Personnel Appeals Board
Annual Report
2003

Personnel
Appeals
Board

December 1, 2003

The Honorable David M. Walker
Comptroller General
United States General Accounting Office
Room 7000
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Walker:

Attached please find a copy of the Annual Report of the Personnel Appeals Board of the U.S. General Accounting Office for fiscal year 2003. The report describes the activities of the Board, its Office of General Counsel, and its Office of Equal Employment Opportunity Oversight during the past fiscal year.

Sincerely,

Anne M. Wagner

Anne M. Wagner
Chair

attachment

U. S. General Accounting Office • Suite 560 • Union Center Plaza II • Washington, D.C. 20548 • Phone (202) 512-6137

Table of Contents

Letter 1

Contents 2

Biographies of Board Members 4

Personnel 6

Chapter 1: About the PAB **8**
Board Staff 9

Chapter 2: The Appeal Process **12**
Prehearing Discrimination Complaint Procedures 12
Initiating an Appeal 12
Board Activity 13
Decisions 13

Chapter 3: PAB Office of General Activities **22**
Case Activity 22
PAB/OGC Investigative Authority 22
Stays 22
Disciplinary Proceedings 23
Employee Contracts 23
Other Activities 23

Chapter 4: The Office of EEO Oversight **24**
Pay Levels and Probationary Periods 24
The Office of Opportunity and Inclusiveness 24
Reasonable Accommodation 25

Chapter 5: Administrative Activities **28**
Regulatory Revisions 28
Web Page Development 28
The Guide to Practice 28

Table of Contents

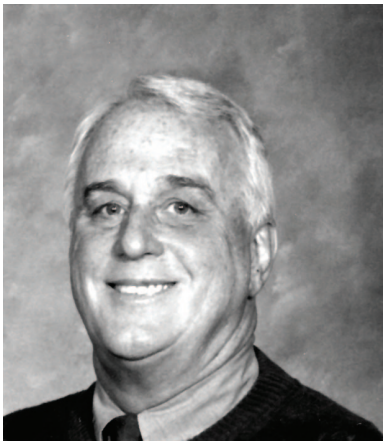
FIGURES

Figure 1.1: Organizational chart for the Personnel Appeals Board 10
Figure 2.2: Process of case from charge to termination of appeal 17
Figure 2.3: Process of case to final board member's decision with no appeal 18
Figure 2.4: Process of case from charge to judicial review 19
Figure 2.5: Process of reduction-in-force case (employee's option) 20
Figure 2.6: Process of case from charge to judicial review (employee opts out) 21

Anne M. Wagner

Anne M. Wagner, was appointed to the Board in 1999; served as Vice-Chair in fiscal year 2002; and, was elected Chair in fiscal year 2003. A graduate of the University of Notre Dame and the George Washington University Law School, Ms. Wagner began her career as a staff attorney in the Office of the General Counsel for the General Services Administration, where she primarily handled labor and employment issues. From there, she went on to become a litigating attorney for the American Federation of Government Employees (AFGE), AFL-CIO, the largest federal sector labor union representing more than 600,000 bargaining unit employees throughout the Federal government. As AFGE's Assistant General Counsel for Litigation, Ms. Wagner has handled a wide array of cases arising under the comprehensive web of federal personnel and labor laws, and has argued numerous cases before federal district and appellate courts. She has also spearheaded litigation targeted at protecting the constitutional rights of federal employees, including challenges to the honoraria ban and mandatory drug testing.

Michael W. Doheny



Michael W. Doheny, was appointed to the Board in 2002 and elected Vice-Chair in fiscal year 2003. He is a graduate of St. Francis DeSales College in Milwaukee, Wisconsin and the Catholic University School of Law. Mr. Doheny retired after 32 years with the Federal government in October 2001. He started his federal employment with the former Civil Service Commission as a hearing officer adjudicating EEO complaints and adverse action appeals. Mr. Doheny was an administrative judge, appellate counsel and a manager with the U.S. Merit Systems Protection Board. He also served as Deputy General Counsel and Regional Director of the Washington, DC Regional Office at the Federal Labor Relations Authority. Mr. Doheny is an arbitrator on the panel of the Federal Mediation and Conciliation Service and is certified as a mediator by the State of Virginia.

Jeffrey S. Gulin

Jeffrey S. Gulin, appointed to the Board in 1998, served as its Vice-Chair in fiscal year 2001 and as Chair in fiscal year 2002 and half of fiscal year 2003. Mr. Gulin's term expired in fiscal year 2003 but his term was extended to allow him to finish work on his cases. A graduate of New York University and the University of Baltimore School of Law, Mr. Gulin has been engaged in administrative adjudication and private arbitration for the past 20 years. From 1989 until early 1997, he served as an administrative law judge for the State of Maryland adjudicating contested cases involving numerous fields of law including employment, disability, and environment. Mr. Gulin continues to serve as a private arbitrator with an emphasis on copyright, telecommunications, and technology. In that capacity, he has authored decisions setting copyright royalty rates for retransmission of television broadcasts by American satellite carriers; rates for the use of music contained in programming broadcast by public television and radio stations; and issuance of a permit to the U.S. Department of Energy to dispose radioactive waste at an underground repository in New Mexico. Recently, Mr. Gulin adjudicated a rate-setting case on behalf of the U.S. Copyright Office to establish royalty fees for internet transmissions of sound recordings.

John P. Mahoney

John P. Mahoney, was appointed to the Board at the end of fiscal year 2003. Mr. Mahoney, a graduate of Assumption College and the Catholic University School of Law, is currently with the law firm of Mahoney & Mahoney, specializing in employment matters. In his legal practice, he has represented federal employees and agencies, employee associations, and unions in cases before the Merit Systems Protection Board, EEOC, FLRA and Office of Special Counsel, and in federal courts. The former chair of the D.C. Bar's Labor and Employment Law Section, Mr. Mahoney also co-authored the book, *The Federal Employee's Legal Survival Guide*, and co-hosted "FEDtalk," a weekly talk show on WTOP's federalnewsradio.com covering federal employment issues. Mr. Mahoney is a member of the bars of the District of Columbia, Maryland, and the Supreme Court of the United States.

PERSONNEL APPEALS BOARD

Anne M. Wagner	Chair
Michael W. Doheny	Vice-Chair
Jeffrey S. Gulin	Member
John P. Mahoney	Member

PERSONNEL APPEALS BOARD STAFF

Beth L. Don	Executive Director
M. Gail Gerebenics	Director, EEO Oversight
Susan P. Inzeo	Solicitor to the Board
Sue Sung Farley	Staff Attorney
Patricia V. Reardon-King	Clerk of the Board

PERSONNEL APPEALS BOARD/OFFICE OF GENERAL COUNSEL STAFF

Janice M. Reece	General Counsel
Diane R. Williams	Senior Trial Attorney
M. J. Alexander	Senior Trial Attorney
Darian C. Jackson	Secretary/Legal Information Assistant

About the PAB

In 1980, Congress passed the General Accounting Office Personnel Act (GAOPA),[1] creating the Personnel Appeals Board (PAB or the Board). The Board is charged with adjudicating disputes, issuing decisions and ordering corrective or disciplinary action, when appropriate, in cases involving prohibited personnel practices, discrimination, and prohibited political activity involving employees of the U.S. General Accounting Office (GAO or the Agency), a legislative branch agency. The GAOPA also gives the Board authority to oversee GAO's employment regulations, procedures and practices relating to anti-discrimination laws.[2]

The PAB's authority combines the adjudicatory functions of its executive branch counterparts: the Merit Systems Protection Board (MSPB);[3] the Equal Employment Opportunity Commission (EEOC);[4] and the Federal Labor Relations Authority (FLRA).[5] The Board's Office of General Counsel (PAB/OGC) performs the investigatory and prosecutorial functions of its executive branch equivalents: the Office of Special Counsel (OSC)[6] and the EEOC Office of General Counsel.

By statute, the Board is comprised of five members who serve five-year, non-renewable terms.[7] The Agency seeks candidates 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; or demonstrated ability to arbitrate or adjudicate complex legal matters; or experience at a senior legal position in resolving complex legal matters.

GAO establishes a screening panel to review the applications and identify the candidates it determines to be especially qualified to sit on the Board.[8] An interview panel composed of some of the screening panel members, including one member of the Employee Advisory Council (EAC), conducts the personal interviews and reports its results to the full screening panel. The panel recommends one or more of the candidates to the Comptroller General who appoints members of the PAB. The Board elects its own Chair and Vice-Chair for one-year renewable terms.

[1] 31 U.S.C. §731.

[2] *Id.* §732(f)(2)(A).

[3] 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.

[4] 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. §2000e-16.

[5] The FLRA protects the "right 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 Board also has the authority to certify collective bargaining representatives and to adjudicate unfair labor practices but, in the absence of unions at GAO, has not had the occasion to do so.

[6] The OSC investigates and prosecutes allegations of 12 prohibited personnel practices (ppp), with an emphasis on protecting Federal whistleblowers. 5 U.S.C. §2302(b). OSC seeks corrective action remedies (such as back pay and reinstatement), by negotiation or from the MSPB, for injuries suffered by whistleblowers and other complainants. OSC is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit ppps.

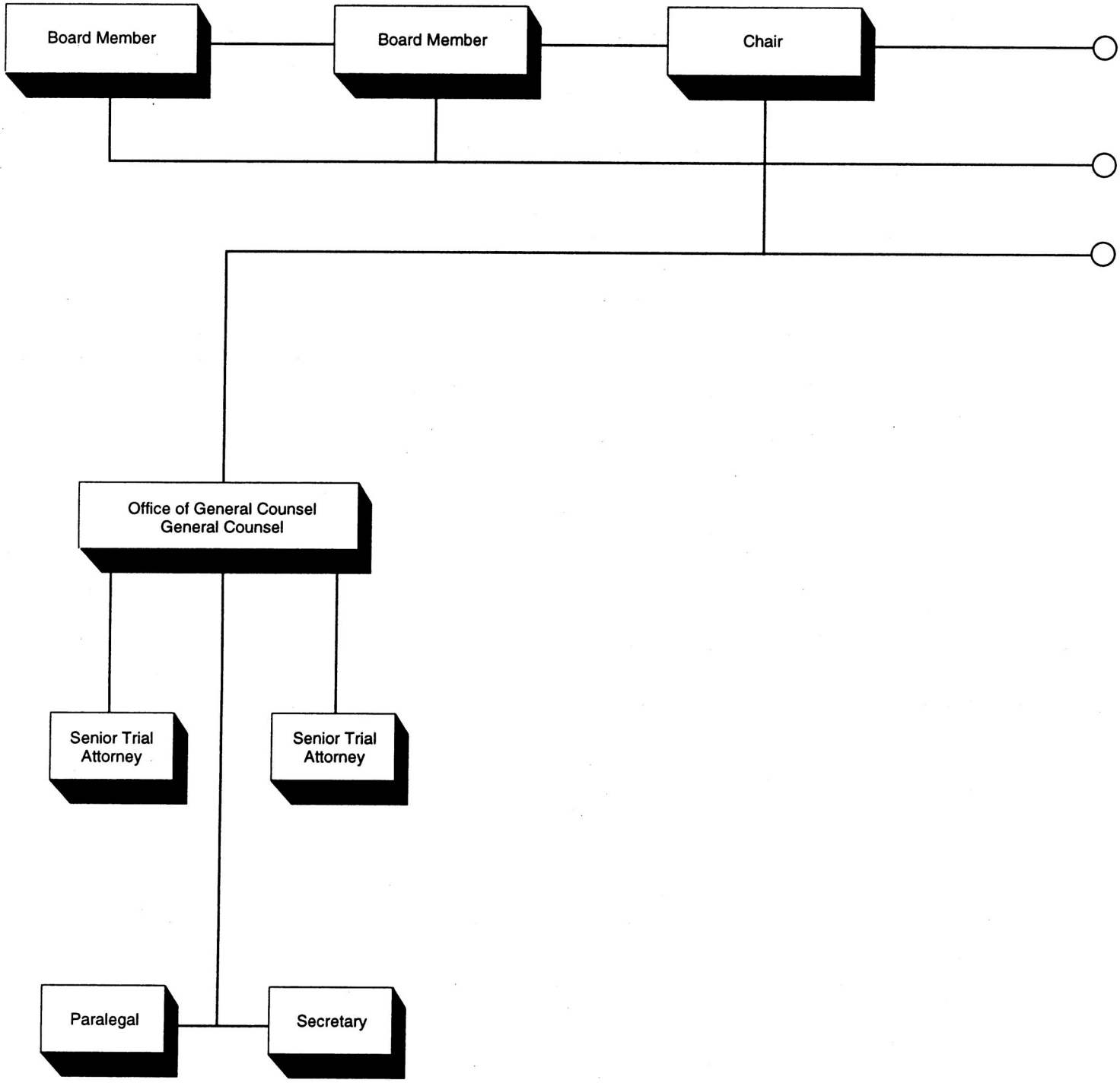
[7] The Board currently operates with a quorum of three members.

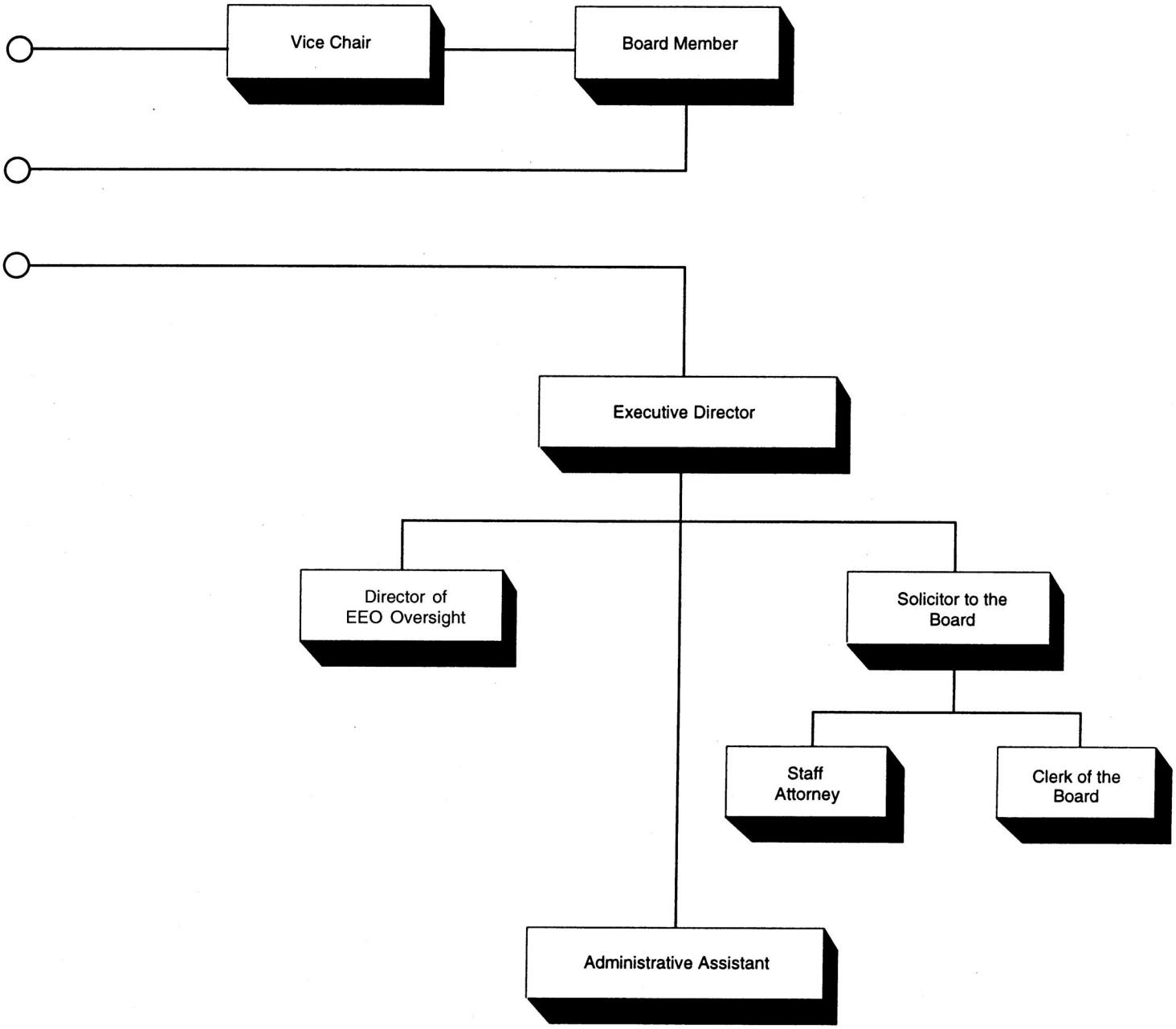
[8] The voting members of the screening panel are three or more senior management officials designated by the Comptroller General. The non-voting members are a representative from the Recruiting and Human Capital Operations Center and three representatives from the Employee Advisory Council.

Board Staff

The Board's Executive Director manages Board staff and Board operations. The Board's Solicitor and her staff advise Board members on legal matters and the Director of EEO Oversight conducts studies and produces reports on selected topics involving equal employment opportunity practices and procedures at GAO. The General Counsel, who is selected by the Board Chair and appointed by the Comptroller General, serves at the pleasure of the Board Chair. The Office of General Counsel investigates charges filed with the office and, if there is reasonable cause to believe that a violation of law has occurred, offers to represent the employee or applicant for employment before the Board.

Figure 1.1: Organizational chart for the Personnel Appeals Board




Vice Chair
Board Member
Executive Director
Director of EEO Oversight
Solicitor to the Board
Staff Attorney
Clerk of the Board
Administrative Assistant

An employee, a group of employees, a labor organization or an applicant for employment at GAO may file an appeal with the Board, which can hear individual complaints, as well as class actions. An appeal by a GAO employee 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 labor relations issue; (4) an action involving prohibited discrimination; (5) prohibited political activity; and, (6) any other personnel issues that the Comptroller General, by regulation, determines that the Board should hear.

Prehearing Discrimination Complaint Procedures[9]

At GAO, the discrimination complaint process begins with a consultation with a civil rights counselor, contact with whom must occur within 45 calendar days of the alleged incident.[10] If the matter cannot be resolved, a formal written complaint may be filed with the Office of Opportunity and Inclusiveness (O&I) within 15 days of receipt from the counselor of notice of the right to file a complaint.[11] The Director of O&I can either accept or dismiss the complaint.[12] 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. The decision of the Comptroller General may be appealed to the Board, as may O&I's decision to dismiss a complaint.

Initiating an Appeal

A GAO employee, group of GAO employees or an applicant for a job at GAO may file a Charge with the PAB/Office of General Counsel to initiate the appeal process. The PAB/OGC has the authority to investigate and to prosecute alleged violations of the law over which the Board has jurisdiction. A person may file a complaint that does not involve discrimination with the PAB/OGC within 30 calendar days after the effective date of a personnel action or within 30 calendar days after the complainant knew or should have known of the action. A person may file an appeal involving alleged discrimination with the PAB/OGC either within 30 calendar days after receipt of the agency rejection of the complaint in whole or in part, 30 calendar days after receipt of the agency's final decision, or when more than 120 days has elapsed since the complaint was filed and GAO has not issued a final decision.

Once an individual complaint is filed with the PAB/OGC, the complainant is advised of appeal rights and settlement options. The PAB/OGC then conducts an independent investigation (which may include obtaining documents and taking oral statements from persons with knowledge of the allegations) of the matters raised in the Charge to determine whether there are reasonable grounds to believe that the employee's rights under the GAO Personnel Act have been violated.

Upon conclusion of the investigation, and if no settlement occurs, PAB/OGC issues a Right To Appeal letter notifying the complainant that the investigation has been completed and that he/she has the right to file an appeal with the

[9] The complete procedures for filing a complaint may be found at U.S. General Accounting Office Operations Manual, Order 2713.2, "Discrimination Complaint Process" (December 2, 1997) (hereafter GAO Order 2713.2).

[10] The Office of Opportunity & Inclusiveness logs more than 100 counseling contacts a year. Memorandum from Ronald A. Stroman, Managing Director, O&I (July 15, 2002).

[11] The Office of Opportunity and Inclusiveness was formerly known as the Civil Rights Office (CRO). GAO Order 2713.2 does not reflect the change in nomenclature.

[12] Among the reasons a complaint may be dismissed are that it fails to state a claim; that it was not filed in a timely manner; that it alleges a matter that was not raised in pre-complaint counseling; that it contains allegations not within the jurisdiction of O&I; that it sets forth matters that are contained in a pending complaint or are the basis of a petition before the PAB or of a pending civil action in a Federal Court in which the complainant is a party; or that it is a matter that has been finally decided. A complaint may also be dismissed at any time during the process for failure of the complainant to prosecute the complaint. GAO Order 2713.2, ch. 3, §5.

Board. The PAB/OGC also issues a confidential Report of Investigation to the complainant 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 complainant in an evidentiary hearing before the Board at no expense to the employee. When the complainant accepts the PAB General Counsel's offer of representation, the PAB/OGC assumes responsibility for the entire case even if the employee has retained private counsel. If, on the other hand, the PAB General Counsel concludes that there are no reasonable grounds to support a claim, the complainant retains the right to file an appeal with the Board and seek an evidentiary hearing. The complainant may represent him/herself or retain private counsel in the appeal.

If an employee chooses to pursue an appeal without representation by PAB/OGC, the employee must file a Petition with the Board within 30 calendar days after service of the Right to Appeal letter from the PAB/OGC. Alternatively, if 180 days have elapsed from the filing of a charge with PAB/OGC and no Right to Appeal letter has been issued by the General Counsel, then an employee may "opt out" of the investigation and file a Petition with the Board. An employee who chooses that route foregoes the opportunity to have the General Counsel present the case to the Board.

Upon receipt of the Petition, the Chair may either appoint a single Board member to hear and decide the case or determine that the Board will hear the case *en banc (*by all Board members).

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 requests full Board review. All final decisions, with few exceptions, may be appealed to the U.S. Court of Appeals for the Federal Circuit.

Board Activity

During fiscal year 2003, Board members addressed a number of issues relating to nine cases and appeals before them individually and collectively. In addition to issuing numerous procedural orders, Board members disposed of substantive motions in pending cases; ruled on an *ex parte* request for a stay of a removal; held a number of status conferences; conducted evidentiary hearings; and, issued appellate decisions.

Decisions

Last fiscal year, a Board member issued an initial decision in which the PAB/OGC represented an employee who was removed from GAO. In that case, it was alleged that certain Agency officials took actions against the Petitioner in violation of Federal laws, rules, and regulations; that such actions were taken against her because she engaged in protected appeal activities; and that the actions were taken because of the Petitioner's race. Subsequent to a nine-day evidentiary hearing, the Administrative Judge determined that Petitioner's removal from the Agency was clearly supported by substantial evidence. The Administrative Judge, however, also ordered that one of Petitioner's performance appraisals be set aside and expunged from all official records. The decision was appealed to the full Board which, in fiscal year 2003, affirmed the initial decision. In its appellate decision, the Board found that the initial decision was

supported by substantial evidence. The Board further determined that the Appellant "failed to show that the Decision was inconsistent with law; an erroneous interpretation of statute or regulation; arbitrary, capricious or an abuse of discretion; or not consistent with required procedures resulting in harmful error." The Appellant appealed the Board's decision to the U.S. Court of Appeals for the Federal Circuit where, at the end of the fiscal year, the case was still pending. (PAB Docket No. 01-03, Mar. 13, 2003; No. 03-6002 (Fed. Cir. 2003)).

An initial decision was issued in fiscal year 2002 in a case involving three Petitions for Review that were consolidated prior to the nine-day hearing. The case involved allegations of reprisal for whistleblowing, retaliation for engaging in protected activity, and the commission of prohibited personnel practices with respect to Petitioner's performance appraisals. The Administrative Judge determined that the Agency violated merit system principles with respect to the lowering of two of Petitioner's ratings on a performance appraisal but ruled for the Agency on the remaining issues. Both parties filed notices of their intention to appeal the decision to the full Board but the Petitioner failed to file the required supporting brief. Because the Petitioner, in effect, abandoned the appeal, the Board had only the issue before it on which the Agency did not prevail. The Board considered and then affirmed the initial decision in its entirety, including the findings and conclusions that were not otherwise addressed in the appellate decision. (PAB Docket Nos. 00-05 and 00-08, July 11, 2003).

In the last fiscal year, an Administrative Judge sustained the removal of an employee who had alleged that GAO discriminated against her by failing to accommodate her disabilities; that GAO failed to provide adequate guidance to employees seeking accommodations for their disabilities; and, that GAO lacked the standards necessary to evaluate requests for accommodations. Following a four-day evidentiary hearing, the Administrative Judge issued a decision that found the removal to be clearly supported by the evidence in the case. The Petitioner appealed the decision to the full Board which, with one Member dissenting, reversed the Agency's decision to remove the appellant and ordered her to be reinstated retroactively to the date of her resignation in the face of removal. In that decision, the Board found that the Agency failed to accommodate the Petitioner's disability in violation of the Americans with Disabilities Act. (PAB Docket No. 99-02, July 18, 2003).

The PAB/OGC filed a Petition for Review with the Board alleging retaliation because of Petitioner's prior appeal activities. Specifically, the Petitioner alleged that his work assignments were of lesser quality and quantity than those of his peers, resulting in lower performance appraisals and awards. Prior to the fiscal year 2002 hearing, the Agency agreed to amend the performance appraisal in question. In an initial decision, the Administrative Judge held that, even with the revised rating, Petitioner was not entitled to monetary relief. The decision was appealed to the full Board which unanimously affirmed the denial of petitioner's request for monetary relief. The Board also found that the Petitioner failed to demonstrate that GAO management retaliated against him for engaging in protected activities. (PAB Docket No. 01-05, April 29, 2003).

A hearing was held in fiscal year 2003 based on a Petition for Review in which an employee claimed that certain managers created a hostile work environment based on his race. He also alleged that Agency managers committed prohibited personnel practices in

the preparation of his performance appraisal, in the denial of promotion opportunities and in job assignments. The employee also asserted that his selection for certain assignments was in retaliation for engaging in protected activities and that the Office of Opportunity and Inclusiveness failed to investigate certain claims. A six-day evidentiary hearing was held during which testimony was taken from 14 witnesses and 62 exhibits were received into evidence. A decision in the case will be issued in fiscal year 2004. (PAB Docket No. 01-09).

Another hearing was held in fiscal year 2003 in which the Petitioner alleged that Agency officials discriminated against him based on race, created a hostile work environment, and committed prohibited personnel practices when they suspended him for two days and prepared performance appraisals that did not accurately reflect his performance. He charged that his suspension and the preparation of his performance appraisals were based on retaliation for his active participation in protected activities. The Petitioner is requesting rescission of the suspension, restoration of lost pay, adjustment of his performance ratings, expungement of related personnel records, and compensatory and punitive damages. Subsequent to the three-day evidentiary hearing, the attorneys for the parties reconvened to present oral arguments in lieu of filing post-hearing briefs. An initial decision will be issued in fiscal year 2004. (PAB Docket No. 01-04).

The steps to process cases before the Board are:

- Petition filed
- Notice of Petition sent out by Board (with service list)
- Board Member/Administrative Judge assigned
- GAO responds to the Petition
- Discovery
- Prehearing matters and motions practice
- Board Member/Administrative Judge rules on motions
- Each side files witness lists, exhibits and prehearing briefs, if required
- Final prehearing or status conference held, if necessary
- Hearing held
- Posthearing briefs filed, if required
- Board Member/Administrative Judge issues decision
- Motions to reconsider or notice of appeal for review by full Board filed
- Final decision issued by full Personnel Appeals Board
- Appeal to the U.S. Court of Appeals for the Federal Circuit (as appropriate)

Figure 2.2: Process of case from charge to termination of appeal

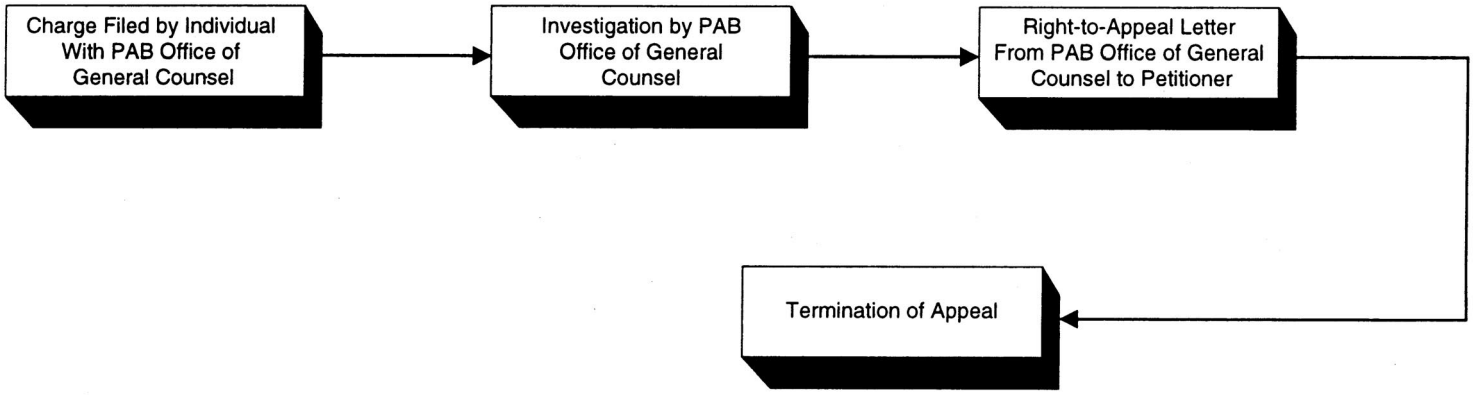


Figure 2.3: Process of case to final board member's decision with no appeal

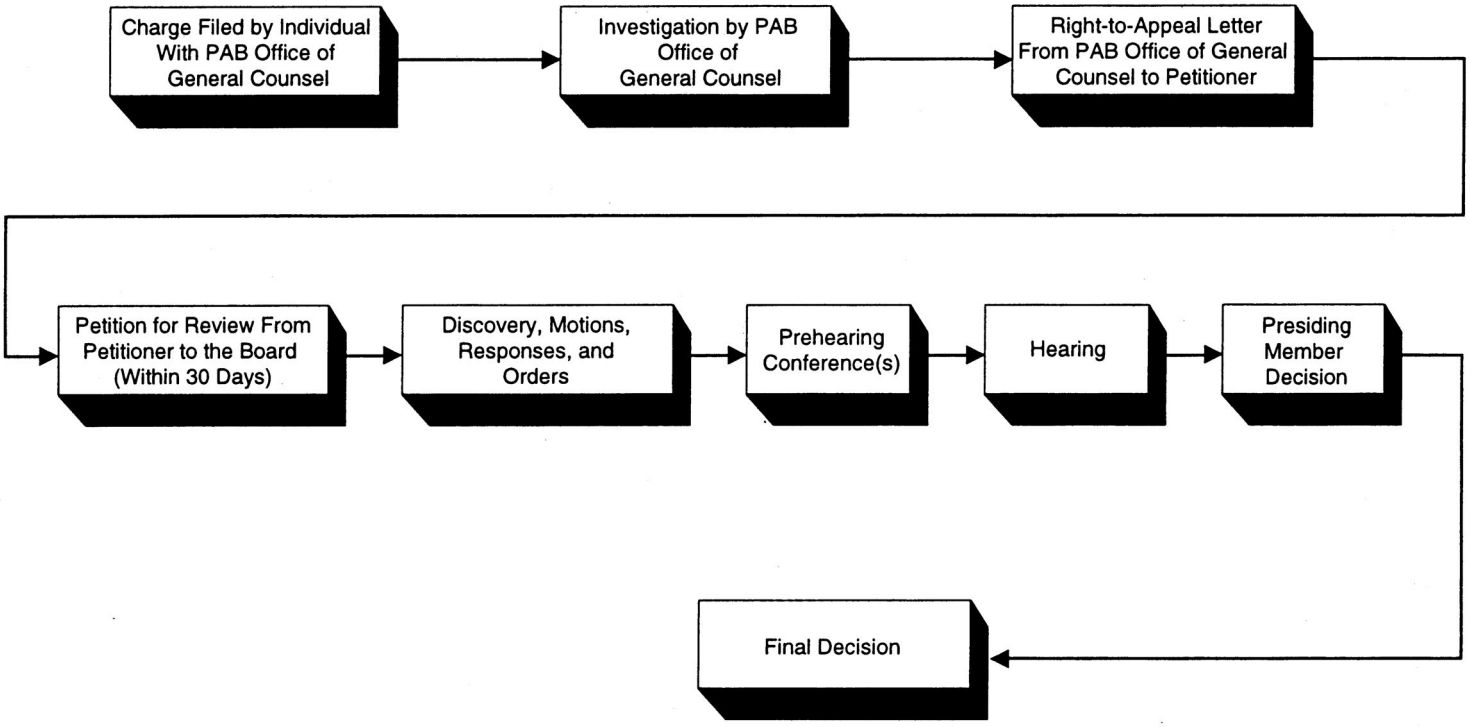


Figure 2.4: Process of case from charge to judicial review

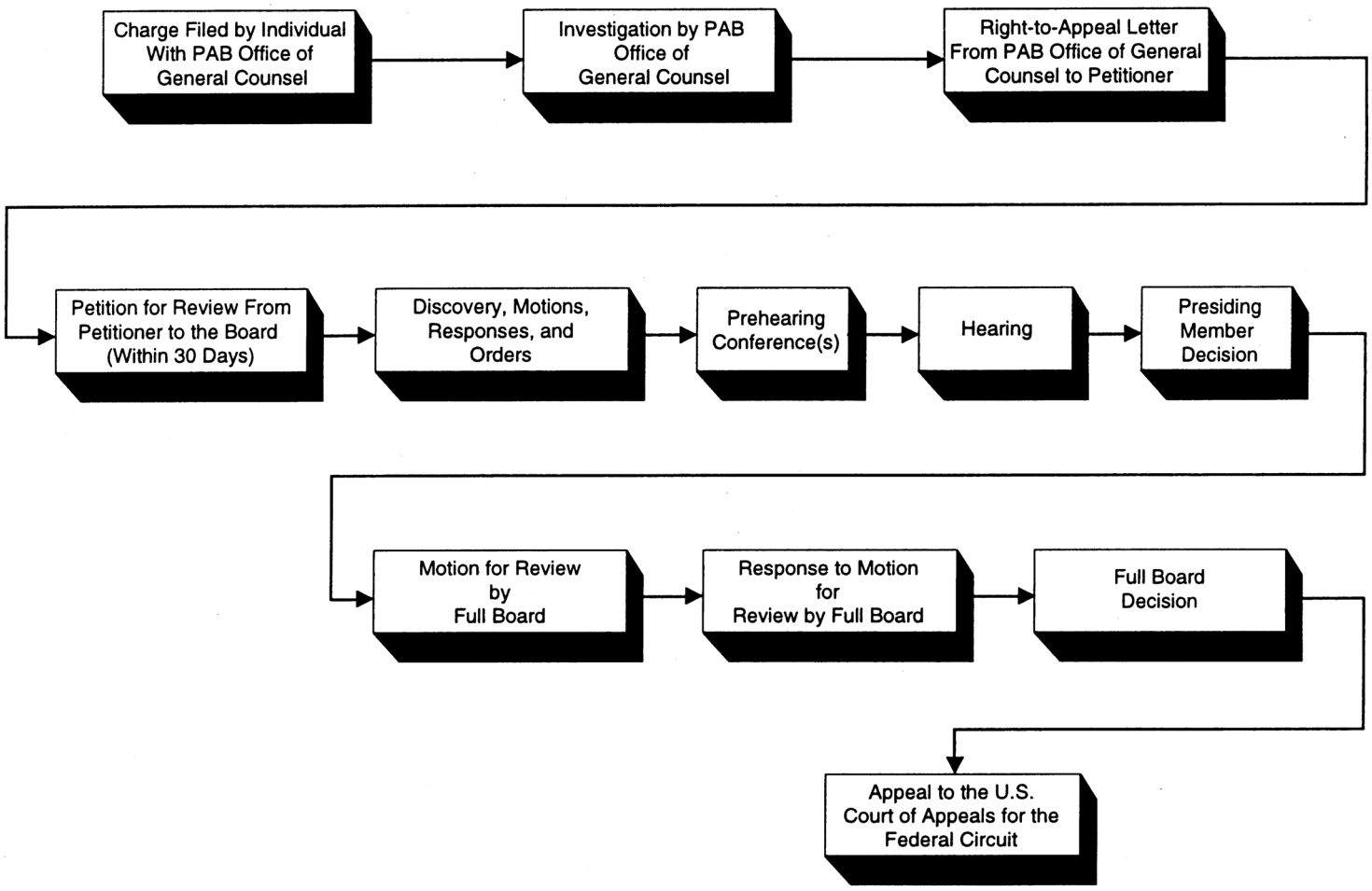


Figure 2.5: Process of reduction-in-force case (employee's option)

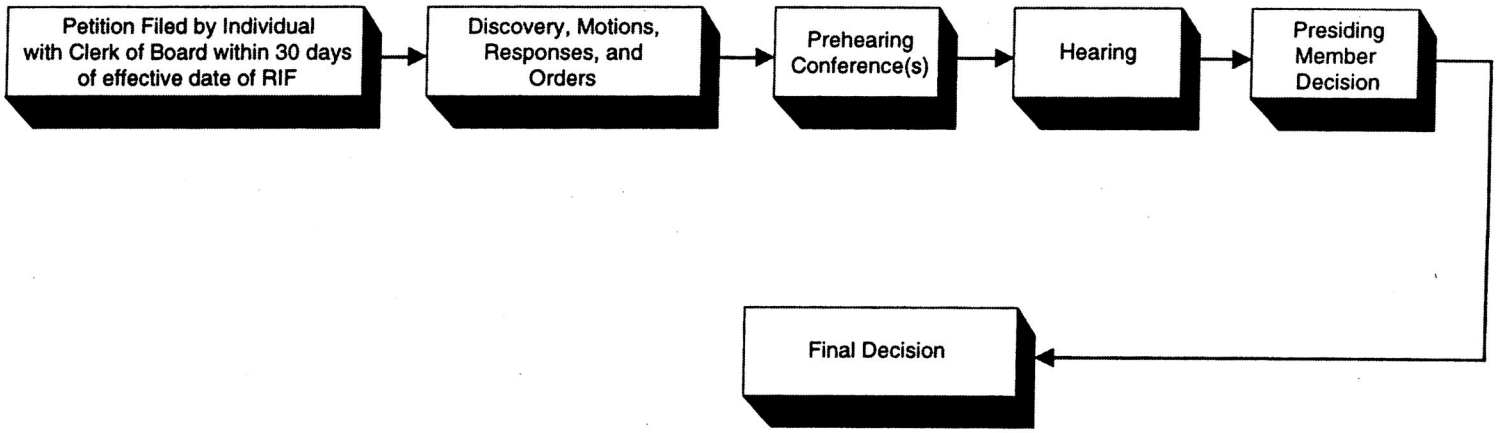
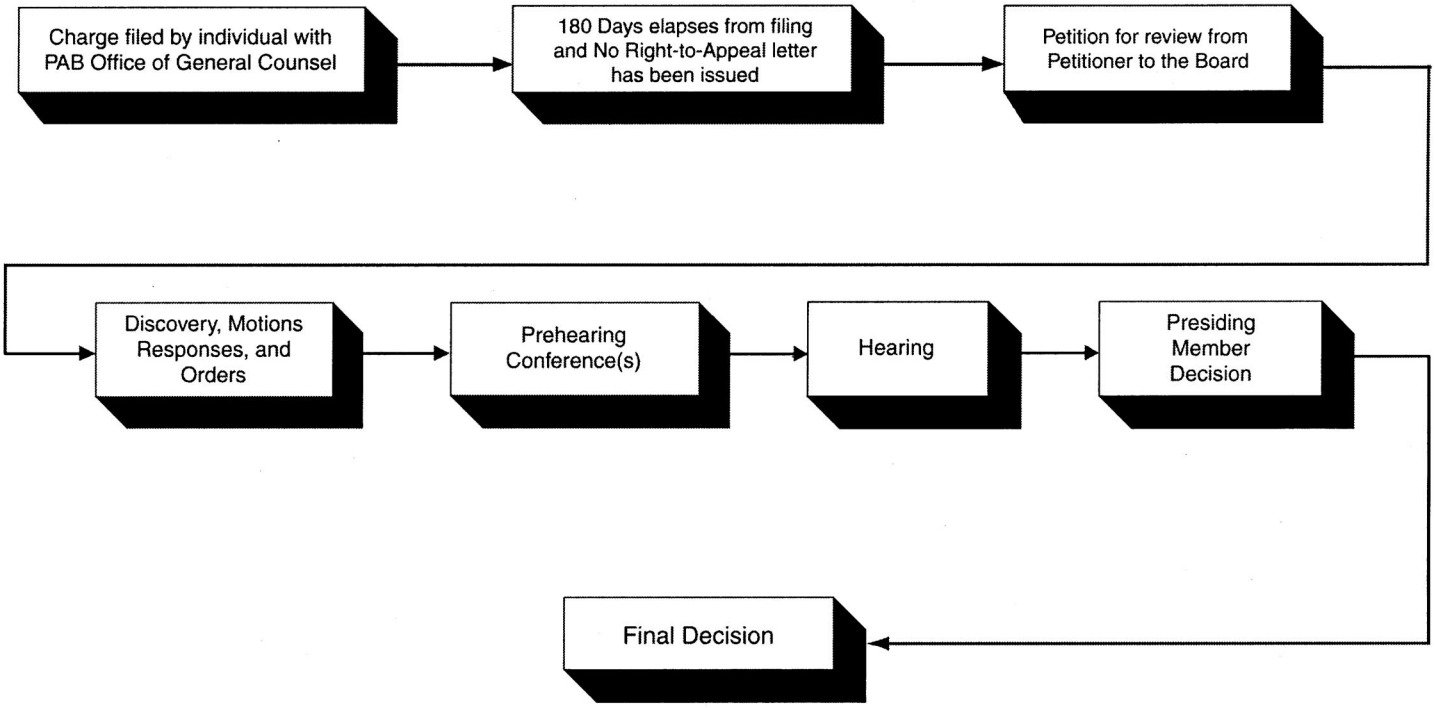


Figure 2.6: Process of case from charge to judicial review (employee opts out)



Case Activity

Twelve new cases were filed with PAB/OGC office during fiscal year 2003. Of those new cases, four involved claims of unlawful employment discrimination: one on the basis of race; two based on age; and, one based on gender. In the areas of prohibited personnel practices, specifically, one employee alleged the use of improper influence to withdraw from competition; another alleged whistleblowing; eight filed charges alleging reprisal for exercising an appeal right; one rested on the granting of an unlawful preference; and eleven alleged the violation of a law, rule or regulation.[13]

Among the personnel actions challenged were seven performance appraisals; three promotions; two disciplinary actions; one transfer/detail; one removal; one pay decision; and, one change in duty.

The PAB/OGC also sought an *ex parte* stay of the removal of an employee and participated in three other cases pending before the Board during the fiscal year. The Office closed 11 cases through the issuance of Right to Appeal letters, settlements, or withdrawals of complaints.

The Office of General Counsel also received 61 requests for advice from GAO employees; two-thirds of those requests concerned performance appraisals, promotions, leave issues and pay decisions.

PAB/OGC Investigative Authority

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 the Office of General Counsel. During fiscal year 2003, all of the investigations conducted by the Office of General Counsel were initiated by charges filed by employees.

In addition to investigations generated by individual or class charges, the Office of General Counsel may initiate its own investigations, otherwise known as informational or GC investigations.[14] The General Counsel may initiate an investigation when information comes to his/her attention suggesting that a prohibited personnel practice has occurred, is occurring, or will occur, regardless of whether a charge has been filed. If an individual brings an allegation to the attention of PAB/OGC, that individual may remain anonymous. Upon the conclusion of an investigation, if PAB/OGC finds insufficient evidence that there are reasonable grounds to believe that a violation of the law has occurred or is about to occur, a confidential summary is forwarded to the complainant. The Agency and the Board are notified that the case is closed. When 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 the findings and its recommendation. If the recommendation is not followed within a reasonable period, PAB/OGC may petition the Board to order corrective action. PAB/OGC did not initiate any information investigations in FY 2003.

Stays

PAB/OGC may request that the Board issue an *ex parte* 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 that requires further investigation. If the request for an *ex parte* stay is granted, the General Counsel may request either a further temporary stay or a

[13] All of the charges filed with PAB/OGC in FY 2003 were based on more than one subject matter category claim.

[14] 4 C.F.R. §28.131

permanent stay of the proposed action. The Board may grant or deny the requested stay, require further briefing and/or oral argument or conduct an evidentiary hearing. When PAB/OGC seeks a stay of a personnel action, it conducts an investigation into the allegations of prohibited personnel practices. In FY 2003, the PAB/OGC sought a 30-day *ex parte* stay of an employee's removal. The Board's Chair granted the stay to allow the office to investigate the employee's claim that the removal action was unlawful. The stay was still in effect at the end of the fiscal year.

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 General Counsel will provide a written summary of the determination and facts to the employee and the Board.[15] However, if the employee is in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, PAB/OGC will forward the written summary to the employee and the Congress, not the Board. The PAB/General Counsel may also propose disciplinary action against any employee 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. There is no administrative appeal from an order of the Board. Judicial review of the Board's order may be obtained in the U.S. Court of Appeals for the Federal Circuit. PAB/OGC did not institute disciplinary proceedings in FY 2003.

Employee Contacts

In addition to its investigative and prosecutorial authority, the PAB/OGC also provides oral advice to employees about their personnel and equal employment rights. This is accomplished by responding to questions about diverse issues such as personnel actions, performance appraisals, grievances, and the complaint process, and presentations to GAO's employee councils to update them on recent changes in the law and Board procedures. The PAB/OGC responded to 61 requests for informal advice during the fiscal year. More than half of the requests for advice presented issues involving alleged prohibited personnel practices.

Other Activities

The PAB Office of General Counsel often submits written comments on proposed GAO-initiated changes to Agency orders and policies to ensure the protection of rights afforded employees under the GAO Personnel Act. Last fiscal year, the Office submitted comments to the Agency on four draft GAO Orders,[16] and also prepared comments on GAO's Proposed Legislation for Increasing Human Capital Flexibilities. The Office also proposed changes to the Board's regulations, which were being revised during the fiscal year, and provided examples and information to assist the Board in the regulatory revision process.

PAB/OGC staff also prepared a section of the PAB's web page describing the jurisdiction, functions, and operations of the office and assisted in the design and planning stages of the web site, as well.

[15] *Id.* §28.132

[16] They included Orders on merit increases for analysts; workforce restructuring procedures; merit selection plans for analysts and specialists; and, performance appraisals.

The GAO Personnel Act directs the Board to oversee equal employment at GAO through review and evaluation of GAO's procedures and practices.[17] In furtherance of its mandate, the Board established an Office of EEO Oversight to conduct studies of selected issues and prepare evaluative reports that often contain specific recommendations to the agency.[18] In fiscal year 2003, the Office of EEO Oversight focused on GAO's pay levels and probationary periods for new employees, the activities of the Office of Opportunity and Inclusiveness, and reasonable accommodation at GAO.

Pay Levels and Probationary Periods

During the fiscal year, the Board completed its report entitled *A Study of Pay Levels and Probationary Periods for New Hires at GAO*. Given the discretion involved in decisions about compensation, the Board set out, in this study, to determine whether race, national origin, sex, age or disability were factors in determining pay levels for new hires. In addition, the Board reviewed data on employees who left GAO during their probationary periods, with emphasis on their reasons for leaving, to ascertain whether groups of employees who left GAO during their probationary periods did so disproportionately to their representation within the new hire group.[19]

The only quantifiable data reviewed by the Board in this study that pertained to pay rates at GAO concerned "special rates" which are paid to applicants who qualify for positions foThe Board also found that, of the 776 employees hired into evaluator and evaluator-related positions during the course of the Board's study, 145 left the Agency during the study; 80 of them during their probationary periods. White females and Hispanic employees had the highest retention rates; black males and Asian employees had the lowest.

Based on its findings, the Board suggested that the Agency undertake a review of retention rates for its new employees, with a goal of determining the reasons underlying the departures of its probationary hires. In addition, the Board proposed that GAO review the process that it has in place for determining which employees are hired at special rates in order to ensure that it is non-discriminatory.

The Office of Opportunity and Inclusiveness

In fiscal year 2003, the Board also approved an oversight report based on a study of the operations of the Office of Opportunity and Inclusiveness at GAO. Twice in the past decade, the Board has studied discrimination complaint processing at GAO and issued reports. In the first report issued subsequent to the studies, the Board made specific recommendations to GAO; the second report was a follow-up to assess the degree of compliance with the recommendations.[20]

Only one of the Board's recommendations for the discrimination complaint process from its 1995 report has not been implemented by the Agency and the Board, in its study of O&I, renewed its concern that having draft final agency decisions reviewed by GAO's Office of General Counsel appears to present a conflict of interest.[21]

[17] 31 U.S.C. §732(f)(2)(A); See applicable regulations at 4 C.F.R. §§28.91 and 28.92.

[18] The Board's oversight reports are available on its web site (www.pab.gao.gov).

[19] Originally, the Board intended to study the lengths of probation periods set for new hires. After receiving and reviewing information and documents provided by the Agency, it became clear that, during the time of the Board's study, the Agency was not granting waivers, reductions, or exceptions to the probationary period requirements. In light of this information, the focus of this portion of the project shifted.

[20] *GAO's Discrimination Complaint Process and Mediation Program* (1995); *Follow-Up Report* (1998).

[21] Legal Services and Ethics (LS&E) is the functional unit within OGC that advises Agency management; represents the Agency in legal proceedings; and, reviews final Agency decisions.

In the most recent report, the Board raises the concern that the Managing Director of O&I has additional duties that include substantial advisory and hands-on participation in the Agency's human capital practices and procedures that also may present a conflict with managing the discrimination complaint process and the mediation program.[22] In its report, the Board suggests that consideration be given to the creation of a separate complaint unit in which assigned staff would devote their time exclusively to the processing of discrimination complaints and have no responsibility for human capital or personnel issues in the Agency.[23]

In addition, the Board recommends that GAO Order 2713.2 be revised as soon as possible. The Board also recommends that the revisions to Order 2713.2 should include the change in office name;[24] a definition of what constitutes contact with an eeo counselor; and mandatory annual training for eeo counselors.

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

Finally, the Board recommends that Order 2713.2 not be amended to include complaints of discrimination based on sexual orientation. Unlike other complainants, applicants and employees who file such complaints will not have the right to pursue their claims beyond GAO's administrative process because sexual orientation is not covered under the anti-discrimination statutes. As is the case in the Executive branch, a GAO employee or applicant may seek redress by filing a charge alleging a prohibited personnel practice based on an allegation of discrimination because of sexual orientation. At GAO, such a charge would be filed with the PAB/OGC and, subsequent to a hearing before the Board, the case could be appealed to the U.S. Court of Appeals for the Federal Circuit.

At the end of the fiscal year, comments that had been received from the Agency and PAB/OGC on the report were being considered and the report was being prepared for publication.

Reasonable Accommodation

In fiscal year 2003, Board staff began collecting data and information for its study of the processing of reasonable accommodation requests at GAO. In 1990, the Board issued a report entitled *EEO Oversight Study of GAO's Employment of People With Disabilities*. Among the issues the report addressed were the accessibility of GAO's facilities, the provision of reasonable accommodation, recruitment and hiring, supervisory training, and affirmative action for persons with disabilities. The Board's report contained the conclusions it reached in the study as well as 12 very specific recommendations to the Agency to assist in its development of a viable program for persons with disabilities.

In 1993, the Board conducted a follow-up study to determine whether, and to what extent, GAO had implemented the Board's recommendations. In its report, issued in January 1994, the Board tracked GAO's responses and activities with respect to each of the 12 recommendations over the three year period since the initial report, concluding that,

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

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

[24] The current Order still refers to the Civil Rights Office throughout.

overall, GAO had complied with nearly all of the recommendations.[25]

Since the issuance of the Board's follow-up report, there have been a number of significant Supreme Court decisions interpreting the Americans with Disabilities Act, which specifically applies to GAO.[26] In addition, the EEOC has issued numerous directives, instructions, and policy and enforcement guidance manuals to assist agencies with disability issues.

GAO Orders 2713.1 and 2713.2 that set eeo policy and govern the discrimination complaint process for the Agency have not been revised since 1997. GAO last updated Order 2306.1, governing employment of individuals with disabilities, in 1999; Order 2339.1, Medical Determinations, was issued in 2000.

[25] Because the earlier study was conducted prior to the passage of the Americans with Disabilities Act of 1990 (ADA, 42 U.S.C. §§12201-14), the follow-up report did not address GAO's policies or practices with respect to the ADA and that law's applicability to various Agency programs.

[26] 42 U.S.C. §12209(c)(4).

Due to the sweeping changes in the law since it last visited these issues, as well as the probability that GAO's own internal operating directives will be revised in the near future, the Board believes it would be timely to re-examine GAO's procedures and practices as they relate to and interpret current disability law, with particular emphasis on reasonable accommodation.

The study will result in a report containing the Board's findings and recommendations which will be published in fiscal year 2004.

Regulatory Revisions

In FY 2003, the Board undertook a substantial revision of its procedural regulations that primarily govern the processing of cases before the Board.[27] The proposed revisions, published for comment in the Federal Register, contained several significant refinements to the Board's procedures. Chief among them was to change many of the terms that apply to various stages of case processing that the Board had observed were confusing to litigants. In addition, the Board clarified a number of definitions, some of which now reflect terminology adopted by GAO in certain of its internal Orders.

The Board also reorganized the sections of its regulations that relate to the filing of petitions and motions and more clearly delineated the requirements of motions practice before the PAB. Among other sections affected by the revisions were those on procedures for filing a Charge with PAB/OGC; sanctions; discovery; subpoenas; burden of proof; decisions; enforcement, class actions in EEO cases; attorney's fees and disciplinary and stay proceedings.

Comments on the proposed regulations that were received were considered by the Board and those that were adopted were then incorporated into the final regulations which, at the end of the fiscal year, were being readied for final publication in the Federal Register.[28]

Web Page Development

The Board's staff, in conjunction with Information Systems and Technology Services staff, (ISTS) has developed an external web site that describes the workings of the Board and its Office of General Counsel. Among the features of the site are more than 20 years of PAB decisions in a searchable format, links to the Board's current and proposed regulations, the *Guide to Practice*, downloadable complaint forms, oversight reports, and links to useful reference and practice materials. The PAB's web site can be found at www.pab.gao.gov.

The Guide to Practice

In fiscal year 2003, the Board issued a guide to litigating cases at the PAB. The guidance manual was particularly designed to provide information and assistance to individuals who bring cases to the Board without the assistance of attorneys. The Guide provides an overview of the Board process, defines commonly-used terms and procedures, and points to sources for more specific information and answers. The *Guide to Practice* is available on the Board's web site at www.pab.gao.gov

[27] Sections of the Board's regulations that relate to its Office of Oversight and labor-management relations were not affected by these revisions.

[28] The Board's regulations can be found at 4 C.F.R. parts 27 and 28.