DATE: March 11, 1991 O.G.C. PRECEDENT 49-91

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FROM: General Counsel (02)

SUBJECT: Patient Meal Preparation Program as a Form of Rehabilitation. (This opinion, previously issued as Opinion of the General Counsel 6-88, dated July 20, 1988, 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: District Counsel

QUESTIONS PRESENTED:

(1) May VA expend funds for a program to allow patients to purchase and prepare food, and then serve each other meals?

(2) If so, may VA charge the patients for the meals they receive as part of the program?

(3) May donations be used to help fund the rehabilitation program?

COMMENTS: As discussed below, a VA medical center may conduct a program to allow veterans to purchase food and prepare and serve each other meals as a form of medical (but not vocational rehabilitation. The center may not, however charge veterans for the meals consumed. Donations to the General Post Fund may be used to help fund such a program.

The administrator is authorized by 38 U.S.C. § 612 to furnish eligible veterans with outpatient medical services. The term "medical services" is defined in 38 U.S.C. § 601(6) as including "rehabilitative services," which are in turn defined in 38 U.S.C. § 601(8).

> (8) the term "rehabilitative services" means such professional, counseling, and guidance services and treatment programs (other than those types of vocational rehabilitation services provided under chapter 31 of this title) as are necessary to restore, to the maximum extent possible, the physical, mental and psychological functioning of an ill or disable person.

Our office has held that the definition of "rehabilitative services" reflects a distinction between the concept of "rehabilitation medicine," which the Department of Medicine and Surgery is authorized to conduct, and vocational rehabilitation which the Department of Veterans Benefits conducts under 38 U.S.C. chapter 31. Digested Opinion, 7-7-78 (15-3 Allowances and Awards). Whether the proposed meal preparation activity can be construed to be a "rehabilitative service" is ultimately for the Chief Medical Director to decide.

Medical rehabilitation is not specifically defined in VA policy manuals, but the types of rehabilitation activities identified in the Rehabilitation Service Manual, M-2, Part VIII, suggest that it means activities that are part of therapy directed to a patient's recovery to enable the patient to function in the community. Undigested Opinion, 3-6-79 (15-Rehabilitation). In OP. G.C. 5-73 (8-15-73), we stated that VA has authority to operate cooperative living facilities and therapeutic communities for treatment and rehabilitation of patients with psychiatric disabilities and alcohol or drug abuse disabilities. In describing such therapeutic communities in that opinion, we wrote,

> [t]he emphasis would be upon rehabilitative measures, designed to ready the veteran for outside placement in the community, either in his own home, a foster home, or some other suitable facility, within one year. The veteran would learn self-sufficiency, would develop confidence to overcome obstacles, and would learn how to function in society despite his handicaps.

See also, Undigested Opinion, 3-21-74 (7-6a Therapeutic Communities) (authority for half way houses for the rehabilitation of SCI patients.) The albany VA Medical Center proposal to help chronically mentally ill patients learn how to purchase food, and prepare and serve meals, is apparently being viewed as a type of rehabilitative activity which could help them learn to function independently in a noninstitutional setting in the community. We are not

inclined to challenge that determination. Having said that, however, we caution that this principle is not unlimited. There may be many types of patient activity that have a rehabilitative impact but which exceed the scope of VA's authority. Section 612 provides that only services determined to be needed may be furnished by the Administrator. That language necessarily has the effect of limiting the kinds of rehabilitative services which VA might offer its patients.

In analyzing whether meal preparation and serving by veterans could be a form of rehabilitation, we considered prior opinions of this office which held that VA lacks authority to furnish veterans with the services of a homemaker (to include meal preparation). Digested Opinion, July 9, 1980 (7-7 Hospital Based Home Care); Digested Opinion, July 14, 1986 (7-2 Medical Treatment - Psychiatric). Those cases differ from the instant case. They involved the question of VA provision of daily maintenance type services to veterans unable to provide the services to themselves. This case, on the other hand, involves a stated intent to rehabilitate chronically mentally ill veterans by letting them participate in activities that will help teach them daily living skills they can use to provide for themselves. In this case, the desired benefit is the rehabilitation, not the meal. In the earlier cases the benefit was the meal itself.

With regard to teaching veterans marketable culinary skills, medical center officials should be aware that the Department of Medicine and Surgery does not have legal authority to conduct vocational rehabilitation programs of the kind conducted by the Department of Veterans Benefits. Such vocational programs, broadly aimed at restoring a veteran's employability, are available only for veterans eligible for those benefits under 38 U.S.C. chapter 31, generally veterans with service-connected disabilities. Digested Opinion, 3-6-79 (15-Rehabilitation). We would, therefore, suggest that officials be cautioned against structuring the food service activities as a vocational rehabilitation program. That is not to say, however, that vocational rehabilitation cannot occur incidental to the therapeutic activity aimed at restoring the veteran's physical and mental health. Op. Sol. 560-46, December 20, 1946.

The Albany Medical Center has proposed that veterans participating in the meal preparation program be charged for the meals they receive to the extent they have the ability to pay. In our view, charging for these meals, even though

it might be considered therapeutic in nature, would be inconsistent with the over all statutory scheme of title 38, United States Code, which is dedicated to providing benefits to veterans, almost without cost in all but a few instances. Section 201 of title 38 provides that VA is an independent Federal agency "especially created for or concerned in the administration of laws relating to the relief and other benefits provided by law for veterans, their dependents, and their beneficiaries." (Emphasis added.) In title 38, Congress has authorized VA to provide veterans with a wide array of services as well as direct monetary benefit payments.

Health care services for veterans are authorized by various sections of 38 U.S.C. chapter 17. Thus, hospital and nursing home care, and outpatient medical services are authorized by 38 U.S.C. §§ 610 and 612. Those sections set forth specific eligibility criteria which veterans must meet before they may receive benefits. In both sections, Congress provided that certain nonservice-connected veterans with relatively high incomes, or levels of assets, could receive health care benefits only if they agree to pay the VA a copayment to partially offset the cost of providing the care. No other veterans are required to make payment for VA health care benefits. (We note, however that in section 613, Congress has authorized the Administrator to provide certain veterans' spouses, survivors, and dependents with medical benefits under the "CHAMPVA" program to the same or similar limitation applicable to the Department of Defense's CHAMPUS program. Among those limitations are certain copayment requirements.) The only other authority in chapter 17 for charging fees for health care services is in 38 U.S.C. § 611, which permits charging for care furnished nonveterans on a humanitarian basis in emergencies, and care furnished in certain other very narrow circumstances. All other direct health care is furnished on a cost-free basis.

Congress has granted the Administrator authority to charge a fee in connection with receipt of nonmedical benefits in only limited instances. Thus, 38 U.S.C. § 1829 permits charging veterans a fee in connection with their obtaining a housing loan guaranteed or insured by the VA, and 38 U.S.C. § 3202 permits charging veterans a fee for fiduciary services they receive in connection with receipt of veterans benefits. It is also noteworthy that Congress directed the Administrator under 38 U.S.C. § 4201 to make available to hospitalized veterans (and certain others) at reasonable prices articles of merchandise and services essential to their comfort and well-being, through a Veteran's Canteen

Service. The availability of these services is in the nature of a benefit provided to these veteran patients. Congress clearly intended that patients would pay for the services provided. (In contrast, it authorized the Administrator to provide tobacco to such patients at no charge. 38 U.S.C. § 615.) Finally, recently enacted Public Law 100-322 amended 38 U.S.C. § 111 to authorize the Administrator to charge veterans a "deductible" in connection with the receipt of VA travel benefits. Imposition of the deductible would either preclude any beneficiary travel payment, or would be deducted from any payment VA would otherwise make.

In construing title 38 to determine whether authority might exist to charge for the meals in question, we must consider the entire title as a whole statutory scheme to provide benefits to veterans. Richards v. United States, 369 U.S 1, 7 L.ED.2D 492, 82 S. Ct. 585 (1962). In construing title 38 or any other body of law, courts have long applied a principle of statutory construction holding that if the legislature specifically authorizes an activity in only certain circumstances (in this case the charging of fees in connection with only a limited number of VA benefits) there is an implication that authority for the activity does not exist in other circumstances. Marshall v. Gibson's Products, Inc. of Plano, 548 F.2d 668 (1978). (See also Sands, Sutherland Statutory Construction, 4th Ed., § 47.23, and cases cited therein.) As we pointed out above, Congress has specifically authorized charging fees for benefits in certain limited circumstances, which do not include fees for meals (except purchased in Veterans Canteen Service facilities) in outpatient programs. Accordingly, we believe the Albany Medical Center is precluded from imposing any charge for meals which veterans would prepare, serve and consume in the proposed outpatient program. In reaching this conclusion we do not intend to minimize in any way the therapeutic value that may be associated with these patients paying for their meals.

The Albany Medical Center's request for an opinion also mentioned that they hoped to fund part of the proposed meal preparation program through "volunteer donations." We recommend that your opinion advise the center that donations intended for the program may be accepted for the program under the gift acceptance authority in 38 U.S.C. §§ 5101, 5103. To assure that the program receives the funds, they should be given to the General Post Fund with specific instructions that the gift be used for the program in question. Guidance on such gifts may be found in Chapter 4

of the DM&S Supplement to MP-4, Pt VII.

HELD:

(1) A VA medical center may conduct a program to allow veterans to purchase food and prepare and serve each other meals as a form of medical (but not vocational) rehabilitation.

(2) The center may not, however, charge veterans for the meals consumed.

(3) Donations may be used to help fund such a program.

Raoul L. Carroll