

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

<hr style="border: 1px solid black;"/>)	
)	
Petitioner,)	
)	
v.)	Docket No. _____
)	
Government Accountability)	
Office,)	
)	
Respondent.)	
<hr style="border: 1px solid black;"/>)	

PETITION

██████████ an employee of respondent, the United States Government Accountability Office (GAO or Agency), hereby petitions the Personnel Appeals Board (PAB or Board) for review of ██████████ reassignment to GAO's newly created classification of Band IIA, which resulted in ██████████ demotion and reduction in pay otherwise violated ██████████ rights under the GAO Personnel Act, 31 U.S.C. §731 *et seq.*

Jurisdiction

The Board has jurisdiction over this appeal pursuant to 31 U.S.C. §753 and 4 CFR §28.2. On February ██████████ 2006, Petitioner filed a charge with the PAB General Counsel challenging ██████████ reassignment from Band II to Band IIA. ██████████ received a right to petition letter from the General Counsel. This petition is, therefore, timely filed.

Petitioner

The Petitioner is [REDACTED] who, at the time of the events giving rise to this action, was employed by GAO and classified as a Senior Analyst (0347) in the [REDACTED] [REDACTED] team.

Responsible Persons

David M. Walker, Comptroller General (CG); Gene Dodaro, Chief Operating Officer (COO); Sallyanne Harper, Chief Administrative Officer (CAO).

Factual Allegations

Band II Restructuring Order

1. In June 2005, GAO issued a project plan for restructuring the Band II into two pay bands designated Band IIA and Band IIB. Under the project plan, analysts, specialists, and communications professionals would be placed into either Band IIA or Band IIB.
2. The stated purpose of the proposed restructuring was to move GAO to a more market-based and performance oriented classification and compensation system that will result in equal pay for work of equal value over time.
3. Prior to the proposed restructuring, GAO operated under a performance-based compensation system that provided for pay distinctions based on performance.
4. Prior to the proposed restructuring, at least most of the GAO Managing Directors were satisfied with the existing performance-based compensation system.
5. Nothing in GAO's compensation system prior to the restructuring precluded the Comptroller General from elevating the pay range of the Band II.

6. The decision to restructure the Band II was made by the Comptroller General, David Walker, either alone or together with the Executive Committee, consisting of Dave Walker (CG), Gene Dodaro (COO), Tony Gamboa (then-General Counsel), and Sallyanne Harper (CAO).

7. The Executive Committee was responsible for providing guidance throughout the Band II restructuring project development and for making final policy decisions.

8. In June 2005, task teams, consisting primarily of GAO Directors, but also including members of the Employee Advisory Council, were assigned to develop and provide proposals to the Executive Committee regarding the roles, responsibilities and competencies of the Band IIA and IIB positions. The task teams were also to identify the criteria and devise the process for making the initial placements into Band IIB.

9. The task teams were scheduled to submit proposals regarding the roles, responsibilities and competencies of the Band IIA and IIB positions by mid-July 2005.

10. On September 27, 2005, GAO posted a document on its intranet website titled “Band II Restructuring roles and responsibilities for Senior Analysts in the IIA and IIB pay ranges...”

11. On September 27, 2005, GAO indicated that it had posted “straw proposals” regarding the criteria and process for the Band II restructuring on the GAO intranet on September 23, 2005. GAO’s announcement indicated that it had posted the proposals for a 30-day comment period ending October 24, 2005.

12. On October 7, 2005, prior to the expiration of the comment period, GAO posted a Draft Order 2900.3 containing what it characterized as the “latest” version of the “roles and responsibilities” factor to be used in the Band IIB selection, as well as additional information about the straw proposals regarding the other criteria and placement. Among the allegedly

“clarifying details and minor revisions” in the Draft Order was the shift to the use of standardized rating scores, rather than appraisal averages, for determining eligibility for initial placement into Band IIB.

13. On October 26, 2005, GAO changed the period for commenting on the Band IIB Standards to November 3, 2005 “in order to properly consider comments prior to the Band II restructuring.” On November 3, 2005, David Walker held a “special CG chat” to provide an “overview of decisions related to the Band II restructuring, and key information on the design and implementation of GAO’s new compensation system.”

14. On November 4, 2005, a day after the close of the comment period referenced in ¶13, GAO issued Order No. 2900.3 captioned “Band II Restructuring” (Order) establishing the policy and procedures for restructuring the then-unified Band II analysts and specialists into two separate pay categories: Band IIA and Band IIB. GAO Order 2900.3, ch. 1(1).

15. On November 8, 2005, without affording GAO employees an opportunity to comment, GAO announced a change to the eligibility requirements contained in the promulgated Order as well as to the meeting schedule for the centralized panels.

16. Prior to the November 4, 2005 issuance of the Order, every employee in Band II was subject to the same minimum and maximum salary, adjusted only by locality pay.

17. Subsequent to the issuance of the Order, employees placed in Band IIB enjoyed a higher minimum and maximum salary range than employees placed in Band IIA.

18. Employees placed in band IIA were subject to restrictions on annual pay adjustments, reduced pay caps, and other pay reductions.

19. Based upon information and belief, there were no reductions in the pay provided employees placed in Band IIB.

20. To be eligible to apply for Band IIB placement, an employee was required to have (1) met certain minimum requirements with regard to the applicant's Standardized Rating Score (SRS), as determined by GAO, based on a mathematical formula that ostensibly scored an employee's previous performance ratings and compared that score to all Band II employees on the applicant's team, or (2) been converted from a GS-14 position to the Band II on June 15, 1989, or (3) been appointed to GAO after June 15, 1989 and held a GS-14 or equivalent position in the federal government prior to appointment. GAO Order 2900.3, ch. 2(2)(a)-(e).

21. The SRS of Band II employees who were not working in a mission team were determined by comparison to ratings of employees in "small offices," such as the Congressional Relations Office, Field Operations, Human Capital Office. GAO Order 2900.3, ch. 2(4)(b).

22. On November 7, 2005, GAO's Human Capital Office (HCO) notified Band II staff by email of their eligibility or ineligibility to be considered for placement in Band IIB.

23. Of 1238 Band II employees, 670 were found to have met the basic eligibility requirements.

24. Employees who did not meet the basic eligibility requirements could nevertheless request a "special eligibility determination" by submitting a "written business case" identifying (1) reasons why the employee should be considered and (2) any unique circumstances that should be considered. GAO Order 2900.3, ch.2(3)(a). The Order provided for consideration of these requests by a panel of senior executives.

25. Employees seeking special eligibility had to submit their requests by November 9, 2005 and were to be notified of the panel's decision by November 14, 2005.

26. The special eligibility panel consisted of Jesse Hoskins (HCO), Timothy Bowling (QCI), Helen Hsing (Strategic Issues) and Ben Nelson (QCI).

27. Of the 108 requests for special eligibility consideration, the panel approved ninety-six. In addition to these and the 670 employees who met the basic eligibility requirements, 28 employees were considered eligible on the basis of directly related non-GAO experience. Thus, in total, 794, or 64.1%, of all Band IIs were deemed eligible for selection into the Band IIB. Of these, 757 applied. Among the 96 special eligibility employees, 94 applied.

28. The November 4, 2005 Order provided that all employees in job series 347 (Analyst) and 511 and 510 (Auditors and Accountants) throughout GAO, and job series 2210 and 1150 (IT Specialists) in the IT team would be presumed to be analysts - as opposed to specialists - for purposes of the restructuring. GAO Order 2900.3, ch. 4(1)(a). However, the Order also provided that employees could seek review of this classification. *Id.* at ch.4(2).

29. Employees wishing to challenge their classification pursuant to GAO Order 2900.3, ch. 4(2) had four days -- until November 9, 2005 -- within which to submit their request. Employees were to be notified of GAO's decision regarding their classification appeal by November 14, 2005. An employee who was not satisfied with the decision had only two days - until November 16, 2005 - within which to seek reconsideration, the decision on which was to be issued by November 18, 2005.

30. The November 4, 2005 Order required that all employees seeking placement in Band IIB submit an application no later than November 21, 2005.

31. The Order provided that eligible employees would be assessed on three factors:
(a) Roles and Responsibilities, i.e., whether the employee had actually been performing the roles and responsibilities of the IIB pay range to a significant degree and on a recurring basis; (b) Past Performance, i.e., had the employee consistently demonstrated strong relative performance as a Band II employee, and c) Performance Potential, i.e., did the employee have the ability to

immediately perform at the “meet expectations” level in “Developing People” and “Investing Resources” that are contained in the Achieving Results, Collaborating with Others, and Leading Others competencies for the Band IIB. GAO Order 2900.3, ch. 2(8)(a)-(c).

32. None of these three selection criteria had been validated prior to the implementation of the restructuring.

33. In the actual selection process, assessment of the applicant’s “Roles and Responsibilities” was based solely on the number of hours an employee had worked as an Analyst-in-Charge (AIC) on engagements and the so-called “risk” level of the engagements.

34. The “risk” level of an engagement primarily reflected its political sensitivity, and was not necessarily reflective of the substantive significance or difficulty of the work to be performed in completing it.

35. The data used to assess the applicant’s Roles and Responsibilities was derived from GAO’s Mission and Assignment Tracking System (MATS).

36. The MATS data is unreliable.

37. For purposes of the initial placement decision, an applicant’s “Past Performance” was assessed almost entirely by reference to his/her Standardized Rating Score (SRS) and last three annual performance ratings.

38. There were significant flaws and inconsistencies in GAO’s SRS calculations.

39. With regard to the actual selection process, the Order provided for a “unit consultation” wherein each Managing Director was to meet with the team’s Directors to obtain input with regard to each applicant within the team. GAO Order 2900.3, ch. 2(10).

40. In preparation for the unit consultation, the participants were given “notebooks” containing the applications, performance ratings, MATS and SRS data for each employee from that team seeking Band IIB placement.

41. Based on a review of the data contained in the notebooks and input from the Directors, the Managing Director was to form a “yes,” “no” or “unsure” preliminary recommendation regarding the placement of each applicant from the team into Band IIB. GAO Order 2900.3, ch. 2(10).

42. The unit consultation meetings between the team Managing Directors and Directors took place between November 22 and December 1, 2005.

43. In addition, each Managing Director served as a panel member on a Centralized Panel (Panel) consisting of at least two other Managing Directors. GAO Order 2900.3, ch. 2(11). Each Managing Director was required to review the data contained in the prepared notebook for each of the applicants from the other teams represented on his/her Centralized Panel, and based on this paper review, make a similar preliminary recommendation of “yes,” “no” or “unsure.”
Id.

44. There were five Centralized Panels considering applications submitted by analysts for placement into Band IIB. These Panels were structured by teams: Panel (1), Homeland Security and Justice (HSJ), National Resources and Environment (NRE), and Physical Infrastructure (PI); Panel (2), Education, Workforce, and Income Security (EWIS), Financial Markets and Community Investment (FMCI) and Health Care (HC); Panel (3) Acquisition and Sourcing Management (ASM), Defense Capabilities Management (DCM), International Affairs and Trade (IAT); Panel (4) Financial Management and Assurance (FMA), Information

Technology (IT), and Strategic Issues (SI); and Panel (5) Small Offices. GAO Order 2900.3, ch. 2(11)(b).

45. The Panel members were to meet and discuss whether their preliminary recommendations for each applicant were appropriate. GAO Order 2900.3, ch. 2(11)(b). They were authorized to change their preliminary recommendations, but if they were unable to reach agreement with regard to selecting the employee for the Band IIB, the employee was to remain in the “unsure” category. *Id.*

46. The same procedures applied to specialists, except that there was only one Centralized Panel consisting of all Managing Directors of teams employing a specialist applicant. GAO Order 2900.3, ch. 2(12)

47. The Centralized Panels met between December 6 and 9, 2005.

48. According to the terms of the Order, the COO and the CAO served as chair and vice chair, respectively, of the Centralized Panels, but were not to serve as panel members. GAO Order 2900.3, ch. 2(11)(b). After receiving recommendations from the Panel, the COO and CAO were to jointly determine whether an employee should be placed in Pay Band IIB. GAO Order 2900.3, ch. 2(11)(c). Thereafter, the GAO Human Capital Office (HCO) and Office of Opportunity and Inclusiveness (OOI) were to review the preliminary determinations of the COO and CAO and provide input prior to any final determinations. GAO Order 2900.3, ch. 2(11)(d).

49. Gene Dodaro (COO) and Sallyanne Harper (CAO) met with each of the Centralized Panels and actively participated in the discussion of applicants.

50. In the course of making their preliminary determinations, Gene Dodaro and Sallyanne Harper applied new quantitative standards for determining employee selection into the Band IIB.

51. The review by the HCO and OOI took place between December 7-13, 2005.

52. Of the 1238 Band II employees, 409 (33%) were selected. This represented 54% of those who were eligible and applied. Only 5 of the 94 (5.3%) special eligibility employees were selected.

53. Managing Directors notified employees of the final selection decisions between December 16 and 23, 2005. The Order provided an opportunity for employees to request feedback about the decisions. GAO Order 2900.3, ch. 2(13)(a). Employees had until January 13, 2006 to make that request.

54. After notification by GAO of final placement decisions, employees not selected for placement in Band IIB could request reconsideration from the Comptroller General (CG). GAO Order 2900.3, ch. 2(13)(b).

55. The Order provides that the CG would review each request and the original employee information considered by the panel. GAO Order 2900.3, ch.2(13)(b). It does not provide the standard to be applied by the CG in reconsidering the applicant's nonselection.

56. In considering requests for reconsideration, the CG, Dave Walker, was aided by Barbara Simball, Assistant General Counsel.

57. On reconsideration, the CG and/or Barbara Simball sought and relied upon employee information and data that went beyond the three year period contemplated by the Order.

58. Employees who sought reconsideration were not told that the CG would rely on information beyond the scope of their application.

59. Employees who sought reconsideration were told that the CG would not consider objections to the restructuring policy or process.

FY 05 Performance-Based Compensation (PBC) Guide for Analysts, Specialists and Investigators

60. Prior to the issuance of GAO Order 2900.3, employees in Pay Band II were subject to the same minimum and maximum pay, adjusted by geographical location.

61. On January 20, 2005, GAO issued a revised Order 2540.3, which, *inter alia*, eliminated annual pay adjustments for Band IIA employees whose pay exceeded the maximum pay rate for Band IIA.

62. The "FY 05 Performance-Based Compensation (PBC) Guide for Analysts, Specialists and Investigators" (*Guide*) was issued on February 8, 2006, and was intended to supplement GAO Order 2540.3. Appendix 2 to the *Guide* sets forth the pay ranges for Band IIA and Band IIB for each geographical zone. The pay range minimums and maximums applicable to Band IIA are significantly lower than those applicable to Band IIB.

63. The *Guide* provides that any portion of the GAO-wide 2.6% annual pay adjustment that exceeds the maximum rate of pay for Band IIA would be "lost." *Guide* at 6.

64. Any Band IIA employee whose salary in December 2005 was in excess of the Band IIA maximum rate was covered by the Band IIA Transition provisions. *Guide* at 7.

65. The *Guide*'s Band IIA transition pay provisions stipulated that any Band IIA whose salary was in excess of the Band IIA maximum rate would not receive the 2.6% annual pay adjustment, receive 50% of their Performance-Based Compensation bonus as a permanent salary increase up to the IIA transition salary range maximum, and not receive any of the remaining portion of the PBC as a performance bonus.

Petitioner's Reassignment to Band IIA - 9166-89: Description of Individual Case

COUNT I

90. Petitioner hereby incorporates and realleges paragraphs 1 through 89.

91. Petitioner's reassignment to Band IIA constituted a constructive demotion and reduction in pay. The reassignment was, therefore, an adverse action within the meaning of 4 CFR §7.6 and 5 U.S.C. §7513(a), which was not taken for such cause as would promote the efficiency of the service.

92. GAO effected this adverse action in violation of the Petitioner's rights under 4 CFR §7.6 and 5 U.S.C. §7513(b), made applicable to GAO employees through the GAO Personnel Act, 31 U.S.C. §732(d)(4).

COUNT II

93. Petitioner hereby incorporates and realleges paragraphs 1 through 92.

94. GAO reassigned Petitioner in violation of [REDACTED] rights under 4 CFR §7.6 and 5 U.S.C. §7513(b), made applicable to GAO employees through the GAO Personnel Act, 31 U.S.C. §732(d)(4).

COUNT III

95. Petitioner hereby incorporates and realleges paragraphs 1 through 94.

96. Petitioner's constructive demotion to Band IIA cannot be sustained because it was obtained through harmful error in the application of the procedures used in restructuring the Band II.

COUNT IV

97. Petitioner hereby incorporates and realleges paragraphs 1 through 96.

98. GAO Order 2900.3, on its face and as applied, violates Pub.L. 108-271 §9.

COUNT V

99. Petitioner hereby incorporates and realleges paragraphs 1 through 98.

100. The GAO Order 2540.3 and the FY 05 Performance-Based Compensation Guide for Analysts, Specialists and Investigators violate Pub.L. 108-271 §3(a).

COUNT VI

101. Petitioner hereby incorporates and realleges paragraphs 1 through 100.

102. The GAO Order 2540.3 and FY 05 Performance-Based Compensation Guide for Analysts, Specialists and Investigators and GAO Order 2900.3 are contrary to 4 CFR §5.1.

COUNT VII

103. Petitioner hereby incorporates and realleges paragraphs 1 through 102.

104. GAO Order 2900.3 was promulgated in violation of 31 U.S.C. §732(a).

COUNT VIII

105. Petitioner hereby incorporates and realleges paragraphs 1 through 104.

106. The FY 05 Performance-Based Compensation Guide for Analysts, Specialists and Investigators was promulgated in violation of 31 U.S.C. §732(a).

COUNT IX

107. Petitioner hereby incorporates and realleges paragraphs 1 through 106.

108. In reassigning Petitioner to Band IIA, GAO committed certain prohibited personnel practices in violation of 5 U.S.C. §2302(b)(4).

COUNT X

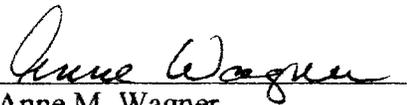
109. Petitioner hereby incorporates and realleges paragraphs 1 through 108.

110. In reassigning Petitioner to Band IIA, GAO committed certain prohibited personnel practices in violation of 5 U.S.C. §2302(b)(12).

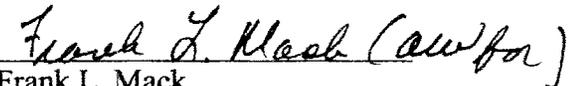
Remedies Sought

Petitioner seeks retroactive placement into the Band IIB category effective January 8, 2006 with full back pay and interest, and consideration for retroactive promotion to Band III with full back pay and interest.

Respectfully submitted,



Anne M. Wagner
General Counsel



Frank L. Mack
Senior Trial Attorney
GAO Personnel Appeals Board
Office of the General Counsel
Union Center Plaza II, Suite 580
820 First Street, NE
Washington, D.C. 20548
(202) 512-7507

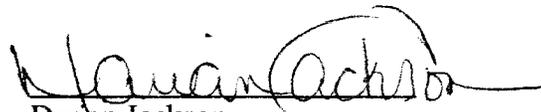
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review was served upon the following, via inter-office hand delivery, this 5th day of September, 2006:

John Bielic, Esq.
Assistant General Counsel

Lincoln Schroth, Esq.
Senior Attorney
U.S. Government Accountability Office
Office of the General Counsel
Legal Services Division
441 G Street N.W. Room 7838
Washington, D.C. 20548



Darian Jackson
Legal Information Assistant
GAO Personnel Appeals Board
Office of the General Counsel
Union Center Plaza II, Suite 580
820 First Street, NE
Washington, D.C. 20548
(202) 512-7512