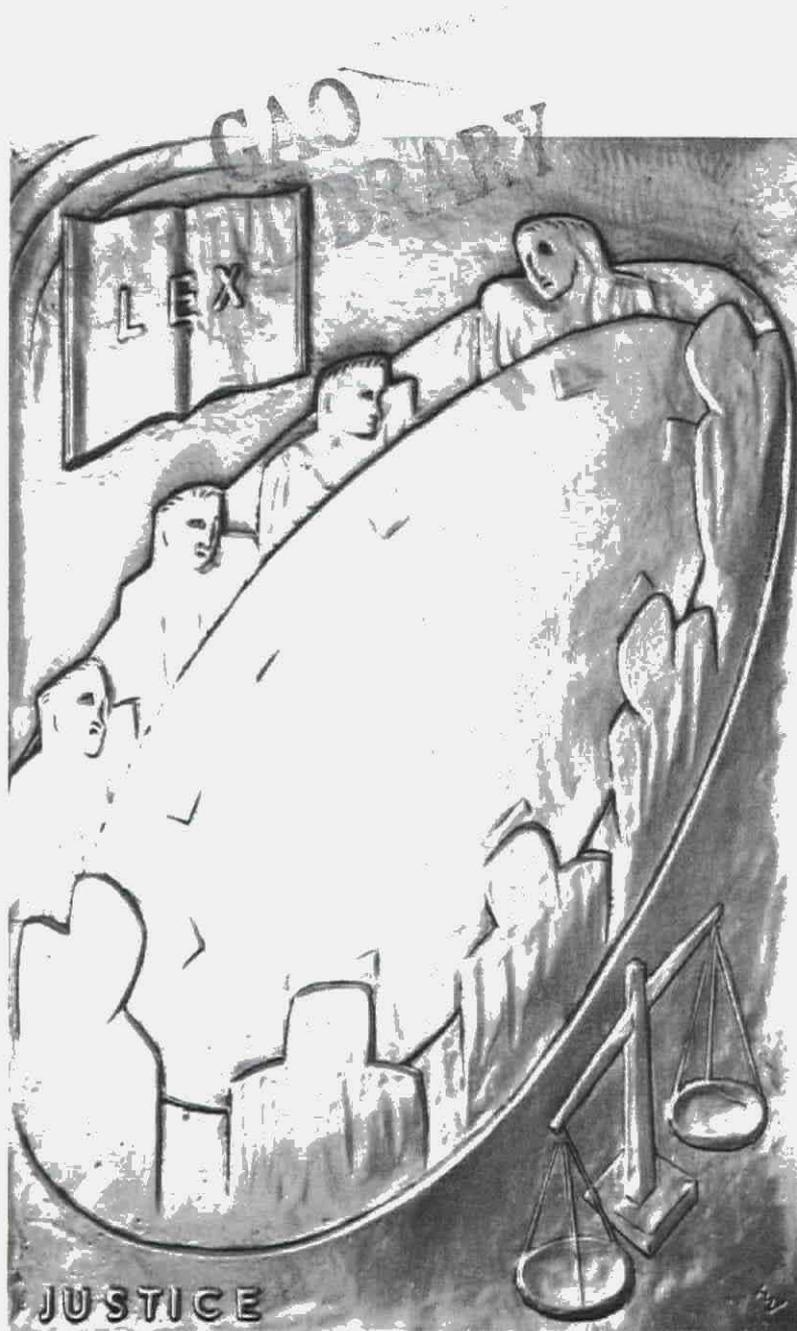


PERSONNEL APPEALS BOARD



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# Contents

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Chapter 1 Introduction		6
Chapter 2 Organization and Functions	Personnel Appeals Board Office of General Counsel Office of EEO Oversight	8 8 9
Chapter 3 Appeals to and Adjudication by the Personnel Appeals Board	The Appeals Process Individual Appeals Individual Cases Filed EEO Class Action Appeals Appeals to Federal Courts	12 12 17 19 19
Chapter 4 Personnel Appeals Board Administrative Activities	Videotape on the Board's Role Meetings With GAO Offices Publication of Board Decision Summaries and Full Decisions Revised Board Regulations	20 20 21 21
Chapter 5 Information Investigations by the Office of General Counsel	Stay Proceedings Corrective Action Proceedings Disciplinary Proceedings	24 24 25
Chapter 6 EEO Oversight Activities	Oversight Study of Career Ladder Promotion Processes New Directions in EEO Oversight Study of Equal Employment Opportunity for Disabled Employees	26 26 27

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## Abbreviations

EEO	equal employment opportunity
EEOC	Equal Employment Opportunity Commission
GAO	General Accounting Office
MSPB	Merit Systems Protection Board
OGC	Office of General Counsel of the Personnel Appeals Board

## Figures

Figure 2.1: Organization of the Personnel Appeals Board	10
Figure 3.1: Process of Case From Petition for Review to Termination of Appeal	14
Figure 3.2: Process of Case From Petition for Review to Final Board Member's Decision With No Appeal	15
Figure 3.3: Process of Case From Petition for Review to Judicial Review	16
Figure 3.4: Disposition of Cases Filed With occ, PAB, FY 1981-FY 1988	18



# Introduction

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Under the 1980 GAO Personnel Act (P.L. 96-191), GAO was allowed to create its own personnel system, independent of administrative, adjudicatory, and oversight agencies. To ensure that GAO employees received the same protection as their counterparts in the executive branch (who are covered by the Civil Service Reform Act), the act also created the GAO Personnel Appeals Board and its Office of General Counsel (OGC). The 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 (EEOC) have in the executive branch. The Board also is responsible for oversight of GAO's equal employment opportunity (EEO) matters. OGC's responsibilities and investigative authority are similar to, though somewhat broader than, those of the MSPB Special Counsel.

The act provided that organizations composed primarily of individuals experienced in adjudicating personnel matters nominate candidates for the Board. After consulting with employee group representatives and the Congress, the Comptroller General appoints Board members from such 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 on a part-time basis.

On September 9, 1988, President Reagan signed into law a bill that amended the GAO Personnel Act. The amendments<sup>1</sup> made four important changes in the law:

- The term of Board members: Over the years, a consensus developed that the 3-year term was too short and disrupted the continuity of the Board's membership. In most years, two members left the Board and two new members arrived. Because they served part-time, members found that assuming full membership responsibilities took many months. And since cases normally take more than a year from the time of the appeal to a decision, members had to decline to hear new cases during most of their last year on the Board to ensure case continuity. Therefore, a member's effective time on the Board was less than 2 years. Finally, having to replace two members 2 out of every 3 years meant that the pool of qualified potential members was growing smaller. To address these problems, the amendments enlarged members' terms from 3 to 5 years and provided that only one member was to leave the Board each year.

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<sup>1</sup>General Accounting Office Personnel Amendments Act of 1988 (P.L. 100-426, 102 Stat. 1598 (1988)).

- Board members' experience requirements: The original law required that nominees have 3 years' experience in adjudicating or arbitrating personnel matters and that they be nominated by organizations composed primarily of individuals having such experience. In the past, most of the Board nominees were private arbitrators. However, arbitrators traditionally deal with labor relations issues other than discrimination cases and frequently have little or no discrimination law experience. On the other hand, the majority of the Board's work load involves complex EEO cases. To allow the pool of potential Board members to tap into EEO lawyers and specialists, the amendments delete the requirement for 3 years' experience in adjudicating or arbitrating personnel matters. Therefore, applicants not nominated by neutral organizations may now be considered.
- The right of GAO employees to recover attorney fees for successful EEO litigation in federal court: A principal purpose of the GAO Personnel Act of 1980, as explained by then Comptroller General Staats, was to make sure that GAO employees had the same rights and protections as other federal employees under the federal antidiscrimination statutes. It was assumed that the act accomplished this purpose until 1987, when a federal court of appeals decided that the act did not incorporate all of the rights and remedies of those statutes.<sup>2</sup> Specifically, it ruled that GAO employees could not recover attorney fees for successful EEO litigation in federal court, as could executive branch employees. The 1988 amendments to the GAO Personnel Act reversed that court decision.
- Judicial review of Board decisions: The original law provided for appeal of Board decisions to the appropriate federal court of appeals.<sup>3</sup> In practice, almost all appeals of Board decisions went to the U.S. Court of Appeals for the District of Columbia. When the original law was passed, MSPB decisions were handled in the same manner. However, in 1982 the Congress created the U.S. Court of Appeals for the Federal Circuit. This court was given exclusive jurisdiction over certain federal government subjects. Appeals from decisions of MSPB was one of the subject areas given to the Federal Circuit. The amendments to the GAO Personnel Act required that appeals of Board decisions also go to the U.S. Court of Appeals for the Federal Circuit.

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<sup>2</sup>General Accounting Office v. GAO Personnel Appeals Board, Civ. No. 86-1443 (D.C. Cir. June 29, 1987) (unpublished); (Reh. denied, Sept. 10, 1987) (unpublished).

<sup>3</sup>This provision applied to cases that did not raise an EEO issue. Such cases may now be heard by a district court; they may be appealed only to the federal court of appeals after a final Board decision. For EEO cases, the employee or applicant for employment may file in federal district court for trial before a federal judge.

# Organization and Functions

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## **Personnel Appeals Board**

The Personnel Appeals Board is composed of five members, including the Chair and Vice Chair, with expertise in the fields of EEO, labor law, and adjudication. They hear appeals from GAO employees arising 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; and (4) an action involving prohibited discrimination. They also hear EEO class action appeals and are responsible for EEO oversight of GAO.

As shown in figure 2.1, Board members are assisted by the Board's OCC, the Office of EEO Oversight, and the following staff positions:

- The Executive Director was appointed in early 1989 to manage the Board's staff and day-to-day office operations. The position was needed because members serve only on a part-time basis.
- The Solicitor is the principal aide to the Chair and to members concerning legal responsibilities provided by statute, regulations, and administrative orders of the Comptroller General.
- The Executive Assistant assists the Board and the Executive Director in managing the Board's caseload and office operations.
- A secretary/receptionist/paralegal provides clerical and administrative support and assumes some paralegal responsibilities to assist the Executive Director and the Solicitor.

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## **Office of General Counsel**

The General Counsel is appointed by the Chair of the Board and serves at the pleasure of the Chair. The General Counsel's main function is to represent the interests of GAO employees through litigation before the Board and in court. The functions include investigations and acting as an advisor to employee groups regarding EEO oversight.

OCC includes the Deputy General Counsel, who assists and, when necessary, acts for the General Counsel, and a paralegal/secretary who assists the office in investigations and legal research and serves as OCC's secretary.

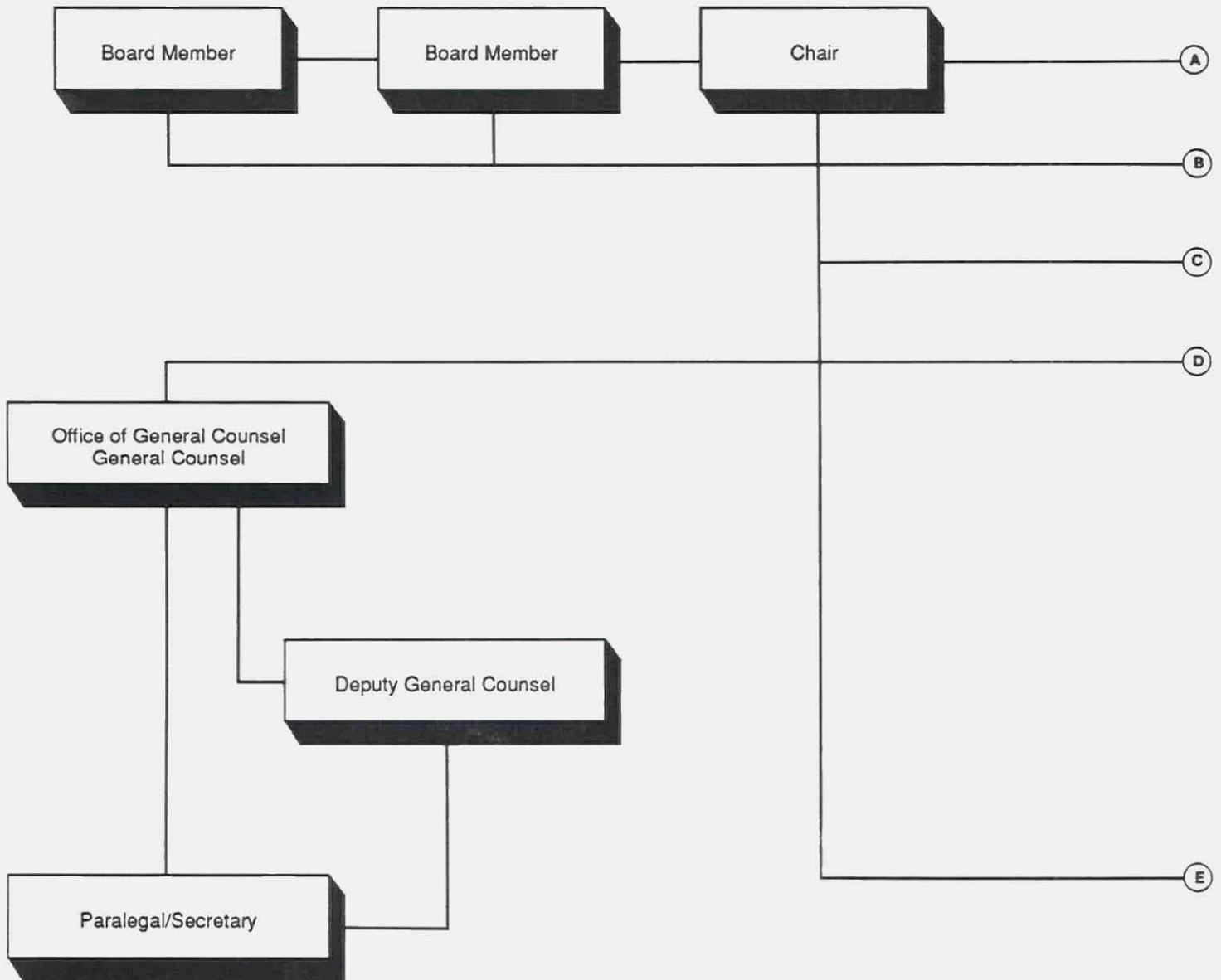
In addition, OCC uses contractors to aid in such functions as statistical analyses and investigations.

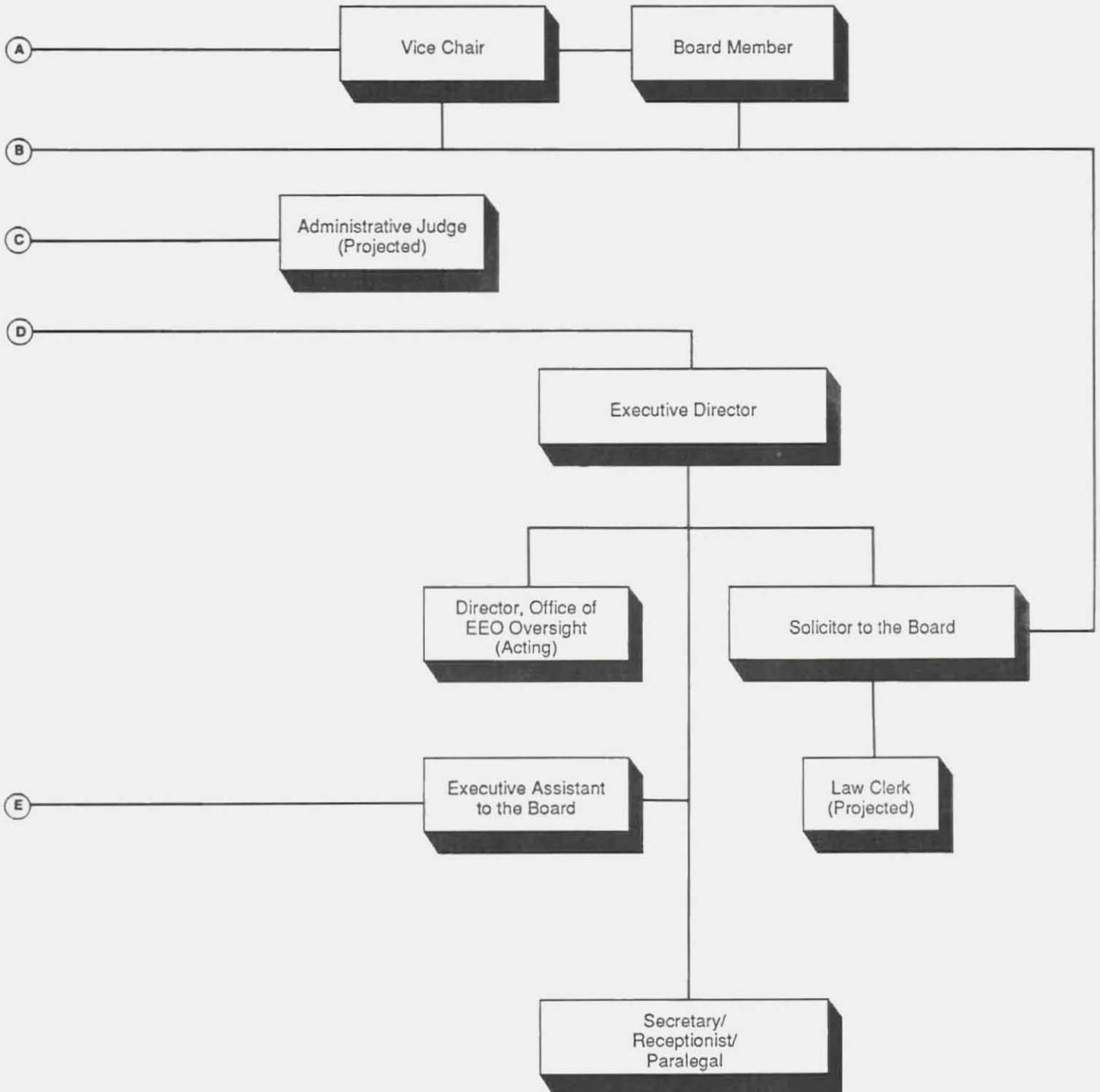
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**Office of EEO Oversight**

The position of Director of the Office of EEO Oversight was created and filled in 1988. The Director, who reports directly to the Board, is responsible for proposing areas for review and implementing studies approved by the Board. The Director is also responsible for overseeing and operating the Board's reporting and retrieval system, which receives EEO-relevant GAO documents and reports.

**Figure 2.1: Organization of the Personnel Appeals Board**





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# Appeals to and Adjudication by the Personnel Appeals Board

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## The Appeals Process

An individual appeal may be brought to the Board by a GAO employee, a group of employees, or an applicant for GAO employment. The Board also has jurisdiction to hear EEO class actions.

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## Individual Appeals

An individual complaint is first investigated by OGC. After the investigation, OGC 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, OGC's report and recommendations, which discuss the legal and factual basis of the appeal. As privileged communications between OGC and the employee, the report and recommendations advise the employee whether OGC has found reasonable evidence to believe that the employee's rights under the GAO Personnel Act have been violated. If OGC determines that such reasonable evidence exists, it offers to represent the employee before the Board, at no expense to the employee. If OGC 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 OGC 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 OGC's offer of representation, OGC must be the lead counsel in the case.

If an employee chooses to pursue an appeal, he or she must file with the Board a petition for review within 20 calendar days after receiving the right-to-appeal letter. After receiving a petition, the Chair 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 the decision. Almost all final decisions are appealable to the federal courts. Certain labor-related cases are not.

OGC may also be involved in an employee's appeal in another circumstance; it may intervene in an employee's case before the Board to represent the public's interest. Ordinarily, this would occur when the interpretation of a civil service law, rule, or regulation is at issue.

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**Chapter 3**  
**Appeals to and Adjudication by the**  
**Personnel Appeals Board**

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Figures 3.1 to 3.3 illustrate the possible directions that an appeal to the Board may follow.

**Figure 3.1: Process of Case From Petition for Review to Termination of Appeal**

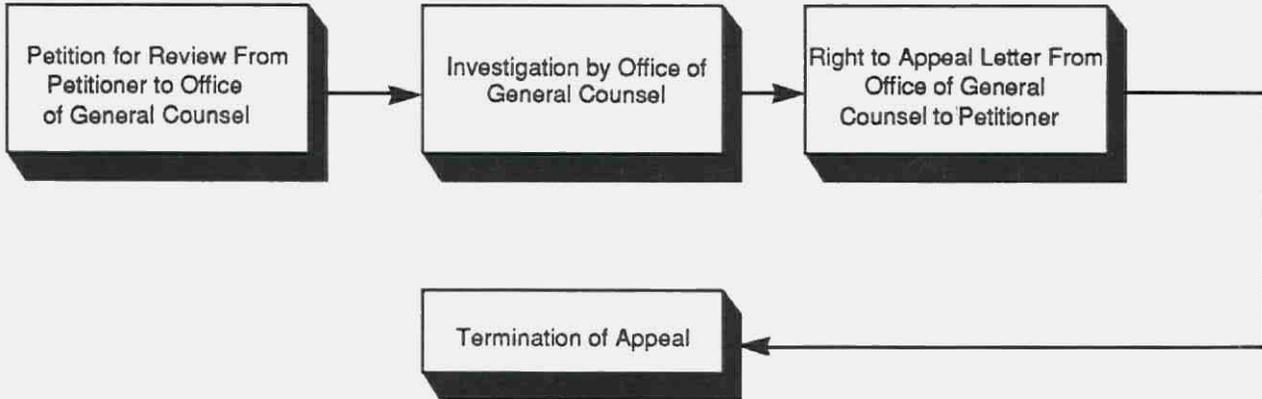
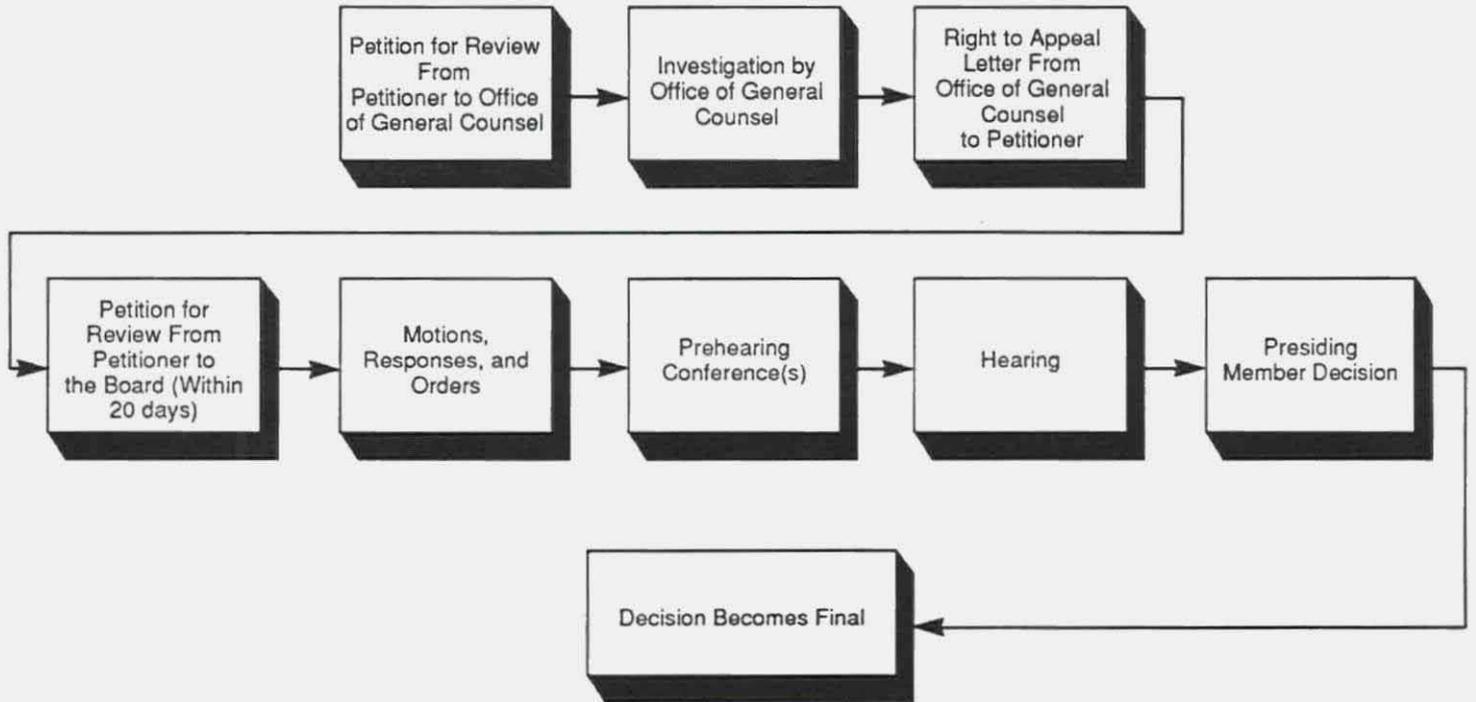
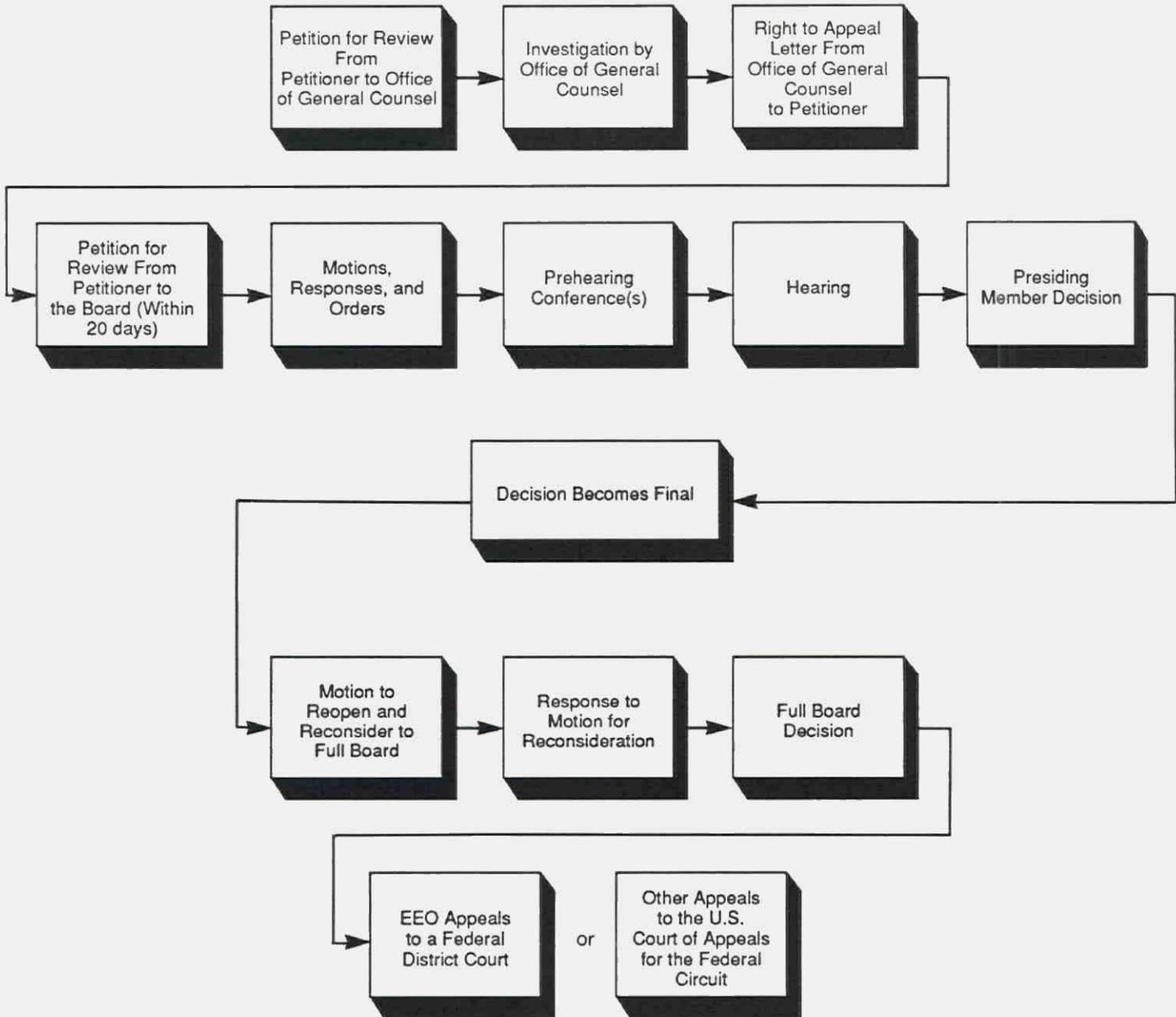


Figure 3.2: Process of Case From Petition for Review to Final Board Member's Decision With No Appeal



Chapter 3  
Appeals to and Adjudication by the  
Personnel Appeals Board

Figure 3.3: Process of Case From Petition for Review to Judicial Review



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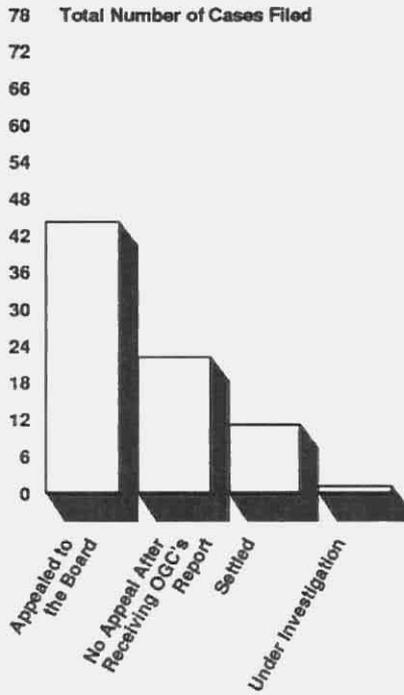
### Individual Cases Filed

The Board has jurisdiction of personnel appeals from the approximately 5,000 GAO employees and from applicants for GAO employment. From fiscal year 1981, the Board's first year in existence, through fiscal year 1988, a total of 78 individual cases were filed with OCC. Figure 3.4 shows the disposition of these cases as of the end of fiscal year 1988.

The alleged bases of these cases are shown below. Because some cases are based on more than one issue, the total number of cases shown exceeds 78.

- EEO issues: 45 cases,
- removal or suspension of 14 days or more: 22 cases,
- prohibited personnel practices: 16 cases, and
- denial of within-grade increase: 8 cases.

Figure 3.4: Disposition of Cases Filed  
With OGC, PAB, FY 1981-FY 1988



### **EEO Class Action Appeals**

Unlike individual EEO cases, EEO class action appeals go through an administrative hearing in the GAO complaints process. One requirement of that 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 OGC'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 challenged GAO's refusal to certify the class. In one case, the Board sustained GAO's action during fiscal year 1987. No suit was filed in federal court to challenge that decision. In the second case, a Board decision during fiscal year 1988 sustained GAO's rejection of the class action. The class representative filed suit in federal district court, where the matter was pending at the close of the fiscal year.

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### **Appeals to Federal Courts**

As already noted, an employee may file a case that raises EEO issues in a federal district court for trial before a federal judge. In one case, alleging age discrimination, the Board found no discrimination. Subsequently, the case was filed in district court, which also found no discrimination. The case was appealed to the court of appeals, where it was pending at the close of the fiscal year.

Since its inception, seven of the Board's decisions have been appealed to federal courts of appeals.<sup>4</sup> Two of these appeals were initiated by GAO and five by GAO employees. The courts sustained the Board's decisions in five cases and reversed the Board in one case. Another appeal was withdrawn from the court prior to consideration.

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<sup>4</sup>The two most recent cases affirmed by the respective court of appeals were *Chennareddy v. GAO*, No. 88-1076 (D.C. Cir. Dec. 30, 1988) and *Carbone v. GAO*, No. 88-1584 (1st Cir. Mar. 20, 1989).

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# Personnel Appeals Board Administrative Activities

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During fiscal year 1988, the Board undertook numerous activities designed to heighten GAO employees' awareness of their employment rights and the Board's role in protecting those rights.<sup>5</sup>

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## Videotape on the Board's Role

During the past fiscal year, the Board produced a videotape explaining the Board's role and function. The videotape, which has been distributed to all GAO units, explains how the Board hears and decides cases and what types of issues the Board is authorized to hear. The video is intended for use by GAO management and staff and is particularly useful for new employee orientations, staff training sessions, and employee groups.

The video begins with an introduction of the Board members, in which each member gives a short recital of his or her background, experience, and current professional endeavors. OGC then gives an overview of the Board process for handling employee-initiated cases. The next portion, which also focuses on employee-initiated cases, is a live question-and-answer session between the Board and representatives of various GAO employee groups. The video's final portion deals with questions about OGC investigations, disciplinary actions, and proceedings to stay or enjoin personnel actions.

The idea for the video came from Board discussions with several employee groups, which felt that the Board's role and the rights of GAO employees needed to be publicized. After the video was produced, representatives from several employee groups provided their reactions.

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## Meetings With GAO Offices

Once the video became available, the Board began a series of meetings in the GAO offices. It held meetings in Philadelphia during fiscal year 1988 and planned meetings in the Resources, Community, and Economic Development Division in headquarters and in the Chicago, Dallas, Los Angeles, and Seattle Regional Offices in early fiscal year 1989.

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<sup>5</sup>To be as responsive to employee needs as possible, the Board has begun exploring the possibility of a telephone line for hearing-impaired employees.

The Board's meeting format follows:

1. Employees are initially shown the videotapes describing the Board's functions and procedures.
2. Board members meet with the office staff to answer any questions.
3. Board members meet with the management team.
4. Finally, Board members meet with the employee group representatives.

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### **Publication of Board Decision Summaries and Full Decisions**

During 1988, the Board also initiated a project designed to give its decisions the widest possible circulation. The project calls for two publications.

- First is a book containing case summaries, in alphabetical order, of every decision issued by the Board to date. Each summary identifies the parties to the decision, the most significant legal issues involved in the case, the holding in the case, and the facts upon which the holding is based. This format was developed to allow readers who are not attorneys to easily understand the Board's decisions. At the end of the book is a topical index, also arranged alphabetically. The book, which has a soft cover, is printed in a format very similar to that of the monthly index of the Comptroller General's decisions.
- The companion publication is a hard-cover volume of the full text of all decisions issued by the Board since its inception. This publication is similar to the standard case reports found in law libraries. A topic digest at the end of the book provides reference to the volume.

The summaries book was completed in April 1989, and the companion publication containing complete decisions is expected to be in print by mid-winter of 1989.

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### **Revised Board Regulations**

During fiscal year 1987, the Board began to revise its regulations. On February 22, 1988, the Board sent to GAO management and employee groups the proposed revisions, which dealt primarily with procedural

matters. The proposed revisions made no significant changes in the Board's overall functions.

Over the years, the Board has developed procedures for dealing with a wide variety of issues. These procedures were based on the needs of the Board's system; the federal Rules of Civil Procedure; and the rules of the Board's counterparts in the executive branch, in particular MSPB, and, to some extent, the EEOC. The revisions codified these procedures to provide clear and concise guidance on issues that are apt to arise in cases before the Board. Thus, some of the major revisions addressed such subjects as discovery, evidence at hearing, motions practice, subpoenas, and interlocutory appeals.

The original comment period was to expire March 30, 1988, but was extended to June 30, 1988. After careful review of the comments, the Board issued the final revisions to its regulations in June 1989.

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# Information Investigations by the Office of General Counsel

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As discussed in chapter 3, OGC investigates almost all employee-cases before they are appealed to the Board. In addition, OGC conducts information investigations.

When information comes to OGC's attention suggesting that a prohibited personnel practice has occurred, is occurring, or will occur, it may investigate the matter regardless of whether an employee appeal or complaint is filed. In most such cases, the individual raising the allegation may remain anonymous. If OGC finds insufficient evidence of a prohibited personnel practice, it prepares a report to close the investigation. The report is sent to the individual who brought the issue to OGC's attention and to GAO management. If OGC 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**

When an employee requests that OGC seek a stay of a personnel action, OGC conducts an investigation of the allegations. If OGC finds reasonable grounds to believe that the personnel action was taken, or will be taken, as a result of a prohibited personnel practice, it may request that the Board stay the personnel action. The stay may remain in effect pending further investigation by OGC or until the matter is litigated before the Board. If OGC finds no reasonable grounds to believe that a prohibited personnel practice is involved in the personnel action, the Board may not entertain a stay request. However, the employee may pursue an appeal to the Board, as described in chapter 3.

During fiscal year 1988, three employees requested that OGC seek a stay of a personnel action. In all instances, OGC found insufficient evidence to support a stay.

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## **Corrective Action Proceedings**

When OGC finds reasonable evidence to believe that a prohibited personnel practice exists, it may prepare a report for GAO management recommending corrective action. If GAO does not take the recommended corrective action, OGC may petition the Board to order corrective action.

During fiscal year 1988, three corrective action requests were filed with OGC. One case was closed due to insufficient evidence, one resulted in corrective action by GAO, and one was still under investigation at the end of the fiscal year. The case under investigation addressed allegations that attacked the legal validity and implementation of the performance appraisal system for evaluator and evaluator-related positions. In March 1989, the investigation was closed. The investigation concluded that the appraisal system's implementation frequently resulted in performance appraisals that constituted prohibited personnel practices. GAO adopted most of the corrective actions recommended by OGC.

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### **Disciplinary Proceedings**

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

In fiscal year 1987, OGC initiated the first disciplinary proceeding 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. During fiscal year 1988, OGC developed evidence that exonerated the supervisors of malfeasance. As a result, OGC withdrew the disciplinary charges against the supervisors.

# EEO Oversight Activities

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The GAO Personnel Act gives the Board oversight responsibilities for GAO's equal employment opportunity program. Fiscal year 1988 represented a particularly important period for the Board in the area of EEO oversight. The Board completed an oversight study of GAO's career ladder promotion processes and, during the fiscal year, decided to substantially modify its oversight process.

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## Oversight Study of Career Ladder Promotion Processes

Just before fiscal year 1988 started, the Board issued a report on GAO's various career ladder promotion processes from 1980 through 1985. In reviewing the statistics by gender and race for the five major career ladders, the study identified statistical disparities associated with race in evaluator career ladder promotions, particularly in comparisons between black and white evaluators.

In response to the draft report, GAO described positive actions it was already pursuing regarding the career ladder promotion process. GAO also stated that there was some evidence to suggest that the conditions noted in the report might have changed in recent years. GAO was planning to make its own analysis to determine whether the disparities still existed.

The report noted that the Board would review the GAO analysis. It also noted that until the Board determined that the disparities no longer existed, GAO should provide the Board with a revised report and supporting data at the close of each fiscal year.

In May 1989, GAO delivered its report on the 1986 and 1987 career ladder promotion process. As of the date of this publication, that report and a follow-up review are under study.

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## New Directions in EEO Oversight

Originally, the Board delegated its EEO oversight authority to its OGC. The oversight process provided for OGC to (1) review one or more EEO issues each year, (2) provide to GAO management and employee groups a draft report on those issues, (3) receive responses from management and employees, and (4) prepare a final report for the Board. The Board's role throughout this process was minimal.

On the basis of an evaluation that began in 1987, the Board decided to reorganize the EEO oversight process. In 1988, it assigned oversight responsibility to the new position of Director of EEO Oversight and selected a Director. (See p. 9.) The Director reports directly to the Board. OGC's revised oversight responsibility is to assist employee groups in EEO oversight matters.

The following factors played a part in the Board's decision:

- The Board concluded that the important statutory responsibility of EEO oversight should be pursued more directly and should be more ambitious than it had been.
- The Board saw a need to allow employee groups to more meaningfully and effectively contribute to the EEO oversight process. Changing OGC's role from that of oversight to that of an advisor to employee groups accomplished that goal.
- The Board believed that changing EEO oversight responsibilities would allow OGC to use more of its resources for the investigation and possible prosecution of alleged prohibited personnel practices. (See ch. 5.)

The Director of EEO Oversight and the Board are developing a system under which GAO will provide, on a routine basis, reports that are basic to monitoring GAO's progress on a wide range of EEO issues. This system will provide a starting point for future oversight studies.

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### **Study of Equal Employment Opportunity for Disabled Employees**

In late fiscal year 1988, the Board decided that its next EEO oversight review would be a functional, in-depth study of GAO's equal employment opportunity for disabled applicants and employees. The study will look at what the law requires concerning the disabled and whether GAO has met the legal requirements. Included in the review will be recruitment and hiring practices, a comparison of promotion rates for disabled and nondisabled employees, building accessibility, accommodation afforded the disabled, and affirmative action programs. The study, which is expected to be completed in fiscal year 1990, will involve a review of GAO records; interviews with and/or questionnaires to employees and managers; on-site viewing of buildings and facilities; and, if necessary, outside consultation.



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