

# **Grant Turner v. U.S. Government Accountability Office**

**Docket No. 08-01**

**Date of Decision: July 17, 2008**

**Cite as: Turner v. GAO, No. 08-01 (7/17/08)**

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

## **Headnotes:**

**Evidence**

**Motions Practice**

**Summary Judgment**

## **RULING ON PETITIONER’S AND RESPONDENT’S MOTIONS ARISING FROM PETITIONER’S MOTION AND RESPONDENT’S CROSS-MOTION FOR SUMMARY JUDGMENT**

### **I. INTRODUCTION**

Petitioner, through the General Counsel of the Personnel Appeals Board, filed his Petition with the Board on April 11, 2008. Petitioner also filed his Motion for Summary Judgment on April 11, 2008, which included a “Statement of Material Facts over Which There is No Genuine Dispute.”

The undersigned, on April 22, 2008, issued an Order staying discovery and granting Respondent until May 27, 2008, to file an Answer and any response or cross-motion.

Respondent filed its Cross-Motion for Summary Judgment on May 27, 2008, which included a section captioned “Undisputed Facts.”

Petitioner filed his “Opposition to Respondent’s Cross Motion for Summary Judgment” on June 16, 2008, in which Petitioner contended that Respondent had failed to oppose his Motion for Summary Judgment and is “deemed to have admitted the validity of the facts contained [in Petitioner’s statement of undisputed facts].” Petitioner’s Opposition, page 1.

On June 18, 2008, Respondent filed its “Motion to Amend Caption of Cross-Motion for Summary Judgment” contending that Respondent’s failure to caption its Motion as an Opposition to Petitioner’s Motion for Summary Judgment is of no moment because “in

substance the filing very clearly constituted both an opposition to Petitioner's Motion for Summary Judgment as well as a cross-motion." Motion to Amend Caption, page 2.

On June 25, 2008, Respondent filed its "Motion for Leave to File Reply Memorandum of Law in Support of Respondent's Cross-Motion for Summary Judgment," along with the Reply Memorandum which contained the Affidavit of Charles Ransom.

On June 27, 2008, Petitioner filed his "Opposition to Respondent's Motion to Amend Caption of Cross-Motion for Summary Judgment."

Pursuant to the undersigned's Order of June 27, 2008, Petitioner filed his Surreply to Respondent's Cross-Motion for Summary Judgment" on July 3, 2008.

Finally, also on July 3, 2008, Petitioner filed his "Motion to Strike Affidavit of Charles Ransom and November 2, 2004 EMAIL."

Respondent filed its Opposition to Motion to Strike on July 15, 2008.

## II. DISCUSSION

### A. Respondent's Motion to Amend Caption of Cross-Motion for Summary Judgment

Petitioner would have Respondent forfeit the opportunity to contest Petitioner's statement of material facts not in genuine dispute simply because Respondent did not add the term "Opposition to Petitioner's Motion for Summary Judgment" to the caption of Respondent's Cross-Motion for Summary Judgment.

I do not agree with Petitioner that *Beard v. Banks*, 548 U.S. 521 (2006), compels that result in the circumstances of this case. Unlike the *Beard* situation, any fair reading of Respondent's Cross-Motion for Summary Judgment discloses that Respondent is vigorously disputing the key factual as well as the legal underpinnings of Petitioner's case as expressed in Petitioner's Summary Judgment Motion.

While the parties do not disagree on most of the underlying facts, it is clear that they do dispute if and when Petitioner was aware of the seminal \$5,000 tuition loan payment on his behalf by Respondent. While the legal significance of such knowledge or non-knowledge is yet to be determined, Respondent should not be barred from presenting its position in the exchange of summary judgment motions.

I am satisfied that the harsh result sought by Petitioner is not warranted in this situation. In enforcing local rules regarding summary judgment, U.S. District Courts have not deemed a party to have lost its ability to dispute such material fact statements when the nature of its responsive filing makes clear the factual issues in dispute. *E.g. Grabowski v. Bank of Boston*, 997 F.Supp. 111, 115 (D. Mass. 1997); *Toy v. United States*, 263 F.Supp. 2d 1, 8 (n.3) (D.D.C. 2002).

Accordingly, I grant Respondent's Motion to Amend the Caption of its Cross-Motion for Summary Judgment.

B. Petitioner's Motion to Strike Affidavit of Charles Ransom and November 2 Email

Respondent attached the November 2, 2004 Email to its Cross-Motion for Summary Judgment. Subsequently, after Petitioner's Opposition thereto denied that Petitioner had seen that email (Opposition to Cross-Motion, Supplemental Affidavit ¶ 2), Respondent's Reply provided the Ransom affidavit seeking to establish that Petitioner did in fact open the subject email.

Petitioner argues that the subject affidavit and email should be stricken, essentially, on the following grounds: (1) the affidavit is untimely; and (2) Respondent should be sanctioned by striking both documents for its failure to produce them in response to Petitioner's requests during the underlying dept-collection process and its failure to provide them to the PAB General Counsel pursuant to her request at the commencement of the investigation of Petitioner's Charge.

Respondent counters that it filed the email with its Cross-Motion for Summary Judgment and that Petitioner's Opposition thereto created an issue of fact as to whether he had received that email. Consequently, Respondent addressed that dispute with the affidavit in a timely fashion.

Moreover, Respondent argues that the production of the email was not required under the dept-collection process and, even if it were, it was provided to Petitioner as that time and he cannot claim prejudice from not receiving it earlier in this proceeding. Respondent submits that the email was not an apparent item to provide the PAB General Counsel during the course of her investigation and it had not been specifically requested.

Respondent assails Petitioner's position, particularly in view of the fact that he waited five weeks and several motions later to file this Motion after the email was attached to Respondent's Cross-Motion for Summary Judgment. Respondent also contends that Board sanctions are directed to actions when a matter is before the Board, while in this case the alleged actions occurred before the Petition was filed with the Board. Finally, Respondent notes that the affidavit was created after the instant Petition was filed.

I am constrained to agree with Respondent that it was appropriate for it to file the Ransom affidavit in its Reply to Petitioner's Opposition to its Cross-Motion for Summary Judgment. In its Cross-Motion, Respondent presented evidence, albeit not conclusive that it had sent an email to various addressees, including the Petitioner, announcing the impending disbursement of tuition loan repayments on their behalf. Petitioner, in his Opposition, disputed receiving that email. Therefore, it was entirely in order for Respondent to present what it believed to be more conclusive evidence in its Reply to the Opposition. This is plainly not a situation where a party is attempting to offer evidence for the first time as an attachment to its reply brief. Respondent was supplementing

evidence that it had already provided and in response to a subsequent denial by the Petitioner.

I am not persuaded that production of the email was clearly mandated by the debt-collection process or that its non-production warrants its exclusion in this proceeding. The point is debatable at best. Moreover, I cannot construe the PAB General Counsel's open request for documents and information<sup>1</sup> to be sufficiently specific so as to put Respondent on notice that such an email was contemplated by the request. It is for that very reason that discovery exercises are so exquisitely detailed and complex.

Accordingly, I deny Petitioner's request to strike those two documents.

The matter is submitted and I shall consider and decide on the parties' competing requests for summary judgment.

**SO ORDERED.**

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<sup>1</sup> "Please provide this office with copies of documents and other information that may be relevant to our investigation of the matters raised in Mr. Turner's Charge within twenty (20) days of your receipt of this notification." (Attachment to Petitioner's Motion to Strike Affidavit of Charles Ransom and November 2, 2004 EMAIL).