DATE: 07-18-90

CITATION: VAOPGCPREC 57-90
Vet. Aff. Op. Gen. Couns. Prec. 57-90

TEXT:

Subject: Definition of "proprietary educational institution" in section 1673(d) of title 38, United States Code, excludes military aero flight clubs operated as Federal instrumentalities

(This opinion, previously issued as General Counsel Opinion 15-71, dated October 20, 1971, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTION:

Are those aero flight clubs which are organized, operated, and controlled pursuant to military regulations, "proprietary educational institutions" and subject to the student ratio requirements under section 1673(d) of title 38, United States Code, requiring that the Administrator shall not approve enrollment in a course given by a proprietary institution where more than 85 percent of the students enrolled in the course are receiving veterans' educational benefits?

COMMENTS:

The Fort Bragg Flying Club, which is based at the Simmons Army Airfield at Fort Bragg, N.C., is organized, established and operated pursuant to Army Regulations 28-95 and 230-1. The purpose of this and other such clubs, as set forth in the regulations, is to stimulate interest in aviation, navigation, mechanics, and related aero space sciences useful to the mission of their military component, as well as providing a welfare, recreational and morale activity. Other branches of the military service, especially the Air Force, have similar types of clubs organized and established pursuant to substantially similar service department regulatory control, and have the same relationship to the military establishment with which they are affiliated as the Army Clubs.

In addition to other flying activities, the clubs offer flight training and related instruction. These instructional courses, if certificated by the Federal Aviation Administration, and if otherwise eligible, may be approved under the VA administered educational assistance programs for veterans. Membership in the clubs is limited by the service department regulations to active-duty

military personnel with associate membership extended to retired personnel, adult dependents, civilian employees of the Department of Defense, reservists and allied military personnel. It is indicated that this restricted membership has resulted in a quantitative limitation upon the group from which nonveteran members could be drawn, so that the clubs find it virtually impossible to comply with the 85-15 student ratio rule of section 1673(d) of title 38, United States Code.

Section 1673(d) provides:

"The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any nonaccredited course below the college level offered by a proprietary profit or proprietary nonprofit educational institution for any period during which the Administrator finds that more than 85 per centum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or the Veterans' Administration ..."

The restriction placed upon proprietary educational institutions contained in section 1673(d) was first included in the Korean GI Bill (PL 550, 82d Congress). Neither the legislative history, the interpretive regulations, nor the precedents of this office define, with precision, those educational institutions which were intended to be construed as “proprietary." However, the pattern is clear that the student ratio restriction in section 1673(d) was included in the legislation to prevent abuses perpetrated under the educational assistance provisions of the World War II Servicemen's Readjustment Act of 1944 by private commercially established schools which mushroomed solely for the purpose of exploiting the educational program for commercial gain by obtaining and catering to a wholly veteran student enrollment. The student ratio restriction in section 1673(d) was intended as a safeguard to assure sound training for the veteran at a reasonable cost commensurate with tuition charged nonveterans by a seasoned institution.

While there is no current regulatory definition of "proprietary” institution," a previous interpretive regulation (VA Regulation 12035) did provide, insofar as here pertinent, that a school would be deemed to be a "proprietary nonprofit school" when it was privately owned and operated, whether by an individual or by a corporation.

The term "proprietary" likewise is defined in Black's Law Dictionary as relating or pertaining to ownership, having exclusive title and property rights, and in this context is in contra-distinction to governmental activities which pertain or relate to the sovereign, or function under the sovereign.

Aero clubs, such as the Fort Bragg Flying Club, generally are established, formed, and operated under the authority of the service department regulations as non-appropriated sundry fund activities. Their membership is limited by service department regulation to service department affiliated or associated personnel; the clubs are entitled to assistance, as prescribed by service regulation, both of a financial as well as material nature; and they are under the direct control and supervision of the base commander of the military installation on which they have facilities in their operations, as well as in their administration. They are governed by a Board of Governors with an advisory officer appointed by the base commander as liaison. The service regulations prescribe a sample type of constitution for formation of the clubs, and by-laws for club operation are subject to review by military authority. All contracts entered into by the clubs are required to be reviewed by the base legal officers, financial records are audited by military authority, and we have been informed that litigation against such clubs is properly brought against the United States and is defended by the United States Attorneys in the appropriate jurisdiction.

Any income or profits generated are retained to finance club programs. Dividends are not declared or paid in any form, nor are gains or income from operations otherwise distributed. Disposition of assets upon dissolution is in accordance with military specifications to other similar sundry fund activities, with residual assets directed to the military establishment.

The clubs are expressly considered in the service department regulations as being "Government instrumentalities and they have been so recognized judicially in U.S. v. Hainline, 315 F.2d 153 (CA 10, 1963) and Brucker v. U.S., 338 F.2d 427 (CA 9, 1964). These cases follow the law established by the United States Supreme Court in Standard Oil Co. v. Johnson, 316 U.S. 481, holding that the Army Post Exchange--another type of activity organized and operated under the same regulatory authority as a non-appropriated sundry fund activity--was a Federal instrumentality.

It is clearly established that none of the incidents of private ownership can be said to be applicable to the Aero Clubs, and the attributes of the clubs organized within the contemplation of the service regulations are those of a component of the military. The conclusion is inescapable that they are not "proprietary" in their control, nature, or status.

It is noted in passing, however, that there is a class of flying clubs (referred to in section 3 of Army Regulation 28-95) which are established as private associations (under AR 230-1, paragraph 1-2c) and do not fall within the

purview of Aero Clubs as contemplated herein to be Government instrumentalities.

With regard to the further question concerning the necessary approval, supervision and inspection of those courses of instruction given by the Aero Clubs, such as flight training, which would constitute an acceptable education program, the responsibility for approval is imposed upon the Administrator under section 1772(b). However, under the provisions of 38 U.S.C. § 213, the Administrator may accept uncompensated services for purposes of implementing laws administered by the Veterans Administration, and may, under section 1773, seek the cooperation of State approving agencies to obtain such "information pertaining to activities of educational institutions" as is necessary for approval or disapproval of courses of education. He also has the authority under section 1774 to contract with such State and local agencies to render "necessary services in ascertaining the qualifications of educational institutions for furnishing courses of education to eligible persons or veterans." In this connection, he may authorize inspection or supervisory visits by such State agency.

HELD:

Aero flying clubs formed and operated pursuant to service department regulations as non-appropriated sundry fund activities (excluding those clubs established as private associations) are federal governmental instrumentalities, and in regard to those flight training and other related instructional programs of education offered, the clubs are not "proprietary educational institutions" subject to the 85-15 student ratio requirements in section 1673(d) of title 38, United States Code. Further, while the Administrator has the responsibility under section 1772(b) for approval of the flight training and other related educational programs of the clubs, there is authority under sections 213, 1773 and 1774 of title 38, United States Code, for the Administrator to either contract with, or accept uncompensated services of, state approving agencies for inspection and supervisory visits to the training facilities and to obtain the recommendations of the state agencies for his approval or disapproval of the courses.

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