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PLM-1
Mr. Dunn

DECISION



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

FILE: B-196611 **DATE:** December 19, 1979

MATTER OF: Department of Medicine and Surgery, *536*
Veterans Administration - Applicability
of Senior Executive Service

DIGEST: Department of Medicine and Surgery, Veterans Administration, is covered by title IV of the Civil Service Reform Act of 1978 establishing a Senior Executive Service. Although the Department was created with autonomy in matters of personnel management with separate authority for hiring and compensating its employees outside the civil service, it satisfies the SES agency and position definitions in 5 U.S.C. § 3132 and was not specifically excluded from SES as were certain other agencies and positions. Federal Reserve Board, 58 Comp. Gen. 687 (1979), distinguished.

R By congressional request, the General Accounting Office has been asked to render a formal opinion on whether the medical employees in the Veterans Administration's Department of Medicine and Surgery employed under the authority of chapter 73 of title 38, United States Code, are subject to the Government-wide Senior Executive Service (SES) provisions of Title IV of the Civil Service Reform Act of 1978. ^{1/}

2 It is the position of the Office of Personnel Management *v. 925* (OPM), which administers the SES program, that the employees of the Department of Medicine and Surgery (DM&S) are subject to the provisions of Title IV of the Civil Service Reform Act governing the Senior Executive Service. OPM has found that the Department falls under the SES criteria contained in 5 U.S.C. § 3132(a), and thus is included under the SES. However, the President, pursuant to his authority under 5 U.S.C. § 3132(c), and upon the recommendation of OPM, has granted a 1-year exclusion of senior medical positions in the DM&S from the SES. This exclusion runs until July 13, 1980.

^{1/}Public Law No. 95-454, October 13, 1978, 92 Stat. 1111, 1154, 5 U.S.C. § 3131 et seq.

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The Veterans Administration (VA) disagrees with the conclusions reached by OPM. The VA points out that, since 1946, when it was established, the Department of Medicine and Surgery has had a separate statutory personnel system. Congress enacted Public Law No. 79-293^{2/} to improve the quality of medical care provided by VA to our nation's veterans, and VA states that its "provisions were designed to achieve this goal by removing the single greatest cause for the poor quality of care that had been provided in the past--the incompatibility of civil service regulations with the operations of a medical care delivery system." In concluding that its employees are not subject to the Senior Executive Service, the VA relies on the strong, clear intent of Congress to establish a personnel system outside of civil service with separate authority to employ and pay medical personnel. The VA specifically points to section 6(a) of Public Law 79-293, 38 U.S.C. § 4106(a), which provides as follows:

"(a) Appointments of physicians, dentists, podiatrists, optometrists, and nurses shall be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Administrator, without regard to civil-service requirements." (Emphasis added.)

Because of this provision and other provisions in chapter 73 of title 38 relating to employment and compensation, VA says that DM&S personnel have not been covered by other laws dealing generally with civil service matters. Therefore, VA believes the Civil Service Reform Act did not repeal the express authority of VA over DM&S medical personnel. In further support of its position, the VA cites our recent decision Federal Reserve Board, B-195418, July 30, 1979, 58 Comp. Gen. 687 (1979), where we held that the employees of the Board of Governors, Federal Reserve System are excluded from the SES provisions of the Civil Service Reform Act of 1978.

^{2/} 59 Stat. 675, January 3, 1946, codified in chapter 73 of title 38, U.S. Code.

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We have carefully considered the VA's position, but we conclude that the medical personnel employed in the Department of Medicine and Surgery are subject to Title IV, Senior Executive Service, of the Civil Service Reform Act for the reasons which follow.

Since the Department is a component of the Veterans Administration, an executive agency, it is evident that the agency requirement for SES coverage in 5 U.S.C. § 3132(a)(1) is met. Further, the Department is not listed among the agency or unit exclusions found in 5 U.S.C. § 3132(a)(1). Moreover, it is apparent that the Department's senior medical positions meet the broad statutory definition of "Senior Executive Service position" as defined in 5 U.S.C. § 3132(a)(2), to mean "any position in an agency which is in GS-16, 17, or 18 of the General Schedule or in level IV or V of the Executive Schedule or an equivalent position; which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, . . ." (Emphasis added).

Considering the congressional intent to coordinate super-grade and equivalent positions government-wide, we interpret the statutory definition as including positions in an agency which are outside the General and Executive Schedules but are equivalent to supergrade levels. Thus, the statutory definition implicitly overrides prior equivalent position authorities that were statutorily placed under an agency's independent control if the equivalent positions otherwise meet the SES test. Certain equivalent position authorities, however, are expressly excluded from SES, e.g., Foreign Service positions, and are not affected by the Reform Act. See 5 U.S.C. § 3132(a)(2)(i). There is no express exclusion or repealer for DM&S positions established under chapter 73 of title 38. Thus, a logical inference may be drawn that had Congress intended to exclude the Department's positions from SES, it would have listed them among the other specified exclusions. See 5 U.S.C. § 3132(a)(2)(ii) and (iii) excluding Administrative Law Judge positions and certain crime control positions in the Drug Enforcement Administration.

In the case of the Federal Reserve Board, supra, we found that the specific independent authority of the Federal Reserve Act took precedence over the Civil Service Reform Act, a subsequently enacted statute applicable to Federal agencies

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4 generally, absent a clear indication that Congress intended otherwise. In that case we noted an exchange of correspondence in 1940-41 between the President and the Civil Service Commission in which the parties sought to retain the Federal Reserve Board's independent authority. Finding in these documents a compelling and clear intent to keep the Board entirely outside the civil service, and noting the long history of the Board's sole authority over its employees, back to the Federal Reserve Act of 1913, we did not believe that Congress meant to override the unusual and special efforts made to preserve the Board's independence. 13 404

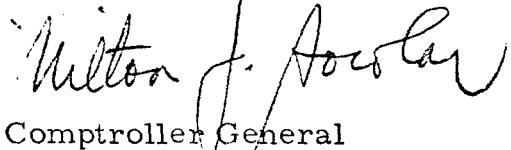
In contrast, we do not believe the Department of Medicine and Surgery makes as strong and as distinct a case as was found in the Federal Reserve Board case. The Board operates under separate authority as a totally independent agency outside of executive branch control and outside the civil service system. In contrast, while the Department also functions under separate statutory authority, it is not a free-standing agency but is a component part of the Veterans Administration, an executive agency within the civil service system. Thus, DM&S is not in the unique independent position that was found essential to our holding concerning the Federal Reserve Board. Congress did not establish the Department as an independent agency outside the civil service or even separate all of the Department employees from the civil service. The 1946 law clearly provides that civil service laws, rules, and regulations apply to its employees, other than the medical personnel specifically excepted. 38 U.S.C. § 4111. Also, specific provision was made placing all Department employees under civil service retirement. 38 U.S.C. § 4109. It is particularly clear as well, from the Department's functions prescribed in section 4101 of title 38, that the VA Administrator has overall responsibility for the Department's policy and operation. Thus, we do not believe the Department of Medicine and Surgery meets the criteria of independence found to exist with regard to the Federal Reserve Board.

Moreover, in Federal Reserve Board, our ruling that SES did not apply to the Board was also based on the absence of any contrary legislative history. We found "nothing in the legislative history of the Civil Service Reform Act to suggest that Congress gave any consideration to a repeal of these

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01-2 [independent personnel] provisions of the Federal Reserve Act." 58 Comp. Gen. 687, ~~at~~ 693. In contrast, the legislative history of the reform legislation includes statements by the Chairmen of the House and Senate Veterans' Affairs Committees during the debate stating that the Senior Executive Service would apply to the top-level medical staff of DM&S.^{3/} No one challenged the statements by the Chairmen that VA medical personnel would be included in the Senior Executive Service. L3900

Accordingly, in view of the clear intent of Congress to extend the SES Government wide and the legislative history referred to above, we conclude, as stated above, that the Senior Executive Service provisions of the Civil Service Reform Act do apply to the employees of the VA's Department of Medicine and Surgery.



For The Comptroller General
of the United States

^{3/} 124 Cong. Rec. S14285 (daily ed. August 24, 1978) (remarks of Senator Cranston).

124 Cong. Rec. H8465 (daily ed. August 11, 1978) (remarks of Representative Roberts).