

GUIDE
TO
PRACTICE BEFORE
THE PERSONNEL APPEALS BOARD

May 2003

THE PERSONNEL APPEALS BOARD

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Introduction

This Guide summarizes the basic procedures and regulations applicable to cases before the Personnel Appeals Board (PAB or Board) of the United States General Accounting Office. It is particularly designed to provide administrative information and procedural guidance to individuals who do not have legal representation in their cases before the Board.¹ The Guide is intended to give an overview of the Board process, provide basic explanation of terms and procedures, and point to sources for more specific answers.

PAB Regulations

Any individual appearing before the Board, whether on a *pro se* basis or as an attorney or representative for another person, should consult the PAB Rules and Regulations ([4 C.F.R., Chapter I, Parts 27](#) and [28](#)). References to the Rules are normally listed as, for example, 4 C.F.R. §28 *et seq.* The Rules and Regulations govern all proceedings before the Board; they apply whether or not an individual is represented by counsel. Individuals normally receive a

¹ Matters brought to the Board for adjudication by individuals without counsel are known as *pro se* cases. This Guide is written from the perspective of the most common type of *pro se* appeal, involving an individual's challenge of Agency action taken against him or her. Such actions include, among other possibilities, discrimination, adverse actions, performance-based removals or reductions-in-grade, and workforce restructuring actions. The Board does not seek to discourage individuals from obtaining counsel to pursue their challenges, but rather, to provide a roadmap of the process for those individuals contemplating proceeding *pro se*, so that they might understand the process they are about to undertake.

copy of the Rules and Regulations along with the Right to Appeal Letter sent by the PAB Office of General Counsel (PAB/OGC) at the close of an investigation. A copy of the Rules in the Code of Federal Regulations may also be obtained through the [Clerk of the Board](#).

The Regulations contain important information concerning such requirements as the deadlines for filing with the Board, the required form for filings, the number of copies required to be filed, the burden of proof in different types of cases, and other matters. This Guide contains much of the information found in the Regulations. In the absence of a PAB rule on a particular question, guidance may be found in the Federal Rules of Civil Procedure.² [See 4 C.F.R. §28.1\(d\)](#). The Federal Rules, however, are not binding on the PAB.

Procedural Guidance

Procedural questions may be directed to the Board's Clerk, staff attorney, or Solicitor. These individuals may not provide legal advice or substantive assistance on a matter pending or that may come before the Board. Some additional assistance may be available from the Board's investigative and prosecutorial arm, the Personnel Appeals Board Office of General Counsel, in the form of oral advice responding to inquiries from employees about their personnel and equal employment rights. Once the PAB/OGC has made a determination not to represent an employee before the Board, however, presentation of legal argument and supporting facts in any matter before the Board is the responsibility of the employee, either proceeding *pro se* or through a lawyer or other representative. [See 4 C.F.R. §28.25](#).

Representation

A party to a case before the Personnel Appeals Board may be represented in any matter relating to his or her Petition by anyone willing and able to serve. The representative need not be

² The Federal Rules of Civil Procedure are available at www.gpoaccess.gov.

an attorney. A representative must be designated by the party, in writing, and can withdraw only upon written notice to the Board. If known, the representative should be designated in the Petition or response to the Petition. If a representative has been designated by a party, all documents required to be served on that party must be served on the representative.

The Personnel Appeals Board Adjudicatory Function

The Personnel Appeals Board is an independent entity established by the General Accounting Office Personnel Act of 1980 (GAOPA) to adjudicate disputes, issue decisions and order corrective or disciplinary action, as appropriate, involving employees (and applicants for employment) of the U.S. General Accounting Office. The Board also is charged by statute with oversight of equal employment opportunity at GAO.

Establishment of the Board stemmed in large part from concern over the inherent conflict of interest in GAO's role as auditor of executive branch agencies while some of those agencies maintained regulatory responsibility over GAO's personnel system.

The GAOPA specifically provided that the Board "may consider and order corrective or disciplinary action" in cases involving:

- an appeal from a removal,
- suspension for more than 14 days,
- reduction in grade or pay,
- furlough of not more than 30 days,
- a prohibited personnel practice,
- a prohibited political activity,
- a decision of an appropriate unit of employees for collective bargaining,
- an election or certification of a collective bargaining representative,

- certain labor-management relations issues,
- an action involving prohibited discrimination,
- and personnel-related issues designated by the Comptroller General in regulations for PAB resolution. ([31 U.S.C. §753\(a\)](#)).³

The PAB hears and decides employee appeals from Agency actions. The Board consists of a maximum of five members appointed by the Comptroller General. Members serve for a non-renewable term of five years, and may not have ever been employed by GAO. Board members select a chair and vice chair from the members. The members all serve as administrative judges to hear and decide petitions.

The Board has a two-tier process. In most instances, when a Petition is filed, the Chair assigns the case to an administrative judge (AJ). The opinion issued by the administrative judge is called an initial decision. If left unchallenged, it becomes a final decision and is appealable to the United States Court of Appeals for the Federal Circuit. However, a party can appeal an initial decision to the full Board or the Board may decide on its own to review the decision. The decision rendered by the full Board, the final decision, can then be appealed to the Federal Circuit.

The case process at the PAB is described more fully below. In brief, an employee or applicant files a Petition with the PAB requesting review of an Agency action. The parties engage in the discovery process, with a view toward preparing for an evidentiary hearing on the matter in dispute. Sometimes, following the discovery process, it may appear that there are no factual matters in dispute. In that event, one or both parties may file a motion for summary judgment, asking the administrative judge to rule on the matter without an evidentiary hearing

³ The provisions of the GAOPA, can be found online at [31 U.S.C. §731](#).

since only questions of law remain. If a party believes that there is no basis for a particular matter to be before the Board, he or she may file a motion to dismiss or a motion for partial dismissal. The motion to dismiss and the motion for summary judgment are known as "dispositive motions," because, if granted, they dispose of the dispute without proceeding to trial.

Generally within a month or two of the end of discovery and the filing of any dispositive motions, the parties are required to file prehearing briefs (on a schedule set by the administrative judge assigned to the matter). Sometimes the judge allows for reply briefs at this stage as well. The hearing is held, most often at the PAB hearing room in Washington, with a court reporter transcribing the testimony from sworn witnesses as it occurs. The administrative judge hearing the case issues an initial decision, and the parties have a right to seek reconsideration by the AJ or review by the full Board.

The Board encourages the parties in all cases to engage in settlement negotiations at any stage in the proceedings. The parties may continue settlement discussions and reach a settlement agreement at any time while a case is pending before the Board, or while it is on appeal to the Federal Circuit. When a settlement agreement is signed by all parties, Board proceedings are terminated. If the parties reach a settlement, they may ask the administrative judge to place the agreement in the record of the proceedings, and thus, the agreement will be explicitly enforceable by the PAB.

PAB Office of General Counsel's Investigatory and Prosecutorial Functions

A GAO employee, group of 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. In many instances, the charge must be filed within 30 days of the action or inaction that forms the basis of the complaint. Anyone considering filing a charge with the PAB/OGC should contact that

Office to determine the proper filing period. The PAB Office of General Counsel investigates alleged violations of the law within the Board's jurisdiction to determine whether there are reasonable grounds to believe that the charging party's rights have been violated. After concluding the investigation, the PAB/OGC issues a Right To Appeal Letter notifying the complainant of the results of the investigation and the right to file a Petition with the PAB. Along with the Right to Appeal Letter, the PAB/OGC issues a confidential Statement of Results of Investigation to the complainant, explaining the results of the investigation and that Office's conclusions concerning legal and factual issues. If the PAB/OGC concludes that there are reasonable grounds to believe that the charging party's rights have been violated, that Office will offer to represent the party in filing a Petition with the Board and in the process of pursuing the matter before the Board.

If the PAB/OGC represents a party before the Board, that Office assumes the role of prosecutor before the Board on behalf of the employee. An individual may decline a PAB/OGC offer of representation, proceeding *pro se* or with the assistance of an outside attorney or other representative. Even if the PAB/OGC does not offer representation, the individual may proceed to file a Petition in order for the PAB to review the Agency action. The Board does not have access to the investigative information and conclusions reached by the PAB/OGC. The Board's administrative judges do not know if an individual not represented by the PAB/OGC chose to proceed without that Office's assistance.

As a general rule, unless the PAB/OGC is representing a party, that Office is not involved in proceedings before the Board. Occasionally, the administrative judge may ask the PAB/OGC to intervene for a particular purpose. In addition, the Board's General Counsel may request

permission to intervene if an issue is raised that involves significant public interest in the preservation of the merit system.

Most cases that the Board hears must originate in the PAB/OGC. After that Office completes its investigation and report, it issues a Right to Appeal Letter to the charging party. A charging party may "opt out" of the investigative phase after 180 days if no report has been issued by the PAB/OGC. Charging parties thus have the option to proceed with a Petition to the Board after 180 days without obtaining a Right to Appeal Letter. In addition, in the limited circumstance of a challenge involving a separation resulting from a Workforce Restructuring Action (WRA) (formerly known as a RIF or Reduction-in-Force), an individual may choose to file directly with the Board (without first filing and obtaining a Right to Appeal Letter from the PAB/OGC). This PAB/OGC "bypass" is specifically designed to expedite resolution of the claim. In such cases, however, and in the case of individuals who "opt out" of the investigation after 180 days, an individual who files without the Right to Appeal Letter loses the benefit of the PAB/OGC investigation and report to the individual on the merits of the case and foregoes the possibility of representation by that Office.

Filing a Petition with the Board

Initial Filing

A Petition⁴ is a written, signed request from an individual or group, filed with the Board, that asks the Board to adjudicate a matter in dispute (see Appendix II) (under construction).

Who May File

A GAO employee, group of employees, an applicant for employment, or a labor organization may file a Petition with the PAB after receiving a Right to Appeal letter from the

⁴ See Definitions Section, Appendix X (under construction).

PAB General Counsel. Situations that may give rise to an employee petition include: removals, suspensions for more than 14 days, reduction in grade or pay, or furloughs up to 30 days; prohibited personnel practices; unfair labor practices or other labor relations issues; actions involving unlawful discrimination; and prohibited political activity.

When to File

Petitions must be filed within 30 days after service upon the charging party of the Right to Appeal letter. If a charging party's claim is still being investigated after 180 days, the party may come forward to the Board at any time before the investigation is completed, but without the assistance of the PAB/OGC. For individuals who are appealing a separation action resulting from a Workforces Restructuring Action, who choose to bypass the PAB Office of General Counsel, the Petition must be filed with the Board within 30 days after the effective date of the WRA.

If a Petition is filed by mail, the postmark is taken as the official filing date. If the filing deadline falls on a Saturday, Sunday, or Federal holiday, the due date is extended to the next business day. Generally, when computing time, "days" means calendar days.

When filing in person or by commercial carrier, the Petition must be received at the Board's offices by 4 pm on the date that it is due.

Board Review is a New Review

The Petition to the Board is not a challenge to or review of the conclusions of the PAB/OGC, but a fresh review of the Petitioner's rights. 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 cause to believe a violation exists in a given case.

Format of Petition

A Petition must be in writing. A letter is acceptable if it includes all the information required. As stated in the Board's Regulations, the Petition must include: 1) the name of the Petitioner (or a clear description of the group or class of persons on whose behalf the Petition is filed); 2) the names and titles of persons, if any, responsible for actions the Petitioner seeks to have the Board review; 3) the actions being complained about, including dates, reasons given and internal appeals taken; 4) the Petitioner's reasons for believing the actions to be illegal; 5) the remedies sought; 6) the name and address of the representative, if any, who will act for the Petitioner in any further stages of the proceeding; and 7) the signature of the Petitioner or Petitioner's representative. A representative may be added at a later time if proper written notice is given to the Board and the Agency's counsel. A sample Petition form is found at Appendix II (under construction).

Amendments to Petitions

The administrative judge may allow amendments to a Petition if parties to the proceeding have adequate notice to prepare for the new allegations and if doing so would not prejudice the rights of the other parties or unduly delay the proceedings.

The Board Process

Notice of Filing of Petition

After a Petition is filed with the PAB, the Board serves the Agency with a Notice of Filing of Petition along with a copy of the Petition (the Petitioner also receives the Notice of Filing). The Notice includes the official caption of the case—the name by which the case will be known in Board proceedings—the case docket number (beginning with the year filed), and the official service list for the case. This list provides the names and addresses of the respective

designated representative for each side. These are the people who must be served with a copy of all pleadings, discovery requests, and official issuances of the Board. The parties are responsible for written notification to the Board and one another of any changes in the service list's names or addresses. All subsequent filings should include the official caption, case number and a certificate of service in conformity with the service list (specifying how and where service was made). The filing should be signed by the party or the representative of the party.

The Notice also informs the party that the discovery period, or time in which to elicit relevant information from the opposing party, commences immediately and runs for a period of 65 days. This is described in more detail below.

After the initial Petition, the parties are required to serve on each other one copy of all pleadings at the same time that they file documents with the Board. Service must be made by mail or by personal delivery to each party on the service list that accompanies the Notice of Filing of Petition. Each party must indicate on each filing to whom the document was sent and the method used. This is called a certificate of service.

Agency Response

After receiving a Notice of Filing and copy of the Petition, the Agency has 20 calendar days in which to respond. The response must contain a statement of the Agency's position on each issue raised by Petitioner, including admissions, denials or explanations of each allegation in the Petition and any other defenses to the Petition. In addition, the response must include designation of, and signature by, the representative authorized to act for the Agency in the case.

The Discovery Process

Introduction

Discovery is the process that a party uses to obtain relevant information, needed for preparation of its case, from another person including a party. Relevant information includes any information that is reasonably calculated to lead to the discovery of evidence that may be admitted in an evidentiary hearing. This 65-day process takes place between the time a Petition is filed and the evidentiary hearing.

The purpose of discovery is to assist the parties in developing, preparing, and presenting their cases. Discovery may be used to obtain information from any person regarding any non-privileged matter relevant to the issues before the Board, including the existence, description, nature, custody, condition and location of documents or other tangible items, and the identity and location of persons having knowledge of relevant facts.

The Board's Rules are applied with the purposes of avoiding unnecessary delay and facilitating adjudication of the case. The parties are expected to initiate and complete discovery with no or minimal Board intervention. The Board and the administrative judge do not receive copies of discovery requests between the parties unless a discovery dispute requires Board intervention. When a Petitioner is appearing *pro se*, the administrative judge often will hold a telephone status conference during the discovery period to make sure that the Petitioner understands the process and that discovery is progressing as expected.

Seeking Discovery

Discovery may be obtained by any of the methods provided for in the Federal Rules of Civil Procedure. These methods include: written interrogatories or questions (to be signed under oath); depositions (oral questions and answers taken under oath and recorded); production of documents or things for inspection or copying; and requests for admission addressed to parties. Such requests for admission include requests for a party to admit the genuineness of any

relevant document (*i.e.*, that it is what it purports to be), or to admit the truth of any relevant matters of fact or application of law to the facts as set forth in the request.

The discovery period commences immediately when a Petition is filed. A party seeking discovery from another party begins the process by serving a request for discovery on the other party. Initial discovery requests must be served within 30 days after receipt of the Board's Notice of Filing of Petition; responses are due within 20 days after service of the requests. Follow-up discovery requests must be served within 10 days of the prior response. A discovery request should state the time limit for responding, as set forth in the Board's regulations, [4 C.F.R. §28.42\(d\)](#). All parties to a proceeding (or their representatives) must receive a copy of every discovery request. Every request should contain a certificate of service.

Discovery ends or closes 65 days after the filing of the Petition, unless the administrative judge orders otherwise. Requests to extend the discovery period are not uncommon in *pro se* cases, but should be filed in writing, contain an explanation of the reason additional time is needed, and a statement of whether the other party objects to an extension. An extension of the discovery period may be granted by the administrative judge "upon due consideration of the particular situation including the dates set for hearing and closing of the case record." [4 C.F.R. §28.42.d.5](#). Of course, any extension of the discovery period ultimately may extend the time before a case reaches final resolution before the Board. The Board favors adherence to the discovery time provided, in order to facilitate prompt resolution of disputes.

If a problem arises during discovery, a party may file a motion seeking appropriate relief from the administrative judge. This may take the form of a motion to compel, in which a party requests an order from the administrative judge requiring the other party to comply with a discovery request. A party may also file a motion for a protective order (such an order might be

sought if a party thinks that the discovery request seeks information that is overly burdensome or beyond the scope of what may be obtained (*e.g.*, attorney-client privileged communication). A party may request a status conference, if appropriate.

Responses to Discovery

Responses to discovery should be as complete as possible, except to the extent that there is an objection to the discovery or a request for a protective order. A party may respond to a discovery request by complying in full with the request in a timely manner; by stating a legal objection to a particular request and the reasons for that objection; or by requesting a protective order from the administrative judge.

Any objection to a discovery request should be addressed to the party requesting discovery and should state the particular grounds for objection. A request for a protective order should state the grounds for such an order and should be served on the administrative judge as well as any other party to the action. It should include a proposed order for the administrative judge to sign in ruling on the request for a protective order.

Requests for Admission

A timely response to a request for admission must contain a sworn statement specifically denying, admitting, or expressing a lack of knowledge after making reasonable inquiry on the specific matters about which the request is made. A party may respond with a timely objection to the request for admission, in whole or in part, on the grounds that the specific matters contained in the request are privileged, irrelevant, or otherwise improper. Failure or refusal of a party to respond to a request for admission in a timely fashion results in a conclusion that the request is deemed admitted. *See* [4 C.F.R. §28.45\(c\)](#).

Depositions

Depositions, where a person is asked questions under oath, are to be taken at the time and place stated in the notice for deposition-taking, unless the parties agree or the administrative judge orders otherwise. Reasonable, written notice is required for the taking of depositions. If the party has a representative, the notice of deposition must be served on the representative. If a party seeks to depose a GAO employee, Agency counsel must be served.

Motions to Compel

If a party fails or refuses to respond fully to a discovery request, the requesting party may file a motion to compel discovery with the Board. A motion to compel must be accompanied by a copy of the original discovery request served on the party from whom discovery was sought and a statement showing the relevancy and materiality of the information sought, as well as a copy of the objections to discovery or a verified statement that no response was received.

A motion to compel should be filed within 10 days of the opposing party's service of objections to the discovery request or within 10 days of the expiration of the time for responding to the discovery request when no response or an inadequate response is received. Normally the opposing party is accorded a 10-day time period in which to respond to a motion to compel, unless the administrative judge rules otherwise. In ruling on a motion to compel, the judge may set conditions or limitations on the conduct or scope of the discovery at issue. The rules governing this procedure are set forth at [4 C.F.R. §§28.42](#) and [28.43](#).

The parties ordinarily have wide latitude to obtain relevant information necessary to prove their cases. The Federal Rules of Civil Procedure may provide guidance for discovery where Board rules are silent; however, they are not controlling of Board procedures.

Status Conferences

At the close of the discovery period, the administrative judge usually holds a status conference with the parties, either in person at the Board's offices or by telephone conference call. The purpose of the status conference at this stage of the proceedings is to make sure that the parties have considered the option of settling the dispute without further adjudication, to focus the issues in dispute, to determine if any party plans to file a dispositive motion, and to set a schedule for the case, including the date for the evidentiary hearing, if necessary.

A status conference may be called by the administrative judge at any time it would be helpful to the case. Often a status conference is held during the discovery period if the Petitioner is representing him or herself. Occasionally the administrative judge will deem it advisable to have a court reporter transcribe the proceedings at a status conference.

Motions

A motion is a formal request by a party, asking the administrative judge to take action on a matter in dispute.

Filing Motions

When a matter is pending before an administrative judge, motions of the parties should be filed with the Clerk of the Board and should be in writing, unless otherwise specified by the administrative judge. Ordinarily, an original and three copies of the motion must be filed. When an action is before the full PAB, an original and five copies of any motion are required. Copies of all motions shall be served simultaneously on the other parties to the proceeding. All motions, and responses to motions, should include or be accompanied by a memorandum of points and authorities in support of the motion, *i.e.*, the legal basis for requesting the action. All motions should also be accompanied by a proposed order for the administrative judge's signature.

Motions or filings related to motions, *e.g.*, responses and replies, delivered in person or by commercial carrier, must be received at the Board's offices no later than 4 pm on the due date.

Responses to Motions

All responses to motions—except discovery motions—must be filed within 20 days of service of the motion, unless the administrative judge (or the Board) changes the response time. Discovery motions must be answered within 10 days, as explained above in the section on discovery. The filing requirements for responses to motions are the same as those for motions, with respect to number of copies, service, and statement of the grounds for the party's position.

Replies

A reply is a written submission addressing issues raised in the opposing party's response that were not addressed by the moving party's initial filing. Replies to responses, pleadings or other documents may be filed only with permission of the administrative judge or the Board.

Motions for Extension of Time

A request for an extension of time should be submitted in writing as a Motion for Extension of Time and must be supported by a showing of good cause for the extension. [4 C.F.R. §28.4\(c\)](#). In addition, the Motion for Extension of Time must contain a statement representing whether the other party(ies) objects or consents to the extension. If the party filing the Motion cannot, despite due diligence, reach the other party, a statement noting such effort should be included in the Motion.

Motions for Leave to File Out of Time

When a party has missed a filing deadline, any late submission must be accompanied by a written Motion for Leave to File Out of Time. Such a Motion must include a statement of the

reason for filing late, as well as a statement of whether the other party(ies) objects to the late filing.

Dispositive Motions

A dispositive motion is an attempt to decide all or part of the case prior to an evidentiary hearing by limiting or eliminating the issues that need to be decided. Such a motion is filed only if the particular case is suited for resolution in whole or in part without a hearing.

In a motion for summary judgment, a party proposes that there are no material facts in dispute, and that they are entitled to judgment as a matter of law; there is nothing to be gained by an evidentiary hearing. A motion for summary judgment may be filed by either party after the discovery period ends.

In a motion to dismiss, a party argues that, even if the facts stated by the opposing party are true, there is no claim entitling that party to relief. Such a motion may be filed at any time after the Petition has been filed.

When a party files a dispositive motion, the opposing party is given a period in which to respond by filing an opposition to the motion, including a statement of its position and citation to supporting case law and/or statutes. The administrative judge may rule on the motion at this stage, hold a conference in which the parties discuss the motion, hold oral argument on the motion, or defer ruling on the motion until later in the proceedings.

Oral Argument on Motions

While this step is unusual, the administrative judge may determine in a particular case that oral argument is required on a pending motion. The administrative judge might also schedule a status conference for a discussion of a motion that has been filed.

Board Hearing Procedure

Introduction

Parties filing Petitions with the PAB may request a formal hearing of their cases. If the Board has jurisdiction over the matter and the Petition was timely filed, the administrative judge will schedule a hearing on the merits of the case, unless it has been disposed of by motion to dismiss or motion for summary judgment. Sometimes part of a case is disposed of and part survives for the evidentiary hearing phase.

Once the hearing has been scheduled, a party seeking to delay the start of the hearing should file a written motion for postponement, stating the reasons for the request, and indicating whether the other party consents or objects to the postponement. If the parties agree on postponement, and time is short, an oral motion may be made. The administrative judge will grant such a request only upon a showing of good cause.

Prehearing Procedures

Prehearing Briefs

The administrative judge in each particular case determines whether to require the filing of prehearing briefs. If so, the briefs must be served on the Board and the opposing party by the scheduled date (original and three copies to the Board), and usually include the following:

Short Statement on the Nature of the Case - This statement should summarize the issue(s) in the case, the basis of the Petitioner's charge, and the statutory or jurisdictional basis of the charge.

Statement of Facts to be Proven at Hearing - These facts should be enumerated separately. Any factual issues not in dispute should be so identified. The Board prefers the parties to file a Joint Stipulation of Facts concerning factual issues not in dispute.

Issues of Law - This is a short memorandum that discusses the law applicable to the party's factual allegations. Any cases or statutes supporting these contentions should be cited.

Relief Requested - The relief requested by the party and the legal basis for the relief must be stated.

Identification of Representative - The name, address, and telephone number of the counsel or person representing the party must be stated.

In addition, principal briefs must be no longer than 60 pages. If the administrative judge allows reply briefs, these must be no longer than 30 pages, exclusive of appendices. A motion to file an extended brief is very unusual and a party must show good cause for exceeding the page limit. Specific rules on brief format are set forth at [4 C.F.R. §28.60](#). All briefs should be on 8 1/2 by 11 inch paper, with margins of at least one inch on all sides, and must be double-spaced between lines of text.

Exhibits and List of Witnesses

Just prior to the hearing, on the schedule set by the administrative judge, the parties must submit to the administrative judge and opposing party a typed list of the witnesses—identified by name and relevant title—expected to testify at the evidentiary hearing. A brief summary of the expected content of testimony, as well as each potential witness' employer and telephone number, should be included. The Board also requires each party to submit to the Board two copies of each proposed exhibit and to serve one copy of the same on the opposing party at the

time the witness list is filed. (See discussion below on requirements for the form of exhibits.) As events unfold, parties frequently reduce the number of exhibits or witnesses. However, it is not fair practice to add to the witness list or exhibit list unless new information becomes available which was not available at the appropriate pretrial stage. An administrative judge may deny the addition of any new witnesses if a party fails to prove that the information was not available earlier.

In addition, a typed list of acronyms, including definitions, expected to be used by the witnesses (*e.g.*, EWIS, GAO, PAB) should be submitted at this time.

Evidentiary Hearings

The administrative judge assigned to the case sets the schedule, determines the order of proceedings, and rules on evidentiary questions as they arise. The rules of evidence provide a guide for the proceedings, but are not strictly followed. At the hearing, the parties present evidence, including sworn testimony of witnesses and documentary evidence. In doing so, they are expected to present their cases in a concise manner, limiting testimony and documents to relevant matters that need to be proven.⁵

The Agency is responsible for making sure that witnesses who are still GAO employees are available and present to testify at the appropriate time. Such individuals are considered to be in official duty status when serving in this capacity. For non-GAO employees called to testify by the Petitioner, travel expenses must be paid initially by the Petitioner. If the Petitioner prevails in the case, he or she can seek reimbursement for those expenses.

Most hearings are conducted by a single administrative judge, but occasionally the Board may hear a case from the beginning *en banc*, meaning that the full Board sits to hear the case.

⁵ The Federal Rules of Evidence are available online at www.uscourts.gov/rules/newrules4.html.

Exhibits

Parties should have at least two copies of each exhibit at the time of the hearing. When a party offers exhibits for the record at the hearing, the party must submit the original of each exhibit to the court reporter. In addition, the party must retain a copy of exhibits to show to witnesses during testimony. As noted above, two copies go to the administrative judge and one copy goes to each opposing party prior to the hearing.

The parties may add rebuttal exhibits as the case proceeds, as long as the requisite copies are provided and the documents otherwise meet the requirements for admission into evidence.

As explained in the Board's regulations, multi-page exhibits must be paginated in the lower right hand corner and the first page of each exhibit must indicate the total number of pages in the exhibit. All exhibits must be properly marked in advance on the first page (*e.g.*, Petitioner 1, Petitioner 2, *etc.*).

A verbatim (word for word) record of every PAB formal hearing is made by a court reporter. The Board furnishes one copy of the hearing transcript to each party, without cost. Hearings are conducted under the Rules and Regulations of the PAB.

The administrative judge takes all necessary action to avoid delay in the disposition of the proceedings. He or she has authority to rule on questions of admissibility of evidence and regulate the progress of the hearing. This includes ruling on all motions, witness and exhibit lists, and proposed findings.

The administrative judge may exclude from consideration evidence or testimony that is irrelevant,⁶ immaterial,⁷ or unduly repetitious. The parties may stipulate (agree in writing) as to

⁶ Relevant evidence has some tendency to make the existence of any fact of consequence to the proceeding more probable than less probable. *See* Federal Rule of Evidence 401.

⁷ Immaterial evidence is of no consequence to the action at issue.

any matter of fact, thereby avoiding the need to prove the alleged fact at hearing. In many cases the administrative judge will request that the parties attempt to submit a joint statement containing any agreements of fact prior to the hearing. See discussion above on prehearing submissions.

Generally no person (other than the Petitioner) may observe the hearing in progress if there is any chance that that person may testify later in the proceeding. The administrative judge may also exclude from the hearing any person whose presence might have a chilling effect on a testifying witness.

Burden of Proof

In cases brought under merit system principles and involving an employee or applicant challenge to Agency action as violating any law, rule, or regulation, the Agency must prove that it was justified in taking the action.

In a performance-based action, GAO must show the action is supported by substantial evidence (see Appendix X, definitions).

In any other case challenging a violation of law, rule or regulation involving an appealable personnel action, the Agency must establish that its action is supported by a preponderance of evidence (see Appendix X, definitions). In any event, if the Petitioner shows harmful error in the application of the Agency's procedures in arriving at such decision, or that the decision was based on any prohibited personnel practice as defined in 4 C.F.R. §2.5 (see

Appendix VIII), or shows that the decision was not in accordance with law, the Agency action will be overturned.

In any other actions under the Board's jurisdiction, the Petitioner has the burden of proof. That means that he or she bears the responsibility of presenting the evidence in support of the case and must prove the allegations of the appeal by a preponderance of the evidence.

Sanctions

The administrative judge may impose sanctions upon a party as necessary in the interest of justice. For example, if a party fails to comply with an order of the administrative judge, the party may be restricted in its ability to use evidence or to prove allegations related to the dispute. If a party fails to prosecute or defend a case, the action may be dismissed with prejudice or the administrative judge may rule in favor of the other party. The AJ may also refuse to consider any motion or other action that is not filed in a timely manner. *See* [4 C.F.R. §28.24](#).

Board Posthearing Procedure

Initial Decision

After the hearing closes, the PAB provides each party with a copy of the transcript of the proceeding as soon as it becomes available. The administrative judge determines whether to ask for posthearing briefs. A written decision, known as the "initial decision," is prepared at this stage. The record of the case is closed at the conclusion of the hearing or, if posthearing briefs or submissions are allowed by the administrative judge, the record closes at the date set for those submissions. After the record is closed, no additional evidence or argument is allowed into the record except upon a showing that new and material evidence has become available which was not available despite due diligence prior to the closing of the record.

Appeal Rights from an Initial Decision

The initial decision contains a notice of appeal rights at the back of the document, noting the right to seek reconsideration by the judge who heard the case or full Board review of the initial decision. A request for reconsideration, which must be filed within 10 days of service of the initial decision, is a request filed with the administrative judge who rendered the initial decision, to reconsider that decision in whole or part. A request for reconsideration should be supported by a written memorandum outlining the reason for seeking a different result. The opposing party may file a response at its own option or may be ordered to do so by the administrative judge if he or she determines a response is necessary. A request for reconsideration will not be granted without providing an opportunity for response.

A notice of appeal, or request for review, is a request that the full Board review an initial decision. An appeal to the full Board must be filed within 15 days of service of the initial decision or, within 15 days of disposition of a request for reconsideration. Within 25 days after filing a notice of appeal to the full Board, the appellant (the party appealing) is required to file and serve a supporting brief, identifying with particularity the findings or conclusions that are challenged and the specific portions of the record and provisions of statutes or regulations that support each assignment of error. Within 25 days after service of the appellant's brief, the opposing party (appellee) may file and serve a responsive brief. The appellant may follow-up with a reply brief within 10 days of service of the appellee's responsive brief.

The Board may decide to hear oral argument on the appeal, or may render its decision based on the record before the administrative judge. Either party may request that the Board hold oral argument.

Final Decision

Absent a timely appeal, the initial decision becomes final 30 days after its issuance or after the disposition of a request for reconsideration, unless the full Board decides on its own motion to review the initial decision in whole or in part (*sua sponte* review), and so notifies the parties in writing before the 30 days have expired. The Board in its discretion may decide to hold oral argument concerning a *sua sponte* review.

On appeal or following *sua sponte* review, the Board may affirm the initial decision in whole or in part. If necessary, the Board may remand (send back) the proceeding to a single member or panel of members for further action, including reopening of the record for taking additional evidence. The Board may dismiss the appeal if there is no jurisdiction or the appeal notice is untimely.

In examining the initial decision, the Board may review the record as though it were making the initial decision. Generally, the Board will not overturn a finding of fact from the initial decision unless that finding is not supported by substantial evidence in the record viewed as a whole. In deciding whether to take any action other than affirmance of the initial decision, the Board considers whether: 1) new and material evidence is available that, despite due diligence, was not available when the record was closed; 2) the initial decision is based on an erroneous interpretation of statute or regulation; 3) the initial decision is not consistent with law; 4) the initial decision is not made consistent with required procedures and results in harmful error. The procedures and standards governing appeals from initial decisions are set forth in the Board's regulations, [4 C.F.R. §28.87](#).

Judicial Review

A final decision of the Personnel Appeals Board generally may be appealed to the United States Court of Appeals for the Federal Circuit within 30 days of service of the Board's decision. This step is outlined in the Notice of the right to appeal accompanying a final decision of the Board.

Attorney's Fees and Costs

If a Petitioner is the prevailing party and engaged an attorney for all or part of the proceedings, he or she may submit a request for reasonable attorney's fees and costs to the administrative judge who heard the case, within 20 days of service of the final decision of the Board, or within 20 days of the initial decision becoming final absent an appeal. The Agency has 20 days after service of the request to file a response.

Processes Afforded Members of the Senior Executive Service

Members of the Senior Executive Service (SES) are entitled to the same PAB processes as other employees at GAO in adverse actions relating to misconduct, malfeasance or similar allegations, and in actions involving allegations that they have been subjected to a personnel action constituting a prohibited personnel practice or subjected to prohibited discrimination. [4 C.F.R. §28.140](#).

With regard to performance matters, SES members' rights are more limited than other GAO employees. If a member of the SES is notified that he or she will be removed from the SES for less than fully successful executive performance, the individual may request an informal hearing before a member of the Board. The SES member may appear and present evidence and argument; generally cross-examination is not allowed in such a proceeding. The informal

hearing does not entitle the individual to initiate any other action before the Board and the removal action need not be stayed as a result of the granting of a hearing. [4 C.F.R. §28.141](#).

Any report issued by the administrative judge is a recommendation to the Agency, not an order.

These procedures conform to practice in the executive branch.