



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

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IN REPLY
REFER TO: B-193637

January 25, 1979

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Col.

Colonel Francis X. Lillis, USA
313 Windover Avenue
Vienna, Virginia 22180

[Propriety of ACCEPTANCE
of a CIVIL OFFICE]

Dear Colonel Lillis:

Reference is made to your letter dated November 29, 1978, concerning whether, if you were to accept an appointment to the Town of Vienna, Virginia, Board of Zoning Appeals, you would be accepting a "civil office" and thus lose your Regular Army commission pursuant to 10 U. S. C. 973(b) (1976).

You say that it is your opinion, and that of the Town of Vienna Attorney, that membership on the Board would not constitute holding "civil office." The Town Attorney offers the view that civil officers would be those "who carry statutory authority to perform executive or administrative type duties" and this definition does not encompass Board members since none perform duties of this nature. However, to avoid any potential conflict between your holding the Board position and your status as a Regular Army officer on active duty, you request an advisory opinion from this Office on the matter.

Section 973(b) 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, provides in pertinent 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 section 973(b) has never been statutorily defined. However, in 13 Op. Atty. Gen. 310 (1870), an opinion rendered shortly after enactment of the act of July 15, 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 that the office of park commissioner had been established by an act of the State legislature, which act designated the mode of appointment, the term of

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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 nonetheless 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." See also 18 Op. Atty. Gen. 11 (1884).

Consistent with 13 Op. Atty. Gen. 310, supra, we have 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. 830 (1965) and 29 Comp. Gen. 363 (1950).

We have also long held that such an elastic measure as the relative importance of the duties to be performed, standing alone, was not intended by Congress to mark the line between mere employment and "civil office" in applying the penalty of the statute. See 25 Comp. Gen. 377, 385 (1945), 29 Comp. Gen. 363, 369, supra, 44 Comp. Gen. 830, 831, supra, and B-173783, October 9, 1975. Also, the determination of whether a certain position is a "civil office" within the meaning of the statute cannot be made to depend on whether the duties of the position might in fact be performed by a particular military officer without interfering with his assigned duties as an officer on the active list. Rather, it has been held that the statute makes the two positions incompatible as a matter of law, without qualification and without regard to any showing of compatibility in fact by reason of leave of absence, or otherwise, with respect to a particular officer and a particular position. See 25 Comp. Gen. 377, 381, supra, and 20 Comp. Gen. 885, 888 (1941). That view is supported by the legislative history of the statute. See 91 Congressional Globe 1352, where it is stated concerning that provision that it was inserted in keeping with the view that it is "inconsistent with our system of government to appoint military officers to civil positions."

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Concerning the position occupied by a member of a Board of Zoning Appeals in Virginia, such positions are established pursuant to State law with the incumbents to be appointed by the appropriate circuit court. Their "terms of office" are established by law and they may be removed for "malfeasance, misfeasance or nonfeasance in office", or for other just cause, by the court which appointed them. Code of Virginia (Va. Code) § 15.1-494 (1978 Supp.). The powers and duties of such Boards are established by law, including hearing and deciding appeals from zoning orders, etc., authorizing in specific cases variances from the terms of the zoning ordinances, and in certain cases granting restraining orders staying proceedings before a zoning administrator. Va. Code §§ 15.1-495, 15.1-496.1 (1978 Supp.).

↘ In view of those provisions of Virginia law, it is our opinion that the position of member of the Zoning Appeals Board is a civil office within the meaning of 10 U. S. C. 973(b) in that it is created by law, its duties are imposed by law on the incumbent, and these duties involve the exercise of some portion of the sovereign power.

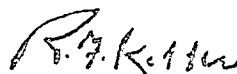
↘ The distinction offered by the Town Attorney that the Board position does not entail exercising executive or administrative duties, but is instead a quasi-judicial position, does not in our view remove it from being a civil office. Many civil officers exercise judicial or quasi-judicial powers rather than executive or administrative powers.

↘ Accordingly, it is our view that if you were to accept the position on the Zoning Appeals Board, you would be in violation of 10 U. S. C. 973(b) and subject to termination of your military appointment.

In view of the sanction which would be invoked based on our conclusion that a Zoning Board member holds a "civil office", we would advise you not to accept the appointment while an active member of the Regular Army. We note, however, that upon retirement from active duty you would no longer be subject to 10 U. S. C. 973(b) since the statute applies only to officers on the active list. 25 Comp. Gen. 38, 41 (1945); 25 Comp. Gen. 203 (1945).

We trust this serves the purpose of your inquiry.

Sincerely yours,



Deputy Comptroller General
of the United States