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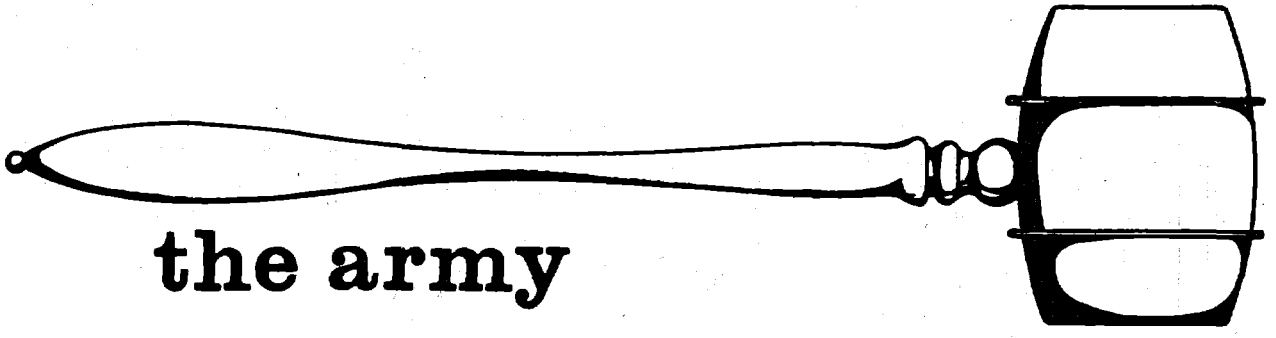

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Remedies for Secondary Picketing at Defense Installations

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When a labor union places pickets at the gates to a Department of Defense (DOD)[1] installation, the result is that most commercial truck traffic into the installation immediately stops. Thus, serious impairment to the ability of the DOD activity to carry out its mission is inevitable. If discussions with the union and the struck contractor prove fruitless in such cases, there are two possible places to go to obtain relief from picketing through the courts: The local U.S. attorney's office via the DOD chain of command to the Department of Justice or The National Labor Relations Board (NLRB) Regional Office. The first alternative involves considerable delays through the bureaucratic hierarchy and, since a labor dispute is involved, Justice usually requires that the NLRB have been offered and refused jurisdiction of the case.[2]

This article will concentrate on the detailed procedure involved in the use of the NLRB Regional

[1]As used herein, Department of Defense (DOD) includes any branch thereof, *i.e.*, Army, Navy, Air Force, and Defense Supply Agency.

[2]Labor disputes between the DOD and its own employees and their unions are outside the scope of this article. *See*, in that connection, the Civil Service Reform Act of 1978, PL 95-454, 92 Stat. 1199 (codified at 5 U.S.C. §§ 7101-35 (Supp. III 1979)).

Office for achieving relief in secondary boycott cases. In passing, however, it should suffice to say that if such route fails to bring relief, use of the Justice Department route involves high level political as well as tough legal considerations. In cases where the NLRB determines the labor dispute is actually between the DOD installation and the union, it will refuse relief on the basis that the picketing is "primary" rather than "secondary" activity.[3] Going to the Justice Department becomes the only alternative in such cases if the dispute cannot be settled with the union.

The NLRB Route of Relief

The Functions and Activities of the NLRB

The National Labor Relations Board is an independent agency created by the National Labor Relations Act of 1935 (Wagner Act), as amended by the acts of 1947 (Taft-Hartley Act) and 1959 (Landrum-Griffin Act).[4] The Board has two principal functions under the act: preventing and remedying unfair labor practices by employers and labor organizations or their agents; and conducting secret ballot elections among employees in appropriate collective-bargaining units to determine whether or not they desire to be represented by a labor organization.

The General Counsel in unfair labor practice cases has final authority to investigate charges, issue complaints, and prosecute such complaints before the Board. On behalf of the Board, he prosecutes injunction proceedings, handles courts of appeals proceedings to enforce or review Board orders, participates in miscellaneous court litigations, and obtains compliance with Board orders and court judgments.

Under general supervision of the General Counsel, thirty-three regional directors and their staffs process representation, unfair labor practice, and jurisdictional dispute cases.

The Board can act only when it is formally requested to do so. Individuals, employers, or unions may initiate cases by filing charges of unfair labor practices or petitions for employee representation elections with the Board field offices serving the area where the case arises.

In the event a regional director declines to proceed on an unfair labor practice charge, the filing party may appeal to the General Counsel. For details concerning filing such appeals with those Washington, D.C. offices, parties may communicate with the field office most convenient to them.

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[3]*See* text accompanying notes 13-27 *infra*. In one case, the NLRB refused relief to the Army because the Army possessed the "right to control" the underlying problem. Letter from Regional Director, Region 32 to Counsel, Oakland Army Base (28 Dec. 1981). In that case, the Army had decided to use civil servants to unload commercial delivery trucks which formerly had been unloaded by Local 70 lumpers as independent contractors. The picketing by the lumpers was held primary, not secondary.

[4]29 U.S.C. §§ 151-68 (1976).

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Administrative law judges conduct hearings in unfair labor practice cases, make findings, and recommend remedies for violations found. Their decisions are reviewable by the Board if exceptions to the decision are filed.[6]

Statutory Basis for Relief

Illegal Secondary Picketing as Unfair Labor Practice

The only basis the DOD installation has for obtaining relief from picketing via the NLRB is where picketing is of a "secondary" rather than "primary" nature and constitutes an unfair labor practice under the secondary boycott provision of the National Labor Relations Act.[8] If the existence of an illegal secondary boycott activity is established to the satisfaction of the General Counsel of the NLRB, he or she is directed to go into federal district court and ask for a temporary restraining order (TRO) on a priority basis to stop the picketing.[7] The request for the TRO is based on the grounds that the picketing is secondary and intended to coerce and prevent neutral third parties from doing business with the primary employer.[8] The TRO can, after a hearing, be converted to a temporary injunction that will remain in force until the illegal secondary boycott charge is heard and decided administratively by the NLRB, or the case is settled by agreement.

When picketing constitutes proscribed secondary activity under Section 8(b)(4) of the Act, it can be enjoined without violating the First Amendment because of its illegal purpose even though it is nonviolent.[9] Section 8(b)(4)(i)(ii)(B) of the Act is directed against the secondary boycott in the form of strikes, picketing, threats, or other coercion whose sanctions bear not on the primary employer who is party to the labor dispute, but upon a neutral secondary employer who has no interest in the conflict.[10]

The United States as a "Person"

While the DOD is not an employer within the meaning of the Act, it is a "person" as defined therein and entitled to the protection of section 8(b)(4).[11] One purpose of the 1959 amendments to section 8(b)(4), which substituted the language "any person engaged in commerce" for "any employer" was to bring within the coverage of the section activities against entities such as railroads and governmental units, which are specifically excluded from the Act's definition of "employer."[12]

Preliminary Action to Requesting Relief from the NLRB Regional Office

Establishing the Secondary Nature of the Picketing

(i) *Identifing the Primary* Contractor's Affidavit

The most important preparatory step is to obtain a written statement preferably an affidavit, from the DOD contractor which was contacted by union officials concerning the labor dispute. This document should clearly demonstrate that the labor dispute is between the contractor and the union and not between the DOD and the union. Other documents such as letters or telegrams from the union to the contractor on the same point would be extremely useful but rarely exist, due to the cleverness of union officials experienced in these matters. In an affidavit used in a recent Navy case,[13] statements were obtained to demonstrate that union representatives repeatedly contacted the contractor by telephone and asked about the latter's hiring plans for the job, and if he had intentions to subcontract the work to local

[6]*See* 29 C.F.R. Pts. 101, 102 (1982).

[8]29 U.S.C. § 158(b)(4)(i)(ii)(B) (1976).

[7]*Id.* at § 160(1).

[8]*See* Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363 (1962).

[9]NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 70-71 (1964); International Brotherhood of Elec. Workers Local 501 v. NLRB, 341 U.S. 694 (1951).

[10]Local 761, Int'l Union of Elec., Radio, & Machine Workers v. NLRB, 366 U.S. 667, 672 (1961).

[11]*See* Plumbers, Steamfitters, Refrigeration, Petroleum Fitters, & Apprentices of Local 298 v. County of Door, 359 U.S. 354, 359 (1959).

[12]NLRB v. Local 254, Bldg. Serv. Employees Int'l Union, 376 F.2d 131 (1st Cir.), *cert. denied*, 389 U.S. 856 (1967).

[13]This affidavit is included as Appendix 1 to this article.

firms. In the decision in that case, the administrative law judge noted:

> After having carefully considered the whole record, I am persuaded that the Respondent Union's real dispute was with Roach and that the Union's picketing at the Oakland Naval facility between June 12 and 16, 1978, was for the purpose of forcing neutrals, including NSCO and employees of trucking companies, to cease doing business with Roach. I therefore hold that the General Counsel established violation of Section 8(b)(4) of the Act.
>
> "It is true, as Respondent asserts, that it had for some time taken the position that NSCO should include Davis-Bacon provisions in its conveyor projects. It took no serious action to change Navy contracting policy, however, until it became clear that its appeals and threats to Roach were not going to be successful.[14]

Contracting Official's Affidavit

In order to avoid the appearance of a primary dispute with the employer-contractor, the union officials may decide to refrain from any direct contact with him and will make threats only to the DOD activity involved. These threats may be to the effect that the union will "shut down" or picket the naval base if award is made to the non-union bidder or, if award has already been made, if the non-union contractor is not made to pay the prevailing or union wage.

Statements by union officials which show an intention to involve neutral employers, such as the DOD, in the dispute establish an independent secondary boycott objective.[15] If such statements were made to officers or employees of the DOD, the affidavits of such persons should be obtained and presented to the Regional Office when the government attorney is preparing to sign the charge of unfair labor practice and retained for later use by the General Counsel of the region in obtaining the TRO or Temporary Injunction.[16]

In a recent case, the union did not contact the employer-contractor, but did contact a contracting official and threatened to "shut down" the Navy base if award were made to the low, non-union bidder. The NLRB held this was sufficient to show the union's primary dispute was with the non-union bidder. The union had claimed the Navy was the real primary party because it was not enforcing prevailing wage requirements. The administrative law judge held that the union's claim was "a thinly veiled effort to legitimize its unlawful secondary activity" by switching the primary subject of its dispute from the low bidder to the Navy.[17]

(ii) *The "Right to Control" Test*[18]

Under the "right to control"[18] test to determine primary versus secondary picketing, the Board attempts to ascertain whether the party being picketed has control over the controversy or is in fact a neutral.[19] Coercion of a neutral party violates the Act even though that is not the sole object of the picketing.

The DOD has no right to control the assignments of work to its contractor's employees, to require the contractor to employ local union members, or to prevent the contractor from employing out-of-state workers. If can only indirectly affect the worker's rates of pay by the appropriate use of certain statutory minimum wage provisions in its contracts. Since the DOD actually has no regulatory discretion as to which labor provisions to use

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[14]Millwrights Union Local 102, No. 32-CC-100, at 12 (22 Mar. 1979), *aff'd*, 246 NLRB No. 152, at 923, 928 (1979).

[15]*See* Chevron, U.S.A., Inc., 244 NLRB No. 160, at 1081, 1086 (1979); Local Bridge & Structural Iron Workers, 245 NLRB No. 21, at 132, 134 (1979); Local 639, Int'l Bhd. of Elec. Workers, 229 NLRB No. 17, at 68 (1977) *enforced*, 102 LRRM 2894 (6th Cir. 1979); Local 441, Int'l Bhd. of Elec. Workers, 222 NLRB No. 24, at 99, 101 (1976).

[16]An example of such an affidavit is included as Appendix 2 to this article.

[17]Teamsters Local 70, No. 32-CC-509, at 11 (14 Dec. 1981), *aff'd*, 261 NLRB No. 79 (1982).

[18]Less relevant to DOD cases is the "totality of the circumstances" test. *See* National Woodwork Mfgrs. Ass'n, 386 U.S. 612 (1967) (boycott of premachined doors).

[19]NLRB v. Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler Pneumatic Table, Ice Mach. & Gen. Pipefitters of N.Y., 429 U.S. 507 (1977); Enterprise Ass'n of Steam Pipefitters, 204 NLRB No. 118, at 760, 765 (1973).

in each case, it has no power to control "the wages paid."[20]

The "right to control" test was recently applied to the Oakland Army Base.[21] The Regional Director refused relief to the Army on the basis it had the right to control the underlying problem, *i.e.*, whether union lumpers or civil servants were to unload the trucks at the installation. Therefore, the Army was deemed not to be a neutral party in the dispute.

The Oakland Army Base ruling seems distinguishable from an earlier Board decision wherein it was held the union, which had no collective bargaining agreement with the state government, could not legally picket the state's buildings when the state decided to do "in-house" maintenance work on leased equipment. Such work previously was done by the lessor, using union labor.[22] In that case, the Board concluded that the union's primary labor dispute was with the lessor and that the state was a neutral. Apparently the Board felt that the lessor had the "right to control" because it could have refused to lease the equipment separately from the maintenance service. In the Oakland Army case, however, there was no other employer, because the union lumpers worked as independent contractors in unloading incoming trucks on a case-by-case basis.

(iii) *"Limited Objective" Argument*

In the Courts

The unions frequently claim that they, by their picketing, are merely exercising their rights to force the DOD installation to comply with statutory labor laws for government contracts. Since such compliance is under DOD control and the objective of the picketing is limited, the picketing would therefore be primary. One federal court, however, has found that there was reasonable cause to believe that the union's objective was, in fact, secondary in cases where the union has tried to force the contractors to hire local union members and, failing that, then complained about contract provisions. In several cases, the court ordered the union to cease and desist from picketing the government activity.[24]

Besides picketing, there is another route that the unions have available to obtain relief when the government fails to interpret or enforce the labor laws. The unions may seek a mandatory injunction suit, essentially in the nature of mandamus, joining all involved government agencies.[25]

The U.S. Supreme Court recently ruled that there was no private right by employees to sue employers for back pay under government contracts which have erroneously omitted statutorily required prevailing wage provisions.[26] In that case, the Court noted that the binding effect on the contracting agency of the Department of Labor's determination as to which labor statutes cover a particular contract is disputed and that "there is currently no administrative procedure that expressly provides review of a coverage determination after the contract has been let."[27]

Before the Board

In an attempt to justify picketing DOD installations, unions frequently cite the decision in *Brotherhood of Painters, Decorators & Paperhangers of America, Local Union No. 171, AFL-CIO (Centric Corporation)*[28] for the proposition that it is legal to picket with the "limited object" of

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[20]*See* Defense Acquisition Reg. §§ 12-103, 12-106, 12-302, 12-602, 12-807, 12-1002, 12-1302, 12-1402 (1 July 1976). *Accord* Teamsters Local 70, 261 NLRB No. 79 (1982).

[21]*See* discussion in note 3 *supra*.

[22]Local 399, Int'l Bhd. of Elec. Workers, 235 NLRB No. 70, at 555 (1978).

[23]*See* National Woodwork Mfgrs. Ass'n v. NLRB, 386 U.S. 612 (1967). *Accord* Brotherhood of Painters, Decorators & Paperhangers of Am., 218 NLRB No. 146, at 944-45 (1975).

[24]NLRB v. Teamsters Local 70, Civ. No. C-81-2823-WHO (N.D. Cal. 1981); NLRB v. Millwrights Union, Local 102, Civ. No. C-78-1334 (N.D. Cal. 1978); NLRB v. Brotherhood of Teamsters & Auto Truck Drivers Local 70, Civ. No. C-77-2489 WAI (N.D. Cal. 1977); NLRB v. Millwrights Union, Local 102, Civ. No. C-73-1004 ASZ (N.D. Cal. 1973).

[25]*See* Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419 v. Brown, 656 F.2d 564 (10th Cir. 1981).

[26]Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981).

[27]*Id.* at 761 n.9.

[28]218 NLRB No. 146, at 944, 945 (1975).

advertising the injustice or illegality of the Government's interpretation or enforcement of the labor laws.

In *Centric*, the union had a long-standing dispute with the government agencies concerning the alleged enforcement of affirmative action apprenticeship programs only against union firms. Stating that the NLRB General Counsel had failed to prove a secondary boycott violation by a preponderance of evidence, the Board dismissed the complaint against the union and allowed it to picket with the limited objective of advertising the injustice of the government's interpretation of the law.

In later cases, however, the Board correctly distinguished the *Centric* case on the basis that, in *Centric*, there was no evidence that the union had a primary dispute with another employer, whereas in other situations, the evidence was clear that the union's objective was to coerce the government and others to cease doing business with the primary employer if the latter did not hire union workers.[29]

Establishment of the Reserved Gate

(i) *Appropriate Signs Posted*

The second most important preliminary step to take before meeting with the NLRB regional attorneys is to set up the "Reserved Gate" with appropriate signs to indicate such gate is the only gate that can be used by the struck contractor, its employees, and suppliers. Signs at all other entrance gates (neutral gates) should forbid entry of the struck contractor, its employees, and his material suppliers except at the designated reserved gate. The union must be notified of the existence and location of the reserved gate and of the intended users.[30] A necessary adjunct to this procedure is to have proof of delivery of letters to the contractor and the union explaining the existence of the reserved gate.[31] It is also helpful to take photographs of the signs in place at all the gates, including the reserved gate.[32] Under section 8(b)(4) of the NLRA, a distinction is made between suppliers of materials to a general contractor at a construction site and the independent subcontractors, the latter being considered neutral employers.

(ii) *Picketing at Reserved Gate*

The courts have held that the right to the exercise of free speech, such as informational picketing, is preserved by the establishment of a reserved gate where the contractor can be picketed, since the union usually will not be allowed by the commander of the DOD installation to picket at the contractor's actual work site inside the base for reasons of base security. Where the primary and secondary employers on occasion share the same physical site—common site cases—the competing interests of the union in being free to picket the primary employer and of the neutral secondary employer in being free from coercion are balanced under the concept of the reserved gate.[33] The reserved gate provides the union a place at which to picket near the site of the primary's activities with signs clearly disclosing that the dispute is solely with the primary, while leaving other gates free from pickets for the secondary's normal activities.[34]

The standards governing such picketing have been summarized as follows:

> To be classified as primary activity, the picketing must meet the following conditions: (a) the picketing is strictly limited to times when the *situs* of the dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places

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[29]*See* cases cited in note 24 *supra*.

[30]Linbeck Constr. Corp. v. NLRB, 550 F.2d 311 (5th Cir. 1977); T.W. Helgesen, Inc. v. Ironworkers, 548 F.2d 175 (7th Cir. 1977).

[31]A sample of such a letter is included as Appendix 3 to this article.

[32]Suggested language for such signs is provided at Appendix 4 to this article.

[33]For a full discussion of the factors which differentiate protected primary picketing from illegal secondary picketing, *see* Local 761, Int'l Union of Elec., Radio, & Machine Workers v. NLRB, 366 U.S. 667, 677 (1961).

[34]*See* Building Constr. Trades Council of New Orleans, 155 NLRB No. 42, at 319 (1965); Sailors Union of the Pacific, 92 NLRB No. 93, at 547 (1950).

reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.[35] Picketing in violation of the standards has been held to be presumptively illegal.[36]

(iii) *Enforcing the Reserved Gate*

There should be available evidence that the DOD installation is enforcing the reserved gate and not allowing the contractor, its employees, or suppliers to use other gates to avoid the picket lines. Failure of enforcement negates the reserved gate function and results in what is called "mixed" or "mingled" gates. The union can use this as an excuse to picket such gates even if there is a TRO in effect.[37] The Board has held that a contractor who was delayed by picketing at all the gates to the Naval shipyard was not entitled to a monetary equitable adjustment for delays because the Navy had acted reasonably in establishing a reserved gate which the union ignored.[38]

Even after mingling, the reserved gate may be rehabilitated notifying the union and contractor and setting rigid enforcement procedures, such as signing in.[39]

(iv) *No Reserved Gate Available*

Occasionally, a DOD activity cannot, for practical reasons, reserve a gate for the use of the struck contractor (primary employer), such as where the installation has only one gate usable by heavy vehicles. The activity must then allow such contractor and his employees and suppliers to use a gate in common with neutrals. One solution to this problem is to establish different work schedules for the struck contractor and to so notify the union. Under existing standards,[40] the union can legally picket at the common situs only when the struck or primary employer is there and engaged in his normal business.[41] Two things are required to make the separate scheduling work similar to separate gates: (1) the union must be notified in writing of the schedule; and (2) the primary must adhere to the schedule.[42] Violating the integrity of the schedule is the same as violating the integrity of the neutral gate by mingled use, the immunity from picketing is destroyed. The primary cannot play a "hide and seek" game with the union.

Checking the Language on Picket Signs and Literature

To be legal, the picketing must clearly disclose that the dispute is with the primary employer. If the signs carried by the union pickets fail to clearly identify the employer with whom the union has the primary labor dispute at the "common situs," this lapse will invalidate the picketing at any gate, including the reserved gate.[44]

The mere language of a picket sign does not in or of itself establish the legality of the picketing or constitute proof as to what the real object or objects of the picketing may be.[45] The Board has held that teamster picketing did not comply with exist-

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[35] *Id.* at 549.

[36] Carpenters Dist. Council of Milwaukee, 224 NLRB No. 149, at 1071, 1079 (1976).

[37] *See* Local 761, Int'l Union of Elec., Radio, & Machine Workers v. NLRB, 366 U.S. 667, 682 (1961); Linbeck Constr. Co. v. NLRB, 550 F.2d 311 (5th Cir. 1977); United Bhd. of Carpenters, 203 NLRB No. 162, at 1112, 1118 (1973). Use of the reserved gate by neutrals or their employees, however, will not "contaminate" or ruin the reserved gate status. *See* Local Union No. 369, Int'l Bhd. of Elec. Workers, 216 NLRB No. 25, at 141, 143 (1975), *enforced*, 528 F.2d 317 (6th Cir. 1976). The key is that primary employees and suppliers must use *only* the reserved gate.

[38] Fred Arnold, Inc., ASBCA No. 165061, 72-2 BCA para. 9608 (1972).

[39] *See* Carpenters Local 470, 224 NLRB No. 21, at 315, 316 (1976), *enforced*, 97 LRRM 2281 (9th Cir. 1977).

[40] *See* text accompanying note 35 *supra*.

[41] *See* Local 1236, Linoleum, Carpet & Soft Tile Layers Union, 180 NLRB No. 40, at 241, 244 (1969); Local 254, Bldg. Serv. Employees, 173 NLRB No. 49, at 280, 281 (1968); Painters Dist. Council No. 38, 153 NLRB No. 70, at 797 (1965).

[42] Local 519, Plumbers v. NLRB, 416 F.2d 1120 (D.C. Cir. 1969).

[44] *See* Linbeck Constr. Corp. v. NLRB, 550 F.2d 311, 318-19 (5th Cir. 1971). *See also* Local 861, Int'l Bhd. of Elec. Workers, 135 NLRB No. 41, at 250, 253 (1962).

[45] Local Union No. 55, Sheet Metal Workers, 244 NLRB No. 125, at 799 (1979).

[46] NLRB v. Local 254, Bldg. Serv. Employees, 376 F.2d 131 (1st Cir.), *cert. denied*, 389 U.S. 856 (1967); Local No. 3, Bhd. of Elec. Workers, 205 NLRB No. 89, at 559 (1973).

ing standards when, in spite of a reserved gate system, the union, with full knowledge thereof, picketed the Navy's neutral gate with signs stating the Navy was "Unfair". Such union action was held in violation of sections 8(b)(4)(i) and (ii)(B) of the Act.[46]

Frequently the unions will name the DOD installation on picket signs in order to be consistent with the union's allegation that the primary dispute is with the DOD. The union's usual pretextual position is that the DOD is not either complying with or enforcing federal labor laws. In two recent cases, the Board found the unions were in violation of sections 8(b)(4)(i) and (ii)(B) of the Act in using such tactics.[47] To prove such a violation by the union in preparing the case for presentation to the NLRB Regional Office, the attorney should have clear pictures of the language on the picket signs, showing the picket at the neutral gate. Affidavits by the photographer and others who witnessed the picketing and can testify as to the exact language on the signs are also necessary.

Proof of Effectiveness of Pickets

(i) *Affidavits of Eyewitnesses*

Affidavits of eyewitnesses, such as gate guards, should be obtained. The affidavits should, at a minimum, contain the date, time, locations, and number of pickets that appeared, the conduct of the pickets concerning vehicles about to enter the DOD base, any acts of violence or overt intimidation should be described in detail, of course, the identity (company name), number, and types of vehicles that were confronted and whether each turned around or entered the base and the date and times thereof.

Affidavits of the truck drivers and officials of the trucking companies whose trucks have turned around after failure to pick up or deliver shipments may be difficult to obtain but would be very helpful and enlightening. Usually they are the best source of evidence of coercion.

(ii) *Logs of Trucks Turned Away*

It is recommended that a log be kept by gate guards at each entrance for contemporaneous entries to be made concerning the number of trucks turned away. These can be attached as exhibits to the affidavits as appropriate. Because of the language of the Act relating to interstate commerce and the effect thereon of the unfair labor practice, the logs should reflect the names of one or more interstate carriers which were turned back from the DOD installation.

Proof of Irreparable Injury to DOD Mission

(i) *Affidavit Describing Mission and Function of the DOD Installation Picketed*

Installation commanding officers or executive officers are usually the most effective affiants to use to describe in writing the DOD installation's mission and function. For purposes of proving the picketing is causing substantial and irreparable injury, which is necessary for an *ex parte* TRO,[48] their affidavits should also cite the extent of the stoppage of traffic in and out of the installation and state conclusions as to the effect of such a situation on the installation's mission.[49]

(ii) *Affidavit Describing Details of Mission Impairment*

If a "strike coordinator" has been appointed, through whom all mission impact information is funneled, he or she is in an excellent position to state the details of mission impairment on a day-to-day basis and the coordinator's affidavits or testimony can be used to prepare for the hearing on the temporary injunction as well as for the TRO. The coordinator can refer to the gate logs made and kept under his or her direction as being genuine copies of official records.[50]

(iii) *"Affecting Commerce" under the National Labor Relations Act*

[46] Teamsters Local 70, 261 NLRB No. 79 (1982). *Accord* Millwrights Union Local 102, 246 NLRB No. 152, at 923 (1979).

[47] *See* cases cited in note 46 *supra*.

[48] *See* 29 U.S.C. § 160(1) (1976).

[49] An example of such an affidavit is included as Appendix 5 to this article.

[50] *See* United States v. Dibble, 429 F.2d 598 (9th Cir. 1970); Fed. R. Civ. Proc. 44.

If the contractor's operations have a substantial impact on national defense or if its direct sales or purchases of goods or services to or from consumers in other states exceed $50,000 a year, the contractor meets the NLRB jurisdictional standards in that its operations have a substantial effect on interstate commerce.[51]

Presentation of the Case to the NLRB

(i) *The Call to the Regional Office*

Each NLRB Regional Office assigns on a rotating basis a daily "duty" or information officer with whom the attorney may discuss, either by telephone or at the regional office, filing charges against the union for unfair labor practices such as illegal secondary boycott picketing. As soon as picketing is threatened the duty officer ought to be called for advice on planning a course of action. The NLRB staff is exceedingly helpful and responsive in such cases.

(ii) *Signing the Charge*

The NLRB will accept a formal charge filed by the attorney for the charging party.[52] After discussing the case and viewing any documentary or photographic evidence presented, the duty officer will, if the case appears to have any merit at all, have the charge promptly typed out on the NLRB Form 508, "Charge Against Labor Organization or Its Agents," and notarize it after it has been signed.

(iii) *Investigation of the Charge*

To accelerate matters, it is recommended that the prime witnesses such as the struck contractor, the head of security, contracting officials, and the strike coordinator or transportation officers be brought to the NLRB office to fill in any details the NLRB attorneys need to assist in the start of their investigation. The NLRB will be responsible for obtaining statements from the respondent union and its people.

Secondary boycott cases are given priority over all other cases in the NLRB office, except cases of like character.[53] Thus, it is possible to obtain a TRO in from three to seven days, depending on the circumstances of the case and the preparation of counsel.

(iv) *Daily Liaison*

The NLRB office should be kept fully and currently informed as to events, especially as picketing continues. Additional affidavits and documentation should be furnished promptly as the story unfolds and the effects of the picketing become increasingly critical to performance of the DOD installation's mission.

(v) *Issuance of the Complaint*

NLRB regulations state, "If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases involving novel and complex issues, the regional director, at the discretion of the General Counsel must submit the case for advice from the General Counsel before issuing the complaint."[54]

The latter stage is a critical one. If the General Counsel determines that the NLRA has not been violated or that the evidence is insufficient to substantiate the charge, the regional director will recommend withdrawal of the charge.[55] If the person filing the charge refuses to withdraw, the regional director dismisses the charge subject to appeal to the General Counsel in Washington, DC, within ten days.[56]

The Judicial Phase—Injunctive Relief

(i) *Statutory Basis*

The National Labor Relations Act provides as to secondary boycott charges:

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[51]*See* 29 U.S.C. §§ 152(2), (6), (7) (1976). *See also* NLRB v. Merrill, 388 F.2d 514, 519 (10th Cir. 1968); NLRB v. Breitling, 378 F.2d 663, 664 (10th Cir. 1967); NLRB v. Marbro Food Serv., Inc., 366 F.2d 477, 478 (10th Cir. 1966).

[52]29 C.F.R. §§ 101.2, 102.9 (1982).

[53]The investigation is conducted under the authority of 29 C.F.R. § 101.4 (1982).

[54]29 U.S.C. § 160(1) (1976); 29 C.F.R. § 101.8 (1982).

[55]*Id.* at § 101.5.

[56]*Id.* at § 101.6.

> If, after investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period . . .[57]

Under this statute, the purpose of the injunctive relief is to preserve the status quo in order that the ultimate decision of the Board on the unfair labor practice issue not be negated or rendered moot by intervening events.[58] The statute is an exception to the general prohibition against injunctions in labor disputes of the Norris-LaGuardia Act[59] confers only a narrow jurisdiction on the district courts.

"Similar standards must be applied by a district court to determine whether to enter a temporary restraining order pending a hearing on a preliminary injunction . . . If the district court finds that a showing of reasonable cause and need has been made, it should grant a temporary restraining order pending a fuller hearing on a preliminary injunction."[60] An evidentiary hearing is discretionary and not always necessary prior to issuance of the temporary or preliminary injunction in cases involving the public interest; oral argument on the affidavits can be sufficient.[61] Only the regional director acting in the public interest, and not the charging party, may petition the district court for injunctive relief.[62]

(ii) *Proof of "Reasonable Cause"*

Federal district courts have power under Sec. 10(1) of the Act[63] (29 USC Sec. 160(1)) to grant temporary injunctive relief upon a showing of reasonable cause to believe an unfair labor practice has occurred.[64] If the conflicting evidence presented allows different conclusions as to the existence of an unfair labor practice, the district court cannot deny the injunctive relief on the basis there is no reasonable cause to believe that the act has been violated.[65] On the other hand, the district court should refuse an injunction where it finds there is no rational basis after a hearing to conclude that an unfair labor practice has actually occurred.[66]

In Hirsch v. Building & Construction Trades Council,[67] the Third Circuit stated that "the Regional Director faces a relative insubstantial burden of proof when he petitions a district court for temporary injunctive relief pursuant to Sec. 10(1)."[68] The court further noted:

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[57] 29 U.S.C. § 160(1) (1976). See also 29 C.F.R. § 101.37 (1982).

[58] Compton v. National Maritime Union of Am., 533 F.2d 1270 (1st Cir. 1976).

[59] 29 U.S.C. §§ 101-15 (1976).

[60] Squillacote for NLRB v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 744 (7th Cir. 1976).

[61] *Id.* at 748-49.

[62] Hirsch for NLRB v. Building & Constr. Trades Council, 530 F.2d 298, 308 (3d Cir. 1976).

[63] 29 U.S.C. § 160(1) (1976).

[64] Kaynard for NLRB v. Palby Lingerie, Inc., 625 F.2d 1047 (2d Cir. 1980); Levine v. C. & W. Mining Co., 610 F.2d 432 (6th Cir. 1979); Squillacote v. Graphic Arts Int'l Union, 540 F.2d 853 (7th Cir. 1976).

[65] Wilson v. Milk Drivers & Dairy Employees Union Local 471, 491 F.2d 200 (8th Cir. 1974).

[66] Fuchs for NLRB v. International Bhd. of Teamsters, Chauffers, Warehousemen & Helpers of Am., Local 115, 427 F. Supp. 742 (D. Conn. 1977).

[67] 530 F.2d 298 (3d Cir. 1976).

[68] *Id.* at 302.

He need not prove that a violation of the NLRA has in fact occurred. Nor must he convince the district court of the validity of the legal theory upon which he predicates his charges. Both questions are for the Board's determination in the first instance, subject to the right of appellate review. Rather, he need only demonstrate that he has reasonable cause to believe that the elements of an unfair labor practice are present and that the legal theory upon which he proceeds is "substantial and not frivolous."[69]

(iii) *Irreparable Injury Test*

"The Second Circuit has yet to decide whether irreparable injury must be demonstrated before an injunction can issue. However, it has established that the injunction must be premised upon preventing some injury, either to the employer or to the general public."[70] Other circuits that have focused on the point do not require a showing of irreparable injury to the charging party except in cases of *ex parte* TROs. Those circuits' only requirement is that the court grant such relief as it deems "just and proper" to best avoid harm to the public.[71]

(iv) *Duration of the Injunction*

The final decision of the Board renders the resolution of the injunction proceeding moot[72] except for acts of contempt which occurred prior to the Board's final decision.[73]

After the Board's final decision is issued finding that an unfair labor practice had occurred, any right to injunctive relief terminates.[74] Thereafter, the Act provides for the adequate remedy of enforcement of the Board's order in the court of appeals.[75]

(v) *Continuance of Reserved Gate*

During the pendency of the matter in court and before the NLRB, the use of the reserved gate should be enforced whenever the struck contractor or employees are on the DOD installation. During other periods, the gate need not be kept open because the union is not entitled to picket the base when the primary employer's operation is elsewhere.[76] Additionally, if the union pickets at the reserved gate, union signs and conduct must clearly indicate that the dispute is with the primary contractor only and not with the DOD installation.

If the union does not place pickets at the reserved gate after the issuance of the temporary injunction and for a reasonable time thereafter, it may be safe to quietly discontinue the reserved gate for economy reasons and take the position the union has a duty to notify the installation if it wishes to picket the contractor at the common situs. If the union pickets thereafter appear at the neutral gates, the installation will probably have to reestablish the reserve gate system with proper notices and signs before the NLRB will take enforcement action against the union. This situation may arise in a case where a noncertified union has the right to picket the primary employer for the reason that it is not paying area wage standards.[77]

The Administrative Phase

(i) *Filing of Complaint*

As noted above, the NLRB regional director, acting on the advice of counsel, will have filed a "Complaint and Notice of Hearing" before the

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[69] *Id.*

[70] Fuchs of NLRB v. International Bhd. of Teamsters, Chauffers, Warehousemen & Helpers of Am., Local 115, 427 F. Supp. 742, 748 (D. Conn. 1977) (citing Danielson v. International Bhd. of Elec. Workers, Local Union 501, 509 F.2d 1371, 1375 (2d Cir. 1975)).

[71] International Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971); Kaynard v. Nassau Dist. Council of Carpenters & Joiners of Am., 384 F. Supp. 1246 (E.D.N.Y. 1974); Kennedy for NLRB v. Sheet Metal Workers Int'l Ass'n, Local 108, 289 F. Supp. 65 (C.D. Cal. 1968).

[72] Johansen for NLRB v. Queen Mary Restaurant Corp., 522 F.2d 6 (9th Cir. 1975).

[73] Hoffman for NLRB v. Cement Masons Union Local 337, 468 F.2d 1187 (9th Cir. 1972), *cert. denied*, 411 U.S. 986 (1973).

[74] Sears, Roebuck & Co. v. Linoleum, Carpet & Soft Tile Layers Union, Local Union No. 419, 397 U.S. 655 (1970).

[75] *See* 29 U.S.C. § 160(e) (1976).

[76] *See* text accompanying note 35 *supra*.

[77] *See* Hendrix for NLRB v. International Union of Operating Eng'rs, 592 F.2d 437, 445 (8th Cir. 1979).

NLRB at the same time he or she went into court for the injunction.[78] The complaint should set forth facts sufficient to show the jurisdiction of the Board under the NLRA and the existence of the unfair labor practice charged. The respondent has ten days after receipt to file an answer. Even though formal proceedings have begun, settlements are encouraged at all times.[79] In fact, under certain conditions, the Board can approve a settlement without the consent of the charging party.[80]

(ii) *Hearing Before Administrative Judge*

Counsel for the General Counsel, all parties to the proceeding, and the administrative law judge have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the administrative law judge.[81]

(iii) *Decision & Order*

When the administrative law judge's written decision is rendered and filed with the Board in Washington, D.C., the latter notifies all concerned of the order transferring the case to the Board.[82] Exceptions, answers thereto, and cross-exceptions to the decision may be filed within twenty days by any party to the case; otherwise it will automatically become the decision and order of the Board.[83] If exceptions are taken, the Board reviews the entire record and issues its decision and order[84] and it may allow oral argument or new evidence.[85]

(iv) *Implementation or Appeal of the Decision and Order*

The Board may decide to ask for an injunction to implement its order by petitioning the court of appeals.[86] The respondent may petition the court of appeals to review and set aside the Board's order.[87] The statutory standard for court review of the Board's decision is whether the Board's findings of fact are supported by substantial evidence on the record considered as a whole.[88]

Finally, contempt of court proceedings may be brought by the General Counsel to enforce the court decree.[89]

Separate Civil Suit Against Union for Damages

(i) *Compensatory Damages, Attorney's Fee and Costs*

Both compensatory damages and attorney's fees are recoverable against the union in illegal secondary boycott cases.[90] The actual losses sustained by the plaintiff as a result of the illegal activity and can be inferred from the circumstances and arrived at by approximation.[91] Litigation expenses incurred during the administrative procedure are included.[92] Punitive damages are not recoverable under federal law, but might be allowed where state law permits such damages for violent picketing and a cause of action for the same is included in the complaint and proved.[93]

(ii) *Res judicata*

Determinations and findings by the NLRB after formal hearing on charges of an illegal secondary boycott are res judicata in actions for damages

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[78] *See* 29 C.F.R. § 101.8 (1982).

[79] *Id.* at § 101.9.

[80] *Id.* at § 101.9(c).

[81] *Id.* at § 101.10(a).

[82] *Id.* at § 101.11.

[83] *Id.* at §§ 101.12(b), 102.46(a), 102.48(a).

[84] *Id.* at § 101.12(a).

[85] *Id.* at § 102.48(b).

[86] *See* 29 U.S.C. § 160(e).

[87] *See id.* at § 160(f); 29 C.F.R. § 101.14 (1982).

[88] 29 U.S.C. § 160(e) (1976).

[89] 29 C.F.R. § 101.15 (1982).

[90] 29 U.S.C. § 187 (1976).

[91] *See* Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Workers Local 480, 428 F.2d 121 (5th Cir. 1970). *See also* Sheet Metal Workers Int'l Ass'n Local Union No. 223 v. Atlas Sheet Metal Co., 384 F.2d 101, 109 (5th Cir. 1967).

[92] Linbeck Constr. Corp. v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, 547 F.2d 948 (5th Cir. 1977), *cert. denied*, 434 U.S. 955 (1978).

[93] *See* United Mineworkers v. Gibbs, 383 U.S. 715 (1966); Local 20 Teamsters v. Morton, 377 U.S. 252 (1964).

brought against the union.[94] Moreover, the NLRB administrative law judge's finding of fact on the secondary boycott to which no exceptions were taken becomes final and cannot be collaterally attacked.[95]

Conclusion

It is axiomatic that union picketing activity at a DOD installation violates the law when an object—not necessarily the sole object—of the action is secondary.[96] When pickets appear at the gates of a DOD installation and it is quite clear they are there to coerce the DOD in matters involving its dealings with a private contractor presently operating on the installation, the nearest NLRB regional office is the place to seek prompt relief. Preliminary action, however, should be taken to make it clear that the NLRB has jurisdiction under the Act, and to expedite and assist the procedure before the Board and in the courts for obtaining injunctive relief as soon as possible. Two of the most critical things to best assure success are to present to the NLRB convincing evidence that the union's real labor dispute is with a primary employer-contractor and not with the DOD and to place in operation a proper reserved gate system, strictly enforced, as soon as the pickets are expected to arrive or as soon thereafter as possible.

The regional office may decide it has no jurisdiction and dismiss the charge because in the particular case the picketing is a primary activity against the DOD. If a complaint is filed by the regional office and the union at any time thereafter is willing to agree to cease and desist from further picketing at the activity, the office can accept the offer with or without the activity's consent and execute a settlement agreement. If, however, the case comes to an administrative hearing on the merits and the Board ultimately finds in the DOD's favor, that decision is *res judicata* on the issue of the unfair labor practice in any subsequent suit for damages and costs of suit.

[94] H.L. Robertson & Assoc., Inc. v. Plumbers Local Union No. 519, 429 F.2d 520 (5th Cir. 1970). *See also* Texaco, Inc. v. Operative Plasterers & Cement Masons Int'l Union, 472 F.2d 594 (5th Cir. 1973), *cert. denied*, 414 U.S. 1091 (1974).

[95] Paramount Transp. Sys. v. Chauffeurs, Teamsters 7 Helpers Local 150, 529 F.2d 1284 (9th Cir. 1976), *cert. denied*, 426 U.S. 908 (1977).

[96] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1971); Local 644, United Bhd. of Carpenters v. NLRB, 533 F.2d 1136, 1149 (D.C. Cir. 1976).

Appendix I

STATE OF CALIFORNIA)
) SS.
COUNTY OF ALAMEDA)

AFFIDAVIT

I, J.M., being duly sworn, upon my oath, do hereby depose and state: I am the contract administrator for the R Manufacturing Corporation (hereinafter called "R"), for all purposes in connection with R's Navy Contract No. 1234-56-789. The aforementioned contract provides for the design, manufacture and installation of an automated Handling System by R in Building 000 at the Naval Supply Center, Oakland, CA. Installation of the hardware for said system is scheduled to start on June 13, 1978, in Building 413. In connection with the above cited Navy contract, I have received to date approximately six calls from representatives of the Union Local of the United Brotherhood, AFL-CIO. The two persons who at various times called identified themselves as J.B. and R.B. Each time they asked questions concerning R's intentions concerning performance of the Navy contract in Oakland, CA. In the last call on June 2 or 3, 1978, J.G. requested the name of my subcontractor. I gave him Mr. E.P.'s name and address. Mr. G. then asked if I intended to use members of his Union Local. I said I did not and that I was going to bring my own expert crew who were trained in the assembly and installation of the conveyor systems we manufacture. In reply Mr. G. informed me that the union had an agreement with the Navy to provide Davis-Bacon Act labor clauses in all conveyor contracts. I told him that in my contract with the Navy the Davis-Bacon Act labor clauses were limited to their application solely to the portion of the work involving construction—that is alterations to the building structures involved, and did not cover the assembly and installation of the conveyor sections themselves. Mr. G. said he was looking for work for "his people". In other conversations with me prior to June 1978, both Mr. G. and Mr. B. had referred to shutting

down the Navy base by picketing if R did not use people from the Union Local for the installation work at the Naval Supply Center.

On May 15, 1978, I received a document from the Union Local, Oakland, CA. This material was entitled "Master Agreement for Northern California" effective June 15, 1977. On page 32 thereof is a copy of the "Special Agreement."

(Signed)
J.M.

Dated: June 9, 1978

State of California)
) SS.
County of Alameda)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 9th DAY OF JUNE 1978

S/

(SEAL)

Appendix 2

AFFIDAVIT

I, M.H., being duly sworn, upon my oath, do hereby depose and state:

1. I am a LCDR in the U.S. Navy. My duty station is DSR-PAC in Alameda, CA. I am the Chief of Transportation at DSR-PAC.

2. On 5 June 1981 at approximately 2:30 P.M., I received a telephone call from a man who identified himself as D.G., a representative of Union Local.

3. Mr. G. informed me that he 'knew' a non-union contractor (carrier) had been awarded the work under the Tender. He requested a meeting with the Navy so that a shut-down or strike would not occur. Mr. G. further stated that if the non-union contractor or any contractor did not hire Union Local lumpers to stuff the vans, there would be a strike as of 1 July 81, the date the new carrier was to commence work.

4. I informed Mr. G. that the actual selection of a carrier under the Tender was made in Philadelphia, PA by DPSC, Transportation, and that I had no knowledge, at that time, of any such selection having been made. I suggested that since he (Mr. G.) seemed to know more about the selection of the carrier than I did, that he contact that carrier and relay directly his demands concerning hiring of Union Local lumpers.

5. I offered to call DPSC Transportation Division in Philadelphia, PA on Monday, 8 June 81 to obtain further information concerning the selection of a carrier under the Tender.

6. I offered to call Mr. G. on Monday, 8 June 81 after I had called DPSC in Philadelphia, PA.

7. On 8 June 81, in the afternoon, I again spoke with Mr. G. on the telephone. I informed him that M.L. had been selected as the primary carrier under the Tender.

8. Mr. G. reiterated his desire to meet with military personnel, including myself, to discuss the 'problem'. He stated this was necessary to avoid a strike or shut-down.

9. I agreed to meet with Mr. G. However, I stated that since the selection of the carrier and the administration of the Tender was directed by DPSC/Transportation in Philadelphia, PA, that my authority was limited.

10. Around 11 or 12 June 81, I again spoke with Mr. G. Mr. G. wanted to speak with an Admiral about this 'problem'. He later stated he would speak with a 'General' when I explained the basic structure of the Defense Logistics Agency. During this telephone conversation, I gave Mr. G. the name and telephone number of COL M., the person who formally selected M.L., Inc. as primary carrier under the Tender. This was the last conversation I had with Mr. G. I have not spoken with anyone from Union Local since that time.

11. Throughout my telephone conversations with Mr. G., a basic message came through: our installation would be faced with a strike or shut-down if Union Local lumpers were not used to stuff the vans, under the new Tender.

I declare under penalty of perjury the foregoing is true of my own knowledge except those statements made on belief and those statements I believe to be true.

DATED: _____ _____
M.S., LCDR, SC, USN

M.H., personally appeared before me and in my presence signed this Affidavit.

DATED: _____ _____
NOTARY PUBLIC

Appendix 3

DEPARTMENT OF THE NAVY
OFFICE OF THE GENERAL COUNSEL
REGIONAL COUNSEL AND COUNSEL
FOR THE
NAVAL SUPPLY CENTER
BUILDING 311.2
OAKLAND, CALIFORNIA 94625

12 June 1978

S.W., Esq.
Attorney at Law
123 Anywhere St.
San Francisco, CA 94102

Re: Union Local

Dear Mr. W.:

The Naval Supply Center Gate No. 3 has been designated as the sole entry and exit gate for R. Corp., its employees, cargo, and suppliers. Signs to this effect were posted at all three gates to the Center in the early morning hours on Monday, June 12, 1978. In addition, R. and its subcontractor have been orally apprised of this restriction.

Sincerely,

/S/ W.F.F.

Copy to:
J.G.
Union Representative
Union Local of the United Brotherhood, AFL-CIO
456 Anywhere St.
Oakland, CA 94621

Appendix 4

1. The reserved gate (struck employer's use) sign:

NOTICE
[Name of Employer] Employees
Cargo and Suppliers
Enter/Exit This Gate
Only
All Others Use Gate(s) No. _____
on _____ Street

2. Sign for the Non-reserved Gate:

NOTICE
[Name of Struck Employer] Employees,
Cargo and Suppliers Enter/Exit
Only Gate No. _____ on
_____ Street
All Others Use This Gate

Instructions

(a) Lettering should be large enough to be easily readable from at least 75 feet distance.

(b) Picketing can legally occur at any gate through which cargo intended for the use or supply of the struck employer passes, even if title thereto is in a neutral. Linbeck Constr. Corp. v. NLRB 550 F.2d 311 (5th Cir. 1977).

(c) Several Board decisions, holding that failure of gate signs to indicate that suppliers of the primary must use the primary's gate alone removes the secondary gates from the protection from picketing normally accorded them, reveal the importance of the right to direct pickets toward gates used by these suppliers. *See* Building & Constr. Trades Council, 192 N.L.R.B. No. 53, 77 L.R.R.M. 1830 (1971); International Bhd. of Elec. Workers Local 441, 153 N.L.R.B. No. 57, 62 L.R.R.M. 1074 (1966); Plumbers & Pipefitters Union, 145 N.L.R.B. No. 21, 54 L.R.R.M. 1341 (1963).

(d) Avoid use of the word "subcontractors" because if the struck employer is a general contractor at a construction site, its subcontractors may be neutral employers, whether or not their work is "related" to the general contractor's work. Building & Constr. Trades Council of New Orleans, 155 N.L.R.B. 319 (1965), *enforced sub nom.*, Markwell & Hartz Inc. v.

NLRB, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968). The latter case held that the "relatedness" test established in *General Electric* does not apply to employers at a common construction situs. The Supreme Court has indicated that subcontractors are to be considered as separate employers under the Act: "Does Section 8(b)(4)(A) apply to normal business dealings between a contractor and subcontractor, both engaged in the same general business, where boycott pressure is applied against the subcontractor in aid of a dispute with the principal contractor? Clearly it does under the wording of the statute." NLRB v. Denver Bldg. & Const. Trades Council, 341 U.S. 675, 690 (1951).

Appendix 5

AFFIDAVIT OF W.S.

STATE OF CALIFORNIA)
SS
COUNTY OF ALAMEDA)

I W.S., now in the military service of the United States as a Captain, SUPPLY CORPS, UNITED STATES NAVY, assigned to the DEFENSE SUBSISTENCE REGION-PACIFIC (DSR-PAC) ALAMEDA, CALIFORNIA, being duly sworn, depose and say:

1. I am Commander of DSR-PAC located at the Navy Supply Center Annex, 2155 Mariner Square Loop, Alameda, California.

2. The mission of DSR-PAC is to provide perishable subsistence-support to the military services and to other specified governmental activities, i.e. Veterans Administration hospitals, Federal prisons, Indian reservations, within a geographical area which includes the ten (10) westernmost states and vast areas throughout the Pacific Ocean, as well as Diego Garcia in the Indian Ocean.

3. As part of that mission, DSR-PAC buys perishable food and ships it overseas to various military installations. A significant portion of that perishable food is shipped from the Alameda Cold Storage Facility Naval Supply Center Annex (ARDOCK). The foodstuffs are shipped in container vans which are stuffed/loaded at ARDOCK and then transported to various steamship lines for shipment overseas.

4. Carriers bid competitively for the opportunity to stuff and dray the container vans to the steamship line yards.

5. The van stuffing and drayage to the steamship lines at the Alameda Cold Storage Facility Naval Supply Center-Annex (ARDOCK), was accomplished by a carrier who used Local Union lumpers (van stuffers). That contract expired on 1 July 1981.

6. The carrier, who, as a result of a competitive bid process, now has the 'Tender' to stuff and dray vans at ARDOCK, has determined to employ his own workers rather than hire or 'take on' the Local Union lumpers who worked at ARDOCK under the former carrier whose Tender expired 30 June 1981. In the event of a strike by the Local Union against a successor carrier because of a failure of that successor carrier to retain Local Union lumpers, a severe degradation of mission operations at DSR-PAC can be anticipated.

7. The following impact from a Local Teamster strike on the supply mission of DSR-PAC is expected.

(a) Deliveries to ARDOCK may be interrupted and would have to be diverted to other warehouses. Considerable cost and diminishment of the mission capability and responsiveness of this Agency would result.

(b) If domestic deliveries (outbound) could not be made, Army, Air Force and Navy activities, as well as Federal prisons and Veterans Administration hospitals would not get perishable food. This would also include Naval ships requiring replenishment.

(c) The Alameda warehouse is the primary shipment point for overseas warehouses. Replenishment of military overseas warehouses, as well as direct support military customers would be halted. As overseas warehouse stocks were depleted, Navy fleet units and shore activities would not receive perishable food. Army, Air Force and Marine units would also rapidly run out of perishable food.

(d) Lack of perishable food support would rapidly affect combat capability/contingency planning

for Western Pacific (WESTPAC) and Indian Ocean units. Required days of contingency stocks on hand would be utilized and depleted rapidly.

(e) The majority of freeze-stock items are historically delivered from eastern suppliers who utilize independent round-trip truckers that have not previously been opposed to crossing strike lines. Nevertheless, ARDOCK is currently only stocked to approximately 70% depth during this particular period due to warehouse restoration; and any reduction in receipts would be conducive to high not-in-stock (NIS) rates.

8. A strike of union lumpers at the Alameda Reefer Dock will also impact the contracting mission of DSR-PAC and incur significant costs to the Government as discussed below:

(a) *Contract Costs*—Perishable subsistence on contract for troop issue items would have to be diverted to another location for receipt and storage. Brand Name items are already being diverted to outside storage during repairs to ARDOCK and would not be affected unless the strike spread to other local commercial cold storage contractors, e.g., Dreisbach Enterprises. These locations could be picketed too. If other locations are also picketed, the entire DSR-PAC mission in Alameda could be halted. The cost for each contract modification would approximate $100.00.

(b) *Transportation Costs*—The actual transportation diversion cost would vary, depending on the new "ship to" location. Local deliveries could be made within the commercial zone at no cost to the Government or diversion could be to a commercial supply point in Los Angeles, San Diego, or Seattle at considerable cost depending on the volume, other items on the truck, potential back hauls, etc. If diversions to local storage are accomplished on a standby basis, deliveries from multiple local storage locations could be necessitated because no single location has the capacity to handle the Government's entire requirement due to the press of in-house commercial business. This would significantly increase local administrative transportation costs.

(c) *Storage Costs*—Contract storage costs would be incurred for storage of supplies in a commercial warehouse rather than at ARDOCK, which is a Government-owned and operated facility. Costs for commercial storage vary by lot size and density and include in and out handling and monthly storage charges which could approximate $2.00 per hundred weight (CWT).

(d) *Other Administrative Costs*—Delays in shipment of stocks from ARDOCK would necessitate accelerated deliveries of items currently on contract. In addition, rush procurements would be necessitated, specifying short delivery lead times. This would result in increased unit prices for the items being acquired since contractors would by necessity delay/refuse commercial business, work overtime, and use premium transportation to meet the accelerated required delivery dates. Costs to the Government and workload for Purchasing personnel could also be increased to accomplish a new temporary cold storage warehouse services contract, if required.

9. In summary, should the strike continue for any duration, there would be a significant impact on military preparedness, contingency stocks, at-sea replenishment, and troop support in critical overseas locations.

DATED: _____ _____

W.S. Jr.
CAPTAIN, SC, USN
Commander DSR-PAC

Subscribed and sworn to before me on
_____, 1981

_____

NOTARY PUBLIC

Defense of Adverse Actions Against Federal Civilian Employees Occasioned by the Revocation of a Security Clearance

Captain Michael G. Gallagher
Office of the Post Judge Advocate
Fort Detrick, Maryland

Introduction

Serious efforts to revise the patronage basis for public employment can be traced to July 2, 1881, when President James A. Garfield was fatally wounded by a disgruntled office-seeker who had charged the President with personal responsibility for the assailant's unsuccessful attempt to become the United States Counsel in Paris.[1] As a result of the public outcry from this assassination, thirteen civil service reform associations met and formed the National Civil Service Reform League.[2]

Due to the intense lobbying of this league and other public pressures, Congress enacted the Pendleton Act of 1883,[3] which served as the first firm foothold in the revision of civil service procedures.[4] This Act was extremely limited in that it only addressed procedures for entry into the federal service. The Act provided for a classified civil service with competitive examinations for entry into the service, but dealt very little with procedures or standards for the removal of civil service employees except that it prohibited removal for failure of an employee in the classified service to contribute to a political fund or to render any political service.[5]

The first step in promulgating merit standards for the removal of employees occurred in 1897, when President McKinley declared that employees could be removed only for just cause.[6] Although this enactment afforded tenure to civil service employees, the regulation did not provide for any enforcement in that there were no administrative appeal procedures and the courts declined jurisdiction to review civil service terminations.[7]

For sixteen years, civil service employees had no forum in which to litigate the issue of just cause in their removals. In 1913, Congress passed the Lloyd-Lafollette Act,[8] which has since served as the basis for modern civil service practices. In addition to guaranteeing federal employees a right to communicate with members of Congress and join employee organizations, this Act restricted existing the just cause basis for removal to encompass only "such cause as would promote the efficiency of the service and for reasons given in writing".[9] In addition to giving advance notice of the proposed removal action, the employee also had the right to litigate any such adverse action before an administrative body within the Civil Service Commission.[10]

In 1971, the Senate noted that the current Civil Service System had its roots in the Pendleton Act of 1883, when federal employment numbered only 131,000.[11] Since then, federal employment has risen to 2.9 million. In 1977, the Senate held hearings to examine the viability of those century-old practices in light of current federal needs. As a result of these hearings, Congress made several observations on the current merit system:

(1) That there exists a widely held impression by the public that a government employee could

[1] Arnett v. Kennedy, 416 U.S. 134, 148 (1974).

[2] *Id.* at 148.

[3] 22 Stat. 403 (1883).

[4] Hampton v. Mow Sun Wong, 426 U.S. 88, 106 (1976).

[5] 22 Stat. 403 (1883).

[6] Fifteenth Report of the Civil Service Commission 70 (1897-98). Rule II, § 8, provided: "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense."

[7] Arnett v. Kennedy, 416 U.S. at 150.

[8] 37 Stat. 555 (1912).

[9] 416 U.S. at 150.

[10] *Id.*

[11] S. Rep. No. 969, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2724.

not be fired regardless of the nature of the unacceptable conduct of performance;[12]

(2) Although government executives and managers are vital to the success of public programs, the existing Civil Service System had failed to adequately recruit and develop government managers;[13]

(3) In general, the complex rules and procedures have, with their resultant delays and paperwork, undermined confidence in the merit system as a whole;[14] and

(4) The federal employment system had grown so large that role conflicts existed within the Civil Service Commission in that the Commission had to simultaneously serve both as a management agent for a President elected through a partisan political process and as a protector of the merit system from partisan abuse. The Commission was expected to be all things to all parties—presidential counselor, merit watchdog, employee protector, and Agency advisor. In light of these conflicting rules, the Commission had become progressively less credible in all of its roles.[15]

In light of these observations, Congress declared its intention to establish a new system in which it would balance employee rights against the need for management flexibility so that the public's right to an efficient government would be assured.[16]

As a result of this reform effort, Congress enacted the Civil Service Reform Act (CSRA)[17] in 1978. To remedy the role conflicts plaguing the Civil Service Commission, Congress abolished the Commission[18] and assigned its previous roles to two newly-created agencies: the Office of Personnel Management (OPM)[19] and the Merit Systems Protection Board (MSPB),[20] to include its Office of Special Counsel.[21]

OPM was created as the President's chief lieutenant in matters of personnel administration within the Executive Branch.[22] The Office of Special Counsel was created to receive and investigate allegations of prohibited personnel practices in violation of the merit system and bring violators before the Merit Systems Protection Board for appropriate and immediate action.[23] Although this Office of Special Counsel is one strong link in developing vigorous protection for the merit system, the "cornerstone" of civil service reform is clearly the Merit Systems Protection Board.[24]

It is this Board which has the principle responsibility for safeguarding merit principles and employee rights.[25] Since no more than two members of the Board will be of the same political party[26] and Board members will not be able to serve more than one term,[27] Congress intended that the Board should be insulated from the kind of political pressures that had led to violations of merit principles in the past.[28]

Frequently, judge advocates are tasked with representing an agency before this Board. It is the purpose of this article to present general guidance in representing the agency before the Board. Specific emphasis is placed upon defending agency adverse actions which are occasioned by the revocation of a security clearance.

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[12] *Id.* at 2731.

[13] *Id.* at 2726.

[14] *Id.* at 2725.

[15] *Id.* at 2727.

[16] *Id.* at 2726.

[17] Pub. L. No. 95-454, 95th Cong., 1st Sess., 91 Stat 1111 (1978).

[18] S. Rep. No. 969, *supra* note 11, *reprinted at* 1978 U.S. Code Cong. & Ad. News 2723, 2727.

[19] 5 U.S.C. § 1101 (Supp. V. 1982).

[20] *Id.* at § 1201.

[21] *Id.* at § 1204.

[22] S. Rep. No. 969, *supra* note 11, *reprinted at* 1978 U.S. Code Cong. & Ad. News 2723, 2727.

[23] *Id.* at 2728, 2729.

[24] *Id.* at 2729.

[25] *Id.* at 2728.

[26] 5 U.S.C. § 1201 (Supp. V 1982).

[27] *Id.*

[28] S. Rep. No. 969, *supra* note 11, *reprinted at* 1978 U.S. Code Cong. & Ad. News 2723, 2729.

Procedures

The merit system principle limiting removals to "only such causes as will promote the efficiency of the service", which originated in the Lloyd-Lafollette Act,[29] continues in force today.[30] This requirement for cause also extends to adverse actions other than removal, to include suspension for more than fourteen days, reduction in grade, reduction in pay, and furlough of thirty days or less.[31]

Although Congress was deeply concerned about the complexity of removal procedures and the duration of appellate reviews, the CSRA still retained a detailed list of procedures which must be accomplished prior to the actual removal. Pursuant to statute,[32] an employee against whom an action is proposed is entitled to the following:

(1) At least thirty days advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence or imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) A reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) Be represented by an attorney or other representative; and

(4) A written decision and the specific reasons therefore at the earliest practical date.

If the decision is made to remove the employee or take other statutorily defined adverse action after the preceding procedure has been satisfied, the employee who is the subject of any adverse action has a statutory right to appeal that action to the Merit Systems Protection Board[33] within twenty days following the effective date of the action.[34]

The employee's appeal is in the form of an adversary hearing for which a transcript will be kept and the appellant may be represented by an attorney or other representative.[35] When the appeal is based upon a proposed removal, the case will be heard by either the Board, an employee experienced in hearing appeals, or an administrative law judge.[36]

To facilitate a full and frank hearing, the Board has the power to issue subpoenas and take appropriate action to enforce those subpoenas.[37] Furthermore, the Board has adopted regulations to relax traditional rules of evidence, such that hearsay is admissible.[38] Therefore, a great deal of evidence, which is generally not admissible in a judicial forum, will be admissible at the hearing.

Defending the Action

The center of controversy in any adverse action is the agency's proposal letter. This letter is similar to a specification or charging document in that the agency's defense of the action is limited to the contents of this proposal letter.[39] Since the proposal letter is the center of attention at the hearing, it is critical that this letter be well drafted. Its content must include sufficient information to satisfy the government's burden of proving three elements: the existence of the misconduct or other basis for removal as alleged in the proposal letter, the existence of a nexus between the misconduct

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[29] 37 Stat. 555 (1912).

[30] 5 U.S.C. § 7513(a) (1976).

[31] *Id.* at § 7511.

[32] *Id.* at § 7513(d). *See* Magers, *A Practical Guide to Federal Civilian Employee Disciplinary Actions*, 77 Mil. L. Rev. 65 (1977), for an excellent article on regulations and decisions which implement the statute. Although written before enactment of the CSRA, the article contains many regulations and rules that are still in effect. Further, the article refers to many cases decided by the appellate agencies of the Civil Service Commission which are still viable before the Board.

[33] 5 U.S.C. § 7513(d) (1976).

[34] 5 C.F.R. § 1201.22 (1982).

[35] 5 U.S.C. § 7701(a) (1976).

[36] *Id.* at § 7701(b).

[37] *Id.* at § 1205(b)(2)(A) (Supp. V 1982).

[38] 5 C.F.R. § 1201.62 (1982).

[39] *Id.* at § 752.404(f) (1982). *But see* Cafferello v. Civil Serv. Comm'n, 625 F.2d 285 (9th Cir. 1980), in which the agency was permitted to introduce evidence not contained within the original proposal letter as rebuttal evidence to appellant's defense.

alleged and efficiency of the service, and the appropriateness of the penalty proposed.[40]

Proof of the Allegation Contained in the Proposal Letter

In proposing to remove an employee from federal service due to the employee's loss of security clearance, the basis for removal must be alleged as the employee's failure to meet the requirements of the position. Unless the proposal letter cites this failure to meet the requirements of the position, the agency action will be reversed since current regulations bar the agency from removing an employee due solely to loss of a security clearance.[41] If the revocation does not affect the employee's ability to meet the requirements of the position, the removal action resulting from derogatory information must be based upon national security grounds for which a separate procedure has been established by Congress.[42]

The separate treatment of these two circumstances is a distinction with a difference. In the national security case, the reason for removal is personal, in that the employee poses a danger to the continued security of the nation.[43] In the position requirements case, the employee's position is the critical factor. As will be seen below, the agency must prove that the position requires a certain clearance level due to the position's need for access to classified information or materials. Without the clearance, the duties of the position can not be performed. Therefore, once the agency demonstrates a nexus between the duties of the position and the need for security clearance, the agency will have proven that the basis for the proposed removal is the employee's failure to meet the requirements of the position and not his or her personal threat to national security.

To prove that the employee no longer meets the requirements of the position, the agency must prove that the position requires possession of a security clearance and that this particular employee does not possess such a clearance. Failure to prove both would be fatal to the agency's defense.

The agency's burden of proving that the employee does not possess a certain level of clearance is relatively easy; the agency need only offer into evidence the notification of revocation of clearance. Since this determination is reduced to writing and is forwarded directly to the employee, it may be introduced upon proper authentication.[44]

The agency's ability to prove one's need for a security clearance lies in the employee's need for access to classified information or material. To meet this test, the agency must first examine the sensitivity of this position.

A sensitive position is defined as any position within the Department of the Army, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security.[45]

Sensitive positions are categorized as:[46]

1. *Noncritical sensitive position*: A position so designated by authority of the Secretary of the Army, involving:

a. Any position, the duties and responsibilities of which require access to Secret or Confidential defense information and material.

b. Any position involving the education or orientation of Department of Defense personnel.

c. Any other position so designated by authority of the Secretary of the Army.

2. *Critical sensitive position*: A position so designated by authority of the Secretary of the Army involving:

a. Access to Top Secret defense information and material.

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[40]Douglas v. Veteran's Admin., MSPB Dec. No. AT075299006 (Apr. 1981).

[41]Civilian Personnel Reg. No. 752-1, Subch. S3(b)(8) (23 July 1976).

[42]5 U.S.C. § 7532 (1976).

[43]Weinstein v. United States, 74 F.2d 554, 109 Ct. Cl. 579 (1947).

[44]U.S. Dep't of Army Reg. No. 604-5, Personnel Security Clearance - Clearance of Personnel for Access to Classified Defense Information and Material, para. 4-4(1)(3) (C. 102, 8 May 1981) [hereinafter cited as AR 604-5].

[45]U.S. Dep't of Army Reg. No. 690-1, Civilian Personnel - Civilian Applicant and Employee Security Program, para. 6(c) (C1, 11 Dec. 1969) [hereinafter cited as AR 690-1].

[46]*Id.*

b. Development or approval of war plans, plans or particulars of future major or special operations of war, or critical or extremely important items of war.

c. Development or approval of plans, policies, or programs which affect the overall operations of the Department of the Army, i.e., policy-making or policy determining positions.

d. Investigative duties, issuing of personnel security clearances, or duty on personnel security boards.

e. Ficudiary, public contact, or other duties demanding the highest degree of public trust.

f. Any other positions so designated by authority of the Secretary of the Army.[46]

Although position sensitivity is a precondition to the need for a security clearance, not all sensitive positions require a security clearance. Rather, only those sensitive positions needing access to classified defense information or material will require its occupant to possess a security clearance. It is without question that an individual must have a proper security clearance in order to have access to classified information.[47] Further, it is clear that to have access to any material that is classified, whether it be confidential, secret, or top secret, the observer must have at least a clearance equal to or higher than the clearance of the material.[48] If the sensitive position does need this access to classified defense information, the letter designating the sensitivity of the position will include the level of security clearance required.[49] Therefore, proof of the position's need for a security clearance may be accomplished by admission of the designation letter.[50]

When a security clearance is one of the requirements of a position, the absence of that clearance makes the employee unable to perform his or her current duties. When civil service procedures are available for removal actions, those procedures must be used to discharge the employee as opposed to a removal action based upon national security grounds.[51] Therefore, to satisfy its burden of proof in civil service removal actions, the agency can offer into evidence authenticated copies of the letters which designate the sensitivity of the position and revoke the security clearance. These can all be admitted as business records or affidavits without need for personal testimony.

Although the agency must prove that a security clearance is required for the employee to perform his duties, the Agency's burden of proof does not extend to defending the decision to revoke the security clearance. Although the Board is charged with safeguarding merit principals and employee rights, the Board's jurisdiction is limited to only those matters appealable to it under any law, rule, or regulation.[52]

Some have asserted that the Board's statutory power to review all the matters within its jurisdiction[53] includes the power to review all matters remotely related to the removal action.[54] Specifically the MSPB hearing official in *Hoska v. Department of the Army*,[55] held that the Board possessed the jurisdiction to review the revocation decision since it has a "pyramidal effect upon the removal action." The subsequent judicial review of that decision failed to address the jurisdictional issue.[56]

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[47]U.S. Dep't of Army Reg. No. 380-5, Security - Department of the Army Information Security Program, para. 7-100 (1 Nov. 1981) [hereinafter cited as AR 380-5].

[48]U.S. Dep't of Army Reg. No. 380-40, Security - Policy for Safeguarding and Controlling Comsec Information, para. 1-4(a) (1 Feb. 1978) [hereinafter cited as AR 380-40].

[49]AR 690-1, para. 9(b).

[50]5 C.F.R. § 1201,62(a) (1982).

[51]AR 604-5, para. 4-4(j).

[52]5 U.S.C. § 7701(a) (1976).

[53]*Id.* at § 1205(a)(1) (Supp. V 1982), which states in part that the Board "shall hear, adjudicate, or provide for the hearing or adjudication, of *all matters* within the jurisdiction of the Board" (emphasis added).

[54]Schwartz v. Department of the Army, MSPB Dec. No. NY07528110226 (14 Aug. 1981).

[55]Hoska v. Department of the Army, MSPB Dec. No. PH07528110029 (29 Jan. 1981).

[56]677 F.2d 131 (D.C. Cir. 1982). Although this case addressed a removal action based upon a security clearance revocation, the Court of Appeals for the District of Columbia Circuit did not consider the MSPB's jurisdiction to review such revocation. Throughout each stage of his appeal, the employee asserted that his removal was unlawful if the underlying revocation was

Thus, the hearing official's decision in *Hoska* is the only opinion to have held that the Board possesses the jurisdiction to review the merits of the revocation decision. This holding is inconsistent with the vast majority of decisions which have specifically rejected the pyramidal argument by holding that the Board has jurisdiction to review only those matters directly appealable to it.[57] A comprehensive review of rules, laws, and regulations reveal that there is no source or authority which grants the Board jurisdiction to directly review the revocation of security clearances. Rather, the law currently directs that the Assistant Chief of Staff for Intelligence is the final appeal authority for the revocation of security clearances for the Department of the Army.[58] In addition to this regulatory denial of Board jurisdiction, other arguments demonstrate the lack of Board jurisdiction to review the merits of the revocation.

First, the clearance revocation and the proposed removal are distinct and separate actions. This revocation action is affected by the Commander, Central Clearance Facility, an agency which is separate and distinct from the employing organization which is proposing the removal action.[59] The revocation letter does not direct the employing agency to take any adverse action against the employee. Rather, the revocation decision only bars the affected employee from entering certain premises or having access to certain information.[60] Hence, the revocation decision has only a limited and slight effect upon the employee.[61]

Secondly, the revocation decision and the proposed removal are different in their origin and nature. The need for security clearances and the procedure for managing those clearances flow from national security concerns as evidenced by statutes,[62] regulations,[63] and executive orders.[64]

The proposal to remove and the appellate procedures flowing therefrom are in the nature of per-

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unlawful. At the MSPB field hearing, the appellant employee prevailed, over agency objection, in litigating the propriety of the revocation. In upholding the removal action, the field examiner held that the hearsay evidence supported by appellant's admission met the agency's burden in proving that the revocation, and therefore the removal, was both reasonable and lawful. *Id.* at 135. By failing to appeal the decision to the full MSPB, the appellant allowed the field examiner's decision to become the final agency decision, which then permitted appellate review by the appropriate Court of Appeals. *See* 5 U.S.C. § 7703(b)(1) (1976). In reversing the MSPB's decision, the District of Columbia Circuit held that the evidence contained in the record did not support the finding that the revocation was reasonable. The court never addressed the issue of whether the MSPB possessed jurisdiction to review the propriety of the revocation. Rather, the court focused only upon:

> examining the legal bases for both the Army's decision to revoke petitioner's security clearance, and its decision to dismiss him. We also review the 'rational nexus' requirement, which we find inherent in the Army's regulation governing security clearance determination. Finally, given the nature of the Army's presentation to the MSPB, we summarize briefly the general principles governing the use of hearsay evidence in adjudication before administrative boards such as the MSPB. 677 F.2d at 135. Hence, this decision does not serve as a precedent establishing that the MSPB has jurisdiction to review security clearance revocation. Rather, the case serves as an authority regarding only the issues placed before it—the use of hearsay evidence in administrative hearings, the scope of AR 604-5, and the requirement of a "rational nexus" in clearance determinations.

[57] *See* Williams v. Department of the Army, 651 F.2d 243 (4th Cir. 1981) (Board lacks jurisdiction in appellant's nonselection for promotion); Budnick v. MSPB, 643 F.2d 278 (5th Cir. 1981) (Board lacks jurisdiction to review adverse action against probationary employee); Pauley v. United States, 419 F.2d 1061 (7th Cir. 1969) (Board's predecessor lacked jurisdiction to review merits of employee's reassignment when such action was not the equivalent of a reduction-in-force); Hellman v. Office of Personnel Mgt., MSPB Dec. No. AT300A799002 (29 Mar. 1982) (Board lacks jurisdiction to review time-in-grade requirements established by OPM pursuant to 5 C.F.R. § 300.104a (1982)); Fitzpatrick v. Department of Health and Human Serv., MSPB Dec. No. AT34438110042 (14 Dec. 1981) (Board lacks jurisdiction to review merit pay appraisal); Ward v. Consumer Prods. Safety Comm'n, MSPB Dec. No. PH34438110229 (9 Nov. 1981) (Board lacks jurisdiction to review denial of severance pay); South v. Department of the Air Force, MSPB Dec. No. AT0351810218 (11 Sept. 1981) (Board specifically rejected the 'pyramidal argument' in holding that it has no jurisdiction to review appellant's nonselection for promotion); Cunningham v. Interstate Commerce Comm'n, MSPB Dec. No. PH300A99002 (3 Oct. 1980) (Board lacks jurisdiction to review nonselection for promotion).

[58] AR 604-5, para. 4-4(n).

[59] *Id.* at para. 4-4(j).

[60] Cafeteria Workers v. McElroy, 367 U.S. 886, 898 (1961)

[61] *Id.*

[62] 5 U.S.C. § 7532 (1980).

[63] AR 604 . 5.

[64] Exec. Order No. 10450, 19 Fed. Reg. 2489 (1953), *reprinted at* 5 U.S.C. § 7311, app at 68 (1976).

sonnel practices governed by the Civil Service Reform Act and its implementing regulations.[65] Since the Board was created by that Act, its jurisdiction is necessarily limited by the scope of that Act. Since the security clearance is not a personnel action,[66] its revocation is so distinct from the personnel matters within the jurisdiction of the Board as not to be reviewable by it.

Finally, the establishment of a due process scheme in revocation actions renders that decision so collateral to the removal decision as to be beyond the Board's jurisdiction to review it.[67] Current regulations provide aggrieved employees notice, an opportunity to be heard, and an appellate route in revocation actions.[68] It is well settled that the Board will not review actions underlying the removal action when the appellant had been afforded due process in those earlier actions.[69] Therefore, in reviewing a removal action occasioned by the revocation of a security clearance, the Board has no jurisdiction to review the merits of that underlying revocation decision.

An illustration of the Board's adoption of these proceding arguments can be found in *Griffin v. Department of Agriculture.*[70] In that case, an employee appealed a reduction-in-force (RIF) action which management had proposed because the employee's duties had been contracted out to commercial activities. At the initial hearing, the employee sought to litigate the propriety of management's decision to contract out by espousing an essentially "pyramidal effect" argument.[71] Both the hearing examiner and the Board felt that the contracting-out decision underlying the proposed RIF was not reviewable by the Board since the decision to contract-out was not directly appealable to the Board, and because it was a separate and unrelated issue committed to agency discretion.[72] Furthermore, the Board declined jurisdiction to review any defects in the underlying contracting-out decision since any such defect would not prevent "the RIF action themselves from according properly with law".[73]

The decision to revoke the security clearance would be treated just as the decision to contract-out was treated in *Griffin.* The decision to revoke, therefore, is distinct and separate from the decision to remove. Neither the pyramidal effect, regulation rule, or statute confer such jurisdiction to review the revocation upon the Board.

Establishment of a Nexus Between the Alleged Misconduct and the Efficiency of the Service

The requirement for this nexus flows from the statutory mandate that federal employees will only be discharged for those causes which promote the efficiency of the service.[74]

Such misconduct may arise from either actions on or off the job. Regardless of the situs of the misconduct, the agency must demonstrate its impact upon the federal service.[75] That impact may be as

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[65]Pub. L. No. 95-454, 95th Cong., 1st Sess., 91 Stat. IIII (1978).

[66]5 U.S.C. § 2302(a)(2) (Supp. V 1982) defines "personnel actions" as

(i) an appointment;
(ii) a promotion;
(iii) an action under Chapter 75 of this title or other disciplinary or corrective action;
(iv) a detail, transfer, or reassignment;
(v) a reinstatement;
(vi) a restoration;
(vii) a reemployment;
(viii) a performance evaluation under Chapter 43 of this title
(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and
(x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level; with respect to an employee in, or applicant for, a covered position in an agency.

[67]Weiss v. United States Postal Serv., MSPB Dec. No. BN075209064 (23 Mar. 1982).

[68]*See* text accompanying note 118 *infra*.

[69]Weiss v. United States Postal Serv. MPSB Dec. No. BN075209064 (23 Mar. 1982).

[70]2 MSPB 335 (1980).

[71]*Id.* at 337.

[72]*Id.*

[73]*Id.* at 336.

[74]5 U.S.C. § 7513(a) (1976); *See* Penna v. United States Army Corp of Eng'rs, 490 F. Supp. 442 (S.D.N.Y. 1980).

[75]Grebosz v. Civil Serv. Comm'n, 472 F. Supp. 1081 (S.D.N.Y. 1979)

localized as the individual employee's position[76] as well as the broader impact of underminding public confidence in the civil service structure.[77] The further removed the misconduct is from on-the-job performance, it is more unlikely that the agency will be able to prove an impact upon promotion of the efficiency of the service. On the other hand, the agency can clearly demonstrate this nexus when the employee's action has been a violation of agency regulations or has otherwise disrupted agency functions.[78]

When the employee's misconduct has occurred outside of the job, the nexus to efficiency of the service becomes strained. It is well settled that the conviction of a crime off the job place does not per se establish any nexus to efficiency of the service.[79] Decisions are clear that convictions must be treated on a case-by-case basis.[80] Key elements that will determine the existence of any nexus in such extra employment cases are type of crime[81], degree of moral turpitude contained within the crime, the degree of public confidence and trust in the employee's position[82], and the duties of the job position.[83]

Although the loss of a security clearance is not in the nature of misconduct, the agency must still prove a nexus between the loss of that security clearance and the efficiency of the service. That nexus can be proved by referring to both the employee's duties and the needs of the agency. In order for the nexus to exist, there must be proof that the employee's responsibilities or duties require a security clearance. These duties will include access to either classified information or material. Unless either of those conditions apply, the employee has no need for a security clearance and, therefore, there will be no nexus between the revocation of that security clearance and the efficiency of the service. The absence of any recent or significant exposure to classified information or areas is not fatal to proof of that nexus. Rather, the agency may prove its case by demonstrating a genuine need to have that position able to deal with either classified information or restricted areas.

Standards of Proof

Since the function of the legal process is to minimize erroneous decision, the standard of proof is used to instruct the factfinder concerning the degree of confidence which society thinks he or she should have in the correctness of facts or conclusions for a particular type of adjudication.[84] This standard serves to allocate the risk of error between ligitatants which indicates the relative importance attached to the ultimate decision by society.[85]

Congress has indicated both society's minimal concern with the outcome of the litigation and the conclusion that the litigants should share the risk of erroneous decision equally[86] by requiring the agency to meet its burden of proving controverted facts by the preponderance of the evidence standard.[87] Since the existence of both the alleged misconduct and its nexus with the efficiency of the service are controverted issues of fact, the agency will satisfy its burden by providing "that degree of relevant evidence which a responsible mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.[88]

Since the preponderance of the evidence standard applies only to the findings of fact, that standard is inapplicable to "evaluating the rationality of

[76]Swentek v. United States, 658 F.2d 791 (Ct.Cl. 1981); Hoover v. United States, 513 F.2d 603, 206 Ct.Cl. 640 (1975).

[77]Wathen v. United States, 527 F.2d 1191, 208 Ct.Cl. 342 (1975), *cert. denied*, 429 U.S. 821 (1976).

[78]Colhoff v. Department of Interior, 641 F.2d 608 (8th Cir. 1981); Wise v. United States, 603 F.2d 182 (Ct. Cl. 1979).

[79]Young v. Hampton, 568 F.2d 1253 (9th Cir. 1977).

[80]Yacovone v. Bailer, 455 F. Supp. 287 (D.D.C. 1978).

[81]Pelicone v. Hodges, 320 F.2d 754 (D.C. Cir. 1963).

[82]Book v. United States Postal Serv., No. 81-1665 (8th Cir. 18 Mar. 1982); Brewer v. United States Postal Serv., 647 F.2d 1093 (Ct. Cl. 1981).

[83]Monahan v. United States, 354 F.2d 306 (Ct. Cl. 1965).

[84]*In re* Winship, 397 U.S. 358 (1970).

[85]Addington v. Texas, 441 U.S. 418, 423-27 (1979).

[86]Santosky v. Kramer, ___U.S.___, 102 S.Ct. 1388 (1982).

[87]5 U.S.C. § 7701(c) (1976).

[88]5 C.F.R. § 1201.56(c)(2) (1982).

non-factual determination reached through the exercise of judgment and discretion."[89] Therefore, since the appropriateness of the penalty is non-factual, a standard different than the preponderance of the evidence applies to it.

Appropriateness of Penalty

The final issue allocated to the agency is the burden of proving that the proposed penalty is appropriate in light of the misconduct alleged. Although many agency managers feel that it is inappropriate for the Board to review the propriety of their proposed penalties, it is well settled that the Board possesses jurisdiction to review that proposed penalty.[90]

In answering the criticism voiced by many that the Board may attempt to displace agency managerial prerogratives, the Board has distinguished its role in reviewing agency actions from that of the judicial forum's review role.[91] This distinction is based upon the functions of each forum in that a court's review is limited to determining whether the proposed penalty is either arbitrary or capricious.[92] The Board's function in reviewing the appropriateness of penalties, however, is not limited to this low threshold of the arbitrary or capacious standard. Rather, the Board's broader review power is due to its statutory role as the final action authority for the agency.[93]

In constructing its standard for review, the Board was cognizant of those earlier criticisms and attempted to balance the competing interests present in all federal personnel actions. The Board announced that it will give due deference to the agency's primary role in exercising the managerial function by acknowledging that the Board's function is not to substitute its judgment for that of the employing agency.[94] As a result of this balancing process, the Board has determined that its role is principally to assure that managerial dis tion has been legitimately invoked and properly exercised within tolerable limits of reasonableness.[95]

To accomplish this role, the Board will consider whether the penalty is clearly excessive in proportion to the sustained charges, violates the principles of like penalties for like offenses, or was otherwise unreasonable under all the relevant circumstances.[96]

The Board's review of an agency-imposed penalty is essentially to assure that the agency has conscientiously considered the relevant factors and struck a responsible balance within tolerable limits of reasonableness.[97] Only if the Board finds that the agency failed to weigh the relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness is it appropriate for the Board to specify how the agency's decision should be corrected to bring a penalty within the perimeters of reasonableness.[98] Finally, before it can properly be concluded that a particular penalty will promote the efficiency of the service, it must appear to the Board that the penalty takes reasonable account of the factors relevant to promotion of service efficiency in the individual case.[99]

While the efficiency of the service is the ultimate criteria for determining both whether any disciplinary action is warranted and whether the particular sanction may be sustained, those determinations are quite distinct and will be considered separately.[100] The Board has offered a list of factors that it utilizes in determining the appropriateness of a penalty:[101]

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[89]Douglas v. Veteran's Admin., MSPB Dec. No. AT075299006, at 21 (Apr. 1981).

[90]*Id.* at 19.

[91]*Id.* at 25.

[92]Citizens to Preserve Overton Park, Inc. v. Volpe 401 U.S. 402, 414, 415 (1971).

[93]Douglas v. Veteran's Admin., MSPB Dec. No. AT075299006, at 25 (Apr. 1981).

[94]*Id.* at 26.

[95]*Id.* at 26, 28.

[96]*Id.* at 28.

[97]*Id.* at 34.

[98]*Id.*

[99]*Id.* at 33, 34.

[100]*Id.* at 29.

[101]*Id.* at 32, 33.

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary roles, contacts with the public, and the prominence of the position;

3. The employee's past disciplinary record;

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

5. The effect of the offense upon the employee's ability to perform in a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties;

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses; like punishment for like offenses;

7. Consistency of the penalty with any applicable agency table of penalties;

8. The notariety of the offenses or its impact upon the reputation of the agency;

9. The degree to which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10. Potential for the employee's rehabilitation;

11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harrassment, or bad faith, malice, or provocation on the part of others involved in the matter;

12. The adequacy and the effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The list is not exhaustive.

Although the agency's proposal letter must include the specific reasons supporting its action, there is no requirement that the agency include evidence demonstrating the factors which it considered in arriving at the proposed punishment.[102] A well-drafted proposal letter, however, would evidence the considerations of matters in extenuation, mitigation, and aggravation of the penalty. If such is done, the Board has stated that it will give greater deference to that proposal than if the decision had not included any information regarding the factors considered in arriving at a penalty.[103] Absent such information in a decision letter, the Board will give more scrutiny to the factors and decisionmaking process which led to the proposed penalty.

Although the revocation of a security clearance is not misconduct, the agency must still prove that its treatment of the employee following the revocation was appropriate. The twelve factors previously mentioned regarding misconduct are not well-tailored to a removal based upon failure to meet the requirements of the position. Factors to be considered in a removal action based upon failure to meet the job requirement due to lack of security clearance are:

1. Degree of sensitivity of the position;

2. Possibility of rehabilitative measures to restore the security clearance;

3. The ability of the agency to restructure the job environment so that the employee may continue to perform the duties;

4. The ability of the agency to provide an escort to the employee during the discharge of his or her duties while in a restricted area;

5. The ability of the agency to sanitize an area so that it is free of classified information.[104]

The sixth and perhaps the most important factor to be considered is the agency's efforts to retain the employee.[105] It is imperative that the

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[102] *Id.* at 31.

[103] *Id.*

[104] Schwartz v. Department of the Army, MSPB Dec. No. NY075281/0226 (14 Aug. 1981).

[105] Hoska v. Department of the Army, MSPB Dec. No. PH07528110029 (29 Jan. 1981). *rev'd on other grounds*, 677 F.2d 131 (D.C. Cir. 1982).

agency take efforts to retain the employee in as good a position without need of security clearance as had been the position while in need of security clearance.[106] Since the security clearance affects the information or environment in which the employee works, a transfer may enable the employee to discharge his or her trade or profession without need of a security clearance. For example, an electrician may need a security clearance only to have access to apply his trade to a particular location. If that employee were to lose his or her security clearance, the employee may be able to discharge those duties in some environment other than the secured area. In such a case, it is incumbent upon the agency to make reasonable efforts to place the employee into an environment which does not require the security clearance.

Appellant's Affirmative Defenses

Although the agency has the ultimate burden of persuasion in proving its case, Congress has allocated the proof of certain affirmative defenses to the appellant.[107] These affirmative defenses are:

1. Showing harmful error in the application of the agency's procedures in arriving at such a decision;

2. Showing that the decision was based upon any prohibited personnel practices, or;

3. Showing that the decision was not inaccordance with law.

In determining the existence of any harmful error[108] in applying agency procedures, two issues are initially raised regarding security clearance revocations. It must be determined whether the procedure for revocation was authorized[109] and, if authorized, whether those procedures were followed.

Authorization of Procedures for Revocation of Security Clearances

The Constitution has granted to the President as Commander in Chief of the Armed Forces broad power to control the property and installations of the nation's warmaking efforts.[110] Pursuant to those powers, the President has directed the head of each department or agency of the executive branch to establish and maintain effective programs to classify national defense information.[111] Furthermore, by executive order, the President has limited access to such classified information only to those personnel who have been determined as trustworthy.[112]

Pursuant to those executive orders, the Secretary of Defense has directed subordinate agencies to establish their individual clearing houses for security clearance determinations.[113] Under the authority of this mandate, the Secretary of the Army has published a regulation entitled "Clearance of Personnel for Access to Classified Defense Information and Material".[114]

Pursuant to its power to make rules for the government and regulation of the land and naval forces,[115] Congress has granted to the Secretary to the Army the authority necessary to conduct all affairs of the Department of the Army, including those activities as may be lawfully prescribed by the President or the Secretary of Defense. The Secretary of the Army may promulgate regulations to carry out those functions, powers, and duties.[116] Since the Secretary of the Army has the statutory power to issue regulations, the regulation govern-

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[106] *Id.*

[107] 5 U.S.C. § 7701(c)(2) (1976).

[108] 5 C.F.R. § 1201.56(c)(3) (1982) defines harmful error as: error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e. caused substantial harm or prejudice to his/her rights.

[109] Cafeteria Workers v. McElroy, 367 U.S. 886, 890 (1961).

[110] U.S. Const. art II, § 2.

[111] Exec. Order No. 10450, 19 Fed. Reg. 2489 (1953).

[112] Exec. Order No. 12065, 43 Fed. Reg. 28, 949 (1978).

[113] Dep't of Defense Directive No. 5200.2R, Department of Defense Personnel Security Program, (20 Dec. 1979).

[114] AR 604-5.

[115] U.S. Const. art.I, § 8.

[116] 10 U.S.C. § 3012(g) (1976).

ing access to classified defense information is an authorized procedure endowed with the sanction of the law.[117] Since this regulation is authorized and lawful, the delegation of security clearance denial authority to the Commander of the U.S. Army Central Personnel Security Clearance Facility is proper.[118]

Authorized Procedures for Clearance Revocations

As noted above, a procedural due process scheme exists for security clearance decisions. Army regulations require that no revocation action shall be taken under its authority unless the person concerned has been given:[119]

1. A written statement of the reasons why the revocation action is being taken. The statement shall be as comprehensive in detail as the protection of sources afford a confidentially under provisions of the Privacy Act of 1974[120] and national security permit;

2. An opportunity to reply in writing;

3. A written response to any submission under number two above, stating the final reasons therefore, which shall be as specific as privacy and national security considerations permit; and

4. An opportunity to appeal to a higher level of authority.

The regulation further provides that this final appellate authority for the Department of the Army is the Assistant Chief of Staff for Intelligence.[121]

Appellant's Proof that the Removal Action is Barred by Agency Procedures

Appellants may assert that current personnel regulations bar an agency from removing an employee based upon the revocation of a security clearance.[122] This affirmative defense addresses the issue of the existence of the reasons cited by the agency for its proposed removal. As was discussed earlier,[123] this issue highlights the need for drafting the proposal letter in terms of the appellant's inability to meet the requirements of the position, rather than citing the revocation of the security clearance as the basis for the removal. Hence, this affirmative defense mirrors the agency's burden to prove that the appellant is no longer capable of performing his or her job without the requisite clearance.

The distinction between citing the clearance revocation and citing the employee's inability to meet the requirements of the position is fine, but sharp. If the agency has met its earlier burdens of proving a nexus between the possession of a security clearance and the job standards, appellant's argument that the agency is committing a prohibited personnel practice will disappear. Only when nexus has not been proven will the agency base its removal action upon a revocation of a security clearance alone. Absent that nexus, the agency will have committed a prohibited personnel practice. When that nexus is established, however, the basis for the removal is proven to be the employee's failure to meet the requirements of the position and not the revocation of a security clearance. Hence, this personnel procedure bars the agency from taking a removal action only against the employee who has failed to retain a security clearance, but who has no real need for a clearance to perform the duties of the position.

Conclusion

Successful defense of agency adverse actions before the Merit Systems Protection Board requires close coordination of efforts between managers, civilian personnel officers, and attorneys. Unless those three members work in concert during each step of the procedure, successful defense of proposed adverse actions will be jeopardized. Close coordination among all three must begin at the initial stage of the decision-making process. In particular, civilian personnel officers and defense attorneys must work closely together. Due to the

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[117] Cafeteria Workers v. McElroy, 367 U.S. 886, 891 (1961).

[118] General Order No. 14, Dep't of Army (27 July 1977).

[119] AR 604-5, para. 4-4(1).

[120] 5 U.S.C. § 552a (1976).

[121] AR 604-5, para. 4-4(n).

[122] *See* text following note 41 *supra*.

[123] *Id.*

complexity and pervasiveness of personnel regulations, the attorney cannot advise managers without the strongest assistance of civilian personnel officers. Likewise, the complexity of legal issues distinct from that contained within personnel regulations limits the effectiveness of the civilian personnel officer's advice to managers. With the vigorous use of the Labor Counselor Program,[124] successful defense of federal adverse actions can be assured.

Government Contract Bid Protests: The Jurisdiction of the Federal District Courts

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Over the past decade, increasing attention has been devoted to the rapidly expanding case loads of the various federal courts. On 1 October 1982, the federal judicial system was significantly affected when the Federal Courts Improvement Act of 1982 (FCIA)[1] became law. The Act, *inter alia*, changed the designation of the Court of Claims to the United States Claims Court and altered the forums available to adjudicate government contract bid award protests.[2] The purpose of this article is to provide an overview of the anticipated impact and, to some extent, the actual impact of the Federal Courts Improvement Act on the jurisdiction of federal district courts over federal contract bid protest matters.

Bid Protest Procedures

The decision to award a government contract to a specific contractor to the exclusion of other bidders usually involves large sums of money. Unsuccessful offerors will generally challenge the award, especially if they believe that some impropriety or procedural defect resulted in the selection of another bidder. The avenues available to these disappointed bidders include administrative and judicial forums.[3] These forums include protests by the aggrieved contractor to the agency contracting officer or higher agency authority,[4] appeal to the General Accounting Office (GAO),[5] and, ultimately, judicial intervention.

These disputes may involve problems with the contract prior to the awarding of the contract (pre-award) or discrepancies which have arisen after the contract has been awarded (post-award).

In 1940, the United States Supreme Court, in *Perkins v. Lukens Steel Co.*,[6] held that potential bidders had no standing to challenge the pre-award actions of Department of Labor officials. Standing would only exist unless the contractor could show "an injury or threat to a particular right of their own" as distinguished from the public's interest in the administration of the law.[7]

The law enunciated in *Perkins* remained basically unchanged for three decades. In 1970, in *Scanwell Laboratories, Inc. v. Schaffer*,[8] an unsuccessful bidder on a government contract brought suit arguing that, in spite of *Perkins*, the bidder had standing to challenge the validity of the contract awarded and, if the contract proved illegal, to have it rescinded. Overruling the lower court the United States Court of Appeals for the District of Columbia Circuit sustained the plaintiff's position

[1] Pub. L. No. 97-164, 96 Stat. 25 (1982).

[2] Pub. L. No. 97-164, § 133(a).

[3] R. Nash & J. Cibinic, Federal Procurement Law, 803-04, (3rd ed. 1977-80).

[4] Defense Acquisition Reg. (§ 2-407.8); Army Defense Acquisition Reg. Supp. (§ 2-407.8).

[124] *See* Dep't of Army Letter, DAJA-CP 1974/8342, subject: The Army Lawyer as Counsellor to the Civilian Personnel Officer (15 July 1974).

[5] 4 C.F.R. § 21.1(a) (1982). Although there is no requirement to exhaust administrative remedies before court action, the standard practice appears to utilize the administrative procedures first. *See Id.* at §§ 21.1, 21.2 (1981).

[6] 310 U.S. 113 (1940).

[7] *Id.* at 125.

[8] Scanwell Laboratories, Inc. v. Schaffer, 424 F.2d 859 (D.C. Cir. 1970).

that it did have standing to sue.[9] The rationale expressed in *Scanwell*, has been adopted by a majority of the federal circuit courts.[10]

Federal Courts Improvement Act of 1982

The Federal Courts Improvement Act of 1982 established a mechanism to resolve questions in specialized areas in which Congress felt a need for nationwide uniformity and expertise.[11] Although the Act contains numerous changes, both procedural and substantive, one of the most controversial additions is the granting to the U.S. Claims Court, formerly the Court of Claims, jurisdiction to issue injunctions and declaratory judgments for pre-award contract actions. The new provision states:

> To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable or extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.[12]

This provision appears to change the forums which were previously available to handle both pre-award and post-award government contract lawsuits.[13] This new power allows the Claims Court to adjudicate all aspects of pre-award issues including equitable relief and monetary damages.[14] While this single-forum concept increases judicial competency, a closer reading of this jurisdictional basis reveals some possible problems.

The statutory language affords unsuccessful offerors access to various forms of equitable relief in the pre-award bid protest. In addition, the express language of the statute appears to grant the U.S. Claims Court exclusive jurisdiction in all pre-award cases. The statute is silent, however, as regards post-award claims. Some commentators have noted that the exclusive pre-award jurisdiction may encompasse the entire bid protest area.[15]

As previously noted, the federal district courts, relying on *Scanwell*,[16] have granted unsuccessful bidders standing to sue federal agency heads in contract bid disputes. Thus, the federal district courts had had jurisdiction over all bid protest matters. Section 133(a) of the FCIA seems to restrict this jurisdiction, in at least the pre-award area, by the exclusive grant of jurisdiction to the Claims Court.

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[9] *Id.* The court based its decision on three distinct theories. First, the 1952 Fulbright Amendment to the Walsh-Healey Act reversed the Supreme Court decision in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940). Secondly, the Administrative Procedure Act has greatly modified the law of standing and waived sovereign immunity. Finally, the disappointed bidder has been deemed a "private attorney general" suing on behalf of the public. For a good discussion of standing to sue in government contract award disputes, *see generally* Davis, *The Private Rights of a Bidder in the Award of Government Contract: A Step Beyond Scanwell*, 24 Case W. Res. L. Rev. 559 (1973); Lent, *Standing to Sue Leaves the Army Standing Where?*, 53 Mil. L. Rev. 73 (1971); Pierson, *Standing to Seek Judicial Review of Government Contract Awards: Its Origins, Rationale and Effect on the Procurement Process*, 12 B.C. Ind. & Com. L. Rev. 1 (1970); Note, *The Erosion of the Standing Impediment in Challenges by Disappointed Bidders of Federal Government Contract Awards*, 39 Fordham L. Rev. 103 (1970).

[10] Davis Assoc., Inc. v. Secretary of Housing & Urban Development, 498 F.2d 390 (1st Cir. 1974); Morgan Assoc. v. United States Postal Serv., 511 F.2d 1223 (2d Cir. 1975); Merriam v. Kunzig, 476 F.2d 1233 (3d Cir.), *cert. denied*, 414 U.S. 911 (1973); William F. Wilke, Inc. v. Department of the Army, 485 F.2d 180 (4th Cir. 1973); Hayes Int'l Corp. v. McLucas, 509 F.2d 247 (5th Cir.), *cert. denied*, 423 U.S. 864 (1975); Airco, Inc. v. Energy Research & Development Ad., 528 F.2d 1294 (7th Cir. 1975) (per curiam); Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972); Armstrong & Armstrong, Inc. v. United States, 514 F.2d 402 (9th Cir. 1975) (per curiam); Libby Welding Co. v. United States, 444 F. Supp. 987 (1977).

[11] Retson, *The Federal Courts Improvement Act of 1982: Two Courts are Born*, The Army Lawyer, Oct. 1982, at 20.

[12] Pub. L. No. 97-164, sec. 133(a) (amending 28 U.S.C. sec. 1491(a)(3) (1976)).

[13] Previously contractors suing on pre-award matters had to sue to enjoin the contract award in federal district court relying on *Scanwell*. If successful in that forum, resort was necessary to the Court of Claims for monetary relief. 28 U.S.C. § 1346(a)(2) (1976).

[14] The current Claims Court retained its pre-award jurisdiction to award monetary damages on a breach of implied contract. 28 U.S.C. 1491(a)(1) (1976).

[15] *Court Consolidation Law's Impact on Pre-Award Protests Remains in Default*, 38 Federal Contracts Report 33 (1982).

[16] *See* text accompanying 8-10 *supra*.

The FCIA of 1982 has had a long and involved history.[17] Both the Senate and House of Representatives expressed opinions prior to its passage indicating their desired intent. The Senate Report states:

> Section 133(a) gives the new Claims Court the power to grant declaratory judgments and give equitable relief in controversies *within its jurisdiction*.[18]
>
> . . . .
>
> By conferring jurisdiction upon the Claims Court to award injunctive relief in the pre-award stage of the procurement process, the [Judiciary] Committee *does not intend to alter the current state of the substantive law in the area. Specifically, the Scanwell doctrine . . . is left intact*.[19]
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> . . .
>
> [S]ince the court is granted jurisdiction in the area [of equitable relief], boards of contract appeals would not possess comparable authority pursuant to the Contract Disputes Act.[20]

These passages from the Senate Judiciary Committee hearings indicate their intent that the current law *i.e.*, the district courts' jurisdiction over all types of contract bid protests, should not be altered by the FCIA. According to a senior Senate Judiciary staffer:

> The district courts would still retain jurisdiction to consider bid protests. . . . The use of the term "exclusive jurisdiction" prohibits the boards of contract appeals, *not the district courts*, from exercising equitable powers. . . . *Scanwell* is judge-made law; there is no legislative mandate involved.[21]

The House of Representatives Judiciary Committee Report contains even stronger language supporting the continued jurisdiction of the federal district courts via the *Scanwell* rationale:

> The new section [of the FCIA] does give the new Claims Court the augmented power to grant declaratory judgments and give equitable relief in contract actions prior to award. This enlarged authority is exclusive of the Board of Contract Appeals and *not to the exclusion of the district courts*. It is not the intent of the Committee to change existing caselaw as to the ability of the parties to proceed in the district court pursuant to the provisions of the Administrative Procedure Act in instances of illegal agency action. *See, e.g., Scanwell Laboratories, Inc. v. Shaffer*, ... Nor is the intent of the Committee to oblige lawyers, litigants, and possibly witnesses to travel to Washington, D.C. whenever equitable relief is sought in a contract action prior to award. . . . [T]he Committee is satisfied by clothing the Claims Court with enlarged equitable powers *not to the exclusion of the district courts*. The dual questions of whether these powers should even be broader and *of whether they should be exclusive of the district courts will have to wait for a later date*.[22]

The legislative history of this statute states in unequivocal language that the district courts should retain jurisdiction in bid protest matters and that the *Scanwell* doctrine is still valid.

Upon initial inquiry, there would appear to exist a conflict between the language of the statute and the congressional intent behind the legislation. In resolving this dilemma, it is instructive to look to

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[17] *A Look at the Federal Courts Improvement Act and the New Courts*, 38 Federal Contracts Report 788, 795 (1982).

[18] S. Rep. No. 97-275, 97th Cong., 2nd Sess. 22 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 32 (emphasis added).

[19] *Id.* at 33 (emphasis added).

[20] *Id.* (emphasis added).

[21] Remarks of unnamed senior Senate Judiciary staff member, *reprinted in* No. 910 Federal Contracts Report A-18 (1981) (emphasis added).

[22] H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 43-44 (1981) (emphasis added).

the rules of statutory interpretation and prior court decisions.

Although the principles of statutory construction are sometimes themselves complex, generally a statute is open to construction only where the language used therein requires some type of interpretation or may reasonably be considered ambiguous.[23] Absent any ambiguity, there is a conclusive presumption that the clear terms of the statute express the legislative intent.[24]

In addition to statutory construction, contemporaneous judicial interpretation is important. Although the case law is sparse in this area,[25] the decisions, appear to be consistent in their analysis. The first case[26] involved two construction contracts awarded by the General Services Administration (GSA). The unsuccessful bidders lodged protests with the GSA prior to the contract being awarded. The contracting officer denied the protests and, on the same day, awarded the contracts. Four days after the effective date of the FCIA, the disappointed offerors filed suit in the Claims Court seeking to enjoin the performance of the contracts. The bidders maintained that Congress intended to create an alternative forum to the district courts in bid protest cases and to maintain the viability of the *Scanwell* doctrine. The government argued that the new act had narrowed jurisdiction over unsuccessful bidders' suits, giving the Claims Court the exclusive jurisdiction of preaward suits.[27] The Claims Court ruled that it lacked jurisdiction to hear the case and ordered the case transferred to the federal district court.[28] In so ruling, the court decided that the FCIA granted it jurisdiction over bidders' suits only in the pre-award stage and that the FCIA had not completely divested the district courts of their *Scanwell* jurisdiction. It should be noted that the court felt that the statute may be ambiguous, either because the statute made no mention of the district courts or because of the extensive legislative history favoring *Scanwell*. Both parties appealed on the issue of jurisdiction.[29]

A second case testing the jurisdictional statute of the new Claims Court involved the United States Postal Service.[30] The facts of this case are interesting. Opal Manufacturing, a producer of stamp vending machines, had supplied some proprietary information to UMC Industries, Inc. in connection with an anticipated business venture. Opal learned that UMC would try to use this proprietary data to bid on an upcoming Postal Service Contract. Opal initiated suit in federal district court, seeking a temporary restraining order.[31] The court denied the order and the bids were opened. Although UMC's bid was low, no contract was awarded because of pending bid protests. UMC then filed a counterclaim against Opal for allegedly providing false information. UMC filed a cross-claim against the U.S. Postal Service to prevent the contract from being awarded to anyone else. The Postal Service then moved to dismiss for lack of jurisdiction. UMC argued that the FCIA did not strip the district courts of jurisdiction to hear disappointed bidders' suits which challenge the award of government contracts. The plaintiffs maintained that "*Scanwell* actions have been an established feature of district court litigation"[32] and that the legislation history of Congress on the statute demonstrated a specific intent to maintain

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[23]73 Am. Jur. 2d *Statutes* § 194, at 392 n.96 (1974).

[24]C. Sand, Statutes and Statutory Construction § 48.06 n.4 (4th ed. 1973). *See also* Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935); Caminetti v. United States, 242 U.S. 470, 490 (1917).

[25]As of this writing there are only four reported cases dealing with the FCIA bid protest jurisdiction.

[26]John C. Grimberg Co., Inc. & William M. Schlasser, Inc. v. United States, No. 510-82C (Cl. Ct. 1982), *reprinted in* 38 Federal Contracts Report 711 (1982).

[27]*CAFC Hears Argument on Scope of Claims Court's Jurisdiction Over Bid Protests*, 38 Federal Contracts Report 757 (1982). [hereinafter cited as CAFC Hears Argument].

[28]28 U.S.C. § 1631 (1976).

[29]*Grimberg*, No. 510-82C (Cl. Ct. 1982), *reprinted in* 38 Federal Contracts Report 711, 712 (1982). The hearing date in the Court of Appeals for the Federal Circuit was 7 February 1983. *See* 38 Federal Contracts Report 1026 (1982).

[30]Opal Mfg. Co., Ltd. v. UMC Industries, Inc. v. United States Postal Serv., No. 82-2699 (D.D.C. 1982), *reprinted in* 38 Federal Contracts Report 862 (1982).

[31]*Id.*

[32]*District Court Lacks Preaward Protest Jurisdiction, Judge Richey Rules*, 38 Federal Contracts Report 841 (1982).

district court jurisdiction.[33] In ruling that the FCIA vested exclusive jurisdiction in the Claims Court for pre-award contract claims the district court relied on the clear language of section 133(a)(3). Although noting the subject of the congressional intent, the Court stated that "legislative history may not be used as a means for construing a statute contrary to its plain terms."[34] The court did note however, that the federal district courts retain jurisdiction over post-award claims.[35]

A third judicial interpretation in this neophytic area involved the Defense Logistics Agency (DLA).[36] The DLA issued a solicitation for insecticide generators and included a maximum pressure limit in the specifications. London Fog, a manufacturer of various types of insecticidal and smoke generating equipment, submitted a bid notwithstanding that their generator did not comply with the DLA specifications. Simultaneous with the bid submission, London Fog filed suit in federal district court, alleging that the DLA specifications were "arbitrary and capricious."[37] The company also requested a temporary restraining order to prevent award of the contract. The court denied the restraining order request and the bids were opened. London Fog was the highest of five bidders.

The plaintiff had maintained that the legislative history of the FCIA indicated an intent to preclude only the boards of contract appeals from exercising equitable jurisdiction. The court, in agreeing with the government, stated that the statutory language is unambiguous and provides that the exclusive jurisdiction for pre-award relief lies with the Claims Court.[38] The matter was dismissed for lack of jurisdiction.

An analysis of the case law, although sparse, reveals certain key points. First, in the absence of some ambiguity in section 133(a), the clear meaning of the language will be enforced according to its terms. Secondly, the thirteen years reliance by unsuccessful contractors on *Scanwell* has been dealt a death-blow. Finally, while the legislative history clearly presents a congressional intent to retain district court jurisdiction viable in bid protest matters, the statutory construction will not permit this result. As has been stated: "The legislative history says one thing, but the law says another."[39]

Department of Justice Position

Anticipating the possible conflict in section 133(a) and attempting to challenge the *Scanwell* doctrine, the Department of Justice has forwarded a memorandum of all United States Attorneys which presents the agency position that contractors' suits involving bid protests must, under the FCIA, be filed in the Claims Court.[40]

Certain portions of this memorandum deserve comment. The paper initially states that "where Congress has given the Claims Court exclusive jurisdiction over certain claims against the United States, the federal district courts will decline to exercise jurisdiction over such claims."[41] While this is generally the case,[42] the pre-FCIA and FCIA procedures permit the district courts to transfer cases to the Claims Court, rather than dismiss erroneously filed claims.[43]

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[33] *Id.*

[34] *Opal*, No. 82-2699 (D.D.C. 1982) (citing United Mineworkers v. Federal Mine Safety and Health Rev. Comm'n, 671 F.2d 615 (D.C. Cir. 1982)), *reprinted in* 38 Federal Contracts Report 862 (1982).

[35] *Id.*, 38 Federal Contracts Report 861, 862 n.3 (1982).

[36] London Fog Co. v. Defense Logistics Agency, Civ. No. 4-82-1334 (D. Minn. 1982), *reprinted in* 39 Federal Contracts Report 215 (1983).

[37] *U.S. District Courts Lack Jurisdiction of Preward Protests, Minnesota Court Rules*, 39 Federal Contracts Report 183 (1983).

[38] *London Fog*, Civ. No. 4-82-1334 (D. Minn. 1982), *reprinted in* 39 Federal Contracts Report 216 (1983).

[39] Interview with Patricia Szervo, Associate Administrator for Procurement Law, Office of Federal Procurement Policy, *reprinted in* No. 910 Federal Contracts Report A-19 (1981).

[40] Department of Justice Memorandum to U.S. Attorneys, and Draft Brief for Use in Scanwell Suits, *reprinted in* 38 Federal Contracts Report 781 (1982) [hereinafter cited as *Memorandum*].

[41] *Id.* at 783.

[42] *Id.* at 783.

[43] 28 U.S.C. § 1631 (1976).

The Department of Justice has also taken the position that section 133(a) of the Act creates Claims Court exclusive jurisdiction over *all* bid protest cases.[44] Notwithstanding the congressional intent behind section 133(a), it appears that this exclusive jurisdiction does exist over pre-award cases. This is evidenced also by the court rulings noted above. Exclusive jurisdiction over post-award bid disputes by the Claims Court is not resolved as easily. The language of the statute discusses only "before the contract is awarded"[45] and is silent on any post-award controversy. Since this creates an ambiguity, it is appropriate to seek assistance from the legislative history. As previously noted,[46] Congress expressly indicated that the district courts would not be deprived of their jurisdiction in this area and that *Scanwell*[47] is still good law. Another court,[48] while denying district court jurisdiction in the pre-award case, expressly found that these courts have jurisdiction in the post-award area. Finally, the government has maintained[49] that the phrase "contract claim brought before the contract is awarded," amounts to a statute of limitations which bars the Claims Court's consideration of post-award claims.[50] The cumulative effect of these factors effectively limits the Claims Court's jurisdiction to *pre-award* claims.

The Justice Department has also asserted that the legislative history of section 133(a) indicates a desire by Congress to transfer the forum of these bid protest cases from the federal district courts to the Claims Court.[51] Relying on the theory of "planted legislative history,"[52] the memo indicates that in spite of the express words of Congress in the committee reports, the legislature had not meant what it had said. As evidenced earlier,[53] Congress did intend to grant jurisdiction to the Claims Court but "not to the exclusion of the district courts."[54]

A further point fostered by the Department of Justice concerns the federal waiver of sovereign immunity. The agency has maintained that, when the United States waives sovereign immunity in a certain class of cases by permitting suits in the Claims Court, the federal district courts lack jurisdiction to hear cases "where the real relief requested is identical to the class of cases where sovereign immunity has been waived."[55] Since the FCIA empowered the Claims Court to provide equitable relief in pre-award bid protest cases, the Department of Justice has argued that the district courts should be precluded from exercising concurrent jurisdiction. This notion of "pre-emption" by the Claims Court is inappropriate. For example, the Postal Reorganization Act[56] has granted the district courts concurrent jurisdiction with the Claims Court over contract cases involving the United States Postal Service. Disappointed individual bidders should thus look carefully at the Department of Justice position when seeking to invoke the jurisdiction of the Claims Court.

Conclusion

The FCIA solved many problems facing the federal court system in such areas of specialized law as patents, claims, copyrights, and government contracts. The Act inadvertently created new problems, however, concerning the limits of jurisdiction of the federal district courts over contract

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[44] *Memorandum, supra* note 40, at 783.

[45] Pub. L. No. 97-164, § 133(a) (amending 28 U.S.C. sec. 1491 (a)(3) (1976)).

[46] S. Rep. No. 97-275, 97th Cong., 2nd Sess. 22-23 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 32-33; H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 43-44 (1981).

[47] *See* text accompanying notes 8-10 *supra*.

[48] *Opal*, No. 82-2699 (D.D.C. 1982) *reprinted in* 38 Federal Contracts Report 861, 862 n.3 (1982).

[49] *Grimberg*, No 510-82C (Cl. Ct. 1982), *reprinted in* 38 Federal Contracts Report 711 (1982).

[50] *CAFC Hears Argument, supra* note 27, at 757.

[51] *Memorandum, supra* note 40, at 785.

[52] *Id.* (citing Harold v. United States, 634 F.2d 553-54 (Ct. Cl. 1980)).

[53] S. Rep. No. 97-275, 97th Cong., 2nd Sess. 22-23 (1981), *reprinted in* 1982 U.S. Code Cong. & Ad. News 11, 32-33; H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 43-44 (1981).

[54] H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 44 (1981).

[55] *Memorandum, supra* note 40, at 787.

[56] 39 U.S.C. § 409(a) (1976). *See District Courts Lack Preaward Protest Jurisdiction, Judge Richey Rules*, 38 Federal Contracts Report 841 (1982).

bid protests. Although it may be somewhat premature to state with certainty the long-term impact this Act may have on the bid protest area, some observations are in order.

In the area of pre-award bid protests, the Claims Court apparently enjoys exclusive jurisdiction. This is evidenced by the clear statutory language and supported by judicial interpretation. The statutory language has effectively suspended the *Scanwell* doctrine in the pre-award area despite express congressional intent to the contrary. Post-award bid protests may be entertained by either the Federal district court or the Claims Court. Support for this position is found in *Scanwell*, the legislative history of the statute, and, most recently, in court decisions.[57] The question of "whether [the equitable powers of the Claims Court] should be exclusive of the district courts"[58] will not be forthcoming from case law. In order to bring the pre-award and post-award areas together and to effectuate the congressionally desired concurrent jurisdiction, statutory amendment of section 133(a) is necessary.

[57]*Opal*, No. 82-2699 (D.D.C. 1982) (emphasis added), *reprinted in* 38 Federal Contracts Report 861, 862 n.3 (1982).

[58]H.R. Rep. No. 97-312, 97th Cong., 1st Sess. 44 (1981).

The Quick Return on Investment Program

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HQ, USACECOM, Ft Monmouth, New Jersey

The Quick Return on Investment Program is part of the Productivity Capital Investment Program covered in Chapter 5, AR 5-4, as are the Productivity Enhancing Investment Program (PECIP) and the OSD Productivity Investment Funding (OSD PIF) Program. These programs are designed to reduce operating costs through timely investments for capital tools, equipment, and facilities.

The Quick Return on Investment Program can provide rapid funding outside the standard budgetary cycle. Funds are generally awarded in the same year as the project submission. In contrast, PECIP and OSD PIF funds usually involve a two year delay in funding. Although not limited to automation equipment, a QRIP funds could be used to finance the procurement of automatic data processing equipment (ADPE) and word processing equipment (WPE) to include dictation equipment, copy equipment, and automatic filing systems.

There are two prerequisites to qualifying for QRIP funding. First, each equipment acquisition project must cost no more than $100,000. Second, the project must result in savings to the government such as will pay for the equipment in a *maximum* of two years. Savings justifications in order of importance are as follows:

a. Manpower spaces authorized and required.

b. Valid manpower requirements without authorizations.

c. Manpower space equivalents.

d. Cost avoidance (overhires, overtime, etc.).

e. Reduced costs (labor, maintenance, utilities, transportation, repair, lease vs. purchase costs, etc.)

The greater the savings to the government, the higher the priority of the project and the quicker the requesting agency receives funding. Approval authority for QRIP has been recently transferred from Department of the Army to MACOM level. The local Comptroller or Resource Management Officer is generally the point of contact for QRIP. At the Department of the Army level, Ms. Mary Walker, HQDA (DACA-RMP), AV 225-1120, is the Director of Productivity Investment Programs.

The Legal Office, USA Communications-Electronics Command (CECOM), Fort Monmouth, New Jersey, has two examples of recently approved QRIP proposals which will be made available to SJA offices upon request. As an example of timely fund availability, data concerning CECOM's QRIP proposals is provided:

a. Type of Project:	Dictation Equipment	Copy Equipment Upgrade
b. Project Cost:	$64,545	$28,960
c. Date QRIP Proposal Submitted:	Mar 82	May 82
d. Date QRIP Proposal Approved:	Jun 82	Jun 82
e. Funding Document Received:	Jul 82	Sep 82
f. Equipment on Site	Oct 82	Dec 82

Productivity Capital Investment Program

Program	*Project Costs*	*Amortization*	*Type of Funds*	*Project Type*
1. QRIP	3,000-100,000 (1,000- 2,999)	2 yrs or less	OPA, RDTE, AMMO, (OMA*)	Equipment
2. PECIP	3,000 or more	4 yrs or less	OPA, MCA	Equipment
3. OSD PIF	100,000 or more	4 yrs or less	OPA, MCA	Equipment

*Although OPA funds are generally used for office-type QRIP equipment acquisitions, a new option allows QRIP OMA funding for equipment purchases under $3,000.

Administrative and Civil Law Section

Administrative and Civil Law Division, TJAGSA

The Judge Advocate General's Opinions

(Line Of Duty) **Results Of Blood Alcohol Test Properly Considered.** DAJA-AL 1982/1827 (4 June 1982).

A soldier was administered a blood alcohol test (BAT) by Army hospital personnel after driving his car into a disabled vehicle. The results showed a very high level of alcohol in his system. Based on the BAT result and other evidence, the line of duty investigating officer (IO) determined the soldier's injuries were incurred not in line of duty—due to own misconduct. The soldier challenged the use of the BAT.

A line of duty determination must be supported by substantial evidence and by a greater weight of evidence than supports any different conclusion. Para. 2-3*a*(1), AR 600-33. Para. 4-1*a*, AR 600-33, provides that AR 15-6 may be used as a guide. Para. 3-7*a*, AR 15-6, provides that, subject to certain listed exceptions, "anything which in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence." Accordingly, BAT results may properly be considered in a line of duty investigation. Of course, the weight given to any item of evidence rests with the IO. Para. 3-2*a*, AR 600-33.

In this case, the BAT was conducted by an Army Medical Center during the course of the soldier's treatment for his injuries. He provided no evidence that the BAT result in his case was inaccurate; instead, he merely raised the possibility of error concerning BAT's in general. Thus the presumption of administrative regularity justifies the conclusion that the test was properly made and the results were accurate.

(Enlistment And Induction, Enlistment) **Bar To Reenlistment For Membership And Participation In The Ku Klux Klan Does Not Violate Rights To Free Speech, Association Or Due Process.** DAJA-AL 1982/2476 (2 September 1982).

The soldier, a military policeman at Fort Monroe, Virginia, was a member of the Knights of the Ku Klux Klan (KKK). In January 1981, a bar to reenlistment action was initiated for his member-

ship and activities on behalf of the KKK. That action was approved by the Commander, Fort Monroe after considering rebuttal matter presented by the service member. The bar was again reviewed in June 1981, in accordance with AR 601-280, and was not removed. The soldier was honorably discharged in August 1981 and a reenlistment code of "RE3" was entered on his DD Form 214 as a result of the approved bar to reenlistment. The Army Board for Correction of Military Records requested an opinion whether the soldier's constitutional rights were violated in the bar to reenlistment action.

The Judge Advocate General concluded that the bar to reenlistment complied with applicable regulations and that it was supported by substantial evidence. It was noted that the action was not based on mere membership in the KKK but rather on activities on behalf of the KKK (e.g., organizing, soliciting membership, and public statements supporting KKK goals and beliefs), which were in violation of the Army Equal Opportunity Program and related regulations (AR 600-50). Further, the due process procedures provided in the bar action, which included notice and an opportunity for rebuttal, were sufficient to protect the service member's interests in reenlisting, as there is no constitutionally protected property interest in reenlistment which would mandate more detailed due process procedures.

Legal Assistance Items

Major John F. Joyce, Major William C. Jones, Major Harlan M. Heffelfinger and Major Charles W. Hemingway

Utah Military Committee

The April 1983 issue of *The Army Lawyer* reported that the state of Utah does not have a military committee. TJAGSA has since learned that a military committee does exist. The address at which the committee may be contacted is:

Professor Ronald N. Boyce
College of Law
University of Utah
Salt Lake City, Utah 84112

Judiciary Notes

US Army Legal Services Agency

West Key Number System for Military Justice

A joint-service committee consisting of representatives of the Army, Navy, Air Force, Marine Corps, Coast Guard, and Court of Military Appeals has been created to formulate suggestions for the improvement of the West Key Number System for Military Justice. The consensus of the committee is that the system should be more specific and that the rearrangement, elimination, and creation of some keys is warranted, especially in light of the adoption of the Military Rules of Evidence. Any specific suggestions adopted by the committee will be submitted to the Judge Advocates General for their review and, ultimately, the West Publishing Company.

The Army representative to the committee is Captain James S. Currie, U.S. Army Legal Services Agency, Court of Military Review (JALS-CR4), 5611 Columbia Pike, Falls Church, Virginia 22041. Autovon: 289-1560; Commercial: (202) 756-1560. Anyone who has identified key number problems or has suggestions relating to this project should contact Captain Currie.

FROM THE DESK OF THE SERGEANT MAJOR

by Sergeant Major John Nolan

1. Basic Soldiering

Legal clerks sometimes complain that, while assigned at battalion or brigade level, too much time is spent doing company details such as PT, going to the rifle range, CBR training, or being in parades.

As noted before in this column, basic soldiering is a part of the Army and always will be. Therefore, the enlisted JAG Corps must condition itself to adhere to Army policies. In order to be a good legal clerk or court reporter, the servicemember must be able to soldier as well as perform specialized duty. This includes, but is not limited to, military appearance, physical conditioning, duty rosters, parades, unit inspections, CBR training, weapon qualification, and Army training readiness tests.

The primary job is to be a soldier, then a legal clerk or court reporter.

2. Promotion

The recent E7 selection board selected four 71Ds out of 286 considered and two 71Es out of 34 considered. The low selection rate results from overstrength at the E7 level. Presently 71Ds are 175% over authorized strength and the 71Es are 205% over authorized strength. Hopefully, this situation will change before the next board convenes.

A number of clerks were disappointed because they were not selected; however, the Corps was fortunate to get the six selected. All of our personnel should continue to prepare for the next selection board.

3. MACOM Training Course

OJA-USAREUR hosted the first European Chief Legal NCO Continuing Legal Education Training Seminar on 11 March 1983. Seventeen chief legal NCOs were present, representing their respective major subordinate command as established by European area jurisdiction. A variety of subjects pertaining to enlisted management and office procedures were discussed. The course was a great success. A copy of the after action report has been forwarded to other MACOMs.

4. SQT

The final average for 71Ds and 71Es showed a vast improvement over last year's scores; all grade levels are 90% or better. Congratulations are in order for the entire Corps.

Reserve Affairs Items

Reserve Affairs Department, TJAGSA

Reserve Component Claims Judge Advocates

The U.S. Army Claims Service (USARCS) is attempting to establish a roster of Reserve Component judge advocates to assist with the processing and settlement of tort claims filed against the Army. In this regard, the services of experienced tort attorneys and attorneys with little or no tort experience are being sought. In the negotiation and settlement of large personal injury claims, resulting from medical malpractice or traffic accidents, assistance in the evaluation of the settlement value of a case in a given geographic area is urgently needed. Equally in demand is investigative assistance, particularly in areas of the United States where there are no large Army installations.

Interested reservists should contact The Judge Advocate General's School, Director, Reserve Affairs Department for advice on obtaining training points, equivalent training and related subjects. Credit may be earned for research and travel time in addition to time spent in the actual investiga-

tion of an incident or negotiation of a claims settlement.

Interested units or individuals should contact USARCS either by telephone or in writing. In order to ascertain the legal background of an individual judge advocate reservist, especially his familiarity with tort law, legal practice, a questionnaire may be requested of some officers.

USARCS phone numbers to call in connection with this subject are Autovon (923) 7803/4/5/6; FTS (938) 7803/4/5/6; or Commercial (301) 677-7803/4/5/6. Written communications should be addressed to Commander, U.S. Army Claims Service, ATTN: Chief, General Claims Division, Office of The Judge Advocate General, Building 4411, Fort George G. Meade, Maryland 20755.

CLE News

1. New Army Weight Standards and TJAGSA Resident and Nonresident Instruction

The Army Weight Control Program, as implemented by AR 600-9, also affects those who enroll in TJAGSA courses. The cited regulation, which became effective on 15 April 1983 for active duty personnel and on 15 July 1983 for Reserve Component personnel, states that individuals who are overweight by body fat measurement are not authorized to attend professional military or civilian schooling. Department of the Army Message, DAPE-MPA-CS, 142258Z March 1983, subject: New Army Weight Control Program, defines professional military schooling as NCOES courses beyond the basic and AIT level for enlisted personnel, and courses beyond the basic branch course for officers. This policy applies to both resident and nonresident instruction.

The screening of personnel who desire to enroll in courses at TJAGSA, both resident and nonresident, is a command responsibility. Accordingly, TJAGSA will look to local SJAs or the command to which a member is assigned for enforcement of the provisions of AR 600-9. These new regulatory provisions should be brought to the attention of all JAG Corps personnel immediately.

2. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Minnesota	1 March every third anniversary of admission
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February every third year
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the January 1983 issue of The Army Lawyer.

3. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or RCPAC if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. Specific questions as to the operation of the quota system may be addressed to Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

4. TJAGSA CLE Course Schedule

July 11-15: 5th Military Lawyer's Assistant (512-71D/20/30).

July 11-13: Professional Recruiting Training Seminar

July 11-15: 5th Military Lawyer's Assistant (512-71D/20/30).

July 12-15: Chief Legal Clerk Workshop (1983).

July 18-22: 9th Criminal Trial Advocacy (5F-F32).

July 18-29: 96th Contract Attorneys (5F-F10).

July 25-September 30: 101st Basic Course (5-27-C20).

August 1-5: 12th Law Office Management (7A-713A).

August 1-May 18, 1984: 32nd Graduate Course (5-27-C22).

August 22-24: 7th Criminal Law New Developments (5F-F35).

September 12-16: 72nd Senior Officer Legal Orientation (5F-F1).

October 11-14: 1983 Worldwide JAG Conference.

October 17-December 16: 102nd Basic Course (5-27-C20).

October 17-21: 6th Claims (5F-F26).

October 24-28: 10th Criminal Trial Advocacy (5F-F32).

October 31-November 4: 13th Legal Assistance (5F-F23).

November 7-9: 5th Legal Aspects of Terrorism (5F-F43).

November 14-18: 1st Advanced Federal Litigation (5F-F29).

November 14-18: 17th Fiscal Law (5F-F12).

November 28-December 2: 6th Administrative Law for Military Installations (5F-F24).

December 5-9: 24th Law of War Workshop (5F-42).

December 5-16: 97th Contract Attorneys (5F-F10).

January 9-13: 1984 Government Contract Law Symposium (5F-F11).

January 16-20: 73d Senior Officer Legal Orientation (5F-F1).

January 23-27: 24th Federal Labor Relations (5F-F22).

January 23-March 30: 103d Basic Course (5-27-C20).

February 6-10: 11th Criminal Trial Advocacy (5F-F32).

February 27-March 9: 98th Contract Attorneys (5F-F10).

March 5-9: 25th Law of War Workshop (5F-F42).

March 12-14: 2nd Advanced Law of War Seminar (5F-F45).

March 12-16: 14th Legal Assistance Course (5F-F23).

March 19-23: 4th Commercial Activities Program (5F-F16).

March 26-30: 7th Administrative Law for Military Installations (5F-F24).

April 2-6: 2nd Advanced Federal Litigation (5F-F29).

April 4-6: JAG USAR Workshop

April 9-13: 74th Senior Officer Legal Orientation (5F-F1).

April 16-20: 6th Military Lawyer's Assistant (512-71D/20/30).

April 16-20: 3d Claims, Litigation, and Remedies (5F-F13).

April 23-27: 14th Staff Judge Advocate (5F-F52).

April 30-May 4: 1st Judge Advocate Operations Overseas (5F-F46).

April 30-May 4: 18th Fiscal Law (5F-F12).

May 7-11: 25th Federal Labor Relations (5F-F22).

May 7-18: 99th Contract Attorneys (5F-F10).

May 21-June 8: 27th Military Judge (5F-F33).

June 4-8: 75th Senior Officer Legal Orientation (5F-F1).

June 11-15: Claims Training Seminar.

June 18-29: JAGSO Team Training

June 18-29: BOAC: Phase III.

July 9-13: 13th Law Office Management (7A-713A).

July 11-13: Chief Legal Clerk Workshop (1984).

July 16-20: 26th Law of War Workshop (5F-F42).

July 16-27: 100th Contract Attorneys (5F-F10).

July 16-20: Professional Recruiting Training Seminar.

July 23-27: 12th Criminal Trial Advocacy (5F-F32).

July 23-September 28: 104th Basic Course (5-27-C20).

August 1-May 17 1985: 33d Graduate Course (5-27-C22).

August 20-22: 8th Criminal Law New Developments (5F-F35).

August 27-31: 76th Senior Officer Legal Orientation (5F-F1).

September 10-14: 27th Law of War Workshop (5F-F42).

October 9-12: 1984 Worldwide JAG Conference

October 15-December 14: 105th Basic Course (5-27-C20).

5. Civilian Sponsored CLE Courses

September

1-2: PLI, Legal Assistants Workshops, Los Angeles, CA.

9-10: LSU, Recent Developments in Legislation and Jurisprudence, Baton Rouge, LA.

11-14: NCDA, Prosecution of the Violent Juvenile Offender, Houston, TX.

11-23: NJC, Non-Lawyer Judge—General, Jackson, MS.

11-23: NJC, Special Court Jurisdiction—General, Jackson, MS.

11-16: NJC, Alcohol and Drugs—Speciality, Jackson, MS.

15-16: FBA, EEO Conference, Washington, DC.

15-16: LSU, Recent Developments in Legislation and Jurisprudence, Shreveport, LA.

18-23: NJC, Evidence in Special Courts—Specialty, Jackson, MS.

19-20: PLI, Research & Development Limited Partnerships, San Francisco, CA.

22-23: PLI, Construction Claims, San Francisco, CA.

22-23: PLI, Estate Planning Institute, San Francisco, CA.

23-24: LSU, Estate Planning Seminar, Baton Rouge, LA.

23-24: NCLE, Real Estate, Lincoln, NE

23-25: NCCD, White Collar Crime, Oklahoma City, OK.

24-30: PLI, Patent Bar Review Course, New York, NY

25: MICLE, Developments in Article 9 & Secured Transactions, Ann Arbor, MI.

9/25-10/14: NJC, General Jurisdiction—General, Reno, NV.

25-30: NJC, Medical—Scientific Evidence—Graduate, Reno, NV.

26-30: SLF, Antitrust Law, Dallas, TX.

29-30: PLI, In-House Management of Mass Tort Litigation, New York, NY.

29-30: PLI, Post-Mortem Estate Planning, San Francisco, CA.

30-10/1: LSU, Medical Damages & Disability, Baton Rouge, LA.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is found to be useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction or returning students' materials or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Biweekly and cumulative indices are provided users. Commencing in 1983, however, these indices have been classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following publications are in DTIC: (The nine character identifiers beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B071083	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-1
AD B071084	Criminal Law, Procedure, Trial/JAGS-ADC-83-2
AD B071085	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-3
AD B071086	Criminal Law, Crimes & Defenses/JAGS-ADC-83-4
AD B071087	Criminal Law, Evidence/ JAGS-ADC-83-5
AD B071088	Criminal Law, Constitutional Evidence/JAGS-ADC-83-6
AD B064933	Contract Law, Contract Law Deskbook/JAGS-ADK-82-1
AD B064947	Contract Law, Fiscal Law Deskbook/JAGS-ADK-82-2

Those ordering publications are reminded that they are for government use only.

2. Regulations and Pamphlets

Number	*Title*	*Change*	*Date*
AR-135-91	Service Obligations, Methods of Fulfillment, Participation Requirements, and Enforcement Procedures	10	1 May 83
AR 135-100	Appointment of Commissioned and Warrant Officers of the Army	16	1 May 83

Number	*Title*	*Change*	*Date*
AR 135-155	Promotion of Commissioned Officers and Warrant Officers Other Than General Officers	12	1 May 83
AR 135-200	Active Duty for Training and Annual Training of Individual Members	1	15 Apr 83
AR 135-210	Order to Active Duty as Individuals During Peacetime	1	1 May 83
AR 140-1	Mission, Organization and Training	1	1 Apr 83
AR 140-158	Enlisted Personnel Classification, Promotion, and Reduction	10	1 Mar 83
AR 140-158	Enlisted Personnel Classification, Promotion and Reduction	11	1 May 83
AR 600-85	Alcohol and Drug Abuse Prevention and Control Program	IO3	29 Apr 83
AR 635-100	Officer Personnel	IO3	15 Apr 83
AR 710-2	Supply Policy Below the Wholesale Level	IO2	15 Mar 83
AR 735-11	Accounting for Lost, Damaged, or Destroyed Property	IO3	15 Apr 83
DA Pam 27-10	The Trial Counsel and the Defense Counsel	1	1 Mar 83
DA Pam 310-1	Consolidated Index of Army Publications and Blank Forms		1 Mar 83

3. Articles

Anthony, *Thirteen Years Later*: Chenery *Revisited*, 18 New Eng. L. Rev. 55 (1982-83).

Brown, *The Good Faith Exception to the Exclusionary Rule*, 23 So. Tex. L.J. 654 (1982).

Chartrand, *Can Federal Employees Be Plaintiffs?*, 30 Fed. B. News & J. 80 (1983).

Crump, *The "Tainted Evidence" Rationale: Does It Really Support the Exclusionary Rule?*, 23 So. Tex. L.J. 687 (1982).

DiGenova & Toensing, *Bringing Sanity to the Insanity Defense*, 69 A.B.A.J. 466 (1983).

Hersbergen, *Contracts of Adhesion Under the Louisiana Civil Code*, 43 La. L. Rev. 1 (1982).

Hoover, *Due Process Immunities in Military Law*, The Reporter, Feb. 1983, at 2.

Kaufman, *Attorney Incompetence: A Plea for Reform*, 69 A.B.A.J. 308 (1983).

Madden & Allard, *The Future of Damage Actions Against Government Officials*, 30 Fed. B. News & J. 77 (1983).

Morris, *The Criminal Responsibility of the Mentally Ill*, 33 Syracuse L. Rev. 477 (1982).

Murphy, *Vicarious Disqualification of Government Lawyers*, 69 A.B.A.J. 299 (1983).

Murray, *The Role of Analogy in Legal Reasoning*, 29 U.C.L.A. L. Rev. 833 (1982).

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