DOCUMENT RESUME

02926 - [A2163282]

[Employment with a State Government while on Terminal Leave Prior to Retirement]. B-162471. August 2, 1977. 5 pp.

Decision re: Maj. Robert C. Crisp; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation (300).
Contact: Office of the General Counsel: Military Personnel.
Budget Function: General Government: Central Personnel Management (805).
Organization Concerned: Department of the Air Force.
Authority: Armed Forces Leave Act of 1946, as amended (37 U.S.C. 501). (P.L. 90-235; 81 Stat. 759; 10 U.S.C. 973). (P.L. 89-554, sec. 8; 80 Stat. 378; 80 Stat. 653). (59 Stat. 584; 5 U.S.C. 61a-1 (Supp. V)). Public Health Service Act, sec. 219(c). P.L. 90-83, sec. 1(22). 81 Stat. 199. 16 Stat. 319. 42 U.S.C. 210, 211(c). 10 U.S.C. 3544. 10 U.S.C. 8544. 5 U.S.C. 5534(a). 10 U.S.C. 842. 27 Comp. Gen. 12. 29 Comp. Gen. 363. 44 Comp. Gen. 830. 25 Comp. Gen. 677. 25 Comp. Gen. 377. 25 Comp. Gen. 381. 44 Comp. Gen. 832. B-173783 (1975).

Arnold G. Bueter, Principal Deputy Assistant Secretary (Financial Management), Department of the Air Force, requested an advance decision with regard to the question of whether a regular officer of the Air Force may begin employment with a State government while on terminal leave immediately prior to his retirement from the Air Force without jeopardizing his active duty or retired status. Acceptance of such employment would terminate the officer's military appointment. (SC)

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DECISION

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

FILE: B-122471 DATE: AUG 2 1977

MATTER OF: Major Robert C. Crisp, USAF

DIGEST: Should a commissioned Officer of the Regular Air Force on terminal leave pending retirement accept a civil office under a State government or perform the duties of the office during such leave, the sanctions of 10 U.S.C. 973(b) (1970), which provides for termination of his military appointment, would apply to him. Since the civil office is under a State government, the provisions of 5 U.S.C. 5534a (1970), which authorizes dual employment during terminal leave in certain other circumstances, would not exempt the member from those sanctions.

This action is in response to a letter dated June 20, 1977, with enclosures, from Mr. Arnold G. Bueter, Principal Deputy Assistant Secretary (Financial Management), Department of the Air Force, requesting an advance decision in the case of Major Robert C. Crisp, USAF, who wishes to begin employment with a State government while on terminal leave immediately prior to his retirement from the Air Force, if possible, without jeopardizing his active duty or retired status by becoming so employed. The request has been assigned Secretarial Submission Number SS-AF-1269 by the Department of Defense Military Pay and Allowance Committee.

The question asked is:

> "May a regular officer of a uniformed service, while on terminal leave, accept or perform the duties of a civil office of a State, as that term is defined in 29 Comp Gen 363 and 44 Comp Gen 830, whether appointed or elected, under 5 U.S.C. 5534a without incurring the sanctions of 10 U.S.C. 973(b)?"

The submission indicates that the member, a Regular Air Force officer (who is retiring for years of service) is scheduled to go on terminal leave beginning August 3, 1977. He wishes to obtain the position of County Clerk for Sutter County, California, and if his application is accepted, assume the duties of that office in August 1977, when he begins his terminal leave.

It is stated in the submission that the office of County Clerk is created by California statute. Since certain duties are statutorily prescribed for that office, the exercise of which duties would involve some portion of that State's sovereign power, the submission recognizes as an accepted fact that such position constitutes a civil office as that term is used in 10 U.S.C. 973(b) (1970). See 29 Comp. Gen. 363 (1950), and 44 Comp. Gen. 830 (1966).

Section 973(b) provides in part:

> "(b) Except as otherwise provided by law, no officer on the active list of the * * * Regular Air Force * * * 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 submission indicates, however, that since the member in the present case would accept the civil office while on terminal leave, certain decisions of this Office (25 Comp. Gen. 677 (1946, and 27 Comp. Gen. 12 (1947)), may be for application. Those decisions interpret the congressional intent regarding the predecessor statute to 10 U.S.C. 973(b)--section 1222, Revised Statutes--and a collateral code provision, 5 U.S.C. 5534a (1970), and its predecessor statute--the act of November 21, 1945, ch. 489, 59 Stat. 584, 5 U.S.C. 61a-1 (Supp. V, 1946), concerning employment while on terminal leave. As a result, it is indicated that it is not clear at the present time whether the language of 5 U.S.C. 5534a may be construed as also allowing the acceptance of a civil office or position under a State government without invoking the sanction of 10 U.S.C. 973(b).

Section 1222, Revised Statutes (section 18 of the act of July 15, 1870, ch. 294, 16 Stat. 319), prohibited the holding of any civil office by an officer of the Army and provided that should any such officer accept or exercise the functions of such an office, his commission would be vacated. Those provisions were brought forward into the 1925 edition of the United States Code as 10 U.S.C. 576 and have been consistently interpreted over the years as including a State office. See generally B-173783, October 9, 1975.

On codification of title 10 into positive law in 1956 (70A Stat.), those provisions became subsection 3544(b) (Army), and 8544(b) (Air Force), and for the first time, specifically included State civil offices in its proscription. In 1968, section 4 of Public Law 90-235, 81 Stat. 759, repealed sections 3544 and 8544 of title 10, and enacted 10 U.S.C. 973, in lieu thereof, in order to extend to all Regular officers of the armed forces the same restrictions against holding civil office as were applied to the Army and Air Force.

Parallel to and independent of the foregoing was the development of the concept of "terminal leave". Basically, "terminal leave", while it is a term of art which arose during World War II, was known by other names since shortly after the Civil War. In essence, such leave represented a leave of absence granted an officer at the end of his period of military services; a permission to be absent from duty. Terry v. United States, 120 Ct. Cl. 315 (1951).

Prior to 1945, under the leave laws then in effect (10 U.S.C. 842 (1940)), leave of up to 60 days without deduction from pay and allowances could be taken by Army officers at the discretion of the Secretary of War. However, there was no statutory authority to make lump-sum payments in lieu of the taking of leave by such members even where they were being separated or released from active duty. The inability to immediately release such members from active duty and pay them for accrued but unused leave on one hand, and the dual office and dual employment prohibitions as well as section 1222, Revised Statutes, on the other hand, created a nearly untenable situation during the final phases of World War II and general demobilization, since service members could not be paid for leave and could not be employed by the government during terminal leave time since they were still in an active duty status, unless they were willing to vacate their commissions and forfeit their leave.

Thus, was enacted the act of November 21, 1945, supra. The act, in part, authorized in section 2(a) the employment and reemployment of members of the armed forces by the United States, its Territories or possessions, and the District of Columbia governments during terminal leave, and permitted them to continue to receive pay and allowances for the unexpired portion of terminal leave. For those who had already vacated their commissions, section 2(b), authorized

payment of a lump-sum for such leave lost by virtue of such employment, and section 2(d), authorized the payment of a lump-sum for unused terminal leave where such member was to be employed by a State government, upon application to and permission granted by the appropriate Secretary.

In 27 Comp. Gen. 12 (1947), to which the submission refers, when we treated the act of November 21, 1945, as having broadly removed the then existing restrictions contained in the dual office and dual compensation laws, as well as section 1222, Revised Statutes, so as to permit officers on terminal leave to accept employment generally, we were relating to the entire scope and purpose of the law, then in effect. However, on analyzing individually the authorities granted by sections 2(a) and (d) of the 1945 act, there is an essential difference. Section 2(a) authorized dual employment during the terminal leave period for those entering or reentering Federal Government employment, whereas section 2(d) authorized a lump-sum payment for accrued but unused terminal leave for those who entered employment of a State. Thus, while the 1945 act sought to achieve a broad solution to the existing restrictions of the dual office and dual compensation laws, as well as section 1222, Revised Statutes, only section 2(a) permitted a member to continue to receive military pay and allowances on terminal leave "at the same rate and to the same extent" concurrently with the receipt of his civilian compensation.

In 1966, the provisions of the 1945 law (5 U.S.C. 61a-1 (1964)) were specifically repealed by section 8 of Public Law 89-554, approved September 6, 1966, 80 Stat. 378, 653, because the 1945 law was considered as having been impliedly rendered obsolete in its entirety by section 4(c) of the Armed Forces Leave Act of 1946, as amended (37 U.S.C. 501), and section 219(c) of the Public Health Service Act, as added August 9, 1950 (42 U.S.C. 210-1(c)), which provided for lump-sum payments for accrued leave. As a result, all exemptions authorized by 5 U.S.C. 61a-1 from the application of the dual office and dual employment statutes as well as the prohibitions against holding civil office then contained in 10 U.S.C. 3544 and 8544, were no longer in effect.

In 1967, it was recognized by Congress that section 4(c) of the Armed Forces Leave Act of 1946, as amended, did not render the 1945 terminal leave law completely obsolete and concluded that

subsection (a) of former 5 U.S.C. 61a-1 (section 2(a) of the 1945 act) had a prospective effect and should have been reenacted in the 1966 codification of title 5, United States Code. Thus, by section 1(22) of Public Law 90-83, approved September 11, 1967, 81 Stat. 199, section 5534a was added to title 5 of the code and now provides:

> "A member of a uniformed service who has performed active service and who is on terminal leave pending separation from, or release from active duty in, that service under honorable conditions may accept a civilian office or position in the Government of the United States, its territories or possessions, or the government of the District of Columbia, and he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal leave."

It is to be observed that Public Law 90-83 did not reenact all of the provisions contained in former 5 U.S.C. 61a-1. It reenacted as section 5534a only those provisions previously contained in 5 U.S.C. 61a-1(a) relating to Federal, Territorial and District of Columbia governments. Thus, it is our view that the language in 27 Comp. Gen. 12, supra, , is not controlling here and the reenactment of only a single subsection of 5 U.S.C. 61a-1 may not be construed as constituting a broad congressional intention to remove all existing restrictions on the holding of a civil office, including those under a State government, during periods of terminal leave.

Therefore, since a member on terminal leave pending retirement is still "on the active list" should he accept or perform the duties of a civil office of a State government during that time, the sanctions of 10 U.S.C. 973(b) would be for application. Compare 25 Comp. Gen. 377, 381 (1945), and 44 Comp. Gen. 830, 832 (1965). Accordingly, the question presented is answered in the negative.

R.F. KELLER

[Deputy] Comptroller General
of the United States