

DATE: 07-18-90

CITATION: VAOPGCPREC 49-90  
Vet. Aff. Op. Gen. Couns. Prec. 49-90

**TEXT:**

**Subject:** Discontinuance of Educational Benefits Payments

(This opinion, previously issued as General Counsel Opinion 5-76, dated March 9, 1976, 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:**

Is there legal authority to pay educational benefits to the end of the term when a decision has been made under VAR 14207 to terminate enrollments and benefits effective prior to the end of the term?

**COMMENTS:** A review of the factual situation presented shows that the school in question was advised on July 10, 1975, that the 85-15 percent enrollment ratio applied to the school; that on October 24, 1975, it was found that nothing had been done by the school to accurately compute the 85-15 ratio; and that a second warning was given. A compliance survey accomplished December 15-17, 1975, disclosed that the school had failed to comply with the 85-15 requirement; that it did not maintain adequate records of veterans' previous training; that it did not maintain accurate, current, and complete records of academic progress; that it had made improper certifications of courses and hours pursued; and that it had made improper certifications in cases where various students were not eligible for the degree program because they lacked a high school diploma or GED. A further survey accomplished January 27-28, 1976, again found the above discrepancies still existed.

As a result of these findings, the school was advised on February 5, 1976, that benefit payments to all veterans were being suspended effective February 29, 1976, and that a hearing would be held by the Station Committee on Educational Allowances on February 18, 1976. On February 6, 1976, approximately 750 veterans at the school were notified of the suspension. A hearing was held by the Station Committee on February 18, 1976, and the school was afforded the opportunity to present its evidence. The Station Committee recommended that educational allowances to all veterans enrolled be terminated and new enrollments not be processed. The Station Director approved this recommendation on February 25, 1976, and on February 26th the school was notified of the decision and the right to appeal this decision to Central Office.

We have reviewed the discrepancies turned up by the compliance survey of the school and find, for the purpose of this opinion, that they fall into two categories.

First, there is the allegation that the school violated the 85-15 ratio requirements of section 1673(d) of title 38, United States Code. In addition, the school has also allegedly violated other statutory requirements which would properly fall under section 1790(b) of title 38.

Turning to the first category cited above, section 1673(d) reads, in pertinent part, as follows:

"§ 1673. Disapproval of enrollment in certain courses.

\* \* \* \* \*

"(d) The Administrator shall not approve the enrollment of any eligible veteran, not already enrolled, in any course ... which does not lead to a standard college degree and which is offered by a proprietary profit or proprietary nonprofit educational institution for any period during which the Administrator finds that more than 85 per centum of the students enrolled in the course are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or the Veterans' Administration under this title." (Emphasis supplied.)

A question was raised in conjunction with virtually identical language contained in Public Law 550, 82d Congress, whether, as a result of a violation of this provision of law, veterans could be "disenrolled." It was held in Administrator's Decision No. 934 that this prohibition extended only to veterans not already enrolled. The A.D. stated:

"It does not, by specific terms or by implication, direct the disenrollment of students already enrolled, nor does it in anywise, insofar as the individual veterans are concerned, affect an enrollment authorized prior to the time the Administrator finds that the 85 per centum-ratio has been extended."

Thus, under the provisions of this section of title 38, veterans currently enrolled at the time a violation of the 85-15 rule is detected may not be disenrolled. It should be pointed out that the language contained in this provision of law is directory in that it states that the Administrator shall not approve the enrollment of a veteran where he finds there is a violation of this provision of law. This language serves to establish a bar to new enrollments during such period and is not subject to discretionary authority to waive.

With respect to the other discrepancies revealed by the compliance survey, it is our view that the question of whether the Administrator has authority to discontinue the allowances of veterans enrolled in courses where these violations occur falls within the provisions of section 1790(b) of title 38, which reads as follows:

"1790. Overcharges by educational institutions; discontinuance of allowances;

examination of records; false or misleading statements

\* \* \* \* \*

### **Discontinuance of Allowances**

"(b) The Administrator may discontinue the educational assistance allowance of any eligible veteran or eligible person if he finds that the program of education or any course in which the veteran or person is enrolled fails to meet any of the requirements of this chapter or chapter 34 or 35 of this title, or if he finds that the educational institution offering such program or course has violated any provision of this chapter or chapter 34 or 35, or fails to meet any of the requirements of such chapters." (Emphasis supplied.)

Thus, under the authority granted the Administrator by section 1790(b), it would be proper to discontinue the educational assistance allowance payments to eligible veterans where violations on the part of the school are found.

Under the provisions of section 210(c)(1) of title 38, the Administrator is given the authority to make all rules and regulations necessary and appropriate to carry out the laws administered by the VA. Under the provisions of section 212(a) of title 38, the Administrator is also given the authority to assign duties, and delegate or authorize successive redelegation of authority to act and to render decisions, with respect to all laws administered by the VA, to such officers and employees as he may find necessary. Such delegated decisions shall be considered as having the same force and effect as though rendered by the Administrator. Pursuant to these provisions of title 38, the Administrator has approved regulations governing the area of concern here and has delegated the necessary authority to the appropriate officials.

VA Regulation 14001 delegates the authority of the Administrator to the Chief Benefits Director and to supervisory or adjudicative personnel within the jurisdiction of the Education and Rehabilitation Service designated by the Chief Benefits Director to make findings and decisions under chapters 34, 35, and 36 of title 38, United States Code, as to programs administered under those chapters. Therefore, the authority of the Administrator to terminate benefits to veterans under 1790(b) has been delegated by him to those persons set forth above.

VA Regulation 14134, in turn, deals with termination of educational assistance allowances. This regulation reads as follows:

"14134 (s 21.4134). WITHHOLDING AND DISCONTINUANCE. Notwithstanding the approval of a course by a state approving agency, educational assistance allowance may be discontinued if it is determined that the course of education in which the individual is enrolled fails to meet, or the school has violated, any of the requirements of chapters 34, 35, or 36. (38 U.S.C. 1790) Where preliminary

evidence indicates that it would be to the best interests of the Government, the station head may withhold further payments to persons enrolled in the school until a determination has been made as to whether approval should be withdrawn and whether overpayments exist. Payments will be promptly released whenever the facts developed justify such action."

VA Regulation 14135(F), in turn, provides that benefits terminated under VA Regulation 14134 shall be ended at the "end of the month in which action is taken."

We turn next to VA Regulation 14207, the regulation which delineates the procedure to be followed where it is determined that a school has violated specific criteria of chapters 34, 35, or 36 of title 38. This regulation provides for referral of such violations to the Station Committee on Educational Allowances which is authorized to make recommendations on action to be taken, subject to the approval of the station head. A hearing may be granted to the school if it so requests. Further, if the school does not agree with the decision of the Station Committee, it has the right to appeal such a decision to Central Office within 30 days after the date of notice of the decision. This regulation also provides that the decision of the station head is to be effective as of the date of the decision; a decision by Central Office affirming the discontinuance of the allowance will be effective the date of receipt of the decision in the field station; and a decision by Central Office which reverses the field station's decision will be effective as of the date of the original decision. Again, VA Regulation 14135(F) calls for termination as of the end of the month where terminations are based upon VAR 14207.

It is our view that the VA has followed all of its regulations in conjunction with this school. When the violations were detected, the station head made his determination that it would be in the best interest of the Government to terminate; the matter was referred to the Station Committee which rendered its decision; and the school was notified it had 30 days in which to appeal this decision. Thus far, the school has not exercised this appeal right.

It would appear that, since the station head exercised his authority under VAR 14134 to terminate benefits based upon a determination that such an action would be to the best interest of the government, and since VAR 14135(F) provides that where a decision is made under VAR 14134 to terminate, the action shall be effective the end of the month in which such action is taken, that there is no authority to continue payments until the end of the term, quarter, or semester. It would further appear that the Station Committee, after hearing evidence from the school at a public hearing, has confirmed the position of the station head which would give even more credence to the decision to terminate under VAR 14134, effective the date prescribed by VAR 14135(F).

In summary, it is our opinion that:

a. Under the provisions of section 1673(d), there is no discretion on the part of the Administrator to permit new enrollments in educational institutions subject to the so-called 85-15 rule as long as the educational institution is in violation of that requirement.

b. Under the provisions of section 1790(b), there is discretionary authority on the part of the Administrator in terminating benefits to those veterans enrolled in schools which are in violation of chapters 34 or 36 of title 38. Under such discretionary authority, for example, where a school is determined to be in minor technical violation, it could be given a reasonable time in which to correct such a violation without termination action being taken.

c. The Administrator has promulgated regulations which set forth the procedures to be followed in cases where a school violates provisions of chapters 34, 35, or 36. These regulations, once adopted, have the effect of law. In the instant case, the regulations provide for termination of payment of benefits to veterans at the end of the month in which an action is taken based upon school violations.

**HELD:**

(1) Unless there were to be a change in current regulations there is no authority to pay educational benefits to the end of the term in view of the decision already made pursuant to VA Regulation 14207 to terminate enrollments and benefits effective prior to the end of the term.

(2) While the Administrator has delegated his authority to act in the case of violations under section 1790(b), he does reserve to himself the final determination authority where he deems it appropriate to exercise such a decision. We believe, however, that such an exercise of authority should not be made absent a strong showing for such action to be taken. We do not believe such to be the case here, since the discretionary authority, which has been exercised by those to whom the authority was delegated, was proper and the school has failed to exhaust the administrative remedies available to it.

VETERANS ADMINISTRATION GENERAL COUNSEL  
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