HEARING BEFORE THE HOUSE SUBCOMMITTEE ON THE FEDERAL WORKFORCE, POSTAL SERVICE, AND THE DISTRICT OF COLUMBIA AND THE SENATE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA --- *GAO PERSONNEL REFORM: DOES IT MEET EXPECTATIONS?*

WRITTEN TESTIMONY OF JANICE M. REECE

Introduction

My name is Janice M. Reece. From March 1999 until December 2005, I served as the General Counsel for the Personnel Appeals Board (hereinafter "PAB or Board"). In that capacity, I became familiar with the personnel reforms implemented by GAO after the enactment of the *GAO Personnel Flexibility Act of 2000* (hereinafter "Flexibility Act") and the *GAO Human Capital Reform Act of 2004* (hereinafter "Reform Act"). This statement represents my personal views and opinions about procedural methods used by GAO to implement those personnel reforms and the effectiveness of the appeal mechanisms available to GAO employees in light of those reforms.

GAO Did Not Implement Its Personnel Reforms According to Its Promises and Congressional Expectations

In 2000 and 2004, Congress granted the requests of the Comptroller General of the United States (hereinafter "CG") for broad authority to overhaul and reshape its personnel management system. The Flexibility Act and the Reform Act gave the CG the authority to, among other things, promulgate new rules relating to reductions in force (wherein performance would be a primary factor in determining which employees would be let go in a reduction in force), promotions, and pay increases. Under the provisions of the Reform Act, GAO employees were no longer subject to the annual cost of living increases authorized by the Office of Personnel Management (hereinafter "OPM"); instead, the CG was given authority to set the level of annual pay increases (including cost of living increases) for GAO employees. Further, as a result of the Reform Act, the pay system for non-analyst/auditor employees was changed from the general schedule system to a merit pay system. This broad authority was granted, in part, based on GAO's assurances and Congressional expectations that the overhaul would be undertaken fairly (within the bounds of the merit system principles), gradually, and in partnership with employees. Specifically, Congress stated that "it is essential that the Comptroller General consult with employees concerning plans for the implementation of the legislation in advance of issuing proposed orders or regulations for comment" and "[b]road consultation with officers and employees should be continued at each stage of the legislation's implementation." *See Legislative History of the GAO Personnel Flexibility Act of 2000* (H.R. 4642, 146 Cong. Rec. H7799, 7803)(2000).

GAO took several steps to sell its requested reforms to GAO employees. GAO made a number of pronouncements (some written, some oral) touting its new human capital authority as the means necessary to make GAO a world-class organization and an example to other governmental agencies. Employees were told that the new scheme would be transparent, would provide more opportunities for recognition and advancement, and would not result in a reduction in pay for any employee whose performance was rated at the "Meets Expectations" level or above. Further, GAO established its own employee group, the Employee Advisory Council (hereinafter "EAC"), which included both employee and management representatives who were initially appointed by the Comptroller General and later elected. The EAC was made the exclusive mechanism through which the CG and GAO employees communicated. Representatives from many of the existing employee groups, such as Blacks In Government and the Hispanic Liaison Group, were also included as members of the EAC. For the most part, GAO employees seemed to embrace the CG's initiatives and were optimistic about the prospect of working together as partners with the CG to develop and implement the new personnel reforms.

However, that optimism gradually changed after Congress granted GAO's legislative requests. GAO moved swiftly to completely overhaul its performance appraisal, promotion, and pay systems. Despite its promises to Congress, GAO did not reveal its plans to implement the legislation to employees until the proposed regulations were issued and published for comment. Often, because of the haste with which the new regulations were promulgated, GAO was forced to amend various regulations several times during a fiscal year. These frequent revisions caused confusion among employees and managers alike as to which version of a regulation was applicable during any given period. Some of the regulations, such as the pay increase regulation, were general in nature and were later supplemented by the issuance of guidances, which contained more detailed information about the actual processes to be used. GAO employees were not routinely given an opportunity to comment on these guidances.

Not only did GAO fail to consult with employees about its reform initiatives, but it also failed to give its employees adequate and meaningful opportunities to comment on proposed regulations that purportedly implemented the Flexibility and Reform Acts. By statute, GAO is obligated to afford notice and opportunity to comment in the development of its regulations. 31 U.S.C. § 732(a). Although this obligation does not contemplate a requirement that GAO publish its personnel regulations in the *Federal Register*, it does indicate Congress' intent that employees receive adequate notice of significant changes in the terms and conditions of their employment. There can be no doubt that the proposed regulations issued by GAO in connection with the personnel reform authority represented significant changes in the terms and conditions of GAO employment. Yet, GAO employees were initially provided only 30 days within which to comment on proposed regulations --- the same time period provided for comment on proposed regulations before the passage of the Flexibility and Reform Acts. The PAB's Office of General Counsel (hereinafter "PAB/OGC") repeatedly urged GAO to provide longer comment periods to allow GAO employees an adequate opportunity to consider,

discuss, and seek additional clarification before submitting comments. This was especially important where the proposed regulations were lengthy, interwoven with other regulations, and subject to frequent revisions. Although, GAO increased the comment period on a few of its proposed regulations to 45-60 days, the increased comment period was not routine and the criteria it used to decide whether a proposed regulation merited a longer comment period were not revealed.

In addition, GAO failed to "follow the best practices of regulatory agencies in regards to summarizing and responding on the public record to significant comments received." *See Legislative History of GAO Personnel Flexibility Act 2000* (H.R. 4642), 146 Cong. Rec. H7799, 7803 (2000). Although GAO, at times, revealed that comments had been submitted on its proposed regulations, the comments were never summarized or responded to on the public record. Nor was it GAO's practice to acknowledge receipt of comments. On or about 2003, GAO began using a computer-based system by which employees could submit comments on proposed regulations. However, the system apparently had no mechanism for the acknowledgment of receipt of comments.

Together with the speed with which GAO implemented its personnel reforms, the lack of meaningful opportunities to consider and comment on proposed regulations placed GAO employees at a severe disadvantage in the process. Many employees became disillusioned with the concept that they could be partners in the development and implementation of the reforms and, instead, believed that they were merely pawns on GAO's chessboard. As a result, morale quickly deteriorated.

GAO Did Not Provide Adequate Resources/Safeguards To Insure Fair And Unbiased Processing and Adjudication of Employee Appeals

The drastic and rapid changes in GAO's personnel rules and working conditions after the enactment of the Flexibility Act and the Reform Act precipitated many questions from employees particularly regarding employee rights to challenge personnel actions, both formally and informally. At the time that the personnel reforms were being implemented by GAO, two primary internal appeal processes existed for GAO employees who wished to challenge personnel actions: the grievance procedure and the discrimination complaint process. Remarkably, GAO did not find it necessary to revise any of these appeal mechanisms to comport with the severity, complexity, and newness of the personnel reforms GAO had undertaken. Furthermore, GAO made no efforts to increase the staff resources for the processing of discrimination complaints or grievances. For example, prior to 2000, GAO had only one EEO counselor to serve its entire staff population (more than 3000 employees) and the Civil Right Office (the unit responsible for processing EEO complaints) had a staff consisting of no more than five employees. These staffing resources remained the same after the enactment of the Flexibility Act and the Reform Act. The resources of the Civil Rights Office were so inadequate to provide service to these employees that there were substantial delays in the processing of EEO complaints; some complaints lingered for years without a final agency decision; some

employees never received final agency decisions at all. Many employees elected to forego their claims of discrimination completely because of the unresponsiveness of the office. GAO's failure to remedy these problems seems to indicate its lack of commitment to or interest in employee appeals.

Other problems arose in connection with the PAB. Congress established the PAB in 1980 to act as a body to adjudicate disputes, issue decisions, and where necessary, order corrective or disciplinary action in cases involving prohibited personnel practices, unlawful discrimination, and prohibited political activity involving employees of GAO. The PAB's authority combines the adjudicatory functions of the Equal Employment Opportunity Commission (hereinafter "EEOC"), the Merit Systems Protection Board (hereinafter "MSPB"), and the Federal Labor Relations Authority (hereinafter "FLRA"). The purpose for the establishment of the PAB was to provide GAO employees with all the rights enjoyed by employees in the Executive Branch. PAB board members are appointed by the CG to 5-year terms and serve as judges in hearings on employee appeals. The PAB General Counsel, who is appointed by the Board chairperson, is, by statute responsible for investigating claims of prohibited personnel practices, discrimination, prohibited political activity, and any other matter under the Board's jurisdiction. By regulation, the PAB General Counsel must offer to represent an employee in a hearing before the Board, if he or she finds (as a result of information obtained during the investigation) reasonable cause to believe that the employee's rights had been violated. As with its internal appeal processes, GAO has not undertaken to amend the PAB enabling statute or sought changes to the PAB procedural regulations since obtaining its personnel reform authority.

Although the PAB process may appear laudable on paper, it is fraught with problems that severely diminish its effectiveness and compromise employee appeal rights. First, the formal appeal process provided by GAO through the PAB does not afford the independence of the formal appeal processes in Executive Branch agencies. Unlike the members of the EEOC and the MSPB, members of the PAB are appointed by the very agency whose personnel actions are adjudicated by the PAB. Further, unlike the EEOC and the MSPB, the PAB does not receive separate funding from Congress for its operations. Instead, GAO provides the funds necessary to run the Board (rent for office space, furniture, equipment, salaries for staff and Board members, supplies, travel, and other necessary expenses). Not only does this close relationship and dependence give rise to the appearance of and potential for conflicts of interest, but it also raises doubts as to whether GAO employees are indeed receiving the same rights as employees in the Executive Branch.

Further, the intimacy between the Board and its General Counsel presents an even more serious problem. Over the years the Board has become more and more involved in the investigative and prosecutorial functions and duties of its General Counsel. The Board controls the staffing and funding of PAB/OGC (including supplies, equipment, staffing levels, staff pay and promotion, travel, and training), and exercises considerable control over the investigation of charges filed by employees as well as the General

Counsel's prosecutorial decisions. For example, the Board has set policies for the investigation of cases filed with and the prosecution of claims by PAB/OGC without consultation with its General Counsel. The Board has also required its General Counsel to provide a detailed monthly status report that includes each and every step taken in the investigation of every case. The report is subject to review and comment by the Board. In addition, the Board appointed its executive director to serve as acting general counsel after my retirement and, based on information and belief, she continues to serve in that capacity when the current General Counsel is out of the office.

The Board's control over the functions of PAB/OGC represents a direct conflict of interest between the primary function of the Board --- adjudication --- and the primary functions of the General Counsel --- investigation and prosecution. The Board's involvement in the investigation of claims and prosecutorial decisions compromises the integrity and independence of PAB/OGC functions as well as the integrity of any decision issued by the Board in connection with cases brought before it for adjudication. The involvement of the Board's executive director in these matters taints the adjudicatory process because she and her staff are routinely intimately involved in the adjudication of cases before the Board, including the preparation of Board decisions. While it is possible that such an intimate process could inure to the benefit of some employees, it is equally possible that it could work to their disadvantage, especially in light of the close connection between the Board and GAO.

In addition, the Board's personal interests can pose a conflict with its statutory obligations and the interests of justice. The Board has a personal interest in ensuring that more cases are not only filed but also litigated at a hearing since its pay is directly tied to the amount of work (*i.e.*, adjudications) it performs. Similarly, the Board has expressed a concern that GAO will abolish the PAB unless the Board has an active adjudication docket. Its control over the General Counsel's office can be used to achieve these goals by influencing prosecutorial decisions. Since these personal interests contemplate litigation and not outcomes, GAO employees can again find themselves cast in the roles of pawns, but this time on the PAB's chessboard.

Further, the Board does not provide adequate access to GAO employees who wish to obtain informal advice. Because of GAO's drastic personnel reforms, it is more and more important that employees have a place where they can obtain unbiased, independent advice on their appeal rights. Such advice is often needed quickly, when time is of the essence, and, if given, can help an employee identify appropriate courses of appeal in time to meet applicable filing deadlines. Although GAO refers employees to its Human Capital Office for such advice, employees are understandably reluctant to either consult with that office or to take the advice given without obtaining a second opinion. The PAB's procedural regulations provide that employees may seek such advice from the Board's General Counsel. However, the Board has restricted employee access to the General Counsel for such advice in various ways, including requiring employees to submit a written request for informal advice, suggesting that employees obtain such advice by filing complainants with the General Counsel, and limiting the ability of the

General Counsel to give such advice if the Board determines that the General Counsel does not have the time to respond. At the same time, the Board has not developed an alternative method by which GAO employees can obtain the advice they seek. This policy is again inconsistent with the access available to Executive Branch employees at federal appeal agencies such as the EEOC and the MSPB. Each of these agencies regularly makes staff available to answer questions from employees on appeal right. By failing to provide this service on a regular and consistent basis, the Board has denied GAO employees the same rights enjoyed by Executive Branch employees.

During my tenure with the Board, I was not aware of any efforts by GAO to restructure Board to avoid these problems. Nor did GAO undertake a comprehensive review of the internal processes of the Board to determine whether it is meeting its responsibilities under pertinent statutory provisions. Instead, the PAB has been allowed to operate with no oversight by anyone --- the CG, GAO, employees, or Congress. Although the Board issues periodic annual reports (the annual reports are not always issued annually), they include very little information about Board and staff activities and no information about its financial expenditures. The Board does not routinely schedule public meetings or publish minutes of regular Board meetings. Furthermore, the non-PAB activities and employment of Board members are not publicly reported, even those that may pose a conflict with their positions on the Board and, thus, compromise the rights of GAO employees to a fair adjudication of their claims. The Board's autonomy is indeed an anomaly especially at an agency such as GAO where accountability is literally its middle name. By failing to hold the PAB accountable, GAO has again demonstrated its lack of concern for employee appeal rights.

Conclusion

GAO has not fulfilled its promises or Congressional expectations in the implementation of its personnel management reforms. It did not consult with employees about its plans to implement the legislation until after the draft regulations were published and issued for comment and did not provide employees with adequate and meaningful opportunity to comment on the proposed regulations once issued. In the atmosphere created by the massive and drastic changes in GAO's personnel management system, GAO has neglected to provide adequate resources to ensure that GAO employees have meaningful access to internal GAO appeal processes. Further, it has not taken steps to ensure that the PAB provides a fair and independent appeal process to its employees. By not providing these fundamental things, GAO has denied its employees the rights they are guaranteed by Congress.