



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Senior Airman Calvin S. Watford, Jr.—Claim for Basic Allowance for Quarters

File: B-270432

Date: June 24, 1996

DIGEST

An Air Force member is married to another member, and they have a child. The member's spouse receives Basic Allowance for Quarters (BAQ) at the with-dependent rate, and the member receives BAQ at the without-dependent rate. The member has been awarded legal custody of his brother by a court, and the brother is therefore now his dependent. The member's claim for BAQ at the with-dependent rate is denied because the brother joins the couple's child as a single class of dependents who live in the family household. Only one of the members may receive BAQ at the with-dependent rate, but they may decide which one will do so.

DECISION

This is in response to a request for an advance decision regarding the claim of Senior Airman Calvin S. Watford, Jr., for Basic Allowance for Quarters (BAQ) pursuant to his guardianship of his brother, who is a minor. His claim is denied.

Senior Airman Watford is married to another service member, and they have one child. His spouse receives BAQ at the with-dependent rate on behalf of that child, and Senior Airman Watford receives BAQ at the without-dependent rate. In February 1995 a Virginia state court made Senior Airman Watford the guardian of his 14-year old brother, who now lives with Senior Airman Watford and his family.¹ Senior Airman Watford claims BAQ at the with-dependent rate on account of his brother.

The Defense Finance and Accounting Service (DFAS) submitted the claim to us as a doubtful claim. Since Senior Airman Watford is married to another member who is

¹The Secretary of the Air Force has apparently determined under 37 U.S.C. § 403(h) that Senior Airman Watford's brother is his dependent. That determination is final and not subject to review by any accounting officer.

receiving BAQ at the with-dependent rate because of their child, DFAS asks whether his brother joins the child in a common class of dependents, in which case Senior Airman Watford is not entitled to the with-dependent rate for his brother.²

Under 37 U.S.C. § 403, a member who receives basic pay is generally entitled to BAQ, unless assigned to appropriate government quarters adequate for himself and his dependents. BAQ is paid either at the with-dependent or without-dependent rate. "Dependent" is defined in 37 U.S.C. § 401, and can include the member's spouse, child, parent, or ward (an unmarried person placed in the legal custody of the member by a court), if that person meets the requirements of the statute. Wards were included among dependents with the enactment of Pub. L. No. 103-160, § 631, 107 Stat. 1683-1684 (1993).

The primary purpose of Congress in enacting § 631, was to provide medical care to minors who were in the care of members. The legislative history of § 631 reveals that in 1991 Congress recognized that members and retired members were taking legal custody of minors for humanitarian reasons and were unable to obtain military medical care for them because the minors did not meet the definition of "dependent" in 37 U.S.C. § 401, as it existed at that time. Congress ordered the Secretary of Defense to submit a report on the feasibility of providing military medical care to such minors, and § 631 was enacted in response to the report.³ Wards apparently were not placed in the definitional category with children because some wards are not related to their guardians and because the definition of "children" is already complex, because it includes legitimate and illegitimate natural children, stepchildren, and adopted children.

A member who is not living in government quarters and who has one dependent (also not in government quarters) generally receives BAQ at the with-dependent rate. Adding another dependent, even from another category of dependents, does not necessarily increase his entitlement—e.g., a member who has a wife (category 1 of dependents in 37 U.S.C. § 401) who is not a member and receives BAQ at the with-dependent rate does not gain entitlement to any more BAQ when he acquires one or more children (category 2 of dependents).

²DFAS has informally advised us that it is their view that the ward joins the Watfords' child in a common class of dependents and that Senior Airman Watford is therefore not entitled to BAQ at the with-dependent rate on account of his ward. DFAS administers the relevant regulation, the Department of Defense Military Pay and Allowances Entitlements Manual; deference is generally accorded to the interpretation of a regulation made by the agency which administers it.

³See Pub. L. No. 102-190, § 732, 105 Stat. 1407-1408 (1991); and H.R. Rep. No. 200, 103d Cong. 1st Sess. 295 (1993) reprinted in 1993 U.S.C.C.A.N. 2013, 2082.

When two service members are married to each other and are not provided appropriate government quarters, each is entitled to BAQ at the without-dependent rate, unless one or both have dependents. See generally the Department of Defense Military Pay and Allowances Entitlements Manual, part 3, chapter 2, section C. If each of them has children from an earlier marriage who live elsewhere and the members live together as a family unit in non-government quarters, one of the members is entitled to BAQ at the with-dependent rate and one at the without-dependent rate. Petty Officer First Class Earl Duffy, USNR, and Petty Officer Carole Duffy, USNR, B-217665, Aug. 23, 1985. Likewise, when one of the members has a child from an earlier marriage and they have a child of their marriage, one of them is entitled to BAQ at the with-dependent rate and one at the without-dependent rate. Warrant Officer Leola F. Cruise, B-180328, Oct. 21, 1974. The common factor in these cases is that the dependent children all form one class of dependents, and all could reside with the members but for reasons of a personal nature. Id.; and Pay Manual, paragraph 30232(b).

The present situation is analogous to that in Warrant Officer Leola F. Cruise, supra. The child of the Watfords' marriage and Senior Airman Watford's brother, who is now in effect his adopted son, form one class of dependent children who reside together. The Watfords may choose which spouse is to receive BAQ at the with-dependent rate and which at the without-dependent rate. Payment of BAQ at the with-dependent rate to both would constitute an unwarranted gratuity unrelated to their housing needs. Petty Officer First Class Earl Duffy, USNR, and Petty Officer Carole Duffy, USNR, supra.⁴

Senior Airman Watford's claim for BAQ at the with-dependent rate is therefore denied.

/s/ Seymour Efros
for Robert P. Murphy
General Counsel

⁴If the Watfords had no children when Senior Airman Watford was granted custody of his brother, it would be appropriate for one of them to begin receiving BAQ at the with-dependent rate. In the present situation Senior Airman Watford's spouse was already receiving BAQ at the with-dependent rate for their child. Adding children to a military family does not increase BAQ at the with-dependent rate. Since Senior Airman Watford's brother is in effect an adopted child of the family, it is our view that additional BAQ is not payable in this situation.