

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2023-03163

XXXXXXXXXXXX

**COUNSEL:** XXXXXXXXXXXX

**HEARING REQUESTED:** NO

### APPLICANT'S REQUEST

His official military record be amended to waive or remit the current debt owed associated with the Defense Finance and Accounting Service (DFAS), or in the alternative, waive the total debt except for the amount owed based on dependent pay.

### APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contended the debt of \$209,863.94 alleged by DFAS to be overpayment of housing allowance from 15 Feb 10 to 8 Nov 17 is an injustice. The applicant disputes the amount deemed owed and payable. He has suffered significant harm economically and mentally from the debt he is accused of owing. DFAS is seeking to be unjustly enriched at the cost of the applicant, seeking more money than what he received for his Basic Allowance for Housing (BAH). DFAS is also seeking to punish the applicant with regulations that were not even published at the time of his adjudication. The applicant is already unable to seek many employment opportunities as a result of his discharge. Adding a debt of almost a quarter of a million dollars has already affected him economically and mentally and will continue to do so. Moreover, if DFAS continues to seek this exorbitant amount of money, the applicant would be faced with increased odds of homelessness.

During Dec 21, he received correspondence from DFAS alleging he owes a debt of \$209,863.94 for overpayment of BAH from 15 Feb 10 to 8 Nov 17. This is more than he received for claiming a dependent, and DFAS is seeking all money, including the amount he rated from housing.

He joined the Air Force on 25 Jul 06 and married soon after. Due to his mother's cancer diagnosis, he requested a humanitarian assignment. During this time, he and his wife decided to end their relationship and get a divorce. The divorce was finalized in Feb 10, and he received a divorce decree. Within one week of receiving the divorce decree, he brought it to be processed, was assured this would be taken care of, and did not think twice about it. The applicant received notification he would be assigned to **Work-Product** Germany and extended his enlistment for 24 months to accept the assignment; however, this assignment was cancelled due to personnel structuring. Two years later, he received orders to **Work-Product** (AB), Japan. When he received his orders, he noticed his divorce was never run in the system and his ex-wife was listed as his spouse. He panicked and did not know what to do as he thought the issue was resolved and he was divorced for four years at that point. He went to his supervisor who advised he go to the Military Personnel Flight to correct the issue. But out of fear, he did not report the discrepancy, and marked that his spouse would not be accompanying him to **Work-Product**.

On 31 Jul 17, he departed **Work-Product** for terminal leave and returned home to his family. Prior to separating, he was notified by the Office of Special Investigations (OSI) that he was under investigation and was to report to **Work-Product** within 10 days. On 15 Feb 18, he agreed to a pre-trial agreement to plead guilty to receiving payments he was not entitled to, stipulate to facts, and pay restitution in the amount of \$17,000. He received a special court-martial and pled guilty to

violating Articles 92, 107, and 121 [of the Uniform Code of Military Justice (UCMJ)]. He was reduced to E-1 (airman basic), confined for 240 days, and separated with a bad conduct discharge.

DFAS calculated the payment owed, based on the Tainted Claim Policy, as \$203,866.92, quoting Air Force Manual (AFMAN) 65-116, Vol 1, *Defense Joint Military Pay System Active Component (DJMS-AC) Financial Management Flight (FMF) Procedures*, and requiring the applicant to repay all BAH received after the date of his divorce, including BAH to which he was entitled. However, the referenced AFMAN was pending review and had not been published at the time it was applied. The applicant was not charged or convicted of submitting any tainted claim until 2014, but the debt seeks to include payments from as far back as 2010. In the stipulation of facts in his case he agreed that he improperly received \$72,577.77 during the charged timeframe and \$11,590.29 of that was outside the statute of limitations. However, he did not actually stipulate to owing the \$203,866.92 and this amount was not part of his sentence. He received a sentence from his court-martial and that has satisfied justice. He paid back \$17,000 in restitution, received a bad conduct discharge, was reduced to E-1, and received 240 days confinement. To force the applicant to pay over \$200,000 to the government is not only extreme but will put him on the brink of homelessness. Further, the policy was not published for dissemination, and he was not put on notice.

DFAS is now seeking an unjust enrichment at the expense of the applicant. Unjust enrichment occurs when one party confers a benefit upon another party without the first party receiving the proper restitution required by law. One is considered to have been unjustly enriched when he has benefitted at another's expense. The elements of an unjust enrichment claim are: (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. DFAS is seeking not only the additional money for claiming a dependent, but all money, including that paid as a single airman. He should be afforded a second opportunity at life. The applicant never sought a lavish lifestyle, instead he unintentionally received the payment and later did so out of fear.

Any statute that punishes a person from an act that was done previous to the statute being enacted into law is prohibited by the ex post facto clause of the constitution. The *Beazell v. Ohio* case stated it is settled, by decisions of the Supreme Court so well known that their citation may be dispensed with, that any statute which punishes as a crime or an act previously committed that was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

The applicant is already at a disadvantage when seeking gainful employment due to his bad conduct discharge, preventing him from obtaining many positions, including public positions from the federal to the local level. He is also barred from Veterans Administration benefits. The stigma of his bad conduct discharge puts him at risk for homelessness and unemployment.

He successfully fulfilled the \$17,000 in restitution. For DFAS to enforce a debt of over \$200,000 is excessive, outlandish, and unconscionable. The tainted claim policy was not published for dissemination when the applicant incurred his debt, thus it was utilized in an ex post facto manner. He was scared when he learned his divorce was not run in the Air Force system and has paid a great price in his life. To insist he pay over \$200,000 to DFAS would only further harm him and his ability to live his life, and unjustly enrich DFAS. He has and continues to deeply apologize for all harmed by his poor decision making; however, he respectfully requests his debt be extinguished, or reduced to the amount he received for a dependent.

The applicant's complete submission is at Exhibit A.

## STATEMENT OF FACTS

The applicant is a former Air Force airman basic (E-1).

On 30 Jun 14, according to *PDT Arrival Worksheet*, the applicant claimed he was married, and his spouse chose not to accompany him to his assignment.

On 15 Feb 18, an Offer for Pretrial Agreement, provided by the applicant, was signed by the applicant, defense counsel, the Staff Judge Advocate, and approved by the applicant's commander.

On 9 Mar 18, according to Special Court-Martial Order Number XX, dated 16 Apr 18, the applicant was arraigned at **Work-Product**, **Work-Product**, Japan on the following offenses at a court-martial convened:

### Charge I: Article 92 (Guilty)

Specification: Who knew or should have known of his duties at or near **Work-Product**, **Work-Product**, Japan, between on or about 29 Jun 14 and on or about 12 Feb 18, was derelict in the performance of those duties in that he willfully failed to report to the United States Air Force that he was divorced, as it was his duty to do.

### Charge II: Article 107 (Guilty)

Specification 1: Did, at or near **Work-Product**, **Work-Product**, Japan, on or about 30 Jun 14, with intent to deceive, sign an official document, to wit: PDT [*Permanent Duty Travel*] Arrival Worksheet, which document was false in that [NAME] was not then his spouse, and was then known by him to be so false.

Specification 2: Did at or near **Work-Product**, **Work-Product**, Japan, on or about 30 Jun 14, with intent to deceive, sign an official document, to wit: Air Force Form 594 [*Application and Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) or Dependency Redetermination*], which document was false in that [NAME] was not then his spouse, and was then known by him to be so false.

Specification 3: Did at or near **Work-Product**, **Work-Product**, Japan, on or about 27 Jul 17, with intent to deceive, sign an official document, to wit: Air Force Form 594, which document was false in that [NAME] was not then his spouse, and was then known by him to be so false.

### Charge III: Article 121 (Guilty)

Specification 1: Did, at or near **Work-Product**, Massachusetts, between on or about 13 Feb 13 and on or about 28 Jun 14, steal money, military property, of a value more than \$500.00, the property of the United States.

Specification 2: Did, at or near **Work-Product**, **Work-Product**, Japan, between on or about 29 Jun 14 and on or about 12 Feb 18, steal money, military property, of a value more than \$500.00, the property of the United States:

The applicant was sentenced to be reprimanded, to be reduced to the grade of E-1, to be confined for a period of 240 days, and to be discharged from the Air Force with a bad conduct discharge.

On 19 Oct 18, according to the Brief on Behalf of Appellant, provided by the applicant, he filed an appeal with the United States Air Force Court of Criminal Appeals.

On 17 Jan 20, the applicant was furnished a bad conduct discharge, with Narrative Reason for Separation: Court Martial (Other), and credited with 12 years, 11 months, 20 days active service, with lost time for the period 9 Mar 18 through 11 Sep 18.

On 1 Dec 21, according to a DFAS letter, RE: Indebtedness to the United States Government, provided by the applicant, a debt for \$209,863.94 was established for the applicant due to overpayment of variable housing allowance from 15 Feb 10 to 8 Nov 17.

According to DFAS letter, undated, provided by the applicant, his request to waive the \$209,863.94 debt was returned without action, as the applicant disputed the validity of the debt and waivers can only be submitted for debts that the applicant agrees are valid.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisories at Exhibits C and D.

### **AIR FORCE EVALUATION**

AF/JAJI recommends denying the applicant's request to discharge the debt owed.

The applicant committed fraud upon and stole from the United States government by collecting various overseas pay and allowances for eight years based on a married status despite being unmarried. On 9 Mar 18, at a trial by special court-martial, he was found guilty of violating Articles 92, 107, and 121 of the UCMJ. He was sentenced to a reduction to E-1, confinement for 240 days, and a bad-conduct discharge. The applicant does not allege injustice in the court-martial proceedings or any other military justice matter. Rather, he challenges the amount DFAS claims he owes. At the time of trial, DFAS claimed a debt of \$203,866.92.

This office does not opine on the calculation of the applicant's debt and instead defers to DFAS. The advisory is confined to the question of whether the applicant's trial by court-martial limits the amount that DFAS can claim. After careful review, we conclude there is no law or policy that limits DFAS's claim based on the findings and sentence of the court-martial. DFAS's civil claim is independent of the court-martial's criminal justice action, and Applicant was aware of this even at trial. The prosecution's argument to the court referenced the \$203,866.92 debt and stated, "[The debt] is an administrative, a logistical thing outside of this which is . . . a criminal matter, not a civil matter." There is nothing in the record to suggest the government or the court-martial discharged the debt at trial.

The complete advisory opinion is at Exhibit C.

HAF/A1PA recommends partially granting the application. Based on the documentation provided by the applicant and analysis of the facts, there is evidence of an error or injustice. The debt should be reduced to only the with-dependent rate BAH entitlements; the applicant was still entitled to the Overseas Housing Allowance (OHA). Total indebtedness recommended is \$75,781.20 for the falsely claimed with-dependent rate BAH allowance.

Service members stationed overseas and not accompanied by their dependents may be entitled to two different forms of allowances. The first is Family Separation Housing – Overseas (FSH-O), also known as OHA, which allows them to receive an allowance for without-dependent rate housing while away from their family. At the same time, if they meet the criteria, they may receive with-dependent rate BAH for their family who remain stateside.

In accordance with Department of Defense Financial Management Regulation (DoDFMR) Vol 7A, Chapter 26, paragraph 7.0. *Family Separation Housing (FSH) Allowance* (2607):

7.1. *FSH Overview* (260701). FSH is payable to a service member with a dependent for added housing expenses resulting from separation from the dependent. The separation must be caused by a service member's assignment on military or uniform orders to either a PDS OCONUS on an unaccompanied or dependent-restricted tour or a PDS to which concurrent dependent travel has been denied or deferred (see paragraph 10.6.).

7.2.2.1.2. FSH-O is payable for an assignment at a PDS outside the United States. FSH-O is payable in a monthly amount up to, and under the same conditions as, the without-dependent OHA rate applicable to the service member's grade and PDS. OHA rules for determining monthly rent, utility, and recurring maintenance allowance, MIHA, and advances apply to FSH-O.

The applicant was married and received with-dependent rate BAH from Dec 06 to 8 Nov 17. During this time, he also received FSH-O for the time he served overseas. However, the applicant divorced on 15 Feb 10. From that time, he did not properly report the change in his dependency status making him ineligible to receive with-dependent BAH.

In accordance with DoDFMR Vol 7A, Chapter 26:

3.1.2. *No Authority on Dependent's Behalf.* A service member is not authorized a housing allowance for any of the following:

3.1.2.3. A dependent for whom the service member is no longer required to provide support.

3.2.1.1. *Dependent Status Certification.* Upon arrival at a new PDS, each service member authorized a housing allowance for a dependent must recertify the status of the dependent to the Secretary concerned to support a housing allowance on the dependent's behalf. If a service member fails to provide the certification, the housing allowance on the dependent's behalf stops at the end of the month in which the certification is due. A housing allowance at the appropriate partial or without-dependent rate is paid unless the service member is not authorized that allowance for some other reason. A housing allowance at the with-dependent rate is authorized effective the date the service member provided proper certification. The higher rate is not retroactive unless the service member's commander certified that the failure to recertify promptly was for reasons beyond the service member's control.

Upon arrival at **Work-Product**, Japan, on 29 Jun 14, the applicant completed finance in-processing documents certifying his dependent status as "married" and did not provide a divorce decree to update his marital status. He continued to falsify documents and received dual housing allowances for the duration of his assignment until his date of separation. The applicant was not entitled to with-dependent rate BAH from the date of divorce to his date of separation.

In accordance with AFMAN 65-116, Vol 1, Chapter 70, dated 23 Oct 19:

70.20. *Debts Established as a Result of an Office of Special Investigations Report.* When an Office of Special Investigation report indicates a debt should be established, it is the responsibility of the FMF where the member is assigned to ensure that the debt is verified, computed, and established. These actions are normally taken by the organization responsible for the subject matter of the debt. If the member has departed on a PCS move, issue a DD Form 139 (with supporting documentation) to the member's gaining FMF as outlined in chapter 2. If the member has separated, establish the debt and follow procedures outlined in DOD 7000.14-R, Volume 5, chapter 29, and AF 65-114. In all cases, the initiating FMF is to provide a report to DFAS as outlined in DOD 7000.14-R, Volume 5, chapter 28. 70.20.1. *Tainted Claims.* When in receipt of an Air Force Office of Special Investigation's Report of Investigation the entire entitlement paid during the period in question would be posted to the MMPA without benefit of an offset of what the member would have otherwise been due had the fraudulent activity not occurred. Per DoD FMR Vol 5, Chapter 12, once fraud has been reported the base level office cannot certify any of the items for payment if it is resubmitted.

The applicant states the with-dependent rate BAH debt was before the publication of DoD or Air Force Tainted Claim policies; therefore, he should not be held accountable to pay back any of the FSH-O portion. He agrees he is accountable to repay the with-dependent rate BAH. Both DoD and Air Force Tainted Claim policies were implemented on 23 Oct 19. The offense took place between 15 Feb 10 and 8 Nov 17.

The complete advisory opinion is at Exhibit D.

### **APPLICANT'S REVIEW OF AIR FORCE EVALUATION**

The Board sent copies of the advisory opinions to the applicant on 13 Dec 23 for comment (Exhibit E), and the applicant replied on 26 Dec 23. In his response, counsel contended the AF/JAJI advisory provided no further relevant facts or arguments to the case beyond recommending denial of relief. AF/JAJI did not opine on the calculation of the debt and deferred to DFAS. The advisory opinion was confined to whether the applicant's trial by special court-martial limited the amount DFAS could claim, and concluded there is no law or policy that limited DFAS's claim based on the court-martial. The advisory further stated DFAS's civil claim is independent of the court-martial's criminal justice action; therefore, the AF/JAJI advisory opinion recommendation should be ignored in its totality as it provides no argument to this matter.

Counsel agreed with HAF/A1PA that the debt, at a minimum, should be reduced to the more manageable amount of \$75,781.20, and that an error and injustice occurred in this case; however, still requests the Board review the waiver of the debt based on facts specific to the applicant. He further requested DFAS recall the debt from the Treasury and collection agency, remove the penalty that has been imposed on the applicant for the transfer of the debt, and reduce the debt based on what he has paid thus far. The applicant was put in such financial distress and debt that he could not pay it. The debt was transferred to the Treasury and his wages garnished for the last two years. The applicant has paid \$3,166.21 in 2022 and \$7,628.83 in 2023, \$10,795.04 in total, through wage garnishments toward the debt.

The HAF/A1PA advisory opinion states the tainted claims policy was implemented on 23 Oct 19, while the applicant's offense took place prior to this date. Thus, per counsel, the basis of the debt from the beginning has been mishandled by the Air Force and DFAS. Counsel reiterated the impact the debt and bad conduct discharge has had upon the applicant, to include potential for homelessness and unemployment.

Finally, counsel contended the applicant already paid \$17,000 in restitution, \$11,590.29 of the debt was outside the statute of limitations, and the applicant paid \$10,795.04 through wage garnishment. If the Board decides to reduce the debt, counsel requests the Board review the amounts already paid and reduce the debt by those amounts.

The applicant's complete response is at Exhibit F.

### **FINDINGS AND CONCLUSION**

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, to include the counsel's rebuttal, the Board concludes the applicant is the victim of an error or injustice. While the Board notes the recommendation of AF/JAJI, it also recognizes the advisory opinion suggests the debt is a civil matter outside of the

criminal justice action. It addresses whether law or policy limits DFAS's claim and finds there is nothing in the record to suggest the debt was discharged at trial, finally deferring the calculation of the applicant's debt to DFAS. The Board concurs with the rationale and recommendation of HAF/A1PA and finds a preponderance of the evidence substantiates the applicant's contentions in part. Specifically, the applicant has addressed the date the tainted claim policy noted in AFMAN 65-116 Vol 1 went into effect as it relates to the inclusive dates of the actions which resulted in his court-martial which is sufficient to justify granting the applicant's request to reduce his debt to only that amount to which he was not entitled. Per HAF/A1PA advisory, that amount is \$75,781.20, and in his rebuttal, counsel agreed the debt, at a minimum, should be reduced to this more manageable amount. However, for the remainder of the applicant's request, the evidence presented did not demonstrate an error or injustice, and the Board therefore finds no basis to recommend granting that portion of the applicant's request. Therefore, the Board recommends correcting the applicant's records as indicated below.

### **RECOMMENDATION**

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show his debt resulting from overpayment of Basic Allowance for Housing is calculated using the Air Force Manual 65-116, Vol 1, *Defense Joint Military Pay System Active Component (DJMS-AC) Financial Management Flight (FMF) Procedures*, in effect at the time of his overpayment, 15 Feb 10 through 8 Nov 17, and any monies collected by the government toward his debt since its establishment, be applied to the calculation of the debt remaining.

However, regarding the remainder of the applicant's request, the Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the application will only be reconsidered upon receipt of relevant evidence not already considered by the Board.

### **CERTIFICATION**

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2023-03163 in Executive Session on 20 Mar 24:

- , Panel Chair
- , Panel Member
- , Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 23 May 23.
- Exhibit B: Documentary evidence, including relevant excerpts from official records.
- Exhibit C: Advisory Opinion, AF/JAJI, dated 18 Oct 23.
- Exhibit D: Advisory Opinion, HAF/A1PA, w/atchs, dated 13 Dec 23.
- Exhibit E: Notification of Advisory, SAF/MRBC to Counsel, dated 13 Dec 23.
- Exhibit F: Counsel's Response, w/atchs, dated 26 Dec 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

**X**

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