



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sergeant Gerald W. Emery
File: B-248213
Date: September 9, 1992

DIGEST

Member whose with-dependent Basic Allowance for Quarters was terminated by the Air Force on a show of clear evidence that member, contrary to previous determination by a court of law, was not in fact the father of a child born out of wedlock, continues to be subject to garnishment of pay for child support until court order requiring garnishment is vacated.

DECISION

A question has been presented to us concerning whether SGT Gerald W. Emery whose pay was being garnished for child support is entitled to Basic Allowance for Quarters at the with-dependent rate (BAQ/W) for the period from October 21 to December 31, 1991.¹ For the following reasons he is not entitled to BAQ/W.

SGT Emery asserts that he is due BAQ/W for the approximately 2 months in question, because, pursuant to a court order, the Air Force garnished his pay for child support during that period. In fact, the garnishment had begun on September 1, 1991, and until October 21, 1991, SGT Emery received BAQ/W. Only after SGT Emery presented the results of a genetic test, on the basis of which the paternity judgment was ultimately reversed, did the Air Force terminate BAQ/W, though it continued to obey the court order to garnish SGT Emery's pay, as required by 42 U.S.C. § 659, until that order was vacated. Essentially, the Air Force, in administering BAQ, acted more quickly than the court, in rescinding the paternity order. This resulted in an anomalous situation in which the Air Force could deny

¹The question was presented by the Chief, Military Pay, Headquarters 5th Wing (SAC), Minot Air Force Base, North Dakota.

SGT Emery's paternity for purposes of BAQ but could not deny his paternity for purposes of child support garnishment. The Defense Finance and Accounting Service (DFAS) affirmed the decision of the Finance Office to terminate BAQ/W as of October 21, 1991. We affirm the decision of DFAS.

BACKGROUND

Default judgment was entered against SGT Emery in a court proceeding in Saskatchewan, Canada. The court determined SGT Emery to be the father of Alexander Dieter and ordered him to pay child support. Enforcement was successfully sought in a North Dakota court, which issued an order to the Commander, Air Force Accounting & Finance, on August 13, 1991 that \$300 per month be garnished from SGT Emery's pay "until further notice." As required under 42 U.S.C. § 659 and 32 C.F.R. § 818.20, the Air Force complied with the court order by garnishing SGT Emery's pay from September 1, 1991. Also, as of that date, the Air Force paid SGT Emery BAQ/W.

SGT Emery contested the Canadian court's determination of paternity, and in October 1991, the results of a blood test indicated that, in fact, SGT Emery was not the father of Alexander Dieter. Based on this evidence, the Air Force discontinued SGT Emery's BAQ/W. However, as the court order had yet to be reversed, the Air Force continued to garnish SGT Emery's pay. Eventually, on January 15, 1992, the court vacated its order.²

DISCUSSION

Two transactions are at issue in this case. In the first transaction, the pay garnishment, the Air Force was bound to follow the instructions of the North Dakota court. 42 U.S.C. § 659. In the second transaction, the BAQ disbursement, the Air Force could make its own determination. According to 37 U.S.C. § 403(h), "[t]he Secretary concerned, or his designee, may make any determination necessary to administer this section [i.e., BAQ] with regard to enlisted members, including determinations of dependency and relationship, and may, when warranted by the circumstances, reconsider and change or modify any such determination." The decision of the Secretary or his designee under this provision is final. Matter of Ronald G. Hull, 62 Comp. Gen. 666, 670 (1983).

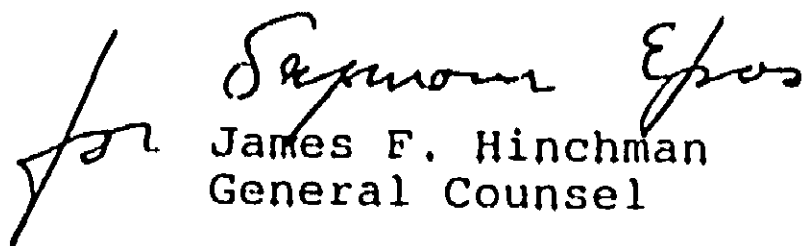
²The North Dakota (Ward County) court issued a Notice to Income Payer to Discontinue Income Withholding Order, dated January 15, 1992. The Air Force processed this notice on January 24, 1992, in time to terminate garnishment of pay covering the month of January 1992.

Moreover, under 37 U.S.C. § 401, dependency of illegitimate children is subject to "criteria prescribed in regulations by the Secretary concerned." Thus the Air Force enjoyed a degree of discretion in administering BAQ which it did not enjoy in garnishing SGT Emery's pay.

Garnishment of a member's pay is controlled by 42 U.S.C. § 659. That act "removes the bar of sovereign immunity that previously prevented garnishment," Matter of Robert A. Bailey, 56 Comp. Gen. 592, 594 (1977). With regard to garnishment for child support or alimony, the federal government is no different than a private employer, Bailey at 594. "Thus, where an order appears regular on its face, the Government must garnish wages to make payment, and in fact, may be held liable if it fails to do so." Matter of Harry E. Mathews, 61 Comp. Gen. 229, 230 (1982). Moreover, even if a garnishment order is later reversed, if "it was valid at the time payment was being made under it . . . the Government had a duty to comply with it until the court modified it." Mathews at 231. In Mathews, the Comptroller General held that the Government is not liable for reimbursement of pay garnished pursuant to an order which was later overturned. See also 42 U.S.C. § 659 (f). Applied to the present case, even though a paternity judgment was entered against Sgt. Emery in default, and though he was later able convincingly to rebut the conclusion of the Canadian court, the Air Force was correct to garnish his pay until the paternity judgment was reversed.

The decision whether to pay BAQ/W did not depend on the judgment of the court. It was an autonomous, internal Air Force decision made according to "criteria prescribed in regulations by the Secretary concerned." 37 U.S.C. § 401(b)(1)(C). The relevant regulation in this case states that "a member who claims BAQ on behalf of an illegitimate child must show proof of parentage." Furthermore, "[i]n cases involving foreign court decrees," such as the present case, "parentage must also be admitted in writing and under oath." Department of Defense Military Pay and Allowances Entitlements Manual § 30238(a). Far from admitting parentage, Sgt. Emery did everything possible to deny it. No regulation requires the Air Force, for purposes of BAQ, to ignore the convincing evidence which Sgt. Emery presented to show that he is not the father of Alexander Dieter. This is so even though the Air Force cannot act on that evidence for purposes of terminating pay garnishment. Indeed, Air Force regulations stipulate that "BAQ termination at the with-dependents rate does not relieve a member of responsibility for providing dependent support." 32 C.F.R. § 818.14 (a).

Accordingly, the DFAS decision to terminate BAQ/W for the period from October 21, 1991 to December 31, 1991 is sustained.


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General Counsel