

DOCUMENT RESUME

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[Entitlement to Variable Incentive Pay]. B-188963. August 9, 1977. 4 pp.

Decision re: Dominick A. Minotti; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Military Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Public Health Service.

Authority: 37 U.S.C. 313 (Supp. IV). Commissioned Corps Personnel Manual CC22.2, Instruction 3, sec. F.4(a). 53 Comp. Gen. 181. 31 Comp. Gen. 340. 18 Comp. Gen. 980. B-185199 (1977). B-186925 (1976).

A commissioned officer of the Public Health Service claimed entitlement to Variable Incentive Pay retroactive to the date of his entry on active duty. The officer was unable to produce the original or either of the copies of a Variable Incentive Pay agreement executed within a time limit set by the Public Health Service regulations. The claimant had the burden of proving the validity of the claim, and, in the absence of some evidence that the agreement was executed, the claim for retroactive payment must be denied. (Author/SC)

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DECISION



J. Dennis Woodcock
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-188963

DATE: August 9, 1977

MATTER OF: Dominick A. Minotti, M.D., PHS

DIGEST: In claim against the Government, claimant has burden of proving the validity of his claim. Where a Public Health Service (PHS) member claims Variable Incentive Pay (VIP) pursuant to 37 U.S.C. 313 (Supp. IV, 1974) but is unable to produce the original or either of the copies of a VIP agreement executed within a time limitation set by the PHS regulation, the claim for retroactive payment must be denied in absence of some evidence that agreement was executed.

This action is in response to a letter dated March 11, 1977, from Dominick A. Minotti, M.D., a commissioned officer of the Public Health Service (PHS), concerning his entitlement to Variable Incentive Pay (VIP) pursuant to 37 U.S.C. 313 (Supp. IV, 1974), retroactive to the date of his entry on active duty, which, in effect, constitutes an appeal from a settlement by the Claims Division of this Office dated March 7, 1977, which disallowed his claim.

The record shows that the member was called to active duty as a medical officer in the PHS from his home in Lebanon, New Hampshire, on October 19, 1976. He reported for duty in Seattle, Washington, on October 29, 1976, as required in the orders calling him to duty and claims that at the time he reported for duty he executed all forms necessary for the effective date of his VIP agreement to coincide with his entry on active duty. It is claimed, however, by the PHS that if such an agreement was signed on October 29, 1976, it was never received in the Commissioned Personnel Operations Division (CPOD) of the PHS.

Upon receipt of his first paycheck, apparently on November 30, 1976, the member observed that he had not received payment of the VIP and immediately discussed the matter with his supervisor. He subsequently completed another VIP agreement which he apparently back dated to October 18, 1976, but which was not notarized until December 6, 1976. This agreement was received in CPOD on December 9, 1976, and the member's VIP agreement was determined to be effective

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from that date in accordance with the PHS regulation. The record also discloses that by letter dated December 1, 1976, addressed to the Comptroller General through the Director, Commissioned Corps Personnel, and the Director, USPHS Hospital, Seattle, Washington, the member brought to the attention of his superiors the nonreceipt of the VIP payment in his paycheck the previous day.

Variable incentive pay for medical doctors of the uniformed services is authorized by 37 U.S.C. 313 (Supp. IV, 1974). This statute requires as a condition precedent to eligibility for VIP the execution of a written agreement by the medical officer and its acceptance by the Secretary concerned or his designee. Under that agreement the medical officer would receive incentive pay for completing a specific number of years of continuous active duty subsequent to executing such an agreement.

Thus, under the applicable law a member is not entitled to VIP for any period prior to his execution of an appropriate agreement. The PHS has reported to us that forms and instructions were sent to the member on October 4, 1976. If he had followed the instructions furnished he would have signed the agreement and had it notarized prior to his entry on duty on October 19, 1976. The instructions also contained information regarding the mailing of the executed agreement so that it would be received by the PHS within time limits prescribed in regulations. However, in his letter of March 11, 1977, appealing the settlement by our Claims Division, Dr. Minotti indicates that he did not receive VIP information with his "call to active duty packet."

The PHS regulations concerning the administration of the VIP program are contained in the Commissioned Corps Personnel Manual (CCPM). The effective date for VIP agreements is set forth in CC22.2, Instruction 3, Section F.4. Subsection (a) of that regulation provides as follows:

"a. Initial Agreement Incident to Entry on Duty.
Such an agreement will be effective on:

- "(1) the date of entry on active duty, provided the executed agreement is received in CPOD within 45 days after date of entry on active duty, and bears a notarized signature on or before the date of entry on active duty.
- "(2) the date the executed agreement is received in CPOD, if not received within 45 days after date of entry on active duty, or
- "(3) a subsequent date designated by the officer."

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The PHS has taken the position that the phrase "entry on active duty" as used in the regulation is the same as the "call to active duty." The "call to active duty" was October 19, 1976, and the member has not furnished an agreement or copy thereof signed and notarized prior to that date. In these circumstances, the effective date of VIP was fixed as December 9, 1976, the date a signed notarized agreement was received in the designated office. Under the quoted regulation an agreement in connection with a member's entry on active duty may be made retroactive from the date it is received by the agency only if it was executed and notarized prior to the date the individual first entered on active duty. Apparently the date of entry on active duty is fixed by the PHS to allow travel time to the member's first assignment in an active duty status. As provided in the authorizing legislation, no VIP is allowable until the member has agreed to remain in service for the appropriate number of years.

The VIP agreement instructions printed on the agreement itself contain directions for completing the agreement in triplicate, forwarding the original to the supervisor or organizational addressee, forwarding the duplicate directly to CPOD and for the member to retain the triplicate. If, in fact, such an agreement other than the one notarized on December 6, 1976, had been properly executed and the instructions followed, it would appear that one of the instruments would have reached the proper office or the member would be in possession of the triplicate.

In any claim against the Government, the claimant has the burden of proving the validity of his claim. See 56 Comp. Gen. _____ (B-185199, April 1, 1977); 53 Comp. Gen. 181 (1973); 31 Comp. Gen. 340 (1952); and 18 Comp. Gen. 980 (1939). If a VIP agreement was executed by the member at any time prior to the execution of the agreement notarized on December 6, 1976, it is incumbent upon him to produce evidence of such an agreement. In the absence of such evidence we must conclude that the member has not complied with the instructions and regulations concerning the execution of a VIP agreement prior to the execution of the agreement received by CPOD on December 9, 1977.

We have compared the facts in this case to those involved in the decision B-186925, November 6, 1976, but do not find that the circumstances here involved can be viewed as sufficiently similar to those in that case to permit the reasoning in that case to be applied. The PHS has advised us that VIP forms and instructions

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were sent to Dr. Minotti prior to his entry on duty whereas the decision in that case was predicated upon the failure of the PHS to advise the member concerned of the regulatory requirements even though he made specific inquiries in a timely manner concerning his eligibility for VIP. Further, it is noted that the VIP program was relatively new at the time involved in that case, whereas here a period of time has elapsed sufficient to permit members of the Commissioned Corps, PHS to become familiar with the statutory and regulatory requirements.

Accordingly, the action taken by our Claims Division is correct and is sustained.


Deputy Comptroller General
of the United States