

# **James B. Dowd v. U.S. General Accounting Office**

**Docket No. 91-03**

**Date of Decision: July 2, 1992**

**Cite as: Dowd v. GAO (7/2/92)**

**Before: Personnel Appeals Board, en banc (Roger P. Kaplan, Chair; Paul A. Weinstein, Vice Chair; Isabelle R. Cappello, Nancy A. McBride and Alan S. Rosenthal, Members)**

**Reopening of PAB Decisions**

**Affirmative Action**

## **DECISION EN BANC ON MOTION FOR RECONSIDERATION**

This case is before the Personnel Appeals Board on the Petitioner's "Motion for Reconsideration as to the Entitlement of Promotions, as a Part of the Relief Available for Vietnam Era and Disabled Veterans and Handicapped Persons." Administrative Judge McBride granted leave to Petitioner to file such a motion because he asserted that the Board misunderstood certain remarks made by Counsel for Petitioner at the oral argument on the Motion and Cross-Motion for Summary Judgment to constitute a waiver or abandonment of the argument with respect to entitlement of disabled veterans to promotional preference. Whether or not this argument was waived, the Board has determined to reconsider the following question on the merits: Do certain veterans who are employed by GAO have an entitlement to the application of a preference in a promotion action.

### **Petitioner's Request for Reconsideration**

In his Motion for Reconsideration, Petitioner raises four questions. These points will be addressed before ruling on the question raised for reconsideration.

I. Whether Petitioner's Counsel ever conceded in oral argument that entitlement to promotions did not apply.

The Order of the Administrative Judge dated March 11, 1992 stated clearly in numbered paragraph 3 that, upon the representation of Petitioner's Counsel that Petitioner had not withdrawn his claim of entitlement to the application of a veteran's preference in promotion and that Counsel had not intended to convey such a waiver, Petitioner was granted leave to seek reconsideration of the Board's February 24, 1992 Decision. The Board has no need to revisit the November 1, 1991 oral argument to determine whether Counsel, in fact, conceded the point. Counsel's representation that he did not was sufficient to persuade the Administrative Judge that the Board should resolve the question on its merits.

II. Whether the scope of the Personnel Appeals Board's ruling of applicable GAO "Orders," rules and regulations was improperly restricted due to GAO's failure to perform its affirmative duty to bring other applicable "Orders" relating to promotions to the Board's attention.

The second argument advanced by Petitioner is that the scope of the February 24 ruling was "improperly restricted" due to GAO's failure to bring certain Orders to the Board's attention. This assertion and the accompanying motion for sanctions against GAO were fully addressed in a Memorandum and Order, issued by the Administrative Judge on May 13, 1992, and will not be reexamined here.

III A. Whether the relief available to Petitioner, and the class he represents, may include consideration of retroactive promotions.

The third argument advanced is that the relief available to Petitioner, and the class he represents,<sup>1</sup> may include retroactive promotions. This assertion is simply not at issue now. The ruling of February 24, left as the question before the Board, what, if any, harm was sustained by the Petitioner as a result of GAO's failure to implement an Affirmative Action Program for disabled veterans as required by GAO Order 2306.1. There has been no articulation of a limit or possible limit on the potential remedies for such harm as may be shown. Thus, it is entirely possible that Petitioner may be able to demonstrate entitlement to a promotion as a remedy for the failure to implement the mandated affirmative action program. This is an entirely separate question from that which the Board understands to be before it at this time, that is, whether some statute, rule or regulation requires the application of a preference for certain veterans being considered for promotion.

III B. Whether GAO misled the PAB by its failure to disclose its own regulations and other applicable "Orders."

As has been previously discussed, the Board is of the view that GAO has not misled it. The provisions cited by Petitioner have all been brought to the Board's attention. The question to be answered is whether these provisions or any other laws or regulations confer on Petitioner an entitlement to a preference in promotion actions on account of his status as a veteran, as a disabled Veteran or as a Vietnam-era Veteran. IV. One additional point raised by Petitioner warrants discussion by the Board, because it suggests that Petitioner has misread the Board's February 24 Decision. The first full paragraph at the top of p. 8 of Petitioner's Motion contains the following summation: "Therefore, the PAB is respectfully urged to reconsider the scope of its ruling en banc and to broaden its ruling to include Vietnam-era Veterans and disabled Veterans as well as the class already covered--disabled persons." This request does not follow from or fit into any of the arguments set out by Petitioner, yet it appears to state the relief requested by the Motion.

The Board's Decision neither included nor excluded a class of persons. It determined that a specific GAO Order, No. 2306.1, required that GAO have an Affirmative Action Plan for disabled veterans and that, therefore, the motion of GAO for summary judgment based on the lack of any legal requirement to provide affirmative action for disabled veterans should be denied.

The Petitioner is under a serious misapprehension of the Board's actions to date if he believes that our prior decision presupposed a class of handicapped persons. To the contrary, it was specifically noted that Petitioner's "complaints are all related to his status as a disabled veteran." (Dowd, Decision En Banc on Motion and Cross-Motion for Summary Judgment, p. 12). We noted there that the Petition in this case is framed exclusively in terms of federal statutes which (1) mandate preferences for Vietnam-era and/or disabled Veterans and (2) mandate the establishment of affirmative action for disabled veterans (Decision p. 12). We are, therefore, puzzled by Petitioner's apparent supposition that our decision somehow addressed the employment rights of handicapped individuals.

## Reconsideration

The question that the Board will resolve in response to the Motion for Reconsideration is that originally presented by GAO in its motion for summary judgment--whether any statute, rule or regulation requires Respondent to implement a preference for Petitioner and the class he seeks to represent with respect to promotion and/or advancement. In its Decision on the Motion and Cross-Motion for Summary Judgment, the Board ruled that the issue became moot upon certain concessions made by Counsel for Petitioner at the oral argument. The Board has now determined to reconsider this question, without regard to any such concessions.

Petitioner's complaint includes an assertion that GAO has failed to grant statutory preferences in the promotion and advancement process (Complaint, p. 3). The Complaint lists as constituting "several federal statutes and regulations" requiring preference in promotion the following sources of the requirement for such preference: 38 U.S.C. 2014(c), 4 C.F.R. § 2.6, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq. Petitioner sought an "order ruling that GAO is subject to all statutory rules and regulations pertaining to preference in hiring and promotion for Vietnam-era Veterans, handicapped veterans and handicapped persons." (Petitioner's Opposition to Respondent's Motion for Summary Judgment and Cross-Motion for Summary Judgment, p.3)

Respondent's position is that there is no legal requirement that GAO grant preference in promotions to Vietnam-era veterans or to disabled veterans. In its Motion for Summary Judgment, GAO sought dismissal of the complaint insofar as it relates to promotional preferences for certain veterans, on the ground that there is no legal requirement for such preferences.

None of the citations listed in the complaint provides any support for Petitioner's position. 38 U.S.C. 2014(c) requires an affirmative action program for disabled veterans employed by Executive Branch agencies. The Board has previously ruled that this affirmative action provision does not cover GAO (Decision, p. 12). However, even if GAO were required by §2014(c) to have an affirmative action program for disabled veterans, such a requirement would not mandate preference generally or specifically in promotion actions.

The Petitioner also cites 4 C.F.R. §2.6 as requiring a preference in promotion actions. Pursuant to §2.6, GAO is obligated to "provide preference, for any individual who would be a preference eligible in the executive branch, in a manner and to an extent consistent with preference eligible in the executive branch." This section implements 31 U.S.C. §732(b)(5) which contains almost identical language, requiring that GAO provide a preference for any individual who would be a preference eligible in the executive branch, "in a way and to an extent consistent with a preference given to an individual in the executive branch." Thus, if it can be demonstrated that a similarly-situated preference eligible in the executive branch would be entitled to preference in promotion, there is legal merit to Petitioner's argument.

Petitioner has failed, however, to cite any provision that would entitle him to a preference in promotion were he in the executive branch. A review of the preference provisions contained in the Veteran's Preference Act of 1947 (VPA), 58 Stat. 387 (codified throughout Title 5, U.S.C.) does not provide any assistance. The preferences therein provided are limited to appointments, reinstatement and retention in federal service and to special procedural and substantive safeguards in removal and other adverse action

proceedings. The VPA does not accord veterans preference in promotion. Crowley v. United States 527 F.2d 1176, 1183 (Ct. Cl. 1975); Stephens v. Coleman 712 F.Supp. 1571, 1581 (N.D. Ga. 1989); aff'd sub. nom., Stephens v. Department of Health and Human Services 901 F.2d 157 (11th Cir. 1990)

Similarly, the Veteran's Readjustment Assistance Act of 1974, Pub. L. 93-508, Title VI, §403(a), Dec. 3, 1974, 88 Stat. 1593 (VRAA) does not provide for veteran's preference in promotion. Subsection (b) of §2014 permits noncompetitive hiring of Vietnam-era Veterans and disabled veterans for positions up to the equivalent of GS-9 and provides follow-up training and subsequent conversion to competitive appointment. No other provision of the VRAA addresses preferences at all.

Based on the foregoing, it is the opinion of the Board, that there is no legal basis for asserting an entitlement to a veteran's preference in a promotion action.

As we stated in the February 24 Decision, the Motion for Summary Judgment filed herein is more properly viewed as a Motion to Dismiss, and the Board will continue to treat it as such. Accordingly, GAO's Motion to Dismiss that part of Petitioner's claim that is based upon an asserted entitlement to a promotional preference is hereby GRANTED.

#### **Notes**

1. A motion to certify a class is pending before the Board; no class has been certified as of yet.