

IN THE CASE OF: ██████████

BOARD DATE: 3 November 2023

DOCKET NUMBER: AR20230003399

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 ██████████, et al., and ██████████, 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 in Colorado at the "without-dependents" rate. In addition, that he is authorized an Overseas Housing Allowance (OHA) at the "with dependent" rate for his housing or alternatively primary residence based BAH and per diem for his time in Wiesbaden, Germany and Stuttgart, Germany from:

- 17 July 2015 through 11 March 2016 based on his DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 11 March 2016
- 29 September 2017 through 1 November 2019 based on his DD Form 214 for the period ending 1 November 2019

b. Removal of any adverse personnel action from the Criminal Investigation Division (CID) (including titling in DCII) due to being investigated for this matter.

c. Removal of the General Officer Memorandum of Reprimand (GOMOR) and any other records that mention or address the GOMOR from his service records

d. Provide direction that should any other records related specifically to this case be filed in his service record in the future, shall be removed as soon as they are recognized by the applicant or unit Human Resources personnel.

e. Require the Army to include him in a Special Selection Board (SSB) to determine appropriate date of rank for his promotion to Lieutenant Colonel (LTC) for Fiscal Year (FY) 2022.

f. Repay allowances that were recouped by Defense Finance and Accounting Service (DFAS) following the unjust GOMOR.

g. Award of the Defense Meritorious Service Medal he was recommended for.

h. Restore leave balance of 69 days that were charged due to not being provided sufficient time for his relief from active duty (REFRAD).

i. Credit for retirement points that were lost due to being flagged for the following periods:

- 30 January 2019 through 29 January 2020, 83 Active Duty (AD) points
- 30 January 2020 through 29 January 2021, 171 AD points
- 30 January 2021 through 29 January 2022, 172 AD points
- 30 January 2022 through 29 January 2023, 335 points

COUNSEL'S SUPPORTING DOCUMENTS CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Patriots Law Brief, to include Exhibits 1 thru 8
- Applicant's self-authored relief requested
- End of Tour Award Memorandum
- Leave Requests
- Active Duty for Operational Support (ADOS) Emails
- Orders Number HR-7234-0017, AD Orders with amendments
- Leave and Earnings Statement (LES) 1 September 2020
- GOMOR with supporting documents
- Supplemental to Counsel's Original Brief, 10 May 2023

FACTS:

1. The applicant states, in effect:

a. Below is the outlined relief requested by the applicant to address the outcomes of multiple personnel action flags and investigations that were conducted against him between May 2019 and October 2022.

b. GOMOR. Immediately remove the unjust GOMOR, dated 15 May 2020 from his Army Military Human Resource Record (AMHRR). Additionally, remove any other records that mention or address this GOMOR from his AMHRR, and provide direction that should any other records related specifically to this case be filed in his AMHRR in

the future, they shall also be removed as soon as they are recognized by himself or unit Human Resource personnel.

c. Promotion. Require Army to include him in a SSB to determine promotion and he be given the appropriate date of rank (DOR) for his promotion to LTC. It is assumed that he certainly would have been selected for promotion from the FY 2022 Reserve Component (RC) LTC Army Promotion List (APL) Promotion Selection Board (PSB), which released results on 21 June 2022. He would request that his LTC DOR be 1 July 2022. He requests this date because it is just days after selection board results were released and coincides with his most recent Officer Evaluation Report (OER) through date. This would be the most clean and transparent DOR.

d. BAH Allowance. Repay allowances that were recouped by DFAS following the unjust reprimand.

e. End of Tour Award. Award the Defense Meritorious Service Medal he was recommended for at the completion of his Special Operations Command Africa (SOCAF) tour. Attached is the recommendation memorandum, DA Form 638 (Recommendation for Award), and narrative for award. The approval authority would have been the Commanding General of SOCAF who was Lieutenant General (LTG) (then Major General) [REDACTED]. LTG [REDACTED] is the current Joint Staff J7 Director at the Pentagon. It would be preferred, though not necessary, that he review and sign the award. It should be dated 28 September 2019, the final date of his orders for that assignment.

f. Restore Leave Balance. Restore 69 days of leave that were charged due to not being provided sufficient time before REFRAD for the Army Transition Assistance Program (TAP) when FY 21 RC LTC APL PSB initiated a Headquarters, Department of the Army (HQDA), Personnel Flag that prevented orders being cut for COADOS positions he was selected for at HQDA G-3/5/7 Army Operations Center.

g. Lost Retirement Points During Investigative Periods. Credit his DA Form 5016 (Retirement Accounting Statement) with AD points that were lost due to flags preventing him from continuing his orders with the Warrior Transition Battalion (WTB) in 2019 and then serving COADOS orders in 2021 and 2022 he was selected for. The breakdown would be as follows:

- 30 January 2019 through 29 January 2020, 83 AD points (would have been at WTB)
- 30 January 2020 through 29 January 2021, 171 AD points (would have been at WTB/ADOS)
- 30 January 2021 through 29 January 2022, 172 AD points (would have been at ADOS)

- 30 January 2022 through 29 January 2023, 335 points (would have been at ADOS)

h. Though it is impossible for him to encapsulate in a memo the SIGNIFICANT amount of personal, professional, emotional, mental, physical, and familial DISTRESS that resulted from the allegations, investigations, personnel actions, reprimand, recoupments, denials of orders, delays of promotion, refusal of medical care for line of duty injury, etc., etc., the above requests would suffice, as a bare minimum, to restore justice to himself and his family for the SEVERE HARDSHIP these unjust actions have caused them over the last almost four years. The Board's consideration is also appreciated more than can be conveyed in this memo.

i. A personal appearance before the Board to address, in person, any questions and/or provide any illuminating information.

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 the original court remand in *Wolfing vs. United States*, which involved the same BAH/OHA issues, as well as the removal of various adverse documentation as in this case, the Board removed all adverse information to include titling in each applicant's request. The dual housing allowance is still an on-going issue, and the applicant is now a plaintiff in Counsel's second court remand.

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, Family Separation Housing – Overseas (FSH-O), OHA for the permanent duty station (PDS), and/or per diem, and if applicable, the removal of any adverse information pertaining to BAH/OHA/FSH-O. 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. The applicant was not part of the original seven and his adverse actions have not been removed from his service record i.e., his titling by CID.

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

d. 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.

e. 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 were given to CID. Upon initiation of the investigation, the Soldier 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 Contingency Operations (CONOP) to ensure these Reservists were able to financially to maintain two households.

e. (End of Tour Award Memorandum). A memorandum from SOCA to the Commanding General, dated 1 September 2019, which is a recommendation for award of the Defense Meritorious Service Medal for the applicant from 28 September 2017 to 28 September 2019. There were no pending unfavorable actions for the applicant.

f. (Leave Request). The applicant asks the Board to use the leave request to determine that he had 69 days of leave that were used, when he was released from AD without the appropriate time to conduct TAP and when follow-on orders were denied due to a flag resulting from PSB requiring an involuntary separation board for the GOMOR. He included a USARC Form 24-R (Individual Claim for AD Pay, Allowances, and Adjustments), which shows his departure from his home of record was 20 July 2020 and his return to his home of record was 26 August 2021. He had accrued 69.5 days of military leave during the period of 20 July 2020 to 26 August 2021 and used 69 days of that accrual. He was due payment for .5 days accrued military leave. He had not received payment for more than 60 days of military leave during his military career.

g. (ADOS Selection Emails). Emails with dates of the applicant's selection for and expected reporting dates to ADOS positions that were eventually "killed" because of the inability of US Army Human Resources Command (HRC) to publish orders due to flags resulting from PSB requiring an involuntary separation Board for the GOMOR. The emails are available for the Board's consideration they show the following dates he would have been on orders:

- 3 September 2021 through 1 August 2022
- 3 Oct 2022 through 30 September 2023

h. Orders HR-7234-00017, published by HRC, dated 22 August 2017, which order the applicant to Contingency Operation for AD Operational Support in Stuttgart, Germany with a report date of 15 September 2017 for a period of 365 days and a end date of 14 September 2018. The orders were amended on 29 August 2017 changing the report date to 29 September 2017 and end date to 28 September 2018 and on 13 September 2018 changing the tour length to 730 days and the end date to 28 September 2019.

i. An LES, dated 1 September 2020, which shows he received BAH in the amount of \$1,147.50. It also shows the following original debts for receiving BAH with Dependents and FSA Type II:

- \$5,190 from 1 January 2018 through 15 March 2018

- \$4,221.20 from 30 July 2018 through 30 September 2018
- \$2,975.80 from 1 October 2018 through 13 November 2018
- \$2,974.40 from 21 November 2017 through 30 December 2017
- \$625.00 from 1 January 2018 through 15 March 2018
- \$508.33 from 30 July 2018 through 30 September 2018
- \$366.67 from 21 November 2017 through 30 December 2017
- \$358.33 from 1 October 2018 through 13 November 2018
- unpaid debt balance total \$11,287.15

j. The GOMOR and supporting documents, which will be summarized below.

k. A self-authored memorandum for record (MFR), dated 21 November 2022, wherein the applicant is requesting reconsideration for the filing for the filing of the GOMOR due to incomplete information being the basis for the previous recommendation. The entire document is available for the Board's consideration.

l. A DA Form 2173 (Statement of Medical Examination and Duty Status), dated 26 April 2019 shows the applicant was an outpatient and sustained an injury to his left shoulder during airborne operations. His injury was incurred in the line of duty.

m. An email from the WTB S-1, dated 6 June 2019 which states due to the Battalion (BN Executive Officer position being dated TOD, she would have to delete the position and repost it with a new start date. The BN Commander had selected the applicant for the position and he needed to apply for it when it opened back up.

n. A self-authored MFR, dated 16 November 2021 which is a list of personal references to request Retention in the US Army Reserve (USAR). The list and character references are available for the Board's consideration.

o. A calendar showing his family's locations during his tour in Europe from 2017 through 2019.

p. A document entitled Pay Difference Totals Accounting for Changes in Allowances, which is available for the Board's consideration and shows the total recouped as \$17,219.53.

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

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

a. A DA Form 71 (Oath of Office) shows on 16 December 2005, the applicant took his oath of office as a Reserve Commissioned Officer in the rank of second lieutenant.

b. Orders Number HR-5188-00020, issued by the HRC, dated 7 July 2015, show the applicant was ordered to AD for the purpose of operational support in Wiesbaden, Germany, with a report date of 17 July 2015 for a period of active duty of 179 days and end date of 11 January 2016. The orders were amended on:

- the first amendment to these orders was not available in the applicant's service record
- 29 September 2015 to add a line of accounting and additional instructions
- 5 October 2015 to remove instructions
- 15 October 2015 changing the travel fund cite

c. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably released from AD on 11 March 2016 for completion of his required AD. He completed 7 months and 25 days of net AD service this period.

d. Orders B-08-704634, published by HRC, dated 17 August 2017 promote the applicant to the rank of Major (MAJ) with a effective date and DOR of 10 March 2017.

e. Orders Number HR-7234-00017, issued by the HRC, dated 22 August 2017, show the applicant was ordered to AD for the purpose of operational support in Stuttgart, Germany, with a report date of 15 September 2017 for a period of active duty of 365 days and end date of 14 September 2018. The orders were amended on:

- 29 August 2017 changing the report date to 29 September 2017 and the end date of 28 September 2018
- 13 September 2018, changing the tour length to 730 days and the end date to 28 September 2019
- 18 September 2019 changing the tour length to 359 days and the end date to 23 September 2019

f. A DD Form 2367 (Individual OHA Report), dated 4 December 2017 which shows he was entitled to a cost of living or OHA for dependents residing elsewhere and he was the only occupant of his house. His rent was \$2,250 per month. The document was signed by the housing officer or appropriate official on 4 December 2017.

g. A DD Form 214 shows he was honorably released from active duty for completion of required active service on 1 November 2019. He had completed 2 years, 1 month, and 3 days of net active service this period.

h. An undated GOMOR states he was reprimanded for Larceny of Military Property of a value of more than \$500 between November 2017 and April 2019, in Stuttgart, Germany. During the course of the investigation conducted by CID, it was discovered that he had, on multiple occasions, family members visiting with him for periods of more than 90 days in Germany. During these visits, he was collecting FSA that was not authorized. This resulted in multiple occasions of him receiving allowances totaling approximately \$2,875 he was not entitled. On 27 March 2020, the applicant acknowledged receipt of the GOMOR and stated he would submit matters in rebuttal. On 15 May 2020, the convening authority filed the GOMOR in the applicant's official military personnel file.

i. A self-authored memorandum to the convening authority in rebuttal to his GOMOR, dated 15 April 2020, states, in effect:

(1) BLUF. He read and understood the information presented against him based on the allegation he committed Larceny of Military Property. In response, he wished to communicate his remorse for his mistakes and his desire to make restitution (emphasis added by applicant) for the situation. He also wished to present a brief explanation and request regarding its adjudication.

(2) Remorse. No amount of writing provided could adequately convey his remorse for his mistakes that had caused the situation. There had been few days, if any, since he became aware of this mistake that he had not felt a significant weight of frustration and disappointment in himself. He is better than the mistake and it saddened him to think that others would have caused to question that. For his entire life he had strove to always be honest and in agreement with established rules, and if he had made mistakes to fully correct them as soon as possible. He felt that way then as much as ever.

(3) Restitution. Since the moment he became aware of this his greatest desire had been to correct the issue of over-payment and return the appropriate amount of allowances back to DFAS. At absolutely not point before, during, or after his time at SOCAF had he ever had any intention to take, obtain, or withhold ANY allowances he was not entitled to and he wanted to return these immediately.

(4) Explanation. Still recognizing that there was no excuse for his mistakes, he wanted to provide an explanation, for the commanding general's clarity, as to what appeared to be two separate occurrences of his family being with him over the 90 days of allowable family visiting.

(5) The first occasion, from 22 November 2017 to 15 March 2018, was shortly after he arrived at SOCAF, and they hadn't yet decided when his family would return to the US, but intended for them to do so before they exceeded 90 days of visiting. They had thought they would return just after President's Day, but then he became aware of a temporary duty (TDY) trip he had to take back to the US in March, and since they had four very young children, he requested a pass to fly home with them before reporting to the TDY location. He should have counted the days and recognized this would cause them to be over, and then gone to the finance office to adjust the allowances. He deeply regrets that he did not do this. It was sloppy and not consistent with his normal excellent efforts.

(6) On the second occasion of his family visit, his family arrived in Stuttgart, but did not stay with him until 17 August. During the time between arrival on 31 July and 17 August, they were traveling throughout Europe with his wife's parents. His father-in-law's parents were from Amsterdam and he speaks fluent Dutch so they all visited The Netherlands for a week, then also spent time in Belgium, the UK, and other parts of Germany. He conferred in person with the finance office, and was left with the impression that if his family was not staying with him, and was out of Germany, even though they were in Europe, that those days didn't count, so in counting the days they were visiting him, he counted from their arrival at his home on 17 August until they departed on 13 November, which was 89 days. He thought he was in compliance with the regulation for this time period, but he also understood the perception it created - especially on paper where the best reference is the immigrations and border control data. Regardless, as an Officer, he needed to avoid even the perception of impropriety and he should have done a better job of doing so. He regretted his handling of the visit as well, especially since it appeared as though he did not learn his lesson after violating the 90 day rule the first time. The only thing he could do was promise to do better in the future. If he ever mobilized on an unaccompanied tour again, he would not have his family visit him for extended periods, and if they did, he would insist on his family separation allowance being stopped to avoid any appearance of impropriety.

(7) Adjudication. He greatly valued his tour with SOCAF, and wished to restore the honor of his time there in any way that he could. Over his 17-year Army career, he had always strove to live the Army values and tried to maintain a stringent personal code of conduct. These mistakes did not reflect his character and would not be

repeated. His only desire was to continue to serve his country as honorably as he had for the last 17 years, he humbly requested the convening authority to file the GOMOR locally, and accept his recommitment to faithfully discharge his duties with excellence and exactness.

(8) He stood ready to provide any further details if the convening authority wished to consider it and requested to meet the convening authority before his final adjudication in the case.

j. Character references in rebuttal to the GOMOR which speak of the applicant's good character. The letters of recommendation are available for the Board's consideration.

k. The applicant's Automated Record Brief, dated 15 December 2018, which shows the applicant's military courses, authorized awards, and duty assignments. The entire form is available for the Board's consideration.

l. A DA Form 4980-5 (The Bronze Star Medal Certificate) which shows he received the medal for exceptionally meritorious achievement in support of Operation Enduring Freedom from 28 January 2013 to 23 December 2013. The entire certificate is available for the Board's consideration.

m. A DA Form 4980-1 (The Army Commendation Medal Certificate (ARCOM)) which shows he received the medal for meritorious service from 15 May 2007 to 30 April 2008 during Operation Iraqi Freedom from 15 May 2007 to 30 April 2008. The entire certificate is available for the Board's consideration. DA Form 638 (Recommendation for Award) for the period of 15 May 2007 through 30 April 2008 which shows the applicant was recommended for the ARCOM with an Oak Leaf Cluster (OLC) for exception meritorious service from 15 May 2007 to 30 April 2008. By permanent Orders 090-065 the recommended award was approved. The DA Form 638 is available for the Board's consideration.

n. A DA Form 4980-1 (ARCOM Certificate) shows he received the medal for meritorious achievement from 25 September 2005 to 25 October 2005.

o. The applicant provided DA Forms 67-10-2 (Field Grade Plate OER) with his GOMOR rebuttal, which are available for the Board's consideration and show from:

- 27 September 2017 to 29 June 2018, he was in the rank of MAJ and rated proficient and highly qualified, his senior rater stated promote to LTC immediately
- 12 March 2016 to 9 September 2017, he was in the rank of MAJ and rated proficient and highly qualified
- 2 July 2015 to 11 March 2016, he was in the rank of CPT and rated highly qualified
- 18 January 2013 to 17 January 2014, he was in the rank of CPT and rated outstanding performance must promote and best qualified, his senior rater stated promote to MAJ
- 26 February 2012 to 17 January 2013, he was in the rank of CPT and rated outstanding performance must promote and best qualified
- 26 February 2011 to 25 February 2013, he was in the rank of CPT and rated satisfactory performance promote and best qualified, his senior rater stated promote with peers
- 5 August 2010 to 25 February 2011, he was in the rank of CPT and rated satisfactory performance promote and best qualified

p. His DA Form 5016 (Retirement Accounting Statement), dated 28 February 2023, shows he received the following AD points for the period requested:

- 30 January 2019 through 29 January 2020, 282 (he is requesting an additional 83 pts)
- 30 January 2020 through 29 January 2021, 194 (he is requesting an additional 171)
- 30 January 2021 through 29 January 2022, 193 (he is requesting an additional (172 points)
- 30 January 2022 through 13 November 2022, 3 (he is requesting an additional 335 points to the end of the year 29 January 2022)

q. In the applicant's documents submitted for the Board's consideration, he mentions an involuntary separation board. His service record was void of documentation showing he was seen before an involuntary separation board.

r. The applicant's service record is void of DA Forms 268 (Report to Suspend Favorable Personnel Actions (Flag)).

s. The applicant's service record is void of a CID report of investigation showing he was titled.

t. The applicant remains on active Reserve status.

7. 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.

8. 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.

9. 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 (OUSDP&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 OUSDP&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".

10. 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. Fifteen 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 single rate station allowances, at the new PDS location and dependent location BAH until dependents hit 90 days at their PDS. After the dependents resided in the new PDS, the applicant was no longer eligible for FSH.

11. 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." 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 (DHRA AOs at 3), 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."

12. 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 that relief is warranted.
2. The Board found FSH could have been approved in this case but was not. The Board noted it appears the applicant's dependents were 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 17 July 2015 through 11 March 2016 and 29 September 2017 through 1 November 2019.
3. The Board determined the applicant's name should be removed from the title block of any CID investigations related to overpayment of housing allowances during the periods 17 July 2015 through 11 March 2016 and 29 September 2017 through 1 November 2019.
4. Given the facts in this case, the Board determined the GOMOR issued to him by the Commander, Special Operations Command Africa, and all allied documents should be removed from his record.
5. The Board acknowledged the applicant's request to provide direction that should any other records related specifically to this case be filed in his service record in the future, they shall be removed as soon as they are recognized by the applicant or unit human resources personnel. The Board noted that its mission is to correct records. Because this request does not constitute a request for a record correction, the Board determined it cannot address this portion of his application.
6. Based on the removal of the GOMOR from his record, the Board determined it would be appropriate to refer his records to an SSB to be considered for promotion to LTC

under the criteria for any fiscal year when he was in the primary zone of consideration or above the primary zone of consideration and not selected.

7. The Board determined the evidence supports returning to him any monies recouped related to overpayment or allegedly improper payment of allowances during the periods 17 July 2015 through 11 March 2016 and 29 September 2017 through 1 November 2019.

8. The Board exercises its authority for the Secretary of the Army, who is not authorized to award the Defense Meritorious Service Medal. The Board cannot address this portion of his request.

9. The Board determined the evidence does not support restoring his leave balance of 69 days or crediting him with additional active duty points. The Board found insufficient evidence in the available service records to confirm that the events that led to his GOMOR caused a loss of leave or prevented him from performing active duty service.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	<u>Mbr 4</u>	<u>Mbr 5</u>	
:	:	:	:	:	GRANT FULL RELIEF
■	■	■	■	■	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:
 - 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 17 July 2015 through 11 March 2016 and 29 September 2017 through 1 November 2019
 - removing his name from the title block of any CID investigations related to overpayment of housing allowances during the periods 17 July 2015 through 11 March 2016 and 29 September 2017 through 1 November 2019
 - removing the GOMOR issued to him by the Commander, Special Operations Command Africa, and all allied documents from his record
 - referring his records to an SSB to be considered for promotion to LTC under the criteria for any fiscal year when he was in the primary zone of consideration or above the primary zone of consideration and not selected
 - returning to him any monies recouped related to overpayment or allegedly improper payment of allowances during the periods 17 July 2015 through 11 March 2016 and 29 September 2017 through 1 November 2019

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

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. ALARACT Message 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 Soldiers will no longer be authorized the option of contingency operations 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: <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.

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. 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.

15. 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.

16. 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.

17. Army Regulation 600-37 (Unfavorable Information) provides that an administrative memorandum of reprimand may be issued by an individual's commander, by superiors in the chain of command, and by any general officer or officer exercising general court-martial jurisdiction over the Soldier. The memorandum must be referred to the recipient and the referral must include and list applicable portions of investigations, reports, or other documents that serve as a basis for the reprimand. Statements or other evidence furnished by the recipient must be reviewed and considered before a filing determination is made.

a. The memorandum must be referred to the recipient and the referral must include and list applicable portions of investigations, reports, or other documents that serve as a basis for the reprimand. Statements or other evidence furnished by the recipient must be reviewed and considered before a filing determination is made.

b. A memorandum of reprimand may be filed in a Soldier's OMPF only upon the order of a general officer-level authority and is to be filed in the performance folder. The direction for filing is to be contained in an endorsement or addendum to the memorandum. If the reprimand is to be filed in the OMPF, the recipient's submissions are to be attached. Once filed in the OMPF, the reprimand and associated documents are permanent unless removed in accordance with chapter 7.

c. Once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned

to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF.

18. Army Regulation 600-37, paragraph 6-3a(5) provides the DASEB process and states Soldiers who believe that unfavorable information filed in their AMHRR, in the form of a memorandum of reprimand, admonition, or censure, or records or proceedings pursuant to UCMJ, Art. 15, have served their intended purpose, may submit an appeal in the case of an UCMJ, Art. 15, to request its transfer to the restricted portion of the AMHRR in accordance with paragraph 7-2d(3). Such appeals must include evidence that—

- the intended purpose has been served
- the Soldier has received at least one evaluation report (not academic) since its imposition
- the transfer is in the best interest of the Army
- the Soldier's chain of command at the time of the imposition and/or imposing authority support the transfer in the form of a memorandum

19. Army Regulation 60-37, paragraph 7-2 (Policies and Standards) states an officer who directed the filing in the AMHRR of an administrative memorandum of reprimand, admonition, or censure, may request its revision, alteration, or removal if later investigation determines such information is untrue/unjust in whole or in part. The basis for such determination must be provided to the DASEB in sufficient detail so as to justify the request. The officer who directed the filing of such a letter in the AMHRR may not initiate an appeal on the basis that the memorandum has served its intended purpose. However, a memorandum of support may be submitted with the recipient's appeal. Paragraph 7-2(d) provides the burden of proof and level of evidence required for an appeal.

20. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the OMPF. Paragraph 3-6 states once filed in the AMHRR, a document will not be removed from the record unless directed the Army Board for Correction of Military Records, DASEB, or an appropriate authority.

21. Army Regulation 135-155 (Promotion of Commissioned Officers and Warrant Officers Other than General Officers) prescribes policy and procedures used for selecting and promoting commissioned officers (other than commissioned warrant officers) of the ARNGUS and commissioned and warrant officers of the USAR.

a. Paragraph 3-5 (Selection Board Procedures) states the Secretary of the Army has delegated the authority to convene SSB's to the Deputy Chief of Staff (DCS), G-1. The DCS, G-1 will convene promotion advisory board/special selection boards on an 'as

needed' basis. These boards will be convened to reconsider officers who were either improperly omitted from consideration due to administrative error, or who were non-selected for mandatory promotion as a result of material error.

b. Paragraph 3-19(2) (SSB) states SSB's, convened under the Reserve Officer Personnel Management Act (ROPMA) on and after 1 October 1996, will reconsider commissioned officers, (other than commissioned warrant officers) who were wrongly not considered and reconsider commissioned officers (other than commissioned warrant officers) who were considered but not selected by mandatory promotion boards that convened on or after 1 October 1996. Records of officers or former officers will be referred for SSB action when the ABCMR request such referral.

22. Army Regulation 600-8-22 (Military Awards) states the Defense Meritorious Service Medal (DMSM) was established by EO 12019, 3 November 1977. It is awarded in the name of the SECDEF to Servicemembers of the Armed Forces of the United States who, after 3 November 1977, distinguished himself or herself by noncombat meritorious achievement or service. The DMSM will not be used to recognize meritorious service or achievement under combat conditions. The BSM is the appropriate award to recognize meritorious service or achievement at the DMSM level. The prescribing directive, including processing instructions and approval authorities, for the DMSM is DODM 1348.33, Volume 4.

23. DOD Manual 1348.33, Volume 4 (Manual of Military Decorations and Awards: DoD Joint Decorations and Awards) states:

a. Members of the armed forces of friendly foreign nations assigned, detailed, or attached to a JDA or JTF are eligible for the DMSM.

b. Only under the most unusual circumstances will the DMSM be awarded as an impact award for outstanding achievement to members temporarily assigned to a JDA or JTF. The DMSM is intended to recognize an individual's accomplishments over a sustained period.

c. The DMSM may only be awarded for "non-combat meritorious service or achievement" in accordance with E.O. 12019. Service members assigned, detailed, or attached to a JDA or JTF who perform meritoriously under combat conditions or who perform combat actions warranting recognition at the DMSM-level should be recommended for award of the Bronze Star Medal in accordance with procedures outlined in the governing regulations of the nominee's respective Military Department.

d. The DMSM is normally awarded to recognize outstanding meritorious service and is intended to honor an individual's accomplishments over a sustained period. It is normally awarded for a period of time greater than 12 months, encompassing the

nominee's entire joint assignment, including any extensions. The DMSM, when awarded for outstanding achievement, should provide clear and concise justification as to why an impact award is warranted.

e. The DMSM for specific achievement may be awarded with the "R" device to distinguish that the award was earned for the direct hands-on employment of a weapon system or other warfighting activities that had a direct and immediate impact on a combat operation or other military operation (i.e., outcome of an engagement or specific effects on a target), including Title 10, U.S.C., support of non-Title 10 operations, and operations authorized by an approved execute order. To be designated as such, the action must have been performed through any domain, in circumstances that did not expose the individual to hostile action, or place him or her at significant risk of exposure to hostile action:, on or after January 7, 2016, under one of the following conditions:

- While engaged in military operations against an enemy of the United States;
- While engaged in military operations involving conflict against an opposing foreign force;
- While serving with friendly foreign forces engaged in military operations with an opposing armed force in which the United States is not a belligerent party.

24. 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.

25. Army Regulation 600-8-10 (Leave and Passes) states:

a. Soldiers on active duty earn 30 days of leave a year with pay and allowances at the rate of 2 1/2 days a month.

b. Payment of accrued leave is made per DOD Financial Management Regulation 7000.14–R. Payment of accrued leave is made per Title 37, U.S. Code, section 501h. By law, payment of accrued leave is limited to 60 days one time during a military career, unless earned in a missing status.

c. Requests for leave will not be approved which encompass two or more periods of absence during which the Soldiers are not required to perform duty from the end of one leave period to the beginning of another leave period. Exceptions may be granted under emergency or unusual circumstances as determined by the leave approval authority.

d. Chargeable leave may be granted in conjunction with PCS or TDY. The DA Form 31 will be used to grant leave together with PCS and TDY. Paragraph 7-3 addresses the rules for granting PCS leave and directs commanders to grant the maximum leave prescribed (30 days) unless the Soldier does not desire leave or does not desire the full amount of leave or military operational requirements preclude leave.

26. Army Regulation 140-185 (Training and Retirement Point Credits and Unit Level Strength Accounting Records) sets responsibilities and procedures to establish and maintain retirement records prescribing the types of training and activities for which retirement points are authorized. It discusses the procedures for recording retirement point credits and training. Personnel on active duty, Active Duty Training (ADT), Inactive Duty Training (IADT), involuntary ADT, or Annual Training (AT) are awarded one point for each calendar day they serve in one of these categories and may not be awarded additional points for other activities while in such status. A maximum of two retirement points may be credited for attendance at unit BA or IDT in any 1 calendar day.

27. Army Regulation 15-185 (ABCMR) states Board members will review all applications that are properly before them to determine the existence of an error or injustice; direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists on the record. The ABCMR will decide cases on the evidence of record. It is not an investigative body. The ABCMR may, in its discretion, hold a hearing. 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//