

Personnel Appeals Board Annual Report



2010

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BIOGRAPHIES OF BOARD MEMBERS

MARY E. LEARY was appointed to the Board in April 2006, elected Vice Chair in September 2007, and Chair in August 2009. Ms. Leary is a graduate of Southwest Minnesota State University and the Howard University School of Law. She 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 served 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 became Vice Chair of the Board in August 2009. 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.

SUSAN R. WINFIELD was appointed to the Personnel Appeals Board in August 2010. Ms. Winfield is a graduate of the University of Pennsylvania and Boston College Law School. Ms. Winfield began her career as an Associate Attorney with a private law firm in Boston, MA. She began her government career as a staff attorney in the Criminal Division at the Department of Justice and later became an Assistant U.S. Attorney in the Office of the United States Attorney in Washington, D.C. In 1984, she was appointed to be an Associate Judge of the District of Columbia Superior Court where she served in the Civil, Criminal and Family Divisions. She retired from the court in 2005 and currently serves occasionally as a Senior Judge. Ms. Winfield currently serves as a mediator and

arbitrator at the Attorneys Mediation Services, Inc. She is also serving as a member at the Foreign Service Grievance Board and as a Hearing Officer at the Office of Compliance. Since 1984, Ms. Winfield has held and served in many other roles, e.g., an adjunct professor, a lecturer, consultant, mentor and trainer. She is a member of the District of Columbia and Massachusetts Bars.

PAUL M. CORAN was appointed to the Personnel Appeals Board in January 2005, elected Vice Chair in September 2005, and served as Chair from September 2007 until August 2009; his term ended in June 2010. 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.

PERSONNEL APPEALS BOARD

Mary E. Leary	Chair
Steven H. Svartz	Vice Chair
Susan R. Winfield*	Member
Paul M. Coran*	
Beth L. Don	Executive Director
M. Gail Gerebenics	Director, EEO Oversight
Susan P. Inzeo	Solicitor
Sue S. Farley	Senior Staff Attorney
Patricia V. Reardon-King	Clerk of the Board
Stuart Melnick*	General Counsel
Frank J. Mack	Senior Trial Attorney
Brian Nuterangelo	Senior Trial Attorney
Darian C. Jackson	Paralegal Specialist

* Susan R. Winfield joined the Board in August 2010.
* Paul M. Coran left the Board in July 2010.
* Stuart Melnick became General Counsel in August 2010.

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 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

¹ 31 U.S.C. §731 *et seq.*

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

³ 31 U.S.C. §732(f)(2)(A).

⁴ The 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).

⁵ The 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. §20003-16(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

Authority (FLRA).⁶ The Board's Office of General Counsel (PAB/OGC) performs the investigatory and prosecutorial functions of its Executive branch equivalents, which are 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. The Board, which currently operates with a quorum of three members, is on schedule to resume its composition of five members by 2013. Thereafter, by allowing a new member to be appointed in the first month of each year, GAO will be able to have a yearly scheduled recruitment process and the Board will be able to function more efficiently as an institution.

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.

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.

⁶ The FLRA protects the "rights 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. 4 C.F.R. §§28.110-28.124.

⁷ The 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.

GAO establishes a screening panel to review applications for Board member positions and identify the best qualified candidates.⁸ An interview panel composed of some of the screening panel members, including one member of the Employee Advisory Council (EAC) and one representative of the GAO Employees Organization, conducts the personal interviews and reports its results to the full screening panel. The screening 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

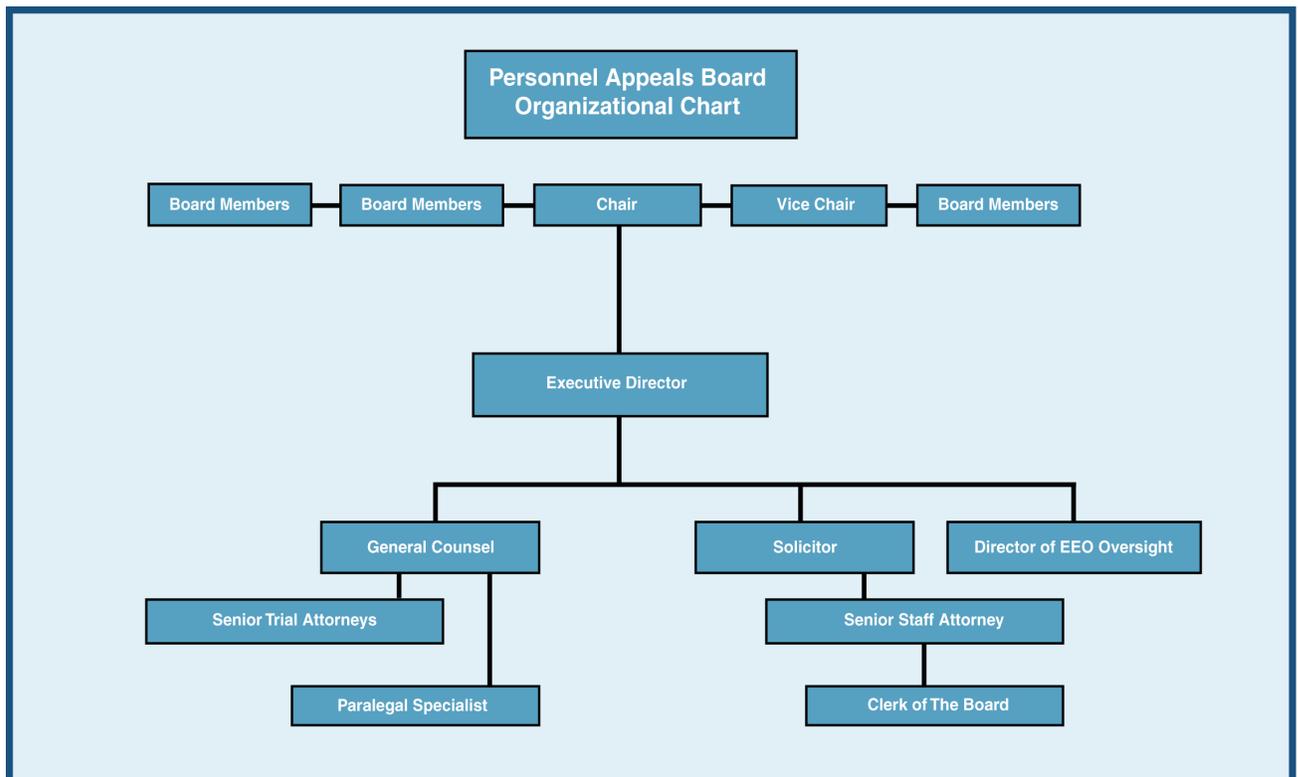
The Board's Executive Director manages Board staff and Board operations. The Board's Solicitor and Senior Staff Attorney advise Board members and the Executive Director on legal matters and provide procedural advice to litigants before the Board. The Board's Director of EEO Oversight reviews equal employment opportunity practices and procedures at GAO and drafts evaluative reports that contain the Board's findings, conclusions, and recommendations to the Agency.⁹ 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)

⁸ The 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, a representative from the Human Capital Office, and four representatives selected by the GAO Employees Organization, IFPTE, Local 1921 (Union). GAO Order 2300.4, ¶7 (11/04/09).

⁹ 31 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.

investigates charges filed with the Office and, if there are reasonable grounds to believe that a violation of law has occurred, offers to represent the employee or applicant for employment in litigation before the Board. Figure 1 below shows the current make-up of the Personnel Appeals Board.

Figure 1: PAB Organizational Chart



CHAPTER 2: THE BOARD PROCESS

The Board's litigation process is explained in detail in the *Guide to Practice Before the PAB*,¹⁰ a brief summary follows.

¹⁰ The *Guide to Practice* is available at the PAB's website: www.pab.gao.gov.

An employee, a group of employees,¹¹ 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 discrimination;¹² (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

¹¹ The Board can hear individual Petitions as well as class actions.

¹² The complete procedures for filing a discrimination complaint with the Agency may be found in GAO Order 2713.2, "Discrimination Complaint Resolution Process" (Dec. 9, 2009) (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, ¶4, 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) or by filing a civil action in Federal district court.

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.

them in collective bargaining, and certifying an organization so selected as the designated exclusive bargaining representative.¹³ The Board also plays a role in resolving impasses in collective bargaining, as well as in resolving certain negotiability issues.¹⁴

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.¹⁵ 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, within 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.

¹³ The Board's *Guide to Labor Management Relations Practice* is available at www.pab.gao.gov.

¹⁴ See GAO Order 2711.1, "Labor Management Relations," ¶14 (Apr. 27, 2001); 4 C.F.R. §§28.110-28.124.

¹⁵ See www.pab.gao.gov, under the link to Charges/Filing.

Once an individual charge is filed with the PAB/OGC, the charging party is advised of his/her rights and informed of the Board's mediation program.¹⁶ 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 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

¹⁶ Information about the Board's mediation program can be found on the website at www.pab.gao.gov.

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: Case Activity Before the Board

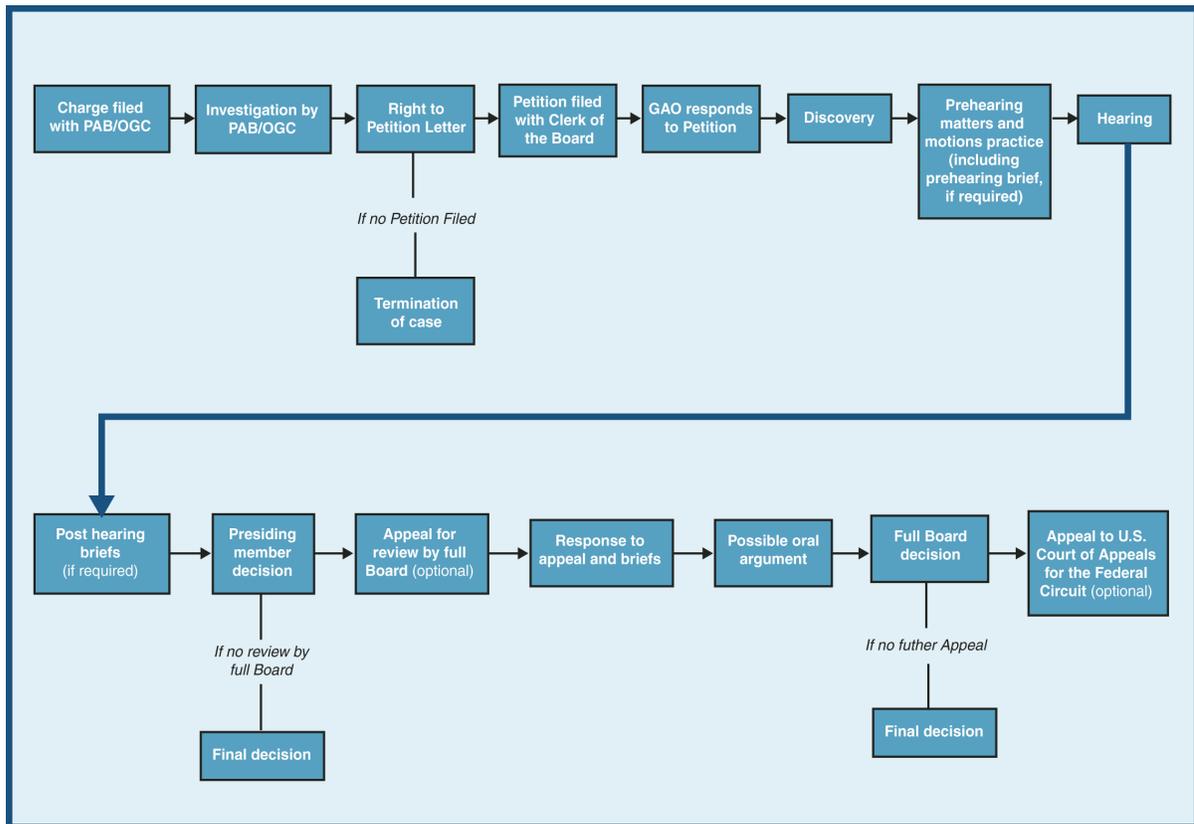
A Petition must be filed with the Board within 30 calendar days after service of the Right to Petition Letter from the PAB/OGC. Alternatively, if 180 days have elapsed from the filing of a charge with PAB/OGC and no Right to Petition Letter has been issued by the General Counsel, the employee may “opt 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, either a single Board member will be appointed to hear and decide the case or 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 a charge is filed through the completion of all adjudication.

Figure 2: 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 “corrective actions.”¹⁷

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. Under this procedure, 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.¹⁸ If the request for an *ex parte* stay is granted, the General Counsel may request either a further temporary stay or a permanent stay of the proposed action. A further temporary stay may be granted if the Board member, or 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.¹⁹ In considering a request for a permanent stay, the Board balances the evidence as

¹⁷ 4 C.F.R. §28.131.

¹⁸ The Board’s stay authority does not extend to any reduction in force action. 31 U.S.C. §753(b).

¹⁹ 4 C.F.R. §28.133(d).

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.²⁰ 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 in the process when a labor organization, an employee or group of employees, or GAO files a representation petition. The General Counsel reviews

²⁰ *Id.* at §28.132.

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 – 2010

Section 1: Labor-Management Relations

The Board continued to receive general inquiries from the Union representatives on a variety of issues. The first case filed with the Board in 2010 was a Labor-Management case relating to performance-based compensation in which GAO Management and the GAO Employees Organization, IFPTE Local 1921, filed a Petition for Resolution of a Bargaining Impasse. This case came before the Board to bring closure to the 2010 Performance Based Compensation (PBC) Negotiations. The parties began negotiations on December 16, 2009 and in January 2010 still had not reached an agreement; they agreed to seek joint mediation. On January 26 and 27, 2010, mediation took place. It ended without an agreement. In accordance with GAO Order 2711.1, an Ad Hoc Committee was established (Management-Union), met with the PAB Chair and determined that an impasse existed. An FMCS mediator worked with the parties, and an agreement was reached.

Section 2: Case Activity for GAO

a. Petitions Before the Board

The Board had a total of 49 Petitions before it in 2010 which included 40 cases from 2009. Thirty-seven of the Petitions were consolidated in the interest of judicial economy because they had similar issues. Four of the Petitions were from 2008 with one on appeal to the full Board. In addition, one case was on appeal from calendar year 2007. There was one Fairness Hearing held by the Board during calendar year 2010.

Cases Pending Before the Board as of January 1, 2010

In January 2010, the Board affirmed a 2009 decision finding that Petitioner had failed to prove that GAO discriminated against her on the basis of her race or her age, retaliated against her because of protected EEO activity, or committed any prohibited personnel practices in issuing her an unsatisfactory performance appraisal in April 2003; not selecting her for promotion in April 2003; not giving her a performance award in April 2003; and issuing her an unsatisfactory performance appraisal in December 2003.

In early 2009, an Administrative Judge ruled on a dispositive motion filed in a case in which a Petitioner had alleged that he was given a lower performance rating in FY 2002 than he would have received if he had fewer than five years of GAO service. The Administrative Judge found that the Petitioner had produced no evidence concerning his supervisor's evaluation of his performance, and thus, the Agency's evidence that the employee's appraisal was based solely on the application of the employee's performance standards

remained unrebutted. Accordingly, the Agency was awarded summary judgment. The Petitioner timely filed an appeal to the full Board on the summary judgment decision and the late 2008 denial of his request for class certification. On May 4, 2010, the Board affirmed the Initial Decision of the Administrative Judge awarding Summary Judgment to the Agency and denying Petitioner's Motion for Class Certification.

In another matter pending from 2009, Petitioner alleged that he had been discriminated against because of his race, color, sex, disability and sexual preference. He further claimed he was subjected to a hostile work environment and retaliated against for his involvement in protected activity. A hearing was held in February 2009. In February 2010, the Administrative Judge issued a decision sustaining the removal of Petitioner.

In the fourth case continued from 2009, Petitioner alleged that he was discriminated against based on his race and retaliated against for participating in protected activity when he received a letter of reprimand for conduct unbecoming a Federal employee. A hearing was held in the case in May 2009. During the preparation of travel for Petitioner to attend the hearing, an issue arose on the reimbursement of travel expenses. A decision was issued in April 2010 that found Petitioner had not proven discrimination based on race or retaliation and that Petitioner had not provided sufficient legal basis for travel reimbursement. An appeal was timely filed regarding the issue of travel reimbursement for Petitioner. That appeal was pending at the end of 2010.

In another case pending from 2009, Petitioner alleged that GAO committed prohibited personnel practices when it only considered her performance subsequent to placement in Band IIB and not the entire performance year in completing her annual appraisal. She claimed that her performance after placement in Band IIB was not measured by assessing her actual performance against her performance standards. Finally, she alleged that she was subjected to a hostile work environment in retaliation for having engaged in protected activity. This case was consolidated with a subsequent case Petitioner filed in 2009 which claimed that the Agency committed a prohibited personnel practice when it appraised her performance. The parties filed Cross Motions for Partial Summary Judgment and, in August 2009, the Administrative Judge granted the Agency's Motion for Partial Summary Judgment; Petitioner's Motion for Partial Summary Judgment was denied. A hearing was held in September and November 2009. The parties filed their post-hearing briefs in the Spring of 2010. A decision was pending at the close of 2010.

In a 2009 filing, a Petitioner requested Board review of certain actions taken by GAO that Petitioner believed violated her rights and the rights of others similarly situated when GAO implemented a new policy that eliminated annual pay adjustments for employees whose pay exceeded the maximum rates for their Band level. Petitioner, who had satisfactory performance in 2005, was denied the 2.6% upward adjustment for 2006 because her annual pay exceeded the compensation limits for her position in accordance with the new policy. By

September 2009, the Government Accountability Act of 2008, Pub.L. No. 110-323 (GAO Act of 2008), was signed into law and a lump sum payment was to be made to certain employees to compensate them for not receiving the full pay increase in 2006 and/or 2007. Petitioner and other employees who left the Agency prior to passage of the GAO Act of 2008 were not covered by its terms. Petitioner requested retroactive adjustments to pay rates, retirement and other benefits as well as a lump sum payment for back pay with interest.

This case was consolidated in June 2009 with 36 other Petitions on the same claim also brought by former employees who retired or left the Agency prior to enactment of the GAO Act of 2008. The Petitioners and GAO filed dispositive motions seeking an Order deciding all or part of the case, prior to an evidentiary hearing. In March 2010 a decision was issued granting Petitioner's Motion for Summary Judgment on the 2006 claim; granting GAO's Motion to Dismiss for lack of standing with respect to Petitioners who were not employed with GAO on the effective date of the pay action; and granting GAO's Motion to Dismiss without prejudice for the remaining 2006 and 2007 claims. Following that decision, the parties requested a stay of appeal while they pursued settlement. A Motion for Conditional Class Certification was filed for purposes of settlement. A settlement agreement was reached in October 2010 resolving all claims brought in the class action and subject to Board approval upon completion of the Fairness Hearing. The Board approved the proposed settlement agreement after determining that the agreement was fair and appropriate in December 2010.

In 2010, the PAB issued a *per curiam* decision denying a request from the PAB/OGC for a statement of policy or guidance as to whether GAO may refuse to process a travel voucher for a retired GAO employee to attend a hearing in his case that involved allegations of prohibited personnel practices brought by PAB/OGC on Petitioner's behalf. The Board declined to issue a Statement of Policy, because the question of travel reimbursement for a retiree-Petitioner arose in a pending case and the specific criteria set forth in §28.155 for the Board to issue such a statement had not been met. The individual Petitioner was allowed to file a motion with the Administrative Judge who heard his case relating to reimbursement of his travel.

In the last 2009 case, Petitioner claimed that his performance appraisal was improperly lowered because the Agency only considered his performance appraisal after placement in Band IIB rather than for the entire appraisal cycle. Petitioner further alleged that his performance ratings were devalued and that he was subjected to a retaliatory and hostile work environment because he engaged in protected activity. Petitioner filed a Notice of Withdrawal in September 2010 because the parties resolved the claims in the matter.

Cases Brought to the Board in 2010

This first 2010 case involved allegations that the Agency committed prohibited personnel actions when four individuals from another Federal agency were appointed to the Human Capital Office staff. Petitioner alleged that there were no vacancy announcements or opportunities for current GAO employees to compete for promotion or placement into the four positions. Petitioner believed that three of the four individuals were not eligible for a non-competitive appointment. The Initial Decision dismissed the Petition for lack of standing, because Petitioner did not allege that he was adversely affected by the Agency's action. An appeal of the Initial Decision was pending before the Board at the end of 2010.

The second 2010 case involved a former GAO employee who filed a Petition alleging that GAO retaliated against him by lowering his performance appraisal and improperly processing his expedited grievance. Petitioner had notified his immediate supervisor that a potential conflict of interest might arise with supervision from a particular supervisor since his wife might be a witness against that supervisor in a discrimination claim and in an investigation into alleged contracting irregularities. The parties reached a settlement at the end of 2010.

In a case filed at the close of 2010, a Petition alleged that GAO committed prohibited personnel practices when the Petitioner was not selected as a PT-III Budget Analyst when two vacancies were filled. Petitioner claimed that

unauthorized preferential treatment was given to one of the applicants (advising the applicant on actions to take) to improve the applicant's prospects for selection, and that GAO discriminated against her because she challenged her performance appraisals and was outspoken. Petitioner further believed that by not selecting her GAO failed to comply with the merit system principles of relative ability, knowledge and skills which violates the GAOPA, GAO Order 2335.1 and GAO Order 2335.6. This case was in the initial processing stage at the end of the 2010.

b. Stay Requests

There were no stay requests filed in calendar year 2010.

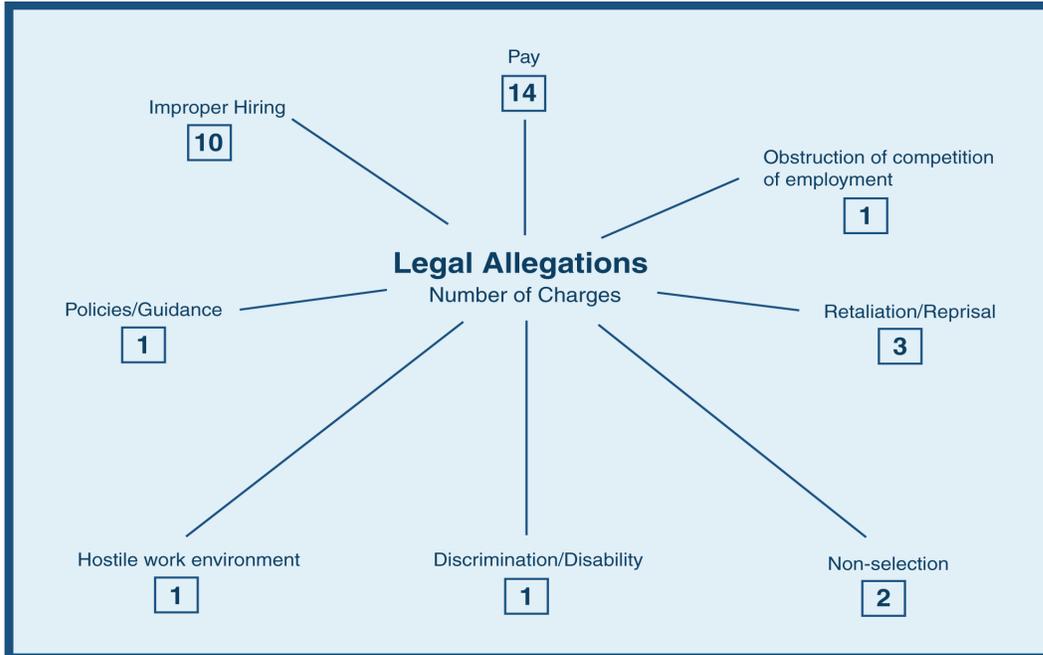
Section 3: PAB Office of General Counsel Activity

a. Case Activity

(1) Charges

There were 18 new charges filed with the PAB/OGC from January 1, 2010 through December 31, 2010. These charges involved allegations concerning: improper hiring, pay, policies and guidance, obstruction of competition of employment, retaliation and reprisal, non-selection, discrimination and disability and hostile work environment. Figure 3 shows the breakdown of the legal allegations presented in charges filed with the General Counsel's office.

Figure 3: Legal Allegations



During 2010, the PAB/OGC had a total of 30 open charges on its investigative case docket and closed 18 of the charges during the year. The PAB/OGC also settled 39 cases after a Petition was filed with the Board.

(2) Litigation

The PAB/OGC participated in 47 cases before the Board, filing two new Petitions. Also, the General Counsel participated in another case by filing an *amicus brief* on a narrow issue of the appropriate standard for determining standing.

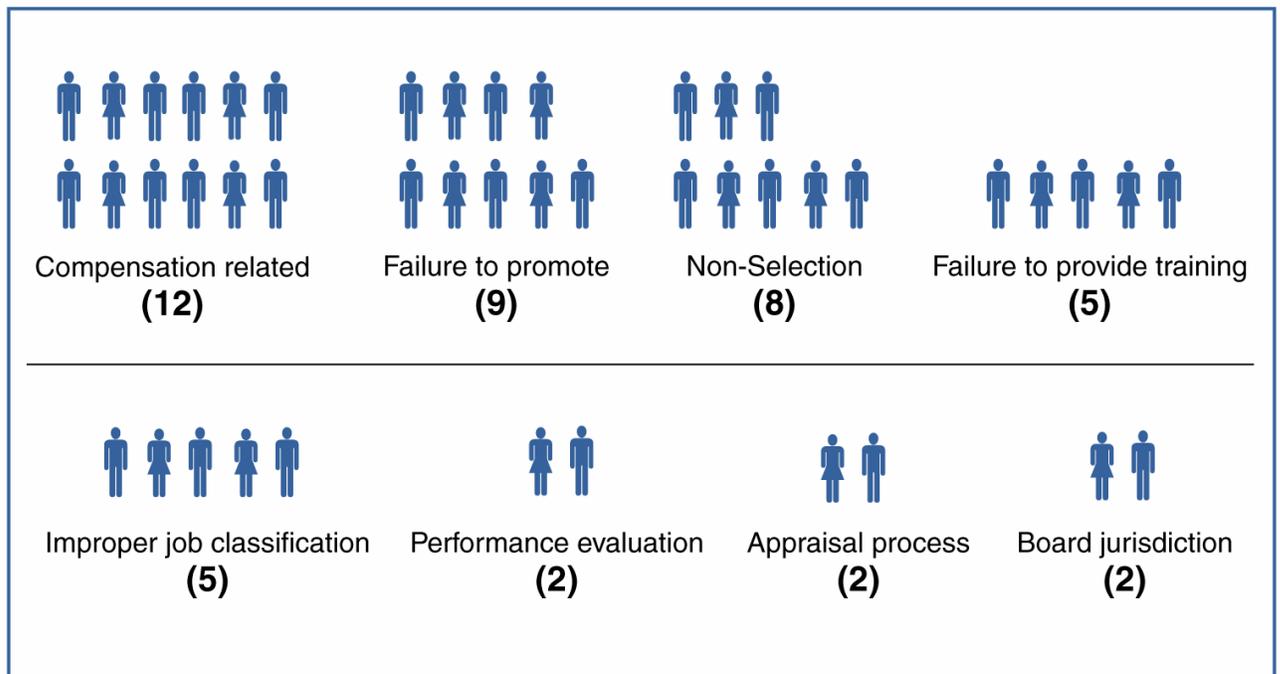
Most of the GAO investigations conducted by the Office of General Counsel were initiated by charges filed by employees. PAB/OGC did initiate an informational and corrective action investigation in 2010 on new hires within GAO. The General Counsel planned to issue its findings and recommendations

on this investigation in 2011. The General Counsel’s office did not initiate any disciplinary proceedings during calendar year 2010.

b. Other Activity and 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 opportunity rights. This is accomplished by responding to informational inquiries received either by phone or an in-person meeting. The General Counsel’s office fielded 45 informational inquiries during 2010. The types of inquiries and the number by type are shown below.

Figure 4 : Types of Inquiries



The General Counsel participated in other activities in 2010, including meeting with the Inspector General’s Office to discuss policy issues; meeting with the Agency’s Office of General Counsel on litigation holds and on the

Memorandum of Understanding on how to handle materials the Agency deems protected by privacy regulations; and meeting with the Agency to discuss the Agency's records retention policies and procedures. In addition, PAB/OGC commented on several proposed GAO Orders.

Section 4: Office of EEO Oversight Activity

The GAO Personnel Act directs the Personnel Appeals Board to oversee equal employment opportunity at GAO through review and evaluation of GAO's procedures, policies, practices.²¹ 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 its recommendations to the Agency. In 2010, the Board published reports on the retention of new employees; the Senior Executive Service (SES) at GAO; and women in the GAO workforce. At the close of the year, the Board was finalizing a study of Asian Americans and Pacific Islanders at GAO and was in the initial stages of a study of older workers at the Agency.²² During the year, the Board also approved a proposal to study the Americans with Disabilities Act Amendments of 2008 (ADAA) and GAO's multidimensional response to the statutory changes.

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

²² The Board's oversight reports can be found at www.pab.gao.gov under the link to EEO Oversight.

Retention of New Hires at GAO

In its study on the Retention of New Hires at GAO, the Board looked at cultural, environmental, and organizational factors that could be leading to an early exodus of members of any protected class from the Agency. The Board's report cited studies that have shown that, culturally, there has been a shift in what the generation entering the workforce expects from its employers in terms of benefits and perquisites and what, in return, employers can expect in the way of long term commitments from its younger employees. The Board analyzed three years of results from the Agency's exit questionnaire that is given to employees leaving GAO.

The final element of Board study was the impact of organizational factors on an employee's decision to separate. On this subject, there was evidence from the results of the exit questionnaire that elements of how GAO operates are problematic for some employees, but because of wide swings in the responses from year to year, no conclusions as to a pattern of perceptions based on membership in a protected class could be drawn.

The Board made eleven recommendations to the Agency to assist it in efforts to retain its recent hires and recoup the investment that hiring, training and developing them necessarily entails. Two of the recommendations were:

- *The Agency should seek greater transparency by ensuring that its recruiters are providing accurate information to potential candidates about the scope and nature of the work they will be performing and the levels of supervision/independence to expect.*
- *The Agency should continue to monitor its promotion data and be mindful that a very high percentage of Band I employees who are promoted remain at the Agency.*

The Senior Executive Service (SES) at GAO

In 1998, the Board issued a study of the SES at GAO; 12 years later, the Board noted many changes in GAO's Senior Executive Service. The SES is now 44.9% female compared to 31.5% in 1998. In addition, after years of very few, if any, people 50 years old and over being selected for the Executive Candidate Assessment and Development Program (ECADP), the disparity between the percentage in the feeder pool and those selected is in single digits (7%) compared to the earlier study (31.5%). There has been some stagnation of diversity on the basis of race and national origin in the SES corps itself but recent gains in diversity in the feeder pool may remedy that.

GAO compares favorably to the Executive branch in minority representation (16.3% v. 16.9%) in its SES, and GAO has a significantly higher percentage of females (44.9%) in its corps than the Executive branch (30.7%).

Perhaps the most important change over the years has been in the selection process for the ECADP. Previously, GAO employees had to request nomination to the ECADP, in writing, from the heads of their units who, in consultation with the requestor's SES supervisor, would determine each employee's potential to perform successfully at the SES level. Currently, all applicants, including those from GAO, apply directly to the Executive Resources Board. The unit screening appeared to be a system in which consistency in the selection process itself and in the criteria used could not be assured. The Board commended the Agency for adopting the centralized application.

The Board made four recommendations to GAO designed to enhance its diversity efforts at the highest levels of Agency management. Two of the recommendations are:

- *The Agency should try to attract a greater diversity of external applicants for its SES vacancies by continuing to target relevant professional associations with diverse membership.*
- *The Agency or its Office of Opportunity and Inclusiveness (O&I) should survey its Band III population to determine their level of interest in the SES; their reasons, if any, for opting out of consideration; and whether they perceive any barriers in the application process.*

Women in the Workforce at GAO

The progress of women at GAO, in general, has been strong and steady over the past two decades as reflected across the workforce and in the highest echelons of Agency management. At every level and by nearly every yardstick, GAO's percentages with respect to gender outstrip the Executive branch; it is clear that the remarkable success of women at the Agency came about through focus and commitment.

A good deal of GAO's appeal to recruits, in general, and to women, in particular, has to derive from the myriad benefits it offers, including those that allow staff to develop and maintain a balance between work and personal life. GAO has found itself frequently in the forefront of Federal agencies when it comes to innovative initiatives, particularly in the area of alternative work arrangements where the Agency has established programs that have flourished and remain integral parts of GAO today.

To a greater extent than some of its Executive branch counterparts, GAO's pool of applicants is defined by the Agency's high educational

requirements. The Agency recruits and hires mostly for positions that require, at a minimum, a bachelor's degree; its workforce has fewer than a half-dozen wage grade employees. According to recent education statistics, the percentage of Bachelor's, Master's, and Doctoral degrees conferred to women exceeds the percentage conferred to men in each of the four major demographic groups (white, black, Asian American and Pacific Islanders (AAPI) and Hispanic).

The one area that caused the Board concern in this study is the composition of the upper levels of the APSS community, which confer eligibility for the SES. Women predominate in the lower levels of the APSS staff by nearly a 3 to 1 ratio yet in the upper levels, men hold 57% of the positions. The Board did recognize the Agency efforts and noted that it has made strides in diversifying the pipeline that leads to PT-IV and MS-II positions and that vacancies do not appear to occur at those levels very often. The Board made the following two recommendations to the Agency:

- *The Agency is to be commended for its very successful efforts to promote gender diversity at all levels at GAO, particularly in the managerial and supervisory ranks. The Board hopes that vigilance will ensure that the participation rates for women will continue to be robust.*
- *The Agency is urged to remain cognizant of the disproportionate gender and racial differences that exist between the APSS corps and its leadership and take into consideration such disproportionate differences as vacancies occur.*

Study of Asian Americans and Pacific Islanders at GAO

In 2010, the Board began its study of Asian Americans and Pacific Islanders at GAO which was prompted by the Board noting, in other studies, that AAPI employees at GAO are well-represented across the Bands within the

analyst population but entry into the Senior Executive Service (SES) has been, and continues to be, problematic. The Board has also taken heed of sporadic spikes in the separations of Asian American females from GAO. In addition, the Agency's 2009 Workforce Diversity Plan noted that diversity of leadership at GAO is a concern, generally, for employee groups and was specifically noted by the Asian American Liaison Group (AALG).

Based on those factors, the Board decided to consider the history of employment of Asian Americans at GAO over the past two decades, in an attempt to identify what factors have affected their career trajectories, either positively or negatively, within GAO. In addition, the Board surveyed the Asian American population at GAO, as well as a random sample of the rest of the workforce for comparison purposes.²³

The Board used the survey to elicit perceptions about GAO's culture or organizational factors that have either limited or fostered employment opportunities and/or career advancement for AAPI staff at GAO. The survey was structured in a way to allow demographic comparisons at a number of levels beyond race, gender and national origin so that the Board was able to review results within categories such as pay bands and time at the Agency. After reviewing the survey results, the Board determined that a few issues still needed to be clarified and further contracted with OPM to establish focus groups to further refine the issues.

²³ The Board entered into a contract with Leadership & Talent Management Solutions at the U.S. Office of Personnel Management (OPM) to develop and administer its survey.

Study of Older Workers at GAO

In 2007, the Office of Personnel Management (OPM) projected that almost one-third of the full-time permanent workforce would leave Federal employment by 2012, generating what was then referred to as a “retirement tsunami.” A widespread economic downturn in 2008-09, however, led to many older workers delaying retirement plans. In the meantime, the Office of Oversight had begun a study of the engagement and retention of older workers at GAO that was, in large part, premised on the 2007 OPM projections on retirement. Given the now unlikelihood of a retirement tsunami, the Board decided to revise its project proposal in order to undertake a more relevant study of older employees in the GAO workforce.

In GAO’s June 2009 Workforce Diversity Plan, representatives of employees 40 and over averred that “GAO’s managers favored younger people in nearly all human capital programs – promotions, awards, ratings, opportunities, and compensation.” They also claimed that older employees are underutilized at GAO. The Diversity Plan disagreed with these conclusions and noted that it had hired many former GAO employees who are over 40 years old to help with its responsibilities under the American Recovery and Reinvestment Act of 2009.

Consequently, the Board amplified its original study on older workers at GAO and refocused it to look at the issues the employee representatives identified, as well as Agency recruiting efforts aimed at mid- to late career employees, training opportunities for its current workforce geared toward the

maintenance and improvement of needed skills, its retention programs, and flexibilities and hiring authorities that GAO has used.

At the end of the year, the Board was awaiting the Agency's response to its request for documents, data and information.

Reasonable Accommodation

The Americans with Disabilities Act Amendments of 2008 (ADAA) were enacted by Congress in response to a series of Supreme Court decisions that narrowly construed sections of the original American with Disabilities Act and eliminated protection for many individuals that Congress intended to be covered by that Act. Among other provisions, the ADAA promulgated rules of construction to be followed when defining the term "disability;" expanded the definition of major life activities; directed the EEOC to revise the portion of its regulations that define the term "substantially limits;" and, changed the definition of the term "regarded as."

In response to these statutory changes, GAO began redrafting its internal Order on reasonable accommodation and offered a course to its managers and supervisors, explaining the main provisions of the ADA and the ADAA, reviewing the definition of reasonable accommodation, describing the process used in GAO to address requests for reasonable accommodation, and providing an opportunity to ask questions regarding ADA-related situations arising in the workplace. The training will also be made available to the GAO workforce, via its Intranet.

The Board decided that the sweeping changes in the law since it last examined these issues, as well as the fact that GAO's own internal operating directives were being revised, meant it was time for the Board to re-examine GAO's procedures and practices as they relate to and interpret current disability law, with particular focus on reasonable accommodation. The study is currently scheduled to commence in 2011 or early 2012.

Section 5: Special Projects

a. Mediation Program

The Board's mediation program continued to provide employees and applicants, the Agency, and their representatives, if any, an opportunity 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. This year the Board processed two mediation requests. One resulted in settlement and the other mediation request resulted in the parties returning to the PAB/OGC charge process.

b. Website Developments

The website²⁴ continues 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.

²⁴ The website can be found at www.pab.gao.gov.

The Board's website is now more user-friendly, including a more informative home page. A directional map has been added that will assist individuals with their travel to the PAB from anywhere within the Washington, D.C. area. A separate section explains the mediation process. The Annual Report is available exclusively on the website. The PAB website now allows individuals to research decisions by topic. The website is updated regularly to include announcements as well as new decisions.

The PAB keeps track of usage on its web site to help determine its usefulness. The Board has switched to a new tracking system this year to monitor the usage of its web site. We are unable to provide the data on this usage for this Annual Report. That data will be provided in the 2011 Annual Report.