

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

Docket No. 91-03

Date of Decision: June 4, 1996

Cite as: Dowd v. GAO (6/4/96)

Before: Alan S. Rosenthal, for the Board, *en banc*; Leroy D. Clark; Harriet Davidson; Nancy A. McBride

Affirmative action

Veterans

Goals and timetables

Underrepresentation

DECISION

This matter is before the full Board on petitioners' appeal, pursuant to 4 C.F.R. §28.87, from an initial decision of the Administrative Judge denying petitioners' request for relief and dismissing the petition for review. Upon full review of the record and consideration of the written and oral arguments of the parties, the initial decision of the Administrative Judge is affirmed.

PROCEDURAL HISTORY

This case has a long procedural history which is set forth in considerable detail in the initial decision. The following is a summary of that history to the extent relevant to this appeal.

By a petition for review filed on March 25, 1991, petitioner James B. Dowd and other similarly situated disabled veterans and veterans of the Vietnam-era complained of the failure of the General Accounting Office (hereinafter referred to as "respondent" or "agency") to fulfill its asserted statutory obligation to establish affirmative action plans for veterans and to provide preferences in promotion or other advancement processes. In response, the agency claimed that it was never obligated by law to institute an affirmative action program for Vietnam-era or disabled veterans or to provide preference in promotions for them.

On February 20, 1992, the full Board ruled on the parties' cross-motions for summary judgment. The Board concluded that there was no merit to petitioners' contention that the agency had not complied with a statutory mandate, holding, *inter alia*, that the affirmative action requirements for disabled veterans found in the Vietnam Era Veterans Readjustment Assistance Act of 1974

(VRAA), 38 U.S.C. §§4212-14,¹ did not apply to GAO because that Act covers executive, rather than legislative, branch agencies. It went on to determine, however, that, under the teaching of such decisions as *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the agency was bound to honor its voluntary commitment to establish an affirmative action plan for disabled veterans contained in Chapter 10 of GAO Order 2306.1, in effect from October 1, 1980 to January 17, 1992. On the strength of that determination, the Board granted, in part, petitioners' motion for summary judgment, ruling that, during the period Order 2306.1 was operative, respondent was required to provide disabled veterans with an affirmative action program in accordance with its requirements.

Following this decision, the case was transferred to the Board's hearing docket and assigned to an Administrative Judge for further proceedings. On December 18, 1992, the case was certified as a class action. On May 13, 1993, the class was redefined to consist of all disabled veterans employed by the agency during the period of October 31, 1990 through January 17, 1992.

By September 14, 1993 order, the Administrative Judge bifurcated the case for separate, sequential determination of the following issues: (1) the scope and content of GAO'S self-imposed obligation to provide an affirmative action program for disabled veterans; and (2) the extent of the harm, if any, resulting from respondent's failure to provide the required affirmative action plans for disabled veterans. Extensive discovery followed, marked by numerous motions to compel and motions for protective orders. Evidentiary hearings addressing the two issues were held in March 1994 and April 1995.

On November 20, 1995, the Administrative Judge issued an initial decision, denying petitioners' request for relief and dismissing, with prejudice, the petition for review.² Petitioners thereafter filed with the Administrative Judge a timely request, under 4 C.F.R. §28.87 (b)(2), for reconsideration of the initial decision. By order dated December 12, 1995, the Administrative Judge denied petitioners' request in its entirety.

On December 27, 1995, petitioners filed their timely notice of appeal with the full Board. Following submission of briefs by both parties, the Board entertained oral argument on March 22, 1996. Argument was confined to a series of questions that the Board determined warranted exploration beyond their development in the briefs.

INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

In the initial decision, the Administrative Judge concluded that petitioners had not established that harm, had accrued to the class members as a result of respondent's failure to adopt and/or to implement an affirmative action plan for disabled veterans between October 1, 1980 and January 17, 1992. In reaching this conclusion, the Administrative Judge rejected the two propositions that

¹ In 1991, sections of the VRAA were renumbered. Prior to that time, §§4212-14 were numbered as §§2012-14. Pub. L. 102-83, §5(b)(1), 105 stat. 406 (Aug. 6, 1991). The former section numbers are used in some documents in the record.

² The initial decision will be discussed in greater detail below.

she deemed to be at the foundation of petitioners' case:

1. GAO was under a legal obligation to provide goals and timetables for disabled veterans.
2. Had goals been set for disabled veterans, they would have been promoted at the same rate as women and minorities and their average rate of salary increase over the period would have matched that of women and minorities.

Initial Decision at 27.

With regard to the first proposition, the Administrative Judge determined that the affirmative action required under GAO Order 2306.1 did not mandate the establishment of goals and timetables for disabled veterans. On that score, the Administrative Judge noted that petitioners' counsel "stipulated" both that GAO Order 2306.1 defined the duty to provide affirmative action and that the plans as written for 1980-85 satisfied that duty. In her view, those plans did not include goals and timetables for disabled veterans. Initial Decision at 29. More importantly, the Administrative Judge found no mention of goals and timetables in GAO Order 2306.1, which was the sole basis of the legal duty of GAO to provide affirmative action for disabled veterans. Initial Decision at 30-31.

The Administrative Judge observed that petitioners relied upon the VRAA, the Veterans' Preference Act of 1944 (VPA) (codified in scattered sections of 5 U.S.C., including §§2108, 3309-12, 3315-18), and the veterans' savings provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-11, in support of their position that goals were required for disabled veterans. She concluded, however, after an examination of them, that these statutory provisions did not apply to the question of affirmative action for disabled veterans at GAO. In this connection, the Administrative Judge pointed to the holding in the Board's 1992 *en banc* decision that the relevant portions of the VRAA are in terms limited in application to departments, agencies and instrumentalities in the executive branch. In addition, she determined that neither the VPA nor the veterans' savings provision of Title VII accords veterans any preference in promotions or mandates the creation of goals and timetables for disabled veterans who are subject to an affirmative action program. Initial Decision at 32-35.

The Administrative Judge additionally held that there was no support for petitioners' contention that, because GAO Order 2306.1 guaranteed them the "same measure of opportunities" as other employees, handicapped individuals and disabled veterans were entitled to have goals set for the reason that setting goals was an opportunity provided to women and minority employees. The Administrative Judge found that there was "no contemporaneous thought on the part of the Agency (GAO) that the obligation undertaken was to provide for handicapped individuals and disabled veterans the same affirmative action that was provided for women and minorities Agency officials did not seriously consider the question of goals for disabled veterans because they did not believe such to be required . . . or feasible . . ." Initial Decision at 36.

Although rejecting petitioners' contention that the agency was required to develop goals and

timetables, the Administrative Judge nevertheless went on to consider whether, in any event, petitioners had shown that their absence harmed class members. She answered this question in the negative and held that petitioners had failed to offer adequate proof of damages. Initial Decision at 38-65.

CONTENTIONS OF THE PARTIES ON APPEAL

Petitioners: Petitioners contend that, pursuant to GAO Order 2306.1, disabled veterans were entitled to an affirmative action plan from 1980 through 1991 that included numerical goals and timetables for the advancement of disabled veterans similar to those that were a feature of affirmative action plans for women and minorities. Petitioners claim that Order 2306.1's commitment to a "full measure of opportunities in hiring, placement and advancement" for disabled veterans mandated the establishment of such goals and timetables in equal measure to the goals and timetables provided to women and minorities. In addition, petitioners point to the definitional section of another GAO order, 2713.1, entitled "Equal Employment Opportunity in the General Accounting Office," which was promulgated on July 15, 1981. In that section, the term "Affirmative Action Program Plan" was defined as "[an] agency operating plan with goals, timetables and personnel management strategies to overcome underrepresentation and the effects of past or present practices, policies or other barriers to equal employment opportunity." Definitions at pg. iii. According to petitioners, this definition should be applied in the determination of the scope and requirements of Order 2306.1, so as to mandate the inclusion of goals and timetables in affirmative action plans promulgated under the aegis of that order. Transcript of March 22, 1996 oral arguments (Tr.) at 7-8, 26-27.³

In that regard, petitioners argue that the agency could and should have measured the underrepresentation of disabled veterans in its work force during the relevant period by developing an appropriate benchmark, and then used that information to establish advancement (promotion) goals and timetables for disabled veterans comparable to those developed for women and minorities. Petitioners assert that they have presented evidence relevant to the benchmark issue by producing statistics on the employment of disabled veterans in the Federal civilian work force as a whole during the years in question, statistics which they claim indicate an underrepresentation of disabled veterans at GAO. Tr. at 24-25; Pet. Exhs. Vol. III-A, Tabs 2 and 8.

As noted above, the Administrative Judge pointed to petitioners' acknowledgement that the three affirmative action plans developed by the agency between 1980 and 1985 for the handicapped, including disabled veterans, would have satisfied the requirements of Order 2306.1 if they had been implemented as to disabled veterans. Petitioners maintain that this is so because, in their view, those three plans did contain relevant goals and timetables. In support of this proposition,

³ Petitioners did not bring the definitional section of Order 2713.1 to the attention of the Administrative Judge, let alone rely upon it before her. Petitioners first raised it in response to a *sua sponte* full Board February 9, 1996 order calling upon the parties to brief the question of the significance of the definition in question. Hence, it is not surprising that the initial decision does not address that definition.

petitioners point, for example, to the fact that the 1980-81 plan provides for certain statistical reports and states that “our secondary and eventual goal is to reach parity with the federal work force by September 30, 1992.” Tr. at 12; Pet. Exhs. Vol. II, Tab A at 10.

Petitioners assert that, if implemented, appropriate goals and timetables for disabled veterans would have led to the same pattern of promotion (using a comparison of the percentage increase in raw numbers of various employee groups in grades 7-12 and 13-15) and the same average rate of increase in salaries as experienced by women and minorities. Based on these assumptions, petitioners use the average rate of salary increase each year from 1980-91 for women and minorities to compute the measure of damages in this case.

At oral argument on the appeal, petitioners presented an alternative theory for determining damages. They proposed the construction of a mathematical model that tracked the average promotion rate for all GAO employees and for various sub-groups within the GAO work force (women, minorities, all disabled veterans, class members) during the relevant time period. These numbers would then be used to establish the deviation experienced by each class member from the average promotion rate.⁴ Petitioners’ counsel did not, however, make clear whether the average promotion rate would be calculated based upon all GAO employees or, instead, just women and/or minorities. Tr. at 36.

The appeal also raises a number of other collateral issues. First, petitioners renew their argument, rejected by the full Board in 1992, that the agency was required to establish an affirmative action program for disabled veterans by the Vietnam Era Veterans’ Readjustment Assistance Act in addition to its self-imposed obligations under GAO Order 2306.1. Second, petitioners contend that the Administrative Judge erred in restricting the class to those disabled veterans employed in the agency during the period of October 31, 1990 through January 17, 1992. Third, petitioners claim that the Administrative Judge also erred in failing to award interim attorney’s fees and costs following the partial summary judgment decision. Finally, petitioners maintain that the proceedings below were tainted by respondent’s withholding of relevant evidence, including its failure to produce documentation of existing affirmative action plans for disabled veterans and “false statements made under oath by GAO officials to the effect that no such documents ever existed.” Notice of Appeal at 5. See also, Pet. Brief at 8; Pet. Reply Brief at 21-22

Respondent: Respondent admits that, during part of the relevant period (1986-1991), it failed to adopt and implement affirmative action plans for disabled veterans pursuant to the self-imposed requirements of Order 2306.1. It contends, however, that petitioners have not shown any harm resulting from the absence of an affirmative action plan for disabled veterans.

Respondent argues that the issue of harm must be viewed within the context of the work force profile at the agency during the relevant period. In this regard, agency counsel emphasized at oral argument that, in 1980, class members earned about 97% of the average GAO salary. By 1986,

⁴ It should be noted, however, that petitioners did not present any evidence of promotion rates for GAO employees or class members. Thus, they are not part of the record before the Board.

and continuing through 1991, class members' salaries had risen to 101% of the average GAO salary. In contrast, in 1980, women earned 69% of the average GAO salary. Women's salaries rose to 73% of the average GAO salary by 1986 and 81% by 1991. Similarly, African-Americans earned 67% of the average GAO salary in 1980, and were earning 74% of the average GAO salary by 1991. Tr. at 46-48.

According to respondent, a similar picture emerges when grade level distribution is examined. Its counsel observed at oral argument that, in 1980, 38% of all GAO employees were in grades 13-15, but only 9% of women were in those grades. By 1991, 48% of all GAO employees were in grades 13-15, and women's representation in those grades had risen significantly to 29%. Class members' representation in grades 13-15 had risen from 41% in 1980 to 47% in 1991. Tr. at 49; Resp. Exh. 17.

Respondent insists that the agency was not required by any law, regulation or order to adopt goals and timetables for disabled veterans, even though it had them for women and minorities. Among other things, it argues that similar executive branch regulations governing affirmative action planning for disabled veterans permitted, but did not require, goals and timetables. Tr. at 41-42.

The agency also maintains that the definitions in Order 2713.1 do not apply to Order 2306.1 because: (1) Order 2306.1 was issued approximately nine months before Order 2713.1; (2) the definition section of Order 2713.1 was amended in 1986 to refer only to women and minorities; and (3) Order 2306.1 contains a more specific definition of an affirmative action program plan than does Order 2713.1 in that it lists the components of such a plan for disabled veterans and those components do not contain an express requirement for goals and timetables. Tr. at 57—59; Resp. Brief of 2/23/96 at 9-11.

Moreover, according to respondent, even were the Order 2713.1 definitions to be applied, petitioners' position would not be improved. In such circumstances, the need for goals and timetables would hinge entirely upon a finding that disabled veterans were underrepresented as compared to civilian labor force statistics for support staff and "relevant labor force" statistics for professional staff. Tr. at 61, 80-81. Respondent claims that the percentage of disabled veterans at GAO "plainly matched the levels of representation in the civilian labor force", so that there was no requirement for goals and timetables. Tr. at 62.

Respondent agrees with petitioners that the three affirmative action plans developed by the agency between 1980-1985 fulfilled the legal obligation that GAO took upon itself in Order 2306.1. Tr. at 78. It insists, however, that there was nothing in these plans that required either action in the promotion area or the collection of data by grade level. Tr. at 79.

Finally, respondent contends that petitioners' formula for determining damages is flawed and does not show that class members were promoted at a significantly slower rate than women and minorities. Agency counsel points to the testimony of respondent's witnesses at the April 1995 hearing that differences in salary growth rates between class members and women and minorities are just as likely to be due to differences in the distribution across grade groups and, at step levels

within the various grades as due to lack of promotions. Resp. Brief at 15-17. Respondent asserts that petitioners failed to conduct a promotion analysis to determine whether certain groups were favored or disfavored in the promotion process.

ANALYSIS

Petitioners' chance of success on their appeal hinges at the outset entirely upon the validity of the claim that, contrary to the holding of the Administrative Judge, the agency was obligated to establish, as part of its voluntary affirmative action undertaking, goals and timetables for disabled veterans. Stated otherwise, if that claim fails the petitioners' other attacks upon the initial decision are of no present moment.

As seen, petitioners' claim rests upon not only Chapter 10 of GAO Order 2306.1, but on statutory provisions as well. Insofar as the Vietnam Era Veterans Readjustment Assistance Act is concerned, petitioners have provided insufficient reason to reconsider the square holding in our February 1992 summary judgment decision to the effect that the VRAA has no application to legislative branch instrumentalities such as this agency.

The 1994 amendment to the Uniformed Services Employment and Reemployment Rights Act of 1993 (USEERRA),⁵ 38 U.S.C. §4301 *et seq.*, that extended coverage of that Act to legislative branch agencies is equally of no assistance to petitioners. The amendment was enacted several years after the events at issue in this case. Moreover, by its terms, it applies only to the particular dictates of the USEERRA. That statute provides that, upon return from military service, an individual covered by it is entitled to be restored to his or her formerly-held position or to a position of like seniority, status and pay.

The present case does not involve veterans' reemployment rights. Rather, it concerns the obligation of a Federal agency to provide an affirmative action program for disabled veterans. This affirmative action obligation has its source in the VRAA, 38 U.S.C. § 4214(c). As used in the VRAA, the term "agency" remains defined as "a department, agency, or instrumentality in the executive branch." 38 U.S.C. §4214(a)(2) [emphasis added].

There being no statutory duty on the part of GAO to provide affirmative action for disabled veterans, the sole source of the obligation is GAO'S voluntary commitment in GAO Order 2306.1, which was in effect between October 1980 and January 1992. The portion of that Order relevant to disabled veterans is Chapter 10, entitled "Affirmative Action Program Plans." Chapter 10 states that the affirmative action program goal is "to strive to ensure that qualified handicapped individuals, including disabled veterans and Federal employees who become disabled after appointment, have a full measure of opportunities in hiring, placement, and advancement in Federal employment." Chap. 10, Sect. 1(a). The order goes on to require an annual affirmative action plan for handicapped individuals, including disabled veterans, consisting of five major components: (1) a report of accomplishments for the previous year; (2) an introduction to the plan; (3) an annual program assessment and plan of action to address

⁵ Formerly known as the "Veterans' Reemployment Rights Act".

problems areas identified; (4) a statistical report of handicapped employees; and (5) a statistical report of disabled veterans. Chap. 10, Sect. 2.

A. As the Administrative Judge correctly observed, there is nothing in the terms of Order 2306.1 that expressly imposes a requirement that the affirmative action plan for disabled veterans contain goals and timetables. Thus, the question is whether there are other sources that might supply a foundation for petitioners' contention that the Order's commitment to a "full measure of opportunities" for disabled veterans should be taken as mandating the establishment of those goals and timetables in equal measure to those provided for women and minorities.

One possible source mentioned by petitioners that might be considered is another GAO order, 2713.1, entitled "Equal Employment Opportunity in the General Accounting Office." That Order was promulgated by the agency on July 15, 1981, and stated, in pertinent part, as its purpose:

. . . [to] set forth the policies and procedures under which the agency will (1) establish and maintain an affirmative action program for equal employment opportunity in employment and personnel operations without regard to race, color, religion, sex, national origin or handicapping condition . . .

GAO Order 2713.1, Chap. 1, Sect. 1(A).

As earlier noted, in its "Definitions" section the term "Affirmative Action Program Plan" was defined as:

An agency operating plan **with goals, timetables and personnel management strategies** to overcome underrepresentation and the effects of past or present practices, policies, or other barriers to equal employment opportunity.

GAO Order 2713.1 at pg. iii (emphasis added). For their part, "Goals and Timetables" were defined as:

Numerical employment targets and time periods for trying to achieve them which an agency sets as a way of assessing its affirmative action efforts to overcome any underrepresentation which may exist in its work force.

Id. at pg. v. "Underrepresentation" was said to occur:

When the percentage of minority, female or handicapped employees in various GAO occupations and grade levels is less than their respective percentage in either the civilian labor force (for support staff occupations) or the relevant labor force (for professional staff occupations).

Id. at pg. vii.

The 1981 version of GAO Order 2713.1 was superseded on June 17, 1983, but the foregoing portions of the “Definitions” section remained virtually unaltered in the new order. Further amendments to the order were made in January 1985, but again the pertinent terms of the “Definitions” section remained the same, with the exception of some modifications in the definition of underrepresentation for professional staff occupations.

Finally, effective October 8, 1986, GAO issued a new order 2713.1, superseding the 1983 version. This version remains in effect today. The 1986 order made significant changes in the definitions of terms. For example, the term “Goals and Timetables” is now defined as:

Numerical hiring and promotion targets and time periods for their achievement which heads of divisions and offices set when they find an underutilization **of women and/or minorities** at any grade level in their respective units, as a means of tracking progress toward ultimate EEO goals.

GAO Order 2713.1, Appendix 1 [emphasis added]. This was the first time, since its initial promulgation in 1981, that 2713.1 specifically limited numerical goals and timetables to women and minorities. The terms “affirmative action” and “underutilization” also, for the first time, refer only to women and minorities.

Before the full Board, the agency asserts that the provisions of Order 2713.1 “are wholly irrelevant to determining the requirements of Order 2306.1.” Resp. Brief at 9-12. It argues that Order 2306.1 contains a “specific, detailed description” of the content requirements of affirmative action plans for disabled veterans. In the agency’s view, these specific provisions should not be set aside in favor of the more “generic” provisions of Order 2713.1.

Upon consideration of the issue of the use of the definitional section of Order 2713.1 in passing on the reach of Order 2306.1, as applied to disabled veterans, the Board finds itself divided. Three Board members have concluded that the definitional section of Order 2713.1 should not be considered, albeit for additional reasons than those propounded by respondent. One Board member disagrees, and would rule that it is appropriate to employ the Order 2713.1 definition of “affirmative action program plan” in the construction of the identical term in Order 2306.1.

However, this difference need not be resolved in the present case inasmuch as all four Board members agree that, even were the definition of “affirmative action program plan” found in Order 2713.1 to be applied to the affirmative action program mandated by Order 2306.1 for disabled veterans, goals and timetables would not be required. This is because respect must be accorded the clear message of Order 2713.1 that a finding of underrepresentation is the triggering event for the creation and implementation of goals and timetables. We do not find a sufficient basis for such a finding in the record before us.

In ascertaining what GAO was required to do to determine underrepresentation, we must look to

the definitional section of the agency's own Order 2713.1. According to that order, as previously noted, "underrepresentation" was to be found:

When the percentage of minority, female or handicapped employees in various GAO occupations and grade levels is less than their respective percentage in either the civilian labor force (for support staff occupations) or the relevant labor force (for professional staff occupations).

GAO Order 2713.1 at pg. vii. Of necessity, any finding of underrepresentation for the purposes of the order would have to be grounded upon a statistical analysis by the agency of the representation of disabled veterans in its work force as measured against a relevant benchmark. Indeed, more broadly, in the case of Title VII affirmative action programs, the Supreme Court held in *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616 (1987), that a statistical analysis of an employer's work force as compared to a relevant benchmark is required prior to the setting of numerical goals and timetables.

It is undisputed that the agency did not perform the required comparative statistical analysis for disabled veterans in connection with the three affirmative action plans it developed between 1980 and 1985. The petitioners failed, however, to establish that this was a significant shortcoming. The record contains nothing to suggest that disabled veterans were underrepresented at the agency in grades GS/7-15.⁶ To the contrary, if anything, the evidence points in the opposite direction.⁷

As we have seen, Order 2713.1 defines the benchmark against which the agency was to evaluate representation in its work force as the percentage of disabled veterans in the "civilian labor force" for support staff occupations and in the "relevant labor force" for professional occupations. To be sure, analyzing the agency's work force in a snapshot fashion against an outside benchmark such as the civilian labor force does not address the issue of rates of promotion at GAO. But there is no indication in Order 2713.1 that such an analysis was required in the setting of promotion goals and timetables.

We can look to the agency's affirmative action plans for women and minorities, promulgated under Order 2713.1, as indicia of the agency interpretation of that order's requirement.⁸

⁶ SES-level positions were not a part of the agency's affirmative action programs. Tr. at 48.

⁷ As a preliminary matter, we note that disabled veterans are advantaged over all other employee groups in hiring, early career-ladder promotions and reduction-in-force situations through the operation of the veterans' preference rules. See GAO Order 2211.1, Veterans' Preference (October 1, 1980).

⁸ It is settled that the construction of a statute by the agency charged with its execution is entitled to judicial deference absent compelling reasons to the contrary. See, e.g., Miller v. Yoakum, 440 U.S. 125, 144 n. 25 (1979); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381

Testimony by agency officials charged with the development and implementation of the affirmative action plans for women and minorities, and the plans themselves, reveal that goals were set based solely on a snapshot comparison of the agency's work force at a particular point in time with a variety of benchmarks.

Between 1980 and 1985, for example, the agency-wide goals were set by using GAO's own work force, as well as civilian labor force statistics, as benchmarks. Tr. at 87-89. In later years, agency unit heads were instructed, in the affirmative action plans for women and minorities, to set "upper-level [grade] goals where they find underrepresentation of women or minorities in the senior and management levels (grades 13-15, Bands II-III). Resp. Exh. 13 at 7. Unit heads were further directed to establish upper-level goals by performing "an analysis of the composition of gender and race of persons in the local, regional, or national labor force (as appropriate) with the desired skills or background. Where there is underrepresentation, the unit will establish goals." *Id.* See also, Resp. Exhs. 10-12 and 14.

With regard to disabled veterans, the record contains evidence relating to several benchmarks similar to those employed in the affirmative action plans for women and minorities. As compared to national labor force statistics, disabled veterans at the agency fared well. Evidence submitted by petitioners indicates that the Bureau of Labor Statistics reported that, between 1980 and 1987, the portion of the national labor force occupied by disabled veterans was around 1.2 percent. Pet. Exhs. Vol III-A, Tab 2 at 3.⁹ Between 1980 and 1992, the agency had an overall disabled veteran employment rate of 2.5 to 2.8 percent. Resp. Exh. 20. When examined by grade groupings, between 1980 and 1992 disabled veterans' representation at the agency in grades 7-12 ranged from 2.2 to 3.9 percent, and from 2.1 to 3.0 percent in grades 13-15. *Id.* These statistics lend no support to any claim that disabled veterans were underrepresented at GAO.

Similarly, an examination of the agency's own work force statistics fails to establish a pattern of underrepresentation of disabled veterans in the upper grade levels. Respondent presented evidence that, in 1980, 38 percent of all GAO employees were in grades 13-15, and 41 percent of class members were in those grades. By 1991, 48 percent of all GAO employees were in grades 13-15, and class members' representation had risen to 47 percent.¹⁰ Tr. at 49; Resp. Exh. 17.¹¹

(1969); *Lewis v. United States Marine Corps*, 674 F.2d 714, 716 (8th Cir. 1982) (citing Davis, Administrative Law §7:13 at 59-64 (2d Ed. 1979)). Clearly, this principle carries even more force when the agency is interpreting one of its own regulations. See *Udall v. Tallman*, 380 U.S. 1 (1965).

⁹ In addition, a 1993 study by the United States Department of Labor, Bureau of Labor Statistics, introduced into the record by petitioners, indicates that the civilian labor force numbered 69,174,000, of whom 1,033,000 were veterans with service-connected disabilities (1.49%). The total number of employed individuals was 64,069,000, of whom 981,000 were veterans with service-connected disabilities (1.53%). Pet. Exhs. III-A, Tab 10.

¹⁰ The same pattern existed at the grades 7-12 levels. In 1980, 46% of all GAO employees were in grades 7-12, and 56% of disabled veterans occupied these grades. By 1991, the percentage of all GAO employees in grades 7-12 was 40%, while 48% of disabled veterans were

We note that the agency used Federal work force statistics as a benchmark in analyzing representation rates for individuals with “targeted” disabilities¹² in the 1980-85 affirmative action plans for handicapped individuals. Pet. Exhs. Vol. II, Tabs A, B & C. Similarly, petitioners urged the use of Federal work force statistics as a benchmark to measure underrepresentation. However, these statistics do not further their case. The record reveals that, between 1982 and 1992, disabled veterans represented from 4.2 to 4.5 percent of all non-postal executive branch employees. Pet. Exhs. Vol III-A, Tab 8 at 2. When the Department of Defense and the Veterans Administration are subtracted from the government-wide figures, the remaining executive branch agencies had a disabled veteran employment rate of between 2.2 and 2.8 percent [Pet. Exhs. Vol. III-A, Tab 2], as compared to GAO’S rate of between 2.3 and 3.9 percent for grades 7-12, and between 2.1 and 3.0 percent for grades 13-15. Resp. Exh. 20.

There is ample justification for removing the Department of Defense and the Veterans Administration from the statistical average as the evidence reveals they clearly skew the statistics. Due perhaps to their mission, these two agencies are the single largest employers of disabled veterans, exceeding over four times the national average employment rate for such veterans. The Department of Defense, for example, accounts for close to one-half of all executive branch employees, and had 6 percent representation of disabled veterans in 1990. Pet. Exhs. Vol. III, Tab 3. In contrast, at the Department of Agriculture, disabled veterans constituted 1.6 percent of the work force, and, at the Department of Commerce, they were 1.7 percent. In fact, except for the Department of Defense, GAO had a greater representation of disabled veterans than any of the other specific agencies shown on petitioners’ Exhs. Vol. III, Tab 3.

Moreover, the record contains a 1989 report by the agency in which it evaluated the effectiveness of the disabled veterans’ affirmative action programs at a number of executive branch agencies. Pet. Exhs. Vol. III-A, Tab 2. In that report, GAO looked at the question of underrepresentation at those agencies, using the benchmark of the Federal (non-postal service) work force, minus the Departments of Defense and Veterans Affairs. We have no reason to believe the agency should have required more of itself than it required of the other agencies it evaluated. Therefore, when using the Federal work force as a benchmark, the evidence of record belies a comparative lack of disabled veterans at GAO.

In sum, taken as a whole, the evidence of record counters any claim of underrepresentation of

in those grades. Resp Exh. 17.

¹¹ Even when, as urged by petitioners, all disabled veterans employed at GAO are used rather than just class members, disabled veterans representation in grades 13-15 was slightly below the GAO average in 1980 at 36%, but achieved and maintained parity with all GAO employees by 1986. Resp. Exh. 20.

¹² The targeted disabilities were deafness, blindness, missing extremities, partial paralysis, complete paralysis, epilepsy, distortion of limbs and/or spine, mental retardation and mental illness. Pet. Exhs. Vol. II, Tabs A, B & C.

disabled veterans at GAO.¹³ Consequently, based on the record before us, the importation of the Order 2713.1 definitional section into Order 2306.1 would not call for the conclusion that the latter order required the establishment of goals and timetables for the members of petitioners' class.

B. Brief discussion is required respecting petitioners' acknowledgement before the Administrative Judge that, as written, the 1980-85 affirmative action plans for handicapped employees, including disabled veterans satisfied the requirements of Order 2306.1. Because she did not read those plans as containing goals and timetables, the Administrative Judge took the statements as a concession that the Order did not mandate the establishment of goals and timetables. It appears, however, that the statements were made in the context of petitioners' belief, whether right or wrong, that the plans in question did contain goals and timetables. In this circumstance, no concession on petitioners' part regarding the requirements of Order 2306.1 may be implied.

At the same time, we do not find the early affirmative action plans as assisting petitioners' cause. Even if, as petitioners would have it, some of their components are suggestive of goals and timetables, there is insufficient basis for using those plans as a springboard for reading any requirement on that score into Order 2306.1.

C. Our rules of practice confer authority upon this Board to award attorney's fees to a petitioner "if he or she is the prevailing party" in a proceeding and certain other conditions are met. 4 C.F.R. §28.89, read in conjunction with 5 U.S.C. §7701 (g). On the strength of that authority, petitioners sought interim attorney's fees in the wake of the Board's 1992 determination that respondent had been obliged to honor the commitment in Order 2306.1 to establish an affirmative action program for disabled veterans. On their appeal, petitioners complain of the denial of their request by the Administrative Judge in her January 22, 1993 memorandum and order.

The basis of the denial was that the 1992 decision did not confer upon petitioners the status of a "prevailing party," as required by 4 C.F.R. 5 28.89. The Administrative Judge pointed to the holding in *Farrar v. Hobby*, 506 U.S. 103, 111 (1992), to the effect that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought." The Administrative Judge went on to note the additional observation in *Farrar* that the relief must materially alter "the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12. Still further, she

¹³ In the proceedings below, petitioners also pointed to the decline in the disabled veteran population at GAO as an indicator of some sort of underrepresentation. However, a report introduced into evidence by petitioners provides a different interpretation of this phenomenon. The report indicates that disabled veterans, in general, are an aging population and according to Bureau of Labor Statistics' studies, the number of unemployed but employable disabled male veterans dropped from 99,000 in 1985 to 67,000 in 1987. Pet. Exhs. Vol. III-A, Tab 2.

alluded to the Supreme Court's citation of its prior holding in *Hewitt v. Helms*, 482 U.S. 755, 762 (1987), for the proposition that " 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status." 506 U.S. at 113. Rather, according to *Farrar*, "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Ibid.*

We agree with the Administrative Judge that the teachings of *Farrar* are directly on point here and preclude the award of interim attorney's fees. And, given our affirmance today of her subsequent determination that petitioners are entitled to no relief on their claim, it perforce follows that no attorney's fees are awardable at this juncture.

Although *Farrar* was a civil rights case, that consideration does not affect the application to the present proceeding of its square holding that a party must obtain at least some relief on the merits of his or her claim to be deemed to have "prevailed." The courts have made it clear that the same standard applies in other situations in which Congress has used the term "prevailing party." See *Henslev v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983); *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178 (Fed. Cir. 1996) (prevailing party has same meaning under 42 U.S.C. §1988 and F.R.Civ. Pro. 54(d)(1)). The Merit Systems Protection Board has also specifically invoked the *Farrar* interpretation of "prevailing party" in passing upon requests for attorney's fees under 5 U.S.C. §7701(g), the statutory provision which, by virtue of 4 C.F.R. §28.89, is to be utilized in the assessment of attorney's fees in our cases. See, e.g., *Ray v. Department of Health and Human Services*, 64 M.S.P.R. 100, 104-06 (1994).¹⁴

For the foregoing reasons, the November 20, 1995 decision of the Administrative Judge in this matter is affirmed.

¹⁴ We have considered petitioners' other contentions (*supra*) and, to the extent not rendered academic by our determination on the goals and timetables issue, find them wholly without merit.