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Amity

DECISION



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

[Request for Reconsideration of Debt Waiver Denial]

FILE: B-200113

DATE: February 13, 1981

MATTER OF: Eugene M. Edynak, M.D.

- DIGEST:**
1. Under the statute authorizing Variable Incentive Pay to medical officers of the uniformed services who undertake active duty commitments and requiring a refund of incentive pay from an officer who "voluntarily" fails to complete his commitment, the early resignation of a Public Health Service (PHS) medical officer must be regarded as "voluntary" despite the officer's assertion that he felt he had no choice professionally but to resign when the PHS did not provide him with laboratory facilities and secretarial services promised him at the time of his recruitment. 37 U.S.C. 313.
 2. An amount correctly and legally paid to a service member in the form of a bonus or special pay as an incentive for him to remain on active duty may not later be considered an "erroneous" payment within the meaning of the statute authorizing waiver of erroneous overpayments of compensation even though the member concerned later becomes liable to refund all or part of the amount received if he fails to complete his active duty commitment; hence, collection of a former member's resulting debt in such situations may not be waived. 10 U.S.C. 2774.

Eugene M. Edynak, M.D., requests reconsideration of our Claims Division's denial of his application for waiver of his debt to the United States arising out of his obligation to refund Variable Incentive Pay on account of his early resignation from the Public Health Service (PHS) in October 1977. In view of the facts presented, and the applicable provisions of law and regulation, we are sustaining the Claims Division's action.

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On April 13, 1976, Dr. Edynak received a commissioned officer's appointment in the PHS with the grade of Senior Surgeon, 0-5, and with the expectation that he would be given the position of Chief of Surgery at the PHS Hospital in Norfolk, Virginia. Thereafter, he traveled from his home in Hawaii to Virginia and undertook the duties of that position in Norfolk in June 1976. At that time he executed a written active duty agreement--effective June 1, 1976--under which he would receive Variable Incentive Pay of \$12,000 per year in return for committing himself to complete 2 years of continuous active duty.

On October 6, 1977, Dr. Edynak submitted his resignation from the Commissioned Corps of the PHS. In submitting his resignation, he expressed dissatisfaction with the PHS Hospital in Norfolk, and he indicated he felt that PHS officials had failed to honor promises made at the time of his recruitment concerning certain laboratory facilities and secretarial services which were to have been made available to him.

The PHS then advised Dr. Edynak that because he had voluntarily resigned prior to completing his 2-year active duty commitment, he was obligated to refund \$15,600 of the \$24,000 in Variable Incentive Pay previously paid to him. Dr. Edynak applied for a waiver of that claim against him, and the PHS forwarded his application to the Claims Division of this Office for consideration. Our Claims Division concluded that the claim against Dr. Edynak was not subject to waiver and denied his application.

Dr. Edynak questions the correctness of the conclusion reached by our Claims Division. In substance, he suggests that the failure of the PHS to fulfill the promises made to him relating to the facilities and services he would be given during his assignment in Norfolk should rightfully be regarded as a breach of the Government's contract with him. He states that he felt he had no choice professionally but to resign from the PHS in the circumstances. He also notes that he did complete more than half of his 2-year active duty commitment, and that he has previously paid income taxes on the Variable Incentive Pay he received. He

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suggests that it is therefore unconscionable for the Government to demand a refund of any substantial portion of the Variable Incentive Pay he received from the PHS on account of his resignation.

It is a well-established and fundamental principle that the entitlement of a member of the uniformed services to pay and allowances is entirely a matter of statutory right, and the common law governing private employment contracts has no place whatever in any determination regarding a service member's entitlement to pay. See United States v. Larionoff, 431 U.S. 864, 869 (1977); Bell v. United States, 366 U.S. 393, 401 (1961); Abbott v. United States, 200 Ct. Cl. 384 (1973), cert. denied 414 U.S. 1024 (1973); 56 Comp. Gen. 943 (1977). Thus, in the present case Dr. Edynak's entitlement to the Variable Incentive Pay in question is a matter for determination by application of the pertinent statutes and regulations to the facts, and cannot be based on the terms of any private contract he may believe he had with the Government or with PHS officials.

Section 313 of title 37, United States Code, authorizes additional Variable Incentive Pay for qualified medical officers of the Armed Forces and the Public Health Service who execute written agreements to complete a specified number of years of continuous active duty. With regard to an officer who resigns prior to completing the specified active duty commitment, 37 U.S.C. 313(c) provides in pertinent part that:

"(c) Under regulations prescribed by the Secretary of Defense or by the Secretary of Health, Education, and Welfare, as appropriate, an officer who has received payment under this section and who voluntarily, or because of his misconduct, 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. * * *"

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Regulations issued by the Secretary of Health, Education, and Welfare under 37 U.S.C. 313 which were in effect in June 1976 are contained in a PHS regulation captioned "Variable Incentive Pay for Commissioned Corps Medical Officers," dated September 9, 1974. Sections S.11. and S.12. of the regulation direct that an officer who voluntarily terminates a 2-year active duty agreement after completing more than 1 year but less than 2 years of service shall be entitled to 35 percent of the Variable Incentive Pay specified and shall be required to refund any amount received by him exceeding that entitlement.

In the present case, Dr. Edynak executed a written agreement pursuant to 37 U.S.C. 313 to remain on active duty with the PHS for 2 years after June 1, 1976, and in return he became entitled to Variable Incentive Pay in the amount of \$24,000. He received that amount in two \$12,000 installments in June 1976 and June 1977. He resigned in October 1977 after completing only 15 months of his 2-year active duty commitment, and it is clear that this occurred because he wanted to remain in the PHS only if the PHS could accommodate him in fulfilling all of the expectations he had when he applied for a commissioned officer's appointment. In view of these circumstances, we cannot say that the PHS was incorrect in its determination that his resignation was "voluntary." Compare B-171942, December 22, 1976. Thus, under the statutory provisions of 37 U.S.C. 313(c) and the implementing PHS regulations referred to above, he is entitled to keep only 35 percent of the \$24,000 in Variable Incentive Pay he received, and he is legally obligated to refund the remaining balance of \$15,600. Any questions concerning the tax consequences of the refund would be matters for determination by the concerned revenue authorities. Compare B-200327, November 13, 1980.

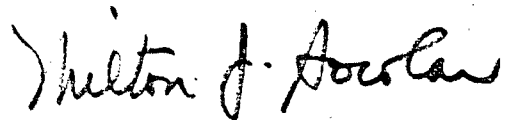
With respect to Dr. Edynak's application for a waiver of the claim against him, the law authorizing the waiver of claims against former members of the uniformed services for the recovery of overpayments of pay or allowances received by them, 10 U.S.C. 2774, provides in pertinent part that:

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"(a) A claim of the United States against a person arising out of an erroneous payment of any pay or allowances * * * to or on behalf of a member or former member of the uniformed services * * * the collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part * * *." (Underscoring added.)

Our Office has consistently ruled that an amount correctly and legally paid to a service member in the form of a bonus or special pay as an incentive for him to remain on active duty may not later be considered an "erroneous" payment within the meaning of 10 U.S.C. 2774. This is so even though the member concerned later becomes legally obligated to refund all or part of the amount received if he does not complete his active duty commitment. See, e.g., decisions B -180028, July 9, 1974; B-186022, March 2, 1977. Hence, the claim against Dr. Edynak for the recovery of the Variable Incentive Pay which was correctly and legally paid to him, but which must be refunded on account of his voluntary resignation from the PHS in October 1977, is not a claim that may be waived.

Accordingly, the action of our Claims Division is sustained.



For the Comptroller General
of the United States