DIGEST - L - Mil

1170

DECISION

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

FILE: B-150187 DATE: AUG 26 1977

MATTER OF: [redacted], USAF

DIGEST:

1. An Air Force officer required to be separated by 10 U.S.C. 8303(d) (1970), was ordered on a permanent change of station from Athens, Greece, to McGuire Air Force Base, New Jersey, to be separated under an Air Force Regulation permitting voluntary resignation for the purpose of enlistment, then traveled to Tyndall Air Force Base, Florida, where he enlisted 2 days later. The member is entitled to an allowance for mileage from McGuire to his home of record. 1 JTR, paragraph M4157-1a. Member may also be allowed a dependents' transportation allowance from Athens to Tyndall. 1 JTR, paragraph M7009-1.

2. A member's entitlement to dependents' transportation allowance depends on whether the dependents traveled to the place to which the allowance is claimed with the intent to establish a bona fide residence there. 1 JTR, paragraph M7000-13. In cases where the dependents stay in a particular place does not exceed the span of an ordinary visit, vacation or business trip and other facts in the case indicate that travel was for purposes other than to establish a home, the conclusion is required that the travel was not to a bona fide residence.

3. Reimbursement to a member for a portion of his dependents' travel by a foreign airline must be recovered although the travel was arranged by an American charter corporation, since under 1 JTR, paragraphs M2150 and M7000-8 the use of foreign flag carriers is prohibited unless a United States flag carrier is not available.

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4. Entitlement to military pay and allowances is not determined by common-law rules governing private contracts but is dependent upon statutory right.

This action is in response to a letter dated February 7, 1977, from Sergeant [redacted], USAF, [redacted] requesting reconsideration and clarification of our decision B-150187, May 12, 1976, concerning his entitlement to reimbursement for transportation expenses for dependents' travel incident to his discharge as an officer from, and subsequent enlistment in, the Air Force in 1975.

The member has submitted additional information with his request for reconsideration. It appears that the member, while a captain in the Regular Air Force stationed in Athens, Greece, became subject to discharge pursuant to 10 U.S.C. 8303(d) (1970) which requires that a "deferred officer" be honorably discharged on any date requested by him and approved under regulations prescribed by the Secretary of the Air Force, but not later than the first day of the seventh calendar month after the Secretary approves the report of the selection board which did not recommend him for promotion. On October 4, 1974, the member was officially notified of the selection board's action and informed that his separation date was set for March 31, 1975, in accordance with law. The member also was provided with a "Separation Fact Sheet-Regular Officers", which stated that under Air Force regulations (AFR) 36-12, paragraph 16e (now 14e), the member could resign effective March 30, 1975 and enlist in the Regular Air Force for the purpose of qualifying for retirement after 20 years of active service. The fact sheet informed him that should he elect to so resign, he would not receive severance pay. The member was also advised that his resignation submitted under AFR 36-12, paragraph 16e, must reach the Air Force Military Personnel Center no later than January 24, 1975. The member elected this option and pursuant to Special Orders AA-165 dated January 24, 1975, and Special Orders AD-476 dated March 28, 1975, he was assigned to McGuire Air Force Base (AFB), New Jersey, for the purpose of separation.

The member's dependents had accompanied him upon his assignment to Greece, and by the January 24, 1975 order they were authorized concurrent travel to return to the United States. The

member indicates that pursuant to that authorization his dependents, accompanied by the member while on leave, departed Athens, Greece, on March 12, 1975, and traveled to his home of record, Glenns Ferry, Idaho, where they arrived on March 24, 1975. That travel was at personal expense by commercial bus from Athens to Frankfurt, Germany, and by commercial airline from Frankfurt to the United States. The airline used for the portion of the travel from Frankfurt to New York, New York, was Condor, a foreign flag airline. The member indicates that he left his dependents in Glenns Ferry and he then went to McGuire AFB, where on March 30, 1975, he was separated from the Air Force. He then went to Tyndall Air Force Base (AFB), Florida, at personal expense, where 2 days later, on April 1, 1975, he enlisted in the Regular Air Force for a period of 5 years and was assigned to Tyndall AFB as his initial duty station. The member on April 15, 1975, made claim for reimbursement for his dependents' travel and was paid the sum of $971.60 on May 8, 1975, by the disbursing officer at McGuire AFB. The member's household goods were shipped from Greece to Los Angeles where they were put into temporary storage at Government expense as stated on the member's claim form, "until a permanent address is established."

By Special Orders AA-624, dated April 21, 1975, the member was authorized transportation of dependents and shipment of household effects to his new duty assignment at Tyndall AFB, Florida, where he had enlisted 2 days after his discharge at McGuire AFB. Pursuant to that authorization the dependents traveled from Glenns Ferry, Idaho, to Parker, Florida, near Tyndall AFB, during April 11-12, 1975, for which the member filed a claim in the amount of $399.60 with the Accounting and Finance Officer at Tyndall AFB. On this trip the member traveled with the dependents, having taken leave and traveled to Idaho to pick up his family and accompany them to Florida. Special Orders AA-624 specifically excluded any reimbursement for transportation expenses of the member from his home of record to the initial duty station on enlistment. The member does not claim any travel allowances for himself in this regard. Subsequently, his household goods were shipped from storage to the vicinity of his duty station, Tyndall AFB.

The Accounting and Finance Officer at Tyndall AFB requested an advance decision from us on the member's claim for dependents' travel from Glenns Ferry to Tyndall. He indicated that it appeared

that the member's travel incident to his separation was not with the intent to establish a bona fide residence at Glenns Ferry.

In response to that request we reviewed the record submitted to us and noted that the member's pay record indicated that he had been separated voluntarily for the purpose of enlisting in the Air Force. We therefore applied the provision of Volume 1, Joint Travel Regulations (1 JTR), paragraphs M4157-2 (change 265, March 1, 1975) and M7009-3 (change 254, April 1, 1974) which apply to a member "separated from the Service or relieved from active duty for the express purpose of continuing on active duty in another status." Those paragraphs provide that the member is not entitled to travel allowances for himself or his dependents in connection with such a separation. Therefore, in view of the circumstances we constructed the member's allowances as though he had been discharged, enlisted and then ordered to Tyndall AFB. On that basis we did not question the mileage allowance the member was paid for his dependents from Athens to Frankfurt; however, we indicated that their mileage within the United States should be limited to the distance from McGuire AFB to Tyndall AFB. We also held that in view of the prohibition against the use of foreign airlines in 1 JTR, paragraphs M2150 (change 248, October 1, 1973) and M7000-8 (change 265, March 1, 1975), the amount the member was reimbursed for dependents' air travel via Condor from Frankfurt to New York must be collected from him. We also held that he was not entitled to a travel allowance for his dependents' travel from Glenns Ferry to Tyndall. See B-150187, May 12, 1976.

The member in his appeal asserts that 1 JTR, paragraphs M4157-2 and M7009-3 are not applicable to a Regular commissioned officer whose removal from the active list is mandated by 10 U.S.C. 8303(d). He indicates that under section 8303(d) the Air Force does not separate an officer for the express purpose of enlisting him, rather it separates him because it is required to do so by statute. Although an officer may elect to resign under AFR 36-12, paragraph 16e, for the purpose of enlisting, the Air Force is under no obligation to enlist him after his separation. Therefore, he indicates, entitlement to travel and transportation allowances of the member and dependents should be determined under 1 JTR, paragraphs M4157-1a (change 265, March 1, 1975) and M7009-1 (change 254, April 1, 1974).

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Paragraph M4157-1a, promulgated pursuant to 37 U.S.C. 404 (1970), provides in pertinent part:

> "* * * A member on active duty who is separated from the Service or relieved from active duty * * * will be entitled to mileage from his last duty station to his home of record or the place from which he was ordered to active duty * * * as the member may elect, provided, there is a break in service of at least 1 calendar day. Members entitled to mileage under this subparagraph may receive such allowances at the time of separation from the Service or relief from active duty without regard to the actual performance of such travel."

Upon further consideration, in view of the mandatory separation required by 10 U.S.C. 8303(d) on a date selected by the member, and since he did have a break in service of at least 1 calendar day, we will now consider him subject to paragraph M4157-1a rather than M4157-2. Accordingly, the member is entitled to the mileage allowance from McGuire AFB to his home of record, Glenns Ferry.

Concerning his dependents' travel, paragraph M7009-1 was promulgated pursuant to 37 U.S.C. 406 (1970) which authorizes transportation of dependents upon a member's change of permanent station. In pertinent part, paragraph M7009-1 states:

> "* * * A member on active duty who is separated from the Service or relieved from active duty * * * will be entitled to transportation of dependents not to exceed the entitlement from his last permanent duty station, or place to which his dependents were last transported at Government expense, to the place to which the member elects to receive travel allowances for his travel under the provisions of par. M4157."

However, 1 JTR, paragraph M7000-13, places a condition upon dependents' travel in that it excludes transportation at Government expense for:

> "* * * any travel of dependents between points otherwise authorized in this volume to a place at which they do not intend to establish a residence; travel expense of dependents for pleasure trips or for purposes other than with intent to change the dependents residence as authorized by this volume may not be considered an obligation of the Government; * * *"

This Office has consistently held that the travel expenses of dependents merely for the purpose of family visits, pleasure trips or for other purposes not contemplating a change of the dependents' primary residence in connection with the member's change of permanent station may not be considered an obligation of the Government. See 33 Comp. Gen. 431 (1954). Although the member is entitled to mileage to Glenns Ferry without regard to whether or not he personally performs the travel (40 Comp. Gen. 77 (1960)), he may only be reimbursed for dependents' travel expenses if they actually traveled to a location where they intended to establish a bona fide residence.

In any claim against the Government the claimant has the burden of proving the validity of his claim. See 53 Comp. Gen. 181 (1973); 31 Comp. Gen. 340 (1952); 18 Comp. Gen. 980 (1939). Generally if a member elects to travel to his officially designated home of record and he and his dependents actually travel to such place, the official designation and the travel will be accepted, in the absence of a clear indication to the contrary, as establishing his entitlement to travel and transportation allowances. Compare 36 Comp. Gen. 774 (1957). However, in instances where there is evidence which raises a grave doubt whether the alleged travel was actually performed or whether there was a change in the place where the dependents intend to establish a bona fide residence we may not properly conclude that payment of travel allowances is authorized. See 33 Comp. Gen. 431, supra. A brief sojourn at the place to which transportation expenses are claimed raises such a doubt. Although there is no requirement in the regulations that dependents stay a certain amount of time at a particular location in order to establish a bona fide residence, travel of dependents in connection with a change of a member's permanent station is necessarily suspect when the stay at the new location is for a relatively short period of

time. In such cases intent necessarily must be inferred from the surrounding circumstance. In cases where the dependents' stay in a particular place does not exceed the span of an ordinary visit, vacation or business trip and other facts in the case indicate that the travel was for purposes other than to establish a home, the conclusion is required that the travel involved was not to a bona fide residence within the contemplation of the law and regulations. See B-182440, November 4, 1975; and B-169604, July 28, 1970.

In support of his claim for dependents' travel to Glenns Ferry the member now states that while on leave he accompanied his family to Glenns Ferry, reestablished their old residence and enrolled his children in the local schools there. Although these may be viewed as indications that he intended his family would make Glenns Ferry their new home, they are not sufficient to remove the grave doubt cast by the other circumstances indicated in the record. The dependents' stay of only 18 days in Glenns Ferry raises a question whether they and the member intended that the dependents would establish a home there. Other facts in the record force the conclusion that Glenns Ferry was not a bona fide residence. The member's household goods were not shipped to Glenns Ferry, but were put in temporary storage in Los Angeles pending establishment of a permanent residence. After his separation the member went to Tyndall where he enlisted and he subsequently went to Glenns Ferry only to transport his family to Tyndall. Most importantly, because the member had to have submitted his resignation prior to January 24, 1975, it is clear that he planned prior to the time his dependents departed Greece to enlist in the Air Force. Compare B-181552, February 24, 1975. Therefore, it seems that his dependents' travel to Glenns Ferry was for a brief sojourn while the member enlisted and established a new residence to which they and his household goods would then be transported.

The record indicates, instead, that the member and his family intended to make Parker, Florida, near Tyndall AFB, their residence. Paragraph M7009-1, 1 JTR, entitles the member to a dependent transportation allowance to any point not to exceed the entitlement from his last permanent duty station to the place to which the member elects to receive travel allowances under paragraph M4157. Accordingly, as we held in our May 12, 1976

decision, the member is entitled to travel expenses from Athens to Parker, Florida, less the amount reimbursed for air travel via Condor from Frankfurt to New York. Payment of the claim for dependents' travel from Glenns Ferry to Tyndall cannot be allowed.

Shipment of the member's household goods from Athens to Tyndall AFB also appears authorized. 1 JTR, paragraph M8259.

The member has raised certain other questions regarding this case. He challenges our prior ruling that the amount he received as reimbursement for dependents' travel from Frankfurt, Germany, to New York aboard a foreign air carrier must be recouped. The member submits that he arranged transportation accommodations through Davis Agency, Inc., a United States charter service operating in accordance with Part 372 of the Special Regulations of the Civil Aeronautics Board (14 C.F.R. §372.1, et seq. (1976)). He also states that no one in the transportation office briefed him on the regulations requiring use of American air travel. While it is unfortunate that the member may not have been aware of the provisions of 1 JTR, paragraphs M2150 (change 248, October 1, 1973) and M7000-8 (change 265, March 1, 1975) requiring the use of American carriers, these regulations, promulgated pursuant to statutory authority, have the force and effect of law and cannot be waived by this office. See B-179445, September 21, 1973. This is so even though travel arrangements were made through a third party such as a base banking facility, or an American travel agency. See B-160969, May 8, 1967; B-155030, September 8, 1964; B-152971, January 6, 1964. An overseas military personnel charter operator, as defined in 14 C.F.R. §372.2, is a citizen of the United States authorized to engage in the formation of charter groups under those regulations, and is not an aircraft of United States registry, as provided in the JTR. Accordingly, we must affirm our May 12, 1976 decision that reimbursement for the dependents' air travel by foreign carrier must be recouped.

The member also claims that by having completed his travel he has executed a binding contract with the Government entitling him to reimbursement under the applicable law and enabling regulations. It has long been held that common-law rules governing private contracts have no place in the area of military pay and allowances. Entitlement to such pay and allowances is dependent upon statutory

right. See Bell v. United States, 366 U.S. 393, 401 (1961), and authority cited therein. The entitlement to transportation allowances for members and their dependents is prescribed under regulations promulgated by the Secretaries concerned pursuant to 37 U.S.C. 404 and 406. This decision is based on the member's entitlement under applicable law and regulations.

MILTON SOCOLAR

For the Comptroller General
of the United States

TRANSPORTATION
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Military personnel
Discharge and reenlistment

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Reenlistment or extension of enlistment

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