

February 27, 2009

Dear Department Commander:

At the National Council of Administration meeting on February 21, 2009, the question was raised, with an ensuing discussion, on the applicability and interpretation of the National By-laws (especially section 708) concerning the amount of Men's Auxiliary members allowable within a VFW Post. In essence, this matter is also driven by specific United States government regulations outlined in IRS Publication 3386.

As can be noted in the attached copy of the pertinent part of the IRS publication, there are two sections applicable to this discussion. The first stipulates requirements for a VFW post that has received an IRS EIN to qualify as exempt under section 501(c)(19) of the US Tax Code. The operative requirements are that “[a]t least 75 percent of [the post’s] members must be past or present members of the [United States armed forces]” and “[a]t least 97.5 percent of its members must be ... present or former members of the [armed forces] ... or ... spouses, widows, widowers, ancestors, or lineal descendents of [the referred to military] individuals” While the percentage is listed as “97.5 percent”, for our purposes that is in reality 100 percent because of the membership eligibility requirements we have in our Congressional Charter (P.L. 630, May 28, 1936 as amended most recently as Title 36 United States Code §§ 230101-230107, January 2, 2006) and ergo, our National By-laws. For this IRS requirement, members of the Men's Auxiliary meet this latter definition of the 100 percent mandate and therefore, for a VFW post to qualify as a 501(c)(19) organization under this provision, no more than 25 percent of its membership can constitute “spouses, widows, widowers, ancestors or lineal descendents”.

There is a second provision in the IRS publication that permits “[a]n organization [to be] exempt under section 501(c)(19) as an auxiliary unit or society of a veterans’ post or organization ...” (emphasis added). This provision allows an associated post Ladies Auxiliary to incorporate separately from the post and accordingly not have its membership restricted to the 25 percent threshold required under the first provision. Section 1104 of the National By-laws is our permission for post Ladies Auxiliary units to so incorporate.

But this second provision in the IRS code does not pertain to the Men's Auxiliary because presently, there is no current VFW National By-law provision for that organization to incorporate as a 501(c)(19) organization. (We realize that the Men's Auxiliary Standard Operating Procedure provides confusing guidance on this issue and suggests obtaining an IRS EIN. That SOP guidance is not to be construed as concurrently authorizing a Men's Auxiliary unit to incorporate and does not preempt the National By-laws.)

The argument was made that because the National By-laws are silent on the question of the Men's Auxiliary being allowed to incorporate, then that silence actually implies allowance to do so. That would be true if the By-laws were silent on this point at all places, which they are not. In addition to section 708, there is section 1104(a) ("The Ladies Auxiliary ... is authorized to incorporate under appropriate not-for-profit corporation laws"), section 1104(b) ("the Ladies Auxiliary ... may ... authorize Department Auxiliaries and Post Auxiliaries to incorporate under appropriate not-for-profit corporation laws and may adopt such Rules and Regulations as are appropriate concerning such incorporation"), and section 1204(a) ("The Military Order of the Cootie ... is authorized to incorporate under appropriate not for profit corporation laws"). Consequently, absence of such similar language on incorporation in Article XIII ("Mens (sic) Auxiliary") of the National By-laws cannot imply authorization but indeed must be interpreted as not allowing a post's Men's Auxiliary to separately incorporate.

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Men's Auxiliary

With that, at this time, the Men's Auxiliary falls under the IRS requirement of being no more than 25 percent of a post's membership. Further, if a pertinent post has an associated Ladies Auxiliary that is not separately incorporated, then the combined total of both Ladies Auxiliary and Men's Auxiliary members must collectively be considered in that 25 percent threshold.

Please contact Kevin Jones, (816) 968-1133 or kjones@vfw.org with any questions.

Sincerely,



Allen "Gunner" Kent
Adjutant General

Enclosure

cc: Glen M. Gardner, Jr., Commander-in-Chief
Thomas J. Tradewell, Sr., Senior Vice Commander-in-Chief
Richard Eubank, Junior Vice Commander-in-Chief
Lawrence M. Maher, Quartermaster General
Dixie Hild, National President, Ladies Auxiliary to the VFW
Jan Tittle, National Senior Vice President, Ladies Auxiliary to the VFW
Cortina Barnes, National Junior Vice President, Ladies Auxiliary to the VFW
Connie Atkinson, National Secretary/Treasurer, Ladies Auxiliary to the VFW
National District Council Members
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Veterans Organizations

To be exempt under Internal Revenue Code section 501(c)(19), an organization must be either (A) a post or organization of past or present members of the United States Armed Forces (USAF); (B) an auxiliary unit or society of such post or organization; or (C) a trust or foundation for such post or organization.

A veterans' post or organization must meet the following requirements to be exempt under section 501(c)(19):

1. It must be organized in the United States or any of its possessions.
2. At least 75 percent of its members must be past or present members of the USAF.
3. At least 97.5 percent of its members must be--
 - (a) present or former members of the USAF;
 - (b) cadets (including only students in college or university ROTC programs or at Armed Services academies); or
 - (c) spouses, widows, widowers, ancestors, or lineal descendants of individuals referred to in (a) or (b).
4. It must be operated exclusively for one or more of the following purposes:
 - to promote the social welfare of the community (i.e., to promote the common good and general welfare of the people of the community);
 - to assist disabled and needy war veterans and members of the USAF and their dependents, and the widows and orphans of deceased veterans;
 - to provide entertainment, care, and assistance to hospitalized veterans or members of the USAF;
 - to carry on programs to perpetuate the memory of deceased veterans and members of the USAF and to comfort their survivors;
 - to conduct programs for religious, charitable, scientific, literary, or educational purposes;
 - to sponsor or participate in activities of a patriotic nature;
 - to provide insurance benefits for members or their dependents; or
 - to provide social and recreational activities for members.
5. No part of its net earnings may inure to the benefit of any private shareholder or individual.

An organization may be exempt under section 501(c)(19) as an auxiliary unit or society of a veterans' post or organization if it meets the following requirements:

1. It is affiliated with, and organized in accordance with the bylaws and regulations of, a veterans' post or organization described above.
2. At least 75 percent of its members are veterans, spouses of veterans, or related to a veteran within two degrees of consanguinity (i.e., grandparent, brother, sister, grandchild, represent the most distant allowable relationships).
3. All of its members are either members of a veterans' post or organization described in (A) above, or spouses of a member of such post or organization, or are related to a member of such post or organization within two degrees of consanguinity.
4. No part of its net earnings inures to the benefit of any private shareholder or individual.

An organization may be exempt under section 501(c)(19) as a trust or foundation for a veterans' post or organization if it meets the following requirements:

1. It is valid under local law and, if organized for charitable purposes, has a dissolution provision described in section 1.501(c)(3)-1(b)(4) of the Income Tax Regulations.
2. The corpus or income cannot be diverted or used other than to fund a veterans' post or organization for charitable purposes or as an insurance set-aside.
3. The trust income is not unreasonably accumulated, and a substantial portion of the income is distributed to such veteran post or organization, or for exclusively religious, charitable, scientific, literary, educational, or prevention of cruelty to children or animal purposes.
4. It is organized exclusively for one or more of those purposes enumerated above for which a veterans' post or organization itself may be organized.

Note: For taxable years beginning on or before November 11, 2003, slightly different membership requirements apply under section 501(c)(19).

To be exempt under Code section 501(c)(23), an organization must meet the following requirements:

1. It is an association organized before 1880;
2. More than 75 percent of its members are past or present members of the USAF; and
3. It has a principal purpose of providing insurance and other benefits to veterans or their dependents.

Depending on their organization and purposes, veterans' organizations may be recognized as tax-exempt under the following sections of the Internal Revenue Code:

- 501(c)(4) - social welfare organizations
- 501(c)(7) - social clubs
- 501(c)(8) - fraternal beneficiary societies
- 501(c)(10) - domestic fraternal societies
- 501(c)(2) - title holding corporations

For more information on the requirements for exemption under the code sections listed above, click on the appropriate **Contents** link (left column, this page) or see Publication 3386, Tax Guide for Veterans' Organizations. For more information about how to apply for recognition of exemption, see Application for Recognition of Exemption.