

CITATION: VAOPGCPREC 1-89
Vet. Aff. Op. Gen. Couns. Prec. 1-89

DATE: 3-8-89

TEXT:

Subj: Request for Legal Opinion--Chapter 106 Eligibility (your memorandum for January 13, 1989)

1. You have asked for our opinion regarding the following two questions:
 - a. Do we have legal authority to pay educational assistance under chapter 106, title 10, United States Code, to an individual who is on active duty?
 - b. If the answer to the first question is yes, may an individual use the same period of service to qualify for educational assistance under both chapter 32, title 38, United States Code, and chapter 106, title 10, United States Code?
2. In the representational case included with your request, the claimant is an Army reservist serving on active duty in 'AGR' status. The Department of Defense (DOD) has certified that he is eligible to receive benefits under the chapter 106 program, effective February 23, 1987. In fact, based upon that certification, benefits payments were made to him by the VA for training he received at a college. Moreover, the individual has enrolled in and contributed to the Post-Vietnam Era Veterans Educational Assistance Program (VEAP) under chapter 32.
3. Although title 10 programs generally are administered solely by DOD, section 2136(a) of chapter 106 uniquely provides that:

Educational assistance under this chapter shall be provided through the Veterans' Administration, under agreements to be entered into by the Secretary of Defense, and by the Secretary of Transportation, with the Administrator of Veterans' Affairs. Such agreements shall include administrative procedures to ensure the prompt and timely transfer of funds from the Secretary concerned to the Veterans' Administration for the making of payments under this chapter.

4. In implementing section 2136, the VA and DOD have followed procedures under which DOD determines and certifies to the VA the eligibility and entitlement of qualified members of the Selected Reserve and the VA pays benefits to such individuals based on their pursuit of approved programs of education. We believe this administrative approach is fully consistent with the meaning and intent of the law.

5. Our review discloses no expression in either the relevant law or de facto administrative procedures used by the VA and DOD which would indicate that the VA is authorized to determine whether an individual is basically eligible under 10 U.S.C. § 2132 to receive these benefits. Traditionally, DOD has been charged with responsibility for administering the laws codified in title 10. We believe that, absent clear statutory expression to the contrary, determinations concerning the eligibility of military personnel for benefits under that title must be considered exclusively within DOD's province. Moreover, DOD has not delegated to the VA its authority for making such decisions vis-a-vis the chapter 106 program. Consequently, the VA's only responsibility, pursuant to section 2136(a), is to provide benefits to any person certified to it by DOD as being eligible therefor (if benefit payment otherwise would be in accord with the title 38 provisions enumerated in 10 U.S.C. § 2136(b)).

6. Thus, in answer to your first question, if DOD considers a reservist serving on active duty to be eligible for chapter 106 benefits, the VA is obliged to accept DOD's determination and pay benefits accordingly. No specific provision is included in title 38, the law administered by the VA, which governs this aspect of the chapter 106 program or otherwise permits the VA to make an independent determination as to service requirements for program eligibility. Determinations of the intent and legal effect of title 10 in this regard are for DOD.

7. As to your second question, we are aware of no provision of law which would preclude an individual from establishing eligibility for both the chapter 106 and chapter 32 (VEAP) programs based upon the same period of service.

8. We note that various provisions of law do bar dual eligibility under certain combinations of VA/DOD education programs when such eligibility would be based upon the same period of military service. See, for example, 38 U.S.C. § 1733; 10 U.S.C. § 2132(d) (barring use of the same period of Selected Reserve service to establish eligibility for the programs under chapter 106 of title 10 and chapter 30 of title 38). However, none is expressly applicable to the chapter 106/chapter 32 combination. Moreover, we find nothing in the statutory payment provisions respecting such programs which would suggest the existence of a prohibition against paying VEAP benefits to an individual who also may use the same qualifying service period for purposes of chapter 106 eligibility. The only prohibition is against paying both benefits concurrently (38 U.S.C. § 1781(b)).

9. The fact that Congress specifically considered and enacted provisions barring dual qualification for benefits under other programs based on the same period of service and failed to do so as to the chapter 32 and chapter 106 programs inevitably leads to the conclusion that a bar was not intended in the latter situation. The VA may not invoke one administratively under such circumstances.

HELD:

Determinations of basic eligibility for education benefits under chapter 106, title 10, United States Code, are within the sole administrative jurisdiction and responsibility of the Department of Defense. If that Department considers a reservist serving on active duty eligible for chapter 106 benefits, the VA must accept such determination and pay benefits accordingly. No statutory bar exists against an individual's establishing eligibility for benefits under the chapter 106 program and the VA educational assistance program under chapter 32 of title 38, United States Code, based in whole or in part upon the same period of military service. However, section 1781(b), title 38, United States Code, does bar concurrent receipt of benefits under those two programs.

VETERANS ADMINISTRATION GENERAL COUNSEL

Vet. Aff. Op. Gen. Couns. Prec. 01-89