

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 April 2024

DOCKET NUMBER: AR20230007798

APPLICANT REQUESTS:

- remission of debt associated with overpayment of Basic Allowance Housing (BAH) and Family Separation Housing – Overseas (FSH-O)
- a personal appearance before the Board

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

- DD Form 149 (Application for Correction of Military Record)
- Self-authored letter
- Memorandum – Subject: Recommendation for Remission of Debt, 26 September 2022
- Memorandum – Subject: Immediate Commanders Recommendation for Remission, 26 August 2022
- Sworn Statement, 23 August 2022
- Email communication
- USAR Form 28-R (Notice of Indebtedness), 19 April 2022
- Leave and Earnings Spreadsheet
- Email communication
- Leave and Earnings Statements (LES)
- Orders Number HR-0199-00004, 17 July 2020
- Orders Number HR-0199-00004A01, 19 July 2021
- Orders Number HR-0199-00004A02, 28 September 2021
- Orders Number HR-2196-00012, 15 July 2022
- DA Form 5960 (BAH Authorization and Dependency Declaration), 23 March 2022
- DA Form 5960, 9 June 2022
- Email communication
- Excerpt from Army Board for Correction of Military Records (ABCMR) Docket Number AR20200006642
- Memorandum – Subject: Endorsement for Remittance of Debt, 25 October 2022
- Memorandum – Subject: Remission or Cancellation of Indebtedness Based on Hardship and/or Injustice, 22 May 2023

FACTS:

1. The applicant states in pertinent that he was on a Contingency Operation Active Duty Operational Support (COADOS) order with service in Wiesbaden, Germany, on an "unaccompanied" tour from 2020-2023. He currently has a \$50,998.76 debt related to the overpayment of FSH-O and BAH based on the location of his dependents. He contests that the 266th Finance Command has misinterpreted the Department of Defense Financial Management (DOD FMR) 7000.14-R and their actions are not consistent with the precedence set by ABCMR Docket Number AR2020006642. In this case, the Board concluded that the Joint Travel Regulation (JTR) supported counsel's assertion that the applicant was, in fact, authorized to receive Overseas Housing Allowance (OHA) and BAH during his tour of duty in Germany. The Board also determined that, for a Reserve Component (RC) Soldier, the JTR authorizes payment of BAH based on the location of the primary residence regardless of where the Soldier's dependents may be located. The Board found error in the interpretation of the JTR that prevented a RC Soldier, serving overseas on orders that did not authorize shipment of household goods or travel of dependents and at a duty station where government housing was not available, from receiving both BAH for his primary residence and OHA based on his duty station. The Board found the erroneous interpretation of the JTR led to the unjust recoupment of alleged overpayment of housing allowances. Further, he argues that the finance office applied an incorrect effective date changing his BAH entitlement which resulted in a 90-day accrued debt of over \$5,000.00. For over seven months he was proactive in seeking guidance from three different authorities and after 18 months of following the provided guidance, a fourth authority determined that the guidance provided was incorrect.

Based on the aforementioned information, he argues that he should be authorized dual housing entitlements i.e. BAH for his primary residence in Los Angeles, CA, and OHA at the without dependent rate for his housing in Germany. He adds that his spouse and children travelled to and from the states and throughout Europe, never staying longer than 90 days with him. He continued to receive BAH/FSH-O entitlements until 15 February 2022, when his FSH-O was terminated. A subsequent audit was conducted with the 266th Finance Company whereby it was determined that he was not entitled to BAH/FSH-O and recoupment action must be initiated starting from the date of his orders rather than the 91st day after his arrival. In October 2022, he submitted a remission of indebtedness packet through the Headquarters Department of the Army (HQDA) G-1 on the basis that this debt was unjust and created a financial hardship. On 23 May 2023, HQDA G-1 granted a partial approval of his incurred debt thereby reducing the total amount by 25 percent (\$38,241.57). This letter is provided in its entirety within the supporting documents for the Boards review.

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

- a. On 20 August 2005, the applicant was appointed a Reserve commission as an Aviation Corps Officer within the California Army National Guard (CAARNG).
- b. On 13 February 2013, the applicant was legally married to Mrs. H_ C_.
- c. On 14 December 2013, the applicant submitted his request for BAH at the "with dependent" rate. This request was subsequently approved on 20 December 2013. The form shows the location of his spouse as Long Beach, CA.
- d. On 29 March 2015, the applicant recertified his BAH entitlement noting the ownership of a home in Lakewood, CA.
- e. On 6 October 2017, the National Guard Bureau (NGB) issued Special Orders Number 207 announcing Federal Recognition of the applicant's promotion to the rank/grade of major (MAJ)/O-4, effective 12 September 2017.
- f. On 17 July 2020, the U.S. Army Human Resources Command (AHRC) issued Orders Number HR-0199-00004 placing the applicant on active duty (COADOS), with duty in Wiesbaden, Germany, effective 1 August 2020, for a period of 365 days. The additional instructions of these orders note this was an unaccompanied Permanent Change of Station (PCS) and the movement of household goods and dependents were not authorized. The applicant's primary address reflects "CA – 90715".
- g. On 28 September 2021, AHRC issued Orders Number HR-0199-00004A02 amending Orders Number HR-0199-00004 to reflect 729 days of duration rather than 425 days with an adjusted end date of 30 July 2022.
- h. On 15 July 2022, AHRC issued Orders Number HR-2196-00012 placing the applicant on active duty (COADOS), with duty in Wiesbaden, Germany, effective 31 July 2022, for a period of 214 days. The additional instructions of these orders note this was an unaccompanied PCS and the movement of household goods and dependents were not authorized. The applicant's primary address reflects "CA – 90715".
- i. On 1 March 2023, the applicant was honorably released from active duty and returned to his ARNG unit.

3. The applicant provides the following:

- a. Memorandum – Subject: Recommendation for Remission of Debt, dated 26 September 2022, reflective of the Commander, U.S. Army Europe and Africa recommendation for full remission of the applicant's debt based on undue hardship and injustice.

b. Memorandum – Subject: Immediate Commanders Recommendation for Remission, dated 26 August 2022, reflective of the applicant's immediate commander's recommendation for approval of his request for full debt remission of the incurred \$50,988.76 debt noting that denial of this request would not serve in the best interest of the U.S. government. Captain P_ C_ notes that there is an on-going court case in the Federal Claims court about this very subject and the ABCMR has already concluded (on seven separate occasions) that Soldiers are entitled to dual housing entitlements while their spouse accompanies them at their primary duty station. Currently, as a National Guardsman that is a homeowner, the applicant is required to maintain two households. In addition to his mortgage for his primary residence in CA, he was also responsible for the rent of his apartment in Wiesbaden, Germany. His unit command policy does not authorize Soldiers on COADOS orders to live on post. Therefore, he was forced to reside within the local economy which has a high cost of living. Reducing his pay based on a perceived overpayment of housing allowances will effectively prevent him from paying either of his housing obligations.

c. Sworn Statement dated 23 August 2022, reflective of the applicant testimony regarding the \$50,998.76 debt associated with his previous receipt of BAH and FSH-O. In addition to his opening remarks to this Board, the applicant adds that in April 2021, he advised his battalion Adjutant General (AG) of his intention to cancel his FSA and confirm if there were any other changes to his entitlements based on his change of circumstances i.e., due to COVID restrictions, his spouse would not be permitted to travel to/from Europe as often as originally planned. He notes that his AG was unaware of how to cancel his FSA and referred him to the local finance office. They too, were unaware of how to terminate FSH. The applicant was later advised that he was in fact authorized BAH and FSH-O because his dependents never spent more than 90 days with him at any given time. Further, based on the regulation, "his spouse was only required to spend one day apart from him." Then, the applicant was subsequently advised by the finance office, that "FSA is only authorized if his spouse was away from him for more than 30 days at a time" and that since his wife's last travel date outside of Germany was in March 2021, he would backdate the cancellation of his FSA to March 2021; the termination did not occur until August 2021. This document is further provided in its entirety for the Board's review within the supporting documents.

d. Email communication pertaining to the applicant's entitlement to FSH-O and BAH. The applicant spells out his wife's intention to travel to and from the U.S. and Europe throughout the duration of his orders in order to maintain their household and her business. He notes that his wife is of British decent with the intention of obtaining German residency as well. The applicant noted that the intention of the communication was to validate his entitlement to BAH based on his Home of Record (HOR) and OHA at the without dependent rate. The applicant also provides a detailed account of his spouse (and dependent children's) travel from September 2020 – April 2022 (duration,

location and frequency). These documents are provided in their entirety for the Board members review within the supporting documents.

e. USAR Form 28-R dated 19 April 2022, reflective of the applicant being advised of the \$50,998.67 debt, his disagreement with the debt's validity and further request for a waiver/remission of the alleged debt.

f. Leave and Earnings Spreadsheet reflective of an account of the applicant's BAH and FSH-O received from August 2020 – April 2022 resulting in the \$50,998.76 debt.

g. Email communication reflective of communication received by the applicant from the 266th Finance company pertaining to his BAH entitlements. The applicant was advised that his BAH II is the default entitlement that starts when the tour information is input in the Reserve Pay system (start of the tour). BAH II (also referred to as BAH-RC) is the housing allowance that is authorized for a Guard or Reserve member called or ordered to active duty. BAH II is paid when the service member is authorized OHA, the BAH II payment is subtracted from the OHA and utility/recurring maintenance allowance when computing the daily rate payable. On 6 April 2022, that applicant was advised by the finance office that his provided flight itineraries reflective of his wife's travel in and out of Europe in December 2020, March 2021, June 2021, September 2021, November 2021 (Belgium), January 2022, February 2022, and March 2022, they now suspect that his spouse was residing with him in Germany and if she was residing with him, the finance office would determine his entitlements; per DOD FMR Section 260701 (B)(3). If his spouse was in Europe for over 90 days, they would terminate his entitlement to FSH-O and collect any overpayments. These documents are provided in their entirety for the Board members review within the supporting documents.

h. LES reflective of the applicant's pay and entitlements from varying periods of military service dating back to September 2020. The applicant's entitlement to a BAH (when authorized) is based upon a CA zip code. The LES also show he was being paid FSA in the amount of \$125.00. In August 2021 the FSA stopped and his zip code is shown as "2110X" and not "9071X." In October 2021 the zip code shows "9071X." In April 2022 the applicant began receiving OHA. And in July 2022 the OHA stopped.

i. Orders Number HR-0199-00004A01 dated 19 July 2021, reflective of Orders Number HR-0199-00004 being amended to reflect a duration of 425 days rather than 365 days.

j. DA Form 5960 dated 23 March 2022, reflective of the applicant's recertification of his BAH at the "with dependent" rate entitlement. The applicant noted his physical and duty location as Germany with his dependents residing in CA.

k. DA Form 5960, 9 June 2022, reflective of the applicant's recertification of his BAH at the "with dependent" rate entitlement. The applicant noted his physical and duty location as Germany with his dependents residing in CA.

l. Email communication wherein the applicant inquired about housing for his wife and children while he was in an unaccompanied status. He was advised that on post housing was only available for service members and their command sponsored dependents. The applicant was not eligible for housing without being command sponsored.

m. Excerpt from ABCMR Docket Number AR20200006642 reflective of a referenced case pertaining to the BAH on OHA entitlements of a RC Soldier when placed on active-duty orders. In pertinent part this case notes that RC Soldiers are authorized BAH based on their primary residence beginning on the first day of their tour of duty. Further, OHA is also authorized upon arrival at their permanent duty station when government housing is neither provided nor available. In this case, the Soldier was entitled to receive two BAH entitlements (BAH and OHA). In this case, the Army denied that applicant's primary residence BAH when he notified the Army that his dependents joined him in Europe. This constituted a material error and an injustice making the Reserve specific portion of the JTR meaningless (Section 100906); to the contrary, Section 100904 "90-day rule" only pertains to the active-component.

n. Memorandum – Subject: Endorsement for Remittance of Debt dated 25 October 2022, reflective of the U.S. Property and Fiscal Office for California's support of the applicant's request for debt remission noting that this year, the higher headquarters to the Wiesbaden finance office conducted an audit and found the dual housing allowance violated the DOD FMR. As a result, corrections placed a financial burden on the applicant. However, the applicant could not have prevented the alleged overpayments.

o. Memorandum – Subject: Remission or Cancellation of Indebtedness Based on Hardship and/or Injustice dated 22 May 2023, reflective of the Department of the Army, Deputy Chief of Staff, G-1 approval to cancel \$12,747.19 of the \$50,988.76 debt. Upon review of the applicant's case, it was determined that the collection of the alleged debt would be an injustice and/or hardship, and the cancellation of this portion of the debt would be in the best interest of the U.S. In result, the residual debt of \$38,241.57 would remain as assessed.

BOARD DISCUSSION:

1. 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 record of service, documents submitted in support of the

petition, and executed a comprehensive review based on law, policy, and regulation. Upon review of the applicant's petition, available military records, letter of partial recommendation from the Deputy Chief of Staff, G-1, the Board concurred with the G-1 memorandum requesting remission of indebtedness based on the indebtedness being a hardship for the applicant; however, the recommendation from G-1 was to approve the cancellation of only so much of the debt in the amount of \$12,747.19. The Board determined there is sufficient evidence to support the applicant's entitlement to Basic Allowance for Housing (BAH) and Family Separation Housing – Overseas (FSH-O) based on the applicant being ordered to active duty for operational support in an unaccompanied tour to Germany. Therefore, the Board unanimously granted relief in the full amount of the debt. The Board defers to the Defense Finance and Accounting Service (DFAS) for calculation of payment.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record 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.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by notifying DFAS that the applicant's debt for BAH and FSH-O has been relieved and that he is entitled to repayment of the collected debt.

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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 7000.14-R Financial Management Regulation Volume 7A Chapter 26 Section 10.5.1.7 (Called or Ordered to Active Duty for Contingency) provides that a RC member called or ordered to Active Duty (AD) in support of a contingency operation is authorized BAH or OHA based on the primary residence beginning on the first day of AD. This rate is authorized even for duty of 30 or fewer days. This rate continues for the duration of the tour unless the RC member is authorized Permanent Change Station (PCS) Household Goods (HHG) transportation, in which case the rate for the Permanent Duty Station (PDS) would apply on the day the RC member reports to the PDS.

a. Section 10.5.2 (Contingency Operation) provides that a RC member called or ordered to AD in support of a contingency operation is authorized BAH or OHA for the duration of the tour. If the RC member receives a PCS order authorizing HHG transportation, BAH or OHA is based on the new PDS. However, if the Service member is called or ordered to AD and a PCS order is not issued, BAH or OHA is based and paid on the primary residence location at the time called or ordered to AD.

b. Section 10.5.1.5 (Called or Ordered to Active Duty Other Than Training for 181 or More Days but not Authorized HHG Transportation) provides that a RC member called or ordered to AD for other than training for 181 or more days who is not authorized HHG transportation for a PCS receives BAH or OHA based on the primary residence. The member must be residing at a location outside the local commuting distance of the RC member's primary residence and the duty is not for more than 180 consecutive days at one location.

c. Section 7.2.2.1.2 provides that Family Separation Housing – Overseas (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 and recurring maintenance allowance, move in housing allowance, and advances apply to FSH-O.

d. Section 7.2.2.3 provides that FSH-O 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. If, for unforeseen reasons, such as due to illness or other emergency, a bona fide social visit lasts 91 or more days, FSH-O stops at the end of the 90-day period. FSH-O is authorized again on the day that the dependent departs from the PDS. If one or more, but not all, dependents visit for longer than 90 days and the Service member is authorized a with-dependent housing allowance on behalf of the dependents who are

not visiting or do not reside in the vicinity of the Service member's PDS, then he or she is authorized FSH-O.

2. Army Regulation (AR) 600-4 (Remission or Cancellation of Indebtedness) in accordance with the authority of Title 10 USC, section 4837, the Secretary of the Army may remit or cancel a Soldier's debt to the U.S. Army if such action is in the best interests of the United States. Indebtedness to the U.S. Army that may not be canceled under Title 10 USC, section 4837 when the debt is incurred while not on active duty or in an active status.

3. AR 15-185 (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 applicant's 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//