

DATE: July 31, 2014

In Re:)

[REDACTED])

) Claims Case No. 2013-WV-091601.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A midshipman in the Naval Reserve Officers Training Corps (NROTC) Scholarship Program who disenrolled from the program and failed to complete her subsequent military service obligation was required to reimburse the government for the cost of advanced educational assistance she received. The resulting debt cannot be considered for waiver under 10 U.S.C. § 2774, because the payments were proper when they were made.

DECISION

A former NROTC midshipman requests reconsideration of the May 23, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-091601. In that decision, DOHA determined that the government's \$56,082.00 claim against her could not be considered for waiver.

Background

The record shows that on August 11, 2009, the midshipman signed a Naval Reserve Officers Training Corps (NROTC) Scholarship Service Agreement, which enrolled her in the NROTC Scholarship Program and assigned her to the NROTC unit at Auburn University. As a result, during the period August 17, 2009, through December 12, 2011, educational benefits in the amount of \$56,082.00 were paid on the midshipman's behalf while she attended the university. Under the terms of the Scholarship Service Agreement, the midshipman had an obligation to complete her course of instruction at the university and serve eight years of military

service. The midshipman disenrolled from the program and signed the *NROTC Disenrollment Authorization* effective February 17, 2012. Paragraph 2 on the form states: “The Secretary of the Navy has approved that Midshipman [redacted] be discharged from the Naval Service and that she be required to reimburse the government for the amount of advanced educational assistance received. The following page 13 entry shall be made and forwarded to NSTC (OD4): ‘I acknowledge indebtedness to the United States Government for advanced educational assistance in the amount of \$56,082.00 received in the form of NROTC scholarship benefits.’” Above the midshipman’s signature line, the form refers to the attached NAVPERS 1070/613. The NAVPERS 1070/613, which is signed by the midshipman and witnessed, states: “I acknowledge indebtedness to the United States Government for advanced educational assistance in the amount of \$56,082.00 received in the form of NROTC scholarship benefits.”

The midshipman argues that collection of the debt against her is against equity and good conscience and not in the best interest of the United States. She states that she was awarded educational benefits and entered Auburn University because the benefits made that possible. After she enrolled and received payments for almost three years, she was found medically ineligible for the NROTC program. She states that she has no money to pay for the rest of her education. She states that she is in a worse position financially than if she had never received the educational benefits. She further states that she refused multiple offers from other universities on the assumption that she would continue her service in the Navy. She believes that recovery of the payments would be against equity and good conscience because she gave up a valuable right to education with the other educational programs.

Discussion

Section 2774 of title 10, United States Code, 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 of the claim would be against equity and good conscience and not in the best interest 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, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

While our office has the authority to consider certain claims of the United States for waiver under the provisions of 10 U.S.C. § 2774, we cannot consider a debt for waiver unless it arose from an erroneous payment of pay or allowances. The debt here did not arise from “pay or allowances” as that term is used in 10 U.S.C. § 2774(a) because educational expenses are not considered “pay or allowances.” *See* DOHA Claims Case No. 2009-WV-072004.2 (October 29, 2009); DOHA Claims Case No. 07101704 (October 30, 2007); and Comptroller General decision B-190935, Oct. 4, 1979. Educational expenses do not fall into the category of “military pay,” which is another term for pay and allowances or salary. *See* B-190935, *supra*. Moreover, if the payments were valid when made, we have no authority to relieve a midshipman of her obligation to repay the government. In this case, the midshipman signed the NROTC Scholarship Service Agreement. When she disenrolled from the program, she acknowledged that she would reimburse the government for the advanced educational assistance she received in the amount of

\$56,082.00. The fact that the midshipman disenrolled from the program prior to completing the requirements does not change the nature of the payments received.

Although we have no authority to consider this debt for waiver under 10 U.S.C. § 2774, this does not preclude the midshipman from pursuing other available remedies. In this regard, we note that the express statutory authority for the Secretary of the Navy to provide advance education assistance to a midshipman is found in 10 U.S.C. § 2005. Under 10 U.S.C. § 2005(a)(3), a midshipman who fails to complete the period of service specified in the agreement is subject to the repayment provisions of 37 U.S.C. § 303a(e). However, under 37 U.S.C. § 303a(e), the Secretary of the Navy has the discretion to determine if the midshipman's repayment of the unearned portion of the bonus or similar benefit is appropriate based on whether repayment would be contrary to a personnel policy or management objective, would be against equity and good conscience, or would be contrary to the best interests of the United States. The implementing regulations for 37 U.S.C. 303a(e) are found in Volume 7A, Chapter 2 of the DoD Financial Management Regulation (DoDFMR), DoD 7000.14-R. Paragraph 020304(A) of Volume 7A, Chapter 2 states that in instances involving a member's separation for medical reasons, which were not the result of the member's misconduct, the Secretary of the Military Department concerned has the discretion to determine whether to require repayment of the unearned portion of pay or benefit, or to pay an unpaid balance of a pay or benefit. The Secretary of the Military Department concerned may, through regulation, delegate the authority to make repayment determinations consistent with the criteria set forth in this section of the DoDFMR. We have been advised by the Navy that they have delegated this authority to the Board of Correction of Naval Records (BCNR).¹ The Navy has advised us that the midshipman should submit a DD Form 149, *Application for Correction of Military Record*, which can be downloaded at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0149.pdf>. The midshipman may wish to pursue this remedy with the BCNR. See DOHA Claims Case No. 2008-WV-081106.3 (April 5, 2011); DOHA Claims Case No. 2010-WV-101303.2 (March 15, 2011); and DOHA Claims Case No. 09082801 (September 21, 2009).

¹Information for filing an application with the BCNR can be found on their website at <http://www.donhq.navy.mil/bcncr/bcncr.htm>.

Conclusion

The former midshipman's request for relief is denied, and we affirm the May 23, 2014, appeal decision. In accordance with the Department of Defense Instruction 1340.23 ¶ 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board