

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

B-190321

October 20, 1977

The Honorable Lloyd Bentsen
United States Senator
912 Federal Building
Austin, Texas 78701

Dear Senator Bentsen:

Further reference is made to your communication received here October 3, 1977, enclosing for consideration and report a letter dated September 22, 1977, to your office from Colonel [REDACTED], USAF, Webb Air Force Base, Texas 79720. Colonel [REDACTED] is concerned about the possible impact that a recent ruling of this Office (B-162471, August 2, 1977, 56 Comp. Gen. [REDACTED]), might have on his military status should he accept employment with the City of Big Spring, Texas, during his terminal leave pending retirement from the Air Force.

Colonel [REDACTED] indicates in his letter that he has tentatively accepted employment with the City of Big Spring, Texas, and plans to assume those duties during his terminal leave time. Apparently, the position which he is accepting involves serving in a dual capacity of Assistant City Manager, and Manager, Big Spring Air Industrial Park. He indicates that whatever problem arises would probably involve the position of Assistant City Manager and that if he is permitted to work for the City during his terminal leave time, he would not be identified to the duties of Assistant City Manager and would not perform any of those duties until after his actual retirement.

Section 973[✓] of title 10, United States Code, which was derived from the act of July 15, 1870, ch. 294, section 18, 16 Stat. 319, section 1222, Revised Statutes, currently 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

B-190321

civil office or the exercise of his functions by such an officer terminates his military appointment."

The term "civil office" as used in the before-quoted subsection has never been statutorily defined. However, in 13 Op. Atty. Gen. 310[✓](1870), an opinion rendered shortly after enactment of the act of July 15, 1870, supra, the Attorney General of the United States held that General [REDACTED] could not exercise the functions of a park commissioner of the City of Philadelphia without vacating his military appointment. The Attorney General pointed out therein that the office of park commissioner had been established by an act of the State legislature, which act designated the mode of appointment, the term of office, and the functions to be performed which were of a civil nature and would fall within any authorized definition of an office. He also indicated that the position was none the less an office because of a provision that the incumbent should receive no compensation. The Attorney General stated that the manifest purpose of Congress in enacting the prohibition was to disencumber Army officers of "every species of official duty not belonging to their military profession."

In 35 Op. Atty. Gen. 187[✓](1927), it was concluded that an Army officer would be in violation of section 1222[✓] Revised Statutes, if he were detailed to act as head of Louisiana State University. In so concluding, it was stated that the purpose of the statute was "to prevent an officer of the Army from accepting an office the duties of which will substantially interfere with the performance of his duties as an officer of the Army." It is noted, however, that the 1927 opinion did not reverse any previous opinions and in fact cited with approval, among others, 13 Op. Atty. Gen. 310, supra, and 18 Op. Atty. Gen. 11[✓](1884), in which it is stated that the policy of the law points to a very liberal interpretation of the phrase "civil office."

Consistent with 13 Op. Atty. Gen. 310, supra, this office has long held that the term "civil office," as distinguished from "military office," is synonymous with "public office" and is usually defined in much the same terms. That is, the specific position must be created by law; there must be certain duties imposed by law on the incumbent; and the duties of the position must involve the exercise of some portion of

B-190321

the sovereign power. See 44 Comp. Gen. 830 (1965) and 29 Comp. Gen. 363 (1950).

This Office has long held that such an elastic measure as the relative importance of the duties to be performed, standing alone, was not intended by Congress to mark the line between mere employment and "civil office" in applying the sanction of the statute. See 25 Comp. Gen. 377, 385 (1945), 29 Comp. Gen. 363, 369, supra, and 44 Comp. Gen. 830, 831, supra. Also, the determination of whether a certain civil position is a "civil office" within the meaning of the statute cannot be made to depend on whether the duties of the position might in fact be performed by a particular military officer without interfering with his assigned duties as an officer on the active list. Rather, it has been held that the statute makes the two positions incompatible as a matter of law, without qualification and without regard to any showing of compatibility in fact by reason of leave of absence, or otherwise, with respect to a particular officer and a particular position. See 25 Comp. Gen. 377, 381, supra, and 20 Comp. Gen. 885, 888 (1941). That view is supported by the legislative history of the statute. See 91 Congressional Globe 1852, where it is stated concerning that provision that it was inserted in keeping with the view that it is "inconsistent with our system of government to appoint military officers to civil positions."

In our most recent decision, B-162471, supra, we held that should a commissioned officer of the Regular Air Force serving on active duty accept a civil office under a State government or perform the duties of that office during terminal leave pending retirement from that service, the sanctions of 10 U.S.C. 973(b) would be for application to him.

While subsection 973(b) as it could apply to Colonel [REDACTED] case, only relates to civil offices under a State government, it is to be observed that political subdivisions of a State, e.g., counties, cities, town and municipalities, are usually creatures of State law, with the structure of such local governments specifically set forth in the law which permits their creation. In such circumstances, should a Regular commissioned officer serving on active duty accept such a specified position, he runs the risk of having the sanctions contained in 10 U.S.C. 973(b) applied to him.

B-190321

In the case of Colonel [REDACTED], it seems possible that the position he contemplates accepting would be considered a State office. However, there does not appear to be sufficient time to resolve the factual and legal issues of his case prior to the date he contemplates taking the position with the City of Big Spring. In view of the sanction imposed by law if the position in question is a State office--loss of military status and thus, retired pay--we believe that Colonel [REDACTED] should be advised that there is considerable risk in his accepting the position prior to his retirement since, on the basis of the facts available, we cannot make a final determination that the position is not a State office.

We trust this will serve the purpose of your inquiry and regret a more favorable reply cannot be made. The enclosures with your communication are returned herewith.

Sincerely yours,

Paul G. Stumbling
Acting Comptroller General
of the United States

Enclosures - 2