

DATE: 03-11-91

CITATION: VAOPGCPREC 11-91
Vet. Aff. Op. Gen. Couns. Prec. 11-91

TEXT:

SUBJECT: VA Manual M-2, Part XVII, Chapter 1, Paragraph 1.05f.

(This opinion, previously issued as Opinion of the General Counsel 15A-62, dated December 31, 1962, 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.)

To: Chief Medical Director

1. Pursuant to informal requests from the Department of Medicine and Surgery we have considered whether any change is required in VA Manual M-2, Part XVII, Chapter 1, Paragraph 1.05f, which reads as follows:

"f. All volunteers, whether or not they are serving under letters of authorization, are considered employees and therefore eligible for compensation benefits as provided by section 108(b), Public Law 357, 81st Congress. All volunteers who are injured in the course of their assigned duties are authorized medical services by the Bureau of Employees' Compensation at bureau expense. (See MP-5, Ch. 9, Sec. B.)"

It is our conclusion that no change is required.

2. The Manual chapter in paragraph 1.01f defines RS volunteers as "those volunteers who normally participate in VA Voluntary Service on a regularly scheduled assignment under VA supervision at least once a month" and further provides in paragraph 1.05d, "A letter of authorization, FL 10-271, in duplicate, will be issued for each person qualified to serve as an RS volunteer". It appears, from the terminology of the Manual, that in referring to "All volunteers, whether or not they are serving under letters of authorization" in paragraph 1.05f. it was meant to include casual or occasional volunteers.

3. This is borne out by a study of the history of the provision. VA Manual M6-2, Chapter 10, Paragraph 41g, dated October 2, 1950, states in part, " * * * The Bureau of Employees' Compensation has determined that VA volunteer workers who serve on a regularly scheduled basis and who receive letters of authorization are eligible for benefits under the Compensation Act, as amended. * * * The Bureau of Employees' Compensation has not as yet rendered a final decision on the eligibility for benefits of those uncompensated volunteer workers

who are not authorized to serve on a 'without compensation' basis. * * *." Change 4 to this Manual, dated June 9, 1952, altered the above-quoted provision to state: " * * * persons supplying personal services without compensation as volunteer workers are considered as employees and therefore eligible for compensation benefits. This applies to all uncompensated volunteer workers regardless of their serving under letters of authorization. * * *." This change was apparently made in the light of a letter addressed to the Assistant Administrator for Personnel by the Director, Bureau of Employees' Compensation, expressing the view that both regular and occasional volunteer workers were covered under the compensation act. The present provision in M-2, Part XVII, Chapter 1, Paragraph 1.05f, is a restatement of an identical provision in M-2, Part XIII, which rescinded VA Manual M6-2.

4. The Federal Employees' Compensation Act, as amended, defines an employee as including " * * * (2) persons rendering personal services of a kind similar to those of civilian officers or employees of the United States to any department, independent establishment, or agency thereof (including instrumentalities of the United States, wholly owned by it), without compensation or for nominal compensation, in any case in which acceptance or use of such services is authorized by an Act of Congress or in which provision is made by law for payment of the travel or other expenses of such person; * * *". (5 U.S.C. § 790) There appears to be nothing in this definition which precludes a conclusion that the so-called casual or occasional volunteer enjoys the same protection as the regular volunteer. Informal advice was received from the Bureau of Employees' Compensation to the effect that no later opinions have altered their expressed view that so-called occasional or casual volunteers, otherwise meeting the requirements, are covered under the Act.

5. Opinion of the General Counsel 15-62, in paragraph 5 of the quoted portion, states: "VA Manual M-2, Part XVII, Chapter 1, Paragraph 1.05f provides in effect that all regular—not casual—VA volunteers are considered employees and therefore eligible for compensation benefits as provided under the Federal Employees' Compensation Act (5 U.S.C. § 751 et seq.). * * * It therefore appears that volunteer workers who are assigned an approved regular schedule with a VA service and are authorized on a 'without compensation' basis are considered as employees and are covered under the Federal Employees' Compensation Act." In view of the foregoing, it is concluded that the part of the mentioned opinion which distinguishes between regular voluntary employees and casual or occasional voluntary employees, insofar as the application of the Federal Employees' Compensation Act is concerned, is in error.

6. The same opinion, in a discussion of the application of the Federal Tort Claims Act, in paragraph 6 of the quoted portion, states in part:

"In this connection employee is defined in section 2671, title 28, U.S.C., as 'Employee of the Government' includes officers or employees of any federal

agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation. It is my view that regular--not casual--volunteer workers who are assigned an approved regular schedule with a VA service, serving on a 'without compensation' basis, should be regarded as employees of the Government within the purview of the Federal Tort Claims Act."

The conclusion stated in the foregoing is in conformance with a prior unpublished opinion dated July 20, 1956, wherein it is stated:

"It therefore seems to this office that a valid distinction can be made between the two types of volunteers and based on this distinction the services of the so-called casual status volunteers can be considered voluntary services to the veteran and his family rather than voluntary services to the VA in carrying out statutory provisions. * * * It is the conclusion of this office that the negligence of casual volunteers would not impose liability on the Government inasmuch as no employee status exists to bring into operation the provisions of the Federal Tort Claims Act."

HELD:

7. It is apparent that the conclusion reached in the foregoing is based on an assumption as to the nature of the duties of a so-called casual volunteer, which it now appears is not warranted. I have been informally advised by your Department that there is not necessarily any difference in the duties performed by regular and so-called casual volunteers merely because of their different status. I am convinced, after reexamination of this matter, that the status of a voluntary employee as either a regular volunteer or as a so-called casual volunteer is not determinative of the question of the application of the Federal Tort Claims Act to tortious acts committed during the performance of their duties. The mentioned opinion is revised accordingly.

8. This opinion will be printed as Opinion of General Counsel 15A-62 for general distribution as a modification of Opinion of General Counsel 15-62.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 11-91

,