

**Department of
Veterans Affairs**

Memorandum

Date: August 11, 2006

VAOPGCPREC 5-2006

From: General Counsel (022)

Subj: Incarceration in a privately Owned and Operated Correctional Facility – 38
U.S.C. § 5313

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

QUESTION PRESENTED:

Is incarceration in a correctional facility that is owned and operated by a private corporation pursuant to a contract with a State to provide correctional facilities for the State incarceration in a "Federal, State, or local penal institution" within the meaning of 38 U.S.C. § 5313?

COMMENTS:

1. The pertinent facts as reported to us are as follows. A veteran to whom the Department of Veterans Affairs (VA) awarded compensation for a number of service-connected disabilities was convicted by an Oklahoma county district court of a felony and sentenced to life imprisonment without parole. Some time after the court committed him to the Oklahoma State Department of Corrections, the veteran was transferred to a correctional facility owned and operated by a private corporation. The veteran, who continues to be incarcerated in a private facility, has contested VA's reduction of his compensation pursuant to 38 U.S.C. § 5313, arguing that, because the facility in which he is incarcerated is privately owned and operated, he is no longer incarcerated in a State penal institution within the meaning of section 5313.
2. The Oklahoma State Legislature has authorized persons convicted of a felony by a court of that state to be incarcerated in privately owned and operated correctional facilities. That legislature created a State Department of Corrections, which is authorized to imprison convicted felons and to assign the convicts to a particular correctional facility. Okla. Stat. Ann., tit. 57, §§ 505, 521.A (2005) ("Whenever a person is convicted of a felony and is sentenced to imprisonment that is not to be served in a county jail, the person shall be committed to the custody of the Department of Corrections and shall be classified and assigned to a correctional facility or program designated by the Department

2.

Chairman, Board of Veterans Appeals (01)

and authorized by law.”). That department is also authorized “to provide for incarceration, supervision, and residential treatment at facilities other than those operated by the Department of Corrections” and to provide for the construction or operation or both of correctional institutions of the Department of Corrections by private prison contractors. Okla. Stat. Ann., tit. 57, § 561.A and C (2005). The Oklahoma Department of Corrections is headed by a State Board of Corrections, which is authorized to enter into contracts with private prison contractors. Okla. Stat. Ann., tit. 57, §§ 503, 504(b)(7) (2005). “Private prison contractor” means “a nongovernmental entity or public trust which, pursuant to a contract with the Department of Corrections, operates an institution within the Department . . . or provides for the housing, care, and control of inmates and performs other functions related to these responsibilities within a minimum or medium security level facility not owned by the Department but operated by the contractor.” Okla. Stat. Ann., tit. 57, § 502.7.a (2005). The Director of the Department of Corrections is authorized to transfer prisoners from one institution to another. Okla. Stat. Ann., tit. 57, § 510.A.9 (2005).¹

3. Section 5313 states, in pertinent part:

[A]ny person who is entitled to compensation . . . and who is incarcerated in a Federal, State, or local penal institution for a period in excess of sixty days for conviction of a felony shall not be paid such compensation . . . for the period beginning on the sixty-first day of such incarceration and ending on the day such incarceration ends, in an amount that exceeds [specified amounts].

38 U.S.C. § 5313(a)(1). Section 5313(a)(1) does not specifically reference penal institutions operated by private entities under contract for a State or other government entity. Neither does it suggest that the day-to-day operations of a penal institution, or the ownership of the physical property of the facility, is decisive as to whether a facility operated for a State may be considered a State penal institution for purposes of the statute.

¹ Section 563.A of title 57, Oklahoma Statutes, provides: “Correctional facilities owned or operated by private prison contractors shall not be deemed to be within the Department of Corrections or other state agency.” However, this provision is not dispositive of the question presented. Section 563.A primarily requires legislative approval before any correctional facility (with two specified exceptions) within the Department of Corrections or any other state agency may be created or have certain construction performed. Thus, in context, the provision exempts from the legislative-approval requirement correctional facilities owned or operated by private prison contractors. It has no bearing on whether section 5313 applies to beneficiaries incarcerated in such facilities.

3.

Chairman, Board of Veterans Appeals (01)

4. A private entity has no authority to incarcerate an individual except as authorized by a government agency itself authorized by law to incarcerate the individual. See *Sarro v. Cornell Corr., Inc.*, 248 F. Supp. 2d 52, 61 (D.R.I. 2003) (“Only the government has the authority to imprison a person[,] and the exclusive governmental nature of that function is not altered by the fact that, occasionally, the government may contract to have criminal defendants incarcerated at privately-operated institutions.”); *Giron v. Corr. Corp. of Am.*, 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998) (“The function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state. . . . The fact that correctional functions have never been exclusively public does not mean that, because run by a private corporation, . . . the extent of the governmental nature of the function is any less.”). Because a private corporation’s authority to confine prisoners under a contract with a State agency derives completely from the State’s inherent authority to incarcerate persons through its operation of a criminal justice system, incarceration in a facility owned and operated by a corporation, pursuant to a contract between the corporation and the State department of corrections, is tantamount to incarceration in a State penal institution within the meaning of section 5313(a)(1).

5. As explained in VAOPGCPREC 59-91 (O.G.C. Prec. 59-91) para. 6, the primary legislative purpose for the limitation imposed by section 5313(a)(1) on the payment of compensation to incarcerated veterans is to prevent duplication of governmental expenditures benefiting incarcerated persons in receipt of veterans’ compensation. For example, the principal sponsor of the bill that established this provision said, “I do not see the wisdom of providing hundreds and thousands of dollars of tax[-]free benefits to such individuals when at the same time the taxpayers of this country are spending additional thousands of dollars to maintain these same individuals in penal institutions.” 126 Cong. Rec. 26,118 (1980) (statement of Congressman Montgomery). He also noted that veterans’ disability compensation is intended to replace lost earning capacity and is unnecessary where a person, by reason of imprisonment, suffers no economic detriment as a result of a disability. *Id.*

6. Construing section 5313(a)(1) as not applying to a convicted felon whom the State, pursuant to a contract between the State and a private corporation, has incarcerated in a privately owned and operated facility rather than a State-owned penal institution would thwart Congress’ clear purpose for the reduction in benefit payments. Such a construction would result in double governmental expenditures for those felons. The continuation of VA benefit payments would be an expenditure by the Federal government to help support the beneficiary, at the same time the State would be incurring expenses in contracting with the private party which owns and operates the facility in which the veteran is confined on the State’s behalf to provide maintenance for the prisoner. It would further conflict with Congress’ objectives to pay full disability compensation to a veteran who, because of his or her incarceration, is suffering no reduction in earning capacity

4.

Chairman, Board of Veterans Appeals (01)

due to disability. An interpretation of section 5313(a)(1) that would permit some felons incarcerated at government expense to also receive full VA benefits simply because, under a contract between a state and a private corporation, the facility in which they are confined is owned and operated by a private corporation would produce an unreasonable result. Such an outcome would impute to Congress an irrational purpose because felons who chance to be incarcerated in private facilities at government expense would continue to be entitled to the full amount of their VA benefits while felons incarcerated in State-owned and operated facilities would not. Because a narrow reading of section 5313(a)(1) would thwart the purpose of that provision by requiring double governmental expenditures for felons incarcerated in a private facility, we conclude that the proper interpretation is that incarceration in a privately owned and operated facility under a contract with a State to confine convicted felons on behalf of the State is incarceration in a "State penal institution" within the scope of section 5313(a)(1).

HELD:

Section 5313 of title 38, United States Code, limits the payment of compensation to any person who is incarcerated in a Federal, State, or local penal institution for a period greater than 60 days for conviction of a felony. Incarceration in a correctional facility owned and operated by a private corporation pursuant to a contract with a State department of corrections responsible within a State for the incarceration of convicted felons is incarceration in a State penal institution within the meaning of section 5313.

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Attachment: C-file