DATE: 03-11-91

CITATION: VAOPGCPREC 42-91
Vet. Aff. Op. Gen. Couns. Prec. 42-91

TEXT:

SUBJECT: Establishment of Exercise Programs at VA Medical Centers for VA Employees.

(This opinion, previously issued as Opinion of the General Counsel 2-85, dated March 5, 1985, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

To: Administrator

QUESTIONS PRESENTED:

A preventive health maintenance program is currently is currently in effect at the Central Office which involves the use of exercise equipment by employees on a voluntary basis. It has been determined that it is in the best interest of the VA to institute similar programs in VA facilities throughout the country. The specific issues raised by the request for an opinion are as follows:

(1) Is there legal authority to allow employees to use, for their own health benefit, equipment paid for from the medical care appropriation and intended for patient use?

(2) What, if any, liability is there for employee us of such equipment during non-duty status times such as before and after work or lunch breaks?

COMMENTS:

With regard to the first issue, the authority for establishment of a physical fitness program is found in 5 U.S.C. § 7901 permitting the establishment of a health service program which can include preventive health programs. Section (a) of the statute states that the establishment of such a program must be "within the limits of appropriation available." Section (b) states " a health service program may be established by contract or otherwise."

The use of facilities by both patients and employees is implied by section 7901 to the extent necessary to implement its provisions. Thus, the statute does not require the construction of totally separate facilities in every Agency nor does it make special provisions for VA facilities in that regard. There is no restriction in

the statute limiting the program to one particular physical location within an Agency.

There is a longstanding medical program for VA employees currently in operation pursuant to the statute in question. It requires the use of examining rooms and facilities which might also be used by VA patients. There employees' health services are paid form the medical care appropriations. The fitness program is an extension of the health care services currently being offered and logically, may be paid from the same funds. The General Counsel, in an opinion to the Chief Medical Director dated July 9, 1980 (7-2 Medical Treatment-Innoculations), concluded that the cost of flu immunization injections for Department of Medicine and surgery employees could legally be paid from medical care appropriations because "these are not activities necessarily provided for the benefit of the employee; rather, they are activities authorized and directed by DM & S management as an important part of the provision of medical benefits to eligible beneficiaries. There is obviously a direct relationship between the quality of health care provided to veterans ... and the maintenance of well-being in those charged with the responsibility for patient care." In our view, the same rationale applies in the case of the physical fitness program thus permitting the costs of the programs to be paid from medical care appropriations. In the case of the Central Office a contract has been entered into with a private party to implement the program. This is probably due to the fact that there was no existing facility which could be taken advantage of. By contrast, at VA medical centers, the existence of exercise equipment makes the implementation of the program extremely cost efficient enabling the program to be administered within available appropriations as required by the statute.

Another example of the permitted use of VA equipment by both VA employees and patients is found at 38 U.S.C. § 233 which allows the Administrator to "provide recreational facilities, supplies, and equipment for the use of patients in hospitals, and employees in isolated installations." The Personnel Policy Manual, MP-5, Part I, Chapter 90 regulates use of the equipment to avoid interference with patient needs. The above statute, although not controlling in the matter in question, is an indication of legislative intent to provide for the well-being of VA employees consistent with patients' needs.

With regard to the second issue, government liability for injuries sustained by employees while participating in the fitness program is affected by the Federal Employees' Compensation Act (FECA), at 5 U.S.C. Chapter 81 and the Federal Torts Claims Act (FTCA), at 28 U.S.C. § 1346(b). FECA is an exclusive no-fault remedy for federal employees who are injured while in the performance of official duties. Compensation is determined by the Office of Workers' Compensation Programs which is part of the Department of Labor. Decisions on claims are final and no judicial appeal is available. The statute requires that the employee be injured in the performance of duty. 5 U.S.C. §§ 8102 and 8103. Whether or not an employee is engaged in the performance of duty is a factual

determination made by the Department of Labor in each case. Appellate courts which have interpreted the words "while in the performance of his duty" have held that the injury must arise out of the special zone of danger created by an obligation or condition of employment. Wright v. United States, 717 F.2d 254, 257 (6th Cir.1983). A strong argument can be made that compensation for injuries world be authorized by and limited to FECA on the basis that the fitness program benefits the VA by improving employee morale and health and is available only to VA employees on VA premises. The program is financed by the VA and participation would be encouraged. In an illustrative case, the Federal Employees Compensation Appeals Board has decided that injury sustained in an off Government premises softball game by a Federal Employee, while off duty, was covered under FECA because the Government was promoting the game and was involved in its financing. Dustin, 33 ECAB 571 (1983). In sume, it appears that even though an employee participating in the fitness program is off duty, he or she may nevertheless be covered by FECA. This office cannot, however, supply a definitive answer on the issue of FECA coverage because of the importance of the facts of each particular case and the willingness of the courts to substitute their judgment for that of the Department of Labor. The issue of liability for individuals is treated differently under federal law. FECA protects only the Government from suit, not an employee, injured on the job and covered by FECA, has been held to retain the right to sue an individual co-worker who negligently caused the injury. Allman v. Hanley, 302 F.2d 559 (5th Cir.1962). Should an employee who administers the fitness program be sued, however, the defense of immunity can be raised by that employee. In Harlow v. Fitzgerald, 102 S.Ct. 2727, 2738 (1982) it was held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." It can reasonably be argued that engaging in an Agency- promoted and sponsored fitness program constitutes a discretionary function which shields the employee from civil liability in accordance with Harlow v. Fitzgerald, supra.

An exception to the ability of an individual to sue the government within FECA is found at 28 U.S.C. § 2671 which states that a contractor with the United States is not a Federal agency for the of the Act. Consequently operation of the fitness center by a contractor immunized Government from responsibility for negligent injury to a participant. In United States v. Orleans, 425 U.S. 807, 813-814 (1976) it was held that if the detailed physical performance of the tasks assigned is under the control of the contractor, the Government is exempt from liability. The fitness program at Central Office is contracted to a private party. A review of the Request for Procurement indicates that control of the performance of the tasks is left to the contractor. The government should therefore be free from any liability for injury to a participant based on the independent contractor's actions. The same principles would apply if other VA fitness programs are operated similarly to the Central Office program.

HELD:

(1) There is ample authority for the joint use by VA employees and patients of equipment paid for by medical care appropriations in order to implement a fitness program pursuant to 5 U.S.C. § 7901.

(2) The liability of individuals is extremely limited and should not act as a deterrent to use of the facilities. Under most foreseeable circumstances, the liability of the government should be limited to that which is permitted under FECA. 5 U.S.C. § 8147 provides for Agency contribution to the employees compensation fund based upon actual cost assessed by the fund. Pursuant to section 8147 "each agency ... shall include in its annual budget estimates for the fiscal year beginning on the next calendar year a request for an appropriation in an amount equal to the costs." The liability costs of the fitness programs can be contained by careful management directed at preventing employee injury.

VETERANS ADMINISTRATION GENERAL COUNSEL
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