UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

67 M.S.P.R. 643

Docket Number CB-1205-94-0017-U-1

SENIOR EXECUTIVES ASSOCIATION, Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT, Respondent.

Date: June 1, 1995

Christopher M. Okay, Washington, D.C., for the petitioner.

Karen D. Kline, Washington, D.C., for the Office of Personnel Management.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

CHAIRMAND ERDREICH ISSUES CONCURRING OPINION

MEMBER AMADOR ISSUES DISSENTING OPINION

OPINION AND ORDER

The Senior Executives Association (SEA) has petitioned the Board under 5 U.S.C. § 1204(a)(4) and (f) (Supp. V 1993), to review the validity of three regulations: 5 C.F.R. § 317.901(c)(4) and (5) (1993), which were promulgated to implement 5 U.S.C. §§ 3395(e)(1) and (3), and 5 C.F.R. § 610.408 (1993), which was promulgated to implement 5 U.S.C. §§ 6122-26. The SEA requests that the Board declare the regulations invalid, order any agency affected by the invalidation of the regulations to cease compliance with and implementation of the regulations and order corrective action necessary to assure compliance with the order. Section 317.901(c)(4) concerns detailing career Senior Executive Service (SES) members during the moratorium on involuntary reassignments in the 120-day period following the appointment of a new agency head or a noncareer supervisor. Section 317.901(c)(5) gives agencies discretion to impose a 120-day

moratorium when an individual is detailed to the position of head of an agency or noncareer supervisor. Section 610.408 bars SES members from accumulating credit hours under an alternative work schedule.

BACKGROUND

Upon the filing of a petition by an interested person, the Board may in its discretion review any provision of a rule or regulation issued by the Office of Personnel Management (OPM or agency), 5 U.S.C. § 1204(f)(1)(B) (Supp. V 1993), and declare the provision invalid on its face if it would require any employee to commit a prohibited personnel practice, or invalidly implemented if it has required any employee to commit a prohibited personnel practice. 5 U.S.C. § 1204(f)(2) (Supp. V 1993). The Director of OPM is entitled to participate in the review. 5 U.S.C. § 1204(f)(3) (Supp. V 1993).

ANALYSIS

In response to the SEA's petition for review, OPM has raised the threshold issue of the standing of the SEA to request regulation review. Specifically, OPM contends that SEA is not an "interested person" because it is a private organization concerned with issues of career federal executives and not a statutorily recognized exclusive representative of its members. OPM also argues that while the SEA has the authority to comment on regulations in the rulemaking process, it is not an "interested person" with respect to a request for regulation review.

The term "interested person" has not been defined in the statute, 5 U.S.C. § 1204(f)(1)(B) (Supp. V 1993), or in the relevant regulations, 5 C.F.R. §§ 1203.1-1203.22. There is no requirement that an "interested person" be a statutorily recognized exclusive representative of employees. While the Board has received requests for the review of regulations from unions, *See*, *e.g., National Treasury Employees Union v. Office of Personnel Management*, 45 M.S.P.R. 432 (1990); *National Council of Field Assessment Locals v. Department of Health and Human Services, Social Security Administration*, 31 M.S.P.R. 590 (1986), it has also received requests from individuals, *See*, *e.g., Larson v. Office of Personnel Management*, 29 M.S.P.R. 317 (1985); *Johnson v. United States Customs Service, Department of the Treasury*, 31 M.S.P.R. 104 (1986), several employees, *See*, e.g., *Brooks v. Office of Personnel Management,* 59 M.S.P.R. 207 (1993), and a committee of employees, *See*, e.g., *Office of Legislative and Public Affairs Legal Defense Committee v. Bell*, 12 M.S.P.R. 143 (1982). In none of these cases did we find that the requester was not an "interested person" and therefore lacked standing to request review of a rule or regulation.

The only test for "interested person" found in the Board's case law is that an "interested person" must establish that the regulation in question is applicable to him or her. *Joseph v. Merit Systems Protection Board*, 11 M.S.P.R. 242, 243 (1982). The SEA has submitted a declaration executed by its current president under penalty of perjury that it is a professional association incorporated in 1980 with 2,979 members from all cabinet-level departments and 44 administrative and independent agencies, commissions and corporations. The declaration states that the SEA represents the interests of career SES employees of the federal government. The regulations in question are applicable to career SES appointees in the federal government. The 2,979 members of SEA are SES appointees. Accordingly, we find that the SEA is an "interested person" in this case and can petition for review of 5 C.F.R. §§ 317.901(c)(4) and (5) and 610.408.

Having resolved the issue of the standing of the petitioner, we turn to the merits of the petition for regulation review. In determining whether to exercise its discretion and review an OPM regulation and declare it invalid, the Board considers several matters. In *McDiarmid v. U.S. Fish and Wildlife Service*, 19 M.S.P.R. 347, 349 (1984), we held that:

> In determining whether to exercise this authority, the Board considers, among other things, the likelihood that a given issue will be reached in a timely fashion through ordinary channels of appeal, the availability of other equivalent remedies, the extent of the regulation's application to the Federal service, and the strength of the arguments against the validity of its implementation.

This *McDiarmid* analysis is founded upon the Board's recognition that striking down the implementation of regulations can be an extremely intrusive remedy. *In re Implementation of 5 C.F.R. Part 430 by the Social Security Administration*, 35 M.S.P.R. 146, 147 (1987). It combines aspects of class action and injunctive relief and must be judiciously applied. *Id.*

In addition, as we indicated in *In re Implementation of 5 C.F.R. Part 430*, 35 M.S.P.R. at 149, the Board may consider the ability of the petitioner to represent adequately the interests of all of the employees who could be affected by the Board's ruling. In making rulings on petitions filed under 5 U.S.C. § 1204(f), it is appropriate for the Board to take into account the same due process considerations relating to the need for adequate protection of the interests of absent individuals which underlie the adequacy of representation requirement contained in the class action provisions of the Federal Rules of Civil Procedure. *Id. Cf. Issen v. GSC Enterprises,* 508 F. Supp. 1278 (N.D. Ill. 1981). Further, the Board determines whether the regulation requires the commission of a prohibited personnel practice. In re Exceptions From Competitive Merit Plans, 9 M.S.P.R. 116 (1981). Based on the substance of the petition, we conclude that review should be denied for the reasons set forth below.

A. The Board declines to review 5 C.F.R. § 317.901(c)(4) and (5) (1993).

The first regulation being challenged, 5 C.F.R. § 317.901(c)(4) (1993), provides that in calculating the 120-day moratorium period (the period after the appointment of the head of an agency or noncareer supervisor and before which an SES career appointee may be involuntarily reassigned):

> [A]ny days, not to exceed a total of 60, during which the career appointee is serving on a detail or other temporary assignment apart from the appointee's regular position shall not be counted. Any days in excess of 60 days on one or more details or other temporary assignment shall be counted.

The second regulation in question, 5 C.F.R. § 317.901(c)(5) (1993), provides that the prohibition on involuntary reassignments:

> [M]ay be applied by an agency, at its discretion, in the case of a detail of an individual as the head of an agency or of a noncareer appointee as a supervisor, or when a noncareer appointee in a deputy position is acting as the agency head or in a vacant supervisory position. If the individual later receives a permanent appointment to the position without a break in service, the 120-day moratorium initiated by the permanent appointment shall include any days spent in the position on an acting basis.[1]

The SEA contends that 5 C.F.R. § 317.901(c)(4) and (5) conflict with 5 U.S.C. § 3395(e), which states that an SES career appointee may not be involuntarily reassigned within 120 days after the appointment of the head of the agency or of the career appointee's most immediate supervisor who is a noncareer appointee and has authority to make an initial appraisal of the SES appointee's performance. The statute explains that in calculating the period during which an involuntary reassignment of an SES career appointee cannot be made:

> [A]ny days (not to exceed a total of 60) during which such career appointee is serving pursuant to a detail or other temporary assignment apart from such appointee's regular position shall not be counted in determining the number of days that have elapsed since the appointment of the agency head or the immediate supervisor. 5 U.S.C. § 3395(e)(3).

The validity of 5 C.F.R. § 317.901(c)(4) and (5) is likely to be addressed by the Board in an appeal if an SES career employee is removed or suspended for more than 14 days for refusing an involuntary reassignment, *See* 5 U.S.C. §§ 7542, 7543, and the employee contends that the reassignment violated 5 U.S.C. § 3395(e). Thus, although the regulation applies to all SES employees, another equivalent remedy is available. *See McDiarmid v. U.S. Fish and Wildlife Service*, 19 M.S.P.R. at 349.

In order for a regulation to be found invalid on its face, it must be shown that it requires the commission of a prohibited personnel practice under 5 U.S.C. § 2302(b). *National Treasury Employees Union v. Office of Personnel Management*, 45 M.S.P.R. at 435; *Johnson v. United States Customs Service*, 31 M.S.P.R. 104, 107 (1986). The SEA alleges that 5 C.F.R. § 317.901(c)(4) and (5) would require that noncareer agency heads or supervisory employees commit the prohibited personnel practice described at 5 U.S.C. § 2302(b)(11) which prohibits taking or failing to take a personnel action in violation of a law, rule or regulation implementing or directly concerning a merit system principle. Specifically, the SEA contends that the regulation would require agency heads to violate 5 U.S.C. §§ 3131(7), (11) and (13) and 3395(e).

The SEA argues that the regulation would require the violation of section 3395(e) by authorizing the reduction of the 120-day moratorium on reassignments to less than 120 days when the career executive is given a detail of more than 60 days, or elimination of the 120-day moratorium when the detail is for 180 days. The starting point for statutory interpretation is the plain language of the statute in question. *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* The language of 5 U.S.C. § 3395 only excludes 60 days of a detail from computation of the 120-day moratorium period. As a general rule of statutory construction, the expression of one restriction or exception indicates that no other restrictions or exceptions apply. *Lisiecki v. Federal Home Loan Bank Board*, 23 M.S.P.R. 633, 643 (1984), *aff'd*, 769 F.2d 1558 (Fed. Cir. 1985). Accordingly, it appears from the language of the statute that Congress intended to exclude only the first 60 days of a detail from the 120-day moratorium.

The 120-day moratorium period, under the terms of the statute, applies only to the appointment of a new agency head or noncareer supervisor. Acting agency heads or noncareer supervisors are not officially appointed to the position in which they act. Instead, they are still attached to the official position of record. Section 317.901(c)(5) could give an SES career appointee 120 days in which to work with acting agency heads or noncareer supervisors. Thus 5 C.F.R. § 317.901(c)(5) has expanded the protection for career SES members by providing agencies the discretion to invoke the moratorium period when an acting agency head or noncareer supervisor is appointed. Therefore, the regulations, 5 C.F.R. § 317.901(c)(4) and (5), do not appear to violate the statute.

In addition to the language of the statute, the Board may examine the statements of members of Congress interpreting a statute. *See Gergick v. General Services Administration*, 49 M.S.P.R. 384, 393 (1991). Representative Gerry Sikorski commented on the floor that some agencies

arbitrarily circumvent the 120-day rule "by allowing a career executive to be detailed during the 120 days then transferred without having had the opportunity to get acquainted with the new political appointee." 137 Cong. Rec. H9631 (daily ed. Novemberÿ12, 1991) (statement of Rep. Sikorski). Representative Constance Morella commented on the floor that the statute:

> would limit the reassignment of a career SES employee by a new noncareer supervisor or agency head during the 120-day trial period. However, in order to retain management flexibility, if the SES employee is detailed out of the position, the 120-day time period does not start [until after the 60 days of the detail].

137 Cong. Rec. H9632 (daily ed. Novemberÿ12, 1991) (statement of Rep. Morella). These statements show that Congress was aware that agencies had tried to circumvent the 120-day moratorium and chose to exclude only the first 60 days of a detail from the moratorium period. Accordingly, we conclude that 5 C.F.R. § 317.901(c)(4) and (5) do not violate 5 U.S.C. § 3395(e).

The SEA argues further that 5 C.F.R. § 317.901(c)(4) and (5) would violate (1) the protections afforded by 5 U.S.C §§ 3131(7), (11) and (13)[3] against arbitrary actions, (2) the protections afforded by the merit system principles at 5 U.S.C. § 2301(b)(8)(A), against arbitrary action, personal favoritism, or coercion for partisan political purposes, and (3) the prohibition in 5 U.S.C. § 2302(b)(2) against personnel actions taken on rumor, speculation or assumptions.[4] The SEA admits that the regulations do not mandate the commission of a prohibited personnel practice. It argues, however, that, by authorizing agency action that is in conflict with §§ 3131 and 3395(e) and the merit principles, the regulation permits politically motivated details and reassignments without giving the career executive the statutorily mandated 120-day period in which to work with the new agency head or supervisor.

An examination of the regulations reveals that they do not require an employee to commit a prohibited personnel practice in violation 5 U.S.C. § 2302(b). A regulation would require the commission of a prohibited personnel practice if it is reasonably foreseeable that it will result in such a practice. *Wells v. Harris*, 1 M.S.P.R. 208, 246 (1979). The mere possibility that the regulations may be implemented in such a way as to constitute a prohibited personnel practice does not make such implementation reasonably foreseeable. *In re Exceptions from Competitive Merit Plans*, 9 M.S.P.R. at 119.

Under the regulations, all career SES members receive the benefit of the 120-day moratorium. Further, 5 U.S.C. § 2302(b)(2) provides increased protection for career SES members. Accordingly, the Board finds that the petitioner's arguments against the validity of 5 C.F.R. § 17.901(c)(4) and (5)

and their implementation are not strong enough to show that a prohibited personnel practice has occurred or is likely to occur. Therefore, the last criterion of the *McDiarmid* test, the strength of the arguments against validity, is not met and review is accordingly denied. *McDiarmid v. U.S. Fish and Wildlife Service*, 19 M.S.P.R. at 349.

B. The Board declines to review 5 C.F.R. § 610.408 (1993).

The SEA also requests review of 5 C.F.R. § 610.408. The regulation states that:

> Members of the Senior Executive Service (SES) may not accumulate credit hours under an alternative work schedule. Any credit hours accumulated in the SES prior to Decemberÿ1, 1993, must be used within 6 months of that date.

The SEA contends that this regulation conflicts with 5 U.S.C. § 6122(a)(2), which states that each agency may establish flexible work schedules that include designated hours during which employees may elect to arrive and depart for the purpose of accumulating credit hours to reduce the length of the workweek or another workday. The SEA contends that the regulation usurps the authority given by section 6122(b) to agency heads to restrict the accumulation of credit hours or to exclude employees from accumulating credit hours. The SEA alleges that requiring that SES employees be charged leave for any absences and subjecting them to disciplinary action if the leave is not charged violates 5 U.S.C. § 6122.

The SEA also contends that 5 C.F.R. § 610.408 (1993), by authorizing violation of 5 U.S.C. § 6122, would require employees of OPM and supervisory employees of various agencies to commit the prohibited personnel practice set out in 5 U.S.C. § 2302(b)(11) of taking or failing to take personnel actions in violation of a law, rule or regulation implementing merit system principles. The SEA apparently contends that 5 U.S.C. § 6122 implements or directly concerns the merit system principles found at 5 U.S.C. § 2301(b)(3), which provides for equal pay for equal work and 5 U.S.C. § 2301(b)(5), which requires that the federal work force be used efficiently and effectively.[2]

Applying the *McDiarmid* analysis, we find that the validity of 5 C.F.R. § 610.408 is not likely to be addressed by the Board in an appeal. Only if an SES career employee is removed or suspended for more than 14 days for attempting to accumulate credit hours or for not using credit hours accumulated prior to December 1, 1993, will the SES member be able to appeal to the Board. *See* 5 U.S.C. §§ 7542, 7543. Nor are other equivalent remedies available. Thus, the first two *McDiarmid* criteria, the likelihood that an issue will be reached through ordinary channels of appeal and the availability of other equivalent remedies are met. The third criterion, the

extent of the regulation's application to the federal service, is also met because the regulation applies to members of the SES.

We turn now to the final *McDiarmid* criterion, the strength of SEA's arguments. SEA has asserted that 5 C.F.R. § 610.408 on its face violates 5 U.S.C. § 6122. Subsection 6122 (a) provides that an agency may establish flexible work schedule programs, including the use of credit hours, consistent with the provisions of the subchapter. In addition, subsection 6122 (b) provides that the head of an agency may restrict employees' arrival and departure times, restrict the use of credit hours, or exclude any employee or group from the program if the agency head determines that an organization is being substantially disrupted by the program or if an organization is incurring additional costs because of the program. Thus SEA argues that this statute authorizes agency heads alone, and not OPM, to exclude groups of employees from accumulating credit hours.

This argument ignores the language of 2 other sections of this statute, 5 U.S.C. §§ 6126(a) and 6133. Notwithstanding an agency's authority under 5 U.S.C. § 6122, OPM has authority to prescribe any limitation on the flexible schedule. 5 U.S.C. § 6126(a). Further, OPM is authorized to prescribe regulations necessary for the implementation of the statute, 5 U.S.C. § 6133(a), and is required to provide assistance to agencies in establishing flexible schedules, particularly insofar as the program may affect the efficiency of Government operations. 5 U.S.C. § 6133(b)(2)(A). Accordingly, an agency's authority to establish a flexible schedule program is subject to the requirements in subchapter II of chapter 61 and to OPM's implementing regulations.

It is clear that an agency head's authority under section 6122 does not preempt OPM's authority to regulate programs established under subchapter II of chapter 61. Therefore, there is no merit to the claim that OPM has exceeded its statutory authority to regulate programs established under subchapter II of chapter 61 by promulgating and implementing 5 C.F.R. § 610.408, or that OPM has violated 5 U.S.C. § 6122. Because we have concluded that 5 C.F.R. § 610.408 does not violate 5 U.S.C. § 6122, we need not decide whether SEA is correct in contending that section 6122 implements or directly concerns the merit systems principles set forth at 5 U.S.C. § 2301(b)(3) and (5).

Nor is it reasonably foreseeable that 5 C.F.R. § 610.408 will result in the commission of a prohibited personnel practice. The SEA alleges that prohibiting SES members from using credit hours will inevitably result in federal employees taking disciplinary actions against SES member because they have not charged their absences to annual leave. We find, however, that it is not inevitable that disciplinary actions will be taken against SES members because of the prohibition on the use of credit hours. Instead,

what is more likely is that agencies will halt the use of credit hours for SES members and that SES members will then charge their absences to leave. Thus, only 3 of the 4 *McDiarmid* criteria have been met. Accordingly, review of the validity of 5 C.F.R. § 610.408 will not be granted.

In conclusion, the petitioner's request for review of the regulations is hereby DENIED. This is the final decision of the Board.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

CONCURRING OPINION OF BENJAMIN L. ERDREICH, CHAIRMAN

In criticizing the holding of the majority, the Member in a footnote in his dissent alleges Board conduct in contravention of 5 C.F.R. § 317.901(c)(4). Nothing in the record before us, or in any case before the Board or any other tribunal, supports this statement. Clearly this extrajudicial invention by the Member breeches the norm of conduct for an impartial adjudicator.

"The function of a judge is to determine controversies between litigants..." 48A C.J.S. Judges § 56, p. 632. An adjudicator has the duty to pass on questions presented to him in accordance with established procedure and not, of his own volition and initiative, as the Member here attempts, to issue edicts based on matters not before him, not raised within the record, and of which he has limited or no knowledge.

Our statutory authority proscribes the Board from rendering advisory opinions, and this Board, with the Member concurring, has strongly admonished our administrative judges from issuing findings or attempting to comment on matters outside the purview of the issues brought before the judge:

> [T]he chief administrative judge lacked the authority to further comment on those matters [which arose in a prior litigation]....[F]or the chief administrative judge to comment and make findings on issues over which he lacked jurisdiction may be deemed a prohibited advisory opinion [citations omitted].[6]

Yet here the Member disregards his own admonition, as most recently articulated in *McLaughlin*, which governs the Board and our administrative judges. Our judges and this Board are to determine questions of fact and law which arise in the record before us. The Member, contrary to our statutory authority and established norms of judicial conduct, unfortunately chooses to do otherwise.

DISSENTING OPINION OF MEMBER ANADOR

I dissent. The Board should exercise its discretion to review 5 C.F.R. § 317.901(c)(4) and find that it is invalid on its face.

The majority correctly refers to *McDiarmid v. U.S. Fish and Wildlife Service*, 19 M.S.P.R. 347, review dismissed, 23 M.S.P.R. 420 (1984), for the factors to be considered by the Board in deciding whether to exercise its discretionary authority. However, its application of these factors to this case is seriously flawed. The first *McDiarmid* factor is the "likelihood that a given issue will be reached in a timely fashion through ordinary channels of appeal." The majority declares, without any supporting argumentation or evidence, that the validity of 5 C.F.R. § 317.901(c)(4) is likely to be addressed if a Senior Executive Service (SES) employee is removed or suspended for more than 14 days for refusing a reassignment. This is directly contrary to the position the majority takes with respect to 5 C.F.R. § 610.408; yet, the majority provides no explanation as to why the former regulation is likely to be addressed in an adverse action, but the latter is not.

According to the majority, the validity of 5 C.F.R. § 317.901(c)(4) can only be addressed in connection with an adverse action appeal. This position would require an SES employee to deliberately court an adverse action by intentionally disobeying an agency's order of reassignment. An agency is specifically authorized to remove an SES employee for "failure to accept a directed reassignment." 5 U.S.C. § 7543. Is it reasonable to expect an SES employee to jeopardize his/her career to challenge this regulation? The answer is, of course, no. The practical effect of the majority's decision will be that the regulation is rendered immune to any challenge.

The majority opinion is similarly cavalier as to the second *McDiarmid* factor, i.e., the availability of other equivalent remedies. The majority apparently reasons that, since an SES employee can challenge the regulation if and when he/she is subjected to an adverse action, there is another equivalent remedy available. That is absurd. The remedy of allowing the Senior Executives Association (SEA) to challenge the validity of 5 C.F.R. § 317.901(c)(4) is not in any way "equivalent" to the remedy of allowing an SES employee to challenge the validity of the regulation after he/she has been subjected to an adverse action for disobeying an order.

The third *McDiarmid* factor is "the extent of the regulation's application to the Federal service." Since this regulation applies to all SES employees, the extent of its application is government wide.

The final *McDiarmid* factor is the "strength of the arguments against the validity of [the regulation's] implementation." I find the SEA's arguments in this regard to be quite persuasive. A regulation is invalid on its face if it would require an employee to commit a prohibited personnel practice if any agency implemented the regulation. 5 C.F.R. § 1203.2 A regulation "would require" a prohibited personnel practice if it is reasonably foreseeable that it will result in such a practice. *Wells v. Harris*, 1 M.S.P.R. 208, 246-47 (1979), modified on other grounds, *Gende v. Department of Justice*, 23 M.S.P.R. 604 (1984).

The SEA argues that 5 C.F.R. § 317.901(c)(4) "would require" noncareer supervisory employees or agency heads to commit the prohibited personnel practice set forth at 5 U.S.C. § 2302(b)(11) because it authorizes the violation of 5 U.S.C. § 3395(e) and 5 U.S.C. 3131(7), (11), and (13). I agree.

There should be no doubt that a detail, transfer, or reassignment is a personnel action. It is a prohibited personnel practice to take a personnel action if doing so violates any law, rule, or regulation implementing or directly concerning the merit system principles contained in 5 U.S.C. § 2301. One of those principles is that employees should be protected against arbitrary action, personal favoritism, or coercion for partisan political purposes. 5 U.S.C. § 2301(b)(8)(A).

Thus, the central issue in this case is whether the regulation in question is violative of 5 U.S.C. § 3395(e)(3). To decide that issue requires an analysis of what § 3395(e)(3) means when it states, "For the purpose of applying paragraph (1) to a career appointee, any days (not to exceed a total of 60) during which such career appointee is serving pursuant to a detail ... shall not be counted in determining the number of days that have elapsed ...."

The Office of Personnel Management (OPM) argues that the statute is to be read literally, meaning that, if an agency head were to detail an SES employee to another position for 180 days or more, the executive would have no opportunity to experience the 120-day "get-acquainted" period. OPM admits that the legislative history of the Civil Service Reform Act (CSRA) states that the purpose of the 120-day moratorium provision was to protect career SES employees from "'peremptory ... reassignment during periods of supervisory transition.'" However, OPM notes that the CSRA did not place limits on details during the moratorium. AF, Tab 3, at 10 (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 77 (1978)). OPM further argues that the legislative history of § 3395(e)(3), which was enacted as part of the SES Improvements Act in 1991, shows that there was a desire to balance the need to prohibit details to circumvent the 120-day moratorium with the need to allow agencies management flexibility. OPM opines that the plain language of the provision allows 60 days of an SES detail to elapse before the 120-day moratorium on reassignments begins to run, and that it does not prohibit a detail of more than 60 days. OPM, citing only to comments of Representative Morella, also contends that it is unnecessary to look at the legislative history because of the clarity of the statute, but that in any event said history supports this interpretation.

However, OPM overlooks three elementary principles of statutory construction. First, the Board has held that the Board may consider legislative history even where the language of the statute is not ambiguous. *See Burrough v. Tennessee Valley Authority*, 43 M.S.P.R. 117, 120 n.3 (1990); *Hanson v. Office of Personnel Management*, 33 M.S.P.R. 581, 589, aff'd, 833 F.2d 1568 (Fed. Cir. 1987). Second, an absurd construction of a statute is to be avoided if at all possible. The Board has stated in this regard that even when the plain meaning of a statute "'did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' the [Supreme] Court has followed that purpose, rather than the literal words.'" *Parker v. Defense Logistics Agency*, 1 M.S.P.R. 505, 525 (1980) (quoting *United States v. American Trucking Association, Inc.*, 310 U.S. 534 1940)). The third rule is that "in determining legislative intent, considerable weight must be given to the evils that the legislation was intended to cure and the intended remedy." *Alvarez v. Department of Veterans Affairs*, 49 M.S.P.R. 682, 685 (1991).

OPM's interpretation would lead to an absurd, or at least unreasonable, result since it would facilitate the perpetration of the evil the legislation was intended to cure. OPM acknowledges that the purpose of § 3395(e)(3) is to prevent circumvention of the 120-day moratorium on involuntary SES reassignments. Indeed, this conclusion is inescapable. In this regard, Representative Sikorski's comments on the House floor could not be clearer. He stated:

> "To ensure an effective get-acquainted period, a career executive should be allowed 120 days to work with [his] immediate noncareer supervisor who has the responsibility for appraising [his] performance under ... Title 5.
>
> In addition, the 120-day rule is circumvented arbitrarily by some agencies by allowing a career executive to be detailed during the 120 days then transferred without having had the opportunity to get acquainted with the new political appointee."

AF, Tab 1 at 12 (quoting 137 Cong. Rec. H9631-32 (daily ed. Nov. 21 1991)).

Thus, the purpose of the statutory provision, as so clearly explained in the legislative history, was to prevent the circumvention of the 120-day moratorium by the use of details. Yet, OPM's interpretation would merely delay a circumvention for a period of 60 days. This is directly contrary to the spirit of the legislation and is therefore properly characterized as an absurd result. Why would Congress enact a remedial provision which could so easily be rendered a nullity? The better interpretation is that Congress chose to remedy the evil of circumvention of the 120-day moratorium by limiting agencies' ability to detail SES employees during the transition period, i.e., any detail must not exceed 60 days' duration. This interpretation provides the desired balance between the need for management flexibility and the need to prevent circumvention of the 120-day moratorium.

I further believe that the SEA has shown that § 3395(e) directly concerns the merit system principle set forth at 5 U.S.C. 2301(b)(8)(A), which provides that employees should be protected from arbitrary action, personal favoritism, or coercion for partisan political purposes. Under OPM's regulation, an incoming political appointee may

arbitrarily determine that an executive's service for a previous administration makes that executive unreliable or politically incompatible with the new administration. Thus, the political appointee can immediately bring in new "politically friendly" executives by simply detailing the incumbent executive for 180 days and then reassigning him/her. This would eliminate the 120-day "get-acquainted" period and would also create an intimidating effect on the other SES executives within that agency. Thus, following OPM's interpretation allows arbitrary actions to be taken against SES employees for partisan political purposes.

OPM further argues that it is not reasonably foreseeable that implementation of 5 C.F.R. § 317.901(c)(4) would result in a prohibited personnel practice because of the protective effect of its Operations Handbook for the SES, FPM Supplement 920-1, section S5-8b(3). This is laughable.[7] That section provides "that details should not be used to circumvent the 120-day moratorium and that any detail during this time 'should be made judiciously and only when there is a clear, bona-fide need for the individual to serve in the position.'" AF, Tab 3 at 13. Even assuming that an agency were to consider OPM's Operations Handbook, it is obvious that its provisions do not carry the force of regulation. The provisions of the handbook are not mandatory, but precatory, and, as OPM admits, the Handbook is only scheduled to be "provisionally" retained until December 1994. AF, Tab 3 at 13 n.8.

The SEA is correct in arguing that OPM's regulation "would require" the commission of a prohibited personnel practice in that it authorizes a violation of 5 U.S.C. 3131(7), (11), and (13) which provides that the Senior Executive Service is to be administered so as to protect executives from arbitrary or capricious actions, ensure compliance with all applicable civil service laws, and provide for an executive system guided by the public interest and free from improper political interference.

Finally, I agree that the Board should not choose to review the other regulations challenged by the SEA.

1 When In re Implementation of 5 C.F.R. Part 430 was issued, the statute authorizing the Board to review OPM regulations was identical to the current statute, but was codified at 5 U.S.C. § 1205(e).

2 The SEA acknowledges that 5 C.F.R. § 317.901(c)(5) may not apply to senior executives but states that it "appears in a regulation aimed at implementing a statute that provides protection to career executives." SEA Request for Board Review, n.12 at 13-14.

3 Title 5 U.S.C. § 3131 provides that the Senior Executive Service must be administered so as to:

> (7) protect senior executives from arbitrary or capricious actions; . . .
>
> (11) ensure compliance with all applicable civil service laws, rules, and regulations, including those related to equal employment opportunity, political activity, and conflicts of interest;
>
> . . ..
>
> (13) provide for an executive system which is guided by the public interest and free from improper political interference; . . ..

4 Title 5 U.S.C. § 2302(b) provides that:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not with respect to such authority -- . . .
>
> (2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of --
>
> (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
>
> (B) an evaluation of the character, loyalty, or suitability of such individual; . . ..

5 The SEA requests that the Board take administrative notice of the U.S. General Accounting Office publication, ALTERNATIVE WORK SCHEDULES (GAO/GGD-94-55) (March 1994) in which GAO found that many agencies do not allow employees to use alternative work schedules, including flexible schedules with credit hour accumulation. The request is granted; however, in light of the language of the relevant statutes, the document is not determinative.

6 *McLaughlin v. O.P.M.*, 62 M.S.P.R. 536, 559 (1994).

7 Indeed, just such an event recently occurred at the Merit Systems Protection Board. Immediately following Chairman Erdreich's appointment to the Board, he executed an agreement with OPM wherein the Board's Executive Director, a career SES executive, was assigned to OPM on a 9-month, non-reimbursable detail. Upon expiration of that detail, she received a permanent appointment with OPM.