

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-185451

DATE: FEB 20 1976

FILE:

MATTER OF: Lt. Cdr.

, USN

DIGEST:

1. An officer's pay entry base date as a matter of law may not be adjusted to include credit for any service based solely on service as a midshipman in the Navy Reserve Officer Training Corps.
2. A member is not entitled to waiver of claim under 10 U.S.C. 2774 for payments made to him upon an erroneous pay entry base date (PEBD) for any period of time after being informed of the error.

This action is in response to a letter dated October 10, 1975, addressed to the Honorable Charles E. Bennett, House of Representatives, from Lieutenant Commander , USN, which has been forwarded to our Office for response, in which the member, in effect, appeals the action taken by our Transportation and Claims Division, dated July 24, 1975, which denied in part his request for waiver of an indebtedness arising out of an overpayment of pay and allowances, due to an erroneous Pay Entry Base Date (PEBD).

In that settlement, the member was granted a partial waiver of the indebtedness, in the amount of \$1,250.61, representing overpayment for the period May 1959 through April 1973, leaving a balance of \$168.10. This settlement was based upon a finding that since it appeared doubtful that the member was informed prior to April 1973 of the correction of his PEBD, he could not reasonably have known that he was being overpaid. However, after he was informed of the error in April 1973, he could not in good faith have expected to retain the overpayments resulting from the erroneous PEBD.

The member contends that the PEBD of August 23, 1957, as corrected is in error and that the May 22, 1957 date is correct. Therefore, there never has been an overpayment. Further, he requests that action be taken to have his records show his PEBD as reestablished as May 22, 1957.

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The record shows that the member was a midshipman in the Navy Reserve Officer Training Corps (NROTC) from September 30, 1953, to August 21, 1957. The record discloses no other affiliation by the member with the United States Navy or any of the other services for this period of time nor does the member claim any other affiliation. He received a commission as an ensign in the United States Navy Reserve on August 22, 1957, but did not enter on active duty until September 8, 1957.

On October 14, 1957, the member's PEED was established as May 22, 1957, giving him service credit for time served on a summer training cruise prior to his commissioning. This cruise had been deferred from the summer of 1956 at the member's request.

Sometime in 1958, it was determined that his correct PEED should have been August 22, 1957, the date of receiving his commission as an ensign in the United States Navy. However, the member's pay record continued to carry the date of May 22, 1957, as the PEED. The member was not informed of the error until April 1973, but he continued to receive pay and allowances based upon the erroneous PEED until August 21, 1973. As a result of the error, it was determined that the member had been overpaid basic pay and aviation allowance from May 22, 1959, through August 21, 1973, in the amount of \$1,418.71.

At the time of the member's appointment as an ensign on August 22, 1957, service to be credited in determining the rate of basic pay to which a member was entitled was governed by section 202 of the Career Compensation Act of 1949, approved October 12, 1949, ch. 681, 82 Stat. 807, 37 U.S.C. 233 (now 37 U.S.C. 205), which generally authorized credit for active service. However, that service under the act was limited to "full time for all periods of active service as a commissioned officer, commissioned warrant officer, warrant officer, Army field clerk, flight officer, and enlisted person in any Regular or Reserve component of any of the uniformed services."

It has long been held that, while midshipmen may be considered Navy officers or members of the armed services for certain purposes, they are neither commissioned officers nor enlisted men and may not count such service in computing length of service for any purpose. See 21 Comp. Gen. 532 (1942) at 539-540, and 29 Comp. Gen. 331 (1950).

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Since no credit is authorized for midshipmen service and a midshipman, although a member of the naval service, does not come within any of the categories specifically listed above, there is no authority under those provisions for allowing credit for any portion of such service in determining the PEBD of a member. See 43 Comp. Gen. 577 (1964); cf. B-138442, April 22, 1959.

The member in this case was not performing active duty as an enlisted member or as a commissioned officer in the United States Navy during the time in question. He was in fact performing training which was a part of his training as a midshipman in the NROTC program, which in turn was a prerequisite to his receiving a commission in the United States Navy Reserve.

Accordingly, we can find no legal authority which would authorize adjusting Lieutenant Commander PEBD to include credit for any of his midshipmen service in the NROTC.

With regard to waiver of the overpayments in this case, the record discloses that the letter of April 9, 1973, which contained the information concerning the member's correct PEBD was delivered to him on or before April 24, 1973. In a letter dated October 10, 1975, the member admits that he had been working closely with the disbursing office to resolve the matter of his correct PEBD from February 9, 1973, until his transfer in August 1974. The member's letter of October 10, 1975, also contends that the disbursing office had knowledge of the April 9, 1973 letter, but took no action to make a correction in member's pay record in accordance with the information contained in that letter, until August 21, 1973, four months later. In the meantime, the failure to correct the PEBD after notice to the member and the disbursing office, resulted in an additional erroneous payment of \$168.10.

We therefore find that there is sufficient evidence in the file to support the conclusion that the member knew or should have known after receiving notice of the error in April 1973 that any further payment of pay and allowances based on a PEBD of May 22, 1959, would result in an overpayment. Therefore, it is our view that he could not in good faith have expected to retain such overpayments resulting from the erroneous PEBD after receiving notice of the error.

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Accordingly, the action taken by the Transportation and Claims Division dated July 24, 1975, is sustained.

R.F. KELLY

Comptroller General
of the United States

~~Deputy~~