

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410

NOV 25 1985

OFFICE OF THE GENERAL COUNSEL

Ms. M. Ayres Gardner
Georgia Legal Services Program
133 Luckie Street, 8th Floor
Atlanta, Georgia 30303

Dear Ms. Gardner:

Re: Request for Advisory Opinion on the Operation of 24 C.F.R.
§913.106(b)(8)

Your letter of October 22, 1985 requested a clarification of the subject regulation.

You represent a tenant of the Housing Authority of Douglas, Georgia (PHA) who is married to a man who is in the Armed Forces. They are and have been estranged for eight years and have not lived together during that time. She receives a monthly allotment of \$250 by virtue of his military service. She has lived in a housing project of the PHA for seven years. He is not now and never has been on the lease. Our response is premised on the accuracy of the stated facts but we have not made any investigation as to their accuracy. Any application of the opinion stated herein would require a determination of the actual facts of a particular case.

The tenant reported and the PHA considered the amount of the allotment as part of the tenant's family income. However, upon publication of the subject regulation and our legal opinion of February 7, 1985, which stated that the term "other person" in Section 913.106(b)(8) was ambiguous but clearly did not include a divorced spouse, the PHA decided that this Section required that all income of the tenant's spouse must be included in family income. This provision of the regulations was amended on September 27, 1985 to change "other person" to "other Family member" and the preamble to the regulation stated that the intent was to include all income of an absent family member who is in the military service, such as the son of the head of the family, where the dependents of such son are living in the unit. The preamble further stated: "the pay of an absent service member is not included in the family's annual income, even if his children do live in the household, if the service member is not a family member (such as a divorced father). In the latter case, of course, to the extent the former husband provides support for the household, these payments would be included in the family's annual income."

Section 913.106(b)(8), as amended, provides: "Annual Income includes, but is not limited to: . . . (8) All regular pay, special pay and allowances of a member of the Armed Services (whether or not living in the dwelling) who is head of the Family, spouse, or other Family member whose dependents are residing in the unit"

The "divorced father" is perhaps the clearest case. Because the divorced father is not living with the family, he is not "head of the Family, spouse or other Family member." Therefore, even though his dependents (children) are residing in the unit, his entire pay is not to be included in family income. An estranged husband is clearly not "head of the Family" nor an "other family member" under the factual circumstances you have set forth. But it would seem that an estranged husband is still a "spouse" in the common understanding of a husband or wife.

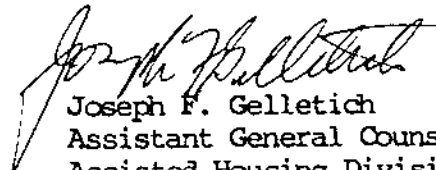
However, Section 913.106(a), which states the general rule to which Subsection (b) is appended, does not require that the income of a spouse be included in all circumstances. Annual income is the "anticipated income from all sources received by the Family head and spouse (even if temporarily absent)." The parenthetical clearly permits exclusion of the income of a spouse who is permanently absent. This is the general rule and the only rule on this point for spouses who are not members of the Armed Forces. Section 913.106(b)(8) is the rule for members of the Armed Forces and because it may be expected that they will be absent for long periods and remain family members, the parenthetical emphasis is different: "(whether or not living in the dwelling)." Notwithstanding this emphasis, we do not believe that this provision overrides the general rule stated in Section 913.106(a) and where it can be shown that a spouse who is a member of the Armed Forces is permanently absent this provision would permit the exclusion of the spouse's income.

We conclude that where a PHA after examination of the relevant facts determines that a spouse is permanently absent, his or her income may be excluded from family income.

This may be a difficult determination to make, especially in the case of a member of the Armed Forces. The factors you mention are certainly among those to be considered: that the period of separation has been prolonged, that the member of the Armed Forces has never been a resident in the unit or on the lease, and that there is no basis for concluding that they are not totally estranged and fully separated. The PHA may also request a copy of the tenant's income tax form to ascertain whether the tenant and spouse file separate income tax forms and that the tenant, and presumably not the member of the Armed Forces, claims the children as dependents. The circumstances under which the tenant receives or is entitled to receive an allotment from the Armed Forces may also be relevant. However, even where the allotment is made to the tenant as the wife of a member of the Armed Forces this merely establishes the existence of a marriage relationship, i.e., they are husband

and wife, and does not address the question of whether a spouse is temporarily or permanently absent. While the decision may be difficult, the regulations do give the PHA the discretion to exclude the income of a spouse, even if the spouse is in the Armed Forces, where the PHA is satisfied that the spouse is permanently absent.

Sincerely,



Joseph F. Gelletich
Assistant General Counsel
Assisted Housing Division