

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

Docket No. 91-03

Date Issued: February 1, 1995

Cite as: Dowd v. GAO, Docket No. 91-03 (2/1/95)

Before: Nancy A. McBride, Administrative Judge

Headnotes:

Discovery

Motion to Compel

Protective Order

ORDER

order were received by Respondent on November 18, 1994. On November 28, 1994, Respondent filed a motion to compel responses to its fourth set of interrogatories.

On December 12, 1994, the Administrative Judge ordered Petitioner to respond to Interrogatories Nos. 61, 62, 63, 66 and 67. In addition, Petitioner was ordered to supplement the responses already served for Interrogatories Nos. 55, 56, 58 and 59, as well as to provide answers to Interrogatory No. 68 as it became available. The Order noted that Respondent withdrew its request for a compelled response to Interrogatory No. 57. In the Order, no date was specified for Petitioner's compelled responses. However, January 18, 1995 was set as the cut-off date for discovery, and therefore, Petitioner's responses were due no later than that date.

To date, Petitioner has failed to file the required responses to Respondent's fourth set of interrogatories. Petitioner has not offered an excuse or explanation for his failure to comply with the December 12, 1994 order, and, at least as it relates to the fourth set of interrogatories, has not opposed Respondent's current motion to compel. The Administrative Judge is at a loss to understand Petitioner's failure to comply with her discovery order. Therefore, **Respondent's motion to compel responses to Interrogatories Nos. 55, 56, 58, 59, 61, 62, 63, 66 and 67 is granted. Petitioner is ordered to serve complete and responsive answers to these interrogatories on Respondent no later than 5 p.m.**

on February 10, 1995. In addition, Petitioner shall respond to Interrogatory No. 68 as soon as the information becomes available.

FIFTH SET OF INTERROGATORIES

Respondent's motion to compel also requests an order requiring responses to its fifth set of interrogatories (Interrogatories No. 69-85, inclusive, and Request for Production of Documents Nos. 1 and 2). Respondent's fifth set of interrogatories was served on Petitioner on November 25, 1994, and responses were due by December 9, 1994. The record indicates that again Petitioner failed to file any response or objection to this set of interrogatories until January 30, 1995, when he filed the present motion for a protective order in response to Respondent's motion to compel.

The Personnel Appeals Board's regulations require a party to respond to a discovery request within twenty days after service of the request. 4 C.F.R. §28.42(d)(2). In addition, the regulations require any request for a protective order to be filed within this same twenty days. 4 C.F.R. §28.42(d)(3). Motions to compel must be filed within ten days of the expiration of the time limit for responses when no response, or an alleged inadequate response, is received. 4 C.F.R. § 28.42(d)(4). Therefore, it appears from the record that both present motions by Respondent and Petitioner are out of time. However, the Administrative Judge recognizes that Respondent may have relied on the January 18, 1995 discovery cut-off date set in the December 12, 1994 order as an extension of Petitioner's time to answer the fifth set of interrogatories, which were originally due on December 9. Petitioner, on the other hand,

seems to mistakenly believe that his responses were due by February 10, 1995. This misunderstanding may stem from an order of January 20, 1995, setting February 10 as the deadline for Respondent's response to Petitioner's discovery request. This order did not affect the timing of Petitioner's responses to Respondent's discovery. However, despite the untimeliness of both motions, the Administrative Judge will consider them on their merits in the interest of expediting the already tortured course of discovery in this case.

Petitioner's General Objection No. 1 to Respondent's fifth set of interrogatories is overruled. The basis of this objection is a tired refrain by Petitioner which plainly has no applicability to the questions posed in the fifth set of interrogatories. For example, Interrogatory No. 69 simply asks Petitioner to identify deposition witnesses who he contends made certain admissions about GAO's affirmative action program. Overall, Interrogatories Nos. 69-84 seek clarification or explanation of Petitioner's own statements. Clearly, it is within Petitioner's own knowledge what he meant or referred to, and upon what evidence he based certain statements.

Petitioner's General Objection No. 2 regarding the relevance of the fifth set of interrogatories is also overruled. In his objection, Petitioner mistakenly characterizes the one remaining issue in the case as the "quantum of damages." Rather, the issue still to be determined is what, if any, cognizable harm resulted to the Petitioner class as a result of Respondent's failure to provide

an affirmative action plan for disabled veterans as required by GAO Order 2306.1. While much of the information sought in the fifth set of interrogatories may ultimately be deemed irrelevant, it is Petitioner who has suggested reliance on this information, and Respondent is entitled to learn from Petitioner the facts upon which he bases certain contentions. For the same reasons, Petitioner's specific objections to Interrogatories Nos. 79, 80, 81, 82, 83 and 84 on the grounds of relevance are also overruled.

Petitioner's motion for a protective order is **denied**. As discussed above in overruling Petitioner's General Objection No. 1, it is simply not correct to state that Petitioner cannot answer the fifth set of interrogatories until Respondent produces information "uniquely available" to GAO. Rather the fifth set of interrogatories seeks explanation from Petitioner about his own statements and contentions.

Petitioner has also noted objections to Respondent's two requests for production of documents. With respect to request No. 1, Petitioner objects on the ground that "the documents have not been fully identified yet since they will be developed with information that has not yet been furnished." This is not a sufficient basis for an objection. However, it would appear that the request may call for material that would be protected by the attorney work product privilege. Certainly, any exhibits which Petitioner intends to introduce will have to be submitted at the appropriate time and, as has been ruled in this and other discovery orders, Petitioner must provide discovery on the theory and basis

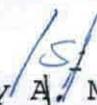
of his claim for damages. He does not, however, have to produce all documents that include "calculations, comparisons, evaluations, or estimations of damages..."

Respondent's document request No. 2 seeks production of all documents which relate in any way to the responses to Interrogatories Nos. 69-84. Petitioner states as the basis for his objection to this request that it calls for legal conclusions, violates the attorney work product privilege, and is premature. This objection is without merit and is overruled. On the face of it, the request does not seek documents that would be privileged. If there are specific documents to which Petitioner wishes to assert a privilege, he is directed to comply with paragraph H of the instructions outlined in the fifth set of interrogatories.

Therefore, Petitioner is ordered to serve full and complete responses to Interrogatories Nos. 69-84 on Respondent by no later than 5 p.m. on February 10, 1995. To the extent that the "answers" provided by Petitioner in his papers filed on January 30, 1995, to Interrogatories Nos. 79, 80, 81, 82, 83 and 84 are not full and complete responses, they should be supplemented by the February 10 deadline. Petitioner is also ordered to comply with Respondent's document request No. 2, including any assertions of privilege relating to particular documents, by February 10, 1995.

SO ORDERED.

DATED: February 1, 1995


Nancy A. McBride
Administrative Judge