

February 26, 2001

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In Re:

[Redacted]

Claimant

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Claims Case No. 00090820

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A reservist was ordered to perform a Temporary Tour of Active Duty (TTAD) for a period of less than 31 days. For that period of time he claims Basic Allowance for Housing (BAH)-I, to which he would be entitled if his TTAD had been in support of a contingency operation and if the orders had been for at least 31 days. The member has not proven his entitlement to BAH-I, since his orders do not state that his TTAD was in support of a contingency operation, the order-issuing authority indicates that his duty was not in support of a contingency operation, and Army Regulation 135-210 requires that an order for duty in support of a contingency operation be for not less than 31 days. The member is therefore entitled to BAH-II rather than BAH-I for the period of the TTAD.

### DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate 00051216, dated August 8, 2000, which denied the claim of an Air Force Reserve officer for Variable Housing Allowance (VHA), which is now included in full Basic Allowance for Housing (BAH-I), during a Temporary Tour of Active Duty (TTAD). The Settlement Certificate indicated that the member was entitled to BAH-II (BAH-I minus the former VHA).

### Background

The member received orders dated September 13, 1999, which purported to send him to a training center in Germany for 20 days (later amended to 22 days) plus necessary travel time.<sup>(1)</sup> The orders stated that in connection with USAREUR (United States Army Europe) the member was to provide Judge Advocate Operations Support to the First Infantry Division Kosovo Force Maneuver. The member carried out the orders. While in Germany, he resided in single-type government quarters and was paid BAH-Partial of \$1.10 per day. When he claimed VHA, the Defense Finance and Accounting Service (DFAS) reconsidered his entitlement to a housing allowance and determined that he was entitled to BAH-II<sup>(2)</sup> rather than BAH-Partial. The member believes that he is entitled to BAH-I because his TTAD was in support

of a contingency operation. Because the member believes he is entitled to BAH-I, he rejected the offer of BAH-II.

According to Army regulations, if the member's orders were in support of a contingency operation, he would be entitled to BAH-I. However, Army Regulation (AR) 135-210 requires that orders in support of a contingency be issued for not less than 31 days. The order-issuing authority maintains that the member's TTAD was not in support of a contingency operation. The member argues that the TTAD was in support of a contingency operation. He contends that the issuance of the orders for a period of less than 31 days acts as a waiver of the minimum time requirement. Alternatively, he argues that the time limitation in the Army regulation is an illegal limitation on his entitlement to BAH-I.

### Discussion

The entitlement to BAH in the situation before us is governed by 37 U.S.C. § 403 and the applicable regulations. Section 403(g) provides that a reservist without dependents who is called or ordered to active duty in support of a contingency operation may not be denied BAH if he is unable to continue to occupy his primary residence on account of the call or order. Paragraph 260203A of volume 7A of the Department of Defense Financial Management Regulation (DoDFMR) provides that a reservist called or ordered to active duty for 139 days or less is entitled to BAH-II unless governed by paragraph 260203B. Under paragraph 260203B, a reservist called or ordered to active duty in support of a contingency operation is entitled to BAH-I if he is unable to occupy his primary residence due to the call or order to active duty. Paragraph 3.15d of Army Regulation (AR) 135-210 provides that orders for TTAD in support of a contingency operation will be for a period of at least 31 days.

The member's orders do not clearly state that his active duty was in support of a contingency operation. The order-issuing authority maintains that the duty was not in support of the Kosovo contingency operation, but rather was an Operational Temporary Tour of Active Duty, augmenting a maneuver rehearsal exercise at the Combat Maneuver Training Center. The order-issuing authority maintains that if such support was intended, the orders would have been issued for a Contingency Operation Temporary Tour of Active Duty rather than TTAD and that purpose would have been clearly stated on the orders. Moreover, the order-issuing authority points out that orders in support of a contingency operation for a period of less than 31 days would violate AR 135-210.

If the member's duty in Germany were in support of a contingency operation, his orders would violate AR 135-210, since they were for less than 31 days. But we must infer that the order-issuing authority followed AR 135-210, and the language in the orders is consistent with an intent not to assign the member to support a contingency operation. <sup>(3)</sup>

The member questions the validity of the 31-day requirement in AR 135-210. We do not have the authority to declare a regulation invalid, but must render decisions based on the applicable statutes and regulations. <sup>(4)</sup> Moreover, in the absence of error on the face of an order, we will generally not question the purpose of orders, since the assignment of members is an administrative matter over which the military authorities have broad discretion. *See* DOHA Claims Case No. 97111901 (December 12, 1997); and *Senior Chief Petty Officer John J. Chiumento, USN (Retired)*, B-244598, Oct. 2, 1991. *See also Jamison v. Stetson*, 471 F. Supp. 48, 52 (N.D.N.Y. 1978).

The member argues that his TTAD was clearly in support of the Kosovo contingency operation. In his view, if the 31-day requirement in AR 135-210 is the only impediment to his receiving BAH-I, the issuance of the TTAD orders must be in effect a waiver of the 31-day requirement. We note that paragraph 3.20 of AR 135-210 contains a waiver

procedure. The order-issuing authority may request a waiver of the administrative procedures of the regulation from Headquarters, Department of the Army. No such waiver was requested.

Since the member's orders do not clearly indicate that his TTAD was in support of a contingency operation and his order-issuing authority indicates that his TTAD was not in support of a contingency operation, we cannot conclude that his TTAD was in support of a contingency operation. The member has not proven his entitlement to BAH-I. He is instead entitled to BAH-II for the days he spent on TTAD.

### **Conclusion**

We affirm the Settlement Certificate.

/s/

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Michael D. Hipple

Chairman, Claims Appeals Board

/s/

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Christine M. Kopocis

Member, Claims Appeals Board

/s/

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Jean E. Smallin

Member, Claims Appeals Board

1. The administrative report refers to a total period of 25 days.
2. The former Basic Allowance for Quarters (BAQ) is now BAH-II. The former BAQ and VHA together make up BAH-I. A member occupying single-type government quarters, who is generally not entitled to BAH, may be entitled to BAH-Partial.
3. The purpose paragraph of the orders states: "USAREUR OPERATIONAL READINESS (JAG OPNS SPT TO 11D KFOR MANEUVER)."
4. However, we note that in a decision regarding the amendment of regulations, the Comptroller General stated that a regulation which adds a limitation to a statutory entitlement is proper as long as it furthers the purpose of the statute. *See* 66 Comp. Gen. 453 (1987).