

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

Docket No. 08-02

Date of Decision: August 8, 2008

Cite as: Lasley v. GAO, No. 08-02 (8/8/08).

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Discovery

Limitations period

Motions practice

PAB Regulations

RULING ON MOTION TO COMPEL

On July 11, 2008, Petitioner filed a Motion to Compel responses to her Second Set of Interrogatories and Request for the Production of Documents. On July 21, 2008, Respondent filed its Opposition to the Motion to Compel. On July 28, 2008, Petitioner filed an Unopposed Motion for Leave to File Reply to Respondent's Opposition to Petitioner's Motion to Compel, along with her Reply to Respondent's Opposition to Petitioner's Motion to Compel.¹

For the following reasons, the Motion to Compel is denied.

Background

On April 21, 2008, the Board served notice that Petitioner had filed a Petition on that date alleging that GAO had discriminated against her based on her race and age, that GAO had retaliated against her for engaging in protected EEO activity, and that GAO had committed prohibited personnel practices against her. The notice stated that discovery was to be completed no later than 65 days after the date of the notice, that is, by June 25, 2008, and further stated that discovery time limits could be altered by the Administrative Judge for good cause shown.

On May 20, 2008, Petitioner served GAO with her First Set of Interrogatories and Request for the Production of Documents ("First Set"). Under the Board's regulations, GAO's responses were due on June 9, 2008. However, GAO requested a 1-week extension, and Petitioner agreed, and GAO responded to the First Set on June 16, 2008.

¹ The Unopposed Motion for Leave to File Reply is granted.

On June 20, 2008, 4 days after GAO's response to the First Set and 5 days before the then-scheduled close of discovery, Petitioner served GAO with her Second Set of Interrogatories and Request for Production of Documents ("Second Set"). On the same date, a few hours earlier, GAO filed a motion to extend the time to complete discovery from June 25, 2008, to July 11, 2008.

On June 25, 2008, the undersigned held a status conference with the parties. At the conference, the parties resolved some discovery disputes and were encouraged to attempt to resolve any remaining discovery disputes, including any dispute with respect to the then-pending Second Set. Also, the undersigned stated that the deadline for the close of discovery would be extended until July 11, 2008, and an Order was issued following the conference confirming this date.

On July 10, 2008, the Respondent filed its responses to Petitioner's Second Set.²

Discussion

Section 28.42(d) of the Board's regulations states in relevant part:

(d) *Time limits.* (1) Requests for discovery shall be served within 30 days after the service list is served by the Board on all parties.

(2) A party or nonparty shall respond to a discovery request within 20 days after service of the request on the party or nonparty. Any discovery requests following the initial request shall be served within 10 days of the date of service of the prior response, unless otherwise directed. . . .

* * *

(5) Discovery shall be completed by the time designated by the administrative judge, but no later than 65 days after the service of the notice of filing of a petition. A later date may be set by the administrative judge after due consideration of the particular situation including the dates set for hearing and closing of the case record.

Respondent raises a number of arguments, both general and specific, in support of its Opposition to Petitioner's Motion to Compel. In particular, GAO argues that Petitioner's Second Set of discovery requests should be disallowed on the ground that "they were not 'follow-up' discovery to the initial discovery[.]" Respondent's Opposition at 6. Petitioner asserts that nothing in the Board's regulations supports the view that additional discovery is limited to matters raised in the responses to initial discovery.

² Citing 4 C.F.R. §28.4(d), Petitioner contends that GAO's responses to the Second Set are untimely because they were served after 4:00 p.m. on the date they were due. This argument is without merit because section 28.4 of the Board's regulations applies only to submissions that are filed with the Board. Responses to discovery requests are not filed with the Board. There is no requirement in the Board's regulations that discovery responses must be served on the opposing party by 4:00 p.m. on the date that they are due.

As noted above, section 28.42(d)(2) states in pertinent part that "[a]ny discovery requests following the initial request shall be served within 10 days of the date of service of the prior response, unless otherwise directed." The parties disagree on the meaning of the phrase "[a]ny discovery requests following the initial request[.]" Neither party cites any pertinent Board case law on this point. In order to determine the meaning of this provision, it is instructive to examine its history.

Prior to 1989, the Board's regulations did not contain a provision referring to discovery requests following the initial request. *See* 4 C.F.R. §28.19(e) (1989). In 1988, the Board proposed revising certain aspects of its regulations, including its discovery regulations, but the proposed revisions did not include any reference to discovery requests following the initial request.³

The Final Rule concerning section 28.42(d), which was published on June 6, 1989 (54 Fed. Reg. 24131), contained the first reference in the Board's rules to "discovery requests following the initial request:"

(d) *Time limits.* (1) Requests for discovery shall be served within 30 days after the service list is issued by the Board to all parties.

(2) A party or nonparty shall respond to a discovery request within 20 days after service on the party or nonparty of the request. Any discovery requests following the initial request shall be served within 10 days of the date of service of the prior response, unless otherwise directed.

³ The proposed rule change pending in 1988-89 suggested a 15-day period for responding to discovery requests. Containing no reference to discovery after the initial request, it read as follows:

(d) Time limits.

(1) Requests for discovery shall be initiated within 30 days after the date the petition for review was filed.

(2) A party or nonparty shall respond to a discovery request within 15 days after filing of the request.

Proposed 4 C.F.R. §28.42(d) (Feb. 1988) (unpublished). The supplementary information/explanation provided with the proposal broadly stated that the procedural changes were being made to codify procedures that had been adopted to conform to comparable executive branch procedures:

[T]he changes for the most part deal with procedural matters. Over the years, the Board has developed methods for dealing with a wide variety of procedural issues. These methods were developed based upon the needs of our system and with reference to the Federal Rules of Civil Procedure and the rules of our counter-parts in the executive branch, in particular the MSPB and, to some extent, the EEOC. The object of these rule changes is to codify these various procedures in order to provide clear and concise guidance to the parties on procedural issues that we have found by experience are apt to arise in cases before the Board. Thus, for example, some of the major additions proposed here deal with subjects such as discovery, evidence at hearing, motions practice, subpoenas, and interlocutory appeals.

Proposed Changes, Supplementary Information at *i* (Feb. 1988) (unpublished).

4 C.F.R. §28.42(d) (1990) (emphasis added). The sentence that refers to "discovery requests following the initial request" has remained unchanged in the Board's regulations since its implementation in 1989.

The PAB published the following supplementary information with respect to the 1989 discovery provision changes:

Section 28.42 of the proposed rule provided guidance on the procedures governing discovery. Comments on this section argued that the time limits for initiating discovery and responding to discovery requests were too short and were not consistent with MSPB [Merit Systems Protection Board] practice and that the requirements imposed on a party seeking a subpoena to show the "relevance, scope and materiality of the particular information sought" [were] not consistent with the requirements in federal civil practice. These comments were all well taken and appropriate changes are made in the final rule.

54 Fed. Reg. 24131, 24133 (June 6, 1989) (emphasis added). Thus, it is clear that in 1989 the Board's newly revised discovery provisions were based on, and were intended to be read in a manner consistent with, the MSPB's discovery regulations at the time.

The MSPB's discovery regulations at the time stated in relevant part:

(d) *Time limits*. (1) Initial requests or motions for discovery shall be served within 25 days after the date of issuance of the Board's order to the respondent agency to produce the agency file and response.

(2) A party or nonparty shall file a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the Board. Any discovery requests following the initial request shall be served within 10 days of the date of service of the prior response, unless otherwise directed.

* * *

(5) Discovery shall be completed within the time designated by the presiding official, but no later than 65 days after the filing of the appeal. A different time limit may be set by the presiding official after due consideration of the particular situation, including the dates set for hearing and closing of the case record.

5 C.F.R. §1201.73(d) (1989). The portion of the MSPB rule at the time referring to "discovery requests following the initial request" is identical to the rule that the Board adopted in 1989. In addition, the phrase "discovery requests following the initial request" remains in place today in both the PAB's and the MSPB's current regulations.⁴

⁴ Earlier this year, the MSPB made minor revisions to its discovery regulations, but did not change the phrase "discovery requests following the initial request." See 73 Fed. Reg. 18149, 18150 (Apr. 3, 2008). That revision restored the period for making such requests to 10 days after receiving the response; the MSPB had shortened it to 7 days by interim rule in 2003. See 68 Fed. Reg. 54651, 54652 (Sept. 18, 2003).

In addition to its regulatory scheme, the MSPB publishes a Judges' Handbook for its administrative judges, which is available at www.mspb.gov. In the currently posted version (October 2007), time limits for discovery are discussed at page 28, chapter 8, ¶7 (Time Limits for Discovery). The section refers to the regulatory provision, 5 C.F.R. §1201.73(d). Subsection c is captioned "Supplemental Requests." It states as follows: "If the requesting party finds it necessary to make additional requests based on the responses it receives, these supplemental requests must be made within 7 days after the date of service of the related response unless otherwise directed by the AJ" (emphasis added). This AJ Handbook amplifies the meaning of the MSPB regulatory allowance for further requests as being restricted to those that are needed based on the responses received to the initial discovery requests, and provides support for the view that the "follow-up" nature of such requests is implicit in the quick filing time set by regulation. This view is consistent with the same view concerning the same language in the PAB regulation expressed in the Guide to Practice Before the Personnel Appeals Board ("PAB Guide"). As pointed out by GAO, the PAB Guide states that "follow-up discovery requests" must be served within 10 days of service of the prior response. PAB Guide at 12.

This interpretation of the PAB's regulation governing discovery procedures is also supported by the Board's introductory provision on discovery, regulation section 28.40, entitled "Statement of Purpose," which states:

Proceedings before the Board shall be conducted as expeditiously as possible with due regard to the rights of the parties. Discovery is designed to enable a party to obtain relevant information needed for presentation of the party's case. These regulations are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of Board intervention.

Pursuant to section 28.40, section 28.42(d)(2) should "be interpreted and applied so as to avoid delay and to facilitate adjudication of the case." Both of these purposes are achieved by interpreting section 28.42(d)(2) as applying to supplemental discovery requests that arise as a result of matters newly raised in responses to initial discovery. A process that defines supplemental discovery requests as ones related to such new matters expedites the processing of the case. Otherwise, if supplemental discovery requests could concern any matter, even those that could have been the subject of initial discovery requests, there would be no need to raise such matters early in the discovery process, thereby potentially and unnecessarily delaying the expeditious processing of the case. Similarly, adjudication of cases would be facilitated by encouraging initial requests for discovery that are comprehensive, rather than allowing possible piecemeal discovery. Such a process provides for a simple and expeditious method of discovery, while ensuring that the purpose of discovery—to enable a party to obtain relevant information needed for presentation of the party's case—is also fulfilled.

In light of these considerations, there is substantial support in the text and history of section 28.42(d)(2), the relationship to the similarly worded and interpreted MSPB provision, the PAB Guide, and the policy concerns set forth in section 28.40 for the conclusion that section 28.42(d)(2)'s reference to "discovery requests following the initial request" applies only to those

supplemental discovery requests that are based on the responses received to the initial discovery requests.

In this case, GAO asserts that "[t]he supplemental discovery requests covered by Petitioner's motion to compel are not related in any way to issues Petitioner learned of through Respondent's response to her first discovery request. Instead, they cover agency-wide statistics, studies, and reports that she could have sought as part of her first discovery request. Thus, they were not a 'follow-up' to Respondent's previous discovery responses at all." Respondent's Opposition at 6.

Although Petitioner disputes GAO's contention that supplemental discovery requests must be related to matters raised only upon review of the responses to the First Set of discovery requests, Petitioner does not contest Respondent's additional assertion that the Second Set is not a follow-up to GAO's previous discovery responses at all.

Conclusion

Accordingly, Petitioner has not demonstrated that the discovery requests contained in the Second Set come within the scope of additional, follow-up discovery intended by section 28.42(d)(2).⁵ As such, and without resolving the other issues presented by the parties,⁶ the Motion to Compel is denied.

SO ORDERED.

⁵ Having found that the Second Set does not come within the scope of section 28.42(d)(2), it is unnecessary to determine whether, as disputed by the parties, the Second Set was timely filed. Nonetheless, the parties' arguments do raise a significant question as to whether the general overall 65-day time limit stated in the regulation can accommodate all of the several individual time limits that are specified in the regulation for filing and responding to discovery requests. However, the regulation allows flexibility in the general 65-day time limit for completing discovery because it also provides that a different time limit may be set by the administrative judge after due consideration of the particular situation, including the dates set for hearing and closing of the case record. 4 C.F.R. §28.42(d)(5).

⁶ GAO's other assertions in opposition to the Motion to Compel, all of which are disputed by Petitioner, include claims that: (1) the number of additional interrogatories and requests for documents is excessive and unreasonable; (2) Petitioner does not make specific reference to the reasons she seeks the information sought in each interrogatory and document request; (3) each interrogatory request is overly broad, unduly burdensome, and not relevant; and (4) the interrogatories and document requests concerning the analysis conducted, data considered, and basis of findings relating to the Ivy Report are inappropriate because, among other things, the Ivy Planning Group is a private contractor and GAO does not have any additional information beyond what is in the written report.