

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, NW
Washington, DC 20006

and

COLLEEN M. KELLEY, National President

NATIONAL TREASURY EMPLOYEES UNION CASE NUMBER 1:03CV01339
1750 H Street, NW
Washington, DC 20006

JUDGE: Reggie B. Walton

Plaintiffs,

DECK TYPE: Administrative Agency Review

DATE STAMP: 06/19/2003

v.

UNITED STATES OFFICE OF MANAGEMENT
AND BUDGET
725 17th Street, NW
Washington, DC 20503

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

and

AUSTIN SMYTHE, Acting Director
UNITED STATES OFFICE OF MANAGEMENT
AND BUDGET
725 17th Street, NW
Washington, DC 20503

Defendants.

INTRODUCTION

Plaintiffs National Treasury Employees Union ("NTEU") and NTEU President Colleen M. Kelley challenge the legality of new revisions to Office of Management and Budget ("OMB") Circular A-76. The revised Circular conflicts in three ways with the Federal Activities Inventory Reform Act of 1998, Pub. L. 105-270, 112 Stat. 2382, at § 5(2), codified at 31 U.S.C. § 501 note

("FAIR Act"). First, the Circular directs that functions performed by federal employees may only be deemed "inherently governmental" if, among other things, they require the exercise of "substantial discretion." OMB Circular No. A-76, Att. A, at A-2 (emphasis added). The function need only involve "discretion," however, to meet the FAIR Act standard. FAIR Act, § 5(2). Second, the FAIR Act mandates that functions involving "the collection, control, or disbursement of . . . federal funds" be deemed inherently governmental. Id. at § 5(2)(B)(v). The revised Circular, however, restricts the inherently governmental designation to only those functions that "establish[] policies or procedures" for carrying out these tasks. OMB Circular A-76, Att. A, at A-2 (emphasis added). Third, the revised Circular replaces the FAIR Act challenge provision--which allows "interested parties" each year to challenge every agency designation of an activity as commercial --with a narrow right to file a single challenge; that single challenge may only be filed when an agency changes its designation of a function from inherently governmental to commercial or vice versa. Compare FAIR Act, § 3 with OMB Circular No. A-76, Att. A, at A-4.

OMB's Circular establishes binding policy for agencies of the executive branch to follow in making procurement decisions. By issuing a Circular that conflicts with the FAIR Act, OMB has

illegally trumped Congress on the sensitive issue of determining whether a function is "so intimately related to the public interest as to require performance by Federal Government employees." See FAIR Act, § 5(2)(A). If OMB is permitted to supplant the FAIR Act, private sector companies will be in a position to perform a host of federal government activities that Congress reserved for federal employee performance due to their "inherently governmental" nature. See FAIR Act, § 5(2). Moreover, federal employee unions will have been deprived of their legal right to challenge many agency decisions to expose such activities to possible performance by the private sector.

In complaining of the actions of the defendants, plaintiffs allege as follows:

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

VENUE

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff National Treasury Employees Union ("NTEU" or the "Union") is an unincorporated association having its headquarters at 1750 H Street, NW, Washington, DC 20006. Plaintiff Colleen M. Kelley is NTEU's National President.

Pursuant to Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111 (1978), codified at 5 U.S.C. §§ 7101-7135, NTEU is the exclusive bargaining representative of approximately 150,000 federal employees in 29 executive branch agencies. NTEU represents the interests of these employees by, inter alia, negotiating collective bargaining agreements; arbitrating grievances under such agreements; filing unfair labor practice charges; lobbying Congress for favorable working conditions, pay, and benefits; and litigating employees' collective and individual rights in federal courts. A critical aspect of the Union's routine representational activities is pursuing challenges and appeals filed by the NTEU National President under Section 3 of the FAIR Act. NTEU brings this action on behalf of itself and its members.

4. Austin Smythe is the Executive Associate Director of OMB. Because the OMB Director position is currently vacant, Mr. Smythe is serving as the Acting Director. As Acting Director, Mr. Smythe is the official ultimately in charge of ensuring that OMB carries out its mission. He is being sued in his official capacity. OMB's responsibilities include overseeing and coordinating the Administration's procurement policies, such as OMB Circular A-76. OMB issued the revised Circular A-76 that is the subject of plaintiffs' lawsuit.

STATEMENT OF CLAIMS

5. The FAIR Act requires federal executive branch agencies to compile annual inventories of functions performed by federal government sources that are not "inherently governmental." See FAIR Act, § 2. These functions are commonly referred to as "commercial." While commercial functions may be performed by private sector sources, inherently governmental functions are reserved for federal employees. Section 5(2) of the FAIR Act contains a definition of inherently governmental functions binding on all federal executive branch agencies.

6. The agencies' inventories of commercial functions must be completed by the end of the third quarter of each fiscal year. See FAIR Act § 2(a). Thus, agencies have already compiled, or are deep into the process of compiling, their inventories for this fiscal year.

7. Once an agency's inventory is published, interested parties, including heads of unions, have the right to file challenges with the agency alleging that it has improperly classified as "commercial" a function that is really "inherently governmental." See FAIR Act, § 3. If the challenge is denied, interested parties may file an appeal of the denial with the head of the agency. See FAIR Act, § 3(e).

8. Every year that the FAIR Act has been in effect, NTEU has pursued challenges to improper agency designations of

government functions as commercial. It has also pursued appeals of agency denials of the challenges every year. NTEU has already begun its preparations for pursuing challenges and appeals this year.

9. OMB's Circular A-76 provides mandatory directions to executive branch agencies in determining whether particular functions should be performed by federal government personnel or contracted out to the private sector. As part of these directions, the Circular provides compulsory instructions to agencies on compiling their FAIR Act inventories.

10. On November 19, 2002, OMB published notice in the Federal Register that it was proposing revisions to its Circular A-76. 67 Fed. Reg. 69769. It made its proposed revised Circular available on its website, and invited interested parties to submit comments by December 19, 2002. NTEU submitted comments by the deadline.

11. On May 29, 2003, OMB published a second notice in the Federal Register stating that its revisions to Circular A-76 are now final. 68 Fed. Reg. 32134-32142. The revised Circular took effect immediately and applies to all executive departments, as defined in 5 U.S.C. § 101, and independent establishments, as defined in 5 U.S.C. § 104 (referred to as "agencies"). See OMB Circular A-76, at 2-3.

12. OMB's revised Circular A-76 adopts a definition of inherently governmental functions that is substantially narrower than the definition contained in the FAIR Act. See OMB Circular A-76, Attachment A, at A-2 to A-3. Whereas the FAIR Act states that a function is inherently governmental if, among other things, it requires the exercise of "discretion," the revised Circular A-76 specifies that inherently governmental functions must require the exercise of "substantial discretion" (emphasis added).

13. The revised Circular also adopts a new, heightened standard for agencies to apply when evaluating whether certain revenue-related functions are inherently governmental. Thus, such functions may only be designated as inherently governmental if they involve "[e]xercising ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds." OMB Circular A-76, Att. A, at A-2 (emphasis added). The FAIR Act dictates a lower standard. It provides that inherently governmental functions "involve, among other things, the interpretation and execution of the laws of the United States so as . . . to exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or

intangible, of the United States, including the collection, control, or disbursement of appropriated and other federal funds." FAIR Act, § 5(s)(B)(v). Contrary to the Circular, the FAIR Act does not require that such functions involve "establishing policies or procedures."

14. As a result of these changes, agency lists of commercial activities for fiscal year 2003 will necessarily contain more functions than they did in past years, including functions that are inherently governmental under the FAIR Act standard. For example, NTEU represents thousands of Internal Revenue Service ("IRS") employees engaged in "the collection, control, or disbursement of appropriated and other federal funds," though some performing those functions are not responsible for "establishing policies or procedures." Upon information and belief, the IRS has submitted to the Department of Treasury a commercial activities list for fiscal year 2003 (for Treasury's submission to OMB) that contains nearly double the number of functions appearing on last year's list.

15. To respond to the increase in the number of functions appearing on agencies' FAIR Act commercial lists, the Union is now being required to devote substantially more time and resources to prepare for this year's challenges. These challenges will now be more numerous and more complicated than in the past, because the revised Circular's inherently

governmental functions standard will be harder to satisfy. The revised Circular will require NTEU to devote more time and resources to challenging and appealing these new agency designations. The Union and President Kelley have been or will imminently be injured as a consequence, because, as a result of the newly promulgated Circular, the Union must shift its limited resources away from other critical activities, which will have a direct adverse effect on the Union's ability to carry out its mission.

16. The Circular also imposes new limits on the challenge process prescribed by the FAIR Act. Under the FAIR Act, interested parties, including heads of unions, have a right to challenge any omission from or inclusion on an agency's commercial activities list. See FAIR Act, § 3(a). The Circular, however, supplants that right with a limited right to challenges only agency reclassifications of a function from inherently governmental to commercial (or vice versa).

17. The Circular's illegal cabining of union challenge rights injures NTEU and President Kelley. By eliminating the Union President's statutory right to challenge any and all inclusions of functions on the commercial list, OMB has deprived her and the Union of an important legal tool to preserve inherently governmental functions for federal employees.

18. NTEU is also bringing this action in its representational capacity on behalf of its members. Many of NTEU's members perform functions that had not been designated as commercial under the statutory standard. Thus, they had not previously been in danger of losing their jobs due to the conversion of their work to performance by the private sector. The revised Circular exposes many of NTEU's members to the new risk that their job functions will be reclassified as commercial and therefore subject to conversion, and it deprives them of their full statutory challenge rights. NTEU's members, therefore, suffer a cognizable injury as a result of OMB's revisions to Circular A-76.

COUNT 1

19. Plaintiffs reassert and reallege the allegations contained in paragraphs 1 through 18 of this complaint as though contained herein.

20. OMB's revised Circular A-76, which instructs agencies that only those functions requiring "substantial" discretion may be designated as inherently governmental in the agency's FAIR Act inventory, is contrary to the FAIR Act. Accordingly, OMB's revised Circular A-76 exceeds the limits of its statutory powers and is an abuse of discretion, arbitrary, capricious, and not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT 2

21. Plaintiffs reassert and reallege the allegations contained in paragraphs 1 through 18 of this complaint as though contained herein.

22. OMB's revised Circular A-76, which instructs agencies that inherently governmental functions involve "[e]xerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds," is contrary to the FAIR Act. Accordingly, OMB's revised Circular A-76 exceeds the limits of its statutory powers and is an abuse of discretion, arbitrary, capricious, and not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706.

COUNT 3

23. Plaintiffs reassert and reallege the allegations contained in paragraphs 1 through 18 of this complaint as though contained herein.

24. OMB's revised Circular A-76, which substitutes for the FAIR Act challenge rights the limited right to challenge "the reclassification of an activity as inherently governmental or commercial," is contrary to the FAIR Act. Accordingly, OMB's revised Circular A-76 exceeds the limits of its statutory powers

and is an abuse of discretion, arbitrary, capricious, and not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706.

REQUEST FOR RELIEF

WHEREFORE, based on the foregoing, plaintiffs request judgment against the defendants:

A. Declaring the above-specified revised OMB Circular A-76 illegal;

B. Ordering the defendants to withdraw the above-specified revised OMB Circular A-76;

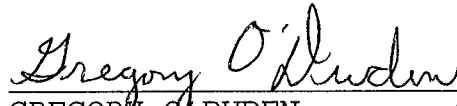
C. Ordering the defendants to direct agencies that the version of OMB Circular A-76 that was in effect prior to November 19, 2002, continues to be in effect unless and until it is withdrawn, replaced, or superseded in accordance with law;


D. Ordering the defendants to direct agencies who have relied on contested provisions of the revised Circular A-76 to rescind any decisions made or actions taken based on that reliance;

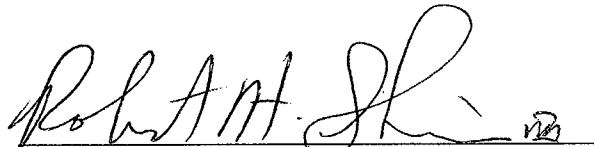
E. Ordering the defendants to pay a reasonable amount of attorney fees and costs as determined by this Court; and

F. Ordering such other and further relief as this Court deems just and proper.

Respectfully submitted,


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