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Vet. Aff. Op. Gen. Couns. Prec. 10-92

TEXT:

Subj: Request for Legal Opinion - Entitlement to Chapter 30 Benefits

ISSUE:

May an individual who, due to reenlistment or extension, is not discharged upon completion of his or her initial obligated period of active duty, but remains on active duty and, thereafter, is discharged with other than an "honorable" discharge be eligible for chapter 30 Montgomery GI Bill benefits under section 3011(a) of that chapter where the Secretary of the military department concerned characterizes the individual's service during the initial obligated period as "honorable"?

DISCUSSION:

1. To be eligible for Montgomery GI Bill (MGIB) benefits under 38 U.S.C. § 3011(a), an individual who first enters active duty after May 31, 1985, must (unless discharged early for certain reasons not pertinent here) complete an initial obligated active duty period of at least 2 continuous years. Further, subsection 3011(a)(3) requires that, upon completion of that initial period of service, the individual must meet the criteria of one of four categories of service status.
 - (A) continues on active duty;
 - (B) is discharged from active duty with an honorable discharge;
 - (C) is released after service on active duty characterized by the Secretary concerned as honorable service and is placed on the retired list, is transferred to the Fleet Reserve or Fleet Marine Corps Reserve, or is placed on the temporary disability retired list; or
 - (D) is released from active duty for further service in a reserve component of the Armed Forces after service on active duty characterized by the Secretary
2. More particularly, paragraph (3) of the subsection 3011(a) provides that an individual meets the active-duty service requirements for MGIB entitlement if, after completion of the requisite initial obligated active-duty period, he or she:

concerned as honorable service;

3. The question raised here postulates a situation in which seemingly none of the criteria of section 3011(a)(3) on their face has been met. That is, the individual is no longer on active duty as provided under section 3011(a)(3)(A), has not received an honorable discharge in accordance with section 3011(a)(3)(B), and was not released from active duty characterized as honorable by the military department concerned under the circumstances described in section 3011(a)(3)(C) or (D).

4. Nevertheless, the premise suggested by the question is that Congress also intended to vest chapter 30 entitlement in an individual who served honorably throughout his or her original obligated period of active duty but, due to extension or reenlistment, did not at that time receive an honorable discharge, notwithstanding that the individual subsequently was discharged with other than an "honorable" discharge.

5. The inquiry points to 38 U.S.C. § 101(18) as supporting VA authority to administratively determine that a veteran has met the discharge requirements for statutory VA benefits. Clause (B) of that section, as added in 1977, defines the term "discharge or release" for title 38 purposes as including satisfactory completion of an initially obligated period of service by one who, due to enlistment or reenlistment, was not accorded a discharge or release therefrom, provided he or she otherwise would have been entitled to such discharge or release "under conditions other than dishonorable." In other words, VA clearly has authority to determine in that particular case whether an individual could be considered to have been awarded an "other than dishonorable" discharge for VA benefit entitlement purposes. See 38 C.F.R. § 3.13(c).

6. However, as we stated in an unpublished opinion issued to the Chief Benefits Director on January 25, 1988 (copy attached), and now hereby reaffirm, section 101(18)(B) of title 38 has no application to chapter 30 eligibility requirements.

First, the term "discharge or release" is not found in section 3011(a)(3) which specifically states the conditions under which an individual must complete his or her active service obligation for chapter 30 purposes. (Note: the term "discharge or release" is used in connection with the alternative qualifying service criteria for an individual discharged or released under the "early out" conditions stated in section 3011(a)(1) (A)(ii) and (B)(ii). However, section 101(18)(B) has no application to those provisions since, on its face, it applies only where a person has satisfactorily completed the period of service for which obligated at time of entry.)

7. Second, the language of section 3011(a)(3), in our view, does not admit any possibility that an individual could qualify for chapter 30 benefits based on a discharge less than "honorable" in character. (We note that a recent technical amendment made by section 10(a)(1) of Public Law 102-16 clarifies that, even in

the case of an individual released from active duty and placed on the retired list under section 3011(a)(3)(C), for example, the individual's entire active service must be characterized by the military as "honorable.") In fact, the higher "honorable" discharge standard for program participation is among the most distinguishing features of the peacetime, All-Volunteer Force education benefit program enacted as chapter 30. Former GI Bills (and most other VA benefits to which the section 101(18)(B) definition of "discharge or release" clearly does apply) only required that the individual have been discharged from qualifying service "under conditions other than dishonorable." See, e.g., 38 U.S.C. § 3452(a)(1).

8. In sum, we have found no statutory authority for VA to assess the character of an individual's active duty service for chapter 30 entitlement purposes by applying the provisions of section 101(18)(B). Indeed, granting entitlement to education benefits under that chapter based on an administrative finding that the individual was discharged "under conditions other than dishonorable" clearly would be inconsistent with the provisions of section 3011(a)(3), expressing the categorical intent of Congress that such entitlement requires "honorable" service.

9. Moreover, we find no statutory basis for "reading into" section 3011(a)(3) a fifth category that, under certain circumstances analogous to those described in section 101(18)(B), would permit VA to determine that an individual not awarded a discharge upon completion of his or her initial obligated period of active duty, nevertheless, may be deemed to have been given an "honorable discharge" at such time. The language of section 3011(a)(3), on its face, is plain and unambiguous. The categories enumerated therein are expressed in exclusive terms; they are not merely representative of a range of permissible circumstances under which one could find an individual had been separated from service in a manner satisfying benefit eligibility requirements. The statute neither expressly nor impliedly delegates to VA legislative authority to interpretively expand the listed categories in the manner suggested by this inquiry.

10. Rather, VA's role in deciding whether an individual meets the requirements of section 3011(a)(3) clearly is limited to that of fact finder. The pertinent facts, vis-a-vis placement of an individual within the categories listed in that section, are ascertainable simply by reference to documentary evidence issued by and manifesting the determination of the military service department concerned. No VA "characterization" of those facts is required. This, we note, is reflected in current VA policy. See VBA Circular 22-85-6 Revised, par. 7.d., dated September 13, 1990.

11. Thus, for example, if an individual has completed his or her initial active-duty period and remains on active duty (a fact attested by the military department concerned), subsection 3011(a)(3)(A) requires no characterization by VA that such service is being honorably performed. (Ostensibly, the law presumes that

an individual who is retained on active duty is performing honorably and, while continuing to so perform, merits entitlement to chapter 30 MGIB-Active Duty benefits.) The statute, likewise, makes apparent that if the same individual, having completed his or her initial period of obligated service (whether extended or not), is discharged from active duty with an "honorable discharge," again, a fact certified by the military department concerned, that individual would meet the requirements of clause (B) of subsection 3011(a)(3). Furthermore, if the military discharged an individual with other than an "honorable" discharge, that fact would be binding on VA and, not falling within any of the section 3011(a)(3) categories, the individual would be denied chapter 30 entitlement.

12. Such results, in our view, are consistent with legitimate legislative objectives for the chapter 30 Montgomery GI Bill program. The goals of that program go beyond the essentially readjustment objectives of the earlier "wartime" GI Bills to include fostering military recruitment and retention of highly qualified personnel, as well as a more highly educated, productive, and competitive national workforce. 38 U.S.C. § 3001. In effect, this GI Bill, unlike its predecessors, rewards the individual only if the individual performs his or her active duty commitment pursuant to the highest standard established by the military.

13. Hence, based on our reading of the pertinent statute, as well as current departmental policy, the instant question is answered in the negative. The following analysis of two factual examples presented with the inquiry illustrates our conclusion.

14. In one of the cases presented, VA received two military service department documents: DD Form 256A and DD Form 214. The former, on its face, establishes that the individual was awarded an "honorable discharge" for his period of service ending November 1, 1988. The latter shows the individual first entered on active duty on October 2, 1985, for an unstated period of enlistment, and was discharged on April 22, 1991, "Under Honorable Condition sic (General)," the reason given, unsatisfactory performance.

15. At first glance, this documentary evidence seems ambiguous since one document indicates that, for the period from October 2, 1985, to November 1, 1988, the individual was awarded an honorable discharge while the other indicates that, for the entire period from October 2, 1985, to April 22, 1991, he was discharged with a less than "honorable" discharge. However, based upon remarks found on the DD Form 214, it appears probable that the veteran, following extension of his initial enlistment period, was discharged on November 1, 1988, for the purpose of immediately reenlisting on November 2, 1988. This event likely was memorialized by the issuance of the Honorable Discharge Certificate noted above, effective November 1, 1988.

16. While we believe further development with the military department concerned is indicated to clarify the facts in this case, it otherwise is our opinion

that, absent any indication of procedural irregularity or other contraindicating evidence of record, the individual's award of an honorable discharge on November 1, 1988 (presumably, following completion of his original enlistment period plus a short extension to allow for reenlistment) would satisfy the requirements of section 3011(a)(3)(B). The fact that the individual subsequently reenlisted in the Armed Forces and was awarded a discharge characterized as other than an "honorable discharge" is of no consequence for chapter 30 entitlement purposes. The event of his receiving a complete discharge (of the requisite character) from his active duty commitment following completion of his initial obligated period of qualifying active duty is conclusive as to meeting the service completion requirement of section 3011(a)(3).

17. Conversely, in the second case presented, the only evidence of record is a DD Form 214 covering the period May 1, 1986, to July 21, 1990, and showing that the individual was granted a discharge "under honorable conditions" on the latter date. The form also contains the remarks "continuous honorable active service from May 1, 1986, to November 5, 1989." Unlike the preceding case, however, no documentary evidence is presented showing that this individual was awarded an honorable discharge after completion of his initial qualifying active-duty service commitment. Therefore, subject to any indicated development which might reveal otherwise, the requirements of section 3011(a)(3)(B) are not shown to have been met in this case.

18. It should be noted that, in each of the above cases, assuming all other pertinent criteria for entitlement were met, the individual would have been entitled to receive basic chapter 30 education benefits for approved educational pursuit while on active duty, by virtue of section 3011(a)(3)(A). However, the individual in the second case discussed would have been divested of such entitlement upon his receiving a nonqualifying discharge; that is, one not meeting the criteria of section 3011(a)(3)(B).

19. Finally, the request for opinion states that the Army does not issue a DD Form 214 to an individual who reenlists. We accept that assertion as given, having no independent information to the contrary. However, we note that, in one of the above-mentioned cases, the individual apparently reenlisted after completing his full original enlistment period, plus an extension, and, thereupon, was issued a DD Form 256A (Honorable Discharge Certificate). Consequently, we suggest that, in all similar cases, VA should develop for the existence of such a document, confirming the award of an honorable discharge, to ensure such evidence of a meritorious claim is not overlooked through reliance solely on the DD 214 data.

HELD:

a. To establish entitlement to chapter 30 Montgomery GI Bill education benefits based on active-duty service pursuant to 38 U.S.C. § 3011, an individual,

following his or her completion of the requisite initial obligated period of active duty, must meet the pertinent service status criteria set forth in section 3011(a)(3) of that chapter. That is, the individual must either continue on active duty; be discharged therefrom with an honorable discharge; or be released from active duty characterized as honorable by the military department concerned under the specific circumstances described in subclause (C) or (D) of section 3011(a)(3).

b. The term "discharge or release," as defined for title 38 purposes by section 101(18) of that title, is not found in section 3011(a)(3). Consequently, VA's authority to administratively consider an individual to have been discharged from his or her obligated period of active-duty service and decide the character of that service, as derived from the circumstances described in section 101(18)(B), does not extend to chapter 30 determinations.

c. Section 3011(a)(3) sets forth categorical requirements that are plain and unambiguous on their face, providing no need nor basis for administrative interpretation. Such provisions exclusively govern determinations of an individual's service completion status for purposes of establishing entitlement to chapter 30 education benefits based on active-duty service under section 3011.

d. An individual who completes his or her initial obligated period of active duty but, due to extension of service or reenlistment, does not at that time receive a discharge from such period by the military department concerned and who, thereafter, is discharged with other than an "honorable" discharge does not meet the discharge requirement of section 3011(a)(3)(B) for entitlement to chapter 30 education benefits. This is so, notwithstanding extrinsic evidence that indicates the veteran completed, though without honorable discharge, his or her initial obligated active-duty period and that the individual's performance of that duty during such period was characterized by the military department concerned as "honorable."

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