CSC OL 730-35

UNITED STATES CIVIL SERVICE COMMISSION

CSC OPERATIONS LETTER

Washington 25, D. C.
August 30, 1963
INA:HCB:vat

LETTER NO. 730-35

SUBJECT: Conducting Special Interviews

Recent central office reviews of reports of special interviews reveal a need for more specialized training of investigators in how to conduct such interviews. This letter discusses the main problem areas noted, suggests some solutions, and asks that any necessary training in special interview techniques be given. The subject should be emphasized in future refresher training conferences for investigators, but Supervising Investigators are expected in the meantime to provide more on-the-job training in this area as the need develops.

Affording an opportunity to comment on and explain matters developed in investigation is highly important to the individuals involved, to the rating activity of the Commission and the agency, the Commission's reputation for treating individuals fairly and impartially, and to the defense of the Commission's action in the courts if necessary. With this in mind, the following is intended to help investigators conduct better special interviews and to alert supervisory personnel to the need for training on this subject.

The disqualifications for employment on suitability grounds are set out in Section 2.106(a) of the Regulations. If the facts do not come within one of those disqualifications the Commission is without authority to take adverse action on suitability. Therefore, the questions or matters presented in a special interview should be related to the pertinent disqualification and preferably stated in the words of the disqualification. Before an interview is conducted the investigator should thoroughly review the file and give careful thought to the basic questions so they will embody all permissible essential facts and clearly state the possible disqualifications. Keep always in mind that an interview is not a perfunctory activity; it deserves the investigator's best effort.

Use of intoxicants is one of the problem areas observed. The following statement in varying forms has been noted in reports of special interview: "The Commission has received information that you use intoxicants more than you should." The Commission's Regulations do not specify the amounts of intoxicants that may be used and obviously the individual cannot set the standard. Better phrasing would be, "The Commission has received information that you use intoxicating beverages habitually to excess." This, at least, is a standard by which the individual may judge

INQUIRIES: Bureau of Personnel Investigations, DU 6-5121 or Code 129, Ext. 5121

CODE: 730, Suitability, Security and Conduct

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LETTER EXPIRES December 31, 1964

CSC Form 658 (Green)
NOVEMBER 1962

his use of intoxicants and one which the Commission has found to be disqualifying. With the question, as appropriate, the investigator should include any information he is permitted to disclose that would indicate to a reasonable person the use of intoxicants habitually to excess. This may include arrest records, court records, discharge for use of intoxicants (if use of the information is authorized), etc.

Another troublesome area relates to intentional false statements. The basic issue may have been presented thus: "In answer to the arrest question (identify) you denied that you had ever been arrested. The Commission has received information that you were arrested . . . ." This is followed by the authorized details concerning the arrest and the usual question providing opportunity to comment and explain. Often nothing further is added to his question. In asking for comments the investigator should add, "including your reason for your apparently intentional false statement in denying that you had ever been arrested." In this manner two possible disqualifications are presented instead of one. Without this addition the individual has not been confronted with the disqualification of intentional false statement.

The above illustration relates to arrests but it applies equally to discharges. It also applies when there is a partial disclosure of derogatory matters and concealment of others, in which case wording such as this can be used: ". . . including your reasons for your apparently intentional concealment of this portion of your arrest record."

Homosexuality is another special area that is causing concern. There have been many instances in which the matter is presented as "The Commission has information that you are a homosexual," or "The Commission has received information that you have engaged in homosexual acts." This has been done even when there is specific information in file of such nature that it can be used without violating a pledge of confidence. The disqualification may be immoral or criminal conduct. The first illustration presumes immoral conduct without actually alleging it; the second, while slightly better, does not indicate whether the acts occurred yesterday or twenty years ago. The first illustration is completely inadequate from a rating standpoint unless an admission is offered or volunteered. A question such as "The Commission has received information that you have recently and in the past engaged in homosexual acts," with such specifics as may be permissible, is preferred.

It is recognized that there may be a small number of cases assigned for interview in which the file reflects convincing allegations of homosexuality but there is a lack of concrete evidence of homosexual acts. In such cases the Investigator has no alternative but to proceed on a general statement of "The Commission has received information that you have engaged in homosexual acts."

Discharges from private employment also cause much difficulty in special interviews. Chapter IX of FPM Supplement (Internal) 736-71 contains clear instructions to the effect that even if the investigator has a release or permission to mention the employer's name, he should try to protect the employer from harrassment. Often the investigator can develop the information independently from the subject by first discussing the circumstances under which he left each employment. If this fails and the witness has granted permission (with or without a release) to present the derogatory information concerning a discharge to the individual, the investigator should present the specifics within the full limits of the granted permission. Cases have been observed in which, despite the witness' permission, the subject has not been presented with the given reason for discharge (or resignation) even when he has claimed a totally different or well watered-down reason during the special interview.

Sometimes at a special interview a person will deny or make only partial disclosure of certain matters, such as arrests or discharges or immoral acts, when the investigative file contains admissions (often in prior applications, interrogatories or special interviews) of these matters. Too often the investigator fails to then present this information to the person and obtain an explanation of the apparent discrepancies.

Permission from a former employer to confront with a discharge and the reason should always be shown in the former employer's recorded statement. This will avoid repetition of recent experiences involving cases sent to the field to obtain the employer's permission and then returned with the investigator's statement that he had previously obtained permission but failed to dictate it into the report.

When specific instructions on how to proceed with the special interview are given by the adjudicating office, these instructions should be carefully followed by the investigator. Failure of the investigator to follow such instructions may completely nullify the value of the interview.

Appropriate parts of this letter will be included in a future revision of FPM Supplement (Internal) 736-71. Meanwhile, this letter should be filed with Chapter IX, Special Interviews, of that supplement.

Kimbell Johnson, Director
Bureau of Personnel Investigations

August 13, 1965

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L.V. Maloy
General Counsel

GC:LVM:dn

THE COMMISSION
THRU: Mr. Groark
Mr. Johnson
Mr. Stahl
Mr. Masterson
Mr. Oganovic

The Commission has been notified that the Solicitor General has determined that a petition for a writ of certiorari will not be filed with the Supreme Court in the Scott case. No order has been filed with the Commission to comply with the decision of the United States Court of Appeals, but time is running out and we can expect such an order any day now. Kimbell Johnson is bolstering the investigation of Scott and we hope to initiate a new proceeding as soon as he is restored to the register.

After analysis of the Scott decision, I have come to the following conclusions:

Without question this decision will give us trouble because the decision of the court consists of three separate opinions -- two of which constitute the decision and one dissent. The two opinions constituting the decision are not consistent. In some areas of discussion they disagree. For instance, Judge McGowan concurring with Judge Bazelon states:

> "I join in the result reached by Judge Bazelon solely for what seems to me to be the inadequacies, in terms of procedural fairness, of the notice given the appellant of the specific elements constituting the 'immoral conduct' relied upon disqualifying him for all federal employment."

Judge McGowan went on to say: "* * * the broad letter of 5 U.S.C. 631 is far from inconsistent with a Congressional purpose that 'each candidate' who 'seeks to enter' federal employment shall have a fair opportunity to assert his 'fitness' both affirmatively and by way of opportunity to know of, and defend against, asserted personal shortcomings which are officially characterized as 'immoral conduct' within the meaning of regulations issued in implementation of the statute. Appellant had the one in the form of competitive examinations. But, in the other respect, the legislative purpose does not seem to me to have been adequately realized."

It is clear that Judge McGowan refrained from joining with Judge Bazelon's

views on the constitutional question. The common thread of the two majority opinions is to the effect the notice (the special interview) was inadequate in procedural fairness in not informing the appellant of the specific elements constituting the "immoral conduct" relied upon to disqualify Scott.

To cure this defect in our processing of applicant and appointee cases Mr. Johnson and the Division of Adjudication have been in constant touch with our office and together we are working out a way to give the applicant or appointee more detailed information from the investigative reports. This is somewhat like walking a tightrope, hemmed in on one side by "confidential information" in the reports and the desire to be more specific in revealing information without breaking the pledge of confidence assured the informant. Nonetheless, we are making headway and will continue our efforts to find a solution satisfactory to the court's demand for what it terms "procedural fairness."

This office believes that the opinion of Judge Burger expresses the correct legal posture of the Government's rights and obligation in adjudging fitness of applicants and appointees who seek employment with the Government. Of course, the Scott decision came as a surprise and shocker.

This office held conferences with Mr. Johnson, Mr. Groark, Mr. Masterson, Mr. Stahl and other interested parties; the pros and cons of the Scott decision were discussed. We discussed its impact upon our process for determining suitability, the difficulties it offered and ways to offset its effect. We considered the wisdom of seeking a hearing before the full Court of Appeals for the District of Columbia, also the possibilities if we requested certiorari in the Supreme Court.

Later Mr. Pellerzi and I met with Mr. Rosenthal and Mr. Saltzman, attorneys in the Appeals Division of the Department of Justice. Both attorneys worked on the preparation of the case before the Court of Appeals and are familiar with the attitudes of the various judges of the Court of Appeals. It was their judgment that a hearing before the full court would result in affirmation of the decision, of the panel and might add language more damaging than the decision is now. They advised us to leave the decision stand in view of the diversities in the individual opinion and it was their consensus of opinion that the decision affected only the procedural question of sufficiency of details in the notice.

Everyone we have conferred with agreed that to request certiorari to the Supreme Court would have been futile because of the attitude expressed by the Solicitor General's Office when we were considering certiorari in the Dew case.

Our office believes that we can overcome the Scott decision by using interrogatories and reciting therein all the information upon which the decision of "immoral conduct" is made keeping in mind of course the limitations imposed by the pledge of confidence under which the information was received. To this end we are collaborating with the Board of Appeals and Review and the Division of Adjudication to be sure that the interrogatories are as detailed as possible.

I see no necessity to revise our regulations. I do see a necessity to concentrate the review of homosexual cases in the Washington Office of the Bureau of Personnel Investigations so a review of information in the investigative file and preparation of the interrogatory can be made in the Division of Adjudication because the personnel of this Division has far more expertise than employees in the field. Moreover, if the preparation of the interrogatory is prepared by the Division our office can be of assistance and readily available.

NOTED:

Nicholas J. Oganovic
Executive Director

NOTED:

Commissioner Hampton

Commissioner Andolsek

Chairman Macy

Enclosures:
Scott case
Letter from Dept. of Justice

-30-

L. V. Meloy

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...ty case of Lonnie Cave Morris

AUG 19 1965

...V. Meloy
General Counsel

GC:TJD:ycd

OGC Index Digest Office

Kimbell Johnson, Director
Bureau of Personnel Investigations

We have got to get this action out of the Bruce Scott category, and I agree generally with your approach. However, I would send the interrogatory to Morris's attorney with an appropriate cover letter (see attached sample letter), and furnish Morris a copy. In addition, I suggest that the proposed interrogatory contain more detail and less conclusion, e.g., as follows:

> The Commission has information that in or about December, 1954, one Paul Richard Stoddard was interviewed in Washington, D. C., by representatives of another government agency, and the report submitted to the Commission reads in pertinent part as follows:
>
> "During the course of the above-mentioned investigation a Bureau Agent interviewed Stoddard concerning the identity of various individuals that he had had these alleged homosexual contacts with. Stoddard claimed that he was always the passive partner in these acts. He stated his initial contact in Washington, D. C., was on April 4, 1954, with an individual known to him as Lonnie Morris. Stoddard stated that through Morris he met many other homosexuals.
>
> "According to Stoddard the following are persons with whom he had homosexual contacts:
>
> Lon C. Morris, 2109 F Street, N. W., Washington, D. C., Apartment 309.
>
> Information was secured to the effect that the name of Mrs. Edith Fergusen appeared on the door of the above-mentioned apartment. It was also determined that one Lonnie C. Morris was listed in the United States Department of Defense Directory as being an

employee of the Armor, Bomb, Projectile, Rocket, Guided Missile and Ballistics Branch, Research and Development Division, Bureau of Ordnance, Department of the Navy. Stoddard stated that the Morris referred to by him had stated that he, Morris, was a Government employee. It is not known by this Bureau whether the Lonnie C. Morris mentioned above is identical with the Lon C. Morris mentioned by Stoddard."

"Louie" Barber (possibly Donald Barber)

"According to Stoddard, this person, known to him as Louie, visited the apartment of Lonnie Morris the morning of April 11, 1954, at which time the two had homosexual contact. Stoddard stated that he was never able to ascertain any further information concerning Barber except that he is employed at the Bureau of Ships, U. S. Navy Department."

"On October 21, 1954, Lon C. Morris told Stoddard that a man from the Metropolitan Police Department, Washington, D. C., had informed him (Morris) that he was under investigation as a result of a complaint made by several teenage boys. According to Morris's story to Stoddard, these boys demanded money from Morris after having homosexual relations with him. Morris advised Stoddard that he refused to give them any money and as a result he was told (identity of person not known) that these boys had turned this information over to the Metropolitan Police. No further information is available in the records of this Bureau concerning this statement by Stoddard."

The Commission has information that on August 16, 1955, you were interviewed in Washington, D. C., by agents of the Office of Naval Intelligence, Department of the Navy, and that their report of this interview states in pertinent part as follows:

"1. Investigation by the Office of Naval Intelligence (ONI) of Lonnie Cave MORRIS was predicated on the request of the Chief, Bureau of Naval Ordnance, Washington, D. C. on 22 April 1955 relative to MORRIS's participation in homosexual activity.

"2. MORRIS was interviewed by the ONI agents at the Intelligence Office, Potomac River Naval Command, Washington, D. C. on 16 August 1955. MORRIS admitted that he had engaged in homosexual activity and had engaged in such to the extent of simultaneous acts of fellatio, the last act occurring on 14 August 1955, with another,

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unidentified, male, whom he met while walking on Connecticut Avenue. According to MORRIS, they went to the individual's apartment and engaged in simultaneous acts of fellatio. MORRIS continued by stating that he had engaged in homosexual activity on an average of once every two or three weeks. He stated that his first homosexual act took place in Miami, Florida in 1950, while he was in the Navy. On that occasion he had been the passive participant with an unknown civilian in a cheap hotel room.

"3. Concerning STODDARD, MORRIS claimed that he has known him for a little less than two years and he couldn't recall how they met. He stated that he had engaged in approximately four acts of fellatio with STODDARD as a passive partner during this period but it had been a matter of months since their last act.

"4. According to MORRIS, he did not know STODDARD or any of the individuals named by STODDARD as homosexuals whom STODDARD allegedly met through MORRIS with the possible exception of "Louie" BARBER. In this connection, MORRIS stated that he neither drinks nor smokes, does not frequent bars and rarely, if ever, knows the names of individuals with whom he has homosexual contact. He explained further that such individuals may be known by a nickname or by an assumed one. MORRIS claims that he keeps no record as to the identity of individuals with whom he has had contact, inasmuch as he has felt that someday his homosexual activity might be brought to light.

"5. Concerning "Louie" BARBER, MORRIS stated that he has known one Lewis BARBER, an employee of BUSHIPS, approximately four and a half years; that he met BARBER at the home of BARBER's parents at Key West, Florida, on the occasion of an invitation to servicemen to come to dinner there; that BARBER was much younger and had been a high school student when they met; that he had not influenced BARBER to come to Washington but that BARBER had worked for the Navy Department in Florida and insofar as MORRIS knew had received a promotion to come to Washington; that their friendship had continued here; that he had definitely never engaged in homosexual activity with BARBER (as alleged by STODDARD), in view of the fact that BARBER is only twenty years old; that he does, however, believe that BARBER possesses homosexual tendencies but was unable to explain why he held this belief. MORRIS stated that he definitely didn't know anyone by the name of STODDARD, John L. KING, Howard A. GEORGE, Ray E. JONES or "Nick" LYONS but did not deny that he may have had activities with these individuals and possibly had not known or

couldn't recall their names. KING, GEORGE, JONES and LYONS were all listed in STODDARD's diary as homosexual contacts. MORRIS, who was willing to submit to a polygraph examination concerning these individuals, declined to furnish a statement relative to his admissions, inasmuch as he didn't feel 'that it will help me in any way.'"

To assist the Commission in completing action on your case, it is requested that you answer the following questions:

1. Do you admit or deny having known the Paul Richard Stoddard referred to above?

2. If you know this Paul Richard Stoddard, do you admit or deny that you had homosexual relations with him to the extent set forth above?

3. Do you admit or deny that, in 1954, you knew the individual described in the Stoddard interview report as "'Louie' Barber (possibly Donald Barber)"?

4. If you did know the individual described in question 3 in 1954, do you admit or deny that you had homosexual relations with him in April, 1954?

5. If you did know the individual described in question 3 in 1954, do you admit or deny that he is one and the same person with whom you now share a common residence in Miami, Florida?

6. Do you admit or deny that you were interviewed by representatives of the Office of Naval Intelligence, in Washington, D. C., on or about August 16, 1955, concerning your alleged homosexual activities?

7. If you admit to being interviewed as described in question 6, do you admit or deny that the description which the report indicates you gave as to nature and extent of your homosexual activities up to that date is substantially correct?

8. Do you admit or deny that the "Lewis Barber" referred to in paragraph 5 of the Office of Naval Intelligence report set out above is one and the same person with whom you now share a common residence in Miami, Florida?

9. Do you admit or deny that you resigned from your employment with the Navy Department in Washington, D. C., on August 19, 1955, "to accept position in private industry"?

10. Did you resign on August 19, 1955, because of the interview conducted by the Office of Naval Intelligence on August 16, 1955?

11. Have you had any employment with the Federal government from the date of your resignation on August 19, 1955, until you received your appointment, effective October 25, 1964, with the Veterans Administration, Coral Gables, Florida? If so, please give details of this employment.

In addition to answering the questions outlined above, please feel free to make such other comments or explanation of these matters as you deem necessary and appropriate.

We are not concerned about whether these exact questions are asked in this form, but we do believe it essential that the subject not only be confronted with the derogatory information contained in these reports, but that he be asked specifically to comment on this information on a detailed basis.

Attachment

GC:TJDalton:ycd 8-19-65

Mondello - Re SCOTT CASE 3

Read

SCOTT v. MACY, decided September 11, 1968

Sept. 11, 1968

GC:LEG 3-2-2
JJM:dn

Anthony L. Mondello
General Counsel

CHAIRMAN MACY
COMMISSIONER ANDOLSEK
COMMISSIONER HAMPTON

"'Strike two' the umpire said."

By now the facts in this case are so well known that they need not be repeated. In our second decision on the question of Mr. Scott's suitability we thought that we were telling him that there was a paragraph in the regulations (5 CFR 731.201(b)) that required disqualification for immoral conduct; that our investigation had raised questions about possible homosexuality on his part; that his refusal to answer our inquiries made it impossible to resolve these questions; and, hence, we could not decide that he met the standard of fitness. The court was told that this meant that we were disqualifying him under paragraph (d) of the same section of the regulations which states that failure of an applicant to answer questions propounded by a Commission representative is cause for his disqualification. The court in reversing the judgment of the District Court in favor of the Government said that the letter of decision left them unable to say with the requisite assurance that this was the exclusive foundation of appellant's disqualification.

> "It seems to us just as likely, if not more so, that the Bureau of Investigations determined that its enlarged investigation report warranted a renewal of the earlier finding that appellant should be disqualified 'because of immoral conduct.' How else can there be a meaningful explanation of the inclusion of subparagraph (b) and the exclusion of subparagraph (d) in a formal adjudication even though we are now told by counsel after the fact that only the omitted ground was the motivation of the decision?" (Sl. op. p. 8)

The court also was unhappy with the Commission's letter to the Mattachine Society as a standard in view of the fact that "the statement has its full share of seeming anomalies and contradictions." In the process, the court compares the Commission's policy with respect to good risk offenders and the stated policy in the Mattachine Society letter relative to homosexuality as criminal conduct. The court ends the discussion by

characterizing the letter as saying that "qualification for Federal employment thus appears to turn not upon whether one is a law violator but whether one gets caught."

Judge Burger vigorously dissents on the ground that the majority's action "evades the central -- indeed the only -- issues in this case." The Commission's attention is invited to footnote 6 on page 6 of the slip opinion in which the court refers to the fact that under present practice there is really a double review of the same administrative record by the District Court and the Court of Appeals. It suggests that this matter should be brought to the attention of Congress. A similar suggestion was made in the case of Connelly v. Nitze, decided by the same court on August 15, 1968. In response to Mr. Stahl's request for legislative proposals and on the basis of the Connelly case this office recommended that legislation be sought in the next Congress that would authorize direct judicial review of the Commission's determinations in employee cases, particularly in adverse action cases.

Immoral Conduct - Task Force
Mondello / Suitability
Kimbell Johnson

COMMISSION POLICY ON IMMORAL CONDUCT

Task Force Minutes---November 12, 1968

(10/31/68 - PGC Index Digest Office)

Attending: Kimbell Johnson, Chairman
Anthony L. Mondello
Irving Kator
William P. Berzak
John W. Steele
Mrs. Tina Lower
Terry J. Dalton, Jr.
Lester W. Krute, Secretary

Introductory Comments by Kimbell Johnson

The Civil Service Act requires certification based on merit and fitness. Merit can be tested by examination or through evaluation of education, experience and skill. Fitness is a highly personal area involving self esteem. Rejection on grounds of fitness stigmatizes the individual. A person declared unfit is inclined to fight the decision. There is a special need for fairness, objectivity and impartiality.

The task imposes a tremendous burden on those who are charged with writing the standards. No matter how they are expressed, there is no substitute for judgment, neutrality and common sense on the part of those who must make the decisions.

If we are to promote confidence of the public in its civil servants, we must not go back to the McCarthy era when public confidence in the Federal work force was at a low point and people believed the Government was staffed with crooks, communists and perverts.

We must take into account that suitability practices must not serve to be a stumbling block to social progress. We are in an era of increased concern for the rights and privacy of individuals and accordingly must operate in an increasingly sensitive arena of court, congressional and public scrutiny.

As illustrated by the case summaries furnished with my memorandum of October 21, 1968, the issues in morals cases rarely are pure black or white. Characteristically there are complex gray areas.

Although we have written a great deal of sophistication into our standards we have not exported these standards to the agencies. The agencies have only the regulations which list the disqualifications, plus the broad treatment of suitability and security given in FPM Chapters 731 and 732. They do not have the benefit of the detailed guidelines given for internal use in the Suitability Rating Handbook, FPM Supplement 731-71.

The regulations on suitability disqualifications do not say you must disqualify--they say you may.

We have tried to write into our internal guides relative to disqualification for immoral conduct the elements of notoriety, scandal or public censure. To avoid the risk of decisions reflecting an individual rater's bias, we provide that all morals cases involving possible removal shall be evaluated by a responsible three-member panel at GS-13 and above.

The incoming administration most likely will wish to take a look at the entire gamut of fitness determinations. We are faced with a situation in which the courts have made it virtually impossible to remove on reasonable doubt as to loyalty. Very few have been removed under security procedures in the past ten years. We have no criteria in the present program to remove people involved in the New Left movement who preach and practice anarchy. For example, the Students for a Democratic Society is not on the Attorney General's list. (The list has not been amended since 1958 in view of the complexity involved in citing an organization and the ease with which an organization can thwart the decision by changing its name or composition.)

It was originally felt that the courts in requiring due process would do so only for appointees. But the Scott case, involving an alleged homosexual, was on an applicant.

General Discussion

Mr. Mondello's memorandum of September 27, 1968, which formed the basis for creation of the task force, does focus on a rather narrow problem--one aspect of morality. In the Commission we do not remove people for having had illegitimate children unless accompanied by notoriety, scandal, censure. The problem is not so much the guidelines being applied within the Commission but in the fact that the guides have not been communicated to the agencies. If there is a need for guidelines in the morals area, is there also a need in other areas--dishonesty, criminal conduct, falsification, etc.?

The Commission recognizes the right of agencies to make refined judgments on suitability related to the specific requirements of particular positions. Yet we have not published guidelines and our internal rating handbook cannot be released without top level approval. When the handbook was developed there was concern that if it were issued to the agencies it might be subjected to critical review and controversy in the press to the detriment of the program.

With each succeeding change in administration the program had been reviewed to determine whether changes should be made to put the imprint of the incoming administration on it. In each instance it was determined that the program was operating fairly smoothly, was not a problem in the public eye, and the reliability of Federal employees had not been raised as a campaign issue since the early 1950's. The conclusion resulting from each review

was to leave the program without major change and to rely mainly on civil service standards and procedures in taking adverse actions--notwithstanding the fact that the program was designed first as a loyalty program, then was shifted to a security emphasis in 1953 under E. O. 10450, and has continued under that authority since then. (The civil service disqualifications have been virtually unchanged over the past 30 years.)

One consequence of our not publicizing our guidelines has been the misconceptions which arise in the public mind--e.g. returning Peace Corps Volunteers who believed the fact of bearing an illegitimate child would henceforth preclude their being employed by the Government. Issuance of the guides to an agency on a confidential basis could permit the agency to inform the person involved but this would not reach someone in private industry caught in similar circumstances.

There is a wide variation in agency attitudes and actions in suitability cases. Decisions are influenced by size of the community, degree of public knowledge and notoriety, etc.

The shadings of meaning of such words as notorious, scandalous, and public censure were discussed. Use of the word infamous as part of the standard was questioned.

The reference in E. O. 11375 to discrimination on account of sex is not considered as protecting homosexuals. Our suitability standards relate to sexual misbehavior rather than gender (male/female).

It is frustrating to suitability rating examiners to review a case in which all the facts point to unfitness and yet the information developed does not under existing restrictions permit adverse action. One method has been to resort to the disqualification on intentional false statements.

The task force will need to consider whether to recommend issuing comprehensive suitability guides to the agencies. If the language on morals is to be made more precise, the language on all disqualifications also should be made more precise. If guidelines can be issued, they should prove helpful. They will never achieve full uniformity, however.

Some doubt was expressed as to whether the Commission would be willing to issue guidelines to the agencies. On the other hand there is a feeling that it would be necessary to collaborate with the agencies in the early days of the new administration and there may now be less apprehension about making our standards and guidelines public. There is a strong need for some hard-rock means of dealing with extremes of the New Left.

A question was raised as to whether the impasse could be broken through the medium of training--through training the agency people who are concerned with the selection and discharge processes. Past considerations about

agency takeover of rating had touched on this, taking into account the costs of preparing instructions, training agency employees, etc.

Experience indicates there are wide differences between agencies in the application and interpretation of guidelines. A question was raised as to whether the investigators could inform witnesses of the fitness qualifications the person must meet. Actually, the usual approach is for the investigator to describe the qualifications for the position if appropriate, or its sensitivity if that is the main purpose of the investigation. The investigator does not get into specific questions bearing on possible unsuitability until the witness has opened the door.

The present disqualifications are stated in negative terms. For task force consideration is the question of whether there should be positive standards--such as reflecting credit on the government--or along the lines of the Veterans Preference Act which refers to promoting efficiency of the service.

One possible approach would be to have about six of the major agencies sit down and discuss the matter of guidelines. This is what was done successfully in the good risk offender study. It also was done on the standards resulting from the recent interagency study of the government's full field investigations programs, as announced in FPM Letter 736-4. While the end product represented a compromise of views, there was a consensus among the task force that it was a net gain. The view was expressed that a further interagency effort after January 20 might as a minimum produce the effect of a mandate that the Commission's suitability standards are ok.

The task force members were asked at the conclusion of the meeting to think about what should be done, what guidelines should be issued, and how broad they should be. The next meeting will be after the Executive Staff meeting, about 9:30 on Tuesday, November 19, in Room 3624.

COUNSEL MONDELLO -

Suitability

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PROPOSED LETTER FOR YOUR SIGNATURE TO HEADS OF DEPARTMENTS AND AGENCIES RE: FULL FIELD INVESTIGATION

Feb. 11, 1969

Anthony L. Mondello
General Counsel

GC:LEG 1
ALM:dn

CHAIRMAN HAMPTON

OGC Index Digest Office

From the legal standpoint there is nothing wrong with the Commission or another agency, upon request, making its investigative reports (or information from them pertaining to an applicant) available to the requesting agency. The publication proposed for your signature, however, raises problems of great sensitivity and wide public interest which I believe should cause you concern. No matter how carefully the issue is disguised, the proposed letter raises the specter that Federal officials make judgments, purportedly concerning the qualifications of a prospective appointee, on the basis of information concerning either (1) security or (2) the forms of suitability which involve judgments concerning morality. While most of the proposed letter has to do with capacity to do the job, suitability is involved explicitly (last paragraph, page 2), and in the vaguer terms of desirable "personal characteristics" (bottom of page 1) or "personal attributes" (lines 8 and 9, page 3). Suitability and security are also linked as components in a "composite judgment concerning the candidate's qualifications" in the first sentence of the first paragraph at page 3.

We need not stress to you the sensitivity of the area in which this letter would operate. We assume you know of our recent confirmation to Health, Education, and Welfare, of the Secretary's right to conduct central agency checks and investigations of prospective consultants on advisory committees; the ACLU and one of Judge Bazelon's assistants having objected to any form of screening for persons who would not become full-time Government employees. But their sensitivity and suspicion embraces as well our use of investigative material concerning full-time Government employees. The basic argument of these and other sources of "liberal" thought is that our concern in non-sensitive positions should be only with an applicant's capacity to do the job, and not with (1) his bare membership in organizations like the Communist Party or Students for a Democratic Society, or (2) his propensity for homosexuality or other kinds of conduct frowned upon by large or majority segments of society. Even with respect to sensitive positions they would have us interpret very narrowly the kinds of information which indicate danger to

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national security. They loathe the mere existence in our files of the kind of unevaluated personal data assembled by our investigators in their reports, and they worry about our use of such data. In the bluntest form, the issue is -- should the Civil Service Commission furnish its investigation reports which are made primarily for determining fitness or employee security, to personnel people considering an applicant's general qualifications? Can those personnel people properly evaluate those files as our trained rating specialists do, or will we be harming applicants unnecessarily?

We remind you that you are writing to the Attorney General seeking full discussion of matters such as these precisely because our assertions of defenses in cases like Scott v. Macy (homosexuality) -- Mandel v. Civil Service Commission (relatively discreet "sleeping around" discovered by full field investigation) and the loss of the Robel case (member of Communist Party not barred from working in defense plant) have pointed the need for reexamination.

We assume that if you sign and issue the proposed letter, its source and content would be widely known, and we believe it would be characterized as an invitation to personnel directors and others to snoop into the private lives of every prospective appointee from either the private sector or the Government's rolls. (See first and last paragraphs of the proposed letter.) It would also raise once again, and without the limiting context of the facts of a specific personnel case, all of the hard problems we plan to discuss with Justice and other agencies.

We suggest --

(1) that you issue no statement until you have had the benefit of further staff discussion followed by interagency discussion, or

(2) if you issue any statement it be a Bulletin of the established issuance system to which you can then, informally, point for Cabinet officers and agency heads if you think it desirable.

Attachment

Mondello - re: Hollander 3
Homosexual File

5H30

mailed
7/16/69

GC:LEG 3-2-2
McC:dn

Honorable William D. Ruckelshaus
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Ruckelshaus:

Attention: Morton Hollander, Esq.

Re: Norton v. Macy, et al. D. C. Cir.
July 1, 1969

For the reasons set forth herein, we respectfully urge that the Government seek review of the Court of Appeals decision in this case, either by petition for rehearing en banc or by petition for a Writ of Certiorari.

The appellant was dismissed from employment in the National Aeronautics and Space Administration (NASA) for off-duty misconduct and for possessing undesirable "personality traits".

It is our position that the court misapplied the standard of judicial review it purported to follow and erred in holding that appellant's dismissal was arbitrary.

At the time of his removal, appellant, aged 44, had been employed by NASA for four years and held a responsible position as a Budget Analyst, grade GS-14, under the Director, Office of Space Sciences and Applications, Program Review and Resources Management Division, NASA, at Washington, D.C. He has had over sixteen years of Federal service, almost six years of which was military service in the Air Force.

The reasons for appellant's removal are discussed in the Norton opinion. The majority noted that the evidence was sufficient to sustain the charge that the appellant had made a homosexual advance to one, Procter, near Lafayette Square in the early morning of October 22, 1963, and that, by appellant's own admissions, he occasionally blacked out while drinking and during two such episodes may have engaged in homosexual activity. Apart from the incident at Lafayette Park, appellant said he suspected he might have engaged in homosexual activity

on three occasions since his graduation from college. (Sl.Op. n.27)

The court correctly invoked the "rational basis" or reasonableness standard as the judicial guide for reviewing the validity of the appellant's dismissal. However, we believe the court misapplied that traditional standard in holding that the agency action was arbitrary. The error was twofold, in our opinion.

Departing from precedent which, under the rational basis test, accords deference to the judgment of executive agencies in personnel matters[1] and requires the court to sustain agency action unless there is no perceivable justification for the personnel action,[2] the court states, in effect, that the relationship between the employee's dismissal and increased efficiency of the government service must be expressed in the agency's decision. Heretofore, the failure of an executive agency in its decision to describe the specific impact of an employee's misconduct upon the efficiency of the service has not been held to be a legal defect. Meehan v. Macy, 392 F.2d 822 at 830-831 (D.C. Cir. 1968), order of remand reinstated on rehearing en banc, May 12, 1969.[3] Rather, the courts will examine the grounds for discharge and sustain the action if on the total record a rational basis for the action can be discerned. Unless the removal of a civil servant is "patently arbitrary" or otherwise unlawful the decision of the employing agency should not be disturbed.

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1) McPherson v. Grounouski, 337 F.2d 31 (2d Cir. 1964); Seabech v. Cullen, 338 F.2d 663 (9th Cir. 1964), cert. denied, 380 U.S. 972 (1965); Harpett v. Summerfield, 243 F.2d 29 (D.C.Cir.), cert. denied 353 U.S. 970 (1957); Bell v. Greark, 371 F.2d 202 (7th Cir. 1966); Fesa v. Ruegg, 379 F.2d 216 218 (6th Cir. 1967); Jenkins v. Macy, 357 F.2d 62 (8th Cir. 1966); Chirisco v. United States, 339 F.2d 588 (5th Cir. 1964); Studemeyer v. Macy, 321 F.2d 386, 387 (D.C. Cir.), cert. denied, 382 U.S. 855 (1965).

2) The "rational basis" test, applied in this and other Circuits. Eustace v. Dey, 114 U.S. App. D.C. 242, 314 F.2d 247 (1962); Harpett v. Summerfield, 100 U.S. App. D.C. 85, 243 F.2d 29 (1957), certiorari denied, 353 U.S. 970; Baum v. Zuckert, 342 F.2d 145 (C.A. 6, 1963).

3) Also, Blackson v. Lee, 205 F.2d 13 (D.C. Cir. 1953); Begendorf v. United States, 340 F.2d 362 (Ct.Cl. 1965); DeBusk v. United States, 132 Ct.Cl. 790 (1955), cert. denied 350 U.S. 988 (1956).

Even in Dew v. Halaby, 317 F.2d 582 (1963), cert. granted, 376 U.S. 904, cert. dismissed by agreement, 379 U.S. 951 (1964), where the court was troubled because the employee's discharge was based on pre-employment conduct that was remote in time and there was evidence of rehabilitation, the court, prompted by the suggestion in the Government's brief that such acts "may have, and can be determined to have, an adverse impact upon the efficiency of the service," discovered a "rational basis" for the agency's action, though the administrative decisions did not spell out precisely what harmful effects the appellant's retention might have had upon the efficiency of the service.

Searching the administrative record in Norton for the required identification of the relationship between the grounds for removal and the appellant's job, the court finds that the removing officer believed that the continued employment of the appellant might embarrass the agency "if an incident like this occurred again * * *." (51.Op. p.10) The same observation would be equally valid if the misconduct of an employee were murder or rape or armed robbery. Yet the majority here holds that the legality of the dismissal must be judged solely on the "embarrassment" ground. In this regard, we think the court improperly excluded from its consideration other relevant factors that might have been taken into account as justification for appellant's discharge.

The majority opinion ignores the realities of the civil service by virtually overriding the long-standing legislative and executive policy that "good character" is as much a qualification for public employment as the skill and competence that are needed in order to perform the duties of a particular position.

The efficiency of the service encompasses much more than the objective of satisfactory performance of particular tasks by individual employees. Indeed, as early as 1871 Congress made it clear that the fitness of applicants for Federal employment is to be judged on the basis of the "character" of the applicants, as well as upon their ability to perform the tasks assigned. See 5 U.S.C. 3301. The 1871 enactment set a new standard for Federal employment, which was designed to promote the efficiency of the civil service system which had permitted the appointment of persons who were incompetent and of others who were "immoral and unscrupulous." A recent law review note discusses the condition of the civil service which prompted that enactment. 82 Harv.L.Rev. 1738 at 1740 (1969). Contemporaneous expressions of the President and of the author of the 1871 legislation show that "a prime concern of the legislation [Act of Mar. 3, 1871, ch. 114, §9, 16 Stat. 514] was correction of the disrepute into which the Service had fallen."

It is evident, therefore, that Congress regarded "efficiency of the civil service" as involving more than job efficiency in a particular assignment. Hence, the character of the individual was one of the factors to be considered in selecting applicants for appointment to the civil service, so that "immoral and unscrupulous men who lowered the public's respect for the Service" might be excluded. 28 Harv.L.Rev. at 1740. Subsequent legislation to protect employees against arbitrary removals adopted substantially the same language, "efficiency of the service". It appeared in section 6 of the Act of August 24, 1912 (37 Stat. 555; see 5 U.S.C. 7501) and in section 14 of the Veterans' Preference Act of 1944 (58 Stat. 390; see 5 U.S.C. 7512). In the absence of a contrary indication it is valid to presume that Congress assigned the same meaning to the phrase in each instance.

Undoubtedly, in the broad view those factors that raise the prestige of the public service tend to promote the efficiency of the service. Public confidence in the integrity, competency and impartiality of the civil service dispels the kind of distrust and criticism that diverts attention from the merits of government programs and undermines public support essential for their effective implementation. There would be a gradual deterioration of the civil service if it were commonly known that persons who repeatedly engaged in serious misconduct offensive to community standards were appointed or retained in Federal agencies. Government employment would be less attractive as a career and the quality of applicants would deteriorate.

The legitimate interests of the executive branch are not fully recognized if, as the reasoning of the majority in Norton suggests, a variable standard of suitability must be applied according to the particular assignment of each employee and the degree to which the lowest standard of suitability can be tolerated with respect to each set of duties. A practising homosexual, for example, would be suitable, under the majority view, for clerical work in the Bureau of Prisons unless his habits were notorious. But, if later in his career he applied for the position of Correctional Officer in a Federal prison, it would seem proper and lawful to decide that he is unsuitable for such work. The logic of the majority opinion might also require the appointment of an individual who has engaged in repeated acts of theft if the position does not involve the handling of money and no notoriety has resulted from his offenses. Thus, it appears the court's view would require Federal agencies, employing nearly three million persons, to examine the relationship between an employee's misconduct and the particular duties assigned to him each time he is considered for a position change. To administer a personnel system in that way would be an oppressive burden. A basic minimum standard of suitability is essential to the effective functioning of a world-wide personnel system.

We suggest that the broader interpretation of the "efficiency of the service" should prevail. Such is consistent with this court's reading of the former Veterans' Preference Act which provides that veterans shall not be removed except for such cause as will promote the efficiency of the service -- the controlling standard in the Norton case. See Kutcher v. Gray, 199 F.2d 783 (D.C. Cir. 1952), in which the court stated:

> "But §14 [of the former Veterans' Preference Act] has reference to efficiency of the public service as a whole, rather than efficiency of performance by a single employee." At 786.

We take exception also to the court's suggestion (Slip Op. p.5; note 27 at p. 11; and p. 13) that Norton's conduct was private and thus within the constitutional provisions which shelter the area of privacy. Soliciting a stranger on the public way to engage in homosexual acts cannot be equated with the privacy of the conjugal bed. See Griswold v. Connecticut, 381 U.S. 479 (1965). If this characterization of the appellant's conduct is valid in law, then the same can be said of a homosexual solicitation of a fellow employee on the job which even this court suggests would be disqualifying.

We strongly urge your careful consideration of the foregoing. If the court had based its decision on the ground that adequate proof of homosexual activity was lacking or that the evidence of the appellant's conduct and occasional blackouts was illegally obtained, we believe the impact of the case would be limited. What is particularly disturbing in the majority opinion is (1) the principle that serious, off-duty misconduct must be shown to be job related in order to justify disciplinary action and (2) the departure from the doctrine of judicial restraint in reviewing actions which involve the internal operations of executive agencies.

If we can be of further assistance, please advise us.

Sincerely yours,

Anthony L. Mondello
General Counsel

[redacted]

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Homosexual file

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WDR:DJA:jmb
35-11-39

Honorable William D. Ruckelshaus
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Ruckelshaus:

Attention: David J. Anderson, Esq.

8/12/70

Re: Thom O'Malley v. The United States Civil Service Commission, et al. - Civil Action No. C-70 1725 ND: Cal. F.

This is in reply to your request for a report in the above-captioned case.

Statement of the Case

Plaintiff, a veteran's preference eligible, was placed on the available register for career substitute clerk, Post Office, San Francisco, California. He alleges that in or about the second week of April, 1969, he was orally advised that he would start work on May 5, 1969. At an interview on April 23, 1969, he was asked to explain the conditions under which he received a General Discharge (under honorable conditions) from military service. He made a written statement that he had been told that "he had been known to associate with homosexuals." By letter dated April 24, 1969, he was advised that his application had been reviewed, and that "all applicants to complete this vacancy" had been selected, he not being one of them.

Thereafter, plaintiff endeavored through his attorney, to determine why he was not selected. On December 2, 1969, he voluntarily appeared before a Commission investigator and was confronted by certain questions. The gist of the interview was that when asked to comment on the statements that prior and during his military service he limited his association to persons known to him to be homosexuals, and that the Commission had information that he engaged in sexual acts with persons of his own sex, he stated that he had never limited his choice of associates to any particular group, and, with respect to the latter part of the question, he stated that he had no comment. The Commission, when requested, refused to divulge the source of information concerning his sexual acts. Finally, the plaintiff inquired as to "what has my private sex life got to do with sorting mail in a post office?"

By letter dated December 8, 1969, the Regional Director notified the plaintiff that he did not meet the suitability requirements for employment under the provisions of section 731.201, 5 CFR, on a finding of unfitness "based on your participation in sexual acts with persons of your own sex." The Regional Office ordered the plaintiff barred from competing in Civil Service examinations, or accepting employment in the Federal service, for a period of three years, and cancelled all pending applications and existing eligibilities he may have.

On initial appeal the Regional Office sustained its previous decision, stating that it was the Commission's policy that "homosexuals do not meet the suitability standards for Federal employment . . . ." (Emphasis supplied.) This decision was affirmed by the Board of Appeals and Review on May 5, 1970, the Board finding that "the employment of Mr. O'Malley would not promote the efficiency of the service."

Plaintiff sues to have all disabilities pertinent to his eligibility for Federal employment removed; and that he be "restored to his position as a Clerk with the San Francisco Post Office as if he had never been terminated" together with restitution of wages lost.

Discussion

I. 1. The Scope of Judicial Review

The plaintiff claims that he was denied due process because there is no evidence that his conduct (1) has any relation to his duties as a postal clerk or (2) brings any discredit on the government. He also alleges that his right of privacy was violated, that his ineligibility determination will not promote the efficiency of the service, andthat the standards relied upon are vague and overbroad. The answers to these claims are implicit in the following discussion.

(a) The Commission's action must be sustained unless arbitrary or capricious.

Basically, apart from procedural considerations, this case presents the question as to whether the Civil Service Commission has the right to maintain a policy of Federal employment which makes admitted or proven homosexual conduct, per se, a valid basis for refusing employment to an applicant for a government position.1/

The source of the Commission's authority lies in the fact that Congress authorized the President to (1) "prescribe such regulations for the admission of individuals into the civil service in the executive branch as

1/ In Scott v. Macy, 402 F.2d 644, 650 (D.C.Cir. 1968), Circuit Judge Burger, dissenting, stated that this question was one of the central issues evaded by the court.

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will best promote the efficiency of that service," and to (2) "ascertain the fitness of applicants as to age, health, character, knowledge and ability for the employment sought." (5 U.S.C.A. 3301).

The Commission's regulations were issued pursuant to the above authority and the Civil Service Rules promulgated by Executive Order No. 10577. 3 CFR 218-25 (1954-1958 Comp.), 5 U.S.C.A. 3301, Note. The authorization by Congress, and the subsequent acts of the Executive pursuant to such authorization, were clearly policy-making determinations of constitutionally authorized branches of the government. The regulations issued by the Commission have the force and effect of law, and are part of the Civil Service laws because of the broad powers conferred upon the President,2/ and delegated by him to the Commission. 39 Op.Atty.Gen. 50 (1937); Nadelhaft v. United States, 131 F.Supp. 930, 132 Ct.Cl. 316 (1955); Atwoods Transport Lines, Inc. v. United States, 211 F.Supp. 168 (D.C. 1962); Indiviglio v. United States, 299 F.2d 266 (Ct.Cl. 1962), cert. denied, 371 U.S. 913 (1962); Bridges v. Wilson, 326 U.S. 135, 153 (1945). The only prerequisite for the regulations was that they would "best promote the efficiency of that [civil] service."

Section 731.201, 5 CFR (1970), provides in pertinent part, as follows:

> "[T]he Commission may deny an applicant examination, deny an eligible appointment, and instruct an agency to remove an appointee for any of the following reasons:
> * * * *
> "(b) criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct; * * * *"

It is to be observed that the above regulation does not automatically bar individuals who engage in the conduct delineated. It states that the Commission "may" take the action authorized against an individual who has engaged in such proscribed conduct. Since the word "may" is used, the Commission exercises discretion respecting such actions.

2/ Sections 3301 and 3302 of title 5 were originally enacted as part of the laws creating the civil service system, and the courts have held that the President has the widest possible discretion to carry out his functions under these laws. See White v. Berry, 171 U.S. 366, 378 (1898); Keim v. United States, 177 U.S. 290, 294-295 (1900); United States ex rel Crow v. Mitchell, 89 F.2d 805, 809 (D.C.Cir. 1937); Harwell v. Hampton, No. 749 (M.D. Tenn. July 7, 1969). See also S.Rept. No. 576, 47th Cong., 1st Sess. 5 (1882).

The Commission in the exercise of its discretion, and in accordance with the authority granted by Congress to hire only those whose employment will "best promote the efficiency" of the public service, has determined that homosexuals[1] do not meet the suitability standards for Federal employment. Under the guidelines of Cafeteria Workers v. McElroy, 367U.S. 886, 898 (1961), the Commission's action must be affirmed unless it is "patently arbitrary or discriminatory."

The courts have consistently recognized that the Commission enjoys a wide discretion in determining what reasons may justify removal of a Federal employee. Judicial review of Federal personnel actions in the past generally has been available only to determine if there had been substantial compliance with the pertinent statutory procedures provided by Congress. This resulted in a line of authorities holding that so long as there was substantial compliance with applicable procedures and statutes, the administrative determination was not reviewable as to the wisdom or good judgment of the department head in exercising his discretion. Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968); Margett v. Summerfield, 100 App. D.C. 85, 243 F.2d 29 (1957), cert. denied, 353 U.S. 970 (1957), together with the cases cited therein; Seebach v. Cullen, 338 F.2d 663 (9th Cir. 1964), cert. denied, 380 U.S. 972 (1965); Baum v. Zuckert, 342 F.2d 145 (6th Cir. 1965); Brown v. Zuckert, 349 F.2d 461, 463 (7th Cir. 1965), cert. denied, 382 U.S. 998 (1966). Fagan v. Schroeder, 284 F.2d 666 (7th Cir. 1960); Pass v. Ruegg, 379 F.2d 216, 218 (6th Cir. 1967); Jenkins v. Macy, 357 F.2d 62 (8th Cir. 1966); Chirisco v. United States, 339 F.2d 558 (5th Cir. 1964).

However, the courts today are consistently abandoning the concept of restricted judicial review enunciated in the foregoing cases. More recent cases, for the most part, follow the admonition in Cafeteria Workers, supra, at page 898, "that there exist constitutional restraints upon state and federal governments in dealing with their employees," and that such action may not be "patently arbitrary or discriminatory."* They hold that courts, after determining whether procedural requirements have been met, must further determine whether the challenged action was arbitrary and capricious. Slochower v. Board of Education, 450 U.S. 551, 556 (1956); Wieman v. Updegraff, 344 U.S. 183, 192; Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968); Halsey v. Nitze, 390 F.2d 142 (4th Cir. 1968), cert. denied, 392 U.S. 939; Taylor v. United States Civil Service Commission, 374 F.2d 446 (9th Cir. 1967); Dabney v. Freeman, 123 U.S. App. D.C. 166, 358 F.2d 533 (D.C. Cir. 1966); Scott v. Macy, 121 U.S. App. D.C. 205, 349 F.2d 182 (1965); Pelicone v. Hodges, 116 U.S. App. D.C. 32, 320 F.2d 754 (1963); Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

1/ Homosexuals in this sense are those who engage in overt homosexual acts with persons of the same sex. See first quoted paragraph of letter to Mattachine Society, p. 5 infra.

* Emphasis supplied.

As stated above, the Civil Service Commission is required and obliged to insure that those persons appointed to positions in the Federal service are suitable both from a suitability and qualifications standpoint. The Commission, acting under its authority, has concluded that homosexual conduct is immoral conduct within the meaning of 5 CFR 731.201(b).

The official Government policy with respect to the unsuitability or unfitness for government employment of persons who have engaged in homosexual acts was publicly announced in a letter addressed to the Mattachine Society, Washington, D.C., by former Commission Chairman John W. Macy, Jr., on February 25, 1966 (copy attached). That policy states in part as follows:

> "Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment. In acting on such cases the Commission will consider arrest records, court records, or records of conviction for some form of homosexual conduct or sexual perversion; or medical evidence, admissions, or other credible information that the individual has engaged in or solicited others to engage in such acts with him.
>
> ". . . . Suitability determinations also comprehend the total impact of the applicant upon his job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees by homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.
>
> ". . . . Homosexual conduct, including that between consenting adults in private, is a crime in every jurisdiction, except under specified conditions, in Illinois . . . .

". . . it is apparent that the Commission's policy must be judged by its impact in the individual case in the light of all of the circumstances, including the individual's overt conduct. Before any determination is reached the matter is carefully reviewed by a panel of three high-level, mature, experienced employees, and all factors thoroughly considered.

"We can neither, consistent with our obligations under the law, absolve individuals of the consequences of their conduct, nor do we propose by attribution of sexual preference based on such conduct, to create an insidious classification of individuals. We see no third sex, no oppressed minority or secret society, but only individuals; and we judge their suitability for Federal employment in the light of their overt conduct. We must attribute to overt acts whether homosexual or heterosexual, the character ascribed by the laws and mores of our society. Our authority and our duty permit no other course."

As pointed out in the Commission's policy statement set forth above, homosexual conduct is treated as criminal conduct in most states, and many jurisdictions still impose strict and often harsh punishment on homosexual offenders. For a compilation of state statutes regarding sexual conduct, see: Mueller, Legal Regulation of Sexual Conduct, Table 8-A (1961). In addition, we refer you to the case of Perkins v. State of North Carolina, 234 F.Supp. 333 (W.D. N.C. 1964), which contains excellent source material on this subject.

Homosexual acts, commonly understood and described as "unnatural and perverted sexual practices" between persons of the same sex, constitute Sodomy, and violate the criminal laws of all American jurisdictions. 48 Am.Jur. Sodomy sec. 1, 2. In an article by Bowman & Engle, A Psychiatric Evaluation of the Laws of Homosexuality, 29 Temple Law Quarterly 272, et seq. (1956), the writers review present-day statutory penalties for Sodomy, and there observe that "forty-six states make sodomy a felony, and the other two have omnibus statutes to cover it." In addition, Table 1 of that article tabulates and cites 89 cases involving in some way the charge of sodomy which reached the appellate courts in 24 different jurisdictions. In addition we refer you to the following law review articles on this subject; An Evaluation of the Homosexual Offender, 41 Minnesota Law Review 187 (1957); Private Consensual Homosexual Behavior: The Crime and Its Enforcement, 70 Yale Law Journal 622 (1961); Government-Created Employment Disabilities of the Homosexual, 82 Harvard Law Review, 1738 (1969).

In Chapter 21 of his book on Sexual Behavior of the Human Male, Dr. Alfred C. Kinsey notes that the religious view from the earliest time has been that "this aspect of human sexuality to be abnormal and immoral" in remarking on the "considerable taboo" retained on these activities by present-day society.

The Group for the Advancement of Psychiatry classified homosexual conduct as a form of sexual perversion, noting the universal disapproval of this sort of behavior. Report on Homosexuality, Group for the Advancement of Psychiatry Report No. 30, January 1955, page 2 (Library of Congress RC 321.G7).

A Senate Committee has given careful consideration to the matter of unsuitability for government employment of persons who engage in homosexual acts which violate the criminal laws and the established moral standards of our society. Under Senate Resolution 280 (81st Cong. 2d Session 1950), the Senate Investigations Subcommittee of the Committee on Expenditures in the Executive Departments conducted an investigation into, and rendered a report on, the Employment of Homosexuals and Other Sex Perverts in Government, S.Doc. No. 241, 81st Cong. 2d Sess. (1950). The "primary objective" of the Subcommittee's inquiry was stated to be (Report, p.1):

> "* * * * To determine the extent of the employment of homosexuals and other sex perverts in Government; to consider why their employment by the Government is undesirable; and to examine into the efficacy of the methods used in dealing with the problem."

In the course of its investigation, the Subcommittee made "inquiries * * * into the basic medical, psychiatric, sociological and legal phases of the problem." (Report, p.2).

In respect to "sex perverts" and "homosexuals", as so defined in the Report, the Subcommittee expressed the following strong views (Report, p.3):

> ". . . sex perverts, like other persons who by their overt acts violate moral codes and laws and the accepted standards of conduct, must be treated as transgressors and dealt with accordingly.
>
> . . . .
>
> "Those charged with the responsibility of operating the agencies of Government must insist that Government employees meet acceptable standards of personal conduct. In the opinion of this subcommittee homosexual and other sex perverts are not proper persons to be employed in Government . . . .
>
> . . . .

> "Overt acts of sex perversion, including acts of homosexuality, constitute a crime under our Federal, State, and municipal statutes and persons who commit such acts are law violators. Aside from the criminality and immorality involved in sex perversion, such behavior is so contrary to the normal accepted standards of social behavior that persons who engage in such activity are looked upon as outcasts by society generally."

In its conclusions, the Subcommittee further declared as follows (Report, page 19):

> "There is no place in the United States Government for persons who violate the laws or the accepted standards of morality, or who otherwise bring disrepute to the Federal service by infamous or scandalous personal conduct. Such persons are not suitable for Government positions and in the case of doubt the American people are entitled to have errors of judgment on the part of their officials, if there be errors, resolved on the side of caution. It is the opinion of the Subcommittee that those persons who engage in acts of homosexuality and other perverted activities are unsuitable for employment in the Federal Government."

Thus, Congress has strongly expressed views parallel to those the Civil Service Commission has announced in its statement of official government policy ~~employment~~ of persons who have engaged in homosexual acts.

Courts have held overt homosexual acts to be immoral. In the cases of United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956); and Wyngaard v. Kennedy, 295 F.2d 184 (D.C.Cir.) cert. denied, 368 U.S. 926 (1961), the court held that convictions of homosexual acts were bases for excluding immigrants under the moral turpitude provisions of the Immigration and Naturalization Act, (8 U.S.C.A. 1182(a)). In Flores, the court declared that "homosexuals with exhibitionistic tendencies and other groups with lewd proclivities" are "repugnant to the mores of our society." In Kelly v. United States, 194 F.2d 153 (D.C. Cir. 1952) the court declared that an accusation of Sodomy charges an "abominable" crime. See also Bicksler v. United States, 90 A.2d 233 (D.C. Mun. App. 1952); King v. United States, 90 A.2d 229 (D.C.Mun.App. 1952).

In Rabouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959), cert. denied, 362 U.S. 913 (1960), and Boutilier v. Immigration and Naturalization Service, 363 F.2d 488 (2d Cir. 1966), the court determined that homosexual offenses involve moral turpitude. In Boutilier, the court held that plaintiff's sworn statement describing in detail his homosexual activities was sufficient evidence of his "psychopathic personality" to justify his deportation under the applicable immigration laws. In tracing the

legislative history of those specific provisions of the immigration laws under which Boutilier was ordered deported the court stated as follows at page 494:

> "* * * * it seems fairly clear that Congress utilized the phrase 'psychopathic personality' not as a medical or psychiatric formulation but as a legal term of art designed to preclude the admission of homosexual aliens into the United States. Whatever the phrase * * * may mean totthe psychiatrist, to the Congress it was intended to include homosexuals and sex perverts. It is that intent which controls here. * * * *"

In State of Washington v. Rose, 382 P.2d 513 (S.C. Wash. 1963), the defendant was convicted of sodomy. The case was reversed because the prosecutor characterized the defendant as a "drunken homosexual", when the record did not support that conclusion. However, the dissenting judge in that case stated as follows:

> "* * * * In the light of the vile details of the act of sodomy by mouth being accomplished in the presence of the officers, and the sordid evidence in relation thereto, the descriptive adjective 'drunken' would not have prejudiced the defendant, or detracted in the slightest degree from the repulsive, degrading, and obscene act which the jury found the defendant had committed." (Emphasis added.) (382 P.2d 518)

In Beard v. Stahr, 200 F.Supp. 766 (D.D.C. 1961), reversed on procedural error, 370 U.S. 41 (1962), plaintiff, an Army captain, was removed from active duty for conduct unbecoming an officer (based on a finding by a board of inquiry that he possessed homosexual tendencies). The board of inquiry was convened as a result of the plaintiff's arrest by a vice squad detective in Washington, D.C. at a place allegedly frequented by homosexuals. In footnote three at page 769 the self-evident importance of eliminating homosexuals from the armed forces is emphasized by Army Regulation AR 635-89, paragraph 2, set out therein. This regulation reads in part as follows:

> "Homosexual personnel irrespective of sex will not be permitted to serve in the Army in any capacity, and prompt separation of homosexuals, as defined in these regulations, is mandatory. Homosexuals are unfit for military service because of their presence impairs the morale and discipline of the Army, and Homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society." (Emphasis added.)

Some of the more recent cases in which the Government's right to exclude homosexuals from employment has been recognized and sustained are: Dew v. Halaby, 115 U.S. App. D.C. 171, 317 F.2d 582 (1963), affirming the discharge of a Federal employee for homosexual acts and smoking marijuana; Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), cert. denied sub nom. Murray v. Macy, 393 U.S. 1041 (1969), holding that a Post Office employee's homosexual acts, even though private, provided valid basis for his discharge; Vigil v. Post Office Department, 406 F.2d (10th Cir. 1969), where a janitor assistant in a post office was discharged for homosexual conduct; Holman v. United States, 383 F.2d 411 (Ct.Cl. 1967), upholding the removal of a Veterans Administration employee on a charge of immoral conduct (engaging in a homosexual act). See also Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965), where applicant was denied eligibility because of homosexual conduct. The case was reversed and remanded by a divided court on the grounds of lack of specificity of charges. However, the court implicitly recognized the right of the government to disqualify for homosexual conduct by distinguishing Dew v. Halaby, supra, decided by the same court in 1963. In footnote 13 at page 184, the court stated:

> "Unlike theppresent case, specific immoral acts were clearly alleged and admitted in Dew v. Halaby . . . 317 F.2d 582 (1963)...."

The purpose of the foregoing dissertation is merely to show that the Commission's determination, that homosexual conduct is "immoral conduct" within the meaning of 5 CFR 731.201(b), falls well within the presently accepted and recognized moral standards and mores of society. Violation of constitutional due process arises when, in the exercise of its wide but constitutionally limited discretion, the Commission's action is arbitrary or capricious. There is no question but that, if there is a demonstrable or implicit deleterious connection between the conduct and job, the Commission's determination of unsuitability would be reasonable and proper. However, in the absence of such considerations, the Commission's determination that homosexual conduct, per se, disqualifies an applicant, or serves as the basis for removal, is highly suspect. This question is considered, infra, under subsection (c).

(b) The standards relied upon are not vague and overbroad.

The plaintiff alleges that "The standards relied on by the defendants are unconstitutional, vague and over broad." (par. XXIV(e) of Complaint.) It is presumed that he means the moral standards by which plaintiff's homosexual conduct has been evaluated. It is submitted that this claim has been answered clearly and forceably in the preceding section. However, in this regard, it may be pertinent to set forth an observation made by Judge Burger in his didsent in Scott v. Macy, 349 F.2d 182, 189:

> "Wisely or not Congress, in common with a host of other law-making bodies, has defined as criminal the homosexual conduct stipulated to by appellant in his final appeal to the Commission.

> Whether it is sound legislative policy to attempt to deal with sex deviates under the criminal law is not open to judges but one can hardly doubt that such conduct is regarded as immoral under contemporary standards of our society. This court is in no position, then, to overturn, or even question, an Executive determination authorized by Congress that homosexual conduct warrants a disqualification from Federal employment." (Emphasis added.)

(c) The necessity for a nexus between the employee's conduct and his employment

The plaintiff claims that there is no evidence that plaintiff's sexual orientation has any rational relationship to his duties as post office clerk, or brings any discredit upon the federal government (par. XXIV(b) of Complaint). He also states that there is no rational basis for the conclusion that the ineligibility determination will promote the efficiency of the service. (Id., (d))

Of course, should the court find that the Commission's policy of excluding homosexuals from government service was not arbitrary and capricious, the question of a nexus between plaintiff's conduct and employment would not arise. However, in recent cases involving homosexuality, as well as other immorality charges, the question of the rational relationship between the conduct charged and the government job involved was squarely presented. Herein lies the soft underbelly of the Commission's position.

The case of Scott v. Macy, 349 F.2d 182 (D.C. Cir. 1965), appears to have been the first case involving the Civil Service Commission in which the court directly expressed a pronouncement on this question. In Scott, as in the instant case, the plaintiff had been placed on the eligible register for federal employment, only to have his eligibility cancelled, and to be disqualified for employment in the competitive service. In Scott, as here, such action was taken on the finding that plaintiff had engaged in homosexual conduct, which was considered "contrary to generally recognized and accepted standards of morality." The District Court sustained the Commission's action. On appeal, Chief Judge Bazelon, speaking for the court, in reversing and remanding the case, stated as follows (pp. 184, 185):

> "The Commission excluded appellant from public employment because it concluded that he had engaged in 'immoral conduct'. With this stigma, the Commission not only disqualified him from the vast field of all employment dominated by the Government but also jeopardized his ability to find employment elsewhere. The stigmatizing conclusion was supported only by statements that appellant was a 'homosexual' and had engaged in 'homosexual conduct.' These terms have different meanings for different people.

> They therefore require some specification. The Commission must at least specify the conduct it finds "immoral" and state why that conduct related to "occupational competence or fitness", especially since the Commission's action involved the gravest consequences. Appellant's right to be free from governmental defamation requires that the government justify the necessity for imposing the stigma of disqualification for 'immoral conduct'." (Emphasis supplied.)

It is to be observed that the requirement that the Commission "state why that conduct related to 'occupational competence or fitness,'" grew out of the fact that the dire consequences to the plaintiff of the stigma of disqualification, imposed a duty on the government to justify the necessity for its action.

This requirement grew to fruition in Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969). There the plaintiff was removed from his position as a Budget Analyst with NASA for "immoral conduct", based on certain alleged homosexual acts. In substance the Court of Appeals concluded that plaintiff had been unlawfully discharged since the administrative record did not establish any reasonable connection between the evidence against him and the efficiency of the service. The court specifically pointed out that there must be some ascertainable deleterious connection between the employee's conduct and his employment (Pp. 1165-1166):

> "Accordingly, a finding that an employee has done something immoral or indecent could support a dismissal without further inquiry only if all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service. The range of conduct which might be said to affront prevailing mores is so broad and varied that we can hardly arrive at any such conclusion without reference to specific conduct. Thus, we think the sufficiency of the charges against appellant must be evaluated in terms of the effects on the service of what in particular he has done or has been shown to be likely to do." (Emphasis supplied.)

With respect to the possibility of embarrassment to the agency as a justification for appellant's dismissal, the court said (P.1167):

> "A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service. Once the connection is established, then it is for the agency and the Commission to decide whether it outweighs the loss to the service of a particular competent employee." (Emphasis supplied.)

The court emphasized that it did not hold that homosexual conduct may never be cause for dismissal (p.1168):

> "Lest there be any doubt, we emphasize that we do not hold that homosexual conduct may never be cause for dismissal of a protected federal employee. Nor do we even conclude that potential embarrassment from an employee's private conduct may in no circumstances affect the efficiency of the service. What we do say is that, if the statute is to have any force, an agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying 'shame'."

The court delineated (p.1166) how, in a number of ways, the homosexual conduct of an employee might bear on the efficiency of the service. Because of the potential for blackmail, it might jeopardize the security of classified communications; or it might in some circumstances be evidence of an unstable personality; or there may be offensive overtures on the job; or notorious conduct; or the reactions of other employees or of the public with whom he came in contact. But, whether or not the conduct would justify removal, it was a relevant question to be considered (p.1166):

> "Whether or not such potential consequences would justify removal, they are at least broadly relevant to 'the efficiency of the service.'"

In other words, the court, in substance, held that homosexual conduct per se, without more, would not justify a finding of unsuitability. Hence, the Commission's general policy "that homosexuals do not meet the suitability standards for federal employment" was not legally sustainable.

Norton has been cited and followed in recent months by several United States District Courts. In Mindel v. United States Civil Service Commission, et al., 312 F.Supp. 485 (1970), the plaintiff was notified that he did not meet the "suitability requirements" for employment as a clerk in the San Francisco, California, post office, because his living with a woman to whom he was not married constituted "immoral conduct". The court in granting plaintiff's motion for summary judgment stated at (p. 487):

> "Even if Mindel's conduct can be characterized as immoral, he cannot constitutionally be terminated from government service on this ground absent a rational nexus between this conduct and his duties as a postal clerk. * * * *." (Citing Norton v. Macy, supra.) (Emphasis in original.)

In Pope v. Volpe, et al. U.S.D.C. D.C. No. 1753-69, decided February 5, 1970, plaintiff was discharged by the Federal Aviation Agency for "conduct unbecoming a Federal Aviation Administration employee," namely, extramarital sex relations, and being involved in an automobile accident while under the influence of alcohol. The District Court granted summary judgment for the plaintiff, stating that the court was bound by Norton v. Macy, supra, in absence of a nexus being established. In Schlegel v. United States, 416 F.2d 1372 (Ct.Cl. 1969), the plaintiff was discharged from his position as Administrative Officer, Department of the Army, Office of Transportation in Hawaii, for "immoral and indecent conduct, consisting of four alleged homosexual acts." The Court of Claims, confirming the Commission's actions, expressly distinguished the case on the facts from Norton.

The case of McConnell v. Anderson, et al., No. 4-70 Civ. 297 D.C. D. Min. 4th Div. (Decided Sept. 1970), appears to be the most recent case in the Federal courts involving the employment of a homosexual. In that case, plaintiff, an avowed homosexual, was denied employment as a librarian at the University of Minnesota. Plaintiff sued under the 1871 Civil Rights Act, 42 U.S.C. sec. 1983, claiming that he was deprived of his rights under the First, Fifth, and Fourteenth Amendments of the Constitution. According to the court, the question involved was "whether it is a violation of plaintiff's constitutional rights to refuse him public employment because he proclaims that he is a homosexual". The court in its discussionkreferred to and quoted from the Scott v. Macy and Norton v. Macy cases (both supra), and, in finding for the plaintiff, stated:

> "Though by current standards many persons characterize an homosexual as engaging in 'immoral conduct,' 'indecent' and 'disgraceful', it seems clear that to justify dismissal from public employment, or as the court finds in this case to reject an applicant for public employment, it must be shown that there is an observable and reasonable relationship between efficiency in the job and homosexuality. In the case at bar, of course, since plaintiff never has been permitted to enter on his duties, there is no history as to his performance or the possible claimed effect of his homosexuality." (Emphasis supplied.)

In the instant case, the job involved was a highly insensitive one -- namely, a career clerk in the post office at San Francisco, California. There was nothing inherent in the plaintiff's homosexual conduct or activities, nor intrinsic in the job, that would interfere with the proper and efficient performance of plaintiff's duties. Essentially, the facts in this case, insofar as the question of a rational nexus is concerned, have been reduced to their "least common denominator", and the Commission's determination of ineligibility could be justified only on a moral basis. This, the court in Norton rejected, Chief Judge Bazelon stating (p.1165):

> ". . . . But the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity . . . ."

II. Due Process Requirements Were Satisfied Without A Hearing

The only procedural consideration in this case is the plaintiff's claim that he was denied due process because he was not permitted to examine the evidence or to confront the witnesses against him.

Obviously since plaintiff was an applicant, he would not come within the former Lloyd-LaFollette Act, 5 U.S.C. 7501(a), or within section 14 of the former Veterans' Preference Act, 5 U.S.C. 7512, 3315, 7701. (5 CFR 752). Rights under the Veterans' Preference Act are limited to "permanent or indefinite preference eligibles who have completed a probationary or trial period." (5 U.S.C. 7511). Similarly, the benefits and protection of the former Lloyd-LaFollette Act only accrue after the expiration of the trial period and the appointment becomes permanent. Nadelhaft v. United States, 131 F.Supp. 930 (Ct.Cl. 1955); Powers v. United States, 169 Ct.Cl. 626, 629 (1965).

Generally, even after appointment, the government may take an action against an employee affecting his employment without following a particular procedure unless Congress provides it by legislation, or the Executive provides it by regulations. Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961); Eberlein v. United States, 257 U.S. 82, 84 (1921); Jaeger v. Freeman, 410 F.2d 528, 531 (5th Cir. 1969); Medoff v. Freeman, 362 F.2d 472 (1st Cir. 1966). See also Chafin v. Pratt, 358 F.2d 349, 356-357 (5th Cir. 1966), cert. denied, 1966, 385 U.S. 878, 87 S.Ct. 159, 17 L.Ed. 2d 105.

Procedures required by due process vary, according to "time, place, and circumstances" and "what procedures due process may require under any given circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected." Cafeteria Workers v. McElroy, supra, at p. 895. Specifically, an applicant for appointment to the Federal civil service does not come within any of the statutes or regulations which establish formal procedures for the determination of rights in the civil service system. Thus, the applicant does not have the right to examine evidence or to confront witnesses. However, the Commission provides an appeal for any person aggrieved by an adverse decision. Basically, such an appeal gives the person an opportunity to show why the decision was wrong, but it does not grant him the right to a personal hearing except in the discretion of the Commission.

3

Comments on Numbered Paragraphs of the Complaint

1. We would admit the allegations in paragraphs I, II, IV, IX, X, XII, XIII, XIV, XV, XVII, XVIII, XX, XXII, and XXIII.

2. Paragraph III - We would deny that the "Jurisdiction of this Court is provided by 5 U.S.C., section 702, et seq." Although the power of the courts to review claims by government employees seems to be well established, the jurisdictional basis for such review has not always been clear. There is a dispute in the courts, as well as in academic circles, as to whether the Administrative Procedure Act, 5 U.S.C. section 701, et seq., is "remedial" or "jurisdictional". See review of cases in Charlton v. United States, 412 F.2d 390, 395-397. Furthermore, the Administrative Procedure Act excludes adjudications of selection or tenure under 5 U.S.C. section 554. McEachern v. United States, 321 F.2d 31, 33 (4th Cir. 1963); Caroline v. Kelly, 236 F.Supp. 955, 956 (S.D. N.Y.), aff'd. 399 F.2d 1023 (2d Cir. 1964); Devine v. Campbell, 194 F.2d 876, 880 (D.C. Cir. 1952), cert. denied, 344 U.S. 826 (1952); Democratic State Central Committee for Montgomery County, Maryland v. Andolsek, 249 F.Supp. 1009, 1017 (D. Md. 1966).*

   For the foregoing reasons it has been the Commission's policy to deny jurisdiction under section 702.

3. We would deny for lack of information the allegations in the following paragraphs and demand strict proof thereof: V, VI, VIII and XI.

4. Paragraph VII - We would deny the accuracy of the allegations in Paragraph VII, and state the best evidence of what plaintiff stated is in the handwritten statement of plaintiff as shown by document dated April 23, 1969.

5. Paragraph XIX - We would admit the allegations in Paragraph XIX, except to point out that the dates contained therein should be December 24, 1969, and January 22, 1970, respectively.

6. Paragraph XXI - We would admit the allegations in this paragraphs with the date corrected to March 12, 1970.

7. Paragraph XXIV - The allegations of this paragraph are conclusions of the plaintiff for which no answer is considered necessary, but if an answer is necessary, we would deny. We would deny that

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* We note that plaintiff has failed to name and join as defendants all members of the Commission, individually, as required. Blackmar v. Guerre, 342 U.S. 512 (1952); Coughlin v. Ryder, 341 F.2d 291 (3rd Cir. 1965).

plaintiff is entitled to the relief sought.

Enclosed are four sets of copies, one certified, of documents in the Commission's file on this case. If further information is desired, please contact Mr. Shelby Fitze of this office, code 101, extension 24600.

Sincerely yours,

Anthony L. Mondello
General Counsel

By: _____
J.James McCarthy
Assistant General Counsel

Enclosure

GC:LEG 3-2-2
SHELBY FITZE:dn
t.d. 9/30/70

I, James C. Spry, Executive Assistant to the Commissioners, United States Civil Service Commission, hereby certify that the documents from the Commission's file relating to Thom O'Malley are true copies of documents under my official custody and control.

James C. Spry
Executive Assistant
to the Commissioners

Washington, D. C.
September 29, 1970