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Comptroller General
of the United States

Washington, D.C. 20548

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May 14, 1987

The Honorable Gerald B. H. Solomon
Ranking Minority Member
Committee on Veterans' Affairs
House of Representatives

Dear Congressman Solomon:

By letters dated October 30 and November 19, 1986, the Committee asked a number of legal questions concerning, with one exception, a Veterans' Administration (VA) proposal to reorganize the Veterans' Canteen Service (VCS) and to have VCS contract out some or all canteen food services. The other question concerns the transfer of funds from the VCS revolving fund to the Treasury as a result of the 1986 sequestration order issued pursuant to Public Law 99-177, 99 Stat. 1037, popularly known as Gramm-Rudman-Hollings. In addition to the legal questions, the Committee requested our views on several other matters. As agreed by Committee staff, this letter addresses only the legal questions. We will contact the staff about proceeding on the other matters.

As discussed more fully below, we think certain aspects of VA's proposed reorganization are inconsistent with the organizational independence and control provided the VCS by 38 U.S.C. § 4208.² With respect to your question concerning VCS' authority to "contract out" all or part of canteen food services to private organizations, we think VCS may, as a general proposition, contract out the provision of goods and services to veterans and other canteen patrons without running afoul of the purpose, or specific provisions, of Chapter 75, Title 38, United States Code. Of course, any contracting out of service must not represent an abdication of VCS' control of canteen operations.

With respect to your question concerning the 1986 sequestration order, we agree with the VA General Counsel that the transfer of money from the VCS revolving fund to the Treasury was proper.

As you know, General Omar Bradley became concerned with the operation of canteens in VA medical facilities during his tenure as Administrator of VA. General Bradley had surveyed the concessionaire system existing in VA hospitals after World War II and verified the numerous complaints "concerning the inadequate and unsatisfactory service rendered at

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these privately operated canteens and the excessive prices charged for many items." H.R. Rep. No. 2432, 79th Cong., 2d Sess. 2 (1946). General Bradley's attempt to reform the system failed, a failure he attributed to the difficulties of managing "the activities of individual, unrelated concessionaires who are motivated, naturally, by the desire to conduct a business as personally profitable as possible." Id. General Bradley then concluded that a unified canteen service, maintained and operated as an independent unit in VA under the Administrator's supervision, was needed to ensure that veterans hospitalized or domiciled in VA facilities could readily obtain merchandise and services at reasonable prices.

In 1946 Congress created VCS. Section 4201 of 38 U.S.C. declares that the primary purpose of the VCS is to make merchandise and services available to veterans in VA facilities at reasonable prices. To this end, Congress charged the Administrator to establish and operate canteens, necessary warehouses, and storage depots; provide space and utilities to VCS, subject to payment of reasonable charges; employ staff and make all necessary contracts to purchase or sell merchandise, equipment, etc.; fix prices of merchandise and services to carry out purposes of the law; make all necessary rules and regulations to carry out provisions of the law, etc. 38 U.S.C. § 4202. Congress established a revolving fund to finance the operation of the Service, 38 U.S.C. § 4204-4205; required the submission of a budget as provided for wholly owned government corporations, 38 U.S.C. § 4206; and provided that VCS' accounts would be audited in accordance with the Government Corporation Control Act,^{1/} 38 U.S.C. § 4207. Finally, and significantly for our discussion here, Congress statutorily mandated VCS' independent status within VA:

"It is the purpose of this chapter that, under control and supervision of the Administrator, the Service shall function as an independent unit in the Veterans' Administration and shall have exclusive control over all its activities including sales, procurement and supply,

^{1/} The original provision was modified in 1975 by Pub. L. No. 93-604 (88 Stat. 1964). VCS audits are now conducted in accordance with Chapter 35, Title 31, United States Code, which prescribes general audit principles for executive agencies.

finance, including disbursements, and personnel management, except as otherwise provided in this chapter."

38 U.S.C. § 4208.

VA's proposals to reorganize the VCS and to contract some or all canteen food service operations has been the subject of considerable debate and discussion over the past 2 years. See, e.g., Hearing on Veterans Canteen Service Before the Subcomm. on Oversight and Investigations of the House Comm. on Veteran's Affairs, 99th Cong., 2d Sess. (1986). Much of this debate has focused on the consistency of VA's proposals with 38 U.S.C. § 4208. In a recent legal opinion, VA's General Counsel concluded that VCS has the legal authority to contract out certain canteen service functions so long as VCS retains control of the canteen operation. VA General Counsel memorandum, July 16, 1986, pages 2, 3. VA's General Counsel also found VA's proposed reorganization plan to be largely unobjectionable, although expressing reservations that certain elements of the reorganization may violate 38 U.S.C. § 4208. In particular, VA's General Counsel considered legally objectionable VA's proposal (1) to transfer all VCS personnel functions to other VA organizational units, (2) to make the medical center director the selecting and rating official for canteen service chiefs for their medical centers, and (3) to subordinate canteen service chiefs to medical center directors with respect to the day-to-day operations of the canteens. However, the VA General Counsel concluded that it was not legally objectionable to require the VCS audit staff "to report directly" to the Director of Administration, the immediate superior of the Director, VCS.

As discussed below, we find ourselves in general agreement with the VA General Counsel's opinions. Your specific questions and our discussion follow.

May VA (or VCS), consistent with 38 U.S.C. § 4208, contract out the services provided by VCS?

We think VCS may contract out canteen functions and services, provided VCS retains control over canteen operations and discharges the responsibilities assigned to the Administrator by 38 U.S.C. § 4201 et seq. and delegated by him to VCS.

An examination of Chapter 75 of Title 38, United States Code, indicates that Congress bestowed on VCS broad authority, similar in scope to that bestowed on government corporations, to establish and operate essentially a commercial activity--the operation of canteens in VA facilities. Congress authorized VCS to make all necessary contracts to provide merchandise and services to veterans, 38 U.S.C. §4202(6), and, in fact, for years VCS has contracted with firms for vending machine, check-cashing, money order, shoe and watch repair, photography, and laundry services, among others, to fulfill its congressional mandate. Presumably, VCS has contracted for such services without undermining its control of canteen operation.

Nevertheless, 38 U.S.C. § 4208 requires that VCS retain "exclusive control over all its activities." Chapter 75 of Title 38 does not define "exclusive control." As a practical matter, "control" certainly may be exercised in different ways, including the use of contractual provisions or the establishment of employment relationships. The statute's use of the adjective "exclusive" to modify "control" does not necessarily require one to reject one method of "control" in favor of another so long as the method adopted does not transfer "control" to other entities inside or outside VA.

We believe the present proposal to contract out some food service operations is not inconsistent with section 4208 because the proposal does not prevent the VCS from continuing to retain control, even though the services would be provided by other than VCS employees.

May VA, consistent with 38 U.S.C. § 4208, give VA medical center directors supervisory control of the management of canteens in their facilities and abolish the VCS Personnel and Administration Division and transfer its functions to the VA Office of Personnel?

We understand that, as part of the proposed VCS reorganization, VA medical center directors were to gain supervisory authority over canteen service chiefs at their respective medical centers from the VCS director. VA proposed to give VA medical center directors, who are not VCS personnel, authority to, among other things,

- select and rate canteen service chiefs, subject to the concurrence of the Canteen Service Director,

- supervise canteen service chiefs in their management of day-to-day canteen operations, and

--advise and consult with canteen service chiefs and the Canteen Service Director.

Although we see nothing inappropriate in an advisory and consulting role for the medical center directors, we do not think that the VCS would maintain exclusive control over personnel management if the medical center directors select, rate, and supervise canteen service chiefs. This would be inconsistent with 38 U.S.C. § 4208, which requires VCS to maintain "exclusive control over all its activities including . . . personnel management." VCS would lose exclusive control under VA's proposal in that canteen service chiefs would be taking orders from medical center directors and selection and rating decisions would be mutual decisions of VCS and medical center directors.

Similarly, and as noted by the VA General Counsel, the proposed abolishment of the VCS personnel office and transfer of its functions to the VA personnel office would conflict with the requirement in 38 U.S.C. § 4208 that VCS exclusively control its personnel management function. However, we do not foreclose the possibility that VCS could reorganize its personnel management function to use VA's personnel office to carry out some functions that are subject to VCS' direction and control or are purely ministerial. For example, we would have no objection to VCS using information generated by the personnel office to assist in making its operational decisions.

May VA, consistent with 38 U.S.C. § 4208, direct VCS audit staff, though remaining within VCS, to report directly to VA's Director of Administration, Department of Medicine and Surgery (DMS), Central Office?

We understand that under VA's proposal the Administrative Director of DMS would not supervise the VCS audit staff and that the VCS director would receive audit results contemporaneously with the Director of Administration. VCS would thus appear to maintain control of audit operations. Although the proposed reorganization would require the VCS audit staff to also report directly to VA's Director of Administration, DMS, Central Office, there is nothing improper about this. Indeed, such an arrangement may be considered an appropriate management response, in light of the VA Administrator's ultimate responsibility, according to section 4208, for VCS operations and his authority to delegate responsibilities to a subordinate with line authority over all VCS employees. As long as VCS retains control, for example, by contemporaneous review of the audit product and supervision of the audit

staff, we find nothing that would preclude the arrangement described.^{2/}

Do you agree with the views expressed in the VA General Counsel memorandum of October 10, 1986, to the Acting Chief Medical Director, concerning the transfer of money from the VCS revolving fund to the Treasury as a result of the 1986 sequestration order under Public Law 99-177?

We agree with the VA General Counsel's opinion that the transfer was proper. In response to the Acting Chief Medical Director's request for an opinion, the VA General Counsel issued the memorandum of October 10, 1986, concluding that VA was "compelled to cover to the Treasury the \$8.104 million reduction in spending authority which was imposed on the Veterans Canteen Service (VCS) fiscal year 1986 budget as part of the first year's implementation of [Public Law 99-177]." As the memorandum correctly points out, GAO has concluded that the VCS revolving fund is subject to sequestration. See B-221498.4, February 7, 1986.

Section 256(a)(2) of Public Law 99-177 provides that:

"Any amounts of * * * spending authority
* * * which is sequestered * * * is
permanently cancelled, with the exception
of amounts sequestered in special or
trust funds, which shall remain in such
funds * * *."

In order to permanently cancel spending authority of amounts in revolving funds, such as the VCS revolving fund, it would be necessary to transfer the amount to the Treasury. Under the clear terms of section 256(a)(2), only amounts in special or trust funds may be retained in the funds. As the VA General Counsel has pointed out, the VCS revolving fund is not a special fund or a trust fund.

^{2/} You also alluded to 38 U.S.C. § 4207 in your question. Section 4207 provides for audit by the Comptroller General. We find nothing in that section that would preclude VCS audit staff from reporting to the DMS Director of Administration.

We trust our responses will be of assistance to you.

Sincerely yours,

Milton F. Howler

Acting Comptroller General
of the United States