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DECISION

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

Addressee - Army Athletic Association
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FILE: B-200240 DATE: May 5, 1981

MATTER OF: Applicability of the Dual Compensation Act to the Head Basketball Coach, United States Military Academy

DIGEST: The test to determine whether the restrictions of the Dual Compensation Act (5 U.S.C. § 5531 et seq.) apply to the head basketball coach employed by the Army Athletic Association, United States Military Academy, a nonappropriated fund instrumentality, is whether the coach occupies a "position" as defined by 5 U.S.C. § 5531(2). In light of the organization and supervision of the Army Athletic Association under the Superintendent of the Academy, and the fact that the Director of Intercollegiate Athletics has the right to supervise the head basketball coach, the coach is an employee who occupies a "position" and is, therefore, subject to the Dual Compensation Act regardless of the fact that the terms and conditions of employment are provided by contract rather than being the general terms applicable to other employees under regulations.

This action is in response to a letter dated August 29, 1980, from the Assistant Secretary of the Army (Installations, Logistics and Financial Management), requesting an advance decision regarding the applicability of the Dual Compensation Act (Act), 5 U.S.C. §§ 5531 et seq., to the head basketball coach at the United States Military Academy, West Point, New York. The issues are whether the Army Athletic Association, which employs the coach, is a nonappropriated fund instrumentality, and if so, whether the coach occupies a "position" in the Government of the United States as defined by 5 U.S.C. § 5531(2) and is thereby subject to the Act. For the following reasons we conclude the Army Athletic Association is a nonappropriated fund instrumentality and the coach does occupy a "position." Therefore, the coach is subject to the Act.

The Act, at 5 U.S.C. § 5532(b), provides that a retired officer of a Regular component of a uniformed service who holds a "position" is entitled to receive the full pay of the position, but during the period for which he receives pay, his retired or retainer pay

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shall be reduced. "Position" is defined as "a civilian office or position * * * appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including * * * a nonappropriated fund instrumentality under the jurisdiction of the armed forces) * * *." 5 U.S.C. § 5531(2).

The Assistant Secretary states that the coach performs duty and is compensated under the terms and conditions of a contract with the Army Athletic Association at the Military Academy. He states that the Athletic Association has a unique status at the Military Academy and within the Department of the Army. The Association does not operate under the provisions of a constitution and bylaws. It is managed by the Director of Intercollegiate Athletics who is responsible to the Superintendent of the Military Academy. In a memorandum for the Superintendent from the Secretary of the Army, dated June 23, 1973, the Athletic Association was designated as a "nonappropriated fund and government instrumentality, as defined in AR 230-1 . . ." However, the Secretary of the Army, acknowledging that the mission of the Association was unique among nonappropriated fund instrumentalities, granted it broad exceptions to the regulatory controls placed upon other Department of the Army nonappropriated fund instrumentalities. Further, the Assistant Secretary states that the Athletic Association performs only the non-governmental intercollegiate athletic functions recognized in 54 Comp. Gen. 518 (1974).

In 54 Comp. Gen. 518 we concluded that the Naval Academy Athletic Association was a purely voluntary organization, not required by law or regulation to function under the jurisdiction of the Navy, and therefore cannot be regarded as a nonappropriated fund instrumentality of the Government. The submission states that the activities of the Army Athletic Association are similar to those of the Naval Academy Athletic Association in all material aspects, thus implying that the Army Association is also not a nonappropriated fund instrumentality of the Government.

The submission appears to confuse the activities of these athletic associations with the criteria which

qualify a particular association as a nonappropriated fund instrumentality. While the activities of the two associations may indeed be similar, this is not sufficient in itself to conclude that because the Navy Association is not such an instrumentality, neither is the Army Association. As explained in 54 Comp. Gen. 518, at 520, the Navy Association was not established pursuant to Navy Department directives or orders, but rather, was formed by individuals who happened to be primarily Naval Academy officers. These officers were not required to participate in the Association as part of their official duties but participated on a purely personal, voluntary basis. See also 45 Comp. Gen. 289 (1965) concerning the United States Marine Corps Association. It is on this basis that we concluded the Naval Academy Association was not a nonappropriated fund instrumentality.

On the other hand, the Army Athletic Association was specifically designated as a nonappropriated fund instrumentality by the Secretary of the Army. It is also apparent from the record that the Superintendent of the Military Academy oversees the Association's operation as a part of his official duties. In that regard the Army Association is very similar to the Air Force Academy Athletic Association as described in 42 Comp. Gen. 73 (1962) and B-165534, December 17, 1968. The immediate control, operation, and supervision of the Air Force Athletic Association was delegated to the Superintendent of the Air Force Academy. Regardless of the fact that, like the Army Athletic Association, the Air Force Athletic Association was exempt from certain Air Force regulations and policies governing nonappropriated funds, we concluded that it was a nonappropriated fund instrumentality of the Government. In light of these cases, it is clear that the exceptions granted the Army Athletic Association from the regulations on other nonappropriated fund instrumentalities do not operate to remove it from the Act's restrictions. Thus, we conclude that the Army Athletic Association is a nonappropriated fund instrumentality of the Department of the Army.

With regard to whether the coach occupies a "position" within the meaning of the Act, the Assistant

Secretary states that the coach is an independent contractor and not an employee of the Army Athletic Association and, therefore, does not hold a "position." In support of this statement the submission refers to Army Regulation (AR) 230-2 which provides personnel policies and procedures for Army nonappropriated fund instrumentalities. The Assistant Secretary distinguishes conditions of Athletic Association employment between personal service contract employees (e.g., coaches) and regular appointed nonappropriated fund employees. For example:

> --NAF employees are required to participate in a retirement plan until age 57 with optional participation from age 57 to 65; contractors must establish their own retirement plans.
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> --NAF employees are entitled to participate in the Group Medical and Life Insurance Plan or the Group Life Insurance Plan; contractors are not entitled to enroll in either of these plans and must secure personal insurance.
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> --NAF employees are appointed to positions for indefinite periods of time, subject to a probation period; contractors are hired for a definite period of employment, usually 1 year with an option to renew.

Further, the Assistant Secretary indicates that there is no appointment or employment. The contract creates a materially different relationship with the Government from that of regular nonappropriated fund employees. The relationship is governed by contract rather than regulation or statute, and there is little if any supervision of the coach by a Federal officer. The submission concludes by citing 45 Comp. Gen. 81 (1965) and id. 757 (1966) in support of the Army's determination that the coach is an independent contractor and not subject to the Act.

We disagree with the Army's conclusions and hold that the coach occupies a "position" and is, therefore, subject to the Act. In 45 Comp. Gen. 81, the circumstances involved a retired Regular Army officer who was placed on a roster of fee basis physicians to examine Armed Forces personnel. We held that no employer-employee relationship existed but rather there was strictly a contractual arrangement by which the physician was reimbursed by fees collected from the patients receiving his services. Similarly, in 45 Comp. Gen. 757 a retired Regular Air Force officer served as a civilian dentist in a family dental clinic. Not only was the clinic not a nonappropriated fund instrumentality but the dentist was paid by fees collected from the persons receiving his dental services. Although the clinic was part of the Central Base Fund, a nonappropriated fund instrumentality, the clinic operated on a totally independent basis. As a result, these cases are distinguished from the instant case.

The coach is not reimbursed on a fee basis. He negotiated a contract with the Army Athletic Association, a nonappropriated fund instrumentality, and he is paid by the Association. Although some indicia of employment have been removed through the contract which was negotiated between the coach and the Association this does not suffice to remove the coach from the restrictions imposed by the Act. The coach cannot perform his duties in a truly independent manner as he is still subject to the supervision of the Director of Intercollegiate Athletics. In determining whether the coach is an independent contractor, the question of whether or not the Director actually exercises his right to supervise is immaterial. It is important only that the right to supervise exists. See the discussion of the employer-employee relationship in 53 Comp. Gen. 753, 756-757 (1974).

Thus, as previously stated, although the Army Athletic Association has been recognized as a unique nonappropriated fund instrumentality by the Secretary of the Army and was granted exceptions from the regulatory controls placed upon other such Army instrumentalities, this did not operate to remove the Association from the class of instrumentalities referred to in

the Act. Similarly, although the Association was granted authority to employ certain athletic department personnel using individualized contracts spelling out the terms and conditions of employment rather than the standard terms provided in regulations applicable to other employees, this does not change the fact that such personnel are employees who occupy "positions" within the meaning of the Dual Compensation Act. Accordingly, on the basis of the information presented it is concluded that the head basketball coach is subject to the restrictions imposed by the Act.

Milton J. Socolar

Acting Comptroller General
of the United States