

DATE: April 11, 2022

In Re:)

[REDACTED])

) Claims Case No. 2020-WV-061703.3

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member's pay entry base date (PEBD) was erroneously established to reflect credit for pay purposes for four years he spent as a cadet in the Reserve Officers' Training Corps (ROTC), and the error was reflected on his leave and earnings statements. The resulting overpayments may not be waived under 10 U.S.C. § 2774 because the member had a duty to verify the information on his leave and earnings statements and to bring any errors promptly to the attention of the proper authorities.

DECISION

A member of the U.S. Army requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-WV-061703.2, dated October 7, 2021. In that decision, DOHA denied the member's request for waiver of a debt in the amount of \$126,829.25, which arose when he was overpaid due to the entry of an incorrect pay entry base date (PEBD).

Background

The member signed a DD Form 4/1, *Enlistment/Reenlistment Document Armed Forces of the United States*, on December 28, 1999, enlisting as cadet in the Army Reserve Officers' Training Corps (ROTC) for eight years. The member's DD Form 4/1 reflected that he also completed a DA Form 597-3, *Army Senior Reserve Officers' Training Corps (ROTC) Scholarship Cadet Contract*. On May 19, 2004, the member signed the DA Form 71, *Oath of Office – Military Personnel*, as a Reserve Commissioned Officer in the grade of a Second Lieutenant. Thus, his officer time for his pay entry base date (PEBD) started on his commission date, May 19, 2004. On July 8, 2004, the member completed the USAREC Form 1223,

Department of the Army Service Agreement F. Edward Herbert Armed Forces Uniformed Services University of the Health Sciences. He completed that service agreement in order to enter the Uniformed Services University of Health Sciences (USUHS) program to receive a medical education in return for an active duty service obligation. Effective August 2, 2004, he was accessed into the USUHS program as a Second Lieutenant. At that time, the member's PEBD should have been consistent with his date of commission and the start of medical school. However, due to an administrative error, the member erroneously received base pay based on a PEBD of December 8, 1999, the date he became a cadet in the ROTC. As a result of this error, the member was overpaid \$28,271.51 in base pay during the period August 2, 2004, through May 16, 2008.

On May 17, 2008, the member signed the DA Form 71, *Oath of Office – Military Personnel*, and was appointed to the Regular Army Medical Corps as a Captain. At the time of his commissioning as Captain, the member's PEBD should have been calculated to reflect the date of his commission, May 17, 2008, with credit for the days he served (up to 75 days) in the inactive Reserve from the date he was commissioned after ROTC, May 19, 2004, until he was accessed into the USUHS on August 2, 2004, resulting in the establishment of his PEBD as March 4, 2008. However, his PEBD remained December 8, 1999, and as a result, he was erroneously overpaid \$39,012.52 during the period May 17, 2008, through March 31, 2012. In addition, effective June 14, 2010, the member was entitled to receive overseas cost of living allowance (OCOLA). Since there was an error in the member's PEBD, the OCOLA he received during the period June 14, 2010, through September 30, 2012, was miscalculated, causing him to be overpaid \$1,065.07. Thus, this increased the member's indebtedness to \$68,349.10 (\$28,271.51 + \$39,012.52 + \$1,065.07).

The record shows that despite the establishment of an erroneous PEBD, the member received his proper base pay during the period April 1, 2012, through February 28, 2014, and his proper OCOLA during the period October 1, 2012, through December 31, 2013. However, due to an erroneous lock on his pay rate during the period March 1, 2014, through July 31, 2015, he was underpaid \$5,193.27 in base pay. In addition, during the period January 1, 2014, through July 31, 2015, he was underpaid OCOLA in the amount of \$705.96. Since he was previously overpaid \$68,349.10, the underpayments totaling \$5,899.23 (\$5,193.27 + \$705.96) reduced his debt to \$62,449.87 (\$68,349.10 - \$5,899.23).

The record further shows that during a review of the member's PEBD in August 2015, his PEBD was erroneously changed to September 23, 2003, retroactive to September 23, 2009. As a result, the member was overpaid \$42,293.56 in August 2015. Since his pay record continued to reflect the erroneous PEBD of September 23, 2003, instead of March 4, 2008, he was overpaid \$22,085.82 during the period September 1, 2015, through April 30, 2020. As a result, the member's total indebtedness to the United States increased to \$126,829.25 (\$62,449.87 + \$42,293.56 + \$22,085.82).

The member requested waiver of his debt, and the Defense Finance and Accounting Service (DFAS) recommended that DOHA waive a portion of the debt. Specifically, DFAS recommended waiver of the overpayment of base pay and OCOLA the member received during the period August 2, 2004, through August 19, 2015. DFAS stated that since the member's

PEBD was incorrect when he started at USUHS, it would have been unreasonable for someone new to the program to suspect an error. However, DFAS found that since the member submitted a pay inquiry on August 20, 2015, he suspected an error in his pay. Therefore, DFAS recommended denial of the overpayment during the period August 20, 2015, through April 30, 2020.

In the DOHA decision, the adjudicator declined to follow DFAS's recommendation of partial waiver of the member's debt, and denied waiver in full. She found that the record evidence reflected that the member was furnished with official documentation, that if reviewed, would have alerted him to the fact that he was being overpaid. She stated that the member received leave and earnings statements (LESs) during the period of overpayment, and in reviewing his first LES, which was for August 2004, she noted that the member's years of service was reflected as four years. However, as of August 2004, the member had not served any years in the military. She further found that all his subsequent LESs reflected that he had completed at least four years of service which he did not complete. She stated that for 11 years, August 2004 through July 2015, the member had been issued LESs that reflected he was paid base pay and COLA based on years of service he did not complete, yet it was not until August 20, 2015, he questioned his pay. In that regard, on August 20, 2015, the member sent a pay inquiry stating that his years of service were incorrect on his LESs; that he graduated from medical school in May 2008; and that he was getting paid less than the correct amount of years of service. He stated that he was receiving monthly base pay of \$5,571.60 for over four years of service, instead of \$5,890.50 for over six years over service. He also stated that his monthly COLA was incorrect because he was receiving \$860.33 for four years of services, instead of six years of service. However, the adjudicator noted that the member's LES for July 2015, the month preceding the member's inquiry concerning his August 2015 LES, reflected that his monthly pay was based on 15 years of service. She noted that after the member's inquiry, his September 2015 LES reflected that he began receiving \$6,747.50 in base pay, and his October 2015 LES reflected that he received \$6,990.06 in base pay. The adjudicator found that despite these discrepancies, the member did not question his pay based on his years of service at that time. She noted that it was not until January 2016 that the member contacted pay officials about his COLA, and it was in April 2016 that he raised his concerns about being overpaid due to his base pay. The adjudicator held that had the member examined his LES that he received beginning in August 2004, he would have noticed the discrepancy in his years of service and contacted the proper pay officials regarding the error, which would have presumably led to the correction of the error. Therefore, under the circumstances, the adjudicator denied waiver of the resulting debt finding that collection of the of it would not be against equity and would be in the best interest of the United States.

In his request for reconsideration, the member states that DFAS, including DFAS's Office of General Counsel, and local Defense Military Pay Office (DMPO) personnel were unaware of his actual, correct PEBD. Therefore, he states that it is unreasonable to hold him accountable for understanding the nuances and intricacies involved in the correct determination of his PEBD. He further states that although his active duty service time as a Medical Corps officer started in May 2008, his entrance in the Army's pay system began in December 1999 as a ROTC cadet. He states that although his years as a medical student do not count as creditable service for pay purposes, he was an active duty soldier throughout his four years at USUHS.

He states that multiple pay errors over the period of 2004 to 2020 resulted in the debt. He states that it is unjust that his reliance on the proper pay office responsible for correcting these errors should now result in a collection action against him.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments and allowances made to members or former members if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. The implementing regulation for our waiver authority is set forth under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). Paragraph E4 of the Instruction sets forth the standards for waiver. A waiver is not a matter of right but is available to provide relief as a matter of equity, if the circumstances warrant. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. *See* Instruction ¶ E4.1. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting a waiver. *See* Instruction ¶ E4.1.3. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the Government, even if the Government fails to act after such notification. *See* Instruction ¶ E4.1.4.

We have consistently held that military members have a duty to verify the information reflected on their LES. If a member is provided information which if reviewed would indicate an error, waiver of a resulting overpayment is precluded. *See* DOHA Claims Case No. 00091501 (December 29, 2000); and DOHA Claims Case No. 97032501 (June 9, 1997).

In this case, the erroneous payments were made as a result of administrative error. However, the member had a duty to verify the information contained on his LES. The member's first LES dated August 2004 erroneously reflected that he was being paid based on four years of service. Under the circumstances, the member should have at least questioned why he was being paid based on four years of service when he had not served any years in the military. For 11 years the member continued to be paid for years of service he did not serve without questioning the information listed on his LES. It was not until August 2015 that the member questioned his pay. Although his inquiry reflected that he believed he had been underpaid because he was receiving pay based on over four years of service when he stated he should have been paid for over six years of service, he acknowledged that he graduated from medical school, the USUHS, in May 2008. This reflects that he knew he was not entitled to receive credit for longevity for pay purposes either for his ROTC time or his time spent in medical school. Under the circumstances, waiver is not appropriate because the member was furnished with documentation in the form of LES that if reviewed would have led him to conclude that there was an error in his PEBD. He has the duty to report the issue to the proper pay officials, and obtain clear and

thorough advice in writing from the appropriate official. In the meantime, he did not acquire title to the questionable overpayments merely because the Government made an administrative error. *See* DOHA Claims Case No. 2012-WV-062502.2 (September 20, 2012).

Conclusion

The member's request for reconsideration is denied, and we affirm the decision dated October 7, 2021. In accordance with DoD Instruction 1340.23 (February 14, 2006) ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

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Member, Claims Appeals Board