

TWO WEEKS OF WORK: HAMPTON DELLINGER

In this post, I used Kel McClanahan's lawsuit against OPM, claiming the email via which Elon Musk sent out his five bullets email was added without proper privacy review, as an example of the added benefits that lawsuits can have, whether or not they succeed. (Though Elon's email has raised the likelihood the lawsuit will succeed, because it has undermined DOJ's claims about the email thus far.)

Another example of Hampton Dellinger's decision to sue to get his job back. In the end, SCOTUS will likely let Trump fire Dellinger. But before SCOTUS does that, Dellinger has made a record of problems with the DOGE firings and gotten at least six of the firings halted for 45 days.

As the timeline below notes, Trump tried to fire Dellinger on February 7. Three days later, on February 10, he sued and asked for a restraining order, preventing Trump from removing him. Judge Amy Berman Jackson first paused, then granted the TR0; because she restored the status quo, Dellinger regained access to his office. Trump appealed, ultimately to the Supreme Court, but after delaying a week, on February 21, they deferred the decision until today (when ABJ has a hearing scheduled and is expected to make a decision that can formally be appealed).

Even as that happened, starting on February 12, Trump started his purge of people he claimed were probationary.

At least six of the people fired brought claims before the Office of Special Counsel, Dellinger's office, claiming that the mass firings were not permissible. Some also argued they weren't probationary (remember that some agencies tried to retroactively change the probationary period from one to two years). Others claimed they were not provided treatment to which veterans are entitled.

On Monday, word started leaking today that Dellinger was asking the MSPB to reinstate those six employees. Citing that, Dellinger provided a public statement explaining that some of the firings violated employment law.

OSC does not typically comment on stay requests while they are awaiting a decision by the MSPB. Consistent with OSC's past practice, Special Counsel Dellinger did not comment publicly on the pending request prior to its apparent disclosure by one of the agencies named as a respondent. Because his stay requests are now being publicly discussed, the Special Counsel provides the following statement.

"Since the Civil Service Reform Act was passed in 1978, the merit system principles have guided how federal government agencies hire, manage, and, if necessary, remove federal employees. These principles establish that all federal employees, including those in a probationary status, should be evaluated based on individual performance."

Dellinger also released a redacted version of one of his requests, sent on February 21, for the Merit Systems Protection Board to stay the termination of six employees, with descriptions of all six employees. As one example, one of the employees is a disabled veteran whose supervisor had, *the day he was fired*, talked about what an exceptional employee he was.

Complainant served as a probationary Program Support Assistant in the competitive service with ED. Ex. 1, Complainant Declaration, ¶¶ 3-4. Complainant was hired with a 100% disabled veteran's preference after 14 years with the Army. Id., ¶ 5. Throughout his tenure, he received consistent praise from leadership, and there is no evidence of any performance

issues. Id., ¶ 9. However, on February 12, 2025, Complainant was issued a termination notice that stated, in relevant part:

I regrettably inform you that I am removing you from your position of Program Support Specialist with the agency and the federal civil service effective today.

Ex. 2, ED Notice. Earlier that same day, Complainant's supervisor had commended his exceptional performance, praising his dedication and calling him a perfect fit for the team. Ex. 1, ¶ 11.

Several of their supervisors tried to overrule the firings. That's one thing Dellinger used to substantiate his finding that this was a Reduction in Force finding, not termination because of performance.

As Dellinger laid out, Reductions in Force have their own requirements, even for probationary employees.

Because 1) agencies are prohibited from circumventing the requirements set forth in the RIF statute and regulations, which apply equally to probationary employees, 2) the evidence indicates that Agencies improperly terminated Complainants without reference to those requirements, and 3) the violation denied Complainants both substantive and procedural rights, OSC has reasonable grounds to conclude that Agencies have engaged in prohibited personnel practices.

Agencies must follow the RIF statute and regulations when the employee's release is required for reasons including lack of work, shortage of funds, and reorganization. See 5 C.F.R. § 351.201. The regulations define a reorganization as "the planned elimination, addition,

or redistribution of functions or duties in an organization.” 5 C.F.R. § 351.203. The Federal Circuit has “defined a ‘reduction in force’ as an ‘administrative procedure’ by which agencies eliminate jobs and reassign or separate employees who occupied the abolished positions.” See *Tippins v. U.S.*, 93 F.4th 1370, 1375 (Fed. Cir. 2024). OPM’s website similarly explains that, “An agency is required to use the RIF procedures when an employee is faced with separation or downgrading for a reason such as reorganization, lack of work, [or] shortage of funds...”¹⁶

Each agency has the right to decide whether a RIF is necessary and when the RIF will take place. However, agencies do not have discretion to bypass RIF procedures when they are reorganizing or reducing the size of components based on lack of work or budgetary concerns.

Employees removed in an RIF get additional benefits, including notice.

Yesterday, the MSPB granted those stays. Dellinger issued a statement calling on agency heads to rescind unlawful terminations.

“I am very grateful the MSPB has agreed to postpone these six terminations,” said Special Counsel Hampton Dellinger. “These stays represent a small sample of all the probationary employees who have been fired recently so our work is far from done. Agency leaders should know that OSC will continue to pursue allegations of unlawful personnel actions, which can include asking MSPB for relief for a broader group of fired probationary employees. I urge agency leaders to voluntarily and immediately rescind any and every unlawful termination of probationary employees.”

The day after Dellinger recommended those stays, Democracy Forward provided OSC a list of those original six agencies, plus thirteen more that used standard letters for firing its people, asking that all those firings be stayed too.

1. U.S. Department of Education
2. U.S. Department of Energy
3. U.S. Department of Housing and Urban Development
4. U.S. Office of Personnel Management
5. U.S. Department of Agriculture, Rural Development
6. U.S. Department of Veterans Affairs
7. AmeriCorps
8. U.S. Department of Homeland Security
9. U.S. Department of Interior
10. U.S. Environmental Protection Agency
11. Export-Import Bank
12. Federal Mediation and Conciliation Service
13. General Services Administration
14. U.S. Department of Health and Human Services
15. Institute of Museum and Library Services
16. Internal Revenue Service
17. National Archives and Records Administration
18. National Science Foundation
19. Surface Transportation Board

Dellinger's success at reviewing and staying

these six people's termination matters for a whole bunch of reasons, even if he is removed today or in days ahead.

First, by labeling this an RIF (and releasing that decision publicly), it'll help lawsuits designed to reinstate larger number of people get standing that otherwise would have to go through this process (which is the basis on which courts have rejected some unions' efforts to slow the DOGE).

Establishing the import of benefits tied to RIFs is particularly important because, as Wired reported, DOGE appears to be trying to automate mass firing even further.

Finally, recall that the day after Trump fired Dellinger, he named Veterans Affairs Secretary Doug Collins Acting Special Counsel. The VA has been among the most aggressive in firings, carrying out a second round of firings in recent days, for a total of 2,400 people.

Had Dellinger not gotten the slight reprieve on his own firing, it would have left one of the people most aggressively pursuing Trump's purge in charge.

Again, I think it likely SCOTUS will let Trump fire Dellinger in short order.

But the fight was worth it.

Update: In a Northern CA lawsuit on behalf of the fired workers, Judge William Alsup is asking the government to answer two questions in advance of a hearing today that get at the same issue Dellinger raised.

1. To what extent did OPM or individuals within OPM direct other agencies to terminate probationary employees based on performance or misconduct? If any such direction (or advice) is in writing, please provide the documents to the Court.

2. How can an agency lawfully terminate a probationary employee on the basis of

“performance” if that employee’s
performance was in fact satisfactory?

Update: Having just listened to the hearing, ABJ sounds like she’s going to extend the TR0 for a few days so she can rule on the merits. It further sounds she’ll say the Special Counsel is so unique that the President can only fire him for cause.

Timeline

[docket]

February 7, 2025: Sergio Gor fires Hampton Dellinger

February 10, 2025: Dellinger sues and moves for a TR0; Amy Berman Jackson issues an administrative stay

February 11, 2025: Trump names Doug Collins Acting Special Counsel; appeals stay

February 12, 2025: DC Circuit denies appeal of stay; ABJ issues a TR0; Trump appeals; Trump starts mass firings of probationary employees

February 13, 2025: Trump appeals stay to SCOTUS

February 15, 2025: DC Circuit denies appeal; ABJ consolidates preliminary injunction

February 16, 2025: Trump appeals stay to SCOTUS

February 21, 2025: SCOTUS defers appeal