

DATE: April 2, 2014

In Re:

[REDACTED]

Claimant

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Claims Case No. 2013-WV-010805.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 10 U.S.C. § 2774, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and allowances to a member or former member of the Uniformed Services if payment would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member.

DECISION

A Navy service member requests reconsideration of the December 18, 2013, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2013-WV-010805. In that decision, our Office denied waiver of the government's claim in the amount of \$33,551.08.

Background

The record shows that on November 24, 2009, the member graduated with a degree in Clinical Psychology. On December 21, 2009, the member volunteered for service in the Medical Service Corps (MSC) by signing a MSC Service Agreement. In addition, she signed an Armed Forces Service Agreement with the Armed Forces Active Duty Health Professionals Loan Repayment Program (AFADHPLRP), also referred to as the Program. The Program offers financial support for authorized health care educational loan repayment in return for an active duty obligation. On December 21, 2009, she also accepted her commission as a Lieutenant in the United States Navy (USN), and on January 2, 2010, she was accessed into the USN. At that time her pay entry base date (PEBD) was erroneously established as January 3, 2006, instead of

December 21, 2009. This caused her basic pay to be miscalculated based on four years of service instead of zero years of service.

The member was paid correctly through February 28, 2010, despite the erroneous PEBD. However, due to the incorrect PEBD, she was overpaid \$26,973.98 in basic pay from March 1, 2010, through September 30, 2011. In October 2011, the error was discovered and the Defense Finance and Accounting Service (DFAS) corrected the member's PEBD from January 3, 2006, to December 21, 2009, which corrected the member's years of service. However, DFAS failed to correct the member's basic pay. Thus, she continued to be overpaid from October 1, 2011, through April 30, 2012, in the amount of \$6,577.10. The total overpayment is \$33,551.08.

Discussion

Title 10, United States Code, § 2774, provides authority for waiving claims for erroneous payments of pay and allowances made to or on behalf of members or former members of the Uniformed Services, if collection 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 an administrative error with no indication of fraud, fault, misrepresentation, of lack of good faith on the part of the member or former member or any other person having an interest in obtaining the waiver.

The Administrative Report from DFAS, dated January 3, 2013, informed the member that administrative mistake on the part of the government in making an erroneous payment is not, in and of itself, sufficient basis for granting a waiver. The member stated to DFAS that her recruiter informed her that she would receive credit towards her rate of pay for her years of education. DFAS pointed to the documents the member signed as proof that she should have known this was not the case. The member signed a Medical Programs Department Memorandum of Understanding for Initial Date of Rank (MPDM) which appears to have shown how her date of rank was computed. DFAS contends that the form shows that her four years of educational credit were utilized in order for her to receive the rank of Lieutenant, and that her education would not affect her date of rank or PEBD. Furthermore, the member signed the Program contract, of which part 12 and paragraph b states:

I further understand and agree that service performed in other than an active duty status while I am a member of this Program will not be counted: To compute years of service creditable under 37 U.S.C. 205.

DFAS contends that this paragraph indicates that the member is not eligible to receive credit for years of education because they were not performed while she was on active duty while a member of the Program. They believe that a thorough review of these documents would have reasonably revealed this to the member. Therefore, waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. *See* Department of Defense Instruction 1340.23 [hereinafter Instruction] ¶ E4.1.4. DFAS notes that the member's belief that she should receive PEBD credit for her period of education may have been based upon misinformation from the recruiter; however, unfortunately there is no way to determine exactly what information she may have been given.

In her appeal, the member contends, “DFAS and its representatives appears to be asserting that I should have assumed something not included in a contract, and not stated explicitly anywhere in any of my agreements.” She stated that the term PEBD or rate of pay were never referenced on the MPDM or the Program contract. The adjudicator agreed with DFAS that the member was furnished with documentary evidence (Leave and Earnings Statement [LES], MPDM, and the Program contract), that would have caused a reasonable person to be aware of or suspect the existence of an error. If a person fails to review such documents and take appropriate action, waiver will generally be denied. Thus, our Office denied waiver of the overpayment on December 18, 2013.

The member requested reconsideration on January 17, 2014. As to the point that the member should have reviewed her LES during the period when she was paid correctly until February 28, 2010, and then it was adjusted incorrectly in March 2010, she argues that she was in Navy Officer Basic Course with no access to the internet. A review of the rules available on the Officer Training Command site confirms that internet is not available in the officer candidate rooms. (There are other restrictions at other sites.)¹ When the member arrived at her first permanent duty station, she then reviewed her LES, and presented it to her finance office. At the end of the member’s pay period for March 2010, the member’s basic pay almost doubled. This would certainly have caused a reasonably person to, at a minimum, question her pay to determine if an error had occurred.

The member states that when she was considering offers from military services, initially the Army offered her \$120,000.00 loan repayment for a three-year contract, and the Navy offered her \$80,000.00 for the same length of time. As this was a significant difference, and the member had a preference for joining the Navy, she asked the recruiter if there were any additional bonuses available. The member contends that it was at this time that the Navy recruiter pulled out a chart of pay and told her where her pay would be on the chart, referencing the over four years of service for an O3 (Lieutenant). Thus, over time, the recruiter informed her that if she stayed in the Navy she would ultimately make more money than in the Army. The member argues that this is not administrative error; this constitutes erroneous enlistment information on the part of the recruiter.² The member states she relied on the erroneous information, accepted the offer of the Navy and received \$80,000.00. She used her own savings to repay the additional \$40,000.00 in student loans. She contends that had she been advised properly, she would have joined the Army and received significantly more loan repayment. The member has enclosed a letter from her first supervisor to whom she confirmed in March 2010 her motivation about joining the Navy. At that time, the member indicated that she was motivated to be involved with the military and had considered the Army, but the Navy offered a better contract.

As to the member’s contention that the term PEBD or rate of pay were never referenced on the MPDM or the Program contract, she has attached several letters. These letters are from senior military Navy officers in places of authority of the Navy Medical Service Corps. They have all reviewed the member’s file and agree with her contention. While DFAS referred to the

¹ See http://www.ocs.navy.mil/ldo_faq.asp; What to expect when I get there.

² This Office is not the forum to decide these issues, and we take no position on her contention.

term PEBD, it is important to note that the member's LES, which she admits to having reviewed when arriving at her first duty station, used the term "pay date" and "years of service."

Waiver generally is not appropriate when a recipient of a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay and allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary. *See* DOHA Claims Case No. 09092401 (October 16, 2009). Thus, when the member arrived at her first duty station and had access to her LES, and her pay almost doubled, she should have attempted to ascertain a reason for the overpayment. Although the member states that she visited the appropriate individual with questions about her pay, there is no documentation of that exchange in the file, nor is there documentation of any further steps the member took. The file contains a contract and other documents which the member signed. While the member states that she received oral promises of further compensation, the record contains no documentation of those promises. We must base our decision on the written record. Moreover, part 17 of the Program contract states that the written contract itself constitutes the entire agreement with the member and that no oral agreement or representations will affect the contract. It is not against equity and good conscience for the government to collect the overpayment past the date of March 2010, as the member should have set aside the funds in the event that repayment would be necessary. Prior to March 2010, the member was paid correctly. After October 2011, the error was discovered. Although it was not corrected until April 2012, the member was aware of the error. Thus, the only date the member could reasonably not have known she was being overpaid was prior to and including the month of March 2010. During that time period, the only time the member was overpaid was the month of March 2010.

Conclusion

The member's request is granted to the extent of the overpayment in the amount of \$3,586.88, and denied as to the overpayment in the amount of \$29,964.20. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Jean E. Smallin
Chairman, Claims Appeals Board

Gregg A. Cervi
Member, Claims Appeals Board

Natalie Lewis Bley
Member, Claims Appeals Board