

*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 16-2098

GORDON A. GRAHAM, PETITIONER,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, RESPONDENT.

Before BARTLEY, *Judge*.

**O R D E R**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

On June 13, 2016, self-represented veteran Gordon A. Graham filed a pro se petition for extraordinary relief in the nature of a writ of mandamus, with an attached appendix. Mr. Graham asserted that a writ of mandamus is necessary to compel the Seattle VA regional office (RO) to comply with a September 2015 Board of Veterans' Appeals (Board) decision granting entitlement to an individualized independent living program (IILP) in the form of a heated, Americans with Disabilities Act (ADA)-compliant greenhouse, which it has been determined would further his ability to function independently. Petition at 1-5 & Appendix at 9. In his petition, Mr. Graham indicated that there has been little advancement in the contract bidding process and that he has received inconsistent information regarding that process, stalling forward movement on the project. *Id.* at 2-3. According to Mr. Graham, he has unsuccessfully attempted to obtain relief by emailing RO Vocational Rehabilitation and Education (VR&E) counselors and supervisors, as well as emailing the VR&E Director. *Id.* at 5-6.

The Court notes that, in granting this benefit, the September 2015 Board decision quoted VA General Counsel Precedent Opinion 34-97, to the effect that

VA has the authority, and responsibility, to provide *all services and assistance deemed necessary on the facts of the particular case* to enable an eligible veteran participating in [an IILP] to live and function independently in his or her family and community without, or with a reduced level of, the services of others. This includes the authority to approve, when appropriate, *services and assistance that are in whole or part recreational in character when the services are found to be needed to enable or enhance the veteran's ability to engage in family and community activities integral*

to the veteran's achieving his or her independent living program goals.

*Id.*, Appendix at 9 (emphasis in part in original).

On June 24, 2016, the Court ordered the Secretary to respond to the allegations in Mr. Graham's petition. *See U.S. VET. APP. R. 21(d)*. On July 13, 2016, the Secretary filed his response, arguing that the Court should deny the petition because the RO "has taken numerous actions in the evaluation and planning process of the greenhouse" and thus is still in the process of taking action on Mr. Graham's claim. Secretary's Response at 1-3. Specifically, the Secretary stated that the VR&E officer in the Seattle RO had provided a declaration that there had been progress in the project and that there was a plan to meet with the veteran on July 13, 2016, to discuss greenhouse construction. *Id.* at 2 & Declaration of David Boyd (Boyd Declaration) at 3. The Secretary further asserted that "VA has been consistently engaged in resolving [Mr. Graham]'s claim" and that the veteran has not met his burden in proving that the passage of time in this case has been unreasonable. Secretary's Response at 3.

On July 16, 2016, Mr. Graham filed a rebuttal in response to the Secretary's response and the Boyd Declaration. Petitioner's Rebuttal at 1-9. Mr. Graham disputed Mr. Boyd's assertion that he had engaged in "repeated consultations with" Mr. Graham. *Id.* at 1-2. In addition, Mr. Graham stated that he was providing notice to the Court of "subsequent receipt of [a] truncated greenhouse proposal on July 7th, 2016," and the results of the July 13, 2016, meeting. *Id.* at 4-7. Mr. Graham provided an account of the July 13, 2016, meeting, *see id.*, and the sworn account of a witness to the meeting, Mr. Mark Tolomei, *id.*, Exhibit D at 1-2. According to Mr. Graham's and Mr. Tolomei's statements, at the July 13, 2016, Mr. Boyd gave Mr. Graham an ultimatum to sign a proposed IILP plan consisting of a 15 foot x 20 foot ADA-compliant greenhouse or it would "cause a lot of problems for all of us." Petitioner's Rebuttal at 4 & Exhibit D. at 1. The Graham and Tolomei statements indicate that Mr. Boyd stated that it was his responsibility to guard U.S. Treasury funds against unreasonable requests such as this one, questioned whether Mr. Graham was sufficiently disabled to require an ADA-compliant structure, questioned why Mr. Graham needed an IILP greenhouse at all, and in general demonstrated abrasive and confrontational conduct. Petitioner's Rebuttal at 4-7 & Exhibit D at 1. Mr. Graham asserted that, following his meeting with Mr. Boyd and others involved in the IILP, he "once again finds himself facing another interminable delay in the delivery of services promised by the [Board]" due to disagreement over the IILP. Petitioner's Rebuttal at 4, 7. On July 20, 2016, Mr. Graham filed notice with the Court of a letter he sent to the Secretary and VR&E Director about his IILP. Petitioner's Correspondence at 1.

This Court has authority to issue extraordinary writs in aid of its jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See Cox v. West*, 149 F.3d 1360, 1363-64 (Fed. Cir. 1998). However, "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Three conditions must be met before the Court can issue a writ: (1) The petitioner must demonstrate the lack of adequate alternative means to obtain the desired relief, thus ensuring that the writ is not used as a substitute for the appeals process; (2) the petitioner must demonstrate a clear and indisputable right to the writ; and (3) the Court must be convinced, given the circumstances, that issuance of the writ is warranted. *See*

*Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004).

The Court concludes that Mr. Graham has not demonstrated entitlement to a writ of mandamus. As noted, one requirement for mandamus relief is that the petitioner demonstrate a lack of adequate alternative means to obtain relief. Pursuant to 38 C.F.R. § 21.98, a veteran who disagrees with an IILP must submit a written request for review of the plan to the case manager. *See* 38 C.F.R. § 21.98 (2016) (Appeal of Disagreement regarding development of, or change in, the plan). Once the written request has been received, "the Vocational Rehabilitation Counselor (VRC), or the case manager will forward the request together with relevant comment to the VR&E Officer who will: (1) [r]eview relevant information; and (2) [i]nform the veteran of his or her decision within 90 days." 38 C.F.R. § 21.98(b)(1)-(2). When the VR&E Officer is the case manager, the veteran's written request must be reviewed by the VR&E Director, who must inform the veteran of his or her decision within 90 days. 38 C.F.R. § 21.98(c). If there is still disagreement, "[t]he veteran may appeal an adverse decision of the VR&E Officer, or the Director, VR&E[,] to the Board." 38 C.F.R. § 21.98(d).

Mr. Graham initiated the § 21.98 process on July 13, 2016. *See* Petitioner's Rebuttal, Exhibit C. Under § 21.98(b), VA has 90 days to respond to Mr. Graham's written disagreement. Given that the § 21.98 process is underway, the veteran has not demonstrated that he lacks adequate alternative means to obtain the desired relief. *See Cheney*, 542 U.S. at 380-81. Accordingly, the Court will deny the petition.

However, it concerns the Court that this IILP request has been pending since May 2011 and that nearly one year after the Board's grant of entitlement little has been accomplished. The Court reminds those involved in implementation that Mr. Graham has been determined to be entitled to this benefit and, thus, entitlement is not an issue in dispute. Given that fact, the purpose of the July 2016 meeting on Mr. Graham's property was *not* investigation of Mr. Graham's disabilities or his need for the approved benefit. Instead, all work on the IILP since the September 2015 grant of the benefit, including scheduling and conduct of the July 2016 meeting on Mr. Graham's property and any decisions as to appropriate fixtures and accoutrements, should have proceeded and should in future proceed with the goal of efficient implementation of the already approved IILP. It is incomprehensible to the Court that a veteran would be questioned in that environment about his or her need for an ADA-compliant structure, or that a VA employee would put a veteran in the position of having to appeal at every step for items or services to which he or she has been already deemed entitled.

And the Court reminds VA employees involved in implementation that, according to the VA General Counsel, VA has the "responsibility[ ] to provide all services and assistance deemed necessary on the facts of the particular case to enable an eligible veteran participating in [an IILP] to live and function independently in his or her family and community," including those services or benefits "found to be needed to enable or enhance the veteran's ability to engage in family and community activities." VA Gen. Coun. Prec. Op. 34-97. The Court expects that those involved in implementation will provide reasonable accommodations and work to complete this IILP, which has been approved for this severely disabled veteran, without further discord so that further costly and

time-consuming appeals are not necessary.

The Court trusts that VA will address Mr. Graham's IILP disagreement in a timely manner and in accordance with 38 C.F.R. § 21.92(b), which requires the approval and agreement of the veteran. The Court also trusts that no further petitions on this matter will be necessary and that the IILP will proceed forward in a prompt and nonadversarial manner.

Upon consideration of the foregoing, it is

ORDERED that Mr. Graham's petition for extraordinary relief in the nature of a writ of mandamus is DENIED.

DATED: August 25, 2016

BY THE COURT:



MARGARET BARTLEY  
Judge

Copies to:

Gordon A. Graham

VA General Counsel (027)