DATE: 07-18-90

CITATION: VAOPGCPREC 42-90
Vet. Aff. Op. Gen. Couns. Prec. 42-90
APPENDIX: 02

TEXT:

Subject: Nonapplication of Section 1789(b)(4), Title 38, U.S.C.

(This opinion, previously issued as General Counsel Opinion 24-75, dated July 29, 1975, 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:

Does title 38, section 1789(b)(4), apply to the following specific set of facts concerning the proposed offering of a course by an educational institution?

COMMENTS:

Briefly stated, a school which is located in the Midwest, and which is a nonprofit, accredited, educational institution, proposes to offer a degree credit course consisting of 3 credit hours, of which 2 credits would be residence training, and the other credit would be off-campus experience or practicum training. The course is one which is very similar in nature to a correspondence course which is presently offered by another Midwest institution through correspondence training.

The school proposing to offer the course has entered into a contract with the correspondence school offering the similar course, under which the latter will provide the necessary course material and will recruit veterans to sign up for the course (it already has approximately 18-19 recruiters to perform this task). The instruction would be offered primarily at off-campus locations (such as motels, etc.). There appears to be a question whether the instructors who will provide the instruction will be hired under the same conditions, such as tenure, as instructors providing teaching functions for other courses offered by the school. Credit for the course would be granted towards the first institution's Associate Degree in Financial Planning. The total tuition cost for the 44-week course is $2,450, which will be disbursed as follows: $150 to the school proposing to offer the course for operating the program; $300 profit to that institution; and $2,000 to the second school. If the cost of operation should exceed $150, the latter would pay any excess. Under the proposed plan, most veterans attending the course would sign a promissory note and execute a power of attorney, under

which the VA check would be sent to a bank. The proceeds would first be used to pay the veteran's tuition, with any excess sent to the veteran.

The pertinent portions of section 1789 of title 38, United States Code, read as follows:

"1789. Period of operation for approval

"(a) The Administrator shall not approve the enrollment of an eligible veteran or eligible person in any course offered by an educational institution when such course has been in operation for less than two years.

"(b) Subsection (a) shall not apply to--"... (4) any course which is offered by a nonprofit educational institution of college level and which is recognized for credit toward a standard college degree; ...."

Before reaching an opinion on this question, it was necessary first to examine the legislative intent of this provision of law.

Clause (4) of section 1789 was originally enacted in Public Law 847, 84th Congress, on July 30, 1956, and was applicable to the Korean conflict GI Bill program. In its report on the bill (H.R. 4127), the House Committee on Veterans' Affairs (House Report 2577, 84th Congress, 2d Session, p. 1) made the following statement in explanation of the purpose of the bill:

"Section 227 of Public Law 550 of the 82d Congress, the Veterans' Readjustment Assistance Act of 1952, the so-called Korean GI bill of rights, prohibits the enrollment of eligible veterans in any course which has not been in operation for at least 2 years. Certain exemptions are provided; namely, courses offered by public or tax supported educational institutions, courses similar in character to the instruction previously given by the institution, and courses offered for more than 2 years by an institution although the institution has not been in one particular locality for a 2-year period.

"This bill would provide a further exception by permitting enrollment in courses which are offered by a nonprofit educational institution of college level and which are recognized for credit toward a standard college degree.

"The net effect of enactment of this legislation would be to permit a limited number of new colleges of unquestioned academic standing, some of which are conducted or sponsored by religious orders or denominations, to qualify for participation in this program of education for the benefit of veterans of the Korean conflict...."

The report of the Senate Committee on Labor and Public Welfare (Senate Report No. 2756, 84th Congress, 2d Session) contained almost identical language.

The Veterans Administration, in reports to the respective House and Senate Committees (set forth in their official reports on the bill), stated as follows:

"The experience of the Veterans' Administration in the administration of the Veterans' Readjustment Assistance Act program has not demonstrated that there would be many instances where college-level courses would be barred by section 227. However, there have been a few such cases, and, perhaps, the interests of all concerned would be better served if new institutions of higher learning or new departments of existing institutions of higher learning could enroll veterans under the act without a 2-year waiting period. Moreover, the experience of the Veterans' Administration under its interpretation of the comparable language placed in the 1944 act would indicate that no adverse results are to be anticipated from excluding courses of the character contemplated by H.R. 4127 from the 2-year operation rule."

This provision of law was repealed by Public Law 89-358, but identical provisions were reenacted in the same law (the "Veterans' Readjustment Benefits Act of 1966") and made applicable to the new program. In its report on the bill, which eventually was enacted as Public Law 89-358 (House Report 1258, 89th Congress, 2d Session, p. 7), the House Committee on Veterans' Affairs noted that the provisions of the measure were patterned closely after Public Law 550, 82d Congress (the "Veterans' Readjustment Assistance Act of 1952"), which gave these benefits to veterans of the Korean conflict. It added: "Insofar as the provisions of the reported bill are the same as Public Law 550, it is expected that they will be administered in the same manner."

It can clearly be seen from the foregoing history that it was the intention of the Congress, when it enacted the law (Public Law 847, 84th Congress, 2d Session) in 1956 providing the fourth exception to the 2-year operation rule, to permit certain limited numbers of new colleges of unquestioned academic standing to qualify for participation in providing education for veterans without having to comply with the 2-year operation rule.

It would appear that the Congress, in enacting this limited exclusion, contemplated that the courses to be excluded were courses offered by schools in a more conventional college arrangement and setting than prevail under the stated facts.

Although your request for our opinion was based upon a stated set of facts, it should be noted that the Administrator, under this broad authority to administer educational programs for veterans and dependents, has the authority and responsibility to review all cases which raise questions as to whether courses offered by nonprofit institutions come within the intent of the Congress in

enacting the above-cited exemption. In those instances where the Administrator determines that the courses do not meet the criteria of the law, he may not authorize the enrollment of veterans and dependents in such course until the school complies with the 2-year operational requirement.

HELD:

In answer to the question presented, it is our opinion that where a course is offered pursuant to a contract entered into between a nonprofit educational institution and another educational institution or organization which permits (a) outside recruiters furnished by the outside institution or organization to be utilized to obtain students for the course; (b) payments of substantial fees to the other institutions or organization for material with "profits" paid to the nonprofit school offering the course; (c) conducting of the training in nonacademic surroundings, such as motels; or (d) the expansion of course offerings by the nonprofit institution well beyond its normal boundary, then such a course clearly does not fall within the criteria of the exception in clause (4) of 38 U.S.C. § 1789 and must comply with the 2-year operation requirement of section 1789(a) of title 38.

It is also our opinion that, when the Administrator is required to make a determination concerning the exemption of courses offered by nonprofit institutions from the operation of the 2-year requirement, and the nonprofit institution has entered into any arrangement which would raise questions concerning its status under 38 U.S.C. § 1789(b)(4), the Administrator has the legal authority to examine the effect of such arrangement on the school's claim to the exemption afforded by section 1789(b)(4). Where a determination is made that the questioned arrangement does not come within the Congressional intent of the exemption, the Administrator may not approve the enrollment of veterans and dependents in such a course until it meets the 2-year operation requirement.

On November 17, 1975, this opinion was approved by the Administrator of Veterans Affairs.

VETERANS ADMINISTRATION GENERAL COUNSEL
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