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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-193864

March 1, 1979

[School District Claim To Department of Air Force]

The Honorable Frank Church  
United States Senate

Dear Senator Church:

We refer to your communication dated December 29, 1978, with enclosures, requesting a review of the claim submitted to the Department of the Air Force by Mr. Wayne B. Fagg, Superintendent, Minidoka County Schools, Rupert, Idaho. The school district has claimed reimbursement for part of the amount paid to Senior Master Sergeant Daniel H. Harrison, USAF (Retired), incident to his employment by them as an instructor in the Air Force Junior Reserve Officers' Training Corps (JROTC) program.

Sergeant Harrison was apparently employed as a JROTC instructor by the school district in the summer of 1978. At that time he was still on active duty in a "terminal" leave status. He did not actually retire from active military service until November 1, 1978. The Air Force has declined to reimburse the school district for any amounts it paid to Sergeant Harrison prior to November 1, 1978, for the reason that he was on active duty until that date. In disallowing the school district's claim, Air Force authorities advised Mr. Fagg that the law permits such reimbursement only in the case of a retired service member employed as a JROTC instructor. Those authorities have also acknowledged, however, that the school district should have been notified in advance of Sergeant Harrison's active duty status and the financial consequences of employing him prior to his retirement date. They have admitted that their failure to provide such notice was a mistake, but have stated that the reimbursement claimed may nevertheless not be paid.

In his letters to the Air Force and to you, Mr. Fagg has expressed dissatisfaction with that result. In substance, he suggests that the disallowance of the school district's claim is based on a technicality and is not warranted under the circumstances. In addition, he notes that Air Force authorities have admitted making a mistake in the matter, and he states, "Usually, when you make an error you pay the costs incurred." He has therefore, in effect, questioned the correctness of the action taken by the Air Force to deny the school district any reimbursement for amounts paid to Sergeant Harrison prior to November 1, 1978.

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Provisions of law governing the JROTC program are contained in section 2031, title 10, United States Code. Subsection 2031(c)(1) authorizes the detail of active duty service members to educational institutions having units of the Corps as administrators and instructors. In addition, subsection 2031(d) provides in pertinent part as follows with respect to the employment of retired service members in connection with the JROTC program:

"(d) Instead of, or in addition to, detailing officers and noncommissioned officers on active duty under subsection (c)(1), the Secretary of the military department concerned may authorize qualified institutions to employ, as administrators and instructors in the program, retired officers and noncommissioned officers, and members of the Fleet Reserve and Fleet Marine Corps Reserve, whose qualifications are approved by the Secretary and the institution concerned and who request such employment, subject to the following:

"(1) Retired members so employed are entitled to receive their retired or retainer pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would receive if ordered to active duty, and one-half of that additional amount shall be paid to the institution concerned by the Secretary of the military department concerned from funds appropriated for that purpose."

Thus, provision is made by statute for the detail of active duty military personnel and also the employment of retired members as instructors for the JROTC program. Detailed active duty personnel are entitled to their active duty military pay and allowances and nothing more. Employed retired members receive their retired pay and an added amount to be paid by the educational institution. The concerned military department is required to partially reimburse the institution for the amount expended. However, the law does not authorize a military department to pay an active duty member on leave his full active duty pay and allowances and at the same time pay still further amounts to an educational institution in connection with that member's employment as a JROTC instructor.

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It is therefore our view that, under the provisions of 10 U. S. C. 2031, the Air Force may not lawfully reimburse the school district for any amounts paid for the employment of Sergeant Harrison prior to the time he was actually retired from active military service on November 1, 1978.

Mr. Fagg has also suggested that reimbursement may be warranted on account of the mistake made by Air Force authorities in the matter. It appears that those authorities did err in informing the school district that Sergeant Harrison was a retired noncommissioned officer qualified for employment as a JROTC instructor under 10 U. S. C. 2031(d), when he was, in fact, still on active duty. However, the receipt of information, later established to be erroneous, by one dealing with a Government official, which was relied upon by the recipient to his detriment, does not afford a basis for a payment from appropriated funds. It has long been held by this Office and the courts that in the absence of specific statutory authority, the Federal Government is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties. See Federal Crop Insurance Corporation v. Merrill, 322 U. S. 380 (1947); Parker, v. United States, 198 Ct. Cl. 661 (1972); and 56 Comp. Gen. 943, 950 (1977). While it is regrettable that the school district received erroneous advice or information concerning Sergeant Harrison's qualifications for employment as a retired noncommissioned officer, such circumstances do not afford a legal basis for allowing the school district's claim.

Accordingly, it is our view that the school district may not lawfully be reimbursed any amount it paid to Sergeant Harrison prior to November 1, 1978, incident to his employment as a JROTC instructor.

We trust this will serve the purpose of your inquiry and regret that we are unable to reach a determination more favorable to the school district. The enclosures forwarded with your communication are returned as requested.

Sincerely yours,

  
Deputy Comptroller General  
of the United States

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