

MEMORANDUM

TO: Indiana Veterans' Affairs Commission

FROM: Jason Thompson
Legal Counsel

DATE: September 27, 2018

RE: Substantive Changes to the Proposed Administrative Rule

BLUF: This memorandum captures the four (4) substantive changes that the IDVA-C's working group agreed upon after consideration of the four (4) sets of written comments submitted to the IDVA-C during the public comment period. Those changes are listed in detail in this memorandum. There were multiple suggestions that the working group did not support, and the general theme(s) of those suggestions and the reasons for rejection are outlined in detail in this memorandum as well.

Changes Recommended by the Working Group

1. Addition of language to 915 IAC 3-4-2, General application process; guidelines and timeframes

The working group agreed to add the following subsection (6) to the proposed rule:

“Once an applicant reaches a total assistance amount of two thousand, five hundred dollars (\$2500) from the fund, he or she is not eligible to apply for further assistance from the fund without the approval of the Commission.”

This change is supported by a written comment submitted by Mr. Jim Bauerle in his annotated draft (page 6, right margin, first comment). The primary purpose is to limit the authority of the Department to granting up to \$2500.00 to any one applicant, in their lifetime. Once an applicant reaches their \$2500.00 “lifetime limit,” the authority to exceed the limit lies solely with the Commission and can only be granted with their approval.

2. Addition of language to 915 IAC 3-4-2, General application process; guidelines and timeframes

The working group agreed to add the following subsection (7) to the proposed rule:

“Any request for assistance in excess of two thousand, five hundred dollars (\$2500) requires the approval of the Commission.”

Similar to subsection (6), the working group felt it was appropriate to limit the authority of the department to a \$2500.00 grant in assistance to any one applicant. Any amounts above this threshold requires approval of the Commission. This change is supported by a written comment submitted by Mr. Jim Bauerle in his annotated draft (page 6, right margin, third comment).

3. Change in language of 915 IAC 3-6-6, Amount of Assistance

The working group changed the word “**Commission**” to “**department**.”

This change is a conforming change necessary to achieve consistency with the working group's intentions that the department is responsible for handling disbursements up to \$2500.00, and any amounts above that are solely the purview of the Commission. This change is supported by a written comment submitted by Mr. Jim Bauerle in his annotated draft (page 6, right margin, third comment).

4. Addition of language to 915 IAC 3-6-6, Amount of Assistance

The working group agreed to add the following sentence to Section 6:

“Any request for assistance in excess of two thousand, five hundred dollars (\$2500) requires the approval of the Commission.”

This change is a conforming change necessary to achieve consistency with the working group's intentions that the department is responsible for handling disbursements up to \$2500.00, and any amounts above that are solely the purview of the Commission. This change is supported by a written comment submitted by Mr. Jim Bauerle in his annotated draft (page 6, right margin, third comment).

Changes Denied by the Working Group

In its review of the written comments submitted during the public comment period, the working group acknowledged that there were six (6) primary themes or areas in which the commenters were seeking changes.

- Eligibility expansion to include more veterans, or more explicitly, the term “Hoosier Veteran.”
- Concerns about the 12 months service requirement for eligibility.
- A prohibition on payment of assistance directly to the veteran.
- Limitations on the categories of assistance that the MFRF could potentially provide
- Allowing dependents to file an application for themselves or for a veteran
- Issues with the application document(s)

1. Hoosier Veteran. The working group considered the issue of the expansion of the definition of eligible veteran, with particular focus on the inclusion of the term “Hoosier Veteran” to the list of persons eligible for assistance from the MFRF. The working group declined to include this term because it does not have the legal authority to do so. The Indiana General Assembly established those individuals that are eligible for assistance at IC 10-17-12-7.5:

“As used in this chapter, “qualified service member” means an individual who is an Indiana resident and who:

(1) is:

(A) a member of the armed forces of the United States or the national guard (as defined in IC 5-9-4-4); and

(B) serving on or has served on active duty during a time of national conflict or war; or

(2) *has:*

- (A) *served on active duty during a time of national conflict or war in:*
 - (i) *the armed forces of the United States; or*
 - (ii) *the national guard (as defined in IC 5-9-4-4); and*
- (B) *received an honorable discharge.*

The term “Hoosier Veteran” does not include an “active duty” requirement in its definition, and effectively creates a substantially larger class of individuals than that contemplated under IC 10-17-12-7.5. Pursuant to IC 1-1-4-5(b):

“Hoosier veteran” means an individual who meets the following criteria:

- (1) The individual is a resident of Indiana.*
- (2) The individual served in a reserve component of the armed forces of the United States or the Indiana National Guard.*
- (3) The individual completed any required military occupational specialty training and was not discharged or separated from the armed forces or the Indiana National Guard under dishonorable or other than honorable conditions.”*

The use of the term “Hoosier Veteran” is pervasive, but not all-encompassing. Pursuant to IC 1-1-4-5(b):

“The term “veteran” includes “Hoosier Veteran”, and applies to the construction of all Indiana statutes, unless the construction is expressly excluded by the terms of the statute, is plainly repugnant to the intent of the general assembly or the context of the statute, or is inconsistent with federal law.”

A general rule of statutory construction is that the specific rules over the general, especially if two statutes both address the same or similar topics. In this case, we have a general statute meant to include the term “Hoosier Veteran” in all appropriate places within the Indiana Code, but even this statutory provision is self-policing, in that it provides that the term’s construction cannot be used to circumvent the context of another statute. The MFRF definition of “qualified service member” is specific to the MFRF statutory framework, and includes an active duty component that “Hoosier Veteran” does not, making it slightly more specific in nature. It stands to reason that the “qualified service member” definition is the more appropriate term to use and follow by the Commission in the construction of its administrative rule.

It is the position of the working group (as well as the Commission’s legal counsel) that the inclusion of the term “Hoosier Veteran” in the administrative rule would expand the class of eligible participants in the MFRF well beyond the original and current legislative intent, and such action would be contrary to the terms of the statutory definition of “qualified service member” at IC 10-17-12-7.5.

For the foregoing reasons, the working group elected not to incorporate the term “Hoosier Veteran” into the language of the proposed rule, nor entertain any other expansion of the eligibility that might call into question the rule’s consistency with IC 10-17-12-7.5.

2. 12 Month Service Requirement. The submitted comments suggested that the twelve (12) month service requirement for qualified service members should be eliminated. Neither the working group nor the Commission has legal authority to affect such a change. Pursuant to IC 10-17-12-10(b):

“The following apply to grants awarded under this chapter:

- (1) An applicant is not eligible for a grant from the fund if:*
- (A) the qualified service member with respect to whom the application is based has been discharged; and*
 - (B) the qualified service member’s term of qualifying military service was less than twelve (12) months.”*

The requirement for twelve (12) months of qualifying military service was established by the Indiana General Assembly, and as such this requirement cannot be circumvented by Administrative Rule. The only legally appropriate method to eliminate or alter this requirement is to seek a statutory change with the Indiana General Assembly.

3. Direct Payment to Veterans. The comments submitted also raised a concern about MFRF payments being made directly to veterans, rather than to vendors or utility providers. The current rule language addressing this topic is found at 915 IAC 3-4-2 (5):

“If the applicant is deemed eligible, the department shall effect prompt payment to the applicant, identified vendor, or utility provider in the amount established in the need determination review, not to exceed two thousand, five hundred dollars (\$2500). Payment shall be made consistent with the state’s payment procedures as established by the auditor of state.”

After careful consideration and deliberation, the working group determined that it may be unduly restrictive to eliminate the *possibility* of making a payment directly to a vendor and that such an action may have the unintended consequence of preventing payment of assistance to a veteran altogether. It is acknowledged that the department works diligently to pay vendors or utility providers directly in every circumstance where it is viable and appropriate, and that only in very limited and unique circumstances has it been appropriate to pay a veteran directly.

It was the determination of the working group that, while a risk of fraud may exist when paying veterans directly, the department has established reasonably sufficient mitigation controls on this issue by requiring receipts, invoices, and other documentation from the veteran verifying that payment was made to cover the circumstances that lead to the award of assistance. In balancing the concern of fraud with the purpose of the fund in assisting as many veterans in need as possible, the working group elected to keep the potential of paying a veteran directly available to the department.

4. Categories of Assistance. Multiple comments submitted to the Commission indicated opposition or discomfort with the various categories of assistance that the MFRF could offer. There were particular objections to MFRF assistance being used for items such as transportation, education, child care costs, food, and others. The general consensus was that these items are not “emergency” items and that there are other assistance programs available to veterans to cover these issues.

Neither the working group nor the Commission has legal authority to affect such a change. Pursuant to IC 10-17-12-8(a):

“The military family relief fund is established to provide short term assistance with food, housing, utilities, medical services, basic transportation, child care, education, employment or workforce, and other essential family support expenses that have become difficult to afford for qualified service members or dependents of qualified service members.”

The creation of the various categories of assistance was established by the Indiana General Assembly, and as such these categories cannot be circumvented by Administrative Rule. The only legally appropriate method to alter these categories is to seek a statutory change with the Indiana General Assembly. Until such time as a statutory change is made the department and Commission should continue to honor reasonable requests for assistance if the request falls into one of these general categories and the other requirements of the rule and statutory framework are met.

5. Assistance for dependents. Commenters took issue with the process that allows dependents of eligible veterans to file applications and receive assistance from the MFRF.

Neither the working group nor the Commission has legal authority to affect such a change. Pursuant to IC 10-17-12-8(f):

“A qualified service member or the qualified service member’s dependent may be eligible to receive assistance from the fund.”

It should be further noted that the MFRF statute provides the reader with a definition of “dependent” at IC 10-17-12-5.5:

“As used in this chapter, “dependent” has the meaning set forth in 37 U.S.C. 401, as in effect on January 1, 2009.”

The federal reference (37 U.S.C. 401) defines “dependent” as follows:

- Spouse of the member
- Unmarried Child of the member
 - Under 21
 - Incapable of self-support
 - Under 23, enrolled full-time in an institution of higher learning
- Parent
 - Dependent upon the member
- An unmarried person who
 - has been placed under the legal custody of the member for at least 12 consecutive months
 - Is under 21
 - Is under 23, enrolled full-time in an institution of higher learning
 - Is incapable of self-support
 - Resides with the member

The inclusion of a qualified service member’s dependent in the list of eligible participants in the MFRF was established by the Indiana General Assembly, and as such this inclusion cannot be circumvented by Administrative Rule. The only legally appropriate method to eliminate or alter this inclusion is to seek a statutory change with the Indiana General Assembly.

6. Application Document. It is acknowledged that some of the comments submitted addressed concerns with inconsistencies between the statute, the proposed rule, and the application document itself. It should be noted that the application document is the document used to execute the policy established in the MFRF statute and the proposed rule, but is not a part of either the statute or the rule itself.

The working group and the department both agree and acknowledge that the application document must undergo substantial changes in order to make it read and operate consistent with the policy established in the proposed administrative rule. However, up to this point the department has been reluctant to institute such changes as the administrative rule itself has undergone multiple changes over the past few months and the department concluded it would be best to withhold substantive changes to the application until such time as the administrative rule was formally adopted, approved, and published.

Upon completion of the rulemaking process, the application document WILL be amended and corrected to ensure that the provisions and statements contained in that document are not contradictory or confusing to the applicant in regards to the process and administration of the MFRF.