PAB/OGC v. U.S. Government Accountability Office

Docket No. 12-01

Date of Decision: July 23, 2012

Cite as: PAB/OGC v. GAO, Docket No. 12-01 (7/23/12)

Before: Personnel Appeals Board *en banc* (William E. Persina, Administrative Judge; Steven H. Svartz, Chair; Susan R. Winfield, Vice Chair; John L. Braxton; Robert F. Herman)

Headnotes:

Discretion of Administrative Judge

Motion to Dismiss

PAB General Counsel

PAB Regulations

Standing

Statements of Policy and Guidance

DECISION

PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.

PERSONNEL APPEALS BOARD **OFFICE OF GENERAL COUNSEL,** **Petitioner**	)	
v.	)	**Docket No. 12-01**
UNITED STATES GOVERNMENT **ACCOUNTABILITY OFFICE,** **Respondent**	)	July 23, 2012

DECISION ON PETITION FOR A STATEMENT OF POLICY OR GUIDANCE

The Personnel Appeals Board General Counsel (PAB/GC or General Counsel) has filed a Petition for a Statement of Policy or Guidance (Petition) under section 28.155 of the Board's Regulations (4 C.F.R. §28.155).

The Government Accountability Office Personnel Act (GAOPA), at 31 U.S.C. §§732(c)(3) and (j), provides for GAO employees evaluated as performing satisfactorily to receive an annual pay adjustment. The PAB/GC requests that the Board issue a Statement of Policy or Guidance as to whether GAO Order 2536.1, Pay Retention in the GAO (Jan. 20, 2006), which at Chapter 2 section 6.b prohibits annual pay adjustments for employees receiving pay retention benefits under the Order, is inconsistent with the GAOPA's annual pay adjustment provisions. Petition at 1. For the reasons set forth below, the Board denies the request.

Applicable Regulation

Section 28.155 of the Board's regulations provides as follows:

> Upon petition by any person, or on its own motion, the Board may issue statements of policy or guidance. In determining whether to issue such a statement, the criteria to be considered by the Board will include, but not be limited to, the following:
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> (a) Whether the question presented can more appropriately be resolved by other means;
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> (b) Where other means are available, whether a Board statement would prevent the proliferation of cases;
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> (c) Whether the resolution of the question presented would have general applicability;
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> (d) Whether the question currently confronts the parties as part of their employee-management relationship;
>
> (e) Whether the question is presented jointly by the parties involved; and
>
> (f) Whether the issuance by the Board of a statement of policy or guidance would promote the purposes of the Government Accountability Office Personnel Act.

Background

The PAB/GC filed the Petition that is now under review on April 16, 2012. On May 3, 2012, the Government Accountability Office (GAO or the Agency) filed a Motion for Extension of Time to Respond to Request for Statement of Policy or Guidance, seeking an additional two weeks beyond the May 7 deadline for filing. The Board granted the request by Order of May 4, 2012. Thereafter, on May 15, 2012, the Board issued an Order requesting the parties to submit written responses to several specific questions raised by the Petition no later than May 25, 2012. On May 21, 2012, GAO

filed a Motion to Dismiss Petition for Statement of Policy or Guidance, which the Board is treating as the Agency's Response to the Petition. *See* Order of May 22, 2012. Both parties timely submitted responses to the questions posed by the Board's Order on May 25, 2012. The Agency sought leave to file a response to the PAB/GC's answers to the questions; the Board granted that request and GAO's Response to the PAB/OGC's Responses to the Questions Posed in the Board's May 15, 2012 Order was filed on June 4, 2012. PAB/GC's Opposition to GAO's Motion to Dismiss was also filed on June 4, 2012.[1]

Positions of the Parties

1. The PAB/GC's Petition for a Statement of Policy or Guidance

a. *Reasons for issuing a policy statement*—The PAB General Counsel first claims that the criteria for issuance of a Statement of Policy or Guidance are met under section 28.155 of the Board's rules, 4 C.F.R. §28.155. The General Counsel addresses the six enumerated criteria for issuance of a Statement of Policy or Guidance set out in that rule.

The PAB/GC argues that the first criterion, whether the question presented can more appropriately be resolved by other means, is met in this case. In this connection, he states that there is no case pending before the Board in which the question presented can be resolved. Moreover, the General Counsel claims that GAO has consistently maintained that the GAOPA requires it to deny annual pay adjustments to employees under pay retention. Thus, the PAB/GC claims, there is no reasonable

[1] The Board shortened the period of time in which the PAB/GC could respond to the Motion to Dismiss in order to expedite the processing of this matter. *See* Order of May 22, 2012 at 2.

prospect that GAO Order 2536.1 can be changed through the notice and comment process for revising GAO orders. Petition at 9-10.

The General Counsel next claims that the second criterion, whether a policy statement will prevent a proliferation of cases, is also met. He argues that a resolution of the issue at this time will eliminate the need for litigation of the issue in the future on behalf of each employee placed on pay retention. *Id.* at 10.

As to the third criterion, whether resolution of the issue would have general applicability, the PAB/GC asserts that a policy statement by the Board "is not contingent on the particular facts of an employee's unique situation." *Id.* at 10. Rather, such a statement will determine the annual pay adjustment issue for all employees on pay retention. Thus, the General Counsel claims, the third criterion is met as well.

The PAB/GC argues that the fourth criterion (whether the issue currently confronts the parties as part of their employee-management relationship) is met because the issue presented goes to an employee's right to receive pay resulting from the employee-management relationship between the employee and GAO. *Id.* at 10-11.

The PAB General Counsel does not dispute that the fifth criterion, *i.e.*, whether the request for a policy statement is presented jointly by the parties, is not met. *Id.* at 11. The General Counsel's final claim for issuance of a statement is that GAO employees on pay retention will likely not be aware of their purported right to an annual pay adjustment. Thus, a policy statement would ensure that these employees will receive the pay to which they are supposedly entitled. *Id.* at 11.

b. *The PAB/GC's argument on the merits*—Turning to his argument on the merits issue presented, the General Counsel asserts that under the GAOPA, employees

whose performance is rated as satisfactory or better, including those on pay retention, are entitled to an annual pay adjustment. Accordingly, he argues, GAO Order 2536.1, insofar as it prohibits employees on pay retention from receiving an annual adjustment, is contrary to law. *Id.* at 11-12.

The PAB General Counsel first relies on the language of two provisions of the GAOPA, 31 U.S.C. §§732(c)(3) and (j). Section 732(c)(3) provides that employees performing satisfactorily shall receive an annual pay adjustment, while section 732(j) establishes a "required minimum percentage" that the Comptroller General must honor when determining the amount of the annual adjustment.[2] The General Counsel points out that there is no express exclusion of employees on pay retention from the coverage of the statutory annual pay adjustment provisions. *Id.* at 12-17.

The General Counsel addresses GAO's argument in support of the prohibition in GAO Order 2536.1 on employees on pay retention receiving an annual pay adjustment. GAO had previously argued to the PAB/GC that the prohibition is mandated by another provision of the GAOPA, 31 U.S.C. §732(c)(5). This section of the law mandates that if an employee is placed in a lower grade or pay band as a result of a reduction-in-force, workforce restructuring, or another similar type of occurrence, the employee is entitled to retain the rate of basic pay of his/her previous position until the previous pay rate becomes less than the maximum rate for the new position. *Id.* at 12-13.

The PAB/GC does not dispute GAO's contention that, standing alone, section 732(c)(5) bars employees on pay retention from receiving any pay adjustments to their basic retained pay rate. However, the PAB/GC argues that section 732(c)(5), enacted in 2004, was repealed by implication when Congress enacted section 732(j) in 2008. In

[2] The full text of these statutory provisions is set out as an addendum to this Decision.

support of this argument, the PAB/GC points, among other things, to the fact that Congress specified in section 732(j) that that section is to apply "notwithstanding any other provision" of Title 31 chapter 7 of the United States Code, which contains section 732(c)(5). Moreover, the General Counsel argues that there is no explicit exclusion of employees on pay retention from the coverage of section 732(j). *Id.* at 13-14. The PAB/GC points to the purpose behind the 2008 amendment—"ensuring that annual adjustments are paid to all GAO employees (except for those in the three groups identified in the statute"—in support of its interpretation that section 732(j) applies as well to pay retention employees. *See id.* at 21.

2. <u>GAO's Motion to Dismiss the PAB/GC's Petition</u>

a. *GAO's standing argument*—Rather than submit a response to the Petition for a Policy Statement, GAO filed a Motion to Dismiss the Petition. The Agency first argues that the PAB/GC does not have standing to file the Petition. Specifically, GAO argues that petitions for policy statements under section 28.155 of the Board's rules can only be filed by a "person," which is defined in 4 C.F.R. §28.3 as "an employee, an applicant for employment, a former employee, a labor organization, or the GAO." The Agency claims that the Office of the PAB/GC is none of these, and therefore lacks standing to file the Petition. Motion to Dismiss at 3.

b. *GAO's reasons for opposing issuance of a policy statement*—GAO next argues that the PAB/GC's Petition does not satisfy the criteria for issuance of a policy statement under section 28.155 of the Board's rules. First, the Agency argues that the issue presented in the Petition can better be resolved by other means. GAO states in this connection that it "is seeking legislation that will clarify that GAO's interpretation of

its pay retention authority under the GAOPA is the appropriate one." Motion to Dismiss at 5 (footnote omitted). GAO argues further that, even in the absence of legislation, it is more appropriate for the Board to address the issue presented in a specific case filed by an individual employee. The General Counsel's claim that pay retention employees may be ignorant of their purported legal rights is unsupported in law and fact, GAO asserts. *Id.* at 5-6.

The Agency next argues that the second criterion for issuance of a policy statement, whether issuance of a statement would prevent a proliferation of cases, is also not met here. GAO states that, with one exception,[3] no current GAO employee is on pay retention, nor is there any prospect that one will be in the foreseeable future. Accordingly, issuance of a policy statement will not prevent a proliferation of cases, GAO asserts. *Id.* at 6-7.

GAO next concedes that a policy statement would, if issued, have general applicability under the third criterion. However, GAO again points out that no GAO employee would be directly affected by such a statement, thus depriving a policy statement of any practical application. *Id.* at 7.

The Agency next argues that it does not have an "employee-management relationship" with the PAB Office of General Counsel under the fourth criterion for issuance of a policy statement. The GAO points out in this regard that the General Counsel and his staff are managed by the Board, not by GAO. *Id.* at 7-8.

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[3] The single exception involves an employee who was placed on pay retention as a result of the employee's voluntary agreement to transfer to a lower paying position. Part of that agreement was that the employee would not receive annual pay adjustments until her retained pay rate was exceeded by the maximum pay rate for her new position. GAO also notes that one former employee, who left the Agency in 2010, was on pay retention. Motion to Dismiss at 6-7.

GAO further states, as did the PAB General Counsel, that the request for a policy statement was not jointly submitted under the fifth criterion. In fact, GAO opposes granting the General Counsel's Petition. *Id.* at 8.

Finally, GAO argues that issuance of a policy statement would not in any practical sense "promote the purposes" of the GAOPA under the sixth criterion. The Agency concedes that issuance of a statement would meet the criterion "on an abstract level," since it would provide the Board's legal interpretation of the GAOPA. *Id.* at 8. However, it again cites to the fact that "a ruling from the Board will not have a direct impact on any employee at this time." *Id.*

c. *GAO's response on the merits*—The Agency indicates that, given its position on the General Counsel's standing and the inappropriateness of the Board's issuing a policy statement, it would not provide lengthy argument on the underlying merits issue. However, it does provide a "brief overview" of its merits argument, and indicates that it would provide more extensive argument if the Petition were granted for consideration on the merits. Motion to Dismiss at 9.

GAO begins by tracing the legislative history of pay retention at the Agency. Prior to 2004, it points out, pay retention at GAO was consistent with the practice in the Executive Branch.[4] In 2004, however, Congress allowed GAO to deviate from the Executive Branch practice, which was problematic because it allowed employees to be paid for too long a time at a rate in excess of the value of the work performed.

[4] Under that practice, an employee placed in a lower graded position for reasons other than personal fault would be in grade retention for two years, including receiving the full salary of the prior position and the annual cost-of-living adjustment (COLA) received by employees not on grade retention. After that, the employee would be in pay retention status, under which he/she would continue to receive the salary of his/her prior position, including 50% of the annual COLA, until his/her pay rate is exceeded by the pay rate of the new position. Executive Branch practice is set out at 5 U.S.C. §§5362 and 5363, and 5 C.F.R. §§536.101 *et seq.*

Accordingly, Congress enacted 31 U.S.C. §732(c)(5), which, as indicated above, prohibited GAO employees on pay retention from receiving any pay increase until the pay rate of their former position is exceeded by the maximum rate for the new position. *Id.* at 9-10.

GAO argues that Congress' enactment of section 732(j) in 2008 did nothing to change Congress' intention in section 732(c)(5) to bar annual pay adjustments for pay retention employees at GAO. Rather, the Agency claims, section 732(j) was intended to address a situation that was unrelated to pay retention. Specifically, section 732(j) was intended to address the Comptroller General's decision in 2006 to deny full annual pay adjustments to certain non-pay retention employees. Motion to Dismiss at 10-11. Indeed, GAO points out (*Id.* at 5 n.1) that under the PAB/GC's view, employees on pay retention would "remain forever overpaid," since their pay rates would always remain higher than the maximum of their new positions. This result is directly counter to Congress' intent in 2004, GAO asserts, and nothing in section 732(j) indicates that Congress intended to completely reverse its view on pay retention for GAO employees, as the PAB General Counsel suggests.[5] *Id.* at 11-12.

3. <u>The PAB/GC's Opposition to GAO's Motion to Dismiss</u>

The General Counsel first rebuts GAO's claim that he is without standing to file the Petition for a Policy Statement. In this connection, he argues that it would "severely

[5] The Agency takes the position that pay retention was simply not at issue in the course of the 2008 legislative process, and that "the subject of pay retention is completely and totally absent from both the text of and the legislative history of the 2008 Act." Motion to Dismiss at 12. While there do appear to be a minimal number of references to pay retention in that legislative history, there is no apparent consideration of the pay retention provision in relation to section 732(j). *See* Joint Hearing, GAO Personnel Reform: Does it Meet Expectations? 110th Cong., 1st Sess. (Rep. No. 110-50) at 111-12, 164-65, 300 (2007).

undercut the usefulness" of section 28.155 to construe the provision to mean that "anyone associated with GAO *except* the PAB/OGC," which is charged in the GAOPA with a key role in implementing that law, could request a policy statement from the Board. Opposition at 1-2 (emphasis in original). Further, the General Counsel points out that GAO did not question his standing to file a Petition for a policy statement in a previous matter.[6] *Id.* at 2.

Concerning GAO's claim that the issue presented is better resolved through legislation, the PAB General Counsel argues that the suggestion is too vague to warrant rejecting his Petition. Too few specifics are provided about GAO's legislative efforts, and there is in any event no prospect that legislation will in fact result from those efforts. Moreover, the PAB/GC asserts, a policy statement by the Board would obviate the need for legislation. *Id.* at 5-6. Further, the General Counsel states that the issue is a "purely legal question" that does not require specific factual circumstances for resolution, and that GAO has failed to show that it would be preferable to await a specific case to resolve the question. *Id. at 6-7.* The PAB/GC also disagrees with GAO's claim that employees should be presumed to know the law on pay retention. *Id.* at 7.

The General Counsel also questions the Agency's claim that it does not anticipate placing any employees on pay retention in the foreseeable future. *Id.* at 9. He speculates that GAO would not be seeking a legislative clarification of the issue if it did not believe that such a clarification would be needed in the future. The General Counsel points to certain pending workforce restructuring plans announced by GAO as possibly triggering pay retention situations. He also questions whether GAO has properly categorized some employees as not being under pay retention. *Id.* at 9-10.

[6] *PAB/OGC v. GAO*, Docket No. 09-03 (Feb. 18, 2010).

The General Counsel next contends that the Agency errs in arguing that no "employee-management relationship" is involved in his Petition for a Policy Statement. In this regard, he states that the Petition is brought for the benefit of employees of GAO. Further, the PAB/GC argues that the fact that the Petition was not submitted jointly with the Agency is not a basis for rejecting the Petition. *Id.* at 10.

As to the merits, the General Counsel reaffirms his argument that Congress made clear in the express language of section 732(j) that it intended to reverse its decision in section 732(c)(5) that employees on pay retention should not receive annual pay adjustments. *Id.* at 11.

The General Counsel concludes by objecting to GAO's failure to provide a full response to the merits of the statutory issue raised in his Petition. By seeking a further opportunity to comment fully on the merits, the PAB/GC says GAO has "unilaterally bifurcated the proceedings," and "granted itself an additional open-ended extension of time to file its response without having to provide a justification for the extension." Opposition at 13.

Discussion

1. The General Counsel Has Standing to File a Petition for a Statement of Policy or Guidance Under Section 28.155 of the Board's Rules.

Section 28.155 of the Board's rules provides in relevant part as follows: "Upon petition by any person, or on its own motion, the Board may issue statements of policy or guidance." 4 C.F.R. §28.155. A "person" is defined in section 28.3 of the Board's rules as "an employee, an applicant for employment, a former employee, a labor

organization or the GAO." The term "employee" as used in section 28.3 is not expressly defined.[7] 4 C.F.R. §28.3. However, because we conclude that the PAB/GC is "an employee" within the meaning of section 28.3, we hold that the PAB/GC has standing to file a petition for a policy statement under section 28.155. Our reasons for this holding are as follows.

First, Board precedent supports a finding that the PAB/GC has standing under section 28.155.[8] In *PAB/OGC* v. *GAO*, No. 09-03 (Feb. 18, 2010), the PAB/GC filed a Petition for a Policy Statement, as in the present matter. The full Board noted that it may issue a statement of policy or guidance, "upon petition of a person or on its own motion." Decision at 4. It also noted that the PAB/OGC had filed the Petition. *Id.* at 1. There was no discussion of whether the PAB/OGC fit the definition of "person." It was assumed by both parties and the Board that the General Counsel was a "person" under section 28.155. In its Response to the PAB/GC's Petition in No. 09-03, GAO simply discussed the merits of the issues raised in the PAB/GC's Petition. Footnote 1 of the GAO Response noted only that because the Petition had been filed by the PAB/OGC rather than by an "aggrieved party," the Agency's Response would "take a more general form than that described" in the Board's regulations governing litigation of specific

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[7] The General Counsel is obviously not an applicant for employment, a former employee, a labor organization or the GAO. Accordingly, only his status as an employee under section 28.3 will be considered.

[8] Determinations by administrative agencies like the Board as to who may properly bring matters before the agency for resolution involve the concept of "administrative standing." This kind of standing is markedly different from the two forms of standing (constitutional and prudential) that federal courts must consider. *E.g., Envirocare of Utah v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 75-77 (D.C. Cir. 1999) (an administrative agency "is not an Article III court and thus is not bound to follow the law of standing derived from the 'case or controversy' requirement" of the U.S. Constitution; nor is an agency bound by "judicially-devised prudential standing requirements"). Administrative standing determinations by agencies are instead reviewed by considering whether the determination is based on a reasonable interpretation of the agency's enabling law, including that law's policies and purposes. *Id.*

cases. In short, the Agency in No. 09-03 effectively stipulated to the PAB/GC's standing to file the Petition in that matter.

GAO attempts to distinguish No. 09-03 by arguing (Motion to Dismiss at 4) that there was a "direct link" in that matter between the General Counsel's request for a policy statement, and a case pending at the time involving a former GAO employee's request for travel expenses to attend his hearing before the Board. The present matter, GAO points out, does not have such a "direct link" to another proceeding.

For whatever significance this distinction may have in assessing whether the Board should issue a policy statement under the criteria set out in section 28.155, we see none in assessing the PAB/GC's standing to file the Petition in the first place. The General Counsel is either a "person" within the meaning of section 28.155 or he is not. Whatever connection the Petition may have to other proceedings that may be before the Board is not relevant to the standing determination.

Second, there are strong indications in statute and regulation that employees of the PAB, including its General Counsel, are correctly viewed as being employees of GAO.[9] Title 31 U.S.C. §751(a)(1), in establishing who can be a member of the Personnel Appeals Board, concludes that a member cannot be a "current or former…employee of the [Government Accountability] Office…." The Agency has always maintained that employees of the PAB are employees of GAO, and therefore could not be appointed as a member of the Board. That obviously includes the Board's General Counsel.

[9] There is no dispute in this case that the PAB/GC has typical indicia of employment with GAO, such as receiving pay from GAO funds.

Moreover, the inclusion of Board employees among GAO employees is seen in 4 C.F.R. §28.17 (internal petitions of Board employees). This section specifies that the GAOPA provisions, implementing regulations and procedural rules "apply in the same manner to employees of the Board as they do to other GAO employees," with exceptions not here relevant. [Emphasis added]. This longstanding regulation clearly identifies PAB employees as GAO employees. Accordingly, finding the PAB/GC to be an "employee" under section 28.3 of the rules, and thus a "person" under section 28.155, is consistent with the plain language of these rules.

Third, a finding of standing for the PAB/GC to petition for issuance of a policy statement is consistent with sound policy in administering the GAOPA. It is simply too incongruous to conclude that just about everyone associated with GAO (including non-employees) has standing to request a policy statement from the Board, while only the Board's General Counsel cannot. The effective operation of the GAOPA calls for the General Counsel, in an appropriate case, being able to obtain such a statement. Based upon the statutory duties of the PAB/GC to investigate allegations of prohibited personnel practices and to help the Board carry out its duties, the PAB/GC needs to have the ability to request a statement of policy or guidance.

Further in this regard, Board regulations envision a broad role for the PAB/GC in protecting the merit system—*i.e.*, more than representation of individuals. The regulations specifically provide: "When the General Counsel is not participating in a case, the General Counsel may request permission to intervene with regard to any issue in which the General Counsel finds a significant public interest with respect to the preservation of the merit system." 4 C.F.R. §28.12(f). This role underscores the logic in

interpreting "person" to include the PAB/GC when acting in furtherance of GAO compliance with the GAOPA. It should also be noted that the GAOPA, after listing three investigative duties of the PAB/GC, states in §752(b)(3)(D) that the Board's General Counsel shall "help the Board carry out its duties and powers." The ability to bring a Petition for a policy statement would seem to fall within the scope of this broad charge. In short, there would not seem to be a more appropriate "person" to bring such questions to the Board (other than the ideal of the parties bringing such a question jointly) than the General Counsel.

It is also well established that the Board is entitled to great deference in interpreting and applying its rules. *GAO v. GAO Personnel Appeals Bd.*, 698 F.2d 516, 528 n.63 (D.C. Cir. 1983) ("PAB has discretion to interpret and implement provisions governing the role of the General Counsel….[T]he rule of deference applies to the PAB's interpretation of the GAOPA"). The GAOPA does not specify who has standing to bring matters before the Board. Instead, the statute "give[s] the Board broad discretion to design appropriate procedures for appeals cases and to include in that design whatever role for the General Counsel it deems helpful in discharging its duties and policies." *GAO v. GAO/PAB*, 698 F.2d at 530. Allowing the PAB/GC to file a Petition for a policy statement would be fully consistent with the purposes and policies of the GAOPA.

Finally, GAO argues (Motion to Dismiss at 3) that the Petition for a Policy Statement in this matter was filed by the Office of General Counsel, which cannot be considered an "employee" within the meaning of section 28.3 of the rules. It is true that the PAB/GC captioned his Petition in the name of the "Personnel Appeals Board Office

of General Counsel." However, in Part II of the Petition, the General Counsel states that "The Petitioner is the PAB General Counsel."[10] Further, the GAOPA makes clear that it is the General Counsel as an individual in his official capacity who is authorized to take various actions in furthering the administration of the GAOPA. *See, e.g.,* 31 U.S.C. §752(b)(3). Thus, regardless of how the General Counsel may choose to fashion his pleadings, the real party at interest in this matter is the PAB/GC, and not his office as an institution. To hold otherwise would put form over substance, something we decline to do.

2. <u>The PAB/GC's Petition Does Not Satisfy the Criteria for Issuance of a Statement of Policy or Guidance Under Section 28.155 of the Board's Rules</u>.

As previously indicated, under 4 C.F.R. §28.155, the Board may issue a statement of policy or guidance, upon petition of a person or on its own motion. The regulation states that, in determining whether to issue such a statement, the criteria to be considered by the Board will include, but not be limited to, the following:

> (a) Whether the question presented can more appropriately be resolved by other means;
>
> (b) Where other means are available, whether a Board statement would prevent the proliferation of cases;
>
> (c) Whether the resolution of the question presented would have general applicability;
>
> (d) Whether the question currently confronts the parties as part of their employee-management relationship;
>
> (e) Whether the question is presented jointly by the parties involved; and

[10] Docket No. 09-03 was similarly captioned and also stated: "The Petitioner is the PAB General Counsel."

(f) Whether the issuance by the Board of a statement of policy or guidance would promote the purposes of the GAO Personnel Act.

In analyzing the six criteria in the case now before us, we first look to Board precedent under 4 C.F.R. §28.155. Since that provision was adopted in 1993,[11] only two other Petitions have been filed seeking a policy statement. In the first such case, the Board deferred action on the request for a policy statement, to allow time for individual employees to file petitions for review; such petitions were filed and decided by the Board, and the Board therefore dismissed the request for a policy statement based on its finding that the issues raised in the request had been adequately resolved in the individual cases. The Board did not discuss the criteria for issuance of a policy statement. *See Philadelphia Regional Office v. GAO,* Docket No. 94-02 (May 17 and Aug. 24, 1994).

In *PAB/OGC v. GAO,* Docket No. 09-03, the Board denied the PAB General Counsel's request for a policy statement under section 28.155. In that case, the Board considered each of the criteria and concluded that the issue could more appropriately be resolved in the course of a related pending proceeding. *See* Docket No. 09-03 (Feb. 18, 2010). In the *GS-13/14* case, the Board found that issuance of a policy statement was appropriate under several of the Federal Labor Relations Authority (FLRA) criteria, in light of some of the particular record facts in the matter.[12]

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[11] The criteria were adapted from the Board's decision in *GS-13/14 Management & Policy Advisory Council v. GAO,* Docket No. 116-600-GC-89 (Sept. 20, 1991), in which the Board looked to practice of the FLRA in issuing policy statements. *See* Explanation of Proposed Changes to Regulations of GAO Personnel Appeals Board (Apr. 22, 1993).

[12] Although the *GS-13/14* case was decided before the Board issued section 28.155, we find it appropriate to consider that case because it relied on FLRA practice, and because the *GS-13/14* case formed the basis for the Board's issuance of section 28.155.

We turn now to examine the factors that inform the Board's discretion to issue a statement of policy or guidance under section 28.155 in light of the pending Petition.

a. The "other means" referred to in the first criterion typically concern whether the issue presented can be more effectively addressed in a case brought before the Board on behalf of specific employees by way of a petition under the Board's rules, 4 C.F.R. Part 28, Subpart B. In No. 09-03, referenced above, the issue presented in the Petition for a Policy Statement was also raised in a case contemporaneously pending before the Board, and the Board ruled that the issue could more appropriately be resolved in that case. However, Board precedent establishes that it is not mandatory that a case must be pending before the Board at the same time the petition is pending in order for this criterion to apply.[13] *Philadelphia Regional Office v. GAO*, Docket No. 94-02 (no petition under section 28.18 of the rules was pending before the Board when a Petition for a policy statement was initially ruled on by the Board).

There is no case currently pending before the Board that presents the pay retention issue that is the subject of the General Counsel's Petition for a Policy Statement.[14] Therefore, the PAB/GC argues, there is at this time no "other means" available to address the issue. Moreover, the PAB/GC argues that the issue presented

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[13] The lack of need for a pending case in the application of this criterion is consistent with case law of the FLRA, the Executive Branch agency whose practice on issuance of policy statements forms the basis for the Board's rule, section 28.155. *See* 3 FLRA 334 (1980) (request for policy statement denied in part on the basis of the first criterion even though no case involving the issue was identified as pending).

[14] The pay retention issue was raised by the General Counsel on behalf of an employee in a case, *Norris* v. *GAO*, Docket No. 11-07 (dismissed Feb. 29, 2012). The General Counsel, representing Petitioner therein, withdrew the case prior to a Board ruling on the merits. The instant Petition for a Policy Statement was filed after the Board granted the General Counsel's request to withdraw the Petition for Board review in *Norris*.

is purely a legal one, not dependent on making factual findings for its resolution, and is thus well suited for a policy statement.

There is some merit to the General Counsel's claims. But whether the GAO pay retention Order violates the annual pay adjustment provisions in the GAOPA is in itself, as the General Counsel contends, a purely hypothetical question not requiring any particular set of facts for an answer. However, the same could be said of the travel expense issue raised in No. 09-03. *See PAB/OGC v. PAB,* Docket No. 09-03. Nonetheless, the Board preferred to resolve that purely legal issue in the context of the pending case presenting the issue, as opposed to using a policy statement. The Board held there that the pending proceeding "provides the parties with a full opportunity to present their legal positions concerning this question in the context of the particular facts of that proceeding." *Id.* at 4. As discussed in more detail in connection with the second criterion, below, a dispute as to annual pay adjustments for pay retention employees may turn on the particular facts of a given case. As indicated above, however, the absence of a pending case in the present matter is not determinative of whether the Board chooses to exercise its discretion to prefer to use case settings over policy statements to resolve such issues in the context of a case or controversy.

In sum, while it may fairly be argued that a policy statement is at least as appropriate as a specific case to resolve the issue presented, application of the criterion in this matter does not on its own conclusively establish that the Board should issue a

policy statement.[15] *Compare GS-13/14, supra,* (a policy statement was found by the Board to be perhaps the only way to resolve the issue presented because a specific case presenting the issue may never arise).

b. The second criterion concerns whether issuance of a policy statement will "prevent the proliferation of cases." The record of this matter is not sufficient for this criterion to be determinative on the appropriateness of issuing a policy statement.

First, the record evidence establishes that there is only one current GAO employee who is subject to the Agency's pay retention Order, and that only one additional individual who is no longer employed at GAO was subject to the pay retention provisions. Respondent's Response to the Board's May 15, 2012 Order at 1. The current employee brought an individual case to the Board, but voluntarily dismissed her Petition in February 2012.[16] *See Norris v. GAO,* Docket No. 11-07 (Ord. of Feb. 29, 2012). The PAB General Counsel states that he is "only certain that one person is currently subject to the Pay Retention Order at issue [the employee in *Norris*], but has reason to believe that the number of employees who could be subject to [the] Pay

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[15] We reject GAO's suggestion that its initiating contacts with "congressional appropriators" to address the issue raised in the Petition for a Policy Statement should be considered a more appropriate means of addressing the issue. First, as the PAB General Counsel argues, the legislative course is simply too unpredictable to qualify as a more appropriate means for resolving the issue presented. Second, administrative tribunals and courts are charged with the duty of resolving matters within their jurisdiction. This responsibility exists apart from the fact that the Congress may (or may not) consider a matter before the tribunal.

[16] The employee on pay retention in *Norris* was placed in that status due to a unique set of circumstances that render that case *sui generis*.

Retention Order may be significantly higher."[17] PAB/OGC's Responses to the Questions Posed in the Board's May 15, 2012 Order at 1.

Nor is there sufficient evidence that there will be additional employees subject to pay retention in the foreseeable future.[18] In light of the absence of any prospect that there is, or any time soon will be, any additional employee who is covered by the GAO pay retention Order, we cannot conclude that issuance of a policy statement by the Board will prevent a proliferation of cases.

Second, as GAO points out, even if there was the prospect of employees becoming subject to the pay retention Order, there can be fact distinctions in individual cases that would still have to be addressed after issuance of a policy statement. The *Norris* case is one example cited by GAO. Motion to Dismiss at 6-7. In that case, the employee voluntarily was placed on pay retention in order to transfer to a lower paying position, and voluntarily relinquished any claim to an annual pay adjustment until her

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[17] GAO contests this claim, arguing that the General Counsel's speculation about coverage of these employees was based on a mistaken understanding of the Agency's pay retention Order. We believe GAO is correct. The General Counsel seems to suggest that any employee whose basic pay rate exceeds the pay cap for his/her position should be deemed subject to the pay retention Order. Pay retention under the GAO Order is only triggered by certain specific personnel actions, such as a reorganization or reclassification of a position. GAO Order 2536.1, Ch. 2 §3.

[18] We note that the Agency's position on this issue seems somewhat contradictory. GAO's Motion to Dismiss states that the Petition should be dismissed, *inter alia*, because "the question presented can more appropriately be resolved by other means." Specifically, the Agency states that it is "seeking legislation that will clarify that GAO's interpretation of its pay retention authority under the GAOPA is the appropriate one." Motion to Dismiss at 4-5. In that same pleading, dated May 21, 2012, the Agency states that it has "no current plans that will affect the number of employees on pay retention, such as a major restructuring, nor does GAO reasonably foresee such action in the near future." *Id.* at 7. GAO makes this representation despite the fact that it viewed the issue as sufficiently important to approach Congress for clarification. GAO states that it has "initiated the legislative process because of the risk the PAB/OGC's construction would pose in the event GAO needs to make liberal use of pay retention in the future." *Id.* at 5 n.1. Invoking the legislative process for a situation that GAO says will not likely arise in the foreseeable future seems incongruous.

pay retention status ended. Further, as the General Counsel's own argument indicates (see pp. 20-21, above), there can also be factual disputes about whether an employee is covered under the pay retention Order. A policy statement would not prevent the need to address these case-specific factual wrinkles, although it could resolve the question of whether the Order is consistent with the GAOPA's requirements.

c. The third criterion is whether a policy statement would be of "general applicability." GAO concedes that in at least a technical sense, the Board's issuance of a policy statement would have general applicability in that it would affect the operation of the GAO pay retention Order which is applicable to virtually all GAO employees. Motion to Dismiss at 7. However, the Agency again points out that in a practical sense, a policy statement will have no applicability because there are no employees currently covered by the Order.

We agree with GAO's point concerning practical applicability. This Board concludes that if it is to exercise its discretion to issue such a statement, there should be a basis to believe that it will have some practical effect in the foreseeable future for GAO and its employees. There is no indication that that will be the case. If an employee should at some point in the future be placed on pay retention under the GAO Order, a case can be filed at that time and the Board will address the issue in due course. There is simply no indication that resolution of the issue will be of sufficient utility to anyone at the present time to justify the undertaking.

d. The fourth criterion is whether the question "currently confronts the parties as part of their employee-management relationship." Much of what was said under the

third criterion applies here, specifically, that no current employee is subject to the pay retention Order, nor is there any imminent prospect that it will become applicable to an employee. Thus, while the PAB/GC and GAO have a theoretical dispute about the interrelationship of the GAOPA's annual pay adjustment provisions and GAO's pay retention Order, there is at this time no practical import to the dispute.

The Agency also argues that the PAB General Counsel and GAO do not share an "employee-management relationship" because the PAB/GC is "managed by the Board itself, not GAO." Motion to Dismiss at 7-8. We reject this argument. The PAB/GC clearly acts on behalf of GAO employees when he files a Petition for a Policy Statement such as the present one. This criterion is not rendered inapplicable by virtue of the fact that the Petition is filed by the General Counsel.

e. The fifth criterion is whether the request for issuance of a policy statement is made jointly. The Petition in this matter was not jointly presented.

f. The final criterion is whether issuance of a policy statement would "promote the purposes" of the GAOPA. GAO "does not dispute that this factor is met on an abstract level," but reiterates the point that no employee would be currently affected by such a policy statement. Motion to Dismiss at 8. In No. 09-03 (at 5), the Board characterized the issue involved as dealing with a "procedural and fiscal matter regarding the logistics of a hearing and does not address the essence of the personnel issues raised by the GAOPA." In contrast in the present matter, the issue involved can fairly be said to "address the essence" of the issues raised by the GAOPA.

However, much of what has already been said supports a conclusion that this criterion is not satisfied on the record of this matter. Accepting the Agency's representations to the effect that no one is subject to pay retention (other than Ms. Norris, whose situation is unique because she requested the placement at issue), it is difficult to conclude that the purposes of the GAOPA are promoted by issuing a policy statement that will have no practical effect, now or in the foreseeable future, on the work lives of GAO employees. The absence of such factors greatly weakens the case for the Board exercising its discretion to issue a statement in this matter.

g. One final item remains to be addressed. In No. 09-03, the Board pointed out that the six enumerated criteria informing the Board's exercise of discretion as to whether to issue a policy statement are not exclusive. The Board may, as appropriate, consider other relevant factors in determining whether to issue a policy statement.

The PAB/GC has raised such an additional factor that it urges for the Board's consideration, namely, that "it is unlikely that an employee under pay retention will even suspect" that he or she may be entitled to an annual pay adjustment. Petition at 11. A policy statement, the General Counsel claims, will ensure that pay retention employees are aware of their purported rights and will be able to "seek redress." GAO disagrees with this argument, stating that employees must be presumed to know the law. Motion to Dismiss at 6.

We do not agree with the PAB General Counsel's position on this issue. To begin with, the argument "puts the cart before the horse." That is, it seems to presume the existence of a statutory right of pay retention employees to receive an annual pay

adjustment as a basis for the Board exercising its discretion to issue a statement addressing whether such a right exists.[19]

Also, the PAB General Counsel's approach does not seem to have any limit in its reach. If employees need to be apprised of this purported right, which other purported rights must they be informed of by way of a Board policy statement? Adopting the PAB/GC's position would seemingly call for the Board to issue policy statements on virtually any personnel question the PAB/GC saw fit to ask the Board. We are unwilling to open the door to such a wide open use of the Board's power to issue policy statements.

Finally, we think GAO is correct in urging that the Board continue to engage in the presumption that individuals know the law. It is our understanding that employees have ample means of informing themselves of their rights under the law (*e.g.*, human resources offices, exclusive representatives, GAO intranet, etc.). We therefore decline to follow the PAB General Counsel's request that we consider this informational factor as a basis for our decision whether to issue a policy statement in this matter.

Conclusion

For the reasons stated above, the Petition for a Statement of Policy or Guidance is denied.[20]

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[19] In denying the General Counsel's Petition for a Policy Statement, the Board does not suggest any view on the merits of this issue.

[20] In light of the Board's disposition of this matter, the PAB/GC's concern about GAO's attempt to "bifurcate" the proceedings (see p.11, *supra*), need not be addressed at this time.

SO ORDERED.

For the Board *en banc:*

Date: ___7/23/12_____

___/s/_____
William E. Persina
Administrative Judge

___/s/_____
Steven H. Svartz, Chair

___/s/_____
Susan R. Winfield, Vice Chair

____/s/_____
John L. Braxton, Member

_____/s/_____
Robert F. Hermann, Member

CERTIFICATE OF SERVICE

This is to certify that on July 23, 2012 the foregoing Decision in *PAB/OGC v. GAO* (Docket No. 12-01), was sent to the parties listed below in the manner indicated.

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(Fax and Interagency Mail)

Date: __7/23/12_____

____/s/_____
Patricia V. Reardon-King
Clerk of the Board

* * *

(c) Under the personnel management system -

* * *

(3) except as provided under section 733(a)(3)(B) of this title, 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;

* * *

and

(5) the Comptroller General shall prescribe regulations under which an officer or employee of the Office shall be entitled to pay retention if, as a result of any reduction-in-force or other workforce adjustment procedure, position reclassification, or other appropriate circumstances as determined by the Comptroller General, such officer or employee is placed in or holds a position in a lower grade or band with a maximum rate of basic pay that is less than the rate of basic pay payable to the

officer or employee immediately before the reduction in grade or band; such regulations -

(A) shall provide that the officer or employee shall be entitled to continue receiving the rate of basic pay that was payable to the officer or employee immediately before the reduction in grade or band until such time as the retained rate becomes less than the maximum rate for the grade or band of the position held by such officer or employee; and

(B) shall include provisions relating to the minimum period of time for which an officer or employee must have served or for which the position must have been classified at the higher grade or band in order for pay retention to apply, the events that terminate the right to pay retention (apart from the one described in subparagraph (A)), and exclusions based on the nature of an appointment; in prescribing regulations under this subparagraph, the Comptroller General shall be guided by the provisions of sections 5362 and 5363 of title 5.

* * *

(j)(1) For purposes of this subsection -

(A) the term "pay increase", as used with respect to an officer or employee in connection with a year, means the total increase in the rate of basic pay (expressed as a percentage) of such officer or employee, taking effect under section 731(b) and subsection (c)(3) in such year;

(B) the term "required minimum percentage", as used with respect to an officer or employee in connection with a year, means the percentage equal to the total increase in rates of basic pay (expressed as a percentage) taking effect under sections 5303 and 5304-5304a of title 5 in such year with respect to General Schedule positions within the pay locality (as defined by section 5302(5) of title 5) in which the position of such officer or employee is located;

(C) the term "covered officer or employee", as used with respect to a pay increase, means any individual -

(i) who is an officer or employee of the Government Accountability Office, other than an officer or employee described in subparagraph (A), (B), or (C) of section 4(c)(1) of the Government Accountability Office Act of 2008, determined as of the effective date of such pay increase; and

(ii) whose performance is at least at a satisfactory level, as determined by the Comptroller General under the provisions of subsection (c)(3) for purposes of the adjustment taking effect under such provisions in such year; and

(D) the term "nonpermanent merit pay" means any amount payable under section 731(b) which does not constitute basic pay.

(2)(A) Notwithstanding any other provision of this chapter, if (disregarding this subsection) the pay increase that would otherwise take effect with respect to a covered officer or employee in a year would be less than the required minimum percentage for such officer or employee in such year, the Comptroller General shall provide for a further increase in the rate of basic pay of such officer or employee.

(B) The further increase under this subsection -

(i) shall be equal to the amount necessary to make up for the shortfall described in subparagraph (A); and

(ii) shall take effect as of the same date as the pay increase otherwise taking effect in such year.

(C) Nothing in this paragraph shall be considered to permit or require that a rate of basic pay be increased to an amount inconsistent with the limitation set forth in subsection (c)(2).

(D) If (disregarding this subsection) the covered officer or employee would also have received any nonpermanent merit pay in such year, such nonpermanent merit pay shall be decreased by an amount equal to the portion of such officer's or employee's basic pay for such year which is attributable to the further increase described in subparagraph (A) (as determined by the Comptroller General), but to not less than zero.

(3) Notwithstanding any other provision of this chapter, the effective date of any pay increase (within the meaning of paragraph (1)(A)) taking effect with respect to a covered officer or employee in any year shall be the same as the effective date of any adjustment taking effect under section 5303 of title 5 with respect to statutory pay systems (as defined by section 5302(1) of title 5) in such year.