Department of Veterans Affairs

Memorandum

Date: DEC - 7 2016

From: General Counsel (02)

Subj: Withdrawal of VAOPGCPREC 3-2015

To: Executive-in-Charge and Vice Chairman, Board of Veterans' Appeals (01)

1. VAOPGCPREC 3-2015 held that the designated cemetery official may be a proper applicant for a government-furnished headstone or marker under 38 C.F.R. § 38.632(b)(1). The opinion also held that Civil-War era graves at Oakwood Cemetery in Richmond, Virginia, which are currently identified with marble stones that do not show the names of each soldier but have identifying numbers that are tracked in a burial ledger, are not "unmarked graves" for purposes of VA furnishing a headstone or marker under 38 U.S.C. § 2306(a)(3), even if such stones denote the location of more than one soldier.

2. This is to inform you that VAOPGCPREC 3-2015 is being withdrawn.

Leigh A. Bradley

Department of Veterans Affairs

Memorandum

Date: August 28, 2015

VAOPGCPREC 3-2015

From: General Counsel (02)

Subj: Whether Graves of Civil War-Era Soldiers Currently Identified with Marble Stones with Numerical Inscriptions Constitute "Unmarked Graves" for Purposes of VA Furnishing a Headstone or Marker Under 38 U.S.C. § 2306

To: Executive-in-Charge, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

1. Is the designated cemetery official a proper applicant for a government-furnished headstone or marker under 38 C.F.R. § 38.632(b)(1)?

2. Do Civil-War era graves currently identified with marble stones that do not show the names of each soldier constitute "unmarked graves" for purposes of VA furnishing a headstone or marker under 38 U.S.C. § 2306(a)(3)?

3. Do Civil-War era graves currently identified with marble stones that do not show the names of each soldier constitute "unmarked graves" for purposes of VA furnishing a headstone or marker under 38 U.S.C. § 2306(a)(3) if such stones denote the location of more than one soldier?

CONCLUSIONS:

1. The designated cemetery official may be a proper applicant for a government-furnished headstone or marker under 38 C.F.R. § 38.632(b)(1).

2. Assuming the facts as stated in this opinion are accurate, Civil-War era graves at Oakwood Cemetery currently identified with marble stones that do not show the names of each soldier but that have identifying numbers that are tracked in a burial ledger are not "unmarked graves" for purposes of VA furnishing a headstone or marker under section 2306(a)(3).

3. Assuming the facts as stated in this opinion are accurate, Civil-War era graves at Oakwood Cemetery currently identified with marble stones that do not show the names of each soldier but that have identifying numbers that are tracked in a burial ledger are not "unmarked graves" for purposes of VA furnishing a headstone or marker under section 2306(a)(3) even if such stones denote the location of more than one soldier.

DISCUSSION:

1. In the facts of the claims underlying this opinion request, the appellants seek Government markers for Confederate soldiers currently interred in the Confederate

section of Oakwood Cemetery, a cemetery owned by the City of Richmond, Virginia. Currently, graves in the Confederate section of Oakwood Cemetery are identified by six-inch-by-six-inch (6"x6") marble stones with three numbers written on each stone. These numbers are tracked in a burial ledger located at the cemetery, which provides the identity of the soldiers buried at that location. Each marble stone identifies the location of three soldiers. Locating a decedent involves looking at the ledger, finding the numbered stone, and measuring out an approximate distance to find the actual burial location.

2. Under 38 U.S.C. § 2306(a)(3), VA has authority to "furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the *unmarked* graves of . . . [s]oldiers of the Union and Confederate Armies of the Civil War." (Emphasis added.) Under section 2306(d), VA has authority to "furnish, when requested, an appropriate Government headstone or marker at the expense of the United States for the grave[s] of [certain individuals] who [are] buried in a private cemetery, notwithstanding that the grave[s] [are] marked by a headstone or marker furnished at private expense." Congress did not recognize Confederate soldiers as a class eligible for the second headstone or marker benefit. *See* 38 U.S.C. § 2306(d). Congress also limited VA's section 2306(d) authority to issue a second headstone or marker to eligible individuals who died on or after November 1, 1990. *See* Pub. L. No. 110-157, § 203(b); 38 C.F.R. § 38.631(b)(1). Moreover, the authority in section 2306(d) only applies in the case of certain individuals buried in a "private cemetery." Oakwood Cemetery is owned by a governmental authority, the City of Richmond, and therefore cannot be considered a private cemetery. *Compare* 38 U.S.C. § 2306(b)(1) (referring to "a State, local, or private cemetery"). There being no authority other than that provided by section 2306(a)(3) that would authorize VA furnishing markers for the Confederate soldiers buried in Oakwood Cemetery, VA may furnish headstones or markers for the graves of these soldiers *only* if the graves are unmarked.

3. With respect to the first question, 38 C.F.R. § 38.632(b)(1) currently defines "applicant" for purposes of requesting a Government headstone or marker as "the decedent's next-of-kin (NOK), a person authorized in writing by the NOK, or a personal representative authorized in writing by the decedent to apply for a Government-furnished headstone or marker."[1] A designated cemetery official does not fall within the

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[1] Current section 38.632(b)(1) became effective on July 1, 2009, prior to VA's receipt of the applications for the Government markers at issue here. *See* Headstone and Marker Application Process, 74 Fed. Reg. 26,092 (Jun. 1, 2009). We note that VA recently issued a notice of proposed rulemaking that would consider additional classes of individuals to be an eligible applicant for a headstone or marker:

> (i) A decedent's family member, which includes the decedent's spouse; a child, parent, or sibling of the decedent, whether biological, adopted, or step relation; and any lineal or collateral descendant of the decedent; (ii) A

regulation's definition of who qualifies as an eligible applicant for purposes of obtaining a Government headstone or marker under section 2306. It appears, however, that the National Cemetery Administration (NCA) has determined it appropriate to accept applications for headstones or markers from certain individuals who do not meet the definition of "applicant" in section 38.632(b)(1). An internal memorandum, dated September 14, 2009, stated that NCA would accept applications from funeral home directors, cemetery officials, and Casualty Assistance Officers appointed by the Department of Defense because these individuals generally are authorized to represent the decedent or the next-of-kin. That memorandum further stated that the landowner of a cemetery may be an applicant when a cemetery is historic and/or does not have officials that are responsible for the administration of the cemetery. One of the applicants of the claims underlying this opinion request was the designated cemetery official of Oakwood Cemetery and had a custodial role in maintaining the Confederate soldiers' graves at the cemetery.[2] In a December 2010 letter, VA's Acting Under Secretary for Memorial Affairs informed the Chairman of the Oakwood Restoration Committee of the Sons of Confederate Veterans (SCV) that, due to the SCV's unique stewardship role regarding the Confederate graves at Oakwood Cemetery, NCA considered the SCV akin to a cemetery operator that VA permitted to serve as the next-of-kin and an applicant, or claimant, under section 38.632.

4. A Federal agency generally must follow its own procedural regulations. *See Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265-66 (1954). However, the U.S. Supreme Court has stated that "'[i]t is always within the discretion of a court or administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'" *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (quoting *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764

> personal representative . . . ; (iii) A representative of a Congressionally-chartered Veterans Service Organization; (iv) Any individual who is responsible, under the laws of the relevant state or locality, for the disposition of the unclaimed remains of the decedent or for other matters relating to the interment or memorialization of the decedent; or (v) Any individual, if the dates of service of the veteran to be memorialized, or on whose service the eligibility of another individual for memorialization is based, ended prior to April 6, 1917.

Applicants for VA Memorialization Benefits, 79 Fed. Reg. 59,176, 59,179 (Oct. 1, 2014).

[2] Serving as an agent for the City of Richmond, which owns the cemetery, the applicant's organization receives Commonwealth of Virginia grant funding used for maintenance and operation of the Confederate graves in that cemetery.

(8th Cir. 1953). An agency may exercise such discretion if "[t]he rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion" or if the waiver would not result in "substantial prejudice" to another party. *Id.* at 538-39; *see also PAM, S.p.A. v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006). The definition of "applicant" is not statutory but is contained solely in VA's regulation. The apparent purpose of that definition is to ensure that requests for headstones and markers are received from those with the most direct interest in ensuring proper memorialization consistent with the decedent's wishes. However, in the case of historical cemeteries, where next-of-kin may be unavailable or difficult to identify, there may be a reasonable basis for concluding that acceptance of an application from one charged with a stewardship role for the cemetery is unlikely to cause substantial prejudice to others. In this case, the Acting Under Secretary for Memorial Affairs exercised his discretion to recognize an individual charged with a stewardship role over a historic cemetery as a proper applicant. Under these circumstances, we believe there is a reasonable basis for recognizing the designated official as a proper applicant for a headstone or marker.

5. With respect to the second question, section 2306(a)(3) authorizes VA to provide a Government headstone or marker for the grave of a Confederate soldier whose grave is "unmarked." Congress did not address what would constitute an unmarked grave. VA regulations also do not define what constitutes a "marked" or "unmarked" grave. Section 38.632(b)(4) of title 38, Code of Federal Regulations, defines "[*h*]*eadstones or markers*" as "headstones or markers that are furnished by the Government to mark the grave or memorialize a deceased eligible veteran or eligible family member." From the plain language of this statute and regulation, it is reasonable to conclude that a grave would be considered unmarked if there was no way to identify or memorialize the individual buried at a particular burial site. Thus, in order for a grave to be considered not unmarked, at a minimum, the individual's name, if known, must be provided on or be ascertainable from some type of headstone or marker.[3] Beyond this basic requirement, however, we find that the statute and regulation are silent as to what type or degree of information on a headstone or marker is necessary to establish that the grave is not "unmarked."

6. In the preamble to an interim final rulemaking document, VA explained that "[t]he original purpose of the [headstone and marker] program, which began over 140 years ago, during the Civil War, was based on the principle that no veteran should lie in an unmarked grave." Eligibility for an Appropriate Government Marker for a Grave Already Marked at Private Expense, 68 Fed. Reg. 55,317, 55,318 (Sep. 25, 2003). VA further explained that "[b]efore the Veterans Education and Benefits Expansion Act of 2001, Public Law 107-103, was passed[,] [which added 38 U.S.C. § 2306(d)], VA was

[3] We distinguish the markers at issue here from markers for "unknowns," or individuals who cannot be identified, which are appropriately designated or memorializing an unknown individual.

restricted by statute from furnishing a marker for an already marked grave." *Id.* VA further noted that it "*considers* a grave marked if there is a marker on the site that displays the decedent's name and dates of birth and death." *Id.* (emphasis added). This statement was consistent with the general information sheet provided on VA Form 40-1330, "Application for Standard Government Headstone or Marker" (Jan. 2003), which stated that "[a] grave is considered marked if a monument displays the decedent's name and date of birth and/or death, even though the veteran's military data is not shown." Those statements could support an inference that VA generally would consider a grave to be unmarked if the monument did not contain the decedent's name and dates of birth and death. However, the basis for that inference is limited because a statement that VA will consider a grave to be marked if the monument contains the specified information does not necessarily indicate that VA will find a grave to be unmarked in all other circumstances. Rather, VA's statements are consistent with the possibility that, in certain cases where the decedent's name and/or dates of birth and death are not contained on the monument, a more fact-specific inquiry may be required. Moreover, because the vast majority of requests VA receives for headstones and markers are likely to pertain to deaths occurring within relatively modern times, the above-referenced statements may not have been based on consideration of the unique factors that would be relevant with respect to headstones and markers of a historical nature.

7. On December 21, 2004, in NCA Notice 2004-06 ("Headstone/Marker Replacement"), VA clarified its view with respect to the particular factual context of historical cemeteries and gravesites and the unique considerations applicable to such cemeteries and gravesites:

> In recent months NCA has seen an increase in requests from the public to replace historic headstones or markers, predominantly from the Civil War era. These inquiries are often based on a desire to "correct" information inscribed during the 19th century, and/or to add new information found through modern research. Neither of these reasons is valid justification for replacing historic headstones or markers. The existing inscriptions were based on information available at the time the headstone or marker was furnished, and the existing headstones and markers are collectively part of a historic cemetery landscape.

In a letter dated November 21, 2007, VA recognized that the proposal to augment the "unusual, numbered gravemarkers by introducing individual, upright Confederate headstones would more clearly identify the soldiers interred [there]" but noted that because "Oakwood Cemetery is an historic landscape . . . , there are guidelines that must be met" concerning historic preservation. In a letter dated June 10, 2010, to the SCV, VA further clarified its position that historical gravesites may be considered marked, even when existing gravemarkers do not contain the decedent's name and dates of birth and death, when it denied SCV's request for a Government-furnished

headstone or marker because "[t]he Confederate grave sites at Oakwood private cemetery are currently marked with 6"x6" marble blocks similar to those found in other federal and private Civil War-era cemeteries throughout the Nation." *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (noting that an ambiguous statutory term "can only be given concrete meaning through a process of case-by-case adjudication" and that "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program"); *see also Mylan Labs., Inc. v. Thompson*, 389 F.3d 1272, 1279 (D.C. Cir. 2004) (concluding that agency interpretation expressed in letters to the parties, and not embodied in any regulation, was entitled to *Chevron* deference). As recently as 2013, VA Form 40-1330 and NCA's website continued to reflect the broader statement that a grave is marked if a gravemarker contains the decedent's name and dates of birth and death. We do not believe these reflect inconsistency in VA's interpretation of the statute, however, because, as noted above, the reference to graves being considered marked under the specified circumstances does not necessarily preclude graves being considered marked under other circumstances as well. In May 2013, VA revised VA Form 40-1330 to state the following: "For Veterans that served prior to World War I, a grave is considered marked when a headstone/marker displays the decedent's name only, or if the name was historically documented in a related document, such as by a number that is inscribed on a grave block and is recorded in a burial ledger. For service during and after World War I, a grave is considered marked if a headstone/marker displays the decedent's name and date of birth and/or death, even though the Veteran's military data is not shown." VA Form 40-1330 (May 2013). On November 21, 2013, NCA clarified the definition of a marked grave on its website as follows: "For Veterans that served prior to World War I, a grave is considered marked when a headstone/marker displays the decedent's name only, or if the name was historically documented in a related document, such as by a number that is inscribed on a grave block and is recorded in a burial ledger." *NCA Eligibility for a Headstone or Marker*, http://www.cem.va.gov/cem/hmm/eligibility.asp (Nov. 21, 2013). In sum, VA has interpreted "marked" to mean that the grave is identified by a headstone or marker that provides information that is sufficient to identify the decedent in a manner consistent with the time and place of the burial and the nature of the resting place.

8. As noted above, the Confederate soldiers' graves in Oakwood Cemetery are identified by a historical marker typical of the time period in which the markers were furnished. VA's historic research determined that, between 1902 and 1912, the graves of Confederate soldiers in Oakwood Cemetery were marked with 6"x6" marble blocks by the Oakwood Memorial Association, which intended to permanently mark each soldier's grave in a manner that was considered appropriate at the time. We note that standards for what constitutes a "marked" grave have changed over time,[4] and evidence shows

[4] NCA's website explaining the history of Government-furnished headstones and markers states the following: "The original standard grave marker precedes the establishment of national cemeteries in 1862 and actually has its origin in the frontier

that the Oakwood Memorial Association intended to mark these graves by using 6"x6" marble blocks with numbers and corresponding ledgers.[5] Although the marble blocks do not identify by name the three individuals buried at the location of a particular marker, they contain numerical inscriptions that are used to identify the names of those individuals. In other words, the marble blocks sufficiently memorialize by name deceased individuals buried a particular site. We understand that similar 6"x6" marble blocks are found in other Federal and private Civil War-era cemeteries throughout the Nation. NCA's policy has been not to apply modern standards retroactively to previously marked graves in national or private cemeteries but, instead, to honor the conventions for style, type, and inscriptions of the period.[6] One reason for NCA's policy is that, as noted by NCA after consultation with State and Federal historic preservation officers, the provision of Government-furnished markers for the graves at historic cemeteries may have an adverse effect on the historic setting and, potentially, archeological resources.

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days of this country prior to the Civil War. . . . A wooden board with a rounded top and bearing a registration number or inscription became the standard. No centralized system for recording burials existed." *See NCA History of Government Furnished Headstones and Markers*, http://www.cem.va.gov/cem/history/hmhist.asp (Apr. 16, 2015).

[5] Excerpts from the "Oakwood Memorial Association Minute Book," held by the Museum of the Confederacy in Richmond, Virginia, note the following statements regarding the marble stones at issue here: "The stones are to be 1 foot, 6 inches long, and 6 inches square, and are to have 3 numbers cut on each stone representing three graves." (April 1902); "The marking of the Confederate graves in Oakwood Cemetery with fitting headstones of marble . . . will withstand the ravages of time." (June 1903); "The resting places of the 16,000 Confederate soldiers lying in Oakwood have been marked with an appropriate stone." (1912)

[6] For example, NCA noted the following regarding its policy for replacement of headstones and markers in national and state veterans cemeteries: "Because the [newer] general style headstone is wider and taller than its predecessor, introducing it into a predominantly 19th century landscape negatively alters the overall appearance of a historic cemetery. . . . [R]eplacement of historic headstones or markers with those made of new materials and methods, even of a matching type/style, can be detrimental to the historical cemetery landscape." NCA Notice 2004-06. Furthermore, in a letter dated December 3, 2010, to Senator Jim Webb, NCA noted that, in historic VA national cemeteries, when Government-furnished headstones or markers require replacement due to deterioration, VA replaces "in-kind," i.e., VA would replace the 6"x6" marble blocks with similar markers, in keeping with the Secretary of the Interior's Standards for the Treatment of Historic Properties.

8.

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9. For these reasons, and based on the facts as stated, the Confederate graves in Oakwood Cemetery are properly marked by the 6"x6" marble blocks and any additional marker provided by VA would constitute an improper "double marking."

10. With regard to the third question, the 6"x6" marble blocks are adequate markers even if the numbers on the blocks represent multiple individuals buried at that particular burial site. Again, section 2306(a)(3) authorizes VA to provide a Government headstone or marker for the grave of a Confederate soldier whose grave is "unmarked." Because the Confederate graves in Oakwood Cemetery are marked by the 6"x6" marble blocks, VA does not have authority to provide an additional marker, notwithstanding the fact that the blocks may be a marker for three individuals. Nothing in the pertinent statutes or regulations indicates that a marker for multiple individuals buried at a particular burial site, especially for graves at historic cemeteries, would not constitute an adequate marker for each of those individuals.

Leigh A. Bradley