

DATE: 11-26-91

CITATION: VAOPGCPREC 72-91
Vet. Aff. Op. Gen. Couns. Prec. 72-91

TEXT:

Subj: Request for legal opinion--proper interpretation of 38 U.S.C. § 3681(a)(1)

QUESTION PRESENTED:

May VA authorize education benefits to active duty servicemembers for pursuit of courses during "nonduty" time if the individual receives tuition assistance from the Armed Forces for the same courses or training?

COMMENTS:

1. The law governing this matter is section 3681(a) (formerly section 1781(a)) of title 38, United States Code, which provides, in pertinent part, as follows:

(a) No educational assistance allowance granted under chapter 30, 34, 35, or 36 of this title or 106 or 107 of title 10, or subsistence allowance granted under chapter 31 of this title shall be paid to any eligible person (1) who is on active duty and is pursuing a course of education which is being paid for by the Armed Forces....

2. The implementing regulations, 38 C.F.R. §§ 21.4025(b)(1), 21.7642(d) and 21.5023 prohibit payment of educational assistance allowance to an individual for any course "being paid for in whole or in part by the Armed Forces during any period he or she is on active duty...."

3. Further, section 101(21) of title 38, United States Code, states:

The term "active duty" means--

(A) full-time duty in the Armed Forces, other than active duty for training;

.....

(E) authorized travel to or from such duty or service.

4. It is clear from the above that section 3681(a)(1) bars a person who is serving on active duty and pursuing a course paid for by the Armed Forces from receiving VA administered education benefits under the programs enumerated therein for pursuit of the same course. Moreover, we find the plain language of that section neither requires nor even suggests a construction that would limit the

application of the bar to "duty" versus "nonduty" periods of active duty.

5. Section 3681(a)(1) is distinguishable from section 3681(a)(2), the counterpart provision barring duplication of benefits for civilian Federal employees whose training is paid for under the Government Employees Training Act (chapter 41, title 5, United States Code). The latter section, by its terms, is more limited in its coverage. It only applies to the extent the individual is paid his or her full Federal salary "while so training." In other words, as we held in O.G.C. Precedent Opinion 20-89, the duplication, hence the bar to VA payment of education benefits to the civilian employee, only operates when the employee is training during regular duty hours (including periods of paid leave) for which the employee receives his or her full Federal salary. No such limitation is present in the language of section 3681(a)(1).

6. The difference in the language used in enunciating the rules in subsections (a)(1) and (a)(2) of section 3681 ostensibly reflects the inherent differences in the nature of military and civilian governmental service. We observe, for example, that the individual on full-time active duty is subject to military authority and receives full pay and allowances for performing active duty service 24 hours per day throughout his or her term of service. Thus, in this sense, all hours of the day are "duty hours" for which the active duty servicemember receives remuneration. By contrast, the civilian government employee receives full pay for working a tour of regular duty hours occupying but a portion of each work day. Thus, the two individuals are not similarly circumstanced vis-a-vis the duplicative nature of Federal benefits payments for educational pursuit during "duty" hours.

HELD:

A person on "active duty" in the Armed Forces, as defined by 38 U.S.C. § 101(21), who is pursuing a course of education paid for by the Armed Forces is barred from receiving education benefits from VA under the programs enumerated in 38 U.S.C. § 3681 (a) for the same training. This bar applies regardless of whether the course is pursued during periods of the day when the individual has no specifically assigned military duties. Even during such periods, the individual is on "active duty" and, thus, subject to the bar.

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