



U.S. OFFICE OF SPECIAL COUNSEL
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OSC POLICY STATEMENT: STAYS

A. OSC Criteria for Seeking a Stay

The Office of Special Counsel (OSC) will consider requesting a stay of a personnel action against an employee from an agency or from the Merit Systems Protection Board (MSPB) when:

1. OSC has reasonable grounds to believe that a personnel action that was taken or will be taken constitutes a prohibited personnel practice;

and

2. Absent a stay, the employee will be subjected to removal; a suspension for more than 14 days; a reduction in grade; a significant reduction in pay; a geographic reassignment; the non-renewal of an appointment; or any other personnel action which the complainant demonstrates, by compelling evidence, will result in a serious, immediate hardship;

or

In any other case when: (a) based on available information, there exists a substantial likelihood a personnel action was taken, or is to be taken, as the result of a prohibited personnel practice; or (b) the Special Counsel, in her sole discretion, otherwise determines that it would be appropriate and consistent with OSC's statutory mission to request a stay from the Board.

B. Processing Stay Cases

1. Stay Procedure for Matters Pending in the Complaints Examining Unit (CEU)

- a. When a complainant requests a stay, the CEU attorney or personnel management specialist will review the file within two (2) business days, and will promptly make a recommendation to the Chief, CEU, about whether any of the criteria for seeking a stay set forth in Section A, above, appear to be present.
- b. If a determination is made that the criteria for seeking a stay do not appear to be present, the attorney or personnel management specialist will document the reasons for that determination in writing. The case

will be returned to his or her case docket to be processed consistent with routine procedure.

- c. If the attorney or personnel management specialist and the Chief, CEU, believe that the criteria for seeking a stay appear to be present, they will make a written recommendation to the Associate Special Counsel for Complaints and Disclosure Analysis and the appropriate Associate Special Counsel for Investigation and Prosecution.
- d. If the Associate Special Counsel for Complaints and Disclosure Analysis and the Associate Special Counsel for Investigation and Prosecution agree that the criteria for seeking a stay appear to exist, the matter will be immediately referred to the Investigation and Prosecution Division and processed in accordance with Section (B)(2), below.
- e. If the Associate Special Counsel for Complaints and Disclosure Analysis and the Associate Special Counsel for Investigation and Prosecution agree that the criteria for seeking a stay do not appear to exist, then the matter will be returned to the examiner's case docket and processed in accordance with routine procedure. When the Associate Special Counsel for Complaints and Disclosure Analysis and the Associate Special Counsel for Investigation and Prosecution do not agree, the matter will be referred to the Special Counsel for a decision.

2. Stay Procedure After Referral to the Investigation and Prosecution Division

- a. At the time that a case is referred to the Investigation and Prosecution Division, pursuant to Section (B)(1)(d), above, the assigned case attorney or investigator will promptly obtain whatever information (if any) is necessary to confirm that the criteria for seeking a stay exist. If the additional information confirms that the criteria for seeking a stay exist, the assigned case attorney or investigator will contact the agency involved to request that the personnel action be held in abeyance for at least 45 days. If the additional information dispels the existence of the criteria for seeking a stay, then the reasons for that conclusion will be documented by the case attorney and the case will be handled consistent with routine procedure.
- b. If the agency declines to hold a personnel action in abeyance at OSC's request, then with the Special Counsel's approval, the OSC will petition the MSPB for a stay, pursuant to 5 U.S.C. § 1214.

- c. If an agency agrees to stay a personnel action, but the agreed-upon stay period ends before OSC completes its investigation, the assigned attorney or investigator will request an extension of the stay, assuming that the criteria for seeking a stay set forth in Section A above, continue to exist.
- d. If an agency agrees to stay a personnel action at OSC's request, or if the MSPB grants a stay request, the case will receive priority for investigation and legal review.
- e. If the agency declines a request for an extension of a stay, then with the Special Counsel's approval, OSC will petition the MSPB for a stay. If the MSPB grants the stay request, the case will receive priority for investigation and legal review.
- f. On occasion, a request for a stay may be made after a case has been referred for investigation, or the investigation may uncover additional facts that suggest that a stay is warranted. In such circumstances, if a determination is made by the assigned case attorney during an investigation that the criteria for requesting a stay exist, then, with the approval of the Associate Special Counsel for Investigation and Prosecution, the assigned attorney or investigator will proceed to seek a stay as set forth above. On the other hand, if the assigned attorney makes a determination that the criteria for seeking a stay have not been met, then the attorney shall document the reasons for the denial in the file.

C. Miscellaneous

1. In their discretion, OSC staff may ask an agency to grant a stay even when the criteria for seeking a stay set forth in Section A do not exist. In addition, an agency may, in its own discretion, decide to stay a personnel action pending an OSC investigation, even when the criteria for seeking a stay set forth in Section A do not exist. In such cases, however, OSC cannot commit to give priority to the investigation or legal review of the case.

2. Except in extraordinary circumstances, OSC will not seek to stay the filling of a vacant position.

3. "Reasonable grounds" means such grounds as a reasonable person, in possession of the same information, and with knowledge of the applicable law, would

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accept as adequate to support the conclusion that a prohibited personnel practice has been or will be committed.

4. This policy statement will become effective on Monday, June 4, 2001, and will supercede the policy statement issued on September 7, 2000. This statement is intended only to provide guidance to OSC staff on the circumstances under which the Special Counsel may exercise her authority under 5 U.S.C. § 1214(b) to seek a stay from the MSPB, and the procedures for doing so. The statement is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Office of Special Counsel or any other individual or entity.

_____/s/_____
Elaine Kaplan
Special Counsel