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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548In reply refer to
B-196197 (RJH)

November 1, 1979

*DO NOT REPLY TO THIS REQUEST*The Honorable David Pryor
Chairman, Subcommittee on
Civil Service and General Services
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

We refer to your letter of September 18, 1979, enclosing copies of letters from James O. Lunsford and Harry C. Bean who are employees of the American Forces Radio and Television Service (AFRTS) in Europe. The employees are concerned with their scheduled conversion from a nonappropriated fund status to a General Schedule status, and the effect such conversion will have on their salaries, sick leave, annual leave, and home leave.

By way of background, the House Committee on Appropriations, in its consideration of the 1979 Department of Defense Appropriation Bill, recommended that AFRTS be retained as an appropriated fund activity. H.R. Rep. No. 95-1398, 95th Cong., 2d Sess. 219. Later, to encourage the Department of the Army to terminate nonappropriated funding support for the AFRTS operations, the House Committee recommended a reduction of \$1,000,000 in the 1980 budget applied against the Operation and Maintenance Army account. The Committee went on to state that if the employees were converted from a nonappropriated fund status to an appropriated fund status in the near future, it would be willing to entertain a reprogramming or supplemental request to restore the \$1,000,000. H.R. Rep. No. 96-450, 96th Cong., 1st Sess. 83. Thus, the Department of the Army action is a direct result of the Committee action.

The letter from Mr. Lunsford indicates that the loss of employee benefits is based on a decision of the Comptroller General, which will require legislative action to set aside. This is not entirely accurate since legislation to afford relief to the employees involved is necessary because of the law rather than the interpretation of the law in the decision referred to, 37 Comp. Gen. 671 (1958). In the cited decision it was held that employees of the Army and Air Force Motion Picture Service, a nonappropriated fund activity, were not subject to the Civil

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Service Act, the Civil Service Retirement Act, the Classification Act of 1949, or the Annual and Sick Leave Act of 1951. We so held because Public Law 397, 66 Stat. 138 (1952), 5 U.S.C. §§ 150k, 150k-1 (now codified at 5 U.S.C. § 2105(c)), stated that nonappropriated fund employees are not considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission (now Office of Personnel Management). The legislative history indicates that the provision was enacted for the purpose of excluding employees of nonappropriated fund activities from the restrictions and requirements applicable to civil service employees to enable such activities to be operated in accordance with methods of private commercial enterprise. S. Rep. No. 1341, 82d Cong., 2d Sess. 1; 48 Comp. Gen. 192 (1968).

The statutory language remains basically the same today. Section 2105(c) of title 5 states:

"(c) An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of--

"(1) laws (other than subchapter IV of chapter 53 and sections 5550 and 7204 of this title) administered by the Office of Personnel Management; or

"(2) subchapter I of chapter 81 and section 7902 of this title.

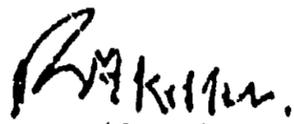
This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities."

Thus, with certain exceptions as to prevailing rates, Sunday and overtime pay, discrimination because of race, etc., compensation

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for work injuries, and safety programs, nonappropriated fund employees are still not subject to laws administered by the Office of Personnel Management. Therefore, we agree with Mr. Lunsford that legislation would be necessary to change nonappropriated fund employee entitlements.

Sincerely yours,


Acting Comptroller General
of the United States