UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON 25, D. C.

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RELEASED

The Comptroller General

The Department of the Navy has revoked concessionaire agreements containing rental payment provisions replacing them with agreements which do not provide for such payments. In addition, payments accrued under an original agreement are waived and monies received from concessionaires are being credited to employee's welfare fund. These actions appear to surrender a vested right formerly held by the Government, and go beyond the scope of authority granted officers of the Government.

Agreement numbered N238s-3332 was entered into on September 1, 1954 between the "Board", representative of the civilian employee cooperative association located at U.S. Naval Ammunition Depot, Hawthorne, Nevada, and Frank E. Hanson et al, also known as Hanson's Food Markets, Reno, Nevada, for the purpose of operating a grocery store as a concession in the Government low-cost housing unit for a period of five (5) years, with renewal option. The agreement provides that the concessionaire will make payments of $250.00 per month to the Government in consideration for use of property made available, and in addition, provides for payment of one-half of one percent (1/2 of 1%) of gross sales from operations for the month under the agreement, to be paid the "Board" for welfare and recreational activities that will benefit the civilian employees.

The concessionaire is required to make repairs to the premises only to the extent that the need for repairs is a result of the negligence, or lack of good faith of the concessionaire, its employees, or sub-contractors.

The "Board" also entered into agreement numbered N238s-3339, on August 17, 1954, providing for rental payments of $10.00 per month to be paid to the Government for use of Government property made available to Duard I. Avery, concessionaire operating a shoe repair shop,

and payment of five percent (5%) of gross receipts made from operations under the agreement during the month, payable to and for use by the "Board" in welfare and recreational activities for civilian employees. The agreement is renewable on a yearly basis. Amendment dated May 24, 1957, states that the volume of business is not of sufficient weight so as to support certain obligations imposed on the concessionaire by the original agreement, and since it is considered beneficial to the Department of the Navy to continue the shoe repair facility, the original agreement is amended to the following extent:

(1) Payment for use of Government property reduced from $10.00 to $1.00 per month.
(2) Payment of the percentage on gross receipts eliminated.
(3) All payments due or past due under the above as previously required and remaining unpaid at the date of the amendment are waived.

Except that the period for notice of non-renewal is 30 days, the provisions applicable to termination are identical to those in agreement N238s-3332.

By copy of letter dated June 27, 1958, advice was received in this office stating that an Employee Services Board was officially established by the command at NAD, Hawthorne, Nevada for the purpose of governing all civilian nonappropriated fund activities at that station. The letter stated further that since these type operations were now divorced from Bureau of Yards and Docks leasing and licensing directives, existing contracts were being revoked and new concessionaire agreements were being executed containing no provision for payment of rent to the Government and were to be administered in accordance with Navy Civilian Personnel Instruction 65.

Navy Civilian Personnel Instructions issued under authority granted by 5 U.S.C. 22, contain the over-all civilian personnel instructions, procedures and policies for the Department of the Navy.

NCPI 65, section 3 revised September 6, 1957, sets forth the policies and procedures for the Department of the Navy relating to operation, distribution of funds, use, supervision and control of civilian nonappropriated fund activities.

In pertinent part, the foregoing section defines a civilian nonappropriated activity as a morale, welfare, or recreational activity established in accordance with regulations as set forth in this section, at least partially supported with nonappropriated funds and authorizes three general categories of civilian nonappropriated fund activities: (1) food and related services, (2) welfare, and (3) recreational.

Included in the definition of food services are cafeterias, lunch counters, canteens, vending machines, shops and stores. In addition, it is stated that these services may be operated through the medium of employee food services boards, comprised of representatives of employees or employees' groups; directly by a food board through employment of a manager, or by an individual or an organization as a concessionaire. Where the decision of the food board is to utilize the services of a concessionaire, a negotiated agreement is contemplated. Further, that although food and related services are Government instrumentalities and are entitled to the privilege of an instrumentality, services operated by concessionaires are classed as private enterprises, and acquire none of the status of a Government instrumentality, and only the food services board assumes the characteristics of an instrumentality entitled to the immunities and privileges pertaining thereto.

NCPI 65.6-3 lists the kinds of activities, i.e. tailor shops, cobbler shops, etc., which should also be placed under control of the "Board" if they are authorized and established.

10 U.S.C. 2667 Supp. V provides in pertinent part that the Secretary of a military department, when he considers it advantageous to the United States, can lease real or personal property on such terms as he considers will be in the public interest. The leases may provide, notwithstanding section 303b of Title 40, U.S.C. or any other provision of law, for the maintenance, protection, repair or restoration, by the lessee, of the property leased or of the entire unit or installation where a substantial part of it is leased, as part or all of the consideration for the lease. Money rentals received by the United States directly from a lease under this section shall be covered into the Treasury as miscellaneous receipts.

40 U.S.C. 303b requires that leasing of public property be for a money consideration only and that rentals therefrom be deposited as miscellaneous receipts. Inclusion in the leases provisions for repair, alteration, or improvement of such property as a part of the rental consideration is prohibited.

Pertinent decisions are stated in 15 Comp. Gen. 238, 22 Comp. Gen. 260, 34 Comp. Gen. 207 and 32 Comp. Gen. 124.

The use of welfare and recreational programs to improve morale of employees, particularly in remote and outlying activities, is recognized. However, nothing is found in the laws or regulations which would indicate that private individuals may be allowed the use of Government property to the degree here involved or that the welfare and recreation programs may be used to replace or compete with those services

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normally available to the surrounding community. Under terms of the agreements, the Government furnishes buildings and facilities to the concessionaire and in effect places private individuals in business with no apparent risk on their part. In addition, inasmuch as the employees benefit to the extent that the services furnished by the concessionaires are made available to them it appears that the monies received from the concessionaires based on gross sales should be covered into the Treasury as miscellaneous receipts rather than to the employees' welfare fund.

The validity of the administrative actions appears doubtful, but since the area is one in which administrative attitudes are becoming increasingly liberal, and we find no ruling on an identical situation, the matter is forwarded for consideration.

MAX A. NEUWIRTH

Max A. Neuwirth
Assistant Director

Enclosures:

Contract No. N238s-3332
Contract No. N238s-3339
NAD letter of June 27, 1958

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Director, Defense Accounting and Auditing Division

Returned. Relative to the Office decisions referred to in your memorandum, the Secretary of the Interior was advised in the decision appearing in 34 Comp. Gen. 207, that where the concessionaire at Shasta Dam was required by the terms of a lease—which the record shows to have been entered into on behalf of the United States by the Bureau of Reclamation in pursuance of the act of June 17, 1902, 32 Stat. 388, as amended—to pay a monthly rental of 5 percent of gross receipts from operation of the concession, with a guaranteed minimum rental, his department was without any authority to terminate the lease and enter into a new lease more favorable to the concessionaire merely because the contract had become unprofitable to the latter, or without compensating benefits to the United States.

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The decision cited decision B-40226, April 11, 1944, to the Secretary of the Interior, which involved a similar situation with respect to a lease which had been entered into on behalf of the United States by the National Park Service pursuant to the act of August 25, 1916, 39 Stat. 535. These decisions were based on the well settled principle of law that there is no legal basis for relieving a contractor from his obligations on the ground that the contract is unprofitable, and the rule that, in the absence of a statute so providing, no officer of the Government has authority to give away or surrender any right vested in or acquired by the Government under a contract. However, on a subsequent submission in the earlier case the Secretary of the Interior was advised that if the facilities required of the lessee were no longer needed the lease could be terminated and the lessee relieved of further liability, B-40226, March 19, 1945. In the decision appearing in 32 Comp. Gen. 124, the Attorney General was advised that it has been the consistent view of our Office that funds derived from the installation and operation of vending machines on Government-owned or controlled property are funds "for the use of the United States" within the meaning of that phrase as used in section 3617, Revised Statutes, 31 U. S. C. 484, and, as such, are required to be deposited into the Treasury as miscellaneous receipts, in the absence of express statutory authority to the contrary. It was therein concluded that the funds which had been received by the Federal Bureau of Investigation from the operation of vending machines were required to be so deposited.

However, in advising the Postmaster General in decision of December 10, 1952, B-112840, 32 Comp. Gen. 282, that we would not object to the continued use of funds received by employee groups of the Post Office Department from the operation of vending machines installed by them in Government-owned post office buildings, we drew attention to the fact that the funds derived from the operation of the vending machines involved in the above decision to the Attorney General had been received by the Government agency there involved, and it was stated:

> "However, in the matter under consideration it appears that contractual arrangements for the installment purchase, installation, and operation of vending machines at various post offices were made by postal employee groups with administrative approval, and with the understanding that any proceeds received by the employee groups from the operation of the machines could be retained by them. While the legal authority of the administrative officials to have agreed to such an arrangement is doubtful, it has been concluded that this Office will interpose no objection to the continued use of proceeds derived by employee groups from the operation of such machines for employee general welfare activities pending further action in the matter by the Congress in the

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form of clarifying legislation as recommended in the report of this Office to the Congress of August 10, 1949, B-45101."

In decision of December 11, 1956, B-129649, 36 Comp. Gen. 461, the Secretary of Commerce was advised that, in the absence of Congressional action establishing a policy concerning profits derived from revenue-producing activities of the Government, profits derived from the operation of ship's service stores operated for the Maritime Service might continue to be used for welfare activities of the trainees of the Maritime Training Program, and no objection would be made to the transfer of such profits to the Academy Chapel Fund for acquisition of a chapel. The decision points out that the Maritime Commission and its successor agencies which administered the maritime training program--the Coast Guard and the War Shipping Administration--possessed authority to make regulations for the control of the training service, and states that such authority appears to be little different from that possessed by the Secretary of the Army to make regulations for the "government of the Army" which on several occasions has been held to authorize the establishment of post exchanges. The decision also states that while the establishment of ship's service stores by the regulation cited therein reasonably may be said to have been authorized, considerable doubt exists whether the authority to establish the stores would permit as well the disposal of the profits therefrom in a manner which fails to recognize the Government's interest therein--stemming from the fact that the stores were operated on Government property, rent free, and that employees of the Office of Maritime Training, whose salaries are paid from appropriated funds, participated in the management and operation of the stores. However, the decision concludes that since the situation as to the profits from the ship's service stores is not materially different from those considered in our report of August 10, 1949, B-45101, to the Congress, we would not, in the absence of further action by Congress, be justified in raising any objection to the continued use of the profits derived from the ship's service stores for welfare purposes, citing 32 Comp. Gen. 282, supra.

In the absence of any overriding regulation of the Secretary of Defense, the Secretary of the Navy must be considered to have, as the Department contends, the same general authority to provide by regulation for the operation of its ship's service stores and equivalent civilian employee welfare organizations as does the Secretary of the Army for the operation of its post exchanges. In view thereof, and since we have taken the position that we will not, in the absence of clarifying action by Congress, further press our objections to such operations, no action is required at this time with respect to the transactions mentioned in your memorandum.

FRANK H. WEITZEL

Comptroller General
of the United States

Assistant

Attachments