

KEYWORDS: waiver of indebtedness

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.

CASENO: 2012-WV-062502.2

DATE: 9/20/2012

DATE: September 20, 2012

In Re:)	
[REDACTED])	Claims Case No. 2012-WV-062502.2
Claimant)	

**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.

DECISION

A member of the U.S. Marine Corps (USMC) requests reconsideration of the July 23, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-062502.2.

Background

On April 19, 2006, the member entered the USMC as a Private, and he enrolled in the Platoon Leaders Class (PLC) Program by executing a *Service Agreement - Platoon Leaders Class (Ground)*. His pay entry base date (PEBD) was established as May 16, 2006. He entered Officer Candidate School (OCS) on July 8, 2006. Effective July 18, 2006, the member was disenrolled from the PLC program.¹ From September 12, 2006, through May 25, 2007, the member was a Private in the USMC. On May 26, 2007, the member again entered OCS. On September 4, 2007, the member applied for Marine Corps Tuition Assistance Program (MCTAP) funds while in college by executing a MCO 1560.33, *Tuition Assistance Agreement Platoon Leaders Class Program*. The record reflects that the member's application and acceptance of the MCTAP resulted in a modification of his PEBD. On July 25, 2009, the member became a commissioned officer in USMC. On the member's *Appointment Acceptance and Record*, NAVMC 763, which he signed on the date of his commission, his PEBD was listed as April 23, 2009. The record reflects that the member's PEBD should have been established as April 21, 2009. However, due to an administrative error, the member's pay records erroneously reflected a PEBD of May 16, 2006. As a result, the member's basic pay was miscalculated during the period October 1, 2009, through January 31, 2011, resulting in an overpayment of \$11,277.30.

In the appeal decision, our Office denied the member's request for waiver. In denying the member's waiver request, the adjudicator quoted the member's statements in his initial waiver request that he knew he was being paid as an O-1 with three years as of October 1, 2009, and as far as he was concerned, his PEBD was when he first attended OCS and rightfully rated an O-1 with three years. The adjudicator noted that the member's initial appointment to OCS began July 8, 2006, but effective 10 days later, July 18, 2006, he was separated from OCS. Therefore, the adjudicator concluded that the member could not have reasonably believed that as of October 1, 2009, he was entitled to receive O-1 pay based on three years of service. The adjudicator also relied on the fact that the member's NAVMC 763 specifically reflected that his enlistment periods as a Private (April 19, 2006, through July 7, 2006, and September 12, 2006, through May 25, 2007), were "NOT CREDITABLE FOR PAY PURPOSES." Therefore, the adjudicator concluded that the member should have questioned the discrepancy between the information contained on his NAVMC 763 and his PEBD as reflected on his leave and earnings statements (LES).

In his request for reconsideration, the member states that when he executed his NAVMC 763, he noticed that the time he first went to OCS was from July 8, 2006, through July 18, 2006. He states that he got paid during this period. Therefore, he states that this is why he believed that his PEBD began at this time. He states that the line on his NAVMC 763 which includes the words, "NOT CREDITABLE FOR PAY PURPOSES," was for the time period he was attending

¹The record reflects that the member was released from active duty because of back pain, and informed that he no longer had any contractual affiliation or obligation to any component of the Marine Corps. He was separated as an Officer Candidate and his description of service was "entry level separation."

college and had no service obligation. However, he states that the PLC program assured him that his PEBD would start on his first day of OCS. Finally, he states that he was never briefed by his Officer Selection Officer (OSO) or signed a document concerning anything about the effect of his acceptance of MCTAP funds on his PEBD.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments to a member or former member of the uniformed services if repayment 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 or former member. *See* Department of Defense Instruction 1340.23 (Instruction) (February 14, 2006) ¶ E4.1.2.

A member is considered to be at least partially at fault, and waiver is precluded when, in light of all the circumstances, it is determined that he should have known that he was being overpaid. The standard employed to determine whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was receiving payments in excess of his entitlements. A member is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in question. *See* DOHA Claims Case No. 07110102 (November 26, 2007). It is a long standing rule that members have a duty to verify information on their LES. Once a member receives information that brings the validity of a payment into question and fails to take corrective action, waiver of the resulting overpayment is precluded because the member is at least partially at fault in the accrual of the debt.

In this case, on July 25, 2009, the member signed his NAVMC 763. His NAVMC 763 reflected his PEBD as April 23, 2009.² The PEBD reflected on the member's October 2009 LES was May 16, 2006. Although the member states that he was assured his PEBD would be the start of OCS, the information on his NAVMC 763 clearly conflicted with the information contained on his LES. In addition, the date he entered OCS was July 8, 2006, not May 16, 2006. The member was furnished with information that would lead a reasonable person to conclude that there was an error in his PEBD. The member had a duty to report the discrepancy, and obtain clear and thorough advice in writing from an appropriate official. In the meantime, he does not acquire title to any questionable overpayments merely because the government made an administrative error. Under these circumstances, waiver is not appropriate. *See* DOHA Claims Case No. 2009-WV-030404.2 (October 1, 2009) and DOHA Claims Case No. 07110102, *supra*.

Although the member states that he was never briefed or informed that his acceptance of MCTAP funds would alter his PEBD, this does not change the fact that the member had

²The record reflects that on February 8, 2011, the member's NAVMC 763 was corrected to reflect the member's PEBD as April 21, 2009, instead of April 23, 2009.

conflicting information in his possession and did not at least question the discrepancy. Further, the record reflects that it is USMC practice to brief all officer candidates about the effect of acceptance of MCTAP funds on their PEBDs.

Conclusion

The member's request for relief is denied, and we affirm the July 23, 2012, appeal decision to deny waiver in the amount of \$11,277.30. In accordance with Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board