

DATE: October 4, 2022

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In Re: )  
          [REDACTED] )     Claims Case No. 2021-WV-060304.2  
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Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

**DECISION**

A member of the U.S. Marine Corps requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-WV-060304, dated February 7, 2022. In that decision, DOHA denied the member’s request for waiver of a debt in the amount of \$3,115.00.

**Background**

On July 8, 2009, the member attended Recruiter School and began performing Recruiter duty in a Recruiter billet (8411) in September 2009. As a result, he began receiving Level-6 Special Duty Assignment Pay (SDAP) effective September 25, 2009.

The record reflects that pursuant to Marine Corps Order (MCO) 7220.12R, *Special Duty Assignment Pay (SDAP) Program*, dated August 6, 2013, members, who were performing in a Recruiter billet and had an additional military occupation specialty (MOS) of 8411, or primary MOS of 8412 and perform duties in an authorized 8411/8412 billet, were eligible for SDAP. In the member’s case, his Careerist Active Duty SDA Only/CAR Recruiter report reflected, in the Message Text section, that his request had been carefully considered and after final review by the Head of the Marine Manpower Enlisted Assignments (MMEA), the member was approved for the intended military occupation specialty (IMOS) in the Career Recruiter billet (8412), effective

December 2, 2013. On February 27, 2014, the member completed the Career Recruiters Course, and was granted the MOS of 8412 (Career Recruiter). However, he remained in the Recruiter (8411) billet and continued to receive Level-6 SDAP.

On August 5, 2014, Marine Administrative Messages (MARADMINs) Number 380/14 was issued, giving advance notification of a change to the MCO 7220.12R. That message stated that due to fiscal constraints, funding for the SDAP program was being reduced in order to comply with lowered funding levels effective October 1, 2014. Specifically, the message stated that members, serving in the SDAP billets listed within the reference and who joined prior to October 1, 2014, would be grandfathered and gave the following as an example:

Pre-1 Oct 2014 example: On 15 Feb 2012, Marine reports into recruiting station to begin duty as a Recruiter (8411 billet) and continues in this duty unit1 [until] 15 Feb 2015. Marine will receive SDAP Level-6 (Pre-1 Oct 2014 pay level) for the entire tour.

Therefore, since the member was assigned to a Recruiter billet (8411), he remained eligible to receive Level-6 SDAP.

The record reflects that on April 1, 2016, the member changed billets from 8411 (Recruiter) to 8412 (Career Recruiter). At that time, he was promoted from a Staff Sergeant to a Gunnery Sergeant, and received a significant increase in basic pay. According to an example in the MARADMINs Number 380/14, a member in this situation SDAP's level should have changed from SDAP Level-6 to SDAP Level-5. Specifically, that example stated the following:

Recruiter [8411] to Career Recruiter [8412] Duty Example: On 15 Sep 2014, Marine is permanently assigned to recruiter duty (8411 billet). The Marine receives SDAP Level-6 (Pre-1 Oct 2014 level) for the entire tour. On 15 Sep 2016, Marine is immediately permanently reassigned to Career Recruiter Duty (8412 billet). Marine will receive SDAP Level-5 while assigned to the 8412 billet.

Due to an administrative error, during the period April 1, 2016, through February 16, 2020, the member erroneously received \$21,865.00 in SDAP Level-6 when he should have only received \$18,750.00 in SDAP Level-5, causing him to be overpaid \$3,115.00 (\$21,865.00 - \$18,750.00).

On July 9, 2020, the member requested waiver of his debt. In that request, the member stated that he did not become aware of the debt until he checked his leave and earnings statement (LES) on March 26, 2020.<sup>1</sup> On January 5, 2021, the Defense Finance and Accounting Service (DFAS) denied waiver of his debt. DFAS determined that the member was assigned to a billet, 8412 (Career Recruiter), during the period of his indebtedness. DFAS found that as a Gunnery Sergeant with 10 years of service, 7 years of recruiting duty, and performing duties as a recruiting instructor, the member should have been familiar with the instructions concerning recruiting duty pay and SDAP levels for recruiters. Therefore, DFAS found that when the

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<sup>1</sup>The member's LES for March 2020 reflects that his SDAP changed from Level 6 to Level 5.

member continued to receive SDAP at Level 6 when he was in a Career Recruiter billet, he should have at least questioned the validity of his pay.

In the member's appeal of DFAS's denial of his waiver request, the member stated that since he completed his MOS 8412 training before October 1, 2014, and he received a roster dated July 9, 2020, which reflected his MOS as 8412, he believed he was grandfathered in, and entitled to receive SDAP at Level 6, especially since his underwent annual SDAP audits.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the member's waiver request. The adjudicator explained that the MARADMINS 380/14 outlined the specific billets and the likely scenarios in which a Marine would be subjected to a lower SDAP level. The adjudicator found that although the member believed he was entitled to the higher SDAP level based on the fact that his MOS was 8412 prior to October 1, 2014, MARADMINS 380/14 did not reference a member's MOS, but referenced a member's billet. She explained that a member does not lose a MOS, unless he changes career fields, whereas a billet is a manpower position number that members fill at their duty station. She stated that on April 1, 2016, the member was placed in the 8412 billet, and was therefore no longer entitled to receive SDAP Level 6. Although the member stated that he underwent SDAP audits and received a July 2020 roster reflecting his MOS and billet, the adjudicator noted that the record did not contain these audits or any other official statement from the member's personnel office reflecting that he was entitled to continue to receive SDAP at Level 6 after changing to the 8412 billet on April 1, 2016. The adjudicator found that the member was on notice by virtue of the publishing of MARADMINS 380/14 that he no longer rated SDAP Level 6 when his billet changed to 8412. Since the member failed to question his entitlement to his pay, the adjudicator held that waiver of the erroneous payment of SDAP would not be proper under the circumstances.

In his request for reconsideration, the member states that he volunteered for recruiting duty in 2009. He states that the reason he chose to become a 8412 was for career progression and he understood that earning the Career Recruiter MOS on December 2, 2013, would put him in the 8412 promotion zone. Therefore, he believed that he was still subject to the grandfather clause because he was zoned for promotion in a new MOS, and should not receive less as a 8412 Career Recruiter. He states that he was never told that he did not rate SDAP at Level 6, but instead was audited annually by his command affirming his entitlement to that level of SDAP.

### **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 in pay documentation submitted to them. 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 he was provided, and compare it with his LES and pay. Although the member maintains that he was annually audited, he has not presented any documentation supporting his assertion that when he changed billets from 8411 to 8412 on April 1, 2016, his SDAP was audited and his entitlement to the SDAP at Level 6 was affirmed. Although he maintains that he was never told he did not rate SDAP at Level 6, he was on notice by virtue of the MARADMINS 380/14, that when he changed billets from 8411 to 8412, he was not entitled to SDAP at Level 6. Under the circumstances, waiver is not appropriate because the member was furnished with documentation which gave an example of his specific circumstance, that if he had reviewed, would have led him to conclude that there was an error in his SDAP. The member had 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 February 7, 2022. 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

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board

SIGNED: Daniel F. Crowley

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Daniel F. Crowley  
Member, Claims Appeals Board