

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-102

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XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case after receiving the applicant's completed application on March 9, 2009, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated December 4, 2009, is approved 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, who retired as a first class yeoman (YN1/E-6) on January 1, 2009, asked the Board to correct his military record to show that he was entitled to his Basic Allowance for Housing (BAH) at the "with dependents" rate (BAH-with) from December 2005 to December 2006 and also to order the Coast Guard to reimburse him for his family court expenses and emotional pain and suffering.

The applicant alleged that BAH regulations state that two active duty members cannot carry the same dependents for BAH purposes. He alleged that when two married members divorce, the member with custody of the children receives BAH-with on behalf of the children. However, he alleged, a non-custodial parent paying child support may receive BAH-with on behalf of the children if the custodial parent signs a notarized agreement to that effect. He also alleged that when a custodial parent obtains a new dependent—by remarrying, for example—the custodial parent may receive BAH-with based on her new dependent while the non-custodial parent receives BAH-with based on the prior dependents.

The applicant alleged that he applied for BAH-with pursuant to these regulations after his ex-wife, who had custody of their two children, remarried in November 2005. (The applicant's record shows that they married in June 2002 and were still married in November 2004 but does not show the date of divorce.) His ex-wife agreed to his request as long as it would not negatively affect her own receipt of BAH-with, and she inquired about the matter through her chain

of command. However, her command delayed answering her inquiry because they knew that a new policy was being issued, which might have affected her entitlements. When the new policy was issued, it did not change the rule that made him eligible for BAH-with on behalf of his children if his wife signed a notarized letter. However, instead of paying him BAH-with in accordance with the regulations, the command and the approving authority at the Pay and Personnel Center (PPC), Ms. B, got into a debate about whether the regulation was fair and right. He was told that applying to receive BAH-with as a non-custodial parent while his ex-wife had custody of his children and was paid BAH-with for her new dependent (a new husband) constituted wrongful “double dipping.”

The applicant alleged Ms. B understood the regulation and agreed with his interpretation on two occasions. However, ultimately she denied his claim for BAH-with for no authorized reason. In support of his allegations, the applicant submitted copies of three emails he received from Ms. B. The first email is dated May 25, 2005, at which time the applicant was divorced and his ex-wife had custody of their two children and had not yet remarried. Ms. B wrote the following to the applicant:

As I understand your situation, you and your wife are divorced & she has physical custody of your children. She is carrying the children for BAH purposes and as her legal dependents. Unfortunately, if you do not have any other dependents than the two children from your former marriage, you are not eligible for BAH/DIFF.^[1] Please refer to Chapter 3, page 3-48, section F(b)4 (example 1) [of the Pay Manual].

(a) Because you were married to another member, and she is carrying the children of the marriage, you cannot carry them as dependents for BAH/Diff purposes. Because they are already being carried by your ex-wife as dependents for BAH purposes. Two people cannot carry the same children for pay purposes. Sorry, I know that seems unfair, but that is the way the Pay Manual, Chapter 3 reads.

(b) If your ex-wife would formally decline to carry the children for BAH, then you would be able to carry them. But, the manual says that in order for you to carry your children for BAH, you would need a letter from your ex-wife telling your command that you can carry them.

The second email is dated February 22, 2006, by which time the applicant’s ex-wife had remarried and moved out of Government housing. Ms. B stated the following in regards to new BAH-diff rules:

I agree – if you have a formal declination from your ex-spouse that says that you can carry the children as legal dependents. Then you are eligible for BAH/DIFF (unless the children are in Government quarters). And she can get the with rate for her civilian husband (unless she is in Government family housing!).

However, three hours later, the applicant received another email from Ms. B, who had in the interim spoken to her own supervisor at the PPC. This supervisor, the applicant stated, was also his ex-wife’s “administrative chief,” YNCS D, and he did not want the applicant to receive BAH-with. Ms. B stated the following in the third email, which was cc’ed to YNCS D:

¹ BAH differential (BAH-diff) is a BAH based on a member’s payment of child support. Coast Guard Pay Manual, sec. 3-C-2.c.

I'm terribly sorry, but I have found out that the Pay Manual still has precedence in the rules of Member to Member. (1) You still have to have physical custody of your children before you can carry them for pay purposes. (2) I know the ALCOAST is silent on this, but the Pay Manual clearly states that "each member is required to have physical custody of the child(ren) in order to be paid BAH at the with dependent rate."

I'm sorry if I have confused you about this issue, but I was only going by the ALCOAST. I was uncomfortable about this so I have checked with Policy and Procedure @ Headquarters and the above issue still stands.

The applicant stated that he agreed that the Pay Manual is controlling but argued that an ALCOAST modifying the policy in the Pay Manual supersedes those provisions in the Pay Manual. The applicant stated that the ALCOAST did not abolish the policy in the Pay Manual and instead only reduced the amount to which he was entitled. He stated that because the ALCOAST is silent about the regulation in the Pay Manual under which he is entitled to BAH-with, the ALCOAST did not effect that provision.

The applicant argued that the grounds for denial of BAH-with stated in Ms. B's third email are irrational because if a non-custodial parent can never receive BAH-with, there is no reason to have a policy in the Pay Manual about how a non-custodial parent can be entitled to BAH-with because if a non-custodial parent has custody, that makes the member the custodial parent.

The applicant alleged that the rules regarding BAH-with were not just misinterpreted but misrepresented and distorted in order to deny him this entitlement by erroneously telling his ex-wife that she would lose something if she signed a notarized letter for him. The denial of BAH-with, he stated, detrimentally affected him and his children and created distrust between him and his ex-wife. Because his ex-wife was erroneously convinced by YNCS D that the applicant was trying to get BAH-with at her expense, she

subsequently refused to work with me on even the simple matters of visitation between me and my children. I ended up paying approximately \$1500/month for child support and childcare and approximately \$600 [per] month in expenses associated with just visiting my 2 and 3 year old children once per month. Within 2½ years, I ended up having to file [for] bankruptcy. Immediately after the decision by [Ms. B], my ex-wife and I ended up in court and it cost us approximately \$15,000. In the proceeding, my ex-wife even referenced all of the emails regarding the entitlement in an attempt to demonstrate to the court that I was seeking an unjust entitlement.

The Coast Guard is specifically responsible for the 1 year period that I did not receive a full entitlement; VERY indirectly responsible for the \$15,000 that it cost us in court (the money could have greatly alleviated visitation and support expenses); and very indirectly responsible for the pain and hardships which ensued afterward, leading to my bankruptcy filing. The ultimate final action of denying my just pursuit of an entitlement was unjustified, had dire consequences for me and my children, and the Coast Guard should be held accountable. Rules and regulations were superseded. My household suffered only due to various officials ensuring that I did not receive the entitlement that only their belief system felt I shouldn't be able to receive.

VIEWS OF THE COAST GUARD

On July 15, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board either dismiss the case for failure to exhaust his administrative remedies or deny it for lack of merit. In so doing, he adopted the findings and analysis provided in a memorandum prepared by the Pay and Personnel Center (PPC). The PPC addressed the applicant's claim for BAH-with but stated that his request for court costs and for compensation for pain and suffering "are beyond the scope of this memo."

The PPC stated that when two members divorce, the custodial parent receives BAH-with even if he or she receives child support from the other member, and the non-custodial member is only entitled to BAH-with "if otherwise qualified." However, "if the custodial parent agrees in a notarized writing, the non-custodial parent may be paid BAH 'with'."

The PPC stated that in March 2005, a State court ordered the applicant to pay \$684 in monthly child support to his ex-wife, who was the custodial parent of their two children and an active duty member of the Coast Guard herself.² The child-support payments were automatically deducted from the applicant's pay, and he received BAH at the regular, "without" rate from December 2005 to December 2006.³ His ex-wife continued to live in their Government housing until May 2, 2005, and began receiving BAH-with when she moved out of Government housing on May 3, 2005. She continued to receive BAH-with until she was discharged from active duty on November 30, 2006. After his ex-wife was discharged, the applicant became eligible for BAH-with because of his child-support payments, and he was paid BAH-with from December 1, 2006, until he retired on January 1, 2009.

The PPC stated that the application should be dismissed for failure to exhaust an administrative remedy because the applicant never applied to the Defense Office of Hearings and Appeals (DOHA) pursuant to 31 U.S.C. § 3702(a)(1) and 32 C.F.R. § 282.5(b). The PPC stated that under 32 C.F.R. §§ 281 and 282 and DODI 1340.21, the applicant should have submitted his claim to the Coast Guard and appealed any denial to the Coast Guard. Then, the Coast Guard "forwards to DOHA's claims examiners if the appeal is denied, and ... DOHA rules on the claims examiner's decision if DOHA's claims examiners deny the appeal."

Regarding this potential avenue of administrative remedy, the PPC stated that under Figure 3-16 of the Pay Manual, "commanding officers [COs] make standard dependency determinations at the field level through their Coast Guard Servicing Personnel Officer (SPOs)." If the CO finds a claim doubtful or unique, the member's request is forwarded to the PPC for a legal review and determination. The PPC stated that under Chapter 5.B. of the Personnel and Pay Procedures Manual (PPPM), "[t]he standard package of forms and documents sent to PPC by the commanding officer's SPO for review includes: (1) Form PPC2020 (request to add dependent), (2) Form PPC 2020a (support statement), (3) Form 4170a (dependency data form), and (4) any additional supporting documents relevant to the request."

² The court order shows that the applicant paid \$342 semi-monthly, or \$684 per month, in child support for his two children.

³ The Coast Guard submitted copies of the applicant's Leave and Earnings Statements showing these payments.

The PPC stated that there is no evidence that the applicant ever filed the appropriate forms with his SPO to receive BAH-with, but even if he did, “neither he nor the SPO filed any required forms or documents with PPC.” The PPC stated that the PPC attorney—not Ms. B, a paralegal specialist at PPC—had delegated authority to render final decisions on BAH determinations. Therefore, the applicant did not exhaust his administrative remedies before applying to the BCMR.

Regarding the merits of his request, the PPC stated that under *Smith v. United States*, 47 Ct. Cl. 313 (1912), BAH cannot be paid unless authorized by a statute or regulation. “In general, when a member is married to another member and there are no children, each is entitled to BAH ‘without’,” under 37 U.S.C. § 421 and the Joint Federal Travel Regulations (JFTR), Table U10C-1 (2006).⁴ “A child born of a marriage to two members entitles only one member to BAH ‘with’ and the members may elect which receives the increased housing allowance for that child [as long as they do not live in Government quarters]. ... The other member receives BAH ‘without’ under JFTR U10002-B and page 3-47 of the Pay Manual.”

The PPC stated that upon divorce, if one member is the sole custodial parent and the other pays child support, 37 U.S.C. § 403(m)(5) states the following:

In the case of two members, who have one or more common dependents ... who are not married to each other, and one of whom pays child support to the other, the amount of [BAH] ... shall be reduced ... [and] the total amount of [BAH] paid to the two members may not exceed the sum of the amounts of the allowance to which each member would be otherwise entitled under this section.

The PPC stated that under JFTR U10206(A)(1) and section 3-F-6-b-1 of the Pay Manual, “unless there is a notarized agreement between the two members, the custodial parent receives BAH ‘with’ and the other BAH ‘without.’ ... Thus, two divorced members can never receive more than one of them at the BAH ‘with’ rate and the other BAH ‘without’. And upon separation or divorce, unless the members agree otherwise, the custodial parent receive BAH ‘with’.”

The PPC stated that from May 2005, when she left Government housing, until her discharge at the end of November 2006, the applicant’s ex-wife was the custodial parent and she received the BAH-with rate. Thus, “the law prohibited [the applicant] from receiving BAH ‘with’ during that time.” After she was discharged, the applicant received BAH-with until he retired.

The PPC stated that the applicant’s argument that upon his ex-wife’s remarriage, they could both receive BAH-with—she, based upon her new dependent husband, and he, based upon their two children—is erroneous. The PPC stated that the law upon which the applicant relies is applicable only for divorces that occurred before July 1, 1992. That regulation, under Section 3-F-6.a.(7) of the Pay Manual, states the following:

⁴ The Board notes that the PPC cited the JFTR rules several times throughout its memorandum for this case. However, the BAH rules were not entered in the JFTR until FY2007. The JFTR paragraphs cited in the advisory opinion lead one to the 2005/2006 JFTR rules for Overseas Housing Allowances (OHA), which are inapplicable because neither the applicant nor his wife were assigned overseas in 2006.

When a non-custodial member pays child support to the custodial parent who also has another dependent who makes that member eligible for BAH, there is a presumption that the custodial parent's entitlement is based on the dependent(s) other than the children of the marriage.

The PPC alleged that because the applicant was divorced after July 1, 1992, his entitlement is not affected by this provision,⁵ and the Pay Manual "otherwise prohibits two [previously married] members receiving BAH 'with'." The PPC stated that Section 3-F-6.b. of the Pay Manual, which applies to divorces occurring after July 1, 1992, does not include the same dependency presumption. Instead, it states the following:

- (1) Unless the members agree to the contrary, the custodial parent is entitled to BAH on behalf of the child(ren) regardless of the amount of child support received by the member. In addition to the court order, a separate notarized agreement between the members must be provided in order for the non-custodial member to receive BAH on behalf of the child(ren). ...
- (2) When the members each have legal and physical custody of one or more of the children of the marriage, they are each entitled to BAH on behalf of the children in their individual custody, regardless of child support payments from one member to the other.

The PPC stated that neither of these two conditions applied to the applicant during the period from December 1, 2005, through November 30, 2006. The PPC alleged that although the applicant claims that his ex-wife agreed to provide a notarized statement and was dissuaded by her command, his claim is not corroborated by the record. Nor is there any evidence that anyone in his ex-wife's chain of command refused to accept a notarized statement from her. The PPC also noted that the applicant failed to submit a copy of the court order outlining custody arrangements.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

In response to the Coast Guard's advisory opinion, the applicant stated that he disagreed with it in its entirety. He stated that the Coast Guard "continually highlight[s] the fact that I never gained my ex-wife's consent via a notarized agreement to claim my children for BAH purposes." The applicant stated that his ex-wife

sought confirmation that what I was seeking from her was legitimate and that it would not impact her own BAH entitlement. Ultimately, that confirmation from the same person responsible for approving the entitlement never came. To be certain, positive confirmation came 6 months before I was eligible to seek the entitlement as well as nearly a year later only to be reversed within hours of confirmation that it was a legitimate entitlement.

The applicant argued that he should be compensated for the expenses he incurred after the Coast Guard deliberately misinformed him, his ex-wife, and/or YNCS D in order to suppress his efforts to gain a just entitlement. He argued that Ms. B correctly interpreted the regulations in her first two emails to him but recanted within three hours and "sided" with YNCS D and "another individual from Policies and Procedures. These efforts convinced my ex-wife that I

⁵ The Board notes, however, that subparagraph (4) of paragraph b. of section 3-F-6, which expressly applies to members divorced after June 30, 1992, states, *in toto*, "When dependents are not a common class, section 3-F-6-a.(7) applies."

was seeking an unjust entitlement and that she would lose her own entitlement if she allowed me to claim my children for BAH purposes.”

The applicant alleged that it is unfair for the Coast Guard to focus on the fact that his ex-wife never signed a notarized statement because it was the Coast Guard who convinced her not to sign one. Moreover, he argued, it was not a matter of the administrative staff simply being mistaken because the regulation is clear. The applicant also alleged that the advisory opinion was deliberately vague about the applicable regulations and did not cite the complete regulations. He argued that a recent revision of the Pay Manual supports his interpretation of the regulations.

The applicant alleged that if the Board reviews all applicable regulations, the Board will see that his ex-wife’s entitlement to BAH-with would not have been reduced if she had signed a notarized letter for him. However, she received erroneous advice from the Coast Guard—Ms. B, YNCS D, and Headquarters personnel—and based on that erroneous advice, refused to sign a notarized statement for him. Therefore, he was unjustly denied BAH-with from December 2005 to December 2006.

The applicant argued that he did exhaust his administrative remedies prior to his retirement. He pursued his claim through Ms. B at the PPC and was not told of or offered any other potential remedy.

COAST GUARD ADDENDUM TO THE ADVISORY OPINION

Upon reviewing the case, the BCMR staff queried the JAG about the applicability of the JFTR rules cited in the advisory opinion, since the BAH rules were not then part of the JFTR, and about the applicant’s entitlement to BAH-with under Section 3-F-6.a.(7) of the Pay Manual because, although that section appears under the rules for members divorced on or before June 30, 1992, section 3-F-6.b.(4) of the rules for those divorced after June 30, 1992, states *in toto*, “When dependents are not a common class, section 3-F-6.a.(7) applies.”

The PPC responded by submitting an addendum to the advisory opinion. In the addendum, the PPC stated that section 3-F-6.a.(7) did apply to the applicant and his ex-wife after she remarried in November 2005 because her new husband and her children from her marriage to the applicant were not “of a common class,” although the term “common class” is not defined in the regulations. Therefore, the ex-wife’s entitlement to BAH-with was presumptively based on her new husband rather than on her children with the applicant and the applicant’s entitlement would be assessed individually based upon his payment of child support. The PPC stated that had the applicant provided the Coast Guard with the necessary documentation in 2005, he should have received BAH-with beginning from the date of his ex-wife’s marriage. Instead, he did not receive BAH-with until December 1, 2006, the first day his ex-wife was no longer serving on active duty. The PPC stated that the applicant “is now entitled to BAH-with dependents from the date of his former spouse’s remarriage to 30 Nov 06.” The PPC stated that whether one consults the Pay Manual, the JFTR, or the Department of Defense Financial Management Regulations, the applicant was entitled to BAH-with dependents after his wife remarried. In addition, the PPC stated that it had checked this conclusion with the JFTR Pay and Per Diem Committee, which concurred that the applicant was entitled to BAH-with dependents during the year in question.

The PPC also noted that the discussion of the lack of a notarized statement in its original memorandum “is not pertinent” in light of the applicable rules.

The PPC stated that the BCMR should, as a general rule, require applicants to exhaust their administrative remedies. The PPC claimed that its personnel had not had an opportunity to review the applicant’s request for BAH-with and make a formal decision. If it had had such an opportunity, the applicant could have sought review of any denial through Coast Guard Headquarters and the Office of the General Counsel, and there would be a complete administrative record for the Board to review. The PPC stated that the Board should return the matter to the Coast Guard to review and deny the applicant’s request for family court costs and compensation for emotional pain and suffering.

APPLICANT’S RESPONSE TO THE ADDENDUM

The applicant stated that the Board should simply grant relief and not return the matter to the Coast Guard since he has already retired from active duty and the PPC had the opportunity to act properly but failed to do so. The applicant alleged that the PPC could and should have advised him accurately about his entitlement and about the proper paperwork to submit and could have processed that paperwork while he was on active duty, but instead they kept blocking his efforts by providing false information to him and his ex-wife. He alleged, for example, that Coast Guard administrative personnel told her that allowing him to claim the children as dependents for BAH purposes might negatively affect her own ability to claim them for tax purposes even though the settlement agreement for their divorce states that his ex-wife could claim the children as dependents for tax purposes.

The applicant alleged that he and his ex-wife “were deliberately miscounseled and misguided for the purpose of preventing the pursuit of a just entitlement.” The applicant stated that the Coast Guard’s bad advice harmed him, his ex-wife, and his children both financially and in ways “that cannot adequately be compensated.” He noted that many other members may have suffered from the same bad advice.

In support of his allegations, the applicant submitted a letter from his ex-wife who wrote that in 2005 she was still on active duty and was living with her two young sons in Virginia while their father, the applicant, lived and worked in New York. When she remarried in November 2005, the applicant asked her to allow him to declare the boys his dependents for BAH purposes. However, she refused because she believed that such a declaration might affect her ability to claim the children as her dependents for tax purposes and because she was also told by her command’s administrative officer that only the parent with whom the children were living could claim them for BAH purposes. “On the advice of my command and wishing to avoid any negative interactions with the IRS, I chose to keep both my new husband and children as dependents as far as the United States Coast Guard was concerned.”

APPLICABLE LAW

37 U.S.C. § 403 (2005).

Section 403(m) of Title 37 of the United States Code states the following with regard to members who pay child support:

(2) A member of a uniformed service assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service who is not otherwise authorized a basic allowance for housing and who pays child support is entitled to the basic allowance for housing differential, except for months for which the amount payable for the child support is less than the rate of the differential. Payment of a basic allowance for housing differential does not affect any entitlement of the member to a partial allowance for quarters under subsection (n).

(3) The basic allowance for housing differential to which a member is entitled under paragraph (2) is the amount equal to the difference between--

(A) the rate of the basic allowance for quarters (with dependents) for the member's pay grade, as such rate was in effect on December 31, 1997, under this section (as in effect on that date); and

(B) the rate of the basic allowance for quarters (without dependents) for the member's pay grade, as such rate was in effect on December 31, 1997, under this section (as in effect on that date).

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(5) In the case of two members, who have one or more common dependents (and no others), who are not married to each other, and one of whom pays child support to the other, the amount of the basic allowance for housing paid to each member under this section shall be reduced in accordance with regulations prescribed by the Secretary of Defense. The total amount of the basic allowances for housing paid to the two members may not exceed the sum of the amounts of the allowance to which each member would be otherwise entitled under this section.

Coast Guard Pay Manual

Section 3-C-3.a. of the Pay Manual in effect in 2005 and 2006 (COMDTINST 7220.29A, Change 4, issued on June 2, 2003) states that “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 unless approved otherwise for a designated location by Commandant (G-WPM-2), the permanent duty station (PDS) assigned (except as otherwise provided in section 3-F-18.)”

Section 3-C-3.d. states that “BAH is not payable to members who are assigned to quarters of the United States appropriate to the grade, rank, or rating of the member and adequate for the member and dependents, if the member is with dependents.”

Section 3-C-2.c. states that “BAH-DIFF is the housing allowance amount for a member who is authorized a basic allowance for housing solely by reason of the member’s payment of child support. A member is not entitled to BAH-DIFF if the monthly rate of that child support is less than the BAH-DIFF amount for their respective pay grade.”

Section 3-F-6 states the following with regarding to entitlement to BAH on behalf of dependents (BAH-with) when two active duty members with children get divorced:

6. Support of Dependent—Both Parents are Members.

a. Divorce or Legal Separation Effective or Amended Before 1 Jul 1992. In addition to the provisions of section 3-F-5, the following subparagraphs apply when divorced or legally separated parents are both members and the divorce or separation occurred prior to 1 Jul 1992. These rules apply only when neither member is assigned to family-type government quarters, unless otherwise specified.

- (1) The non-custodial parent is entitled to BAH on behalf of the child(ren), provided the non-custodial parent pays adequate child support.
- (2) If the non-custodial member does not pay the required amount of child support, the custodial member is entitled to BAH on behalf of the children.
- (3) The custodial member is entitled to BAH on behalf of the child(ren) if the non-custodial member declines to claim the child(ren). ...
- (4) Only one parent is entitled to BAH on behalf of children of the marriage when all of the children reside in one household; ...
- (5) When the child(ren) of the marriage are in the custody of a third party, ...
- (6) When each member has legal and physical custody of one or more of the children of the marriage, ...
- (7) When a non-custodial member pays child support to the custodial parent who also has another dependent who makes that member eligible for BAH, there is a presumption that the custodial parent's entitlement is based on the dependent(s) other than the child(ren) of the marriage. The BAH entitlement for the custodial and non-custodial parents is determined individually.

b. Divorce or Legal Separation Effective or Amended After 30 Jun 1992. In addition to the provisions of section 3-F-5, the following subparagraphs apply when the divorced or separated parents are both members and the divorce or separation occurred, or the decree or agreement was amended after 30 June 1992. These rules apply only when neither member is assigned to family-type government quarters, unless otherwise specified.

- (1) Unless the members agree to the contrary, the custodial parent is entitled to BAH on behalf of the child(ren) regardless of the amount of child support received by that member. In addition to the court order, a separate notarized agreement between the members must be provided in order for the non-custodial member to receive BAH on behalf of the child(ren).
- (2) When the members each have legal and physical custody of one or more of the children of the marriage, they are each entitled to BAH on behalf of the children in their individual custody, regardless of child support payments from one member to the other.
- (3) When the child(ren) are in the custody of a third party, the rule in 3-F-6.a.(5) applies.
- (4) When the dependents are not a common class, section 3-F-6.a.(7) applies.

ALCOAST 625/05, issued on December 15, 2005, amended some of the BAH regulations in the Pay Manual as of December 31, 2005. Paragraphs 3.C. and 4. of this ALCOAST state that 37 U.S.C. § 403

currently limits BAH-diff entitlement to single members who pay child support and who are authorized to reside in private sector quarters or are assigned to single-type Government owned or leased quarters. The BAH Transitional Authority, established in 1997, authorized the payment of BAH-diff and BAH-w/o ... to members authorized to receive these allowances. The BAH Transitional Authority is scheduled to expire on 1 JAN 2006. The effective date for this policy is 31 Dec 2005 and the payment of BAH-diff will be limited solely to members who pay child support who are assigned to single-type Government owned or leased quarters.

4. Policy. Effective 31 DEC 2005 the following housing allowance policy will apply concerning the authorization and payment of BAH, OHA, and BAH-diff to single members and married military active duty service couples. ...

A. Single members who pay child support and who are receiving BAH-w/o and BAH-diff will no longer receive these allowances, but will receive BAH-with dependents based on payment of child support. These members will see a change in their monthly housing allowance amount.

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E. Married members who have a child(ren) from the marriage, and the marriage terminates (in divorce, annulment, etc.) resulting in the member having a child support payment are required to submit supporting documentation to their servicing personnel office (SPO) to verify that their child support payment is equal to or greater than the BAH-diff amount for their respective pay grade. The member will not be entitled to [BAH-with] based on payment of child support until this documentation is submitted, and the member will only be entitled to [BAH-without] in the interim.

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 matter pursuant to 10 U.S.C. § 1552. The application was timely.⁶

2. The PPC argued that the Board should return this matter to the Coast Guard because the applicant did not exhaust his administrative remedies through the Coast Guard and the Defense Office of Hearings and Appeals (DOHA). The PPC stated that the applicant should have submitted his claim to the Coast Guard and appealed any denial. Then, the Coast Guard would "forward[] to DOHA's claims examiners if the appeal is denied, and ... DOHA rules on the claims examiner's decision if DOHA's claims examiners deny the appeal." However, the record shows that the applicant attempted to claim his entitlement through PPC personnel and was not only advised by PPC personnel that he was not entitled to BAH on behalf of his children after his wife remarried but was also not offered any administrative remedies by which he could dispute that erroneous determination. Nor did those PPC personnel forward any query to DOHA on his behalf. Under 33 C.F.R. § 52.13, members must exhaust effective administrative remedies, but a remedy that is not timely offered is not effective. The regulation also specifies that the Board may determine what remedies are "practical, appropriate, and available to the applicant." Because the applicant was not timely afforded his administrative remedies when his disagreement with PPC personnel arose in 2005 and 2006 and because he is now retired and has

⁶ *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

already waited a long time to receive his entitlements, the Board finds that it is neither practical nor appropriate to require him to exhaust the administrative remedies now offered by the PPC as it might only delay the matter further.

3. The applicant and his then active duty member wife were divorced after June 30, 1992. Therefore, section 3-F-6.b. of the Pay Manual applies to the applicant's BAH entitlements. Paragraph (4) of that section states, "When the dependents are not a common class, section 3-F-6.a.(7) applies." In the addendum to the advisory opinion, the Coast Guard has stated that the new husband of the applicant's ex-wife and the children of the applicant's marriage are not of a "common class." The term "common class" is not defined in the Pay Manual or the JFTR but appears to depend upon whether the dependents are related other than by marriage and/or whether they are living in the same household.⁷ The Board agrees with the Coast Guard that the new husband and the children of the applicant's marriage should not be considered a "common class" of dependents even though they live in the same household because they are not related to each other apart from the "step" relationship through the ex-wife. Therefore, under section 3-F-6.b.(4) of the Pay Manual, section 3-F-6.a.(7) applied to the applicant's BAH entitlement from the date of the ex-wife's marriage in November 2005 (which is not stated in the record before the Board) until her separation from active duty on November 30, 2006.

4. Section 3-F-6.a.(7) of the Pay Manual states that "[w]hen a non-custodial member [such as the applicant] pays child support to the custodial parent [his ex-wife] who also has another dependent who makes that member eligible for BAH [her new husband], there is a presumption that the custodial parent's entitlement is based on the dependent(s) other than the child(ren) of the marriage. The BAH entitlement for the custodial and non-custodial parents is determined individually." Therefore, after her remarriage, the applicant's ex-wife presumptively received BAH-with on behalf of her new husband, and the applicant's entitlement to BAH for his child-support payments should have been determined individually—i.e, without regard to his ex-wife's receipt of BAH-with for her new husband.

5. Because of the presumption under section 3-F-6.a.(7) of the Pay Manual, the Board agrees with the PPC addendum to the advisory opinion that the fact that the applicant's ex-wife was unwilling, because of the erroneous information she received from her command, to give the applicant a notarized letter allowing him to claim the children as his dependents for BAH purposes was actually irrelevant. His entitlement to BAH for child support did not depend on his ex-wife's agreement because her own receipt of BAH-with was presumptively based on the dependency of her new husband.

6. The Board must therefore determine whether the applicant was entitled to BAH-with or BAH-diff individually without taking into consideration his ex-wife's receipt of BAH-with. In the addendum to the advisory opinion, the PPC stated that the applicant "is now entitled to BAH-with dependents from the date of his former spouse's remarriage to 30 Nov 06." The PPC also stated that this conclusion has been confirmed in consultation with the JFTR Pay and

⁷ See, e.g., *Watford*, B270432, 1996 WL 345581 (Comp. Gen.) (finding that a member's minor brother and minor children who are all living with the member are dependents of the same class); *but see* JFTR U10204 (2009) (stating that if two members who both have children from previous relationships marry and are stationed in the same area, "all children are one class of dependents," even though they are not genetically related).

Per Diem Committee. According to the Coast Guard's advisory opinion and the applicant's pay records, from November 2005 through the end of November 2006, the applicant received BAH-without, presumably because he was living in private quarters.⁸ However, under Section 3-C-2.c. of the Pay Manual and paragraph 3.C. of ALCOAST 625/05, from the date of his ex-wife's remarriage in November 2005 until December 30, 2005, he was entitled to both BAH-without and BAH-diff if his child-support payments equaled or exceeded the amount of BAH-diff authorized for his pay grade. And paragraphs 4.A. and E. of ALCOAST 625/05 show that effective as of December 31, 2005, the applicant was entitled to BAH-with if his child-support payments equaled or exceeded the amount of BAH-diff authorized for his pay grade.

7. According to the Department of Defense, the monthly BAH-diff for an enlisted member in pay grade E-6 in fiscal year 2006 was \$243.00 and the monthly BAH-diff in fiscal year 2007 was \$248.40 (not including locality adjustments).⁹ Therefore, since the applicant had been ordered to pay \$684 per month in child support for his two children and the Coast Guard was deducting this amount from his pay, it is clear that the amount of his monthly child support exceeded the amount of BAH-diff authorized for his pay grade and so he was entitled to BAH for his child-support payments from the date of his ex-wife's remarriage until her separation from the Coast Guard.

8. The Board notes that in her letter to the Board, the applicant's ex-wife expressed concern about the effect of the applicant's entitlement to claim BAH on behalf of their children on her entitlement to claim the children as dependents for tax purposes. The Board can find no legal connection between the two matters. The Internal Revenue Service requires a custodial parent to complete a form 8332 in order to allow the non-custodial parent to claim a child as a dependent, or a notarized letter with the same information, and the required information and wording on the form is specifically about tax exemptions and tax years.¹⁰

9. The applicant also asked the Board to order the Coast Guard to compensate him for his emotional pain and suffering and for family court costs that he alleged resulted from the erroneous advice the Coast Guard gave him and his ex-wife. The applicant and his ex-wife clearly received very poor advice from Coast Guard administrative personnel. However, 10 U.S.C. § 1552(c)(1) states that the Secretary "may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, or on account of his or another's service as a civilian employee." Under this statute, the applicant is entitled to the BAH payments due him after the Coast Guard corrects his record to show that he is entitled to them. However, the statute does not allow the Board to order the Coast Guard to pay the applicant's family court costs or to pay him for his emotional pain and suffering even if they are directly

⁸ Coast Guard Pay Manual, sec. 3-C-3.

⁹ See archived BAH rate charts at <<http://defensetravel.dod.mil/pdc-archive/bah/bah2>>.

¹⁰ INTERNAL REVENUE SERVICE, PUB. 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION (2008); INTERNAL REVENUE SERVICE, FORM 8332, RELEASE/REVOCATION OF RELEASE OF CLAIM TO EXEMPTION FOR CHILD BY CUSTODIAL PARENT (Feb. 2009).

attributable to the bad advice he and his ex-wife received from Coast Guard administrative personnel.¹¹

10. Accordingly, the applicant's request for entitlement to BAH as a result of his child-support payments from the date of his ex-wife's remarriage to the date of her separation from active duty should be granted, but his request for compensation for his family court costs and emotional pain and suffering must be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

¹¹ See *Cook v. Sec'y of the Air Force*, 850 F. Supp. 901, 903 (D.C. Ore. 1994); *Moore v. Sec'y of the Army*, 627 F.Supp. 1538, 1542 (D.C. Conn. 1986); *Dumas v. President of the United States*, 554 F. Supp. 10, 16 (D.C. Conn. 1982).

ORDER

The application of YN1 xxxxxxxxxxxxxxxxxxxxxxxx, USCG Retired, for correction of his military record is granted in part. His military record shall be corrected to show that he was entitled

(a) to both BAH differential (BAH-diff) and BAH at the “without dependents” rate from the date of the remarriage of his ex-wife, xxxxxxxxxxxxxxxxxxxxxxxx, in November 2005 through December 30, 2005; and

(b) to BAH at the “with dependents” rate from December 31, 2005, through November 30, 2006, in accordance with ALCOAST 625/05.

The Coast Guard shall pay him any amount due as a result of these corrections.

All other requested relief is denied.

Nancy L. Friedman

Patrick B. Kernan

George A. Weller