SELECTED NONAPPROPRIATED FUND MANAGEMENT PROBLEMS HAVING SIGNIFICANCE FOR THE MILITARY LAWYER

A Thesis

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The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE

A study of current nonappropriated fund management organization (other than that of the Army and Air Force Exchange and Motion Picture Services) as relating to procurement of supplies and services and to the hiring, administration and discharge of personnel; including an analysis of management limitations and an evaluation of current and proposed statutory and regulatory directives pertaining to these two management areas.

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CHAPTER I

INTRODUCTION

A. MAGNITUDE OF ARMY NONAPPROPRIATED FUND ACTIVITY.

Nonappropriated fund activities of the United States Army today constitute "big business." Some conception of the magnitude of this important function of the Department of the Army may be obtained by an examination of selected statistics.[1] The net worth of the Army Central Welfare Fund at the beginning of fiscal year 1969 was $13.5 million. This fund's fiscal year 1969 budget was based on an anticipated income of $48.0 million which includes an anticipated income from the Army and Air Force Exchange Service [hereafter referred to as the AAFES] of $4.9 million. This budget reflected an anticipated fiscal year 1969 expenditure of $50.1 million.

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[1]The statistics quoted in this division of Chapter I were obtained from the Nonappropriated Fund Division, Army Education and Morale Support Directorate, the Adjutant General's Office, Department of the Army. Those statistics relating to welfare funds were extracted from the 1969 Fiscal Year Major Army Command Welfare Fund Budget. Those pertaining to open messes were obtained from the Open Mess Branch of the Nonappropriated Fund Division and particularly from reports submitted to that Branch for calendar year 1967 as required by Army Reg. No. 230-60, para. 44 (28 Aug. 1967)[hereafter cited as AR 230-60].

Of this $50.1 million, $45.6 million will be distributed to major command welfare funds and central post funds. These activities expect to receive an additional income of $17.3 million and expend during the same fiscal year a total of $66.0 million. This compares with an actual expenditure by major command welfare and central post funds of $63.6 million during fiscal year 1968. Expenditure of appropriated funds in the amount of $54.9 million in direct support of welfare, recreational, and morale activities is expected during fiscal year 1969, making a total expenditure of $120.9 million for a single fiscal year. These statistics relate only to the major funds of those categorized by Army regulations as welfare funds.[2] Additional insight into the scope of nonappropriated fund activity is afforded by an examination of statistics pertaining to officers' and

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[2]Army Reg. No. 230-5, para 5*b* (18 Jul. 1956)[hereafter cited as AR 230-5]. A nonappropriated welfare fund is an entity established by authority of the Secretary of the Army for the purpose of administering moneys not appropriated by Congress to supplement the costs of benefits and services provided by appropriated funds for morale, welfare and recreation of military personnel or civilian employees of the Army. These funds are established and maintained primarily from dividends from revenue-producing activities such as the Army and Air Force Exchange and Motion Picture Services. Army Reg. No. 230-1, para. 3-4*a* (8 Apr. 1968)[hereafter cited as AR 230-1]; AR 230-5, paras. 3*a* and 3*c*.

noncommissioned officers' open messes.[3] During calendar year 1967 these activities reported total worldwide sales of over $150.5 million. Membership dues in excess of $15 million were collected. Salaries to employees exceeding $60.8 million were disbursed. Statistics concerning the "club" operation at any selected major Army post are revealing. For example, during calendar year 1967 the open messes at Fort Bragg, North Carolina, rang up total sales of over $6.5 million and expended in excess of $2.1 million for salaries. During calendar year 1967 over $12.3 million of nonappropriated funds were expended worldwide for capital improvements of open messes. These statistics do not include those pertaining to civilian open messes[4] operated in overseas areas. The magnitude of these operations may be highlighted by reference to one construction project to expand and improve the physical plant and facilities of the Harborview Open Mess, a civilian open mess of the

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[3]Open messes are categorized as sundry funds by AR 230-5, para. 5*c*(3). A sundry fund is a self-sustaining fund "whose active membership is composed of limited groups of military personnel on active duty and eligible civilian employees or any combination of such membership." AR 230-5, para. 3*d*.

[4]Civilian open messes are generally organized as "other sundry or association funds" pursuant to AR 230-5, para. 5*c*(8) and Section IV.

United States Army Ryukyu Islands Command.[5] This project required 7-1/2 years from inception to completion. At least seven prime contracts were awarded and administered and almost $930,000 of nonappropriated funds were expended.

It is also pertinent to note that an estimated 12,000 to 15,000 United States civilian citizens paid from nonappropriated funds are employed by Army welfare and sundry fund activities.[6] It is likely that the number of citizen welfare and sundry fund employees is exceeded by foreign national employees working at overseas locations for these nonappropriated fund activities. A consolidated figure is not available. However, Headquarters, Eighth United States Army reported almost 6800 Korean national welfare and sundry fund employees as of 30 June 1968 and Headquarters, United States Army Ryukyu Islands reported approximately

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[5]Information and statistics relating to this project were obtained from the S-1 office, Headquarters, Fort Buckner, Okinawa.

[6]This estimate was provided the author by personnel of Nonappropriated Fund Division, the Adjutant General's Office, Department of the Army. No accurate figure can readily be obtained as there is no Department of Army reporting requirement. The estimate was projected from the number of employees participating in the Group Insurance and Retirement Plan for nonappropriated fund employees. The estimate is considered very conservative by the author.

3,000 Ryukyuan national welfare and sundry fund employees as of 1 March 1968.[7] Addition of similar statistics from Japan, Taiwan, Viet Nam and Europe undoubtedly would boost the total number of local national employees well over 25,000.

The foregoing statistics do not cover the entire spectrum of nonappropriated fund activity. However, the major activities are included with the exception of the AAFES and the Army and Air Force Motion Picture Service [hereafter referred to as the AAFMPS]. These revenue-producing funds[8] generally will be excluded from the scope of this thesis, but will be examined from time to time for the purpose of comparison of personnel and procurement management systems and where necessary to understand the nonappropriated fund system as a whole.

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[7]Hq., Eighth Army statistics were provided by the Eighth Army Staff Judge Advocate Office from reports made available to that office. The S-1, Hq., Fort Buckner (Okinawa) provided statistics relating to Hq., USARYIS. The statistics given for citizen and non-citizen employees include special services employees paid from nonappropriated funds.

[8]AR 230-5, para. 5*a* authorizes revenue-producing funds including exchanges and motion picture theaters. AR 230-5, para. 3*b* defines these funds as "[s]elf-sustaining non-appropriated funds established to sell merchandise and services...and to provide financial support to welfare funds."

B. SCOPE AND NATURE OF NONAPPROPRIATED FUND MANAGEMENT.

1. General.

The recitation of actual and anticipated income and expenditure of major Army nonappropriated funds alone is evidence of the complexity and variety of management problems which arise. The purpose of this thesis is to examine two areas of nonappropriated fund management: (1) the organizational scheme within the Department of the Army and subordinate units taxed with the responsibility to procure supplies and services, and current statutory and regulatory guidance pertaining to nonappropriated fund procurement; and (2) the Department of the Army nonappropriated fund personnel structure, including statutory and regulatory provisions relating thereto. Current and proposed statutes, regulations, directives and policies relating to nonappropriated fund procurement and personnel will be examined. This thesis is expected to demonstrate that within the management areas to be examined there is a present paucity of current, readily available written guidance, a decided lack of statutory clarification of the status of nonappropriated funds and the existence of an inadequate statutory and regulatory scheme permitting effective and efficient management. These

inadequacies have created a present inability to achieve fair and uniform treatment of employees, to adhere to the directives which are extant and to maintain efficiency and economy in the procurement of supplies and services and the administration of personnel as well as contracts. An attempt will be made to pinpoint the major causes of these inadequacies, to provide the legal practitioner and nonappropriated fund activity manager in the field with a source of current procurement and personnel policy and directives, and to propose possible solutions to the problems discussed.

2. History, Nature, and Purpose of Nonappropriated Fund Activities.

Nonappropriated fund management problems can be better understood and proposed solutions to those problems more completely analyzed against an origin and history backdrop of these activities. An annotated history has been accomplished[9] so only a brief resume will be provided in this thesis. The historical roots of nonappropriated funds reach back to the American Revolution and the sutler, a civilian merchant, who was authorized by the

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[9] *See* Kovar, *Legal Aspects of Nonappropriated Fund Activities*, 1 MIL. L. Rev. 95 (1958).

Articles of War of 1775 to provide for the individual personal needs of service personnel.[10] By 1821 the sutler was returning a part of his profit on sales to the unit to which he was attached. These charges plus fines collected from sutlers for violations of regulations were lumped together to constitute a "post fund."[11] This fund was administered by a council and a custodian, initially the paymaster and later the post commander. The fund was utilized for such varied welfare projects as relief of widows and orphans, financial assistance for the post school, purchase of library books and maintenance of the post band.

In 1835 companies were authorized by Army regulations to have their own funds for morale, welfare and recreational purposes.[12] The principal source of revenue of this fund was savings which accrued from the economical use of rations issued to the company. Officers' and noncommissioned officers' open messes were authorized by

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[10] W. WINTHROP, MILITARY LAW AND PRECEDENTS 953 (2d. ed. rev. & enl. 1920). See in particular Arts. XXXII, LXIV, LXV, and LXVI.

[11] The General Regulations for the Army, para. 41 (1821) Act of 2 March 1821, 3 Stat. 615.

[12] Army Regulations of 1835, para. 31.

Army regulations during this same period.[13] At various times Congress, pursuant to its constitutional authority,[14] approved or adopted the Army regulations which created the post fund, the company fund and the open messes and in doing so gave recognition to the necessity for providing morale, welfare and recreational activities to servicemen and the nonappropriated fund as a means to that end.

The sutler was later replaced by the Post Trader which in turn was supplanted by the Post Canteen, a voluntary cooperative effort recognized by Congress,[15] which eventually gave birth to the Post Exchange in 1895.[16] Both the canteen and the exchange initially operated independently from installation to installation. Each installation exchange was managed by an officer placed

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[13]Army Regulations of 1835, Art. IX (officers' open messes). Army Regulations of 1841, para. 94 (non-commissioned officers' open messes).

[14]U.S. Const. Art. I, § 8, cl. 14.

[15]The Post Trader was established "on the frontier" by Congressional Joint Resolution of 30 March 1867, 15 Stat. 29 and later was authorized at all posts by Sec. 3, Act of 24 Jul. 1876, 19 Stat. 100. Post Canteens were authorized at all posts by Gen. Order No. 51, Hq. Dep't of Army (13 May 1890).

[16]Gen. Orders No. 46, Hq. Dep't of Army (25 July 1895).

in charge and a council, both appointed by the installation commander. Originally, the capital and operating funds came from credit or assessment upon the company funds, profits were distributed to participating companies, and the company's vested interest was compensable to that unit upon departure from the installation. It wasn't until 1941 that the exchanges were merged into an Army Exchange Service with a central organization[17] which collected all excess profits and re-distributed them to welfare, morale and recreational activities.

This historical development provides an insight into the specific Army need that gave rise to the creation of such entities. That need was to provide for the morale, recreation and welfare of the soldier and his dependents without complete dependence upon congressional appropriation specifically for that purpose. The nonappropriated fund gave the unit or installation

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[17]War Dep't Circular No. 124 (28 June 1941). In 1955 the Army and Air Force Exchange and Motion Picture Services were established for joint operation of exchanges and theaters. All other nonappropriated funds were controlled and administered separately by each service.

commander a "purse" of his own, completely within his own control without congressional strings, so the commander could ease the rigors and exigencies of military life imposed upon the soldier and his family. This necessity and purpose fostered the concept of decentralized management which allowed the installation commander maximum control. It will be demonstrated that as the size and complexity of the Army organization has grown this concept and purpose has retarded economical and efficient fund management. The purpose of the fund remains the same. Thus, the questions posed are (1) Whether management can and should be changed? (2) If management can and should be changed, how is it to be changed? and (3) Will such change aid or hinder the commander in achieving his mission which remains unchanged?

CHAPTER II

PRESENT MANAGEMENT STRUCTURE

A. DEPARTMENT OF THE ARMY ORGANIZATION.

Prior to a direct confrontation with procurement and personnel management within the nonappropriated fund system, it is necessary to examine the present organization through which management is effected. The concept that the nonappropriated fund is a commander's tool over which he wielded almost complete control to give the troops something extra and thereby promote the successful accomplishment of the installation or unit mission has had a marked effect upon management organization. This concept of decentralized management with each fund essentially operating independently persists today with the exception of the AAFES and AAFMPS,[18] and

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[18]The Army and Air Force Exchange Service [hereafter referred to as AAFES] and the Army and Air Force Motion Picture Service [hereafter referred to as AAFMPS] are controlled and supervised by a Chief under the direction of a board of directors composed of three general officers of the Army and three general officers of the Air Force. AR 230-5, para. 8*b*; Army Regulation No. 60-10, para. 5 (19 Jan. 1968)[hereafter cited as AR 60-10]. Civilian Welfare Funds and post restaurants are partly controlled by a board of directors composed of ranking civilians of the Army and Air Force. The chairmanship of both boards alternates between the two services.

the Civilian Welfare Fund. The Deputy Chief of Staff for Personnel at Headquarters, Department of the Army, is responsible for the supervision and control of all other Army nonappropriated funds. The organization utilized by that staff section to discharge its nonappropriated fund supervisory responsibilities is relatively simple and staffed with what appears to be a minimum number of people, considering the large business involved. Directly under the Deputy Chief of Staff for Personnel within the Personnel Division of the Directorate of Personnel Policy is a Welfare Branch which is the only branch in the office of the Deputy Chief of Staff for Personnel that is concerned with nonappropriated fund matters. This branch is manned by a military officer, a chief, and four civilians, two of whom are secretaries. The civilians' salaries are paid from nonappropriated funds.[19] The Adjutant General is assigned nonappropriated fund administrative responsibilities under the supervision of the Deputy Chief of Staff for Personnel. This function of The Adjutant General's Office has been assigned to a Nonappropriated

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[19]Salaries of these employees are paid from the Army Central Welfare Fund.

Fund Division. The division chief and assistant are military officers who supervise 21 civilian employees, all paid from the Army Central Welfare Fund.[20] These two offices, operated by three military officers and 25 civilian employees are responsible for the supervision and administration of thousands of welfare and sundry funds.[21] The Nonappropriated Fund Division also has direct supervision of the Army Central Welfare Fund, the Army Central Mess Fund, the Army Book Departments and the War Department Historical Fund.[22] These two offices promulgate all regulations, circulars, directives, pamphlets and other written guidance to the field including the extremely complex areas of procurement and personnel. Oral guidance is given to the field

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[20]One other office at Dep't of Army level has responsibilities in the nonappropriated fund area. The Office of Civilian Personnel Directorate has a Recruiting Branch with six civilian employees, paid from nonappropriated funds, tasked with nonappropriated fund personnel recruitment.

[21]The author was informed by the Staff Judge Advocate at Ft. Benning, Georgia, that that installation has 112 nonappropriated funds operating (excluding unit funds). The Eighth Army Staff Judge Advocate reported 616 funds including 406 unit funds.

[22]AR 230-5, para. 8*c*(4). The assistant division chief is the custodian of each of these funds.

over the telephone. Other duties include[23] (1) controlling the distribution of nonappropriated funds through allotments, grants or loans; (2) determining sources of income and the general purposes for which income may be expended and controlling assets of nonappropriated funds; (3) requiring the transfer of assets excess to requirements of nonappropriated funds to the central Department of the Army funds or other nonappropriated funds; (4) recommending and coordinating accounting and financial reporting procedures; and (5) administering the Group Insurance and Retirement Plan and all other employee centralized programs directed from departmental level.

It is obvious that the largest share of the burden of administration and operation of nonappropriated funds falls upon the field commands due to the stark reality that the departmental level is neither manned nor equipped to provide more than the minimum assistance, a situation which undoubtedly stems from the historical concept of independent and separate control and operation.

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[23]AR 230-5, para. 8.

B. MAJOR COMMAND AND INSTALLATION ORGANIZATION.

Department of the Army guidance concerning management organization and administration below Department level is minimal. Major commanders[24] are responsible for supervision and administration of nonappropriated fund programs and facilities at installations within their command jurisdictions[25] but no instructions are given as to the internal organization to accomplish such supervision and administration except the general guidance that major command welfare funds will be established.[26] Installation commanders are authorized to establish central post funds,[27] civilian welfare funds,[28] and sundry and association funds.[29] Commanders of organizations smaller than battalions have the authority to

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[24]Major commanders are defined as commanders of Zone of the Interior Armies, the Military District of Washington, Dep't of Army Staff Agencies having command jurisdiction over installations and major class II activities, the Army Security Agency, Army Antiaircraft Command, and overseas commanders directly under the Dep't of the Army. AR 230-5, para. 3*f*.

[25]AR 230-5, para. 6*a*(3).

[26]AR 230-5, para. 14.

[27]AR 230-5, para. 15.

[28]AR 230-5, para. 18.

[29]AR 230-5, sec. IV.

establish unit funds.[30] Each fund is required to have a custodian and a council or board of governors, appointed by the commander authorized to establish the fund, vested with the responsibility to safeguard the fund and supervise related programs.[31]

The management guidance outlined above essentially is the entire guidance provided to the major commander and the installation commander. From that point on each command is left to its own devices to guide, control, and coordinate the activities of what can amount to hundreds of separate funds in the case of the larger commands.[32] As could be expected, a variety of approaches has been taken. Some commands provide a strong centralized control while others allow each nonappropriated fund activity to function as independently as possible with general guidance by various staff agencies. Without known exception the G-1 section or Directorate of Personnel and Administration or

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[30] AR 230-5, para. 16.

[31] AR 230-5, para. 6*b*. Appointment may be accomplished by election in the case of sundry and other association funds, but the commander has to approve the results of such elections.

[32] *See* note 21 *supra*.

counterpart at lower or higher echelons of command, as the case may be, is charged with the overall supervision and administration of nonappropriated fund activities. From this point various functions may be distributed to the Civilian Personnel Office, a Morale and Welfare Division, a Plans and Services Division, a Financial Management Officer, a Post Services Section, a Non-appropriated Funds Branch, a Central Accounting Office, and other organizations.[33] Just as at Department of the Army, the offices within lower commands which operate and supervise the morale, welfare, and recreational functions are staffed with an admixture of military personnel and civilian employees paid, in some cases, from appropriated funds and in other cases from non-appropriated funds.

C. MANAGEMENT LIMITATIONS.

It is at this point that the installation commander

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[33]Information on nonappropriated fund organization at installation level was furnished by Staff Judge Advocates of various commands in response to a questionnaire sent to 37 representative commands throughout the world. One or more of the offices, divisions, or sections mentioned were used by the following commands: Eighth United States Army; United States Army, Japan; Seventh Infantry Division; U.S. Army Garrison, Ft. Huachuca, Arizona; White Sands Missile Center; Ft. Lewis, Washington; Ft. Carson, Colorado; Ft. Knox, Kentucky.

comes face to face with serious limitations upon what would seem to be a "free rein" in the management of nonappropriated fund activities. Army regulations provide that civilian personnel paid from nonappropriated funds ordinarily will be utilized in the operation of non-appropriated funds and related programs[34] and military personnel may be utilized within official manning document limitations on a full-time duty basis where necessary to exercise command *supervision*.[35] However, military personnel will not be assigned primary duty with a non-appropriated fund for *operational* purposes.[36] Civilian employees paid from appropriated funds cannot be used in the operation of revenue producing and sundry funds but may be utilized for the "administration" of these funds and for both operation and administration of military welfare programs such as those operated by command welfare funds and special services.[37] Thus, the

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[34] AR 230-5, para. 6*c*(1).

[35] AR 230-5, para. 6*c*(3).

[36] *Id.*

[37] AR 230-5, para. 6*e*(4).

installation commander is introduced to the "supervisory-operational" dichotomy that continually plagues him in the utilization of his resources to effect efficient management of his morale, welfare and recreational program.[38] As the commander distributes the responsibility for the many and varied functions of nonappropriated fund activities he must continually attempt to apply the litmus test labelled as "supervisory-operational" to determine whether the regulation is being adhered to. The impact of this can be sensed if a management problem such as expansion of a club facility is considered. The commander must decide if he can use the post engineers to draft the plans, drawings, and specifications, and whether the solicitation can be prepared and issued, bids evaluated and a contract awarded and administered by his purchasing and contracting office. If new personnel are needed to operate the expanded facility, the question arises as to whether they are to be recruited by his civilian personnel office, paid by his finance and accounting office and whether

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[38] *See* Ayres, *Support of Nonappropriated Funds With Appropriated Funds*, Chapter III (1965) (an unpublished thesis presented to the Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Thirteenth Career Class)[hereafter cited as Ayres].

their grievances can be handled through the same channels as though they were civil service employees. Even as it is sometimes necessary for a judge advocate to raise a warning finger to his commander to prevent what appears to be a breach of the regulatory limitations, so has The Judge Advocate General been called on to establish the parameters of the limitation and explain its basis. In one opinion[39] The Judge Advocate General of the Army stated that:

> It is legally objectionable for a command Civilian Personnel Office to assume the responsibility for the appointment and employment rights of nonappropriated fund employees. Further, a command Civilian Personnel Office does not have, and may not be vested with, any authority to deal with problems relating to nonappropriated fund employees, except to give technical advice when called upon by the commander or a responsible staff officer.

This opinion follows other Judge Advocate General opinions interpreting the prohibition of Title 10, *United States Code* § 4779(c)[40] as applying to all nonappropriated fund

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[39] JAGA 1965/4160, 11 June 1965, *as digested in* 65-22 JALS 7.

[40] 10 U.S.C. § 4779(c)(1964).

activities.[41] That statute provides that:

> No money appropriated for the support of the Army may be spent for post gardens or Army exchanges. However, this does not prevent Army exchanges from using public buildings or public transportation that, in the opinion of the office or officer designated by the Secretary, are not needed for other purposes.[42]

It appears that this statutory provision coupled with the statutory requirement that an appropriation must be used for the purpose for which appropriated[43] accounts for the cautious attitude toward the use of civilian employees paid from appropriated funds in the operation of nonappropriated fund activities. There appears to be no other statutory restrictions on expending appropriated

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[41] *See, e.g.*, JAGA 1963/4262, 20 June 1963, holding that the rental of Madison Square Garden with appropriated funds for an Army Band concert, the proceeds of ticket sales to go to nonappropriated welfare funds would violate 10 U.S.C. § 4779(c)(1964).

[42] A General Counsel of the AAFES has launched a strong attack on the validity of 10 U.S.C. § 4779(c)(1964), arguing that inasmuch as the Act was passed in 1892 when the post exchange was a voluntary cooperative association among particular units that retained a residual interest in and ownership of the activity's assets and the modern post exchange was created in 1895 with a different concept, the Act is no longer applicable. The Judge Advocate General of the Army counters with the argument that the Act has been considered inferentially by Congress and left unchanged. JAGA 1964/4364, 21 Aug. 1964.

[43] Rev. Stat. § 3678 (1875), 31 U.S.C § 628 (1958).

funds for the support of nonappropriated fund activities if used for the purpose for which appropriated. On the contrary, the annual Department of Defense appropriations acts provide money for "welfare and recreation" of Army personnel,[44] and many annual military construction appropriations acts provide money for the construction of post exchanges and other nonappropriated fund activities.[45]

The regulation[46] does allow the use of personnel paid from appropriated funds in the operation of military welfare programs. It seems that the drafter of that regulation and those who passed on it for legal sufficiency interpreted Title 10, *United States Code* § 4779(c) as a statement of Congressional intent to limit expenditure of appropriated funds on revenue-producing and

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[44] *See, e.g.*, the Dep't of Defense Appropriation Act for the fiscal year ending June 30, 1969, 82 Stat. 1120, Public Law 90-580, October 17, 1968 which provides in Title III under "Operation and Maintenance, Army" for "welfare and recreation."

[45] The Military Construction Acts do not state specifically for what projects the money appropriated is to be spent. The specific construction items are to be found in the Congressional hearings. *See, e.g., Hearings on H.R. 10202 and H.R. 11131 (Military Construction Act, Fiscal Year 1964) Before the House Appropriations Committee*, 87th Congress, 2d Sess. at 4086-4136.

[46] AR 230-5, para. 6c(4).

sundry funds but not on welfare funds.[47] This observation is strengthened by an expressed opinion by The Judge Advocate General of the Army that there is no legal objection under existing regulations that an appropriated fund operated civilian personnel office be tasked with servicing nonappropriated fund employees of special services.[48] Further, the opinion emphasized that the servicing should be accomplished by civilian personnel office employees paid from appropriated funds as long as sufficient appropriated funds were available for that purpose. In addition, it is of significance that Congress appropriates money for welfare, morale and recreational purposes which is used in direct support of welfare fund and special services activities. But, regardless of the legal precedent for prohibiting the use of appropriated funds by revenue-

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[47] *But see*, JAGA 1963/4262, *supra* which seems to be inconsistent with the theory advanced here. However, this is an area of inconsistencies and "onion-paper" thin theories.

[48] JAGA 1966/3986, 2 June 1966. This opinion arose from a request of the Commander in Chief, U.S. Army Europe to the Deputy Chief of Staff for Personnel for authority for USAREUR civilian personnel offices to service special services nonappropriated fund employees.

producing and sundry funds for purposes other than those specified in Title 10, *United States Code* § 4779(c)[49] and the regulatory prohibition on use of civil service personnel in the operation of such funds, as a matter of practice those activities are indirectly assisted in many ways by the expenditure of appropriated funds. For example, a Department of Defense directive does allow the furnishing of utilities without charge to enlisted clubs and to those officer messes required for essential messing even though the same directive requires that type of nonappropriated fund generally to be self-sustaining.[50] The cost of command supervision is an expressly authorized expenditure of appropriated funds which is indirect support available to all nonappropriated fund activities. In addition, the cost of transporting United States products for use and resale in overseas nonappropriated fund activities from the port of embarkation to port of debarkation in public facilities

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[49]10 U.S.C. § 4779(c) states that the section shall not be construed to prevent post exchanges from using public buildings and public transportation when not required for other purposes.

[50]Dep't of Defense Directive No. 1330.2, sec. III F (19 Jan. 1953); Army Regulation No. 210-55, Table I (26 July 1952)[hereafter cited as AR 210-55].

such as those of the Military Airlift Command and Military Sea Transportation Service can be paid from appropriated funds.[51] In certain cases, Government-owned portable equipment may be used by nonappropriated funds.[52] Many other instances of indirect support provided both pursuant to regulation and without specific regulatory authority could be cited,[53] but those mentioned are sufficient to cast doubt on the premise that there is a firm statutory basis for the rules and practices that have grown up limiting the commander in the utilization of all his resources in the management of all nonappropriated fund activities. It also appears that the line drawn between the military welfare funds on the one hand and all other nonappropriated funds on the other is a very indistinct one and one which continually breaks down in actuality. Indeed it seems to be drawn more from a fear that Congress may firmly establish the line absent

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[51]Army Reg. No. 230-4 (17 May 1968)[hereafter cited as AR 230-4].

[52]AR 210-55, para. 4*b*, Table I, and n.3 (messing equipment); Army Regulation No. 28-95, para. 7 (15 Oct. 1968)(aircraft).

[53]*See*, Ayres, *supra* note 38, for a complete documentation of support provided nonappropriated funds from appropriated funds.

Department of Defense self-disciplinary measures than from a real conviction that the line actually exists.[54] Another influential factor is the fear that any further attempts to obliterate the line by seeking more appropriated fund support of revenue-producing and sundry funds, in particular, may imperil the entire system and require coverage of receipts of these funds into the Treasury.[55]

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[54] *See*, JAGA 1964/4186, 14 July 1964.

[55] Rev. Stat. § 3617 (1849), 31 U.S.C. § 484 (1964).

CHAPTER III

PROCUREMENT AND PERSONNEL MANAGEMENT

A. GENERAL

The historical concept of the nonappropriated fund activity as a separate, independent entity upon each installation and a tool of the installation commander to accomplish his mission, and the limitations imposed on management concerning the use of installation resources, have joined to create a minimum of guidance and a lack of uniformity in areas where these elements are greatly needed. Of these, two major areas of importance, singled out for discussion in this thesis, are procurement and personnel.

Government procurement, today, is a vast, intricate subject regulated by dozens of statutory provisions implemented by volumes of regulations.[56] The intricacies

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[56]Dep't of Defense implementation, The Armed Services Procurement Regulation (1 Jan. 1969)[hereafter cited as ASPR] fills several volumes; the Army Procurement Procedure (1965) is a one volume Army implementation. In addition, each Head of Procuring Agency publishes directives such as the Army Procurement Instructions for the western pacific (WESTPAC) area.

of employment of civil servants require a commission in the executive branch of our federal government to develop orderly procedures. As a result, a plethora of directives covering almost every conceivable aspect of federal employment have been promulgated.[57] Admittedly, appropriated fund procurement involves many billions of dollars,[58] and civil servants number in the hundreds of thousands, whereas expenditure of approximately $121 million in fiscal year 1969 by morale, recreational, and welfare activities is anticipated and employment of less than 20,000 citizen civilians is estimated. However, the smaller operation of nonappropriated fund activities is significant and that significance has not been matched by a management system adequate to its needs. To understand those needs and propose a new management system adequate to fulfill those needs, an evaluation of the present system is required.

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[57]The Civil Service Commission has issued the Federal Personnel Manual, the Dep't of Defense supplements this with Civilian Personnel Regulations. These are loose leaf services kept current by periodic revisions.

[58]The Dep't of Defense Appropriations Act for the fiscal year ending June 30, 1969, Public Law 90-580, October 17, 1968, 82 Stat. 1120 appropriated about $78 billion for the use of DOD. Of this, approximately $47 billion was used for operations and maintenance, procurement and research and development; the remainder was for salaries, claims and contingencies.

B. NONAPPROPRIATED FUND PROCUREMENT.

1. Substantive Requirements.

The status of nonappropriated fund procurement policy may best be illustrated by quoting an opinion of The Judge Advocate General of the Army who was requested to comment on the propriety of an award of a contract for the purchase and installation of bowling equipment to a contractor who did not submit the low bid. After noting applicable regulations, the opinion said:[59]

> 3. No provision of law expressly governs the procurement activities of non-appropriated funds. The legal basis for the quoted regulations, therefore, is the Secretary of the Army's power to prescribe regulations governing the Army (10 U.S.C. 3012(g)). No procedure is prescribed for nonappropriated procurement activities except the quoted regulations.... Accordingly, two price quotations were not required nor is the lower quotation required to be accepted. The only requirement in this connection was that the responsible commander determine that the proposal would work to the best advantage of the Army....
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> 4. The question might be raised whether nonappropriated fund procurement activities should not be subject to the same rules and regulations as appropriated fund procurement activities. Being the creatures of regulations, nonappropriated fund activities are not subject to the laws pertaining to the expenditure of public funds. Likewise, they are not subject to

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[59] JAGA 1959/2727, 24 Mar. 1959.

> the Departmental regulations in implementation of Chapter 135, Title 10, *United States Code* (formerly the Armed Services Procurement Act).

This opinion candidly illustrates that most nonappropriated fund procurement procedures and contractual provisions are left to the installation commander.

a. Solicitation.

The installation commander is not restricted to a particular method of procurement provided the method used be that deemed to be the most favorable to the Government.[60] Title 10, *United States Code*, Chapter 135 by its express wording applies only to procurement with appropriated funds.[61] Accordingly, there is no statutory preference for advertised solicitation. Regulations merely caution the commander that a purchase must be made in the open market without favoritism. There are no specific requirements that solicitations be issued and publicized in such a way as to gain the widest attention and afford maximum competition, nor that specifications be drafted so as not to be restrictive. Open public

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[60] AR 230-5, para. 6*b*(11)(Change No. 4, 26 Jun 1959).

[61] 10 U.S.C. § 2303 (1964).

solicitation is required to encourage competition, but price is not the only factor that need be considered when making an award. The lowest offer does not have to be accepted provided the council or board of governors can satisfy the installation commander that it is not in the best interests of the fund to accept that offer.[62] Competition is not required if it can be shown that competition was not necessary to protect the interests of the fund. It can be said that the commander merely is enjoined to utilize good business practices without favoritism to any offeror or potential offeror.

b. Submission of Bids, Opening and Award.

There is no statutory or regulatory guidance concerning submission or opening of bids or offers. The nonappropriated fund contracting officer may either utilize the forms prescribed for appropriated fund procurement or devise his own unless some command in his chain of command below Department of the Army level has published more specific guidance. The manner and method of award has not been directed. There are no standards for determining responsibility, except to the extent dictated by what is in the best interests of the Government. A nonappropriated

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[62] AR 230-5, para. 6*b*(11)(Change No. 4).

fund is not fettered with obtaining any approval prior to award beyond that of the council or board of governors for purchases under $500 or purchases of merchandise for resale regardless of amount.[63] All other purchases must be approved by the appropriate installation commander.[64] The Judge Advocate General of the Army and the Army Deputy Chief of Staff for Personnel, have recognized that there are no prescribed Department of the Army procedures for processing cases involving mistakes in bids alleged in nonappropriated fund procurement and that the method of processing such cases is a matter within the prerogative of the appropriate commander subject to the application of pertinent general principles of law.[65]

c. Types of Contracts.

Just as there is no prescribed method of procurement (advertising or negotiation) for nonappropriated funds, similarly, there is no guidance as to

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[63] AR 230-5, para. 6*b*(11)(Change No. 4).

[64] Certain restrictions on the approval authority of the installation commander outside the U.S., its possessions, and Puerto Rico are imposed to effectuate the International Balance of Payments Program. Dep't of Defense Directive No. 7060.3 (16 Jan. 1965)[hereafter cited as DOD Dir. 7060.3]; AR 230-4.

[65] JAGT 1959/2795, 15 May 1959. This opinion suggests that ASPR procedures might be used as a guide.

selection of contract type. Procurement for non-appropriated funds is generally the responsibility of the secretary or custodian acting as a contracting officer after approval of the council or board of governors, except where installation commander approval is required.[66] Accordingly, selection of contract type is within the discretion of that officer. Even the statutory prohibition against the cost-plus-a-percentage-of-cost system of contracting has not been made applicable to nonappropriated fund contracting[67] nor is there any limitation on the fee for performing cost-plus-a-fixed fee type contract.[68] There is not even a general requirement that contracts with all nonappropriated fund activities be in writing. However, all open mess contracts involving future performance are specifically required to be reduced to writing.[69]

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[66] *See, e.g.*, AR 230-60, para. 24*a* which specifies that the secretary is the contracting party for an open mess.

[67] *See*, 10 U.S.C. § 2306(a) (1964) which is included in Chapter 137, Title 10. Section 2303 of that chapter specifically limits the application of the chapter to procurement with appropriated funds.

[68] *Id. See also*, 10 U.S.C. § 2306(d) (1964).

[69] AR 230-60, para. 24*e*. The same requirement is imposed on all military sundry funds. *Id.* para. 50.

d. Statutory Protection.

The statutory and regulatory requirement that contracts contain a covenant against contingent fee does not apply to nonappropriated fund contracts.[70] Likewise, the Gratuities clause requirement is limited to contracts expending "[m]oney appropriated to the Department of Defense." Submission of cost and pricing data and certification as to its being complete, accurate, and current is a requirement of Title 10, *United States Code*, Chapter 137, which chapter expressly applies only to obligations of appropriated funds.

The same chapter contains the requirements pertaining to examination of books.[71] Thus, the same protection through Comptroller General audit up to three years after final payment of cost and cost-plus-a-fixed fee contracts is not available to the non-appropriated fund. The debarment and suspension

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[70] 10 U.S.C. § 2306(b) (1964) is contained in Chapter 137 of Title 10. Section 2303 of that chapter specifically limits the application of that chapter to procurement with appropriated funds. ASPR §§ 1-101 and 1-102 (1 Jan. 1969) make it clear that that regulation applies only to obligation of appropriated funds.

[71] 10 U.S.C. § 2313(a) (1964) *as amended*, (Supp. III, 1965-1968).

procedures of the Armed Services Procurement Regulation [hereafter referred to as the ASPR] has not been made applicable to nonappropriated funds except that the Chief, AAFES has been authorized by regulation[72] to debar or suspend a firm or individual for any of the causes and conditions presented in the ASPR.[73] In addition, the AAFES has been prohibited from buying from vendors[74] on the Joint Consolidated List of Debarred, Ineligible and Suspended Contractors of the Departments of the Army, Navy and Air Force. There is no similar specific regulatory prohibition pertaining to other nonappropriated fund activities. However, the restrictions of the Davis-Bacon[75] and Walsh-Healey Acts[76] prohibiting contracting with persons or firms on the list could be construed to apply to nonappropriated funds. The Walsh-Healey Act

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[72]Army Regulation No. 60-20, para. 4-30 (17 Oct. 1968) [hereafter cited as AR 60-20].

[73]*See*, ASPR Sec. I, part 6 (1 Jan. 1969).

[74]AR 60-20, para. 4-29. The regulation makes an exception for purchases from vendors listed for violations of Sec. 1(a) of the Walsh-Healey Act, 49 Stat. 2036 (1936), 41 U.S.C. §§ 35-45 (1964), which pertains to representations as to status as a manufacturer or regular dealer.

[75]49 Stat. 1101 (1931), 40 U.S. C. § 276a-a7 (1964).

[76]49 Stat. 2036 (1936), 41 U.S.C. §§ 35-45 (1964).

specifically includes contracts made and entered into by an instrumentality of the United States.[77] Davis-Bacon applies to construction contracts upon public buildings or public works.[78] It has been held by a federal district court[79] that a contract by a nonappropriated fund activity for construction of a library upon a military post was construction of a public building or public work within the purview of the Miller Act.[80] The very same wording is used in the Davis-Bacon Act and would likely be construed in the same way. However, it is readily admitted that any application of debarment and suspension proceedings to nonappropriated funds is conjectural. The Judge Advocate General of the Army has recognized the absence of regulations prescribing a procedure for debarment of firms and individuals doing business with nonappropriated funds and cautioned against attempts by such a fund to debar a contractor.[81] This

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[77] 49 Stat. 2036 (1936), 41 U.S.C. § 35 (1964).

[78] 49 Stat. 1011 (1931), 40 U.S.C. § 276a (1964).

[79] *United States v. Phoenix Assurance Co. of New York*, 163 F. Supp. 713 (N.D. Cal. 1958).

[80] 49 Stat. 793-4 (1935), 40 U.S.C § 270-a-e (1966).

[81] JAGA 1967/4219, 18 Jul. 1967.

position is understandable in light of a recent case that held that, absent procedural regulations governing debarment from participation in contracts with the Commodity Credit Corporation, a Government corporation, a debarment by that agency was invalid.[82] Lack of debarment procedures by nonappropriated funds should be corrected. This could be done by incorporating the ASPR procedure.

e. Socio-economic Policies.

Buy American[83] and Purchase from Communist Areas[84] requirements have not been implemented by regulation in relation to nonappropriated funds. The statutory language appears to exclude construction contracts of such funds from the application of the Buy American Act as it refers to contracts "growing out of an appropriation."[85] However, the language is not equally clear as

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[82] *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964). The Court said, "Such debarments cannot be left to administrative improvisation on a case-by-case basis... considerations of basic fairness require administrative regulations establishing standards for debarment procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made."

[83] 47 Stat. 1520 (1933), 41 U.S.C. §§ 10a-10d (1964). *See also*, ASPR Sec. VI, part 1 (supply and service contracts) and Sec. XVIII, part 5 (construction contracts).

[84] ASPR Sec. VI, part 4.

[85] 47 Stat. 1520 (1933), 41 U.S.C. § 10 b(a) (1964).

to supply contracts as the statute speaks of acquisition for "public use." This term is defined as "use by ... the United States." It is doubtful that the Act read as a whole was intended to apply to nonappropriated funds. The Court of Claims[86] and District Courts[87] have held that the United States is not a party to a contract with a nonappropriated fund. If the United States is not a party to such contracts, then it can be argued that purchases pursuant thereto are not for use by the United States.

A policy prompted program somewhat akin to Buy American but prompted by a different purpose is that designed to achieve a more favorable balance of payments posture for the United States. Policy and procedures limiting nonappropriated fund purchases of foreign goods and services and expenditures for construction, maintenance and repair projects resulting in an outward "gold flow" have been promulgated by the Departments of Defense and Army.[88] Although the requirements generally are not

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[86] *Borden v. United States*, 126 Ct. Cl. 902, 116 F. Supp. 873 (1953).

[87] *Bailey v. United States*, 201 F.Supp. 604 (D. Alaska 1962).

[88] Dep't of Defense Directive 7060.3; AR 230-4. *See also*, Exchange Service Manual 65-1, "Exchange Service Procurement Instructions," Chapter 8 (3 Feb. 1969)[hereafter cited as ESM 65-1].

as restrictive as those applied to appropriated fund procurement[89] a realistic balance is struck. The directives recognize that servicemen and their dependents overseas will purchase certain foreign goods from local markets if these items are not offered in the exchanges. Accordingly, the Exchange is allowed to purchase and sell such items at a price at least as high as offered in local markets.[90] Flexibility is also allowed by the general policy statement that steps will be taken to promote the sale of and to stock United States products "within the limits of sound business policy."[91] However, the same practical arguments for flexibility are not applicable to construction, maintenance and repair projects. Thus, these projects are to be considered justified only in cases where serious deficiencies exist in morale and welfare facilities at isolated locations

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[89] *See* ASPR Sec. VI, Part 8, as compared to AR 230-4. Restrictions on the purchase of foreign goods for resale are less restrictive. However, guidelines on expenditures for construction and purchase of goods not for resale are similar to the ASPR guidelines for appropriated fund procurement.

[90] AR 230-4, para. 1-4*a*(1).

[91] AR 230-4, para. 1-3 (Change No. 1, 9 Aug. 1968).

and would contribute to a favorable balance of payment posture by diverting expenditures from the local economy. Although this justification may exist approval for projects estimated to exceed $25,000 in cost must be obtained at major commander level or above.[92]

Neither the Department of Defense nor Congress has required nonappropriated funds to place a fair proportion of purchases with small business concerns[93] nor has the labor surplus area policy[94] been made applicable to non-appropriated fund procurement.

Already mentioned is the court holding[95] that a post library constructed with nonappropriated funds was a public work and subject to the Miller Act. However, the Secretary of the Army has not issued regulations requiring application of the Miller Act to nonappropriated

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[92]Dep't of Defense Directive No. 7060.2, para. V C 1 (26 Aug. 1966); AR 230-4, para. 1-6.

[93]67 Stat. 232 (1953) *as amended,* 15 U.S.C. § 631 (1964).

[94]32A C.F.R. Chapter 1, DMP 4 (1967).

[95]*United States v. Phoenix Assurance Co. of New York,* 163 F.Supp. 713 (N.D. Cal. 1958).

fund procurement in spite of an opinion expressed by The Judge Advocate General of the Army that under the holding of the *Phoenix* case performance and payment bonds should be furnished and that such bonds should comply with all the provisions of the Miller Act.[96]

f. Labor Standards.

Perhaps the area evidencing the greatest need for reexamination is the applicability of statutory labor standards to nonappropriated fund procurement. At present the only federal labor standards legislation implemented by Army regulations applicable to nonappropriated funds is that regarding equal employment opportunity.[97] Even that provision is outdated as it requires usage of contract provisions promulgated in an executive order now superseded. Neither the expressed Government policy against discrimination based on age nor on sex has been carried forward in directives pertaining to nonappropriated

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[96]JAGT 1964/6191, 10 Apr. 1964. AR 230-60, para. 24*e*, requires open messes to obtain performance bonds for contracts involving advance payments for future performance of services pertaining to construction or entertainment. Army Regulation No. 230-8, para. 22 (27 Aug. 1958)[hereafter cited as AR 230-8] permits obtaining of performance bonds if considered necessary by the fund council.

[97]AR 230-5, para 6*b*(12) (Change No. 5).

funds.[98]

Labor standards established by the Davis-Bacon,[99] Copeland,[100] Walsh-Healey[101] Contract Work Hours Standards[102] and Service Contract Acts[103] have been ignored in Army regulations. The Department of Defense has published some guidance in an attempt to prescribe a uniform policy for the application of construction labor standards to nonappropriated fund construction contracts.[104] The directive applies to all Department of Defense components, includes nonappropriated fund activities within the United States and requires that

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[98]The regulation references Exec. Order No. 10925 § 301 (6 Mar. 1961), 3 C.F.R. 1959-1963 Comp., page 448 which was *superseded by* Exec. Order No. 11246 § 403 (24 Sep. 1965), 3 C.F.R. 1964-1965 Comp., page 339, *as amended by* Exec. Order No. 11375 (13 Oct. 1967), 3 C.F.R. 1967 Comp., page 320.

[99]49 Stat. 1101 (1931), 40 U.S.C. § 276a-a7 (1964).

[100]18 U.S.C. § 874 (1964).

[101]49 Stat. 2036 (1936), 41 U.S.C. §§ 35-45 (1964).

[102]76 Stat. 357 (1962), 40 U.S.C. §§ 327-332 (1964).

[103]79 Stat. 1034-1035 (1965), 41 U.S.C. §§ 351-357 (Supp. III, 1965-1968).

[104]Dep't of Defense Instruction 1135.10 (27 Jun. 1966) [hereafter cited as DOD Instr. 1135.10].

all construction contracts contain clauses consistent with those prescribed by the ASPR which implement the Davis-Bacon, Copeland, and Contract Work Hours Acts.[105] Although each military department apparently was expected to implement the directive within 90 days,[106] the Army has never done so.[107] Arguments have already been set forth that the Davis-Bacon Act applies to nonappropriated fund procurement. As the Copeland Act is designed to enforce the Davis-Bacon Act, it follows that it also is applicable. The Contract Work Hours Standards Act is also expressly made applicable by stating that it includes "contracts...to which the United States or any agency or instrumentality thereof...is a party." This Act applies to contracts other than construction where laborers or mechanics are employed. However, not even the Department of Defense has applied it this broadly.

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[105]ASPR Sec. VIII, part 7. Excepted is work financed by contributions or donations for the specific project. Deviations must be requested from the Secretary of a military department.

[106]DOD Instr. 1135.10, sec. VI B.

[107]It is interesting to note that the Army Judge Advocate General was asked to comment on a proposal of the Adjutant General to implement DOD Instr. 1135.10 by referencing ASPR in a proposed Change 13 to AR 230-5. It is not known what happened to the proposed Change 13. The opinion concurred, but recommended drafting detailed guidance without reference to ASPR. JAGT 1966/6394, 13 Sep. 1966.

It may be speculated that it was thought that the statutory exemptions would exclude most nonappropriated fund contracts other than construction.[108] Lack of regulations applying the Walsh-Healey Act to nonappropriated fund contracts may also be due to the broad exemptions from that Act.[109] The Act, for example, exempts contracts for less than $10,000, purchases of perishable items and purchases of generally available commercial items. However, the Act specifically states that it includes contracts of instrumentalities[110] of the Government. A strict interpretation of the Service Contract Act would rule out its application to nonappropriated fund contracts

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[108] Excluded are contracts performed outside the United States, contracts for supplies where services are only incidental to sale, contracts for materials or articles usually bought in the open market, contracts in the amount of $2,500 or less and contracts subject to the Walsh-Healey Act. *See* 76 Stat. 357 (1962), 40 U.S.C. § 329 (1964); ASPR § 12-302.

[109] *See*, 49 Stat. 2039 (1936), 41 U.S.C. §§ 40 and 43 (1964). Exempt from the Act are purchases of supplies usually bought in the open market, perishables, transportation where published tariff rates are in effect. The Act is applied to contracts to be performed within the U.S., Puerto Rico or the Virgin Islands. *See also* ASPR § 12-602.1.

[110] 49 Stat. 2036 (1936), 41 U.S.C § 35 (1964).

as it includes "[e]very contract...entered into by the United States."[111] It has been judicially determined that the United States is not a party to nonappropriated fund contracts.[112]

The Convict Labor Law[113] is a criminal statute the prohibition of which is directed towards "an officer, employee, or agent" who contracts for the use of or permits the use of convict labor. The Executive Order implementing this statute requires a contract[114] clause forbidding employment of convict labor in performance of the contract. As contracting officers of nonappropriated funds often are officers of the United States[115] and even nonappropriated fund civilian employees may be considered to be agents, it appears unwise completely to

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[111] 79 Stat. 1034 (1965), 41 U.S.C. § 351(a)(Supp. III, 1965-1968).

[112] *Bailey v. United States*, 201 F.Supp. 604 (D. Alaska 1962).

[113] 18 U.S.C. § 436 (1964).

[114] Exec. Order No. 325 A (1905). *See also* ASPR § 12-203 (Convict Labor Mar. 1949).

[115] AR 230-60, paras. 15 and 24*a*.

disregard this Act when drafting contracts of Government instrumentalities.[116]

In summary, some statutory labor standards specifically apply to nonappropriated fund procurement, others do not. It is submitted that labor standards legislation, even though it has grown haphazardly, causing gaps and overlaps, evidences a scheme and a purpose to upgrade the working standards within the reach of federal law and that all of those statutory provisions discussed under this heading should be applied to non-appropriated fund procurement. The Department of the Army has failed to recognize the need for detailed examination of labor standards in relation to its non-appropriated fund activities and the need for guidance to the contracting officer.

g. Contract Modifications and Termination.

Presently, Army regulations prescribe no clauses relating to modification and termination with one exception. A clause is required in open mess contracts, "when applicable," providing for termination upon

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[116]The Judge Advocate General of the Army has expressed the opinion that utilization of prisoner labor on the grounds of a sundry fund golf course is unlawful. JAGA 1964/3675, 30 Mar. 1964.

liquidation of the mess or for other reasons at the option of the open mess upon 30 days written notice.[117]

One of the consequences of the lack of a "Termination for Convenience"[118] clause is demonstrated by a case decided by the Armed Services Board of Contract Appeals [hereafter referred to as the ASBCA] involving a dispute under a nonappropriated fund contract.[119] The Fort McNair Officers' Open Mess had contracted with the appellant for furnishing all of the Club's requirement for clean linen for one year starting 12 June 1961. The contract contained the following provision:

> The term of the Agreement shall be for one year from the date hereof or from the start of service and thereafter for similar terms until...cancelled by either party by notice in writing given to the other, thirty (30) days before any termination date.[120]

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[117] AR 230-60, para. 24*c*.

[118] *See* ASPR § 8-701 and § 8-702 for examples of termination for convenience clauses.

[119] Central Linen Service, ASBCA No. 8179, 8 Jan. 1963, 1963 B.C.A. para. 3637.

[120] *Id.* at 18,281. Apparently an attempt was made to implement the regulatory requirement that open mess contracts must contain a termination upon 30 days written notice provision. *See* AR 230-60, para. 24*c*. This demonstrates the danger when a regulation does not specify the exact language of a required clause.

The contracting officer attempted to cancel by giving 30 days written notice, effective 1 March 1962. The Board interpreted the clause as providing for a definite one year term and termination could only be effected after that. The entire dispute would have been avoided if a "Termination for Convenience" clause similar to those set forth in the ASPR had been prescribed by regulations and inserted in the contract.[121]

A "Changes" clause for use in supply contracts as prescribed by the ASPR[122] allows a contracting officer to change drawings, designs or specifications, method of shipment or packing or place of delivery with a corresponding price or time adjustment. In doing so by contractual agreement, that which would otherwise be a breach of contract by the Government is converted to an administrative matter and the contractor is required to continue performance. Similar clauses[123] are prescribed

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[121] *See* various clauses set forth in ASPR Sec. VIII, part 7.

[122] *See* ASPR § 7-103.2 (changes clause for supply and service contracts); ASPR § 7-602.3 (construction and Architect-Engineer contracts).

[123] *See* ASPR § 7-104.77(f) (Supply contract, Delay of Work clause); ASPR § 7-602.46 (Construction contract, Suspension of Work clause); ASPR § 7-105.3(c) (Fixed price supply contract, Stop Work Order clause).

for the same purposes to provide for the occasional need of the Government to suspend or stop work on a contract. Such a delay may be necessary pending issuance of a change order, due to the unavailability of a site or delay in delivery of Government furnished property, *inter alia*. A "Differing Site Conditions" clause[124] is prescribed for use in construction contracts to prevent a builder or offeror from including an amount for contingencies such as differing unsuspected physical conditions. It provides for an equitable adjustment by administrative procedure if subsurface or latent conditions encountered differ materially from those specified in the contract or if physical conditions of an unusual nature differing materially from those ordinarily to be expected are discovered. In addition to the "Termination for Convenience" clause required for use in appropriated fund contracts, a "Termination for Default" clause is mandatorily prescribed.[125] This clause

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[124] ASPR § 7-602.4.

[125] ASPR § 7-103.11 requires usage of the clause at ASPR § 8-707 for fixed price supply contracts; ASPR § 7-602.5 requires usage of the clause at ASPR § 8-709 for fixed price construction contracts.

reserves to the Government common law rights and remedies while providing an administrative forum for resolution of contract breaches. At the same time it generally requires strict performance and repudiates or alters the common law doctrine of substantial performance. It gives the contracting officer the right upon default to repurchase a "similar" item which is to the advantage of the Government as the common law required a more exact standard. In addition, a contract mistakenly terminated for default is automatically turned into a termination for convenience which avoids a common law breach of contract. This works to the advantage of the Government as the "Termination for Convenience" clause changes the common law rule of breach of contract in that anticipatory profits of a contractor are disallowed and only profit on work done paid. It also provides for an orderly administrative procedure outside of the courts and a set formula on the measure of recovery.

All of the clauses discussed are designed to provide an advantage to the Government. Accordingly, their mandatory use in appropriate nonappropriated fund contracts is recommended.

h. Disputes.

One of the three clauses generally required for inclusion in nonappropriated fund contracts is a "Disputes" clause.[126] Two types are prescribed--one for use within the United States and the District of Columbia, and one for use outside of those areas. These clauses state that unless otherwise provided, any dispute or claim under the contract not disposed of by agreement shall be decided by the contracting officer with a right of appeal given the contractor, if exercised within 30 days, to the Secretary of the Army or his duly authorized representative. The clause prescribed for use outside the United States provides for an intermediate appeal to a major commander. When the amount involved is less than $50,000, the decision of the major commander is to be final and conclusive. If the amount involved is over $50,000, a further appeal to the Secretary of the Army or his duly authorized representative is allowed. These clauses are written as "all disputes" clauses, *i.e.*, they encompass all disputes, whether legal or factual, that might arise concerning contract performance. Although a regulatory

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[126] AR 230-8, para. 15. This regulatory requirement is based on Dep't of Defense Directive No. 5515.6, sec. II (3 Nov. 1956).

requirement is imposed on the contracting officer to screen all disputes to insure that his findings and decisions appealable under the disputes clause are rendered only on factual disputes,[127] ASBCA has ruled that the clause covers both questions of fact and of law.[128] This confirmed the opinion[129] of Government attorneys who had previously taken the position that the Disputes Act[130] (also known as the Wunderlich Act) had no applicability to contracts of nonappropriated funds.

The mandatory inclusion of a "Disputes" clause in nonappropriated fund contracts is quite understandable as it provides the contractor with his only remedy. Although Congress has waived the sovereign immunity of the United States and permits suit against the Government on express or implied contracts funded by

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[127] AR 230-8, para. 16*a*.

[128] Lauris L. Beigh, ASBCA No. 7711, 29 April 1963, 1963 B.C.A. para. 3740.

[129] *See* JAGT 1958/5351, 14 Jul. 1958 which purports to record the consensus of opinion of several attorneys from various Government agencies who met to discuss various legal aspects of nonappropriated fund activities.

[130] 68 Stat. 81 (1954). 41 U.S.C. §§ 321-322 (1964).

appropriated funds[131] it has been held that Congress has not consented to suits arising out of contracts of nonappropriated fund activities.[132] Consequently, a nonappropriated fund activity as an instrumentality of the United States shares sovereign immunity from suit with the United States.[133] As the United States has not waived sovereign immunity in regards to nonappropriated fund contracts neither the nonappropriated fund activity nor the United States is judicially liable or suable on such contracts. Accordingly, although a nonappropriated fund assumes an obligation on its contracts,

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[131] 28 U.S.C. §§ 1346, 1491 (1964). Judgments are paid from a general appropriation for that purpose rather than from the funds of the agency awarding the contract. 28 U.S.C § 2517 (1964).

[132] *Nimro v. Davis*, 204 F.2d 734 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 901 (1953); *Bailey v. United States*, 201 F.Supp. 604 (D. Alaska 1962); *Pulaski Cab Co. v. United States*, 141 Ct. Cl. 160, 157 F.Supp. 955 (1958). *See* Office of Gen. Counsel, (2d ed. 1959). This publication advances the thesis that the Tucker Act has been improperly construed to leave out nonappropriated fund contracts from its coverage.

[133] *See, e.g., Nimro v. Davis*, 204 F.2d. 734 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 901 (1953), which relies on the United States Supreme Court decision in *Standard Oil of California v. Johnson*, 316 U.S. 481 (1942); *See also, Edelstein v. South Post Officers' Club*, 118 F.Supp. 41 (E.D. Va. 1951).

it cannot be sued for a breach and a contractor is without remedy[134] if the "Disputes" clause is not included in the contract.[135] Inclusion of such clause partially overcomes the lack of judicial review. Pursuant to the "Disputes"clause, the ASBCA takes jurisdiction of disagreements of law and fact except it has decided that wage claims are not within the purview of the clause[136] and it has pointed up that relief that may be granted by the Board is limited. In one case, the ASBCA held that the fund breached the contract, but due to the fact that the Board had no power to assess damages and the contract had no provision such as a "Termination for Convenience" clause specifying damages, it could only send the case

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[134]The Judge Advocate General has expressed the opinion that current regulations do not authorize the assessment of members of sundry nonappropriated funds to make up a deficit. JAGA 1960/4405, 28 Jul. 1960. *See also Nimro v. Davis*, 204 F.2d 734 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 901 (1953) where an unsuccessful attempt was made to sue individuals associated with the nonappropriated fund activity and not as officers or employees of the United States.

[135]All nonappropriated fund contracts are required to contain a clause that no appropriated funds shall become due or be paid by reason of the contract. AR 230-8, para. 15.

[136]Noel P. Bouchea, ASBCA No. 9444, 19 Feb. 1964, 1964 B.C.A. para. 4126. *See also*, JAGA 1963/4870, 23 Oct. 1963.

back to the contracting officer to do equity.[137] Thus, even the administrative relief afforded a contractor is limited and somewhat ineffectual due to the lack of a regulatory requirement for insertion of a termination clause similar to that specified for appropriated fund procurement.

2. Evaluation

a. Solicitation, Award and Contract Form.

Regulatory guidance for nonappropriated fund procurement is completely inadequate at the present time. Generally, only three clauses are required for insertion in all nonappropriated fund contracts. Of these, only the "Disputes" clause has any real significance.[138] The custodian-contracting officer either relies on his own good business judgment or the assistance of the purchasing and contracting officer and

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[137] Central Linen Service, ASBCA No. 8179, 8 Jan. 1963, 1963 B.C.A. para. 3637. The charter of the Board does not give it authority to express opinions on the amount of unliquidated damage liability although it may make findings of fact thereon. The Board can grant relief for unliquidated damages if the contract provides for such relief. *See also*, Mayco Salvage Co., Inc., ASBCA No. 4225, 4 Dec. 1958, 58-2 B.C.A. para. 2032; Paragon Oil Co., Inc., ASBCA No. 3980, 18 June 1958, 58-2 B.C.A. paras. 1845 and 1997.

[138] AR 230-8, para. 15. The other clauses define the term, "contracting officer" and disclaim obligation of appropriated funds.

legal officer who will probably apply appropriated fund procedure. It is submitted that detailed guidance would result in more adequate competition and lower prices. Labor standards should be applied more strictly for protection of contractor employees and clauses designed to facilitate administration and insure close pricing should be required and utilized. It is not proposed that the ASPR be applied to all aspects of nonappropriated fund procurement. On the other hand it is not enough to say that the ASPR should be used as a guide. The nonappropriated fund contracting officer does not have the time nor expertise to extract and tailor for use those provisions which are applicable. The most workable solution would be for the Department of the Army to publish and keep current a regulation with specific guidance in all aspects of the problem. It is beyond the scope of this thesis to propose every matter for inclusion in such a regulation, but proposals on major areas are as follows. Generally, all nonappropriated fund procurement guidance should follow that prescribed for the AAFES.[139] Formally advertised procurement should not be required.[140] The average nonappropriated fund procurement

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[139] ESM 65-1.

[140] *See*, AR 60-20, para. 4-28.

is small enough that the disadvantages of the exacting requirements of formalized advertising would outweigh the advantages of open public bidding. Competitive negotiation can secure most of the same advantages if regulations prescribe safeguards such as solicitation of a minimum number of sources and factors to be considered in proposal evaluation.[141] On the other hand, advertised procurement may be thought practical and desirable for procurements in excess of $5,000. If so, a small purchase procedure similar to that used in appropriated fund procurement could be applied to smaller procurements.[142] The statutory requirement[143] concerning submission of cost and pricing data and the accompanying certificate as to accuracy, completeness, and currency is not applicable to nonappropriated fund procurement. However, as it is designed to secure closer pricing and otherwise protect the Government, it should be imposed

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[141] *See, e.g.*, ESM 65-1, paras. 3.1.2, 3.1.3, and 3.1.4.

[142] ASPR Sec. VI, part 3.

[143] 10 U.S.C.A § 2306(f), *as amended* (1969 Pocket Part).

by regulation on nonappropriated funds. Not many nonappropriated fund contracts or modifications will exceed $100,000, but occasionally one will be awarded, *e.g.*, a contract for furnishing a new club facility can easily reach such a figure. In such cases, nonappropriated funds might as well take advantage of the protection afforded by the cost and pricing data submission device and certificate requirement.

Specific guidance pertaining to drafting and use of specifications is needed to prevent restriction of competition and purchase of that which is in excess of fund needs. Conditions and limitations which have no reasonable relation to actual minimum needs and designed to limit competition to one or a few sources of supply should be prohibited as not in the best interest of the fund concerned.

Solicitation forms to be used in nonappropriated fund procurement should be prescribed including instructions and conditions apprising the recipient of the legal ramifications of bid or offer submission. The forms set forth in the ASPR[144] could be used as patterns

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[144] *See, e.g.*, ASPR App. F § F 100.33 (Standard Form 33, July 1966) and ASPR App. F § F 100.33A (Standard Form 33A, July 1966).

but the instructions and conditions would have to be tailored for nonappropriated fund use. One of the more interesting examples of a feature of appropriated fund solicitation desirable for incorporation in non-appropriated fund procurement but a potential source of litigation is that concerning irrevocable bids. The ASPR solicitation forms require the offeror to specify on the face of the form the number of days he agrees to keep his offer open and in the absence of such specification agrees that it will not be withdrawn for a period of 60 days. The instructions and conditions supplement this by stating that in the case of an advertised solicitation offers may not be withdrawn after opening during the period specified on the face of the form. The enforceability of this "firm bid" provision in appropriated fund advertised solicitation has not always been without doubt and its enforceability by a non-appropriated fund undoubtedly would be questioned. Under general contract law principles an offer is revocable by the offeror until accepted unless consideration is given, or a statute provides otherwise or promissory estoppel can be invoked.[145] Although early

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[145] 1 Corbin on Contracts §§ 38, 42-46 (1963) and cases cited therein; Restatement of Contracts §§ 35(e), 46, 47 (1934).

Attorney General opinions held that a gratuitous promise not to withdraw a bid on a Government solicitation was not binding[146] this position was overruled by the Attorney General and not followed by the Comptroller General or the courts that have considered the problem.[147] These later opinions have enforced a "firm bid" agreement on two specific grounds and discussed a third which is probably the most important. The two specific grounds are (1) consideration does pass from the Government in the form of a promise to consider only those bids which are submitted containing a promise not to withdraw and to award to the lowest, responsive, responsible bidder, and (2) as ASPR Section 2-304 specifies that bids may not be withdrawn after bid opening the promise not to withdraw is enforceable without consideration. The first of these two bases has been attacked on the premise that consideration, to operate as such, must be bargained for and the bidder on a Government solicitation receives the stated "consideration"

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[146] 15 Op. Att'y Gen. 648 (1877); 9 Op. Att'y Gen. 174 (1858).

[147] 30 Op. Att'y Gen. 56 (1913); 31 Comp. Gen. 323 (1952); *Refining Associates, Inc. v. United States,* 109 F.Supp. 259 (Ct. Cl. 1953).

by virtue of statute and not bargain.[148] The second basis has been said to be foundationless as the ASPR is not a statute because the executive branch is powerless to legislate; therefore, no exception to the general common law rule that bids are revocable until accepted is established.[149] Accordingly, the underlying but less verbalized ground of public policy actually presents the strongest argument and is in actuality the real basis for excepting Government solicitations from the general rule. Withdrawal at any time after opening and prior to award would strike a devastating blow at the integrity of the bid system. A contracting officer, unlike his private business counterpart, must accept the low responsive offer by a responsible bidder or cancel the solicitation; there can be no counter-offer in advertised solicitation.[150] Withdrawal or modification after opening

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[148] *See* Stelzenmuller, *Formation of Government Contracts - Applicability of Common Law Principles*, 40 Cornell L.Q. 238 (1955).

[149] *Id.* There is no federal statute which expressly changes the common law rule. Many states have such statutes. *See, e.g.*, Cal. Govt. Code, § 14316 (1963).

[150] *See* Pasley, *Formation of Government Contracts - Application of Common Law Principles - A Reply*, 40 Cornell L.Q. 518 (1955). It should also be noted that the drafters of Standard Form 33A prescribed for use by ASPR recognized that an exception to the general rule that an offer is revocable until accepted could not be applied to negotiated procurement. Para. 7 of SF 33A specifies that in case of a negotiated procurement an offer may be modified or withdrawn any time before award.

would introduce uncertainty, confusion, sharp practices and outright fraud; in short, it is unworkable.

Whether a purported "firm bid" (irrevocable offer) on a nonappropriated fund advertised solicitation would be enforceable is an open question. If the general rule exception carved out for appropriated fund solicitations rests entirely on the two specific grounds mentioned above the exception would not apply to nonappropriated fund procurement. There is no statute or regulation imposing an absolute requirement that a nonappropriated fund contracting officer accept the low bid or to award to a responsive, responsible bidder. Thus an offer striking out the terms prohibiting withdrawal after opening and prior to award could be accepted by the contracting officer if justified to the board of governors and the installation commander.[151] It is doubtful that imposition of irrevocable bid provisions by Army regulation similar to ASPR provisions would be sufficient to invoke the exception as it would be without statutory basis although a supporting argument could be advanced based on decisions that Army regulations have the force

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[151]AR 230-5, para 6*b*(11) (Change No. 4).

and effect of law.[152] The most convincing argument in support of enforcing irrevocable bid agreements in non-appropriated fund solicitations would be one sounding in public policy. Nonappropriated fund activities are closely identified with the Government and treated as "arms of the government" for many purposes.[153] Therefore, the integrity of a nonappropriated procurement system should be deemed of sufficient importance to justify adopting a position relating to irrevocable bids identical to that applied to appropriated fund solicitation. On this basis implementation of irrevocable bid provisions and procedure in nonappropriated fund procurement is recommended whenever the formal advertising method is used.

In addition, the nonappropriated fund contracting officer needs guidance on determining the responsiveness and responsibility of offerors so that fund assets are properly safeguarded. Further, as the Walsh-Healey Act

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[152] *See Standard Oil Co. v. Johnson,* 316 U.S. 481, 484 (1962); *United States v. Gratiot,* 45 U.S. (4 How.) 80, 117 (1846); *United States v. Eliason,* 41 U.S. (16 Pet.) 291, 302 (1842).

[153] *Standard Oil Co. v. Johnson,* 316 U.S. 481, 485 (1942); *See* pp. 72-74 *infra* and accompanying notes for supporting material and citations to authorities.

is considered by the author to be applicable to non-appropriated fund procurement,[154] it is proposed that forms for solicitation should include an offeror representation as to regular dealer or manufacturer status.[155]

As most nonappropriated fund contracts are made for merchandise, supplies and services in the open market, it is proposed that only fixed-price type contracts be used unless specific deviation is approved by higher authority. A mandatory requirement to this effect would allow monitoring of cost-reimbursement type contracts to prevent the use of cost-plus-a-percentage-of-cost type contracts and excessive fees and secure control of allowability of costs.

b. Statutory Protection and Policies.

Clauses pertaining to contract assignment, contingent fees, and gratuities, although not required by statute should be inserted in nonappropriated fund contracts.[156] "Examination of Records" clauses should be considered in connection with cost and pricing data

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[154] *See*, pp. 36-37 *supra*.

[155] *See, e.g.*, AAFES Forms 4450-3 and 4450-5 (Aug. 1967) (Solicitation/Proposal, Services and Supplies) and AAFES Form XPR-55 (XE-11)(Rev. Aug. 1967) (Solicitation/Proposal, Building Improvement and Construction).

[156] Such clauses are required in AAFES contracts. AR 60-20, paras. 4-33*f* and 4-33*h*.

representations and certificates for the protection of fund assets and to insure close pricing. Specific guidance on contracting with vendors on the Joint Consolidated List of Debarred, Ineligible and Suspended Contractors should be given in addition to providing procedures for initiating and processing actions to debar and suspend. The restrictions of the Davis-Bacon and Walsh-Healey Acts prohibiting contracting with such firms may be construed to apply to nonappropriated funds[157] and, if not, public policy dictates the application.

Statutes dictating Buy American and Small Business policies do not apply to nonappropriated fund procurement and regulations have not made Labor Surplus and Purchase from Communist Areas specifically applicable. It is submitted that Small Business and Labor Surplus policies would be too burdensome on nonappropriated funds, but the preference for domestic products expressed in the Buy American Act and the prohibitions on trading with Communist Areas are policies which can and should be applied strictly to nonappropriated fund procurement.[158]

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[157] *See*, pp. 35-36 *supra*.

[158] *See*, ESM 65-1, para. 8.3.1.

As previously mentioned[159] regulations should be written to require compliance by nonappropriated funds with provisions of the Miller Act in soliciting and awarding construction contracts exceeding $2,000.[160]

The Balance of Payments program is adequately regulated and acceptable results have been achieved.

c. Labor Standards.

Regulations pertaining to equal employment opportunity provisions in nonappropriated fund contracts needs updating.[161] Labor standards established by the Davis-Bacon, Copeland, Walsh-Healey, Contract Work Hours and Service Contracts Act of 1965 can no longer be ignored in relation to nonappropriated fund procurement. The language of most of these acts include nonappropriated fund activities.[162] Implementation of all the acts would be consistent with an apparent federal policy to set minimum labor standards and the use of all means available

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[159] *See*, p. 41 *supra*.

[160] AR 60-20, para. 4-33*k* now requires that AAFES construction contracts comply with the Miller Act unless waived by the Chief, AAFES.

[161] Provisions should be updated in accordance with Exec. Order No. 11246 (24 Sep. 1965) 3 C.F.R. 1964-1965 Comp., p. 339, *as amended by* Exec. Order No. 11375 (13 Oct. 1967), 3 C.F.R. 1967 Comp., p. 320.

[162] *See*, pp. 44-45 *supra*.

to establish those standards throughout territory subject to United States sovereignty.[163] Exception could be made for supply and service contracts where it appears that statutory exemptions would render application a practical nullity.

To preclude any question of a possible criminal violation, the Convict Labor Law and the Executive Order implementing it should be complied with by nonappropriated fund contracting officers and provisions requiring compliance promulgated.

d. Other Contract Clauses

The mandatory use of a changes, termination for convenience and termination for default clause is recommended. Contract administration would be facilitated, the possibility of payment of anticipatory profits under common law breach of contract avoided, and the administrative board remedy made more effective by providing a contractual method of unliquidated damage computation. Usage of stop work, suspension of work, and differing site conditions clauses when applicable should be prescribed.

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[163]The AAFES is required by AR 60-20, paras. 4-33*j* and 4-33*k* to include labor standards clauses consistent with ASPR Sec. XII, ASPR Sec. XVIII.

e. Disputes.

It is recommended that legislation be passed by Congress amending the Tucker Act[164] to permit suits against the United States on express or implied contracts with nonappropriated fund activities. Bills to accomplish this have been introduced in Congress on at least three occasions,[165] but have not been enacted into law. An attempt,[166] was made in the 90th Congress. The bill was referred to the House Judiciary Committee and never reported out. The most recent proposal was introduced in the Senate on 7 February 1969 and referred to the Committee on the Judiciary.[167] This bill provides that payment of judgments or settlements in such suits would be made from appropriated funds on a reimbursable

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[164] 28 U.S.C. § 1346 (1964).

[165] H.R. 13262, 86th Congress, 2d Session (1960); H.R. 3084, 90th Congress, 1st Sess. (1967). The bill introduced in the 86th Congress would have required payment of judgments on contractual claims against nonappropriated funds to be paid out of nonappropriated funds. The Judge Advocate General commented, in relation to this aspect of the proposed legislation, that there appeared to be no justification for requiring payment out of nonappropriated funds as there was no similar requirement in respect to tort claims. JAGA 1960/5098, 29 Nov. 1960.

[166] *See also*, S.3163, 90th Cong., 2d Sess. (1968) for similar attempted legislation in Senate channels.

[167] S. 980, 91st Cong., 1st Sess. (1969).

basis to the extent the Comptroller General determines that a reimbursement may be made without unduly jeopardizing the operation of the nonappropriated fund activity. In each case the legislation drafters have failed to anticipate questions as to the applicability of the Disputes Act.[168] If legislation similar to that most recently introduced is enacted there is a distinct possibility that a court could hold the present "all-disputes type clause" prescribed for nonappropriated fund contracts in violation of the Disputes Act. If judgments and settlements arising out of suits on nonappropriated fund contracts are initially and perhaps finally paid out of appropriated funds the United States may be considered a party to the contract for the purpose of effectuating the policies espoused in the Disputes Act. However, this matter should not be left for judicial decision. Proposed legislation should clearly provide that the Act is applicable. There appears no persuasive reason why contractors with nonappropriated fund activities should not have the same protection against capricious and arbitrary acts of contracting officers as those contractors paid from

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[168] 68 Stat. 81 (1954), 41 U.S.C. §§ 321-322 (1964).

appropriated funds. Whether or not public funds are being used it is not good public policy for a quasi-public official (the nonappropriated fund contracting officer) to act as the judge of his own administrative decisions where he has a vested interest in the finality of those decisions. To a somewhat lesser degree this applies to the Secretary of the Army and the ASBCA. As stated in Justice Douglas' dissent in the *Wunderlich* case,[169] the "all disputes" clause "...makes a tyrant out of every contracting officer...he has the power of life or death over a private business even though his decision is grossly erroneous." The laissez-faire argument that parties should be allowed to negotiate any contractual provisions they can mutually agree to is contrary to good public policy as contractors can justifiably form the impression that the boiler plate provisions of a nonappropriated fund contract dictated by agency regulations are nonnegotiable.

Passage of the recommended legislation would have a salutary effect. Nonappropriated fund contractors would gain an effective remedy on the contract. The

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[169] *United States v. Wunderlich*, 342 U.S. 98, 101 (1951).

Government would acquire uniformity of procedure and treatment which, in turn, would facilitate contract administration. Lastly, Congress would face up to the reality of the concept pronounced frequently by courts that nonappropriated fund activities are not entities separate and apart from the United States government. In *Standard Oil Co. v. Johnson,* the Supreme Court stated that[170] "post exchanges, as now operated, are arms of the government." It has been held[171] that the United States can be sued under the Federal Tort Claims Act[172] for activities of a nonappropriated fund because such a fund is a federal agency within the meaning of the Act and that States can't tax the post exchange without consent of the United States.[173] Under present regulations, no individual, unit, or installation owns an interest in a nonappropriated fund activity[174] and

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[170] 316 U.S. 481, 485 (1942).

[171] *United States v. Holcombe,* 277 F.2d 143 (4th Cir. 1960). However, regulations provide that all administrative claims against the United States arising out of post exchange activities are to be paid solely from post exchange funds. AR 60-20, para. 7.

[172] 28 U.S.C. §§ 2671-2680 (1964).

[173] *United States v. Query,* 37 F.Supp. 972 (E.D. S.C. 1941).

[174] AR 230-5, para. 4*d*(2).

title to permanent buildings and facilities of such activities constructed with either appropriated or non-appropriated funds vests in the Government and is carried on property records of the Department of the Army.[175] At one time Congress directed transfer of some three quarter of a million dollars of nonappropriated funds from the Secretary of the Army to the Treasury.[176] Thus, it is apparent that Congress, the Secretary of the Army and the courts regard such funds as Government property, ownership and control of which is vested in and protected by the Government. The question can be asked as it was in a dissent by Judge Whitaker of the Court of Claims:[177]

> "The contracts [of nonappropriated fund activities] having been made for and on behalf of the United States and under regulations authorized by Congress, how can it be doubted that the United States is liable on them, since long ago Congress authorized suits against the United States on express or implied contracts."

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[175] AR 60-20, para. 8-3; Army Regulation No. 60-28, para. 51, (25 Jul. 1960)[hereafter cited as AR 60-28]; AR 210-55, para. 5*b*(1).

[176] *Hearings on the War Department Appropriations Bill for 1934, Before the Subcommittee of the House,* 72d Cong., 2d Sess., at 645-47 (1932).

[177] *Borden v. United States,* 126 Ct. Cl. 902 at 911, 116 F.Supp. 873 at 879 (1953).

However, even though the courts have ruled that neither the United States nor a nonappropriated fund can be sued on a contract of such fund there appears no convincing arguments why Congress should not eliminate the inconsistent treatment of contractors paid from appropriated funds and those paid from nonappropriated funds.[178]

3. Proposed Department of Army Procurement Guidance.

It would be inaccurate and unfair to leave the impression that the Department of the Army is unaware, or if aware, unconcerned about the lack of and obsolesence of regulatory guidance concerning nonappropriated fund procurement. Chapters 1 and 2 of Army Regulation 230-1[179]

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[178] It should also be noted that the U.S. can sue on behalf of a nonappropriated fund. *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963). The Funds recovered are deposited in the U.S. Treasury. Also, a person who steals from a nonappropriated fund can be prosecuted under 18 U.S.C. § 641 (1964). JAGA 1962/4936, 30 Nov. 1962. *See also, Harlow v. United States*, 301 F.2d 361 (5th Cir. 1962); *United States v. Brethauer*, 214 F.Supp. 820 (W.D. Mo. 1963).

[179] Army Reg. No. 230-1, Chapter 3 (8 Apr. 1968) supersedes Army Reg. No. 230-10 (4 June 1958) which dealt with nonappropriated military welfare funds. Chapter 1 will replace AR 230-5 and Chapter 2 will replace AR 230-8. The Nonappropriated Fund Division, Office of the Adjutant General, is the action office on this proposed regulation. Required staff concurrences have been obtained.

are presently awaiting publication. It is proposed that one of these chapters contains a section on procurement.[180] This proposed section makes a few major changes and some minor changes. It specifies that in all procurements over $1,000 the procurement will be accomplished with the technical advice and assistance of the installation purchasing and contracting officer and contracts in such cases shall be reviewed for legal sufficiency by the staff judge advocate or legal advisor prior to award. This is a step in the right direction, but it raises the issue as to how much "assistance" and "technical advice" can be given before it falls into the "operational" field rather than "supervisory" and is held contrary to regulation and statute under present Judge Advocate General interpretation. This problem apparently is ignored and it must be faced and solved prior to effective application of such a regulatory provision. The proposed regulation gives some general guidance to assure full and free competition by requiring "solicitation from all qualified sources" and "from the maximum number of sources...deemed necessary" consistent with the nature of

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[180]The section will not apply to the AAFES, the AAFMPS nor the Army and Air Force Civilian Welfare Fund.

the procurement "to the end that the procurement will be made to the best advantage of the fund, price and other factors considered." This is not much help to the non-appropriated fund contracting officer as it is not specific. The proposed regulation prohibits solicitation or puchase from firms or individuals on the Joint Consolidated List[181] of firms and individuals debarred, suspended or declared ineligible. The major improvement of the proposed regulation is guidance pertaining to implementation of equal employment opportunity policy, the Service Contract Act of 1965 and the Davis-Bacon Act. Appendices to the regulation set forth contract clauses to be used and give specific guidance as to when the clauses are to be used. This is also a step ahead, but the lack of additional required clauses pertaining to labor standards is conspicuous. Perhaps it was thought that the exemptions to the Walsh-Healey Act make that Act inapplicable to purchases of nonappropriated funds, but lack of an anti-kickback clause pursuant to the Copeland Act is not similarly explained. This is particularly pertinent in the face of the construction labor standards requirement of the Department

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[181] Dep't of Army Circular 715-1 (1 Jan. 1968).

of Defense directive.[182] The same observation can be made in relation to the Contract Work Hours Standards Act, the implementation of which, is also required by the same directive.

In short, the procurement guidance in the proposed regulation is certainly late and much too little. It appears that nonappropriated funds may be doomed to suffer another twelve years[183] of minimal effort in the area of procurement guidance.

4. Conclusions Concerning Procurement Management.

The latest effort to provide regulatory guidance for nonappropriated fund procurement dramatically demonstrates the underlying mire that continually seeps through to stall effective procurement management. It tacitly recognizes that neither the manpower nor expertise is available at any level of command to solicit, award and administer purchases estimated to be in excess of $1,000. Hopefully, this thesis has demonstrated that 26 individuals, including secretarial and clerical personnel, at Department of the Army level cannot draft, publish

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[182] DOD Instr. 1135.10.

[183] AR 230-5 was published in 1956 and Changes 4 and 5 in 1962. (Changes 4 and 5 are the only changes which include any procurement guidance.)

and keep current adequate procurement guidelines and competently execute their other duties. Nor is the requisite ability available in the field from nonappropriated fund resources. Certainly, a council or board of governors lacks this capacity. Procurement, which involves logistics and supply matters, is beyond the scope of duties performed by the staff section charged with supervision of nonappropriated funds. It is conjectured, and not entirely without evidence, that in most commands purchases not in excess of $1,000 are already handled by the purchasing and contracting office as provided in the proposed Army regulation. The entire handling of a procurement package cannot be labelled as a supervisory matter (as opposed to operational) any more than it could be said that the civilian personnel office could assume the resonsibility for the appointment and employment rights of the employees of an open mess employing over 50 individuals on the basis that such work is supervisory in nature. Yet The Judge Advocate General has opined that the latter situation is legally objectionable while approving the former.[184]

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[184] JAGA 1965/4160, 11 June 1965, *as digested in* 65-22 JALS 7. Regardless of this opinion three divisions of the Office of the Judge Advocate General have concurred in the proposed regulation, Military Affairs, Civilian Personnel Law and Procurement Law.

It is time that this entire quagmire was openly admitted and efforts made to clean it out with new legislation, regulation, and organization. Proposals already advanced will be summarized and additional proposals made after the area of personnel management is explored as such proposals are inseparably connected with those relating to personnel administration. At this point, it is emphasized that a reorganization of nonappropriated fund procurement management is imperative. Several alternatives will be proposed and evaluated in the concluding chapter of this thesis.

C. PERSONNEL MANAGEMENT.

1. Status of the Nonappropriated Fund Employee.

a. A Federal Employee?

The nonappropriated fund employee might be likened to a poor country cousin employed by his rich city uncle to perform the same job as the sophisticated city cousin but has not been granted the same rights, benefits and privileges. The nonappropriated fund has been considered by the highest Court of the land,[185] an

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[185] *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942).

"arm of the government deemed by it essential for the performance of governmental functions" for the purpose of exempting a post exchange from state taxation. "Uncle" has clasped the nonappropriated fund to his bosom to invoke sovereign immunity and deny a judicial remedy to those who contract with a nonappropriated fund[186] while at the same time exhibiting a cruel rejection when the poor country cousin employee seeks to enforce an alleged employment contract right against the "uncle."[187] But with even more cruelty the "uncle" can treat the employee of a nonappropriated fund as his employee (*i.e.*, an employee of the United States) for the purpose of convicting that employee for soliciting or receiving bribes in violation of a federal criminal statute.[188] The nonappropriated fund employee has been

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[186] *Pulaski Cab Co. v. United States*, 141 Ct. Cl. 160, 157 F.Supp. 955 (1958).

[187] *See, Bleuer v. United States*, 117 F.Supp. 509 (E.D. S.C. 1950); *Borden v. United States*, 126 Ct. Cl. 902, 116 F.Supp. 873 (1953). (The Court of Claims reluctantly held in the *Borden* case that an Exchange employee could not sue the United States on a contract of employment executed by an agent of the AAFES.

[188] *Harlow v. United States*, 301 F.2d 361 (5th Cir. Cir. 1962). The court didn't have to determine that the Exchange employee was a federal employee under 18 U.S.C. 202 (1964), but the case illustrates that a nonappropriated fund employee is treated as a federal employee by Congress when it inures to the benefit of the federal government.

treated like a civil servant for the purpose of paying claims by third parties under the Federal Tort Claims Act based on the official duty acts of the employee on the theory that such activities are federal agencies within the meaning of that Act.[189] The nonappropriated fund activity also has been embraced by "uncle" as "an instrumentality...entitled to the immunities and privileges available to the Departments and agencies of the Federal Government" in order to bring suit against a third party in which case the damage recovery was deposited in the United States treasury.[190] Thus, the nonappropriated fund employee thinking himself rejected as a federal employee might feel justified in turning to a state to claim certain benefits such as coverage under state workmen's compensation laws. However, when he did he discovered that he is an "employee without a country" as it has been held that as an employee of a federal instrumentality he does not come within the scope of the

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[189] *United States v. Holcombe*, 277 F.2d 143 (4th Cir. 1960).

[190] *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963). In this case the United States on behalf of the AAFES sued a concessionaire who had falsified the amount of his receipts.

various state workmen's compensation laws.[191] But just in case the nonappropriated fund employee might start to argue at this point that he is a federal employee with all the benefits and rights granted by the Civil Service Commission, Congress has anticipated the contention and nipped it in the bud. Under the provisions of Title 5, *United States Code* § 2105(c)[192] civilian employees of nonappropriated funds are not to be considered employees of the United States for the purpose of any law administered by the Civil Service Commission or the provisions of the Federal Employees

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[191] *See*, Kovar *supra* note 9 at 22. *See also*, JAG 248.5, 10 Sep. 1941; SPJG/C-331.3, 6 Aug. 1942, 1 Bul. JAG 199 (1942-51).

[192] 5 U.S.C § 2105(c) (Supp. III, 1965-1968). This provision specifically was enacted to erase any doubts as to the status of nonappropriated fund employees that might have been raised by *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) upon prodding by the Civil Service Commission. *See, Aubrey v. United States*, 254 F.2d 768 (D.C. Cir. 1958); S. Rep. No. 1341, 82d Cong., 2d Sess. (1952); H.R. Rep. No. 1995, 82d Cong., 2d Sess. (1952).

Compensation Act.[193] Thus, in the words of the Court of Claims,[194] "[t]he trend of the pertinent decisions, statutes and regulations has generally been to establish that employees of Exchanges [and other nonappropriated fund activities] are not Federal employees, except for the purpose of unemployment compensation."[195]

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[193] 5 U.S.C. §§ 8101-8150 (Supp. III, 1965-1968). Because of the statutory provision (5 U.S.C. § 2105(c) limiting the coverage of the Federal Employees Compensation Act to civil service employees and the holdings (*see* note 169) that state programs do not cover nonappropriated fund employees, Congress has required by 5 U.S.C. § 8171 (Supp. III, 1965-1968) that all U.S. citizen employees of nonappropriated funds employed either within or outside the continental U.S. and all such employees employed within the U.S. to be compensated under the Longshoremen's and Harbor Workers' Compensation Act, 4 Mar. 1927, C. 209, § 1, 44 Stat. 1424, 33 U.S.C. §§ 901-950. Under that Act the employer has to provide protection through approved private insurance companies. *See*, AR 230-8, para. 19 (Change No. 1, 4 Nov. 1958).

[194] *Gradall v. United States*, 161 Ct. Cl. 714 at 720, 329 F.2d 960 at 964 (1963) which held that an Exchange employee was not subject to the Economy Act, 47 Stat. 406 (1932), 5 U.S.C. § 59a(a), *as amended*. The Court of Claims either misinterpreted congressional intent in relation to § 212(a) of that Act or congressional intent changed. Section 212(a), which did not specifically include nonappropriated fund employees in the definition of "civilian office or position" for dual compensation purposes, was repealed by P.L. 88-448, § 101(3), 78 Stat. 484 (1964), 5 U.S.C. § 5531(2) (Supp. III, 1965-1968) which did specifically include nonappropriated fund employees.

[195] For the purpose of unemployment compensation a nonappropriated fund employee, by statutory mandate is to be considered in the federal service, 5 U.S.C. Chapter 85 (Supp. III, 1965-1968). *See*, AR 230-117 (10 Nov. 1967).

b. If Not a Federal Employee, Then What?

The result of legislation, regulations, and court decisions is to place the nonappropriated fund employee in some "limbo" between a federal civil servant and an employee of a private employer. In addition to coverage by the federal unemployment scheme and death and disability compensation protection under the Longshoremen's and Harbor Workers' Compensation Act, the nonappropriated fund employee is an employee for purposes of the Economy Act (also known as the Dual Compensation Act),[196] and the Government's equal employment opportunity program including the right of appeal within this limited area to the Civil Service Commission.[197] A few other statutory provisions are applicable including (1) prohibitions against striking against the Government,[198] (2) requirements of the Federal Insurance Contributions Act,[199] (3) provisions of the Fair Labor Standards Act[200]

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[196] *See* note 194 *supra*.

[197] *See*, Executive Orders cited Note 98 *supra* and accompanying text; AR 230-5, para. 6*e*(2.1) (Change No. 4).

[198] 5 U.S.C. § 7311 (Supp. III, 1965-1968).

[199] *See*, Int. Rev. Code of 1954 § 3101 *et seq*; AR 230-5, para. 7*a*(2) (Change No. 10).

[200] 52 Stat. 1060-1069 (1938), 29 U.S.C. §§ 201-219 (1964), *as amended* (Supp. III, 1965-1968). *See*, Dep't of Defense Directive 1416.6 (27 Mar. 1964).

relating to minimum wages, and (4) Section 9 of the Military Selective Service Act of 1967.[201] On the other hand, employees of nonappropriated fund activities do not have civil servant status, attain no tenure, receive no standardized fringe benefits, are not covered by the civil service retirement, health benefits or group life insurance acts, and have no right that removal be based on that which promotes the efficiency of the service nor do they have any right to administrative review of adverse actions. The civil service scheme of classification, pay and allowances, annual and sick leave and transportation rights are not applicable to nonappropriated fund employees. The only protection presently afforded these employees by the Department of the Army are regulations implementing those statutory provisions which are applicable, discussed above, plus a general requirement that "their standing as employees will not differ materially from the standing enjoyed by other civilian employees of the Department of the Army."[202] This regulation also requires that "[p]ay, allowances, and job related benefits for civilian employees of non-appropriated fund instrumentalities will be commensurate

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[201] 62 Stat. 614 (1948), 50 U.S.C. App. § 459 (1964).

[202] AR 230-5, para. 6e(1).

with, but not exceed those established for similar or comparable [civil servants]." Pursuant to this guidance group health, life, and retirement programs were developed by The Adjutant General's Office and went into effect on 1 January 1966. This was a giant step forward, but the need for uniform benefits and employment protection is great. Guidance to the installation commander to guarantee sane and sensible personnel management is totally inadequate. It has been previously demonstrated that personnel management of nonappropriated fund employees has been "hamstrung" by limiting the extent that a civilian personnel office can assist the installation commander in hiring, firing, paying and otherwise administering and managing nonappropriated fund employees. The effects of this "operation-supervision" limitation coupled with the non civil servant status of a nonappropriated fund employee becomes more apparent upon examination of selected personnel management problems.

2. Hiring of Employees.

Employing, discharging, and supervising employees of nonappropriated funds are responsibilities of the secretary, manager or custodian of the fund as supervised by the council or board of governors and the installation

commander.[203] The Judge Advocate General of the Army has expressed the opinion that it is "legally objectionable for a command civilian personnel office to assume the responsibility for the appointment and employment rights of nonappropriated fund employees" other than those working for special services.[204] Although technical advice is available from the civilian personnel office, each fund manager or custodian is charged with the responsibility to determine how employees are to be appointed, the terms of such employment and the administration thereof. Initially, a determination has to be made as to what form of contractual arrangement is required or advantageous. Open mess secretaries and managers are directed by regulation that employment agreements with all civilian employees are to be reduced to writing[205] and signed by the parties and contracts

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[203] *See*, AR 230-60, paras. 15*a*(4)(d) and 16*c* in relation to open messes and sundry funds.

[204] JAGA 1966/3986, 2 Jun. 1966; JAGA 1965/4160, 11 Jun. 1965. "Special services" embraces those personnel services established and controlled by military authorities, designed to contribute to the physical and mental effectiveness of military personnel, authorized dependents, and civilian employees, provided, operated and maintained from appropriated fund sources. If necessary appropriated funds may be supplemented with nonappropriated funds to support special services programs. AR 28-1, paras. 2*a* and 6.

[205] AR 230-60, para. 24*e*.

cannot be for more than one year[206] unless approved by the major commander. These provisions are made applicable to all sundry funds.[207] Regulations also provide that open mess contracts must contain a clause allowing termination by the mess upon 30 days notice for any reason. Thus, in the absence of statutory protection, the employee has no tenure and no employment security. He can be fired upon 30 days notice for any cause and cannot contract for more than one year's employment at one time. He is completely subject to the whims of an installation commander, and to a lesser extent, a club manager, secretary, or custodian or board of governors or council. The effect then of these regulations is to force a violation of the regulation which requires substantially equal standing of nonappropriated fund employees with civil servants.[208]

Each fund custodian, secretary or manager is then required to determine what the terms of employment are to be and to draft a contract which will include any

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[206] AR 230-60, para. 24*d*.

[207] AR 230-60, para. 50*b*.

[208] AR 230-5, para. 6*e*(1).

mandatory clauses as well as advantageous permissive clauses. Here the regulations require compensation equal to equivalent civil service positions. However, there has been no classification of nonappropriated fund jobs, no published job standards and thus small basis for achieving equality within the system, not to speak of achieving comparability with civil service positions.[209] At the outset the employing agent is faced with the dilemma that jobs such as snack bar manager, club manager, and waitress have no civil service position equivalent. Even the degree of responsibility in club management positions vary considerably in relation to club size, plant, membership and sales. Uniformity and comparability are not even achieved within many commands where each fund is given an entirely free hand to determine compensation. In fact, one club within a command, by virtue of the current system, may offer a much higher salary to entice a good manager away from another club within the same system. As neither statutes nor regulations require or specify annual and sick leave

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[209]Specific guidance for achieving position and pay fairness in the civil service is given in 5 U.S.C. Chapter 51 (Supp. III, 1965-1968).

entitlement or other fringe benefits, the terms of employment may vary from no provision of fringe benefits to elaborate schemes which again defy comparability. Indeed, there is evidence that employee agreements for many fund employees are oral. Also, there seems to be a divergence of opinion and practice as to whether a bilateral contract is necessary or whether an appointment notice can be used which sets forth employment terms or references a local regulation or other directive which sets forth somewhat uniform terms. This latter method if used by open messes or other sundry funds violates regulations.[210] A fund contracting officer also has just cause for puzzlement in determining whether or not the minimum wage requirements of the Fair Labor Standards Act are met. His problem not only stems from computation and the effect of tips, leave, and cost to the employer

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[210] AR 230-60, para. 24*e*.

of board and lodging on that computation,[211] but also from the fact that directives and regulations in relation to minimum wages give neither adequate guidance nor are kept current in a manner allowing effective timely application. The Department of Defense directive and Army regulation presently specify an *obsolete* minimum hourly rate and indicate the state of the law prior to its being made specifically applicable to nonappropriated fund activities.[212] The Army regulation was updated by a Department of the Army message to major commands,[213] but there is evidence that this inadequate notification failed

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[211] *See,* Early, *Nonappropriated Funds under the FLSA: Some Guideposts for the Novitiate,* Vol. X, No. 4, AF JAG L. Rev. Jul.-Aug. 1968, p. 35. This article demonstrates that careful drafting of employment contracts can avoid pitfalls that the inexperienced drafter will likely stumble into. A knowledge of regulations of the Wage and Hour Division, Dep't of Labor is helpful as these regulations are controlling on computation of wages to determine if there has been compliance with the Fair Labor Standards Act 52 Stat. 1060-1069 (1938), 29 U.S.C. §§ 201-209 (1964), *as amended,* (Supp. III, 1965-1968).

[212] Dep't of Defense Directive 1416.6 (27 Mar. 1964), AR 230-5, para. 6.1 (Change No. 12, 7 Jul. 1966).

[213] Unclassified Dep't of Army Message 799160 dated 301646 Z Jan. 1967 in which the Adjutant General informed major commands of the requirements of 81 Stat. 222, 29 U.S.C. 206(a)(1) (Supp. III, 1965-1968) which raised the minimum wage to $1.60 an hour beginning 1 February 1968.

to reach some fund supervisory personnel and may have resulted in an inadvertent violation of federal statute. This alone demonstrates the present problems inherent in decentralized personnel management responsibility. Expertise in personnel matters cannot be created nor maintained under the limitations of the present system. Neither the fund custodian nor the members of a board of governors can be expected to adequately handle these matters. Unless a separate centralized management system is created or the limitations removed from the use of the entire capability of the civilian personnel office, operational inefficiency will continue unabated.

3. Discharge of Employees.

The nonappropriated fund employee has no statutory or regulatory tenure guarantee. As has been noted open messes and sundry funds even are required not to contract for more than one year, unless higher authority approves, and employment agreements must be written bilateral agreements. In the absence of a provision in the employment agreement, it has been determined that an employee is not authorized severence pay even though the regulations dictate treatment equated

to that given civil servants.[214] The statutory right to unemployment compensation is the only security of the employee against the unlimited and uncontrolled right of discharge by the installation commander. Equality of treatment is an illusory lip service regulatory policy.

4. Disputes, Complaints and Grievances.

Even if the applicant for employment by a non-appropriated fund is able to negotiate a favorable contract which is comprehensive and artistically drafted, all of which seldom occurs due to the present system, he will find his contract judicially unenforceable against either the fund or the United States. Cases so holding have been discussed previously. One additional case[215] pertinent to this issue presents a Court of Claims holding

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[214] JAGA 1967/4551, 17 Nov. 1967. A central post fund employee at Sandia Base, New Mexico, was involuntarily terminated after three years employment. The employee asked for three weeks' pay based on the provisions of AR 230-5, para. 6*e*(1) and Federal Personnel Manual 550-20, para. 7-5 (17 Mar. 1967) which was denied. The Comptroller General took the same position in Ms. Comp. Gen. B-135115, 10 Oct. 1968 on the basis that severance pay under Title 5, *United States Code* is a program administered by the Civil Service Commission and, thus, pursuant to 5 U.S.C. § 2105 (c) (Supp. III, 1965-1968) a nonappropriated fund employee has no entitlement.

[215] *Keetz v. United States*, 168 Ct. Cl. 205 (1964).

that that court has no jurisdiction in connection with a claim of a nonappropriated fund employee arising out of his employment. The holding was based on the fact that such an employee was not a federal employee, his contract was not with the United States and further, the fact that a federal Departmental regulation may have been violated in connection with the employee's separation vests no jurisdiction in the Court. The employee may be aware of these holdings but still may think he has adequate administrative remedies. Army regulations[216] require insertion of a "Disputes" clause in all "contracts, purchase orders, or agreements entered into by non-appropriated fund activities," which purports to provide administrative access to the Secretary of the Army or his duly authorized representation when disputes of law or fact arise under the contract. Initially there is a good chance that even this administrative remedy will not be provided by the contract. The author canvassed thirty-seven representative Army commands scattered throughout the world. Out of the twenty-one replies received, at lease one half indicated either that no disputes clause

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[216]AR 230-8, para. 15.

was used in employment agreement or that employment agreements were not used but a grievance procedure provided for hearing employment complaints. Of these, six commands indicated usage of a bilateral contract without use of a disputes clause. The Judge Advocate General of the Army has given the opinion that the pertinent Army regulation[217] only requires the use of the prescribed disputes clause when the employment agreement is in the form of a bilateral contract. Apparently, the opinion endorsed usage of a unilateral notice of appointment type arrangement for a sundry fund in which case a disputes clause would not be required. This appears contrary to the provisions of Army Regulation 230-60 which requires bilateral written employment agreements to be executed by open messes and other sundry funds.[218]

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[217] AR 230-8, para. 15.

[218] AR 230-60, para. 24*e*. It is interesting to note that the ASBCA has interpreted AR 230-8, para. 15, as expressing no intent that a disputes clause be inserted in "Civilian Employment Contracts." Noel P. Bouchea, ASBCA No. 9444, 19 Feb. 1964, 1964 B.C.A. para. 4126. The basis for this opinion is an opinion of the Judge Advocate General of the Army that wage claims of non-appropriated fund employees are not contract claims under AR 230-8. JAGA 1963/4870, 23 Oct. 1963.

If, however, a disputes clause is included in the employment agreement, there is still no guarantee of an administrative remedy for disagreements arising under the contract. The ASBCA has held[219] that wage claims under an employment agreement with a nonappropriated fund are not within the disputes article. Although the employment contract under consideration by the Board did not contain a disputes clause, the letter of the fund custodian denying the employee's claim for overtime pay advised the employer that he had the right to appeal to the Secretary of the Army if exercised within 30 days. Application of the *Christian* doctrine[220] would also serve to incorporate the mandatory disputes clause into the employment agreement. However, the Board declined to use either of these available arguments to take jurisdiction and observed that "[t]here has been no Army directive denoting an intent to transfer civilian employee disputes from normal administrative channels to

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[219] Noel P. Bouchea, ASBCA No. 9444, 19 Feb. 1964, 1964 B.C.A. para. 4126; *See also*, JAGA 1963/4870, 23 Oct. 1963.

[220] *See, G. L. Christian and Associates v. United States*, 160 Ct. Cl. 58, 320 F.2d 345 (1963).

a contract adjudicatory body such as this Board." This broad language portends a general refusal to take jurisdiction of any dispute concerning the terms of employment under nonappropriated fund employment agreements whether bilateral or unilateral. In this case the Board also cited a Department of Defense directive which requires all nonappropriated fund contract claims be treated procedurally as though the claim was against an appropriated fund and finds in this an intent that employment wage disputes be handled by a grievance procedure. This Board deduced this intent from the fact that civil service employees who are paid from appropriated funds do not have access to the Board machinery in case of a wage dispute. The Board reasoned, therefore, that the Department of Defense did not intend that nonappropriated fund employees have such access. The shaky basis for this "logic" is apparent when considered in light of the fact that with one exception not pertinent to the case, no grievance procedure has been promulgated for nonappropariated fund employees.[221] The author's survey

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[221]The AAFES has provided such a procedure. AR 60-21, sec. IV (14 May 1959). Also, a grievance procedure is prescribed for nonappropriated fund employees of special services by incorporating that provided by the Civilian Personnel Regulations. Army Reg. No. 28-1 (15 Sep. 1964). The *Bouchea* case involved an open mess employee.

disclosed that a number of commands provide a grievance procedure for these employees which may envision appeal to as high as Army level, but no farther.[222] Many of the commands surveyed use employment contracts or have regulations which provide that complaints and grievances will be handled by the fund secretary or custodian whose decision is final and conclusive.[223] It is clear that the statutory provisions of Title 5, *United States Code*, Chapter 75, which prescribe certain protections in case of adverse actions are available only to civil servants as the procedures are administered by the Civil Service Commission. Not quite so clear is the intent of the Department of Defense directive which provides that "[a]ny employee having a grievance shall be accorded a fair and prompt discussion with the supervisor...and failing [satisfaction] he shall have a right to appeal under

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[222]The Staff Judge Advocate at Ft. Sill reported to the author a complaint handled by a grievance examiner and processed as a complaint of a civil servant would be. The examiner sustained the discharge of the employee whereupon appeal was taken to the installation level and then to Fourth Army. The discharge was sustained at each level. It is noted that the employment agreement used by Ft. Sill provides for grievances to be handled by the fund secretary or custodian whose decision is to be final.

[223]*E.g.*, Ft. Sill, Oklahoma; Ft. Lewis, Washington.

established grievance procedure."[224] Apparently, this was either meant, or interpreted by the Department of the Army, to have application only to civil servants as it has not been made effective in relation to non-appropriated fund employees as required by the directive.

The nonappropriated fund employee has not only been denied a judicial forum, but he lacks an effective, uniform, administrative forum to hear either disputes over the terms of his employment or complaints relating to adverse actions taken against him or in relation to his working conditions. The ultimate authority in many cases is the fund secretary or custodian or board of governors who hardly can be expected to be completely objective in such matters. This inadequate protection should not persist. Definitive, uniform procedures promulgated at Department of the Army level are required to correct this glaring inequity.

5. Evaluation.

The Department of the Army can no longer ignore the need for a new approach to nonappropriated fund

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[224] Dep't of Defense Directive 1400.5, sec. III, para. 10 (14 May 1953).

personnel management. Written guidance to major and installation commanders is woefully inadequate. Just as in 1941 it was perceived that the exchange and motion picture systems had to be restructured from separate intra-installation matters so must it now be perceived that a new organizational concept is required for all other nonappropriated funds. If voluntary internal reform is not effected, it may be forced by outside pressure. Unionization of nonappropriated fund employees is on the upswing. Installation commanders already are presented with organized effort to change the employment milieu of the nonappropriated fund employee and has received little uniform instruction as to how he should react to these probes. In one regulation[225] the Department of the Army expresses the opinion that Executive Order 10988[226] entitled "Employee-Management Cooperation in the Federal Service," which establishes policy concerning recognition and treatment of federal employee collective bargaining units, is not directly applicable

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[225] AR 230-5, para. 6e(2.3) (Change No. 9).

[226] Exec. Order No. 10988 (17 Jan. 1962), 3 C.F.R. 1959-1963 Comp. p. 521, 5 U.S.C. § 7301 (Supp. III, 1965-1968).

to Army relationships with organizations of employees of nonappropriated fund activities. However, installation commanders are counselled to use Army regulations which implement Executive Order 10988 as an administrative guide when dealing with nonappropriated fund employee-management relationships. Yet in another Army regulation[227] the general provisions of the executive order "have been administratively extended" to AAFES employees in the continental United States, Alaska, Hawaii and United States citizens employed overseas. In being more specific the Department of the Army appears unequivocably to have extended the benefits of the Executive Order to AAFES employees whereas installation commanders are left to "shoot in the dark" to determine which collective bargaining benefits, if any, are to be extended to other nonappropriated fund employees. If this is a correct analysis it again demonstrates the inequitable treatment of nonappropriated fund employees not only as compared with that afforded civil servants but that existent within the nonappropriated fund system itself.

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[227]AR 60-20, para. 2-1*a*.

That confusion concerning the status of the nonappropriated fund employee exists and is becoming more apparent and vexatious is aptly illustrated by a column appearing in the 25 October 1968 issue of a prominent newspaper. The columnist wrote:

> Strike? Fifty cafeteria employees of the Navy's Hunter's Point Shipyard in San Francisco struck over "grievances" during a four-day period, Oct. 7 through 11. They are now back working and they haven't been disciplined.
>
> These employees work in a "grey" area in Government. They are paid from nonappropriated funds; they aren't subject to Civil Service laws or roles [sic]; their salaries and working conditions are fixed by local cafeteria boards. But they are generally regarded as "Federal employes."
>
> Because the employes are "neither fish nor fowl," as explained by an official, Federal agencies and their officials were sharply divided over how to handle their case. At one time, the Navy was prepared to fire them and to refer their cases to the Justice Department for prosecution.
>
> Attorneys, however, raised doubts over the application of the stiff no-strike law to this group and the matter apparently has been dropped -- at least temporarily.[228]

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[228] Klutz, *Pre-Inaugural Lag Deplored*, The Washington Post, Oct. 25, 1968, at A26.

Although the unidentified "attorneys" mentioned in the column were reported to doubt the application of the law which imposes sanctions against federal employees who strike, assert the right to strike or belong to organizations knowing that organization asserts the right of a federal employee to strike,[229] the Secretary of the Army apparently harbors no similar doubts. An Army regulation[230] unequivocably states that nonappropriated fund employees "are forbidden by law" to engage in the strike activities mentioned above. This further highlights the tendency of the Government to treat nonappropriated fund employees as federal employees only when it is to the advantage of the Government. The "no-strike" law appears in the same subchapter of the official codification as the provision cited as authority for the President to promulgate Executive Order 10988.[231] Some confusion could be eliminated and equality of treatment achieved by expressly extending the procedural and substantive provisions of the Executive Order and regulations implementing it to all nonappropriated fund employees.

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[229] 5 U.S.C. § 7311 (Supp. III, 1965-1968).

[230] AR 230-5, para. 6*e*(2.2) (Change No. 5).

[231] 5 U.S.C. § 7301 (Supp. III, 1965-1968).

Presently, the Nonappropriated Fund Division of The Adjutant General's Office is making a concentrated effort to finish drafting, to obtain approval for and publish a regulation entitled, "Nonappropriated Funds and Related Activities, Personnel Policies and Procedures."[232] Comprehensive coverage is envisioned by the proposed regulation. For example, chapters on salary and wages, hours of duty, leave, performance ratings, complaints and grievances, reductions in force, adverse actions, and employee organizations, *inter alia*, have either been drafted and are being staffed or such chapters are being drafted. Because of the comprehensive coverage in this proposed regulation, no purpose will be served by making specific recommendations in this thesis for regulatory changes in personnel policies as was done in the procurement area. In addition, it is beyond the scope of this thesis to attempt a detailed analysis of this proposed regulation and it might be unfair as well as unproductive to do so inview of the lack of finality to the product. However, several observations on the proposed regulation

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[232]It is proposed to publish this as Army Reg. 230-2. Six of nineteen chapters have been staffed and approved and are awaiting publication. These chapters are (1) General. (2) Employment. (3) Pay and Allowances. (17) Group Health and Life Insurance. (18) Retirement. (19) Personnel Records and Files. The remaining chapters are in various stages of drafting and staffing; none of which have received final staff approval.

are considered particularly pertinent to the thesis of this article, that is, management organization.

The proposed regulation extends the policies and procedures of the Army Civilian Personnel Regulations for use in the administration of nonappropriated fund employees. It establishes "categories" of employees to correspond with the division of civil servants into general schedule (white collar) and wage rate (blue collar) groups. Appropriate grades and series are to be determined by reference to classification standards published for civil servants. Each position will be described in writing and properly appraised for grade and salary or wage rate. Minimum qualifications that are required must be established in writing and equal to the requirement established for comparable appropriated fund positions. Testing similar to that for civil service positions is contemplated. Definite, indefinite part-time and temporary positions are defined and a one-year probationary period established which arrangements produce certain results on job tenure and security. A grievance procedure is established which provides for use of examiners who may be either civil servants or nonappropriated fund employees. In all of these provisions

it is apparent that the civil service system has been used as the pattern. This is understandable in view of the requirement that the standing of fund employees be equivalent to that of comparable civil service positions and the fact that the stated objectives of the proposed regulation are to produce uniformity, provide attractive career opportunities and promote the efficient use of funds, all of which are objectives held in common with those of the civil service. In the opinion of the author, these objectives are commendable, the proposed regulation long overdue and a step in the right direction. However, the regulation does not answer nor attempt to face up to the underlying management problem that will continue to destroy the effectiveness of the most comprehensive regulation. In fact the regulation perpetuates the problem by repeating the requirement that official duty time of civilian employees paid from appropriated funds will not be used in the *operation* of revenue-producing and sundry funds. The operational-supervisory rule continues to be recognized in various parts of the regulation where it is mentioned that *advice* from the civilian personnel office may be requested. Some, of the many, important questions left unanswered by

the regulation are: Who determines nonappropriated fund approved standards? What office or officer assists each fund to describe each position and properly appraise it for grade and salary? Who checks to see that the job description recognizes minimum qualification requirements for the job and that these are equal to a comparable appropriated fund position? It is obvious that the civilian personnel office already has the expertise to manage the system contemplated by the proposed regulation, but the degree of management that will be required goes far beyond the hazy line where supervision stops and operation begins. This is demonstrated much better by the fact that the regulation permits the use of grievance examiners paid from appropriated funds and also allows an aggrieved nonappropriated fund employee to be represented by a civil servant. In both cases official duty time will be utilized at the expense of appropriated funds. If the proposed regulation is approved and published, one predictable result is the development of a further obliteration of the line between supervision and operation and increased hypocritical lip service to the requirement.

CHAPTER IV

CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS

Nonappropriated fund management is long overdue for a reorganization. Regulations pertaining to substantive and procedural aspects of procurement and personnel matters are obsolete and inadequate. Present attempts to correct the inadequacies in the regulations is a step forward but insufficient. The growth of nonappropriated fund activities in number and magnitude and the increased complexity of purchasing and personnel management dictate an intense examination of basic concepts and organization. If the historical concept of the nonappropriated fund as the sacrosanct private domain of the installation commander still has any validity it must be reconciled with the need for efficient, knowledgeable centralized management. To facilitate any management system proposed, some correlative actions are required. First, a comprehensive procurement manual for nonappropriated funds should be published. Those specific proposals in Chapter III of this thesis could be a jumping-off point. The proposed

Army Regulation 230-1 should be considered as no more than a "stop-gap" measure in relation to the procurement guidance given therein. Merely making reference to the ASPR as a guideline is completely unworkable. This approach completely skirts such an important issue as what statutory requirements are imposed on nonappropriated funds and leaves the practitioner buried in a maze of inapplicable policies and practices. Secondly, the proposed Army regulation on personnel policies and procedures should be approved and published as soon as possible, even though the present machinery, considering the Army as an entirety, to implement the regulation is inadequate. It will, at least, provide a uniform approach and begin to stablilize and upgrade the status of the nonappropriated fund employee. One unlamented casualty, as a result of promulgation of the proposed regulation, would be the bilateral employment agreement with its ambiguities, lack of uniformity and illusory promises without remedy. If the proposed regulation is stalled, it is recommended that those installations or major commands that haven't already done so publish their own regulation setting forth uniform terms of employment and then utilize

a notice of appointment method. A grievance procedure should then be devised in lieu of the "Disputes" clause which provided no remedy.[233] A third action by the Department of the Army should be concerted effort to push legislation through Congress to permit suits against the United States arising out of contracts entered into by nonappropriated funds.[234] There appears no logical reason why damage awards on such suits should not be paid from appropriated funds inasmuch as tortious acts of nonappropriated fund employees occurring during performance of official duty are compensable from appropriated funds. However, if this feature of such legislation proves to be such a stumbling block as to prevent passage, a compromise feature could be

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[233]The procedure set forth in the proposed regulation (AR 230-2) could be used even if that regulation is delayed in publication. The requirement of AR 230-60, para. 24*e*, that bilateral contracts be used which in turn triggers the requirement of AR 230-8, para. 15, that a disputes clause be included can be considered a nullity in view of the ASBCA opinion that the Board has no jurisdiction over any civilian employee disputes, even though arising under an employment agreement. *See*, pp. 96-97 and notes 219-221 *supra*.

[234]*See*, pp. 69-70 and notes 165, 166, and 167 relating to previous attempts to secure legislation of this nature.

introduced dictating the use of nonappropriated funds to pay judgments or payment from nonappropriated funds to the extent determined by the Comptroller General to be possible without unduly jeopardizing the operation of the activity concerned as provided in the most recent legislation proposed.[235] The important need is to provide an adequate remedy to those who contract with nonappropriated funds.

The author does not recommend an attempt to either clarify or repeal the ambiguous prohibitions of Title 10, *United States Code* § 4779(c) although the temptation is great. This statute which prohibits spending of money appropriated for the support of the Army for post gardens or Army exchanges and which has been interpreted to apply to all nonappropriated funds[236] introduces the supervision-operation dichotomy into the law and all its attendant problems. It can be argued with some persuasion that repeal of this law would merely eliminate a fiction because it is breached as much as honored. Repeal would simplify management organization by removing

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[235] S. 980, 91st Cong., 1st Sess. (1969).

[236] *See*, p. 22 *supra*.

what has been held to be a statutory barrier against complete use of civilian personnel and purchasing and contracting offices in the servicing of nonappropriated funds. However, this action, coupled with legislation waiving sovereign immunity against suits arising out of nonappropriated fund contracts, might place these funds so close in identity to the federal government itself as to require coverage of receipts into the Treasury.[237] This, of course, would defeat the entire purpose of the nonappropriated fund system. An attempt to repeal this Act might result in even more stringent congressional controls. This might even happen if the Act were repealed, and if not imposed by Congress it might be necessary for the Department of the Army to apply at least as strict a policy to prevent abuse which eventually would call down congressional wrath. Accordingly, it is recommended that this "sleeping dog" be allowed to remain at rest.

B. ALTERNATE MANAGEMENT SOLUTIONS.

Adoption of the recommended proposals for substantive statutory and regulatory changes might result in a

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[237] Rev. Stat. § 3617 (1849), 31 U.S.C. § 484 (1964).

completely futile effort unless the package comes complete with an organization equipped to administer the substantive provisions. The Department of the Army organization is not presently staffed or designed to promulgate and oversee the required comprehensive procurement and personnel guidance. This holds true for most major and installation commands. On many installations most funds are completely independent with only general staff supervision. This is conducive to neither uniformity nor efficiency.

Several alternative solutions will be proposed. One solution will be recommended, but it is admitted beforehand that each solution has its advantages and disadvantages and any solution accepted must, of necessity, be a compromise because the purposes to be served are divergent and at cross-purposes.

1. Plan A.

At one extreme of the spectrum of solutions is a proposal which would integrate nonappropriated fund employees into the civil service system except the source of funds for pay and allowances would be non-appropriated funds. To make this workable, there would have to be a repeal of Title 10, *United States Code*

§ 4779(c) and an elimination of the regulatory prohibition against the use of civil servants in the operational functions of nonappropriated funds. This would allow complete personnel servicing by civilian personnel offices. The installation commander could either task his purchasing and contracting office with all nonappropriated fund procurement or only that in excess of a certain dollar amount, with small purchasing accomplished by each fund. The commander, within priorities established by funding limitations, could then utilize his post engineer, his finance and accounting officer, and all other resources to manage and operate his morale, recreational and welfare activities. This approach would obviate the necessity to establish a separate system. The present Department of the Army level organization would be nearly sufficient. The Civilian Personnel Regulations could be applied with minimal supplementation. Procurements handled by the purchasing and contracting office generally could be effected under the guidelines of the ASPR. Separate guidance could be issued for small purchases by the funds.

This proposal, at first blush, appears very attractive. It has the advantages of efficiency and economy through the use of an existing system and the utilization

of existing expertise. On the other hand, the proposal is impractical as obtaining the requisite congressional action is extremely doubtful. Also, as previously discussed, an attempt to accomplish the proposal could endanger the entire system. Mixing of the appropriated fund system with that of the nonappropriated funds would also tend to create internal confusion. Use of the ASPR is not considered feasible because of its inapplicability in many areas. It is desirable not to burden the nonappropriated fund system with all the policies and programs imposed by the ASPR. Procurement of the former is largely in the commercial market, construction is infrequent, and purchases small and simple. Integration of nonappropriated fund employees in the civil servant system would destroy much of the flexibility of control now vested in the installation commander, the board of governors and the custodian. This strikes at the historical purpose of nonappropriated funds.

2. Plan B.

On the other end of the scale of alternatives would be a proposal to develop an entirely separate system. Separate and complete regulatory guidance for

procurement and personnel would be promulgated by the Deputy Chief of Staff for Personnel. This would require an overhaul and enlargement of that portion of this staff section charged with the responsibility for non-appropriated funds. Employees would be paid from the Army Central Welfare and Army Central Mess Funds. This proposal would also require a centralization of functions at command level. One office would be established with complete responsibility under the supervision of the S-1, G-1 or equivalent for all nonappropriated fund personnel matters, including hire, discharge, and payroll, and all procurement. This office would also receive, disperse, and account for all funds. Expenses of this office, including civilian salaries, would be prorated among the funds. The share chargeable to welfare funds would be paid from the command or post welfare fund. Sundry funds would individually bear their share of this burden through assessment of a fee based on the number of personnel serviced and the number of man-hours devoted to purchasing for that fund. Special services would be required to pay a fee for servicing nonappropriated fund employees. However, such servicing could legally be furnished by the civilian

personnel office.[238] Inasmuch as this centralized office would handle funds for its own operation, it should be established as a separate welfare fund with a council and a custodian appointed by the installation commander. The custodian would be the office manager.

Obviously, one disadvantage of this proposal is the inefficiency resulting from duplication of four management systems wholly or partially within Department of the Army responsibility. Separate management systems are presently maintained for (1) appropriated fund procurement and personnel, (2) the Army and Air Force Exchange Service, (3) the Army and Air Force Motion Picture Service, and (4) a system for all other nonappropriated funds. The increase of personnel at all levels would increase costs. In effect, the AAFES system would shoulder a large share of these increased costs inasmuch as welfare funds are derived primarily from Exchange profits. Duplicative costs would result as the Exchange has its own comprehensive personnel and

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[238] *See*, JAGA 1966/3986, 2 Jun. 1966, which appears to support this view. This opinion is discussed at p. 24 *supra*.

procurement management organization. Counterbalancing these disadvantages are some distinct advantages. Certainly not the least important of these is the absence of any need to approach Congress for legislation. It not only avoids the danger posed by the previous proposal of running afoul of the "miscellaneous receipts" rule, it retreats to a more distant point than the system is at present. Management expertise can be developed and maintained and efficiency achieved through uniformity and centralization of effort. Perhaps most importantly an organization is established which can be realistically expected to effectuate the purpose of much needed substantive provisions.

3. Plan C.

A third proposal, situated somewhere between the two plans previously discussed, would be based upon utilization of the presently viable Exchange organization. The AAFES has comprehensive procurement and personnel regulations and manuals[239] based on nonappropriated fund concepts and legal status. Presently approved by the

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[239]AR 60-21; AR 60-29 (28 May 1959); ESM 65-1.

AAFES Board of Directors and in the process of publication is a 166-page regulation on personnel policies.[240] Complete utilization of this extant system by all nonappropriated funds is immediately attractive. Accountants could cost out the charge for services rendered based on personnel serviced and man-hours expended on purchases. Procurements under $2,500 could be made by the fund with minimal departmental and command guidance. The purchasing and personnel requirements of the Exchange and other nonappropriated funds being similar, regulatory procedures would not vary in most respects. However, there is one glaring exception which might alone militate against serious consideration of implementation of this plan in the personnel area. Both the AAFES and other nonappropriated funds have separate health and life insurance and retirement plans. Integration of these two plans might be difficult. Another serious practical obstacle is the fact that the AAFES is a joint Army-Air Force endeavor. To be workable other Air Force nonappropriated

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[240] Proposed AR 60-21 (26 Nov. 1968, Draft) which will supersede AR 60-21 (14 May 1959) and AR 60-29 (28 May 1959). Proposed AR 60-21 has received staff approval and is awaiting publication.

fund management would have to be integrated. Achieving bi-service agreement may not be feasible. Assuming these obstacles were overcome the most serious objection remains. This plan would remove much of the control from the commander which is necessary to effectuate the morale, recreational and welfare purposes peculiar to each command. The commander's control would not just be removed to Department of the Army level, but would transfer to the joint service Board of Directors. This would weigh heavily against the apparent economies and efficiency which would be gained.

4. Plan D.

Combinations of various aspects of the proposals presented are myriad. Only one combination will be discussed as others are not considered by the author to offer any overall improvement on those presented. Inasmuch as the prohibitions of Title 10, *United States Code* § 4779(c) may be interpreted to apply to revenue-producing and sundry funds and not welfare funds,[241] personnel and procurement management of the latter funds could be accomplished with appropriated fund agencies.

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[241] *See*, pp. 22-25 *supra* where this proposition is supported.

Sundry fund procurement could be handled through the Exchange as in Plan C and sundry fund personnel matters by a centralized organization as in Plan B. This proposal avoids most of the problems of Plan C by splitting out all personnel management. The commander's control remains almost the same as in Plan B. Some control over procurement matters would be sacrificed, but this could be kept minimal by close coordination by custodians during solicitation and award and appointment of the custodian as the contracting officer's representative during administration. Economies would result from a single nonappropriated fund procurement system and, of course, from utilization of appropriated fund resources to service welfare funds. Many of these economies would be offset by the inefficiency inherent in maintaining a personnel management system for sundry funds separate from that of the welfare funds, both systems being subject to the same regulatory scheme.

C. RECOMMENDED MANAGEMENT PLAN.

Those general recommendations presented in Part A of this Chapter must be coupled with an effective management plan or the advantages to be gained by

comprehensive statutes and regulations will be lost. Plan B discussed above is suggested by the author as the most practical alternative and presents the best balancing of advantages and disadvantages. Changes are necessary now! Legislative action, essential to Plan A, cannot be anticipated in the near future, if at all. Plan C destroys the degree of control required by the commander to achieve the historical and yet valid purposes of nonappropriated funds. This control will be weakened when, and if, the proposed Army regulation on personnel policies and procedures is promulgated, but that sacrifice is necessary to correct inequalities and achieve uniformity. A further weakening under Plan C could not be similarly justified. Plan D, by fragmenting the management effort could defeat the goal of uniformity, the lack of which typifies the present system. The economy achieved probably does not counter balance this defect. In addition, the legal basis presented to allow complete welfare fund servicing by appropriated fund agencies may not be acceptable.

Plan B would establish an autonomous organization with requisite internal authority to effectuate the system

and operate it thereafter. The extra cost will be repaid in concrete results. Some innovations or changes, such as splitting out large procurements for placement with the AAFES may improve the plan. However, this should not be attempted if it will delay or endanger the promulgation of directives to accomplish the plan. Time is of the essence!

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