DECISION

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

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FILE: B-173325 DATE: JUL 3 1975

MATTER OF: Susanne Donnelly - Reconsideration of claim for living quarters allowances

DIGEST: Claimant accompanied her military-member spouse to post in Europe and later secured employment with Department of the Army. After claimant's husband retired from military on disability effective March 1, 1968, she earned 51 percent or more of family income. She thereby qualified for living quarters allowance under provisions for local-hire waiver pursuant to Army Headquarters policy letter of September 25, 1964, since prior DOD Instruction 1418.1, April 17, 1961, is invalid as discriminatory under Frontiero v. Richardson, 411 U.S. 677 (1973), and she has met requirements of policy letter. The disallowance of claim for DOD tuition-free education for claimant's child is not affected. Prior decisions B-173325, October 8 and December 21, 1971, are modified.

This is a reconsideration of our decisions, B-173325, October 8 and December 21, 1971, which sustained the disallowance of the claim of Mrs. Susanne Donnelly, an employee of the Department of the Army stationed in Europe, for a living quarters allowance.

Our reconsideration is prompted by a request from the claimant and the Supreme Court decision in Frontiero v. Richardson, 411 U.S. 677 (1973). That decision struck down as unconstitutional certain portions of 37 U.S.C. §§ 401 and 403 which permitted a serviceman to claim his wife as a dependent, without regard to whether she was in fact dependent on him for any financial support, but denied a servicewoman the privilege to claim her husband as a dependent unless he was in fact dependent upon her for over one-half of his support.

Our prior decisions, cited above, relate the underlying facts of the claim which need not be fully repeated here. For present purposes we note that in 1966, approximately 2 years after Mrs. Donnelly accompanied her husband (a member of the Armed Forces) to Europe, she obtained civilian employment with the Department of the Army. She first applied for a living quarters allowance in 1966; she reapplied for the allowance after her husband retired on disability from military service, effective March 1, 1968, when her earnings

accounted for over 51 percent of the family's income. Her first request was denied because she was termed a dependent of a military member in the area. The second request was denied on the basis of DOD Instruction 1418.1, April 17, 1961, which was in force during the period in question and provided, in pertinent part, that a married woman employed by the Government, who accompanied her husband to a foreign area, was considered his dependent but could qualify for a living quarters allowance if her husband later became "physically or mentally incapable of self-support." The record before us did not show that such a determination was officially made and the fact of her husband's disability retirement was not considered controlling on this issue.

Since Mrs. Donnelly was a local hire and there was no provision for waiving the requirement for recruitment outside the area merely because the dependent was employed by the Government, there is no basis for granting the allowance in 1966. However, in view of Frontiero we must examine the propriety of the waiver provisions of DOD Instruction 1418.1 and their application to Mrs. Donnelly's request for the allowance at the time of her husband's retirement. The cited instruction did not have a parallel provision applicable if a "dependent" husband accompanied his wife to a foreign area and the wife subsequently became incapable of self support. Since under Frontiero, regulations must be applied without sex discrimination, we conclude that the distinction made between males and females under the cited DOD instruction, and relied on by the agency in denying claimant a living quarters allowance after her husband lost the comparable allowance provided to military members, renders that part of the regulation invalid. In this connection decisions of this Office applying Frontiero and relating to analogous allowances for military members have been applied retroactively. See 53 Comp. Gen. 148 (1973) and 53 id. 539 (1974). Inasmuch as no discrimination on the basis of sex may be made and this principle is to be applied retroactively, Mrs. Donnelly's affirmative entitlement to a living quarters allowance after March 1, 1968, must be considered without regard to her sex.

The criteria for basic eligibility for the allowance in 1968 and now require that: (1) the employee's place of residence be fairly attributable to Government employment and (2) the employee was recruited from the United States under conditions whereby return transportation to the United States is provided and after recruitment the employee remained in "substantially continuous employment." The conditions in (2) can be waived by the head of the agency in individual cases of "unusual circumstances." In this connection the Department of Defense established a uniform policy and guidelines for exercising

this waiver authority with respect to employees of its component agencies. DOD Instruction 1418.1, as discussed above, constituted such policy and guidelines. However, since we concluded above that the instruction as applicable in Mrs. Donnelly's case was invalid, the question arises as to what waiver policy was in effect and proper for application in her case.

The record includes a letter issued on November 25, 1964, by Headquarters, United States Army, Europe, which deals with the subject of living quarters allowances for locally hired dependents who lose dependency status as to their sponsor, the principal income producer for the family. This letter constitutes a policy statement to the effect that loss of dependency status is an "unusual circumstance" justifying waiver of criteria (2), discussed above, relating to eligibility for the living quarters allowance. An example included in the November 1964 letter clearly indicates that if a former dependent of a military member later produces 51 percent or more of the family's income, that "dependent," though locally hired, is given a waiver and becomes entitled to the living quarters allowance.

The November 25, 1964, letter constitutes the waiver policy applicable to Mrs. Donnelly. Since Mrs. Donnelly alleges, and the agency has not denied, that she did in fact earn 51 percent or more of the family's income after March 1, 1968, she is entitled to payment of a living quarters allowance beginning on that date and continuing until her eligibility otherwise terminated by operation of law or regulation. Accordingly, our decisions of October 8 and December 21, 1971, are modified. The claim is being hereby remanded to our Transportation and Claims Division for further development and computation of the appropriate amount which will be paid to Mrs. Donnelly in due course.

For the reasons discussed in our decision, B-173325, October 8, 1971, the previous disallowance of Mrs. Donnelly's claim for tuition-free, space-required education for her son in Department of Defense dependents schools during the 1968-69 school year is not affected by this decision.

R.F.KELLER
Deputy Comptroller General
of the United States