

# **Thomas Taydus v. U.S. Government Accountability Office**

**Docket No. 07-03**

**Date of Decision: November 25, 2008**

**Cite as: Taydus v. GAO, No. 07-03 (11/25/08)**

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

## **Headnotes:**

**Discovery**

**Evidence**

**Motions Practice**

**Sanctions**

## **DECISION ON PETITIONER'S MOTION TO ADMIT EXPERT REPORT AND TESTIMONY INTO THE RECORD**

### **I. INTRODUCTION**

On November 20, 2008, a status conference was held to discuss Petitioner's Motion to Admit Expert Report and Testimony into the Record (Pet. Expert Motion), the Respondent's Opposition to this Motion (GAO's Opposition), and Petitioner's Reply to GAO's Opposition.<sup>1</sup> This matter is addressed below.

### **II. BACKGROUND**

The relevant background pertaining to Pet. Expert Motion is set forth in full in the portion of my Decision of September 24, 2008 that addressed Petitioner's Motion to Stay Discovery, and is incorporated by reference herein. *See* Decision of September 23, 2008 at 4-9.

In brief, based on representations made by the parties in their Joint Motion for Enlargement of the Discovery Period, an Order was issued on June 9, 2008, extending the closing date for the completion of all discovery in this case to September 15, 2008. Thereafter, Petitioner filed a Motion for Leave to Amend Petition, which, as relevant here, sought to allow Petitioner to proceed on the so-called Five Year claims. In that Motion, Petitioner stated that he had "retained a statistical expert to review" the data provided by GAO on May 30, 2008, and "[b]ased upon that review" Petitioner sought to amend the Petition. Motion for Leave to Amend Petition at 2.

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<sup>1</sup> At the status conference, Petitioner's Motion for Leave to File Reply to GAO's Opposition was granted.

On September 4, 2008, I issued a Decision on Petitioner's Motion for Leave to Amend Petition and Related Matters. As relevant here, I directed Petitioner to file a response specifically addressing the Agency's assertions relating to Petitioner's Five-Year claims no later than September 11, 2008. In addition, I stated that the September 15, 2008 date "for the close of the discovery period remains unchanged." Decision of September 4, 2008 at 16 n.12.

At 3:57 p.m. on September 15, 2008 (3 minutes before the close of the discovery period), Petitioner filed a Motion to Stay Discovery. Petitioner sought the stay "for the limited purpose of allowing for the completion of expert discovery should the Board rule that Petitioner's Five-Year claims may go forward in this matter." Motion for Stay at 1 (footnote omitted). According to Petitioner, "[p]rudence suggests that the Board should decide whether those claims can go forward before Petitioner, through the Personnel Appeals Board Office of the General Counsel ("PAB/OGC"), expends government funds to pay his expert to analyze those claims." *Id.* at 3. Petitioner asserted that "[s]taying discovery until the Board rules on the pending motions to amend and to dismiss would not necessitate a rescheduling of the hearing, would not prejudice either party, and would serve the interest of justice by facilitating adjudication of this case." *Id.*

GAO opposed the motion, arguing that Petitioner had "done nothing to advance expert discovery despite having months to do so." GAO's Opposition to Motion to Stay Discovery at 2. In this regard, GAO contended that "Petitioner was supposed to have produced his expert witness report with sufficient time remaining before the September 15 close of discovery that would have allowed GAO to depose the expert, retain its own expert if necessary, and then produce the expert for deposition[,] [y]et Petitioner failed to do so." *Id.*

By Decision of September 23, 2008, I granted Petitioner's Motion to Amend the Petition to the extent that the Five-Year claims were permitted to proceed, and I concluded that no extension of the discovery period was warranted. Among other things, I noted that the discovery period in this proceeding had been a lengthy one, that extending the discovery period would necessarily result in delaying the long-established dates for the briefing and hearing schedule, and that Petitioner had had ample time in which to complete expert discovery so as to permit all additional discovery related to the expert to be completed before the close of discovery on September 15, 2008. In addition, I noted that nothing had precluded Petitioner from seeking a stay of the discovery period to complete expert discovery at the same time that Petitioner filed his Motion for Leave to Amend Petition, which was "based upon" the "statistical expert['s]" review of the data provided by GAO on May 30, 2008. Motion for Leave to Amend the Petition at 2. Finally, I explicitly declined to rule at that time on the Agency's assertion that, "'given [Petitioner's] failure to comply with discovery deadlines, Petitioner should also be precluded from offering expert testimony in support of his claims!'" Decision of September 23, 2008 at 8 n.4 (quoting GAO's Opposition at 6-7).

### III. POSITIONS OF THE PARTIES

Petitioner asserts that "critical question[s] common to" two pending motions—Petitioner's Motion for Class Certification and GAO's Motion for Summary Judgment—are whether Petitioner's expert report should be excluded from the record before the Board and whether the expert will be allowed to testify at the hearing in this case. Pet. Expert Motion at 1. Petitioner

asserts that "because of the particular circumstances of this case, the draconian remedy of excluding relevant probative evidence is unwarranted and does not serve the interest of justice." *Id.*

In this regard, Petitioner states that shortly after the September 24, 2008 Decision, he "expeditiously submitted to Respondent the just-written Expert Report." *Id.* at 4.<sup>2</sup> According to Petitioner, to exclude the expert's analysis of statistical data "would deprive the Board of relevant probative evidence and impede Petitioner's ability to fully litigate his claims." *Id.* at 5. Petitioner acknowledges that under 4 C.F.R. §28.24, an administrative judge has the authority to impose sanctions upon a party "as necessary to serve the ends of justice" when a party fails to comply with, among other things, an order for the production of evidence within the party's control or for the production of witnesses. Citing decisions of the Merit Systems Protection Board (MSPB), Petitioner asserts that no sanction is warranted here because: (1) a single failure to comply with an order is insufficient to show a lack of due diligence, negligence or bad faith in a party's compliance with an administrative judge's orders, such as would justify such a drastic sanction; and (2) even if it were appropriate to impose a sanction for a single failure to comply with a Board order, such a sanction is not warranted absent a showing of prejudice, and there is no showing of prejudice in this case (and even "if any prejudice did arise as a result of Petitioner's production of his expert's report, it is readily curable"). *Id.* at 8.

The Agency argues that it has been prejudiced in several ways by Petitioner's failure to produce the expert report within the discovery period, and that Petitioner should be precluded from admitting the expert report and testimony into the record. In particular, the Agency asserts that it has been prejudiced by: (1) not "having the opportunity to test [the] expert's opinions and methodology during discovery"; (2) "forcing GAO to move for summary judgment and oppose class certification without expert discovery;" and (3) by "successfully preventing GAO from making an informed decision based upon a full and fair discovery record as to whether and to what extent it should retain its own expert to counter Petitioner's assertions in the briefs and at a hearing." GAO's Opposition at 2. In this regard, GAO asserts that "[t]hrough excluding Petitioner's expert report will prevent Petitioner from offering relevant and perhaps dispositive evidence . . . fairness dictates that such evidence should have been subject to fair testing by GAO." *Id.* at 10. Additionally, GAO contends that greater weight should be given to federal court decisions in this area, rather than to decisions of the MSPB, and that federal court decisions support the exclusion of the expert report and testimony.

#### IV. STATUS CONFERENCE OF NOVEMBER 20, 2008

On November 20, 2008, prior to the start of the status conference, Petitioner filed an unopposed Motion to Dismiss Certain Counts of Amended Petition. The Motion sought to dismiss Counts I, III, and IV of the Amended Petition (the age discrimination counts). According to the Motion, "the counts remaining extant are Counts VII and VIII [which] allege that GAO's practice of assessing Band IF employees' job performance for FY 2002 resulted in Petitioner and other GAO employees with more than five years of GAO experience receiving disproportionately lower ratings than those GAO employees with less than five years of GAO experience." Petitioner's

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<sup>2</sup> The expert report is attached to Petitioner's Opposition to Summary Judgment as Exhibit 1.

Motion to Dismiss Certain Counts of Amended Petition at 1. The Motion was granted at the status conference.

During the conference, counsel for Petitioner acknowledged that the expert report had not been completed and provided to GAO counsel within the discovery period, and further acknowledged that this inaction resulted in prejudice to GAO. However, counsel for Petitioner reiterated his earlier contention that the sanction of excluding the expert report and the expert testimony was not warranted because the failure to comply with the discovery deadline in this respect was not the result of bad faith or willfully disobeying an order; rather, it was based on a good faith belief that government funds should not be expended unnecessarily pending resolution of whether the Five Year claims would be permitted to go forward. Counsel for GAO disputed Petitioner's good faith argument and reiterated his contention that the failure to comply with the established discovery deadline and the prejudice incurred by GAO warranted the imposition of the sanction of excluding the expert report and expert testimony.

In addition, during the status conference the parties engaged in a productive discussion about specific ways to minimize the acknowledged prejudice to GAO in the event that the expert report and testimony were admitted. This matter is addressed below.

## V. ANALYSIS

On consideration of the record in this case, as well as the representations by counsel at the status conference, I find as follows.

Section 28.24 of the Board's regulations provides that an administrative judge has the authority to impose sanctions on a party "as necessary to serve the ends of justice" when, among other things, a party fails to comply with an order for the taking of a deposition, for the production of evidence within a party's control, for an admission, or for the production of witnesses. *See* 4 C.F.R. §28.24. In order to determine whether the sanction of excluding the expert report and testimony is warranted in this case, it must first be determined whether Petitioner failed to comply with Board orders directing Petitioner to complete discovery within the established time period. If the answer to that question is yes, consideration must be given to the reasons for such a failure to comply, the extent of the prejudice suffered by GAO, and the possible ways, if any, by which any prejudice can be minimized at this point in time.

As to the first matter, I find, as acknowledged by Petitioner's counsel during the status conference, that Petitioner failed to comply with Board orders directing Petitioner to complete discovery within the established time period. As stated in my Order of June 9, 2008, and explicitly reaffirmed in my decision of September 4, 2008, all discovery in this case was due to be completed by September 15, 2008. Petitioner should have ensured that the expert report was completed and provided to GAO in sufficient time before the expiration of the discovery period for GAO to have considered the report, deposed Petitioner's expert, and determined whether it should retain its own expert.

As to the reasons for Petitioner's failure to comply, nothing in the record suggests that Petitioner was unable to comply with his discovery obligations within the established time period, and,

indeed, Petitioner does not claim that he was unable to provide the report in a timely manner. Moreover, the record does not support a conclusion that Petitioner's failure was an act of bad faith or was a willful failure to disobey a Board order. Rather, I find that Petitioner's failure to do so was based on counsel's good faith, albeit mistaken, belief that the particular circumstances of this case warranted waiting until almost literally the last minute of the discovery period before seeking to extend the period for purposes of completing the expert report and providing it to GAO.

Further, as to the extent of the prejudice suffered by GAO, it is clear, as acknowledged by Petitioner's counsel at the status conference, that GAO was prejudiced in several ways. First, GAO was prevented from deposing Petitioner's expert during the discovery period as to his opinions or methodology or any other matters. In this regard, GAO correctly asserts that "fairness dictates that such evidence should have been subject to fair testing by GAO." GAO's Opposition at 10. Second, in order to file its Motion for Summary Judgment and Opposition to Class Certification within the established time limits, GAO had to submit its filings without having had the benefit of first deposing Petitioner's expert. Third, because of its inability to depose Petitioner's expert during the discovery period, the Agency was unable to make a determination based on all of the relevant evidence as to whether it should retain its own expert and, if so, for what purposes.

As stated earlier, during the status conference the parties engaged in a productive discussion about specific ways to minimize the acknowledged prejudice to GAO in the event that the expert report and testimony were admitted. With respect to the first area of prejudice identified above, the parties agreed that GAO could depose Petitioner's expert as soon as schedules and availability permitted. With respect to the second area of prejudice, a suggestion was made that GAO could supplement its filings following its deposition of Petitioner's expert. Noting the numerous submissions already filed in this case, counsel for GAO expressed the view that supplemental filings were not necessary.<sup>3</sup> With respect to the third area of prejudice, the parties agreed that, following the deposition of Petitioner's expert witness, GAO could determine whether to retain its own expert witness. In order to provide for the continued processing of this case in an expeditious manner, counsel for Petitioner stated that he would waive any right to depose an expert witness chosen by GAO.<sup>4</sup>

In the circumstances of this case, I conclude that the sanction of excluding the report and testimony of the expert witness for Petitioner is not "necessary to serve the ends of justice" within the meaning of section 28.24 of the Board's regulations.<sup>5</sup> In my view, this case presents an unusual situation of a clear, but nonetheless good faith, failure to comply with the Board's

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<sup>3</sup> Counsel for Petitioner did not disagree with this view.

<sup>4</sup> A discussion was also held on the possibility of admitting either the expert report or the expert testimony, but not both. It was determined that this possibility was not feasible in these circumstances.

<sup>5</sup> Although the parties dispute whether MSPB or federal court cases are more apposite in this instance, I need not resolve that dispute because I find that the cases cited by the parties are not sufficiently analogous to the circumstances in this case to be of any significant weight.

discovery deadlines, where the prejudice to GAO that resulted from that failure to comply can be ameliorated with minimum disruption to the continued processing of this case. Accordingly, given the particular circumstances of this case and the representations of counsel for Petitioner at the status conference, I conclude that it is not necessary to impose the sanction of excluding the report and testimony of Petitioner's expert witness. Rather, I will admit the report of Petitioner's expert, attached to Petitioner's Opposition to Summary Judgment as Exhibit 1, and will permit the expert to testify, subject to the conditions and dates set forth below (all of which were discussed at the status conference).<sup>6</sup>

## VI. CONCLUSION

The report of Petitioner's expert will be admitted into the record, and the Petitioner's expert will be permitted to testify, subject to the following conditions:

1. Petitioner will make his expert available for deposition by GAO as expeditiously as possible, in order to ensure that the continued processing of this case can take place consistent with the dates set forth below.

2. If GAO decides that it will retain its own expert, that expert will be allowed to testify at the hearing. Counsel for Petitioner will not be able to depose GAO's expert, having explicitly waived that right at the status conference.

3. The parties will submit their lists of proposed witnesses and exhibits by close of business on **Wednesday, December 3, 2008**.

4. An in-person pre-hearing conference is scheduled for **Thursday, December 4, 2008, at 10:00 a.m.**

5. The hearing in this case is scheduled to open on **Wednesday, December 10, 2008, at 10:00 a.m.** As discussed by the parties at the status conference, if GAO determines that it needs additional time after the opening of the hearing to make determinations based on its deposition of Petitioner's expert, it may seek a continuance of the hearing for that purpose.<sup>7</sup>

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<sup>6</sup> Nothing in this decision should be construed as condoning Petitioner's failure to comply with the established discovery deadlines and with the spirit of section 28.40 of the Board's regulations, "Statement of purpose" regarding discovery, which 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.

<sup>7</sup> With respect to the scheduling of the hearing, I asked counsel for GAO, as the representative of the party that incurred prejudice, for his view as to whether, if the expert report and testimony were to be

Remaining pending at this time are Petitioner's Motion for Class Certification and GAO's Motion for Summary Judgment.

**SO ORDERED.**

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admitted, the hearing should be postponed or whether it should be opened during the previously scheduled week of December 8, 2008 and continued if necessary. Counsel for GAO stated that, in his view, the latter option was more appropriate. Counsel for Petitioner deferred to counsel for GAO on this matter.