

**DECISION**

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

FILE: B-192858

DATE: November 14, 1978

MATTER OF: John P. Manges, MD

- DIGEST:**
1. An existing Variable Incentive Pay (VIP) agreement under 37 U.S.C. 313 may not be renegotiated to a lesser commitment by executing a second VIP contract, even if it had been received by the proper officials. Terms of the first VIP contract are binding on the parties and where officer does not complete active service agreed to, he is subject to the refund provisions of the contract, 37 U.S.C. 313, and the regulations requiring repayment of amounts received for which service was not performed.
  2. A commissioned officer of the Public Health Service who does not complete a term of active service to which he agreed in writing may be divested of entitlement to lump-sum annual leave and travel and transportation entitlements in accordance with regulations promulgated by the Public Health Service under 37 U.S.C. 501(g) and paragraph M6457 of 1 Joint Travel Regulations, promulgated under 37 U.S.C. 404(b) and 406(c).

This action is the result of an appeal by Dr. John P. Manges, Jr., of a settlement of our Claims Division dated September 1, 1977. In the settlement, Dr. Manges claim for the payment of transportation expenses, the shipment of household goods, and lump-sum payment for unused leave incident to his separation from active duty with the Commissioned Corps of the Public Health Service in June 1977, was denied.

On July 23, 1973, Dr. Manges was recalled to active duty as a medical officer with the Public Health Service and assigned as a resident in internal medicine at the University of Vermont. On July 1, 1975, he was transferred to the Public Health Service Indian Hospital in Santa Fe, New Mexico. As a result of his assignment to the University of Vermont he incurred an active

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duty obligation of 2 years for training received outside the Public Health Service.

On August 7, 1975, he executed a Variable Incentive Pay (VIP) contract for 4 years and was authorized a VIP payment of \$9,000 effective July 1, 1975, to coincide with the completion of his initial residency. He was also paid \$9,000 for the second year of this contract.

Dr. Manges requested release from active duty with a termination date effective on the completion of his obligated term of active duty resulting from his training at the University of Vermont. Since, Dr. Manges did not fulfill the 4-year VIP contract which he had executed on August 7, 1975, he was divested of entitlement to transportation for himself and his dependents, shipment of household goods, and lump-sum payment for unused annual leave in accordance with Public Health Service regulation, Commissioned Corps Personnel Manual (CCPM) CC 22.2, Instruction 3, Section H.5.

Dr. Manges in requesting payment of these allowances indicates that on signing the VIP contract for 4 years he realized that he would receive the lower rate of \$9,000 per year until he satisfied his obligation resulting from his residency at the University of Vermont. He states that although he realized this, he was not aware that the contract once executed was not renegotiable to a lesser commitment.

Dr. Manges states that in June of 1976 his career plans had altered and that he planned to leave the Public Health Service on completing his 2-year obligation resulting from his residency. Thus, on June 17, 1976, he executed the annual recertification indicating that he intended to serve only 1 additional year rather than 3 years required under his original VIP contract. The VIP for this year would be \$9,000 under either the first or second contract for the year commencing July 1, 1976. Dr. Manges says that he assumed that this action cancelled the remaining portion of the first VIP agreement and that he had entered into a new contract with only a 1-year obligation.

The Public Health Service report on this matter states that the second VIP contract executed by Dr. Manges on June 17, 1976, was never received in their headquarters. Dr. Manges has submitted

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a copy of the contract and statements from witnesses in support of his statement that he did execute the agreement in June 1976. Dr. Manges also contends that since the original contract he signed made no provision to the effect that the contract was not renegotiable, he was justified in assuming that it could be renegotiated. He also refers to other situations existing during his tenure with the Public Health Service which he believes contributed to the decision to deny him the benefits claimed. However, we do not feel that a listing of these factors has any bearing on his entitlement to the claimed benefits.

Under 37 U.S.C. 313 (1976) 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.

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 1 Joint Travel Regulations (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 PHS Personnel Instruction 3, dated July 13, 1976,

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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 a 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. 404(b) and 406(c) (1976). See 41 Comp. Gen. 767 (1962).

In Dr. Manges' case he executed a contract by which he agreed to serve 4 years from the date of that contract. It is true that for the first 2 years of that contract he could only receive \$9,000 per year because of the obligated service. However, the fact that he executed a 4-year contract would have entitled him to substantially higher payments during his third and fourth year under the contract.

Furthermore, a VIP contract is not renegotiable and clearly states on its face that penalties will be imposed in accordance with service policies. See also PHS Personnel Instruction 3, July 13, 1976, CC22.2, Section F, paragraph 5. The subsequent contract executed by Dr. Manges in June 1976, even if received at Commissioned Corps headquarters would not have served to renegotiate his initial agreement. It also appears that he should have been aware that the second contract had not been received or was invalid, when he received the orders authorizing the second year's installment of VIP. The orders clearly stated that the payment would be for 1 year of a 4-year agreement.

Moreover, a memorandum dated May 10, 1976, to all medical and dental officers clearly stated that officers who voluntarily terminate their agreements prior to the date their current agreement expires will be divested of entitlement to transportation for themselves and dependents, shipment of household goods, and

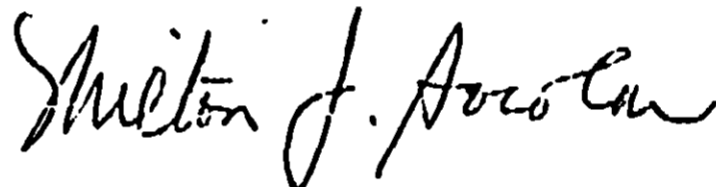
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lump-sum payment for unused annual leave. This statement was issued as a clarification of the policy, and was not a new policy.

The indications in the record that the Indian Health Service was aware at a relatively early date that Dr. Manges intended to terminate his active service in June 1977, in our view has no bearing on his entitlement to the lump-sum payment and the travel and transportation allowances.

While, it is unfortunate that Dr. Manges was not aware that he would be divested of the claimed entitlements until just prior to his separation, the contract and the pertinent regulations should have put him on notice that he would be divested of these entitlements.

Accordingly, it is our view the actions of the Public Health Service were proper in the circumstances and the denial of Dr. Manges' claim by our Claims Division must be sustained.

*for*   
Comptroller General  
of the United States