NATIONAL TREASURY EMPLOYEE'S UNION
v.
DONALD DEVINE, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

DOCKET NO.
HQ120500006

## OPINION AND ORDER

Having conducted a review of 5 C.F.R. § 752.401(c)(9) under the Board's authority to review regulations issued by the Office of Personnel Management (OPM) on the petition of an interested party, in accordance with 5 U.S.C. § 1205(e)(1)(B), we find that regulation to be valid for the reasons set forth below. More specifically, we find that "[p]lacement of an employee serving on a . . . seasonal basis in a nonduty, nonpay status in accordance with conditions established at the time of employment" is properly excluded by 5 C.F.R. § 752.401(c)(9) from the adverse action procedures of 5 U.S.C. § 7513.

### I. BACKGROUND

On the petition of the National Treasury Employees' Union (NTEU) to review three regulations promulgated by OPM,[1] the Board granted the petition with respect to 5 C.F.R. § 752.401(c)(9) only, by order dated January 13, 1981, upon finding that the petition raised a genuine question as to whether OPM had exceeded its statutory authority in issuing that regulation with regard to seasonal employees. We therefore ordered OPM to file briefs and affidavits as necessary in response to NTEU's petition and permitted reply briefs by NTEU.

Briefs have been received from the parties and comments have been filed by the Office of Management and Budget, as well as the Department of Agriculture. In addition, OPM has responded to extensive requests for factual information by NTEU and by the Board. All of these submissions have now been considered.

We note preliminarily that the record discloses no statutory or regulatory definition of a "seasonal employee." Only OPM's Federal Personnel Manual (FPM) offers an official definition, albeit vague, describing a "seasonal employee" as "one who works on an annual recurring or on-call basis and for less than 2,080 hours per year." FPM Supp. 296-33, ch. S15-2(e) (April 30, 1981). In response to NTEU's written interrogatories, OPM asserted to seasonal employees are usually "employees" as defined at 5 U.S.C. § 7511(a)(1) to whom adverse action procedures apply. OPM contended, however, that seasonal employees accept something less than full-time em-

[1]The other two were 5 C.F.R. §§ 401(c)(2) and 771.204.

ployment at the time of their appointment, and that seasonal lay-offs in accordance with the terms of their appointment do not constitute adverse actions under 5 U.S.C § 7513.

In response to an order by the Board to provide us with certain information, OPM indicated that historically the concept of seasonal employment originated with individual agencies at an unknown point in time, perhaps around 1960, as a means of managing fluctuating workloads. OPM has ascertained that 10 agencies out of more than 100 employ a total of 59,197 seasonal employees, but it has estimated that a total of more than 100,000 seasonal employees are currently employed by the Federal government.[2]

OPM stated further that, since the nature of seasonal employees' appointments depends upon the workload situations of the individual hiring agencies, the only common denominator has been that they do not work year-round. Although many seasonal employees are appointed for fixed tours of duty, the tours of most seasonals are specifically conditioned "as needed," "as weather permits," or "at the discretion of the employer." Seasonal employees serving under permanent appointments, OPM represented, are entitled by the terms of their appointments to the full range of benefits afforded by Federal employment, including job security, appeal rights and procedures, promotion eligibility, access to other job opportunities within the employing agencies, inclusion in bargaining units, annual and sick leave, and insurance and retirement coverage. In addition, OPM asserted, from the agencies' point of view the advantages of permanent seasonal employment as opposed to temporary employment include a stable, productive workforce, with resultant financial and time-savings in recruitment and training.

## II. DISCUSSION

Under 5 U.S.C. § 1201(e)(2)(A), the Board shall declare a regulation invalid on its face if it determines that the terms of the regulation, if implemented by an agency, would require an employee to commit a prohibited personnel practice. The only prohibited personnel practice pertinent to 5 C.F.R. § 752.401(c)(9) is the taking of a personnel action in violation of a law, rule, or regulation which implements or directly concerns a merit system principle.[3] *See* 5 U.S.C. § 2302(b)(11); *Wells v. Harris*, 1 MSPB 199, 204 (1979). *Compare* 5 U.S.C. § 2302(b)(1)–(b)(10). The determinative issue in this case, therefore, is whether 5 C.F.R. § 752.401(c)(9) requires the

[2]OPM began collecting data on seasonal employment on October 1, 1981, but an analysis of this data is not yet available. In order to reflect the total picture, in any event, an analysis must be based on a full year's collection of data. *See* FPM Letter 298–13 (June 17, 1981).

[3]NTEU asserted the applicability of other prohibited personnel practices but offered no supporting rationale and we can discern none.

violation of the adverse action procedures of 5 U.S.C. § 7513 by erroneously exempting from those procedures the placement of seasonal employees in a nonduty, nonpay status in accordance with conditions established at the time of employment.

According to 5 U.S.C. §§ 7511(a)(1) and 7512, the adverse action procedures must be adhered to in effecting a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough of less than 30 days, where the employee is a competitive service or preference-eligible nonprobationer. The adverse action most akin to the layoff of a seasonal employee is a "furlough," which is defined at 5 U.S.C. § 7511(a)(5) as "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons."

In challenging the validity of 5 C.F.R. § 752.401(c)(9), NTEU argued that the plain, obvious meaning of the definition of "furlough" includes placing seasonal employees in a nonduty, nonpay status in accordance with the terms of appointment because of lack of work. In response, OPM countered that the legislative history of 5 U.S.C. § 7511, *et seq.*, evidences Congressional intent to incorporate the same definition of "furlough" as existed under pre-existing law, and that the FPM provided for a substantially identical definition of "furlough" but specified that placing an employee serving on a seasonal basis in a nonduty, nonpay status in accordance with conditions of employment was not a "furlough."

As held in *United States v. American Trucking Association*, 310 U.S. 534, 543–44 (1940),[4] "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words appear on 'superficial examination.'" *See also Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).[5] Moreover, where the plain meaning of statutory language leads to results that are unreasonable in light of the policy of the legislation as a whole, courts follow the purpose rather than the literal words. *Percy v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).[6]

The fundamental policy of the Civil Service Reform Act of 1978 (Reform Act), Pub. L. No. 95–454, 92 Stat. 1223, is set forth in the merit system principles for implementation of Federal personnel management at 5 U.S.C. § 2301(b)(1)–(b)(9). One of these principles

[4]*Cited with approval in Church of Scientology v. Department of Justice*, 612 F.2d 417, 422 (9th Cir. 1980).

[5]*Cited with approval in Foulkes v. Commissioner of Internal Revenue*, 638 F.2d 1105, 1109 (7th Cir. 1981).

[6]*Cited with approval in United States v. Mendoza*, 565 F.2d 1285, 1289 (5th Cir. 1978), *modified*, 581 F.2d 89 (5th Cir. 1978); *see also Steuer v. United States*, 207 Ct. Cl. 282, 294 (1975).

mandates that "[t]he Federal work force . . . be used efficiently and effectively." 5 U.S.C. § 2301(b)(5). We note that seasonal employment furthers this principle by permitting agencies to hire employees for periods of increased workload and enabling them to cope with such workload without hiring full-time employees for whom there may be insufficient work on a year-round basis. In addition, since 1977, agencies have been experimenting with a staffing concept termed "on-call employment," designed to adjust rapidly to varying workload levels by, *inter alia*, shifting on-call employees to a nonpay, nonduty status on just 3 days' notice. *See* FPM Bulletin 340–4 (April 18, 1980).

We conclude that requiring agencies to adhere to adverse action procedures under 5 U.S.C. § 7513 in laying off seasonal workers in keeping with the terms of their employment, most especially the 30-day advance notice provision, would be unreasonable because it would frustrate the desired flexibility of this effective and efficient employment concept. To avoid this impediment, agencies may well phase out the use of seasonal employees by attrition and rely to a greater extent on the hiring of temporaries to accommodate increased seasonal workloads. This would result in a less efficient use of the workforce because of the need to screen and train temporary employees each time they are hired. It would also result in decreased benefits for employees since temporary employees receive fewer than the full range of the benefits of Federal employment that permanent seasonal employees receive. Instead of phasing out seasonal employment, agencies might simply avoid laying off seasonal employees for less than 30 days when there is insufficient work or inclement weather prevents work. This, too, would result in a less efficient use of the workforce in that employees who were hired to work only during periods of increased workload would be paid when there is no work to be done.

NTEU has contended that if the FPM exception of seasonal employees from the definition of "furlough" were intended by Congress to be included in the Reform Act, it would have been listed among the exceptions of 5 U.S.C. § 7512(A)–(E), and that Congress intended to extend adverse action protections to all competitive service employees. We find that these arguments overlook the significant distinction that 5 U.S.C. § 7512(A)–(E) lists personnel actions which may otherwise technically qualify as adverse actions, whereas placing a seasonal employee in a nonpay, nonduty status in accordance with the terms of his appointment does not constitute an adverse action "furlough"[7] any more than the expiration of a

[7]NTEU admitted in its petition for regulation review that it has a labor agreement with the Internal Revenue Service specifically acknowledging that such an action is not covered by the adverse action procedures at 5 U.S.C. § 7513.

temporary appointment constitutes a "removal" or the termination of a temporary promotion constitutes a "reduction in grade or pay." *See Beyer v. Department of Commerce*, MSPB Docket No. SE075299008 at 2 (September 25, 1980); *Winn v. Department of the Treasury*, 7 MSPB 76 (1981). On the other hand, if placing a nonprobationary competitive service or preference-eligible seasonal employee in a nonpay, nonduty status were not in accordance with the terms of his appointment, the action may be a removal, a suspension for more than 14 days, or a furlough for less than 30 days, depending on the circumstances of the case, so that the action would be required to conform to the adverse action procedures of 5 U.S.C. § 7513. If it is a suspension for less than 14 days, the procedures at 5 U.S.C. § 7503 must be followed. Thus, the crucial question in an individual case is whether placing the seasonal employee in a nonduty, nonpay status was in accordance with the terms of his appointment. Proving the meaning of an appointment for duty "as needed," "as weather permits," or the like, may not be a simple matter in some cases, but that remains a matter for determination on a case-by-case basis.

With these considerations in mind, we shall look to the legislative history to determine whether Congress intended the unreasonable result that the placement of a seasonal employee in a nonduty, nonpay status in accordance with the terms of his appointment should be deemed an adverse action "furlough."

The definition of "furlough" as reported to the United States Senate in S. 2640, 95th Cong., 2d Sess. § 204(a) (1978), was identical to that reported to the United States House of Representatives in H.R. 11280, 95th Cong., 2d Sess. § 204(a) (1978), and the Senate version of the bill was eventually passed by both houses of Congress. It is meaningful, therefore, that in reporting S. 2640 to the entire Senate, the Committee on Governmental Affairs expressly stated in S. Rep. No. 95–969, 95th Cong., 2d Sess. 48 (1978), that the term "furlough" as set forth at 5 U.S.C. § 7511(a)(5) is "defined elsewhere in title 5 or in civil service regulations or policy issuances and . . . [is] added for uniformity and clarity."

Since the term "furlough" was not defined elsewhere in title 5 of the United States Code, we look to pre-existing civil service regulations and policy. Adverse actions enumerated at 5 C.F.R. § 752.201(b)(3) (1978) included a "furlough without pay." FPM Supp. 752–1, ch. S1–6(a) (October 11, 1976), defined the term "furlough" as "an action placing an employee in a temporary nonduty and nonpay status because of lack of work or funds or for other nondisciplinary reasons," which is substantially identical to the current statutory definition at 5 U.S.C. § 7511(a)(5). FPM Supp. 752–1, ch. S1–1(b)(4) (October 11, 1976), provided further that "[p]lacing an employee serving on a . . . seasonal basis in a nonwork nonpay status in

accordance with conditions of employment established at the time of appointment is not an adverse action under part 752." We conclude, therefore, that as under pre-existing civil service policy, Congress intended that the placement of a seasonal employee in a nonduty, nonpay status in accordance with the terms of his appointment shall not be deemed an adverse action "furlough" under 5 U.S.C. § 7511(a)(5).

NTEU asserted additionally that if Congress had intended to grant OPM the authority to exclude seasonal employees from coverage by chapter 75 of title 5, Congress would have granted that authority expressly, as it did in other chapters. This argument again fails to discern that seasonal employees are not excepted from chapter 75 coverage. Placing them in a nonduty, nonpay status simply does not constitute an adverse action under chapter 75 as long as that action is in accordance with the terms of their appointment. Clarifying this point at 5 C.F.R. § 752.401(c)(9) is, we find, well within OPM's statutory authority to issue regulations concerning adverse actions at 5 U.S.C. § 7513(a).

In further support of the validity of 5 C.F.R. § 752.401(c)(9), we note that it is entitled to substantial deference because it represents statutory interpretation by the agency charged with administration of the statute. *United States v. Clark*, 50 U.S.L.W. 4128, 4130 (1982); *see also Aeronautical Radio, Inc. v. Federal Communications Commission*, 642 F.2d 1221, 1233 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 2059 (1981). Moreover, OPM's predecessor, the Civil Service Commission, participated in developing chapter 75,[8] and in such a case the administrative agency's interpretation of the statute is especially persuasive. *Miller v. Youakim*, 440 U.S. 125, 144 (1979).

### III. CONCLUSION

Accordingly, having found 5 C.F.R. § 752.401(a)(9) to be valid on its face, we hereby DISMISS this regulation review.

For the Board:

HERBERT E. ELLINGWOOD,
*Chairman.*

ERSA H. POSTON,
*Vice Chair.*

WASHINGTON, D.C., *February 10, 1982*

[8]S. 2640, 95th Cong., 2d Sess. (1978), and H.R. 11280, 95th Cong., 2d Sess. (1978), as originally introduced in Congress, represented President Carter's proposal to reform the civil service system as drafted by the Civil Service Commission, among others. *See* U.S. Senate Hearings Before the Committee on Governmental Affairs on S. 2640, S. 2707, and S. 2830, 95th Cong., 2d Sess. 29, 42 (1978). The definition of "furlough" in both original bills is identical to that in the Reform Act at 5 U.S.C. § 7511 (a)(5).