United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

VOL. 17 JANUARY 31, 1969 NO. 5

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 17 January 31, 1969 No. 5

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NEWS NOTES

ATTORNEY GENERAL NAMES DEPUTY ATTORNEY GENERAL AND ASSISTANT ATTORNEYS GENERAL

January 21, 1969: Attorney General John N. Mitchell has named Richard G. Kleindienst Deputy Attorney General to assist in the over-all supervision and direction of the Department of Justice and in the formulation of Departmental policies and programs.

The 45-year-old Kleindienst, National Director of Field Operations for the Nixon for President Committee during the campaign, is responsible for legislation, Congressional relations and judicial and presidential appointments. In the absence of the Attorney General, he acts as Attorney General.

Other names sent to The White House for Senate confirmation are:

Richard W. McLaren, Assistant Attorney General, Antitrust Division, to replace Edwin M. Zimmerman.

William D. Ruckelshaus, Assistant Attorney General, Civil Division, to replace Edwin L. Weisl, Jr.

Will R. Wilson, Assistant Attorney General, Criminal Division, to replace Fred M. Vinson, Jr.

Johnnie McK. Walters, Assistant Attorney General, Tax Division, to replace Mitchell Rogovin.

Jerris Leonard, Assistant Attorney General, Civil Rights Division, to replace Stephen J. Pollak.

William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to replace Frank M. Wozencraft.

Attorney General Mitchell also announced that several top assistants had been asked to remain.

They are:

Erwin N. Griswold, Solicitor General; J. Walter Yeagley, Assistant Attorney General, Internal Security Division; and Leo M. Pellerzi, Assistant Attorney General for Administration.

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POINTS TO REMEMBER

PREPRINTED LETTERS AND MEMORANDA BEARING UNITED STATES ATTORNEYS' NAMES

With the advent of the new Administration, it may become necessary to revise certain forms and preprinted letters and memoranda which bear names of United States Attorneys.

If in the interim, it becomes necessary to reprint preprinted forms, letters, or memoranda, it would be advisable to block out inappropriate names and order minimum quantities so as to avoid the waste of large quantities of the interim document. Please seek proper approval before ordering large quantities of documents preprinted with names of U.S. Attorneys, if such preprinting is deemed necessary.

OFFICE OF MANAGEMENT SUPPORT

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EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
Director Harlington Wood

APPOINTMENTS

Harlington Wood, Director, Executive Office for U.S. Attorneys

On January 21, 1969, Harlington Wood, Jr. of Springfield, Illinois was appointed Director of the Executive Office for U.S. Attorneys by Attorney General John M. Mitchell. Mr. Wood received his J.D. degree from the University of Illinois in 1948, and was the United States Attorney for the Southern District of Illinois from 1958 to 1961. For the past eight years he has engaged in private practice in Springfield. Former Director John K. Van de Kamp is now assisting Mr. Wood as Deputy Director.

ASSISTANT UNITED STATES ATTORNEYS

California, Central - WILLIAM J.TOMLINSON: Wichita University, A.B.; Washburn University School of Law, LL.B. Formerly an Assistant County Prosecutor in Kansas and in private practice.

Connecticut - RICHARD P. CRANE, JR.: Vanderbilt University, B.A. and LL.B. Former Legislative Assistant, U.S. Senator T.J. Dodd; Associate Counsel, Education & Labor Committee, House of Representatives; and Assistant Counsel, Government Operations Committee, House of Representatives.

District of Columbia - GREGORY C. BRADY: University of Nebraska, B.A.; University of Nebraska College of Law, J.D. Former Judge Advocate, United States Navy.

Mississippi, Northern - NORMAN L. GILLESPIE: University of Mississippi, B.A.; University of Mississippi Law School, LL.B. Formerly in private practice; also, County Prosecuting Attorney, New Albany, Mississippi.

Washington, Western - CHARLES PINNELL: Tufts University, A.B.; Rutgers Law School, LL.B. Formerly a law clerk and in private practice.

RESIGNATIONS

ASSISTANT UNITED STATES ATTORNEYS

Illinois, Northern - GERALD L. SBARBORO: To become legal advisor to Lt. Governor Paul Simon of Illinois.

Louisiana, Eastern - FREDERICK W. VETERS: To become member of Texaco Corporation.

New York, Southern - EZRA FRIEDMAN: To join Criminal Division, Department of Justice.

Oklahoma, Eastern - CECIL E. ROBERTSON: To become state judge in Oklahoma.

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ANTITRUST DIVISION

Deputy Assistant Attorney General Robert A. Hammond, III

DISTRICT COURT

SHERMAN ACT

COURT GRANTS PARTIAL SUMMARY JUDGMENT.

United States v. New Orleans Chapter, Associated General Contractors of America, Inc. (E.D. La., Civ. 14190; December 30, 1968; D.J. 60-12-116)

On January 28, 1964, a civil action was filed in the Eastern District of Louisiana, charging that the New Orleans Chapter, Associated General Contractors of America, conspired with its members; the American Institute of Architects, New Orleans Chapter, the Construction Industry Association of New Orleans, Inc.; and others, to violate Section 1 of the Sherman Act. Only the New Orleans Chapter, Associated General Contractors of America, Inc. was named as a defendant.

The complaint charges that the combination and conspiracy consisted of a continuing understanding and concert of action between the defendant and the co-conspirators, the substantial terms of which have been and are:

(a) That each member of the defendant Association bidding on building construction projects in the New Orleans metropolitan area should include the quantity survey costs in the bid price, regardless of whether such member desired and requested such quantity survey; and that the successful bidder only should pay those quantity survey costs. A quantity survey is a detailed listing of the items and amounts of material required for the construction of a structure, and is used by contractors in calculating bids on given projects.

(b) That each member of the defendant Association and non-member bidding on any construction project in the New Orleans metropolitan area should include Chapter dues in his bid price; and that the successful bidder only should pay those dues to the defendant Association.

(c) That Bidding Rule C of defendant's by-laws requires that members of the Association should boycott and refuse to submit competitive bids on building construction projects for which the owner or architect intends to accept, or in fact accepts, separate bids from subcontractors.

Bidding Rule C provides:

> C. WORK TO BE INCLUDED.
> Competitive bids shall not be submitted on any project unless all of the items necessary to complete the job are included in the bid on the general contract. All items entering into the general contractor's bid are to be based upon prices, costs and estimates solicited or otherwise obtained directly by the general contractor from the subcontractors or vendors involved. This Rule is intended to prohibit members from submitting competitive bids in cases where the owner or architect takes bids direct from one or more classifications of subcontractors.

The defendant filed an answer denying the plaintiff's charges that it had violated the Sherman Act. It contended that its requirements for members did not have the effects alleged in the complaint. Specifically they answered:

(1) That its bidding rules were adopted for the purpose of promoting economic, coordinated, harmonious and properly supervised construction work and constituted reasonable and lawful self regulation by members of the defendant;

(2) That as a result of a previous civil action in this court (Civil No. 249) between the plaintiff and defendant, a final decree was entered on January 13, 1940, under which members of the defendants were permitted to take into account the element of dues in figuring bids, and this decree is res judicata as to that bidding practice;

(3) That in order to insure harmonious labor relations and to meet the various members' labor contract requirement of using only union labor, it has been necessary, as provided in Bidding Rule C, for members of defendant to contract directly with subcontractors.

In April 1968, the plaintiff filed a motion for summary judgment in accordance with Rule 56(a), (c) and (d), Federal Rules of Civil Procedure. The motion was argued before Judge Herbert W. Christenberry on August 1, 1968.

On December 30, 1968, Judge Christenberry ruled that the Government is entitled to summary judgment respecting the inclusion of quantity survey costs and dues in bids submitted to owners or architects of building projects, since any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal *per se*." *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). Once a combination has been construed as illegal *per se* under the Sherman

Act, it is not susceptible to a defense or explanation of reasonableness.

Respecting Bidding Rule C, the court ruled that the Government is not entitled to summary judgment since the defendant claims that it is not an agreement to boycott, but a reasonable act of self-regulation adopted for the proper business purpose of promoting economic, coordinated, harmonious and properly supervised construction work. The court said:

> While it would appear that Bidding Rule C implies a restraint, it is not clear on its face whether it has an adverse effect on competition and lacks any redeeming virtues. There is a need to hear the evidence as to the underlying reason for the rule and also its effect.

There is also pending in the Eastern District of Louisiana a criminal action charging only the Bidding Rule C violation against the defendant association and six individuals.

Staff: Charles L. Beckler and Arthur A. Feiveson (Antitrust Division)

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C I V I L D I V I S I O N

Acting Assistant Attorney General Carl Eardley

COURTS OF APPEALS

VETERANS

WHERE COLLECTIVE BARGAINING AGREEMENT BASES LENGTH OF VACATION ON YEARS OF "COMPENSATED SERVICE" WITH EMPLOYER, RE-EMPLOYED VETERAN IS ENTITLED TO HAVE TIME SPENT IN MILITARY COUNT AS QUALIFYING YEARS OF "COMPENSATED SERVICE" IN DETERMINING LENGTH OF HIS VACATION.

Robert E. Morton v. Gulf, Mobile & Ohio Railroad Co. (C.A. 8, No. 19,243; January 2, 1969; D.J. 151-42-858)

Morton, a veteran, began working for the Railroad in 1950. He left the Railroad's employment to serve for four years in the Air Force. He then returned to his job with the Railroad and has been working with them continuously since that time. Under the collective bargaining agreement governing Morton's vacation, the length of the vacation is based on the number of years in which the employee has performed a minimum number of days of "compensated service". Morton contended that by the end of 1965, he had performed 15 qualifying years of "compensated service", and he was therefore entitled to a 15-day paid vacation (which the collective bargaining agreement awarded to an employee with 15 years "compensated service"). The Railroad contended, however, that Morton's four years in the military could not be counted as qualifying years of "compensated service", and thus by the end of 1965 he did not have 15 qualifying years such as to entitle him to a 15-day vacation. The Railroad instead awarded Morton a 10-day vacation which was provided under the collective bargaining agreement for employees who had three to fourteen qualifying years.

Upon the Railroad's refusal to grant him a 15-day vacation, Morton brought this action in the district court. The district court held in the Railroad's favor. The court rejected Morton's argument that his longer vacation was a seniority right protected by Section 9 of the Universal Military Training and Service Act, 50 U.S.C. App. 459, which provides that a veteran shall be re-employed "without loss of seniority".

The Court of Appeals, however, reversed and ruled that Morton was entitled to a 15-day paid vacation. The Court held that under Section 9's protection of "seniority", Morton's time spent in military service must be counted as qualifying years of "compensated service" notwithstanding

the fact that he did not perform any actual work for the Railroad during those years. Relying on Accardi v. Pennsylvania R. Co., 383 U.S. 225, the Court pointed out, "The broad scope of seniority rights for reemployed veterans under the Act are not to be eroded by fine factual distinctions." See also Magma Copper Co. v. Eagar, 389 U.S. 323, reversing per curiam, 380 F.2d 318 (C.A. 9).

Staff: Robert E. Kopp (Civil Division)

VETERANS - RULE 4a F.R.A.P.

WHERE VETERAN HAS BROUGHT AN ACTION TO ASSERT HIS REEMPLOYMENT RIGHTS, NOTICE OF APPEAL FROM DISTRICT COURT DECISION MUST BE FILED WITHIN 30 DAYS OF DISTRICT COURT'S JUDGMENT.

Arthur J. Barry v. Richard Joyce Smith, et al., Trustees for the New Haven Railroad (C.A. 1, No. 7204; January 8, 1969; D.J. 151-36-1743)

This was an action brought by a veteran under an identical factual situation with Morton, supra, where the veteran was asserting that the Railroad had denied him his rights to a longer vacation under 50 U.S.C. App. 459. The statute provides that upon application by the veteran, officers of the Department of Justice "shall appear and act as attorney" for him. 50 U.S.C. App. 459(d). In this case, the veteran, Barry, was represented in the district court by Department of Justice attorneys. The district court held in the veteran's favor, on reasoning similar to that of the Court of Appeals in Morton. Barry v. Smith, 285 F.Supp. 801.

The Railroad did not file a notice of appeal until 59 days after the judgment of the district court. We filed a motion to dismiss the appeal on the grounds that the notice had not been filed within the 30-day period prescribed by Rule 4(a), F.R.A.P. The Railroad answered that the situation was governed by the 60-day period specified in Rule 4(a) where "the United States or an officer or agency thereof is a party". From the bench, the First Circuit rejected the Railroad's argument and dismissed the appeal.

Staff: Robert E. Kopp (Civil Division)

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CRIMINAL DIVISION

Acting Assistant Attorney General Nathaniel E. Kossask

COURTS OF APPEALS

SAFETY APPLIANCE ACT

SELF-PROPELLED CRANE USED TO MOVE CARS OVER TRACKS IN RAILROAD YARD HELD TO BE LOCOMOTIVE AND REQUIRED TO HAVE POWER BRAKES ON ITS DRIVE WHEELS.

The Atchison, Topeka and Santa Fe Railway Co. v. United States (C.A. 10, No. 9988; November 20, 1968; D.J. 59-2-23-0)

On September 21, 1966, the Railway Company operated a self-propelled Burro Crane to push two push cars and to pull one flat car over tracks in its Nowers Yard. The crane was equipped with foot brakes, which could be operated from the cab, but which were not actuated by compressed air, electrical, steam, or vacuum power.

The United States brought an action against the defendant to recover penalties for violations of Section 1 of the Safety Appliance Act (45 U.S.C. 1) which provides in part: "It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake . . . ." The district court granted judgment in favor of the United States.

The Court of Appeals for the Tenth Circuit affirmed. The Court of Appeals held the crane was being used as a locomotive and, as such, was required to have power brakes on its drive wheels, even though it was only being used in the railroad yard (the Court observed that the yard tracks were part of the railroad's interstate system) to move cars loaded with materials to be used in connection with the crane.

Staff: United States Attorney B. Andrew Potter; Assistant United States Attorney Givens L. Adams (W.D. Okla.)

DISTRICT COURT

NARCOTICS AND DANGEROUS DRUGS - FORFEITURES

PRESCRIPTION DRUGS FORFEITED AND CONDEMNED WHERE OWNER OF PHARMACY VIOLATED FEDERAL AND STATE NARCOTICS LAWS.

United States v. Undetermined Quantities of Depressant & Stimulant Drugs (Walker Walgreen Drugs & Palace Drug Store) (N.D. Miss., Dec. 1968; D.J. 22B-40-23-1)

In a forfeiture proceeding involving a large quantity of depressant and stimulant drugs, the district court for the Northern District of Mississippi, after trial, ordered forfeiture and condemnation of the drugs in question.

William A. Walker, a resident of Clarksdale, Mississippi owned and operated two drug stores in that city, Walker Walgreen Drugs and Palace Drug Store. In January, 1967 accountability audits by both State agents and agents of the former Bureau of Drug Abuse Control revealed serious violations of State and Federal law. Material discrepancies were found in the records being maintained by Walker; he was employing unqualified people who were filling prescriptions; he failed to have a Federal narcotics stamp which had previously been voluntarily surrendered and cancelled and was operating without valid store permits from the State Board of Pharmacy. In addition, the evidence adduced at trial showed that Walker was dispensing drugs without prescription and selling them for purposes of abortion.

It has been estimated that the drugs seized were valued in excess of $50,000. In view of the total disregard shown by Walker for both State and Federal laws governing the operation of pharmacies and the sale and distribution of drugs, their forfeiture and condemnation is considered to be a great public service to the people of the Clarksdale, Mississippi area.

Staff: United States Attorney H. M. Ray;
Assistant United States Attorney Roger M. Flynt, Jr. (N.D. Miss.)

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

COURTS OF APPEALS

EVIDENCE

SPECIAL AGENT MAY PROPERLY INTERVIEW TAXPAYER WITHOUT ADVISING OF RIGHT TO COUNSEL.

Cohen v. United States (C.A. 8, No. 19,181; December 18, 1968; D.J. 5-42-1115)

Muse v. United States (C.A. 8, No. 19,259; December 18, 1968; D.J. 5-42-1096)

In recent issues of the Bulletin we have called attention to three district court decisions which hold, in effect, that a special agent must, at his initial meeting with a taxpayer, identify himself as a criminal investigator and advise the taxpayer of his rights under the circumstances. United States v. Dickerson (N.D. Ill.), United States v. Habig (S.D. Ind.), and United States v. Lackey (N.D. Ind.). In each case the Solicitor General has authorized an appeal to the Seventh Circuit from an order granting a motion to suppress evidence.

All three cases show the influence of United States v. Tursynski, 268 F.Supp. 847 (N.D. Ill.), which reads the Supreme Court's decisions in Miranda (384 U.S. 436), and Escobedo (387 U.S. 478), to mean that any Government investigator, who asks a citizen for information after he is known to be a potential criminal defendant, must begin by advising him of his constitutional rights. None of the circuit courts of appeals has so interpreted Miranda - Escobedo. All have limited the application of those cases strictly to custodial interrogations. In addition to the cases which we have mentioned in past issues of the Bulletin your attention is directed to the following recent decisions: Schlinsky v. United States, 379 F.2d 735 (C.A. 1), certiorari denied, 389 U.S. 920; Spinney v. United States, 385 F.2d 908 (C.A. 1), certiorari denied, 390 U.S. 921; Taglianetti v. United States, 398 F.2d 558 (C.A. 1), petition for certiorari pending; United States v. Squeri, 398 F.2d 785, 790 (C.A. 2); United States v. Dawson, 400 F.2d 194 (C.A. 2), petition for certiorari denied January 13, 1969; United States v. Mackiewicz, 401 F.2d 219, 221-223 (C.A. 2), certiorari denied October 28, 1968; United States v. Driscoll (C.A. 2), 68-2 USTC Sec. 9500; United States v. Marcus, 401 F.2d 563, 566 (C.A. 2), certiorari denied January 13, 1969; United States v. Bagdasian, 398 F.2d 971 (C.A. 4); Feichtmeir v. United States, 389 F.2d 498 (C.A. 9);

Boyle v. United States, 395 F.2d 413 (C.A. 9), petition for certiorari pending. The Eighth Circuit's opinions in Cohen and Muse follow the same line of reasoning and specifically reject Turzynski.

Cohen--A special agent was assigned to contact Cohen because the St. Louis office had no record of returns having been filed. The special agent indentified himself, said that he investigated tax irregularities, and asked what district Cohen had filed his returns. Cohen stated that he had filed four years previously in Detroit, but had not done so thereafter. The special agent then said that a revenue agent would be assigned to determine what Cohen's tax liability was, and that he would continue his own investigation. Not until much later was Cohen told that the investigation was criminal in nature and that he need not answer incriminating questions and could have the assistance of counsel.

Muse--A revenue agent, who had been investigating Muse's brother, began to check on Muse's returns and told him that his purpose was to determine his correct tax liability. After a short time he referred the case to a special agent. The first meeting between Muse and the special agent was in the latter's office with the revenue agent also present. The special agent identified himself, told Muse that he did not have to answer incriminating questions, and that anything he produced could be used against him. He was not told that a criminal proceeding was possible and that he could have the assistance of an attorney until much later when he was asked to sign a statement.

The Eighth Circuit holds that neither a revenue agent nor a special agent is required to warn a taxpayer, who is not in custody, of his constitutional rights. About two weeks before the decisions in Cohen and Muse the Internal Revenue Service altered its procedure and announced that special agents, upon their initial meeting with a taxpayer, will introduce themselves as criminal investigators and advise the taxpayer that he is not obliged to incriminate himself and may seek the assistance of counsel. See 68 CCH Tax Service, Volume 7, par. 6946. The Eighth Circuit noted this change in procedure, and, while describing it as a step forward, noted that it was not required in law and that it would raise practical, administrative problems. The Court quoted the following language from the recent opinion of the Second Circuit in Mackiewicz: "To inject the full Miranda warnings at this stage of the proceedings would merely clutter an already difficult administrative task." Judge Leonard Moore, who wrote the opinion in Mackiewicz, knew from his experience as United States Attorney, the

administrative and legal problems created by the discredited voluntary disclosure and health policies of the Internal Revenue Service. See also United States v. Shotwell Mfg. Co., 352 U.S. 998, and Shotwell Mfg. Co. v. United States, 371 U.S. 341.

Staff: Joseph M. Howard and John M. Brant
(Tax Division)

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