

February 20, 2019

Compliance and Liaison Advisory 223-19-01

SUBJECT: Clarification Regarding 38 C.F.R. § 21.4250: Failure to Act, Notice of Intent Not to Act, Denial of an Application for Approval, and the Fiscal Year 2019 Cooperative Agreement between the Department of Veterans Affairs and State Approving Agencies

Purpose: To provide guidance to State Approving Agencies (SAA) regarding “Failure to Act” in response to receipt of an application for program approval.

Background: Section 21.4250 of title 38, Code of Federal Regulations, addresses the approval of courses. Paragraph (b)(1) addresses SAA approvals, paragraph (b)(2) addresses SAA suspension of approval or disapproval, and paragraph (b)(3) addresses “Failure to Act” by the SAA. Schools can “request approval” from VA “[i]f notice has been furnished that the [SAA] does not intend to act on the application of a school.” 38 C.F.R. § 21.4250(b)(3). Issuance of such a notice is not addressed in paragraph (b)(2) as a suspension or a disapproval, but rather in paragraph (b)(3) and serves as an abdication of the SAA’s jurisdiction to the Secretary. The Fiscal Year (FY) 2019 Cooperative Agreement (CA) does not list providing notice of an intent not to act as an acceptable SAA response to an application.

Discussion: The FY19 CA states that an SAA can either approve, disapprove, suspend, or withdraw approval of a program of education. These are the exclusive actions allowable under the FY19 CA in response to an application by a school, and none either explicitly or implicitly support the issuance of a notice of intent not to act.

The language of 38 C.F.R. § 21.4250(b)(3) was established at a time when the Secretary shared approval authority with SAAs. Since that time several legislative changes (e.g., section 408 of Public Law 114-315, and section 2 of Public Law 115-89) have curtailed the Secretary’s authority to approve programs of education, and approval authority is now vested almost exclusively with the SAAs. According to 38 U.S.C. § 3672(b)(2)(A), courses are “deemed to be approved ... if [an SAA], or the Secretary when acting in the role of [an SAA],” makes specific determinations. According to 38 U.S.C. § 3675(a)(1), “[an SAA], or the Secretary when acting in the role of [an SAA], may approve accredited programs” that meet specific criteria. However, according to 38 U.S.C. § 3671(b)(1), VA acts as an SAA only if a “State fails or declines to create or designate [an SAA], or fails to enter into an agreement” with VA.

The Secretary would not be acting as the SAA if there is an active SAA of jurisdiction and, therefore, cannot satisfy the statutory criteria of “acting in the role of [an SAA].” See 38 U.S.C. §§ 3672(b)(2)(A), 3675(a)(1). Therefore, an SAA providing a school with notice of its intent not to act when the school is seeking approval of a course pursuant to section 3672(b)(2)(A) or 3675(a)(1) would leave that school in limbo because the SAA would be refusing to act while the Secretary would lack the authority

to act. Consequently, section 21.4250(b)(3) was rendered obsolete by the later-enacted statutes limiting VA's authority to act upon a school's application for program approval while there is an active SAA.

Under the current FY 19 CA and laws, when a school submits an incomplete, insufficient, or otherwise not approvable application, or when the SAA lacks jurisdiction to decide on the application the SAA should disapprove the application. While section 21.4250(b)(2) addresses "suspension of approval or disapproval of any course ... previously approved," disapproval of an initial application is an implicit authority of the SAAs' authority to approve an initial application addressed in section 21.4250(b)(1).

/S/
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