

February 1988

# Annual Report Fiscal Year 1987

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## Abbreviations

PAB	Personnel Appeals Board
MSPB	Merit Systems Protection Board
EEO	Equal Employment Opportunity

# Introduction

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In 1980 Congress passed the GAO Personnel Act (P.L. 96-191). Under this law, GAO was allowed to create its own personnel system independent of administrative, adjudicatory and oversight agencies in the executive branch. To ensure that GAO employees were given the same protection as their counterparts in the executive branch, who are covered by the Civil Service Reform Act, the GAO Personnel Act also created the GAO Personnel Appeals Board (PAB) and the PAB General Counsel. The Personnel Appeals Board has substantially the same adjudicatory responsibilities at GAO as the Federal Labor Relations Authority, the Merit Systems Protection Board (MSPB), and the Equal Employment Opportunity Commission have in the executive branch. The Board also has responsibility for oversight of the EEO program at the General Accounting Office. The PAB General Counsel's responsibilities are similar to, though somewhat broader than, those of the MSPB Special Counsel.

The act provides that organizations composed primarily of individuals experienced in adjudicating personnel matters nominate candidates for the Board. After consulting with employee group representatives and Congress, the Comptroller General appoints Board members from the nominees. The first five members were sworn in on October 1, 1980. One member was to serve 1 year, two for 2 years, and two others for 3 years. All future members were to serve 3-year terms. All members serve on a part-time basis and are in a pay status for periods when their individual services are required.

The current members of the Board are Jesse James, Jr., Chairman; Jonathan E. Kaufmann; Isabelle R. Cappello; Roger P. Kaplan; and Paul A. Weinstein. The Chairman selects the PAB General Counsel, who prosecutes cases before the Board and conducts EEO oversight reviews on behalf of the Board. Carl D. Moore has served as the General Counsel since the Board's inception. Jan Freeman Willis has served as Deputy General Counsel since her appointment in 1984.



# The Appeals Process

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The Personnel Appeals Board hears appeals arising from

- a removal, suspension for more than 14 days, reduction in grade or pay, or furlough of not more than 30 days;
- a within-grade increase denial;
- a prohibited personnel practice;
- an unfair labor practice or other labor relations issue; and
- an action involving prohibited discrimination.

An appeal may be brought to the Board by a GAO employee or by an applicant for GAO employment.

An appeal on any issue is first investigated by the Office of the General Counsel. After the investigation, the General Counsel may encourage settlement of the dispute. If there is no settlement, a right-to-appeal letter notifies the employee, GAO management, and the Board that the investigative phase is completed. The employee also receives, at the same time, the report and recommendations of the General Counsel, which discuss the legal and factual basis of the employee's appeal. As privileged communication between the General Counsel and the employee, the report and recommendations advise the employee whether the PAB General Counsel has found reasonable evidence to believe that the employee's rights under the act have been violated. If the General Counsel determines that such reasonable evidence exists, the General Counsel offers to represent the employee before the Board. If the General Counsel determines that such reasonable evidence does not exist, the employee is advised that he/she may personally present a petition to the Board or arrange for representation in further processing the appeal.

Regardless of whether the General Counsel finds reasonable evidence to believe the employee's rights have been violated, the employee may elect to be represented by private counsel or to represent himself or herself. If, however, an employee accepts an offer of representation from the General Counsel, the General Counsel must be the lead counsel in the case. If an employee chooses to pursue an appeal, he/she must file with the Board a petition for review within 20 days after receiving the right to appeal letter. When a petition is received, the Chairman appoints a Board member to hear and decide the case. The Board member's decision becomes final unless the Board or either party requests that the full Board reconsider it. Almost all final decisions of the Board are appealable to the federal courts.

The General Counsel may also be involved in an employee's appeal in another circumstance. The General Counsel may intervene in an employee's case before the Board to represent the public's interest in one or more issues in a

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case. Ordinarily, this would occur when the interpretation of a civil service law, rule, or regulation is at stake.

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The Board has jurisdiction for personnel appeals from the 5,000 GAO employees and from applicants for GAO employment. From fiscal year 1981, the Board's first year in existence, through fiscal year 1987, a total of 69 individual cases have been filed with the General Counsel.

By the end of fiscal year 1987, right-to-appeal letters had been issued in 61 of the 69 individual cases and 7 cases (representing 10 percent of the total cases investigated) had been settled by the employees and the agency during the General Counsel's investigation. Thus, one case was still under investigation at the close of the fiscal year.

In 28 percent (20 cases) of the 69 investigations, the employees elected not to pursue an appeal after they received the right-to-appeal letter and the General Counsel's report and recommendations. Thus, 39 percent (7 cases settled and 20 cases dropped by the employees) of employee cases were resolved without litigation before the Board. Of the 42 employee appeals that went to the Board, 33 percent (14 cases) involved the General Counsel's participation.

The majority of the cases filed with the General Counsel through fiscal year 1987 involved EEO issues (41 of 69 cases). Another 18 cases concerned removal of employees or suspensions of more than 14 days. The next largest category included 10 cases in which the employees alleged the existence of prohibited personnel practices. Finally, seven cases appealed to the Board involved the withholding of within-grade salary increases.<sup>1</sup>

The Board also has jurisdiction to hear EEO class action appeals. Unlike individual EEO cases, EEO class actions go through an administrative hearing in the GAO complaints process. One requirement of that hearing process is that the class be represented by competent legal counsel. Thus, when an EEO class appeals to the Board, the case does not go through the General Counsel's investigative process. Instead, it goes directly to the Board for review. The first two class action cases to be appealed to the Board both arose in fiscal year 1987. In both cases, the class was challenging GAO's refusal to certify the class. In one case, the Board sustained GAO's action. The second case was still pending before the Board at the close of the fiscal year.

Since the Board's inception, five of its decisions have been appealed to the Court of Appeals for the District of Columbia. Two of these appeals were initiated by GAO and three by GAO employees. The court sustained the Board's

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<sup>1</sup>It should be noted that some cases filed with the Board arise from more than one of these categories. For example, an employee whose employment is being terminated may raise EEO issues as an affirmative defense to the removal action. Such a case would be counted in both categories. Thus, the total number of cases reported above exceeds 69.

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decisions in three cases and reversed the Board in one case. The other appeal was withdrawn before the court could consider it.

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# Stay Proceedings, Corrective Actions and Disciplinary Actions

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When information comes to the attention of the General Counsel suggesting that a prohibited personnel practice has occurred, is occurring, or will occur, the General Counsel may investigate the matter regardless of whether an employee appeal or complaint is filed. If the General Counsel finds insufficient evidence of a prohibited personnel practice, a report is prepared to close the investigation. The report is sent to the individual who brought the issue to the General Counsel's attention and to the agency. If the General Counsel finds evidence of a prohibited personnel practice, three courses of action are available: seeking a stay of the personnel action, proposing corrective action or proposing disciplinary action.

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## **Stay Proceedings**

On a motion from the General Counsel, the Board may stay a personnel action pending further investigation by the General Counsel or pending adjudication of the alleged prohibited personnel practice. Before fiscal year 1987, five employees requested that the General Counsel seek the stay of a personnel action. The General Counsel found insufficient evidence to support a stay in three of those cases. In two cases the General Counsel sought, and the Board granted, a stay of the personnel action. During fiscal year 1987, two employees requested that the General Counsel seek a stay of a personnel action. In one case, the Board granted an initial stay. Subsequently, the matter was settled and the stay was dissolved. In the second case, the Board granted an indefinite stay of a personnel action. Final adjudication of that matter is pending before the Board.

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## **Corrective Action Proceedings**

When the General Counsel concludes that there is reasonable evidence to believe that a prohibited personnel practice exists, the General Counsel may prepare a report for the agency recommending corrective action. If the agency does not take the recommended corrective action, the General Counsel may petition the Board to order corrective action. Before fiscal year 1987, information alleging the existence of a prohibited personnel practice was filed on seven occasions. In five cases, insufficient evidence was found to support the allegations and the cases were closed. In one case, evidence of a prohibited personnel practice was found and the agency took the corrective action recommended by the General Counsel. The other case is still pending investigation by the General Counsel. During fiscal year 1987, one corrective action

request was filed with the General Counsel. In that case, a finding of insufficient evidence was made and the case was closed.

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### **Disciplinary Proceedings**

When the General Counsel concludes that there is reasonable evidence to believe that a prohibited personnel practice exists, the General Counsel may propose disciplinary action against the employee responsible for the practice. Also, the General Counsel may propose disciplinary action against any GAO employee for engaging in prohibited political activity. In either case, the General Counsel's proposal for discipline is presented to the Board and to the affected employee. After appropriate proceedings, the Board decides whether discipline is warranted and what discipline is appropriate.

In fiscal year 1987, the General Counsel initiated the first two disciplinary proceedings against two supervisors (a GS-15 supervisor and a member of the Senior Executive Service) for alleged retaliation against an employee who had filed an EEO complaint. At the close of the fiscal year, both cases were pending before the Board.

# EEO Oversight

The GAO Personnel Act gives the Board oversight responsibilities for GAO's equal employment opportunity program. During fiscal year 1983, the Board, in cooperation with management and employee representatives, developed a policy statement defining the role, scope, and general procedures for EEO oversight. This policy statement provides for an agencywide EEO oversight review every 5 years. In the intervening 4 years, functional studies focusing on discrete areas of EEO compliance are to be conducted.

The first functional study, initiated in fiscal year 1986 and completed in fiscal year 1987, reviewed the various career ladder promotion processes in GAO from 1980 through 1985. The study identified statistical disparities associated with race in evaluator career ladder promotions, particularly in comparisons between Black and White evaluators. In responding to the draft report, GAO described positive actions it was already pursuing regarding the career ladder promotion process. GAO also noted that there was at least some evidence to suggest that in recent years the conditions noted in the report might have changed. Thus, GAO is presently making its own analysis to determine whether the disparities still exist. The General Counsel of the Board will review the GAO analysis each year until the Board determines that the disparities no longer exist.

Jessie James, Jr., Chairman

Isabelle R. Cappello, Board Member

Roger P. Kaplan, Board Member

Jonathan E. Kaufmann, Board Member

Paul A. Weinstein, Board Member





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