

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE**

██████████,)	
)	
Appellant,)	
)	
vs.)	Docket Number
)	██████████
Department of Homeland Security,)	August 20, 2024
)	
Agency.)	Hon. Paul DiTomasso
)	

**AGENCY’S MOTION TO DISMISS APPEAL WITHOUT PREJUDICE, SUBJECT TO
AUTOMATIC REILING**

The Department of Homeland Security, the United States Secret Service (Secret Service or Agency) hereby files this Motion to Dismiss Appellant ██████████’s appeal without prejudice, subject to automatic reiling on January 2, 2024.¹ It is the Agency’s position that due to the Agency’s current operational demands, including multiple internal and external investigations into the attempted assassination of former President Donald Trump, National Special Security Events (NSSEs) such as the United Nations General Assembly (UNGA) in September, and the increased protective demands of the Presidential campaign season, the appeal cannot be properly or fairly adjudicated within the Board’s 120-day time limit for processing appeals.²

¹ The Agency acknowledges that it discussed seeking a motion for 90 days at the status conference. However, while drafting the proposed schedule for this motion, the Agency realized that 90 days may result in the Agency needing to seek an extension for discovery deadlines due to the holiday season.

² The remand order was issued on July 19, 2024. Accordingly, the 120-day deadline to adjudicate this Appeal is Monday, November 18, 2024.

I. Legal Standard

Administrative judges have wide discretion to control the proceedings before them, including whether to grant a motion to dismiss an appeal without prejudice. 5 C.F.R. § 1201.29; *Bowens v. Off. of Pers. Mgmt.*, 59 M.S.P.R. 390, 392 (1993). See also *Hinton-Morgan v. Dep't of the Army*, 75 M.S.P.R. 382, 399 (1997) (“An administrative judge has broad discretion to control the proceedings before [him], and dismissal without prejudice is a procedural option that is committed to [his] sound discretion.”) (citing 5 C.F.R. § 1201.41(a)-(b)). As such, administrative judges have the discretion to dismiss an appeal without prejudice subject to refiling where an appeal cannot be properly or fairly adjudicated within the Board’s 120-day time limit for processing appeals because a request for a continuance is either too lengthy or indefinite. *Milner v. Dep't. of Justice*, 87 M.S.P.R. 660, ¶ 9 (2001). Such dismissals are in accordance with the Board’s policy of processing cases in an expeditious manner. *Espinoza v. Dep't. of the Navy*, 69 M.S.P.R. 679, 682 (1996). Moreover, dismissal without prejudice is appropriate where such a dismissal is “in the interests of fairness, due process, and administrative efficiency.” *Gidwani v. Dep't of Veterans Affs.*, 74 M.S.P.R. 509, 511 (1997).

II. Argument

The August 5, 2024 Order and Summary of Status Conference provides that discovery must be initiated no later than August 30, 2024 and the discovery period closes on November 8, 2024. However, the Agency’s operational demands through the Presidential election will frustrate its ability to fully engage in discovery given the limited availability and resources during this time, as explained below. Such limitations not only affect the Agency’s ability to defend itself but will also negatively impact Appellant’s ability to obtain information that could help him establish his case.

The Agency anticipates that any document requests and interrogatories in this appeal will need to be answered, in significant part, by employees in the Agency's Office of Professional Responsibility (RES) and/or its subordinate office, the Inspection Division (ISP), including by three employees/witnesses directly involved in the underlying issues in the appeal who are currently employees of ISP and engaged in its daily operations: Deputy Special Agent in Charge (DSAIC) [REDACTED], Inspector [REDACTED], and Inspector [REDACTED]. Separate and apart from these three individuals, RES and ISP are themselves key entities in the Appeal, given those offices roles in investigating Appellant's alleged whistleblowing disclosures. Critically, ISP is the Agency's division responsible for conducting the Mission Assurance Investigation (Investigation) into the July 13, 2024 assassination attempt of former President Trump in Butler, Pennsylvania. In order to complete this essential and time sensitive task, all ISP law enforcement staff have been tasked with some aspect of the Investigation, including DSAIC [REDACTED], Inspector [REDACTED], and Inspector [REDACTED]. Based on current demands, over the next eight weeks (approximately), ISP must complete at a minimum 83, and up to almost 200 interviews, and document the results of those interviews, as well as other findings as part of the Investigation. In addition to the Mission Assurance Investigation, there are also ongoing external investigations and reviews being conducted by Congress, the Federal Bureau of Investigation, the Blue Ribbon Panel, and the Department of Homeland Security's Office of the Inspector General, the schedules for which are largely outside of the Agency's control. ISP is also involved in responding to inquiries from those entities. Additionally, the three ISP employees identified above may be called to participate in these matters, including but not limited to by responding to inquiries or being called on to testify.

Furthermore, other employees who gather documents and information in response to MSPB discovery requests directed towards RES and ISP must also continue the normal work of the division, including completing ongoing investigations and reports. Additionally, from September 9, 2024 through September 30, 2024, ISP will have five personnel designated to respond to UNGA on a moment's notice in the event an incident occurs there. Over the next few weeks, up to ten personnel also have previously scheduled leave on the books, which of course, requires other ISP staff to fill in while those individuals are out. Further, other witnesses or offices that may be identified through the discovery process may also be involved in the ongoing investigations and/or be responsible for performing the Agency's protective functions at the upcoming NSSEs and numerous campaign events. Additionally, the Agency's Office of Chief Counsel, is intimately involved in advising on the assassination attempt investigations and the upcoming NSSEs, which further strains the Agency's resources during this time and limits the Agency's ability to effectively defend itself.

Given the limited staffing and resources resulting from the Agency's operational and investigative demands, the Agency submits that the appeal cannot be fairly adjudicated within the 120-day time period prescribed by the Board. Under these circumstances, dismissal without prejudice is appropriate in the interests of administrative efficiency and judicial economy. It would also eliminate the need for filings and subsequent rulings on motions for extensions of time related to the timing of discovery responses or any potential discovery disputes that could arise, which will inevitably be necessary in light of these competing demands for time and resources if the appeal proceeds as scheduled.

Although Appellant noted his objection to the dismissal based on the length of time this appeal has been pending during the status conference on August 5, notably, he did not claim that

he would be prejudiced by the dismissal and the comparatively short amount of time it would add to the adjudication of his appeal. Nor could he, as the dismissal would not actually prejudice Appellant, particularly since he is retired and no longer an Agency employee. The nine personnel actions at issue are all related to internal matters that, even if eventually ordered to take corrective action on, would have no benefit or impact on Appellant's life outside the Agency.³ Conversely, the Agency would be unfairly prejudiced if discovery proceeds as normal during an unprecedented time-period where its divisions and personnel relevant to the appeal are stretched incredibly thin.

Based on the current situation, the Agency's operational tempo is anticipated to lighten in December 2024 after the NSSEs, the election, and after many of the current assassination attempt investigations deadlines are met. In light of that, and taking into consideration the holiday period then, the Agency requests that the Board dismiss the appeal without prejudice and automatically refile Appellant's appeal on January 2, 2025.⁴

III. Conclusion

For the reasons stated above, the Agency respectfully requests that the Administrative Judge exercise his wide discretion in controlling these proceedings and grant the Agency's motion to dismiss the appeal without prejudice, subject to automatic refiling on January 2, 2025.

Respectfully submitted,

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³ As his related EEOC cases have established, there is no monetary impact associated with any of these nine actions.

⁴ To ensure that the refiled appeal moves expeditiously once it is automatically refiled, the Agency has no objection to the dismissal order also stating the discovery deadlines that will be in effect once it is refiled.