

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

MISC. NO. 07-13

IN RE: LAPSE IN FUNDING FOR DEPARTMENT OF VETERANS AFFAIRS

Before KASOLD, *Chief Judge*, and HAGEL, MOORMAN, LANCE, DAVIS, SCHOELEN,  
PIETSCH, BARTLEY, and GREENBERG, *Judges*.

**ORDER**

On September 30, 2013, the Secretary of the Department of Veterans Affairs (VA) filed an ex parte motion to stay "all VA-related filing deadlines in all cases currently pending before the Court during any lapse in funding for [VA]." Appendix A at 1. On October 3, 2013, the Secretary filed an amended ex parte motion to stay the same cases during any lapse in funding for VA's "Office of General Counsel [(OGC)], Staff Group VII." Appendix B at 2. In support of his amended motion, the Secretary informs the Court that VA's current funding will be exhausted on October 16, 2013, such that "certain VA attorneys and support staff who are not otherwise funded or determined to be essential for the protection of life or property" will be unable to work as of October 17, 2013. *Id.* He also indicates that "a majority of OGC operations," including those of Professional Staff Group VII, which is responsible for litigation before the Court, "are generally not considered to be . . . essential." *Id.* at 2. The Secretary seeks an open-ended stay of proceedings in all cases before the Court in which the Secretary has a filing deadline on or after October 17, 2013, until funding is appropriated.

The Secretary avers, however, that "current guidance by [VA] indicates that[,] should the Court deny this motion, or otherwise require [VA] to satisfy particular filing deadlines in cases pending before the Court, the Secretary will make every effort to ensure that sufficient OGC staff are available, notwithstanding any lapse of funding, to satisfy VA pleading requirements." *Id.* at 2-3.

The Court remains open for business.

Upon consideration of the foregoing,<sup>1</sup> it is

ORDERED that the Secretary's motion is granted in part and denied in part, as noted below. It is further

ORDERED that the time to file any pleading by the Secretary on or after October 17, 2013, in any matter now before the Court or any matter filed hereafter – except a Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit),<sup>2</sup> or the matters noted below or as

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<sup>1</sup> See U.S. VET. APP. R. 27(c) ("[T]he Court may act upon motions for procedural orders at any time without awaiting a response.").

<sup>2</sup> Any request to stay the time to file an appeal with the Federal Circuit should be filed with that Court.

otherwise ordered by the Court – is stayed for ten (10) days beginning October 17, 2013, and the time to file any such pleading at the end of the stay is extended by 10 days, beginning when the stay expires. It is further

ORDERED that the above-noted stays and extensions of time do not apply to the following matters:

(1) Any case for which the Secretary has already submitted his Rule 28 (b) brief; this includes the holding of oral arguments already scheduled or to be scheduled;

(2) Any motion for expedited proceedings. It is further

ORDERED that the Secretary shall promptly notify the Court when funding to support the operations of VA OGC Professional Staff Group VII is appropriated, in whole or in part. Such notification shall contain any motion for continued relief based on the lapse of funding to support the operations of VA OGC Professional Staff Group VII. It is further

ORDERED that the Secretary's request to stay proceedings is deemed a continuing request until such time as the Secretary informs the Court that funding is appropriated, and therefore the stay granted herein shall be reviewed by the Court, sua sponte, before its expiration, at which time the stay may be extended as is, or modified, to permit the Court to continue to perform its constitutional and statutory duty to decide cases.

DATED: October 4, 2013

BY THE COURT:



BRUCE E. KASOLD  
Chief Judge

Appendices

## Appendix A

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

<b>JOHN DOE, <i>et al.</i>,</b>	)	
	)	
v.	)	Vet. App. No. XX-XXXX
	)	
<b>ERIC K. SHINSEKI,</b>	)	
Secretary of Veterans Affairs	)	

**SECRETARY’S *EX PARTE* MOTION FOR AN ORDER STAYING ALL  
VA-RELATED FILING DEADLINES IN ALL CASES CURRENTLY  
PENDING BEFORE THE COURT DURING ANY LAPSE IN FUNDING  
FOR THE DEPARTMENT OF VETERANS AFFAIRS**

Pursuant to U.S. Vet. App. R. (Rule) 2 and 27, Appellee respectfully moves this Court for a stay of proceedings in all cases before the Court in which a Department of Veterans Affairs (Department or VA) filing deadline is currently pending, or where VA is permitted to file a pleading, beginning on Monday, October 7, 2013, through such time as funding for the Department is reinstated. The Secretary also respectfully moves this Court to suspend Rules 5(d), 25, 27(a)(5), 35(d), 36, and 41(b)(3).

As the Court is aware, upon expiration of the current funding authority and expenditure of all “carry-over” funding, no public funds will be available to pay the expenses and salaries of VA attorneys or support staff who are not otherwise funded or determined to be essential for the protection of life or property for the performance of their official duties. The attorneys and support staff in VA’s Office of the General Counsel, Veterans Court Litigation Group (*i.e.* Staff Group VII) are not separately funded, and are generally not considered to be personnel essential for the

protection of life or property. Thus, during any lapse of funding to the Department, those employees will not be deemed “excepted employees” and are statutorily prohibited from performing the functions essential to litigating cases pending before the Court on a voluntary basis. As such, the Secretary requests that the Court stay all proceedings currently pending which have a VA pleading or filing due on or after October 7, 2013, or which by operation of the Court’s rules, would have a VA filing deadline created during such time as the Department is without funding authority. This would include staying all cases in which the Court has issued a decision, and which, pursuant to Rules 36 and 41, are subject to the entry of Judgment or Mandate in the absence of a motion by one of the parties for reconsideration or a panel or en banc decision, or an appeal to the U.S. Court of Appeals for the Federal Circuit. The Secretary requests that any such stay remain in effect until such time as the Department’s funding is reinstated.

Because this motion impacts a vast majority of the cases currently before the Court and not already submitted for a decision, individualized consent pursuant to Rule 27(a)(5) is not possible. Moreover, given the nature of this motion, the Secretary requests that the Court, pursuant to Rule 2, suspend the prohibitions of Rule 5(d) regarding combined motions; the requirements under Rule 25 regarding service; Rule 27(a)(5)’s requirement to state the position of the opposing party relevant to the

motion; and the timelines for entry of Judgment and Mandate pursuant to Rules 35(d), 36, and 41(b)(3).

The Secretary notes that while delaying these Veterans' cases due to a lack of resources is undesirable, unfortunately, any lapse in the Department's funding, absent a specific order from the Court, would preclude the General Counsel, and specifically Staff Group VII, from performing official functions necessary to satisfy the Court's filing deadlines in the cases currently pending before the Court.

**WHEREFORE**, Appellee, Secretary of Veterans Affairs, respectfully moves the Court to suspend its rules to allow for this motion, and to, for the duration of any lapse in funding for the Department, beginning October 7, 2013, stay all VA-related filing deadlines that are pending, as well as any VA filing deadlines that may be created by operation of the Court's Rules during any lapse of funding for the Department.

Respectfully submitted,

**WILL A. GUNN**  
General Counsel

/s/ David L. Quinn

**DAVID L. QUINN**  
Acting Assistant General Counsel  
U.S. Department of Veterans Affairs  
Office of the General Counsel (027)  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
Telephone: (202) 632-6982

## Appendix B

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

<b>JOHN DOE, <i>et al.</i>,</b>	)	
	)	
v.	)	Vet. App. No. XX-XXXX
	)	
<b>ERIC K. SHINSEKI,</b>	)	
Secretary of Veterans Affairs	)	

**SECRETARY'S AMENDED *EX PARTE* MOTION FOR AN ORDER  
STAYING ALL VA-RELATED FILING DEADLINES IN ALL CASES  
CURRENTLY PENDING BEFORE THE COURT DURING ANY LAPSE IN  
FUNDING FOR THE DEPARTMENT OF VETERANS AFFAIRS' OFFICE  
OF GENERAL COUNSEL, STAFF GROUP VII**

Pursuant to U.S. Vet. App. R. (Rule) 2 and 27, Appellee respectfully moves this Court for a stay of proceedings in all cases before the Court in which a Department of Veterans Affairs (Department or VA) filing deadline is currently pending, or where VA is permitted to file a pleading, beginning on Thursday, October 17, 2013, through such time as the requisite funding for the Office of General Counsel (OGC) is appropriated. The Secretary also respectfully moves this Court to suspend Rules 5(d), 25, 27(a)(5), 35(d), 36, and 41(b)(3).

As the Court is aware, upon expiration of the current funding authority and expenditure of all "carry-over" funding, no public funds will be available to pay the expenses and salaries of certain VA attorneys or support staff who are not otherwise funded or determined to be essential for the protection of life or property. It is currently estimated that the carry-



over balance in the Department's General Administration Account, which funds the majority of OGC operations (including those of attorneys and support staff in OGC's Veterans Court Litigation Group, Staff Group VII), will be exhausted at the close of business on October 16, 2013. Personnel of OGC's Staff Group VII are generally not considered to be personnel essential for the protection of life or property. Thus, during any lapse of funding, those employees would generally not be deemed "excepted employees" and would be statutorily prohibited from performing the functions essential to litigating cases pending before the Court on a voluntary basis. For that reason, the Secretary requests that the Court stay all proceedings currently pending which have a VA pleading or filing due on or after October 17, 2013, or which by operation of the Court's rules would have a VA filing deadline created during such time as the OGC is without the requisite funding authority. This would include staying all cases in which the Court has issued a decision and which, pursuant to Rules 36 and 41, are subject to the entry of Judgment or Mandate in the absence of a motion by one of the parties for reconsideration or a panel or en banc decision, or an appeal to the U.S. Court of Appeals for the Federal Circuit. The Secretary requests that any such stay remain in effect until such time as the requisite funding is appropriated.

In the interest of candor, the undersigned notes that the current guidance by the Department indicates that should the Court deny this

motion, or otherwise require the Department to satisfy particular filing deadlines in cases pending before the Court, the Secretary will make every effort to ensure that sufficient OGC staff are available, notwithstanding any lapse of funding, to satisfy VA pleading requirements.

Because this motion impacts a vast majority of the cases currently before the Court and not already submitted for a decision, individualized consent pursuant to Rule 27(a)(5) is not possible. Moreover, given the nature of this motion, the Secretary requests that the Court, pursuant to Rule 2, suspend the prohibitions of Rule 5(d) regarding combined motions; the requirements under Rule 25 regarding service; Rule 27(a)(5)'s requirement to state the position of the opposing party relevant to the motion; and the timelines for entry of Judgment and Mandate pursuant to Rules 35(d), 36, and 41(b)(3).

The Secretary notes that while delaying these Veterans' cases due to a lack of resources is undesirable, unfortunately, any lapse in the requisite funding, absent a specific order from the Court, would preclude the General Counsel, and specifically Staff Group VII, from performing official functions necessary to satisfy the Court's filing deadlines in the cases currently pending before the Court.

**WHEREFORE**, Appellee, Secretary of Veterans Affairs, respectfully moves the Court to suspend its rules to allow for this motion, and, for the duration of any lapse in funding, to stay all proceedings currently pending

which have a VA pleading or filing due on or after October 17, 2013, or which by operation of the Court's rules would have a VA filing deadline created during such time as the OGC is without the requisite funding authority.

Respectfully submitted,

**WILL A. GUNN**  
General Counsel

/s/ David L. Quinn

**DAVID L. QUINN**  
Acting Assistant General Counsel  
U.S. Department of Veterans Affairs  
Office of the General Counsel (027)  
810 Vermont Avenue, N.W.  
Washington, D.C. 20420  
Telephone: (202) 632-6982