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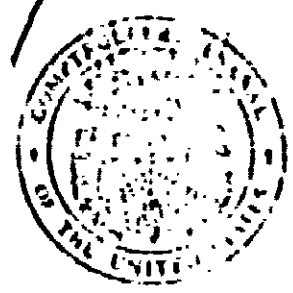
DECISION



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

FILE: B-201118 DATE: March 23, 1982

MATTER OF: Maury L. Hanson, Jr., M.D.

DIGEST: A medical officer of the Public Health Service signed a 1-year variable incentive pay agreement, but voluntarily left the service to accept employment in a civilian capacity with a different agency before completing the agreed-upon service. Since regulations promulgated under 37 U.S.C. 313, apply only to the uniformed services and do not apply to other Government service and since they provide that no part of the payment is earned unless the medical officer serves a minimum of 1 year with the Public Health Service, the payment made upon execution of the agreement must be refunded.

This action is in response to a letter from Maury L. Hanson, Jr., M.D., requesting reconsideration of decision B-201118, May 21, 1981, rendered in his case. In that decision we held that where a Public Health Service medical officer executed a 1-year variable incentive pay agreement and voluntarily leaves the service before completion of that 1 year, even though he transferred to another Government agency, the entire amount of the payment must be refunded. We must affirm that decision.

The bases upon which Dr. Hanson appeals are: that he was never informed of the pertinent regulations concerning repayment; that 37 U.S.C. 31 indicates that repayment should be prorated on the basis of service performed; that the armed services' regulations require only a prorated repayment based on service performed; and that since he was allowed credit for unused annual leave in his new agency, indicating continuing Federal service, he should also be allowed the variable incentive pay.

Dr. Hanson, a former officer of the Commissioned Corps of the Public Health Service on active duty, executed an agreement on May 25, 1979, to remain in the service for 1 year, in exchange for variable incentive pay of $11,000 in addition

to his regular pay and allowances. The effective date of the agreement was June 25, 1979. On January 5, 1980, Dr. Hanson was released from active duty with the Public Health Service at his request for the purpose of accepting employment with the Department of Labor. Since Dr. Hanson voluntarily separated before June 24, 1980--the 1-year completion date of his agreement--he was required under Public Health Service regulations to refund all of the incentive pay received pursuant to the agreement.

Section 313 of title 37, United States Code, authorizes the payment of variable incentive pay in addition to other pay and allowance entitlements for qualified medical officers of the uniformed services who execute a written agreement to complete a specified number of years of service. The Commissioned Corps of the Public Health Service is a uniformed service. See 37 U.S.C. 101(3). For those officers who resign prior to completion of their agreed to period of service, subsection (c) provides in part:

> "(c) Under regulations prescribed by the Secretary * * * an officer who has received payment under this section and who voluntarily * * * fails to complete the total number of years of active duty specified in the written agreement shall be required to refund the amount received that exceeds his entitlement under those regulations. * * *" (Emphasis supplied.)

Regulations issued pursuant to this section by the Secretary of Health, Education and Welfare in effect in June 1979, are contained in the Public Health Service Commissioned Corps Personnel Manual dated July 13, 1976. Personnel Instruction 1, Subchapter CC42.2, Chapter CC42 of Part 4 of that Manual, provides in Section D, paragraphs 12 and 13:

> "12.a. A medical officer may, at any time, voluntarily terminate his active duty agreement provided he refunds any Variable Incentive Pay that he received in

excess of the amount to which he is entitled under 13 below.

* * * * *

"13. If a Variable Incentive Pay agreement is terminated * * * his entitlement shall be prescribed in the following table:

"Length of Agreement	Number of Years completed Under Agreement				
	Less than 1	1	2	3	4
4 years	0%	15%	40%	70%	100%
3 Years	0%	22%	60%	100%	
2 Years	0%	35%	100%		
1 Year	0%	100%"			

These regulations have the force and effect of law and are to be so treated unless shown to be plainly inconsistent with the purpose of the governing statute. See United Mine Workers of America v. Kleppe, 561 F.2d 1258, 1263 (7th Cir. 1977).

There is nothing in the law which requires the repayment of incentive pay received to be prorated with the period of service when the agreement is not fulfilled by the officer. Nor are we aware of any other basis for concluding that the method used is unlawful or inconsistent with the authority granted by the law. As can be seen from the quoted table, no one who serves less than 1 year may retain any of the payment received. We do not consider it to be an unreasonable requirement that an officer of the Commissioned Corps of the Public Health Service, who executes an agreement to serve for 1, 2, 3, or 4 years, must complete a minimum of 1 year of service in order to retain any part of the payment received pursuant to the agreement.

Dr. Hanson refers to DOD Directive 1340.13 in support of his position and indicates that the other uniformed services required only a prorated repayment in similar circumstances. It should be noted that this Directive was effective July 10, 1980, subsequent to Dr. Hanson's service.

Furthermore, this regulation was promulgated pursuant to a change in the law regarding incentive pay for medical doctors in the uniformed services, and is not applicable to his case. The controlling regulation at the time Dr. Hanson was serving was Department of Defense Directive 1340.11, September 12, 1974, section III L. of which provides that an officer who voluntarily terminates his 1-year agreement prior to completing the year of service is not entitled to any variable incentive pay and must repay any amounts received pursuant to the agreement.

As to Dr. Hanson's assertion of not being informed of the Public Health Service regulations, the agreement which he executed on May 25, 1979, states:

> "IF I VOLUNTARILY TERMINATE THIS AGREEMENT I WILL BE DIVESTED OF ENTITLEMENTS FOR TRANSPORTATION FOR MYSELF AND MY DEPENDENTS, SHIPMENT OF HOUSEHOLD GOODS AND LUMP-SUM PAYMENT FOR UNUSED ANNUAL LEAVE. I WILL REFUND VIP IN ACCORDANCE WITH ESTABLISHED REGULATIONS." (Underscoring supplied.)

If he did not know what the governing regulations provided, he should have at least made inquiry as to their contents at that time.

The payment of variable incentive pay is not based on an agreement merely to continue in Federal service for a specified period. Under 37 U.S.C. 313, the payment is authorized to be made as an incentive to medical officers of the uniformed services with a critical specialty to serve on active duty for an agreed period of time. It is not applicable to medical personnel in other agencies and departments. Under the provisions of 37 U.S.C. 501(g) an officer of the Commissioned Corps of the Public Health Service on active duty who has unused accrued leave to his credit on the date of his separation, retirement or release from active duty, if approved, shall receive a lump-sum payment for that unused leave. However, a lump-sum payment shall not be made if an officer "is transferred to another department or agency" under circumstances in which his

leave may be transferred. Presumably that was the finding in Dr. Hanson's case. Thus, specific authority exists for the transfer of annual leave in certain cases, however, pay, allowances, special and incentive pays and the conditions under which they are paid are governed by title 37, United States Code, which is applicable only to the uniformed services.

Thus, Dr. Hanson's accrued leave at the time of his transfer to the Department of Labor could be transferred with him. In contrast, since under the regulations governing variable incentive pay, he had not completed the minimum unit of time upon which that payment was predicated, there is no basis for him to retain any portion of the payment made.

Accordingly, our decision of May 21, 1981, is correct and must be sustained.

for Milton J. Socolar
Comptroller General
of the United States