

DOCUMENT RESUME

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[Claim for Reimbursement Involving Termination of Variable Incentive Contract]. B-192285. December 15, 1978. 4 pp.

Decision re: Dr. Clinton Hoen; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel; Personnel Law Matters II.

Organization Concerned: Public Health Service.

Authority: 37 U.S.C. 313. 37 U.S.C. 501(g). 37 U.S.C. 404(b). 37 U.S.C. 406(c). 41 Comp. Gen. 767. 1 J.F.R., para. B5457.

Public Health Service Personnel Instruction 3, CC22.2.

A physician appealed a settlement denying his claim for payment for transportation for himself and his dependents, shipment of household goods, and lump-sum payment for annual leave incident to his voluntary release from active duty. The officer had signed a variable incentive pay (VIP) agreement, but because he terminated his contract before the VIP period was completed, he was not entitled to transportation, shipment of household goods, nor lump-sum payment for annual leave. (R25)

DECISION

L. Hoover
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20543 *8627*

FILE: B-192285**DATE: December 15, 1978****MATTER OF: Dr. Clinton Moen**

DIGEST: A Variable Incentive Pay (VIP) agreement when signed by an officer, represents a binding contract, and when an officer executes such a contract for 2 years and subsequently accepts the authorized payment, this officer may be divested of his entitlement to transportation, shipment of household goods, and lump-sum payment for unused annual leave if he terminates his contract prematurely even though he claims to have intended only a 1-year commitment.

This is in response to an appeal of a settlement of our Claims Division denying the claim of Dr. Clinton Moen for payment for transportation for himself and his dependents, shipment of his household goods, and lump-sum payment for annual leave incident to his voluntary release from active duty with the Public Health Service.

Dr. Moen entered on active duty with the Public Health Service in August 1974. On September 17, 1974, he executed a Variable Incentive Pay (VIP) contract, whereby he agreed to remain in the service for 1 year in exchange for variable incentive pay of \$12,000 in addition to his regular pay and allowances. Due to delays in issuing regulations implementing the legislation which authorized the variable incentive pay, an opportunity was provided in June 1975 to terminate existing contracts and execute new VIP contracts. Under this offer a prorated amount of the initial contract payment would have to be refunded. New contracts had to be submitted before July 1, 1975.

Dr. Moen states that he executed a new VIP contract for 1 year on June 1, 1975. A copy of this is enclosed with his appeal. However, this contract is not signed by the proper officials and was never received at headquarters, Public Health Service. Dr. Moen indicates that on not receiving the payment for this contract, on the advice of his supervisor he executed another contract on September 19, 1975, for a 2-year period. This contract was approved and he was paid \$12,500 for 1 year of a 2-year contract and a personnel order confirming this was sent to him.

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Subsequently, another contract dated June 1, 1975, but approved in November 1975, was submitted to headquarters, Public Health Service. This contract was not accepted since there was already a valid contract for 2 years executed on September 19, 1975. Program officials considered this 1-year agreement invalid, since Dr. Moen was already serving under the 2-year agreement and had been paid accordingly.

On September 17, 1976, Dr. Moen was released at his own request from active duty with the Public Health Service. Pursuant to Commissioned Corps Personnel Manual (CCPM), CC22.2, Instruction 3, Section H.3, Dr. Moen was informed that he was indebted to the United States for \$3,750 of the \$12,500 he received for completing only 1 year of a 2-year agreement. He was also diverted of payment for travel and transportation expenses for himself and his dependents, shipment of household goods, and payment for unused annual leave for failing to complete his active duty commitment under the VIP agreement executed September 19, 1975.

Dr. Moen states that he never intended to serve more than 2 years with the Public Health Service. He contends that in executing the September 19, 1975 VIP agreement, he erred in checking the box on the contract indicating he would serve 2 additional years from the date of execution. He states that he believed this to be the appropriate action, since it indicated a total commitment of 2 years--the 1 year he had already served and an additional year. He, also, contends that the VIP agreement for 1 year dated June 1, 1975, and received at headquarters, Public Health Service, in November 1975 should be accepted as a correction of the September 19, 1975 agreement which was in error.

Under 37 U.S.C. § 313 and regulations promulgated pursuant thereto by the Secretary of Health, Education, and Welfare, a medical officer of the Public Health Service who is otherwise eligible and executes a written active duty agreement will receive incentive pay for completing a specified number of years of continuous active duty. Upon acceptance of the written agreement by the Secretary or his designee, he may be paid an amount not to exceed \$13,500 for each year of the agreement, in addition to any other pay and allowances to which he is entitled.

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This statute also provides that an officer who does not complete the service for which he received the VIP payment, will be required to refund any amounts received in accordance with regulations promulgated by the Secretary. There is no provision authorizing the renegotiation of a VIP agreement that has been executed and approved.

Apparently, no authority exists whereby the Public Health Service can require a commissioned officer to remain on active duty. Consequently, 37 U.S.C. § 501(g) (1976) and paragraph M6457 of Volume 1, Joint Travel Regulations (1 JTR) which authorize a lump-sum payment for unused annual leave on separation and travel and transportation allowances, respectively, are used to provide additional incentives for an officer to serve the complete period of active duty to which he had agreed.

Under 37 U.S.C. § 501(g) a commissioned officer of the Public Health Service may be paid a lump-sum payment for unused annual leave under certain circumstances, with the approval of the Surgeon General. It has been the practice of the Surgeon General to disapprove applications for the lump-sum payment made by officers who do not serve the entire period of duty to which they agreed. See Public Health Service Personnel Instruction 3, dated July 13, 1976, CC22.2, Section H, paragraph 5. Since the Congress specifically provided approval authority to the Surgeon General in connection with the payment for unused annual leave, it is our conclusion that regulations providing for divestiture of this entitlement are within the scope of the statute.

Likewise, 1 JTR M6457, provides similar authority in connection with entitlement to travel and transportation allowances for himself and his dependents and household goods when a member voluntarily leaves the service prior to the expiration of a period that he agreed in writing to serve. This restriction is apparently issued under the authority of the Secretary concerned to prescribe conditions and limitations under which such travel and transportation allowances accrue. 37 U.S.C. §§ 407(b) and 406(c) (1976). See 41 Comp. Gen. 767 (1962).

In Dr. Moen's case he executed a contract on September 19, 1975, by which he agreed to serve for 2 years from the date of

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the contract. He contends that the commitment he made to serve 2 years was an error because of the ambiguity of the contract form. We note, however, that the copy of the contract form he executed on June 16, 1975, which was not received by the proper officials, clearly shows a 1-year commitment. Furthermore, this was not the first time Dr. Moen had executed a VIP contract, and detailed regulations concerning the VIP program had been promulgated at the time he executed the VIP agreement on September 19, 1975.

The contract received at Public Health Service headquarters in November 1975, which was intended to amend the agreement of September 19, 1975, was not effective since it was not approved by the proper officials on the basis that a VIP contract is not renegotiable and clearly states on its face that penalties will be imposed in accordance with service policies. Furthermore, the acceptance of the payment of \$12,500 and the personnel order indicating that the payment was for 1 year of a 2-year contract should have put him on notice that he had committed himself for 2 years from the date of the contract, rather than the 1 year he states that he intended to serve.

In the circumstances presented Dr. Moen is bound by the terms of the contract he executed on September 19, 1975.

Accordingly, the settlement of the Claims Division denying his claim must be sustained.

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