

Thomas Taydus v. U.S. Government Accountability Office

Docket No. 07-03

Date of Decision: September 4, 2008

Cite as: Taydus v. GAO, No. 07-03 (9/4/08)

Before: Steven H. Svartz, Administrative Judge

Headnotes:

Age Discrimination

Class Action

Disparate Treatment

Exhaustion of Remedies

Length of Service

Motions Practice

Notice

Undue Delay/Prejudice

DECISION ON PETITIONER'S MOTION FOR LEAVE TO AMEND PETITION AND RELATED MATTERS

I. INTRODUCTION

In a decision dated February 29, 2008, the undersigned granted, in part, and denied, in part, GAO's Motion to Dismiss the Petition in this proceeding. That decision dismissed claims in the Petition relating to fiscal years (FY) 2003 – 2006.

On June 27, 2008, Petitioner filed a Motion for Leave to Amend Petition (Motion to Amend) as well as an Amended Petition, addressing matters related to FY 2002.¹ After Petitioner filed his Motion to Amend and Amended Petition, the parties filed several other

¹ Section 28.21(a) of the Board's regulations (4 C.F.R. §28.21(a)) states:

The Board, at its discretion, may allow amendments to a petition as long as all persons who are parties to the proceeding have adequate notice to prepare for the new allegations and if to do so would not prejudice the rights of the other parties or unduly delay the proceedings.

documents.² The matters in dispute relate generally to two areas: counts alleging age discrimination and counts alleging discrimination based on length of service with the Agency.³ These matters are discussed and resolved below.

II. COUNTS RELATING TO CLAIMS OF AGE DISCRIMINATION

A. Individual claims

Counts V – VII of the original Petition allege that GAO’s practice of giving lower performance appraisals to Band I employees who were over the age of 40 relative to Band I employees who were under the age of 40 had a disparate impact on Petitioner’s promotion opportunities and pay in violation of the Age Discrimination in Employment Act (ADEA) (Count V) and subjected Petitioner to personnel practices prohibited by 5 U.S.C. §2302(b)(1)(B) (Count VI) and 5 U.S.C. §2302(b)(12) (Count VII).

² In sequence, the parties filed the following documents:

- (1) GAO's Motion for Leave to File Response to Motion to Amend Petition;
- (2) Petitioner's Response to Respondent's Motion for Leave to File Response to Motion to Amend Petition;
- (3) GAO's Withdrawal of Motion for Leave to File Response to Motion to Amend Petition;
- (4) GAO's Motion to Dismiss Count XII of Original Petition, or, in the Alternative, Motion to Dismiss Counts VII and VIII of Amended Petition (GAO Motion to Dismiss);
- (5) Respondent's Opposition to Motion to Amend Petition and Memorandum of Law in Support of Motion to Dismiss Count XII of Original Petition (GAO Opposition);
- (6) GAO's Errata to Opposition to Motion to Amend Petition and Memorandum of Law in Support of Motion to Dismiss Count XII of Original Petition;
- (7) Petitioner's Reply to Respondent's Opposition to Motion to Amend Petition, and Petitioner's Opposition to Respondent's Motion to Dismiss Count XII of Original Petition, or, in the Alternative, Motion to Dismiss Counts VII and VIII of Amended Petition (Pet. Reply);
- (8) Petitioner's Motion for Class Certification;
- (9) GAO's Motion for Leave to File Sur-Reply to Motion for Leave to Amend Petition and to File Reply in Support of Motion to Dismiss Count XII of Original Petition, or, in the Alternative, Counts VII and VIII of Amended Petition (GAO Motion for Leave to File Sur-Reply and Reply);
- (10) Respondent's Sur-Reply to Motion for Leave to Amend Petition and Reply in Support of Motion to Dismiss Count XII of Original Petition, or, in the Alternative, Counts VII and VIII of Amended Petition (GAO Sur-Reply and Reply);
- (11) Petitioner's Opposition to Respondent's Motion for Leave to File Sur-Reply to Motion for Leave to Amend Petition (Pet. Opposition);
- (12) Respondent's Motion to Hold in Abeyance Respondent's Opposition to Petitioner's Motion for Class Certification (GAO Motion to Hold in Abeyance); and
- (13) Petitioner's Opposition to Respondent's Motion to Hold in Abeyance Respondent's Opposition to Petitioner's Motion for Class Certification.

³ Petitioner also seeks to dismiss Counts I – IV, VIII – X, and XI of the original Petition, insofar as those counts relate to FY 2002. Motion to Amend at 2. The Agency does not oppose this portion of the Motion to Amend. These counts are dismissed.

Counts I, III, and IV of the Amended Petition allege that GAO's practice of assessing Band IF employees' job performance for FY 2002 had a disparate impact on Petitioner, who was over the age of forty at the time his job performance for FY 2002 was measured, and resulted in Petitioner receiving a lower appraisal score and lower merit pay, and decreasing his promotion opportunity, in violation of the ADEA (Count I), and subjected Petitioner to personnel practices prohibited by 5 U.S.C. §2302(b)(1)(B) (Count III) and 5 U.S.C. §2302(b)(12) (Count IV).

In essence, Counts I, III, and IV of the Amended Petition restate the allegations of Counts V, VI, and VII of the original Petition, respectively, and identify the Petitioner as being over the age of forty at the time his job performance for FY 2002 was measured. GAO does not object to the amendment of the Petition as to these counts. Counts I, III, and IV of the Amended Petition satisfy the standards of 4 C.F.R. §28.21(a). Accordingly, Petitioner's Motion to Amend is granted as to Counts I, III, and IV of the Amended Petition.

B. Class Claims

1. Background

Counts II, V, and VI of the Amended Petition seek to extend the individual age discrimination allegations of the original Petition to similarly situated current and former GAO employees.⁴ Petitioner asserts that such an amendment is appropriate because "Petitioner exhausted his administrative remedies [with respect to such class claims], Respondent will suffer no prejudice from the amendment, and amending the Petition will facilitate the processing of this matter." Motion to Amend at 3. Among other things, Petitioner argues that, as a *pro se* complainant, he put GAO on sufficient notice that he was alleging a class-wide age discrimination claim and that the Office of Opportunity and Inclusiveness (O&I) should have informed the *pro se* complainant of the "detailed and intricate" requirements of the administrative scheme for pursuing a class complaint but failed to do so. Petitioner's Reply at 8; *see also* Motion to Amend at 5.

The Agency opposes such an amendment, arguing that "Petitioner failed to exhaust his age discrimination claims on a class basis [and] [a]s such, Petitioner's request to add class claims should be denied because the proposed amendment could not survive a dispositive motion, would prejudice GAO, and delay these proceedings." GAO Opposition at 2. In this regard, the Agency contends, in part, that Petitioner did not file a class complaint with O&I after he had been given a "Notice of Right to File a Discrimination Complaint" that advised him that "[i]f you wish to file a class complaint, a counselor will explain the class complaint procedures and the responsibilities of a class agent required by chapter 4 of GAO Order 2713.2." GAO Opposition at 9.

⁴ In seeking to extend the individual age discrimination claim in the original Petition to current and former GAO employees similarly situated to him, Petitioner states that he "also slightly refined the class definition of his original Petition to clarify that his claim regarding GAO's performance appraisal process arose from when the performance of the putative class members was measured by GAO, rather than when those employees received their performance appraisal." Petitioner's Motion for Class Certification at 1.

2. Analysis

a. Exhaustion of Administrative Remedies⁵

As noted above, "[t]he Board, at its discretion, may allow amendments to a petition as long as all persons who are parties to the proceeding have adequate notice to prepare for the new allegations and if to do so would not prejudice the rights of the other parties or unduly delay the proceedings." 4 C.F.R. §28.21(a). No purpose would be served by allowing an amendment to a petition if it can be shown that the amended claim would be futile, because it would be dismissed or otherwise would fail if subjected to a dispositive motion. *See, e.g., James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1099 (D.C. Cir. 1996).

The parties dispute whether the age discrimination class claims set forth in the Amended Petition would be subject to dismissal on the ground that Petitioner did not exhaust his administrative remedies for filing such class claims. For the reasons discussed below, I conclude that Petitioner did not exhaust his administrative remedies for filing such class claims.

It is undisputed that GAO Order 2713.2 establishes a separate and distinct administrative procedure for processing discrimination claims of a class as opposed to the procedure that is used for processing an individual's discrimination claims. *Compare* GAO Order 2713.2, Ch. 4, Class Complaints *with* GAO Order 2713.2, Ch. 3, Individual Complaints. If a matter has not been resolved to the satisfaction of an aggrieved individual before the end of the precomplaint processing period, a counselor must inform the individual in writing of, among other things, the right to file a discrimination complaint and the right to file a class complaint. *See* GAO Order 2713.2, Ch. 3, ¶1.d(1) & (4). If the aggrieved person informs the counselor that he or she wishes to file a class complaint, the counselor shall explain the class complaint procedures and the responsibilities of a class agent required by Chapter 4 of the GAO Order. *See id.* at Ch. 3, ¶1.d(4).⁶

In this case, record evidence demonstrates that in February 2003, the O&I counselor gave to Petitioner, and Petitioner signed, a form entitled "Notice of Right to File a Discrimination Complaint." GAO Opposition, Ex. B. The form states that the counselor held a final interview with Petitioner related to the matter he presented during counseling, that Petitioner had a right to file a complaint of discrimination with O&I, and that "[i]f you wish to file a class complaint, a

⁵ GAO filed a Motion for Leave to File Sur-Reply to Motion for Leave to Amend Petition, and Petitioner filed an Opposition to this Motion. The Motion is granted with respect to the first and second matters discussed therein, as those matters were addressed for the first time in Petitioner's Reply. The Motion is denied as to the third matter, which relates to *Federal Express v. Holowecki*, 128 S.Ct. 1147 (2008) (*Holowecki*), which was previously brought up in this proceeding.

⁶ In this regard, the Board's regulations (4 C.F.R. §28.97(a)) state:

Prior to invoking the Board's procedures in a case alleging prohibited discrimination on behalf of a class of GAO employees or applicants for employment, a complaint must first be filed with GAO in accordance with GAO Order 2713.2.

counselor will explain the class complaint procedures and the responsibilities of a class agent required by chapter 4 of GAO Order 2713.2." *Id.*

On February 20, 2003, Petitioner filed a complaint of discrimination with O&I alleging that he had been discriminated against on several bases and requesting, as corrective action, that he be awarded a promotion and back pay. GAO Opposition, Ex. C. No class complaint was filed.

Petitioner argues that "a fair reading of Petitioner's *pro se* administrative discrimination complaint and supplemental submissions to O&I show[s] that Petitioner put the Agency on notice that he was alleging a class-wide disparate impact age discrimination claim [and that] [g]iven that he gave the Agency sufficient notice of that claim, the fact that he, a non-lawyer, did not explicitly identify it as a class-wide disparate impact age discrimination claim is of no legal consequence." Motion to Amend at 5. This contention is not persuasive.

First, as to Petitioner's *pro se* status, it is correct that, as the Supreme Court recently stated, "*pro se* litigants are held to a lesser pleading standard than other parties;" that the ADEA "sets up a 'remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process'[";]" and that the "system must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Holowecki*, 128 S. Ct. at 1158 (internal citations omitted). It can fairly be assumed that, like other individuals proceeding without an attorney, the *pro se* Petitioner had no detailed knowledge of the relevant statutory mechanisms and agency processes.

However, the question here is not whether he had such detailed knowledge, or whether he had access to the class action procedure established by the GAO Order—clearly, he had such access. Rather, the pertinent point is that by signing the Notice given to him by the counselor, Petitioner acknowledged that he had been advised that there were *different* processes for filing an individual complaint and a class complaint, and that if he wished to file a class complaint the counselor would explain the procedures for filing a class complaint and the responsibilities of a class agent under Chapter 4 of the GAO Order. Shortly after signing this acknowledgment, Petitioner chose to file an individual complaint and did not file a class complaint.⁷ The fact that he did not file a class complaint in addition to his individual complaint, after being made aware of the two different processes, is a clear indication that he did not intend to pursue allegations of discrimination on behalf of a class.

Nonetheless, Petitioner asserts that O&I "failed to fully and adequately investigate Petitioner's claims and advise him of his rights and obligations" in several respects and that "the record supports the conclusion that, in addition to not providing Petitioner the written notifications required by paragraph 1 of Chapter 3 of GAO Order 2713.2, O&I simply gave him the Notice [of Right to File a Discrimination Complaint] to sign without any exploration or explanation of the possibility of considering his age discrimination claims as a class-wide allegation." Pet. Reply at 5, 7. These contentions do not support Petitioner's claim that he intended to file a class complaint.

⁷ There is no allegation that Petitioner was prevented in any way from filing a class complaint.

First, even assuming that O&I failed to provide Petitioner with other required written notifications, the record is clear that it did provide him with the Notice of Right to File a Discrimination Complaint.⁸ That Notice explicitly stated, among other things, that Petitioner had a right to file a complaint of discrimination with O&I, and that if he wished to file a class complaint, a counselor would explain the class complaint procedures and the responsibilities of a class agent required by Chapter 4 of GAO Order 2713.2. Second, the record does not demonstrate that during or before the final interview with the counselor, Petitioner expressed a wish to the counselor to file a class complaint or that the counselor failed to explain the procedures for doing so. In essence, Petitioner is asserting that his receipt of the Notice of Right to File a Discrimination Complaint should not be viewed as compelling evidence that he was aware that he had a right to file a class complaint. However, Petitioner's evidence is insufficient to support this claim.

Moreover, contrary to Petitioner's assertions, the text of his O&I complaint and the supporting documentation do not demonstrate an intent to allege a class-wide disparate impact age discrimination claim. Most persuasively, the relief sought by Petitioner was focused solely on him, rather than on other individuals. As corrective action, he requested only that he be awarded a promotion and back pay; there was no request for any other corrective action. *See* GAO Opposition, Ex. C. The absence of any request for relief for other individuals similarly situated to Petitioner strongly suggests that his complaint was exactly what it appeared on its face to be—a request for individual relief. Similarly, the absence of any request for relief for other individuals suggests that the references in the O&I complaint and in the material supporting the O&I complaint to other individuals are most appropriately viewed as Petitioner's efforts to support his claims that he had been discriminated against. *Cf. McIntosh v. Weinberger*, 810 F.2d 1411, 1424-25 (8th Cir. 1987), *judgment vacated on other grounds*, 487 U.S. 1212 (1988) (upholding failure to exhaust class procedures through investigation of individual complaint); *see also Ransom v. U.S. Postal Service*, 170 Fed. Appx. 525, 527-28 (10th Cir. 2006) (unpublished) (brief reference to maltreatment of other employees did not qualify as class complaint). It would be unusual to construe such references as raising a class-wide disparate impact age discrimination claim in the absence of any explicit or implicit request for corrective action for any individuals other than Petitioner. *See also* EEOC Management Directive 110, Ch. 8, ¶III.A (specificity and detail required for administrative class complaints).

For these reasons, I conclude that Petitioner did not exhaust his administrative remedies with respect to a class-wide disparate impact age discrimination claim.

b. Prejudice and Delay

Petitioner argues that amending the Petition to additionally allege a class claim of disparate impact age discrimination would not prejudice GAO because: (1) "Petitioner's filings with O&I gave the Agency sufficient notice of his class-wide disparate impact age discrimination claim[;]" (2) the processing of this matter would not be delayed "as Respondent already submitted to

⁸ Contrary to Petitioner's argument, nothing in *Holowecki* required O&I to provide Petitioner with more information or assistance regarding the possibility of considering his age discrimination claims as a class-wide allegation than is required in the GAO Order. Whether, as a policy matter, such additional information or assistance would be advisable in such instances is not an issue that is present in this case.

Petitioner data relating to putative class members, and additional discovery on that claim will only require expert review of, and testimony about, that data[;]" and (3) "the proposed amendment will reduce the number of claims and concomitant discovery, thus furthering the Board's stated desire to expedite the processing of each case with due regard to the rights of all parties." Motion to Amend at 5-6.

The Agency asserts that "[s]ince 2002, this case has proceeded only as an individual claim [and] Petitioner should not be permitted to transform his claim at this late date into a class action, which would effectively eviscerate the detailed administrative scheme for class claims implemented at the direction of Congress." Additionally, GAO contends that "[t]he current schedule will very likely have to be altered as a result of the issues raised in Petitioner's Motion to Amend." GAO Opposition at 11-12 & n.5.

For the reasons stated above, Petitioner's filings with O&I did not give the Agency sufficient notice of his class-wide disparate impact age discrimination claim. To the contrary, the absence of any filing of a class claim, after Petitioner was notified of the separate process for doing so, as well as the absence of any relief requested on behalf of anyone other than Petitioner, would reasonably have led the Agency to conclude that no such class-wide claim was being pursued. Thus, amendment as to this matter is not appropriate at this time because the Agency would not have sufficient notice of the claim. In addition, the Agency would be prejudiced if such an amended Petition were permitted because allowing a class discrimination complaint to proceed without having first used the established procedures set forth in Chapter 4 of the GAO Order would be inconsistent with the protections contained in that Chapter for the benefit of all parties, including the Agency. Finally, the processing of this matter would require additional time if a new class-wide claim were permitted at this point, and such additional time would unduly delay the established schedule for processing this case.

III. COUNTS RELATING TO CLAIMS OF DISCRIMINATION BASED ON LENGTH OF SERVICE

A. Background

Count XII of the original Petition alleged that "GAO's practice of giving lower performance appraisals to employees with more than five years of service to GAO relative to employees with less than five years of service to GAO constituted a personnel practice prohibited by 5 U.S.C. §2302(b)(12)." Petition at 16, ¶81. Although not noted or discussed in the Motion to Amend, the Amended Petition modifies Count XII of the original Petition.⁹

Count VII of the Amended Petition alleges that "GAO's practice of assessing Band IF employees' job performance for FY 2002 had a disparate impact on Petitioner, who had been employed by GAO more than five years at the time his job performance for FY 2002 was measured, and subjected Petitioner to a personnel practice prohibited by 5 U.S.C. §2302(b)(12)." Count VIII of the Amended Petition alleges that "GAO's practice of assessing Band IF employees' job performance for FY 2002 had a disparate impact on Band IF employees who had been employed

⁹ It is not clear why the Motion to Amend failed to note or discuss the modification to Count XII of the original Petition, and Petitioner has not offered any explanation in this regard.

by GAO more than five years at the time their job performance for FY 2002 was measured, and subjected those employees to a personnel practice prohibited by 5 U.S.C. §2302(b)(12)."

Following receipt of the Amended Petition, GAO construed Counts VII and VIII of the Amended Petition as clarifying that Petitioner was pursuing those counts, as well as Count XII of the original Petition, under a disparate impact theory, and the Agency argued that these counts should be dismissed because disparate impact is not a theory that applies to 5 U.S.C. §2302(b)(12). GAO Motion to Dismiss, ¶12. In response, Petitioner stated as follows:

Upon reviewing the Motion to Amend the Petition and the Amended Petition, it is evident that the use of the phrase "disparate impact" as it relates to Counts VII and VIII confused and obscured the true nature of those allegations. Petitioner intended the phrase "disparate impact" to reflect only that he and other GAO employees who had more than five years of service to GAO received disproportionately lower performance ratings relative to employees who had less than five years of service to GAO. Petitioner agrees with Respondent that disparate impact is a theory of discrimination liability and is not applicable to these non-discrimination claims, and regrets his confusing use of that phrase in these Counts. Petitioner expressly disavows any intent to state a claim of disparate impact in these Counts.

However, Petitioner disagrees with Respondent that Counts VII and VIII of the Amended Petition should be dismissed. Rather, Petitioner believes that these claims should be considered in the context of Count XII of the original Petition; i.e., that GAO's practice of giving lower performance appraisals to employees with more than five years of service to GAO relative to employees with less than five years of service to GAO subjected Petitioner and the putative class to a personnel practice prohibited by 5 U.S.C. §2302(b)(12). As GAO was on notice of this claim by virtue of Count XII of the original Petition, withdrawing that portion of Counts VII and VIII of the Amended Petition that reference "disparate impact," and reverting to the language of Count XII of the original Petition would not necessitate additional discovery being conducted by the Agency, will not delay these proceedings, and will not prejudice Respondent.

Pet. Reply at 11-12.

GAO then sought leave to file a reply "in order to address Petitioner's disavowal of pursuing Counts VII and VIII of the Amended Petition under a disparate impact theory, and his statement that he now intends to pursue those claims under a disparate treatment theory. Respondent could not have anticipated this change of position at the time of filing its Motion to Dismiss, and therefore has not previously had the opportunity to state its position as to it." GAO Motion for Leave to File Sur-Reply and Reply at 2 ¶5.¹⁰

¹⁰ GAO stated in its Motion that Petitioner does not oppose the filing of a Reply. GAO's Motion for Leave to File a Reply is granted.

In reply, GAO asserts that, contrary to Petitioner's representation, "Petitioner is in fact attempting to bring a disparate impact case" with respect to these counts. GAO Sur-Reply and Reply at 4. In support, the Agency cites the Amended Petition itself, Petitioner's discovery responses, and Petitioner's handling of Count XI of the original Petition, and further contends that "the fact that GAO has filed a motion to dismiss that Petitioner concedes he cannot prevail on supports an inference that Petitioner is attempting to transform the theory of his claims solely to avoid a dismissal." *Id.* at 8. Finally, GAO states:

It is GAO's position that Petitioner's Five-Year Claims should be dismissed with prejudice. However, if the Administrative Judge grants Petitioner leave to re-file these claims, Petitioner should be required to plead them with more particularity than he has to date. Any amended pleadings should be filed consistent with the obligation to raise only those claims for which there is a good faith evidentiary basis to assert. See Fed. R. Civ. P. 11. It is highly questionable whether these claims can be re-pleaded consistent with Rule 11 given that Petitioner's discovery responses indicate that he is aware of no evidence showing that GAO has an intentional practice of giving lower ratings to individuals with more than five years of experience.

Id. at 9 n.1.

B. Analysis

Petitioner has expressly disavowed any intent to pursue a disparate impact theory with respect to Counts VII and VIII of the Amended Petition. Acknowledging that such a theory is inapplicable to Counts VII and VIII, Petitioner has clarified and restated those counts in a manner similar to the wording of Count XII of the original Petition.¹¹ For purposes of this decision, Counts VII and VIII, as clarified and restated, are construed as constituting claims that GAO's practice of giving lower performance appraisals to employees with more than five years of service to GAO relative to employees with less than five years of service to GAO subjected Petitioner and the putative class to a personnel practice prohibited by 5 U.S.C. §2302(b)(12).

The Agency's concern that Petitioner will attempt to use a disparate impact theory as to these amended counts, despite his disavowal of any intent to use this theory, is without merit. Simply put, Petitioner will not be able to use such a theory in support of the modified Counts VII and VIII.

However, contrary to Petitioner's position that the references to disparate impact in the Amended Petition "confused and obscured the true nature of those allegations" (Pet. Reply at 11), GAO asserts that the Amended Petition, Petitioner's discovery responses, and Petitioner's handling of Count XI of the original Petition demonstrate that "the Five Year claims, *from their inception*, were being pursued under a disparate impact theory." GAO Sur-Reply and Reply at 5 (emphasis

¹¹ As noted above, Count XII of the original Petition alleged that "GAO's practice of giving lower performance appraisals to employees with more than five years of service to GAO relative to employees with less than five years of service to GAO constituted a personnel practice prohibited by 5 U.S.C. §2302(b)(12)." Petition at 16, ¶ 81.

added). Additionally, the Agency asserts that if Petitioner is granted leave to re-file these claims, the claims must be filed with more particularity and consistent with the requirement in Fed. R. Civ. P. 11 that there be a good faith evidentiary basis for claims asserted. In this regard, the Agency contends that "[i]t is highly questionable whether these claims can be re-pleaded consistent with Rule 11 given that Petitioner's discovery responses indicate that he is aware of no evidence showing that GAO has an intentional practice of giving lower ratings to individuals with more than five years of experience." *Id.* at 9 n.1.

Petitioner has not addressed these assertions. Before a determination is reached regarding whether these claims in the modified Counts VII and VIII may be pursued under a discriminatory treatment theory, Petitioner will be provided an opportunity to respond to the Agency's assertions. Petitioner is directed to file a response specifically addressing these assertions no later than September 11, 2008.

IV. MATTERS RELATING TO CLASS CERTIFICATION

By Order dated March 31, 2008, the undersigned directed, among other things, that Petitioner's Motion for Class Certification would be due no later than August 11, 2008, that any opposition thereto by the Agency would be due no later than September 15, 2008, and that the discovery period would also end on September 15, 2008. On August 11, 2008, Petitioner filed a Motion for Class Certification.

On August 14, 2008, GAO filed a Motion to Hold in Abeyance Respondent's Opposition to Petitioner's Motion for Class Certification "until such time as the Administrative Judge issues a ruling on the Amended Petition and determines whether there are any class claims to be litigated." GAO's Motion to Hold in Abeyance at 3. The Agency further stated that "[i]f, upon issuance of the ruling, an Opposition to Class Certification is necessary, Respondent would file the Opposition expeditiously, within 30 days of the Board's decision." *Id.* at 2.

On August 22, 2008, Petitioner filed an Opposition to Respondent's Motion to Hold in Abeyance. Petitioner contends, among other things, that granting the Motion could result in postponement of the hearing dates established by the March 31, 2008 Order. Petitioner notes that he had "identified in his original Petition a putative class comprised of current and former Band I employees of the [GAO] who had been employed by GAO for more than five years." Pet. Opposition to GAO's Motion to Hold in Abeyance at 2 & n.2.

In light of the above discussion, the Agency's Motion to Hold in Abeyance is granted pending the filing of Petitioner's response (due September 11, 2008) and resolution of whether the Petitioner's Five-Year Class class claim may be pursued. The due date for any possible Opposition to the Motion for Class Certification will be set by subsequent Order, if necessary.¹²

¹² 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.

CONCLUSION

Petitioner's Motion for Leave to Amend the Petition is granted in part and denied in part, consistent with the discussion set forth above.

Petitioner is directed to file a response specifically addressing the Agency's assertions relating to Petitioner's Five-Year Class claims no later than September 11, 2008.

The due date for any possible Opposition to the Motion for Class Certification will be set by subsequent Order, if necessary.

All other dates set forth in the Order of March 31, 2008, up to and including the hearing dates, remain unchanged.

SO ORDERED.