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TO THE MEN AND WOMEN WHO SERVED

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The DAV Case, Again

Has VA Found a Regulatory Loophole?

This newsletter has always devoted itself to nuts-and-bolts topics that affect DAV departments and chapters. This issue is no different, except that it will focus on a case now pending before the United States Court of Appeals for the Federal Circuit (CAFC), the court that reviews certain cases from the Veterans Court.

In Episode 130 of *Seinfeld*, Todd Gack bets Elaine Benes a restaurant dinner that Richard M. Nixon's middle name was "Moe." Gack of course loses the ridiculous wager and the dinner takes place. Jerry perceptively notes that Gack has gotten a date with Benes without actually asking her out and facing rejection. He has, in short, identified a "dating loophole."

Loopholes may be funny business for sitcoms, but not for veterans benefits. Sad to say, VA has found a ***regulatory*** loophole and it's not helping veterans. Last year, DAV itself filed a case at CAFC in which it argued that VA could not, in essence, alter the standards for veterans benefits by changing its internal manuals (in this case the M21-1 Manual [hereafter "Manual"]) and thereby avoid the public "notice and comment" procedures to which all regulatory changes are subject. These "notice and comment" opportunities have, in the past, led to the revision – and sometimes the withdrawal – of proposed regulations unfriendly to veterans' interests.

DAV lost the 2017 case. CAFC ruled that it lacked jurisdiction to review rules that VA publishes in the Manual. In a searing dissent, CAFC Judge Dyk rejected the majority's rationale, pointing out that well-settled Supreme Court jurisprudence mandates that "internal manuals" are not to be used as an end-run around "notice and comment" procedures when the manual provisions concern important issues of law. The DAV case involved a Manual change that dramatically tightened the standards for granting service connection to veterans injured in the Gulf War.

The current case is *Gray v Secretary of Veterans Affairs*, which raises an issue similar to the one on tap in the *DAV* litigation. Under the Agent Orange Act, any veteran who "served in the Republic of Vietnam" during the war is entitled to a presumption of exposure to certain herbicides and, therefore, a presumption of service connection for related diseases. VA modified the Manual to eliminate the presumption for veterans – including Gray — who served in Vietnam's ports, harbors and bays during conflict.

Gray argued that the change in the law should have been vetted through the "notice and comment" procedure.

CAFC was not unsympathetic to this position – the same position DAV advanced last year – but said it was bound by the decision in the *DAV* case! A judicial Catch-22 if there ever was one!

The remedy now is to convince the CAFC to overrule its own recent decision. As might be imagined, that is an uphill climb. Nonetheless, Mr. Gray is in for the duration and DAV is right with him. Although DAV was not a party to the *Gray* case, it has formally entered the matter as an amicus curiae ('friend of the court") to offer its perspective on the matter. DAV will ask the court to consider the fairness of making substantive changes to veterans law through the Manual when "any VBA employee can request changes to [the Manual] through submission of an online form."

DAV is trying to convince the court of the seriousness of this matter. Its brief states, in part: "It is critical for Manual provisions that set eligibility rules to be subject to notice and comment, rule challenges, and to bind the Board. Otherwise, veterans are left with a system that is subject to change at a moment's notice, and where different sets of rules can apply depending on the level of appeal and whether a particular Board member or VA adjudicator decides to follow the Manual. They begin their claims assuming they are playing checkers, only to later be told they are playing chess. When their claims get to the Board, the game changes again, [1] but they are not told the rules until after the game is over. This uncertainly is unfair in any system, but especially so in a system that is designed to be veteran- friendly."

DAV believes that there is a substantial possibility for this case to wind up before the Supreme Court, and we intend to have our voice heard there as well. Unlike some nonprofits, DAV only rarely inserts itself into a case at the nation's highest court (just three in the last twenty years). We save our voice for matters of monumental significance such as the Manual issue, which has the potential to affect every single veteran who is receiving — or may someday receive — benefits. It is time to close this regulatory loophole.

[1] Although the court in the *DAV* case held that unilateral changes to the Manual would bind VA adjudicators, they would not bind the BVA or the courts. Using a baseball analogy, this is equivalent to changing the strike zone when the game goes into extra innings.

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