UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN GARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 00-1096 (PLF)**
	)	
UNITED STATES DEPARTMENT OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S OBJECTION TO MAGISTRATE JUDGE'S OCTOBER 15, 2008 ORDER DENYING DEFENDANT'S MOTION FOR A DEPOSITION DE BENE ESSE, AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

The Defendant, through counsel, the United States Attorney for the District of Columbia, pursuant to LCvR 72.2 (b), respectfully objects to (moves to modify or set aside) the October 15, 2008 Minute Order of the Honorable Deborah Robinson, Magistrate Judge, denying the United States Department of Education's (ED) Motion for a Deposition De Bene Esse [#107].[1] The order, like Plaintiff's opposition on which the order rests for its reasoning, misunderstands Defendant's grounds for the requested deposition and, consequently, erroneously concludes that the deposition should not be permitted. However, a true assessment of the circumstances supporting the request clearly establishes that adequate grounds well-support Defendant's request. Moreover, Defendant submits that the order exceeds the breadth of the referral made by this Court to the Magistrate Judge in its February 19, 2008 Order for the management of discovery [#83], inasmuch as a De Bene Esse deposition controls the availability of evidence at trial. In support hereof, Defendant relies on the following supporting memorandum of points and authorities.

[1] "[#?] " refers to the number of the entry on the Court's docket associated with the referenced document.

DISCUSSION

Standard for Review

Courts in this District have held, consistent with the court's ruling in Graham v. Mukasey, 247 F.R.D. 205, 207 (D.D.C. 2008), that a "clearly erroneous or contrary to law" standard applies to District Court review of a Magistrate Judge's pretrial rulings. Fed.R.Civ.P. 72(a); LCvR 72.2. See also, Neuder v. Battelle Pacific Northwest Nat. Lab., 194 F.R.D. 289, 292 (D.D.C. 2000); 28 U.S.C. § 636 (b)(1)(A). The District Court reviews *de novo* the Magistrate Judge's legal conclusions. Beale v. District of Columbia, 545 F.Supp.2d 8, 14 n.2 (D.D.C. 2008). "[T]he magistrate judge's decision is entitled to great deference," Boca Investerings Partnership v. United States, 31 F. Supp. 2d 9, 11 (D.D.C. 1998), and therefore will not be disturbed unless "on the entire evidence the court is left with the definite and firm conviction that a mistake has been committed." Beale, 545 F. Supp. 2d at 13 (internal quotation marks and citations omitted). Nevertheless, "a district judge may modify or set aside any portion of a magistrate judge's order under this Rule found to be clearly erroneous or contrary to law." LCvR. 72.2(c).

The De Bene Esse Deposition Should be Permitted

The order should be modified or set aside because Plaintiff's argument that Defendant's current request for a de bene esse deposition can only be a discovery issue is flawed. Contrary to Plaintiff's arguments, Defendant did not contend that the deposition of Ms. Steinbrueck was a discovery issue, only that taking the deposition during the discovery process was important to give Defendant subpoena power to ensure that the deposition occurs, particularly considering that she resides a great distance from this District and no longer is employed by the federal government. Since subpoena power can be conferred outside the discovery period, Ms. Steinbrueck's deposition

is not necessarily strictly a discovery issue. See Rule 45 of the Fed. R. Civ. P. As noted in its motion, Defendant has now confirmed the location of the witness. Defendant clearly set forth in its motion what testimony it anticipated from the witness in support of the requested deposition. This proffer was not based on speculation.

Plaintiff incorrectly claims that Defendant could have taken the deposition of Ms. Steinbrueck earlier. In fact, given that Ms. Steinbrueck previously resided in Nevada and recently moved to Hawaii, it made no sense to travel to take her deposition, particularly while the parties were actively mediating the case. Defendant had no immediate reason to believe that Ms. Steinbrueck might be unavailable for trial. It was not until near the end of the discovery period that Defendant learned of her move. Since her move was relatively recent, Defendant could not obtain the same certainty of her new address as it had of her former address. So, notwithstanding Plaintiff's effort to make much of how recent Ms. Steinbrueck moved, again, logic does not lead to the conclusion that Defendant should have sought to take her deposition earlier, nor the conclusion that whatever opportunity existed to take the deposition meant that Defendant should have sought to take the deposition before it learned of all the circumstances suggesting that an immediate deposition was appropriate.

For these reasons as well, Plaintiff's and thus the order's reliance on Charles v. Wade, 665 F.2d 661 (5th Cir. 1982), and related authority, is misplaced. Once again, Plaintiff ignored the four-and-a-half years of a stay ordered by this Court for Plaintiff to pursue a case before the Merit Systems Protection Board (MSPB), that, to obtain the stay, Plaintiff represented to the Court that the resolution of the MSPB matter would lead to a resolution of this matter and the fact the discovery process was interrupted for that stay. It appears patently unfair and incongruent to afford

Plaintiff such a lengthy stay, so that he could litigate his MSPB case, but to force Defendant now to bear the brunt of the sacrifice necessary to move this case along, given its age. Defendant is simply attempting to avoid any further prejudice that it will suffer from being precluded from ensuring that Ms. Steinbrueck is available as a witness for **trial**. As to this circumstance Plaintiff's case authority is inapposite.

The Court in Charles states explicitly,

> Although the discovery period had indeed closed at the time appellant made his motion, the requested **deposition would not have been taken for purposes of discovery but as the testimony of a witness unavailable for trial**. Appellant's motion underscored this distinction by informing the court that the deposition would "not be taken for discovery purposes, but in lieu of Mr. Nixon's live testimony at trial." **The distinction is a valid one.** Appellant was **not seeking to discover Nixon's testimony-appellant knew what Nixon had to say-but was seeking a means for introducing Nixon's testimony at trial.** A party to a lawsuit obviously is entitled to present his witnesses. **The fact that the discovery period had closed had no bearing on appellant's need, or his right, to have the jury hear Nixon's testimony.** We hold that the court clearly erred in denying appellant's deposition motion on the ground stated in its order.

665 F.2d at 664 (emphasis added). Similarly, here, Defendant is not seeking to learn to what the witness will testify. Defendant has set forth Ms. Steinbrueck's anticipated testimony. Defendant is seeking a means for introducing Ms. Steinbrueck's testimony at trial, if necessary. If Ms. Steinbrueck proves to be available for trial, Defendant will present her testimony live and will not rely on her deposition testimony.

What Plaintiff is seeking, without proper grounds, is the sanction of potentially excluding the witness's testimony. This result would be unfair to the Defendant. If Ms. Steinbrueck is actually unavailable for trial, as it appears she will be, and Defendant had not made this request, Plaintiff certainly will argue that such a deposition should have been sought by Defendant earlier. Plaintiff's claims that the deposition could have been scheduled earlier are based on pure speculation.

Certainly, it is proper, in light of the witness's move to a location that is so distant and difficult to reach, now to seek to preserve her testimony. Prior to this recent move, there were no reasonable grounds to take the deposition.[2]

WHEREFORE, this Court should reconsider, that is, modify or set aside, the October 15, 2008 Minute Order denying Defendant's Motion for a Deposition De Bene Esse.

Respectfully submitted,

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October 29, 2008

[2] Additionally, the October 15, 2008 order exceeds the breadth of the referral made by this Court to the Magistrate Judge in its February 19, 2008 Order for the management of discovery [#83], inasmuch as a De Bene Esse deposition controls the availability of evidence **at trial**. The Court in its February 19 referral order stated: "on any filing related to discovery the parties shall place the initials of Judge Paul L. Friedman and the initials of the magistrate judge following the case number in the caption. On any other filings in this case, the parties shall place only the initials of Judge Paul L. Friedman after the case number." Following this direction, Counsel for the Defendant placed only the initials "PLF" on the Motion for a De Bene Esse Deposition. Because such depositions are by definition a part of the pretrial process and are ruled upon in anticipation of trial, Defendant submits that the motion was not denominated as a discovery issue and should not have been considered part of the discovery process, notwithstanding Plaintiff's arguments. Consequently, the Magistrate Judge did not have jurisdiction to rule on the motion.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2008, I caused the foregoing Defendant's Objection to the Magistrate Judge's October 15, 2008 Minute Order Denying Defendant's Motion for a Deposition De Bene Esse and Supporting Memorandum of Points and Authorities to be served on Counsel for the Plaintiff by the Electronic Court Filing system or, if this means fails, then by U.S. mail, postage prepaid, addressed as follows:

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