

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-012

XXXXXXXX XXXXX
Xxx xx xxxxx, ET2/E-5

FINAL DECISION

AUTHOR: Hale, D.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on October 26, 2004, upon receipt of the applicant's completed application and military records.

This final decision, dated July 28, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, an Electronics Technician, Second Class (ET2), in the Coast Guard, asked the Board to correct his military record to show that he is entitled to Basic Allowance for Housing (BAH) payments at the dependent rate (BAH-W) beginning on December 16, 1998.¹ He alleged that he is entitled to receive BAH-W because he was awarded physical custody of his son in a divorce decree dated December 16, 1998.

The applicant further alleged that notwithstanding the December 1998 divorce decree wherein he was awarded physical custody, he and his ex-wife agreed that she would retain physical custody of the child and that he would pay her voluntary child support on a monthly basis. Finally, he alleged that his

¹ In general, the amount of BAH members receive depends on location, pay grade, and whether they have dependents. BAH-W varies by pay grade, but it roughly provides the member an additional sum of \$100 to \$200 per month.

former wife remarried in 1999 and the child continued to reside with the mother and her new husband.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on July 27, 1993. The applicant had a child with another Coast Guard member in October 1995, and the couple married on March 16, 1996. The records indicate that they separated in September 1996 and were divorced on December 16, 1998. Pursuant to the divorce decree, the applicant was awarded physical custody of the minor child, and the mother was ordered to pay the applicant child support of \$125 per month. The child remained with the mother, with the exception of the summer of 2002 when the child stayed with the applicant for approximately one month.

The applicant submitted a copy of the first two pages of a Divorce Decree and Judgment awarding child custody that was issued on December 16, 1998, by the Superior Court of California, County of Alameda. The applicant is named as the petitioner. The decree indicates that the parties "shall have joint legal custody. [The applicant] shall have physical custody of [the] minor child ... subject to reasonable visitation rights awarded to Respondent upon mutual agreement of the parties, and contingent on the parties' schedules." According to the applicant and the Coast Guard, the applicant was also married from December 1998 to February 2000.

According to the applicant, the mother, the child, and her new husband moved to Massachusetts in May 2001. On May 6, 2002, the mother filed a Complaint for Modification of a Foreign Divorce Decree in Massachusetts wherein she sought court-ordered physical custody of the child and a child support order. On June 14, 2002, the court granted the mother temporary legal and physical custody.

On December 31, 2002, the Probate & Family Court in Massachusetts ruled "that a grant of joint legal custody of the child, with physical custody to the mother, is in the best interests of the child." The court further noted that the mother had been the primary caretaker for the child's entire life and that he had adjusted well to his life in Massachusetts. The court ordered the applicant to pay the sum of \$350.00 per month to the mother as child support, commencing on January 1, 2003.

The Coast Guard's pay records for the applicant indicate that he was paid BAH-W from December 1998 through April 7, 2000.² From April 2000 through

² An e-mail message in the record notes that the applicant should not have received BAH-W for March 2000 since he was divorced in February 2000. It is not clear whether this was ever recouped.

July 4, 2002, the applicant received BAH at the without dependents rate (BAH-WO) but received a "BAH differential" during this period.³

The records also indicate that the applicant received BAH-W from July 5, 2002, through December 2002, when he was ordered by the Massachusetts court to pay child support as of January 1, 2003. The reason for his receipt of BAH-W during these months is unclear since the applicant was not married and his former spouse had physical custody of their child during this time.⁴

VIEWS OF THE COAST GUARD

On March 10, 2005, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he adopted the findings of the Coast Guard Personnel Command (CGPC) and recommended that the Board deny the applicant's request. The JAG argued that the applicant failed to meet his burden of production and persuasion and that the "only evidence that he produced to show his entitlement to [BAH-W] was his divorce decree in which he was awarded physical custody of his son." The JAG stated that the applicant was not entitled to BAH-W because he "never had physical custody of his son; the son continued to reside with his mother from before the decree through the present."

The JAG also argued that the Board should deny relief because the Coast Guard did not commit an error or injustice that shocks the sense of justice, and that under 10 U.S.C. § 1552(1), the BCMR may only correct errors and injustices that "shock the sense of justice." *Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989), citing *Reale v. United States*, 208 Ct. Cl. 1010, 1011, cert. denied, 429 U.S. 854, 50 L. Ed. 2d 129, 97 S. Ct. 148 (1976).

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 14, 2005, the BCMR sent the applicant a copy of the views of the Coast Guard and invited him to respond within 30 days. No response was received.

APPLICABLE LAW

³ BAH differential (BAH-DIFF) is a housing allowance authorized for members who pay child support. A member is not entitled to BAH-DIFF if the monthly rate of that child support is less than the BAH-DIFF. Article 3.C.2.c.

⁴ E-mail messages in the record indicate that the Coast Guard is aware that the applicant had neither wife nor child living with him on a permanent basis from July 5, 2002, through December 2002. It is not clear whether the BAH-W he received for this period was ever recouped.

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

Title 37 U.S.C. § 403 provides that:

(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 housing at the monthly rates prescribed under this section or another provision of law with regard to the applicable component of the basic allowance for housing. The amount of the basic allowance for housing for a member will vary according to the pay grade in which the member is assigned or distributed for basic pay purposes, the dependency status of the member, and the geographic location of the member.

(2) A member of a uniformed service with dependents is not entitled to a basic allowance for housing as a member with dependents unless the member makes a 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.

Coast Guard Pay Manual (COMDTINST M7220.29)

Article 3.C.2. of the Pay Manual states “BAH is payable to members on active duty and will vary according to the grade in which serving or appointed for basic pay purposes, dependency status, and the permanent duty station (PDS) assigned. This allowance is authorized for members both ‘with’ and ‘without’ dependents.”

Article 3.C.3.c. of the Pay Manual provides that determinations of dependency and relationships (primary dependents) are made by the commanding officer. Commanding Officer, Coast Guard Human Resources Services & Information Center (LGL) shall make determinations of dependency and relationships (secondary dependents and doubtful primary dependents).

Article 3.F.5.d. of the Pay Manual provides that “[W]hen a member has temporary custody of a child and they reside in private quarters...[t]he dependent child must reside with the member on a non-temporary basis (e.g., for a continuous period of **more than 90 consecutive days**) to qualify for [BAH-W] for the temporary period.”

Memorandum of the Office of Military Personnel

The Office of Military Personnel (OMP) stated on January 13, 1999, 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.

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 concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant argued that his record should be corrected to show that he is entitled to receive BAH-W from the date he was awarded physical custody of his son pursuant to the December 16, 1998, divorce decree. The JAG recommended that the Board deny relief because the applicant's ex-wife had physical possession of their son at all times, with the exception of a period of less than 90 days (approximately one month) in the summer of 2002. The Board notes that the applicant acquiesced to the son's remaining with his mother and that he agreed to provide child support payments to his ex-wife notwithstanding the fact that the divorce decree ordered the mother to pay child support to the applicant.

3. The records indicate that the applicant **was** paid BAH-W from December 1998 through April 7, 2000. From April 8, 2000, through June 2002, the applicant received BAH-WO and BAH-DIFF. The applicant was not entitled to receive BAH-W during the latter period because, as he admitted, he was not married and his child was living with the his ex-wife since that time. Pursuant to Article 3.F.5.d.2. of the Pay Manual, the applicant was not entitled to BAH-W because his child did not reside with him on a non-temporary basis (e.g., for a continuous period of *more than 90 consecutive days*) so as to qualify for BAH-W.

4. The records also indicate that the applicant received BAH-W from July 2002 through December 2002. The reason for this change is unclear since he was not married and his former spouse had physical custody of their child during this time. Although the applicant had his son with him from July 22, 2002, through August 21, 2002, under Article 3.F.5.d.2. of the Pay Manual, a visit of less than 90 days would be characterized as a temporary visit and would not trigger the applicant's eligibility for BAH-W.

5. Therefore, the applicant has not proved that he was denied BAH-W during any period in which a wife or child lived with him on a permanent basis.

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

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of XXXXXXXXXXXX, xxx xx xxxx, USCG, for correction of his military record is denied.

David Morgan Frost

Patrick B. Kernan

Audrey Roh