

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FT. DEVENS RIFLE & PISTOL CLUB, INC.,

Plaintiff,

v.

U.S. ARMY GARRISON FORT DEVENS,

Defendant

Civil No.: 1:22-cv-11288-RGS

FIRST AMENDED COMPLAINT- LEAVE GRANTED 6/23/2023

PRELIMINARY STATEMENT

This action involves the Plaintiff, Ft. Devens Rifle & Pistol Club, Inc.'s access to, and Defendant's challenged fees for use of, firing ranges at the U.S. Army Garrison Fort Devens, an installation within U.S. Army Installation Management Command, with headquarters at Devens, Massachusetts. The Plaintiff has used multiple rifle and pistol ranges at USAG Fort Devens, without cost, for many years, in accordance with Federal statutes. However, following promulgation of former Secretary of Defense Mark Esper's June 19, 2020 Memorandum concerning "Reimbursable Activities in Support of Other [non-DoD] Entities," a copy of which is attached hereto as "**Exhibit A**", Defendant's personnel, in November 2020, notified Plaintiff that beginning in January 2021, and throughout calendar year 2021, Plaintiff would be charged a minimum fee of Two Hundred and Fifty Dollars ("\$250.00") per range outing to use firing ranges at Defendant's South Post range complex. Former Secretary of Defense Esper's June 19, 2020, Memorandum, while citing multiple other Federal statutes and regulations, failed to cite 10 U.S.C. § 7409 and 36 U.S.C. § 40721 *et seq.*, and promulgated that Memorandum in derogation

of those un-cited statutes. Moreover, that June 19, 2020, Memorandum did not set forth any firing range use charge or fee parameters or guidelines. The calendar year 2021 range use fees Defendant attempted to charge Plaintiff were arbitrary and exorbitant, bearing no relation to the express language of 10 U.S.C. § 7409. In January of 2021, Plaintiff attempted to discover any actual costs incurred by Defendant in providing firing ranges for Plaintiff's use by sending a Freedom of Information Act (hereinafter, "FOIA") Request to LTC Lindsey Halter, then the USAG Fort Devens Commander, a copy of which is attached hereto as "**Exhibit B**". Thereafter that FOIA request was assigned a case number and Plaintiff was charged, and paid to the United States Treasury, One Thousand and Fifty-Six Dollars ("\$1,056.00") the stated estimated search and copying costs for the USAG Fort Devens documents so requested, but the Defendant has failed to produce any of the requested and paid-for documents or document copies.

Consequently, Plaintiff hired undersigned counsel and initiated this action in order to vindicate its rights under Federal statutes to have access to the firing ranges for fees that equate to the Defendant's actual costs incurred in providing firing ranges for Plaintiff's use, in accordance with applicable Federal statutes, and also to have its FOIA request honored forthwith.

I. PARTIES

1. Plaintiff *Ft. Devens Rifle & Pistol Club, Inc.* (hereinafter, the "Plaintiff") is a shooting and marksmanship-promoting club incorporated under the laws of the Commonwealth of Massachusetts. Its membership consists primarily of veterans who served honorably in the U.S. Armed Forces.
2. Defendant *U.S. Army Garrison Fort Devens* (hereinafter, the "Defendant" or "USAG Fort Devens") is a component of the U.S. Army, which itself is a part of the U.S. Government's Executive Branch.

II. JURISDICTION

3. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. Sections 2201 & 2202 (Declaratory Relief), 5 U.S.C. § 552 (Freedom of Information Act), 5 U.S.C. Section 702 (Right of Review), and the Constitution and Laws of the United States.

III. FACTS

4. Plaintiff club was founded and organized in the early 1990s as an association and later was incorporated in 1996.

5. From its founding through approximately December 2020, Plaintiff used firing ranges at Fort Devens South Post on a monthly basis, free of charge because Defendant waived any possible nominal fees that it could have charged. Plaintiff furnished all its own certified Range Safety Officers and all its own firearms, ammunition, targets, target spotters, and other related supplies and components.

6. At all relevant times Plaintiff was, and is now, a certified affiliate of the *Civilian Marksmanship Program* (hereinafter, "CMP"), whose custodian is the Congressionally chartered Corporation for the Promotion of Rifle Practice and Firearm Safety, Inc. Plaintiff is CMP affiliated Club No. 013159.

7. Prior to the September 2001 terrorist attacks, Plaintiff was permitted to, and did, host many shooting events at Fort Devens South Post, including, but not limited to, Northeast High Power Rifle League matches and the annual Colt Cup Match. Following the September 2001 terrorist attacks Defendant limited the number of privately owned vehicles (POVs) allowed on Fort Devens South Post and refused to grant Plaintiff any more weekend firing range dates.

8. In or about November 2020, Defendant notified Plaintiff that use of the Defendant's firing ranges during calendar year 2021 would require a minimum fee payment of Two Hundred and Fifty Dollars (“\$250.00”) per range outing. Plaintiff refused to sign the “General Installation License/License to Use Ranges and/or Training Facilities” prepared by Defendant setting forth that minimum fee amount, Plaintiff citing 10 U.S.C. § 7409 and 36 U.S.C. § 40727.

9. Title 10 U.S.C. § 7409 provides in pertinent part:

a) Ranges available. All rifle ranges constructed in whole or in part with funds provided by the United States may be used by members of the armed forces *and by persons capable of bearing arms.*

(b) Military ranges. (1) In the case of a rifle range referred to in subsection (a) that is located on a military installation, the Secretary concerned may establish reasonable fees *for the use by civilians* of that rifle range *to cover the material and supply costs incurred by the armed forces to make that rifle range available to civilians.*

(emphasis supplied).

Title 36 U.S.C. §§ 40721 *et seq.* are statutes that relate to the *Civilian Marksmanship Program*. In particular, 36 U.S.C. § 40727 mandates that the Secretary of the Army “*shall provide logistical support*” to the CMP for a host of activities (emphasis supplied).

10. Upon information, believed to be true, Defendant incurs no costs, over and above costs already incurred for Department of Defense activities, in furnishing to Plaintiff firing ranges located at Fort Devens South Post. Moreover, upon information, believed to be true, all USAG Fort Devens firing range operating, maintenance, and repair costs are paid by Congressionally appropriated “Operations and Maintenance (O & M) Funds” and the USAG Fort Devens Range Control civilian DoD employees are paid with “O & M Funds” also.

11. Attempting to discover documentation that could justify the \$250.00 minimum-fee-per-range-outing that Defendant attempted to charge Plaintiff, Plaintiff sent Defendant a FOIA request for relevant documents on or about January 19, 2021.

12. Defendant, as of the date of the original Complaint and as of the date of this Amended Complaint, has failed to provide Plaintiff the requested and paid-for documents.

13. Many non-military entities use the firing ranges at USAG Ft. Devens. Upon information and belief, many of these entities are municipal police departments and state law enforcement agencies that have no interest in contesting fees.

14. Plaintiff has a statutory right to use the firing ranges at USAG Ft. Devens so long it reimburses or pays Defendant its demonstrated costs for materials and supplies, if any, actually incurred in providing firing ranges for use by Plaintiff. Moreover, Plaintiff has a statutory right to be provided documents showing Defendant's actual costs, if any, for materials and supplies, specifically incurred by Defendant in providing firing ranges for use by Plaintiff.

IV. CLAIMS

COUNT 1

(Violation of 10 U.S.C. § 7409)

15. Plaintiff re-alleges the foregoing paragraphs 1-14 as if set forth again here.

16. Defendant violated 10 U.S.C. § 7409 by attempting to charge Plaintiff unreasonable and exorbitant firing range use fees in excess of Defendant's actual "material and supply costs incurred by the armed forces to make" firing ranges at Fort Devens South Post available to Plaintiff. Defendant had and has no discretion under 10 U.S.C. Section 7409 to charge range use fees outside the parameters set forth in that statute.

COUNT 2

(Violation of 36 U.S.C. § 40727)

17. Plaintiff re-alleges the foregoing paragraphs 1-16 as if set forth again here.

18. Defendant violated 36 U.S.C. § 40727 by failing to "provide logistical support" to the Plaintiff, a certified affiliate of the Civilian Marksmanship Program.

COUNT 3
(Violation of 5 U.S.C. § 552)

19. Plaintiff re-alleges the foregoing paragraphs 1-18 as if set forth again here.
20. Defendant has failed to provide the Plaintiff the documents requested in Plaintiff's Freedom of Information Act request, already paid for by Plaintiff, within the time allowed by said FOIA.

WHEREFORE, Plaintiff requests the following:

V. RELIEF

- A. A declaration that Plaintiff's statutory rights have been violated.
- B. An order directing Defendant to allow Plaintiff use of its firing ranges, in accordance with past practices, for only the demonstrated *material and supply costs incurred by the armed forces to make [its] rifle range[s] available to Plaintiff*.
- C. An award to Plaintiff reasonable attorney fees and costs of this action.
- D. Such other and further relief that to the Court seems just, proper and equitable.

Respectfully submitted,
The Plaintiff,
Ft. Devens Rifle & Pistol Club, Inc.,
By its attorneys,

DATED: June 26, 2023

/s/ Richard C. Chambers, Jr., Esq.
Richard C. Chambers, Jr., Esq.
BBO#: 651251
Chambers Law Office
220 Broadway, Suite 404
Lynnfield, MA 01940
Office: (781) 581-2031
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed through the ECF system and will therefore be sent electronically to the registered participants as identified on the Notice of Electric Filing (NEF) and paper copies will be sent this day to those participants indicated as non-registered participants.

DATED: June 26, 2023

/s/ Richard C. Chambers, Jr., Esq.
Richard C. Chambers, Jr., Esq.

EXHIBIT A



**SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000**

JUN 19 2020

**MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF
DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEF OF THE NATIONAL GUARD BUREAU
COMMANDERS OF THE COMBATANT COMMANDS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM
EVALUATION
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF
DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC
AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES**

SUBJECT: Reimbursable Activities in Support of Other Entities

The National Defense Strategy (NDS) focuses the DoD on great power competition against China and Russia, in three lines of effort: Increasing Lethality, Strengthening allies and Partners, and Reform. I have also added a personal focus on taking care of our people. All of these priorities require resources.

Over the decades, DoD has been perceived too often by non-DoD departments, agencies, and entities, both domestically and internationally, as an available resource for funding and other support in a variety of contexts. Some are under the impression that DoD's budget is big enough to allow for in-kind or non-reimbursable support or even the creation of non-DoD programs, which has resulted in DoD spending resources on things that are outside of DoD's missions and especially its NDS focus. Therefore, it is important we keep in mind that any non-reimbursable support provided by the Department results in time, money, and manpower that are then unavailable for a core warfighting task, including critical NDS priorities. Moreover, even if DoD is reimbursed for its support, such assistance often results in Service members not being able to perform training or readiness actions for DoD missions and sometimes requires these Service members and civilian employees to spend additional time away from their home station.



OSD004898-20/CMD006384-20

Moving forward, the Department will no longer provide non-reimbursable support of any nature to other Federal, State, Territorial, Tribal, or local government entities; private groups and organizations; foreign governments; and international organizations (hereinafter non-DoD entity or entities), unless such support is required by statute or if discretionary non-reimbursable support is authorized but not required by statute, such support: (1) is authorized by the DoD Joint Ethics Regulation or DoD Public Affairs guidance; or (2) is provided after approval of an exception under the process prescribed below.

EXCEPTION PROCESS

Statutes that authorize but do not require DoD to provide non-reimbursable support to a non-DoD entity, or that authorize the Secretary to waive reimbursement, will be considered on a case-by-case basis for exceptions to this prohibition on discretionary non-reimbursable support.

Requests for exceptions may be submitted in writing with justification articulating why providing the requested support on a non-reimbursable basis, or why waiving the requirement for reimbursement if waiver is authorized by statute, supports the NDS. Until further notice, exceptions may only be approved by the Secretary of Defense, the Deputy Secretary of Defense, the Chief Management Officer (if authorized by existing DoD policy), the Secretaries of the Military Departments (if authorized by existing DoD policy), and the Under Secretaries of Defense (if authorized by existing DoD policy). These officials may not further delegate their authority to approve exceptions to this policy prohibiting non-reimbursable support.

Within 30 days of the date of this memorandum, the Chief Management Officer, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the Under Secretaries of Defense will provide to the Acting Under Secretary of Defense (Comptroller) a list of specific types of support, with justification, that may warrant advance approval as a broader exception to policy, or that may warrant the delegation of approval authority.

Sixty days after the date of this memorandum and every 60 days thereafter, the Chief Management Officer, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, and the Under Secretaries of Defense will provide to the Acting Under Secretary of Defense (Comptroller), a report that captures: When exceptions were granted; for what purpose; with what justification; and the estimated cost of the support provided without reimbursement.

- The Military Departments will submit their exception requests through the respective Secretary of the Military Department.
- The Chief of the National Guard Bureau and the Commanders of the Combatant Commands will submit their exception requests through the Chairman of the Joint Chiefs of Staff.
- The Directors of Defense Agencies and Field Activities will submit their exception requests through the Under Secretary of Defense or other DoD Component head to whom he or she reports.

- The heads of all other DoD Components not listed above will submit their exception requests through the Chief Management Officer.

EXEMPTIONS

This memorandum excludes DoD activities or programs in support of other non-DoD entities for which Congress has specifically authorized and appropriated funding, or for which the Department has dedicated programs and resources, such as counterdrug activities and activities to counter transnational organized crime (10 U.S.C. § 284).

This memorandum also excludes activities for which Congress specifically appropriates funds to support foreign partners, including: Coalition Support Funds, funding for Afghanistan/Counter Islamic State in Iraq and Syria (ISIS) Lift and Sustain, the Afghanistan Security Forces Fund, and the Counter-ISIS Train and Equip Fund.

Finally, this memorandum excludes support of the U.S. Coast Guard when conducting activities in direct support of DoD missions.

This memorandum supersedes any previous policy or guidance on providing non-reimbursable support to non-DoD entities. Attached is a list of references to assist with this process. To the extent DoD issuances are inconsistent with this memorandum, this memorandum shall take precedence, and the heads of DoD Components will take steps within 90 days to update issuances and policies to conform to this memorandum.

The point of contact for this matter is the Acting Under Secretary of Defense (Comptroller).



Attachment:
As stated

References

- a. 2 U.S.C. § 1966 – Protection of Members of Congress
- b. 10 U.S.C. Chapter 15 - Military Support for Civilian Law Enforcement Agencies
- c. 10 U.S.C. § 277 - Reimbursement
- d. 10 U.S.C. § 284 – Support for counterdrug activities and activities to counter transnational organized crime
- e. 10 U.S.C. § 2012 – Support and services for eligible organization and activities outside Department of Defense
- f. 10 U.S.C. § 2053 - Equipment and services: Presidential inaugural ceremonies
- g. 10 U.S.C. § 2554 – Equipment and other services: Boy Scout Jamborees
- h. 10 U.S.C. § 2555 – Transportation services: international Girl Scout events
- i. 10 U.S.C. § 2556 – Shelter for homeless; incidental services
- j. 10 U.S.C. § 2564 - Provision of support for certain sporting events
- k. 18 U.S.C. § 3056 – Powers, authorities, and duties of the United States Secret Service
- l. 31 U.S.C. § 1301(a) – The Purpose Statute
- m. 31 U.S.C. § 1535 -1536 – The Economy Act
- n. 31 U.S.C. § 9701 – Fees and charges for Government services and things of value
32 U.S.C. § 508 – Assistance for certain youth and charitable organizations
- o. 42 U.S.C. § 5121-5207, et seq., - The Robert T. Stafford Disaster Relief and Emergency Assistance Act
- p. 44 C.F.R, part 206.8 - Reimbursement of other Federal agencies
- q. Public Law 94-524, “The Presidential Protection Assistance Act of 1976,” October 17, 1976, as amended
- r. Sections 5802 of Public Law 104-208, the Omnibus Consolidated Appropriations Act of 1997, as amended – Funding for support of certain events – Support for International Sporting Competitions, Defense
- s. Section 1059 of Public Law 114-92, the National Defense Authorization Act for Fiscal Year 2016 – DoD authority to provide assistance to secure the southern land border of the United States
- t. Section 1650 of Public Law 115-232, the John S. McCain National Defense Authorization Act for Fiscal Year 2019 – Pilot program authority to enhance cybersecurity and resiliency of critical infrastructure
- u. DoD 7000.14-R Financial Management Regulations, Volume 11A, Chapter 19: Defense Support of Civil Authorities
- v. DoDD 3015.18 Defense Support of Civil Authorities

EXHIBIT B

P.O. Box 452

South Lancaster, MA 01564-0452

19 January 2021

LTC Lindsey E. Halter, Installation Commander
Headquarters, U.S. Army Garrison Fort Devens
31 Quebec Street
Devens, MA 01434

SUBJECT: Freedom of Information Act (5 U.S.C. Sec. 552) Request by Ft. Devens Rifle & Pistol Club, Inc., a Non-Profit, Civilian Marksmanship Program Affiliate No. 013159

Dear LTC Halter,

Copies of fired SECDEF Esper's 19 June 2020 Memorandum For Chief Management Officer Of The Department Of Defense, 10 U.S.C. Sec. 7409, and 36 U.S.C. Sec. 40727, are enclosed for reference.

Copies of the following records are requested in accordance with the Freedom of Information Act (FOIA):

1. All records showing the itemized costs for materials and supplies incurred by U.S. Army Garrison Fort Devens, specifically attributable to the Ft. Devens Rifle & Pistol Club, Inc., to make the following rifle or pistol ranges available to that Club on the range dates it scheduled during calendar year 2020:
 - a). ALPHA;
 - b). BRAVO;
 - c). DELTA;
 - d). ECHO;
 - e). GOLF;
 - f). HOTEL;
 - g). PAPA.

2. All records showing the itemized incremental direct costs incurred by U.S. Army Garrison Fort Devens, specifically attributable to the Ft. Devens Rifle & Pistol Club, Inc., for logistical support, to make the following rifle or pistol ranges available to that Club on the range dates it scheduled during calendar year 2020:

- a). ALPHA;
- b). BRAVO;
- c). DELTA;
- d). ECHO;
- e). GOLF;
- f). HOTEL;
- g). PAPA.

3. The U.S. Army Garrison Fort Devens regulations promulgated according to 10 U.S.C. Sec. 7409(c) to carry out the provisions of 10 U.S.C. Sec. 7409, effective for calendar year 2021, and all written communications demonstrating that those regulations were, in fact, approved by the Secretary of the Army.

4. Records showing the total dollar amount collected during calendar year 2020 by U.S. Army Garrison Fort Devens, in charges or fees imposed on non-Department of Defense entities, including but not limited to, law enforcement agencies, other agencies, corporations, and other persons, for use of its rifle and pistol ranges during 2020.

5. All records demonstrating the U.S. Army Garrison Fort Devens charge and fee rates for use of its rifle and pistol ranges by non-Department of Defense entities during calendar year 2020, and all records showing that those charge and fee rates were approved by the Secretary of the Army.

6. All records demonstrating the U.S. Army Garrison Fort Devens charge and fee rates for use of its rifle and pistol ranges by non-Department of Defense entities during calendar year 2021, and all records showing that those charge and fee rates were approved by the Secretary of the Army.

7. All maintenance and repair records showing the number of motorized target carriers on GOLF Range that actually functioned properly, and the number that did not function properly, during each of the months March, April, May, June, July, August, September, October, November, and December 2020.

Please advise this requester of the costs for production and mailing of the above-requested record copies.

I thank you for your consideration.

Sincerely,

James F. Gettens, Esq.

Treasurer, Ft. Devens Rifle &

Pistol Club, Inc.

(978) 660-2806

Enc.

cc:

Michael Jean, Esq., Director, Office of Litigation Counsel, National Rifle Association of America

Office of the Staff Judge Advocate, U.S. Army Installation Management Command, Joint Base San Antonio-Fort Sam Houston, 11711 N. Interstate Highway 35, San Antonio, TX 78233

Office of the Judge Advocate General, 2200 Army Pentagon, Washington, D.C. 20310-2200

Office of General Counsel, Department of Defense, 1600 Defense Pentagon, Washington, DC 20301-1600

Office of the Army Auditor General, 6000 6th Street, Bldg. 1464, Fort Belvoir, VA 22060-5609

Keith Jackson, Director, PTMS, USAG Fort Devens