

DECISION



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

FILE: B-189211

DATE: SEP 8 1977

MATTER OF: Veterinary and Optometry Officers of the
Uniformed Services

DIGEST:

1. Where a statute is unambiguous and its directions specific, its plain meaning may not be altered or extended by administrative regulations, nor may administrative regulations be formulated in an attempt to add to the statute something which is not there.
2. The receipt of information, later established to be erroneous, by one dealing with a Government official, which was relied upon by the recipient to his detriment, does not afford a legal basis for a payment from appropriated funds, since it has long been held that in the absence of specific statutory authority, the United States is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties.
3. A service member's entitlement to military pay is dependent upon a statutory right, and neither equitable considerations nor the common law governing private employment contracts have a place in the determination of entitlement to military pay.
4. There is currently no statutory authority for the payment of special professional pay to Reserve veterinary and optometry officers of the uniformed services who entered on active duty after June 30, 1975; hence, such officers are not entitled to special pay notwithstanding any administrative regulations or recruiters' promises to the contrary. 37 U. S. C. 302a and 303 (Supp. III, 1973).
5. By statute, Reserve service performed by members participating in the Armed Forces

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Health Professions Scholarship Program may not be counted in computing years of service creditable for basic pay, except as may otherwise be provided for certain physicians and dentists; hence, veterinary officers who participated in the program may not receive longevity credit for time spent in professional school in the computation of their active duty basic pay despite any promises to the contrary that may have been made to them.

10 U. S. C. 2126 (Supp. II, 1972).

8. Reserve veterinary and optometry officers of the uniformed services, who were wrongly advised about their basic and special pay entitlements and who were then mistakenly overpaid, may receive favorable consideration under the statute authorizing waiver of claims arising out of such erroneous payments; however, overpayments received by an officer after he received notice of the error may not properly be waived, since upon notice the officer would become partially responsible for correcting the error, at least to the extent of setting aside subsequent overpayments for eventual return to the Government.
- 10 U. S. C. 2774 (Supp. II, 1972).

This action is in response to questions recently brought to our attention regarding basic pay and special pay entitlements of certain veterinarians and optometrists who are commissioned officers in the uniformed services.

It is indicated the Department of Defense has determined that Reserve veterinary and optometry officers who were on active duty prior to July 1, 1975, are entitled to receive special pay of \$100 per month, but that such officers who entered active duty on or after July 1, 1975, are not entitled to special pay in any amount. The correctness of this determination has been questioned. In

addition, it is said many of the members, who participated in and were commissioned through the Armed Forces Health Professions Scholarship Program, were advised that their time spent as commissioned reservists while attending professional school would be creditable for purposes of longevity in the computation of active duty basic pay, but it was later determined that time spent in professional school was not creditable in computing basic pay. The correctness of that determination is also questioned. Finally, it is indicated that through administrative errors, many of the members may have received overpayments of basic and special pay, and they may have, as a result, become indebted to the United States. Their eligibility to obtain waivers of the claims against them is questioned.

The cases of three of the officers affected have been presented in specific detail:

1. Lieutenant Robert E. Titcomb, USNR, [REDACTED], received the degree of [REDACTED] in June 1975 and accepted an appointment as an [REDACTED] Navy Reserve, on June 10, 1975. However, he did not enter on active duty as an [REDACTED] until July 5, 1975. He was paid special pay as an [REDACTED] at the rate of [REDACTED] a total amount of [REDACTED]. In February 1977, he was advised that a mistake had been made, that he had never been entitled to special pay, that such pay was being terminated, and that he was indebted to the United States in the amount of [REDACTED]. He has questioned the propriety of action taken to terminate special optometry pay to him and has also, in effect, requested that his indebtedness, if any, be waived.
2. Captain David F. Thompson, USAR, [REDACTED], received the degree of [REDACTED] in June 1975 and accepted an appointment as a Reserve commissioned officer of the Veterinary Corps of the Army on June 26, 1975. However, apparently he did not enter on active duty with the [REDACTED] until September 1975 and was then advised that he was not entitled

to special pay as a [REDACTED]. He has never received special pay and has suggested that the withholding of such pay from him is improper.

3. Captain Samuel P. Galphin, Jr., USAFR,

[REDACTED] was commissioned a [REDACTED]

February 12, 1973, through the Armed Forces Health Professions Scholarship Program while he was attending veterinary school. He received the degree of [REDACTED]

[REDACTED] was appointed a Reserve [REDACTED] of the Air Force effective June 14, 1975, and was ordered to extended active duty effective July 4, 1975, [REDACTED]. Special pay was withheld from him after he entered on active duty, but he did receive basic pay as a captain with over 2 years of service, with a pay date of February 12, 1973. However, on May 5, 1976, he was notified that a mistake had been made in the computation of his basic pay and that he should have been paid as a captain with less than 2 years of service, since the time spent in the scholarship program was not creditable in computing basic pay. Air Force authorities have advised that he received overpayments of basic pay in an amount of [REDACTED] between July 4, 1975, and May 5, 1976, and received additional overpayments of basic pay thereafter in an amount of [REDACTED] until his pay records were adjusted effective May 31, 1976. Captain Galphin has questioned the propriety of withholding special pay from him and has also requested waiver of the claim of the Government against him for [REDACTED] the total amount of apparent overpayments of basic pay received by him.

In addition to these three members, it is reported that other veterinary and optometry officers similarly situated have expressed dissatisfaction due to the withholding of special pay from them. Also, it is reported that other Air Force and Army veterinary officers, aside from [REDACTED], who were commissioned through the

Armed Forces Health Professions Scholarship Program were mistakenly credited with time spent in professional school for basic pay purposes, and have expressed an interest in obtaining waivers of the claims against them arising from the overpayments of basic pay they received; however, the particular facts and circumstances of their cases have not been presented.

The service members affected contend, first of all, that the withholding of special pay from them is inequitable and contrary to regulation. It is asserted that they were promised by military authorities prior to their entry on active duty that they would receive special pay, and that the denial of such pay constitutes both a breach of their contracts with the Government and a broken promise made by recruiting officials that they relied upon to their detriment. It is further asserted that it is inequitable to deny them special pay simply because they happened to enter on active duty on or after July 1, 1975, while other officers similarly qualified who were on active duty before that date were given and continue to receive special pay. It is also suggested that Table 1-5-1 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) authorizes the payment of special professional pay to them, since they were appointed and designated as veterinary and optometry officers prior to July 1, 1975, even though they were not called to active duty until a later date.

Secondly, several of the officers who participated in the Armed Forces Health Professions Scholarship Program state that they were promised by military authorities that their time spent as reservists during professional school would count for longevity purposes in the computation of their active duty basic pay. They say that they relied upon such promises when they entered the program and thus obligated themselves to enter on extended active military service. They contend it is inequitable for the Government to renege on the promises made to them by military officials while still holding them to perform active duty in accordance with their agreements.

Third, several of those officers against whom claims have been brought due to apparent erroneous overpayments of basic pay and special pay state that, in general, they did not know they were being overpaid, and they had established their personal financial planning and budgeting in accordance with the pay they were given

and to which they believed they were entitled. They have expressed the belief that recoupment of the apparent overpayments they received would be unjust and would cause them to suffer unreasonable personal financial hardship.

I. Special Pay Entitlement of Optometry and Veterinary Officers

With respect to the statutory authority governing the eligibility of optometry officers to receive special pay, 37 U. S. C. 302a (Supp. III, 1973) provides in pertinent part that:

"(a) In addition to any other basic pay, special pay, incentive pay, or allowances to which he is entitled, each of the following officers is entitled to special pay at the rate of \$100 a month for each month of active duty:

"(1) a commissioned officer--

"(A) of the Regular Army or the Regular Navy who is designated as an optometry officer;

"(B) of the Regular Air Force who is designated as an optometry officer; or

"(C) who is an optometry officer of the Regular Corps of the Public Health Service;

who was on active duty on the effective date of this section; who retired before that date and was ordered to active duty after that date and before July 1, 1975; or who was designated as such an officer after the effective date of this section and before July 1, 1975;

"(2) a commissioned officer--

"(A) of a reserve component of the Army or Navy who is designated as an optometry officer;

"(B) of a reserve component of the Air Force who is designated as an optometry officer; or

"(C) who is an optometry officer of the Reserve Corps of the Public Health Service;

who was on active duty on the effective date of this section as a result of a call or order to active duty for a period of at least one year; or who, after that date and before July 1, 1975, is called or ordered to active duty for such a period; * * * (Underscoring supplied.)

And with respect to the statutory authority for the entitlement of veterinary officers to special pay, 37 U.S.C. 303 (Supp. III, 1973) provides in pertinent part:

"(a) In addition to any other basic pay, special pay, incentive pay, or allowances to which he is entitled, each of the following officers is entitled to special pay at the rate of \$100 a month for each month of active duty:

"(1) a commissioned officer--

"(A) of the Regular Army who is in the Veterinary Corps;

"(B) of the Regular Air Force who is designated as a veterinary officer; or

"(C) who is a veterinary officer of the Regular Corps of the Public Health Service;

who was on active duty on June 29, 1953; who retired before that date and was ordered to active duty after that date and before July 1, 1975; or who was appointed or designated as such an officer after June 29, 1953, and before July 1, 1975;

"(2) a commissioned officer--

"(A) of a reserve component of the Army who is in the Veterinary Corps of the Army;

"(B) of a reserve component of the Air Force, of the Army or the Air Force without

specification of component, or of the National Guard, who is designated as a veterinary officer of the Army or the Air Force, as the case may be; or

"(C) who is a veterinary officer of the Reserve Corps of the Public Health Service;

who was on active duty on June 29, 1953, as a result of a call or order to active duty for a period of at least one year; or who, after that date and before July 1, 1975, was called or ordered to active duty for such a period;
* * * (Underscoring supplied.)

It appears that all of the optometry and veterinary officers in question here are members of Reserve components of the uniformed services. Hence, their entitlement to additional special pay of \$100 per month is dependent upon their having been "called or ordered to active duty" before July 1, 1975.

Special pay for veterinary officers was originally authorized by section 8 of the act of June 29, 1953, ch. 158, 67 Stat. 86, 89-90. The legislative history of the act indicates the purpose of this authorization was to help equalize the position of veterinarians with that of physicians and dentists, who had previously been authorized special pay, since veterinarians were also subject to the so-called "doctors draft" existing at the time. In addition, it appears a shortage of Reserve veterinary officers had arisen then. See Doctors Draft Law Amendments: Hearings on H. R. 4495 (S. 1531) Before the Senate Comm. on Armed Services, 83rd Cong. 1st Sess. 130-135 (1953) (statement of Dr. James A. McCallam). The 1953 legislation authorized special pay for veterinarians called or ordered to active duty "prior to July 1, 1955." Subsequent legislation periodically extended entitlement to special pay for veterinarians entering on active duty thereafter, up until 1975.

Special pay for optometry officers was originally authorized by section 202 of the act of September 28, 1971, Public Law 92-129, 85 Stat. 348, 357-358. The legislative history of that act indicates it was then determined that optometrists should receive special pay at the same flat rate as veterinarians, since both health professional

groups had about the same educational requirements and comparable civilian incomes, and draft calls for optometrists and veterinarians had been about the same. See Senate Report No. 92-93, 92d Cong., 1st sess. (1971). The 1971 act authorized special pay for optometrists called or ordered to active duty "before July 1, 1973."

Sections 202 and 203 of the act of July 9, 1973, Public Law 93-64, 87 Stat. 147, 149, extended the eligibility date for both groups from July 1, 1973, to July 1, 1975. It was the last such extension. Concerning the purpose of that extension, Senate Report No. 93-235, 93d Cong., 1st sess. (1973), contains the following comments:

"The bill as reported continues until July 1, 1975, the special pay provision for physicians, dentists, veterinarians, and optometrists. Under existing law health professionals in these categories on active duty or entering on active duty before July 1, 1973, receive special pay as authorized in Sections 302, 302a, and 303 of Title 37 of the United States Code. Unless the authority for this special pay is continued, those physicians, dentists, veterinarians, and optometrists entering on active duty on or after July 1, 1973, would not be entitled to receive this special pay but those who have entered on active duty before July 1, 1973 would continue to receive such pay.

* * * * *

"The committee believes that it would be inequitable to cut off arbitrarily special pay for the health professionals in question who happened to have entered service after June 30, 1973.

"The committee notes, however, that in all probability, the entire matter of special pays and bonuses for health professionals will be given further consideration in the not too distant future." (Underscoring supplied.)

It thus appears that this legislation was intended to extend special pay eligibility to those optometry and veterinary officers who "entered on active duty" before July 1, 1975. Therefore, it is our

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view that 37 U. S. C. 302a and 303 in authorizing special pay for Reserve optometry and veterinary officers "called or ordered to active duty" before July 1, 1975, requires such officers to have entered on active duty before that date as a prerequisite to special pay entitlement.

With regard to the suggestion that Defense Department regulations may provide authorization for special pay to the three particular officers in question, Note 2 referred to in Rules 6 and 10 of Table 1-5-1 of the DODPM purports to authorize special pay for Reserve optometry and veterinary officers "who were designated, appointed, or called to active duty under these rules on or before 30 June 1975, and who otherwise qualify." This regulatory provision, if effective, would appear to grant the members entitlement to special pay, since they were designated and appointed Reserve optometry and veterinary officers prior to June 30, 1975, although they did not enter on active duty until a later date. However, Note 2 applies to both Regular and Reserve officers, and in view of the specific language of 37 U. S. C. 302a and 303 quoted above, apparently the terms "designated" and "appointed" on or before June 30, 1975, refer only to Regular officers, while the term "called to active duty" on or before June 30, 1975, apparently refers to Reserve officers. The statutory provisions of 37 U. S. C. 302a and 303 and their legislative history make it clear that a Reserve optometry or veterinary officer must have been called to active duty, that is, entered on active duty, before July 1, 1975, as a prerequisite to special pay entitlement. The statute does not extend entitlement to a reservist who may have been designated or appointed an optometry or veterinary officer but not called to active duty prior to July 1, 1975. It is a settled rule of law that where a statute is unambiguous and its directions specific, its plain meaning may not be altered or extended by administrative regulations, nor may administrative regulations be formulated in an attempt to add to the statute something which is not there. See Koshland v. Helvering, 298 U. S. 441, 447 (1936); United States v. Calamaro, 354 U. S. 351, 357-359 (1957); Ruiz v. Morton, 462 F. 2d 818, 822 (1972); Bank of New York v. United States, 526 F. 2d 1012, 1018 (1975); 53 Comp. Gen. 547 (1974). Hence, the cited regulatory provision is ineffective to the extent that it purports to authorize special pay to members appointed or designated as Reserve optometry and veterinary officers prior to July 1, 1975, but not called to active duty before that date. We are advised that the military authorities have become aware of this discrepancy, and that action has been initiated to clarify the regulation

in order to make it consistent with the statute. Accordingly, it is our view that the regulation does not furnish a basis for special pay entitlement to the three members specifically identified in this decision or others who may be similarly situated.

It has been further suggested that the members in question were improperly misled by recruiters to believe they would receive special pay and that they were led to believe that such pay may have been a part of their contracts with the Government. In addition, it is suggested that it is inequitable to withhold special pay from them, since other optometry and veterinary officers who happened to have entered on active duty before July 1, 1975, have continued to draw special pay. However, the receipt of information, later established to be erroneous, by one dealing with a Government official, which was relied upon by the recipient to his detriment, does not afford a legal basis for a payment from appropriated funds. It has long been held that in the absence of specific statutory authority, the United States is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties. See Federal Crop Insurance Corporation v. Merrill, 322 U.S. 380 (1947); Posey v. United States, 449 F. 2d 228, 234 (1971); and Parker v. United States, 198 Ct. Cl. 661 (1972). The rule is also well established that a service member's entitlement to pay is dependent upon a statutory right, and that equitable considerations and the common law governing private employment contracts have no place in the determination of entitlement to military pay. See Bell v. United States, 366 U.S. 393, 401 (1961); United States v. Williams, 302 U.S. 46 (1937); and 52 Comp. Gen. 506 (1973). Therefore, since 37 U.S.C. 302a and 303, and other statutory provisions concerning military pay, provide no authority for granting the members special pay by virtue of their being Reserve optometry and veterinary officers entering active duty after June 30, 1975, they are not entitled to such pay; and while it is regrettable that they may have received erroneous advice or information from recruiters regarding their entitlements, such circumstances do not afford a legal basis upon which special pay may be allowed to them. Accordingly, it is our view that the three members referred to above and others similarly situated, are ineligible for special professional pay, in the absence of further legislation to extend eligibility to them.

II. Longevity Credit for Basic Pay Purposes under the
Armed Forces Health Professions Scholarship
Program

Under the Armed Forces Health Professions Scholarship Program, 10 U.S.C. 2120-2127 (Supp. II, 1972), students following courses of education in designated health professions may be commissioned in Reserve components of the Armed Forces and receive scholarships provided by the Department of Defense, thereby incurring active duty obligations. Section 2126, 10 U.S.C., directs that service performed while a member of the program shall not be counted in computing years of service creditable under 37 U.S.C. 205 (service creditable for basic pay), except as may be provided for under 37 U.S.C. 205(a)(7) and (8), that is for officers of the Medical Corps or Dental Corps of the Army or Navy, officers designated as medical or dental officers of the Air Force, or officers commissioned as medical or dental officers in the Public Health Service, (physicians and dentists). Hence, veterinary students participating in the program may not receive longevity credit for time spent in professional school in the computation of their active duty basic pay.

Despite this provision of the law, Captain Galphin was apparently advised that his time as a [REDACTED] would be creditable as service time for purposes of computing basic pay, and upon entering on extended active duty he began receiving basic pay at the enhanced rate of a captain with over 2 years of creditable service. Statements contained in the file indicate that the Air Force Assistant Surgeon General for Veterinary Services has confirmed that many veterinary officers were given service credit for veterinary school in the same circumstances, and that several Air Force and Army veterinary officers aside from Captain Galphin feel they were improperly misled in the matter. Again, however, as in the question of special pay entitlement, the fact that the members in question may have received erroneous advice concerning their basic pay entitlements does not afford a basis for concluding they may as a matter of law receive service credit for their time in professional school. Accordingly, those veterinary officers who participated in the Armed Forces Health Professions Scholarship Program are not entitled to receive credit for service performed in the program in computing years of service creditable for basic pay. Any erroneous overpayments of basic pay they received are subject to recoupment, if not waived.

III. Waiver of Erroneous Overpayments of Basic and Special Pay

Subsection 2774(a) of title 10, United States Code (Supp. II, 1972), provides in pertinent part that a claim of the United States against a person arising out of an erroneous payment of pay or allowances, to or on behalf of a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part. However, subsection (b) provides in pertinent part that the Comptroller General or the Secretary concerned, as the case may be, may not exercise his authority to waive any claim--

"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim; * * *"

The word "fault," as used in this subsection, has been interpreted by our Office as including something more than a proven overt act or omission by a member. Thus, fault is considered to exist if it is determined that the member should have known that an error existed and should have acted to have it corrected. The standard employed by this Office is whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlements. See 4 C.F.R. § 91.5 (1977) and B-188107, February 16, 1977.

In the case of Captain Galphin, it appears that he and other veterinary officers similarly situated were mistakenly advised by military authorities that service performed while attending school under the Armed Forces Health Professions Scholarship Program would be creditable for purposes of computing basic pay, and it further appears that those authorities mistakenly assigned to the veterinary officers pay dates coinciding with their dates of commissioning under the program. Hence, it is apparent that the member could not reasonably have been expected to know or realize he was being overpaid until he was actually notified of the mistake on May 5, 1976. In these circumstances it is our view that it would be against equity and good conscience to require collection of the [REDACTED] erroneously overpaid to him for service prior to that date, since until that time he was not at fault in the matter and had no responsibility to correct the mistake made.

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"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim; * * *"

The word "fault," as used in this subsection, has been interpreted by our Office as including something more than a proven overt act or omission by a member. Thus, fault is considered to exist if it is determined that the member should have known that an error existed and should have acted to have it corrected. The standard employed by this Office is whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlements. See 4 C.F.R. § 91.5 (1977) and B-188107, February 16, 1977.

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However, when the member was made aware of the fact that he was being overpaid, he then became partially responsible for correcting the error, at least to the extent of setting aside subsequent overpayments received by him for eventual repayment to the Government. We are advised that the member received additional overpayments of basic pay in the amount of [REDACTED] after May 5, 1976. It is, therefore, our view that the member may properly be required to repay that amount. Accordingly, we waive the claim of the United States against Captain Galphin in the amount of [REDACTED] which arose out of overpayments of basic pay to him during the period July 4, 1975, to May 5, 1976. However, we do not waive the claim against him for [REDACTED] arising from overpayments received by him for service between May 5 and 31, 1976.

In the case of Lieutenant Titcomb, documentation in the file indicates he was initially advised by Navy disbursing officers in July 1975 that he was not entitled to special pay, but that he was later advised he was entitled by regulation to such pay on the basis of his having been designated an optometry officer before July 1, 1975. He then received erroneous overpayments of special pay in a total amount of [REDACTED] until the mistake was eventually corrected. Since it does not appear that he knew or should have known that any portion of the payments of special pay were actually erroneous when he received them, we waive the claim of the United States against him in the total amount of [REDACTED]

Appropriate officials of the Air Force and the Navy should advise Captain Galphin and Lieutenant Titcomb, respectively, of this waiver action and their right to apply for refund of any of the waived amounts which have been refunded by them.

While we understand that other optometry and veterinary officers have raised similar questions concerning their basic and special pay entitlements, and have expressed an interest in receiving waivers of the claims against them arising out of erroneous overpayments, the particular circumstances of their cases are not before us. Accordingly, such cases when brought to the attention of the proper authorities should be treated in conformity with the views expressed here.

R. P. KELLER
Deputy³ Comptroller General
of the United States