

JAMES B. DOWD v. U.S. General Accounting Office

Docket No. 91-03

Date Issued: January 13, 1994

Cite as: Dowd v. GAO, Docket No. 91-03 (1/13/94)

Before: Nancy A. McBride, Administrative Judge

Headnotes:

Discovery

Motion to Compel

MEMORANDUM AND ORDER

to respond by any particular date. At the hearing on Respondent's Second Motion to Compel, Counsel for Petitioner continued to argue the merits of whether Petitioner should have to answer these interrogatories. Counsel for Petitioner argued that Petitioner's beliefs as to the required contents of an affirmative action plan were irrelevant and that the question called for legal conclusions.

These arguments were fully aired during consideration of Respondent's First Motion to Compel as it related to Interrogatories 4, 41, 47 and 51 and led to the bifurcation of the trial proceedings in this matter. The purpose of the first stage will be to determine the legal requirements for the required affirmative action plan. Once this is established, the purpose of the second stage will be to determine what, if any, harm accrued to Petitioner and to the class members as a result of the absence of an affirmative action plan.

For unknown reasons, Petitioner has demonstrated an unwillingness or an inability to describe that to which he believes he was entitled, the absence of which he contends caused him harm. It is Petitioner's burden to assert and prove these matters. Respondent is entitled to discover Petitioner's beliefs and the bases therefore. Petitioner was given until December 3, 1993 to respond fully to Interrogatories 4, 41, 47 and 51.

To the extent that Petitioner maintains that these interrogatories call for a legal conclusion and, therefore, cannot be answered by Petitioner, then Counsel for Petitioner was directed to file a legal memorandum setting forth the legal basis for the

claim, specifically addressing, as a legal matter, the scope and content of GAO's self-imposed duty to provide affirmative action for disabled veterans. This brief was due on or before December 10, 1993.

Respondent's Motion for an Order Requiring Petitioner to Submit a Proposed Affirmative Action Program and Plan was denied. Although Petitioner is required to provide discovery and/or a legal memorandum as set forth above, he is not required to draft an affirmative action plan.

Petitioner's Second Motion to Compel and the Supplement thereto raised several matters, most of which were withdrawn at the hearing and will not be addressed on the merits. This is the second occasion on which Counsel for Petitioner has appeared at a hearing requested by him to consider argument on his motion to compel. On both occasions, Counsel for Petitioner was not familiar with the content of his written motions and not prepared to pursue many of the points raised therein. At the hearing that is the subject of this Memorandum and Order, Counsel for Petitioner withdrew all but one request contained in his motion and supplement. Upon prompting by the Administrative Judge, he agreed that his request regarding SES contracts was unresolved and that he wanted a ruling on it. Then, upon prompting by Petitioner, he asked that a request to reserve the right later to request correcting of missing or erroneous data on the disk data be deferred until after the first hearing. Therefore, as requested by Counsel for Petitioner, there was no ruling on this request.

Counsel is cautioned that his lack of attention to matters raised in his own pleadings before this Board raises a serious question as to whether such pleadings were filed in good faith.

At the hearing, Petitioner sought an order compelling the production of an index of personnel documents produced by Mr. Felix Brandon, through a subordinate employee, at the direction of Counsel for Respondent. Counsel for Respondent contends that the document is privileged under the attorney work product doctrine and that Respondent has fully complied with all outstanding discovery requests and will continue to supplement its responses should additional responsive documents come to its attention.

Upon further consideration of this request, I have concluded that the document is responsive to the document request served on Mr. Brandon; it is not duplicative of documents previously produced; and it is not privileged under the attorney work product doctrine. The document in question was not prepared in anticipation of litigation; it was prepared to enable Counsel for Respondent to determine the completeness of Respondent's document production. This does not make it the work product of Counsel for Respondent.

Respondent was under no obligation to compile the index, but, having done so, it created a document that is a proper subject of discovery. Had the contested document been an analysis of certain documents or witness interviews under the explicit direction of counsel, the work product doctrine might apply. The mere tabulating of a record of all episodes of reporting data in

response to a variety of personnel requests does not constitute an attorney's work product. It is, therefore, ordered that Respondent shall comply with this request on or before January 19, 1994.

Petitioner also sought an order compelling the appearance of Mr. Brandon at a continuation of his deposition, his first deposition having been cut short by Petitioner on the asserted grounds of Mr. Brandon's failure to produce certain documents and his refusal to answer certain questions at the direction by Respondent's counsel. Regardless of whether Petitioner was justified in terminating Mr. Brandon's deposition, Mr. Brandon continued to be available for deposition and Respondent communicated the fact of this availability to Petitioner. In view of Respondent's continuing willingness to make Mr. Brandon available for further deposition, the motion for an order compelling his appearance was denied.

Petitioner also sought an order compelling production of all executed SES contracts, copied in their entirety, for review by Counsel, Petitioner and selected class members. Respondent objected to such broad dissemination of these documents, in which the subject SES employees have a right of privacy, and offered several more limited ways of presenting the information to Counsel for Petitioner. The question was resolved at the discovery hearing as follows:

Counsel for Petitioner was authorized to inspect himself full copies of the executed SES contracts under a protective order forbidding disclosure of their contents to anyone, including

Petitioner and members of the class. If this protected inspection reveals anything suggesting to Counsel for Petitioner the need for modification of this order, he is free to present a motion to that effect, setting forth the grounds therefor. Counsel for Petitioner may obtain, upon request, copies of SES contracts, redacted of all information not related to EEO and/or affirmative action.

Respondent's Motion for Enlargement of Time to File Dispositive Motions was granted, and the time for filing such motions was extended to on or before January 25, 1994.

Other dates were modified as follows:

The date for the exchange of prehearing briefs, proposed findings of fact and witness lists was changed to February 22, 1994.

The final prehearing status conference was set for March 1, 1994, and the hearing was set for March 10, 1994.

However, due to scheduling conflicts for Counsel for Petitioner, the final prehearing status conference is hereby changed to March 11, 1994 at 10:00 a.m. in the offices of the Personnel Appeals Board. The hearing will begin on March 21, 1994 and run on consecutive business days until finished. The hearing is expected to last two days, but four days have been set aside to avoid delay in the event that additional hearing time is required. The hearing shall commence at 9:00 a.m. and end at 4:30 p.m. each day, unless otherwise noticed.

SO ORDERED.

DATED: January 13, 1994

NS/
Nancy A. McBride
Administrative Judge