

*See tab —**6/6 Kumu website —**Ran fed reg —*

Memorandum to Sheila Cheston, General Counsel  
 From: Jeff Patterson, Assistant Counsel  
 Date: June 1, 1993

-----

This memorandum discusses two federal statutes, the Rehabilitation Act of 1973 and the Americans with Disability Act of 1990, which prohibit discrimination against handicapped individuals, and their potential application to the Defense Base Closure and Realignment Commission ("Commission").

#### I. REHABILITATION ACT OF 1973

The Rehabilitation Act of 1973<sup>1</sup> was enacted to ensure that federal executive agencies, federal contractors and recipients of federal funds do not discriminate against handicapped persons. Section 794(a) of the Act states that a handicapped individual shall not, based solely on his or her handicap, be excluded from participation in, denied benefits of, or subjected to discrimination pursuant to any program or activity receiving federal financial assistance or conducted by any executive agency.

##### A. Applicability to the Commission<sup>2</sup>

According to its language, the Act's provisions are applicable to the Commission if the Commission's work is found to be a program or activity (1) that receives federal financial assistance; or (2) conducted by an executive agency.<sup>3</sup>

##### (i) "Program or Activity"

The first step in ascertaining whether the Act is applicable to the Commission is to determine if its operations are a "program or activity." The Civil Rights Restoration Act of 1987<sup>4</sup> amended the Act by defining "program or activity" as the operations of (i) instrumentalities of a state or of a local government; (ii) postsecondary institutions; (iii) business entities; or (iv) any entity formed by a combination of two or more of those listed in

---

<sup>1</sup> 20 U.S.C. §§701 *et seq.* (West Supp. 1993).

<sup>2</sup> There is no provision in the Defense Base Closure and Realignment Act of 1990, P.L. 101-510, exempting the Commission from the provisions of 20 U.S.C. §794(a) or making it applicable.

<sup>3</sup> Id. at §794(a).

<sup>4</sup> 20 U.S.C. §1687 (1993).

(i) through (iii), which receives federal funding.<sup>5</sup> The Commission does not fall within any of these four categories and thus cannot be classified as a program or activity that receives federal funding.

Courts appear reluctant to expand this definition, applying instead a literal interpretation of the statute.<sup>6</sup> Accordingly,

---

<sup>5</sup> §794(b) states in its entirety:  
For the purposes of this section, the term "program or activity" means all of the operations of--

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or  
(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or  
(B) a local educational agency (as defined in section 2891(12) of Title 20) system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--  
(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.  
29 U.S.C. §794(b).

<sup>6</sup> See Schroeder v. City of Chicago, 715 F.Supp. 222, 225-26 (N.D.Ill. 1989) (the court denied expanding the definition of "program or activity" to include an entire city, stating that 'nothing in the amendment's legislative history suggest that Congress contemplated classifying an entire municipality like the City of Chicago as a "program or activity" subject to [§794] of the Rehabilitation Act.'). Williams v. Meese, et al., 926 F.2d 994, 997 (10th Cir. 1991) (plaintiff, incarcerated in a federal penitentiary, was denied relief under the Rehabilitation Act because 'the Federal Bureau of Prisons does not fit the definition of "program or activities"' supplied by §794(b)), Johnston v. Capt. Horn,

even if the Commission qualifies as either a recipient of "federal financial assistance" or as an "executive agency" as used by the statute, its operations must still qualify as a "program or activity" in order for the Act's provisions to apply. Therefore, based on the preceding discussion, the Commission's operations, including the holding of hearings, employing of staff,<sup>7</sup> and operating a library available to the public, would not be considered a "program or activity" pursuant to the Act.

(ii) "Federal Financial Assistance"

To reiterate, one way to come within the mandate of §794 is to operate a program or activity that receives federal financial assistance. Whereas the Act fails to provide a definition for "federal financial assistance," federal courts have broadly construed the term to encompass assistance of any kind, whether it be direct or indirect.<sup>8</sup> The Supreme Court, however, has limited its meaning to those who actually "receive" such assistance, as opposed to those who merely benefit from it.<sup>9</sup> Furthermore,

---

Commander Puget Sound Naval Shipyard, et al., 875 F.2d 1415, 1420-21 (9th Cir. 1989) (denying coverage of §794 to federal employers or employees, as the statutory definition of "program or activities" does not refer to these parties).

<sup>7</sup> As an aside, while employment is not within the breadth of §794, §791 involves the consideration of employment of individuals with disabilities. Section 791 creates a private cause of action for a federal employee discriminated against by a federal employer because of his or her handicap. Specifically, §791(b) states that "[e]ach department, agency, and instrumentality . . . in the executive branch shall . . . submit . . . an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality." 29 U.S.C. §791(b). See Johnston v. Capt. Horne, Commander Puget Sound Naval Shipyard, et al., 875 F.2d at 1421 ('If Postal Service employees, mentioned specifically in §794, may not sue, it follows that federal employees may not'), Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985) ([§791] is exclusive remedy for federal employees). Whereas §791 is not within the scope of this memorandum, no further discussion of this provision will be made.

<sup>8</sup> Independent Housing Services of San Francisco v. Fillmore Center Associates, No. C 91-1220 RFP (D. Calif. Oct. 16, 1991) (Lexis 14960), and Arline v. School Board of Nassau County, 772 F.2d 759, 762 (11th Cir. 1985), cert. granted and limited on other ground, 475 U.S. 1118 (1986).

<sup>9</sup> Department of Transportation v. Paralyzed Veterans, 477 U.S. 597 (1986) (holding that commercial airlines are not recipients of federal financial assistance under [§794], but merely 'beneficiaries' of funding granted to airports).

Congress sought to impose §794 coverage as a condition of the recipient's agreement to accept federal funds.<sup>10</sup> The Tenth Circuit has also contributed to the development of this definition by holding that an entity receives such assistance when it receives a subsidy, as opposed to compensation for goods and services received, even if the compensation is in excess of the fair market value of the goods and services.<sup>11</sup>

Because the Commission's operating funds are authorized and appropriated by the federal government, these resources could be classified as "federal financial assistance," as they are a direct subsidy. As additional support for this notion, Mr. Paul Koffsky, Attorney, Office of General Counsel, Department of Defense, informally stated that in his view, §794(a) would apply to the Commission because "the Commission receives federal funding." However, this argument can be countered because the Commission was not given the opportunity to accept or reject these funds, being a creature of legislation, and with it the obligations imposed by §794.

---

<sup>10</sup> Id. at 605. This contractual arrangement imposes §794's obligations upon those who are in a position to accept or reject them as part of the decision to accept federal funds. Id. See Glanz v. Beth Israel Corporation, 756 F.Supp. 632 (D.Mass. 1990) (agreeing with the reasoning of the Fifth Circuit in United States v. Baylor Univ. Medical Center, 736 F.2d 1039 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985), and holding that the receipt of Medicare or Medicaid payments by a hospital constituted 'receiving federal financial assistance'), Arline at 762 (finding that since impact aid--aid which is provided to school systems whose populations have been substantially enlarged by the attendance of federal employees' children, but which have reduced tax revenues due to the presence of federally-owned property in the district--does not fall within a specific exception to the Act, 'it must be defined as "federal financial assistance" in order to give effect to the broad legislative intent expressed in [§794]'), Nolley v. County of Erie, 776 F.Supp. 715, 742-43 (W.D.N.Y. 1991) (declaring that because federal funds received by the county did not exceed the fair market value of the cost to detain federal prisoners, it did not qualify as federal financial assistance).

<sup>11</sup> DeVargas v. Mason & Hanger-Silas Mason Co., 911 F.2d 1377, 1382 (10th Cir. 1990). Mass v. Martin Marietta Corp., 805 F.Supp. 1530, 1542 (D.Colo. 1992), upheld DeVargas as being the applicable rule, noting the "result is consistent with the definition of 'federal financial assistance' used in federal regulations" which specifically excludes procurement contracts (citing 14 C.F.R. §1251.102(f) (1992) (NASA regulation); 32 C.F.R. §56.3(b) (1991) (DoD regulation)).

(iii) "Executive Agencies"

Title 5 of the U.S. Code<sup>12</sup> defines "executive agency" as an executive department, a government corporation or an independent establishment.<sup>13</sup> Whereas the Rehabilitation Act as a whole does not explicitly incorporate the definitions of Title 5, §794a (Remedies and Attorney Fees) adopts the procedures of Title VII of the Civil Rights Act of 1964<sup>14</sup> for the remedies, procedures and rights to be followed for complaints brought under §791 of the Act (Employment of Handicapped Individuals), that in turn incorporates the definition of executive agencies found in 5 U.S.C. 102 into its statutory language.

Although a tenuous connection, it could be argued that the Rehabilitation Act incorporates the definitions supplied by Title 5, specifically that of "executive agency." Coupled with Congress' intent to provide the statute with a broad reach,<sup>15</sup> it's arguable

---

<sup>12</sup> Title 5 is entitled 'Government Organization and Employees.'

<sup>13</sup> 5 U.S.C. §105 (1977). An independent establishment is defined as an establishment of the executive branch which is not an executive or military department, government corporation, or part of another independent establishment. 5 U.S.C. §104 (1977).

<sup>14</sup> Specifically, 42 U.S.C. 2000e-16 (Section 717, Employment by Federal Government).

<sup>15</sup> Whereas the Act as originally enacted was not clear on its application to the federal government, it was amended in 1978 to explicitly extend its coverage to executive agencies. See Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1381 n.13 (11th Cir. 1982).

While the 1978 amendments also expanded the remedies of handicapped individuals, its legislative history illustrates Congress' intentions to enlarge, not reduce, the reach of the Act. For example, Congressman Jeffords proclaimed "[t]his amendment removes [the exemption for the federal government] and applied [§794] to the Federal Government . . . and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong.Rec. H13901 (daily ed., May 16, 1978). Furthermore, Senator Stafford exclaimed that "The bill allows the rehabilitation program to grow and serve more handicapped individuals and provide those individuals with greater opportunities to maximize their potential." 124 Cong.Rec. S30311 (daily ed., Sept. 20, 1978). Court interpretations further support this view. See John and Jane Doe, et al. v. Devine, Blue Cross/Blue Shield Association and Aetna Life Insurance Company, 545 F.Supp. 576, 585 (D.D.C. 1982) (quoting Doe v. Colautti, 454 F.Supp. 621, 629, aff'd 592 F.2d 704 (3d Cir. 1979)), Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1381 (11th Cir. 1982).

that the Commission is an executive agency, as it is an independent establishment of the executive branch.

#### B. Office of Coordination and Review, Department of Justice

To alleviate all questions regarding the applicability of the Act to the Commission, the Commission could formally request from the Office of Coordination and Review,<sup>16</sup> Civil Rights Division, Department of Justice, a legal analysis, according to Dan Searing, Attorney-Advisor, with that office.

Mr. Searing informally suggested that the Commission continue including in its "notice of hearing" a statement requesting anyone requiring special accommodations to contact its office prior to the hearing, as well as ensuring the facilities where its hearings take place are handicap accessible. He also suggested that the Commission contact his office asking for a legal analysis only after the Commission has received a complaint from someone who feels they have been discriminated against on the basis of their handicap.<sup>17</sup>

Therefore, according to Mr. Searing, the Commission should promulgate regulations only upon such determination by the DoJ as a result of their legal analysis or upon notification by the DoJ based on their periodic review of small agencies and departments.

#### C. Obligations Imposed by the Act

Upon a determination that the Rehabilitation Act applies to a specific "program or activity," §794(a) further requires each agency to promulgate regulations implementing the purpose of the statute. Whereas one would presume that this would result in a multitude of varied and conflicting provisions, it has not, as most agencies have generally duplicated the Equal Employment Opportunity Commission's regulations.<sup>18</sup>

---

<sup>16</sup> The Office of Coordination and Review is the department of the DoJ which has been delegated, inter alia, the responsibility for coordinating the implementation and enforcement of §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). The Attorney General was originally charged with this responsibility pursuant to Executive Order 12250 (1980).

<sup>17</sup> The basis of Mr. Searings suggestion to wait until after a complaint has been received to issue regulations is his belief that the Commissions 1995 mandate would have expired by the time the regulations would become effective.

<sup>18</sup> Overton v. Reilly, 977 F.2d 1990, 1193-94 (7th Cir. 1992). The EEOC's regulations are found at 29 CFR Ch.XIV, Subpart G (§§1613.701-.709) (1991) (copy attached).

Assuming for the benefit of analysis that the DoD's regulations are typical of those promulgated by most agencies,<sup>19</sup> the Commission's hearings would be required to be accessible to handicapped persons,<sup>20</sup> with reasonable accommodations<sup>21</sup> being made to known physical or mental handicaps of an individual.<sup>22</sup> The Commission would be excepted from this requirement if it could establish that the requested accommodation would impose an undue hardship on the operation of its program.<sup>23</sup>

In issuing regulations, Mr. Searing of the DoJ stated that the Commission could do so in the form of a "joint resolution" in which several small agencies and departments promulgate regulations together in an effort to save time and resources.<sup>24</sup> The Office of Coordination and Review would organize such efforts.

#### D. Recommendation

Whereas an argument could be made both for and against the application of the Rehabilitation Act to the Commission, it may be in the best legal interest of the Commission to formally request

---

<sup>19</sup> 32 CFR Part 56. A copy of DoD's regulations and internal directive are attached.

<sup>20</sup> 32 CFR §56.8(c)(2) states that each program or activity shall operate in such a way that, when viewed in its entirety, is readily accessible to and usable by handicapped persons.

<sup>21</sup> 32 CFR §56.8(d)(2) states that reasonable accommodation includes "(i) making facilities . . . readily accessible to and usable by handicapped persons; (ii) . . . the provision of readers or certified sign-language interpreters; and similar actions." The same language is found in EEOC's regulations at 29 CFR §1613.704(b).

The determination of whether an accommodation is reasonable is fact-specific and requires the court to perform individualized examinations to ensure that the justifications "reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives . . ." Arline, 772 F.2d at 765. For example, in Wonder v. Department of Energy, 35 M.S.P.R. 209 (1987), the Merit Systems Protection Board stated that "where the ability of a qualified handicapped individual to understand and communicate . . . with regard to proceedings before the Board is impaired, the Board is obligate to provide an interpreter" pursuant to §794. Id.

<sup>22</sup> 32 CFR §56.8(d).

<sup>23</sup> Id.

<sup>24</sup> The agencies and departments involved would utilize a prototype prepared by the Department of Justice pursuant to Executive Order 12250 and initially issued to executive agencies. See n.18.

from the Department of Justice a legal analysis to decide this issue. The DOJ's determination would be conclusive and permit the Commission, if required, to begin promulgating regulations. In the alternative, if the Commission is not required to issue regulations, the issue will be permanently resolved. This approach may be preferred to that of waiting for a complaint before asking for review, because the issue will be decided and no further time will be expended on its regard. Furthermore, if compliance with the Act is required, it is to the advantage of the Commission to do so as quickly as possible rather than incur any further risk of litigation.

## II. THE AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act of 1990<sup>25</sup>, whose mission is to eliminate discrimination against individuals with disabilities, is not applicable to the federal government.<sup>26</sup> Accordingly, the statute's provisions have no affect on the Commission.

---

<sup>25</sup> 42 U.S.C. §§12101 *et seq.* (1993).

<sup>26</sup> See 42 U.S.C. §§ 12111(5), 12131(1).