Date: July 18, 1994 O.G.C. Precedent 17-94

From: General Counsel (021)

Subj: Conflicting Interests (38 U.S.C. § 3683, 38 C.F.R. § 21.4005)

To: Under Secretary for Benefits (20)

QUESTION PRESENTED:

May a supervisor for a State Approving Agency (SAA) enroll in and pursue training at a for-profit flight school in a course approved for training under a VA administered education benefits program?

COMMENTS:

1. This conflicting interest question arises in the context of an SAA "supervisor" who, while so employed, wants to use his VA education benefits to pursue approved courses offered by a flight school that is operated for profit. The facts given do not state whether the supervisor's present duties are related to VA course approvals or might be so related in the future. Nevertheless, the determinative legal issue in the matter is whether the activity in which the SAA supervisor wants to engage (i.e., attending a for-profit flight school having VA approved courses) is a proscribed activity under 38 U.S.C. § 3683.

2. Section 3683(b) of title 38, United States Code, provides that VA shall discontinue reimbursement payments provided by law and contract to SAA's for undertaking approval functions as to courses to be pursued by veterans if:

> [A]ny person who is an officer or employee of a State approving agency has, while such person . . . received any wages, salary, dividends, profits, gratuities, or services from, an educational institution operated for profit [in which a student is pursuing training under VA programs unless the SAA promptly acts to terminate employment of the officer or employee].

3. Similarly, section 3683(c) of that title provides that the SAA shall disapprove or cancel an existing approval for any course at a for-profit educational institution if any SAA officer or employee "receives any wages, salary, dividends, profits, gratuities, or services from" the institution. (Note: Paragraph E of schedule No. 1 to the SAA-VA reimbursement contract contains a similar proscription and comparable language implementing both referenced statutory provisions is found in 38 C. F. R. § 21.4005(a)(1), (a)(2), and (a)(3).)

4. Application of these conflicting interests provisions, however, may be waived as to any SAA officer or employee, pursuant to section 3683(d) and the implementing VA regulation, if VA finds "no detriment will result to the United States or to eligible persons or veterans by reasons of such . . . connection of such officer or employee." 38 C. F. R. § 21.4005(a)(4), (b), and (c).

5. Our response to the instant inquiry turns upon the meaning and scope of the activities delineated in section 3683 which invoke the sanctions of that statute, absent waiver. Clearly, of such proscribed activities, i.e., receipt of "wages, salary, dividends, profits, gratuities, or services," only the last has potential application here given the facts presented. Thus, the question is reasonably narrowed to whether the SAA supervisor's receipt of instruction, educational credit, and ultimately a flight rating or certificate of training from the for-profit educational institution, albeit in return for payment of tuition and fees, constitutes receipt of "services."

6. The term "services" as delineated in Webster's Third New International Dictionary of the English Language, Unabridged (1976), has a panoply of meanings including, but not limited to, "the performance of work commanded or paid for by another," "an act done for the benefit of . . . . another," "useful labor that does not produce a tangible commodity," and "to provide information or other assistance to." For our purposes here, however, the specific nature of the range of activities defined as "services" must be construed in the context of section 3683. In this regard, the language of section 3683(b), on its face, reveals a congressional design to protect the integrity of the GI Bill program by proscribing an SAA official's (employee's) ownership of, pecuniary interest in, or other personal connection with a for-profit school. Ostensibly, the proscribed activities listed in that section, though not per se unlawful, unethical, or violative of the public trust, suggest a relationship that presents at least the appearance of a conflict of interest or has the potential for creating such a conflict.

7. Each of the other terms with which "services" is linked in section 3683(b) (i.e., wages, salary, dividends, profits, or gratuities) is a form of compensation, a gain or return for something done, given, risked, or expressly or impliedly promised. The terms share the concept of a relationship between parties based on an exchange of value, with no connotation of anything fraudulent or sinister about the relationship, no implication that it is based on other than "arms-length" dealing. Clearly, the flight training received in this case would fall within the meaning of "services" in such a broadly conceived context.

8. Nevertheless, to ascertain whether Congress may have intended a less inclusive application for the proscribed receipt of "services," one that focused on only suspect activities, we reviewed the legislative history associated with the enactment of Public Law 82-550, the law which created the Korean conflict GI Bill educational assistance program, initiated the present SAA system of course approval, and incorporated the conflicting interests provisions at issue.

9. Our review disclosed no discussion of the particular meaning the drafters ascribed to the term "services," as used in the conflicting interests section, nor any indication that the term was to be understood in a manner different from normal usage. However, we did note Congress' obvious concern with abuses under the World War (WW) II GI Bill and that body's resolve to preclude in the new GI Bill any conduct through which a VA or SAA officer or employee could receive a direct benefit or economic gain in return for granting the veteran, the school, or its operators, or lawyers, an improper advantage or an opportunity to defraud the United States.

10. Documented and anecdotal accounts of these abuses, including blatant bribery resorted to by owners and operators of for-profit schools, such as gifts of furniture, liquor, money, and even donations to one SAA official's church organ fund, were presented in extensive hearings held in connection with the House Select Committee's investigation of the WW II GI Bill. As a result of initial hearings in Harrisburg, Pennsylvania alone, 21 persons were indicted, 133 audits were made by the General Accounting Office and VA, with exception taken to $2,625,232 in payments to Private trade schools in Pennsylvania, many of which should never have received approval. Summary Report of the House Select Committee to Investigate Educational, Training, and Loan Guaranty Programs Under GI Bill, 82d Congress, lst Sess. (1951).

11. Clearly, the variety and pervasiveness of circumstances and conditions enabling such abuse were known to Congress when the conflicting interests section was drafted as part of the Korean conflict GI Bill program. Moreover, the history shows that Congress fully understood and intended the breadth of prohibition it was imposing on an SAA officer's (employee's) receipt of certain emoluments and perquisites from for-profit schools. As originally drafted, for example, the section clearly established a strict liability for the delineated activities, allowing no consideration of whether any given factual circumstances negated an inference of conflict of interest or resulted in actual detriment to the United States, veterans, or eligible persons. VA, in fact, noted this at the time and is on record as

urging Congress to modify the provision to avoid the inequity of imposing sanctions in situations beyond the SAA employee's control, such as where the employee inherits a financial interest in a for-profit school. See Veterans Readjustment Assistance Act of 1952: Hearings Before the Special Subcommittee on Veterans' Education and Rehabilitation Benefits of the Committee on Labor and Public Welfare, United States Senate, on H. R. 7656, 82d Cong., 2d Sess. 221-222 (1952) (letter to Chairman James E. Murray dated June 10, 1952, from Carl R. Gray, Jr., Administrator, Veterans Administration). Ultimately, Congress did modify the section to protect against such eventualities, though not by means of narrowing the scope of proscribed conduct. Instead, it added the waiver authority found in current section 3683(d). H. R. Rep. No. 2481, 82d Cong., 2d Sess. 15 (1952).

12. Against this backdrop, we believe the statute's proscription against receipt of "services" should be given a broad construction and, so construed, would embrace the normal educational service of instruction or training for which the individual student pays tuition and fees. To find otherwise would yield anomalous results. It would give blanket exemption to the obvious potential conflict-of-interest relationship inherent in an SAA official's pursuit of training under the GI Bill at a for-profit school for which the official's employer has approval and oversight responsibility. Surely, it goes beyond reason to suggest that Congress would have intended, in such circumstances, to deny even the most basic scrutiny into whether the SAA official's duties involved decisionmaking concerning approval of courses at, or compliance with reporting and recordkeeping requirements by, the very school the employee is attending.

13. Rather, upon consideration of the relevant law and legislative history, as well as the abuse which Congress was seeking to remedy, we find it more reasonable to conclude that an SAA officer or employee who, while so employed, enrolls in a for-profit educational institution regulated by his or her agency (even though that enrollment may be on the same basis, with receipt of the same educational services, as any other member of the public) necessarily thereby receives "services" from that educational institution within the meaning and scope of the conflicting interests statute, 38 U.S.C. § 3683(b).

14. Consequently, it is our opinion that, in the subject case, the SAA official's pursuit of flight training at a for-profit flight school under a VA administered education benefits program will invoke the sanctions of section 3683(b) and (c).

15. Having reached this conclusion, however, we also find that, given the waiver language, it is outside the intent of this statute to impose sanctions when the facts indicate that no detriment will result to the United States or to eligible persons or veterans as a result of the SAA official's economic or financial interest in, or other personal connection with the educational institution attended. Thus, full consideration should be given to application of the waiver authority in the statute. More particularly, the instant case should be reviewed and information obtained to ascertain whether a waiver of the section 3683 provisions may be granted pursuant to the criteria in 38 C. F. R. § 21.4005(b)(2) and, if not, whether the circumstances, nevertheless, warrant submission of the matter to the Secretary for waiver consideration pursuant to 38 C. F. R. § 21.4005(c)(3).

HELD:

1. An SAA officer or employee will be considered to have received "services" from a for-profit educational institution within the meaning of section 3683 of title 38, United States Code, when the individual receives instruction in a course approved for VA purposes at that institution, even though the official or employee is enrolled in and pursuing the course on the same basis as similarly circumstanced students not so employed.

2. A waiver may be granted by the Director, Education Service, or by the Secretary, pursuant to 38 C.F.R. § 21.4005, when the facts show no detriment to the United States, veterans, or eligible persons will ensue from the receipt of such services by the SAA officer or employee.

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