

Judy T. Lasley v. U.S. Government Accountability Office

Docket No. 08-02

Date of Decision: July 2, 2008

Cite as Lasley v. GAO, No. 08-02 (7/2/08)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Discovery

Motions Practice

Time Limits

ORDER

A status conference was held in this case on June 25, 2008. During the conference, the parties resolved several pending matters relating to the discovery process. In order to allow the parties to complete discovery in accordance with the discussions at the conference, the discovery period was extended to July 11, 2008, by Order issued on June 25, 2008.

The only matter relating to discovery that remains pending at this time concerns Respondent's Emergency Motion for a Protective Order seeking to bar the deposition of Acting Comptroller General Gene L. Dodaro.¹ For the reasons set forth below, this Motion is granted.

Background

Pursuant to the Board's Notice of April 21, 2008, discovery in this case was scheduled to close on June 25, 2008. On June 3, 2008, Petitioner's counsel sent Respondent's counsel an e-mail checking on the availability of, among other individuals, Mr. Dodaro for deposition. On the same date, Respondent's counsel sent a reply e-mail, stating that she was "not sure what role . . . Mr. Dodaro played in this matter." Petitioner's counsel responded, also on the same date, that "Mr. Dodaro was the COO [Chief Operating Officer] who signed off on the final agency decision in [Petitioner's] EEO case."

¹ Respondent's Emergency Motion also sought to bar the deposition of the Managing Director of the Office of Opportunity and Inclusiveness, Ronald A. Stroman. At the status conference, the parties reached agreement to depose Mr. Stroman on certain specified matters. *See* Transcript of Status Conference (Tr.) at 25-26, 44-45, 55. Based on the parties' agreement, the Emergency Motion as to Mr. Stroman is dismissed as moot.

On June 5, 2008, Respondent's counsel advised Petitioner's counsel by e-mail that "GAO objects to the PAB/OGC's attempt to depose" Mr. Dodaro. The e-mail stated that the area of inquiry referenced in the June 3, 2008 e-mail from Petitioner's counsel concerned "the administrative investigation and processing of [Petitioner's] EEO complaint, as opposed to the facts underlying the merits of this action." The June 5, 2008 e-mail from Respondent's counsel to Petitioner's counsel went on to state:

It is well established that an agency's administrative handling of an EEO complaint fails to state a claim upon which relief can be granted. See, e.g., Horton v. GAO, Docket No. 01-09 (Sept. 19, 2002) (citing Gaston v. GAO, Docket No. 99-02 (April 25, 2002)). In addition, Mr. Dodaro, who is now the Acting Comptroller General, was acting in a quasi-judicial capacity as a deciding official of the administrative complaint and the mental processes underlying such decisions are protected. See, e.g., Sykes v. Brown, 90 F.R.D. 77 (D.C. Pa. 1981). Thus, deposing . . . Mr. Dodaro about this subject is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

For these reasons, please be advised that we do not intend to make . . . Mr. Dodaro available for deposition.

On June 19, 2008, during a telephone conversation between Respondent's counsel and Petitioner's counsel concerning a possible extension of the discovery deadline, Petitioner's counsel advised Respondent's counsel that she wanted to depose Mr. Dodaro. Respondent's counsel replied that GAO had previously objected to the taking of his deposition, and had not been served with a timely motion to compel.

Later on June 19, 2008, Petitioner's counsel served a notice of deposition on Respondent's counsel, seeking to take Mr. Dodaro's deposition on June 23, 2008.

On June 20, 2008, Respondent's counsel sent an e-mail to Petitioner's counsel stating that she had received the previous day's notice seeking to depose Mr. Dodaro and that Respondent did not intend to make Mr. Dodaro available for deposition. This e-mail further stated that Petitioner's counsel had previously noted via electronic mail Mr. Dodaro's . . . deposition[], to which we provided you our written objections. You did not respond to our objections or file any type of motion to compel. Until yesterday, you had not mentioned or indicated any further intent to depose Mr. Dodaro . . . in this matter. We will be filing an emergency motion for a protective order by close of business today.

Also on June 20, 2008, Petitioner's counsel replied by e-mail, stating that the reasons for seeking to depose Mr. Dodaro were indicated in the discovery responses.

Later that same day, Respondent filed its Emergency Motion for a Protective Order preventing Petitioner from deposing Mr. Dodaro. In support of its Motion, Respondent argued that: (1) Petitioner did not comply with PAB regulations by failing to file a timely motion to compel upon

receipt of GAO's objections to Mr. Dodaro's deposition; (2) the June 19, 2008 notice seeking to depose Mr. Dodaro on June 23, 2008 failed to provide reasonable notice as required by PAB regulations; (3) Mr. Dodaro does not possess relevant information relating to Petitioner's claims; (4) Petitioner's additional areas of inquiry are not relevant and were known to her at the time she originally noted the deposition of Mr. Dodaro; and (5) the administrative complaint process is not relevant to Petitioner's claims.

Also on June 20, 2008, the undersigned issued an Order, after regular business hours, directing Petitioner to file a response to Respondent's Emergency Motion for Protective Order by 4:00 p.m. on June 24, 2008. The Order excused Respondent from making Mr. Dodaro available for deposition on June 23, 2008, and stated that "[i]n the absence of any agreement between the parties, [Mr. Dodaro is] not required to appear for deposition unless so ordered by the undersigned."

Petitioner filed its Opposition to Respondent's Emergency Motion shortly after 4:00 p.m. on June 24, 2008, along with a Motion for Leave to File its Opposition out of time. At the status conference on June 25, 2008, Petitioner's Motion for Leave to File its Opposition out of time was granted. *See Tr.* at 15. In its Opposition, Petitioner argues that: (1) filing a motion to compel discovery would have been premature in the circumstances of this case; (2) Petitioner's notice of deposition provided reasonable notice to Respondent; and (3) Petitioner has reason to believe that Mr. Dodaro possesses information that is critical to her case.

At the status conference on June 25, 2008, both parties were afforded the opportunity to discuss their respective positions regarding this matter, and both parties did so. At the conclusion of the conference, the undersigned reserved ruling on this matter.

Discussion

The PAB's regulations establish procedures and time limits applicable to the discovery process. A party seeking to depose an individual must give "reasonable notice in writing" of the request to the other parties in the proceeding. 4 C.F.R. §28.42(a)(2). The party must answer such a discovery request within 20 days either by agreeing to make the deponent "available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for objection, or by requesting a protective order." 4 C.F.R. §28.42(c)(1). "Upon failure or refusal of a party to respond in full to a discovery request, the requesting party may file with the administrative judge a motion to compel discovery." 4 C.F.R. §28.42(c)(2). "Motions for an order compelling discovery shall be filed with the administrative judge within 10 days of the service of objections or within 10 days of the expiration of the time limits for response when no response or an alleged inadequate response is received." 4 C.F.R. §28.42(d)(4).

By e-mail of June 3, 2008, Petitioner's counsel sought, in writing, to depose Mr. Dodaro. By e-mail of June 5, 2008, Respondent's counsel timely stated that it objected to the attempt to depose Mr. Dodaro and presented the reasons for its objection, and further stated that it did not intend to make Mr. Dodaro available for deposition. Under these circumstances, the regulations cited above require that any motion for an order compelling discovery be filed with the administrative judge within 10 days of the service of the objections—that is, within 10 days of the receipt of the

Respondent's June 5, 2008 e-mail setting forth its objections. No such motion to compel was filed by Petitioner's counsel.

Petitioner asserts that the Respondent's e-mail of June 5, 2008, did not constitute a formal objection for purposes of 4 C.F.R. 28.42(c) because it "was part of an ongoing informal effort on the part of the parties' counsel to schedule depositions and cannot be construed as triggering an obligation on the part of Petitioner to invoke the Board's process in compelling the testimony of" Mr. Dodaro. Petitioner's Opposition at 4. Petitioner further states:

In this regard, it is not entirely accurate to assert, as the Respondent does, that the Petitioner "did not respond to the objections" the Respondent raised about deposing [Mr. Dodaro]. Rather, Respondent did not respond to Petitioner's stated reasons for seeking to depose [Mr. Dodaro]. In the spirit of cooperation to which the Respondent refers, the Petitioner was of the opinion that their differences could be resolved—preferably without seeking the intervention of the Administrative Judge.

Id.

Petitioner's argument is unpersuasive. Respondent's counsel clearly raised timely objections to the proposed deposition of Mr. Dodaro. The regulations provide that if the requesting party continues to seek to depose the individual in this situation, it is up to the requesting party to timely file a motion to compel. No such motion was filed. While informal attempts to resolve discovery issues are encouraged,² the situation presented in this matter is one clearly contemplated by the regulations: (1) a party made a request in writing for a deponent; and (2) the other party made a timely objection accompanied by reasons. In this circumstance, the regulations provide a specific process that the requesting party must follow if it seeks to challenge the stated objections to the proposed deposition. Contrary to Petitioner's suggestion, a motion to compel would not be premature in this circumstance; rather, it is required and must be filed timely.

Moreover, the service by Petitioner's counsel of a document entitled "Notice of Deposition" on June 19, 2008 for Mr. Dodaro cannot operate as establishing a new, later date for the purpose of determining the time by which a motion to compel would be due under the PAB's regulations. Petitioner's counsel had already noticed on June 3, 2008, in writing by e-mail, Mr. Dodaro's deposition, and Respondent's counsel had clearly objected thereto in a timely manner with specific reasons. It would be inconsistent with the purposes and policies of the discovery regulations to allow a second written request for the same deponent, in the absence of having timely used the established regulatory process for responding to the previously stated objections to his deposition, to extend the time in which to file a motion to compel.

² See 4 C.F.R. §28.40 ("The parties are expected to initiate and complete discovery with a minimum of Board intervention").

Accordingly, having failed to timely file the required motion to compel, Petitioner is not entitled to depose Mr. Dodaro.³ Respondent's Emergency Motion for a Protective Order excusing GAO from making Mr. Dodaro available for a deposition in this proceeding is granted.⁴

SO ORDERED.

³ At the status conference, Respondent's counsel agreed to seek to obtain an affidavit from Mr. Dodaro regarding his involvement, or lack thereof, in any of the personnel actions referenced by Petitioner in the Petition. *See* Tr. at 45-47, 56-57. Mr. Dodaro's affidavit was filed on July 2, 2008.

⁴ Additionally, it is noted that Mr. Dodaro is the Acting Comptroller General. Applicable case precedent establishes that depositions of high-level government officials are generally permitted only upon a showing that the official has first-hand knowledge directly related to the claims being litigated and that this information cannot be obtained from another source, and that the deposition would not significantly interfere with the official's ability to perform his or her governmental duties. *See, e.g., Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). Based on the record in this case, including the parties' representations during the status conference, Petitioner has not made such a showing with respect to Mr. Dodaro.