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DECISION



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

FILE: D-186925

DATE: NOV 4 1976

MATTER OF: Dr. Norman L. Clark, USPHS

DIGEST: When, due to administrative error commissioned officer was not considered for continuation pay (37 U.S.C. 311 (Supp. IV, 1974)) prior to the date he became eligible for such, and, as a result, Continuation Pay Voluntary Service Agreement was not sent to him until months later, entitlement to continuation pay for period from date of eligibility to date when form was actually executed is not precluded since record shows that he did intend to serve additional year and would have timely executed such agreement had it been sent to him.

This action is in response to a letter dated July 7, 1976, from the Acting Director, Commissioned Personnel Operations Division, Public Health Service, requesting a determination as to the propriety of allowing a claim for retroactive payment of continuation pay presented by Norman L. Clark, D.D.S., USPHS.

In his submission letter, the Acting Director stated that as of August 19, 1975, Dr. Clark had fulfilled all of the eligibility requirements for continuation pay with the exception that he did not execute the required written agreement until May 1976. Under 37 U.S.C. 311 (Supp. IV, 1974) and section F, paragraph 1 of the implementing regulations, Public Health Service, Commissioned Corps Personnel Manual, Subchapter CC 42.2, Personnel Instruction 2-Continuation Pay Regulation, a Public Health Service officer may be paid continuation pay under certain conditions, one of which is that he execute a written agreement expressing his intention to remain on active duty for at least 1 additional year.

The record indicates that Dr. Clark failed to execute such an agreement as of August 19, 1975, the date he was otherwise eligible for continuation pay, because the Continuation Pay Voluntary Service Agreement Form, PHS Form 5102-1, was not sent to him until late in April of 1976. Dr. Clark states that he

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made inquiries concerning his eligibility for continuation pay in February and then again in April of 1975 at the suggestion of his superior in Chicago, where he was then assigned, who recognized that Dr. Clark would soon be eligible for such pay. Dr. Clark indicates that he was assured by the Commissioned Personnel Operations Division, Public Health Service, that his eligibility date would be established and that an agreement form would be sent to him at the appropriate time. He indicates that he then felt that he understood the procedure and that further action on his part was not necessary. On September 1, 1975, Dr. Clark was transferred to the Division of Dentistry, Bethesda, Maryland. Shortly thereafter he again contacted the Commissioned Personnel Operations Division concerning his continuation pay and received assurances similar to those he had previously received. Dr. Clark indicates that after several more months elapsed without his hearing anything about his continuation pay, at the suggestion of his Division Director a detailed check was made into his status and, as a result, the Commissioned Personnel Operations Division finally sent him PHS Form 5102-1 late in April 1976. The Commissioned Personnel Operations Division received his executed agreement on May 7, 1976, and fixed that day as the effective date for the award of his continuation pay.

Dr. Clark contends that because he was not considered for continuation pay until after he became eligible for such pay and did not receive a Continuation Pay Voluntary Service Agreement Form until April 1976, because of administrative errors, he is entitled to a retroactive payment of continuation pay for the period of August 19, 1975, to May 6, 1976, in the amount of \$5,068.84. He indicates, in effect, that if the Public Health Service had properly followed its own regulations, he would have received and executed the agreement form prior to his eligibility date, August 19, 1975. In his submission letter, the Acting Director of the Commissioned Personnel Operations Division agrees that the Division should have considered Dr. Clark for continuation pay and should have sent him a Continuation Pay Voluntary Service Agreement Form prior to August 19, 1975. He referred the matter to this Office, however, with recommendation for payment because the Public Health Service has no authority to grant continuation pay retroactively.

The purpose of the continuation pay law is to provide an incentive for officers to remain on active duty for a specified

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period of time and the condition required is the execution of a written agreement which evidences the officer's intent to serve for a specified period. We cannot adopt the view that apparent eligibility under the statute and performance of the duty alone will suffice to authorize payment. Thus, in the absence of an executed written agreement, payment of continuation pay would ordinarily not be authorized. However, the view has been expressed that where it is clear that there was 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, would not necessarily preclude entitlement to authorized benefits. See Methodist Home and Hotel Corp. v. United States, 291 F. Supp. 595 (S.D. Tex. 1968).

In the present case, it is reasonably clear that prior to his eligibility date, August 19, 1975, Dr. Clark intended to serve for at least a year after August 19, 1975. Furthermore, the Acting Director of the Commissioned Personnel Operations Division has admitted that but for administrative error, Dr. Clark would have been receiving continuation pay as of August 19, 1975. It is also clear that Dr. Clark would have executed the agreement promptly had it been sent to him at the proper time.

Accordingly, since there is both demonstrated intent and performance of the required service on the part of Dr. Clark, payment of continuation pay is authorized, if otherwise correct, for the period of August 19, 1975, through May 6, 1976.

[Deputy

R. F. KELLER
Comptroller General
of the United States