

DATE: 07-18-90

CITATION: VAOPGCPREC 45-90
Vet. Aff. Op. Gen. Couns. Prec. 45-90

TEXT:

Subject: Application of Dual Compensation to Veteran-Student Services Program

(This opinion, previously issued as General Counsel Opinion 3-75, dated December 13, 1974, is reissued as a Precedent Opinion pursuant to 38 C.F.R. ss 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:

Should there be a reduction in service retired pay under the Dual Compensation Act, 5 U.S.C. § 5532, because of a veteran's receipt of a work-study allowance under 38 U.S.C. § 1685?

COMMENTS:

Public Law 92-540 established a new work-study program in title 38 U.S.C., whereby veterans training full-time under chapters 31 and 34 of such title 38 may, upon meeting certain criteria, perform various services for the Veterans Administration, such as work in our hospitals, domiciliaries, and regional offices, as well as perform services at educational institutions. Under the provisions of section 1685(a) of title 38, participants are paid \$250 advance in return for an agreement to work for the VA for 100 hours. Advances of less than \$250 are made in return for agreements to perform less than 100 hours of service at the rate of \$2.50 per hour.

The Dual Compensation Act (section 5532 of title 5, U.S.C.) requires reduction in the retirement pay of a retired officer who holds a civilian office or position in the Government of the United States. Exempt from this reduction are officers whose retirements were based on disability resulting from a service-connected disease or injury and officers employed on a temporary (full-time or part-time) basis, any other part-time basis, or an intermittent basis, for the first 30-day period for which he receives pay.

The U.S. Coast Guard, in an advisory opinion dated August 2, 1974, is of the view that under the Dual Compensation Act a reduction in retirement pay of a retired officer is required after the officer, as a veteran-student, has worked more

than 30 days under a VA work-study agreement. The opinion notes the three elements needed to actuate the requirement of the statute (5 U.S.C. § 5532): (1) status as a retired regular officer of a military service; (2) employment in a U.S. Government job or position; and (3) receipt of pay for the Government civilian service performed.

The current work-study program had its genesis in S. 3657, 91st Congress, as reported to the Senate on September 23, 1970. With respect to the status of veteran-students utilized under the program, the Senate Committee on Labor and Public Welfare, in its report (Senate Report 91-1231, pages 15 through 16) stated:

"Veterans would perform such services under agreements with the Veterans Administration. They would not be considered VA employees for purpose of Federal employment laws administered by the Civil Service Commission--such as those governing application and selection for Federal employment, retirement and other length-of-service Federal employment benefits, and Federal employment fringe benefits such as group health and life insurance programs. Also, work-study allowances, as all other GI bill allowances, would be exempt from taxation as a payment of a benefit under any law administered by the Veterans Administration, as provided in section 3101(a), of title 38, United States Code."

Although this bill passed the Senate, it failed to receive favorable action by the House. It was reintroduced in the 92d Congress as S. 740. The language of that measure was, in turn, included in S. 2161, 92d Congress. In its report on that measure (Report 92-988, pages 42 through 43), the Senate Committee on Veterans' Affairs stated that:

"... while performing services under the work-study/outreach program, and the veteran-student program is (sic) new section 1688, described below, such veteran-students shall be deemed to be employees of the United States for the purposes of benefits of chapter 81 of title 5 but not for purposes of laws administered by the Civil Service Commission. This subsection exempts work-study/outreach veterans from strictures of Federal employment laws and regulations; however, as persons performing services for Federal Government such veterans would be covered by the Federal Employees Compensation Act for injuries or death occurring while in the performance of such services."

The language in this measure was included in H.R. 12828, 92d Congress, which was enacted as Public Law 92-540 on October 24, 1972.

The statute itself speaks in terms of "an additional educational assistance allowance" and a "work-study allowance". With a prerequisite of full-time training under the VA vocational rehabilitation or education programs, such additional allowance is, in fact, a benefit rather than a wage. This allowance is unlike

wages in that it is paid in advance. Another feature, as noted in the Senate report referred to above, is its exemption from taxation. Moreover, the veteran-students are not considered as employees for the purpose of laws administered by the Civil Service Commission, except for the limited purpose of coverage under BEC and FTCA relating to injury or death protection. The failure of the veteran to fulfill his obligation under the program results in an overpayment which is treated in the same manner as any other overpayment of VA benefits. Another distinction between pay contemplated by the Dual Compensation Act and the additional educational allowance is the source of funding. Payment for salaries for government services is normally made from general operating expenses of the Federal Government, whereas payment under the work-study program is made from VA's readjustment benefit fund.

HELD:

The Congress never intended that the allowances paid to veteran-students under the work-study program (38 U.S.C. § 1685) should be considered wages, nor that such veteran-students should be considered Federal employees (except for the limited purposes set forth in the statute). Manifestly, the question of a reduction in retirement pay under the Dual Compensation Act is for consideration by the military. And, we agree with the Coast Guard that a binding interpretation of the application of the Dual Compensation provisions to the veterans' work-study program should ultimately be sought from the Comptroller General of the United States. We presume that such submission will be made by the Coast Guard, some other branch of the military, or by the Department of Defense.

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