

DATE: 03-11-91

CITATION: VAOPGCPREC 29-91  
Vet. Aff. Op. Gen. Couns. Prec. 29-91

**TEXT:**

**SUBJECT:** Change of use of State Home Nursing Home Care Units  
Constructed with Grant Funds.

(This opinion, previously issued as Opinion of the General Counsel 15-74, dated July 22, 1974, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

**To: Chief Medical Director**

**QUESTION PRESENTED:**

Does VA have authority to waive the recapture provisions of 38 U.S.C. § 5036, when State Home nursing home care units constructed with grant funds provided by VA pursuant to subchapter III of chapter 81, title 38, United States Code, are utilized for a different level of care?

**COMMENTS:**

A nursing home care unit of the Nebraska Veterans Home was constructed with grant funds provided by the VA pursuant to subchapter III of chapter 81, title 38, United States Code. The Administrator of the Nebraska Veterans Home wishes the facility to be redesignated as a "hospital type" facility and has requested from the Division of Standards of the Nebraska State Department of Health a license based on a long-term convalescent-type of care. It is stated that the nursing home care rate of \$6 per patient day is presently being paid to the State, but they intend to request that this be increased to the \$10 per diem hospital rate if a waiver, requested by the Administrator of the Home, is granted. The waiver being sought is from the recapture provisions of 38 U.S.C. § 5036.

There is no indication from the submitted material whether the Department of Medicine and Surgery would honor a request to increase the per diem rate. As a matter of fact, the letter from the VA Hospital Director indicates that the degree of care would not in reality change. If this is the case, and if DM & S were to conclude that the level of care being provided is, in fact, still within the guidelines established for nursing home care, as found in M-1, Part I, Chapter 3 (based on the definition contained in 38 U.S.C. § 101(28)), notwithstanding a denomination as and a license for a type of hospitalization, it would be necessary to continue to

make payments to the Nebraska Veterans Home at the per diem rate of \$6 for nursing home care. In that event, there would be no question requiring an answer. If, however, DM & S were to conclude that the level of care being provided warrants a per diem payment of \$10 for hospital care, then the legality of the request for waiver from the recapture provisions of 38 U.S.C. § 5036 must be considered.

The purpose of subchapter III is stated in clear terms in 38 U.S.C. § 5032 as follows:

"The purpose of this subchapter is to assist the several States to construct State home facilities for furnishing nursing home care to war veterans." (Emphasis added.)

There can be little doubt that the aforementioned purpose of the grant in question was understood and intended by Congress to be utilized for the single purpose of making available nursing home care facilities. We find in Senate Report No. 1293, 88th Congress, to accompany H.R. 8009 (the bill which was ultimately enacted as P.L. 88-450), the following:

"All the funds must be used for the construction of nursing home care facilities and not to enlarge or increase existing facilities for hospital or domiciliary care."

38 U.S.C. § 5036 reads as follows:

"If, within twenty years after completion of any project for construction of facilities for furnishing nursing home care with respect to which a grant has been made under this subchapter, such facilities cease to be operated by a State, a State home, or an agency or instrumentality of a State principally for furnishing nursing home care to war veterans, the United States shall be entitled to recover from the State which was the recipient of the grant under subchapter, or from the then owner of such facilities, 65 per centum of the then value of such facilities, as determined by agreement of the parties or by action brought in the district court of the United States for the district in which such facilities are situated."

VA Regulations 6170-6176 (38 C.F.R. §§ 17.170-17.176) implementing the law are of like content.

#### **HELD:**

The congressional intent to assist States in the construction of nursing home care facilities appears unmistakable. We find nothing in the legislative history of P.L. 88-450, which introduced the subchapter in question, or in the general rules of statutory construction, from which authority to waive the recapture provisions can be deduced. However commendable it might be for the State of Nebraska to make a higher level of care available to the residents of the Home, we are of the

opinion that there is no authority for the VA to waive the recapture provisions.

VETERANS ADMINISTRATION GENERAL COUNSEL

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