



VETERANS AND MILITARY LAW SECTION

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MESSAGE FROM THE CHAIR: HAIL AND FAREWELL

by Alan Goldsmith, Veterans and Military Law Section Chair

It was a great honor and privilege for me to assume the mantle of leadership when I became Chair of the Veterans and Military Law Section on October 1 of last year. I want to thank all members of the Section for their willingness to be a part of the important work that we do for our military members and veterans.

I believe I would be remiss if I did not acknowledge the debt that I, and all members of the Section, owe to my two predecessor section chairs—Bob DeSousa and Jim Richardson. Both of these individuals are past presidents of the FBA and accordingly, had already put in incalculable amounts of time and effort to make the FBA a first-class organization. Yet they felt an obligation to revitalize the Section which, in recent years, had not been particularly active. Looking at our activities and accomplishments over the last three years, they have succeeded well beyond any reasonable expectation. Going forward, I am extremely fortunate to have Jim's advice and counsel as immediate past chair, and Bob has gone on to pump new life into FBA's Federal Career Service Division.

During the first three months of my year-long tenure as chair, the Section has been extremely busy and productive. On October 3, I attended the annual reception in Washington,



DC put on by a sister organization, the Veterans Consortium. This event was productive for the Section since the director of the Consortium expressed interest in participating in a continuing legal education program the Section will sponsor in March.

Later in October, VMLS joined an *amicus curiae* brief on behalf of the plaintiff in a case pending in the United States Court of Appeals for the Federal Circuit, *Procopio v. Wilkie*. This case pertains to the entitlement of "Blue Water" Navy veterans to benefits administered by the Department of Veterans Affairs, and the applicability of the DVA's current regulation for the presumption of service connection to

CHAIR continued on page 2

Agent Orange exposure. A member of the Section's Board of Directors, John Wells, is a co-counsel for the plaintiff. On December 7, Veterans Affairs Committee Chair Carol Scott and I attended the oral argument before the Federal Circuit sitting *en banc*. On January 29, by a vote of 9-2, the Court ruled on favor of the plaintiff.

One of the methods by which a Section can have a significant impact is to put on a CLE program. Accordingly, the Section co-sponsored, with Bob DeSousa's Federal Career Service Division, a day-long CLE in San Juan, Puerto Rico, on November 1. The program dealt with the numerous ways in which attorneys can assist veterans. Blocs of instruction were provided on the military justice system, advocating on behalf of veterans at the DVA, upgrading military discharges (presented by me), and military naturalization. More than 50 practitioners were in attendance and the program was very well received. The Section then marked Veterans Day by co-sponsoring a Veterans Day CLE/Ceremony at Widener Law School which was attended by VMLS Board member Frank McGovern.

On November 29 the Section co-sponsored, with the Judge Advocates Association (JAA), the annual day-long Jobs for JAGs seminar. The FBA's Pentagon Chapter began this event 25 years ago and the FBA has been deeply involved with it ever since. The Chapter once again co-sponsored the event, along with the Federal Career Service Division. During the seminar, 80 retiring or separating judge advocates received instruction on subjects such as resume preparation, dressing for success, and interviewing techniques. Information was also provided on various forms of civilian employment such as government service, law firm practice, and opportunities as administrative law judges. I attended and assisted with the administration of this event in my dual capacity as Section Chair and as a member of JAA's Board of Directors.

On December 18, VMLS submitted a letter to the leaders of the House and Senate Veterans' Affairs Committee pertaining to implementation of the Mission Act and related matters. On the next day, Carol Scott attended a joint hearing before both committees.

Upcoming, on March 20 and 21, the Section will sponsor a CLE at the University of Montana Law School with a focus on assisting Native-American Veterans. As part of the program, the United States Court of Appeals for Veterans Claims will hear oral argument on a pending case. Sometime in the Spring, the Section will co-sponsor, with the Pentagon Chapter, the annual end of term lunch reception at the United States Court of Appeals for the Armed Forces.

Since VMLS is a relatively small section, there are abundant opportunities for leadership and participation. As we create continuing legal education activities for next year, we need instructors and support workers on our CLE Committee. Our Communications Committee puts out this high-quality newsletter which provides an outlet for those who wish to write and edit. Our Military Justice and Veterans Affairs Committees provide numerous opportunities to network among your fellow counsel who represent veterans or military service members throughout the world. Finally, our Membership Committee needs committed individuals who will work to recruit new members to our section, and ensure that we retain the members already on the rolls. If you wish to get involved with one of our committees, contact me and I will put you in touch with the appropriate committee chair.

Each of you can be an ambassador for VMLS by encouraging others to join the Section. One need not be in the exclusive practice of either veterans or military law to benefit from membership. Military service members and veterans have issues across the legal spectrum, albeit with

some different questions. Expertise in many fields are needed and we can help attorneys expand their practice and interests to include this unique area for federal law.

I hope to meet as many of you as I can during my year-long term as Section Chair. If you wish to speak with me about the Section, feel free to contact me at aeg4451@aol.com or at 703/941-4725. I will be back in touch with you in the next issue of the newsletter.

Alan Goldsmith

*Chair of Veterans and Military Law
Section of the Federal Bar Association
PLEASE JOIN the Veteran's and Military
Law Section at: www.fedbar.org/Veterans*

Victory for Blue Water Navy Veterans in Procopio Decision

by John Wells, CDR, USN (ret), Counsel on *Procopio v. Wilkie*

In a 9-2 decision, the Court of Appeals for the Federal Circuit overturned seventeen years of VA policy and a decade old precedent to restore benefits to the so called Blue Water Navy. The decision centered around the application of international law and the Law of the Sea to find that the phase served in the Republic of Vietnam included the territorial sea of that nation.

The Agent Orange Act of 1991 included a presumption of exposure for those who in air, land or naval service served in the Republic of Vietnam. The VA initially used eligibility for the Vietnam Service Medal as criteria for recognizing the presumption. But in 1997, the VA General Counsel, in a precedential opinion, ruled that the veteran must have served within the boundaries of the Republic of (South) Vietnam. In 2002, the Veterans Benefit Administration interpreted this as the Vietnamese landmass and the internal river system. They excluded the bays, harbors and any waters offshore from the presumption. The Federal Circuit applied *Chevron* deference to uphold that interpretation in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

At approximately the same time, the University of Queensland found that the evaporation distillation system, which was used to convert salt water to potable water, enriched the effects of the dioxin. This phenomenon was later confirmed by two separate committees of the Institute of Medicine.

Starting in 2011, the Blue Water Navy Vietnam Veterans Association and later Military Veterans Advocacy urged legislation to clarify the Agent Orange Act by recognizing the presumption for veterans who served in South Vietnam's bays, harbors and territorial sea. Despite overwhelming support in Congress the bill was never enacted.

The VA strongly resisted the legislation often testifying that the science did not support the infiltrations of Agent Orange into the waters past the landmass. Congress rejected the VA argument, but could not find sufficient offsets to fund the bill. In 2018 the House passed the legislation 382-0, but it died in the Senate under holds by Senators Enzi and Lee.

Frustrated with Congressional inaction, this author brought the Procopio case in the Federal Circuit. Al Procopio had served onboard an aircraft carrier that periodically entered the territorial sea. He later developed prostate cancer, ischemic heart disease and diabetes. The Court of Appeals for Veterans Claims had ruled against Procopio in reliance upon *Haas*.

Relying on the 1958 Convention on the Territorial Sea and the Contiguous Zone,

15 U.S.T. 1606, T.I.A.S. No. 5639 (Apr. 29, 1958), the United Nations Convention on the Law of the Sea, 1833 U.N.T.S.397 (Dec. 10, 1982) and the Restatement (Third) of Foreign Relations Law, the Court recognized national sovereignty over the territorial sea. Based on Congress' use of South Vietnam's formal name, the Republic of Vietnam, the Court held that the plain meaning of the statute included the territorial sea.

The *Haas* Court applied the two step *Chevron* analysis and found ambiguity in the statute that *Procopio* said did not exist. Where *Haas* moved to step two and applied *Chevron* deference, *Procopio* never moved beyond the first step.

Although heavily briefed to the Court and discussed in Judge O'Malley's concurrence, the *Procopio* majority never reached the issue of whether the pro-claimant (pro-veteran) canon of construction reaffirmed by *Henderson ex rel. Henderson v. Shinseki*, 562

U.S. 428 (2011) attached at *Chevron* step one. While the court in its en banc order specifically requested that this issue be addressed, their reliance on the plain meaning canon made the matter moot. The pro-claimant question remains open for future litigation.

The bottom line is that *Procopio* recognized benefits for tens of thousands of new veterans. VA Secretary Robert Wilkie has said that he is not inclined to seek Supreme Court review, but qualified his statement by leaving open action by the State or Defense departments. Should the government petition for *certiorari*, the pro-veteran canon will be ripe for reevaluation by the Justices. In light of the unanimous opinion in *Henderson*, the government may wish to avoid that scrutiny.

John B. Wells is a retired Navy Commander. After retirement he became an attorney practicing military and veterans law. He is Executive Director of the nonprofit Military-Veterans Advocacy, Inc and a proponent of veterans benefits legislation. He was also counsel on Procopio v Wilkie.

The Value of Leave

by Mark Sullivan

Who hasn't doubted the value of a vacation day or two during busy times at work? The rest and respite provided by taking leave for a few days can often recharge one's batteries, as well as make room for family time and duties at home.

But the North Carolina Court of Appeals was thinking of a different "value of leave" when it decided *Rathkamp v. Danello* on December 4, 2018. In the *Rathkamp* case, the Court of Appeals (COA) addressed an appeal by both parties to a 2017 equitable distribution order from Mecklenburg County related to the parties' divorce. One of the issues was valuation and classification of the vacation and sick leave of the former husband.

The ex-wife claimed that the judge had erred in failing to classify, value and divide her former husband's job-related sick leave or annual leave. The judge made a finding in his order that there was insufficient evidence to allow classification, valuation or distribution of the accrued leave.

What did the former wife have for proof? The COA said that there was a "Statement of Earnings and Leave" that documented the ex-husband's accrued leave as of 6 days after the date of separation, but there was no proof of its value, only the affidavit of the ex-wife that it was worth \$56,218.

The COA noted that the record showed annual leave of 83 hours and sick leave of about 440 hours for the ex-husband; there was no evidence, however, no evidence in the record supported the classification and valuation claimed by the ex-wife. Noting that case law provides that the "... party claiming that property is marital property must also provide evidence by which that property is to be valued by the trial court," the COA affirmed the trial court's finding

of insufficient evidence, which meant a loss of about \$28,000 by the former wife.

What went wrong? The ex-wife should have obtained documents from the former husband's employer (such as an employee manual) which would have stated whether there was a cash value to accrued sick leave and vacation time. A current or former employee familiar with the policy of the employer could have also given testimony to back up the ex-wife's assertion of a value of over \$56,000. With such a value at stake, it certainly would make sense for the ex-wife and her attorney to spend some time nailing down the means of establishing value for the accrued leave.

The issue is not unique to North Carolina. While half a dozen states have clearly held that vacation time and leave are marital or community property, three states - Illinois, Kentucky and Maryland - have stated that leave may not be distributed as marital property. The Maryland case found that leave was "alternative wages," not deferred compensation; the appellate court held that accrued leave was less tangible, more difficult to value and more personal than pension and retirement benefits, and thus it was a nonmarital asset.

In some cases, leave can have little or no value. In the Maryland case, for example, the wife would have lost her sick leave (about \$11,000) if she terminated employment. It was only good for taking time off for health reasons, not for cashing in the time.

The same is not true, however, for military leave. Servicemembers get 30 days of paid leave each year, accruing at 2.5 days a month. It is worth the same amount as the base pay for each day of leave, and thus one can determine the value of an Army sergeant's accrued leave by looking at the Leave and

Earnings Statement (LES); the row entitled "Leave" will show in the box marked "CR BAL" the number of days of existing leave that have been earned as of that pay period. If the sergeant's base pay is \$4,000 a month, and his or her LES shows **60** for "CR BAL," then the leave is worth \$8,000.

It takes some time to establish the rules for valuing leave. I was tasked with writing a brief for a Colorado attorney who needed to determine the value of the 65 days of leave shown on the LES of the husband, an Army warrant officer. I finally figured out the location of the rules and the statute governing this issue for military cases, and I've finished the brief; it will be presented to the court in Colorado Springs in April.

It's surprising how seldom accrued leave comes up in settlement negotiations. Most of the time the parties seem unaware of the value of this asset. It's truly "hidden money" for some people who are going through a divorce. In recognition of this potential problem, I wrote an article several years ago entitled "Hidden Money in Military Divorce Cases" which deals with this and other matters which may be overlooked in the divorce process.

The case is: *Rathkamp v. Danello*, No. COA 17-760, 2018 N.C. App. LEXIS 1190, 2018 WL 6318307 (N.C. Ct. App., Dec. 4, 2018).

Federal Career Service Division and Puerto Rico Chapter Host CLE One Year Post-Hurricane Maria

by Adam M. Hill, Vice Chair for Veterans, Federal Career Service Division



Betty Stephens and members of the immigration law section present their CLE block

Hurricane Maria struck Puerto Rico on September 20, 2017, just below a category 5 storm.¹ Winds and floods caused widespread devastation on the island. NOAA estimates the damage in Puerto Rico and the U.S. Virgin Islands due to Hurricane Maria is 90 billion dollars. *Id.* Maria is, by a large degree, the most destructive hurricane to hit Puerto Rico in modern times. *Id.*

On November 2, 2018, just past one year after Hurricane Maria, the Federal Bar Association's Federal Career Service Division and the Puerto Rico Chapter of



Jonathan Crisp, a member of the veterans and military law section discusses Military criminal justice.

the Federal Bar Association presented a very successful CLE in San Juan, Puerto Rico. Titled "An Overview of Veterans Litigation for General Practitioners," the CLE covered a wide range of relevant and current topics including VA appeals, discharge upgrades, military naturalization and derivative citizenship, military justice, and ethical issues in representing Veterans.

The nearly 80 participants registered for the event were very pleased to hear from both the Honorable Gustavo Gelpi, Chief Judge for the U.S. District Court for the District of Puerto Rico, and the Honorable Roberto Feliberti, Associate Justice, Supreme Court of Puerto Rico. Judge Feliberti told in detail about the devastation suffered in Puerto Rico during a luncheon for all attendees. Although the island still has a long way to go on the path to recovery, Judge Feliberti encouraged participants to go home and tell their friends and family to come visit the Island of Enchantment. Ongoing necessary recovery work, including painting and restoration, occurred outside and inside the scenic San Juan Embassy Suites and was visible throughout Puerto Rico during our trip. Many beaches and restaurants are open for business, and the U.S. Territory is ready to welcome many more people back to the Commonwealth.

All of the helpful resources from the CLE, including slides and handouts, are available on the Federal Bar Association's website at: <http://www.fedbar.org/Divisions/Federal%20Career%20Service%20Division/Puerto-Rico-CLE-Nov-2-2018.aspx>. Anyone who wants to learn more about legal issues involving Veterans are encouraged and welcome to review the slides. ●



Robert Chisholm, who's law firm was a sponsor of this event addresses the overflow crowd regarding veterans appeals

Endnotes:

¹<https://noaa.gov/data/tcr/AL15017.pdf>



Past national president and current chairman of the federal career services division Robert DeSousa introduces long time Federal Bar member, the Honorable Roberto Feliberti of the Supreme Court of Puerto Rico to the attendees during lunch

Veterans and Military Law Section
Federal Bar Association
1220 N. Fillmore Street, Suite 444
Arlington, VA 22201

The views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions to Raymond J. Toney at rjtoncy@militarylawpro.com. Yanissa Pérez de León, managing editor.

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