13181 PLM-11 mr. Faulkner

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

FILE: B-195859 DATE: March 18, 1980

MATTER OF: Federal Aviation Administration - Government Quarters

DIGEST: Under 5 U.S.C. § 5911(e) the Federal Aviation Administration (FAA) may not require its employees, while they are assigned as students at the FAA Academy, to use Government-furnished quarters without making the finding that use of such quarters was necessary in order to accomplish the employee's mission. The Court of Claim's holding in Boege v. United States, 206 Ct. Cl. 560 (1975), should be limited to the peculiar facts of that case and is not applicable here. The "necessity" determinations cannot be made on a blanket basis, but must be tailored to each particular course.

Requirement

AGC00030

We have been asked by the Federal Aviation Administration (FAA) whether they may institute a policy of requiring students attending courses at the FAA Academy at the Aeronautical Center in Oklahoma City to use Government-leased or Government-owned quarters and to take their meals at Government factilities, in lieu of giving these students a per diem allowance. For the reasons stated below, we hold that the FAA may not require students to use Government procured quarters unless the finding of necessity required by 5 U.S.C. § 5911(e) (1976) is made in individual cases or for particular courses.

The FAA, in its request for our decision, states that the FAA Academy annually trains about 17,000 students in 342 courses, which range from one to twenty-six weeks in length. Currently the students receive per diem allowances and obtain lodging and meals from commercial sources in the area. The FAA also states that initial studies have indicated that a substantial savings could be realized by the Government if facilities were furnished for at least some part of the student population. They recognize that a high-occupancy rate would be necessary to achieve the savings and that such an occupancy rate could be ensured only if students are required to use the quarters.

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The FAA acknowledges that under our present interpretation of 5 U.S.C. § 5911(e) (1976), the procedure they suggest is probably not authorized. Section 5911(e) provides that:

> "The head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise."

This section was initially considered by this Office in 44 Comp. Gen. 626 (1965), and that interpretation has been followed ever since. That decision contains an extensive review of the legislative history of not only section 5911(e), but also of the precursors of that section, which were embodied in provisions in appropriation acts and which prohibited the forced assignment of employees on temporary duty to Government quarters. The major difference between 5911(e) as enacted and the earlier restrictions is the insertion of the phrase "on a rental basis."

In discussing this addition, along with the application of the section to employees on temporary duty, our intial decision stated:

> "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 W. 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 all Government quarters available for temporary duty of civilian personnel whether furnished with or without charge." (Emphasis in original. 44 Comp. Gen. at 628-629.)

We have not changed this interpretation of section 5911(e).

In its submission, however, the FAA requests that we reconsider our prior holdings in light of Boege v. United States, 206 Ct. Cl. 560 (1975). The FAA points out that the Court of Claims states that section 5911(e) does not apply if quarters are furnished free. Boege involved civilian employees serving temporarily aboard ships performing duties for the Naval Oceanographic Office. We had previously considered some of the same issues in our decision 50 Comp. Gen. 388 (1970). In that decision we also held that section 5911(e) did not apply to the employees involved, but our rationale was not the same as that advanced by the Court.

The issue in Boege was whether employees on temporary duty assignments aboard Naval Oceanographic ships could be required to use the quarters on board the ships during stopovers in ports. They were, of course, free to use lodging ashore, but the per diem payable would not be increased above the rate paid if the shipboard quarters were used. We held that if the stay in port was limited to three days or less it was merely a continuation of the voyage and the ship itself continued to be the employee's temporary duty station so that they did not have a right to insist on use of quarters ashore at the local per diem rate. If the stay in port exceeded three days we held that then the Navy would be required to pay the applicable local per diem rate, if the employees chose to use lodgings ashore. In effect, we interpreted section 5911(e) there to mean that under the special circumstances presented, as long as the ship continued on its "voyage", the ship was the duty station and the only quarters available were those aboard the ship. Therefore, it was not inconsistent with section 5911(e) for the Navy not to pay the applicable local per diem rates as long as the ship was still on a "voyage."

The Court of Claims in Boege devoted the majority of opinion to a discussion of whether or not the Navy had abused its discretion in implementing our decision. The Court found that it had not and accepted our decision. However, the Court also gave section 5911(e) a sweeping interpretation after a much briefer review of its legislative history. The Court simply stated that as

long as an employee was not actually charged rent for quarters, section 5911(e) did not apply. The Court did not restrict its consideration of section 5911(e) to the special circumstances presented in Boege.

We believe that our cases more correctly state the purpose of section 5911(e). This view is supported by Office of Management and Budget Circular No. A-45 implementing Public Law 88-459, August 20, 1964, 78 Stat. 557, which enacted section 5911(e). While the major part of this Circular provides instructions for computing reasonable rentals for government quarters, it also requires agencies to comply with section 5911(e). Additionally, in section 5(a), it defines rental quarters:

> "Rental quarters. Except as specifically excluded herein, the term rental quarters, as used in this Circular includes all quarters supplied, under specific Government direction, as an incidental service in support of Government programs. It excludes public quarters designated for occupancy by members of the uniformed services with loss of allowances, but it includes quarters occupied by such personnel on a rental basis under 37 U.S.C. 403(e), 42 U.S.C. 1594a(f) and 1594b, and other authority. It includes quarters not only for Government employees but also for contractors, contractors' employees and all other persons to whom housing is provided as incident to the performance of a Government activity. Finally, it includes housekeeping and nonhousekeeping units (including trailers but not tents), furnished and unfurnished." (Emphasis in original).

This definition of rental quarters is much broader than the one used by the Court of Claims and is in accord with the interpretation that we have given the term. We believe

that this interpretation, instead of that used by the Court of Claims is the proper one, and it is the one that we will continue to follow. We also believe that the holding of the Court of Claims should be confined to the unusual fact situation presented in Boege.

We note that subsequent to the Boege decision the Congress nullified the effect of section 5911(e) as to Department of Defense (DOD) employees. Section 853 of the Department of Defense Appropriation Act, 1978, Public Law 95-111, September 21, 1977, 91 Stat. 908, enables DOD to require its employees to use available government quarters while on temporary duty assignments. This appropriation restriction has been carried forward in subsequent DOD appropriation Acts. This method, with Congressional approval, would also be available to the FAA, and would allow the FAA to accomplish its purposes.

Finally, the FAA asks that we provide them with guidance as to what is needed to reach the determination of necessity required by section 5911(e). In our original decision in this area, 44 Comp. Gen. 626 (1965), we held that blanket determinations of necessity were contrary to the intent of the statute. We have not changed our view on that point.

The FAA further states that they believe that our decision B-177752, May 17, 1973, can be read to say that the only requirement is that the agency inform employees that training at a particular facility requires residence at Government-furnished quarters. That case does not state so broad a rule. In the notice to the employees of the residence requirement in that decision, the agency spelled out specific reasons for the requirement.

It is difficult, if not impossible, to establish general rules as to when residence in Government-furnished quarters is necessary for the proper completion of an employee's mission. That determination is essentially a factual determination to be made by each agency after

considering the facts surrounding each particular course or duty assignment. Therefore, we cannot state a blanket rule that can be relied upon in all circumstances to guide the FAA in making the determinations of necessity.

Milton J. Socolar

For The Comptroller General
of the United States

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

B-195859(DAF) March 18, 1980

The Honorable Neil Goldschmidt
Secretary of Transportation

Dear Mr. Goldschmidt

Enclosed is a copy of our decision Matter of Federal Aviation Administration, B-195859, of today, which was issued in response to a request of Mr. Charles H. Onstad, Chief Counsel of the Federal Aviation Administration.

Sincerely yours,

Milton J. Socolar

For The Comptroller General
of the United States

Enclosure

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

B-195859(DAF) March 18, 1980

The Honorable Robert Duncan, Chairman
Subcommittee on Transportation and
Related Agencies
Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of our decision Matter of Federal Aviation Administration, B-195859, of today, which was requested by Mr. Tom Kingfield of your staff.

Sincerely yours,

Milton J. Socolar

For The Comptroller General
of the United States

Enclosure