

**Department of
Veterans Affairs**

Memorandum

Date: September 1, 2010

VAOPGCPREC 5-2010

From: General Counsel (021)

Subj: Applicability of 38 U.S.C. § 3677(c)(7) to Approval of On-the-Job Training Programs for
To: Employees of State Approving Agencies

Director, Education Service (22)

QUESTION PRESENTED:

Does 38 U.S.C. § 3677(c)(7), which provides that “[n]o course of training will be considered bona fide if given to an eligible veteran or person who is already qualified by training and experience for the job” preclude approval of an on-the-job training (OJT) program for employees of State approving agencies (SAA) who are identified by contract as professional staff members responsible for approving programs of education or training?

Held:

Section 3677(c)(7) precludes approval of an OJT program for SAA employees who are identified by contract as professional staff members responsible for approving programs of education because these employees are already qualified by training and experience for the job. Because we have determined that all professional staff members responsible for approving programs of education or training are already qualified by training and experience for the job and, therefore, are not eligible for participation in an OJT program, it is not necessary to address the additional questions presented in B1 and B2 of your request.

Discussion:

1. State approving agencies (SAA) are created or designated by the chief executive of a State for the purpose of carrying out the provisions of chapters 34, 35, and 36 of title 38, United States Code. These chapters, together with chapters 30, 32, and 33 of title 38, govern the provision by the Department of Veterans Affairs (VA) of educational assistance benefits to eligible individuals, including, as an essential element, the approval of courses of education, programs of apprenticeship, and on-the-job training programs. An eligible individual may receive benefits under these chapters only if the course of education, program of apprenticeship, or on-the-job training program is properly approved by an SAA, or by the Secretary of Veterans Affairs, in certain specified circumstances. The Secretary is required to coordinate approval activities and, under 38 U.S.C. § 3674, may enter into contracts with SAAs to pay reasonable and necessary expenses of salary and travel of employees employed thereby. Pursuant to annually-executed contracts, SAAs across the country have assumed responsibility for all duties necessary for the inspection, approval, and supervision of courses or

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programs, or tests pursued by eligible individuals under chapters 30, 32, 33, 34, 35, and 36 of title 38, United States Code, offered by qualified educational institutions and training establishments. Each SAA contract provides personnel standards, and requires the use of "fully qualified personnel" in order to receive reimbursement of expenses from VA.

2. A program of training on the job may be approved when "the job which is the objective of the training is one in which progression and appointment to the next higher classification are based upon skills learned through organized and supervised training on the job and not on such factors as length of service and normal turnover" and other provisions are met. 38 U.S.C. § 3677(a) (emphasis added). In addition, 38 U.S.C. § 3677(c)(2) requires that the job be one that customarily requires full-time training for a period of not less than six months and not more than two years. Furthermore, section 3677(c)(7) provides that "no course of training will be considered bona fide if given to an eligible veteran or person who is already qualified by training and experience for the job." Section 3677 was added by House and Senate conferees as part of the Veterans' Pension and Readjustment Act of 1967, Pub. L. No. 90-77, title III, § 304(d), 81 Stat. 178, 186-188. (emphasis added). It allowed an eligible veteran to receive a training assistance allowance while pursuing a program of apprenticeship or a program of other training on the job approved by an SAA. In enacting the new program of on-the-job training, the conferees intended that such new program be approved "only in those fields that offer worthwhile knowledge and skills ordinarily obtained through the educational process leading to an accepted training objective and which will not have the attributes of a wage subsidy." S. Conf. Rep. No. 90-554, *reprinted in 1967 U.S.C.C.A.N.* 1493, 1512-13. (Emphasis added).

3. Section 3674(a)(1) of title 38, United States Code, authorizes the Secretary to enter into contracts or agreements with State and local agencies to pay for SAA employees' reasonable and necessary expenses of salary and travel. The "reasonable and necessary expenses" are further described as those expenses incurred in ascertaining the qualifications of educational institutions for furnishing courses of education under chapters 30 through 36 and in the supervision of these educational institutions. Pursuant to 38 U.S.C. § 3674A(a)(4), VA and the SAAs, together, must prescribe prototype qualification and performance standards for SAA personnel carrying out the approval responsibilities under a contract or agreement entered into under section 3674(a). The expenses will be paid by VA under the terms of the contract for employees who meet the qualification and performance standards.

4. Each SAAVA contract containing the prototype qualification and performance standards requires SAAs to inspect, approve, and supervise courses or programs or tests taken by eligible individuals under chapters 30, 32, 33, 34, 35, and 36 of title 38, United States Code. The contract incorporates a detailed plan by which the SAAs must abide when performing their duties. To be capable of performing the specified duties, a certain degree of expertise is required. The contract details the personnel standards

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that must be met by SAA employees, and states that the "State shall use fully qualified personnel in accordance with qualification and performance standards mandated by 38 U.S.C. § 3674A(a)(b) and the State's Civil Service or other existing State employment standards for the performance of the functions for which reimbursement is provided under this contract." (Emphasis added.) The qualifications standards defined in the contract are as follows:

- (a) Qualification standards for personnel approving and supervising courses offered by educational institutions are as follows: Bachelor's Degree with 5 years of related experience; Master's Degree with 3 years of related experience; or Doctoral Degree with 1 year of related experience.
- (b) Qualification standards for personnel approving and supervising courses offered by job training establishments are as follows: Bachelor's Degree with 2 years of related experience or equivalent in education and/or related work experience totaling 6 years.

It is notable that the higher-level qualification standards for personnel approving and supervising courses offered by educational institutions, versus personnel approving and supervising courses offered by job training establishments, contemplate additional periods of related service or higher-level degrees rather than additional training on the job.

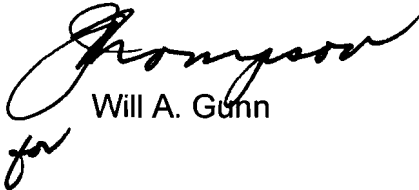
5. Under 38 U.S.C. § 3674A(b)(1), each SAA who has a contract or agreement with VA must apply qualification and performance standards based on the prototype standards developed jointly by VA and the SAAs. Moreover, Federal Acquisition Regulations require government contractors to meet the standards prescribed for qualification before award of a contract. See FAR § 52.209-1 ("the product, manufacturer, or source must have demonstrated that it meets the standards prescribed for qualification before award of this contract"). Thus, contractors are usually hired because they have particular expertise that the agency lacks and that is needed to accomplish a desired goal.

6. The statutory scheme governing SAAs and contractual requirements which bind SAAs make clear that SAA employees must have the education and experience to be "fully qualified" for the position when they are hired. Accordingly, 38 U.S.C. § 3677(c)(7), which prohibits approval of a course of training given to "an eligible veteran or person who is already qualified by training and experience for the job" precludes approval of an OJT program for these employees. Furthermore, a position with an SAA whose sole responsibility is to approve courses of education and OJT

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programs is not one that usually requires full-time training for a period of not less than 6 months and not more than 2 years, which is a condition for approval of an OJT program under 38 U.S.C. § 3677(c)(2). Rather, the contract an SAA signs with VA requires a candidate hired by an SAA to approve and supervise courses offered by job training establishments to meet specified qualification and personnel standards, including years of related work experience, which would enable the employee to perform the job without further full-time training. For the reasons stated, VA may not approve an OJT program for SAAs' professional staff members responsible for approving programs of education or training for veterans training under the provisions of chapter 36.



Will A. Gunn