

SANDRA P. DAVIS v. U.S. General Accounting Office

Docket Nos. 00-05; 00-08

Date of Decision: August 20, 2001

Cite as: Davis v. GAO, Docket Nos. 00-05; 00-08 (8/20/01)

Before: Michael Wolf, Administrative Judge

Headnotes:

Discovery

Sanctions

Subpoenas

ORDER

On September 21, 2000, Petitioner propounded a Second Set of Interrogatories and Request for Production of Documents; with subparts, the interrogatories and document requests numbered in the hundreds. The Agency responded with a Motion for Protective Order, based on a number of alleged defects in the discovery request. Petitioner responded with a Motion to Compel Discovery and for Sanctions. I presided over a discovery conference on November 6, 2000 and issued a Status Conference Report and Order on that same date. In that Order, I granted in part and denied in part the Agency's Motion for Protective Order. In addition, I denied Petitioner's Motion to Compel responses to the Second Set of Interrogatories, in part because many of the interrogatories were vague and overbroad and because many were directed to specific employees of the Agency, as opposed to the Agency itself. However, I granted Petitioner leave to resubmit her interrogatories in a proper format. The parties were allowed until December 19, 2000 to complete this process.

Petitioner then submitted what she styled as a Third Set of Interrogatories and Request for Production of Documents. This discovery reformulated the previous inquiries from the Second Set of Interrogatories. Petitioner additionally included a new introductory general instruction stating: "Produce any and all documents related to the Interrogatories set forth below." That instruction had not been made a part of Petitioner's Second Set of Interrogatories.

On February 9, 2001, Petitioner filed a Motion for Leave to Continue Discovery, contending that the Agency had failed to provide adequate responses to the Third Set of discovery requests. After holding a hearing and reviewing memoranda from both parties, I issued an Order dated May 25, 2001 in which I concurred in some of Petitioner's objections to the Agency's responses and disagreed with other objections. In that Order, I directed the Agency to supplement several of its discovery responses. Currently before me is Petitioner's June 15,

2001 Motion for Sanctions and for Subpoenas. Petitioner claims that the Agency did not comply with my May 25 Order and that its failure to provide adequate discovery constitutes "bad faith" and that it has "wilfully and intentionally thwarted the purposes of the discovery regulations of the GAO Personnel Appeals Board in reckless disregard of Petitioner's right to gather evidence."

I address each of the disputed discovery requests below.

1. Interrogatories 12, 13 and 20

These Interrogatories requested the following information, and the Agency provided the following responses:

Interrogatory 12: Summarize the results of the 1999 GAO Employee Survey related to management of the Denver Regional Office. Provide all documents relied upon to prepare the summary.

Response 12: The results of the 1999 GAO Survey are contained in the attached disk (attachment 2).

Interrogatory 13: Summarize the results of the 1999 GAO Employee Survey related to management of the HEHS Issue Area. Provide all documents relied upon to prepare the summary.

Response 13: See answer to No. 12 above.

Interrogatory 20: State whether the 1999 GAO Employee Survey concluded that there was poor management of personnel in the Denver Regional Office. Provide all documents related to your answer.

Response 20: No. The survey and documents used to create the survey are provided in disk form.

In her February 9, 2001 Motion for Leave to Continue Discovery, Petitioner complained that the spreadsheet produced in computer disk format was unintelligible and did not summarize the information requested. Petitioner also requested that the Agency be compelled to produce "all reports ... prepared by Schulman, Ronca, and Bucuvalas, Inc. ["SRBI"] under contract with

Respondent, all report appendices, all statistical analyses, and any analyses of respondent and non-respondent populations, strata, sub-strata, methodology, and similar information.”

In my May 25 Order, I agreed with Petitioner that the spreadsheet produced did not summarize the data, as requested by Petitioner, and that the Agency must supplement its response so that the data is understandable to Petitioner. I further instructed the Agency that, if the supplemental submission was still unacceptable to Petitioner’s counsel, it should submit a written narrative explaining the spreadsheet. However, I denied Petitioner’s request for the above-quoted SRBI materials because they had not previously been requested:

To the extent that Petitioner seeks to expand her original Interrogatories by requesting supplemental documents (as quoted above), the Petitioner’s request is denied. Discovery is closed, and Petitioner’s Motion should not be used as a means of obtaining documents that were not previously requested. [May 25 Order at 2.]

The Agency ultimately responded to my Order by re-submitting the spreadsheet with headings inserted to explain the data and by submitting a declaration by Alice Feldesman, Assistant Director, Office of Applied Research and Methods. Petitioner objects to this response, contending that Feldesman’s declaration was deficient in explaining the spreadsheets and that the Agency had failed to produce any reports, analyses, etc. prepared by SRBI. After Petitioner’s Motion was filed, the Agency submitted another declaration from Feldesman, which expanded upon her previous declaration. GAO argues that it has now complied with my May 25 Order.

As to Petitioner’s demand for the SRBI materials, that matter was clearly and unequivocally decided by my May 25 Order. That Order stated that the SRBI materials did not have to be produced, since that request, propounded for the first time in Petitioner’s February 9, 2001 Motion, constituted a request for new documentation after discovery had been closed.

As to the remainder of Petitioner's objection, I have reviewed the spreadsheets and Feldesman's two declarations and conclude that these materials adequately respond to Petitioner's Interrogatories 12, 13 and 20. If Petitioner has doubts about Feldesman's interpretation of the data in the spreadsheet, she is free to cross-examine Agency witnesses at the hearing or to retain her own expert to analyze and explain the data. Petitioner is not free, however, to perpetuate discovery long past its closing date.

2. Interrogatories 14 and 27

These Interrogatories requested the following information, and the Agency provided the following responses:

Interrogatory 14: Summarize Comptroller General David Walker's remarks on the negative aspects of GAO culture when he used slides during a to [sic] GAO employees. Provide all documents relied upon to prepare the summary.

Response 14: See a copy of the slide used during Comptroller General Walker's presentation entitled "Barriers Affecting Past Efforts" (attachment 3).

Interrogatory 27: State whether Comptroller General David Walker gave a presentation to GAO employees which documented GAO's "fear-laden" environment. Provide any and all slides, documents, or reports related to your answer.

Response 27: No (attachment 3).

In my May 25 Order, I concluded that the Agency had not produced a summary of the Comptroller General's remarks as requested. I directed the Agency to produce a narrative summary. In response to my Order, the Agency produced a declaration of Cynthia Bascetta, who apparently was one of the attendees at the presentation made by the Comptroller General. The Agency characterizes the declaration as "Ms. Bascetta's best recollection of Mr. Walker's remarks." It also produced documents used by Bascetta in preparing her declaration.

Petitioner's pending Motion argues that Bascetta's declaration contains very little information and that "it only addresses two of the fourteen topics introduced in the single slide attached to her statement." Petitioner also argues that instead of providing a complete summary of the Comptroller General's presentation, the Agency has produced only "Ms. Bascetta's incomplete recall of this presentation and 'recycled' documentation provided by Petitioner in the first place."

I agree with Petitioner that the Agency's response does not comply with my May 25 Order. A summary of a speech by the Comptroller General must address all of the issues that he presented to employees. Presumably, the Comptroller General would be the best person to render such a summary. One attendee's recollection is not sufficient to meet the obligation imposed by my May 25 Order. Since the Agency did not object to the original interrogatory, it must provide a comprehensive summary of the Comptroller General's remarks, signed by either the Comptroller General or another appropriate official who has personal knowledge of the entirety of the presentation.

3. Interrogatory 33

Interrogatory 33 requested: "Provide a summary of each and every EEO complaint, PAB charge, or Federal District Court action filed against the following present or former HEHS and/or Denver Regional Office manager or employee.... [names omitted]."¹ The Agency responded with a list of actions, accompanied by the requested explanatory material.

Petitioner's February 9 Motion complained that this response was incomplete. She additionally requested that the answer be supplemented with documents. In my May 25 Order, I

¹ In fact, Petitioner had two interrogatories numbered "33." The one at issue is the first of the two interrogatories so numbered.

agreed that the answer should be supplemented if it was indeed incomplete, but that the Agency had "no obligation to produce any documents as a supplement to its original answer," because there was no document request with the original interrogatory. May 25 Order at 5.

In her pending Motion, Petitioner again complains that the Agency failed to produce documents in supplementation of the interrogatory. In an effort to avoid the obvious fact that the Interrogatory itself contained no such document request, Petitioner points to the introductory general instruction to her Third Set of Interrogatories, stating that the Agency should "produce any and all documents related to the Interrogatories set forth below."

Again, Petitioner is arguing a point that she already lost in my May 25 ruling. Her reliance on the quoted introductory language is unavailing. I had instructed Petitioner to re-file her Second Set of Interrogatories because they were grossly deficient. Those instructions did not give Petitioner an opportunity to re-open discovery. The Third Set of Interrogatories should have merely re-formulated the previous discovery questions into more appropriate formats. The addition of a wholly new "general instruction" was inappropriate and not in compliance with my Order of November 6, 2000. General instruction (I) (quoted above) was an improper expansion of discovery long past the date when discovery had been closed.

Moreover, even if that instruction had been proper, it was so vague and overbroad that it could not have been enforced as written. Many of Petitioner's individual interrogatories were accompanied by specific document requests (see, for example, Interrogatories 12 and 27, quoted above). The logical interpretation of instruction (I) is that it warned the Agency of the need to produce all of the documents specifically identified in the succeeding individual interrogatories. An interpretation of the general instruction that gives it a wider meaning cannot be accepted,

because of its impermissible vagueness and overbreadth.²

4. Interrogatory 36

This Interrogatory requested the following information, and the Agency provided the following response:

Interrogatory 36: Describe and explain the purpose, members and conclusions of the 1999 Price Waterhouse Coopers focus group for the VA & MHC issue area. State whether this focus group was convened at the request of Comptroller General Walker. Provide a copy of the report provided to Comptroller General Walker in June 1999 and any and all documents and other information related to your answer.

Response 36: Price Waterhouse Coopers provided Comptroller General Walker an oral briefing of their findings. The Price Waterhouse contract is attached (attachment 7).

In her February 9, 2001 Motion, Petitioner contended that the contract with Price Waterhouse provided for a written report. She reiterated her request that the written report and “briefing slides” be produced. She also requested that she be permitted to take the deposition of Comptroller General Walker. At the hearing at which this issue was discussed (March 23, 2001), the Agency opposed the taking of the Comptroller General’s deposition and reiterated its statement that no written report was ever produced by Price Waterhouse. The Agency offered to supplement its response, however, with a paper copy of a slide presentation made by Price Waterhouse during the oral briefing given to the Comptroller General. At the hearing, Petitioner’s counsel stated that she did not want to review the slide presentation; she would only accept a deposition.

² By way of example, general instruction (I) would arguably have required the Agency to produce every pleading and every piece of correspondence in every one of the actions identified in Interrogatory 33. Even Petitioner does not seem to be requesting such a broad document production. See Motion for Sanctions at 9. Such a broad request could not be made after the close of discovery and would have been questionable in its scope even if it had been timely filed.

In my Order of May 25, I denied Petitioner's request for the Comptroller General's deposition:

Petitioner's request for the CG's deposition must be denied for several reasons. First, Petitioner's original Interrogatory 36 was limited in scope. She did not seek the CG's deposition to ascertain his understanding, if any, of the events alleged in the consolidated Petition. Indeed, she did not allege that the CG had any connection to or knowledge of the alleged prohibited personnel practices that are outlined in the Petitions, a fact confirmed in the CG's Declaration. All that Petitioner originally requested was a copy of the PWC final report, apparently under the assumption that the report would have been in writing. When Petitioner was informed that the report was presented orally, she insisted, without any foundation, that it must have been in writing. Respondent again represented that there was no written report.

Respondent has now offered to produce a copy of the slide presentation used by PWC in making its oral presentation. For reasons that remain baffling, Petitioner has refused to even look at this information, at the same time that she insists the slides would be neither reliable nor an adequate substitute for a deposition. I cannot accept Petitioner's demand that the CG submit to a deposition before she even reviews other relevant materials. [Citations omitted.]

In the end, Petitioner has actually received (although she refuses to look at) the material she requested in Interrogatory 36. Respondent has produced a written summary (in the form of the 27-page slide presentation) of the oral presentation that was given to the CG. The CG's Declaration also states his recollections regarding the Denver office. At no time in the course of discovery did Petitioner seek the deposition of a PWC representative to obtain a fuller explanation of the oral briefing. Instead, Petitioner has pursued her request for the CG's deposition without articulating why that deposition is necessary or relevant. The CG disclaims any personal knowledge of the events alleged by Petitioner. He has stated under oath that he was not involved in the decisions about which Petitioner complains. Petitioner has not alleged any facts to the contrary. Accordingly, a deposition of the CG would not elicit any information directly related to the decisions about which Petitioner complains. [May 25 Order at 7-8.]

Subsequent to the May 25 Order, the Agency sent copies of its supplemental discovery responses to the PAB. Among those documents was a copy of the slide presentation alluded to above.

Based on Petitioner's representations at the hearing, the Agency did not send a copy of the slide presentation to Petitioner's counsel.

Petitioner's Motion for Sanctions complains that the slide presentation was presented to me, but not to Petitioner's counsel. Counsel claims that she

never indicated that "she did not want them [the slides]." The truth is that Petitioner's counsel argued that she did not want to barter away her lawful right to depose the Comptroller General in exchange for PowerPoint slides the Comptroller General does not recall receiving from PwC [Price Waterhouse Cooper].

Contrary to Petitioner's protestations, my recollection of the March 23 hearing is very clear. At that time, Petitioner's counsel declined the offer to receive a copy of the slide presentation; there were no qualifications or explanations at the time, as she now professes.

In her Motion for Sanctions, Petitioner now requests (for the first time) a copy of the slide presentation. In its response to her Motion, the Agency indicated that it would comply with her request "as soon as she executes and returns the Protective Agreement GAO sent to her in February 2001." In light of this representation, I am directing the Agency to send a copy of the slide presentation to Petitioner's counsel, under the conditions indicated. In all other respects, Petitioner's complaints about the response to Interrogatory 36 are rejected.

5. Interrogatory 50

This Interrogatory requested the following information, and the Agency provided the following response:

Interrogatory 50: State whether there was any change to NSIAD/IRT workload in Denver following Ms. Davis' request to transfer to that issue area. Describe what the changes were.

Response 50: There is no NSIAD/IRT core group in the Denver office. Whatever work was being done in the Denver office for the NSIAD/IRT core group was on an as needed basis. NSIAD/IRT has decided not to establish a permanent presence in Denver.

In my May 25 Order, I concluded that the Agency had not provided all of the information requested by Petitioner and that the Agency should supplement its response to indicate "the

changes that occurred in the NSIAD/IRT workload in Denver from the period before Petitioner's request for a transfer to the period after her request for a transfer." Order at 9-10.

In her Motion for Sanctions, Petitioner asserts that the Agency has not provided a supplemental response that complies with my Order. However, the Agency points to the following language in a declaration provided by James Solomon, the Acting Denver Field Office Manager:

There was a change to the NSIAD/IRT workload in the Denver office following Ms. Davis' request to be transferred to NSIAD. While at the time of Ms. Davis' transfer request the Denver office did some very limited NSIAD/IRT work on an as needed basis, they no longer do and there is no expectation that this will ever change. To the best of my knowledge all of the very limited NSIAD/IRT work that was performed in the Denver office was performed by Denver staff from the NSIAD/DA core group. There never was a NSIAD/IRT core group in the Denver office as management decided not to establish a permanent presence.

I conclude that this supplemental response is sufficient to comply with my May 25 Order. No further supplementation is required.

* * * *

In addition to the above interrogatory disputes, Petitioner has raised several additional examples of what she alleges are the Agency's non-compliance with its discovery obligations.

1. Failure to Produce Original Notes of Interviews by Stephen Backhus

Petitioner asserts that she did not receive the originals of several notes of interviews, although transcripts were provided. The Agency states that it believes it previously produced these notes, but that it did so again on July 25, 2001. In view of this representation, there is no outstanding dispute at this time.

Petitioner additionally states in her Motion for Sanctions that:

Further inspection of the transcription reveals a series of UNDATED events under a general heading "Jot down notes about Sandy's conversations." Respondent needs to provide additional information as to when and why these notes were

prepared by Mr. Backhus. A LEGIBLE copy of the original source document needs to be provided. If these notes were created before or during the PAB General Counsel's Office investigation, Respondent can request and obtain all documents memorializing discussions between Mr. Backhus and Petitioner from PAB/OGC." [Emphasis in original.]

Petitioner seems to forget that discovery was closed a very long time ago and that motions to compel or for sanctions are not vehicles for re-opening discovery. The fact that the Agency's production has prodded Petitioner to think of additional questions does not mean that she is permitted to impose new discovery obligations at this late date. This case has been set for trial and no further discovery will be permitted. The Agency does not "need" to provide the additional information requested by Petitioner.

2. Stephen Backhus' Feedback Report

Petitioner admits that this document was produced in February 2001. She now complains as follows:

Each statement about Backhus is followed by a series of Xs. Respondent needs to explain what the Xs mean, i.e. number of committee members who agreed with the statement, an individual identifier, or something else.

The Agency justifiably complains that Petitioner is merely seeking to expand upon her original discovery requests. As noted above, now is not the time for Petitioner to be submitting follow-up discovery questions. That time has passed.

3. Sharon Cekala's Notes

Petitioner asserts that she received copies of these notes in October 2000. She complains now that they are not legible. The Agency has responded that it produced the best available copy of these notes, since Ms. Cekala (a former employee) elected to retain the originals. The Agency has re-contacted Ms. Cekala, and she has agreed to search for the original notes and, if she locates them, to produce better copies. The Agency has also offered to transcribe its best copy of

