

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

SPECIAL COUNSEL
EX REL. FRANZ GAYL,
Petitioner,

DOCKET NUMBER
CB-1208-12-0001-U-1

v.

DATE: October 13, 2011

DEPARTMENT OF THE NAVY,
Agency.

THIS STAY ORDER IS NONPRECEDENTIAL¹

Malia S. Myers, Esquire, Washington, D.C., for the petitioner.

LTC Robert Cheshire, Esquire, Washington, D.C., for the agency.

BEFORE

Mary M. Rose, Member

ORDER ON STAY REQUEST

Pursuant to 5 U.S.C. § 1214(b)(1)(A), the Office of Special Counsel (OSC) requests that the Board stay for 45 days the agency's indefinite suspension of Franz J. Gayl while OSC completes its investigation of whether the indefinite

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

suspension would constitute a prohibited personnel practice under 5 U.S.C. § 2302(b)(8). For the reasons discussed below, OSC's request is GRANTED.

BACKGROUND

In its October 7, 2011 stay request, OSC alleges that Mr. Gayl is the Deputy Branch Head (GS-1301-15) for the Information Operations and Space Integration Branch of the Plans, Policies and Operations Division (PPO) of the United States Marine Corps and that, until recently, he also held the title of Science and Technology Advisor for PPO.² OSC further alleges that, beginning in early 2007 and continuing to the present, Mr. Gayl has disclosed information that criticized Marine Corps decisions in conversations with and emails to officials of the Marine Corps and the Department of Defense, in interviews with public media outlets, in testimony to Congress, and in discussions with congressional staff and outside veterans and whistleblower-advocacy groups. Specifically, OSC alleges that Mr. Gayl disclosed concerns regarding the failure of the Marine Corps' "support and establishment" to timely provide Mine Resistant Ambush Protected (MRAP) vehicles to service members in Iraq. Mr. Gayl disclosed that, because MRAPs are far more effective at repelling attacks from improvised explosive devices than armored Humvees, the failure to quickly send MRAPs to Iraq led to unnecessary deaths and injuries. Mr. Gayl's disclosures were reported by *USA Today*, *Newsweek*, *60 Minutes*, and *Newshour with Jim Lehrer*. Mr. Gayl also made the same disclosures in testimony and statements to Congress and congressional staff.

² The facts set forth in this section of the Board's Nonprecedential Stay Order are those alleged by OSC's counsel in its request for a stay. They are supported by a declaration she has prepared in which she states that she is familiar with the attendant facts and circumstances that form the basis for OSC's request for a stay, and that, based on her personal review of Mr. Gayl's allegations, the summary of evidentiary support fairly and accurately summarizes the evidence to date.

OSC claims that, following his initial whistleblowing activities, Mr. Gayl was subjected to a series of personnel actions, including a reprimand, a proposed suspension, two lowered performance appraisals affecting his pay, placement on a Performance Improvement Plan, and significant changes and restrictions to his duties and working conditions. In an earlier complaint filed with OSC, the investigation of which is still ongoing, Mr. Gayl alleged that these personnel actions constituted a pattern and practice of retaliation. On October 4, 2010, the Marine Corps suspended Mr. Gayl's access to classified information and placed him on paid administrative leave, pending adjudication of his security clearance by the Department of the Navy Central Adjudication Facility.

OSC alleges that, after his placement on paid administrative leave in 2010, Mr. Gayl continued to engage in whistleblowing activity. On November 20, 2010, the *Washington Post* published an article summarizing his disclosures and the actions subsequently taken by the Marine Corps. On February 4, 2011, Mr. Gayl appeared on the nationally syndicated radio program, *On the Media*, which was broadcast on National Public Radio (NPR) and during which Mr. Gayl summarized his prior disclosures and the agency's allegedly retaliatory actions. On June 20, 2011, Mr. Gayl, through his attorneys, engaged in a mass emailing to solicit signatures on his behalf to an online petition to incoming Secretary of Defense Leon Panetta. The email recounted Mr. Gayl's whistleblowing activities and asserted that the Marine Corps suspended his security clearance in retaliation. Finally, on June 27, 2011, *Washington Monthly* published an article highlighting Mr. Gayl's disclosures and the Marine Corps' subsequent actions.

On September 12, 2011, the Marine Corps advised Mr. Gayl that he would be suspended indefinitely, which would change his pay status from paid to unpaid. OSC claims that Mr. Gayl has maintained that, from the time he was placed on paid administrative leave until he received his notice of indefinite suspension, he has not engaged in any conduct that might justify his suspension and that his only actions related to his employment were the email petition to

Secretary Panetta and the three public media events in which he discussed his whistleblowing activities and the Marine Corps' alleged retaliatory actions.

OSC contends that a stay of Mr. Gayl's indefinite suspension is appropriate while it completes its investigation because, based on the evidence that it has gathered to date, there are reasonable grounds on which to believe that Mr. Gayl's indefinite suspension is a result of his protected activity and is therefore prohibited under 5 U.S.C. § 2302(b)(8). OSC emphasizes that it is not challenging the merits of the agency's suspension of Mr. Gayl's security clearance or asserting that Mr. Gayl has any right to be placed in a noncritical-sensitive position while he awaits a final agency decision on the merits of his security clearance suspension. Rather, OSC asserts that the stay request requires the Board only to review the merits of the Marine Corps' decision to change Mr. Gayl's pay status and determine whether there are reasonable grounds to believe that the decision was made because of Mr. Gayl's protected whistleblowing activities.

ANALYSIS

OSC asserts that 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 or took the personnel action had actual or constructive knowledge of the protected disclosure; (3) a personnel action was threatened or taken; and (4) the protected disclosure was a contributing factor in the personnel action. *See Office of Special Counsel ex rel. Hopkins v. Department of Transportation*, 90 M.S.P.R. 154, ¶ 4 (2001). OSC further asserts that prima facie evidence supports each of these four elements in this case.

First, OSC claims that Mr. Gayl's disclosures in a November 20, 2010 *Washington Post* article, during a February 4, 2011 NPR interview, in a June 27, 2011 *Washington Monthly* article, and within the text of a mass email that accompanied an online petition to Secretary Panetta on June 20, 2011, were

protected because he disclosed information that showed that the Marine Corps failed to promptly procure and deploy MRAPs, that its failure resulted in battlefield casualties, and that it violated the Whistleblower Protection Act (WPA) by taking various personnel actions in retaliation against him for his protected activity. OSC claims that a disinterested observer in Mr. Gayl's position could believe that the information he disclosed regarding the Marine Corps' failure to provide MRAPs evidenced a substantial and specific danger to service members' health and safety. Second, OSC contends that agency officials in Mr. Gayl's chain of command knew of the *Washington Post* and *Washington Monthly* articles and that OSC has reason to infer from the complaint record that responsible agency officials were aware of the disclosures in the NPR interview and the online petition to Secretary Panetta. Third, OSC states that the Marine Corps' decision to change Mr. Gayl's pay status is a decision concerning pay and therefore a covered personnel action under 5 U.S.C. § 2302(a)(2)(A)(ix). Fourth and finally, OSC contends that Mr. Gayl's activity was a contributing factor in the Marine Corps' personnel action because the Marine Corps proposed to suspend Mr. Gayl and change his pay status only 2½ months after the publication of his most recent disclosures in *Washington Monthly*, satisfying the knowledge-timing test. OSC further contends that Mr. Gayl's whistleblowing activities have attracted widespread attention and generated criticism of the Marine Corps from members of Congress and have been substantiated by the Department of Defense's Office of the Inspector General, giving rise to a fair inference of retaliatory animus. OSC thus states that it has reasonable grounds to believe that the change in Mr. Gayl's pay status was a result of a prohibited personnel practice under 5 U.S.C. § 2302(b)(8).

Under 5 U.S.C. § 1214(b)(1)(A)(i), 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.” Such a request “shall” be granted, “unless the [Board] member determines that, under the facts and circumstances involved, such a stay would not be appropriate.” 5 U.S.C. § 1214(b)(1)(A)(ii). OSC’s stay request need merely fall within the “range of rationality” to be granted, *In re Kass*, 2 M.S.P.R. 79, 96 (1980) (interpreting the predecessor provision to 5 U.S.C. § 1214, 5 U.S.C. § 1208), and the facts must be reviewed 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. Department of Transportation*, 59 M.S.P.R. 552, 555 (1993).

Given the assertions made in OSC’s stay request and the deferential legal standard applied at this stage, I find that there are reasonable grounds to believe that the agency has decided to effect Mr. Gayl’s indefinite suspension and change in pay status in violation of 5 U.S.C. § 2302(b)(8). *See Chambers v. Department of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (discussing factors to consider in determining when a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA); *Ganski v. Department of the Interior*, 86 M.S.P.R. 32, ¶¶ 2, 12-13 (2000) (finding that Ms. Ganski made nonfrivolous allegations of fact that, if proven, would establish that her disclosure of violations of the agency’s Merit Promotion Plan and placement assistance procedures was a protected whistleblowing disclosure under the WPA).

ORDER

Based on the foregoing, I conclude that granting OSC’s stay request would be appropriate. Accordingly, a 45-day stay of Mr. Gayl’s indefinite suspension is hereby GRANTED.³ The stay shall be in effect from October 13, 2011, through

³ To the extent that the effective date of Mr. Gayl’s indefinite suspension may have already passed, the Board has the authority to stay an action after its effective date if OSC has reasonable grounds to believe that the action was taken as a result of a prohibited personnel practice. *Special Counsel ex rel. Hoyt v. Department of Veterans Affairs*, 84 M.S.P.R. 314, ¶ 6 (1999).

and including November 26, 2011. It is further ORDERED that:

- (1) All actions of the Marine Corps to effect Mr. Gayl's indefinite suspension are hereby stayed;
- (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 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 November 14, 2011. 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 November 21, 2011.

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.