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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548In reply refer to  
D-196392 (RJH)

November 1, 1979

The Honorable James M. Hanley  
Chairman, Committee on Post Office  
and Civil Service  
House of Representatives

Dear Mr. Chairman:

We refer to your letter of October 3, 1979, enclosing a copy of a letter from Clifford A. White, Program Director, American Forces Radio and Television Service (AFRTS), Berlin. The letter expresses concern with a scheduled conversion of employees from a nonappropriated fund status to a General Schedule status, and the effect such conversion will have on their salaries and annual and sick leave. In this connection you ask us if any steps can be taken to ensure that the employees will not lose accumulated benefits as a result of the conversion.

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 be 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. White 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

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that employees of the Army and Air Force Motion Picture Service, a nonappropriated fund activity, were not subject to the Civil 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.

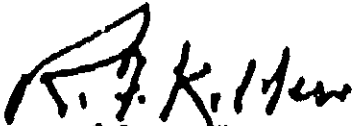
This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities."

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Thus, with certain exceptions as to prevailing rates, Sunday and overtime pay, discrimination because of race, etc., compensation for work injuries, and safety programs, nonappropriated fund employees are still not subject to laws administered by the Office of Personnel Management. Therefore, it would require legislation to correct the nonappropriated fund employees' entitlements. In this connection the Department of the Army has informally advised us that there are many other nonappropriated fund employees that are similarly scheduled for transfer to the General Schedule.

If we can be of further assistance to you in this matter, please advise.

Sincerely yours,

  
Acting Comptroller General  
of the United States