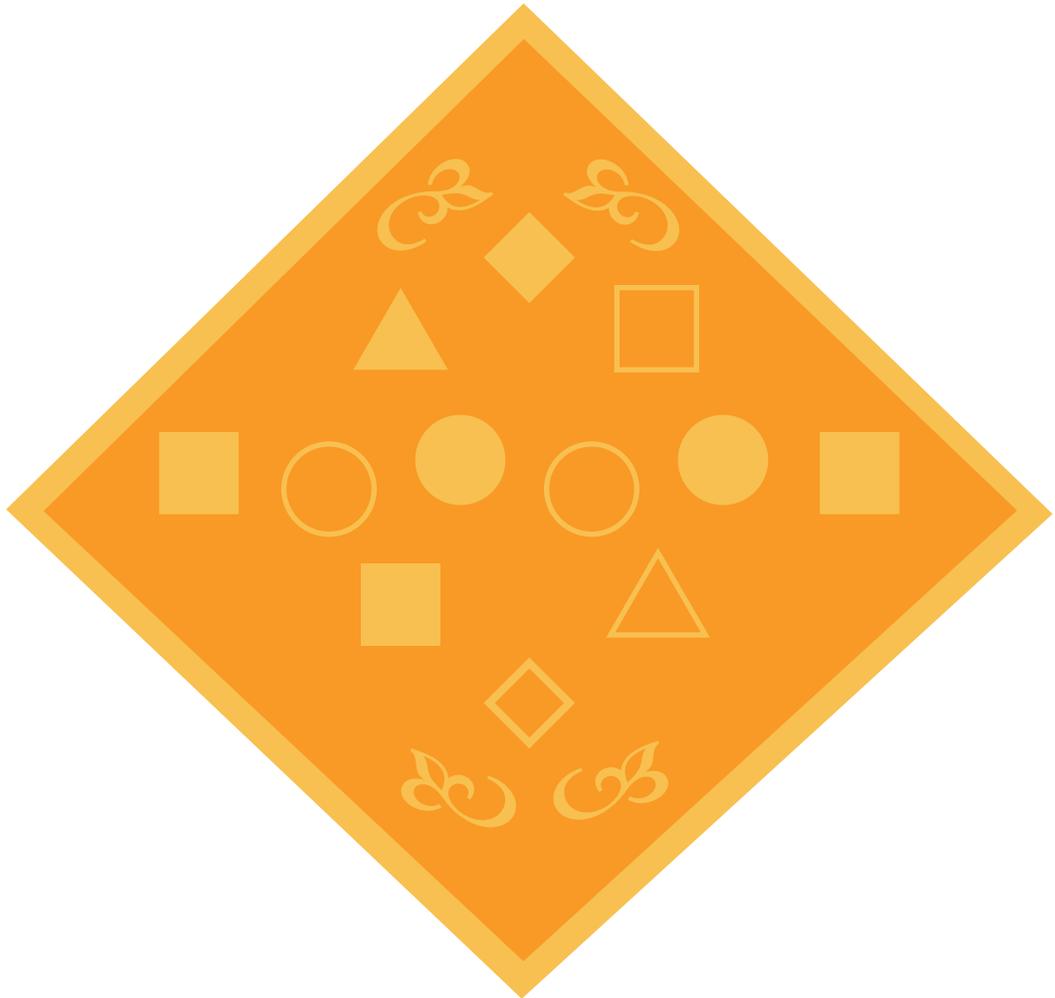


PERSONNEL APPEALS BOARD



ANNUAL REPORT 2008

Table of Contents

BIOGRAPHIES OF BOARD MEMBERS	1
CHAPTER 1: THE PERSONNEL APPEALS BOARD	3
<i>Section 1: About the PAB</i>	3
<i>Section 2: Board Staff</i>	4
CHAPTER 2: THE BOARD PROCESS	4
<i>Section 1: Filing with PAB Office of General Counsel</i>	5
<i>Section 2: Before the Board.</i>	6
<i>Section 3: Other PAB Office of General Counsel Authority.</i>	7
a. PAB/OGC Investigative Authority.	7
b. PAB/OGC Stay Requests	7
c. Disciplinary Proceedings	8
d. Labor-Management Relations	8
CHAPTER 3: ACTIVITY OF THE PAB.	8
<i>Section 1: Labor-Management Relations Activity.</i>	8
<i>Section 2: Case Activity for the Government Accountability Office (GAO)</i>	8
a. Petitions before the Board	9
b. Summary of Cases.	9
c. Stay Requests	10
<i>Section 3: Board Case Activity for the Library of Congress (Library or LOC)</i>	10
<i>Section 4: PAB Office of General Counsel Activity</i>	11
a. Case Activity	11
b. Employee Contacts	12
c. Other Activity	12
<i>Section 5: Office of EEO Oversight Activity</i>	12
<i>Section 6: Special Projects</i>	15
a. Mediation Program	15
b. Website Developments	15
C. Guide to Labor Relations at the PAB.	16

BIOGRAPHIES OF BOARD MEMBERS

PAUL M. CORAN was appointed to the Personnel Appeals Board in January 2005, elected Vice Chair in September 2005, and Chair in 2007. Mr. Coran is a graduate of Northeastern University and Boston College Law School. He retired from the federal government with 33 years of service in July 2001. Mr. Coran engaged in the practice of employment law throughout his career, serving consecutively at the National Labor Relations Board, U.S. Department of Labor, Federal Labor Relations Council, and U.S. Department of State. Following his retirement and until August 2004, he served as Deputy Executive Director for the U.S. Senate, Office of Compliance. During his career, Mr. Coran represented management, employees, and labor organizations; conducted mediations; and also performed impartial adjudication functions in both the Executive and Legislative branches. He was a regular contributor to the American Bar Association's Annual Employment Law Report for a number of years. Mr. Coran is a member of the Massachusetts Bar.

MARY E. LEARY was appointed to the Board in April 2006 and elected Vice Chair in 2007. Ms. Leary is a graduate of Southwest Minnesota State University and the Howard University School of Law. Ms. Leary began her career as a field attorney with the National Labor Relations Board and served as an attorney advisor with the NLRB in Washington, D.C. As an arbitrator for the U.S. Postal Service and its unions from 1988 to 1992, Ms. Leary decided numerous cases involving discipline, discharge, and contract interpretation. She served as general counsel for the United Electrical, Radio and Machine Workers of America from 1992 to 1997, where she handled a wide array of cases arising under personnel and labor laws, and has litigated cases in federal courts

including the U.S. Supreme Court. Ms. Leary was an attorney advisor for the U.S. Patent and Trademark Office, handling labor and employment law cases, and the Merit Systems Protection Board, drafting decisions for cases on appeal. She was appointed the Director of Labor Relations and Collective Bargaining for the District of Columbia, where she oversaw the development of a comprehensive labor relations program. Ms. Leary currently serves as Associate Vice Chancellor for Labor Relations for the Minnesota State Colleges and Universities. She is a member of the South Dakota Bar, as well as the Bars of numerous U.S. Courts of Appeals, District Courts, and the U.S. Supreme Court.

STEVEN H. SVARTZ, a graduate of the Massachusetts Institute of Technology and Georgetown University Law Center, was appointed to the Board in January 2007. He retired from the federal government in June 2006 with 31 years of service. After starting his career with the Federal Labor Relations Council, he served in various capacities with the Federal Labor Relations Authority from its inception in 1979 until his retirement. He represented the FLRA in the U.S. Supreme Court and various U.S. Courts of Appeals. In addition, he served as Chief Counsel for several FLRA members, Acting Director of the Collaboration and Alternative Dispute Resolution Office, and Assistant General Counsel for Legal Services. He is a member of the District of Columbia Bar, the U.S. Supreme Court Bar, and the bars of other federal courts.

PERSONNEL APPEALS BOARD

Paul M. Coran	Chair
Mary E. Leary	Vice Chair
Steven H. Svartz	Member
Beth L. Don	Executive Director
M. Gail Gerebenics	Director, EEO Oversight
Susan P. Inzeo	Solicitor
Sue Sung Farley	Senior Staff Attorney
Patricia V. Reardon-King	Clerk of the Board
Anne M. Wagner	General Counsel
Frank J. Mack	Senior Trial Attorney
Darian C. Jackson	Legal Information Assistant

CHAPTER 1: THE PERSONNEL APPEALS BOARD

Section 1: About the PAB

Under the Government Accountability Office Personnel Act of 1980 (GAOPA),¹ the Personnel Appeals Board (PAB or the Board) is charged with adjudicating disputes, issuing decisions, and ordering corrective or disciplinary action, when appropriate, in cases alleging prohibited personnel practices, discrimination, prohibited political activity, and unfair labor practices involving employees of the U.S. Government Accountability Office² (GAO or the Agency), a Legislative branch agency. The GAOPA also authorizes the Board to oversee GAO's employment regulations, procedures, and practices relating to anti-discrimination laws.³

The PAB's authority combines the adjudicatory functions of its Executive branch counterparts: the Merit Systems Protection Board (MSPB);⁴ the Equal Employment Opportunity

Commission (EEOC);⁵ and the Federal Labor Relations Authority (FLRA).⁶ The Board's Office of General Counsel (PAB/OGC) performs the investigatory and prosecutorial functions of its Executive branch equivalents at the Office of Special Counsel (OSC)⁷ and the EEOC.

The statute provides for a Board comprised of five members who serve five-year, nonrenewable terms.⁸ Candidates are sought through a process that includes advertising and recruitment efforts that focus on organizations whose members are experienced in the adjudication or arbitration of personnel matters. Applicants are expected to have expertise or litigation experience in the area of federal personnel law, demonstrated ability to arbitrate or adjudicate complex legal matters, or experience at a senior level position in resolving complex legal matters.

¹31 U.S.C. §731 *et seq.*

²In July 2004, the Agency's name was changed from the General Accounting Office. Pub.L. No. 108-271 (Jul. 7, 2004).

³31 U.S.C. §732(f)(2)(A).

⁴The MSPB was "created to ensure that all Federal government agencies follow Federal merit systems practices. The Board does this by adjudicating Federal employee appeals of agency personnel actions, and by conducting special reviews and studies of Federal merit systems." 5 C.F.R. §1200.1. The Personnel Appeals Board has similar jurisdiction to hear and decide matters alleging prohibited personnel practices under 5 U.S.C. §2302(b). 4 C.F.R. §28.2(b)(2).

⁵The EEOC ensures that personnel actions that affect employees or applicants for employment in the Executive branch "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. §2000e-16(a) (Title VII). In addition, EEOC enforces the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* and the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* The Personnel Appeals Board has similar jurisdiction to hear and decide cases alleging discrimination. 4 C.F.R. §§28.95-28.99.

⁶The FLRA protects the "right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." 5 U.S.C. §7101. The Personnel Appeals Board also has the authority to certify collective bargaining representatives and to adjudicate unfair labor practices.

⁷The OSC investigates and prosecutes allegations of twelve prohibited personnel practices, with an emphasis on protecting federal whistleblowers. 5 U.S.C. §§1214, 2302(b). The Board's General Counsel investigates and prosecutes allegations of prohibited personnel practices. 4 C.F.R. §28.12.

⁸The Board currently operates with a quorum of three members.

GAO establishes a screening panel to review applications for Board member positions and identify the best qualified candidates.⁹ An interview panel composed of some of the screening panel members, including one member of the Employee Advisory Council (EAC), conducts the personal interviews and reports its results to the full screening panel. The panel recommends one or more of the candidates to the Comptroller General who makes an appointment to the Board after considering the recommended candidates. The Board members elect their own Chair and Vice Chair.

Section 2: Board Staff

The Board's Executive Director manages Board staff and Board operations. The Board's Solicitor and Senior Staff Attorney advise Board members and the Executive Director on legal matters and provide procedural advice to litigants before the Board. The Board's Director of EEO Oversight reviews equal employment opportunity practices and procedures at GAO and drafts evaluative reports that contain the Board's findings, conclusions, and recommendations to the Agency.¹⁰ The Clerk of the Board is responsible for receiving filings, distributing Board orders and decisions, and maintaining the Board's official records. The PAB Office of General Counsel (PAB/OGC) investigates charges filed with the Office and, if there are reasonable grounds to believe that a

⁹The voting members of the screening panel are three senior management officials designated by the Comptroller General. The nonvoting members are three representatives selected by the Comptroller General's Employee Advisory Council and a representative from the Human Capital Office. GAO Order 2300.4, ¶7 (8/30/05).

¹⁰31 U.S.C. §732(f)(2)(A); see applicable regulations at 4 C.F.R. §§28.91 and 28.92. The Board's EEO Oversight reports can be found at the PAB's website: www.pab.gao.gov.

violation of law has occurred, offers to represent the employee or applicant for employment before the Board.

CHAPTER 2: THE BOARD PROCESS

The Board's litigation process is explained in detail in the *Guide to Practice Before the PAB*;¹¹ a brief summary follows.

An employee, a group of employees,¹² a labor organization, or an applicant for employment at GAO may file a Petition with the Board seeking review of Agency action or inaction that adversely affected them. Such a Petition may arise from: (1) a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of not more than 30 days; (2) a prohibited personnel practice; (3) an unfair labor practice or other covered labor relations issue; (4) an action involving prohibited

¹¹The Guide is available at the PAB's website: www.pab.gao.gov.

¹²The Board can hear individual petitions as well as class actions.

discrimination;¹³ (5) prohibited political activity; and (6) any other personnel issues that the Comptroller General, by regulation, determines that the Board should hear.

In addition to its litigation activity, the Board is authorized to conduct representation proceedings at GAO, including determining appropriate bargaining units of GAO employees, conducting elections to determine whether employees in any such units wish to select a labor organization to represent them in collective bargaining, and certifying an organization so

¹³The complete procedures for filing a discrimination complaint with the Agency may be found in GAO Order 2713.2, “Discrimination Complaint Resolution Process” (May 21, 2007) (hereafter GAO Order 2713.2). At GAO, the discrimination complaint process begins when the employee consults with a civil rights counselor in the Agency’s Office of Opportunity and Inclusiveness (O&I).

Such contact must occur within 45 calendar days of the alleged incident. If the matter cannot be resolved, the employee may file a formal written complaint with O&I within 15 days of receipt from the counselor of notice of the right to file a complaint. The Director of O&I can either accept or dismiss the complaint. (See GAO Order 2713.2, ch. 3, ¶5, for reasons why a complaint may be dismissed).

If the complaint is accepted, it is investigated and a report of the investigation is submitted to the Director of O&I. If the complaint cannot be resolved through negotiation with GAO management, the Director submits a recommended decision to the Comptroller General who issues a final Agency decision.

An individual may seek relief from the PAB by filing a charge with the PAB Office of General Counsel within 30 days of receipt of GAO’s final decision or dismissal of the complaint in whole or part. GAO Order 2713.2, ch. 6, ¶4. An individual may also file with the PAB/OGC anytime after 120 days have elapsed from the date the complaint was filed provided that GAO has not issued a final decision. Id.

The PAB’s review is *de novo*, which means that the PAB will review all the facts and issues and render a decision independent of the final Agency decision, if there is one.

selected as the designated exclusive bargaining representative.

Section 1: Filing with PAB Office of General Counsel

At GAO, an employee, group of employees, or an applicant for a job may file a charge with the PAB Office of General Counsel to initiate the Board process.¹⁴ The PAB/OGC has the authority to investigate and to represent employees where the General Counsel finds reasonable grounds to believe the charge regarding alleged violations of the law over which the Board has jurisdiction.

A charge that does not involve discrimination may be filed with the PAB/OGC within 30 calendar days after the effective date of the underlying personnel action or within 30 calendar days after the charging party knew or should have known of the action.

An individual may file a charge involving alleged discrimination with the PAB/OGC either within 30 calendar days after receipt of the Agency rejection of the complaint in whole or in part, 30 calendar days after receipt of the Agency’s final decision, or when more than 120 days have elapsed since the complaint was filed and GAO has not issued a final decision.

Once an individual charge is filed with the PAB/OGC, the charging party is advised of his/her rights and the Board’s mediation program.¹⁵ The PAB/OGC then conducts an independent investigation of the matters raised in the charge to determine whether there are reasonable grounds to believe that the employee’s rights under the GAOPA

¹⁴See www.pab.gao.gov, under the link to Charges/Filing.

¹⁵Information about the Board’s mediation program can be found on the website at www.pab.gao.gov.

have been violated. This process may include obtaining documents and taking oral statements from persons with knowledge of the circumstances that are involved in the allegations.

Following the investigation, and if no settlement occurs, PAB/OGC issues a Right to Petition Letter notifying the charging party that the investigation has been completed and that he/she has the right to file a Petition with the Board seeking a review of the Agency action or inaction. The PAB/OGC also issues to the charging party a confidential Report of Investigation that includes the results of the investigation and the PAB/OGC's conclusions with regard to the legal and factual issues.

If the General Counsel concludes that reasonable grounds exist to believe that a violation of the law has occurred, the General Counsel will offer to represent the charging party in an evidentiary hearing before the Board at no expense to the employee. If the offer of representation is accepted, the PAB/OGC assumes responsibility for the entire case even if the employee has retained private counsel.

If the PAB General Counsel concludes that there are no reasonable grounds to support a claim, the charging party retains the right to file a Petition with the Board and request an evidentiary hearing. A Petitioner may represent him/herself or retain private counsel, if he or she chooses, before the Board.

Section 2: Before the Board

A Petition must be filed with the Board within 30 calendar days after service of the Right to Petition Letter from the PAB/OGC. Alternatively, if 180 days have elapsed from the filing of a charge with PAB/OGC and no Right to Petition Letter has been issued by the General Counsel, the employee may "opt out" of

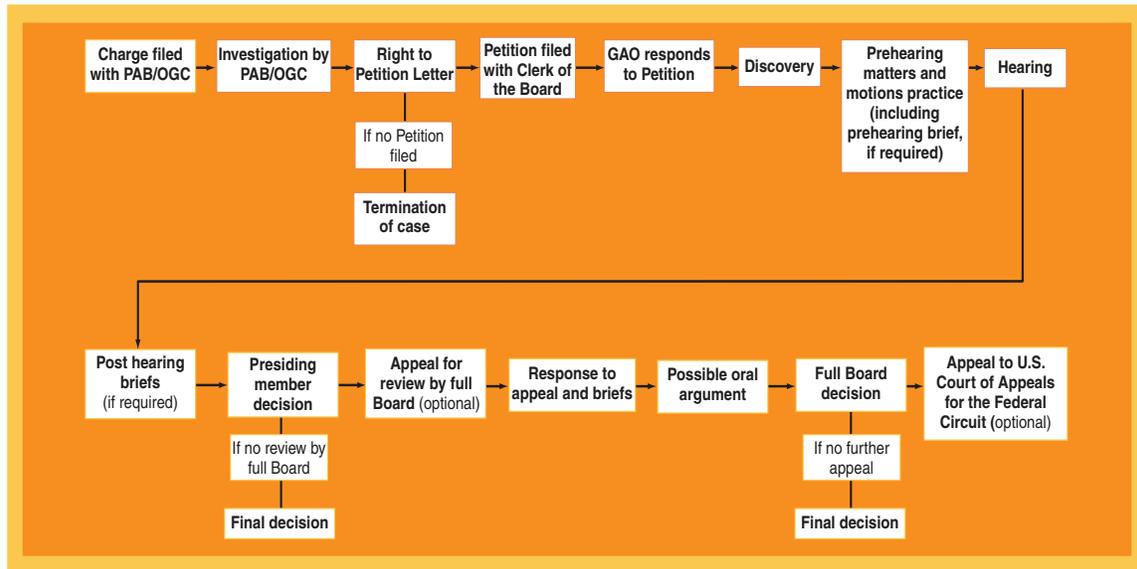
the investigation and file a Petition with the Board. An employee who chooses that route foregoes the opportunity to have the General Counsel present the case to the Board.

Upon receipt of a Petition, the Chair may either appoint a single Board member to hear and decide the case or determine that the Board will hear the case *en banc* (by all Board members). The Petition to the Board is not a challenge to or review of the conclusions of the PAB/OGC, but a fresh consideration of the Petitioner's claims. The Board does not have access to the investigative work and conclusions of the PAB/OGC; the administrative judge does not know whether the PAB/OGC found reasonable grounds to believe a violation existed in a given case.

A Board member's decision is final unless: (1) the Board member grants a party's motion to reconsider; (2) the Board, on its own motion, decides to review the initial decision; or (3) a party appeals to the Board for full Board review. Final decisions of the Board, with few exceptions, may be appealed to the U.S. Court of Appeals for the Federal Circuit.

The following chart describes the Board process from the time of a charge is filed through the completion of all adjudication.

Figure 1: Board Process Illustrated



Section 3: Other PAB Office of General Counsel Authority

a. PAB/OGC Investigative Authority

As discussed above, the PAB Office of General Counsel is authorized to conduct independent investigations into matters raised and presented in charges filed by GAO employees or applicants for employment. This investigative authority represents the vast majority of investigations conducted by PAB/OGC. In addition to investigations generated by individual or class charges, PAB/OGC may initiate its own investigations, otherwise known as informational or GC investigations.¹⁶ The General Counsel may initiate an investigation when information comes to his or her attention suggesting that a prohibited personnel practice has occurred, is occurring, or will occur, regardless of whether a charge has been filed. If an individual brings an

allegation to the attention of PAB/OGC, that individual may remain anonymous.

If, during the informational investigation, it is determined that there are sufficient grounds to believe that a violation of the law has occurred or is about to occur, the PAB/OGC will contact the Agency with its findings and recommendation. If the recommendation is not followed within a reasonable period, PAB/OGC may petition the Board to order corrective action.

b. PAB/OGC Stay Requests

PAB/OGC may request that the Board issue an *ex parte* temporary stay, not to exceed 30 calendar days, of any proposed personnel action that, in the General Counsel’s judgment, may constitute a prohibited personnel practice. If the request for an *ex parte* stay is granted, the General Counsel may request either a further temporary stay or permanent stay of the proposed action. A further temporary stay may be granted if the Board member, or

¹⁶4 C.F.R. §28.131.

Board *en banc*, determines that under all of the circumstances the interests of justice would be served by providing more time for PAB/OGC to pursue the investigation.¹⁷ In considering a request for a permanent stay, the Board balances the evidence as to whether the proposed personnel action arises out of a prohibited personnel practice against the nature and gravity of any harm that could flow to each side from granting or denial of the stay. The Board may grant or deny the requested stay based upon the pleadings, require further briefing and/or oral argument, or conduct an evidentiary hearing on the request for further stay.

c. Disciplinary Proceedings

The PAB General Counsel is authorized to initiate a disciplinary action against an employee when it is determined, after an investigation, that such action is warranted. In such cases, the PAB/GC will provide a written summary of the determination and facts to the employee and the Board.¹⁸ The authority to propose disciplinary action includes action for engaging in prohibited political activity.

After a hearing, the Board decides whether discipline is warranted and what punishment is appropriate. The Board may order removal, reduction in grade, debarment from GAO employment, reprimand, or an assessment of civil penalty not to exceed \$1,000. Judicial review of the Board's final order may be obtained in the U.S. Court of Appeals for the Federal Circuit.

d. Labor-Management Relations

Through the Board's regulations, the PAB/OGC is authorized to play a major role when a labor organization, an

¹⁷4 C.F.R. §28.133(d).

¹⁸Id. at §28.132.

employee or group of employees, or GAO files a representation petition. The General Counsel reviews the representation petition and coordinates with the parties before preparing a report for the Board which may recommend approval of appropriate agreements reached during consultation of the parties, dismissal of the petition as being without merit, or issuance of a notice of hearing to dispose of unresolved issues raised in the petition. In addition, the PAB Office of General Counsel is responsible for investigating unfair labor practice charges filed with the Board.

CHAPTER 3: ACTIVITY OF THE PAB

Section 1: Labor-Management Relations Activity

The Board conducted the September 19, 2007 union representation election and issued the Board's Certification of Representation on September 27, 2007 to GAO and the International Federation of Professional and Technical Engineers (IFPTE) subsequently, the GAO employees moved forward and became the "GAO Employees Organization Local 1921." Although, the PAB/OGC received a number of labor-related inquiries in 2008, there were no unfair labor practice charges filed with the PAB/OGC or the Board.

Section 2: Case Activity for the Government Accountability Office (GAO)

There were nine new Petitions filed with the Board in calendar year 2008. Two of the nine Petitions filed were internal matters and are being handled by

outside Administrative Judges.¹⁹ At the close of 2008, the Board had two cases on appeal pending decision. There was one Stay removal case brought before the Board in 2007 that led to the filing of a Petition with the Board in 2008. This case is in the post hearing stage. A Petition filed with the Board settled prior to hearing; and a second Petition was dismissed with prejudice. One evidentiary hearing was held in calendar year 2008. The two remaining cases were scheduled for hearing in calendar year 2009.

a. Petitions before the Board

The PAB/OGC filed seven Petitions and two Amended Petitions with the Board in calendar year 2008. The issues raised included removals, discrimination concerning promotions, performance ratings, the American with Disabilities Act (ADA), GAO's student loan program, and retaliation.

b. Summary of Cases

A Petition was filed in April 2008 alleging that Petitioner's rights were violated when GAO attempted to recover a student loan payment that GAO erroneously made on his behalf pursuant to the Student Loan Repayment Act. Petitioner initially applied to participate in the Student Loan Repayment program but later declined the offer. However, GAO erred and made the payment to Petitioner's loan creditor without his knowledge or consent. Petitioner subsequently left GAO. GAO withheld his final paycheck to recover the money. In his Petition, he claimed that he should have received notice prior to his departure from GAO and, having failed to provide that notice, GAO is not now entitled to recover that money from him. The case was dismissed for lack of jurisdiction on the basis that no personnel action was involved.

¹⁹See §28.17, Internal Petitions of Board Employees.

Petitioner filed a timely appeal and the case is currently pending before the full Board.

In the second case filed with the Board in 2008, Petitioner alleged that GAO discriminated against her based on race and age and retaliated against her for participation in protected activity. Petitioner claimed that she was not promoted to a Band II Senior Analyst position because she had received a "below expectations" rating on one of her competencies on an out-of-cycle performance appraisal that she received in order to apply for the promotion. She claimed that she had not been informed of any deficiencies in her job performance and that she had not received adequate training, mentoring or feedback. Petitioner also claimed that the Agency discriminated and retaliated against her by not giving her performance awards and for giving her a "below expectations" on subsequent performance appraisals. A hearing was held in this matter and at the end of 2008 the decision was pending.

In the third case, Petitioner alleged that GAO discriminated against him based on race, color, sex, sexual preference, and disability when he was removed from his position. He further claimed that his supervisors subjected him to a hostile work environment. Petitioner also alleged that he was retaliated against for protected activity. A hearing was scheduled for 2009.

In another case, Petitioner filed a Petition alleging that GAO discriminated against him when he was not selected for a GS-15 position. Petitioner claimed that the Agency discriminated against him based on race and age by promoting a Hispanic male who had been acting in the position in question. Petitioner also alleged that the Agency committed prohibited personnel practices because the Hispanic male had been pre-selected

for the position and that the Agency had attempted to prevent Petitioner from applying for the position by posting the position during the December holidays. Respondent filed a Motion for Summary Judgment which was denied. A hearing was scheduled for early 2009.

In another Petition, Petitioner alleged that GAO committed prohibited personnel practices because of its practice in doing an annual appraisal of only considering the employee's performance subsequent to placement into Band IIB rather than considering the employee's performance throughout the entire performance appraisal cycle including performance as a Band IIA. She further alleged that her performance appraisal subsequent to her promotion was done without measuring her actual job performance against her position performance standards. She further alleged that she was subjected to a hostile work environment in retaliation for engaging in protected activity. The case was scheduled for an evidentiary hearing in the middle of 2009.

In another case, the Petitioner alleged that he was discriminated against based on race and retaliated against for participating in protected activity when he was issued a letter of proposed suspension for conduct unbecoming a federal employee after an incident with a co-worker. The proposed suspension was changed to a letter of reprimand. An evidentiary hearing was scheduled for early 2009.

Another Petitioner filed a Petition alleging that GAO committed prohibited personnel practices by misrepresenting Petitioner's performance and creating a hostile work environment which forced Petitioner to retire. GAO filed a response to his Petition and, on the same day, Petitioner moved to dismiss his Petition with prejudice, a motion which was subsequently granted.

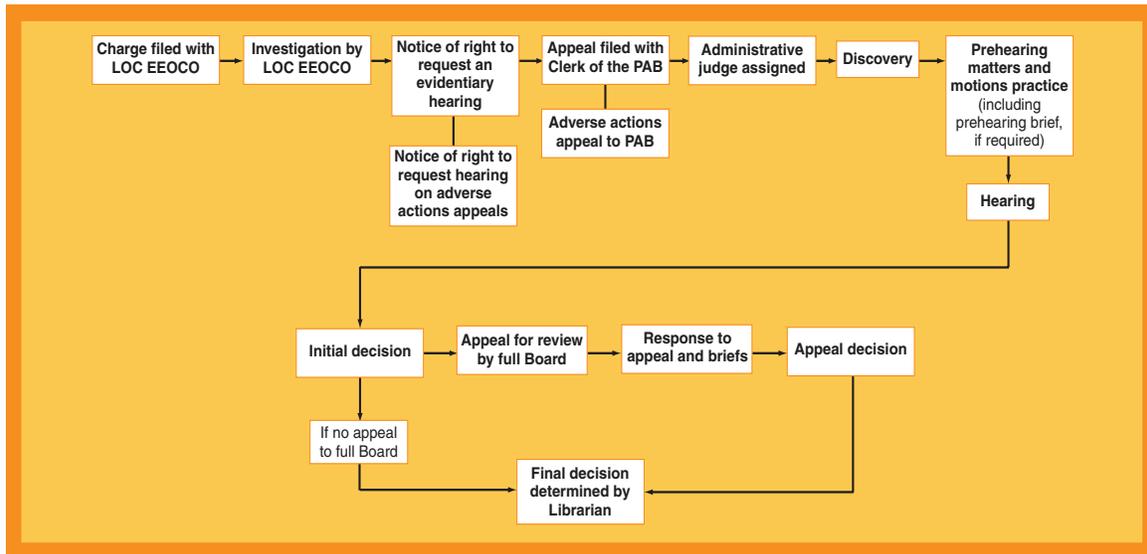
c. Stay Requests

The Board received one *ex parte* stay request on a proposed removal in an internal matter in December 2008. The Board granted a 30 day stay in this matter. This case is currently being handled by an outside Administrative Judge.

Section 3: Board Case Activity for the Library of Congress (Library or LOC)

During calendar year 2008, GAO, the Board, and LOC continued their Interagency Agreement establishing a pilot program giving the Board authority to hear certain LOC cases. The LOC case handling process is slightly different from the Board's process for GAO cases (see chart below). During the 2008 calendar year, none of the LOC cases undergoing counseling or investigation with the PAB/OGC were brought before the Board for hearing.

Figure 2: LOC Case Process



Section 4: PAB Office of General Counsel Activity

a. Case Activity

(1) Charges

There were eleven new charges filed with the PAB/OGC from January 1, 2008 through December 31, 2008. The PAB/OGC had a total of 320 open cases during that period. The PAB/OGC closed 29 cases during calendar year 2008. The PAB/OGC settled five (5) cases during calendar year 2008 with one being settled after a Petition was filed with the Board. The PAB/OGC docket included eleven (11) cases under counseling and investigation from the Library of Congress during calendar year 2008. Seven (7) of the investigative requests were dismissed as part of a settlement agreement and four (4) of the cases were closed during calendar year 2008. None of the investigations were brought before the Board.

NEW CHARGES LEGAL ISSUES

Proposed Suspension	1
Retaliation	3
Pay	1
Performance	3
Discrimination	3
Promotion	2
Placement into Band IIA	1
Hostile Work Environment	2

(2) Litigation before the Board

The PAB/OGC participated in seven (7) cases before the Board. PAB/OGC filed seven Petitions with the Board and two (2) Amended Petitions. The PAB/OGC settled one case during calendar year 2008. The issues presented in the seven cases related to the following:

ISSUES PRESENTED

Performance Ratings
Removals
Discrimination concerning Promotion
Discrimination concerning the Americans with Disabilities Act (ADA)
Retaliation
GAO's student loan program

All of the GAO and LOC investigations conducted by the Office of General Counsel were initiated by charges filed by employees. PAB/OGC did not initiate any information investigations in calendar year 2008, nor did it initiate any disciplinary proceedings.

b. Employee Contacts

In addition to its investigative and prosecutorial authority, the PAB/OGC also provides information or informal advice to employees about their personnel and equal employment rights. This is accomplished by responding to questions about diverse issues such as personnel actions, performance appraisals, grievances, and the complaint process, as well as presentations to GAO employees groups to update them on recent changes in the law and Board procedures.

The PAB/OGC responded to 16 requests for information or informal advice during calendar year 2008. The requests involved the following issues shown in the table below.

INFORMATION INQUIRES

Suspension	2
Discrimination	9
Disciplinary Actions	2
Performance	2
Pay (COLA)	1

c. Other Activity

On March 13, 2008, the Board's General Counsel testified before the Congress regarding the Government Accountability Office's personnel reform efforts. The PAB/OGC did not comment on any Agency Orders, policies, or legislation during calendar 2008.

Section 5: Office of EEO Oversight Activities

The GAO Personnel Act directs the Board to oversee equal employment at GAO through review and evaluation of GAO's procedures, policies, and practices.²⁰ To fulfill this mandate, the Board established an Office of EEO Oversight to assist it in conducting studies of selected issues and preparing evaluative reports that contain its findings and conclusions, as well as recommendations to the Agency.²¹ During 2008, the Board published a report on the operations of the Agency's Office of Opportunity and Inclusiveness and the No FEAR Act; worked on its study and report on retention of new employees; and approved a study on recruiting, retaining, and reclaiming older workers.

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

²¹The Board's EEO Oversight reports can be found at www.pab.gao.gov.

Study of the Office of Opportunity and Inclusiveness (O&I) and the No FEAR Act

At GAO, the processing of cases in which an employee or applicant for employment alleges discrimination begins at the Agency's Office of Opportunity and Inclusiveness which provides the threshold for Board jurisdiction over complaints of discrimination. The Board has had a longstanding interest in ensuring the integrity of the discrimination complaint process at GAO and, over the years, has made a number of recommendations to enhance and fine tune the Agency's internal procedures. As noted in previous reports, the Agency has adopted many of the Board's recommendations but, there continue to be issues about which the Board and Agency have yet to agree. At the conclusion of the most recent study, there remain some minor adjustments that need to be made, as well as three major areas of concern to the Board: the potential conflict of interest in the complaint process caused by a serious accretion of duties by O&I's Managing Director; the manner in which complaints of discrimination on the basis of sexual orientation are handled; and, the increasing length of time that complaints are languishing awaiting final Agency action.²²

In its report published in 2008, the Board made the following specific recommendations to improve the Agency's internal administrative process:

1) A separate unit should be established in which assigned staff would devote their time exclusively to the processing of discrimination complaints, including

mediation. The unit could be part of O&I for administrative purposes or be a stand-alone unit but its staff would not have any responsibility for human capital or personnel issues at GAO.

2) GAO Order 2713.2 should be revised to provide that complaints of sexual orientation may be appealed to the Personnel Appeals Board in the same manner as other discrimination complaints.

3) O&I staff should explain to complainants alleging discrimination on the basis of sexual orientation that they have the option of filing a charge that a prohibited personnel practice has occurred with PAB/OGC and that the exercise of such option fully preserves all appeal rights, including the right to appeal an adverse decision to the U.S. Court of Appeals for the Federal Circuit.

4) If no final agency decision has issued and 120 days has elapsed since the filing of a complaint, then a letter should be issued to the complainant explaining the procedures by which the complainant may immediately seek relief from the Personnel Appeals Board. The letter should also give a reason for the delay and proffer a realistic timeframe for completion of the Agency's final decision.

5) As soon as possible, O&I should create a survey instrument that is distributed to everyone who contacts the office. The survey should include a section designed to elicit the reasons that 80 percent of those contacting O&I ultimately decide not to pursue a complaint. The survey should be made available in both electronic and manual formats.

²²GAO Order 2713.2 directs the Agency to issue final Agency decisions within 90 days of the complainant's receipt of the investigative file. During the time of the Board's study, the average length of time that pending complaints were awaiting final decision was 614 days.

6) Chapter 3, ¶1(b) of GAO Order 2713.2 should be amended to require that a complainant who is the subject of an action appealable to PAB/OGC and who has raised an issue of discrimination is to be advised that he or she must elect the forum in which to proceed. Any such complainant should be fully apprised of their respective rights and be told that he or she may file a charge with the PAB/OGC within 30 days of the effective date of the personnel action and raise the issue of discrimination in Board proceedings or may file a complaint of discrimination with O&I and begin the administrative process. Electing the latter process does not necessarily preclude a subsequent filing with PAB/OGC relating to the personnel action. The explanation to the choices and their ramifications should be such that it ensures that the employee's election is both knowing and voluntary. In addition, any such explanation should also include sufficient information about processing times in O&I and in PAB/OGC to enable a complainant to make a fully informed decision.

In pre-publication comments, the Agency's Chief Human Capital Officer told the Board that GAO has no objection to Recommendation 3 and agrees with Recommendations 4, 5 and 6. The Board and the Agency continue to disagree about the matters in Recommendations 1 and 2.

Study of Retention Rates

In 2005, the Board decided to embark on a two year study of retention rates at GAO in order to identify whether there are any cultural, environmental, or organizational factors at GAO that could lead to a disproportionate number of members of any protected class leaving the Agency early in their tenures. Recently, an SES/SL Partners' Workshop at GAO focused on the retention of GAO analysts/specialists who had been

hired during fiscal years 2002-2005. Excluding all but voluntary resignations and transfers, the study disclosed that, as of January 2007, the Agency had retained 58% of those hired in 2002; 64% of the 2003 hires; 69% of the 2004 hires; and, 87% of those hired in 2005. At the Band I level for the four years of the study, retention rates for white analysts/specialists was 70%; for Asian Americans, 77%; for Hispanics, the figure was 62%; and for African-American analysts/specialists, the rate was 61%.

Among the key factors the Partners' Workshop identified that influence retention were the organization's culture and the kind of work it does; the quality of supervision; staff opportunities to utilize skills and advance their careers; and, the promotion of a family-friendly work environment. The Agency's 2008 Workforce Diversity Plan also raised concerns about sustaining adequate representation of protected groups at GAO and noted that, from April 2007 to March 2008, Asian American and Hispanic females and staff with disabilities were separating from the Agency at rates higher than their representation within the workforce. The study also pointed out that employees under 40 made up 41% of the GAO workforce and were 44.8% of the separations during the same time period.

The Board's study, well underway at the end of 2008, involved data collection on hiring and separations which included gathering information on a unit and office basis, by position/job category and by race, sex, national origin, disability and age in order to discern whether any patterns having EEO consequences emerged. The Board also examined GAO's retention efforts, as well as those of other Federal agencies and private sector institutions. Finally, the Board reviewed the responses to the

GAO Employee Exit Questionnaire which is sent to every employee who leaves GAO. The Board will issue a report with its findings and recommendations in 2009.

Study on Recruiting, Retaining, & Reclaiming Older Workers

In a 2007 report, the Office of Personnel Management (OPM) projected that almost one-third of the full-time permanent workforce will leave Federal employment within the next five years. Both the public and private sectors have been scrambling to ensure that they can adequately compensate for the gaps in necessary skills and institutional knowledge that are likely consequences of the anticipated mass retirements.

In a recent report, GAO identified some of the challenges facing employers in their attempts to retain older workers, such as adapting job designs, making workplace accommodations, offering flexibilities in schedules and benefits, and keeping workers past the traditional retirement age. The report also identified key obstacles to the retention of older workers such as employer perceptions about the cost to an agency or company of an older worker versus a new hire and the limited pool of workers who want to work past traditional retirement age. Most tellingly, however, the report concluded that age discrimination was a critical barrier to the continued employment of older workers.

GAO, which described itself as a "knowledge-based professional services organization" in its most recent Strategic Plan, made the implementation of strategies to retain the knowledge and expertise of retirement eligible senior employees a key Agency objective.

In its study, the Board will be attempting to identify whether there

are any cultural, environmental, or organizational barriers to the engagement and retention of older workers at GAO. The study will also entail a thorough review of GAO's internal practices and procedures in order to identify any policies, procedures or practices at GAO that either limit or foster employment opportunities for older workers. In addition, the Board will examine various Executive Branch initiatives, including the use of personnel and hiring flexibilities, aimed at increasing employment opportunities for older workers in the Federal workforce. Issuance of a report with findings and recommendations is planned for 2009.

Section 6: Special Projects

a. Mediation Program

The Board's mediation program provides an opportunity for employees or applicants, the Agency, and their representatives, if any, to meet separately and/or jointly with a mediator, *i.e.*, a skilled neutral trained to assist them in resolving their disputes. The mediator is a facilitator who has no power or role to impose a specific resolution. Parties to the mediation explore and discuss alternatives to continuing their dispute, including the goal of reaching a voluntary, mutually satisfactory resolution. Shortly after the mediation program was put into place, a case settled as a result of mediation.

b. Website Developments

The website,²³ currently in its 6th year, has continued to be an invaluable resource for information about the Board. Statistical information has shown that over the years the use of the Board's website has been on a steady rise. In 2008 it was visited by approximately 618 individuals per

²³The website can be found at www.pab.gao.gov.

month. Once on the site, individuals researched various sections such as information about the PAB, Board decisions and regulations, and how to contact PAB staff.

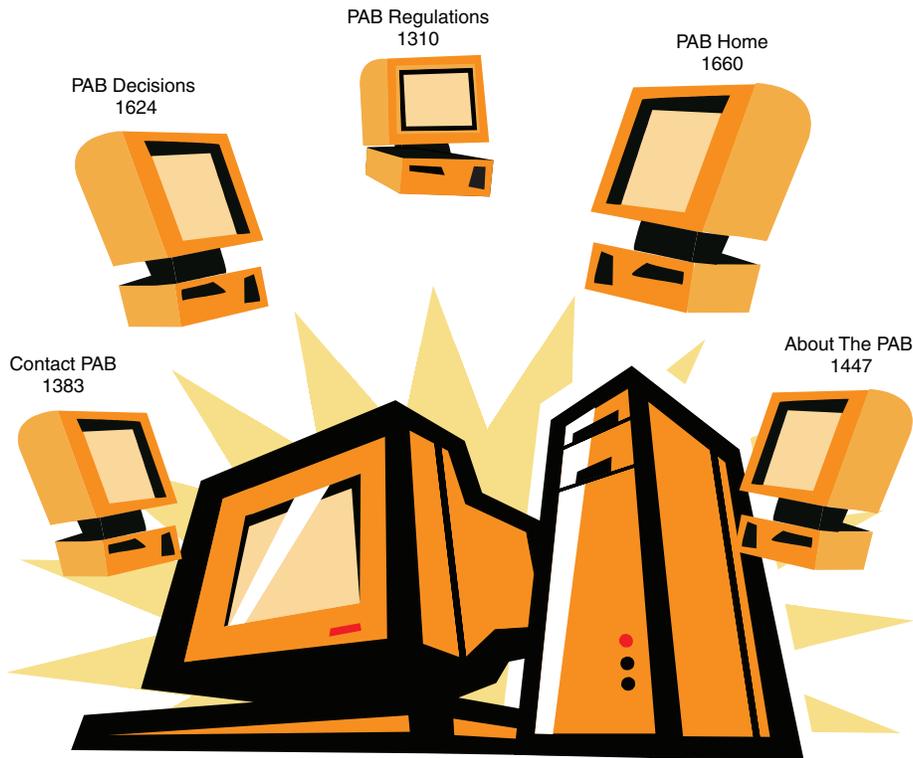
The Board's website is now more user friendly, attractive and has a more informative home page. A new section was developed to explain the mediation process. The site now has the capacity to allow research of decisions by topic.

The website is updated regularly to include announcements as well as new decisions, including LOC decisions. The Annual Report is available exclusively on the website. The following figure shows the number of visits to the Board's website this year, as well as usage within the site.

c. Guide to Labor Relations at the PAB

At the close of 2008, the Board began to develop a "Guide to Labor Relations at the PAB" as a companion to its "Guide to Practice at the PAB" which is geared to employment law. The Board expects to complete its latest guide and have it on its website in 2009.

Figure 3: Web Site Statistics



GAO 2008 web hits totals

Source: GAO analysts