COUNSEL MONDELLO / Suitability Court Decisions 2

December 22, 1970

Significant Judicial Decisions

GC:LEG 3-2-2
McC:gmr

Anthony L. Mondello
General Counsel

The Commission

Re: Frank v. Hampton, N.E. Ill., Civil No. 69-C-899, decided Oct. 23, 1970

Dorais v. Snell, E.D. Cal., Civil No. S-1012, decided Nov. 25, 1970

Hanly v. CSC, N.D. Cal., Civil No. C-70-1049-RFP, decided Oct. 12, 1970

We have received notice that in the first two cases above, judgment has been granted in favor of the plaintiffs. They involve the dismissal of Federal employees for alleged homosexual conduct. The bases for the ruling against the Government are strikingly similar in each case. The rationale expressed by the two courts in these cases is that it was neither apparent nor affirmatively established in the record how the plaintiff's conduct related to his capacity and fitness to perform the duties of his position.

In requiring that a relationship between an employee's misconduct and the "efficiency of the service" be demonstrated to support his dismissal, the district judges in these cases followed the precedent set by the U.S. Court of Appeals for the District of Columbia in two relatively recent cases, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Scott v. Macy, 349 F.2d 182 (1965). The same principle had been recognized and applied by the Supreme Court to State action involving public employees. Pickering v. Board of Education, 391 U.S. 563, 572-73 (1968).

The facts in the case of Frank v. Hampton, as viewed by the district judge, are set forth in the attached transcript beginning at the bottom of page 3, to page 6. The principal basis on which Judge Julius J. Hoffman decided the Frank case is set forth in the transcript beginning at page 16. The court's view of the case is perhaps adequately summarized in the following statement, beginning at page 17 of the transcript:

> "It is unimaginable how isolated incidents having occurred six years previously, without any suggestion by the Commission that such conduct or even the inclination to engage therein had continued down to the present, could

> bear any reasonable connection to the plaintiff's capacity or fitness to service. To punish an individual by denying him federal employment for activity which is protected by the constitutional guarantee of a right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965), the government [must] state some rational connection between the conduct and the person's occupational fitness. This the Commission has not done and its action must be considered 'arbitrary and capricious'."

The reasoning expressed in the Frank case appears to be the basis for the court's decision in Dorais.[1/]

These recent decisions illustrate additional applications of the judicial requirement that the dismissal of a Federal employee under a stigma or "badge of infamy" must be supported by a record that will clearly demonstrate how (in the terms of the Veterans' Preference Act) the removal "will promote the efficiency of the service".

It is our view that the rule of law, essentially a due process requirement, as enunciated in Norton v. Macy and applied in several subsequent decisions cannot be successfully challenged, for it rests directly or indirectly on principles applied by the Supreme Court in analogous cases. In future cases, therefore, if it is not self-evident that the kind of off-duty misconduct involved warrants removal for the good of the service, we believe the Government will be required to show in the record how the employee's conduct affects the efficiency of the service.

In the Frank case, for example, Judge Hoffman remarked:

> ". . . The Commission did not state why the charges against the plaintiff had any relation to his capacity or fitness to perform the duties of his position. Nor is such a relationship self-evident." [Page 16 of the transcript]

1/ On a vacation trip in February 1966, plaintiff allegedly picked up a 20-year old hitchhiker and engaged in homosexual activities with him while sharing the same rooms and beds in a number of motels, with all expenses of travel, meals and lodging borne by plaintiff. After a week of travel, the hitchhiker fled with plaintiff's car, cash and other valuables. Plaintiff's call to the police and the arrest of the hitchhiker in another State apparently caused the matter to come to the attention of plaintiff's agency. He was removed in August 1967, on charges issued in July 1967, specifying off-duty misconduct, based primarily on a sworn statement given by plaintiff in June 1966 to an Air Force investigator. Later, plaintiff attempted to repudiate his statement in his own testimony at the agency hearing.

In contrast, the third case cited above, Hanly v. CSC, exemplifies a case in which it is fairly apparent that the employee's removal would promote the efficiency of the service. The court granted judgment in favor of the Government. It is interesting to note that the judge in the Hanly case was Judge Robert Peckham who ruled against the Government in the Mindel case by applying the principle adopted by the Court of Appeals in Norton v. Macy. Miss Hanly was removed by the Post Office Department for: (1) disrupting a public speech and endangering people by firing a water pistol at General Maxwell Taylor in what appeared to be a mock assassination atempt; (2) driving her car so as to obstruct napalm trucks; (3) causing an accident involving a napalm truck and thus endangering lives and property; and (4) causing a disturbance at an Air Force recruiting office by scattering Government property on its floor.

In Hanly the plaintiff argued that the reasons for her removal had no connection with her employment as a mail carrier. Our position, incorporated into the Government's brief, was that her conduct showed lack of judgment, contempt for authority and special hostility toward the Government, all of which makes her employment in the Federal service undesirable and potentially harmful. In this case, the judge (deciding the case without filing an opinion) apparently believed that the relationship between plaintiff's misconduct and the efficiency of the service was fairly shown by the nature of the charges.

The "efficiency of the service" is a phrase that embraces matters beyond the mere performance of job tasks. Recent court decisions warn, however, that in cases where the nexus between the employee's conduct and the efficiency of the service is not readily apparent, the relationship should not be left to assumption or conjecture.[2/]

[2/] Judge Nichols of the Court of Claims made the following remarks, as dictum, in a case decided on December 11, 1970, in which he concurred with the court in granting judgment for the Government:

> "[M]ore recently some courts have, and I believe soundly, relied on this phrase ['promote the efficiency of the service'] to require some nexus with the interests of the service in cases of off-duty misconduct. See, Norton v. Macy, 417 F.2d 1161, 1163-64 (D.C. Cir. 1969), but contrary to that case, this nexus one may suppose arguendo is furnished if the off-duty misconduct is of a kind that many people, even in these permissive days, regard as so infamous that they mistrust a Government agency which retains the perpetrators on its payroll, to a degree to impede its performance of its lawful missions.

[Footnote continued on next page]

The conclusion that an employee's off-duty sexual immorality (including homosexuality) harms the efficiency of the Federal service must, in each case, rest on an adequate evidentiary and procedural basis.

We will carefully review the administrative and court records in Frank and Dorais to determine the advisability of appealing.

2/ -- Con't.

> "I do not think that a man's discreet extra-marital relations with a consenting adult female are anywhere now regarded as so infamous that they would reflect crippling discredit on an agency of Government which knowingly employed him, or her either. Thus the removal of Mr. Williams, on this ground, if persisted in, could not have stood up in court." Williams v. United States, No. 219-68 (sl.op. - pp. 14-15).

This is the same judge who criticized the U. S. Court of Appeals majority opinion in Norton. See page 17, concurring opinion, Schlegel v. United States, Ct. Cl. No. 369-63, decided October 17, 1969.

Chairman Hampton -

3

Laurence A. Tate v. Civil Service Commission
U.S.D.C. N.D. Calif. Civ. No. C-70 1929 RFP
Thom O'Malley v. Civil Service Commission
U.S.D.C. N.D. Calif. Civil No. C-70 1725

April 6, 1971

Anthony L. Mondello
General Counsel

GC:LEG 3-2-2
BCM:jb

Chairman Hampton

The subject cases are submitted for your consideration in view of the determination by this office concurred in by Kimbell Johnson, that both cases are likely to be lost if we continue to contest them. Both cases arise from disqualifications from employment in the Post Office Department for allegedly immoral conduct.

Tate was charged by the Commission with engaging in sexual acts with persons of his own sex and with being a "professed practicing homosexual" and with being a user "until a recent date" of marijuana, and LSD. Tate denied that he had ever been a "practicing or professed homosexual" and that he had not used any marijuana "for some years." His removal from employment was directed and upheld on appeal.

O'Malley was charged in 1969 with receiving a General Discharge (under honorable conditions) because (he said) "he had been known to associate with homosexuals." He was also charged with engaging in sexual acts with persons of his own sex. Mr. O'Malley's discharge was issued in 1954.

These cases present similar problems. The most obvious is, of course, the Norton consideration--is a nexus established in the record between the action being taken and the promotion of the efficiency of the service. The same question raised in Mindel is also present here--what has my private sex life got to do with working in the Post Office? Questions also exist as to the specificity of the charges and the proximity of the events charged to the date of employment. These matters are discussed in detail in the attached memorandu.

The suits appear to be indefensible and could, if pursued, provide a vehicle for issuance of legal decisions we could not live with. I propose to tell Justice we will restore both plaintiffs unless you instruct me to the contrary.

Attachment.

UNITED STATES GOVERNMENT

Memorandum

U.S. CIVIL SERVICE COMMISSION

3

Subject: Laurence A. Tate v. Civil Service Commission, et al.
U.S.D.C. N.D. Calif., Civ. No. C-70 1929 RFP

Date: March 16, 1971

In Reply Refer To:
GC:LEG 3-2-2
ALM:dn

Your Reference:

From: Anthony L. Mondello
General Counsel

To: Kimbell Johnson
Director, BPI
Rm. 3609

In the attached memorandum to me, dated December 22, 1970, written by Shelby Fitze and concurred in by Burt McDonald and Jack McCarthy, my staff recommends that we abandon further defense of this case and retroactively restore Mr. Tate to duty as a letter carrier in the Post Office at Oakland, California.

The principal bases of the recommendation are that (1) we cannot prove by substantial evidence the facts relating to the conduct with which we charged Mr. Tate, and (2) that the record is devoid of the kind of proof required by the Norton case and its progeny, viz., that the private conduct with which Mr. Tate was charged has a rational nexus with his duties as a postal clerk; in effect, that his having so conducted himself means that he cannot creditably perform his job.

I request you consider whether the defense of the case should be abandoned, and whether or not you think it should, whether the Commission should be asked to consider the matter.

In your consideration of this matter I invite your attention to several features of the problem area in which this case occurs.

1. There is great need to harmonize the various voices with which the Commission speaks in suitability matters. The complaint in this case accuses it of having two voices, one in the suitability regulations which plaintiff regards as unconstitutionally overbroad, and one in the statement he attributes to you that "Under Civil Service Commission standards, immoral conduct is significant only when accompanied by notoriety, scandal or public censure." In this case, as in Mindel and a number of others, we have not been able to point to the kind of widespread public knowledge of what should be an individual's private affairs to satisfy the standard implicit in that quotation.

   Then there is the voice of the Board of Appeals and Review. As Mr. Berzak's memorandum of October 13, 1970 indicates, the

GOVERNMENT PRINTING OFFICE: 1961—O-729-462

Board saw the same substance in the evidence that your Bureau did, -- evidence that attorneys in my office regard as lacking in substance. (Incidentally, there is another possible view of the evidence that is probably too late to explore. One of the witnesses suggested that Mr. Tate probably told the draft board he was a homosexual and a marijuana smoker in order to avoid the draft. If we could have proved he lied when he said so, we could have reached his case under the term "dishonest" of the suitability regulations, a term relating to the requirement of honesty which a court is far more likely to find necessary in the duties of a postal clerk or carrier than it is the vaguer requirement of morality. This is precisely what the Court of Claims did recently in the Williams case where both issues were available for decision. And you should note from the tenor and content of Judge Nichols' concurring opinion that he has receded from the disagreement with the Norton case that he exhibited in his concurrence in the Schlegel decision, and now cites Norton with approval and regards Mindel as "well reasoned." Procedurally I think it is too late to change the nature of the charges unless we could persuade the court to remand the case so we could start all over again -- a very doubtful prospect.)

I was disappointed that the Board decision did not undertake to review the evidence in detail as it has done so well in many adverse action cases I have seen. Its detached position, away from the daily operations of your personnel who have to dig up the facts and who perhaps unconsciously react to an investment in them, could provide a valuable second look to see whether the charges are fairly supportable. Unfortunately, we do not have a detailed statement from that vantage point in this case.

And then there is the voice of the General Counsel's office. We see these cases very late, and on a cold record we cannot change. Our realities are the Justice Department and the courts, areas where our cases are forced into a larger context than any we normally see. United States Attorneys handle all agencies' cases before the courts, and they know what it is to lose credibility before a judge who measures their competence and reliability in an important criminal case in part in terms of the U.S. Attorney's response to interrogation as to why he persists in defending these personnel cases which the judge may consider worthless, or controlled by precedent. The U.S. Attorney's Office in San Francisco has several times written to effect restoration to duty immediately after a case has been filed, and his office wrote to Justice once practically inviting Justice to send out anyone who was willing to defend the case, since no one in his office thought it defensible.

I think it fair to say that those who see these cases in the Department of Justice think that the only cases we can win are those which are indeed covered by your statement concerning notoriety, scandal and public censure, and some think that even then we must show some deleterious effect on "the efficiency of the service". This attitude is also reflected by Judge Nichols in his concurrence in Williams:

> When the only proper "service connection" in cases of offduty misconduct is the possible disrepute to the agency, an illicit liaison which is decently concealed from view is less of an offense than one which is overt and flaunted, if it is one at all. The court in Mindel, supra, agrees. In this regard an agency which persists in ferreting out its employees' secret affairs may be said to be contributing to its own discredit. If the employee strives successfully to keep them secret, the agency's repute flourishes as well as his own.

The attitude explains why we have been unable to get appeals authorized in recent cases, and I have exercised considerable discrimination lately in noting in all personnel cases the issues I consider appealable.

2. Attached is a copy of my no-appeal letter to Justice in the Frank case. It suggests another problem area you might consider. You taught me in the Scott case the folly of proceeding further, after the second Scott decision, because we had litigated the case for five years and had no evidence of his recent activity. You pointed out that where we had evidence of recent disqualifying activity, we barred applicants from eligibility for only three years. The letter in this Tate case similarly proposed a bar of three years, and if this office's lawyers are correct, there was a gap of at least three years between the suspected homosexual activity of which we have little proof, and the time we took action against Mr. Tate.

If we indulge in a presumption that three years without disqualifying activity implies effective rehabilitation from aberrant behavior, then we should try to see that we do not permit cases to leave the pipeline in which that disability is apparent. Sooner or later a court will note the matter and hold us to our self-imposed standard. Of course, if it is a standard, we should follow it without outside urging.

"Rehabilitation."

3. Stan Taylor may have reported to you that at a meeting with Post Office personnel it was suggested that if we were going to continue ordering personnel off Post Office rolls in the seven or eight then-pending cases they regarded as sure losers, then we should pick up the tab for back pay. They were only half joking about that, and they were deadly serious about trying to persuade us to accept their view of the meaning of the cases we lose in court. I suggested that if they were serious, they should put their views in writing and suggest what policy changes they would urge on the Commission in these cases. I am informed that such a letter was written, but got to the office of the Assistant Postmaster General for Personnel only after Mr. Housman had left. The new man, Mr. Gayle, has not made up his mind about it, and I suspect the postal reorganization will be effective before that matter need be decided.

I have made the same suggestion to Justice Department personnel who indicate we should change our ways, but I doubt we will have a writing from that source either.

And there it is -- I cannot dissemble with the Department of Justice, and I think it impossible to cast the record in this case in such terms as to suggest we have facts to support a defense. Defending the case can affect the Commission in several ways. We never enhance our reputation for good judgment, with either the courts or the Justice Department, when we show that we cannot distinguish between the evidence which supports our charges, and the suspicions which guided our investigation. If, as I believe, the facts cut so clearly against us, not merely our judgment but our sense of responsibility as well will be subject to question. What I mean by that is that we are supposed to react responsibly to the decisions of the courts, particularly in areas where they are charting such fundamentals as the constitutional protections of employees and even applicants. Specifically, we should not follow a practice which leads outsiders to claim, or even believe, that we are willing to flaunt our power and lose the few court cases which are brought since we effectively win the greater number of cases where suit is not filed. I have faith that you will help me avoid that image.

Attachments

COPY

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF PERSONNEL INVESTIGATIONS
WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

INA:INV

YOUR REFERENCE

May 20, 1971

Received on August 16 19
Vacation
Pers'l
4 1/2

Mr. Charles W. Baker
13309 Cleveland Drive — obsolete
Rockville, Maryland 20850

Dear Mr. Baker:

Your appointment as Clerk-Typist, GS-2, National Bureau of Standards, was made subject to investigation. That investigation disclosed matters which raised a question of your suitability for such employment. You were invited to appear for an interview with a representative of the Commission so that you might submit comments or explanation concerning these matters. You replied that you would not appear for the interview until you were advised in writing of the subject matter of the proposed interview.

We are now advising you in writing in order to afford you an opportunity to make comments or explanation on all known matters which might result in a determination that you are presently disqualified for your present position. These matters are as follows:

In a sworn statement to which you subscribed on July 9, 1970, at Portsmouth, Virginia, before an official of the United States Navy, you stated that beginning May 1, 1969, you and your cousin Don Rau engaged with each other at various times in acts of caressing, kissing, mutual masturbation, anal intercourse, and rubbing of your bodies together to obtain sexual climax. You further stated that on occasions Mr. Rau committed an act of fellatio on you and that you permitted acts of fellatio to be performed on you by Cliff Witt, John Tracey, and Robert Harding.

On July 28, 1970, at Gaithersburg, Maryland, Donald Preston Rau, Jr. subscribed to a sworn statement before an official of the Navy Department in which he stated that since April 1969, you and he had been lovers, intimately related, that the two of you had been engaged with each other in homosexual activities including caressing, sodomy, fellatio, anal intercourse, mutual masturbation, and rubbing the penis on the body.

In your sworn statement of July 9, 1970, you admitted that because of your interest in homosexual activities you paid frequent visits to public establishments where persons with homosexual tendencies tended to congregate where you could and did pick up chance acquaintances for the purpose of engaging in homosexual acts. You also indicated that at other times you had solicited and picked up chance acquaintances in other public places for the purpose of engaging in homosexual acts.

In view of the above-described immoral, infamous, scandalous, and notoriously disgraceful conduct, you are invited to show cause why you should not be disqualified for Federal employment and removed therefrom to promote the efficiency of the service.

Sincerely yours,

/s/

Stanley N. Taylor, Chief
Division of Adjudication
and Appraisal

UNITED STATES

CIVIL SERVICE COMMISSION

BOARD OF APPEALS AND REVIEW

WASHINGTON, D.C. 20415

DECISION

IN THE MATTER OF

Mr. Charles Walter Baker
U.S. Department of Commerce
National Bureau of Standards
Washington, D.C.

William P. Benzak

CHAIRMAN

February 27, 1973

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D. C. 20415

D E C I S I O N

IN THE MATTER OF

Charles Walter Baker

TYPE CASE: Suitability

INTRODUCTION

Mr. Baker, through his representative, Dr. Franklin E. Kameny, appealed to the Board of Appeals and Review from the decision of the Director of the Commission's Bureau of Personnel Investigations. In that decision the original determination that Mr. Baker does not meet the suitability requirements for employment in the competitive Federal service under the provisions of Section 731.201 of the Civil Service Regulations was affirmed.

STATEMENT OF THE CASE

The appellant is employed as a Clerk-Typist with the National Bureau of Standards, Washington, D.C., and has been suspended from active duty pending final adjudication of his appeal.

The appellant's appointment was made subject to investigation. Investigation was conducted and information was developed which raised a question as to whether the appellant meets the Commission's standards for Federal employment. Arrangements were made for a special interview with the appellant by a Commission representative, but he declined to attend the special interview, on the advice of his representative, without first receiving in writing a statement

setting forth the matters to be covered in the interview. Then, on August 16, 1971, a letter was delivered to the appellant to afford him an opportunity to make comments on, explain, or refute the derogatory information. However, the appellant did not furnish any explanation or comments on the material set forth in that letter. After reviewing the evidence of record, the truth and accuracy of which was not denied by the appellant, the Commission's Division of Adjudication and Appraisal, Bureau of Personnel Investigations, made an original determination on September 15, 1971 that the appellant did not meet the Commission's suitability standards for Federal employment under Section 731.201 of the Civil Service Regulations. The basis of the original determination was the Division of Adjudication and Appraisal's finding, which was not controverted by the appellant, that he had engaged in indecent acts of sexual perversion on recent occasions and extending back for several years; that these acts are known to a sufficient number of persons to constitute infamous, immoral and notoriously disgraceful conduct; and that such conduct by the appellant reflects discredit upon the Government as his employer, brings his agency into public ridicule and contempt, and inhibits its ability to perform its mission.

The original determination directed Mr. Baker's separation; cancelled all eligibility for reinstatement obtained as a result of existing appointment, and all other existing eligibilities; rated ineligible any pending applications; and barred the appellant from competing in Civil Service examinations or accepting employment in the competitive Federal service for a period of three years.

The appellant, through his representative, then appealed from the original determination. On May 2, 1972, the Director, Bureau of Personnel Investigations, after reconsideration of the entire record in the appellant's case, including the appellant's written representations and submissions, affirmed the original determination. The appellant, through his representative, then appealed to the Board of Appeals and Review.

ANALYSIS AND FINDINGS

The Board of Appeals and Review has carefully reviewed the record in this case and has given full consideration to the written representations submitted by Dr. Kameny on behalf of the appellant.

As already mentioned, the appellant's appointment was conditional in nature, in that it was made subject to investigation to continue the Commission's jurisdiction to investigate the qualifications and suitability of an applicant after appointment and to authorize the Commission to require removal when it finds the appointee is disqualified for Federal employment. (5 CFR 5.2, 5 CFR 731.301, et seq.) Reasons for such removal appear under Section 731.201 of the Commission's Regulations and include among others the following:

> "(b) Criminal, infamous, dishonest, immoral or notoriously disgraceful conduct;
>
> "(d) Refusal to furnish testimony as required by 5.3 of this chapter."

Unsuitability because of infamous, immoral, or notoriously disgraceful conduct established by an individual's participation in homosexual acts without evidence of rehabilitation has long been a basis for disqualification from employment in the competitive service under Section 731.201(b) of the Civil Service Regulations. Based on the evidence of record available and after unsuccessful efforts to elicit additional information from the appellant regarding his past homosexual conduct and possible rehabilitation, the Bureau of Personnel Investigations made its decision that the appellant was unsuitable for employment in the competitive service pursuant to Section 731.201(b) of the Civil Service Regulations.

While recognizing the Commission's policy with regard to rehabilitation, the Board finds no evidence in the record that the appellant is rehabilitated and he himself, admitting to his past homosexual conduct, has consistently refused to furnish any information to the Commission in response to questions submitted to him. Accordingly, in light of the available evidence and since the appellant has furnished nothing new in his written representations except his admission to past homosexual conduct, the Board does not find that the Bureau of Personnel Investigations' decision in the appellant's case was improper.

The record also contains a copy of a sworn statement, dated July 9, 1970, in which the appellant who was then serving in the United States Navy, upon being questioned by Command personnel admitted, among other things, that: his interest in homosexual activities led him to make frequent visits to public establishments where persons of similar interests tended to congregate

and where he could and did pick up chance acquaintances for the purpose of engaging in homosexual acts. He also stated that at other times he solicited chance acquaintances in other places for the same purpose.

Against this background of prior homosexual conduct, it was clearly necessary to inquire of the appellant at a special interview whether in the period of more than one year which had elapsed since the date of his sworn statement he had continued to engage in homosexual activities, and whether his practice of soliciting others to join him in the commission of such acts had extended to on-the-job solicitations of co-workers. Moreover, a further line of inquiry was also indicated for appraisal by medical or psychiatric experts by the appellant's disclosure in his statement that in September, 1969, he was on the verge of a mental breakdown and at times he would find himself crying for no reason and was unable to stop.

The record further shows that the appellant not only refused to appear at the special interview, but he has consistently refused to furnish the Commission any information whatever relating to his past homosexual conduct. He simply takes the position that:

> "* * * if the * * * Commission * * * wishes to consider the aforementioned alleged facts as being stipulated to by us, [it] may do so without effort at controversion by us. In this appeal, we ourselves may tacitly assume these factual allegations as stipulated, arguendo, without further discussion or disclaimer, but without thereby modifying our contemptuous and disdainful refusal directly to address ourselves to them further." (Appeal Brief, page 5)

While the Bureau of Personnel Investigations did not have unlimited authority to interrogate the appellant about his private sex life, it surely had the right to ascertain the facts as they currently existed at the time of the proposed interview and to determine on the basis of all reasonably relevant information his suitability for Federal employment, particularly where, as here, there was convincing evidence of past homosexual conduct beginning in April 1969, as well as indications of emotional instability.

Under the circumstances, the appellant's refusal to appear at the special interview and furnish information regarding his suitability for continued Federal employment, as required by Civil Service Rule 5.3, warrants his removal from employment pursuant to Section 731.201(d) of the Commission's regulations.

DECISION

As modified above, the Board of Appeals and Review hereby affirms the decision of the Director, Bureau of Personnel Investigations.

For the Commissioners:

William P. Berzak
Chairman

February 27, 1973

Individual - LOFTIN Homosexual

DEC 23 1971

GC:LEG 3-2-2
RHM:krs

3

LPG:PDC:pa
35-11-53

OGC Index Digest Office
Noted 11/19/72 ASM

Honorable L. Patrick Gray, III
Assistant Attorney General
Civil Division
Department of Justice
Washington, DC 20530

Dear Mr. Gray:

Attention: Harland F. Leathers, Chief
General Litigation Section

Re: Linda Jean Loftin v. United States of America, et. al.
U.S.D.C. N.D. Cal. Civil No. C-71 1165 LHB

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

FACTS

Plaintiff was appointed on April 13, 1970, subject to investigation, to the position of Distribution Clerk in the United States Post Office, Oakland, California. During the ensuing suitability investigation, the Civil Service Commission (the Commission) discovered that the plaintiff, during the period of August-October 1969, while serving in the Women's Army Corp (WAC), had participated with another WAC named Lawson in homosexual activities including at least one act of oral sodomy. Plaintiff was discharged from the WAC on January 8, 1970, the classification of the discharge being "General (Under Honorable Conditions) due to Homosexual-Class II."

Because the foregoing became apparent to the Commission, plaintiff, a career-conditional appointee serving her probationary period, was given a special interview on August 5, 1970, so that she could explain the derogatory information. She made a sworn statement admitting the homosexual acts with Lawson, but averred that she had not engaged in any homosexual activity since that time. She did state, however, that she had some homosexual friends. 1/

1/ At a later date, in a letter beseeching the Board of Appeals and Review to reverse her removal order, she states:

> "I pointed [sic] at the meeting at Alemeda [the special interview] that I didn't wish to use the word associate because it sounds as though I still live among them, which is wrong. The homosexuals rather be with their own kind not a drop out."
> (Emphasis and grammar in original.)

IV Adverse actions cases will promote efficiency of service
Immorality
Homosexual conduct

Based upon the file information and the special interview, the Commission directed the Regional Director of the Post Office Department, San Francisco, California, to separate plaintiff from her employment because she "does not meet the suitability requirements for employment in the competitive Federal Service." Plaintiff appealed this determination to the Regional Director of the Commission. On November 17, 1970, the separation decision was affirmed. Plaintiff appealed the affirmation to the Board of Appeals and Review on November 24, 1970. Plaintiff's attorney, in a letter to the Commission, suggested that evaluation reports of plaintiff's performance at her job be scrutinized by the appellate body.

On March 3, 1971, the Board of Appeals and Review affirmed plaintiff's separation, refusing to consider plaintiff's performance at her job because "suitability for Federal Service . . . as a general rule is adjudicated as of the date of appointment." Furthermore, the Board felt that plaintiff's continued association with homosexuals was indicative of "lack of rehabilitation" and that plaintiff's continued employment would not promote the efficiency of the Federal Service.

Consequently, plaintiff filed, on June 16, 1971, in the United States District Court for the Northern District of California, a "Complaint For Review of Administrative Decision." She asks that she be reinstated in her prior employment and that she be awarded lost wages incurred as a result of her discharge.

APPLICABLE STATUTES AND REGULATIONS

5 CFR 731.201 states that the Civil Service Commission may instruct an agency to remove an appointee for

> (b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.

5 CFR 731.301(a) prescribes that, subject to certain exceptions not pertinent here, every appointment to a position in the competitive service is subject to investigation by the Commission. It is as a result of just such an investigation that plaintiff has been separated from her employment.

5 CFR 731.302(a) provides that for one year following an appointment subject to investigation the Commission may instruct the employing agency to remove an appointee found unsuitable for any of the reasons stated in 5 CFR 731.201.

DISCUSSION

It has been consistently recognized that the interest of a government employee in retaining his job can be summarily denied in the absence of a limiting provision of the Constitution, a statute or regulation. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 896 (1961). Nevertheless,

when a substantial interest of an individual is involved, governmental action must not be patently arbitrary or discriminatory. Where, as here, the Commission's action excludes the plaintiff from Federal employment on the ground that she is morally unsuitable because she engaged in homosexual conduct, the stigma that attaches to this disqualification impairs her opportunity for employment outside of Government as well. Such action by an executive agency is subject to judicial review. Green v. McElroy, 360 U.S. 474 (1959). The courts insist that applicants and probationary employees so disqualified be given at least a statement of the specific reasons for the agency's conclusion and a fair opportunity to controvert the allegations offered to support the action. Scott v. Macy, 349 F.2d 182 (1965). No particular procedure is dictated by statute or regulation to control the Commission's action affecting an applicant or a probationer. See 5 CFR 731.302(c); cf. 5 U.S.C. 7501-7512, and Sec. 22 of E.O. 11491, as amended--governing removal of certain employees who have completed a probationary period. The rule governing administrative action in a case such as the plaintiff's, therefore, appears to be requiring procedural fairness and the avoidance of arbitrary action.

The authority for plaintiff's disqualification and dismissal is referred to on page 2 of this report, 5 CFR 731.201(b). The part of the record, furnished with this report, that is available to the court will show the plaintiff admitted engaging in homosexual acts during her active service with the Army, and that she received a General Discharge. Her military service ran from March 20, 1969, to January 8, 1970. Her appointment to the position of Distribution Clerk in the Oakland Post Office was made on April 13, 1970; she was dismissed on March 12, 1971.

A review of the critical document on which this action was based, namely, Report of Special Interview, raises two related questions concerning the sufficiency of the record to support the action taken. The first is whether the record discloses adequate details of plaintiff's misconduct to survive judicial review. We take it that the basis for the Commission's action satisfies the legal requirement of specificity if it enables both the plaintiff and the court to understand the exact nature of the conduct charged and discloses such details of time, place, frequency, seriousness, etc., to allow the court to determine whether the Commission's action was arbitrary or discriminatory. Scott v. Macy, supra.

In view of plaintiff's admission of the misconduct involved, she has in no way been prejudiced by the Commission's failure to confront her with more specific information concerning her homosexual conduct. However, unless the Government is able to reveal to the court (in camera or otherwise) the report of the Army investigation enclosed herein, the court will probably not have a sufficient basis for determining whether the Commission's action was justified. The court's knowledge of plaintiff's conduct will be limited to the fact that sometime during the 10 months of her Army Service (it ended 14 months before her dismissal from the Postal Service) she engaged in certain undefined homosexual acts on undisclosed number of times with one person whose identity or relationship to the plaintiff is not disclosed. We believe the plaintiff's explanation of those incidents needs to be answered by a more specific disclosure from the military records. Unless this is done, we have little confidence that the District Court will rely

on the time-honored doctrine of judicial deference to executive judgment in matters of this sort. Benson v. U.S., 421 F.2d 515 (9th Cir. 1970), cert. denied 398 U.S. 943 (1970). The presumption of regularity that restrains the court from reviewing the exercise of executive discretion is invoked with less frequency in the later cases. See Scott v. Macy, supra; Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Mindel v. U.S. Civil Service Commission, 312 F.Supp. 485 (N.D. Cal. 1970). Also, see Taylor v. U.S. Civil Service Commission, 374 F.2d, 466 (9th Cir. 1967).

A more specific disclosure may also be necessary if we are to have a basis for arguing the second and more important issue in the case, that is, whether considering all the evidence in the possession of the Commission, it was arbitrary to disqualify the plaintiff. The answer to this question depends on the ability of the Government to demonstrate how the particular misconduct impairs plaintiff's fitness to perform the duties of her position, or how her retention would otherwise be detrimental to the efficiency of the Government service.

Cases such as Norton, for example, place the burden on the government to demonstrate how the efficiency of the service would be adversely affected by the individual's employment. See particularly the dissent of Judge Wright in Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969) cert. denied 397 U.S. 1039, involving revocation of an industrial worker's security clearance because of his homosexual conduct. Judge Wright said, "Assumptions predicated on appellant's unfortunate affliction unrelated to the facts of this case cannot provide a legal basis for effectively denying him access to his livelihood . . . . [N]o rational connection between isolated homosexual activity and reliability is demonstrated by facts as distinguished from unsupported assumptions". Id. 241. On the other hand, in other cases the courts have not insisted on an explicit evidentiary showing of the nexus between the alleged misconduct of the employee and the efficiency of the service. Eg., Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968), Cert. denied sub nom.; Murray v. Macy, 393 U.S. 1041 (1969); McConnell v. Anderson, 316 F.Supp. 809 (D. Minn. 1970) rev'd 8th Cir., Oct. 18, 1971, Docket No. 20,583; Schlegel v. U.S., 416 F.2d 1372 (Ct. Cl. 1969); Vigil v. Post Office Dept., 406 F.2d 921 (10th Cir. 1969); Holman v. U.S., 383 F.2d 411 (Ct. Cl. 1967).

It is our belief that although there is divergence of opinion among the courts in employee cases dealing with homosexual behavior, the trend is toward holding the government to the stricter standard for justifying adverse actions based on such conduct. This being so, the restricted evidence in the Army report may be of crucial importance in the defense of the Commission's action. From the evidence in that report, some reasonable argument may be presented to the court to sustain the administrative action in the case at bar.

It could be shown that the plaintiff's misconduct occurred in circumstances similar to an employment situation, i.e., that her liaison was with another "employee" (a member of her unit in the WAC); that plaintiff and her partner solicited other "employees" to engage in homosexual conduct; that plaintiffs conduct was not private but was engaged in openly without regard to the sensibilities of others; and that the conduct occurred frequently over a

substantial period of time and within six months of her appointment in the Federal service. If such evidence were made available, it might support an argument defending the dismissal action and temporary bar from Federal employment. Nevertheless, there are countervailing factors involved. Military service has many features that are not found in government employment. One of these is barracks life--an important difference relative to the conduct involved here. There is also the report of an Army psychiatrist who stated that plaintiff was not a homosexual, that further experimentation on her part was unlikely, and that she should be retained in the WAC.

For the defense of this case we recommend that the Commission's unrestricted records be filed with the court and that the Army records be withheld, at least initially. Reliance may be placed on the recency of plaintiff's discharge in relation to the decision on her suitability for Federal civilian employment. Since plaintiff had not completed her probationary period of one year, she had no form of tenure or had not reached the status that brings employees within the protection of certain statutory and regulatory procedures. Hence, like the applicant in Scott v. Macy, plaintiff was not entitled to a detailed statement of charges, a hearing, and other such rights granted by statute. Cf. 5 U.S.C. 7512. From this, it may be argued that plaintiff was not denied any of the rights demanded by the requirements of procedural due process--her admissions prove her familiarity with the basis for the Commission's action.1/

We believe, however, that it would be helpful to have in the record an official verification of the reason for plaintiff's military discharge so that the court will have more than plaintiff's simple admission. We are checking to determine what evidence, such as plaintiff's discharge papers, will be available for that purpose. When we have that evidence, we will send it to you promptly. In the meantime, we are also inquiring as to whether the Army would be willing th release its report of investigation to the court in camera if that course of action meets with your approval.

Plaintiff has brought suit in this case without naming the Commissioners of the Civil Service Commission as parties defendant. The Supreme Court has held that since the Civil Service Commission is not a body corporate and has not been authorized by Congress to be sued eo nomine, the Commissioners themselves as members of the Civil Service Commission must be named as defendants and personally served with process. Blackmar v. Guerre, 342 U.S. 512 (1952). See also, Bell v. Groark, 371 F.2d 202, 204 (7th Cir. 1966).

Failure to name and serve the Commissioners is in theory grounds for dismissal. Blackmar v. Guerre, supra; Bell v. Groark, supra. Courts will usually in the interest of justice grant leave to amend rather than dismiss. See FRCP 15(c)(2); Washington v. Cameron, 411 F.2d 705 (D.C. Cir. 1969); Yates v. Manale, 341 F.2d 294 (5th Cir. 1965). We, therefore, recommend that instead of filing a motion to dismiss that plaintiff's attorney be contacted so that he may take corrective action

1/ Vitarelli v. Seaton, 359 US 535, Medoff v. Freeman, 362 F.2d 472, (1st Cir. 1966). Jaeger v. Freeman, 410 F.2d 528, (4th Cir. 1969).

to name the individual Commissioners defendants and to individually serve them.

RESPONSES TO THE NUMBERED PARAGRAPHS OF THE COMPLAINT

Paragraphs:

1. Deny. (See Affirmative Defenses).

2. Admit.

3. Admit, except for date of plaintiff's discharge, which is 3/12/71.

4. The statements made by plaintiff in this paragraph are conclusions of law for which no answer is deemed necessary, but to the extent that an answer is required, we would deny.

5. We would deny for lack of information and belief sufficient to determine the truth of the allegations.

6. Admit.

7. We would admit plaintiff is represented by an attorney, but would deny she is entitled to recover attorney's fees and costs. Fed. R. Civ. P. 55(d).

Enclosed are four sets of copies (one certified) of documents pertinent to this matter which may be released to plaintiff. If further information is desired, please contact Mr. Robert Moll of this office, code 101, extension 24600.

Sincerely yours,

Anthony L. Mondallo
General Counsel

By: _____
J. James McCarthy
Assistant General Counsel

Enclosures

GC:RHMoll:krs:JJamesMcCarthy:vc
t.d. 12/21/71

...the ...ppeal...

MONDELLO
9/19 Sent to Drummond,
signed w/attach

REDACT/PRIVACY

Suitability of SUSAN R. FRASIER

Sept. 19, 1973

3

Anthony L. Mondello
General Counsel

Robert J. Drummond, Jr.
Director, BPI

I offer you the following personal reflections on this case. It was brought to my attention yesterday in a telephone call from Dr. Kameny who represents Ms. Frasier and I discovered by the end of the day that the staff of this office had already prepared a memorandum dealing with the matter. That memorandum addressed from me to Mr. Sandow is attached, unsigned. It proposes a change in the draft of a letter to be sent to Dr. Kameny -- a change which is designed to play down the salacious nature of the questions put to Ms. Frasier in a statement of interrogatories attached to Mr. Sandow's letter to her dated August 30, 1973. The reason I write separately in this fashion is that I do not think the palliative will solve, or even ease, the basic problem of the case. I read the Wentworth case as deciding that questions put in the sexual detail with which our interrogatories are stated, constitute an unconstitutional incursion into protected personal rights. There can be nothing job-related (i.e., no nexus) in our obtaining knowledge that in the performance of particular homosexual acts one sexual partner manipulated particular private parts, rather than other private parts, of the other participant. If we follow the Labody case, our questions should have shown concern for whether the acts were performed in discreet fashion behind closed or locked doors as distinguished from being performed in apartment building vestibules, subways, theatre foyers or other public places. Another possible nexus, if we follow the McConnell case, would be a concern reflected in the interrogatories whether what should be private activity had been made public by the applicant in such a way as to involve tainting any employer for whom she might serve. Our interrogatories do not reflect these concerns expressly.

I am troubled that the effort to paper over our difficulties in this case by writing a kind of ameliatory letter to Ms. Frasier will be totally unavailing. I think the court will understand that the Commission's second thoughts were better than its first reaction to the case. But the one thing that has become inescapable in this case even if such a letter is sent, is the fact that there are those in the Commission who show a lustful and salacious interest in the specifics of what might well be

IV Investigations
Interrogatories

I Applic. Comp. Sep.
Eval. & Disqual.
Suitability
Immorality
Homosexual
Conduct

private sexual activity of applicants. There is no way to expunge the record we have made of such an interest; and I think inclusion of our interrogatories in the record will so characterize this Commission as to place the case beyond redemption by second thoughts or by briefing materials filed by the United States Attorney's Office.

Since I have not detected in the file that was furnished any information that should lead us to believe that further investigation could convert this to a Labody or McConnell-type case, I suggest it would be in order, on the present record, to permit Ms. Frasier to serve as an employee. Any other course would not only cause us to lose another unfortunate case in court but might, in addition, damage what credibility we may shortly attain if the Commission makes the changes the staff is recommending in the suitability regulations.

GC:LEG I
ALMONDELLO:dn
t.d. 9/19/73

Homosexuals Singer

Counsel Burton McDonald

UNITED STATES CIVIL SERVICE COMMISSION
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO
GC:LEG 3-2-2
EAS:cdb

YOUR REFERENCE
HW:BET:sf

JUN 29 1973

No Hearing

Honorable Harlington Wood, Jr.
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Wood:

Attention: Harland F. Leathers, Chief
General Litigation Section

Re: John F. Singer, et al. v. United States Civil Service Commission et al., U.S.D.C. WD Wash., Civil No. 839-72C2

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

STATEMENT OF THE CASE

Plaintiff John F. Singer was appointed to the position of Clerk Typist, GS-3, at the Seattle District Office of the Equal Employment Opportunity Commission, effective August 2, 1971. By letter of May 12, 1972 (page 26a of the enclosures to this report, hereinafter, Encl. p.__), plaintiff was informed by the Civil Service Commission's Seattle Regional Office that adverse information had been developed against him, and was requested to appear at an interview at which he would be informed of charges against him and be given an opportunity to respond. On May 19, 1972, plaintiff appeared at the Commission office in Seattle for the interview, accompanied by his attorney Ms. Christopher E. Young. Plaintiff was informed of the information developed in the interview and was asked to respond to the allegations, all involving charges of homosexual conduct:

(1) that plaintiff had twice been observed kissing another male at his former place of private employment;

(2) that plaintiff has spontaneously and publicly stated his homosexual preference and activity in response to a newspaper reporter's question in a "man on the street" interview, and had identified himself as an EEOC employee (See also Encl. p. 28);

MERIT PRINCIPLES ASSURE QUALITY AND EQUAL OPPORTUNITY

1883-1973

A. Subsection (a) Requirements

1. Common Question of Fact and Law

Despite the allegations of plaintiff's complaint (Pl. Comp. para 3), the present suit does not involve a valid common question of fact or law, as required by subsection (a)(2) of Rule 23. As the previous discussion demonstrated, the trend of judicial decisions in recent years is that each indivudual case involving adverse action by the Federal Government on the grounds of immoral conduct must be judged on its own merits after evaluating all the relevant factors described in the previous discussion. The decision in one such case thus cannot be binding on any other. The plaintiffs allege that the removal of a federal employee on the grounds of homosexual conduct is per se a denial of due process of law under the Fifth Amendment.

However, the judicial decisions clearly establish that no such absolute constitutional prohibition exists. Constitutional due process requires only that there be established a rational connection between the efficiency of the federal service and the particular homosexual conduct alleged, and that the Government's inquiry into the private sex habits of an individual also be limited to those matters which bear a rational connection to the efficiency of the service. The courts have not fashioned in this area an automatically applied constitutional fiat, but rather a tool for careful application through the administrative process. In effect, the constitutional issue has already been decided and all that remains to be carried out is its application. It is true that the courts have generally given subsection (a)(2) its most liberal interpretation, requiring only that a common question be alleged, and holding that the existence of other diverse issues of fact and law will not prevent maintenance of a class suit. See William Goldman Theatres, Inc. v. Paramount Film Distributing Corp., 49 FRD 35 (E.D. Pa. 1969); Like v. Carter, 448 F.2d 798 (8th Cir. 1972); Siegel v. Realty Equities Corp. of New York, 54 FRD 420 (S.D. N.Y. 1972); Gerstle v. Continental Airlines, Inc., 50 FRD 213 (D. Colo. 1970); Katz v. Carte Blanche Corp., 52 FRD 510 (W.D. Pa. 1971); Contract Buyers v. F. and F. Investment Corp., 48 FRD 7 (N.D. Ill. 1969); Swank v. Rodriguez, 315 F. Supp. 289 (N.D. Calif. 1970), aff'd 403 U.S. 901 (1971); U.S. v. Cantrell, 307 F. Supp. 259 (E.D. La. 1969); Thomas v. Clarke, 54 FRD 245 (D. Minn. 1971).

2. Claims Typical of the Parties

Because of the lack of a question of fact or law common to the alleged class, it is impossible for plaintiff Singer to present a claim "typical of the class" as required by Rule 23(a)(3). Because each case must be ajudicated on its particular merits, there can, by definition, be no claim representative of the class of persons separated from the federal service for homosexual conduct.

3

However, even assuming arguendo that there could be a valid "typical" class representative of all persons separated under 5 CFR 731.201 et seq., plaintiff Singer could not be that representative. The courts have held that the "typicality" standard requires the individual plaintiff to have a claim representative of the class and that the interests of the representative not be antagonistic to those of the class. Thomas v. Clark, supra; Katz v. Carte Blanche Corp., supra; Rosenblatt v. Omega Equities Corp., 50 FRD 61 (S.D. N.Y. 1970). In the present suit, the interests of plaintiff Singer might well be antagonistic to other persons within the alleged class. Plaintiff Singer is an open exclusive activist homosexual, who has obtained--indeed, sought--publicity in his advocacy of freedom of homosexual activity, who has identified himself as an employee of his agency. This places plaintiff in a different position from another individual who has committed homosexual acts only infrequently and privately, or remotely in time, or who has not become publicly known as a homosexual, and/or identified with his employing agency. Such an individual, holding the same type of job and in whose case there are no other factors affecting the efficiency of the service, might be able to obtain judicial relief by a decision based on much narrower grounds than required by plaintiff Singer. Therefore, conduct of a suit tailored to the needs of plaintiff Singer might well be antagonistic to the interest of others in the class.

MONDELLO
Immoral Conduct
re: U.S. CIVIL SERVICE COMMISSION
S.I.R.
v
Hampton

UNITED STATES GOVERNMENT

Memorandum

Subject: FPM SUPPLEMENT (INT.) 731-71

Date: NOV 8 1973

In Reply Refer To: GC:LEG 3-2-2

Your Reference:

From: Anthony L. Mondello
General Counsel

To: William P. Berzak, Chairman
Board of Appeals and Review

Robert J. Drummond, Jr., Director
Bureau of Personnel Investigations

All Regional Directors

See Also: Society for Indiv. Rts v. Hampton

The United States District Court for the Northern District of California has recently decided the case of Hickerson, et al. v. Hampton, et al., challenging the validity of FPM Supplement (Int.) 731-71, relating to Commission policy concerning the exclusion of persons who have engaged in, or solicited others who have engaged in, homosexual acts. The court in that case has entered an order providing that the Commission shall:

> "forthwith cease excluding or discharging from government service any homosexual person who the Commission would deem unfit for government employment solely because the employment of such a person in the government service might bring that service into the type of public contempt which might reduce the Government's ability to perform the public business with the essential respect and confidence of the citizens which it serves."

In rendering this decision, the court has made it clear that its purpose is to prohibit the Commission from discharging, or finding as unfit for government employment, persons who are homosexual on the ground that such employment might bring the public service into public contempt and reduce the ability to perform the public business. Likewise, the court has also made it clear that:

> "granting this relief will not interfere with the power of the Commission to dismiss a person for homosexual conduct in those circumstances where more is involved than the Commission's unparticularized and unsubstantiated conclusion that possible embarrassment about employee's homosexual conduct threatens the quality of the government's performance. Thus, although the overbroad rule stated in Federal Personnel Manual Supplement (Int.) 731-71, supra, cannot be enforced, the Commission is free to consider what particular circumstances might justify dismissing an employee for charges relating to homosexual conduct."

Accordingly, you may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into public contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness -- excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service.

Please keep in mind that the Commission has not yet determined whether it will seek a stay of the district court's order, or whether it will seek to have the case appealed. Moreover, the Commission has made no change in policy on the basis of the outstanding order. Until these matters are decided, you need not make any determination finding suitability on matters pending investigation but in no event may you make an unsuitable determination or cause a discharge on the grounds prohibited by the court.

I have discussed this matter with the Executive Director and the Chairman and can advise you that you should consider this memorandum as a direction from the Commission. In the event that you have questions as to the application of the above advice to a specific case, you should contact the Office of the General Counsel for further guidance.

Suitability Regulation + Strategy, 1974 2

Mr. Drummond 7-26-74 167

UNITED STATES GOVERNMENT

Memorandum

U.S. CIVIL SERVICE COMMISSION

Subject: Proposed Revision of Suitability Regulations

Date: JUN 20 1974

In Reply Refer To:

From: Robert J. Drummond, Jr., Director
Bureau of Personnel Investigations

Your Reference:

To: The Commission

Thru: Bernard Rosen
Executive Director

In collaboration with the Bureau of Policies and Standards and the Office of the General Counsel, we have completed our review of the comments received on the proposed revision of the suitability regulations in response to Bulletin No. 731-2 of December 3, 1973, and the material published in the Federal Register on the same date. This memorandum contains our recommendations based on that review.

Background Information

A proposal to revise the suitability regulations and submit them to agencies and groups for review and comment was submitted to the Commission by memorandum of November 6, 1973 from the Director, Bureau of Policies and Standards. The memorandum indicated that agreement had been reached by the interested bureaus and offices (principally BPS, OGC and BPI) on three previously contested issues:

-- Continuance of "negative" criteria as grounds for disqualification instead of the affirmative criteria that had been proposed earlier.

-- A single standard for evaluating sexual conduct, whether heterosexual or homosexual, couched in terms of the individual's ability to perform his job and the agency's ability to fulfill its responsibilities.

-- Publication of the proposed Regulations for public and agency review and comment.

The memorandum (copy included in Tab A) described the proposed changes in the regulations, discussed their meaning and impact in some detail, and attached for consideration a proposed CSC Bulletin seeking agency comment and a proposed Federal Register notice inviting comment from the public and interested groups.

(Bureau of Personnel Investigations)

BPI has been aware for some years of the aims and efforts of so-called "radical caucuses" to infiltrate and control professional groups. Their efforts have been both concerted and organized. The Gay Task Force influence with the APA may well be another example of the success of these efforts.

A number of cities have in fact passed laws barring discrimination against homosexuals in such areas as employment and housing. Among them are Washington, Minneapolis, Detroit, Ann Arbor, Columbus and Seattle. Others such as Chicago and Philadelphia are considering laws. Often when the issue has been publicized, there has been controversy and ferment. New York and Boulder, Colorado, for example, have rejected proposals for similar laws following public scrutiny and discussion. And despite the APA decision, Newsweek for May 27, 1974 states that most therapists continue to treat homosexuality as a disorder.

We make no recommendation here to change the proposal contained in Bulletin 731-2 to treat homosexual and heterosexual misconduct alike. Our purpose simply is to provide some insights into what has been taking place. If backup details are desired, BPI will be pleased to furnish them.

Nature of Comments Received

Only thirty-six responses were received in reply to our published requests for comments. Of these, 22 were from departments and agencies, two from unions, seven from special interest organizations outside of Government, four from individuals, and one from a CSC Region.

The comments and a digest of them are in Tab C.

The comments reflect no groundswell either of opposition or support. Most agency comments were diffident or noncommittal, showing little indication of enthusiasm and giving the impression of a superficial review. With few exceptions they were signed by the Director of Personnel or other personnel official. There was little or no evidence that security officials provided input and our contacts with the investigative and security community confirm that by and large they were not consulted. Security officials from State, AID and USIA did, however, ask separately for a discussion meeting with BPI. A summary of that meeting is included in Tab C. Their principal concern related to the impact of the proposed changes on determinations in sensitive cases.

No comments were received from the four Congressional committees to whom the Bulletin was sent by special letter. Nor did any of the veterans' organizations that were personally contacted elect to respond.

Except for a handful of agencies, by far the greater depth of analysis was reflected in the comments of the special interest groups, notably the American Bar Association, the American Civil Liberties Union, and the three homosexual organizations that responded. The ACLU and the homosexual groups consistently were scornful of the proposals as offering little change and not going far enough to open Federal employment to homosexuals. Their proposed changes were principally aimed at limiting the Commission's concern to on-the-job behavior of the individual.

Of the two union responses, one suggested some changes in wording; the other declined to comment pending court action on the appeal in the Society for Individual Rights case mentioned above.

Analysis and Discussion

Treated separately below are our assessment of the responses that merit consideration with respect to the proposed reasons for disqualification and the factors to be considered, the comments on the regulations in general, and our rationale for the changes we propose to make on the basis of our review.

Reasons for Disqualification

(a) Dismissal from employment for delinquency or misconduct.

The ACLU would add an elaboration of this disqualification (see Tab C) which we consider too lengthy and restrictive. The guidelines we will issue for application of the disqualifications will contain all that is necessary for decision-making purposes. We therefore propose to make no change in this disqualification.

(b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.

Inclusion of "immoral" in this disqualification received more adverse comment than any other disqualification. Most of these suggested it be deleted. We propose to do so on the premise that we will still adequately be able to take action when warranted on the remainder of the disqualification, which will read "Criminal, infamous, dishonest or notoriously disgraceful conduct." The related guides to be developed will cover our needs.

United States of America
Office of
Personnel Management

Office of the General Counsel
Washington, D.C. 20415

3

FEB 14 1980

In Reply Refer To: GC:LEG 3-2-2
SHS:mkc

Your Reference:

Honorable Alice Daniels
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Dear Ms. Daniels:

Attention: John F. Cordes, Esq.
Appellate Staff

Re: Ashton v. Civiletti
D.C. Cir. No. 76-1142

This is in response to your request for our comments on the advisability of seeking certiorari in the above-captioned case. Although we believe the decision to be totally erroneous in that the court has misconstrued the nature of the excepted service, we do not believe that this case, on its facts, is an appropriate vehicle for Supreme Court review.

Appellant was dismissed from his excepted service position as a messenger with the FBI based on his admitted homosexuality. The court held that an FBI Handbook given the appellant at the time of his appointment, making reference to his continued employment should his performance be satisfactory, created an expectation of continued employment and thereby a property interest in the appellant's position. This holding was made in the face of a clear statement in the manual that competitive status previously acquired was given up while the employee served in the excepted service position.

The court has clearly misinterpreted applicable Supreme Court decision on the nature of a federal employee's property interest in his or her employment. A property interest sufficient to create due process rights in an employee is created when the statutory or regulatory provisions establishing the basic ground rules for the employment in question provide that removal can only be for cause. Board of Regents v. Roth, 408 U.S. 593 (1972). Casual or offhand statements in agency publications do not rise to the level of creating such a property interest. A far better statement of the law can be found in the recent Court of Claims decision in Fiorentino v. United States, wherein the court held that it would be totally inappropriate for the clearly established congressional distinction between the competitive and excepted service to be undermined by less than precise use of words in a handbook prepared by a low level agency staff member.

3

Nonetheless, we do not recommend an appeal. Recent changes in the law have blurred the previously clear distinction between the excepted and competitive service. For example, an excepted service employee subjected to disciplinary action for inadequate performance is entitled to the same procedural protections as the employee in the competitive service with the exception of a direct appeal to the Merit Systems Protection Board. Moreover, the non-tenured employee who believes that his or her disciplinary action is not job related can seek redress through the Special Counsel. 5 U.S.C. §2302(b)(10).

It is true that such redress is not available to an employee of the FBI. 5 U.S.C. §2302(a)(C)(ii). Nonetheless, a substantial body of case law has evolved making job relatedness a prerequisite to disciplinary action against any federal employee, particularly in the area of homosexuality. See S.I.R. v. Hampton, 63 F.R.D. 399 (N.D. Calif. 1973). On the facts of this case, it is highly questionable whether the removal of a low grade messenger for homosexuality would be found to be performance related.

Since the difference in procedural rights available to employees in the competitive and excepted services has been substantially lessened, and the courts have shown a clear tendency to be offended by the removal of low grade employees on the ground of homosexuality, I can see no benefit to be gained by a petition for certiorari in this case.

Sincerely yours,

Margery Waxman

Margery Waxman
General Counsel

COUNSEL MARGERY WAXMAN Suitability 2

United States of America
Office of Personnel Management
Washington, D.C. 20415

In Reply Refer To:

JUN 26 1980

Your Reference:

Same letter went to Hon. Lloyd Bentsen (Sen

Honorable J. J. Pickle
House of Representatives
242 Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Pickle:

This responds to your letter of May 20, 1980, concerning the May 12, 1980 policy statement prohibiting discrimination on the basis of conduct which does not adversely affect the performance of employees or applicants for employment.

As you know, it is the policy of the Federal Government to recruit from all segments of society, and to select and promote individuals on the basis of ability, knowledge, and skills, under fair and open competition. Hence, the Civil Service Reform Act added 5 U.S.C. § 2302(b) which specifically prohibits employees who are authorized to take personnel actions from discriminating for or against any employee or applicant for employment on the basis of conduct which does not adversely affect either the employee's own job performance or the performance of others. Subsection (c) of 5 U.S.C. § 2302 further goes on to give notice to agency heads that they will be held responsible for the prevention of prohibited personnel practices.

In an effort to protect their privacy and constitutional rights (such as any infringement of due process, self-incrimination and other rights) the directive states that applicants and employees are to be free of inquiries into, or actions based upon, non-job-related conduct such as religious, community or social affiliations, or sexual orientation. On the other hand, if the employees or applicants wish to do so, they may receive credit for pertinent religious, civic, welfare service and organizational work performed, with or without compensation, in connection with an examination for civil service positions.

The directive goes on to state that Federal employees are still expected to maintain high standards of honesty, integrity, and impartiality, and to conduct themselves while at their workplace in a manner which will foster public confidence in the Federal Government.

This directive is one of a series of memoranda issued by OPM giving employing agencies guidance on the various provisions of the Civil Service Reform Act of 1978. OPM believes that it has a responsibility to employing agencies to explicate fully any provisions of the Act which may not be absolutely clear by their language, especially the prohibited personnel practices.

OPM's interpretation that discrimination on the basis of conduct not related to work performance constitutes a prohibited personnel practice arises from recent court decisions. Those decisions, beginning in the late 1960's, led the Civil Service Commission to examine its policies concerning inquiries by the Federal Government into the lifestyles and non-job-related conduct of Federal employees and applicants for employment. Until that time the rationale behind such inquries had been that information about unusual, non-traditional lifestyles or sexual orientation might be the subject of talk or scandal. That scandal might subject the agency to a loss of respect in the community, or impede the carrying out of its mission, thereby interfering with "the efficiency of the service."

During the 1970's various court decisions began exhibiting a trend towards making the Federal Government show more than a mere threat or possibility of harm to agencies' reputations. Agencies were now being required to show a "nexus" or connection between the conduct and promotion of the "efficiency of the service." That is, the Federal Government had the burden of demonstrating that any conduct used as the basis for a personnel action adversely affected the efficient performance of the employing agency.

In December 1973, the Civil Service Commission issued an FPM Bulletin (No. 731-3 of December 21, 1973) advising Federal agencies that homosexuals were not unsuitable for Federal service unless it was established that the individual's conduct affected job performance. This change came as a result of a court's holding invalid Commission regulations making homosexuality per se grounds for unsuitability. Henceforth, unsubstantiated claims as to possible embarrassment to the Government which would impede its efficiency were no longer sufficient to exclude homosexuals for consideration from employment.

In 1977, the Civil Service Regulations (5 CFR § 731.202) were amended to delete the category of "immoral conduct" as a basis for disqualification from employment. Current suitability regulations do not permit disqualification unless individuals engage in "criminal, dishonest, imfamous, or notoriously disgraceful conduct", or are otherwise disqualified.

Based upon the aforementioned court decisions section 2302(b) was added to title 5, United States Code, by the Civil Service Reform Act of 1978 to encourage Government managers to review employees solely on the basis of job performance and conduct related to their jobs rather than conduct unrelated to the office work, and to insure that all supervisors and co-workers treat all employees and applicants for employment fairly by giving them an opportunity to perform without pressure or discrimination,

I trust the foregoing will be of some assistance to you in your response to your constituents.

In addition I am also enclosing the specific citations to relevant court decisions which you requested.

Sincerely yours,

Margery Waxman

Margery Waxman
General Counsel

Enclosure