

PERSONNEL **A**PPPEALS **B**OARD

Follow-Up Report

GAO's Discrimination Complaint
Process and Mediation Program

August 31, 1998

Personnel
Appeals
Board



The Honorable James Hinchman
Acting Comptroller General
United States General Accounting Office
Room 7000
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Hinchman:

Pursuant to the authority granted to it under the General Accounting Office Personnel Act of 1980, the Personnel Appeals Board has statutory responsibility to oversee equal employment opportunity at GAO. In September, 1995, the Board issued an EEO Oversight report entitled *GAO's Discrimination Complaint Process and Mediation Program*, assessing how the complaint process and the mediation program work at the agency.

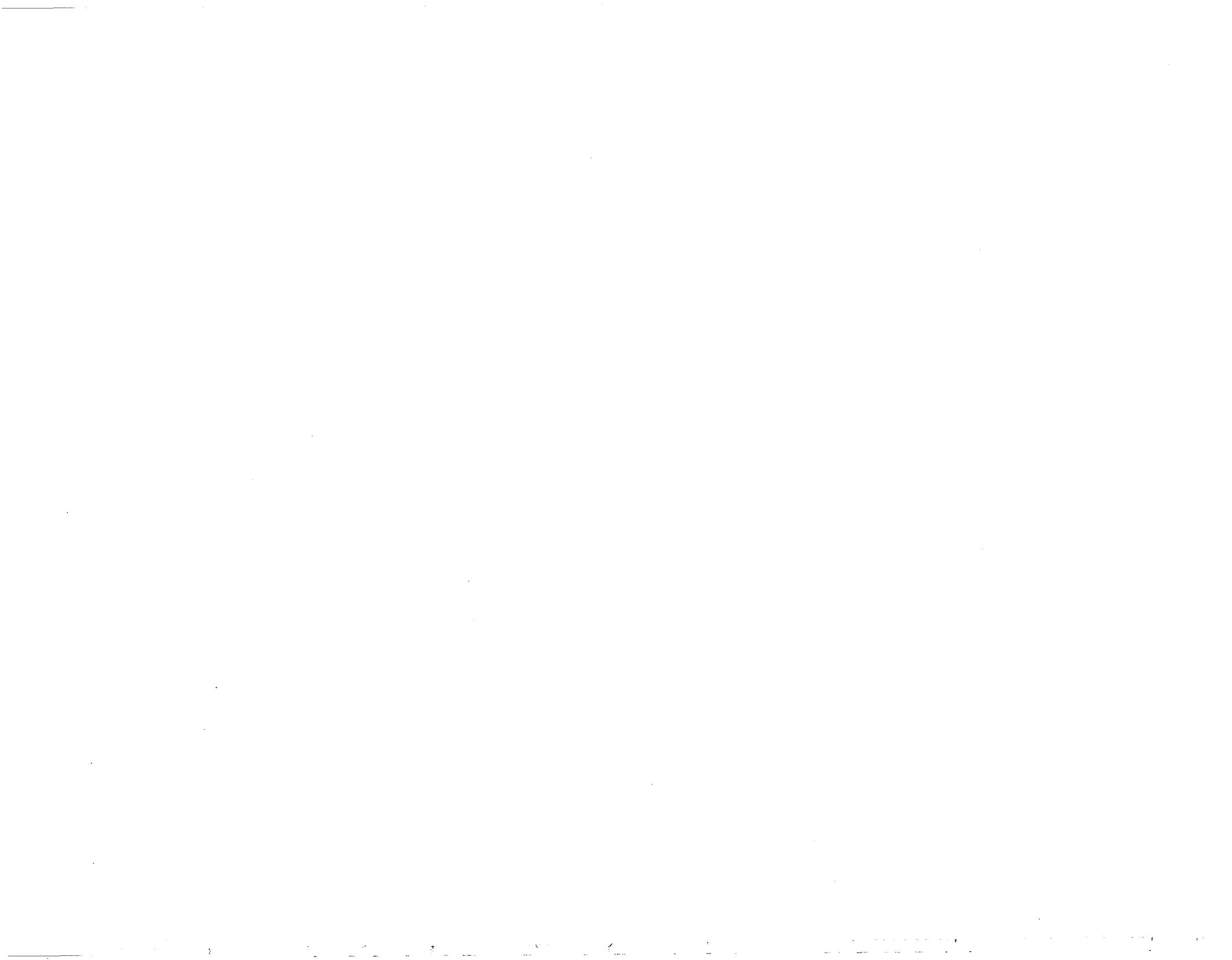
In that report, the Board noted that a framework for the thorough and fair administrative processing of discrimination complaints existed at GAO. The Board made specific recommendations designed to improve the agency's internal complaint system and to strengthen the mediation program. The attached follow-up tracks the agency's compliance with those recommendations since the issuance of the Board's 1995 report.

Sincerely,

Michael Wolf

Michael Wolf
Chair

attachment





PERSONNEL APPEALS BOARD

Michael Wolf
Harriet Davidson
Jeffrey Gulin

Chair
Vice-Chair
Member

PERSONNEL APPEALS BOARD STAFF

Executive Director
Co-Directors, EEO Oversight

Solicitor to the Board
Staff Attorney
Administrative Operations Assistant
& Acting Clerk of the Board

Beth L. Don
M. Gail Gerebenics
Barbara Lipsky
Vacant
Susan P. Inzeo
Sarah L. Hollis



Personnel Appeals Board Follow-Up Report (GAO's Discrimination Complaint Process and Mediation Program)

Introduction

In September, 1995, the Personnel Appeals Board of the U.S. General Accounting Office (the Board or PAB) issued an EEO Oversight report entitled *GAO's Discrimination Complaint Process and Mediation Program*, assessing how the complaint process and mediation program work at the agency. The Board's study, on which the report was based, included a review of relevant GAO Orders, a literature search, and staff interviews with other Federal agency personnel, as well as with GAO staff and mediators. In addition, the entire GAO workforce was surveyed to determine employees' levels of awareness of and satisfaction with the discrimination complaint process and the mediation program.

In its report, the Board noted that a framework for the thorough and fair administrative processing of discrimination complaints existed at GAO. It also concluded that continued improvement would lead to an increase in the credibility of the process. To that end, the Board made 12 specific recommendations designed to improve the agency's internal complaint system and to strengthen the mediation program.

Prior to publication of the Board's 1995 report, the Deputy Assistant Comptroller General for Human Resources informed the Board that the agency was taking immediate steps to implement eight of the Board's recommendations. He also announced that they would take the remaining four recommendations "under advisement." Since the issuance of the report, the GAO Order that governs the processing of discrimination complaints has been revised to address, in part, Board recommendations.

Rationale and Methodology

The Board undertook this follow-up study in fulfillment of its statutory mandate to oversee equal employment opportunity in GAO's programs and practices.¹ Because the implementation of a fair and viable process for resolving complaints of discrimination is central to the policy of promoting equal employment opportunity at GAO, the Board made recommendations specifically designed to improve that process. Monitoring the implementation of its recommendations has been an important part of the PAB's oversight authority.

For this follow-up study, the Board reviewed updated versions of GAO Orders and performance indicators provided by the Civil Rights Office. In addition, Board staff sent a letter to the Deputy Assistant Comptroller General for Human Resources asking him to provide, in detail, the agency's response to each of the Board's recommendations. The

¹31 U.S.C. §732(f)(2)(A); 4 C.F.R. §§28.91 and 28.92.

information contained in this report about the agency's actions since the publication of the Board's report is based, in large part, on the letter and materials that the Deputy Assistant Comptroller General for Human Resources sent to Board staff.²

GAO Order 2713.2

In 1994, midway through the Board's first study of GAO's discrimination complaint process, the internal Order governing that process underwent extensive revision. It was revised again in 1996 to incorporate specific Board recommendations.³

In general, the changes to the Order make clear the requirement to contact a civil rights counselor before the initiation of a complaint; require notification of appeal rights at certain stages; and provide for conciliation. The Order also allows for appeal to the Personnel Appeals Board for specific enforcement of mediation and settlement agreements.

PAB Recommendations and GAO's Response

EEO counselors, especially counselors in field and regional offices, should be provided with prompt initial training and further updated training on at least an annual basis. This training should specifically include instruction on the counselor's duty not to restrain employees in any way from participation in the complaint process.

A number of survey respondents indicated that they thought some counselors actively discouraged the filing of complaints or applied inappropriate pressure on employees to settle their complaints at the informal stage. The Board believes that improved training for eeo counselors would assist them in providing employees with the information necessary to base a judgment on whether or not to file a complaint. At the time the Board's report was issued, however, some counselors reported that they had had no training or that it had been sporadic, at best. Since publication of the Board's report, the counseling function at GAO has been centralized and all counseling is now handled from the headquarters Civil

²Letter from John H. Luke to Gail Gerebenics, Co-Director, EEO Oversight (November 18, 1997).

³In December, 1997, GAO Order 2713.2 was again revised to comply with the Americans with Disabilities Act (ADA). Under the new provisions of the Order, a qualified individual with a disability who is a visitor, guest, or patron of GAO may file a complaint with GAO's Civil Rights Office. The complainant may also file a civil action in the appropriate United States District Court within 90 days of receipt of the agency's Final Decision or within 180 days from the date the complaint was filed as long as a Final Decision has not issued.

Rights Office (CRO). All CRO headquarters staff attend eeo training at least once a year.

AA/CRO should work out the logistics of making counselors available to regional employees outside of their own units, exploring the use of counselors from other regional offices, as well as video-conferencing and telephone counseling as options.

Underlying this recommendation was the Board's concern that because of the relatively small size of field and regional offices, counselors could be called upon to counsel employees in their own units and negotiate with managers and supervisors in their own chains of command. The potential conflict of interest could compromise the confidentiality of the process and create the appearance of a lack of impartiality. Currently, as noted above, all counselors work out of headquarters. Due to confidentiality concerns surrounding the use of video-conferencing, counseling for regional staff usually takes place via telephone. Under certain circumstances, counselors may travel to the regions. In addition, the agency is in the process of establishing an electronic bulletin board that will contain information about employees' equal employee opportunity rights and mediation as well as all CRO orders. The bulletin board will also post the names and telephone numbers of eeo counselors and the names of mediators.

AA/CRO should examine the entire formal discrimination complaint process, with special attention to the time between investigations and the issuance of a final agency decision, to find ways of reducing the average case processing time. A specific time frame should be developed for issuance of a final agency decision and GAO Order 2713.2 should be amended to reflect that time frame.

During the course of its original study, the Board found that for all final agency decisions issued in fiscal years 1993-95, discrimination complaints took an average of 581 days from the filing of a formal complaint to issuance of a final decision. GAO's average case processing time placed them in the bottom one-third of 74 Federal agencies. The Board further determined, however, that the problem did not necessarily lie with the Civil Rights Office. GAO Order 2713.2 provides for AA/CRO to complete its investigation within 180 days. For the years studied, the Board found that the average time for investigation was 169 days. Following completion of the investigation, however, it took an average of an additional 412 days for the issuance of a final agency decision. This was attributed to the layers of

review to which the recommended and final decisions were subjected, as well as the lack of timelines within the review process. In response to the Board's recommendation, GAO Order 2713.2 was amended in 1996 to provide that the Comptroller General or his designee shall issue a final decision no later than 90 days after receipt of the investigative file by the complainant. Since the issuance of the Board's report, the Civil Rights Office has been endeavoring to reduce the overall time of complaints from filing to decision. In fiscal year 1997, CRO achieved a 34 percent reduction from the previous fiscal year. Its goal for fiscal year 1998 is to reduce the time from filing to decision to 180 days, nearly a 39 percent reduction from fiscal year 1997.

A system to track complaints at every stage of the process for compliance with the mandated schedule should be developed and closely monitored by the Director of AA/CRO. Where a deviation from the time frame is noted, the Director of AA/CRO should intercede immediately to ascertain the nature of the delay and to provide necessary resources to cure it.

As noted above, at the time the original report was issued, the Board was concerned about the length of time it took for a complaint to be processed from the time of filing through the final agency decision. The Civil Rights Office has been tracking complaints, with emphasis on timing, and, as previously noted, has significantly reduced the time frames.

A periodic report of each complaint's status, with emphasis on adherence to GAO Order 2713.2 timelines, should be forwarded to the Comptroller General and/or his designee.

A quarterly report containing the status of each complaint is sent to the Assistant Comptroller General for Operations.

The Director of the Civil Rights Office should report directly to the Comptroller General, or if a designee is desired, to the Assistant Comptroller General for Operations. The Deputy Assistant Comptroller General for Human Resources should not be one of the reviewers of draft final agency decisions on discrimination complaints.

During the course of the study, the Board learned that the Assistant Comptroller General for Operations had delegated the supervision of the Civil Rights Office and its Director to the Deputy Assistant Comptroller

General for Human Resources, who also is directly responsible for the Personnel Office. The Board was disturbed by the close supervisory connection between the eeo and personnel functions in the agency which lead to a single person overseeing the development and management of personnel policies and practices that are often at issue in the complaint system. The agency has not modified the chain of command that leads from CRO to the Deputy Assistant Comptroller General for Human Resources and does not intend to do so. According to the Deputy Assistant Comptroller General for Human Resources, GAO will "continue to explore practices that will mitigate any perceived conflict of interest." The Board remains committed to its recommendation that the Director of the Civil Rights Office report directly to the Comptroller General or the Assistant Comptroller General for Operations.

If the agency elects to have draft final agency decisions reviewed by the Office of General Counsel, those reviews should be assigned to a functional unit within the Office of General Counsel apart from that unit which later represents the agency in subsequent legal proceedings on the same complaint before the PAB or in court.

A potential conflict of interest that concerned the Board during its original study was GAO's practice of having final agency decisions reviewed by the same functional unit that represents the agency in subsequent proceedings. The Board feared that the structural arrangement could give the appearance that OGC attorneys are able to urge the agency to take a position in a decision based on its benefit to a future defense. The Board perceived this as undermining the credibility of the discrimination complaint process. The Agency, however, thinks that leaving review of agency decisions in the Legal Services section of its General Counsel's Office facilitates its ability to expedite complaints through the involvement of the most knowledgeable GAO officials in the area of personnel law. The Agency does not intend to change its system of review. The Board is committed to its original recommendation. It thinks that the goal of expediting complaints, that the agency so appropriately seeks, could be met in other ways that would be less likely to be seen as a conflict of interest.

GAO Order 2713.2 should be amended to provide for appeal rights to the PAB if a complainant is dissatisfied with AA/CRO's determination that there was no breach of his or her settlement agreement. As an alternative to requesting specific performance, the complainant should be permitted to request that the complaint

be reinstated for processing from the point at which settlement was reached. These rights should be applicable to all settlement agreements arising from the discrimination complaint process, including those reached outside the mediation program.

More than a third of the survey respondents who had settled their complaints through mediation reported to the Board that there had been noncompliance with the terms of the agreement. At the time of the earlier report, GAO Order 2713.2 provided for the Director of the Civil Rights Office to make a determination of noncompliance after being notified of such by the complainant. There was no right to appeal that recommendation. GAO Order 2713.2 has since been amended to allow for appeal to the Personnel Appeals Board for specific implementation of the terms of the agreement if the complainant is not satisfied with the CRO determination.⁴

Every participant in mediation should be provided with a copy of the relevant section of GAO Order 2713.2 concerning enforceability of settlement agreements, and mediation program staff should endeavor to ensure that he or she understands the rights it confers and the procedure by which to obtain them.

As noted, GAO Order 2713.2 was amended to provide for appeal to the PAB for enforcement of agreements. In addition, a package of information that explains the enforceability of settlement agreements and the right to reinstatement of a complaint if the agreement fails is now provided to all mediation participants and employees who settle their eeo complaints.

AA/CRO has a continuing obligation to ensure that the mediators it uses in its program are skilled, competent, and well-trained and should establish guidelines for discontinuing use of any mediators who are not functioning effectively in case the need to remove a mediator arises. Every mediator should attend training every year regardless of the number of mediations he or she conducted that year.

Mediators interviewed as part of the Board's study unanimously hailed the training they received as the most valuable tool in maintaining and sharpening their mediation skills. At the time of the report, however, training was offered initially to employees who became mediators but follow-up training was sporadic. In October, 1997, a new group of 28

⁴GAO Order 2713.2, ch. 7(2)(c).

mediators from throughout the agency was trained by CRO. The newly-trained mediators will co-mediate with experienced mediators, as needed, and are scheduled to attend a follow-up two day training program at the end of the current fiscal year. The agency also offers a course called "Mediation Skills for Managers" designed to increase awareness of situations in which mediation could be useful. There does not appear to be any structure and program to ensure that veteran mediators receive yearly training. There also does not appear to be any structured review mechanism in place to remove ineffective mediators.

AA/CRO should ensure that parties are aware that they may have an attorney advise them or that they may consult with an attorney at any time during the mediation process. Special care should be taken when the negotiated agreement could involve the diminution of an employee's rights or when complex matters are at issue.

Parties are advised that they have the right to be represented by or consult with an attorney. The agency notes that almost all employees who have entered into settlement agreements have done so in consultation with an attorney.

A "customer satisfaction" questionnaire should be developed for use by the mediation program staff at the conclusion of every mediation. It should be designed to elicit the reasons that the participant chose to mediate the complaint, whether he or she is satisfied with the results, and whether he or she felt any inappropriate pressure to choose mediation, remain in the program, or settle all or some of the issues under dispute.

At the time of the Board's study, more than eighty percent of the complaints filed since the inception of the mediation program were settled through this process. A number of survey respondents indicated, however, that they were dissatisfied with the results of the mediation. During its review of relevant literature and other mediation programs, the Board learned that customer satisfaction surveys were becoming an increasingly accepted means of improving the level of participant satisfaction with the use of alternative means of dispute resolution. GAO has since developed a customer satisfaction survey that has been in use for the past year.

Conclusion

GAO has complied with 9 of the 12 recommendations that the Board made concerning the discrimination complaint process and mediation program.

**Personnel Appeals Board Follow-Up Report
(GAO's Discrimination Complaint Process
and Mediation Program)**

Most of the recommendations were intended to assist in the fine tuning of a process that was functioning well, albeit slowly. During its earlier study, the Board was quite concerned about the length of time it was taking to process a complaint from filing through final decision. The agency clearly took heed of the Board's recommendations in this area and has significantly reduced the average time for processing.

The Board and the employee groups that commented⁵ continue to disagree with the Agency about the supervisory and managerial chain of command between the Civil Rights Office and the Deputy Assistant Comptroller General for Human Resources and on the involvement of the Legal Services Division of the Office of General Counsel in the review of Final Decisions.

It appears that mediators receive initial training and a follow-up during the first year on the job. Employee groups noted, and the Board is not aware of anything to the contrary, that there does not appear to be formal annual training for mediators after the first year nor does the agency have any mechanisms in place to review and remove ineffective mediators. The Board remains committed to its recommendation that GAO institute the quality control features of yearly training for veteran mediators as a well as a process for removing mediators who are not performing adequately.

Overall, the agency's serious commitment to ongoing evaluation of its discrimination complaint process and mediation program is evident and has led to significant and far-reaching improvements in the past two years. That evident commitment should produce further review, re-evaluation and reform in the future.

⁵The President of the Advisory Council on Persons With Disabilities (ACPD) and the Chair of the Mid-Level Employees Council (MLEC) submitted comments on the Board's follow-up report. Both of them urged the Board to make a stronger statement about the agency's compliance with the recommendation about annual training for mediators and the establishment of removal procedures for mediators who are not functioning effectively. In response to their comments, the Board made revisions in its comments on the agency's compliance with its earlier recommendation concerning the training and removal of mediators. In addition, both commentators indicated their strong support for the Board's positions on the two recommendations the agency continues to decline to follow.

