

NICHOLAS CARBONE v. U.S. General Accounting Office

Docket No. 72-704-02-85

Date of Decision: February 16, 1988

Cite as: Carbone v. GAO, Docket No. 72-704-02-85 (2/16/88)

Before: Jessie James, Jr., Chairman

Headnotes:

Grounds for Review

Interest of Justice

Motions Practice

Request for Reconsideration

ORDER

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

* * * * *
NICHOLAS CARBONE,
Petitioner
v.
GENERAL ACCOUNTING OFFICE,
Respondent
* * * * *

Docket No. 72-704-02-85

ORDER

This matter is before the Board on Respondent's motion for reconsideration of the Presiding Member's August 31, 1987, decision holding that Respondent had violated Petitioner's rights under the Age Discrimination in Employment Act.

Respondent filed its motion for reconsideration of the Presiding Member's decision on October 26, 1987. Petitioner filed his opposition to Respondent's motion on December 23, 1987. On January 4, 1988, the Agency filed a motion for leave to file a response to Petitioner's opposition. Although we customarily decline to grant motions for leave to file additional responsive pleadings, we granted Respondent's motion, primarily because of the unusual procedural history of this case. On January 19, 1988,

the Agency filed its response to Petitioner's opposition to Respondent's motion for reconsideration.

Petitioner has now filed a combined motion to strike the Agency's response as an inappropriate pleading. Alternatively, Petitioner requests an order allowing him to reply to the Agency's response to Petitioner's opposition. Petitioner objects to the Agency's reply brief on two grounds. First, Petitioner argues that the Agency, in stating the grounds for their request for the additional response, misrepresented to the Board that Petitioner's counsel did not object to the filing of Respondent's additional brief. Petitioner states that he did not agree to the Agency's filing of an additional response, but instead, agreed not to object to the Agency's request for additional time to file a responsive brief.

We are uncertain what agreement, if any, the parties reached regarding the Agency's motion for leave to file an additional responsive pleading. However, we are certain that the Agency's January 4 motion clearly requested leave to file an additional response and we are equally certain that Petitioner did not at that time object to the Agency's motion. Moreover, it was fully two weeks after Respondent filed its additional pleading that Petitioner came before us with his combined motion. Petitioner's failure to file a timely objection to Respondent's motion alone is sufficient grounds for us to deny his objection. Further, we fail to understand what Petitioner intended when he agreed not to object to Agency's request for additional time to file a responsive

brief. The position in which Petitioner finds himself is of his own making.

Petitioner also objects to the Agency's additional response on the basis that the pleading is not responsive to his opposition to the Agency motion to reconsider. We disagree. Both the Respondent's opening brief and reply brief make the same argument: that the Presiding Member's decision is inconsistent with the law and is not supported by substantial evidence. There is nothing in Respondent's additional pleading that indicates that Respondent has changed the grounds upon which it based its request for reconsideration. Respondent requested leave to file an additional response in order to more fully explain its position in light of the factual and legal statements contained in Petitioner's opposition. This we think Respondent has done, and find no grounds upon which to grant Petitioner's motion to strike.

In the alternative, Petitioner requests permission to reply to the Agency's response to his opposition. As grounds for his motion, Petitioner argues that the Respondent's brief contains new materials and arguments presented to the Board, and Petitioner requests an equal opportunity to embellish his position before the Board.

We find none of Petitioner's grounds for allowing further response persuasive. However, having already taken the highly unusual tact of allowing the Agency to respond further, we think the interests of justice may best be served by allowing Petitioner an opportunity to submit a second substantive brief.

Accordingly, the Petitioner's motion to strike the Agency's response to Petitioner's opposition is hereby DENIED. The Petitioner's alternate motion to allow Petitioner an opportunity to file a second responsive brief is GRANTED. It is hereby ORDERED that Petitioner shall have until February 25, 1988, to submit his additional pleading.

Date:

2/16/88