Department of Veterans Affairs

Memorandum

Date: August 28, 2003 VAOPGCPREC 4-2003

From: General Counsel (022)

Subj: Suspension or Termination of Debt Collection

To: Chairman, Board of Veterans' Appeals (01)

QUESTIONS PRESENTED:

A. Who has the authority to consider whether collection of a debt should be suspended or terminated?

B. Is a denial of suspension or termination of collection activity under 31 U.S.C. § 3711 reviewable by the Board of Veterans' Appeals (Board)?

C. If regional-office rating personnel and/or the Board have the authority to consider whether collection of a debt should be suspended or terminated, must the Department of Veterans Affairs (VA) consider this issue in all cases where a debtor has requested a waiver of overpayment?

D. If regional-office rating personnel and/or the Board have the authority to consider whether collection of a debt should be suspended or terminated, then what is the relationship between the criteria for suspending or terminating collection activity and waiving recovery of an overpayment?

COMMENTS:

1. VA's debt-collection activities are governed by several statutes, some of which are specific to VA and some of which establish Government-wide debt collection practices. Among other things, the VA-specific statutes authorize VA to waive recovery of overpayments in certain circumstances, to collect overpayments arising out of VA benefit programs by means of offset against future VA benefit payments, and to bring suits to collect overpayments arising out of VA benefit programs. *See* 38 U.S.C. §§ 5302, 5314, 5316. The Government-wide debt collection statutes require agencies to try to collect debts arising out of their activities, but also vest agency heads with authority to compromise debts of up to $100,000 and to suspend or terminate collection activity on such debts. *See* 31 U.S.C. § 3711(a). Pursuant to 31 U.S.C. § 3711(a)(3), the head of an agency "may suspend or end collection action on a claim [of not more than

$100,000] when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered."

2. The Secretary of the Treasury and the Attorney General of the United States have jointly prescribed regulations implementing the Government-wide debt collection standards. Those regulations, which are codified at 31 C.F.R. Parts 900 to 904 and are known collectively as the "Federal Claims Collection Standards" (FCCS), apply to all federal agencies. *See* 31 U.S.C. § 3711(d)(2). Part 903 of title 31, Code of Federal Regulations, provides standards governing the suspension and termination of debt collection activities. Additionally, VA regulations at 38 C.F.R. §§ 1.900 to 1.994 prescribe additional standards implementing the various debt-collection statutes applicable to VA, including the Government-wide standards in title 31, United States Code. Section 1.941 and 1.942 of title 38, Code of Federal Regulations, respectively, contain VA's regulations regarding suspension and termination of collection activity pursuant to the authority granted by 31 U.S.C. § 3711(a)(3).

Delegated Authority to Suspend or Terminate Collection Action

3. Section 3711(a)(3) of title 31, United States Code, vests the head of each Federal agency with the authority to suspend or terminate collection action on a debt of not more than $100,000 arising out of such agency's operations. The Department of Justice has authority to suspend or terminate collection action on debts exceeding $100,000 arising out of any agency's operations. 31 C.F.R. § 903.1(b). With respect to debts not exceeding $100,000, the Secretary's authority to suspend or terminate collection has been delegated to various officials, depending on the nature of the debt. Section 2.6(e)(4)(ii) of title 38, Code of Federal Regulations, delegates to the General Counsel, regional counsels, and certain other officials in the Office of the General Counsel the authority to suspend or terminate collection on claims of $100,000 or less based on damage to or loss of Government property under VA's jurisdiction resulting from negligence or other legal wrong of a person other than a Government employee acting within the scope of employment. *See also* 38 C.F.R. § 14.618. Section 2.6(e)(4)(iii) vests those same individuals with authority to suspend or terminate collection on claims of $100,000 or less for amounts owed by an individual or legal entity who is liable for the cost of hospital, medical, surgical, or dental care of a person. *See also* 38 C.F.R. § 14.619.

4. By Memorandum 00-92-2 (Delegation of Authority – Federal Claims Collection Act and Title 38 U.S.C. Section 3720), dated March 11, 1992, the Secretary delegated authority to the Assistant Secretary for Management, as the Chief Financial Officer of VA, to suspend or terminate collection action on claims not exceeding $100,000. In VA Directive 4800 (Debt Management), issued May 21, 2001, the Assistant Secretary for Management delegated that authority to the Chief Financial Officers for the Veterans Benefits Administration (VBA) and the

Veterans Health Administration (VHA), and to the Deputy Assistant Secretary (DAS) for Finance with respect to claims within the jurisdiction of each of those organizations. VA Directive 4800, para. 3.b. The Assistant Secretary for Management further authorized redelegation within each administration and recommended that substantial authority to suspend or terminate collection be delegated to the level of the Chief of the Fiscal Activity (CFA) at field stations and to the Director of the Debt Management Center. *Id.* (The CFA is the VA employee at each VBA, VHA, or joint VBA/VHA field station who has been designated with primary responsibility for fiscal matters at that station.) We have been informed that, pursuant to redelegations within each administration, the CFA at each VBA and VHA station and the Director of the Debt Management Center currently exercise the authority to suspend or terminate collection on most debts other than those expressly reserved to the Office of the General Counsel.

5. A nontax claim may, with the consent of the Secretary of the Treasury, be referred to a Federal debt-collection center or a private collection contractor for servicing, or to the Department of Justice (DOJ) for litigation. 31 U.S.C. § 3711(g)(4). Upon referral, the debt-collection center, collection contractor, or DOJ may, among other things, suspend or terminate collection. 31 U.S.C. § 3711(g)(5). If a debt has been delinquent for 180 days, it must be referred to the Secretary of the Treasury, who may collect the claim, terminate collection, or refer the claim to one of the entities referenced above. 31 U.S.C. § 3711(g)(1). An agency head also may sell any nontax debt that has been delinquent for more than 90 days, 31 U.S.C. § 3711(i)(1), and may be required by the Secretary of the Treasury to sell any nontax debt on which collection has been suspended. 31 U.S.C. § 3711(i)(2).

6. In summary, the authority to suspend or terminate collection action on debts arising out of VA activities may be exercised by the CFAs at individual VBA and VHA stations, the Director of VA's Debt Management Center, authorized personnel in the Office of the General Counsel, DOJ, the Secretary of the Treasury, a Federal debt-collection center, or a private collection contractor, depending on the nature, amount, and status of the debt. The Regional Office Committees on Waivers and Compromises, which have authority to waive or compromise a wide variety of debts, including those arising out of most VA benefit programs (*see* 38 C.F.R. §§ 1.955-1.957), do not have the authority to suspend or terminate collection action on the debts within their waiver and compromise jurisdiction.

Review of Decisions Denying Suspension or Termination of Collection

7. Suspension and termination of debt collection differ from waiver of recovery of debt in two significant respects. Waiver is granted where collection of a debt would be "against equity and good conscience," and the determination, therefore, requires VA to balance the interests of the debtor and VA in order to arrive at a decision fair to both parties. *See* 38 U.S.C. § 5302; 38 C.F.R. § 1.965. In

contrast, suspension and termination are designed to promote the Government's interest in the efficient and cost-effective collection of debts, and the determination, therefore, is based primarily upon the best interests of the Government, as discussed below. Additionally, waiver serves to release the debtor from further liability for the waived portion of the debt. In contrast, suspension and termination of collection action do not relieve the debtor of liability, nor do they prevent further collection or other actions to enforce the debt. *See* 31 C.F.R. § 903.5(a) ("When collection action on a debt is suspended or terminated, the debt remains delinquent and further collection action may be pursued at a later date."); 31 C.F.R. 903.3(b) (termination does not preclude agency from selling debt or undertaking future collection).

8. VA regulations provide that decisions denying waiver of a debt may be appealed to the Board, but that decisions rejecting a compromise offer are not subject to appeal. 38 C.F.R. § 1.958. Neither VA's regulations, nor the FCCS, however, indicate whether decisions denying suspension or termination of collection action are subject to appeal. From November 12, 1976, to December 24, 1996, paragraph 4.03 of VA's Field Appellate Procedures Manual M1-1 stated that determinations regarding "collection of debt procedures as distinguished from waiver of recovery" could not be appealed to the Board. The manual, however, was rescinded in its entirety by VA Notice 96-18 (Dec. 24, 1996), and we are aware of no comparable provision in any current manual or regulation. We note that some agencies that ordinarily provide for agency review of their initial determinations have issued regulations specifying that determinations regarding suspension or termination of collection action on claims arising under certain programs are not subject to review under appeal procedures applicable to those programs. *See* 20 C.F.R. § 404.903(h) (Social Security); 32 C.F.R. § 199.11(g)(10) (CHAMPUS); 42 C.F.R. § 405.705(d) (Medicare).

9. Section 7104(a) of title 38, United States Code, states that the Board has jurisdiction to decide "[a]ll questions in a matter which under section 511(a) of this title is subject to decision by the Secretary." Section 511(a) states that "[t]he Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." In circumstances where VA collects a debt by means other than offset of benefits under 38 U.S.C. § 5314, a decision regarding suspension or termination of collection clearly would not affect the provision of benefits to veterans or their dependents or survivors within the meaning of section 511(a). Where a debt is collected by offset, a decision regarding suspension or termination of collection arguably would "affect[] the provision of benefits" in the sense that it would determine whether the debtor's benefits are paid directly to the debtor or applied to satisfy his or her debt, although that interpretation of 38 U.S.C. § 511(a) and 7104(a) is not without ambiguity. Further, it is unclear whether decisions on suspension or termination of collection would involve reviewable decisions on "questions of law and fact"

within the meaning of section 511(a). As explained below, the authority to suspend or terminate benefits is discretionary. Although agencies may consider factual matters pertaining to the debtor's financial condition, the ultimate determination is discretionary and may be based on fiscal judgment regarding the Government's best interests and upon policy considerations, as distinguished from findings of fact and conclusions of law.

10. It is unnecessary to resolve the ambiguity discussed above, because we conclude that decisions regarding the suspension or termination of debt collection are not subject to appeal as they have been committed by Congress to the discretion of the Secretary or his delegates. It is well established that some types of discretionary determinations are unreviewable by their nature. *See Rank v. Nimmo*, 677 F.2d 692, 699-700 (9th Cir. 1982) (VA decision not to exercise discretionary authority to pay off mortgage and accept assignment and security was not subject to review); *Darrow v. Derwinski*, 2 Vet. App. 303, 306 (1992) (Board lacks jurisdiction to review Secretary's discretionary equitable relief determinations under 38 U.S.C. § 503). A decision is committed to agency discretion "whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quoting *Data Processing Serv. v. Camp*, 397 U.S. 150, 157 (1970)). This requirement may be satisfied by statutory language or reliable legislative history, or by "inferences of intent drawn from the statutory scheme as a whole." *Block*, 467 U.S. at 349. The Supreme Court has found agency decisions unreviewable where a statute is drawn so that a reviewing body would have no meaningful standard against which to judge the agency's exercise of discretion, where the agency's decision requires a complicated balancing of factors that are peculiarly within its expertise, or where review would frustrate the clear purpose of the statute. *See Lincoln v. Vigil*, 508 U.S. 182, 191 (1993); *Morris v. Gressette*, 432 U.S. 491, 503-05 (1977).

11. In *Rank*, for example, as noted above, the U.S. Court of Appeals for the Ninth Circuit concluded that a discretionary decision by VA not to exercise its statutory authority to pay the balance of a mortgage upon default by a veteran and to take assignment of the loan and security was unreviewable. The court observed that the governing statute provided that VA "may" pay off the obligation and take assignment in the event of default by the veteran, but provided no criteria to govern the exercise of such discretion. 677 F.2d at 699-700. The court further noted that, VA's decision on such matters "necessarily involves a consideration of myriad factors, including, but not limited to, internal VA management considerations relating to budget and personnel, the risk of loss to the VA, the adequacy of prior loan servicing, and the circumstances of the borrower's default." *Id.* at 700. In reaching a similar conclusion, another court found it significant that the statute authorizing VA to take assignment of defaulted loans was "intended primarily to afford flexibility in administering the governmental liability resulting from defaults; that it is, primarily for the aid of the

government, not of veterans." *Gatter v. Nimmo*, 672 F.2d 343, 345 (3d Cir. 1982).

12. Several factors suggest that the decision to suspend or terminate collection of a debt is committed to an agency's unreviewable discretion. In 1966, Congress enacted the Federal Claims Collection Act of 1966, Pub. L. No. 89-508, 80 Stat. 308 (FCCA), to enhance the Government's debt collection actions.[1] The FCCA specifies that the head of an agency "may" suspend or terminate collection action when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered. 31 U.S.C. § 3711(a)(3). The statute provides no criteria to govern the agency head's determination regarding whether or not to suspend or terminate collection action in such cases. The FCCS provisions and VA regulations relating to suspension or termination specify certain circumstances in which suspension or termination may be employed. *See* 31 C.F.R. §§ 903.2(a), 903.3(a); 38 C.F.R. §§ 1.941, 1.942. However, neither suspension nor termination is required when the specified circumstances exist. Even where an agency determines that suspension or termination would be justified in the economic interests of the Government, the agency has discretion to proceed with collection, if, for example, such action would further an agency policy or priority. *See* 31 C.F.R. § 903.4 ("When a significant enforcement policy is involved . . . agencies may refer debts for litigation even though termination of collection activity may otherwise be appropriate."); 38 C.F.R. § 1.943 (stating similar rule). Similarly, agencies have discretion to choose among various debt-collection options, including suspension, termination, compromise, referral of the debt for litigation or servicing, or sale of the debt. *See* 62 Comp. Gen. 599, 604 (1983) (suspension of collection "need not be undertaken when compromise under the FCCS seems more appropriate"). The Board would have no meaningful basis for reviewing decisions regarding whether to pursue collection or the choice among the various debt-servicing options available to VA, because those decisions may

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[1] Section 3(a) of the FCCA, now codified, as amended, at 31 U.S.C. § 3711(a)(1), provided that the head of an agency must seek to collect debts arising out of the agency's operations. *See also* 31 C.F.R. § 901.1 (requiring agencies to "aggressively collect all debts"). Section 3(b) of that Act, now codified, as amended, at 31 U.S.C. § 3711(a)(2) and (3), provided that, with respect to any such claims not exceeding $20,000, the head of an agency may seek to compromise the claim or may "cause collection action on any such claim to be terminated or suspended where it appears that no person liable on the claim has the present or prospective financial ability to pay any significant sum thereon or that the cost of collecting the claim is likely to exceed the amount of recovery." The Administrative Dispute Resolution Act, Pub. L. No. 101-552, § 8(b), 104 Stat. 2736, 2746-47 (1990), extended this authority to claims of up to $100,000.

be based on discretionary judgments regarding policy matters and VA's best interest, as distinguished from matters of fact or law.

13. The decision regarding whether to suspend or terminate collection, or to pursue any other available debt-servicing procedure, requires the exercise of judgment and discretion regarding matters of internal agency operation, including assessment of the cost of agency proceedings, the risk of loss to the Government, and the availability and allocation of agency resources for debt collection. Further, as noted above, a determination regarding suspension or termination may be based on policy judgment. We believe that, in general, the assessment and balancing of matters of fiscal management and policy are properly reserved to the discretion of agency financial officers and do not lend themselves to review by the Board, which has been constituted to review matters of fact and law.

14. The Supreme Court's decision in *Morris v. Gressette* is instructive for purposes assessing whether VA decisions regarding suspension or termination of collection action are appealable. The petitioners in that case challenged the United States Attorney General's failure to object to a change in a state's voting procedures under the Voting Rights Act of 1965. The Voting Rights Act vested the Attorney General with authority to object to changes in state voting procedures within 60 days after receiving notice of them. *See* 42 U.S.C. § 1973c. Although nothing in the text or history of the Act specified whether the Attorney General's decision was subject to review, the Court found that permitting review would be inconsistent with the clear purpose of the Act to provide an expedited process for a state's voting procedures to become effective. The Court stated:

> [W]e think it is clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. . . . Since judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded.

Morris, 432 U.S. at 504-05. A similar concern applies with respect to debt collection under the FCCA.

15. The legislative history indicates that the FCCA was intended primarily to promote efficiency and economy in debt collection by authorizing agencies to compromise claims or suspend or terminate collection, where it is in the best interest of the Government to do so. The Senate Committee on the Judiciary noted that agencies previously could not compromise claims, "even if such a settlement would be in the interest of the Government and justified by normal

practices in business in the light of the debtor's ability to pay and the risks and costs inherent in litigation" and could not "terminate or suspend efforts to collect a claim even when the very futility of these efforts serves to add to the cost of government and therefore compound the loss of the United States." S. Rep. No. 89-1331, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2533. The Committee's report noted that claims were routinely referred to DOJ for enforcement even though there was no realistic prospect for collecting the debt. *Id.* at 2-3, 1966 U.S.C.C.A.N. at 2533-34. The Committee's report stated that "[i]t simply is not good business to send a worthless debt through this collection process . . . simply because no agency has the statutory authority to withhold it from this process." *Id.* at 3, 1966 U.S.C.C.A.N. at 2534. The Committee's report further stated that the authority provided by the FCCA, "if properly applied, can be expected to reduce the flow of claims of the Government into the courts." *Id*

16. The legislative history of the FCCA reflects concern that the prior limits on agency authority in debt collection often resulted in futile collection actions and needless litigation that added to the Government's cost in collecting debts. S. Rep. No. 89-1331, at 2, 1966 U.S.C.C.A.N. at 2533. By mandating aggressive collection action and giving agencies flexibility to suspend or terminate collection when justified by standard business practices, Congress clearly intended to promote efficient and cost-effective debt collection action and to reduce economic losses associated with prior collection practices. Further, Congress expressed its belief that the FCCA would reduce litigation over debt collection matters. In view of this purpose to reduce the costs, delays, and litigation associated with Government debt collection, it is clear that Congress did not intend to establish additional rights and administrative or judicial remedies for debtors, which would plainly increase the cost of Government debt collection, interpose additional delays, and foster additional litigation. Providing such procedures would frustrate the very purpose of the statute. Moreover, providing for administrative and judicial appeals of a decision regarding a particular debt-collection option would impair the agency's right to pursue other options, including compromise, sale of the debt, or referral to other sources for servicing or litigation.

17. Nothing in the FCCA or the FCCS suggests an intent to vest debtors with additional rights or remedies of either a substantive or procedural nature. *See* 31 C.F.R. 900.8 ("[t]he standards in this chapter do not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person"). In our view, the FCCA, like the statute at issue in *Gatter*, was enacted "primarily for the aid of the government" and not for the aid of debtors. *Gatter*, 672 F.2d at 345. Notably, any decision to suspend or terminate collection would not relieve debtors of any liability, nor insulate debtors from collection by means of offset, litigation, or any other procedure. *See* 31 C.F.R. 903.3(b) (termination of collection does not preclude sale of debt or further collection action). Debts on which collection action has been suspended or terminated may be referred to

DOJ for litigation. *See* 31 C.F.R. 903.1(a). Any debt that has been delinquent for 180 days or more must be referred to the Department of the Treasury, a Federal debt collection center, or a private debt collector for servicing, if it has not already been referred for litigation or other arrangements for collection have not been made. *See* 31 U.S.C. § 3711(g); *see also* 31 C.F.R. § 903.5 ("[w]hen collection action on a debt is suspended or terminated, the debt remains delinquent"). DOJ, the Department of the Treasury, a Federal debt collection agency, or a private debt collector may be able to collect the debt by means not available to VA, including tax-refund offset, salary offset, wage garnishment, litigation, or foreclosure. *See* 31 U.S.C. § 3711(g)(9). Additionally, the Secretary of the Treasury may require an agency head to sell debts through competitive procedures after collection has been terminated. *See* 31 U.S.C. § 3711(i)(2). Accordingly, suspension or termination would generally confer no significant benefit upon debtors, but would potentially subject them to additional collection actions.

18. We note that debtors have the right to dispute the validity and amount of any benefit debt owed to VA, to seek waiver of the debt, and to appeal adverse decisions on those issues. *See* 38 U.S.C. §§ 5302(a), 5314(b); 38 C.F.R. §§ 1.911(c), 1.958. Those procedures provide debtors with a comprehensive remedy to challenge the Government's authority to collect a debt. As noted above, there is no indication that Congress intended to authorize further review of the Government's discretionary determination to collect a valid unwaived debt.

19. For the foregoing reasons, we conclude that a VA decision declining to suspend or terminate collection of a debt is not subject to review by the Board. Because neither regional-office rating personnel nor the Board have the authority to consider suspension or termination of collection, it is unnecessary to respond to the third and fourth questions presented in your opinion request.

HELD:

A. Various Department of Veterans Affairs (VA) and non-VA personnel have the authority to suspend or terminate collection action under the Federal Claims Collection Act (FCCA) on debts arising out of VA activities, depending upon the amount, nature, and status of the debt. The Department of Justice may suspend or terminate collection on debts of more than $100,000. Designated officials in VA's Office of the General Counsel may suspend or terminate collection on debts of less that $100,000 involving liability for negligent damage to or loss of Government property or for the cost of hospital, medical, surgical, or dental care of a person. The Chief of the Fiscal Activity at individual Veterans Benefits Administration or Veterans Health Administration stations and the Director of VA's Debt Management Center may suspend or terminate collection on debts of up to $100,000 arising out of the operations of their offices. The Secretary of the

Treasury, a Federal debt-collection center, a private collection contractor, or the Department of Justice may suspend or terminate collection on debts that have been referred to them for servicing or litigation under the FCCA.

B. The Board of Veterans' Appeals does not have jurisdiction to review discretionary decisions by authorized VA and non-VA officials concerning suspension or termination of collection of a benefit debt.

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