



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

To: Office of the Legislative Counsel, United States House of Representatives
Office of the Legislative Counsel, United States Senate

From: Daniel Sheffner, Attorney Advisor, Administrative Conference of the United States

Re: Administrative Conference's *Statutory Review Program*

Date: May 30, 2018

The Office of the Chairman of the Administrative Conference of the United States is transmitting the attached judicial and administrative opinions under its *Statutory Review Program* that identify technical and related issues in several statutory provisions pertaining to federal administrative procedure. The three opinions from the Court of Appeals for the District of Columbia Circuit identify scrivener's errors that did not affect the court's decisions. The concurring opinion from the Merit Systems Protection Board discusses a potential gap in the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 U.S.C. §§ 4301 *et seq.*) that may present a question of policy for Congress. The opinions are as follows:

- In *Lacson v. DHS*, 726 F.3d 170 (D.C. Cir. 2013), the D.C. Circuit affirmed an order of the Transportation Security Administration terminating the employment of a federal air marshal due to his unauthorized disclosure of sensitive security information pertaining to the Federal Air Marshal Service. The court noted that subsection (a) of 49 U.S.C. § 46110, which confers jurisdiction on the court to hear such appeals, contains a cross-reference to "subsection (l) or (s) of [49 U.S.C. §] 114." Subsection (s) of § 114, however, was re-designated subsection (r) subsequent to the cross-reference's addition to § 46110(a). The court concluded that the inaccurate cross-reference was merely a scrivener's error and did not indicate Congress's intention to alter the scope of the statute.
- In *American Petroleum Inst. v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), the D.C. Circuit determined that it did not have jurisdiction to review, in the first instance, a regulation of the Securities and Exchange Commission under section 25(b) of the Securities Exchange Act (SEA) (15 U.S.C. § 78y(b)). The court noted that the Dodd-Frank Act had re-designated section 9(h)(2) of the SEA as section 9(i)(2) but did not amend section 25(b)'s cross-reference to section 9(h)(2). The court concluded, however, that this was "likely the result of a scrivener's error" and, therefore, did not affect its analysis.
- In *EME Homer City Gen. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), the D.C. Circuit held that the Environmental Protection Agency's (EPA) Cross-State Air Pollution Rule violated the Clean Air Act. The court examined section 126(b) of the Act (42 U.S.C.



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§ 7426(b)), which authorizes a state to petition EPA for a finding that a source that generates pollution in a nearby state is in violation of “section 110(a)(2)(D)(ii)” of the Act. The court noted that the correct cross-reference is to section 110(a)(2)(D)(i), not (ii). However, it concluded that the incorrect cross-reference was merely a scrivener’s error.

- In *Gjovik v. HHS*, 117 M.S.P.R. 30 (2011), the Merit Systems Protection Board concluded that it had jurisdiction under USERRA to entertain an appeal from a member of the Public Health Service’s (PHS) Commissioned Corps alleging discriminatory conduct by his employing agency due to his status as a uniformed service member. The Board based its decision, in part, on the fact that USERRA does not exempt the Department of Health and Human Services from the list of applicable employers and includes the PHS Commissioned Corps as a component of the uniformed services. Remarking on the fact that members of the Commissioned Corps are subject to immediate deployment by the President in times of war or emergency, a concurring opinion expressed concern that “Congress has left a loophole in the statute that excludes military officers, but not Commissioned Corps officers, from bringing USERRA appeals” and a desire that “this apparent mistake will be brought to Congress’s attention so that it can be corrected.”