

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1998-089

FINAL DECISION

██████████ Attorney-Advisor:

This proceeding was conducted under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. It was commenced upon the BCMR's receipt of the applicant's request on June 23, 1998.

This final decision, dated March 25, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a xxxxxxxxxxxxxx asked the Board to correct his military record to show that he never lost his "with-dependents" status for the purposes of calculating his Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA).¹ He asked to receive the back pay and benefits he lost as a result of losing this status.

In the alternative, the applicant asked to be repaid the sums that were deducted from his pay in 199x when the Coast Guard determined that he had been overpaid because he was not entitled to "with-dependents" status.

¹ BAQ is the housing allowance of an enlisted member living in a private residence. VHA is the additional housing allowance such members may receive if they are stationed in a region with high housing costs. Both BAQ and VHA may increase if the member has dependents who reside with him or if the member pays a certain level of child support. If a member qualifies for BAQ at the with-dependents rate (BAQ-W) based on actual physical custody (rather than child support payments), he automatically receives VHA at the with-dependents rate.

APPLICANT'S ALLEGATIONS

The applicant alleged that his "with-dependents" status was unjustly withdrawn and previous allowances were deducted from his salary after his ex-wife told someone that he did not have custody of their children. The applicant alleged that he had joint physical and legal custody of his children. As proof, he submitted a copy of two pages of his divorce decree (discussed below). He alleged that the children reside with him for, in the aggregate, "six months out of the year with no more than a twelve day break in said residence."

The applicant alleged that the xxxxxx District Personnel Office told him that he could not receive BAQ at the with-dependents rate (BAQ-W) under the regulations unless he had physical custody of his children for 90 consecutive days. The applicant alleged that this provision did not apply to his case. He pointed out that, under the regulation, he cannot be considered a non-custodial parent unless his ex-wife is awarded primary physical custody. He alleged that his wife was not awarded primary physical custody. He further alleged that the 90-day provision does not specify physical custody, and he has permanent joint physical and legal custody, which is longer than 90 days. The applicant further alleged that, even if he had been awarded full custody of the children, he could not meet the 90-day rule because the children would visit his ex-wife.

The applicant also alleged that the regulations concerning "with-dependents" status conflict with other laws and regulations. He alleged that, if he waived his BAQ and VHA entitlements to reside in Family Government Housing, the rules would require his children to reside with him for at least 183 days and for at least a 30-day period with no break in custody.

The applicant compared himself to a "geographical bachelor," who remains married but whose children live with his spouse in a distant location. He alleged that such geographical bachelors receive BAQ-W without having their children reside with them and without having to provide any proof that they are supporting their children at all. In contrast, the applicant alleged that his children reside with him for half the year, and he pays about \$940 per month "to provide for their well being." Therefore, he alleged that the Coast Guard is denying him BAQ-W merely because he does not have a marriage certificate.

The applicant alleged that, after the Coast Guard removed his "with-dependents" status, it also ordered that previous allowances be deducted from his pay. He applied for remission of those sums, but his request was rejected because the Coast Guard claimed the regulations were very clear and that he should have known he did not qualify for BAQ-W. However, he alleged the regulations are not at all clear. As proof, he pointed out that both the xxxxx

District personnel and legal offices had been unable to determine his entitlement to BAQ-W. He alleged that the personnel office had ultimately relied on a determination made by the Coast Guard Human Resources and Information Center (HRIC). Furthermore, he stated that no one at the xxxxxx District had known or informed him of any other "special conditions" that must be met, aside from custody, to qualify for BAQ-W. In addition, he stated that the decision to deny remission was made before the xxxxxx District personnel office saw a copy of his divorce decree.

SUMMARY OF THE RECORD

The applicant submitted a copy of the first two pages of a "Decree Granting Absolute Divorce and Awarding Child Custody." It was issued on August 3, 199x, by the Family Court of the First Circuit of the State of xxxx. The applicant is named as the defendant. The decree indicates that the parties have two minor children. The third paragraph, entitled "Custody of Minor Children," states the following:

Plaintiff and Defendant are awarded the joint legal and physical custody of the minor children of the parties. Each party shall have the children for one-half (1/2) of the year; provided, Plaintiff shall have [the son] for one (1) day more than one-half (1/2) of the year and Defendant shall have [the daughter] for one (1) day more than one-half (1/2) of the year. Visitation and physical custody shall be in accord with a written mutually agreed upon parenting plan. The parties may vary the plan by mutual agreement. . . .

All decisions which materially affect the health, education and general welfare of the children of the parties hereto shall be made jointly by the parties. . . .

The applicant also submitted a copy of a letter from Commandant to the HRIC dated March 3, 199x. It states that the applicant's request for remission of the overpayment of \$619.82 is disapproved because the "regulations clearly state that a member must have physical custody for more than 90 **consecutive** days to qualify for the with dependents rate." It also informs him that the sum will be incrementally deducted from his pay.

VIEWS OF THE COAST GUARD

Advisory Opinion of the Chief Counsel

On February 25, 1998, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the requested relief. The Chief Counsel argued that the case should be "dismissed without prejudice for failure to state a claim under the jurisdiction of the BCMR."

The Chief Counsel acknowledged that the applicant asked "that his record be 'corrected' to indicate that he was eligible for Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA) at the with dependents rate." But then he argued that the applicant "point[ed] to no error in the record or injustice that the BCMR can correct. This is a monetary claim against the government that does not implicate the authority of the BCMR." The Chief Counsel

stated that “the BCMR statute, 10 USC § 1552, does not authorize the BCMR to settle claims against the United States, and applications for such claims must be dismissed.”

The Chief Counsel alleged that the applicant “has not alleged that his record is factually incorrect. He simply alleges that the Coast Guard has misapplied the law to the facts of his case. . . . Even if he somehow was to prove that he was entitled to BAQ/VHA at the with dependents rate, any remedy would be a matter for the claims process, not for the BCMR.”

Regarding the merits of the case, the Chief Counsel alleged that “[i]n 70 Comp. Gen. 703, No. B-240236 (12 September 1991), the Comptroller General clearly states that when joint custody is awarded, a dependent child must reside with the member in private quarters for a continuous period in excess of 3 months in order to qualify for BAQ/VHA at the with dependents rate.” Because the applicant did not dispute the fact that his children do not reside with him for 90 consecutive days, the Chief Counsel argued, “there are no facts in dispute, only a dispute as to a matter of law that is beyond the jurisdiction of the BCMR.” The Chief Counsel further stated that the “Board must give due deference to the Coast Guard’s interpretation of laws that it is entrusted to administer, as well as to its implementing regulations.”

Memorandum of the Office of Military Personnel

The Chief Counsel attached to his advisory opinion a memorandum from the Office of Military Personnel (OMP) dated January 13, 1999.

The OMP states that “Section 3-E-4.d., of [the Pay Manual] established that when a member has temporary custody of a dependent child, the child must reside with the member on a nontemporary basis for a continuous basis of more than 90 consecutive days to qualify for the with dependents rate of Basic Allowance for Housing.” The OMP also cited Comptroller General decision B-240236 for the proposition that this provision applies even when joint custody is awarded.

The OMP alleged that the applicant had informed the Coast Guard that his children attended school near his ex-wife’s residence and that this fact “supports our position that despite being awarded equal physical joint custody, the children’s primary residence is with his former spouse.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On February 25, 1999, the Chairman forwarded a copy of the views of the Coast Guard to the applicant and invited him to respond. On March 9, 1999, the applicant submitted a response.

The applicant reiterated that the “regulation clearly states that my former spouse must be awarded primary physical custody in order for me to be considered a non-custodial parent. It does not say she must appear to have, or claim she has primary physical custody, it says she must be awarded primary physical custody.”

The applicant alleged that the Coast Guard “did not grant [him] due process in the submission of [his] claim” for remission because the HRIC denied his claim even before sending it to Integrated Support Command. The applicant also alleged that the Coast Guard had violated the Privacy Act of 1972 by informing his ex-wife how much money was going to be deducted from his pay even before informing him.

APPLICABLE LAW--JURISDICTION

BCMR Statute

According to 10 U.S.C. § 1552(a)(1), “[t]he 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. . . . The Secretary of Transportation may in the same manner correct any military record of the Coast Guard.”

Oleson v. United States, 172 Ct. Cl. 9 (Ct. Cl. 1965).

In holding that the Army BCMR had the authority to order the Army to pay the plaintiff back wages even though no fact in the applicant’s record had been changed, the court stated the following:

Despite the position of the Comptroller General, we see no adequate reason why the Correction Board could not direct that this payment be made to Captain Oleson. . . . The Comptroller General felt that the Board’s power was merely to correct, change, or supplement facts set out in the original record, but the statute refers, not to alteration of the facts in the record, but to a correction of “any military record” itself. . . . Records often embody and reflect legal conclusions, or the application of legal views to bare facts, and it is proper to say that such records are corrected when the Board changes those parts of the record which incorporate the administrative conclusions as to the legal effect of the facts. . . . *Id.* at 16-17.

This means, it is true, that, in cases in which the Correction Boards merely correct legal conclusions embodied in military records and payment is then made to the claimant, the Boards will afford a second forum, alternative or additional to the courts, for relief of what would otherwise be conventional judicial claims. The sweeping words of the statute permit that result So long as the records contain a mistake or an omission bearing on pay – whether factual or legal – we think that the Boards have authority to consider the matter and then to order payment if they make a correction calling for a monetary award. *Id.* at 18-19.

APPLICABLE LAW – ENTITLEMENT TO BAQ-W

Coast Guard Pay Manual (COMDTINST M7220.29)

Article 3 of the Pay Manual governs members' entitlement to BAQ-W. Article 3-E-3.b.(2)(c) states that divorced members who are claiming a child of the marriage as a dependent must furnish a certified copy of a final divorce decree.

Article 3-E-4, "Support of Dependents – General," contains the support requirements for members with children whose other parent is not a member. The following are relevant excerpts from that article:

a. Proof of Support of a Lawful Spouse or Unmarried Minor Child in the Custody of a Member is Generally Not Required. However, when a complaint of nonsupport or inadequate support is received from or on behalf of a dependent, proof of support will be required. Failure to support a dependent on whose behalf BAQ is being received, will result in nonentitlement to BAQ and recoupment for periods of nonsupport. . . .

c. Legal Separation Agreement or Court Decree, Judgment or Order Silent on Support, Not Stating Amount of Support, or Absolving Member of Support Responsibility. The aforementioned does not of itself deprive a member of BAQ for a lawful dependent. . . . The member is entitled to BAQ if he or she contributes to the support of the dependents in the full amount of the BAQ, or a reasonable amount requested by or on behalf of the dependents, whichever is less, but in no case may the support contributions be less than the difference between the member's applicable "with" or "without" dependents BAQ rates. If satisfactory evidence is received that the member has not provided the support specified above, action will be taken to recoup BAQ from the member for any period such support was not provided.

d. Legal Separation Agreement or Court Order Stating Amount of Support. The member must contribute to the support of the dependent

the amount specified therein, or the full amount of BAQ, whichever is less, but in no case may the support payments be less than the difference between the applicable BAQ at the "with" and "without" dependents rate. If satisfactory evidence is received that the member has not provided the support specified above, action will be taken to recoup BAQ from the member for any period adequate support has not been provided.

(1) When a member is divorced from a nonmember, and they share legal custody of a legitimate child, and the ex-spouse is awarded primary physical custody and is not living in government quarters, then the member is considered a noncustodial parent for the purpose of entitlement to BAQ. If the member's court-ordered support is less than the difference between BAQ at the "with" and "without-dependent" rate for his/her grade, then member is not entitled to any BAQ on behalf of that child. However, if the member is paying an amount of support greater than the difference between BAQ at the "with" and "without-dependent" rate, then member would be entitled to BAQ (child). . . .

(2) When the member has temporary custody of the child and they reside in private quarters, then the cost of maintaining a residence is not a factor in determining entitlement to BAQ with dependents and cannot be used instead of or in addition to child support to qualify for increased allowances. The dependent child must reside with the member on a nontemporary basis, for a continuous period of more than 90 consecutive days, to qualify for the BAQ "with-dependent" rate for the nontemporary period. The cost of maintaining a home cannot be added to the child support amount to qualify for the increased allowances. Reference 64 Comp Gen 224 and Comp Gen B-240236, 12 Sep 91.

70 Comptroller General 703, September 12, 1991, B-240236

In this case, the claimant was a sergeant in the Air Force who claimed BAQ-W. According to his divorce decree, the claimant shared legal custody of his son with his ex-wife, but his ex-wife was awarded primary physical custody. The son spent approximately two days per week with the claimant during the school year and approximately three days per week during the summer. The claimant paid \$90 per month in child support.

The Comptroller General held that, to be entitled to BAQ-W under the regulations, the claimant would either (1) have to pay child support equal to or in excess of the difference between BAQ and BAQ-W or (2) have his son reside with him "on a nontemporary basis, e.g., for a continuous period in excess of 3 months" The Comptroller General cited the decisions in 69 Comp. Gen. 407 (1990) and 64 Comp. Gen. 224 (1985) for this position.

The Comptroller General had also been asked to address the same issue for a hypothetical situation in which a member was awarded joint physical custody. He first noted that, if both parents were members of the Service, they would each receive BAQ at the with-dependents rate "for the periods when the child actually lives with him or her. If support is paid, support payments will take precedence over physical custody." However, "[i]f only one parent is a member, . . . [d]uring a period when the child is living with the member in private quarters for a continuous period in excess of 3 months, BAQ-W is payable without additional payment of child support. The cost of maintaining a home is not a factor in determining entitlement to BAQ-W and cannot be used instead of or in addition to child support to qualify for increased allowances."

64 Comptroller General 224, January 29, 1985, B-215441

Two claimants sought BAQ-W. Neither had been awarded physical custody of his children. One claimed BAQ-W for a period of continuous visitation from June 15, 1983, to September 5, 1983. The second claimed BAQ-W for a period of continuous visitation from April 6, 1984, to September 1, 1984. The Comptroller General characterized the issue as "what period of time constitutes more than a short visit for the purposes of providing an increased allowance to the members in the circumstances presented." The Comptroller General denied the first claimant BAQ-W because the period of visitation was less than 90 days and thus considered temporary. The second claimant was awarded BAQ-W because his continuous visitation with his child had lasted for more than 90 days.

69 Comptroller General 407, April 18, 1990, B-230318

The claimant received BAQ-W because of the level of child support he paid. He sought to receive VHA at the with-dependents rate as well (VHA-W). The Comptroller General found that, under 64 Comp. Gen. 224 (see above), he qualified for VHA-W only for periods of continuous visitation in excess of 90 days.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Chief Counsel of the Coast Guard alleged that the Board does not have jurisdiction over this case because it is essentially a monetary claim against the United States. The Chief Counsel argued that the applicant is asking

the Board to overrule how the Coast Guard applied the regulations in his case, instead of asking the Board to correct a factual error in his record. However, the applicant has asked the Board to correct Coast Guard records concerning his eligibility for BAQ-W. In light of 10 U.S.C. § 1552 and the decision in Oleson v. United States, 172 Ct. Cl. 9 (Ct. Cl. 1965), the Board finds that it has jurisdiction over this case.

2. The application was timely.

3. The applicant alleged that he had been awarded joint physical custody of his children, which entitled him to have custody of them for half of each year. He alleged that he had initially received BAQ-W but that it was canceled after the Coast Guard determined that he did not have custody of his children for 90 continuous days. The applicant alleged that this rule was wrongly and unfairly applied to him. He further alleged that the Coast Guard had then unfairly deducted previous BAQ-W payments from his salary. He argued that rejecting his application for remission of these sums was unjust because the regulations regarding BAQ-W in his circumstances were not at all clear. He asked the Board to correct his record to show that he had not lost his “with-dependents” status and therefore continued to qualify for BAQ-W and VHA-W. In the alternative, he asked the Board to order the Coast Guard to remit him the sums it had deducted as “overpaid” BAQ-W.

4. The Chief Counsel argued that the applicant was not entitled to BAQ-W or to remission of the overpayments deducted from his pay. The Chief Counsel alleged that, to qualify for BAQ-W, the applicant would have to show that he had custody of his children for a continuous period of more than 90 days. He cited Article 3-E-4.d.(2) and the decision in 70 Comptroller General 703, September 12, 1991, B-240236, for this 90-day requirement.

5. The regulations concerning BAQ-W do not thoroughly address cases of joint physical and legal custody. As interpreted by the Coast Guard, they would apparently deny BAQ-W to members with joint custody of their children if the children stayed with a nonmember parent just one weekend per month because the member’s custody would not meet the consecutive 90-day rule. The denial of BAQ-W in such a case would appear to contradict the purpose of Congress in creating BAQ-W. The regulations also apparently do not apply the 90-day rule to cases in which both parents are members. It is unclear why the Coast Guard has created greater obstacles for the children of member/nonmember marriages to receive adequate housing than for the children of member/member marriages. Therefore, the Board finds the Chief Counsel’s argument that the applicant did not qualify for BAQ-W because he did not have custody of his children for 90 consecutive days unpersuasive.

6. The part of the applicant's divorce decree that he submitted entitles him to custody of his children for half of each year. He alleged that his children reside with him for half of each year "with no more than a twelve day break in said residence." The applicant, however, submitted no proof that his children reside with him for extended periods of time. The regulations do not indicate that an award of joint custody in a divorce decree *per se* qualifies a member for BAQ-W. The applicant also presented no evidence to show that his child support payments equal or exceed the difference between his "with" and "without" dependents BAQ rates. Moreover, the regulations clearly warn members that BAQ-W payments will be recouped if it is later determined that the members did not meet the requirements.

7. Therefore, the applicant has not proved to the Board that the Coast Guard committed an error or injustice in denying him BAQ-W and in recouping past BAQ-W payments from his pay.

8. Accordingly, the applicant's request should be denied. However, the Board will reconsider his application if he reapplies within 60 days of the date of this final decision and submits substantial evidence of his physical custody and support of the children for extended periods of time consistent with the terms of his divorce decree.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application for correction of the military record of XXXXXXXXX, USCG, is hereby denied.

