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

B-69907

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The Honorable Robert N. C. Nix
Chairman, Committee on Post Office
and Civil Service
House of Representatives

Dear Mr. Chairman:

This is in response to a request from the previous Chairman of your Committee for an opinion as to whether 31 U.S.C. § 665(b) (1970) applies to Members of Congress and, if so, whether it prohibits a Member of Congress from utilizing volunteers to assist in the performance of the official functions of the Member's office.

Section 665(b) of title 31 provides:

> "(b) No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property."

Section 665(b) is by its terms comprehensive, and there appears to be no basis to exclude from its application Members of Congress or other legislative branch officers or employees. Cf., B-127343, December 15, 1976, and authorities cited, concerning the applicability of the Federal Tort Claims Act to legislative branch employees. Moreover, it seems reasonable to construe subsection (b) in relation to 31 U.S.C. § 665 as a whole, and other provisions of this section clearly apply to the legislative branch. For example, subsection (h) generally prohibits any "officer or employee of the United States" from exceeding an apportionment of appropriations. Subsection 665(d)(1) expressly subjects legislative branch appropriations to apportionment. In view of these considerations, we believe that 31 U.S.C. § 665(b), concerning voluntary services, does apply to Members of Congress.

In construing this provision, our decisions have explained that the restriction against acceptance of "voluntary service" was not intended to prohibit use of gratuitous service generally, but rather to forbid the acceptance of unauthorized services not intended or agreed to be gratuitous, which therefore may afford a basis for future claims. Thus in 7 Comp. Gen. 810 (1928), our Office stated:

> "The voluntary service referred to in said statute is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section. * * *"

Accordingly, our Office has held, on numerous occasions, that where a Federal employee clearly and distinctly agrees in advance to serve without compensation and a formal contract is entered or a proper record is made evidencing this agreement, the services are "gratuitous" rather than "voluntary" and, consequently do not violate 31 U.S.C. § 665(b). See, for example, 24 Comp. Gen. 314 (1944); 7 id. 810 (1928); B-13378, November 20, 1940; 27 Comp. Dec. 131 (1920). However, where the employee's right to compensation is specifically fixed by or pursuant to statute, prior Comptroller General decisions have held that the employee cannot legally waive his right to compensation nor thereafter be estopped from claiming and receiving the compensation fixed for that particular office under the law. 26 Comp. Gen. 956 (1947); B-181229, November 14, 1974. In contrast, where authority exists to fix compensation for appointment administratively, there is no legal objection to an administrative determination that compensation will not be paid to a particular appointee. 26 Comp. Gen. 956, 961 (1947). In other words, the authority to fix rates of compensation by administrative action necessarily includes authority to appoint employees without compensation.

At the outset we note that individuals performing "official duties or functions" of a Member's office must be considered employees, whether or not the individuals are to receive compensation for the services they perform. However, we are not aware that either body of the Congress has ever established what activities performed by individuals in a Member's office constitute official duties or functions of the office and what activities merely represent personal services to the Member. Clarification of this distinction may be advisable.

As previously explained, generally gratuitous service may be accepted by officers and employees of the Government where rates of compensation for appointments are fixed administratively, rather than by statute. Such is the case with respect to individuals serving in a Member's office. The provisions of title 2, United States Code, governing employment in the Congress, do not establish rates of compensation for these individuals. Under 2 U.S.C. § 332 (1970), each

Member of the House is provided a lump-sum allowance for clerk hire, which the Clerk of the House disburses in accordance with the certification of that Member. Thus each Member is the pay-fixing authority for employees in his office. See H. Rep. No. 91-1685 (1970), 1970 U.S. Code Cong. and Admin. News 5918, 5928. We are aware of no statutory provision which would prohibit a Member from making an administrative determination that an individual may serve in his office without compensation.

However, we note that under 2 U.S.C. § 57(a)(1) (Supp. V, 1975), the Committee on House Administration may "fix and adjust from time to time, by order of the committee, the amounts of allowances (including the terms, conditions, and other provisions pertaining to those allowances)" for, inter alia, clerk hire allowances of House Members. We have been informally advised that there are two unpublished committee orders which presently limit the number of clerks each Congressman may have to 18 and which require a minimum payment to each individual of $1200. Such orders may limit the authority of a Member to appoint clerks as employees without compensation, even though, in the absence of such orders, the Member would have general authority to fix the rates of compensation in his own office.

In summary, it is our opinion that Members of the House may utilize volunteers on their office staffs, subject to any limiting orders of the Committee on House Administration under 2 U.S.C. § 57.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General
of the United States

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Digest

Section 665(b) of title 31, United States Code, prohibiting officers and employees of United States from accepting voluntary services, is applicable to Members of Congress. Section 665(b) does not forbid acceptance of services intended and agreed to be gratuitous, where rates of employee compensation are administratively determined and not fixed by or pursuant to statute. Members of Congress may determine rates of compensation for employees in their offices, see 2 U.S.C. § 332, subject to orders of Committee on House Administration issued pursuant to 2 U.S.C. § 57(a)(1).