

GUIDE
TO
PRACTICE BEFORE
THE PERSONNEL APPEALS BOARD

October 2017

THE PERSONNEL APPEALS BOARD

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PATRICIA REARDON-KING, CLERK OF THE BOARD

STUART MELNICK, GENERAL COUNSEL
FRANK J. MACK, SENIOR TRIAL ATTORNEY
BRIAN NUTERANGELO, SENIOR TRIAL ATTORNEY
DARIAN C. JACKSON, PARALEGAL SPECIALIST

CONTACTING THE BOARD

<i>Address:</i>	Personnel Appeals Board, GAO Room 1566 441 G Street, N.W. Washington, D.C. 20548
<i>Telephone:</i>	202-512-6137
NexTalk-VM (for the hearing impaired):	202-512-7506
<i>Fax:</i>	202-512-7525
<i>E-mail:</i>	pab@gao.gov

CONTACTING THE BOARD OFFICE OF GENERAL COUNSEL

<i>Address:</i>	PAB/Office of General Counsel, GAO Room 1562 441 G Street, N.W. Washington, D.C. 20548
<i>Telephone:</i>	202-512-7507
NexTalk-VM (for the hearing impaired):	202-512-7506
<i>Fax:</i>	202-512-7522
<i>E-mail:</i>	pabogc@gao.gov

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GUIDE TO PRACTICE BEFORE THE PERSONNEL APPEALS BOARD

Introduction

This Guide summarizes the basic procedures and regulations applicable to cases before the Personnel Appeals Board (PAB or Board) of the United States Government Accountability Office (GAO). 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's process, provide a 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, as an attorney, or as a 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. A copy of the Rules in the Code of Federal Regulations may be obtained on the PAB website (www.pab.gao.gov).

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.

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 reductions in force (RIFs). 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.

² The Federal Rules of Civil Procedure are available online at www.uscourts.gov/rules/newrules4.html.

Procedural Guidance

Procedural questions may be directed to the Board's clerk, staff attorney, or solicitor. These individuals may not provide substantive legal advice. Some additional assistance may be available from the Board's investigative and prosecutorial arm, the Personnel Appeals Board Office of General Counsel (PAB/OGC), 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 an outside 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 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 Government Accountability 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. Government Accountability Office.³ 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 concerning the appropriateness of a 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)).⁴

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 AJ is called an initial decision. If left unchallenged, it becomes a final decision. 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

³ In July 2004, the Agency's name was changed from the U.S. General Accounting Office. Pub.L. No. 108-271 (Jul. 7, 2004).

⁴ The provisions of the GAOPA, 31 U.S.C. §731-755, can be found online at www.gpoaccess.gov under United States Code, Title 31, Subtitle I, Chapter 7, Subchapters III and IV.

decision rendered by the full Board, the final decision, can then be appealed to the United States Court of Appeals for 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 AJ to rule on the matter without an evidentiary hearing 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 or part 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 submissions (on a schedule set by the AJ assigned to the matter). These usually include lists of proposed witnesses, proposed exhibits and lists of acronyms that are relevant to the matter. Occasionally the AJ may also require prehearing statements summarizing the issue for trial. 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. Usually the AJ requires the parties to submit posthearing briefs including references to the hearing transcript. Thereafter, the AJ 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 AJ 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 Board 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 laws 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 Petition Letter notifying the complainant of the right to file a Petition with the PAB. Along with the Right to Petition 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 Petition 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 Petition Letter. In addition, in the limited circumstance of a challenge involving a separation resulting from a Reduction in Force (RIF), an individual may choose to file directly with the Board (without first filing and obtaining a Right to Petition 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 Petition 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 Petition⁵ 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* Sample Petition, Appendix II).

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 Petition Letter from the PAB Office of General Counsel. Situations that may give rise to an employee Petition include: removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs up to 30 days; prohibited personnel practices; unfair labor practices or other covered 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 Petition 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 Reduction in Force, 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 RIF.

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 p.m. on the date that it is due.

Board Review is a New Review

The Petition to the Board is not a challenge to or reconsideration 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 (unless the PAB/OGC is representing the party).

⁵ *See* Legal Terminology, Appendix XIII.

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. 4 C.F.R. §28.18(d). A representative may be added at a later time if proper written notice is given to the Board and the Agency's counsel. (*See* Sample Petition, Appendix II.)

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 name and address 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 to 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. The discovery process 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, facsimile, 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 Notice of Filing of a Petition is served 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 Notice of Filing a Petition is served. 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 service 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(a)(1), (d)(2). 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 service of the Notice of Filing of 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 "after 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. A protective 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. (*See* Appendices V, VII.)

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 on 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 p.m. 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 all other parties involved object or consent to the extension. If the party filing the Motion cannot reach the other parties, despite due diligence, 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 any other party involved 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 the party is entitled to judgment as a matter of law. In other words, 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 a motion to dismiss or a 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 reason(s) 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 Submissions

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 generally 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 prior to the hearing. (*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.

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.

Certificate of Service - With all filings after the Petition, a Certificate of Service must be included indicating the date and manner of service and on whom the filing was served.

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.

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.⁶

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.

⁶ 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. Generally, two copies go to the administrative judge and one copy goes to each opposing party prior to the hearing. Requirements for prehearing submissions are at the discretion of the administrative judge.

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. (*See* 4 C.F.R. §§28.55 – 28.63.)

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,⁷ immaterial,⁸ or unduly repetitious. The parties may stipulate (agree in writing) as to 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.

⁷ Evidence that is considered relevant 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.

⁸ Evidence that is considered immaterial is of no consequence to the action at issue.

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 XIII, Legal Terminology).

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 XIII, Legal Terminology). 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 XI), 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 case 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. Normally, the administrative judge asks for posthearing briefs. 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. A written decision, known as the "initial decision," is prepared at this stage.

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 full 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. If a party does not appeal an initial decision to the full Board, there is no right to judicial review.

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, the rights of SES members 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.

APPENDIX I: General Procedures Including Filings

I-1. Public Business Hours

The public business hours of the Board's offices are from 9:00 a.m. to 4:30 p.m. (Eastern Standard Time), Monday through Friday except official government holidays. However, all pleadings and other documents must be filed with the Board before 4:00 p.m., unless the administrative judge specifies otherwise. While filings generally may be filed by mail, with the postmark determining the filing date, occasionally an administrative judge may order that a filing be at the Board's offices by a particular deadline. A motion is not considered "filed" until it is stamped with the Board's official receipt stamp, indicating date and time of filing, by the Clerk of the Board or his or her designee.

Filings made after 4:00 p.m. are considered filed on the next business day. When a document is filed after 4:00 p.m. on the due date, it is considered late. Any late filing must be accompanied by a Motion for Leave to File Out of Time and must be substantiated with an explanation of cause or reason for the untimely filing. The Motion also must contain a statement as to whether the other party objects to the late filing. The administrative judge assigned to the matter determines whether or not to accept a late filing.

I-2. Computation of Time

In computing the number of days for filing before the Board, the first day counted is the day after the event from which the time period begins to run and the last day for filing is the last day of the computation. If the last day falls on a Saturday, Sunday, or Federal holiday, the filing deadline is the next regular workday.

When a party must take a particular action within a certain time after the service of a notice or paper, and service is by mail, five (5) days are added to the prescribed period. If service is by express mail or other expedited delivery, two (2) days are added. No time is added if delivery is by courier on the date indicated on the service certificate.

Unless the administrative judge provides otherwise, all responses to pleadings must be filed within 20 days of service of that pleading upon the party, in other words, 20 days after the party has received the papers from the opposing party. Discovery motions, however, must be answered within 10 days of service.

The administrative judge is authorized to lengthen or shorten a prescribed period for filing papers or taking certain action, upon a showing of good cause.

I-3. How to File

The Board accepts filings by the following means:

- 1) In person at the PAB office prior to 4:00 p.m. on or before the due date;
- 2) By mail, postmarked on or before the deadline.

An administrative judge may set an earlier filing time to facilitate distribution of a filing on its due date. This may occur on a case-by-case or filing-by-filing basis. In rare instances, the administrative judge may specifically authorize a filing by FAX or other electronic means, in which case the PAB must receive follow-up copies by mail or messenger the next business day.

The Board encourages parties to file all pleadings, motions and other formal submissions electronically to the extent possible. This electronic filing is *in addition* to filing (by hand or mail) the number of copies required under 4 CFR §28.20. The electronic copy should be sent to pab@gao.gov, and labeled with the case name, docket number, and an identifiable document name (*e.g.* Doe 12-56 MotDismiss.doc). After the initial filings by the parties, the Board will determine the number of paper copies required on a case by case basis.

I-4. Where to File

Filing in person or by mail: Any documents sent by mail, delivered **in person, or by messenger** should be addressed to:

Personnel Appeals Board, GAO
Room 1562
441 G Street, N.W.
Washington, D.C. 20548

The postmark is considered the date of filing for submissions made by mail, unless the administrative judge has specified that a submission must be received by a certain date.

I-5. Number of Copies

For all matters pending before a single administrative judge, an original and three copies must be filed. For matters pending before the full Personnel Appeals Board, an original and six copies must be filed. The administrative judge assigned to a particular matter may alter the required number of copies.

I-6. Form; Certificate of Service

All filings (pleadings, motions, and briefs) must be signed and dated, and must include the case name and PAB docket number. All filings must also be accompanied by a certificate of service that attests that a copy of the pleading was sent to the opposing party. The certificate of service must specify the method by which service was made (U.S. Postal Service, messenger, express mail, hand delivery) and must be signed and dated by the individual responsible for the service.

I-7. Exhibits and Attachments

All exhibits and attachments to pleadings and documents filed with the Board must be set off with dividers, separately labeled, and paginated. Pleadings containing exhibits and attachments should have a separate table of contents, setting forth the order of the documents and attachments contained therein.

I-8. Rejection of Filing

Any filing that fails to conform to the requirements of the Rules and Regulations of the Board may be rejected.

APPENDIX II: Sample Petition

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

_____)	
LUCY DOE,)	Docket No. _____
)	
Petitioner)	
)	
v)	
)	
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
)	
Respondent)	
_____)	March 7, 2005

PETITION

I. Petitioner

1. Petitioner, Lucy Doe, is a (position title) in the (name of office). She has worked in that office since (give dates of employment with the office).
2. Prior to that the Petitioner worked in _____ from August 1996 to June 1998.
(Give any prior employment history with the Agency which is relevant to the charge.)

II. Responsible Agency Officials

3. The GAO officials who are believed to be responsible for the actions complained of include _____. (Give officials' names, position titles and offices).

III. Actions Giving Rise to the Complaint

4. On or about November 3, 2003, the Petitioner was given a rating of “needs improvement” on three of her critical elements on her 2003 performance appraisal.

5. On or about November 7th, Petitioner appealed her performance appraisal to her second-line supervisor. On November 12th, she was advised that her performance appraisal would not be changed.

6. On or about December 1, 2003, Petitioner was advised by her supervisor that she would be denied a within-grade increase.

(Specify the action, including dates, reasons given by management for the actions, any internal appeals taken and the results of those appeals.)

5. On or about December 7th, Petitioner sought counseling with an EEO counselor in the Office of Opportunity and Inclusiveness (OO&I) regarding her ratings.

6. After subsequent discussions with the EEO counselor, Petitioner filed a formal EEO complaint. OO&I investigated Petitioner’s claim. On or about March 10, 2004, Petitioner filed a charge with the PAB Office of General Counsel claiming that her performance ratings were lowered because she was African-American and female.

(Specify the action, including dates, reasons given by management for the actions, any internal appeals taken and the results of those appeals.)

IV. Nature of the Claim

7. Petitioner claims that the above actions were taken as a result of discrimination based on race (African-American) and gender (female) and that her supervisors committed prohibited personnel practices in violation of 5 U.S.C. §2302(b)(12).

8. Petitioner claims that the above actions were taken as a result of retaliation based on a complaint that she made in January 2001.

V. Remedies Sought

9. Petitioner requests that the discriminatory actions cease.

10. Petitioner requests that the rating on the three critical elements in question be changed to “exceeds fully successful” on her 2003 performance appraisal.

11. Petitioner requests that she be granted her within-grade increase, retroactive to her anniversary date.

VI. Name and Address of Representative (if applicable)

James Doe, Esq.
Doe & Doe
700 Connecticut Avenue, NW
Washington, D.C. 20003
(202) 555-2468
Fax (202) 555-5555
James.doe@internet.com

Lucy Doe
Address
(202) 555-1234 (home)
(202) 512-2222 (work)
(202) 555-1111(fax)
Lucy.doe@internet.com

APPENDIX III: Sample Discovery Questions

Sample Interrogatories

1. List the position title, race, and gender of all individuals under Ms. Carmen's supervision who were denied a within-grade increase in the last five years.
2. Identify any and all reasons for the Petitioner's unacceptable rating under critical element five. Give specific examples for each reason.

Sample Requests for Admissions

1. Admit that Ms. Carmen did not discuss Petitioner's performance elements with Petitioner until July 7, 1999.
2. Admit that on or about May 4, 2000, Ms. Carmen advised Petitioner that Petitioner had made significant progress in her performance.

Sample Requests for Documents

1. Produce all notes, memoranda, e-mails, logs, or documents prepared or maintained by you or in your custody relating to Petitioner's employment and/or performance.
2. Produce all documents which you intend to use as an exhibit at the hearing in this matter.

APPENDIX IV: Sample Notice of Deposition

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

LUCY DOE,)	Docket No. _____
)	
Petitioner)	
)	
v.)	
)	
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
)	
Respondent)	

March 7, 2005

NOTICE OF DEPOSITION

To: Joseph Jones
Address

PLEASE TAKE NOTICE that pursuant to 4 C.F.R. §28.44, Petitioner Lucy Doe will take your deposition upon oral examination before a Notary Public or other official authorized by law to administer oaths for the purposes of discovery or for use as evidence in the above-styled matter. The deposition will take place on Wednesday, July 10, 2005, beginning at 10:00 a.m. in GAO conference room 7833, and will continue from day to day until completed.

Respectfully submitted,

Lucy Doe
Address
Phone number

APPENDIX V: Sample Proposed Motion - (Enlargement of Time)

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

LUCY DOE,)	Docket No. _____
)	
Petitioner)	
)	
v.)	
)	
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
)	
Respondent)	

February 21, 2005

MOTION FOR ENLARGEMENT OF TIME

Pursuant to 4 C.F.R. §28.21(b), Petitioner requests an enlargement of time from February 25, 2005 until Wednesday, March 9, 2005 in order to complete discovery. The outstanding discovery includes two depositions that could not be completed prior to February 25.

The deposition that was scheduled to take place the week of February 14 had to be re-scheduled/cancelled due to the recent inclement weather that resulted in the closing of Government offices for two days. The remaining deposition, scheduled for February 23, 2005, had to be re-scheduled due to a death in the witness' immediate family. The Respondent has been contacted and has stated that it does not object to the Motion.

The extension of the close of discovery until March 9, 2005, would permit sufficient time to conduct the remaining depositions without affecting the hearing schedule set forth in the Administrative Judge's Order of February 4, 2005.

Respectfully submitted,

Lucy Doe
Address
Phone number

APPENDIX VI: Sample Proposed Order - (Enlargement of Time)

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

_____)	
LUCY DOE,)	Docket No. _____
)	
Petitioner)	
)	
v.)	
)	
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
)	
Respondent)	
_____)	February 22, 2005

PROPOSED ORDER

Petitioner filed a Motion for Enlargement of Time on February 21, 2005 and stated that Respondent does not object to the Motion. Upon consideration of Petitioner’s Motion for Enlargement of Time, and for good cause shown, it is hereby ordered that Petitioner’s deadline for filing a response to GAO’s Motion to Dismiss is extended to Wednesday, March 9, 2005. See 4 C.F.R. §§28.4 and 28.21.

SO ORDERED.

Date: _____

Jonah Brown
Administrative Judge

APPENDIX VII: Sample Proposed Order - (Protective Order)

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

LUCY DOE,)	
)	Docket No. _____
)	
Petitioner)	
)	
v.)	
)	
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
)	
Respondent)	

March 10, 2005

PROPOSED ORDER

Upon consideration of Petitioner’s Motion for a Protective Order dated March 7, 2005, and the grounds stated therein, the Motion is hereby granted. Accordingly, it is ordered that any letters or memoranda written by the Petitioner to her attorney should not be turned over to GAO because they are protected by attorney-client privilege. See 4 C.F.R. §28.42 (c) and (d).

SO ORDERED.

Date: _____

Jonah Brown
Administrative Judge

APPENDIX VIII: Form of Briefs

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

LUCY DOE,)	
)	Docket No. _____
Petitioner)	
)	
v.)	
)	
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
)	
Respondent)	

March 7, 2005

PETITIONER’S PREHEARING BRIEF

I. Statement on Nature of the Case

(Summary of the issues in the case, the basis of the charge and the statutory or jurisdictional basis of the charge.)

II. Statement of Facts

(A detailed account of what occurred including dates and persons involved. Identify any facts which are not in dispute. Each paragraph should be numbered.)

II. Issues of Law (Argument)

(Detailed argument of why Petitioner believes that the actions taken against her were wrong. Petitioner should include any legal bases for why she believes that the actions were improper. The argument should also include the relief the Petitioner is requesting and the bases for the relief.)

III. Conclusion

(Summary of the argument and relief requested.)

Respectfully submitted,

Lucy Doe
Address
Phone number

APPENDIX IX: Hearing Procedures

IX-1. Exhibits - Before the hearing begins (at a time determined by the administrative judge), exhibits must be marked in the lower right hand corner of the page as "Petitioner's 1," or "P.1," *etc.*, or "Respondent's 1," or "R.1," *etc.* Each multipage exhibit must be numbered sequentially in the lower middle of each page and the first page of such exhibits must indicate the total number of pages in the exhibit (*e.g.* 1/8, 2/8, 3/8, *etc.*). Any portions of exhibits containing illegible matter will not be admitted into evidence. Any exhibit containing handwriting must be either proffered along with a typed version or the typed version must be proffered in lieu of the original with a stipulation between the parties that it is an accurate copy. Generally, any party offering exhibits into evidence must present the original to the court reporter, two copies to the administrative judge, and one copy to each other party to the case. In addition, they must retain a copy to show to witnesses at the hearing, if appropriate. Specific instructions regarding the submission of exhibits will be given at the discretion of the administrative judge.

IX-2. List of Witnesses and Acronyms - Before the hearing commences, a typed list of witnesses, including telephone number and brief summary of expected testimony for each potential witness must be filed. A separate typed list of acronyms, with definitions (*e.g.* HCO – Human Capital Office, CASO – Controller/Administrative Services Office) expected to be used by witnesses must be provided to the court reporter and to the administrative judge.

IX-3. Sequestering - Witnesses will be sequestered, in other words, any persons who may be called to testify later in the proceeding (other than the Petitioner) may not observe the hearing in progress.

IX-4. Examination of Witnesses - Witnesses are subject to examination only on direct, cross, and redirect. Cross-examination must stay within the bounds of direct and redirect must stay within the bounds of cross. The credibility of witnesses may be developed fully.

IX-5. Counsel - While on the record, counsel may address only the witness or the administrative judge. If counsel needs to confer, he or she must ask the administrative judge to go off the record.

IX-6. Hearing Hours - Hearings will be scheduled within the Board's official hours or slightly longer, as determined by the administrative judge.

Appendix X: Merit System Principles

The personnel management system at GAO is required to be consistent with the merit system principles applicable to employees in the executive branch of the Federal government. These merit system principles, enacted into law by the Civil Service Reform Act and codified at 5 U.S.C. §2301(b), are briefly summarized below. They can also be found in GAO's regulations at 4 C.F.R. §2.4(c).

- 1) Selection and promotion of employees should be based on merit alone (relative ability, knowledge, and skills), after fair and open competition. The workforce should be composed of qualified people from all segments of society, and recruitment should serve this goal.
- 2) All employees and applicants for positions should be treated fairly in all aspects of personnel management, without regard to political affiliation, race, color, religion, national origin, sex, marital status, age or handicapping condition, and with proper regard for their privacy and constitutional rights.
- 3) Equal pay should be provided for work of substantially equal value; excellent performance should be rewarded with appropriate incentives and recognition.
- 4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
- 5) The workforce should be used efficiently and effectively.
- 6) Retention should be based on performance, inadequate performance should be corrected, and employees who cannot or will not improve their performance to meet required standards should be separated.
- 7) Employees should be provided effective education and training where it would achieve better organizational and individual performance.
- 8) Employees should be protected against arbitrary action, personal favoritism, or coercion from partisan political purposes; they may not use their official authority or influence for partisan political purposes.
- 9) Employees should be protected from reprisal for lawfully disclosing information that the employee reasonably believes evidences a violation of law, rule or regulation, or mismanagement, gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety (whistleblowing).

Appendix XI: Prohibited Personnel Practices

In addition to the ideals embodied in the merit system principles, the Civil Service Reform Act also enumerated certain prohibited personnel practices (PPPs). PPPs are unlawful agency actions that undermine the principles of the Federal merit system. No GAO employee with authority to take, direct others to take, recommend, or approve any personnel action may engage in any prohibited personnel practice with respect to such authority. The PPPs, found at 5 U.S.C. §2302(b) and 4 C.F.R. §2.5, are:

- 1) Discrimination for or against an employee on the basis of race, color, religion, sex, national origin, age, disability, marital status, or political affiliation;
- 2) Soliciting or considering recommendations or statements concerning a person under consideration for personnel action unless the statement is based on personal knowledge or records and concerns the individual's work performance, ability, aptitude, qualifications and character or suitability;
- 3) Coercing the political activity of any person (including contribution or service), or taking any action as a reprisal for a person's refusal to engage in political activity;
- 4) Deceiving or willfully obstructing anyone regarding that person's right to compete for employment;
- 5) Influencing anyone to withdraw from competition for any position, for the purpose of improving or injuring any other person's employment prospects;
- 6) Giving unauthorized preferential treatment to any employee or applicant to improve or injure the prospects of any individual for employment;
- 7) Appointing, employing, promoting, advancing, or advocating for those same actions, with respect to a GAO position for a relative;
- 8) Taking or failing to take a personnel action because of an individual's lawful disclosure of information reasonably believed to evidence wrongdoing (whistleblowing);
- 9) Taking or failing to take a personnel action because of an individual's exercise of any appeal rights;
- 10) Discriminating for or against an employee on the basis of conduct that does not adversely affect the performance of that individual or of others (except that an employee or applicant's conviction for a crime may be taken into account in determining suitability or fitness);
- 11) Knowingly taking, recommending, or approving a personnel action, or failing to do so, in violation of veteran's preference rights; and

12) Taking or failing to take any other personnel action if doing so would violate any law, rule, or regulation implementing or directly concerning the merit system principles;

13) Implementing a nondisclosure policy unless the policy comports with the laws regarding whistleblower protection and disclosures to Congress or Inspectors General.

Appendix XII: Federal Equal Employment Opportunity (EEO) Laws

Most EEO claims at GAO must first be filed with the Agency's Office of Opportunity and Inclusiveness (O&I). The Board's Rules recognize exceptions for adverse and performance based actions, as well as those involving separation by Reduction in Force. *See* 4 C.F.R. §28.98; GAO Order 2713.2, ch. 3 ¶2, ch. 6 ¶5. The following federal equal employment opportunity statutes may give rise to a claim in an action against the Agency.

- Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, religion, sex, national origin, pregnancy or genetic information. 42 U.S.C. §2000e *et seq.*; 42 U.S.C. §2000e(k); 42 U.S.C. §2000ff.
- Americans with Disabilities Act of 1990 (ADA) prohibits discrimination against employees and applicants based on disability. 42 U.S.C. §12101.
- Equal Pay Act requires employers to treat male and female workers in a nondiscriminatory manner in the payment of wages (substantially equal work under similar working conditions warrants equal pay). 29 U.S.C. §206(d).
- Age Discrimination in Employment Act prohibits age discrimination in hiring, discharge, pay, promotions and other terms and conditions of employment when the aggrieved party is at least 40 years old. 29 U.S.C. §§631, 633a.
- Retaliation/Reprisal are prohibited responses to a person filing a complaint or charge, participating in an investigation or charge, or opposing a prohibited employment practice.

Appendix XIII: Legal Terminology

Acronyms - Words formed from the initial letter or letters of each of the successive parts or major parts of a compound term or name (for example: HCO, CASO, ISTS, KSO).

Attachments - Documents affixed to a pleading as proof or illustration of the points at issue.

Brief - Printed statement for the Board containing a concise, organized presentation of facts, circumstances and positions of law supporting a case.

Certificate of Service - A document certifying that delivery of a pleading was made to a particular individual on a specified date.

Counsel - One who has been admitted as an attorney and counselor at law and who represents or advises an individual in a matter before the Board.

Discovery - The pretrial disclosure of pertinent facts or documents by one or both parties to a civil proceeding; the process by which the parties elicit information from each other to narrow the issues for trial and learn helpful information for their positions.

Discovery Period - A time period in which the parties to a Board proceeding are permitted to ascertain facts and information from each other; the disclosure or coming to light of what was previously hidden; the acquisition of notice or knowledge of given acts or facts and of legal theories anticipated to be used.

Exhibits - Any article(s) or document(s) offered in proof of facts or otherwise connected to the subject matter. If accepted into evidence, exhibits are marked for identification and annexed to the official file of record in the case.

Harmful Error - Error by the Agency, or the Administrative Judge, in the application of its procedures which might have caused the Agency, or the Administrative Judge, to reach a conclusion different from the one reached. The Petitioner must show that, based upon the record of the case as a whole, the error caused substantial harm or prejudice to his or her rights.

Hearing - The official proceeding, generally open to the public, whereby the parties attempt to prove specific issues of fact to support their theories of legal entitlement.

Memorandum of Points and Authorities - A document stating the legal theories, arguments, citations to statutes and cases to support a party's position on a legal issue.

Motion - The formal request to an administrative judge to take action on a matter in dispute.

Petition - Any request filed with the Board for action to be taken on matters within the jurisdiction of the Board.

Petitioner - Any person filing a Petition for Board consideration.

Pleading - A formal written statement of accusation or defense presented by the parties alternately in an action at law.

Prehearing Brief - A condensed statement of papers, facts and circumstances, or propositions of the parties prepared before the hearing and submitted to the Board for its consideration.

Preponderance of the Evidence - That degree of relevant evidence which a reasonable person, considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not.

Proposed Order - A draft order or decision presented by a party for possible use by the administrative judge if he or she rules in the party's favor on the course of action at issue. All motions must include a proposed order for the administrative judge to consider and sign.

Pro se - An individual who represents him or herself in a matter before the Board without representation by counsel.

Relief - The remedy or consequence that the party seeks from the Board as a result of the Board's consideration of the matter.

Representative - One who represents an individual in a matter before the Board but who is not necessarily an attorney.

Sequestering or Sequestered - When a witness is ordered by the administrative judge or the Board not to appear in the hearing room until he or she is called to testify.

Substantial Evidence - That degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. This is a lower standard of proof than preponderance of the evidence.

Witness - One who testifies in a hearing as to what he or she has seen, heard, or observed.