

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 26 January 2024

DOCKET NUMBER: AR20230003843

APPLICANT REQUESTS: a payment correction to receive retroactive Basic Allowance for Housing (BAH) pay at the “with dependent” rate from the time he went Active Guard Reserve in July 2009 through June 2020.

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

- DD Form 149 (Application for Correction of Military Record)
- Memorandum for Record
- Two (2) Certificates of Birth
- Thirty (30) Leave and Earnings Statements

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states, in effect, the Human Resources Office (HRO) should be the subject matter experts for all administrative actions. On more than five occasions, he attempted to submit his DA Form 5960 (Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance) to “with dependents;” however, the HRO personnel denied it stating that he was not entitled to add his dependents. The misinformation provided by the HRO personnel has caused him to pay out-of-pocket each time for a sworn statement as proof. It was not until years later that he was informed by the Judge Advocate General (JAG) office that he was entitled since he entered the Active Guard Reserve (AGR) program.
3. The applicant provides:
  - a. Memorandum for Record, dated 26 January 2023, which states:

(1) On 19 July 2009, he was chosen as the best qualified for an AGR position as a training NCO. One of the requirements to complete the initial package was to submit the BAQ and OHA package with his dependents. When he submitted the package, he was told by the HRO representative that he was not entitled to add his dependent because he was not legally married.

(2) The following year, he tried again to submit the package with dependent but was told by the HRO representative that he was not entitled. Due to, if he does not submit the package on time and at that time, I was not orientated on the regulation that when you are not married but live with your kids you are still entitled to get pay with dependents, I did not submit a claim [sic]. As of note, it is of the belief the applicant was attempting to state, "due to him being unfamiliarized with the regulation regarding dependents, and the fact that if he did not submit the package on time and at that time, he did not submit a claim."

(3) In 2010, he went to the Reserve Component JAG to ask the same question about been entitled for his dependents and the answer was that he was not entitled to add my dependents. This is the reason why he does not have proof of any DA Form 5960 submitted because they never allowed him to submit it through the system.

(4) It was not until 2018 that the unit received a JAG orientation. He asked about his case and the JAG representative informed him that he was entitled to submit his dependents if they were living with him. In 2018, upon inquiring about his pay with dependents rate, he was told by the HRO representative that he was not entitled to the "with dependent" rate because he was not legally married with dependents.

(5) On 3 June 2019, a DA Form 5960 was submitted with the "without dependents" as per previous guidance. This time, he went to the Puerto Rico Army National Guard (PRANG) JAG at Fort Buchanan and asked to be oriented about his case. Sergeant N at that time was the one that provided him all the information and documents that showed he was entitled to "with dependents" since he started in the AGR Program.

(6) In 2020, after getting all the information about his case, he inquired at State JAG office, and they explained that he should have continued certifying his dependent children since his conditions regarding them never changed. They assisted him with preparing the required supporting documentation to correct his dependent status. The DA Form 5960 "with dependents" was submitted on 8 June 2020.

(7) On 14 May 2021, a DA Form 5960 "with dependents" was resubmitted and approved.

(8) On 27 June 2022, a DA Form 5960 “with dependents” was resubmitted and approved.

(9) In all these years, he has attempted multiple times to submit the correct DA Form 5960 “with dependents,” but was always denied. He was instructed to complete three affidavits over the years to prove that his kids lived with him, but were always denied.

b. Two Certificates of Birth for the following:

- J.M.Z. (male) born on 9 May 2011 to the applicant (father) and Ms. Je\_\_\_ Ma\_\_\_ Za\_\_\_ Sa\_\_\_ (mother)
- J.M.Z. (female) born on 9 February 2005 to the applicant (father) and Ms. Je\_\_\_ Za\_\_\_(mother)

c. Thirty Leave and Earnings Statements (LES), dated between 1 January 2012 through 31 December 2020.

4. A review of the applicant’s service record shows:

a. He enlisted in the Army National Guard on 29 February 2000.

b. U.S. Army Human Resources Command (HRC) orders A-02-702774, dated 1 February 2007, and reflects the applicant was ordered to active duty under provision of Section 12301 (D), Title 10 U.S. Code for 336 days, with duty at Guantanamo Bay Cuba in support of Operation Enduring Freedom.

c. Joint Forces Headquarters (JFHQ) orders 195-019, dated 15 July 2009, reflects the applicant was ordered to Active Guard Duty (AGD) for a period of 36 months, from 20 July 2009 to 19 July 2012, to serve as a Squad Leader (Training Noncommissioned Officer (NCO)).

d. JFHQ orders 125-503, dated 4 May 2012, reflects the applicant was ordered to AGD for a period of 19 months, from 20 July 2012 to 28 February 2014, to serve as the Training NCO (Section Leader).

e. JFHQ orders 013-506, dated 13 January 2014, reflects the applicant was ordered to AGD for a period of 72 months, from 1 March 2014 to 285 February 2020, to serve as a Training NCO (Squad Leader).

f. JFHQ orders 321-506, dated 17 November 2019, reflects the applicant was ordered to Full-Time National Guard Duty (FTNGD) for a period of 6 years and 1 day, from 29 February 2020 to 28 February 2026, to serve as Readiness (Platoon Sergeant).

g. Sworn Statement, dated 4 June 2020, reflects the applicant and Ms. J.Z.S. solemnly declared that the two children, Ms. J.M.Z and Mr. J.M.Z., a product of their relationship and whom are minors live in the same household. Further declaring that they live together as a couple, both provide the necessities for their children, to include health insurance and educational expenses. The sworn statement was notarized by Captain (CPT) R.A.R., Judge Advocate, Puerto Rico Army National Guard (PRARNG).

h. JFHQ orders 41-333-0003, dated 29 November 2022, reflects the applicant was ordered to AD, with an effective date of 5 January 2023, for a period of 400 days, from 29 February 2020 to 28 February 2026, in support of Operation Enduring Freedom (Spartan Shield).

i. Headquarters, U.S. Army Garrison, Fort Bliss orders BL-045-0565, dated 14 February 2023, reflects he was deployed in a Temporary Change of Station (TCS) status in support of Operation Enduring Freedom (Spartan Shield), with a proceed date of 16 February 2023, not to exceed 358 days.

j. JFHQ orders 256-689, dated 13 September 2023, reflects the applicant was ordered to FTNGD for a period of 2 years and 4 months, from 1 October 2023 to 28 February 2028, to serve as Readiness NCO.

5. National Guard Bureau advisory opinion, dated 14 November 2023, recommended partial approval and further states:

a. The applicant requests BAH with dependent be paid retroactively to the start of Soldier's AGR orders in 2009. Soldier stated BAH with dependents was denied from 2009 until 2020 by the HRO representative due to absence of legal marriage.

b. The applicant stated from 2009 until 2020, his DA form 5960 was submitted without dependents at the request of the HRO representative who declared BAH with dependents was not authorized if SM is not legally married.

c. The applicant stated in 2010 SM had a meeting with a JAG representative who confirmed SM was not entitled to BAH with benefits. In 2018 SM had another meeting with a JAG representative who stated SM was entitled to BAH with dependents, however the HRO still denied approval of BAH with dependents. The applicant was directed by the HRO representative to submit DA form 5960 without dependents. In 2019 the applicant had a meeting with a JAG representative from FT Buchanan who confirmed SM was eligible for BAH with dependents and provided documents to confirm eligibility. In 2020 the applicant met with the State JAG office who confirmed SM was eligible for BAH with dependents since the start of AGR orders. The state JAG office assisted with the development of supporting documentation to correct the dependent status.

d. The applicant submitted DA form 5960 in 2020, 2021, and 2022 with dependents. SM stated the forms submitted in 2021 and 2022 with dependents were approved. The applicant provided a birth certificate for both dependent children, sworn statements written in 2013, 2020, and 2022 declaring both children reside with SM, DA forms 5960 submitted in 2013, 2015, 2018, and all LES documents from January 2012 through December 2020 as evidence.

e. After review of the applicant's documents provided and given the concurrence email from the Puerto Rico Army National Guard (PRARNG) G1, it is the conclusion of this office, that the applicant was eligible for BAH with dependent pay from 2012 thru 2020. LES documents show applicant did not receive BAH with dependent pay from 2012 to 2020. If the applicant provides evidence of BAH without dependents from 2009 to 2012 it is recommended retroactive pay, be granted for this period. It is reasonable SM would not have a record DA5960 without dependents if not authorized.

f. The Puerto Rico Army National Guard concurs with recommendation for partial approval given evidence of record DA 5960 during this time period.

6. The applicant was notified of the ex-parte correspondence received from the National Guard Bureau. He was afforded the opportunity to submit comments on the correspondence; however, as of the date of this writing, none have been received.

7. Department of Defense (DoD) 7000.14-R (Financial Management Regulation), Volume 7A, Chapter 26, provides policy pertaining to housing allowances. Housing allowances include Basic Allowance for Housing (BAH), Overseas Housing Allowance (OHA), and Family Separation Housing (FSH) Allowance. It is not authorized when a member performs duty at any station under permissive orders.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the applicant's contentions, the military record, and regulatory guidance. One possible outcome was to grant full relief. However, the Board determined that documentation available for review sufficient to support payment of without dependents from 2009 to 2012 and a recommendation for partial relief is warranted.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

█████	:	:	GRANT FULL RELIEF
:	█████	█████	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented 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 authorizing him Basic Allowance for Housing with dependent pay for the period 2012 thru 2020. The exact arrears payment to be determined by DFAS-IN.
2. The Board further determined the evidence presented 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 BAH without dependents payment through July 2009 through June 2012.

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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. Title 10, United States Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3 year statute of limitations if the Army Board for Correction of Military Records (ABCMR) determines it would be in the interest of justice to do so.

2. Department of Defense (DoD) 7000.14-R (Financial Management Regulation), Volume 7A, Chapter 26, provides policy pertaining to housing allowances. Housing allowances include Basic Allowance for Housing (BAH), Overseas Housing Allowance (OHA), and Family Separation Housing (FSH) Allowance. It is not authorized when a member performs duty at any station under permissive orders.

a. Section 2602 states, a service member on active duty entitled to basic pay is authorized a housing allowance based on his or her grade, rank, location, and whether he or she has any dependents. A housing allowance generally is not authorized for a Service member who is assigned to appropriate and adequate Government quarters (see Section 2608 for Government quarters). If a Service member is on excess leave, neither BAH nor OHA accrues for any excess-leave period. If a Service member is absent without leave which is not excused as unavoidable, neither BAH nor OHA is authorized.

b. Table 26-1 (Types of Housing Allowances):

- BAH is 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) is paid to a Service member assigned to single-type Government quarters who qualifies for a BAH solely due to paying sufficient child support.

3. Title 32 Code of Federal Regulations (CFR) Section 584.7 prescribes eligibility for Basic Allowance for Quarters (BAQ) as follows:

a. Soldiers entitled to basic pay, who have family members, are entitled to BAQ at the rates prescribed for Soldiers "with dependents" under certain conditions. The Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) governs entitlements.

b. Soldiers may receive BAQ at the “with dependents” rate as long as they pay at least the difference between BAQ at the with- and without-dependents rate each month in support of their families. This is so even if a divorce decree or court order is silent on support or releases the soldier from the responsibility of supporting the family. Normally, a soldier is not entitled to BAQ on behalf of a former spouse or stepchildren after the divorce. BAQ at the “with dependents” rate is not authorized when the Soldier or the supported family is residing in Government family quarters. Also, if two Soldier member-parents are supporting the same child, only one Soldier member is entitled to BAQ at the “with dependents” rate.

//NOTHING FOLLOWS//