

Date: October 3, 1994

O.G.C. Precedent 18-94

From: General Counsel (022)

Subj: Classification of Service--Attendance at the United States  
Air Force Academy Preparatory School

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Whether service as a precadet at the United States Air Force Academy Preparatory School may be considered "active duty" service for purposes of title 38, United States Code.

COMMENTS:

1. The claimant seeks service-connected disability benefits based upon a period of service in which he attended the United States Air Force Academy Preparatory School (USAFAPS). The claims folder contains a DD Form 214, "Certificate of Release or Discharge From Active Duty," indicating that the claimant served on active duty from July 30, 1992, to December 22, 1992. The certificate indicates that this service was as a "Precadet Assignee" at the USAFAPS. It appears that this was the claimant's sole assignment during this period of service. The reason for separation is stated as "Elimination of USAF Academy Preparatory School."

2. Pursuant to 38 U.S.C. §§ 1110 and 1131, service-connected disability compensation may be paid only to a "veteran." The term "veteran" is defined in 38 U.S.C. § 101(2) as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." Section 101(24) defines the term "active military, naval, or air service" as including "active duty" and "any period of active duty for training during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty." The term "active duty" is defined in 38 U.S.C. § 101(21) to include, inter alia, "full-time duty in the Armed Forces, other than active duty for training," and "service as a cadet at the United States Military, Air Force, or Coast Guard Academy,

or as a midshipman at the United States Naval Academy." The term "active duty for training" is defined in 38 U.S.C.

§ 101(22) as including "full-time duty in the Armed Forces performed by Reserves for training purposes."

3. The issuance of a DD Form 214 reflecting "active duty" would appear to indicate that the Air Force considers the claimant's service to have been active duty for its purposes. However, 10 U.S.C. § 101(d)(1) provides that, for purposes of laws governing armed forces personnel, the term "active duty" includes "full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned." Accordingly, "active duty" for Air Force administrative purposes may include service for training which would not be considered active duty for VA purposes under title 38. In O.G.C. Prec. 25-90, we concluded that the Air Force's issuance of a DD 214 indicating that an individual had served on active duty "cannot . . . be considered conclusive evidence of true 'active duty'." Our conclusion was based on provisions in an Air Force manual indicating that a DD 214 would be issued to anyone serving on active duty for training for periods in excess of ninety days and that the space on the form regarding the authority for issuance of the discharge would be annotated "Release from active duty," even if the period of service was actually active duty for training. We understand that a substantively similar provision is currently contained in Air Force Instruction 36-3202, sec. B, ¶ 3.1.3. Accordingly, the DD Form 214 in this case cannot be taken as establishing that the claimant in fact served on active duty for VA purposes.

4. We must, therefore, determine whether the claimant's service is within the definition of "active duty" for VA purposes, as that term is defined in 38 U.S.C. § 101(21). We note that the provision in section 101(21)(D) expressly including service as a cadet or midshipman at one of the service academies as "active duty" does not include within its terms service as

a "precadet" at a service-academy preparatory school. Statutes provide for the establishment and operation of the service academies and establish specific criteria for attendance at those academies by cadets or midshipmen. See 10 U.S.C. §§ 4331-56 (Military Academy), 6951-74 (Naval Academy), 9331-55 (Air Force Academy); 14 U.S.C. § 181-96 (Coast Guard Academy). Those statutes do not specifically provide for the establishment of the service academy preparatory schools and provide no basis for concluding that attendance at a service academy preparatory school constitutes service as a cadet or midshipman at a service academy. In Op. Sol. 101-53 (6-3-53), the Veterans' Administration Solicitor noted that the Naval Academy Preparatory School was a distinct entity from the Naval Academy and that service at the preparatory school was not the equivalent of service at the Academy. Accordingly, we find no authority suggesting that the reference in 38 U.S.C. § 101(21)(D) to service as a cadet or midshipman at a service academy was intended to refer to service as a precadet at a service-academy preparatory school.

5. In the claims folder in the instant case, it is noted that VA Manual M22-4, Part III, ¶ 3.313 b., provides that "[s]ervice at an Army, Navy, or Air Force preparatory school is considered active duty." (Emphasis in original.) However, that manual provision pertains solely to entitlement to education benefits and is not persuasive in the context of the present determination because the term "active duty" is defined differently for purposes of education benefits than it is for other purposes. With respect to education benefits, 38 U.S.C. §§ 3002(6)(B), 3202(1)(C)(ii), and 3452(a)(3)(B), all provide that the term "active duty" "does not include any period during which an individual . . . served as a cadet or midshipman at one of the service academies." (Emphasis added.) These definitions clearly differ from the definition in section 101(21), which expressly includes service at the service academies as "active duty."

6. The decision in Op. Sol. 101-53 responded to a question as to whether service at a service-academy preparatory school

was the equivalent of service at a service academy for purposes of the provision of the Veterans' Readjustment Assistance Act of 1952, ch. 875, § 201, 66 Stat. 663, excluding a period of attendance at a service academy from the computation of an individual's period of active duty for purposes of education benefits. The Solicitor determined that service at a service-academy preparatory school was not the equivalent of service at a service academy, but he expressed no opinion as to whether service at such a preparatory school would constitute "active service" under the statute. Nonetheless, the manual provision appears to be predicated upon the Solicitor's opinion. The manual provision seems to rest on the supposition that service at a service-academy preparatory school constitutes "active duty" because the pertinent statutes do not expressly exclude such service from active duty. We find no clear authority for that conclusion. Accordingly, we will proceed to consider the nature of service at the USAFAPS to determine whether such service constitutes "active duty" under section 101(21)(A), which refers to "full-time duty in the Armed Forces, other than active duty for training."

7. In contrast to the situation of cadets and midshipmen at the service academies, who serve as such under a special statutory classification and not under an ordinary enlisted grade or rank, there is no special statutory authority for service as a "precadet" at the USAFAPS. Persons attending the USAFAPS are enlisted in the service under generally applicable enlistment procedures and serve in an enlisted rank or grade on the same basis as other enlisted personnel.

8. Air Force regulations establish the basis of enlistment and the service obligation of persons attending the USAFAPS. Under those regulations, applicants to the USAFAPS come from three basic classes -- persons serving on active duty under a prior enlistment, members of the Air Force Reserve and Air National Guard, and civilian personnel. Under 32 C.F.R. § 903.5(d), all persons attending the USAFAPS must be on "active duty." (As noted above, under title 10 of the United States Code, which governs service in the Armed Forces, the term "active duty" encompasses "full-time training duty, annual training duty, and attendance, while in the active

military service, at a school designated as a service school by law or by the Secretary of the military department concerned." 10 U.S.C. § 101(d)(1).) When an active-duty servicemember is selected to attend the USAFAPS, he or she will continue to serve on active duty under the previous enlistment, but will be reassigned to the USAFAPS for purposes of attending the school. See AFR 53-14, ¶ 6.c.(1). Air Force Reserve and Air National Guard personnel who are selected to attend the USAFAPS will be called to active duty for purposes of attending the school. See 32 C.F.R. § 903.5(d). Air National Guard personnel will be transferred to the Air Force Reserve prior to the call to active duty. Id. Civilian personnel who are accepted to the USAFAPS will be required to enlist in the Air Force Reserve and will then be called to active duty, as Reserve members, to attend the USAFAPS. 32 C.F.R. § 903.13; AFR 53-14, ¶ 6.c.(2), ¶ 7.

9. In the event that a student is disenrolled from the USAFAPS prior to completion of the school program, the student's further service obligation is determined by his or her status prior to enrollment. If the student was serving under a prior enlistment at the time of enrollment into the USAFAPS, he or she will be reassigned following disenrollment and will continue service under the prior enlistment. 32 C.F.R. § 903.11(a); AFR 53-14, ¶ 9.a. Air Force Reservists who were called to active duty solely to attend the USAFAPS will, upon disenrollment, be discharged from the Air Force. 32 C.F.R. § 903.11(b)(1); AFR 53-14, ¶ 9.b.(1).

10. The referenced regulations suggest that the service of persons attending the USAFAPS may be classified differently based upon the individual's status prior to entering the USAFAPS. Persons serving as enlisted personnel at the time of entry into the USAFAPS continue to serve under the prior enlistment; they are merely reassigned and are not relieved of their service obligation. In contrast, persons who were previously reservists, Air National Guard members, or civilians are enlisted as members of the Air Force Reserve and called to active duty for the sole purpose of attending the USAFAPS. We

believe that this distinction is significant in determining the nature of the individual's service for purposes of VA benefits.

11. Inasmuch as reservists, Air National Guard members, and civilians attending the USAFAPS do so as Air Force Reserve members called to active duty for the sole purpose of attending the USAFAPS, their service appears to meet the definition of "active duty for training" for title 38 purposes. Air Force regulations provide that the purpose of the USAFAPS is "to prepare and evaluate selected personnel for entrance into the Cadet Wing of the United States Air Force Academy" and to provide "in-depth instruction in mathematics, English, and the basic sciences, to enable students to qualify for entering into the Cadet Wing." 32 C.F.R. § 903.2; see also AFR 53-14, ¶ 1. We believe that the term "training" as used in 38 U.S.C. § 101(22) may be interpreted to encompass education which is related to the functions performed by the Armed Forces or is designed to facilitate an individual's development and advancement within the Armed Forces. Accordingly, service at the USAFAPS by persons who, prior to enrollment, were civilians, reservists, or members of the Air National Guard is most accurately characterized as "active duty for training" under 38 U.S.C. § 101(22) and thus is not within the definition of "active duty" under 38 U.S.C. § 101(21) (A).

12. With respect to persons who were already enlisted active-duty members at the time of their enrollment at the USAFAPS, it is clear that their service at the USAFAPS may not be characterized as "active duty for training," since that term applies only to service rendered by reserve personnel. Under Air Force regulations, active-duty personnel who attend the USAFAPS continue to serve on active duty in accordance with their prior enlistment and are merely reassigned to the USAFAPS. This situation may be contrasted with the situation where an active-duty servicemember is enrolled at a service academy. In the latter case, the servicemember must be released from his or her enlisted active duty in order to accept an appointment to the service academy. 32 C.F.R. § 903.12. We believe that, where a person serving on active duty pursuant to an enlistment is reassigned to the USAFAPS without

a release from enlisted active duty or a change in service status, service at the USAFAPS is merely a continuation of the prior period of active service.

HELD:

Characterization of an individual's service at the United States Air Force Academy Preparatory School (USAFAPS) for purposes of entitlement to veterans' benefits depends upon the status in which the individual enters the USAFAPS. Service by an individual who attends the USAFAPS as a reservist called to active duty for the sole purpose of attending the USAFAPS constitutes "active duty for training." This includes persons who are enlisted directly from civilian life or from the Air National Guard for the sole purpose of attending the USAFAPS, as well as members of reserve components who are called to active duty for this purpose. Service by an enlisted active-duty servicemember who is reassigned to the USAFAPS without a release from active duty constitutes a continuation of the servicemember's "active duty."

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