IN THE CASE OF: [redacted]

BOARD DATE: 3 November 2023

DOCKET NUMBER: AR20230003536

APPLICANT REQUESTS:

a. This case comes before the Army Board for Correction of Military Records (ABCMR) on a second remand from the U.S. Court of Federal Claims in [redacted], et al., and [redacted], et al., v. United States, case numbers 18-523C and 21-1825C, 2 and 6 December 2022. The Court directs the Army Board for Correction of Military Records (ABCMR) as required by the Joint Travel Regulation (JTR), to consider the applicant's request for correction of his records to pay him the correct primary residence-based Basic Allowance for Housing (BAH) and Family Separation Housing-Overseas (FSH-O) from 1 October 2014 to 1 July 2017 (due to his child being in [redacted]); or alternatively, primary residence based BAH and per diem at the "with-dependents" rate for his Stuttgart, Germany primary residence from 1 October 2014 to 31 October 2015 and from 21 February 2016 to 1 July 2017.

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

c. Removal of a General Officer Memorandum of Record (GOMOR).

d. Extension of his mandatory retirement date (MRD) to 31 July 2019.

e. Credit for 32 membership points during his last year of service.

f. Recalculation of his retired pay.

g. Refund from the Oregon Department of Revenue in the amount of $27.40.

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

- DD Form 149 (Application for Correction of Military Record), 13 March 2023
- Patriots Law Group Brief, to include Exhibits 1 thru 8
- Applicant's undated addendum
- U.S. Army Garrison, Stuttgart, Germany, memorandum, 13 April 2015

- Orders HR-5209-00029, U.S. Army Human Resources Command (AHRC), 28 July 2015
- Orders HR-5209-00029A03, AHRC, 29 October 2015
- Orders HR-6050-00013, AHRC, 19 February 2016 and Orders HR-6050-00013A01, AHRC, 6 April 2016
- Orders HR-6258-00017, AHRC, 14 September 2016
- Orders C-01-700429, HRC, 11 January 2017 and Amended Orders C-01-700429A01, HRC, 24 January 2017
- Email, Stuttgart Judge Advocate General, 17 February 2017
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 1 July 2017
- Letter, Department of the Treasury, Bureau of the Fiscal Service letter, 6 June 2018
- U.S. Army Criminal Investigation Command, Stuttgart Germany, Law Enforcement Reports, [redacted], 9 February 2016; [redacted], undated draft; and [redacted], 18 May 2017
- U.S. Africa Command, Army Service Element, General Officer Memorandum of Record (GOMOR), 23 June 2017
- letter, Department of Treasury, Bureau of the Fiscal Service, 11 July 2018
- Department of Treasury, Hearing Request Form, Administrative Wage Garnishment, 11 July 2018
- DA Form 5016 (Chronological Statement of Retirement Points), 2 April 2020
- Supplemental to Counsel's Legal Brief, 10 May 2023

FACTS:

1. The ABCMR considers individual applications that are properly brought before it. In appropriate cases, it directs or recommends correction of military records to remove an error or injustice. The ABCMR's jurisdiction under Title 10 U.S.C., § 1552 extends to any military record of the DA. It is the nature of the record and the status of the applicant that define the ABCMR's jurisdiction.

2. The applicant's request for reimbursement in the amount of $27.40 from the [redacted] Department of Revenue does not fall under the purview of the ABCMR. Therefore, this issue will not be discussed further in this record of proceedings.

3. The applicant defers to counsel.

4. Counsel states a material error and injustice exists based on an incorrect and unlawful decision to deny his client his full BAH at the "with dependents" and OHA at the "without dependents" entitlements, pursuant to Title 37 U.S.C., § 403 and the applicable JTR in effect during the relevant time. In 2017, the applicant was subjected to a retroactive recoupment based upon the Army's sudden decision to employ an unlawful

cost-savings measure, creating an extreme financial hardship for the applicant and Soldiers like him. In addition to the recoupment, he was thereafter improperly denied his full BAH entitlements through the duration of his tour of duty in Stuttgart, Germany.

5. A prior ABCMR decision, Docket Number AR20170016309, 23 June 2017, in which the applicant requested removal of a GOMOR issued by the Commanding General, Army Service Element, U.S. Africa Command, is not contained in the available records. It appears the Board denied his request as the GOMOR remains in his records as of April 2023.

6. 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.

7. On 13 March 2023, Counsel submitted a second remand request to ABCMR pursuant to the U.S. Court of Federal Claims decision. The entitlements at issue in this dispute are as follows: primary residence-based BAH, dependent location-based BAH, FSH-O, OHA for the PDS, and/or per diem, 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-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.

b. The issues central to this matter were caused in or around October 2016 when, despite no change to the law or regulation, the Army implemented a new interpretation of the JTR-3 Under this new interpretation, the Army ceased dual housing allowance payments to Reservists without dependents and reduced those with dependents to a single housing allowance if their dependents opted to join their Reservists at the PDS. The Army implemented its change retroactively, recouping years' worth of BAH payments.

c. In addition to retroactive recoupments, the Army subjected certain of these Reservists to criminal investigations and disciplinary actions. The Army accused these Reservists of fraud and larceny, insisting that even though their dependents traveled at personal expense under State Department travel laws, their primary residence-based housing allowances were unauthorized. Since its implementation of the new rule, and

through present day, the Army has continued to deny dual housing allowances to Plaintiffs and others like them.

d. For the original seven Wolfing Plaintiffs, the Board directed records corrections to resolve this. The ruling authorized both an overseas housing allowance (OHA at the without dependent rate) and a primary residence based BAH (at the without or without dependent rate as applicable). The Board also directed removal of the adverse actions for those affected and deletion of any records pertaining thereto.

e. 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. Additionally, DFAS maintained that Reservists who had all their dependents join them at the duty station were not entitled to the primary residence-based housing allowance designed to sustain their households and household goods at their primary residences; households they were ordered to return to upon mission completion.

f. DFAS and Army finance personnel have insisted that there is no law or regulation to support simultaneous payment of both a BAH for the primary residence and an OHA for the duty location. This is despite the fact that as reflected on their LESs, DFAS had remitted BAH and OHA payments for many years prior to (and even after) its late 2016 reinterpretation of the JTR-5. Thus, continued litigation became necessary to determine whether the JTR and Title 37 U.S.C. § 403 permitted payment of OHA and primary residence-based BAH for both Reservists with dependents and without that have yet to be compensated.

g. DFAS contended that Reservists with dependents, dual housing allowances could only be paid in the form of an FSH-O allowance and a primary residence-based BAH, pursuant to Title 37 U.S.C. § 403(d), but that, unlike Reservists without dependents (pursuant to § 403(g)), the statute did not permit payment of both an OHA and a primary residence-based BAH simultaneously for Reservists with dependents. To qualify for FSH-O payments, the dependents of the Reservists must not be deemed to be residing with the Reservist, even if they travelled at no expense to the government.

h. With concern to Reservists with dependents, the Court sided with DFAS' interpretation that only a primary residence-based BAH and FSH-O may be paid simultaneously in accordance with the limitations provided in Title 37 U.S.C. § 403(d) and the JTR.

i. Plaintiffs seek either dual housing allowances or a primary residence-based BAH with per diem for the PDS. For any other Plaintiff that was not part of the first remand who were subjected to adverse personnel actions, Plaintiff's request that the Board order their records cleared like those from the first remand.

j. 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.

k. Counsel's complete brief is available for the Board to review.

8. Counsel provides the following additional documents as exhibits:

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

b. U.S. Army Europe's late 2016 slide outlines the BAH overpayment investigations. It shows the USAG Wiesbaden Finance Office identified approximately 140 activated National Guard and Reserve Soldiers that received an aggregate $250,000 per month in BAH overpayment. The slide indicates that the rule was a recent change, and the Army implemented the change retroactively, recouping overpaid BAH payments. In addition to retroactive recoupments, the Army subjected certain Guard/Reserve Soldiers to criminal investigations and disciplinary actions.

c. Bringing Your Family Over slide, which authorized dependent travel at personal expense. It states Soldiers on PCS to Germany, for an unaccompanied tour less than 1 year can bring their family over at their own expense (non-reimbursable). Dependents will not be command sponsored and are not authorized to live on post.

d. Legislative proposals as part of the National Defense Authorization Bill 2007, with rationale urging amendment to housing allowance statute, and the National Defense Authorization Act (NDAA) 2007, 3 April 2006, which shows Title 37, U.S.C. § 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 maintain two households.

e. A comparison of a Reserve Component (RC) 2019 temporary duty (TDY) orders and 2016 permanent change of station (PCS) orders. Counsel states, based on the comparison, to the extent that any of the Reservists are deemed ineligible for dual housing allowances based on the Board's decision, it is apparent that the PCS orders

issued are unlawfully characterized as such, and that these Reservists are entitled to a primary residence BAH and per diem that are mandated for a TDY.

f. Orders and amended orders HR-5209-00029, HR-5209-00029A03, HR-6050-00013, HR-6050-00013A01, and HR-6258-00017, issued by U.S. Army Human Resources Command (AHRC), mobilizing him to active duty and then amending his report date, length of tour, and end date, for the purpose of operational support for Reserve Component (ADOS-RC) at Stuttgart, Germany for the effective periods:

- 1 October 2014 to 31 October 2015
- 21 February 2016 to 1 July 2017

g. An email to the applicant from Staff Judge Advocate, CPT [redacted], 17 February 2017, notifying him that he was eligible to receive BAH at the 'with dependents' rate and OHA. This email reads, in part:

(1) If a member is served an unaccompanied (emphasis added) overseas tour, the member is eligible for BAH at the "with dependents" rate, based on the dependent's U.S. residence zip code, plus OHA (emphasis added) at the "without dependent's rate, if the member is not furnished government housing overseas.

(2) Furthermore, a reservist ordered to active duty, who is paying child support and is not assigned to single type government quarters while on active duty, is entitled to receive BAH at the with dependent rate while on active duty. However, if the children are:

(a) residing in government family quarters, or

(b) residing with another military member who is receiving BAH or OHA with dependents on their behalf, then the reservist is only entitled to BAH at the without dependent rate.

(3) The appropriate BAH will be full BAH if the orders are for 31 days or more, or for IADT, or in support of a contingency operation, or BAH-RC is the orders are 30 or less days.

h. U.S. Army Criminal Investigation Command (CID), Stuttgart, Germany, Law Enforcement Report (LER) Number [redacted], 18 May 2017, shows an unfinalized LER was conducted for the offenses of pay and allowance BAH-OHA fraud and false official statement. The combination of an initial report, and second and third status reports read, in part:

(1) During an administrative review of this investigation, it was noted that (Applicant) reported that his spouse, [redacted] resided at (address) (City), [redacted]. Checks with Customs and Border Protection revealed no record of Mrs. [redacted] entering or leaving any CONUS port of embarkation since she and (Applicant) married in July 2015.

(2) Coordination with (name redacted) revealed (Applicant) was single when he was ordered to active duty and entitled to BAH and single rate OHA. The (Applicant) married Mrs. [redacted] on 17 June 2015 and as she was in Germany with (Applicant) his BAH should have been terminated. Further (name redacted) revealed on 20 January 2016, (Applicant) submitted a DA Form 5960 where he reported Mrs. [redacted] resided in (city), [redacted].

(3) Mrs. [redacted] had an active registration in the Installation Access Control System with regular installation access being on 28 November 2014. A check of SOFA office did not reveal a SOFA stamp for Mrs. [redacted].

(4) The estimated loss to the U.S. Government was $48,450.00.

i. A letter, 6 June 2018 from the Department of the Treasury, Bureau of the Fiscal Service, notified him that DFAS referred his debt to the Department of the Treasury for collection, in the amount of $134,529.84. He was informed of various payment options available to him to repay his debt to the U.S. Government.

j. A U.S. Treasury Department Hearing Request form, 11 July 2018, notified him of the Department of Treasury's intent to initiate administrative wage garnishment for the amount of $134,529.84 he owed to DFAS. This form does not indicate whether or not a hearing took place.

k. A DA Form 5016 (Chronological Statement of Retirement Points), 2 April 2020, shows he had 23 creditable years towards retirement with a current grade of colonel.

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

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

a. On 6 June 1987, he was appointed a Reserve commissioned officer in the Medical Corps as a second lieutenant.

b. A DA Form 5960 (Authorization to Start, Stop, or change BAQ/VHA), 30 November 2010, shows he recertified his entitlement to BAQ. He resided in [redacted] and was married with two children.

c. Orders HR-09-409108 issued by U.S. Army Human Resources Command (AHRC), 13 September 2014, ordered him to active duty for the purpose of operational support for Reserve Component (ADOS-RC) duty at Patch Barracks, Germany, with a report date of 1 October 2014 for 365 days, with an end date of 30 September 2015.

d. On 17 June 2015, he was married to [redacted] in [redacted], his second wife. His records are void of a court document showing the date of his divorce from his first wife.

e. Orders HR-5209-00029 issued by AHRC, 28 July 2015, ordered him to active duty for the purpose of ADOS-RC duty at Stuttgart, Germany with a report date of 1 October 2015, a tour of 365 days (amended later by AHRC Orders HR-5209-00029A02 to a tour length of 31 days) with an end date of 29 September 2016 (also later amended by the same orders to 31 October 2015).

f. On 31 October 2015, Stuttgart Transition Center issued him a DD Form 214, honorably releasing him from AD. This DD Form 214 shows he served on AD from 1 October 2014 to 31 October 2015; and he completed 1 year and 1 month net service during this period.

g. A DD Form 2058, 24 November 2015, shows his state of legal residence was (city), [redacted].

h. Orders HR-6050-00013 issued by AHRC, 19 February 2016, ordered him to active duty for the purpose of ADOS-RC duty at Kelley Barracks, Germany with a report date of 21 February 2016, a tour length of 222 days (later amended to 365 days) with an end date of 29 September 2016 (later amended to 19 February 2017).

i. On 23 June 2017, he was reprimanded by the Commanding General, Army Service Element, U.S. Africa Command, for misconduct. The GOMOR reads, in part:

(1) "I hereby reprimand you for knowingly making false official statements on several occasions on Army financial entitlement forms. A thorough Criminal Investigation Division investigation established that on three occasions, you signed and certified a DA Form 5960 (BAH Start/Stop) that your wife was then living at a house you own in [redacted]. The DA Form 5960 is an official financial record used to calculate your housing entitlements.

(2) I impose this reprimand as an administrative action under Army Regulation 600-37, and not as punishment under Article 15, of the Uniform Code of Military Justice. I am considering filing this reprimand in your Official Military Personnel File. However, I will not make a final determination until after I receive and consider any statements or documents, which you submit to me in a timely manner before I make my determination."

j. On 27 June 2017, the applicant acknowledged receipt of the GOMOR and elected to submit written matters within seven days for consideration.

k. On 29 June 2017, he responded in writing to the Commanding General's GOMOR and submitted written matters in his own behalf. His response reads, in part, "CID has initiated investigations three times into my pay and allowances and never uncovered a single cent that I improperly received. I respectfully request that you consider the overbearing nature of these repeated investigations when making your filing decision."

l. On the same date, the Trial Defense Attorney, Major [redacted], an attorney detailed to assist him, wrote in response to the Commanding General's GOMOR, referencing three separate U.S. Army Criminal Investigation Division investigations, which are not contained in the applicant's available records. The memorandum reads, in part, "[Applicant] did not commit BAH fraud. He entitled to receive BAH with dependents at his primary residence [emphasis added]. His primary residence is [city], [redacted], because he lived there before mobilizing on CO-ADOS orders. This location cannot change for the duration of a CO-ADOS tour. The primary residence of reserve component member controls where a Reservist on Contingency Operation orders receives BAH."

m. On 30 June 2017, the Commanding General directed this GOMOR be filed in his Official Personnel Military File (OMPF) (Army Military Human Resource Record AMHRR).

n. An email, 30 June 2017 from the applicant to his military attorney, indicates he submitted matters in response to his GOMOR. It also shows his retirement ceremony was planned (voluntary) after 30 years, 1 month, and 1 day after he commissioned.

o. On 1 July 2017, Stuttgart Transition Center issued him a DD Form 214, honorably releasing him from active duty. He completed 1 year, 4 months, and 11 days net service during this period and was released to control of USAR Control Group (Reinforcement).

p. On 3 September 2019, AHRC issued him Orders C09-996444, placing him on the USAR Retired List in the Retired Grade of COL/O-6, effective 1 August 2019. This was a reduced age retirement authorized under Title 10, U.S.C., § 1273, in accordance with the National Defense Authorization Act of 2008.

q. An Army Grade Determination Review Board (AGDRB) Case Number AR20190011694, was administratively closed on 20 August 2019 on his issue of the highest grade satisfactorily held for pay purposes. He received a non-regular retirement at the grade O-6, the grade he was requesting. Notes in this case indicate he

was authorized a 60 month drop, effective 1 August 2019, and had not reached age 60 (he was age 55 at that time).

r. As it appears his retirement date was voluntary, it is not clear what basis upon which he is requesting an extension of his MRD, credit for an additional 32 membership points, and recalculation of his retired pay.

10. The United States Court of Federal Claims case, 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 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.

11. An advisory opinion was requested from the DOD Office of Assistant Secretary of Defense for Manpower and Reserve Affairs, regarding dual housing allowances.

12. 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(M&RA)), 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(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 (Reference (f)) and Title 10 U.S.C. § 113 (Reference (e)). 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&RA)) 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(P&R) and OASD(M&RA) 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(P&R) and as further delegated, to OASD(M&RA)).

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."

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

14. 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(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 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".

15. 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 the applicant, counsel states, "[The Applicant] certified that his spouse remained in Germany for more than 90 days, but the child dependent did not remain on base or in country."

16. 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 Title 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 Title 37 U.S.C. § 403(k), which provides for SECDEF's ability to 'prescribe regulations for the administration of [Section 403]." Title 37 U.S.C. § 403(k)(1). To be clear, this AO's opinion applies solely to those Reservists without dependents, as section 403(g) has no applicability to RC members with dependents, which are already accounted for in section 403(d) and the applicability of FSH-O.

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

c. No governing regulation (or lack thereof) can strip authority vested by statute. Any attempt to do so violates the balance of powers between the legislative and executive branches and is unlawful. Here, section 403(g)(2) vests discretionary

authority in "[t]he Secretary concerned" to provide a second housing allowance. Meaning here, this decision is left to SECARMY to decide. Neither SECDEF (nor its delegee) has authority to override this plain language of the statute, or SECARMY's prior decision. As previously decided, SECARMY, through this Board, determined that…an RC soldier without dependents records "should be corrected to show he was authorized to receive both OHA and primary residence BAH (at the without- dependents rate) during his period of service in Germany," thereby exercising its discretionary authority to provide him a second housing allowance.

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

e. In further support of this being the only correct interpretation, 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.' 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 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.' 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, 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."

17. 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 partial relief is warranted.

2. The Board found FSH could have been approved in this case but was not. The Board noted the applicant's dependent was with him at his duty station in Germany for more than 90 days, which would normally affect his eligibility for FSH. The Board found the unique circumstances in this case support approval of an exception to policy for the 90-day limitation and correction of the record to show the applicant was authorized both BAH based upon his primary residence at the "with-dependents" rate and FSH at the rate applicable to his duty station during his service in Germany from 1 October 2014 to 31 October 2015 and from 21 February 2016 to 1 July 2017.

3. In view of the foregoing, the Board determined it would be appropriate to remove the applicant's name from the title block of the CID investigation into BAH/OHA fraud and to remove the GOMOR dated 23 June 2017 and all allied documents from his AMHRR.

4. The Board found no evidence that would support a recommendation to extend his mandatory retirement date to 31 July 2019, provide him credit for 32 membership points during his last year of service, and recalculate his retired pay. The Board determined this portion of his request should be denied.

5. The Board has no jurisdiction to correct records created by the Oregon Department of Revenue and declined to address the portion of his request pertaining to a refund.

BOARD VOTE:

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

BOARD DETERMINATION/RECOMMENDATION:

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

a. Approval of an exception to policy for the 90-day limitation on the presence of dependents at the permanent duty station and correction of the record to show the applicant was authorized both BAH based upon his primary residence at the "with-dependents" rate and FSH at the rate applicable to his duty station during his service in Germany from 14 August 2017 through 12 October 2019.

b. Removal of his name from the title block of any investigations related to overpayment of housing allowances.

c. Removal of the GOMOR and all allied documents from his AMHRR.

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

X [redacted]

CHAIRPERSON

[redacted]

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

REFERENCES:

1. 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 begins its consideration of each case with the presumption of administrative regularity. 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, U.S.C., § 403(a)(1) states, "a member of a uniformed service who is entitled to basic pay is entitled to a BAH."

5. Title 37, U.S.C., § 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 37, U.S.C., § 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, U.S.C., § 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, U.S.C., § 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, U.S.C., § 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: • 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.

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

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

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

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

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

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

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

18. Army Regulation 600-37 (Unfavorable Information) sets forth policies and procedures to ensure the best interests of both the Army and Soldiers are served by authorizing unfavorable information to be placed in, transferred within, or removed from an individual's AMHRR.

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

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

c. Paragraph 7-2 (Policies and Standards) provides that once an official document has been properly filed in the OMPF, it is presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority. Thereafter, the burden of proof rests with the individual concerned to provide evidence of a clear

and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF.

d. Only letters of reprimand, admonition, or censure may be the subject of an appeal for transfer to the restricted folder of the OMPF. Such documents may be appealed on the basis of proof that their intended purpose has been served and that their transfer would be in the best interest of the Army. The burden of proof rests with the recipient to provide substantial evidence that these conditions have been met.

19. Army Regulation 600-8-104 (Army Military Human Resource Records Management) prescribes Army policy for the creation, utilization, administration, maintenance, and disposition of the AMHRR. Table B-1 states a memorandum of reprimand is filed in the performance folder of the AMHRR unless directed otherwise by an appropriate authority.

20. Army Regulation 135-180 (Retirement for Non-Regular Service), implements statutory authorities governing the granting of retired pay for non-regular service to Soldiers in the Army National Guard and Army National Guard of the United States or the U.S. Army Reserve. HRC will update the DA Form 5016 for USAR Soldiers annually at the end of their annual year and place it into their on-line record. Soldiers will review their retirement point statement annually and provide supporting documents to correct any deficiencies through their chain of command to HRC in accordance with Army Regulation 140-185. Discharged Soldiers with no military service obligation will receive an updated DA Form 5016 if a request is received with supporting documents and an account is already established in the Retirement Point Accounting System.

a. Paragraph 1-7. Service requirement for a satisfactory year of service for non-regular retirement. A qualifying year of service for non-regular retired pay is a full year during which a RC member is credited with a minimum of 50 retirement points. Except as otherwise provided by law, an accumulation of 20 such years is one requirement necessary to qualify for non-regular retired pay.

b. Paragraph 1-8b. Establishment of anniversary year. The criteria for establishing the service requirement for a satisfactory year of service for non-regular retirement per DODI 1215.07 and changing the anniversary year ending date are as follows: the full-year periods used for the crediting of qualifying years for non-regular retirement must be based on the anniversary years. Anniversary year periods are calculated from an anniversary date. The anniversary date is the date the Servicemember entered into active service or active status in a RC. The month and day for each successive anniversary year will not be adjusted unless the Servicemember has a break in service. A break in service occurs only when a member transfers to an inactive status list, the inactive National Guard, a temporary disability retired list, the Retired Reserve, or is discharged for longer than 24 hours. There will not be a break in service if the

Servicemember transfers directly to another active component or RC. When a Servicemember with a break in service returns to an active Reserve status or to active service, the revised anniversary year start date will be the date of return or reentry. When the anniversary date shown on any authorized DA Form 5016 is incorrect the Soldier's unit of assignment should submit a request for action to HRC via encrypted email for processing.

c. Paragraph 2-1. Criteria for crediting retirement points. The limitations on the number of points that may be credited to a Soldier during an anniversary year are:

- maximum-365 (366 during leap year) points
- no more than one retirement point may be awarded for any day in which the Soldier is on active duty
- a maximum of two retirement points may be awarded in 1 calendar day for any activity or combination of activities
- inactive duty training (IDT) will be either 4 hours in length for one retirement point or 8 hours in length for two retirement points, with the exception of the 2 hour IDT funeral honors duty
- membership-Soldiers are awarded 15 membership points for each year in an active status

21. Title 10, U.S.C., §14509 (Separation at age 62: reserve officers in grades below brigadier general or rear admiral (lower half)) states each reserve officer of the Army, Navy, Air Force, or Marine Corps who is in an active status or on an inactive-status list and who reaches the maximum age specified in section 14509 [age 62], 14510 [age 62 brigadier general], 14511 [age 64 major general], or 14512 [age 66 "certain general officers"] of this title for the officer's grade or position shall (unless the officer is sooner separated or the officer's separation is deferred or the officer is continued in an active status under another provision of law) not later than the last day of the month in which the officer reaches that maximum age:

a. be transferred to the Retired Reserve if the officer is qualified for such transfer and does not request (in accordance with regulations prescribed by the Secretary concerned) not to be transferred to the Retired Reserve; or

b. be discharged from the officer's reserve appointment if the officer is not qualified for transfer to the Retired Reserve or has requested (in accordance with regulations prescribed by the Secretary concerned) not to be so transferred.

22. Title 10, U.S.C. § 1552, the law which governs the operation of the Board, states that “The Secretary may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or the repayment of a fine or forfeiture, if, as a result of correcting a record under this section,

the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps or Coast Guard, as the case may be."

23. Title 10, U.S.C. § 1552 states the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice.

//NOTHING FOLLOWS//