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

FILE: B-190458 DATE: January 26, 1978

MATTER OF: Dr. Reuben J. Washington

DIGEST: The separation orders of a Public Health Service officer, released from active duty upon the completion of his obligated term of service, must be amended retroactively to authorize payment for unused accrued leave, and travel and transportation allowances, where it is clearly demonstrated that the withholding of these entitlements under the original orders was the result of an erroneous assumption made when those orders were prepared that the member had breached an agreement to remain on active duty.

This action is in response to correspondence dated September 8, 1977, from the Director, Commissioned Personnel Operations Division, United States Public Health Service, requesting an advance decision as to the propriety of making payment to Dr. Reuben J. Washington for unused accrued leave, and travel and transportation allowances, incident to his release from active duty as a commissioned officer with the Public Health Service (PHS) on June 30, 1977.

The member was graduated from the University of Pittsburgh in May 1975 with the degree of doctor of medicine, and on July 1, 1975, he entered active service with the PHS as an intern at the PHS Hospital, Boston, Massachusetts. Thereafter, in February 1976, he applied for a 1-year residency training program in general surgery at the PHS Hospital, Seattle, Washington, by completing and submitting Form PHS-1122-1, "Application for Training for PHS Commissioned Personnel." In conjunction with the application, he signed a statement in which he acknowledged his understanding as to the additional active duty obligation he might incur by participating in an intramural PHS residency training program. The statement reads in pertinent part as follows:

> "A. I understand that I am not obligated to remain on active duty on account of residency training received within a Public Health Service Hospital or other PHS facility.

"B. If the intramural residency training program includes one or more periods of training in a non-PHS facility, I agree to remain on active duty in the Public Health Service Commissioned Corps for six months or twice the total period of training received in non-PHS facilities, whichever is greater, subject to the following limitations:

"(1) If the total period of training in non-PHS facilities is less than 30 days, I will incur no obligation.

"(2) Up to one year of training in non-PHS facilities, for which no tuition and fees are charged shall be disregarded in determining the period of obligated service.

"(3) My total obligation shall not exceed two years.

"C. I understand that if I fail to complete the agreed period of active duty subsequent to training stated in this agreement, the Service will withhold lump sum payment of accrued annual leave; divest me of any entitlements to travel and transportation allowances and travel time which are otherwise authorized in connection with separation from the Service; * * *"

These conditions are based upon and are consistent with the provisions of subchapter CC25.2, instruction 3, of the PHS Commissioned Corps Personnel Manual regarding the participation of officers in intramural residency training programs. The manual implements 37 U.S.C. 501(g) and paragraph M6457 of Volume 1, Joint Travel Regulations, in authorizing the withholding of payment for unused accrued leave and divestment of travel and transportation allowances as a penalty for the failure of a PHS officer to complete an obligated period of active duty.

The member's application was approved, and he was reassigned from Boston to the PHS Hospital in Seattle on July 1, 1976, as a resident

in general surgery. In the course of the following year, his residency program included several periods of service exceeding 30 days at non-PHS hospitals and medical centers in the Seattle area in addition to duty at the PHS Hospital. It is indicated, however, that no tuition and fees are charged in a general surgical residency training program such as that undertaken by the member. Thus, under the applicable directives and the terms of his agreement, the member incurred no additional obligation to remain on active duty through his participation in that residency program, since his tuition-free training at non-PHS facilities did not exceed 1 year.

On June 2, 1977, the member submitted a request to be released from active duty on June 30, 1977, upon the completion of his second year of PHS service. He apparently had made no commitment to remain on active duty beyond the requested date of separation. However, the separation orders that were issued specified that neither payment for unused accrued leave nor travel and transportation allowances were authorized incident to his release.

It is indicated that the withholding of these entitlements was due to an administrative error on the part of the order-issuing authority (the PHS Surgeon General acting through the Commissioned Personnel Operations Division), in assuming the member had incurred an additional active duty obligation through his participation in the residency program. It is said that the error would not have occurred if the member's records concerning his residency service had been thoroughly reviewed prior to the issuance of the separation orders. It is also said that the error was partly due to the omission of the member and his supervisors at the PHS Hospital, Seattle, in not furnishing a detailed description of his residency service for use in connection with his separation processing. The error did not come to light until after the member was separated from active duty and had apparently already moved from Washington to his home State, Pennsylvania, in order to participate in a residency program in othopedic surgery at the University of Pittsburgh.

In the submission it is indicated that PHS authorities desire to correct the error and provide the member with those entitlements and benefits which were due him. However, doubt is expressed as to whether it would be permissible to retroactively modify the member's separation orders under rules previously enunciated in

decisions of this Office, since no error is apparent on the face of the orders as issued. Specific reference is made to decision B-186036 of January 26, 1977.

It is a well established rule that legal rights and liabilities with regard to travel allowances vest as and when travel is performed under orders and that such orders may not be revoked or modified retroactively so as to increase or decrease the rights which have accrued or become fixed, after the travel has already been performed. An exception to this rule has been recognized when an error is apparent on the face of the original orders, or all facts and circumstances surrounding the issuance of such orders clearly demonstrate that some provision which was previously determined and definitely intended had been omitted through error or inadvertence in preparing the orders. 23 Comp. Gen. 713 (1944); 24 Comp. Gen. 439 (1944); 44 Comp. Gen. 405 (1965); 48 Comp. Gen. 119 (1968) and 55 Comp. Gen. 1241 (1976).

Decision B-186036, supra, concerned the claim of a former PHS officer for travel and transportation allowances incident to his requested separation from active duty prior to the completion of an obligated term of service incurred through participation in residency training. In that case, PHS authorities and the member were aware of the fact that he was abrogating his agreement to remain on active duty, and his separation orders properly specified that he was not entitled to travel and transportation allowances. Two days before he was to be released, the member asked that his orders be cancelled, so that he could remain in service. This request was denied, and he was separated as scheduled. Several years later, upon the member's application, PHS authorities made a determination that his service had been inadvertently terminated. We held that such determination did not furnish a legal basis for amendment of the separation orders to retroactively authorize payment of travel and transportation allowances, since it was evident that the member had in fact not completed his service obligation and the omission of travel authorization in the original separation orders had been definitely and properly intended by the order-issuing authority at the time such orders were promulgated.

The circumstances of that case differ materially from those presented here. In the present case, the member in fact had no service obligation

remaining beyond his requested date of release from active duty and the order-issuing authority has acknowledged that this fact should have been apparent when the separation orders were prepared. Hence, it is evident that the orders as published erroneously and improperly purport to deprive the member of travel and other separation benefits to which he is entitled. It is, therefore, our view that the rule prohibiting the retroactive modification of executed orders has no application in the present case, since the circumstances presented here clearly demonstrate error in the preparation of the original separation orders which if left uncorrected would wrongfully deprive the member of his entitlements under the law. Thus, it is also our view that these orders must be amended to authorize travel and transportation allowances and, in addition, payment for unused accrued leave.

Accordingly, payment may be made to the member for unused accrued leave, and travel and transportation allowances, incident to his separation from active duty with the PHS, if otherwise correct.

R.F. Keller

Deputy Comptroller General
of the United States