



THE SECRETARY OF VETERANS AFFAIRS  
WASHINGTON

August 28, 2009

The Honorable William E. Reukauf  
Acting Special Counsel  
U.S. Office of Special Counsel  
1730 M Street, NW, Suite 300  
Washington, DC 20036-4505

Re: OSC File Number DI-09-1868

Dear Mr. Reukauf:

Your letter of April 28, 2009, outlines allegations regarding conduct at the Department of Veterans Affairs (VA) National Cemetery Administration (NCA) in Washington, DC, that may constitute a violation of a law, rule, or regulation. The specific allegations were made by Mr. William Schuetz, an employee of the VA Veterans Benefits Administration.

In response to your letter, I asked the Acting Under Secretary for Memorial Affairs to review this matter and conduct an investigation for purposes of providing your office with a report as required under 5 U.S.C. § 1213(c) and (d). He, in turn, established an Administrative Investigative Board (AIB) to review the allegations. The AIB interviewed the complainant and relevant NCA employees; reviewed pertinent laws, regulations, policy documents, and internal communications; and considered current NCA procedures. The AIB determined that the complainant's main allegation that NCA does not routinely provide a notice of appellate rights when denying a claim for an NCA-administered benefit was substantiated.

NCA senior management has already taken steps to address the specified issues, including the provision of a formal written notice of appellate rights to any claimant who is denied burial in a VA national cemetery or the rights to a Government-furnished headstone or marker. The enclosed VA report addresses the allegations, the AIB investigation, and VA's aggressive action plan to correct noted deficiencies. I have reviewed the report, and now submit it to the Office of Special Counsel for your review.

Sincerely,

A handwritten signature in black ink, which appears to read "Eric K. Shinseki".

Eric K. Shinseki

Enclosure

# REPORT TO OFFICE OF SPECIAL COUNSEL

Report of Complaint File No. DI-09-1868  
Office of Special Counsel

Prepared by:  
National Cemetery Administration  
Department of Veterans Affairs

Report Date: **August 21, 2009**

## 1. SUMMARY OF THE INFORMATION WHICH FORMED THE BASIS FOR THE INVESTIGATION

The U.S. Office of Special Counsel (OSC) wrote the Honorable Eric K. Shinseki, Secretary of Veterans Affairs, regarding a whistleblower disclosure received from Mr. William Schuetz, Management and Program Analyst, Department of Veterans Affairs (VA) Veterans Benefits Administration (VBA). Mr. Schuetz alleged that the VA National Cemetery Administration (NCA) has consistently failed to notify claimants that they have the right to appeal its decisions regarding burial in a national cemetery and headstones and markers. The allegations are as follows:

*Upon denying a claim for NCA-administered benefits, VA does not provide the claimant with a notice of appellate rights, as required under 38 CFR § 19.25; and*

*The 2008 edition of the VA pamphlet, "Federal Benefits for Veterans and Dependents," omits NCA determinations from its information on appeals.*

OSC found that there was a substantial likelihood that Mr. Schuetz's allegations disclosed a violation of law, rule, or regulation and directed VA to investigate these allegations and report the findings of the investigation as required under 5 USC § 1213. This report provides a summary of the background on the allegations, the investigation into the allegations; VA's findings from the investigation; and VA's response to the findings.

## 2. DESCRIPTION OF THE CONDUCT OF THE INVESTIGATION

Upon receipt of the OSC letter, the Secretary directed the Acting Under Secretary for Memorial Affairs (AUSMA) to undertake an investigation into the allegations and report on his findings. The AUSMA reports directly to the Secretary and is responsible for all management and operations of NCA. The AUSMA requested that the VA Inspector General (IG) conduct an investigation into the allegations, but the IG declined. The AUSMA then convened an Administrative Investigative Board (AIB) in accordance with VA Directive 0700, *Administrative Investigations* (March 25, 2002), and VA Handbook 0700, *Administrative Investigations* (July 31, 2002), and directed the AIB to inquire into the facts and circumstances concerning the whistleblower's allegations that NCA may be engaging in conduct that constitutes a violation of a law, rule, or regulation. The AIB was comprised of three team members: two NCA field employees and a staff attorney from VA's Office of the General Counsel (GC).

The AIB interviewed under oath the following VA employees:

- William Schuetz, Management and Program Analyst, VBA
- Patrick K. Hallinan, Director, Office of Field Programs, NCA
- Lindee L. Lenox, Associate Director, Office of Field Programs, NCA
- Donnie W. Murphy, Chief, Memorial Programs Service Operations, NCA
- Robin V. Pohlman, Coordinator, Memorial Service Network III, NCA

- Deanna L. Wilson, Chief, Legislative and Regulatory Division, NCA
- Patricia Tyson, Program Analyst, Legislative and Regulatory Division, NCA

The AIB obtained and reviewed the following relevant documents:

- NCA Policy Manual 40-2 (May 1, 1984)
- NCA Directive 3210 – Eligibility Requirements (June 4, 2008)
- NCA Notice 2003-02 – Processing of Denials of Interment (Oct. 7, 2003)
- Sensitive Case Advisory Form and Process Overview
- VA Form 4107 – Your Rights to Appeal Our Decision
- VA Form 9 – Appeal to the Board of Veterans' Appeals
- VA Form 40-4962 – Verification of Eligibility for Burial in a National Cemetery
- VA Form 40-1330 – Application for Standard Government Headstone or Marker
- VA Pamphlet: *Federal Benefits for Veterans, Dependents and Survivors (2009)*

The AIB reviewed the following applicable statutes and regulations:

- 38 U.S.C. Chapter 23 – Burial Benefits
- 38 U.S.C. Chapter 24 – National Cemeteries and Memorials
- 38 U.S.C. § 5104 – Decisions and notices of decisions
- 38 U.S.C. § 7105 – Filing of notice of disagreement and appeal
- 38 C.F.R. Part 3, Subpart B – Burial Benefits
- 38 C.F.R. § 19.25 – Notification by agency of original jurisdiction of right to appeal
- 38 C.F.R. § 20.101 – Jurisdiction of the Board
- 38 C.F.R. § 38.617 – Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes
- 38 C.F.R. § 38.618 – Findings concerning commission of a capital crime where a person has not been convicted due to death or flight to avoid prosecution
- 38 C.F.R. § 38.620 – Persons eligible for burial
- 38 C.F.R. § 38.630 – Headstones and markers
- 38 C.F.R. § 38.632 – Headstone or marker application process

The AIB obtained and reviewed formal and informal NCA communications concerning the appeals process for determinations on burial in a national cemetery and Government-furnished headstones and markers.

### **3. SUMMARY OF EVIDENCE AND INFORMATION OBTAINED FROM THE INVESTIGATION**

Except for an appeal process for capital crime denials (described below), NCA does not have regulations or written policies, directives, or other guidance governing the provision of notice of appellate rights to claimants denied benefits.

NCA's practice has generally been to provide a claimant who was denied an NCA-administered benefit with a written response explaining the process followed, the evidence considered, and the reasons for the ineligibility determination only upon receiving a claimant's request for additional information concerning the denied claim.

In 1989, GC informed NCA that a claim for burial in a national cemetery involved a "benefit," which, if denied, could be appealed to the Board of Veterans' Appeals (Board). GC also informed NCA of its obligations under 38 U.S.C. § 4005(d) (1989) and 38 C.F.R. §§ 19.114, 19.119-19.123 (1989) to: (1) notify claimants denied burial benefits of their appeal rights; (2) process notices of disagreement filed by appellants; (3) issue statements of the case to appellants; and (4) certify appeals to the Board.

In 2004, GC again informally advised NCA of the need to provide notice of appellate rights with denials of NCA-administered benefits. In 2005, GC identified NCA determinations regarding burial in a national cemetery and Government-furnished headstones and markers as benefits decisions that are appealable under 38 U.S.C. §§ 5104 and 7105.

During 2004 and 2005, NCA held six working group meetings to develop procedures that would have required VA to provide notice of appellate rights for denied claims but did not proceed further due to competing priorities.

For capital crime cases, NCA established an appeals process in both regulation and policy to provide claimants with written notice of appellate rights along with denial determinations for claims for burial in a VA national cemetery or for a Government-furnished headstone or marker.

Aside from capital crimes cases, NCA identified only two cases in which NCA provided notice of appellate rights. In both cases, NCA provided the notice in response to the claimants' requests for written notification of the denial of the burial claims.

In the past five years, there have been no appeals to the Board concerning any NCA-benefit determinations.

NCA has an extensive internal review process, which is summarized below, for claims that are ultimately denied.

### **NCA Benefit Process**

Benefits provided by NCA to eligible Veterans and Veterans' spouses or dependents significantly differ from benefits provided by VBA or the Veterans Health Administration (VHA). A burial claim requires an immediate, "at the time of need" determination by NCA personnel regarding the decedent's eligibility for interment in a national cemetery. In order to permit grieving families to make expeditious burial arrangements, NCA currently provides verbal notification of whether the deceased is eligible for interment in a national cemetery. NCA processes approximately 110,000 burial requests per year; more than 95 percent of these requests are straightforward with eligibility easy to confirm based on available service records. When necessary, NCA has always taken extensive measures to assist families in locating missing information or documentation to approve a burial request. NCA also has a comprehensive, multiple review process in place to ensure the accuracy of any denials.

If a comprehensive search fails to locate eligibility documentation or NCA staff determines that the Veteran or family member is not eligible for burial due to failure to meet eligibility requirements under 38 U.S.C. § 2402, then NCA policy requires the

cemetery staff to submit a Sensitive Case Advisory and all supporting documentation to the next level in the organization, which is either a Memorial Service Network or the National Cemetery Scheduling Office. If the second level review also results in a denial determination, the case is forwarded to NCA Central Office staff in Washington, DC, for a final review and eligibility determination by the Director, Office of Field Programs. This rigorous review process incorporates two levels of internal "de novo" review above the initial eligibility determination. Sensitive to the grieving family, NCA does not require the family to initiate a written request for additional review but provides these two internal reviews automatically. NCA generally completes this multi-level review within 24 hours of the NCA staff's initial determination.

When NCA is unable to determine or establish eligibility of the deceased, or determines the deceased is ineligible for interment in a national cemetery, the next of kin (NOK) or personal representative is notified immediately by telephone so that the NOK may make timely alternate arrangements for burial. Historically, there has been no follow-up written notice to the decedent's NOK. The family or representative is informed verbally that the request was denied and that NCA will reevaluate the burial request should they locate necessary missing information.

Claims for a Government-furnished headstone or marker are not as time sensitive as burial claims because final disposition of the deceased's remains has usually been completed. NCA Memorial Programs Service (MPS) processes approximately 220,000 headstone and marker application requests per year; less than 20 percent of these requests cannot be granted using available service records. However, if upon receipt of an application for a headstone or marker, MPS cannot find eligibility information in VA's comprehensive records system, MPS sends a written notice to the applicant describing the additional information needed to grant the claim. If additional information is not submitted within 35 days of the letter, MPS closes the application. If the evidence shows the Veteran is ineligible for the benefit, MPS sends a written notice explaining why the benefit could not be awarded. If, at any time, the applicant submits the necessary information to establish eligibility, NCA reopens and approves the claim.

As prescribed in 38 CFR. §§ 38.617 and 38.618, NCA provides written determinations and notice of appellate rights for all capital crime case denials. Those regulations describe an appeals process for cases in which an otherwise eligible decedent is prohibited from burial or memorialization in a national cemetery due to the commission of a Federal or state capital crime.

#### **4. LISTING OF VIOLATIONS OF ANY LAW, RULE, OR REGULATION**

Section 7105 of title 38, United States Code, explains the process in which a claimant may appeal an adverse agency decision to the Board. Section 5104(a) of title 38, United States Code, provides that, in the case of a decision by the Secretary regarding the provision of benefits to a claimant, the Secretary must furnish the claimant with notice of such decision and an explanation of the procedure for obtaining review of the decision. Section 19.25 of title 38, Code of Federal Regulations, provides that VA will furnish a claimant with a notice of appellate rights along with each notification of a determination on entitlement to VA benefits.

The AIB found that GC had advised NCA that burial in a national cemetery and the provision of headstones and markers are "benefits" for purposes of 38 CFR § 19.25 and 38 U.S.C. §§ 5104(a) and 7105. The AIB verified the whistleblower's assertion that, upon a denial of a claim for NCA-administered benefits, NCA does not provide the claimant with either written or verbal notice of appellate rights. The AIB also found that, in cases other than those involving the capital crime prohibition, NCA does not have a process for or policy of providing notice of appellate rights to claimants whose claims for interment in a VA national cemetery or for a Government-furnished headstone or marker were denied.

## **5. DESCRIPTION OF ACTIONS TAKEN OR PLANNED**

### **Actions Taken**

- When denying claims for burial in a national cemetery, NCA is now providing claimants with specific denial letters, which have been approved by GC, along with a notice of appellate rights (VA Form 4107, *Your Rights to Appeal Our Decision*), in addition to providing immediate notification by telephone of the denial to the claimant, NOK, or personal representative.
- With regard to claims for a Government-furnished headstone or marker, NCA is now denying claims that cannot be substantiated and providing claimants with specific GC-approved denial letters along with VA Form 4107.
- The NCA Office of Field Programs is working with the NCA Training Officer to develop comprehensive training for all NCA benefit processing staff regarding appeal procedures; initial training was provided at the annual NCA conference in August 2009.

### **Actions Planned**

- The NCA Offices of Field Programs and Memorial Programs Service will provide all claimants who have had applications denied since March 30, 2009, with a written denial letter and VA Form 4107. This represents the period of time for which NCA has complete and accessible records that can be used to provide claimants with an adequate written decision and notice of appellate rights.
- The NCA Office of Field Programs will work with the NCA Communications Management Service to update the 2010 edition of the VA pamphlet, *Federal Benefits for Veterans, Dependents and Survivors*, and all relevant VA or NCA publications and websites to explain the appeals process for NCA-administered benefits.
- The NCA Office of Field Programs will work with the NCA Legislative and Regulatory Division to develop policy guidance documents or regulations, as necessary.
- The NCA Office of Information and Technology will update pertinent information systems and forms necessary to reflect new policies and procedures.