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Letter to Col. Charles C. Eaves; by Edwin J. Monsma, Assistant General Counsel.

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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

IN REPLY
REFER TO:

B-190284

OFFICE OF GENERAL COUNSEL

OCT 26 1977
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Colonel Charles C. Eaves, M.D.
Medical Department Activity
Fort Hood, Texas 76544

Dear Colonel Eaves:

Reference is made to your letter of September 23, 1977, with enclosure, in which you seek information from this Office on the question as to whether you may accept the position of Deputy Chief, Bureau of Tuberculosis Service, Texas Department of Health, while on terminal leave pending retirement from the Army.

You say that no oath of office is required of you should you accept such position and that according to your analysis you would be an employee rather than an officer of the State of Texas. In addition, you say that during the first several months on the job you will be in a trainee status, having no director or supervisory authority over the operation of the Bureau and that will coincide with your period of terminal leave. However, in order to avoid any potential conflict between that position and your status as a Regular Army officer while on active duty and in retirement, you are requesting an advisory opinion from this Office on the matter.

An official decision will not be rendered at your request on the question presented. See 31 U.S.C. 74 and 82d. However, the following comments and references to the United States Code and decisions of this Office may be helpful.

Section 973 of title 10, United States Code, which was derived from section 18 of the act of July 15, 1870, ch. 294, 16 Stat. 319, section 1222, Revised Statutes, currently provides in part:

"(b) * * * no officer on the active list of the Regular Army * * * may hold a civil office by election or appointment, whether under the United States, a Territory or possession, or a State. The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment."

The term "civil office" as used in subsection 973(b) has never been statutorily defined. However, in 13 Op. Atty. Gen. 110 (1870),

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an opinion rendered shortly after enactment of the act of July 12, 1870, *supra*, the Attorney General of the United States held that General George G. Meade could not exercise the functions of a park commissioner of the City of Philadelphia without vacating his military appointment. The Attorney General pointed out therein that the office of park commissioner had been established by the act of the state legislature, which act designated the mode of appointment, the term of office, and the functions to be performed which were of a civil nature and would fall within any authorized definition of an office. It was also indicated that the position was none the less an office because of a provision that the incumbent should receive no compensation. The Attorney General stated that the manifest purpose of Congress in enacting the prohibition was to disencumber Army officers of "every species of official duty not belonging to their military profession."

In 35 Op. Atty. Gen. 187 (1927), it was concluded that an Army officer would be in violation of section 1222, Revised Statutes, if he were detailed to act as head of Louisiana State University. In so concluding, it was stated that the purpose of the statute was "to prevent an officer of the Army from accepting any office the duties of which will substantially interfere with the performance of his duties as an officer of the Army." It is noted, however, that the 1927 opinion did not reverse any previous opinions and in fact cited with approval, among others, 13 Op. Atty. Gen. 310, *supra*, and 18 Op. Atty. Gen. 11 (1904), in which it is stated that the policy of the law points to a very liberal interpretation of the phrase "civil office."

Consistent with 13 Op. Atty. Gen. 310, *supra*, this Office has long held that the term "civil office," as distinguished from "military office," is synonymous with "public office" and is usually defined in much the same terms. That is, the specific position must be created by law; there must be certain duties imposed by law on the incumbent; and the duties of the position must involve the exercise of some portion of the sovereign power. See 44 Comp. Gen. 838 (1905) and 29 Comp. Gen. 363 (1900).

From the information provided, we are unable to determine whether the position of Deputy Chief, Bureau of Tuberculosis Services, Texas Department of Health, is a civil office. In

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order to avoid the sanction provided by law for Regular military officers who accept State positions--loss of military status and thus, retired pay--it would be necessary for you to demonstrate that the position you propose to take while on terminal leave is not a State office under the decisions discussed above. In that connection, statements from appropriate State officials regarding the statutory authority under which this position is created and duties assigned would be helpful. If these statements demonstrated that the position was not established by law and that the duties thereof were not provided by law and do not involve the exercise of the sovereign power of that State, the sanction provided would not be for application. However, in view of the sanction which would otherwise be applicable and since the facts and law involved in any determination of whether this is a State office are complex, you might be well advised not to take the State position until after you have retired. However, if you wish to pursue the matter, specific and detailed information with respect to the State position should be furnished the responsible accounting and finance officers of the Department of the Army for their consideration and, if appropriate, forwarding to the Comptroller General for a decision.

As to the holding of a "civil office" after retirement, 10 U. S. C. 973(b) refers only to Regular commissioned officers on the "active list." We are not aware of any Federal law which would penalize a Regular commissioned officer from serving in a civil office by election or appointment while not on the active list.

We trust this information will serve the purpose of your inquiry.

Sincerely yours,

Edwin J. Monsma

Edwin J. Monsma
Assistant General Counsel