

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

Docket No. 91-03

Date of Decision: June 21, 1995

Cite as: Dowd v. GAO, Docket No. 91-03 (6/21/95)

Before: Nancy A. McBride, Administrative Judge

Headnotes:

Costs

Discovery

Evidence

Motions Practice

Sanctions

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 matter comes before the Administrative Judge on Respondent's Motion to Strike Petitioner's Post-Hearing Exhibits, as set forth in Respondent's Objection to Petitioner's Post-Hearing Exhibits, filed on June 16, 1995. It is noted that Petitioner filed a response to this motion on June 20, 1995. For the reasons stated below, Respondent's motion is DENIED.

Respondent objects to three tables, designated respectively Tables A, B, and C, set forth in Petitioner's Post-Hearing Brief. In Respondent's view, these tables constitute exhibits setting forth new evidence, and it would be unfair to permit their submission after the record has closed in this matter.

Having reviewed the tables in question, I am of the opinion that Respondent is mistaken in its view of the tables as evidentiary exhibits. I think that the tables are more properly viewed as argument regarding evidence admitted at the hearing, specifically Respondent's Exhibit 20. The argument is presented in tabular form, but reflects the kind of simple arithmetic

comparisons that a decisionmaker might make in evaluating the evidence presented at the hearing. Moreover, because reply briefs are already part of the briefing schedule in this case, Respondent will have ample opportunity to respond to the argument reflected in Tables A, B, and C.

I note that the transcript does not clearly reflect the admission of Respondent's Exhibit 20 into the record. I hereby direct that the record reflect that Respondent's Exhibit 20 was admitted into evidence at the hearing. It is apparent that the Court Reporter misunderstood the discussion that occurred at Hearing Transcript p. 640. The remarks of the Administrative Judge were intended to signify admission of the exhibit. The discussion reflects the fact that the exhibit had been previously marked for identification as Respondent's Exhibit 20 and that it was, at that point in the proceeding, being introduced by Petitioner into the record.

In his response to Respondent's motion to strike, Petitioner made a counter-motion for costs and sanctions. Petitioner's motion is DENIED. There is no evidence whatsoever that Respondent's motion was filed in bad faith. Although I have ruled against Respondent on this motion, I do not deem it to have been frivolous. I further note that Petitioner's research efforts appended at Tabs 2, 3, and 4 to his response to the motion were of little assistance in ruling on this motion. In fact, the materials put forward by Petitioner related to the propriety of admitting, at trial, summary evidence, where the underlying data was available

and the preparer of the summary evidence was available for cross examination. Respondent did not challenge the tables on the ground that they constituted summary evidence. Clearly, the cases cited by Petitioner would not support submission of summary evidence, after trial, after the close of the record, and absent an opportunity to cross-examine the person who prepared the evidence.

Petitioner has been very free with allegations of bad faith on the part of Respondent, especially as it relates to the discovery process. Respondent's failure to disclose the 1980-1985 Affirmative Action Plans for Handicapped, Including Disabled Veterans, has been the subject of a previous motion. I considered Petitioner's views and concluded that no evidence existed to support a finding of bad faith on the part of Respondent in failing to produce those plans. I do not intend to review the entire discovery record in this memorandum and order. Petitioner's assertions of dishonesty and bad faith have no support in the record. Specifically, Respondent did not withhold or refuse "cell data." Respondent supplied copious raw data regarding employee histories in every category requested by Petitioner. At the conclusion of the discovery process, it appeared that Petitioner was unable to make use of that data by performing the necessary analysis. I permitted Petitioner to propound additional interrogatories and required Respondent to answer them, performing data analysis where necessary. In connection with these extra interrogatories, Petitioner never requested specific raw numbers or

