

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

**Docket No. 91-03**

**Date of Decision: May 13, 1992**

**Cite as: Dowd v. GAO, Docket No. 91-03 (5/13/92)**

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

**Headnotes:**

**Discovery**

**Motions Practice**

**Motion to Compel**

**Protective Orders**

**Sanctions**

**MEMORANDUM AND ORDER**



file a Motion to Compel Discovery from Petitioner. Respondent is deemed satisfied with the discovery response of Petitioner and there appears to be no need for a protective order.

The final request of Petitioner contained in this pleading is a request that the Comptroller General be required to appear for deposition. Inasmuch as a subsequent pleading is identified as Petitioner's Second Motion to Compel, I will assume that this is the first Motion to Compel. This matter will be addressed by a subsequent ruling on the merits of the two motions.

2. PETITIONER'S MEMORANDUM OF OBJECTIONS TO RESPONDENT'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS REGARDING CLASS CERTIFICATION SUPPORTING MOTION FOR A PROTECTIVE ORDER.

In this pleading, Petitioner recites that he does "hereby move for a protective order staying the premature, oppressive, and bad-faith discovery attempted by the Respondent..." To the extent this is a motion for protective order that is somehow different from that discussed in 1. above, it is moot for the same reasons.

3. PETITIONER'S MOTION FOR RECONSIDERATION.

This motion actually encompasses two motions and a request for a hearing. With reference to the Motion for Reconsideration of the Board's February 24, 1992, Decision regarding the legal entitlement of veterans employed by GAO to a preference in promotion, the matter has been fully briefed. The parties and the PAB General Counsel, as amicus, filed memoranda in support of their respective positions on the Motion and Cross-Motion for Summary Judgment. Oral Argument was heard on November

1, 1991. Now both parties have submitted memoranda in support of their positions on the Motion to Reconsider. No purpose would be served by additional oral argument. Therefore, the request for a hearing on the Motion is DENIED.

The Board will reconsider en banc, its ruling and issue a decision on the merits of the question whether veterans employed by GAO are entitled to the application of a preference in promotion. The Motion to Reconsider also contains a Request for Sanctions against the Respondent for misconduct in failing to disclose relevant GAO orders and regulations. For clarity, I will consider this as a separate motion in the following section.

#### 4. MOTION FOR SANCTIONS.

Counsel for Petitioner has, in the strongest tones, leveled serious charges of misconduct against "agency personnel." He charges that GAO "misled the Board by its failure to disclose its own Regulations and other applicable Orders," labeling the conduct "shameful" and "dishonest," having as its objective "obstruction of the administrative process."

The only regulations or orders mentioned are those cited in Appendix A of the Motion to Reconsider, namely GAO Orders 2211.1, 2306.1, 2307.1, and 2713.1 and 4 C.F.R. §2.6. It is my assumption, therefore, that these are the ones which Counsel claims were not disclosed by Counsel.

The Motion for Sanctions is without any basis in law or fact. Petitioner's Counsel's assertions are false and were known or should have been known by him to be false. GAO Order 2211.1 is

cited in a letter to the Petitioner from Mr. Socolar, dated November 6, 1990, which letter was attached to the Petition for Review; in addition, Order 2211.1 was reproduced in its entirety by the Agency in the Appendix to Respondent's Motion for Summary Judgment.

GAO Order 2306.1 was also cited in the Socolar letter. In addition, Order 2306.1 was cited and discussed in the Memorandum of the General Counsel of the Personal Appeals Board, a document incorporated by Petitioner into his Petition for Review. Moreover, at the March 10, 1992, prehearing conference in this matter, Counsel for Petitioner asserted that GAO had hidden Order 2306.1. The undersigned Administrative Judge identified one or more of the citations to 2306.1 that are in the record. At the very least, the reference to 2306.1 in the Memorandum of the PAB's General Counsel was specifically called to the attention of Petitioner's Counsel. Despite three clear and separate indications that the Board had not been misled, counsel persisted in his baseless allegation.

GAO Order 2307.1 was reproduced in its entirety and set forth by the Agency in the Appendix to Respondent's Motion for Summary Judgment.

4 C.F.R. §2.6 was cited in the Socolar letter attached to the Petition for Review. In Respondent's Motion for Summary Judgment, the Agency not only cited and discussed this provision but it set out the text as well.

The only referenced order not cited by GAO is 2713.1. Inasmuch as this order is not relevant to the instant action, no

misconduct can be inferred from GAO's "failure to disclose" the order, assuming arguendo that GAO would be under a duty to disclose this order if it were relevant.

Counsel either is totally unacquainted with the record, including attachments to Petitioner's own pleadings, or he has no regard for the truth. This memorandum constitutes a reprimand of counsel for Petitioner. It is the hope of the undersigned Administrative Judge and of the Board that this reprimand will serve to warn Counsel that baseless and frivolous motions will not be tolerated.

5. MOTIONS TO COMPEL DEPOSITION OF THE COMPTROLLER GENERAL.

Petitioner has filed two motions to compel the deposition of the Comptroller General. In its Responses to Petitioner's Discovery Requests, Respondent noted its objection and reasons therefor to the proposed deposition of the Comptroller General. If the Respondent wishes to make further reply on this issue to the Petitioner's Second Motion to Compel, it shall do so on or before May 22, 1992. This represents a shortening of its time to reply from 20 days to approximately 11 days. After receipt of any additional reply that Respondent may choose to make, the undersigned will rule on the Motions to Compel the Deposition of the Comptroller General.

6. MOTION FOR PROTECTIVE ORDER RE INCOMPLETE DATA.

This motion will be considered after Respondent has had the 20 days response period provided for in the Board's regulations. If

