

***In re* Lenora J. Pernell**
Lenora J. Pernell v. U.S. General Accounting Office

Docket Nos. 00-12 and 01-03

Date of Decision: May 21, 2001

Cite as: *In re* Pernell; Pernell v. GAO (5/21/01)

Before: Jeffrey S. Gulin, Chair

Stay

***Ex parte* stay**

Permanent stay

Standard of review

ORDER

Now pending before an administrative judge on behalf of the Personnel Appeals Board (Board) are a Request for Permanent Stay as well as the underlying Petition for Review. The Board's General Counsel (General Counsel) filed both the Request and the Petition, challenging the decision of Respondent (GAO or Agency) to remove Petitioner from its employment. The General Counsel filed the Request on February 8, 2001, asking that the removal be stayed under 4 C.F.R. §28.133(b) until the merits of the claims in the Petition have been adjudicated. The General Counsel asserts that reasonable grounds exist to believe that "a myriad of prohibited personnel practices are involved," and that Petitioner would suffer harm from removal while the case is pending. Request for Permanent Stay at 40-41, n.18. On April 18, 2001, the Agency filed GAO's Response to the PAB General Counsel's Request for a Permanent Stay, asserting that there is no basis for granting the General Counsel's request.

Procedural Background

Pursuant to 4 C.F.R. §28.133(a), on December 27, 2000, the General Counsel filed a Request for *Ex Parte* Stay claiming that Petitioner's removal may involve one or more prohibited personnel practices and that a temporary stay would allow an opportunity to investigate the allegations. By Order of the same date, the undersigned administrative judge granted the requested stay of 30 days to allow the General Counsel time to investigate the matter.

On January 19, 2001, the General Counsel filed a Request for Further Temporary Stay under 4 C.F.R. §28.133(b), along with a Motion to File Out of Time,¹ asking for an additional 30-day stay to allow for completion of its investigation and analysis of the case. In support of its request, the General Counsel stated that "the Agency's decision to terminate Ms. Pernell's employment very likely constitutes one or more prohibited personnel practices." Request for Further Temporary Stay at 6. In addition, the General Counsel argued that "any prejudice that the Agency may suffer if our request is granted does not outweigh the harm to Ms. Pernell that would result if the request is not granted, since the purpose of a stay is to minimize the consequences of an alleged prohibited personnel practice." *Id.* By Order of January 23, 2001, the late filing was accepted and the temporary stay was extended pending resolution of the Request for Further Temporary Stay. On January 26, 2001, GAO filed its Response to the General Counsel's Request for Further Temporary Stay, arguing that there "is no basis for the additional 30-day extension." Response at 1. By Order of January 29, 2001, the temporary stay was extended through February 10, 2001, to "allow for the completion of the General Counsel's investigation 'in the exercise of a high degree of diligence'."

On February 8, 2001, pursuant to 4 C.F.R. §28.133(b), the General Counsel filed a Request for Permanent² Stay and a Petition for Review on the underlying claims. A telephone conference was held on February 9, 2001, to discuss procedures concerning the Request for Permanent Stay. The Agency requested a filing deadline extension, until March 16, 2001, to respond to the Request for Permanent Stay. The extension was granted and the Agency agreed not to proceed with the removal pending resolution of the Request for Permanent Stay. A schedule for discovery and for filing the Agency's Answer to the Petition for Review was also set.

On March 16, 2001, the Agency moved to further extend the deadline for filing its response to the Request for Permanent Stay until March 28, 2001, and the extension was granted by Order of the same date. On March 27, 2001, the Agency again moved for an extension, requesting until April 18, 2001 to respond. This motion was also granted by Order of the same date. GAO's Response to the General Counsel's Request for a Permanent Stay was filed on April 18, 2001. On April 27, 2001, another telephone conference was held and the evidentiary hearing on the Petition for Review was scheduled for June 11 through June 18, 2001.

Discussion

Standard of Review

Stay proceedings are governed by the provisions of 4 C.F.R. §28.133. The standard for ruling upon an initial *ex parte* stay is one of great deference to the General Counsel. Such request "shall be granted ... unless ... the request either fails to satisfy the [procedural] requirements of this paragraph or, on its face, conclusively establishes the absence of a prohibited personnel

¹ Under the Board's regulations, a request for further temporary stay or permanent stay must be filed at least 10 days before expiration of an *ex parte* stay. See 4 C.F.R. §28.133(b).

² The term "permanent stay" is not defined in the regulations but presumably refers to a stay that would remain effective until a final decision on the underlying Petition for Review is rendered.

practice.” 4 C.F.R. §28.133(a). The initial *ex parte* stay may be extended for a limited period to provide for briefing and the receipt of documentary evidence, and to allow “a reasonable opportunity to decide the matter.” 4 C.F.R. §28.133(d)(2),(3). As to ruling upon a request for a *permanent* stay, no standard of deference to the General Counsel is discernible under 4 C.F.R. §28.133(b). The presiding judge is required to:

[C]onsider and balance such established equitable factors as:

- (1) The likelihood that the personnel action sought to be stayed involves a prohibited personnel practice; and
- (2) The nature and extent of the injury that the employee and the agency likely will suffer if the requested stay is or is not issued.

4 C.F.R. §28.133(e).

Citing a 1987 Board case, *Jimenez v. GAO*, 1 PAB 403 (1987), the General Counsel urges this administrative judge to adopt the deferential standard employed by the Merit Systems Protection Board (MSPB). In ruling upon requests by the Office of Special Counsel³ for initial *and any subsequent* stays, the MSPB views the record in a “light most favorable” to the Special Counsel, and will grant a permanent stay if the Special Counsel’s claim of prohibited personnel practices “is not clearly unreasonable.” *Special Counsel v. Federal Emergency Management Agency*, 44 M.S.P.R. 544, 546 (1990). *See also, Special Counsel v. Department of the Treasury*, 72 M.S.P.R. 62 (1996); *Special Counsel v. Department of Transportation*, 72 M.S.P.R. 186 (1996); *Perfetto v. Department of the Navy*, 85 M.S.P.R. 454 (2000). However, the *Jimenez* case, *supra*, was decided by this Board in 1987, *prior* to substantial changes to the stay provisions. Moreover, significant differences exist between the *current* stay language of 4 C.F.R. §28.133 and the language of the analogous MSPB regulation.

In *Jimenez*, this Board stated the following:

In ruling on requests for stays, we are governed by the standards enunciated in our decision in *Ramey v. GAO*, 1 PAB 365 (1984).

In that decision, we held that the showing necessary for issuance of a stay under 4 C.F.R. §28.107(c) is less than the showing required to prevail on the merits.... [W]e are to interpret all disputed facts in the light most favorable to the Petitioner.

Jimenez at 405 (citing MSPB precedent as guidance). In both *Ramey* and *Jimenez, supra*, the Board adopted the MSPB summary judgment-like standard for reviewing requests for stays. This adoption is plainly understandable in light of the nearly identical language of the *then applicable* provisions of 4 C.F.R. §28.107(c) and the MSPB governing provisions.⁴ Section

³ The Special Counsel performs functions substantially analogous to those of the General Counsel. *See e.g., GAO v. GAO/PAB*, 698 F.2d 516, 523 (D.C. Cir. 1983).

⁴ The applicable MSPB provisions also have been revised since *Ramey* and *Jimenez, supra*, as part of the Whistleblower Protection Act of 1989, but with no substantive changes pertinent hereto.

28.107, then applicable under both *Ramey* and *Jimenez, supra*, provided, in pertinent part, as follows:

(a) If the General Counsel determines ... there are reasonable grounds to believe that a personnel action was taken ... as a result of a prohibited personnel practice, the General Counsel may request ... a temporary stay ...

(b) A Board member shall order a temporary stay ... unless the member determines that such a stay would not be appropriate.

(c) The Board may grant a further temporary stay or a permanent stay if the Board concurs in the determination of the General Counsel

Compare this former language to the pertinent MSPB language of 5 U.S.C. §1214(b)(1) as follows:

(A) (i) The Special Counsel may request ... the Merit Systems Protection Board to order a stay ... if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken ... as a result of a prohibited personnel practice.

(ii) Any member of the Board ... shall order such stay unless the member determines that ... such a stay would not be appropriate.

...
(B) The Board may extend the period of any stay ... for any period which the Board considers appropriate.

The MSPB has consistently limited its inquiry under 5 U.S.C. §1214(b)(1)(B) to whether the Special Counsel's *belief was reasonable* under a summary judgment standard. *See Special Counsel cases, supra*. Citing MSPB precedent as guidance, under *Ramey* and *Jimenez, supra*, the Board similarly limited its inquiry under the then applicable 4 C.F.R. §28.107(c) to whether the General Counsel's *belief was reasonable* under a summary judgment standard -- viewing all disputed facts in the light most favorable to the Petitioner. *See Ramey* and *Jimenez, supra*.

In 1993, however, after *Ramey* and *Jimenez* were decided, the Board's stay provisions were "substantially rewritten to provide more detailed procedures for such requests and to provide more specific standards to guide the Board's disposition of such requests." Explanation of the Proposed Changes to the Regulations of the GAO Personnel Appeals Board at 9 (Apr. 26, 1993). In contrast to the MSPB statute, the revised language now requires the Board to affirmatively consider (1) the "likelihood" that the action sought to be stayed involves a prohibited personnel action and (2) any "injury that the employee and the agency likely will suffer." 4 C.F.R. §28.133(e). This standard is clearly more stringent than either the prior Board standard or the long established MSPB standard. Earlier statements of the Board also provide compelling evidence that the 1993 revisions reflected a deliberate intent to deviate from the MSPB deferential standard. In 1989, the Board entertained the very revisions that were ultimately adopted in 1993. But, in 1989, the Board explicitly rejected these proposed revisions. The Board stated:

A comment was received on the stay process in general. In brief, the General Counsel is authorized to ask the Board to stay a personnel action when there are *reasonable grounds to believe* that the personnel action will result in a prohibited personnel practice. The comment received on the stay process suggested that the General Counsel also be required to show *harm* to the affected employee and to show a *likelihood of prevailing* in the subsequent litigation.... After careful consideration, the Board rejected all of these suggestions. The criteria and processes for stay proceedings before this Board are based upon and derived from the stay authority created by Congress for the Special Counsel and the MSPB. However, *the changes suggested in the comment would restrict the General Counsel's authority as compared to that of the Special Counsel and would prevent the General Counsel from requesting a stay in circumstances in which the Special Counsel in the executive branch could successfully seek a stay.* This Board is unwilling to modify the stay process in ways that *would significantly reduce the authority of the General Counsel*

54 Fed. Reg. 24131, 24132 (June 6, 1989) (emphasis added).

The Board's subsequent reversal in 1993, deciding to adopt these suggested revisions, evinces a clear intent to "significantly reduce the authority of the General Counsel" *vis-a-vis* the Special Counsel respecting stay proceedings. *Id.* Indeed, the current standard smacks of traditional injunction law that requires a petitioner to demonstrate likelihood of prevailing at trial and irreparable⁵ injury. *Cf. Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 236 F.3d 1363 (Fed. Cir. 2001) (upholding District Court denial of injunctive relief in patent case because petitioner failed to demonstrate likelihood of prevailing); *Sampson v. Murray*, 415 U.S. 61 (1974) (reversing D.C. Circuit action affirming District Court grant of a personnel action stay because petitioner failed to affirmatively demonstrate irreparable injury).

Accordingly, I conclude that the currently applicable standard, enunciated under 4 C.F.R. §28.133(e), does *not* permit the presiding judge to defer to the reasonable belief of the General Counsel, or to apply a summary judgment analysis to the evidence of record. Rather, based upon the evidence of record, the presiding judge is required to *independently assess*, (1) whether the Petitioner would likely prevail after an evidentiary hearing and, (2) the nature and extent of any harm that would likely inure to the Petitioner and to the Agency as a result of his decision on the request for permanent stay.

Application of the Standard

For the limited purpose of ruling upon the General Counsel's Request for Permanent Stay, the following documents of record were considered:

Petitioner's Request for Permanent Stay, with Attachments A, B, C, D, E, F, G, H, I, J, K, L, M, N, O;

⁵ Although section 28.133(e) does not explicitly require consideration of whether the claimed harm is "irreparable," it requires an assessment of the "nature" of the harm. Irreparability is clearly relevant.

GAO's Response to the PAB General Counsel's Request for a Permanent Stay, with Exhibits C, D, E, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z.

Preliminarily, it should be noted that in the Petition for Review, the General Counsel alleges that GAO committed a number of personnel actions, beyond the Agency's decision to remove Petitioner from employment, that were taken as a result of prohibited personnel practices. These include denial of within-grade step increases and "unacceptable" performance ratings motivated by discrimination and retaliation. *See* Petition for Review at 2-3. But, in accordance with 4 C.F.R. §28.133(e)(1), the only prohibited personnel practice claims considered here were those relating to the likelihood that *removal* of Petitioner from employment involved a prohibited personnel practice.

The decision to remove Petitioner appears to be directly related to an unacceptable performance rating in the job dimension of "Checking, Examining, and Recording" during an "opportunity period" between June and September 2000. *See* Exhs. R, S. Petitioner had previously been placed in this opportunity period following receipt of an unacceptable performance appraisal for the period of November 1999 through May 2000. *See* Exhs. K, T, U. The gravamen of the General Counsel's stay request is that throughout these periods, GAO management was motivated by racial discrimination and retaliation. *See* Request for Permanent Stay at 2, 34-40. The General Counsel alleges, *inter alia*, that Petitioner's supervisors failed to accurately measure and evaluate her performance based upon objective criteria, *see id.* at 26; failed to provide Petitioner with timely, clear expectations and adequate feedback, *see id.* at 22-24, 30-33; failed to provide appropriate training, *see id.* at 30; and failed to adequately document the bases for the removal decision, *see id.* at 33.

I have carefully reviewed the documents and arguments submitted in support of these allegations. The General Counsel heavily relies upon a perceived inability by Petitioner's supervisors, when she interviewed them, to provide specific answers to her questions. For example, the General Counsel asserts that the supervisors did not adequately explain "how many errors in [Petitioner's] work products they deemed to be an 'acceptable' level," *see id.* at 25, and they could not "specify the dates or substance of any feedback sessions" during the November through May 2000 rating period, *see id.* at 23. Notwithstanding, the record is replete with evidence of error-laden work, *see, e.g.*, Exhs. K, T, U, V, W, Y; substantial feedback offered to Petitioner, *see, e.g.*, Exhs. K, L, P, Q, T, X, Y; timely and clear expectations, *see, e.g.*, Exhs. I, J, P, U; and training offered to Petitioner, *see* Exh. T. In short, there is considerable evidence to support GAO's claim that its decision to remove Petitioner was based upon legitimate, non-retaliatory and non-discriminatory performance-based assessments. Based upon the record before me, I can not now conclude that Petitioner would likely prevail at a hearing on the merits or that the decision to remove her likely involves a prohibited personnel practice. Accordingly, a consideration of this factor does not militate in favor of granting a stay of the removal. Of course, the state of the record before me is inadequate to render a decision on the merits. The record contains substantial evidence favoring both parties, much of it at odds,⁶ and only a hearing can afford the trier-of-fact an adequate opportunity to fully appraise the evidence. For example, though the record reflects clear evidence of feedback and training offered to Petitioner,

⁶ Compare, *e.g.*, Request for Permanent Stay at 23 with Response to Request for Permanent Stay at 21-22.

the issue of whether the feedback and training were adequate remains a question of fact to be assessed under the totality of circumstances fleshed out at a hearing.

Respecting the second factor -- potential injury -- the Agency cogently argues that loss of a job and the concomitant economic harm, alone, is not sufficient to justify a permanent stay because lost wages and benefits may be recouped if Petitioner ultimately prevails. *See* Response to Request for Permanent Stay at 28-29 (citing *Sampson, supra*). By contrast, GAO's loss, if required to pay Petitioner's salary until a final decision on the merits is rendered, is not recoverable, even if it ultimately prevails. Finally, GAO argues that the public interest would not be served by retaining an "unacceptable performer" on the job. *Id.* at 29. The General Counsel notes that virtually all personnel actions can be remedied with monetary compensation should the Board ultimately determine the actions were unlawful. *See* Request for Permanent Stay at 41. She understandably argues that the availability of this remedy should not preclude a stay under section 28.133(b). Such an interpretation would render the Board's stay authority "a nullity." *Id.*

I agree that the ability to recoup lost wages and benefits is not a bar, *per se*, because this interpretation would, indeed, render section 133(b) meaningless. Nor should consideration of the injury factor under section 28.133(e)(2) be viewed as always militating in favor of the Agency. However, precisely because wages and benefits are recoupable by Petitioner but not by the Agency, in order to "tip the scales" toward Petitioner with respect to this factor, she must adduce evidence that, *in her particular circumstances*, even a temporary loss of her job would create unusual hardship and injury. No such evidence has been adduced. Accordingly, this factor militates in favor of declining the request for permanent stay of removal.

Section 133(e) provides no guidance as to whether, or under what circumstances, either of the factors should be accorded more weight. For example, it is conceivable that a stay could be granted where one factor militates in favor of a petitioner though the other factor militates in favor of the Agency. In this case, however, neither factor militates in favor of Petitioner and the Request for Permanent Stay is hereby DENIED.

SO ORDERED.