

DATE: April 29, 2015

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In Re:

[REDACTED]

Claimant

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) Claims Case No. 2014-WV-090504.2  
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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The unearned portion of a selective enlistment bonus (SEB) may not be considered for waiver under 32 U.S.C. § 716 because payment was proper when made.

When a payment of SEB is erroneous when paid, it may be considered for waiver. However, under 32 U.S.C. § 716, waiver is not appropriate when a member was aware or should have been aware that he was being overpaid.

**DECISION**

A former member of the Army National Guard (ANG) requests reconsideration of the March 31, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-090504.

**Background**

On January 19, 2007, the member enlisted in the ANG. In exchange for serving at least six years in a paid drill status assigned to the 670<sup>th</sup> Military Police, the member was eligible to receive a \$20,000.00 SEB. On October 10, 2007, the member received the first installment in the amount of \$10,000.00. On September 19, 2008, the member was released from the 670<sup>th</sup> Military Police and transferred to the Inactive National Guard (ING). Since the member was released from the 670<sup>th</sup> Military Police and no longer in a paid drill status prior to the completion

of his service commitment, recoupment of a *pro rata* portion of the SEB in the amount of \$4,444.44 was required.

On January 19, 2010, the member was erroneously issued the second installment of the SEB in the amount of \$10,000. Since the member was released from the 670<sup>th</sup> Military Police and no longer in a paid drill status effective September 19, 2008, he was no longer entitled to receive any SEB payments. As a result, he became indebted for the erroneous \$10,000.00 SEB payment, which increased his debt to the United States to \$14,444.44.

In the appeal decision, the DOHA adjudicator determined that the claim against the member in the amount of \$4,444.44 could not be considered for waiver under 32 U.S.C. § 716 because it did not arise from an erroneous payment. The adjudicator further determined that the erroneous \$10,000.00 payment should be denied. The adjudicator found that the member should have questioned why he was entitled to receive such a large payment for an enlistment he had terminated.

In his request for reconsideration, the member states that he had no reason to question his entitlement to the SEB bonus payment of \$10,000.00. He states that he entered the ING on September 19, 2008, to attend the Border Patrol Academy. He states that he subsequently worked as a Border Patrol Agent securing the nation's borders. He states that he then returned to his unit and was deployed to Afghanistan. He states that while he was in Afghanistan, he received the \$10,000.00 payment of SEB. He states that he did not find out he was no longer eligible to receive the SEB due to his transfer to the ING until he was honorably discharged in 2012. He was under the impression that entering the ING would only effect his retirement and not effect his entitlement to the SEB. He acknowledges that he should have been more responsible in reviewing and understanding his enlistment agreement. However, he states that he only looked at it the day he signed it, and he does not remember reading the portion of the agreement concerning the effect of entering the ING on his entitlement to the SEB. He states that even if he would have read it, he still would have had no idea what it meant since he did not know what ING was until his chain of command told him about it a year after he signed the agreement.

### **Discussion**

Under 32 U.S.C. § 716, we have the authority to waive a claim for the erroneous payment of pay or allowances if collection 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. Our Office has consistently held that the waiver authority provided by 32 U.S.C. § 716 applies only to claims arising out of erroneous payments, and not to payments which are valid when made. We have further held that a claim arising from a properly paid enlistment bonus, which later must be recouped because of a member's early separation, is not a claim arising from an erroneous payment which may be considered for waiver under 32 U.S.C. § 716. *See* DOHA Claims Case No. 2013-WV-110407.2 (November 6, 2014); DOHA Claims Case No. 2012-WV-031303.2 (May 14, 2012); and DOHA Claims Case No. 09082801 (September 21, 2009).

Although we have no authority to consider the unearned portion of a SEB in the amount of \$4,444.44 for waiver because it does not constitute an erroneous payment, our decision does not preclude the member from seeking other available remedies. We note that under 37 U.S.C. § 303a(e), the Secretary concerned, (in this case the Secretary of the Army or the appropriate National Guard authority), has the discretion to determine if the member's repayment of the unearned portion of the SEB 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 member may wish to pursue this remedy with the Secretary of the Army through his state's National Guard chain of command. *See* DOHA Claims Case No. 2012-WV-031303.2, *supra*.

The payment of the \$10,000.00 SEB made to the member was erroneous when paid and may be considered for waiver. However, under 32 U.S.C. § 716, a member is considered to be 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 payment in excess of his entitlements and made inquiries or brought the matter to the attention of the appropriate officials. 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. 2012-WV-040904.2 (September 25, 2012). In this case, on October 10, 2007, when the member enlisted in the ANG, in exchange for the SEB, the member agreed to serve at least six years in a paid drill status with the 670<sup>th</sup> Military Police. Specifically, he agreed to the following:

6. I am enlisting into the following Unit: 670<sup>th</sup> MILITARY POLIC, UIC: WTSSAA, Position Number: 0000, paragraph Number: 0104, Line Number: 0044 to serve at least 6 years in a paid drill status.

7. I am enlisting for 31 B1O00YY which is designated as a NGB or State Critical Skill MOS.

However, on September 19, 2007, the member was released from the ANG and transferred to the ING. Since he was no longer in a paid drill status, he should have at least questioned the effect his transfer to the ING had on his entitlement to payment of the SEB. Even though the member states that he had no idea of the effect of his transfer to the ING on his entitlement and returned to his unit for deployment to Afghanistan, we note that he did not serve the full six years with the 670<sup>th</sup> Military Police as set forth under the agreement even if the time he spent in the ING was counted. Given that he enlisted in October 2007 and he states that he was discharged in 2012, he only would have served five years. Under the circumstances, the member had documentation that reflected that if he did not serve six years in a paid drill status, he was no longer eligible to receive the SEB. Therefore, waiver is not appropriate. *See* DOHA Claims Case No. 2012-WV-040904.2, *supra*; and DOHA Claims Case No. 00102418 (December 18, 2000).

## Conclusion

The member's request for relief is denied and we affirm the appeal decision of March 31, 2015. In accordance with the Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative decision of the Department of Defense concerning the member's request for waiver in this matter.

Signed: Jean E. Smallin

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board