

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

**Docket No. 91-03**

**Date of Decision: January 22, 1993**

**Cite as: Dowd v. GAO, Docket No. 91-03 (1/22/93)**

**Before: Nancy A. McBride, Administrative Judge**

**Headnotes:**

**Attorney Fees**

**Class Action**

**Prevailing Party**

**MEMORANDUM AND ORDER**

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

JAMES B. DOWD,	)	
	)	
Petitioner,	)	
v.	)	Docket No. 91-03
	)	
	)	
UNITED STATES GENERAL	)	
ACCOUNTING OFFICE,	)	
Respondent.	)	
	)	

MEMORANDUM AND ORDER

Having considered Petitioner's Motion for Interim Attorneys' Fees and for Continuing Attorneys' Fees on a Monthly Basis Henceforth and Respondent's memorandum in opposition thereto, the Petitioner's motion is denied. For reasons more fully set forth below, I am of the opinion that Mr. Dowd, and the class he represents, are not prevailing parties at this stage of the litigation.

Petitioner contends that, based on the Board's Decision of February 24, 1991, he "substantially prevailed by the granting of summary judgment as to liability." On this basis, he seeks payment of attorneys' fees and costs incurred by or on behalf of Mr. Dowd and the class through May 7, 1992<sup>1</sup> and continuing fees

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<sup>1</sup>Notwithstanding the May 7, 1992 cut-off in the Motion for Fees, time sheets through July 31, 1992 are appended to the motion. The denial of this motion is unaffected by the date through which fees are sought, whether May 7, 1992 or July 31, 1992.

on a monthly basis.

Respondent objects, contending, inter alia, that: (1) the case has not been finally resolved; (2) petitioner failed to satisfy the statutory eligibility requirements for recovery of attorneys' fees--i.e., petitioner and the class are not prevailing parties and an award of attorneys' fees is not warranted in the interest of justice; and (3) Petitioner's Motion for Fees is untimely.

This motion is denied on the ground that Petitioner has not satisfied the statutory requirements governing the award of attorneys' fees. Therefore, no opinion is expressed on the availability of fees prior to a final case decision or on the timeliness of Petitioner's request, approximately nine months after the summary judgment decision.

#### ANALYSIS

The Board's authority to award attorneys' fees derives from 4 C.F.R. § 28.89 which states, in pertinent part, that "... the petitioner, if he/she is the prevailing party, may submit a request for the award of reasonable attorneys' fees and costs." Such fees are to be awarded consistent with the standards of 5 U.S.C. § 7701(g) which sets forth the appellate procedures of the Merit Systems Protection Board.

Section 7701(g)(1) contains two express conditions for the award of attorneys' fees: the petitioner must be the prevailing party and the award must be warranted in the interest of justice. In addition, courts and boards have added the subsidiary

conditions that an attorney-client relationship must exist, that the fees must be incurred pursuant to an appeal, and that the fees must be reasonable. Sterner v. Department of the Army, 711 F.2d. 1563 (Fed. Cir. 1983)

The Merit System Protection Board has ruled that an appellant may be deemed a prevailing party for purposes of an attorneys' fee award "if he or she has obtained all or a significant part of the relief sought in petitioning for appeal." Hednick v. Federal Mediation and Conciliation Service 4 M.S.P.B. 431, 434 (1980).

The concept of prevailing party has received considerable judicial attention and analysis in cases arising under the Civil Rights Attorneys' Fee Award Act of 1976 (42 U.S.C. § 1988) and Titles II and VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a-3(b) and 2000e-5(k)). A prevailing party is one who succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) citing, Nadeau v. Helgemoe, 581 F.2d 278-96.<sup>2</sup> The extent of the relief and its centrality to the plaintiff's position are factors in assessing the amount of a "reasonable" fee, but as long as the plaintiff can show that he or she has succeeded on a significant issue, thereby achieving some of the benefit sought, he or she will be

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<sup>2</sup>Hensley involved a claim for attorneys' fees under 42 U.S.C. § 1988. The Court stated that the standards set forth in that opinion are generally applicable in all cases in which Congress has authorized an award of attorneys' fees to a "prevailing party." Hensley at n.7.

eligible for, although not necessarily entitled to, a fee award.  
Id.

The Supreme Court has elaborated on the definition of "prevailing party" in several cases, most recently in Farrar v. Hobby, 113 S. Ct 566, 61 U.S.L.W. 4033 Dec. 14, 1992, 60 FEP Cases 635 (1992). "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought." Farrar, 60 FEP 633, citing Hewitt v. Helms, 482 U.S. 755, 760 [44 FEP Cases, at 17] 1987. The relief must materially alter "the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Id.

Petitioner's success on the summary judgment motion and cross-motion achieved for him the opportunity to demonstrate cognizable injury, if any, caused by respondent's failure to implement affirmative action for disabled veterans, and any consequent entitlement to relief. The mere pronouncement that respondent has violated a duty by failing to follow its own personnel order, unaccompanied by an enforceable judgment on the merits, does not confer upon the petitioner prevailing party status. " '[T]he moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status. Hewitt, 482 U.S. at 762 [44 FEP Cases, at 17]. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a

judgment, consent decree, or settlement against the defendant." Farrar, Supra, at 636.

Petitioner's motion for fees was filed before the Board's decision to grant Petitioner's Motion for Certification of a Class. I have considered whether, by virtue of the decision in favor of class certification, petitioner and the class he represents, should be considered prevailing parties. Based on the foregoing analysis, I conclude that they should not. On a motion for class certification, the inquiry is emphatically limited to whether the requirements for class certification are met; the merits of the claim may not be considered. Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178, 94 S. Ct. 2140, 2152-53, 40 L. Ed. 2d 732 (1974). Although prevailing in a motion for class certification is, no doubt significant to the proponent, it does not, of itself, achieve any of the benefit for which the action was instituted. While it may be considered a significant procedural victory, it does not provide petitioners with an enforceable judgment, consent decree or settlement.

Inasmuch as petitioners are not prevailing parties at this stage of the litigation, the Motion for Interim Attorneys' Fees and for Continuing Attorneys' Fees on a Monthly Basis is hereby DENIED.

DATE: 1/22/93

NS  
Nancy A. McBride  
Administrative Judge