

CITATION: VAOPGCPREC 24-90  
Vet. Aff. Op. Gen. Couns. Prec. 24-90

DATE: 07-17-90

**TEXT:**

**Subject:** Validity of Military Enlistment--Discharge Under Honorable Conditions with Active Duty shown as Zero Days

(This opinion, previously issued as General Counsel Opinion 2-80, dated March 29, 1979, 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 PRESENTED:**

May an individual's military service be considered valid and honorable, for purposes of qualifying as an eligible veteran under 38 U.S.C. § 1652 (a), where the service department has voided the entire period of service while granting a discharge under honorable conditions?

**COMMENTS:**

An individual entered active duty in the U.S. Army on November 6, 1974. During processing for enlistment, the applicant denied in writing having any prior arrest record, juvenile violations, or felony convictions. A subsequent background investigation by the FBI revealed that there had been an arrest and charge of attempted rape in 1970, later dismissed; a charge of larceny in 1972, filed and never tried; and a charge of marijuana possession in 1973, with the individual being placed on probation in lieu of conviction. Following the disclosure of the arrest record this person was discharged from service on May 7, 1975, and was given a statement indicating that the reason for separation from active duty was "Misconduct--fraudulent entry Chap 14 AR 635-200." The Report of Separation from Active Duty, DD Form 214, showed the character of service to have been under honorable conditions. The form indicated the dates of entry and separation, but in the summary section showed zero years, months, and days of net active service. In November 1977 the individual applied for education assistance allowance from the VA. The claim was denied in December 1977 for the stated reason that the claimant lacked the requisite 181 days of active service. In 1978 the records of the arrest for the rape and drug charges were expunged by court order.

Under 38 U.S.C. § 101(2), a "veteran" is defined as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." An "eligible veteran" for purposes of education assistance is elsewhere defined as one who "served on active duty for a period of more than 180 days, any part of which occurred after January 31, 1955, and before January 1, 1977, and was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 1652(a)(1)(A).

By showing zero days of active service, the Army separation authority apparently intended to render the claimant's entire enlistment void ab initio. Nevertheless, the Report of Separation does show entrance on active duty on November 6, 1974, and separation on May 7, 1975, which would indicate 183 days of service. Moreover, the DD Form 214 also shows a discharge under honorable conditions, which is binding on the VA. VAR 1012(A) (38 C.F.R. §§ 3.12(a)).

In determining the validity of enlistments, VAR 1014 (38 C.F.R. § 3.14) states, in pertinent part:

(A) Enlistment Not Prohibited by Statute. Where an enlistment is voided by the service department for reasons other than those stated in subparagraph (B), service is valid from the date of entry upon active duty to the date of voidance by the service department. Benefits may not be paid, however, unless the discharge is held to have been under conditions other than dishonorable.

Generally, discharge for concealment of a physical or mental defect except incompetency or insanity which would have prevented enlistment will be held to be under dishonorable conditions.

(B) Statutory Prohibition. Where an enlistment is voided by the service department because the person did not have legal capacity to contract for a reason other than minority (as in the case of an insane person) or because the enlistment was prohibited by statute (a deserter or person convicted of a felony), benefits may not be paid based on that service even though a disability was incurred during such service. An undesirable discharge by reason of the fraudulent enlistment voids the enlistment from the beginning. (Emphasis added.)

#### **HELD:**

(1) It is clear that the claimant had no statutory impediment to enlistment in the Army, being sui juris and having never been convicted of a felony, although so charged. It follows that VAR 1014(A) is for application in this case. Accordingly, the law and regulations qualify the claimant as basically eligible for education assistance benefits. (2) In view of the foregoing, an individual's military service may be considered valid and honorable, for purposes of qualifying as an eligible veteran under 38 U.S.C. § 1652(a), where the service department has voided the entire period of service while granting a discharge under honorable conditions.

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