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CITATION: VAOPGCPREC 41-90
Vet. Aff. Op. Gen. Couns. Prec. 41-90

TEXT:

Subject: Continuity of Service Within the Meaning of VA Regulation 11040

(This opinion, previously issued as General Counsel Opinion 9-74, dated March 8, 1974, 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:

Do interruptions in periods of active service by reason of the situations enumerated in VA Regulation 1015, or due to an individual being placed in an excess leave status, break the continuity of the period of active service of more than 180 days required for educational benefit purposes under 38 U.S.C. § 1652(a) and VA Regulation 11040?

COMMENTS:

Section 1652(a) of title 38 reads as follows:

"(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 who was discharged or released therefrom under conditions other than dishonorable or (B) was discharged or released from active duty after such date for a service-connected disability.

"(2) The requirement of discharge or release, prescribed in paragraph (1)(A), 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 he 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." (Emphasis added)

VA Regulation 11040 reads, in pertinent part, as follows:

"11040 (s 21.1040). BASIC ELIGIBILITY. Basic eligibility for educational assistance is subject to the following requirements:

"(A) Service. The veteran must have served on active duty for a continuous period of 181 days or more, any part of which occurred on or after February 1, 1955, or if he served for less than 181 days, must have been discharged or released on or after February 1, 1955, because of service-connected disability. Travel time which meets the requirements of VA regulation 1006(B)(6) may be included.

"(B) Periods Excluded. In computing the 181 days service, there will be excluded any period during which he:

"(1) Was assigned full time by the service department to a civilian school for a course of education which was substantially the same as established courses offered to civilians;

"(2) Served as a cadet or midshipman at one of the service academies;

"(3) Served under the provisions of [10 U.S.C. s 511](#)(d) in an enlistment in the Army National Guard or the Air National Guard, or as a reservist in the Army, Navy, Air Force, Marine Corps or Coast Guard Reserve; or

"(4) Is not entitled to credit for services for the periods of time specified in VA Regulation 1015." (Emphasis supplied)

VA Regulation 1015 reads as follows:

"1015 (s 3.15). COMPUTATION OF SERVICE. For non-service-connected or service-connected benefits, active service is countable exclusive of time spent on an industrial, agricultural, or indefinite furlough, time lost on absences without leave (without pay), under arrest (without acquittal), in desertion, while undergoing sentence of court-martial or a period following release from active duty under the circumstances outlined in VA Regulation 1009. Time spent in a hospital on sick furlough or as a prisoner-of-war is included. In claims based on Spanish-American War service, leave authorized under General Order No. 130, War Department, is included."

The question concerning continuity with respect to educational benefits has not previously been raised with this office. A question of continuity was presented to us in conjunction with post-Korean veterans' eligibility for loan guaranty benefits

under chapter 37 of title 38. Eligibility of veterans for loan guaranty benefits is based upon the definition of a veteran as set forth in section 1652(a) of title 38-- the same as that applicable to educational benefits. In an opinion of this office, dated April 2, 1968 (Op. G.C. 1-68), it was held that "an uninterrupted or unbroken period of 181 or more calendar days of active duty is necessary for loan guaranty eligibility under Section 1818(a)." As was also pointed out, "The statutory language 'a period of more than 180 days' is neither vague nor ambiguous. It clearly prescribes a single period of active duty. Consistent therewith, VA Regulations 4301(HH) and 4501(P), relative to the home loan programs, and VA Regulation 11040(a), relative to educational assistance, each provides for 181 or more days of 'continuous' active duty." The opinion concluded that "... absent a discharge or release from active duty after January 31, 1955, because of service- connected disability, an uninterrupted or unbroken period of 181 or more calendar days of active duty is necessary for loan guaranty eligibility under Section 1818(a)."

This 1968 opinion, however, dealt with a fact situation where an individual served during a series of temporary active-duty periods and was released from active duty between such temporary periods. We believe that such situations can be distinguished from those enumerated in VA Regulation 1015, and from cases involving periods of excess leave. In these latter situations, there is no intervening release or discharge from active duty. In the case of excess leave, for example, as pointed out in our opinion of January 26, 1967, the military views an individual as being on active duty. And, although the VA is not bound by that concept, and regards him as not on active duty during an excess leave period for certain purposes, there is, of course, no discharge or release. The law simply authorizes the exclusion of such periods in computing the 181-day period for eligibility. It appears clearly within the Congressional intent to consider that such periods do not break the continuity of service requirement.

HELD:

For the purpose of computing 181 days of continuous service under VA Regulation 11040, time spent in excess leave, or for any of the reasons set out in VA Regulation 1015, does not constitute a break in active duty or interrupt the continuity of the period of active-duty service.

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