

DATE: March 9, 2016

In Re:

[REDACTED]

Claimant

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Claims Case No. 2014-WV-120803.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

1. Under the provisions of the Department of Defense Instruction 1340.23, the Defense Office of Hearings and Appeals generally must receive a claimant's request for reconsideration of an appeal decision within 30 days of the date of the appeal decision. Upon request, this period may be extended for an additional 30 days for good cause shown. In the absence of such a request, the decision becomes final 30 days after the date of the appeal decision.

2. Regardless of the lateness of the appeal, this Office does not have the authority to consider the request for waiver. The cadet signed a contract, was enrolled in the Reserve Officer Training Corps program, and was obligated to complete the course of instruction and his service commitment for the advanced educational assistance payments he received. The cadet was disenrolled from the program prior to completing the requirements. 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."

DECISION

A former Reserve Officer Training Corps (ROTC) cadet of the Army National Guard requests reconsideration of the December 23, 2014, appeal decision of the Defense Office of Hearings and Appeals in DOHA Claim No. 2014-WV-120803. In that decision, DOHA determined that the government's \$36,865.00 claim against him could not be considered for waiver.

Background

The record shows that the cadet was in the Army National Guard, through the Simultaneous Membership Program, and enrolled in the ROTC program while he attended Morehouse College. Under this program, the cadet signed a three-year contract on December 10, 2010, in exchange for the Army paying him advanced financial educational assistance. Consequently, the cadet had an obligation to complete his course of instruction and a set number of years of military service. During the period December 10, 2010, through January 6, 2012, the cadet received advanced financial educational assistance from the Army in the total amount of \$36,865.00. However, effective July 31, 2012, the cadet was disenrolled from the ROTC program. Since the cadet did not complete his course of instruction or term of service, he was required to reimburse the government for the advance financial educational assistance he received in the amount of \$36,865.00.

The appeal decision was dated December 23, 2014, and in that decision the cadet was advised that he could request reconsideration of the decision. However, the letter advised the cadet that he had 30 days from the date of the appeal decision to request reconsideration. He was further advised that if an extension of time was needed, he could request an additional 30 days. This Office received a number of phone calls from the member in December 2015 in which he indicated that he had not received the decision from our Office. This Office mailed the cadet a copy of the decision and requested that he explain the facts of why he did not receive the initial decision. The decision was mailed to a different address than the first appeal; however, the cadet had not updated his address with the Defense Finance and Accounting Service (DFAS). The cadet was advised to send the request to this Office; however, he sent the request to DFAS. The request for reconsideration was finally located in DFAS in February 2015. At that time, this Office advised the cadet we would issue a decision in the case.

Discussion

A request for reconsideration should have been received by this Office by January 22, 2015. The cadet has not given an acceptable explanation as to why his request is untimely. However, even if the request had been timely, the cadet's arguments would not have changed our decision.

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 the waiver.

While this 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 and allowances. The debt here did not arise from "pay and allowances" as that term is used in 10 U.S.C. § 2774(a) because educational expenses are not considered "pay and 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. Moreover, if the payments were valid when made, we have no authority to relieve a member of his obligation to repay the government.

In his request for reconsideration, the cadet argues about the reasons he was disenrolled from the ROTC program. The cadet challenges the Army's determination regarding his enrollment in the program. Our authority in this case is limited to a consideration of whether the cadet's debt may be waived under 10 U.S.C. § 2774. We are obligated to give considerable deference to military authorities to resolve "uniquely military matters," such as personnel decisions. *See Chappell v. Wallace*, 462 U.S. 296 (1983); and Comptroller General decision B-259696, Jan. 25, 1999. In situations like this, we accept the agency's statement of the facts absent clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 03082101 (August 29, 2003). The military states the cadet's disenrollment was due to an indifferent attitude as evidenced by his frequent absences from military science classes and training. The cadet states that he had excuses for his absences. Since military personnel decisions are matters within the discretion of the military departments, this Office will not question the Army's determination that the cadet breached his agreement to serve.

Although we have no authority to consider this debt for waiver under 10 U.S.C. § 2774, this does not preclude the cadet from pursuing other remedies. In this regard, we note that the express authority for the Secretary of Defense to provide advanced educational assistance to a member is found in 10 U.S.C. § 2005. Under 10 U.S.C. § 2005(a), a member who fails to complete the educational requirements and does not serve the requisite years of service is subject to repayment provisions of 37 U.S.C. § 303a(e). However, under 37 U.S.C. § 303a(e), the Secretary concerned (in this case, the Secretary of the Army), has the discretion to determine if the member's 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 cadet may wish to pursue this remedy with the appropriate authorities. *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).

We note that the cadet originally requested his file be considered for remission rather than waiver; however, the same problem arises in that the payment must have been made in error and this payment was valid when made.¹ Finally, the cadet contends that this would cause him financial hardship; however, financial hardship is not a factor for consideration in determining whether waiver is appropriate. *See* DoD Instruction 1340.23 ¶ E4.1.7.

¹ This Office takes no position whether the cadet would meet the eligibility requirements for remission of his debt. The address to request remission is Commander, U.S. Army Human Resources Command, ATTN: AHRC-EPO-A, Dept. 334, 1600 Spearhead Division Road, Fort Knox, KY 40122-5303. Phone number is 1-888-276-9472.

Conclusion

The cadet's request for relief is denied, and we affirm the December 23, 2014, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative decision of the Department of Defense in this matter as regards to waiver.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

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Gregg A. Cervi
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board