

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

**Docket No. 91-03**

**Date of Decision: November 20, 1995**

**Cite as: Dowd v. GAO (11/20/95)**

**Before: Nancy A. McBride, Chair**

**Affirmative action**

**Veterans**

**Goals and timetables**

**Underrepresentation**

**Corrective action**

**Class action**

**INITIAL DECISION**

## **INTRODUCTION**

This case arises from a Petition for Review alleging a failure on the part of Respondent, United States General Accounting Office, (hereinafter "GAO" or "the Agency") to provide preference and affirmative action, as mandated, for a class consisting of disabled veterans employed by Respondent. At this point in the proceedings, the sole remaining issue is what, if any, cognizable harm was suffered by the class members due to the failure of Respondent to adopt and/or implement an affirmative action plan for disabled veterans from October 1, 1980 through January 17, 1992. For reasons that are more fully set forth as follows, I conclude that Petitioner did not show such harm or prove any damages arising from the absence of an affirmative action program for disabled veterans during the period in question, and, therefore, that he is not entitled to any relief.

## **BACKGROUND**

This case has a long and voluminous history, which is outlined below in its major dimensions. The Petition for Review (entitled "Complaint"), alleging that Petitioner and similarly situated disabled veterans and veterans of the Vietnam era were unlawfully denied veterans' preference rights by GAO, was filed on March 25, 1991. Petitioner contended that GAO had failed to establish affirmative action plans for veterans or to provide mandated preferences in the promotion or advancement processes. In its Response, Respondent countered that the Agency was not obligated by law to provide a preference in promotions for Vietnam-era or disabled veterans or to institute

affirmative action plans for them.<sup>1</sup> The General Counsel of the PAB participated as an *amicus curiae*, arguing that the Agency was required to establish affirmative action plans for the handicapped and for disabled veterans under the General Accounting Office Personnel Act (GAOPA), the Vietnam Era Veterans' Readjustment Assistance Act (VRAA), and the Rehabilitation Act of 1973.

The Board ruled *en banc* on the parties' cross motions for summary judgment on February 24, 1992. In doing so, the Board treated Respondent's motion as a motion to dismiss Petitioner's case for failure to state a claim upon which relief may be granted. The Board's decision dismissed all but one of Petitioner's claims, leaving only the issue of the alleged failure of the Agency to establish affirmative action plans for disabled veterans. In reaching its decision not to dismiss the claim relating to affirmative action, the Board concluded that the VRAA's affirmative action requirement for disabled veterans in executive agencies does not apply to GAO, because it is not included in the express term "executive branch" agency contained in that statute. The Board also rejected the argument that the VRAA's requirements were incorporated into the GAOPA. The decision concluded, however, that GAO was bound by the terms of chapter 10 of its own Order 2306.1, in effect from October 1980 to January 17, 1992, by which the Agency "unmistakably committed itself" to establish an affirmative action plan for disabled veterans. Decision *en banc* on Motion and Cross-Motion for Summary Judgment at 17 (Feb. 24, 1992). In this limited sense, the Board granted, in part, Petitioner's motion for summary judgment, finding that during the period October 1, 1980 through January 17, 1992, the Agency was required to provide an affirmative action plan in accordance with the requirements of GAO Order 2306.1. The claim for entitlement to a preference in promotions and advancements for disabled veterans was dismissed on the basis of counsel's concession at oral argument that this was not an issue. On subsequent reconsideration at Petitioner's request, the Board *en banc* decided that there was no legal basis for asserting an entitlement to veterans' preference in promotion actions. Decision *en banc* on Motion for Reconsideration at 8 (July 2, 1992).

The case was certified as a class action on December 18, 1992, based on the common question of the nature and scope of the legal obligation to provide affirmative action under GAO Order 2306.1. As modified on May 13, 1993, the class was determined to consist of all disabled veterans employed by GAO during the period October 31, 1990 through January 17, 1992.

For hearing purposes, the case was bifurcated for determination of the following issues: first, the scope and content of GAO's self-imposed duty to provide an affirmative action program for disabled veterans; and subsequently, the extent of harm, if any, resulting from the Agency's failure to provide the required affirmative action plans for disabled veterans. Memorandum and Order at 2-3 (Sept. 14, 1993). Bifurcation was ordered because of Petitioner's failure to identify the nature of the affirmative action which he claimed was mandated.

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<sup>1</sup>Respondent also argued that the Board lacked subject-matter jurisdiction, the allegations were untimely, and the Board lacked jurisdiction to grant preliminary injunctive relief absent a request from its General Counsel.

After an evidentiary hearing, the first issue was resolved on October 4, 1994, in a decision which concluded that:

the legal requirements that governed the obligation of the agency to provide affirmative action for disabled veterans during the period October 1, 1980, through January 17, 1992 are precisely those found in GAO Order 2306.1, as in effect during that time.

Decision Regarding Legal Requirement to Provide Affirmative Action for Disabled Veterans at 7 (Oct. 14, 1994) (hereinafter "Affirmative Action Decision"). Pursuant to GAO Order 2306.1, the essential elements required for GAO's affirmative action program for disabled veterans were determined to be as follows:

1. Setting objectives to address equal opportunities for disabled veterans in hiring, placement and retention;
2. An affirmative action plan having among its components:
  - a) report of accomplishments for the previous years;
  - b) program assessment and plan of action, describing the current status of the program as it related to the objectives and development of action items and target dates for the upcoming year; and
  - c) statistical report of disabled veterans.

Affirmative Action Decision at 11. The decision further concluded that the Agency was in compliance with Order 2306.1 from October 1, 1980 through September 30, 1985, based upon the promulgation and apparent implementation of three affirmative action plans during that period. From October 1, 1985 through January 17, 1992, however, the Agency was not in compliance with Order 2306.1 and failed to make the required effort outlined in that Order. *Ibid.*

At a status conference held on October 19, 1994, the Board considered Petitioner's motion for reconsideration of the determination that Respondent had implemented the 1980/85 Plans for disabled veterans. The Board agreed to reconsider this finding in light of any additional evidence that would be presented at the second hearing, that to be held on the question of harm suffered by the class members as a result of the absence of affirmative action as required by GAO Order 2306.1. Memorandum and Order at 2 (Oct. 20, 1994).

Following the October 1994 decision regarding the nature of the legal duty to provide affirmative action for disabled veterans at GAO, the parties resumed discovery in preparation for hearing on the remaining issue. Discovery in this case was extensive and marked by numerous motions to compel and motions for protective orders.

Prior to the 1994 hearing on the required content of an affirmative action program for disabled veterans, Petitioner sought and received voluminous data, including complete employee histories

for class members, women, minorities, and persons with disabilities employed by GAO from October 1, 1980 through January 17, 1992, along with information on codes, formats, and file layouts used in compiling the data. The information was provided in direct response to the discovery requests of Petitioner. Petitioner's Motion to Compel at 5-11 (Aug. 17, 1993). Other production requests that were responded to by Respondent well before April 1994, included data and statistics on all employees who were eligible for promotion from 1980 through 1992. Transcript of discovery conference at 16 (Dec. 8, 1994).

Following the October 1994 decision on the legal requirements for affirmative action for disabled veterans at GAO, the parties propounded additional discovery. Petitioner sought responses to interrogatories, some of which called on Respondent to determine for Petitioner the very matter at issue in this hearing, that is, damages resulting to class members from the absence of an affirmative action program.<sup>2</sup> These interrogatories were loaded with undefined terms and parameters, and they demonstrated a lack of control over the evidence being developed and a willingness to surrender that control to the Respondent.

On December 8, 1994, a discovery conference was held to address numerous discovery issues resulting from the inability of the parties to effect a reasonable plan or program for prehearing discovery. Order at 3 (Dec. 5, 1994).<sup>3</sup> The gist of Petitioner's position at this conference was that he now sought to have Respondent provide, in data base format, the employee histories previously supplied in raw data form. Petitioner acknowledged that limited resources were a significant factor in his ability to use the raw data. It was determined, however, that GAO did not possess the data in

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<sup>2</sup>Petitioner asked for Respondent's "estimate" of the dollar benefit to each handicapped employee, severely handicapped employee, and "other affirmative action eligible person" from the particular plan in effect with respect to that person, for each year, and the cumulative effect, in dollars, of being eligible for that plan. Then "[u]sing the highest result obtained for benefits for any other group of affirmative action eligibles as a measure, please calculate the average benefit to each disabled veteran." Notice of Petitioner's Depositions by Written Interrogatories at 3-4 (Oct. 28, 1994). Respondent was asked to identify among GAO employees, each disabled veteran and each woman, and calculate for both groups the average yearly rate of increase in total compensation. In so doing, Respondent was invited to "make whatever statistical corrections, adjustments or arithmetic assumptions are necessary to calculate the most accurate increase for each." Respondent was asked to "separate the result by each year, and please separate employees by clerical support staff, professional level, and managerial employees, or such other separate grouping as may show a fair comparison for both the lower level of personnel and the higher level of personnel." Finally, Petitioner advises that "if any better methodology is available at the GAO to determine the comparative deprivation of the class of disabled veterans as compared to other affirmative actions eligibles, petitioners would welcome the most accurate and complete presentation possible." Petitioner's Pre-Hearing Interrogatories at 1-3 (Oct. 28, 1994).

<sup>3</sup>Counsel for Respondent brought to the hearing copies of the seven boxes of documents that had previously been produced for Petitioner in response to his discovery requests, and noted that 43 computer disks containing the same information had been produced as well.

data base format and that, in terms of technical effort, the same effort would be required of the Agency as of Petitioner to convert the raw data to that format. In lieu of the interrogatories summarized in footnote 2, Petitioner was permitted to propound ten additional questions--specific, focused, and relevant to damages--even if these questions called for Respondent to manipulate raw data previously provided to Petitioner.<sup>4</sup>

Petitioner sought prehearing guidance about the relevance of comparison evidence of the experience of disabled veterans and that of women and minorities. Respondent sought the same guidance by filing a motion *in limine* to exclude, as irrelevant, evidence comparing disabled veterans to women and minorities. The Board indicated general agreement with the view expressed by Respondent on this question, but declined to tie Petitioner's hands at that point in the proceedings. Decision (Dec. 23, 1994). The interim decision on the relevance of proposed comparisons specifically cautioned Petitioner on significant differences between affirmative action plans for women and minorities, which typically mandate the setting of goals or targets, and those for individuals with disabilities.

On March 22, 1995, the Board issued an order identifying the individuals who comprise the class in this case. The order listing all class members was prompted by a need to identify with particularity the individuals to be considered by Respondent in replying to Petitioner's statistical requests for data on the class members. Eleven disabled veterans had previously opted out of the class and it was apparent that some individuals whose names appeared on a GAO-generated list of employees coded as disabled veterans were not properly coded and, therefore, could not properly be considered part of the class. The Agency challenged the status of several individuals on its own list of disabled veterans, due to lack of documentation that they were disabled veterans. In some cases, Petitioner had no evidence to answer the challenge, and such individuals were ruled out of the class. In any case in which an individual produced some documentation of disability relating to military service, including a personal affidavit, class membership was sustained. The final count of class members was 106, as reflected in the order of March 22, 1995. The individuals there identified constitute the statistical base of the Agency's response to Petitioner's final set of interrogatories and of any analyses performed by Respondent on the class.<sup>5</sup>

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<sup>4</sup>Petitioner's Pre-Hearing Interrogatories and Request for Production of Documents (Dec. 29, 1994). Petitioner withdrew Interrogatory 1. Respondent's Motion for a Protective Order was denied as to Interrogatories 3 and 4; the motion was granted as to Interrogatories no. 2 and 5, and as to the Request for Production of Documents. Memorandum and Order (Jan. 20, 1995). The request for production of documents sought underlying raw data (in hard copy, spread sheet or data base format on disks) relied on in responding to the Interrogatories, information that had previously been supplied to Petitioner and considered to be of no practical use to him.

<sup>5</sup>After issuance of this order, the Board received a letter from Neilson S. Wickliffe, who asserted that he met the qualifications for class membership, had not opted out of the class, and should be properly considered a member of the class. For purposes of relief and *res judicata*, Mr. Wickliffe, and any other individual who is, in fact, a member of the class certified by previous order of the

The parties proceeded to hearing on the issue of harm, if any, over a four-day period in April 1995.

## **POSITION OF THE PARTIES**

### **a) Petitioner's Position**

Petitioner contends that disabled veterans were entitled to an affirmative action plan that included goals and timetables for the advancement of disabled veterans and that the absence of such goals harmed class members, because it impaired their promotion rate. GAO Order 2306.1 committed GAO to ensuring for disabled veterans "...a full measure of opportunities in hiring, placement and advancement." A "full measure of opportunities" for disabled veterans mandated the establishment of goals and timetables for them, because goals and timetables were a feature of the affirmative action plans for minorities and women. Furthermore, disabled veterans were entitled to be a "preferred group" at GAO because of their status under various veterans' employment statutes. Finally, the failure to provide goals and timetables for disabled veterans violated the Title VII veterans' savings provision (42 U.S.C. §2000e-11).

Respondent is wrong, Petitioner continues, when it asserts that it could not measure underrepresentation of disabled veterans at GAO due to the lack of an appropriate statistical benchmark. If Respondent had a desire and willingness to develop an appropriate benchmark, it would have discovered or created the necessary data. From such data, it could have developed goals and timetables for disabled veterans comparable to those developed for women and minorities.

Petitioner contends that due to the lack of goals and timetables, disabled veterans suffered cognizable financial harm. Petitioner's expert, Dr. Richard Lurito, testified that such harm was shown by the following: 1) Class members had a slower average rate of salary increase as compared with the average rate of salary increase for other groups at GAO from 1985 through 1991; 2) A comparison of the percentage increase in raw numbers of disabled veterans in grades 7-12 and in grades 13-15<sup>6</sup> with the percentage increase in raw numbers of other employee groups

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Board, is and continues to be a member of the class, notwithstanding their exclusion from the list of class members issued by the Board on March 22, 1995. Their exclusion from the list means that their experience does not form part of the statistical base used to analyze the question of harm suffered by class members as a result of the failure of Respondent to implement affirmative action for disabled veterans.

<sup>6</sup>In 1989, GAO converted its evaluator and evaluator-related positions from the General Schedule (GS) to three bands. After that date, evaluators and evaluator-related positions that were previously in GS levels 7-12, were placed in Band I; those previously in GS levels 13 and 14, were placed in Band II; and those previously in GS level 15, were placed in Band III.

Data and expert testimony in this case were all presented with reference to GS levels. When the

between 1980 and 1991 demonstrates that disabled veterans did not enjoy the same pattern of promotions as did women and minorities; and 3) Class members had a poor promotion record and received few promotions between 1980 and 1991.

Petitioner contends that the measure of damages for the harm suffered by disabled veterans may be derived by computing the average rate of salary increase each year from 1980-91 for various comparison groups. This rate of increase is applied to the average salary for class members and for all disabled veterans. The damage is the difference between the actual average salary for that year and what the average salary would have been had it increased at the same rate as did the average salary of the comparison group. Allowing for an annual adjustment of 8%, and projection of the loss incurred during 1980-91 through 1995, the present value of the salary loss for class members is shown on Revised Tables 3A through 9A.<sup>7</sup> When comparing class members to all GAO employees, the loss is \$0; to handicapped employees, \$54,504; to African-American employees, \$4,633,745; to Hispanic employees, \$345,301; to all GAO employees, except minorities, \$0; to Asian employees, \$500,411; to women employees, \$8,477,567.<sup>8</sup>

#### b) Respondent's Position

Respondent contends that Petitioner has failed to show harm to class members as a result of a failure to adopt or implement affirmative action for disabled veterans during the period 1980-91. From 1980 through 1985, Respondent adopted and implemented affirmative action plans that satisfied the self-imposed requirements of GAO Order 2306.1. After that, GAO did not adopt an affirmative action plan for disabled veterans, but Petitioner has not shown any harm resulting from the absence of an affirmative action plan for disabled veterans.

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data or testimony concerns events during or after 1989, GS 7-12 is presumed to include Band I employees, GS 13-14 is presumed to include Band II employees, and GS-15 is presumed to include Band III employees.

<sup>7</sup>Revised Table 11 purports to summarize the figures on Revised Tables 3A-9A, but the numbers are not in agreement. It appears that Revised Table 11 contains summary figures from the original Tables 3A-9A and was not revised to conform to Revised Tables 3A-9A. Petitioner's argument is, therefore, summarized with reference to the figures contained in Revised Tables 3A-9A.

<sup>8</sup>These figures are illustrative of alternative damage theories advanced by Petitioner. He does not state which comparison groups should be used or how they might be used in combination. A combined comparison figure would require weighting to account for differing raw numbers of members of the component groups. Petitioner also suggests calculating damages based on a comparison of all disabled veterans to other employee groups, rather than comparing class members to other employee groups. This comparison is irrelevant, because class members would only be entitled to compensation for their loss, not for loss to some other group. If the group of all disabled veterans suffered a harm greater than that of the class members (as Petitioner's data purports to show), that would not entitle class members to relief based on that harm.

Respondent contends that GAO was not required by any law, regulation or order to implement goals and timetables for disabled veterans, even though it did so for women and minorities. Even if it had wanted to compare the representation of disabled veterans at GAO to a relevant benchmark, benchmarks similar to those used in affirmative action plans for women and minorities do not exist. Moreover, GAO is legally prohibited from considering handicap in making employment decisions. Petitioner has failed to demonstrate that GAO had a compelling basis upon which to adopt an affirmative action plan for disabled veterans, which plan would permit or require promotion based on the handicapping conditions of disabled veterans.

Finally, Respondent contends, Petitioner's evidence did not show that the class members were not promoted as readily as women and African-Americans. Differences in the salary growth rates of class members and the salary growth rates of women and minorities are due to the differences in their distribution across grade groups and at step levels within the various grades. The evidence did not establish that differences in the rates of salary growth were attributable to lack of promotions. Petitioner also failed to conduct a promotion analysis to determine whether groups were favored or disfavored in the promotion process.

### **SUMMARY OF EVIDENCE**

Extensive evidence was received during the course of these proceedings. Prior to oral argument on his motion for class certification, Petitioner submitted a lengthy "Exhibit A" appended to his Reply to Respondent's Opposition to Petitioner's Amended Motion for Certification of Class (Sept. 8, 1992). The document, apparently drawn from the Agency's response to interrogatories, contained computerized employment data for 187 GAO employees who were coded as disabled and veterans. Petitioner's Reply to Respondent's Opposition at 6 (Sept. 8, 1992).

At the hearing on the issue of the content of an affirmative action program for disabled veterans as required by GAO Order 2306.1, Petitioner submitted Vol. I, Exhibits 3 through 10, and Vol. II, Exhibits A through T, and did not call any witnesses. Respondent submitted Exhibits 1 through 6 and 8. Respondent called then-Deputy Assistant Comptroller General Joan Dodaro as its only witness.

The hearing on the issue addressed in this Decision was held on April 24, 25, 27 and 28, 1995. Petitioner himself testified and called the following witnesses: Roger Carroll, a one-time supervisor of James Dowd; Alex Silva, Director of GAO's Civil Rights Office, 1980-86; Lowell Dodge, Director of GAO's Office of Affirmative Action Plans from 1986-89; Joan Dodaro, GAO Deputy Assistant Comptroller General for Human Resources, at the time of the hearing, since 1987;<sup>9</sup> and Petitioner's expert, Dr. Richard Lurito. Deposition testimony was admitted for Alex Silva; Arnold Jones, Director of GAO's Office of Affirmative Action Planning, at the time of his deposition, since 1989;<sup>10</sup> and Felix Brandon, formerly Director of GAO's Office of Personnel. (Deposition Exhibits

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<sup>9</sup>In October 1995, Ms. Dodaro became Assistant Comptroller General for Operations.

1, 2, and 3, respectively). Petitioner also submitted documents marked Vol. III, Exhibits 1 through 4 and Vol. III-A, Exhibits 1 through 11. Except for Exhibit 4 of Vol. III and Exhibit 11 of Vol. III-A, these documents were admitted into evidence. In addition, numerous documents from Vol. I and Vol. II, the exhibits from the March 1994 hearing on the required content of the affirmative action plan, were admitted.<sup>11</sup>

Respondent submitted its Exhibits 1 through 20. Appearing on behalf of Respondent were its expert, Dr. Mary Baker, and Donald L. Phillips, Chief of the Systems Liaison and Information Branch of GAO's Office of Personnel.

## **FINDINGS OF FACT**

1. Petitioner, James Dowd, is a 30-percent disabled veteran. Petitioner identified himself as a disabled veteran at the time of his application for employment at GAO, by so indicating on his SF-171 and by attaching an appropriate form. (TR 308<sup>12</sup>).
2. When he began employment at GAO, Petitioner had 20 years of professional and industrial work experience. (TR 304).
3. Petitioner began employment at GAO in 1979 as a GS-7. (TR 304). He was hired as an evaluator and continues to work in this capacity.
4. Petitioner progressed through the career ladder (grades 7-12) at the average or typical rate for GAO employees. (TR 309). He was promoted to GS-12 in December 1984. (TR 309). Petitioner is now a Band I-Full Performance Evaluator, which is equivalent to GS-12.
5. Petitioner applied for competitive promotion in 1982, when he applied for an SES (Senior Executive Service) candidate position. The SES candidate position was open to GS-14s. Petitioner was not eligible for this position because he was below the GS-12 level at that time.<sup>13</sup> (TR 309-10).
6. A prerequisite to promotion to GS-13 is one year of service as a GS-12. Petitioner thus became eligible for promotion to GS-13 in December 1985, one year after his promotion to GS-12. He applied for promotion to GS-13 in 1986 and every year thereafter. In connection with these efforts

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<sup>10</sup>Mr. Jones left GAO in December 1993.

<sup>11</sup>For clarity, a detailed listing of exhibits admitted during the hearing on the required elements of the affirmative action plan and during the hearing on damages is appended to this document as Appendix A.

<sup>12</sup>"TR" refers to the transcript of the hearing on damages, Apr. 1995.

<sup>13</sup>The record does not indicate whether he was a GS-9 or 11 at the time of the 1982 application for the SES candidate position.

to be promoted, Petitioner did not make the best qualified list ("BQ list") until 1994, the only year in which he made this list. (TR 333). He was not selected for promotion above the GS-12/Band I level any year.

7. The instant appeal originated as a grievance filed by Petitioner regarding his nonselection for promotion during the 1988 promotion cycle. (TR 331).

8. In 1988, when he filed the grievance that gave rise to this appeal, Petitioner did not know of the existence of an affirmative action program for disabled veterans at GAO.

9. Roger Carroll was the senior evaluator on a project with Petitioner during 1985 and 1986. In that capacity, Mr. Carroll was charged with supervising and rating the work of Petitioner. Mr. Carroll's supervisor did not approve his recommended rating of Petitioner and it was subsequently lowered on some elements. The final rating was a factor in Petitioner's not making the best qualified list during the 1986 promotion cycle. (TR 282-85).

10. Salary progression is more rapid during the early years in grade than during the middle or later years.

11. For employees under the GS system, each GS level has ten salary steps. Employees receive within-grade salary increases based on satisfactory performance and length of service at the current step. At the beginning steps (1-3), an employee is eligible for a salary step increase every year. At the middle steps (4-6), an employee is eligible for a salary step increase every two years. At the upper steps (7-9), an employee is eligible for a salary step increase only once every three years, until reaching the final step. At step 10, the employee is no longer eligible for a within-grade increase. (TR 361-62, Dodaro).

12. Under the Pay for Performance System ("PFP"), pay increases are based on the employee's relative position in the salary range. At the low end of the salary range, the employee receives a higher percentage increase than does the employee at the higher end of the range. At the ceiling, or top of the range, there are no further salary increases. (TR 362-63, Dodaro).

13. Until 1989, evaluator and evaluator-related positions were under the GS system. GS-7 was the entry level grade. For these positions, promotion from GS-7 to GS-9, from GS-9 to GS-11, and from GS-11 to GS-12 was a noncompetitive, career ladder progression. Following a prescribed period of time in one grade, the employee was eligible for promotion to the next grade in the career ladder, given a satisfactory level of performance. (TR 309, Dowd).

14. Since 1989, evaluator and evaluator-related positions previously classified as GS-7 through GS-12 are classified as Band I positions. Evaluator and evaluator-related positions previously classified as GS-13 and GS-14 are classified as Band II. Evaluator and evaluator-related positions previously classified as GS-15 are classified as Band III. (See, GAO Order 2540.1).

15. Promotion above Grade 12 (or from Band I to Band II and from Band II to Band III) is competitive. (TR 354). Employees seeking promotion to Grades 13-14/Band II or to Grade 15/Band III are rated by a promotion panel according to performance. The panels are made up of senior managers (GS-15/Band III) in a given unit. Panels meet in each of the units and rate individuals who have applied for promotional opportunities. Each panel designates those deemed "best qualified" based on their performance. The best qualified list is forwarded to the selecting official. Persons not on the BQ list cannot be selected for promotion. The list developed is sent to the unit's selecting official, usually an Assistant Comptroller General. The individuals on the best qualified list are not ranked, and the selecting official is free to select any person from the list. When a goal exists due to underrepresentation, the selecting official may consider affirmative action in making a selection. (TR 355-56, Dodaro).

16. The competitive selection process was adopted in the mid- 1980's. Panels were convened to evaluate candidates' credentials and establish lists. Until around 1986, panels met throughout the year. The current system was adopted in 1986. Since that time, the process occurs once a year. Individuals may declare their interest in promotion at a designated time. (TR 355-56).

17. GAO has had an affirmative action program for women and minorities since 1980. (Deposition Exhibit 1 at 19).

18. Alexander Silva was Director of GAO's Office of Civil Rights from 1980-86. He assumed this job around the time when the General Accounting Office Personnel Act of 1980 (GAOPA) became effective. Mr. Silva had development and oversight authority for the agency's affirmative action plans for women, minorities and the handicapped during his tenure as Director of the Office of Civil Rights. (TR 42).

19. During the period 1980-86, hiring and promotion goals for women and minorities were in effect. Promotion goals for women and minorities were set on an agency-wide basis. These goals were developed by determining representation among the applicant pool for promotion to specific grades. A goal was set for a percentage of promotions that approximated representation of women and minorities among the applicant pool. GAO did not consider external data, such as civilian labor force data during this period. (TR 87-90, Silva).

20. In 1986, a new affirmative action program for women and minorities was designed to place responsibility at the unit-head level. Responsibility for this program was transferred from the Office of Civil Rights to a new Office of Affirmative Action Plans. After that time, Mr. Silva was not responsible for affirmative action at GAO. (TR 70).

21. Lowell Dodge was the Director of the Office of Affirmative Action Plans from 1986-89. Mr. Dodge was charged with implementing affirmative action plans on a unit-based level. The heads of each of 26 units (divisions and regional offices) were required to formulate plans, including, where appropriate, goals for their respective units. During this time period, unit heads were required to compare the representation of women and minorities in their units with their availability as

determined by reference to various GAO benchmark data. Where a shortfall was found to exist, unit heads were required to set goals. Mr. Dodge was responsible for reviewing and approving proposed goals and for monitoring whether the goals were met. (TR 101).

22. In affirmative action planning, benchmarks are measures chosen to demonstrate the representation of the subject group in a particular population. The population chosen must be relevant as compared to the GAO occupational group against which it is measured. (TR 176-77).

23. GAO has used two primary measures of women and minorities in the external labor market: a) degrees-conferred data; and b) the Civilian Labor Force (professional). When determining representation in a job series or classification that may be filled by promotion, GAO has also considered availability in the grades or jobs that feed into such job series. A comparison is made between the actual representation at GAO and the availability or potential representation as reflected in the benchmark. (TR 180-81).

24. During the period relevant to this case, GAO had delegated accountability for affirmative action to the unit level and allowed unit heads latitude in determining their respective benchmarks, at least insofar as weighing of various elements was concerned. Thus, in formulating benchmarks, a unit head would consider national and local labor market data, as well as representation at GAO among those eligible for particular positions. (TR 343, 373-74).

25. Unit heads were accountable for achievement of the affirmative action goals for women and minorities developed for their unit. Their performance in this area was one element of their rating in the category "Staff Management/EEO/Affirmative Action," contained in the SES Performance Contract/Assessment. (TR 377).

26. GAO's policy is to consider affirmative action only when choosing from among those on the best qualified list and, then, only where a goal exists. Affirmative action is not to play a role when conducting performance appraisals or when rating employees for placement on a best qualified list. Goals are not set for SES positions. (TR 357-58, 378, Dodaro).

27. Joan Dodaro served as Deputy Assistant Comptroller General for Human Resources at GAO from 1987 through the date of the hearing. In this capacity, she had responsibility for all human resource activities, including personnel, recruiting, promotions and affirmative action.

28. Between 1980 and 1985, GAO promulgated three affirmative action plans for handicapped individuals. These plans included disabled veterans in their coverage. Respondent's Exhibit 3, "Affirmative Action Program Plan for Handicapped Individuals Including Disabled Veterans, Fiscal Years 1980/1981" (hereinafter "the 1980/81 Plan"); Respondent's Exhibit 4, "Affirmative Action Program Plan for Handicapped Individuals Including Disabled Veterans, Fiscal Years 1982/1983" (hereinafter "the 1982/83 Plan"); and Respondent's Exhibit 5, "Affirmative Action Program Plan for Handicapped Individuals Including Disabled Veterans, Fiscal Years 1984/1985" (hereinafter "the 1984/85 Plan"). (Collectively, these plans will be referred to as "the 1980/85 Plans.")

29. There was no special plan for disabled veterans during this time. They were considered part of the handicapped population. Affirmative action for disabled veterans was never considered as a separate program. (TR 44). It was incidental to affirmative action for handicapped individuals. (TR 42). The 1980/85 Plans were focused on hiring and improving the profile of handicapped employees, making the building more accessible to the handicapped and making reasonable accommodations to help them on the job. (TR 67).

30. The 1980/85 Plans had provisions that addressed disabled veterans as follows:

a) The 1980/81 Plan: Section I of the 1980/81 Plan is a statistical report, Part B of which is captioned "Format for Agency Report of Affirmative Action Program Plan on Employment of Disabled Veterans." Statistical data on disabled veterans is provided as of December 31, 1980.

Section IV of the 1980/81 Plan addressed recruitment. One specific action item was: "Establish outreach recruitment activities with counseling psychologists of Veterans Administration regional offices and hospitals and with military installations to facilitate procedures for recruitment, training assistance and additional services to disabled veterans." One objective was: "Include sources of Handicapped Persons and Disabled Veterans in Ongoing Recruitment Efforts."

b) The 1982/83 Plan: Section I of the 1982/83 Plan, titled "Introduction," notes that in past years, the Agency had concentrated its efforts on recruitment, hiring and appropriate placement of handicapped individuals and disabled veterans, efforts that had been curtailed during the previous period due to reduced funding and a resulting hiring freeze.

Section II of the 1982/83 Plan is a statistical report. Statistical data on disabled veterans is provided as of September 30, 1981.

Section III, "Accomplishment Report for 1981," and Section IV, "Handicapped Hiring Goals for 1982 and 1983," do not refer to disabled veterans. The focus of the report of accomplishments for the prior period is on improvement in accessibility through interpreters for the deaf, teaching sign language to co-workers, development of a safe evacuation plan for physically handicapped and hearing-impaired employees, steps toward developing a policy for hiring personal assistants and reorganization of the Handicapped Advisory Council. Another reported accomplishment was the development by Personnel of computerized lists of local and nationwide organizations to be used as recruiting sources for handicapped persons. Handicapped Hiring Goals for 1982 and 1983 were articulated with respect to the category "severely disabled" without reference to whether such individuals might also be disabled veterans.

Section V, "Fiscal Years 1982-1983, Recruitment," has as one of its two main objectives, "Give priority to increased hiring of handicapped persons and disabled veterans." In furtherance of this objective, Action Item 5 was "Establish outreach recruitment activities with counseling psychologists of Veterans Administration regional offices and hospitals and with military

installations to facilitate procedures for recruitment, training assistance and additional services to disabled veterans."

c) The 1984/85 Plan: In the Introduction to the 1984/85 Plan, Comptroller General Bowsher wrote, "In the recruitment and hiring process particular attention must be given to veterans with the targeted disabilities since they presently comprise only 4 percent of our severely handicapped staff." (Emphasis in original). Section II, "Statistical Report," contained statistical data for disabled veterans as of September 30, 1983. Personnel Statistics were reported for FY 1982-83 for such actions as promotions, awards, hires, and attrition for severely handicapped employees, without regard to whether such employees were also disabled veterans.

Section V, "Fiscal Year 1984-1985," states as an objective: "Give priority to increased hiring of handicapped persons and disabled veterans." Action Item no. 3 was: "Establish contact with sources for the recruitment of qualified handicapped persons; primarily with counseling psychologists of Veterans Administration offices and State vocational rehabilitation agencies."

31. After promulgation of the 1984/85 Plan, responsibility for developing and implementing affirmative action for the handicapped and for disabled veterans fell through the cracks. (TR 152, Dodaro).

32. There were two sources for the data provided to Petitioner by Respondent. From 1979 until October 1988, GAO's personnel data was maintained by the Department of the Army Civilian Personnel Accounting System. As of October 1988, the data is from the National Finance Center.

33. In responding to Petitioner's request, Respondent adhered to Petitioner's definition of "working person" as someone employed by GAO on January 1 and December 31 of the year in question. This has the obvious effect of not counting, for any given year, an individual who began or terminated employment at any time during that year.

34. Certain problems with the data for 1982, 1984, and 1985 do not affect the analysis based on that data. A large number of employees are missing from the data base for these three years. This affects the total count and any computations based on raw numbers, but it does not impair the integrity of the data for comparative purposes. The computerized file randomly lost records for these years on a seemingly proportionate basis; thus, the average salaries by grades are not affected by the data problems. (TR 624-27, Baker; TR 676-77, Phillips).

## **DECISION AND RATIONALE**

Petitioner asserts that class members have demonstrated that they suffered cognizable harm as a result of the failure of GAO to implement affirmative action as mandated by GAO Order 2306.1. That order, as in effect from October 1, 1980 through January 17, 1992, was the sole basis of GAO's duty to provide affirmative action for disabled veterans. Affirmative Action Decision at 7.

As has been the case throughout this protracted litigation, Petitioner raises numerous irrelevant points and presents his case in a way that is often internally contradictory and lacking in focus. But the essence of Petitioner's case necessarily rests on the correctness of the following propositions:

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.

For reasons that are more fully discussed as follows, I do not accept either proposition. I conclude that Petitioner has failed to establish that he or the class members suffered any harm as a result of the failure of GAO to implement affirmative action pursuant to 2306.1. Regardless of the view of the required content of affirmative action for disabled veterans, Petitioner has failed to demonstrate any harm caused by its absence. Finally, even if one were to presume harm, Petitioner has not calculated damages in a legally sufficient manner.

**I. The affirmative action required under GAO Order 2306.1 did not require the establishment of goals and timetables for disabled veterans.**

The nature of the legal obligation to provide affirmative action for disabled veterans has been determined by the Board to be that set forth in GAO Order 2306.1, as in effect from October 1, 1980 until January 17, 1992. Affirmative Action Decision at 7. That order plainly did not require the Agency to establish goals and timetables for disabled veterans.

Throughout this case, Respondent and this Board have endeavored to obtain from Petitioner a statement of his theory of the case. During discovery, Respondent repeatedly sought the identification of the specific elements of affirmative action to which Petitioner claimed entitlement and which Petitioner claimed were not provided, thereby causing harm to the class. Petitioner maintained: 1) that he could not respond to these requests until Respondent complied with Petitioner's discovery requests; and 2) to the extent that questions about his views on the required content called for legal conclusions, they were not appropriate for Petitioner's response. Petitioner was directed by the Board to comply with the discovery request. Memorandum and Order (Sept. 14, 1993). If he could not do so because of an asserted belief that the request called for legal conclusions, then Petitioner was ordered to submit, through counsel, a legal memorandum setting forth his legal position on the nature of the obligation to provide affirmative action for disabled veterans, citing any supporting statutory or other provisions. When it became clear that Petitioner could not or would not identify the elements of affirmative action to which he claimed entitlement and the absence of which he alleged caused him financial injury, the Board bifurcated the hearing. At the first hearing, the legal question to be addressed was the required content of affirmative action for disabled veterans. A subsequent hearing was to address the issue of the extent, if any, of harm suffered by the class due to the lack of the required affirmative action.

In Petitioner's brief on the question of the legal requirements for affirmative action for disabled veterans, he stipulated that GAO Order 2306.1 defined the duty to provide affirmative action and that the plans as written for 1980-85 satisfied that duty. Petitioner's Post-Hearing Brief--The Contents of the Legal, Proper and Reasonable Affirmative Action Plan for Disabled Veterans, 10/1/80 - 1/17/92 at 1, 3, 4, and 17 (Apr. 18, 1994). Those plans did not include goals and timetables for disabled veterans.

Petitioner did not, during discovery or in any other prior phase of this case, ever state the view that affirmative action for disabled veterans should have been the same as that provided for women and minorities. He did not claim that disabled veterans were entitled to goals and timetables. He did not state this view at the hearing dedicated to answering the precise question of the required content of the affirmative action due to disabled veterans under GAO Order 2306.1. This view was stated for the first time in Petitioner's pre-hearing brief submitted just prior to the April 1995 hearing that was held to address the sole question of what harm, if any, resulted from the Respondent's failure to provide affirmative action for disabled veterans.<sup>14</sup>

The Board has determined that GAO Order 2306.1 was the sole basis of the legal duty of GAO to provide affirmative action for disabled veterans. This order does not mention or even suggest goals and timetables. It indicates a general objective to increase the employment rate of handicapped individuals and disabled veterans at GAO, especially through targeted recruiting. Taken alone, this does not constitute an intent or obligation to analyze representation levels and establish goals where underrepresentation is found to exist, as was done for women and minorities.

Petitioner makes assertions about the historical special treatment of veterans (Post-Hearing Brief at 2 (June 15, 1995)) and alludes to certain "underlying statutes" as supporting his position that goals were required for disabled veterans. He characterizes GAO as building its defense, in part, on the "myth" that disabled veterans are not special and are not entitled to preferential treatment on a par with other "EEO preference eligible groups," including women, minorities and handicapped individuals. In adhering to this myth, Petitioner continues, Respondent fails to take account of the

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<sup>14</sup>Petitioner's discovery efforts, which sought data on women and minorities, suggested this view, but it was not articulated as the theory of his case until just prior to the hearing. Petitioner's pre-hearing brief (titled "Petitioner's Pre-Hearing Brief, Hearing on the Single Issue of Comparison Evidence Involving Groups of Employees Who Were Similarly Situated to Class Members"), includes as part of Proposed Finding of Fact No. 9, "Each promotion at GAO during the relevant period was subject to the mandatory EEO goals which were applicable to minorities and women and not applicable to disabled veterans, although, in a properly designed plan, such goals and timetables should have been applicable." Petitioner's Amended and Corrected Pre-Hearing Brief at 7 (Apr. 11, 1994) (filed Apr. 27, 1995). In this Pre-Hearing Brief, Petitioner also articulates, as part of his argument, the position that the class members "are entitled to be elevated to the same promotional and affirmative action status as women as a secondary position the class contends it was entitled to treatment equal to the second most favored group, african americans and minorities at GAO.[sic]" *Id.* at 13. No legal or regulatory authority is cited in support of this position.

historical preferences afforded veterans through the Veterans' Preference Act of 1944 (VPA), (codified in scattered sections of 5 U.S.C., including §§2108, 3309-12, 3315-18), the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VRAA), (38 U.S.C. §§4212-14), and the veterans' savings provision of Title VII of the Civil Rights Act (42 U.S.C. §2000e-11). Petitioner does not address how any of these statutory provisions supports his position. A brief examination of the referenced provisions will demonstrate their lack of relevance to the question of affirmative action for disabled veterans at GAO.

The first statute mentioned by Petitioner is the Veterans' Preference Act of 1944. It is not clear how Petitioner believes this statute advances his position that disabled veterans were entitled to the same affirmative action as was provided to women and minorities. The VPA was earlier considered by the Board in connection with Petitioner's claim that disabled veterans had a statutory right to preference in promotions. Decision *en banc* on Motion for Reconsideration (July 2, 1992).

The Board held that VPA preferences apply to GAO employees, via 31 U.S.C. §732(b), which requires 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 an individual in the executive branch." A review of the preference provisions contained in the VPA demonstrates that those preferences are limited to initial appointment, 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 any 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 1571 (11th Cir.), *cert. denied*, 498 U.S. 998 (1990). If Petitioner now means to suggest that the VPA confers upon disabled veterans a right to affirmative action that is the same as that provided to women and minorities or, more specifically, a right to goals and timetables in affirmative action, that contention is expressly rejected.

Petitioner's second statutory reference is to the Vietnam Era Veterans' Readjustment Assistance Act of 1974. At the outset of this litigation, Petitioner relied on the provisions of the VRAA as a basis for the requirement to provide affirmative action for veterans. See 38 U.S.C. §4214(c) (Supp. IV 1992) [previously codified at 38 U.S.C. §2014(c)]. The Board rejected this view in its 1992 *en banc* decision on cross motions for summary judgment, finding that §4214 is specifically limited in its application to departments, agencies and instrumentalities in the executive branch. Decision *en banc* on Motion and Cross Motion for Summary Judgment at 14 (Feb. 24, 1992); see 38 U.S.C. §4214(a)(2)). The Board also noted that other provisions of the VRAA, governed by a different coverage provision, do apply to GAO, but these provisions have nothing to do with affirmative action.<sup>15</sup>

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<sup>15</sup>Section 4211 establishes definitions for Chapter 42, Title 38, U. S. Code (these definitions bring GAO within the coverage of Chapter 42, except for the affirmative action requirement contained in § 4214); §4212 provides for veterans' employment emphasis under Federal contracts; §4213 establishes eligibility requirements for veterans under Federal employment and training programs.

It bears repeating, as the Board has already held, that, even if GAO were required to have an affirmative action program for disabled veterans under §4214(c), "such a requirement would not mandate preference generally or specifically in promotion actions." Decision *en banc* on Motion for Reconsideration at 7 (July 2, 1992). Although the Petitioner has not explained how the VRAA supports his position, it is clear that it does not mandate for disabled veterans at executive branch agencies, affirmative action that is identical, or even similar, to that provided to women and minorities at those agencies. Specifically, where the VRAA does mandate affirmative action for disabled veterans, it does not mandate preference in promotions or the implementation of goals and timetables for disabled veterans.<sup>16</sup>

Petitioner's third statutory reference is to the "veterans' savings provision" of Title VII of the Civil Rights Act of 1964. Reliance on this section is likewise misplaced. The referenced provision states that nothing in Title VII "shall be construed to repeal or modify" any statute "creating special rights or preference for veterans." Title VII prohibits discrimination based on race, sex, color, creed and national origin, without providing a preference for the groups that it was designed to protect. The "veterans' savings provision" precludes a Title VII challenge to an otherwise lawfully applied veterans' preference. Thus, even if the effect of a lawfully applied veterans' preference is to exclude women, it may not be challenged as unlawful sex discrimination under Title VII. The provision, on its face, creates no new preference for disabled veterans. *Bannerman v. Dept. of Youth Authority*, 436 F.Supp. 1273 (N.D. Cal. 1977), *aff'd*, 615 F.2d 847 (9th Cir. 1980). It does not mandate that they receive preference, generally, or specifically in promotion; it does not require that affirmative action programs for disabled veterans be the same as affirmative action programs for women and minorities; and it does not mandate the implementation of goals and timetables for disabled veterans who are subject to an affirmative action program.

An additional argument in support of Petitioner's position regarding goals and timetables was raised for the first time at the hearing. Petitioner contends that because GAO Order 2306.1 guaranteed handicapped individuals and disabled veterans the "same measure of opportunities" as other employees, that entitled them to have goals set, because setting goals was an opportunity provided to other employee groups at GAO. Petitioner would have it that by virtue of this phrase, disabled veterans at GAO were entitled to the same elements of affirmative action as were contained in the plans for women and minorities. More specifically, he asserts, the phrase indicates entitlement to goals and timetables.

Petitioner has not provided this Board with any support for this interpretation of the language of

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<sup>16</sup>Federal regulations promulgated to establish the requirements for affirmative action for handicapped individuals and for disabled veterans focus on recruitment and on identifying and removing barriers to equal opportunity. *See, e.g.*, 41 C.F.R. §60-741.4 (1980), uniform affirmative action clause covering employment of handicapped individuals by federal contractors; 41 C.F.R. §60-250(1993), federal contractors' affirmative action for disabled veterans; 5 C.F.R. §§720.301 to 720.307 (1993), federal agencies' (executive branch) affirmative action for disabled veterans.

GAO Order 2306.1, and my own research has failed to uncover any such support. I find no evidence that the Agency, the architect of the obligation to provide affirmative action for disabled veterans, ever intended that such affirmative action would be the same as that implemented for women and minorities. As was discussed in the decision on the required content of affirmative action for disabled veterans, there is no legal principle that would ascribe to the term "affirmative action" a single meaning. Affirmative Action Decision at 5. It is clear that as the plans were designed and implemented from 1980 through 1985, there was no contemporaneous thought on the part of the Agency that the obligation undertaken was to provide for handicapped individuals and disabled veterans the same affirmative action that was provided for women and minorities. During the years in which there was an effort to comply with GAO Order 2306.1, those efforts never mirrored those on behalf of 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 (TR 86, Silva; TR 366-8, Dodaro) or feasible (TR 169, 353, 370, Dodaro; Deposition Exhibit 2 at 63, Jones). Rightly or wrongly, Agency officials believed that data for disabled veterans did not exist that was comparable to that which existed for women and minorities and was used in determining whether employees in those groups were appropriately represented at GAO and if not, the proper measure by which their numbers should be increased. Agency officials had a sincere belief that the methodology used to develop goals for women and minorities was not applicable to handicapped individuals and disabled veterans.

Petitioner points to the mention of goals in the 1980/81 Plan as evidence of a commitment to establish goals for disabled veterans. This reference to goals was very general, posed to bring up the overall rate of employment of handicapped persons, including disabled veterans, at GAO. It did not evidence an intent to establish goals and timetables for disabled veterans.

An oversight report of the General Counsel of the Personnel Appeals Board (Petitioner's Vol. III-A, Exhibit 1) indicates another contemporaneous view that "[h]andicapped programs do not include goals and timetables." Petitioner appears to read this statement as criticism of the specific program in effect at GAO at the time of the report. In fact, it is apparent that the author is making an observation about affirmative action programs for handicapped individuals in general; that observation is that such programs do not provide for goals and timetables. The observation was a correct one, inasmuch as statutory and regulatory provisions governing affirmative action for handicapped individuals do not establish requirements for goals and timetables. See, e.g., 41 C.F.R. §60-741.4 (1980).

Having rejected Petitioner's contention that GAO was required to develop goals and timetables for disabled veterans, it is perhaps unnecessary to determine whether Petitioner has shown harm or whether Petitioner has offered adequate proof of damages, inasmuch as Petitioner's entire analysis is premised on the contention that the harm was caused by the failure to implement goals and timetables for disabled veterans. Nevertheless, due to the protracted nature of these proceedings, the lengthy hearing and the voluminous exhibits, it is preferable to consider Petitioner's case in whole. In this instance, judicial economy demands a thorough review of the record and arguments.

## **II. The absence of goals and timetables was not shown to have caused harm to the class.**

Even assuming that goals and timetables were required, Petitioner has not shown that their absence harmed class members. And, even if such harm were presumed, Petitioner has not demonstrated a proper measure of damages. Petitioner's methodology is flawed in several respects. First, Petitioner asserts that the measure of damages is the difference between the actual average salaries of the class members (or all disabled veterans)<sup>17</sup> and what those salaries would have been if they had increased at the same rate as did the salaries of the proper comparator group (possibly women, blacks, all minorities, or some combination). This position is rife with assumptions that are without any support in the record evidence.

Petitioner's case is based on promotions and the failure of the Agency to apply affirmative action to disabled veterans in the competitive promotion process in a manner similar to that for women and minorities.<sup>18</sup> To prevail, Petitioner would have to show that women and minorities received a greater number of promotions due to affirmative action, and, more specifically, due to promotion goals, which translated into a higher rate of promotions. He would also have to show that, had similar goals and timetables been applied to disabled veterans, they would have had an increased rate of promotion.

Petitioner assumes that the goals established for disabled veterans would have been the same as those established for minorities and women and/or that such goals would have resulted in promotions that would have caused the average class member's salary to increase at the same rate as did the average woman or minority employee's salary. These assumptions are wholly unwarranted. Assuming, *arguendo*, that disabled veterans were entitled to have goals set, this would not have assured that the goals would have been the same as those set for women and/or minorities or that the results would have been the same. If goals were set, those goals would have been based on an analysis of the representation of disabled veterans in the GAO workforce as compared with a relevant benchmark. Under Petitioner's theory of the case, damages would be measured based on the failure to meet the goals established for disabled veterans. Petitioner has not produced any evidence to show that disabled veterans were underrepresented at GAO. Indeed, he could not have made such a showing without producing the very data regarding disabled veterans which data he claimed was available to the Agency had it but chosen to obtain and use it.

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<sup>17</sup>As stated in footnote 8, a comparison between all disabled veterans employed at GAO and other employees is rejected as irrelevant to the question of damages suffered by the class members. Where possible, the discussion of Petitioner's arguments will focus on comparisons made with reference to the class members.

<sup>18</sup>Petitioner presents comparative data for women, blacks, Hispanics, and Asians. His specific arguments are made with reference to data for women and blacks. He seems to favor the data on women because it nets the highest damage calculation under his theory.

The various components of Petitioner's argument will be discussed separately in the following sections.

a) The evidence did not show the existence of a reasonable benchmark for disabled veterans.

Petitioner contends that Respondent failed in its duty by not establishing goals and timetables for disabled veterans. Respondent explains the absence of goals for disabled veterans, in part, on the unavailability of the kind of data used to develop goals for women and minorities. Whether Respondent was right or wrong in its belief regarding the availability of the data does not bear on the question of its obligation to implement goals and timetables for disabled veterans. That is, if there were an obligation to implement goals and timetables, Respondent would have had an obligation to do so on the basis of the best data available. Conversely, if there was no such obligation, as I have concluded, then the existence of flawless data would not have converted "no obligation" into "obligation."

Nevertheless, if adequate data were available, one would have expected Petitioner to have produced such data, first, to demonstrate that such data were available and, second, to demonstrate that disabled veterans were in fact underrepresented at GAO. Petitioner challenges Respondent's positions on these questions without producing the very data that he claims exists. It must be remembered that Petitioner, as the moving party, bears the burden of proof. Thus, if the existence of a reasonable benchmark for disabled veterans is an element of Petitioner's claim, it was his burden to demonstrate its existence. Respondent was not required to prove that a benchmark does not exist.

Petitioner's evidence in support of the existence of data from which a benchmark would have been developed consisted of testimony from Dr. Lurito and three exhibits; two of these exhibits showed federal workforce data between 1982 and 1990, and the other showed civilian labor force data for 1993. Dr. Lurito did not identify or produce a benchmark. He testified that there are rich sources of data and GAO with all its resources could have developed a benchmark if it had chosen to do so. (TR 252-53, 419-20, Lurito). Petitioner's Vol. III-A, Exhibit 8 showed the representation of disabled veterans among employees in the executive branch for 1982, 1984, 1986, 1988, 1990, and 1992. Petitioner's Vol. III, Exhibit 3 showed the representation of disabled veterans among employees in the executive branch at large and in a few selected executive branch agencies as of September 30, 1984, 1986, 1988, and 1990. Petitioner's Vol. III-A, Exhibit 10, introduced on the last day of the hearing, provided data on disabled veterans in the civilian labor force during the calendar year 1993.

Respondent's witnesses testified as to their beliefs (TR 169, 353, Dodaro; Deposition Exhibit 2 at 63, Jones) and opinions (TR 584, Baker) that data did not exist from which to construct a reasonable benchmark for disabled veterans. The Agency witnesses testified that they were unaware of data that would permit an analysis of the availability of disabled veterans with the education and training necessary for GAO evaluator and evaluator-related positions. Educational

data, such as degrees conferred data used from 1986-91 to measure representation of women and minorities, was not available for disabled veterans. (TR 180, Dodaro). Occupational data relevant to the job series at GAO was not available for disabled veterans. (TR 584, Baker).

Petitioner argued that federal workforce data provides a suitable benchmark for GAO. Joan Dodaro testified that federal workforce data is not an appropriate measure for GAO because of the high concentration of evaluator and attorney positions requiring certain levels of education and skills not typical of the workforce population in most of the federal government. (TR 165). Petitioner did not refute this testimony. With respect to the 1993 data for the civilian labor force, Respondent argued that it was not appropriate as a measure for GAO's workforce which demands a much higher proportion of employees with professional experience and credentials than is found in the general civilian labor force. Moreover, 1993 data has no bearing on whether data existed between 1980 and 1991 that would have enabled Respondent to develop an appropriate benchmark.

The evidence produced fell far short of establishing that Respondent knew or should have known of the existence of workforce data on disabled veterans. It also fell far short of proving that a reasonable benchmark could in fact have been created.<sup>19</sup>

b) The evidence did not establish that disabled veterans were underrepresented at GAO.

For goals and timetables to have been meaningful for disabled veterans, it would be necessary that they have been underrepresented in particular job classes, thereby prompting the setting of a goal. Petitioner asserts, but does not demonstrate, that disabled veterans were underrepresented at GAO. This assertion is based on a comparison with federal executive branch workforce data and on a decline, during the relevant time period, in the total number of disabled veterans employed at GAO.

For reasons discussed more fully above, neither the federal workforce data, nor the 1993 civilian labor force data, provide an appropriate benchmark for the employment of disabled veterans at GAO. However, even if one considers these data sources to be appropriate for establishing a benchmark for disabled veterans at GAO, they were not shown to indicate a shortfall at GAO.

The federal workforce data presented showed disabled veterans as a percentage of employees in the federal executive branch, which percentage could be compared to the percentage at GAO. Dr. Lurito testified that disabled veterans comprised 2.1% of the GAO workforce in 1990-91. He derived this figure by comparing the number of class members, 107, to a total GAO workforce of approximately 5200 employees. (TR at 265, Lurito). Referring to Petitioner's Vol. III, Exhibit 3,

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<sup>19</sup> As noted, there was considerable doubt about the existence of an appropriate, broad-based external benchmark for disabled veterans. With reference to promotion, however, information about the number of disabled veterans eligible for promotion to specific grades would have provided a benchmark similar to that used for women and minorities from 1980-85. Although Petitioner obtained in discovery the information necessary to construct this very simple form of benchmark, he did not suggest it as an available and appropriate benchmark.

the exhibit appears to be, for each of four years, the first page of a multi-page analysis that shows the data about disabled veterans in the federal executive workforce as a whole and then breaks it down for cabinet-level departments and agencies within those departments. From the single page presented, it would appear that there is considerable variation in the employment of disabled veterans from agency to agency within the executive branch of the federal government. The page presented for each of four years shows the total federal workforce, the Executive Office of the President, the Department of Agriculture, the Department of Commerce, and the Department of Defense.

Looking at the first page, it can be seen that disabled veterans constituted 4.2% of the total federal executive workforce in 1990.<sup>20</sup> During the same year, the Department of Defense, which accounts for close to half of all federal employees, had 6% representation of disabled veterans in 1990. At the Executive Office of the President, disabled veterans accounted for .46% of the employees. At the Department of Agriculture, they constituted 1.6% of the workforce, and, at the Department of Commerce, they were 1.7%. Without information about the education and experience required of agency employees and the availability of disabled veterans among that population, it is not possible to evaluate and compare the adequacy of Respondent's employment of disabled veterans with that of other federal agencies or with the federal government as a whole. It is noted, however, that except for the Department of Defense, GAO has greater representation of disabled veterans than the other specific agencies shown on Petitioner's Vol. III, Exhibit 3. This does not suggest that disabled veterans were underrepresented at GAO.

On the final day of hearing, Petitioner presented additional data, as reflected in Petitioner's Vol. III-A, Exhibit 10, for the purpose of showing that a relevant benchmark could have been developed despite GAO's protestations to the contrary. Exhibit 10 contains data for 1993 and, on the face of it, appears to have been produced only for that year. This data does not prove that Respondent could have developed a benchmark during the years 1980-91, because it was not shown to have existed during those years. Data that did not exist until 1993 could not have aided the Agency in an analysis which Petitioner contends was required during 1980-91. Moreover, this data is limited in that it does not break down disabled veterans according to their qualifications for Respondent's workforce needs. It does not provide the kind of data, such as degrees conferred, availability in certain occupational groupings, etc., that would have been necessary to perform an analysis comparable to that which was done for women and minorities.

Even if these limitations are ignored, the data does not support Petitioner's position that disabled veterans were underrepresented at GAO. According to this study, in 1993, 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%). Thus, it can be seen that, in 1993, disabled veterans constituted 1.49% of the civilian labor force and 1.53% of the number of persons

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<sup>20</sup>The examples discussed in this section are from page one, representing figures for 1990. The data is similar for the other years presented, 1988, 1986, and 1984.

employed, as compared to a 2.1% representation rate at GAO. Given the obvious limitations of this data, it does not establish that GAO had the proper representation level of disabled veterans. But, it clearly does not support a conclusion that disabled veterans were underrepresented at GAO.

Petitioner's exhibits discussed above also put some of his other contentions into a different perspective. For example, Petitioner points to a decline in the number of disabled veterans as further evidence of harm caused by the absence of affirmative action for disabled veterans. It is not clear how this claim might relate to Petitioner's complaint about promotions; issues related to hiring and retention were not part of his claim. Nevertheless, it is noted that a similar decline took place elsewhere in the federal government. Data presented over a multi-year period for executive branch agencies discloses a similar trend. Looking at Petitioner's Vol. III, Exhibit 3, the total number of disabled veterans was 92,177 in 1984 (4.56%); 91,797 in 1986 (4.4%); 90,087 in 1988 (4.24%); and 89,918 in 1990 (4.18%). At the Department of Agriculture the number of disabled veterans was 2399 in 1984 (1.91%); 2306 in 1986 (1.98%); 2219 in 1988 (1.72%); and 2125 in 1990 (1.61%). This comparison suggests that, at least as compared to the federal workforce, declining numbers at GAO was not atypical.<sup>21</sup> In any event, this is another example of a failure by Petitioner to eliminate other possible causes for a statistical occurrence. The evidence establishes the decline. Petitioner's mere assertion that the decline was caused by or related to the lack of affirmative action is not sufficient to establish that as a fact.

c) The evidence did not show disparity in promotion.

Petitioner advanced his case for harm largely through the testimony and analysis of his expert witness, Dr. Richard Lurito. The testimony did not establish the asserted harm to class members. To the extent that differences were noted between the experiences of class members and those of other employee groups, Petitioner's evidence did not disclose a causal link between those differences and the lack of the required affirmative action program for disabled veterans. A brief outline of Dr. Lurito's testimony, the response from Respondent's expert, Dr. Mary Baker, and Dr. Lurito's rebuttal will demonstrate the evidence on this crucial point.

i) Rate of salary increase

In his opening appearance and supporting exhibits, Dr. Lurito relied on GAO data on average salary of various groups for each year, 1980 through 1991, to measure the differential promotional experience of various groups. (TR 271; Petitioner's Vol. III, Exhibit 1, Table 1). Dr. Lurito asserted that the data demonstrated that disabled veterans did poorly with respect to the promotion pattern for women and minorities (TR 272). He distinguished between two time periods--1980-85 and 1985-91. For the first period, 1980-85, he conceded that harm to disabled veterans was not

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<sup>21</sup>It may be appropriate to take judicial notice that since the withdrawal of American forces from Vietnam in 1973, there has not been a significant "opportunity" for an increase in the number of disabled veterans. Thus, with the aging of the disabled veteran population and the lack of new members of that group, it is not surprising that the absolute and relative numbers of disabled veterans would level off and begin to decline.

shown. He stated that during this earlier period, they did almost as well as women, and, in some cases, slightly better than African-Americans and other minority groups. (TR 272). In that period, he concludes that class members were moving through the career ladder from GS 7-12; "their promotion experience was comparable to certain of the minorities" (TR 273); they were keeping up with their "minority peers" (TR 273); the percentage increase in average salary kept pace with minorities and women (TR 422); and there appeared to be *de facto* compliance with 2306.1 (TR 423).

Dr. Lurito reached a different conclusion with respect to the salary data for 1985-91. For that period, he contended, disabled veterans fell behind other employee groups due to the fact that they were not being promoted in appropriate numbers. (TR 273-74). The vigor with which disabled veterans were promoted slowed rapidly from what had happened in the prior period. (TR 422). After 1985, the number of disabled veterans in terms of promotion was very, very minimal. (TR 423).

The basis of his analysis is a comparison of the rates of salary increase. For example, the average salary of class members went from \$26,209 in 1980, to \$37,940 in 1985, to \$48,900 in 1991, an increase of 28.97% from 1985 to 1991 and an increase of 86.6% from 1980 to 1991. By comparison, the average salary for African- American employees went from \$17,655 in 1980, to \$24,804 in 1985, to \$36,091 in 1991; the rate of increase was 45.5% for 1985 to 1991 and 104.4% for 1980 to 1991. For women, the average salary was \$18,122 in 1980, \$26,506 in 1985, and \$39,391 in 1991; the rate of salary increase was 48.6% from 1985 to 1991 and 117.4% from 1980 to 1991. For all GAO employees, the average salary was \$26,933 in 1980, \$35,765 in 1985, and \$48,437 in 1991; the rate of salary increase was 35.4% for 1985 to 1991 and 79.8% for 1980 to 1991.

The rate of salary change data may be summarized as follows:

<u>EMPLOYEE GROUP</u>	% Change 1980-85	% Change 1985-91	% Change 1980-91
1. Class members	44.8	28.9	86.6
2. Disabled veterans	40.3	21.6	70.7
3. All GAO employees	32.8	35.4	79.8
4. Handicapped	28.8	43.4	84.7
5. Women	46.3	48.6	117.4
6. African-Americans	40.5	45.5	104.4
7. Hispanics	31.8	43.1	88.5
8. Asians	36.5	38.5	89.0
9. All GAO employees, except women and minorities	37.7	31.2	80.6

Dr. Lurito infers one cause for these differing rates of salary increase; that is a correspondingly differing rate of promotion. The salary data alone does not support any inferences regarding

promotions. Dr. Lurito later admitted that he did not perform a promotion analysis. (TR 449). In fact, on the second day of his direct examination he seemed to repudiate his opening testimony. He stated that he was not interested in the average salary because it "tells us nothing about promotion. It tells us nothing about hiring." (TR 431). The repudiation was completed in his rebuttal testimony, in which he stated, ". . . [T]he percentage increase in salary is absolutely irrelevant." (Tr. 704).

Respondent's expert, Dr. Mary Baker, agreed with Dr. Lurito's later evaluation of the salary analysis. She discussed factors, other than promotion, that likely contributed to differing rates of salary increase. First, she noted that in many respects the class members were not similar to the groups to which they were being compared. Class members were much more highly represented at the higher grades than women and minorities; women and minorities were much more highly represented at the lower grades than were class members.

Respondent's Exhibit 17 shows the distribution of employees across grade groups. During the 11-year period, on average 2.5% of the class members were assigned to the wage grades; .73% to GS 1-6; 55.63% to GS 7-12; 41.14% to GS 13-15; and 0% to SES. For women the average distribution for the same period was as follows: .36% to the wage grades; 26.23% to GS 1-6; 55% to GS 7-12; 17.77% to GS 13-15; and .63% to SES. The average distribution for black employees for this period was 2.77% to the wage grades; 34.17% to GS 1-6; 47.50% to GS 7-12; 14.99% to GS 13-15; and .57% to SES. Thus, it can be seen that 26% of women and 34% of blacks were in GS 1-6, compared to .73% of the class members. Looking at grades 7-15, 97% of the class members were in these grades, as compared to 73% of women and 62% of blacks. For grades 13-15, 41% of class members were in these upper grades, compared to less than 18% for women and 15% for blacks. This indicates that the level and type of work being performed by the class members was different from the level and type of work being performed by women and blacks. This is significant because promotion opportunities and opportunities for other kinds of pay increases differ from one grade group to another. (TR 591, Baker). Placement throughout the organization influences the frequency and size of other kinds of pay changes. (TR 592, Baker).

The second factor that may account for differences in the rates of salary increase is length of service in grade, as reflected by placement in a step within a grade. Newer employees are at the lower steps, in which they are eligible for within-grade salary increases annually. Employees in the middle steps receive within-grade salary increases every other year. Those in the upper steps must wait three years before their next within-grade salary increase. According to Dr. Baker, differing rates of salary increase may reflect a clustering of disabled veterans at the upper steps and of women and minorities at the lower steps, due to less time in service. (TR 603).

The data contained in Respondent's Exhibit 20 discloses an increase in the raw numbers of women and minorities over the course of the 11-year period that would support Dr. Baker's opinion that women and minorities, the more recent hires, were more likely to be in the lower steps of their respective grades. From 1980 to 1986, the total employee count at GAO increased by 51; the count for women increased from 1606 to 1955, a total of 349; the number of blacks increased from 795 to

978, a total of 183. From 1986 to 1991, a similar trend is noted. During that time, the total Agency employee count increased by one. By comparison, the total count for women increased by 316, and the total count for blacks increased by 80. It is logical to infer that, as newer employees, women and minorities were heavily represented among those who were progressing through the lower steps and receiving the more frequent within-grade salary increases.

Dr. Lurito acknowledged that he had not studied the distribution of GAO employees across steps even though he agreed that if employee groups differed in distribution across steps, one would expect a difference in their salary increases. (TR 516). Dr. Lurito also noted his agreement with the general principle that a worker's rate of salary increase is greatest in the early work years. He testified that one expects to see an acceleration in earnings in the early 20s, continuing through the 30s and 40s. This peaks out in the worker's early 50s and begins to level off and may even decline as the worker enters the 60s. The percentage change in salary is typically greater in the earlier work years. (TR at 477-78.) He admitted that if women and minorities had fewer years of experience he would expect their rate of salary increase to be greater. Despite this understanding of salary acceleration, Dr. Lurito did not report a comparative analysis of age or years of experience of women, minorities, and class members.

In sum, Petitioner did not establish that the difference in the rate of salary increase was attributable to a difference in promotions.

ii) Changes in distribution across grades

After Dr. Lurito repudiated the significance of the differing rates of salary increase, he pointed to a comparison of the percentage increases in raw numbers of disabled veterans in grades 7-12 and in grades 13-15 with the percentage increase in raw numbers of other employee groups between 1980 and 1991 as evidence that class members did not enjoy the same promotion pattern as did women and minorities.

For example, Dr. Lurito noted that, over the 11-year period, the number of women in Grades 13-15 increased from 148 to 668, an increase of 351%. During the same period, the number of African- Americans in those grades increased from 51 to 262, an increase of 413.7%, and the number of class members increased from 18 to 47, an increase of 161%.<sup>22</sup> In Dr. Lurito's opinion, this analysis shows that disabled veterans did not enjoy the same pattern of promotion as did women and minorities. (TR 430).

Dr. Baker challenged the appropriateness of this analysis. She testified that these comparisons are meaningless and that the more telling analysis is obtained by looking at the relative distribution of members of the various employee groups throughout the grade groupings as reflected in

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<sup>22</sup>Dr. Lurito actually testified that the increase from 18 to 47, or 161%, related to disabled veterans. Exhibit 19, which contains the underlying data for this testimony, indicates that these figures relate to the class members, not to all disabled veterans. See, TR 428.

Respondent's Exhibit 17. Changes in these distributions over time are then compared. Dr. Baker looked at the average distribution of the various employee groups over the 11-year period and the average for two subperiods, 1980-85 and 1986-91. Looking only at GS 13-15, the range of most relevance to this case, it may be seen that:

- \* The average percentage of class members in grades 13-15 was 35.43% from 1980-85 and 46.84% from 1986-91.
- \* The average percentage of women in grades 13-15 was 12.10% from 1980-85 and 23.44% from 1986-91.
- \* The average percentage of blacks in grades 13-15 was 9.53% from 1980-85 and 20.46% from 1986-91.
- \* The average percentage of all GAO employees in grades 13-15 was 39.67 from 1980-85 and 47.69% from 1986-91.

Dr. Baker compared these percentages by measuring the difference between percentages for the 1980-85 period and the 1986-91 period. Thus, she concluded that the distribution of class members in the 13-15 group went up 11.4 percentage points, the distribution of women in the 13-15 group went up 11.3 percentage points and the distribution of blacks in the 13-15 group went up 10.9 percentage points, while the distribution of all GAO employees went up 8 percentage points.

Dr. Lurito challenged this analysis because the comparison of the class members to the other groups is a comparison of a fixed defined group, disabled veterans employed at GAO between October 31, 1990 and January 17, 1992, to constantly changing groups of employees during the years reflected in the exhibit. Dr. Lurito's counter-analysis is reflected in Table B, Petitioner's Post-Hearing Brief. Table B displays data that shows representation levels for the various employee groups in the major grade groupings for each of three years, 1980, 1985, and 1991. Instead of data limited to class members, Petitioner uses data for all disabled veterans. Dr. Lurito's point about comparing the class, a fixed group, to the other, ever-changing groups is well-taken. However, the more apt comparison would have been between the class members and a similar "snapshot" of relevant comparator groups. For example, Dr. Lurito could have compared the class members with women employed at GAO between October 31, 1990 and January 17, 1992. Although the relevance of comparing women to class members would remain an issue, such a comparison would resolve the problem of comparing a fixed group to a changing group. Nevertheless, Petitioner's analysis, set forth in Table B of the Post-Hearing Brief, does provide a rough indicator of how class members fared in comparison to women, minorities and all GAO employees, even though it does not present a proper measure of damages for the class.

Dr. Lurito concludes from this data that the percentage of women in grades 13-15 increased by 219.6%, from 9.2% to 29.4%, while the percentage of disabled veterans in grades 13-15 increased by only 33.6% from 35.7% to 47.7%. Similarly, the percentage of blacks at GS 13-15 increased by 287.5% from 1980-91, as compared to 33.6% for disabled veterans. Applying Dr. Baker's method of analysis to a comparison between disabled veterans and women and between disabled veterans and blacks, one would note that the percentage of disabled veterans went up a total of 12 percentage

points, the percentage of women went up a total of 20.2 percentage points and the percentage of blacks went up a total of 18.4 percentage points. During this time, the percentage of all GAO employees in Grades 13-15 went up a total of 11.0 percentage points.

It is apparent that the numbers of women and minorities were growing at a rate faster than those of disabled veterans. Dr. Baker would have it that this was not significant because class members retained a favorable distribution across the upper salary groups, indicating that they were not being treated unfairly. Dr. Lurito would argue that this fact demonstrates that women and minorities were being promoted at a faster rate than were disabled veterans. One may speculate that the increase of women and minorities in the GS 13-15 range was due to promotion, but this simple fact was not shown by any evidence. Even if that had been shown, that fact alone would not establish any disparity or unfairness in the rate of promotion.

iii) Number of class members receiving promotions

The third prong of Petitioner's evidence regarding the promotion experience of class members was the assertion that disabled veterans received a low number of promotions. Petitioner James Dowd testified that 8 of 107 class members were promoted between 1980 and 1991. (TR 327). Dr. Lurito's version of this was that 8 class members were promoted to positions above GS 12 between 1985 and 1991. (TR 422, 574). The evidence does not provide a basis upon which to conclude that one or the other of these statements is correct. Petitioner did not identify any documentary evidence in support of either statement. Because of the large number of disabled veterans who appear to have moved through the career ladder noncompetitive promotions during the 11-year period under review, Mr. Dowd's figure seems unlikely. This doubt, however, is not sufficient to credit Dr. Lurito's statement as correct.

Regardless of the true number of promotions during either period, 1980-91 or 1985-91, the information is meaningless without some context. There was no evidence indicating how many disabled veterans or class members were eligible for promotion, how many applied for promotion, and how many were selected.<sup>23</sup> There was no comparable information for other groups, upon which some comparison might be made. Once these facts were known, it might well appear that eight competitive promotions from among eligible class members was an impressive rate of promotion. It might just as well appear that this number of promotions indicated a poor rate or promotion or a typical rate of promotion. But, the mere recitation of a certain number of promotions does not in any way establish disparity in promotion.

iv) Absence of promotion analysis

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<sup>23</sup>As previously noted, there was significant doubt about the existence of an appropriate, broad-based external benchmark for disabled veterans. With reference to promotion, however, information about the number of disabled veterans eligible for promotion to a specific grade would have provided a benchmark similar to that used for women and minorities from 1980-85.

A critical failing of Petitioner's case is the complete absence of any meaningful promotion analysis. He looks at a difference such as the increase in the number of employees in certain salary groups and asserts that this was the result of unequal treatment in the promotion process. Petitioner clearly obtained during discovery the information necessary to analyze this question, yet no evidence was presented showing the number of promotions and the number of applicants and selectees from the various employee groups.

Even if the differing salary increase rate were found to be attributable to a difference in the number of promotions, it would remain to be shown that there was a difference in the rate of promotion. A promotion analysis would require data on the number of promotions available, the location of those promotions, the applicant pool, the composition of the best qualified list, and the selection rate from among the best qualified.

### **III. Petitioner has not shown harm to class members as a result of the failure to develop and implement affirmative action for disabled veterans.**

Petitioner's evidence regarding differing rates of salary increase, differing rates of increase in raw numbers of employees in specific salary groups, and a purportedly low number of promotions of class members failed to establish that there was disparity in the promotion experience of class members. This evidence likewise failed to disclose any other disparity or unfairness caused by the absence of goals and timetables or by the failure to implement affirmative action with the elements required by GAO Order 2306.1.

The question of whether the 1980/85 Plans were implemented was open for reconsideration at the hearing on damages. On the face of the plans, there appears to have been some minimal implementation, at least insofar as statistics on disabled veterans were provided and accomplishment reports indicated the results, if any, of objectives from the previous plan. Beyond this, it appears that there was no serious effort at implementation of affirmative action for disabled veterans. Alex Silva, the Agency official who signed these plans and who was charged with implementing them, testified that during the period in which he was responsible for affirmative action at GAO, the Civil Rights Office never undertook a disabled veterans affirmative action plan. (Deposition Exhibit 2 at 44). He had no recollection of affirmative action for veterans ever being considered by anyone at GAO. (TR 44). "Handicapped veterans were considered part of the handicapped population." (TR 42). The fact that not a single Agency witness remembered the existence of the affirmative action plan component for disabled veterans supports Petitioner's general view that the plans were not implemented.

I do not find it necessary, however, to determine whether the 1980/85 Plans were, in fact, fully implemented. Petitioner acknowledges that the class members did well during the earlier period and that there was *de facto* compliance from 1980 to 1985. See discussion, *supra*. Petitioner's evidence of damages is presented almost exclusively for the period 1985-91, during which period it is conceded that there was no plan for affirmative action for disabled veterans. The central issue remains whether Petitioner has shown harm as a result of the failure to develop and/or implement

affirmative action for disabled veterans as required by GAO Order 2306.1.

During the 11-year period under review, the average salary of class members was approximately the same as the average salary of all GAO employees; class members earned 97% of the average GAO employee salary in 1980, 101% in 1986, and 101% in 1991. The average salary of women employed at GAO was 69% of that of the average GAO employee in 1980, 73% in 1986, and 81% in 1991. African-American employees earned 67% of the amount earned by the average GAO employee in 1980, 69% in 1986, and 74% in 1991. The salaries of women and blacks did grow at a rate sufficient to narrow somewhat the gap between them and the average salary of all GAO employees. This did not harm class members, whose average salary continued to be at or about 100% of the average salary for all GAO employees, as compared to 81% for women and 74% for African-Americans at the end of the 11-year period.

Similarly, the faster rate of increase of women and blacks in grades 7-15 does not demonstrate harm to the class members. Using Dr. Lurito's analysis, one can compare, for each of three years, the distribution of disabled veterans in grades 7-12 and 13-15 to the distribution of all GAO employees, women and blacks in those grades.

In 1980:

- \* 55.6% of disabled veterans were in grades 7-12 and 35.7% were in grades 13-15 (91.3% in grades 7-15);

- \* 48.9% of black employees were in grades 7-12 and 6.4% in grades 13-15 (55.3% in grades 7-15);

- \* 51.5% of women were in grades 7-12 and 9.2% were in grades 13-15 (60.7% in grades 7-15).

In 1985:

- \* The percentage of disabled veterans in grades 7-12 had decreased to 48.1% and the percentage in grades 13-15 had increased to 44.3% (for a total of 92.4% in grades 7-15);

- \* For black employees, the percentage in grades 7-12 had decreased to 43.1% and the percentage in 13-15 had increased to 13.3% (for a total of 56.4% in grades 7-15);

- \* For women, the percentage in grades 7-12 had increased to 54.6% and the percentage in grades 13-15 had increased to 14.6% (69.2% in grades 7-15).

In 1991:

- \* The percentage of disabled veterans in grades 7-12 had decreased to 46.8% and the percentage in grades 13-15 had increased to 47.7% (94.5% in grades 7-15);

- \* For black employees the percentage in grades 7-12 had increased to 51.8% and the percentage in grades 13-15 had increased to 24.8% (for a

total of 76.6% in grades 7-15);

\* For women, the percentage in grades 7-12 had increased to 56.3% and the percentage in grades 13-15 had increased to 29.4% (for a total of 85.7% in grades 7-15).

By comparison, the average for all GAO employees was as follows:

\* In 1980, 45.6% were in grades 7-12 and 38.2% in grades 13-15 (for a total of 83.8% in grades 7-15);

\* In 1985, 44% of all GAO employees were in grades 7-12 and 39% were in grades 13-15 (for a total of 83% in Grades 7-15);

\* In 1991, 41.1% of all GAO employees were in grades 7-12 and 49.2% were in Grades 13-15 (for a total of 90.3% in grades 7-15).

As was the case with salary, disabled veterans continued to enjoy an average position in the distribution of employees across grade groups. At the beginning of the period, 35.75% of disabled veterans were in grades 13-15 compared to 38.2% for the average GAO employee; at the end, 47.7% of disabled veterans were in grades 13-15, as compared to 49.2% for all GAO employees. During this period, women and blacks made some gains in their relative distributions in the upper salary groups, a gain that nonetheless left them far short of the average GAO distribution, as well as that of disabled veterans. In 1980, 9.2% of women and 6.4% of blacks were in grades 13-15; in 1991, these numbers were 29.4% and 24.8% respectively. The gains made by women and blacks do not appear to have harmed the position of disabled veterans, and, by inference, class members.

Petitioner has not shown that the class members suffered any harm as a result of the failure to implement an affirmative action program at GAO for disabled veterans. The affirmative action plan required by GAO Order 2306.1 was a modest effort that did not promise to deliver anything tangible to the beneficiaries of the plan. It was focused on increasing the employment opportunities for disabled veterans through enhanced recruiting efforts, removing physical barriers, and seeking to ensure equal opportunity, *i.e.*, the absence of any discriminatory treatment. There is no evidence that these objectives were not met.

Recruitment was not an issue in this proceeding on behalf of individuals who were already employed by Respondent and whose complaints about the absence of affirmative action focused exclusively on promotion. Similarly, physical accessibility or accommodation was not raised as an issue. Conceptually, at least, failure to provide accessibility or otherwise accommodate could impede promotion, but no such contention was made in this case.

Finally, equal opportunity, or the absence of discrimination, was not a direct issue in this case. Petitioner's claim was not one of discrimination, and had it been, he would have been required to have complied with administrative processing requirements through the Civil Rights Office prior to initiating a complaint with the Personnel Appeals Board. Nevertheless, evidence of discrimination

could have been considered as evidence of harm related to noncompliance with the affirmative action requirement contained in GAO Order 2306.1. Petitioner did not present any statistical evidence tending to show that the Agency discriminated against disabled veterans or against class members on account of their status as disabled veterans.

Petitioner has alleged that class members were denied equal opportunity because they were not provided an affirmative action program that mirrored that provided to women and minorities and, specifically, one that provided goals and timetables. I have rejected this contention, in holding that a "full measure of opportunity" did not include identical affirmative action plans. The provision of affirmative action for women and minorities does not constitute prohibited discrimination against disabled veterans.

Petitioner's testimony indicated a belief on his part that he was discriminated against by Respondent when he was passed over for promotion in 1988 and 1989 in favor of women. Testimony about this belief was not accompanied by any evidence in support thereof, except for overheard conversations that suggested to Petitioner that the two women were preselected for their respective promotions.

The only other testimony that could be construed as evidence of discrimination was that of Roger Carroll, Mr. Dowd's supervisor, at least for purposes of performance evaluation, for a period in 1985-86. Mr. Carroll testified that his superior instructed him to lower Petitioner's performance appraisal in certain elements.(TR 283). The final rating received by Petitioner in 1986 prevented him from being on the best qualified list during that promotion cycle.<sup>24</sup> Mr. Carroll stated an opinion that he was instructed to lower the rating to favor promotion opportunities for women. This opinion was not supported by any facts or specific knowledge on the part of Mr. Carroll.<sup>25</sup>

These two pieces of opinion evidence, standing alone as they do, without fact or evidence to support them, do not lead to a conclusion that Respondent was not living up to the objective of GAO Order 2306.1 to provide equal employment opportunity to disabled veterans.

#### **IV. Having shown no harm, Petitioner is not entitled to any relief.**

Petitioner has not proven entitlement to monetary damages under the theory and evidence advanced by him. The request for damages is, therefore, denied.

Although Petitioner has not requested injunctive relief, I have considered, *sua sponte*, the appropriateness of pursuing such relief by ordering some form of corrective action on the part of

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<sup>24</sup>There was no evidence about whether the rating originally proposed by Mr. Carroll would have resulted in Mr. Dowd's inclusion on the best qualified list during that cycle.

<sup>25</sup>Despite repeated questions, Mr. Carroll was unable to provide any foundation for his opinions regarding the lowering of Mr. Dowd's rating in 1986. He was, at the time, a GS-13, who was not directly involved in the promotion process. He had never sat on any promotion panels.

Respondent.<sup>26</sup> The Board does not take lightly the fact that the Agency failed to follow a course to which it had "unmistakably committed itself," that is, the development and implementation of affirmative action for disabled veterans.

However, from a review of the evidence produced during the many months this case has been before the Board, it is apparent that the course to which Respondent was committed was nebulous and of no certain benefit. One would hope that Respondent would not have promulgated an Order promising affirmative action for disabled veterans if it did not expect the plan to have been of some benefit. Intuition might reasonably lead one to believe that the affirmative action contemplated by GAO Order 2306.1 would have been of some benefit to members of the class. This intuition, however, does not provide an adequate basis upon which to order corrective action on the part of Respondent. Absent a showing of some harm, caused by the failure to develop and implement the affirmative action contemplated by GAO Order 2306.1, the Board would be hardpressed to identify a correction that should be undertaken by Respondent. Even considering this question in the context of the affirmative action plan that Petitioner contends should have been established, including goals and timetables, does not suggest a different answer.

The evidence established that the relative position of the class members among other GAO employee groups was a strong one. The general goal of affirmative action programs is to eliminate barriers to full participation in employment opportunity. The specific means employed to achieve this goal vary depending upon the barriers that have existed for the subject group. For women and minorities, affirmative action has been designed to remedy an imbalance in the workplace due to race and sex discrimination in the past. Goals serve this limited purpose and are eliminated once an imbalance no longer exists. For veterans, the purpose is to make up for lost time; affirmative recruitment practices, preferences in hiring and retention, and reemployment rights work to insure that they not lose ground as a result of having been out of the civilian labor market. For disabled veterans, the purpose is to insure entry into the labor market and the provision of whatever reasonable accommodation for the effects of the disability may be necessary to foster full participation in the workforce.

The class members were not shown to have encountered any barriers to full participation owing to their status as disabled veterans. The evidence did not establish, or even suggest, any specific action items that might have been appropriate subjects of injunctive relief from this Board. In these circumstances, I conclude that there is no form of injunctive relief that would be appropriate to this case.

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<sup>26</sup>Except for GAO Order 2306.1, Respondent was under no obligation to provide affirmative action for disabled veterans. It was free to repeal the order at any time, a course it elected in January 1992. Nevertheless, as part of its broad authority to grant relief from, and order corrective action for, the commission of prohibited personnel practices, the Board may, in appropriate circumstances, order injunctive relief; such relief might well include ordering some measures of affirmative action, for a specified period, to remedy the effects of a prohibited personnel practice.

## **CONCLUSION**

Based on the foregoing, Petitioner's request for relief is denied and his Petition for Review is DISMISSED, with prejudice to Petitioner and the class members.

### **Special Instructions Regarding Notice to Class Members**

The class members have been identified as those listed in Appendix B to this Decision.<sup>27</sup>

In an exercise of the discretion contemplated by FRCP 23(d)(2) (Federal Rules of Civil Procedure), I have determined that the class members should receive notice of the issuance of this Initial Decision and that such notice should be provided by Respondent. The notice to be provided is that set forth in Appendix C to this Decision.

To accomplish service of this Notice on the class members, I direct Respondent to provide, on or before November 27, 1995, to Petitioner and to the Board, a service list for the class members listed in Appendix B, indicating for each the address last known to Respondent.<sup>28</sup> Petitioner shall, on or before November 28, 1995, notify Respondent of any address changes known to him. Respondent shall, on or before November 29, 1995, serve or cause to be served on each class member listed in Appendix B a copy of the Notice set forth in Appendix C. For class members who are no longer employed at GAO, service shall be by regular first-class mail to the last known address or to a corrected address supplied by Petitioner. For class members who are employed at GAO, service shall be by internal mail and facsimile transmission.

**SO ORDERED.**

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<sup>27</sup>The specific members of this class were identified by Order dated March 22, 1995. Mr. Nielsen Wickliffe was subsequently identified as a member of the class.

<sup>28</sup>In the case of class members who are still GAO employees, a work address, including fax number, would be the most suitable address.