

17063 Mrs. Schneider

DECISION



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

FILE: B-198751

DATE: February 19, 1981

MATTER OF: Theodore W. Hammer

DIGEST: Where retired Regular officer of the uniformed services signs and submits bids as part of employment with contractor doing business with Department of Defense agencies, the officer is "selling" within the meaning of 37 U.S.C. § 801(c) which prohibits such activity for 3 years after his name is placed on the retired list and is subject to loss of retired pay while so engaged. Ignorance of the law does not provide a legal basis for retention of retired pay during a period of employment prohibited by the statute.

This decision is in response to a request from the Department of the Army, Finance and Accounting Center, Indianapolis, Indiana, concerning the propriety of deductions from the retired pay of Lieutenant Colonel Theodore W. Hammer, a retired officer of the Regular Army, as recovery of the amount paid from June 4, 1979, to September 28, 1979. The Army contends and we agree that Colonel Hammer's activities as a contract administrator during that period were in violation of 37 U.S.C. § 801(c) (1976) which states:

"(c) Payment may not be made from any appropriation, for a period of three years after his name is placed on that list, to an officer on a retired list of the Regular Army, the Regular Navy, the Regular Air Force, the Regular Marine Corps, the Regular Coast Guard, the Environmental Science Services Administration, or the Public Health Service, who is engaged for himself or others in selling, or contracting or negotiating to sell, supplies or war materials to an agency of the Department of Defense, the Coast Guard, the Environmental Science Services Administration, or the Public Health Service."

Colonel Hammer retired from active duty on June 1, 1979, with over 26 years of service. On June 4, 1979, he began working as a contract administrator for a small electronics firm which derives the majority of its sales volume from supply contracts with Government activities. On Department of Defense Form 1357, Statement of Employment for Regular Retired Officers, dated September 8, 1979,

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Colonel Hammer indicated that his employer sells, or offers to sell, its products to the agencies mentioned in 37 U.S.C. § 801(c). The job description attached to DD Form 1357 stated that his duties included reviewing, signing, and mailing of formal advertisement solicitations from Government supply agencies, and preparing and forwarding contract amendments to those agencies.

The Army notified Colonel Hammer by letter dated September 21, 1979, that the above activities were in violation of the post-employment selling restrictions of 37 U.S.C. § 801(c), and that he was not entitled to retired pay while he remained engaged in those activities. His employer submitted a written statement, dated October 16, 1979, that Colonel Hammer's job had been restructured as of September 28, 1979, to avoid either "a real or apparent violation" of the statute. In March 1980 the Army began deducting \$75 per month from Colonel Hammer's retired pay toward repayment of \$6,260.80 received from the date of employment to the date his job responsibilities were revised. Colonel Hammer protests the deductions, claiming that he should not be penalized because his duties prior to September 28, 1979, were purely administrative in nature, and because he had no knowledge of the post-employment selling restriction when he took the job.

The term "selling" as used in 37 U.S.C. § 801(c) is defined in Army Regulation (AR) 600-50, entitled "Standards of Conduct for Department of the Army Personnel," September 30, 1977, which implements the conflict of interest provisions of former Department of Defense Directive 5500.7, January 15, 1977. Appendix A, paragraph VII A.2.c, of AR 600-50 states:

"For the purpose of this statute, 'selling' means:

"(1) Signing a bid, proposal, or contract:

"(2) Negotiating a contract;

"(3) Contacting an officer or employee of any of the foregoing departments or agencies for the purpose of:

"(a) Obtaining or negotiating contracts.

"(b) Negotiating or discussing changes in specifications, price, cost allowances, or other terms of a contract, or

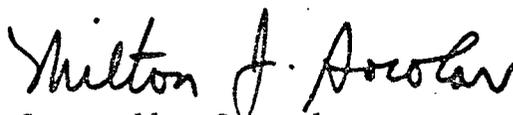
"(c) Settling disputes concerning performance of a contract; or

"(4) Any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by another person."

In construing 37 U.S.C. 801(c), we have held that contacts made by retired officers with noncontracting technical specialists of the listed agencies which are made as part of non-sales, executive or administrative positions, and contacts by retired officers which involve no sales activity whatever, are outside the purview of the statute. See 42 Comp. Gen. 236 (1962) and 52 Comp. Gen. 3 (1972). However, we have maintained that where the record discloses that a retired officer actually participates in some phase of the procurement process, such activities bring him within the above-quoted definition of selling. See 42 Comp. Gen. 236, supra.

It is our view that Colonel Hammer's activities during the period in question fall within the scope of the activities prohibited by the law. The signing and submission of bids constitute actual participation in the Government procurement process under the decisions of this Office. More significantly, signing of bids and proposals is an activity explicitly proscribed by the definition of selling in AR 600-50, supra. Regardless of whether the function was substantially clerical in nature, as is contended, it clearly involved direct contact with Government contracting officials on matters involving sales activity. The purpose of the statute is to eliminate any danger of favoritism or use of personal influence in the procurement process of certain agencies. That danger appears whenever a retired officer may be considered to be representing a potential contractor before those agencies for the purpose of selling.

Further, the fact that an officer acted in good faith, was ignorant of the law, or will suffer financial hardship, does not provide a legal basis for retention of retired pay during a period of employment prohibited by 37 U.S.C. 801(c). 41 Comp. Gen. 642, 646 (1962). Accordingly, Colonel Hammer was not entitled to retired pay from June 4 to September 28, 1979, and such pay should be recovered by deduction from future retired pay entitlements.



For The Comptroller General
of the United States