

DECISION

18856
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-200975

DATE: July 20, 1981

MATTER OF: Dr. David N. Tobey, Jr., USPHS

DIGEST: Where Public Health Service (PHS) regulations prescribe that training received in a non-PHS facility shall be classified as extramural training, thereby giving rise to an active duty obligation and a reduced entitlement to variable incentive pay (VIP), it is within the authority of the PHS to prescribe such regulations and thus limit an officer who received 45 months of training in non-PHS facilities to a reduced amount of VIP.

What is the proper rate of variable incentive pay (VIP) to be paid to a medical officer of the Public Health Service (PHS) after he completes a 4-year residency program while on active duty? A lower rate (\$9,000) is authorized if the officer is considered as incurring a period of obligated service as a result of accepting the residency. A higher rate (\$12,000) may be paid if he did not incur an active duty obligation as a result of the training. Under PHS regulations an officer who receives extramural training incurs an active duty obligation; whereas, an officer who receives intramural training does not incur such an obligation unless the intramural training involves periods of training in non-PHS facilities. It is our view that the officer in this case incurred a period of obligated service as a result of the residency program and, thus, is limited to the lower rate (\$9,000) of VIP.

This action is the result of an appeal from a settlement of our Claims Group denying the claim of Dr. David N. Tobey, Jr., for additional VIP in connection with a period of active duty with the PHS.

Dr. Tobey was called to active duty in the Commissioned Corps of the PHS on June 25, 1971. He began residency training in otolaryngology on July 1, 1975, at the PHS hospital in Seattle, Washington, through a program conducted in affiliation with the University of Washington. He completed the 4-year training program on June 30, 1979, and signed a VIP agreement authorized under 37 U.S.C. 313 to remain on active duty for 2 years, beginning July 1, 1979.

[Claim for Additional Variable Incentive Pay]

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The PHS determined that Dr. Tobey's 4 years of residency training included 45 months of extramural training at the University of Washington. Consequently, PHS concluded that he had incurred a 2-year active duty obligation as a result of the training. Therefore, he was entitled to only a \$9,000 VIP payment instead of a \$12,000 payment he would have otherwise received. Dr. Tobey contends that he did not incur an active duty obligation as a result of the training since it was strictly intramural and that he should be entitled to the \$12,000 per year VIP payment. He bases this view on the fact that his position at the PHS hospital in Seattle was filled by himself or another doctor affiliated with the program at all times. He also contends that if it was extramural training, orders should have been issued so designating it, and that he was at all times administered by the PHS hospital and no tuition and fees were paid by PHS.

Under the provisions of 37 U.S.C. 313, a medical officer of the PHS may be paid VIP in exchange for his agreement to remain on active duty for a specified number of years. The law also provides that an officer serving an active duty obligation resulting from a medical education program leading to appointment or designation as a medical officer, shall be paid \$9,000 for each year of the active duty agreement.

Regulations implementing this law are found at Commissioned Corps Personnel Manual, CC22.2, Personnel Instruction 3. Section G, paragraph 2.b provides in part as follows:

"An officer serving an obligation incurred as a result of full-time (1) extramural training (see Instruction 1, Subchapter CC25.2, this manual) or (2) intramural training which includes one or more periods of extramural training (see Instruction 3, Subchapter CC25.2, this manual), is eligible for VIP at the rate of \$9,000 per year while so serving. * * *"

The program that Dr. Tobey entered was listed in the PHS publication as "Intramural Medical and Dental Residency Programs of the Public Health Service." The residency program in otolaryngology was to be conducted at the PHS

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hospital in Seattle and is integrated with the University of Washington Hospitals.

The source of the active duty obligation for medical training received by PHS officers is 42 U.S.C. 218a (1976), which provides as follows:

"(a) Appropriations available for the pay and allowances of commissioned officers of the Service shall also be available for the pay and allowances of any such officer on active duty while attending any Federal or non-Federal educational institution or training program and, subject to regulations of the President and to the limitation prescribed in such appropriations, for payment of his tuition, fees, and other necessary expenses incident to such attendance.

"(b) Any officer whose tuition and fees are paid pursuant to subsection (a) of this section while attending an educational institution or training program for a period in excess of thirty days shall be obligated to reimburse the Service for such tuition and fees if thereafter he voluntarily leaves the Service within whichever of the following periods of active service is the greater: (1) six months, or (2) twice the period of such attendance but in no event more than two years. Such subsequent period of service shall commence upon the cessation of such attendance and of any further continuous period of training duty for which no tuition and fees are paid by the Service and which is part of the officer's prescribed formal training program, whether such further training is at a Service facility or otherwise. The Surgeon General may waive, in whole or in part, any reimbursement which may be required by this subsection upon a determination that such reimbursement would be inequitable or would not be in the public interest."

Regulations of the PHS dealing with subsection (b) of this statute are found in CC25.2 which deals with extramural training. Clearly under both the statute and the regulations a medical officer whose tuition and fees are paid by

the PHS incurs an active duty obligation in exchange for the educational benefits.

Subsection (a) of the statute provides that subject to regulations of the President, the pay and allowances as well as the tuition and fees of an officer may be paid in a Federal or non-Federal educational institution. While the statute does not specifically provide for incurring an active duty obligation as a result of attending an educational program, it does vest the President with broad regulatory authority in administering the program. Thus, it is our view that it is within the scope of the PHS authority to prescribe regulations requiring an active duty obligation in exchange for the payment of pay and allowances while attending an educational institution.

The provisions of CC25.2, Instruction 3, Section D, paragraph 3, are as follows:

- "3. When an intramural training program includes one or more periods of extramural training (i.e., training received in a non-PHS facility), then the officer will be obligated to remain on active duty for six months or twice the total period of extramural training, whichever is greater, subject to the following limitations:

* * * * *

- "b. For extramural training which involved no payment of tuition and fees - only the period of such training which exceeds one year will be included in the computation of the officer's active duty service obligation."

Under the provisions of this regulation, Dr. Tobey's instruction in other than a PHS facility must be considered as extramural training, even though this definition of extramural training is not entirely consistent with the chapter of the Commissioned Corps Personnel Manual dealing exclusively with extramural training.

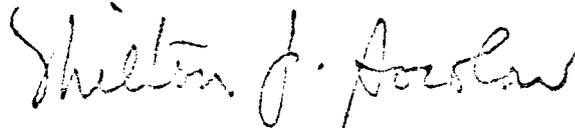
Furthermore, the explicit reference in the VIP regulations makes it clear that the PHS intended officers who have

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periods of extramural training in connection with intramural training which exceed the limitation of the regulation to receive the reduced amount of VIP.

While Dr. Tobey contends that he is entitled to the additional VIP, because he was administratively controlled by the PHS hospital, that his position with the hospital was always filled by himself or another doctor in the program, and that no orders were issued classifying his training as extramural, the fact remains that he received 45 months of training in a non-PHS facility.

Accordingly, we must sustain the action of our Claims Group and his claim must be denied.



Acting Comptroller General
of the United States