

In re Joanna Chan

Docket No. 06-01

Date of Decision: October 6, 2006

Cite as: In re Joanna Chan, No. 06-01 (10/6/06)

Before: Michael Doheny, Chair

Headnotes:

Good Cause

Motions Practice

Stays

MEMORANDUM AND ORDER

On August 31, 2006, the undersigned Administrative Judge issued a 30-day *Ex Parte* Stay of the termination of Joanna Chan's employment at the U.S. Government Accountability Office (GAO), pursuant to 4 C.F.R. §28.133(a). Accordingly, the stay was to expire on September 30, 2006. Under the Board's regulations, if the PAB General Counsel (PAB/GC) was to seek a further temporary stay to allow additional time to pursue an investigation, such a request was due "no less than 10 days before the expiration" of the *ex parte* stay, *i.e.*, by September 20, 2006; the Agency was required to file any response "no less than three days before the expiration of any stay then in effect"—by September 27, 2006. 4 C.F.R. §28.133(b).

On September 25, 2006, the PAB/GC, pursuant to 4 CFR §28.133(b), requested a further temporary stay of thirty (30) days in this matter to allow for completion of the Personnel Appeals Board Office of General Counsel (PAB/OGC) investigation. Because the deadline for filing had passed, the Request for Temporary Stay was accompanied by a Motion for Leave to File Request for Temporary Stay.

By Order of September 26, 2006, the temporary stay was extended pending disposition of PAB/GC's requests, and the Agency was given until 4:00 p.m. on October 2, 2006 to file its response. GAO's Opposition to Motion for Leave to File Request for Temporary Stay was officially filed on October 3, 2006.¹ The PAB/OGC filed a Reply on October 4, 2006 (after hours on October 3); PAB/OGC did not submit a motion for leave to file the reply. Upon reading PAB/OGC's submission, the Agency learned that its Opposition had been late and

¹ Any responses filed after 4:00 p.m. are considered filed on the following business day. The Opposition was date stamped by the Clerk of the Board at 4:50 p.m. on October 2, 2006.

promptly thereafter submitted a Motion to Accept Late Filing of GAO's Opposition on October 4, 2006, stating that its courier had not realized the filing needed to be delivered by 4:00 p.m.

Under the circumstances, GAO's late submission is accepted.

Motion for Leave to File Request for Temporary Stay

In the Motion for Leave to File Request for Temporary Stay, the PAB/OGC states that it has "quickly and diligently pursued its investigation of the discrimination and whistleblower allegations raised by Ms. Chan's Charge." Motion for Leave at 1. The record shows that PAB/OGC received documents on September 11 and 18, and conducted interviews between September 14 and 18.

The Motion contains the following: an acknowledgement by PAB/OGC that the request was due on September 20, 2006; a statement to the effect that on September 22 additional documents were received from the Agency; and a statement that on September 20 Petitioner amended her Charge.² The only other additional information offered by way of explanation for the late filing of the Motion for Leave to File is that there were computer problems on Friday, September 22, 2006—two days past the deadline for filing the Request for Temporary Stay.

The Agency argues that the "PAB/OGC has set forth no legitimate justification for its untimely filing. The PAB/OGC first attempts to explain its late filing by implying that GAO has somehow delayed in producing documents." Opposition at ¶2. The Agency's Opposition states further that it did not delay the PAB/OGC's investigation. GAO provided the requested documents in full by the due date—September 11—and it promptly produced seven witnesses for interviews. Opposition at ¶2. The Agency further states that the additional documents produced on September 18 and 22 were "prompt responses to a number of additional requests for documents and information from the PAB/OGC that subsequently arose during the course of witness interviews and upon Ms. Chan's amending of her Charge"—not late responses to the initial requests. Opposition at ¶2.

The PAB/GC's Reply claims that "[a]s explained more fully in our Motion for Leave, we attempted, but were not able, to seek an extension of the stay prior to September 25, 2006." Reply at 3. The Reply also states that the "Motion [for Leave] also set forth in some detail the many substantive and procedural issues, as well as technical difficulties, with which we were confronted since the August 30, 2006 filing of Ms. Chan's Charge." *Id.* The Request for Temporary Stay acknowledges that the Agency provided its first set of documents on the due date (September 11) and additional documents on September 18; that interviews were conducted and that Ms. Chan amended her charge on September 20, 2006; that settlement discussions have begun and that on September 22, 2006, GAO delivered a significant number of additional documents. Request for Temporary Stay at 1-2.

² The amended Charge appears to be dated September 19 rather than September 20, 2006. Opposition, Attachment A at 5.

The Board's regulations state that "[m]otions for extension of time will be granted only upon a showing of good cause." 4 C.F.R. §28.21(b)(6). The PAB has granted leave to file a request for temporary stay out of time in two prior cases. In the case of *In re Pernell* (No. 00-12), the PAB/OGC stated, in detail, the efforts that had been made in the investigation. Specifically, PAB/OGC stated that interviews had not been completed nor were all documents submitted by the due date of the request for further temporary stay:

Document production was made by the agency on January 9, January 12, January 17 and January 18, 2000 [2001]. The interviews took place on January 16 and 17, 2001. Furthermore, the time available to conduct a preliminary investigation and analysis of the information obtained therein was limited due to the January 1 and January 15 government holidays that occurred during the first 20 days of the stay period. Therefore, despite our best efforts, we were unable to determine whether a further stay would be required before January 16.

Motion to File Out of Time (Jan. 19, 2001) at 2. The request for further stay in *Pernell* was due on January 16. The PAB/OGC argued that despite their "best efforts," they were unable to determine whether a further stay would be required before the due date for filing any requests for a further temporary stay, because of the volume of documents and government holiday schedule.³ In that case, the interviews were scheduled on and after the due date, and two of four document deliveries took place after the due date for requesting a further stay. The Board found good cause to exist because PAB/OGC had made its "best efforts" to obtain the necessary information promptly. *In re Pernell*, Order of Jan. 23, 2001.

The Board also found good cause in the case *In re Poole* (No. 97-04). In that instance, the AJ granted the request to file out of time (five days late) based on the PAB/GC's explanation that "time and staff resources were not sufficient to meet the filing deadline." Furthermore, in *Poole*, the Acting General Counsel was the only attorney on staff at the time:

Because the Acting General Counsel was occupied with reviewing documents and conducting interviews at the time the request for further stay became due, time and staff resources did not permit the timely preparation and filing of the request. Currently, the Acting General Counsel is the only attorney available in the Board's General Counsel's Office to conduct investigations into charges filed with and respond to employee inquiries made to the General Counsel's Office.

Motion to File Out of Time (Nov. 18, 1997), at 2.

I find that the PAB/OGC's current Motion for Leave is not consistent with prior requests for extensions of time that have been granted by the Board. The Agency correctly characterizes the PAB/OGC's Motion as containing no just cause to explain why it was filed five days late. At a minimum, the PAB/OGC should have submitted a motion for leave on the due date stating that it required more time to determine whether a further stay was needed, accompanied by a detailed

³ In contrast to *Pernell*, the Motion for Leave in the instant case refers to "effort" and "diligence," whereas "best efforts" expended in *Pernell* more closely approximates the "high diligence" standard set for further temporary stays under 4 C.F.R. §133(d).

explanation for the delay. Further, the PAB/OGC had sufficient time subsequent to receiving the documents and completing the interviews to determine whether a request for an extension of time to seek a request for further stay was warranted. The PAB/OGC compares the instant case to *Pernell*. However, in *Pernell*, the PAB/OGC specifically identified the reasons for the delay, *i.e.*, it had not completed the interviews nor received all its requested documents in order to assess the status of the case. Additionally, there was no objection made by GAO at that time. In this case, PAB/OGC did not identify good cause for its delay in filing its Request for Further Temporary Stay or in filing its Motion for Leave to File and the Agency expressed its opposition to the Motion for Leave.

Motion for Further Temporary Stay

Even assuming that the Motion for Further Stay was timely filed, it would have been denied at least in part. The Board regulations state that a further temporary stay may be granted if the Board member “determines that under all of the circumstances the interests of justice would be served by providing more time for the Board’s Office of General Counsel to pursue the investigation. However, the duration of any single temporary stay shall not exceed the amount of time reasonably necessary to acquire sufficient information to support a request for a permanent stay in the exercise of a high degree of diligence.” 4 C.F.R. §28.133(d). The issuance of a temporary stay therefore is a discretionary action that may be taken in furtherance of the interests of justice and in keeping with the exercise of a high degree of diligence by the PAB/OGC.

The PAB/OGC’s Request for Temporary Stay states that “[a]dditional time is required to allow for the completion of our investigation of Ms. Chan’s initial Charge, to analyze further the matters discussed above, and to investigate and analyze the claims raised in Ms. Chan’s amended Charge, which was filed on September 20, 2006.” Request at 5. In its Reply to GAO’s Opposition, the PAB/OGC claims that “additional time is needed to evaluate all of the evidence obtained to date in light of Ms. Chan’s claims before seeking . . . a permanent stay.” Reply at 5.

The Agency argues that the PAB/OGC has already interviewed the individuals most knowledgeable about Ms. Chan’s termination, and received voluminous documentation. Opposition at ¶¶7, 8. Further, the Agency notes that the PAB/OGC has failed to identify any additional witnesses or any other documents that it needs. Opposition at ¶9. GAO also states that Petitioner’s amended Charge involved incidents that occurred on August 8 and 15, 2006 and on September 11, 2006. The Agency contends that the PAB/OGC should already have investigated the incidents that occurred in August and that the incident that occurred on September 11, 2006 occurred after Petitioner’s termination. Thus, in GAO’s view, at a minimum, “investigation of the amended Charge is clearly not central to GAO’s termination decision.” Opposition at ¶¶10, 11.

In prior cases, additional time was given if, despite “high diligence,” further investigation was necessary. For example, in the case of *In re Young* (No. 97-05), a request for further temporary stay was granted because the interviews of Agency personnel had not yet been completed. Further, the PAB Acting General Counsel at the time was the only attorney available in the office; thus despite high diligence, she was unable to complete the investigation. In the case of

In re Cumberbatch (No. 03-02), the PAB/GC outlined the matters which still needed to be investigated. Instead of the 20 days requested, the stay was extended for 10 days—one day beyond the last scheduled interview. In the case of *In re Blank* (No. 04-05), the PAB/GC specified that additional interviews needed to be conducted; GAO opposed the extension beyond 14 days to allow for interviews of individuals outside of GAO. Rather than the 30 days requested, the stay was extended for 14 days to allow for completion of the investigation and analysis in that case. Order of Nov. 22, 2004 at 5-6. In the case of *In re Beyah* (No. 04-03), the PAB/OGC requested a further stay of 21 days. The Agency did not oppose a seven-day extension in order to permit the PAB/GC to interview key management officials and to produce her report and recommendations. In that case, the AJ granted the request for 10 days instead of the requested 21 days. Order of Oct. 8, 2004.

Upon consideration of the submissions of the parties, I agree with the arguments made by the Agency. Furthermore, as of the date of this Order, the PAB/OGC has received an additional seven days in which to complete its investigation. Accordingly, the pending requests of the PAB/OGC are hereby **denied**. The temporary stay of the termination of Joanna Chan shall expire at close of business on **Tuesday, October 10, 2006**.

SO ORDERED.