

THE NORTH AMERICAN CONFERENCE OF HOMOPHILE ORGANIZATIONS

COMMITTEE ON THE FEDERAL GOVERNMENT

MEMORANDUM

Volume I, Number 4

February 20, 1970

Subject: Norton v. Macy — Major Victory over U. S. Civil Service Commission
(U. S. Court of Appeals; D. C. Circuit; No. 21,625, July 1, 1969)

A major victory has been won by American Homosexuals in the decision by the U. S. Court of Appeals, D. C. Circuit, on July 1, 1969, in the case of Norton v. Macy and the subsequent decision by the Solicitor-General, in January, 1970, not to appeal the case to the U. S. Supreme Court.

Norton, a GS-14 NASA employee, was discharged in 1963, following an arrest (for a trumped-up traffic-violation, after police observation of his picking up someone at Lafayette Square in Washington, D. C.). The formal basis for the discharge was the standard allegation of "immoral conduct". The question of security was explicitly not an issue. In essence, Norton was found to be a Homosexual and to have engaged in homosexual acts.

By a 2-1 decision (Judges David L. Bazelon and F. Skelly Wright affirming; Judge Edward A. Tamm dissenting) the court reinstated Norton in his job. Some notable quotations from the decision are:

"The Government's obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees: it forbids all dismissals which are arbitrary and capricious."

"The Due Process Clause may also cut deeper into the Government's discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections."

"The requirement that there be a 'cause' for discharge imposes higher duties on the Government-as-employer than merely abstaining from violation of constitutional rights."

"--we have recognized -- that the employer agency must demonstrate some 'rational basis' for its conclusion that a discharge 'will promote the efficiency of the service'."

"-- we must reject (the Government's) contention that once the label 'immoral' is plausibly attached to an employee's off-duty conduct, our inquiry into the presence of adequate rational cause for removal is at an end."

"-- the Civil Service Commission has neither the expertise nor the requisite appointment to make or enforce absolute moral judgments, and we do not understand that it purports to do so."

" -- the notion that it could be an appropriate function of the federal

bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity."

"Accordingly a finding that an employee has done something immoral or indecent could support a dismissal without further inquiry only if all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service."

and finally:

"--an agency cannot support a dismissal as promoting the efficiency of the service merely by turning its head and crying 'shame!'".

The Justice Department moved, in late July, 1969, for an en banc^{MC} rehearing before the entire 7-judge Court of Appeals. The Court denied the Government's motion in mid-October.

In mid-January, 1970, the Solicitor-General informed Norton's attorney that the Government had decided NOT to appeal the case to the U. S. Supreme Court, thereby converting the decision into a clear, final victory for Norton. The Solicitor-General made an interesting and possibly significant comment to the effect that they did not consider this issue as a very important one, anyhow.

Norton is now preparing to return to Washington to resume his job at NASA. He will receive over \$100,000 in gross back pay (minus: pay received in the interim; taxes computed on an annual basis; and contingent lawyers' fees).

The decision now represents a firm, binding precedent in the D. C. Federal Judicial Circuit.

NOTE: Speaking generally, suits against the Federal Government may be brought either in the geographically appropriate judicial circuit or in Washington, D. C. Those filing such suits whose interest is solely or primarily in winning back their jobs are advised to consider filing in the courts of the D. C. Circuit; those of a more militant or cause-oriented turn of mind, interested in creating test cases in other circuits, getting the matter before the U. S. Supreme Court and resolving the matter for the whole country, etc., should consider filing in their own circuit (possibly significantly decreasing their chances of winning thereby, however).

For additional information, write to: Dr. Franklin E. Kameny; Chairman, Committee on the Federal Government; 5020 Cathedral Avenue, N. W.; Washington, D. C. 20016; or telephone 202-362-2211. Your questions, suggestions, and comments are welcome.

(Publication of this series of Memoranda was authorized and funds appropriated therefor by vote of the North American Conference of Homophile Organizations in Conference assembled, in Kansas City, Missouri, in August, 1969).