

# **Damian Kelly v. U.S. Government Accountability Office**

**Docket No. 08-03**

**Date of Decision: August 1, 2008**

**Cite as: Kelly v. GAO, No. 08-03 (8/1/08)**

**Before: Paul M. Coran, Administrative Judge**

## **Headnotes:**

**Discovery**

**Motions Practice**

## **RULING ON PETITIONER'S MOTION TO COMPEL**

### **I. INTRODUCTION**

Petitioner, through the General Counsel of the Personnel Appeals Board, filed his Motion to Compel with the Board on July 18, 2008. Respondent filed "GAO's Opposition to Motion to Compel" on July 28, 2008. These filings arise from "Petitioner's First Set of Interrogatories and Request for Production of Documents," dated June 18, 2008; and Respondent's "GAO's Answers to Petitioner's First Set of Interrogatories and Responses to Requests for Production of Documents," dated July 14, 2008. In addressing this dispute I am generally guided by the Federal Rules of Civil Procedure in accord with the Board's regulations. *4 C.F.R. §28.41(a)*.

The Board's discovery regulations provide that "the parties are expected to initiate and complete needed discovery with a minimum of Board intervention." *4 C.F.R. §28.40*. This provision implicitly embodies the requirement that parties attempt to meet, confer, and resolve discovery disputes before bringing such matters to the Administrative Judge.

### **II. DISCUSSION**

#### **A. Preliminary Rulings**

Petitioner initially contends that Respondent erred by failing (1) to adhere to Petitioner's interrogatory instructions to identify those individuals or agents acting on behalf of GAO who answered each interrogatory; and (2) to sign the interrogatory responses under oath attesting to the accuracy of those responses. Respondent's responses were signed, although not under oath, by an Assistant General Counsel and two senior attorneys. Unless Respondent's attorneys personally and independently developed 100% of the responses without consultation with any other persons, which is highly unlikely, Petitioner is entitled to know the identity of source persons for each interrogatory response. Such information could certainly facilitate and

suggest additional discovery (if timely) as well as the identification of prospective hearing witnesses. Accordingly, I instruct Respondent to provide that information to Petitioner.

I believe that the cause of discovery is best served by responses being signed under oath as required by Rule 33(b)(1) of the Federal Rules of Civil Procedure, which is a guiding authority under the Board's rules. I therefore direct Respondent to re-file its responses under oath. *See United States of America v. 58.16 Acres of Land*, 66 F.R.D. 570, 572 (E.D. Ill. 1975).<sup>1</sup>

#### B. Specific Discovery Requests

As a general matter, Petitioner emphasizes Respondent's objections to the discovery requests; whereas Respondent submits that with one exception, despite its objections, it was fully responsive to Petitioner's requests. In this regard, I note my role in resolving the controversy, is as described below:

[T]his court cannot look beyond the papers before it to determine whether plaintiff has complied with its legal duty, and we deny defendants' request to compel more complete answers from plaintiff. However, this Court cautions plaintiff to supplement its answers if in retrospect there exists other information relevant to the point in time at which the cause of action accrued.

*Chubb Integrated Sys. v. National Bank of Washington*, 103 F.R.D. 52, 61 (D.D.C. 1984).

Accordingly, it is not my role to dispute Respondent's assertions that it has been adequately responsive unless Petitioner presents persuasive evidence to the contrary.

I agree with Respondent's assertion that the Board should not be implicated in a discovery dispute until and unless the parties have met and conferred over the matter in the spirit of Fed. R. Civ. P. 36(a), and encourage the parties to so do in the future. This would minimize disputes and expedite the process. *See 4 C.F.R. §28.41*.

Interrogatory 6: Petitioner sought to discover whether any comparator employee to Petitioner, during the specified time period, "had leave restriction(s) of any type and duration imposed upon him/her." Despite Respondent's objection to the interrogatory's perceived vagueness, Respondent answered that Petitioner was the only such employee. In so doing, Respondent interpreted the interrogatory as addressing a formal leave restriction situation rather than the day-to-day event where a leave request might be denied because of the exigencies of the public business. I believe that construction was reasonable and that Respondent's reply appears to be complete.

Interrogatories 13-15: These interrogatories seek the identity of each individual who provided calendar, travel voucher and transportation service arrangements for named individuals in Petitioner's organization. My review of Respondent's replies, although not altogether precise, finds them to be fairly responsive, in view of the 3-year time period and process informality

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<sup>1</sup> Respondent's Opposition expressed its intention to provide such verifications upon the ruling on the Motion to Compel.

involved. Additionally, Respondent's reference to relevant deposed witnesses appears to be offered as elucidating and not to evade answering the interrogatories more fully. Accordingly, I find that Respondent has properly responded to these interrogatories.

Interrogatories 4, 16, and 23: These interrogatories deal with: (4) identifying Petitioner's comparator employees required to leave a note at their worksite regarding their whereabouts; (16) identifying the critical elements in Petitioner's job description; and (23) disclosing for the referenced appraisal periods each instance where Petitioner declined to accept an assigned task.

GAO replied: (4) that it was aware only that Petitioner was required to post such notifications, although per custom other named employees did so; (16) that while Petitioner did not have a job description he was governed by a band-level description that Respondent provided to Petitioner; and (23) Petitioner declined to accept an assigned task in only one instance, which was described in Ms. Ekstrand's deposition.

I find Respondent to have replied adequately to these interrogatories. Moreover, I am puzzled why Petitioner objects to the reference to Ms. Ekstrand's deposition. Apparently, she was centrally involved in the subject incident and had direct knowledge of the event. On one hand Petitioner has objected to Respondent not providing the identities of individuals who answered each interrogatory, but here objects when presented direct evidence from such a source.

Interrogatories 2, 7, 8, 9, 11, 12, 17, and 18: The subject interrogatories address **communications** related to: (2) restrictions on Petitioner's use of leave; (7) Petitioner's work performance; (8) Petitioner's gender, sexual preference, race, color, religious beliefs, migraine headaches or other physical condition; (9) one Jamal Wilson or a similarly named individual; (11) Petitioner's communications with the Office of Opportunity and Inclusiveness (O&I); (12) Petitioner's requests for leave; (17) work expectations for Petitioner including deadlines; and (18) performance feedback, coaching, mentoring and/or training provided to Petitioner by HC [Health Care Team] managers and/or HC employees.

Respondent replied: (2) with documentary evidence imposing and related to the leave restriction, also referencing general recollections of several HC personnel; (7) while acknowledging that Petitioner's supervisors and coworkers had numerous performance-related conversations with him during the subject 3-year period, Respondent, rather than conducting independent interviews of all possible sources, refers Petitioner to the knowledgeable deponents and responsive documentation Respondent provided Petitioner; (8) by denying knowledge of any communication regarding Petitioner's gender, race, color or religious beliefs, identifying a communication concerning his sexual orientation, and describing and providing documentation addressing the health issue; (9) denying knowledge of such person but providing information and documentation about contacts with someone who might be that person; (11) Respondent identified an instance where an employee was counseled for sending an email [apparently to O&I] about Petitioner's imminent arrival in that office; (12) Respondent incorporates its response to Interrogatory 2, states that participating individuals lacked specific recollection of such communications, while producing documents related to Petitioner's leave requests; (17) Respondent acknowledges that such communications occurred, acknowledges its inability to

locate some of the confirming documentation while providing the rest, and refers Petitioner to depositions of the officials who, apparently, maintained these communications with Petitioner; and (18) Respondent addresses its efforts to identify such oral communications, indicates that the participants lack detailed substantive recollections thereof; Respondent refers Petitioner to the depositions of knowledgeable persons and to its responses to Petitioner's related documents request.

My review of Respondent's replies to these interrogatories, on their face, satisfies me that Respondent provided elucidating documentation and undocumented anecdotal information in a reasonable manner under the circumstances. Unless oral communications over a three-year period were somehow recorded in e-mail, calendar, diary, memorandum or other recallable format, no one could be expected to produce specificity regarding those communications. I must assume, unless Petitioner has proof to the contrary, that Respondent has disclosed all such preserved information in response to Petitioner's documentation request.

Interrogatories 19-22: These interrogatories concern: identification of each instance where Petitioner's work was "below expectations" for the achieving results and maintaining customer focus competencies in a FY 2007 rating period and in the subsequent performance improvement opportunity period.

Respondent replied by referencing formal performance evaluations documenting those events. Respondent also noted that Petitioner had availed himself of the opportunity to depose Petitioner's performance rating personnel to elaborate more on those ratings.

I find in the extant circumstances that Respondent has replied with reasonable completeness to these interrogatories. However, should Respondent later in these proceedings seek to add additional acts of performance deficiency not already provided to Petitioner, I shall entertain a motion to exclude such evidence.

Interrogatories 3 and 5: These interrogatories ask Respondent to identify each HC employee during the relevant period whom Respondent required to (3) document by daily summary of their work performed; and (5) notify HC managers when they arrived to and departed from work.

Respondent declined to provide the requested information, as overly broad, beyond Petitioner's APSS [Administrative and Professional Support Staff] work unit. Respondent replied that Petitioner was the only APSS employee subject to those work conditions.

I am unconvinced that providing Petitioner with such information for the entire HC workforce would not effectuate the purposes of discovery herein. It is appropriate to inquire, irrespective of professional or staff support function, how Respondent treated employees perceived to be non-performers and/or to exhibit irregular attendance habits. This is particularly germane in the arena of discrimination cases. I therefore direct that Respondent provide its response regarding the entire HC work unit.

Interrogatory 24: This interrogatory instructs Respondent to state all the factual bases for its asserted affirmative defenses.

Respondent objected to this interrogatory as being unduly burdensome, premature and violative of attorney-client work product privilege.

GAO's Opposition does not pursue its objections except for that of prematurity. Even in that regard, Respondent asserts that it "is willing to supplement this interrogatory answer once it has had a reasonable opportunity to evaluate Petitioner's deposition transcript." Respondent's Opposition, at 13.

Accordingly, I direct Respondent to respond to this interrogatory. However, should Respondent seek to assert any privilege it must provide the necessary *Privilege Log* in the sense of *FRCP 26(b)(5)*.

Document Requests 5, 6, and 7: These requests sought: (5) all documentation reflecting Respondent's feedback, mentoring, coaching, or training of Petitioner; (6) all communications, and the like, between HC personnel concerning the assessment of Petitioner's work performance during relevant periods; and (7) all documents during those periods written by Respondent's personnel relating to Petitioner's performance.

Respondent provided Petitioner: (5) with "responsive documents" from the supervisors and personnel with whom Petitioner normally worked; (6) a statement that no specific responsive documents were issued regarding Petitioner, whose work was governed by Respondent's general guidance; and (7) Respondent incorporates by reference documentary responses to other document requests that subsume this request.

I am constrained to accept Respondent's assurance that it "has conducted a reasonable search with the employees connected to this case and has provided Petitioner with the responsive documents of which it is aware." Opposition at 13. *See also, Chubb Integrated Sys.*, 103 F.R.D. at 61.

Document Request 10: This calls for the production of all documents relating to Petitioner and/or his job performance for each of the relevant performance appraisal periods.

Respondent objected to the request as overly broad but provided response documentation regarding Petitioner's work performance and attendance.

I cannot sustain Respondent's blanket objection to producing documentation that does not directly relate to Petitioner's work performance and/or attendance. Hypothetically, Respondent might possess documentation illuminating Management's attitudes towards Petitioner that would be relevant but not necessarily directly related to his work performance and attendance. Accordingly, I direct that Respondent provide Petitioner with any additional documentation related to Petitioner except for which it has a specific and cognizable objection.

Document Request 23 seeks a copy of all documents relating to the termination of employment of one "Tracy Hawkins."

Respondent objected to this request as being vague, overly broad, irrelevant and not calculated reasonably to lead to the discovery of admissible information. However, Respondent did provide a copy of Ms. Hawkins' removal letter and an underlying memorandum regarding Ms. Hawkins' potential termination.

Ms. Hawkins is a comparator employee and was employed in Petitioner's work unit. I am not satisfied that providing Petitioner with complete documentation regarding Ms. Hawkins' treatment in the removal process could not or would not lead to the discovery of admissible evidence. Depending on Ms. Hawkins' inclusion in or exclusion from any or all of Petitioner's protected groupings, Management's disparate or like treatment of these individuals in substance and/or procedure could be relevant to the issues herein. I therefore direct that Respondent provide Petitioner with the sought documentation, while preserving Ms. Hawkins' privacy to the fullest extent practicable.

### III. RULING

- A. Respondent shall identify those individuals or agents who answered each interrogatory.
- B. The signatories to each interrogatory shall verify and attest to the truthfulness of each response.
- C. Respondent shall comply with this Opinion's directives regarding Interrogatories 3, 5, 24; and Document Requests 10 and 23.
- D. Petitioner's Motion to Compel is denied in all other particulars.

**SO ORDERED.**