

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL,
Petitioner,

v.

DEPARTMENT OF VETERANS
AFFAIRS,
Agency.

DOCKET NUMBER
HQ12149010030

DATE: JUL 27 1990

Lynn Alexander, Esquire, Washington, D.C.,
for the Special Counsel.

Thomas J. McKeever, Jr., Esquire, Washington, D.C.,
for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

On June 8, 1990, the Special Counsel filed a request with the Board pursuant to 5 U.S.C. § 1214(b)(1)(A)(i) (West Supp. 1990) for a 45-day stay of the termination of Mr. Terry L. Albright's probationary employment as a Boiler Plant Operator, WG-10, at the VA Medical Center in Allen Park, Michigan. The Special Counsel argued in the request that there were reasonable grounds to believe that the suspension was ordered in reprisal for

Mr. Albright's engaging in protected activity (disclosures of mismanagement), and therefore was violative of 5 U.S.C. § 2302(b)(8). The stay was granted by Chairman Daniel R. Levinson on June 13, 1990.

On July 13, 1990, the Special Counsel requested an extension of the stay, pursuant to 5 U.S.C. § 1214(b)(1)(B) (West Supp. 1990), for up to 60 days. Section 1214(b)(1)(C) (West Supp. 1990) provides that the Board shall allow comment from the agency that is the subject of the stay before granting such an extension. The agency's comments were filed on July 20, 1990. For the reasons set out below, a 60-day extension of the stay is hereby GRANTED.

In her request for an extension of the stay, the Special Counsel states that the investigation for which the original stay was granted has not been completed. She states that more time is needed for informational gathering and that additional time will be necessary to prepare the Report of Investigation.

Under 5 U.S.C. § 1214(b)(1)(B) (West Supp. 1990), a statute newly enacted as part of the Whistleblower Protection Act of 1989, the Board may grant extensions of stays at its discretion while viewing the record in the most favorable light to the Special Counsel. Under this standard, the Board will grant the Special Counsel's request for an extension if the Special Counsel's prohibited personnel practice claim is not clearly

unreasonable. See *Special Counsel v. Federal Emergency Management Agency*, 44 M.S.P.R. 544 (1990) (this standard is consistent with the legislative history which shows that Congress intended to make it easier for the Special Counsel to obtain a stay under the Whistleblower Protection Act of 1989). In granting the initial request for a stay in this case on June 13, 1990, the Chairman found that the facts as presented by the Special Counsel supported a reasonable belief that a prohibited personnel practice had occurred. The Chairman found that it would, therefore, not be inappropriate to grant a stay to permit an investigation by the Special Counsel.

The agency has expressed opposition to the extension and contends that the termination was proper, and that Mr. Albright's continued employment is burdensome and not in the medical center's best interest.* We find that the record in this case, when viewed in the light most favorable to the Special Counsel, continues to support a reasonable belief that a prohibited personnel practice has occurred. The investigator assigned to the case has

* The agency has asked the Board to clarify whether Mr. Albright will retain his probationary status during the stay. It is well settled that a stay of the termination of an employee during his probationary period serves to maintain the probationary period for the duration of the stay. See *Special Counsel v. Department of Commerce*, 23 M.S.P.R. 469, 471 (1984); *Special Counsel v. Department of Commerce*, 23 M.S.P.R. 136, 137 (1984). The agency has also asked whether the stay requires an award of back pay. As the Board's order clearly stated, the stay went into effect on the date of the order. Thus the stay was not retroactive and did not result in an entitlement to back pay.

listed in a sworn affidavit what needs to be done to complete the investigation and has estimated that 45 days are needed. Fifteen (15) additional days to complete a prosecutorial evaluation of the case is reasonable; therefore we believe that an extension of 60 days is appropriate in this case.

Accordingly, a 60-day extension of the stay pursuant to 5 U.S.C. § 1214(b)(1)(B) (West Supp. 1990) is hereby GRANTED. It is further ORDERED that:

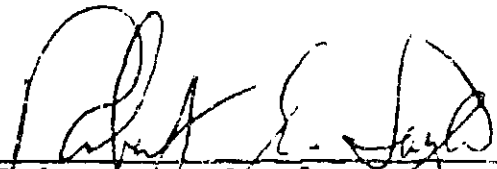
(1) The terms and conditions of the stay issued on June 13, 1990, are extended to and including September 25, 1990;

(2) Within 5 working days of this Order, the agency shall submit a verified report to the Board explaining the facts and circumstances surrounding compliance with this Order;

(3) The Special Counsel shall file with the Board, and serve on the agency any additional information and arguments that she wishes the Board to consider for further extension of the stay on or before September 7, 1990; and

(4) Any comments on such a request for further extension that the agency wishes the Board to consider must be received by the Clerk of the Board and served on the Special Counsel on or before September 14, 1990.

FOR THE BOARD:



Robert E. Taylor
Clerk of the Board

Washington, D.C.