

CITATION: VAOPGCPREC 26-90
Vet. Aff. Op. Gen. Couns. Prec. 26-90

DATE: 07-17-90

TEXT:

Subject: Concurrent Notice of Termination or Suspension of Educational Benefits

(This opinion, previously issued as General Counsel Opinion 24-79, dated May 16, 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.)

QUESTIONS PRESENTED:

- a. Does 38 U.S.C. § 1790(b)(2) require that benefits be paid for the period following a defective notice to the veteran or eligible person of his or her rights until a proper notice can be granted?
- b. Do the terms of 38 U.S.C. § 1790(b)(2) requiring "concurrent" notice to the veteran of his or her rights require that the notice be given before the effective date of suspension of benefits or may it be given at the time the suspension is processed, even though the suspension is backdated to the date of last payment of benefits?

COMMENTS:

Section 1790(b)(2), title 38, United States Code, provides in pertinent part as follows:

"(2) Any action by the Administrator under paragraph (1) of this subsection to discontinue (including to suspend) assistance ... shall be based upon evidence that the veteran or eligible person is not or was not entitled to such assistance. Whenever the Administrator so discontinues any such assistance, the Administrator shall concurrently provide written notice to such veteran or person of such discontinuance and that such veteran or person is entitled thereafter to a statement of the reasons therefor such action and an opportunity to be heard thereon."

The legislative history for this provision of law may be found in Senate Report No. 95-468 at page 121 which reads in pertinent part as follows:

"Under the provision in the Committee bill, the Administrator will be required to provide concurrently to the veteran--at the same time that he notifies him or her of the suspension or termination in the amount of educational assistance allowance--written notice of the entitlement of such veteran or eligible person to a statement of the reasons for the action and an opportunity to be heard thereon."

It is our opinion that the intent of section 1790(b)(2) is to insure that the veteran receives funds for all training undertaken through the date that the suspension action is processed and notice is sent to the veteran. It should be noted that the Senate Report quoted above defines "concurrently" as "at the same time." To do otherwise would be to act to the detriment of the veteran. As the Senate Report indicates, the impetus for the legislative provision was the advent of cases such as the Citrus College and Waterman cases where the Veterans Administration has been challenged for failing to provide the veterans with adequate due process as to terminations and suspensions of benefits.

It should be noted that the amendment to section 1790(b)(2) specifically included suspension cases as well as terminated cases.

HELD:

a. The notice of the veteran's rights required by 38 U.S.C. § 1790(b)(2) may not be given to him or her on a date later than the effective date of the suspension. Thus, the effective date of the suspension could not precede the date that notice is being given to the veteran. The earlier "date of last payment" would be inappropriate and unfair to the veteran, since this means that potentially, under a more extreme example, the veteran would not know for as much as a month that payment was not going to be made or of his or her right to contest the action.

b. In light of our first holding above, it is apparent that the veteran must be paid for the period between a defective notice and the issuance of a proper notice of his or her rights.

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