

# GAO's *Discrimination Complaint Process and Mediation Program*

*A Report of the Personnel Appeals Board*



September 29, 1995

Personnel

Appeals

Board



Office of the Chair

The Honorable Charles A. Bowsher  
Comptroller General  
United States General Accounting Office  
Room 7000  
441 G Street, N.W.  
Washington, D.C. 20548

Dear Mr. Bowsher:

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. As part of this responsibility, the Board undertook an oversight study of the discrimination complaint process and the mediation program at GAO. Attached is a copy of the Board's report entitled *GAO's Discrimination Complaint Process and Mediation Program*.

As a result of its study, the Board makes a number of recommendations to ensure continued improvement in the discrimination complaint process and to further ensure that the process affords GAO employees a fair and viable means for resolving complaints of discrimination.

Overall, the Board commends GAO for its leadership role in the Federal sector in establishing and implementing a mediation program as an adjunct to the conventional system for resolving complaints alleging discrimination.

Sincerely,

A handwritten signature in cursive script that reads "Nancy A. McBride". The signature is written in dark ink and is positioned above the printed name and title.

Nancy A. McBride  
Chair

attachment

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# Introduction

Pursuant to the authority granted to it under the General Accounting Office Personnel Act of 1980,<sup>1</sup> the Personnel Appeals Board (PAB or the Board) has statutory responsibility to oversee equal employment opportunity (EEO) at the U.S. General Accounting Office (GAO). As part of this responsibility, the Board has undertaken an oversight study of the discrimination complaint process and the mediation program at GAO. This report reflects the results of that review.

The Board initially decided to conduct a study for the purpose of determining whether GAO's use of mediation, a form of alternative dispute resolution, in the discrimination complaint process serves as an adequate means of addressing complaints of discrimination. With a mediation program created in 1989, GAO established itself in the vanguard of Federal agency efforts to incorporate alternative dispute resolution methods into the conventional systems for resolving complaints alleging discrimination.

Midway through the Board's study, the GAO internal order under which the discrimination complaint process and the mediation program are administered underwent extensive revision.<sup>2</sup> In light of major changes in the discrimination complaint process implemented by GAO, the Board decided to expand its study of the mediation program to include the operation of the discrimination complaint process from the initial contact with a pre-complaint counselor through the issuance of the agency's final decision.

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## Methodology

The Board began its study with a review of GAO's regulations and orders relating to the discrimination complaint process and mediation program, as well as other relevant literature,<sup>3</sup> including information about these processes at other Federal agencies. Board staff interviewed and collected information from GAO and other Federal agency personnel, GAO's Director

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<sup>1</sup>31 U.S.C. §732(f)(2)(A) (1990); 4 C.F.R. §§28.91 and 28.92.

<sup>2</sup>U.S. General Accounting Office Operations Manual, Order 2713.2, "Discrimination Complaint Process" (October 14, 1994) (hereafter GAO Order 2713.2).

<sup>3</sup>In its examination of the GAO mediation program, the Board made use of the following publications to identify elements critical to the effective functioning of a mediation program: National Standards for Court-Connected Mediation Programs, Center for Dispute Settlement and the Institute of Judicial Administration (1992); Court ADR: Elements of Program Design, Center for Public Resources/CPR Legal Program, Judicial Project (1992); Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, Administrative Conference of the United States (1992).

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of the Civil Rights Office (AA/CRO),<sup>4</sup> the mediation program administrator, and mediators.

As part of the PAB's study of the GAO discrimination complaint process, the entire agency population was asked to participate in a survey to assess employee awareness of and satisfaction with the complaint process and the mediation program.<sup>5</sup> The survey posed additional questions designed to elicit feedback from those employees who had participated in either process. About one-third of the GAO workforce (1586 of 4700) completed and returned survey forms. Of those survey respondents, 94% reported that they were aware that the agency had a complaint process to handle allegations of discrimination and 77% were aware that GAO had a mediation program to resolve discrimination complaints. Approximately two-thirds of the respondents indicated that they knew who to contact about a discrimination complaint.

Of the 1586 completed surveys received, 71 respondents indicated that they had participated in either the discrimination complaint process or the mediation program, and therefore were able to answer a series of questions concerning their level of satisfaction with these systems. While this is a relatively small number, responses from participants in these programs served the valuable purpose of raising issues for further exploration in the Board's study. These issues will be identified throughout this report.

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<sup>4</sup>In 1994, the Office of Affirmative Action Planning (OAAP) merged with the Civil Rights Office to form the Affirmative Action/Civil Rights Office (AA/CRO).

<sup>5</sup>The survey and a tabulation of the answers received is at Appendix I.

# The GAO Individual Discrimination Complaint Process

The discrimination complaint process at GAO covers all GAO employees and applicants for employment<sup>6</sup> who allege that they have been discriminated against based on race, color, religion, sex, national origin, disability or age or who allege retaliation for engaging in protected activities.<sup>7</sup> GAO Order 2713.2, which governs the operation of the discrimination complaint process, underwent major revision in 1994. The revised order was modeled, with few exceptions, after the Equal Employment Opportunity Commission's (EEOC) regulations and directives for discrimination complaint processing by Federal executive branch agencies.<sup>8</sup>

## Overview of GAO'S Complaint Program Pre-Complaint Procedures

According to GAO Order 2713.2, any employee or applicant for employment who believes that he or she has been discriminated against must contact a civil rights counselor within 45 calendar days of the alleged discrimination or retaliatory act or the effective date of the disputed personnel action.<sup>9</sup> The written procedures provide for a counselor to advise the employee of his or her rights, to describe applicable time frames, and to explain the mediation program.<sup>10</sup> The GAO Order also directs the counselor to attempt informal resolution of the complaint.<sup>11</sup> The Order further provides that, if the complaint cannot be resolved, the counselor must conduct a final interview within 30 days of the initial contact and notify the complainant, in writing, of his or her right to file a formal complaint within 15 days.<sup>12</sup> According to information provided by the Director of AA/CRO, one full-time

<sup>6</sup>This report is concerned solely with individual complaints. Procedures for filing, presenting, and resolving complaints from groups of employees, former employees or applicants for employment differ substantially from those applicable to individuals. Internal class action complaint procedures may be found in GAO Order 2713.2, Ch. 4.

<sup>7</sup>Definitions of discrimination in the Order are consistent with Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16) for race, color, religion, national origin, sex, and sexual harassment; the Age Discrimination in Employment Act of 1967 (ADEA) (29 U.S.C. §§631, 633a) for persons at least 40 years old; the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C. §206(d)) for sex-based wage claims; and the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§12112-14) for disability.

<sup>8</sup>See, 29 C.F.R. Part 1614.

<sup>9</sup>If the complainant demonstrates that he or she "did not know and reasonably should not have known" that the discrimination or personnel action occurred, the AA/CRO Director shall extend the time limit. GAO Order 2713.2, Ch. 3, § 1(a)(2).

<sup>10</sup>Throughout the agency, there were 70 contacts with EEO counselors in fiscal year 1990; 53 in fiscal year 1991; 64 in fiscal year 1992; 39 in fiscal year 1993; 43 in fiscal year 1994; and 16 in the first two quarters of fiscal year 1995.

<sup>11</sup>Counselors resolved 30% of their complaints in fiscal year 1990; 53% in 1991; 45.3% in 1992; 33.3% in 1993; 26% in 1994; and, 18% in the first half of fiscal year 1995.

<sup>12</sup>Prior to the final interview, the complainant and counselor may agree to extend the counseling time period for another 30 days. If the mediation process is to be used, the complaint process time is automatically extended for 60 days. GAO Order 2713.2, Ch. 3, §1 (f), (g).

counselor, working in that office, is available for Headquarters personnel. Where circumstances present a reason not to use this counselor, another staff member of AA/CRO, who has received counseling training, serves as an alternate counselor. In the field and regional offices, counseling is provided by employees of those offices who hold other positions, but perform EEO counseling as a collateral duty on an as-needed basis. AA/CRO provides some guidance to these twenty-nine EEO counselors in the performance of their counseling duties, but their supervisors of record are the managers responsible for overseeing their non-counseling work.

## Formal Complaint Procedures

After counseling, the formal discrimination complaint process begins with the filing of a written complaint with AA/CRO. That Office either accepts or dismisses the complaint.<sup>13</sup> If the complaint is accepted, the Order specifies that it be investigated by AA/CRO, which then submits a report of investigation to the Director of that Office.<sup>14</sup> The Director may attempt to negotiate a resolution with the appropriate GAO officials. If the complaint cannot be resolved, the Order requires the Director to recommend an agency decision to the Comptroller General,<sup>15</sup> who then issues a final agency decision.<sup>16</sup> The decision of the Comptroller General may be appealed to the Personnel Appeals Board, as may be the decision of the AA/CRO to dismiss a complaint.

## Areas of Concern With GAO'S Discrimination Complaint Program Pre-Complaint Procedures

### 1. Field and Regional EEO Counselors: Potential Conflicts of Interest

As noted above, due to their smaller size, the field and regional offices use these EEO counselors, who provide counseling services on an as-needed basis. Because counseling is not their primary function within the field office, collateral duty counselors may be called upon to counsel

<sup>13</sup>Among the reasons for dismissal of a complaint are that it fails to state a claim of discrimination covered by the applicable statutes; that it was not filed in a timely manner; that it contains allegations not raised in pre-complaint counseling or mediation; or that it sets forth matters that are contained in a pending complaint or that have been finally decided. A pending complaint may also be dismissed at any time during the process for failure of the complainant to prosecute it. See, GAO Order 2713.2, Ch. 3, §5.

<sup>14</sup>Unlike the counseling process which is done in-house, AA/CRO contracts for investigatory services.

<sup>15</sup>The recommended final agency decision is actually forwarded to the Special Assistant to the Comptroller General through the Deputy Assistant Comptroller General for Human Resources. Interview with Nilda Aponte, Director, AA/CRO, May 17, 1995.

<sup>16</sup>Pursuant to GAO Order 0140.9.5 (May 4, 1995), the Comptroller General delegated to his Special Assistant the authority to sign and issue final agency decisions on discrimination complaints.

employees in their own units and to negotiate with managers and supervisors who may be in the counselor's own chain of command. This may create the potential of a conflict of interest for the counselor, or at the least, create an appearance of a lack of complete impartiality. This concern was expressed in several survey responses. One respondent from a regional office indicated a hesitance to take a complaint to the local counselor "for fear of a leak," while another noted that the counselors "report to the same superiors that are making the difficult personnel decisions." This lack of distance among the counselors, supervisors and complainant may, indeed, compromise the confidentiality and integrity of the complaint process. A counselor negotiating with a person in his or her chain of command may be perceived by the complainant as not always acting on the complainant's behalf. The counselor may also be involved in, or certainly be aware of, internal office politics that could affect advice rendered.

GAO has made no provision within its counseling procedures to address this potential conflict of interest. It should be noted that, in creating the mediation program, this potential problem was recognized, and specific provision was made that mediators would not mediate problems within their own work unit. Similar provisions should be made for the counseling program. When the potential for a conflict with a counselor is identified, the services of a more detached counselor should be secured. In smaller field offices, this may require the use of a counselor from another field office. While face-to-face counseling is preferable in complex or sensitive cases, the agency may wish to explore the use of video-conferencing and telephone counseling as an option in more routine matters.

## **2. Counselors Discouraging Employees from Filing Complaints**

A concern in the complaint processing system raised by several of the survey respondents was the perception that complaint counselors actively discourage employees from filing complaints. GAO Order 2713.2 states unequivocally that "[t]he civil rights counselor shall not try in any way to restrain the aggrieved person from filing a complaint."<sup>17</sup> Eighteen of the fifty-eight survey respondents who reported having contact with a counselor felt that there was inappropriate pressure placed upon them to settle their complaints at the informal stage. Despite the fact that retaliation for using the complaint process is expressly prohibited by the GAO Order,<sup>18</sup> several respondents stated that counselors warned them of

<sup>17</sup>Chapter 3, §1(h).

<sup>18</sup>GAO Order 2713.2, Ch. 1, §5(b).

the possibility of reprisal or serious adverse consequences to any future career aspirations if they filed a complaint. A complaint of retaliation is processed in the same manner as a complaint of discrimination.<sup>19</sup>

Improved training for EEO counselors, especially those serving in a collateral duty capacity, may assist counselors in providing employees with the proper information upon which to base a judgment of whether or not to file a formal complaint. Several EEO counselors who responded to the survey indicated a general lack of recent training opportunities. One counselor noted receiving "no training, formal or informal" despite having been a counselor for more than a year. Another counselor claimed to have had no refresher training for the past two years. The integrity of the complaint process is damaged when complainant decision-making is uninformed or is based on fear. Improved training opportunities for counselors should address this area of concern.

## Formal Complaint Process

### 1. Lengthy Case Processing Times

The timely resolution of complaints is critical to the integrity of GAO's discrimination complaint process. However, for all final agency decisions issued in fiscal years 1993-1995, discrimination complaints were taking an average of 581 days from the filing of a formal complaint to issuance of the final decision. See, Figure 2.1. Based on this statistic, GAO's average case processing time falls well below the average for other Federal agencies. The most current EEOC statistics available for 74 executive branch agencies indicate that GAO would fall in the bottom one-third for average case processing time.<sup>20</sup> This provides even greater cause for concern given that executive branch case processing times include hearings before the EEOC prior to a final agency decision, whereas GAO employees are not entitled to a hearing until after the issuance of the final agency decision. They then may obtain a hearing if they elect to appeal their case to the PAB or go to Federal District Court.

<sup>19</sup>In fiscal year 1990, 1.2% of people contacting counselors alleged retaliation as a basis for the complaint. In fiscal year 1992, that figure was 2.1%; 8% in 1992; 2.4% in 1993; 6.7% in 1994, and 10% for the first half of fiscal year 1995.

<sup>20</sup>See, U.S. Equal Employment Opportunity Commission, "Federal Sector Report On EEO Complaints and Appeals — By Federal Agencies For Fiscal Year 1992", pps. 45-47.

Chapter 2  
 The GAO Individual Discrimination  
 Complaint Process

Figure 2.1: Processing Times for Final Decisions Issued<sup>\*</sup> FY 1993-1995 (in Days)

	Regions		Headquarters		All Complaints	
	Range	Average	Range	Average	Range	Average
From date filing received to date Report of Investigation received	93-303	175	127-178	158	93-303	169
From date ROI received to date decision issued	190-650	429	265-507	380	190-650	412
<b>Total process from date of filing to date of decision</b>	<b>337-804</b>	<b>604</b>	<b>392-681</b>	<b>539</b>	<b>337-804</b>	<b>581</b>

\* Summary of data from the 17 cases that resulted in final agency decisions since 10/1/92.

Source: GAO Affirmative Action/Civil Rights Office

GAO Order 2713.2 provides that AA/CRO shall endeavor to complete the investigative phase of the complaint process within 180 days of the filing date of the complaint.<sup>21</sup> AA/CRO has been largely successful in meeting this benchmark, with fiscal years 1993-1995 average processing time of 169 days for completion of the investigation. However, following completion of the investigation it is taking, on average, an additional 412 days to issue a final agency decision. One reason for this delay may be the multiple layers of review each draft of a final agency decision is subjected to prior to submission to the Comptroller General for final approval and issuance. AA/CRO also reports making attempts to settle complaints prior to issuance of a final decision. However, statistics from that office indicate that this is often a fruitless effort as only four formal complaints were resolved during the administrative processing between fiscal years 1992-95. See Figure 2.2.

<sup>21</sup>The 180-day benchmark for completion of the investigative phase is the same as the one provided for in EEOC regulations at 29 C.F.R. Part 1614 for executive branch agencies.

**Chapter 2**  
**The GAO Individual Discrimination**  
**Complaint Process**

**Figure 2.2: Administrative Outcome of Formal Complaints by Date Filed (FY 1988-1995)**

	1988	1989	1990	1991	1992	1993	1994	1995	Total
Agency Decision	3	7 <sup>a</sup>	9 <sup>b</sup>	4	11 <sup>c</sup>	1	3		38 (48.7%)
Resolved During Administrative Process	1	10	2	2 <sup>d</sup>	4				19 (24.4%)
Filed in Court before Agency Decision	2	2		1 <sup>e</sup>	1	3			9 (11.5%)
Pending						2 <sup>f</sup>	4	6	12 (15.4%)
<b>Total</b>	6 <sup>g</sup>	19	11	7	16	6	7	6	78

<sup>a</sup>Includes one complaint settled by OGC pending appeal.

<sup>b</sup>Includes three charges incorporated and counted as one complaint.

<sup>c</sup>Includes two charges incorporated and counted as one complaint.

<sup>d</sup>Includes two charges incorporated and counted as one complaint.

<sup>e</sup>Includes three charges incorporated and counted as one complaint.

<sup>f</sup>Includes five charges incorporated and counted as one complaint.

<sup>g</sup>Data not retained for 6 charges filed prior to January 1, 1988.

Source: GAO Affirmative Action/Civil Rights Office

GAO Order 2713.2 provides no time frame for the issuance of a final agency decision. A time frame would give more structure and guidance to the process thereby providing employees with a clearer and more realistic expectation about the time it takes to process a complaint. AA/CRO should examine the current process between the investigative stage and issuance of the final agency decision, and develop a timely, yet realistic, benchmark to reduce its average case processing time. GAO Order 2713.2, Ch. 3, §7 should then be amended to reflect this new time frame. In developing the time frame, AA/CRO should consider that the EEOC's regulations require 60

days for the issuance of a final agency decision following the investigative stage in cases where there is no hearing.<sup>22</sup>

## **2. The Need to Avoid the Appearance of Possible Conflicts of Position and/or Interest**

The discrimination complaint process is administered by AA/CRO. The agency's organizational chart discloses that the AA/CRO Director reports to the Special Assistant to the Comptroller General through the Assistant Comptroller General for Operations. GAO Order 2713.2, Ch.1, §6(a) reflects this organizational structure by providing that the Assistant Comptroller General for Operations is "responsible for ensuring that all the provisions of this order are carried out."<sup>23</sup> However, in reality, the Assistant Comptroller General for Operations has delegated his supervision of the Director of AA/CRO to the Deputy Assistant Comptroller General for Human Resources, who also has direct supervisory responsibility for the Personnel Office.<sup>24</sup>

The chain of command involving the Deputy Assistant Comptroller General for Human Resources in AA/CRO's affairs is one of the largest points of divergence between the EEOC regulations and GAO's order. The EEOC regulations require the EEO Director to be under the "immediate supervision" of the head of the agency.<sup>25</sup>

GAO's chain of command gives the appearance of too close a connection between the personnel and EEO functions in the agency. The Deputy Assistant Comptroller General for Human Resources oversees the Personnel Office's execution of its mandate to plan, to develop, and to administer a program "for the acquisition and management of the human

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<sup>22</sup>EEOC's regulations at 29 C.F.R. §1614.109(f) provide that, within 30 days of a complainant's receipt of the report of investigation on his or her complaint, the complainant shall notify the agency whether he or she is requesting a hearing before the EEOC or is requesting a final agency decision without a hearing. 29 C.F.R. §1614.110 provides that the agency shall issue a final decision within 60 days of being notified that a complainant is requesting a final agency decision without a hearing. This situation is analogous to that at GAO where, as above noted, there is no provision for a hearing prior to issuance of the final agency decision.

<sup>23</sup>This however, is at odds with another GAO order which provides for the CRO Director to be responsible to and report to the Comptroller General directly. See GAO Order 0130.1.26—Civil Rights Office (October 8, 1986). This Order was not expressly superseded by GAO Order 2713.2 when it became effective in 1994.

<sup>24</sup>Interview with Nilda Aponte, Director, AA/CRO, May 17, 1995. See also, GAO Orders 0130.1.7 and 0130.1.13, §3.

<sup>25</sup>29 C.F.R. §1614.102(b)(3). In the parlance of EEOC's regulations, the head of the complaint unit is called the EEO Director. At GAO, that person is the Director of the Civil Rights Office.

resources needed to effectively carry out the functions of GAO.<sup>26</sup> The Personnel Office is also charged with "representing the Comptroller General in personnel management matters."<sup>27</sup> In fulfillment of the latter mandate, the Deputy Assistant Comptroller General for Human Resources is called upon by the agency to appear before the PAB or in court to testify in support of the agency's employment policies and practices in cases alleging discrimination in agency policy or practice.

This reporting structure, with the directors of GAO's EEO and personnel functions reporting to the same official, may create the appearance of a conflict of position and/or interest. As the immediate supervisor of the Director of AA/CRO, the Deputy Assistant Comptroller General for Human Resources is in a position to exert influence on the Director's decision-making. This may lend an appearance that the Director's recommended final agency decisions are lacking in the required neutrality because they may be drafted to meet the approval of the Deputy Assistant Comptroller General for Human Resources, who simultaneously oversees the development and management of the very personnel policies and practices often at issue in discrimination complaints.

Even if the Director of AA/CRO had another immediate supervisor, but the Deputy Assistant Comptroller General for Human Resources retained the authority to review and alter recommended final agency decisions, the appearance of a conflict would remain. Such a structure would still place the Deputy Assistant Comptroller General for Human Resources in the position of defending agency personnel practices against challenges by employees whose final agency decisions she has the authority to review and alter.

The EEOC has cautioned against such a practice in its Management Directives:<sup>28</sup>

Agencies must avoid conflicts of position or conflicts of interest as well as the appearance of such conflicts. For example, the same agency official(s) responsible for executing and advising on personnel actions, may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint processes. Those processes generally challenge the motivations and impacts of personnel actions and decisions. In order to maintain the integrity of the EEO investigative and decision making processes, those functions must be kept separate from the personnel functions.

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<sup>26</sup>GAO Order 0130.1.13 §3.

<sup>27</sup>*Id.*, §4(a).

<sup>28</sup>Management Directives for 29 C.F.R. Part 1614 (MD 110), p. 1-1

The EEOC regulation—with its required direct chain of command to the agency head—not only underscores the intended importance of the EEO function within federal agencies, but also recognizes the need for independence in the EEO function, particularly in relation to the personnel/human resources function. Without such separation of functions, employees may perceive pursuing EEO rights or challenging personnel policies and practices to be an exercise in futility. Some survey respondents indicated that they do indeed observe too close a connection between EEO, personnel, and human resources authority.

GAO's recent revision of its order governing the discrimination complaint process and mediation program diverges from the EEOC regulations in this important aspect. Although GAO (along with the Library of Congress) is expressly exempt from EEOC's regulatory requirements,<sup>28</sup> the underlying purpose of the rule seems to dictate a similar structure at GAO. The GAOPA requires that GAO's personnel management system—like that in the executive branch—"provide that all personnel actions affecting an officer, employee, or applicant for employment be taken without regard to race, color, religion, age, sex, national origin, political affiliation, marital status, or handicapping condition."<sup>29</sup> Because GAO employees share essentially the same rights under Title VII and the ADEA as executive branch employees, similar structural safeguards seem necessary to support those rights and guarantee that they may be pursued in a meaningful way.

A more direct link to the highest level of management would symbolize the importance of EEO matters to the agency. Moreover, the independence of the EEO function at GAO should be no less imperative than at other federal agencies, if employees are to have confidence to pursue their rights without repercussion and to believe that their EEO rights are worthy of attention at the highest agency levels. At a minimum, consistency with the executive branch in assuring independence of the EEO function seems to require that GAO have the AA/CRO Director report directly to the Assistant Comptroller General for Operations, without the intervening authority of the Deputy Assistant Comptroller General for Human Resources. This would remove the appearance of overly close ties between the personnel and EEO functions, while conveying to employees the importance of the EEO function within the agency structure.

The Board's study of the structural aspects of the discrimination complaint process also revealed another area of the appearance of a potential

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<sup>28</sup>29 C.F.R. § 1614.103(d)(2) and (3)

<sup>29</sup>31 U.S.C. § 732(e).

conflict of interest. According to information elicited from the Director of AA/CRO, drafts of final agency decisions on discrimination complaints are sent for review and approval to the agency's Office of the General Counsel (OGC). This review occurs in the same functional unit within OGC as that which later represents the agency in subsequent hearings on the same complaints before the Board or in court. Although there is no evidence of improper influence on final agency decisions by OGC, this structural arrangement may give the appearance that the lawyers who will later be called upon to defend the agency are in the position to urge a draft of the final agency decision that is most beneficial to any future defense. This appearance alone may undermine the credibility of the complaint discrimination process with employees.

The EEOC's management directive is clear on this subject:

Agencies should also be cautious of excessive intrusion on the investigative and deliberative processes of EEO complaint resolution by agency representatives and offices responsible for defending the agency against complaints...Legal sufficiency reviews of EEO matters are best handled by a functional unit apart from the unit which handles agency representation in EEOC complaints. This is suggested by the Commission because impartiality or the appearance of impartiality is important to the credibility of the equal employment program.<sup>30</sup>

Based on this rationale, GAO should consider assigning review of final agency decisions to a functional unit within the Office of General Counsel which is separate from the unit that provides representation for the agency in subsequent legal actions on the same complaint.

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<sup>30</sup>EEOC MD-110, pg. 1-1.

# Alternative Dispute Resolution and GAO'S Mediation Program

Alternative dispute resolution is a common term to describe a variety of techniques used to resolve conflicts without resorting to litigation or a formal administrative proceeding. Mediation, arbitration, conciliation, and "mini-trials"<sup>31</sup> are among some of the more popular techniques used.

Mediation, the process used by GAO, features the use of a neutral third party (mediator) to facilitate a negotiated agreement between the parties by moving them toward a reconciliation of their differences. A mediator talks to the parties, individually and together, to focus and to define the issues in dispute, to develop options for resolving the dispute, and to explore mutually agreeable ways in which to settle the dispute. Mediation allows the parties to maintain substantial control over the dispute and presents a much larger universe of possible resolutions than does a traditional complaint process.

According to a recent study of alternative dispute resolution, mediation is especially useful in situations in which the parties' relationship will be ongoing, because contentiousness and antagonism are avoided in the process due to the use of a neutral third party through whom communication is facilitated or filtered.<sup>32</sup>

## The History of the Federal Experience

The Federal government's previously fragmented efforts at incorporating alternative methods of resolving disputes into its contracting, complaint processing, and bargaining became focused with the passage of the Alternative Means of Dispute Resolution in the Administrative Process Act of 1990.<sup>33</sup> In promulgating the Act, Congress found that administrative proceedings in the Federal Government had become "increasingly formal, costly, and lengthy;" that the use of alternative dispute resolution techniques in the private sector yielded decisions that were achieved faster, less expensively, and less contentiously, leading to "more creative, efficient, and sensible outcomes;" and that use of these procedures "will enhance the operation of the Government and better serve the public."<sup>34</sup>

<sup>31</sup>In arbitration, a third party receives and reviews evidence, hears argument, and renders a decision which may, upon prior agreement of the parties, be binding. Conciliation is a process in which a third party is used to improve communication, provide technical assistance, and to interpret issues, and is particularly used in volatile situations. It sometimes precedes mediation. "Mini-trials" occur outside a formal court setting and, although they resemble a trial in that limited discovery is allowed and arguments are heard, the third party hearing the abbreviated case is asked for an opinion on how the matter might be resolved by a court which then frequently leads to a negotiated settlement.

<sup>32</sup>Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists, p. 30.

<sup>33</sup>Pub. L. 101-552, 5 U.S.C. §571 (1992)

<sup>34</sup>Ibid.

The Civil Rights Act of 1991 also specifically encourages the use of alternative dispute resolution to resolve disputes arising under the various civil rights laws it amended.<sup>35</sup>

While most agencies use alternative means of dispute resolution to resolve contracting disputes, resolution of EEO or personnel matters and labor-management issues through ADR has become the largest area of ADR use in the Federal government.<sup>36</sup>

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## Overview of GAO'S Mediation Program

In 1989, in the forefront of Federal efforts, GAO established a mediation program in its Civil Rights Office as an adjunct to the conventional system for resolving complaints alleging discrimination. Seeking an alternative to a formal, lengthy, and sometimes contentious administrative proceeding, AA/CRO turned to a form of dispute resolution which it hoped would stress creative problem solving, efficiency, and flexibility.

When an employee first contacts the AA/CRO or one of its counselors concerning a complaint of discrimination, GAO Order 2713.2 provides that the option of resolving the complaint through mediation be explained. One of the goals of the agency in incorporating mediation into its administrative complaints process is to shorten the length of time, overall, that it takes to resolve complaints. By introducing mediation as early as possible in the complaint process, it is anticipated that disputes will be resolved more promptly and efficiently. Several years of experience at GAO have now confirmed that this goal has been successfully achieved through the mediation program when compared to the lengthy average case processing time for formal discrimination complaints. Figure 3.1 shows the average number of days a mediation typically takes, as well as the average number of hours the process consumes.

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<sup>35</sup>Pub. L. No. 102-166, §118 (amending 42 U.S.C. §1981). "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution . . . is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title . . ."

<sup>36</sup>Toward Improved Agency Dispute Resolution: Implementing the ADR Act, Administrative Conference of the United States (ACUS), p. vii (February 1995).

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Mediation Program

Figure 3.1: Data on GAO's Mediation Program (FY 1989-1995)

Results of Mediations

Results	1989		1990		1991		1992		1993		1994		1995		Total	
	#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
Matter resolved	16	80.0	5	83.3	10	66.7	26	92.9	29	100	24	96.0	11	84.6	121	89.0
Formal complaint	3	15.0	1	16.7	2	13.3	1	3.5			1	4.0	1	2.7	9	6.6
Did not pursue	1	5.0			3	20.0	1	3.5					1	2.7	6	4.4
<b>Total</b>	<b>20</b>		<b>6</b>		<b>15</b>		<b>28</b>		<b>29</b>		<b>25</b>		<b>13</b>		<b>136</b>	

Source: GAO Affirmative Action/Civil Rights Office

When an employee chooses to attempt to mediate the complaint during the pre-complaint stage of the discrimination complaint process, that stage is extended for 60 days from the date of the initial mediation session.<sup>37</sup> If agreement has been reached on all of the issues in the complaint at the end of the agreed-upon time, the complaint is withdrawn. Any unresolved issues may still be pursued through the formal complaint system outlined above.

In addition, an individual employee or manager may request mediation services to resolve an issue between them that may not involve an EEO complaint. If both parties agree, the program will provide a neutral party to mediate the dispute.<sup>38</sup>

Mediation at GAO is made available to employees through the AA/CRO in headquarters, which is staffed between the hours of 8:30 a.m. and 5:30 p.m. five days a week. Nearly all of the employees responding to the survey

<sup>37</sup>GAO Order 2713.2, Ch.2, §2(a).

<sup>38</sup>Although this study is concerned with the treatment of employees who have lodged complaints of discrimination, it should be noted that AA/CRO makes mediators available to resolve non-EEO complaints arising from the grievance process or work relations, in general. The grievance process has accounted for 12.5 percent of mediations since the program began; work relations issues have accounted for 44.9 percent; and, the discrimination complaint process has been the source of 42.6 percent of all mediations.

question concerned with convenience of the program indicated that sessions were scheduled at times and places convenient for them. The Civil Rights Office is accessible to employees who have mobility impairments, and GAO provides interpreters for employees with hearing impairments. In addition, both the mediation program manager and the AA/CRO Director are bilingual (Spanish). A complaint arising in a regional office is mediated in that region with a mediator from another regional office. Headquarters staff is served by mediators from the main office.<sup>39</sup>

## GAO Mediators

There was no single method for the selection of the 25 mediators who comprised the original corps. Some of them were chosen from lists of suitable candidates proposed by their peers; others were selected by their office directors with no employee/peer input; still others nominated themselves for the pilot training.

Either party opting to participate in a mediation may object to any particular mediator. A substitute will then be found. The administrator of GAO's mediation program has co-mediated more than once with every mediator in the program, observes each in role-playing training sessions, and informally solicits feedback about the mediator's performances from the participants. There are no established procedures for the removal of mediators from the roster and the issue of removing a mediator from the program has not arisen.<sup>40</sup>

Mediators interviewed unanimously agreed that the role-playing training offered initially and periodically thereafter is the most valuable tool for honing negotiating skills. Indeed, a study of the issue has found that having mediators engage in simulations and listen to skilled feedback, as well as peer observation, is the most effective method of training mediators.<sup>41</sup>

The majority of survey respondents who answered questions about the GAO mediators found them to be informed about the issues and procedures and perceived them to be acting in a neutral manner.

<sup>39</sup>The regional offices account for 24.3% of all mediations; 75.7% have originated in headquarters.

<sup>40</sup>Interview with Patricia Shahan, Director, GAO Mediation Program, May 17, 1995.

<sup>41</sup>Court ADR: Elements of Program Design, p.69.

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## Dissemination of Information

The Civil Rights Office disseminates information about its mediation program through Management News (a weekly internal agency publication), in certain training seminars for managers and employees, and to all employees who contact the office concerning a complaint. The office has published several pamphlets that explain the program and answer commonly asked questions about it. The pamphlet, updated every other year and currently in preparation, is distributed to all GAO employees and is also available upon request. Approximately seventy-five percent of the nearly 1,600 employees who responded to the survey question about whether they were aware of GAO's mediation program, answered in the affirmative.

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## Legal Representation

*Attorney representation of parties in mediation programs is a matter of some dispute. Particularly in court-connected mediation where a participant may be giving up significant legal rights and interests, some states have mandated that participants be advised, for example, that the mediator has no duty to protect their rights or interests,<sup>42</sup> or that they should seek the advice of an attorney before signing an agreement if they are uncertain of their rights.<sup>43</sup>*

It is not common for complainants to be represented by a lawyer at any stage during the administrative complaint process, including mediation. While their presence is not discouraged in GAO's program, eighty-six percent of the mediation participants who responded to the survey elected to forgo the involvement of an attorney. Only one mediator interviewed had had experience with legal representation during a mediation. He noted that the attorney's participation seemed to lengthen the process compared to other mediations in which he had been involved and that the presence of a lawyer compromised the non-adversarial posture of the process.

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## Confidentiality of the Mediation Program

Pursuant to GAO Order 2713.2, a mediator may not disclose information communicated to the mediator during the mediation, and no party may subpoena or request a mediator as a witness, or request or use as evidence any materials prepared by the mediator for or about a mediation, with the exception of a non-confidential settlement document signed by all parties.<sup>44</sup> At GAO, only the settlement document is kept by the mediation

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<sup>42</sup>Minn. Stat. Ann. §572.35(1).

<sup>43</sup>Kan. Stat. Ann. §23-603(a)(5).

<sup>44</sup>GAO Order 2713.2, Ch. 2, §3.

program after a mediation is completed. All other notes and records are destroyed.<sup>45</sup>

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## Settlements

The type of relief available in mediation is the same as that available in formal complaint resolution and includes monetary relief, reinstatement or change in employment status or conditions, opportunity to participate in a denied benefit, or an apology. The Deputy Assistant Comptroller General for Human Resources reviews settlement agreements and the Office of General Counsel reviews them if the settlement involves finances.

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## GAO's Settlement Rate

As Figure 3.1 shows, the most current statistics for the GAO mediation program reveal that 121 of the 136 cases<sup>46</sup> mediated between 1989 and the middle of fiscal year 1995 were resolved. Of the remaining 15 cases, six were not pursued by the complainant and nine resulted in the filing of a formal complaint.

One of GAO's goals in incorporating mediation into its administrative procedures was to shorten the length of time it takes to resolve complaints. Figure 3.2 shows the average number of days a mediation typically takes, as well as the average number of hours the process consumes. With an average number of processing days of 21.1 for fiscal year 1993 and 30.2 for fiscal year 1994, cases in mediation are clearly resolved much more quickly than those in the traditional formal complaint process.

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<sup>45</sup>Interview with Nilda Aponte, Director, AA/CRO, May 17, 1995.

<sup>46</sup>Of the 136 cases mediated, 58 involved complaints of discrimination, 17 were from the grievance process, and 61 concerned work relations.

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Figure 3.2: Mediation Processing Times

Number of Days From Beginning to End of Mediation (FY 1989 - 1994)

Fiscal Year	Headquarters		Regions		Total	
	Range	Average	Range	Average	Range	Average
1989	11-120	59.69	4-129	50.5	4-129	57.85
1990	14-57	32.17	0	0	14-57	32.17
1991	5-97	29.75	56-85	66	5-97	37.0
1992	2-95	25.43	2-147	27.86	2-147	26.04
1993	5-72	22.29	3-34	18	3-72	21.1
1994	4-55	21.87	2-225	42.7	2-225	30.2

Number of Hours Actually Spent in Mediation Sessions (FY 1989 - 1994)

Fiscal Year	Headquarters		Regions		Total	
	Range	Average	Range	Average	Range	Average
1989	5-18	10.69	13-25	18	5-25	10.69
1990	6-18	9.17	0	0	6-18	9.17
1991	3-13	8.0	15-30	22.33	3-30	10.87
1992	5-16	8.76	6-23	11.71	5-23	9.5
1993	4-18	9.14	6-18	10.25	4-18	9.45
1994	4-14	7.07	4-25	9.2	4-25	7.92

Source: GAO Affirmative Action/Civil Rights Office

## Settlement Rate in Comparison to Other Federal Agencies

GAO's high rate of settlement under this program appears to be in keeping with comparison figures from other Federal agencies.<sup>47</sup>

Among the strongest results reported were from several Bureaus at the Department of Interior. For example, Interior's Bureau of Reclamation has had a pilot program using mediation to resolve EEO issues since 1992. In fiscal year 1993, 22 of 26 cases were successfully settled, for an effective rate of 84.5 percent. Other Interior offices have reported similar success: 10 of 10 for the Office of the Secretary; 13 of 17 (76 percent) for the Fish and Wildlife Service; 16 of 20 (80 percent) for the Bureau of Mines; and 4 of 6 (66 percent) for the Minerals Management Service.

The Library of Congress reported that 500 of 700 cases have been closed since October 1991 using mediation in many pilot programs. This figure does, however, include some cases dropped but not resolved.

In the Department of Labor's pilot program for early resolution of EEO complaints, mediation was offered to 43 employees. Nineteen of those elected mediation, with all but one complaint resolved or withdrawn. This compares to a settlement rate below 25 percent under traditional methods.

Other Federal agencies report similar successes. The Defense Mapping Agency has recently broadened its mediation pilot program and reported 6 of 8 cases (75 percent) successfully mediated; the Air Force reported 57 percent successful EEO mediations during 1992-93.<sup>48</sup> In addition, the Federal Election Commission, in its first year of a small test program, reported 8 of 9 (88 percent) cases successfully resolved.

## Areas of Concern With GAO'S Mediation Program

### 1. Inadequate Procedures to Resolve Breach of Settlement Agreement Claims

The integrity of a successful mediation program lies in the enforceability of the resulting settlement agreements. If one party believes that it does not have to live up to all of the terms or if there is no clearly defined recourse available for non-compliance with the agreement, the program will lose credibility and no longer be used by employees. This appears to be an area of concern at GAO as more than one-third of those survey

<sup>47</sup>PAB staff informally surveyed agency representatives.

<sup>48</sup>The settlement rate under traditional methods was about 26% for Defense Mapping and 30% for the Air Force in Fiscal Year 1992. See EEOC, Federal Sector Report on EEO Complaints and Appeals (FY 1992), Table III at A-34.

respondents (11 out of 29) who had settled their complaints through mediation indicated that there had been noncompliance with the terms of their settlement agreements.

GAO Order 2713.2 provides that any settlement or mediated agreement is binding and requires that the complainant notify the AA/CRO Director of noncompliance within 30 days of the alleged noncompliance. The complainant may request specific performance of the terms of the agreement or settlement. The Order directs AA/CRO to make a determination about whether there has been noncompliance and to notify the complainant in writing.<sup>49</sup> There is no right to appeal a finding of compliance.

This procedure to resolve breach of settlement agreement claims is inadequate to protect employees who have given up the right to pursue a discrimination complaint in exchange for the agency's agreement to abide by the terms of the mediated settlement agreement. If the agency does not comply with the settlement agreement, employees have been improperly deprived of their lawful right to pursue their complaints. Employees must have the right to appeal the Director of AA/CRO's determination that there has been full compliance with the settlement agreement to the PAB, and to request either specific performance of the agreement or reinstatement of the underlying discrimination complaint. The same process should also be available to employees who have settled their complaint during its processing, such as complaints settled by EEO counselors.

EEOC regulations provide similar appeal rights to executive branch employees who raise breach of settlement agreement claims. 29 C.F.R. §1614.504 provides employees with the right to appeal an agency's finding of compliance with a settlement agreement to the EEOC, which may, upon a determination of noncompliance, order specific performance of the agreement or reinstatement of the previously settled discrimination complaint.

It may also be useful in avoiding claims of breach of settlement for employees to be fully aware of the content and meaning of their agreements. Therefore, especially in more complex matters, employees should be reminded of their entitlement to consult an attorney during the mediation process.

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<sup>49</sup>GAO Order 2713.2, Ch. 7, §2.

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## **2. Need for Participant Feedback**

In a program such as GAO's, where more than 80 percent of complaints are settled through mediation, systematically soliciting feedback from participants is crucial to ascertaining whether complainants voluntarily chose the mediation process absent coercion and with a full understanding of what they might gain and lose in the process. The agency's mediation program allows participants to opt out at any time for any reason, and the overwhelming majority of mediation participants who responded to the survey indicated that they entered the program freely and voluntarily. However, nearly one-half of the respondents (18 out of 37) said they were dissatisfied with the results of their mediation. The source or sources of this expressed dissatisfaction is not clear from the results of the survey. Therefore, the Board recommends that this is an issue for further exploration by the mediation program. To assist in this process, the mediation program should develop and systematically use a customer satisfaction survey to continue to improve the level of participant satisfaction with the process.

# Summary of Recommendations: The Discrimination Complaint Process

The General Accounting Office Personnel Act (GAOPA), requires GAO to maintain a personnel management system which provides "a procedure that ensures that all personnel actions affecting an officer, employee, or applicant for employment be taken without regard to race, color, religion, age, sex, national origin...or handicapping condition." GAO Order 2713.2 implements this statutory requirement by providing for an administrative discrimination complaint process, which states as a purpose, that individual complaints will be fairly and thoroughly investigated, and processed in a timely manner.<sup>50</sup>

The GAO Order covers each phase of the complaint process from the pre-complaint stage through the investigatory process to the final agency decision, prescribing specifically the duties and responsibilities of the agency, the complaint processing unit, and the complainant at each major step and mandating timelines for various activities.

In developing its Order on complaint processing, GAO looked to EEOC regulations and management directives for Federal executive branch agencies for guidance on the ingredients of an effective internal complaint system, and adopted the majority of the components required by those regulations.

Based upon its review of GAO's discrimination complaint process, and the standards set in the EEOC's regulations and directives, the Board makes the following recommendations to improve the agency's internal complaint system:

- **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.**
- **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.**

<sup>50</sup>GAO Order 2713.2, Ch. 1, §6(c)(4).

- **AA/CRO should examine the entire formal discrimination complaint process, with special attention to the time between investigations and the issuance 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.**
- **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.**
- **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.**
- **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.**
- **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.**

# Summary of Recommendations: The Mediation Program

In order to evaluate the GAO mediation program, the Board reviewed widely-accepted standards that have been established to guide the operation of such programs and to promote quality and effectiveness in them.<sup>51</sup> Although those standards have been developed primarily to govern the operation of court-connected mediation programs, the principles and concerns underlying their development are similar to those raised by administrative programs such as the one established at GAO. The mediation program at GAO incorporates many of the elements of court-connected programs.

Based on its review of the aforementioned standards and the GAO program, the Board makes the following recommendations:

- **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.**
- **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 procedures by which to obtain them.**
- **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.**

<sup>51</sup>See note 3, *supra*.

- **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.**
- **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.**

# Conclusion

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The retooling of the agency's internal complaint process, resulting in the promulgation of GAO Order 2713.2 in 1994, provides GAO employees with a framework for a thorough and fair administrative processing of allegations of discrimination. However, continued improvement of the program will significantly contribute to an increase in the credibility of the process as a viable means of resolving complaints of discrimination.

AA/CRO should insist on strict adherence to internal time frames and monitor their observance by all parties in the system, and develop a reasonable benchmark for issuance of final agency decisions. In addition, far more attention should be given to the training and development of counselors, who play such an integral role in the process. In many instances cited by survey respondents, human factors such as perceived biases were identified as systemic problems in the process. Part of addressing this issue lies in making a clearer separation between the agency's EEO and personnel functions by altering the chain of command to provide for direct supervision of the director of AA/CRO by the Comptroller General or, at the least, by the Assistant Comptroller General for Operations rather than the Deputy Assistant Comptroller for Human Resources.

The mediation program at GAO has established itself as an integral and institutional part of the EEO complaint process. It functions efficiently and boasts a high degree of success, at least in terms of the percentage of matters resolved and the reduction in processing time over the traditional complaint process. However, the continued success of the program may be dependent, in part, upon the provision of an effective method for the parties to enforce resulting settlement agreements. Without such a mechanism the program will eventually lose credibility and its success will decline.

The agency is ultimately responsible for maintaining the integrity of the program and the quality of the services provided. Evaluation of the program should be an ongoing process that is not simply result-oriented and based on quantitative data. Anecdotal information and observations, collected through questionnaires from participants can provide invaluable information to the agency about their level of satisfaction and how the program is meeting its goals.



# Employee Questionnaire

## SURVEY

### DIRECTIONS

Please circle the appropriate answer to each question. Where a range of possible answers is provided, place an "X" in the appropriate place along the range, with "1" being the highest rating, "5" the lowest. Comments and explanations are strongly encouraged and you may submit supplemental pages if your comments exceed the space allotted on the form.

Note: If you have filed more than one equal employment opportunity (EEO) complaint -- or if you have consulted an EEO counselor regarding more than one matter -- please answer these questions based on your experience with your most recent complaint, or the most recent issue raised with the EEO counselor.

If you have filed more than one EEO complaint, please indicate the number you have filed:

1. Are you aware that GAO has a complaint process to handle allegations of discrimination?

Yes (1484) No (88)

2. Are you aware that GAO has a mediation program to resolve complaints of discrimination?

Yes (1222) No (353)

If yes, how did you hear about the mediation program?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. Do you know whom or what office to contact about a discrimination complaint?

Yes (1032) No (554)

### ANSWER QUESTIONS 4 THROUGH 14 ONLY IF YOU HAVE PARTICIPATED IN PRECOMPLAINT COUNSELING

Please specify the GAO facility where counseling occurred on your complaint (for example: HQ, regional office):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

4. Did the counselor appear to be informed about precomplaint procedures?

32 15 13 8 3

Very informed 1 2 3 4 5 Not informed

5. Did the counselor act in an impartial manner?

33 15 8 10 5

Very impartial 1 2 3 4 5 Not impartial

6. Did the counselor appear to take your complaint seriously?

Yes (59) No (9)

7. Were conspicuous efforts made by the counselor to settle the matter?

22 12 10 12 10

Yes/effort 1 2 3 4 5 No effort

8. If efforts were made to resolve the complaint, to what extent did the alleged discriminating officer or a management official cooperate in those settlement efforts?

11 10 12 9 16

Excellent cooperation 1 2 3 4 5 Not cooperation

9. Was a settlement reached prior to the filing of a formal complaint?

Yes (27) No (36)

10. Did you feel that anyone applied inappropriate pressure to persuade you to settle your complaint?

Yes (18) No (40)

Please describe:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

11. Did your counselor explain the mediation program to you?

Yes (47) No (19)

12. How well did you understand your rights, as explained by the counselor and provided to you in the written notice of your final interview?

24 8 14 6 10

Fully understood 1 2 3 4 5 Did not understand

13. Overall, how satisfied were you with the actions of your complaint counselor?

24 8 15 8 15

Very satisfied 1 2 3 4 5 Not satisfied

Please explain:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Appendix I  
Employee Questionnaire**

14. Following eeo counseling, did you file a formal (written) complaint of discrimination with the Civil Rights Office?  
Yes (24) No (42)

If no, please explain why you did not. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

21. During the processing of the complaint, if you had occasion to contact the Office of General Counsel at the Personnel Appeals Board with questions or concerns about your case, how satisfied were you with the manner in which your inquiry was handled by the PAB's Office of General Counsel?

	3	2	4	1	7	
Very Satisfied	1	2	3	4	5	Not Satisfied

Please explain your answer to question 20 or 21: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ANSWER QUESTIONS 15 THROUGH 22 ONLY IF YOU HAVE FILED A COMPLAINT ALLEGING DISCRIMINATION.**

15. If your complaint was rejected, was the reason for the rejection explained to you?  
Yes (14) No (6)

16. Do you believe that the investigation of your complaint was conducted in a thorough and impartial manner?  
Yes (9) No (19)

If no, please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

22. Do you believe that you were subjected to any form of reprisal or other adverse action by any agency official for having participated in the eeo complaint process?  
Yes (25) No (13)

Please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

17. Did you understand the basis (reasoning) for the final agency decision on your complaint?  
Yes (16) No (8)

18. Do you believe that the final agency decision was fair?

	1	0	2	5	18	
Very Fair	1	2	3	4	5	Very Unfair

Please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**ANSWER QUESTIONS 23 THROUGH 36 ONLY IF YOU HAVE PARTICIPATED IN A MEDIATION**

23. Was the option of mediation fully explained to you?  
Yes (36) No (8)

24. Did you have legal or other representation during the mediation process?  
Yes (6) No (37)

25. Were the mediation sessions scheduled for a time and place convenient for you?  
Yes (36) No (6)

26. Was there anything that anyone connected to the complaint process said or did that persuaded you to participate or dissuaded you from participating in the mediation program?  
Yes (17) No (23)

Please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

19. How well did you understand your rights, as provided in the final agency decision on your complaint?

	8	2	8	3	3	
Fully Understood	1	2	3	4	5	Not Understand

20. During the processing of your case, if you had occasion to contact the Civil Rights Office with questions or concerns about your case, how satisfied were you with the manner in which your inquiry was handled?

	3	4	7	4	9	
Very Satisfied	1	2	3	4	5	Not Satisfied

27. Was your decision to participate in mediation made freely and voluntarily?  
Yes (34) No (8)

28. Did you think that failure to participate in the mediation program would have an adverse effect on the handling of your complaint?  
Yes (13) No (22)

**Appendix I  
Employee Questionnaire**

29. Did the mediator appear to be informed about the issue in dispute and about mediation procedures?

20    7    6    2    5



30. Did the mediator act in a neutral manner?

22    6    4    3    5



31. Was the issue about which you were complaining fully and accurately addressed during the mediation?

Yes (24)      No (9)

32. Did you feel any inappropriate pressure to settle your complaint during the mediation?

Yes (11)      No (25)

33. Was a settlement reached through mediation?

Yes (23)      No (15)

34. Were you satisfied with the results of your mediation?

Yes (18)      No (19)

35. Have all parties to your agreement adhered to the settlement agreement reached by way of mediation?

Yes (18)      No (11)

*If No, please explain:* \_\_\_\_\_

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

36. If the agreement has not been complied with, what steps, if any, have you taken to secure compliance?

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

*Please use the area below for additional comments or specific suggestions for improvement to the Agency's complaint processing or mediation program or to expand on any of your survey answers. You may attach supplemental pages, if necessary.*

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Office: \_\_\_\_\_

**THANK YOU FOR YOUR ASSISTANCE!**

**PLEASE RETURN THE COMPLETED QUESTIONNAIRE TO:**

**PERSONNEL APPEALS BOARD**  
 U.S. GENERAL ACCOUNTING OFFICE  
 441 G Street, N.W.  
 UCP II, Suite 830  
 Washington, D.C. 20548

# Agency Comments



Assistant Comptroller General  
of the United States  
Washington, D.C. 20548

October 5, 1995

Ms. Gail Gerebenics  
Director, EEO Oversight  
Personnel Appeals Board  
U.S. General Accounting Office  
UCP II, Suite 830  
441 G Street, NW  
Washington, DC 20548

Dear Ms. Gerebenics:

We have reviewed your report on the discrimination complaint process and the mediation program at the General Accounting Office (GAO). In doing so, it is clear that you raised a number of issues worthy of our consideration and made recommendations that will help improve our programs.

Specifically, you made four recommendations that we will take under advisement as we continue to enhance our policies, procedures, and processes here at GAO. One of our first steps will be to begin a full review of our regulations to determine if improvements are needed and if there is a more effective way to conduct the EEO process. In conducting our review, among other things, we will focus on the four recommendations you made in the report concerning (1) time frames for issuing final agency decisions, (2) reporting channels for the Director of the Civil Rights Office (3) reviews of draft agency decisions by the Office of General Counsel and (4) appeal rights for breach of settlement agreement claims.

As for the remaining recommendations, we have taken or plan to take actions to address them. We have numbered these recommendations and included our comments after each one.

## I. Counselor Training

**Recommendation:** 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.

**Comment:** When counselors from our field offices are appointed, they receive initial training from their local Office of Personnel Management. According to

your survey report, this training has not always taken place promptly. In future appointments our office will endeavor to ensure that prompt initial training takes place. In the past we have provided agency wide training to all counselors when there have been significant changes in the process. We held training sessions for all counselors in 1990 to incorporate the mediation process and in 1992 to familiarize the counselors with the provisions of the 1991 Civil Rights Act. We will, however, consider the feasibility of annual training sessions via video conferencing for all counselors.

**2. Making Counselors Available Outside Their Units**

Recommendation: 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.

Comment: We agree that making counselors available from outside a complainant's unit to avoid a potential conflict with the line of command is desirable. Our headquarters counselors are currently available for all employees, including those from our field offices. We will take steps to actively publicize their availability. Also, we are exploring the feasibility of centralizing the counseling function, or as an alternative, restricting counselors throughout headquarters and the regions to counseling in units other than their own, similar to the practice used in the mediation program. As you recommended, we will also explore the possibility of counseling via telephone or video-conferencing.

**3. Tracking Complaints**

Recommendation: 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.

Comment: A tracking system is in place that complies with your recommendation. This tracking system is monitored by the Director of AA/CRO and has helped reduce our processing time. We will continue to track complaints to achieve further reductions.

**4. Periodic Reports of Complaint Status**

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

Comment: AA/CRO sends a quarterly report to the Assistant Comptroller General for Operations that provides the status of each complaint.

**5. Providing Information to Mediation Participants**

Recommendation: 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 procedures by which to obtain them.

Comment: AA/CRO now provides a package of information for all participants in the mediation process and to each individual who initiates counseling. GAO Order 2713.2 is included in this package. A sample package is enclosed.

**6. Mediation Training and Monitoring**

Recommendation: 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.

Comment: Although you pointed out that there are different methods used for selecting mediators, in all cases the final selection is made with the concurrence of the AA/CRO Director to help ensure that the mediators are skilled and competent. Further, mediators must complete several co-mediations with the Deputy Director as part of their training. This practice gives the AA/CRO Deputy Director an opportunity to observe their skills, first-hand and to assess their performance. To date, this has been a very effective method for monitoring the performance of our mediators. Nevertheless, we will consider a more formal method of monitoring performance, especially as we incorporate customer satisfaction questionnaires into the program.

Performance guidelines for mediators are being developed by the Society for Professionals in Dispute Resolution. We plan to develop guidelines that are consistent with these national guidelines.

As for training, we have offered follow-up sessions on three occasions since the initial training in November 1990. We plan to begin annual training by video-conferencing in fiscal year 1996.

**7. Attorney Involvement to Safeguard Employee Rights**

Recommendation: 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.

Comment: In conjunction with our new Order, counselors and mediators advise employees of their right to be represented at any phase of the process, and the materials given to the employees include this advice. In addition, all written mediation agreements clearly state that the employees have the right to consult with an attorney before signing the agreement. Nearly all of the employees who participated in our mediation program consulted with an attorney before signing these agreements.

**8. Customer Satisfaction Questionnaire**

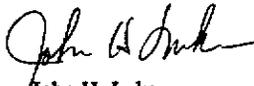
Recommendation: A "customer satisfaction" questionnaire should be developed for use by the mediation program staff at the conclusion of every mediation. It should be designed to elicit the reasons that the participant chose to mediate the complaint, whether he or she is satisfied with the results, and 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.

Comment: We agree that a customer satisfaction questionnaire is important. Many GAO operations have incorporated this quality management step and various survey instruments are being used to measure and monitor customer satisfaction. We will develop a questionnaire to help improve our mediation program.

**Appendix II  
Agency Comments**

Thank you for your insightful observations regarding the above matters. These will be valuable in our future process improvement initiatives in this area.

Sincerely,



John H. Luke  
Deputy Assistant Comptroller General  
for Human Resources

Enclosure

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# Personnel Appeals Board

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