

**STATEMENT FOR THE RECORD
SUBMITTED TO THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
118TH CONGRESS, FIRST SESSION**

DELIVERED BY CHARLES BERNSTEIN

**ON THE HEARING TOPIC OF
“LESS IS MORE: THE IMPACT OF
BUREAUCRATIC RED TAPE ON
VETERANS EDUCATION BENEFITS”**

September 20, 2023

Chairman Van Orden, Ranking Member Levin, and Members of the Subcommittee:

I am a Captain in the Marine Corps, where I have served since 2014, and a JD candidate at Harvard Law School.

I joined the Marine Corps because I wanted to serve others, challenge myself, and earn a place among an elite group of peers. After attending Officer Candidate's School and commissioning as a Second Lieutenant I had the tremendous honor to lead infantry Marines at Camp Lejeune, North Carolina. I completed my first overseas tour with the infantry, and a second as a foreign military advisor, before competing for the privilege of joining Marine Reconnaissance. After 17 weeks of training and assessment I was assigned to 1st Reconnaissance Battalion in Camp Pendleton, California.

I completed my third and most recent deployment as a Force Reconnaissance Platoon Commander. Notable Marines who have held this role include Major James Capers, who fought off a North Vietnamese regiment with his 10 men, and Colonel John Ripley, who swung from the beams beneath the Dong Ha Bridge to place explosives in the path of an enemy advance. Words cannot describe the privilege of serving in such a storied unit among such a tremendously talented group of Marines and sailors.

When I think about my career, however, the accomplishments above pale in comparison to the pride I take in having successfully advocated for my Marines. The small role I've had in facilitating their personal successes – accelerated promotions, personal awards, college acceptances, commissioning program selections, and others – is more fulfilling to me than any operational accomplishment.

For this reason, I applied to the Marine Corps' Excess Leave Program – Law (ELP). The ELP allows officers to take an unpaid leave of absence to pursue a law degree at their own expense, after which they continue to serve as Judge Advocates (military attorneys). I leapt at the opportunity to formalize my advocacy for Marines by representing their interests and those of the service.

I was selected for ELP in November, 2021. In March, 2022 the Department of Veterans Affairs (VA) [confirmed in writing](#) that as an ELP participant I would receive a Monthly Housing Allowance (MHA) while using my Chapter 33 Post-9/11 GI Bill Education Benefits. Because of VA's assurance that I would have the financial resources to pay my tuition and living expenses, I formally accepted a place in ELP and committed to three years of post-law school service. I also relied on VA's assurance in committing to attend Harvard Law School, which is located in a high cost city and does not offer merit-based financial aid.

As I finished my first semester of law school, VA informed me and four other ELP Marines that [they would no longer pay us MHA](#) as of August 1, 2023. This decision is financially crushing – MHA in my high-cost area is over \$4,000 per month. And sadly, it is voluntary on the part of VA – there was no legislative amendment or regulatory change that forced their hand.

Worse than its financial effects, losing MHA impacts my ability to become a high-performing, effective Judge Advocate. I am foregoing critical educational opportunities because of financial hardship. Rather than selecting classes based on their relevance, I must now arrange my academic schedule to facilitate two part-time jobs (this year I will miss out on a once-in-a-career opportunity to study Military Justice with two Court of Appeals for the Armed Forces judges). Instead of spending next summer completing on-the-job training in a military court under the supervision of practicing Judge Advocates, I am seeking permission from the Marine Corps to take further paid civilian employment to make ends meet. Even with these efforts I do not know whether I will have the resources to complete my third year of law school.

The Marine Corps' motto is Semper Fidelis – Always Faithful. My four fellow ELP participants and I continue to serve, and in return we ask that VA remains faithful to us. Please ensure that VA keeps the commitment it made by extending MHA for ELP through at least June, 2025 when the last of the affected group graduates.

Respectfully Submitted,



Charles Bernstein

Additional Background Facts

- Veterans Education Success (VES) met with VA Veterans Benefit Administration leadership in July and August 2023 to discuss deferring the MHA change until 2025 or otherwise “grandfathering” current ELP participants in. VA was unwilling to do so.
- Despite VA’s rationale above, ELP participants relied on written communications from VA and their own policies in understanding that ELPers were treated as “Veterans:”
 - The Buffalo Regional Office of VA [confirmed to me via email on March 31, 2022](#), before I committed to attending law school or participating in ELP, “that participants in the Marine Corps’ Excess Leave Program - Law (ELP) are considered Veterans by the VA while in this program.” My peers were similarly reliant;
 - [VA’s own processing handbook, M22-4](#), explains that “A Serviceperson attending school in an excess leave status, if otherwise eligible, may be paid at the rates payable to Veterans;”
 - [VA’s regulations make clear](#) in 38 CFR 21.9505 that “Active duty does *not* include . . . Any period during which the individual was assigned full-time by the Armed Forces to a civilian institution to pursue a program of education that was substantially the same as programs of education offered to civilians.” ELP participants are assigned to their civilian institutions – we have [obligatory military orders](#) assigning us to our respective schools.
- It has been VA’s longstanding practice to treat ELP participants as “Veterans” and thus meriting MHA - [since 1967, VA’s General Counsel has held](#) that educational “excess leave... should *not* be held to be active duty” for VA benefits purposes.
- [In its own determination letter of December 2022](#), VA already acknowledges the challenge created by changing policy midstream, saying “since [our] education is in progress, VA is making an exception to allow current ELP participants to receive the appropriate MHA until... 2023.” We merely ask that this be corrected to the appropriate date of 2025.

March, 2022 Email Confirming MHA for ELP Participants



Charlie Bernstein <crlbernstein@gmail.com>

Request for MHA in conjunction with Marine Corps Excess Leave Program Law

Cotterman, David J. VBABUF <david.cotterman@va.gov>
To: "crlbernstein@gmail.com" <crlbernstein@gmail.com>

Thu, Mar 31, 2022 at 9:31 AM

CAPT Bernstien,

You are correct that participants in the Marine Corps' Excess Leave Program - Law (ELP) are considered Veterans by the VA while in this program. The documents you provided are what is required to verify you are in Marine Corps' Excess Leave Program - Law (ELP).

The next step is for the Harvard Law School to submit an enrollment certification (VA Form 22-1999). After we receive this document from the school, we will determine what payments you are eligible for.

Since your excess leave is not until August 24, 2022, you are still in an active duty status till then. Once law school starts, we will update your status to veteran while you are a participant in the Marine Corps' Excess Leave Program - Law (ELP). Please note that if you are no longer in the program, please let me know.

Once, Harvard submits the enrollment certification, please reach back out to me at that time so I can ensure you are properly paid.

If you have any questions or concerns please let me know

Sincerely,

Dave

December 2022 Letter Withdrawing MHA



DEPARTMENT OF VETERANS AFFAIRS
BUFFALO REGIONAL OFFICE
P.O. BOX 4616
BUFFALO NY 14240-4616

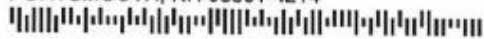
DECEMBER 22, 2022

2169203_1*****SNGLP
MR. CHARLES R. BERNSTEIN
239 ISLINGTON ST
PORTSMOUTH, NH 03801-4214

T1 P0



307/22
CRBERNS
XXX-XX



Dear Mr. Bernstein:

We are writing to inform you of a recent VA Office of General Counsel (OGC) decision regarding the U.S. Marine Corps Excessive Leave Program (Law), here abbreviated as ELP(L) and your VA education benefits under the Post 9/11 GI Bill (Chapter 33).

On September 13, 2022, the Benefits Law Group of the VA Office of General Counsel (OGC) clarified the administration of VA Education benefits for participants in the ELP(L). This clarification impacts eligibility and the monthly housing allowance. The VA must treat participants in the ELP(L) as on active duty for purposes of Post 9/11 GI Bill eligibility tier and will no longer pay the Monthly Housing Allowance (MHA) to impacted individuals effective August 1, 2023.

Why Did VA Make This Change?

The VA Office of General Counsel updated its interpretation of Excess Leave Programs in which the student is not assigned to the school based on the definition of 38 USC 3311(b) and (c), since the participants in the ELP(L) do not meet the criteria for a discharge or release from active duty.

How Will This Impact Me?

The decision to treat ELP(L) participants as on active duty and therefore not eligible for the MHA will be effective immediately for all new applicants. However, since your education is in progress, VA is making an exception to allow current ELP(L) participants to receive the appropriate MHA payment based on your rate of pursuit, eligibility percentage level, and location of training until August 1, 2023. Due to system limitations, our letters and education records will show that you are "off active duty" effective the first day of the term we started paying you under the ELP(L).

Effective August 1, 2023, we will update your file to reflect your status as "on active duty" until your official discharge from active duty. Your school should continue to certify you if you wish to continue using your VA benefits for tuition & fees and/or the books & supplies stipend. If you wish to preserve your GI Bill benefits for future use, please discuss this with your school so you are certified correctly.

Explanation of ELP Pay

SECNAVINST 1520.7G
22 Jan 2019

the LSAT at their own expense. All LSAT scores must be submitted and received prior to convening of the selection board. The LSAT is administered by the Law School Admission Council, www.lsac.org.

f. A statement of 500 words or less indicating the steps the applicant has taken to learn about a career as a member of the Judge Advocate General's Corps or as a Marine Corps judge advocate and the reasons for seeking such a career.

g. Prior to submitting an application, Navy officers shall complete a structured interview with two Navy judge advocates, both of whom must be senior to the applicant. If available, one of the two interviewers should be a former LEP participant. Navy applicants will be granted only one interview in a 3-year period. Marine Corps officers shall be interviewed by a senior (O-5 or O-6) Marine Corps judge advocate. Navy and Marine Corps candidates shall refer to this interview and identify their interviewer in their application.

h. Current work mailing and e-mail addresses and phone number must be included.

2. The Marine Corps uses two programs, the Funded Law Education Program (FLEP) and ELP(L):

a. FLEP. Pursuant to section 2004 of reference (a), as implemented by reference (b), commissioned officers of the Marine Corps, while continuing to draw full pay and allowances, may be ordered as students at Government expense to ABA accredited law schools located in the United States for education leading to the degree of Juris Doctor.

b. ELP(L). Commissioned officers of the Marine Corps may be placed in excess leave to attend ABA accredited law schools located in the United States for a period not to exceed 36 months leading to a Juris Doctor and completion of legal licensing requirements. Excess leave is leave other than that accrued under section 701 of reference (a). It is not charged against an officer's leave account and does not have to be repaid. Pursuant to section 502 of reference (i), **no pay and allowances are authorized for such periods**, and ordinary leave is not accumulated. Officers continue to accrue time for

VA General Counsel Letter of 1967 Construing ELP Participants as Veterans

7. The provisions of the law relating to veterans' benefits cannot be interpreted in a literal and mechanical manner, if to do so would defeat the manifest intent of the Congress. The consequences outlined in the preceding paragraph cannot be rationalized as consistent with the Congressional pattern for educational benefits under chapter 34. This becomes particularly clear when the extended excess leave situation is contrasted with "Operation Bootstrap." Under "Operation Bootstrap" a serviceman likewise attends a civilian institution and pays his own tuition and fees but contrary to the situation on extended excess leave, the serviceman having the benefit of "Operation Bootstrap" receives full military pay and allowances for the entire period which he is going to school. This latter is an excellent example of the situation such as the Congress had in mind when it limited payments of educational assistance allowance to persons on active duty to the amount of tuition and fees, and is strongly suggestive that the Congress never contemplated a holding that a non-paid status was consistent with active duty status insofar as educational assistance benefits in chapter 34 are concerned.

8. To summarize our views, while, as stated, it is clear that extended excess leave is considered by the military as active duty and, in fact, does have many of the attributes of active duty, this is not controlling upon the Veterans Administration (see A.D. 972) and it is our opinion that a correct evaluation of all factors impels the legal conclusion that extended excess leave, as here discussed, should not be held to be active duty for the purposes of chapter 34. The foregoing conclusion is consistent with the views expressed in the letter from the Chief Benefits Director, dated June 13, 1966, to the Assistant Director, Veterans' Affairs Commission, Austin, Texas, which was concurred in by this office, and which stated in part:

"It has been determined that a serviceman who is placed on excess leave without pay for the purpose of attending school may not accrue additional entitlement to educational assistance during such period. Accordingly, the rate of

(OGC 22-08186-F) 000005

5.

Current VA Regulation Defining Active Duty, Payment of MHA

Department of Veterans Affairs

§21.9640

(a) *Percentage of maximum amounts payable.* Except as provided in paragraph (d) of this section, VA will apply the applicable percentage of the maximum amounts payable under this section for pursuit of an approved program of education, in accordance with the following table—

Aggregate length of creditable active duty service after 09/10/01	Percentage of maximum amounts payable
At least 36 months ¹	100
At least 30 continuous days (Must be discharged due to service-connected disability)	100
At least 30 months, but less than 36 months ¹	90
At least 24 months, but less than 30 months ¹	80 ³
At least 18 months, but less than 24 months ²	70 ³
At least 12 months, but less than 18 months ²	60
At least 6 months, but less than 12 months ²	50
At least 90 days, but less than 6 months ²	40

¹ Includes entry level and skill training.
² Excludes entry level and skill training.
³ If the service requirements are met at both the 80 and 70 percentage level, the maximum percentage of 70 must be applied to amounts payable.

(Authority: 38 U.S.C. 3311, 3313)

(b) *Maximum amounts payable for training at more than one-half time.* An individual, other than one on active duty, who is pursuing a program of education at more than one-half time (at a rate of pursuit greater than 50 percent) and who—

(1) Is enrolled at an institution of higher learning located in the United States, or at a branch of such institution that is located outside the United States, may receive—

(i) A lump sum amount for established charges paid directly to the institution of higher learning for the entire quarter, semester, or term, as applicable. The amount payable will be the sum of the lower amount of tuition as determined in paragraph (b)(1)(i)(A) and the lower amount of fees as determined in paragraph (b)(1)(i)(B) of this section.

(A) The amount of tuition payable is the lesser of—

(1) The actual amount of tuition charged by the institution of higher learning; or

(2) The maximum amount of tuition regularly charged per credit hour to full-time undergraduate in-State students by the public institution of higher learning having the highest rate of regularly-charged tuition per credit hour in the State in which the individual is enrolled or, if the individual is enrolled at a branch located outside the United States, in the State where the main campus of the institution of

higher learning is located, multiplied by the number of credit hours in which the individual is enrolled.

(B) The amount of fees payable is the lesser of—

(1) The actual amount of fees charged by the institution of higher learning; or

(2) The maximum amount of fees regularly charged full-time undergraduate in-State students in a term, quarter, or semester by the public institution of higher learning having the highest rate of regularly-charged fees in a term, quarter, or semester in the State in which the individual is enrolled or, if the individual is enrolled at a branch located outside the United States, in the State where the main campus of the institution of higher learning is located.

(C) The lesser amount of paragraph (b)(1)(i)(A) or (B) of this section, divided by the number of days in the individual's quarter, semester, or term, as applicable, to determine the individual's daily rate which will then be multiplied by the individual's remaining months and days of entitlement to educational assistance in accordance with §21.4020 and §21.9635(o);

(ii) Except for individuals pursuing a program of education offered entirely through distance learning, a monthly housing allowance. The monthly housing allowance will be equal to the monthly amount of the basic allowance for housing payable under 37 U.S.C. 403

§ 21.9505 Definitions.

For the purposes of this subpart (governing the administration and payment of educational assistance under 38 U.S.C. chapter 33) the following definitions apply. (See also additional definitions in §§ 21.1029 and 21.4200).

Academic year means the period of time beginning August 1st of each calendar year and ending July 31st of the subsequent calendar year.

(Authority: 38 U.S.C. 3034(a), 3323(a), 3680(a))

Active duty means full-time duty in the regular components of the Armed Forces or under a call or order to active duty under 10 U.S.C. 688, 12301(a), 12301(d), 12301(g), 12302, or 12304. **Active duty does not include—**

(1) Full-time National Guard Duty performed under 32 U.S.C. orders;

(2) Any period during which the individual—

(i) Was assigned full-time by the Armed Forces to a civilian institution to pursue a program of education that was substantially the same as programs of education offered to civilians;

(ii) Served as a cadet or midshipman

(2) Service under the provisions of Section 12103 (formerly Section 511(d) of Title 10) pursuant to an enlistment in the Army National Guard or the Air National Guard, or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve.

(3) Periods of military service in an excess leave status.

NOTE 1: A Serviceperson attending school in an excess leave status, if otherwise eligible, may be paid at the rates payable to Veterans including additional allowance for dependents. Excess leave is defined as leave without pay and is granted only by the service department under emergency or unusual circumstances. The service department places the individual in a "leave without pay" status; the Serviceperson pays the tuition and fees and agrees to extend the length of service on active duty. Education benefits may be authorized for the full period of enrollment certified by the school even though there may be a brief period of active duty during a holiday or during any other day the school was not in session which did not interrupt the continuity of pursuit of the course.

NOTE 2: There is an important distinction in service department programs in which the Serviceperson attends a civilian school while on excess leave without pay and other programs in which the Serviceperson attends a civilian school while on a temporary "duty assignment with full pay and allowances." In the latter instance, the student is considered to be on active duty and should be paid education benefits at the rates payable to Servicepersons unless the military is paying for the training.

(4) Periods of Service Not considered Active Duty for Chapter 33

- Was assigned to a civilian institution for a course of education which was substantially the same as established courses offered to civilians,
- Served as a cadet or midshipman at one of the service academies, or
- Served under the provisions of Section 12103(d) (initial skills and training) of Title 10 pursuant to an enlistment in the Army National Guard, Air National Guard or Reserve components.
- Was called up to active duty from a reserve component of the Armed Forces, Army National Guard or Air National Guard, under Title 10 and it was under a section other than 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 or Section 712 of Title 14 for the USCG Reserve.
- Was called up to active duty under Title 32 that was NOT under Title 32 502(f) for the purpose of responding to a national emergency declared by the President and supported by Federal Funds.
- Served full time in the National Guard under Title 32 for a purpose other than organizing, administering, recruiting, instructing, or training.

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Military Orders Assigning Me to Law School



MARINE CORPS BASIC ORDER

RANK: CAPT	NAME: CHARLES R BERNSTEIN	EDIPI:	PMOS: 0302
FROM MCC: 1R1	PRESENT COMMAND: 1ST RECON BN 1STMARDIV CAMP PENDLETON CA		

HQMC ORDER DETAILS - 20220704

FMCC: JVB	FUTURE COMMAND: SPECIAL EDUCATION PROGRAMS - BOSTON MA	TOUR: 36 MONTHS, CONUS (OPERATIONAL- FROM/WITHIN CONUS)
ESTIMATED DETACH DATE: 20220729	REPORT NO LATER THAN: 20220828	BILLET: 4401, O3

THIS IS AN INVOLUNTARY ASSIGNMENT.

20220704 - Modification

- 1. TRANSFER SUBJECT NAMED OFFICER DIRECT REPORT NLT 28 AUG 2022 TO HARVARD LAW SCHOOL FOR FOR THE EXCESS LEAVE PROGRAM (LAW).**
2. WHILE ON THE ABOVE DUTY SNO WILL BE CARRIED ON THE ROLLS AND SUPPORTED ADCON SITE SPT (FT DEVENS MA) 25THMAR
4TH MARDIV, FOR ADMIN PURPOSES. DIR SNO TO SETTLE TRAVEL CLAIM WITHIN 10 DAYS OF CHECK-IN TO NEW DUSTA. ENSURE ORIG ORDS W/ENDS AND TRAVEL ITINERARY ARE FWD'D TO GAINING ADMIN UNIT. FITREP REPORTING, ANNUAL TRAINING REQUIREMENT COMPLETION AND ALL OTHER LEGAL, MEDICAL AND ADMINISTRATIVE REPORTING REQUIREMENTS WITH GAINING CMD.
3. INCL IN ORDS ISS: YOUR ATTN IS INVITED TO MARCORSEPMAN PARS 2003 AND 5002 AND SECNAVINST 1520.7F REGARDING THE OBL SVC INCURRED AS A RESULT OF PARTICIPATION IN THE EXCESS LEAVE PROGRAM.
4. MARINES ARE ENCOURAGED TO ACCESS THE MOST CURRENT INFORMATION ON FAMILY MEMBER TRICARE PRIME AND TRANSFER ENROLLMENT TO THE NEW REGION VIA THE ONLINE WEBSITE AT WWW.TRICARE.MIL/ENROLLMENT.
5. IT IS RECOMMENDED THAT SNO VISITS THE FUTURE DUTY STATION'S WEBSITE PRIOR TO EXECUTION OF PCSO FOR ADDITIONAL INFORMATION REGARDING CHECK-IN PROCEDURES AND BASE POLICIES. ([HTTP://WWW.MILITARYINSTALLATIONS.DOD.MIL](http://WWW.MILITARYINSTALLATIONS.DOD.MIL))
6. DELAY AUTHORIZED PER MCO 1050.3J CHAP 2, MCO 1000.6 CHAP 4, MCO 11000.22 APPLY.