

**Department of
Veterans Affairs**

Memorandum

Date: November 4, 1999

VAOPGCPREC 14-1999

From: General Counsel (021)

Subj: Vesting of Montgomery GI Bill (MGIB) benefits

To: Under Secretary for Benefits (20)

ISSUE: Is an individual who successfully completes all requirements for eligibility for educational assistance benefits under the Montgomery GI Bill (MGIB) barred, under 38 U.S.C. § 3011(c)(2), from receiving those benefits if he or she graduates from one of the U. S. military academies and receives a commission in the Armed Forces?

DISCUSSION:

1. To obtain basic eligibility for MGIB benefits, an individual must meet the service requirements found in 38 U.S.C. § 3011, which provides generally that the individual must first become a member of the Armed Forces or enter active duty after June 30, 1985, and must serve 3 years of the initial obligated period of active duty in the Armed Forces (2 years if the initial obligated period is for less than 3 years). 38 U.S.C. § 3011(a)(1)(A).

2. An exception to the requirement that the individual must initiate active duty service after June 30, 1985, is made for individuals who had served in the Armed Forces during the period from January 31, 1955, to January 1, 1977, and, as a result of that service, on December 31, 1989, had remaining entitlement to educational assistance benefits under the Vietnam Era GI Bill (chapter 34 of title 38, United States Code). Such individuals ("chapter 34 converters") may receive MGIB benefits if they served on active duty at any time during the period beginning on October 19, 1984, and ending on July 1, 1985, and continued on active duty for 3 continuous years after June 30, 1985. 38 U.S.C. § 3011(a)(1)(B).

3. Section 3011(c)(2) further provides that, if an individual receives a commission as an officer in the Armed Forces after December 31, 1976, upon graduation from one of the four U.S military academies, the individual "is not eligible for educational assistance under [section 3011]." (Note: 38 U.S.C. § 3012(d)(2) contains a similar bar to eligibility for MGIB benefits under section 3012. This opinion has equal application to these provisions.)

4. At the outset, we should clarify that, for purposes of the chapter 30 MGIB, service as a cadet or midshipman at one of the service academies does not constitute "active duty" (38 U.S.C. § 3002(6)(B)). Therefore, such service may not be used to qualify for chapter 30 benefits either as the individual's "initial period of active duty," required under section 3011(a)(1)(A), or the "three years of

continuous active duty” required under section 3011(a)(1)(B). Thus, for example, if an individual without previous military service enters a service academy after June 30, 1985, and, upon graduation, serves 3 years on active duty, that 3 years’ service, not the academy service, would be considered the individual’s initial period of active duty.

5. Under a plain reading of section 3011(c)(2), the individual in the preceding example may not receive MGIB benefits, notwithstanding his or her initial 3-year period of active duty, because the individual’s graduation from the academy precludes eligibility for those benefits. However, a different circumstance is presented when, for instance, an individual enlists in the Armed Forces, serves on active duty for a 3-year initial obligated period of service, and then enters a military academy. In this case, the individual was eligible for chapter 30 education benefits upon commencing the 3-year initial obligated period of active duty after June 30, 1985, and, upon completion of that service, vested entitlement to MGIB benefits before entering the military academy. VA has interpreted 38 U.S.C. § 3011(c)(2) as not applying to such a case. See 38 C.F.R. § 21.7042(f)(3).

6. We believe VA’s interpretation is reasonable. We note that applying the “academy graduation” bar to the individual described in the last example above would divest the individual of a right already acquired. Yet, in context, the statute seems intended only to prevent the acquisition of a new right to education benefits following an individual’s receipt of a cost-free military academy education, not to take away an established benefit entitlement. In this regard, our review of the pertinent legislative history discloses no indication that Congress contemplated any such divestiture. It made no provision, for example, for recoupment of MGIB benefits already paid based on the established entitlement.

7. Moreover, interpreting the academy graduation bar as applying in a case where entitlement already has vested would, in effect, work a forfeiture of future education benefits. Such a result usually is reserved only for the most serious offenses against the Government (e.g., forfeiture for fraud, 38 U.S.C. § 6103; for treason, 38 U.S.C. § 6104; for subversive activities, 38 U.S.C. § 6105) and is explicitly expressed in statute. This is not the case, however, with section 3011(c)(2). Its provisions make no mention of termination or forfeiture of benefits, or even of barring continued or future payment of educational assistance. Rather, the language of that section precludes “eligibility for [MGIB] educational assistance.” We believe something more is necessary to evince an intent to take away an entitlement.

8. We note that VA’s interpretation equally applies to individuals described in paragraph 2, above, who seek to establish eligibility for MGIB benefits based upon remaining chapter 34 entitlement. See 38 C.F.R. § 21.7044(d). In concept, this parallel approach certainly seems appropriate. As previously mentioned, an eligible individual who seeks to “convert” remaining chapter 34 entitlement to MGIB entitlement, also must serve 3 years of continuous active duty after June 1, 1985. Once that duty is completed and the individual’s entitlement vests, any subsequent graduation from a military academy and commissioning should not divest that established entitlement.

9. It appears, nevertheless, that such parallel regulatory exception actually may have no practical application due to the statutory age restrictions on service academy admission (e.g., “a candidate must be at least 17 years of age and must not have passed his twenty-third birthday on July 1 of the year in which he enters the Academy.” 10 U.S.C. § 4346(a)). In other words, a chapter 34 converter, upon completing the 3 years of additional active duty required for MGIB entitlement, necessarily would be well beyond the maximum age (23) allowed for academy admission. Thus, the circumstance invoking the exception would not be present. Consequently, unless some waiver of admissions requirements exists or other factors are present of which we are not aware, we suggest you consider amending 38 C.F.R. § 21.7044 to delete reference to an exception from the academy graduation bar for those seeking to become entitled to chapter 30 benefits based on their prior chapter 34 entitlement.

10. In sum, while different interpretations of the statute and regulation may be possible, VA’s construction and application of section 3011(c)(2) seem to us reasonable and compliant with both the meaning and spirit of that statute.

CONCLUSION:

As provided by 38 C.F.R. § 21.7042(f)(3), an individual who has met all the military service requirements to become entitled to MGIB benefits, as set forth in 38 U.S.C. §3011(a)(1)(A) or §3012(a)(1)(A), and who subsequently graduates from a military academy and is commissioned an officer in the Armed Forces is not barred by 38 U.S.C. § 3011(c)(2) or § 3012(d)(2) from receiving the vested MGIB benefits. However, if an individual is commissioned upon graduating from a military academy after December 31, 1976, and before completing the military service needed to establish MGIB entitlement, that individual is disqualified by section 3011(c)(2) and section 3012(d)(2) from MGIB eligibility.

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