



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
2 NAVY ANNEX  
WASHINGTON DC 20370-5100

LCC  
Docket No. 3173-08  
3 March 2009

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD ICO  
[REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments  
(2) PCS orders  
(3) Letter for Parenting Plan  
(4) Court Order  
(5) Memo from CMC MPO

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, that the applicable naval record be corrected to show Petitioner is entitled to payment of Basic Allowance for Housing (BAH) at the "with dependent" rate and Family Separation Allowance (FSA) for the period between 1 September 2007 and 14 May 2008.

2. The Board, consisting of Messrs. George, Pfeiffer, and Zsalman reviewed Petitioner's allegations of error and injustice on 22 December 2008 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Prior to filing enclosure (1) with this Board, Petitioner exhausted all administrative remedies afforded under existing law and regulations within the Department of the Navy.

b. Petitioner was divorced in 2003. The divorce decree specified joint custody of the children of the marriage. The decree also included a provision stating that it was "subject to modification as mutually agreed by the parties." From 2003 to 2007 he was entitled to and received BAH at the "with dependent" rate based on the joint child custody arrangement.

c. In 2007, Petitioner received Permanent Change of Station (PCS) orders to ██████████ for a 12 month unaccompanied tour. For an unaccompanied tour, transportation/travel of dependents is not authorized. See enclosure (2).

d. Petitioner's parenting plan was that he would maintain his house in California and his adult sister would live in the house and care for ██████████ during the period Petitioner was assigned to ██████████ when he otherwise would have physical custody of the child. See enclosure (3).

e. On 12 September 2007, Petitioner reported to ██████████. He was assigned government quarters. His BAH at the "with dependent" rate was stopped and "BAH-Diff" was started.

f. Petitioner sent numerous emails seeking to determine why the change had been made and asserting entitlement to BAH at the "with dependent" rate and Family Separation Allowance.

g. Petitioner was advised, essentially, that he did not rate BAH at the "with dependent" rate and Family Separation Allowance because of his (joint) custody arrangement and because he was assigned government quarters.

h. Petitioner, with his former spouse's concurrence, thereafter sought and received a court order awarding him "custody of ██████████ (sole)" effective retroactively to "1 September 2007." See enclosure (4).

i. Petitioner submitted the court order on 15 May 2008. At that time, BAH for the dependent location ██████████ was started and FSA was started *prospectively*. However, Petitioner's request for those allowances for the period



1 September 2007 through 15 May 2008 was administratively denied.

j. By enclosure (1), Petitioner seeks a change to his record to show that he is entitled to (BAH) at the "with dependent" rate and Family Separation Allowance (FSA) for the period between 1 September 2007 and 14 May 2008.

k. In correspondence attached as enclosure (5), the office having cognizance over the subject matter involved in Petitioner's application recommended denial, commenting that Petitioner is only authorized BAH and FSA effective the date of command notification of the court order. Retroactive payment of pay and allowances (i.e. prior to 15 May 2008) are only authorized when a certified administrative error was made causing the member to be underpaid.

CONCLUSION:

Upon review and consideration of all the evidence of record, notwithstanding the comments contained in enclosure (5), the Board finds the existence of an injustice warranting the requested relief. The Board gave due consideration to the Manpower Policy Branch's view that the entitlement should not be recognized retroactively. However, the Board also notes that Petitioner's former spouse apparently agreed to the change from "joint" custody to "sole" custody and the court determined that the arrangement should be effective retroactively. These two factors present unusual circumstances and suggest that Petitioner likely would have sought and received the sole custody order earlier if he had been aware of the adverse impact the prior joint custody would have on his housing allowances. Accordingly, the Board finds that the circumstances are such that the Department of the Navy should give effect to the court order retroactively to 1 September 2007 and recommends the following corrective action.

RECOMMENDATION:

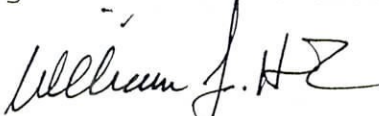
That Petitioner's naval record be corrected, where appropriate, to show that:

a. Petitioner was awarded sole legal custody of [REDACTED] on 1 September 2007. He notified his command of the custody order on 1 September 2007. He is thus authorized payment of "BAH at the with dependent rate" vice "BAH-DIFF" and FSA effective 12 September 2007 which is the date he reported to Okinawa. The address for the dependent [REDACTED]


b. A copy of this Report of Proceedings will be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above-entitled matter.


ROBERT D. ZSALMAN  
Recorder

  
WILLIAM J. HESS, III  
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.

  
W. DEAN PFEIFFER

Reviewed and approved:

  
3-12-09