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DECISION



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

[Indebtedness for Nonfulfillment of Active Duty Commitment]

FILE: B-190935

DATE: October 4, 1979

MATTER OF: Dr. Ralph E. Gaskins, Jr., Armed Forces Health Professions Scholarship Program - Request for Reconsideration

DIGEST:

Decision B-190935, January 25, 1979, in which we held that doctor participating in Armed Forces Health Professions Scholarship Program who did not fulfill his active duty commitment had to reimburse Navy for full cost of financial assistance he received, including monthly stipend payments, is affirmed. Since participants in Navy Program are not required to perform any military duties while attending school other than while on active duty, for which they are paid separately, stipend cannot justifiably be treated as salary for present services. Instead, stipend is part of total benefits paid to participants to induce them to enter Armed Forces and as such should be viewed as "other educational costs" that must be repaid if service commitment is not met.

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This decision is in response to a request from counsel for Ralph E. Gaskins, Jr., M.D., for our Office to reconsider our decision, Dr. Ralph E. Gaskins, Jr. - Armed Forces Health Professions Scholarship Program (B-190935, January 25, 1979). In that decision, we concluded that Dr. Gaskins was indebted to the United States for the total amount of \$17,137.08 that he received in scholarship benefits while participating in the Armed Forces Health Professions Scholarship Program (AFHPSP), 10 U.S.C. §§ 2120-2127 (1976).

As stated in our decision of January 25, 1979, Public Law No. 92-426, approved September 21, 1972, established the AFHPSP and authorized the Department of the Navy (as well as the other military departments) to provide "scholarship" assistance to participants, including the cost of tuition, books, and miscellaneous fees, as well as a \$400 monthly stipend. In return for receiving such assistance, program participants must promise to fulfill an active duty obligation, upon their graduation from professional school, of at least one year for every year of participation in the Program.

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After Dr. Gaskins was graduated from medical school, having received four years of scholarship assistance totalling \$17,137.08, including \$3,797.08 for tuition and books and \$13,340 in monthly stipend payments, he applied for and was granted a discharge as a conscientious objector. In the same letter (dated September 15, 1977) in which the Secretary of the Navy approved Dr. Gaskins' request for a conscientious objector discharge the Navy also asserted a claim against Dr. Gaskins for the full amount of assistance he received (\$17,137.08), including the monthly stipend payments.

In response to the Navy's claim, Dr. Gaskins, through his attorney, maintained that under the terms of the agreement he signed as a condition of entering the AFHPSP, he was only obligated to repay \$3,797.08, representing "tuition, books, and miscellaneous." In support of his position, Dr. Gaskins relied primarily on the language of paragraph 4 of the scholarship program application in which he agreed "to reimburse the Government for all tuition and other educational costs which it incurred * * * if he failed to complete his service obligation under the contract as a result of action not initiated by the Government. It was Dr. Gaskins' contention that the stipend payments actually constituted his salary, and were treated as such by the Internal Revenue Service (IRS), and therefore did not fall within the scope of the phrase "other educational costs" that he had agreed to repay in the event he did not fulfill his service commitment.

In our decision, we agreed with Dr. Gaskins (and the Navy) that resolution of the matter depended largely on principles of contract law. However, we rejected Dr. Gaskins' contention that the stipend constituted a salary for "future services," and could therefore not be included in the phrase "other educational costs," as that term was used in the agreement Dr. Gaskins signed:

"In light of the purpose of this program and the clear establishment of a requirement that participants reimburse the Government if they fail to fulfill their obligation, it is only reasonable to interpret the provision in question to include the stipend payments which represent the single largest category of benefits received by program participants. Moreover, there is no inconsistency in our view, between treating the stipend payments as an inducement or payment for future services, for tax purposes and, at the same time, requiring the recipient of those payments to repay the Government if he never performs the services as agreed."

In a related footnote concerning the "salary" question, we said:

"We should also point out that in his initial correspondence with the Navy concerning this matter, Dr. Gaskins' attorney also argued that the stipend payments constituted a salary for present services. However, in his subsequent correspondence with the Navy as well as his submission to our Office, this argument apparently was dropped. Accordingly, this decision does not address that issue beyond agreeing with the Navy's view that the facts do not support such a contention, since Dr. Gaskins had no military duties to perform for the Navy during the period he was receiving the monthly stipend (as Dr. Gaskins acknowledged in correspondence with the IRS in 1973)."

We also rejected Dr. Gaskins' reliance on the IRS' treatment of stipends generally as salary when a quid pro quo is required of the recipient, because the tax consequences of receiving stipends would not have been controlling with respect to the question of contract interpretation we were considering. Furthermore, the IRS treatment of the particular stipend received by Dr. Gaskins did not support his position since specific legislation was enacted providing that the stipend paid to participants in the AFHPSP was to be treated as a nontaxable scholarship rather than as a taxable salary.

Essentially, this request for reconsideration sets forth two separate, although related, bases in support of Dr. Gaskins' contention that he is not legally obligated to repay the monthly stipend payments. First, Dr. Gaskins' attorney maintains that he never intended to abandon the contention that the stipend payments constituted a salary for present services (as we indicated in the above quoted footnote from our decision). To the contrary, Dr. Gaskins' attorney states that to be his strongest argument. Second, it is now contended that the Government cannot apply "ordinary notions of contract law in matters pertaining to military pay." Instead, it is argued, we are bound to interpret Dr. Gaskins' obligations pursuant to the applicable regulations, which are said to support his position.

In suggesting that the stipend payments constituted a salary for present services which he performed to the extent required, Dr. Gaskins is apparently relying primarily on the requirement set

forth in the Department of Defense (DOD) Directive that, in addition to serving on active duty for 45 days each year, program participants "shall be required to participate in prescribed military and professional training." Part IV, Para. E of DOD Directive 1215.14, February 4, 1975. Also, see Para. D.3(e). Although Dr. Gaskins' attorney does not rely on the statute itself, 10 U.S.C. § 2121(c) states in very similar terms that:

"* * * members of the program shall, under regulations prescribed by the Secretary of Defense receive military and professional training and instruction."

Even if participants in the AFHPSP were required, pursuant to the quoted provisions in the statute and regulations to participate in some type of military training while in an inactive status, in addition to the prescribed 45-day period of active duty, we do not necessarily agree that the stipend payments would, as a result, have to be treated as salary rather than educational costs for purposes of the question before us. However, we do not have to make this determination because Dr. Gaskins was not in fact required to perform any military duties for the Navy while he was attending school. In this regard, the Navy regulation governing the AFHPSP provides as follows:

"Participants in this program will not be required to wear the uniform while attending school, nor will they be required to attend drills, daily musters, or perform any other duties while in school that are not part of their academic curriculum." Para. 11, SECNAV Instruction 1520.8, September 12, 1975.

Moreover, if a participant in the program was placed on active duty and required to perform any military duties or receive any additional military training, for any period in excess of the prescribed 45-day period of active duty, it is clear that he would be entitled to and would receive active duty pay for the entire period during which he was so activated. For example, see Para. 9 of SECNAV Instruction 1520.8, supra. Therefore, we could not agree that Dr. Gaskins was paid the stipend in return for his remaining available for active military service while attending school since he would have been separately compensated for any such period of active duty that was required of him.

Furthermore, as we said in our earlier decision, Dr. Gaskins took the position with the IRS in 1973, while a participant in the AFHPSP, that the stipend payments he received should not be treated as taxable salary because he had no duties to perform for the Navy during the period he was receiving the monthly stipend payments.

For the foregoing reasons, we cannot subscribe to the view that the stipend can justifiably be treated as a salary for present services, rather than as a portion of the educational costs incurred by the Government that Dr. Gaskins is obligated to repay.

Turning to the contention that our original decision improperly applied concepts of contract law to this case instead of relying solely on the applicable regulations, our position remains unchanged. Dr. Gaskins relies on the case of Larionoff v. United States, 431 U.S. 864 (1977), to support the proposition that contract law is not applicable to questions involving military pay. The Supreme Court held in Larionoff that "a soldier's entitlement to pay is dependent upon statutory right," and hence that a service member's right to receive a variable reenlistment bonus (VRB) "must be determined by reference to the statutes and regulations governing the VRB, rather than to ordinary contract principles." However, Dr. Gaskins' reliance on the holding of that case begs the question under consideration here, that is, whether stipend payments fall into the category of "military pay," which is but another term for salary. Since it is our view, for the reasons stated above, that the stipend payments do not constitute salary (military pay) for present services, we do not believe that the Larionoff holding has any applicability.

Moreover, even if we were to assume that principles of contract law are not applicable here, and therefore that the matter is to be decided solely by reference to the applicable statutory and regulatory provisions, our conclusion would not be significantly different. Dr. Gaskins' attorney contends that a "close reading of the regulations demonstrates that the 'stipend' is for Dr. Gaskins' remaining available for military service while he was attending school" and, furthermore, that only monies other than the stipend payments are specifically required to be repaid. Our reading of the regulations demonstrates no such thing. Nowhere do the regulations state or even suggest a link between payment of the stipend and performance of any present duties other than academic ones. Rather than serving to induce participants in the AFHPSP to remain available for military service while attending school, which was never required of Navy participants in the program in any event, the stipend, in our view, was intended to allow participants

B-190935

to meet their living expenses while attending school. In this sense, the stipend was just another element of the benefits paid to participants in the AFHPSP as an incentive for them to enter the Armed Forces and agree to fulfill a period of active duty service upon their graduation from professional school. We see no basis for differentiating between the stipend payments and the other forms of scholarship assistance received by program participants in determining the appropriate amount the Government should recover in the event that commitment is not fulfilled.

Furthermore, the regulations do not specifically limit the required repayment to monies other than the stipend payments. Rather, the pertinent DOD Directive states the obligation of participants who do not fulfill their active service commitment to reimburse the Government "for all tuition and other educational costs incurred * * *," using virtually the same language as the agreement Dr. Gaskins signed. Part IV, Para. G.(2), DOD Directive 1215.14, supra. We determined that the provision in the agreement requires individuals who withdraw from the program to repay the stipend. Our view of the regulatory requirement is no different.

Accordingly, we affirm our decision of January 25, 1979, that Dr. Gaskins is indebted to the United States for \$17,137.08.


Deputy Comptroller General
of the United States