

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548***Browne
24835***FILE:** B-209191**DATE:** April 13, 1983**MATTER OF:** Lieutenant Commander William J. Harrigan,
et al.**DIGEST:**

The holding in 60 Comp. Gen. 181 (1981) regarding the limitation on use of appropriated funds to pay per diem or actual expenses where an agency contracts with a commercial concern for lodgings or meals applies to members of the uniformed services as well as to civilian employees of the Government. However, because 60 Comp. Gen. 181 was addressed specifically to the per diem entitlement of civilian employees under 5 U.S.C. 5702, the Comptroller General will not object to per diem or subsistence expense payments already made to military members that exceed the applicable statutory or regulatory maximums as the result of an agency's having contracted for lodgings or meals.

By letter of September 7, 1982, Lieutenant Commander William J. Harrigan asks whether there is any basis to excuse his liability and that of other members of the Helicopter Operations Group, National Oceanic and Atmospheric Administration, arising out of overpayments of subsistence expenses made in disregard of the principles set forth in Matter of Bureau of Indian Affairs, 60 Comp. Gen. 181 (1981). Agency bills of collection issued to these members of the uniformed services were the subject of our Claims Group's letter of July 19, 1982, advising Commander Harrigan that overpayments of per diem or subsistence expenses may not be considered for waiver under 5 U.S.C. 5584. While the overpayments may not be waived, for the reasons set forth herein, we find that the bills of collection should be cancelled.

The record indicates that at varying times between January 21 and May 20, 1981, members of the Helicopter Operations Group performed temporary duty in the State of Alaska. Lodgings were procured by purchase order and were furnished to the members who were reimbursed for the remainder of their subsistence expenses on the basis of

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individual travel vouchers. On July 27, 1981, the members were issued bills of collection for repayment of subsistence expenses they had received in excess of the maximum fixed by regulation. The bills of collection were issued on the basis of our holding in Matter of Bureau of Indian Affairs, 60 Comp. Gen. 181 (1981).

Matter of Bureau of Indian Affairs held that while a Government contracting officer may procure rooms or meals from a commercial concern for employees on temporary duty, appropriated funds are not available to pay per diem or actual expenses of employees in excess of that allowed by statute or regulation, whether by direct reimbursement or indirectly by furnishing meals and/or rooms by contract. While that decision was based on the general proposition that officers of the Government may not do indirectly that which statute or regulation forbids doing directly, it was specifically addressed to the per diem and subsistence expense provisions of 5 U.S.C. 5702 applicable to civilian employees of the Federal Government. In issuing the bills of collection in this case, the agency's finance office concluded that the principles of law underlying our holding in 60 Comp. Gen. 181 are equally applicable to members of the uniformed services who receive per diem or subsistence expenses under 37 U.S.C. 404 and 405. We agree that agencies may not circumvent the per diem or actual subsistence expense limitations prescribed by statute or regulation by contracting with commercial concerns for lodgings or meals to be furnished members of the uniformed services or civilian employees.

Our holding in Bureau of Indian Affairs was made prospective in application from January 19, 1981, the date the decision was issued, for the reason that there had been a lack of precedent in this particular area. Since that decision was not, by its specific terms, applicable to members of the uniformed services, we will not object to per diem payments such as those already made to Commander Harrigan that exceed statutory or regulatory maximums as a result of the agency's having contracted for lodgings or meals with commercial concerns. Effective from the date of this decision that rule will be applicable to per diem payments made to members of the uniformed services.

The bills of collection issued Commander Harrigan and other members of the Helicopter Operations Group should be cancelled.

for 
Comptroller General
of the United States