

Date: March 6, 1995

O.G.C. Precedent 7-95

From: General Counsel (022)

Subj: Fees for Obtaining Records; Duty to Assist Claimants

To: Director, Compensation & Pension Service (213B)

QUESTIONS PRESENTED:

1. In light of 38 U.S.C. § 5106, may the National Archives and Records Administration (NARA) charge a fee for providing the Department of Veterans Affairs (VA) with copies of documents from its records?
2. Does VA's statutory duty to assist claimants under 38 U.S.C. § 5107(a) require that VA pay fees charged by Federal, state, or local agencies or private sources to obtain copies of records maintained by those sources?

COMMENTS:

1. These questions arose as the result of the policy of the NARA to charge other Federal agencies for copies of documents from its records. Section 2116(c) of title 44, United States Code, provides that the Archivist of the United States may not charge for making copies of NARA records for official use by the United States Government unless appropriations available for this purpose are insufficient to cover the cost of performing the work. In 1985, the Comptroller General concluded that 44 U.S.C. § 2116(c) permits the NARA to charge Federal agencies for copies of documents if the NARA receives no appropriated funds specifically for the purpose of providing such copies. See 64 Op. Comp. Gen. 724, 726 (1985). With reference to the Comptroller General's decision, the Deputy Assistant Archivist for the National Archives has stated that the NARA receives no appropriated funds for reproduction services.
2. The provisions of 38 U.S.C. § 5106 require heads of Federal departments and agencies to "provide such information to the Secretary [of Veterans Affairs] as the Secretary may request for purposes of determining eligibility for or amount of benefits, or verifying other information with respect thereto." The plain language of 38 U.S.C. § 5106 contains no requirement that Federal agencies provide VA with information without charge. The

legislative history of the provision is equally silent in that regard. Although a statute that imposes a duty also confers all powers incidental and necessary to make the statute effective, the extension of a statute by implication must be necessary and not merely convenient. See 73 Am. Jur. 2d Statutes §§ 209, 262 (1974); 82 C.J.S. Statutes § 327 (1953). See also 2B Norman J. Singer, Sutherland Statutory Construction § 55.04 (5th ed. 1992). In the present situation, interpreting section 5106 to authorize VA to require that other agencies absorb reproduction costs in connection with VA requests for information would, in our view, be unwarranted. Since either VA or the claimant could pay reproduction costs, it is neither necessary nor incidental to fulfillment of the statutory directive that the agency supplying the information absorb the costs.

3. Under accepted rules of statutory construction, Federal statutes should be construed harmoniously. See 2B Norman J. Singer, Sutherland Statutory Construction § 53.01 (5th ed. 1992). Reading 44 U.S.C. § 2116(c) together with 38 U.S.C. § 5106 in order to give effect to the provisions of both statutes suggests that the latter statute should be construed as only imposing a duty on Federal agencies to provide information, not an obligation to supply information without charge, regardless of the availability of appropriated funds for that purpose. Further, to the extent the two statutes could be considered in conflict, specific provisions may generally be considered to prevail over general provisions, see 2A Norman J. Singer, Sutherland Statutory Construction § 46.05 (5th ed. 1992), and later enacted statutes generally take precedence over those enacted earlier, see United States v. Tynen, 78 U.S. (11 Wall.) 88, 92 (1870); In re Glacier Bay, 944 F.2d 577, 581-82 (9th Cir. 1991). Since section 2116 permits the NARA to charge Federal agencies for copies of records under specified circumstances, and section 5106 does not explicitly address the matter of fees, section 2116 may be considered controlling as applying to a particular agency and specifically addressing the issue of charges for copying records.

Further, since the substance of section 5106 was enacted in 1976, Pub. L. No. 94-432, § 403(2), 90 Stat. 1369, 1372 (1976), and the current language of section 2116 was enacted in 1984 as section 201 of Pub. L. No. 98-497, 98 Stat. 2280, 2292 (1984), the latter provision should be considered controlling as the later-enacted statute, to the extent of any conflict.

4. We also note that, as a general matter of administrative law, the heads of executive agencies have the authority to promulgate rules governing the copying of records and release of records to other government agencies. 2 Am. Jur. 2d Administrative Law § 120 (1994); see also 77 Am. Jur. 2d United States § 52 (1975).

Generally, a custodian of public records may charge a reasonable fee for furnishing a copy of a record. See 76 C.J.S. Records §§ 66, 128 (1994). If Congress had intended to override this recognized authority, it may be assumed that it would have done so in explicit terms. In this regard, when Congress sought to assure that veterans and Veterans Administration personnel could obtain copies of official records of the District of Columbia without charge, it enacted legislation specifically so providing. Act of December 3, 1945, ch. 513, 59 Stat. 591 (now codified as amended at 38 U.S.C. § 5703).

5. In view of the foregoing, we conclude that the NARA may charge VA for copies of records, notwithstanding 38 U.S.C. § 5106, so long as the NARA has no appropriation to cover reproduction costs.

6. The remaining question is whether VA is obligated to obtain on behalf of a claimant records for which a fee is charged. When a claimant submits a well-grounded claim for VA benefits, VA has a duty under 38 U.S.C. § 5107(a) to "assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title." This statutory "duty to assist" was intended to codify VA's "practices of providing claimants all reasonable assistance in the development of claims," including VA's self-imposed obligation under 38 C.F.R. § 3.103(a) to assist claimants in developing the facts pertinent to their claims. See S. Rep.

No. 418, 100th Cong., 2d Sess. 22 (1988) (emphasis added). Although the United States Court of Veterans Appeals (CVA) has held that the duty to assist, as defined in 38 C.F.R. § 3.159, requires VA to request both Federal and non-Federal records pertinent to a claim, see, e.g., Counts v. Brown, 6 Vet. App. 473, 478-79 (1994), appeal docketed, No. 95-7004 (Fed. Cir. Oct. 14, 1994), the CVA has not addressed the question of whether VA must pay any fees charged in connection with a request for records.

7. The resolution to this question appears to lie in the regulatory provisions of 38 C.F.R. § 3.159, which implement the statutory requirements of section 5107(a). That regulation provides:

When information sufficient to identify and locate necessary evidence is of record, the Department of Veterans Affairs shall assist a claimant by requesting, directly from the source, existing evidence which is either in the custody of military authorities or maintained by another Federal agency. At the claimant's request, and provided that he or she has authorized the release of such evidence in a form acceptable to the custodian thereof, the Department of Veterans Affairs shall assist a claimant by attempting to obtain records maintained by State or local governmental authorities and medical, employment, or other non-government records which are pertinent and specific to the claim. The Department of Veterans Affairs shall not pay any fees charged by the custodian for providing such evidence.

38 C.F.R. § 3.159(b) (emphasis added). The regulation goes on to provide that, "[s]hould its efforts to obtain evidence prove unsuccessful for any reason which the claimant could rectify, the Department of Veterans Affairs shall so notify the claimant and advise him or her that the ultimate responsibility for furnishing evidence rests with the claimant." 38 C.F.R. § 3.159(c).

8. When section 3.159 was proposed, VA clarified its intention with respect to the interaction of these provisions, stating that, "[s]hould [VA] be unable to acquire necessary evidence for any reason which the claimant could rectify by paying a fee, . . . etc., VA will so notify the claimant and advise him or her that the ultimate responsibility for providing the requested evidence rests with him or her." 55 Fed. Reg. 31,192, 31,193 (1990) (emphasis added). Further, VA made clear its intention that the prescription on paying fees for evidence would apply to evidence requested from both Federal and non-Federal sources. After reviewing various categories of military, Federal, state, and local government, and non-government records, VA stated that it would request such records on behalf of a claimant but "will not pay any fees charged for furnishing requested information." Id. See also Veterans Benefits Administration Adjudication Procedure Manual, M21-1, part III, ch. 1, para. 1.05.c. ("VA is not authorized to pay a fee for copies of public documents or other evidence. . . . If payment of a fee is required to obtain a document, [the adjudicator is to] advise the claimant that VA is not authorized to pay the fee and advise him or her how to secure the evidence.").

9. VA's policy, embodied in section 3.159, that claimants must bear any expense of obtaining records, is consistent with not only the language of 5107(a), which states the duty to assist in general terms, but also with the legislative purpose of the statute, which, as noted above, was to ensure VA's "reasonable assistance" in the development of claims. Assistance in requesting, but not paying for, records is reasonable in light of the potentially large financial burden VA could incur if it were obligated to pay for the numerous records it must seek on behalf of claimants.

10. Further, the provisions of 38 U.S.C. § 501(a) authorize the Secretary of Veterans Affairs "to prescribe all rules and regulations which are necessary or appropriate to carry

out . . . and are consistent with" the laws administered by VA. Section 501(a)(1) authorizes regulations, such as section 3.159, which relate to "the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws." An administrative regulation such as section 3.159, which resolves an issue not specifically addressed by Congress through legislation, is valid if plausible or reasonable, and not manifestly inconsistent with law. See Rust v. Sullivan, 111 S. Ct. 1759, 1767 (1991); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). We consider the regulation consistent with the statute it implements, in light of the very general nature of the statutory provision establishing the duty to assist. Further, in light of the statutory directive to "assist" a claimant, it is not unreasonable to place on the claimant some share of the responsibility for development of evidence to support a claim. Therefore, we consider the regulation to reflect a reasonable construction of the statute.

HELD:

1. The National Archives and Records Administration may charge a fee for providing the Department of Veterans Affairs with copies of records requested in connection with a benefit claim, notwithstanding 38 U.S.C. § 5106, which requires that the head of any Federal agency provide information to VA upon request for the purpose of determining benefit eligibility.

2. Under 38 U.S.C. 5107(a), which establishes the Secretary of Veterans Affairs' duty to assist claimants in developing the facts pertinent to their claims, the Secretary may require claimants to assume responsibility for payment of

any fees associated with obtaining copies of records maintained by Federal, state, or local agencies or private sources.

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