

# **Shirley A. Perry V. U.S. Government Accountability Office**

**Docket No. 07-02**

**Date of Decision: February 11, 2008**

**Cite as: Perry v. GAO, No. 07-02 (2/11/08)**

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

## **Headnotes:**

**Discovery**

**Evidence**

**Motion Practice**

**Show Cause Order**

**Subpoena**

## **ORDER**

Now pending in this matter are Petitioner's Motion for the Issuance of a Subpoena and Petitioner's Motion *in Limine* to Exclude Certain Evidence Proffered by Respondent, filed on February 6, 2008. Because the Agency's Response to the Motion for Subpoena (filed February 7, 2008) questioned the veracity of the statement underlying the Motion, the undersigned Administrative Judge issued an Order to Show Cause, requiring both parties to file follow-up submissions by 3:00 p.m. on Friday, February 8, 2008.

### **Order to Show Cause**

As ordered, Respondent filed an electronic confirmation that the e-mail attachment to its filing was in fact delivered on the date it was written (*i.e.*, "properties" print out). Respondent's submission shows that the e-mail was sent, delivered, opened and replied to on January 28, 2008.

Petitioner submitted a Response to the Show Cause Order stating that the "alleged misrepresentation was inadvertent and a result of the simultaneous preparation of a number of filings that day." She further states that "[i]t is difficult to discern what, if any, harm has been inflicted upon Respondent or the Personnel Appeals Board . . . by Ms. Williams' inadvertent error regarding the timing of the Respondent's notification concerning Mr. Seeley's refusal to appear as a witness to the trial."

Petitioner's response overlooks the fact that the very premise for seeking a waiver of the time limit for a subpoena was based upon the misrepresentation—whether inadvertent or not. Under the circumstances, there is no cause to make an exception to the Board's timeframe. 4 C.F.R. §§28.4(c), 28.46(b)(1). Accordingly, upon consideration of Petitioner's Motion for the Issuance of a Subpoena, the Response thereto, and the responses to the Order to Show Cause, the Motion for Subpoena is denied.

Petitioner's Response to Order to Show Cause also ignores the impact on the Board's process when an attorney submits a pleading that cannot be relied upon for veracity and candor. This action goes to the heart of the legal process. The Board is cognizant of the fact that an individual's hearing rights may be affected. Rather than excusing the misstatement, this implication should serve as an admonishment to counsel for future actions.<sup>1</sup>

### Motion in Limine

Petitioner's Motion *in Limine* seeks to exclude certain documentary evidence and testimony "regarding all matters within the scope of the Petitioner's Interrogatories No. 5, 7, and 11." This matter will be held in abeyance pending a further submission from the parties at the close of the waiting and revocation period following their settlement efforts.

### **SO ORDERED.**

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<sup>1</sup> This is not the first incident in the last several months involving a representation by PAB/OGC that is promptly refuted with documentation by Agency counsel. *See In re Kelly*, PAB Docket No. 07-04, Opposition to Request for Further Temporary Stay (Respondent submitted five declarations to refute PAB/OGC claim that Agency counsel had hindered investigation of Family Medical Leave Act (FMLA) issues). In that case, PAB/OGC did not seek leave to respond to the Agency's filing; in this case, they only provided a response when ordered to do so.