



U.S. Department of Justice

Civil Division

REK:MFH:EBruskin  
D.J. No. 154-F20-71

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Washington, DC 20530  
November 20, 2020

Peter R. Marksteiner  
Office of the Clerk  
United States Court of Appeals for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Re: National Organization of Veterans' Advocates, Inc., et al v. Secretary of  
Veterans Affairs, No. 20-1321

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Dear Colonel Marksteiner:

The Court should place no weight on the Department of Veterans Affairs' (VA) final rule implementing Executive Order (EO) 13891 because it does not interpret 5 U.S.C. § 552(a)(1)(D) or its reference to "interpretations of general applicability," which is at the heart of this dispute.

EO 13891 directs agencies to make publicly available non-binding "guidance document[s]," which it defines as "agency statement[s] of general applicability, intended to have future effect on the behavior of regulated parties, that set[] forth a policy . . . or an interpretation of a statute or regulation," but does not include "internal guidance directed to the issuing agency . . . not intended to have substantial future effect on the behavior of regulated parties." 84 Fed. Reg. 55,235 (Oct. 15, 2019). This definition does not readily apply to VA's internal manual, which does not bind the public or agency. VA Br. 30-33. Instead, the manual would appear to constitute "internal guidance directed to the issuing agency . . . not intended to have substantial future effect . . ." See 84 Fed. Reg. at 55,235-36. The EO thus recognizes that a document may apply generally but not qualify as a "guidance document" when it is internal guidance that is not intended to affect regulated parties, *i.e.*, have binding effect. This accords with our view of section 552(a)(1)(D). VA Br. 21-30.

Petitioners make much of VA's understanding of "general applicability" to mean "more than one person, event, or transaction." 85 Fed. Reg. 72,569 (Nov. 13, 2020). But, as explained in our brief, "relevance to more than one person or fact pattern is a *necessary*, but not a *sufficient*, condition for an interpretation to be one 'of general applicability'" under section 552(a)(1)(D). VA. Br. 21. This is true of the EO and final rule too; neither places determinative significance on the "general applicability" of a statement, but also look to whether the statement affects regulated parties. The EO and final rule thus confirm that a statement's applicability to more than one person or circumstance is not normally, by itself, of determinative significance in administrative law.

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Very truly yours,

/s/Eric P. Bruskin

ERIC P. BRUSKIN

Assistant Director

Commercial Litigation Branch