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DECISION

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

FILE: B-123698 DATE: May 10, 1978

MATTER OF: Associate Attorney General -- Exemption from Annual and Sick Leave Act

DIGEST: Decision B-123698, June 22, 1955, holds that only individuals appointed by the President may be designated by him as exempt from Annual and Sick Leave Act of 1951, as amended, now codified as 5 U.S.C. § 6301(2)(B)(xi). That decision is affirmed. Any broadening of eligibility for exemption from the leave act is for consideration of the Congress.

The Department of Justice has requested our decision as to whether the position of Associate Attorney General may be exempted from the provisions of the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. § 6301 et seq.

The position of Associate Attorney General is an excepted position in Schedule C (confidential or policy-determining positions) in the Office of the Attorney General. It was designated for pay purposes as a Level IV Executive Schedule position by the President under the provisions of 5 U.S.C. § 5317 (Executive Order No. 11736, dated August 6, 1973, superseded by Executive Order No. 11861, May 21, 1975, which continues the designation). The incumbent of the position is appointed by the Attorney General.

In its letter the Department has requested that we rescind or modify our decision B-123698, June 22, 1955, which holds that only officials appointed by the President may be exempted from the provisions of the Annual and Sick Leave Act. In that decision, we considered the meaning of the term "officers" as used in section 1 of Public Law 102, 67 Stat. 136, approved July 2, 1953, which amended section 202 of the Annual and Sick Leave Act to provide for exclusion from the Act of officers appointed by the President whose rate of basic pay exceeds the maximum rate provided by the General Schedule and such other "officers" (with exceptions not relevant here) who are designated by the President. We held that the term "officers" as used in

section 1 of Public Law 102 referred only to those officials appointed by the President. Our holding was based upon the legislative history, existing law, and 24 Comp. Gen. 45 (1944) and 24 id. 64.

The Department of Justice believes that our 1955 decision is in error primarily because of the literal wording of the pertinent exemption provision in the 1953 leave act amendments, the definition of "officer" now contained in 5 U.S.C. 2104 and the enactment of the Federal Executive Salary Act of 1964, 5 U.S.C. 5311 - 5317.

We recognize the merit in the Department of Justice's interpretation of the language in the 1953 leave act exemption provision. In 1955 our Office was faced with the same basic concern, and therefore we carefully examined the legislative history prior to rendering our decision.

Subsection (c)(1)(A) of the 1953 leave act amendments removed from the leave act Presidential appointees with salaries above GS-18. That provision alone would have left subject to the leave act, and also entitled to salary as "officers," Presidential appointees whose salaries were equal to or less than GS-18. Since there evidently were some instances in which it was preferable to permit such lower salaried "officers" to be placed outside the purview of the leave act, the Congress added (c)(1)(C) authorizing exemption from the leave act of "such other officers (except postmasters, United States attorneys, and United States marshals) as may be designated by the President." The amendment then provides that no officer in the executive branch to whom the leave act applies shall be entitled to his salary solely by virtue of his status as an officer.

When Public Law 102 was enacted in 1953, persons who were deemed entitled to their salaries by virtue of holding title to the office were those required to be appointed by the President. The term officer in that sense had for many years been so limited. 24 Comp. Gen. 45; 24 id. 64. The 1966 codification of title 5 contains a broader definition of officers in 5 U.S.C. 2104. That codification, however, was not intended to make substantive changes in

pre-existing law. The courts have upheld the presumption that the statutes covered by a codification are intended to remain substantially unchanged. See Senate Report No. 1380, on H.R. 10104, 89th Congress, 2nd session, pp 20-21. Thus, we do not view the definition of "officer" in 5 U.S.C. 2104 as operating to change the meaning of "officers" as used in the 1953 leave act amendment.

Nor do we consider the enactment of the Federal Executive Salary Act of 1964 persuasive in this matter. That act establishes "offices and positions" in levels I through V to be known as the Federal Executive Salary Schedule. The enactment of that schedule was for the purposes of setting levels of compensation of Federal Executives substantially higher than those established in the Federal Executive Pay Act of 1956, and establishing a new, consistent and rational salary structure for Executive level offices and positions. The 1956 pay act, Public Law 854, July 31, 1956, 70 Stat. 736, had enacted a Federal Executive schedule for high-level officers and positions, (though not as extensive in coverage as the 1964 Executive Pay Act) with 6 identifiable salary groupings. The 1956 act had in turn adjusted the pay rates set forth in the 1949 pay act for certain high-level executives and broadened the coverage. The 1949 act, Public Law 359, October 15, 1949, 63 Stat. 880, likewise had increased the pay of a limited number of high-level officials, the pay of which was set by law in various basic statutes. Thus, as early as 1949 action had been taken to set salary rates of high-level officials by a special pay act. The 1949, 1956 and 1964 enactments were part of a pattern of actions by the Congress to authorize separate pay increases for high-level officials and to extend the coverage to include thereunder positions throughout the executive branch that were comparable. Thus, we cannot isolate the 1964 Executive Pay Act and treat it as a new statutory concept that could alter the coverage or exemptions permitted by the 1953 leave act amendments.

The legislative history of the 1953 leave act amendments reflects the fact that a major objective of the Congress was to abolish the dual entitlement of certain

high-level officers in the executive branch to leave entitlement, including lump-sum leave on separation, and their entitlement to their salaries solely by virtue of their status as officers. Further, the legislation established a standard under which it could be determined which officers in the executive branch would be entitled to the compensation attached to their offices solely by virtue of their status as officers and which officers would not be so entitled. See Conference Report and Senate Report No. 294 on H.R. 4654, 83rd Congress. We have found no indication of an intent by Congress to permit the privilege of unlimited absence without loss of salary to be conferred by executive authority on a class of persons who did not have that right at the time the 1953 leave amendment was enacted.

As indicated above at the time of our 1955 decision we recognized that the literal language of subsection (c)(1)(C) could be interpreted to permit exemption of other than Presidential appointees. But a review of the legislative history convinced us that the better view was that the Congress only wanted to permit executive exemption to be made for Presidential appointees. That view was also held at that time by the then General Counsel of the Civil Service Commission. We consider our 1955 interpretation as a contemporaneous interpretation of the leave act amendment and as such it should not be overruled at this time unless found to be clearly erroneous. We do not so find it. In the circumstances, we believe that any broadening of exemption eligibility should be by legislative action.

We find no inconsistency in 53 Comp. Gen. 577 (1974) with our 1955 decision. That case held that two United States attorneys who had been placed in Executive level positions are exempt from the leave act under 5 U.S.C. 6301(2)(X). Those individuals are Presidential appointees and meet the criteria for exemption under that provision. The Associate Attorney General is not a Presidential appointee. While not specifically stated in our 1955 decision, section 202(c)(1)(C), now codified in 5 U.S.C.

6301(2)(XI), is viewed by our office as only authorizing eligibility for Presidential designation thereunder to individuals whose basic rates of compensation are equal to or less than the highest rate payable under the General Schedule. Individuals with rates of pay in excess of the highest rate payable under the General Schedule are exempt from the leave act upon qualifying under 5 U.S.C. 6301 (2)(X), as was the case with respect to the United States attorneys covered by our 1974 decision.

Accordingly, we sustain our decision of June 22, 1955, B-123698. Thus, the position of Associate Attorney General may not be exempted from the provisions of the Annual and Sick Leave Act of 1951, as amended, by executive action.

Deputy Comptroller General
of the United States