

# Personnel Appeals Board

U.S. Government Accountability Office



# Annual Report

# 2012

TABLE OF CONTENTS

<b>BIOGRAPHIES OF BOARD MEMBERS .....</b>	<b>2</b>
<b>PERSONNEL APPEALS BOARD .....</b>	<b>7</b>
<b>CHAPTER 1: THE PERSONNEL APPEALS BOARD .....</b>	<b>8</b>
<i>Section 1: About the PAB .....</i>	<i>8</i>
<i>Section 2: Board Staff .....</i>	<i>10</i>
<b>CHAPTER 2: THE BOARD PROCESS .....</b>	<b>12</b>
<i>Section 1: Filing with PAB Office of General Counsel .....</i>	<i>13</i>
<i>Section 2: Case Activity Before the Board .....</i>	<i>15</i>
<i>Section 3: Other PAB Office of General Counsel Authority .....</i>	<i>18</i>
a. PAB/OGC Investigative Authority .....	18
b. PAB/OGC Stay Requests .....	18
c. Disciplinary Proceedings .....	19
d. Labor-Management Relations .....	20
<b>CHAPTER 3: ACTIVITY OF THE PAB – 2012 .....</b>	<b>20</b>
<i>Section 1: Labor-Management Relations .....</i>	<i>20</i>
<i>Section 2: Case Activity .....</i>	<i>23</i>
a. Petitions Before the Board .....	23
b. Stay Requests .....	32
<i>Section 3: PAB Office of General Counsel Activity .....</i>	<i>33</i>
a. Case Activity .....	33
(1) Charges .....	33
(2) Litigation .....	35
b. Other Activity and Employee Contacts .....	35
<i>Section 4: Office of EEO Oversight Activity .....</i>	<i>37</i>
<i>Section 5: Special Projects .....</i>	<i>37</i>
a. Mediation Program .....	37
b. Website Developments .....	38
c. Legislative Branch Employment Dispute Resolution Council .....	39
d. Board Relocation to Headquarters .....	39

## **BIOGRAPHIES OF BOARD MEMBERS**

**SUSAN R. WINFIELD** was appointed to the Personnel Appeals Board in August 2010. She became Vice Chair of the Board in September 2011 and Chair in July 2012. 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. In addition, Ms. Winfield serves as a private mediator and arbitrator. 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.

**JOHN L. BRAXTON** was appointed to the Board in February 2011. Mr. Braxton was elected Vice Chair of the Board in July 2012. Mr. Braxton is a Senior Judge

of the Court of Common Pleas of Philadelphia County. He has been a member of the Pennsylvania bar for over 40 years, and he has an accomplished career of public service in law, business, and financial administration. Mr. Braxton has developed expertise in commercial and economic development within heavily-regulated industries including banking and insurance. He also has built a record of success in directing long-term strategic business planning and managing executive-level responsibilities in both the private and public sectors. Mr. Braxton served as Chair of the Board of Berean Federal Savings Bank from 1999 to 2003. He also served as Chair of the Bank's Investment Committee. In addition, Mr. Braxton served as Chair of the Audit Committee of Intellisource Group, Inc. which is a publicly held corporation. From 1991-1996, Mr. Braxton served as Chair of the Board of the Philadelphia Commercial Development Corporation. From 1975-1978, he served as a member of the Pennsylvania Minority Business Development Authority. Mr. Braxton earned his undergraduate degree from Penn State University as well as a commission as a Second Lieutenant in the U.S. Army. Once he completed his military service, Mr. Braxton went on to earn a law degree from Howard University School of Law. He retired in 1995, but was recalled to serve on the Court of Common Pleas of Delaware, Bucks and Montgomery Counties in Pennsylvania.

***WILLIAM E. PERSINA*** was appointed to the Personnel Appeals Board in June 2011. Mr. Persina is a labor arbitrator specializing in public sector labor and employment law issues. In addition to his service with the Personnel Appeals

Board, Mr. Persina is also a Presiding Member on the Foreign Service Grievance Board, which arbitrates grievances involving labor and employment law issues for Foreign Service employees. He also serves as the Chairman of the District of Columbia Office of Employee Appeals, which decides adverse personnel action appeals of District government employees, and is a former member of the District of Columbia Police and Fire Retirement Board. Prior to beginning his arbitration practice Mr. Persina was in private law practice, providing representation and consulting services to federal agencies and unions in the areas of employment and labor law before such administrative agencies as the Merit Systems Protection Board, the Federal Labor Relations Authority, and the U.S. Equal Employment Opportunity Commission. Before entering private practice, Mr. Persina served as senior litigation counsel and Solicitor for the FLRA, in a career spanning almost 27 years with that agency. While in the Solicitor's Office, Mr. Persina represented the agency in federal courts, including the Supreme Court of the United States. He also gave legal advice to the FLRA's presidential appointees. Mr. Persina received his law degree, with honors, from the National Law Center of the George Washington University, in 1972. He received his undergraduate degree from the School of Industrial and Labor Relations, Cornell University, in 1968. Mr. Persina is admitted to practice in the District of Columbia.

**ROBERT F. HERMANN** was appointed to the Personnel Appeals Board in January 2012. Mr. Hermann has practiced law for 40 years, focusing on labor and employment law in both the public and private sectors. He has worked as a neutral, as an advocate for management and as an advocate for employees in all areas of employment law. Since 1991 he has been a partner in the Westfield, New Jersey firm of Hermann & Bateman. From 1988 to 1991 he was in private practice in New York City. From 1975 to 1988, Mr. Hermann handled employment law matters as an attorney with the Office of the Chief Counsel, Internal Revenue Service. From 1978 to 1988, he was Assistant Regional Counsel for the Internal Revenue Service's North Atlantic Region, based in New York City. Mr. Hermann began his career in Washington, D.C. in 1973 as an attorney with the Federal Labor Relations Council, the predecessor to the Federal Labor Relations Authority. Mr. Hermann is a 1970 graduate of Cornell University's School of Industrial and Labor Relations and a 1973 graduate of the Cornell Law School. He is a member of the New York and New Jersey state bars, the U.S. Supreme Court Bar, and the bars of other federal courts.

**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 and Chair in September 2011. His term ended in July 2012. 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 (FLRA) 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**

Susan R. Winfield	Chair
John L. Braxton	Vice Chair
William E. Persina	Member
Robert F. Hermann*	Member
Steven H. Svartz*	Member
Beth L. Don	Executive Director
Vacant*	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

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\* Robert F. Hermann joined the Board in January 2012.

\* Steven H. Svartz left the Board in July 2012.

\*The Oversight Director position remained vacant in 2012.

## **CHAPTER 1: THE PERSONNEL APPEALS BOARD**

### **Section 1: About the PAB**

Under the Government Accountability Office Personnel Act of 1980 (GAOPA),<sup>1</sup> 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 Office<sup>2</sup> (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.<sup>3</sup>

The PAB's authority combines the adjudicatory functions of its Executive branch counterparts: the Merit Systems Protection Board (MSPB);<sup>4</sup> the Equal Employment Opportunity Commission (EEOC);<sup>5</sup> and the Federal Labor Relations Authority (FLRA).<sup>6</sup> The Board's Office of General Counsel (PAB/OGC) performs

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<sup>1</sup> 31 U.S.C. §731 *et seq.*

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

<sup>3</sup> 31 U.S.C. §732(f)(2)(A).

<sup>4</sup> 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). The PAB also has similar review and study authority over GAO with regard to assessing EEO impact of GAO's actions and/or inactions. See fn. 3 supra.

the investigatory and prosecutorial functions of its Executive branch equivalents, which are the Office of Special Counsel (OSC)<sup>7</sup> and the EEOC.

The statute provides for a Board comprised of five members who serve five-year, nonrenewable terms. For a period of time, the Board operated with a quorum of three members. Now, the Board is on schedule to operate with its original composition of five members by summer 2013. 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 for the Board 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

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<sup>5</sup> 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. §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.

<sup>6</sup> 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.

<sup>7</sup> The OSC investigates and prosecutes allegations of thirteen 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.

legal matters, or experience at a senior level position in resolving complex legal matters.

GAO establishes a screening panel to review applications for Board member positions and identify the best qualified candidates.<sup>8</sup> 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 can choose to make an appointment to the Board after considering the recommended candidates. The Board members elect their own Chair and Vice Chair. Board members can only be removed by their colleagues.

## **Section 2: Board Staff**

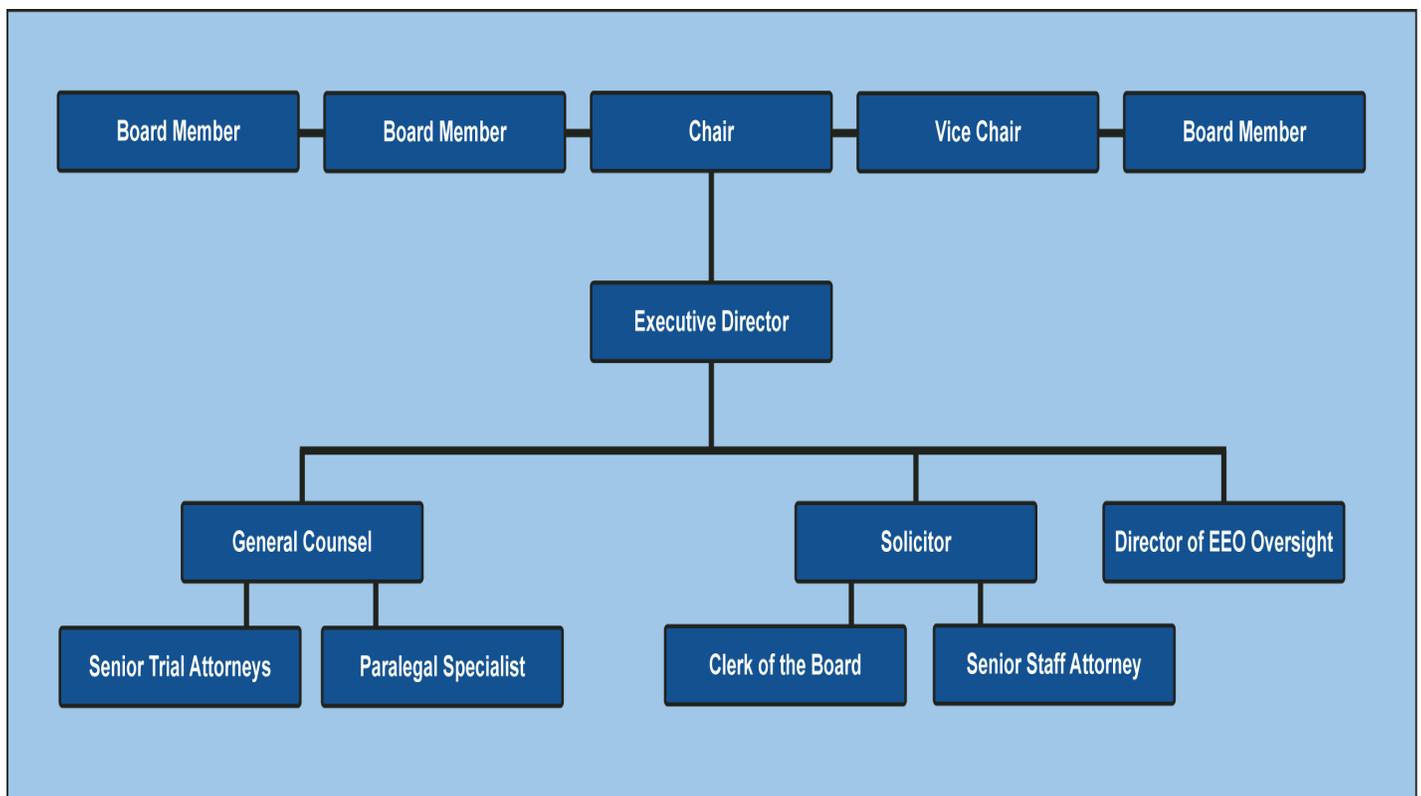
The Board's Executive Director manages Board staff and Board operations. The Board's Solicitor and Senior Staff Attorney advise Board members and the Executive Director on legal matters and provide procedural advice to litigants before the Board. The Board's Director of EEO Oversight reviews equal employment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

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<sup>8</sup> 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).

recommendations to the Agency.<sup>9</sup> 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 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 organizational make-up of the Personnel Appeals Board.

**Figure 1: PAB Organizational Chart**



<sup>9</sup> 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](http://www.pab.gao.gov).

## CHAPTER 2: THE BOARD PROCESS

The Board's litigation process is explained in detail in the *Guide to Practice Before the PAB*;<sup>10</sup> a brief summary follows.

An employee, a group of employees,<sup>11</sup> 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;<sup>12</sup> (5) prohibited political

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<sup>10</sup> The *Guide to Practice* is available at the PAB's website: [www.pab.gao.gov](http://www.pab.gao.gov).

<sup>11</sup> The Board can hear and decide individual Petitions as well as class actions.

<sup>12</sup> 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 the appropriate 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.

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 selected as the designated exclusive bargaining representative.<sup>13</sup> The Board also plays a role in resolving impasses in collective bargaining, as well as in resolving certain negotiability issues.<sup>14</sup>

### **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.<sup>15</sup> The PAB/OGC has the authority to investigate charges 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.

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<sup>13</sup> The Board's *Guide to Labor-Management Relations Practice* is available at [www.pab.gao.gov](http://www.pab.gao.gov).

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

<sup>15</sup> See [www.pab.gao.gov](http://www.pab.gao.gov), under the link to Charges/Filing.

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.

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.<sup>16</sup> 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.

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<sup>16</sup> Information about the Board's mediation program can be found on the website at [www.pab.gao.gov](http://www.pab.gao.gov).

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 alone 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: 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

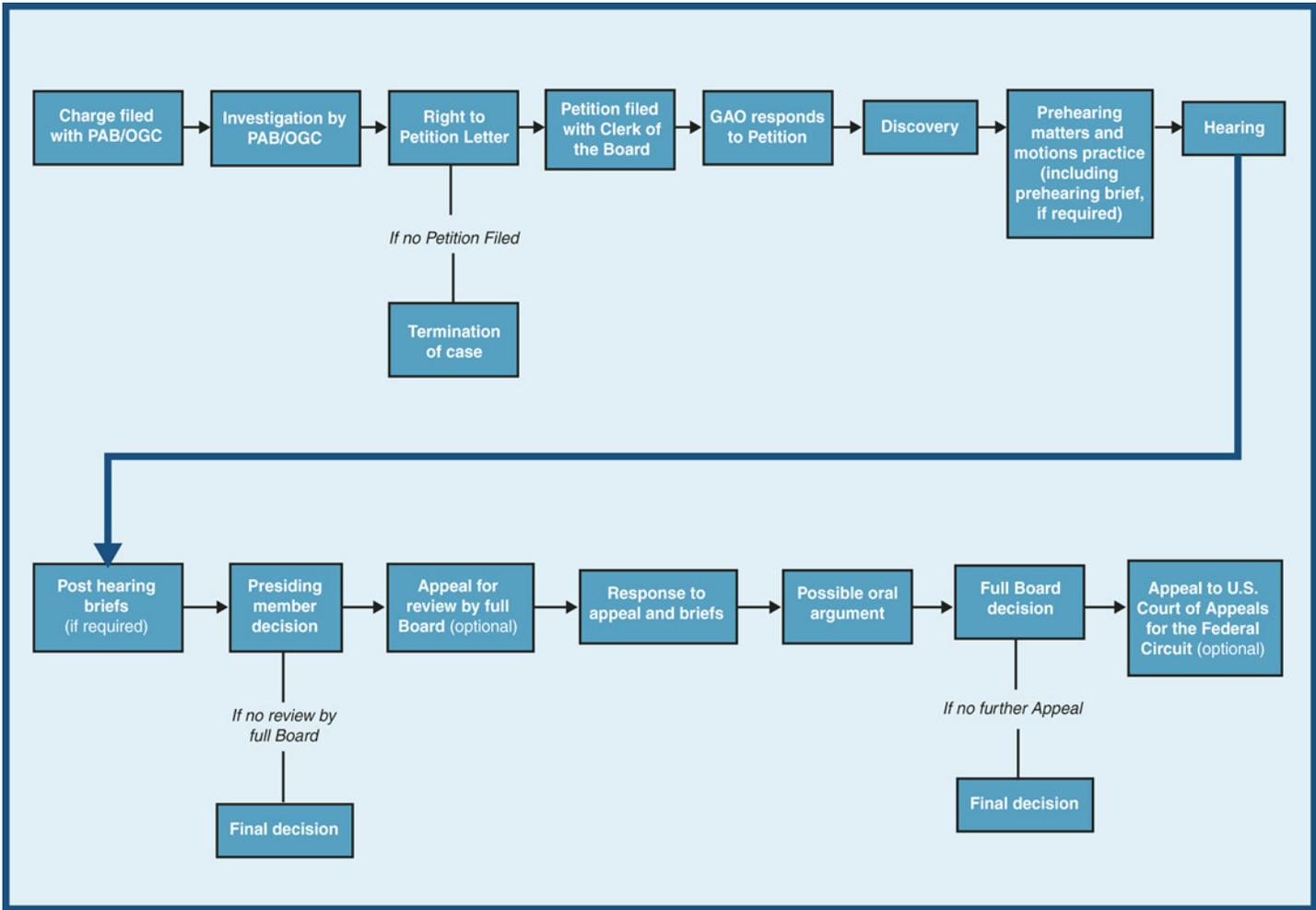
days have elapsed from the filing of a charge with PAB/OGC and no Right to Petition Letter has been issued by the General Counsel, the employee may “opt out” of the investigation and file a Petition with the Board. An employee who chooses that route foregoes the opportunity to have the General Counsel present his/her 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.”<sup>17</sup> 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

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<sup>17</sup> 4 C.F.R. §28.131.

General Counsel's judgment, may constitute a prohibited personnel practice.<sup>18</sup> If the request for an *ex parte* stay is granted, the General Counsel may later 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.<sup>19</sup> 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.<sup>20</sup> The authority to propose disciplinary action includes action for engaging in prohibited political activity.

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

<sup>19</sup> 4 C.F.R. §28.133(d).

<sup>20</sup> *Id.* at §28.132.

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 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 – 2012**

**Section 1: Labor-Management Relations**

A Labor-Management Relations matter from 2011 involving two Representation Petitions and a Clarification Petition was pending in early 2012. A Representation Petition had been filed on March 4, 2011 with the PAB Office of General Counsel by GAO Employees Organization, International Federation of

Professional and Technical Engineers (IFPTE). This Petition sought an election to determine if an appropriate unit of Administrative Professional and Support Staff (APSS) employees wanted to be represented for the purpose of collective bargaining by IFPTE as an exclusive representative. Two subsequent Petitions were filed jointly by IFPTE and GAO. The second filing was a Clarification Petition. The Petition sought to preserve Written Communication Analysts (WCAs) in the Analyst Bargaining unit of GAO that was certified by the PAB in 2007. The third filing was a Petition for Election which sought to schedule an election for Visual Communication Analysts (VCAs) and Lead Communication Analysts (LCAs), to determine whether they wanted to be included in the bargaining unit of analysts that was certified in 2007.

A preliminary determination was made that the IFPTE had met the 30 percent showing of interest on the APSS petition as required under 4 C.F.R. §28.113(a)(7). The PAB General Counsel met with representatives from IFPTE and GAO to review procedures, standards, and timeframes governing the processing of the Petition. Pursuant to 4 C.F.R. §28.114, a 10-day notice period started on March 21, 2011.

An e-mail announcement was sent to employees informing them of IFPTE's Petition to represent APSS employees. In addition, a Notice was posted on GAO's intranet and physically posted throughout GAO headquarters. The purpose of the Notice was to identify permanent employees who would be included in the proposed unit and to identify those who would be excluded from

the proposed unit, such as confidential employees, supervisors or management officials. After further meeting and communication, on May 18, 2011 the parties agreed on additional employees to be excluded from the bargaining unit and agreed to schedule interviews of the remaining disputed employees. After numerous employee interviews, on August 10, 2011, the parties advised PAB/OGC that they had agreed on a list of employees who should be excluded from the APSS bargaining unit. On October 14, 2011, the parties jointly filed with PAB/OGC an Amended Petition for Representation Election requesting that the APSS bargaining unit exclude all Communication Analysts (Visual, Written, and Lead).

The PAB/General Counsel submitted a Report of Recommendations to the PAB on November 14, 2011. The Report recommended that the Board conduct two elections, one for eligible APSS employees to determine whether they would like to be represented as a unit for purposes of exclusive representation by the GAO Employees Organization, IFPTE, and one for eligible VCA and LCA employees to determine whether they would like to be represented as part of the Analysts Bargaining Unit. The Report also recommended that the Clarification Petition be granted and that the 2007 certification of the Analysts Bargaining Unit be amended to preserve the WCAs as part of that bargaining unit.

Upon review of the General Counsel's Report, the Board Chair scheduled a conference to address the process with respect to the matters raised in the

Report, as well as to discuss dates for the election. During the conference it was determined that an additional Notice needed to be provided to all employees affected by the three pending Petitions. The parties also discussed the dates and other matters related to the election process. On December 30, 2011, the Board issued an Order addressing the two Representation Petitions. The Order stated that the two consent elections would be conducted concurrently on February 8, 2012 and outlined the procedures which would be used for those elections, including times for absentee voting and voting by mail for field office employees.

The elections were conducted on February 8, 2012, and a majority of the eligible employees in the APSS unit at GAO designated the GAO Employees Organization, IFPTE, as the exclusive representative of all employees in the unit. The VCAs and LCAs, by a majority of the valid ballots cast, elected to be included in the Analysts bargaining unit currently represented by GAO Employees Organization, IFPTE. The Personnel Appeals Board issued the Certification of Representative for APSS and the Certification for Inclusion in Existing Unit for VCAs and LCAs on February 16, 2012.

## **Section 2: Case Activity**

### **a. Petitions Before the Board**

The Board had a total of 49 Petitions before it in 2012. Thirty-seven 2009 Petitions had been consolidated in the interest of judicial economy because they

involved similar issues. One case was pending from 2010 on appeal to the full Board and two were pending from 2011. The cases pending from 2009 and 2010 were closed during 2012.

Summary of Cases Pending Before the Board as of January 1, 2012

In a 2009 case filing, Petitioner requested Board review of certain actions taken by GAO that Petitioner believed violated her rights and the rights of others similarly situated as a result of GAO's implementation of 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. In September 2009, the Government Accountability Office Act of 2008, Pub. L. No. 110-323 (GAO Act of 2008), had been 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 similar Petitions with 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 a Fairness Hearing. The Board approved the proposed settlement agreement after determining that the agreement was fair and appropriate. Throughout 2011 and part of 2012, under the Judge's direction, the parties worked with the relevant agencies to ensure compliance with the settlement agreement. An Order was issued on July 19, 2012 dismissing the case with prejudice and reinstatement solely for the purpose of assisting a class member's beneficiary in obtaining the appropriate retirement benefits from OPM as provided in the Settlement Agreement.

In a 2010 case, 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 (*i.e.*, 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 requirement that selections be based on relative ability, knowledge and skills, in violation of the GAOPA, GAO Order 2335.1 and GAO Order 2335.6. An evidentiary hearing was held in 2011. A decision was issued in this matter on February 1, 2012 in favor of the Agency as a result of Petitioner not proving by a preponderance of the evidence that the Agency committed a prohibited personnel practice as defined by 5 U.S.C. §2302(b)(12).

In another case filed in 2011, a former employee of GAO alleged that starting in 1994, she was subjected to a pattern of retaliation and a retaliatory hostile environment based on her having engaged in protected activity. She further alleged that in 2003, the Agency forced her to retire in retaliation for her having engaged in protected activity. Specifically, in 1993 and 1994, she had raised with an Agency official a claim that GAO was violating the Equal Pay Act, *inter alia*, by paying her male counterparts more to perform work at the same level. She alleged that, shortly after her raising these issues, she was subjected to a hostile environment based on her gender including being prevented from competing for promotions. Discovery in this matter was extended several times because the personnel actions were remote in time and many of the individuals

involved in the case were no longer employed at GAO. The time for discovery was also extended due to Petitioner's medical circumstances. At the close of 2012, the case remained pending before the Board on the Agency's Motion for Summary Judgment.

The last case pending before the Board at the beginning of 2012 involved a Petitioner who filed on behalf of herself and other similarly situated individuals. Petitioner claimed that the Agency violated the GAO Personnel Act when it refused to provide minimum pay increases to which she and others were entitled pursuant to 31 U.S.C. §§732(c)(j). In Petitioner's case, she had voluntarily transferred to a lower Banded position in 2009 and signed a memorandum stating that she would continue to receive the rate of basic pay that she was receiving prior to her move to a lower Band. She was advised that she would not receive a pay increase, including an annual increase, until the maximum of the lower Band reached her current salary. In 2010, the Comptroller General authorized the payment of salary adjustments to most GAO employees whose work performance was at a satisfactory level. Petitioner's work performance was at a satisfactory level, but she did not receive a minimum percentage pay increase. Petitioner alleged that this denial of a pay increase was in violation of the GAOPA. The Agency filed a Motion for Leave to file a Motion to Dismiss and to Stay Discovery. The Administrative Judge granted the stay request in part and allowed Petitioner time to respond to the Agency's Motion. Petitioner then filed a Motion for Summary Judgment. The Agency subsequently filed its Motion to

Dismiss. Shortly thereafter, Petitioner filed a Motion for Voluntary Dismissal. The Administrative Judge in the case granted the Motion and the case was dismissed.

### Summary of Cases for 2012

The first case filed in 2012 was brought by the Personnel Appeals Board Office of General Counsel. In this case, the PAB/OGC petitioned the Board for a statement of policy or guidance pursuant to Board regulation 4 C.F.R. §28.155. It challenged whether GAO's Pay Retention Order, 2536.1, was consistent with the Government Accountability Office Personnel Act at 31 U.S.C §§732(c)(3) and (j). Those sections of the GAOPA provide for GAO employees who are evaluated as performing satisfactorily to receive an annual pay adjustment. The GAO Pay Retention Order bars employees under pay retention who are performing satisfactorily from receiving annual pay adjustments to their basic rate of pay. The PAB/OGC argued that the provision concerning non-payment of annual adjustments to employees' basic rates of pay was inconsistent with the GAOPA, thereby making the Pay Retention Order invalid. On July 23, 2012, the Board

issued a decision on this matter denying the PAB/OGC's request because it did not meet the criteria<sup>21</sup> for issuing a policy statement under 4 C.F.R. §28.155.

The Board held, *inter alia*, that the issue of whether pay retention employees are entitled to annual pay adjustments may depend on the particular facts of a given case. Therefore, pay adjustment questions are better addressed in those circumstances where the parties can present their legal positions concerning this question within the context of the particular facts. The Board also determined that it was difficult to conclude that the purposes of the GAOPA would be promoted by issuing a policy statement that had no practical effect on the work lives of GAO employees, *i.e.*, no other employees are currently subject to pay retention, now or in the foreseeable future. Thus, this situation was not a suitable one for the Board to exercise its discretion to issue a policy statement.

A *pro se* Petitioner filed a charge with the PAB/OGC alleging that GAO committed multiple prohibited personnel practices because it did not follow procedures set forth in GAO Order 2335.6 (Competitive Selection Plan for Administrative Professional and Support Staff) when it selected another

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<sup>21</sup> The Board's regulations specify the following criteria to be considered in deciding whether to issue a statement of policy or guidance: (a) Whether the question presented can more appropriately be resolved by other means; (b) Where other means are available, whether a Board statement would prevent the proliferation of cases; (c) Whether the resolution of the question presented would have general applicability; (d) Whether the question currently confronts the parties as part of their employee-management relationship; (e) Whether the question is presented jointly by the parties involved; and (f) Whether the issuance by the Board of a statement of policy or guidance would promote the purposes of the GAOPA. 4 C.F.R. §28.155.

employee for a PT-III position in the Human Capital Office (HCO). Petitioner argued that the selectee should not have been chosen for the position because she did not meet the eligibility standards for an excepted-conditional appointment. Petitioner contended that this improper selection impacted him. As a remedy, the Petitioner made several requests, including that GAO 1) void the selection and improper conversion of the selectee; 2) re-announce or reconstruct the selection process for the Human Capital Specialist positions; and 3) require GAO to offer fair and open competition for all mission support hiring and promotion opportunities. GAO filed a Motion to Dismiss. The Board issued a decision on July 20, 2012 denying GAO's Motion to Dismiss because issues of material fact remained. After discovery was completed, a Motion for Summary Judgment was filed by the Agency which was pending at the close of 2012.

Three cases, making similar allegations, were filed simultaneously and were eventually consolidated in 2012. The Petitioners in these cases alleged that GAO committed prohibited personnel practices when it failed to follow its Order in making selections for two PT-III vacancies in the Human Capital Office. GAO's Competitive Selection Plan for Administrative Professional and Support Staff, Order 2335.6, establishes a plan for processing applications for vacancies

in certain positions. Petitioners alleged that GAO adopted a different plan and did not give employees notice or an opportunity to comment on the new plan, thereby violating 5 U.S.C. §2302(b)(2). Petitioners filed a Motion for Partial Judgment on the Pleadings arguing that since GAO clearly failed to follow its own Order that it committed a prohibited personnel practice and that Petitioners were entitled to remedies including reconstruction of the selection process. The Administrative Judge held that GAO did commit a prohibited personnel practice because it did not follow its own Order but that the parties needed to complete discovery to determine the appropriate remedy. At the end of the calendar year, the parties were discussing possible settlement options.

In another case, the PAB/OGC filed a Petition requesting the Board to review actions taken by GAO that it believed resulted in the Agency violating GAO Order 2335.8 (Merit Selection Plan for Analyst and Specialist Positions) and 5 U.S.C. §2302(b)(12). The Petition alleged that these actions caused seven employees to be denied a fair and open selection process; one employee denied promotion; the promotion of an ineligible employee; and the continuation of employment for an individual without a valid GAO appointment. The PAB/OGC conducted a corrective action investigation on this matter and submitted its findings and recommendations to the Agency. The Agency rejected the substantive findings and refused to take any corrective action. The PAB/OGC requested that the Board provide relief to the individuals harmed and order the

Agency to make corrective actions as a result of this violation. At the close of 2012, the case remained pending before the Board.

**b. Stay Requests**

The Board received three *Ex Parte* Requests for Initial Stays of Removal during 2012. In the first *Ex Parte* Request, filed in August, PAB/OGC requested an initial stay of 30 days to further investigate allegations that the Agency's decision to remove the employee was based on disability discrimination. Petitioner believed that GAO's actions violated the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12102(1)(A)-(C), and involved prohibited personnel practices pursuant to 5 U.S.C. §2302(b)(1)(D) when it decided to remove Petitioner from her position with GAO. The Board issued an Order granting the PAB/OGC's request for an initial stay. No further requests were made.

In September, the PAB/OGC filed a request, in another matter for a thirty (30) day stay of removal to preserve the *status quo ante* while an investigation was conducted. Petitioner alleged that GAO discriminated against her on the bases of age, disability and gender. Petitioner further alleged that GAO created a hostile work environment when it proposed her removal from her position with

GAO. Petitioner also claimed that GAO retaliated against her as a result of her protected activities. The Board granted the PAB/OGC request to stay the removal for thirty (30) days. No further requests were made in this case.

In late December 2012, the PAB/OGC requested that the Board issue a thirty (30) day initial stay to investigate the allegations that GAO committed a prohibited personnel practice by requiring Petitioner to retire from his position as a Federal Law Enforcement Officer (LEO) pursuant to 5 U.S.C. §8425(b)(1). Petitioner contended that his position did not fall under this section. Petitioner also argued that GAO retaliated against him for his protected disclosure in violation of the Whistleblower Protection Act, 5 U.S.C. §1213. The PAB/OGC believed that there was evidence to prove Petitioner's position does not fall under the LEO provision and it would be unlawful to force him to retire. The Board granted the PAB/OGC's request for a thirty (30) day initial stay. This case was still pending at the close of 2012.

### **Section 3: PAB Office of General Counsel Activity**

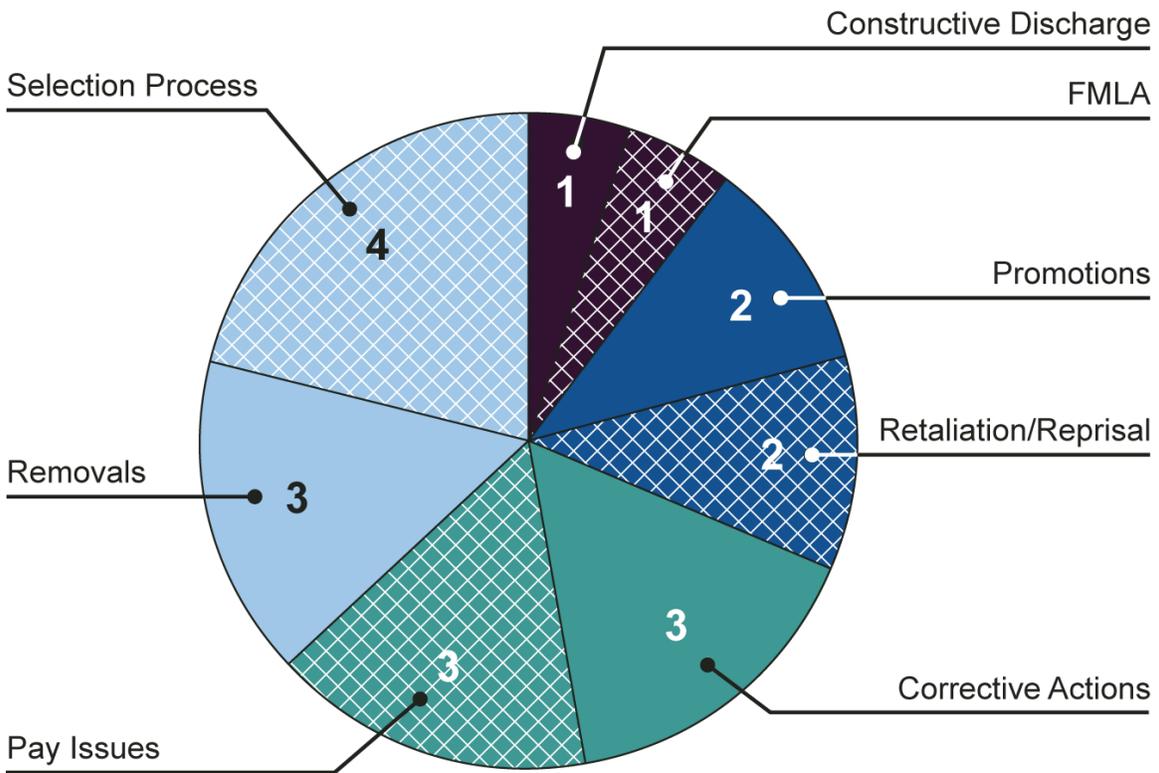
#### **a. Case Activity**

##### **(1) Charges**

There were eleven new charges filed with the PAB/OGC from January 1, 2012 through December 31, 2012. These charges involved allegations concerning the Family and Medical Leave Act (FMLA), retaliation/reprisal, the selection process, promotions, constructive discharge, removals, pay issues and corrective action investigations.

Figure 3 shows the breakdown of the legal allegations presented in charges filed with the PAB General Counsel's office.

**Figure 3: Legal Allegations**



During 2012, the PAB/OGC had a total of 34 open charges on its investigative case docket and closed 10 of the charges during the year, leaving 24 open cases on its docket at the end of 2012. The PAB/OGC settled a total of 5 cases in 2012 with 3 of the settlements being finalized in January 2013.

**(2) Litigation**

The PAB/OGC participated in twelve cases before the Board, filing five Petitions and three *Ex Parte* Requests for Initial Stay and handling four Petitions filed in previous years.

Most of the GAO investigations conducted by the PAB Office of General Counsel were initiated by charges filed by employees. PAB/OGC initiated three (3) corrective action investigations in 2012. One corrective action initiated by the PAB/OGC alleged systematic acts of age discrimination. The other two corrective actions were for allegations of improper procedures used in hiring selections.

**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 through an in-person meeting. The General Counsel's office fielded thirty-three (33) informational inquiries during 2012. The types of inquiries and the number by type are shown below.

**Figure 4: Types of Inquiries**

Legal Issues	Inquiries Totals
Hatch Act	(1) 
Hostile Work Environment	(1) 
Race Discrimination	(1) 
Hiring Process	(2) 
Disability	(2) 
Promotion	(2) 
Pay	(3) 
ULP	(3) 
Performance	(3) 
Removal	(4) 
Age Discrimination	(5) 
FOIA Requests	(6) 

In addition to the informational inquiries, the PAB/OGC also responded to a subpoena from the Department of Justice (DOJ) involving a criminal investigation at GAO.

As discussed in detail in the section on Special Projects, *infra*, an attorney in the General Counsel’s office served as Chair of the Legislative Branch Employment Dispute Resolution Council. His term ended in December 2012.

PAB/OGC commented on the following orders: GAO Order 2430.4, Performance Management Program of GAO; GAO Order 2335.8, Merit Selection Plan for Analyst and Specialist Positions; and GAO Order 2751.1, Discipline and Adverse Actions.

#### **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, and practices.<sup>22</sup> 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.<sup>23</sup>

In 2012, the Board posted an announcement to fill the vacant Oversight Director's position. Applications were received, reviewed and interviews conducted. At the close of 2012 no selection had been made.

#### **Section 5: Special Projects**

##### **a. Mediation Program**

The Board's mediation program<sup>24</sup> continued to provide employees and applicants, the Agency, and their representatives an opportunity to meet separately and/or jointly with a mediator, *i.e.*, a skilled neutral trained to assist

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<sup>22</sup> 31 U.S.C. §732(f)(2)(A); See applicable regulations at 4 C.F.R. §§28.91; 28.92.

<sup>23</sup> The Board's oversight reports can be found at [www.pab.gao.gov](http://www.pab.gao.gov) under the link to EEO Oversight.

<sup>24</sup> See *the Board's Practice Guide to Mediation of Disputes at the Personnel Appeals Board*. The mediation guidelines can also be found on the PAB's website at [www.pab.gao.gov](http://www.pab.gao.gov).

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 one mediation request. Shortly after mediation ended, the parties continued to discuss settlement arrangements.

**b. Website Developments**

The website<sup>25</sup> continues to be a valuable resource for information about the Board. The Board's website is now more user-friendly, including a more informative home page. A separate section explains the mediation process. The Annual Report and Oversight Reports are available exclusively on the website. The PAB website now allows individuals to research decisions by search terms within the decision. The website is updated regularly to include announcements as well as new decisions.

In the past, statistical information has shown that over the years the use of the Board's website has been on a steady rise. However, due to changes by GAO's Office of Information Systems Technology Services in their tracking of website usage, we are unable to provide this data for this report but the Board plans to do so as a part of next year's Annual Report.

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<sup>25</sup> The website can be found at [www.pab.gao.gov](http://www.pab.gao.gov).

**c. Legislative Branch Employment Dispute Resolution Council**

Since September 25, 2008, the Personnel Appeals Board has been a member of the Legislative Branch Employment Dispute Resolution Council (LBEDRC). This Council grew out of comments of members of the Committee on Appropriations (House Report 109-139) accompanying the Appropriations Bill for FY 2006. The Committee suggested: 1) the establishment of a Council to engage in collaborative efforts to explore and implement improvements in efficiency and effectiveness, as well as reduction of redundancies; and 2) that the Council be guided by a charter like the Administrative Officers Council and the Legislative Branch Financial Managers.

Various PAB employees have represented the PAB at these quarterly meetings. For the past three years, a PAB/OGC Senior attorney and the Clerk of the Board have been the lead PAB representatives. The PAB/OGC Senior attorney completed a two year term as Chair of the Council at the end of December 2012. In closing out his term, the Chair provided a report to the Council on its accomplishments and its future. The Council members voted to dissolve the Council but to continue sharing resources and expertise.

**d. PAB Relocation to GAO Main Headquarters**

The Board and its Office of General Counsel relocated to the GAO headquarters building in March 2012. The PAB is located in suite 1566 and the PAB/OGC is in suite 1562.