IN THE CASE OF: [redacted]

BOARD DATE: 3 November 2023

DOCKET NUMBER: AR20230002116

COUNSEL FOR THE APPLICANT REQUESTS:

a. This case comes before the Army Board for Correction of Military Records (ABCMR) on a second remand from the U.S. Court of Federal Claims in [redacted], et al., and [redacted], et al., v. United States, case numbers 18-523C and 21-1825C, dated 2 and 6 December 2022. The Court directs the Army Board for Correction of Military Records (ABCMR) as required by the Joint Travel Regulation (JTR), to consider the applicant's request for correction of his records to pay him the correct Basic Allowance for Housing (BAH) entitlements based upon his primary residence at the "with-dependents" rate for his Virginia primary residence. In addition, that he is authorized an Overseas Housing Allowance (OHA) at the "without dependent" rate for his housing while on his assigned Contingency Operation (CONOP), for the duration of the tours, in Wiesbaden, Germany from 26 March 2016 through 30 December 2018.

b. Reinstatement on active duty, effective 1 May 2017, past the age of 62 years old because he was improperly discharged from active duty, after being improperly assessed on active duty.

c. Removal of his General Officer Memorandum of Reprimand (GOMOR) from the Defense Finance and Accounting Services (DFAS) to include the Case Management System. This needs to be expunged.

d. Although his name was removed from titling by the Criminal Investigation Division (CID), his record needs to be expunged from the DCII database and allied CID files. Including the files at CID Wiesbaden, Germany; 3rd MP Group (CID) Hunter Army Airfield, Georgia; and CID Headquarters, Quantico, Virginia.

e. Any adverse action related to this matter in databases maintained by the Office of the Inspector General (OTIG) that have not been removed after the previous Board decision be removed.

f. The Army follow their own evaluation for an Officer Evaluation Report (OER) and have the rater and senior rater fulfill their responsibilities.

g. Direct US Army Europe (USAREUR) to write an end of tour award.

h. If he is reinstated on active duty, per his request, then he should receive a retirement award.

COUNSEL'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- Applicant's Addendum for Requested Relief in Second Remand
- Patriots Law Brief, to include Exhibits 1 through 8
- Document Germany Military Base Gate Entrance Information
- Calendar with Index
- DA Form 2823 (Sworn Statement) from the applicant's wife
- Applicant's Time Line
- Supplemental to Counsel's Original Brief, 10 May 2023

FACTS:

1. The applicant states:

a. At no time did his dependent wife exceed 90 days at his permanent duty station with him during the relevant time of this matter. As evidence, which was previously included in his successful response to the Army Grade Determination Review Board, he provided the gate access records to the post, a calendar, and timeline demonstrating the location of his dependent, during the relevant time. These records are again resubmitted for the Board's consideration.

b. Along with consideration on the dual housing allowances/per diem claim asserted in his attorney's memorandum on behalf of the *Wolfing* Plaintiffs, he wants to reemphasize that his case is a little different. He was involuntarily assessed on Active duty for 4 months (1 January 2017 through 30 April 2017) for the purpose of court-martial which makes his matter somewhat unique.

c. His time from 1 January 2017 to 30 April 2017 would have been on active duty, with no dependent authorization, so in his case, for these 4 months, BAH and FSH-O he believes is authorized. His wife was in [redacted] the entire time.

d. Since he was assessed on active duty on 1 January 2017, his basic active service date should have been adjusted for the Army Program Call to Active Duty. This in turn would have his mandatory retirement date (MRD) recalculated during the service computation step. This was never done.

e. His retirement, originally scheduled for 1 January 2017, was solely based upon

his hitting his MRD and even though the wording is voluntary, it was never voluntary, he was forced to request this because he had reached his MRD as a Reserve Component Officer with his involuntary assessment on Active Duty, then his retirement was adjusted to 1 May 2017. Per his retirement Order, he has 23 years, 11 months, and 6 days of active duty service. When adding blocks 12c and 12d of his DD Form 214 (Certificate of Release or Discharge from Active Duty), he can serve another 6 years and 24 days of active duty service.

2. Counsel states:

a. A material error and injustice exists based on an incorrect and unlawful decision to deny his client his full BAH at the "with dependents" and OHA at the "without dependents" entitlements, pursuant to Title 37 USC, section 403 and the applicable JTR in effect during the relevant time. In 2017, the applicant was subjected to a retroactive recoupment based upon the Army's sudden decision to employ an unlawful cost-savings measure, creating an extreme financial hardship for the applicant and Soldiers like him. In addition to the recoupment, he was thereafter improperly denied his full BAH entitlements through the duration of his tour of duty in Wiesbaden, Germany.

3. In a prior ABCMR request, Docket Number AR 20200006466, dated 10 August 2021, Counsel requested, in pertinent part, for this applicant the following:

a. Pay him the correct housing entitlements based upon his primary residence at the "with dependent" rate for his [redacted] primary residence (BAH) and OHA at the "without dependent" rate for his housing while on his assigned Contingency Operation (CONOP), for the duration of the tour.

b. Remove all titling, disciplinary or adverse personnel actions related to this matter.

c. Removal of his GOMOR, dated 24 March 2017.

d. Restoration on active duty at station of choice and a General Certificate of Eligibility/Retiree Recall/Security Clearance renewal, as appropriate.

e. A formal apology.

f. Absolve him from any double-recoupments and returning any monies owed to him; and

g. To conduct an investigation into the unlawful and retaliatory actions of those within the Army involved in this matter.

h. The Board, based on a preponderance of evidence, determined the applicant

warranted partial relief. In that his record should be corrected to show he was authorized to receive both OHA and primary residence BAH (at the with-dependents rate) during his period of service in Italy that began in March 2014 and both OHA and BAH during his period of duty in Germany that began in March 2016. The Board further determined that any monies that were recouped should be returned to him and he should be paid both OHA and BAH for any periods for which one or the other entitlement was not paid. Additionally, the GOMOR, dated 24 March 2017 and all allied documents should be removed from the applicant's AMHRR; any records of a flag for adverse action related to this matter should be removed from his AMHRR; his name should be removed from the title block of the CID's investigation of his matter; and any records of adverse information related to this matter in databases maintained of the Office of the Inspector General should be removed.

i. The Board noted the applicant's most recent OER was for the period 7 April 2015 through 6 April 2016. He was not given an OER for any subsequent periods. The Board agreed that, considering he has retired and the Board has no knowledge of his duty performance after 6 April 2016, there is no effective means of providing the end of tour OER he has requested.

j. While officers are routinely given end of tour and retirement awards, the Board, again, has no knowledge of the applicant's duty performance during the period in question. This being the case, the Board agreed that it is not well positioned to provide equitable relief by recommending he receive the awards he has requested. This determination should not, however, prevent any individuals with direct knowledge of his duty performance from recommending him for the awards he seeks. The recommendations may be submitted to the U.S. Army Human Resources Command under the rules governing the processing of such recommendations.

k. The applicant voluntarily retired for length of service. The Board determined that there is administrative finality when a voluntary decision to retire is approved and executed. The Board determined the evidence in this case is an insufficient basis for restoring the applicant to active duty.

l. This Board is not an investigative body. However, the Board granted the applicant’s counsel’s request to orally advocate the applicant’s case before the Board using video teleconference technology. The Board found that the applicant’s counsel provided a thorough presentation of the facts and circumstances of the applicant’s case. Consequently, the Board finds it unnecessary to direct or recommend additional investigations. If, however, the applicant or his counsel nonetheless believes additional investigations are necessary, they may direct those requests to the appropriate

agencies responsible for investigating alleged governmental impropriety. Consequently, the Board denies the applicant's request to direct investigations.

m. The Board determined that a formal apology from the Army is not warranted. The ABCMR's responsibility is to direct records corrections that are necessary to correct an error or to remove an injustice. An apology addressed to the applicant would neither correct an error nor remove an injustice. Nor is an apology necessary to implement the corrections the Board has otherwise granted in this case. Consequently, the Board denies this portion of the applicant's request.

4. On 22 February 2023, Counsel submitted a second remand request to ABCMR pursuant to the U.S. Court of Federal Claims decision. The entitlements at issue in this dispute are as follows: primary residence-based BAH, dependent location-based BAH, FSH-O, OHA for the PDS, and/or per diem. His legal brief states:

a. This matter comes before the ABCMR for the second time. In its prior decisions following the first remand to the Board from the Court of Federal Claims, the ABCMR found on 10 August 2021 that, in accordance with the Joint Travel Regulations (JTR)2 and the BAH, 37 U.S.C. § 403, the original seven Wolfing Plaintiffs were all erroneously denied dual housing allowances. The Board also directed the removal of the adverse actions.

b. The Defense Finance and Accounting Service (DFAS) disagreed with the Board's monetary decision and believed the Board's pay record correction to be unlawful with respect to Reservists with dependents as well as Reservists without dependents.

c. Counsel also provided additional items for reconsideration on behalf of the applicant, which has been previously discussed above.

d. Thus, continued litigation of OHA and BAH for both Reservists with dependents and without dependents have yet to be compensated.

e. At the end of 2022, the U. S. Federal Court of Claims made a determination as to what the JTR and statute lawfully authorized. The Court agreed that Reservists "without dependents" may be paid both OHA and BAH. However, since the Court was still determining the relief of the other applicants who sought dual housing at the "with dependent" rate, Counsel offered an alternative to payment of dual housing in anticipation of the possibility that the Court might not permit such payments for some or all of the Plaintiffs. The Plaintiffs amended their complaint to allege entitlement to a per diem as a second payment vice OHA for the "without dependents" Soldiers, however, the Court had not yet resolved the dual housing entitlement for Plaintiffs at the "with dependents", such as the applicant.

f. The complete legal brief has been provided to the Board for their review.

5. Counsel provides the following additional documents as it pertains to the applicant:

a. In the United States Court of Federal Claims, dated 2 December 2022 and corrected on 6 December 2022. This document will be discussed further in these proceedings.

b. Command BAH Overpayment Investigation Slide shows the situation at that time in 2016, and the consequences, law and the way forward. The USAG Wiesbaden Finance Office identified approximately 140 activated Army National Guard and Reserve Soldiers with an aggregate $250,000.00 per month in BAH overpayment. A list of names where given to CID. Upon initiation of the investigation, the Solder must be flagged, and their security clearance is general suspended.

c. Command “Bringing Your Family Over” Slide, discussed the requirements of Soldiers on Permanent Change of Station orders for an unaccompanied tour less than 1 year in Germany, could bring their family over at the Soldier’s own expense.

d. National Defense Authorization Act (NDAA) 2007, dated 3 April 2006, shows Title 37, U.S.C. section 403 was amended to reflect the rules for a second BAH for Reserve members in support of CONOP to ensure these Reservists were able to financially to maintain two households.

e. A military gate access roster from 2016, which shows the dates and times the applicant's spouse entered the access gate. The entire document is available for the Board's consideration.

f. A calendar from January through December 2016, which shows when the applicant reported and where he was throughout Europe during his time on orders.

g. A DA Form 2823 (Sworn Statement) from the applicant's spouse, dated 24 January 2017, which states in effect, she arrived in Germany in late June 2016 for vacation after her second semester for her master's degree. She traveled throughout Europe after her arrival. They also traveled to the United States when she heard of her father's passing. She then traveled to [redacted] where she stayed until the middle of October. The entire statement is available for the Board's consideration.

h. A timeline of the applicant's year in Germany, which is available for the Board's consideration.

i. Counsel provides a supplemental document dated 10 May 2023, which made minor modifications to his original legal brief.

7. The applicant's service record shows the following documents:

a. A DA Form 71 (Oath of Office) shows on 17 December 1986, the applicant took the oath of office as a Reserve Commissioned Officer in the rank of second lieutenant.

b. Orders B-05-402213, published by US Army Human Resources Command (HRC), dated 8 May 2014, show the applicant was promoted to the rank of Colonel (COL) effective 12 April 2014, when he was assigned to USAR Control Group (Reinforcement).

c. Orders 071-0040, published by US Army Garrison, Fort Bliss, dated 11 March 2016, released the applicant from active duty effective 25 March 2016 and assigned him to USAR (Reinforcement).

d. Orders HR-6082-00002, published by HRC, dated 22 March 2016 ordered the applicant for active duty operation support in Wiesbaden, Germany with a report date of 26 March 2016 for a period of 281 days with an end date of 31 December 2016.

e. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was transferred to USAR Control Group (Reinforcement) for completion of required active service on 25 March 2016. He had completed 1 year, 11 months, and 13 days of net service this period.

f. The last award the applicant received was the Meritorious Service Medal, Permanent Orders 035-01, dated 4 February 2016 for meritorious service from 7 April 2014 to 4 April 2016. It does not appear to be a retirement award.

g. The last DA Form 67-9-10 (Strategic Grade Plate (O6) OER) the applicant received covered the period of 7 April 2015 through 6 April 2016. It was an annual report and is available for the Board's consideration.

h. Orders C-10-613902, published by HRC, dated 13 October 2016, transferred the applicant from USAR Control Group Reinforcement to Standby Reserve (Inactive List) because he made no military service obligation election. The effective date of transfer was 13 October 2016.

i. Orders 357-05, published by US Army Installation Management Command, Headquarters, US Army Garrison, Wiesbaden, dated 22 December 2016, involuntarily extended the applicant on active duty for a period of 120 days, and stated that a DD

Form 214 would be issued upon completion of Uniform Code of Military Justice (UCMJ) actions.

j. Orders 118-0017, published by US Army Installation Management Command, Headquarters, US Army Garrison, Fort Bliss, dated 28 April 2017, retired the applicant effective 30 April 2017. It does not appear that he received any UCMJ actions.

k. His DD Form 214 shows he was honorably released from active duty and placed in the Retired Reserve on 30 April 2017, for completion of his required active duty. He had completed 1 year, 1 month, and 5 days of active duty service.

l. A memorandum from the Army Grade Determination Review Board, dated 28 November 2017, shows he was placed on the retired list in the grade of COL.

m. The applicant's service record was void of a GOMOR or CID report showing he was titled. It did not appear the applicant received a retirement award or OER upon retirement.

n. The Record of Proceedings (ROP) from AR20200006466, dated 10 August 2021, which shows the applicant's specific requests and the Board's directed action for each request. The entire ROP is available for the Board's consideration.

o. On 10 November 2021, a letter to the applicant from HRC states the following documents were removed from the applicant's records:

- the flag for adverse action
- the GOMOR dated 24 March 2017 and all allied documents

p. An email from OTIG, dated 24 August 2022, states a search of the provided information revealed no substantiated or unsubstantiated allegations pertaining to the applicant.

q. On 14 October 2022, CID states the applicant's name had been removed from the titling black of Law Enforcement Report 00162-2016-CID987-022736-7F.

r. All other requests were denied.

8. The United States Court of Federal Claims case, dated 2 December 2022 and corrected on 6 December 2022, states the following:

a. While the Secretary must adhere to the DOD Joint Travel Regulations, as highlighted above, the regulations vest considerable discretion in the Secretary to authorize or approve Family Separation Housing (FSH) in situations where the maintenance of two households is deemed necessary regardless of the established living arrangements between a service member and their dependents. The Court leaves to the Secretary of the Army or their designee (i.e., ABCMR) to make individualized determinations, grant a blanket waiver or exception.

b. At the request of the parties, this military pay case is voluntarily remanded to the Secretary of the Army and the ABCMR for a period of six months to consider whether plaintiffs are entitled or otherwise authorized and approved to receive (retroactively and prospectively, where applicable) housing allowances in the form of BAH, OHA, FSH-B, and FSH-O or, in the alternative, per diem, consistent with this decision.

c. This military pay case is remanded to the Secretary of the Army and the ABCMR to consider whether plaintiffs are entitled or otherwise authorized and approved to receive housing allowances or other subsidies consistent with this Opinion and Order as well as other relief specified herein.

d. The ABCMR shall request an advisory opinion from the DOD Office of Assistant Secretary of Defense for Manpower and Reserve Affairs addressing the discretion vested in the Secretary of the Army to grant dual housing allowances under 37 U.S.C. § 403(g) and implementing DOD regulations. To the extent the DOD is of the opinion the Secretary lacks such authority, or that the discretion has evolved since the passage of § 403(g) and, more particularly, between October 2016 and the present, the advisory opinion must include a timeline of the evolution of the nature and scope of the discretion vested in the Secretary of the Army and the basis for the opined evolution.

e. The ABCMR shall request an advisory opinion from the Defense Human Resources Activity (DHRA) on whether per diem is (or was) authorized for Reserve Component members while serving on active duty under the Travel and Transportation Allowances statute, 37 U.S.C. § 474 (2016) (repealed and re-codified at 37 U.S.C. § 452 (2021)), and the implementing DOD regulations. To the extent the DHRA is of the opinion that the authorization evolved between October 2016 and the present, the advisory opinion must include a timeline of the evolution of the per diem authorization and the basis for the opined evolution.

f. The Court agrees with the government that plaintiffs' requests for secretarial authorization and approval under this provision of the DOD Joint Travel Regulations–particularly with regard to retroactive requests–fall within the exclusive providence of the Secretary of the Army through the ABCMR.

9. An advisory opinion was requested from the DOD Office of Assistant Secretary of Defense for Manpower and Reserve Affairs. DOD responded on 30 May 2023, regarding dual housing allowances, which states:

a. "This memorandum provides the advisory opinion requested in reference (a), as required by reference (b), regarding the discretion vested in the Secretary of the Army to grant dual housing allowances under title 37, U.S. Code, section 403(g) (37 U.S.C. § 403(g)) and implementing Department of Defense (DoD) regulations. Specifically, this advisory opinion will address the discretion of the Secretary of the Army in regards to dual housing allowances for Reserve component (RC) members (with and without dependents) on active duty for more than 30 days or who are called or ordered to active duty in support of a contingency operation regardless of the duration of such a call or order. This opinion is issued based on applicable provisions of law, regulation, and policy, contained in references (c) through (g), or as described herein, governing entitlement to, and administration of, housing allowances for members of the uniformed services.

b. In general, under the provisions of Title 37, United States Code (U.S.C), section 403 and DOD 7000.14-R, DoD Financial Management Regulation, Volume 7a, Military Pay Policy and Procedures – Active Duty and Reserve Pay, Chapter 26, Housing Allowances, to be entitled to a housing allowance a member of a uniformed service:

(1) Must be entitled to basic pay under 37 U.S.C. § 204, meaning the member must be serving on active duty;

(2) Must not permanently reside in government quarters or a housing facility under the jurisdiction of a uniformed service that is appropriate for the member's pay grade, rank or rating of the member at the member's permanent duty station (PDS) (except that if residing in such government quarters or housing facility, and if a member with dependents, such quarters/housing facility are deemed inadequate to house the member and the member's dependents);

(3) Must not be assigned to initial field duty in conjunction with a permanent change of station (except if so assigned, a member's commanding officer has certified that the member was necessarily required to procure quarters at the member's expense);

(4) Must not be a member without dependents who is in a pay grade below E-6 and is permanently assigned to sea duty aboard a ship or vessel that has not been determined by the Secretary concerned to be inadequate for berthing while the ship or vessel is in its home port (except if such a member in pay grade E-4 or E-5 has been authorized under regulations of the Service concerned to receive a housing allowance

based on the location of the home port of the ship or vessel to which such a member in pay grade E-4 or E-5 is permanently assigned); and,

(5) Must be permanently assigned to a duty station to receive a housing allowance at the full rate applicable to a uniformed service member of the member's pay grade and dependency status at the location of the duty station (i.e., the location of a member's PDS, including the location of its home port if the PDS is a ship or vessel, but under certain circumstances, a location other than the location of a member's PDS).

c. In addition to the eligibility criteria stated above in subparagraphs 1 through 4, in order to be eligible to receive a housing allowance at the "full locality rate" as described in subparagraph 5, a RC member must be serving on active duty under a call or order to active duty for a period of more than 30 days, or regardless of duration, in support of a contingency operation or to attend accession training (if a member without dependents). In such cases, and unless these RC members are authorized a permanent change of station (PCS) that includes shipment of household goods (HHG) at government expense, and if a member with dependents, government funded the travel and transportation of all the dependents to the member's new PDS, the housing allowance paid to such members is the applicable BAH or OHA rate that is based on the location of the primary residence from which the members have been called or order to active duty. Moreover, in these cases, entitlement to a housing allowance based on the location of an RC member's primary residence accrues, even if such a member is a member without dependents and occupies government quarters (including berthing aboard a U.S. ship or vessel, or a housing facility under the jurisdiction of a uniformed service) at the location of the RC member's PDS. Further, the aforementioned RC members with dependents, may be authorized to receive a housing allowance based on the location of such members' dependents (if other than the members' primary residences), if the RC members otherwise meet the eligibility criteria for the allowance contained in Title 37, United States Code (U.S.C), section 4031 and DoD 7000.14-R, DoD Financial Management Regulation, Volume 7a, Military Pay Policy and Procedures – Active Duty and Reserve Pay, Chapter 26, Housing Allowances and the regulations of the uniformed service concerned, and is approved for payment of the applicable BAH or OHA based on the dependents' location by the Service concerned.

d. Uniformed service members who are otherwise eligible to receive a housing allowance generally are only authorized to receive one allowance, the rate of which, besides being based on the member's pay grade and dependency status, is normally based on the location of the member's PDS as previously described in this Advisory Opinion. In the case of RC members who are called or ordered to active duty, and who are otherwise eligible to receive a housing allowance, eligibility to receive a second housing allowance for a RC member with dependents may become entitled to receive a second housing allowance under the same eligibility criteria of a similarly situated regular component, or Active Guard and Reserve (AGR) uniformed service member.

Referred to as Family Separation Housing Allowance (FSH), this second housing allowance may be payable to a uniformed service member with dependents if:

(1) The member is assigned to a PDS at which the member's dependents were not authorized government-funded travel and transportation allowances to accompany the member to the PDS; and,

(2) The dependents do not in fact reside in the vicinity of the member's PDS, meaning the member does not commute daily to his or her PDS from a dwelling in which the dependents reside with the member, or if not residing in the same dwelling as the member, the dependents do not visit the member for period exceeding 90 consecutive days; and,

(3) Government quarters (suitable for a member without dependents of the same pay grade and specialty of the member) at or near the member's PDS are not available for occupancy by the member. Government quarters (to include berthing aboard a U.S. ship or vessel determined to be adequate for occupancy in the ship or vessel's home port by members for whom the ship or vessel is their PDS) are not considered unavailable solely because a member makes a personal choice not to occupy those quarters."

e. The complete Advisory Opinion and the authority of the Office of the Under Secretary of Defense for Personnel and Readiness to establish implementing housing allowance regulations and policies, is available for the Board to review.

10. An advisory opinion was requested from the Defense Human Resources Activity – Defense Travel Management Office (DHRA-DTMO) in regards to authorization travel and transportation allowances, including per diem, for temporary duty assignments, and defining and implementing DOD regulations. It states, in part:

a. "The Army Board for Correction of Military Records (ABCMR) requested an advisory opinion from the Defense Human Resources Activity (DHRA) on whether per diem is (or was) authorized for Reserve Component members while serving on active duty under the Travel and Transportation Allowances statute, 37 U.S.C. chapter 8, and the implementing DoD regulations. To the extent DHRA is of the opinion that the following Service members are authorized specific travel and transportation allowances, this advisory opinion is based upon documents that were provided to DHRA. In several cases, no documents were provided, and the ABCMR will need to apply the regulations as explained below. For the individuals specifically identified, this opinion assumes that all applicable documentation was provided.

Authority of the Defense Human Resources Activity to Establish Travel and Transportation Allowance Regulations and Policies through the Per Diem, Travel, and Transportation Allowance Committee (PDTATAC):

b. The office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)) provides overall policy guidance for carrying out the personnel and readiness responsibilities and duties of the Secretary of Defense in accordance with reference (e), DoD Directive 5124.02. In this capacity, it is the responsibility of the OUSD(P&R) and the Defense Human Resources Activity as further delegated by reference (f), DoD Instruction 5154.31, Volume 5 to develop and promulgate the Joint Travel Regulations (JTR) on behalf of the Uniformed Services' Per Diem, Travel, and Transportation Allowance Committee (PDTATAC).

Temporary Duty Allowance Eligibility:

c. In general, travel for training at one location for over 20 weeks, or travel for other than training for over 180 days, are performed as a permanent change of station and temporary duty travel allowances are not authorized, in accordance with the JTR, par. 2230-B at reference (g). The exception is if one of the authorizing officials listed in paragraph 2230-C of reference (g) explicitly authorizes temporary duty travel in advance of travel. This applies to all Uniformed Service members, including both active and Reserve Component members. In addition, for Service members supporting a contingency operation or other operation in a geographic combatant command's area of responsibility, it is the responsibility of the geographic combatant commander to determine whether travel is performed in a temporary or permanent duty status in order to ensure members of all services and components receive the same allowances as mandated at the time by 37 U.S.C. § 481(a) 5

d. The authority for the secretaries concerned to limit temporary duty travel to six months in the Joint Travel Regulations and to permit the Service secretaries to allow Service members to receive temporary duty allowances rather than permanent duty allowances under limited circumstances was established by the U.S. Comptroller General in reference (h). This Comptroller General decision was made at the request of the Secretary of the Army and applied to both the Active and Reserve Components. The decision listed various conditions under which temporary duty would be appropriate, including when international agreements precluded Service members from being ordered to a foreign duty station in a permanent duty status. The conditions were incorporated in the rules that the Services must follow as implemented by the PDTATAC in the JTR. Further, there is no mention in the pleadings or documentation provided as to whether the Status of Forces Agreements with Germany, Italy, Romania, or Bahrain prohibited these Service members from serving in a permanent duty status.

e. The interpretation in reference (c) that the JTR definition of 'Temporary Duty (TDY)' establishes that all travel that returns to the old PDS is, by definition, temporary duty is incorrect. That is but one possible condition of temporary duty. It also includes travel that proceeds to a new PDS, as seen in the JTR definition provided in reference (c). Further, travel by the plaintiffs in this case cannot be reclassified by the ABCMR as temporary duty when the travel orders specifically, and correctly, characterize the travel as permanent duty. Absent some special legal authority the PDTATAC is unaware of, such action would otherwise violate long standing policy and regulation validated by the Comptroller General in reference (i), which states that travel and transportation allowances cannot be retroactively amended to increase or decrease allowances, except to correct an administrative error. There is no evidence to support or suggest that the geographic combatant commanders authorized temporary duty vice permanent duty travel for support of the applicable operations within the U.S. European Command's area of responsibility. Therefore, there are no facts under the law with which to even allege there is an administrative error that could support such a change.

Temporary Duty Allowance Eligibility for Specified Individual Claims:

f. This advisory opinion is limited to the distinction between temporary duty vice permanent duty travel even though the station allowances such as Basic Allowance for Housing, Overseas Housing Allowance, Family Separation Housing, and Overseas Cost of Living Allowance, were included in the Joint Travel Regulations and were under the purview of the Per Diem, Travel, and Transportation Allowance Committee during most of the period in question. Listed below is our analysis of the allowances [this applicant is] entitled to receive based upon the documentation provided. Any opinions concerning related station allowances are not intended as definitive and are subject to review by Office of the Undersecretary of Defense for Personnel Readiness, Military Personnel Policy, who has the authority to interpret station allowance policy.

g. [This member] self-certified that all their dependents did not remain at their new PDS for more than 90 days. If true, then th[is] member should have received Standard PCS travel and transportation allowances, other than household goods (HHG) transportation from their home to Wiesbaden, Germany, for themselves, but not their dependents. [He was] authorized single rate station allowances at the new permanent duty station (PDS) location, Wiesbaden, Germany, and dependent location BAH until dependents hit 90 days in Germany. After the dependents resided in Germany, the Service member [was] no longer eligible for FSH".

11. DHRA/DTMO submitted a supplemental A/O, dated 11 September 2023, to its original AO, dated 29 August 2023, which includes a response to additional travel orders that was provided by ABCMR on 6 September 2023 on cases that were missing travel orders. Seven servicemember's, including the applicant, self-certified that their dependents did not remain at their new PDS more than 90 days. If true, then the

applicant should have received standard PCS travel and transportation allowances, other than HHG transportation from their home to their PDS location for themselves, but not their dependents. They were authorized Family Separation Housing at the new PDS location, and dependent location BAH. The complete supplemental has been provided to the Board for their review.

12. Counsel for the applicant has been provided copies of both advisory opinions for an opportunity to respond. On 29 September 2023, counsel submitted a response, which states, in pertinent part:

Addressing the M&RA Advisory Opinion:

a. "The sole purpose for why the M&RA AO was directed by the Court was to allow that office to provide its opinion over whether "discretion vested in the Secretary of the Army to grant dual housing allowances under 37 U.S.C. § 403(g) and implementing DOD regulations. 'In its AO, M&RA asserts that it alone retains such authority, acting on behalf of the Secretary of Defense (SECDEF) pursuant to 37 U.S.C. § 403(k), which provides for SECDEF's ability to 'prescribe regulations for the administration of [Section 403]." 37 U.S.C. section 403(k)(1). To be clear, this AO's opinion applies solely to those Reservists without dependents, as section 403(g) has no applicability to RC members with dependents, which are already accounted for in section 403(d) and the applicability of FSH-O.

b. M&RA asserts that, 'In this case, the Department of Defense has not implemented regulatory policy regarding section 403(g)(2), and that provision is not, and has not been, an authority available for the Military Departments to exercise." M&RA AO at 4 (underline in original). This statement is contradicted by the statute which cannot be contradicted by any issuance of a regulation (or lack thereof), and it is plainly wrong.

c. No governing regulation (or lack thereof) can strip authority vested by statute. Any attempt to do so violates the balance of powers between the legislative and executive branches and is unlawful. Here, section 403(g)(2) vests discretionary authority in "[t]he Secretary concerned" to provide a second housing allowance. Meaning here, this decision is left to SECARMY to decide. Neither SECDEF (nor its delegee) has authority to override this plain language of the statute, or SECARMY's prior decision. As previously decided, SECARMY, through this Board, determined that…an RC soldier without dependents records "should be corrected to show he was authorized to receive both OHA and primary residence BAH (at the without- dependents rate) during his period of service in Germany," thereby exercising its discretionary authority to provide him a second housing allowance.

d. If it were otherwise, and SECARMY lacked such authority, then the only appropriate measure to keep these Reservists without dependents from an "undue financial hardship," would be to provide them per diem as discussed above. However, such a measure is not necessary so long as the law permits SECARMY to proceed with providing this second housing allowance (which it does), thereby in keeping with the reason for why the law was created in the first place, to ensure the avoidance of "overburdening scarce taxpayer resources" associated with the payment of the more costly per diem. Again, as DoD GC put it, this law was created to provide "the military departments the option to either pay per diem or [BAH]…at the gaining command," not to withhold both entitlements.

e. In further support of this being the only correct interpretation, 37 U.S.C. § 403(k)(2), directs that, "The Secretary concerned may make such determinations as may be necessary to administer this section," and that, "Any determination made under this section with regard to a member of the uniformed services is final and is not subject to review by any accounting officer of the United States or a court, unless there is fraud or gross negligence." 37 U.S.C. section 403(k)(2). As relied upon by the M&RA AO, the fact that 37 U.S.C. medical 403(k)(1) provides authority to SECDEF to "prescribe regulations for the administration of this section," simply means that it has the authority to issue the JTR/DoD FMR (as it already has) to provide a uniform procedure and application of housing allowances. However, this provision does not, and cannot, legally strip the Secretary Concerned (i.e., SECARMY's) of the statutory authority to provide Reservists with a second housing allowance, as this authority is vested to her through § 403(g)(2).

f. Therefore, not only was this Board's prior decision correct in providing [a previous applicant] his dual housing allowances so that he could satisfactorily maintain his two households without incurring an undue financial hardship, the ABCMR should also provide the same relief to the other Reservists without dependents who have joined him in this case. Of course, however, to the extent the Board may still believe that it lacks such legal authority, a decision that reflects such a measure under equitable grounds—to remove an injustice—remains a viable course of action, as discussed above."

Addressing the DHRA/DTMO Advisory Opinion:

a. "The DHRA AOs from August 29, 2023 and September 11, 2023 are concerningly unsupported. They present themselves from an office that purports to have authority over the matter of "whether per diem is (or ever was) authorized for reserve component members while serving on active duty under the Travel and Transportation Allowances statute, 37 U.S.C. section 4748 (2016) (repealed and recodified at 37 U.S.C. section 452 (2021)), and the implementing DOD regulations, 'but then they never

use any law or regulation to support their key conclusions. DHRA does not even attempt to substantiate how the applicants' situations could be categorized as permanent change of station (PCS) orders, as opposed to temporary duty/change of station (TDY/TCS) orders. Here, rather than providing any basis for what constitutes a PCS order in comparison to a TDY order, the AO simply makes the unsupported claim that 'the travel orders specifically, and correctly, characterize the travel as permanent duty.' This AO lacks any of the analysis that was intended by the Court.

b. The applicants herein have asserted that the orders issued to them are designated as PCS orders, as opposed to TDY/TCS orders, in name only. Literally, what the applicants mean is that these orders have the words PCS slapped into them simply so that the Army can pull from a different pool of money, but then not actually provide the entitlements that are supposed to accompany a PCS. Shockingly, the DHRA AOs do not even make reference to the definition of PCS found in the JTR, nor do they explain how that definition is not being violated to support its conclusion.

c. The JTR defines a PCS as, 'The assignment, detail, or transfer of an employee, member, or unit to a different PDS under a competent travel order that does not specify the duty as temporary, provide for further assignment to a new PDS, or direct return to the old PDS.' JTR, Appendix A at A1-32 (emphasis added). It is written in the disjunctive, excluding all three of these possibilities from inclusion within PCS orders. Now, the first DHRA AO indicated that, 'The law, policy, and regulations analyzed in this opinion did not evolve from October 2016 to present.' However, this appears inaccurate. In the July 2022 (current) revision of DoD FMR 7000.14-R, Vol. 7a, Definitions at DEF-22, the definition of Permanent Duty Station (PDS) was revised to include that, 'The primary residence of a Reserve Component member is considered the permanent duty station for the purpose of determining allowances.' Either the DHRA AO erred in failing to account for this change in definitions when asserting the lack of any evolution, or this has always been the case—just never expressly stated. Either way, the DHRA AO fails in all respects to explain how an order classified as a PCS, that expressly directs the member to return to his old PDS (i.e., his primary residence), is not violative of the definition of what a PCS order permits in the JTR.

d. As stated by the DHRA AOs, the applicants' should have received Standard PCS travel and transportation allowances.' If that were so, the expected entitlements for a PCS for these Reservists, like those received by active duty members, pursuant to ALARACT 384.2011, would include: 1) orders durations at a minimum of two years; 2) dependent travel and transportation allowances; 3) HHGs transportation and storage/shipment authorization; 4) Unaccompanied baggage transportation; 5) POV transportation and storage; and 6) Dislocation allowance. Exhibit 6, ALARACT 384.2011 at paragraphs 11.A.1-6. In this case, none of these were provided to the affected Reservists.

e. DHRA then refers to our first submission for this remand stating that within it, our assertion that 'all travel that returns to the old PDS is, by definition, temporary duty is incorrect.' However, it is not incorrect at all, it may just not be as comprehensive as DHRA may have liked, because it left out a circumstance entirely inapplicable here (i.e., 'or to proceed to a new PDS'), and even it concedes that it is but one possible condition to temporary duty.'

f. JTR Appendix A defines Temporary Duty as: 'Duty at one or more locations, away from the PDS, under an order providing for further assignment, or pending further assignment, to return to the old PDS or to proceed to a new PDS.' JTR, Appendix A at A1-43 (emphasis added). This is exactly what Plaintiffs' orders directed them to do—to leave their old PDS (their "homes") and return them to their homes upon mission completion. Here, given Plaintiffs' orders direct return to the old PDS, and when taken in complement with the Army's withholding of the above-listed PCS travel and transportation entitlements, Plaintiffs' orders can only be defined as temporary (TDY).

g. Furthermore, in direct contrast with DHRA's assertion that the applicants' orders cannot be retroactively amended,' relying on a Comptroller General case from 1944, is the fact that both the Court and the JTR state otherwise. See Applicants' June 7, 2023 ABCMR Remand Submission, Exhibit 1 (Page 52 of 76) (stating, 'The Court is unaware of any regulation or statute forbidding retroactive authorization. To the contrary, JTR Ch. 2, Part C, paragraph 2205 provides that '[a]n order . . . [m]ay be retroactively corrected to show the original intent . . . .' Id. (citation omitted).').

h. Additionally, the DHRA AOs opine that only 'the authorizing officials listed in paragraph 2230-C' of the JTR may authorize TDY travel that exceeds 180 days.' DHRA AOs at 2. However, when looking at the orders for [another applicant] (like all others), they specifically state that they are issued 'FOR THE SECRETARY OF THE ARMY,' who happens to be the very first authority listed in JTR par. 2230.C.2.a.1. See, e.g., Applicants' June 7, 2023 ABCMR Remand Submission, Exhibit 8 (Page 76 of 76). Therefore, given SECARMY's involvement with these orders, DHRA's mention of any involvement of a Geographic Combatant Commander is entirely inapplicable.

i. Lastly, although DHRA is 'unaware' of any 'special legal authority' that would allow for the actual intent of the orders to be effectuated retroactively as discussed above, the ABCMR (acting on behalf of SECARMY) has the powers of equity to remove injustices. Thus, any reference to what the Comptroller General found permissible or impermissible from 1944, has no affect on this Board's equitable authority established in 10 U.S.C. § 1552, as the Comptroller General was bound solely to correcting legal errors, but had no power of equity. It is for all these reasons, that the Army has improperly mischaracterized the applicants' orders as PCS rather than TDY, and the entitlements associated with TDY orders (i.e., per diem) remains an appropriately viable

remedy to prevent these applicants from what would otherwise be the 'undue financial hardship' of having to pay out-of-pocket to maintain one of their two households."

13. Counsel's complete response has been provided to the Board for their review.

BOARD DISCUSSION:

1. After reviewing the application and all supporting documents, the Board found partial relief is warranted.

2. The Board found FSH could have been approved in this case but was not. The Board noted the applicant's dependent may have been with him at his duty station in Germany for more than 90 days, which would normally affect his eligibility for FSH. The Board found the unique circumstances in this case support approval of an exception to policy for the 90-day limitation and correction of the record to show the applicant was authorized both BAH based upon his primary residence at the "with-dependents" rate and FSH at the rate applicable to his duty station during his service in Germany from 26 March 2016 through 30 December 2018.

3. The Board determined that if a GOMOR associated with housing or family separation allowance issues relevant to this case or investigations related to such allowances has been retained in a Department of Defense system of records, it should be removed.

4. The applicant voluntarily retired for length of service. The Board again determined there is administrative finality when a voluntary decision to retire is approved and executed. The Board determined the evidence in this case is an insufficient basis for restoring the applicant to active duty.

5. When the name of the subject of an investigation is removed from the title block of the investigation, the subject of the investigation can no longer be identified. The Board determined no further action is required to remove additional CID records related to this matter.

6. The applicant has not demonstrated that there are additional records in OTIG databases related to this matter. The Board determined the evidence does not support directing further review of OTIG databases for additional records that should be deleted.

7. The Board noted the applicant's most recent OER was for the period 7 April 2015 through 6 April 2016. He was not given an OER for any subsequent periods. Although he has again requested an OER, the Board agreed that, considering he has retired and

considering the passage of time, there is no effective means of providing the OER he has requested.

8. Regarding an end of tour and retirement award, the Board determined the applicant has not exhausted his administrative remedies. Anyone with direct knowledge of his duty performance during the periods in question may recommend him for an award through his former chain of command with referral to the U.S. Army Human Resources Command under procedures established by that command.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	Mbr 4	Mbr 5	
:	:	:	:	:	GRANT FULL RELIEF
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	GRANT PARTIAL RELIEF
:	:	:	:	:	GRANT FORMAL HEARING
:	:	:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

a. If necessary, approval of an exception to policy for the 90-day limitation on the presence of dependents at the permanent duty station and correction of the record to show the applicant was authorized both BAH based upon his primary residence at the "with-dependents" rate and FSH at the rate applicable to his duty station during his service in Germany from 26 March 2016 through 30 December 2018.

b. If present, removal of the GOMOR associated with housing or family separation allowance issues relevant to this case, or investigations related to such allowances, from any Department of Defense systems of records.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of that described above.

X [redacted]

CHAIRPERSON

[redacted]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. All Army Activity Message Number 384/2011, states in paragraph:

a. (4). Intent: To ensure continued mission success, and maximize efficiencies while balancing the needs of RC Soldiers and their families and, to implement new policy guidance regarding use of PCS for RC Soldiers serving on active duty in excess of 180 days.

b. (5). Policy: effective 1 June 2011, RC Solders will no longer be authorized the

option of CONOP flat rate per diem (Temporary Change of Station-55 percent) tours. PCS travel and transportation allowances must be paid to all RC Soldiers and retiree recall Soldiers on voluntary duty for more than 180 days at any one location.
2. Title 37, USC, section 403c (BAH) Outside the United States, states:

a. The Secretary of Defense (SECDEF) may prescribe an overseas BAH for a member of a uniformed service who is on duty outside of the United States. The Secretary shall establish the BAH under this subsection on the basis of housing costs in the overseas area in which the member is assigned.

b. So long as a member of a uniformed service retains uninterrupted eligibility to receive a BAH in an overseas area and the actual monthly cost of housing for the member is not reduced, the monthly amount of the allowance in an area outside the United States may not be reduced as a result of changes in housing costs in the area or the promotion of the member.

3. Title 37, USC, section 403(a)(1) states, "a member of a uniformed service who is entitled to basic pay is entitled to a BAH."

4. Title 37, USC, section 403g(1) (Reserve Members) states, a member of a RC without dependents who is called or ordered to active duty, in support of a CONOP, or for a period of more than 30 days under Title 10, USC, section 688(a) in support of a CONOP or for a period of more than 30 days, may not be denied a BAH if, because of that call or order, the member is unable to continue to occupy a residence:

a. Which is maintained as the primary residence of the member at the time of the call or order; and

b. Which is owned by the member or for which the member is responsible for rental payments.

5. Title 37, USC, section 403g(2) states, The Secretary concerned may provide BAH to a member described in paragraph (1) at a monthly rate equal to the rate of the BAH for housing established under subsection (b) or the overseas basic allowance for housing established under subsection (c), whichever applies to the location at which the member is serving, for members in the same grade at that location without dependents. The member may receive both a BAH under paragraph (1) and under this paragraph for the same month, but may not receive the portion of the allowance authorized under section 474 of this title, if any, for lodging expenses if a BAH for housing is provided under this paragraph.

6. Title 37, USC, section 403g(4) states, the rate of BAH to be paid to the following members of a RC shall be equal to the rate in effect for similarly situated members of a regular component of the uniformed services:

a. A member who is called or ordered to active duty for a period of more than 30 days.

b. A member who is called or ordered to active duty for a period of 30 days or less in support of a contingency operation.

7. Title 37, USC, section 403g(5) states, The SECDEF shall establish a rate of BAH to be paid to a member of a RC while the member serves on active duty under a call or order to active duty specifying a period of 30 days or less, unless the call or order to active duty is in support of a contingency operation.

8. Joint Travel Regulations (JTR), Section 1001, Table 10-1 states:

Table 10-1. Types of Housing Allowances

Allowance	Description
BAH	Paid for housing in the United States. The BAH rate is based on median housing costs and is paid independently of a Service member's actual housing costs.
BAH Differential (BAH-Diff)	Paid to a Service member assigned to single-type Government quarters and who qualifies for a BAH solely due to paying sufficient child support.
Partial Housing Allowance (BAH-Partial)	Paid to offset the raise that was reallocated from basic pay to housing between 1980 and 1981. It is paid when a Service member without a dependent is assigned to single-type quarters, or is on either field or sea duty, and not authorized to receive a BAH or an OHA. BAH-Partial is not authorized during proceed time, leave en route, and travel time on a permanent change of station (PCS) move unless the member is assigned to single type Government quarters and not authorized BAH or OHA. The rate is fixed from those years and does not change.
Transit Housing Allowance (BAH-Transit)	Paid while a Service member is in travel or leave status between permanent duty stations (PDS), provided the Service member is not assigned Government quarters. The BAH-Transit rate is paid during proceed time and authorized delays en route, including a TDY en route.
BAH for Reserve Component (RC) Member (BAH-RC)	Paid when authorized for an RC member called or ordered to active duty for 30 or fewer days, except when called to active duty for a contingency. When an RC member is called to active duty for a contingency, even for tours of 30 or fewer days, he or she is authorized the BAH or OHA rate. The Secretary of Defense establishes BAH-RC rates.
OHA	Paid monthly to help offset housing expenses for a Service member or dependent authorized to live in private-sector leased or owned housing at an assigned overseas location outside the United States. OHA is based on cost reimbursement. The amount of OHA paid considers factors, such as whether the housing is shared, the appropriate utilities (see Section 1005), and whether the Service member owns or rents the housing. OHA cannot be paid if there is no rent or purchase expense for housing.
Family Separation Housing (FSH)	Paid to a Service member with a dependent for added housing expenses resulting from one of the following: • Separation from the dependent when a Service member is assigned to a PDS OCONUS. • An assignment in the CONUS when dependent travel is delayed or restricted.

9. JTR, Chapter 10, paragraph 1006 (FSH Allowance): Administration of FSH Allowance.

a. Eligibility. For FSH to be payable, all of the following conditions must be met:

- dependent transportation to the PDS is not authorized at Government expense under Title 37, USC, section 476
- dependent does not reside in the PDS vicinity
- Government quarters are not available for assignment to the Service member

b. Allowances: There are two types of FSH: FSH-B and FSH-O.

(1) FSH-B is payable for an assignment at a PDS in Alaska or Hawaii or to a PDS in the CONUS to which concurrent travel has been denied. FSH-B is payable in a monthly amount equal to the "without dependent" BAH rate applicable to the Service member's grade and PDS. Payment starts upon submission of proof that Government quarters are not available and that the Service member has obtained private-sector housing.

(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 or recurring maintenance allowance, MIHA, and advances apply to FSH-O.

(3) FSH-O or FSH-B is not authorized if all of the Service member's dependents reside in the PDS vicinity. If some, but not all, of the dependents voluntarily reside near the PDS, FSH-O or FSH-B continues.

(4) FSH-O or FSH-B continues uninterrupted while a Service member's dependent visits at or near the Service member's PDS, but not to exceed 90 continuous days. Circumstances must clearly show that the dependent is not changing residence and that the visit is temporary and not intended to exceed 90 days.

10. JTR, Chapter 10, section 100904, states:

a. A Service member with a dependent who serves an unaccompanied or dependent-restricted tour OCONUS or "unusually arduous sea duty" outside the United States is authorized a "with dependent" housing allowance based on the dependent's location. The housing allowance may be based on the old PDS if the dependent remained in the residence shared with the Service member before the PCS, did not relocate, and is not in Government quarters. The housing allowance for the dependent's location may be authorized or approved to be effective on the date of the lease.

b. FSH Authorization. If the Service member is serving an unaccompanied or dependent-restricted tour and single-type Government quarters are not available for assignment at the PDS OCONUS, and the dependent does not reside at or near the PDS, then FSH-O or FSH-B is also authorized. A Service member assigned to "unusually arduous sea duty" is not authorized FSH since Government quarters are available for assignment.

c. Dependent Visit. If the Service member is outside the United States, then the allowance is either OHA or FSH-O, as applicable. If all of a Service member's dependents arrive at his or her PDS OCONUS and stay beyond 90 days, the Service member is not authorized OHA simply because the dependent is present. To be paid OHA the Service member must provide the required documentation—a completed and approved OHA report (DD Form 2367)—for private-sector leased or owned housing.

11. JTR, chapter 10, section 100906(7). RC Member states, "Called or Ordered to Active Duty for Contingency:

a. An RC member called or ordered to active duty in support of a contingency operation is authorized BAH or OHA based on the primary residence beginning on the first day of active duty. This rate is authorized even for duty of 30 or fewer days.

b. This rate continues for the duration of the tour unless the RC member is authorized PCS HHG transportation, in which case the rate for the PDS would apply on the day the RC member reports to the PDS."

12. The JTR, Appendix A defines primary residence, stating, "For an RC member ordered to active duty, the primary residence is the dwelling (e.g.., house, townhouse, apartment, condominium, mobile home, houseboat, vessel) where the RC member resides before being ordered to active duty."

13. Army Regulation 420-1 (Army Facilities Management), paragraph 3-6.b. (1), states "PP [permanent party] personnel are entitled to housing allowances to secure private housing in the civilian community if Government housing is not provided."

14. Title 10 US Code Section 1251 (Age 62: Regular Commissioned Officers in grades below general and flag officer grades; exceptions) states unless retired or separated earlier, each regular commissioned officer of the Army, Navy, Air Force, Marine Corps, or Space Force (other than an officer covered by section 1252 of this title or a commissioned warrant officer) serving in a grade below brigadier general or rear admiral (lower half), in the case of an officer in the Navy, shall be retired or separated, as specified in subsection (e), on the first day of the month following the month in which the officer becomes 62 years of age.

15. Army Regulation 600-8-104 (Army Military Human Resources Records Management (AMHRR)), in effect at the time, provides policies, operating tasks, and steps governing the AMHRR. This regulation states that only those documents listed in Appendix B are authorized for filing in the AMHRR and/or in the Interactive Personnel Electronic Records Management System.

a. Depending on the purpose, documents will be filed in one of three sections: performance, service, or restricted.

b. Table 3-1 (OMPF folders in the AMHRR) states the performance folder contains performance related information to include evaluations, commendatory documents, specific disciplinary information, and training/education documents. The restricted folder contains documents that may normally be considered improper for viewing by selection boards or career managers.

16. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures to authorize placement of unfavorable information about Army members in individual official personnel files; ensure that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files; and ensure that the best interests of both the Army and the Soldier are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files.

a. Chapter 7 (Appeals and Petitions) provides the policies and procedures for appeals and petitions for removal of unfavorable information from the OMPF.

b. Paragraph 7-2 (Policies and Standards), subparagraph b (Appeals for Transfers of OMPF Entries), contains guidance on transfers of OMPF entries. It states only letters of reprimand, admonition, or censure may be the subject of an appeal for transfer to the restricted section of the OMPF.

(1) Appeals will normally be returned without action unless at least 1 year has elapsed since imposition of the letter or memorandum and at least one evaluation report, other than academic, has been received in the interim. It also shows that appeals approved under this provision will result in transfer of the document from the performance section to the restricted section of the OMPF.

(2) GOMOR's may be transferred upon proof that their intended purpose has been served or that their transfer would be in the best interest of the Army. The burden of proof rests with the Soldier concerned to provide substantial evidence that these conditions have been met.

15. Army Regulation 190-45 (Law Enforcement Reporting), prescribes policies, procedures, and responsibilities on the preparation, reporting, use, retention, and disposition of Department of the Army (DA) forms and documents, listed in sections III and IV of appendix A, related to law enforcement (LE) activities. It implements Federal reporting requirements on serious incidents, crimes, and misdemeanor crimes. It also assigns the geographic areas of responsibility to a specific installation Provost Marshal Office (PMO) or Directorate of Emergency Services (DES). Paragraph 3–6 (Amendment of records), a. Policy. An amendment of records is appropriate when such records are established as being inaccurate, irrelevant, untimely, or incomplete. Amendment procedures are not intended to permit challenging an event that actually occurred. Requests to amend reports will be granted only if the individual submits new, relevant and material facts that are determined to warrant their inclusion in or revision of the police report. The burden of proof is on the individual to substantiate the request. Requests to delete a person's name from the title block will be granted only if it is determined that there is not probable cause to believe that the individual committed the offense for which he or she is listed as a subject. It is emphasized that the decision to list a person's name in the title block of a police report is an investigative determination that is independent of whether or not subsequent judicial, non-judicial or administrative action is taken against the individual. In compliance with DOD policy, an individual will still remain entered in the Defense Clearance Investigations Index (DCII) to track all reports of investigation.

16. Army Regulation 195-2 (Criminal Investigative Activities), prescribes policies and procedures pertaining to criminal investigation activities within the Department of the Army (DA). It prescribes the authority for conducting criminal investigations, crime prevention surveys, protective service missions, force protection and antiterrorism efforts and the collection, retention, and dissemination of criminal information. It delineates responsibility and authority between installation law enforcement (LE) activities and the U.S. Army Criminal Investigation Command (USACIDC). Paragraph 4–4 (Individual requests for access to, or amendment of, U.S. Army Criminal Investigation Command reports of investigations), b. (Amendment of U.S. Army Criminal Investigation Command reports), the USACIDC ROIs are exempt from the amendment provisions of 5 USC 552a and AR 340–21. Requests for amendment will be considered only under the provisions of this regulation. Requests to amend or unfound offenses in USACIDC ROIs will be granted only if the individual submits new, relevant, and material facts that are determined to warrant revision of the report. The burden of proof to substantiate the request rests with the individual. Requests to delete a person's name from the title block will be granted, if it is determined that credible information did not exist to believe that the individual committed the offense for which titled as a subject at the time the investigation was initiated, or the wrong person's name has been entered as a result of mistaken identity. The decision to list a person's name in the title block of a USACIDC ROI is an investigative determination that is independent of judicial, non-

judicial, or administrative action taken against the individual or the results of such action. Within these parameters, the decision to make any changes in the report rests within the sole discretion of the CG, USACIDC. The decision will constitute final action on behalf of the Secretary of the Army with respect to requests for amendment under this regulation.

17. Department of Defense Instruction (DoDI) 5505.07 (Titling and Indexing in Criminal Investigations), in accordance with the authority in Department of Defense (DoD) Directive 5106.01, this issuance establishes policy, assigns, responsibilities, and provides procedures for a uniform standard for titling and indexing subjects of criminal investigations by DoD.

a. Paragraph 1.2 (Policy), a. DoD Components authorized to conduct criminal investigations, as outlined in DoD Instruction 5505.16, will title and index subjects of criminal investigations as soon as the investigation determines there is credible information that the subject committed a criminal offense. Indexing in the DCII may be delayed until the conclusion of the investigation due to operational security. b. Victims and incidentals associated with criminal investigations can be titled and indexed. c. Titling and indexing are administrative procedures and will not imply any degree of guilt or innocence. d. Once the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if the subject is found not guilty of the offense under investigation, unless there is mistaken identity or it is later determined no credible information existed at the time of titling and indexing. e. If a subject's information requires expungement from or correction in the DCII, DoD Components will remove the information as soon as possible, as outlined in Section 3. f. Judicial or adverse administrative actions will not be taken based solely on the existence of a titling or indexing record in a criminal investigation.

b. Paragraph 3.1, a subject is titled in a criminal investigative report to ensure accuracy and efficiency of the report. A subject's information is indexed in the DCII to ensure this information is retrievable for law enforcement or security purposes in the future.

c. Paragraph 3.2, a subject who believes they were incorrectly indexed, as outlined in Paragraph 1.2.d., may appeal to the DoD Component head to obtain a review of the decision.

d. Paragraph 3.3, when reviewing the appropriateness of a titling or indexing decision, the reviewing official will only consider the investigative information at the time of the decision to determine if the decision was made in accordance with Paragraph 1.2.a.

e. Paragraph 3.4, DoD Components that conduct criminal investigations will make appropriate corrections or expungements to criminal investigative reports or the DCII as soon as possible.

18. Army Regulation 623-3 (Evaluation Reporting System) prescribes the policy for completing evaluation reports and associated support forms that are the basis for the Army's Evaluation Reporting System (ERS). This includes DA Form 67-10-1 (Company Grade Plate (O1 – O3; WO1 – CW2) Officer Evaluation Report), DA Form 67-10-2 (Field Grade Plate (O4 – O5; CW3 – CW5) Officer Evaluation Report), and DA Form 67-10-3 (Strategic Grade Plate (O6) Officer Evaluation Report). It includes DA Form 67-10 -1A (Officer Evaluation Report Support Form). It states the rated Soldier is the subject of the evaluation and has considerable responsibility in the evaluation process.

a. Normally, to be eligible for an OER or NCOER, a Soldier will complete 90 calendar days in the same position under the same rater. Nonrated periods are not included in this 90-day period (see DA Pam 623 – 3). For USAR TPU, DIMA, and drilling IRR Soldiers and ARNG Soldiers, the minimum rating period is 120 calendar days (see apps G and H).

b. Newly commissioned officers (Regular Army and ARNG) and newly appointed warrant officers will not be eligible to receive OERs, except for "Relief for Cause" reports, until after the completion of the respective officer basic course (either Basic Officer Leaders Course (BOLC) or Warrant Officer Basic Course (WOBC)). Units will begin the rating period upon arrival at the first duty station or assignment after completion of BOLC or WOBC. The officer's first annual ("Extended Annual") OER will be due 12 rated months after arrival at the first duty assignment (see paras 3 – 35, 3 – 42, and 3 – 43) unless another event (for example, "Change of Rater" or "Change of Duty") occurs. The "From" date in the period covered will be the commissioning or appointment date.

19. Title 10, U.S. Code, section 1130 (10 USC 1130) provides:

a. The legal authority for consideration of proposals for decorations not previously submitted in a timely fashion. Upon the request of a Member of Congress, the Secretary concerned shall review a proposal for the award of or upgrading of a decoration. Based upon such review, the Secretary shall determine the merits of approving the award.

b. The request, with a DA Form 638 (Recommendation for Award), must be submitted through a Member of Congress to: Commander, U.S. Army Human Resources Command (AHRC-PDP-A), 1600 Spearhead Division Avenue, Fort Knox, KY 40122. The unit must be clearly identified, along with the period of assignment and the recommended award. A narrative of the actions or period for which recognition is being requested must accompany the DA Form 638. Requests should be supported by sworn affidavits, eyewitness statements, certificates, and related documents. Supporting evidence is best provided by commanders, leaders, and fellow Soldiers who

had personal knowledge of the facts relative to the request. The burden and costs for researching and assembling supporting documentation rest with the applicant.

20. Title 10 USC, section 1251 (Age 62: Regular Commissioned Officers in Grades below General and Flag Officer Grades (Exceptions) provides that unless retired or separated earlier, each regular commissioned officer of the Army, Navy, Air Force, Marine Corps, or Space Force (other than an officer covered by section 1252 of this title or a commissioned warrant officer) serving in a grade below brigadier general or rear admiral (lower half), in the case of an officer in the Navy, shall be retired or separated, as specified in subsection (e), on the first day of the month following the month in which the officer becomes 62 years of age.

a. The Secretary of the military department concerned may defer the retirement or separation of a health professions officer if the Secretary determines that such deferral is in the best interest of the military department concerned.

b. A deferment may not extend beyond the first day of the month following the month in which the officer becomes 68 years of age. The Secretary of the military department concerned may extend a deferment beyond the day referred to in paragraph 1. if the Secretary determines that extension of the deferment is necessary for the needs of the military department concerned. Such an extension shall be made on a case-by-case basis and shall be for such period as the Secretary considers appropriate.

21. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//