UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDIAN EDUCATORS FEDERATION (Local 4524 of the American Federation of Teachers, AFL-CIO) Plaintiff, v. DIRK KEMPTHORNE, Secretary, United States Department of the Interior, Defendant.	Civil Action No. 1:04CV01215 (TFH)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR ENTRY OF FINAL JUDGMENT

PRELIMINARY STATEMENT

The force and effect of the Court's Memorandum Decision in this action is sufficient to warrant entry of a final declaratory judgment without an injunction. In resolving the parties' dispositive motions, the Court has decided that the Interior Department has interpreted the statute providing an employment preference to Indians in the "Indian Office" too narrowly in applying the preference within the Bureau of Indian Affairs ("BIA") and organizational components of the BIA moved intact to other parts of the Department. The Court determined that for purposes of the preference statute, the "Indian Office" includes positions in the Interior Department outside the BIA that "primarily and directly" relate to the provision of services to Indians, and has indicated its intention of entering declaratory relief.

As framed by the Court, the sole remaining question in this action is "whether injunctive relief is appropriate under the circumstances." Order of March 31, 2008 (Dkt. No. 27). Because an injunction is available only if a plaintiff meets a heavy burden of proof that plaintiff here

cannot meet, no relief beyond a final declaratory judgment should issue in this case. As a matter of law, that judgment should be no broader than necessary to remedy the specific injury suffered by plaintiff. Because plaintiff alleged that its members have been wrongfully denied positions in two non-BIA offices – the Office of Special Trustee ("OST") and the Office of the Assistant Secretary – Indian Affairs ("AS-IA"), this Court's final declaratory judgment need only require application of the preference to jobs in AS-IA and OST that meet the test articulated by the Court. For these reasons, injunctive relief is unnecessary, and the Court should enter the appropriately tailored Proposed Order and Judgment filed herewith.

STATEMENT OF THE CASE

The Department of the Interior is a large and multi-faceted federal agency, with wide-ranging, diverse areas of responsibility undertaken by numerous entities such as the Bureau of Land Management, the U.S. Fish and Wildlife Service, the National Park Service, the U.S. Geological Survey, the Bureau of Reclamation, the Minerals Management Service, and the Office of Surface Mining, Reclamation, and Enforcement. *See* www.interior.gov. One of the many components of the Interior Department is the Bureau of Indian Affairs, which is responsible for "the benefit, care, and assistance of the Indians throughout the United States" in connection with a number of specified aspects of Indian self-government. 25 U.S.C. § 13. Two other offices within Interior which form a focus of plaintiff's papers in this case also have broad responsibilities relating to Indians: the Office of the Assistant Secretary – Indian Affairs, which makes and coordinates United States government policy in connection with Indian matters, (*see* Compendium filed with Defendants' Motion to Dismiss at 154 (filed Dec. 17, 2004) (Dkt. No. 15)), and the Office of the Special Trustee for American Indians, which oversees activity relating

to trust responsibilities towards individual Indians and Indian tribes, (Second Amended Complaint ¶ 5). *See* Plaintiff's Motion for Summary Judgment, *passim*. The membership of plaintiff in this case, a labor union, is employed in two specific units of the Department of the Interior: BIA and OST. Second Amended Complaint ¶ 4.

The statute at issue here provides an employment preference to Indians in connection with positions in the "Indian Office," a term that is not statutorily defined. 25 U.S.C. § 472. The Interior Department has construed that term with reference to a particular organizational unit within the Department, applying the preference to the BIA and entities moved intact from the BIA to other parts of the Department. Regarding that construction as too narrow, plaintiff brought this action seeking relief that would require the preference to be applied to hiring in OST, AS-IA, and "and all other positions in the Department which directly or primarily relate to the providing of services to Indians." Second Amended Complaint at 14. Plaintiff does not, however, assert that its members were wrongfully denied the benefit of the preference in applying for jobs in any offices except for OST and AS-IA. Second Amended Complaint ¶¶ 26, 31.

On cross-motions for summary judgment, the Court largely agreed with plaintiff's construction of the statute. While the Court did not construe the preference as applicable to all jobs within OST and AS-IA, the Court ruled that the preference applies to all positions within the Interior Department that directly and primarily provide services to Indians.[1] The Court did

[1] Plaintiff is inconsistent in seeking to have the preference defined as applying to positions that "directly *or* primarily" provide services to Indians and those that "directly *and* primarily" do so. The Court's ruling uses the latter formulation, which is consistent with an Office of Personnel Management issuance on which it is based. *See* 68 Fed. Reg. 71176, 71181 (Dec. 22, 2003).

not determine, however, whether injunctive relief was warranted. Rather, the Court directed the parties to brief that question. For the reasons that follow, no injunctive relief should issue and the declaratory judgment entered should be specific to the injury claimed by plaintiff here.

ARGUMENT

I. INJUNCTIVE RELIEF SHOULD NOT BE GRANTED IN THIS CASE

The record in this case does not support the award of more relief than a declaratory judgment. While the practical effect of a declaratory judgment and that of an injunction are often seen as largely the same, *see Samuels v. Mackell*, 401 U.S. 66, 73 (1971), the two types of relief are hardly identical. In particular, the standard that must be met before injunctive relief can be awarded is considerably more stringent than that applicable to declaratory relief. For that reason, the Supreme Court has said that "a district court can generally protect th[e] interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975). Because plaintiff cannot meet the standard applicable to injunctive relief, and in any event, a declaratory judgment by itself is sufficient remedy, the Court should not enter an injunction in this action. *Indian Educators Fed'n v. Kempthorne*, 2008 WL 857444, *7 (D.D.C., Apr. 1, 2008) ("'the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power.' *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243, 73 S.Ct. 236, 97 L.Ed. 291 (1952).").

A. The Equities In This Case Do Not Support Injunctive Relief.

Even though this Court determined that plaintiff was entitled to declaratory relief, the Court should reach a different conclusion as to injunctive relief. The standard for determining whether injunctive relief is warranted is considerably stricter – and not demonstrated on the record here.

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).[2] In this case, the Court summarized that standard by noting that it "has discretion to issue an injunction if it determines that a balance of the equities and hardships on both sides favors granting such relief." *Indian Educators*, 2008 WL 857444, *8. The equities here clearly do not favor plaintiff.

Fatal to any claim to the contrary is plaintiff's inability to demonstrate that declaratory relief alone is an insufficient remedy. As the Supreme Court has made clear, absent evidence to the contrary, a court should assume that government officials are likely to conform their conduct to an authoritative construction of a statute contained in a declaratory judgment even though not coupled with a coercive injunctive order. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Plaintiff brought this case to resolve the question of the preference statute's scope – a

[2] While this four-part test is commonly encountered in the context of preliminary injunction proceedings, it is equally applicable in a situation such as this one. "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987).

question now resolved by the Court's declaratory order (subject, of course, to whatever appeal might be taken). By that order, plaintiff already has received as much as it needs by way of remedy, and as much as that to which equity entitles it. Since the Court has no reason to believe that plaintiff requires any more relief – and indeed, should assume plaintiff does not – injunctive relief is unwarranted.

B. An Injunction In This Case Would Contravene the Requirements of Rule 65 of the Federal Rules of Civil Procedure.

An injunction must be "specific" and "reasonably detail[ed]." Fed. R. Civ. P. 65; *see also Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 438-39 (1976) (affirming importance of this requirement). As the Supreme Court has emphasized, "the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). Indeed, the Court recognized long ago that an order articulating "an abstract conclusion of law, not an operative command capable of 'enforcement,'" does not meet the specificity requirement applicable to injunctions. *International Longshoremen's Assn. v. Philadelphia Marine Trade Assn.*, 389 U.S. 64, 74-76 (1967). For several reasons, an injunction satisfying that requirement could not be crafted in this case.

First, the Court's decision requires the Interior Department to apply the preference to positions that meet a test defined in functional terms: jobs that "primarily and directly" relate to Indian services. *See Indian Educators*, 2008 WL 857444, *7. The Court's functional test, however, does not identify those jobs to which the preference should apply in a manner that would avoid uncertainty as Rule 65 requires. Second, the record contains nothing that would

allow the Court to create a list of those positions that satisfy this Court's test. Third, even if such a list could be created, it would be rendered ineffective should the Interior Department determine it necessary and appropriate to exercise its discretion to create, eliminate, reorganize and redefine the jobs held by members of its workforce.

The agency expressly has been given the authority to reorganize its workforce as it sees fit. *See* Reorganization Plan No. 3 of 1950, 64 Stat. 1262, as amended Pub. L. 92-22, 85 Stat. 76 (June 1, 1971). The Plan was adopted pursuant to the Reorganization Act of 1949, which provides that "[t]he President shall from time to time examine the organization of all agencies and shall determine what changes in such organization are necessary." 5 U.S.C. § 901(d) (as amended). Under that Plan, "The Secretary of the Interior may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan." Reorganization Plan § 2. The Court of Appeals for this Circuit concluded long ago that Executive Branch agencies have wide discretion to structure the jobs performed by their employees, and to change that structure in accordance with the agency's needs. Thus,

> The creation or abolition of Government jobs, within the scope of the authority given by law to supervisory officials, requires primarily a judgment as to the needs of public business. The determination of those needs plainly involves the exercise of discretion, not the performance of a ministerial duty which can be compelled by mandamus.

Adams v. Humphrey, 232 F.2d 40, 41 (D.C. Cir. 1955) (per curiam).

Therefore, any injunction complying with Rule 65 necessarily and fundamentally would interfere with the Interior Department's discretion to structure its workforce, and thus on that independent ground is unwarranted.

C. Injunctive Relief Would Circumvent the Available Remedies Congress Established for Redress of Adverse Employment Decisions.

This Court alternatively should deny injunctive relief because it would constitute an end run around the administrative remedies and judicial review available by regulation and statute to redress federal personnel grievances. For example, the Civil Service Reform Act ("CSRA"), sets forth a remedial scheme to challenge adverse federal personnel actions.[3] *See* Pub. L. 95-454, 92 Stat. 1111 et. seq. (Oct. 13, 1978) (codified in various sections of Title 5 of the United States Code); *see also Lindahl v. OPM*, 470 U.S. 768, 773 (1985). Because the CSRA creates an "integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration," the remedies provided in that statute for employees, or applicants for employment, who believe themselves aggrieved by unlawful adverse employment actions are exclusive. *United States v. Fausto*, 484 U.S. 439, 443-44 (1988); *Fornaro v. James*, 416 F.3d 63 (D.C. Cir. 2005). Thus, the avenues for an individual to challenge a non-selection for a position on account of the Indian preference are limited by the exclusivity of the CSRA.[4]

An injunction in this case, however, effectively would afford a new and additional avenue of redress for such an employment decision. Specifically, an injunction would require

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[3] Declaratory relief sets forth a general pronouncement of the law and is not position-focused like an injunction and thus does not implicate the same concerns about CSRA exclusivity.

[4] The scope of CSRA exclusivity is quite broad. Certain types of federal personnel decisions may be challenged before the Merit Systems Protection Board ("MSPB"), with review in the United States Court of Appeals for the Federal Circuit. *See Carducci v. Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983); 5 U.S.C. § 1204. Others are reviewable by the Office of Special Counsel, with limited judicial review thereafter. *See* 5 U.S.C. § 1212. Minor personnel actions under the CSRA umbrella are not reviewable either administratively or in court. *See Carducci*, 714 F.2d at 175.

the Interior Department to handle specific hiring decisions in specific ways, on pain of contempt. If an applicant for a position believed that a particular decision was made in contravention of such an order, the decision would become the subject of an injunction enforcement proceeding in this Court. Entering an injunction would provide the predicate for just the sort of proceeding that would be inconsistent with CSRA exclusivity. For that alternative and independent reason, no injunction should issue here.

II. THIS COURT SHOULD NOT REQUIRE EXTENSION OF THE INDIAN EMPLOYMENT PREFERENCE BEYOND OST AND AS-IA.

Even if the Court determines that an injunction is warranted, that injunction should be narrower than the functional test the Court articulated. *See Indian Educators*, 2008 WL 857444, *7. The scope of a remedial order may not be any broader than the scope of the injury that gave the plaintiff standing to sue in the first place. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382-83 (1992) (vacating part of injunction that was not related to plaintiff's injury). Plaintiff brought this action because, in its view, the Department had improperly failed to apply the preference to positions in two specific organizational entities: OST and AS-IA. *See* Declaration of Patrick Carr ¶¶ 6-15, attached as an exhibit to Plaintiff's Motion for Summary Judgment ("Pl. Mot.") (filed Nov. 12, 2004) (Dkt. No. 12). Plaintiff did not complain about the failure to apply the preference in any other specified office. And the Court determined that the preference applies to those positions that directly and primarily relate to the provision of services to Indians. Therefore given the requirement that the remedy be no broader than the injury, any injunction here should relate only to positions in those two offices about which plaintiff alleged injury from a failure to apply the preference, OST and AS-IA, and only to the positions in those offices that primarily and directly provide services to Indians. Indeed, for similar reasons, even

this Court's declaratory judgment should be similarly limited. *See Wycoff Co.*, 344 U.S. at 243 (requiring circumspection and the careful exercise of equitable discretion in fashioning declaratory relief).

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff injunctive relief and enter a declaratory judgment consistent with the injury allegedly suffered. An appropriate judgment is attached hereto.

Dated: May 16, 2008

Respectfully submitted,

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