UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,
Petitioner,

v.

JON GREINER
and

OGDEN CITY, UTAH,
Respondents.

DOCKET NUMBER
CB-1216-08-0025-R-1

DATE: May 28, 2013

Mariama Liverpool, Esquire, and Peta-Gay Irving, Esquire, Washington, D.C., for the petitioner.

Bryan M. Scott, Esquire, James C. Bradshaw, Esquire, Michael T. Holje, Esquire, and Stanley J. Preston, Esquire, Salt Lake City, Utah, for the respondent.

BEFORE

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

ORDER

On March 14, 2013, Respondent Jon Greiner filed a request for the Board to reopen this case, in which the Board (with Vice Chairman Wagner dissenting) found him in violation of the Hatch Act and ordered his removal from employment by Utah state and local agencies for a period of 18 months. *Office of Special Counsel v. Greiner*, 117 M.S.P.R. 117, ¶¶ 27-28 (2011). The Board may at any time reopen a case in which it has issued a final order. However, the

Board will exercise its discretion to do so only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final. 5 C.F.R. § 1201.118. For the reasons set forth below, we DENY the respondent's request to reopen. The November 30, 2011 Opinion and Order remains the Board's final decision in this matter. 5 C.F.R. §§ 1201.125(c)(5), .126(b) (2006).

As the respondent describes his situation, he is currently at the top of a local government hiring register, and a local agency wishes to offer him employment. However, he is ineligible for hiring under the terms of the Board's order until July 1, 2013. *See Greiner*, 117 M.S.P.R. 117, ¶ 27. The respondent and the local agency that wishes to hire him would like to know whether the Board is willing and able to waive the remainder of the 18-month reemployment bar.[1]

In support of his request, the respondent cites the Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, 126 Stat. 1616. He argues that, under this new law, his 2006 candidacy for Utah State Senate would not have been prohibited and that he is therefore now serving a continuing penalty for a matter that is no longer a violation of the Hatch Act. The respondent asks that, considering his history of public service, his adherence to the employment bar thus far, and the recent amendments to the Hatch Act, the Board "limit [his] civil sentence to time served." The respondent has included a copy of a letter from Special Counsel Carolyn Lerner, in which she stated that the respondent's "previous candidacy for State Senator is no longer activity that would violate the Hatch Act." Request to Reopen File (RRF), Tab 1 at 7; *see* Hatch Act Modernization Act § 2, 126 Stat. at 1616 (partisan political candidacy is prohibited only where the state or local

[1] It appears that this is not the first time that the respondent has had to forgo public employment under the Board's order.

employee's salary is paid completely by federal loans or grants) (codified at 5 U.S.C. § 1502(a)(3) (2013)). Special Counsel Lerner went on to state:

> If [the Office of Special Counsel (OSC)] were now to be presented with an identical set of facts, we would close the complaint without taking any further action. Indeed, after the change in the law, OSC closed many cases where employees were alleged to have previously run for office in violation of the Hatch Act's amended candidacy prohibition. We believed the interests of justice and the clear demonstration of congressional intent required this office to close these cases without prosecution or penalty.

RRF, Tab 1 at 7. In light of the equities of this case, including the Special Counsel's letter, our sense of Congress's intent, and the respondent's personal situation, we have given serious consideration to the respondent's reopening request.

However, the Board's authority to amend the 18-month employment bar is very limited. One aspect of the Hatch Act that has not changed is that, when a violation is found, the Board has the choice between imposing a removal with an 18-month employment bar and imposing no penalty at all.[2] 5 U.S.C. §§ 1505, 1506; *Williams v. Merit Systems Protection Board*, 55 F.3d 917, 922 (4th Cir. 1995); *Special Counsel v. Brondyk*, 42 M.S.P.R. 333, 339 (1989); *In re Pfitzinger*, 2 P.A.R. 298, 305 (1948), *aff'd*, 96 F. Supp. 1 (D. N.J. 1951); 5 C.F.R. § 1201.126(b). To the extent that the respondent is requesting that the Board mitigate the penalty to include an employment bar of less than 18 months, we find no mitigation authority in the statute.

We have also considered alternative approaches to the matter. First, we considered whether the amendment to 5 U.S.C. § 1502(a)(3) might be retroactive, thus covering the 2006 events underlying this case. However, we find insufficient evidence to overcome the presumption that this amendment is prospective in nature. *See Landgraf v. USI Film Products*, 511 U.S. 244, 272-73

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[2] The Hatch Act Modernization Act offers greater penalty flexibility only where federal employees are concerned. Hatch Act Modernization Act § 4, 126 Stat. at 1617.

(1994) (prospectivity is the appropriate default rule for applying new legislation); *see also* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide."). The statute does not expressly provide that the amendment to § 1502(a)(3) will apply retroactively, and our review of the legislative history reveals no evidence of any such congressional intent. *See* S. Rep. No. 112-211 (2012); 158 Cong. Rec. H7320 (daily ed. Dec. 19, 2012). An examination of the statute's "effective date" provision gives further indication that Congress did not intend the amendment to 5 U.S.C. § 1502(a)(3) to be retroactive. Specifically, § 5(a) of the Act states that it will generally take effect 30 days after its enactment, but § 5(b) makes an exception for the amendment to 5 U.S.C. § 7326, prescribing limited retroactivity for that provision and that provision alone. It therefore appears that Congress deliberately treated the amendments to §§ 1502(a)(3) and 7326 differently, and we find that the absence of retroactivity language for the 5 U.S.C. § 1502(a)(3) amendment was intentional.[3]

Second, we considered whether the statute might be construed as a private law to benefit the respondent in this case personally. However, we cannot in good faith interpret it as such. Although the amendments were clearly meant to allow people in the respondent's situation to run for office in the future,[4] they were not styled as a private relief bill, the respondent was not personally named in the bill, and it does not appear that the Senate followed its normal procedures

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[3] Even the retroactivity provision for the 5 U.S.C. § 7326 amendment is limited to cases in which OSC has not yet presented a complaint or entered into a settlement agreement. Hatch Act Modernization Act § 5(b)(2), 126 Stat. at 1617-18.

[4] Indeed, two Members of Congress held this particular case out as an example of the "absurdities" of the former law. 158 Cong. Rec. H7320 (daily ed. Dec. 19, 2012) (statements of Mr. Clay and Mr. Chaffetz). The respondent himself also testified before a House subcommittee on the matter. *Hatch Act: Options of Reform: Hearing Before the H. Subcomm. on Fed. Workforce, U.S. Postal Serv. and Labor Policy*, 112th Cong. (2012).

for a private bill. *Cf.* S. 295, 112th Cong. (2011) (example of a private bill); Standing Rules of the Senate, Rule 14.9 (procedures for a private bill).

It appears that the Board's only option for affording the respondent relief at this point would be to vacate our Opinion and Order and substitute a finding that no penalty was warranted at all. For the following reasons, we decline to do so.

In deciding whether to reopen a closed appeal, the Board will balance the desirability of finality against the public interest in reaching the right result and will exercise its authority to reopen only in unusual or extraordinary circumstances. *Turner-Thompson v. Office of Personnel Management*, 112 M.S.P.R. 418, ¶ 8 (2009). In reaching its determination, the Board will consider all of the relevant facts and circumstances, including the length of time that has elapsed since the prior decision, the likelihood of reaching a new result based on the evidence and argument presented, and whether the party seeking reopening has acted diligently in doing so. *Anthony v. Office of Personnel Management*, 70 M.S.P.R. 214, 219 (1996). In this case, the respondent acted with reasonable promptness after the January 27, 2013 effective date of the new law to obtain an opinion from OSC and request reopening by the Board. However, the 15-month time period that elapsed between the Board's Opinion and Order and the date of the respondent's reconsideration request is more than the Board is generally inclined to accept. *See Arenal v. Office of Personnel Management*, 106 M.S.P.R. 272, ¶ 10 (2007) (the Board's authority to reopen a case is limited by the requirement that such authority be exercised within a reasonably short period of time, which is usually measured in weeks, not months or years), *aff'd*, 264 F. App'x 891 (Fed. Cir. 2008); *Tipsword v. Department of the Army*, 66 M.S.P.R. 53, 56 (1994) (although the appellant filed his request to reopen within 2 months after the law changed, the change in the law did not occur until 8 months after the Board's decision). We also note that the respondent did not exercise his right to judicial review of the Board's decision. *See Tipsword*, 66 M.S.P.R. at 56. Most importantly, however, if the Board were to reopen this appeal and vacate the

penalty determination, it would not be doing so to reach the "right result" in the sense of correcting a manifest error in its prior decision. Rather, it would be substituting a more equitable result based on a law that was not in effect at the time.[5]

We have considered the congressmen's disapproval of the results of this particular case and that the change in the law was in no small part a response to the respondent's personal situation. We have also considered that OSC has reacted to the change in the law by dropping pending prosecutions in cases like the respondent's even though it may still be legally able to pursue them. Nevertheless, we find more relevant the positions that Congress and OSC took on the matter back when the events underlying this case occurred and when the Board issued its prior decision. Given the state of the law at the time and OSC's decision to prosecute this case to its conclusion, we cannot now find sufficient reason to overturn the results of that prosecution.

In sum, our decision on this request to reopen is driven by the rather unfortunate timing of it all. We do not intend this as another indictment of the respondent, and we do not mean to say that we would reach the same result in this

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[5] The Board will sometimes reopen a case based on a change in the law that occurred after it issued its final decision. *See Special Counsel v. Sullivan*, 7 M.S.P.R. 357, 360 (1981). However, the Board will normally only do so when the change corrects the Board's previous erroneous application of the law, *e.g.*, *Seward v. Department of Veterans Affairs*, 106 M.S.P.R. 121, ¶ 6 (2007); *McDowell v. Department of Defense*, 76 M.S.P.R. 281, 283 (1997), or is explicitly retroactive, *e.g.*, *Rivera v. Department of Transportation*, 94 M.S.P.R. 216, ¶¶ 10-11 (2003); *Waters v. Department of Transportation*, MSPB Docket No. AT-0752-10-0197-R-2, Nonprecedential Final Order (Nov. 7, 2012). Neither of those is the case here.

case if we had it to do over under current law. However, the fact remains that we do not have it to do over.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board

Washington, D.C.

DISSENTING OPINION OF ANNE M. WAGNER

in

Special Counsel v. Jon Greiner

MSPB Docket No. CB-1216-08-0025-R-1

¶1 I agree with the majority that the Hatch Act did not give the Board the authority to mitigate the penalties prescribed therein. However, I would vacate the Opinion and Order in this case and substitute a finding that no penalty was warranted at all for the reasons set forth in my previous dissenting opinion.

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Anne M. Wagner
Vice Chairman