DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 47

[DoD Directive 1000.20]

Determinations of Active Military Service and Discharge; Civilian or Contractual Personnel

AGENCY: Office of the Secretary of Defense.

ACTION: Final rule.

SUMMARY: This rule has been revised to require the Secretary of the Military Department concerned to issue a report of casualty including an equivalent pay grade for those civilian or contractual personnel who were killed during a designated period of active military duty. The revision also directs the Secretary of the Air Force to publish notification in the Federal Register of the acceptance of a group application and, subsequently, of the final Secretarial determination. The DD Form 2108, Application for Discharge of Member or Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Forces of the United States, has been revised to include an authorization to release copies of official personnel records maintained by the National Personnel Records Center to the appropriate Military Service. These changes will allow the Veterans Administration to award appropriate survivor benefits, ease notification to members of approved groups, and speed processing of requests for discharge from members of approved groups.

EFFECTIVE DATE: This rule was approved and signed by the Deputy Secretary of Defense on June 9, 1983, and is effective as of that date.

FOR FURTHER INFORMATION CONTACT: Major Sallie A. Savage, USAF, Office of the Secretary of the Air Force (Personnel Council) [SAF/MIPC], The Pentagon, Washington, D.C. 20330, telephone 202-694-5204 or 694-5074.


List of Subjects in 32 CFR Part 47

Military personnel.

Accordingly, 32 CFR is amended by revising Part 47, reading as follows:

Sec.

47.1 Reissuance and purpose.

47.2 Applicability.

47.3 Definition.

47.4 Policy.

47.5 Responsibilities.

47.6 DoD Civilian/Military Service Review Board and Advisory Panel.

47.7 Procedures.


§ 47.1 Reissuance and purpose.

This Part is hereby revised and reissued and implements Section 401, Pub. L. 95-202, which directs the Secretary of Defense to determine whether civilian employment or contractual service rendered by civilian or contractual groups to the Armed Forces of the United States shall be considered active military service (38 U.S.C. 301) for purposes of laws administered by the Veterans Administration. It also establishes the DoD Civilian/Military Service Review Board and Advisory Panel, sets forth policy, assigns responsibilities.

§ 47.2 Applicability.

This Part applies to the Office of the Secretary of Defense (OSD), the Military Departments, and, by agreement with the Secretary of Transportation, the U.S. Coast Guard.

§ 47.3 Definition.

Civilian or Contractual Group. An organization similar to the Women's Airforce Service Pilots (a group of federal civilian employees attached to the U.S. Army Air Force in World War II) whose members rendered service to the Armed Forces of the United States in a capacity that was then considered civilian employment or contractual service.

§ 47.4 Policy.

(a) It is DoD policy to determine whether the civilian employment or contractual services of a civilian or contractual group shall be considered active military service for the purposes of laws administered by the Veterans Administration by considering judicial and other appropriate precedents, including the extent to which the members of such a group:

1. Received military training and acquired a military capability, or the service performed by such group was critical to the success of a military mission.

2. Were subject to military justice, discipline, and control.

3. Were permitted to resign.

4. Were susceptible to assignment for duty in a combat zone.

5. Had reasonable expectations that their service would be considered to the active military service (see Pub. L. 95-202).

(b) The Department of Defense may not provide counsel representation or defray the cost of such on any matters covered by this Part.

§ 47.5 Responsibilities.

(a) The Secretary of the Air Force shall:

1. Establish the DoD Civilian/Military Service Review Board and Advisory Panel.

2. Appoint a chair and a member and alternate from members or employees of the Air Force in grades GS-15 or O-6 or higher.

3. If civilian or contractual groups claim Coast Guard active military service, request the Secretary of Transportation to appoint one member and one alternate member in the grade of GS-15 or O-6 or higher from the Coast Guard to be an additional voting member of the Board when the Board is considering the claims of such groups.

4. Provide a recorder, maintain the records of the Board, and provide the Board with nonvoting legal advisors as requested by the chair.

5. Publish notification in the Federal Register of the acceptance of a group application and, later, of his final determination.

(b) The Secretaries of the Army and Navy and the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L)) shall appoint to the Board a member and an alternate from members or employees of their organization in grades GS-15 or O-6 or higher.

§ 47.6 DoD Civilian/Military Service Review Board and Advisory Panel.

(a) Organization and Management. (1) The Board shall consist of a chair and one representative each from the OSD.
the Departments of the Army, Navy, and Air Force, and the Department of Transportation when cases involve groups claiming active Coast Guard service. Each member shall have one vote except that the chair shall vote only in the event of a tie vote. The chair and two voting members shall constitute a quorum.

(2) The Advisory Panel shall act as a nonvoting adjunct of the Board. It shall consist of a group of historians or their alternates selected by the Secretaries of the Military Departments and, if required, by the Secretary of Transportation. The respective Military Departments shall ensure that the Advisory Panel is provided with the necessary administrative and legal support.

§ 47.7 Procedures.

(a) The Secretary of the Air Force shall consider the recommendations of the Board and determine whether the service rendered by a civilian or contractual group shall be considered active military service for the purpose of all laws administered by the Veterans Administration. If the Secretary does not concur with the recommendation or rationale of the Board, his decision and reasons therefor shall be stated in writing, and he shall notify:

(1) The person or persons who made the request for the active military service determinations.

(2) The Administrator of Veterans Affairs.

(b) The Secretaries of the Army and Navy.

(c) The ASD(MR&L).

(d) The Secretary of Transportation when a civilian or contractual group claimed Coast Guard service.

(e) Following a determination by the Secretary of the Air Force that the service of a civilian or contractual group constitutes active military service, individuals who were members of that group may submit to the Military Department concerned on the Department of Transportation, as appropriate, an application for discharge.

(f) If the applicant challenges the characterization of a discharge issued by a Military Department or the Department of Transportation, as appropriate, the applicant may appeal the characterization to the Secretary concerned.

(g) Applications. (1) Applications for civilian or contractual group determinations shall be submitted to the Secretary of the Air Force (SAF/MIPC) at the Pentagon, Washington, D.C. 20330.

(2) Individual members of civilian or contractual groups whose employment was determined to have been active military service may submit applications for discharge to the Military Department concerned or the Department of Transportation, as appropriate. The application may be prepared using DD Form 2168, Application for Discharge of Member or Survivor of Member of Group Certified To Have Performed Active Duty With the Armed Forces of the United States, or in narrative form. Applications on behalf of individuals who are deceased or incompetent shall be accompanied by legal proof of death or incompetency.

Dated: August 22, 1983.

M. S. Healy,
OSD Federal Register Liaison Officer,
Department of Defense.
or write the Department of Education contact person.


SUPPLEMENTARY INFORMATION: The notice of proposed rulemaking with invitation to comment was published in the Federal Register in 47 FR 21096-7 (May 17, 1982). The public was given 30 days to comment on this regulation. The period for comment was extended to August 13, 1982, 47 FR 30498 (July 14, 1982). These regulations allow OCR to deny access to the complaint file and log by individuals who file complaints, and to delete portions of the notices of systems of records published in the Federal Register. In addition, OCR would not be required to account for disclosure of an individual's record to that individual. These regulations will aid negotiations between recipients and OCR in resolving civil rights issues. Disclosure of an investigative file to a complainant pursuant to the Act has on occasion disrupted negotiations. Also, the regulations will encourage recipients to more readily furnish information to OCR, since that information will not be subject to disclosure under the Act. Comments were received from several State and local governmental entities, private individuals, and advocacy groups. The concern most often expressed was that the regulations were overbroad, and that Congress did not intend the exemption codified at 5 U.S.C. 552a(k)(2) (k)(2) exemption) to apply to civil rights investigatory files. The comments have been reviewed and appropriate responses have been prepared.

Summary of Comments and Responses

A summary of the substantive comments and the responses of the Secretary follows:

Comment: A school district commented that it opposed the regulations as the "accused" should have a right to respond to charges made against it, and that the exemption will delay the resolution of complaints. Response: No change has been made. The exemption only affects the rights of individuals under the Act. School districts do not have any rights under the Privacy Act 5 U.S.C. 552a(a)(2). The purpose of the regulations is to expedite civil rights investigations, not to delay them. If a school district is found in violation of the civil rights laws, it is notified through a letter of findings. Comment: One commenter opposed adoption of the regulations on the ground that it would violate the court order entered in Adams v. Bell, C.A. No. 3905-70 (D.D.C., filed Dec. 29, 1977). Response: The Adams order requires that a complainant be interviewed during the course of an investigation. Further, if OCR anticipates making a finding adverse to the complainant, then OCR must notify the complainant to that effect. In addition, OCR must notify the complainant of the evidence supporting the adverse finding, either by actually showing the evidence to the complainant or by providing a written or oral summary of the evidence. Then, the complainant will be provided an opportunity to respond. See Adams v. Bell, supra, § 10. The Adams order does not require that the entire contents of an investigatory file be turned over to a complainant upon request. Thus, the regulations do not violate the Adams order. OCR will continue to carry out its obligations under Adams.

Comment: Some commenters stated that the justification for the regulations is insufficient as written in the preamble to the NPRM. Response: No change has been made. The Secretary feels that the reasons set forth in the NPRM are ample justification for the regulations. As stated in the NPRM, OCR's investigatory efforts, in certain instances, have been impeded by recipients' reluctance to reveal information where providing such information compromises the legitimate privacy interests of a source. Additionally, the untimely release of information may jeopardize delicate and sometimes lengthy negotiations that would otherwise result in the successful resolution of complaints. The regulations reflects the Secretary's carefully considered solution to problems experienced in the course of investigating civil rights complaints. It is intended to enhance OCR's ability to conduct investigations and thus to ensure compliance with civil rights laws. Comment: Some commenters stated that the exemption was unnecessary, since the Department has the power to compel a recipient to respond to an information request pursuant to an investigation. One commenter also stated, in this vein, that an administrative proceeding to compel disclosure of information is the more appropriate method of resolving the problem. Response: No change has been made. While it is true that a refusal by a recipient to supply information upon request is grounds for an administrative proceeding under 34 CFR 100.3(c), it has been the experience of OCR that these proceedings are time consuming and may delay the investigation of the merits of a complaint for years while the access issue is being litigated. In that light, the Secretary feels that the regulations are appropriate and will encourage cooperation of recipients in providing the information necessary for investigating complaints, and thereby avoid protracted litigation which might substantially delay resolution of complaints.

Comment: Several commenters stated that the exemption of the complaint files and log is overbroad, and suggested that the more appropriate method is to disclose records on a case-by-case basis.

Response: No change has been made. OCR has considered this type of procedure, but has rejected it as impractical. Further, it is not required under the Act.

Comment: An attorney who has represented school districts commented that the regulations may impede discovery, and may lead to litigation. Response: No change has been made. As already stated, the Privacy Act does not apply to school districts. Consequently, promulgating the regulations will not alter any right or privilege of a school district. However, the Secretary feels that the exemption will encourage the school districts to provide information pursuant to a civil rights investigation, and thereby diminish the possibility of litigation.

Comment: One commenter stated that OCR should maintain a list of persons to whom the investigatory file has been disclosed. Response: No change has been made. The Department is required by the Act to maintain an accounting of disclosures made under most of the exceptions to the Act, except 5 U.S.C. 552a(b) (1) and (2). Under 5 U.S.C. 552a(c)(5), the Department must make the accounting of disclosures under each exception, other than exception (b)(7), available to the subject individual. (See 34 CFR 5b.9(c)). The Department is still required to keep the accountings. The change made by this amendment only affects a subject individual's access to the accountings.

Comment: Several commenters have expressed concern that the regulations will exclude complainants from the investigatory process, in that they will be precluded from "overseeing" the case, and from the opportunity to rebut incorrect information or otherwise be apprised of the course of the investigation.
As already stated, the ... information contained in investigative files will "damage the purpose for which the information is collected." The Department has demonstrated that disclosure of its investigative files by a complainant has impeded investigations by OCR because recipients were reluctant to disclose information, thus damaging the purpose for which the information is collected. Moreover, a plain reading of 5 U.S.C. 552a(k)(2) does not limit the exemption to the very narrow grounds urged by the commenter. Thus, both the legislative history and the statute support the promulgation of the regulations by the Secretary. Moreover, many other Federal agencies have promulgated regulations similar or identical to the present regulations.

Comment: One commenter stated that the Privacy Act does not give the Department authority to exempt whole systems of files from disclosures under the (k)(2) exemption.

Response: No change has been made. The Act specifically allows the head of any agency to promulgate rules to "exempt any system of records" under the appropriate circumstances outlined by the Act. 5 U.S.C. 552a(k). This language is broad enough to allow the Secretary's exemption permitting the Office for Civil Rights to withhold investigatory materials contained in its complaint files and log system of records.

Comment: A commenter suggested that there was no "compelling need" for the exemption, and that the same end could be achieved by deleting or encoding names or other information, encoding or eliminating confidential documents, or summarizing documents.

Response: No change has been made. The suggested measures, if adopted, would not avoid the application of the Privacy Act. Every record connected to an individual by a personal identifier must be disclosed to that identifying under the Act unless the record falls within an exemption. Moreover, the Secretary must disclose what identifying symbols, numbers, or other identifying particulars the Secretary used in responding to a request under the Act. Consequently, encoding or eliminating documents with personal identifiers from files will not avoid disclosure under the Act. These regulations are the most viable means available for exempting its complaint log and files from disclosure. See 5 U.S.C. 552a(a)(4-5); 34 CFR 5b.1(h,n); Shermco Industries v. Secretary of the Air Force, 452 F. Supp. 306, 315 n. 5 (N.D. Tex. 1976); reversed on other grounds, 613 F.2d 1314 (5th Cir. 1980). The Secretary disagrees that a compelling case for implementing the regulations has not been made.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291, and are classified as nonmajor because they do not meet the criteria for major regulations established in the order.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations will not have a significant economic impact on a substantial number of small entities. These
regulations are administrative and do not affect any small entities.

List of Subjects in 34 CFR Part 5b
Administrative practice and procedure, Civil rights, Privacy, Privacy Act regulations.

Citation of Legal Authority
A citation of statutory authority is placed in parentheses on the line following the regulations. (Catalog of Federal Domestic Assistance number does not apply.)

Dated: August 22, 1983.

T. H. Bell, Secretary of Education.

The Secretary amends Part 5b of Title 34 of the Code of Federal Regulations as follows:

PART 5b—PRIVACY ACT REGULATIONS

1. Section 5b.11 is revised by adding a new paragraph (b)(2)(ii) to read as follows:

§ 5b.11 Exempt systems.

(b) * * *

(ii) Pursuant to subsection (k)(2) of the Act: Complaint Files and Log, Office for Civil Rights.

[5 U.S.C. 552a(k)]

BILLING CODE 4000-01-M

VETERANS ADMINISTRATION

38 CFR Part 3

Definition of Nursing Home

AGENCY: Veterans Administration.

ACTION: Final regulation amendment.

SUMMARY: The Veterans Administration has amended its adjudication regulations to establish a definition of the term "nursing home" for benefit purposes. This definition is necessary to determine the scope of that term as used in the adjudication of claims.

EFFECTIVE DATE: This amendment is effective August 10, 1983.

FOR FURTHER INFORMATION CONTACT: Robert White, Compensation and Pension Service [211B], Department of Veterans Benefits, Veterans Administration, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 389-3005.

SUPPLEMENTARY INFORMATION: On pages 56881 to 56882 of the Federal Register of December 21, 1982, the Veterans Administration published a proposed amendment to 38 CFR 3.1 which added a new paragraph (3) defining the term "nursing home." Interested persons were given until January 20, 1983 to submit comments, objections or suggestions on this regulatory amendment.

A total of three written comments were received. The commentators were the Congressmen from the 4th District of Oregon, the Director, National Veterans Service, Veterans of Foreign Wars of the United States (VFW), and attorneys of the National Senior Citizens Law Center (NSCLC).

The major concern expressed by all commentators involved the procedural aspects of reviewing the files of beneficiaries who are already receiving the aid and attendance benefit to determine their continued entitlement, and the assistance to be provided by the VA to beneficiaries who may no longer be entitled to that benefit on a presumptive basis. This concern involves the use to be made of the new definition and not the regulatory definition itself. A general description of the VA's review procedure should alleviate this concern.

The aid and attendance review procedures have been constructed in such a manner as to provide a wide variety of assistance in establishing entitlement while protecting due process rights. Those beneficiaries whose aid and attendance entitlement is based on a formal rating decision or on patient status in a nursing home which meets the proposed definition will not lose that benefit because of this review. Those who reside in extended care facilities which do not meet the proposed definition will be advised as to the type of evidence necessary to support entitlement and will be given a reasonable time in which to submit that evidence. Statements of private physicians will be interpreted liberally in favor of beneficiaries, and if they are insufficient to establish entitlement, a VA examination may be authorized. No benefits will be adjusted until a final rating decision has been made or until the due process period for submission of evidence has lapsed without response.

Two commentators indicated that the regulation may result in higher costs to the VA than any savings realized by the current trend toward community-based residential care as an alternative to institutionalization and indicated that aid attendance benefits for individuals so placed may be terminated because of this regulation. We do not believe that this concern is justified. Although beneficiaries in such programs would have to establish aid and attendance entitlement on a factual basis, significant weight would be accorded to a statement of the medical professional who supervises such care that, but for the residential care program, the beneficiary would require admission to a nursing home.

With regard to residential care programs the NSCLC specifically recommended expansion of the regulatory definition to include "board and care homes that are regulated by States." We cannot accept that recommendation because such terminology is so imprecise as to include nearly every extended care facility currently in operation, whether or not nursing care is provided. Such vague terminology cannot be the basis for a legal presumption of entitlement to additional VA benefits.

One commentator was concerned about the effects of license revocation and variations among States as to the terminology used for licensing different levels of nursing care. The terms "skilled and intermediate-level care" are standard within the nursing home industry. Any variations in the terminology used by individual States would be closely examined by the VA authorities in those States to ensure that the level of care provided is comparable to the care certified by most States as skilled or intermediate-level. If, by application of the 38 CFR 3.1(z) standard, a beneficiary were to lose entitlement to the presumption granted by 38 CFR 3.351(c)(2) he or she could still qualify for an aid and attendance allowance if his or her disabilities meet the requirements of 38 CFR 3.351(c)(1) or (3). Finally, the NSCLC recommended that the new regulatory definition be applied prospectively only and that no action be