United States Attorneys

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UNITED STATES DEPARTMENT OF JUSTICE

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Washington, W.	Stanley G. Pitkin	Seattle
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West Virginia, So.	Wade H. Ballard, III	Charleston
Wisconsin, E.	David J. Cannon	Milwaukee
Wisconsin, W.	John O. Olson	Madison
Wyoming	Richard V. Thomas	Cheyenne

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

STATUTE OF LIMITATIONS IN GOVT. ANTITRUST DAMAGE ACTIONS.

United States v. Grinnell Corp., et al. (S.D. N.Y., No. 65-2486; October 21, 1969; D.J. 60-339-1)

On June 7, 1965 the Government filed a damage action against the Grinnell Corporation and three Grinnell controlled protection service companies to recover damages which it sustained due to violations by defendants of Sections 1 and 2 of the Sherman Act. The case was filed after Judge Wyzanski had found the defendants had violated Sections 1 and 2 of the Sherman Act (236 F. Supp. 244) on November 27, 1964. The Government's complaint requests damages dating from April 13, 1957 on the theory that the Government enforcement action filed against the four defendants herein on April 13, 1961 tolled the running of the statute of limitations during the pendency of the Government enforcement action under the tolling provisions of Section 5(b) of the Clayton Act.

On June 9, 1969 defendants moved for a partial summary judgment with respect to any of plaintiff's damage claims for injuries suffered more than four years prior to filing of this action, and for an order permitting defendants to amend their answers affirmatively to assert the statute of limitations as a defense to this action.

The sole issue before the court in this motion for partial summary judgment was whether a damage claim under Section 4A by the Government for injury to its business or property is a "private right of action" within the meaning of the tolling provision of the Section.

> Section 5. ***
>
> (b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws but not including an action under section 15a /4A/ of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter

> complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 /4/ of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. /15 U.S.C. 16(b); emphasis added./

The Government contended that the words "every private right of action" were intended to protect the rights of all injured parties and allowed them to collect damages sustained pursuant to the provisions to Sections 4 and 4A of the Clayton Act and intended only to draw a distinction between damage suits and enforcement actions. That is, the word "private" should be interpreted as meaning "proprietary" rather than "non-government".

The court stated the question presented in the motion was one of first impression and the resolution of the question requires an understanding of the history of the Clayton Act. Section 4 of the Act, enacted in 1914, permits "any person--injured in his business or property" by an antitrust violation to recover treble damages, the cost of suit and counsel fees. The Supreme Court held in 1961 that the United States was not a "person" within Section 4. United States v. Cooper Corporation, 312 U.S. 600 (1941). In response the Congress in 1955 added Section 4A to the Clayton Act, permitting the Federal Government to recover single damages and cost, but not counsel fees, from antitrust violators who have injured it.

The court stated that the same amending statute divided existing Section 5 into two subdivisions. That section had provided that prima facie effect be given to the decree in the enforcement action "in any suit or proceeding brought by any other party against such defendant". It had also tolled the statute of limitations "in respect of each and every private right of action arising under said /antitrust/ laws" during the pendency of the enforcement action.

Then the court stated:

> Since these amendments resulted from the Cooper decision, supra, it is obvious that Congress was very careful in delineating what it intended. When it continued to use the language "private right of action" it understood how that language had been interpreted by the Court. This is all the more obvious when the clause quoted above refers only to Section 4, which provides the damage remedy for private litigants.

> Consequently, it appears that it was never intended to give the government the advantages of the tolling period . . . .

Staff: Noel E. Story (Antitrust Division)

* * *

CIVIL DIVISION

Assistant Attorney General William D. Ruckelshaus

COURTS OF APPEALS

CIVIL SERVICE

GOVT. MAY NOT DISMISS EMPLOYEE FOR HOMOSEXUAL CONDUCT UNLESS THERE IS SHOWING OF SPECIFIC CONNECTION EFFECT BETWEEN CONDUCT AND EFFICIENCY OF SERVICE.

Clifford L. Norton v. John Macy, et al. (C.A. D.C., No. 21,625; decided July 1, 1969, rehearing denied October 20, 1969; D.J. 35-16-264)

Norton was a GS-14 budget analyst in NASA. In 1963 he was arrested at 2 a.m. in the morning after having picked up another male in a park in Washington, D.C. After the police interrogated Norton they charged him only with a traffic violation. The other male, however, later admitted to NASA that the intent of both of them was to engage in homosexual activities. Norton was discharged by NASA on the grounds of "immoral conduct" and possessing personality traits which rendered him "unsuitable for further Government employment". In the discharge proceedings, the agency conceded that Norton's job performance was satisfactory, and that this incident in the park, which had been kept secret by the agency, would not affect the morale of his co-employees or his relationship with them. The agency also admitted that no security considerations were involved. However, as explained by Norton's supervisor, the agency based its discharge on the ground that it would be "embarrassed" if the employee repeated his conduct and it became known. The Civil Service Commission sustained the discharge, and its decision was affirmed by the district court. The Court of Appeals, however, reversed in a two-to-one decision.

According to the Court of Appeals, the connection between the employee's conduct and the "efficiency of the service" was too nebulous to support the discharge. "A reviewing Court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service". In the instant case, the Court found, there was no showing of such a specific connection. "We think the unparticularized and unsubstantial conclusion that such possible embarrassment threatened the quality of the agency's performance is an arbitrary ground for dismissal". The Court hastened to add that it was not saying that homosexual conduct may never be cause for dismissal. "What we do say is that, if the statute is to have any force, an agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying 'shame'."

Staff: Robert E. Kopp (Civil Division)

FEDERAL TORT CLAIMS ACT

AIR LINE PILOT WHO TAKES OFF INTO A KNOWN THUNDERSTORM THEN ON THE FIELD AND CRASHES IS GUILTY OF CONTRIBUTORY NEGLIGENCE.

Joan A. Neff, Admx. v. United States (C.A. D.C., No. 22,262; October 10, 1969; D.J. 157-16-1938)

In this airplane accident case, the wife of the pilot of a Mohawk Airlines commercial flight sued the Government for the death of the pilot, who was killed when the flight took off with a full passenger load into a thunderstorm which was then on the field and crashed on the field shortly thereafter. The district court found the Government controllers negligent in failing to see the storm, or, if they saw it, in failing to warn the pilot of the existence of the storm, whether or not regulations required it. The evidence established that thunder, lightning, rain and hail, all indicia of thunderstorms, were present before take off, and that Mohawk crews were trained in the danger of thunderstorms and the necessity to avoid them whenever possible. Nevertheless, the court held that the pilot was not contributorily negligent in fact or law. Judgment for the plaintiff was in the amount of $334,149.21.

On appeal, the Court of Appeals reversed. In so doing, the Court pointed out that it did not take issue with the evidentiary facts--the sequence of events--found by the trial court, but concluded that the ultimate finding on the issue of contributory negligence was erroneous. Without passing on the question of the Government's negligence, the Court held that First Officer Neff's attempt to take off into an obvious thunderstorm, which carried the known threat of immediate danger from severe turbulence, "Constituted contributory negligence as a matter of law", and barred recovery under applicable New York law.

Staff: Kathryn H. Baldwin (Civil Division)

GOVERNMENT EMPLOYEES

CT. UPHOLDS DISCHARGE OF CIVILIAN AIR FORCE TEACHER BECAUSE OF CONTROVERSIAL STATEMENTS HE MADE IN CLASSROOM.

David Goldwasser v. Harold Brown (C.A. D.C., No. 22,253; September 17, 1969; D.J. 35-16-279)

Petitioner was a civilian teacher employed by the Air Force to teach English to foreign army officers receiving training in the United States. The Civil Service Commission found that, although he had been

admonished by his superior not to make controversial statements in the classroom, the petitioner, while teaching classes, nevertheless criticized the United States' involvement in the war in Viet Nam and made comments with regard to anti-Semitism in America. The Civil Service Commission ruled that this was sufficient ground to discharge the employee, and the district court agreed. The Court of Appeals for the District of Columbia, one judge dissenting, affirmed.

Petitioner argued, among other things, that his right of free speech conferred by the First Amendment to the Constitution precluded his being discharged for the controversial statements attributed to him. The Court, in rejecting this defense, reasoned that the free speech rights of the First Amendment were not absolute but that petitioner's right of speech had to be balanced against the Government's interest as an employer in maintaining an efficient public service. The Court concluded that it was permissible to place limitations upon petitioner's expression of his personal views in the classroom on controversial subjects unrelated to the teaching assignments.

Staff: Former United States Attorney David G. Bress; Assistant United States Attorney Gil Zimmerman (Dist. of Col.)

SOCIAL SECURITY ACT - JUDICIAL REVIEW

SOCIAL SECURITY ACT - SUMMARY JUDGMENT OF REVIEW; SUBSTANTIAL EVIDENCE CONTRAVENING COMMON-LAW MARRIAGE AND ACKNOWLEDGMENT OF CHILD.

Neta Jones v. Robert H. Finch, Secy. of Health, Education and Welfare (C.A. 10, No. 92-69; October 3, 1969; D.J. 137-49-52)

The district court, in an action to review the Secretary's denial of mother's and child's benefits, granted the Secretary's motion for summary judgment. Upon appeal, the Tenth Circuit was concerned that disposition of the case on summary judgment would here deprive the parties of their statutory right of judicial review. Upon our argument, the Court agreed that since the inquiry presented by the motion for summary judgment is whether substantial evidence supported the findings of the Secretary, the motion constitutes a procedure to invoke exercise of the court's power to enter its judgment upon the "pleadings and transcript of the record", and is no frustration of the congressional policy that the parties be afforded an evidentiary review of the case.

The Court of Appeals then concluded that the district court here disposed of the matter upon the basis that substantial evidence supported the findings.

The Court of Appeals further held, upon review of the entire record, that there was the necessary substantial evidence of an absence of common-law marriage and no acknowledgment of the child, despite portions of the record supporting the claimant's position.

Staff: J. F. Bishop (Civil Division)

SOCIAL SECURITY ACT - SUBSTANTIAL EVIDENCE

CT. DENIES REHEARING BUT LIMITS CIRCUMSTANCES IN WHICH ITS PRIOR HOLDING--THAT WRITTEN MEDICAL REPORTS CANNOT BE "SUBSTANTIAL EVIDENCE"--WILL BE APPLICABLE.

Cohen v. Perales (C.A. 5, No. 26,238; October 10, 1969; D.J. 145-9-221)

A prior issue of the Bulletin (October 17, 1969, p. 730) contained a report on the Fifth Circuit's original decision (412 F.2d 44) in this case and advised that a petition for rehearing and suggestion of rehearing en banc was pending. After that issue had been printed, we received the October 10 per curiam opinion of the original panel denying rehearing but limiting the applicability of the prior holding. Thus, the opinion explains that "mere uncorroborated hearsay evidence as to the physical condition of a claimant" cannot support a decision denying a disability claim "if the claimant objects to the hearsay evidence and if the hearsay evidence is directly contradicted by the testimony of live medical witnesses and by the claimant who testify in person ***". The opinion then goes on to state that "when these conditions are not present, there is nothing to prevent an examiner from basing his decision, which is adverse to the claimant, on hearsay medical evidence, if such evidence has sufficient probative force to support his decision".

The Court's opinion did not discuss our contention on rehearing that the "residuum rule" is invalid. Since the Court's holding, even as now limited, is still based on that rule, it should be urged (outside the Fifth Circuit) that the holding is incorrect; nonetheless, where appropriate, there should be reliance on the specific limitation which the Court has placed on the holding.

Staff: Kathryn H. Baldwin and Michael C. Farrar
(Civil Division)

STANDING

ATTORNEYS-TAXPAYERS LACK STANDING TO CHALLENGE LEGALITY OF LEGAL SERVICE PROGRAMS UNDER ECONOMIC OPPORTUNITY ACT OF 1964.

Russell Troutman, et al. v. Sargent Shriver & United States (C.A. 5, No. 25539; September 30, 1969; D.J. 145-1-56)

Plaintiff Troutman, a Florida attorney, brought suit as a citizen-taxpayer and practicing attorney, challenging the legality of the Legal Service Program instituted in Orange County, Florida, pursuant to the Economic Opportunity Act of 1964. Troutman alleged that he would be forced to compete with OEO lawyers for a clientele who could afford representation by Troutman. The complaint prayed for declaratory and injunctive relief, asserting the invalidity and impropriety of the Economic Opportunity Act and the OEO legal service programs operating thereunder. Four local bar associations moved to intervene, charging that OEO was operating or prospectively would operate legal service programs in their respective counties. Generally, the movants sought relief similar to that demanded by Troutman. The district court dismissed the action on the ground that neither Troutman nor the intervenors had standing. The Court of Appeals unanimously affirmed for the same reason.

In affirming, the Court of Appeals ruled that appellants (i.e. Troutman and the intervenors) lacked standing as citizens or taxpayers under the test enunciated by the Supreme Court in Flast v. Cohen, 392 U.S. 93, since appellants did allege violations of legally protected rights conferred upon them by the Constitution or by any statute. The Court of Appeals also ruled that appellants lacked standing as competitors, since they possessed no legal rights to be free from competition. The Court of Appeals examined the Economic Opportunity Act and found that it was enacted to benefit the public and not to protect competitive interests.

Staff: John C. Eldrige and Leonard Schaitman
(Civil Division)

NATIONAL BANKS

COMPTROLLER OF CURRENCY MAY NOT CIRCUMVENT STATE BRANCH BANKING LAWS BY AUTHORIZING NATIONAL BANK TO MOVE ITS MAIN OFFICE TO NEW CITY WHILE RETAINING PREVIOUS MAIN OFFICE AS BRANCH IN CIRCUMSTANCES WHERE BANK WOULD NOT HAVE BEEN PERMITTED UNDER STATE LAW TO OPEN A BRANCH IN NEW CITY.

Marion National Bank, et al. v. The Van Buren Bank, et al. (C.A. 7, Nos. 17,078 and 17,114, decided November 5, 1969; D.J. 145-3-842)

The Van Buren Bank, a state-chartered institution, which serves the rural town of Van Buren, Indiana, applied for and was granted permission by the Comptroller of the Currency to convert from a state to a national bank, to relocate its main office from Van Buren to Marion, Indiana, and to retain its former main office in Van Buren as a branch office. The plaintiffs, two national banks doing business in Marion, brought this suit to have the Comptroller's decision declared unlawful and to have the actions contemplated by the applications enjoined. The district court issued the injunction and the Court of Appeals affirmed.

In pertinent part, 12 U.S.C. 36(c) provides that national banks can create branches in circumstances where they have the permission of the Comptroller and where the statute law of the particular state specifically and affirmatively grants such authority to branch to state-chartered banks. The applicable statute in Indiana provides that a bank may establish a branch in any city or town in the same county as the principle office is located if there is no bank presently located there.

The Government argued that the precise same result could be lawfully obtained by virtue of the fact that (1) the Van Buren Bank could, as a national bank, move its entire operation from Van Buren to Marion, notwithstanding the presence of the plaintiffs in Marion, and (2) once having done this, the Van Buren Bank could establish and operate a branch in Van Buren. The Court rejected this argument and held that the proposed maneuver was unlawful. The Court reasoned that the proposed maneuver was a single indissoluble process of which an integral part was that an existing bank would branch. The Court looked to what it determined to be the underlying policy of the Indiana Statute and held that a state bank would not be permitted to perform the same maneuver. Accordingly, the Court ruled that 12 U.S.C. 36(c), which authorized creation of a branch only if the state statute granted "such authority affirmatively and not merely by implication or recognition ***", did not permit the Comptroller to authorize the plan proposed by the Van Buren Bank.

Staff: Leonard Schaitman (Civil Division)

COURT OF CLAIMS

CIVIL SERVICE

DISCHARGE OF CIVIL SERVICE EMPLOYEE WHO ENGAGED IN HOMOSEXUAL ACTS UPHELD.

Richard L. Schlegel v. United States (Ct. Cl., No. 369-63, decided October 17, 1969)

Schlegel was a civilian employee of the Department of the Army serving as a GS-12 Administrative Officer. A routine security check revealed that he had on at least four recent occasions engaged in homosexual acts off duty. Accordingly, the Department of the Army decided to discharge Schlegel for conduct which "reflects discredit upon this installation, the Department of the Army, and the ethical stature of Federal employees". The Civil Service Commission sustained the discharge, and Schlegel thus brought the instant back pay action in the Court of Claims challenging his discharge.

The Court of Claims after a trial de novo held that the discharge was proper. The primary contention of the employee was that the Government had no right to discharge him for private, off-duty homosexual conduct among consenting adults. The Court of Claims, however, noted that under the Army's regulations "when an employee's misconduct impairs the efficiency of the service, he can be removed from his position regardless of his ability to reconcile his behavior with his personal standard of morality". The question as to whether "a person's discharge will promote the efficiency of the service is an administrative decision to be determined within the discretion of the agency, and no court has power to review the action, if taken in good faith". The testimony of plaintiff's supervisors before the trial commissioner indicated that the morals and efficiency of the office would be adversely affected by his presence, coupled with the administrative determinations that the efficiency of the service would be adversely affected, constituted "convincing proof that plaintiff's removal promoted the efficiency of the service and eliminated plaintiff's detrimental influence on the efficiency of the service". The Court distinguished Norton v. Macy, No. 21,265 (C.A. D.C., July 1, 1965), on the ground that in Norton the employee had only committed a single homosexual advance, and not four complete homosexual acts. "Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene."

Judge Davis, concurring, distinguished Norton on the grounds of "the particular circumstances of this case", namely (1) that plaintiff's acts were in apparent violation of state law against sodomy, (2) the acts were repeated, (3) the security requirements of plaintiff's position, and (4) the testimony that retention of plaintiff would negatively affect the operation of the office. On the other hand, Judge Nichols, concurring separately, believed that Norton had been wrongly decided. According to Judge Nichols, "The point is, as Judge Tamm /dissenting in Norton/ says, the choice as to what measures are required to produce efficiency is properly one for the executive branch to make."

Staff: Edward Weintraub (Civil Division)

* * *

CRIMINAL DIVISION
Assistant Attorney General Will Wilson

SUPREME COURT

NARCOTICS

FURTHER DECISIONS AFTER LEARY.

Jay Ed Miller v. United States (U.S. Supreme Court, No. 106 Misc., October Term, 1969)

In 1964, Miller was convicted of a violation of 26 U.S.C. 2644 and in May, 1968, he filed a motion under 28 U.S.C. 2255 to vacate his conviction on the basis of a Marchetti, Grosso, Leary type of argument. In a memorandum in opposition to the granting of a petition for a writ of certiorari, the Government argued that it was untimely to raise the privilege against self-incrimination in a 28 U.S.C. 2255 motion. On October 17, 1969 the Supreme Court denied the petition for a writ of certiorari.

Staff: Erwin N. Griswold
Solicitor General

COURTS OF APPEALS

NARCOTICS

FURTHER DECISIONS AFTER LEARY.

John T. McClain v. United States (C.A. 9, No. 2335; September 18, 1969; D.J. 12-12C-80)

McClain was convicted at a non-jury trial of receiving and concealing marihuana in violation of 21 U.S.C. 176a. On two separate occasions, he and a co-defendant received marihuana which was brought across the Mexican border by a Customs informant. The Court of Appeals, analogizing to Witt v. United States, C.A. 9, No. 23065 (June 6, 1969), held that Leary is not relevant to a charge of receiving and concealing marihuana in a border situation where there is evidence of actual knowledge of and participation in the plan of illegal importation and where because of a non-jury trial, it can be presumed that the statutory inference was not relied upon. The Court specifically distinguished the jury trial situation from the decision in this case.

McClain had previously been convicted of a violation of 26 U.S.C. 4704(a) in 1958, and he was therefore sentenced in the present case as a

second offender. On appeal, he challenged the constitutionality of his first conviction on the basis that that statute violated his privilege against self-incrimination. The Court of Appeals held that it is untimely to raise the privilege against self-incrimination in a collateral attack on the judgment of conviction citing Graham v. United States, 407 F.2d 1313 (1969). Further, the Court upheld the constitutionality of 26 U.S.C. 4704(a), ruling that that provision is separable from, and not affected by, the registration, possession and order from provisions of the narcotic tax act.

Staff: United States Attorney Wm. Matt Byrne, Jr. (C.D. Calif.)

IMMUNITY STATUTE; ANTI-RIOT LAWS

NEW IMMUNITY STATUTE (18 U.S.C. 2514) HELD VALID.

Larry Carter, Steve Shead and Fred Crawford v. United States (C.A. 9, No. 24554; October 9, 1969; D.J. 95-800-11-4)

The appellants were subpoenaed to testify before a Federal grand jury. Each refused to answer questions invoking the Fifth Amendment privilege against self-incrimination. The Government sought to compel testimony after immunity was conferred by the district court on the basis that the grand jury was inquiring into interstate travel to organize, promote, and encourage riots in violation of 18 U.S.C. 2101. The questions asked also related to violations of 18 U.S.C. 231, teaching and demonstrating use of firearms and explosives for use in civil disorders.

The Court of Appeals held that the new immunity statute, 18 U.S.C. 2514, is constitutionally valid. The Court also held that appellants could be required, under the grant of immunity, to answer questions relating to violations of 18 U.S.C. 231, even though it was not one of those statutes for which immunity could be granted under 18 U.S.C. 2514. This is so because violations of 18 U.S.C. 231 can be committed in violations of 18 U.S.C. 2101. The investigating violations of 18 U.S.C. 2101, the grand jury can require answers to any questions "even remotely relevant to that section".

Staff: United States Attorney Cecil Poole (N.D. Calif.); Guy L. Goodwin (Criminal Division); Jerome K. Heilbron, Victor Woerheide, Richard Darst (Special Interdivisional Unit, Criminal Div.)

MILITARY SELECTIVE SERVICE ACT

SUFFICIENCY OF INDICTMENT OMITTING "WILFULLY"--ORDER OR CALL--OCCUPATIONAL DEFERMENT--BELATED CONSCIENTIOUS OBJECTION CLAIM.

United States v. John Frederick Weersing (C.A. 9, Docket No. 23055, August 7, 1969; D.J. 25-12C-358)

Affirming a conviction for refusing to submit to induction, the Court held that although it had ruled in Graves v. United States, 252 F.2d 878, 882 (9th Cir. 1958), that "knowing" in 50 U.S.C. App. 462 required proof of culpable intent, an indictment which omitted "wilfully" but charged "knowingly" was sufficient. It distinguished Graves as based on insufficiency of the evidence of criminal intent.

The Court also held that the presumption of regularity attached to the order of call (32 C.F.R. 1631.7) and relieved the Government of proving defendant was properly ordered in the absence of a challenge in the trial court.

The Board's denial of an occupational deferment to the registrant, a city planner, was also sustained on the grounds that the activity was too remote from the national interest and registrant's irreplaceability had not been demonstrated. The Court also held that the Board was under no obligation to specially notify the registrant that his appeal could be heard at his request by the Appeal Board exercising jurisdiction over the city where he was employed, 32 C.F.R. 1626.11(b).

The Board's refusal to grant a reopening on a post-induction order conscientious objector claim was also sustained because the registrant submitted no facts from which post-order "crystallization" could be inferred, 32 C.F.R. 1625.2. Accordingly, the Court found it unnecessary to reach the question (pending decision by the Court en banc in Ehlert v. United States) of whether late maturation of conscientious objection was a circumstance "over which the registrant had no control", 32 C.F.R. 1625.2.

Staff: United States Attorney Wm. Matt Byrne (C.D. Calif.)

SERVICEMAN, EN ROUTE TO VIETNAM AFTER LEAVE IN U.S., MAY NOT FILE APPLICATION FOR RELEASE AS CONSCIENTIOUS OBJECTOR WITH OVERSEAS REPLACEMENT STATION.

Charles Hancock v. Melvin Laird, et al. (C.A. 9, Docket No. 24487, August 15, 1969; D.J. 145-4-1736)

Military authorities at the Oakland Overseas Replacement Station refused to accept the application for release as a conscientious objector

endered by a serviceman assigned to that Base for return to Vietnam on the expiration of compassionate leave. The Court of Appeals affirmed the district court's refusal to issue a writ of mandamus. The Court held that paragraph 6(b) of AR 635-20, which permits the filing of an application at an Overseas Replacement Station, was applicable only to one who had not yet commenced overseas service, and that one in Hancock's position must return to and file the application with his Unit where, presumably, his records were located and relevant information was more available.

Staff: United States Attorney Cecil Poole (N.D. Calif.)

ADMINISTRATIVE APPEAL A PREREQUISITE TO JUDICIAL REVIEW - POST-VIOLATION CLAIMS NOT GROUNDS FOR REOPENING - SELECTION FOR INDUCTION BY CLERK.

United States v. Paul Alexander Smogor (C.A. 7, Docket No. 17173; August 25, 1969; D.J. 25-26-722)

Denying rehearing of its affirmance of defendant's conviction for refusing induction, the Court of Appeals held that he was precluded from challenging denial of conscientious objector status because he had failed to exhaust the administrative remedy of appeal, required by McKart v. United States, 395 U.S. 185, 200 (1969), where expertise and the exercise of discretion are necessary. It also held that he had no right to reopening of his classification where the claim was first made after the offense had been committed.

The Court further found valid the Board practice of having the Clerk, in response to a call, pull the files of registrants in I-A and issue orders for induction.

Staff: United States Attorney K. Edwin Applegate (N.D. Ind.)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Shiro Kashiwa

COURT OF APPEALS

PUBLIC LANDS

PATENT INCORPORATING PROVISIONS OF 23 U.S.C. 317 BY REFERENCE DID NOT PASS TITLE TO HIGHWAY MATERIALS SITE WITHIN CONFINES OF PATENT.

Southern Idaho Conference Assn. of Seventh Day Adventists, a Corporation v. United States (C.A. 9, No. 22960, October 27, 1969; D.J. 90-1-3-1496)

On November 7, 1947, the State of Idaho applied to the Government for appropriation of a 40-acre tract for use as a site for the removal of road building material, pursuant to the Act of November 9, 1921, 42 Stat. 212, 216, 23 U.S.C. 317. The State's application for appropriation was for a highway designated as Project No. 189, Federal Aid Route No. 35. While the materials from the site have not been used for Project No. 189, they have been used since 1948 for other Federal Aid projects.

On November 28, 1947, the appellant's predecessor in interest, Carter, filed a desert land entry on 160 acres of land, including the 40-acre tract. On May 18, 1948, the Department of the Interior approved the application of the State of Idaho and issued a materials use permit for the 40-acre tract upon the "express condition that the materials taken from the land shall be restricted in their use to Federal Aid Highways". On October 25, 1933, the Department of the Interior issued a patent to Carter covering the 160 acres, including the 40-acre tract in question. The patent contained the following reservation:

> There is, also, reserved a right-of-way for a material site under the Act of November 9, 1921. (42 Stat. 212)

The patent was subsequently conveyed to the Southern Idaho Conference Association of Seventh Day Adventists.

Following massive removals by the State of Idaho from 1965 through 1967, and attempts by the Southern Idaho Conference to enjoin such action in an Idaho state court, the Government brought this action to quiet title in the material site and to enjoin the Southern Idaho Conference from interfering with its title. The district court granted the relief requested by the Government.

The Court of Appeals affirmed, stating:

> The patent reserves a right-of-way for a material site under the Act of November 9, 1921 /23 U.S.C. 317/. The Act itself provides for "appropriation and transfer" of the material site to the State Highway Department, and if the need for the materials "shall no longer exist", the lands or materials "shall immediately revert to the control of the Secretary of the department from which they have been appropriated".

The Court then held:

> There has been no cancellation or reservation of the permit by the United States. It was not revoked or canceled by the "final disposal" through issuance of the patent. On the contrary, the patent expressly reserved the right-of-way for the material site in accordance with Department regulations. Neither the statute nor any regulation gives appellant any right of revocation or cancellation.

The Court also rejected the Southern Idaho Conference's claim that the State was limited to use of the material site for Project No. 189, noting that the permit restricts the use of the material to "Federal Aid Highways". Finally, the Court agreed with the district court that the provision of 23 U.S.C. 317, restricting use of material sites to federal aid highways "adjacent" to such sites, was not violated by the use of material for the construction of highways eight to ten miles distant from the site.

Staff: Frank B. Friedman (Land & Natural Resources Div.)

DISTRICT COURTS

INDIANS

FED. CT. JURISDICTION, CIVIL RIGHTS ACT OF 1968, BREACH OF LEASE CONTRACT.

Sunny Valley Citrus v. Adrian Fisher, Sr., et al. (D. Ariz., No. 69-405-Phx.; October 27, 1969; D.J. 90-2-0-660)

In December 1967, Sunny Valley Citrus and the Colorado River Indian Tribes entered into an agricultural lease of tribal lands under the authority

of 25 U.S.C. 415. Sunny Valley prepared the raw desert land for cultivation, drilled three wells, installed an irrigation system, and planted crops. In September 1969, the Indian Tribe retook possession of the land and the personal property thereon, claiming no valid lease existed since it was never approved by the Secretary of the Interior.

Sunny Valley brought suit against the individual members of the Tribal Council, the Tribe, the Superintendent of the Colorado River Agency, the Indian Chief of Police, and the Government for injunctive relief, for damages, and for the exclusive right of the use of the water from the wells. The district court dismissed the complaint for lack of jurisdiction.

Sunny Valley asserted jurisdiction against the Government and the Superintendent under 28 U.S.C. 1346(b) and 43 U.S.C. 666. The court held that since Sunny Valley's claim was essentially one for breach of contract, a suit did not lie under the Federal Tort Claims Act, and that even if the Government had committed a tort, it would have been an interference with a contractual relationship, and, as such, was expressly barred by 28 U.S.C. 2680(h). With respect to 43 U.S.C. 666, the court found that since the sole purpose of that section is to permit the Government to be joined in a suit involving a general adjudication of all water rights of various owners on a given stream, it was not available to Sunny Valley in a private suit. The court further held, since section 666 serves only to waive the Government's immunity and does not confer jurisdiction, that in the absence of jurisdiction on independent grounds, the court was without jurisdiction.

As to defendants other than the Government, Sunny Valley asserted jurisdiction under 28 U.S.C. 1331 and 1343(4), the "Indian Civil Rights Act". With respect to Sunny Valley's claim for jurisdiction under 28 U.S.C. 1331, the court found that since the controversy centered upon the alleged contract rather than the statutory basis for the contract, there was no federal-question jurisdiction by virtue of 25 U.S.C. 415. In addition, Sunny Valley also claimed that the Superintendent acted in excess of his statutory authority. The court held that since Sunny Valley did not show that the Superintendent had exceeded his authority, it was without jurisdiction.

Relying upon 25 U.S.C. 1302, particularly subsections (5) and (8) thereof, Sunny Valley asserted jurisdiction under 28 U.S.C. 1343(4), claiming that it was being deprived of its property without due process of law. The court held that since the complaint was for either breach of a lease or breach of a contract to make a lease, neither constituted a taking of property without due process, and that, therefore, it was without jurisdiction over the subject matter.

Staff: Assistant United States Attorney Richard C. Gormley (D. Ariz.)

PUBLIC LANDS

SCRIP SELECTION REJECTED BECAUSE VALUATION OF LAND SELECTED IS IN EXCESS OF AMOUNT SET BY SECRETARIAL REGULATIONS; ADMINISTRATIVE PROCEDURE - RIGHT TO TRIAL DE NOVO.

Hall v. Hickel (D. Nev., No. R-2115; October 15, 1969; D.J. 90-1-4-163)

Bronken v. Hickel (D. Nev., No. R-2012; October 15, 1969; D.J. 90-1-4-180)

Boothe v. Hickel (D. Nev., No. R-2048; October 15, 1969; D.J. 90-1-15-145)

These are suits to obtain judicial review of Secretarial decisions rejecting plaintiffs' applications for selection of public lands in satisfaction of scrip rights. In all three cases the rejection was based, among other things, upon the Secretary's conclusion that the lands selected had been valued for more than a maximum value fixed by Secretarial regulation for satisfaction of the outstanding scrip issue. Plaintiffs contended that the Secretary lacked authority to place a maximum value on lands available for satisfaction of the scrip and contended (1) that they had been deprived of property without due process of law by the administrative diminishment of the value of their scrip selection rights; (2) that the applications were required to be processed without regard to the value of the lands selected; (3) that all applicants for lands to satisfy the scrip rights were not treated equally, in that some patents had issued without regard to value of the lands selected; (4) that for a period of two years, from 1964 to 1966, all scrip applications were arbitrarily delayed or postponed and local land offices were directed not to approve scrip for patent; (5) that the Secretary's offering of available lands was not actually worth the amount at which he valued them; and (6) that plaintiffs were never granted a hearing or the opportunity to present evidence and cross-examination and therefore they were deprived of administrative due process.

After motions for summary judgment were filed, plaintiffs, with permission of the court, were allowed to submit voluminous argumentative affidavits setting forth the nature of the testimony or evidence which would be offered if they were granted a trial de novo, notwithstanding defendant's contention that under the Administrative Procedure Act the court is limited to the administrative record. However, upon consideration of the briefs, arguments, and the affidavits, the court granted defendant's motions for summary judgment and specifically ruled that plaintiffs were not entitled to a trial de novo because the Administrative Procedure Act precludes such a procedure; that the Secretary is authorized in his discretion to examine and classify all available public lands for disposal in satisfaction of scrip rights;

that the Secretary may in his discretion place a maximum value on lands for satisfaction of such rights, or a maximum value to be paid in cash in lieu of lands; and that the Secretary's classification is not reviewable on the state of the administrative record.

Staff: Assistant United States Attorney Julien G. Sourwine (D. Nev.)

PUBLIC LANDS

LESSOR LEASING GOVERNMENT-OWNED BUILDING TO GOVT. CONTRACTOR HELD TO BE TRESPASSER AND LIABLE FOR NOMINAL DAMAGES.

United States v. Kittredge (M.D. Fla., 67-6 Orl.; September 30, 1969; D.J. 90-1-1-1854)

The Government owned a warehouse near Orlando which had been a part of a military airport during World War II. The warehouse was licensed to the City of Orlando for such use as it desired to make of it, but with a limitation against subleasing without the approval of the Government. The City, thinking such approval had been given by the CAA, subleased the building to the defendant who in turn subleased to a Government contractor. The defendant, the City, and the Government contractor made repairs and improvements to the building. The Corps of Engineers, which had jurisdiction over the building, did not discover that it was being occupied by a Government contractor for over three years; at that time it asserted ownership over the building and the Government contractor was advised to pay no further rents to the defendant.

The court found the defendant to be a trespasser, but only assessed nominal damages since the building was in better condition when the Government reasserted its ownership than it was at the time it was licensed to the City of Orlando. The court has been asked to amend the holding as to damages and grant recovery of mesne profits; that is, the trespasser is liable to pay the reasonable rental value of the building or its yield, if that is greater, whether or not it acted in good faith.

Staff: United States Attorney John L. Briggs; Assistant United States Attorney Kendell W. Wherry (M.D. Fla.); and David W. Miller (Land & Natural Resources Division)

CONTRACTS

DULLES CONCESSIONAIRE ESTOPPED FROM ASSERTING DEFENSE OF MISREPRESENTATION IN SUIT FOR NONPAYMENT OF RENT;

DEFENSE THAT FAA TRAFFIC FORECASTS FOR DULLES DID NOT MATERIALIZE WAIVED BY FAILURE TO RESCIND CONTRACT PRIOR TO ITS EXPIRATION.

United States v. Idlewild Pharmacy, Inc. (E.D. Va., No. 4740-A; October 1969; D.J. 90-1-1-2145)

On September 24, 1962, Idlewild Pharmacy, Inc., entered into a contract with the Federal Aviation Administration to operate a news, drug and gift concession at Dulles International Airport. The contract was to run for a five-year period beginning on January 1, 1963, and ending on December 31, 1967.

In the prospectus to the contract issued by the FAA, the FAA had forecast certain levels of passenger and aircraft volume for the five-year contract period, but at the same time it cautioned prospective bidders that the traffic forecasts were furnished "for informational purposes only" and that the prospective bidder was "to determine for itself the business potential".

Idlewild Pharmacy operated a concession at Dulles for the full five-year period and in fact held over until March 12, 1968, despite the fact that passenger and aircraft volume was substantially lower than was previously anticipated.

Idlewild Pharmacy paid only $167,109.04 of the $485,000 minimum rentals due under the contract and paid nothing for the period during which it held over. Consequently, the Government sued to recover the unpaid rentals.

The district court held that even if the FAA's forecasts constituted a misrepresentation, defendant Idlewild Pharmacy was estopped from asserting that defense by occupying the premises for the entire contract period and for an additional two and a half months.

Staff: Jonathan U. Burdick (Land & Natural Resources Div.)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

DISTRICT COURT

BANKRUPTCY

BANKRUPTCY PROCEEDING IN WHICH U.S. SOUGHT TO RECOVER ASSESSED INCOME TAXES WHICH HAD PREVIOUSLY BEEN REFUNDED TO TAXPAYERS IN 1964, WITHIN 3 YEARS OF BANKRUPTCY. REFUND RESULTED FROM ALLOWANCE OF NET OPERATING LOSS CARRYBACK TO YEARS 1960 AND 1961, PURSUANT TO AN APPLICATION FOR TENTATIVE CARRYBACK ADJUSTMENT WITH RESPECT TO NET OPERATING LOSS CLAIMED FOR 1963. UPON AUDIT OF 1963 RETURN A SUBSTANTIAL PORTION OF CLAIMED NET OPERATING LOSS WAS DISALLOWED, AND ASSESSMENTS WERE MADE IN 1966, PRIOR TO BANKRUPTCY, AGAINST BANKRUPTS FOR AMOUNT OF TAXES PREVIOUSLY REFUNDED.

In the Matter of Wilson Monroe Young & Thomas Hamilton Hanna, Individually, and the Partnership Known as Able Roofing & Sheet Metal Co. (M.D. Ala., In Bankruptcy No. 2105-N; January 10, 1969; D.J. 5-2-178)

The taxpayers filed a petition in bankruptcy on December 1, 1966. Young and Hanna filed timely individual and partnership income tax returns for 1960 and 1961. Subsequently, the taxpayers filed a 1963 partnership return which showed a net loss by the partnership for that year of $57,254.63. Based on a carryback of the 1963 loss deduction, the taxpayers claimed refunds of taxes paid on their 1960 and 1961 returns; and the Service allowed refunds on or about September 12, 1964, in the sum of $977.58, plus $36.30 interest to Young on his 1960 return; $1,551.46 plus $57.62 interest to Young on his 1961 return; $500.48 plus $18.42 interest to Hanna on his 1960 return; and $658.72 plus $24.24 interest to Hanna on his 1961 return. The Service made an audit in 1966 and disallowed a substantial portion of the claimed 1963 partnership loss; the Service in 1966 made assessments in the amounts of the refunds previously made to Young and Hanna.

The Trustee argued that the claims based on the assessments made in 1966 were dischargeable in bankruptcy under the Bankruptcy Act, Sec. 17(a)(1), as amended July 5, 1966, which provides for the release of a bankrupt from taxes which became legally due and owing to the Government more than three years preceding bankruptcy, with certain exceptions not here applicable. The Trustee argued that the taxes claimed were income taxes for the years 1960 and 1961, became due and owing more than three years preceding bankruptcy, and were dischargeable. The Government argued that the taxes claimed did not became due and owing until the refunds