

Discussion

Section 716 of title 32, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the National Guard, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are met by a finding that the claim arose from administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

The member requested and obtained an extension to provide additional documentation until July 25, 2016. Although the member has requested further time to obtain legal counsel and submit additional documentation, DOHA has no authority to grant further time for reconsideration. *See* DoD Instruction 1340.23 (February 14, 2006) ¶ E8.12.

In the member's previous rebuttal, he noted that he was unaware of the fact that at the time of his actual commissioning he would have been eligible for a \$6,000.00 OAB. At a minimum, he contends that he should not have to pay back the \$6,000.00 because had he known about it at the time, he certainly would have made different decisions. As to the actual OAB of \$10,000.00 that he received, he also contends that he always acted in good faith and under every presumption that he was fully eligible. As the adjudicator in the appeal decision stated, while an administrative error may have occurred, our Office has consistently held that the waiver statute does not apply automatically to relieve the debts of members who, through no fault of their own, have received erroneous payments from the government. Waiver action under 32 U.S.C. § 716 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the government. If it were merely a matter of right, then virtually all erroneous payments made by the government to members would be excused from repayment. Additionally, we have consistently held that the United States is not liable for the erroneous actions of its officers, agents, or employees even though committed in the performance of their duties. *See* DOHA Claims Case No. 2015-WV-062904.2 (November 17, 2005).

In the case at hand, the file indicates that the member had nine years of creditable service when he was commissioned as an officer on August 20, 2005; he had over twelve years of creditable service and was serving as a First Lieutenant when he received the erroneous OAB. This Office believes that a member with the rank and length of service such as this officer had attained should reasonably been aware that he did not meet the eligibility requirements for a bonus incentive to become an officer when he had already taken the oath of office more than two full years previously. The member contends that he should be able to rely on those working in the incentives office as they had the expertise in the area. While we do not expect members to be subject matter experts in matters of pay and allowances, we do expect that a senior member of the National Guard would know that he would not be entitled to an incentive to become an officer when he already was an officer. Whatever incentives would have been available at the time the member was actually commissioned are not relevant to waiver consideration of the erroneous payments the member did receive. Our jurisdiction is limited to determining the appropriateness of waiving the erroneous OAB payments. Additionally, this issue has already

been addressed by the Army Board for Correction of Military Records (ABCMR); on March 4, 2014, the member's application was denied. If the member has additional concerns regarding this issue, he should address them to the Department of the Army.

This Office has consistently held that if the recipient of an overpayment is furnished with documentary evidence or information which, if reviewed, would cause a reasonable person to be aware of or suspect the existence of an error, but fails to review such documents (in this case the OAB) or otherwise fails to take corrective action, waiver will generally be denied. The record is absent any evidence that this member took any action questioning his eligibility to receive the OAB even though he had accessed two years prior to signing the contract for the bonus. This Office believes collection of the bonus would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. *See* DOHA Claims Case No. 06110602 (November 16, 2006), DOHA Claims Case No. 04041901 (April 28, 2004), and DOHA Claims Case No. 00111318 (February 13, 2001).

Conclusion

The member's request for reconsideration is denied and the appeal decision of May 24, 2016, is affirmed. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

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Catherine M. Engstrom
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