

KEYWORDS: waiver of indebtedness

DIGEST: 1. A cadet of the United States Military Academy (USMA) who failed to complete his course of instruction and subsequent military service obligation due to separation from the USMA was required to reimburse the government for the cost of advanced education payments provided to him. His resulting debt for the cost of his education may not be considered for waiver under 10 U.S.C. § 2774, because his educational expenses are not considered pay and allowances under the statute. 2. We will not disturb the Army’s determination that a cadet of the USMA breached his service agreement and subsequently is liable for the cost of his education under 10 U.S.C. § 2005. This type of matter is in the discretion of the Secretary of the Army.

CASENO: 07101704

DATE: 10/30/2007

DATE: October 30, 2007

In Re:)	
[REDACTED])	Claims Case No.07101704
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

1. A cadet of the United States Military Academy (USMA) who failed to complete his course of instruction and subsequent military service obligation due to separation from the USMA was required to reimburse the government for the cost of advanced education payments provided to him. His resulting debt for the cost of his education may not be considered for waiver under 10 U.S.C. § 2774, because his educational expenses are not considered pay and allowances under the statute.

2. We will not disturb the Army’s determination that a cadet of the USMA breached his service agreement and subsequently is liable for the cost of his education under 10 U.S.C. § 2005. This type of matter is in the discretion of the Secretary of the Army.

DECISION

A former cadet of the United States Military Academy (USMA) requests reconsideration of the September 25, 2007, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07072003. In that decision, DOHA determined that the government's \$114,181.00 claim against him could not be considered for waiver.

Background

On June 28, 1999, before entering the USMA, the cadet signed USMA Form 5-50, Agreement to Serve, by which he agreed to complete the course of instruction at the USMA and assumed a military service obligation of eight years upon completion of the course of instruction. The agreement provided, among other things:

“e. That if I fail to complete the course of instruction of the United States Military Academy, breach my service agreement as defined in paragraph 1.g.(3), Statement of Policies on the next page, or decline to accept an appointment as a commissioned officer, I will serve on active duty as specified in paragraph 1.b. through 1.g., which are contained in the Statement of Policies on the next page;

f. That if I voluntarily fail, or because of misconduct fail, to complete the period of active duty specified in paragraphs IIb, c, d or e above, I will reimburse the United States in an amount that bears the same ratio to the total cost of advanced education provided me as the unserved portion of active duty bears to the total period of active duty I have agreed to serve;

g. Further, that if I am separated from the United States Military Academy for breach of this service agreement, as defined in paragraph 1.g.(3), Statement of Policies on the next page, and the Army decides that I should not be ordered to active duty because such service would not be in the best interests of the Army, I shall be considered to have either voluntarily or because of misconduct failed to complete the period of active duty and may be required to reimburse the United States as described above;”

Pursuant to his agreement to serve, his education expenses were paid by the Army during the period August 1999 through June 2002. However, the cadet was discharged from the USMA for failing the Army Physical Fitness Test (APFT) prior to the completion of his USMA course of instruction and his required term of service. On August 6, 2002, an investigator of the USMA concluded that the cadet had adequate notice that he would be liable to pay back the cost of his education if he failed to fulfill the obligations under his agreement to serve. The investigator also concluded that the cadet was not given a mandatory 90-day retest of his APFT after his first failure in his second year at the USMA. The investigator concluded that had the cadet been given a retest of his APFT during the 90-day window, he most likely would have failed and been separated with no obligation. However, the investigator found that the cadet had the opportunity

to withdraw before his third year and by not doing so, the cadet agreed to the obligation to repay the cost of his educational expenses. On November 8, 2004, the Army directed the USMA to initiate a recoupment action under 10 U.S.C. § 2005, for the cadet's cost of his educational expenses at the USMA in the amount of \$114,181.00 in lieu of the cadet being called to active duty.

The cadet subsequently requested waiver of the claim under 10 U.S.C. § 2774. The Defense Finance and Accounting Service (DFAS) determined that the claim could not be considered for waiver because the payments were proper when made. In the appeal decision, our Office upheld DFAS's determination.

In his request for reconsideration, the cadet asserts that USMA's failure to conduct a retest of the APFT constituted a breach of contract and he is therefore not liable for the debt. He states that had he been discharged from the USMA prior to the commencement of his second class (third) year, he would have no obligation to repay the government. In this regard, the cadet refers to the findings made by the investigator appointed by the USMA to investigate his claim. The investigator stated that if the cadet had been given a APFT retest, the cadet "most likely would have failed and separated with no obligation." The cadet also argues that since the USMA failed to retest him prior to the start of his third year, the payment for his third year educational expenses was not proper when made because he most likely should have been separated before then.

Discussion

The express statutory authority for the Army to require reimbursement of educational costs from the cadet is found in 10 U.S.C. § 2005, which provides:

“(a) The Secretary concerned may require, as a condition to the Secretary providing advanced education assistance to any person, that such person enter into a written agreement with the Secretary concerned under the terms of which such person shall agree—

(1) to complete the educational requirements specified in the agreement and to serve on active duty for a period specified in the agreement;

(2) that if such person fails to complete the education requirements specified in the agreement, such person will serve on active duty for a period specified in the agreement;

(3) that if such person does not complete the period of active duty specified in the agreement, or does not fulfill any term or condition prescribed pursuant to paragraph (4), such person shall be subject to the repayment provisions of section 303a(e) of title 37; and

(4) to such other terms and conditions as the Secretary concerned may prescribe to protect the interest of the United States.”

The statute authorizes the Army to enforce agreements to serve signed by cadets that call for repayment of educational costs if the cadets do not complete their educational requirements and are unable to fulfill their commitment to serve.

Our authority in this case is restricted to a consideration of whether the cadet's debt may be waived under 10 U.S.C. § 2774. Under 10 U.S.C. § 2774, we have the authority to waive claims of the United States only if they arise from erroneous payments of pay and allowances, and only if collection would be against equity and good conscience and not in the best interest of the United States.

In this case, the Army made an administrative determination that the cadet had breached his agreement to serve by failing the APFT, and he was therefore indebted in the amount of \$114,181.00 for the cost of his education under 10 U.S.C. § 2005. The cadet challenges the Army's determination asserting that the Army and the USMA breached the contract by not following their own regulations. As stated above, our jurisdiction in this case is limited to a determination under the waiver statute. However, we note that it is purely speculative on the cadet's part that had he been given a retest after his second year, he would have failed and been discharged without obligation. In addition, 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 B-259696, Jan. 25, 1999. In situations like this, we accept the agency's statement of facts absent clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 03082101 (August 29, 2003). Since military personnel decisions are matters within the discretion of the military departments, this Office will not question the Army's determination that the member breached his agreement to serve.

In the appeal decision, the DOHA adjudicator upheld DFAS's determination that the payments of the cadet's educational expenses were proper when made and therefore cannot be considered for waiver. The Board agrees with the outcome reached by the DOHA adjudicator that the debt cannot be considered for waiver. However, the Board concludes that the educational expenses in this case do not constitute pay and allowances under 10 U.S.C. § 2774. *See* 10 U.S.C. § 2005(d)(3) (specifically stating the term "cost of advanced education" does not include pay or allowances); *cf.* B-190935, Oct. 4, 1979 (a doctor who did not fulfill his service obligation was required to repay his scholarship benefits, including a stipend, which was considered "other educational costs" rather than pay).

Finally, our decision in this case does not preclude the cadet from pursuing other available remedies. *See* 37 U.S.C. 303a(e) (regarding the Secretary concerned's authority to establish by regulations procedures for determining the circumstances under which an exception to the required repayment may be granted).

Conclusion

The cadet's request for relief is denied, and we affirm the September 25, 2007, appeal decision. In accordance with DoD 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
Acting Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board