

DECISION

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

6835

FILE: B-161396

DATE: MAY 3 1976 98987

MATTER OF: Per Diem, Travel and Transportation
Allowance Committee Control No. 76-1B

DIGEST: The Joint Travel Regulations may be amended to allow the Per Diem, Travel and Transportation Allowance Committee to approve payment of special per diem rates prescribed in Appendix F of the regulations for duty performed under unusual or extraordinary circumstances outside the continental United States subsequent to the performance of the duty. In such cases, the approval merely constitutes a determination that the duty was in fact performed under unusual circumstances contemplated by the regulations and would not involve retroactive determination of entitlement.

This action is in response to a letter dated December 31, 1975, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) requesting an advance decision concerning a proposal to amend Volume 1 of the Joint Travel Regulations (JTR) to authorize the use of special per diem allowance rates published in Appendix F of the JTR as distinguished from prescribing another rate. That letter was forwarded to our Office by letter dated January 16, 1976, by the Per Diem, Travel and Transportation Allowance Committee and was assigned PDTATAC Control No. 76-1B.

The Assistant Secretary states that requests for special per diem allowances in cases otherwise proper, which are disapproved solely due to late receipt of such requests in the offices of the Per Diem, Travel and Transportation Allowance Committee, have prompted the restudy of our decision B-161396, August 23, 1967 (47 Comp. Gen. 127). The Assistant Secretary also states that our decision did not specifically consider whether the Secretaries concerned had the authority to permit the application of the prescribed Appendix F, JTR, special per diem rates in proper cases in lieu of the prescribed Appendix A, JTR, normal travel per diem rates when review revealed that the type of duty performed was in fact the type of duty for which the special per diem rates were intended.

The Assistant Secretary points out that because of the nature of the duty involved, members of the uniformed services often find themselves

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with little or no time to concern themselves with administrative requirements related to personal per diem. The mission requirements dictate the type of accommodations and their location with no control on the part of the member as to the costs necessarily incurred by him from personal funds. Further, while headquarters personnel, who must frequently perform this type of travel, are sensitive to the requirements of the regulation and are able to secure verbal approvals of proper cases later confirmed in writing, personnel in field or overseas locations or personnel not aware of the legal requirements of the case fail to secure the necessary advance approvals for purely administrative reasons.

In view of the foregoing, the Assistant Secretary asks whether the Secretaries concerned have the authority to amend the JTR to allow the Per Diem, Travel and Transportation Allowance Committee to approve special per diem allowances for foreign travel at the rates published in Appendix F as distinguished from prescribing some other rate subsequent to the performance of the travel upon which the entitlement is based. If our reply is in the negative, the Assistant Secretary asks if there exists any legal means by which members may be relieved of the financial penalties imposed on them by the force of their duties or administrative failure to trigger the system on an advance basis.

A member's entitlement to special per diem allowances for foreign travel is contained in 37 U. S. C. 405 (1970), and provides that "the Secretary concerned may authorize the payment of a per diem" to a member who is on duty outside the United States or in Hawaii or Alaska.

It has long been the position of this Office that when the Congress by statute empowers the head of an agency or establishment to authorize an act or expenditure, it was contemplated that the approval must be given in advance. See e. g., 22 Comp. Gen. 895, 900, (1943). The basis for that position was expressed in 14 Comp. Gen. 698, 700 (1935), as follows:

"* * *[W]hen a statute vests in a board or other Federal agency discretion in the use of appropriated funds, such discretion properly may be exercised only in advance of the incurring of the obligation, as approval after an expenditure has been incurred does not constitute the exercise of discretion in

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the use but a condoning of what has already been done. This does not meet the requirements of the law and tends to encourage subordinates in incurring obligations which, perhaps, the officials vested by law with authority to exercise discretion in the matter would not have sanctioned had the matter been brought to their attention in advance.
* * *

It has also long been the view of this Office that in the case of members entitled to per diem for travel and temporary duty performed, the rights of the member and the Government became fixed under the applicable orders and regulations in effect at the time such duty is performed. See e.g., 47 Comp. Gen. 127, supra, and decisions cited therein.

Paragraphs M4250 and M4253 of the JTR provide that a member of the uniformed services is entitled to a per diem allowance at the rate established in Appendix A of the JTR for periods of travel and temporary duty performed under competent orders outside the continental United States. These provisions contemplate that the right to per diem arises automatically with the performance of the travel or temporary duty without the necessity for a specific per diem authorization in the orders. Under the current provisions of paragraph M4350 of the JTR, the right to per diem at a higher rate, as established by Appendix F of the JTR, for periods of travel or temporary duty performed under unusual or extraordinary circumstances, as described in paragraph M4351 of the JTR, accrues to the member only when specifically authorized by the Per Diem, Travel and Transportation Allowance Committee prior to the performance of the duty.

Under the proposal, the right to per diem at the rate established in Appendix F would accrue automatically to the member for periods of travel and temporary duty performed under unusual or extraordinary circumstances, as described in paragraph M4351 of the JTR, without the necessity for prior approval of a specific rate.

It is our view that if basic per diem at rates prescribed in either Appendix A or Appendix F, depending on the circumstances involved is authorized in advance, the approval merely constitutes a determination that the duty was in fact performed under the unusual or

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extraordinary circumstances contemplated by the regulations and would not involve retroactive determination of entitlement.

Therefore, so long as recognition of possible entitlement to the special per diem rate is administratively established prior to the performance of the duty, we would not object to a change in the regulations which would permit payment at the Appendix F rates based upon a determination, made after travel was performed, that such rates were justified by the facts.

R.F. KELLER

Deputy

Comptroller General
of the United States