

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

Docket No. 91-03

Date Issued: December 12, 1994

Cite as: Dowd v. GAO, Docket No. 91-03 (12/12/94)

Before: Nancy A. McBride, Administrative Judge

Headnotes:

Damages

Discovery

Motion to Compel

MEMORANDUM AND ORDER

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

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James B. Dowd,
Petitioner,

v.

United States General
Accounting Office,
Respondent.

Docket No. 91-03

MEMORANDUM AND ORDER

This order will memorialize the rulings made at the discovery conference of December 8, 1994, in the above-entitled matter. The conference was scheduled by order of the Administrative Judge because the parties were unable to effect a reasonable plan or program for prehearing discovery which resulted in the filing of a number of discovery-related motions.

Specifically, on November 23, 1994, Petitioner's attorney filed a Motion to Compel, asking, in pertinent part, for an order requiring Respondent to produce certain statistical information which is asserted to be necessary for the calculation of damages in this case (and/or requiring Respondent to perform the calculations) and compelling the deposition of certain named individuals by written interrogatory.

On November 28, 1994, Respondent filed a Motion to Compel responses from Petitioner to its Fourth Set of Interrogatories # 55, 56, 57, 58, 59, 61, 62, 63, 66, 67 and 68. The record reflects

that on November 17, 1994, Petitioner's attorney made a motion to strike¹ Respondent's "latest [fourth] set of interrogatories." In his November 17 motion, Petitioner also requested a Protective Order preventing "oppressive and expensive discovery requests" of information which is claimed to be "uniquely at [the] disposal" of the Respondent. Specifically, Petitioner objected to Respondent's Fourth Set of Interrogatories #55, 56, 57, 58, 59, 61, 62, 63 and 68.

The Administrative Judge convened the discovery conference to hear oral argument and rule on the parties' cross-Motions to Compel and Petitioner's requests for a Protective Order. It should be noted that on December 6, 1994, Petitioner's attorney filed a motion for a continuance of the discovery conference for "at least" ten days. This motion asserted that the testimony of three "expert" witnesses (a data processor, a rehabilitation expert and an economist/statistician), as well as one named class representative, was necessary at the conference, and that several of these parties were not available on the date set. The Administrative Judge denied the motion for the continuance on several grounds. First, time was of the essence in scheduling the discovery conference as December 9, 1994, had been previously scheduled as the discovery cut-off date. Moreover, Petitioner's attorney orally agreed to the date set for the conference prior to the scheduling order being issued. Finally, the motion for a

¹ This motion was contained within an "objection" to Respondent's November 7, 1994 response in opposition to Petitioner's October 17, 1994 motion for sanctions.

continuance provided inadequate justification for why, at a conference between the judge and respective counsel for the parties, witnesses were necessary.²

Therefore, the discovery conference proceeded on December 8, 1994. After lengthy argument by counsel on both sides, as well as the testimony of Petitioner's expert witness, Richard J. Lurito, Ph.D., an economist and statistician, regarding what he had been advised by counsel for Petitioner were several significant "data management and data integrity problems," a number of rulings were made:

1. In response to Petitioner's request, Respondent has stipulated that the raw data (employee histories) it has provided to Petitioner is true and correct to the best of Respondent's knowledge and belief. If Petitioner's attorney can identify any errors in the data, he should attempt to resolve those errors with Respondent's counsel.

2. In the interest of narrowing the damages issues to conserve the resources of both parties, the Administrative Judge will issue a decision prior to the damages hearing concerning whether appropriate comparisons can be made between class members and other groups of GAO employees (referred to by Petitioner's expert witness as the "control group"). At the least, this decision will

² One of Petitioner's expert witnesses, Richard J. Lurito, an economist/statistician, did testify at the discovery conference. It is noted that Dr. Lurito's testimony was of little evidentiary value at the conference as he had not yet reviewed the data at issue and could only speak hypothetically based on the representations of Petitioner's attorney. It should also be noted that two class representatives attended the conference.

determine whether the results of affirmative action plans for women and minorities, as compared to the experiences of class members, provide a basis for determining damages to the class members. **Briefs on this issue are due from both sides by 2 p.m. on Friday, December 16, 1994. Reply briefs are due by 5 p.m. on Tuesday, December 20, 1994.**

3. Petitioner's attorney's written submissions in support of his Motion(s) to Compel and his articulation of his requests during oral arguments, were confusing and imprecise. During the course of the proceedings, Petitioner's attorney frequently changed the nature of the discovery requests he wished compelled from Respondent.

After much discussion among the Administrative Judge, the parties and Petitioner's expert witness, it was determined that Petitioner's request was that Respondent provide the data (employee histories), which it had previously supplied in raw data form in response to earlier discovery requests, in a data-base format. Petitioner had initially objected to Respondent's production of this raw data at an earlier point in these proceedings, but withdrew that objection at an August 30, 1993 hearing on a motion to compel. To the extent that Petitioner's argument on the instant motion was an attempt to renew his earlier motion, it is found that the Respondent fully satisfied the production request when it supplied the raw data on disk, along with the file format and printouts of the data.

Petitioner's request for the data in data-base format was nevertheless considered to determine if there were any equities in favor of requiring the agency to honor this request. The Administrative Judge concluded that there were not. Upon the representation of Respondent, it appears that the agency does not retain the data at issue in an existing data-base, and it would require the same effort for the agency to convert the information to this form as it would Petitioner. It is noted that Petitioner has been in possession of the data in raw form for approximately 15 months, and has neither converted it to a data-base format nor requested that the agency do it until the present time.

Petitioner's attorney also sought to have Respondent compelled to perform the necessary calculations and data manipulations to enable him to calculate damages. Petitioner contends that the agency can do such manipulations quite easily. Although Petitioner made this request in the context of his motion to compel, he was unable to point to any questions or precise requests for information which Respondent had not answered. Ordinarily a party is under no obligation to do damages calculations for an opposing party. However, mindful of the expenses involved to Petitioner in this phase of the case, the Administrative Judge decided to extend the discovery period for the sole purpose of allowing Petitioner time to reformulate certain informational requests to allow for more precise responses. Therefore, Petitioner will be allowed to formulate **ten (including subparts) questions** for Respondent to answer; said questions must be informational requests specific in

nature, focused and relevant to the damages issue. To the extent that it does not impose an undue burden on Respondent, Petitioner will be permitted to ask, and Respondent should provide responses to, questions which require the manipulation by Respondent of raw data (employee history records) already provided to Petitioner. **Petitioner's ten questions must be served on Respondent no later than 5:00 p.m. on December 29, 1994.** Under this expanded schedule, discovery is to be completed no later than **January 18, 1995.**

4. After considering Respondent's motion to compel responses to certain questions in its fourth set of interrogatories, the Administrative Judge has found the bulk of Petitioner's objections to these interrogatories to be unfounded. The identified interrogatories call for factual information related to Petitioner's claim rather than legal conclusions or attorney work product as claimed by Petitioner's attorney. Therefore, Petitioner is hereby compelled to provide responses to the questions Nos. 61, 62, 63, 66 and 67 in Respondent's Fourth Set of Interrogatories. In addition, Petitioner will supplement the responses already served on Interrogatories (Fourth Set) Nos. 55, 56, 58 and 59, as well as provide answers to Interrogatory No. 68 as it becomes available. Respondent withdrew its request for a compelled response to Interrogatory No. 57.

5. In order to give the Petitioner additional time to complete the desired data analysis, the hearing on damages previously scheduled for the week of January 9, 1995, is continued until **the week of April 24, 1995.** This date was based on the

representation of Petitioner's expert that the necessary tasks could reasonably be completed and analyzed by the middle of March 1995.

IT IS SO ORDERED.



Nancy A. McBride
Administrative Judge

Date: December 12, 1994