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

Docket No. 91-03

Date of Decision: September 14, 1993

Cite as: Dowd v. GAO, Docket No. 91-03 (9/14/93)

Before: Nancy A. McBride, Administrative Judge

Headnotes:

Affirmative Action

Discovery

Motion to Compel

MEMORANDUM AND ORDER

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

James B. Dowd, Petitioner,	)	Docket No. 91-03
v.	)	
United States General Accounting Office, Respondent.	)	

MEMORANDUM AND ORDER

This matter come on for hearing on the following motions:

1. Respondent's Motion to Compel Answers to Interrogatories;

2. Petitioner's Motion for Leave to File Motion to Compel Out of Time;

3. Petitioner's Motion to Compel; and

4. Petitioner's Motion for Expansion of Time for Completion of Discovery and For Modification of Trial Schedule.

Respondent's Motion to Compel sought answers to interrogatories in three broad categories. Interrogatories 4 and 43 relate to Petitioner's belief as to the required provisions for the absent affirmative action program for disabled veterans. Interrogatories 13-26, 31, 32 and 41 seek information related to the harm suffered by class members due to the absence of affirmative action for disabled veterans. Interrogatories 27 and 29 seek information regarding the nature of the disabilities of Petitioner and the class members.

Petitioner objects to Interrogatories 4 and 43, and contends that (1) his beliefs on this question are irrelevant insofar as it

calls for a legal conclusion and, (2) he does not yet have sufficient information to answer the questions posed. Petitioner seems generally to contend that the affirmative action plan for disabled veterans should have similar to those in place for women and minorities.

As to Interrogatories 13-26, 31, 32 and 41, Petitioner objected because the questions cannot be answered until it is known what the plan should have been and because the information is better known to the Agency, Petitioner not having kept records on the matters requested.

The circular arguments advanced in these two categories of Interrogatories demonstrated a need to bifurcate the trial proceedings in this matter to determine first the legal requirements for the affirmative action plan. Once this is established, a second hearing would be held to determine what, if any, harm accrued to Petitioner and class members as a result of the absence of the required affirmative action plan. Respondent favors and Petitioner has no objection to the proposed bifurcation of the issues in this matter. Indeed Petitioner seems wholly unprepared to advance to the harm portion of his case prior to a determination of the required content of the affirmative action plan called for by GAO Order 2306.1.

Accordingly, I have decided to bifurcate the hearing in this matter, proceeding first to determine the sole issue of the scope and content of GAO's self-imposed duty to provide an affirmative action program for disabled veterans. A second and later hearing

following an additional discovery period, will be held to determine issues related to harm.

I turn now to a discussion of the motions under review. With respect to Respondent's Motion to Compel Answers to Interrogatories, Petitioner is to answer Interrogatories 4 and 41. To the extent that Petitioner has a belief as to the required content of an affirmative action program for disabled veterans that constitutes information that Respondent is entitled to discover.

Interrogatories 13-26, 31, 31 and 41 call for information on harm suffered as a consequence of the failure to implement affirmative action for disabled veterans. Petitioner shall answer these Interrogatories within 20 days of a decision in the Phase I hearing on the required content of the affirmative action program for disabled veterans.

Interrogatories 27 and 29 relate to the disabilities of Petitioner and the class members. It is not the purpose of this proceeding to litigate the award of service-connected disability previously made by another government agency. On the other hand, information about the individual class members is properly discoverable in reference to their claims of injury. Within 20 days of the Phase I decision, Petitioner shall respond to these Interrogatories by providing information on the nature of the disabilities and the date on which the Petitioner or class member was determined to have a service-connected disability.

Petitioner's Motion for Leave to File Motion to Compel Out-of-Time was granted upon his representation that the Respondent's

discovery response was too voluminous to review within the discovery time limits. Although this fact could easily have been determined within the time limits, even if the specific deficiencies could not then be determined, the motion was granted.

Petitioner's Motion to Compel sought an order compelling answers to Interrogatories Number 11, 12, 13, 14 and 15 and production of documents in response to his Requests Number 1, 2, 3 and 4. Because Interrogatory Number 11 calls on Respondent to assemble, in a particular format, information that it has already produced, a motion to compel would be denied. However, Petitioner withdrew the motion, upon representation of counsel for Respondent that Number 11 had been answered to the best of its ability and that it would be supplemented upon the discovery and correction of any flaw in the data retrieval process.

Petitioner sought an order compelling an answer to Interrogatory Number 13. Counsel for Petitioner acknowledged that there was no respect in which Respondent had not answered this Interrogatory. He expressed a wish that the information had been presented in a manner that was not even suggested by the way the interrogatory was framed. He virtually expected Respondent to anticipate how he might wish to be able to manipulate the data being requested. With respect to Interrogatory Number 13, the motion is without merit and it is denied.

Petitioner sought a fuller response to Interrogatory Number 14. Specifically, he sought production of every individual SES contract executed between October 1980 and January 1992.

Respondent argued that this request was burdensome and called for the production of irrelevant information. Counsel for Petitioner stated a belief that these contracts established hiring and/or promotion goals for women and minorities and demonstrate that meeting these goals was part of a manager's SES contract. This is sufficiently related to the matter at hand as to be reasonably calculated to lead to the discovery of admissible evidance, the only relevancy standard applicable to discovery matters. As worded, however, the request is deemed burdensome for Respondent. Accordingly, Respondent is to produce a copy of each form SES used during the relevant time period. Upon receipt of this information, Petitioner may deem it necessary to follow-up with a more focused request for specific executed SES contracts or he may be able to articulate a need for the information as originally requested.

With respect to Interrogatories Number 12 and 15 Counsel for Petitioner withdrew the Motion to Compel upon the representation of Counsel for Respondent that Respondent's answers were full to the best of its knowledge and that it would continue to search for responsive information and timely supplement its answers if such additional information was found.

Petitioner withdrew Parts II and III of the Motion to Compel.

Scheduling

In accordance with the foregoing, this matter will proceed to hearing on the sole question of the scope of the legal duty self-imposed on Respondent by GAO Order 2306.1 to have an affirmative action program for disabled veterans. The following scheduling

changes are hereby made.

1. Further answers due under this order compelling certain discovery are due on or before September 24, 1993.

2. All discovery related to the issue of the nature of affirmative action that was required must be completed by October 20, 1993. Any additional discovery, including deposition of expert witnesses shall be propounded or noticed in such time as to leave sufficient time for response or deposition on or before October 25, 1993.

3. Dispositive motions are to be filed by November 10, 1993.

4. No later than December 20, 1993, the parties shall file, and exchange with each other the following documents:

1) Prehearing briefs and proposed findings of fact.

2) A witness list which includes:

a) The official position of the witness at all times relevant to this proceeding;

b) A summary of the substance of the testimony of the witness, which summary should be sufficiently particular to allow for relevant cross-examination.

3) A copy of all exhibits expected to be profered at hearing, such exhibits to be marked according the requirements of the Board's Regulations at 4 C.F.R. §28.56. Proposed exhibits containing illegible handwriting shall be accompanied by a typed version.

5. No later than January 10, 1994, the parties shall file a list of stipulated facts.

6. A final status conference shall be held in the offices of the Personnel Appeals Board at 10:00 a.m. on January 17, 1994.

7. The hearing in this matter shall commence at 9:00 a.m., on January 24, 1994, and run on consecutive business days until finished. The hearing is expected to last two days, but four days have been set aside to avoid delay in the event that additional hearing time is required. The hearing shall commence at 9:00 a.m. and end at 4:30 p.m. each day, unless otherwise noticed.

SO ORDERED.

Date: 9/14/93

Nancy A. McBride
Administrative Judge