

Commence?

National Oceanic and Atmospheric Administration

Office of the General Counsel

14th & Constitution Avenue, N.W., Rm 5814A

Tel: 482-4080 Fax: 482-4893



Julie - Please look into this and

get back to Monica. She's

Ran Klain's wife and a good friend of mine.

Elena

Date: 7/16/98

To: Elena Kagan 456-2878 (Fax)

From: Monica Medina

Number of pages: 4
(Including cover sheet)

Call me who to call?
Thanks

Comment: I am sending over a very puzzling document. Did you all agree to let the Public Health Service get a legal waiver from civil rights laws? Now our uniformed service (a.k.a. the NOAA Corps) wants the same exemption. The military gets one for national security reasons. The Public Health Service's rationale

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Seems very slim. How does this square with the President's initiative on race? Will freedom from civil rights laws really "revitalize" the Public Health Service? We have a real problem of equity here because of this precedent. I need some more background. HELP! Can you



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

MAY 21 1997

The Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20505

Dear Mr. Speaker:

We wish to offer an Administration legislative proposal for revitalizing the Public Health Service. The proposal excludes the budget provisions sent separately to the Congress.

The enclosed proposal addresses two important needs. First, for each program area, it recommends the reauthorization of a large number of expired or expiring Department programs that are important for promoting the health of the American public. Second, it recommends a number of consolidations and improvements to enhance the effectiveness and efficiency of public health programs.

With this request, for each public health agency within the Department, we are providing a detailed list of the program authorities for which we are seeking reauthorization. We are also providing descriptions of our specific recommendations for program consolidations and improvements. In addition, the Administration will be providing separately some specific legislative actions regarding programs that receive funding through the Superfund authority, including some in my Department.

We urge the Congress to give its prompt and favorable consideration to this proposal.

We are advised by the Office of Management and Budget that enactment of this proposal would be in accord with the program of the President.

Sincerely,

A handwritten signature in dark ink, appearing to read "Donna E. Shalala".
Donna E. Shalala

Enclosure

Background Re HHS + Exemption from Title VII for Public Health Service

OSG-98/01

2/19/97

OFFICE OF PUBLIC HEALTH AND SCIENCE FISCAL YEAR 1998 LEGISLATIVE PROPOSAL

Seek Comparable EEO Treatment

Place PHS commissioned officers under the same EEO Anti-discrimination Laws as members of the Armed Forces.

Current Law: Section 221 of the PHS Act (42 U.S.C. 213), addressing the rights and privileges of Commissioned Corps Officers has no provision pertaining to applicability of the Armed Forces standard for commissioned corps officers. However, by longstanding practice, the Commissioned Corps has followed the Armed Forces model with regard to employment discrimination complaints.

Five Federal courts have addressed the issue of whether Public Health Service Commissioned Officers are subject to the provisions of Title VII of the Civil Rights Act (42 U.S.C. 2000e-16.) in the same manner as Federal civil service employees. Three of the courts have concluded that PHS officers are not covered by Title VII while two courts have reached the opposite conclusion. Since 1996, the Solicitor General (reversing longstanding practice) has determined to no longer contest court decisions that place PHS Commissioned Officers under the provisions of Title VII pertaining to other civil service employees. The effect of this decision is that claims regarding possible discrimination on the basis of race, gender, disability, national origin, and religion are now being processed using EEO procedures applicable to Federal civil service employees rather than procedures applicable to members of the Uniformed Services.

Proposal: Deem active service of Commissioned Corps Officers active military service in the Armed Forces of the United States for purposes of all laws related to discrimination on the basis of race, color, sex, ethnic origin, and religion.

Permit officers to pursue discrimination claims, as has been the past practice, under regulations of the Department of Health and Human Services pursuant to anti-discrimination laws governing the Armed Forces rather than permitting them to file claims under Title VII procedures that pertain to Federal civil service employees.

Rationale: The reversal of longstanding practice of the Solicitor General could expose the Commissioned Corps to unintended and anomalous consequences. It has been a longstanding effort, on the part of the Department of Health and Human Services, to support treatment of Commissioned Corps members consistent with the rules that apply to the Uniformed Services (Armed Forces) generally. Like the other Uniformed Services, the PHS Commissioned Corps has had an administrative policy in place prohibiting discrimination on the basis of race, color, national origin, gender, and religion. However, blurring the distinction between PHS Commissioned Corps and civil service by considering officers as employees for Title VII

purposes undercuts the viability of the PHS Commissioned Corps as a Uniformed Services within the Department. This proposal continues to advance this consistent treatment.

Prior to appointment in the commissioned corps, individuals must meet physical and mental standards that are based on the standards employed by the Armed Forces. These standards are in keeping with the expectation that the Corps is ready, in emergencies, to be called up by the President in a fashion analogous to the armed forces in order to provide health services where needed. In addition, fitness for duty determinations for active duty PHS officers are conducted under the same law (10 U.S.C. Chapter 61) and procedures that apply to Armed Forces members. If an officer is separated from active duty because he/she is determined to be unfit for duty due to physical or mental impairment, the officer receives compensation (severance pay or disability retired pay) under the same law that governs the Armed Forces (10 U.S.C. Chapter 61). PHS officers, like Armed Forces members, are subject to reassignment at any time to meet the needs of PHS, and the corps may be made a military service by Executive Order of the President in time of war or emergency involving the national defense.

Cost: None to the Federal Government

Personnel Requirements: None

Effective Date: Upon enactment

so they are
not now a
military service.

Public Health Service

waiver from CR law s (?)

expand to all other "corps" (?)

Military exemption from Title VII

national security reasons ⊗

beyond area of expertise

Ellen Vargas

Tom Perez (@ DoJ)

Special Asst. to Bill Lee

Employment

202/514-1638

someone in SGT's off ☞

* Smithsonian
* Fed. Reserve Board

Unif. military exempt from Title VII
why?

- + EEOC has always taken position that covered
- + Harriet Rabb (HHS) thinks they are covered

Public Health Service:

Policy argument — they can be called up
and/or mobilized.

What is the latest from HHS(?)

New Surgeon General (Satcher)

PHS refusing

~~Refused~~ to take complaints under Title VII

Are commissioned public service officers
exempt from Title VII.

Not employed by military department

DOJ's position that

Drew Day

Cases

(5)

Salazar v. HHS 787 F.2d 527 (Wt. Cir. 1986)

Milbert v. Corp 830 354 (D.C. Cir. 1987)

Carlson v. Shale

C O V E R

FAX

S H E E T

To: Julie Fernandez
Fax #: 456-5581
Subject:
Date: July 28, 1998
Pages: 8, including this cover sheet.

COMMENTS:

From the desk of...

Benita Lucy
Confidential Assistant to Legal Counsel
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
1801 L STREET, NW
WASHINGTON, D.C. 20507

202/663-7197
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Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

July 26, 1995

Harriet S. Rabb, Esq.
General Counsel
Department of Health and Human Services
Washington, D.C. 20201

Re: Carlson v. Shalala, No. AW-94-1928
(D. Md. Mar. 17, 1995)

Dear Harriet:

In a letter to Robert Kopp of Civil Division's appellate staff, dated April 28, 1995, you recommended that I authorize an appeal in this case of the district court's decision that Title VII of the Civil Rights Act of 1964 covers commissioned officers of the Public Health Service (PHS). Although I recognize that the Department of Health and Human Services has long maintained that commissioned PHS officers are not covered by Title VII, I have concluded that we can no longer defend that position in court, and have therefore decided that no appeal on that ground should be authorized in this case. I know that staff lawyers in the Civil Division have communicated this decision to your staff, but I thought that I should also explain my decision directly to you.

As your letter noted, the two courts of appeals that have considered the issue have disagreed as to whether the PHS has an exemption from Title VII analogous to the "military exception" which, several courts have found, excludes uniformed members of the armed forces from the protective reach of Title VII. Compare Salazar v. Heckler, 787 F.2d 527 (10th Cir. 1986) (extending military exception to PHS) with Milbert v. Kopp, 830 F.2d 354 (D.C. Cir. 1987) (declining to do so, in a case arising under Section 504 of the Rehabilitation Act). After fully considering the issue, I have concluded that the reasoning of Salazar is not persuasive.

The Salazar court pointed out that Title VII covers only "employees" of the federal government, and it suggested that commissioned officers of the PHS are not "employees" within the meaning of Title VII because they are excluded from the

definition of "employee" in Title 5 of the United States Code. There is no indication in Title VII, however, that Congress intended to incorporate the technical definition of "employee" found in Title 5, rather than the more generally understood meaning of that term. Members of the armed forces may well not be "employees" of the federal government under a common understanding of that term, since they are unable to leave military service at will and are subject to military law as well as military discipline, but the same cannot be said of commissioned PHS officers.

Moreover, the principal policy justifications for excluding the military from Title VII--concerns about the courts' second-guessing of military decisions, and the fact that members of the armed forces are subject to the Uniform Code of Military Justice--do not apply to the PHS. The other factors cited by Salazar--that PHS officers wear uniforms, are assigned ranks equivalent to military ranks, and receive pay tied to military pay scales--are not alone sufficient to exclude PHS officers from Title VII, given the broad reach of that remedial statute.

Two other matters are of concern to the PHS. First, you have pointed out that the President has authority to "militarize" the PHS during wartime, and by doing so can effectively convert the PHS into part of the armed services. My conclusion that PHS officers are protected by Title VII is limited to normal, peacetime operations of the PHS, and it is not intended to preclude the argument that the PHS would be covered by the military exception if the President were to mobilize the PHS as part of the armed forces.

Second, because PHS may be required to assist military units during combat it has enhanced physical fitness requirements for its commissioned officers. There may be concern that those requirements would conflict with various federal laws prohibiting discrimination against the disabled, which incorporate some of the remedies of Title VII. I believe that, if physical fitness is an important condition of service as an officer of the PHS under particular circumstances, that fact would be relevant, under handicap discrimination laws, to determining whether any discrimination has occurred and whether an accommodation would be reasonable under those circumstances. It is not, however,

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sufficient entirely to exclude PHS officers from the coverage Title VII.

Sincerely,



Drew S. Days, III
Solicitor General

cc: Frank W. Hunger
Assistant Attorney General
Civil Division
Walter E. Dellinger
Assistant Attorney General
Office of Legal Counsel
Deval L. Patrick
Assistant Attorney General
Civil Rights Division
Gilbert F. Casellas
Chairman, Equal Employment
Opportunities Commission

- JUL 16 1998

Mr. Dan J. Rondeau, Director
Office of Civil Rights
Environmental Protection Agency
Washington, D.C. 20460

Dear Mr. Rondeau:

This responds to your letter inquiring into the EEOC's position on jurisdiction under 29 CFR Part 1614 over Public Health Service Officers. As you know, the courts that have examined this issue are split on whether commissioned Public Health Service Officers are covered under EEOC Regulation 29 CFR Part 1614. Compare Salazar v. HHS, 787 F.2d 527 (10th Cir. 1986) (PHS Officers are within the military exception to 1614 and are exempt from coverage under Title VII) with Milbert v. Koop, 830 F.2d 354 (D.C. Cir. 1987) (PHS officers are covered under section 717 of Title VII, 42 U.S.C. § 2000e-16, and section 505 of the Rehabilitation Act, 29 U.S.C. 794(a)). The Commission believes that Milbert was correctly decided.

Section 717(a) of Title VII of the Civil Rights Act of 1964, 42 USC 2000e-16(a), covers employment actions within military departments, executive agencies, the United States Postal Service and Postal Rate Commission, and competitive service positions of the legislative and judicial branches. Military departments as defined by 5 USC 102 are the Departments of the Army, Navy and Air Force. As defined in 5 USC 105, an executive agency is "an Executive department, a Government corporation, and an independent establishment." While HHS would not fall into the definition of military departments, it would fall into the definition of executive agency. Therefore, PHS officers, as employees of HHS, would appear to be covered.

There is a judicially recognized exception to the coverage of section 717 for uniformed members of military departments. EEOC Regulation 29 CFR 1614.103(d)(1) incorporates this exemption for uniformed members of military departments. Exemptions and exceptions to remedial statutes like Title VII should be strictly and narrowly construed. This is especially the case where the exception is implied rather than express. Although PHS officers are uniformed, they do not come within the exception because they are not employed by a military department. While the President may "militarize" PHS officers during wartime, we see no reason to expand the exception to encompass PHS officers in peacetime.

In a letter dated July 28, 1995, the Solicitor General notified HHS of DOJ's position that commissioned officers are covered by section 717 and that DOJ would no longer defend HHS' contrary

position. The Solicitor General's letter determined that the Milbert case extending Title VII coverage to PHS officers was persuasive and that the reasoning of the Salazar decision was flawed. Further, the letter stated that the public policy reasons for excluding military from Title VII coverage, such as concerns about the court's second guessing of military decisions and the application of the Uniform Code of Military Justice to members of the armed forces, do not apply to the PHS. The Solicitor General noted that the position that PHS officers are covered under Title VII is limited to normal peacetime operations.

While we were considering your request, the Director of the Commission's Office of Federal Operations received a July 5, 1996 letter from Timothy M. White, Deputy Associate Legal Counsel, Department of Health and Human Services (HHS). In his letter, Mr. White states that they have revisited the question and will process complaints by members of the Commissioned Corps pursuant to 29 C.F.R. Part 1614. We attach a copy of Mr. White's letter.

In light of our analysis of the statutory and regulatory language, the Milbert decision, the Solicitor General's letter and the recent HHS letter, we believe that Public Health Service Officers are entitled to file complaints under 29 CFR Part 1614 and section 717. Therefore, we advise federal agencies to provide Public Health Service Officers with rights under 29 CFR Part 1614 including hearing and appeal rights. Moreover, federal agencies should not sign MOU's or agreements with HHS or PHS inconsistent with such coverage nor enter into agreements denying full rights under Title VII and other employment discrimination statutes.

Sincerely,
Nicholas M. Inzeo

Nicholas M. Inzeo
Deputy Legal Counsel

cc: Dr. Audrey F. Manley
Acting Surgeon General
Public Health Service

Timothy M. White
Deputy Associate General Counsel
Department of Health and Human Services



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Business and Administrative Law
Rm. 5362 Cohen Bldg.
330 Independence Ave., S.W.
Washington, D.C. 20201

July 5, 1996

Ms. Ronnie Blumenthal, Director
Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, NW
Washington, D.C. 20507

Dear Ms. Blumenthal:

As you know, the Department of Health and Human Services (Department or HHS) has been asserting the position that officers of the Commissioned Corps of the Public Health Service (PHS), like uniformed members of the armed services, are not "employees" for purposes of 42 U.S.C. § 2000e-16(a), and therefore are not covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, or other statutes prohibiting discrimination in federal sector employment. However, the Department has processed employment discrimination complaints brought by Commissioned Corps officers under PHS internal administrative procedures not governed by regulations promulgated by the Equal Employment Opportunity Commission (EEOC). These procedures do not afford an opportunity for a hearing before an EEOC administrative judge, nor any kind of review on appeal to the EEOC.

Several courts have considered this issue, and the Department's view has often prevailed. Recently, however, the Solicitor General notified us that he would not advocate this position in a case in which the district court had adopted this reasoning, but in which the unsuccessful plaintiff had taken an appeal to the Eleventh Circuit. Similarly, in a case pending in the District of Maryland, when the district court rejected our approach, the Solicitor General refused to authorize an interlocutory appeal. Thus, we have revisited the question, and now plan to process discrimination complaints brought by members of the Commissioned Corps pursuant to 29 C.F.R. Part 1614.

The application of EEOC regulations to complaints of discrimination by Commissioned Corps officers will probably increase the number of HHS cases referred to the EEOC for hearings, and probably also increase the number of appeals from final agency decisions to the EEOC. We look forward to working

DFU
330
7/8/96
TKC

Page 2 - Ms. Ronnie Blumenthal

with the EEOC in resolving these complaints, and welcome any comments or suggestions you may have. Please let me know if you have any concerns about our implementation of this new policy.

Sincerely,

A handwritten signature in dark ink, appearing to read "Timothy M. White". The signature is fluid and cursive, with a large initial "T" and a stylized "W".

Timothy M. White
Deputy Associate General Counsel