

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 22 May 2024

DOCKET NUMBER: AR20230002434

APPLICANT REQUESTS: correction of his record to show:

1. He was authorized dual housing allowance in the form of Basic Allowance for Housing (BAH), Overseas Housing Allowance (OHA), Family Separation Housing – B (FSH-B), and/or FSH-Overseas (O).
2. In the alternative, Per Diem consistent with the decision rendered in the Wolfing and Gulley cases.
3. Expunge from his records any investigations based on his BAH entitlements.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Orders Number HR-8277-00022, 4 October 2018
- Memorandum, Subject: Statement of Understanding for Army Reserve or National Guard Personnel on Unaccompanied Orders Regarding Entitlement to BAH, Family Separation Housing - Overseas (FSH-O) and Family Separation Allowance (FSA), 20 March 2019
- Orders Number HR-8277-00022A01, 5 December 2019
- Orders Number HR-8277-00022A02, 18 November 2020
- Orders Number HR-8277-00022A03, 2 December 2021
- Orders Number HR-8277-00022A04, 12 May 2022
- Orders Number HR-2350-00011, 16 December 2022
- G-1 Letter to the Honorable J- H-
- BAH calculations
- Leave and Earnings Statements (LES), December 2019 through February 2023

FACTS:

1. The applicant states, he is an Army Reservist that was activated for Contingency Operations in Stuttgart Germany on 1 January 2019, initially for a period of 365 days, later extended to 1825 days in 1-year increments. He remained on Contingency Orders

at the time of this filing. He was not authorized shipment of Household Goods (HHG) at government expense when he was ordered to active duty (he was later authorized a minimal 10 percent HHG entitlement in May 2022 for the purpose of getting items back to the Continental U.S. (CONUS)) and was ordered to live on the economy due to non-availability of government housing. He resides in Lakewood CO (80215). He had three dependents at the time he was ordered to active duty (now four), and initially his dependents stayed in CO, and came to visit for short periods. In December 2019, when his first extension order was published, his family decided to stay in Germany full time. He told the Army Finance office at Panzer Barracks, Stuttgart of their decision and they immediately revoked his BAH entitlement and threatened to report him to the U.S. Army Criminal Investigative Division (CID), despite the fact that he "self-reported" that his family had decided to stay. He was unsure whether CID actually initiated an investigation, but he never personally spoke to an investigator. The removal of his BAH entitlement has caused him significant financial hardship in maintaining two households, as he still had to pay for his mortgage, insurance, taxes, etc, back in CO. At no time was he informed that he could request a Secretarial waiver for dual entitlements, and in fact was required to sign a form stating unambiguously that if his family moved here with the intent to stay, that it would "negate his housing entitlement for their primary residence."

2. The applicant requests the Board to expunge from his Army Military Human Resources Record any documentation pertaining to a CID investigation related to BAH fraud. A review of the applicant's Interactive Personnel Electronic Records Management System record did not show any documentation pertaining to a BAH fraud investigation. The applicant may contact the U.S. Army CID at Department of the Army CID, 27130 Telegraph Rd, Quantico, Virginia, 22134. The Board will not address this portion of the applicant's request.

3. A review of the applicant's official record shows the following:

a. On 31 May 2008, the applicant was appointed as a Regular Army commissioned officer and executed an oath of office.

b. On 1 September 2016, the applicant was honorably released from active duty by reason of completion of required active service and transferred to the 75th Training Division.

c. On 2 September 2016, the applicant was appointed as a Reserve commissioned officer.

d. On 4 October 2018, Orders Number HR-8277-00022 issued by the U.S. Army Human Resources Command (HRC) ordered the applicant to Contingency Operation for Active Duty Operational Support (CO-ADOS) for a period of 365 days with assignment to Headquarters, European Command (EUCOM) in support of Operation

Inherent Resolve (OIR) with duty at Stuttgart, Germany. The additional instructions state "this is an unaccompanied Permanent Change of Station (PCS) and movement of HHG and dependents was not authorized. These orders show the applicant's home address as Lakewood, CO, 80215.

e. On 5 December 2019, Orders Number HR-8277-00022A01 issued by HRC amended Orders Number HR-8277-00022 changing the applicant's end of tour from 31 December 2019 to 31 December 2020.

f. On 18 November 2020, Orders Number HR-8277-00022A02 issued by HRC amended Orders Number HR-8277-00022 changing the applicant's end of tour from 31 December 2020 to 30 December 2021.

g. On 2 December 2021, Orders Number HR-8277-00022A03 issued by HRC amended Orders Number HR-8277-00022 changing the applicant's end of tour from 30 December 2021 to 30 December 2022.

h. On 12 May 2022, Orders Number HR-8277-00022A04 issued by HRC amended Orders Number HR-8277-00022 by changing the applicant's address from Lakewood, CO, 80215 GM to Lakewood, CO, 80215 and changed his authorization to "10 percent HHG authorized but dependents not authorized."

i. On 16 December 2022, Orders Number HR-2350-00011 issued by HRC ordered the applicant to CO-ADOS in support of Operation Enduring Freedom for a period of 365 days with assignment to Headquarters, EUCOM, with assignment to Patch Barracks, Germany with an end date of 30 December 2023. The additional instructions state "this is an unaccompanied PCS and movement of HHG, and dependents not authorized." These orders show the applicant's home address as Lakewood, CO, 80215.

j. On 18 July 2023, Orders Number HR-2350-00011A01 issued by HRC amended Orders Number HR-2350-00011 changing the applicant's end of tour date from 30 December 2023 to 10 September 2023.

k. On 10 September 2023, the applicant was honorably released from active duty and transferred to the U.S. Army Reserve Element EUCOM, Norfolk, Virginia. DD Form 214 (Certificate of Release or Discharge from Active Duty), item 7a (Place of Entry into Active Duty) shows Lakewood, CO, and item 8a (Last Duty Assignment and Major Command) shows U.S. Army Element Headquarters EUCOM.

4. The applicant provides:

a. Memorandum, Subject: Statement of Understanding for Army Reserve or National Guard Personnel on Unaccompanied Orders Regarding Entitlement to BAH, FSH-O and FSA, dated 20 March 2019, from the 266th Financial Management Support Center, wherein it states in pertinent part, BAH is an entitlement for housing based on my dependent's primary residence in the United States or OHA is my primary residence is at an overseas location. Dependents must reside at that location to claim BAH or OHA entitlements associated with the respective location. While on an unaccompanied tour, I understand that if I intend to bring my dependents to Germany, even for a short period, I must pay for their housing/lodging, flights, and all other associated costs and that they are not command sponsored. While on an unaccompanied tour, I understand that bringing my dependents to Germany with the intent for them to reside here will negate my housing entitlement for their primary residence and my FSA. I understand that I must take action to stop my previous dependents-based housing allowance and FSA with my servicing Finance Customer Support Team office within 10 days of the arrival of my dependent(s) to Germany.

b. G-1 Letter to the Honorable J- H- wherein the Office of the Deputy Chief of Staff, G-1 replied to an inquiry pertaining to the applicant's compensation and entitlements while stationed in Germany. The letter states in pertinent part:

(1) We contacted the United States Army Reserve Command and confirmed the applicant was being paid correctly. The supporting finance followed current Department of Defense policy to adjust his compensation based on his dependents living with him.

(2) Since his dependents have been living with him in Germany for 90 or more consecutive days, this does not constitute a temporary social visit. Therefore, he is not authorized a BAH, a FSH, or an FSA while assigned to Germany. However, he is eligible to receive an OHA based on his duty station, provided he submits a lease agreement and a certified Department of Defense Form 2367 (Individual Overseas Housing Allowance Report), to the supporting finance office.

(3) Under current Department of Defense policy, the purpose of FSH is to partially cover the added housing expense resulting from separation from dependents while the member serves an unaccompanied overseas tour. Since his dependents live at the duty station with him in Germany, they are considered to have relocated the household to Germany. This is not in accordance with Department of Defense policy and, therefore, BAH, FSH, and FSA are not payable.

c. BAH calculations showing for the months of December 2019 through December 2022 the differences between BAH with Dependent and OHA without Dependent in comparison to what the applicant received resulting in a difference of \$80, 540.00.

d. LES's for December 2019 through February 2023 showing:

- BAH with Dependent for CO and FSA in the amount of \$125.00 for December 2019
- January 2020 FSA was removed and he was manually paid FSH-O
- February 2020 he was paid OHA (OHA removed at the end of month payment) and BAH Type II
- March 2020 – 24 November 2021 OHA and BAH Type II paid, check date 26 November 2021 and OHA debt of \$7,206.60 was established
- 1 December 2021 OHA and BAH Type II paid
- 14 January 2022 OHA removed BAH Type II paid
- 1 February 2022 – 30 December 2022 OHA and BAH Type II paid
- 13 January – 1 February 2023 – OHA not paid

5. On 27 June 2023, in the processing of this case, the Office of the Deputy Chief of Staff, G-1 provided an advisory opinion recommending disapproval and stating:

a. After careful review of the information provided in the application, we recommend the Board disapprove the applicant's request for administrative relief. The applicant stated in his Congressional inquiry that his dependents resided with him full time. Since his dependents resided with him at his duty station for more than 90 consecutive days, he is not authorized BAH, FSH, or FSA during that period in Germany.

b. The Defense Finance and Accounting Service, Office of General Counsel (DFAS, OGC) advised that to the extent the facts are such that a member's dependents were in the vicinity of the Permanent Duty Station (PDS) for more than 90 continuous days, the member would not be entitled to FSH-O for those time periods. Moreover, the dependents' Overseas CONUS location for more than 90 days would require payment of BAH at the with-dependent rate based upon the PDS (i.e., OHA, rather than BAH), if the Government did not provide housing for the member and dependents.

c. Since his application is related to the court remanded cases currently in litigation, we recommend that the board request a legal determination of entitlements from DFAS, OGC. He should provide proof of his dependents' location to assess whether he meets the requirements for payment of two housing allowances under the law. We find that his application does not contain factual evidence verifying the location of his dependents during the tour and the duration of their location in the vicinity of his PDS.

6. On 5 January 2024, the applicant was provided with a copy of the advisory opinion for comment or rebuttal.

7. On 24 January 2024, the applicant responded to the advisory opinion and stated:

a. He does not dispute the facts as listed in the Office of the Deputy Chief of Staff (ODCS) memorandum. His dependents did reside with him for more than 90 days while

overseas, and the Army's interpretation of the regulation is that he is not entitled to BAH or FSH-O due to that fact.

b. The whole point of the lawsuit and subsequent ABCMR application as directed by the judge, is that the Army is inequitably applying the regulation and that the Army has the ability within the Joint Travel Regulation (JTR) to authorize dual allowances due to the "general need for Reservists with dependents to maintain two households regardless of where their dependents reside."

c. For the ODCS G-1 to come back and say "the law says No" when the Court of Federal Appeals has clearly said that the law may allow it if the Army agrees to it, is disingenuous.

d. One of the three criteria that the judge listed that the Army should look at when deciding whether dual entitlements are authorized is whether the member maintained separate households. He owned and paid a mortgage on his home in Denver, CO, for the duration of his orders activating him and ordering him to Europe. He is happy to provide a copy of any relevant documents if the Board desires it.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records, the Board considered the applicant's request for correction of his military records to reflect entitlement to dual housing allowances during his overseas assignment in Germany. Based on the applicant's service history, relevant orders, DD Forms 214, the advisory opinion from the Office of the Deputy Chief of Staff, G-1, and the applicant's rebuttal.

2. Notwithstanding the advising official's recommendation for disapproval, based on the applicant's dependents residing with him overseas for more than 90 consecutive days, the Board found compelling evidence supporting the applicant's claim. The applicant, a Reserve commissioned officer, maintained two separate households during his active-duty assignment in Germany, including continued ownership and financial responsibility for his primary residence in Denver, Colorado. The Board acknowledged that the applicant's situation aligns with the broader context of ongoing litigation concerning the equitable application of housing entitlements for reservists, particularly those activated under CO-ADOS orders.

3. The Board noted that the applicant's orders explicitly designated his assignment as an unaccompanied Permanent Change of Station (PCS), with no authorization for dependent movement. Despite this, the applicant incurred the financial burden of maintaining his stateside residence while serving overseas. His rebuttal emphasized that the Army retains discretion under the Joint Travel Regulation (JTR) to authorize dual housing allowances in such circumstances, and that the court has recognized the potential for such entitlements when justified. The Board determined that the applicant's records warrant correction to reflect entitlement to Basic Allowance for Housing (BAH), Overseas Housing Allowance (OHA), Family Separation Housing – B (FSH-B), and/or Family Separation Housing – Overseas (FSH-O), as applicable. Furthermore, the Board agreed that any investigations or adverse actions related to his BAH entitlements should be expunged from his record, as they were initiated through no fault of the applicant. Based on this, the Board granted relief.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
XXX	XXX	XXX	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected to reflect authorization for dual housing allowances during his overseas assignment, and any investigations or adverse actions related to his BAH entitlements should be removed from his official record.

X //SIGNED//

CHAIRPERSON

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. Department of Defense 7000.14-R Financial Management Regulation Volume 7A Chapter 26 Section 10.5.1.7 (Called or Ordered to Active Duty for Contingency) provides that a Reserve Component (RC) member called or ordered to Active Duty (AD) in support of a contingency operation is authorized BAH or OHA based on the primary residence beginning on the first day of Active Duty (AD). This rate is authorized even for duty of 30 or fewer days. This rate continues for the duration of the tour unless the RC member is authorized Permanent Change Station (PCS) Household Goods (HHG) transportation, in which case the rate for the PDS would apply on the day the RC member reports to the PDS.

a. Section 10.5.2 (Contingency Operation) provides that a RC member called or ordered to AD in support of a contingency operation is authorized BAH or OHA for the duration of the tour. If the RC member receives a PCS order authorizing HHG transportation, BAH or OHA is based on the new PDS. However, if the Service member is called or ordered to AD and a PCS order is not issued, BAH or OHA is based and paid on the primary residence location at the time called or ordered to AD.

b. Section 10.5.1.5 (Called or Ordered to Active Duty Other Than Training for 181 or More Days but not Authorized HHG Transportation) provides that a RC member called or ordered to AD for other than training for 181 or more days who is not

authorized HHG transportation for a PCS receives BAH or OHA based on the primary residence. The member must be residing at a location outside the local commuting distance of the RC member's primary residence and the duty is not for more than 180 consecutive days at one location.

2. JTR Chapter 10 states, OHA is designed to cover actual rental costs for 80 percent of the assigned Service members. A Service member is reimbursed actual rental costs, limited to the maximum OHA rate for each locality and grade. OHA is not intended and must not be used for the personal enrichment of a Service member by including costs incurred for procuring or adapting a residence to accommodate renters or for vacation purposes. Disciplinary action may apply when housing allowances are used for other than the purpose intended. Payment of OHA requires a lease agreement or a verifiable purchase price. The reported housing must be the actual residence that the Service member occupies and from which the Service member commutes to and from work daily. Monthly rent is the amount paid each month by a Service member for possession and use of private-sector housing, to include a mobile home or boat. The rent stated in the lease, or as otherwise agreed to by the landlord and the tenant in a written document, must be used in computing the OHA. If a Service member or dependent jointly occupy a dwelling with relatives or friends who own the dwelling, the rent amount is zero, even if there is a lease or written document.

3. 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: <ul style="list-style-type: none"> • 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.

4. 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.

5. 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.

6. JTR states per diem allowance is a daily rate meant to cover living expenses. It provides the maximum amount a traveler may be reimbursed for lodging, Meals and Incidental Expense (M&IE). The per diem is based on the rate of the official duty location. Per diem is comprised of three elements: lodgings, M&IE. The Army's

contingency operation flat per diem rate for a member assigned to a location in excess of 180 days at one location is 55 percent of the applicable maximum locality per diem rate.

7. Army Regulation 637-1 (Military Personnel Pay, Allowances, and Incentives - Army Compensation and Entitlements Policy) provides that BAH is a housing allowance based on the market price of rental housing in the civilian market. BAH distinguishes between "with dependents" and "without dependents," not the number of dependents. BAH compensation is based on duty station and is fixed regardless of where the Soldier may choose to live. As an exception, an RC member called or ordered to active duty for other than training for 181 or more days, whose orders do not authorize household goods (HHG) transportation for a PCS, are not paid BAH based on duty station, but rather, their primary residence.

8. Title 37, United States Code (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.

//NOTHING FOLLOWS//