



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

B-150136 ✓

JUL 2 1974

The Honorable
The Secretary of Defense

Dear Mr. Secretary:

Reference is made to our letter B-150136, dated February 7, 1974, requesting your views concerning the service of General [redacted], USA, [redacted], in the White House during the period from May 4 to July 31, 1973, while he was an officer on the active list of the Regular Army. In that letter we stated that in view of the factual situation (primarily as reported in White House press releases) concerning General [redacted] functions and duties at the White House, we had tentatively concluded that when he began to exercise those functions and duties on or about May 4, 1973, he occupied a civil office and that his military appointment automatically terminated by operation of law under 10 U.S.C. 973(b). We also tentatively concluded that with the termination of his military appointment General [redacted] would not appear to have qualified as a "commissioned officer of the Army" for the purposes of 10 U.S.C. 3911, the law under which we understand he retired on July 31, 1973. As a result, there was brought into question the legality of the payment to him of active duty pay and allowances during the period May 4 to July 31, 1973, and retired pay from and after August 1, 1973.

We have now received a letter dated April 22, 1974, from the General Counsel of the Department of the Army replying on behalf of the Department of Defense to our February 7, 1974 letter. In his letter the General Counsel provides the following "Statement of Facts" concerning this matter:

"After serving for almost four years in the Office of the President, first as Military Assistant to the President for National Security Affairs and subsequently as Deputy Assistant to the President for National Security Affairs, General [redacted], returned on January 4, 1973, to the Army staff, having been assigned on that date as Vice Chief of Staff of the Army.

"On April 30, 1973, the White House announced the resignation of two of the President's senior assistants: Messrs. H. R. Maldeman and John Ehrlichman. Because of his confidence in General [redacted] and because of his uncertainty as to the future roles of his personal staff, on May 3, 1973, the President

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directed _____ to assist him temporarily with the functioning of the White House staff in order to help fill the void left by the resignations. _____ complied with this order and assumed his new duties the following day. Because the assignment was a temporary one, id., _____ retained his assignment as Vice Chief of Staff of the Army. He planned to return on a full-time basis to his Army post at the conclusion of his temporary service at the behest of the President.

"During the period May 4 through July 31, _____ performed for the President duties essentially of an administrative nature. Representative examples of _____ duties included coordinating dissemination of presidential directives, insuring receipt by the President of information necessary for decision making, coordinating staff actions, and supervising the operation of the White House staff. These functions correspond to some extent, but not entirely, with those previously performed by H.R. Haldeman. However, _____ did not assume Haldeman's position, which remained vacant.

"After the lapse of some time, the President and General _____ agreed that _____ services would be required for a longer period than had originally been anticipated and that his role should be expanded to include a more substantive, policy-oriented area of responsibility. General _____ immediately took steps to be retired from the Army. He chose August 1, 1973, as the effective date of his retirement to allow time for administrative processing and Senate confirmation of his retirement request, for moving to civilian quarters, and for the transfer of authority to his successor as Vice Chief of Staff of the Army.

"On June 14, 1973, the President nominated General _____ for retirement and on July 14, 1973, the Senate duly voted its advice and consent. See 119 CONG. REC. S13516 (daily ed. July 14, 1973). General _____ retired on July 31, and his name was placed on the retired list on August 1, 1973. On the latter date, the President for the first time appointed _____ an Assistant to the President, under title 3 of the United States Code, and _____ for the first time took an oath of office, received a presidential commission, and was placed on the White House payroll by salary order."

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The General Counsel's letter also specifically states that from May 4 through July 31, 1973, General [redacted] served the Government only in the capacity of Army Vice Chief of Staff; that he did not become Assistant to the President until August 1, 1973; and that prior to his retirement, he neither held, nor exercised the functions of Mr. Haldeman's position within the meaning of 10 U.S.C. 973(b). In this regard, that letter states that the characterization by the White House Press Secretary of General [redacted] service as an "appointment" should not be determinative since the imprecise use of the word "appointment" in the informal atmosphere of a press conference is without legal effect. The General Counsel's letter concludes by expressing the view that our tentative conclusion is erroneous and recommends that we take the position that General [redacted] remains a General, United States Army (retired), and that he is entitled to retain the pay and allowances and retirement benefits paid to him to date and to continue to receive retirement benefits.

We have also received affidavits of General [redacted]; Mr. Jerry H. Jones, Special Assistant to the President, who is responsible for personnel administration of members of the White House Staff; and Major General H.G. Moore, USA, Commanding General, Military Personnel Center, United States Army, who is the official custodian of the personnel records of all living retired general officers of the Army, including General [redacted]. Those affidavits support the General Counsel's statement of the facts in this matter.

Our tentative conclusion that as a result of his White House service, General [redacted] military appointment terminated on May 4, 1973, was based on a finding that on that date he began to exercise the functions of the position previously held by Mr. Haldeman. A position created by 3 U.S.C. 106 which in our view is a civil office within the meaning of 10 U.S.C. 973(b). However, as noted above, the General Counsel's letter and the supporting affidavits set forth the facts in the matter and indicate that, while General [redacted] performed some administrative functions for the President which correspond to some extent with some of the functions Mr. Haldeman performed, he did not substantially perform the functions of that position until after his retirement from the Army, effective August 1, 1973.

As the General Counsel's letter also points out, the Attorney General's representation of the defendants in the case of [redacted] v. [redacted], Civil Action No. 1108-73, United States District Court for the District of Columbia, decided January 8, 1974, implies that the Attorney General found no impropriety in General [redacted]

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service in the White House. In addition, as the General Counsel's letter indicates, on July 14, 1973, the Senate confirmed General retirement in the grade of general, as is required by 10 U.S.C. 3962(a).✓

While the matter is not entirely free from doubt, in view of the facts set forth above and since General current service as an Assistant to the President while on the retired list of the Army clearly does not violate 10 U.S.C. 973(b) (see 25 Comp. Gen. 38,741 (1945)), this Office will no longer question the active duty pay and allowances paid to General for the period May 4 to July 31, 1973, and the payment of retired pay from and after August 1, 1973.

Sincerely yours,

SIGNED ELMER B. STAATS

Comptroller General
of the United States