DATE: 07-17-90

CITATION: VAOPGCPREC 34-90
Vet. Aff. Op. Gen. Couns. Prec. 34-90

TEXT:

Subject: Bankruptcy Procedures--Education Overpayments

(This, opinion, previously issued as General Counsel Opinion 3-78, dated October 25, 1977, 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.)

QUESTIONS PRESENTED:

(a) Has the Veterans Administration the authority to refrain from filing a claim against a debtor who is filing for bankruptcy if the amount owed is below a certain set figure;

(b) Is it proper to charge entitlement in education cases without formal notification that the debt was discharged in bankruptcy;

(c) What date should be used in calculating the refund of monies withheld during the bankruptcy proceedings in the event of a discharge in bankruptcy; and

(d) Can District Counsels be directed to notify the appropriate office of the actual discharge in bankruptcy?

COMMENTS:

The Veterans Administration's standards for collection, compromise, suspension or termination of collection effort, and referral of civil claims to the Comptroller General for money or property are found in VA Regulation 900-954 (38 C.F.R. § 1.900-1.954). Also applicable are the regulations of the Comptroller General (see 38 C.F.R. § 1.900). While the instructions contained in our regulations contain no express reference to the bankruptcy situation, the filing of a claim by the Veterans Administration as a creditor in a bankruptcy proceeding is a function of the collection activity mandated by 38 C.F.R. § 1.910 which reads as follows:

"Aggressive collection action. The Veterans Administration will take aggressive action, on a timely basis with effective follow-up, to collect all claims for money or property arising from its activities."

A discharge in bankruptcy releases a bankrupt from all his provable debts, and a creditor must timely file a proof of claim in order to be entitled to share in the distribution of available assets of the bankrupt's estate. Therefore, except as conditions exist for

which the bankruptcy act specifically provides that discharge from a debt will not be granted, or that a debt shall not be affected by discharge (i.e., sections 14C and 17A(2) of the act, 11 U.S.C. §§ 32 and 35, respectively), a decision by the Veterans Administration not to file proof of a claim in bankruptcy against the veteran or eligible person for overpayment of educational benefits constitutes, in effect, a termination of collection action. The legal authority that would justify such a decision is contained in 38 C.F.R. § 1.942 which reads in pertinent part as follows:

"Termination of collection activity. Termination of collection activity involves a final determination ... The Veterans Administration may terminate collection activity and consider closing the agency file on a claim, which meets any of the following standards:

"(a) Inability to collect any substantial amount. It is clear that the Government cannot enforce collection of any significant sum from the debtor and future prospects for collection are remote.
* * * * * * *
"(d) Cost will exceed recovery. The cost of further collection effort is likely to exceed the amount recoverable."

Essentially the regulation cited above releases the VA from what would otherwise be a requirement to perform a useless act. It is premised not on the amount of the debt owed the VA, but upon the extent to which collection of a substantial portion of that amount is possible. Subparagraph (d) of the same regulation is of broader implication. It suggests a marginal weighing of the cost of performance against the amount of debt able to be recovered, the latter of which may be the full amount of overpayment, seeking the point at which further collection activity becomes unprofitable.

Section 98 of title 4 of the revised General Accounting Office Policy and Procedures Manual for guidance of Federal agencies provides as follows:

"SECTION 98--REFERRAL OF DEBTS TO THE DEPARTMENT OF JUSTICE

"Debt claims involving bankruptcies (other than those covered in section 97(2) and (3) above) will be referred directly to the Department of Justice (either to the Washington Office, or to the U.S. attorneys when authorized by that Department) except that:

"(1) Generally, debts less than $600 will not be referred to the Department of Justice. However, a series of smaller debts involving the same debtor and aggregating $600 or more should be referred with attending proof of claim. Also, if the facts and circumstances in a particular case warrant filing a proof of claim (e.g., if petition is filed under Chapters X, XI, or XIII of the Bankruptcy Act), debts of lesser amounts may be referred to that Department.

"(2) When the information of record indicates that there will be no assets for distribution to creditors at the present level of Government claims, the debt should not be referred.

"Debt claims not referred under (1) or (2) above to the Department of Justice need not be reported to the Claims Division."

In view of the above, we conclude that the Veterans Administration does have the authority not to refer to the Department of Justice a claim against a debtor who is filing for bankruptcy if the amount owed is below $600, and such a policy is to be implemented nationwide. Exceptions to the general rule are cases where referral is important to a significant enforcement policy, or where a series of smaller debts involving the same debtor total $600 or more.

COMMENTS:
Entitlement charge is a necessary incident of educational benefit payments. VA regulation 11045(F) (38 C.F.R. § 21.1045(f)) provides:

"Overpayment cases. Entitlement will be charged for an overpayment in educational assistance allowance only if the overpayment is discharged in bankruptcy or waived and is not recovered. The charge will be at the appropriate rate for the elapsed period covered by the overpayment."

The provision regarding bankruptcy was added to the regulation on June 27, 1977. Its purpose was to reflect a situation that may arise in which an overpayment of benefits may become legally uncollectible. In such event, the entitlement must be charged since the money paid can never be recovered. For all benefits irrevocably paid out an appropriate debit to entitlement must be made in the individual's account. The existing regulation was intended to reflect that when an individual receives benefits, for which entitlement charge has been made, the creation of an overpayment to the individual's account results in the restoration of the entitlement charged when the payment was made upon the presumption that the debt will be recovered. If the debt thus created is waived, the entitlement must be charged again to account for the benefits not recovered. Similarly, entitlement should be charged when the District Counsel determines that the debt will not be referred to the Department of Justice since this, in effect, constitutes a termination of collection efforts. A similar problem arises if, after creation of the overpayment, the individual obtains a discharge of bankruptcy for the debt. The entitlement must likewise be charged to account for the benefits that were paid.

There is no authority to charge entitlement while the discharge of the indebtedness to the Veterans Administration is still undecided. Accordingly, formal notification of the amount of debt discharged in bankruptcy should be received before entitlement is charged. The District Counsel handling the case should notify the appropriate office of the actual discharge in bankruptcy at which time the veteran's entitlement must be charged.

Section 97 of title 4 of the aforementioned revised GAO Manual provides the administrative responsibility for collecting debts. In pertinent part it states:

"Upon receiving information that a debtor is involved in bankruptcy proceedings, the administrative department or agency concerned shall:

"(1) Set off any amounts due the debtor which were earned before the petition in bankruptcy was filed and which are available for application to the debt. Any amount in excess of that required to satisfy known Government debts should be paid to the receiver, trustee, assignee, etc., as appropriate."

From the foregoing, we must conclude that, if a veteran is receiving educational benefits and has filed for bankruptcy and an amount of the veteran's indebtedness was withheld during the proceedings, we may only use those funds as an offset which were withheld before the date the petition in bankruptcy was filed, and that any amounts withheld after that time should be paid to the veteran's receiver, trustee, etc.

HELD:

(a) Subject to some exceptions, the VA does have the authority to refrain from referring to the Department of Justice a claim against the debtor who is filing for bankruptcy (1) if the amount owed is less than $600, or (2) if the cost of collecting the amount would be more than the amount itself, or (3) if the veteran has no assets;

(b) It is proper to charge entitlement in education cases (1) when the District Counsel determines that the debt will not be referred to the Department of Justice, and (2) when formal notification is received that the debt was discharged from bankruptcy;

(c) The date to use in calculating the amount of money that was withheld during the bankruptcy proceedings that may be used to set off the debt is the date the petition in bankruptcy was filed; and

(d) The District Counsels have been directed to notify the appropriate office of the actual discharge in bankruptcy.

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