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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-187241 (MLM)

Claim for Reimbursement of Transportation Expenses

JUL 1 1980

Mr. Roy C. Kesner
Department of Transportation
Federal Aviation Administration
Pacific Asia Region
P.O. Box 50109
Honolulu, Hawaii 96850

Dear Mr. Kesner:

Reference is made to your letter dated August 30, 1979, requesting guidance and reconsideration in view of our decision John C. Raynor, B-187241, July 5, 1977.

In view of the statutes relating to our decision-making authority, we will not render a formal decision to you at this time. See 31 U.S.C. §§ 74 and 82d (1976). However, on the basis of the information provided by you, we offer the following comments.

In our decision, John C. Raynor, B-187241, July 5, 1977, we denied Mr. Raynor's claim to reimbursement of transportation expenses for his minor children who accompanied him on tour renewal agreement travel from his post of duty outside the continental United States to his place of residence and return in December, 1975. The issues involved in that case relate to a civilian employee's entitlement to reimbursement of travel expenses for his minor children whose custody under a divorce decree has been placed jointly between the employee and his former spouse.

The Federal Aviation Administration (FAA) legal opinion submitted with your letter contends that a civilian employee stationed overseas is entitled to reimbursement of travel expenses for children who visit the employee for 1 month during the summer pursuant to a divorce decree but who actually reside elsewhere. It is argued that the children of employees so situated are "members of the employee's household" within the meaning of para. 2-1.4d of the Federal Travel Regulations (FTR) (FPMR 101-7 (May 1973)) since the children have all the attributes of a member of the household, i.e., the children were employee's natural children, responsive to employee's



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authority, claimed as tax deductions, and financially supported by the employee, although they were members of his household for only 1 month each year.

Based upon the following discussion it would appear that the factual circumstances described in the legal opinion fail to sufficiently establish an affirmative finding that the children are "members of the parent-employee's household" under 5 U.S.C. § 5728. Under the provisions of section 5728 of title 5, U.S.C., an employee and his immediate family may be eligible for home leave travel at Government expense.

Paragraph 2-1.5h of the implementing regulations contained in the FTR sets forth the eligibility requirements for home leave travel benefits. In addition para. 2-1.4d of the FTR defines "immediate family" in relevant part as follows:

"d. Immediate family.

"(1) Any of the following named members of the employee's household at the time he reports for duty at his permanent duty station or performs authorized or approved overseas tour renewal agreement travel or separation travel:

"(a) Spouse;

"(b) Children of the employee or employee's spouse who are unmarried and under 21 years of age or who, regardless of age, are physically or mentally incapable of self-support (The term 'children' shall include natural offspring; stepchildren; adopted children; and grandchildren, legal minor wards, or other dependent children who are under legal guardianship of the employee or employee's spouse.);"

Under this definition a child of an employee qualifies as a member of the employee's "immediate family" if the child is a "member of the employee's household" at the time the renewal agreement travel is performed. There is no dispute that the term "children" is sufficiently broad to

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include minor children whose custody has been placed jointly on an employee and his former spouse. 52 Comp. Gen. 878 (1973). However, to be considered a member of the employee's household an affirmative finding must be established that the children are residing at the parent-employee's overseas post and not merely engaged in visitation travel to the parent-employee's post while actually residing elsewhere. Ernest F. Gianotti, B-195969, May 15, 1980, 59 Comp. Gen._____.

The term household is not defined in the regulations. Raynor, above. As stated in Raynor, with respect to the term household;

"We have stated that the term is one of uncertain meaning and that persons may be members of the same household even though they are not living under the same roof. See also Crossfield v. Phoenix Insurance Co., 187 A.2d 20 (1962); Mazzillio, Accident & Casualty Insurance Co. of Winterthur, Switzerland, 170 A.2d 800 (1961)."

The meaning of the term "household" was also discussed in our Gianotti decision. This Office found that transportation expenses of a civilian employee's minor children were allowable where the children's custody was equally divided under a divorce decree between the employee and his former spouse. We stated that the period of entitlement begins with the time when the facts and the intent of the parties show that the child became a member of the employee's household. Thus, the actual duration of an individual's residence with the employee plus the intent of the parties to make the individual a "member of the employee's household" are evidentiary facts to be considered. Gianotti, above.

In Raynor, we concluded that:

"* * * [t]he facts in this case show that the children actually reside with their mother approximately 11 months of each year and although the employee has joint custody of said children, rather than a permissive right

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to visit the minors, plans for them to visit at his residence in Juneau for one month during the summer, and is financially responsible for the support of his children, the period of time during which they actually live with the claimant is not of sufficient duration to warrant a determination that the children are in fact 'members of the employee's household.'" (Citations omitted.)

Other decisions of this Office are in accord with this construction of the term "household". In B-189962, November 17, 1976, we held that section 5924 of title 5, United States Code, provides entitlement to travel and education allowances for members of the family residing at the officers post but make no provision for visitation travel to the employee's post by dependent children elsewhere. Likewise, where an employee of the Department of Navy was granted a divorce nearly 6 months before his appointment and his children were residing with and in the custody of his former wife, this Office concluded that the employee was not entitled to reimbursement. His children were not residing with him at the time he reported for duty, therefore, they were not considered members of his "household". B-177761, April 18, 1973.

Your Regional Counsel cites as authority our decision in 48 Comp. Gen. 457 (1969), in support of the rationale that home leave travel under 5 U.S.C. § 5728(a) is a contractually created benefit earned by an employee by reason of having served a tour of duty and entered into a new agreement. This analysis, while appealing, is not the law. As we stated in William J. Elder and Stephen M. Owen, 56 Comp. Gen. 85 (1976):

"* * * the relationship between the Federal Government and its employees is not a simple contractual relationship. Since Federal employees are appointed and serve only in accordance with the applicable statutes and regulations, the ordinary principles of contract law do not apply. Hopkins v. United States, 513 F.2d 1360 (Ct. Cl. 1975)."

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The issue in 48 Comp. Gen. 457, was whether the 17-year old divorced daughter of a civilian employee stationed overseas under a renewal contract may be considered a member of the employees household even though she was not living under the employees' roof at the time his employment contract was renewed or the fact that he had not yet performed home leave travel incident to that contract. This Office concluded that the employee's daughter was a member of his household and consequently entitled to transportation expenses. We stated that his daughter would have joined the employee immediately after her divorce had he not lived overseas and that within 3 days after the employee was apprised of his daughter's divorce he took steps to have her join him.

Similarly, in Gianotti, above, we concluded that a civilian employee stationed in Truk, was entitled to reimbursement of travel expenses for his daughter, Christine, who resided with the employee-parent only during the summer and then went to school in Hawaii. This Office found that his daughter was a member of his household since the record showed that it was the intent of the parties that the child remain in the father's household, even though she was attending school elsewhere. We stated:

"The situation here, where Christine would have been residing with her father but for her attendance at a school away from post, is a good example of our construction of the concept of member of the household of the employee."

Thus, this Office recognizes special circumstances under which an individual is not living under the same roof as the employee but is found to have a "constructive residence" with the employee and to be a member of his household where the record shows that the parties intended that the individual become a "member of the employee's household" within the meaning of section 5728 of title 5, United States Code, and its implementing regulations. See Gianotti, above; George S. Barnard, B-188096, April 6, 1977; 48 Comp. Gen. 457 (1969).

Therefore, based upon the foregoing discussion it would appear that the factual circumstances submitted

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by the Regional Counsel underlying his opinion that minor children who visit the employee stationed at an overseas post for 1 month during the summer pursuant to a divorce decree are "members of the employee's household" under 5 U.S.C. § 5728 are insufficient to establish an affirmative finding that the children are residing with the employee-parent and not merely engaged in "visitation travel" while actually residing elsewhere. Accordingly, it must be noted that the allowability of travel expenses pursuant to 5 U.S.C. § 5728 must be determined by the employing agency based upon the facts of the particular case.

The above information and enclosures should assist you in reaching that determination. This, of course, does not preclude you from forwarding any doubtful claim, regarding a particular employee, to this Office. The claim should be addressed to:

U.S. General Accounting Office
FGMSD - Claims Group
441 G Street, NW.
Washington, D.C. 20548

We also wish to point out that the waiver, by this Office, of any erroneous overpayment of travel and transportation expenses is specifically precluded by statute. 5 U.S.C. § 5584 (1976).

We regret the delay in responding to your request.

Sincerely yours,

Robert L. Higgins

Robert L. Higgins
Assistant General Counsel

Enclosures