

J. Mitchell

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-192338

DATE: September 19, 1978

MATTER OF: Variable Incentive Pay contracts

DIGEST: Twelve Doctors who are commissioned officers of the Public Health Service executed Variable Incentive Pay (VIP) contracts at a later date than the date of reporting to active duty, because of lack of information or misinformation or lack of forms. These doctors may be released from active duty prior to dates of expiration in VIP contract, and this Office will not object if Public Health Service does not make collection from VIP payment ordinarily required, if the doctors serve tours of duty required by their original active duty orders.

This decision is the result of a request from the United States Public Health Service. A determination is requested concerning what action is to be taken concerning Variable Incentive Pay (VIP) contracts in the case of 12 doctors, who are officers of the Commissioned Corps of the Public Health Service.

The 12 officers are:

- Anthes, V. Malurker
- Burman, William D.
- Cairns, Robert B.
- Cowherd, C. Miki
- Geil, James H.
- Gunderson, Elizabeth P.
- Ianetsky, Allan M.
- McGann, Gary D.
- Poe, David F.
- Rabkin, Joel K.
- Rosseler, Gerald C.
- Warren, Edward S.

In each case the individual doctor agreed to serve on active duty with the Public Health Service for a specified period of time. All of the doctors are eligible to receive Variable Incentive Pay (VIP) under the provisions of 37 U.S.C. 313 (Supp. IV, 1974), as amended. However, they have executed VIP contracts which obligate

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them to serve a longer period than contemplated by their active duty orders. Therefore, if they do not serve the period agreed to in the VIP contracts they are subject to substantial forfeitures of their incentive pay. The doctors have made various commitments following the tours of duty with the Public Health Service and the untimely execution of the VIP contracts creates conflicts with such commitments. The periods between their active duty orders requirement and the period they have obligated themselves to serve under the VIP contract range from 2 days to substantial periods.

Generally, the reasons advanced by the doctors for not executing the VIP contracts to run for their agreed to period of active duty are that they were unaware of the requirement of executing the contract prior to reporting for active duty or that they did not have the contract forms available. In one instance the member indicates that he mailed the contract but it was not received in the Commissioned Personnel Operations Division of the Public Health Service.

All of the doctors were recruited to serve in the Indian Health Service and their duty locations were in remote areas where there was limited access to personnel office services. In most of the cases the doctors indicate they did not become aware of the problems concerning the VIP payment until they received their first payment of pay and allowances and the VIP payment was not included. At that time they became aware of the necessity of executing the contracts.

The Public Health Service states that all doctors are sent a packet of materials prior to reporting for active duty and that the VIP contract and instructions are included. However, it is acknowledged that the possibility exists that some members may not have received their VIP contracts.

Variable incentive pay for medical doctors of the uniformed services is authorized by 37 U.S.C. 313. 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.

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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 which 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 notary 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."

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.

Thus, under ordinary circumstances it is necessary for an officer to execute and have his signature notarized on a contract which commits him to serve for a specified period subsequent to the date of execution, in order to receive the VIP. The written agreement evidences the physician's intent to remain on active duty and also serves as a means of determining the rate of compensation to be received. By implementing regulations, a physician executing a long-term contract receives a greater yearly compensation than one executing a short-term contract.

The view has been expressed by the courts and this Office that where it is clear that there was an intent to meet the requirements of a statute or regulation and substantial performance of the requirements is accomplished, the omission of a requirement, such as the filing of an exemption or execution of a written agreement, would not necessarily preclude entitlement to authorized benefits. See

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Methodist Home and Hotel Corp. v. United States, 291 F. Supp. 595 (S. D. Tex. 1968). Also compare B-186925, November 4, 1976. Thus it would appear that notwithstanding the language of a statute requiring the execution of a written agreement as a condition precedent to receiving some benefit or allowance, the failure to execute a written agreement will not necessarily preclude payment of the benefit or allowance if the party concerned is otherwise qualified, has substantially complied with all other requirements and there is evidence, either express or implied, of an intent by the member to timely execute such an agreement. Stated another way, if the failure to execute was due to lack of information or misinformation and it can be shown that had the agreement been timely presented to the member he would have executed it, then substantial compliance with the requirements of the statute may be inferred. This is not to say that the requirement to execute an agreement will be considered in all circumstances as perfunctory and thus of no value. Where for instance a member is fully aware of the requirement for a written agreement but refuses to execute it thus leaving open his options and leaving the Government unsure of his future services in a critically needed skill, he should not be permitted at a later time to claim retroactive payments of the benefit or allowance. Compare B-168139, October 31, 1969.

In the circumstances presented, it is apparent that many of the individuals expected the VIP payment to be made with their payments of pay and allowances. On not receiving the payments they inquired and then executed the VIP agreements on being made aware of the necessity. In other cases the claimants executed the agreements shortly after reporting for duty presumably on being made aware of the requirements for receiving a VIP payment. Also, for consideration is the fact that the individuals concerned in these cases performed their duty assignments in remote areas and did not have access to personnel offices as readily as those serving at larger facilities.

These circumstances lead us to conclude that the VIP program as administered by the Public Health Service does not insure that the necessary information concerning the import of executing a VIP contract to run contemporaneously with the period of ordered active duty is conveyed to the doctors in a clear and timely fashion. While the regulations are specific, it is our view that steps could be taken to insure that the officers who are eligible for VIP are informed in a timely and direct manner so as to preclude similar cases from arising in the future.

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Of the 12 cases forwarded to this Office, we have been informally advised that 9 of the officers have performed the duty required by their VIP contracts. Accordingly no action is necessary in those cases.

In the cases of Doctors Warren, Poe, and Cairns it is our view that had the doctors been fully aware of the requirements they would have executed the contracts in a timely fashion. Thus, the officers have substantially complied with the requirements of 37 U.S.C. 313, since they have served the period of duty in accordance with their active duty orders.

Accordingly, these officers may be paid Variable Incentive Pay for the period of duty required by their active duty orders. If the payments have been made and the officers do not complete the duty in accordance with the VIP contract, collection action on these payments need not be taken.

Any cases which in similar circumstances should be forwarded to this Office with a complete administrative report for a determination on the basis of the facts in each individual case.

R. F. K. K. K.
Deputy Comptroller General
of the United States