

# **Thomas Taydus v. U.S. Government Accountability Office**

**Docket No. 07-03**

**Date of Decision: February 29, 2008**

**Cite as: Taydus v. GAO, No. 07-03 (2/29/08)**

**Before: Steven H. Svartz, Administrative Judge**

## **Headnotes:**

**Jurisdiction**

**Merit System Principles**

**Motions Practice**

**Personnel Action**

**Prohibited Personnel Practice**

**Statutory Construction**

**Timeliness**

## **DECISION ON RESPONDENT'S MOTION TO DISMISS**

### **I. INTRODUCTION**

This matter is before the Personnel Appeals Board (PAB or Board) as a result of a Petition filed by the Personnel Appeals Board Office of General Counsel (PAB/OGC) on behalf of Thomas Taydus (Petitioner) on August 31, 2007.<sup>1</sup> As set forth more fully below, Petitioner challenges certain matters that he asserts relate to a Complaint of discrimination that he had filed with the Government Accountability Office (GAO or the Agency) Office of Opportunity and Inclusiveness (O&I).<sup>2</sup>

The Agency filed a Motion to Dismiss the Petition on October 5, 2007. PAB/OGC filed an Opposition to the Motion to Dismiss on November 9, 2007. The Agency then filed a Reply Memorandum to the Opposition on November 20, 2007, and PAB/OGC filed a Surreply to the

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<sup>1</sup> This case was originally assigned to another Administrative Judge, and was reassigned to the undersigned Administrative Judge on November 29, 2007.

<sup>2</sup> The acronym "O&I" is substituted herein where Petitioner references "OOI."

Agency's Reply Memorandum on December 4, 2007.<sup>3</sup> For the reasons stated below, the Motion to Dismiss is granted in part and denied in part.

## A. BACKGROUND

### 1. The Complaint of Discrimination Filed with O&I

At all times relevant to this Petition, Petitioner was a Band I Analyst employed by GAO in the Boston field office. On February 20, 2003, he filed, *pro se*, a Complaint of discrimination with O&I. As the bases on which discrimination was alleged, Petitioner checked the boxes specifying race (Caucasian), sex (male), and age (55).<sup>4</sup> Respondent's Exhibit (Resp. Ex.) A at 1. Petitioner alleged that GAO had discriminated against him on two occasions: (1) when the panel that determined the list of best-qualified (BQ) applicants did not include his name on the list of BQ applicants for promotion to Band II during the fiscal year 2002 (FY 02) promotion cycle; and (2) when two GAO management officials failed to correct the actions of the BQ panel by not accepting an administrative grievance that he had filed. *Id.* at 1-6.

According to the Complaint, Petitioner's "age, sex, race, or a combination of these factors is the reason" that he did not make the BQ list in FY 02. *Id.* at 2. *See also id.* at 5 (alleging that "GAO has a history of discriminating against males over 40 in promotions from Band IF to Band II" and that "panel members considered my age of 55 when scoring my application") and 6 (alleging that "the panel members discriminated against me because I am a white male over 50 years old").

More specifically, in his description of the alleged discrimination, Mr. Taydus asserted that he was led to believe that he had been given "a competitive [performance] appraisal," that his experience was "rich and extensive and more than 10 years," and that "[g]iven that these are the key elements that the panel should have considered, the only conclusion that can be made is that my age, sex, race, or a combination of these factors is the reason I received the lowest BQ score and did not make the BQ list." *Id.* at 2. The Complaint also asserted that

field staff and staff over 50, on average, have been given lower [performance appraisal] ratings than headquarters' staff and that an analysis of this issue should be part of this discrimination determination process. I believe this analysis will show that older staff and field staff receive lower appraisal scores than headquarters' staff.

*Id.* at 3 (emphasis in original). In this regard, the Complaint alleged that an analysis of appraisal scores would show that Mr. Taydus' "appraisal rating would have been higher or other ratings would have been lower (thus the average would have been lower) if field and headquarters' staff

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<sup>3</sup> Under Board regulations, acceptance of further submissions after a motion to dismiss and an opposition is discretionary. 4 C.F.R. §28.21(b)(4). The Agency and PAB/OGC requested leave to file the Reply Memorandum and the Surreply, respectively. On December 5, 2007, the undersigned Administrative Judge granted leave to file the documents.

<sup>4</sup> Petitioner did not check the box specifying discrimination on the basis of disability.

had been rated the same.” *Id.* In addition, Petitioner alleged in the Complaint that the guide that governed the process used by the BQ panel stated that “there is no automatic conversion of performance appraisal ratings to scores, but I believe that this is what happened in this process.” *Id.* at 6.

Further, the Complaint asserted that the BQ panel discriminated against Mr. Taydus by not considering his complete record (all the information that he had submitted) against the record of the other candidates and “by just considering the current year’s appraisals.” *Id.* at 4. In support of this assertion, the Complaint stated that “[t]here can be no other explanation given the fact that the appraisal scores track the BQ scores.” *Id.*

As corrective action for the alleged discrimination, the Complaint requested that Mr. Taydus be awarded a Band II promotion effective as of the date that those making the BQ list would have been promoted in February 2003 and all back pay from that date. *Id.* at 1.

## 2. O&I Proceedings

By letter of March 3, 2003, O&I acknowledged receipt of the discrimination Complaint, and stated the following:

Based on our review of your allegations and related information, the following claims are accepted for investigation:

Whether you were discriminated against, based on your race (Caucasian), sex (male) and age (55), when you were excluded from the list of best-qualified applicants for promotion to Band II on the Physical Infrastructure (PI) team during the 2002 promotion cycle.

Whether the Managing Director, PI, and the Human Capital Officer discriminated against you, based on your race, sex, and age, when they did not accept your grievance regarding your exclusion from PI’s Band II best-qualified list.

If you believe that we have not correctly identified the issues in your complaint, please provide us with your specific reasons, in writing, within 10 calendar days of receiving this letter.

Resp. Ex. B at 1.<sup>5</sup> The letter also stated that “[w]hen the investigation is completed, [O&I] will provide you an opportunity to comment on the report.” *Id.*

On March 7, 2003, an EEO counselor issued a report stating that the bases of the O&I Complaint were discrimination based on race, sex, and age, and that the issues in the Complaint were “appraisal” and “promotion/pay/bonus/award.” Petitioner’s Exhibit (Pet. Ex.) 1 at 1.<sup>6</sup>

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<sup>5</sup> Petitioner did not submit a response to this letter.

On August 13, 2003, during the O&I investigation, Petitioner gave the investigator his analysis of Agency FY 02 appraisal and merit pay slides. Pet. Ex. 2. Petitioner's analysis stated that he was "a 56 year old white male, 40 percent rated disabled Vietnam veteran, who has been employed at GAO for more than 10 years in a field office," and that "all the group categories with which I am affiliated had the poorest showing of any other groups." *Id.* at 4, 8. Further in this regard, he alleged that GAO gave lower performance appraisal scores to "older male workers, with more than 5 years experience, and working in field offices." *Id.* In addition, he requested that, as part of his Complaint and "to show that there is a pattern of discrimination against older (over 40 and 50y [sic] years old) white males at GAO," "any complaints that allege discrimination to older staff and older white males [be] included in [his] complaint." *Id.*

On September 2, 2003, Petitioner submitted an affidavit to the O&I investigator in which he alleged that his analysis of the GAO slides showed "that in all categories with which I am associated: male, over 5 years at GAO, Band I, Field Staff and Disabled; the average [performance appraisal] score is lower than the average for all staff." Pet. Ex. 3, ¶16. He also alleged that a slide "of staff with over 5 years at GAO and with some disability show[ed] that 55 percent of this staff received the lowest or no merit pay increase," and that this was "also a problem with the promotion process." *Id.* Further, he asserted that "[t]here is a contention among GAO employees that older workers and workers in field offices have gotten lower ratings," and that "GAO's denying me the opportunity to grieve this matter is just another way of fostering a denial of promotions to older white males." *Id.*, ¶¶6, 18.

On September 5, 2003, the O&I investigator submitted a Report of Investigation (ROI) to O&I stating that the types of discrimination alleged by Petitioner were race, sex, and age. Pet. Ex. 4 at 1. The ROI noted Petitioner's allegation "that there is a pattern within GAO as a whole that older, white employees in [the] Agency have gotten lower [performance appraisal] ratings in general, and have had less success with promotions." *Id.* at 2.<sup>7</sup>

Over three years later, on September 25, 2006, GAO issued its decision in the discrimination Complaint filed with O&I. Resp. Ex. C. GAO determined that there was insufficient evidence to conclude that Mr. Taydus had been discriminated against with respect to the claims that were accepted for review by O&I. Specifically, GAO found that there was insufficient evidence to prove the assertions that Mr. Taydus was discriminated against on the basis of race, sex, and age when: (1) he was excluded from the list of best-qualified applicants for promotion to Band II on

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<sup>6</sup> The report did not list "disability" as a basis of the Complaint. *Id.* The report stated that Petitioner had noted "that he is a Vietnam-Era Veteran with a disability (Negerners Granulomotosis) but made no reference to any need for, or having ever requested, a reasonable accommodation." *Id.* at 2.

<sup>7</sup> The record in this case contains no information as to when O&I provided Petitioner an opportunity to comment on the Report, as it stated it would do in its March 3, 2003 letter (Resp. Ex. B at 1) and is required by GAO Order 2713.2, Discrimination Complaint Process (Dec. 2, 1997), Ch. 3, ¶6d (Resp. Ex. F). Apparently, Petitioner had such an opportunity because he alleged in his Charge with PAB/OGC that "GAO management and O&I failed to consider the complaints about the investigation I listed in my rebut[t]al." Resp. Ex. D, ¶18. The record does not contain any information relating to Petitioner's complaints about the investigation.

the Physical Infrastructure team during the FY 02 promotion cycle; and (2) the Managing Director, Physical Infrastructure and the Chief Human Capital Officer did not accept Mr. Taydus' grievance regarding his exclusion from the BQ list. *Id.* at 3-6.

### 3. Petitioner's Charge Filed with PAB/OGC

On October 17, 2006, Mr. Taydus filed a Charge, *pro se*, with the PAB/OGC. Resp. Ex. D. In the Charge, he checked the boxes alleging discrimination on the bases of race, sex, and age. *Id.*, ¶9.<sup>8</sup> In the portion of the Charge setting forth the types of action upon which the claim is based, he checked "Promotion." *Id.*, ¶13.<sup>9</sup> In his description of the actions complained of and the reasons that he believed the actions to be improper, Mr. Taydus stated that his "complaint is in the documents he filed with" O&I. *Id.*, ¶18.<sup>10</sup> As corrective action, the Charge requested that Mr. Taydus "be promoted to Band II as of Feb. 20, 2003 with back pay and salary (cost of living etc.) calculated as well as TSP contributions [he] missed out on." *Id.*, ¶19.

### B. THE PETITION FILED WITH THE PAB

On August 31, 2007, the PAB/OGC filed a Petition on behalf of Mr. Taydus. The Petition seeks review of certain actions by GAO that allegedly violated Mr. Taydus' rights under: (1) the GAO Personnel Act, 31 U.S.C. §731, *et seq.*; (2) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, *et seq.* (Title VII); (3) the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (ADA); (4) the Equal Pay Act, 29 U.S.C. §206(d)(1) (EPA); and (5) the Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (ADEA).

The Petition alleges that the PAB has jurisdiction over the appeal pursuant to 31 U.S.C. §753 and 4 C.F.R. §28.2. The Petition states that the Complaint that Mr. Taydus filed with O&I "challeng[ed] his performance ratings and certain other actions taken by the Agency." Petition at 1. Further, the Petition asserts that the Charge that Mr. Taydus filed with the PAB/OGC "challeng[ed] the performance ratings that were the subject of his discrimination complaint." *Id.* at 1-2.

According to the Petition, "[w]hen assessing employee performance in FY 2002, GAO gave lower average performance appraisal scores to male Band I employees relative to female Band I employees, to Band I employees over the age of forty relative to Band I employees under the age of forty, and to Band I employees who suffered from some disability relative to Band I employees who suffered no disability." *Id.*, ¶7.

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<sup>8</sup> He did not check "Handicapping Condition." *Id.*

<sup>9</sup> He did not check "Performance Evaluation." *Id.*

<sup>10</sup> The Charge also stated: "see my PAB filing of February 2003." *Id.* This appears to be another reference to Mr. Taydus' O&I filing of February 2003. The use of the term "PAB" seems to be inadvertent, since the record does not show that Mr. Taydus made any filing with the PAB in February 2003.

The Petition alleges that these practices by GAO in FY 2002 “disadvantaged” Mr. Taydus, “a male over age forty who suffered from some disability, in the promotion process because GAO relied on his FY 2002 performance appraisal in deciding not to promote him in November 2002.” *Id.*, ¶8. Additionally, the Petition contends that “GAO’s practice in FY 02 of assigning lower appraisal scores to employees possessing Petitioner’s characteristics caused Petitioner to receive lower pay in FY 02 than Band I employees not possessing these characteristics.” *Id.*, ¶9.

The Petition further asserts that GAO engaged in these same practices, and that these practices had the same consequences for Mr. Taydus (lack of promotion and lower pay than Band I employees not possessing Petitioner’s characteristics), for FY 03 (¶¶10-14), FY 04 (¶¶15-18), FY 05 (¶¶19-22), and FY 06 (¶¶23-28).<sup>11</sup> The Petition notes that in December 2006, GAO held a promotion cycle for Band I employees seeking to be placed into Band IIA, and that Petitioner applied for placement into Band IIA, was placed on the BQ list, and was selected for placement into Band IIA effective March 4, 2007. *Id.*, ¶29.

The Petition restates its allegations of GAO’s practices for FY 02 through FY 06 as the basis for its class action allegations. *Id.*, ¶¶30-49. In this regard, Petitioner seeks, in accordance with 4 C.F.R. §28.11(a)(2), to represent the following class of individuals similarly situated to him:

All current and former Band I employees of the Government Accountability Office who are or were employed by GAO in a field office at any time during Fiscal Year 2002 to 2006 inclusive, and who received performance appraisals during that time period, and all current and former Band I employees of the Government Accountability Office who are or were employed by GAO during Fiscal Year 2002 to 2006 inclusive, and who received performance appraisals during that time period, and who were employed by GAO for five or more years at the time they received performance appraisals during that time period.

*Id.*, ¶50.

The Petition next sets forth ten counts alleging individual claims of discrimination and prohibited personnel practices, as follows:

(1) GAO’s practice of giving lower performance appraisals to male Band I employees relative to female Band I employees had a disparate impact upon Petitioner’s promotion opportunities and pay in violation of Title VII (Count I) and had a disparate impact upon Petitioner’s pay in violation of the EPA (Count II), and subjected Petitioner to personnel practices prohibited by 5 U.S.C. §2302(b)(1)(A) (Count III) and 5 U.S.C. §2302(b)(12) (Count IV);

(2) GAO’s practice of giving lower performance appraisals to Band I employees who were over the age of 40 relative to Band I employees who were under the age of 40 had a disparate impact on Petitioner’s promotion opportunities and pay in violation of the ADEA

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<sup>11</sup> The Petition notes that in November 2005, GAO instituted a restructuring of the Analyst and Specialist Band II pay band by creating two sub-categories known as Band IIA and Band IIB. *Id.*, ¶23.

(Count V) and subjected Petitioner to personnel practices prohibited by 5 U.S.C. §2302(b)(1)(B) (Count VI) and 5 U.S.C. §2302(b)(12) (Count VII); and

(3) GAO's practice of giving lower performance appraisals to Band I employees who suffered from some disability had a disparate impact upon Petitioner's promotion opportunities and pay in violation of the ADA (Count VIII) and subjected Petitioner to personnel practices prohibited by 5 U.S.C. §2302(b)(1)(D) (Count IX) and 5 U.S.C. §2302(b)(12) (Count X).

As to these individual claims, Petitioner requests that the PAB: (1) issue an order declaring that GAO's practice of issuing lower appraisal scores to employees who are male, or over age 40, or who suffer from some disability, violated Petitioner's rights under the GAO Personnel Act, Title VII, the ADA, the EPA, and the ADEA; (2) enjoin GAO from considering Petitioner's gender, age, and disability status when appraising his performance; (3) promote Petitioner to Band II retroactive to February 2003; (4) award Petitioner back pay; and (5) grant any other relief it deems appropriate.

Finally, the Petition sets forth two class action counts alleging that: (1) GAO's practice of giving lower performance appraisals to Band I field employees relative to Band I Headquarters employees constituted a personnel practice prohibited by 5 U.S.C. §2302(b)(12) (Count XI); and (2) GAO's practice of giving lower performance appraisals to employees with more than five years of service to GAO relative to employees with less than five years of service to GAO constituted a personnel practice prohibited by 5 U.S.C. §2302(b)(12) (Count XII). As relief for these class action claims, Petitioner requests that the PAB, on behalf of himself and other similarly situated employees: (1) issue an order declaring that GAO's practice of assigning lower appraisal scores to employees located in an Agency field office, or to employees having over five years of service at the time a performance appraisal is issued, violated 31 U.S.C. §731 *et seq.*; (2) enjoin GAO from considering work location and length of service when appraising an employee's performance; and (3) grant any other relief it deems appropriate.

## C. RESPONDENT'S MOTION TO DISMISS

### 1. Summary of Respondent's Arguments

GAO filed a Motion to Dismiss the Petition. Respondent sets forth three grounds in support of its Motion.

First, GAO asserts that the Petition is "fundamentally flawed" because it "bears no resemblance to the charge Petitioner filed" with the PAB/OGC. Memorandum of Law in Support of Motion to Dismiss (Memorandum) at 1-2 (emphasis in original). In this regard, GAO contends that "filing a timely charge with the PAB/OGC over an allegedly improper personnel action is a jurisdictional prerequisite to filing a petition with the Board," and "the charge Petitioner filed with the PAB/OGC is entirely bereft of allegations regarding performance appraisals, which are the management actions at the center of the Petition." *Id.* at 2.

Second, GAO alleges that "Petitioner has failed to exhaust his administrative remedies with respect to his discrimination claims (Counts I-X) because he did not, as required by 4 C.F.R.

§28.98, pursue an administrative remedy with [O&I] over any of the acts challenged in the Petition.” *Id.*

Third, GAO contends that “Petitioner’s class claims (Counts XI and XII) are untimely in that they seek to challenge performance appraisal rating practices dating back to as far as 5 years ago, which is well beyond the 30-day limitations period contained in 4 C.F.R. §28.11(b).” *Id.*

These grounds and the arguments presented in support thereof are set forth in more detail below.

a. Charge Prerequisite for Allegations in Petition

According to GAO, “[t]he Board’s jurisdiction is not plenary, and the filing of a charge challenging the subject matter raised in a petition is a jurisdictional prerequisite to pursuing a cause of action with the Board.” Memorandum at 9. In this regard, GAO cites the Board’s regulations pertaining to the procedures that must be followed in order for a petitioner to bring claims before the Board (4 C.F.R. §28.11(b)(1) and (2) and 4 C.F.R. §28.18(a)), and also cites an order by then-Chair Wolf in *Smith v. GAO*, Docket No. 01-08 (Order of Sept. 19, 2001) (*Smith*). GAO contends that *Smith* stands for the proposition that the Board has jurisdiction over a claim only “‘if that claim has been the subject of a charge filed with the PAB General Counsel’.” Memorandum at 9 (quoting *Smith* at 2).

GAO asserts that the Petition filed by the PAB/OGC in this case “is unrecognizable when compared to the Charge.” *Id.* at 10. GAO contends that “every count of the Petition rests on allegations relating to allegedly improper performance appraisal practices for each year from FY 2002 - FY 2006,” but “no such practices were raised in Petitioner’s Charge with the PAB/OGC.” *Id.* In GAO’s view, Petitioner’s claims in his Charge related to the matters investigated and resolved by O&I: GAO’s “failure to include [Petitioner] on the list of best-qualified applicants for promotion to Band II during the 2002 promotion cycle, and its not having processed his grievance over this issue.” *Id.* GAO contends that “[n]owhere in the Charge did Petitioner indicate that he sought to challenge GAO’s performance appraisal practices in any year, including 2002.” *Id.*

Additionally, according to GAO, “nowhere in the Charge did Petitioner indicate that he sought to challenge any actions, such as performance appraisals, promotions, or pay decisions, that occurred after the 2002 promotion cycle (other than his grievance over the 2002 promotion cycle).” *Id.* (emphasis in original). Moreover, GAO asserts that “[c]ertainly, nowhere in the Charge did Petitioner indicate that he sought to represent a class of field office employees or a class of employees with more than 5 years of experience at GAO who had been receiving allegedly improper appraisals since 2002.” *Id.*

In sum, because “[f]iling a timely charge encompassing the actions ultimately alleged in the Petition was a jurisdictional prerequisite to filing suit, and Petitioner failed to take this necessary step,” GAO contends that the Petition should be dismissed in its entirety. *Id.* at 11.

b. Exhaustion of Administrative Remedies as to Discrimination Claims

Citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (*Morgan*) and *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007) (*Ledbetter*), GAO asserts that Petitioner's EEO claims (Counts I-X) should be dismissed because Petitioner failed to exhaust his administrative remedies. Memorandum at 11-12. In this regard, GAO contends that "[t]he Board's jurisdiction over discrimination claims is limited to appeals for claims timely made to O&I," and that Counts I-X "rest entirely on discrete acts that Petitioner failed to exhaust with O&I." *Id.* at 13, 14.

Specifically, with respect to the allegations in the Petition that arose after Petitioner filed his O&I Complaint (namely, that GAO had discriminatory appraisal practices in effect every year from FY 03 through FY 06), the Agency contends that these allegations "clearly cannot withstand the exhaustion analysis" and must be dismissed. *Id.* at 14. GAO asserts that "Petitioner was required to have filed a timely O&I complaint" alleging that these appraisal practices damaged his promotion prospects and adversely affected his pay from FY 03 through FY 06 "before pursuing them at the PAB." *Id.* According to the Agency, Petitioner's failure to file an O&I complaint with respect to any of these actions "mandates dismissal of all claims relying on appraisal, promotion, or pay decisions that arose after February 20, 2003," the date on which Petitioner filed his O&I Complaint. *Id.* GAO contends that to allow Petitioner "now to so drastically expand the nature and scope of his claims" would be "both prejudicial and unfair." *Id.* at 15.

GAO also contends that Petitioner failed to exhaust his claims of disability discrimination for any of the time periods involved because at no time did he claim that he was disabled under the ADA. *Id.* In this regard, the Agency alleges that it would be "fundamentally unfair for Petitioner to be permitted at this late date to litigate a disability claim against GAO[,] because "Petitioner's failure to raise disability discrimination with O&I prevented the investigator from seeking information from Petitioner about his alleged disability [and] deprived the investigator of learning from managers whether they were even aware of an alleged disability." *Id.* at 16.

Accordingly, GAO asserts that Counts VIII, IX, and X of the Petition should be dismissed.

c. Exhaustion and the FY 02 Performance Appraisal Claims

GAO contends that the "only actions for which Petitioner can raise even a colorable argument of exhaustion are the sex and age discrimination claims that rely on events arising prior to February 20, 2003." *Id.* (emphasis in original). "Nonetheless," according to GAO, these claims "should still be dismissed because the acts complained of in the Petition from this period are not the acts challenged by Petitioner in his O&I Complaint." *Id.*

The Agency asserts that the Petition does not claim that GAO discriminated against Petitioner with respect to either of the only two issues that were investigated and resolved by O&I: Petitioner's failure in FY 02 to be included on the list of best-qualified applicants for promotion to Band II and GAO's refusal to process an administrative grievance over this issue. Rather, according to GAO, the Petition

challenges GAO's ratings practices by alleging that GAO discriminated by providing improperly low ratings to men and employees over age 40 for FY 2002. . . . Although the Petition makes reference to the effect these appraisals had on Petitioner's ability to be promoted and on his pay, it does not allege that GAO had a separate discriminatory practice with respect to promotions or pay during FY 2002. Thus, because GAO's ratings practices were not the subject of the O&I Complaint, they cannot now form the basis for the Petition.

*Id.* at 17 (emphasis in original; citations omitted).

GAO "acknowledges that Petitioner does make reference to performance appraisal practices" in part of his statement attached to his O&I Complaint, but contends that this reference does not demonstrate that Petitioner exhausted his remedies because the reference "was only made in the context of Petitioner's assertion that the promotion panel allegedly placed too much emphasis on his rating and not enough emphasis on his prior experience when it determined whether he should be placed on the BQ list for promotion during the 2002 promotion cycle." *Id.* The Agency asserts that "it cannot be concluded that the Petition's sweeping challenge to GAO's performance appraisal practices would 'arise from the administrative investigation that can be reasonably be expected to follow' from Petitioner's O&I Complaint." *Id.* at 18 (quoting *Cross v. Small*, 2006 WL 2819758 (D.D.C. Sept. 29, 2006) (*Cross*) at 14). In this regard, GAO asserts that no such investigation occurred and that Petitioner did not challenge the scope of O&I's investigation by invoking his right to immediately pursue a performance appraisal claim with the PAB. Memorandum at 18.

Further, the Agency contends that "even Petitioner's Charge with the PAB/OGC—filed almost 5 years later—failed to challenge GAO's performance appraisal practices." *Id.* at 18-19. According to GAO, "[t]he explanation for both the delay and the omission can be only that Petitioner had never seriously contemplated a challenge to GAO's performance appraisal practices." *Id.* at 19. Because, in GAO's view, "[t]hat allegation never formed any part of the administrative process," the Agency asserts that Counts I-X should be dismissed. *Id.*

#### d. Timeliness of Class Action Claims

GAO contends that Counts XI and XII should be dismissed not only because of the "jurisdictional defect" discussed above, but also "because they are untimely." *Id.* at 19. In support of this contention, the Agency states that under 4 C.F.R. §28.11(b)(2), Petitioner had 30 days from the effective date of the action, or 30 days from when he knew or should have known of the action, to file a charge. According to GAO, the Charge which Petitioner filed on October 19, 2006, is untimely as to these counts because

Petitioner cannot claim that he was unaware of a performance appraisal until September 19, 2006 (which is 30 days prior to his PAB/OGC Charge) when he has asserted it caused harm in June. Moreover, the May 2006 performance appraisal is the most recent appraisal at issue in the case. Petitioner's allegations regarding his FY 2002-FY 2005 performance appraisals are far more dated.

*Id.* at 20. As such, GAO asserts that Petitioner’s class action claims (Counts XI and XII) should be dismissed.

#### D. PETITIONER’S OPPOSITION TO RESPONDENT’S MOTION TO DISMISS

##### 1. Summary of Petitioner’s Arguments

Petitioner contends that the Agency’s argument—“that the Petition must be dismissed because Mr. Taydus did not state with particularity in his Charge each and every issue raised in the Petition”—“ignores that the Charge referenced the underlying discrimination Complaint.” Petitioner’s Opposition to Respondent’s Motion to Dismiss (Opposition) at 2. Further, Petitioner argues that if GAO’s “position (which is based on a crabbed reading of a previous ruling by the Board)” is adopted by the PAB, it “would impose on employees seeking to file charges with the PAB/OGC additional requirements not mandated by law or regulation.” *Id.*

Petitioner also disputes the Agency’s argument that “the Petition’s discrimination claims must be dismissed because Mr. Taydus did not initially bring his claims to O&I.” *Id.* In this regard, Petitioner asserts that

Respondent’s argument conflates Petitioner’s discrimination and prohibited personnel practice claims, overlooks that there is no exhaustion of remedies requirement for Equal Pay Act claims, disregards that Mr. Taydus raised his claims with O&I, and ignores the fact that, rather than fully investigating his claims, O&I instead chose to ignore some of them. Respondent also fails to recognize that the Agency waited three years after the conclusion of the O&I investigation to issue its decision on his Complaint.

*Id.* at 2-3.

These contentions in opposition to the Motion to Dismiss are set forth in more detail below.

##### 2. Subject Matter Jurisdiction

Petitioner first disputes GAO’s argument “that allegations must be raised in the Charge in order for the Board to have subject matter jurisdiction over them” and its reliance for this proposition on *Smith*. *Id.* at 10. As an initial matter, Petitioner questions whether *Smith* is binding in this proceeding, inasmuch as *Smith* was never tested before the full PAB, the PAB/OGC was not a party to the case, and the case was ultimately settled. *Id.* at 11.

Further, Petitioner argues that *Smith*, “if read literally as Respondent does[,] is arguably inconsistent with GAO’s and the Board’s regulations.” *Id.* at 11 n.7. Noting that GAO Order 2713.2, Discrimination Complaint Process,<sup>12</sup> “requires only that the Complainant ‘. . . describe generally the action(s) or practice(s) that form the basis of the complaint,’” Petitioner questions “whether one filing a Charge with the PAB/OGC must describe his allegations in more exacting

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<sup>12</sup> The cited version of Order 2713.2 (Dec. 2, 1997) applies in this case and can be found at Resp. Ex. F. It was revised and renamed “Discrimination Complaint Resolution Process” on May 21, 2007.

detail than one filing a formal complaint of discrimination.” *Id.* In addition, relying on 4 C.F.R. §28.18(e) (“Failure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties or unduly delay the proceedings”), Petitioner argues that “[i]f failure to raise a claim in the petition does not negate that claim, then failure to raise it in the Charge—which, of course, is predicate to an investigation—is even less likely to negate the claim.” *Id.* Petitioner argues that “Respondent’s position, if adopted, would thus impose on GAO employees a more stringent standard than that found in the Order and Board regulations.” *Id.*

Petitioner goes on to assert that even if *Smith* governs this matter, the instant case is distinguishable. Petitioner characterizes the “import” of the *Smith* Order “to be that a matter cannot be brought before the Board unless it was first investigated by the PAB/OGC.” *Id.* at 12. According to Petitioner, “all the allegations raised by Mr. Taydus were investigated by the PAB/OGC,” as opposed to the situation in *Smith*, where the individual sought to file an amended petition “raising a wholly new claim that had not been the subject of the PAB/OGC investigation.” *Id.*<sup>13</sup> Therefore, Petitioner contends that *Smith* is inapplicable here and, “[t]hus, there is no support for Respondent’s position that the Charge is required to contain all the allegations found in the Petition.” *Id.*

Next, Petitioner argues that even if GAO is correct in contending that the Charge is required to contain all the allegations found in the Petition, in this case “the Charge is not deficient because it relates back to the underlying discrimination Complaint.” *Id.* Citing Fed. R. Civ. P. 15(c) and the rationale behind the “relation back” doctrine, Petitioner contends that in this case there is “a common core of [operative] facts in the Charge and the underlying discrimination Complaint,” namely, that GAO “discriminated against certain classes of individuals when scoring performance appraisals,” and as such “the Board has subject matter jurisdiction over Petitioner’s claim.” *Id.* at 13.

### 3. Exhaustion of Administrative Remedies

Petitioner disputes GAO’s claim that he “failed to exhaust his administrative remedies with respect to his discrimination claims contained in Counts I-X of the Petition because he did not initially bring those matters to O&I.” *Id.* at 13.

As to Count II, which alleges a violation of the Equal Pay Act, Petitioner asserts that it is “well settled that ‘the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts’.” *Id.* (quoting *Washington County v. Gunther*, 452 U.S. 161, 175 n.14 (1981) (*Gunther*)). Thus, according to Petitioner, “Respondent’s assertion that Petitioner’s Equal Pay Act claim (Count II) should be dismissed for failure to exhaust is simply wrong.” *Id.*

As to Counts III, IV, VI, VII, IX and X, which allege that GAO committed personnel practices prohibited by 5 U.S.C. §2302, Petitioner contends that such claims “are not required to be

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<sup>13</sup> Petitioner alleges that he had raised disability discrimination in the documents supporting his O&I Complaint, and that although “this claim was investigated by the PAB/OGC, it was inadvertently omitted from the right to petition letter.” Opposition at 12.

exhausted by first filing with O&I,” and, therefore, “Respondent’s assertion that these claims should be dismissed for failure to exhaust is groundless.” *Id.* at 14. Further, Petitioner argues that even if these claims were required to be filed first with O&I, “Petitioner did precisely that, as evidenced by his [O&I] Complaint.” *Id.*

As to the remaining discrimination claims (Counts I, V, and VIII), Petitioner disputes Respondent’s contention that these claims “must be dismissed because Petitioner failed to exhaust his administrative remedies in not bringing these matters to the attention of O&I.” *Id.* Noting that the purpose of the exhaustion requirement is to put an employer on notice of an alleged violation of law and to give the employer an opportunity to pursue resolution before a suit is brought, Petitioner contends that a comparison of the claims in Counts I, V, and VIII to the Petitioner’s O&I submissions “shows that the Agency was on notice as to the allegations raised by Mr. Taydus.” *Id.*

Petitioner acknowledges that “Mr. Taydus did not specifically raise in his February 2003 discrimination Complaint allegations regarding the Agency’s post-2002 performance appraisal practices because those events had not yet occurred.” *Id.* at 15. However, Petitioner asserts that he was not required to amend his Complaint each year that GAO discriminatorily scored performance appraisals, as long as “those claims are like or reasonably related to the allegations in his Complaint.” *Id.* (citing *Weber v. Battista*, 494 F.3d 179, 184 (D.C. Cir. 2007) (*Weber*) and *Cross*). According to Petitioner, a claim meets this standard if it “‘could have reasonably been expected to grow out of the original complaint during the investigation’.” *Id.* (quoting *Weber* at 183 (internal citation omitted)).

Noting that Mr. Taydus’ discrimination Complaint “allege[d] that GAO had a ‘history’ of assigning lower appraisal scores to certain classes of employees,” Petitioner claims that “[i]t was reasonable to expect that an O&I investigation into the Agency’s 2002 performance appraisal practice would have grown to encompass performance appraisal scoring practices arising subsequent to Mr. Taydus’ Complaint and during the course of the O&I investigation.” *Id.* However, Petitioner contends that rather than investigating such subsequent practices, “the Agency chose to ignore that portion of Mr. Taydus’ Complaint and did not investigate those allegations at all. The Agency now seeks to benefit from its failure to investigate Mr. Taydus’ claims regarding its performance appraisal scoring practices.” *Id.* (emphasis deleted).

In addition, Petitioner disputes GAO’s claim that it would be prejudiced by having these issues raised in the Petition, and asserts that any prejudice was borne by Petitioner, not the Agency, “given that the Agency did not investigate Petitioner’s performance appraisal scoring claim, disregarded information submitted by him in support of his Complaint, and sat on the Report of Investigation for over three years before issuing its decision.” *Id.* at n.9. In short, Petitioner asserts that adoption of the Agency’s position would allow GAO “to escape adjudication of discrimination complaints by simply waiting years to issue its decision on such complaints, and then pleading that it is prejudiced by the long-delayed adjudication.” *Id.* at 18-19.

Petitioner further argues that Respondent errs in reading *Morgan* and *Ledbetter* as requiring Petitioner “to file a new administrative discrimination complaint challenging every

discriminatory act he wishes to pursue, regardless of whether those acts arose before or after the filing of his initial discrimination complaint.” *Id.* at 15-16. Distinguishing *Morgan* as a “discriminatory treatment” case, Petitioner argues that in the instant case, Mr. Taydus “does not allege that he was the victim of discriminatory treatment, but rather that he has been harmed by a policy that has had an unlawfully disparate impact upon him.” *Id.* at 16-17 (emphasis in original). Petitioner contends that in *Morgan*, the Supreme Court made it clear that “its ruling did not apply to allegations of a discriminatory practice, such are at issue here.” *Id.* at 17. Additionally, Petitioner claims that GAO has not cited any case “in which a court has ruled, post-*Morgan*, that disparate impact claims are subject to the same filing requirements as disparate treatment claims.” *Id.*

In sum, Petitioner asserts that “Respondent’s failure-to-exhaust defense is without merit.” *Id.*

#### 4. Timeliness of Putative Class Claims

Petitioner disputes the Agency’s claim that the putative class claims—Counts XI and XII—are untimely because they challenge performance appraisal rating practices “‘dating back to as far as 5 years ago, which is well beyond the 30-day limitations period contained [in] 4 C.F.R. 28.11(b)’.” *Id.* (quoting Memorandum at 2). According to Petitioner, these counts “allege a continuing violation, *i.e.*, that during the relevant time period GAO engaged in an ongoing prohibited personnel practice of giving lower performance appraisal scores to certain classes of employees.” *Id.* Since 4 C.F.R. §28.11(b)(4) provides that charges relating to continuing violations may be filed at any time, Petitioner contends that the putative class action counts are timely.

### E. RESPONDENT’S REPLY MEMORANDUM

#### 1. Jurisdiction

GAO disputes Petitioner’s claim that its position regarding the requirements for stating claims in a charge would result in an “onerous burden that charging parties cannot be expected to meet.” Reply Memorandum at 2. The Agency notes that the charge form “provides readily-understandable boxes to check so that the employee can indicate the types of actions he/she wishes to challenge.” *Id.* GAO states that Petitioner “indicated only ‘promotion’ as the type of action upon which his claims were based,” and “nothing in the Charge indicated that Petitioner was seeking to challenge any action other than those previously investigated by O&I and addressed in the Final Decision of his O&I Complaint.” *Id.* at 3.

The Agency also asserts that the requirement to identify the types of actions challenged by a charging party is consistent both with the Board’s regulations, including 4 C.F.R. §28.18(e), and with *Smith*. According to GAO, *Smith* recognized that “Board regulations have made it a mandatory jurisdictional prerequisite to actually file a charge challenging the subject matter subsequently raised in a petition.” *Id.*

GAO also takes issue with Petitioner’s assertion that *Smith* is distinguishable on the basis that, in the instant case, PAB/OGC investigated all of the claims raised in the Petition. The Agency

asserts that both *Smith* and the Board’s regulations “tie jurisdiction to the charge document itself,” not to the investigation. *Id.* at 4. Moreover, GAO contends that to determine Board jurisdiction “based upon the PAB/OGC’s assertions as to which claims it has investigated would divest the Board of its authority to determine its own jurisdiction and place that authority solely in the hands of the PAB/OGC,” and “PAB/OGC investigations are not public proceedings that are independently verifiable.” *Id.* at 5. In addition, GAO contends that “the charge process is about more than [PAB/OGC’s] own investigation. It also serves to notify GAO of the existence of a claim so that it can preserve evidence and have the opportunity to resolve the issue at an administrative stage.” *Id.* at 5-6.

GAO also asserts that Petitioner’s “relation back” argument is without merit because Fed. R. Civ. P. 15 is inapplicable here. In this regard, GAO contends that an O&I complaint and a charge filed with the PAB/OGC are “fundamentally different” documents, and “[n]either the text nor the logic of Rule 15 permits fundamentally different documents to ‘relate back’ to one another.” *Id.* at 6.

## 2. Exhaustion of Administrative Remedies

GAO disputes Petitioner’s criticism of its handling of the O&I complaint. First, with respect to Petitioner’s contention that O&I did not investigate Petitioner’s concerns regarding his FY 02 performance appraisal, GAO contends that, under GAO Order 2713.2, O&I is not required to investigate “each and every matter raised by an employee during the administrative process” and may “dismiss portions of a complaint for numerous reasons.” *Id.* at 7. GAO asserts that, in this case, O&I provided Petitioner with “explicit notice of the two claims it had accepted for investigation, neither of which involved a challenge to GAO’s performance appraisal practices.” *Id.* at 7-8.

Also, citing 4 C.F.R. §28.98(b)(1), which provides an individual 30 days from receipt of “a GAO decision rejecting the complaint in whole or part” to file a charge with the PAB/OGC, GAO asserts that if Petitioner disagreed with the scope of O&I’s investigation, “he was required to immediately pursue his performance appraisal claim with the PAB” but “simply failed to meet this obligation.” *Id.* at 8. GAO contends that O&I’s “rejection of Petitioner’s performance appraisal allegations in no way prevented him from exercising his rights at the PAB and it does not now save his claims.” *Id.*

With respect to the length of time it took for O&I to issue a final decision on Petitioner’s Complaint, GAO concedes that “the delay in issuing the Final Decision was admittedly not ideal.” *Id.* However, the Agency notes that Petitioner had the right under 4 C.F.R. §28.98(b)(2) and GAO Order 2713.2 to pursue his claims with the PAB at any time once 120 days had elapsed from the filing of the Complaint if no final decision had been issued at that point. In any event, GAO contends that the same exhaustion issues it raises would have been present “regardless of whether the Final Decision had been issued and the Petition filed in 2003 rather than 2007,” because “the issues challenged in the O&I Complaint (*i.e.*, GAO’s failure to include Petitioner on the list of best-qualified applicants for promotion to Band II during the 2002 promotion cycle and its decision not to process his grievance over this issue) are not the ones challenged in the Petition (*i.e.*, allegedly discriminatory performance appraisals through 2006).” *Id.* at 8-9.

### 3. Exhaustion of Equal Pay Act Claims

GAO disputes Petitioner’s contention that the Equal Pay Act does not contain exhaustion requirements. GAO contends that this assertion “might have merit” if “Petitioner worked in the private sector and was attempting to file this action in federal court;” however, Petitioner “is subject to the Board’s regulations, which specifically require petitioners to exhaust Equal Pay Act claims with O&I before pursuing such claims with the PAB.” *Id.* at 9 (citing 4 C.F.R. §28.98(a) and §28.95).

In addition, the Agency asserts that Petitioner’s Equal Pay Act argument should be dismissed because it fails to state a claim. GAO states that in the Opposition, Petitioner “repeatedly disavows . . . that he is alleging any form of disparate treatment in the Petition.” *Id.* According to GAO, this constitutes a tacit admission that the claim is deficient as a matter of law because the Supreme Court has stated that “Equal Pay Act claims are—by definition—claims of intentional discrimination. . . .” *Id.* at 10 (citing *Gunther*, 452 U.S. at 170-71 and *Smith v. City of Jackson*, 544 U.S. 228 (2005) (*Smith v. Jackson*)).

### 4. Discrimination Claims Filed as Prohibited Personnel Practices

GAO contends that “Petitioner’s assertion that he may circumvent exhaustion requirements by pleading a discrimination claim as a prohibited personnel practice” is unsupported by either GAO Order 2713.2 or Board regulations. *Id.* at 11. According to GAO, claims based on discriminatory actions must be exhausted with O&I before they can be filed with the Board, regardless of whether the Petitioner “pleads the cause of action as a violation of Title VII, or as a violation of ‘any other law [such as 5 U.S.C. §§2302(b)(1) or (b)(12)] prohibiting discrimination in Federal employment’.” *Id.* at 12. GAO further contends that “Counts III, IV, VI, VII, IX, and X very plainly allege discriminatory actions that fall squarely under 4 C.F.R. §§28.95 and 28.98.” *Id.* The Agency alleges that Petitioner’s interpretation of exhaustion requirements would be inconsistent with long-established statutory and regulatory requirements and would “run contrary to decades of practice before the Board.” *Id.* at 13.

### 5. Exhaustion of Performance Appraisal Claims from FY 03 - FY 06

GAO disputes Petitioner’s argument “that it is reasonable to expect that an investigation of Petitioner’s Administrative Complaint would grow to encompass appraisal practices for the years 2003-2006.” *Id.* at 13. In this regard, GAO notes that “performance appraisals for 2003 had not even been issued in September [2003] when O&I completed its investigation.” *Id.* Moreover, GAO contends that neither of the cases relied on by Petitioner—*Weber* and *Cross*—supports Petitioner’s argument. *Id.* at 14-15.

GAO also takes issue with Petitioner’s attempt “to show exhaustion by arguing that his claims are ones of disparate impact rather than disparate treatment.” *Id.* at 15. In the Agency’s view, Petitioner has mischaracterized *Morgan* and *Ledbetter* because neither of those decisions “drew a distinction between disparate treatment claims and disparate impact claims for exhaustion purposes.” *Id.* According to GAO, Petitioner has failed to show any support for the proposition

that “a challenge to performance appraisals is subject to different exhaustion requirements depending upon whether the legal theory is disparate impact or disparate treatment.” *Id.* at 16.

#### 6. Exhaustion as to Disability Discrimination Claims

GAO contends that “passing, general references to disability” made in material submitted by Petitioner to an O&I investigator after “over five months had elapsed from” O&I’s identification of the issues, which did not include a disability claim, are insufficient to demonstrate that “Petitioner was attempting to pursue a disability claim.” *Id.* at 18. GAO asserts that “[m]ore than this is required for exhaustion, and the disability claims should be dismissed.” *Id.* (citing *Cross* at \*14-15; *Caldwell v. ServiceMaster Corp.*, 966 F. Supp. 33, 49 (D.D.C. 1997) (*Caldwell*); and *Alfred v. Scribner Hall & Thompson*, 473 F. Supp.2d 6 (D.D.C. 2007) (*Alfred*)).

#### 7. Timeliness of Non-EEO Class Claims

The Agency disputes Petitioner’s argument that his non-EEO class claims (Counts XI and XII) constitute continuing violations and are, therefore, timely under 4 C.F.R. §28(11)(b)(4). GAO asserts that section 28.11(b)(4) “must be read in the context of the Supreme Court’s *Morgan* decision.” *Id.* According to GAO, the continuing violation doctrine is inapplicable here because that doctrine does not apply to discrete acts, and performance appraisals, which are the subject of Counts XI and XII, are discrete acts. *Id.* at 19. Moreover, GAO argues that “even the broadest reading of the continuing violation theory requires at least one of the acts challenged to be timely,” and in this case “none of the performance appraisals were subject to a timely charge with the PAB/OGC as required by 4 C.F.R. §28.11(b)(2).” *Id.* at 19-20.

### F. PETITIONER’S SURREPLY TO RESPONDENT’S REPLY

#### 1. Jurisdiction

With respect to GAO’s contentions regarding *Smith*, Petitioner contends that *Smith* is inapposite here because the governing regulation is 4 C.F.R. §28.98, whereas in *Smith* the regulation at issue was 4 C.F.R. §28.18(a). Surreply at 2. Petitioner also disagrees with GAO’s position that the Board’s jurisdiction is defined only by a charge. According to Petitioner, this position is contrary to 4 C.F.R. §28.131, which authorizes the PAB/OGC to file a petition under certain circumstances when no charge has been filed, and is also contrary to 4 C.F.R. §28.12(a), which allows the PAB/OGC to investigate the matters raised in a charge and refine the issues where appropriate. *Id.* at 2 n.1. Further, Petitioner asserts that “GAO’s insistence that the Charge must be viewed as a stand-alone document, utterly divorced from the underlying discrimination complaint, is simply wrong.” *Id.* at 3. Moreover, Petitioner argues that “to the extent that notice was required, it is the underlying complaint and matters raised during the course of the investigation into that complaint which provided notice to the Agency.” *Id.* at n.3.

#### 2. Equal Pay Act

As to GAO’s contention that Petitioner’s Equal Pay Act argument should be dismissed because it fails to state a claim, Petitioner contends that GAO “overstates” the “holdings and impact” of the

two Supreme Court cases on which it relies. *Id.* at 3. According to Petitioner, “neither *Gunther* nor *Smith* [*v. Jackson*] compels the conclusion that EPA claims are, by definition, disparate treatment claims, or that Petitioner’s EPA claims should be dismissed.” *Id.* at 4. Further, Petitioner disputes GAO’s argument that EPA claims are required to be exhausted in the absence of such a statutory requirement. Petitioner contends that adoption of this argument “would accord GAO employees fewer rights to pursue an EPA claim than their executive agency counterparts.” *Id.* at 5. In addition, Petitioner contends that even if GAO’s position “that EPA claims must have been exhausted is correct, Petitioner did bring his allegations that male employees received unequal pay relative to female employees to the attention of O&I.” *Id.* Accordingly, Petitioner contends that the EPA claims should not be dismissed.

### 3. Exhaustion of Discrimination Claims

Petitioner also disputes GAO’s argument that all discrimination claims must be exhausted before a charge based on discrimination can be filed with PAB/OGC. According to Petitioner, “[t]his broad argument overlooks several important exceptions to the general rule that discrimination claims must be exhausted.” *Id.* First, Petitioner asserts, for the reasons set forth above, that EPA claims are not subject to an administrative exhaustion requirement. Second, Petitioner contends that where an employee is subject to a removal or other serious adverse action, “that employee may file a charge directly with the PAB/OGC without having to exhaust administrative remedies.” *Id.* at 6. Finally, in this regard, Petitioner disputes as “incorrect” GAO’s argument that “Petitioner attempted to circumvent the exhaustion requirement by labeling his discrimination claims as prohibited personnel practice claims.” *Id.* Petitioner contends that GAO “misread” Petitioner’s argument in the Opposition as to these claims, and acknowledges that, “with the exception of his EPA claims, he was required to exhaust his administrative remedies at O&I,” and “asserts that he met this requirement.” *Id.* at n.4.

### 4. Performance Appraisal Claims

Petitioner disputes GAO’s claim that O&I’s letter to him constituted a dismissal of Petitioner’s claim that in FY 02 the Agency had a practice of discriminatorily scoring performance appraisals. Petitioner notes that GAO Order 2713.2, Ch. 3, ¶5 “provides that O&I ‘shall dismiss a complaint or a portion of a complaint’ for any one of ten reasons” and “further mandates that O&I ‘shall notify the complainant if a complaint or a portion of a complaint is dismissed and shall set forth the appeal rights under chapter 6 and the reason for the dismissal’.” *Id.* at 6-7. In this regard, Petitioner asserts that O&I’s letter “did not state that O&I was dismissing any part of Petitioner’s complaint, nor did it cite to any of the reasons listed in the Order for dismissing a complaint or a portion of a complaint.” *Id.* at 7. Further, Petitioner states that “the letter makes clear that Petitioner’s appeal rights would arise at a time subsequent to the letter.” *Id.*

Therefore, according to Petitioner, “[r]ather than constituting a dismissal of part of the complaint, the letter is simply what it said it was—an acknowledgment of receipt of Petitioner’s discrimination complaint, and an identification of the issues that O&I intended at that time to

investigate.”<sup>14</sup> *Id.* In sum, Petitioner contends that “the letter did not trigger a requirement that Petitioner had to file that claim with the Board within thirty days, and he was not untimely as to his 2002 performance appraisal claim.” *Id.*

Petitioner also disputes GAO’s argument that he failed to exhaust his administrative remedies as to his post-2002 performance appraisal claims because he “was obligated to file a new complaint of discrimination for each year that he alleges the Agency’s scoring of performance appraisals had a disparate impact on him and other similarly situated employees,” but “failed to do so.” *Id.* Petitioner states that while “[i]t may well be that in a disparate treatment case, the issuance of an individual performance appraisal to an individual employee constitutes a discrete event requiring that employee to file a complaint as to that performance appraisal,” that is not the situation here because “Petitioner is not alleging that GAO discriminated against him in issuing him a performance appraisal.” *Id.* at 7-8. Rather, Petitioner “alleges that the Agency had an on-going practice from 2002 to 2006 of scoring a class of employees’ performance appraisals in a manner that had a discriminatory impact on that class of employees.” *Id.* at 8 (emphasis in original). According to Petitioner, the fact that “Petitioner alleges disparate impact distinguishes his matter from the disparate treatment cases cited by Respondent.” *Id.*

Additionally, Petitioner asserts that he “was not required to identify in his underlying complaint that he was alleging disparate impact in order to exhaust those claims;” “[r]ather, he was simply required to put the agency on notice as to the nature of his claim.” *Id.* Petitioner contends that both in his Complaint and during the O&I investigation, he “put the Agency on notice that he was alleging the Agency’s practice of scoring performance appraisals had a discriminatory impact on certain employees.” *Id.* at 8-9. Noting that GAO Order 2713.2, Ch. 3 ¶4 “requires only that Complainant ‘. . . describe generally the action(s) or practice(s) that form the basis of the complaint,” Petitioner alleges that he “met this obligation.” *Id.* at 10.

Petitioner also takes issue with the Agency’s argument that O&I’s “termination of the investigation in September 2003 necessarily means that any matters arising subsequent to that termination could not have reasonably been expected to arise during the course of the investigation into Petitioner’s discrimination complaint.” *Id.* Because GAO “did not notify Petitioner until three years later that its investigation had terminated,” Petitioner contends that “it was entirely reasonable for Petitioner to assume in 2003, 2004, 2005 and most of 2006 that the O&I investigation was continuing . . . [and] that the investigation would encompass the subsequent performance years.” *Id.* at 10-11 (footnote omitted).

In addition, Petitioner disputes GAO’s reliance on *Morgan* and *Ledbetter*, which “analyze whether plaintiffs timely filed an administrative complaint regarding alleged acts of discrimination.” *Id.* at 11. Petitioner asserts that these decisions are inapposite for two reasons: (1) “the allegations raised by Petitioner are reasonably related to his underlying discrimination complaint and grew out of such allegations, and thus were not subject to the requirement that each related claim be timely filed;” and (2) “the cases cited turned on the question of inputting [sic] intent in a disparate treatment cause of action,” whereas here Petitioner raises disparate impact claims, in which discriminatory intent is “not an element . . . .” *Id.* at 11-12. Moreover,

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<sup>14</sup> Petitioner states that “[w]hile it is unfortunate that Petitioner, who was acting *pro se*, did not notify O&I at that time of any disagreement he had with its issue identification, nothing in Order 2713.2 or in the Board’s regulations required him to do so.” *Id.* at n.5.

Petitioner asserts that GAO cites no cases “for its proposition that, post-*Morgan*, disparate treatment and disparate impact claims—despite their being two separate and distinct theories of discrimination—are subject to the same requirement.” *Id.* at 12 (citation omitted).

## 5. Disability Claims

With respect to the disability claims, Petitioner contends that he met the obligation set forth in the GAO Order to “generally describe the actions or practices forming the basis of his complaint.” *Id.* at 13. In this regard, Petitioner asserts that he “raised allegations regarding disability discrimination in his underlying discrimination complaint,” and that GAO’s reliance on *Alfred* and *Caldwell* to support its proposition that Petitioner’s reference to these claims was insufficient for exhaustion purposes is without merit. *Id.* at 12.

## 6. Non-Discrimination Class Action Claims

Finally, as to GAO’s contention that the non-discrimination class action claims are untimely because the continuing violations provision of 4 C.F.R. §28.11(b)(4) must be read in the context of *Morgan*, Petitioner asserts that *Morgan* “addressed a disparate treatment allegation, not a non-discrimination claim,” and therefore is “inapposite to Petitioner’s non-discrimination claims.” *Id.* at 13.

## II. ANALYSIS

GAO has moved to dismiss Petitioner’s allegations on the bases of lack of PAB jurisdiction, failure to exhaust administrative remedies, and untimeliness.<sup>15</sup> These bases will be considered in turn.

### A. JURISDICTION

#### 1. Regulatory Requirements Relating to a Charge

The Board’s regulations establish requirements for bringing a case before the Board. In order to raise before the Board a matter relating to EEO claims, the charging party must first file a complaint of discrimination with O&I before filing a charge with the PAB/OGC. 4 C.F.R. §28.98(a).<sup>16</sup> A charge relating to GAO’s disposition of any individual EEO complaint may be filed with the PAB/OGC at the following times: (1) within 30 days from the receipt by the charging party of a GAO decision rejecting the complaint in whole or part; (2) whenever a period

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<sup>15</sup> In reviewing a motion to dismiss, the Board must construe the pleadings in a light most favorable to the Petitioner and may only dismiss the claim if, based on the facts, no claim may be found. *See Williams v. Meese*, 926 F.2d 994, 997 (10<sup>th</sup> Cir. 1991); *Frankel v. GAO*, PAB Docket No. 05-02, Memorandum & Order (June 10, 2005) at 3; *Horton v. GAO*, PAB Docket No. 01-09, Memorandum & Order (Sept. 19, 2002) at 4-5.

<sup>16</sup> This requirement does not apply in certain adverse and performance based actions. *See* 4 C.F.R. §28.98(c).

of more than 120 days has elapsed since the complaint was filed, and GAO has not issued a final decision; or (3) within 30 days from the receipt by the charging party of a final GAO decision concerning the complaint of discrimination. 4 C.F.R. §28.98(b). When a charge is filed with the PAB/OGC, the PAB/OGC serves a copy of the charge on GAO or the other charged party. 4 C.F.R. §28.12(a).

A charge is defined as any request filed with the PAB/OGC to investigate any matter within the Board's jurisdiction. 4 C.F.R. §28.3. The Board's regulations state that a charge should include, among other things, "[t]he actions complained about, including dates, reasons given, and internal appeals taken," and the charging party's "reasons for believing the actions to be improper." 4 C.F.R. §§28.11(d)(3) and (4).

The filing of a charge initiates the PAB/OGC investigatory process. A person may file a petition with the Board if the person has received a Right to Petition Letter from the PAB/OGC or if at least 180 days have elapsed from the filing of the charge with the PAB/OGC and the PAB/OGC has not issued a Right to Petition Letter. 4 C.F.R. §28.18(a)(1) and (2).<sup>17</sup>

As is evident from the Board's regulations, a charge is a prerequisite for the filing of a petition for matters like those involved in this case.<sup>18</sup> A charge serves two important purposes: it initiates an investigation by the PAB/OGC and it provides notice to the respondent as to the nature of the allegations at issue. Specifically, by requiring that a charge include "the actions complained about, including dates, reasons given, and internal appeals taken," and the charging party's "reasons for believing the actions to be improper," the Board's regulations anticipate that such information will provide the respondent with notice as to the nature of the charge and what may be contained in a subsequent petition. *See* 4 C.F.R. §§28.11(d)(3) and (4). These regulatory requirements are neither onerous nor burdensome; to the contrary, similar regulatory provisions are commonplace in other federal administrative proceedings. *See, e.g.,* 5 C.F.R. §1201.24; 29 C.F.R. §1614.106. The notice required by the Board's regulations benefits the parties and the administrative process by enabling a respondent to identify and maintain relevant evidence and by facilitating the possibility of early resolution of the matters raised in the charge. Accordingly, in order to comply with the applicable regulatory requirements, a charge must contain enough information to provide a respondent with such notice.

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<sup>17</sup> A different provision applies to a person who was separated due to a Workforce Restructuring Action. *See* 4 C.F.R. §28.18(a)(3).

<sup>18</sup> Although Petitioner correctly points out that in very limited circumstances (4 C.F.R. §28.131), not present here, a petition may be filed without a charge first having been filed, this fact does not address what the relationship between a charge and a petition is in those circumstances when a charge must be filed. Further, even in the situation envisioned by section 28.131, the PAB/OGC is required to "report the determination together with any findings or recommendations to the GAO." 4 C.F.R. §28.131(c). Only after that step, if "after a reasonable period, GAO has not taken the corrective action recommended, the Board's Office of General Counsel may file a petition with the Board." 4 C.F.R. §28.131(d). Thus, this narrow exception that allows a petition without a preceding charge nevertheless contemplates that an informative report will be issued (and an opportunity to correct the situation short of litigation will be provided) to the Agency before further action can be taken. This is analogous to the notice requirement of charge filing and supports rather than diminishes the importance of that aspect of filing a charge.

*Smith* simply constitutes an application of the Board’s regulations and does not impose any new or additional requirements beyond those set forth in the regulations. In short, *Smith*, like other Board decisions, recognizes that there must be a sufficient nexus between a charge and a petition in order for allegations in a petition to be considered by the Board. See, e.g., *Gaston v. GAO*, No. 99-02 (AJ Order of July 11, 2000 at 2-3, *aff’d*, Board Decision on Appeal (July 18, 2003) at 2 n.2) (*Gaston*) (AJ properly rejected GAO motion to dismiss a discrimination claim made to the Board where the claim was “reasonably related” to a claim raised in the underlying administrative proceeding).<sup>19</sup> Moreover, Petitioner’s attempt to diminish the import of *Smith* because it was not “tested” or reviewed by the full Board, or because the PAB/OGC was not a party to the case and the case was ultimately settled, is without merit. See Opposition at 11.

## 2. Allegations Relating to FY 02

In this case, the Charge includes the information contained in the O&I Complaint and in the other documents Mr. Taydus provided in the O&I proceeding. Specifically, in the portion of the Charge requesting Mr. Taydus to “[b]riefly describe the actions complained of and the reasons [he] believe[d] the actions to be improper,” he expressly states that his “Complaint is in the documents [he] filed with O&I.” Charge, ¶18 (Resp. Ex. D). He also references his “PAB [sic] filing of 2003.” *Id.* at 6.; see note 10, *supra*. This explicit incorporation of his earlier filings with O&I—his Complaint as well as his subsequent submissions—as part of his Charge with PAB/OGC makes those earlier O&I filings as much a part of his Charge as if they had been appended thereto. Accordingly, any analysis of the contents of the Charge must include consideration of the O&I filings.

Such an analysis establishes that Petitioner alleged that, during the FY 02 promotion cycle, GAO’s performance appraisal process discriminated against him on several impermissible bases.

First, the O&I Complaint itself explicitly alleged that GAO discriminated against field staff and staff over 50 years old.<sup>20</sup> Specifically, Mr. Taydus asserted in his O&I Complaint that

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<sup>19</sup> For the reasons stated above, I reject Petitioner’s argument that *Smith* imposes “a more stringent standard than that found in the [GAO] Order and Board regulations.” Opposition at 11 n.7. Similarly, I reject Petitioner’s contention that the “import” of *Smith* is “that a matter cannot be brought before the Board unless it was first investigated by the PAB/OGC.” *Id.* at 12. Such a contention is unsound for the reasons set forth by GAO. Further, I also find without merit Petitioner’s contention that *Smith* does not apply in this case because here the governing regulation is 4 C.F.R. §28.98, not 4 C.F.R. §28.18(a) as it was in *Smith*. The pertinent point is that the contents of the charge are governed by 4 C.F.R. §§28.11(d)(3) and (4), regardless of which regulatory provision governs the timeliness of a charge. See 4 C.F.R. §28.98(e)(1). Finally, in light of the fact that, as discussed below, the Charge in this case explicitly incorporated the O&I Complaint and other O&I filings, there is no need to address Petitioner’s “relation back” argument.

<sup>20</sup> Petitioner checked the box on the Complaint alleging discrimination on the basis of age. Resp. Ex. A at 1.

field staff and staff over 50, on average, have been given lower [appraisal] ratings than headquarters' staff and that an analysis of this issue should be part of this discrimination determination process. I believe this analysis will show that older staff and field staff receive lower appraisal scores than headquarters' staff.

Resp. Ex. A at 3 (emphasis in original). In addition, during the O&I process, Mr. Taydus repeated this assertion in the material that he gave to the O&I investigator on August 13, 2003. There, his analysis of GAO FY 02 appraisal and merit pay slides alleged that GAO gave lower performance appraisal scores to “older male workers, with more than 5 years experience, and working in field offices. . . .” Pet. Ex. 2 at 8.

Therefore, it is clear that, with respect to FY 02, Petitioner had alleged both in the Complaint and during the O&I process that GAO's performance appraisal process had discriminated against field staff and staff over 50 years old.

Further, Mr. Taydus' allegations both in the Complaint and during the O&I process included claims that GAO discriminated against him during the FY 02 promotion cycle on the bases of his sex and race.<sup>21</sup> His O&I Complaint alleged that the panel that determined the BQ applicants erred by making an “automatic conversion of performance appraisal ratings to [BQ] scores,” and that “the panel members discriminated against [him] because [he is] a white male over 50 years old.” Resp. Ex. A at 6. In addition, as noted above, his analysis of GAO FY 02 appraisal and merit pay slides alleged that GAO gave lower performance appraisal scores to older male workers. Further, the O&I investigator's report noted Mr. Taydus' allegation “that there is a pattern within GAO as a whole that older, white employees in [the] Agency have gotten lower [performance appraisal] ratings in general, and have had less success with promotions.” Pet. Ex. 4 at 2.

These contentions are sufficient to establish that, with respect to FY 02, Mr. Taydus had alleged both in the Complaint and during the O&I process that GAO's performance appraisal process had discriminated against him on the bases of race and sex.

The answer to whether Mr. Taydus sufficiently raised, in the O&I proceeding, an allegation of discrimination on the basis of disability as to the FY 02 performance appraisal, is less clear. Petitioner did not check the box on the Complaint alleging discrimination on the basis of disability. Resp. Ex. A at 1. However, he did state in the Complaint that he was a 40 percent disabled Vietnam veteran and that he had a rare disease. *Id.* at 2.<sup>22</sup> Moreover, he raised allegations regarding discrimination on the basis of his disability in both of his submissions to the investigator during the O&I process.

In this regard, the record shows that Petitioner made the following allegations concerning his disability during the O&I investigation: (1) Petitioner's August 13, 2003 analysis of GAO's FY 02 appraisal and merit pay slides stated that he was “a 56 year old white male, 40 percent rated

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<sup>21</sup> Petitioner checked the boxes on the Complaint alleging discrimination on the bases of sex and race. Resp. Ex. A at 1.

<sup>22</sup> In addition, the EEO counselor's report of May 7, 2003 stated that Petitioner had noted that he has a disability. Pet. Ex. 1 at 2.

disabled Vietnam veteran, who has been employed at GAO for more than 10 years in a field office,” and that “all the group categories with which I am affiliated had the poorest showing of any other groups.” Pet. Ex. 2 at 4, 8; (2) Petitioner’s September 2, 2003 affidavit stated that his analysis of the GAO FY 02 appraisal and merit pay slides demonstrated the average performance appraisal score was lower “in all categories with which I am associated,” including “Disabled,” than the average for all staff; and (3) his affidavit also alleged that a slide “of staff with over 5 years at GAO and with some disability show[ed] that 55 percent of this staff received the lowest or no merit pay increase,” and that this was “also a problem with the promotion process.” Pet. Ex. 3, ¶16.

Noting Petitioner’s *pro se* status,<sup>23</sup> I conclude that this evidence, rather than simply constituting “passing, general references to disability” as claimed by the Agency (Reply at 18), is sufficient to demonstrate that Petitioner raised an allegation of discrimination based on disability in the O&I proceeding, notwithstanding his failure to check the “disability” box on the Complaint. In this regard, the cases relied on by the Agency are distinguishable from the instant situation. *Cross* involved only one reference to the allegation at issue, not several, and, unlike here where Petitioner filed his O&I Complaint *pro se*, plaintiff in that case was at all times represented by counsel, including when he filed his administrative charge with the EEOC. In *Caldwell*, the court found that “[a] fair reading of the administrative complaints and affidavits submitted by Plaintiffs . . . do[es] not even hint that they were complaining about sex discrimination.” *Caldwell*, 966 F. Supp. at 48-49. Here, by contrast, a fair reading of Petitioner’s evidence presented in the O&I proceeding shows that he was complaining about discrimination on the basis of disability. Finally, in *Alfred*, the court found that where the plaintiff did not identify any sexual discrimination claim in the administrative charge filed with the EEOC, “the plaintiff failed to exhaust her administrative remedies by inadequately notifying the agency of the theory underlying her claim.” *Alfred*, 473 F. Supp.2d at 9. Here, Petitioner’s evidence was sufficient to provide the Agency with notice that he was raising a claim of disability discrimination.

GAO’s contention that the Board does not have jurisdiction over the Petition because the Charge does not challenge GAO’s performance appraisal practices for FY 02 is unavailing. As set forth above, Petitioner alleged to O&I that GAO’s performance appraisal practices for FY 02 discriminated against him on the bases of age, sex, race, office location, and disability.<sup>24</sup> Contrary to GAO’s argument, Petitioner’s claims in the Charge did not relate solely to the matters that were investigated and actually resolved by O&I—they related to the matters that he presented

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<sup>23</sup> See *Federal Express Corp. v. Holowecki*, 522 U.S. \_\_\_, No. 06-1322, slip op. at 11 (Feb. 27, 2008).

<sup>24</sup> On the Charge form, Petitioner checked “Promotion” as the type of action upon which his claim was based, and did not check “Performance Evaluation.” Pet. Ex. D, ¶13. In light of the fact that he checked the “Promotion” box and that he specifically alleged, both in the Charge itself and in the O&I proceedings that were incorporated in the Charge, that his failure to make the BQ list for promotion was based on his improper performance evaluation resulting from GAO’s allegedly discriminatory performance appraisal practices for FY 02, I do not find his failure to check the “Performance Appraisal” box dispositive.

to O&I for investigation and resolution. Accordingly, the fact that GAO's final decision did not address, let alone resolve, some of his claims does not bar them from being raised in the Charge.<sup>25</sup>

As recognized in the EEO counselor's report of March 7, 2003 (the issues in the O&I Complaint were "appraisal" and "promotion/pay/ bonus/award"), the O&I investigator's Report of September 5, 2003 (Petitioner alleged "that there is a pattern within GAO as a whole that older, white employees in [the] Agency have gotten lower [performance appraisal] ratings in general, and have had less success with promotions"), and the August 13, 2003, and September 2, 2003 submissions made by Petitioner during the O&I investigation (discussed above), the matter of the allegedly discriminatory performance appraisal system for FY 02 was clearly presented to O&I for investigation and resolution. Pet. Exs. 1 at 1, 4 at 2. Moreover, the fact that Petitioner could have filed a charge with the PAB/OGC at any time after 120 days had elapsed from his filing of the O&I Complaint, instead of waiting for a final decision by GAO, is irrelevant to a determination of what issues were presented to O&I for investigation and resolution.<sup>26</sup>

Accordingly, I find that the Charge, which explicitly incorporated the O&I Complaint and subsequent filings, alleged that GAO discriminated against Petitioner in the FY 02 promotion cycle by giving lower performance appraisal ratings to employees with one or more of the same characteristics as Petitioner: white, male employees over the age of 50 who worked in field offices and who had a disability. As Petitioner correctly argues, "it is the underlying complaint and matters raised during the course of the investigation into that complaint which provided notice to the Agency." Surreply at 3 n.2. As such, GAO had adequate notice that these FY 02 allegations might be presented in a Petition.

Therefore, as the regulatory requirement that a charge contain notice of matters alleged in a petition has been met with respect to the FY 02 allegations, GAO's Motion to Dismiss the Petition on jurisdictional grounds is denied as to the FY 02 allegations.

### 3. Allegations relating to FY 03 – FY 06

However, with respect to the allegations in the Petition relating to FY 03 – FY 06, a different conclusion is warranted. As GAO correctly points out, "[n]owhere in the Charge did Petitioner indicate that he sought to challenge any actions, such as performance appraisals, promotions, or pay decisions, that occurred after the 2002 promotion cycle (other than his grievance over the 2002 promotion cycle)." Memorandum at 10 (emphasis in original).

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<sup>25</sup> Similarly, GAO's contention that Petitioner's failure to respond to O&I's letter of March 3, 2003, setting forth the claims that it had accepted for investigation, bars Petitioner from raising performance appraisal-related claims in the Charge, is without merit. Inasmuch as Petitioner's O&I Complaint alleged that his exclusion from the BQ list for promotion during the FY 02 promotion cycle was based on a discriminatory performance appraisal, it is quite reasonable to construe O&I's statement of the claims accepted for investigation as incorporating the performance appraisal issue. As such, there was no basis for Petitioner to believe that O&I had not correctly identified the issues in his Complaint. Moreover, as discussed *infra* at note 31, nothing in O&I's letter dismissed or rejected any of Petitioner's claims.

<sup>26</sup> The lengthy period of time from the date that the O&I investigator submitted a Report (Sept. 5, 2003) (Pet. Ex. 4) to the issuance by GAO of a final decision on the O&I Complaint (Sept. 25, 2006) (Resp. Ex. C) is unexplained.

Moreover, nowhere in the O&I Complaint that was incorporated in the Charge was any reference made to any such actions after FY 02. In this regard, the O&I Complaint was filed on February 20, 2003, and was never supplemented or amended to add allegations relating to any period after FY 02. In addition, nothing in the record indicates that any new O&I Complaint was filed regarding any actions after FY 02. Further, Petitioner makes no assertion that he presented any evidence to O&I at any time following the submission of his affidavit on September 2, 2003. Thus, at no time was there any allegation or evidence submitted to O&I concerning performance appraisal practices (or any other matters) for FYs 03 - 06.<sup>27</sup> Accordingly, nothing in the Charge (including the O&I Complaint) contained any allegations with respect to actions after FY 02.

Petitioner acknowledges that the O&I Complaint did not raise allegations regarding the Agency's post-2002 performance appraisal practices "because those events had not yet occurred." Opposition at 15. Nonetheless, citing *Weber*, Petitioner asserts that "[i]t was reasonable to expect that an O&I investigation into the Agency's 2002 performance appraisal practice would have grown to encompass performance appraisal scoring practices arising subsequent to Mr. Taydus' Complaint and during the course of the OOI investigation." *Id.* This contention is without merit.

During the pendency of the O&I proceeding, Petitioner applied for promotion during the FY 03, FY 04, FY 05, and FY 06 promotion cycles but was not selected. Petition, ¶¶10, 15, 19, 25. As noted above, at no time did Petitioner either seek to amend his Complaint or file a new Complaint alleging discrimination in the performance appraisal process for those years, nor did he at any time submit any evidence concerning those years.

In these circumstances, there is no reason to believe that a pending investigation about a Complaint that contained allegations relating only to FY 02 matters would automatically continue to encompass each new fiscal year that the Complaint was pending. To the contrary, the absence of new assertions or evidence regarding any post-FY 02 matter reinforces the conclusion that the Complaint and O&I investigation concerned only the FY 02 matters that were raised therein by Petitioner. As such, I find unpersuasive any contention that the FY03 – FY06 claims should be viewed as "reasonably related" to the FY 02 claim that was raised in the underlying administrative proceeding. *Cf. Gaston*.

Accordingly, as the regulatory requirement that a Charge contain notice of matters alleged in a Petition has not been met with respect to the FY 03 – FY 06 allegations, the individual counts in the Petition are dismissed insofar as they relate to FY 03 – FY 06.<sup>28</sup>

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<sup>27</sup> In the absence of any such submissions, O&I could not have been reasonably expected to know whether Petitioner had even applied for promotions in any of those fiscal years. In this regard, Petitioner noted in his O&I Complaint that "[l]ast year [presumably FY2001], [he] did not apply for the BQ list or promotion." Resp. Ex. A at 3.

<sup>28</sup> Whether the filing of an amended charge to include allegations relating to post-FY 02 matters would have yielded a different result is a moot point, since no amended charge was filed. In addition, having found that the counts in the Petition are dismissed insofar as they relate to FY 03 – FY 06 because those allegations do not comply with the regulatory requirements, there is no need to address or resolve the parties' further arguments regarding exhaustion and untimeliness insofar as they relate to those matters.

## B. EXHAUSTION<sup>29</sup>

GAO contends that Petitioner failed to exhaust his “discrimination claims that rely on events arising prior to February 20, 2003.” Memorandum at 16 (emphasis in original).<sup>30</sup> In this regard, GAO asserts that the Petition does not claim that the Agency discriminated against Petitioner with respect to either of the issues investigated and resolved by O&I, and that Petitioner was required to, but did not, challenge the scope of O&I’s investigation by invoking his right to immediately pursue a performance appraisal claim with the PAB. These assertions lack merit.

The focus of the administrative exhaustion doctrine is on whether Petitioner has raised a claim in the earlier proceeding, not on whether that claim has been resolved. *Park v. Howard Univ.*, 71 F.3d 904, 907 (D.C. Cir. 1995), *cert. denied*, 519 U.S. 811 (1996) (*Park*). As noted above, Petitioner sufficiently raised before O&I claims of discrimination in the performance appraisal process for FY 02. The fact that O&I failed to resolve those claims is irrelevant to the exhaustion analysis; the relevant fact is that they were presented to O&I. Indeed, Petitioner had no knowledge that O&I had not resolved those claims until GAO issued its final decision in the matter. Upon receipt of that decision, he timely filed a Charge with PAB/OGC incorporating his O&I filings.

GAO’s reliance on *Cross* is misplaced. Here, unlike in *Cross*, “the administrative investigation that [could] reasonably be expected to follow” from Petitioner’s O&I Complaint is one that would have included examination of his claims of discrimination in the FY 02 performance appraisal process. See *Cross*, 2006 WL 2819758 at 14 (quoting *Park* at 907). In fact, the investigation did include, at least to some degree, consideration of such claims. In this regard, the EEO counselor’s report of March 7, 2003 noted that appraisal was an issue in the Complaint, and the O&I investigator’s Report of September 5, 2003 expressly noted Petitioner’s allegation “that there is a pattern within GAO as a whole that older, white employees in [the] Agency have gotten lower [performance appraisal] ratings in general, and have had less success with promotions.” Pet. Exs. 1 at 1, 4 at 2.

The Agency also contends that it would be “fundamentally unfair for Petitioner to be permitted at this late date to litigate a disability claim against GAO[,]” because “Petitioner’s failure to raise disability discrimination with O&I prevented the investigator from seeking information from Petitioner about his alleged disability [and] deprived the investigator of learning from managers whether they were even aware of an alleged disability.” Memorandum at 16. This claim lacks merit. As discussed above, Petitioner raised an allegation of discrimination based on disability in

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Nonetheless, I note in this regard that a recent judicial decision in an employment discrimination case contains an extensive discussion of these and related matters. See *Lewis v. District of Columbia*, 2008 U.S. Dist. LEXIS 4571 (D.D.C. Jan. 24, 2008).

<sup>29</sup> GAO’s arguments relating to Petitioner’s Equal Pay Act claims, including its exhaustion argument, are addressed below in Part C.

<sup>30</sup> Although GAO references only sex and age discrimination, I construe its argument as applying also to the other claims of discrimination in FY 02 that were found above to have been properly raised in the Petition.

the material that he submitted to the investigator during the O&I proceeding. The Agency has not demonstrated that the investigator was prevented in any way from seeking information from Petitioner about his disability or that the investigator was precluded from learning from managers whether they were aware of Petitioner's disability. As such, the Agency has not established any unfairness or prejudice in this regard.

GAO also notes that Petitioner did not challenge the scope of O&I's investigation by invoking his right to pursue a performance appraisal claim with the PAB. This fact is not relevant to an exhaustion analysis. First, as noted above, Petitioner submitted claims to O&I alleging discrimination in the performance appraisal process for FY 02, and such claims were acknowledged in the reports of the EEO counselor and O&I investigator. Second, Petitioner could have reasonably expected that his FY 02 claims were being investigated during the pendency of the O&I proceeding.<sup>31</sup> Third, the fact that Petitioner had a right to file a performance appraisal claim with the PAB at any time after 120 days from the filing of his O&I Complaint had elapsed does not mean that he had any obligation to file such a claim with the PAB during the pendency of the investigation. Rather, as was his right under applicable GAO and Board regulations, he awaited the final decision by GAO regarding the O&I Complaint and thereafter filed a timely Charge to initiate a PAB proceeding.

Finally, GAO contends that "even Petitioner's Charge with the PAB/OGC—filed almost 5 years later—failed to challenge GAO's performance appraisal practices." Memorandum at 18-19. For the reasons discussed earlier, the Charge did challenge GAO's performance appraisal practices for FY 02 and, therefore, this contention is without merit. Further, the length of time between the filing of the O&I Complaint and the Charge with PAB/OGC is not due to the failure of Petitioner to comply with any regulatory requirement, but rather to the unexplained delay by GAO in issuing a final decision on the O&I Complaint.<sup>32</sup>

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<sup>31</sup> GAO also asserts that when O&I informed Petitioner that it had accepted two claims for investigation, it effectively was dismissing his challenge to GAO's performance appraisal practices for FY 02. This assertion is faulty for two reasons. First, for the reasons stated above, the claims accepted for review could reasonably be read as encompassing the challenge to GAO's performance appraisal practices for FY 02. Second, as pointed out by Petitioner, if O&I dismisses a portion of a complaint, it must so notify the complainant and state the reason for the dismissal and set forth the applicable appeal rights. *See* GAO Order 2713.2, Ch. 3, ¶5c. O&I's letter of March 3, 2003 did none of these. Resp. Ex. B. Accordingly, there was no reason for Petitioner to have viewed the letter as dismissing any of his allegations of discrimination.

<sup>32</sup> There is no regulatory requirement governing how soon GAO must issue a final decision after a complaint is filed with O&I. Rather, GAO's final decision must be issued "[n]ot later than 90 days after the complainant receives a copy of the investigative file." GAO Order 2713.2, Ch. 3, ¶8. The GAO Order also provides that O&I "shall endeavor to complete its investigation within 180 days of the filing date of an individual complaint," and "shall notify the complainant when the investigation has been completed [and] shall provide the complainant with a copy of the investigative file." *Id.*, ¶¶6.c and d. The record does not indicate when O&I notified Petitioner that the investigation had been completed. GAO issued its final decision on September 25, 2006. Resp. Ex. C.

Accordingly, GAO's contention that Petitioner failed to exhaust his administrative remedies with respect to his individual claims of discrimination in the performance appraisal practices for FY 02 is rejected.

### C. EQUAL PAY ACT

GAO contends that Petitioner's EPA claims should be dismissed for two reasons: for failure to exhaust administrative remedies and for failure to state a claim. As to the first reason, even assuming, without deciding, that Petitioner's EPA claim is subject to an administrative exhaustion requirement, Petitioner satisfied any exhaustion requirement by presenting such a claim with respect to FY 02 in the O&I proceeding. Specifically, in conjunction with his argument that promotion opportunities were based on discriminatory performance appraisal practices, Petitioner alleged to O&I that his analysis of GAO slides for FY 02 showed that average performance appraisal scores for men were lower than for women; average performance appraisal scores for men who worked more than five years were lower than for women who worked more than five years; a higher percentage of women than men received the two highest pay categories of merit pay; and a higher percentage of men than women received the lowest category or no merit pay. *See* Pet. Ex. 3. These allegations are restated in the Petition. Accordingly, Petitioner satisfied any administrative exhaustion requirement that might apply with respect to the EPA claim.

However, GAO's contention that Petitioner's EPA argument fails to state a claim has merit. GAO asserts that, in the Opposition, Petitioner "repeatedly disavows . . . that he is alleging any form of disparate treatment in the Petition." Reply at 9. As an example in this regard, GAO cites Petitioner's statement that he "does not allege that he was the victim of discriminatory treatment, but rather that he has been harmed by a policy that has had an unlawfully disparate impact upon him." *Id.* (citing Opposition at 16) (emphasis in Opposition). According to GAO, this constitutes a tacit admission that the claim is deficient as a matter of law because the Supreme Court has stated that "Equal Pay Act claims are—by definition—claims of intentional discrimination. . . ." *Id.* at 10 (citing *Gunther*, 452 U.S. at 170-71 and *Smith v. Jackson*).

Petitioner does not dispute GAO's characterization that Petitioner's EPA claims constitute disparate impact claims.<sup>33</sup> Rather, in response to GAO's contention that Petitioner's EPA argument fails to state a claim, Petitioner attempts to distinguish *Gunther* and *Smith v. Jackson* and argues that "Respondent overstates their holdings and impact on Petitioner's EPA claims." Surreply at 3.

In *Gunther* and *Smith v. Jackson*, the Supreme Court made clear that the EPA does not prohibit pay differentials between male and female employees when those differences are based on factors other than sex. *Gunther*, 452 U.S. at 170-71; *Smith v. Jackson*, 544 U.S. at 239 n.11.<sup>34</sup>

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<sup>33</sup> Indeed, Count II of the Petition explicitly alleges that GAO's practice "had a disparate impact upon Petitioner's pay in violation of the [EPA]." Petition ¶61.

<sup>34</sup> The fact that both cases arose under other statutes does not affect the substance of what the Supreme Court stated with respect to the EPA.

The Supreme Court’s interpretation that the EPA is restricted to claims of disparate treatment and precludes disparate impact claims arising under that law has been noted by several courts of appeals. *See, e.g., Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325 (11<sup>th</sup> Cir. 2001), *cert. dismissed*, 535 U.S. 228 (2002) (“The Supreme Court has interpreted section 206(d)(1) of the Equal Pay Act to preclude disparate impact claims”) (citing *Gunther*); *Ellis v. United Airlines*, 73 F.3d 999, 1008 (10<sup>th</sup> Cir. 1996), *cert. denied*, 517 U.S. 1245 (1996) (citing *Gunther*). Petitioner cites no case law to the contrary. Accordingly, inasmuch as Petitioner does not dispute that his EPA claims constitute disparate impact claims and the EPA has been judicially interpreted as precluding disparate impact claims, Petitioner’s EPA claims are dismissed for failure to state a claim.

#### D. CLASS ACTION CLAIMS

Counts XI and XII raise non-EEO class claims.<sup>35</sup> Count XI alleges that GAO’s practice of giving lower performance appraisals to Band I field employees relative to Band I Headquarters employees constituted a personnel practice prohibited by 5 U.S.C. §2302(b)(12). Count XII alleges that GAO’s practice of giving lower performance appraisals to employees with more than five years of service to GAO relative to employees with less than five years of GAO service constituted a personnel practice prohibited by 5 U.S.C. §2302(b)(12). The class of individuals sought to be represented by Petitioner is defined as:

All current and former Band I employees of the Government Accountability Office who are or were employed by GAO in a field office at any time during Fiscal Year 2002 to 2006 inclusive, and who received performance appraisals during that time period, and all current and former Band I employees of the Government Accountability Office who are or were employed by GAO during Fiscal Year 2002 to 2006 inclusive, and who received performance appraisals during that time period, and who were employed by GAO for five or more years at the time they received performance appraisals during that time period.

Petition ¶50.

The parties dispute whether these non-EEO counts are timely.<sup>36</sup> Petitioner asserts that they are timely because they “allege a continuing violation, i.e., that during the relevant time period [FY 02 – FY 06] GAO engaged in an ongoing prohibited personnel practice of giving lower

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<sup>35</sup> Therefore, the procedures set forth in GAO Order 2713.2, Chapter 4 for discrimination class complaints do not apply here.

<sup>36</sup> Section 28.18(f) of the Board’s regulations states the following with respect to non-EEO class actions:

*Non-EEO class actions.* One or more persons may file a petition as representatives of a class in any matter within the Board’s jurisdiction. For the purpose of determining whether it is appropriate to treat a petition as a class action, the administrative judge will be guided, but not controlled, by the applicable provisions of the Federal Rules of Civil Procedure. See §28.97 for EEO class actions.

4 C.F.R. §28.18(f). *See also* 4 C.F.R. §28.11(a)(2).

performance appraisal scores to certain classes of employees.” Opposition at 17. GAO disputes this claim.

However, as discussed earlier, to the extent that any of the individual counts in the Petition relate to FY 03 – 06 matters, those matters are not properly before the Board because they were not raised either in the Charge or in the O&I Complaint. As such, to the extent that Counts XI and XII relate to FY 03 – 06 matters, those claims are dismissed. Thus, the only portion of Counts XI and XII that requires consideration concerns the discrete performance appraisals for FY 02.

Neither party focused on this potential outcome in their submissions to date. Under the circumstances, GAO’s Motion to Dismiss Counts XI and XII, to the extent that those counts relate to FY 02, is denied at this time, subject to renewal at a subsequent point if, upon consideration of the conclusions reached herein, such a Motion is warranted.

### **CONCLUSION**

GAO’s Motion to Dismiss the Petition is granted with respect to Counts I-X, to the extent that those counts relate to FY 03 – FY 06 and to Equal Pay Act claims.

GAO’s Motion to Dismiss the Petition is denied with respect to Counts I-X, to the extent that those counts relate to FY 02 and to claims not based on the Equal Pay Act.

GAO’s Motion to Dismiss the Petition with respect to Counts XI and XII is granted, to the extent that those counts relate to FY 03 – FY 06.

GAO’s Motion to Dismiss the Petition with respect to Counts XI and XII is denied at this time, to the extent that those counts relate to FY 02, subject to renewal at a subsequent point if, upon consideration of the conclusions reached herein, such a Motion is warranted.

**SO ORDERED.**