

DECISION

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

FILE: B-178490

DATE: JUL 2 1975

MATTER OF: Mr. J. Elmer Dunham - Separate Maintenance Allowance

DIGEST: AID employee was denied Separate Maintenance Allowance by GAO for wife for tour of duty in Vietnam because of "breach in domestic relations," even though no legal action had been instituted for divorce or formal legal separation. Regulations (Standardized Regulations (Government Civilians, Foreign Areas)) have been changed to clarify definition of "breach in domestic relations" to require legal action or formal separation. As clarification rather than revision, regulation may be applied retroactively. Therefore, B-147034, September 18, 1961, is overruled and will no longer be followed. Additionally, B-178490, May 6, 1974, is modified. Employee may be paid SMA for wife for entire tour under clarified definition.

This matter is before us for reconsideration of our decision B-178490, May 6, 1974, which, in effect, partially denied Mr. J. Elmer Dunham's claim for Separate Maintenance Allowance (SMA) while he was stationed in Vietnam with the Agency for International Development (AID), Department of State.

Mr. Dunham's claim was originally submitted to us in December 1973, as a request for an advance decision from AID. At that time there was an outstanding Bill for Collection against Mr. Dunham in the amount of \$8,116.33. The issues involved related to Mr. Dunham's right to receive SMA for his wife and two minor children while in Vietnam, and his right to be reimbursed for Family Visitation Travel expenses. The relevant facts and law are set forth, in detail, in B-178490, *supra*, and they will be repeated here only where necessary for clarity. Of the issues raised in the original submission, the only one that is still being contested by Mr. Dunham is whether or not his wife may be included in computing his SMA for his entire tour in Vietnam.

Following our May 6, 1974 decision, a revised Bill for Collection was issued on July 16, 1974, showing that Mr. Dunham still owed AID \$106.94. In that Bill for Collection, Mrs. Dunham was included in computing the SMA from the time of Mr. Dunham's arrival in Vietnam, October 19, 1968, to the beginning of his home leave trip, July 25, 1969. By letter of August 15, 1974, Mr. Dunham

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protested the failure to credit him with SMA for his wife for his entire tour in Vietnam (which ended November 25, 1970), and suggested that his claim for increased SMA, which he alleged to be in the amount of \$2,917.43, be offset against a claim asserted against him for overpayment of salary and post differential in the amount of \$2,940.13. By letter of September 9, 1974, from John W. Finn, Chief, Central Accounting Division, Office of Financial Management, AID, Mr. Dunham was advised that his August 15, 1974 letter would be treated as a request for reconsideration of B-178490, May 6, 1974, and would be forwarded to GAO. He was also asked how he calculated the amount of SMA he was claiming. After further correspondence between this Office and Mr. Dunham and informal conversations between this Office and AID, it was ascertained that Mr. Dunham had included a supplemental SMA in the form of a 20 percent additional cost of living allowance, in his calculations, that had been in effect for Vietnam from December 5, 1965, until April 18, 1970. AID made further inquiries and determined that a second revised Bill for Collection should be issued. That was done on December 20, 1974, adding the supplemental SMA and showing a credit in favor of Mr. Dunham in the amount of \$718.04. No further action has been taken regarding the Bill for Collection of the overpayment of salary and post differential. That Bill is not before us for consideration, and will not be further discussed.

In our prior decision in this case, we applied the holding in B-147034, September 18, 1961, to the effect that a determination of whether or not a breach in domestic relations exists is a factual determination to be made on a case-by-case basis, and that it is not limited to cases where legal action had been instituted or where a formal separation is in effect. At the time of Mr. Dunham's service in Vietnam, the applicable statutory regulation, Standardized Regulations (Government Civilians, Foreign Areas) § 262.31c, simply stated that SMA could not be paid when there was a "breach in domestic relations." That section was revised by TL:SR-239, October 28, 1973, so that it now provides, in pertinent part, that:

"262.31 Separate Maintenance for Reasons not
Contemplated in Basic Law

"A separate maintenance allowance shall not be granted where conditions in section 262.1 are not met, including (but not limited to)

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situations where the separation is for the following or other personal reasons:

* * * * *

"c. a voluntary legal separation between an employee and spouse; or a separation occurring through a divorce decree, whether limited interlocutory or final. (A voluntary legal separation is deemed to exist at such time as either the employee or spouse shall have initiated legal action affecting the status of the marriage such as a separate maintenance action or separation from bed and board between the parties short of application of divorce. A separate maintenance action is an action against a spouse for permanent support and maintenance for the moving spouse and for support, maintenance and education of minor children.)"

The explanation contained in the accompanying Transmittal Letter stated that:

"Section 262.31(c) is revised to provide a more complete description of marital breach either by voluntary separation or by divorce in connection with non-eligibility for separate maintenance allowance."

From the statement contained in the Transmittal Letter, it appears that the new language in Standardized Regulations (Government Civilians, Foreign Areas) 263.31c, is not a revision of the regulations, but is clarification of the definition of "breach in domestic relations." As a clarification rather than a revision, the change in the language of the regulation may be applied retroactively. In light of this clarification, we have reviewed our holding B-147034, supra, and the entire record in the case at hand. The holding in B-147034, supra, is hereby overruled and will no longer be followed. Additionally, to the extent that it is inconsistent with this decision, B-178490, May 6, 1974, is modified.

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Applying the clarified language of the regulations to the record in Mr. Dunham's case, we find that there is no evidence that any legal action between Mr. Dunham and his wife was ever actually instituted. Mrs. Dunham, in her July 1970, statement to the agency investigators indicated that she had instituted legal action. However, it appears that no action was actually filed. There is no evidence in the record that a formal separation agreement was ever reached between Mr. and Mrs. Dunham. Therefore, under the clarified regulation, there was no "breach in domestic relations" between Mr. and Mrs. Dunham while Mr. Dunham was stationed in Vietnam and Mr. Dunham should be granted SMA to include his wife, for his entire tour in Vietnam.

Accordingly, Mr. Dunham's SMA should be recomputed to include Mrs. Dunham for his entire tour in Vietnam. Because of the other outstanding Bill for Collection against Mr. Dunham, this matter will not be referred to our Transportation and Claims Division for the issuance of a settlement. Instead, when Mr. Dunham's SMA has been recomputed, it should be set off against the outstanding Bill for Collection, and payment should be made or a Bill for Collection should be issued, as appropriate.

R.F.KELLER

Deputy } Comptroller General
of the United States