

DOCUMENT RESUME

03192 - [A2273398]

[Activities of Retired Regular Officers of Uniformed Services under "Civil Selling Law"]. B-184849. August 11, 1977. 2 pp. + 5 enclosures (8 pp-).

Decision by Elmer B. Staats, Comptroller General.

Issue Area: Personnel Management and Compensation (300).
Contact: Office of the General Counsel: Military Personnel.
Budget Function: General Government: Central Personnel Management (805).
Organization Concerned: Department of Defense.
Authority: Civil Selling Law (37 U.S.C. 801(c)). DOD Directive 5500.7. 41 Comp. Gen. 784. 41 Comp. Gen. 799. 42 Comp. Gen. 236. 52 Comp. Gen. 3. 42 Comp. Gen. 52. 43 Comp. Gen. 408. 39 Comp. Gen. 470.

Retired regular officers of the uniformed services, employed by contractors doing business with the Department of Defense (DOD), were alleged to have attended social functions sponsored and paid for by their employers at which civilians and active duty military personnel of DOD were present. Contacts made with departmental personnel who are in a position to influence procurements are viewed as establishing a prima facie case that such officers are "selling" and are subject to forfeiture of retired pay. (HTW)

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Case No. 71-10000
The Case

DECISION



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

FILE: B-184849

DATE: August 11, 1977

MATTER OF: "Civil Selling Law" 37 U. S. C. 801(c)

DIGEST: Where contractor doing business with Department of Defense agency sponsors and pays for social function at which retired Regular officers of the uniformed services employed by the contractor make contact with departmental personnel who are in a position to influence procurements by the Department, such contacts will be viewed as establishing a prima facie case that such officers are "selling" within the meaning of 37 U. S. C. 801(c) and they will be subject to forfeiture of retired pay.

Recently the activities of certain retired Regular officers of the uniformed services employed by contractors doing business with the Department of Defense (DOD) and its various agencies, have been brought to our attention. Information made available to us indicates that these officers have attended social functions sponsored and paid for by their employers at which civilians and active duty military personnel of the DOD have been present. An example of this type activity involves functions held at hunting lodges leased by certain Defense contractors for the purpose of generating good will for the corporation.

Subsection 801(c) of title 37, United States Code, provides that payment may not be made to a retired Regular officer of the uniformed services who is engaged for himself and others in selling, or contracting, or negotiating to sell, supplies or war materials to an agency of the DOD or one of the uniformed services.

Activities prohibited by that provision are described in DOD Directive 5500.7 and in decisions of this Office.

In construing the above-cited law, we have held that contacts made by retired officers with personnel of the various agencies when the retired officers are in nonsales, executive or administrative positions, and contacts by the retired officer in his capacity as a noncontracting technical specialist which involve no sales activity

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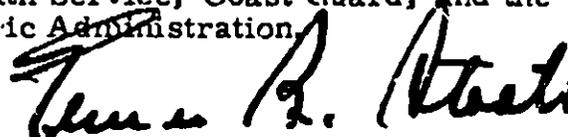
are outside the purview of the statute. See 41 Comp. Gen. 784 (1962); 41 id. 799 (1962); 42 id. 87 (1962); 42 id. 236 (1962) and 52 id. 3 (1972). However, we have also maintained that where a retired officer actually participates in some phase of the procurement process, such activities bring him within the purview of the definition of selling contained in DOD Directive 5500.7. See 42 Comp. Gen. 52 (1962); 42 id. 236 (1962) and 43 id. 408 (1963).

In construing statutes similar to 37 U.S.C. 801(c), we have held that a retired Regular naval officer engaged in the promotion of good will on behalf of his employer, a contractor doing business with Navy, which resulted in sales to be effected by other employees of the employer, was "selling" within the meaning of the statutes. 38 Comp. Gen. 470 (1959).

Furthermore, while noting that the statutory provisions do not encompass purely social contacts, we have expressed the view that contacts with departmental officials for sales purposes at places other than Government facilities at social gatherings, if established, would not make it any less a sales activity for which forfeiture of retired pay would be required. See 42 Comp. Gen. 237, supra.

Thus, in any case arising in the future when a Defense contractor sponsors or pays for what could be construed as a social event, and retired Regular officers employed by the contractor attend together with departmental personnel, who are in a position to influence procurements, we will be compelled to view such contacts as establishing a prima facie case that the retired officers are "selling" within the meaning of 37 U.S.C. 801(c) and unless adequately rebutted the officers will be subject to forfeiture of retired pay.

In order that our views on this matter may be clearly understood by all involved, we urge the Secretary of Defense to revise the applicable directive or take other steps calculated to inform all individuals concerned of our position in this matter. We also urge the Secretaries of Health, Education, and Welfare, Transportation and Commerce to take similar action with regard to the Commissioned Officer Corps of the Public Health Service, Coast Guard, and the National Oceanic and Atmospheric Administration.


Comptroller General
of the United States



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

D-184849

MAY 11 1977

The Honorable
The Secretary of Defense

Dear Mr. Secretary:

There is enclosed a copy of our decision of today holding that in the future when a Defense contractor sponsors or pays for what could be construed as a social event, and regular retired officers employed by the contractor attend together with departmental personnel, who are in a position to influence procurements, we will view such contacts as establishing a prima facie case that the retired officers are "selling" within the meaning of 37 U.S.C. 801(c).

We also urge that you take steps to revise the applicable directives or take other steps to inform all individuals concerned of our position.

Please inform us of the action taken by your Department in our recommendation.

Sincerely yours,

SIGNED ELMER B. STAATS

Comptroller General
of the United States

Enclosure



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

B-184849

August 11, 1977

The Honorable William Proxmire
Vice Chairman, Joint Committee
on Defense Production
Congress of the United States

Dear Mr. Chairman:

This is in further reference to your letters of December 22, 1976, April 7, 1977, and July 11, 1977, in which you offer comments and additional material particularly in connection with the employment of a retired naval officer, and ask reconsideration of the decision contained in our report dated December 16, 1976, concerning possible violations of 37 U.S.C. 801(c) (1970), "the civil selling law", by three retired Regular officers of the armed services. The report was prepared at your request and concerned employment activities of certain retired officers employed by Defense contractors and the attendance of these officers at hunting lodges controlled by the contractors at the same time active duty military personnel were at the lodges.

It was concluded in the report that while the activities of the three retired officers raised questions in connection with the prohibition of 37 U.S.C. 801(c), we were unable to establish an adequate basis to support a determination that the officers had violated the above-cited provision of law.

In your letters you express concern as to the conclusion reached in our report of December 16, 1976, and indicated that in your opinion evidence existed that demonstrated violations of 37 U.S.C. 801(c) in the case of the three retired officers particularly the retired naval officer.

It appears that a misunderstanding arose in connection with statements made in our report concerning the duties of Defense contractor personnel. This statement was a generalization of the duties of Defense contractor personnel in the Washington area, and was not intended to be specifically applied to the three officers whose activities were being questioned and was not considered evidence of a violation of the statute.

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While we share your concern and we appreciate your position with regard to the situation of retired officers who are employed by Defense contractors, our investigation of the three retired officers, did not provide enough evidence concerning their general activities to conclude that they had violated the provisions of 37 U. S. C. 801(c). As we stated in our earlier report, our investigation was hampered by the considerable period of time which had elapsed between the occurrence of the questioned activities and the commencement of the investigation.

Concerning activities of retired Regular officers in connection with the prohibition contained in 37 U. S. C. 801(c) this Office has held that the employment of such officers in nonsales, executive or administrative positions, and contacts by a retired officer, in his capacity as a non-contracting technical specialist which involve no sales activities are outside the purview of the statute. See 41 Comp. Gen. 784 (1962); 41 id. 799 (1962); 42 id. 87 (1962); 42 id. 236 (1962); and 52 id. 3 (1972). However, we have also maintained that where a retired officer actually participates in some phase of the procurement process, such activities bring him within the purview of the definition of "selling" contained in the Department of Defense (DOD) Directive. See 42 Comp. Gen. 52 (1962); 42 id. 236 (1962); and 43 id. 408 (1963).

The information gathered in connection with our investigation indicated that the duties of the three retired officers were generally of a nonsales type and should be classified as either technical or administrative in nature. This view is supported by our examination of job descriptions of the individuals and interviews with representatives of their employers and DOD personnel. Our investigation did not produce substantial evidence that the normal activities of the three individuals constituted a basis for concluding that they had violated the provisions of 37 U. S. C. 801(c). In other words information provided to representatives of this Office did not establish that the retired officers had actually engaged in prohibited activities, notwithstanding presumptions created by generalizations with regard to duties of Defense contractor personnel.

Concerning your comments in connection with the enforcement and interpretation of 37 U. S. C. 801(c), we invite your attention to our letter to you, B-184849, December 3, 1975, copy enclosed,

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wherein we stated the position of this Office with regard to responsibilities under 37 U.S.C. 801(c).

We noted in that letter that we conduct periodic reviews on conflict of interest situations. However, prime responsibility for the enforcement of 37 U.S.C. 801(c) rests with the agencies within the DOD. The decisions of this Office in this area have been in response to DOD's referral of doubtful cases to this Office or in asking hypothetical questions concerning interpretations of 37 U.S.C. 801(c). Cases which are not doubtful from a legal or factual viewpoint need not be referred to this Office by the Defense agencies.

As a result of a meeting of members of the staff of the Joint Committee on Defense Production and General Accounting Office staff members involved with the report, it was brought to our attention that the Committee staff had information which had not been considered in the formulation of our response to you dated December 16, 1976. At this meeting, it was concluded that the additional information concerning the activities of one of the officers would be provided and that this information would be considered in connection with our response to you. This information was attached with your letter of April 7, 1977, to this Office.

Further, your letter of July 11, 1977, points to certain additional information concerning the activities of that retired officer. We are taking action to acquire the material identified and we will respond to you concerning this in the future.

Concerning the general problem, we have expressed the view that, while realizing the difficulties which could be encountered in policing social activities, contacts with departmental officials for sales purposes at places other than Government facilities at social gatherings, if established, would not make it any less a sales activity for which a forfeiture of retired pay would be required. See 42 Comp. Gen. 237, *supra*. We also noted, in that decision, however, that the statutory provisions do not encompass purely social contacts. We have further held that a retired regular officer of the Navy employed by a contractor doing business with the Navy, whose duties "provide that he contact the trade for the purpose of promoting good will which will result in sales to be effected by other employees of the

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employer", must be viewed as "selling" within the meaning of statutes similar to 37 U. S. C. 801(c). See 38 Comp. Gen. 470 (1959).

You will note that the decision holding the promotion of good will as a sales activity dealt with a specific set of facts which left no doubt as to the duties the individual involved was to perform for his employer. In the situation we are now considering, the presence of the retired officers at the hunting lodges when DOD personnel were present, is considerably less conclusive as to their engaging in the promotion of good will than in the above-cited case.

Thus, on the basis of the information available to us, that is, interviews with the individuals, their employers, and the active duty personnel attending the functions at the lodge, we were unable to conclude that the retired officers were actively engaged in the promotion of good will for their employers or that the attendance of those individuals at the functions was for any purpose other than to hunt. Again, we encountered difficulty in ascertaining the facts as a result of the elapsed time between the activities and the investigation.

For this reason together with the fact that the decisions of this Office have not specifically addressed the questions raised by this case, nor do the present DOD regulations cover such situations, we do not believe that a forfeiture of retired pay in these circumstances can be sustained.

We share your concern that violations of the statute may have occurred and have today advised the Secretary of Defense (copy enclosed) and the Secretaries of the other Departments concerned that in the future if a retired Regular officer attends a social function sponsored by his employer at which departmental personnel, who are in a position to influence procurements, are also present we will consider that there has been established a prima facie case of promoting a good will for the purpose of selling to the Government. Unless adequately rebutted, such a case will be treated as a violation of 37 U. S. C. 801(c), and the retired officer will be subject to forfeiture of retired pay.

Sincerely yours,
Lucas A. Atchley

Comptroller General
of the United States

Enclosures - 2



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

U-184849

AUG 11 1977

The Honorable
The Secretary of Health,
Education and Welfare

Dear Mr. Secretary:

There is enclosed a copy of our decision of today holding that in the future when a Defense contractor sponsors or pays for what could be construed as a social event, and regular retired officers employed by the contractor attend together with departmental personnel, who are in a position to influence procurements, we will view such contacts as establishing a prima facie case that the retired officers are "selling" within the meaning of 37 U.S.C. 801(c).

Since 37 U.S.C. 801(c) is applicable to retired Regular officers of the Commissioned Officer Corps of the Public Health Service, we urge that you take steps to revise the applicable directives or take other steps to inform all individuals concerned of our position.

Please inform us of the action taken by your Department in our recommendation.

Sincerely yours,

SIGNED ELMER B. STAATS

Comptroller General
of the United States

Enclosure