

KEYWORDS: Waiver of Indebtedness

DIGEST:

1. Under 10 U.S.C. § 2774(b)(2), we may not waive collection of erroneous payments to or on behalf of a service member if application for waiver is received after the expiration of five years immediately following the date on which the erroneous payment was discovered.

2. The unearned portion of non-prior service enlistment bonus payments may not be considered for waiver under 10 U.S.C. § 2774 because payment was proper when made.

3. Tuition assistance payments made on behalf of the member who did not complete course requirements, which are a condition of the payments, cannot be considered for waiver. The resulting debt of educational expenses are not considered pay and allowances under 10 U.S.C. § 2774.

CASENO: 2016-WV-050304.2

DATE: 10/25/2016

DATE: October 25, 2016

|            |   |                                  |
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|            | ) |                                  |
| In Re:     | ) |                                  |
| [REDACTED] | ) | Claims Case No. 2016-WV-050304.2 |
|            | ) |                                  |
| Claimant   | ) |                                  |

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

1. Under 10 U.S.C. § 2774(b)(2), we may not waive collection of erroneous payments to or on behalf of a service member if application for waiver is received after the expiration of five years immediately following the date on which the erroneous payment was discovered.

2. The unearned portion of non-prior service enlistment bonus payments may not be considered for waiver under 10 U.S.C. § 2774 because payment was proper when made.

3. Tuition assistance payments made on behalf of the member who did not complete course requirements, which are a condition of the payments, cannot be considered for waiver.

The resulting debt of educational expenses are not considered pay and allowances under 10 U.S.C. § 2774.

## **DECISION**

A former member of the United States Army Reserve (USAR) requests reconsideration of the appeal decision dated July 28, 2016, of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-WV-050304. In that decision, this Office denied waiver in the amount of \$6,287.53.

### **Background**

On November 3, 2004, the member enlisted in the USAR for eight years. As part of her enlistment, she signed the *Record of Military Processing – Armed Forces of the United States* (DD Form 1966) which guaranteed that in exchange for her eight-year service commitment, she would receive up to \$7,000.00 in non-prior service enlistment bonus (NPSEB) payments. Also, in exchange for her service, the member was eligible for the student loan repayment plan and the Montgomery GI Bill (GI Bill). She subsequently received \$5,250.00 in NPSEB as outlined in the appeal decision. She was discharged from the USAR on June 28, 2007, and did not complete her eight-year enlistment contract. Thus, recoupment of a pro rata portion of the NPSEB was required, in the amount of \$2,236.11.

The record also shows that the member enrolled in the University of Tennessee Knoxville (UTK) during the period August 23, 2006, through December 5, 2006. The USAR paid \$2,811.00 in TA payments to UTK. However, it was later determined that the member did not successfully complete the course requirements, which was a condition of the TA payments.

During the period March 31, 2007, through June 20, 2007, the service member's group life insurance (SGLI) premiums in the amount of \$116.00 were paid on the member's behalf by her unit. Finally, the record shows that at various times during the member's period of military service from November 3, 2004, through June 28, 2007, she received payments from the Department of Veterans Affairs (VA). For reasons not specified in the record, on February 7, 2008, the VA indebted the member in the amount of \$1,124.42. Thus the member became indebted in the total amount of \$6,287.53 (\$2,236.11 + \$2,811.00 + \$116.00 + \$1,124.42).

### **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, Section 2774(b)(2) states that the Secretary concerned or head of the agency may not exercise his authority under this section to waive any claim if the application for waiver is received in his Office after the

expiration of five years following the date on which the erroneous payment of pay was discovered. This provision is implemented by DoD Instruction 1340.23 § E5.6.<sup>1</sup>

In 54 Comp. Gen. 133 (1974), the Comptroller General states that “such period must be considered as beginning to run from the date the erroneous payment was discovered by the administrative office. That is, from the date it was definitely determined by an appropriate official that an erroneous payment had been made. The date of notice to the member is not relevant in fixing such date.” The member contends that she became aware of the debt “between April 2015 to June 2015.” She stated that “I called the Tax offset hotline and was told I incurred a debt.” Since the former member’s debts for the NPSEB, SGLI, and GI Bill were discovered in February 2008, she would have had to request waiver of those debt amounts in February 2013. Since her debt for TA was discovered February 2010, her request would have been due by February 2015.

Even if the waiver requests had been submitted prior to the expiration of the five-year statute of limitations, this Office would still not have been able to consider the member’s waiver request. 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, this statute specifically limits our authority to only claims which arose from an erroneous payment. If the payment was correct when made, regardless of the subsequent events, we have no authority to relieve a member of her obligation to repay the government. In this regard, as previously noted, on November 3, 2004, the member signed an enlistment contract with the USAR. The USAR subsequently paid the member NPSEB payments in accordance with her enlistment contract agreement. Therefore, since payments were proper when made, we have no authority to consider waiver of the member’s NPSEB payments. *See* DOHA Claims Case No. 2013-WV-110407.2 (November 6, 2014), and DOHA Claims Case No.2013-WV-011101.2 (July 16, 2013).

As to the TA payments paid by the U.S. Army on the member’s behalf, again, we have no authority to consider the payments for waiver even if the application for waiver had been timely. Our Office has the authority to consider certain claims of the United States for waiver under the provisions of 10 U.S.C. § 2774, but we cannot consider a debt for waiver unless it arose from an erroneous payment of pay or allowances. This debt did not rise 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.” The waiver authority for such payments is granted to each respective Service Secretary under 37 U.S.C. § 303a(e). Therefore, we have no authority to consider waiver of the TA payments (educational expenses). *See* DOHA Claims Case No. 2015-WV-032301.2 (September 29, 2015), and DOHA Claims Case No. 2010-WV-042701.2 (August 12, 2010).

Also, we would not have been able to consider waiver of the SGLI premiums. SGLI payments paid on the member’s behalf do not constitute erroneous payments. *See* DOHA Claims Case No. 99042101 (June 24, 1999). Finally, as to the GI Bill payments, this Office only has authority to consider waiver of payments made by this agency, the Department of Defense. Therefore, we cannot consider waiver of any payments made by the VA. Since the VA makes payments under the GI Bill, the member’s debt is a debt with the VA. The member can find debt

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<sup>1</sup> The Instruction states three years, but it has been updated to five years.

information with the VA online at:

[www.benefits.va.gov/gibill/resources/education\\_resources/debt\\_info](http://www.benefits.va.gov/gibill/resources/education_resources/debt_info)

In her request for reconsideration, the member notes that she was separated from the USAR for “failure to report.” She contends that under USAREC Regulation 601-56, Chapter 3, she should have been extended more time to report as the section indicates that if a FS fails to report on his or her scheduled active duty enlistment date due to various reasons, and if the FS has a valid reason for not reporting, she will be extended in the program. First, “FS” stands for future soldier, and the regulation is discussing actions prior to enlistment. The member had already enlisted. Therefore, the regulation does not apply to her. Second, we will not set aside administrative personnel decisions of the services. That is within the authority of the Service Secretary and not within our authority.

### **Conclusion**

The member’s request for reconsideration is denied. We affirm the decision dated July 28, 2016. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter on the member’s waiver request under 10 U.S.C. § 2774.

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Jean E. Smallin  
Chairman, Claims Appeals Board

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Catherine M. Engstrom  
Member, Claims Appeals Board

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Natalie Lewis Bley  
Member, Claims Appeals Board

