

ARTHUR W. BROUK v. U.S. General Accounting Office

Docket No. 01-07

Date Issued: November 16, 2001

Cite as: Brouk v. GAO, Docket No. 01-07 (11/16/01)

Before: Michael Wolf, Administrative Judge

Headnotes:

Discovery

Motion to Compel

ORDER

**PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.**

ARTHUR W. BROUK,)
)
)
 Petitioner)
)
)
 v.)
)
)
 UNITED STATES GENERAL)
 ACCOUNTING OFFICE,)
)
)
 Respondent)
 _____)

Docket No. 01-07

November 16, 2001

ORDER

Petitioner filed a Motion to Compel Discovery in this matter on October 18, 2001. The Agency's Reply was filed on October 29, 2001. Each disputed discovery request is discussed below.

Interrogatory 9/Document Request 3

Petitioner asked for information and documents pertaining to "each and every discrimination and/or EEO or CRO retaliation complaint filed against the Agency from January 1, 1994 to the present." The Agency contended that these requests are "overbroad, unduly burdensome, irrelevant, and vexatious."

The Motion is denied with respect to these two requests, except to the extent that the Agency shall provide information and documents as follows:

All EEO lawsuits, CRO complaints and PAB/OGC complaints filed since January 1, 1994 by employees of AIMD who alleged age discrimination and/or retaliation based on engaging in protected EEO activities.

Information and documents beyond these parameters are not likely to lead to the discovery of relevant information.

Interrogatory 10/Document Request 14

Petitioner requested a detailed description and related documents concerning "all complaints, grievances, criticism or proposed criticism, discipline or proposed discipline, and/or corrective action or proposed corrective action against each of "five named individuals. The Agency objected that the requests are "overbroad and unduly burdensome."

The Motion is denied with respect to these two requests, except to the extent indicated below, because these requests are both vague (*e.g.*, lack of a definition of "criticism") and overly broad (*e.g.*, they cover subject matters that are not reasonably related to the allegations in the Petition for Review). The Agency shall provide the following information and documents:

All complaints, grievances, proposed discipline, and proposed corrective actions against Neil P. Curtin, Lisa G. Jacobson, Thomas J. Brew, Linda M. Calbom and Elliott C. Smith¹ since January 1, 1994, where the subject of these actions was age discrimination and/or retaliation based on engaging in protected EEO activities.

Interrogatory 12

Petitioner requested the following:

Identify each and every communication . . . pertaining in any way to the specific personnel actions challenged in this action. Provide at a minimum the date of each communication, the parties to each communication, a brief summary of the communication, and identify each and every document related in any way to the communication.

The Agency found this request "over-broad and unduly burdensome."

¹ I am including these individuals based on Petitioners representation that these GAO employees were the "Agency officials who participated in selecting for the promotions that Complainant did not receive." Motion at 2. The Agency has not contested this assertion.

The Motion is granted with respect to this request. The Agency has not demonstrated that this request encompasses irrelevant information or that it would be unduly burdensome to comply with the request. Accordingly, the Agency shall supplement its response.

Document Request 6

Petitioner sought "all correspondence and other writings, of whatever nature, including but not limited to electronic mail, that relate to Complainant and are not included in Complainant's official personnel file. . . ." The Agency objected to this request as "overbroad, unduly burdensome, and irrelevant," but nevertheless produced responsive documents, with one exception:

It is possible that relevant e-mail communications existed for which GAO has no copy because GAO's e-mail system automatically deletes e-mail messages after 90 days. However, an archive copy is created and maintained electronically. GAO does not have the in-house ability to search the e-mail archive. GAO is willing to contract for an e-mail archive search to locate and retrieve any archived copies of e-mail communications. We believe that petitioner should bear the cost of this search and will not begin a search until we have heard from petitioner.

Petitioner responded in his Motion that the

Agency has stated no reason why it cannot or should not cover the costs of this production. We submit that the Agency should bear this cost as part of its normal record-keeping expenditure. Complainant has already expended substantial resources in the prosecution of this case. [Motion at 3.]

In its opposition to the Motion, the Agency stated that "[i]t would cost approximately \$360,000 and take approximately nine months to search the six and one-half years of electronic archives covered by petitioner's requests." Reply at 10.

Petitioner's document request is clearly overbroad, since it would encompass communications that do not have any connection to the allegations in the Petition for Review. For example, this request would encompass an ordinary e-mail request for sick leave, even if it

has no bearing on this case. Similar communications of a purely administrative and irrelevant nature would be swept within the net of this request.

To the extent that archived e-mail may include relevant communications, I agree with the Agency that the cost of searching the archived e-mail to locate relevant information should rest with Petitioner. That Complainant has already expended "substantial resources" in the litigation of this case is not a sufficient reason to impose such a high financial burden on the Agency for the completion of discovery requested by Complainant, especially when the discovery is framed so broadly. Nor has Complainant made a showing that the archived e-mails are especially important to this case or that they are not likely to be duplicative of paper documents that he has already received in discovery. Assuming the accuracy of the Agency's prediction of the expense for compiling the relevant archived e-mails, that burden is too high to be justified as an administrative expenditure that a party would normally incur in a case before the PAB.

Accordingly, I am denying the Motion with respect to this request. However, I will permit Petitioner to retain his own expert to determine whether an alternative means of gathering this information, at less expense and in less time, can be arranged. I am directing the Agency to have its information technology employees and its outside contractor consult with Petitioner's expert, if he/she so wishes. If, as a result of these efforts, Petitioner believes that the relevant archived e-mails can be assembled at less expense and in a shorter period of time than was represented by GAO, then Petitioner may renew the motion for the production of this information. However, these steps must be undertaken expeditiously and Petitioner must file any new motion within 14 calendar days from the date of this Order.²

²This ruling also applies to Interrogatories 2, 4-8 and 16, and to Document Requests 15-17.

Document Request 10

Petitioner sought "[e]ach document relating to each communication (including but not limited to oral discussion, notes, memos and electronic mail) pertaining in any way to the specific personnel actions challenged in this action." The Agency again objected that this request is "overbroad and unduly burdensome." Although the Agency represented that it had produced some of the information, it again noted that archived e-mails exist and that Petitioner should bear the cost of retrieving those e-mails.

Unlike Document Request 6, this request is properly limited to relevant information. However, the financial burden of producing the archived e-mails still exists, as detailed above. For this reason, the same restrictions on production of this information that were applied to Document Request 6 shall also apply to Document Request 10.

Interrogatory 20

Petitioner requested information pertaining to a "visiting professor program," which the Agency asserted does not exist. The Agency stated that it has a "visiting fellows program" and that it has already produced the information relating to this program. Based on this representation, the Motion is denied with respect to this Interrogatory. However, Petitioner is given leave to file a motion to reconsider this ruling if it has information that contradicts the Agency's representations. Such motion must be filed within 14 days from the date of this Order.

SO ORDERED.

Date: November 16, 2001


Michael Wolf
Administrative Judge