IN THE CASE OF: [redacted]

BOARD DATE: 3 November 2023

DOCKET NUMBER: AR20230003402

COUNSEL FOR THE APPLICANT REQUESTS: This case comes before the Army Board for Correction of Military Records (ABCMR) on a second remand from the U.S. Court of Federal Claims in [redacted], et al., and [redacted], et al., v. United States, case numbers 18-523C and 21-1825C, dated 2 and 6 December 2022. The Court directs the ABCMR to consider the applicant's request for correction of his records by providing him both a primary residence Basic Allowance for Housing (BAH) and an Overseas Housing Allowance (OHA) or alternatively, primary residence based BAH and per diem for the duration of his Contingency Operation (CONOP) tour in Italy from between 15 June 2019 - 30 March 2021 and his CONOP tour in Germany from between 31 March 2021 – 30 March 2022 at the without dependents rate.

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

- DD Form 149 (Application for Correction of Military Record)
- Patriots Law Group Brief, to include Exhibits 1 thru 8
- Orders Number HR-9143-00017, Vincenza, Italy, 23 May 2019
- Orders Number HR-9143-00017A03, dated 1 March 2021
- Orders Number HR-1069-00003, Wiesbaden, Germany, 10 March 2021

FACTS:

1. The applicant defers to counsel.

2. Counsel states, in effect, that the applicant should be entitled to both BAH and OHA or BAH and per diem should the Defense Human Resources Activity (DHRA) opine that the Reservists who were deployed, to include the applicant and other Soldiers without dependents, be entitled to per diem, vice BAH and OHA.

3. In the original court remand in the 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. The applicant's service

record was void of and the applicant nor his counsel provided a CID investigation wherein the applicant was titled.

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 exhibits:

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. A slide that shows the outcome for Reservists “without dependents” when they are called to duty, whether quarters are available, if they obtained an off-post lease, if necessary, or whether a Secretarial waiver is needed.

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

d. Counsel provides a supplemental document dated 8 May 2023, which made minor modifications to his original legal brief.

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

a. On 13 December 2006, he took his oath of office as a Reserve Commissioned Officer as a second lieutenant (2LT).

b. Orders Number HR-9143-00017, issued by AHRC, dated 23 May 2019, shows he was ordered to active duty for operational support for the purpose of Contingency Operation for active duty Operational Support, with a report date of 15 June 2019 for 365 days in Vicenza, Italy.

a. Orders Number HR-9143-00017A03, issued by AHRC, dated 1 March 2021, shows an amended tour length of 655 days ending 30 March 2021.

b. Orders Number HR-1069-00003, issued by AHRC, dated 10 March 2021, shows he was ordered to active duty for operational support for the purpose of Contingency Operation for active duty Operational Support, with a report date of 31 March 2021 for 365 days in Wiesbaden, Germany.

c. A DD Form 214 shows he served on active duty overseas from 22 June 2019 – 31 March 2021 in Italy and 31 March 2021 – 20 January 2023 in Germany and was honorably released from active duty due to the completion of his required active service.

d. The applicant is still active in the U.S Army Reserves.

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 regards to retroactive requests–fall within the exclusive providence of the Secretary of the Army through the ABCMR.

8. On 30 May 2023, the Office of the Assistant Secretary of Defense, Manpower and Reserve Affairs, provided an advisory opinion for the Board's consideration, which states in effect:

a. In general, to be entitled to a housing allowance a member of a uniformed service:

(1) Must be entitled to basic pay under Title 37 USC section 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 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 (PCS) (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 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 assed); 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).

b. 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 Reserve Component (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 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 on the member's new PDS, the housing allowance paid to such member 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 ordered 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 US 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 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.

c. Enacted in October of 2006, Title 37 USC 403(g)(2) provides the Secretary concerned with the discretionary authority to pay a second housing allowance to RC members without dependents based on their pay grade and location of the members' PDS, as long as such members do not occupy government quarters (to include berthing aboard a US ship or vessel as described in the preceding paragraph or a housing facility under the jurisdiction of a uniformed service) at or near the location of the members' duty locations. The law specifically prohibits an RC member who is in receipt of this second housing allowance from simultaneously receiving the lodging portion of any travel allowances (i.e., the lodging portion of per diem) to which the RC member may be entitled. This second allowance would be payable in addition to the housing allowance payable to such an RC member based on the location of the member's primary residence. This discretionary provision in 37 USC 403(g) has never been implemented by the DoD and thus has been available for execution by the Secretaries of the Military Departments (to include the Secretary of the Army) since its enactment. See the next section for a discussion providing a clarification of existing policy, which has been long-established as applicable in cases of discretionary authority.

d. The Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)) provides overall policy guidance for carrying out the personnel and readiness responsibilities and duties of the Secretary of Defense in accordance with DoD Directive 5124.02. In this capacity, it is the responsibility of the OUSD(P&R) and the Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs (OASD(M&R)) as further delegated by DoD Directive 5124.10 to develop policies, plans, and programs for compensation. From a policy perspective, this office has long maintained the position that this OUSD(P&R) and OASD(M&R) responsibility is reinforced by 37 USC 1001 and specifically reinforced with respect to housing allowance by 37 USC 403(k), which assigned responsibility for issuing housing

allowance regulatory guidance/policies to the Secretary of Defense (and by extension to OUSD(P&R) and as further delegated to OASD(M&RA)).

e. Where there may be certain organizations who have taken the position that 37 USC 403(g)(2) provides authority to the Secretary of the Army to permit a second housing allowance to be paid to RC members without dependents, as a policy mater; however DoD can implement or refrain from implementing a discretionary authority provided in law. In this case, the DoD 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 absence of regulatory implementing guidance by the Department has not materially or substantively changed since enactment of subsection 403(g)(2) in 2006.

f. The department has, however, implemented policy guidance governing administration of housing allowances in general, and FSH in particular. Such guidance is now contained in DoD 7000.14-R, DoD Financial Management Regulation, Volume 7a, Military Pay Policy and Procedures - Active Duty and Reserve Pay, Chapter 25, Housing Allowances, but was previously contained in chapter 10 of the Joint Travel Regulations from prior to 2016 until approximately 2019. Although moved to a different regulatory vehicle, the implementing policy guidance for housing allowance (including FSH) established the parameters of the roles and responsibilities of the Secretaries concerned (and by extension, the uniformed services concerned) in administering housing allowances in general, and FSH in particular. DoD 7000.14-R lays out specific authority of the Secretaries concerned make determinations regarding matters such as, but not limited to dependency, government funded travel for dependents to accompany a uniformed service member to a new PDS, available of government quarters (suitable for members without dependents) at the new PDS, etc. These authorities, roles, and responsibilities of the Secretaries concerned (including the Secretary of the Army), have not substantially or materially changed since 2016.

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

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

policy, contained in references (c) through (g), or as described herein, governing entitlement to, and administration of, housing allowances for members of the uniformed services.

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

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

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

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

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

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

c. In addition to the eligibility criteria stated above in subparagraphs 1 through 4, in order to be eligible to receive a housing allowance at the "full locality rate" as described in subparagraph 5, a RC member must be serving on active duty under a call or order to active duty for a period of more than 30 days, or regardless of duration, in support of a contingency operation or to attend accession training (if a member without dependents).

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

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

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

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

(3) Government quarters (suitable for a member without dependents of the same

pay grade and specialty of the member) at or near the member's PDS are not available for occupancy by the member. Government quarters (to include berthing aboard a U.S. ship or vessel determined to be adequate for occupancy in the ship or vessel's home port by members for whom the ship or vessel is their PDS) are not considered unavailable solely because a member makes a personal choice not to occupy those quarters."

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

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

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

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

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

Temporary Duty Allowance Eligibility:

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

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

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

duty travel for support of the applicable operations within the U.S. European Command's area of responsibility. Therefore, there are no facts under the law with which to even allege there is an administrative error that could support such a change.

Temporary Duty Allowance Eligibility for Specified Individual Claims:

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

> Fifteen (15) members without dependents were identified (the applicant being one of them) Standard PCS travel and transportation allowances, except HHG transportation, was authorized. Station allowances were authorized at the new PDS location, and the JTR did not authorize payment of any additional housing allowances for the old PDS.
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> Based on the initial and supplementary documentation provided, the only Service member authorized any TDY allowances, including per diem, would appear to be [another applicant [redacted]] for at least part of his time in Bahrain. All the other Service members had initial orders for over 180 days and had no additional documentation that any duty should have been in a TDY status.

11. DHRA/DTMO submitted a supplemental A/O, dated 11 September 2023, to its original AO, dated 29 August 2023, which includes a response to additional travel orders that was provided by ABCMR on 6 September 2023 on cases that were missing travel orders. Fifteen members, to include the applicant, without dependents were identified. The supplemental does not apply to this applicant. The complete supplemental has been provided to the Board for their review.

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

Addressing the M&RA Advisory Opinion:

a. "The sole purpose for why the M&RA AO was directed by the Court was to allow that office to provide its opinion over whether "discretion vested in the Secretary of the Army to grant dual housing allowances under 37 U.S.C. § 403(g) and implementing DOD regulations. 'In its AO, M&RA asserts that it alone retains such authority, acting on behalf of the Secretary of Defense (SECDEF) pursuant to 37 U.S.C. § 403(k), which provides for SECDEF's ability to 'prescribe regulations for the administration of [Section 403]." 37 U.S.C. § 403(k)(1). To be clear, this AO's opinion applies solely to those Reservists without dependents, as § 403(g) has no applicability to RC members with dependents, which are already accounted for in § 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, § 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. § 403(k)(2). As relied upon by the M&RA AO, the fact that 37 U.S.C. § 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. § 4748 (2016) (repealed and recodified at 37 U.S.C. § 452 (2021)), and the implementing DOD regulations,"6 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.' However, when looking at the orders for [another applicant] (like all others), they specifically state that they are issued 'FOR THE SECRETARY OF THE ARMY,' who happens to be the very first authority listed in JTR par. 2230.C.2.a.1. See, e.g., Applicants' June 7, 2023 ABCMR Remand Submission, Exhibit 8 (Page 76 of 76). Therefore, given SECARMY's involvement with these orders, DHRA's mention of any involvement of a Geographic Combatant Commander is entirely inapplicable.

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

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

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

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found relief is warranted.

2. The Board recommends the payment of two housing allowances to the without-dependent applicants. However, the Board is aware it is unlikely this payment would be executed under the circumstances described in these cases for the reasons provided in the advisory opinion from the Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs. In the alternative, and for the reasons provided by counsel in counterpoint to the advisory opinion provided by DHRA-DTMO, the Board found no barriers to exercising Secretarial authority to correct the record to show the applicant was in a TDY status during his service in Italy from June 2019 through March 2021 and Germany from March 2021 through March 2022 and therefore authorized per diem during this period in addition to BAH for his permanent residence in the United States. In view of the foregoing, the Board determined the applicant's orders to duty in Italy and Germany should be amended to show his periods of service were in a TDY status. As a result of this correction, the applicant may receive both BAH and per diem at the applicable rates for the duration of his service in Italy from between 15 June 2019 - 30 March 2021 and Germany from between 31 March 2021 – 30 March 2022.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	Mbr 4	Mbr 5	
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	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 by amending his orders to duty in Germany to show his periods of service were in a TDY status. As a result of this correction, the applicant should be paid both BAH and per diem at the applicable rates for the duration of his service in Italy from between 15 June 2019 - 30 March 2021 and Germany from between 31 March 2021 – 30 March 2022.

X [redacted]

CHAIRPERSON

[redacted]

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

REFERENCES:

1. 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 Solders 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 contingency operation, or for a period of more than 30 days under Title 10, USC, section 688(a) in support of a contingency operation or for a period of more than 30 days, may not be denied 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 BAH 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 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 (Travel and transportation allowance: general) of this title, if any, for lodging expenses if 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 Secretary of Defense shall establish a rate of BAH to be paid to a member of a RC while the member serves on active duty under a

call or order to active duty specifying a period of 30 days or less, unless the call or order to active duty is in support of a contingency operation.

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

Table 10-1. Types of Housing Allowances

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

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

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

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

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

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

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

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

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

10. JTR, chapter 10, section 100906(A)(7) (Called or ordered to Active Duty for Contingency) states:

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."

11. JTR, Appendix A defines primary residence, states, "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."

12. 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."

13. AR 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army,

acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//