

LEO G. CLARKE v. U.S. Government Accountability Office

Docket No. 05-03

Date of Decision: August 12, 2005

Cite as: Clarke v. GAO, Docket No. 05-03 (8/12/05)

Before: Michael W. Doheny, Administrative Judge

Headnotes:

Discovery

Motions Practice

MEMORANDUM AND ORDER

**PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.**

LEO G. CLARKE,)	
)	
Petitioner)	
)	
v.)	Docket No. 05-03
)	
UNITED STATES GOVERNMENT)	
ACCOUNTABILITY OFFICE,)	
)	<u>August 12, 2005</u>
Respondent)	
)	

MEMORANDUM AND ORDER

Now pending in this action are the Agency's Motion for Protective Order, filed on August 5, 2005, and Petitioner's Motion for Extension of Time to Complete Discovery, filed after hours¹ on August 10, 2005 along with Petitioner's Response to the Motion for Protective Order. A telephone conference was held on August 12, 2005 to discuss these matters.

Previously, the discovery period was adjusted and the hearing schedule was set during a telephone conference with the parties and the undersigned administrative judge on June 16, 2005. At that conference, the date for completion of discovery was extended to Friday, August 12, 2005 (by operation of the Board's regulations, it should have closed 65 days after service of the Notice of Petition). 4 C.F.R. §§28.42(d)(5).

¹ The Board's regulations (4 C.F.R. §§28.4(d) and 28.21) and the Order (dated Aug. 8, 2005) allowing for a response to the Motion for Protective Order specify a 4:00 p.m. filing deadline. In addition, Petitioner has failed to perfect the latest filing by submitting the requisite original and three copies after filing the fax copy at 4:16 p.m. on August 10, 2005. See 4 C.F.R. §28.20(a) and 28.21.

The Board's regulations clearly delineate the time frame for the progress of discovery, stating that requests "shall be served within 30 days after the service list is served" and that follow-up requests "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)(1) and (2). Further, the regulations state that "[a]ny objection or request for a protective order shall be filed within the time limits set forth in paragraph (d)(2) of this section" (4 C.F.R. §28.42(d)(3)) and that "[m]otions 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)). The Board's regulations also specify that the rules governing hearing procedures "shall be applied in a manner which expedites the processing of each case, but with due regard to the rights of all parties." 4 C.F.R. §28.15.

The Agency now argues that it should be relieved of its duty to respond to Petitioner's First Set of Interrogatories and Request for Production of Documents, because Petitioner failed to act with requisite diligence in serving or responding to discovery. GAO points to its filing of a Motion to Compel to secure any response to its initial discovery request, and Petitioner's submission of his request beyond the deadline and with insufficient time for an Agency response before the expiration of the discovery period.

Petitioner's Response attempts to argue that his due process rights are endangered by the Agency's Motion for Protective Order. In fact, Petitioner has been given more than requisite latitude to pursue his case before the Board and has more than once failed to meet deadlines established either by regulation or by order. Beginning with the Notice of Petition (May 5, 2005), which referenced the regulations and stated that the parties had 65 days in which to

complete discovery, ample notice and opportunity to follow the required discovery schedule have been provided. As the Agency notes and the record reflects, previous extensions within the discovery schedule have been granted.

In addition to the earlier adjustment to the discovery schedule, Petitioner did not provide any responses to GAO's initial discovery request until after the Motion to Compel had been lodged, and again, required Board intervention when his initial response to the discovery request was insufficient. *See* Order of July 26, 2005. It is Petitioner who has failed to observe the requirements of the Board's process in this matter.

Nevertheless, upon consideration of Petitioner's Request for an Extension of Time for Completion of Discovery, and the interests of the parties herein, it is hereby ordered that the discovery period be extended to September 1, 2005. The Agency has until that date to provide responses to Petitioner's pending request.

No further extensions of discovery will be entertained. All other deadlines previously set remain in effect. Further delays or failure to meet established deadlines without first seeking Board permission will result in dismissal of the case.

SO ORDERED.

Date: 8-12-05

/s/
Michael W. Doheny
Administrative Judge