

CITATION: VAOPGCPREC 3-89
Vet. Aff. Op. Gen. Couns. Prec. 3-89

DATE: 3-8-89

TEXT:

Constitutionality of Section 7(b)(3) of the Emergency Veterans' Job Training Act of 1983

1. On June 4, 1987, you requested our opinion regarding the legal issues inherent in complying with the provisions of section 7(b)(3) of the Veterans' Job Training Act of 1983 (VJTA), as amended, which bars payments under the Act for 'employment which involves political or religious activities.'
2. We requested the Office of Legal Counsel (OLC) of the Department of Justice to consider various issues of constitutional law inherent in the application and enforcement of this provision of law. We now have received that opinion, a copy of which is attached for your information. We believe that the discussion and conclusions of this opinion provide a clear and proper response to the concerns raised by your memorandum and will not undertake to provide a further explanation of our own.
3. The OLC opinion finds that the VJTA provision at issue does not violate the so-called 'free exercise' clause of the first amendment to the United States Constitution. That clause bars any law which would prohibit free exercise of a religion. The OLC opinion concludes that Congress' decision not to fund training to perform religious activities is not a penalty on the free exercise of religion but is merely a refusal to fund the exercise of a constitutionally protected right.
4. The opinion further holds that the provision of the first amendment barring the Federal Government from acting to foster the establishment of a religion would not operate to prevent two categories of employers from participating in the VJTA program. The employer which may be described as a 'religiously affiliated institution,' such as the National Lutheran Home for the Aged described in your memorandum, may participate in the VJTA program as long as the veteran is performing nonreligious activities.
5. Although the law is less clear, OLC concludes that even a 'pervasively sectarian' institution such as a church, parochial school or seminary may participate in a program such as the VJTA program to provide training for nonreligious activities. This conclusion is based upon the fact that the veteran, not the Federal Government, chooses the employer (case law has held that Federal funds may be used for a nonsecular purpose when the Government does not select the school); the funds under the Federal program are made

available generally without regard to the nature of the institution; and the funds are by way of reimbursement for previously incurred costs.

6. Finally, the opinion provides some guidance on determining what activities may be considered to be religious or nonreligious in nature. It relies, in part, on a Federal district court case *Amos v. Corporation of Presiding Bishop*, 594 F. Supp. 791 (D. Utah 1984), reversed on other grounds, 107 S.Ct. 2862 (1987), a copy of which is attached for your use. As noted in that case and the OLC opinion, the determination rests upon 'the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration. . . .' *Id.* at 799. This concept is further refined by the court's opinion in *Amos*, at 799.

7. We would suggest that you consider adoption of regulatory standards for making such a determination. Both this office and OLC will be pleased to work with your staff in the development of such standards.

HELD:

Section 7(b)(3) of the Veterans' Job Training Act of 1983 (VJTA), as amended, bars payments under the Act for 'employment which involves political or religious activities.' The Office of Legal Counsel, Department of Justice has rendered a legal opinion holding this provision of law to be constitutional. The VA does not violate the 'free exercise clause' of the first amendment to the Constitution by excluding training programs involving religious activities because it does not prohibit exercise of a religion; it is not in violation of the 'establishment' clause of the first amendment by approving training by 'religiously affiliated institutions' or 'pervasively sectarian institutions' provided the training is for nonreligious activities. Regulations may be formulated distinguishing between approvable and non-approvable training based upon a determination of the nexus between the primary function of the activity and the religious tenets and rituals of the institutions.

VETERANS ADMINISTRATION GENERAL COUNSEL

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