

## AIR NATIONAL GUARD

### BAH Waiver for Military-to-Military Couples

You asked whether a military member (National Guard on active duty) who has an active-duty husband and two stepchildren is eligible for a waiver to continue receiving basic allowance for housing (BAH) at the old permanent duty station (PDS) rate during a permanent change of station (PCS) for professional military education (PME). In our opinion, you may authorize BAH at the old PDS rate pursuant to JFTR U10400(b) if the member is not authorized a household goods (HHG) move and you determine it would be inequitable to base the allowance on the new PDS rate.

A military member's active duty spouse is a dependent pursuant to 37 U.S.C. § 401, but 37 U.S.C. § 421 provides that a "member . . . may not be paid an increased allowance under this chapter, on account of a dependent, for any period during which that dependent is entitled to basic pay . . . ."

The JFTR specifically provides for BAH at the old PDS rate for members with dependents who do not accompany them to certain PME assignments:

#### U10402 Member With Dependent

B. Location Rate. Ordinarily a housing allowance is paid based on the member's PDS, or the home port for a member assigned to a ship or afloat unit. However, the Service may determine that a member's assignment to a PDS or the circumstances of that assignment requires the dependent to reside separately. The Secretary Concerned or the Secretarial Process, at Service discretion, may authorize/approve a housing allowance based on the dependent's location or old PDS.

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5. Examples of Location Rate Changes Routinely Authorized/Approved: The member is:

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g. Assigned to a Professional Military Education (PME) or training course that is scheduled for a duration of one year or less.

Because the JFTR provision concerning PME follows directly from 37 U.S.C. § 403(d)(3)(c)(ii), however, we conclude 37 U.S.C. § 421 prohibits application of that provision to increase an allowance for a member whose only dependent is a military member entitled to basic pay.

The member's request to maintain the old PDS rate includes an agreement not to ship HHG, which would otherwise be permitted pursuant to the member's orders. If the Government accepts this agreement, modifying the orders accordingly, the member could maintain BAH at the old PDS rate pursuant to 37 U.S.C. § 403(o):

Treatment of low-cost and no-cost moves as not being reassignments. -- In the case of a member who is assigned to duty at a location or under circumstances that make it necessary for the member to be reassigned under the conditions of low-cost or no-cost permanent change of station or permanent change of assignment, the member may be treated for the purposes of this section as if the member were not reassigned if the Secretary concerned determines that it would be inequitable to base the member's entitlement to, and amount of, a basic allowance for housing on the cost of housing in the area to which the member is reassigned.

This authority is reflected in JFTR U10400(B) for members without dependents and (with minor variation in language) in JFTR 10402(B)(1) for members with dependents:

If a member is reassigned under the conditions of a low-cost or no-cost PCS and not authorized a HHG move, [the housing allowance] is based on the old PDS if:

[-] Requested by the member, and

[-] The [Service selected decision] process determines that it would be inequitable to base the [member's] allowances on the housing cost in the new PDS area to which the member is assigned.

You stated that AF/A1PA has been delegated Secretarial authority to make such determinations. Because the authority is equally applicable to members with and without dependents, it need not be treated as a prohibited increase on account of an active-duty dependent. A1PA could find it inequitable to accept considerable savings in PCS costs while the member's possessions are maintained at the old PDS without continuing the single-rate BAH at the old PDS rate, particularly in this case where the member will PCS on 20 Jul 10 and her husband will retire on 1 Dec 10, after which time the member will be "with dependents" for allowance purposes.

Alternatively, as you noted, the member and her husband could arrange to have her allowances, rather than her husband's, at with-dependent rates based on the children. If they did so, BAH at the old PDS rate could be approved under JFTR U10402(B)(5)(g).