

member's PEBD was established as May 14, 1999, causing him to be paid as a Second Lieutenant with zero years of experience during the period May 14, 1999, through August 31, 1999. As a result, the member was underpaid \$2,253.42. In September 1999, when the member was attempting to correct his PEBD, his PEBD was erroneously established as January 24, 1991, instead of April 14, 1993. As a result, the member was erroneously paid as a Second Lieutenant with over eight years of service instead of over six years of service. This administrative error caused the member to be overpaid \$23,552.01 from September 1, 1999, through August 15, 2009. Since the member was also underpaid when he was initially credited with zero years, the total overpayment is \$21,298.59 (\$23,552.01 - \$2,253.42).

In his request for waiver, the member states that he exercised due diligence to determine if his pay was correct at each duty station. He states that his pay was verified as correct by pay officials over and over, and he had no reason to believe the information was incorrect. He contends that waiver of the overpayment should be granted on the basis that it resulted from an administrative error and was due to no fault on his part. In the appeal decision, the adjudicator concurred that the debt was the result of administrative error. However, she cited the long-standing principle of this Office that the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the government. Additionally, she determined that the member was aware, or reasonably should have been aware of the error because beginning in August 1999, the member's Leave and Earnings Statement (LES) reflected his years of service as "08", and his pay date as January 24, 1991. Further, the remarks section of his August 1999 LES, stated that on August 19, 1999, the member's pay date was corrected. The member has acknowledged in his waiver request that he receives his LES. Finally, the member signed an Army Senior Reserve Officer Training Corps (ROTC) Non-scholarship Cadet Contract which clearly stated that if he completed the ROTC course of instruction and was appointed an officer, he would not be credited with any length of service for any purpose for the period of his membership in the Reserve Component Unit while he was a member of the ROTC advanced course. The adjudicator determined that the member should have questioned the changes in his PEBD; and because he did not, he is partially at fault and waiver is not appropriate.

In his request for reconsideration, the member submits that he does scrutinize his LES. He states he was aware of the PEBD listed on his LES, as well as the statement on the Senior ROTC Non-Scholarship Cadet Contract. He states that is the reason that he questioned his PEBD at each Personnel Services Battalion (PSB) or installation finance office for the last 5 years. He states that he had the ROTC contract in his possession for each pay inquiry appointment, and he presented the document with his specific concerns about the statement in the contract regarding no time counted for pay or retirement purposes. He states that at each appointment he was assured that nothing was incorrect about his pay. He states that when he initially converted his status and had to account for the number of years of prior service, he had that document and a copy of his DD Form 214. He was told that the rules regarding his case were different due to the circumstances of his enrollment into the Senior ROTC, and the statement was probably in error because it was a standard statement. The member states that when he initially started the "Green to Gold" program he spoke with an Army Reserve recruiter who told him about the Simultaneous Membership Program (SMP). The recruiter told him that the SMP program would alter his retirement timeline, but if he did not enter the SMP his time in

the Senior ROTC would be payable for pay but not retirement since he was entering as a non-scholarship academic junior directly into the ROTC program. He states that he had no way of validating the information at that time because information wasn't as available then, but that is why he checked with each organization during PCS (permanent change of station) moves to ensure the information was correct. When he was advised that he had been receiving incorrect information, he promptly acted to correct it. He contends that he has been prompt in all his submissions throughout this matter, and there is a distinct lack of understanding between DoD and the Army financial organizations regarding this issue. He believes denial of waiver would be against equity and good conscience, because he has acted in good faith although on incorrect information. The member presents his service record and diligence in this process to show the Board that he is an honorable and conscientious person who would not attempt to defraud the government or subvert any regulations.

Discussion

Title 10, United States Code, § 2774, 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 uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States provided there is 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 a waiver of the claim.

Department of Defense Instruction (DoDI) 1340.23, ¶ E4.1.1:

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. . . A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant.

DoDI 1340.23, ¶ E4.1.4:

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 funds for eventual repayment to the Government, even if the Government fails to act after such notification.

The member did contact finance officials, which is what is expected of a prudent person. Also, while an administrative error did occur, our Office has consistently held that the waiver statute does not automatically apply to relieve the debts of all members, who through no fault of their own, have received erroneous payments from the government. Waiver action under 10 U.S.C. § 2774 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.

The member was, unfortunately, misinformed regarding the effect of enrollment into the SMP. Had he enrolled in the SMP, the time spent in the ROTC advanced program would have been creditable for pay purposes. Section 2106 of title 10 of the United States Code allowed an officer appointed in the Senior Reserve Officers' Training Corps to be credited with any period of enlisted service performed after August 1, 1979, as a member of the Selected Reserves. Paragraph 010101.D.14, states, "Prior provisions of law excluded the Simultaneous Membership Program from creditable service for commissioned officers effective October 13, 1964. Public Law 104-201, section 507, September 23, 1996, amended these provisions to provide service credit retroactive to August 1, 1979." In his request for reconsideration, the member contends that he was advised at each PCS that his pay was correct. The fact that the member consistently questioned his pay at each duty station leads this Board to conclude that he did have doubts about the correctness of his pay date. He should have required the local finance office to give him a written opinion and/or send the question to a higher office. *See* DOHA Claims Case No. 02120917 (December 20, 2002); DOHA Claims Case No. 01010906 (March 8, 2001); DOHA Claims Case No. 97042817 (July 1, 1997); and Comptroller General decision B-256417, July 22, 1994. Additionally, even though there was an error, we have consistently held that the United States is not liable for the erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties. *See* DOHA Claims Case No. 98033023 (June 25, 1998).

The member argues that the overpayment was not based on fraud, misrepresentation, fault, or lack of good faith. The Board finds no indication of fraud, misrepresentation, or lack of good faith on the part of the member. The Board is unable to say that the member is entirely without fault. However, the legal definition of "fault" does not imply any ethical lapse on the part of the member. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person: if such a person knows or reasonably should know that he is receiving money to which he is not entitled. In such a situation, waiver is precluded. *See* Instruction, ¶ E4.1.4.

Conclusion

The employee's request for reconsideration is denied, and we affirm the July 28, 2011, decision. In accordance with DoDI 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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