

DECISION

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

FILE: B-211693**DATE:** July 15, 1983**MATTER OF:** Sergeant Major Alexander Titoff, USA

DIGEST: An Army sergeant serving an unaccompanied tour of duty in Portugal was authorized a family separation allowance, types 1 and 2 since his separation from his wife and children was due to military orders. While the member was serving that tour of duty, a California court granted to him and his wife an interlocutory decree of divorce that apparently incorporated a separation agreement which gave each joint custody of the children but gave physical custody of the children to the wife. The Army then terminated the member's family separation allowances. This action was correct since, although the member's separation from his wife and children initially was due to military orders, the interlocutory decree of divorce changed the nature of the separation to one for personal reasons which makes him ineligible for the allowances.

This decision is in response to a request for review of our Claims Group's disallowance of Sergeant Major Alexander Titoff's claim for a family separation allowance, type 1 for a period beyond the date of his divorce. As will be explained, we sustain the action taken by our Claims Group because his separation from his family after the date of the divorce was not as a result of military orders.

Sergeant Titoff was ordered on a permanent change of station from Fort Ord, California, to Lisbon, Portugal. Since he had elected to serve an "all others" tour in Portugal, that is a tour of duty unaccompanied by his dependents, his orders did not authorize transportation of his dependents to his new duty station. Consistent with this type of tour, he was authorized family separation allowance, type 1 and type 2, since his dependents, a wife and two children, did not reside with him in Portugal but remained in the United States, and Government quarters were not available for him in Portugal.

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From his arrival in Portugal until March 5, 1981, Sergeant Titoff was entitled to family separation allowance, types 1 and 2. His entitlement to both types terminated on March 6, 1981, because on that date an entry was made of an interlocutory judgment of dissolution of marriage by the Superior Court of California, County of Monterey. As part of their divorce proceeding the parties, Alexander Titoff and Ingrid L. Titoff, entered into a "MARRIAGE SETTLEMENT AGREEMENT" that apparently was incorporated into the interlocutory judgment of dissolution of marriage.

Among other things, the marriage settlement agreement provided that the husband and wife would have joint custody of the two minor children but the wife would have physical custody. Also, the parties would have a joint ownership in a house and land in Salinas, California, with the wife residing there and paying all costs associated with the residence except "[t]he tax consequences of the home ownership [would] be divided equally between the parties."

In disallowing Sergeant Titoff's claim, our Claims Group explained that his entitlement terminated upon the interlocutory judgment of dissolution of marriage because the entitlement to either type of the allowance is not authorized if a family separation does not result from military orders. Thus, a family separation which is the result of a divorce decree does not meet the requirement that a member is separated as a result of military orders even if the initial separation does arise from military orders.

In pursuing this appeal, Sergeant Titoff does not dispute that the Army correctly terminated his entitlement to family separation allowance, type 2. He, however, does contest the termination of his entitlement to type 1. In support of this, he argues that neither the statutory authority for the allowance, 37 U.S.C. § 427(a), nor the implementing regulations in the Department of Defense Military Pay and Allowances Entitlements Manual specify that the allowance will terminate in case of legal separation or divorce. He does recognize that certain decisions of the Comptroller General support the termination of the allowance, but he questions whether these decisions should be applied to his case.

The statutory authority for payment of family separation allowances is 37 U.S.C. § 427, subsection (a) of which authorizes the payment of type 1. The allowance is in addition to any other allowances or per diem to which he is entitled under title 37, United States Code, including basic allowance for quarters. It is in an amount equal to basic allowance for quarters (without dependents) and is payable to a member with dependents who is on permanent duty outside of the United States or in Alaska if:

"(1) the movement of his dependents to his permanent station or a place near that station is not authorized at the expense of the United States under section 406 of this title and his dependents do not reside at or near that station; and

"(2) quarters of the United States or a housing facility under the jurisdiction of a uniformed service are not available for assignment to him."

The legislative history regarding the family separation allowance reveals that the purpose of the allowance as authorized by 37 U.S.C. § 427(a) is to compensate a member for the expense of providing public quarters for himself during periods of enforced separation from his dependents where Government quarters are unavailable to him at his overseas station. Although it is not necessary that a member and his dependents reside together immediately prior to his overseas transfer in order to qualify for the allowance, the allowance was not intended to be paid if the family separation does not result from military orders. See, e.g., B-161781, August 9, 1967, and B-178915, March 8, 1974. A family separation which is the result of a divorce decree which grants custody of a member's minor children to his divorced wife does not meet the requirement that the member is separated from his dependents as a result of military orders. See 56 Comp. Gen. 805 (1977); 44 Comp. Gen. 572 (1965). See also Department of Defense Military Pay and Allowances Entitlements Manual, paragraphs 30303d and 30311b, which provide that a member is not considered "a member with dependents" for family separation allowances if his sole dependent is a child in the legal custody of another person.

Thus, the family separation allowance, type 1 is not authorized if the member is separated from his dependents for personal reasons, such as a divorce or legal separation, and not as a result of military orders. Furthermore, we have held that while the initial separation may be as a result of military orders, if a member subsequently obtains a legal separation or is divorced, the separation becomes one for personal reasons and if a member's wife were his only dependent or if legal custody of any dependent children is in the wife, the member is not entitled to the allowance, even though he may pay support for the children. See 49 Comp. Gen. 867 (1970), and B-169522, August 3, 1971.

In the present case, the facts indicate that the member's separation from his wife and children was initially due to military orders but that such separation has ceased to be due to military orders. Rather, the separation is due now to personal reasons, the interlocutory decree of divorce and the separation agreement. As the above discussion reveals, this factor precludes the member from an entitlement to the family separation allowance he claims. In so concluding, we did consider that the member has joint custody of the children with his former spouse; however, since she has physical custody, we discern no basis to consider his separation from his children as being one caused by military orders as opposed to the divorce and separation agreement.

Accordingly, the disallowance of Sergeant Titoff's claim is sustained.

for *Harry D. Van Cleave*
Comptroller General
of the United States