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of interment or memorialization, as an individual who has been convicted of a State capital crime, and whose conviction is final, other than a person whose sentence was commuted by the Governor of a State.

(3) A person found under procedures specified in § 38.618 to have committed a Federal or State capital crime but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

(b) *Notice.* The prohibition referred to in paragraph (a)(3) of this section is not contingent on receipt by the Secretary of Veterans Affairs or any other VA official of notice from any Federal or State official.

(c) Receipt of notification. The Under Secretary for Memorial Affairs is delegated authority to receive from the United States Attorney General and appropriate State officials on behalf of the Secretary of Veterans Affairs the notification of conviction of capital crimes referred to in paragraphs (a)(1) and (2) of this section.

(d) *Decision where notification previously received.* Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has received the notification referred to in paragraph (a)(1) or (2) of this section with regard to the deceased, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411.

(e) *Inquiry.* (1) Upon receipt of a request for interment or memorialization, where the Secretary of Veterans Affairs has not received the notification referred to in paragraph (a)(1) or (a)(2) of this section with regard to the deceased, but the cemetery director has reason to believe that the deceased may have been convicted of a Federal or State capital crime, the cemetery director will initiate an inquiry to either:

(i) The United States Attorney General, in the case of a Federal capital crime, requesting notification of whether the deceased has been convicted of a Federal capital crime; or

(ii) An appropriate State official, in the case of a State capital crime, requesting notification of whether the

deceased has been convicted of a State capital crime.

(2) The cemetery director will defer decision on whether to approve interment or memorialization until after a response is received from the Attorney General or appropriate State official.

(f) *Decision after inquiry.* Where an inquiry has been initiated under paragraph (e) of this section, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411 upon receipt of the notification requested under that paragraph, unless the cemetery director initiates an inquiry pursuant to § 38.618(a).

(g) *Notice of decision.* Written notice of a decision under paragraph (d) or (f) of this section will be provided by the cemetery director to the personal representative of the deceased, along with written notice of appellate rights in accordance with § 19.25 of this title. This notice of appellate rights will include notice of the opportunity to file a notice of disagreement with the decision of the cemetery director. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§ 19.26 through 19.38 of this title.

(Authority: 38 U.S.C. 512, 2411, 7105)

[70 FR 4769, Jan. 31, 2005, as amended at 73 FR 35352, June 23, 2008]

§ 38.618 Findings concerning commission of a capital crime where a person has not been convicted due to death or flight to avoid prosecution.

(a) *Inquiry.* With respect to a request for interment or memorialization, if a cemetery director has reason to believe that a deceased individual who is otherwise eligible for interment or memorialization may have committed a Federal or State capital crime, but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director, with the assistance of the VA regional counsel, as necessary, will initiate an inquiry seeking information from Federal, State, or local law enforcement officials, or other

sources of potentially relevant information. After completion of this inquiry and any further measures required under paragraphs (c), (d), (e), and (f) of this section, the cemetery director will make a decision on the request for interment or memorialization in accordance with paragraph (b), (e), or (g) of this section.

(b) *Decision approving request without a proceeding or termination of a claim by personal representative without a proceeding.* (1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there is no clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving the interment or memorialization.

(2) If the personal representative elects for burial at a location other than a VA national cemetery, or makes alternate arrangements for burial at a location other than a VA national cemetery, the request for interment or memorialization will be considered withdrawn and action on the request will be terminated.

(c) *Initiation of a proceeding.* (1) If, after conducting the inquiry described in paragraph (a) of this section, the cemetery director determines that there appears to be clear and convincing evidence that the deceased has committed a Federal or State capital crime of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution, the cemetery director will provide the personal representative of the deceased with a written summary of the evidence of record and a written notice of procedural options.

(2) The notice of procedural options will inform the personal representative that he or she may, within 15 days of receipt of the notice:

- (i) Request a hearing on the matter;
- (ii) Submit a written statement, with or without supporting documentation, for inclusion in the record;
- (iii) Waive a hearing and submission of a written statement and have the matter forwarded immediately to the

Under Secretary for Memorial Affairs for a finding; or

(iv) Notify the cemetery director that the personal representative is withdrawing the request for interment or memorialization, thereby, closing the claim.

(3) The notice of procedural options will also inform the personal representative that, if he or she does not exercise one or more of the stated options within the prescribed period, the matter will be forwarded to the Under Secretary for Memorial Affairs for a finding based on the existing record.

(d) *Hearing.* If a hearing is requested, the Director, Memorial Services Network will conduct the hearing. The purpose of the hearing is to permit the personal representative of the deceased to present evidence concerning whether the deceased committed a crime which would render the deceased ineligible for interment or memorialization in a national cemetery. Testimony at the hearing will be presented under oath, and the personal representative will have the right to representation by counsel and the right to call witnesses. The VA official conducting the hearing will have the authority to administer oaths. The hearing will be conducted in an informal manner and court rules of evidence will not apply. The hearing will be recorded on audiotape and, unless the personal representative waives transcription, a transcript of the hearing will be produced and included in the record.

(e) *Decision of approval or referral for a finding after a proceeding.* Following a hearing or the timely submission of a written statement, or in the event a hearing is waived or no hearing is requested and no written statement is submitted within the time specified:

(1) If the cemetery director determines that it has not been established by clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, and the deceased remains otherwise eligible, the cemetery director will make a decision approving interment or memorialization; or

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(2) If the cemetery director believes that there is clear and convincing evidence that the deceased committed a Federal or State capital crime of which he or she was not convicted due to death or flight to avoid prosecution, the cemetery director will forward a request for a finding on that issue, together with the cemetery director's recommendation and a copy of the record to the Under Secretary for Memorial Affairs.

(f) *Finding by the Under Secretary for Memorial Affairs.* Upon receipt of a request from the cemetery director under paragraph (e) of this section, the Under Secretary for Memorial Affairs will make a finding concerning whether the deceased committed a Federal or State capital crime of which he or she was not convicted by reason of unavailability for trial due to death or flight to avoid prosecution. The finding will be based on consideration of the cemetery director's recommendation and the record supplied by the cemetery director.

(1) A finding that the deceased committed a crime referred to in paragraph (f) of this section must be based on clear and convincing evidence.

(2) The cemetery director will be provided with written notification of the finding of the Under Secretary for Memorial Affairs.

(g) *Decision after finding.* Upon receipt of notification of the finding of the Under Secretary for Memorial Affairs, the cemetery director will make a decision on the request for interment or memorialization pursuant to 38 U.S.C. 2411. In making that decision, the cemetery director will be bound by the finding of the Under Secretary for Memorial Affairs.

(h) *Notice of decision.* The cemetery director will provide written notice of the finding of the Under Secretary for Memorial Affairs and of a decision under paragraph (b), (e)(1), or (g) of this section. With notice of any decision denying a request for interment or memorialization, the cemetery director will provide written notice of appellate rights to the personal representative of the deceased, in accordance with §19.25 of this title. This will include notice of the opportunity to file a notice of disagreement with the decision of the

cemetery director and the finding of the Under Secretary for Memorial Affairs. Action following receipt of a notice of disagreement with a denial of eligibility for interment or memorialization under this section will be in accordance with §§19.26 through 19.38 of this title.

(Authority: 38 U.S.C. 512, 2411)

§ 38.620 Persons eligible for burial.

The following is a list of those individuals who are eligible for burial in a national cemetery:

(a) Any veteran (which for purposes of this section includes a person who died in the active military, naval, or air service).

(b) Any member of a Reserve component of the Armed Forces, and any member of the Army National Guard or the Air National Guard, whose death occurs under honorable conditions while such member is hospitalized or undergoing treatment, at the expense of the United States, for injury or disease contracted or incurred under honorable conditions while such member is performing active duty for training, inactive duty training, or undergoing that hospitalization or treatment at the expense of the United States.

(c) Any Member of the Reserve Officers' Training Corps of the Army, Navy, or Air Force whose death occurs under honorable conditions while such member is—

(1) Attending an authorized training camp or on an authorized practice cruise;

(2) Performing authorized travel to or from that camp or cruise; or

(3) Hospitalized or undergoing treatment, at the expense of the United States, for injury or disease contracted or incurred under honorable conditions while such member is—

(i) Attending that camp or on that cruise;

(ii) Performing that travel; or

(iii) Undergoing that hospitalization or treatment at the expense of the United States.

(d) Any person who, during any war in which the United States is or has been engaged, served in the armed forces of any government allied with the United States during that war, whose last such service terminated