

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,	)	DATE: <u>JUL 8 1993</u>
)	
Petitioner,	)	DOCKET NUMBERS
	)	CB1216930016T1
	)	CB1216930019T1
v.	)	CB1216930020T1
	)	CB1216930021T1
KEITH BISSELL, ET AL.,	)	CB1216930022T1
Respondents,	)	CB1216930023T1
	)	CB1216930024T1
and	)	CB1216930025T1
	)	CB1216930026T1
THE PUBLIC SERVICE COMMISSION	)	CB1216930027T1
OF THE STATE OF TENNESSEE,	)	CB1216930028T1
Respondent.	)	CB1216930029T1
	)	CB1216930030T1
	)	CB1216930031T1
	)	CB1216930032T1

Ruth Robinson Ertel, Karen G. Dowling, David J. Gorman,
Esquires, Washington, D.C., for the petitioner.

J. Stanley Rogers, Christina Henley Duncan, Esquires,
Manchester, Tennessee, for the respondents.

Paul A. Harr, Esquire, Manchester, Tennessee, for
respondent Millhorn.

Philip N. Elbert, A. Scott Ross, Esquires, Nashville,
Tennessee, for respondent Tennessee Public Service
Commission.

BEFORE

Ben L. Erdreich, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

This case is before the Board pursuant to respondents' motions for a stay of all proceedings pending a determination of the interlocutory appeal on the question of jurisdiction. The Office of Special Counsel opposes the motion. All parties have submitted memoranda of law in support of their positions. For the reasons set forth below, the Board GRANTS a stay of all proceedings pending a determination of the interlocutory appeal.

BACKGROUND

On March 19, 1993, the Office of Special Counsel filed a complaint for disciplinary action against the Public Service Commission of the State of Tennessee (TPSC) and 15 individual respondents alleging that they had violated 5 U.S.C. § 1502(a)(2) of the Hatch Act. Following the complaint, the respondents filed motions to dismiss the case for lack of jurisdiction alleging that they are not covered employees for purposes of the Hatch Act because the TPSC is not an executive branch agency within the State of Tennessee. Respondents also filed motions to bifurcate the proceedings, so that the jurisdictional issue can be resolved before proceeding with the case on the merits, and to stay discovery. CALJ Reidy denied these motions by Order dated May 10, 1993, stating that "[t]hese requests have delays inherent." See Official File (OF), Vol. II, Tab 19.

With respect to the motions to dismiss for lack of jurisdiction, CALJ Reidy issued two orders on May 24, 1993:

the first one denying these motions, and the second order certifying the jurisdictional issue to the Board for interlocutory appeal. See OF, Vol. 3, Tabs 33 and 35 respectively. In certifying this jurisdictional issue, the CALJ determined that it is "substantial in scope and importance" and is not "totally free from doubt." See respectively OF, Vol. 3, Tabs 35 and 33. In his certification order, the CALJ again stated that he would not "stay this proceeding while awaiting a ruling." See OF, Vol. 3, Tab 35.

On June 1, 1993, respondent TPSC filed a motion directed to the Board for a stay of all proceedings pending a determination of the interlocutory appeal on the jurisdictional question. On June 11, 1993, the Office of Special Counsel (OSC) filed a response to the TPSC's motion. The TPSC replied to OSC's opposition on June 16, 1993. The individual respondents filed a motion to stay proceedings on June 17, 1993, and the OSC opposed their motion on June 24, 1993.

ANALYSIS

The Board's regulations give the CALJ the authority to proceed with or to stay the hearing in a case while an interlocutory appeal is pending before the Board. See 5 C.F.R. § 1201.93(c). The regulation, however, also states that "the Board may stay a hearing on its own motion while an interlocutory appeal is pending with it." *Id.* In requesting

the Board's consideration of a stay,¹ the respondents argue that if the proceedings are not continued until the resolution of the interlocutory appeal by the Board, the 16 respondents will be forced to spend substantial sums of money on expenses associated with discovery and preparation for the hearing. The respondents maintain that if the Board concludes that there is no jurisdiction in this case in the interlocutory appeal, this great expense would be for naught and would be a waste of time and resources. Respondents point out that there have been no prior stays or continuances and that no party would be prejudiced by a stay. They further assert that given the important nature of the precedent to be set, the Board should allow itself sufficient time to review the record, research the jurisdictional issues and carefully consider its decision on interlocutory appeal. Respondents also contend that the failure to grant a stay would render the certification of the jurisdictional question for interlocutory appeal meaningless because the hearing could be concluded before the interlocutory appeal is decided.

In its opposition to the motion, the OSC recognizes that the Board has not established what criteria it will consider

¹ We recognize that the respondents' motion for a stay of proceedings before the Board is not contemplated by the Board's regulation because it is not a motion to stay the hearing. Nevertheless, we will consider the motion for a stay more in the nature of a continuance. Moreover, the regulation does not contemplate a party's making such a motion to the full Board. Therefore, we will treat the respondents' motion as a request for the Board to act on its own motion to continue or to stay the proceedings pending the interlocutory appeal on the jurisdictional question.

when deciding whether to grant a stay pending an interlocutory appeal. It argues, however, that the case law pertaining to 28 U.S.C. § 1292 is relevant and useful in determining whether a stay should be granted here because the language of the Board's regulations concerning interlocutory appeals so closely resembles the text of § 1292.² OSC maintains that the stay should be denied because the TPSC failed to meet the established criteria for issuance of a stay applicable to federal court cases.

The Special Counsel is quite correct in pointing out that the Board has not established what factors it will consider when deciding whether to stay proceedings pending an interlocutory appeal. Indeed, the issue of whether to grant a stay pending an interlocutory appeal is an issue of first impression before the Board. While the Board has used the four criteria established by the federal courts for considering whether to grant stays, it has done so only in cases involving motions to stay enforcement of a final decision pending judicial review. See, e.g., *Special Counsel v. Hathaway*, 52 M.S.P.R. 375 (1992), *aff'd*, 981 F.2d 1237 (Fed. Cir. 1992); *Special Counsel v. Camillieri*, 35 M.S.P.R.

² The criteria federal courts consider in deciding whether to grant a stay are the following: (1) the likelihood of success on the merits; (2) the petitioner will likely suffer irreparable injury if a stay is not granted; (3) the likelihood that a stay will substantially harm the other parties interested in the proceedings; and (4) the public interest in a stay of the proceedings. See *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958).

170 (1987); *Berard v. Office of Personnel Management*, 24 M.S.P.R. 347 (1984). However, because the respondents' motion for a stay of Board proceedings pending the resolution of the interlocutory appeal is more in the nature of a continuance of the proceedings, Board law concerning continuances is more applicable to this situation. Under Board law, a continuance of the proceedings is warranted if good cause is established.³ See *Smith v. Department of the Army*, 41 M.S.P.R. 110, 113 (1989); *Bergstein v. U.S. Postal Service*, 27 M.S.P.R. 56, 58 (1982). Good cause is generally determined under the unique circumstances of each case and is "an elastic concept which rests upon principles of equity and justice." See *Roberson v. Department of Health and Human Services*, 24 M.S.P.R. 240, 241-42 (1984).

The determination of the question concerning jurisdiction in this case is one which may dispose of the entire suit. It is particularly for this reason that a stay is appropriate here. Cf. *O'Brien v. Avco Corporation*, 309 F. Supp. 703, 705 (S.D.N.Y. 1969) (when determination of a preliminary question regarding jurisdiction may dispose of the entire suit, it is proper to stay proceedings pending the interlocutory appeal of the jurisdictional question). It would be fundamentally unfair for the respondents to be subjected to costs of

³ We note that while the Board may look to federal procedural rules for guidance concerning the treatment of motions before it, the Board is not bound to follow these rules. See *Hebert v. Department of the Navy*, 57 M.S.P.R. 68, 72 (1993).


litigation when there is a substantial question pending with the Board whether it has jurisdiction over the respondents.

The jurisdictional question involved here is a significant one of first impression and the Board will need time to carefully consider the arguments of the parties and render its decision. Thus, absent a stay, the interlocutory appeal could be decided after the parties have completed their preparation for the hearing and possibly even after the hearing itself. We therefore agree with the respondent that this result would render the whole purpose of having an interlocutory appeal meaningless.

In contrast to the potential harm to the respondents should a stay not be granted, we note that the OSC has not shown or even asserted that it will be harmed if the proceedings are stayed. We also observe that there have been no prior continuances or stays to date. We therefore find under the circumstances here that there is good cause to stay the proceedings pending the resolution of the interlocutory appeal. The Board hereby ORDERS the proceedings in this case stayed pending the resolution of the interlocutory appeal. The Board ORDERS that the hearing be rescheduled for a time

sufficiently following the Board's decision on the interlocutory appeal to allow the parties to conduct discovery and otherwise properly prepare for the hearing.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.