

OPTIONAL FORM 95 (7-00)

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NSN 7540-01-317-289 5010-101 GENERAL SERVICES ADMINISTRATION

ANNIEMARIE HARRISON-GRAY,
BEVERLY HATCHER,

CLASS AGENTS

v.

SECRETARY,
DEPARTMENT OF VETERANS AFFAIRS,

AGENCY

EEOC CASE NO.:
120-2003-00508X

AGENCY CASE NO.:
2004-0652-2002103851

MAR 27 2009

ORDER DENYING CLASS MOTION FOR SANCTIONS

ORDER DENYING CLASS AGENTS' MOTION TO COMPEL
SUPPLEMENTAL DISCOVERY RESPONSES

AMENDED SCHEDULING ORDER

1. ORDER DENYING CLASS MOTION FOR SANCTIONS

This matter is now before the Commission on the Class Agents' Motion for Sanctions for Agency's Failure to Comply with Administrative Judge's Order Regarding Production of Supervisor Data and the Agency's Response to Class Agents' Motion for Sanctions. For the reasons set forth below, the Class Agents' Motion is **DENIED**.

As set forth in the Order Granting Agency's Motion to Redefine Class, the Class in the above-captioned matter has been redefined as follows:

All African American employees, past and present, who have worked at the McGuire facility in Richmond, Virginia at any time from 1996 to the present, while in a non-supervisory position, and have been discriminated against with respect to the Agency's policies and practices in the selection and distribution of monetary and non-monetary awards, including but not limited to special

contribution awards, on-the-spot and time-off awards, quality step increases, gain-sharing awards, honor awards, and other monetary and non-monetary awards.

The Order Granting Agency's Motion to Redefine Class also stated the Agency was responsible for determining those African-American employees who were in a supervisory position at any time from 1996 to the present and the period(s) of time that they were in such positions. The Agency was directed to provide this information within 15 days of the date of the Order.¹

As set forth in the Class Agents' Motion, the Agency provided a total of five CDs purporting to set forth the information required by the Orders dated May 9, 2008 and June 2, 2008. The last of these CDs was provided on July 25, 2008. The Class Agents argue the Agency should be sanctioned for several reasons, i.e., (1) failure to provide the exact dates that the employees served in supervisory positions - the Agency provided only the months and years that the employees served in supervisory positions; (2) failure to produce the programs and files by which it created its datasets purportedly identifying supervisory employees; (3) spoliation of the programs, and the Agency's continued failure to comply with the orders of the Administrative Judge; and (4) failure to produce the source data and the formats for the files.

In its opposition to the Class Agent's Motion, the Agency argues that no sanctions should be imposed because it complied with the previously issued Orders which stated "[t]he Agency shall be responsible for determining those African-American employees who were in a supervisory position at any time from 1996 to the present and the period(s) of time that they were in such positions." Although this information was not provided within 15 days, the Agency explained the complex procedure that had to be used to obtain this information.

Based on the arguments of the parties, it is found that the Agency has acted in good faith and has complied with the previously issued Orders. As correctly stated by the Agency, the previously issued Orders did not require that the Agency identify the specific dates when a person served as a supervisor. The Agency's identification of supervisors as of the end of each calendar month is sufficient.

Also, as correctly stated by the Agency, there has been no spoilage of evidence. The Agency shall, however, provide to the Class, what lines of code were changed in the programs that were

¹ The Order was originally dated and issued on May 9, 2008. It was subsequently dated and reissued on June 2, 2008.

reused so that the Class may track the program changes the Agency made.²

2. ORDER DENYING CLASS AGENTS' MOTION TO COMPEL SUPPLEMENTAL DISCOVERY RESPONSES

This matter is now before the Commission on: Class Agents' Motion to Compel Agency's Supplemental Discovery Responses; Agency's Response to Class Agents' Motion to Compel Agency's Supplemental Discovery Responses; and the Class Agency's response.

The Class Agents' Motion is **DENIED**.

The class is seeking awards data through the end of fiscal year (FY) 2008 (September 30, 2008). At the time this matter was certified as a class case and the initial Orders entered concerning the development of the evidence, it was not anticipated that this matter would still be pending at this time but rather that it would have been resolved long before by either dispositive Motion or by hearing.³ However, disputes between the parties arose concerning discovery which have caused delays. Accordingly, the September 17, 2007 Amended Joint Stipulation and Scheduling Order granted the Class' Motion to for the Agency to provide awards data through fiscal year 2007 (September 30, 2007). Nevertheless, non-expert discovery in this matter has now been completed and the parties have already submitted their initial expert reports in accordance with the Amended Joint Stipulation and Scheduling Order dated September 17, 2007. The Order Granting Agency's Motion to Redefine Class provided that each party would have 30 days from the time it was determined which African-American employees were in supervisory positions and the periods of time they were in such positions to submit revised expert reports with rebuttal expert reports due 30

² As set forth in the May 8, 2008 Order, the Notice attached to that Order must be sent to all class members who were in supervisory positions at some point from 1996 to the present. In accordance with the Class Agents' request, attached to the Notice is an Objection Form that can be completed by any class members who believe that they were not in a supervisory position during the relevant time period. This procedure will operate as a fail-safe mechanism to ensure that no class members are incorrectly found to have been supervisors. Any conflicts that arise concerning any class members and their supervisory status will have to be resolved at hearing. If this resolution establishes significant discrepancies between those African American employees who were actually in a supervisory position during the relevant time period and those as set forth in the data provided by the Agency, the Class may seek appropriate sanctions at that time.

³ Indeed, the February 6, 2007 Non-Expert Discovery Oder stated, "[t]he Class Certification period is from Fiscal Year 1996 (10/1/95) through FY 2006 (9/30/06). The Agency is not required to provide any data before or after this time period."

days after their submission. However, due to difficulty in obtaining and addressing concerns with data involving which class members were supervisors and the periods of such supervision, this schedule could not be met and the revised expert reports have not been submitted as of this date.

As set forth above, these concerns have now been addressed and the revised expert reports can now be submitted. In order to expedite this matter and to avoid further delay, the Agency need not provide supplemental discovery responses for Fiscal Year 2008.

3. AMENDED SCHEDULING ORDER

The class shall submit its revised expert report on or before **May 1, 2009**. The Agency shall submit its revised expert report on or before **June 5, 2009**. The class shall submit its rebuttal expert report on or before **July 3, 2009**.⁴

In order to expedite this matter and to avoid the necessity of a surrebuttal report by the Class (See, Order Denying Class Agents' Motion to Strike Agency's Expert Report), the schedule above will be adhered to rather than the one set forth in the Amended Joint Stipulation and Scheduling Order which allowed both parties to submit rebuttal expert reports.

All expert depositions shall be completed no later than **August 7, 2009**.

All other requirements of the Amended Joint Stipulation and Scheduling Order concerning the compliance with the requirement of the Federal Rules of Civil Procedure remain in effect.

On or before **September 11, 2009**, each party shall submit a prehearing statement, including a list of witnesses that the party intends to call, with a detailed proffer for each witness, and any dispositive Motion that the party wishes to submit. On or before **October 9, 2009**, each party shall file a reply prehearing statement, including any objection to witnesses and opposition to

⁴ By letter dated May 10, 2008, the Agency requested "clarification on when (or under what circumstances) an individual should be considered a supervisor for the purposes of statistical groupings of similarly situated employees and analyses of the same." In view of the fact that each party has the same data with the identification of supervisors as of the end of each calendar month, it is, as stated by the Class in its letter dated May 16, 2008, up to each party to decide how it will analyze the data. This, of course, does not preclude the parties from agreeing on the method of analysis. However, absent such an agreement, which method is entitled to the most probative weight will be determined at hearing based upon an analysis of all of the evidence.

Motions.⁵

A prehearing conference is scheduled for November 13, 2009 at 10:00 a.m. at the Baltimore Field Office.


The hearing, if necessary, will commence as follows:

DATE: FEBRUARY 1, 2010
TIME: 9:00 A.M.
PLACE: VA MCGUIRE FACILITY IN RICHMOND, VIRGINIA.

The hearing will continue through February 26, 2010, as necessary. Both parties should be prepared to appear at hearing every week day during this period.

It is so ORDERED.

For the Commission:


MARLIN D. SCHREFFLER
ADMINISTRATIVE JUDGE

⁵ The parties shall serve their submissions by FAX or some other method to ensure that they are received by the opposing party and the undersigned on the dates set forth above.

CERTIFICATE OF SERVICE

For timeliness purposes, it shall be presumed that the parties received the foregoing **ORDER DENYING CLASS MOTION FOR SANCTIONS; ORDER DENYING CLASS AGENTS MOTION TO COMPEL SUPPLEMENTAL DISCOVERY RESPONSES and AMENDED SCHEDULING ORDER** within five (5) calendar days after the date it was sent via first class mail. I certify that on March 27, 2009 the foregoing **ORDER** was sent via first class mail to the following:

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