

James B. Dowd, *et al* v. U.S. General Accounting Office

Docket No. 91-03

Date of Decision: December 11, 1995

Cite as: Dowd v. GAO (12/11/95)

Before: Nancy A. McBride, Chair

Reconsideration

Recusal

Affirmative action

Veterans

MEMORANDUM AND ORDER

Having considered the pleading filed by Petitioner and captioned "Objection, Request for Reconsideration, and Suggestion for Recusal of Presiding Judge, or alternatively, Recusal of the Entire PAB" (hereinafter "Request for Reconsideration"), the undersigned Administrative Judge denies all relief therein requested for reasons more fully set forth below.

The regulations of the Personnel Appeals Board (PAB) provide for two forms of review of an Initial Decision. Pursuant to 4 C.F.R. §28.87(b)(2), an aggrieved party may file, within ten days of service of the initial decision, a request for reconsideration with the administrative judge who rendered the initial decision. Under §28.87(b)(1), an aggrieved party may seek review by the full Board by filing a notice of appeal with the Board, within 15 days of service of the initial decision. Filing a request for reconsideration under §28.87(b)(2) tolls the running of the 15-day time period for noting an appeal, pending disposition of the request for reconsideration by the administrative judge. Within 25 days of filing a notice of appeal with the full Board, the appellant shall file and serve a supporting brief. That brief shall identify with particularity those findings or conclusions in the initial decision that are challenged and shall refer specifically to the portions of the record that assertedly support each assignment of error. 4 C.F.R. §28.87(c).

A final decision of the Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. 31 U.S.C. §755(a); 4 C.F.R. §28.90(a).

The Board's rules do not contemplate any other form of post-hearing review of an initial decision. Moreover, a request for reconsideration by the deciding judge and an appeal to the full Board are clearly sequential, not concurrent, avenues of review. Therefore, I treat Petitioner's pleading, in its entirety, to be a request for reconsideration by the administrative judge who rendered the initial decision. The service of this Memorandum and Order denying Petitioner's Request for

Reconsideration will begin the running of the 15-day period for seeking review by the full Board, after which Petitioner has 25 days in which to file a supporting brief. Petitioner may raise with the full Board such grounds for review as he deems appropriate, including matters raised in the Request for Reconsideration, which matters Petitioner wishes to be considered by the full Board rather than by the administrative judge who rendered the initial decision.

Petitioner asks of this administrative judge both that I recuse myself of further involvement in this case and that I reconsider the initial decision. Petitioner also requests an additional 45 days to prepare a detailed brief in support of his request for reconsideration, for which brief a page limit of 150 pages is suggested. As a preliminary matter, the request for a 45-day period in which to file a brief of up to 150 pages is denied. A careful reading and consideration of the points raised in Petitioner's request for reconsideration did not disclose or suggest any legal or factual arguments that would cause me to reconsider the initial decision. Petitioner is free to pursue the other avenues of review provided by the General Accounting Office Personnel Act of 1980 (GAOPA).

Petitioner raises several points in his Summary of Objections and Grounds for Reconsideration. These points will be briefly addressed in numbered paragraphs corresponding to Petitioner's numbered paragraphs.

1. Petitioner contends that the PAB is in a position of conflict of interest because of its statutory oversight responsibility. The GAOPA assigns to the Board statutory responsibility to oversee equal employment opportunity at GAO through review and evaluation of the Agency's procedures and practices. 31 U.S.C. §732(f)(2)(A); 4 C.F.R. §§ 28.91 and 28.92. Petitioner incorrectly asserts that PAB oversight authority extends to all personnel actions and all personnel laws and to whether, by not following applicable personnel laws, GAO has committed a "prohibited personnel practice." PAB oversight authority extends only to "employment regulations, procedures and practices as they relate to laws prohibiting discrimination in employment on the basis of race, color, religion, national origin, political affiliation, age, sex, marital status, or disability." 4 C.F.R. §28.91. The Board has no direct oversight authority over the matters that are the subject of this litigation. Such matters might only have come to the Board's attention incidental to its review of equal employment opportunity programs for individuals with disabilities. Moreover, having oversight authority in an area does not create a conflict of interest that limits the ability of the PAB to rule in cases presented. It was the intent of Congress to vest adjudicatory and oversight authority in matters of employment discrimination in the PAB, as it did in the EEOC for executive branch agencies.

Petitioner also asserts that the PAB failed in its oversight responsibility, because "as a matter of federal code, GAO and the PAB had the duty to furnish the underlying statistics." Although the PAB does, from time to time, review statistics on GAO's EEO program, the Board is not required by statute or regulation to collect, maintain, or develop any particular statistics or statistical analyses. Thus, the Board had no responsibility to furnish statistics in support of Petitioner's case.

2. Petitioner alleges overwhelming bias in favor of the General Accounting Office on the part of the

administrative judge. As evidence of bias, Petitioner points to the conclusion that damage was not shown and to a "misdefinition" of the class. It is clear that Petitioner takes issue with the rulings on these matters, but that difference of opinion is not evidence of bias. He asserts that the administrative judge lacked the authority to modify the definition of the class adopted by the full Board when it granted class certification. The administrative judge acts for the full Board. Review by the full Board is available after initial decision. Interlocutory appeal is also available under certain circumstances, but Petitioner did not seek review through this avenue.

3. In Paragraph 3, Petitioner expands his discussion of the class definition. The reasoning of the administrative judge on the definition of the class is set forth in the Memorandum and Order of May 13, 1993. That ruling reflects a reading of relevant case law to the effect that class membership is limited to individuals who themselves could have filed an action against the defendant. The continuing violation theory allows such individuals to seek relief for violations that occurred outside the statute of limitations period, but only if they could have brought the action at the time it was filed by the class representative. *Id.* at 6-7.

4. Petitioner asserts, without elaboration or record reference, that the decision goes beyond the scope of determining the existence of damages due to the failure of GAO to implement affirmative action for disabled veterans, providing, instead, a "comparison of the relative social value 'merits' of GAO's ongoing affirmative action program for women and minorities." Petitioner asserts that "[c]lear evidence of record showed more promotions to minorities and women (dollar wise) than to veterans." This assertion completely ignores the fact that the ruling in the initial decision was precisely that the dollar differences shown by the salary analysis did not establish that there was a disparity in promotions. The rationale for this was extensively discussed. The administrative judge continues to reject the position of Petitioner on this point and is given no basis upon which to reconsider her ruling.

5. I am at a total loss to understand Petitioner's meaning when he asserts that the administrative judge "participated in the disclosure of improper actions by former GAO counsel whereby GAO witnesses were instructed not to bring any record or copies of any Affirmative Action Plans for Disabled Veterans to their depositions and to testify falsely that none such plans existed." A reading of the deposition testimony and oral argument before the administrative judge did reveal that counsel for the Agency had instructed Agency deposition witnesses in his view that the request for documents that had accompanied their deposition notices was repetitive of the request for documents that had been served on the Agency. This position was never the subject of a discovery motion before the administrative judge.

Petitioner also complains of a finding that GAO implemented affirmative action for disabled veterans. At Petitioner's request, an earlier finding to that effect was reconsidered at the final hearing. The initial decision discusses the conflict in the evidence on this question. It concludes that some minimal implementation of the 1980/85 Plans took place, to the extent of providing statistics on disabled veterans and accomplishment reports from the previous year's plan, but that,

beyond this, there does not appear to have been a serious effort at implementation. Initial Decision at 59-60. However, in light of Petitioner's acknowledgement that class members did well during the earlier period and that there was *de facto* compliance from 1980 to 1985, it was not deemed necessary to determine the question of full implementation of the 1980/85 Plans. With respect to the later period, when there was no affirmative action plan for disabled veterans, the finding, as conceded by all parties, was that there was no implementation of affirmative action for disabled veterans. With respect to that period, the question was whether Petitioner showed harm as a result of the absence of such plans.

6. Petitioner states a belief that

. . . every single disputed factual question has been decided by utilization of a biased approach in favor of the GAO. All of GAO's ephemeral misrepresentations have been accepted as 'fact' and all of Dowd's evidence which is in most cases, corroborated and supported by documents, has been rejected.

The administrative judge has a different view of the factual determinations and Petitioner is free to take up the matter with the full Board and with the Court of Appeals for the Federal Circuit should he so chose.

7. Petitioner submits that the PAB and GAO should recuse themselves and refer this case for a new trial or rehearing before a truly independent party, noting further a belief that no fair hearing will ever be held before Judge McBride. The record is clear that a fair hearing was held before Judge McBride, one in which she repeatedly made allowances for the poor preparation of Petitioner's counsel. That the result was not in favor of Petitioner does not suggest that the hearing was not fair; fair hearings routinely result in winners and losers. With this Memorandum and Order, the administrative judge ceases to act for the full Board, and Petitioner may pursue further review. The role of the administrative judge in that further review will be that of a member of the Board.

With respect to recusal of the PAB and GAO, the Administrative Judge is obviously without authority to rule on such a request. Moreover, I am once again at a total loss as to the meaning of this request. The GAOPA does not suggest the availability of some other administrative tribunal and Petitioner does not suggest what that might be. GAO is a party and Petitioner does not suggest how a party might recuse itself from litigation to which it is a party.

8. In Paragraph 8, Petitioner cites the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995), in support of a contention that the initial decision and the acceptance of the legality of GAO's affirmative action plan for women and minorities are contrary to law. The legality of GAO's affirmative action program for women and minorities is not at issue in this case. Rather, the issue is the failure of GAO to provide affirmative action for disabled veterans in accordance with GAO Order 2306.1 and any cognizable harm that may have resulted from that

failure. Petitioner's reliance on *Adarand* is misplaced.

Paragraph 8 reflects such a misunderstanding and misstatement of fact and law that it does not warrant further response, except to note that it provides no basis upon which I would reconsider the initial decision.

9. Petitioner further asserts that the "mis-definition" of the class limited Petitioner in statistical development, "particularly when the Judge allowed GAO's expert witness, Dr. Baker, to compare persons who were 'short timers' within a particular GS grade to class members in the same pay bracket." Petitioner defined the terms of the comparison when he asked for certain salary data from GAO. Petitioner's expert, Dr. Lurito, then analyzed the data and presented a report and testimony on it. Dr. Baker's testimony was in response to the testimony of Petitioner's expert. There was no basis for not allowing Dr. Baker to testify about the comparisons that were being advanced by Petitioner, nor did Petitioner ever request that Dr. Baker not be allowed to so testify. It was not until after Dr. Baker's testimony that Petitioner developed his theory about the unsuitability of comparing "apples to oranges," and advanced a different comparison which assertedly was apples to apples (or oranges to oranges). Dr. Lurito made some comparisons involving all disabled veterans employed at GAO during the relevant period. These comparisons were not disregarded by the administrative judge; they were considered and found not to establish harm to the class members.

Petitioner complains again that he repeatedly asked for underlying statistics. I have repeatedly stated my view that he obtained virtually all underlying data which he sought throughout this litigation. The "11th hour order" of the judge requiring GAO to furnish answers to interrogatories calling for manipulation of data previously provided was an extraordinary order in response to Petitioner's "11th hour request" for information in "data base format." The judge ordered GAO to provide answers to a set of interrogatories that required the Agency to manipulate data. Petitioner propounded the permitted interrogatories, along with a request for production of documents that sought underlying raw data relied on in responding to the interrogatories, information previously supplied to Petitioner and considered to be of no practical use to him. The judge granted the Agency's Motion for a Protective Order as it related to the production of documents, ruling that the Agency was not required to produce again the underlying data which it had supplied in the past and which Petitioner had indicated he was ill-equipped to use in any meaningful way. Moreover, Petitioner's concerns in this area are not new. They have been raised and considered repeatedly and do not provide a basis for reconsideration by the administrative judge.

10. Petitioner asserts that he was held to a standard of mathematical certainty, because of the judge's conclusion that "GAO's misrepresentations would be given full consideration as 'evidence' and petitioner's correct statistical presentations were insufficient." The stated rationale for this argument does not make any sense. I do, however, reject an argument that Petitioner was held to an incorrect standard of proof in this case.

11. Petitioner contends that the determination of the administrative judge that "statistical basis for

the development of an Affirmative Action Plan for disabled veterans was not available is absurd on its face" and "can only be understood within the framework of extreme bias." Petitioner here misstates the determination of the administrative judge on this point. The administrative judge determined that the evidence failed to establish that the Agency knew or should have known of the existence of workforce data on disabled veterans or that a reasonable benchmark could in fact have been created. Initial Decision at 42. This determination rested on the failure of Petitioner to produce the very data which it claimed existed and should have been known to the Agency, namely, benchmark data on disabled veterans. Petitioner's argument that GAO was in the business of producing statistics and could have developed a benchmark, had it so chosen, was not supported by evidence. Petitioner submitted certain data as possible benchmarks; for reasons stated in the Initial Decision, these data were not deemed appropriate for determining whether disabled veterans had the proper representation at GAO. Finally, it was determined that, even if Petitioner's data were considered to provide a benchmark for disabled veterans at GAO, those data did not show that disabled veterans were, in fact, underrepresented at GAO.

12. In Paragraph 12, Petitioner states, "Extant GAO orders require promotions for all persons to include consideration of 'the add-on rule'/ are points for disabled veterans. This was never done." A footnote reference after the phrase "the add-on rule," directs the reader to Attachment 1, which appears to be page 8 of GAO Order 2307.1. The add-on rule is mentioned in paragraph c of section 7, pertaining to noncompetitive movements, with a reference to GAO Order 2337.1, Examining System. The referenced provision of GAO Order 2337.1 is not included.

As far as I can determine, the matters alluded to in Petitioner's Paragraph 12, were not raised before. There was no testimony on the "add-on rule," no documentation of its existence, and no argument regarding its relevance to the issues before me. Paragraph 12 does not provide a basis for reconsideration of the initial decision.

13. Petitioner asserts that the administrative judge failed to consider the interrelationships involved in the "background historical law" of the Civil Service Act preceding the GAOPA, to the effect that "GAO persons were always treated on a par with their Executive Branch cousins." The meaning of the GAOPA was fully briefed, argued, considered and reconsidered by the full Board in ruling on the cross motions for summary judgment and, specifically, in ruling that the GAOPA did not incorporate the requirements of the Vietnam Era Veteran's Readjustment Assistance Act (VRAA).

14. Paragraph 14 reflects Petitioner's view that the failure of the Agency to produce copies of the 1980/85 Affirmative Action Plans for Handicapped Individuals Including Disabled Veterans during discovery was "stone-walling" and testimony of its officials denying the existence of such documents was perjury. Petitioner alleges that the "erroneous denial of discovery greatly prejudiced the ability of Petitioners to present all of the facts in this case" and that an award of interim fees and costs should have been granted to cure "the gross deficiencies in GAO failure to meet its discovery obligations." These allegations were earlier raised by Petitioner in two separate pleadings: 1) Motion and Request for a Hearing on Fees, Costs and Sanctions (October 17, 1994); and, 2)

Objection to Respondent's Response in Opposition to Petitioner's Motion for Sanctions (November 17, 1994). Respondent produced evidence by affidavit that the existence of the 1980/85 affirmative action plans for disabled veterans was not initially discovered, despite a reasonable and diligent search, because they were not retained by the agency for more than three years, pursuant to the Agency's record retention policy. Petitioner failed to produce any evidence to contradict Respondent's affidavits. Petitioner accused Respondent's counsel of perjury, but he did not disclose the existence of any evidence that might tend to support that charge. Based on the foregoing, Petitioner's motions were denied. Order (December 5, 1994).

Paragraph 14 does not seem to present an argument for reconsideration, but rather to state a belief that the Petitioner should appeal to "another forum."

15. In paragraph 15, Petitioner asserts that the administrative judge misconstrued evidence related to Petitioner's qualifications for an SES position by virtue of OPM's certification of him at a GS-14 level. The factual matters alleged as well as the legal conclusions that Petitioner would draw from those facts do not warrant reconsideration of the initial decision.

16. Paragraph 16 summarizes Petitioner's conclusion that the administrative judge "used the wrong standard of evidence applicable to the . . . determination [of] . . . what is the value of the program which GAO failed to implement." In Petitioner's view, GAO Order 2306.1 required GAO to develop statistical data and it was wrong to transfer that responsibility to the class. GAO Order 2306.1 did require that the Agency include statistical data as part of the Affirmative Action program mandated for disabled veterans. It did not specify the nature of the required data or the scope of statistical analysis that was expected. From the plans that were promulgated pursuant to the 1980/85 Plans, it is evident that the Agency did prepare statistical data for those plans. The data was simple in form and presented as a report. It simply cannot be said that GAO Order 2306.1 required the Agency to perform a promotion analysis, in general, or the specific one that Petitioner now wishes existed.

Petitioner alleges that with more time and more money (which should have been awarded in the form of sanctions for GAO's "stone-walling" behavior during discovery), he could have produced a promotion study which would have determined damages to a "mathematical certainty." For reasons previously noted, an award of fees was not deemed warranted. The suggestion that Petitioner should have been given more time is preposterous. Petitioner filed his charge with the PAB in March 1991. At every stage, he has sought extensions of time and demonstrated a lack of readiness to go forward. The current pleading under consideration is a case in point. Petitioner seeks a 45-day extension of a ten-day time period allowed for a request for reconsideration in which to file a brief of up to 150 pages in support of both a request for reconsideration by the administrative judge who rendered the initial decision and a request that the same administrative judge recuse herself from further involvement in this case. It is clear from reading the pleading that Petitioner believes that the administrative judge is biased and that he did not and could not get a fair hearing before her. It is, therefore, incomprehensible why he would seek 45 days to prepare the intended brief. Petitioner could have initiated the review process by noting an appeal to the full Board, a process which builds

in 40 days for the preparation of a brief (15 days to note an appeal and 25 days to submit a brief in support thereof).

17. Paragraph 17 begins with the assertion that the administrative judge erred when she failed to order injunctive relief on numerous occasions, without identifying these numerous occasions. No argument is made as to why the previous denial of injunctive relief constitutes a basis upon which reconsideration should be granted. The next point made is that GAO failed to fully disenfranchise veterans when it canceled GAO Order 2306.1 on January 17, 1992, because GAO Orders 2211.1 and 2307.1 are still extant. It is not suggested how these orders might have affected the outcome of the initial decision, but they were not presented during the long period of preparation and consideration of the case and no reason is advanced as to why they should now be considered.

18. There is no paragraph 18.

19. Petitioner simply repeats the argument that the "Judge erred when she failed to award attorney's fees for sanctional behavior and interim attorney's fees in order to allow Petitioners to develop the statistics which were required" by GAO Order 2306.1 to be prepared by GAO. This position has previously been dealt with to the full extent warranted.

Petitioner's specific requests are denied as follows:

- 1) that the initial decision be reconsidered by the Presiding Judge, DENIED;
- 2) that a new hearing be ordered, with a new and independent judge who is not compromised by the conflict interest or bias demonstrated by the present Presiding Administrative Law Judge, DENIED;
- 3) that GAO be ordered to prepare all of the statistics called for by GAO Order 2306.1, DENIED;
- 4) that the scope of the class be redefined to conform to the generally accepted definitions of Fed.R.Civ.P. 23, DENIED;
- 5) that GAO be sanctioned for its actions in this case to date, DENIED;
- 6) that all class members be notified of this Motion, DENIED, insofar as this request seeks to have the Board or the Respondent assume the responsibility of notifying the class; Petitioner, as the class representative, is free to notify the class, and is, in fact, generally charged with keeping the class members apprised of developments in the litigation;
- 7) that Petitioner be given 45 days to file a detailed brief on the perceived errors of the Presiding Member, DENIED, insofar as it relates to the Request for Reconsideration, but without prejudice to Petitioner's right to pursue other avenues of review.

SO ORDERED.