

DECISION

DIGEST - L-Mil
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-183846

DATE: OCT 9 1975

MATTER OF: Basic Allowance for Quarters - Sergeant First Class, USA

DIGEST: Where it is shown in records that a service member who resided off post, requested BAQ at the "without dependent" rate and his request was approved contemporaneously by company, battalion, and brigade commanders, but due to administrative breakdown, not by installation commander, such member may receive BAQ for the period in question based upon delayed approval by proper authority even where there is a delay in the issuance of a statement of nonavailability since such statement is not an order authorizing BAQ but rather documentation of existing facts clearly discernible from other records.

This action is taken in response to a letter dated March 20, 1975, with enclosures, file reference ATZK-CM-FA, from the Finance and Accounting Office, Headquarters United States Armor Center and Fort Knox, Fort Knox, Kentucky, requesting an advance decision concerning the propriety of making payment of basic allowance for quarters (BAQ) at the "without dependent" rate in the case of Sergeant First Class, USA, SSAN, for the period December 10, 1972, through September 18, 1974, or in the alternative, for the period February 12, 1973, through September 18, 1974, in the circumstances described. That letter was forwarded to our Office by the Office of the Comptroller of the Army (file reference DACA-FAF-P), and assigned Department of Defense Military Pay and Allowance Committee Control Number DO-A-1237.

The record shows that the member, who was stationed at Fort Knox, Kentucky, moved into an off-post mobile home on December 10, 1972. By Disposition Form dated February 12, 1973, the member requested BAQ at the "without dependent" rate, which request was approved by his company commander on February 15, 1973, by his battalion commander on February 16, 1973, and by the brigade commander on February 20, 1973. That request was then forwarded to the Commander of the Armor Center and approval was recommended. However, the Finance and Accounting Officer states that they have been unable to determine whether any final action was ever taken on that request.

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B-183846

On August 27, 1974, the member took followup action on his February 12, 1973 request and further requested that payment be made retroactively from December 10, 1972. His company, battalion and brigade commanders recommended approval. Comment 5 to that followup action dated September 19, 1974, signed by Colonel N. W. Hammes, GS, Director, Industrial Ops, approved the member's request with the stated intention to make it retroactive to February 12, 1973, provided there were no legislative or legal prohibition, for the reason that had the member's February 12 request been processed in an expeditious manner, approval would have been granted under the policies in effect at that time. It is also indicated that the delay in processing the request of February 12, 1973, was the result of the member's transfer to another unit, administrative inaction, and a misunderstanding concerning the nature of the request.

In comment 6 dated October 17, 1974, the Finance and Accounting Officer stated that BAQ could be paid from September 19, 1974, provided a statement of nonavailability of Government quarters was issued, but such a certificate would not be honored if dated or made effective prior to September 19, 1974. Apparently, it was the Finance and Accounting Officer's view that a statement of nonavailability is an order authorizing BAQ and since retroactive orders generally may not increase or decrease vested pay rights and since verbal orders must be confirmed in writing within a reasonable time, a statement of nonavailability of Government quarters issued in September 1974 to cover a period beginning in December 1972 or February 1973 would be improper and without effect.

In this connection, the Finance and Accounting Officer's March 20, 1975 request for advance decision cites our decision B-169677, May 22, 1970, involving the effect of confirmation of a verbal order after a lengthy delay in a basic allowance for subsistence (BAS) case, as being somewhat parallel and applicable.

Our decision B-169677, *supra*, involved a member who was issued orders dated December 20, 1968, which purportedly confirmed verbal orders of December 8, 1967, authorizing the member to ration separately. Subsection 402(b)(2) of title 37, United States Code, provides that an enlisted member is entitled to a basic allowance for subsistence when permission to mess separately is granted. The implementing regulations involved provided that

B-183846

an authorization to mess separately cannot cover retroactive periods but that written orders issued in confirmation of specific verbal orders within a comparatively short period of time after such verbal orders have been issued may be accepted as establishing that permission. However, where such confirmatory orders are not promptly issued they may not be so accepted for BAS purposes unless there has been full administrative disclosure of all facts and circumstances which prevented prompt confirmation. Since there was no administrative report in that case which explained the reasons for the long delay in issuing confirming orders, we did not accept the written orders as providing a legal basis for payment of BAS.

Section 403 of title 37, United States Code (1970), provides that members of the uniformed services entitled to basic pay are entitled to BAQ unless assigned to adequate Government quarters for themselves and their dependents, if with dependents. Implementing regulations are contained in Part 3 of the Department of Defense Military Pay and Allowances Entitlements Manual. Rule 1 of Table 3-2-3 of the Manual provides that BAQ accrues when a member is assigned to a permanent station if Government quarters are not assigned.

Paragraph 3-6(b) of Army Regulation 210-16 (change 5, November 21, 1972), provides that the installation commander is responsible for determining when available quarters are adequate and suitable for assignment. If he determines that the quarters are not suitable for assignment or unavailable, the individual may be authorized to reside offpost and receive BAQ at the "without dependent" rate. Paragraph 3-6(a) of that regulation provides that enlisted members in grade E-6 (the grade of Sergeant during most of the relevant period), may be authorized to live off post and receive BAQ when the total capacity of the installation's quarters are or will be exceeded; the person is not required to live on post as a result of military necessity; the person desires to live off post; and community housing is available and appropriate. When the commander or his designee determines that all the conditions are met, he may authorize a person to live off post by simply approving the request. Usually at that time a statement of nonavailability of Government quarters is issued by the installation housing office. Where offpost living is authorized, a member will not receive BAQ for any of the period involved until the statement has been issued and processed through the installation finance office.

B-183846

From the foregoing, it is to be observed that, in general, the determination by an installation commander is conclusive as to the rights of a member to receive payment of BAQ. While a contemporaneous authorization or certification of nonavailability by proper authority usually is considered the best evidence of the facts, such a contemporaneous certification is not essential when the facts can be discerned and documented from other records.

The record in the present case shows that on February 12, 1973, the member initiated a request to live off post, which request had received approval by all the levels of command, except by the installation commander, which has been reported would have been given but for administrative breakdown both as to chain of command and nonissuance of a contemporary statement of nonavailability of Government quarters. When the oversight was discovered, a statement was issued which reflected that Government quarters were not available to the member during the period February 12, 1973, through September 18, 1974.

Therefore, it is our view that the member is entitled to receive BAQ at the "without dependent" rate for the period February 12, 1973, through September 18, 1974.

With regard to the period December 10, 1972, through February 11, 1973, while the member states that he requested permission to live off post, there is nothing in the file to show that an appropriate written request was made at that time. In the absence of proof that such a request was made by the member and received, but not finally acted upon by appropriate authority, and that Government quarters were not then available, no authority exists for payment of BAQ during that earlier period.

Thomas D. Morris

Comptroller General
of the United States