



COMMONWEALTH of VIRGINIA

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The Honorable Harry B. Blevins
Member, Senate of Virginia
Post Office Box 16207
Chesapeake, Virginia 23328

Dear Senator Blevins:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire regarding eligibility for in-state tuition of dependents of certain military personnel. Specifically, you ask whether the one-year residency requirement must be satisfied to establish domicile in the following situations: 1) when the service member has been ordered on an unaccompanied deployment with a "follow-on duty station" in Virginia, where Virginia is not listed on the orders; and 2) when the service member has been stationed in Virginia for 3 years but assigned to a one-year unaccompanied submarine tour and Virginia is not listed as the ultimate duty station on the orders.

Response

It is my opinion, based on the limited facts provided, that the dependents of the service members described in the scenarios you present neither qualify for waiver of the one-year residency requirement, nor otherwise can be deemed domiciled in Virginia for purposes of in-state tuition based on the service member's military status.

Background

You present two scenarios involving the domicile status of dependents of military service members. In the first scenario, the family of a military service member has moved to the City of Chesapeake while the service member is on an unaccompanied deployment.¹ You indicate that in these situations, the family is typically moved by the military to the follow-on duty station. You state that in this instance the next duty station is Virginia, but that Virginia is not listed in the orders. You relate that the service member is not a Virginia resident, but that the family members hold Virginia drivers' licenses and are registered to vote in the Commonwealth.

¹ According to your letter, an "unaccompanied deployment" is a duty station with a home port where dependents are not permitted to reside.

In the second scenario you describe, the military service member has been on active duty and stationed in Virginia for the past three years, but in March 2012, he was assigned to the Emory S. Land, a submarine tender, which has its home port in Diego Garcia. You relate his assignment is an unaccompanied tour for one year, during which time the service member's family will remain in Virginia. The service member's orders currently do not list Virginia as the ultimate duty station.

Applicable Law and Discussion

Eligibility for in-state tuition charges for students enrolled in Virginia's institutions of higher education is governed by § 23-7.4 of the *Code of Virginia*. The law generally provides that

To become eligible for in-state tuition, a dependent student or unemancipated minor shall establish by clear and convincing evidence that for a period of at least one year prior to the date of the alleged entitlement, the person through whom he claims eligibility was domiciled in Virginia and had abandoned any previous domicile, if such existed.^[2]

Further,

The domicile of a dependent student shall be rebuttably presumed to be the domicile of the parent or legal guardian claiming him as an exemption on federal or state income tax returns currently and for the tax year prior to the date of the alleged entitlement or providing him substantial financial support.^[3]

In determining domicile status, several factors are required to be considered; these factors, which include continuous residency in the Commonwealth, must exist for the one-year period prior to the date of alleged entitlement.⁴ Nonetheless, this one-year requirement is waived statutorily for active duty military personnel residing in the Commonwealth and their dependents who voluntarily elect to establish Virginia as their permanent residence for domiciliary purposes, provided all other conditions for establishing domicile are satisfied.⁵

In the first scenario you present, although the family, including the future student, have relocated to Virginia, the military service member does not appear to reside in the Commonwealth. Also, the facts you relate do not indicate that he has voluntarily elected to establish Virginia as his permanent residence for domiciliary purposes. Moreover, Virginia is not listed in the military member's orders. The service member in your second scenario similarly neither currently resides in the Commonwealth, nor has orders listing Virginia as a duty station. Furthermore, the facts you present do not suggest that he has voluntarily elected to establish Virginia as his permanent residence for domiciliary purposes, even though he resided in Virginia prior to his new assignment. Applying the plain language of § 23-7.4(B), which affords a waiver for military personnel "residing in the Commonwealth" and their dependents "who claim domicile

² VA. CODE ANN. § 23-7.4(B) (2011). "Date of the alleged entitlement" means the first official day of class within the term, semester or quarter of the student's program." Section 23-7.4(A). A "dependent student" is "one who is listed as a dependent on the federal or state income tax return of his parents or legal guardian or who receives substantial financial support from his spouse, parents or legal guardian." *Id.* Absent an exception, it is presumed that "a student under the age of 24 on the date of the alleged entitlement receives substantial financial support from his parents or legal guardian, and therefore is dependent on his parents or legal guardian[.]" *Id.* I assume for purposes of this Opinion that the children of the service members you present are "dependent students."

³ Section 23-7.4(C).

⁴ Section 23-7.4(B).

⁵ *Id.*

through them," I conclude that the conditions for waiving the one-year residency requirement are not met in the scenarios you present as you describe them.

Nonetheless, § 23-7.4 further provides that,

all dependents, as defined by 37 U.S.C. § 401, of active duty military personnel, or activated or temporarily mobilized reservists or guard members, assigned to a permanent duty station or workplace geographically located in Virginia, or in a state contiguous to Virginia or the District of Columbia, who reside in Virginia shall be deemed to be domiciled in Virginia for purposes of eligibility for in-state tuition and shall be eligible to receive in-state tuition in Virginia^[6]

In neither scenario does it appear that the military service member is assigned to a permanent duty station or workplace geographically located in Virginia, or in a state contiguous to Virginia or the District of Columbia. Although the guidelines developed by the State Council of Higher Education for Virginia further allow that such assignment may include temporary assignments to locations outside Virginia, a state contiguous to Virginia or the District of Columbia as long as the member remains assigned to a unit considered to have its home port or base located in Virginia, the District of Columbia, or a state contiguous to Virginia,⁷ it does not appear from the facts you present that either military member is on such a temporary assignment. Rather, the unaccompanied deployments are assignments of each service member to areas outside this geographic area. Therefore, the provision found in subsection 23-7.4(E) deeming certain military dependents to be domiciled in Virginia does not apply in the situations you relate.

Conclusion

Accordingly, it is my opinion, based on the limited facts provided, that the dependents of the service members described in the scenarios you present neither qualify for waiver of the one-year residency requirement, nor otherwise can be deemed domiciled in Virginia for purposes in-state tuition based on the service member's military status.⁸

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

⁶ Section 23-7.4(E).

⁷ See STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA, DOMICILE GUIDELINES, available at <http://www.schev.edu/Students/VAdomicileguidelines.asp>.

⁸ I limit this Opinion to the dependents' ability to qualify for in-state tuition through the service member's statutory domicile status. Nonetheless, I note that, depending on facts not before me, the students may be eligible to avail themselves of in-state tuition on their own accord or through a nonmilitary parent. Factors relevant to such a domicile determination are listed in Sections 23-7.4(A) and (B). I express no opinion on these separate issues. See 1987-88 Op. Va. Att'y Gen. 348, 349.