

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

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

Petitioner,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER(S)

CB-1208-12-0025-U-2
CB-1208-12-0025-D-1
CB-1208-12-0026-D-1
CB-1208-12-0026-U-2
CB-1208-12-0027-D-1
CB-1208-12-0027-U-2
CB-1208-12-0028-D-1
CB-1208-12-0028-U-2
CB-1208-12-0029-D-1
CB-1208-12-0029-U-2
CB-1208-12-0030-D-1
CB-1208-12-0030-U-2

DATE: October 22, 2012

THIS ORDER IS NONPRECEDENTIAL¹

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

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

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future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

ORDER

The Office of Special Counsel (OSC) requests an extension of a stay under [5 U.S.C. § 1214\(b\)\(1\)\(B\)](#). It also seeks a protective order under [5 U.S.C. § 1204\(e\)\(1\)\(B\)](#). We consolidate these matters for decision. See [5 U.S.C. § 7701\(f\)\(1\)](#). For the reasons set forth below, we GRANT OSC's request for an extension of the stay IN PART and DENY its motion for a protective order without prejudice to refiling.

BACKGROUND

OSC originally brought this action on August 31, 2012, on behalf of Psychologists Holly Kunert, Michael O'Friel, and Mary Colleen Morgan, Licensed Professional Counselor Tamera Randolph, Administrative Assistant Brooke Wilkins, and Social Worker Teresa Williams. When the relevant events took place, these six individuals made up the nonsupervisory staff of the Army Substance Abuse Program (ASAP) at Fort Richardson, Alaska. OSC alleged that the six individuals were subjected to various actions in retaliation for their having reported to Ombudsman Karl Hansen that their Clinical Program Manager and second-level supervisor had falsified, removed, and/or destroyed patient records and that she created a hostile work environment for her staff. A complete statement of OSC's allegations appears in *Office of Special Counsel ex rel. Kunert et al. v. Department of the Army*, MSPB Docket No. CB-1208-12-0025-U-1 (U-1 File), Nonprecedential Stay Decision (Sept. 6, 2012), and is incorporated by reference herein.

Pursuant to [5 U.S.C. § 1214\(b\)\(1\)](#), OSC requested a 45-day stay of agency efforts to recover incentive payments from any of the above-named individuals, as well as a stay of the agency's provision of negative information about them to prospective employers and/or credentialing bodies. OSC characterized the agency's actions as "harassment" that should be stayed. Further, pursuant to

[5 U.S.C. § 1204](#)(e)(1)(B)(i), OSC sought an order protecting the six individuals from harassment. *See* U-1 File, Tab 1.

Member Robbins granted OSC's stay request in part. He concluded that the agency's attempt to recover incentive payments was a "decision concerning pay," which is a personnel action under [5 U.S.C. § 2302](#)(a)(2)(A)(ix). He assumed, "solely for purposes of this nonprecedential single-member decision in this *ex parte* proceeding," that "a series of unwelcome actions directed at an employee that amount to 'harassment' *may* be a 'personnel action'" (emphasis supplied) subject to the Board's stay authority; on that basis, he stayed the agency's provision of negative information about the six individuals to prospective employers and/or credentialing bodies. Member Robbins further concluded, however, that his Order operated only as to those individuals who were either federal employees or applicants for federal employment. Finally, Member Robbins found that, as a single Board member, he lacked authority to rule on OSC's request for a protective order, and he informed the parties that that request would be acted on separately. *See* Nonprecedential Stay Decision (Sept. 6, 2012).

In a pleading filed after Member Robbins issued his Order, OSC alleged that Kunert, O'Friel, and Randolph are currently employed in other agencies, while Morgan, Williams, and Wilkins are not. *Office of Special Counsel ex rel. Kunert et al. v. Department of the Army*, MSPB Docket No. CB-1208-12-0025-D-1 (D-1 File), Tab 5 at 2-3. OSC further alleged that Morgan "has applied for several federal positions" and that she has been informed that she is "under consideration" for a position with the Army Medical Command. *Id.* at 3-4. OSC also clarified that the agency is trying to recover relocation expenses (as opposed to retention incentives) from Morgan. *Id.* at 4. OSC further alleged that it has not been able to contact Wilkins because she is in the process of relocating from Alaska to Kentucky and that, on information and belief, Wilkins "plans to seek new federal employment once she has settled in." *Id.* at 5. OSC

further alleged that Williams is currently employed at the Anchorage Community Mental Health Services, that she does not currently have an application for federal employment outstanding, and that she “will apply” for positions with the federal government when appropriate vacancies “become available.” *Id.* at 5.

OSC has now filed a timely request that the Board extend the stay for an additional 120 days and expand its scope and that the Board issue a protective order, while OSC conducts an investigation. Specifically, OSC asks the Board to:

- (1) modify the existing stay order to apply to all agency actions that may adversely affect the employment prospects of the affected individuals in applying for a covered position at a federal agency;
- (2) expand the existing stay order to apply to all agency actions to collect retention bonuses, relocation expenses and similar alleged debts for any of the affected individuals; and
- (3) issue an anti-harassment protective order that ensures that, to the extent they are not covered by a modified stay order, the non-federal employee complainants are provided the same relief from harassment as the federal employee complainants for the same duration that the stay order is in effect.

Office of Special Counsel ex rel. Kunert et al. v. Department of the Army, MSPB Docket No. CB-1208-12-0025-U-2 (U-2 File), Tab 1 at 11-12. In support of its request, OSC incorporates the allegations that it made in its request for an initial stay and for a protective order, but includes some supplemental allegations based on information obtained during its ongoing investigation. The agency has not responded to OSC’s request for an extension of the stay.

DISCUSSION

I. STAY

A. The stay should be extended for 120 days.

The Board will grant OSC’s request for an extension of a stay as long as OSC’s prohibited personnel practice claim is not clearly unreasonable. *Special Counsel ex rel. Waddell v. Department of Justice*, [105 M.S.P.R. 208](#), ¶ 3 (2007). OSC’s original request for a stay was based on its allegation that the agency took

a series of retaliatory actions against the six individuals because they reported to the agency Ombudsman that their supervisor had violated law and regulation and had abused her authority. Viewing the facts in the light most favorable to OSC, *Special Counsel ex rel. Meyers v. Department of Housing & Urban Development*, [111 M.S.P.R. 48](#), ¶ 16 (2009), and as explained in detail in Member Robbins' September 6, 2012 Order at pages 6 through 8 (concluding that OSC has alleged a prima facie case of retaliation for disclosures protected under [5 U.S.C. § 2302\(b\)\(8\)](#)), we find that OSC's prohibited personnel practice claim is not clearly unreasonable.

The length of the extension is a separate determination. *Special Counsel ex rel. Perfetto v. Department of the Navy*, [85 M.S.P.R. 92](#), ¶ 12 (2000). Considering that this matter involves numerous actions involving six individuals, and further considering OSC's representations that it must analyze a large number of documents that it has received from the agency and then send an investigator to Alaska, U-2 File, Tab 1 at 7, a 120-day extension is appropriate. See [5 U.S.C. § 1214\(b\)\(1\)\(B\)](#) (“[t]he Board may extend the period for any stay . . . for any period which the Board considers appropriate”).

B. The Board extends the stay under [5 U.S.C. § 1214\(b\)\(1\)\(B\)](#) as to four of the six individuals identified in OSC's submissions.

Upon OSC's request, the Board may stay a “personnel action,” [5 U.S.C. § 1214\(b\)\(1\)\(A\)\(i\)](#), (B), a term that is defined at [5 U.S.C. § 2302\(a\)\(2\)\(A\)](#). “Harassment,” per se, is not a “personnel action” under section 2302(a)(2)(A). As noted above, exercising the liberal deference accorded OSC upon an initial single-member stay request, Member Robbins initially stayed the agency's provision of negative information to prospective employers and/or credentialing bodies because he credited OSC's allegations that such actions amounted to harassment and because he assumed arguendo that “harassment” is a “personnel action” that may be stayed. In *Covarrubias v. Social Security Administration*,

[113 M.S.P.R. 583](#), ¶ 15 n.4 (2010), cited by OSC, the Board suggested that a series of harassing management actions that creates a stressful or hostile work environment, and that in themselves are not “personnel actions,” may in combination amount to a “significant change in . . . working conditions,” which is a “personnel action.” See [5 U.S.C. § 2302](#)(a)(2)(A)(xi). Here, OSC alleges a pattern of actions affecting the ASAP staff that it says was harassing and that in combination could amount to a significant change in working conditions. We can stay the provision of negative information to prospective employers and/or professional credentialing bodies because it is part of the alleged pattern.

Furthermore, regardless of whether the agency’s alleged attempts to collect retention pay, relocation expenses, and similar debts are considered part of the alleged pattern of harassment against the six individuals, such collection efforts are decisions concerning pay or benefits. These are personnel actions that can be stayed. See [5 U.S.C. § 2302](#)(a)(2)(A)(ix).

Some of the six individuals are not covered by the stays described above, however. A “personnel action” is one of the statutorily-specified directives or decisions taken “with respect to an employee in, or applicant for, a covered position in an agency” and, where retaliation for whistleblowing is alleged, a government corporation. [5 U.S.C. § 2302](#)(a)(2)(A). This language on its face indicates that an action taken against an individual who is neither a federal employee nor an applicant at the time of the action is not a “personnel action” under [5 U.S.C. § 2302](#)(a)(2)(A)(2). Case law is in accord. See *Pasley v. Department of the Treasury*, [109 M.S.P.R. 105](#), ¶¶ 6, 10 (2008); see also *Nasuti v. Merit Systems Protection Board*, 376 F. App’x 29, 33-34 (Fed. Cir.), *cert. denied*, 131 S. Ct. 393 (2010).² We therefore cannot order a stay of agency actions taken or to be taken against any of the six individuals identified in OSC’s

² We are not bound by the *Nasuti* decision because it is nonprecedential, but we follow it because we find it persuasive. See *Worley v. Office of Personnel Management*, [86 M.S.P.R. 237](#), ¶ 8 (2000).

submissions who is neither a federal employee nor an applicant for federal employment when the action was or is to be taken.

II. PROTECTIVE ORDER

Under [5 U.S.C. § 1204](#)(e)(1)(B)(i), “[t]he Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment.” The Board’s regulations permit the Board, sitting as a body, to rule on a motion for a protective order or to designate a judge to rule on the motion. *See* [5 C.F.R. §§ 1201.4](#)(a), 1201.146(c). The Board chooses to rule on OSC’s motion for a protective order itself.³ OSC made its request for a protective order concurrently with its initial stay request and shortly after it began its investigation, thus satisfying the requirement that a motion for a protective order be made “as early in the proceeding as practicable.” [5 C.F.R. § 1201.146](#)(b).

Although there is some case law concerning protective orders sought by parties other than OSC, *see, e.g., In re Uriarte*, [93 M.S.P.R. 183](#), ¶ 8 (2002); *Oates v. Department of Health & Human Services*, [64 M.S.P.R. 349](#), 351 (1994), this is the first time that OSC has requested a protective order in conjunction with a stay request, and for the benefit of the alleged victims of whistleblower reprisal. As a legal matter, it is not clear that the protective order statute was intended to be used in this way. In this connection, we note that OSC does not allege that the agency’s alleged harassment of the six individuals who used to work at ASAP is interfering with its investigation. Further, the evidentiary standard that OSC must meet to demonstrate that an order is “necessary” to protect a witness or individual from harassment is not set forth in [5 U.S.C. § 1204](#)(e)(1)(B)(i), nor is

³ Our choice is consistent with the September 13, 2012 notice to the parties, which stated that the Board would designate a “judge” to rule on the motion, because the full

it established in any regulation or caselaw; this is therefore a question of first impression.

Accordingly, OSC's request for a protective order is DENIED without prejudice to refiling. Should OSC choose to refile its request, it should fully brief the legal and evidentiary issues discussed above, and it should be prepared to present oral argument on these significant, novel issues. The agency shall be given a chance to respond to any refiled motion for a protective order that OSC might make.

ORDER

Based on the foregoing, the Board concludes that an extension of the stay under [5 U.S.C. § 1214](#)(b)(1)(B) is appropriate. Accordingly, a 120-day extension of the stay is hereby GRANTED, IN PART, as expressly described below. The stay, as extended, shall be in effect from October 22, 2012, through and including February 18, 2013. It is ORDERED that:

- (1) All agency actions to collect retention bonuses, relocation expenses, or similar debts concerning pay and benefits, *see* [5 U.S.C. § 2302](#)(a)(2)(A)(ix), from employees Holly Kunert, Michael O'Friel, and Tamera Randolph, and from applicant Mary Colleen Morgan, are hereby stayed.
- (2) All agency actions that may adversely affect the employment prospects or employment tenure of employees Holly Kunert, Michael O'Friel, and Tamera Randolph, and applicant Mary Colleen Morgan, including any adverse employment recommendations to current or potential employers or to professional credentialing entities, are hereby stayed.

Board is included within the definition of "judge." *See* D-1 File, Tab 4 at 3; [5 C.F.R. § 1201.4](#)(a).

- (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 items (1) and (2) above.

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 4, 2013. Any comments on such a request that the agency wants the Board to consider must be received by the Clerk of the Board, together with any evidentiary support, on or before February 11, 2013. OSC is cautioned that stays should not be extended for lengthy periods. *Special Counsel v. Internal Revenue Service*, [66 M.S.P.R. 369](#), 371 (1995).

FOR THE BOARD:

William D. Spencer
Clerk of the Board

Washington, D.C.