

Date: June 8, 1994

O.G.C. Precedent 14-94

From: General Counsel (022)

Subj: Determination of Period of Active Service Under 38 U.S.C.
§ 3.9 for Philippine Veterans Detained or Interned by the
Enemy

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

Where a veteran of service in the Regular Philippine Scouts or the Philippine Commonwealth Army reports having been detained or interned by the enemy on a date following the date of termination of the veteran's period of active duty as certified by the service department, may VA recognize the veteran as having been in a prisoner-of-war (POW) status during the period of detention or internment and recognize that period as a period of active service under 38 C.F.R. § 3.9?

COMMENTS:

1. Pursuant to 38 U.S.C. § 501, VA has the statutory authority to prescribe regulations governing the evidentiary requirements for establishing active military service and POW status. VA has promulgated 38 C.F.R. §§ 3.1(y), 3.9, and 3.203, which address the nature of proof of active service and POW status necessary to establish benefit entitlement.

2. With respect to the determination of POW status, 38 C.F.R. § 3.1(y)(1) states that, in the case of detention or internment by an enemy government or its agents, VA "shall accept the findings of the appropriate service department that a person was a prisoner of war during a period of war unless a reasonable basis exists for questioning it." However, the regulation does not indicate that VA must follow a service-department finding that an individual did not have the status of a POW. See *Mangila v. Brown*, No. 92-248, slip op. at 5 (Vet. App. July 8, 1993) (single CVA judge indicated that that court had not held that certification of the absence of POW status is necessarily binding on VA); cf. *Young v. Brown*, 4 Vet. App. 106, 108 (1993) (VA must accept service-department finding that veteran had POW status). The court in *Mangila*, citing section 3.1(y)(1) and (y)(3), indicated that those regulations "suggest that VA could recognize former POW status on the basis

of evidence other than service department findings." *Mangila*, slip op. at 5, 6.

3. Section 3.203 of title 38, Code of Federal Regulations, specifies only two methods of proving active military service for VA benefit purposes. That regulation requires either submission of a document issued by a service department or verification of claimed service by such a department. The United States Court of Veterans Appeals (CVA) has held that service department findings are binding on VA for purposes of establishing that a person had active service. *Duro v. Derwinski*, 2 Vet. App. 530, 532 (1992). However, that decision related to establishment of the fact of service, not to determination of the dates of such service.

4. Regarding Philippine service, 38 C.F.R. § 3.9(a) provides that the period of active service for a Regular Philippine Scout or a member of one of the regular components of the Philippine Commonwealth Army while serving with the Armed Forces of the United States will be "from the date certified by the Armed Forces as the date of enlistment or date of report for active duty whichever is later to date of release from active duty, discharge, death, or in the case of a member of the Philippine Commonwealth Army June 30, 1946, whichever was earlier." Section 3.9(d) provides that the active service of members of the irregular guerrilla forces "will be the period certified by the service department." Thus, in the case of a Philippine veteran, a service-department certification of the veteran's period of active duty will generally be controlling as to a member of the irregular guerrilla forces, and, in the case of a member of the Regular Philippine Scouts or a regular component of the Philippine Commonwealth Army which served with the United States Armed Forces, with regard to the date of enlistment or date of report for active duty. The service-department certification is not binding on VA for purposes of determining termination of active duty for a member of the Regular Philippine Scouts or a regular component of the Philippine Commonwealth Army, and, therefore, a service-department certification indicating that such a veteran was not on active duty at the time he or she allegedly was detained or interned is not conclusive in determining the termination date of the veteran's period of service for VA purposes.

5. We note that there is an apparent conflict as to the evidence of active service required under 38 U.S.C. §§ 3.9 and 3.203. Section 3.203 requires either a document issued by a

service department or verification of claimed service by such a department. By referring to service-department certifications only as to certain matters, section 3.9 suggests that, in the case of Philippine service, other evidence may be considered as to other matters. In certain cases where a veteran was killed or injured by the Japanese following release from active duty, section 3.9(b) specifically requires that VA consider "all available evidence, including service department reports." Section 3.9 relates specifically to determinations of Philippine service, while section 3.203, which section 3.9 predated, is a more broadly applicable provision. A more general law will usually be construed as not impliedly repealing a more specific law where an irreconcilable conflict does not result. 1A Norman J. Singer, *Sutherland Statutory Construction* § 23.15 (4th ed. 1985). The prior, more-specific law will generally be considered to remain in effect as a qualification or exception to the later, more-general law. *Id.*; see also *id.* at § 23.10 (harmonious effect should be given to all provisions if reasonably possible); *Rucker v. Wabash R.R.*, 418 F.2d 146, 149 (7th Cir. 1969) (same rules of interpretation apply to both statutes and regulations). Thus, section 3.9 may be read as an exception to the section 3.203 evidence requirements. Under section 3.9, VA may utilize, in addition to a service-department determination, other evidence to establish the conclusion of a Philippine veteran's period of active service.

6. In determining the period of active service of a Philippine veteran under section 3.9(a), active service generally includes the period from the later of the date of enlistment or the date of report for active duty to the date of discharge, death, or release from active duty under the circumstances listed in section 3.9(a)(1)-(5). See also 38 C.F.R. § 3.15 (excluding from period of active service the period following release from active duty under the circumstances outlined in section 3.9). The request for opinion raises the issue of whether there is an "order of precedence" among the circumstances listed in section 3.9(a)(1)-(5). Section 3.9(a)(1)-(5) is simply a listing of various circumstances which constitute release from active duty. The occurrence of any one of these circumstances is sufficient to terminate active-duty status. For purposes of determining the active-service period, the release-from-active-duty date would be based on the earliest of the dates determined under section 3.9(a)(1)-(5) which is applicable to the veteran's circumstances.

7. Section 3.9(b) provides in pertinent part that the active service of a Regular Philippine Scout or a member of the Philippine Commonwealth Army serving with the Armed Forces of the United States "will include a *prisoner-of-war* status immediately following a period of active duty" or certain periods of guerrilla service (emphasis in original). A review of the regulatory history of section 3.9(b) and General Counsel opinions does not reveal any definition or interpretation of the phrase "immediately following a period of active duty." However, the term "immediately" is commonly used to mean "without intermediary: in direct connection or relation: CLOSELY". *Webster's Third New International Dictionary* 1129 (1981). In light of this definition, the phrase "immediately following a period of active duty," as used in section 3.9(b), need not be construed as referring only to an event following active duty without any interruption whatsoever. Rather, it may include an event following closely after a period of active duty, directly related to that duty, and occurring before the veteran performed activities not related to active military duty, such as returning to the civilian population and engaging in private pursuits. See generally 95 Op. Sol. 263 (11-26-47) (veteran mingled with civilian population and engaged in private business). For example, due to logistic factors, members of the Philippine Commonwealth Army or Regular Philippine Scouts may not have been physically detained or interned by the Japanese until a day or two after the capitulation, or such persons may have left their units and attempted to flee or hide from the Japanese in anticipation of the capitulation and been quickly detained or interned. In such cases, the detention or internment may, under the circumstances, have been so closely related to the period of active duty that it may be included in the active-service period pursuant to section 3.9(b).

8. Finally, the request for opinion raises the issue of whether VA must accept as proof of active duty a service-department finding under the Missing Persons Act, ch. 166, 56 Stat. 143 (1942), as amended by the Act of July 1, 1944, ch. 371, 58 Stat. 679 (codified, as amended, at 5 U.S.C. §§ 5561 *et seq.*), that a veteran was entitled to pay for a period while in a missing status. Section 3.9(a)(4) provides that, in the case of Philippine service, release from active duty occurs at the commencement of missing status. Administrator's Decision No. 972 (1-10-61) held that a determination of eligibility for service pay under the Missing Persons Act is not a determination that the period for which such pay was authorized was a period of active service for VA benefit purposes. The Administrator reasoned that, because the service-department's determinations

under the Missing Persons Act are made for different purposes and under different statutory criteria, VA may reach its own independent judgment consistent with the laws it administers. See also O.G.C. Prec. 18-90 (independent VA determination necessary where service-department finding did not conform to standard provided in veterans' benefit statute); Op. G.C. 7-83 (7-29-83) (VA not bound by service dates established by service department where service-department determination was governed by considerations inconsistent with those applied under statutes administered by VA). We find the reasoning of Administrator's Decision No. 972 convincing. Thus, VA may make its own independent determinations concerning missing-in-action status under section 3.9(a)(4) and is not bound by a service-department determination of pay entitlement under the Missing Persons Act.

HELD:

In determining for veterans' benefit purposes under 38 C.F.R. § 3.9 the period of active service of a Regular Philippine Scout or a member of the Philippine Commonwealth Army while serving with the United States Armed Forces, the Department of Veterans Affairs is not bound by a service-department certification as to the ending date of the veteran's period of active duty. The Department may include a period spent in a prisoner-of-war status in determination of the veteran's period of active service, if the veteran was detained or interned by the enemy "immediately following a period of active duty." The phrase "immediately following a period of active duty," as used in section 3.9(b), may be construed as referring to an event following closely after a period of active duty, directly related to that duty, and occurring before the veteran performed activities not related to active military duty. The Department is not bound in determining a period of active service by a service-department finding of pay entitlement under the Missing Persons Act, as amended.

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