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BULLETIN

THE NEWSLETTER OF VETERANS UNITED FOR TRUTH, INC.

#48

“VETERANS STANDING UP FOR EACH OTHER”

15 AUGUST 2011

UPDATE ON STATUS OF OUR CLASS ACTION LAWSUIT

As we have reported to you before, the Ninth Circuit Court of Appeals ruled on our case on 10 May 2011. The majority of the three-judge panel (Circuit Judges Hug & Reinhardt) found that veterans' constitutional rights were being violated by the manner in which the VA's had implemented their policies, and by how those policies were being executed. FYI here is the “Conclusion” statement from that ruling:

“The United States Constitution confers upon veterans and their surviving relatives a right to the effective provision of mental health care and to the just and timely adjudication of their claims for health care and service-connected death and disability benefits. Although the terms of the Administrative Procedure Act preclude Veterans from obtaining relief in our court for their statutory claims, their entitlements to the provision of health care and to veterans' benefits are property interests protected by the Due Process Clause of the Fifth amendment. The deprivation of those property interests by delaying their provision, without justification and without any procedure to expedite, violates veterans' constitutional rights. Because neither Congress nor the Executive has corrected the behavior that yields these constitutional violations, the courts must provide the plaintiffs with a remedy. We therefore remand this case to the district court with the instruction that, unless the parties resolve this dispute first, it enter an order consistent with this opinion.”

Chief Judge Kozinski wrote a lengthy dissent from that position, essentially agreeing with the VA that the courts had no business in the game.

Since that time the VA has petitioned the court to have the case returned to the Ninth Circuit for an *en banc* hearing, raising entirely new objections previously unmentioned. In the Ninth Circuit an *en banc* panel consists of 11 of the 29 judges. The VA has no automatic right to an *en banc* hearing; their request must be ruled upon by the court. Our counsel has subsequently filed for a ruling to deny the VA's request.

Our counsel has provided us with a layman's interpretation of the current situation which we would like to share with all of you. Please pass it on to any of your correspondents who might have interest in this case, pro or con:

“On August 9, Veterans for Common Sense and Veterans United for Truth filed their response to VA's petition for rehearing.

As explained in the response filed yesterday, VA's petition raised four legal arguments as to why the case should be reheard, but VA did not even raise three of those arguments in the original appeal to the Ninth Circuit Court of Appeals. This is particularly interesting because in raising the arguments, VA's petition described these issues as "questions of exceptional importance." Yet, they were not so important that VA felt it necessary to raise these issues in the original appeal.

The three new issues are:

- 1) VA now claims that veteran applicants do not have a constitutionally protected property interest in mental health care or disability compensation.
- 2) VA now claims that it enjoys sovereign immunity, and therefore courts cannot review its unconstitutional actions.
- 3) VA now claims that VCS and VUFT do not have standing to pursue their constitutional claims.

In addition to these new issues, VA also claims that the Veterans Judicial Review Act strips the court of any jurisdiction to hear these constitutional claims.

VA's position - if correct - would have far-reaching implications for veterans. It would mean that veterans have fewer constitutional rights than any other applicants for benefits. And it would mean that veterans have no recourse in Article III federal courts to challenge unconstitutional actions of VA.

In response, VCS and VUFT noted:

- 1) That the federal courts - under the Administrative Procedure Act and otherwise - are open to provide remedies for constitutional violations by federal agencies and federal officials;
- 2) That the Veterans Judicial Review Act does not prevent the district court from hearing these constitutional challenges;
- 3) That VCS and VUFT have standing to bring these claims on behalf of themselves (as organizations) AND on behalf of their members; and
- 4) That veterans have a constitutionally protected property interest in timely medical care and timely resolution of their appeals from service-connected death and disability compensation decisions, and that the Ninth Circuit panel was correct in holding that the egregious delays violated veterans' constitutional right to due process.

We believe that the Ninth Circuit panel correctly resolved all of these issues, and that rehearing is not necessary.”

We will continue to keep you informed as to the progress in the case.

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And if you are so inclined, please help us in this effort through a contribution:

<http://www.vuft.org/donate.html>