

DATE: September 3, 2015

In Re:)

[REDACTED])

) Claims Case No. 2015-WV-020306.2

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 to the government.

DECISION

A U.S. Army member requests reconsideration of the May 19, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-020306. In that decision this Office denied waiver of the overpayment of basic pay in the amount of \$25,982.45.

Background

The member served in the U.S. Navy Reserve during the period May 12, 2000, through July 31, 2005, for five years, two months, and 20 days. On August 1, 2005, the member signed a *Department of the Army Service Agreement F. Edward Herbert Armed Forces Health Professions Scholarship Program (AFHPSP)*. Under the agreement, the member agreed to serve with the U.S. Army for four years on extended active duty and four years in the Individual Ready Reserve (IRR) in exchange for scholarship benefits. In the agreement, the member acknowledged that he understood and agreed that service performed while he was a member of the AFHPSP would not be counted in computing years of service creditable under 37 U.S.C. § 205. On July 5, 2009, the member entered active duty with the Army. At that time, his pay entry base date (PEBD) was erroneously established as May 12, 2000, and his years of service were erroneously listed as "09." As a result of this administrative error, the member was paid as

a Captain beginning with over nine years of service during the period July 6, 2009, through October 30, 2013, causing him to be overpaid \$25,982.45.

The member subsequently applied for a remission with the Army Human Resources Command (HRC) at Fort Knox, Kentucky. His request for remission was partially approved in the amount of \$6,495.61, leaving the member liable in the amount of \$19,846.84. Although the member in the appeal decision requested waiver of an unspecified amount less than \$19,846.84, the adjudicator considered the entire amount of \$25,982.45 for waiver. In his rebuttal to the administrative report, the member clarifies that he is not seeking waiver of the entire \$19,846.84, but only the overpayments from July 2009 through July 2013, as he discovered the overpayment in August 2013 and informed his supervisors and began to set aside funds for repayment. The amount the member requests to be waived would then be the amount of \$17,617.54. The member in his rebuttal states that our Office's discussion of the original waiver amount is prejudicial to him because it makes him appear to be asking for waiver of an amount that is inappropriate. It is our policy to always use the original waiver amount. The fact that other amounts may be remitted, or excepted is noted and will be honored by the Defense Finance and Accounting Service; however, since those are actions not taken by this Office, we always note the original waiver amount. It has no effect on the position of the member.

Discussion

Section 2774 of title 10, United States Code, 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. However, the statute states that waiver may not be granted if fraud, fault, misrepresentation, or lack of good faith are present.

The member applied to the AFHPSP, effective August 1, 2005, by signing USAREC Form 1131. Paragraph 20 stated:

I further understand and agree that service performed while I am a member of this Program will not be counted:

- a. In determining eligibility for retirement other than by reason of a physical disability incurred while on active duty as a member of the Program; or
- b. In computing years of service creditable under Title 37, United States Code, Section 205.

The member contends that he did not understand the code section cited in computing the years of service. However, this Office has determined that a reasonable person would read section (a) and understand that service while in the Program would not be counted in determining eligibility for retirement.

The member's DA Form 1506, *Statement of Service – For Computation of Length of Service for Pay Purposes*, dated July 9, 2009, correctly listed his PEBD as "20050801." He

turned this form into his local personnel office at his first assignment as a Medical Corps Officer. An administrative error was made, and the service he performed while in the AFHPSP was counted in determining his eligibility for retirement. His PEBD was listed on his Leave and Earnings Statement (LES) as "000512" or May 12, 2000, and his years of service listed as "09." The member states that waiver should be granted as the error was administrative with no fault on his part.

While an administrative error did occur, this Office has consistently held that the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the government. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the government. If it were merely a matter of right, then virtually all erroneous payments made by the government to service members would be excused from repayment. *See* DoD Instruction 1340.23 ¶ E4.1.3, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances* (February 14, 2006) (hereinafter Instruction).

This Office has consistently held that waiver is not appropriate when a member knows or reasonably should know that he was being overpaid. The member indicates on his DD Form 2789, *Waiver/Remission of Indebtedness Application*, dated April 3, 2014, that he was receiving his LES. If a member is furnished with documentary records or information which, if reviewed, would cause a reasonably prudent person of the same rank and experience to be aware or suspect the existence of an error, but the member fails to review the document carefully or otherwise fails to take corrective action, the member is not without fault and waiver is precluded.

In this case, the member was furnished with documentation in the form of his AFHPSP agreement, his DA 1506, and his LES that would have alerted him to the possibility of an error in his pay. We cannot stress too highly the importance of a careful review by each member of the pay documents provided by the employing agency. Pay documents are issued to members so that they can verify the accuracy of their pay and allowances (in this case, his LES); we have consistently held that a member who receives such documents has a duty to carefully examine them and report any errors. Since the member failed to do so, we must hold him partially at fault in the matter, which statutorily precludes waiver of the overpayment. *See* DOHA Claims Case No. 2012-WV-062502.2 (September 20, 2012), and DOHA Claims Case No. 06110603 (November 16, 2006). The member's assertion that the adjudicator in the appeal decision only made a general allusion to this principle and cited no case law is incorrect. In fact, the above two cases were cited in the appeal decision, and copies of the cases were enclosed for the member's review.

The member submits that he provided all necessary documentation to his Personnel Office at in-processing; and when his pay began, he assumed that the pay office had done their job correctly. The member did not double-check the Personnel Office's work. The member submits that the Army has a detailed personnel and pay system with experts having many years of expertise, review, and audit; and he should be able to rely upon the correctness of their calculations. The member argues that since that appeal decision stated that because the member did not check the Personnel Office's work he is partially at fault in the matter, therefore; there

should be some granting of partial relief in the matter of waiver. The case law indicates that since the member is partially at fault, waiver of any or all of the debt is statutorily prohibited. This Office does not make partial waivers. *See* Comptroller General decision B-201814, Sept. 18, 1981.

The Board finds no evidence of fraud, misrepresentation, of lack of good faith on the part of the member. However, the Board is unable to say that the employee is entirely without fault. The legal definition of “fault” does not imply any ethical lapse on the part of the member. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. *See* DOHA Claims Case No. 2011-WV-041102.2 (January 20, 2012).¹

The member has cited several cases where this Board has waived the indebtedness of members or employees. The standards for waiver determinations are listed at Instruction ¶ E4.1. It is important to note that Instruction ¶ E4.1.8, states that waiver determinations under the standards listed depend on the facts in each case. The cases cited by the member are distinguishable from the facts in the member’s case, and those facts do not support waiver.²

The member contends that due to the fact that a number of officers had the same error made in regards to their PEBD, that the Army should bear more responsibility. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. *See* Instruction ¶ E4.1.1. Additionally, our Office has consistently held that “the Government is not liable for the erroneous or negligent acts of its officers, agents, or employees even though they are committed in the performance of their official duties.” *See* DOHA Claims Case No. 07041204 (April 25, 2007), and DOHA Claims Case No. 96070222 (January 27, 1997). While the member argues that he was treated unfairly in comparison with other similarly situated officers, we are limited to the remedy available under 10 U.S.C. § 2774 and the associated case law. Moreover, we have no specific information about other officers. In any event, each case must be reviewed on its own merits. Finally, we have no authority over the HRC and their decision-making.

¹ The waiver standards under 5 U.S.C. § 5584 are the same as those under 10 U.S.C. § 2774.

² In short, the member cites 2012-WV-102203.2 (May 8, 2013) in which the claimant thought her pay was correct because her pay grade was correct on her Leave and Earnings Statement (LES) and SF-50. This is distinguishable from the member’s case because the member’s LES listed a PEBD and years of service different from his other documents, which if the member had reviewed would indicate he was being overpaid. The member cites 2011-WV-033107.2 (November 10, 2011) for the principle that partial relief is an appropriate remedy. The employee in that case took prompt action to correct the pay error and therefore was without fault. This is distinguishable from the member’s case because the member did not take prompt corrective action. The member cites several cases for the principle that once a member is notified that he is being overpaid, he does not acquire title to the excess payments. Because the member is not without fault, these cases are not applicable.

Conclusion

The member's request for reconsideration is denied, and the appeal decision of May 19, 2015 is affirmed. In accordance with the Instruction, this is the final decision of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

Gregg A. Cervi
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board