted elections for and certified two collective bargaining units, and presided over negotiation impasses as well as impasse negotiability cases for the Agency and the Union.



Comptroller General Gene Dodaro with retiring PAB Executive Director Beth L. Don and present and returning PAB Members

The Diversity Hallway Fair

The Board staff participated in the GAO Annual Diversity Hallway Fair, providing information on PAB services to GAO employees. The Board also distributed informational handouts and copies of its Guide to Practice, Guide to Mediation, and Labor-Management Relations Guide.

Black History Month Oratorical Contest

Board Chair William Persina served as one of the judges for the District of Columbia Public Schools Oratorical Contest sponsored by the GAO Blacks in Government Chapter in 2015. The contest involved review of the contestants' written essays and, along with other judges, determining the top three finalists for the oral presentations. The contest was held in the GAO Auditorium in March 2015.