

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

SPECIAL COUNSEL  
EX REL. VINCENT CEFALU,  
Petitioner,

DOCKET NUMBER  
CB-1208-13-0006-U-2

v.

DATE: December 6, 2012

DEPARTMENT OF JUSTICE,  
Agency.

**THIS STAY ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Bruce D. Fong, Esquire, and Elizabeth R. Brown, Esquire, Oakland,  
California, for the petitioner.

Carolyn N. Lerner, Esquire, Washington, D.C., for the petitioner.

Andrew M. Dunnaville and Katherine Meng, Washington, D.C., for the  
agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member  
Member Robbins issues a separate concurring opinion.

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

## ORDER ON STAY EXTENSION REQUEST

Pursuant to [5 U.S.C. § 1214](#)(b)(1)(B), the Office of Special Counsel (OSC) requests a 90-day extension of the previously granted stay of the Department of Justice's removal of Vincent Cefalu. For the reasons discussed below, the request is GRANTED, and the stay is extended through March 6, 2013.

### BACKGROUND

On October 18, 2012, OSC filed an initial request for a 45-day stay of the removal of Mr. Cefalu, a Criminal Investigator for the Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). OSC alleged that it had reasonable grounds to believe that his removal was a prohibited personnel practice because it constituted a violation of his First Amendment right to free speech, and, thus, the merit system principle found at [5 U.S.C. § 2301](#)(b)(2). Based on OSC's factual allegations, Member Robbins granted OSC's initial stay request, giving deference to OSC and the allegations described by OSC in its stay request, while identifying concerns about OSC's legal arguments. *Special Counsel ex rel. Vincent Cefalu v. Department of Justice*, MSPB Docket No. CB-1208-13-0006-U-1, Order on Stay Request at 3-5 (Oct. 23, 2012). On November 21, 2012, OSC filed a timely request for extension of the stay for 90 days. Stay Request Extension File (SREF), Tab 1. The agency filed a timely opposition to the extension request. SREF, Tab 2.

### ANALYSIS

A stay granted pursuant to [5 U.S.C. § 1214](#)(b)(1) is issued in order to maintain the status quo ante while OSC and the agency involved resolve the disputed matter. The purpose of the stay is to minimize the consequences of an alleged prohibited personnel practice. *Special Counsel v. Department of Transportation*, [74 M.S.P.R. 155](#), 157 (1997). In evaluating a request for an extension of a stay, the Board will review the record in the light most favorable to OSC and will grant a stay extension request if OSC's prohibited personnel

practice claim is not clearly unreasonable. *Special Counsel ex rel. Meyers v. Department of Housing & Urban Development*, [111 M.S.P.R. 48](#), ¶ 16 (2009).

The agency removed Mr. Cefalu on the basis of a lack of candor charge because his testimony in a suppression hearing concerning the validity of a wiretap affidavit was “stale and uninformed.” Stay Request File (SRF), Tab 1 at 39. The record reflects that Mr. Cefalu was subpoenaed by the defense attorney in *United States v. Holloway*, No. 1:08-CR-00224 OWW (E.D. Cal.), to testify in a suppression hearing concerning evidence obtained as a result of a wiretap. *Id.* at 36. The agency found that Mr. Cefalu lacked candor when he testified that local law enforcement officers had lied or misrepresented facts to a judge in an affidavit in order to obtain an illegal wiretap. *Id.* at 39-40. The agency concluded that Mr. Cefalu had no basis upon which to provide such testimony. *Id.* In its stay request, OSC asserted that it had a reasonable belief that the agency’s decision to remove Mr. Cefalu because of his testimony violated the First Amendment and thereby constituted a prohibited personnel practice under [5 U.S.C. § 2302\(b\)\(12\)](#). *Id.* at 5.

In its request for an extension of the stay, OSC argues that the First Amendment is a law that implements or directly concerns the merit systems principle found at [5 U.S.C. § 2301\(b\)\(2\)](#), which requires that federal employees be treated with proper regard for their “constitutional rights.”<sup>2</sup> SREF, Tab 1 at 7-10. OSC further argues that it has reasonable grounds to believe Mr. Cefalu’s speech is entitled to First Amendment protection because his testimony was both

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<sup>2</sup> In the alternative, OSC argues that the Oath of Office, at [5 U.S.C. § 3331](#), gives practical effect to [5 U.S.C. § 2301\(b\)\(2\)](#) because it requires employees to act consistently with and uphold the Constitution in the discharge of their duties, which OSC alleges ATF failed to do by violating Mr. Cefalu’s First Amendment rights. SREF, Tab 1 at 15-16. The agency counters that OSC’s premise and investigation is based upon the legal theory that the agency violated the First Amendment, and OSC has never argued that the agency officials violated the Oath of Office when they removed Mr. Cefalu. SREF, Tab 1 at 13-14.

truthful and beyond the scope of his official duties. *Id.* at 16 & n.6. OSC further argues that *Garcetti v. Ceballos*, [547 U.S. 410](#) (2006), does not apply to Mr. Cefalu's sworn court testimony because the agency lacked the right to control his testimony under oath in a court of law. *Id.* at 16-18. OSC asserts that a 90-day extension of the stay is within the range of rationality because there are reasonable grounds to believe a prohibited personnel practice has been committed and it is appropriate to maintain the status quo ante while it completes its investigation and decides whether to prepare a prohibited personnel practice report. *Id.* at 23.

The agency argues that OSC's request for an extension of the stay is clearly unreasonable because OSC has failed to articulate a cognizable claim concerning [5 U.S.C. § 2302](#)(b) and because the record does not support OSC's assertion that Mr. Cefalu's speech is entitled to protection. SREF, Tab 2 at 29. The agency argues that OSC has not made a cognizable prohibited personnel practice claim under [5 U.S.C. § 2302](#)(b)(12) because the merit systems principles themselves are not self-executing and the merit systems principle at [5 U.S.C. § 2301](#)(b)(2) incorporates constitutional rights, including the First Amendment. *Id.* at 7. The agency argues that the Board should follow *Radford v. Office of Personnel Management*, [69 M.S.P.R. 250](#) (1995), and *Pollard v. Office of Personnel Management*, [52 M.S.P.R. 566](#) (1992), which contain the Board's analysis that a constitutional provision incorporated by the merit systems principle at section 2301(b)(2) cannot "be both the merit systems principle and the violated law, rule, or regulation which implements or directly concerns the merit systems principle." SREF, Tab 2 at 10 (quoting *Radford*, 69 M.S.P.R. at 255 n.3 (citations omitted)). The agency also argues that Mr. Cefalu's testimony is not entitled to First Amendment protection because his testimony was made in the scope of his official duties as an ATF Special Agent. *Id.* at 14. Further, the agency argues that under the *Pickering* balancing test, even assuming that Mr. Cefalu's testimony is protected under the First Amendment, the agency's interest

in promoting the efficiency of the service outweighs Mr. Cefalu's interest because, in part, his speech was not truthful. *Id.* at 19-28 (citing *Pickering v. Board of Education*, [391 U.S. 563](#) (1968)).

OSC acknowledges that its prohibited personnel practice theory in this matter raises "novel" legal questions, SRF, Tab 1 at 5, and the agency has raised substantial questions concerning the merits of OSC's theory. A stay proceeding is not intended to be a substitute for a complete hearing on the merits of a prohibited personnel practice claim. *See, e.g., Special Counsel v. Department of Transportation*, 74 M.S.P.R. at 157. OSC's stay request need merely fall within the range of rationality to be granted. *Special Counsel ex rel. Tines v. Department of Veterans Affairs*, [98 M.S.P.R. 510](#), ¶ 5 (2005). Given the points and authorities set forth by OSC, we cannot say that its prohibited personnel practice theory is irrational or clearly unreasonable.

We have considered the agency's assertion that, even accepting OSC's legal theory, OSC has failed to set forth sufficient facts to establish a prohibited personnel practice occurred under that theory. SREF, Tab 2 at 29. For instance, the agency identifies several factors concerning Mr. Cefalu's testimony that cast doubt on his truthfulness, including: his lack of personal knowledge concerning the contents of the wiretap affidavit, his lack of involvement in the case as of early 2006, and the findings of Judge Oliver Wanger concerning Mr. Cefalu's testimony at the suppression hearing. *Id.* at 26-27. Nevertheless, OSC has presented some argument and evidence, including some subsequent statements from Judge Wanger, that, viewed in the light most favorable to OSC's theory, could indicate that Mr. Cefalu was not untruthful in his testimony, that he testified sincerely, and that his opinion concerning the legality of the wiretap affidavit was based on his personal experience during his involvement in the case, which he acknowledged ended well before the issuance of the wiretap. SREF, Tab 1 at 18-20. Further, we note that the import of Mr. Cefalu's testimony during the suppression hearing, at issue before Judge Wanger, is a different

inquiry than that currently before the Board. For these reasons, and viewing the record in the light most favorable to OSC, we find that OSC has shown reasonable cause to justify extending the stay an additional 90 days.<sup>3</sup>

### **ORDER**

Pursuant to [5 U.S.C. § 1214\(b\)\(1\)\(B\)](#), a 90-day extension of the stay is hereby GRANTED. It is hereby ORDERED that:

- (1) The terms and conditions of the stay issued on October 23, 2012, are extended through and including March 6, 2013;
- (2) 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;
- (3) Any request for a further extension of the stay must be received by the Clerk of the Board and the agency, together with any evidentiary support, on or before February 19, 2013; and
- (4) Any response to such a request that the agency wishes the Board to

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<sup>3</sup> Still, OSC has not presented much evidence to support its factual assertions beyond providing the suppression hearing transcript. Although it seems unlikely that a further extension of the stay will be necessary given OSC's representation that it "does not believe a substantial investigation is required" at this juncture, SREF, Tab 1 at 21, should OSC decide to request another extension of the stay, it must submit further evidence to support all its material factual assertions, including its representations regarding the truthfulness of Mr. Cefalu's statements during the suppression hearing.

consider must be received by the Clerk of the Board and served on OSC on or before February 26, 2013.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF MEMBER ROBBINS

in

*Special Counsel*

*Ex Rel. Vincent Cefalu v. Department of Justice*

MSPB Docket No. CB-1208-13-0006-U-2

¶1 Although I reluctantly agree with the majority that the stay should be extended, I write separately to express significant reservations with the merits of the legal arguments advanced by the Office of Special Counsel (OSC) in its request for a stay extension.

¶2 The U.S. Supreme Court recently reaffirmed that, when seeking preliminary injunctive relief, a party “must establish that he is likely to succeed on the merits[.]” *Winter v. NRDC, Inc.*, [555 U.S. 7](#), 20 (2008). This is not the standard used when the Board considers a stay request from OSC. In fact, Title 5 sets no Board standard. Rather, it requires that *OSC* determine there are “reasonable grounds” to believe a prohibited personnel practice has occurred. Board practice has been to defer to OSC.

¶3 But when OSC argues the merits of its legal rationale in a motion to extend a stay, I believe the Board must move beyond mere deference and consider the likelihood of success on the merits of OSC’s arguments. The further OSC strays from that standard, the less reasonable are its grounds for an extended stay.

Background

¶4 The following facts are not in dispute. Mr. Cefalu was a GS-13 Criminal Investigator with the Bureau of Alcohol, Tobacco, Firearms & Explosives (ATF or the agency). Beginning in June 2005, Mr. Cefalu served as the lead agent on an investigation conducted jointly by ATF and local law enforcement officers (LEOs). Mr. Cefalu and the local LEOs disagreed over which investigatory tactics to use, and the local LEOs complained about Mr. Cefalu’s decisions to his superiors. Mr. Cefalu was taken off the case in December 2005, and ATF ceased

its involvement with the investigation about 3 months later. *See* U-2 File, Tab 1, Exhibit (Ex.) A, Hearing Transcript (7/24/09) at 43-44, 48, 57-58. The FBI later joined the investigation. On September 12, 2007, an FBI agent executed an affidavit in support of an application for a wiretap on telephones used by the targets of the investigation. A federal judge authorized the wiretap. *Id.* at 77-79. Mr. Cefalu provided a memorandum that he had prepared, in which he questioned the propriety of the wiretap, to someone who operated a website; Mr. Cefalu had hoped that the memorandum would be posted on the internet, and in fact it was. *Id.* at 88-92. After federal prosecutors obtained an indictment against seven individuals based in part on evidence gathered via the wiretap, the seven defendants filed a motion to suppress the wiretap evidence and subpoenaed Mr. Cefalu to testify. The agency gave Mr. Cefalu permission to testify, Mr. Cefalu appeared in court while in pay and duty status, and Mr. Cefalu applied for and received reimbursement from the agency for his expenses in traveling to the hearing. U-2 File, Tab 2, Exs. 2, 3, 4. Consistent with his memorandum, Mr. Cefalu testified that the affidavit in support of the wiretap amounted to “perjury” and that it contained “lie[s]” and “misrepresentations.” Hearing Transcript (7/24/09) at 88, 134-35. Mr. Cefalu had no involvement with the investigation in the 20 months leading up to the filing of the wiretap application, he has never personally prepared an affidavit in support of a wiretap application, he has never seen the FBI agent’s affidavit in support of the September 12, 2007 wiretap application, and he did not speak to the FBI agent who prepared the affidavit. *Id.* at 79, 112-13, 131-32.

¶5 A federal judge denied the motion to suppress, and in so doing commented that Mr. Cefalu was “unworthy of belief”; that his testimony would not be given “any weight” because, *inter alia*, it was based on “limited knowledge” and “limited participation” in the investigation; that by the time of the wiretap application Mr. Cefalu was “20 months removed” from the investigation, which had “moved far beyond [him]”; Mr. Cefalu did not have “the slightest idea of

what [was] going on with three quarters of the investigation”; Mr. Cefalu’s testimony was “reckless”; and, by testifying as he did, Mr. Cefalu did “a disservice to the agency that . . . continues to . . . employ[]” him. U-2 File, Tab 1, Ex. C, Hearing Transcript (7/6/10) at 45-46.

¶6 The agency later removed Mr. Cefalu on a “lack of candor” charge, which was expressly based on his testimony at the hearing on the motion to suppress. U-1 File, Tab 1, Ex. 4; U-2 File, Tab 1, Ex. B. Shortly thereafter, the Office of Special Counsel filed a request for an initial stay of the removal under [5 U.S.C. § 1214\(b\)\(1\)\(A\)](#), claiming that the removal constituted a prohibited personnel practice because it was based on speech protected under the First Amendment. I deferred to OSC’s assessment of the case and granted the initial stay, while raising some questions about OSC’s theory. *Special Counsel ex rel. Vincent Cefalu v. Department of Justice*, MSPB Docket No. CB-1208-13-0006-U-1, Order on Stay Request (Oct. 23, 2012). OSC now seeks an extension of the stay for 90 days under [5 U.S.C. § 1214\(b\)\(1\)\(B\)](#). U-2 File, Tab 1. The agency opposes an extension. *Id.*, Tab 2.

¶7 As detailed below, there are three problems with OSC’s legal theory, and a separate problem with the request for an extension of the stay to conduct additional investigation.

Whether OSC has identified a law that implements or directly concerns the merit system principles

¶8 OSC claims that it has reason to believe the agency has violated [5 U.S.C. § 2302\(b\)\(12\)](#), which makes it a prohibited personnel practice to “take or fail to take [a] personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles.” One of the merit system principles states that “[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management . . . with proper regard for their

privacy and constitutional rights.” [5 U.S.C. § 2301\(b\)\(2\)](#). However, the merit system principles are not self-executing. *LeBlanc v. Department of Transportation*, [60 M.S.P.R. 405](#) (1994) (citations omitted), *aff’d* 53 F.3d 346 (Fed. Cir. 1995) (Table). Moreover, to make out a prohibited personnel practice claim based on an asserted violation of a constitutional right, the complaining party must identify a law, rule, or regulation that implements or directly concerns the constitutional provision involved; the Constitution itself is not such a law, rule, or regulation. *Radford v. Office of Personnel Management*, [69 M.S.P.R. 250](#), 254-55 (1995); *Pollard v. Office of Personnel Management*, [52 M.S.P.R. 566](#), 570 n.3 (1992). Thus, to find that OSC alleges a prohibited personnel practice requires the Board either to overrule or otherwise disregard *Radford* and *Pollard*, or to find, as OSC alleges for the first time in its extension request, that the official who removed Mr. Cefalu may have violated his oath of office. *See* [5 U.S.C. § 3331](#) (oath of office for executive branch appointees provides that an appointee shall swear or affirm that he will “bear true faith and allegiance” to “the Constitution”).

Whether First Amendment protection is foreclosed on the ground that Mr. Cefalu’s testimony was given as part of his official duties

¶9 In *Garcetti v. Ceballos*, [547 U.S. 410](#), 421 (2006), the court held as follows:

[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. . . . Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

Although OSC contends that, notwithstanding *Garcetti*, the government in its capacity as an employer has no authority to control truthful testimony given

under subpoena, in fact the agency could have lawfully prohibited Mr. Cefalu from testifying. *See United States ex rel. Touhy v. Ragen*, [340 U.S. 462](#) (1951). As noted above, the agency permitted Mr. Cefalu to testify, but all indications are that his testimony was within the scope of his duties as a matter of law. *See 28 C.F.R. § 16.21(a)* (agency regulations implementing *Touhy*). It appears that Mr. Cefalu's testimony was within the scope of his duties as a matter of fact as well, inasmuch as his testimony related to his work for the agency, and he testified while in pay and duty status. *See Garcetti*, 547 U.S. at 422 (speech that has "no official significance" and that is similar to speech made "by numerous citizens every day" will generally not be considered to be within the scope of a public employee's official duties; by contrast, an individual "act[s] as a government employee" when he "[goes] to work and perform[s] the tasks he [is] paid to perform"). Thus, to find that Mr. Cefalu's testimony was potentially protected under the First Amendment, the Board must choose not to follow *Garcetti* or conclude that this case presents an exception to *Garcetti*.

Whether the agency's interest in controlling Mr. Cefalu's speech outweighs his interest in expressing his views

¶10 A public employee, like all citizens, enjoys a constitutionally protected interest in freedom of speech. *Connick v. Myers*, [461 U.S. 138](#), 149 (1983); *Pickering v. Board of Education*, [391 U.S. 563](#), 568 (1968). Employees' free speech rights must be balanced, however, against the need of government agencies to exercise "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Mings v. Department of Justice*, [813 F.2d 384](#), 387 (Fed. Cir. 1987). Thus, in determining the free speech rights of government employees, a balance must be struck between the interest of the employees, as "citizens," in commenting on matters of public concern, and the interest of the government, as an employer, in promoting

the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568.\*

¶11 For purposes of this decision, I assume that Mr. Cefalu's testimony about the conduct of a criminal investigation involved a matter of public concern. In conducting the *Pickering* balance, significant weight will be given to a public employee's statements that reveal corruption or wrongdoing on the part of government officials. *See, e.g., McGreal v. Ostrov*, [368 F.3d 657](#) (7th Cir. 2004). Here, however, OSC does not allege that Mr. Cefalu revealed corruption or wrongdoing in his testimony, and there is no indication that he did. Instead, all indications are that Mr. Cefalu testified with reckless disregard for the truth. Furthermore, his testimony had a disruptive effect on government operations insofar as it was intended to derail a criminal prosecution, and it required considerable time and effort of an Assistant U.S. Attorney to persuade the judge to deny the motion to suppress. At least one circuit has held that a public employee's statements made with reckless disregard for the truth are per se unprotected by the First Amendment. *Brenner v. Brown*, [36 F.3d 18](#), 20 (7th Cir. 1994). Other courts have not followed a per se approach, but have nonetheless held that, for purposes of *Pickering*, a public employee has a very weak interest in making statements with reckless disregard for the truth or without a reasonable basis, and the government as employer has a very strong interest in controlling such speech, especially where such speech was disruptive to government

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\* A law enforcement officer's First Amendment rights are narrower than those of other kinds of public employees. *See O'Donnell v. Barry*, [148 F.3d 1126](#), 1135 (D.C. Cir. 1998); *McMullen v. Carson*, [754 F.2d 936](#), 938 (11th Cir. 1985); *Jurgensen v. Fairfax County*, [745 F.2d 868](#), 880 (4th Cir. 1984). The reason for allowing greater restraints on the speech of law enforcement officers is that law enforcement work requires: A high degree of discipline and harmony among officers; confidentiality; protection of close working relationships that require loyalty and confidence; minimal disruption to the public safety mission; and fostering uniformity and esprit de corps. *Cochran v. City of Los Angeles*, [222 F.3d 1195](#), 1201 (9th Cir. 2000); *Bennett v. City of Holyoke*, 230 F. Supp. 2d 207, 225 (D. Mass. 2002), *aff'd*, 362 F.3d 1 (1st Cir. 2004); *Pierson v. Gondles*, 693 F. Supp. 408, 413 (E.D. Va. 1988).

operations. *See, e.g., Lytle v. City of Haysville*, [138 F.3d 857](#), 866 (10th Cir. 1998); *Brasslett v. Cota*, [761 F.2d 827](#), 839 (1st Cir. 1985); *Dillman v. City of Winchester*, 639 F. Supp. 2d 1257, 1267 (W.D. Okla. 2009). Indeed, in *Pickering* itself, the court strongly suggested that a public employee has a very weak First Amendment interest in making “false statements knowingly or recklessly.” 391 U.S. at 575.

¶12 The analysis does not change by characterizing Mr. Cefalu’s testimony as “his opinion” that the FBI “misled the court in order to obtain the wiretap,” as OSC does in its request for an extension of the stay. U-2 File, Tab 1 at 15. In *Milkovich v. Lorain Journal Co.*, [497 U.S. 1](#) (1990), an individual sued a newspaper for libel, after the newspaper published an article implying that the individual had lied in an administrative hearing. The newspaper defended by arguing that the statements in the article were “opinions” that were privileged under the First Amendment. The Court disagreed, explaining that prefacing a statement that is in the nature of a factual assertion with the words “I think” or “in my opinion” does not transform the statement into a mere viewpoint or idea with no truth value. 497 U.S. at 17-18. According to the Court, accusing someone of being “a liar” is a factual assertion that can be verified or disproved, and, as such, the accusation is not automatically shielded under the First Amendment. *Id.* at 18. Here, Mr. Cefalu’s testimony that the affidavit in support of the wiretap application contained “misrepresentations” is a factual assertion, not a mere opinion that can neither be verified nor disproved.

¶13 In sum, to find that OSC alleges a prohibited personnel practice, the Board must conclude -- contrary to all of the evidence and allegations presented by OSC and contrary to the findings of a federal judge -- that Mr. Cefalu may have had a reasonable basis for testifying that the affidavit in support of the wiretap contained misrepresentations.

Whether OSC has established that it needs additional time to conduct an investigation

¶14 OSC states that it needs an additional 90 days to investigate Mr. Cefalu's allegation that other ATF agents whose testimony was discredited by a judge were not removed. U-2 File, Tab 1 at 19. Whether Mr. Cefalu was subjected to a disparate penalty as compared to other similarly situated employees is relevant under [5 U.S.C. § 7513](#), see *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 313 (1981), but it has no bearing on whether the agency committed a prohibited personnel practice. OSC does not contend that it needs additional time to look for evidence that Mr. Cefalu had a reasonable basis for testifying as he did. Thus, extending the stay is not necessary; the Board has all the information it needs to decide whether OSC has made a prima facie showing of a prohibited personnel practice.

Conclusion

¶15 A proceeding on OSC's request for an extension of a stay is not intended to be a substitute for a complete hearing on the merits of OSC's claim. *Special Counsel v. Department of Transportation*, [71 M.S.P.R. 87](#), 90 (1996). The Board's function in a stay proceeding is "circumscribed," with the Board merely exercising "a measure of quasi-judicial oversight." *Special Counsel v. Department of Commerce*, [26 M.S.P.R. 280](#), 281-82 (1985). I would not find that the agency committed a prohibited personnel practice on the facts alleged, but, given the Board's "restricted role" in a proceeding such as this, *id.* at 282, I reluctantly concur with my colleagues and defer to OSC's judgment that there may have been a prohibited personnel practice.

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Mark A. Robbins  
Member