# 37 Named Petitioners v. U.S. Government Accountability Office

**Docket Nos. 09-01; 09-06 through 09-41**

**Date of Decision: March 31, 2010**

**Cite as: 37 Named Petitioners v. GAO, Docket Nos. 09-01; 09-06 through 09-41 (3/31/10)**

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

**Headnotes:**

**Equal Pay**

**Jurisdiction**

**Merit System Principles**

**Motion to Dismiss**

**Pay Bands**

**Personnel Action/Adverse Action**

**Prohibited Personnel Practice**

**Standing**

**Statutory Construction**

**Summary Judgment**

**Timeliness**

## DECISION

### I. INTRODUCTION

This matter is before the Personnel Appeals Board (PAB or Board), pursuant to 4 C.F.R. §28.21(c), on Petitioners' Motion for Summary Judgment and Respondent's Motion to Dismiss, or, in the Alternative, for Summary Judgment. Each party filed an Opposition to the other party's Motion.

In this consolidated case, thirty-seven individuals (Petitioners) allege that the Respondent U.S. Government Accountability Office (GAO or the Agency) committed personnel practices

prohibited by 5 U.S.C. §2302(b)(12) by improperly failing to provide them with a full upward adjustment to their basic rates of pay in 2006 and 2007 in violation of the GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004) (the 2004 Act) (Respondent's Exhibit (Resp. Ex.) D). All of the Petitioners are former GAO employees who retired from, or otherwise left, GAO before the enactment of the Government Accountability Act of 2008, Pub. L. No. 110-323, 122 Stat. 3539 (the 2008 Act) (Petitioner's Exhibit (Pet. Ex.) 13).

The parties agree, and I find, that there is no genuine issue as to any material fact. For the reasons stated below, the parties' respective Motions are granted in part and denied in part.

## II. BACKGROUND

### A. Petitioners' Charges and Amended Charges and Other Filings

On February 7, 2006, Judy T. Lasley, then a Band I Analyst at GAO, filed a Charge with the Personnel Appeals Board Office of General Counsel (PAB/OGC) seeking "[r]estoration of pay protection & across the board increase" based on her claim that the Agency committed certain prohibited personnel practices as a result of a number of pay-related decisions, including the fact that "[m]any GAO employees had all of their across the board increases taken away, including me[.]" *See* Charge of Judy T. Lasley (Feb. 7, 2006) (Pet. Ex. 1 at 7, 9). Ms. Lasley retired from the Agency in January 2007. *See* Petition at 1.

The other thirty-six Petitioners filed Charges between April 27, 2007, and June 25, 2007, alleging that GAO had committed certain prohibited personnel practices in 2006 and 2007 by failing to give them their "rightful pay" in violation of the 2004 Act.[1] Pet. Ex. 2.

On December 13, 2007, Ms. Lasley amended her Charge to state that she was seeking redress on behalf of herself and "all similarly situated current and former GAO employees who were denied a pay increase in January 2006 as a result of the Comptroller General's unauthorized actions in interpreting and implementing" the 2004 Act. *See* Amended Charge of Judy Lasley at 5 (Dec. 13, 2007) (Pet. Ex. 3).

On January 14, 2009, Ms. Lasley filed a Petition with the Personnel Appeals Board containing two counts alleging that GAO's failure to provide her and all similarly situated former GAO employees a full 2.6% upward adjustment to their basic pay in 2006, and a full 2.4% upward adjustment to their basic pay in 2007, violated section 3(a) of the 2004 Act. In her Petition, Ms. Lasley also sought, in accordance with 4 C.F.R. §28.18(f), to represent all former GAO employees employed by GAO during Fiscal Years (FYs) 2006 and 2007 (and who were not

[1] These Petitioners are Don Allison, Frederick Berry, Betty Clark, Jacqueline Cook, Terry Draver, David Epstein, Joseph Faley, Daniel Garcia, Charity Goodman, William Hall, David Hand, Susan Higgins, Lynn Johnson, Nancy Lively, William Mathers, James McDowell, MaeWanda Michael-Jackson, Roderick Moore, Lynn Musser, John Nelson, James Newton, Dudley Roache, Jr., Jeffrey Rose, Virginia Saavedra, Robert Sampson, Enemencio Sanchez, Samuel Scrutchins, Paul Shoemaker, Ellen Smith, Frank Smith, William Sparling, Jennifer Thomas, Gerald Thompson, John Ting, Robert Wagner, and Marcia Washington.

covered by the 2008 Act) who demonstrated satisfactory performance during 2005 and 2006 but did not receive the full 2.6% and/or full 2.4% annual adjustment in 2006 and 2007, respectively.

On February 24, 2009, the parties agreed that dispositive motions would likely be determinative with respect to Ms. Lasley's Petition, and, therefore, further agreed that a schedule for filing motions concerning class certification would be determined, if necessary, following a decision on any dispositive motions. Status Conference Report and Order (Feb. 24, 2009).

On May 13, 2009, the other thirty-six Petitioners filed their Petitions, containing substantively similar allegations to those raised in Ms. Lasley's Petition. On May 21, 2009, the parties filed a Joint Motion to Consolidate the 37 Petitions. The parties' Joint Motion was granted on June 2, 2009.

On September 29, 2009, Petitioners filed a Motion for Leave to Amend Petitions, and included the Amended Petition. The Amended Petition reiterated the two counts in Ms. Lasley's Petition and added two counts alleging that "[i]n failing to provide Petitioners and other similarly situated individuals a full 2.6% upward adjustment to basic pay in 2006" and "a full 2.4% upward adjustment to basic pay in 2007," "as required under Pub. L. 108-271 §3(a), GAO denied them equal pay for work of substantially equal value in violation of 5 U.S.C. §2302(b)(12)." Amended Petition, ¶¶11, 15.

On October 8, 2009, GAO filed an Opposition to Petitioners' Motion for Leave to Amend Petition. On October 9, 2009, Petitioners filed a Reply to GAO's Opposition, and on October 15, 2009, GAO filed a Sur-Reply to Petitioners' Reply.

On October 13, 2009, both parties filed dispositive motions. Petitioners' Motion for Summary Judgment was based on the assumption that the Motion for Leave to Amend Petitions would be granted. GAO's Motion to Dismiss or, in the Alternative, for Summary Judgment was based on the original Petitions.

On October 20, 2009, the undersigned issued an Order granting Petitioners' Motion for Leave to Amend Petitions after finding that the regulatory requirement governing amendments to petitions, 4 C.F.R. §28.21(a), had been satisfied. Because GAO's dispositive motion had been based on the original Petitions, GAO was granted additional time to file a supplemental or substitute dispositive motion. However, GAO responded that it did not believe that its dispositive motion needed any supplementation or substitution, and that it would not be filing any supplemental or substitute dispositive motion. GAO Letter of Oct. 26, 2009.

On November 20, 2009, each party filed its Opposition to the other party's dispositive motion.

B. Statutory Background and GAO Actions

1. 1980 Legislation

Until 1980, GAO's personnel system was similar to the personnel systems of Executive branch agencies and was subject to the same laws and regulations governing those agencies. *See* House

Comm. on Government Reform, GAO Human Capital Reform Act of 2003, H.R. Rep. No. 108-380, 108th Cong., 1st Sess., at 6 (2003) (Resp. Ex. A). In 1980, Congress enacted the General Accounting Office[2] Personnel Act (GAOPA). Pub. L. No. 96-191, 94 Stat. 27 (1980). The GAOPA established an independent personnel system for GAO and gave the Comptroller General authority to establish pay rates for GAO employees without regard to the General Schedule (GS) applicable to much of the Federal government (31 U.S.C. §§731(a), (b) and 732(b)(6)), subject to, among other things, the requirement that salaries "be adjusted at the same time and to the same extent as rates of basic pay are adjusted for the General Schedule." 31 U.S.C. §732(c) (2000); Pub. L. No. 96-191, §3(c)(2).[3]

Following enactment of the GAOPA, GAO essentially adopted the GS pay scale. *See Alamilla v. GAO,* PAB Docket No. 94-01 at 2 (3/17/95). In 1989, GAO abandoned the GS pay scale and converted to a pay-banding system for the Analyst workforce. *Id.* Under the pay-banding system, banded employees continued to receive an annual pay adjustment in the same amount and at the same time that Executive branch employees received such increases. *See id.* at 3; House Comm. on Oversight & Government Reform, Government Accountability Office Act of 2008, H.R. Rep. No. 110-671, 110th Cong., 2d Sess., at 9 (2008).

2. <u>2004 Legislation</u>

In 2004, Congress passed the GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271 (the 2004 Act). The 2004 Act addressed several personnel areas, including annual pay adjustments. Specifically, section 3(a) of the 2004 Act provided that "basic rates of officers and employees of [GAO] shall be adjusted annually to such extent as determined by the Comptroller General, and in making that determination the Comptroller General shall consider" several enumerated factors. *Id.,* §3(a). Section 3(a) of the 2004 Act also provided that "an adjustment under this paragraph shall not be applied in the case of any officer or employee whose performance is not at a satisfactory level, as determined by the Comptroller General for purposes of such adjustment[.]" *Id.*

3. <u>2006 Agency Actions</u>

Following enactment of the 2004 Act, GAO engaged a consulting firm to review GAO compensation practices. *See* H.R. Rep. No. 110-671 at 9. On January 22, 2006, after review of the firm's report, the Agency divided GAO Band II Analyst and Specialist positions into two pay ranges, Band IIA and Band IIB, and set a new schedule of pay ranges for Bands I, IIA, and IIB respectively. Resp. Exs. E ¶¶3, 5; J ¶2. Under the 2006 pay ranges, the maximum rate of pay for Band I employees was lower than the previous maximum rate for Band I employees; the maximum rate of pay for Band IIA Analysts and Specialists was lower than the previous

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[2] The Agency's name was changed to Government Accountability Office in 2004. Pub. L. No. 108-271, §8.

[3] The GAOPA also provided that the highest rate of pay under the GAO system generally was not to exceed the highest rate for GS-15 employees under the General Schedule. *See* Pub. L. No. 96-191, §3(c)(1).

maximum rate for Band II; and the maximum rate of pay for Band IIB Analysts and Specialists was higher than the previous maximum rate for Band II. Resp. Ex. J ¶2.

At the same time that the new pay ranges were established, the Agency authorized a 2.6% annual pay adjustment increase for most Analysts in 2006 whose performance was determined to be satisfactory, based on their annual performance ratings for 2005. *See* "2006 PBC Guide for Analysts, Specialists and Investigators – Appraisal Cycle from Oct. 1, 2004 to Sept. 30, 2005 (FY 05)" (2006 PBC Guide), §§1, 4 (Pet. Ex. 8); *see also* Resp. Ans., ¶1 (Pet. Ex. 9). However, as set forth more fully below, the Agency provided no annual pay adjustment increases, or in some cases limited increases, for certain employees in Bands I, IIA, and IIB. GAO Order 2540.3, Pay Administration in the Analyst Performance-Based Compensation System (Jan. 20, 2006) (Pet. Ex. 7). As a result, in 2006, thirty-three Petitioners received no increase at all in pay and four Petitioners received less than the 2.6% increase that most Analysts received, despite the fact that all thirty-seven Petitioners had been rated as performing at least at the "meets expectations" level in all competencies applicable to them for the FY 2005 rating period. *See* Resp. Ex. J, ¶2; Performance Assessments (Pet. Ex. 4A-4AF); GAO Resp. to Interrogatories (Pet. Ex. 5 at 3-4, 15).

Specifically, for Band I and Band IIA staff, the Comptroller General determined that "satisfactory" meant that they had received ratings of at least "meets expectations" on all competencies on which they had been rated in the last performance cycle. GAO Order 2540.3, Ch. 4, ¶2.a(1)-(2) (Pet. Ex. 7). Employees in these Bands whose performance was "satisfactory" received the full annual adjustment increase, except for those whose salary was already at or above the maximum pay rate for their Band (they received no increase) and those whose salary was close to the maximum pay rate for their Band (they received only the portion of the increase that brought them to the maximum rate). *See id.*, Ch. 4, ¶¶3.a, 3.b.

For 2006, the salaries of three Band I Petitioners (Lasley, Newton, and Sanchez) were above the maximum rate for Band I and they did not receive any annual adjustment; the salaries of twenty-eight Band IIA Petitioners (Allison, Berry, Clark, Cook, Draver, Epstein, Faley, Garcia, Goodman, Hall, Hand, Higgins, Johnson, Lively, Mathers, McDowell, Michael-Jackson, Moore, Rose, Sampson, Scrutchins, Shoemaker, E. Smith, F. Smith, Thompson, Ting, Wagner, and Washington) were above the maximum rate for Band IIA and they did not receive any annual adjustment in 2006; and the salaries of four other Band IIA Petitioners (Musser, Saavedra, Sparling, and Thomas) were close to, but not over the maximum rate for Band IIA, and they received annual adjustments in 2006 that put their salaries at the maximum rate for Band IIA, but their increases were less than 2.6%. Mowbray Declaration, ¶2 (Resp. Ex. J).[4]

With respect to Band IIB employees, the Comptroller General defined satisfactory level of performance with reference to a concept called a "speed bump." Walker Declaration,[5] ¶8 (Resp.

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[4] William R. Mowbray holds the position of Mathematical Statistician at GAO. In this capacity, his duties include the collection and retention of data affecting GAO operations. Resp. Ex. J, ¶1.

[5] David M. Walker was the Comptroller General of the United States from 1998 to 2008 and thus was the Agency head when the 2006 and 2007 pay decisions here at issue were made. Walker Declaration, ¶1.

Ex. E); *see also*, Resp. Ex. I, Ch. 4, ¶ 2.a(3)-(4). The "speed bump" referred to a salary rate between the competitive pay rate (*i.e.,* the salary rate representing the market median for the position covered by the salary range) and the maximum rate of the Band. Walker Declaration, ¶8; *see also*, Resp. Ex. I, Ch. 1, ¶¶3.f, 3.n. For 2006, the salary range for Band IIB in Washington, D.C., for example,[6] was $82,100 to $128,300, and the "speed bump" was $118,000 (based on a competitive pay rate of $105,200).

For employees in Band IIB whose salaries were below the "speed bump," the Comptroller General defined "satisfactory" performance in the same way that he defined it for employees in Bands I and IIA—"satisfactory" meant that they had received a rating of at least "meets expectations" on all competencies on which they had been rated in the last performance cycle. Pet. Ex. 7, Ch. 4, ¶2.a(3). However, "satisfactory" Band IIB employees whose salaries were below the "speed bump" and who were not in the top 50% of appraisal averages for Band IIBs in their team could receive only the portion of the annual adjustment that would not exceed the "speed bump." Pet. Ex. 7, Ch. 4, ¶3.c.

For employees in Band IIB whose salaries were at or above the "speed bump," the Comptroller General applied a different definition of "satisfactory" performance. These employees had to meet two conditions in order for their performance to be deemed "satisfactory": they had to have received a rating of at least "meets expectations" on all competencies on which they had been rated in the 2005 performance cycle <u>and</u> their appraisal had to have placed them in the top 50% of appraisal averages for Band IIBs in their team. Pet. Ex. 7, Ch. 4, ¶2.a(4). Employees who did not meet both conditions received no annual adjustment; employees who met both conditions received an annual adjustment not to exceed the maximum rate for Band IIB. Pet. Ex. 7, Ch. 4, ¶3.c.

For 2006, two Band IIB Petitioners whose salaries were above the "speed bump" (Nelson and Roache) received ratings of at least "meets expectations" on all competencies on which they had been rated in the 2005 performance cycle. Mowbray Declaration, ¶2 (Resp. Ex. J); Pet. Ex. 5 at 3-4, 14-15. However, their appraisals did not place them in the top 50% of appraisal averages in their team. Mowbray Declaration, ¶2; Pet. Ex. 5 at 3-4, 14-15. Therefore, their performance did not meet both conditions for "satisfactory" performance for employees whose salaries were above the "speed bump," and they did not receive any annual adjustment increase in 2006. Mowbray Declaration, ¶2.

4. <u>2007 Agency Actions</u>

In January 2007, the Agency determined that it would use the same approach as in 2006 with respect to annual pay adjustments, limiting the pay adjustments in the same manner as in 2006 for employees in Bands I, IIA, and IIB. *See* revised GAO Order 2500.1, Compensation Administration in the Government Accountability Office, Ch. 2, §§2, 3 (Jan. 5, 2007) (Pet. Ex. 10); revised GAO Order 2540.3, Pay Administration in the Analyst Performance-Based Compensation System, Ch. 4 (Jan. 5, 2007) (Pet. Ex. 11). On February 28, 2007, the Agency announced a 2.4% annual adjustment for "eligible" employees to be applied retroactively to the

[6] During the two years at issue, GAO's pay plans were separated into five geographical zones, and the ranges varied by zone. *See* Pet. Ex. 8 at 21-30 (2006); Resp. Ex. K at 7 (2007).

pay period beginning February 18, 2007. *See* Memorandum from Comptroller General David M. Walker to All Employees re: "Pay Adjustments for GAO Employees" (Feb. 28, 2007) (Pet. Ex. 12); *see also* Resp. Ans., ¶4 (Pet. Ex. 9).

Ten Petitioners (Allison, Garcia, Johnson, Lasley, Mathers, Michael-Jackson, Moore, Sampson, Thompson, and Wagner) had retired from or otherwise left GAO prior to February 18, 2007, the effective date of the annual adjustment. *See* Mowbray Declaration, ¶ 3 (Resp. Ex. J); Resp. Ans., ¶5 (Pet. Ex. 9). They did not receive any annual increase in 2007.

The remaining twenty-seven Petitioners[7] who were still employed at GAO in 2007 had their annual adjustments determined by using the same standards for satisfactory performance that had been used in 2006. Walker Declaration, ¶9 & n.2. They had all been rated as performing at least at the "meets expectations" level in all competencies applicable to them for the FY 2006 rating period.[8] *See* Resp. Ans., ¶5 (Pet. Ex. 9 at 3); Performance Assessments (Pet. Ex. 4A- 4AF); GAO Resp. to Interrogatories (Pet. Ex. 5 at 4-5). However, as set forth more fully below, seventeen of those twenty-seven Petitioners received no pay increase at all in 2007 and six Petitioners received less than the 2.4% increase that most Analysts received.[9]

Specifically, for 2007, the salaries of two Band I Petitioners (Newton and Sanchez) were above the maximum rate for Band I and they did not receive any annual adjustment; the salaries of fifteen Band IIA Petitioners (Berry, Clark, Cook, Draver, Epstein, Faley, Hall, Higgins, Lively, McDowell, Rose, Scrutchins, Shoemaker, E. Smith, and F. Smith) were above the maximum rate for Band IIA and they did not receive any annual adjustment in 2007; and the salaries of four Band IIA Petitioners (Goodman, Musser, Sparling, and Thomas) were close to, but not over the maximum rate for Band IIA, and they received annual adjustments in 2007 that put their salaries at the maximum rate for Band IIA, but the increases were less than 2.4%. Mowbray Declaration, ¶4 (Resp. Ex. J).

With respect to Band IIB, two Band IIB Petitioners (Nelson and Roache) had rates of basic pay in 2007 that put them close to, but not over, the speed bump for Band IIB.[10] Mowbray

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[7] The remaining twenty-seven Petitioners are Berry, Clark, Cook, Draver, Epstein, Faley, Goodman, Hall, Hand, Higgins, Lively, McDowell, Musser, Nelson, Newton, Roach, Rose, Saavedra, Sanchez, Scrutchins, Shoemaker, E. Smith, F. Smith, Sparling, Thomas, Ting, and Washington.

[8] In determining whether employees demonstrated satisfactory performance for purposes of receiving the 2.4% pay increase for 2007, GAO relied on annual ratings for FY 2006. *See* GAO Order 2540.3, Ch. 4 ¶2(c) (Jan. 50, 2007) (Pet. Ex. 11 at 16).

[9] Four Petitioners (Hand, Saavedra, Ting, and Washington) apparently received the full 2.4% annual adjustment increase for 2007. Resp. Ex. J, ¶3. *See* discussion at 21 & n.15, *infra*.

[10] The record reflects that the competitive pay rate for Band IIB increased from 2006 to 2007. Resp. Ex. K at 7. Since the "speed bump" was based on a computation between the competitive rate and the maximum rate for the Band (Walker Declaration, ¶8), the increase in competitive rate would have caused an increase in the "speed bump." Thus, a Band IIB employee's pay rate could have been above the speed bump in 2006, but below the speed bump in 2007.

Declaration, ¶4. They received ratings of at least "meets expectations" on all competencies on which they had been rated in the 2006 performance cycle, and therefore their performance was viewed as satisfactory for 2006. *Id.* If they had received the full 2.4% annual increase, that increase would have placed them over the speed bump. *Id.* However, these Petitioners' appraisal averages did not place them in the top 50% for Band IIBs in their team, and therefore they received only the portion of the 2.4% annual adjustment that brought their salaries to the speed bump. *Id.*

5. 2008 Legislation

On September 22, 2008, the Government Accountability Act of 2008 (the 2008 Act) was signed into law. *See* Pub. L. No. 110-323 (Resp. Ex. M; Pet. Ex. 13); *see also* Resp. Ans., ¶6 (Pet. Ex. 9). Section 2 of the 2008 Act modified the process set forth in section 3(a) of the 2004 Act regarding pay adjustments and mandated that, for future pay adjustments, employees whose performance is at least at a satisfactory level (as determined by the Comptroller General under the provisions of 31 U.S.C. §732(c)) must receive, at a minimum, an increase to their basic pay rate that is equal to the percentage set by the General Schedule.

In addition, the 2008 Act provided for a lump sum payment to be made to GAO employees employed with GAO on the date of enactment of the 2008 Act who, in 2006 and 2007, had not received either or both of the full 2.6% and 2.4% pay increases. The lump sum payment was equal to the total amount of basic pay that would have been paid to the employee if the employee had received a 2.6% and 2.4% pay increase in 2006 and 2007, respectively, minus the total amount of basic pay that was paid to the employee during 2006 and 2007, increased by 4%. Pub. L. No. 110-323, §3(d) (Pet. Ex. 13). The 2008 Act made no reference to Petitioners, who were not employed with GAO on the date of enactment of the 2008 Act. Accordingly, Petitioners did not receive any payment pursuant to the 2008 Act. *See* Amended Petition, ¶7.

## III. POSITIONS OF THE PARTIES

### A. GAO

GAO asserts that the Board lacks jurisdiction to enforce the provisions of the 2004 Act and that, therefore, the Board lacks jurisdiction over Petitioners' claim that GAO violated section 3(a) of the 2004 Act by electing not to provide them with the pay increases. GAO Memorandum of Law in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment (GAO Memorandum) at 2, 13-14. GAO also asserts that, with the exception of Ms. Lasley's 2006 claims, all of the Petitioners' claims are untimely. *Id.* at 27. Moreover, GAO contends that ten Petitioners lack standing to pursue their 2007 claims. *Id.* at 33.

Further, GAO asserts that even if this consolidated case is properly before the Board, GAO did not violate the 2004 Act because the plain language of the 2004 Act unambiguously provided the Comptroller General with the discretion in 2006 and 2007 to determine to what extent an employee's salary would be adjusted, including the discretion not to raise pay rates at all. *Id.* at 16. GAO also asserts that the 2004 Act prohibited the Comptroller General from "providing a salary adjustment" to employees whose performance was not considered "satisfactory," and gave

the Comptroller General the discretion to determine when performance would be considered "satisfactory" for purposes of pay adjustments. *Id.* at 16-17.

In addition, GAO contends that the legislative history of the 2004 Act and the text of the 2008 Act reinforce the conclusion that the 2004 Act did not compel the Agency to provide Petitioners with pay increases in 2006 and 2007. *Id.* at 19-21.

Moreover, even assuming, *arguendo*, that the language of the 2004 Act is ambiguous, GAO asserts that its interpretation and implementation of the statute is reasonable and is entitled to deference from the Board. *Id.* at 24.

B. Petitioners

Petitioners assert that the Board has jurisdiction in this case because they are raising prohibited personnel practice claims. Memorandum of Points and Authorities in Support of Petitioners' Motion for Summary Judgment (Pet. Memorandum) at 4-5. In addition, Petitioners contend that all of their claims are timely. With respect to GAO's claim that ten Petitioners lack standing to pursue their 2007 claims, Petitioners acknowledge the reasonableness of this contention, but assert that they "are not in a position to agree with [this] conclusion at this time." Pet. Opposition to Resp. Motion at 2 n.2.

Petitioners contend that the plain language of the 2004 Act unambiguously required the Agency to provide them full pay increases in 2006 and 2007 because their performance was determined to be at least satisfactory. Pet. Memorandum at 11-12. Further, Petitioners assert that the legislative history of the 2004 Act, as well as that of the 2008 Act, supports their position that GAO was required to provide them full pay increases in 2006 and 2007. *Id.* at 12-15.

Finally, Petitioners contend that GAO's failure to pay them the full pay increases constitutes a prohibited personnel practice because the Agency's action denied Petitioners equal pay for work of substantially equal value in violation of 5 U.S.C. §2302(b)(12). *Id.* at 16.

IV. DISCUSSION

Summary judgment is appropriate under the guidelines of the Federal Rules of Civil Procedure if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Tekeley v. GAO*, PAB Docket No. 06-16 at 22 (8/9/07); *see also* 4 C.F.R. §28.21(c)(3). The record in this case demonstrates that there is no genuine issue as to any material fact. Accordingly, the parties' legal arguments are addressed next.

A. Jurisdiction

The counts in the Amended Petition allege that: (1) "GAO's failure to provide Petitioners and other similarly situated individuals a full 2.6% upward adjustment to their basic pay in 2006 violated" section 3(a) of the 2004 Act (Count I) and also violated 5 U.S.C. §2302(b)(12) because

it "denied them equal pay for work of substantially equal value" (Count II); and (2) "GAO's failure to provide Petitioners and other similarly situated individuals a full 2.4% upward adjustment to basic pay in 2007 violated" section 3(a) of the 2004 Act (Count III) and also violated 5 U.S.C. §2302(b)(12) because it "denied them equal pay for work of substantially equal value" (Count IV). Amended Petition, ¶¶8-15.

The Board clearly has jurisdiction over the counts alleged in the Amended Petition.[11] Under 31 U.S.C. §753(a)(2), the Board has jurisdiction to consider allegations of prohibited personnel practices as defined under 5 U.S.C. §2302(b):

> (a) The G[overnment] A[ccountability] Office Personnel Appeals Board may consider and order corrective or disciplinary action in a case arising from—
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> . . .
>
> (2) a prohibited personnel practice under section 732(b)(2) of this title;

31 U.S.C. §753(a)(2); *see* 4 C.F.R. §28.2.

Here, Petitioners allege that the Comptroller General took personnel actions in 2006 and 2007 that "violate[d] [a] law . . . implementing, or directly concerning, the merit system principles contained in section 2301" of Title 5. 5 U.S.C. §2302(b)(12). In enacting this provision, Congress intended "to make unlawful those actions which are inconsistent with merit system principles, but which do not fall within the [other] categories of personnel practices." House Comm. on Post Office & Civil Service, Legislative History of the Civil Service Reform Act of 1978, H.R. Doc. No. 2, 96th Cong., 1st Sess., at 1486-87 (1979).

A cause of action alleging a violation of 5 U.S.C. §2302(b)(12) consists of three elements: there must be (1) a personnel action that (2) violates a law, rule or regulation, and (3) the law, rule or regulation must be one which implements or directly concerns a merit system principle. *See Special Counsel v. Byrd*, 59 M.S.P.R. 561, 579 (1993), *aff'd*, 39 F.3d 1196 (Fed. Cir. 1994). Petitioners claim that the elimination or the limitation of the 2006 and 2007 annual adjustments to the base pay of employees who had satisfactory performance constituted an unauthorized reduction in pay in violation of the 2004 Act (Pub. L. No. 108-271) and that this law implements or directly concerns the merit system principle requiring equal pay for substantially equal work.

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[11] GAO's jurisdictional argument addressed only the counts in Ms. Lasley's original Petition, not the counts in the Amended Petition. *See* GAO Memorandum at 13-14. As noted above, GAO declined the opportunity to supplement or substitute its arguments following the granting of the Motion to Amend Petitions. *See* GAO Letter of Oct. 26, 2009. The Agency's Opposition to the Motion to Amend was based on the premise that the new counts would add two new claims alleging prohibited personnel practices. *See* GAO's Opposition to Petitioner's Motion for Leave to Amend Petition, ¶5. Petitioners contended that the amendment was for the purpose of clarifying the original Petitions, *i.e*, "to explicitly set forth this [prohibited personnel practice] implied basis for challenging Respondent's actions in this matter." *See* Motion for Leave to Amend Petitions at 1. The Agency's Opposition to Petitioner's Motion for Summary Judgment, filed after the Order granting the Motion for Leave to Amend Petitions, appears to concede jurisdiction for the new counts. *See* GAO Opposition at 7.

As such, they have raised nonfrivolous claims of a violation of 5 U.S.C. §2302(b)(12) over which the PAB has statutory jurisdiction. *See* 31 U.S.C. §753(a)(2).[12]

B. Timeliness

The Board's regulations require charges to be timely filed. Specifically, 4 C.F.R. §28.11(b) states:

> (b) *When to file*. (1) Charges relating to adverse and performance-based actions must be filed within 30 days after the effective date of the action.
>
> (2) Charges relating to other personnel actions must be filed within 30 days after the effective date of the action or 30 days after the charging party knew or should have known of the action.
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> (3) Charges which include an allegation of prohibited discrimination shall be filed in accordance with the special rules set forth in §28.98.
>
> (4) Charges relating to continuing violations may be filed at any time.

It is undisputed that Ms. Lasley's Charge challenging the 2006 pay decision is timely filed. That Charge was filed within 30 days of the Agency's action on January 22, 2006 and, therefore, is timely filed under 4 C.F.R. §28.11(b)(2).

The parties disagree on the timeliness of all of the remaining Charges. GAO argues that all Charges regarding the 2006 pay decision (except for that of Ms. Lasley) are untimely and all Charges regarding the 2007 pay decision are untimely. According to GAO, Petitioners' Charges were required to be filed within 30 days after the effective date of the Agency's 2006 and 2007 pay decisions; *i.e.*, January 22, 2006, and February 18, 2007, respectively. Resp. Ex. J, ¶¶ 2, 4. Since no Petitioner (except Ms. Lasley) filed a Charge challenging GAO's 2006 pay decision until more than 15 months after the effective date of that decision, and no Petitioner filed a Charge challenging the Agency's 2007 pay decision until more than 70 days after the effective date of that decision, GAO asserts that all of these Charges are untimely. GAO also contends that the "continuing violation" exception to the Board's timeliness requirements (4 C.F.R. §28.11(b)(4)), which permits charges to be filed at any time with regard to continuing violations, does not apply in this case.[13]

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[12] In the 2008 Act, Congress addressed pay claims of GAO employees then-employed by GAO by giving those current employees back pay. Pub. L. No. 110-323, §3(d). At the same time, the 2008 Act specifically stated that the Board no longer had jurisdiction over those current employees' claims. *Id.,* §3(g). However, the 2008 Act did not address the claims of Petitioners and other similarly situated individuals and did not deprive the Board of its statutory jurisdiction to consider and order corrective action in a case arising from a prohibited personnel practice under 31 U.S.C. §732(b)(2). *See* 31 U.S.C. §753(a)(2).

[13] Even though GAO asserts that all of the Petitioners except for Ms. Lasley have filed untimely claims that should be dismissed, GAO acknowledges that, as to the 2006 claims, "these other [P]etitioners may still be part of a class should a class ever be certified as to Ms. Lasley's claim. *See American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974)." GAO Memorandum at 27 n.10.

Petitioners contend that the Charges are timely for all Petitioners based on the Charge and Amended Charge filed by Ms. Lasley. Relying on the principle of "class action tolling" of a statute of limitations set forth by the Supreme Court in *American Pipe and Construction Co. v. Utah*, 415 U.S. 538, 550 (1974), and the fact that Ms. Lasley was clearly authorized to file a Charge as representative of a class, 4 C.F.R. §28.11(a)(2), Petitioners assert that Ms. Lasley's timely-filed Charge effectively commenced the action for all of the "similarly situated" members of the class for whom she sought redress.[14] Moreover, Petitioners contend that all the Charges are timely "because the Petitioners are challenging the implementation of an illegal pay system." Pet. Opposition at 9. Finally, Petitioners request that, if the Board determines that some of the Petitioners' claims were not timely filed, the Board defer issuing a final ruling on dismissal of those claims and that Petitioners be afforded an opportunity to submit a motion to waive the limitations periods "for good cause shown" (4 C.F.R. §28.16(b)) for filing with the PAB/OGC in this case.

I find that there were two discrete actions that occurred in this case for purposes of determining the applicable time limits for filing under the Board's regulation: the Agency's decisions setting forth how pay would be determined in 2006 and 2007. Those actions were taken on January 22, 2006 and February 18, 2007, respectively, through the issuance of the Pay Orders on those dates. It is undisputed that those Pay Orders were made available to GAO employees on those dates. Thus, as of those dates, Petitioners were given information that they knew, or should have known, could result in their receiving less than the full pay increases set for each of those years. Ms. Lasley is the only Petitioner who filed a Charge within 30 days of the effective date of the 2006 pay determination. No Petitioner filed a Charge within 30 days of the effective date of the 2007 pay determination. Thus, except for Ms. Lasley's Charge, no other charge was filed within the period set forth in 4 C.F.R. §28.11(b)(2).

Further, I find that the continuing violation exception in 4 C.F.R. §28.11(b)(4) does not apply in this case. As in *Tekeley*, GAO made a specific pay determination that had subsequent effects on Petitioners' pay and/or retirement benefits. As stated in *Tekeley*:

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[14] In this regard, Petitioners state:

> The Board has not yet reached the question of class certification in this matter. Nonetheless, the proper approach is to apply the class action tolling rule not only to other individually named plaintiffs, but to any other former GAO employee whose performance was satisfactory and who was nevertheless denied the annual pay increases and was not covered by the GAO Act of 2008. *See American Pipe and Construction Co.*, 414 U.S. at 552 ("[E]ven as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment."). Even if the Board ultimately denies class certification, under the rule articulated in *American Pipe and Construction Co.*, the filing deadline should be tolled for a period of time afterwards to provide any putative individual class member the opportunity to file a charge challenging the Comptroller General's decisions to deny them the 2.6% and 2.4% increases to base pay in 2006 and 2007 respectively.

Pet. Memorandum at 7.

> For purposes of defining a continuing violation in order to compute time limits, there is a distinction between actions that a party takes and the impact of those actions. A party may not use the continuing violation theory to challenge discrete actions that occurred outside the limitations period even though the impact of the acts continues to be felt. A continuing violation is occasioned by continual unlawful acts, not by continual effects from the original violation. An employee's repeated requests for relief from one act cannot turn a discrete action into a continuing violation.
>
> [The] case law demonstrates that Petitioner's claim of a continuing violation cannot serve to justify the Petition based upon a Charge filed seventeen months after GAO's denial of his request to be placed in CSRS-Offset. The fact that Petitioner continues to feel impact from the Agency's actions in 1990, 1996, and 2004 does not render his filing timely under the continuing violation theory. Under Petitioner's theory, there would be no time limit for filing a petition as long as GAO did not provide him the remedy that he seeks. This would permit a petition to be filed at any time, a result that would render the PAB's regulatory time limit meaningless.

*Tekeley*, PAB Docket No. 06-16 at 23 (citations omitted).

Petitioners' attempt to distinguish *Tekeley* is unpersuasive. Petitioners' claim that they do not seek relief from GAO's initial announcement of its pay determination, but rather for the harm caused by the continued application of that decision, is no different from the claim in *Tekeley*. In both instances, GAO made a discrete determination that had continuing effects on individuals' pay. For the same reasons stated in *Tekeley*, the continuing violation theory is inapplicable here.

Accordingly, the 2006 claims (except that of Ms. Lasley, which is undisputedly timely) and all of the 2007 claims will be dismissed. However, the dismissal will be without prejudice to the Petitioners' opportunity after issuance of this Decision on the dispositive motions to file a motion for waiver of time limits for good cause shown. If such a motion is filed, GAO will have an opportunity to respond. I also note that, regardless of whether such a motion is filed and as acknowledged by GAO, the other thirty-six Petitioners may join Ms. Lasley's putative class claim alleging an improper denial of a pay increase in January 2006.

Having found that Ms. Lasley's Charge alleging a violation as to 2006 is timely, I find that the purposes of administrative and judicial economy will best be served by proceeding to address the standing issue before addressing the merits of Ms. Lasley's Charge.

C. <u>Standing</u>

GAO alleges, and Petitioners do not dispute, that ten Petitioners (Allison, Garcia, Johnson, Lasley, Mathers, Michael-Jackson, Moore, Sampson, Thompson, and Wagner) left GAO prior to the implementation of the Comptroller General's 2007 pay decision. Resp. Exs. J (Mowbray Dec., ¶3), P. GAO asserts that these individuals were not adversely affected by the 2007 pay

decision and thus have no standing to challenge that decision. *See* 4 C.F.R. §§28.11(a), 28.18 (a person who files a charge must claim to be adversely affected by a GAO action or inaction). Petitioners acknowledge that "it is reasonable for the Respondent to suggest that th[e]se individuals" were not adversely affected, but Petitioners further state that they are not in a position to agree with GAO's conclusion at this time because "Petitioners are still in the process of ascertaining the extent of damages caused by the Comptroller General's 2006 and 2007 pay policies and will not be able to make a final determination as to the extent of the harm until that effort is complete." Opposition at 2 n.2.

I find that inasmuch as it is undisputed that the ten named Petitioners left GAO before the date of the 2007 pay determination, they could not have been adversely affected by that decision (which had prospective application only). Accordingly, even if it is ultimately determined that a waiver of time limits is warranted with respect to the filing of the Charges as to these ten named Petitioners regarding the 2007 pay determination, the Charges would nonetheless be dismissed for lack of standing under 4 C.F.R. §§28.11 and 28.18.

Similarly, GAO asserts that four Petitioners (Hand, Saavedra, Ting, and Washington) who were still employed with GAO as of the date of the 2007 pay adjustment determination received the full 2.4% pay increase in 2007. GAO's Statement of Undisputed Facts #28; Mowbray Declaration, ¶3 (Resp. Ex. J). Petitioners do not appear to contest this assertion.[15] Consequently, even if a waiver of time limits is warranted as to the filing of the Charges of these four Petitioners, I find that they were not adversely affected by the 2007 pay determination and lack standing with respect to any 2007 claim.

D. <u>The 2006 Pay Determination Relating to Ms. Lasley</u>

In order for Ms. Lasley to establish a prohibited personnel practice as alleged, she must show that: (1) the 2006 pay determination constituted the taking of a personnel action; (2) the pay

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[15] Petitioners' Opposition to GAO's Motion does not directly refute the Agency's Statement of Undisputed Facts #28 or ¶3 of the Mowbray Declaration, or otherwise specifically discuss these four Petitioners by name, but merely refers back to their own Memorandum (at 2-3) and reiterates that "twenty-seven Petitioners did not receive the 2.4% upward adjustment to their basic pay in 2007). . . ." Opposition at 5 n.5. Petitioners' Memorandum and their Statement of Facts rely on GAO's Response to Petitions ¶5 (Pet. Ex. 9) to support their position. Pet. Memorandum at 3; Pet. Statement of Facts for Which There Exists No Genuine Dispute #118. GAO's Response to Petitions ¶5 also does not specifically discuss these four Petitioners by name: "Deny fifth paragraph, except to aver that 27 of the petitioners, who had satisfactory performance during 2006, . . . did not receive all or part of the 2007 annual adjustment of 2.4% because their salaries were already above or within 2.4% of the pay range speed bump or pay range maximum rate for their band level. . . . Analysts who had satisfactory performance in 2006, . . . and whose pay was 2.4% or more below the speed bump or maximum rate for their band level received the full 2.4% annual adjustment [for 2007]." In these circumstances, I find that these four Petitioners received the full 2.4% increase in 2007. If Petitioners have any evidence to the contrary, they should file a motion for leave to provide such evidence to me within 30 days of the date of this Decision. If such a motion is filed, GAO will have an opportunity to file a response.

determination violated section 3(a) of the 2004 Act; and (3) the 2004 Act implements or directly concerns a merit system principle. These will be addressed in turn.[16]

1. The 2006 Pay Determination Constituted the Taking of a Personnel Action

The Agency's decision in 2006 to deny Ms. Lasley any annual increase to base pay is a personnel action within the meaning of 5 U.S.C. §2303(b)(12). A "personnel action" for purposes of establishing a prohibited personnel practice is defined in 5 U.S.C. §2302 as including a "decision concerning pay, benefits, or awards. . . ." 5 U.S.C. §2302(a)(2). The 2006 decision at issue here directly concerns pay and thus plainly is within the scope of the prohibited personnel practice statute. *See Turner v. GAO,* PAB Docket No. 94-07 at 14 (7/3/95); *Briley v. National Archives & Records Admin.*, 71 M.S.P.R. 211, 222 (1996) (reclassification decision affects basic rate of pay and therefore concerns pay for purposes of establishing prohibited personnel practice). Indeed, GAO does not argue otherwise. Therefore, the 2006 pay determination constitutes the taking of a personnel action for purposes of establishing a prohibited personnel practice covered under §2302(b)(12).

2. The Application of the 2006 Pay Determination to Ms. Lasley was Inconsistent with Section 3(a) of the 2004 Act

A. Meaning of Section 3(a) of the 2004 Act

The essential issue in this case is one of statutory construction: what is the extent of the discretion given to the Comptroller General in the 2004 Act in making determinations regarding annual adjustments of GAO employees' basic rates of pay? Both parties claim that the language of the 2004 Act is "unambiguous" (GAO Memorandum at 16; Pet. Opposition at 2), yet they reach opposite conclusions as to whether the Comptroller General complied with the 2004 Act in this case. GAO contends that "the 2004 Act unambiguously gave the Comptroller General discretion to do whatever he saw fit with respect to whether and to what extent to provide employees with pay adjustments in 2006 and 2007 [and] . . . [n]othing in section 3 mandated that the pay rates be adjusted upward, as opposed to downward." GAO Memorandum at 16. On the other hand, Petitioners contend that "Congress' intention [was] clear[:] all employees performing satisfactorily should have their basic pay rate adjusted upward annually, with the Comptroller General determining the extent of the adjustment" (Pet. Opposition at 4), and that "Congress did not give the Comptroller General authority to eliminate the adjustments altogether—except in the case of poorly performing employees. 31 U.S.C. §732(c)(3)." Pet. Memorandum at 11.

As this case involves a question of statutory interpretation, the starting point of the analysis is the text of the legislation itself. *See Carcieri v. Salazar,* 555 U.S. ___, 129 S.Ct. 1058, 1063-64 (Feb. 4, 2009) (According to settled principles of statutory construction, "we must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms.") (*citing United States v. Gonzales*, 520 U.S. 1, 4 (1997) ("Our analysis begins, as always, with the statutory text."); *see Alamilla v. GAO,* PAB Docket No. 94-01 at 6 (3/17/95).

[16] Although the analysis that follows will be applied at this time only to the one claim that is indisputably timely and properly before me (Ms. Lasley's 2006 claim), the analysis would apply as well to any other 2006 and/or 2007 claims that may ultimately be found to be properly before me.

Section 3(a) of the 2004 Act states:

> …basic rates of officers and employees of the Office shall be adjusted annually to such extent as determined by the Comptroller General, and in making that determination the Comptroller General shall consider—
>
> (A) the principle that equal pay should be provided for work of equal value within each local pay area;
>
> (B) the need to protect the purchasing power of officers and employees of the Office, taking into consideration the Consumer Price Index or other appropriate indices;
>
> (C) any existing pay disparities between officers and employees of the Office and non-Federal employees in each local pay area;
>
> (D) the pay rates for the same levels of work for officers and employees of the Office and non-Federal employees in each local pay area;
>
> (E) the appropriate distribution of agency funds between annual adjustments under this section and performance-based compensation; and
>
> (F) such other criteria as the Comptroller General considers appropriate, including, but not limited to, the funding level for the Office, amounts allocated for performance-based compensation, and the extent to which the Office is succeeding in fulfilling its mission and accomplishing its strategic plan;
>
> notwithstanding any other provision of this paragraph, an adjustment under this paragraph shall not be applied in the case of any officer or employee whose performance is not at a satisfactory level, as determined by the Comptroller General for purposes of such adjustment;

Pub. L. No. 108-271, §3(a).

The initial question that must be answered is what did Congress intend in section 3 of the 2004 Act by using the terms "adjusted" and "adjustment" in connection with pay rates? An adjustment in pay, ordinarily, can mean either an increase or a decrease in pay. However, in the text of section 3(a) of the 2004 Act, Congress made it clear that the term "adjustment" refers only to an increase. It did so most particularly by specifying in the "notwithstanding" paragraph of section 3(a) that no adjustment could be applied to an individual whose performance was not at a satisfactory level, as determined by the Comptroller General. The only possible meaning of the term "adjustment" that could apply in this context is "increase"; if the Comptroller General determined that an individual's performance was not at a satisfactory level, the Comptroller General did not have power to increase the pay of that individual. Stated otherwise, it would be implausible to conclude that Congress intended "adjustment" to refer to a decrease in pay (or to no change at all), such that Congress felt it necessary to specifically preclude the Comptroller

General from decreasing, or leaving unchanged, the pay of an individual who was not performing satisfactorily.

This conclusion that "adjustment" in section 3(a) can only mean "increase" is also supported by the requirement earlier in that section that in determining the annual adjustment, the Comptroller General must consider "the need to protect the purchasing power of officers and employees of the Office." Section 3(a)(B). The inclusion of this factor demonstrates Congressional intent to ensure that the Comptroller General consider the need to protect GAO employees' purchasing power in determining the amount of a pay increase. Nothing in section 3(a) suggests otherwise.

It is axiomatic that the same meaning is to be given to the same term used in different parts of a statute, absent compelling evidence otherwise. *Ratzlaf v. United States,* 510 U.S. 135, 143 (1994). This principle is even stronger when the same term is used in the same provision in a statute. *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320, 329-30 (2000); *Brown v. Gardner,* 513 U.S. 115, 118 (1994). Here, there is nothing to indicate that Congress intended to give different meanings to the same term—"adjusted" or "adjustment"—used in the same provision (section 3(a)) of the 2004 Act.

Accordingly, I reject GAO's claim that "[n]othing in section 3 mandated that the pay rates be adjusted upward, as opposed to downward."[17] GAO Memorandum at 16. The plain text of section 3(a) demonstrates that Congress clearly intended the term "adjustment" in that section of the 2004 Act to refer only to an increase in pay.[18]

However, it is also clear from the statutory text that Congress gave the Comptroller General discretion in determining both how much the annual increase should be and what would constitute "satisfactory" performance that would entitle an employee to an annual increase. Congress stated in section 3(a) that basic rates of officers and employees of the Office "shall be adjusted" (that is, increased) annually to such extent as determined by the Comptroller General.[19] Congress also stated that in making that determination the Comptroller General "shall" consider

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[17] GAO's reliance on the use of the term "adjustment" in other cases, such as *NTEU v. Horner*, 869 F.2d 571 (Fed. Cir. 1989), is inapposite because of the differences in the text and purposes of the varying pieces of legislation. *See* Resp. Opposition at 2-3. Similarly, GAO's reliance on Congressional use of the term "increase" in other statutes does not undercut the clear meaning of the term "adjustment" in section 3(a) of the 2004 Act. *See id.* at 3.

[18] In light of the clarity of the text of the 2004 Act, GAO's reliance on the *Chevron* doctrine is inapplicable. GAO Memorandum at 24; *see Chevron v. Natural Res. Def. Council,* 467 U.S. 837 (1984). That doctrine recognizes that an agency is entitled to deference in its construction of a statute, but only if the statute is silent or ambiguous with respect to a specific issue; such is not the case with respect to the meaning of the term "adjustment" in section 3(a) of the 2004 Act.

[19] The use of the term "shall" demonstrates that Congress intended to require the Comptroller General to take such action. *See Merck v. Hi-Tech Pharmacal*, 482 F.3d 1317, 1322 (Fed. Cir. 2007) ("use of the word 'shall' in a statute usually denotes the imperative"). While Congress gave the Comptroller General flexibility to determine the "extent" of such adjustment, the use of the word "shall" reflects its intent that basic salary rates be increased annually by some amount.

certain enumerated criteria. The Comptroller General's discretion in making the determination of the amount of the annual increase was constrained only by the requirements that he consider the enumerated criteria and that he could not give an increase to an employee whose performance is not at a "satisfactory" level. Even there, Congress gave the Comptroller General the discretion to determine what constituted "satisfactory" performance for the purpose of determining the amount of annual pay adjustment increases. Moreover, while section 3(a) made it clear that there must be a pay increase for employees whose performance was satisfactory, it did not specify the amount of the increase and left that determination to the Comptroller General.[20]

Accordingly, I conclude that the plain wording of section 3(a) of the 2004 Act demonstrates that in making his 2006 pay determination: (1) the Comptroller General was required to grant an annual increase to employees whose performance he deemed to be satisfactory; (2) the Comptroller General had discretion in determining the appropriate level of the annual increase, as long as his determination took into account the criteria set forth in section 3(a); and (3) the Comptroller General had discretion in defining what constitutes "satisfactory" performance for purposes of the annual increase.

Although this conclusion is based on the plain text of the statute, it is also supported by the relevant legislative history of the 2004 Act. *See, e.g.,* H.R. Rep. No. 108-380, at 23 (Resp. Ex. A) ("Section 3 gives the Comptroller General discretion over annual pay *raises* for GAO employees") (emphasis added). Additionally, in the House of Representatives' subcommittee hearing on the bill, Representative Jo Ann Davis (a co-sponsor of the bill and chairwoman of the subcommittee) remarked in her opening statement that the 2004 Act "would give the Comptroller General and GAO managers more authority to reward employees for good work, while taking away the guarantee of the annual Federal pay adjustment." *See* GAO Human Capital Reform: Leading the Way: Hearing on H.R. 2751 Before the Subcomm. on Civil Serv. & Agency Organization of the Comm. on Government Reform, 108th Cong., 1st Sess., at 2 (2003). (House Hearing, Resp. Ex. O).[21]

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[20] The fact that Congress intended to require the Comptroller General to provide some level of pay increase for employees whose performance was satisfactory is also evident from its provision precluding him from raising the pay of employees whose performance was unsatisfactory. If the Comptroller General had the authority not to give any pay increase to a satisfactorily performing employee, the result would have been to erase the distinction between employees whose performance was satisfactory and those whose performance was unsatisfactory. Nothing in the 2004 Act supports the view that Congress wanted to erase this distinction; to the contrary, Congress intended the Comptroller General to reward employees whose performance was at least satisfactory and precluded him from rewarding those whose performance was not satisfactory.

[21] I reject GAO's interpretation that this statement indicates that the Comptroller General had discretion not to give satisfactorily performing employees any increase in pay at all. Rather, I find that the statement supports a different conclusion: that the 2004 Act was intended to give the Comptroller General flexibility in how much he determined to reward employees for good work, and that employees' pay increases would be set by the Comptroller General as opposed to being guaranteed by the annual Federal pay adjustment increase given to other employees in the GS system. Nothing in Representative Davis's statement suggests in any way that the intent of giving the Comptroller General flexibility in determining the size of the adjustment was to allow the Comptroller General to reduce or leave unchanged the basic rate of pay for employees whose performance he deemed to be satisfactory. Rather, as the following

Both parties discuss several statements made by the Comptroller General during the development of the 2004 Act concerning annual pay adjustments for satisfactorily performing employees. In sum, these statements demonstrate two points. The first point is that, in exercising the power that Congress was considering granting to him in the 2004 Act, the Comptroller General intended to grant pay increases to employees whose performance was satisfactory (as determined by him), absent extraordinary circumstances. For example, in his July 16, 2003, written testimony before the House Subcommittee on Civil Service and Agency Organization, the Comptroller General stated: "Ultimately, if GAO is granted this authority, all GAO employees who perform at a satisfactory level will receive an annual base pay adjustment composed of purchase power protection and locality based pay increases absent extraordinary economic circumstances or severe budgetary constraints." *See* GAO: Additional Human Capital Flexibilities Are Needed, GAO-03-1024T, at 17 (July 16, 2003) (Written Statement of David M. Walker, Comptroller General) (Resp. Ex. N). Moreover, in the same written testimony in support of the Human Capital Reform Act, the Comptroller General said that GAO would adopt a commitment

> . . . to guarantee annual across the board purchase power protection and to address locality pay considerations to all employees rated as performing at a satisfactory level or above (i.e., meeting expectations or above) absent extraordinary economic circumstances or severe budgetary constraints . . . I have committed to our employees that I would include this guarantee in my statement here today so that it could be included as part of the legislative record.

*Id.* at 10.

The second point is that several Members of Congress fully expected these commitments to be honored. For example, the following exchange took place between a Committee Member and the Comptroller General:

> Representative Van Hollen: After some of the earlier testimony you presented, there were some concerns among a number of employees at GAO, and I was assured that you were going to go back and consult and further explain what you had proposed. . . .

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exchange between Representative Davis and the Comptroller General demonstrates, the lack of a pay increase was intended to be restricted to the relatively few employees whose performance was deemed to be unsatisfactory. During a hearing on the proposed legislation, Representative Davis asked the Comptroller General: "[W]hen you said . . . that [what] some of the employees are worried about is that if you do the pay adjustment so that they are not guaranteed what they are now, that they are worried that there would be a cut, or less than—did you mean really a cut, or do you mean less than, a smaller increase?" Comptroller General Walker replied that under the bill, those employees who are not meeting expectations "will be worse off, because . . . we would not have to give across-the-board increases nor merit pay increases to that small percentage of our employees who are not performing at a meets expectation level." House Hearing at 73-74.

> Mr. Walker: I have made it clear that, as long as employees are performing at the meets expectation level or better, then they will be protected against inflation . . . it would be an increase in base pay. . . .
>
> Representative Van Hollen: Let me make sure I understand what you were just saying. You have provided an assurance that except under extraordinarily bad budget scenarios, for example, a situation much worse than anything we're encountering even today, and things are pretty bad today—that you would assure that employees who are meeting the minimal expectation would receive a COLA and locality pay; is that right?
>
> Mr. Walker: Yes, and we would have a different method. But, yes, they would receive protection against erosion of purchasing power due to inflation, and some consideration of locality at a minimum. And then they should receive a performance-based compensation increase in the form of base pay as well.

House Hearing at 78-79 (Resp. Ex. O).

Similarly, the Report accompanying S. 1522, the Senate version of the 2004 Act, stated: "The Committee also received a commitment from the Comptroller General that, absent extraordinary circumstances or serious budgetary constraints, employees or officers who perform at a satisfactory level will receive an annual base-pay adjustment designed to protect their purchasing power." Senate Comm. on Governmental Affairs, GAO Human Capital Reform Act of 2003, S. Rep. No. 108-216, 108th Cong., 1st Sess., at 9 (2003). In addition, Representative Waxman stated that the Comptroller General had given "guarantees to employees about their future pay." 150 Cong. Rec. H582 (daily ed., Feb. 25, 2004). Thus, Members of Congress who sponsored the legislation that became the 2004 Act or sat on Committees considering the legislative proposals expressed their concern about future pay increases and their intent that GAO employees receive an annual increase to their salaries as determined by the Comptroller General. *See also,* House Comm. on Appropriations, Legislative Branch Appropriations for 2007 Hearings, Part 2: FY 2007 Legislative Branch Appropriations Requests, 109th Cong., 2d Sess. at 321 (Questions and Answers Submitted for the Record as Part of GAO's 2007 Appropriations Hearing) (Comm. Print 2006).

The parties agree, and I find, that the Comptroller General's testimonial commitment to annual pay adjustment increases is not binding on Congress. However, the Congressional responses to the Comptroller General's statements are to be given some weight because they demonstrate a consistent degree of reliance on his representations in giving him the flexibility to deviate from the statutory annual cost-of-living adjustment increase established by Congress for GS-system employees.

In addition, the enactment of the 2008 Act also supports the view that Congress did not intend that the Comptroller General would exercise his pay authority so as to eliminate the annual adjustment entirely for employees whose performance was satisfactory. In the 2008 Act, Congress revoked the authority that it had given to the Comptroller General in section 3(a) of the

2004 Act to determine the amount of the annual pay adjustment. Section 2 of the 2008 Act mandates that the Comptroller General give all employees an annual "increase" equal to that received by GS employees.[22] Further, the 2008 Act authorized back pay to individuals who were then employed with GAO and who did not receive the full pay adjustments for 2006 and 2007. Pub. L. No. 110-323, §§3(a), 3(d). While post-legislative action can sometimes be of limited usefulness in determining earlier Congressional intent, the specificity and immediacy of the 2008 Act's provisions provide support for the view that by denying pay increases to employees who—even by the Comptroller General's own definition of satisfactory performance—were performing at a satisfactory level, the Comptroller General's determinations did not comply with Congressional understanding when it passed the 2004 Act.[23] *See, e.g., Gulf Life Ins. Co. v. United States,* 118 F.3d 1563, 1566 (Fed. Cir. 1997).

In sum, the plain language of the 2004 Act, which is supported by its legislative history as well as by Congressional enactment of the 2008 Act addressing the same matter shortly after the Comptroller General's exercise of his authority under the 2004 Act, demonstrates that the Comptroller General was statutorily mandated to increase, in an amount to be determined by him after taking into account the criteria enumerated by Congress, the pay of all GAO employees in 2006 who, as determined by the Comptroller General, had performed satisfactorily. Simply stated, pursuant to section 3(a) of the 2004 Act, employees whose performance was deemed to be satisfactory were entitled to a pay increase; employees whose performance was deemed less than satisfactory were precluded from receiving a pay increase. Accordingly, the failure to provide a pay increase to Ms. Lasley in 2006, an employee whose performance was determined to be at a satisfactory level, was inconsistent with section 3(a) of the 2004 Act.

3. <u>The 2004 Act Implements or Directly Concerns a Merit System Principle</u>

The third and final element of the cause of action based upon 5 U.S.C. §2302(b)(12) is that the violated law, rule, or regulation implement or directly concern a merit system principle as defined by 5 U.S.C. §2301. 5 U.S.C. §2302(b)(12); *see Davis v. GAO,* PAB Docket Nos. 00-05 and 00-08 at 35, 42 (7/26/02); *Turner v. GAO,* PAB Docket No. 94-07 at 14 (7/3/95). In this context, "implement" means "to carry out, accomplish, fulfill or give practical effect to, in

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[22] GAO's assertion that its interpretation of the word "adjustment" in the 2004 Act is supported by Congressional use of the word "increase" in the 2008 is without merit. *See* Resp. Opposition at 3-4. To the contrary, Congress's action in 2008 demonstrates Congressional dissatisfaction with the Comptroller General's application of his authority under the 2004 Act. *See, e.g.,* H.R. Rep. No. 110-671 at 9 ("Under the auspices of the GAO Reform Act of 2004, and contrary to congressional intent, the [Comptroller General], in 2006 and 2007, denied certain employees whose job performance at least 'met expectations' the annual GAO across-the-board increase. In addition, certain GAO employees did not receive all of the merit pay that they earned in 2006.").

[23] GAO contends that the Petitioners are trying to achieve through this litigation a result that they were unable to obtain through the legislative process in 2008. GAO Memorandum at 12. However, GAO cites no support for the contention that Congress considered and rejected the claims of Petitioners and other individuals who were no longer employed by GAO at the time of the development of the 2008 Act. The absence of evidence in the record on this point suggests that the claims of Petitioners and similarly situated individuals simply were not raised, and therefore not addressed, in the legislative process.

the context of a manifest purpose or design to prevent conduct which directly and substantially 'undermines' the merit system principles and the 'integrity' of the merit system." *Wells v. Harris*, 1 M.S.P.R. 208, 243 (1979). It signifies a provision that "prescribe[s] processes and procedures that were deliberately designed to accomplish a specific result." *Special Counsel v. Harvey*, 28 M.S.P.R. 595, 601-02 (1984). A law, rule, or regulation "directly concerns" a merit system principle when its connection to such principle is "clear." *Id.* at 602 n.13; *see Turner v. GAO,* PAB Docket No. 08-01 at 17-18 (9/25/08). Thus, the remaining issue is whether section 3(a) of the 2004 Act implements or directly concerns a merit system principle.

The merit system principle applicable here states that "equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance." 5 U.S.C. §2301(b)(3). The statutory language here at issue not only mandates that employees who are performing satisfactorily receive some annual increase in pay, but also specifically identifies the principle that equal pay should be provided for work of equal value as one of several factors that the Comptroller General must consider in calculating the amount of that increase. *See* §3(a) of the 2004 Act. The 2004 Act expressly requires that, in making the determination of the extent of annual adjustment, the Comptroller General "shall consider":

> (A) the principle that equal pay should be provided for work of equal value within each local pay area;
>
> (B) the need to protect the purchasing power of officers and employees of the Office, taking into consideration the Consumer Price Index or other appropriate indices;
>
> (C) any existing pay disparities between officers and employees of the Office and non-Federal employees in each local pay area;
>
> (D) the pay rates for the same levels of work for officers and employees of the Office and non-Federal employees in each local pay area;
>
> (E) the appropriate distribution of agency funds between annual adjustments under this section and performance-based compensation; and
>
> (F) such other criteria as the Comptroller General considers appropriate, including, but not limited to, the funding level for the Office, amounts allocated for performance-based compensation, and the extent to which the Office is succeeding in fulfilling its mission and accomplishing its strategic plan;

*Id.*

Thus, this provision on its face makes clear that Congress intended that the annual adjustment be a means to implement the merit system principle of equal pay for work of equal value. *See Turner v. GAO,* Docket No. 08-01 at 20 (9/25/08) (*aff'd,* 9/18/09) (distinguishing between personnel-related statutory provision that is directly tied to merit system principles and one tied

to recoupment of erroneous student loan payments); *cf. Hinkel v. England*, 349 F.3d 162, 165 (3d Cir. 2003) (ruling that claim stated a prohibited personnel practice under §2302(b)(12) in part because statutory purpose behind the law was to promote principle of equal pay for substantially equal work). As such, the connection of section 3(a) of the 2004 Act to 5 U.S.C. §2301(b)(3) is clear.[24]

Accordingly, I find that the determination not to grant Ms. Lasley a pay increase in 2006 was inconsistent with section 3(a) of the 2004 Act and further violated 5 U.S.C. §2302(b)(12).[25]

Petitioners' Motion for Summary Judgment as to Ms. Lasley's 2006 claim is granted. The appropriate remedy will be determined after the period for submission of a motion for class certification, and if such a motion is filed, after consideration of the motion and Respondent's opposition thereto, unless otherwise resolved by the parties.

GAO's Motion to Dismiss the 2007 claims of Petitioners Allison, Garcia, Johnson, Lasley, Mathers, Michael-Jackson, Moore, Sampson, Thompson, and Wagner is granted based on their lack of standing because they were no longer employed with GAO as of the effective date of the 2007 pay action.

GAO's Motion to Dismiss the 2007 claims of Petitioners Hand, Saavedra, Ting, and Washington is granted based on their lack of standing because these four Petitioners received the full pay increase in 2007. As noted above (n.15), if these Petitioners have any evidence to the contrary, they should file a motion for leave to provide such evidence within 30 days of the date of this Decision. If such a motion is filed, GAO shall have 30 days in which to file a response.

GAO's Motion to Dismiss the remaining 2006 claims and the 2007 claims that have not already been dismissed for lack of standing is granted, without prejudice to the Petitioners' opportunity to file a motion for waiver of time limits for good cause shown within 30 days from the date of this Decision and Order. If such a motion is filed, GAO shall have 30 days to file a response. The

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[24] Indeed, GAO does not argue that the 2004 Act does not implement or directly concern a merit system principle.

[25] As discussed above, a 2.6% pay increase was given in 2006 to most Band I employees whose performance, like that of Ms. Lasley, was deemed to be satisfactory. Also, if Ms. Lasley had still been employed at GAO at the time of the enactment of the 2008 Act, she would have received back pay based upon the general increase of 2.6%. Finally, GAO does not claim, or offer any evidence to support a claim, that if it had given Ms. Lasley a pay adjustment increase in 2006, as I have found that it was required to have done, it would have given her an increase that was less than 2.6%. Based on the record before me, a determination that her increase should be 2.6% would clearly be an appropriate determination.

Having found a violation herein, Ms. Lasley is entitled to a remedy of appropriate backpay, interest, and an adjustment to her annuity. However, recognizing that a class claim may be filed within 60 days of this Decision, and that Petitioners have indicated that a class claim would be filed, I will defer ordering a specific remedy until such time as a class claim is filed. If no such class claim is timely filed, an order will issue as to the appropriate remedy for the violation found herein, absent the parties resolving the matter without resort to further litigation.

dismissal of the remaining 2006 claims is also without prejudice to the ability of the other thirty-six Petitioners to join Ms. Lasley's putative class claim alleging an improper denial of a pay increase in January 2006, as acknowledged by GAO (see nn.13, 25, *supra*).

A motion for class certification will be due 60 days after the date of this Decision. Any response to the motion will be due 45 days thereafter.

The parties are strongly encouraged to resolve any remaining issues without the need for further litigation, consistent with the Guide to Practice Before the Personnel Appeals Board (at 5). *E.g., Turner v. GAO,* PAB Docket No. 08-01 at 26 (9/25/08); *see* 4 C.F.R. §28.22(b)(11).

**SO ORDERED**.