

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,
EX REL. JOSEPH PERFETTO,
Petitioner,

v.
DEPARTMENT OF THE NAVY,
Agency.

DOCKET NUMBER
CB-1208-99-0062-U-4

DATE: December 15, 1999

Kristin A. Gray, Esquire, Washington, D.C., for the petitioner.

James Dikeman, Esquire, and Deborah Miron, Esquire, Washington, D.C., for the agency.

BEFORE

Susanne T. Marshall, Member

OPINION AND ORDER

¶1 Pursuant to 5 U.S.C. § 1214(b)(1)(B), the Special Counsel (OSC) requests a third extension of the previously-granted stay of the termination of Joseph Perfetto during his probationary period. For the reasons stated below, OSC's request is GRANTED and the stay is extended up to and including January 15, 2000.

BACKGROUND

¶2 Perfetto was appointed to an excepted service position as a GS-7 Safety Technician with the U.S. Naval Support Activity, Naples, Italy, on August 8, 1998. On January 15, 1999, he filed a grievance against the Director of the Public Safety Department, Lt. Jason Strength. On March 19, 1999, during his probationary period, the agency issued him a letter terminating his appointment.

¶3 On July 29, 1999, OSC filed a request with the Board for a 45-day stay of Perfetto's termination, alleging that it had reasonable grounds to believe that the termination violated 5 U.S.C. § 2302(b)(9), which prohibits an agency official from taking a personnel action against any employee because the employee has exercised any appeal, complaint, or grievance right granted by any law, rule, or regulation. The Chairman granted OSC's request and stayed Perfetto's termination through September 17, 1999. *Special Counsel ex rel. Perfetto v. Department of the Navy*, 83 M.S.P.R. 169 (1999).

¶4 On September 1, 1999, OSC filed a request with the Board for a 45-day extension of the stay to continue pursuing a resolution of this matter, to obtain a response from the agency to its recommendation for corrective action, and to decide what further action, if any, is warranted. Stay File in MSPB Docket No. CB-1208-99-0062-U-2, Tab 1. The Vice Chair granted OSC's request and stayed Perfetto's termination through November 1, 1999. *Special Counsel ex rel. Perfetto v. Department of the Navy*, 83 M.S.P.R. 468 (1999).

¶5 On October 15, 1999, OSC filed a request with the Board for a second 45-day extension of the stay, contending that, on October 13, 1999, the agency requested a meeting with it to discuss the merits of Perfetto's allegations; that it was currently working with the agency to arrange the meeting; and thus that it needed more time to obtain a final response from the agency on its previous recommendation that Perfetto be returned to his position and to decide what further action, if any, is necessary to resolve the matter. Stay File in MSPB Docket No. CB-1208-99-0062-U-3, Tab 1. The Chairman granted OSC's request and stayed Perfetto's termination through December 16, 1999. *Special Counsel ex rel. Perfetto v. Department of the Navy*, MSPB Docket No. CB-1208-99-0062-U-3 (Oct. 29, 1999).

¶6 OSC now requests that the stay be extended an additional 20 days. Stay File in MSPB Docket No. CB-1208-99-0062-U-4, Tab 1. The agency has not filed any comments on the request for a third stay extension.

ANALYSIS

¶7 A stay granted pursuant to 5 U.S.C. § 1214(b) is issued to maintain the *status quo ante* while OSC and the agency involved resolve the disputed matter. The purpose of a stay is to minimize the consequences of an alleged prohibited personnel practice. *Special Counsel v. Department of Veterans Affairs*, 60 M.S.P.R. 40, 41 (1993). The Board may extend the period of any stay for any period that the Board considers appropriate. 5 U.S.C. § 1214(b)(1)(B). In doing

so, the Board will view the record in the light most favorable to OSC and will grant an extension of the stay if OSC's prohibited personnel practice claim is not clearly unreasonable. *Special Counsel v. Federal Emergency Management Agency*, 44 M.S.P.R. 544, 546 (1990).

¶8 OSC contends that it continues to have a reasonable basis to believe that Perfetto engaged in a protected activity, that he was subjected to a personnel action, that the official who took the action knew of the protected activity, and that the protected activity was a significant factor in the personnel action. It thus contends that it has a reasonable belief that the agency's action violated 5 U.S.C. § 2302(b)(9). It asserts, however, that it needs additional time to decide what further action, if any, is necessary to resolve the matter. In that regard, it states that it met with the agency's counsel on November 3, 1999, to discuss the merits of Perfetto's allegations; that the parties were unable to come to any resolution; that, on November 17, 1999, the agency provided it with an additional piece of information; and that it is continuing to pursue a resolution of this matter and deciding whether to submit a formal corrective action letter and report of prohibited personnel practice to the Secretary of the Navy.

¶9 The agency has not opposed OSC's request for an extension. The absence of any objection from the agency is implicit consent to the extension. *Special Counsel v. Department of the Treasury*, 71 M.S.P.R. 419, 421 (1996). Therefore, viewing the record in the light most favorable to OSC, I find that it is reasonable to believe that a prohibited personnel practice occurred in connection with Perfetto's termination, and that it is appropriate to grant OSC's request for a third stay extension.

¶10 The length of the extension requires a separate determination. *Special Counsel v. General Services Administration*, 45 M.S.P.R. 601, 604 (1990). The Board has recognized congressional intent that stays should not extend for "prolonged periods of time," and that the Board should "press the Special Counsel

to present any corrective action case in a timely manner.” *Special Counsel v. Federal Emergency Management Agency*, 44 M.S.P.R. at 546-47 (quoting H.R. Rep. No. 100-274, at 23 (1987)). Here, OSC requests a 20-day stay extension. I find, however, that 30 days is an appropriate period for the stay extension.

¶11 In that regard, I note the following: If I were to grant OSC’s request for only a 20-day stay, the stay would expire on January 5, 2000. Any request by OSC for an extension of the stay, together with any additional evidentiary support, would have to be received by the Board on or before December 21, 1999. 5 C.F.R. § 1201.136(b). Thus, OSC would be required to file the request within five days of the expiration of the current stay on December 16, 1999. Moreover, any agency response to the request for an extension would have to be received by the Board on or before December 28, 1999. *Id.* I take official notice of the fact that December 24, 1999 is a legal public holiday. 5 U.S.C. § 6103; 5 C.F.R. § 1201.64. In addition, because it falls on a Friday, the agency would be deprived of a three-day period, during its response period, to address this matter. Furthermore, I note that the agency is located in Naples, Italy, and that that distance may present additional difficulty in timely communicating among the parties and the Board. In light of these facts, and at the same time considering the Board’s obligation to press OSC to present corrective action cases in a timely manner, I find that a longer extension of the stay than was requested by OSC is warranted. *See, e.g., Special Counsel, ex rel. Jacobs v. Department of Justice*, 81 M.S.P.R. 439, ¶ 6 (1999) (granting a 20-day stay extension although OSC had requested only a 10-day extension).

¶12 Accordingly, pursuant to delegated authority from the Board, *see* 5 C.F.R. § 1201.134(b), I GRANT OSC’s request for a stay extension, but for an additional 30 days.

ORDER

¶13 Pursuant to 5 U.S.C. § 1214(b)(1)(B), a 30-day extension of the stay is GRANTED. It is further ORDERED that:

¶14 (1) The terms and conditions of the stays issued August 3, 1999, September 10, 1999, and October 29, 1999, are extended through Saturday, January 15, 2000;

¶15 (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;

¶16 (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, together with any further evidentiary support, on or before December 30, 1999; and

¶17 (4) 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 January 7, 2000.

FOR THE BOARD:

Susanne T. Marshall
Member

Washington, D.C.