Date: January 22, 1997 VAOPGCPREC 4-97

From: General Counsel (022)

Subj: Board of Veterans' Appeals Jurisdiction in Matters Pertaining

to Garnishment of Benefits

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

a. May the action of a Department of Veterans Affairs (VA) regional office withholding a portion of a veteran's compensation and paying it to the veteran's former spouse pursuant to a state-court support order be considered an apportionment under 38 U.S.C. § 5307?

b. Does the Board of Veterans' Appeals (Board) have jurisdiction to review a VA regional office decision to withhold a portion of a veteran's compensation benefits pursuant to a state-court support order and 5 C.F.R. §§ 581.103 and 581.402?

DISCUSSION:

1. Pursuant to 38 U.S.C. § 5305, the veteran has waived his entitlement to receive military retired pay (\$847 per month as of August 3, 1992) in order to receive the full amount of disability compensation payable to the veteran by VA (\$1,730 per month as of December 1, 1992). Under 42 U.S.C. §§ 659(a) and 662(f)(2), the amount of VA compensation paid in lieu of military retired pay is, with certain limitations, subject to garnishment for purposes of satisfying a veteran's childsupport or alimony obligations. In 1986, the Superior Court of the State of Arizona, County of Maricopa, ordered the veteran to pay support to the veteran's former spouse in the amount of \$750 per month, upon the former spouse's release from the hospital. In April 1992, the Maricopa County Public Fiduciary, as quardian for the former spouse, requested a VA regional office to furnish "the requisite material to institute garnishment proceedings." In June 1992, the regional office informed the veteran that it had awarded the veteran's <Page 2>

former spouse an apportionment of the veteran's benefits in the amount of \$750 per month.

- The veteran's claims file was transferred to another regional office, and the veteran, in July 1992, requested a reduction in the amount of benefits being withheld. regional office informed the veteran that the reduction was made pursuant to the state-court support order and 5 C.F.R. § 581.103, a regulation issued by the Office of Personnel Management to implement the garnishment provisions of 42 U.S.C. § 659. The regional office further stated that the veteran's request could not be accepted as a notice of disagreement and that the veteran should seek legal counsel regarding the veteran's right to contest the amount of the support obligation. Nonetheless, the regional office subsequently concluded that the regulations governing garnishment in 5 C.F.R. part 581 permitted withholding of only \$508 per month of the veteran's benefits and reduced the withholding to that amount. The veteran thereafter filed a "notice of disagreement" asserting that the amount withheld should be further reduced to \$339 per month. In a November 9, 1993, opinion, a VA district counsel concluded that the veteran was challenging a VA decision interpreting and applying Federal regulations in determining the amount of withholding and that the matter could, therefore, be appealed to the The District Counsel stated that, if the veteran were challenging the propriety of the state-court order, the veteran's recourse would be with the state court rather than VA.
- 3. In the veteran's substantive appeal, the veteran asserted that the amount of benefits withheld by VA was inconsistent with an Arizona statute limiting the amount of earnings which may be subject to garnishment. Further, in a personal hearing at the regional office, the veteran asserted that VA's action in withholding benefits was not in accordance with the Uniformed Services Former Spouses Protection Act. You have requested our opinion as to whether the Board may exercise jurisdiction over the appeal, either on the basis that the withholding constituted an apportionment under 38 U.S.C. § 5307 or on the basis that the appealed issues are otherwise within the Board's jurisdiction under 38 U.S.C. § 7104(a).

<Page 3>

4. In our view, the issues presented in the opinion request arise primarily due to VA's apparent noncompliance, in this

case, with the statutory and regulatory requirements governing garnishment of Federal compensation and benefits. The applicable provisions of 42 U.S.C. § 659(a) and 5 C.F.R. § 581.301 authorize Federal agencies to garnish Federal payments only pursuant to proper "legal process" brought to enforce a support obligation. The term "legal process" is defined by statute and regulation to mean "any writ, order, summons, or other similar process in the nature of garnishment" which is issued by a court of competent jurisdiction or an authorized official pursuant to the order of such court or state or local law and which "is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments." 42 U.S.C. § 662(e); see also 5 C.F.R. § 581.102(f). Garnishment is a statutory remedy governed by state law, Millard v. United States, 916 F.2d 1, 3 (Fed. Cir. 1990), cert. denied, 500 U.S. 916 (1991), and compliance with state-law requirements governing petitioning for a writ of garnishment or similar process and bringing the garnishee before the court is generally required before a garnishment may be made effective. 6 Am. Jur. 2d Attachment and Garnishment §§ 330, 332, 335 (1963). Section 659 of title 42, United States Code, does not provide independent authority for garnishment of Federal compensation or benefits or Federalcourt jurisdiction over garnishment matters, but merely makes the United States subject to state garnishment orders to the See Diaz v. Diaz, 568 F.2d same extent as private persons. 1061, 1063 (4th Cir. 1977); Wilhelm v. United States Dep't of Air Force, Accounting and Finance Ctr., 418 F. Supp. 162, 164 (S.D. Tex. 1976). Accordingly, section 659 permits garnishment of VA compensation paid in lieu of military retired pay only where VA has received a garnishment order or similar legal process issued by a state court or an authorized official directing VA to withhold such payments for purposes of enforcing a support obligation.

5. The claims file in the instant case does not contain any garnishment order or other document which would satisfy the statutory requirement of "legal process." Rather, it appears

<Page 4>

that the garnishment was implemented by VA in response to a letter from the guardian of the veteran's former spouse requesting information for purposes of initiating garnishment proceedings. The guardian transmitted a copy of the order of

the Superior Court of Arizona directing the veteran to pay support to the former spouse. However, the support order does not constitute "legal process" for purposes of 42 U.S.C. § 659 because it was not directed to VA and was not issued for the purpose of compelling VA to withhold payments to the veteran or make payments to the former spouse. Accordingly, it appears that garnishment should not have been implemented in this case.

Arizona law establishes specific procedures for obtaining legal process for garnishment. To obtain a writ of garnishment, a judgment creditor must file an application with the appropriate state court or other official. Ariz. Rev. Stat. Ann. \$\$ 12-1598.02 and 12-1598.03 (1994 & Supp. 1995). court or other official then issues a writ and summons of garnishment to obtain service of legal process upon the garnishee commanding the garnishee to appear before a state court within a specified time to answer the writ. Id. § 12-1598.04 (1994). The garnishee must respond to the court within ten days of service, stating, among other things, whether the garnishee owes money in the nature of earnings to the judgment debtor. Id. §§ 12-1598.06 and 12-1598.08. Upon receipt of the garnishee's reply, the court may order a continuing garnishment of the funds held by the garnishee. § 12-1598.10 (Supp. 1995). If the Court orders garnishment, the garnishee must deliver to the judgment creditor and debtor nonexempt earnings statements specifying the amount of money it owes to the debtor which is subject to garnishment. §§ 12-1598.11 and 12-1598.16.K (1994 & Supp. 1995). Any party having an objection to the writ of garnishment, the answer of the garnishee, or a nonexempt earnings statement, including any objections to the amount withheld or any claim of exemption, may file a written objection with the court and obtain a hearing on the objection. *Id.* § 12-1598.07 (1994). Arizona statutes governing issuance of legal process for garnishment thus establish specific procedures for resolving any objections to garnishment and any disputes as to the amount of garnishment. Accordingly, the state proceedings for issuance of legal process required by 42 U.S.C. § 659(a) would

<Page 5>

have provided a forum for resolving the dispute presented in this case as to the proper amount of garnishment.

7. As the foregoing discussion indicates, the requirement for "legal process" issued pursuant to state garnishment proced-

ures serves to limit the role of Federal agencies in implementing garnishments. Because garnishment is a matter of state law, the decision as to whether, and to what extent, to order garnishment is a matter for determination by the states. The legal process served on an agency may specify the manner and amount of garnishment, and any disputes regarding the manner or amount of garnishment generally must be resolved in the state-court garnishment proceedings. See Millard, 916 F.2d at 7-8. Further, regulations implementing 42 U.S.C. § 659 narrowly limit the scope of an agency's determinations with respect to garnishment orders. Pursuant to 5 C.F.R. § 581.305, an agency which receives legal process for garnishment must comply with such process unless one of the following circumstances is present:

- (1) The legal process does not, on its face, conform to the laws of the jurisdiction from which it was issued;
- (2) The legal process would require the withholding of funds not deemed moneys due from, or payable by, the United States as remuneration for employment;
- (3) The legal process is not brought to enforce legal obligations for alimony and/or child support;
- (4) The legal process does not comply with the mandatory provisions of 5 C.F.R. part 581; or
- (5) An order of a court of competent jurisdiction enjoining or suspending the operation of the legal process has been served on the agency.

Consequently, the scope of the agency's determination is limited to the bases specified in the regulation and the agency generally may not inquire into the validity of the legal process on any other basis. See Millard, 916 F.2d at 7-8 (claims that garnishment was unconstitutional and inconsistent with Federal statute must be presented to state court and are not for determination by garnishee agency).

<Page 6>

8. Because the "legal process" required by 42 U.S.C. § 659(a) and 5 C.F.R. § 581.301 has not been received in this case, it cannot be determined whether a state court of competent jurisdiction would have ordered garnishment of the veteran's VA compensation or to what extent it would have authorized such garnishment. In the absence of the requisite legal process, VA has no authority to withhold a portion of the veteran's VA compensation under 42 U.S.C. § 659(a) and implementing regula-

tions for the benefit of the former spouse. We believe it will be necessary to discontinue the "garnishment" and to inform the parties that VA may not make any further payments to the former spouse in the absence of valid legal process secured through state garnishment procedures. Consequently, we do not believe it will be necessary for the Board to address the question of its jurisdiction over the appeal with respect to the amount of benefits which may be withheld from the veteran.

9. Although we believe that the appeal in this case will be mooted when the Veterans Benefits Administration is informed of our views concerning the propriety of the subject benefit withholding, we will address the questions posed in your opinion request, as they are likely to have a bearing on future cases. You have asked whether the September 1993 regional office decision to withhold a portion of the veteran's compensation benefits pursuant to 5 C.F.R. §§ 581.103 and 581.402 was essentially an apportionment action under 38 U.S.C. § 5307. We conclude that the regional office decision was not an apportionment action under section 5307. Although the regional office on several occasions referred to its action in withholding benefits and paying them to the former spouse as an "apportionment," it is clear from the documents in the claims file that the regional office did not purport to act pursuant to the apportionment authority of section 5307. The November 1993 statement of the case stated the issue as "[t]he percentage amount being withheld for garnishment of military retired pay" and indicated that the withholding was implemented pursuant to the state-court support order and 5 C.F.R. §§ 581.103 and 581.402. Similarly, in a July 1, 1993, letter to the veteran, the regional office stated that "[t]he court has ordered us to deduct the apportioned share for your ex-wife in accordance with 5 CFR 581.103." The regional office did not purport to rely upon

<Page 7>

- 38 U.S.C. \S 5307, which does not authorize an apportionment to a veteran's former spouse. Accordingly, there is no basis for concluding that the regional office awarded an apportionment under section 5307.
- 10. You have asked whether the September 1993 regional office decision conferred a jurisdiction-creating substantive benefit on the veteran. We note, initially, that, as is clear from the ensuing discussion, the Board's jurisdiction is not limited to decisions conferring a benefit. Accordingly, we

have construed your request as asking whether the Board would have jurisdiction to review a regional office decision concerning garnishment under 42 U.S.C. § 659(a) and 5 C.F.R. part 581.

- 11. Pursuant to 38 U.S.C. § 7104(a), the Board has jurisdiction to review "[a]ll questions in a matter which under section 511(a) of this title is subject to decision by the Secretary." Section 511(a) authorizes the Secretary to "decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." See also 38 C.F.R. § 20.101(a) (Board's jurisdiction extends to review of all decisions "under a law that affects the provision of benefits by the Secretary to veterans or their dependents or survivors."). Thus, the Board's appellate jurisdiction is generally coextensive with the Secretary's authority under 38 U.S.C. § 511(a) to render initial decisions.
- 12. Pursuant to the plain language of section 511(a), the Secretary's decisional authority is not limited to questions based on provisions of title 38, United States Code, conferring entitlement to benefits, but encompasses questions based on "a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." The history of section 511(a) indicates that Congress intended to provide the Secretary and the Board with exclusive authority to decide matters pertaining to the provision of VA benefits, including matters arising under a statute outside of title 38, United States Code, to the extent that such a statute affects the provision of VA benefits. H.R. Rep. No. 963, 100th Cong., 2d Sess. 19-22, 27 (1988), reprinted in

<Page 8>

1988 U.S.C.C.A.N. 5782, 5800-04, 5809. Accordingly, section 511(a) authorizes the Secretary to decide claims "under a law that affects the provision of benefits by the Secretary," regardless of whether the law is codified in title 38, United States Code, and regardless of whether the law specifically provides benefits to veterans or is merely a law of general applicability which affects the provision of benefits to veterans. Your opinion request suggests that 38 C.F.R. § 20.101(a) limits the Board's jurisdiction over matters arising under a statute outside of title 38, United States Code, to those matters specifically identified in section 20.101(a) (11)-(13). We note that section 20.101 does not

purport to limit the Board's jurisdiction, but merely states that issues over which the Board has jurisdiction "include, but are not limited to" the matters specifically identified in the regulation.

13. Where garnishment of VA compensation is sought pursuant to 42 U.S.C. §§ 659 and 662, those statutes might be viewed as laws "affect[ing] the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans" within the meaning of section 511(a), inasmuch as the garnishment permitted by those statutes would limit the amount of benefits which VA could pay to an otherwise entitled veteran. view, however, those statutes generally may not be construed to provide a basis for the Board's jurisdiction because the statutes, and the regulations implementing them, clearly contemplate that most matters relating to garnishment will be subject to the exclusive jurisdiction of the state courts. noted above, 42 U.S.C. § 659 does not create a Federal right to garnishment, nor create any Federal jurisdiction over garnishment proceedings, but merely waives the sovereign immunity of the United States with respect to garnishment proceedings. The effect of section 659 is to subject Federal agencies to the jurisdiction of state courts in garnishment proceedings to the same extent as private persons. v. Rush, 767 F.2d 800, 809 (11th Cir. 1985). The agency's role is essentially that of a party to the garnishment proceedings, and the agency's rights and obligations as a party will be the same as those relating to private employers under state garnishment laws. United States v. Morton, 467 U.S. 822, 831 (1984); Loftin, 767 F.2d at 809.

<Page 9>

14. Pursuant to delegations of authority from Congress and the President, the Office of Personnel Management has issued regulations, at 5 C.F.R. part 581, to implement the garnishment provisions of 42 U.S.C. § 659. See 42 U.S.C. § 661; Exec. Order No. 12,105, 43 Fed. Reg. 29,465 (1978); Exec. Order No. 12,107, 44 Fed. Reg. 1055 (1979). The Supreme Court has held that, because the regulations in part 581 were issued pursuant to specific statutory delegation of authority to construe 42 U.S.C. § 659, they must be given controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute. Morton, 467 U.S. at 834. Section 659 and the implementing regulations narrowly define the agency's role with respect to garnishment. As noted above, the agency is required to comply with the legal process unless one of the

circumstances specified in 5 C.F.R. \$ 581.305(a) is present. Further, the agency is required to respond to the legal process within thirty days of service or such longer period as may be prescribed by state law. 42 U.S.C. \$ 659(d); 5 C.F.R. \$ 581.303. When the agency determines that it cannot comply with the legal process, it is required to notify the court of its objections to compliance with the process. 5 C.F.R. \$ 581.305(c).

The statutory and regulatory scheme clearly contemplates that challenges to the agency's decision to honor or not to honor legal process are generally to be resolved by the state court having jurisdiction over the garnishment proceedings. The requirement that VA respond to the legal process within thirty days of service would obviously preclude the Board from reviewing, within the time limit for VA's response, a regional office decision as to whether, and to what extent, VA may honor legal process for garnishment. The apparent purpose of requiring the agency to respond to the legal process within thirty days is to provide for quick and definite resolution of garnishment matters. The Supreme Court has stated that the purpose of section 659 is to provide for speedy and efficacious resolution of garnishment matters and to simplify the task of Federal agencies in deciding whether to comply with garnishment orders. Morton, 467 U.S. at 831 n.12, 833-34. The requirement for a prompt response to the legal process is thus intended to enable the state court to quickly and conclusively resolve the garnishment proceedings. Accordingly, the statute and regulations clearly contemplate that the state

<Page 10>
court will rely upon the agency's response in determining
whether further action is needed to enforce its legal process.

16. Because section 659 merely provides that a Federal agency may be made a party to state garnishment proceedings, but does not vest Federal agencies with authority over garnishment proceedings, it is clear that the state courts retain the authority to resolve all issues under state law pertaining to garnishment. The agency's role is generally limited to the functions specified in 42 U.S.C. § 659, the implementing regulations, and applicable state law. Although 5 C.F.R. § 581.305(a) in effect requires the agency to make a number of determinations before complying with legal process served upon it, the requirement in section 581.305(c) that the agency inform the state court of any objections to the legal process clearly indicates that the agency's determinations will be

subject to review by the court, rather than through any appeal to the agency or to a Federal court from the agency's determination. Accordingly, review by the Board of VA's determinations under section 581.305(a) would be inconsistent with the statutory scheme governing garnishment of Federal payments.

17. State courts having jurisdiction over garnishment proceedings are clearly competent to address challenges to the agency's determinations under 5 C.F.R. part 581. Accordingly, state courts have, in the context of garnishment proceedings, reviewed VA's determinations as to whether VA compensation benefits constitute moneys due or payable "based upon remuneration for employment" within the meaning of 42 U.S.C. Veterans Admin. v. Kee, 706 S.W.2d 101 (Tex. 1986); United States v. Murray, 282 S.E.2d 372 (Ga. Ct. App. 1981). State statutes or procedures governing garnishment will ordinarily provide procedures for resolving disputes concerning the sums held by the garnishee which are subject to garnish-Arizona law, for example, as noted above, requires a garnishee to file a statement specifying the amount of "nonexempt earnings" in its possession which are subject to garnishment and permits a party to the proceedings to file a written objection to that statement and to request a hearing before the state court on that issue. Ariz. Rev. Stat. Ann. §§ 12-1598.07, 12-1598.11, and 12-1598.16.K. (1994 & Supp. 1995). The availability of state procedures for challenging

<Page 11>

VA's determinations under 42 U.S.C. § 659 and 5 C.F.R. part 581 further supports the conclusion that those provisions contemplate that VA's determinations will be subject to review in state court proceedings rather than by appeal to the agency or to the Federal courts.

18. For the foregoing reasons, we believe that the Board may not review VA's determinations made for purposes of state garnishment proceedings under 42 U.S.C. § 659 and the implementing regulations. The statute and regulations clearly contemplate that garnishment matters will be governed by state law and procedures and that VA's role will in effect be limited to that of a garnishee. Consistent with the statutory and regulatory scheme, when a continuing garnishment order has been implemented by VA, subsequent challenges to the order or requests for modification or discontinuance of the garnishment generally must be directed to the state court or official which issued the legal process, rather than to VA. Accord-

ingly, VA regional offices, as well as the Board, will generally be without authority to entertain claims for modification of garnishment implemented pursuant to legal process.

There may, however, be circumstances in which a claim relating to VA garnishment raises issues which are beyond the purview of any state proceedings. In such circumstances, VA would be required to address the claim insofar as it relates to the provision of VA benefits. For example, where, as in this case, VA undertakes garnishment in the absence of any state-issued legal process or any state garnishment proceedings, the veteran may lack any state remedy to compel VA to cease the unauthorized garnishment. A claim for discontinuance of the unauthorized garnishment would not implicate any state-court proceedings or challenge any state-issued legal process, but would involve issues relating to VA's statutory authority to undertake garnishment in the absence of such legal process. Because that claim would not implicate state proceedings or state-issued legal process, nothing in 42 U.S.C. § 659 or the implementing regulations would preclude a VA regional office or the Board from adjudicating it. Moreover, because the veteran would lack any other remedy to challenge the garnishment, it would ordinarily be necessary for VA to address the claim.

<Page 12>

- Further, in the event that VA withholding pursuant to a garnishment order is unlawful or excessive, a veteran may lack a state-court remedy to recover amounts improperly withheld. Although state courts have jurisdiction to order garnishment of VA compensation paid in lieu of retired pay, and to interpret and enforce their garnishment orders, such courts may lack authority to compel VA to pay the veteran any amounts improperly withheld. Section 659 merely waives the Government's sovereign immunity to the extent of authorizing garnishment of certain Federal payments, see Rose v. Rose, 481 U.S. 619, 635 (1987); it does not clearly authorize state courts to order Federal agencies to pay to a debtor any amounts improperly withheld. Accordingly, where a veteran seeks payment from VA of amounts wrongfully withheld by VA for purposes of garnishment, the appropriate VA regional office and the Board would, in our view, have jurisdiction over the claim.
- 21. We do not mean to suggest that VA may entertain a challenge to state-issued legal process or a claim requiring in-

terpretation of the legal process merely on the basis that the claim seeks repayment of funds which are alleged to have been wrongfully withheld. To the extent a claim challenges the legal process or raises issues requiring interpretation of the legal process, the claim would be within the exclusive jurisdiction of the state court having jurisdiction over the garnishment proceedings. In contrast, however, where the only issue presented is whether VA has erroneously withheld a veteran's benefits in conflict with the unambiguous direction of a state court, the veteran's claim for payment of the erroneously withheld benefits would be within the jurisdiction of the VA regional office and the Board. For example, if the legal process clearly specifies the amount to be garnished and VA inadvertently withholds a greater amount, a claim for payment of the amount erroneously withheld would not involve issues of the validity or interpretation of the legal process, which are within the issuing court's jurisdiction, but would involve a challenge to VA's ministerial actions in making benefit payments and implementing the unambiguous garnishment order. Similarly, if a state court has issued an order terminating a garnishment and VA has inadvertently continued to withhold benefit payments for garnishment purposes, a claim to

<Page 13>

recover the amounts improperly withheld ordinarily would not involve a challenge to the validity or interpretation of the state legal process, but would relate primarily to VA's payment action and implementation of an unambiguous statecourt order. We believe such claims would be within the jurisdiction of the regional offices and the Board.

22. There may be other circumstances in which a claim relating to garnishment raises issues which are not subject to resolution in state-court proceedings and which may, therefore, be adjudicated by VA. As a general matter, however, any claim which challenges the validity or interpretation of legal process issued by a state court or official must be resolved through appropriate state proceedings.

HELD:

a. The action of a VA regional office withholding a portion of a veteran's compensation and paying it to the veteran's former spouse, which was based on a state-court support order which the regional office misconstrued as requiring garnish-

ment of the veteran's benefits, may not be considered an apportionment action under 38 U.S.C. § 5307.

b. The Board of Veterans' Appeals does not have jurisdiction to review VA regional office decisions made for purposes of responding to state-issued legal process for garnishment pursuant to the procedures of 42 U.S.C. § 659(a) and implementing regulations and generally lacks authority over challenges to continuing garnishments, insofar as such challenges involve issues as to the validity or interpretation of state-issued legal process. In the event that a claim relating to VA garnishment does not challenge the validity or interpretation of state-issued legal process, but challenges VA action which is not subject to resolution in state garnishment proceedings, the regional office of jurisdiction and the Board may entertain the claim.

Mary Lou Keener