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Office of the
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Washington, D.C. 20530

4 AUG 1981

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Air Traffic Controllers Strike

This memorandum sets forth, in summary form, the legal considerations governing the punishment of Federal workers who have participated in a strike.

Under 5 U.S.C. § 7311, an "individual may not accept or hold a position in the Government of the United States if he . . . participates in a strike, or asserts the right to strike, against the Government of the United States . . . ."1/ Violation of this provision may result in a fine of $1000, a term of imprisonment not to exceed one year and a day, or both. See 18 U.S.C. § 1918.

The general prohibition on striking by federal employees was first enacted as part of an appropriations act, the Third Urgent Deficiency Appropriation Act of 1946. See Public Law No. 79-419, 60 Stat. 262, 268-69 (1946). The relevant provision, which was added on the Senate floor, barred the payment of salaries or wages "to any person who engages in a strike against the Government of the United States . . . ," and carried a penalty of one year imprisonment, a $1,000 fine, or both. In 1955, the prohibition was codified in a form substantially identical to the current provisions of 5 U.S.C. § 7311 and 18 U.S.C. § 1918. See Public Law No. 84-330, 69 Stat. 624 (1955).

As the relevant committee reports suggest, see H.R. 1152, 84th Cong., 1st Sess. (1955); S. Rep. No. 1256, 84th Cong.,

1/ This provision has been held constitutional insofar as it conditions federal employment on an agreement not to strike, see United Federation of Postal Clerks v. Blount, 325 F.Supp. 875 (D.D.C.), aff'd, 404 U.S. 802 (1971), but invalidated insofar as it penalizes mere assertions of the right to strike, National Ass'n of Letter Carriers v. Blount, 305 F Supp. 346 (D.D.C. 1969), appeal dismissed, 400 U.S. 801 (1971).

1st Sess. (1955), the prohibition against strikes by federal employees reflects the fact that public employees are obliged to furnish vital services to the public, and that any strike is a violation of a solemn trust. Before assuming office, federal employees 2/ are required to take an oath to the effect that they are not engaging and will not engage in strikes against the Government of the United States. As a district court has eloquently stated:

> In connection with this promise to obey the law, the Court would like to gently remind the defendants that they are in no different position than any other employee of our federal government, including each and every federal judge in this country. All of us also are under the same strictures of the above-cited federal statutes and have taken identical oaths not to violate the same or to participate in any strike against the government. Were these laws and oaths not to be honored and upheld, anarchy and chaos would inevitably result.
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> . . . 'One of the reasons for the federal statute against strikes by federal employees is that the employees are performing an essential service, for the benefit of the public, and also for the segment of the public which the particular employees serve.' In addition to the essential public services which the defendants provide, they are, I am sure, mindful of the fact that they have the lives of many thousands of people in their hands on each and every one of their working days. . . .
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> Stated in another way, government employment is a privilege which carries with it in many cases . . . awesome responsibilities. If one undertakes such responsibilities, one has a sworn obligation to fulfill them. If defendants are dissatisfied with the conditions of this undertaking, the solution, failing negotiations or persuasion, is to seek other employment, not to engage in or encourage conduct which violates the law and their sworn oaths at the expense of and possible endangerment to the lives of innocent people and the nation as a whole.

2/ The broad prohibition on strikes by federal employees applies to all employees, including employees of entities such as the Postal Service. We note in addition that the oath serves to demonstrate the employee's personal commitment, but that it is not necessary that he take such an oath in order to be forbidden to strike; the statute bars strike activity regardless of whether the oath has been administered.

Air Transport Ass'n v. PATCO, 453 F.Supp. 1287, 1289 (E.D.N.Y 1978) (citation omitted).

It is established that 5 U.S.C. § 7311 authorizes the Government to discharge an employee who participates in a strike.3/ The plain language of the statute states that, if an employee does so, he may not "hold" a position in the Government of the United States. This conclusion was reached in United States v. Professional Air Traf. Con. Org. (PATCO), 438 F.2d 79 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971). The court concluded that the Federal Aviation Administration "has the power to discipline its [striking] employees without judicial interference . . . . It is for the FAA, not the courts, to gauge the need for and the effect of disciplinary action when an unlawful work stoppage occurs." Id. at 80-81. Only if the agency's disciplinary actions were "arbitrary or capricious" would judicial intervention be appropriate. Id. at 81.

In a footnote, the court noted that there "is a substantial question whether th[e] statute must be read in a manner which would require the government to dismiss all controllers and thereby to end travel service until replacements could be trained." Id. at 82 n.3. See also id. at 85 (Waterman, J., dissenting) (expressing the view that government must dismiss all controllers). The better reading of the statute, we believe, is that selective dismissal, if neither arbitrary nor capricious, would be permissible. Under ordinary principles of prosecutorial discretion, officials in the Executive Branch generally have considerable latitude in enforcing the law, so long as their actions do not exceed constitutional limits. See Marshall v. Jerrico, 446 U.S. 238, 248-50 (1980), and cases cited. Nothing in the language or history of 5 U.S.C. § 7311 suggests that that discretion, which is rooted in constitutional principles of separation of powers, may not be exercised here.4/

3/ We are aware of no basis, however, for a conclusion that federal workers who strike forfeit any vested financial rights they may have obtained pursuant to their federal employment.

4/ For similar reasons, we believe that the statute does not bar the reemployment of workers who have participated in a strike. Cf. United States v. PATCO, supra, 438 F.2d at 80-82.

If employees are to be discharged, we believe that the ordinary procedures for removal of civil servants, see 5 U.S.C. § 7321, should be held inapplicable to strikers. The prohibition of the continued employment of strikers appears to establish a general rule that, subject to constitutional constraints, the government may (or must) discharge striking employees regardless of the statutory protections that accompany disciplinary action for other forms of misconduct, such as inadequate job performance. The history of the relevant provision of the Civil Service Reform Act, see 5 U.S.C. § 7321, contains no indication that the procedural safeguards are designed to apply in cases of strike activity by federal workers, which has always been treated as sui generis. Accordingly, we believe that the more specific provision, 5 U.S.C. § 7311, governs removal as a sanction for participating in strikes and that the generally applicable safeguards were not intended to apply to them.5/

Under the due process clause, strikers would be entitled to some form of notice and opportunity to be heard before discharge. See, e.g., Perry v. Sindermann, 408 U.S. 593 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972). To be adequate, notice need not be actual, but it must be reasonably calculated to furnish the necessary information to the employees. See Mullane v. Central Hanover Bank Trust Co., 339 U.S. 306 (1950). We believe that, for these purposes, the President's televised announcement of August 3, 1981, in which he gave forty-eight hours notice of termination, will be held to be adequate. After notice has been given, the employee must be furnished some opportunity to argue that termination is not justified (e.g., because he was not in fact participating in a strike). For these purposes, the seven-day period for reply furnished by the Civil Service Act, should be sufficient, even if the Act is not applicable to strikers, see note 5 supra. Thus, a termination notice, announcing the termination of striking

5/ Even if the safeguards do apply, minimal notice should be adequate here. The relevant provision requires "at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action." 5 U.S.C. § 7513(b)(1) (emphasis added). In the case of a strike, of course, there is such reasonable cause. 18 U.S.C. § 1918. After receiving notice, however, an employee may be entitled to seven days in which to prepare an oral or written answer to the notice. Id. at § 7513(b)(2).

employees unless such employees claim or prove that they did not participate in the strike, would satisfy both due process and any pertinent statutory requirements.

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