

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

May 23, 2005

Opinion No. 05-086

Eligibility for Tuition Waivers by Spouses and Dependent Children of Deceased Tennessee National Guard Members

QUESTION

Does Tenn. Code Ann. §49-7-102(a), as currently written, provide the same benefit of tuition waivers for spouses and dependent children of Tennessee National Guard members who are killed while on federal active duty as the benefit proposed in SB 2288/HB 2301?

OPINION

No. As currently written, Tenn. Code Ann. §49-7-102(a) limits tuition waivers to the spouse and dependent children of a Tennessee National Guard member who is killed while on federal active duty “during a qualifying period of armed conflict.” Under SB 2288/HB 2301, such benefits would also be available if the death of the Tennessee National Guard member occurred after September 11, 2001, while on federal active duty as determined by 10 U.S.C. §12302(a), regardless of the location at the time of such member’s death or the existence of a qualifying period of armed conflict.

ANALYSIS

As currently written, Tenn. Code Ann. §49-7-102 provides for a waiver of tuition and fees to any institution of higher education owned, operated and maintained by the state for the spouse and dependent children of a veteran killed or officially reported as being either a prisoner of war or as missing in action “while serving honorably as a member of the United States armed forces during a qualifying period of armed conflict...”

Once a unit of the Tennessee Army or Air National Guard is called to federal active duty, the members of that unit become members of the United States armed forces. *See* 10 U.S.C. §§10106, 10112. Once ordered into federal service, members of the Tennessee National Guard lose their status as members of the state military and are considered members of the United States armed forces during their period of federal active duty. *Perpich v. Department of Defense*, 496 U.S. 334, 347, 110 S.Ct. 2418, 2426, 110 L.Ed.2d 312 (1990). Thus, the spouse and dependent children of members of the Tennessee National Guard ordered into federal service who are killed during a

qualifying period of armed conflict would be eligible for tuition waivers under Tenn. Code Ann. §49-7-102 as currently written.

Under proposed SB2288/HB 2301, this statute would be amended to include:

a member of the Tennessee army or air national guard whose death occurs after September 11, 2001, while in active federal service of the United States as determined by 10 U.S.C. 12302(a) regardless of the location at the time of such member's death.

The authority to order a unit of the National Guard or any member not assigned to a unit to active duty pursuant to 10 U.S.C. §12302 is not limited to only "qualifying periods of armed conflict." Rather, this statute provides such authority in a time of national emergency or when otherwise authorized by law. 10 U.S.C. 12302(a). Accordingly, under proposed SB 2288/HB 2301, the spouse and dependent children of a member of the Tennessee National Guard whose death occurs after September 11, 2001, while in active federal service as determined by 10 U.S.C. §12302(a), would also be eligible for tuition waivers even if such death did not occur "during a qualifying period of armed conflict."

Moreover, as currently written, it is not as clear whether Tenn. Code Ann. §49-7-102(a) is intended to provide tuition waivers only if the National Guard member is killed while actually participating in a qualifying armed conflict. In construing a statute, reviewing courts must ascertain and give effect to the legislative intent without restricting or expanding the statute's intended meaning or application. *Perrin v. Gaylord Entertainment Co.*, 120 S.W.3d 823, 826 (2003). In doing so, the court will examine the language of the statute and give the words their ordinary and plain meaning. *Id.* If the language of the statute is ambiguous, the court will examine the entire statutory scheme and relevant legislative history to ascertain and give effect to the legislative intent. *Id.* Assuming *arguendo* that a court would determine that Tenn. Code Ann. §49-7-102(a), as currently written, was intended to limit the availability of tuition waivers to the spouse and dependent children of Tennessee National Guard members killed while participating in a qualifying armed conflict, proposed SB2288/HB2301 would expand the availability of tuition waivers. Under the provisions of proposed SB2288/HB2301, tuition waivers are available regardless of the location of such member's death.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

DIANNE STAMEY DYCUS
Deputy Attorney General

Requested by:

Honorable James F. Kyle
State Senator
Office of the Democratic Leader
9A Legislative Plaza
Nashville, TN 37243-0228