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**TEXT:**

The Effect of a Discharge Under Dishonorable Conditions on Eligibility for Gratuitous Veterans' Benefits Based on a Prior Period of Honorable Service

**QUESTION PRESENTED:**

Does a discharge under dishonorable conditions bar an individual from receiving gratuitous benefits under laws administered by the Department of Veterans Affairs (VA) based on a prior period of service which terminated under honorable conditions?

**COMMENTS:**

1. The Department of the Air Force recently requested our advice concerning the effect of a discharge under dishonorable conditions on a service member's eligibility to receive veterans' benefits based on a prior period of service which terminated under honorable conditions. We conclude that, unless VA determines that an individual was guilty of an offense listed in 38 U.S.C. § 6104 (formerly § 3504) FN1 , subject to the limitations on application of that section imposed by 38 U.S.C. § 103(d)(1) (formerly § 3503(d)(1)), or the individual was convicted of an offense listed in 38 U.S.C. § 6105(b) (formerly § 3505(b)), a discharge under dishonorable conditions does not bar such individual from receiving VA benefits based on a prior period of service which terminated under honorable conditions.

2. Section 101(2) of title 38, United States Code, provides the basic definition of the term "veteran" for purposes of benefits under laws administered by VA, i.e., " t he term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." See also 38 C.F.R. § 3.1(d). The term "veteran" is used repeatedly in title 38 to identify an individual who is eligible for benefits by virtue of his or her service. The section-101(2) definition establishes a standard regarding the quality of active service which will result in eligibility for veterans' benefits.

3. A discharge under honorable conditions is binding on VA as to character of discharge. 38 C.F.R. § 3.12(a). Under the terms of 38 U.S.C. § 101(2) and 38 C.F.R. § 3.12(a), a "dishonorable" discharge would require a finding that an

individual is not a veteran for purposes of the period of service in question. However, in cases in which an individual's discharge is neither honorable nor dishonorable (i.e., "undesirable," "bad conduct," or "under other than honorable conditions"), VA is required to determine whether such discharge was issued "under conditions other than dishonorable." 38 U.S.C. § 101(2); 38 C.F.R. § 3.12(a). A discharge because of acceptance of an undesirable discharge to escape trial by general court-martial, mutiny or spying, an offense involving moral turpitude, willful and persistent misconduct, or homosexual acts involving aggravating circumstances or other factors affecting the performance of duty is considered to have been issued under dishonorable conditions and, thus, effectively bars an individual from receiving gratuitous VA benefits based on the period of service for which it was issued. 38 C.F.R. § 3.12(d). (Pub.L. No. 95-126, § 2, 91 Stat. 1106, 1107 (1977), does authorize VA to provide health care and related benefits under 38 U.S.C. ch. 17 for a disability incurred or aggravated in line of duty by a person other than a person barred from receiving benefits under 38 U.S.C. § 5303(a) (formerly § 3103(a)), except for a disability incurred or aggravated during a period of service from which the person was discharged by reason of a bad conduct discharge.)

4. A discharge found by VA to have been issued under dishonorable conditions does not, in and of itself, bar an individual from receiving VA benefits based on an earlier period of service which terminated under honorable conditions. VA long ago adopted an administrative interpretation that a discharge under dishonorable conditions from one period of service does not constitute a bar to VA benefits if there was another period of qualifying service upon which a claim could be predicated. See Administrator's Decision No. 655 (6-20-45); Op.Sol. 218-51 (6-4-51). This interpretation is currently reflected in the language of 38 C.F.R. § 3.12(a), which provides, in part, that " i f the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable" (emphasis added).

5. Congress' recognition and approval of VA's interpretation is found at 38 U.S.C. § 101(18), which provides that:

The term 'discharge or release' includes (A) retirement from active military, naval, or air service, and (B) the satisfactory completion of the period of active military, naval, or air service for which a person was obligated at the time of entry into such service in the case of a person who, due to enlistment or reenlistment, was not awarded a discharge or release from such period of service at the time of such completion thereof and who, at such time, would otherwise have been eligible for the award of a discharge or release under conditions other than dishonorable.

Subsection (B) was added by Pub.L. No. 95-126, s 3, 91 Stat. 1106, 1108 (1977), which provided new rules for determining certain veterans' eligibility for VA benefits. The legislative history of this provision discloses that Congress was attempting to correct an inequity: veterans were being denied benefits based upon an entire period of service which terminated in a discharge under dishonorable conditions, even though the individuals had successfully completed the period of service to which they had originally agreed. The intent of the change in law was to treat the honorable completion of the original period of obligated service as though it had resulted in a full discharge or release. See, e.g., H.R.Rep. No. 95-580, 95th Cong., 1st Sess. 18, reprinted in 1977 U.S.Code Cong. & Admin.News 2844, 2861. This resulted in the individual having more than one period of service and the final discharge under dishonorable conditions no longer constituting a bar to receipt of veterans' benefits based on the prior period.

6. Section 5303 of title 38, United States Code, and the regulation implementing this statutory provision, 38 C.F.R. § 3.12(c), provide that an individual may be denied gratuitous VA benefits if the nature of such individual's discharge falls within one of the bars to benefits listed in 38 U.S.C. § 5303(a). Those bars include "discharge or dismissal by reason of the sentence of a general court-martial," discharge as "a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority," discharge as a deserter, discharge under conditions other than honorable "on the basis of an absence without authority from active duty for a continuous period of at least one hundred and eighty days" unless there are compelling circumstances to warrant such prolonged unauthorized absence, discharge of an individual upon his or her request during a period of hostilities as an alien, or, in the case of an officer, resignation for the good of the service. However, under the terms of section 5303(a), the bars to benefits listed in that section only affect rights of persons so discharged "based upon the period of service from which discharged or dismissed." Thus, even though the nature of an individual's last discharge from service falls within one of these bars to benefits, such person may retain eligibility for VA benefits based on an earlier period of service which terminated under honorable conditions.

7. A question arises as to eligibility for national-cemetery burial due to prior law on the subject. An examination of the legislative history of the National Cemeteries Act of 1973, Pub.L. No. 93-43, 87 Stat. 75, which established the National Cemetery System within VA, discloses that, under then-current law, eligibility requirements for burial in national cemeteries varied with the operating agency (Department of the Army, VA, National Park Service, and American Battle Monuments Commission). See S.Rep. No. 93-55, 93th Cong., 1st Sess., reprinted in 1973 U.S.Code Cong. & Admin.News 1401, 1404. Section 1002, as included in S. 49, 93rd Cong., which became Pub.L.

No. 93-43, established a single standard for eligibility for burial in national cemeteries transferred to VA. The eligibility provisions of the bill were described as being "identical to those currently in force in section 281 of title 24, United States Code." See id. at 1420. However, the language of section 1002 differed significantly from 24 U.S.C. § 281 in that the latter provided that only members or former members of the Armed Forces whose last period of service terminated honorably were eligible for burial in national cemeteries. Section 1002 had no such provision and was interpreted by VA as differing from the title 24 provision in this regard. See Letter of the Administrator of Veterans Affairs to Congressman Lamar Baker, November 23, 1973.

8. The legislative history of the National Cemeteries Act of 1973 contains no explanation for the failure to incorporate the express terms of 24 U.S.C. § 281 into new section 1002. The act contains no definitional provision defining the term "veteran" and, in the absence of such a provision, the general definitional statute applicable to title 38, 38 U.S.C. § 101(2), should be relied on in determining the meaning of the term "veteran." See 1A N. Singer, Sutherland Statutory Construction, § 27.02 (4th ed. 1985). There is no basis for applying that term more restrictively for purposes of section 1002 than for purposes of other provisions of title 38. We conclude, therefore, that for purposes of establishing eligibility for burial in national cemeteries under VA's control, there is no requirement that a veteran's last period of service have terminated honorably.

9. A review of the forfeiture provisions of title 38, United States Code, and their legislative history leads us to conclude that there are some circumstances under which a person discharged under dishonorable conditions may be barred from receipt of gratuitous VA benefits based on a prior period of service which terminated under honorable conditions. Section 6104(a) of title 38, United States Code, provides that:

Any person shown by evidence satisfactory to the Secretary of Veterans Affairs to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies shall forfeit all accrued or future gratuitous benefits under laws administered by the Department of Veterans Affairs (emphasis added).

The application of this provision has been severely limited since September 1, 1959. No forfeiture of benefits may be imposed under 38 U.S.C. § 6104 after that date against an individual who was a resident of, or domiciled in, a state at the time of commission of the offense unless the individual ceases to be a resident of, or domiciled in, a state before the expiration of the period during which criminal prosecution could be instituted. 38 U.S.C. § 6103(d)(1). This limitation does not apply with respect to any forfeiture which occurred before September 1, 1959, or to acts which occurred in the Philippine Islands prior to

July 4, 1946. Id. The term "state" means the several states, territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico. 38 U.S.C. § 101(20).

10. The forfeiture provision embodied in section 6104(a) developed from a provision of the World War Veterans' Act, 1924, ch. 320, § 23, 43 Stat. 607, 613, which provided that:

The discharge or dismissal of any person from the military or naval forces on the ground that he is guilty of mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he has been found guilty by a court-martial, or that he is an enemy alien, conscientious objector, or a deserter, shall terminate any insurance granted on the life of such person under the provisions of Title III and shall bar all rights to any compensation under Title II....

Pursuant to section 208 of that act, a dismissal or discharge from the service by sentence of court martial barred all rights to compensation only for the period of service from which such discharge was given. Sections 23 and 208 of the World War Veterans' Act, 1924 were consolidated and amended by the Act of March 4, 1925, ch. 553, § 3, 43 Stat. 1302, 1303. This later act removed contracts of insurance from the operation of the bar limited the application of the bar in the case of aliens and minors, and retained the provision which limited the bar to compensation to benefits based on the period of service for which the bad discharge or dismissal was issued.

11. The Act of July 13, 1943, ch. 233, s 4, 57 Stat. 554, 555, used language very similar to that of current section 6104, providing that persons shown by evidence satisfactory to the Administrator to be guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States would forfeit "all accrued or future benefits" under laws administered by VA. the proviso regarding prior periods of service was retained in the law on a much more limited basis by the Servicemen's Readjustment Act of 1944, ch. 268, § 300, 58 Stat. 284, 286, which provided that a bar to VA benefits for actions similar to those currently listed in 38 U.S.C. § 5303, would apply only to the period of service from which the person was discharged or dismissed.

The legislative history of section 4 of the Act of July 13, 1943, contains no discussion of its intended scope. See S.Rep.No. 403, 78th Cong., 1st Sess. 8 (1943);H.R.Rep. No. 463, 78th Cong., 1st Sess. 10 (1943). However, courts have recognized VA's authority, pursuant to the predecessors to 38 U.S.C. § 6104(a), i.e., former 38 U.S.C. §§ 728 and 3504(a), to terminate gratuitous benefits awarded to veterans based on periods of honorable service when, subsequent to discharge, such veterans were found by VA to have aided the enemies of the United States or conspired or advocated the forceful overthrow of the Government. See Thompson v. Gleason, 317 F.2d 901 (D.C.Cir.1962); Wellman v. Whittier, 259 F.2d 163(D.C.Cir.1958); Thompson

v. Whittier, 185 F.Supp. 306 (D.D.C.1960), appeal dismissed, 365 U.S. 465 (1961). Further, 38 U.S.C. s§6104(c), added in 1959 as 38 U.S.C. § 3504(c) by Pub.LNo. 86-222, § 2, 73 Stat. 452 (1959), prohibits an award to any person of gratuitous benefits based on any period of military, naval, or air service commencing before the date of commission of an offense listed in subsection (a).

12. In light of the terms of section 6104(a), including Congress' use of the sweeping language "all accrued or future gratuitous benefits," the referenced judicial precedents, and the terms of section 6104(c), we conclude that, subject to section 6103(d)(1), if VA determines upon the evidence (see 38 C.F.R. § 3.905(b)) that an individual is guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies, regardless of whether there has been a criminal conviction for the offense, such individual would be barred from receiving any gratuitous benefits administered by VA, including burial in a national cemetery, based on a prior period of service which terminated under honorable conditions.

13. Section 6105(a) of title 38, United States Code, added by Pub.L. No. 86-222, § 3(a), 73 Stat. 452, 453 (1959), as amended, provides in part that:

Any individual who is convicted after September 1, 1959, of any offense listed in subsection (b) of this section shall, from and after the date of commission of such offense, have no right to gratuitous benefits (including the right to burial in a national cemetery) under laws administered by the Department of Veterans Affairs based on periods of military, naval, or air service commencing before the date of the commission of such offense and no other person shall be entitled to such benefits on account of such individual.

The offenses enumerated in subsection (b) of 38 U.S.C. § 6105 include offenses for which punishment is prescribed in articles 94 (mutiny or sedition), 104 (aiding the enemy), and 106 (spying) of the Uniform Code of Military Justice, various violations of title 18, United States Code, relating to espionage, treason, rebellion, sedition, subversive activities, and sabotage, as well as certain violations of the Atomic Energy Act of 1954 and the Internal Security Act of 1950. Only a Presidential pardon for the offense would restore eligibility for VA benefits. See 38 U.S.C. § 6105(a).

14. H.R. 7106, 86th Cong., which became Pub.L. No. 86-222, was intended to modify existing law by providing automatic forfeiture of rights of veterans to gratuitous benefits in all cases of conviction of specified offenses involving loyalty or security. See S.Rep. No. 664, 86th Cong., 1st Sess., reprinted in 1959 U.S.Code Cong. & Admin.News 2216. In a letter dated August 4, 1959, to the Chairman of the Senate Committee on Finance on H.R. 7106, incorporated in the Committee's report, the Deputy Administrator of Veterans Affairs stated that " t he disenitlement to VA benefits would apply to benefits

based on service before or after conviction." *Id.* at 2217. The Deputy Administrator expressed the view that proposed 38 U.S.C. § 3505 (now § 6105) was an improvement over the related existing 38 U.S.C. § 3504 (now § 6104), stating "clearly, an individual convicted of serious offenses against the Government, involving national security, should not be the recipient of our Government's gratuities." *Id.* at 2218. This legislative history and the sweeping language of 38 U.S.C. § 6105 support the conclusion that a veteran who is discharged as a result of a conviction of an offense enumerated in 38 U.S.C. § 6105(b) is barred from receiving gratuitous VA benefits, including the right to burial in a national cemetery, based on a prior period of service which terminated under honorable conditions.

15. We do not believe that the absence of the parenthetical phrase "including the right to burial in a national cemetery" in 38 U.S.C. § 6104 and the inclusion of the phrase in 38 U.S.C. § 6105 by section 8 of the National Cemeteries Act of 1973 suggests that the former provision was intended to have a narrower scope. The use of the phrase "all accrued or future gratuitous benefits under laws administered by VA" in section 6104 is sufficiently broad to include the right to burial in a national cemetery. There is nothing in the legislative history of Pub.L. No. 86-222, which added what are now section 6105 and subsection (c) of section 6104, to suggest that the forfeiture prescribed by section 6104 was to be less inclusive than the penalty prescribed in section 6105.

16. Section 1002 of title 38, United States Code, as contained in section 2(a) of the National Cemeteries Act of 1973, included within the class of persons eligible for interment in national cemeteries "any veteran," but added the proviso "subject to the provisions of section 6105 of title 38." The regulation implementing this provision, 38 C.F.R. § 1.620(a), essentially restates the definition of a "veteran" found in 38 U.S.C. § 101(2) and 38 C.F.R. § 3.1(d) and provides for adjudication of character of discharge under 38 C.F.R. § 3.12.

17. Both 38 U.S.C. § 1002 and 38 U.S.C. § 6105 specifically indicate that persons convicted of certain offenses listed in 38 U.S.C. § 6105(b) have no right to burial in a national cemetery. S.Rep. No. 93-55, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Admin. News 1401, 1425, and H.R. Rep. No. 93-131, 93d Cong., 1st Sess. 22, indicate that section 8 of the National Cemeteries Act was intended "to make explicit" that forfeiture pursuant to 38 U.S.C. § 6105 included the right to burial in a national cemetery. Such language suggests that this penalty would otherwise have been implicit in the terms of then current section 3505 (now section 6105) and that Congress, for whatever reason, wished to highlight the effects of forfeiture on persons convicted of offenses listed in what is now 38 U.S.C. 6105(b).

18. As discussed above, the broad language of section 6104 indicates that an individual shown by evidence satisfactory to the Secretary to be guilty of

mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies forfeits all accrued or future gratuitous VA Benefits, including eligibility for burial in a national cemetery. The legislative history of the National Cemeteries Act contains no reference to the effect of forfeiture pursuant to 38 U.S.C. § 6104, nor any statement suggesting that Congress intended to liberalize then-existing law regarding forfeiture pursuant to what is now 38 U.S.C. § 6104. See S.Rep.No. 93-55, supra; H.R.Rep. No. 93- 131, supra. In the face of such legislative silence, it would be absurd to conclude that at the same time it was taking measures to ensure that individuals convicted of espionage are excluded from burial in national cemeteries, Congress intended to restrict the scope of another provision which would serve to exclude individuals guilty of treason and other serious offenses from access to national-cemetery burial. See 1A N. Singer, Sutherland Statutory Construction § 23.06 (4th ed. 1985). Such an action would be tantamount to repeal by implication of the broad reference in what is now section 6104 to "all accrued or future gratuitous benefits." "Courts have created a presumption against the repeal of prior laws by implication.... Where the repealing effect of a statute is doubtful, the statute is strictly construed to effectuate its consistent operation with previous legislation." Id. at § 23.10 (emphasis in original). Accordingly, we conclude that, in specifically barring national-cemetery burial for persons convicted of offenses listed in 38 U.S.C. § 6105, Congress did not intend to limit the effect of 38 U.S.C. § 6104 in this regard, and that persons subject to forfeiture under the latter provision are hereby barred from national-cemetery burial.

#### **HELD:**

Unless the Secretary of Veterans Affairs determines that an individual is guilty of an offense listed in 38 U.S.C. § 6104 (formerly § 3504) (mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or of its allies) or the individual is convicted of an offense listed in 38 U.S.C. § 6105 (formerly § 3505) (articles 94 (mutiny or sedition), 104 (aiding the enemy), and 106 (spying) of the Uniform Code of Military Justice; various provisions of title 18, United States Code, relating to espionage, treason, rebellion, sedition, subversive activities, and sabotage; violations of the Atomic Energy Act of 1954 and the Internal Security Act of 1950), a discharge under dishonorable conditions does not bar that individual from receiving gratuitous benefits administered by the Department of Veterans Affairs, including burial in a national cemetery, based on a prior period of service which terminated under conditions other than dishonorable. However, if VA determines, subject to the severe limitations on application of 38 U.S.C. § 6104 to U.S. residents and domiciliaries after September 1, 1959, under 38 U.S.C. § 6103(d)(1) (formerly § 3503(d)(1)), that an individual is guilty of an offense listed in 38 U.S.C. § 6104, or if an individual is convicted of an offense listed in 38 U.S.C. § 6105, such individual is barred from receiving all accrued or future benefits regardless of whether the individual may have had a



prior period of honorable service.

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1/ The Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub. L. No. 102-40, s 402 (b)(1), 105 Stat. 187, 238 (1991), redesignated each section in, among other chapters, chapters 53 and 61 of title 38, United States Code, so that the first two digits of the section number are the same as the chapter containing that section.