

DECISION



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

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FILE: B-173783.191

DATE: MAR 1 1976

MATTER OF: First Lieutenant

USAF

DIGEST:

Air Force officer stationed in Ohio accepted Ohio notary public appointment apparently in an attempt to accept a "civil office" for purpose of terminating his military commission under 10 U. S. C. 973(b). Although Ohio notary public position is a civil office, in view of Ohio court decision casting doubt on military officer's eligibility for such office and Federal court decisions in a similar case the Comptroller General finds the matter too doubtful to hold that the officer has forfeited his commission and therefore will not object to continuing the officer's military pay and allowances.

This action is in response to a letter dated January 23, 1976 (RMF), with enclosures, from Captain M. V. Starr, USAF, Accounting and Finance Officer, Headquarters Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of payment of active duty pay and allowances to First Lieutenant , USAF, sub-sequent to his appointment as a notary public in the State of Ohio. The request was assigned number DO-AF-1249 by the Department of Defense Military Pay and Allowance Committee and was forwarded to this Office by Headquarters United States Air Force letter dated January 29, 1976. We have also received letters dated January 15 and 19, from Lieutenant concerning this matter.

The facts in this case appear to be as follows. On December 1, 1975, Lieutenant , a Regular Air Force officer on active duty, was appointed a Notary Public for the County of Montgomery, State of Ohio, by the Governor of that state. Pursuant to the requirements of Ohio law Lieutenant indorsed the oath on his notary commission and filed the commission with the Clerk of the Montgomery County Court of Common Pleas on December 15, 1975. By letter of that same date Lieutenant advised his commanding officer at Wright-Patterson Air Force Base of his

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appointment as a notary public and that, pursuant to 10 U. S. C. 973(b)(1970), as interpreted by Comptroller General Decision B-173783, October 9, 1975, it would appear that his commission as a Regular officer in the Air Force was terminated by operation of law. Upon receiving notification of such facts the Accounting and Finance Officer determined sufficient doubt existed as to propriety of payment of pay and allowances to Lieutenant because of the possibility that the notary public appointment had terminated his military commission. Thereupon the Accounting and Finance Officer suspended, effective January 1, 1976, Lieutenant active duty pay and allowances. However, it appears that Lieutenant has not been released from active duty by the Air Force.

Considering these circumstances, the Accounting and Finance Officer has submitted a voucher in favor of Lieutenant covering pay and allowances for the period of January 1 through 15, 1976, and asks, specifically, whether Lieutenant entitlement to pay and allowances continues. He also requests, if it is determined that Lieutenant is not entitled to pay and allowances because of acceptance of the notary public appointment, that it be decided as of what date Lieutenant entitlement ceased, i. e., December 1, 1975, December 15, 1975, or some other date.

Section 973(b) of title 10, United States Code, provides as follows:

"(b) Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard 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."

Our decision B-173783, October 9, 1975, supra, concerned Lieutenant and his purported appointment as a Colorado notary public in May 1975 while on leave from his duty station in Ohio. As was indicated in that decision, Lieutenant apparently attempted to resign his Air Force commission but,

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because he had not completed his obligated active service as an Air Force Academy graduate (10 U. S. C. 9348(a) (1970)) and as a Woodrow Wilson Fellow (10 U. S. C. 2603(b) (1970)), his resignation was refused by the Air Force. He admittedly accepted the Colorado notary appointment in an attempt to have his Air Force commission terminated under 10 U. S. C. 973(b). That also appears to have been the primary reason for his acceptance of the Ohio notary appointment, although he indicates he intends to use his notary position in connection with civilian work outside his military assignment.

In the October 9, 1975 decision it was held that the office of Notary Public in Colorado is a "civil office" within the meaning of 10 U. S. C. 973(b) as that term has long been defined by this Office. That is, it is synonymous with the term "public office"-- a position specifically created by law with certain duties imposed by law on the incumbent which duties involve the exercise of some portion of the sovereign power. There was also cited authority to the effect that such an elastic measure as the relative importance of the duties to be performed, standing alone, or whether the duties of the position might be performed by a particular military officer without interfering with his assigned duties as a military officer, do not determine whether a position is a "civil office" within the meaning of 10 U. S. C. 973(b).

There was noted, however, a somewhat similar case, _____ v. _____, et al., No. C-73-0768 SW (N. D. Calif., decided November 6, 1973), involving a Navy Judge Advocate General Corps (JAG) officer who accepted a notary public appointment in California and thereafter brought an action for a writ of habeas corpus to release him from service in the Navy on the ground that his commission was terminated under 10 U. S. C. 973(b). The District Court held in that case that his commission had been a nullity and that, therefore, no conflict had been created within the meaning of section 973(b). The court based its conclusion on (1) a provision in California law that gave the officer the same authority as a notary public by virtue of his Navy commission, (2) another provision which limited the issuance of notary commissions for use on military bases to civil service personnel, and (3) a section of the California Constitution which provides that a person holding a lucrative office under the United States (which includes commissioned officers on active duty) may not hold any civil office of profit in the state (which includes that of notary public).

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In view of the District Court's decision in the _____ case and certain provisions of the Colorado Constitution and statutes which cast substantial doubt on Lieutenant _____ status as a Colorado notary public, and since Colorado law also authorizes commissioned officers in the Armed Forces to perform many of the duties of a notary public, it was held in our October 9, 1975 decision that sufficient grounds did not exist to support a holding that Lieutenant _____ commission was terminated under 10 U. S. C. 973(b). Therefore, we stated that we would not object to continuation of his active duty pay and allowances.

We now note that the plaintiff in the _____ case appealed the District Court decision in that case. In decision dated July 10, 1975, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision that Riddle's commission was not terminated under 10 U. S. C. 973(b) by virtue of his appointment as a California notary public. _____ v. _____, 522 F. 2d 882 (1975). However, for various reasons, including a reluctance to decide first impression questions involving the California Constitution and the validity of a state office, the Court of Appeals grounded its decision solely on its interpretation of the Federal statutes involved without adopting or further commenting on the District Court's grounds.

In its decision the Court of Appeals examined the congressional purpose of 10 U. S. C. 973(b) and concluded that the purpose of the statute was twofold: (1) to assure civilian preeminence in government, i. e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing "paramount" to it, and (2) to assure the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers. The court recognized that the Department of Justice in a letter dated October 7, 1971, has opined that a commission as notary public is not a "civil office" within the meaning of 10 U. S. C. 973(b) while the Comptroller General in decision B-127788, June 8, 1956, came to an opposite conclusion. (Both that opinion and that decision are discussed in our October 9, 1975 decision.) The court noted, however, that unlike either of those cases, Riddle was a military JAG officer, a lawyer.

The court stated that in its view, the office of notary public when held by a military officer cannot be said to offend either of

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the purposes underlying the statute in that there would be no danger that military officers becoming notaries public would threaten civilian preeminence in government nor would the responsibilities of a notary public adversely affect the efficiency of a military officer, especially a military lawyer whose value and efficiency are perhaps enhanced because of a lawyer's need for notary service. The court stated that its conclusion that 10 U. S. C. 973(b) should not apply in the _____ case is supported by the fact that a JAG officer already has "the general powers of a notary public" conferred upon him by Federal statute, 10 U. S. C. 936(a)(1970), which can be read as indicative of congressional intent that 10 U. S. C. 973(b) not reach the state commission as a notary public when held by a JAG officer.

Thus, the court held that the acceptance "by a military JAG officer" of a commission as a state notary public does not trigger the automatic termination provisions of 10 U. S. C. 973(b).

Concerning the position of notary public to which Lieutenant Peppers was appointed in Ohio, section 147.01, Ohio Revised Code (R. C.), provides that the governor may appoint and commission as notaries public as many persons as he deems necessary who are citizens of the state and are of the age of eighteen or over and, in addition to being appointed for the county in which they reside, they may also be appointed as notaries in any adjacent county, under certain conditions. Also, the governor may revoke a notary commission upon presentation of satisfactory evidence of official misconduct or incapacity. Certain qualifications are required of notaries. Section 147.02, R. C. An oath is required of notaries before entering upon the duties of their "office" and the term of office is set at five years. Section 147.03, R. C. Notaries are required to provide themselves with a seal and an official register. Section 147.04, R. C. They are empowered to administer oaths required or authorized by law, take and certify depositions, acknowledgments of deeds, mortgages, liens, powers of attorney, and other instruments of writing, and receive, make and record notarial protests. In taking depositions they have the power which is by law vested in judges of county courts to compel the attendance of witnesses and punish them for refusing to testify. Sheriffs and constables are required to serve and return all process issued by notaries in the taking of depositions. Section 147.07, R. C. Notaries fees are prescribed by law. Section 147.08, R. C.

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In view of those provisions of Ohio law it appears that the position of notary public in that state falls within the definition of "civil office" long applied by this Office. That is, it is created by law and has certain duties imposed on it by law which involve the exercise of a portion of the sovereign power. B-173783, October 9, 1975, *supra*; 44 Comp. Gen. 830 (1965), and 29 Comp. Gen. 363 (1950). We also note that in the case of *State ex rel. Attorney General v. _____*, 51 N. E. 135 (1898), the Ohio Supreme Court held that a notary public in that state is an officer, which holding is consistent with the generally accepted view of notaries. See 66 C. J. S. Notaries, sect. 1; 58 Am Jur 2d, Notaries Public, sects. 3 and 5; and 19 Comp. Gen. 951, 953 (1940).

Concerning the assumption of a civil office in Ohio by an active duty military officer, we note that in the case of *State v. _____*, 77 N. E. 2d 245 (1948), the Ohio Supreme Court held that a commissioned officer in the active military service of the United States was not eligible to qualify for the office of county prosecutor. In so holding the court noted that if the officer had found the duties of his military office in conflict with his civil office, he would have been under obligation to conform to the requirements of his military duties and subordinate those of his civil office. Thus, the court indicated that the two offices were incompatible. While we are aware that Ohio law (section 305.03, R. C.) now indicates that the absence of a "county officer" from his county because of active military service shall not vacate his office, that provision would not appear to apply to the office of notary public which appears to be a state office created under Title 1 of the Ohio Revised Code, State Government, and not a county office created under Title III of the Ohio Revised Code, Counties. Thus, it appears that the Ohio Supreme Court's decision in the _____ case casts substantial doubt on Lieutenant _____ eligibility to qualify for the office of Ohio notary public.

In addition we note that, as was the situation in the _____ case and in the previous _____ case, state law in Ohio authorizes "any commissioned officer of the armed forces of the United States" to perform many of the duties of a notary public. See sections 147.38 and 147.51, R. C.

Thus, considering the Ohio Supreme Court decision in the _____ case, Lieutenant _____ status as an Ohio notary public

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appears doubtful. In addition the reasoning of the Court of Appeals decision in the _____ case, although specifically applicable to JAG officers (Lieutenant _____ is not a JAG officer) casts further doubt on whether he could be held to have forfeited his commission. In view of the above we find that there is considerable doubt that Lieutenant _____ military commission was terminated under 10 U. S. C. 973(b) as a result of the Ohio Notary Commission.

In the circumstances, we will not object to the continuation of Lieutenant _____ active duty pay and allowances. The voucher which was enclosed with the Finance and Accounting Officer's letter will be returned, payment being authorized, if otherwise correct.

REFUSED

Deputy Comptroller General
of the United States