IN THE CASE OF: [redacted]

BOARD DATE: 3 November 2023

DOCKET NUMBER: AR20230003530

APPLICANT REQUESTS:

a. This case comes before the Army Board for Correction of Military Records (ABCMR) on a second remand from the U.S. Court of Federal Claims in [redacted] [redacted], et al., and [redacted], et al., v. United States, case numbers 18-523C and 21-1825C, dated 2 and 6 December 2022. The Court directs the Army Board for Correction of Military Records (ABCMR) to consider the applicant's request by providing him primary residence-based Basic Allowance for Housing (BAH) and Family Separation Housing-Overseas (FSH-O); or alternatively, primary residence-based BAH and per diem; at the with dependents rate, for the duration of his Contingency Operation (CONOP) tour in Vicenza, Italy from 5 October 2015 to 26 September 2016, vice overseas housing allowance (OHA).

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. Recoupment of any funds levied from his pay from the Defense Finance and Accounting Service (DFAS) and payment of any funds owed to him as a result of the Board’s favorable decision.

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

- DD Form 149 (Application for Correction of Military Record), 20 March 2023
- Patriots Law Brief, to include Exhibits 1 thru 8
- DFAS, Debt and Claims Management Operations Letter, dated 10 January 2023
- Supplemental to Counsel's Original Brief, 10 May 2023

FACTS:

1. The applicant defers to counsel.

2. Counsel states:

a. A material error and injustice exists based on an incorrect and unlawful decision to deny his client his full basic allowance for housing (BAH) at the "with dependents" and OHA at the "without dependents" entitlements, pursuant to Title 37 USC, § 403 and the applicable Joint Travel Regulation (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.

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.

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 JTR Volume 2 and the BAH, Title 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 the Criminal Investigation Division (CID).

b. 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.

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

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

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

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

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

d. National Defense Authorization Act (NDAA) 2007, dated 3 April 2006, shows Title 37, U.S.C. § 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. A letter of indebtedness was issued to the applicant from DFAS, Debt and Claims Management Operations, dated 10 January 2023, giving him 30 days to pay an unspecified amount of debt. This letter does not specify what debt he owed or why he incurred such debt.

6. A review of the applicant's service record shows:

a. On 9 August 2011, he enlisted in the U.S. Army Reserve (USAR) for a period of 4 years.

b. Orders Number HR-527-00014, issued by the U.S. Army Human Resources Command, (AHRC), dated 28 January 2015, ordered him to active duty for the purpose of operational support for Reserve Component (ADOS-RC) in Vicenza, Italy, with a report date of 27 January 2015 (later amended to 30 January 2015) for a period of active duty of 251 days (later amended to 245 days, then amended again to 244 days), and an end date of 26 September 2015.

c. A DD Form 214 (Certificate of Release or Discharge from Active Duty), dated 30 September 2015, shows he was honorably released from active duty at Vicenza, Italy, by reason of completion of required active service.

d. Orders Number T-09-508849, dated 30 September 2015, issued by AHRC ordered him to active duty in Vicenza, Italy with a reporting date 5 October 2015, for a period of 180 Days.

e. Orders Number T-09-508849A01, dated 10 March 2016, issued by AHRC, amended Orders Number T-09-508849, which extended his active duty service in Vicenza, Italy from 180 days to 357 days. The reporting date remained the same.

f. A memorandum issued by Office of the Deputy Chief of Staff, G-1, Subject: OHA Secretarial Waiver – Applicant, dated 7 June 2016, authorized an exception to policy to receive OHA for his permanent duty state, Vicenza, Italy.

g. A DD Form 214 for the period ending on 26 September 2016, shows he was honorably released from active duty at Vicenza, Italy, by reason of completion of required active service after having completed 11 months and 22 days.

h. A DA Form 5960 (Authorization to Start, Stop, or Change BAQ and/or VHA), 23 October 2017, shows he was married in 1991. He recertified his entitlement for basic allowance for quarters (BAQ)/variable housing allowance (VHA), and his BAQ type was without dependents.

i. His DD Form 214, dated 8 June 2018, released him from active duty and transferred him to the USAR Control Group (Individual Mobilization Augmentee).

j. The applicant's available records are void of any adverse or derogatory information such as a CID report of investigation, a general officer memorandum of record, or any other derogatory information pertaining to his request for authorization for BAH and OHA.

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 Title 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, Title 37 U.S.C. § 474 (2016) (repealed and re-codified at Title 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, regarding dual housing allowances.

9. 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:

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) (Title 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) [Title 37, United States Code (U.S.C), § 403] through (g) [Department of Defense Directive 5124.10, Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(MandRA)), March 13, 2018 ], or as described herein, governing entitlement to, and administration of, housing allowances for members of the uniformed services.

b. Housing Allowance Eligibility: 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 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. Housing Allowance Eligibility Specific to RC Members: 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, an 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 references (c) [Title 37, U.S.C., § 403] and (d) [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. Eligibility of RC Members to Receive a Second Housing Allowance (Dual Housing Allowances): 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 memorandum. In the case of RC members who are called or ordered to active duty as

explained in this memorandum, and who are otherwise eligible to receive a housing allowance, eligibility to receive a second housing allowance is as follows:

e. RC Member With Dependents. An 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.

f. Authority of the Office of the Under Secretary of Defense for Personnel and Readiness to Establish Implementing Housing Allowance Regulations and Policies: The office of the Under Secretary of Defense for Personnel and Readiness (OUSD(PandR)) 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 (Reference (f)) and Title 10 U.S.C. § 113 (Reference (e)). In this capacity, it is the responsibility of the OUSD(PandR)— and the Office of the Assistant Secretary of Defense for Manpower and Reserve Affairs (OASD(MandRA)) as further delegated by DoD Directive 5124.10 (Reference (g))—to develop policies, plans, and programs for compensation. From a policy perspective, this office has long maintained the position that this OUSD(PandR) and OASD(MandRA) responsibility is reinforced by Title 37 U.S.C. § 1001, and specifically reinforced with respect to housing allowances by Title 37 U.S.C. § 403(k), which assigns responsibility for issuing housing allowance regulatory guidance/policies to the Secretary of Defense (and by extension to OUSD(PandR) and as further delegated, to OASD(MandRA)).

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

h. The Department has, however, implemented policy guidance governing the administration of housing allowances in general, and FSH in particular. Such guidance is now contained in Reference (d) [DoD 7000.14-R, DoD Financial Management Regulation, Volume 7a, Military Pay Policy and Procedures – Active Duty and Reserve Pay, Chapter 26, 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 allowances (including FSH), establishes 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. Reference (d) [DoD 7000.14-R, Volume 7a, Chapter 26] 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, availability 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."

10. On 30 May 2023, the advisory opinion was provided to the applicant's attorney to give him an opportunity to respond.

11. An advisory opinion was requested from the Defense Human Resources Activity – Defense Travel Management Office (DHRA-DTMO) in regard 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, Title 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(PandR)) 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(PandR) 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 Title 37, U.S.C., § 481(a)5

d. The authority for the secretaries concerned to limit temporary duty travel to six months in the Joint Travel Regulations and to permit the Service secretaries to allow Service members to receive temporary duty allowances rather than permanent duty allowances under limited circumstances was established by the U.S. Comptroller General in reference (h). This Comptroller General decision was made at the request of the Secretary of the Army and applied to both the Active and Reserve Components. The decision listed various conditions under which temporary duty would be appropriate, including when international agreements precluded Service members from being ordered to a foreign duty station in a permanent duty status. The conditions were incorporated in the rules that the Services must follow as implemented by the

PDTATAC in the JTR. Further, there is no mention in the pleadings or documentation provided as to whether the Status of Forces Agreements with Germany, Italy, Romania, or Bahrain prohibited these Service members from serving in a permanent duty status.

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

Temporary Duty Allowance Eligibility for Specified Individual Claims:

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

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

11. DHRA/DTMO submitted a supplemental A/O, dated 11 September 2023, to its original AO, dated 29 August 2023, which includes a response to additional travel orders that was provided by ABCMR on 6 September 2023 on cases that were missing travel orders. The complete supplemental has been provided to the Board for their review. As it pertains to this applicant, counsel states, "Finally, Adair, John began travel in PCS status. Standard PCS travel and transportation allowances, except HHG transportation, was authorized. The member was authorized FSH at Vicenza, Italy, and dependent location BAH, until dependents resided in Italy for 90 days. This initial order ended on September 30, 2015. The member later received new orders dated September 30, 2015 for 180 days in Vicenza, Italy beginning October 5, 2015. Because the order involved a break in service, and the duration was for less than 181 days, this member was authorized TDY allowances, including lodging plus meals and incidental expenses per diem, until the amendment was issued on March 9, 2016 extending beyond the 180-day TDY time limitation. At that point the member received the amendment, per diem was no longer payable, and only Overseas Housing Allowance (OHA) would be authorized."

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 MandRA Advisory Opinion:

a. “The sole purpose for why the MandRA 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 Title 37 U.S.C. § 403(g) and implementing DOD regulations. ‘In its AO, MandRA asserts that it alone retains such authority, acting on behalf of the Secretary of Defense (SECDEF) pursuant to Title 37 U.S.C. § 403(k), which provides for SECDEF’s ability to ‘prescribe regulations for the administration of [Section 403].” 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. MandRA 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, Title 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." Title 37 U.S.C. § 403(k)(2). As relied upon by the M&RA AO, the fact that Title 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, Title 37 U.S.C. § 4748 (2016) (repealed and recodified at Title 37 U.S.C. § 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.’ 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.' 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 at 22 (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 at 1 (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 Title 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 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 Italy from 5 October 2015 to 26 September 2016.

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 period 5 October 2015 to 26 September 2016.

4. In view of the foregoing, the Board determined any funds he has paid toward debt related to overpayment of housing allowances during the period 5 October 2015 to 26 September 2016 should be returned to him.

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:

- 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 Italy from 5 October 2015 to 26 September 2016
- returning to him any funds he has paid toward debt related to overpayment of housing allowances during the period 5 October 2015 to 26 September 2016

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. Army Regulation 15-185 (Army Board for Correction of Military Records) 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 (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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.

2. 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.

3. Title 37, U.S.C., § 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.

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

5. Title 37, USC, § 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, § 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.

6. Title 37, USC, § 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.

7. Title 37, USC, § 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.

8. Title 37, USC, § 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.

9. 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:<br>• Separation from the dependent when a Service member is assigned to a PDS OCONUS.<br>• An assignment in the CONUS when dependent travel is delayed or restricted. |

10. JTR, Chapter 10, paragraph1006 (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, § 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.

11. 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.

12. 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."

13. 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."

14. 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."

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

16. Army Regulation 195-2 (Criminal Investigative Activities), prescribes policies and procedures pertaining to criminal investigation activities within the Department of the Army (DA). It prescribes the authority for conducting criminal investigations, crime prevention surveys, protective service missions, force protection and antiterrorism efforts and the collection, retention, and dissemination of criminal information. It

delineates responsibility and authority between installation law enforcement (LE) activities and the U.S. Army Criminal Investigation Command (USACIDC). Paragraph 4–4 (Individual requests for access to, or amendment of, U.S. Army Criminal Investigation Command reports of investigations), b. (Amendment of U.S. Army Criminal Investigation Command reports), the USACIDC ROIs are exempt from the amendment provisions of 5 USC 552a and AR 340–21. Requests for amendment will be considered only under the provisions of this regulation. Requests to amend or unfound offenses in USACIDC ROIs will be granted only if the individual submits new, relevant, and material facts that are determined to warrant revision of the report. The burden of proof to substantiate the request rests with the individual. Requests to delete a person's name from the title block will be granted, if it is determined that credible information did not exist to believe that the individual committed the offense for which titled as a subject at the time the investigation was initiated, or the wrong person's name has been entered as a result of mistaken identity. The decision to list a person's name in the title block of a USACIDC ROI is an investigative determination that is independent of judicial, non-judicial, or administrative action taken against the individual or the results of such action. Within these parameters, the decision to make any changes in the report rests within the sole discretion of the CG, USACIDC. The decision will constitute final action on behalf of the Secretary of the Army with respect to requests for amendment under this regulation.

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

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

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

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

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

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

//NOTHING FOLLOWS//