

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: ██████████

BOARD DATE: 15 March 2024

DOCKET NUMBER: AR20230006066

APPLICANT REQUESTS: retroactive backpay of Basic Allowance for Housing (BAH) with dependent instead of BAH differential for the period of 6 September 2021 to 18 August 2022. A personal appearance before the Board.

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

- DD Form 149 (Application for Correction of Military Record)
- Personal Letter
- Affidavit
- Dependent Birth Certificate
- Orders Number 146-081, 26 May 2021
- Email Correspondence with the 19th Military Police Battalion (Criminal Investigation Division (CID)), Human Resources (S1) Non-Commissioned Officer in Charge (NCOIC)
- Court Docket, 25 January 2022
- DA Form 1559 (Inspector General Action Request), 13 June 2022
- Orders Number 166-1005, 15 June 2022
- Email Correspondence, 5 April 2022
- Email Correspondence with the Finance Department
- Just Breathe Nurse Invoice, 7 April 2022
- Email Correspondence, 13 April 2023
- Department of Defense Financial Management Regulation (DoD FMR) 7000.14-R BAH Table Excerpt

FACTS:

1. The applicant states, in pertinent part:

a. He is seeking a resolution of his pay issue with the Camp Casey Finance Office ("Finance") and officer in charge Captain (CPT) M- D-. Finance continues to deny his BAH at the "With Dependent" rate despite his eligibility under DoD FMR 7000.14-R, Volume 7A, Chapter 26 before taking the extraordinary step of filing a complaint with the Inspector General or a complaint under Article 138, Uniform Code of Military Justice.

b. CPT M- D- told him that he is entitled to BAH-Diff because of being a single father, stationed at Camp Casey and "therefore do not have physical custody of the child," and that while stationed here he was "being provided government quarters on the installation," citing paragraph 3.5.1.3 of the FMR, Chapter 26. (See enclosed email chain between him and CPT M- D-). However, CPT M- D- has incorrectly interpreted the regulation and incorrectly applied it to his situation.

c. His request for BAH at the with dependent rate complies with the FMR, Chapter 26, for the following reasons:

(1) He currently has joint legal custody and shared physical custody of his daughter and has since her date of birth. He has also contributed to her support in an amount at least equal to the applicable BAH-Diff rate since her birth. (See enclosed Birth Certificate, Court Order, and Affidavit of Support.)

(2) He has provided Finance with a birth certificate with his name on it, which is the only requirement to prove his child's status as his dependent minor child born out of wedlock in accordance with (IAW) paragraph 3.5 of DoD FMR 7000.14-R, Volume 7A, Chapter 26.

(3) CPT M- D- cited the FMR, Chapter 26, paragraph 3.5.1.3, which states that "if the child is not in the custody of the Service member parent, the case is treated as specified in the rules for BAH-Diff." However, he does have custody of his child. The regulation does not require physical custody; it simply requires custody. Even if the regulation did require physical custody, he does, in fact, have physical custody, per the court order. The child is simply not physically present with him in Korea by virtue of his unaccompanied tour. In any event, this provision of the regulation does not apply because he has custody – both legal and physical – of his daughter. The BAH-Diff provisions apply to Soldiers who pay sufficient child support but do not have any custody of their dependent child, which is not the case for him. Therefore, his case should not be "treated as specified in the rules for BAH-Diff."

(4) His entitlement to BAH at the with-dependent rate is not impacted by the fact that his co-parenting agreement is silent on the exact amount of child support he must pay each month and permits him to pay his child support expenses directly. All that matters according to paragraph 3.5.2 of DoD FMR 7000.14-R, Volume 7A, Chapter 26 is that he contributes to his dependent's support in an amount not less than the applicable BAH-Diff rate. Nothing in this paragraph requires him to pay the other parent rather than directly provide for his dependent's support.

(5) His child was not permitted to accompany him to Korea, which authorizes him to receive BAH at the with-dependent rate IAW paragraph 10.2.1.3 of DoD FMR 7000.14-R, Volume 7A, Chapter 26.

(6) It is a common misconception that the parent of a child born out-of-wedlock must have physical custody at least 51 percent of the time in order to be entitled to BAH at the with dependent rate rather than BAH-Diff. With regards to a child born out-of-wedlock, DoD FMR 7000.14-R, Volume 7A, Chapter 26 simply draws a distinction between having custody versus not having custody. There is no distinction between physical versus legal custody (and he has both in any event). In addition, Table 26-1 of DoD FMR 7000.14-R, Volume 7A, Chapter 26 defines BAH-Diff as "paid to a Service member assigned to single-type Government quarters and who qualifies for a BAH solely due to paying sufficient child support." Again, BAH-Diff is not applicable to Soldiers who also have legal and/or physical custody of their dependent child.

(7) Table 26-29, in the FMR, Chapter 26 sets out the guidelines for "Changes in BAH or OHA When a Service Member Assigned OCONUS Acquires a Dependent." Specifically, Rule 3 of Table 26-29 states, "If a dependent is located in the CONUS...and not at or near the PDS, and Government quarters are available for the Service member, then start BAH at the with-dependent rate based on the dependent's location as of the date the dependent is acquired." Therefore, the date he acquired the dependent (i.e., the date of birth) should have entitled him to receive BAH at the with-dependent rate. The regulation is clear.

d. While he understands that it is unusual for a male Soldier whose out-of-wedlock child is born while he is serving an unaccompanied tour stationed in Korea to receive a court order granting him both physical and legal custody of his child from birth, that is in fact the case for him. Because he and his child's mother both agreed to this legal arrangement and the judge reviewing the case found this agreement was in his daughter's best interest, the judge approved it.

e. Just because his fact pattern is unusual does not excuse the finance office's refusal to process his request for BAH at the with-dependent rate, when his request meets all the regulatory requirements to receive BAH at the with-dependent rate. The detailed affidavit provided by his child's mother shows that his request is being made in good faith and provides additional facts supporting his request.

f. He seeks assistance to facilitate the submission and processing of his request for BAH at the with-dependent rate by a finance officer and the submission be back dated to 6 September 2021 to 18 August 2022, the birth date of his daughter to his Permanent Change of Station date from Korea.

2. A review of the applicant's available service record reflects the following:

a. On 10 October 2013, having previous enlisted service with the Army National Guard and the Regular Army, he was appointed as Regular Army commissioned Infantry officer and executed an oath of office.

b. On 1 June 2018, the U.S. Army Human Resources Command (HRC) issued Orders Number A-06-800779 assigning him to active duty status for a voluntary indefinite status, effective 24 September 2018.

c. On 4 June 2018, HRC issued a Memorandum for Appointment as a Reserve Warrant Officer of the Army.

d. DD Form 214 (Certificate of Release or Discharge from Active Duty), ending 2 July 2018 reflects an honorable discharge from active duty to continue in active duty in another status. Item 12 (Record of Service) shows service from 10 October 2013 to 2 July 2018 for a net active service this period of 4 years, 8 months, and 23 days.

e. On 3 July 2018, he accepted a Reserve Warrant Officer commission and executed an oath of office.

f. DA Form 1059 (Service School Academic Evaluation Report), dated 10 August 2018 shows completion of Warrant Officer Basic Course with the U.S. Army Military Police School.

g. On 26 May 2021, the United States Army Installation Management Command, Headquarters, United States Army Garrison, Fort Sill issued Orders Number 146-081 ordering him to PCS to Camp Casey, Korea, with a reporting date effective 15 August 2021. Item J shows dependents: "No." Item K shows a 12 month "dependent restricted tour."

h. On 15 June 2022, the United States Army Installation Management Command, Pacific Region, U.S. Army Garrison Casey issued Orders Number 166-1005 ordering him to PCS to Fort Belvoir, Virginia, with an effective reporting date of 12 September 2022. Item A shows dependents: "Yes."

i. His record is void of a DA Form 5960 (Authorization to Start, Stop, or Change Basic Allowance for Quarters (BAQ) and/or Variable Housing Allowance (VHA)).

j. He continues service in the Regular Army.

### 3. The applicant provides the following:

a. Affidavit statement from the mother of the dependent child attesting to the applicant's continued involvement with their child during his assignment at Camp Casey, Korea, his costs he has incurred while providing support of his child, and the court requirements of at least 25 percent physical custody of his dependent with an agreement to increase that time once he returned from Korea.

b. Dependent Birth Certificate from the State of Maryland showing him as the parent of the dependent child.

c. Email Correspondence, with the 19th Military Police Battalion (CID), S-1 office, NCOIC showing their communications regarding his request for assistance with receiving BAH with dependents.

d. Court Docket, dated 25 January 2022 from the Montgomery Circuit Court showing the co-parenting agreement for their dependent child with the mother holding primary physical custody. This document states the applicant would have custody of the dependent child 25 percent of the time and upon the applicant's return to the Washington D.C area that would increase.

e. DA Form 1559 dated 13 June 2022 wherein the applicant requested assistance from the IG with his BAH to be paid at the "with dependent" rate.

f. Email Correspondence, dated 5 April 2022 with the 19th Military Police Battalion (CID), Battalion Operations Officer notifying him that he is ineligible for BAH with differential pay but not BAH with dependents.

g. Email Correspondence, dated 24 November 2021 with the Finance Department notifying him that he was ineligible for BAH differential with dependent due to him not paying child support.

h. Just Breathe Nurse Invoice, dated 7 April 2022 showing the overnight care for his premature dependent child in the amount of \$5,750.00.

i. Email Correspondence, dated 13 April 2023 showing his communication with the Battalion S-1 NCOIC regarding assistance for a resolution of his BAH request.

j. DoD FMR 7000.14-R, Volume 7A, chapter 26 BAH Table Excerpt showing the rule for a service member change in BAH upon acquiring a dependent.

4. On 9 November 2023, the Office of the Deputy Chief of Staff, G-1, Program Analyst, Compensation and Entitlements Division, provided an advisory opinion recommending disapproval of the applicant's request, stating in effect:

a. Based on a careful review of the facts surrounding this situation, we recommend the Army Review Board Agency disapprove his request for correction to military records. He is seeking a with-dependent housing allowance based on a court order that awards the mother primary physical custody of his minor child.

b. This office supports the determination provided by the Camp Casey finance

office. Per Army Regulation (AR) 637-1 (Army Compensation and Entitlements Policy), Chapter 7-9 Soldiers who do not have court ordered primary legal and physical custody of their dependent children generally receive BAH –Differential. Since the court order does not award him legal and physical custody of his dependent child for a period of 91 or more consecutive days, he is a noncustodial parent for housing allowance purposes. He received the authorized BAH – Difference since he was assigned single type quarters and paying child support in at least the BAH-Difference amount for his grade.

5. On 17 November 2023, the applicant was provided with a copy of the advisory opinion to provide a response. As of 19 November 2023, he did not respond.

#### BOARD DISCUSSION:

1. The applicant's contentions, the military record, and regulatory guidance were carefully considered. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted.
2. The applicant's request for a personal appearance hearing was carefully considered. However, in this case, the evidence of record and independent evidence provided by the applicant was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
3. Soldiers who do not have court ordered primary legal and physical custody of their dependent children receive BAH – differential. Since the court order does not award him primary legal and physical custody his dependent child for a period of 91 or more consecutive days, he is a noncustodial parent for housing allowance purposes. He received the authorized BAH – differential since he was assigned single type quarters and paying child support in at least the BAH- differential amount for his grade.

BOARD VOTE:

Mbr 1    Mbr 2    Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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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. Department of Defense Financial Management Regulation, Volume 7A, Chapter 26 (Basic Allowance for Housing (BAH) provides that effective 1 January 1998, in general, BAH provides members a monthly allowance for housing. This allowance is authorized for members with and without dependents. Basic Allowance for Housing is intended to pay only a portion of housing costs. Basic Allowance for housing will consist of BAH, BAH-II, BAH Difference (BAH-DIFF), Partial BAH, Overseas Housing Allowance (OHA), and Family Separation Housing (FSH). Basic Allowance for Housing also consists of the former allowances known as Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA).

2. AR 637-1 (Army Compensation and Entitlements Policy) states:

a. Chapter 7-2 (General Provisions) A Soldier is authorized a housing allowance for a child for whom the Soldier is paying child support if all the following conditions are met:

- The Soldier is required to support a child in the custody of a former spouse
- He or she is married to another Soldier with children born of this marriage
- The Soldier lives in family-type government quarters with the Soldier's spouse and children
- The Soldier is assigned to PCS to a different Permanent Duty Station outside commuting distance
- The Soldier's current spouse, who is also a Soldier, and children remain in government quarters
- The government quarters assignment is in or transferred to the remaining Soldier's name.

b. Chapter 7-6 (Dependent custody effects on housing allowances) Voluntary support payments. Voluntary support payments must not be considered to determine housing allowance authorization unless there is a mutual agreement between the Soldier parents that the custodial Soldier parent accepts the support payments.

(1) Single Soldiers requesting basic allowance for housing differential. Single Soldiers who are requesting to receive BAH – DIFF and/or BAH/OHA at the with dependent rate based on a dependent child are required to be the custodial parent by having legal and physical custody or by paying monthly child support to the custodial parent in at least the BAH – DIFF amount for the Soldier's grade. For housing allowance purposes, legal custody is defined as having a court order awarding the Soldier the custodial parent. Physical custody is defined as the child living in the same residence as the Soldier on a nontemporary basis for a period of at least 90 consecutive days.



(2) Proof of parentage. Soldiers are required to be identified on the birth certificate. A properly certified DNA test or court declaration establishing proof of parentage are also acceptable if no birth certificate is available. Proof of support.

(3) When paying monthly child support, a cancelled check, money order, Electronic Fund Transfer (EFT), voluntary allotment, and involuntary allotment are acceptable as proof of support. EFT payments made via bank account deduction or PayPal account is also acceptable. However, all transactions must be payable to the custodial parent monthly. The amount of support must be in an amount that is at least the current BAH – DIFF based on the Soldier's grade. In child support payment cases, a joint bank account or letter signed by the custodial parent attesting to support payments are not acceptable as proof of support.

c. Basic allowance for housing differential Soldiers who do not have court decreed primary legal and physical custody of their children generally receive BAH – DIFF, which is the difference between with and without dependent nonlocality BAH rate in a given calendar year. A Soldier who is paying child support and residing in single-type government housing is authorized BAH – DIFF, providing the amount of child support is greater than or equal to the BAH – DIFF amount for the Soldier's pay grade. A Soldier must be able to demonstrate that they contribute no less than the applicable BAH – DIFF rate to retain the allowance, but it is not required for a legal document to state support or responsibility to support in order to be eligible for BAH – DIFF.

3. AR 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

//NOTHING FOLLOWS//