

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

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|--------------------------------|---|-----------------------|
| JEFFREY K. LILE, |) | |
| Appellant, |) | |
| |) | |
| v. |) | Vet. App. No. 21-6977 |
| |) | |
| DENIS MCDONOUGH, |) | |
| Secretary of Veterans Affairs, |) | |
| Appellee. |) | |

NOTIFICATION OF SUPPLEMENTAL AUTHORITY UNDER RULE 30(b)

Appellee submits this notification of supplemental authority pursuant to U.S. Vet. App. Rule 30(b). The additional authority is VA General Counsel Precedential Opinion (VAOPGCPREC) 16-1999, (Attachment 1), which the undersigned counsel discovered after the oral argument that was held on January 11, 2024.

Although the Secretary does not view this authority as adverse and directly controlling, he submits it in an abundance of caution in case the Court finds it relevant to this case. VAOPGCPREC 16-1999 addressed the fraudulent enlistment of an Air Force claimant who was given an uncharacterized discharge in February 1998 for an entry-level separation that was not categorized as a void enlistment by the chain of command or service department.

This authority is potentially relevant to the argument as to whether Appellant qualifies as a veteran for VA purposes pursuant to 38 U.S.C. § 101(2). This argument can be found on pages 14-15 of Appellee's October 22, 2022, brief, and pages 15-18 of Appellee's August 14, 2023, brief, as well as minutes 27:34-48, 55:04-16, and 57:10-30 of the oral argument held on January 11, 2024.

But the Secretary takes the position that this precedential opinion is not controlling as to the instant appeal because it has significant distinctions from Appellant's case. As an initial matter, in VAOPGCPREC 16-1999, the Air Force claimant's separation occurred in February 1998, whereas in the case before the Court Appellant's Army separation was initiated in March 1980. See (VAOPGCPREC 16-1999 at 2); (Secretary's Brief at 3-4); (Appellant's Brief at 22); (R. at 415, 416, 438). Based on the date of the Air Force claimant's separation, it was recognized that the Air Force claimant's certificate of release noted an uncharacterized entry level separation under the controlling nature of 38 C.F.R. § 3.12(k)(1), which was applicable for separations after October 1, 1982, such that he was accorded veteran status; however, Appellant was released from military custody and control in April 1980, prior to promulgation of § 3.12(k), pursuant to an administrative determination that he "is not currently a member of the Army cannot be legally discharged from the Army. Such individual will, instead, be released from the custody and control of the Army[.]" See (VAOPGCPREC 16-1999 at 5); (Secretary's Brief at 12-13, 15-16); AR 635-200 (1974); (R. at 248, 413).

The Secretary apologizes for not discovering this authority earlier in the appeal and submits VAOPGCPREC 16-1999 to the Court pursuant to U.S. Vet. App. Rule 30(b).

Respectfully submitted,

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ATTACHMENT 1

**Department of
Veterans Affairs**

Memorandum

Date: December 15, 1999

VAOPGCPREC 16-1999

From: General Counsel (022)

Subj: Effect of Entry Level Separation Based upon Fraudulent
Enlistment on Status as a Veteran

To: Director, Compensation and Pension Service (21)

QUESTIONS PRESENTED:

a. May a claimant who has been discharged from active duty with an entry level separation due to fraudulent enlistment and credited with zero net active service time by the Air Force be considered a veteran under 38 U.S.C. § 101(2)?

b. Should VA consider an Air Force enlistment which is terminated with an entry level separation to have been voided by the service department under 38 C.F.R. § 3.14?

c. For purposes of 38 C.F.R. § 3.14(a), if the service department has voided an enlistment, is concealment of past illegal behavior a basis for considering the discharge to have been under dishonorable conditions?

d. Does 38 C.F.R. § 3.12(k)(1) compel a finding that a claimant's military service terminated by an uncharacterized entry level separation was "under conditions other than dishonorable," regardless of the circumstances surrounding the separation from service?

COMMENTS:

1. The questions presented arose in a claim for service connection for a neck condition. The claimant, who entered active service on January 21, 1998, and was discharged on February 10, 1998, was a basic airman in initial military training for the entire active-duty period. Service records indicate that on January 21, 1998, the claimant filled out and signed an Air Force "Drug and Alcohol Abuse Certificate" as a condition of enlistment in the Air Force. In this document, the claimant admitted using marijuana three

times, but denied using any other illegal drugs, and denied illegal drug use since June of 1995.

2. Service records reflect that after entry into service the claimant experienced adjustment problems and was counseled several times by military superiors. During a January 1998 mental-health examination, the claimant stated that he could not handle the stress of basic military training and wanted to go home and attend vocational school. On February 2, 1998, the claimant signed a statement admitting use of a variety of illegal drugs prior to entering service, including the daily use of marijuana from July of 1992 to January of 1998. On February 5, 1998, the claimant's military commander recommended that the claimant be discharged under the authority of Air Force Instruction (AFI) 36-3208, ¶ 5.15 for fraudulent entry based upon intentional concealment of illegal drug use prior to service.

3. The claimant's administrative separation from the Air Force was approved on this basis on February 9, 1998, with the type of discharge being designated as "entry level separation." The claimant was discharged on February 10, 1998. The claimant's Certificate of Release or Discharge from Active Duty (DD Form 214) states that the claimant received an "uncharacterized" "entry level separation" for "fraudulent entry into military service/drug abuse." The DD 214 also indicates that although the claimant spent twenty days on active duty, no net active service time was credited. On February 20, 1998, the claimant filed a claim with the Department of Veterans Affairs (VA) seeking service connection for "neck pain."

4. Your first question asks whether an individual who enters active duty but is discharged with an entry level separation due to fraudulent enlistment, without being credited with any net active service time, can be considered a veteran. As provided in 38 U.S.C. § 101(2), a "veteran" is defined as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." Thus, under section 101(2), there are two basic requirements for veteran status: 1) active military, naval, or air service; and 2) separation from such service under conditions other than dishonorable. We understand your question to be whether the failure of the Air Force to

credit the claimant with any active service time means that the claimant does not meet the active service requirement of section 101(2).

5. Under 38 U.S.C. § 101(24) active military, naval, or air service generally refers to "active duty," which, in turn, is defined in 38 U.S.C. § 101(21)(A) as including, "full-time duty in the Armed Forces, other than active duty for training." Although the claimant was not credited with any net active service time, the claimant's military records document actual active duty service. In particular, block 11 of the claimant's DD Form 214 indicates service of "20 Days" as a basic airman, and blocks 12a and 12b of this form document performance of active duty during a specified period. Pursuant to AFI 36-3208, ¶ 5.19.5, airmen discharged for fraudulent entry do not receive credit for service performed. However, the fact that the Air Force did not credit the claimant with any time in service is not, in our view, controlling for purposes of section 101(2). Rather than being a factual finding of lack of active service, we believe the "net active service" entry on the DD Form 214 is in essence a personnel management tool for calculating eligibility for increased pay or retirement based upon longevity. Based on the facts presented, it appears that the individual in question did in fact serve on active duty and may be considered to have performed such duty for purposes of section 101(2).

6. The second and third questions presented ask whether a claimant's enlistment which was terminated by an entry level separation should be considered to have been voided by the service department for purposes of 38 C.F.R. § 3.14 and, if so, whether concealment of past illegal behavior is a basis for considering the discharge to have been under dishonorable conditions pursuant to that regulation. The fourth question asks whether 38 C.F.R. § 3.12(k)(1) compels a finding that the claimant's service was under conditions other than dishonorable, regardless of the circumstances surrounding the separation. Prefatory language contained in 38 C.F.R. § 3.14, which is titled "Validity of enlistments," states, "[s]ervice is valid unless the enlistment is voided by the service department." In paragraphs (a) and (b), the regulation, which pre-dates 38 C.F.R. § 3.12(k), goes on to describe rules for determination of the validity of service and character of discharge under enlistments voided by the service department, distinguishing between enlistments which are prohibited by statute and

those which are not. However, only section 3.12(k)(2), entitled "Void enlistment or induction," not section 3.12(k)(1), "Entry level separation," refers to review of the separation with reference to section 3.14. Furthermore, Air Force regulations distinguish between an entry level separation and a separation by reason of a void enlistment. AFI 36-3208, ¶¶ 1.16.2, 1.19.1 and 1.19.2. This separate regulatory classification supports the view that these terms and the separations they describe are distinguishable.

7. Notwithstanding the fact that the Air Force did not credit the claimant with any net active service time, and annotated the claimant's certificate of release from active duty to reflect that entry into service was fraudulent, it did not release the claimant based upon a void enlistment. Because the Air Force described the claimant's release from service as an "entry level separation," it is our view that this claim is governed by 38 C.F.R. § 3.12(k)(1) and not 38 C.F.R. § 3.12(k)(2). Accordingly, the reference to 38 C.F.R. § 3.14 in 38 C.F.R. § 3.12(k)(2) is not applicable in this case.

8. Section 3.12(k)(1) clearly states that an uncharacterized entry level separation "shall be considered under conditions other than dishonorable." Further, even if the claimant's enlistment could be considered to have been "voided by the service department" for purposes of 38 C.F.R. § 3.14(a) and (b), the provisions of that regulation establishing rules for determination of character of discharge with regard to the circumstances of the case would not be applicable in this case. To the extent of any conflict between sections 3.12(k)(1) and 3.14, the former regulation would prevail as the more recent, and more specific, issuance. 2B Norman J. Singer, *Sutherland Statutory Construction* § 51.02 (5th ed. 1992); see also *Smith v. Brown*, 35 F.3d 1516, 1523 (Fed. Cir. 1994) (canons of construction apply equally to statutes and regulations). Because the Secretary, in 38 C.F.R. § 3.12(k)(1), has issued a regulation stating that an uncharacterized entry level separation shall be considered under conditions other than dishonorable, there is no need for VA to consider the circumstances underlying such a separation.

9. The controlling nature of section 3.12(k)(1) in this situation is confirmed by the regulatory history of that regulation. Section 3.12(k) was added in response to the decision by the Department of Defense (DOD) to create three categories of administrative separation for enlisted personnel which would not include a characterization of service. 49 Fed. Reg. 28,267 (1984). In the preamble explaining the proposal to add section 3.12(k), VA noted that "veteran status" for VA purposes requires a discharge or release from service under conditions other than dishonorable and concluded that DoD's three categories of uncharacterized administrative separations required amendment of VA's adjudication regulations concerning character of discharge in order to establish criteria for determination of status where such separations are employed. After reviewing the requirements for issuance of an entry level separation, VA noted that such a separation could not be issued if the circumstances of an individual case warranted a characterization of "under other than honorable conditions." 49 Fed. Reg. at 28,267; see also AFI 36-3208, ¶¶ 1.19.1 and 1.19.1.1 (providing that certain separation actions will be described as entry level separation, "unless . . . [a] service characterization of under other than honorable conditions is authorized under the reason for discharge and is warranted by the circumstances").

10. Accordingly, VA proposed to consider entry level separations as being under conditions other than dishonorable without review of the facts or circumstances underlying the separations. 49 Fed. Reg. at 28,267. VA adopted this amendment as a final rule without change. 49 Fed. Reg. 44,099 (1984). Even if the Air Force's action in this case could be considered as voiding the claimant's enlistment, we believe that, in light of the Air Force's issuance of an entry level separation, section 3.12(k)(1), not section 3.14, would control, and the claimant's discharge would necessarily be considered to have been under conditions other than dishonorable.

HELD:

a. A claimant who served on active duty in the Air Force and was discharged from such service with an entry level separation due to fraudulent enlistment may qualify as a veteran under the provisions of 38 U.S.C. § 101(2), even though the claimant was not credited with any net active service time.

b. Section 3.12(k)(1) of title 38, Code of Federal Regulations, requires a finding that an individual who was released from military service with an uncharacterized entry level separation was separated "under conditions other than dishonorable." In such a case, the provisions of 38 C.F.R. § 3.14(a) and (b) concerning enlistments voided by the service department are not controlling for purposes of determination of character of discharge.

Leigh A. Bradley

Attachment: C-file