DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2000-071

FINAL DECISION

ANDREWS, 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. The BCMR docketed this case on February 14, 2000, upon receipt of the completed application.

This final decision, dated December 14, 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 xxxxxxxxx in the Coast Guard Reserve, asked the Board to correct her military record to make her eligible for Basic Allowance for Housing (BAH) payments from October 1, 1998, to March 31, 1999. She asked to be awarded the payments denied her as a result of the Coast Guard's determination that she was not eligible because she served under two orders for 90 days of service each, rather than one order for 180 days of service.

APPLICANT'S ALLEGATIONS

The applicant alleged that in 1998, she "responded to a critical solicitation from Group xxxxx for a xxxx to fill a S.P.E.A.R. gap for 180 days." She alleged that the understanding at the time she accepted the orders was that she would serve for approximately six months, until the billet was filled. However, instead of issuing her one set of orders for that period, the Coast Guard issued her two sets of orders for 90 days each. Therefore, she alleged, she was unfairly denied BAH because one criterion for eligibility is to be in receipt of orders of at least 140 days.

SUMMARY OF THE RECORD

On September 22, 1998, a petty officer in the Xxxxxx District Budget Office sent a chief petty officer in Group xxxxxx an e-mail message stating that Group Xxxxxx was authorized 90 days of Active Duty for Special Work in support of the Active Component (ADSW-AC) in fiscal year 1999, from October through December 1998. The applicant was issued travel orders stating that she was to report to Group Xxxxxx on October 1, 1998, for 90 days of active duty.

On November 18, 1998, the applicant sent an e-mail to the petty officer at the Budget Office containing the codes in her orders issued by Group Xxxxxx's PERSRU (apparently in response to a request from the Budget Office for copies of her orders). The petty officer responded, "This is all wrong. I gave chief the accounting data to use. The orders have to be amended or you will have trouble getting payed [sic]."

On December 2, 1998, the chief petty officer in Group Xxxxxx sent an e-mail to the petty officer at the Budget Office that stated the following:

> Request an additional 90 days ADSW for [the applicant] from JAN-MAR 1999. Her current ADSW period is covered through DEC 1998 … . She is filling the SPEAR gapped XXX Billet here at Group Xxxxxx. The detailer has told Group to expect a replacement around MAY/JUNE 1999 timeframe.

On December 3, 1998, the applicant's orders were amended to extend her active duty period for 90 days, from January 1 through March 29, 1999. The amendment stated that "[T]his amendment is now part of the original orders and shall remain attached thereto at all times."

On December 17, 1998, the chief petty officer sent the Budget Office an e-mail stating the following:

> As discussed (17DEC98) Group Xxxxxx agrees to transfer to D1 the difference in cost of providing both [the applicant] and [another petty officer] the Xxxxxx full [without dependents] BAH rate vice the BAH II [without dependents] rate for their full 180 day ADSW-AC. Currently there [sic] ADSW-AC has been set-up as two separate 90 ADSW-AC periods, leaving them short of the 140 day requirement to pay them their full respective [without dependents] BAH rates. Currently the [without dependents] BAH II is $365.10 for Xxxxxx and the Full [without dependents] BAH is $588.75, a difference of $223.65/mo. … in the meantime, corrections to their orders will be completed to get them payed [sic] for their past 90 day period. …

On September 17, 1999, the Commanding Officer of Group Xxxxxx wrote a letter to the Commandant (G-WPM), asking that the applicant be paid BAH

and a cost-of-living allowance (COLA) for the 180 consecutive days of active duty she performed from October 1, 1998, through March 29, 1999. She stated that when she hired the applicant, she expected the billet to be vacant for six months. She stated that the Xxxxxx District issued the orders for 90 days despite a mutual understanding that the applicant's assignment would be funded for up to six months, and she accepted the 90-day orders because she did not know their implications for the applicant's receipt of BAH. The Commanding Officer further stated that, if she had known the applicant would not receive BAH and COLA with the 90-day orders, she would not have approved them. She stated that, although the orders have been amended, the PERSRU has informed her that the applicant cannot be paid without G-WPM's approval. She asked G-WPM to approve her request because reserves are critical to Group Xxxxxx's operation, and "[t]his is not the right way to treat our reserve personnel." She also stated that the issue was "not about money" because the applicant's assignment was fully funded.

On October 18, 1999, Commandant (G-WPM-2) responded to the Commanding Officer's letter. Her request was denied with the following explanation:

> 2. Housing allowances for reservists on short-term active duty are clearly spelled out in Title 37 USC § 403(g)(3):
>
> > "The Secretary of Defense shall establish a rate of basic allowance for housing to be paid to a member of a reserve component while the member serves on active duty under a call or order to active duty specifying a period of less than 140 days, unless the call or order to active duty is in support of a contingency operation."
>
> The Secretary of Defense has established BAH-II as the housing allowance rate for reservists under individual active duty orders of 139 days or less.
>
> 3. Your letter states it was the command's intention to utilize ADSW-AC to cover a gapped billet until a backfill was available. Unfortunately, because the initial orders and subsequent amendment were prepared for a period of less than 139 days, we have no legal basis to approve your request. There is nothing to indicate that any provisions concerning the member's duty status were omitted from the orders through error or inadvertence, nor are they incomplete or ambiguous. The orders, on their face, indicate they were short-term active duty orders for a member of a Reserve Component. …

On October 29, 1999, the Commanding Officer responded to the denial. She stated that G-WPM does have the authority to correct her mistake under Article 3.D.7 of the Reserve Policy Manual. She further stated that

the mistake was discovered within one month of being made. Thus, this is not a case where as the reservist approached the end of a 90 day period of ADSW-AC, the command then and only then decided to ask for an extension and additional entitlements. The intent was always to bring [the applicant] on for a period of 180 days. The delay in sending my request for relief to you was created by my attempt to get the issue resolved at the lowest level possible. I pursued relief through PERSRU, ISC Xxxxxx (fot), and the Xxxxxx District. Each initially thought that they could solve the problem. However, as each reviewed the situation, they recommended contacting the next higher authority.

… Group Xxxxxx set aside all of the money necessary to cover all of [the applicant's] pay and allowances from the very beginning. …

The response to this appeal is not in the record. On January 13, 2000, the Commanding Officer of Group Xxxxxx signed a letter to the BCMR containing the following statements in support of the applicant's allegations:

[The applicant] came on active duty to fill the E-6 billet left vacant when the incumbent made E-7 prior to executing his orders. This billet is critical … .

Since the assignment cycle had ended and no one responded to the 'shopping list' advertising the billet, the detailer decided not to order a relief until March 1999 at the earliest. … I was quite certain the billet would in fact remain vacant until at least March. … So, we arranged to bring a reserve E-6 onto active duty. [The applicant] accepted the orders and started ADSW-AC on 1 October 1998.

Group Xxxxxx is a relatively small unit which receives no funding for ADSW-AC. Since the estimated cost for six months of ADSW-AC was high, we requested and received funding from the Xxxxxx Coast Guard District. The District agreed to fund the ADSW-AC until March 1999 or the arrival of a relief, whichever occurred sooner. Unfortunately, the District issued the funds in an initial increment of 90 days, a practice which we now realize is 'standard,' and intended to reduce the cost of reserve augmentation. With orders of only 90 days duration [the applicant] was entitled to BAH II vs. full BAH and COLA, a monthly shortfall of $274.65 in 1998 and $436.70 in 1999.

The Group staff questioned this arrangement since our request had been based on the mutual understanding that the orders would be funded for 182 days or longer. The District advised that they would simply fund orders in a second 90 day increment when the time came. Unfortunately, my staff was unaware of the full implications of this course of action: that [the applicant's] take home pay would be reduced. Being unaware, they did not approach the District with a request to fully fund BAH, nor did the District raise the issue, despite our obvious intent to keep the XXX on duty for six months. Had the implications of this funding decision been understood, I would have issued the orders for the full duration, right from the start. …

The oversight went undetected for about two months. A BM1 on ADSW-AC at Group Xxxxxx (filling a vacancy over nearly the same period of time) observed his paycheck as a reserve on active duty was less than his pay check as an active duty member had recently been. He compared with [the applicant], whose pay

was identical. Both sets of orders were funded by the Xxxxxx District; the BM1's orders were issued by another Group at our request.

The shortfall in pay was identified as the difference between BAH II and BAH with COLA. The situation involving the BM1 and [the applicant] was immediately brought to the District's attention. The District agreed to continue funding the orders, but asked that the Group pay the difference. I was more than happy to do so, since it was my original intent to keep both Petty Officers on ADSW-AC for six months or more, and in any case beyond the 139 day limit that defines BAH eligibility. The BM1's orders were quickly straightened out by the PERSRU that issued them, using administrative means.

Since then my staff and the Integrated Support Command PERSRU, who issued the XXX's orders, have spent many fruitless hours trying to correct a simple mistake based on my lack of familiarity with reserve orders. My PERSRU has been unable to fix the oversight administratively, noting that permission from higher authority is required. On 17 September 1999 I asked Commandant (G-WPM) to issue a waiver based on the authority discussed in Article 3.D.7 of the Reserve Policy Manual (enclosure (1)). The response, (enclosure (2)), states that Commandant has no legal authority to grant the waiver and restore the entitlements owed [the applicant] for duty faithfully performed. G-WPM's response presumes that the orders were written right the xxxxxx time. They were not.

VIEWS OF THE COAST GUARD

Advisory Opinion of the Chief Counsel

On August 25, 2000, the Chief Counsel of the Coast Guard submitted an advisory opinion recommending that the Board deny the requested relief.

The Chief Counsel alleged that under 23 Comp. Gen. 713 (1944); 37 Comp. Gen. 627 (1958); and 63 Comp. Gen. 4 (1983), legal rights with respect to travel orders may not be modified retroactively unless "an error is apparent on the face of the original orders, or all facts and circumstances surrounding the issuance of such orders clearly demonstrate that some provision which was previously determined and definitely intended had been omitted through error or inadvertence in preparing the orders." He argued that the applicant voluntarily and knowingly accepted two 90-day orders and that her unit's "desire" to keep her for more than 140 days did "not equate to 'intent' nor was this an error of inadvertence in preparing the orders." He alleged that the 140-day provision of the regulations "is well known within the Reserve community and such knowledge could reasonably be imputed to Applicant, an administrative expert with 20 years of military service."

The Chief Counsel alleged that the applicant's unit "did not have the authority or make adequate funding available to issue ADSW-AC orders. The fact that the total funding *eventually* received allowed the Applicant to remain on

ADSW-AC for 180 days is inconsequential." The Chief Counsel argued that the record indicates that it was the Xxxxxx District's decision, as the source of the funds, to limit the duration of the applicant's orders to fewer than 140 days "to reduce their expenses." He argued that it is "the express or implied intent of the District decision-maker as to Applicant's orders [that] governs this case, not the intent of the Group Commander."

The Chief Counsel stated that the Xxxxxx District may have maximized the number of reserves it could hire by issuing short-term orders that did not require payment of BAH. He argued that under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), and the Decision of the Deputy General Counsel in BCMR Docket No. 167-94 at 2, the Board "must defer to the Coast Guard's interpretation of its own fiscal management policy and allow the agency the discretion to decide how it will meet the statutory requirements if Congress was either silent or ambiguous on the issue." He stated that "[t]he internal management practices the Coast Guard employed in managing and distributing its funding for ADSW-AC were not in error or an injustice" and that it would be contrary to the Supreme Court's decision in *Chevron* for the Board to "restrict the Coast Guard's management practices and limit its flexibility in implementing [37 U.S.C. § 403]."

The Chief Counsel also argued that its regulations did not create any personal right not provided for under the statute and that, under the Supreme Court's decisions in *United States v. Caceres*, 440 U.S. 741 (1979), and *Cort v. Ash*, 422 U.S. 66, 78 (1975), violations of agency procedural regulations do not create private rights of action. Therefore, he alleged, "the methodology the Coast Guard used to allocate and manage reserve funding is not a right that the BCMR may independently impose on the Coast Guard as it is within the discretion of the Coast Guard to decide how to manage its workforce policies."

The Chief Counsel concluded that the Board should deny relief in this case "consistent with its decision in BCMR Case No. 1999-023." In that case, the Chairman denied relief under 33 C.F.R. § 52.32(a)(1) because the applicant submitted no evidence supporting his allegation that his command originally intended to retain him for at least 140 days. Nor did he prove that the Coast Guard erred in refusing to merge his initial 83-day orders and subsequent six sets of orders, which totaled 321 consecutive days of active duty.

Memorandum of the Chief of the Compensation Division (G-WPM)

The Chief Counsel attached to his advisory opinion a copy of a memorandum on the case by the Chief of the Compensation Division (G-WPM). The Chief stated that "[t]he contention that Group Xxxxxx fully intended all along to

employ [the applicant] from 1 October 1998 through 30 March 1999, and had the funds to do so is undercut by the fact that neither they nor ISC Xxxxxx issued the simple amendment to her orders that would have corrected the alleged oversight at the time the 'error' was discovered." He alleged that the applicant should have known, as a yeoman, of the implications of her 90-day order and that if she had not, "it would have been immediately obvious on her xxxxxx Leave & Earnings Statement. The issue could have been immediately resolved by an amendment to her initial tour of duty prior to its conclusion, thus avoiding the after-the-fact remedy proposed in her CGBCMR application." The Chief further alleged that "there was no policy, official or informal, that would have precluded issuance of ADSW orders for 180 days."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 28, 2000, the Chairman forwarded a copy of the views of the Coast Guard to the applicant and invited her to respond. No response was received by the Board.

APPLICABLE LAW

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

Title 37 U.S.C. § 403 provides that members of a uniformed service entitled to basic pay are also entitled to BAH based on a formula spelled out in the statute. Subsection (g)(3) contains the following exception for Reserve members serving under short-term orders:

> The Secretary of Defense shall establish a rate of basic allowance for housing to be paid to a member of a reserve component while the member serves on active duty under a call or order to active duty specifying a period of less than 140 days, unless the call or order to active duty is in support of a contingency operation.

37 U.S.C. § 403b. Cost of Living Allowance

Title 37 U.S.C. § 403b. authorizes the Secretary to pay eligible members of a uniformed service a COLA if they are assigned to an area with high housing costs. Subsection (f)(2)(A) provides that Reserve members are not entitled to this COLA unless they are serving under an order to active duty for a period of 140 days or more.

Coast Guard Reserve Policy Manual (COMDTINST M1001.28)

Chapter 3.D. of the Reserve Policy Manual governs members' assignment to ADSW-AC. Chapter 3.D.2. states that "[n]ormally, the span of the orders is limited to one fiscal quarter to allow for proper funds management."

Chapter 3.D.3.a. states that "(1) Long-term ADSW-AC is duty performed consecutively in excess of 20 weeks. … BAH and COLA are paid to members who perform long-term ADSW (JFTR U8008). …. (2) Short-term ADSW-AC is duty performed consecutively for 20 weeks or less."

Chapter 3.D.6. states that "ADSW-AC is normally funded from an individual unit's AFC-30 account."

Chapter 3.D.7. states the following:

> a. The authority to issue orders is delegated to the member's servicing PERSRU. …
> b. Standard Travel Order for Military Personnel, CG-5131, will be used to issue ADSW orders.
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> • • •
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> e. … (1) Orders shall not be retroactively amended to change entitlements for duty already performed unless all facts and circumstances clearly demonstrate that some provision previously determined and definitely intended was omitted through error.
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> (2) Retroactive amendments of entitlements requires documentation concerning original intent, facts and circumstances to be sent to Commandant (G-WPM) with the claim. This claim review process is lengthy. Careful avoidance of initial errors and amending of orders only for duty not yet performed will avoid costly administrative delays in processing.

Chapter 3.F.4. states that "[a]mendments to orders may only be effected by the originating or higher authority, with the following exceptions: a. Orders inaccurately reflect entitlements due to error, oversight, or change in member status during execution, the orders shall be amended per COMDTINST M7220.29 (series), CG Pay Manual."

In re Snapp, 63 Comp. Gen. 4 (1983).

In *Snapp*, which was cited by the Chief Counsel in his advisory opinion, the plaintiff was a warrant officer in the Marine Corps whose permanent change-of-station orders were canceled and replaced by temporary duty orders after he himself had moved to the new station but his family had not yet moved. The plaintiff sought temporary duty allowances (per diem) for the entire period. The Comptroller General found that he was owed allowances for a permanent change of station up until the day his orders were cancelled and for temporary duty thereafter. In so holding, the decision stated the following:

> It is well established that legal rights and liabilities in regard to per diem and other travel allowances vest when the travel is performed under orders, and that such orders may not be canceled or modified retroactively to increase or decrease the rights which have become fixed under the applicable statutes and regulations unless error is apparent on the face of the orders, or all the facts and circumstances clearly demonstrate that some provision previously determined and definitely intended had been omitted through error or inadvertence in the preparation of the orders.

In re Posey, 1976 Comp. Gen. LEXIS 2186.

In *Posey*, the plaintiff's initial 50-day temporary orders were later extended by amendment for an additional 89 days and were subsequently extended a second time for another 125 days. The plaintiff sought temporary duty allowances for the entire period, although the active duty period exceeded 140 days. The Air Force argued that no temporary duty allowances were owed because the extended period of active duty was "foreseeable." However, the Comptroller General held that he was entitled to temporary duty allowances because at the time the orders were issued for 50 days and amended to include a total of 139 days, "it was not contemplated that [the plaintiff's assignment] would be continued beyond that time period."

In re Connaughton, 1977 Comp. Gen. LEXIS 2195.

In *Connaughton*, the plaintiff's initial 88-day orders were extended several times for short periods, which ultimately totaled 453 days of active duty. Because none of the orders exceeded 140 days, he received per diem and travel allowances for the entire time. The evidence indicated that "the allocation of man days may have been the driving force behind the issuance of multiple orders for less than 20 weeks rather than the anticipated period for which clerical help was required." The short-term orders did not refer to any unforeseen circumstances. Therefore, the Comptroller General concluded that "[w]hen such a period of active duty must be extended by another period of less than 20 weeks

due to 'unforeseen circumstances', these allowances continue to be payable throughout the period of the extension. However, no per diem is payable from the date the Reservist receives the extension order if the extension is not due to unforeseen circumstances and the total period on active duty is 20 weeks or more."

In re Silverberg, 1977 Comp. Gen. LEXIS 1674.

In Silverberg, the plaintiff received orders for annual training, for which no per diem is allowed, although he was actually performing active duty for training, for which per diem is payable. His orders were later amended to reflect the nature of his service. The Comptroller General found that the facts of the case proved that the initial orders were incorrect because the plaintiff was performing active duty for training rather than annual training. Therefore, he concluded that, "[s]ince a material error is apparent on the face of the original orders, and the facts and circumstances clearly demonstrate that a status previously determined and definitely intended had been omitted through error or inadvertence, he was entitled at the time he performed his duty to receive per diem."

In re Wilkerson, 1982 Comp. Gen. LEXIS 1338.

In *Wilkerson*, the plaintiff served on continuous active duty for over 5 months based on short-term orders of less than 20 weeks each. The Comptroller General found that he was not owed per diem because "[i]n this regard we have held that when more than one set of orders are issued for active duty and each set of orders is for less than a 20-week period, but the total period exceeds 20 weeks, the [temporary duty] allowances authorized should not be paid. The only exception to this being when the extension of active duty is ordered because of unforeseen circumstances."

In re Lewis, 48 Comp. Gen. 655 (1969).

In *Lewis*, the plaintiff was issued one set of orders for 63 days, because the funding for further service had not yet been authorized. Prior to the day he began serving, however, further funding was authorized. Therefore, at the end of the 63 days, he received orders for another 150 days of active duty. The Comptroller General found that because the Navy had clearly intended to keep the applicant on active duty for more than 140 days, his orders should have been modified when the further funding was authorized. Therefore, the plaintiff was not entitled to temporary duty allowances because his additional 150 days of active duty "did not arise from circumstances not foreseen at the time he reported for active duty on April 29, but was merely an assignment to further

active duty under the same circumstances, as originally intended." The Comptroller General concluded that "since it is clear that in [the plaintiff's] case the assignment was intended to be for a period in excess of 20 weeks when he reported for duty and that orders properly should have been issued to accomplish this, it is our view that in his case and the other similar cases, the periods of duty authorized by the separate sets of orders should be considered as one continuous period in determining entitlement to per diem and mileage allowance."

In re Brown, 66 Comp. Gen. 264 (1987).

In *Brown*, the plaintiff initially received orders for 139 days. After serving approximately 45 days, his orders were amended to add another 26 days of active duty. The Comptroller General found that he was due per diem for the entire period because the extension was not foreseen intended ab initio. In reaching this conclusion, he held that periods of 5 or 6 months cannot normally be considered "temporary" because a temporary duty assignment confers eligibility for per diem, and conversely, that short-term assignments cannot be considered "permanent" because a permanent duty assignment confers eligibility for reimbursement of household moving expenses.

BCMR Docket No. 1999-023

In BCMR Docket No. 1999-023, cited by the Chief Counsel, the applicant alleged that the Coast Guard committed an injustice when it failed to merge his initial 83-day orders and six subsequent sets of orders, which totaled 321 consecutive days of active duty, so that he would be entitled to BAH. The applicant submitted a letter from his commanding officer stating the following: "My original intention was to keep the member on ADSW-AC for a minimum of six months. The reason for the various amendments was due to my inability to identify a dedicated funding source at the beginning to cover the entire six-month period. Hence, funding was added to [the applicant's] order as it became available." The Chairman denied relief under 33 C.F.R. § 52.32(a)(1) (Summary denial by Chairman) because, he stated, the applicant submitted no evidence supporting his allegation that his command originally intended to retain him for at least 140 days.

BCMR Docket No. 167-94

In BCMR Docket No. 167-94, the Board found that the temporary appointment of an officer who had committed adultery and fraternization was erroneously vacated. The Board interpreted 14 U.S.C. § 214, "Original appointment of temporary officers," as allowing only the vacation of a temporary officer's "original" appointment as an ensign and therefore not allowing the

vacation of the applicant's subsequent appointment as a lieutenant junior grade. In disapproving the Board's decision, the Deputy General Counsel determined that the Board's interpretation of the statute was erroneous and that the statutory language ("An appointment under this section may be vacated by the appointing officer at any time." 14 U.S.C. § 214(e)) authorized the Secretary to vacate his appointment as a lieutenant junior grade. She based her decision on a broader reading of the statutory language. She stated that this broader interpretation of the statute was supported by the Coast Guard's regulations implementing the statute and that, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), those regulations "represent the service's implementation of the applicable statutes, and are entitled to considerable deference."

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 under section 1552 of title 10 of the United States Code. The application was timely.

2. The applicant argued that her record should be corrected to show that in September 1998, she was issued orders to serve on active duty at Group Xxxxxx for 180 days, instead of 90 days, because her command knew the billet would be open for that 180 days and intended to keep her in the position until the billet was filled. She argued that her orders and entitlements should reflect the actual intent of the Coast Guard to keep her on active duty for 180 days.

3. The Chief Counsel argued that the Coast Guard's regulations do not give the applicant a private cause of action. However, the applicant's claim is based on both the alleged error in her orders, which gives her a cause of action under 10 U.S.C. § 1552, and on the denial of BAH and COLA, entitlements under 37 U.S.C. §§ 403 and 403b. In *United States v. Caceres*, 440 U.S. 741 (1979), which the Chief Counsel cited, there was no underlying federal statute to support the criminal defendant's claim of being deprived of a right. Nor does *Cort v. Ash*, 422 U.S. 66 (1975), support the Coast Guard's position. All four factors that the Court stated should be considered in *Cort* weigh in the applicant's favor here: (a) Congress specifically intended Coast Guard members to benefit under the BAH and COLA statutes; (b) Congress implicitly created a private remedy; (c) a member's suit for a wrongfully withheld BAH and COLA would be consistent with the underlying legislative scheme; and (d) disputes over these allowances are clearly not within the province of the states. *See* Concurring Opinion of the Deputy General Counsel, BCMR Docket No. 69-97.

4. The Chief Counsel argued that the "desire" of the applicant's Commanding Officer to retain her for 180 days is irrelevant because she had no authority to issue the orders. He alleged that only the intent of the Xxxxxx District, which issued the orders, is relevant and that the Xxxxxx District intended to issue 90-day orders. He indicated that the 90-day orders may have been part of a plan to lower the cost of hiring Reservists by issuing orders that would not entitle them to BAH or COLA. He argued that the Board should defer to the Coast Guard's determination that the law permits it to save money by issuing Reservists series of short-term orders that disentitle them to BAH and COLA, rather than orders covering the foreseen period of active duty. He also argued that under *Snapp* (summarized above), the Comptroller General has held that orders may not be retroactively amended to increase or decrease a member's entitlements unless "an error is apparent on the face of the original orders, or all the facts and circumstances surrounding the issuance of such orders clearly demonstrate that some provision which was previously determined and definitely intended had been omitted through error or inadvertence in preparing the orders."

5. The Comptroller General's decisions in *Posey*, *Connaughton*, *Wilkerson*, and *Lewis* (summarized above) indicate that a Reservist's short- or long-term status and consequent entitlements depend not on the duration of the orders issued by their commands but on the foreseeable duration of the Service's need for the member and its original intention to keep the member in the position for that duration. The Service's actual intent supersedes the duration of the orders issued in determining the member's status and entitlements. Thus, although the statutes and regulations prescribe short- and long-term status and entitlements by the duration of orders, the Comptroller General looks behind the orders issued to the Service's actual intent. Moreover, the Comptroller General expects the Services to amend orders to reflect their intent. *See In re Lewis*, 48 Comp. Gen. 655 (1969). Therefore, the Services cannot thwart the purpose of the statutes by issuing orders that do not reflect their actual intent to retain their members for short or long periods.

6. Under 37 U.S.C. §§ 403 and 403(b), Congress clearly intended Reservists serving more than 140 days of continuous active duty to have the same right to BAH and COLA as regular enlisted members, just as under 37 U.S.C. § 404, it intended members serving away from home on a short-term basis to receive per diem. If a Service cannot create an entitlement to per diem by issuing short-term orders that do not reflect its actual intent to retain the member, the Board fails to see how a Service can rightly negate an entitlement to BAH and COLA by issuing short-term orders that do not reflect its actual intent.

7. The statements signed by the applicant's Commanding Officer indicate that the Coast Guard knew from the start that the billet would remain unfilled for 180 days and intended to keep the applicant until the billet was filled. In addition, the statements indicate that the Xxxxxx District agreed to fund the billet for 180 days and that the Commanding Officer "set aside all of the money necessary" to cover the applicant's service for 180 days. The Chief Counsel presented no evidence contradicting the Commanding Officer's statement that the Xxxxxx District agreed to fund the applicant's duty for 180 days and intended to do so even though it issued orders for only 90 days. Both the Chief Counsel and the Chief of the Compensation Division (G-WPM) disregarded the Commanding Officer's statements in their arguments and relied on the fact that the orders were issued for only 90 days to prove that the Coast Guard did not intend to retain the applicant for at least 140 days. However, in light of the Commanding Officer's statements and Chapter 3.D.2. of the Reserve Policy Manual (which states that "[n]ormally, the span of orders is limited to one fiscal quarter to allow for proper funds management"), the Board finds that the fact that the applicant was issued 90-day orders is not particularly probative of the Coast Guard's actual intent to keep her for only 90 days.

8. In her statements, the applicant's Commanding Officer repeatedly avowed that both she and the Xxxxxx District foresaw the need to retain the applicant for 180 days, intended to retain her for 180 days, and agreed that the position would be funded for 180 days. Under the Comptroller General's decisions in *Snapp*, *Posey*, *Connaughton*, *Wilkerson*, *Silverberg*, *Brown*, and *Lewis*, it is the true intent and foreseeability of a Reservist's duration of active duty that governs her entitlement to duty allowances, not the wording of her orders. The Board finds that the Commanding Officer's statements constitute virtually unrebutted, substantial evidence that in September 1998, the Coast Guard foresaw the need to retain the applicant for 180 days, intended to retain her for 180 days, and yet erroneously issued her orders for only 90 days.

9. The applicant's Commanding Officer stated that the Xxxxxx District told her that it issued the 90-day orders under a standard practice to save money so that it could afford to employ more Reserves. Although the Chief of the Compensation Division (G-WPM) seemingly denied this in his memorandum attached to the advisory opinion, the Chief Counsel did not deny it but argued instead that the Board should defer to the Coast Guard's determination that the statutes allow such means of limiting costs so that it can employ more Reserves. In BCMR Docket No. 167-94, the Deputy General Counsel held that the Coast Guard's interpretation of its statutes are entitled to considerable deference from the Board, just as courts defer to agencies' interpretations under *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). However, in this case, the Coast Guard's determination that it can issue orders not reflective of its

actual intent to retain members in order to increase or decrease their entitlements has been soundly refuted by the Comptroller General in the cases summarized above. Although these cases involved Reservists who received pretextual short-term orders that seemed to entitle them to per diem, the Comptroller General's reasoning applies just as certainly to cases in which pretextual short-term orders disenfranchise Reservists.

10. The Chief Counsel argued that the Board should deny relief in this case to be consistent with the Chairman's denial of relief in BCMR Docket No. 1999-023. However, in that case, the record indicated that, although the commanding officer desired to keep the applicant on active duty for six months, he was unable to "identify a dedicated funding source" and so wrote short-term orders as funds became available. Such uncertainty could be considered to have negated any "intent" of the command to keep him and to have rendered unforeseeable the ultimate length of his service.[1] In contrast, the record here indicates that the Xxxxxx District agreed with the applicant's Commanding Officer in September 1998 that it would fund the applicant's service through March 1999.

11. The Chief Counsel argued that no relief is due because the applicant was an experienced yeoman who knew or should have known the monetary implications of her original 90-day orders before she accepted them. However, as the Comptroller General's decisions in *Posey*, *Connaughton*, *Wilkerson*, and *Lewis* indicate, the applicant's expectations are irrelevant as to whether she was entitled to BAH and COLA. Each of the Reservists in those cases reasonably expected to receive per diem based on their acceptance of short-term orders. However, each of them was denied per diem because the Comptroller General determined that the need for their work for periods longer than 140 days was foreseeable by the military service involved. The fact that they all accepted short-term orders with the expectation of receiving per diem was not even mentioned as a factor in the Comptroller General's decisions.

12. The applicant has also proved by a preponderance of the evidence that she was treated differently than a similarly situated BM1 in her unit. The Commanding Officer's statements indicate that, upon her inquiry and request, the Coast Guard amended the BM1's orders to reflect his foreseeable and intended long-term duty, thereby entitling him to BAH and COLA. Although

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[1] The Board notes that the effect of a military service's indecision as to whether or how to apply resources to retain a Reservist upon the Reservist's right to short-term or long-term allowances is unclear. In *Lewis*, the Comptroller General's decision indicates that a lack of authorized funding would be a proper basis for issuing short-term orders that entitle a Reservist to per diem. However, in *Connaughton*, the Comptroller General indicated that the Service's sporadic "allocation of man days" did not justify short-term orders and entitle the plaintiff to per diem when "the anticipated period for which clerical help was required" exceeded 140 days.

the BM1's orders were apparently issued by a different unit, the Commanding Officer indicated that they were funded by the Xxxxxx District under an agreement and arrangement similar to those made for the applicant. The Chief Counsel has not explained why it was correct for the Coast Guard to conserve resources by issuing one Reservist at Group Xxxxxx short-term orders that denied her BAH and COLA, although it amended another Reservist's orders to entitle him to the allowances, when the Service knew it would need both Reservists' services for periods longer than 140 days.

13. The applicant has proved by a preponderance of the evidence that the 90-day ADSW-AC orders she received for active duty service beginning on October 1, 1998, were erroneous and inconsistent with the Coast Guard's actual intent to retain her for 180 days. In accordance with the Comptroller General's decisions in *Snapp*, *Silverberg*, and *Lewis*, her erroneous orders should be corrected to reflect the Service's true intent.

14. Accordingly, the applicant's request should be granted by correcting her orders to show that in September 1998, she was called for 180 consecutive days of ADSW-AC.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of XXXXXXX, USCGR, for correction of her military record is hereby granted.

Her records shall be corrected to show that she received orders for 180 consecutive days of ADSW-AC beginning on October 1, 1998, instead of 90-day orders. The subsequent orders she received in December 1998, amending her original orders to extend them for another 90 days, are therefore redundant and void.

The Coast Guard shall pay the applicant any allowances, such as BAH and COLA, that she is due as a result of this correction.

Terence W. Carlson

Beverly Russell

Jacqueline L. Sullivan