

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

SPECIAL COUNSEL  
EX REL. PAUL T. HARDY,  
Petitioner,

DOCKET NUMBER  
CB-1208-12-0002-U-1

v.

DATE: October 14, 2011

DEPARTMENT OF HEALTH AND  
HUMAN SERVICES,  
Agency.

Bruce D. Fong, Esquire, Oakland, California, and Anne M. Gullick, Dallas, Texas, for the petitioner.

Keian Weld, Esquire, Washington, D.C., for the agency.

**NOTIFICATION OF STAY BY OPERATION OF LAW**

On October 3, 2011, the Special Counsel filed a petition pursuant to 5 U.S.C. § 1214(b)(1)(A)(i) requesting a retroactive stay of the performance evaluation given by the Department of Health and Human Services (DHHS) to Mr. Paul T. Hardy pending the Office of Special Counsel's (OSC) completion of its investigation of the matter. No Board member has acted on the Special Counsel's request. Therefore, a 45-day stay went into effect by operation of law pursuant to 5 U.S.C. § 1214(b)(1)(A)(iii). *See also* 5 C.F.R. § 1201.136. As requested by OSC, the effectiveness of the performance evaluation is stayed for

45 days. The stay will be in effect from October 14, 2011, to and including November 28, 2011.\*

Any request that the OSC makes to extend the stay must be received by the Board and the agency on or before November 14, 2011. Any response by the agency must be received by the Board and OSC no later than November 21, 2011.

FOR THE BOARD:

Washington, D.C.

---

William D. Spencer  
Clerk of the Board

---

\* On the afternoon of October 12, 2011, the agency submitted a pleading contending that Mr. Hardy is not an "employee" covered by the Whistleblower Protection Act, and that the Board therefore lacks jurisdiction to issue a stay under the provisions of 5 U.S.C. § 1214(b)(1)(A). As this statute gives a Board member only three business days to consider a request for a stay submitted by the Special Counsel, there was no opportunity to consider the agency's argument and make a ruling on this issue. The Board will consider and rule on the jurisdictional issue should the Special Counsel seek an extension of the 45-day stay or corrective action on Mr. Hardy's behalf.