

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2006-047

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XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

AUTHOR: Ulmer, 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 Chair docketed the case on January 30, 2006, upon receipt of the applicant's completed application and military records.

This final decision, dated November 2, 2006, is adopted and 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 asked the Board to correct his military record to show that he was entitled to full basic allowance for housing (BAH) ¹, rather than BAH-II, ² for the period of active duty from September 6, 2005, through October 19, 2005. The applicant stated that, after making several appeals, he was told on January 3, 2006, that he was not entitled to BAH.

¹ BAH is a monthly housing allowance for members on active duty. It varies according to the grade in which serving or appointed for basic pay purposes, dependency status, and the permanent duty station (PDS) assigned. Chapter 3.C.1. of the Pay Manual. It consists of the former allowance known as Basic allowance for quarters (BAQ) and variable housing allowance (VHA). Chapter 3.C.2.a. of the Pay Manual.

² BAH-II is the equivalent to what used to be basic allowance for quarters (BAQ). It does not vary by geographic location. It is the housing allowance, or is used to calculate the housing allowance for members in particular circumstances, such as reservists on active duty for less than 20 weeks . . . members with court-ordered child support, and members in confinement, etc. Chapter 3.C.2.b. of the Pay Manual.

The applicant, a Reservist, served on active duty for special work (ADSW) orders during the Hurricane Katrina relief effort from September 6, 2005, through October 19, 2005. He received BAH-II for this active duty period, but believes that he was entitled to full BAH based upon his interpretation of Chapter 12.F.1. of COMDTINST M7220.29A (Coast Guard Pay Manual), hereafter referred to as the Pay Manual. This provision states as follows:

a. . . . Except as provided in subparagraph b. below, a reserve component member called or ordered to active duty for 139 days or less is entitled to BAH-II. However, if the member receives an order modification or extension of assignment, the prospective period of active duty (as measured from the date the orders are amended to the new ending date) must total 140 days or more and BAH would start on the date of modification. Members whose orders originally called or ordered the member to active duty for 140 days or more are entitled to BAH.

b. Contingency Operations. A reserve component member called or ordered to active duty in support of a contingency operation (other than a member who is authorized transportation of household goods as a part of the call or order) is entitled to BAH, if the member is unable to continue to occupy the primary residence because of the call or order to active duty. This applies when the residence is maintained as the primary residence of the member when called or ordered to active duty and is owned by the member or for which the member is responsible for rental payments.

A contingency operation is defined as a military operation that is designated by the Secretary of Defense as one in which members of the armed force are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force. A contingency operation is also defined as a military operation that results in a call or order to active duty under 10 U.S.C. §§ 672(a), 673, 673b, 673c, 688, 3500, or 8500,³ or any other provision of law during a war or national emergency declared by the President or Congress. See figure 3-8, Note 3. of the Coast Guard Pay Manual.

The applicant argued that he was entitled to BAH because both the President and the Secretary of Defense declared a national emergency with respect to Hurricane Katrina. In this regard, he submitted a Presidential Proclamation entitled: "Proclamation by the President: To suspend Subchapter IV of Chapter 31 of Title 40, United States Code, Within a limited Geographical Area in Response to the National

³ These sections of the title 10 have been renumbered, except that sections 3500 and 8500 have been abolished and section 688 remains unchanged. The renumbered sections are 10 USC §§ 12301, 12302, 12304, & 12305.

Emergency Caused by Hurricane Katrina." The proclamation specifically stated, "Hurricane Katrina constitutes a 'national emergency' within the meaning of section 3147 of title 40, United States Code."⁴

The applicant also submitted a memorandum from the Under Secretary of Defense entitled: "Increased Thresholds for Procurements in Support of Hurricane Katrina Relief Efforts". The Under Secretary authorized the use of the special procurement authorities in 41 U.S.C. 428a to increase the micro-purchase, the simplified acquisition, and the rest program for commercial item thresholds for procurements in support of Hurricane Katrina efforts.

The applicant further argued that in addition to having established the existence of a declared national emergency with respect to Hurricane Katrina, he also met the other eligibility requirement for entitlement to full BAH. In this regard, he stated that he was not authorized transportation of household goods, that he could not remain in his California home, and that he paid rent for the entire period that he was a responder in Louisiana.

VIEWS OF THE COAST GUARD

On June 26, 2006, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG stated that the applicant had not met his burden of production and persuasion in overcoming the presumption of regularity afforded Coast Guard officials. The JAG stated that the applicant's call to active duty was in response to a voluntary solicitation for reservists.

The JAG stated that for the applicant to be entitled to BAH he had to meet the requirements of the Pay Manual, which allowed the payment of BAH to a reservist who is ordered to active duty for less than 140 days, if the member's orders to active duty were in support of a national contingency. In this regard, the JAG stated the following:

The Applicant has not provided nor has the Coast Guard been able to find evidence that the Secretary of Defense designated a contingency operation for purposes of BAH or that reservists were involuntarily recalled pursuant to one of the triggering authorities . . . The applicant is incorrect

⁴ Further in the Presidential Proclamation, it reads "[The] President of the United States of America, do by this proclamation suspend as to all contracts entered into on or after the date of the proclamation and until otherwise provided, the provisions of subchapter IV of chapter 31 of title 40, United State Code, 40 U.S.C. 3141-3148, and the provisions of all other acts providing for the payment of wages, which provisions are dependent upon determinations by the Secretary of Labor under section 3142 of title 40, United States Code, as they apply to contracts to be performed in the following jurisdictions: [Counties affected in Alabama, Mississippi, and Louisiana]."

in asserting that a declaration of contingency for the purpose of procuring goods and services in support of hurricane relief triggers the BAH entitlement under the Coast Guard Pay Manual . . . Therefore, there is no entitlement to payment of full BAH for the period of service in question. If this operation is subsequently declared a contingency by the Secretary of Defense for purposes of BAH, the Coast Guard will be authorized to pay the BAH rate and other applicable entitlements effected under the contingency order.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 15, 2006, the Board received the applicant's reply to the views of the Coast Guard. He disagreed with the advisory opinion and argued that he has established that the President declared a national emergency under which he served on active duty, and therefore, he is entitled to full BAH. In this regard, he offered the President's message notifying Congress "of his declaration of a national emergency within the limited geographic area of the states of Alabama, Florida, Louisiana, and Mississippi in response to Hurricane Katrina, pursuant to 50 U.S.C. 1621(a)." ⁵

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 section 1552 of title 10 of the United States Code. The application was timely.
2. The applicant volunteered for active duty in response to a solicitation from the Commandant for personnel to serve on active duty in support of Hurricane Katrina relief efforts. Subsequently, he was issued orders to and served on active duty from September 6, 2005, through October 19, 2005, for which he received pay and allowances that included BAH-II. He is requesting that the Board finds that he was entitled to BAH for this period of active duty because it was in support of a contingency operation, which was the Hurricane Katrina relief effort.
3. Since the applicant's orders to active duty were for a period less than 140 days, he would only be entitled to BAH if he were called or ordered to active duty in support of a contingency operation and was unable to continue to occupy his primary residence. See Chapter 12.F.1. of the Coast Guard Pay Manual.

⁵ Section 1621 of title 50 of the United States Code gives the President to power to declare national emergencies.

4. Figure 3-8, Note 3 of the Coast Guard Pay Manual defines a contingency operation as a military operation that is

a. [d]esignated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

b. that results in the call or order to, or retention on, active duty of members of the Uniformed Services under 10 USC [§§ 12301, 12302, 12304, 12305 & 688]⁶, or any other provision of law during a war or during a national emergency declared by the President or Congress.

5. The applicant has failed to prove that he was called to active duty in support of a contingency operation designated by the Secretary of Defense. There is no evidence in the record that the Secretary of Defense designated Hurricane Katrina relief efforts as a contingency operation that involved military actions, operations, or hostilities against an enemy of the United States. The Under Secretary of Defense did authorize "Increased Thresholds for Procurements in Support of Hurricane Katrina Relief Efforts" under the special emergency procurement authorities in 41 U.S.C. § 428a. However, the purpose of recognizing Hurricane Katrina as an emergency was to have the authority necessary to relax the federal rules with respect to procurements. As such, the recognition by the Under Secretary does not satisfy the definition of a contingency operation, as defined in Figure 3-8, Note 3., paragraph a. of the Pay Manual, because it did not designate a contingency operation against an enemy of the United States.

6. Nor has the applicant proved that the President or Congress declared a national emergency that resulted in a call or order to active duty of the uniformed services under any provision of law. While the President's proclamation "To Suspend Subchapter IV of Chapter 31 of Title 40, United States Code, Within in a Limited Geographic Area in Response to the National Emergency caused by Hurricane Katrina" is proof that he declared a national emergency, it did not contain the essential element of involuntarily ordering or calling to, or retaining uniformed personnel on active duty. In this regard, the Presidential Proclamation stated that "[the President] finds that the conditions caused by Hurricane Katrina constitute a 'national emergency' within the meaning of section 3147 of title 40, United States Code," which gave the President the

⁶ These statutes allow for the involuntary recall of Reservists in the event of a national emergency, except that 10 U.S.C. § 1205 allows for the suspension of certain laws relating to promotion, retirement, and separation of any member in the armed forces if the President determines it is essential to the National Security of the United States.

authority to suspend the provisions of 40 USC §§ 3141 *et. seq.* (that required wage rate requirements in federal contracts).

7. Therefore, the proclamation by the President was for the limited purpose of making the contracting process easier and faster for getting aid to the people and for rebuilding the affected Gulf Coast areas. Paragraph b. of Figure 3-8, Note 3. of the Pay Manual states in relevant part that a contingency operation is a military operation that *results in the call or order to, or retention on, active duty of members of the Uniformed Services under 10 USC [§§ 1209, 12302, 12304, 12305 & 688], or any other provision of law* during a national emergency declared by the President or Congress. The President's Proclamation dealing with the suspension of the wage rate requirements because of the national emergency caused by Hurricane Katrina mentioned nothing about calling or ordering members of the uniformed service to active duty in support of the relief effort.⁷

8. Accordingly, the applicant has failed to prove that the Coast Guard committed an error or injustice by not paying him BAH for the period he served on active duty in support of Hurricane Katrina Relief efforts.

⁷ Compare the Declaration of National Emergency by Reason of Terrorist Attacks of September 14, 2001. In this Declaration, the President made it clear that he intended to utilize 10 USC § § 12006 & 12302 and 14 USC 331, 359, & 367, all of which allows for recalling reservists or retirees to active duty or detaining those already on active duty.

ORDER

The application of xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

Harold C. Davis, M.D.

James E. McLeod

Dorothy J. Ulmer