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ORAS

DEPARTMENT OF NATIONAL DEFENCE

OFFICE OF THE
JUDGE ADVOCATE GENERAL



CANADA

MINISTÈRE DE LA DÉFENSE NATIONALE

CABINET DU
JUGE-AVOCAT GÉNÉRAL

Memorandum

FILE NUMBER

4 Oct 95

ADDRESSEE

**INTERPRETATION OF MILITARY FOREIGN
SERVICE REGULATIONS - DEPENDENT STATUS**

Ref: E-Mail 27 Sep 95

1. At ref, you requested an opinion as to whether [redacted] could add [redacted] as his dependant for the purpose of the Military Foreign Service Regulations (MFSR). For the reasons set out below, in my opinion, the member cannot add this individual as a dependant.
2. In his memo enclosed at ref, [redacted] indicates that he and [redacted] have been living as a same sex couple since Mar 1993. Further, he states that [redacted] is financially dependent upon him because [redacted] is a student. On this basis, [redacted] argues that exceptional circumstances exist and therefore, [redacted] is a dependant.
3. In attempting to determine whether [redacted] can be considered a dependant of [redacted] the entire scheme of the dependency definitions provided in the MFSRs must be reviewed. The definition of a dependant is found in subsection 1(f) of the MFSRs. The definition of dependant is comprised of three distinct groups of individuals; the lawful spouse of the member, children of the member both below and above the age of 21 and dependent students. In defining the term dependant, TB has specifically dealt with the question of spousal relationships and has chosen not to include ~~common law spouses of~~ same sex spouses as dependants. The "exceptional circumstances" exception cannot be used to widen a class of persons already contemplated by the regulations.
3. Paragraph 1(f)(iii) of the MFSR does provide that, "any person who normally resides with the member at his post and who, in the opinion of the Minister, is dependent upon the member **because of exceptional circumstances**", is a dependant for the purpose of the regulations. Again, this

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exception is included to provide for situations where a class of particular individual has not been contemplated and not to widen a particular class of dependants such as spouses.

4. In light of the above, it is my view that [redacted] cannot derive dependant status as a spouse. The final issue therefore is whether he is a dependant because he is financially dependent on the member by reason of his being a student. The MFSRs specifically deal with the subject of dependent students, who are limited to the unmarried children of the member being less than 21 years of age at the commencement of the school year. I have also reviewed the Treasury Board Foreign Service Directives (FSD) which apply to foreign service employees of the Public Service. In reviewing the definition of dependant in the FSDs, I note that at paragraph 2(j)(iii) there is a provision similar to paragraph 1(f)(iii) of the MFSR. I also note that a "dependent student" is defined as follows:

"dependent student except as provided for in FSD 51.01(d)(ii) means a dependant within the meaning of subsection 2.01(j) (ii) or (iii), who is not residing with the employee because that student is in full-time attendance at an educational institution."

Following from the definition, it is clear that a person must first be a dependant as defined before they can be a dependent student. In this case, [redacted] is not a dependant as defined in the regulations and therefore, he cannot be a dependent student.

4. In summary, ^{the} Treasury Board ~~has specifically defined~~ ^{definition of} the term dependant ^{does not} in such a manner as to exclude "same sex couples". Had they intended to extend the benefits to the class of persons, they could have expanded the definition. In this case therefore, the member cannot extend the spousal class by relying on exceptional circumstances. [redacted] cannot be considered a dependant of [redacted].

5. As a last matter, you indicated at ref that in your view, subparagraph (3)(a)(ii) of QR&O article 209.80 applied. After having reviewed that provision, it is my view that it has no application in the present case since [redacted] is not a "relative by blood, marriage or adoption. Furthermore, terms are often defined differently for the purposes of different regulations. One cannot therefore simply substitute definitions between regulations for the sake of consistency. For this reason, the definition included in the MFSRs must be applied to this situation.

in any event

this should be fine

6. I trust that the above addresses your concerns, but in the event that you wish to discuss this matter further, please do not hesitate to contact me.

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