ARTHUR L. SWEETING
v.
DEPARTMENT OF JUSTICE

Docket No.
AT315H09025

OPINION AND ORDER

The Board reopened this appeal by order dated October 15, 1980, to determine the meaning of "partisan political reasons" as used in 5 C.F.R. 315.806(b). The Department of Justice (the agency) and the Office of Personnel Management (OPM) responded to the order by submitting briefs, and Arthur L. Sweeting (the appellant) submitted a reply brief. All three briefs have been given careful consideration.

I. BACKGROUND

The agency's Bureau of Prisons removed the appellant from the GS-7 position of Correctional Officer during his probationary period at the Federal Correctional Institution in Memphis, Tennessee, based on the charge of conduct unbecoming a Correctional Officer. The appellant petitioned the Board's Atlanta Field Office for review of the removal action, alleging that it resulted from discrimination based on race (Black) and "partisan politics." With regard to the latter claim, the appellant asserted in his petition that "other persons involved in the case who had higher rank and connections were not discharged."

In an initial decision dated April 1, 1980, the presiding official noted that the Board has jurisdiction over probationers' appeals only in those cases involving discrimination based on partisan political reasons and/or marital status in accordance with 5 C.F.R. 315.806(b). The presiding official then considered the appellant's claim of discrimination based on partisan political reasons:

> *The appellant presented no evidence to show that his termination was the result of partisan political reasons, as envisioned by the regulations, e.g., the result of his affiliation with one of the nationally recognized politcal parties.* The mere use of the term, partisan politics, in the absence of evidence to show that the appellant was involved in some partisan political activity that would serve as a discriminatory basis, is insufficient to bring the matter within the Board's appellate jurisdiction.

Initial Decision at 2 (empasis added). He therefore dismissed the appeal for lack of jurisdiction.

II. DISCUSSION

We note preliminarily that the presiding official erred in finding that the Board lacks jurisdiction over this appeal without first affording the appellant an opportunity to amplify or make an offer of proof in support of his allegation that his discharge was a result of "partisan politics."

Whenever a presiding official questions whether the Board has jurisdiction over an appeal in which the appellant has alleged an appealable matter, the appellant should be given a chance to submit further material to show why his claim is not frivolous, as is the practice in appeals involving allegations of involuntary resignation. Because of the present posture of this appeal, the Board has no way of knowing what kind of "connections" the appellant referred to in his petition for appeal.

With regard to the meaning of "partisan political reasons" in 5 C.F.R. 315.806(b), since the regulation itself provides no hint, we shall look to its evolution. Before the regulation was amended in 1972, it stated that "an employee may appeal under this subparagraph a termination not required by statute which he alleges was based on *political reasons*. . .," (emphasis added) and the term "political reasons" in that context was construed in two reported judicial decisions.

In *Peale v. United States*, 325 F.Supp. 193, 194–95 (N.D.Ill. 1971), the district court noted that the former Civil Service Commission (Commission) dismissed the probationer plaintiff's appeal because it found that wearing a black arm band to signify opposition to a war did not constitute a "partisan political reason" for which termination was prohibited. The court found the Commission's equation of "political reasons" with "partisan political reasons" to be a plainly erroneous construction of 5 C.F.R. 315.806(b) because the Hatch Act prohibits partisan political activity and permits non-partisan political activity.[1]

Similarly, in *Holden v. Finch*, 446 F.2d 1311 (D.C. Cir. 1971), the court of appeals noted that the Commission dismissed the probationer

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[1] 5 U.S.C. 7324 provides:

(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

(2) take an active part in political management or in political campaigns.

. . .

(b) An employee or individual to whom susbsection (a) of this section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

5 U.S.C. 7326 then explains:

Section 7324(a)(2) of this title does not prohibit political activity in connection with—

(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

For purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States.

plaintiff's appeal on the grounds that civil rights activity did not constitute a "partisan political reason" because it did not relate to "affiliation with or support of recognized partisan political parties, their candidates for public office, or their political campaign activities." *Id.*, 1314. The court strenuously disagreed:

> The Commission has seen fit to interpret its regulation as confined to partisan political activity in the Hatch Act sense. It appears to believe that it has in terms excluded from the concept of political discrimination any conduct which does not fit into the traditional partisan mould of organized contention for elective political office. . . .We think. . .that such a reading is at odds with the Congressional purpose, stated in the Hatch Act itself, that the statutory proscription of partisan political activity does not extend to the right of an employee to "express his opinion on political subjects," or to engage in political activity in connection with "a question which is not specifically identified" with political parties. We suggest, finally, that such an interpretation could not, compatibly with the First Amendment, be constitutionally maintained as against any and all activities involving speech and association relating to public policies of essentially political, albeit non-partisan, nature.

Id., 1316.

After these two decisions were rendered, the Commission amended 5 C.F.R. 315.806(b) in 1972 by adding the word "partisan" before "political reasons" in order to "clarify appeal rights of probationers." 37 Fed. Reg. 26575 (1972). Since there is no question that the Commission acted within its authority in amending the regulations,[2] the word "partisan" must be given full effect. *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *cf. Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976).

OPM urged in its brief that the proper interpretation of "partisan polical reasons" in 5 C.F.R. 315.806(b) is the same as the Commission's interpretation of "political reasons" in *Holden*, namely:

> [P]olitical influences, specifically as resulting from affiliation with or support of recognized partisan political parties, their candidates for public office, or their political campaign activities.

446. F.2d at 1314. OPM contended that this interpretation is rational when the regulation is viewed as a complement to the Hatch Act, and that discrimination against an employee because of more general non-

[2]The Civil Service Commission's authority to promulgate regulations for the civil service was based on the President's delegation of that authority in Exec. Order No. 9830, 3 C.F.R. 608 (1943–1948 Compilation), and Exec. Order No 10577, 3 C.F.R. 218 (1954–1958 Compilation), which in turn were based on the Civil Service Act of 1883, 22 Stat. 403. Similar delegation of authority to OPM, the Commission's successor, is provided for at 5 U.S.C. 1104(a), 3301, and 3302, in addition to Article II of the U.S. Constitution.

partisan political beliefs may be addressed by Special Counsel action under 5 U.S.C. 1206. *See* 5 U.S.C. 2301(b).

The construction of "partisan political reasons" in 5 C.F.R. 315.806(b) by OPM and its predecessor is entitled to great deference as long as the interpretation is reasonable and consistent with the regulation. *Larionoff*, 431 U.S. at 872; *Belco Petroleum Corp. v. Federal Energy Regulatory Commission*, 589 F.2d 680, 685 (D.C. Cir. 1978). We believe that OPM's construction is indeed both reasonable and consistent with the regulation.[3] Moreover, it is consistent with Civil Service Rule IV which specifies the type of political discrimination prohibited in Federal employment:

> No discrimination shall be exercised, threatened, or promised by any person in the executive branch of the Federal Government against or in favor of any employee in the competitive service, or any eligible or applicant for a position in the competitive service because of his race, *political affiliation*, or religious beliefs, except as may be authorized or required by law.

5 C.F.R. 4.2 (emphasis added).[4] We find, therefore, that discrimination based on "partisan political reasons" under 5 C.F.R. 315.806(b) means discrimination based on affiliation with any political party or candidate.

III. CONCLUSION

The presiding official erred in finding that the Board lacked jurisdiction over this appeal without first affording the appellant an opportunity to make an offer of proof in support of his allegation that his discharge was a result of "partisan politics." The presiding official erred, further, in finding that the discrimination alleged must have resulted from "affiliation with one of the nationally recognized political parties" when it may have resulted from affiliation with any political party or candidate.

Accordingly, the initial decision dated April 1, 1980, is hereby VACATED and this appeal is REMANDED to the Atlanta Field Office for further proceedings consistent with this opinion.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *June 12, 1981*

[3]The term "partisan politics" is defined in *The Random House College Dictionary* (rev. ed. 1975) as "partial to a specific party, person, etc."

[4]In *Elrod v. Burns*, 427 U.S. 347, 352, 363 (1976), the Supreme Court considered the "constitutionality of dismissing public employees for *partisan reasons*," (emphasis added) and found that "conditioning the retention of public employment on the employee's support of the in-party. . ." is constitutional only under certain limited circumstances. *See also Branti v. Finkel*, 445 U.S. 507, 518 (1980).