

CITATION: VAOPGCPREC 25-90
Vet. Aff. Op. Gen. Couns. Prec. 25-90

DATE: 07-17-90

TEXT:

Subject: "Active Duty" for VA Benefits' Purposes

(This opinion, previously issued as General Counsel Opinion 32-79, dated August 3, 1979, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

QUESTION PRESENTED:

Did service performed by this individual, a member of the Air National Guard who was called to duty as an instructor at an Air Force NCO school, constitute "active duty" for purposes of chapter 34 eligibility?

COMMENTS:

This opinion addresses the question of a person's eligibility for chapter 34 benefits based upon military service he performed during the period July 1, 1973 to June 29, 1975, inclusive. We are of the opinion that service he performed at that time was qualifying for chapter 34 purposes.

During the time in question, the individual, a member of the Air National Guard of Tennessee, served as a full-time instructor at a USAF NCO school. His special orders for this assignment originated with the National Guard Bureau of the Departments of the Army and Air Force. They specify that he, with the consent and concurrence of the Governor of Tennessee, was ordered to "active duty" for two consecutive one-year tours, for assignment with "CenConGp, Hq. USAF, Pentagon, Wash., DC for duty with the National Guard Bureau with duty station Gunter AFB, Alabama" under authority of 10 U.S.C. § 672(d). He was issued DD Form 214, Report of Separation from Active Duty, upon completion of this assignment, which lists the separation type as "RELEASE FROM ACTIVE DUTY," with transfer to the "ANG State of Tennessee."

In determining whether this duty assignment was qualifying for purposes of chapter 34 educational assistance, an interdependent chain of definitional provisions must be considered. The general definition of "veteran" for title 38 purposes specifies persons who served in the "active military, naval or air

service" and whose discharges or releases were not dishonorable. 38 U.S.C. § 101(3). Such service is defined as including, besides "active duty," certain periods of "active duty for training" and "inactive duty training" as a result of which service-connected disability or death occur. 38 U.S.C. § 101(24).

Eligibility under chapter 34 is not open to all such "veterans," however. Proscriptions are contained in 38 U.S.C. § 1652, which specifies in pertinent part:

For the purposes of this chapter--

(a)(1) The term "eligible veteran" means any veteran who--

(A) served on active duty for a period of more than 180 days, any part of which occurred after January 31, 1955, and before January 1, 1977, and was discharged or released therefrom under conditions other than dishonorable; or

(B) contracted with the Armed Forces and was enlisted in or assigned to a reserve component prior to January 1, 1977, and as a result of such enlistment or assignment served on active duty for a period of more than 180 days, any part of which commenced within 12 months after January 1, 1977, and was discharged or released from such active duty under conditions other than dishonorable; or

(C) was discharged or released from active duty, any part of which was performed after January 31, 1955, and before January 1, 1977, or following entrance into active service from an enlistment provided for under clause (B) of this paragraph, because of a service-connected disability.

(2) The requirement of discharge or release, prescribed in paragraph (1)(A) or (B), shall be waived in the case of any individual who served more than one hundred and eighty days in an active-duty status for so long as such individual continues on active duty without a break therein.

(3) For purposes of paragraph (1)(A) and section 1661(a), the term "active duty" does not include any period during which an individual (A) was assigned full time by the Armed Forces to a civilian institution for a course of education which was substantially the same as established courses offered to civilians, (B) served as a cadet or midshipman at one of the service academies, or (C) served under the provisions of section 511(d) of title 10 pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve unless at some time subsequent to the completion of such period of active duty for training such individual served on active duty for a consecutive period of one year or more (not including any service as a cadet or midshipman

at one of the service academies).

Because chapter 34 entitlement is so limited to active-duty veterans, two more definitions in title 38 are yet significant:

a. § 101(21): "The term 'active duty' means--(A) full-time duty in the Armed Forces, other than active duty for training...."

b. § 101(22): "The term 'active duty for training' means--(A) full-time duty in the Armed Forces performed by Reserves for training purposes; ... and (C) in the case of members of the National Guard or Air National Guard of any State, full-time duty under section 316, 502, 503, 504, or 505 of title 32, or the prior corresponding provisions of law...."

In view of the clearly enunciated congressional intention to limit entitlement to veterans of "active duty" as opposed to "active duty for training" only, precision must be used in employing these terms. For example, "active duty" is defined in title 10 as including any full-time duty in the active military service, including full-time training duty and annual training duty. 10 U.S.C. § 101(22). This broad definition is exemplified by the fact that a DD Form 214, "Report of Separation from Active Duty," will be issued to anyone serving on active duty for training for periods in excess of 90 days, including members of the Air National Guard serving on full-time duty. Para. 3-3, Air Force Manual 35-6. The manual further provides that the space on the separation paper for the authority for issuance is to be annotated "Release from active duty," even if it is in fact active duty for training.

While the report of separation in this case cannot, therefore, be considered conclusive evidence of true "active duty," we are of the opinion that the orders issued and the circumstances of this service demonstrate "full-time duty in the Armed Forces other than active duty for training." First, this man was ordered to "active duty" under the provisions of 10 U.S.C. § 672(d), which authorizes the ordering to active duty of Reserves with the members' consent. The authorization was not under one of the disqualifying training sections of title 32 (§ 316, 502, 503, 504 or 505) specified in 38 U.S.C. § 101 (22), or that in title 10 § 511(d) see 38 U.S.C. § 1652(a)(3). Second, the purpose of the duty assignment was to enlist his service as an instructor, not for his own training; as such, it was not "active duty for training" under the DoD definition of the term, i.e., "a tour of AD reserve training (emphasis supplied) ... which includes annual tours, special tours, school tours and the initial tour performed by enlistees without prior military service." AFR 35-41, para. 3-4. These training tours are designed to maintain or increase a member's mobilization readiness. AFR 35-41, para. 13-22(a).

Op. G.C. 16-79 considered the question of whether Army Reservists whose orders specified "active duty for training" when they were assigned to duties recruiting for the Reserves were veterans of "active duty" for purposes of loan guaranty entitlement. There it was considered determinative that the characterization of such duty as training duty by the Army permitted the service to exclude these members in counting its statutory ceiling for active-duty personnel. It was concluded that the service's designation of the tours as active duty for training should be binding upon the VA.

We obtained a different characterization of the service in the instant case from the Department of the Air Force on July 9, 1979. In a June 25, 1979 memorandum obtained through the Air Force Office of General Counsel, the Assistant Secretary for Reserve Affairs advised that personnel serving under such circumstances as this would not be counted under 10 U.S.C. § 8201, Air Force: members on active duty, only because they are paid from appropriations for the Air National Guard see subsection (a)(4) , not because they are on active duty for training subsection (a)(3) . He further stated that this person was "clearly not" on active duty for training, his orders specifying active duty and his assignment having nothing to do with training him, and that the case demonstrated that "members of the Air National Guard ... do perform periods of active duty other than for training ... "

HELD:

The foregoing compels the conclusion that the military service performed by this individual July 1, 1973 to June 29, 1975, inclusive, was "active duty" under 38 U.S.C. §§ 101(21)(A) and 1652(a).

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