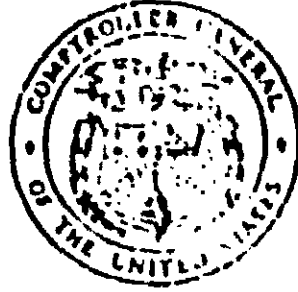


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**DECISION**



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

FILE: B-203079

DATE: March 22, 1982

MATTER OF: Sales Activities of Retired Regular  
Officers--Application of 37 U.S.C. § 801(c)

- DIGEST: 1. Regular officers, employed by companies which sell supplies and war materials to the Department of Defense or its agencies, who visit Army and Air Force Exchange Service stores to perform warranty repairs on their employer's products purchased from store, perform their duties as noncontracting technical specialist and are not in violation of 37 U.S.C. § 801(c).
2. Visits by retired Regular officers to Army and Air Force Exchange Service stores for purposes of demonstrating employer's product and conducting seminars to induce procurement by the Government are in violation of 37 U.S.C. § 801(c). However, stocking stores with employer's sales literature, taking sales inventory and conducting product demonstrations and seminars to explain the use of previously procured products or to influence sales to store customers do not violate the statute, since these activities do not directly influence Government procurement.

The issues are whether certain activities of retired Regular officers constitute violations of the selling restrictions of 37 U.S.C. § 801(c). Specifically, certain of these officers, employed by contractors who sell supplies or war materials to the Department of Defense and its agencies, hold positions that entail visiting Army and Air Force Exchange Service stores on behalf of the employer to (1) demonstrate company products, (2) perform warranty repairs on company products purchased from the stores, (3) stock the stores with company advertisements, and (4) conduct sales inventory to determine rate of sales.

In clarification of these duties, the officers contend that their activities are not in violation of

37 U.S.C. § 801(c) because the actual contracting functions are performed by the company they represent in accordance with sales and procurement procedures. The question is also raised as to whether the determination of a violation of the statute in such instances turns solely upon whether the company's product or item has been contracted for prior to an officer's visits or may be contracted for subsequent to his visits.

These questions were asked by the Assistant Secretary of Defense (Comptroller). The questions together with a discussion are contained in the Department of Defense Military Pay and Allowance Committee Action No. 525.

Subsection 801(c) of title 37, United States Code, provides that, for a period of 3 years after the name of a Regular officer of the uniformed services is placed on a retired list, payment may not be made to such an officer who is engaged for himself or others in selling, contracting, or negotiating to sell supplies or war materials to an agency of the Department of Defense or one of the uniformed services. As stated in the discussion of the questions posed here, the definition of "selling" as provided by DOD Directive 5500.7 includes:

"Any \* \* \* liaison activity with a view toward ultimate consummation of a sale although the actual contract thereof is subsequently negotiated by another person."

At the outset we would like to point out that the law and regulations do not apply to sales activities of retired Regular officers designed to promote sales to individuals who desire to purchase a particular product. The law relates only to retired Regular officers who engage in sales activities where the Government entities listed in the statute are the potential or actual purchasers of supplies or war materials.

In construing this statute, we have held that when a retired officer "participates in some phase of the procurement process, such activities bring him within the purview of the definition of selling" stated in DOD

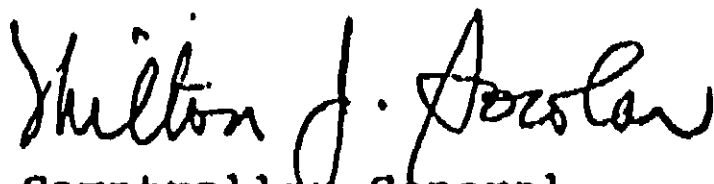
Directive 5500.7. 56 Comp. Gen. 898, 899 (1977). The purpose of this statute is to prevent favoritism and preferential treatment in the Department of Defense and uniformed services' procurement process that may result from the employment of retired Regular officers by potential contractors. Accordingly, activities designed to influence procurement must be considered within the scope of the statute, even though the actual procedural functions of negotiating sales contracts or executing sales may be performed by an individual who is not bound by the restriction. See 38 Comp. Gen. 470 (1954). However, employment in nonsales, executive, or administrative positions which require agency contacts in the capacity of a noncontracting technical specialist or consultant, but which involve no sales activities, is outside the scope of the statute and DOD Directive 5500.7. 53 Comp. Gen. 616, 618 (1974); 52 Comp. Gen. 3 (1972).

Visits or contacts by the retired officers for the purpose of repairing company products constitute contacts as a noncontracting technical specialist, and such activity is not in violation of the selling restrictions of this statute, provided that no sales activities are conducted during the course of such contacts. See 52 Comp. Gen. 3, supra. However, retired Regular officers who conduct seminars may or may not be in violation of the restrictions, depending upon the content of the seminars and the purpose for which they are conducted. If, in the course of conducting a seminar as a part of his employment, a retired Regular officer promotes, recommends, suggests, or in any way induces a sale to the Department of Defense or a uniformed service, he is in violation of the statute. If, on the other hand, a retired Regular officer conducts a seminar for the purpose of explaining the use of products that have already been procured by the agency or service, that activity would not violate the prohibition unless it influences the procurement process.

Retired Regular officers who demonstrate an employer's product to customers in the Army and Air Force Exchange Service stores, stock the stores with the employer's sales literature, and take inventory of their company's sales, are not violating the statute.

As we noted earlier, the statute applies to activities of retired Regular officers which involve selling to the Department of Defense. This includes contacts with Department officials who are in a position to influence procurement. The statute does not prohibit contacts with customers in the service stores since this activity can have only an indirect effect on the Department's procurement. In our view the statute does not bar a retired Regular officer from promoting the sale of a product to the public simply because the promotion activities involve items being sold at Army and Air Force Exchange Service stores. Such activities are a step removed from those aspects of the procurement process to which the statute pertains.

Regarding the basis for determining whether an officer's activities under the stated circumstances are in violation of the restriction, the statute proscribes payment to retired Regular officers who are involved in ongoing or continuing procurement efforts or activities. Even though an employer's product has been previously contracted for, if there exists a possibility that the activities or contacts of an officer within the restricted period could influence additional contracts for supplies or materials, that officer's activities are in violation of the statute. Therefore, the fact that a prior sales transaction has been executed is not determinative of whether an officer's activities constitute a violation of the statute.

*for*   
Comptroller General  
of the United States