



DEPARTMENT OF VETERANS AFFAIRS
Office of the General Counsel
Washington DC 20420

In Reply Refer To: 023

VA District Counsel (372/02)
941 North Capitol Street, NE
Washington, DC 20421

QUESTION PRESENTED: Whether individuals can transfer royalty rights to VA research corporations.

DISCUSSION:

1. You have asked us to concur as to a particular portion of a draft opinion letter you are sending to the Director of the Washington VA Medical Center ("DCVAMC"). The Director has told you that Dr. David J. Nashel, Chief of Rheumatology and Mr. John J. Martin, Research Biologist, both of whom work for the DCVAMC, have developed a new software program called Images in Rheumatology. You state that the Institute for Clinical Research, the DCVAMC's title 38 nonprofit research corporation ("ICR"), provided part of the funding for the development of this software package. Presuming that the software is copyrightable (a question you have asked 024 to address), and that Dr. Nashel and Mr. Martin can individually obtain royalty payments in the form of a licensing fee from the sale of the software product, you have asked whether they could transfer the proceeds generated by this fee to ICR. We conclude that they can transfer the royalty proceeds to ICR provided that the rights to the royalty initially belong to Dr. Nashel and Mr. Martin and not to VA.

2. You state in your opinion that royalties and other income from the licensing or assignment of inventions cannot be transferred to and administered by a VA nonprofit research corporation. For support, you relied upon an opinion rendered by the Office of General Counsel (Op. G.C. 27-90 (April 24, 1990)) which held that (1) a VA laboratory may transfer funds received under a cooperative agreement for the conduct of research to its nonprofit research corporation for administration, and (2) royalties and other income from licensing or assignment of inventions may not be transferred to and administered by a VA nonprofit research corporation. We disagree with your interpretation of Op. G.C. 27-90 as an absolute prohibition against the transfer of royalties by any entity or preteen to any title 38 research corporation. That Opinion addressed the factual situation where the royalty interest involved was "owned" by VA. The Opinion prohibited VA from transferring its royalty interest to the research corporation because of the

NONPROFIT RESEARCH CORPORATIONS
AND THE FEDERAL TECHNOLOGY
TRANSFER ACT

VA has authority to establish nonprofit research corporations as "flexible funding mechanisms" for conducting approved research at VA medical centers. 38 U.S.C. § 7361(a). VA also has authority to permit the directors of Government-operated laboratories to enter into cooperative research and development agreements (CRADAs) with other Government agencies, private organizations, and persons. 15 U.S.C. § 3710a(a)(1). The question presented is whether a nonprofit research corporation has authority to enter into a CRADA on behalf of the Government. As explained below, a nonprofit research corporation is not a Government-operated laboratory and therefore does not fall within the statutory language permitting such agreements.

The purpose of the statute authorizing nonprofit research corporations is to allow private entities to contribute research monies to Government projects without augmenting appropriations, and without passing monies through universities. The relationship which the statute creates between these corporations and the Federal Government is that the corporations, although formed under and subject to state corporate laws, are subject to oversight by the Inspector General and the Comptroller General. The statute does not create a relationship in which a nonprofit research corporation is an arm of the Government.

In the House Report on the Veterans' Omnibus Health Care Amendments of 1987, Congress addressed the proposed amendment authorizing nonprofit research corporations, stating that "[t]hese corporations would not be considered for any purposes as corporations owned or controlled by the United States, except for the limitations made applicable to these corporations by this Act." H.R. Rep. No. 373, 100th Cong., 1st Sess., at 5 (1987).

Given this legislative history, attorneys at the Department of Veterans Affairs and the Department of Justice have concluded that the Federal Tort Claims Act does not cover employees of nonprofit research corporations, that nonprofit research corporations cannot use the GSA supply schedule, and that VA medical centers may not transfer funds received pursuant to a CRADA to nonprofit research corporations for administration.

Consistent with the conclusion that nonprofit research corporations are not Government-operated laboratories, and consistent with prior determinations finding that nonprofit research corporations have no governmental authority, we find that they also have no authority to enter into CRADAs on behalf of the Federal Government.

2.

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limitation in the Federal Technology Transfer Act to "accept, retain, and use" royalty funds. 15 U.S.C. § 3710a(b)(1)(1992). Here, there would be no such prohibition because the owners of the royalty, Dr. Nashel and Mr. Martin, are individuals who are not subject to the Federal Technology Transfer Act. Therefore, we conclude that any royalty interest that Dr. Nashel and Mr. Martin own could be transferred to ICR.

HELD: Individuals owning royalty rights may transfer the royalty rights to a VA nonprofit research corporation.

Audley Hendricks
Assistant General Counsel