

DEPARTMENT OF VETERANS AFFAIRS**38 CFR Parts 38 and 39**

RIN 2900-AM86

Prohibition of Interment or Memorialization in National Cemeteries and Certain State Cemeteries Due to Commission of Capital Crimes**AGENCY:** Department of Veterans Affairs.**ACTION:** Final rule.

SUMMARY: This final rule amends the Department of Veterans Affairs (VA) regulations to implement section 662 of the National Defense Authorization Act of 2006 (Pub. L. 109-163). Section 662 of the Act prohibits interment and memorialization in a national or State veterans cemetery of certain persons who have been convicted of a Federal or State capital crime and whose conviction is final, unless such a person's sentence was commuted by the President or the Governor of a State. The final rule implements statutory provisions to ensure that the remains of certain persons who have committed Federal or State capital crimes are not interred or memorialized in a national or State veterans cemetery.

DATES: *Effective Date:* June 23, 2008.

Applicability Date: Pursuant to the provisions of Public Law 109-163, the National Defense Authorization Act of 2006, the provisions to this regulation shall apply to interment or memorialization occurring on or after January 6, 2006.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: The provisions of 38 U.S.C. 2411 prohibit, under specified circumstances, interment or memorialization in VA national cemeteries of certain persons who are convicted of, or are found to have committed, Federal or State capital crimes. Under 38 U.S.C. 2408(d), this prohibition also applies to interment or memorialization in a State veterans cemetery that received a grant from VA on or after November 21, 1997. This final rule implements provisions of the National Defense Authorization Act of 2006, and prohibits interment or memorialization in a VA national cemetery or an affected State veterans cemetery of any person who is convicted of a Federal capital crime and whose conviction is final, unless the

sentence was commuted by the President. This final rule also prohibits interment or memorialization in a VA national cemetery or an affected State veterans cemetery of any person who has been convicted of a State capital crime and whose conviction is final, unless the sentence was commuted by the Governor of a State.

We note that regulations governing the VA State Cemetery Grants Program, which appear in part 39 of title 38 of the CFR, previously contained language making eligibility for a VA State Cemetery Grant subject to compliance with the capital crimes prohibitions codified in 38 U.S.C. 2408 and 2411. 67 FR 62,642 (Oct. 8, 2002). These regulations were inadvertently deleted when VA's State Cemetery Grant Regulations were amended in 2004. 69 FR 16,344 (Mar. 29, 2004). The provisions that were inadvertently deleted are being updated to reflect the recent amendments to 38 U.S.C. 2411 and are being reinserted into part 39 of title 38 of the CFR.

Additionally, this final rule will revise the definitions of Federal capital crime and State capital crime in § 38.600 and clarify in § 38.617 what procedures the Under Secretary for Memorial Affairs, or his or her designee, will employ as a good faith effort to determine if a person described in 2411(b) is ineligible for interment in a national cemetery as required under Public Law 109-163. Following passage of the law, VA provided updated guidance to all personnel responsible for processing requests for interment or memorialization that incorporated the revised definitions of Federal and State capital crimes.

Section 662(d)(1) of Public Law 109-163 directed VA to issue regulations to ensure that a person is not interred in any cemetery in the National Cemetery System unless a good faith effort has been made to determine whether the person is ineligible by reason of being a person described in 38 U.S.C. 2411(b). Current VA regulations in 38 CFR 38.617(a) prohibit the interment or memorialization of persons found ineligible under the standards and procedures set forth in 38 CFR 38.617 and 38.618. Section 38.617(e) provides that, if VA has not previously received notice from the relevant authorities (the United States Attorney General or an appropriate State official) that a person was convicted of a capital crime, but there is reason to believe the person may have been so convicted, VA will initiate an inquiry to the relevant authorities and will defer its decision until it has received the information needed to determine whether the person

is ineligible for burial. Section 38.618 states that, if VA has reason to believe that a person committed a capital crime but avoided conviction by reason of unavailability for trial due to death or flight to avoid prosecution, VA will initiate an inquiry to the relevant authorities for information on that matter. Further, § 38.618 prescribes procedures VA will follow in order to determine, based on information received from the relevant authorities, whether an individual is ineligible for burial due to the commission of a capital crime, and provides that VA will make its determination only after completion of the prescribed inquiry and applicable procedures under that regulation.

Following enactment of Public Law 109-163, VA reviewed all administrative procedures used to establish interment eligibility and determined the existing procedures are sufficient to ensure that a good-faith effort is made to ensure that individuals otherwise prohibited are not interred in national cemeteries. Accordingly, we are not revising the procedures currently required by VA regulations. However, to make clear that VA will continue to apply those procedures in accordance with the "good faith" standard imposed by section 662(d)(1) of Public Law 109-163, VA is revising § 38.617(a) to incorporate the "good faith" standard to govern VA's duties under §§ 38.617 and 38.618.

This final rule is necessary to incorporate statutory provisions into VA regulations.

Administrative Procedure Act

Changes made by this final rule reflect implementation of changes in statutory requirements. For the reasons explained above, in response to the rulemaking requirement in section 662(d)(1) of Public Law 109-163, VA is making no substantive changes to its current regulations, but is adding reference to the "good faith" standard imposed by the statute. Accordingly, this rule is exempt from the notice-and-comment and delayed-effective-date requirements of 5 U.S.C. 553.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Provisions currently in 38 CFR 38.617 and 38.618 providing for requests to Federal and State officials for information concerning capital crimes will apply to fewer than 10 persons annually and therefore do not constitute a collection of information under 5 CFR 1320.3(c).

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this final rule have been examined and it has been determined not to be a significant regulatory action under the Executive Order because it is unlikely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order, or otherwise meet the criteria listed above.

Regulatory Flexibility Act

The initial and final regulatory flexibility analysis requirements of sections 603 and 604 of the Regulatory Flexibility Act, 5 U.S.C. 601–612, are not applicable to this rule because a notice of proposed rulemaking is not required for this rule. Even so, the Secretary of Veterans Affairs hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act. This final rule would not affect any small entities. Only individual VA beneficiaries would be directly affected. Therefore, pursuant to 5 U.S.C. 605(b), this final rule is also exempt from the regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Program

The Catalog of Federal Domestic Assistance program numbers and titles for this final rule are 64.201, National Cemeteries; and 64.202, Procurement of Headstones and Markers and/or Presidential Memorial Certificates, and 64.203, State Cemetery Grants.

List of Subjects in 38 CFR Parts 38 and 39

Administrative practice and procedure, Cemeteries, Claims, Crimes, Criminal offenses, Veterans, Grant Programs—veterans.

Approved: June 16, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

■ For the reasons set out in the preamble, 38 CFR parts 38 and 39 are amended to read as follows:

PART 38—NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

■ 1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 107, 501, 512, chapter 24, 7105, and as noted in specific sections.

■ 2. In § 38.600(b), revise the definitions of "Federal capital crime" and "State capital crime" to read as follows:

§ 38.600 Definitions.

* * * * *

(b) * * *

Federal capital crime means an offense under Federal law for which a sentence of imprisonment for life or the death penalty may be imposed.

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State capital crime means, under State law, the willful, deliberate, or premeditated unlawful killing of another human being for which a sentence of imprisonment for life or the death penalty may be imposed.

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■ 3. Section 38.617 is amended by revising paragraphs (a), (e)(1)(i), and (e)(1)(ii) to read as follows:

§ 38.617 Prohibition of interment or memorialization of persons who have been convicted of Federal or State capital crimes.

(a) *Persons Prohibited.* The interment in a national cemetery under control of the National Cemetery Administration of the remains of any person, or memorialization in such a cemetery of such person, shall not take place absent a good faith effort by the affected cemetery director, or the Under Secretary for Memorial Affairs, or his or her designee, to determine whether such person is barred from receipt of such benefits because the individual for whom interment or memorialization is sought is:

(1) A person identified to the Secretary of Veterans Affairs by the United States Attorney General, prior to approval of interment or memorialization, as an individual who has been convicted of a Federal capital crime, and whose conviction is final, other than a person whose sentence was commuted by the President.

(2) A person identified to the Secretary of Veterans Affairs by an appropriate State official, prior to approval of interment or memorialization, as an individual who has been convicted of a State capital crime, and whose conviction is final, other than a person whose sentence was commuted by the Governor of a State.

(3) A person found under procedures specified in § 38.618 to have committed a Federal or State capital crime but avoided conviction of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

* * * * *

(e)

(1) * * *

(i) The United States Attorney General, in the case of a Federal capital crime, requesting notification of whether the deceased has been convicted of a Federal capital crime; or

(ii) An appropriate State official, in the case of a State capital crime, requesting notification of whether the deceased has been convicted of a State capital crime.

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PART 39—STATE CEMETERY GRANTS

■ 4. The authority citation for part 39 continues to read as follows:

Authority: 38 U.S.C. 101, 501, 2408.

■ 5. In § 39.5, a new paragraph (d) is added immediately following the authority citation at the end of paragraph (c) to read as follows:

§ 39.5 General requirements for a grant.

* * * * *

(d) Any grant under this part made on or after November 21, 1997, is made on the condition that after the date of receipt of the grant the State receiving the grant, subject to requirements for receipt of notice in 38 U.S.C. 2408 and 2411, will prohibit in the cemetery for which the grant is furnished the interment of the remains of or the memorialization of any person:

(1) Who has been convicted of a Federal capital crime, as defined in § 38.600(b) of this chapter, and whose conviction is final, other than a person whose sentence was commuted by the President;

(2) Who has been convicted of a State capital crime, as defined in § 38.600(b)

of this chapter, and whose conviction is final, other than a person whose sentence was commuted by the Governor of a State.

(3) Who has been found by an appropriate State official, under procedures to be established by the State, to have committed a Federal or State capital crime, as defined in § 38.600(b) of this chapter, but to have not been convicted of such crime by reason of unavailability for trial due to death or flight to avoid prosecution.

(Authority: 38 U.S.C. 501, 2408, 2411).

■ 6. In § 39.6, paragraph (c) (1) and the authority citation at the end of the section are revised to read as follows:

§ 39.6 Preapplication requirements.

* * * * *

(c) * * *

(1) Any cemetery established, expanded, or improved through a grant will be used exclusively for the interment or memorialization of eligible persons, as set forth in §§ 39.2(h) and 39.5(a), whose interment or memorialization is not contrary to the conditions of the grant (see §§ 39.5(d) and 38 U.S.C. 2408 and 2411).

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(Authority: 38 U.S.C. 501, 2408, 2411).

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