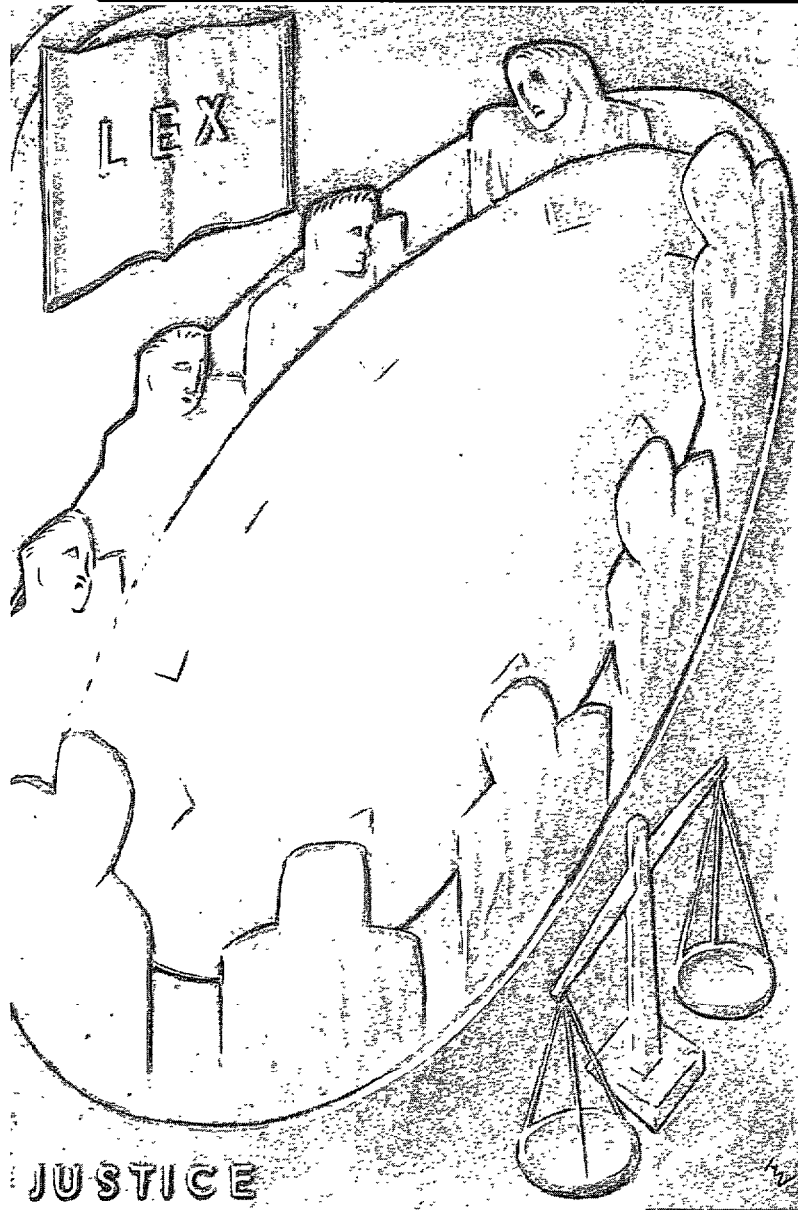




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May 13, 1994



Personnel

Appeals

Board

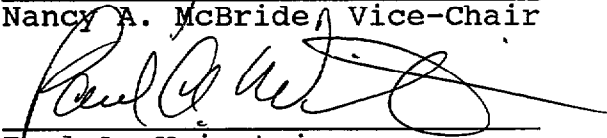
The Honorable Charles A. Bowsher  
Comptroller General  
United States General Accounting Office  
Room 7000  
441 G Street, N.W.  
Washington, D.C. 20548

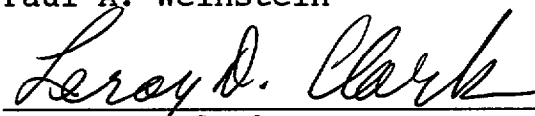
Dear Mr. Bowsher:

Please find enclosed a copy of the 1993 Annual Report of the Personnel Appeals Board of the U.S. General Accounting Office. Congress created the Board to ensure that employees of the General Accounting Office are afforded essentially the same rights as their executive branch counterparts. The attached report describes the functions of the Board, its Office of General Counsel, and Office of Equal Employment Opportunity Oversight and the activities undertaken during the past fiscal year to fulfill that mandate.

  
Alan S. Rosenthal, Chairman

  
Nancy A. McBride, Vice-Chair

  
Paul A. Weinstein

  
Leroy D. Clark

  
Harriet Davidson

attachment

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Personnel Appeals  
Board 1993



Paul A. Weinstein, Nancy A. McBride, Leroy D. Clark, Isabelle R. Cappello, Alan S. Rosenthal



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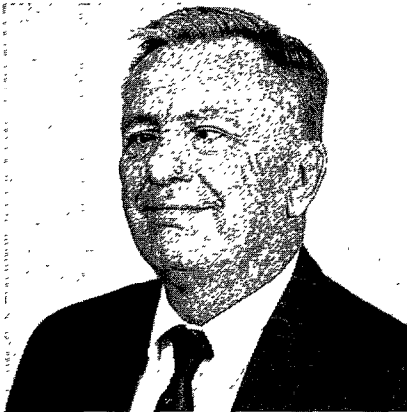
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**Abbreviations**

EEO	equal employment opportunity
EEOC	Equal Employment Opportunity Commission
FLRA	Federal Labor Relations Authority
GAO	General Accounting Office
MSPB	Merit Systems Protection Board
PAB/OGC	Personnel Appeals Board/Office of General Counsel
PAB	Personnel Appeals Board
SES	Senior Executive Service

# The Personnel Appeals Board



Alan S. Rosenthal was appointed to the Board in 1991 and served as Chair in fiscal year 1993. A graduate of the University of Pennsylvania and the Yale Law School, he retired in 1988 after nearly 40 years in the Federal service. Following a clerkship with a judge on the U.S. Court of Appeals for the District of Columbia Circuit, Mr. Rosenthal served for 20 years in the Appellate Section of the Civil Division of the Department of Justice (for 14 years as Assistant Section Chief). In 1972, he became Chair and Chief Administrative Judge of the Atomic Safety and Licensing Appeal Panel of the Atomic Energy Commission (later Nuclear Regulatory Commission). Mr. Rosenthal has taught at the University of Pennsylvania Law School and the Washington College of Law of the American University.



Nancy A. McBride was appointed to the Board in 1991 and served as Vice-Chair in fiscal year 1993. She is a graduate of Georgetown University and the Marshall-Wythe School of Law of the College of William and Mary. Ms. McBride was an Assistant City Attorney for the City of Alexandria, Virginia for six years. She has been in private practice since 1989, serving as an arbitrator and hearing officer primarily in labor and education matters. Ms. McBride is a frequent instructor at the George Meany Center for Labor Studies in Silver Spring, Maryland.



Isabelle R. Cappello was appointed to the Board in 1986. She is retired after 30 years of Federal service, which included service as an officer in the U.S. Navy; an attorney at the Equal Employment Opportunity Commission; and an administrative law judge at the Interstate Commerce Commission and the Federal Labor Relations Authority. Ms. Cappello is a Labor Arbitrator listed by the American Arbitration Association. Her term on the Personnel Appeals Board expired at the end of fiscal year 1993.



Appointed to the Board in 1987, Paul A. Weinstein, who has a Ph.D. from Northwestern University (1961), served as Vice-Chair in fiscal years 1991 and 1992. Professor Weinstein directed the Industrial Relations and Labor Studies Center from 1980-91 and is a member of the Department of Economics at the University of Maryland, College Park. An Arbitrator listed by the American Arbitration Association and the Federal Mediation and Conciliation Service, and a Panel Arbitrator between the U.S. Postal Service and the American Postal Workers Union, AFL-CIO, Eastern Region, he specializes in public sector issues. He chairs the Statistics Committee of the Industrial Relations Research Association and is a member of the Board of Directors of the Council of Professional Associations on Federal Statistics (COPAFS).



Leroy D. Clark was appointed to the Board in 1992. A graduate of the City College of New York and the Columbia University Law School, Professor Clark has been an attorney for the N.A.A.C.P. Legal Defense Fund, Inc., and served as General Counsel of the Equal Employment Opportunity Commission. He is also an arbitrator listed with the American Arbitration Association and the Federal Mediation and Conciliation Service. Currently a faculty member at the Catholic University Law School, Professor Clark is also the co-author of a textbook on employment discrimination law.



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**The Personnel Appeals Board**

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**Personnel Appeals Board**

Alan S. Rosenthal  
Nancy A. McBride  
Isabelle R. Cappello  
Paul A. Weinstein  
Leroy D. Clark

**Chair**  
**Vice-Chair**

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**Personnel Appeals Board Staff**

Executive Director  
Solicitor to the Board  
Director, EEO Oversight  
Co-Directors, EEO Oversight  
  
Clerk of the Board  
Administrative Assistant

Beth L. Don  
John W. Davis  
Karen M. Danart\*  
Barbara Lipsky  
M. Gail Gerebenics  
Dora M. Patton  
Sarah L. Hollis

---

**Personnel Appeals Board/Office of General Counsel Staff**

General Counsel  
Deputy General Counsel  
Senior Trial Attorney  
Staff Attorney  
Paralegal  
Secretary

Jessie James, Jr.  
Janice E. Willis  
Janice Reece  
Donnell Adams, Jr.\*  
Cheryl Painter\*  
Darian Jackson

\*Left during Fiscal Year 1993

# Functions and Organization

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## Functions

The Personnel Appeals Board (PAB) of the General Accounting Office (GAO) is an independent agency created to afford GAO employees essentially the same rights that employees in the Executive Branch enjoy. The passage of the 1980 GAO Personnel Act (P.L. 96-191) allowed GAO to establish its own personnel system, independent of any other administrative, adjudicatory, or oversight agencies. The Personnel Appeals Board and its Office of General Counsel combine the adjudicatory functions of the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority (FLRA), and the Equal Employment Opportunity Commission (EEOC), as well as the investigatory and prosecutorial functions of the Office of Special Counsel and the FLRA General Counsel. The Board adjudicates disputes concerning personnel actions or alleging discrimination; the PAB's Office of General Counsel (PAB/OGC) investigates and prosecutes alleged violations in those areas. The Board also has the authority to adjudicate unfair labor practices but, in the absence of a union, does not do so. In addition, the Board has oversight authority for equal employment opportunity in GAO's practices and programs.

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## Organization

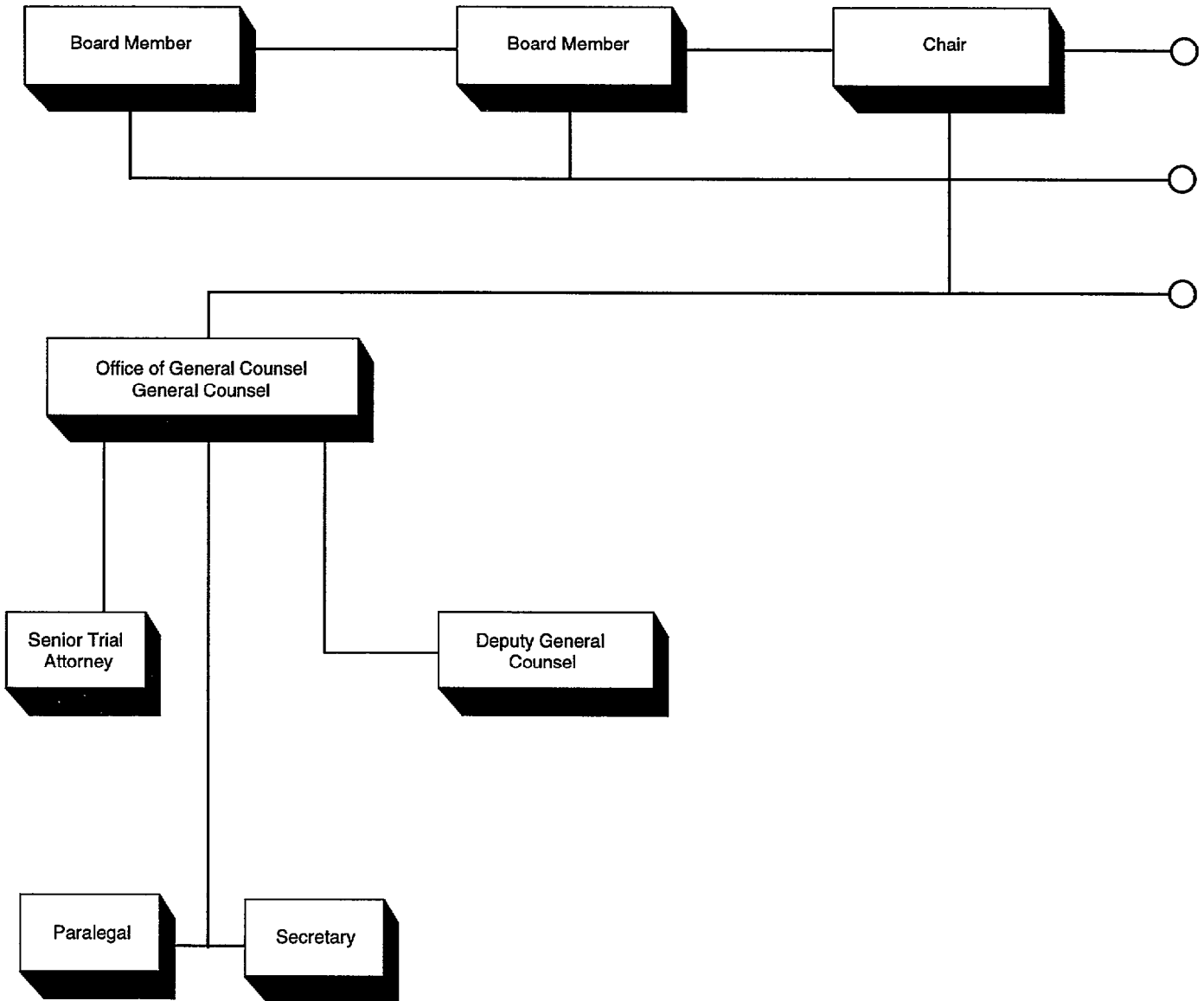
The Personnel Appeals Board is comprised of five members who have expertise in the areas of EEO, labor law, arbitration, mediation, and adjudication. The members are appointed by the Comptroller General for five year, non-renewable terms and select their own Chair and Vice-Chair for one year renewable terms.<sup>1</sup>

The Executive Director manages the Board's staff and office operations and the Solicitor advises the Board members on legal matters. In addition, the Office of EEO Oversight conducts studies and produces reports on selected topics involving equal employment opportunity at GAO. The Board's Chair selects the General Counsel who, with the assistance of senior trial attorneys and a paralegal, represents the interests of GAO employees in litigation before the Board and in court.

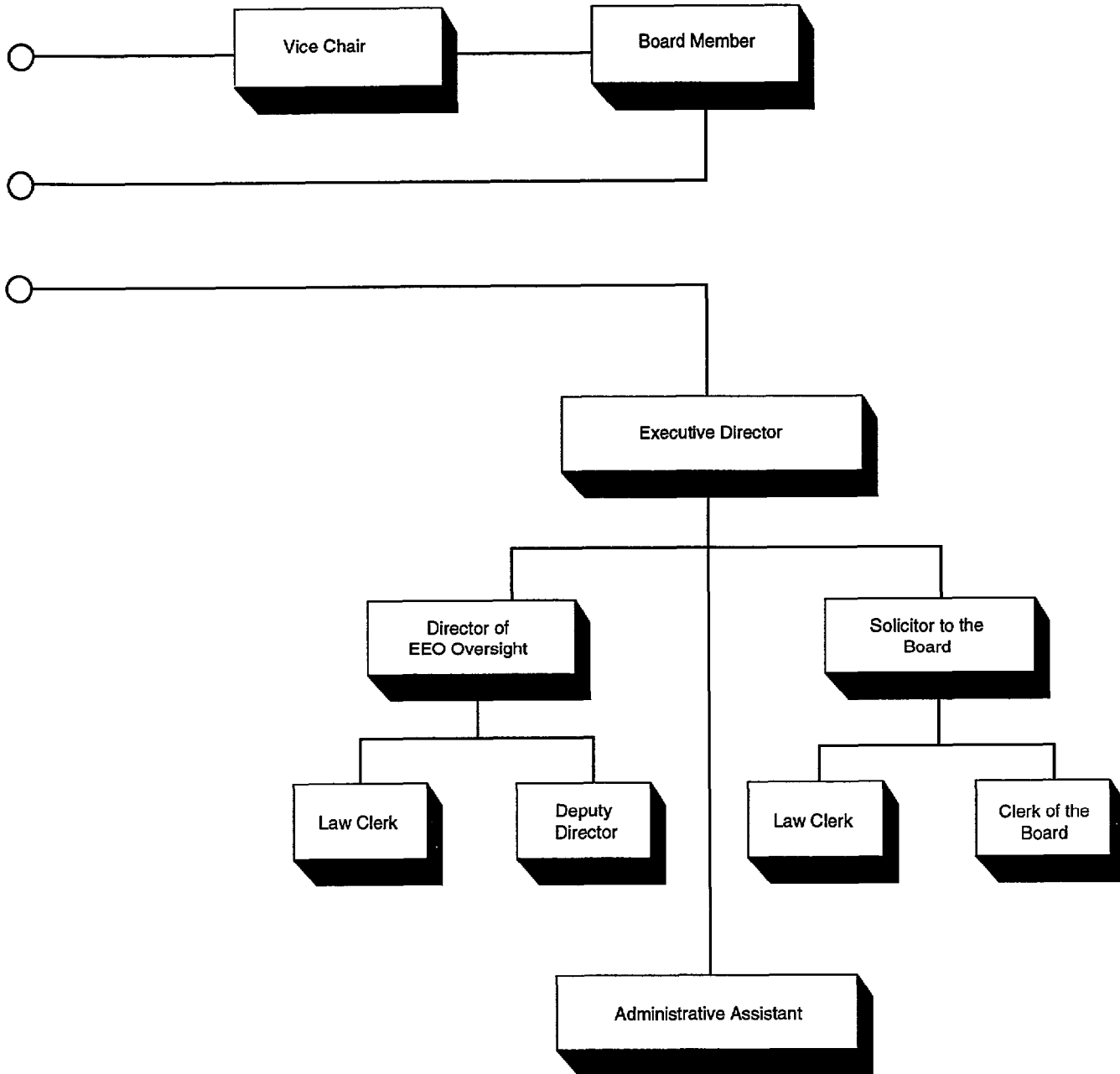
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<sup>1</sup>As a result of amendments to the statute, the terms of two Board members were extended to 7 years.

Figure 1.1: Organization of the Personnel Appeals Board



**Chapter 1  
Functions and Organization**



# The Appeal Process

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A GAO employee, a group of employees, a labor organization, or an applicant for GAO employment may appeal to the Board, which can hear individual complaints as well as class actions. An appeal may arise from (1) a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of not more than 30 days; (2) a prohibited personnel practice; (3) an unfair labor practice or other labor relations issue; (4) an action involving prohibited discrimination; (5) prohibited political activity; and, (6) any other issues that may arise from Comptroller General regulations.

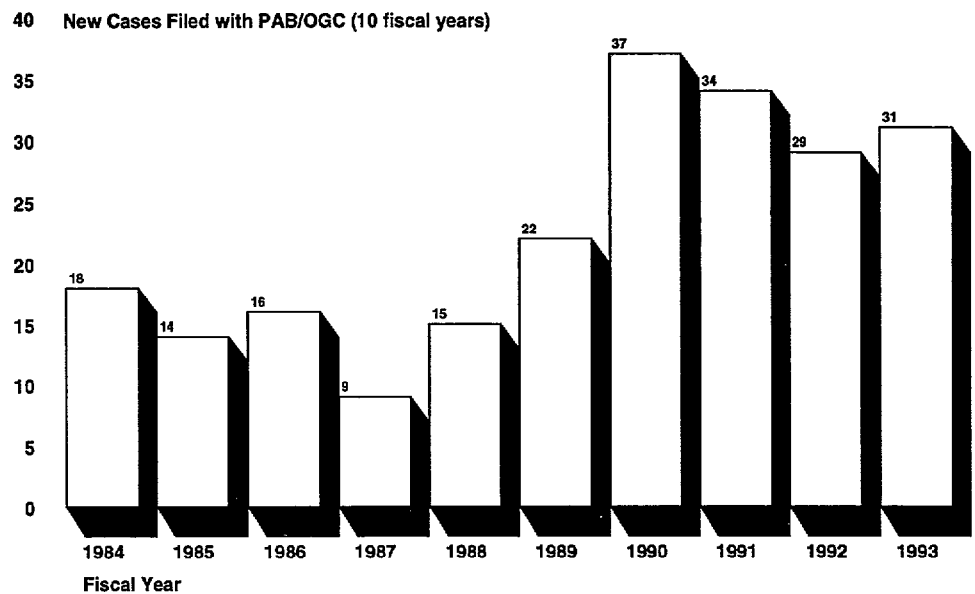
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## Individual Complaints

The Office of General Counsel of the Personnel Appeals Board (PAB/OGC) has the authority to investigate and prosecute alleged violations of the law over which the Board has jurisdiction. Most appeals begin with the Board's Office of General Counsel, which started fiscal year 1993 with 27 holdover investigations from the previous year. Thirty-one new charges were filed with the OGC during fiscal year 1993. Nineteen of the new cases concerned prohibited personnel practices, eight involved equal employment opportunity issues, four pertained to removals or suspensions of 14 days or more, and one involved a whistleblower. The ten year pattern of cases shows the number of cases involving prohibited personnel practices surpassing the number involving equal employment opportunity issues.

Figure 2.1 shows the new cases filed with the PAB Office of General Counsel in each of the past ten fiscal years.

Figure 2.1: New Cases Filed With PAB/OGC



Once an individual complaint is investigated, PAB/OGC advises the complainant about appeal rights and settlement options. If no settlement occurs, PAB/OGC issues a right-to-appeal letter notifying the employee, GAO management, and the Board that the investigation has been completed. The employee also receives PAB/OGC's confidential investigative report and recommendations which include a determination of whether there is a legal and factual basis for an appeal. At this point, PAB/OGC advises the employee whether there is reasonable evidence to believe that the employee's rights under the GAO Personnel Act have been violated. If PAB/OGC determines that such evidence exists, it offers to represent the employee before the Board at no expense to the employee. The employee may retain private counsel, but not at Board expense. If the determination is made by PAB/OGC that there are no reasonable grounds to support the claim, the employee may still personally petition the Board or retain private counsel to represent him or her in the appeal.

If an employee chooses to pursue an appeal, he or she must file a petition for review with the Board within 20 calendar days after receiving the right-to-appeal letter from the PAB/OGC. Upon receipt of the petition, the

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Chair either appoints a Board member to hear and decide the case or the Board decides to handle the case en banc. The Board member's decision is final unless the PAB or a party requests that the full Board reconsider. Final decisions, with few exceptions, are appealable to the U.S. Court of Appeals for the Federal Circuit.

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## Summary of the Board's Activities

The Board conducted hearings during fiscal year 1993 and issued decisions addressing a number of personnel issues.

In an early fiscal year 1993 decision, GAO's motion for summary judgment was granted thereby upholding the performance-based discharge of an employee. The employee, who had received a notice of proposed termination, argued that the agency was nonetheless required to consider his performance during the period after issuance of the notice up to and until the final agency decision to discharge. The Presiding Member found that once the deciding official has determined that the employee's past record does not warrant further reviews of performance and the notice has issued, the agency is under no obligation to consider subsequent performance. A request for reconsideration of the Presiding Member's decision by the full Board was granted and the Board's decision was pending at the end of the fiscal year.

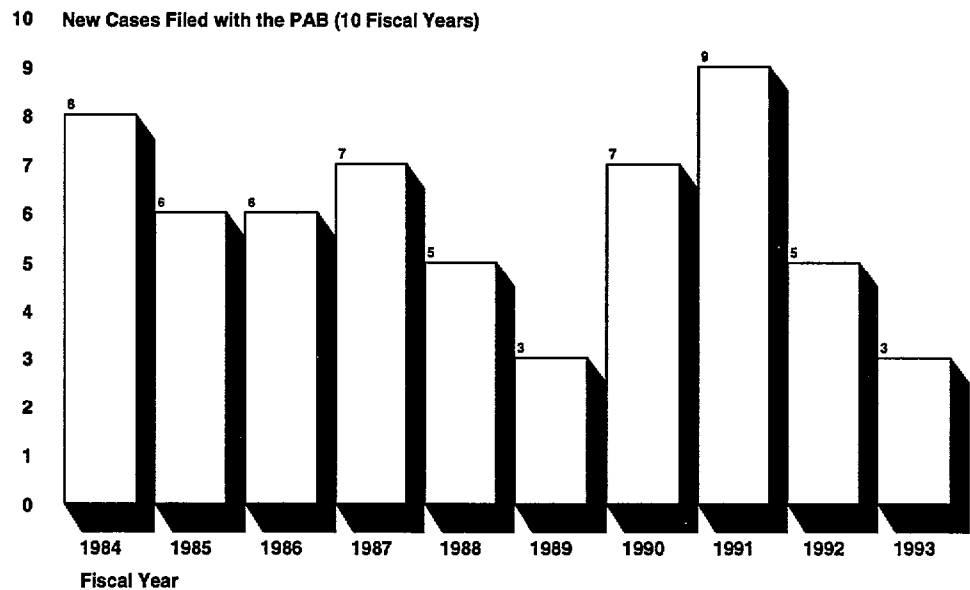
Another decision concerned a Band II Specialist who claimed that, because of his race and age and due to retaliation for a prior complaint he had filed, he was excluded from meaningful assignments that restricted his competitiveness for promotions and bonuses. The Board, sua sponte and en banc, found that, as a rule, specialists at GAO have little promotion potential and do not receive the types of assignments that necessarily lead to consideration for Band III evaluator jobs. The Board then concluded that the agency's failure to assign the employee to a particular report was not based on his race, age, or in retaliation for the prior complaint. In fact, the Board found that the employee had limited his own career potential by removing himself from the evaluator series, seeking classification as a specialist and refusing any work that he considered to be evaluator work.

In another case, an employee claimed that he was the victim of a number of prohibited personnel practices in retaliation for having filed an earlier discrimination complaint that was settled. The Presiding Member found that GAO neither took any action in retaliation nor committed any prohibited personnel practice with respect to the employee. On reconsideration, the Board reversed the initial decision of the Presiding

Member and determined by a 3-2 vote that the employee had been denied a promotion in retaliation for his prior discrimination complaint. GAO has appealed the decision to the U.S. Court of Appeals for the Federal Circuit.

Figure 2.2 shows the number of cases filed with the Personnel Appeals Board in each of the past ten fiscal years.

Figure 2.2: New Cases Filed With the Personnel Appeals Board



The steps to process cases before the Board are:

- Notice of petition for review sent out (with service list)
- GAO responds to the petition for review
- Board Member/Administrative Judge assigned
- Discovery
- Prehearing matters and motion practice
- Board Member/Administrative Judge rules on motions
- Final prehearing briefs filed
- Final prehearing or status conference held
- Hearing held



- Transcript of hearing distributed to parties by PAB
- Posthearing briefs filed 30 days after PAB receipt of transcript
- Board Member/Administrative Judge issues decision
- Motions to reconsider filed
- Final decision issued by full Personnel Appeals Board
- Appeal to the U.S. Court of Appeals for the Federal Circuit

Figures 2.3 through 2.5 show the process of cases once a charge is filed.

Figure 2.3: Process of Case From Charge to Termination of Appeal

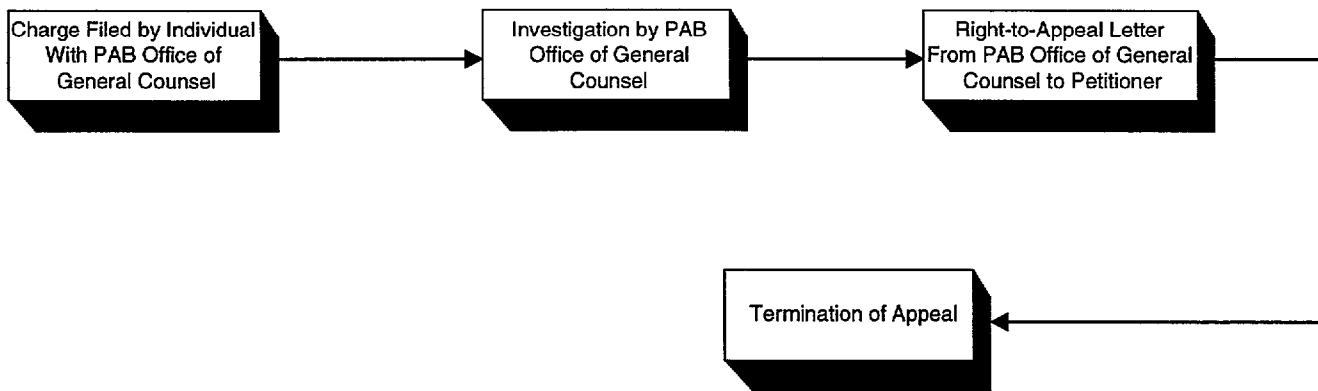


Figure 2.4: Process of Case to Final Board Member's Decision With No Appeal

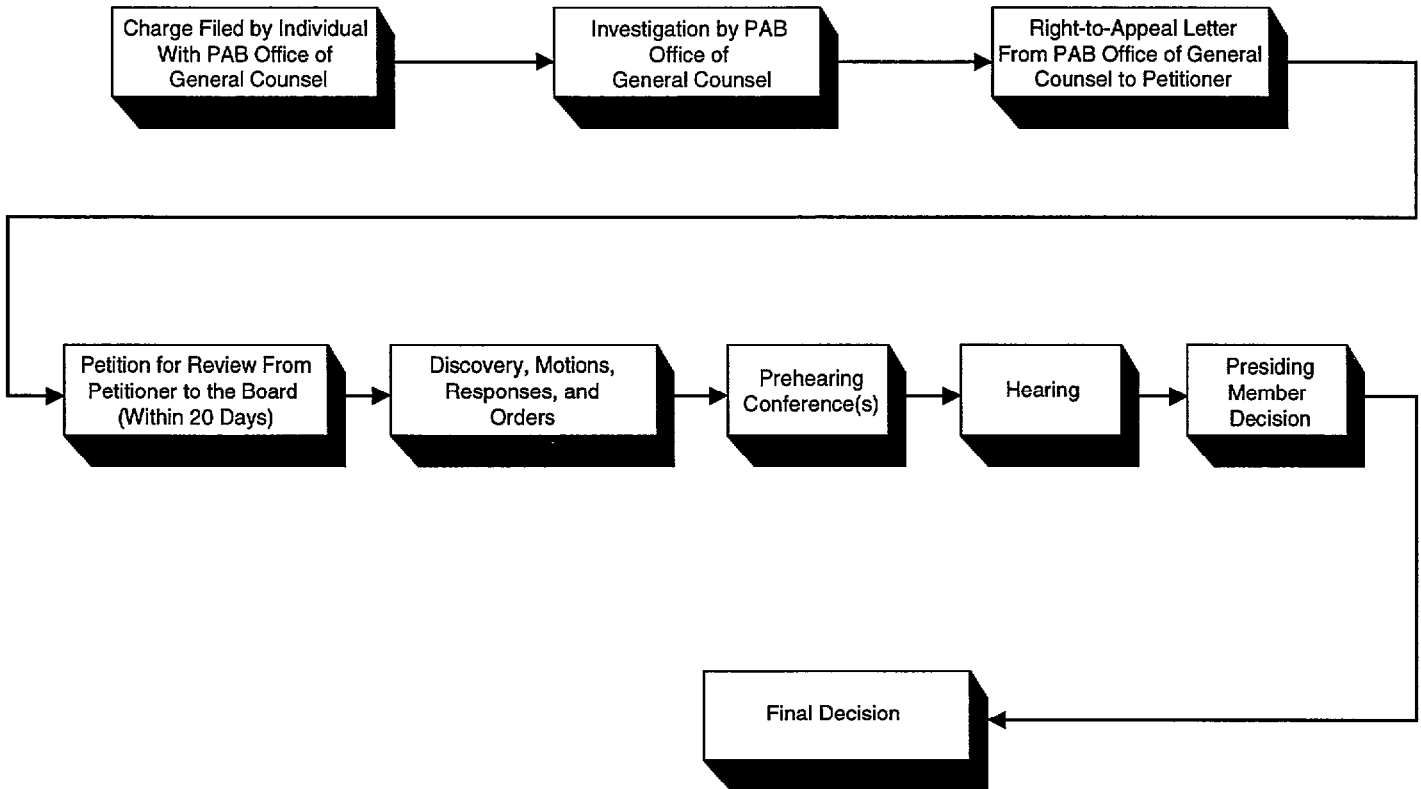
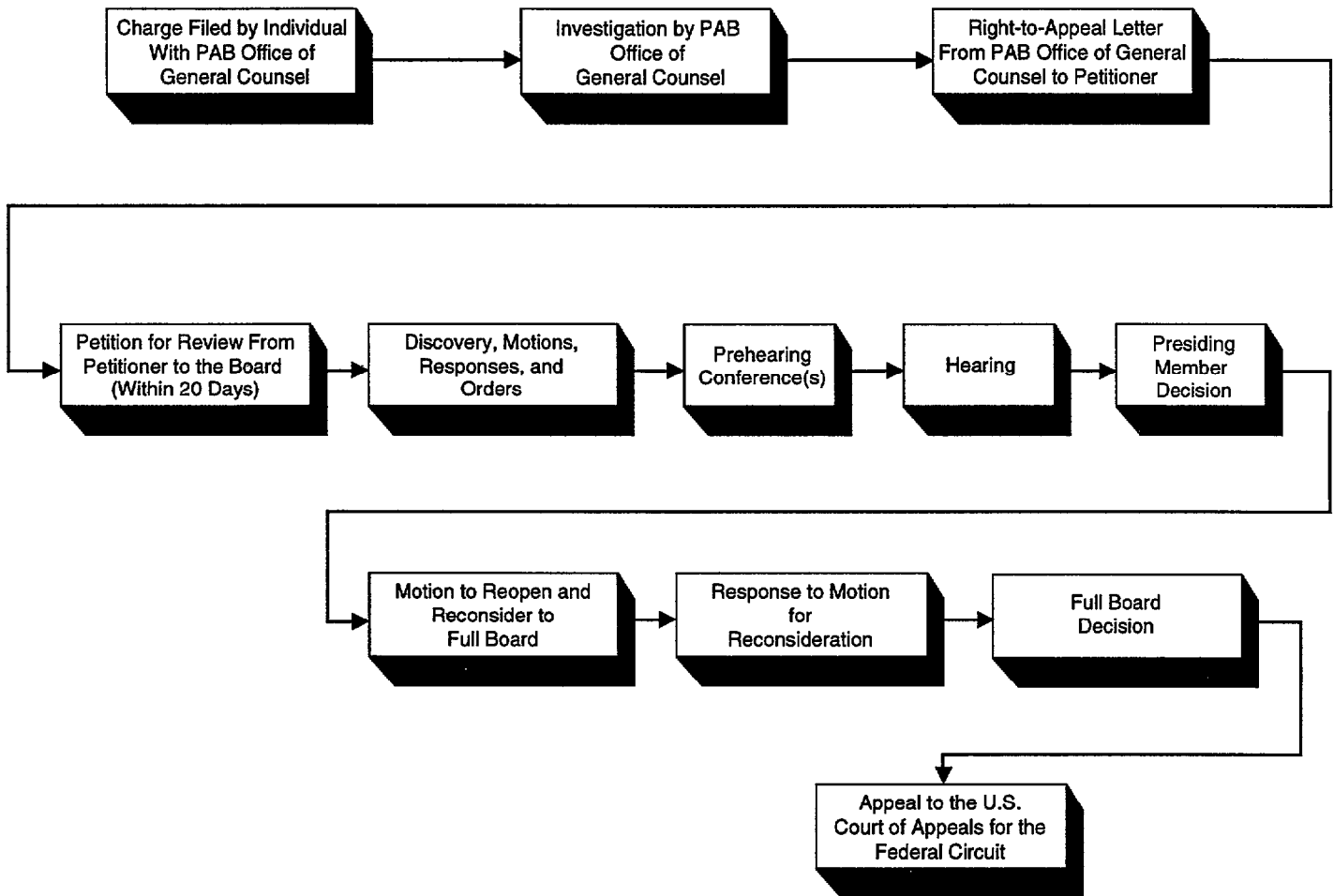


Figure 2.5: Process of Case From Charge to Judicial Review



## Class Action Appeals

Equal employment opportunity class action appeals are processed through an administrative hearing in the GAO complaint process, bypassing the PAB/OGC investigation and proceeding directly to the Board for review.

In the most recent class action case, which is not an EEO case, an employee filed a request for class certification alleging that he and other similarly situated disabled veterans of the Vietnam era had been denied veterans' preference rights due to GAO's failure to establish an affirmative action plan for such veterans. Previously in the case, the Board, en banc, had held that GAO had voluntarily assumed the obligation to provide such a plan

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when it promulgated internal Order 2306.1 but had failed to do so. In fiscal year 1993, the Board certified a class comprised of disabled veterans employed by GAO between October 31, 1990 and January 17, 1992 who were covered by GAO Order 2306.1. The case is still pending.

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## Court Cases

A case originally appealed from a Board decision was argued in September, 1993, before the U.S. Court of Appeals for the District of Columbia Circuit. (Ramey v. Bowsher, 9 F.3d 133 (D.C. Cir. 1993)) The Board's General Counsel, speaking for his office, filed a brief as Amicus Curiae arguing that, in lieu of seeking appellate review of an adverse decision of the Board, an employee in an discrimination case had the right, pursuant to statute and Board regulations, to file a de novo action in U.S. District Court. In November, the appellate court ruled that an employee may only appeal an adverse Board decision to the U.S. Court of Appeals for the Federal Circuit and transferred the case of Ramey v. Bowsher to that Court. A petition for a rehearing was denied by the U.S. Court of Appeals for the District of Columbia Circuit.

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# PAB Office of General Counsel Activities

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## Information Investigations

The Office of General Counsel sometimes initiates investigations when information comes to its attention suggesting that a prohibited personnel practice has occurred, is occurring, or will occur. The Office of General Counsel may investigate the matter regardless of whether a complaint is filed. If, however, an individual brings an allegation to the attention of PAB/OGC, that individual may remain anonymous in most cases. After an investigation, if PAB/OGC finds insufficient evidence of a prohibited personnel practice, it prepares a report, closing the case, and sends it to the individual who brought the complaint and GAO management. If it is determined that there is sufficient evidence of a prohibited personnel practice, the Office may seek a stay of the personnel action, propose corrective action, or propose disciplinary action. One information investigation was initiated in fiscal year 1993.

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## Stay Proceedings

When an employee requests that PAB/OGC seek a stay of a personnel action, the Office of General Counsel conducts an investigation into the allegations. PAB/OGC may request that the Board stay the personnel action if it finds reasonable grounds to believe that the personnel action was taken, or will be taken, as a result of a prohibited personnel practice. If a stay is granted, it may remain in effect pending further investigation or until the matter is litigated before the Board. One stay request was prepared but not filed in fiscal year 1993. GAO agreed to a brief voluntary stay while a favorable settlement was negotiated for the employee.

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## Corrective Action Proceedings

When PAB/OGC finds reasonable evidence to believe that a prohibited personnel practice exists, it may recommend corrective action to GAO management and, if the recommendation is not followed, it may then petition the Board to order corrective action. No new corrective action proceedings were initiated in fiscal year 1993.

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## Disciplinary Proceedings

The PAB/OGC, when it finds reasonable evidence to believe that a prohibited personnel practice exists, may propose disciplinary action against the employee responsible for the practice. The Office may also propose disciplinary action against an employee engaging in prohibited political activity. In either case, PAB/OGC's proposal for discipline is presented to the Board and to the responsible employee. After a hearing, the Board decides whether discipline is warranted and what is appropriate. No disciplinary proceedings were instituted in fiscal year 1993.

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**Informational  
Inquiry/Intake Data**

A significant activity of the Office of General Counsel involves responding to employee questions about diverse issues such as personnel actions, performance appraisals, grievances, complaint processing, and performance and development options. The Office of General Counsel tracks the amount of time its staff expends responding to these inquiries from employees, the nature of those inquiries, and the service, if any, provided. Forty-four informational inquiries were fielded in FY 1993 by the staff of the PAB's Office of General Counsel.

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# Administrative Actions

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## New Regulations

The Board revised its regulations in fiscal year 1993 in order to refine the Board's procedures and bring its regulations into conformity with the Civil Rights Act of 1991.

Among the significant changes are a provision that allows the parties to request reconsideration by the member of his or her initial decision and others that lay out detailed procedures for appealing an initial decision to the full Board. In addition, standards for disposing of requests for stays of personnel actions and revisions in the manner in which SES and labor-management cases are handled were included. Time limits throughout the new regulations also were revised including one that gives individuals 90 days to file suit in court following notice of final agency action on their administrative complaints of discrimination. This provision, which brings the Board's regulations in accord with the Civil Rights Act of 1991, expands the previous time limitation of 30 days.

The most substantial modifications were made in the procedures for filing charges alleging discrimination. Under the new regulations, individuals who have been affected by specified adverse and performance-based actions and who allege that these actions were due, in whole or part, to discrimination may choose to file a charge directly with the Board's General Counsel rather than first pursuing a complaint through GAO's administrative complaint process.

The new regulations clarify the definition of a "person," allowing former GAO employees to file charges, and also set forth the criteria the Board will consider in deciding whether to issue a statement of policy or guidance. The regulations became effective on January 1, 1994.

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## The Decisions Book

All of the Board's decisions issued since 1981 have recently been compiled, organized by date and year, and are in the process of being published in their entirety. Intended primarily as a reference manual for practitioners before the Board, the decisions book will be available in an easily updated, looseleaf format.

# Oversight Projects

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## New Directions

The GAO Personnel Act gives the Board oversight responsibilities for GAO's equal employment program. In fiscal year 1993, the Office of Oversight completed its follow-up study to determine whether and to what extent GAO has implemented the Board's recommendations contained in its 1990 report entitled EEO Oversight Study of GAO's Employment of Persons With Disabilities. The follow-up report was published in 1994. The Office of Oversight also began its analysis of whether GAO's use of alternative dispute resolution in the EEO complaint process serves as an adequate means for addressing complaints.

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## Follow-Up Report on EEO Oversight Study of GAO's Employment of Persons With Disabilities

The Board's follow-up report concludes that, since publication of the 1990 report and its recommendations, GAO has made significant progress in its efforts to ensure that persons with disabilities are afforded equal employment opportunities. In general, the agency has formulated a program that addresses many vital concerns and needs of employees and applicants with disabilities. The report notes, however, that while its attention to ensuring accessibility and accommodation is commendable, the agency should exert more vigilance in hiring and promoting employees with severe disabilities and should offer broad-based training programs, open to all employees, that include information designed to dispel stereotypes and improve attitudes about employees with disabilities. The report also calls on the agency to establish and maintain a database to track requests for reasonable accommodation from employees, indicating the nature of the requests and the responses to them.

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## Study of GAO's Affirmative Action Program

The Office of EEO Oversight's report on the agency's affirmative action activities concerning women and minorities was published in Fiscal Year 1993.

The report assessed GAO's strategy underlying its affirmative action efforts; the implementation of that strategy; the specific approaches for various job categories; and, management accountability for implementation of affirmative action.

The report concluded that GAO has a statutory responsibility to formulate a national affirmative action plan on an agency-wide basis and called for an analysis of the operation of permanent pay increases and bonuses as a component of affirmative action with emphasis on determining the Band II applicant pool for promotion to Band III. The report also suggested that GAO formulate its EEO categories more discretely; develop a consistent,



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standardized method of calculating underrepresentation; and, add a training component to its affirmative action planning process.