

In Re Sharon M. Blank

Docket No. 04-05

Date of Decision: November 22, 2004

Cite as: In re Blank, No. 04-05 (11/22/04)

Before: Anne M. Wagner, Chair

Headnotes:

Stays

MEMORANDUM ORDER ON REQUEST FOR FURTHER TEMPORARY STAY

This matter is before the Personnel Appeals Board (PAB) on a Request for Further Temporary Stay filed by the General Counsel of the Personnel Appeals Board (PAB/GC) on behalf of Sharon M. Blank. Ms. Blank, a Human Capital Manager (GS-14/4), was notified by GAO that she would be removed from employment on October 21, 2004 based on a negative suitability determination. This Board previously imposed a stay of the removal action until November 22, 2004, pursuant to an *ex parte* stay request filed by the PAB/GC under 4 C.F.R. §28.133(a). The initial stay was intended to provide time for the PAB Office of General Counsel (PAB/OGC) to investigate the allegations contained in Ms. Blank's Charge, dated October 18, 2004, challenging the lawfulness of the actions leading to the decision to remove her.

The Request for Further Temporary Stay

Pursuant to 4 C.F.R. §28.133(b), the PAB/GC now requests a further temporary stay of thirty (30) days, until December 22, 2004, "to allow sufficient time to complete the investigation and the analysis of the allegations that are raised by Ms. Blank in her Charge." Request at 1. The Request also states that the PAB/OGC has worked diligently to expedite the investigation, but that during the course of interviews, the need to interview several individuals outside of GAO, including members of the Senior Executive Service, became apparent. The PAB/OGC has been unable to secure those interviews to date, but believes that these individuals "possess information that is critical to the determination as to whether reasonable cause exists to believe the agency's termination of Ms. Blank arose out of prohibited personnel practices." Request at 3. The PAB/GC further states that the deciding official on the removal based his findings on interview summaries prepared by investigators from GAO's Office of Security and Safety, but that the investigators had not taken sworn statements from some of these non-GAO officials in the course

of their investigation of the matter.¹ For that reason, the PAB/OGC believes that further investigation is necessary. Request at 3.

Ms. Blank’s pending charge in the PAB/OGC involves allegations of retaliation for exercising appeal rights, discrimination based on hostile work environment, and violation of laws, rules or regulations applicable to GAO. The PAB/GC “continues to believe it is possible GAO may have committed prohibited personnel practices as articulated in her Request for *Ex Parte* Stay. . . .” Request at 3-4.

The underlying circumstances are explained in the earlier Request for *Ex Parte* Stay. In that document, the PAB/OGC states that an investigation of Ms. Blank’s employee status—*i.e.*, whether she was properly classified as a probationary employee—is crucial to whether she can appeal the negative suitability determination. *Ex Parte* Request at 4. Under GAO Order 2752.1 (Adverse Actions), a non-probationary employee is entitled to appeal the decision to remove on suitability grounds to the Board. However, a probationary employee does not have the same appeal rights; the decision to remove for suitability in that case would be governed by GAO Order 2315.1. Probationary employees are entitled to file a discrimination complaint if they believe the removal decision is based on unlawful discrimination. Order 2315.1, ch. 7, ¶4.b(5). The PAB/GC states that because Ms. Blank is a 20-year career federal employee, whose duties involved identical or very similar requirements to her GAO position, the Agency unlawfully characterized her as a probationary employee.² The Request for Further Temporary Stay does not address the status of the PAB/OGC review of this question.

The PAB/OGC also challenges the validity of the decision to remove Ms. Blank. The removal decision letter stated that Ms. Blank had engaged in misconduct in her prior employment and intentionally made false statements on the federal Form SF-86. As to misconduct, the deciding official cited an unauthorized release of personnel information concerning other employees, for which Ms. Blank had been suspended, and an attempt to bring a large knife into the workplace after being specifically warned not to do so. *See Ex Parte* Request, Attach. A. The removal decision found that Ms. Blank failed to reveal that she left one job “by mutual agreement following allegations of unsatisfactory conduct” and failed to reveal that she left that and one other job “for other reasons under unfavorable circumstances.” *Ex Parte* Request at 5 (quoting removal letter, Oct. 7, 2004 (*Ex Parte* Request, Ex. A)).

¹ As detailed in the earlier Request for *Ex Parte* Stay, the negative suitability determination is based on Ms. Blank’s alleged misconduct in prior employment and her alleged intentional false statements on the Form SF-86 (Questionnaire for National Security Positions) that she submitted to GAO.

² The PAB/OGC argues that 5 U.S.C. §7511, made applicable to GAO under 31 U.S.C. §732(d)(4), requires that an employee who has at least one year of current continuous service in a non-temporary appointment in the same or similar position is non-probationary. *Ex Parte* Request at 3.

GAO's Response to Request for Further Temporary Stay

GAO's Response to Request for Further Temporary Stay was timely filed on November 18, 2004. In the Response, the Agency states that it objects to an extension of the temporary stay for more than fourteen (14) additional days, until December 6, 2004. The Response details GAO's efforts to produce documents and arrange interviews on an expedited basis, so as to avoid any need for an extension of the stay: "By the close of business on November 3, 2004, all interviews of GAO employees requested by the PAB/OGC had been conducted and all relevant non-privileged documents in GAO's possession had been provided. Therefore, as of November 3, 2004, the PAB/OGC had 19 days to focus their investigation exclusively outside of GAO." Response at 2. The Agency further argues that "as of October 18, 2004, the PAB/OGC should have known the identity of many of the non-GAO witnesses that it may have wanted to interview. It appears that the PAB/OGC delayed more than two weeks before taking any action to arrange such interviews." Response at 3. The Response also points out that the Request explains neither what information the non-GAO witnesses might possess that is critical to the assessment about whether a prohibited personnel practice is present, nor why the investigators' statements and documents provided to the deciding official were not sufficient for this purpose. Response at 4.

GAO also contends that in applying the "interests of justice" standard, due weight should be given to the Agency's position. The Response argues that the suitability determination was premised on careful consideration of the facts and circumstances involved. Claiming that the PAB/OGC offered no evidence to support its belief that prohibited personnel practices may be involved, GAO states that "[t]he interests of justice are not served by requiring the agency to continue compensating an employee that has been properly determined to be not suitable more than \$3,600 every two weeks while belated interviews are pursued." Response at 4.

The Stay Regulation

The Board's regulations clearly state that the PAB/GC may request the issuance of further temporary stays "for the purpose of allowing additional time to pursue its investigation." 4 C.F.R. §28.133(b)(1). Under 4 C.F.R. §28.133(d), such a temporary stay "may be issued 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 . . ." (emphasis added). Issuance of a temporary stay is therefore 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.

Upon consideration of the facts and arguments presented, some extension of time seems to be warranted for the completion of the investigation and analysis. However, a shorter period than that requested would be more consistent with the standard enunciated in the Board's regulations.

See 4 C.F.R. §28.133(d). The Agency has persuasively presented the outline of the course of the investigation.

Accordingly, to allow time for the PAB/OGC to complete the investigation and analysis of this matter, the PAB/GC's request that the removal of Sharon M. Blank be stayed for 30 days until December 22, 2004 is hereby granted in part and denied in part. The removal is stayed for a period of fourteen (14) days, until **Monday, December 6, 2004**.

SO ORDERED.