

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 1999-102

FINAL DECISION ON FURTHER CONSIDERATION

██████████ Attorney-Advisor:

The original proceeding in this case, BCMR Docket No. 1998-089, was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The case was docketed on June 23, 1998. On March 25, 1999, the Board issued a final decision in which it denied relief but agreed to reconsider the case if the applicant submitted further evidence within 60 days. On April 20, 1999, the applicant submitted further evidence and asked the Board to reconsider his case.

This final decision on further consideration, dated February 24, 2000, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant, a xxxxxxxxxx, 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 back payments the Coast Guard denied

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. 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 higher, "with-dependents" rate (BAQ-W) based on actual physical custody (rather than child support payments), he automatically receives VHA at the higher, "with-dependents" rate (VHA-W). If a member pays child support in an amount equal to or greater than the difference between basic BAQ and BAQ-W, he receives basic BAQ plus "BAQ Child," which together equal BAQ-W.

him when it determined he was not eligible for the “with-dependents” status from August 2, 1996, to August 14, 1998.

In the alternative, the applicant asked to be repaid the sums that were deducted from his pay in 1998 when the Coast Guard determined that he had been overpaid from August 2, 1996, to June 30, 1997, because he was not entitled to BAQ at the “with-dependents” rate (BAQ-W).

SUMMARY OF THE ORIGINAL CASE

In BCMR Docket No. 1998-089, the applicant alleged that in July 1997, the Coast Guard unjustly withdrew his “with-dependents” status and deducted BAQ-W payments he had received since August 1996 from his salary after his ex-wife told someone that he did not have custody of their two children.² The applicant alleged, however, that the children resided with him for, in the aggregate, “six months out of the year with no more than a twelve day break in said residence.” In support of this allegation, he submitted an August 1995 divorce decree from a xxxx court. The decree awarded him joint physical and legal custody of the children. The decree states that he shall have physical custody of one child for one-half of each year plus one day (183 days) and that his ex-wife shall have physical custody of the other child for one-half of each year plus one day. The decree states that physical custody shall be arranged “in accord with a written mutually agreed upon parenting plan.” “Primary custody” is not mentioned in the decree. The applicant did not submit a copy of a parenting plan.

In a Recommendation for Summary Disposition, the Chief Counsel primarily argued that the Board had no jurisdiction over the case. He further stated that the Coast Guard withdrew the applicant’s “with-dependents” status and recouped previous BAQ-W payments because he could not prove that he had actual physical custody of his children for 90 consecutive days, which is one criterion for BAQ-W under the regulations. The Chief Counsel argued that the continuous 90-day requirement has been upheld by the Comptroller General in 70 Comp. Gen. 703, No. B-240236 (1991).

The applicant argued that the BAQ regulations do not adequately address situations of joint physical and legal custody. He alleged that under the regulations, he should not have been denied BAQ-W unless his ex-wife had primary

However, a member who receives BAQ plus BAQ Child does not automatically receive VHA-W because the children may not live in an area of high housing costs.

² The applicant and his now ex-wife were divorced in xxxxx on xxxxx, 1995. Prior to August 1996, the applicant received basic BAQ plus BAQ Child based on his child support payments. In August 1996 he applied for and was granted BAQ-W and VHA-W based on his representation that the children would be living with him.

custody of the children, which she did not. The applicant further argued that the consecutive 90-day requirement was unjust because, even if he had been awarded full custody of the children, they would visit his ex-wife and be in her physical custody more often than once every three months. The applicant also alleged that the regulations concerning "with-dependents" status conflict with other regulations. He alleged that to reside in Family Government Housing, the rules require only that his children reside with him for at least 183 days and for one 30-day period each year with no break in custody.

In its final decision, the Board found it had jurisdiction over the case but denied relief. However, the Board provided for further consideration so that the applicant would have an opportunity to prove that his children lived with him for extended periods of time during the months he had been denied BAQ-W. The Board reasoned as follows:

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.

APPLICANT'S NEW ALLEGATIONS AND EVIDENCE

In his application for further consideration, the applicant apologized for not submitting proof of his children's residence with him in his first application. He explained that the proof had "already been supplied to the Coast Guard on numerous occasions," and he had assumed the Board would have access to everything he had sent to the Coast Guard.

As new evidence, the applicant submitted a copy of a Supplemental Final Judgment issued by a xxxxxxxxx, court on March 1, 1999, which modified his divorce decree. He also submitted copies of evidence that, he alleged, was entered into the record before the court concerning his history of child support payments and periods of actual physical custody of the children. He alleged that his wife did not dispute any of the information in these records.

The applicant submitted copies of a calendar on which he recorded his

dates of physical custody of the children from June 15, 1996, when he moved to xxxx, to the time he submitted his application for further consideration. He also submitted a typed list of the custody dates and a typed list of child support checks from the date of his divorce until May 1998. In addition, he stated that he submitted copies of his child support checks to the court, but they have not been returned to him. He alleged, however, that he has previously sent copies of these checks to the Coast Guard.

The applicant further alleged that the Coast Guard did not award him "with-dependents" status again until he was transferred to a new duty station on August 14, 1998, even though they have been living with him continuously, with no breaks, since May 1998. He submitted a copy of a letter indicating that a \$619.82 overpayment of VHA-W had been recouped.

Finally, the applicant argued that, since the Board found the Chief Counsel's reliance on the consecutive 90-day rule "unpersuasive" and that rule was the only reason he was denied BAQ-W, he should be granted relief.

SUMMARY OF NEW EVIDENCE

Applicant's Calendar of Child Custody

The applicant's calendar of child custody, which he stated was submitted into evidence in court and not contested by his ex-wife, shows the days he had physical custody of the children crossed out with Xs from the date of his divorce in August 1996 to the date he applied for further consideration by the Board.

The calendar shows that for the 11-month period the applicant received BAQ-W payments that were later recouped, August 1996 through June 1997, he had custody of the children for all of August 1996 and the following number of days (mostly weekend and holiday days) in the other 10 months: September 1996, 11 days; October 1996, 7 days; November 1996, 10 days; December 1996, 24 days; January 1997, 10 days; February 1997, 4 days; March 1997, 10 days; April 1997, 12 days; May 1997, 10 days; and June 1997, 16 days.

After that period, the applicant's schedule of custody was limited to some weekends and holidays until late May 1998. In fact, the calendar indicates that, during the 21 months between August 1996, when the applicant had custody the entire month, and June 1998, when he again had continuous custody, xxxx he had custody of the children 9 days per month, on average. Since the last week of May 1998, the calendar shows that the applicant has had continuous physical custody of his children with no breaks.

Court's Supplemental Final Judgment

On March 5, 1999, the Circuit Court in xxxxxxxxx, issued a Supplemental Final Judgment Modifying Primary Physical Residence, Visitation, and Support. The court stated that the modification was necessary because the joint custody awarded by the xxxxx court "never worked well and now that the children are attending school, it does not work at all." On September 17, 1996, the applicant's ex-wife had sued for "primary physical residence." When the trial concluded in July 1998, the court granted the ex-wife "primary physical residence," although "evidence at trial ... was very close on the issue of who should have primary physical custody." However, due to an incident that summer, the court in August 1998, reversed the decision and granted the applicant temporary primary physical custody.

In the Supplemental Final Judgment, the court awarded the applicant permanent primary physical residence based on the fact that (1) the children had been living with him continuously since May 1998 and were "doing better" and (2) their mother had not visited them or paid any support for them since the court issued the temporary order in August 1998.

List of Checks

The applicant submitted a typed list of checks that, he alleged, show his child support payments for the periods in question. The list indicates that from date of his divorce through May 1998, the applicant paid child support in the amount of \$600 monthly, with a few lapses that were made up the next month.

VIEWS OF THE COAST GUARD

On January 6, 2000, the Chief Counsel of the Coast Guard submitted an Advisory Opinion in which he recommended that the Board deny the applicant's request.

The Chief Counsel explained that, from the time of his divorce in August 1995 until August 1996, the applicant received basic BAQ plus BAQ Child, which together equal BAQ-W, based on his child support payments. In August 1996, he applied for and was granted BAQ-W because he submitted a copy of his divorce decree and signed forms CG-4170A, CG-5425, and CG-5507, attesting that his children were living with him and that he was entitled to BAQ-W. Because he was receiving BAQ-W, the applicant automatically began receiving VHA-W. However, after his ex-wife questioned her congressman about the matter, the Coast Guard investigated and determined that the children spent the majority of their time with the ex-wife and that the applicant was not entitled to "with-

dependents" status.³ The Chief Counsel submitted a statement signed by the applicant's PERSRU [Personnel Reporting Unit] yeoman, who attested to these facts. She stated that the investigation revealed that the applicant "might have had 183 days of physical custody but they never amounted to 90 consecutive days to the best of my recollection." Therefore, the Coast Guard recouped the overpayment of VHA-W.

The Chief Counsel alleged that the record shows that the applicant was not entitled to VHA-W or BAQ-W during the 11-month period in question because he did not have custody of the children for 90 consecutive days. The Chief Counsel argued that the Coast Guard's regulations requiring 90 consecutive days of physical custody are "neither irrational nor unjust and are adequately supported by statute and the Service's requirement for administrability." The Chief Counsel alleged that the 90-day rule is "equitable and administrable," and that, without it, the Coast Guard would "be forced to document the various coming and goings of children of divorced members and make at least two start/stop pay entries each pay period (every 2 weeks)" in accordance with Articles 3.D.10 and 3.D.11 of the Pay Manual (COMDTINST 7220.29). The Coast Guard also stated that the applicant and his divorce counsel could have but apparently failed to incorporate a custody arrangement in the divorce decree that would have met the 90-day requirement for VHA-W and BAQ-W.

³ The Chief Counsel stated that his office sought but did not find a copy of this investigation.

The Chief Counsel pointed out that in the BAQ statute, 37 U.S.C. § 403, Congress delegated to the Secretary the authority to administer BAQ and make determinations of child dependency. Moreover, the Chief Counsel argued, under subsection (h) of that statute, the Board should not reverse the Coast Guard's determination of the applicant's ineligibility for BAQ-W absent fraud or gross negligence. The Chief Counsel also cited decisions by the Comptroller General upholding the 90-day rule, as he did in his Recommendation for Summary Disposition in the original case. See 70 Comp. Gen. 703, No. B-240236 (1991); 64 Comp. Gen. 224, No. B-215441, B-2155630 (1985).

Citing Article 3.E.4.d.(2) of the Pay Manual and 37 U.S.C. § 403(m)(5), the Chief Counsel also denied that the criteria for BAQ-W and VHA-W are more stringent for children of member/nonmember divorced parents than for member/member divorced parents. He argued that when two members divorce, the armed services can ensure that only one member parent receives BAQ-W and VHA-W, and therefore, "[a] 90-day rule for member/member dependency determinations in light of the Services' dominion over both member parents (whose interests are adverse) is duplicative and would create an administrative burden where none is required."

The Chief Counsel also argued that the primary issue in this case is the applicant's eligibility for VHA-W, not BAQ-W. The VHA-W regulations, he stated, require 90 consecutive days of custody, but "a break, or breaks if for 5 days or less, shall not be considered an interruption of the 90-day period." 37 U.S.C. § 403a; Joint Federal Travel Regulations (JFTR), Article U8012. Therefore, a member with custody whose children visited the other parent on weekends would be eligible for VHA-W. However, the Chief Counsel argued, the applicant did not have such custody. In addition, he alleged, the applicant's payment of child support is "a per se admission that his ex-spouse was the primary custodian of the children." See COMDTINST 7220.29, Article 3.e.4.d.(1).

Furthermore, the Chief Counsel argued, even if the Board were to find that the 90-day rule is arbitrary and capricious, the applicant failed to submit the "substantial evidence" of extended periods of physical custody that the Board invited him to submit. The Chief Counsel characterized the applicant's calendar and list of payments as "nothing more than a retrospective listing constructed by Applicant for the purpose of this case." Moreover, the Chief Counsel argued, the Supplemental Final Judgment submitted by the applicant actually supports the Coast Guard's position that, prior to August 1998, the children's primary residence was with their mother.

In addition, the Chief Counsel argued, assuming *arguendo* that the Board ignored the 90-day rule and found that the applicant had submitted "substantial

evidence" of extended periods of custody, he has failed to prove that he actually paid housing expenses. Although the applicant signed a form CG-5507 stating that he was paying \$695 per month in rent, he has not submitted proof of that fact. The Chief Counsel also submitted forms signed by the applicant and a copy of a xxxxxxxx property record showing that the address the applicant listed as his residence and that of his children is also the principal residence of his mother and is owned by her.

Finally, the Chief Counsel indicated that, if the applicant continued to pay child support from August 1996 through June 1997, he may have been eligible to receive BAQ plus BAQ Child for that period, as he did before August 1996. However, the Chief Counsel argued, the applicant "has not provided a court decree stating that child support payments are required in an amount equal to or exceeding the difference between BAQ-W and [basic BAQ], nor has he documented that he made those payments under such a court decree." Therefore, the Chief Counsel argued, the applicant has failed to prove that he was entitled to BAQ Child during the period in question.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 6, 2000, the Chairman forwarded a copy of the views of the Coast Guard to the applicant and invited him to respond within 15 days. On January 13, 2000, the applicant submitted a response.

The applicant stated that the evidence he submitted is not inaccurate, as the Chief Counsel alleged, and was not disputed by his ex-wife when it was entered into evidence in their custody case. He reiterated his claim that he was the primary custodial parent for the period in dispute. In response to the Chief Counsel's argument that the applicant could have incorporated into his divorce decree a custodial arrangement meeting the 90-day requirement, the applicant alleged that he never received the documented counseling required for divorcing members under Article D.2.b.(2) of the Housing Manual.

The applicant also stated that payment of child support should not be considered evidence that he was not the primary custodial parent. He explained that under xxx law, each parent pays child support to the other for the time the other parent has custody. Thus, his ex-wife owed him child support for half the year and he owed her child support for half the year. However, the reciprocal payments vary according to each parent's income, and rather than have both parents writing checks to each other, the amounts the lower-income parent owes the higher-income parent in child support are subtracted from what the higher-income parent owes, and the higher-income parent pays the difference. Therefore, his child support payments reflect only the fact that he makes more money

than his ex-wife; they do not at all indicate who has primary custody of the children.

The applicant alleged that he has already provided the Coast Guard with copies of his rent checks and child support checks,⁴ so further proof of these payments should not be necessary to receive relief. However, the applicant stated, he has asked the BCMR to determine whether he qualified for BAQ-W and VHA-W, not whether he qualified for BAQ Child.

APPLICABLE LAWS

37 U.S.C. § 403. Basic Allowance for Quarters

(a)(1) Except as otherwise provided by law, a member of a uniformed service who is entitled to basic pay is entitled to a basic allowance for quarters at the monthly rates prescribed in accordance with section 1009 of this title or as otherwise prescribed by law, according to the pay grade in which he is assigned or distributed for basic pay purposes. The allowance authorized by this section may be paid in advance.

(2) A member of a uniformed service with dependents is not entitled to a basic allowance for quarters as a member with dependents unless the member makes an annual certification to the Secretary concerned indicating the status of each dependent of the member. The certification shall be made in accordance with regulations prescribed by the Secretary of Defense.

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(h) The Secretary concerned, or his designee, may make any determination necessary to administer this section with regard to enlisted members, including determinations of dependency and relationship, and may, when warranted by the circumstances, reconsider and change or modify any such determination. The Secretary concerned or his designee may redelegate this authority. Any determination made under this section with regard to enlisted members 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.

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(m)(1) Except as provided in paragraph (2), in the case of a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service and who is authorized a basic allowance for quarters solely by reason of the member's payment of child support, the amount of the basic allowance for quarters to which the member is entitled shall be equal to the difference between the basic allowance for quarters applicable to the member's grade, rank, or rating at the with-dependent rate and the applicable basic allowance for quarters at the without-dependent rate.

(2) A member of a uniformed service shall not be entitled to a basic allowance for quarters solely by reason of the payment of child support if the

⁴ The applicant's response indicates that he believes he submitted copies of his child support checks to the BCMR. However, he did not submit copies of any checks. In his application, he explained that the court had not returned his checks to him.

monthly rate of that child support is less than the amount of the basic allowance for quarters computed for the member under paragraph (1).

37 U.S.C. § 403a. Variable Housing Allowance

(a)(1) Except as provided in subsection (b) of this section, a member of the uniformed service entitled to basic allowance for quarters is entitled to a variable housing allowance under this section whenever assigned to duty in an area of the United States which is a high housing cost area with respect to that member. . . .

- (4) In the case of a member with dependents—
- (A) who is assigned to duty inside the United States;
 - (B) who is authorized to receive the basic allowance for quarters at the rate established for a member with dependents solely by reason of the payment of child support by the member; and
 - (C) who is not assigned to a housing facility under the jurisdiction of an uniformed service,

the member may be paid a variable housing allowance at the rate applicable to member without dependents serving in the same grade and at the same location.

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.

Article 3.D.5. of the Pay Manual provides that the dependency of a legitimate child of an enlisted member is to be determined by his commanding officer. Article 3.D.10. specifies that BAQ payments begin on the date the dependency begins or, if dependency is in doubt, on the date the commanding officer determines that dependency exists. Article 3.D.12. requires members annually to validate their entitlement to BAQ-W annually for the previous year.

Article 3.D.15. states that BAQ Child is received by members who pay monthly child support in an amount greater than the difference between basic BAQ and BAQ-W, and BAQ Child is equal to that difference in rates.

Article 3.D.16. states that, if two divorced parents both serve on active duty and share joint custody of their children, the parent maintaining the principal residence and "extended physical custody" receives BAQ-W, and the other parent receives basic BAQ, assuming the children do not live in government quarters.

Joint Federal Travel Regulations

Article U8012 of the JFTR provides the following with respect to VHA-W for members with physical custody of children:

Generally, a divorced or legally separated member with legal custody of a child or children of the marriage is entitled to VHA at the with dependent rate. However, a member parent who has physical custody, but not legal custody, of at least one child is entitled to VHA at the "With" dependent rate when the following conditions are met:

1. the member must be entitled to BAQ, and
2. physical custody must be for a minimum of 90 consecutive days (a break, or breaks if for 5 days or less, shall not be considered an interruption of the 90-day period).

Note: 2. In cases where the child or children are in the physical custody of a member paying child support for more than 90 consecutive days (excluding a break or breaks for 5 days or less). Such member isn't considered to be receiving BAQ at the "with" dependent rate solely because he or she is paying child support.

Coast Guard Housing Manual (COMDTINST)

Article D.2.b. of the Housing Manual states the following with regards to members living in government housing:

(2) The member provides the command with a written notice of separation [from a spouse] usually within 30 days after actual, physical separation. The command then must provide documented counseling to the member to advise him or her of housing eligibility status, options, the date eligibility ceases, and his or her entitlement to one AFC-30 local move....

(3) To be eligible for continued housing entitlements, the certified separation agreement and/or final divorce decree must require the member to provide custody of a dependent for more than 50 percent of the year (FY or CY)—183 days or more, not necessarily consecutively. The member must have actual, physical custody. The member must also amend their CG-5267, "Application for Government Housing," stating that the dependents listed will reside with the applicant more than 50 percent of the time.

APPLICABLE CASES

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 Board has jurisdiction over this case pursuant to section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant alleged that his VHA-W payments from August 1996 through June 1997 were unjustly recouped by the Coast Guard. He also alleged that he has been eligible for BAQ-W and VHA-W since August 1996 based on his children's residence with him but that the Coast Guard has only granted him "with-dependents" status since August 1998.

3. In the Board's original decision in this case, it denied relief but provided for further consideration on the chance that the applicant could prove that, during the time in question, his children resided with him for extended periods and that the consecutive 90-day rule prescribed in Article 3.E.4.d.(2) of the Pay Manual had been unfairly applied to deny him and his children the benefit of BAQ-W.

4. Assuming that the calendar and dates submitted by the applicant accurately represent his physical custody of the children, the Board finds that the applicant did not have custody of his children from August 1996 through May 1998 for such extended periods of time as would make the recoupment of VHA-W and denial of "with-dependents" status unjust. While his divorce decree entitled him to custody for at least half of each year, the calendar shows that he did not actually have custody for as many days as he was entitled to. The calendar shows that he had custody for the entire month of August 1996 and that from September 1996 through May 1998, he had custody of his children for 9 days per month, on average. Furthermore, it shows that his custody was generally limited to weekends and school holidays. This pattern of custody does not meet the standard set for VHA-W under Article U8012 of the Joint Federal Travel Regulations. Therefore, the Coast Guard did not err or commit injustice when it determined that the applicant was not eligible for BAQ-W or VHA-W based on the pattern of his custody of the children.

5. The Chief Counsel argued, in essence, that the Board should not question the validity or application of the consecutive 90-day rule. Because the applicant has failed to prove that he had actual physical custody of his children for extended periods of time from August 1996 to May 1998, it is unnecessary for the Board to address the fairness of the rule or the Chief Counsel's other legal arguments.

6. The applicant alleged that he was not granted BAQ-W until August 1998, two months after the onset of this children's continuous residence with him in late May 1998. However, the record indicates that up until August 1998, the applicant was expected to return the children to his ex-wife's custody after the summer vacation. Moreover, the record indicates that in July 1998, the judge granted the ex-wife primary physical custody. Therefore, the Board concludes that the Coast Guard did not err or commit an injustice by failing to grant the applicant "with-dependents" status until the court awarded him temporary primary physical custody in August 1998.

7. The applicant alleged that the Coast Guard had a duty to counsel him properly concerning BAQ-W and VHA-W regulations prior to his divorce, under Article D.2.b. of the Housing Manual, but failed to do so. Article D.2.b., however, requires counseling concerning "housing eligibility status" and "options" for members who are living in government housing at the time of separation. Moreover, it is incumbent upon the member to inform his command of his separation. However, even if the Coast Guard had a duty to counsel the applicant as he alleged, failure to counsel applicant would not make the Coast Guard liable for VHA-W payments to which he was not entitled because he did not have custody of his children for extended periods.

8. The applicant alleged that the 90-day rule was unfairly applied to him because members qualify for family government housing as long as they have custody for at least 183 days per year and for one 30-day period with no break in custody. The Board finds that it is not inequitable for the Coast Guard to use different standards for determining eligibility for family government housing than it uses for determining eligibility for BAQ-W and VHA-W.

9. The Chief Counsel indicated that if the applicant continued to pay child support from August 1996 through June 1997, he may have been entitled to continue to receive BAQ Child, as he did prior to August 1996. However, the applicant failed to submit to the Board proof of such payments, and he stated that he has not asked the Board to determine his eligibility for BAQ Child. Therefore, the Board is not required to consider this issue.

10. The applicant has not proved by a preponderance of the evidence that the Coast Guard committed any error or injustice by denying him "with-dependents" status during the periods in question or by recouping past VHA-W payments from his pay.

11. Accordingly, the applicant's request should be denied.

ORDER

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

