

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

Docket No. 91-03

Date of Decision: April 14, 1995

Cite as: Dowd v. GAO, Docket No. 91-03 (4/14/95)

Before: Nancy A. McBride, Administrative Judge

Headnotes:

Subpoenas

Timeliness

ORDER

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

95 118

James B. Dowd,
Petitioner,

v.

United States General
Accounting Office,
Respondent.

Docket No. 91-03

ORDER

The following Order is intended to dispose of Petitioner's "Motion In Request For Issuance of Subpoenas Out of Time," filed on April 13, 1995, and objected to orally by Respondent on that same date. In that motion, Petitioner requests that subpoenas be issued requiring the attendance and testimony of three witnesses now retired from GAO, Alexander Silva, Arnold Jones and Felix Brandon, at the hearing in this case scheduled for the week of April 24, 1995.

Personnel Appeals Board (PAB) regulations require a motion for the issuance of a subpoena to be submitted to the Administrative Judge "at least 15 days in advance of the date scheduled for the commencement of the hearing." 4 C.F.R. §28.46(b). Petitioner's motion was submitted only 10 days prior to the April 24, 1995 scheduled commencement of the hearing in this matter. Counsel for Petitioner explains the failure to file a timely motion on an "inadvertent" error on the part of counsel in computing the

relevant time frame, and on a "temporary overload" in counsel's office caused by personnel turnover. Counsel for Respondent objects to the granting of the untimely motion, noting that all three potential witnesses have been known to Respondent for years, and that the commencement date of this hearing was set several months ago.

This Board has the power to subpoena witnesses in proceedings before it. However, with that power comes a responsibility to ensure that reasonable steps are taken to avoid imposing an undue burden on a person subject to a subpoena. The 15-day rule for motions for subpoenas is designed to allow subpoenas to be issued in a manner which gives the person subject to it reasonable advance notice of the requirement of their appearance at a Board proceeding. Witnesses no longer working for GAO may have to make arrangements to be absent from other employment or to travel to this area. Therefore, the Board generally requires strict adherence to the time frames outlined in its regulations. It is only on rare occasions, when necessitated by the interests of justice, that the Board will exercise its discretion to waive this time limit.

It is noted that Petitioner has deposed all three of the individuals for whom he now seeks a subpoena. After reviewing these depositions, it is further noted that the depositions covered the same topics as Petitioner's current representation of their proffered testimony at the hearing. The parties have stipulated that the transcripts of the depositions may be entered into the

record as part of the evidence taken at the hearing, subject to Respondent's right to call these witnesses, if it wishes, for cross examination purposes. With one exception, there has been no representation of potential testimony from these witnesses which differs significantly from that covered in during their depositions. That one exception is testimony concerning the implementation of the 1980-1985 affirmative action plans for handicapped individuals, including disabled veterans. It is noted that at the time of the depositions, the existence of these affirmative action plans was not known, at least by Petitioner and counsel. Therefore, there has been no other opportunity to elicit this testimony, which is directly relevant to the issues to be determined at this hearing.

For these reasons, Petitioner's motion for a subpoena is granted as to Alexander Silva. Mr. Silva was responsible for the development and implementation of the relevant affirmative action plans during the 1980-1985 time frame. He is in the best position to provide testimony on the relevant issues. On the other hand, the motion for subpoenas is denied as to Felix Brandon and Arnold Jones. Mr. Brandon, while GAO Director of Personnel during the relevant time period, has no special knowledge of the affirmative action programs because these programs were not housed in the Office of Personnel. Mr. Jones cannot testify to the development and implementation of the 1980-1985 plans, because he was not appointed to the Office of Affirmative Action Plans until September 1989, several years later. Testimony about his role after

