

UNITED STATES COURT OF VETERANS APPEALS

No. 98-425

IN RE: A PROPOSED AMENDMENT TO RULE 26(b)

Before NEBEKER, *Chief Judge*, and KRAMER, FARLEY,
HOLDAWAY, IVERS, STEINBERG, and GREENE, *Judges*

MEMORANDUM AND ORDER

On April 24, 1998, the en banc Court issued a Memorandum and Order regarding amendments proposed by the Court (December 1, 1997) and by the Court's Rules Advisory Committee (February 19, 1998) to Rule 26(b) of the Court's Rules of Practice and Procedure (Rules), (which addresses the matter of the extension of time for certain filings). *In re: A Proposed Amendment to Rule 26(b)*, 11 Vet.App. ___, No. 98-425, (Apr. 24, 1998) (en banc Memorandum and Order, temporarily found at 11 Vet.App. Ct.R-3 (June 1998)). The Court noted that it had taken the proposed amendments under advisement.

The Memorandum and Order set forth the Court's concern that, at a time when the number of appeals being filed with the Court had doubled from FY 1994, the resolution of appeals was "being unduly and unreasonably delayed by the thousands of motions filed by the Secretary for extensions of time based on the demands of caseload assignments". Slip order at 2, Ct.R-4. The Court summarized actions taken by the Court and the Secretary's February 19, 1998, response addressing the Court's concerns about extension motions. The Court then outlined factors that it intended to consider in acting on extension motions from either party and ordered that the pending Rule 26(b) amendments be held in abeyance until further order of the Court. The Court directed that the Secretary file with the Court on July 1 and October 1, 1998, supplemental reports on the current status of actions taken and projected as described in the Secretary's February 19, 1998, response and of any other actions taken and planned "to ensure that records on appeal will be timely designated and transmitted and that pleadings, including responses to EAJA [Equal Access to Justice Act, 28 U.S.C. § 2412(d)] applications, will be timely filed." Slip order at 6, Ct.R-9. On July 1 and October 1, 1998, the Secretary filed the ordered status reports.

In his reports, the Secretary outlined the actions taken and planned to reduce individual attorney caseloads and increase support staff in Professional Staff Group VII (PSG VII); the Secretary reported that by October 1, 1998, average case count per appellate attorney had been reduced from about 80 in February to fewer than 50 (October 1, 1998, Response (Oct. Resp.) at 2). The Secretary also reported increased use of an automated data processing system and increased management efforts to improve individual efficiency, and reported that these actions had resulted in the closing of 30 more cases per month in FY 1998 than were closed in FY 1997 (*ibid*). The full October 1, 1998, report of the Secretary is included as an Appendix to this Memorandum and Order.

The Court notes that, according to its statistics, motions for various extensions of time by

the Secretary have continued over the last eight months (February through September 1998) to average about 350 per month (except for a slight drop in May and June 1998) and were 361 in September 1998. The Secretary reported that total extensions filed by him in FY 1998 grew to 5,578 from 4,195 in FY 1997 and 2,938 in FY 1996 (Oct. Resp. at 7). However, the Court also notes that the Secretary reported that internal realignment of PSG VII has been accomplished effective October 1, 1998, and that permanent PSG VII staffing has reached 78, will quickly reach the target of 82 with the addition of paralegals and legal assistants, and will reach 91 in FY 1999 (*id.* at 5). The Court also notes that the FY 1999 appropriation for the Department of Veterans Affairs was not enacted until October 21, 1998 (Pub. L. No. 105-276, 112 Stat. 2461). The Secretary also reported that requests for extensions of time by appellants grew from 1,934 in FY 1997 to 2,952 in FY 1998 and that requested stays (apparently filed by the Veterans Consortium Pro Bono Representation Program) were 1,540 in FY 1997 and 1,237 in FY 1998, and, as he had in his July 1, 1998 report (July 1, 1998, Resp. at 9-10), the Secretary stated that no Rules amendment was needed (Oct. Resp. at 7-8).

It is obvious to the Court that the Secretary is making substantial efforts to ameliorate the extension problem, although, given the rise in new appeals, including a concomitant increase in applications under the EAJA, and the delays experienced in the acquisition and build-out of new space and acquisition of new equipment and support personnel, the results of these efforts have not been realized in substantial part. Accordingly, the Court will continue to hold the question of a Rule 26(b) amendment in abeyance and require two further status reports from the Secretary.

On consideration of the foregoing, it is

ORDERED that the pending December 1, 1997, proposal by the Court and the pending February 19, 1998, proposal by the Court's Rules Advisory Committee to amend Rule 26(b) be held in abeyance until further order of the Court. It is further

ORDERED that the Secretary file with the Court, and serve on each member of the Rules Advisory Committee, on April 2 and October 1, 1999, respectively, supplemental reports as described in the last paragraph of the Court's April 24, 1998, Memorandum and Order. The reports shall describe also the pertinent actions taken with FY 1999 appropriations and plans for further such actions in FY 2000. Each report shall also set forth the number of monthly motions for extensions filed by the Secretary in each month beginning in January 1998.

DATED: November 25, 1998

PER CURIAM.

Appendix

**IN THE UNITED STATES COURT
OF VETERANS APPEALS**

IN RE: A PROPOSED AMENDMENT)
 TO RULE 26(b))
)
) Vet. App. No. 98-0425

APPELLEE'S RESPONSE TO COURT ORDER

Appellee, Togo D. West, Jr., Secretary of Veterans Affairs
(Secretary), respectfully responds to the Order of the Court, dated April 24, 1998, which directed the Secretary to file an October 1, 1998, report on the following: (a) the current status of all actions taken and projected that were described in the Secretary's February 19, 1998, Response in YQ, No. 97-1092, and (b) any other actions taken and planned by the Secretary and General Counsel to ensure that records on appeal will be timely designated and transmitted and that pleadings, including responses to EAJA applications, will be timely filed.

Recognizing the General Counsel's statutory duty to represent the Secretary before the Court in compliance with the Court's rules of Practice and Procedure regardless of the growing caseload, the Secretary is aware of, and continues to track the ever growing number of appeals filed in the U.S. Court of Veterans Appeals (Court). General Counsel continues to

take management actions to reduce Government requested extensions. Many of those actions were described in the Secretary's February 19, 1998, and July 1, 1998, pleadings and are further detailed below. The February 19th pleading stated that additional FY 98 funds in the amount of one million dollars (\$1,000,000) have been channeled to the Office of General Counsel (OGC), Professional Staff Group VII (PSG VII) to support the actions instituted or planned by the OGC to address the growing problem. That influx of funding has made it possible to expand PSG VII work spaces, hire staff, and to realign the professional and support staff into smaller, more efficient work groups.

A. Status of current and projected actions.

The OGC has invested a substantial effort to reducing individual attorney caseloads and to eliminating as many Government extensions as possible. PSG VII has extensively used overtime and other compensation for attorneys and support staff in its effort to insure timely case resolution. Management liberally reassigned cases, including reassignments to management personnel. See *United States v. Raimondi*, 760 F.2d 460 (2d Cir.1985). Overtime and case reassignments have impacted the average active case count per appellate attorney. The average case count has been reduced from about 80 cases per attorney in February to fewer than 50 per attorney by October 1. During this same period, PSG VII increased

its use of the Automated Data Processing (ADP) system, and management increased its efforts to improve individual efficiency by enforcing more stringent performance requirements on attorneys and support staff. The efforts are reflected in an improved efficiency which closed 30 more cases per month in FY 98 than were closed in FY 97.

It appears that PSG VII's specially organized "early intervention" team, which consists of attorneys and paralegals is resolving or diverting as much as 35% of the initial incoming caseload, thereby enabling the rest of the staff to devote their attention to cases requiring more developmental time and personnel resources. This group reviews decisions of the Board of Veterans' Appeals (BVA) immediately after appeals are docketed in order to identify and dispose of appropriate cases at the earliest feasible stages.

As of October 1, 1998, PSG VII had requested three (3) additional copiers at a cost of approximately \$61,000. Two (2) have been ordered and/or delivered. The Government is using overtime compensation, as required, to complete the Designations of Record (DORs) and Transmissions of Record (TORs) in a timely manner. OGC continues to maintain a constant search for more efficient and advanced copying technologies and new procedures to eliminate DOR and TOR extensions. At least one of the identified copy machines, which is in place, uses an

advanced technology which produces quality copies quicker than can be achieved with the reproduction technology presently in use. PSG VII has expanded into an additional 4,800+ sq. ft. space at 625 Indiana Ave., N.W., Washington, D.C. 20004, to support OGC's growth requirements. However, additional machines, people, and/or improved technology may still be required if the workload continues to grow.

PSG VII established an ADP training room in the expansion space at the "M" level of 625 Indiana Avenue, N.W. ADP training programs are being developed and evaluated by ADP personnel and the training officer. ADP instruction will be developed to assist in improving performance at all levels. Much of the instruction will be presented in the new PSG VII, ADP training facility.

PSG VII continues to develop, refine, and update operational manuals for its employees. In conjunction with the BVA, it holds joint training classes to improve BVA and PSG VII efficiency and professionalism. Additional in-house training classes held since July 1, 1998, include: Brief Writing; Handling Appealed Cases; Appellate Advocacy; and a professional development program for Federally Employed Women.

PSG VII continues to recruit, add to and replace attorney and paralegal personnel as money, space and positions become available.

PSG VII also continues its attempt to hire additional students from local schools to fill critical support functions where personnel shortages exist. However, filling these positions is difficult as indicated by experience. Since the July response, 5 of the 8 identified students have returned to school. This has created a shortfall in the support available to assist attorneys in case management, legal research, drafting and writing.

B. Other actions taken and planned to address timeliness issues.

The General Counsel was committed to having at least 82 permanent, full-time employees working in PSG VII by the end of FY 98. The goal has not been reached due to the limitations on space. The growth could not take place until the expansion space became available for occupancy. The expansion space is built and furnishing it is almost complete. Most moves will take place before the end of the week.

The staff consists of 46 attorneys, 4 designated paralegals (one is a paralegal student) along with two law students who are doing paralegal support work, and 28 support staff. The permanent staff is 78, plus two law students, but will quickly reach the 82 target with the addition of paralegals and legal assistants. Recruitment actions for 8 additional paralegals are being worked along with recruitments for more support personnel. Those actions will bring the total permanent, full-time employee count to 91. PSG VII is recruiting legal assistants and copy clerks to staff the expanding

organization for FY 99. The addition of support staff will improve the quality of PSG VII's data base, and, it will increase its ability to process information in the case tracking system, respond to requests for C-files, and assist attorneys with case management.

Internally, the PSG VII organization is evolving. It is realigned effective October 1, 1998, to insure closer supervision for attorneys and paralegals. The organization has been reconfigured to consist of five litigation teams and an expanded "early intervention" group. This reorganization reduces the supervisor to appellate attorney ratio from 8/9 per supervisor, to six (6) action attorneys per supervisor. Each team also has a senior appellate attorney who helps the first line supervisor while also maintaining a personal caseload.

The early intervention group includes experienced attorneys who will handle early case evaluation, participate in intervention, assist in training programs, and spearhead the move toward standardization. That unit will grow to four or more attorneys and they will acquire a support staff. They are now preparing and filing dispositive pleadings to resolve cases before additional PSG VII resources are required for full record development. The realignment insures closer supervision for staff and insures that the training program keeps abreast of legal and procedural developments. Tighter management is aimed to insure timely resolution of cases and consistency

of representation for the Secretary.

The case tracking system continues its development to provide pertinent information on workloads and employee output. This will assist supervisors to effectively measure employee productivity. Additionally, the improved case tracking capability should assist managers to identify "problem" cases early in the assessment and development process.

C. October 1, 1998 status report of trends.

The Court directed that "Each status report include PSG VII personnel in total and broken down by categories in comparison to the total and categorical figures at the close of FYs 1994, 1995, 1996, and 1997."

The personnel breakout

and other relevant information are presented in the following chart:

| FISCAL YEAR | <u>94</u> | <u>95</u> | <u>96</u> | <u>97</u> | |
|--------------------|------------------|------------------|------------------|------------------|-------|
| <u>98</u> | | | | | |
| Attorneys | 35 | 35 | 36 | 32 | |
| 46 | | | | | |
| Paralegals | 5 | 5 | 3 | 1 | |
| 4* | | | | | |
| Students | | | | 7 | |
| 2** | | | | | |
| Support | <u>20</u> | <u>17</u> | <u>20</u> | <u>23</u> | - |
| <u>28***</u> | | | | | |
| Total Personnel | 60 | 57 | 59 | 63 | 80 |
| New Cases | 1,347 | 1,456 | 1,836 | 2,650 | 2,975 |

| | | | | | |
|-------------------|-----------|-----------|-----------|-----------|-------|
| Extensions | 1,447 | 1,752 | 2,938 | 4,195 | 5,578 |
| Stays (appellant) | 643 | 1,039 | 924 | 1,540 | 1,237 |
| Copies | 4,582,398 | 4,487,528 | 4,708,474 | 5,714,848 | |
| | 7,189,154 | | | | |
| Cases Closed | 1,500 | 1,461 | 1,490 | 2,002 | 2,371 |

* One of the four (4) paralegals is a student. Recruiting eight (8) additional

paralegals.

** Attempting to recruit as many as five (5) more.

*** Recruiting for five (5) additional positions.

FY 98 figure reflects figures through September 15, 1998.

Two support supervisors and two “secretaries” are reflected in the support count for each of the FYs. However, one support supervisory position and one secretary position are being converted to program analysts positions, to reflect their added responsibilities for legal support functions.

D. Secretary's views on the proposed revisions of Rule 26(b).

While the Court focuses on the Secretary’s actions, it is no secret that case delays are not caused solely by the Secretary’s extensions.

Delays also stem from numerous extensions sought by opposing counsel and from extensions (or stays) sought by the pro bono consortium.

Appellant extensions for FY 97, identified within the PSG VII case tracking system, are approximately 1,934 and stays are about 1,540 for a total of 3,474 appellant requested delays. The figures for FY 98 are approximately

2,952 extensions and 1,237 stays for a total of 4,189 appellant requested delays. That represents about a 20% increase for appellant requested delays in a single year.

The Secretary continues to urge that, to the extent the Court determines that a proceeding is unjustifiably delayed, it has the ability, within the current rules, to evenhandedly end extension abuses by any party.

CONCLUSION

The Secretary and the Department of Veterans Affairs will continue to take, all reasonable measures available within the Department's appropriated and authorized spending levels, along with personnel recruitment limitations, to insure that cases are timely presented to the Court for resolution.

Wherefore, the Secretary respectfully responds to the order of the Court dated April 24, 1998.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on the 1st day of October, 1998, a copy of the foregoing was mailed postage prepaid, addressed to:

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