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Part VII

Department of Veterans Affairs

38 CFR Part 61

VA Homeless Providers Grant and Per Diem Program; Religious Organizations; Proposed Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 61

RIN 2900–AL63

VA Homeless Providers Grant and Per Diem Program; Religious Organizations

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: We propose to revise the regulations concerning the VA Homeless Providers Grant and Per Diem Program. More specifically, we propose to revise provisions that apply to religious organizations that receive VA funds under VA's Homeless Providers Grant and Per Diem Program to ensure that VA activities under this program are open to all qualified organizations, regardless of their religious character, and to clearly establish the proper uses to which funds may be put, and the conditions for the receipt of such funding.

Also, consistent with Title VII of the Civil Rights Act of 1964, we propose to remove the regulatory prohibition against religious organizations making employment decisions on a religious basis. The numerous other requirements are more than sufficient to ensure that direct government funds are not used for inherently religious activities.

DATES: Comments must be received on or before October 30, 2003.

ADDRESSES: Mail or hand-deliver written comments to: Director, Regulations Management (00REG1), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or fax comments to (202) 273–9026; or e-mail comments to *OGCRegulations@mail.va.gov.* Comments should indicate that they are submitted in response to ''RIN 2900–AL63.'' All comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call 202 273–9515 for an appointment.

FOR FURTHER INFORMATION CONTACT: Roger Casey, VA Homeless Providers Grant and Per Diem Program, Mental Health Strategic Health Care Group (116E), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (877) 332–0334. (This is a toll-free number.)

SUPPLEMENTARY INFORMATION: In the interim final rule document published in the **Federal Register**, March 19, 2003, we revised a portion of the ''VA Homeless Providers Grant and Per Diem Program'' regulations. In order to allow the public to easily review the regulatory changes, we included the entire rule text for that section, including portions that were not changing from the regulation that had already been promulgated prior to the interim final rule. The interim final regulation contained a § 61.64 concerning religious organizations, which had been promulgated previously and was not changed in the interim final rule, that reads as follows:

(a) As a condition for receiving assistance under this part, an organization that is primarily a religious organization must agree to conduct activities for which the assistance is provided in a manner that is free from religious influences and must comply with the following:

(1) It will not discriminate against any employee or applicant for employment on the basis of religion and will not limit employment or give preference in employment to persons on the basis of religion;

(2) It will not discriminate against any person applying for housing or supportive services on the basis of religion and will not limit such housing or services or give preference to persons on the basis of religion; and

(3) It will provide no religious instruction or counseling, conduct no religious worship or services, engage in no religious proselytizing, and exert no other religious influence as a condition of the provision of housing and supportive services.

We propose to revise § 61.64, consistent with Executive Order 13199 (''Establishment of White House Office of Faith-Based and Community Initiatives'') and Executive Order 13279 (''Equal Protection of Laws for Faith-Based and Community Organizations''), to ensure that VA programs under this part are open to all qualified organizations, regardless of their religious character, and to establish clearly the proper uses to which funds may be put, and the conditions for the receipt of such funding. Accordingly, we propose to revise § 61.64 in accordance with the following principles.

1. *Participation by faith based organizations in VA programs.* The proposed rule would make clear that organizations are eligible to participate in VA programs under this part without regard to their religious character or affiliation, and that organizations may not be excluded from the competition for VA funds under this part because they are religious. Specifically, religious organizations would be eligible to compete for funding on the same basis, and under the same eligibility requirements, as all other nonprofit organizations. Also, the Federal Government, as well as State and local governments administering funds under VA programs under this part, would be prohibited from discriminating against organizations on the basis of religion or their religious character.

2. *Faith-based activities.* The proposed rule would describe the requirement applicable to all recipient organizations regarding the use of VA funds under this part for faith-based activities. Specifically, a participating organization could not use direct VA funds under this part to finance inherently religious activities, such as worship, religious instruction, or proselytization. If the organization engages in such activities, the activities must be offered separately, in time or location, from the programs or services funded with VA assistance, and participation must be voluntary for the beneficiaries of the directly funded programs or services under this part. This requirement would ensure that direct VA funds under this part provided to religious organizations are not used to support inherently religious activities. Thus, VA funds under this part provided directly to a participating organization may not be used, for example, to conduct prayer meetings, studies of sacred texts, or any other activity that is inherently religious.

This proposed restriction does not mean that an organization that receives VA funds under this part cannot engage in inherently religious activities. It simply means such an organization cannot fund these activities with direct VA funds under this part. Thus, faith-based organizations that receive direct VA funds under this part must take steps to separate, in time or location, their inherently religious activities from the VA-funded services that they offer under this part.

The proposed rule defines the meaning of ''direct financial assistance'' and ''indirect financial assistance.'' We note, however, that VA currently has in place only programs that provide direct financial assistance to participating organizations.

3. *Independence of faith-based organizations.* The proposed rule clarifies that a religious organization that participates in VA programs will retain its independence and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from VA under this part to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations

may use space in their facilities to provide VA-funded services under this part, without removing religious art, icons, scripture, or other religious symbols. In addition, a VA-funded religious organization may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

4. *Nondiscrimination in providing assistance.* The proposed rule clarifies that an organization that participates in a VA program under this part shall not, in providing service funded in whole or in part by VA, discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief.

5. *Assurance requirement.* The proposed rule would remove those provisions of VA's regulation that require only VA-funded religious organizations to provide assurance that they will conduct eligible program activities in a manner that is ''free from religious influences'' as VA imposes no comparable assurance requirements in any other context. VA believes it is unfair to require religious organizations alone to provide additional assurance, above and beyond those any other organization is required to provide, that they will comply with VA requirements. All organizations that participate in VA programs, including religious ones, must carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of VA-funded activities, including those prohibiting the use of direct financial assistance from VA to engage in inherently religious activities. In addition, to the extent that provisions of VA's regulation disqualify religious organizations from participating in VA's program because they are motivated or influenced by religious faith to provide social services, the proposed rule removes that restriction, which is inconsistent with governing law. Such requirements may have a ''chilling effect'' on religious organizations, many of which are motivated by their faith to provide VA-funded social services or view the provision of such services as a ''ministry.''

As noted above, current § 61.64 provides that as a condition for receiving assistance an organization that is primarily a religious organization must agree not to discriminate against any employee on the basis of religion and could not limit employment or give preference on the basis of religion. We propose to delete the hiring restriction. Section 702 of the Federal Civil Rights Act of 1964 provides that a religious organization may, without running afoul of Title VII, employ individuals who share its religious beliefs. This provision helps enable faith-based groups to promote common values, a sense of community and unity of purpose, and shared experiences through service—all of which can contribute to a religious organization's effectiveness. It thus helps protect the religious liberties of communities of faith. The proposed regulation thus reflects the recognition that a religious organization may determine that, in order to define or carry out its mission, it is important that it be able to take its faith into account in making employment decisions.

Comment Period

As noted above, an interim final rule revising the VA Homeless Providers Grant and Per Diem regulations became effective on March 19, 2003. We will begin working on a final rule relating to the interim final rule as soon as the comment period for the interim final rule closes. We are providing a 30-day comment period for this proposed rule concerning religious organizations so that any resulting changes can be included in said final rule.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

Executive Order 12866

This document has been reviewed by the Office of Management and Budget under Executive Order 12866.

Regulatory Flexibility Act

The Secretary hereby certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–602. This proposed rule merely ensures that religious organizations are treated the same as other participants in the Homeless Providers Grant and Per Diem Program. It creates no new economic impact. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirement of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before developing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of $100 million or more in any given year. This rule would have no consequential effect on State, local, or tribal governments.

Catalog of Federal Domestic Assistance Program

The Catalog of Federal Domestic Assistance program number is 64.024.

List of Subjects in 38 CFR Part 61

Administrative practice and procedure, Alcohol abuse, Alcoholism, Day care, Dental health, Drug abuse, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Mental health programs, Per-diem program, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Approved: May 30, 2003.

Anthony J. Principi,

Secretary of Veterans Affairs.

For the reasons set forth in the preamble, we propose to amend 38 CFR part 61 as follows:

PART 61—VA HOMELESS PROVIDERS GRANT AND PER DIEM PROGRAM

1. The authority citation for part 61 continues to read as follows:

Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 note.

2. Revise § 61.64 to read as follows:

§ 61.64 Religious organizations.

(a) Organizations that are religious or faith-based are eligible, on the same basis as any other organization, to participate in VA programs under this part. Neither the Federal Government nor a State or local government receiving funds under this part shall discriminate against an organization on the basis of the organization's religious character or affiliation.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, ''indirect financial assistance'' means Federal assistance in which a service provider receives program funds through a voucher, certificate, agreement or other form of disbursement, as a result of the independent and private choices of individual beneficiaries. ''Direct financial assistance,'' means Federal aid

in the form of a grant, contract, or cooperative agreement where the independent choices of individual beneficiaries do not determine which organizations receive program funds.

(c) Organizations that engage in inherently religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA, and participation in any of the organization's inherently religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA.

(d) A religious organization that participates in VA programs under this part will retain its independence from Federal, State, or local governments and may continue to carry out its mission, including the definition, practice and expression of its religious beliefs, provided that it does not use direct financial assistance from VA under this part to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without removing religious art, icons, scripture, or other religious symbols. In addition, a VA-funded religious organization retains its authority over its internal governance, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious references in its organization's mission statements and other governing documents.

(e) An organization that participates in a VA program under this part shall not, in providing program assistance, discriminate against a program beneficiary or prospective program beneficiary regarding housing, supportive services, or technical assistance, on the basis of religion or religious belief.

(f) If a State or local government voluntarily contributes its own funds to supplement Federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(Authority: 38 U.S.C. 501, 2002, 2011, 2012, 2061, 2064, 7721 *note*)

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