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## GENERAL ACCOUNTING OFFICE

### 4 CFR Part 28

#### Personnel Appeals Board; Procedural Rules

**AGENCY:** General Accounting Office Personnel Appeals Board.

**ACTION:** Final rule.

**SUMMARY:** The General Accounting Office Personnel Appeals Board hereby amends its regulations to permit charging parties to bring their cases directly to the Board after the passage of 180 days from the filing of the charge, if the Board's General Counsel has not yet completed the investigation of the charge, if the Board's General Counsel has not yet completed the investigation of the charge and issued a Right to Appeal Letter. This amendment offers employees an option for expedited processing and conforms Board procedures with those of other agencies that hear employment-related appeals.

**DATES:** This final rule is effective December 21, 2000.

**ADDRESSES:** General Accounting Office Personnel Appeals Board, Suite 560, Union Center Plaza II, 441 G Street, NW., Washington, DC 20548.

**FOR FURTHER INFORMATION CONTACT:** Beth Don, Executive Director, 202-512-6137.

**SUPPLEMENTARY INFORMATION:** The General Accounting Office Personnel Appeals Board performs for GAO employees the functions performed in the executive branch by the Merit Systems Protection Board, the Equal Employment Opportunity Commission, and the Federal Labor Relations Authority. In order to bring a case before the Board, except in cases involving a Reduction in Force, an employee must first file a charge with the Board's General Counsel. The General Counsel investigates the charge and determines whether there are reasonable grounds to believe that the employee's rights have

been violated. At the end of the investigation, the General Counsel issues to the employee a "report and recommendation" that explains the results of the investigation. If the General Counsel finds that there are reasonable grounds to believe that the employee's rights have been violated, then the General Counsel offers to represent the employee in a proceeding before the Board. If the General Counsel does not find "reasonable grounds," the General Counsel will not represent the employee. The employee, however, may still bring the case to the Board by representing him- or herself, or by obtaining private representation. Accompanying the report and recommendation, whether favorable or unfavorable, is a "Right to Appeal" Letter which permits the employee to file a petition for review with the Board.

Under the Board's current regulations, an employee may not bring his or her complaint to the Board until the General Counsel's investigation is completed and the employee has received a "Right to Appeal" Letter. In other agencies that hear employment-related appeals, employees are able to "opt-out" of the investigative phase and proceed directly to the hearing stage after they have waited a certain period of time.

The Board believes that the approach taken by these agencies is a reasonable and fair one. It therefore is adopting a similar approach for cases within its jurisdiction. The Board published this rule as a proposed rule on August 30, 2000 (65 FR 52674), and invited comments by October 30, 2000. One comment from a current litigant before the Board, supporting the proposed rule, was received within the comment period. The proposed rule is adopted as a final rule without change.

Under the final rule set forth below, GAO employees have the option of bringing their cases directly to the Board if 180 days have passed and the Board's General Counsel has not yet completed the investigation and issued a "Right to Appeal" Letter concerning their case. Thus, no employee will have to wait more than 180 days to have the opportunity to present his or her case to an administrative judge. The amendments do not require an employee to file with the Board as soon as the 180-day period has expired; he or she may file at any time after 180 days have passed, so long as no "Right to

Appeal" letter has been issued. An employee still retains the right to wait for the General Counsel to complete the investigation, before going forward.

Under the final regulations, certain consequences flow from an employee's decision to file a petition for review with the Board before the completion of the General Counsel's investigation. First, the investigation by the Board's General Counsel would be terminated as soon as the employee files a petition for review with the Board. The General Counsel would not gather any further evidence after that point, and the employee would not receive a report from the General Counsel analyzing the facts or law relevant to the employee's case. Second, the Board's rules only permit the General Counsel to represent employees before the Board if the General Counsel completes the investigation and finds "reasonable grounds" to believe that the charge is true. Under the final regulations, therefore, an employee who "opts out" of the investigation after 180 days, and files directly with the Board, would forego the opportunity to have the General Counsel present his or her case to the Board. Such an employee could either represent him- or herself, or obtain private representation.

The Board believes that these consequences are necessary features of its final regulation. While the Board wishes to extend a choice to employees, it does not believe that it would be justifiable to permit employees to go forward before both the General Counsel's Office and the Board simultaneously. Nor would it be appropriate to permit an employee to be represented at public expense in the absence of a finding of reasonable cause by the General Counsel.

The Personnel Appeals Board certifies under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this rule will not have a significant economic impact on a substantial number of small entities, because it applies exclusively to employees and applicants for employment at the General Accounting Office. For this reason, a regulatory flexibility analysis is not required.

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

Administrative practice and procedure, Claims, Equal employment opportunity, Government employees, Labor-management relations.

For the reasons stated in the foregoing preamble, the General Accounting Office Personnel Appeals Board amends 4 CFR Chapter I, Subchapter B, Part 28 as follows:

**PART 28—GENERAL ACCOUNTING OFFICE PERSONNEL APPEALS BOARD; PROCEDURES APPLICABLE TO CLAIMS CONCERNING EMPLOYMENT PRACTICES AT THE GENERAL ACCOUNTING OFFICE**

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

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

2. Amend § 28.12 by adding a new paragraph (g) to read as follows:

**§ 28.12 General Counsel procedures.**

\* \* \* \* \*

(g) If 180 days have elapsed since the filing of the charge, and the General Counsel has not completed the investigation and issued a Right to Appeal Letter, the charging party may bring his or her case directly to the Board by filing a petition for review in accordance with § 28.18. If a charging party exercises this option to file a petition for review with the Board without waiting for the completion of the investigation, the General Counsel shall not represent the charging party in proceedings before the Board. The charging party may represent him- or herself or obtain other representation. The General Counsel shall close the investigation of the charge upon being notified by the Clerk of the Board that the charging party has filed a petition for review with the Board under this paragraph (g).

3. Amend § 28.18 by revising paragraphs (a) and (b) to read as follows:

**§ 28.18 Filing a petition for review with the Board.**

(a) *Who may file.* Any person who is claiming to be affected adversely by GAO action or inaction that is within the Board's jurisdiction under subchapter IV of chapter 7 of title 31, United States Code, or who is alleging that GAO or a labor organization engaged or is engaging in an unfair labor practice, may file a petition for review if one of the following is met:

(1) The person has received a Right to Appeal Letter from the Board's General Counsel; or

(2) At least 180 days have elapsed from the filing of the charge with the Board's General Counsel and the General Counsel has not issued a Right to Appeal Letter; or

(3) The person was separated due to a Reduction in Force and chooses to file an appeal directly with the Board,

without first filing with the Board's General Counsel, as provided in § 28.13.

(b) *When to file.* (1) Petitions for review filed pursuant to paragraph (a)(1) of this section must be filed within 30 days after service upon the charging party of the Right to Appeal Letter from the Board's General Counsel.

(2) Petitions for review filed pursuant to paragraph (a)(2) of this section may be filed at any time after 180 days have elapsed from the filing of the charge with the Board's General Counsel, provided that the General Counsel has not issued a Right to Appeal Letter concerning the charge.

(3) Petitions for review filed pursuant to paragraph (a)(3) of this section must be filed within 30 days after the effective date of the separation due to a Reduction in Force.

\* \* \* \* \*

**Michael Wolf,**  
*Chair, Personnel Appeals Board, U.S. General Accounting Office.*  
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**DEPARTMENT OF AGRICULTURE**

**Food and Nutrition Service**

**7 CFR Part 246**

**RIN 0584-AC51**

**Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Clarification of WIC Mandates of Public Law 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996**

**AGENCY:** Food and Nutrition Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the regulations governing the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) to clarify one of the provisions required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, enacted on August 22, 1996. The nondiscretionary provisions of that act were incorporated in the WIC Program regulations in an interim rule published September 5, 2000.

**EFFECTIVE DATE:** This rulemaking becomes effective January 22, 2001.

**FOR FURTHER INFORMATION CONTACT:** Debra R. Whitford at (703) 305-2746.

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 5, 2000, we published an interim rule (65 FR 53523) that

amended the WIC Program regulations to incorporate certain nondiscretionary requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub. L. 104-103). We received ten comments on the interim rule.

Nine of the comments concerned the provision in § 246.7(c)(2) providing WIC State agencies the option to limit WIC participation to U.S. citizens, nationals, and qualified aliens contained in section 742 of Pub. L. 104-193 (8 U.S.C. 1615). In particular, the commenters suggested that we incorporate into the regulations our statement in the preamble concerning the effect of a provision to implement this option on the State agency's WIC-eligible population. In the preamble (65 FR 53524-25) we said:

Because a State agency's decision to implement this option will effectively reduce the State agency's eligible WIC population, FNS, by regulatory authority, will make a downward adjustment of that State agency's estimated WIC-eligible population to reflect the number of aliens the State agency declares no longer eligible. If a State agency's participation decreases and food funds are not expended, for whatever reason, including the exclusion of certain categories of aliens, FNS may execute its regulatory authority to recover funds during the year from the State agency in question.

We use the estimated WIC-eligible population for each State agency to determine the State agency's fair share allocation of food funds. We believe that adjusting the State agency's WIC-eligible population to reflect the more limited population eligible for that State agency's WIC Program is a logical result under the current regulations. As such, we have adopted the commenters' suggestion. Accordingly, this final rule amends § 246.16(c)(3)(i)(A) to provide that if a State agency chooses to exercise the option in § 246.7(c)(2), FNS will reduce the State agency's population of income eligible persons to reflect the number of aliens the State agency declares no longer eligible.

Another commenter raised two concerns. First, the commenter objected to the change in § 246.7(b)(3) that makes food assistance referrals optional. We had no discretion on this point as the change was required by Pub. L. 104-193. Second, the commenter encouraged FNS to provide State and local agencies with two years' advance notice when making changes to the data required for the participant characteristic reports. Traditionally, we have worked closely with our State, tribal, and local government partners on any changes to the reporting on participant characteristics. We recognize that