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DOC NO	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1	FORM	SF 171	7	4/10/1986	B6

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
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THE WHITE HOUSE
WASHINGTON

Date: 8/10/88

TO: Central Records

FROM: C. DEAN McGRATH
Associate Counsel
to the President

ACTION

- ☐ For your information
- ☐ For your review & comment
- ☐ As we discussed
- ☐ For your files
- ☐ Please see me
- ☐ Return to me after your review

COMMENTS: Please return to file

for C. Dean McGrath, Jr

Copy # 005

Thank you

THE WHITE HOUSE

WASHINGTON

April 16, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: C. DEAN MCGRATH, JR.

SUBJECT: Demaris H. Miller: Status Report

Status

On April 15, 1986, I spoke with Ms. Miller about her application for a part-time position at the Office of Personnel Management (OPM). I learned that Ms. Miller has received no notification that she has been selected. I asked Ms. Miller to notify me as soon as she receives word on whether she has been selected. She promised to do so.

Background

Ms. Miller learned of the OPM opening through a friend at George Mason University. Ms. Miller's friend learned of the job from a professor at GMU, who had been contacted by Bergita Shay at OPM. The friend was not interested and alerted Ms. Miller to the opening. Ms. Miller contacted Ms. Shay directly and submitted her SF-171 and letters of recommendation. Ms. Miller applied for the job to fulfill a practicum requirement for her Ph.D. Apparently, the job was advertised at George Washington University. Ms. Miller did not know if there were any other applicants.

THE WHITE HOUSE
WASHINGTON

April 11, 1986

TO: DEAN

FROM: PETER

WITHDRAWAL SHEET

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MCGRATH, C. DEAN: FILES

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FOIA
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The State University
in Northern Virginia

4400 University Drive
Fairfax, Virginia 22030

(703) 323-2000

George Mason University

April 9, 1986

Kathleen Connelly, Chief
Research and Demonstration Staff
Office of Performance Management
Work Force Effectiveness and Development Group
U.S. Office of Personnel Management
1900 E. Street, N.W.
Washington, D.C. 20415

Dear Ms. Connelly,

This is to confirm that Demaris H. Miller is a student in the doctoral program in Industrial/Organizational Psychology. If selected for the position of personnel research psychologist, she will receive academic credit for her work. Her on-campus practicum supervisor for this experience will be Dr. Louis Buffardi.

Yours truly,

Jane Flinn,
Chairman,
Department of Psychology

THE WHITE HOUSE

WASHINGTON

May 7, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: C. DEAN MCGRATH, JR.

SUBJECT: Demaris H. Miller: Interview with Brigitte Schay (Office of Personnel Management)

On April 18, 1986, I learned that Mrs. Miller had been offered and accepted a part-time position at the Office of Personnel Management (OPM). On April 21 I advised Jack Carley (General Counsel, OMB) of this fact.

On April 23, 1986, I contacted Brigitte Schay (OPM) who was responsible for the selection of Mrs. Miller as a graduate student assistant at OPM. Dr. Schay advised me that she had contacted George Mason and George Washington Universities about candidates for the position. Dr. Schay advised that the position is difficult to fill because it requires a person with a background in psychology research, mathematics, and statistics.

Dr. Schay and Kathleen Conley (Chief, Research and Demonstration Staff, OPM) interviewed Mrs. Miller and felt that she was the most qualified candidate for the job. Mrs. Miller's grades and course work matched the position's requirements perfectly. Furthermore, the two other candidates for the position indicated that they were not interested in the position.

Dr. Schay stated that Mrs. Miller's relationship with the Director of OMB played no part in their hiring decision. Dr. Schay indicated that, if anything, Mrs. Miller's relationship was considered a negative factor.

Based on my conversation with Dr. Schay, I am convinced that Mrs. Miller's selection to the position was not influenced by her relationship with Jim Miller (Director, OMB). I informally advised Jim Miller and Jack Carley of my conclusions.

THE WHITE HOUSE

WASHINGTON

March 1, 1985

MEMORANDUM FOR THE FILE

FROM: JOHN G. ROBERTS
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Appointment of Maureen Reagan to U.S. Delegation to the World Conference of the United Nations Decade for Women, 1985

On February 28, 1985, I telephoned Ralph Tarr, Acting Assistant Attorney General for the Office of Legal Counsel, to obtain his advice concerning the prospective appointment of Maureen Reagan to the U.S. Delegation to the World Conference of the United Nations Decade for Women, 1985. My question to Tarr was whether any problems were presented under the Anti-Nepotism Act, 5 U.S.C. § 3110, by Maureen Reagan's appointment. Tarr reseafched the question and returned my call later in the day.

The President is authorized by 22 U.S.C. § 287(d) to appoint individuals "to represent the United States in organs and agencies of the United Nations." That authority, with respect to organizations such as this Conference, was delegated to the Secretary of State on February 28, 1948, by President Truman. Tarr advised that in light of the delegation of authority Maureen Reagan's appointment would not constitute a violation of the Anti-Nepotism Act. According to Tarr, the statute is concerned with the act of appointment, and a delegation of authority operates to transfer responsibility for that act to the delegate.

THE WHITE HOUSE

WASHINGTON

January 12, 1984

MEMORANDUM FOR NANCY PALMER
STAFF ASSISTANT
LEGISLATIVE AFFAIRS

FROM: JOHN G. ROBERTS JGR
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Anti-Nepotism Statute

As we discussed, I am attaching a copy of the anti-nepotism statute, 5 U.S.C. § 3110. I should point out that the statute has, over the years, been interpreted by the courts, the Department of Justice, other federal agencies, and this office. In light of this fact, it would be imprudent to rely on a reading of the statute without consulting this office. Please do not hesitate to let us know if we may be of any assistance.

Attachment

DEPARTMENT OF STATE
WASHINGTON

February 26, 1948

MEMORANDUM FOR THE PRESIDENT

Subject: Designation of United States Delegations and Representatives to International Conferences and Organizations.

It has always been the practice for the Secretary of State to submit to the President for approval the names of those persons proposed to represent this Government both permanently on international organizations and temporarily at international conferences. In some instances, like the United Nations, the enabling legislation for participation requires Presidential approval as well as Senate confirmation of United States Representatives, Alternates or Delegates. Otherwise, the practice of reference to the President has been a matter of custom, not of law.

Approval of the hundreds of such designations may be for you an unnecessary burden which could be partially eased now in view of the broad consideration among interested government agencies and private interested groups that normally precede my nominations to you. Furthermore, I believe that your attention may not be warranted for many technical or exploratory delegations, for many brief assignments or for the selection of advisory and secretariat staffs. Some few lists of advisory personnel on delegations to recent meetings have not been sent you because of their non-committal character. Since all such designations are peculiarly a Presidential prerogative, however, I would welcome a delegation of authority from the President to the Secretary of State for certain instances.

Therefore, I recommend that you continue to approve the designation of those United States Representatives, Alternates and Delegates to international organizations and conferences as required by law or of major importance, and that you delegate to the Secretary of State the authority to designate all other representatives and delegates as well as advisory and secretariat staffs for all groups. You would thus authorize me to state in any letter of designation: "By authority of the President the Secretary of State designates you ...". A list of typical international activities in both

categories

categories is enclosed. If at any time a difference of opinion arose within the Government on any of the matters so delegated to me, I would of course exercise the discretion of referring the question to you for decision.

I should appreciate your informing me whether you approve the above delegation of authority with regard to the designation of United States delegations and representatives to international conferences and organizations.

Dean Acheson

A good suggestion.
Glad to approve it.

Harry S Truman

2-28-48
Enclosure:

Proposal for Naming Delegates

THE WHITE HOUSE

WASHINGTON

June 29, 1983

MEMORANDUM FOR JOHN S. HERRINGTON
ASSISTANT TO THE PRESIDENT
FOR PRESIDENTIAL PERSONNEL

FROM: RICHARD A. HAUSER
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Under Secretary of Commerce
for Travel and Tourism

We have been advised that Donna Tuttle, wife of Bob Tuttle, is being considered for appointment to the above-referenced position. The process by which Mrs. Tuttle first came to be considered for this position raises concerns under the anti-nepotism statute, 5 U.S.C. § 3110. It is our understanding that Bob Tuttle made inquiries concerning the suitability of his wife for this position with Joe Ryan and yourself. The anti-nepotism statute prohibits a "public official" -- defined as an officer with authority "to recommend individuals for appointment, employment, promotion, or advancement" in an agency -- from advocating the appointment of a relative for a position in any agency "over which he exercises jurisdiction or control." 5 U.S.C. § 3110(b). Under 5 U.S.C. § 3110(c), an individual who benefits from a recommendation prohibited by § 3110(b) is not entitled to pay.

It is not clear whether a technical violation of the anti-nepotism statute occurred in this case. It is of course Mr. Tuttle's job to recommend individuals for Presidential appointment, and while his portfolio does not specifically include the Commerce Department, nor is that area strictly off limits. He may thus be considered to fit the definition of "public official" in the statute. The critical question so far as actual violation of the statute is concerned would thus appear to be whether Mr. Tuttle exercises jurisdiction or control over the Commerce Department. While he obviously does not with respect to the operations of the Department, the Office of Presidential Personnel does exercise jurisdiction with respect to Presidential appointments at Commerce, and such authority may be considered sufficient under the statute.

Quite apart from the question of compliance with the anti-nepotism statute -- on which no definitive answer is possible -- this appointment raises serious appearance problems. The media has focused considerable attention on similar appearance problems in the recent past, and can be expected to do so in this case. While we understand Mrs. Tuttle to be eminently qualified for the position in question, her qualifications are likely to be overlooked by those in the media and on the Hill who are interested in embarrassing the Administration with renewed charges of nepotism. All of the individuals involved have been forthright in raising this question with our office, and we do not mean to suggest the existence of any willful or actual "nepotism." Appearance problems do, however, exist, and at a minimum they should be raised with Messrs. Meese, Baker and Deaver.

RAH:JGR:aw 6/29/83

cc: RAHauser
JGRoberts
Subj.
Chron

THE WHITE HOUSE

WASHINGTON

June 28, 1983

MEMORANDUM FOR JAMES A. BAKER III
MICHAEL K. DEAVER
JOHN S. HERRINGTON

FROM: RICHARD A. HAUSER /s/
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT: Under Secretary of Commerce
for Travel and Tourism

We have been advised that Donna Tuttle, wife of Bob Tuttle, is being considered for appointment to the above-referenced position. The process by which Mrs. Tuttle first came to be considered for this position raises concerns under the anti-nepotism statute, 5 U.S.C. § 3110. It is our understanding that Bob Tuttle recommended his wife for this position to Joe Ryan and John Herrington. The anti-nepotism statute prohibits a "public official" -- defined as an officer with authority "to recommend individuals for appointment, employment, promotion, or advancement" in an agency -- from advocating the appointment of a relative for a position in any agency "over which he exercises jurisdiction or control." 5 U.S.C. § 3110(b). Under 5 U.S.C. § 3110(c), an individual who benefits from a recommendation prohibited by § 3110(c) is not entitled to pay.

It is not clear whether a technical violation of the anti-nepotism statute occurred in this case. It is of course Mr. Tuttle's job to recommend individuals for Presidential appointment, and while his portfolio does not specifically include the Commerce Department, nor is that area strictly off limits. He may thus be considered to fit the definition of "public official" in the statute. The critical question so far as actual violation of the statute is concerned would thus appear to be whether Mr. Tuttle exercises jurisdiction or control over the Commerce Department. While he obviously does not with respect to the operations of the Department, the Office of Presidential Personnel does exercise jurisdiction with respect to Presidential appointments at Commerce, and such authority may be considered sufficient under the statute.

received by Mrs. Rufer from the corporation as wages was more than $140 per month. The record shows that $100 per month office rent was reasonable, $100 per month car rent was reasonable, the traveling expenses were reasonable, and that the interest obtained from loans made to the corporation was reasonable. None of these items of income are to be included as total earnings. 42 U.S.C.A. Secs. 403(f) (5) (A, B) and 411. There is not substantial conflicting evidence that any of these amounts were net earnings from self-employment and were, therefore, to be added to Mrs. Rufer's wages in determining her total earnings under 42 U.S.C.A. Sec. 403(f) (5) and 20 C.F.R. 404.429. Since there is little, if any, conflicting evidence on this point, the findings of the hearing examiner are not supported by substantial evidence. Reams v. Finch, 428 F.2d 1225, 1226 (8th Cir. 1970); Celebrezze v. Bolas, 316 F.2d 498, 506 (8th Cir. 1963).

The record indicates by substantial evidence that in 1968, the corporation underwent a major managerial change. Most of Mrs. Rufer's former duties were now performed by Mr. Smith, who now received most of the salary Mrs. Rufer had received prior to 1968. There was no obvious scheme to redirect income and retain the same amount of control and earnings as was present in Ludeking v. Finch, 421 F.2d 499 (8th Cir. 1970) and Newman v. Celebrezze, 310 F.2d 780 (2d Cir. 1962). The mere fact that Mrs. Rufer owned 98% of the corporate stock and was therefore responsible for realigning the corporate management means no more than that she intended to qualify for Social Security benefits, and absent any element of fraud or deceit does not automatically disqualify her from such benefits. Sewell v. Celebrezze, 216 F.Supp. 192 (D.S.D.1963).

The decision of the Appeals Council of the Department of Health, Education and Welfare is reversed, and summary judgment is denied the defendant pursuant to Rule 56 of the Federal Rules of Civil Procedure. Attorney's fees are granted to the claimant in an amount equal to 25% of the total of the benefits past due as of the filing date of this opinion, according to the provisions of 42 U.S.C.A. Sec. 406(b) (1).

This memorandum decision shall constitute the Court's findings of fact and conclusions of law in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure.

William LEE, Plaintiff,

v.

Winton BLOUNT, Postmaster General of the United States Postal Service, et al., Defendants.

No. 71-305.

United States District Court, N. D. California.

July 7, 1972.

United States Postal Service employee brought suit seeking review of what he contended to be an unlawful failure by defendants to promote him to the position of "Foreman of the Mails" in the San Francisco Post Office. The District Court, Sweigert, J., held that since plaintiff failed to show that defendants, who had initially denied him promotion under federal antinepotism statute because his uncle was the postmaster having discretion over his promotion, acted arbitrarily or abused their discretion in denying his promotion, plaintiff, who had subsequently been promoted, had not "undergone an unjustified or unwarranted personnel action" entitling him to back pay under the Back Pay Act.

Summary judgment for defendants.

1. Officers ⇐11.7

Promotion or nonpromotion within government service as a general rule in-

appropriate for judicial review.

2. Post Office ⇐5

United States Postal Service employee, who brought suit seeking review of what he contended to be an unlawful failure by defendants to promote him to the position of "Foreman of the Mails" in the San Francisco Post Office, had the heavy burden of showing that the failure of defendants to timely promote him constituted improper agency action.

3. United States ⇐36

Antinepotism statute, providing in part that a public official may not appoint or promote any individual who is a relative of his, is not unconstitutionally overbroad. 5 U.S.C.A. § 3110.

4. Post Office ⇐5

Since plaintiff, a United States Postal Service employee who brought suit seeking review of what he contended to be an unlawful failure by defendants to promote him to the position of "Foreman of the Mails" in the San Francisco Post Office, but who had subsequently been promoted, failed to show that defendants, who had initially denied him promotion under federal antinepotism statute because his uncle was the postmaster having discretion over his promotion, acted arbitrarily or abused their discretion in denying his promotion, plaintiff had not "undergone an unjustified or unwarranted personnel action" entitling him to back pay under the Back Pay Act. 5 U.S.C.A. §§ 3110, 5596.

Edward Bell, San Francisco, Cal., for plaintiff.

James L. Browning, Jr., U. S. Atty., and Brian Denton, Asst. U. S. Atty., San Francisco, Cal., for defendants.

MEMORANDUM OF DECISION

SWEIGERT, District Judge.

This is an action by William Lee, an employee of the United States Postal Service, seeking review of what plaintiff tion of "Foreman of the Mails, Supervisorial Level PFS–8, in the San Francisco Post Office.

The record shows, however, that on March 19, 1971, the Regional Director for the Postal Service, R. E. James, informed Postmaster Lim Poon Lee, plaintiff's superior, that plaintiff had been selected, under legal authority of Regulation 5 C.F.R. § 335.102, for promotion to the position in question effective March 20, 1971. (Certified Copy of letter, attached as an exhibit to defendants' brief, filed July 7, 1971).

The parties have stipulated among themselves that the only issue remaining in this action is whether plaintiff is entitled to back pay for the period commencing with the date plaintiff claims he should have been promoted and the date upon which he was in fact promoted (Stipulation, filed January 12, 1972).

The complaint alleges that plaintiff was one of one hundred postal workers who, by virtue of having attained a certain score on written eligibility examinations, were in September, 1968, placed on an "eligibility list" for one hundred-twenty open positions of "Foreman of the Mails," Supervisorial Level PFS–8; that it had been the practice of defendants to promote such eligibles in the order they appeared on the eligibility list; that plaintiff was, nevertheless, denied the promotion to Level PFS–8 because of his relationship to his uncle, Lim Poon Lee, defendant herein and Postmaster for the City of San Francisco.

Both parties now make cross-motions for summary judgment. Neither party has submitted any affidavits as to factual matters in support of its motion; nor has there been filed herein any record of administrative action taken by the Postal Service in connection with plaintiff's promotion other than as indicated above. Both parties base their motions entirely on matters of law.

[1, 2] We note at the outset that promotion or non-promotion within Gov-

ernment service as a general rule involves supervisory discretion and is not appropriate for judicial review. Reece v. United States, 455 F.2d 240 (9th Cir., 1972). Noting that Title 5 U.S.C. § 701(a) (2) expressly provides that the judicial review provisions of the Administrative Procedure Act are not applicable in cases where agency action has been committed to the discretion of the administrative agency, the Ninth Circuit stated in *Reece* that "charges of abuse of discretion will be rejected, unless there is a strong showing of such abuse." Plaintiff in this case, therefore, has a heavy burden of showing that the failure of defendants to timely promote him constituted improper agency action.

It is clear that in this case the matter of promotion is in the discretion of the Postmaster. Applicable instructions pertaining to promotions, set forth in Part 10(D) (4) of Postal Bulletin 20480–A (Exhibit A to the Complaint), provide that with respect to Level PFS–8 promotions, the Postmaster, with or without calling upon the assistance of a Promotion Advisory Board, must first select three candidates for promotion to the position in question, must analyze and assess their respective qualifications for that position, and must then recommend to the Regional Director one such individual for promotion to said position. The Regional Director must then determine whether proper procedures have been followed and, if satisfied, he must then approve the Postmaster's recommendation and instruct the Postmaster to make the promotion.

It is undisputed that plaintiff is and has been during all applicable periods the nephew of Lim Poon Lee, the Postmaster for the Post Office wherein plaintiff sought his promotion to Level PFS–8.

The record shows that the reason given plaintiff for the denial of his promotion by the Regional Director [1] was that his relationship with his uncle, i.e., the Postmaster having discretion over his promotion, barred the promotion under the so-called anti-nepotism statute, 5 U.S.C. § 3110, providing, in pertinent part, as follows:

> "A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official." 5 U.S.C. § 3110(b)).

In 5 U.S.C. § 3110(a) (3) Congress has limited the applicability of this statute to only specified classes of "relatives," including the relationship between uncle and nephew.

[3] Plaintiff first contends that the above statute is somehow unconstitutionally overbroad in that it "reaches too far in quelling the ill of favoritism" in Government service. Plaintiff argues that this alleged overbreadth is illustrated by its operation in this case to deny his promotion.

We are not persuaded by plaintiff's argument that 5 U.S.C. § 3110 is unconstitutionally overbroad. The legislative history of this provision indicates that the Congressional purpose behind its enactment was "to prevent a public official from appointing a relative to a civilian position, or from advocating a relative for appointment to a civilian position, in the agency in which the public official serves or over which he exercises supervision . . . ." and that it was also the intent of Congress that "[t]he provision would prohibit *promotions* and advancements in such cases as well as appointments." U.S.Code Cong. & Admin.News, 90th Cong., 1st Sess. vol. 2 at pp. 2284–2285 (1967).

Given the Congressional purpose of the statute, the propriety of which

1. See Exhibit B to the Complaint, letter from R. E. James, Regional Director of the Postal Service, incorporated by reference in defendants' brief filed July 7, 1971.

plaintiff does not challenge, the statute is not overbroad. Application of the anti-favoritism prohibitions of the Act to promotional situations involving specified kinship relationships, such as the relationship between uncle and nephew, cannot be said to constitute an overbroad classification. Congress could not have been more specific.

[4] Plaintiff also contends that defendants here acted arbitrarily in failing to timely promote him to Level PFS–8 in that, since it was possible for them to eventually devise some method whereby plaintiff could be subsequently promoted, such method should have been utilized to promote him in the first instance.

The only indication in the record as to the manner in which plaintiff was eventually promoted in March, 1971 is the above-mentioned reference to Regulation 5 C.F.R. § 335.102. That regulation, as we read it, is merely a general Civil Service regulation providing general authority for federal agencies to promote certain types of employees; there is no reference in that regulation to authorizing promotion of employees when such promotion would be otherwise barred by the anti-nepotism statute.

Upon what authority plaintiff here was evenutally promoted after the institution of this lawsuit cannot be ascertained from the record. But the propriety of that promotion is not an issue in this case.

The real issue is whether plaintiff has shown that defendants acted arbitrarily in denying plaintiff's promotion in the first instance. As indicated above, the applicability of the anti-nepotism statute in the present case is clear. Plaintiff's promotion by his uncle was barred by the statute and defendants acted correctly.

If there existed some other lawful means whereby plaintiff could have been and should have been promoted in the first instance, it is incumbent upon plaintiff to show it.

The only authority furnished by plaintiff in support of the proposition that plaintiff could have been promoted notwithstanding his relationship to the Postmaster is a reference to a Postal Bulletin 20660, dated August 29, 1968, wherein it is stated:

"(Note: Postal Bulletin 20643 dated May 9, 1968 states as follows: 'In instances where the law and regulations permit a public official to appoint, employ, promote, advance, or advocate the appointment, employment, promotion, or advancement of a relative a recommendation shall be forwarded to the next higher appointing or approving authority for decision, with full disclosure of the relationship and circumstances.')"

This provision assumes, by its own terms, that the promotion by a relative, or, upon the recommendation by a relative, is permitted by law or regulation. We have been cited to no law or regulation which would allow such a promotion in this case in view of the prohibitions of the anti-nepotism statute. Moreover, if the procedure suggested in this bulletin were followed in the present case, the promotion would still have been barred by the statute since it would have involved the recommendation of a relative —albeit with full disclosure of the relationship and the circumstances.

Plaintiff's prayer for back pay is based on the Back Pay Act, 5 U.S.C. § 5596, which provides as follows:

"(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all

or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through any other employment during that period."

Plaintiff has failed to show that defendants acted arbitrarily or abused their discretion in denying his promotion in the first instance and we find, therefore, that he has not "undergone an unjustified or unwarranted personnel action" entitling him to back pay under the Back Pay Act.

Having examined the pleadings and the record herein, we are satisfied that there are no genuine issues as to any material fact and that defendants are entitled to judgment in their favor as a matter of law.

Ronald SHAAB, Plaintiff,

v.

Richard G. KLEINDIENST, Acting Attorney General, et al. (Formerly John N. Mitchell, Attorney General) Defendants.

Civ. A. No. 11-72.

United States District Court,
District of Columbia.

June 7, 1972.

Suit seeking, inter alia, to enjoin Attorney General from enforcing criminal provisions of the Copyright Act. On motion by plaintiff for summary judgment, and by defendants to dismiss or, in the alternative, for judgment on the pleadings, the three-judge District Court held that failure of 1971 statute which established copyright protection for sound recordings to provide for compulsory licensing of those recordings that were copyrighted did not result in invidious discrimination against plaintiff, who was himself subject to compulsory licensing of musical compositions under 1909 revision of the copyright clause, since distinction between the two provisions was rational and reasonable, in that provision for compulsory licensing of copyrighted musical compositions promotes the arts by permitting numerous artistic interpretations of a single written composition, while extension in 1971 statute of compulsory licensing provisions to require licensing of companies that wish to make and sell identical versions of recorded compositions would not result in a public benefit.

Plaintiff's motion denied, motions of defendants granted.

1. Copyrights ⇐4

Copyright clause of the Constitution must be interpreted broadly to provide protection for technical advances unknown and unanticipated in the time of the founding fathers, such as the sound recording industry. U.S.C.A.Const. art. 1, § 8, cl. 8.

2. Constitutional Law ⇐208(1)
Copyrights ⇐2

Failure of 1971 statute which established copyright protection for sound recordings to provide for compulsory licensing of those recordings that were copyrighted did not result in invidious discrimination against plaintiff, who was himself subject to compulsory licensing of musical compositions under 1909 revision of the copyright clause, since distinction between the two provisions was rational and reasonable, in that provision for compulsory licensing of copyrighted musical compositions promotes the arts by permitting numerous artistic interpretations of a single written composition, while extension in 1971 statute of compulsory licensing provisions to require licensing of companies that wish to make and sell identical versions of recorded compositions would not result in a public benefit. 17 U.S.C.A. § 1 et seq.; U.S.C.A.Const. art. 1, § 8, cl. 8.

3. Copyrights ⇐4

Statute establishing copyright protection for sound recordings was not ambiguous, where purpose of statute was to provide a limited right in sound recordings to protect against unauthorized duplication and "piracy," and where the statute contained specific language designed to carry out that purpose.

2ND CASE of Level 1 printed in FULL format.

GERALD ALEXANDER v. DEPARTMENT OF THE NAVY

DOCKET NUMBERS DC07528310310, DC07528310948

MERIT SYSTEMS PROTECTION BOARD

24 M.S.P.R. 621

December 6, 1984

OPINION:

OPINION AND ORDER

Gerald A. Alexander (appellant) was suspended for twenty-one days and reduced in grade from a Supervisory Personnel Management Specialist, GM-13, to an unspecified GS-12 position in the Consolidated Civilian Personnel Office (CCPO), Department of the Navy (agency). The agency based its actions on two instances of appellant's alleged "advocating" of his daughter for employment with the agency and also negligence in the management of the Summer Employment Program for 1982.

Appellant filed a petition for appeal with the Board's Washington, D.C. Regional Office. Following a hearing, the presiding official issued an initial decision reversing the agency action. In that decision, the presiding official held, first, that the agency had failed to establish that appellant's actions constituted "advocacy" in violation of 5 U.S.C. §§ 2302(b)(7), and 3110, 5 C.F.R. Part 310 and 310 FPM Subchapter 1, and second, that it had failed to prove the negligence charge.

The agency has filed a timely petition for review contending that the presiding official erred in finding that appellant's actions did not constitute advocacy. Specifically, it argues that the presiding official misinterpreted the relevant statutes and regulations by finding that appellant did not "advocate" as that item is defined in the American Heritage Dictionary (Second College Edition) and not applying the definition of the term contained in the Office of Personnel Managment (OPM) regulations and the Federal Personnel Manual.

The Office of the Special Counsel has filed an amicus brief in which it argues that the presiding official erroneously defined "advocacy" in the initial decision because the regulations and the FPM implementing instructions provide a clear interpretation of the term.

The petition for review is GRANTED.

Appellant, a public official as that term is defined in 5 U.S.C. § 3110, was charged with two specifications of "advocating" his daughter, n1 Perea Alexander, for a position with the agency.

n1 A daughter is considered a relative under 5 U.S.C. § 3110(a)(3).

The first specification concerned a telephone call that appellant made to Sylvia Mitchell, Assistant Administrative Officer, Headquarters, Naval District of Washington (NDW), in June 1982. The presiding official found that although appellant initiated a conversation concerning employment opportunities in NDW,

it was only after an inquiry from Ms. Mitchell that appellant indicated his daughter was looking for employment, and it was Ms. Mitchell who asked appellant to send over his daughter's SF-171. n2

n2 See Initial Decision at 4-6. These findings are entitled to deference since the presiding official had the opportunity to observe the demeanor and hear the testimony of the witnesses. Weaver v. Department of the Navy, 2 MSPB 297 (1980).

The second specification concerns appellant's conduct following the conversation. Appellant asked his subordinate, Ms. Tyra Dent, to take his daughter's SF-171 to Ms. Mitchell. Ms. Dent was the designated Coordinator for the 1982 Summer Employment Program and as such, was responsible for the hiring of persons to serve as summer aids within CCPO and the agency commands that it serviced. However, an activity such as NDW could request that a specific individual be appointed by means of a "Recruit 52" form to fill one or more of its available summer positions. After receiving Ms. Alexander's SF-171 from Ms. Dent, Ms. Mitchell determined that a position was not available to WND and shortly thereafter returned the SF-171 to Ms. Dent who refiled Ms. Alexander's application.

In the initial decision, the presiding official found that these actions did not constitute advocacy because the dictionary definition of "advocacy" is "to speak in favor of; recommend" and appellant's conduct did not rise to that level.

Restrictions on the employment of relatives in the federal civil service are found in several statutory and regulatory provisions. n3 Each of these provisions prohibits a public official from advocating a relative for appointment or employment in the agency in which the person is employed. The relationship between a father and daughter is included in the statutory prohibition. 5 U.S.C. § 3110(a)(3); Roberts v. United States Postal Service, 11 MSPB 106 (1982).

n3 5 U.S.C. §§ 2302(b)(7); 3110, 5 C.F.R. Part 310.

The Term "advocate" is not defined by statute. However, regulations promulgated by OPM n4 do provide a definition and examples of the term.

n4 The regulations set forth at 5 C.F.R. §§ 310.101-310.103, although closely related to the nepotism restriction in 5 U.S.C. § 3110, neither derive from nor interpret the statute. These regulations are promulgated under the general authority of 5 U.S.C. § 1104, which authorizes the Director of OPM to prescribe regulations and ensure compliance with the civil service laws. Except for the emergency exceptions contained in §§ 310.201-202, OPM has no authority to interpret or to regulate under 5 U.S.C. § 3110.

Section 310.103 of title 5, Code of Federal Regulations, provides that "a public official shall not advocate one of his relatives for appointment, employment, promotion, or advancement to a position in his agency or in an agency over which he exercises jurisdiction or control." 5 C.F.R. § 310.103(a). This section further states:

For the purpose of this section, a public official who recommends a relative, or refers a relative for consideration by a public official standing lower in

the chain of command, for appointment, employment, promotion, or advancement, is deemed to have advocated the appointment, employment, promotion, or advancement of relative. (Emphasis added.)
5 C.F.R. § 310.103(c).

Because the regulations clearly state what actions constitute advocating, the presiding official erred in considering appellant's action under the definition of advocacy contained in the dictionary, which limits the definition to recommending. The regulatory definition of the term includes either a recommendation or a referral of the relative for consideration by a subordinate. Therefore, appellant's behavior must be measured against this dual prohibition. n5

n5 In its brief, the Office of Special Counsel relies upon 310 FPM § 1-3a(2) which expands upon the "referral for consideration" requirement set forth in the regulations. The FPM, insofar as it includes more than a restatement of statutory and regulatory requirements, constitutes only the Office of Personnel Management's official "guidance" to agencies. See Tuggle v. Consumer Product Safety Commission, MSPB Docket No. DC03518210356 (March 17, 1984); Carter v. Department of the Navy, 6 MSPB 92 (1981).

This Board cannot find that appellant's conversation with Ms. Mitchell constitutes advocacy under the statute or regulations. It is clear that Ms. Mitchell was not a subordinate of appellant, nor is there any evidence that appellant spoke in favor of, recommended, commended, or endorsed the employment of his daughter by NDW. n6 Even assuming, arguendo, that appellant's conduct revealed an interest in securing or facilitating his daughter's consideration for employment, as argued by the agency, and his conduct does constitute referral for consideration, such conduct does not violate the regulations since Ms. Mitchell was not lower in the chain of command.

n6 See Initial Decision at 6.

Similarly, the Board cannot find that appellant's request that Ms. Dent take his daughter's SF-171 to Ms. Mitchell constituted advocacy. Although Ms. Dent was the coordinator of the summer program and had hiring authority, in this instance she was merely acting in a ministerial manner by taking the application to Ms. Mitchell, who was the public official considering the application. Ms. Dent could not have facilitated the hiring of appellant's daughter since the initial determination as to whether there was a position available in NDW was to be made by Ms. Mitchell. Therefore, appellant did not "refer" his daughter "for consideration by a public official standing lower in the chain of command", as required by the regulation, since the application was not for Ms. Dent's consideration but rather for Ms. Mitchell's.

Finally, the agency contends that the presiding official's findings concerning the negligence charge were incorrect. These arguments constitute mere disagreement with the factual findings and credibility statements of the presiding official which are entitled to due deference by the Board. See Weaver v. Department of the Navy, 2 MSPB 297 (180). n7

n7 The agency has also introduced as "new and material evidence" affidavits of Frank Sharkey and Susan Reider, to attempt to show that appellant was calling other agency activities looking for employment for his daughter. The agency has not made a sufficient showing that this evidence was unavailable prior to the

close of the record and therefore fails to meet the due diligence requirement of 5 C.F.R. § 1201.115(a). Avansino v. U.S. Postal Service, 3 MSPB 308 (1980). Further, the Board notes that the evidence would not be relevant since appellant was not charged with contacting these two officials concerning his daughter's employment opportunities with the agency.

Accordingly, the initial decision is AFFIRMED as MODIFIED herein. The agency is hereby ORDERED to cancel the suspension and the reduction in grade taken against appellant Gerald A. Alexander. Proof of compliance with this Order shall be submitted by the agency to the Office of the Secretary of the Board within twenty (20) days of the date of issuance of this opinion. Any petition for enforcement of this Order shall be made to the Washington, D.C. Regional Office in accordance with 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the court no later than thirty (30) days after the appellant's receipt of this order.

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