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DECISION



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

21043

FILE: B-205775

DATE: March 9, 1982

MATTER OF: E. Paul Tischer, M.D.

DIGEST: Physician who voluntarily terminated his service under a Federal Physicians Comparability Allowance Agreement prior to completing 1 year of service under that agreement is required to refund the comparability allowance payments he received pursuant to his agreement. The obligation to repay the allowance received may not be waived since the payments were proper when issued, even though the physician may have signed the agreement on the basis of the erroneous advice from a Government employee. Nor may the debt be reduced by tax or other deductions since those deductions constitute constructive payments the refund of which is for the consideration of revenue authorities concerned.

We have for consideration a question regarding the provisions of the Federal Physicians Comparability Allowance Act of 1978, 5 U.S.C. § 5948, and a request for waiver of indebtedness to the Government under the provisions of 5 U.S.C. § 5584. These questions pertain to the Government's claim against E. Paul Tischer, M.D., for the total amount of Physicians Comparability Allowance he received pursuant to a 2-year service agreement with the Department of the Army.

Because Dr. Tischer terminated his employment with the Army prior to completing 1 year of service under the agreement, the entire amount paid to him under that agreement is for recoupment. The fact that he was subsequently employed by the Veterans Administration does not alter these consequences since the statute that authorizes payment of the Comparability Allowance, as well as the service agreement Dr. Tischer executed, provides for employment agreements between the member and the employing agency only. The debt may not be waived under 5 U.S.C. § 5584 since payment of the Comparability Allowance was proper when made.

Dr. Tischler executed a Physicians Comparability Allowance Agreement in September 1979, by which he agreed to serve for 2 years as Chief Medical Officer at the Armed Forces Entrance and Examining Station, Salt Lake City, Utah. Under the provisions of 5 U.S.C. § 5948, this agreement entitled him to Federal Physicians Comparability Allowance at an annual rate of \$6,000 during the period of the agreement.

However, part 3 of the agreement provided in part the following:

"d. If my employment in the position shown in paragraph 2 is terminated during the period of the agreement at my request, or as a result of my misconduct, I will be required to refund the total amount received under the agreement if I have completed less than one year of the agreement * * *."

In April 1980, Dr. Tischler voluntarily terminated his employment with the Army and accepted a position on the following day as Medical Examiner for the Veterans Administration Outpatient Clinic in Evansville, Indiana. Since he terminated his employment with the Army before completing 1 year of service under the agreement, the Army Finance and Accounting Office demanded that he repay the Comparability Allowance paid to him during the period of his contracted service in the amount of \$3,368.06.

Dr. Tischler has protested the recoupment action. He contends that when he asked his commanding officer, Major John Eno, about executing the agreement in view of his impending transfer to the Veterans Administration, which was in progress at that time, the commanding officer advised him to sign the agreement since, if he should transfer to a new assignment, he could retain that portion of the allowance already paid at the date of the transfer. The commanding officer's statements were apparently based upon his interpretation of part 3, paragraph e, of the agreement, which states:

"e. If, during the period of the agreement I become eligible for the comparability allowance under a newly

announced category, I may terminate this agreement and execute a new agreement reflecting entitlement under the newly assigned category. If I exercise this option, I will be entitled to retain that portion of the allowance earned to the date of termination."

Thus, Dr. Tischer states that he signed the agreement in good faith on the basis of the erroneous advice of his commanding officer and his own private attorney, who agreed with Major Eno's interpretation of paragraph e. Dr. Tischer expresses the view that since he transferred from a civil service position with the Army to another civil service position with the Veterans Administration, he should not be required to repay the Comparability Allowance.

The Army Staff Judge Advocate's Office has concluded, and we agree, that part 3, paragraph e, of the agreement does not pertain to transfers between Federal agencies. Rather, the provision allows a physician to terminate an agreement under which he is serving and execute a new agreement when changes within the national or local agency program create a new category or position for which the physician may be eligible.

The statute which authorizes the Federal Physicians Comparability Allowance, 5 U.S.C. § 5948, provides in pertinent part:

"(a) * * * the head of an agency * * * may enter into a service agreement with a Government physician which provides for such physician to complete a specified period of service in such agency in return for an allowance for the duration of such agreement * * *.

* * * * *

"(d) Any agreement entered into by a physician under this section shall be

for a period of one year of service in the agency involved unless the physician requests an agreement for a longer period of service. * * * (Emphasis added.)

Since the statute authorizes comparability allowance agreements only between the agency head and the physician for service in the employing agency, the agreement may not extend to employment in some other Federal agency.

Therefore, neither Dr. Tischer's agreement with the Army nor the authorizing statute permits him to retain any portion of the allowance in question here, even though he transferred to the Veterans Administration, which has a different statutory authorization to pay a similar allowance. See 38 U.S.C. § 4118.

Dr. Tischer has requested waiver of his debt since he signed the agreement in good faith on the basis of the erroneous advice of his commanding officer and his attorney. The statute which authorizes waiver of the Government's claim against an employee, 5 U.S.C. § 5584, provides as follows:

"(a) A claim of the United States against a person arising out of an erroneous payment of pay and allowances * * * to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part * * *."

Thus, the waiver authority under this provision applies only to claims arising out of erroneous payments.

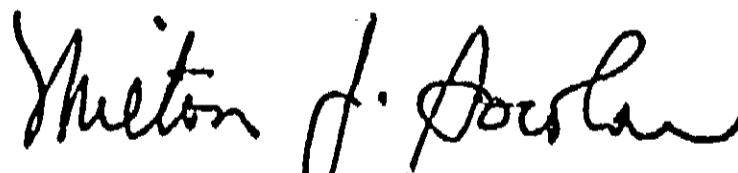
Since the comparability allowance was properly and legally paid to Dr. Tischer in accordance with the agreement he executed with the Army, the payments may not now be considered erroneous because he has become obligated to repay it due to the voluntary termination of his employment under the agreement. The fact that his superior may have given him erroneous advice concerning the meaning of his agreement does not render the payments erroneous, since he was statutorily entitled to

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the allowance when he received it. See B-200113, February 13, 1981. Moreover, the Government may not be bound by the erroneous advice of its agents. 56 Comp. Gen. 131 (1976); B-198804, December 31, 1980. Since the payments were valid when received, they were not erroneous and, therefore, repayment may not be waived under 5 U.S.C. § 5584.

Dr. Tischer also contests the Army's determination of the amount of his indebtedness. He says he did not receive \$3,368.06 in Comparability Allowance payments as the Army claims since that amount includes withholding taxes which were deducted from the payments he received. However, the amount of pay and allowances that must be repaid by an employee in cases such as this is not reduced by taxes deducted prior to payment since deductions are constructively paid to the employee. See 26 U.S.C. § 3123. Questions concerning the refund of taxes or other adjustments to income may be submitted to the revenue authorities concerned. See B-201818, August 18, 1981; B-200327, November 13, 1980, and cases cited therein.

Therefore, if otherwise correct, the Government's claim against Dr. Tischer for the Federal Physicians Comparability Allowance paid under his agreement of September 1979 with the Army is for recoupment and is not subject to waiver under 5 U.S.C. § 5584.

for 
Comptroller General
of the United States