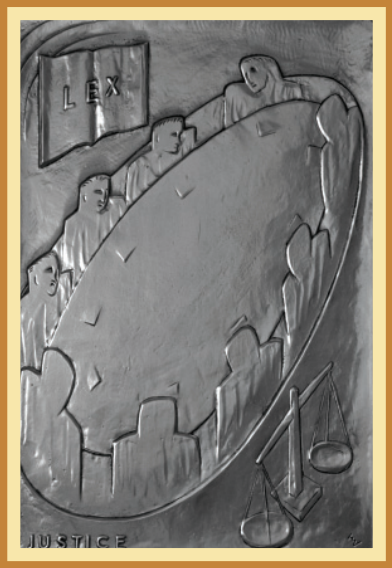

PAB

Personnel Appeals Board

O&I and the No FEAR Act at GAO

Personnel
Appeals
Board

September 15, 2008

The Honorable Gene L. Dodaro
Acting Comptroller General
U.S. Government Accountability Office
Room 7000
441 G Street, N.W.
Washington, D.C. 20548

Dear Mr. Dodaro:

Pursuant to the authority granted to it under the Government Accountability Office Personnel Act of 1980, the Personnel Appeals Board has statutory responsibility to oversee equal employment opportunity at GAO. The Board performs this function through a process of review and assessment that includes the conduct of studies and the preparation of evaluative reports containing its findings, conclusions and recommendations. In exercise of that authority, the Board is issuing the attached report on the Office of Opportunity and Inclusiveness and the No FEAR Act at GAO.

Sincerely,

P. M. Coran

Paul M. Coran
Chair

U.S. General Accounting Office • Suite 560 • Union Center Plaza II • Washington, D.C. 20548 • Phone (202) 512-6137

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PROLOGUE

Congress passed The Notification and Federal Employee Antidiscrimination and Retaliation Act (The No FEAR Act) in 2002 after finding that "Federal agencies cannot be run effectively if those agencies practice or tolerate discrimination." (5 U.S.C. §2301 note)

The Act, which creates no new cause of action, requires agencies to notify their employees of their rights under discrimination and whistleblower laws in order to increase Federal agency compliance with the law. The No FEAR Act also mandates that agencies file annual reports with Congress on the number and severity of discrimination and whistleblower cases brought against each Federal agency and that Federal agencies pay for any discrimination or whistleblower judgments, awards, or settlements in order to improve agency accountability with respect to discrimination and whistleblower laws.

At GAO, The No FEAR Act data is updated quarterly and posted on GAO's intranet under "Guidance." The web site of the Office of Opportunity and Inclusiveness (O&I) also has a link to the data, as does the Agency's external web site: www.gao.gov.

History of Board Activity

The 1995 Report

The Board took its first in-depth look at GAO's discrimination complaint process when it embarked on a study that resulted in a 1995 report entitled *GAO's Discrimination Complaint Process and Mediation Program*. In preparation for that report, the Board examined the operation of GAO's discrimination complaint process from the initial contact with a counselor through the issuance of the Agency's final decision. The study also focused on the Agency's mediation program, specifically setting out to determine whether the program provided an adequate means of resolving complaints of discrimination.

After reviewing the data, the Board became concerned about the lengthy case processing times in which discrimination complaints were taking an average of 581 days from the filing of a formal complaint to issuance of a final agency decision. The data revealed, however, that the CRO was meeting its benchmark of 180 days for investigations as they were taking an average of 169 days. Following completion of the investigation, it was taking Agency management, on average, 412 days to issue a final agency decision.

Based upon its review of GAO's complaint process and mediation program and the standards set out in directives and guidance from the Equal Employment Opportunity Commission (EEOC), the Board made seven specific recommendations about the complaint process and five recommendations about the mediation program. Contemporaneous to the issuance of the 1995 report, the Agency took steps to implement eight of the Board's recommendations. The GAO Order that governs the processing of discrimination complaints was also revised in 1997 to address, in part, Board recommendations that had included the addition of a 90-day timeframe for the issuance of final agency decisions.

The 1998 Follow-Up Report

In 1998, the Board issued a follow-up report on the discrimination complaint process in order to track the Agency's compliance with the Board's earlier recommendations from the 1995 study. By that time, the Agency had complied with 10 of the 12 recommendations that the Board had made with respect to the discrimination complaint process and the mediation program. Also of import in the 1998 study was the decrease in complaint processing time that the CRO had achieved since the release of the 1995 report. The length of time it took to process a complaint from filing through final decision had been of critical concern to the Board in the earlier study, with GAO's average case processing time placing it in the bottom one-third of Federal agencies.[1] In the year preceding the issuance of the follow-up report, CRO had reduced complaint processing time by 34 percent.

[1]GAO's average of 581 days from filing to final Agency decision did not include a hearing as a hearing in its process can only occur after the issuance of a final agency decision. The data with respect to the Executive branch agencies sometimes includes time for EEOC hearings before final agency decisions. Follow-Up Report: GAO's Discrimination Complaint Process and Mediation Program, p. 5 (1998).

The 2004 Report

In October 2000, the name of the Civil Rights Office was changed to the Office of Opportunity and Inclusiveness (O&I) and its role at the Agency was greatly expanded in order to implement a pro-active approach to equal employment opportunity.[2] Among the duties the Managing Director of O&I assumed were the review of all human capital practices, policies and procedures, as well as oversight of the performance appraisal and pay systems, promotions, the distribution of awards, the disposition of reasonable accommodation requests, discipline, and recruiting.

The Board embarked on a study of O&I in 2003 and made a number of new recommendations in the report it issued in 2004, and, again, urged the Agency to reconsider implementing prior recommendations on which there had been no action. Of utmost importance to the Board at the time was the fact that the accretion of duties by O&I's Managing Director, particularly his advisory and participatory roles in most, if not all, of the Agency's human capital practices and procedures, raised a new concern about the discrimination complaint process. EEOC's Management Directive 110 (MD 110) provides direction to Federal agencies in the development of EEO programs, including complaint processing. The Directive unequivocally states that the "same agency official responsible for executing and advising on personnel actions may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint processes."[3] In order to maintain the integrity of the EEO complaint process, the Board recommended creation of a separate unit devoted exclusively to the processing of discrimination complaints.

The 2005 Report

In 2005, the Board took a decidedly more global approach to the discharge of its oversight mandate. In a report entitled *The State of Equal Employment Opportunity at GAO in the 21st Century*, the Board revisited a number of issues on which it had reported and recommendations it had made during the previous 18 years, including those that were developed to ensure the integrity of the discrimination complaint process.

At the time of that report, there remained two significant matters affecting the operations of O&I about which the Board and the Agency disagreed. In the aforementioned 2004 report in which the Board studied the operations of O&I, the Board expressed concern that the Managing Director's advisory and participatory roles in the Agency's human capital practices and procedures ran afoul of established complaint processing procedures. In order to maintain the integrity of the EEO complaint process, the Board recommended creation of a separate unit devoted exclusively to the processing of discrimination complaints. In comments on the 2005 draft report, the Agency reiterated that it opposed the creation and maintenance of a separate unit as it would be inefficient given the small number of complaints O&I handles and that the appearance of any conflict of interest would be mitigated by the fact that GAO contracts out its complaint investigation function.

[2]See Management News, Vol. 28, No. 16 (Jan. 22-26 (2001)); Vol. 28, No. 21 (Feb. 26 - Mar. 2 (2001)). The head of the Office, who reports directly to the Comptroller General, was given the title of Managing Director.

[3]Equal Employment Opportunity Management Directive 110, Ch. 1, p.2 (found at www.eeoc.gov).

The second area of disagreement concerned the addition of discrimination on the basis of sexual orientation to the GAO Order that governs the discrimination complaint process at GAO, which the Comptroller General had already indicated that he planned to do when it was next revised.[4] Unlike other complainants, employees who file complaints alleging discrimination on the basis of sexual orientation do not have the right to appeal their claims to the PAB because sexual orientation is not covered under any anti-discrimination statutes. The Government Accountability Office Personnel Act (GAOPA) that established the PAB provides that the Board may adjudicate any personnel matter that the Comptroller General decides that the Board should resolve.[5] Based on that authority, the Board suggested that the Comptroller General revise GAO Order 2713.2 to provide that complaints of discrimination on the basis of sexual orientation be appealed to the PAB in the same manner as other discrimination complaints. The Agency notified the Board that it had no plans to extend the jurisdiction of the PAB to cover complaints of discrimination on the basis of sexual orientation.

The No FEAR Act

In 2002, Congress enacted The Notification and Federal Employee Antidiscrimination and Retaliation Act[6] (No FEAR Act) to hold Federal agencies financially accountable for violations of discrimination and whistleblower protection laws and to strengthen notification and reporting requirements. The statute creates no new cause of action for employees. Under the provisions of the No FEAR Act, agencies are required to use a number of training techniques to ensure that their employees and managers are aware of their respective responsibilities, rights, and remedies; to provide notice to employees and applicants about their rights and protections available under discrimination and whistleblower laws; and to post publicly their complaint resolution data.

GAO publishes information about its discrimination complaints collected pursuant to the No FEAR Act on a quarterly basis on both its Intranet and Internet pages with comparative data for multiple years. The data includes the number of complaints filed, the number of complainants, the basis of each complaint (i.e., race, sex, age disability, etc.), the issue being alleged (e.g., disciplinary action, reassignment, termination, non-selection for promotion, etc.), processing times,[7] dismissals, final agency actions, and bases for final actions.

Board staff has been regularly reviewing GAO's No FEAR Act data as it is posted and, in 2007, brought the increasing times in the length of processing discrimination complaints to the Board's attention. After noting that the average number of days complaints were pending in final action stage was 614, the Board determined that it was time to begin a systematic review of the results from the first five years of reporting. In Chapter II of this report, the Board takes an in-depth look at the No FEAR Act data.

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[4]In 2005, when the *State of Equal Opportunity* report was published, GAO Order 2713.2 had not been revised or updated since 1997. The Board noted then that the revisions were "long overdue." A revised Order, that included discrimination on the basis of sexual orientation, was finally published on May 21, 2007.

[5]31 U.S.C. §753(a)(8).

[6]5 U.S.C. §2301 note. For its applicability to GAO, see No FEAR Act Notice, 71 Fed. Reg. 65,525 (Nov. 8, 2006).

[7]Processing time is defined as "The average length of time it has taken an agency to complete respectively investigation and final action for [all complaints] . . . ." 29 C.F.R. §1614.704(f).

GAO Order 2713.2

In its 2005 report on the state of EEO at GAO, the Board addressed O&I's procedures and operations, calling again for the Agency to update its internal Order on discrimination complaint processing.[8] In May 2007, nearly ten years after the last revision and six years after the creation of O&I, GAO issued a revised Order. Other than necessary updating to reflect the change in nomenclature from Civil Rights Office to Office of Opportunity and Inclusiveness, the single biggest change to the Order was the inclusion of sexual orientation as a basis for a discrimination complaint. As previously discussed, the Board and the Agency disagree on how these complaints should be handled and also how much information about the lack of appeal rights employees should be given. A complete discussion of this topic and other changes to the Order can be found in Chapter III.

Additional Duties and Responsibilities of O&I

As previously noted, when the Office of Opportunity and Inclusiveness replaced the Civil Rights Office, its role in the Agency's Human Capital programs and initiatives was greatly expanded beyond the complaint processing, mediation, and affirmative action planning functions of its predecessor. The O&I of today is a pro-active force at GAO in virtually every internal and external matter with a human capital component. The Managing Director participates in the design of recruitment procedures; reviews offers of employment; makes recommendations with respect to the promotion process; and conducts independent data reviews of the Agency's promotions, competitive placements, performance ratings, and awards. In addition, the Managing Director is a stakeholder in any GAO engagement that addresses EEO issues, reviewing and commenting on the project design and draft report, as well as functioning as an advisor to the relevant team handling the engagement. The Office's direct, hands-on involvement in a broad range of activities that have an impact on GAO's equal employment practices and policies and the question of whether participation in these activities creates an appearance of a conflict of interest with the complaint function are addressed in Chapter IV of this report.

Scope of the Study

The Board fulfills its oversight mandate by conducting evaluative studies of GAO's equal employment opportunity policies, practices, and procedures and issues reports containing its findings, conclusions, and recommendations.[9] Comporting with longstanding Board practice, this study began with a request to the Agency to supply certain data and information to the Board and to answer questions about the operations of the Office of Opportunity and Inclusiveness. In addition, Board staff obtained No FEAR Act data posted by other agencies for comparative purposes and reviewed relevant GAO Orders, EEOC Directives, regulations and statutes.

[8]State of Equal Employment Opportunity at GAO, pps.40-41.

[9]The Board's oversight reports are at www.pab.gao.gov under the link to EEO Oversight.

No FEAR Act: 2002-2007

Pursuant to the mandates of the No FEAR Act, GAO has posted a notice on both the Agency's internal and external websites setting forth the bases on which discrimination is prohibited and the procedures to follow in order to seek relief.[10] Another section of the notice references the timelines for filing complaints and provides citations to the Orders and regulations that further describe complaint procedures. The notice also explains whistleblower protection laws and lays out the procedures for filing such a claim. Finally, the notice provides contact information within GAO, including O&I, the Legal Services Group in GAO's Office of General Counsel, and the PAB/OGC and provides information about and Internet addresses for both the EEOC and the Office of Special Counsel.

In addition to the notice, O&I is responsible for providing training to all GAO employees every two years on their rights and protections under antidiscrimination statutes and whistleblower protection laws. O&I staff worked with the Agency's Office of General Counsel to develop a mandatory web-based training course, "Rights and Protections Under Antidiscrimination and Whistleblower Protection Laws." The course is updated and offered every two years.

In 2002, O&I began posting No FEAR Act data on the number and status of complaints at GAO on the Agency's internal and external web sites.[11] The data includes not only the statutory basis for each complaint but also the issue underlying each allegation.[12] In addition, GAO must show the average length of time it takes to complete each step of the process, dismissals, final agency actions with findings of discrimination by basis and issue, and comparative data for previous years.

In 2006, the Agency changed the format of its No FEAR Act reporting, transitioning from an 11-page document that relied on Tables to present the information to a four page spreadsheet layout that more closely conforms to the format preferred by other agencies in the Executive branch.

In the five year time period of 2002-07, 635 employees contacted O&I for counseling. Of those, 511 (80%) chose not to pursue their concerns through the administrative process; 13 complaints were informally resolved or settled, although only one since 2002; and 69 people filed formal complaints. At the end of 2006, the average number of days complaints were pending in the investigative stage was 144, well below the 180 days mandated by the GAO Order that governs discrimination complaint processing at GAO.[13] By the end of 2007, however, there were 12 complaints pending in the investigatory stage that had already exceeded that required time frame.[14]

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[10]Data on complaints of discrimination captured under the No FEAR Act include the categories of race, color, religion, reprisal, sex, national origin, age, disability, and the Equal Pay Act. Allegations of discrimination on the bases of marital status or political affiliation are handled as prohibited personnel practices by the PAB/OGC and are not within the purview of the No FEAR Act posting requirements. Data on complaints of discrimination on the basis of sexual orientation are also not included in No FEAR Act postings because the Act covers only statutory bases of discrimination. Sexual orientation discrimination complaints are processed as prohibited personnel practices in the Executive Branch.

[11]While O&I publishes No FEAR data on the GAO internal web site, the link to No FEAR Data on its own web site does not lead to any site with data or information.

[12]Issues include appointment, assignment, awards, disciplinary action, duty hours, appraisal, harassment, pay, promotion, reassignment, reasonable accommodation, retirement, termination, terms and conditions of employment, time and attendance, and training.

[13]The investigation of discrimination complaints at GAO is performed under contract.

[14]The No FEAR Act data for the quarter ending on December 31, 2007 shows the average number of days in the investigation stage as 416. However, the average for 2006 was 144 days and at the end of 2006 and through the second quarter of 2007, the posted data show no pending complaints exceeding the time frame.

The Agency also issued 16 final decisions during the relevant time, none of which resulted in a finding of discrimination. GAO Order 2713.2 directs the Agency to issue final decisions within 90 days of the complainant's receipt of the investigative file yet the average length of time that pending complaints are currently awaiting final decision is 614 days.

The table below shows GAO's processing times as compared to those of five other agencies. The last complete year for which most agencies have posted data is 2006 so that is the year for which data are reflected in the table.

Table 1: Comparative Complaint Processing Times[15]

Agency	Number filed complaints (2006)	Average days investigation	Average days final action	Dismissals	Average time to dismissal
GAO	35	144	614	0	0
EEOC	21	180	174	4	75
SEC	13	176	71	4	77
FLRA	1	176	42	0	0
CPSC	7	147	70	2	7
OPM	36	105	209	16	56

For the period shown, GAO's processing times in the investigation stage were well within the 180 days mandated by the Order and also at the lower end when compared to other agencies.[16] Its times for completing the final action portion of the process, however, were nearly three times longer than the nearest figure reported by the other agencies and not very far from the 581 day average that the Board first noted as a problem in 1995.[17] At GAO, O&I drafts a recommended decision and the Chief Operating Officer and issues a final agency decision with either a finding of no discrimination or a finding of discrimination.[18]

[15]The agencies selected and their approximate number of employees are: the Equal Employment Opportunity Commission (2,200); the Securities and Exchange Commission (3,800); the Federal Labor Relations Authority (215); the Consumer Product Safety Commission (420); and, the Office of Personnel Management (5,700).

[16]For example, the Office of Management and Budget (OMB) which, from 2001 through 2006, had six discrimination complaints filed reported in 2006 that complaints were in the investigation stage for an average of 365 days.

[17]GAO's Discrimination Complaint Process and Mediation Program, p. 9 (1995).

[18]In the past, the Legal Services Group, located within GAO's Office of General Counsel, reviewed the draft decision. The Board has pointed out the inherent conflict of interest that arises when the decision is reviewed by the same unit that represents the Agency in subsequent legal proceedings. Attorneys from the Legal Services Group no longer review final agency decisions. Memorandum from Ronald A. Stroman, Managing Director, O&I (Apr. 29, 2008).

Complaint Resolution

According to figures provided by O&I, 80 percent of those contacting the Office in the past five years chose not to pursue their complaints. At the time of the Board's 2004 study and report, when it was discovered that 65 percent of those contacting the Office were deciding not to pursue their complaints, the Board recommended that O&I survey those who made contact and track the reasons that such a high percentage was dropping out of the formal Agency process. The Agency assured the Board that O&I was in the process of developing a customer satisfaction survey that would be provided to everyone who contacts the Office.[19]

In 2005, when the Board again inquired about a survey, the Agency unequivocally stated that "O&I plans to do a customer satisfaction survey in Fiscal 2006."[20] In materials sent to the Board in 2007 pursuant to a request in this current study, O&I stated that it "does not currently have a customer satisfaction survey, but will be able to survey our customers through our website that was just launched on May 10, 2007."[21] At the end of 2007, the section of the web site called "Listening to Our Customers" remained under construction and unavailable.

The table below shows discrimination complaint activity and resolutions in O&I for 2002 through the second quarter of 2007.

Table 2: Discrimination Complaint Processing at GAO

	2002	2003	2004	2005	2006	2007
Contacts	70	115	101	125	160	64
Did not pursue	36 (51%)	102 (87%)	92 (91%)	115 (92%)	118 (74%)	48 (75%)
Number of complaints	5	6	4	4	35	13
Informal resolution	12	0	0	0	1	0
Mediation	2	6	3	15	9	
Dismissals	3	1	1	0	2	0
Final decision	0	4	4	5	3	0

[19]Letter from Jesse E. Hoskins, Chief Human Capital Officer (Aug. 21, 2003).

[20]The State of Equal Employment Opportunity at GAO in the 21st Century, p. 43 (2005).

[21]Memorandum from Ronald A. Stroman, Managing Director, O&I (May 11, 2007) (hereinafter Stroman Memorandum).

Of the 42 persons who entered the mediation program, 23 completed mediation successfully; none of those who terminated mediation subsequently filed a formal complaint.

According to the Managing Director, more than 60 percent of people contacting O&I alleged discrimination on the basis of race, with age discrimination and retaliation comprising 10 to 20 percent of the allegations each year.[22] Now that the GAO Order covers discrimination on the basis of sexual orientation, the Board trusts that whenever O&I proffers discrimination complaint processing figures and percentages that they will reflect the universe of complaints the Office handles, including those alleging discrimination on the basis of sexual orientation.

[22] *Id.*

During the preparation of the Board's 1995 report on the discrimination complaint process, GAO made extensive revisions to Order 2713.2, bringing the Agency's discrimination complaint process, for the most part, in line with EEOC's standards for Executive branch agencies. The Agency retooled the Order again in 1997, incorporating many of the changes that the Board had recommended in its 1995 report. Despite the Board's repeated recommendations that the Order be updated, particularly after the creation of the Office of Opportunity and Inclusiveness, nearly 10 years elapsed before the next revision which took place in 2007.

Discrimination on the Basis of Sexual Orientation

The most significant change that occurred as a result of the latest revision to Order 2713.2 was the addition of sexual orientation as a basis for filing a complaint of discrimination at GAO. Prior to the issuance of the revised Order, an employee or applicant who believed that he or she had been discriminated against on the basis of sexual orientation could seek redress by filing a Charge directly with the Board's Office of General Counsel alleging a prohibited personnel practice.[23] Any charge alleging a prohibited personnel practice filed with the PAB/OGC is investigated and may be adjudicated in a formal hearing before the Board, with any resultant adverse decision appealable to the U.S. Court of Appeals for the Federal Circuit. Even with the revision to the GAO Order, that option remains available to GAO employees and applicants who allege discrimination on the basis of sexual orientation.

The Board's approach to handling complaints of discrimination on the basis of sexual orientation is very similar to that of the Executive branch. In that branch of the Government, the fact that Title VII of the Civil Rights Act does not prohibit discrimination on the basis of sexual orientation precludes the EEOC from handling such complaints.[24] Because the Office of Personnel Management (OPM) has determined that discrimination based on sexual orientation is a prohibited personnel practice, those cases fall under the jurisdiction of the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) which process cases in much the same manner as the Board.[25] Early in his tenure, however, then Comptroller General David M. Walker issued a Memorandum giving employees "the right to file a complaint with the Civil Rights Office when they believe discrimination has occurred based upon their sexual orientation."[26] In its 2004 report on the operations of O&I, the Board recommended against the formal inclusion of sexual orientation in the GAO Order and urged the Agency to continue to follow the Executive branch's lead and process the allegations as prohibited personnel practices.

When it became clear that the Agency would be including sexual orientation in its forthcoming revision of GAO Order 2713.2, the Board suggested a compromise. The Government Accountability Office Personnel Act that established the Board contains a provision that allows the Comptroller General to decide that the Board may adjudicate any personnel matter he deems appropriate.[27] Based on that authority,

[23] 5 U.S.C §2302(b)(10). It is a prohibited personnel practice to "discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or appliant or the performance of others."

[24] On November 7, 2007, the House of Representatives passed the Employment Non-Discrimination Act of 2007 (ENDA) which prohibits employment discrimination on the basis of sexual orientation. ENDA is similar in most respects to Title VII of the Civil Rights Act but provides more limited remedies. As is the case with Title VII, enforcement of ENDA's provisions would lie with the EEOC. The bill is pending in the Senate. H.R. 3685, 110th Cong. (2007).

[25] Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights, U.S. Office of Personnel Management, available at www.opm.gov.

[26] Comptroller General's June 25, 1999 Memorandum to All GAO Employees.

[27] 31 U.S.C. §753(a)(8).

the Board noted that the Comptroller General could amend the Order allowing complaints alleging discrimination on the basis of sexual orientation to be appealed to the PAB in the same manner as other discrimination complaints. The Board cautioned the Agency that it needs to make clear to complainants that even this method of handling sexual orientation discrimination complaints will not afford those complainants the same panoply of appeal rights available to others alleging discrimination. While these complainants would be able to take advantage of the PAB processes from investigation through adjudication and internal appeal, they would have no right to appeal any adverse Board decision to the U.S. Court of Appeals for the Federal Circuit.

The Agency notified the Board in 2005 that the Comptroller General would not be expanding the jurisdiction of the Board to cover appeals of complaints of discrimination based on sexual orientation filed with O&I. The right to file a complaint of discrimination based on sexual orientation with O&I was formally accomplished with the publication of revised Order 2713.2 in May 2007 which describes the types of complaints covered by the Order and their legal bases:

> Individual and class complaints of employment discrimination and retaliation prohibited by Title VII (discrimination based on race, color, religion, sex, or national origin) the ADEA (discrimination based on age when the aggrieved person is at least 40 years of age), the ADA (discrimination based on disability), the EPA (sex-based wage discrimination), or Executive Order 13087, Further Amendment to Executive Order 11478, Equal Employment Opportunity in the federal government (discrimination based on sexual orientation) shall be processed in accordance with this order. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for the purposes of this order.[28]

With the exception of sexual orientation, the prohibitions against employment discrimination listed in the Order all have statutory bases.[29] Because the authority for the sexual orientation jurisdiction does not derive from an anti-discrimination statute, the only remedy available to complainants is through the administrative process of O&I with no appeal rights. The Board had urged the Agency to include language in any updates to the Order that would clearly explain the lack of any appeal right to complainants. While Chapter 6, *Civil Actions and PAB Appeals*, of the revised Order notes that "Title VII does not cover sexual orientation" and fails to explain the difference in appeal options to individual complainants at that point, the Order does charge O&I with advising that "no appeal rights exist with respect to any allegations in a complaint of discrimination based on sexual orientation" when acknowledging the receipt of the complaint in writing.[30] According to the Managing Director of O&I, he and his staff "indicate to employees that the Personnel Appeals Board does not currently enforce the protections that prohibit discrimination and harassment based on sexual orientation."[31]

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[28]GAO Order 2713.2, Ch. 1, ¶7.

[29]The ban against discrimination on the basis of sexual orientation derives from Executive Order 13,087 (3 C.F.R. 191 (1999)) which amended Executive Order 11,478. 34 Fed. Reg. 12,985 (Aug. 12, 1969).

[30]Ch. 6, ¶1 (Note). The Order's explanatory language for complainants in a class action states: "The [final] decision shall include a notice of the right to file a charge with the General Counsel of the PAB or a civil action in U.S. district court, in accordance with chapter six and the applicable time limits, except that no such rights exist with respect to findings involving sexual orientation discrimination." Order 2713.2 Ch. 4, ¶14(c).

[31]Letter from Ronald A. Stroman, Managing Director, O&I (May 11, 2007).

Other Changes

The remainder of the revisions made to GAO Order 2713.2 either involved changes necessitated by CRO's name conversion to O&I or conformed procedures to those of the Executive Branch. In the section of the Order on dismissals of complaints, for example, a subsection was added that allows O&I to dismiss a complaint that is "part of a clear pattern of misuse of the discrimination complaint process for a purpose other than the prevention and elimination of employment discrimination.[32] To establish evidence of misuse of the process, O&I is to consider multiple complaint filings, prior allegations that are similar or identical, and/or indication the complaint was filed to circumvent other administrative processes or retaliate against GAO's process, or the filing overburdens the discrimination system. The new bases for dismissal bring that portion of the GAO Order in accord with EEOC regulations.[33]

The Board has also previously recommended that the Order include standards for discretionary dismissal of complaints that form the basis of Charges filed with PAB/OGC. In the Executive branch, the complainant must elect to pursue the non-EEO process and the Agency must inform and advise complainants of their rights in order to ensure that any such election is knowing and voluntary. No such standards were added to the Order when it was most recently revised.

[32]GAO Order 2713.2, Ch. 3, ¶5(a)(11).

[33]29 C.F.R. §1614.107(a)(9).

As noted in the Board's 2004 study of O&I, the role that Office plays in Human Capital related programs has been greatly expanded beyond the complaint processing and mediation that were the primary functions of its predecessor office. The Office was created to transform the Agency's diversity management practices and the Managing Director serves as principal advisor to the Comptroller General on a wide range of matters involving equal employment opportunity at GAO.[34] As an indication of its changing role, in 2001, O&I spent 70 percent of its time on discrimination complaint processing; that figure is now 50 percent.[35]

At the time of the Board's 2004 study of O&I, the Managing Director was overseeing the performance appraisal, promotion and pay systems; reviewing decisions affecting the composition of best-qualified lists, awards, promotions, reasonable accommodation, benefits, assignments, discipline and terminations; and was active in the recruitment and hiring processes. The Managing Director of O&I is also charged with reviewing and, where appropriate, recommending changes to GAO's human capital policies and practices.[36] His advisory and participatory roles in most of the Agency's human capital practices and procedures appear to be every bit as integral to the personnel workings of GAO now as they were then.

Among the Managing Director's more visible functions are his roles serving as a Stakeholder in all GAO engagements with a human capital component; contributing to the GAO Strategic Plans; holding briefing sessions and training for managers and employees on diverse issues such as the performance evaluation system, recruiting strategies and techniques; hosting workshops for interns and providing counseling sessions for them; participating in Diversity Month activities; and, briefing staff on the Agency's policy on sexual harassment.

As noted in prior Board reports and earlier in this report, the EEOC cautions that the agency official responsible for executing and advising on personnel actions cannot also be responsible for managing, advising, or overseeing the EEO pre-complaint or complaint processes. The Board has long advocated administrative separation of the O&I functions.

The Managing Director at GAO is not only active in the development of personnel policies but takes actions with respect to employees that may very well form the basis for a complaint in the very system that he runs. For example, the Managing Director has reviewed performance appraisals and, based on discussions with other Managing Directors, changes were made in the appraisals. He has also identified staff who he believed should have been on a best-qualified list but were not. In some cases, adjustments were made to the lists. The Managing Director has also been instrumental in the reversal of the disapproval of telework decisions and the addition of employees to QSI and honor award lists.

In each of these instances, a person who failed to make a best-qualified list or who did not get an award or believed a performance appraisal or some other personnel action to be discriminatory may file a complaint with O&I. If the complainant were, in fact, alleging discrimination in a personnel action that the Managing Director had reviewed and adjusted, the complaint would raise the very conflict underlying the EEOC Directive and the Board's concerns.

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[34]Building Diversity in GAO's Senior Executive Service, Hearing Before the House Subcommittee on Federal Workforce, Postal Service, and the District of Columbia, Committee on Oversight and Government Reform, 110th Cong. (2007) (Testimony of Ronald A. Stroman, Managing Director, Office of Opportunity and Inclusiveness, GAO).

[35]Stroman Memorandum.

[36]GAO Order 0130.1.26, Office of Opportunity and Inclusiveness (Mar. 17, 2005).

The Agency has always asserted the small number of discrimination complaints filed each year as the reason that a creation of a separate unit within O&I would be inefficient. That may have been true in the past when four or five formal complaints a year were the norm at GAO but 35 complaints of discrimination were filed in O&I in 2006 and 13 had been filed by mid-2007.

Separation of the functions would dispel the notion of any appearance of a conflict while allowing the Managing Director to continue the proactive program of prevention of discrimination and wide-ranging approach to equal employment opportunity he has brought to GAO.

Chapter V: Recommendations

The Board has had a longstanding and genuine interest in ensuring the integrity of the discrimination complaint process at GAO and, over the years, has made a number of recommendations to the Agency designed to enhance and fine tune the process. As noted in previous reports, the Agency has adopted many of the Board's recommendations but, as also noted, there continue to be issues about which the Board and Agency have yet to agree. At the conclusion of this study, there remain some minor adjustments that need to be made, as well as three major areas of concern to the Board: the potential conflict of interest in the complaint process caused by a serious accretion of duties by O&I's Managing Director; the manner in which complaints of discrimination on the basis of sexual orientation are handled; and, the increasing length of time that complaints are languishing awaiting final Agency action. The Board makes the following recommendations to improve the Agency's internal administrative process:

- **A separate unit should be established in which assigned staff would devote their time exclusively to the processing of discrimination complaints, including mediation. The unit could be part of O&I for administrative purposes or be a stand-alone unit but its staff would not have any responsibility for human capital or personnel issues at GAO.**

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

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

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

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

- **Chapter 3, ¶1(b) of GAO Order 2713.2 should be amended to require that a complainant who is the subject of an action appealable to PAB/OGC and who has raised an issue of discrimination is to be advised that he or she must elect the forum in which to proceed. Any such complainant should be fully apprised of their respective rights and be told that he or she may file a charge with the PAB/OGC within 30 days of the effective date of the personnel action and raise the issue of discrimination in Board proceedings or may file a complaint of discrimination with O&I and begin the administrative process. Electing the latter process does not necessarily preclude a**

subsequent filing with PAB/OGC relating to the personnel action. The explanation of the choices and their ramifications should be such that it ensures that the employee's election is both knowing and voluntary. In addition, any such explanation should also include sufficient information about processing times in O&I and in PAB/OGC to enable a complainant to make a fully informed decision.

Chapter VI: Appendix

Pursuant to established practice, after the Board approved the O&I draft report, it was circulated for comment to the Agency, the PAB General Counsel, the Union, and GAO's five diversity councils: the Advisory Committee for Persons with Disabilities (ACPD); the Asian American Liaison Group (AALG); Blacks In Government (BIG); the Gay and Lesbian Employee Association (GLEA); and, the Hispanic Liaison Group (HLG). The comments received follow. In addition, based on suggestions made by BIG, GLEA, and the Union, the Board made appropriate changes to the report.

GAO

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Advisory Council for Persons With Disabilities

April 9, 2008

Ms. M. Gail Gerebenics
Personnel Appeals Board
US Government Accountability Office
Suite 560, Union Center Plaza II
Washington, DC, 20548

Dear Ms. Gerebenics:

Thank you for providing me an opportunity to comment on the Personnel Appeals Board draft report on the Office of Inclusiveness and Opportunity and the No FEAR Act. As a member of the Employee Advisory Council for the Advisory Council for Persons with Disabilities I support all of the recommendations made in this report.

As part of GAO's mission to make government work better, your recommendations to more clearly articulate the process and options associated to all employees filing a discrimination complaint should provide greater transparency of the process and educate GAO employees allowing for a more informed and comfortable environment in which to decide a course of action. In the same light, by supplementing its web site, the Office of Inclusiveness and Opportunity has an opportunity to provide GAO employees with information which can be accessed easily, anytime. In addition, the collection of information from employees who contact the office could ultimately support its own operations and services.

Sincerely yours,

Elizabeth D. Morris

Elizabeth D. Morris
Employee Advisory Council Representative
For the Advisory Council for Persons with Disabilities

Blacks In Government
U.S. Government Accountability Office
And U.S. Army Corps of Engineers Chapter
P.O. Box 50533
Washington, D.C. 20001

April 14, 2008

M. Gail Gerebenics
Personnel Appeals Board
U.S. Government Accountability Office
Suite 500
Union Center Plaza II
Washington, DC 20548

Dear Ms. Gerebenics:

On the behalf of the GAO-USACE chapter of Blacks in Government (BIG), I thank you for the opportunity to comment on this valuable report on GAO's Office of Opportunity and Inclusiveness (O&I) and its implementation of the No FEAR Act. Upon reviewing this report, we agree with its recommendations and hope that they will be quickly implemented by the office. The issues raised in this report, especially concerns related to options for filing discrimination complaints and the timeliness in issuing decisions on these cases, have been longstanding concerns for our chapter, and we have discussed these matters with GAO managers on several occasions.

All federal agencies are charged with implementing their mission in an efficient and equitable manner, recognizing that balance is needed between the two. However, upon reviewing this report, specifically the findings on the discrimination complaint process, it appears the O&I is currently not meeting either of these goals. For example, the report mentions that average number of days for complaints pending in final action was 614, or over 1 ½ years, on average. Furthermore, the officers and members of BIG have learned about how several cases related to the Band II restructuring which were filed with O&I have still not been resolved, despite the fact that similar cases filed with the PAB were settled in the spring of 2007. Therefore, O&I's current process results in GAO employees having to work in potentially hostile work environments for long periods of time without resolutions. These conditions are among those that breed issues, such as a lack of confidentiality and retribution, from which the No Fear Act was design to protect federal employees. Beyond this, the current process puts into question whether an employee can obtain good counsel from the office, given that 80% of those soliciting assistance do not take further administrative action.

Although we agreed with all of the recommendations, we would like to see a refinement to these that we believe with improve the process. Specifically, we believe that an individual should be informed about the average complaint resolution time for both O&I and the PAB at that point he or she is being counseled, in addition to information on

filing options. We believe that this information is vital to the individual's ability to determine the best personal option.

Again, we thank you for the opportunity comment and look to the implementation of recommended changes.

Sincerely,

Danielle T. Giese
EAC Representative

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GLEA

April 14, 2008

M. Gail Gerebenics
Director, EEO Oversight
Personnel Appeals Board
U.S. Government Accountability Office
Union Center Plaza II, Suite 560
820 First Street, N.E.
Washington, D.C. 20002

Dear Ms. Gerebenics:

Thank you for providing GAO's Gay and Lesbian Employee Association (GLEA) an opportunity to comment on your recent draft report based on your study of GAO's Office of Opportunity and Inclusiveness (OOI) and the No FEAR Act. We appreciate your attention to the issue of equal treatment of all employees, including lesbian, gay, bisexual, and transgender employees, and keeping LGBT employees and our colleagues informed about our rights in the workplace.

While major in-roads have been made in the provision of equal rights and benefits for LGBT employees and their families working in the private sector and some state and local governments, progress in this area for federal employees has been minimal. We are very appreciative that GAO's nondiscrimination policy includes sexual orientation and that we have at least some, if not equal, access to certain benefits, such as being able to use sick leave to care for a same-sex partner or spouse in some situations. However, we continue to fall behind our colleagues in other areas including some benefits and protections that are at the discretion of GAO and others that are broader, such as not being fully protected from discrimination by federal law, not having any protection from discrimination based on gender identity, and not being able to access the same benefits that our married colleagues enjoy, such as being able to have a partner eligible for coverage insured under an employer-provided health care plan.

We therefore appreciate the Personnel Appeals Board's efforts to recognize and correct disparities that may exist within GAO's policies. To that end, we endorse your recommendations to revise GAO Order 2731.2 to provide that complaints of discrimination on the basis of sexual orientation may be appealed to the PAB in the same manner as other discrimination complaints and to have O&I staff explain to complainants alleging discrimination on the basis of sexual orientation that they have the option of filing a charge with PAB that a prohibited personnel practice has occurred and that the exercise of such option fully preserves all appeal rights.

Additionally, we noted with interest that GAO is required under the No FEAR Act to collect and report data on discrimination complaints in a number of categories. While we understand that the act does not require GAO to collect and report data on discrimination complaints on the basis of sexual orientation or gender identity, we believe it would be worthwhile for GAO to voluntarily track and report this data, so that GAO, its employees, and the public could have a better understanding of the magnitude of this issue.

Thank you again for your attention to these issues and for the opportunity to be a part of your efforts to make GAO a model agency for all employees.

Sincerely,

Beverly Ross

Beverly Ross
Member, GLEA Executive Committee

Personnel
Appeals
Board

Office of General Counsel

April 16, 2008

Ms. M. Gail Gerebenics
Director of Oversight
Personnel Appeals Board
U.S. Government Accountability Office
820 First Street, N.E., Suite 560
Washington, D.C. 20002

Dear Ms. Gerebencis:

This is in response to your letter of March 14, 2008 forwarding a draft copy of the Oversight Report of the Personnel Appeals Board (PAB or Board). In the section designated "Other Changes," the Report states that the "Board has also previously recommended that the Order include standards for discretionary dismissal of complaints that form the basis of Charges filed with the PAB/OGC" and notes that the Order did not include such standards. Report at 20. While recognizing that GAO Order 2713.2 ch 3 5(b) refers to the Office of Opportunity and Inclusiveness (OOI) Managing Director discretion to dismiss such complaints, I do not believe, based on the following analysis, that the regulatory scheme contemplates such authority. Therefore, I am submitting these comments in order to address this potential point of confusion in the complex relationship between the OOI and PAB/OGC processes.

The mechanism for processing discrimination claims of GAO employees is an amalgam of the Board's regulations at 4 CFR §28.95 *et seq.* and GAO Order 2713.2 (*Discrimination Complaint Process*)(Order). The regulatory complaint process is bifurcated based upon the nature of the underlying personnel action. Specifically, with regard to removals, demotions, and other adverse actions[1] which the employee believes were due in whole or in part to unlawful discrimination, the regulations stipulate that the complainant may, in the first instance, elect to seek relief *either* at OOI (for the discrimination claims) or from the PAB (for the discrimination

[1] The Order defines "adverse action" as referring only to major personnel actions, a usage which comports with the practice under the Civil Service Reform Act. *See* Order, ch.3(2). For purposes of these comments, "adverse action" refers only to major personnel actions.

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and other claims), but not both. *See* 4 CFR §28.98(c)(1); Order, ch. 3(2). In the case of a nonadverse action, such as a nonselection for promotion or reassignment, which the complainant believes was due in whole or in part to unlawful discrimination, the complainant *must first* seek relief from OOI concerning the discrimination claims before pursuing any other remedy. *See* 4 CFR §28.98(a).

However, even where an employee has either elected (adverse actions) or has been required (nonadverse actions) to pursue a remedy for the discrimination claims at OOI, he/she can ultimately obtain Board review of the discrimination claims, as well as any related nondiscrimination claims,[2] by filing a charge with the General Counsel within thirty days after GAO rejects the complaint in whole or in part, or issues a final decision upon OOI's investigation, or after 120 days from the date of filing the formal complaint with OOI if GAO fails to issue a final GAO decision. *See* 4 CFR §28.98(b) and (c)(2); Order, ch. 6(4)(a). The claim is thereafter processed under the Board's regulations governing the investigation of charges. *See* 4 CFR §28.98(e)(1); Order, ch. 6(4)(b).

Consistent with the regulatory scheme outlined above, if an employee elects to challenge an adverse action with the PAB, then he or she cannot thereafter pursue a remedy for claims arising from the same action at OOI. Therefore, that Office has no choice but to dismiss any complaint filed under these circumstances.

Conversely, the employee seeking to challenge a nonadverse action on the grounds that it was due in whole or in part to discrimination *must* file a complaint with OOI first before coming to the PAB/OGC under the conditions set forth in 4 CFR §28.98(b). A premature filing of a charge with the PAB in this instance does not deprive the OOI of jurisdiction and it therefore does not have the discretion to dismiss the complaint even in the face of an improperly filed PAB charge.

Finally, where the conditions in 4 CFR §28.98(b) are present, and the employee properly files a charge with the PAB/OGC after having initially pursued relief from OOI, then OOI must dismiss the complaint that had been filed there. In any event, in no instance does OOI have discretionary authority to dismiss a complaint in response to a charge having been filed at the PAB/OGC.

Sincerely,

Anne Wagner

Anne Wagner
General Counsel

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[2] The PAB regulation provides that if a discrimination claim filed at OOI relates to non-discrimination claims within the PAB's jurisdiction, a charge filed pursuant to 4 CFR §28.98(b) will be deemed a timely appeal of the nondiscrimination claims. 4 CFR §28.98(c)(2).

May 21, 2008

M. Gail Gerebenics
Director, EEO Oversight
Personnel Appeals Board
U.S. Government Accountability Office
Union Center Plaza II, Suite 560
820 First Street, N.E.
Washington, D.C. 20002

Dear Ms. Gerebenics,

Thank you for providing the GAO Employees Organization with the opportunity to comment on your draft report concerning the Office of Opportunity and Inclusiveness and the No FEAR Act. We commend PAB in its efforts to provide oversight of GAO's regulations, procedures, and practices relating to laws prohibiting discrimination in employment.

We share PAB's particular concerns and belief that GAO's Office of Opportunity and Inclusiveness (O&I) needs greater transparency, oversight, and accountability. O&I provides counsel to employees filing discrimination complaints while concurrently advising management about these complaints, which we believe is a conflict of interest. This dual role brings into question the independence of O&I and, more importantly, the overall legitimacy and fairness of the internal adjudication process. While GAO may need to have the advice and counsel of a manager on diversity issues, it also needs an office to process employees' complaints that is independent of management. Without such an organizational structure, it is probable that employees pursuing claims against the agency will be at a disadvantage. Indeed, GAO reported that 635 employees contacted O&I for counseling between 2002 and 2007 but only 124 chose to pursue their claims through the administrative process, raising questions about whether employees are receiving independent guidance and support in pursuing their claims. In addition since 2004, O&I has promised, but has not provided, information on why those who chose not to pursue their claims made such decisions, lending credence to perceptions that the current process for employee discrimination complaints is not adequate.

A further concern about O&I is the adequacy of its staffing resources. In testimony before a congressional subcommittee in May of 2007, the former General Counsel for PAB stated that the staff of O&I had not exceeded 5 employees during GAO's workforce restructuring despite having service responsibility for more than 3,000 employees. This official went on to state that resources were so inadequate that there were substantial delays in processing discrimination complaints such that some complaints lingered for years without a final agency decision, some employees never received final agency decisions at all, and others elected to forego their claims of discrimination completely because the office was unresponsive. Our position is that employees have a right to a

fair and timely resolution of their complaints. Currently, O&I appears to be unable to provide such resolution.

Additionally, the report highlights a number of other noteworthy concerns:

- *Untimely final decisions.* From the information provided in Table 1 (page 12), although employees are constrained by strict timelines in filing grievances, GAO management appears to be consistently untimely in its action with no apparent consequences. GAO Order 2713.2 directs the agency to issue a final decision within 90 days of receipt of the investigation file, but GAO's average time for a final decision is 614 days. Although PAB recommends that complainants be notified after 120 days if no final agency decision has been made, GAO's Employee Organization recommends that such a communication inform the employee of why a decision has not been made and how much more time is needed to render a decision, as well as how the employee may immediately seek relief from PAB.
- *Handling of sexual orientation discrimination claims.* Despite previous recommendations from PAB, management has not revised its orders to allow complaints of discrimination based on sexual orientation to be appealed to PAB in the same manner as other discrimination complaints.
- *Lack of transparency.* Management does not appear to be meeting its responsibilities to provide clear information to employees about their rights and possible options in seeking resolution of their grievances or how these rights and options are affected by the type of complaint being filed. The report recommends that GAO orders be revised to require that a complainant who has raised an issue of discrimination should be advised of his/her rights and options for pursuing such claims with either O&I or PAB, including the ramifications of this choice. Additionally, the report notes that those alleging discrimination on the basis of sexual orientation have the option of pursuing such a claim with PAB as a "prohibited personnel practice," an option that fully preserves all appeal rights. The report recommends that O&I staff explain this option to such complainants.

We agree with PAB that these situations need to be remedied and support all of PAB's recommendations. We appreciate the work of PAB in bringing these issues to light and thank you for providing an opportunity for the GAO Employees Organization to comment.

Sincerely,

Ronald La Due Lake
Chair, Interim Council,
GAO Employees Organization, IFPTE

GAO

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United States Government Accountability Office
Washington, DC 20548

May 23, 2008

Ms. Beth L. Don
Executive Director
Personnel Appeals Board
UCP II, Suite 580
820 First Street, N.E.
Washington, D.C. 20002

Dear Ms. Don:

This letter responds to the Personnel Appeals Board's (Board) report on The No FEAR Act. We appreciate the opportunity to provide comments on the Board's recommendations. I have shared the draft report with appropriate GAO officials and our responses to the recommendations are summarized below.

1. **A separate unit should be established in which assigned [O&I] staff would devote their time exclusively to the processing of discrimination complaints, including mediation.**

   We disagree with this recommendation. The report argues that a separate unit within O&I should be established to exclusively handle discrimination complaints because, unlike in previous years, when on average O&I received 4.5 formal discrimination complaints per year, 35 complaints of discrimination were filed in 2006 and 13 had been filed by mid-2007. However, of the 35 complaints filed in 2006, 20 of those complaints were filed by one complainant, and 14 were filed as a result of the Band II reorganization. Of the 13 complaints filed in 2007, 10 were filed by the same complainant who filed 20 complaints in 2006 (GAO has settled all complaints filed by that one person). The factors that caused the unusually high number of complaints filed in 2006 and 2007 are not likely to repeat themselves in the future because the Band II reorganization is now complete, and as the PAB report notes, GAO Order 2713.2 was revised to allow O&I to dismiss a complaint that is "part of a clear pattern of misuse of the discrimination complaint process…" Thus, as of May 12, 2008, O&I has received five discrimination complaints. We believe that this is the more likely pattern for the foreseeable future.

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

We believe it is appropriate to handle discrimination complaints in the same manner as in the Executive Branch. As the PAB Report points out, the Equal Employment Opportunity Commission (EEOC) (the executive branch counterpart to the PAB for adjudication of discrimination complaints) does not enforce the protections that prohibit discrimination based on sexual orientation, since sexual orientation is not included among the categories for protection addressed by Title VII. The Office of Personnel Management (OPM) also has noted that employees and applicants may not seek relief for allegations of discrimination based on sexual orientation from the EEOC. See OPM Publication entitled "Addressing Sexual Orientation Discrimination in Federal Civilian Employment: A Guide to Employee's Rights" (available on the OPM website).

However, as the PAB Report indicates, the Merit Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) (counterparts to the PAB for purposes of addressing prohibited personnel practices), do address allegations of discrimination based on sexual orientation as a prohibited personnel practice in accordance with OPM's interpretation of protections covered by the Civil Service Reform Act.

Like the MSPB and OSC, the PAB currently addresses allegations of discrimination based on sexual orientation when alleged as a prohibited personnel practice. We believe that until such time as Title VII is amended to include "sexual orientation" as a protected category, the PAB should continue to address allegations concerning sexual orientation as prohibited personnel practices.

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

   We have no objections to this recommendation, but suggest that the notification state that complainants have the option of filing a charge with the PAB/OGC if they believe a prohibited personnel practice has occurred with respect to their sexual orientation claim. As written by the PAB it implies that all such claims should also be considered as prohibited personnel practices.

4. **If no final agency decision has issued and 120 days has issued and 120 has elapsed since the filing of a complaint, then a letter should be issued to the complainant explaining the procedures by which the complainant may immediately seek relief from the Personnel Appeals Board.**

   We agree with this recommendation.

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

   We agree with this recommendation.

6. **Chapter 3(b) of GAO Order 2713.2 should be amended to require that a complainant who is subject of an action appealable to PAB/OGC and who has raised an issue of discrimination is to be advised that he or she must elect the forum in which to proceed.**

   We agree with this recommendation.

If you have any questions or need additional information, please contact me at 202-512-6606 or via e-mail at heckmannc@gao.gov. Again, thank you for the opportunity to provide these comments.

Sincerely yours,

Cynthia C. Heckmann
Chief Human Capital Officer

cc: Joan Hollenbach,GC
Ron Stroman, O&I

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