DECISION

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

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**FILE:** B-212046 **DATE:** January 23, 1984

**MATTER OF:** Cooperative Employees, Extension Service, Department of Agriculture - Deduction of Retired or Retainer Pay

**DIGEST:**

1. With certain exceptions, Federal law, now codified as 5 U.S.C. § 5532 note (1982), requires that if members or former members of a uniformed service during any period in fiscal year 1983, 1984, or 1985 receive retired retainer pay, and hold a "civilian position" as defined therein, then deductions, equal to the amount of any increases in retired or retainer pay, be made from the pay for their Federal civilian positions. The State Agricultural Extension Service employees involved are within the definition of "civilian position" since they hold a joint Federal-State appointment by authority of the Smith-Lever Act and Office of Personnel Management regulations.

2. No salary deductions can properly be made even though the employees involved here hold a "civilian position," since they serve as agents without compensation, do not receive any pay from Federal funds for their civilian positions, and the funds under the Smith-Lever Act from which they are paid are considered funds of the grantee involved.

This decision is in response to a request from Mary Nell Greenwood, Administrator, Extension Service, Science and Education Administration, Department of Agriculture. The issue presented is whether Federal law requires that deductions equal to the amount of any increases in retired or retainer pay be made from the Federal civilian pay of certain members or former members of a uniformed service who, (1) during any period in fiscal

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year 1983, 1984, or 1985 receive retired or retainer pay, and who (2) hold positions in the Extension Service under the authority of the Smith-Lever Act. For the following reasons, we hold that although Federal law requires such deductions, none can be properly made here because the employees involved serve as agents without compensation, i.e., without any Federal civilian pay.

The Administrator has stated that there is a group of certain State Agricultural Extension Service employees who hold a joint Federal-State appointment by authority of the Act of May 8, 1914, Ch. 79, §1, 38 Stat. 372, as amended, 7 U.S.C. §§ 341-349 (1982) (Smith-Lever Act). These employees are considered cooperative employees of the United States Department of Agriculture who serve in the excepted service as Extension Service Agents as authorized by Schedule A, 213.3113(a)(1) of the Office of Personnel Management's (OPM) regulations. 48 Fed. Reg. 43429, 43435 (September 23, 1983). As explained further below, the Federal appointment of these employees is without compensation.

Section 301(d) of the Omnibus Budget Reconciliation Act of 1982, Public Law 97-253, 96 Stat. 791 (1982), as amended by Public Law 97-346, § 3(h), October 15, 1982, 96 Stat. 1648, 5 U.S.C. § 5532, note (1982) (the Act), provides in part as follows:

> "(d)(1) In the case of any member or former member of a uniformed service who, during any period in fiscal year 1983, 1984, or 1985, is receiving retired or retainer pay and holds a civilian position, there shall be deducted from the pay for such position, in accordance with regulations issued by the Office of Personnel Management, an amount equal to the amount of any increase in such individual's retired or retainer pay * * *" (Emphasis added.)

The implementing regulations to the Act of the Office of Personnel Management (OPM) are found at 48 Fed. Reg. 13952 (April 1, 1983) (to be codified at 5 C.F.R. § 553).

In the present case, there are a group of members or former members of a uniformed service who are receiving retired or retainer pay and who hold positions in the Extension Service under the Smith-Lever Act. The first issue is thus whether these positions are "civilian positions" as defined by the Act.

Section 301(d)(2)(B) of the Act defines "civilian position" by adopting the definition of 5 U.S.C. § 5531(2) (1982), which provides:

> "'position' means a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia; * * *."

As noted above, the State Agricultural Extension Service employees involved here hold a joint Federal-State appointment by authority of the Smith-Lever Act. The purpose of that Act was to establish cooperative agricultural extension work among the Agricultural Colleges in the several States. 25 Comp. Gen. 868, 869 (1946), overruled on other grounds, 36 Comp. Gen. 84 (1956). While the grant funds originate with the Federal Government, once the grantee has met the conditions imposed by the Act, then the grant funds, upon being receipted for by the grantee's authorized officer, lose their identity as Federal funds and become funds of the grantee. 37 Comp. Gen. 85 (1957). See National Highway Traffic Safety Administration, B-210967, July 8, 1983, 62 Comp. Gen. ____; 36 Comp. Gen. 221, 224 (1956).

We also note that the employees involved here do not receive any federal civilian pay, and serve as agents without compensation. Their pay is entirely from state funds. Insofar as their federal appointment is concerned, however, they are classified as serving in the excepted service as Extension Service Agents as authorized by Schedule A, 213.3113(a)(1) of OPM's regulations, the statutory authority

for which is the Smith-Lever Act. Accordingly, we conclude that the employees involved here hold a "civilian position" as defined in the Act quoted above.

While the employees involved come within the scope of the Act, we note that the Act requires only that the deduction be made "from the pay for such [civilian] position." Act, § 301(d)(1). The legislative history of the Act further demonstrates that the deduction is only to be made from Federal civilian pay. H. Conf. Rep. No. 97-759, 97th Cong., 2d Sess. 76 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 1641, 1846. Since these employees serve as agents without compensation, do not receive any pay from Federal funds for their civilian positions, and the funds under the Smith-Lever Act from which they are paid are considered funds of the grantee involved, no deductions can properly be made.

We observe that our decision in the present case is based on the Act and thus presents no conflict with our previous holding in 36 Comp. Gen. 84 (1956), which was based on different (and since repealed and replaced) statutory provisions. We are aware that the constitutionality of the Act has been challenged in at least two court cases. See NARFE v. Devine, Civil No. 83-2097 (D.D.C. filed July 21, 1983); AFGE v. Devine, Civil No. C83-1641A (N.D. Ga. filed August 4, 1983). Those challenges present different issues from what we have resolved here and thus we think it is appropriate for our Office to resolve the issues presented by this case. We are also aware that at least two bills have been introduced to repeal the Act. See H.R. 1515, and H.R. 493, 98th Cong., 1st Sess.

Accordingly, the Department of Agriculture is not legally required to seek collection of an amount equivalent to the required Federal civilian pay deductions from any of the employees or grantees involved.

Milton J. Socolar

for Comptroller General
of the United States