UNITED STATES OF AMERICA MERIT SYSTEMS PROTECTION BOARD

SPECIAL COUNSEL EX REL. JOHN DOES, 1-4,

DOCKET NUMBER CB-1208-13-0011-U-1

Petitioners,

V.

DATE: November 29, 2012

DEPARTMENT OF COMMERCE, Agency.

THIS STAY ORDER IS NONPRECEDENTIAL¹

Julie Martin-Korb, Esquire, Washington, D.C., for the petitioner.

Wade Green, Esquire, Washington, D.C., for the agency.

BEFORE

Mark A. Robbins, Member

ORDER ON STAY REQUEST

Pursuant to <u>5 U.S.C.</u> § 1214(b)(1)(A), the Office of Special Counsel (OSC) requests a 45-day stay of the following actions while it completes its investigation into whether the agency's actions constitute prohibited personnel practices under <u>5 U.S.C.</u> § 2302(b)(8), (b)(9), and (b)(12): (1) a significant change in working conditions imposed by allegedly unlawful nondisclosure

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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 <u>5 C.F.R.</u> § 1201.117(c).

agreements; and (2) threats to send failing performance appraisals to the four affected individuals should they either fail to sign or revoke the allegedly unlawful nondisclosure agreements. OSC contends that the nondisclosure agreements are interfering with an ongoing investigation of an independent prohibited personnel practice complaint (hereinafter "Ongoing Investigation"). For the reasons set forth below, I GRANT OSC's request IN PART.

BACKGROUND²

In its November 26, 2012 stay request, OSC alleges that the four affected individuals (hereinafter "Former Employees") previously worked in the agency's Office of Inspector General (OIG).³ Stay Request File,⁴ Tab 1 at 1. OSC asserts that three of the Former Employees are current federal employees. *Id.* at 1 n.1. As alleged by OSC, the three highest officials in OIG, consisting of the Inspector General (IG), the Deputy IG and Counsel to the IG (Deputy IG), and the Principal Assistant IG for Investigations (PAIGI), coerced the Former Employees to sign nondisclosure agreements in an effort to chill the Former Employees from whistleblowing, cooperating with OSC, and reporting wrongdoing to the United States Congress. *Id.* at 2-3. Specifically, OSC alleges that, from 2010 to 2011, the IG, Deputy IG, and/or the PAIGI issued a failing performance appraisal to

² For purposes of ruling on OSC's request for an initial stay in this ex parte proceeding, I accept OSC's version of the facts as true. See, e.g., Special Counsel v. Department of the Interior, 62 M.S.P.R. 388 (1994).

³ OSC requests that the Board grant the Former Employees anonymity and, in filing the stay request, has not provided the Board with the identities of these individuals, referring to the individuals only as "John Does 1-4." The Board has docketed the stay request using "John Does 1-4," and the identities of these individuals are not necessary to act on the initial stay request on their behalves.

⁴ OSC has filed a motion to strike the first eight pages of its stay request because the pages were inadvertently submitted when e-filing its pleading. Stay Request File, Tab 2. I grant OSC's motion and strike the first eight pages from the record. Accordingly, the first page of OSC's submission is the first page of its brief entitled "Initial Request for Stay of Personnel Action and Protective Order."

each of the Former Employees. *Id.* at 1, 4. Based on the timing and the content of the performance appraisals, OSC asserts that the appraisals did not reflect an honest assessment of each employee's performance. *Id.* at 4. OSC asserts that each of the Former Employees had worked in OIG for several years but was actively seeking employment elsewhere, as was known by the IG, Deputy IG, and/or the PAIGI. *Id.* In addition, OSC alleges that each of the Former Employees had received superior performance evaluations in previous years and had recently received at least a satisfactory appraisal. *Id.*

According to OSC, immediately after the IG, Deputy IG, and/or the PAIGI issued the failing performance appraisals to each of the Former Employees, the IG, Deputy IG, and/or the PAIGI presented each employee with the allegedly unlawful nondisclosure agreement and stated that, if the employee signed the agreement, the failing performance appraisal would not go into the employee's Official Personnel Folder (OPF) and the agency would provide prospective employers with a neutral job reference. *Id.* OSC further asserts that, if the employee did not sign the agreement, however, the IG, Deputy IG, and/or the PAIGI threatened to put the failing performance appraisal into the employee's OPF and notify the employee's new employer about the failing performance appraisal. *Id.*

OSC alleges that the nondisclosure agreement provides, in pertinent part, as follows:

[Employee] further agrees: . . . not to disparage the Agency in any communications to any person or entity, including but not limited to Members of Congress, the Office of Special Counsel, and the media. However, nothing in this Agreement shall prevent or inhibit [Employee] from responding truthfully to direct questions posted to him in writing or in the course of a formal hearing before any legislative, executive, or judicial body; . . .

The parties agree that this Agreement . . . shall not be used, cited, or relied upon by any party in connection with any other judicial or administrative proceedings.

[Employee] and the Agency agree to keep the nature and terms of this Agreement confidential. The terms of the Agreement may not be disclosed to any person or entity beyond the persons signing below and those persons and entities represented by the persons signing below, except as required by law, as necessary to implement the terms of the Agreement, or as ordered by a court or administrative body of competent jurisdiction.

In the event that [Employee] exercises his right to revoke this Agreement in writing during the revocation period contemporary with or after his transfer from employment with the OIG, the OIG will deliver a full accounting of [the Employee's] performance over the last performance year to his new employer.

Id. at 3, 5.

OSC alleges that the nondisclosure agreements are chilling the Former Employees from whistleblowing, filing complaints with OSC, cooperating in an OSC investigation, and exercising their right to petition Congress. *Id.* at 5.

ANALYSIS

OSC "may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the [OSC] determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice." § 1214(b)(1)(A)(i). Such a request "shall" be granted "unless . . . such a stay would not be appropriate." <u>5 U.S.C. § 1214(b)(1)(A)(ii)</u>. The statute thus sets up a presumption that OSC's request for an initial stay will be granted, and it makes OSC the lead actor in securing provisional relief when, in OSC's judgment, an agency may have committed a prohibited personnel practice. OSC's stay request need merely fall within the "range of rationality" to be granted, and "the facts should be viewed in the light which is most favorable to a finding of reasonable grounds to believe that a prohibited personnel practice was (or will be) Special Counsel ex rel. Perfetto v. Department of the committed." Navy, 83 M.S.P.R. 169, ¶ 11 (1999) (citations omitted); accord Special Counsel ex rel. Aran v. Department of Homeland Security, 115 M.S.P.R. 6, ¶ 9 (2010).

Deference is given to OSC's initial determination, and a stay will be denied only when the asserted facts and circumstances appear to make the stay request inherently unreasonable. *Special Counsel v. Department of Veterans Affairs*, 50 M.S.P.R. 229, 231 (1991).

Here, OSC asserts that it has reasonable cause to believe that the agency has taken, or will take, personnel actions against the Former Employees as a result of prohibited personnel practices under <u>5 U.S.C.</u> § 2302(b)(8), (b)(9), and (b)(12). Stay Request File, Tab 1 at 8-9.

5 U.S.C. § 2302(b)(8)

OSC alleges that the agency took or threatened to take personnel actions against the Former Employees because of their perceived whistleblowing under 5 U.S.C. § 2302(b)(8). Under section 2302(b)(8), an agency may not take or threaten to take certain personnel actions against an employee because of a Generally, a prima facie violation protected whistleblowing disclosure. of 5 U.S.C. § 2302(b)(8) exists when: (1) The employee made a protected disclosure; (2) the official(s) who recommended, took, or threatened the personnel action had actual or constructive knowledge of the protected disclosure; (3) a personnel action was taken or not taken or threatened to be taken or not taken; and (4) the protected disclosure was a contributing factor in the challenged personnel action. See Office of Special Counsel ex rel. Hopkins v. Department of Transportation, 90 M.S.P.R. 154, ¶ 4 (2001). The Board has recognized, however, that an individual who is perceived as a whistleblower is still entitled to the protections of the Whistleblower Protection Act, even if that individual has not made protected disclosures. See King v. Department of the Army, 116 M.S.P.R. 689, ¶¶ 6, 7-8 (2011). Under these circumstances, the Board will focus its analysis on the agency's perceptions, i.e., whether the agency officials involved in the personnel actions at issue believed that the appellant

made or intended to make disclosures that evidenced the type of wrongdoing listed under 5 U.S.C. § 2302(b)(8). *Id*.

OSC contends that, although the Former Employees have not made protected disclosures themselves, they nevertheless satisfy the first element because the agency believed that the Former Employees might make protected disclosures, file complaints, or cooperate with OSC. Stay Request File, Tab 1 at 8-9 (citing King, 116 M.S.P.R. 689, ¶¶ 7-8). According to OSC, the IG, Deputy IG, and/or the PAIGI gave the employees failing performance appraisals, and threatened to make them part of their OPFs and forward them to new employers, in order to coerce them into signing the nondisclosure agreement. Id. at 4. OSC contends that the nondisclosure agreements are chilling the Former Employees from whistleblowing, filing complaints with OSC, cooperating with OSC, and exercising their right to petition Congress. Id. at 5. OSC further implies that the perceived whistleblowing was a contributing factor in the alleged personnel actions because the agency would not have taken the personnel actions but for the Former Employees' perceived whistleblowing activities. Id. at 4-5. Given the deference that should be afforded OSC and the assertions made by OSC in its stay request, I find that there are reasonable grounds to believe that the agency took or threatened to take these actions against the Former Employees because of their perceived whistleblowing under <u>5 U.S.C.</u> § 2302(b)(8). See King, <u>116 M.S.P.R.</u> **689**, ¶¶ 6, 7-8.

I further find that it is within the range of rationality to believe that the alleged actions could constitute "personnel actions" as defined in <u>5 U.S.C.</u> § 2302(a)(2)(A). Based on OSC's assertions, the threat of issuing a failing performance appraisal constitutes a threat to take a "personnel action" against the Former Employees. <u>5 U.S.C.</u> § 2302(a)(2)(A)(viii); see Schlosser v. Department of the Interior, <u>75 M.S.P.R.</u> <u>15</u>, 22 (1997). With respect to the alleged significant change in working conditions, OSC contends that the nondisclosure agreements impose a significant change by restraining the Former Employees from:

(1) making a protected disclosure to any entity, including Congress, OSC, or the press; (2) cooperating with or disclosing information to OSC; and (3) exercising their right to petition Congress. Stay Request File, Tab 1 at 10. OSC argues that a significant change in working conditions should include any harassment that could have a chilling effect on whistleblowing. *Id.* at 8 (citing *Covarrubias v. Social Security Administration*, 113 M.S.P.R. 583, ¶ 15 n.4 (2010)). For purposes of this nonprecedential single-member decision in this ex parte proceeding, I accept OSC's assertion that the Former Employees' inability to report perceived wrongdoing to the appropriate authorities as a result of signing the nondisclosure agreement may constitute a "significant change in duties, responsibilities, or working conditions" under 5 U.S.C. § 2302(a)(2)(A)(xi).

5 U.S.C. § 2302(b)(9)

OSC alleges that it has reasonable cause to believe that the agency has taken, or will take, personnel actions against the Former Employees in violation of 5 U.S.C. § 2302(b)(9). Under section 2302(b)(9), an employee who has the authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any personnel action against any employee because of, among other things, the employee's cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law. 5 U.S.C. § 2302(b)(9)(C). Generally, a prima facie violation of 5 U.S.C. § 2302(b)(9) exists when: (1) The employee engaged in a protected activity; (2) the employee was subsequently treated adversely; (3) the acting official had actual or imputed knowledge of the protected activity; and (4) there is a causal connection between the protected activity and the personnel action. See Special Counsel ex rel. StephensonPino v. Department of the Navy, 96 M.S.P.R. 311, ¶ 13 n.2 (2004).

Here, OSC has generally argued that the Former Employees have been chilled from, among other things, cooperating with OSC or otherwise participating in its Ongoing Investigation. Stay Request File, Tab 1 at 5. OSC argues that the agency took or threatened to take personnel actions⁵ against the Former Employees because of the agency's belief that they might make a protected disclosure, file a complaint, or cooperate with OSC. *Id.* at 8. Given the deference that should be afforded OSC and the assertions made by OSC in its stay request, I find that there are reasonable grounds to believe that the agency took or threatened to take these personnel actions against the Former Employees in violation of 5 U.S.C. § 2302(b)(9)(C).

5 U.S.C. § 2302(b)(12)

OSC alleges that the agency took or threatened to take the actions in violation of 5 U.S.C. § 2302(b)(12). Under section 2302(b)(12), it is a prohibited personnel practice to "take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title." One of the merit system principles states that "[e]mployees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences . . . a violation of any law, rule, or regulation, or . . . mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. § 2301(b)(9).

OSC contends that the two personnel actions the agency took or threatened to take violate the Lloyd-LaFollette Act of 1912, <u>5 U.S.C. § 7211</u>, and annual appropriations law, citing Pub. L. No. 112-74, Consolidated Appropriations Act,

⁵ These personnel actions are the same personnel actions that OSC sufficiently alleged constituted personnel actions under 5 U.S.C. § 2302(b)(8).

2012, Section 715, made current through March 27, 2012, through Pub. L. No. 112-175. Stay Request File, Tab 1 at 9-10, 14. OSC contends that the nondisclosure agreements violate the Lloyd-LaFollette Act because they interfere with the Former Employees' right to petition Congress, and violate annual appropriations law because they do not contain express language to inform the employees that the agreement's restrictions do not supersede, conflict with, or otherwise alter an employee's rights under sections 2302(b)(8) and 7211 of Title 5 of the United States Code. *Id*.

Given the deference that should be afforded OSC and the assertions made by OSC in its stay request, and considering that the Lloyd-LaFollette Act and annual appropriations law may arguably implement, or directly concern, the merit system principle found at <u>5 U.S.C.</u> § <u>2301(b)(9)</u>, I find that there are reasonable grounds to believe that the agency took or threatened to take actions in violation of <u>5 U.S.C.</u> § <u>2302(b)(12)</u>.

Based on the above analysis, I find that it is appropriate to order a stay under the terms set forth below. Notwithstanding the foregoing, the Order below does not operate with respect to any of the Former Employees who are not employed by an "agency" within the meaning of 5 U.S.C. § 2302(a)(2)(C). Extending the Order to individuals who are not employed by an "agency" "would not be appropriate," 5 U.S.C. § 1214(b)(1)(A)(ii), because such individuals are not protected from allegedly retaliatory acts taken after they leave government employment. See Weed v. Social Security Administration, 113 M.S.P.R. 221, ¶ 9 (2010); Pasley v. Department of the Treasury, 109 M.S.P.R. 105, ¶ 10 (2008); accord Nasuti v. Merit Systems Protection Board, 376 F. App'x 29, 33-34 (Fed. Cir.), cert. denied, 131 S. Ct. 393 (2010). 6 Individuals not employed in an

⁶ Although the *Nasuti* decision is nonprecedential and, as such, is not binding on the Board, I may rely on it to the extent I find its reasoning persuasive. *See Worley v. Office of Personnel Management*, <u>86 M.S.P.R. 237</u> (2000). The *Nasuti* decision, in any event, is consistent with the Board's precedential decisions in *Weed* and *Pasley*.

"agency" may seek relief for acts of retaliation taken against them while they were employed in an "agency," cf. <u>5 U.S.C.</u> § <u>1221</u>(a), but OSC does not ask for relief for such acts in this proceeding.

In its stay request, OSC additionally asks the Board to find the nondisclosure agreements void and unenforceable. It also seeks to nullify the nondisclosure agreements not only with respect to the Former Employees, but also with respect to all former OIG employees subject to a nondisclosure agreement. This requested relief is beyond the scope of the relief I am able to grant in the context of an initial stay request.

Pursuant to <u>5 U.S.C.</u> § 1204(e)(1)(B), OSC further requests that the Board issue a protective order to protect the Former Employees against any enforcement of their nondisclosure agreements and any other retaliatory harassment. I have not been designated to rule on this request, however, and the matter has been separately docketed and referred to the full Board for decision. *See Office of Special Counsel ex rel. Kunert, et al. v. Department of the Army*, MSPB Docket No. CB-1208-12-0025-U-1, Nonprecedential Final Order at 7-8 (Oct. 22, 2012); <u>5 C.F.R.</u> § 1201.146.

ORDER

Based on the foregoing, I conclude that granting OSC's stay request in part is appropriate. Accordingly, a 45-day stay is hereby GRANTED as expressly described below. The stay shall be in effect from November 29, 2012, through and including January 13, 2013. It is ORDERED that:

- (1) All agency actions issuing or threatening to issue any performance appraisals based on an alleged violation of the nondisclosure agreement for any of the Former Employees employed in an "agency" are hereby stayed;
- (2) All agency actions taking or threatening to take any other personnel action that may adversely affect the Former Employees

employed in an "agency" based on an alleged violation of the nondisclosure agreement are hereby stayed;

(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 this Order.

Any request for an extension of the stay pursuant to <u>5 U.S.C.</u> § 1214(b)(1)(B) must be received by the Clerk of the Board and the agency, together with any evidentiary support, on or before December 31, 2012. Any comments on such a request that the agency wants the Board to consider pursuant to <u>5 U.S.C.</u> § 1214(b)(1)(C) must be received by the Clerk of the Board, together with any evidentiary support, on or before January 7, 2013.

FOR THE BOARD:	
	William D. Spencer
	Clerk of the Board

Washington, D.C.

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⁷ OSC has alleged that it has obtained the nondisclosure agreements of at least two employees in the course of its Ongoing Investigation. Stay Request File, Tab 1 at 3 n.4. In order for the Board to fairly evaluate whether a stay of the agency's action should be extended, the Board should be provided with a copy of the entire nondisclosure agreement.

⁸ By regulation, any request for an extension of a stay must be received by the Board no later than 15 days before the expiration date of the stay, and any response by the agency must be received no later than 8 days prior to the expiration of the stay. <u>5 C.F.R.</u> § 1201.136(b). Because these dates fall on Saturdays in both cases, OSC and the agency have until the following Mondays to submit their pleadings. <u>5 C.F.R.</u> § 1201.23.