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

AIB

B-156187   APR 15 1965

Per Diem, Travel and Transportation
  Allowance Committee
c/o Office of the Secretary of the Army
Department of the Army

Gentlemen:

In compliance with your request dated February 17, 1965, PDTATAC 65-11, there is enclosed a copy of decision of this date, B-156187, to the Secretary of the Air Force.

Sincerely yours,

Joseph Campbell

Comptroller General
of the United States

Enclosure

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WASHINGTON, D.C. 20548

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Dear Mr. Secretary:

Further reference is made to letter of February 15, 1965, from the Assistant Secretary of the Air Force, forwarded here by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 65-11) on February 17, 1965, requesting a decision on certain questions relating to the effect of section 5 of the act of August 20, 1964, Public Law 88-459, 78 Stat. 557, on the per diem allowances of members of the uniformed services and Department of Defense civilian personnel while performing temporary duty at places where Government quarters are available.

Section 5 of the act of August 20, 1964, provides:

> "An employee or a member of the uniformed services shall not be required to occupy quarters on a rental basis unless the head of the agency concerned shall determine that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise."

The Assistant Secretary states that Department of Defense Directive 5154.20 of June 23, 1964, assigned the Army, Navy and Air Force members of the Per Diem, Travel and Transportation Allowance Committee, among other things, with responsibilities for issuing uniform regulations for Department of Defense civilian personnel for per diem, travel and transportation allowances in such manner that they will not require further entitlement implementation by Defense components. The allowances established are required to be fixed, within statutory limitations, so that they provide equivalent entitlements to civilian and military personnel when the requirements of travel and temporary duty are substantially the same for both. Travel of all members of the uniformed services has been administered by the Per Diem, Travel and Transportation Allowance Committee through the medium of the Joint Travel Regulations since April 1, 1951. The Assistant Secretary says that the civilian regulations, to be issued under present plans as Volume 2 of the Joint Travel Regulations, should be distributed and made effective in the next few months, and that the questions contained in his letter arose in connection with an examination of the military regulations by that Committee and the effect of the above statute on these regulations.

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The Assistant Secretary points out that it has been the consistent policy of the Department of Defense that Government facilities, where available, shall be utilized to the maximum extent practicable by members of the uniformed services, and that this policy, with three exceptions thereto, is contained in paragraph 4451-1 of the Joint Travel Regulations. He further states that to insure such utilization, the Joint Travel Regulations provide for payment of maximum per diem allowances only when the voucher is supported by a statement executed by the member or a commanding officer, as applicable, under paragraph 4451-2, 3 and 4 of the Joint Travel Regulations that Government quarters were not available to the traveler. Thus, he continues, if transient Government quarters were available but not utilized because of personal choice, the average quarters portion of the per diem allowance (currently 50 percent) was eliminated from the per diem payable notwithstanding that the member may have procured commercial quarters at personal expense.

The Assistant Secretary also states that with the passage of Public Law 88-459 question arose immediately as to the propriety of the military regulations and it was referred to the then Committee Counsel in the Office of the Judge Advocate General whose opinion (paragraph 2, JAGA 1964/4621 of October 6, 1964) was issued holding that:

> "a. PL 88-459 (Act of 20 Aug 1964; 78 Stat. 557) is applicable to temporary duty and permanent duty of both civilians and uniformed personnel.
>
> "b. When quarters are available but not voluntarily occupied, the Joint Travel Regulations may not continue to require forfeiture of a portion of the temporary duty per diem unless a positive statement can be made to the effect that necessary service cannot be rendered and/or Government property cannot be adequately protected otherwise.
>
> "c. The action of authorizing temporary occupancy of quarters without a service or linen charge to enlisted men is not a relevant criterion for making a determination whether the quarters are 'on a rental basis' within the meaning of this Public Law. A reduction in per diem otherwise payable to enlisted members on temporary duty does comprise a 'rental' within the meaning of the statute.

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"d. Service or linen charges are irrelevant in determining whether an occupancy of quarters is a 'rental' within the meaning of the statute (see par. 5-42, AR 37-104). A per diem forfeiture does comprise a 'rental' as viewed by this law."

The Assistant Secretary of the Air Force asks whether our views are in accord with the opinion of the Army Judge Advocate General and also presents the following questions:

"1. May the Secretaries concerned make a general finding to the effect that temporary duty at military posts, camps, stations, bases, or depots owned or operated by the United States is such that necessary service by members of the uniformed services or Department of Defense Civilian Personnel cannot be rendered efficiently unless available Government quarters are utilized, and use such finding as a basis for reducing the per diem allowances in cases where the Government quarters were actually utilized and in cases where the quarters, though available, were not utilized?

"2. If the reply to question 1 is negative, may the Secretaries direct payment of a reduced per diem allowance in cases of members or civilian employees where Government quarters were actually utilized even though the traveler contends that he was required to occupy such quarters against his will?"

The primary purposes of Public Law 88-459 were (section 2) to authorize Government agencies to provide quarters and related facilities for civilian employees stationed in the United States and (sections 3 and 6) to permit the President to prescribe uniform regulations relating to the provision and occupancy of quarters and facilities and the criteria to be used in determining the rental rates to be charged (1) civilian employees for quarters and facilities provided under section 2 of the act, or (2) occupied on a rental basis by a civilian employee or a member of the uniformed services under any other provision of law. Such rental rates are to be based on the reasonable value of the quarters and facilities to the employee or member in the circumstances under which occupied or made available.

The legislative history of Public Law 88-459 shows that it stems from proposed legislation submitted to the Congress by the Bureau of

the Budget in 1960 and introduced in the 86th Congress as S. 3486 but which failed of enactment. Section 4 contained language which in substance was the same as section 5 of the 1964 act, quoted above.

Language similar to section 5 of the 1964 act but pertaining only to civilian officers and employees and not including the words "on a rental basis" first appeared in section 1413 of the Supplemental Appropriation Act of 1953, 66 Stat. 661, and was contained in appropriation acts from 1955 through the fiscal year 1959. The provision was not repeated in 1960 or 1961. As a result, there apparently were many instances where civilian employees were required to occupy inadequate Government quarters while on temporary duty. Thus, section 4 of the 1960 bill was designed to reinstate the prohibition against enforced occupancy of Government quarters but language was added to make it applicable to "rental quarters" and to include military personnel within its purview. In Senate Report No. 1570, 86th Congress, 2d Session, to accompany the bill, it is stated that the word "rental" in section 4 of the bill was inserted "to avoid any possible interference with the right of the military services to order military personnel to occupy public quarters."

In May 1961, two bills (H.R. 7021 and H.R. 7273, 87th Congress) similar to S. 3486 were introduced in the House of Representatives upon the recommendation of the Bureau of the Budget. H.R. 7021 was passed by the House but was not acted upon by the Senate. An identical bill (S. 1833) was introduced in the Senate in 1963 and passed by that body in January of 1964. When the bill was acted upon by the House of Representatives certain modifications were made in the language of the bill and the prohibition in question was renumbered as section 5 but the coverage and purpose remained the same. The bill as modified became Public Law 88-459.

The purpose of section 5 is explained on page 6 of House Report No. 1459 accompanying S. 1833, as follows:

> "Section 5 restates the prohibition against forcing employees to occupy Government quarters on a rental basis. It continues the prohibition previously stated in appropriation acts and includes an exception for cases where the head of the agency determines that necessary service cannot be rendered or property of the United States cannot be adequately protected otherwise. The section differs from the earlier appropriation acts in two respects. First,

> it is broader, in that it affords members of the uniformed services who occupy quarters on a rental basis the same protection as civilian employees have against being required to occupy rental quarters (which, in the case of rental quarters for the military, are frequently inadequate) against their will. <u>This does not in any way interfere with the authority to require military personnel to live in free 'public quarters' in accordance with the normal military practice.</u> Second, section 5 is applicable to all quarters for which the occupants are charged a rental (whether Government-owned or Government-leased), but is not applicable to free quarters. Section 5 would not apply to quarters for civilian employees having permanent stations in foreign countries, since such quarters are furnished without cost under title 5, United States Code, section 118a." (Underscoring supplied.)

The language of section 5 of S. 1833, together with the Committee reports which accompanied that bill and the related bills do not provide a clear indication as to whether the prohibition is intended to apply to Government quarters furnished civilian employees while on temporary duty but an examination of the hearings reveals that civilian employees on temporary duty assignments were the primary concern of the sponsors of the related bills. When S. 1833 was considered, there was no indication that the coverage and purpose of such prohibition were any different than contained in H.R. 7021 as understood by the Committee and the Congressmen who testified on that bill.

While the statutory prohibition refers to the occupancy of quarters "on a rental basis," we are satisfied that so far as civilian employees are concerned, such language was inserted only for the purpose of rendering the prohibition inapplicable to permanent living quarters furnished overseas employees under 5 U.S.C. 118a. In support of this view see the statements of Carl V. Tiller, Bureau of the Budget, and D. Merle Walker, State Department, which appear in the hearing before the House Committee on Post Office and Civilian Service on H.R. 7021 and related bills, July 27, 1961.

The proponents for the insertion of the word "rental," which was not contained in the prior appropriation act provisions, apparently believed that all Government quarters for civilian personnel were furnished on a rental basis except those furnished overseas employees under 5 U.S.C. 118a. We understand, however, that certain installations, both

in this country and overseas, do provide temporary duty quarters to civilian personnel without charge, apparently on the basis that an employee's per diem is reduced when he occupies such quarters. Notwithstanding such situation, it appears that the legislators clearly intended that civilian employees should not be required to occupy Government-furnished quarters while on temporary duty unless the head of the agency determines that necessary service cannot be rendered or property of the United States cannot adequately be protected otherwise. We believe that this prohibition is intended to apply to <u>all</u> Government quarters available for temporary duty of civilian personnel whether furnished with or without charge.

With respect to members of the uniformed services, however, the situation is entirely different. As indicated above, the legislative history of S. 1833 and the prior related bills, clearly shows that the prohibition in section 5 was designed to protect these members from being required to occupy inadequate quarters on a rental basis except upon a determination of necessity by the head of the agency concerned as there provided. It is equally clear that it was the legislative intent that the prohibition would not disturb or interfere in any way with the long-standing authority to assign free public quarters to military personnel and require the occupancy of such quarters. This intent is also reflected in the above Committee Report on section 7 of S. 1833, it being stated that such section keeps the legislation from disturbing the provisions of law relating to free quarters in foreign countries and "public quarters" of the uniformed services.

Moreover, the regulations to implement Public Law 88-459, issued under authority of Executive Order 11184 dated October 13, 1964, by the Bureau of the Budget in Circular No. A-45, Revised, dated October 31, 1964, reflects such legislative intent, paragraph 5 providing that the term "rental quarters" excludes "public quarters" designated for occupancy by members of the uniformed services with loss of allowances, but that it includes quarters occupied by such personnel <u>on a rental basis</u> under 37 U.S.C. 403(e), 42 U.S.C. 1594a(f) and 1594b, and other authority.

Therefore, while section 5 of Public Law 88-459 is applicable to both temporary duty and permanent duty of members of the uniformed services insofar as the occupancy of rental quarters is concerned, it is our view that it has no application to the occupancy or utilization of available public quarters. Consequently, when public quarters are available but not occupied by members of the uniformed services on temporary duty, Public Law 88-459 does not require any change in those

provisions of the Joint Travel Regulations which relate to the payment of per diem at a reduced rate. Such a reduction clearly does not constitute a rental charge for the quarters occupied or available within the contemplation of Public Law 88-459 since the amount by which the per diem is reduced is not based on the reasonable value of the actual quarters occupied or available, but is the same regardless of the size and quality of such quarters. Per diem is paid as reimbursement of the average expenses normally incurred by a member while in a travel status, including the cost of quarters. If free quarters are provided by the Government, then no expense for quarters has been incurred and no reimbursement for such item is required. In such case a right to the quarters portion of the per diem simply does not exist. Hence, a reduction in the per diem on that basis is not a charge for the use and occupancy of the free quarters and it is not to be regarded as "rental." Likewise, a nominal service charge to cover linen and housekeeping services does not constitute a rental for the use and occupancy of the free quarters since it is not based on the reasonable value of the quarters occupied.

From the foregoing, it will be seen that our views generally are not in agreement with those expressed by the Army Judge Advocate General in the opinion of October 6, 1964. In this respect it may be noted that under the rationale of that opinion denial of the basic allowance for quarters when public quarters are occupied would constitute a rental charge for the quarters, a result which, in our view, was not contemplated by Congress.

In answer to question 1, it is our opinion that a blanket determination by the Secretaries concerned as proposed would be contrary to the intent and thwart the purpose of section 5 of the 1964 act. It seems obvious that the Congress contemplated that determinations of necessity in the case of rental quarters would be made on the basis of the circumstances attending particular assignments or prevailing at particular installations rather than on a service-wide basis. Hence, it is our view that a blanket determination would not constitute a proper basis for reducing per diem allowances where Government quarters were utilized or available. Of course, as indicated above, such determination is not necessary or required insofar as members of the uniformed services are concerned if public quarters are available for occupancy.

Question 2 is answered in the affirmative. While it would be contrary to the intent of section 5 to require a civilian employee to occupy Government quarters unless a determination of necessity is

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made as provided by the section, we point out that if he actually utilizes Government quarters without charge, or at a nominal cost, the Standardized Government Travel Regulations require that an appropriate reduction be made from the authorized per diem rate. See section 6.7 of such regulations. So far as civilian employees on temporary duty are concerned, it would not be proper to provide that if other accommodations are used despite the availability of suitable Government quarters, the authorized rate of per diem may not exceed that which it would be if the personnel had resided in the Government quarters.

Sincerely yours,

Joseph Campbell

Comptroller General
of the United States

The Honorable
The Secretary of the Air Force