

# **Janett P. Smith v. U.S. General Accounting Office**

**Docket No. 01-08**

**Date of Decision: September 19, 2001**

**Cite as: Smith v. GAO, No. 01-08 (9/19/01)**

**Before: Michael Wolf, Chair**

## **Headnotes:**

**Discovery**

**Jurisdiction**

**Motion to Dismiss**

**Motions Practice**

**Timeliness**

## **ORDER**

Several motions are currently pending in the above-captioned case. The following are my rulings with respect to those motions.

### **Petitioner's Motion for Entry of a Decision by Default**

Petitioner has filed a motion to "dismiss" Respondent's response to the Petition on the ground that it was not timely filed. Petitioner argues that the response to the Petition was due on August 23, 2001, but was not received by Petitioner until August 24, 2001. Based on the untimely response, Petitioner requests that this Board "grant Petitioner the relief prayed for in the Petition for Review based on Respondent's failure to serve Petitioner with a timely response. . . ."

Petitioner is correct that the response to the Petition for Review was due on August 23, 2001. Petitioner is incorrect, however, that Respondent's response was untimely. In fact, the response was received by this Board on August 23, 2001. A response to a Petition for Review is timely if it is received by this Board on the date when it is due. In addition, Respondent timely served a copy of the response by mail on Petitioner's counsel on August 23, 2001. *See* 4 C.F.R. §§28.4(b), 28.20(b)(2). The fact that Petitioner's counsel did not receive the response until the following day (August 24) does not mean that the response was untimely. The date when Petitioner's counsel receives a response to a Petition for Review is irrelevant to the question whether the response was timely filed with this Board. Accordingly, Petitioner's assertion that the response was untimely is frivolous and her motion is denied.

### Petitioner's Motion to Amend the Petition for Review

Petitioner has requested permission to amend the Petition for Review to add allegations that Respondent "committed prohibited personnel practices while issuing the FY 2000 performance appraisal, as set forth in the Petition for Review." Respondent does not oppose this request, provided it has the opportunity to respond.

Under this Board's regulations, it has jurisdiction over the type of claim asserted by Petitioner only if that claim has been the subject of a charge filed with the PAB General Counsel. 4 C.F.R. §28.18(a) (1) and (2). A Petition based on such a charge cannot be brought to this Board until either 180 days have passed or the PAB General Counsel has issued a right to appeal letter, whichever occurs first.

Petitioner's allegations regarding her FY 2000 performance appraisal were not included in the charge that she filed with the PAB General Counsel. The right to appeal letter preceding this Petition states that Petitioner's charge alleged "that your Fiscal year 1999 performance appraisal did not accurately describe the quality or the quantity of the work you performed during the rating year. . . ." The charge filed by Petitioner did not involve the performance rating for FY 2000 and, consequently, the right to appeal letter does not address any allegations regarding the performance appraisal for FY 2000.

The issue raised by Petitioner's motion to amend is a jurisdictional one. Accordingly, Respondent's consent to the motion cannot control whether it is appropriate to grant the motion. This Board cannot create jurisdiction over a Petition unless the statute and regulations confer such jurisdiction. Since the regulations do not confer jurisdiction over the new claims that Petitioner wishes to assert, Petitioner's request to amend the Petition must be denied.

### Respondent's Motion to Enlarge Time for Discovery

Respondent filed a motion for enlargement of time on September 13, 2001, asserting that it could not meet the discovery deadlines in this case because Respondent's counsel was on a previously scheduled vacation until September 19 and because counsel had a previously scheduled training course on September 24. Respondent contends that these conflicts prevented it from responding to Petitioner's interrogatories and requests for documents by the September 19 due date and will prevent it from meeting the other discovery deadlines.

I must assume that Respondent's counsel was well aware of her vacation and training schedules long before the dates cited above. There is no explanation why Respondent waited until six days prior to the deadline for answering interrogatories to file its motion. This is not the first case before this Board in which Respondent has made last-minute requests to change the deadline for its discovery obligations. It is a tactic that has been followed all too frequently. Such belated requests do not pay sufficient respect to this Board's discovery regulations and show a disturbing lack of concern for the schedules of this Board and opposing counsel.

Unfortunately, the late filing by Respondent has effectively presented this Board with a *fait accompli*. Petitioner seems to have recognized this fact in her response, since she proposes that discovery be extended even later than the date suggested by Respondent.

In view of Respondent's motion and Petitioner's response, the following discovery schedule shall apply in this case. No further requests for extensions of any of the discovery deadlines will be granted.

**September 28, 2001**---Respondent shall file and serve upon Petitioner's counsel its responses to all outstanding interrogatories and requests for production of documents.

**September 28, 2001**---Respondent shall file and serve upon Petitioner's counsel a motion for a protective order with respect to the proposed depositions of Comptroller General David Walker and Human Capital Officer Jesse Hoskins.

**October 9, 2001**---Petitioner shall file and serve upon Respondent's counsel her opposition to the motion for protective order.

**October 9, 2001**---Petitioner shall serve upon Respondent's counsel any motion to compel discovery that she feels is necessary in light of Respondent's answers to the interrogatories and requests for production of documents.

**October 19, 2001**---Respondent shall file and serve upon Petitioner's counsel its opposition to the motion to compel discovery.

**November 14, 2001**---All depositions shall be completed by this date, with the exception of the Walker and Hoskins depositions. Petitioner's deposition shall be taken on November 14. In the event that Respondent's motion for a protective order with respect to either the Walker or Hoskins deposition is denied, such deposition(s) shall take place no later than fourteen days after the date of the order.

All filings set forth above shall be filed with the Board and served on opposing counsel by hand on the dates indicated.

**SO ORDERED.**