[B-214919]

Public Health Service—Commissioned Personnel—Dual Employment

An active duty Public Health Service commissioned officer provided medical consulting services for which he was paid on an hourly basis under personal services contracts with the Social Security Administration over a period of 13 years. The officer was not entitled to receive compensation for services rendered under this arrangement because as an officer of the Public Health Service, a uniformed service,

he occupied a status similar to that of a military officer and his performance of services for the Govt. in a civilian capacity was incompatible with his status as a commissioned officer. Also, receipt of additional pay for additional services by such an officer is an apparent violation of a statutory prohibition, 5 U.S.C. 5536.

Public Health Service—Commissioned Personnel—Dual Employment

Compensation paid to an active duty commissioned officer of the Public Health Service for medical consulting services he performed under personal services contracts with the Social Security Administration constituted erroneous payments because he was entitled to receive only the pay and allowances that accrued to him as a member of the uniformed services. He is, therefore, indebted to the Govt., for the compensation paid to him for the services he rendered to the Social Security Administration.

Set-Off—Pay, etc. Due Military Personnel—Private Employment Earnings

The debt of an officer of the Public Health Service, occasioned by his receipt of erroneous pay from the Social Security Administration, may be collected by administrative offset against his current Public Health Service pay, or upon his separation or retirement from the Service, offset may be affected against any final pay, lump-sum leave payment and retired pay to which he may be entitled. The 10-year limitation on collection by setoff does not apply in this case where facts material to the Govt.'s right to collect were not known by Govt. officials until 13 years after the erroneous payments began. Amounts collected are to be deposited into the general fund of the Treasury as miscellaneous receipts.

Statutes of Limitation—Debt Collections—Military Personnel

The Government's claim against a member of the uniformed services for erroneous dual pay is not barred from court action if the facts material to the claim were discovered within less than 6 years of the date that an action is filed. Nor is the claim barred from consideration under the statute waiving the Govt.'s claims for dual pay if not received in the General Accounting Office within 6 years when it was received in that Office within 6 years of the last date of an unbroken period during which the individual occupied a status in which he was to receive compensation.

Compensation—Double—Military Personnel in Civilian Positions—*De Facto* Status

An active duty commissioned officer of the Public Health Service who illegally performed personal services under contract for the Social Security Administration is not entitled to retain compensation he received for the performance of those services on the basis of *de facto* employment or *quantum meruit*, and his debt may not be waived, in the absence of clear and convincing evidence that he performed the civilian Govt. services in good faith.

Matter of: Public Health Service Officer, March 22, 1985:

This action responds to a request for an advance decision regarding the legality of payment of compensation to an active duty commissioned officer of the Public Health Service for work he performed as a Federal civilian medical consultant for the Social Security Administration.[1] We conclude that the officer's performance of

[1] The request for this decision was submitted by Mr. Thomas S. McFee, Assistant Secretary for Personnel Administration, Department of Health and Human Services, Washington, D.C.

compensated services for the Social Security Administration was improper, and he is liable to the Government for the compensation paid to him for those services.

Background

This case concerns a physician who is a commissioned officer in the Regular Corps of the Public Health Service. He has been on continuous active duty since 1959, and is currently assigned to the National Institute on Aging, National Institutes of Health, at the Gerontology Research Center, Baltimore, Maryland. As a commissioned officer he receives the pay and allowances to which he is entitled as a member of the uniformed services. This officer also worked, under a series of personal service contracts, as a medical consultant to the Office of Disability Programs, Social Security Administration, from 1970 until July 1983, when an investigation of his dual employment was commenced by the Office of the Inspector General of the Department of Health and Human Services.[2]

Medical consultants working for the Social Security Administration under personal services contracts, as this officer was, are paid by the hour for hours spent working at the Social Security Administration facility. The number of hours a consultant works and for which he or she is to be paid is documented by sign-in and sign-out sheets maintained by the office of the project officer who is responsible for medical consultant contracts. Generally, the officer in this case performed his consulting services for the Social Security Administration outside his normal hours of duty at the Gerontology Research Center. Those hours were from 8:30 a.m. until 5 p.m. However, it is stated that based on information obtained from agency time records, there were "many occasions" when he signed in for work at the Social Security Administration prior to 5:30 p.m., which is said to be the earliest time, after his regular duty hours, in which he reasonably could have traveled from his duty station at the Gerontology Research Center to the site where he performed his contract services. These records would, therefore, seem to indicate that the officer has periodically received pay for services performed under his contract with the Social Security Administration for the same time he was to be performing his duties as an officer of the Public Health Service at the Gerontology Research Center.

Regulations of the Department of Health and Human Services require that employees (including Public Health Service commissioned officers) obtain administrative approval, in writing, prior to engaging in professional and consultative services outside of their regular duties (45 C.F.R. § 73.735–708). However, the record shows that this officer did not seek or receive approval from the National Institute on Aging or the National Institutes of Health to engage

[2] Both the Public Health Service and the Social Security Administration are agencies within the Department of Health and Human Services.

in the consultant services he performed for the Social Security Administration, although he did request and obtain administrative approval for other outside professional activities.

The officer states that he cannot recall that such formalized administrative procedures for accepting outside professional commitments were in effect in 1970 when he began working under these contracts, and that when he later became aware of the advance administrative approval requirement, he did not deem it necessary to seek approval for activity with which he had been involved for so long. He states further that to the best of his knowledge he has never received a copy of the Department of Health and Human Services Standards of Conduct, although he has seen references to them in Public Health Service circulars. In spite of the fact that he did obtain the required administrative approval for other outside professional activities, he states that he never informed anyone at the Gerontology Research Center of his consulting services for the Social Security Administration because he considered that his "personal business," which he does not discuss with his professional associates.

Certain of this officer's personnel records (curriculum vitae) that he filed in connection with his most recent request for renewal of his Social Security Administration contract (and with the Gerontology Research Certer) incorrectly indicate that he was employed by the Department of Medicine, Baltimore City hospitals, not by the Public Health Service. Social Security Administration Officials responsible for approving his contracts with that agency have stated that they were not aware that he was a Government employee. It appears that the contract officers were misinformed or misled regarding his employment in a Government position due to his omission or misrepresentation concerning his status in the Public Health Service.

Between October 1978 and June 1983 while he was on active duty as a Public Health Service commissioned officer, this officer received a total of $77,704 for medical consulting services he performed under contract for the Social Security Administration. The amount he received for contract services performed between 1970 and 1978 has not yet been determined because necessary records, now filed at the Federal Records Center, have not yet been obtained by the Department of Health and Human Services.

Questions Presented

In connection with the facts and circumstances of this case, the Department of Health and Human Services has asked the following questions:

1. Is the long-standing rule, articulated in prior decisions of the Comptroller General, which prohibits military members on active duty from concurrently engaging in compensated Federal civilian employment, also applicable to members of a non-

military Uniformed Service—specifically, to officers of the PHS Commissioned Corps?

2. If the above-referenced rule is applicable to members of PHS, was it violated in the present case?

3. If item number 2 is answered in the affirmative, is there legal authority to recover the improper SSA compensation?

4. If item number 2 is answered in the negative, is there legal authority to recover the improper SSA compensation because of [the] prohibition against contracting with Federal employees set forth in 41 CFR 1-1.302-3(a) and (b)?

5. If SSA payments are recoverable, what is the appropriate mechanism for accomplishing such recovery? Specifically, may the funds be recovered by PHS through administrative offset against the officer's active duty or retired pay? If so, what would be the proper disposition of such recovered funds? May they be transferred from PHS to the SSA account from which originally disbursed?

6. If the SSA payments are recoverable, is there any authority under which recovery may be waived?

7. If the SSA payments are recoverable, is there any recognized principle under which [the officer] could assert a right to retain any portion of these payments? For example, could he contend that he was entitled to retention of such payment as a 'de facto' employee or under the principles of quantum meruit or similar contract-type remedies?

Status of a Public Health Service Commissioned Officer

While the Public Health Service is not an armed service,[3] it is one of the "uniformed services," along with the National Oceanic and Atmospheric Administration, and the Armed Services—the Army, Navy, Air Force, Marine Corps and Coast Guard. 42 U.S.C. § 201(p); 37 U.S.C. § 101(3). We have held that officers of the Regular component of the Commissioned Corps of the Public Health Service.

As noted in the agency's submission, we have long held that any agreement or arrangement by a member of a military service for the rendition of services to the Government in another position or employment is incompatible with the member's actual or potential military duties, and additional payment therefor is not authorized unless there is specific statutory authority authorizing it.[4] We have held that the fact that military service members may have hours of relaxation and relief from the actual performance of duty during which they may attend to personal affairs, including the perform-

[3] Except in time of war, or emergency involving the national defense when the President may declare the Commissioned Corps of the service to be a military service. 42 U.S.C. § 217 (1982). hold a status like that of Regular commissioned officers of the armed forces. 51 Comp. Gen. 780 (1972). That is, Regular commissioned officers of the Public Health Service are appointed by the President with the advice and consent of the Senate 42 U.S.C. § 204 (1982), as are Regular officers of the armed services, 10 U.S.C § 531 (1982), 14 U.S.C. § 211 (1982). Public Health Service officers are appointed to grades which correspond to grades of Army officers and are compensated under the pay and allowance system applicable to armed services officers. 42 U.S.C. § 207 (1982, and 37 U.S.C. § 101, *et seq.* (1982). The provisions pertaining to retirement of commissioned officers of the Public Health Service, 42 U.S.C. § 212, are similar to those pertaining to officers of the armed services. 51 Comp. Gen. 780 (1972). And, Public Health Service officers enjoy most of the benefits, rights, privileges and immunities enjoyed by armed services officers, including medical care for themselves and their dependents, and survivor benefits. 42 U.S.C. §§ 213, 213a; 10 U.S.C. chapt. 55.

[4] See, *e.g., Air Force Dental Officers*, B-207109, November 29, 1982; *Martin P. Merrick and Albert Jackson, Jr.*, B-20533, December 30, 1981. 47 Comp. Gen. 505 (1968); 46 Comp. Gen. 400 (1966).

ance of other duty, is not the test of whether the other duty is incompatible. The obligation to render military service is the superior—the controlling—obligation. 18 Comp. Gen. 213, 216 (1938). The time of one in the military service is not his own, however limited the duties of a particular assignment may be, and any agreement or arrangement for the rendition of services to the Government in another position so employment is incompatible with military duties, actual or potential. 18 Comp. Gen. at 217.

While the Commissioned Corps of the Public Health Service is included among the military services only when, in time of war or national emergency, the President declares the Corps to be a military service, it is one of the uniformed services and its members hold a status like that of military officers. Under the pay system applicable to members of the uniformed services, members are entitled to pay based on their status as members and not based on the rendition of specific numbers of hours of duty. 37 U.S.C. § 204. They occupy the status of uniformed service members 24 hours a day, notwithstanding that they may actually only perform duties during certain hours, and their pay is paid on the basis of that status and not the hours of duty they perform. They are not entitled to any additional pay for performing services for another component of the Government. See, e.g., 5 Comp. Gen. 206 (1925).

In addition to the general rule of incompatibility, under 5 U.S.C. § 5536 an employee or a member of the uniformed services whose pay is fixed by statute or regulation is specifically prohibited from receiving additional pay "for any other service or duty," unless specifically authorized by law. That statutory prohibition has been held not to apply where there are two distinct offices, places or employments, each of which has its own duties and its own compensation which both may be held by any one person at the same time. *United States v. Saunders*, 120 U.S. 126 (1887). However, that exception to the prohibition would not appear to apply in this case because the status of commissioned officer is not compatible with the holding of any other Federal Government position.

Furthermore, both the Public Health Service and the Social Security Administration are components of the Department of Health and Human Services (previously the Department of Health, Education and Welfare) and this officer was performing medical services for both. If the officer's services were needed by the Social Security Administration, he could have been detailed there to provide the additional services on a part-time basis at no extra cost to the Government.[5]

Thus, while an officer of the Public Health Service Commissioned Corps may receive permission to pursue private employment

[5] See *Woodell v. United States*, 214 U.S. 82 (1909), and *Mullett v. United States*, 150 U.S. 566 (1893), where employees assigned additional duties to perform for agencies other than their employing agencies were held not entitled to additional compensation in view of R.S. § 1765, the predecessor to 5 U.S.C. § 5536.

which does not interfere with the performance of his or her duties as an officer of the Corps, he or she may not be otherwise employed by the United States.

For these reasons, in answer to question 1, it is our view that the rule prohibiting payment to members of the military services for services rendered to the Government in a civilian capacity is applicable to commissioned officers of the Regular Corps of the Public Health Service. As to question 2, the officer involved in this case should not have been paid additional compensation to perform consulting services for the Social Security Administration. 47 Comp. Gen. 505, *supra; Air Force Dental Officers,* B-207109, *supra.*

Improper Payments of Compensation

Since the officer in this case was only entitled to receive pay from the Government for the performance of his official duties as an active duty commissioned officer of a uniformed service, he was not entitled to the additional compensation for the personal contract services rendered to the Social Security Administration. Therefore, all such compensation paid to him constituted erroneous payments. 47 Comp. Gen. at 506-507; *Air Force Dental Officers,* B-207109, *supra,* at 13.

Persons who receive public funds erroneously paid by a Government agency acquire no right to those funds and are liable to make restitution. *United States v. Sutton Chemical Co.,* 11 F.2d 24 (1926); *Dr. Frank A. Peak,* 60 Comp. Gen. 71 (1980). We thus conclude that the officer in this case is indebted to the Government for compensation paid to him on account of his personal services contracts with the Social Security Administration. 46 Comp. Gen. at 402. Question 3, therefore, is answered in the affirmative, and question 4 requires no answer.

Debt Collection and Setoff

Question 5 concerns the procedures for the collection of the debt that has resulted from erroneous payments made to this officer and the proper disposition of the funds collected.

It appears that the provisions of 5 U.S.C. § 5514, which specifically authorize collection of erroneous payments made to "an employee, member of the Armed Forces or Reserve of the Armed Forces" by deduction in reasonable amounts from the individual's current pay, do not apply to Public Health Service commissioned officers since such officers are not included in the definitions of the categories of individuals covered by that statute. That is, the statute covers only "employee[s]" and members of the "Armed Forces," neither of which is defined to include Public Health Service officers, members of the "uniformed services." See 5 U.S.C. §§ 2101, 2105.

In this case the general provisions of 31 U.S.C. §§ 3711–3720, which provide for the collection of claims of the Government, are applicable. Under those provisions, and implementing regulations, the head of the agency is to try to collect a claim arising out of the activities of, or referred to, the agency. 31 U.S.C. § 3711(a). Under certain conditions he may collect the claim by administrative offset, which means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government. 31 U.S.C. § 3701(a). These provisions are broad enough to encompass withholding money payable to the officer in this case for pay and allowances, accrued leave or retired pay due him, where the more specific provisions of 5 U.S.C. § 5514 are not applicable to him. See 31 U.S.C. § 3716(c)(2).[6] The procedural standards promulgated jointly by the Attorney General, and the Comptroller General and agency regulations implementing 31 U.S.C. § 3711, *et seq.*, should be followed in taking the collection action. See 4 C.F.R. Parts 101–105, as revised, 49 Fed. Reg. 8896 (1984), particularly sections 102.1–102.3.

Concerning the proper disposition of the erroneous payments upon collection, a refund of payments or fees paid in consideration of some benefit to the Government is to be deposited into the general fund of the Treasury as miscellaneous receipts, since to credit an appropriation with a refund of earned payments would constitute an augmentation of the appropriation. See 39 Comp. Gen. 647 (1960), and 31 U.S.C. § 3302(b) (1982) (previously 31 U.S.C. § 484). Therefore, payments that are refunded by the officer or collected from him by setoff or other means should be transferred to the general fund of the Treasury.

Statutes of Limitations

Although not specifically stated in the submission to us, the question arises whether collection of the payments which the officer received more than 6 years prior to the discovery of the matter by the Inspector General may be time-barred. The statute of limitations in 28 U.S.C. § 2415(d) could, under certain circumstances, prevent court action to recover overpayments if the complaint is not filed within 6 years after the right of action accrues. However, periods during which facts material to the right of action are not known and reasonably could not be known by officials, whose responsibility it is to take action, are excluded from the limitation

[6] See also B-215128, December 14, 1984, 64 Comp. Gen. 142. We note that 31 U.S.C. § 3701(d) provides that debt collection under 31 U.S.C. §§ 3711–3720 is not applicable to a claim or debt under the Social Security Act (42 U.S.C. § 301, *et seq.*). That exclusion does not apply to debts owned by persons employed by agencies administering the Social Security Act, unless the debt arose under that Act. 4 C.F.R. § 102.19(b), 49 Fed. Reg. 8902 (1984). Thus, 31 U.S.C. § 3701(d) would not preclude the application of 31 U.S.C. §§ 3711–3720 in this case where the debt is for erroneous payments of pay.

period. 28 U.S.C. § 2416(c). Moreover, in appropriate circumstances outstanding claims may be recovered by administrative setoff under 31 U.S.C. § 3716 for up to 10 years. And, this 10-year limitation does not apply in a case such as this where facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the officials of the Government charged with the responsibility to discover and collect the debt. 4 C.F.R. § 102.3(b)(3), as revised, 49 Fed. Reg. 8898 (1984).

It is also noted that 31 U.S.C. § 3712(d) establishes a statute of limitations for claims arising from receipt of dual pay. That provision is as follows:

> (d) The Government waives all claims against a person arising from dual pay from the Government if the dual pay is not reported to the Comptroller General for collection within 6 years from the last date of a period of dual pay.

In considering a question arising under 31 U.S.C. § 237a, the statute from which 31 U.S.C. § 3712(d) is derived, we held that no part of a dual pay claim against an employee is waived under this provision if the debt is reported to this Office within 6 years of the last date of an unbroken period during which a person drew dual compensation. 43 Comp. Gen. 165 (1963). The record in this case states that the officer has engaged in the performance of the services in question while also serving as a commissioned officer in the Public Health Service since 1970. It is further stated that on or about July 30, 1983, he was ordered to cease work under his contract in effect at that time until inquiries into the matter of his contract services were settled. Thus, it appears that he was performing contract services and was in receipt of pay for those services at least through July 1983. The Government's claim against him on account of his receipt of erroneous pay for these services was received in this Office on April 10, 1984. Accordingly, if this officer has been under contract each year since 1970 to render services for the Social Security Administration, it would appear that no part of the Government's claim against him for compensation which he received for those services since 1970 is barred under 31 U.S.C. § 3712(d). See B-203209, July 15, 1981. Therefore, the entire amount of the Government's claim that has accrued since 1970 may be collected by administrative setoff.

Potential Defenses to Recoupment Action

Questions 6 and 7 concern whether this officer is entitled to retain the erroneous payments on the bases that he was *de facto* employee of the Social Security Administration or under *quantum meruit* or similar principles, or to have the Government's claim against him waived.

A. De Facto Employment

A *de facto* officer or employee is one who holds a public office or position with apparent right, but without actual entitlement because of some defect in his qualifications or in the action placing him in the office or position. *Air Force Dental Officers*, B-207109, *supra*, at 12. In certain cases where an individual was discovered to have been improperly serving the Government in dual capacities, we have held that the services performed by that individual could be considered as having been rendered in a *de facto* status. In those cases the recoupment of pay for services performed, or forfeiture of other entitlements, was not required. 52 Comp. Gen. 700 (1973); 40 Comp. Gen. 51 (1960).

However, in this case the applicability of the principle of *de facto* employment is similar to that in *Air Force Dental Officers*, B-207109, *supra*. In that decision we addressed the question of the applicability of the doctrine of *de facto* employment to two Air Force dentists who had performed fee contract services for the Veterans Administration. There we said that although it is not clear whether the *de facto* employment doctrine is applicable to fee basis physicians since they do not hold a public office or position with the contracting agency (45 Comp. Gen. 81 (1965)), the doctrine is generally for application only if the individual claiming relief on that basis can demonstrate his good faith in having improperly entered into the subject employment. See *Air Force Dental Officers*, B-207109, *supra* at 13. See also *Victor M. Valdez, Jr.*, 58 Comp. Gen. 734 (1979).

As is stated previously, the record indicates that the officer in this case never sought or obtained administrative approval from the National Institute on Aging or the National Institutes of Health to perform consulting services under contract for the Social Security Administration. While this officer has offered various explanations for the discrepancies and improprieties surrounding his performance of contract services, we find his explanations and justifications unpersuasive. On the basis of the facts as presented to us, it appears that he deliberately concealed his performance of contract services from those who might have questioned or sought to prevent his continued services in this capacity. Although he was on notice that administrative approval was required, he failed to comply with that requirement. Under these circumstances it appears doubtful that he acted in good faith in requesting and performing the contract services while an active duty commissioned officer of the Public Health Service. In the absence of clear and convincing evidence that he did, in fact, act in good faith in contracting for and performing these contract services, he does not qualify under the principle of *de facto* employment to retain the compensation paid to him for rendering those services. *Air Force Dental Officers*, B-207109, *supra*, at 16.

B. Retention of Fees on Quantum Meruit Basis

There is a well-established rule that the Government is not obligated to pay contractors or others who have provided services without proper authorization. *General Clinical Research Center,* B-212430, June 11, 1984. However, where performance by one party has benefited another, equity requires that the party receiving the benefit should not gain a windfall at the expense of the performing party, even through the contract between them was unenforceable. The courts and our Office have recognized that in these instances, the Government is obliged to pay the reasonable value of the services on an implied contract for *quantum meruit.*

Before we will authorize a *quantum meruit* payment, we must make a threshold determination that the services would have been a permissible procurement if the proper procedures had been followed. Then we must find that (1) the contractor acted in good faith, (2) the Government received and accepted a benefit, and (3) the amount claimed represents the reasonable value of the benefit received. *See* 33 Comp. Gen. 533, 537 (1954); 40 Comp. Gen. 447, 451 (1961); and B-207557, July 11, 1983.

We do not question, in general, the procurement of the subject medical consulting services by the Office of Disability Programs of the Social Security Administration. It was not proper, however, for the agency to negotiate such a contract with an active duty commissioned officer of the Public Health Service.

Nevertheless, and, even if such a contract were authorized, a significant impediment to this officer's entitlement to retain compensation he received under these personal service contracts is the apparent lack of good faith on his part in providing those services. By his own admission, at the time he began performing these services he had doubts as to the propriety of his participation in the Social Security Administration Office of Disability Programs, yet he did not inquire into the matter to the point of obtaining an authoritative response. The fact that over a period of 13 years he continued to request renewal of his contract to perform contract services within the same Government department in which he was regularly employed without ever requesting approval to perform those services, as required for any outside professional activities under department regulations, precludes a determination that he acted in good faith. We conclude, therefore, that this officer has no remedy for retention of erroneous pay on the basis of an invalid contract for *quantum meruit.*

C. Waiver

The Comptroller General is authorized to waive, in whole or in part, a claim for the recovery of an erroneous payment of pay or allowances made to an employee of an agency or a member of the uniformed services if the collection of the debt "would be against

equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a); 10 U.S.C. § 2774(a). A claim may not be waived under this authority if in the opinion of the Comptroller General there is, in connection with the claim, "* * * an indication of fraud, misrepresentation, fault, or lack of good faith" on the part of the employee or member. 5 U.S.C. § 5584(b); 10 U.S.C. § 2774(b).

In cases in which an employee has received erroneous payments in contravention of the dual compensation laws, we have looked favorably on requests for waiver where the individual had made no secret of dual employment and had no reason to know in the circumstances that he was in violation of those laws. See, e.g., *Reserve Members Restored to Duty,* 57 Comp. Gen. 554 (1978); 53 Comp. Gen. 377 (1973).

Under the circumstances of the case now before us, however, we do not consider waiver of the Government's claim appropriate. As previously stated, the fact that this officer failed to seek approval of this subject outside employment in accordance with applicable regulation, of which he had knowledge, and, from all appearances, took steps to prevent staff members where he was assigned as a Public Health Service officer from knowing of his involvement in this particular outside professional activity, indicate that he was not without fault and did not act in good faith in the matter. Thus, we may not waive the Government's claim against him for compensation he received to which he was not entitled.