

# IN RE JANICE M. TURNER

Docket No. 04-02

Date of Decision: October 27, 2004

Cite as: In re Turner, No. 04-02 (10/27/08)

Before: Anne M. Wagner, Chair

## Headnotes:

**Opportunity to Improve Period**

**Prohibited Personnel Practice**

**Stays**

## MEMORANDUM ORDER ON REQUEST FOR PERMANENT STAY

This matter is before the Personnel Appeals Board (PAB) on a Request for Permanent Stay filed on September 14, 2004 by the Personnel Appeals Board General Counsel (PAB/GC) on behalf of Janice M. Turner, a Band IF analyst in the Atlanta Office of the U.S. Government Accountability Office (the Agency or GAO). The PAB/GC asks this Board to stay the removal of Ms. Turner “until the Board has rendered a final decision on the issues raised and/or presented in the Petition filed on September 13, 2004.”<sup>1</sup> Request at 23.

Following preliminary stay proceedings before the Board, a temporary stay is in effect through October 27, 2004 to allow for consideration of the Request for Permanent Stay. After reviewing the parties’ initial submissions on the Request, and replies thereto, the undersigned administrative judge asked the parties specifically to address one issue raised by the PAB/GC, *i.e.*, whether GAO acted lawfully in noticing the proposed removal of Petitioner outside the one-year period running from the commencement of her opportunity period. Both parties timely filed a submission on the requested issue, and the Agency submitted a reply to the PAB/GC’s brief. Upon review of the parties’ submissions, I have concluded that this remains a serious and important issue that cannot be resolved definitively at this juncture. This issue is addressed more fully below in the discussion on the merits of the Stay Request.

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<sup>1</sup> The Petition filed on September 13, 2004, PAB Docket No. 04-04, involves allegations found in Ms. Turner’s Charges filed with the PAB/OGC on May 4, 2004 and June 23, 2004 (as supplemented on June 28, 2004). On September 30, 2004, the Petition was amended to include allegations that the removal decision and underlying actions resulted from unlawful discrimination based on Petitioner’s race (African-American) and sex (female) as well as from reprisal for engaging in protected appeal activity.

## ANALYSIS

The Board's regulations provide in 28 C.F.R. §28.133(b)(2) that the PAB/GC may seek a "permanent stay for the purpose of staying the proposed personnel action until a final decision is rendered." The stay provisions further detail the test to be applied in making a decision on a request for permanent stay:

In determining whether a permanent stay under paragraph (b)(2) of this section should be issued, the Board member, or Board en banc, shall:

- (1) Assess the evidence adduced by each side as to whether the proposed personnel action arises out of an alleged prohibited personnel practice as specified by the Board's General Counsel;
- (2) Assess the nature and gravity of any harm that could inure to each side if the request for permanent stay is either granted or denied; and
- (3) Balance the assessments conducted under paragraphs (e)(1) and (2) of this section.

4 C.F.R. §133(e). Under the PAB regulations, therefore, it is necessary to balance the evidence provided by each side as to whether one or more prohibited personnel practices are involved and the type of harm to either party that would result from the denial or granting of the request.

At the outset, it is essential to reiterate that the Personnel Appeals Board utilizes the balancing test detailed in the regulations in making a decision as to the appropriateness of a permanent stay. As explained most recently in the *Pernell* matter, the Board took steps in 1993 to "deviate from the MSPB deferential standard," *i.e.*, to make its stay standard "clearly more stringent than either the prior Board standard or the long established MSPB standard." *In re Pernell* (May 21, 2001) at 4. In the most recent Board regulatory changes, the stay provision was revised "to streamline and clarify the balancing test applicable to a request for permanent stay pending a decision on the merits." 68 Fed. Reg. 41742, 41744 (Jul. 15, 2003). Thus, the Agency correctly argues that 4 C.F.R. §28.133(e) requires balancing the evidence concerning the alleged prohibited personnel practices against the nature and gravity of asserted harm resulting from the denial or granting of the request. While the PAB/GC's reliance on the more deferential standard applicable in the executive branch is misplaced, the conclusion as to the evidence at hand for the stay determination should not be read to diminish the merits of the underlying case. This result simply flows from the balancing of evidence presented at this stage for the purpose of considering the appropriateness of a stay pending review on the merits.

### A. Assessment as to Prohibited Personnel Practices

As a basis for the Request, the PAB/GC states that "there is ample evidence to indicate that the May 2004 performance appraisal issued to Ms. Turner for her performance for the period October 1, 2003 through April 9, 2004, the decision to propose her removal from GAO's employment rolls, and the August 25, 2004 decision to remove her from GAO's employment rolls (to the extent that the removal decision relies on the grounds specified in the May 27, 2004 removal proposal) arose out of prohibited personnel practices." Request at 5-6. The PAB/GC

further states that she “believes that there is sufficient evidence to show” that the subject performance appraisal, proposal to remove and removal decision all constitute personnel actions arising out of “several prohibited personnel practices committed by GAO,” and that the Agency “violated applicable laws, rules, and/or regulations in recommending and taking the above actions,” contrary to 5 U.S.C. §2302(b)(12). Request at 9-10. Specifically, the Request argues that GAO failed to accurately assess Ms. Turner’s performance and failed to manage, develop, coach and provide feedback, thereby committing prohibited personnel practices under 5 U.S.C. §2302(b)(12). Section 2302(b)(12) makes it unlawful to take or refuse to take a personnel action in violation of a law, rule, or regulation that implements or directly concerns a merit system principle. According to the PAB/GC, the actions at issue also violate 5 U.S.C. §4302(b)(1), which requires that a performance management system accurately assess performance. The PAB/GC also asserts that the Agency’s actions violated sections I, II, V and VII of GAO’s Policy and Operations Manual (October 2003), which is a law, rule or regulation implementing or directly concerning the merit system principles of maintaining a high standard of integrity, conduct and concern for the public interest (5 U.S.C. §2301(b)(4)); using the Federal workforce efficiently and effectively (5 U.S.C. §2301(b)(5)); retaining employees on the basis of adequacy of performance (5 U.S.C. §2301(b)(6)); and protecting employees against arbitrary actions (5 U.S.C. §2301(b)(8)). Moreover, the PAB/GC believes that Ms. Turner was entitled to a new opportunity period before a performance-based action could be undertaken.

### 1. Post-Opportunity Performance

In support of the stay, the PAB/GC offers a theory of the case but little in the way of evidentiary support. For example, the Request points out instances during the post-opportunity period when Ms. Turner received ambiguous or even favorable feedback in addition to constructive criticism, and that nothing in such feedback indicated that she was failing to meet expectations. *See* Request at 16. The Attachments supplied with the Request do reflect some mixed feedback. *See, e.g.,* Attach. 13 (interview “over all well done and captured almost all of the essential information,” also noting that other changes were minor but “could be important”); Attach. 14 (interview “well done and contained the essential information. . . . You missed the set up but captured the remainder correctly. We all miss things from time to time but I expect you to miss less and less the longer you are on the job;” Attach. 18 (“you captured all of the essential information . . . [but] the writing itself was not all that is expected from a senior Band I analyst”).

The Request alleges that the supervisors “did not invite Ms. Turner to attend” a conference call on the project, but provides no evidentiary support for that claim. Request at 17. In addition, the PAB/GC asserts that Ms. Williams “failed to appropriately solicit and use feedback from Ms. Ortega, who was Ms. Turner’s supervisor for at the very least 50% of the assessment period.” *Id.* Again, no evidentiary support is provided for this contention. The Request merely summarizes the results of PAB/OGC interviews; no affidavits or other documentary support is provided.

In contrast to the PAB/GC submission, the Agency has provided extensive documentary support for its arguments. For instance, Ms. Turner’s performance history from 2002 through the opportunity period is detailed in the declaration submitted by her Designated Performance

Manager (DPM), Patricia McClure (Ex. B). The DPM explained in the declaration that performance questions persisted during the opportunity period but that Ms. Turner’s improvement toward the end of the period was given extra consideration in the decision to evaluate her as having successfully completed the opportunity period. *See id.* ¶6. The Agency also submitted detailed declarations from the two supervisors involved in the post-opportunity period job—the Webcasting assignment—on which the removal action is premised. Exs. D, E. In addition to attesting to the circumstances involved in that job, these declarations counter the PAB/GC’s unsupported assertion as to how much of Ms. Turner’s work was supervised by each supervisor. *See* Response Ex. D ¶7 (Williams Dec.: “I was Ms. Turner’s primary day-to-day supervisor and supervised Ms. Turner for the large majority of the work . . .”); Ex. E (Ortega Dec. ¶3: “I had some supervisory responsibilities . . . my supervisory responsibilities with respect to Ms. Turner were limited. . . Cheryl Williams supervised the large majority of Ms. Turner’s work”).

Another example of the vastly different record for stay purposes is seen in the contention concerning inadequate feedback and coaching during the Webcasting assignment. While the PAB/GC argues that the feedback on that assignment was mixed and sometimes complimentary (Request at 14-15), the Agency’s declarations provide further support for its position that performance problems were apparent early on the project and were communicated to Ms. Turner at that time. *See* Response at 8-15, 29-32 and supporting documents. Further, GAO provides a rational explanation as to why Ms. Williams asked Ms. Turner to write up interviews based upon her own notes, as a supervisory prerogative to assess performance, and in fact provides evidence that she used this method with another employee as well. *See* Williams Dec. ¶27. Moreover, the Williams’ declaration also provides affirmative proof that no team-wide conference call excluding Ms. Turner took place, contrary to the PAB/GC’s assertion. Based on the evidence, the call in question was among managers and concerned managerial issues. *See id.* at ¶33.

As stated at the outset, the Board determination on a permanent stay cannot be premised on the PAB/GC’s belief alone; a weighing of the evidence is required. Based on the evidence presented, the PAB/GC has not met her burden to show that the removal of Ms. Turner, as premised on the post-opportunity period performance, likely involves a prohibited personnel practice. Conversely, the Agency has provided varied support for its contention that Ms. Turner’s proposed removal was due to her unacceptable performance and did not arise out of a prohibited personnel practice.

## 2. Timing of the Action

The PAB/GC asserts that GAO improperly denied Ms. Turner a new opportunity to improve performance. Relying on 5 U.S.C. §4302(b)(6), made applicable to GAO through 31 U.S.C. §732(d), the PAB/GC argues that the Agency could not take action against Ms. Turner after May 14, 2004, the one year anniversary of the commencement of her opportunity period. In that view, a new opportunity period was required after a year had passed since the beginning of the underlying opportunity period. The PAB/GC argues that the proposed removal action was taken outside the permissible period because “both fairness and the intent of 5 U.S.C. §§4302(b)(6), 4303(c)(2)(A) and 4303(d) . . . require the agency to take action, not one year from the close of

the opportunity period, rather one year from the **beginning** of the opportunity period.” Request at 20 (emphasis in original).

In support of its position, the PAB/GC relies primarily on language in *Sullivan v. Department of Navy*, 44 MSPR 646, 659 (1990), wherein the MSPB stated that 5 U.S.C. §4304 requires that “an agency not delay taking action more than one year after the beginning of the PIP.” In *Sullivan*, the MSPB also stated that an agency *may* rely on instances of unacceptable performance that arise after the employee’s successful completion of a PIP but within one year of the initial notice of the adverse action. *Id.*

For its part, GAO contends that the proposed removal accords with the GAO regulation stipulating that an employee may be removed without an additional opportunity period if unacceptable performance occurs within one year of completion of the PIP. Alternatively, it maintains that the proposed removal is proper even if the operative time period starts with the beginning of the PIP because the unacceptable performance upon which it relies here did occur within one year after commencement of the PIP. In this regard, the Agency also points to the fact that Ms. Turner was warned in February 2004 that her performance was deficient, as evidence that the Agency did take action prior to May 14, 2004. Thus, it submits that the proposed removal meets the dictates of *Sullivan*.

The issue as to whether an agency may institute an adverse action beyond one year after the commencement of a PIP if it relies on instances of unacceptable performance occurring within one year after commencement of the PIP appears to be a significant and relatively novel question of law. Both parties have presented meritorious argument in support of their positions. However, none of the pleadings to date addresses the matter sufficiently to warrant a conclusion at this juncture. Accordingly, based upon the pleadings submitted, this remains a serious question that cannot be resolved definitively in the context of the stay submissions.

## B. Nature and Gravity of Harm

In addition to assessing the evidence as to whether the proposed action “arises out of an alleged prohibited personnel practice,” we must also assess the relative harm to the parties if a stay is granted or denied, and weigh the two assessments. The PAB/GC argues that denial of a stay will leave Ms. Turner “substantially harmed in the event GAO effectuates the removal.” Request at 21. Further, because “reasonable grounds exist to believe that GAO’s removal of Ms. Turner . . . arises out of the prohibited personnel practices discussed above,” a stay pending final decision on the merits is needed to prevent GAO from benefiting from its own wrongdoing. Request 21. While there is a public interest in the objective set forth, it is not sufficient to base such an action on “reasonable grounds to believe.” Under the regulatory framework, as discussed above, the evidence is assessed and then balanced against the competing harms.

Pointing to Ms. Turner’s 16 years of service, the PAB/GC contends that termination would have “significant adverse impact” on her income, and “severely limit her ability to find other equivalent employment.” Request at 21. Termination would also mean the end of “affordable health care benefits,” on which Ms. Turner depends for care and treatment of diabetes and

hypertension. Request at 22. Finally, the Request contends that “GAO must show that the harm a stay of the removal will cause is significant and absolutely compelling,” and contends that a stay pending resolution before the Board “does not harm GAO.” *Id.*

The Agency counters that Ms. Turner cannot premise the harm argument on monetary issues alone, since she has an adequate remedy if ultimately successful before the Board. Response at 38. GAO also contends that Ms. Turner can extend her health care coverage for 18 months beyond the removal date and that there is no evidence that her health care will be in jeopardy or that she is unable to afford health care. Response at 39. In the Agency’s view, GAO will be irreparably harmed if the stay is imposed, because of the “deleterious effects upon her office’s ability to accomplish its work” if she is kept in place. *Id.* Keeping a poor performer on the payroll is “not a prudent use of taxpayer money,” and GAO would never be able to recoup the losses resulting from paying her salary and providing benefits pending resolution of the case on the merits. *Id.*

On the question of harm, neither party has presented a clearly compelling case. The availability of remedy should Ms. Turner prevail is a factor to be considered, as is the Agency’s inability to recover its financial losses should a different result obtain. Moreover, managerial discretion to take action against poor performance and to have resolution of the workplace decision also bears weight. In addition, one cannot ignore the effect that a removal action has on marketability for future employment. Similarly, the possibility that litigation will outlast the 18-month extension of health benefits must be taken into account. Finally, the PAB/GC is correct that an agency should not be rewarded for taking action that involves any prohibited personnel practices.

The Board’s regulations require that these factors be evaluated and compared, but provide no guidelines regarding how much weight should be afforded to each factor. The facial allegations and arguments presented here do raise a question of some harm flowing from the denial of a stay, as well as some harm flowing from the granting of a stay. However, some evidence is necessary to support the allegations concerning harm; neither party has buttressed its argument concerning harm with evidentiary support.

Under the circumstances, weighing the arguments of the parties, the balance is fairly even in this case. The availability of a remedy for Ms. Turner if she prevails on the merits of the case, and the apparent lack of such a remedy for the Agency should the Agency ultimately prevail, appears to be the strongest contrast of positions.

Considering all the factors presented as to relative harm to the parties, and absent a stronger evidentiary basis on which to decide, the balance slightly favors GAO.

### C. Balancing of Assessments

The PAB/GC seeks a permanent stay pending resolution of the case-in-chief. This type of relief requires a clear showing that the equities favor the requestor. As set forth above, the PAB/GC has supplied no evidentiary support for its position on the merits, while the Agency has provided detailed documentary evidence for its view. The legal question on the timing of the post-opportunity period action remains unresolved, while the relative harm stands in near equipoise,

leaning slightly toward GAO. In light of the fact that there is not enough evidence at this juncture showing that the removal action arises out of a prohibited personnel practice, the PAB/GC has not met her burden of establishing that the overall balance supports a permanent stay pending Board resolution of the merits of the removal decision.

Accordingly, the Request for Permanent Stay is hereby denied.

**SO ORDERED.**