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Statement of
H. L. Krieger, Director
Federal Personnel and Compensation Division

Before the

Subcommittee on Compensation and Employee Benefits
of the Committee on Post Office and Civil Service
U.S. House of Representatives

on

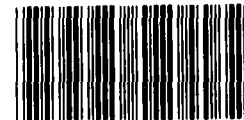
The [Conversion of Department of Defense
Nonappropriated Fund Employees and Other
Employees to Civil Service Positions]

Madam Chair and Members of the Subcommittee:

I am pleased to be here to present the General Accounting Office's views on certain pay and benefit problems which can occur when personnel employed by nonappropriated fund instrumentalities (NAFI) of the Department of Defense are converted to positions within the Federal civil service. I will also present our views on these problems with respect to the planned integration of the Smithsonian Science Information Exchange, Inc., into the Department of Commerce.

Before discussing the specific problems, I would like to briefly review the nature of DOD NAFIs and, in particular, the status of their employees in relationship to the United States Government.

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The armed forces are authorized to establish NAFIs to provide activities for enhancing the morale, welfare, and recreation of active and retired military and Coast Guard personnel and their dependents. NAFI operations vary and include such activities as officers' and enlisted personnel clubs, rod and gun clubs, bowling centers, barber shops, and gasoline stations. One of the oldest and perhaps most familiar NAFI operations is the post exchange or PX, a commercial retail merchandise store. The first exchanges were established in the late 1800s.

While NAFIs receive some appropriated fund support, by and large they are self-sustaining. Salaries and wages paid NAFI employees come primarily from the sale of authorized goods and services, dues, assessments, and fees.

Based on a survey by the Department of Defense, in 1976, there were about 12,600 NAFIs in operation, employing approximately 185,000 civilian, foreign national, and off-duty military personnel. NAFI personnel include craftsmen and tradesmen, administrative personnel, customer service clerks, and professionals such as managers, accountants, lawyers, engineers, buyers, and media specialists.

Prior to 1942, the military departments and the former Civil Service Commission maintained that persons employed by NAFIs were not employees of the United States because they were not paid from appropriated funds and the instrumentalities

themselves were not Federal Government operations.

Furthermore the Commission viewed such employees as working under what amounted to a private contract of employment.

However, as a result of a 1942 United States Supreme Court decision, 1/ the Commission changed its position. While the Supreme Court decision did not specifically relate to the employment status of NAFI personnel, it did establish that such instrumentalities were an integral part of the Department of Defense and therefore of the Federal Government. In view of this, the Commission believed that it was necessary to consider NAFI employees as Federal employees and subject to the usual personnel laws. The Departments of the Army and Navy did not agree, and legislation was proposed to clarify the matter.

The legislation was enacted in 1952 and provided that employees paid from nonappropriated funds of instrumentalities of the armed forces were not to be considered employees for the purpose of laws administered by the Civil Service Commission or for the purpose of the Federal Employee's Compensation Act. 2/ The fundamental reasons given for excepting NAFI employees were that the civil service laws were not flexible enough for the purposes of operating commercial retail type activities and if such laws were applied to the NAFIs, their ability to compete with private enterprise would be severely restricted.

1/316 U.S. 481

2/5 U.S.C. 2105(c)

In effect, the 1952 law excluded NAFI employees from the operation of civil service laws and regulations which govern the employment, removal, classification, pay, retirement, leave, and disability and death compensation of Federal officers and employees. They are, however, subject to certain laws which, in part, govern the pay of Federal employees. These include laws for determining the rates of pay for certain personnel employed on an hourly wage basis, 1/ laws relating to pay for Sunday and overtime work, 2/ and the provisions of the Dual Compensation Act which restrict the amount of military retired pay received by individuals who are reemployed by the Government in civilian positions. 3/

One other law which has been determined to be applicable in the employment of NAFI personnel is the Federal Tort Claims Act. The Act establishes procedures relating to the liability of the United States for losses caused by Federal employees while acting within their scope of employment. I mention this law because, in relation to it, there have been several Federal court decisions which have held that NAFIs are instrumentalities of the United States, and those employed by them are Federal employees. 4/

I should mention that, in our 1978 report on the need for an overall Federal retirement policy, we pointed out that

1/5 U.S.C. 5342(a)(2)(B)

2/5 U.S.C. 5550

3/5 U.S.C. 5531(2)

4/176 F. Supp. 297; 298 F. 2d 748

separate retirement systems have been established for NAFI employees even though they meet the same employment criteria for participating in the civil service retirement system as required of other Federal employees. 1/ To be considered a Federal employee, the criteria require that an individual must be: (1) engaged in the performance of Federal functions under authority of an Act of Congress or an Executive order; (2) appointed or employed by a Federal officer; and (3) work under the supervision or direction of a Federal officer. Moreover, in 1973, a Civil Service Commission study concluded that the source of funds from which an employee is paid is not a governing factor in determining his Federal employment status.

PROBLEMS CAUSED BY CONVERSIONS

Given this background, I will discuss some of the pay and leave problems which can arise when NAFI personnel are converted to positions under the civil service. NAFIs have established pay and leave systems almost identical to those under the civil service. However, except under special circumstances, present law and regulations require that an individual with no prior Federal civilian service who is appointed to a position under the General Schedule will be paid at the minimum rate of the appropriate grade for the position. In addition, if such individual has had no service which is creditable under the civil service retirement system, he or she will accrue annual leave at the lowest established

1/"Need for Overall Policy and Coordinated Management of Federal Retirement Systems," FPCD-78-49, December 29, 1978.

rate--4 hours each biweekly pay period, or 13 days a year. NAFI personnel who become employed in the civil service are not considered to be former Federal personnel for these purposes. The potential consequences of this can best be seen by an actual case example.

On November 1 of last year, 29 NAFI employees, who worked for the Army's American Forces Network in Europe, had their jobs abolished and were rehired under the civil service pay and leave systems. As a result of this action, the employees, as a group, lost approximately 27,500 hours of accrued sick leave, 8,500 hours of accrued annual leave, and \$87,000 in their annual rates of basic pay. Perhaps the most adverse impact of the conversion was the reductions 23 of the employees received in their annual basic pay. Individually, the reductions ranged from \$687 a year to \$8,811 a year, the average being approximately \$3,800.

It is not very difficult to appreciate the hard feelings this action must have caused, to say nothing of the hardships. Consider for example the case of one of the employees who, on the day before the conversion, was a UA-13, step 10, earning a salary identical to that earned by a GS-13, step 10, under the General Schedule. He had also accrued 2,589 hours of sick leave and 487 hours of annual leave. On the following day, his position was converted to the civil service, and his salary was fixed under the General Schedule at GS-13, step 1. As a consequence, he lost all of his accrued leave, and his annual salary was reduced by \$8,811--a 23 percent

reduction. These consequences are even worse when you consider that all of the employees involved were converted to positions in which they performed the same jobs as they had been performing immediately prior to the conversion.

The primary reason why a conversion of this type can have these adverse results is that, as I mentioned earlier, NAFI personnel are not considered employees for the purposes of civil service laws and regulations nor is their service considered Federal service for such purposes. In this regard, I think it is interesting to note the concerns of a former Chairman of the Civil Service Commission, as expressed nearly 30 years ago. In commenting on the bill which excepted NAFI employees from civil service laws, the Chairman stated that the Commission did not object to its enactment but believed that it would not settle the fundamental question as to whether NAFI service should be considered Federal service for any purposes in which it is a factor in civil service personnel administration. Obviously, this 30-year old concern is still with us.

TREATMENT OF CERTAIN OTHER EMPLOYEES

To further demonstrate the inconsistencies in the treatment of NAFI employees with other types of Federal personnel, it is interesting to consider the treatment accorded individuals who transfer to civil service positions from employment with the Tennessee Valley Authority (TVA), the Board of

Governors of the Federal Reserve System, and the Veterans Canteen Service, an independent unit within the Veterans Administration.

Both the TVA and the Federal Reserve Board generally operate with nonappropriated funds, and their employees are excepted from most civil service laws and regulations. However, unlike NAFI employees, because their employment is considered Federal service when they transfer to civil service positions, they can retain any accumulated sick and annual leave balances, and their salary can be set at a level equal to the highest previous rate received in their previous employment.

Most employees of the Veterans Canteen Service also serve in excepted civil service positions, but are otherwise considered Federal employees and in transferring to the civil service are treated the same as TVA and Federal Reserve Board employees. Like the DOD NAFIs, the Canteen Service is a Federal instrumentality supported primarily by nonappropriated funds. It was established to make available, at reasonable prices, merchandise and services for the comfort and well-being of armed forces' veterans in VA hospitals and homes. Employees of the Service perform duties essentially the same as those performed by employees of some DOD NAFIs, and the laws for determining the rates of pay of NAFI personnel, employed on an hourly wage basis, apply to Canteen Service employees as well. Furthermore,

the reasons given for excepting both NAFI and Canteen Service employees from civil service personnel laws are also essentially the same.

INTEGRATION OF SSIE

The planned integration of the Smithsonian Science Information Exchange (SSIE) into the Department of Commerce's National Technical Information Service presents similar, but yet quite different, problems from the NAFI situation.

The SSIE is a private, nonprofit corporation incorporated in the District of Columbia in June of 1971 by the Smithsonian Institution. It was organized as a National repository for information on ongoing scientific research activities sponsored by governmental and private agencies and individuals.

Before its incorporation as a private business, all or parts of the Exchange's present functions were carried out, beginning in 1950, by various organizational units indirectly connected with the Smithsonian Institution, the National Science Foundation, and a number of other Federal agencies.

The working relationship between the Smithsonian and the SSIE has been embodied in a series of annual agreements under which the SSIE, as contractor, was to maintain the Exchange as the National repository. Ninety percent of the Exchange's financial support comes from the Federal Government, either by way of appropriated funds transferred under contracts with the Smithsonian or from user fees received from Federal agencies.

The Exchange is managed by a Board of Directors, the majority of whom are officials of the Smithsonian, including the Assistant Secretary for Science of the Smithsonian who serves as the Board's Chairman. Under its contracts with SSIE, the Smithsonian performs accounting, personnel administration, payroll, audit, legal, fiscal, and procurement services for the Exchange.

In 1977, the Senate Committee on Appropriations concluded that, in view of the fact that the Exchange received about 90 percent of its funding from the Government, its operations should be transferred to Federal status, either in the Smithsonian or another appropriate Federal agency. In 1978, the Committee directed the Smithsonian to consult immediately with the Department of Commerce and OMB regarding the termination of the Exchange and conversion of its employees to civil service status within Commerce's National Technical Information Service.

The integration was planned to take effect on October 1, 1980. However, in considering the Department of Commerce's appropriation bill for fiscal year 1981, the House Appropriations Committee noted that the employees of the SSIE could lose substantial employment rights and other accumulated benefits if they were Federalized under present law. Although SSIE's pay and leave systems are the same as the civil service systems, the employees would not be allowed to transfer accrued

leave balances, and the highest previous paid rate rule would not be applied in determining their civil service salaries.

In view of this, the Committee denied funds to cover the integration costs in order to give the appropriate legislative committees of the House and Senate an opportunity to review the matter and consider legislation to preserve these rights if SSIE employees are converted to civil service status. The Committee did provide for continued funding of the Exchange by contract, pending a resolution of the matter.

HOW ADVERSE EFFECTS MIGHT BE AVOIDED

In concluding, I would like to suggest, for the Subcommittee's consideration, several different ways in which the adverse effects of conversions on employees can be avoided.

With regard to NAFI employees, there are three possible remedies. In transferring a nonappropriated fund activity to an appropriated fund activity, consideration could be given to achieving the transition, with respect to the employees involved, through attrition. This way, the employees could retain their NAFI employment status, including pay and benefits, and their positions would be converted to the civil service only when they retired or separated from employment.

Another remedy would be to continue to operate the activity as a NAFI but support it with appropriated funds on a reimbursable basis. At present, there is in fact at least one such arrangement. The Navy Resale and Services Support Office, a

NAFI under the control of the Naval Supply Systems Command, is reimbursed with appropriated funds for the cost of its employees who work in commissary operations, an appropriated-fund activity.

These two remedies could also be used in combination, particularly in cases where there are not sufficient nonappropriated funds to support continuing an activity.

Another option would be to change existing personnel laws and regulations to allow NAFI employees, converted to civil service positions, to transfer their accrued sick and annual leave and to permit their salary rates under the General Schedule to be set at the highest previous rate received during their NAFI employment. Such action, in effect, would recognize that NAFI employees are Federal employees and would be treated as such if they subsequently became employed in the civil service.

In the case of SSIE employees, I think the only possible remedy available would be to enact legislation granting special treatment, in terms of pay and benefits, for those personnel converted to civil service positions in transferring the Exchange's operations into the Department of Commerce. However, although I can certainly sympathize with the situation these employees are in, I would caution that consideration be given to the precedent such legislative action might

establish with regard to other employees working under private contracts for the Government.

Furthermore, I would strongly suggest that, at present, any legislative action to resolve NAFI and SSIE employees' problems be limited to their pay and leave problems and not attempt to address problems relating to retirement benefits. The issue of retirement benefits is very complex and would require an indepth study, particularly in view of the fact that NAFI and SSIE employees are covered both by employer pension plans and social security.

That concludes my statement, Madam Chair. My colleagues and I will be pleased to answer questions.