UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL
EX REL. DR. HOLLY KUNERT,
ET AL.,
Petitioners,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBERS
CB-1208-12-0025-U-1
CB-1208-12-0026-U-1
CB-1208-12-0027-U-1
CB-1208-12-0028-U-1
CB-1208-12-0029-U-1
CB-1208-12-0030-U-1

DATE: September 6, 2012

THIS STAY ORDER IS NONPRECEDENTIAL[1]

Gregory Giaccio, Esquire, Washington, D.C., for the petitioner.

Asmaa Abdul-Haqq, Fort Wainwright, Alaska, for the agency.

BEFORE

Mark A. Robbins, Member

ORDER ON STAY REQUEST

Pursuant to 5 U.S.C. § 1214(b)(1)(A), the Office of Special Counsel (OSC) requests a 45–day stay of the following actions while it completes its investigation into whether the listed actions constitute prohibited personnel practices under 5 U.S.C. § 2302(b)(8): (1) All agency actions to collect alleged

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

debts, including repayment of retention bonuses, for any of the six affected individuals identified in this decision; (2) all agency actions that may adversely affect the employment prospects or employment tenure of the affected individuals, including any adverse employment recommendations to current or potential employers or to professional credentialing entities.[2] For the reasons set forth below, I GRANT OSC's request IN PART.

BACKGROUND[3]

In its August 31, 2012 stay request, OSC alleges that the employees, Psychologists Holly Kunert, Michael O'Friel, and Mary Colleen Morgan, Licensed Professional Counselor Tamera Randolph, Administrative Assistant Brooke Wilkins, and Social Worker Teresa Williams, formerly constituted the nonsupervisory staff of the local Army Substance Abuse Program (ASAP) at Fort Richardson, Alaska. On January 13, 2012, the employees jointly reported to Joint-Base Elmendorf-Richardson Ombudsman Karl Hansen that their Clinical Program Manager and second-level supervisor, Terry Bates, had been observed knowingly falsifying, removing, and/or destroying clinical patient records, and that Bates also created a hostile work environment for her staff. Hansen recommended to Colonel George Appenzeller that the disclosures be investigated.

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[2] Pursuant to 5 U.S.C. § 1204(e)(1)(B), OSC further requests that I issue a protective order to prevent the agency from taking any actions during this period that may threaten the individuals' employment prospects or that may otherwise be reasonably construed as retaliatory harassment. However, in contrast to other statutory provisions that grant authority to "any member" of the Merit Systems Protection Board to take certain actions, *see* 5 U.S.C. §§ 1204(e)(1)(A), 1214(b)(1)(A)(i), section 1204(e)(1)(B) provides that the "Merit Systems Protection Board" may issue a protective order. Thus, as a single Board member, I am without authority to rule on OSC's request under section 1204(e)(1)(B). The request will be referred to the full Board for decision. *See* 5 C.F.R. § 1201.146.

[3] For purposes of ruling on OSC's request for an initial stay in this ex parte proceeding, I accept OSC's version of the facts as true. *See, e.g., Special Counsel v. Department of the Interior*, 62 M.S.P.R. 388 (1994).

On January 29, 2012, Regional Clinical Program Manager and Bates's immediate supervisor Scott Mims visited the clinic to conduct an inquiry. The command also sent local medical personnel to investigate the clinical aspects of the disclosures, and the agency temporarily suspended Bates's supervisory and clinical responsibilities. Although Mims found problems with Bates's leadership, he described his primary concern as the current clinical staff's disregard of the established chain of command. On February 10, 2012, Garrison Commander Colonel Ronald Johnson, Army Support Activity Director Michael Haney, and Bates met with the employees. The employees stated that Johnson told them that a review failed to substantiate their concerns, warned that if they could not accept the circumstances they would have to leave, and announced that he would reinstate Bates as clinic manager.

OSC alleges that, after Bates was reinstated, the following occurred concerning the individual employees:

O'Friel: Bates referred to O'Friel as the "ringleader" behind the investigation. On March 1, 2012, Bates provided new standards for recordkeeping and began to audit the employees' files, resulting in Bates berating and reprimanding O'Friel because he placed a form in a file that was 24 hours late. Three days after an employer informed Bates on May 14, 2012, that it was interested in hiring O'Friel, Bates placed him on a performance improvement plan to correct minor problems uncovered in her audit. By June 2012, O'Friel had accepted a new position, and he departed in late July 2012. The agency has sought repayment of retention incentives.

Morgan: Morgan had decided during the investigation to leave the clinic. She gave notice of her resignation on February 10, 2012, and in her resignation letter, she expressed fear that continuing at ASAP would harm her clinical license and future employment prospects. In her letter, she asked that Bates not be told of her decision to leave. By June 2012, Morgan had resigned. The agency has sought repayment of retention incentives of over $2,000.

Kunert: On February 9, 2012, Kunert learned that she had not been selected for the vacant ASAP Supervisory Counseling Psychologist position and began to look for work elsewhere. On March 12, 2012, Bates relieved Kunert of her responsibilities as counselor for high-risk patients, although previously Bates had rated her "exceptional" in all performance categories. On March 14, 2012, Bates refused to provide Kunert with an employment reference, citing the agency's investigation, and later told Kunert that she planned to audit Kunert's files. Kunert sought to return to her former position in Japan. On May 8, 2012, the former employer learned that Fort Richardson would not release Kunert for an inter-agency transfer, and, although Fort Richardson finally released her, it directed her to repay approximately $10,000 in incentive pay. By June 2012, Kunert took annual leave in anticipation of returning to Japan.

Wilkins: At the end of March 2012, Haney issued a letter of reprimand to Wilkins for discussing the details of her stressful work environment with another employee. The same day, Bates proposed to suspend Wilkins for failing to follow her instructions, specifically for delegating the task of delivering certain weekly reports to Bates to an intern instead of delivering them herself. Wilkins resigned on April 13, 2012.

Williams: Under the new recordkeeping standards and audits, Bates rated Williams's performance as "needs work" for mistakes such as failing to write the date on a particular spot on a form and told her newly hired Supervisory Psychologist to reprimand Williams for questioning the rating. On June 1, 2012, Bates counseled Williams about minor discrepancies in her files and declared her insubordinate when she questioned the findings. Two weeks later, Haney terminated Williams's appointment during her probationary period, and, consequently, she was directed to repay a retention incentive of over $5,000.

Randolph: Bates canceled Randolph's access to the ASAP electronic file system, and, for the first time, required Randolph's patient records entries to be co-signed. On March 27, 2012, Dr. Wanda Kuehr, Bates's second-level

supervisor, sent a letter to the National Association of Alcoholism and Drug Abuse Counselors accusing Randolph of misconduct and opposing her certification. On April 25, 2012, Bates rated Randolph "unacceptable" in 9 of 15 areas in which Randolph's previous supervisor had given her the highest possible score on her 2010 evaluation. By June 2012, Randolph took sick leave. On July 18, 2012, after she returned from sick leave, she learned that her clinical duties had been placed in abeyance pending investigation of Kuehr's charges, leading to her detail to non-clinical work and loss of retention pay. Although, by the end of July 2012, an independent credentialing committee dismissed the accusations against her, management refused to reinstate her retention pay. On August 10, 2012, Randolph left, accepting a demotion. Because she has only recently left ASAP, she has not yet received her notice of repayment.

OSC contends that its request for stay of personnel actions is appropriate while it completes its investigation. It states that, based on the evidence that it has gathered to date, there are reasonable grounds on which to believe that the actions resulted from protected activity and therefore are prohibited under 5 U.S.C. § 2302(b)(8).

ANALYSIS

OSC "may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the [OSC] determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." 5 U.S.C. § 1214(b)(1)(A)(i). Such a request "shall" be granted "unless . . . such a stay would not be appropriate." 5 U.S.C. § 1214(b)(1)(A)(ii). The statute thus sets up a presumption that OSC's request for an initial stay will be granted, and it makes OSC the lead actor in securing provisional relief when, in OSC's judgment, an agency may have committed a prohibited personnel practice. OSC's stay request need merely fall within the "range of rationality" to be granted, and "the facts should be viewed in the light which is most favorable to a finding of reasonable

grounds to believe that a prohibited personnel practice was (or will be) committed." *Special Counsel v. Navy*, 83 M.S.P.R. 169, ¶ 11 (1999) (citations omitted); *accord Special Counsel v. Department of Homeland Security*, 115 M.S.P.R. 6, ¶ 9 (2010).

A prima facie violation of 5 U.S.C. § 2302(b)(8) exists where: (1) The employee made a protected disclosure; (2) the official(s) who recommended, took, or threatened the personnel action had actual or constructive knowledge of the protected disclosure; (3) a personnel action was taken or not taken or threatened to be taken or not taken; and (4) the protected disclosure was a contributing factor in the challenged personnel action. *Office of Special Counsel v. Department of Transportation*, 90 M.S.P.R. 154, ¶ 4 (2001). OSC asserts that prima facie evidence supports each of these four elements.

First, OSC contends that the six employees engaged in activity covered by 5 U.S.C. § 2302(b)(8) when they disclosed to Ombudsman Hansen and agency investigators evidence that would lead a disinterested observer to conclude, at a minimum, that Bates had abused her authority and violated a law, rule, or regulation. OSC cites disclosures that Bates managed her subordinates through intimidation, by insulting staff and making baseless threats of discipline over minor disagreements, and conclusions by Hansen and even Mims of a negative and hostile working environment. OSC asserts that, likewise, the evidence supports a finding that the employees reasonably believed that Bates violated several laws and regulations, noting that the employees were in a position to observe her signing a former social worker's name on an official form and disclosing the contents of patient medical records to unauthorized personnel.

Second, OSC contends that it has reasonable grounds to believe that the agency knew of the employees' disclosures when the alleged retaliatory harassment occurred because the employees made their disclosures to Hansen, who reported their concerns to his commander. The agency investigated the

disclosures and the employees met with Johnson, Haney, and Bates to discuss the results of the investigation.

Third, OSC contends that harassment is a personnel action, that it has reasonable grounds to believe that the agency engaged in a pattern of retaliatory actions after the employees made their disclosures, and that the pattern of retaliatory actions, viewed in their totality, reasonably threatened the employees' well-being, their continued employment in ASAP, and their future employment prospects. OSC similarly asserts that it has reasonable grounds to believe that the agency significantly changed the employees' working conditions. It claims that O'Friel and Randolph were either placed on or threatened with performance improvement plans; Randolph was detailed, resulting in a loss of pay; Williams was terminated during her probationary period; Kunert was not selected for promotions; and Wilkins and O'Friel received disciplinary actions. Likewise, it claims that, because all of the employees left ASAP due to harassment following their disclosures, it has reasonable grounds to believe that they were constructively removed. It states that, as a result of these personnel actions, every employee except Wilkins faces the prospect of repaying incentive benefits and asserts that agencies have discretion to waive the requirement to repay these benefits.

Fourth and finally, OSC contends that the employees' protected activity was a contributing factor in the personnel actions under the knowledge-timing test set forth at 5 U.S.C. § 1221(e)(1). It asserts that the employees suffered threats to their employment, a hostile work environment, and discrete personnel actions immediately after their whistleblowing, and that the pattern of hostile actions continued even after their departure. It further cites Johnson's comments at the February 10, 2012 meeting that an insurgency would be "put down," Mims blaming the employees for failing to follow the chain of command in making their disclosures, and Bates's overheard comments that she would regain control

over the ASAP after the investigation concluded and her references to the investigation as the reason for some of her comments and actions.

Given OSC's assertions in its stay request, I find that there are reasonable grounds to believe that the agency took these actions against the six employees because of their protected disclosures under 5 U.S.C. § 2302(b)(8). In this connection, and solely for purposes of this nonprecedential single-member decision in this *ex parte* proceeding, I accept OSC's assertion that a series of unwelcome actions directed at an employee that amount to "harassment" may be a "personnel action" for purposes of 5 U.S.C. § 2302(b)(8). *See Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 15 n.4 (2010).

The question of the scope of the stay remains. Many of the actions that OSC claims were part of a pattern of harassment were themselves "personnel actions," *e.g.*, O'Friel's reprimand, Randolph's "unacceptable" performance rating, and Williams' probationary termination. *See* 5 U.S.C. § 2302(a)(2)(A)(iii), (viii). OSC's proposed order, however, is very specific; OSC does not ask that I order rescission of the reprimand, amendment of the performance rating, cancellation of the probationary termination, or correction of any other action taken or decision made while the six individuals were employed by the agency. Instead, OSC asks me to enjoin the agency from: (1) Collecting incentive payments from the six individuals and (2) providing negative information about them to prospective employers and/or credentialing bodies. *See* Stay File, Tab 1 (proposed order at 2). I find it appropriate to order item (1) because it is a "decision concerning pay" under 5 U.S.C. § 2302(a)(2)(A)(ix). I find it appropriate to order item (2) because, viewing the facts in the light most favorable to OSC, such negative statements can be deemed continuing harassment.

Notwithstanding the foregoing, the Order below does not operate with respect to any of the six individuals who are not employed by an "agency" within the meaning of 5 U.S.C. § 2302(a)(2)(C). Extending the Order to individuals who

are not employed by an "agency" "would not be appropriate," 5 U.S.C. § 1214(b)(1)(A)(ii), because such individuals are not protected from allegedly retaliatory acts taken after they leave government employment. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 9 (2010); *Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶ 10 (2008); *accord Nasuti v. Merit Systems Protection Board*, 376 F. App'x 29, 33-34 (Fed. Cir.), *cert. denied*, 131 S.Ct. 393 (2010).[4] Individuals not employed in an "agency" may seek relief for acts of retaliation taken against them while they were employed in an "agency," *cf.* 5 U.S.C. § 1221(a), but again, in this proceeding OSC does not ask for relief for such acts.

ORDER

Based on the foregoing, I conclude that granting OSC's stay request in part is appropriate. Accordingly, a 45-day stay is hereby GRANTED as expressly described below. The stay shall be in effect from September 6, 2012, through and including October 21, 2012. It is ORDERED that:

(1) All agency actions to collect retention bonuses and similar alleged debts for any of the affected individuals employed in an "agency" are hereby stayed;

(2) All agency actions that may adversely affect the employment prospects or employment tenure of the affected individuals employed in an "agency," including any adverse employment recommendations to current or potential employers or to professional credentialing entities, are hereby stayed;

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[4] Although the *Nasuti* decision is nonprecedential, as and such, is not binding on the Board, I may rely on it to the extent I find its reasoning persuasive. *See Worley v. Office of Personnel Management*, 86 M.S.P.R. 237 (2000). The *Nasuti* decision, in any event, is consistent with the Board's precedential decisions in *Weed* and *Pasley*.

(3) Within 5 working days of this Order, the agency shall submit evidence to the Clerk of the Board showing that it has complied with this Order.

Any request for an extension of the stay pursuant to 5 U.S.C. § 1214(b)(1)(B) must be received by the Clerk of the Board and the agency, together with any evidentiary support, on or before October 6, 2012. Any comments on such a request that the agency wants the Board to consider pursuant to 5 U.S.C. § 1214(b)(1)(C) must be received by the Clerk of the Board, together with any evidentiary support, on or before October 13, 2012.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.