

# Rules and Regulations

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## GOVERNMENT ACCOUNTABILITY OFFICE

### 4 CFR Part 28

#### Personnel Appeals Board; Procedural Rules

**AGENCY:** Government Accountability Office Personnel Appeals Board.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Government Accountability Office Personnel Appeals Board (the Board or PAB) is amending its regulations to reflect a change in law concerning grievance procedures. The amended rule provides a choice of forum to employees with prohibited personnel practice claims. We are taking this opportunity to change some specific terms in the regulations to ones more commonly used throughout the government.

**DATES:** This rule is effective December 9, 2011. Comments must be received by the Board on or before February 7, 2012.

**ADDRESSES:** You may submit comments by any of the following methods:

*Mail:* Patricia Reardon-King, Clerk of the Board, Personnel Appeals Board, U.S. Government Accountability Office, Suite 560, Union Center Plaza II, 820 First St. NE., Washington, DC 20002; email: [pab@gao.gov](mailto:pab@gao.gov); or fax: (202) 512-7525.

**FOR FURTHER INFORMATION CONTACT:** Beth Don, Executive Director, or Susan Inzeo, Solicitor, (202) 512-6137.

**SUPPLEMENTARY INFORMATION:** The Government Accountability Office Personnel Appeals Board is authorized by Congress, pursuant to 31 U.S.C. 751-755, to hear and decide cases brought by GAO employees concerning various personnel matters including adverse or performance-based actions, claims of discrimination, alleged prohibited personnel practices, and labor-management relations. The Board also

exercises oversight authority over equal employment opportunity at the agency. The Board's procedural regulations applicable to GAO appear at 4 CFR parts 27 and 28. The Board is revising one section of these regulations to ensure consistency with current law.

The Board published section 28.2(c)(2) on November 23, 1993, effective January 1, 1994 (58 FR 61998, Nov. 23, 1993). The Board's regulation mirrored that of the Merit Systems Protection Board (MSPB) and conformed with 5 U.S.C. 7121. The regulations provided that bargaining unit employees could pursue prohibited personnel practice (PPP) claims at the Board or the MSPB, respectively, only if those claims involved discrimination, performance-based reduction in grade or removal, or an adverse action as defined in 5 U.S.C. 7512; an employee could choose either the administrative appeal route or the negotiated grievance procedure but not both. An individual with PPP claims beyond those specified in the PAB regulation or the earlier MSPB regulation did not have a choice of forum.

In 1994, Congress amended 5 U.S.C. 7121 by requiring that bargaining unit employees could elect to raise any PPP claim within the MSPB's jurisdiction either to the MSPB or through the parties' negotiated grievance procedures. Public Law 103-424, sec. 9(b), 108 Stat. 4361, 4365 (Oct. 29, 1994). The PAB now amends its regulations to ensure that GAO employees' rights are consistent with the statute. The amendment provides that a GAO employee who seeks to bring a PPP claim that is covered by a negotiated grievance procedure may elect either the negotiated grievance procedure or the procedure under PAB regulations. The special rule for such claims that involve allegations of discrimination remains unchanged.

The Board is making this amendment effective immediately upon publication, on an interim basis, to conform the regulation with the statutory requirement of 5 U.S.C. 7121. See *GAO Employee Organization, IFPTE Local 1921 v. GAO*, PAB Docket No. LMR 2001-02 (Aug. 24, 2011). At the same time, however, the Board is soliciting comments on the amendment. These comments will be considered fully before the final regulation is adopted.

On September 19, 2011, GAO issued revised Order 2351.1 regarding "Reduction in Force Procedures for the Government Accountability Office." This Order was previously titled "Workforce Restructuring Procedures for the Government Accountability Office." However, as stated in the revised Order, instead of "GAO-specific terms," the Order is now adopting "governmentwide reduction-in-force terminology—i.e., reduction in force (RIF) is used rather than workforce restructuring." In order to conform with GAO's revised Order, the Board is substituting "Reduction in Force" for the term "Workforce Restructuring Action," in the definition section 28.3. It also is substituting Reduction in Force throughout part 28.

The Board is also making two additional nonsubstantive corrections to the regulations in the Table of Contents for part 28 and in section 28.113.

#### List of Subjects in 4 CFR Part 28

Administrative practice and procedure, Claims, Government employees, Labor-management relations, Reduction in force.

For the reasons set forth in the preamble, 4 CFR part 28 is amended as follows:

#### PART 28—GOVERNMENT ACCOUNTABILITY OFFICE PERSONNEL APPEALS BOARD; PROCEDURES APPLICABLE TO CLAIMS CONCERNING EMPLOYMENT PRACTICES AT THE GOVERNMENT ACCOUNTABILITY OFFICE

■ 1. The authority citation for part 28 continues to read as follows:

**Authority:** 31 U.S.C. 753.

■ 2. In part 28, revise all references to "Workforce Restructuring Action" to read "Reduction in Force", and revise all references to "WRA" to read "RIF".

■ 3. Amend § 28.2 by revising paragraph (c)(2), redesignating paragraph (c)(3) as paragraph (c)(4), adding new paragraphs (c)(3) and (d) to read as follows:

#### § 28.2 Jurisdiction.

\* \* \* \* \*

(c) \* \* \*

(2) *Matters involving prohibited personnel practices.* If the negotiated grievance procedure permits the employee to grieve an appealable action involving a prohibited personnel

practice other than prohibited discrimination (as defined in § 28.95), such an action may be raised under either, but not both, of the following procedures:

(A) The Board's procedures; or

(B) The negotiated grievance procedure.

The employee will be deemed to have elected the Board's procedures if the employee files a timely charge with the Board's Office of General Counsel before filing a timely grievance.

(3) *Other matters.* If the negotiated grievance procedure permits the employee to grieve any matters which would otherwise be appealable to the Board, other than those listed in paragraphs (c)(1) or (c)(2) of this section, then those matters may only be raised under the negotiated grievance procedure and not before the Board.

\* \* \* \* \*

(d) Except for actions involving prohibited discrimination (under § 28.95) or any other prohibited personnel practice, any appealable action that is excluded from the application of the negotiated grievance procedure may be raised only under the Board's procedures.

■ 4. In § 28.12, revise the section heading to read as follows:

**§ 28.12 General Counsel Procedures.**

\* \* \* \* \*

■ 5. In § 28.113, revise paragraph (a)(5) to read as follows:

**§ 28.113 Contents of representation petitions.**

(a) \* \* \*

(5) A declaration by the signer of the petition, under penalties of the Criminal Code (18 U.S.C. 1001), that the petition's contents are true and correct, to the best of his or her knowledge and belief;

\* \* \* \* \*

**Steven H. Svartz,**

*Chair, Personnel Appeals Board, U.S. Government Accountability Office.*

[FR Doc. 2011-31549 Filed 12-8-11; 8:45 am]

**BILLING CODE 1610-02-P**

**DEPARTMENT OF AGRICULTURE**

**Grain Inspection, Packers and Stockyards Administration**

**9 CFR Part 201**

**RIN 0580-AB07**

**Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration**

**AGENCY:** Grain Inspection, Packers and Stockyards Administration, USDA.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Agriculture (USDA) Grain Inspection, Packers and Stockyards Administration (GIPSA) is amending the regulations issued under the Packers and Stockyards Act, 1921, as amended and supplemented (P&S Act). GIPSA is amending the regulations to clarify conditions for industry compliance with the P&S Act pursuant to the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). In response to comments and other public input received in response to the proposed rule published in the **Federal Register** on June 22, 2010, making necessary changes. The provisions finalized with this action will clarify conditions for industry compliance with the P&S Act. Other provisions listed in the June 22, 2010, proposed rule are not being finalized at this time.

**DATES:** This rule is effective February 7, 2012.

**FOR FURTHER INFORMATION CONTACT:**

Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave. SW., Washington, DC 20250, (202) 720-7363, *s.brett.offutt@usda.gov*.

**SUPPLEMENTARY INFORMATION:** The supplemental information of this final rule is composed of four sections. Section I provides a background of the rulemaking. Section II provides a summary of provisions not being finalized by this action. Section III provides a summary of provisions being finalized. Section IV provides a summary of the comments received on the proposed rule and at the relevant USDA/Department of Justice (DOJ) Joint Competition workshops that occurred during the comment period and describes how sections of the proposed rule have been modified based on these comments. Section V provides the revised impact analyses including those required by Executive Orders 12866 and

13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act.

**I. Background**

*The P&S Act, As Amended by the 2008 Farm Bill*

The P&S Act was enacted in 1921 "to comprehensively regulate packers, stockyards, marketing agents and dealers."<sup>1</sup> The P&S Act provides that "[t]he Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter."<sup>2</sup> The P&S Act also sets forth procedures for administratively adjudicating certain enforcement actions.<sup>3</sup> Title XI of the 2008 Farm Bill requires the Secretary of Agriculture to issue a number of regulations under the P&S Act, 1921, as amended. Among these instructions, the 2008 Farm Bill directed the Secretary to identify criteria to be considered in determining:

- Whether an undue or unreasonable preference or advantage has occurred in violation of the Act;
- Whether a live poultry dealer has provided reasonable notice to poultry growers of any suspension of the delivery of birds under a poultry growing arrangement;
- When a requirement of additional capital investments over the life of a poultry growing arrangement or swine production contract constitutes a violation of the Act;
- If a live poultry dealer or swine contractor has provided a reasonable period of time for a poultry grower or a swine production contract grower to remedy a breach of contract that could lead to termination of the poultry growing arrangement or swine production contract; and
- Whether the arbitration process provided in a contract provides a meaningful opportunity for the grower or producer to participate fully in the arbitration process.

In addition to developing criteria, the 2008 Farm Bill provided that livestock and poultry contracts must specifically disclose the right of the contract producer or grower to decline the requirement to use arbitration to resolve any controversy that may arise under the livestock or poultry contract.

On June 22, 2010, GIPSA published a Notice of Proposed Rulemaking in the **Federal Register** that proposed language for implementing both the Farm Bill provisions described above and a number of discretionary provisions, including a ban on packer-to-packer

<sup>1</sup> *Hays Livestock Comm'n Co. v. Maly Livestock Comm'n Co.*, 498 F.2d 925, 927 (10th Cir. 1974).

<sup>2</sup> *Id.* section 408.

<sup>3</sup> *Id.* sections 203, 309, 411.