

# **Patricia Donahue v. U.S. Government Accountability Office**

**Docket No. 08-05**

**Date of Decision: September 16, 2008**

**Cite as: Donahue v. GAO, No. 08-05 (9/16/08)**

**Before: Steven H. Svartz, Administrative Judge**

## **Headnotes:**

**Discovery**

**Discretion of Administrative Judge**

**PAB Regulations**

## **ORDER ON PETITIONER'S MOTION TO EXTEND DISCOVERY PERIOD AND REQUEST FOR A STATUS/SCHEDULING CONFERENCE**

### **I. BACKGROUND**

The Petition in this case raises both individual and class claims. A status conference was conducted in this case on September 12, 2008. At the status conference, the parties presented their respective positions and arguments regarding Petitioner's Motion to Extend Discovery Period and Request for a Status/Scheduling Conference (Motion) and GAO's Response to that Motion (Response). The discovery period had been scheduled to close on September 12, 2008, in accordance with the Board's Notice dated July 9, 2008. At the conclusion of the conference, the undersigned extended the discovery period until the issuance of this Order. This Order controls the discovery period from this date forward.

Section 28.40 of the Board's regulations, "Statement of purpose" regarding discovery, states as follows:

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.

4 C.F.R. §28.40.

Section 28.42(d) of the Board's regulations sets forth the time limits regarding discovery.<sup>1</sup> In particular, section 28.42(d)(5) permits an administrative judge to set a later date than the 65-day period established by the regulation (which in this case was September 12, 2008) "after due consideration of the particular situation including the dates set for hearing and closing of the case record."

The parties agree that an extension of the discovery period is warranted in this case, but disagree as to the scope of discovery that would be permitted during any extension. Although both parties agree that the scope of discovery should include discovery that concerns the individual claims raised in the Petition, the parties disagree as to the extent to which the extended discovery period should include discovery that concerns the class claims contained in the Petition.

The parties' dispute focuses on the following portion of section 28.42(d)(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*

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<sup>1</sup> That regulation (4 C.F.R. 28.42(d)) provides:

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. Deposition witnesses shall give their testimony at the time and place stated in the notice of deposition-taking or in the subpoena, unless the parties agree otherwise.

(3) In responding to a discovery request, a party or nonparty shall respond as fully as possible, except to the extent that the party or nonparty objects to the discovery or requests a protective order. Any objection or request for a protective order shall be filed within the time limits set forth in paragraph (d)(2) of this section. Any objection shall be addressed to the party requesting discovery and shall state the particular grounds for the objection. Any request for a protective order shall state the grounds for the protective order and shall be served on the administrative judge and any other parties to the action. The administrative judge shall rule on the request for a protective order.

(4) 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. Opposition to a motion to compel must be filed with the administrative judge within 10 days of the date of service of the motion.

(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.

*following the initial request shall be served within 10 days of the date of service of the prior response, unless otherwise directed.*

4 C.F.R. §28.42(d)(2) (emphasis added).

In essence, the parties disagree over what constitutes the date of GAO's "prior response" for purposes of additional discovery requests relating to the class claims in the Petition. Although not explicitly set forth in its Response, GAO clarified its position at the status conference as follows: (1) Petitioner did not serve any additional class discovery requests within 10 days of the date of service of GAO's response to the initial request, which included GAO's response to all class discovery requests and to some of Petitioner's discovery requests relating to individual claims; and (2) therefore, Petitioner should not now be permitted to file any additional class discovery requests that it could have filed, but did not file, within 10 days of that response (that is, within 10 days of August 29, 2008).<sup>2</sup>

On the other hand, Petitioner argues that it would not be practical or realistic to essentially bifurcate time limits for additional individual and class discovery requests where, as here, GAO has yet to provide its complete response to Petitioner's initial discovery requests. According to Petitioner, "[i]n the absence of GAO's complete response to her initial discovery requests, Petitioner is currently unable to determine if, and to what extent, additional discovery requests contemplated by 4 C.F.R. §28.42(d)(2) are warranted." Motion at 3 (footnote omitted). Furthermore, according to Petitioner, the 10-day period in section 28.42(d)(2) "for submitting additional discovery requests runs from the date Petitioner is served with GAO's complete responses[]" to all of Petitioner's initial discovery requests. *Id.* at n.5.<sup>3</sup>

## II. DISCUSSION

### A. Extension of discovery period

Based on the record to date, including the status conference, and the application of the wording and intent of the Board's discovery regulations, I find that an extension of the discovery period is warranted in the circumstances of this case. Section 28.42(d)(5) permits an administrative judge to set a "later date" for the completion of discovery (that is, later than 65 days after the service of the notice of filing of a petition) "after due consideration of the particular situation including the dates set for hearing and closing of the case record." As the parties discussed at the status conference, GAO's responses to Petitioner's initial discovery requests relating to Petitioner's individual claims are not yet complete, and counsel for Petitioner has indicated that an expert

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<sup>2</sup> Pursuant to 4 C.F.R. 28.42(d)(2), GAO's responses to Petitioner's initial discovery requests were due August 27, 2008. GAO responded to those requests on August 29, 2008. According to Petitioner's Motion, GAO "indicated that its tardy response was a result of a mix-up at GAO, and Petitioner takes no issue with its explanation." Motion at 2 n.2.

<sup>3</sup> At the status conference, GAO stated that it anticipated completing its response to Petitioner's initial discovery requests by Wednesday, September 17, 2008.

witness will likely be retained to review the complete discovery responses. In addition, no dates have yet been set for hearing or the closing of the case record.

Accordingly, the discovery period is extended to Friday, December 12, 2008. In addition, a status conference will be scheduled for Thursday, November 20, 2008 at 2:00 p.m. to discuss the further scheduling of this case. The parties are strongly encouraged to discuss scheduling before that date and to file before that date an agreed-upon proposal for the further expeditious scheduling of this case, including dates for any possible dispositive motions and for hearing and the closing of the case record.

B. Scope of discovery during extended discovery period

As noted above, the relevant portion of section 28.42(d)(2) provides 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." Consistent with my determination in *Lasley v. GAO*, the term "discovery requests following the initial request" refers only to those supplemental discovery requests that are based on the responses received to the initial discovery requests. As stated in that case, there is

substantial support in the text and history of section 28.42(d)(2)... 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.

*Lasley v. GAO*, Dkt. No. 08-02, *Ruling on Motion to Compel*, at 7 (August 8, 2008).

The parties dispute what constitutes the date of GAO's "prior response," within the meaning of section 28.42(d)(2), for purposes of determining the timeliness of additional discovery requests relating to the class claims in the Petition. GAO argues that the pertinent date for these purposes is August 29, 2008, and since over 10 days have passed from that date without any additional discovery requests from Petitioner relating to the class claims in the Petition, any such requests served after that 10-day period would be untimely. Petitioner, on the other hand, argues that the pertinent date for these purposes is the date on which GAO will complete its response to all of Petitioner's initial discovery requests (which GAO has represented will be September 17, 2008), and, therefore, any additional discovery requests Petitioner serves within 10 days of that date would be timely.

I find that I do not need to resolve what date would constitute GAO's "prior response" within the meaning of section 28.42(d)(2), because that section also provides an administrative judge with discretion to determine a date by which the timeliness of additional discovery requests will be measured. Specifically, section 28.42(b)(2) provides that such additional requests following the initial request "shall be served within 10 days of the date of service of the prior response, *unless otherwise directed.*" 4 CFR 28.42(d)(2) (emphasis added). Thus, the general 10-day period measured from the date of the prior response is subject to modification at the direction of an administrative judge, without the need to determine the exact date of service of GAO's prior

response.<sup>4</sup> In the circumstances of this case and in furtherance of the purposes of discovery, I conclude that any additional discovery requests from Petitioner must be served within 10 days following the date on which GAO will complete its response to all of Petitioner's initial discovery requests (which, based on GAO's representations at the status conference, is expected to be September 17, 2008).<sup>5</sup> This conclusion is not to be construed as a determination that the date on which GAO will complete its response to all of Petitioner's initial discovery requests is the date of GAO's "prior response" within the meaning of the regulation. Rather, my determination that any discovery requests from Petitioner following the initial request shall be served within 10 days of the date of service of GAO's completion of its response to Petitioner's initial discovery request is an exercise of my discretion under section 28.42(d)(2) to "otherwise direct[]" a date.

## **CONCLUSION**

The discovery period is extended to **Friday, December 12, 2008**.

Any discovery requests by Petitioner following the initial request shall be served within 10 days of the date of service of GAO's completion of its response to the initial request.

A status conference will be scheduled for **Thursday, November 20, 2008 at 2:00 p.m.** to discuss the further scheduling of this case. The parties are strongly encouraged to discuss scheduling before that date and to file before that date an agreed-upon proposal for the further expeditious scheduling of this case, including dates for any possible dispositive motions and for hearing and the closing of the case record.

A ruling on the Motion to Compel is stayed.

## **SO ORDERED.**

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<sup>4</sup> Similarly, as noted above, the general 65-day period for the completion of discovery is subject to modification by an 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).

<sup>5</sup> Petitioner also filed a Motion to Compel Discovery and Request to Stay Ruling on Motion (Motion to Compel). Petitioner states that she is requesting "that the Board stay a ruling on this Motion because Petitioner is hopeful that Respondent will address the concerns Petitioner raises in this Motion to Compel, thus obviating the need for Board intervention." Motion to Compel at 2. A ruling on the Motion to Compel is stayed. The parties are encouraged to resolve any remaining discovery matters, consistent with the expectation in section 28.40 of the Board's regulations that the parties "initiate and complete needed discovery with a minimum of Board intervention." 4 C.F.R. §28.40.