

LEAVE

Legal Review of Denial of Emergency Leave

This responds to your request for our review of the following issues: (1) is a stillborn child an immediate family member for purposes of emergency leave; (2) does the commander have the discretion to deny emergency leave for the purpose of returning to the continental United States (CONUS) for the burial of a stillborn child; and (3) did the commander properly exercise his discretion in denying the military member emergency leave under such circumstances? Because we answer the second question in the negative, we do not address the third issue.

You advise that the Air Force Aid Society (AFAS) recently assisted an Airman serving an accompanied tour at an OCONUS installation with airfare expenses related to the burial of his stillborn child. According to AFAS, "...the member's commander denied emergency leave because the child was stillborn and it was a personal choice for the member and family to bury the child away from the permanent duty station." AFAS provided a loan in the amount of \$1,700 to the member and his family for the cost of airfare to CONUS. AFAS believes that the stillborn child should be considered an immediate family member for purposes of emergency leave and travel, and that the commander should have approved the emergency leave and transportation request.

For the purposes of emergency leave, an "immediate family member" under AFI 36-3003, *Military Leave Program* (11 May 16), paragraph 4.1.3.1, includes the member's spouse as well as the member or spouse's parents (including stepparents); children (including illegitimate children and stepchildren); brothers and sisters; sole surviving blood relative; and other persons in-locoparentis. We conclude that the member's stillborn child falls within the meaning and intent of the definition of immediate family member under the above guidance.¹

The rules governing emergency leave are set forth in paragraph 4.1.3, its subparagraphs, and Table 4.2. Paragraph 4.1.3.5.1 indicates that unit commanders have the responsibility to "approve or deny emergency leave on a case-by-case basis based on their knowledge of the circumstances." However, this apparent discretion must be considered in light of paragraph 4.1.3.10, which reads, "The following table [Table 4.2] explains when to approve or disapprove emergency leave requests."

Table 4.2 contains 14 rules constructed in an "if-then" format. The predicate for the "if" portion is, "If a member requests emergency leave ..." and the consequence is phrased, "then the unit commander ...". Although some of the rules in this table include discretionary evaluations by the commander even if the predicate is met, Table 4.2, Rule 2, reads as follows when predicate and

¹ The federal statute establishing emergency leave does not specifically list appropriate rationales, while DoDI 1327.06, defines "immediate family" as including, "...[s]ervice member's ... children," without further discussion. A potentially relevant federal statute regarding stillbirth is 38 USC § 1965(10), where a service member's "stillborn child" is defined explicitly as an insurable dependent for the purposes of SGLI, *but see* 5 USC § 8701(d)(1)(B), excluding "a stillborn child" from "family members" for the purposes of federal employee life insurance.

consequent are joined: “If a member requests emergency leave because of a verified death in the member’s or spouse’s immediate family then the unit commander approves the request.”

After evaluating the apparent discretion provided by paragraph 4.1.3.5.1 in combination with the mandatory nature of paragraph 4.1.3.10 and its table, we conclude that paragraph 4.1.3.5.1 is intended to preserve the commander’s discretion in determining the facts of the case, and does not represent discretion in overriding the consequence designated by the table once those facts, and therefore the appropriate rule, are determined. This conclusion is reinforced by the inclusion of broad predicates in Table 4.2, such as “If a member requests emergency leave because a severe or unusual hardship may result from failure to return home the unit commander approves the request,” which provide significant scope for commander discretion.

This conclusion is further reinforced by the fact that paragraph 4.1.3.5.1 contains a single injunction for the commander to “approve or deny” emergency leave on a case-by-case basis. Table 4.2 contains a number of rules which instruct the commander to deny emergency leave. For example, Rule 11 indicates that if a member requests emergency leave to “... help harvest crops or manage other business the unit commander denies emergency leave.” It seems unlikely that the commander possesses discretion to grant emergency leave in circumstances otherwise plainly prohibited, which would parallel an absence of discretion when the rules plainly instruct the commander to approve such leave.

Of course, the commander retains the general discretion provided by AFI 36-3003, paragraph 3.1.2, which notes, “Leave is a right; however, unit commanders can deny leave due to military necessity or when in the best interests of the Air Force.” However, this does not appear to match the rationale of the commander as provided by AFAS: “...the member’s commander denied emergency leave because the child was stillborn and it was a personal choice for the member and family to bury the child away from the permanent duty station.” Additionally, when considering the needs of the Air Force, it may be worthwhile to note that although “[a]uthorized transportation expenses are chargeable” to the member’s unit’s TDY funds, both DoDI 1327.06 and AFI 36-3003 specifically prohibit denial of emergency leave because of inadequacy of unit funds.²

Rather than reflecting military necessity, the commander in the instant case appears to have made a determination either (1) that the stillborn child was not a member of the immediate family of the member, or (2) that the event was not appropriate for emergency leave despite falling squarely under Rule 2.³ Because we conclude that the applicant’s stillborn child was properly a member of his immediate family, we also conclude that under paragraph 4.1.3.10, Table 4.2, Rule 2, the commander lacked discretion to deny emergency leave barring a supervening finding of military necessity or the needs of the Air Force under paragraph 3.1.2. Therefore, the application should have properly been approved.

The AFAS correctly notes that if the rules had been properly applied, the member and dependents would have been eligible for government funded travel under AFI 36-3003, paragraph 4.1.3.9 and its subparagraphs.

² DoDI 1327.06, Enclosure 2, Section 1(j)(3)(c) and AFI 36-3003, paragraph 4.1.3.5.7.

³ That the decision of the member and spouse to bury their stillborn child outside Hawaii was a “personal choice” rather than an “emergency.”

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This opinion rescinds and supersedes OpJAGAF 2006/36, 30 August 2006.