

ROBERT L. THAMES v. U.S. General Accounting Office

Docket No. 92-02

Date of Decision: June 5, 1992

Cite as: Thames v. GAO, Docket No. 92-02 (6/5/92)

Before: Alan S. Rosenthal, Administrative Judge

Headnotes:

Age Discrimination

Motions Practice

Race Discrimination

Undue Delay/Prejudice

ORDER

That assumption remained undisturbed for over a month. However, on June 4, less than three weeks before the current hearing date--and less than a week before witness and exhibit lists are now due--petitioner's counsel filed a motion for a postponement of the hearing to the week of July 20, 1992 (and a corresponding extension of the deadline for the filing of the witness and exhibit lists to July 8.)² In justification of this request, counsel stated the following:

Due to the press of other business, namely a proceeding in another case in the Federal District Court for the District of Maryland in Baltimore, Maryland, counsel for petitioner herein has not been unable[sic] to devote the time and effort necessary to adequately prepare the above entitled matter for a hearing scheduled for June 23, 1992.

Further, certain conflicts in evidence have been revealed as the result of discovery which will make petitioner's preparations for trial more extensive than[sic] originally planned. Additional witnesses, exhibits and trial preparation make it necessary for petitioner's counsel to have extra time to adequately prepare for the hearing.

The motion went on to represent that counsel had been orally advised that agency counsel would not interpose an objection to the grant of the sought relief.

A. As a general matter, there is every reason to expedite proceedings before this Board that seek to overturn such management

²On June 1, the Clerk of the Board was advised by agency counsel that the parties desired another status conference. When it turned out that the only matter to be discussed was the hearing postponement, petitioner's counsel was instructed to submit his request in the form of a written motion to be in my hands no later than June 4.

actions as the selection of an individual other than the petitioner to fill a particular position. This is a case in point. According to the documents now on file, petitioner is complaining of his failure to have been selected for a position that was the subject of a vacancy announcement that was issued in May 1989 and then filled the following September. The present record does not shed any light on why it has taken so long for the grievance to reach the Board.³ Be that as it may, however, the interests of all concerned will be best served at this juncture by moving forward promptly with the exploration and resolution of petitioner's charge that he was a victim of racial and age discrimination in the selection process for the position in question.

That is a most serious charge indeed--particularly inasmuch as petitioner apparently would have it that racial discrimination exists broadly within the agency. If, in fact, there is substance to petitioner's claims, corrective action manifestly should be forthcoming at an early date both for his benefit and in the public interest. On the other hand, fairness to the agency dictates that, should it turn out instead that those claims are insubstantial, the cloud that the petitioner has sought to place on the agency's

³All that now appears is that the petitioner's formal discrimination complaint was filed with the agency's Office of Civil Rights on March 13, 1990; that the agency issued an unfavorable final decision on November 25, 1991; and that the right to appeal letter was furnished to him by this Board's General Counsel on February 11, 1992. There thus is no available basis for passing judgment on whether, and if so to what extent, there was undue delay in the administrative consideration of the complaint during the intervening period.

integrity and obedience to the law should be dissipated at an equally early date.

In this connection, it must be kept in mind that, no matter what I might conclude on the merits of the petition for review, if dissatisfied with the result either or both parties will be free to seek reconsideration by the full Board. And, depending upon the outcome on reconsideration, the case could possibly end up in the Court of Appeals for the Federal Circuit. These factors reinforce the desirability of not permitting any unnecessary delay in the progress of the case before me.

B. It is within this framework that I turn to the specific reasons assigned in petitioner's motion for the requested several week postponement of the evidentiary hearing. In short, are those reasons sufficiently weighty to counterbalance the factors strongly favoring adherence to the current schedule?

On their face, the reasons are patently inadequate to accomplish that end. To begin with, of itself the claimed "press of other business" cannot carry the day. Petitioner's counsel has been aware since April 16 that this hearing was to commence on June 23 and the scheduling order entered on that date referred specifically to "the expectation of the Board that the parties will make every reasonable effort to adhere to it."⁴ The motion does not demonstrate that such an effort was made, let alone explain (as the April 16 order required in support of any request for a

⁴As earlier noted, that observation was in the context of the notation in the order that it was my "intention to have this matter proceed to a hearing without unnecessary delay."

schedule change) "why [the] effort proved unavailing." In this connection, in the absence of much greater detail, counsel's elliptical reference to a case pending in the federal district court in Baltimore scarcely is helpful to his cause.

Nor is the postponement request furthered by the bald averment that "certain conflicts in evidence" assertedly "revealed as the result of discovery" have required more extensive trial preparation than initially anticipated. Discovery closed on May 13 and, presumably, petitioner's counsel was then aware of the claimed "conflicts." Without a substantially greater bill of particulars as to the nature and implications of the "conflicts" than that contained in the motion, there is no basis for assuming counsel's inability, in the exercise of due diligence, to meet the existing schedule.

There is also the matter of the timing of the motion, which came virtually on the eve of the deadline for the submission of the witness and exhibit lists. The motion does not explain why, if the need for additional trial preparation time became apparent during discovery, petitioner's counsel waited until the first week of June to seek the postponement.

C. For the foregoing reasons, had the agency opposed it, the postponement motion likely would have been summarily denied. In view of the lack of such opposition, however, I decided to give petitioner's counsel a second opportunity to justify the requested

postponement.⁵ Accordingly, a conference with counsel was held this morning.

At the conference, petitioner's counsel provided some additional detail respecting the work that, assertedly unexpectedly, was recently required of him in the federal court litigation in Baltimore. In addition, he made passing reference to having received documents from the agency in discovery that assertedly contradicted information earlier supplied to him on answers to interrogatories. None of these supplemental revelations sufficiently explains, however, counsel's inability to prepare adequately for a June 23 trial date in this proceeding (or the timing of the motion). Indeed, during the conference counsel stated that, at the time he filed the motion he had thought that a thirty day postponement would be granted to him as a matter of course without the necessity of any detailed explanation of the necessity for it.

That belief is difficult to square with the prior orders entered in the proceeding. Giving petitioner's counsel the benefit of all possible doubt on the matter of the warrant for his professed assumption that a postponement would be forthcoming automatically on request, and in light of agency counsel's representation that her witnesses can be available the week of July 6, I nevertheless have reluctantly decided to grant the motion in part. The hearing will now start on Monday, July 6, 1992 and will

⁵Standing alone, the agency's consent could not serve to provide that justification. Clearly, scheduling matters are within the control of the Board, not the litigants.

continue during that week until completion; the witness and exhibit lists are to be in the hands of opposing counsel and this Board no later than 5:00 p.m. on Monday, June 22, 1992.⁶

To avoid any possible misunderstanding, I must stress that this action should not be taken as an alteration of my conviction that this proceeding should receive expeditious consideration and resolution. On that score, counsel were advised at today's conference that post-hearing briefs will be due approximately thirty days following the conclusion of the evidentiary hearing. Once a firm date is fixed at hearing end, it will not be subject to extension on a claim of press of other business.

Motion granted in part as above stated.

So Ordered.

DATE: June 5, 1992

/s/
Alan S. Rosenthal
Administrative Judge

⁶The provisions of the April 16 order respecting the precise starting hour and location remain in effect.