Thomas Taydus v. U.S. Government Accountability Office

Docket No. 07-03

Date of Decision: September 23, 2008

Cite as: Taydus v. GAO, No. 7-03 (9/23/08)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Discovery

Disparate Treatment

Filing of a Petition

Motions Practice

Prohibited Personnel Practice

DECISION ON PETITIONER'S AND RESPONDENT'S MOTIONS WITH RESPECT TO COUNTS VII AND VIII OF THE AMENDED PETITION AND PETITIONER'S MOTION TO STAY DISCOVERY

I. INTRODUCTION

In a decision dated September 4, 2008 (Decision), the undersigned granted, in part, and denied, in part, Petitioner's Motion for Leave to Amend the Petition. In addition, the Decision directed Petitioner to file a response no later than September 11, 2008, specifically addressing the Agency's assertions relating to Counts VII and VIII of the Amended Petition (also referred to as the Five-Year claims). The Decision also stated that the due date for any possible Opposition to the Motion for Class Certification would be set by subsequent order, if necessary, and that "[a]ll other dates set forth in the Order of March 31, 2008, up to and including the hearing dates, remain unchanged." Decision at 16.

Petitioner filed his Response on September 11, 2008. On September 15, 2008, Petitioner filed a Motion to Stay Discovery Pending Board's Ruling on Petitioner's Motion to Amend and Respondent's Motion to Dismiss (Motion to Stay Discovery). On September 19, 2008, the Agency filed its Opposition to Motion to Stay Discovery (Opposition).

On consideration of the parties' filings and the record in this case, my determinations are set forth below.

II. DISCUSSION

A. The Five-Year Claims

As acknowledged by Petitioner, his Motion for Leave to Amend Petition and the wording of Counts VII and VIII of the Amended Petition "caused confusion regarding the nature of his Five-Year claims." Response at 3; *see also* Decision at 11-16. For this reason, the Decision directed Petitioner to file a Response clarifying the nature of these claims.

In his Response, Petitioner states that these counts allege that "the Agency had a practice in FY 2002 of giving lower performance ratings to those employees who had been employed by GAO for more than five years at the time their performance was measured relative to those employees with less than five years experience at GAO at the time their performance was measured, and that this practice constituted a prohibited personnel practice in violation of 5 U.S.C. §2302b)(12)."[1] Response at 4. Petitioner "unequivocally states that he is not asserting, and has not, asserted a disparate treatment discrimination theory with regard to" the Five-Year claims. *Id*. at 2. In addition, Petitioner states that the record "demonstrates that, rather than pursuing his Five-Year claims under a discrimination disparate impact theory, Petitioner has consistently pursued those claims as a prohibited personnel practice claim" under 5 U.S.C. §2302(b)(12). *Id.* at 8.

In particular, Petitioner alleges that: (1) the Agency's issuance of performance appraisal ratings constitutes a personnel action within the meaning of 5 U.S.C. §2302(a)(2)(A)(viii); (2) the relevant merit system principles at issue are that equal pay should be provided for work of equal value, 5 U.S.C. §2301(b)(3), and that employees should be protected against arbitrary action, 5 U.S.C. §2301(b)(8)(A); (3) the rules or regulations implementing those principles are GAO Order 2430.1, which states that employees shall be rated according to performance standards that accurately measure performance on the basis of job-related criteria, and GAO Order 2540.3, Pay Administration in the Analyst Performance-Based Compensation System (November 14, 2002); and (4) the Agency acted arbitrarily in evaluating the work performance of employees with more than five years of GAO experience lower than that of employees with less than five years of experience. Response at 4.

Further, Petitioner contends that the factual bases for this allegation are that "'GAO's own statistics . . . suggest that . . . when rating employees, calculating appraisal scores, calculating Standardized Rating Scores . . . placing employees in merit pay categories, and calculating merit pay, GAO improperly considered whether the employees . . . had worked at GAO for more or less than five years'." Response at 7-8 (*quoting* Petitioner's Responses to Interrogatory No. 2 at 2).

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[1] Section 2302(b)(12) states that "any employee who has the authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority . . . take or fail to take any other personnel action if the taking or failing to take such action violates any law, rule or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title." 5 U.S.C. §2302(b)(12).

On July 14, 2008, prior to the issuance of the Decision on September 4, 2008, GAO filed a Motion to Dismiss Petitioner's Five-Year claims and a Memorandum in support thereof. In the Memorandum, GAO argued that disparate impact is not a theory that can be used under 5 U.S.C. §2302(b)(12). *See* Memorandum at 2, 12-15. In the Decision of September 4, 2008, I found that "Petitioner has expressly disavowed any intent to pursue a disparate impact theory with respect to Counts VII and VIII of the Amended Petition[,]" and "Petitioner will not be able to use such a theory in support of the modified Counts VII and VIII." Decision at 13, 14. In this regard, Petitioner's Response states that the record "demonstrates that, rather than pursuing his Five-Year claims under a discrimination disparate impact theory, Petitioner has consistently pursued those claims as a prohibited personnel practice claim" under 5 U.S.C. §2302(b)(12). Response at 8.

In these circumstances, I reaffirm my determination that Petitioner will not be able to use a disparate impact theory in support of Counts VII and VIII of the Amended Petition. For the reasons stated by the Agency in its Memorandum, disparate impact is not a theory that can be used under 5 U.S.C. §2302(b)(12). Accordingly, the Agency's Motion to Dismiss Counts VII and VIII is granted to the extent that those counts rely on a disparate impact theory.

However, insofar as Petitioner's Response suggests that he is pursuing Counts VII and VIII under a theory that is cognizable under 5 U.S.C. §2302(b)(12), I further find that the continued processing of this case will best be effectuated by granting Petitioner's Motion to Amend to the extent that Counts VII and VIII are permitted to proceed consistent with Petitioner's Response. If either party wishes to file a dispositive motion regarding Counts VII and VIII (as permitted to proceed consistent with Petitioner's Response), it must do so by October 3, 2008, which is the date specified previously by Order of March 31, 2008, as the date on which dispositive motions are due. In addition, any Opposition to the Motion for Class Certification with respect to Count VIII must also be filed by October 3, 2008.

B. Petitioner's Motion to Stay Discovery

By Order of March 31, 2008, all discovery in this case was to be conducted and completed by July 3, 2008. That Order also established the following schedule: dispositive motions are due October 3, 2008; responses are due October 24, 2008; pre-hearing submissions are due November 21, 2008; a pre-hearing conference is set for December 2, 2008; and the commencement of the hearing is set for December 8, 2008.

On June 6, 2008, the parties filed a Joint Motion for Enlargement of Discovery Period (Joint Motion) seeking to extend the completion date for discovery to September 15, 2008. The Motion represented that: (1) GAO had completed providing its responses to Petitioner's initial discovery requests on May 30, 2008; (2) much of that information consisted of statistical data that had to be reviewed by an expert retained by Petitioner for the purpose of determining whether additional discovery requests were warranted; (3) Petitioner's expert had begun such a review, but did not expect to conclude that review until after June 9, 2008 (the date on which any additional discovery requests by Petitioner were due to be served on GAO); (4) because Petitioner's expert had not completed a review of the data provided by GAO, Petitioner would have to supplement a majority of his responses at a later date; (5) GAO had requested any report by Petitioner's expert and would depose Petitioner's expert; (6) GAO anticipated that it may also

have to retain its own expert, but would not be able to make that determination until after it is able to discover the opinions of Petitioner's expert; and (7) Petitioner similarly anticipated taking the deposition of any expert GAO intends to call at a hearing.

In their Joint Motion, the parties also stated that the "granting of this Motion will not necessitate changing either the briefing or hearing schedules previously established in this case by the Board." Joint Motion at 1. More specifically, they "agree[d] that extending the discovery completion date to September 15, 2008 . . . would afford the parties a realistic opportunity to complete discovery [and] would not necessitate rescheduling the filing of any motions and oppositions thereto, the pre-hearing statement, the pre-hearing conference or the hearing." *Id.* at 3 (emphasis in original).

By Order of June 9, 2008, upon consideration of the Joint Motion, the underlying circumstances, and "the joint representation that the briefing and hearing schedule remains as set by Order of March 31, 2008," the Joint Motion was granted and the closing date for the completion of all discovery was extended for over two months to September 15, 2008.

On June 27, 2008, Petitioner filed a Motion for Leave to Amend Petition. 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 on that review" Petitioner sought to amend the Petition. Motion for Leave to Amend the Petition at 2.

Subsequently, the parties filed numerous documents up to and including August 25, 2008.[2] On September 4, 2008, a Decision was issued. With respect to the discovery period, the Decision stated:

> As established by the Order of March 31, 2008, the discovery period closes on September 15, 2008. The date for the close of the discovery period remains unchanged.

Decision at 16 n.12.[3]

On September 15, 2008, Petitioner filed his Motion to Stay Discovery. Petitioner seeks 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. Noting that 4 C.F.R. §28.42(d)(5) authorizes the administrative judge to extend the discovery period after due consideration of the particular situation, including the dates set for the hearing, Petitioner asserts 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,

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[2] The documents filed by the parties are set forth in the Decision at 2 n.2.

[3] The reference in the Decision to the Order of March 31, 2008 was inadvertently in error. As stated above, the Order establishing the close of discovery as September 15, 2008 was dated June 9, 2008.

would not prejudice either party, and would serve the interest of justice by facilitating adjudication of this case." *Id.*

On September 19, 2008, GAO filed its Opposition to the Motion to Stay Discovery. GAO argues that Petitioner "has done nothing to advance expert discovery despite having months to do so." Opposition at 2. In this regard, GAO contends 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.* Moreover, GAO asserts that, "despite its label, Petitioner's Motion is not a motion to 'stay' discovery[;] [rather, it] is actually an attempt to extend discovery for what would amount to a lengthy delay of all of the scheduled dates, including the hearing dates." *Id.* (emphasis in original). As such, GAO argues that Petitioner's request should be denied.

Section 28.42(d)(5) of the Board's regulations permits an administrative judge to set a later date than the 65-day period established by the regulation "after due consideration of the particular situation including the dates set for hearing and closing of the case record."

Having given due consideration to the particular situation in this case, including the dates set for hearing and closing of the case record, I conclude that no extension of the discovery period is warranted. Section 28.40 of the Board's regulations, "Statement of purpose" regarding discovery, 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.

As set forth in detail above, the discovery period in this proceeding has been a lengthy one. The initial date for the close of discovery was set for over three months from the date of the Status Conference Report and Order. That date was then extended for over two more months by Order of June 9, 2008, based upon the parties' joint representation that the briefing and hearing schedule would remain as set by Order of March 31, 2008. I find that extending the discovery period at this point in the proceeding would necessarily result in delaying the long-established dates for the briefing and hearing schedule. Moreover, I note that Petitioner 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.[4] In addition, nothing

[4] The Agency asserts that "given [Petitioner's] failure to comply with discovery deadlines, Petitioner should also be precluded from offering expert testimony in support of his claims." Opposition at 6-7; *see also id.* at 10. No ruling on this request is made at this time.

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 (June 27, 2008), 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.[5]

In these circumstances, and consistent with the statement in the Board's discovery regulations that Board proceedings should be conducted as expeditiously as possible with due regard to the rights of the parties, no further extension of the discovery period is appropriate.[6]

CONCLUSION

The Agency's Motion to Dismiss Counts VII and VIII is granted to the extent that those counts rely on a disparate impact theory.

Insofar as Petitioner's Response suggests that he is pursuing Counts VII and VIII under a theory that is cognizable under 5 U.S.C. §2302(b)(12), Petitioner's Motion to Amend is granted to the extent that Counts VII and VIII are permitted to proceed consistent with Petitioner's Response. If either party wishes to file a dispositive motion regarding Counts VII and VIII (as permitted to proceed consistent with Petitioner's Response), it must do so by **October 3, 2008**, which is the date specified previously by Order of March 31, 2008, as the date on which dispositive motions are due. In addition, any Opposition to the Motion for Class Certification with respect to Count VIII must also be filed by **October 3, 2008**.

As set forth in the Order of March 31, 2008, responses to any dispositive motions are due **October 24, 2008**; pre-hearing submissions are due **November 21, 2008**; a pre-hearing conference is set for **December 2, 2008**; and the commencement of the hearing is set for **December 8, 2008**.

Petitioner's Motion to Stay Discovery is denied.

SO ORDERED.

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[5] As the issue is not before me, I need not address whether any stay request that might have been filed at that time would have been granted.

[6] As stated above, under §28.42(d)(5) of the Board's regulations, determinations as to whether to extend the period for discovery are to be made "after due consideration of the particular situation including the dates set for hearing and closing of the case record." In another case, I recently granted a motion to extend the discovery period where, among other things, no dates had yet been set for hearing and closing of the case record. *See Donahue v. GAO*, Docket No. 08-05 (Order of September 16, 2008).