

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-132

**XXXXXXXXXXXXX
XXXXXXXXXXXXX**

FINAL DECISION

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 application on April 30, 2009, upon receipt of the applicant's completed application and subsequently prepared the final decision as required by 33 CFR § 52.61(c).

This final decision, dated January 14, 2010, 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 asked to be paid basic allowance for housing (BAH) for the period December 10, 2000 to January 2, 2001 based on his pay grade at the time, which was E-2. The Board interprets the applicant's request as one for the correction of his record to show that he was entitled to the payment of BAH¹ with dependents (BAH/with) for the period in question. The applicant stated the following:

I was told by the executive officer onboard the [Coast Guard Cutter] . . . in December 2000 that I couldn't draw BAH because I was non-rated and I had shipboard berthing. I was married on December 10, 2000 and was not placed in government quarters with my spouse until 3 January 2001. I did not receive BAH dependents for that time period. I believe I was underpaid \$651.95.

The applicant claimed that he did not discover the alleged error until March 27, 2009 during a casual conversation with a crewmember. He stated that using his yeoman training he researched the issue and realized that he was incorrectly counseled about BAH.

¹ BAH is a monthly allowance for housing payable to members on active duty and varies according to the grade in which the member is serving for basic pay purposes, the member's dependency status, and the permanent duty station to which the member is assigned. This allowance is authorized for members both "with" and "without" dependents. Chapter 3.C.1. of the Coast Guard Pay Manual.

The applicant submitted his December leave and earnings statement (LES) which shows that he received \$7.20 in partial BAH² for that month. He also submitted his January 2001 LES which showed BAH with dependents in the amount of \$383.32, which was offset by the applicant's assignment to government quarters. The applicant claimed that he is owed \$71.66 for 2 days in January and \$580.29 for 21 days in December.

VIEWS OF THE COAST GUARD

On September 24, 2009, the Judge Advocate General (JAG) submitted the views of the Coast Guard. The JAG requested that the Board accept the comments from the Commander, Coast Guard Pay and Personnel Center (PPC) as the advisory opinion.

PPC asserted that the applicant's claim exceeds the Board's three-year statute of limitations as well as the six year time limit under the Barring Act.³ PPC also asserted that the applicant failed to exhaust his administrative remedies by applying to the Defense Office of Hearings and Appeals.⁴ In this regard, PPC stated the following:

As a preliminary matter, federal regulations prohibit the Board from considering matters "until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations . . ." ⁵ The Secretary of Defense settles claims involving uniformed service members' pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivor benefits. [Footnote omitted.] The Secretary of Defense delegated uniformed service member's pay claims down to the Defense Office of Hearings and Appeals (DOHA). [Footnote omitted.] Federal regulations and a Department of Defense instruction that applies to the Coast Guard outline the administrative remedies available in military pay and allowance matters: (1) members submit a claim to the Coast Guard, (2) appeal to the Coast Guard if the initial claim is denied, (3) the Coast Guard forwards to DOHA's claims examiners if the appeal is denied, and (4) DOHA rules on the claims examiner's decision if DOHA's claims examiners deny the appeal.⁶

² BAH partial is paid to a member without dependents assigned to single-type quarters or is on field or sea duty, and is not entitled to receive a BAH. Chapter 3.C.2.d. of the Coast Guard Pay Manual.

³ Section 3702 of title 31 of the United States Code gives the Secretary of Defense, except as provided in this Chapter or another law, the authority to settle claims involving service members' pay, allowances, travel, transportation, etc., including the Coast Guard. Subsection 3702 (b) mandates that a claim against the Government must be presented to the appropriate agency within six years after the claim accrues, and if not received in the time required under this section, the claim shall be returned and no further action on the part of the Government is required.

⁴ The Secretary of Defense delegated his authority under title 31 USC § 3702 to settle claims involving the pay and allowances of members of the Uniformed Services to the Defense Office of Hearings and Appeals.

⁵ 33 C.F.R. § 52.13

⁶ See 32 CFR §§ 281-282; and DODI 1340.21 for Settling Personnel and General Claims and Processing, Advance Decision Requests, Enclosures 3-7, May 12, 2004.

PPC argued that notwithstanding the above, the applicant has provided no evidence that he is entitled to BAH/with for the period in question. In this regard, PPC stated the following:

An allowance for housing cannot be paid unless authorized by some statute or regulation. Coast Guard members entitled to basic pay are entitled to BAH paid according to the member's pay grade, dependency status, and geographic location.

At the time of the alleged error, [the applicant] lived aboard [a Coast Guard Cutter]. As a member with dependents assigned to duty aboard a cutter, BAH regulations provided an entitlement payable at the rate prescribed for the ship's homeport. But a member is entitled to such a rate only when the government does not furnish adequate quarters and their dependents are not en route to the duty station or local vicinity. Even though he moved into government quarters a month later, it is not clear from the record [the applicant] applied for government housing after he married and was turned down or told to wait, or that his spouse was not en route. He also provides no evidence his executive officer's or anybody else's counsel was misplaced or misguided. And while it is unfortunate that the member may have received erroneous advice, if true, that does not provide a basis for payment of his claim because the government is not liable for the erroneous or negligent acts of its officers, agents, or employees.

Even if the Board waives both the three-year and six-year limits, [the applicant] failed to establish an entitlement to BAH 'with' for the relevant period. Instead, he only offers unsubstantiated assertions of fact his executive officer told him he was ineligible for BAH 'with' because he was a non-rate living on the ship.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September a copy of the views of the Coast Guard was sent to the applicant for his reply. The Board did not receive a response from the applicant.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.
2. The application was timely. Although the application was not filed with the BCMR within three years of January 2001 when the alleged error or injustice was or should have been discovered, it is considered timely under *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). The applicant has been on active duty since his enlistment on August 22, 2000.

3. Contrary to the advisory opinion, the Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b),⁷ because there is no other forum or procedure provided by the Coast Guard that is currently available to the applicant for correcting the alleged error or injustice in his military record other than the Board. The six-year time period for filing a claim under 31 U.S.C. § 3702 with the Defense Office of Hearings and Appeals has expired and is no longer "practical, appropriate, and available."⁸ However, the applicant has a remedy through the correction of his record under 10 U.S.C. § 1552 which states that the Secretary of a military department may correct any military record when the Secretary considers it necessary to correct an error or remove an injustice. In this regard, the Defense Office of Hearings and Appeals might not have been an appropriate forum even if it were still available to the applicant because the applicant's application before this Board is more than a request for payment of money based on existing records, it is a request for a correction to documents in his record to show that he was entitled to BAH/with from the date of his marriage in December 2000 to January 3, 2001, the date he was assigned to government quarters.

4. Further, the applicant's failure to file a claim under 31 U.S.C. § 3702 with the Defense Office of Hearings and Appeals does not constitute a waiver of his request for a record correction under 10 U.S.C. § 1552. Section 3702(a) of title 31 states that "Except as provided in this chapter or another law, all claims of or against the United States Government shall be settled as follows: (1) The Secretary of Defense shall settle—(A) claims involving uniformed service members' pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivor benefits:" Section 1552 of title 10 of the United States Code is "another law." Therefore, as stated above, pursuant to *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994), the applicant's application is timely.

5. With respect to the merits of the applicant's claim, Chapter 3 of the Pay Manual states that a member is entitled to monthly BAH in an amount that is dependent on their grade, dependency status, and permanent duty station. If a member is assigned to government housing the amount received is reduced or completely set-off. Prior to January 3, 2001, the applicant received partial BAH because he was single and assigned berthing on his cutter, which was his permanent duty station. The applicant married on December 10, 2000 and did not receive government housing until January 3, 2001; he received partial BAH for the period from December 10 through January 2, 2001. He seeks to have his record corrected to show that he is entitled to BAH/with for this period.

6. The applicant argued that his executive officer incorrectly counseled him that he could not receive BAH because he was a non-rate and had shipboard berthing. However, the applicant offers no corroborating evidence from the executive officer, or anyone else, that he was provided

⁷ Section 52.13(b) of the title 33 of the Code of Federal Regulations states as follows: "No application shall be considered by the Board until the applicant has exhausted all effective administrative remedies afforded under existing law or regulations, and such legal remedies as the Board may determine are practical, appropriate, and available to the applicant."

⁸ *Id.*

with such counseling at any time. Nor did the applicant state the date in December that he was allegedly counseled by the executive officer; he merely stated that he asked the executive officer about BAH in December 2000 and that he was married on December 10, 2000. Nor does the applicant state explicitly that he told the executive office during the alleged counseling that he was married. The applicant has offered insufficient evidence to prove that the executive officer counseled him that he could not receive BAH for the period in question. Nor has the applicant pointed to any requirement for the Coast Guard to provide him with specific BAH counseling, and the Board is not aware of any such requirement.

7. According to Chapter 3.F.21. of the Pay Manual, to apply for BAH the applicant was required to submit a dependency worksheet with supporting documentation that he was newly married. The CO was required to review and approve the applicant's dependency worksheet and then submit it to the unit's Personnel Reporting office. The applicant offered no indication as to when he completed the dependency worksheet for his wife, but he must have done so prior to January 3, 2001 because he was placed in government housing that day. It would be conjecture on the Board's part to correct the applicant's record granting him BAH from a day certain when he has offered no evidence establishing the date that he was allegedly erroneously counseled by the executive officer or the date that he completed the necessary paperwork to be entitled to BAH. Therefore, even if the Board were to consider granting relief in this case, the inception date for the start of any BAH/with has not been established. Additionally, the Board could find nothing in the regulation that stated that a member was entitled to be paid BAH prior to completion of the process establishing his entitlement to BAH/with.

8. It is clear to the Board that at some point after his marriage and prior to January 3, 2001, the applicant applied for BAH because he received government housing 23 days after his marriage. The Board finds that whenever the request was made, the Coast Guard acted expeditiously to place the applicant into government.

9. The applicant has failed to prove an error or injustice in this case and his application should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXX, USCG, for correction of his military record is denied.

Donna M. Bivona

Evan R. Franke

James E. McLeod