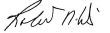


**MOTION DENIED**For the Panel  
January 10, 2018**Robert N. Davis**  
**Chief Judge**

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

Douglas J. Rosinski,  
Petitioner,

v.

David J. Shulkin, M.D.,  
Secretary of Veterans Affairs,  
Respondent.

No. 17-1117

**Motion to Strike**  
**Secretary's Petition**  
**Response**

Petitioner Douglas J. Rosinski moves the Court to strike the Secretary's June 16, 2017, Petition Response ("Pet. Resp.")<sup>1</sup> as unresponsive and order a substantive response addressing the issues raised in the petition. The Secretary's response addresses only the purported issue of the standing to challenge a policy denying an individual a benefit afforded to other, similarly situated, individuals. Not a word is spared for the (apparently uncontested) assertions of (1) the existence and enforcement of the prejudicial policy; (2) the favorable treatment of non-attorney accredited representatives; (3) the advantage to non-attorney representatives and their clients (and the reciprocal disadvantage to attorney representatives and their clients) from the prejudicial policy.

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<sup>1</sup> *Secretary's Response to Petition for Extraordinary Relief and Court Order* dated June 1, 2017 (Jun. 16, 2017).

The Secretary, therefore, has failed to substantively respond to the Petition. In this case where substantive briefing and oral argument is already scheduled, the failure to address the substantive issues leaves Mr. Rosinski *still* wondering after more than 3 years what possible basis there is for the Secretary's prejudicial policy. More importantly, it leaves Mr. Rosinski without a clue as to what substantive issues to address in briefing the Court because the Secretary *still* refuses to provide Mr. Rosinski (and now the Court) with any policy position or legal basis for his position.<sup>2</sup>

Indeed, because the Secretary has now stonewalled the *Court*, Mr. Rosinski submits that Secretary has conceded the issues raised in the petition. *See MacWhorter v. Derwinski*, 2 Vet. App. 133, 136 (1992) ("Where appellant has presented a legally plausible position . . . and the Secretary has failed to respond inappropriately, the Court deems itself free to assume, and does conclude, the points raised by appellant,

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<sup>2</sup> To the extent relevant now, the Secretary's "standing" argument lacks any discernable logic or basis. The Secretary's position that an individual denied a government benefit afforded to similarly situated individuals is without legal or equitable recourse is untenable. fails on The Secretary has not and cannot identify any basis allowing him to discriminate against veterans based on their choice of representative. Moreover, if the Secretary deems VSOs and attorneys *not* similarly situated for the purposes of the access sought, he has had over three years to say so.

and ignored by the General Council, to be conceded.”). Should nothing further be provided by the Secretary, therefore, the only issue remaining for briefing is the appropriate relief.

To the extent that the Secretary raised issues unrelated to the bases for denial of Mr. Rosinski’s access while affording non-attorney VSOs that very access, they are irrelevant self-serving strawmen. For example, the Secretary argues Mr. Rosinski no right to an “opportunity to see drafts of decisions before they have become final and appealable.” Pet. Resp. at 10-11. Yet, that is the specific “right” which non-attorney VSOs are granted under the challenged policy. Mr. Rosinski submits that either all representatives have such a “right” or none do.

Pursuant to Rule 27, undersigned contacted the Secretary’s counsel and is authorized to state that the Secretary is opposed to this motion.

### **Conclusion**

The Secretary's response failed to address much less rebut, any of the substantive assertions or issues raised by Mr. Rosinski's petition. The response, therefore, is either properly stricken or accepted as a concession of the underlying assertions, leaving only the appropriate relief before the Court.

Respectfully submitted,

/s/ Walton J. McLeod  
McLeod Law Group, LLC  
500 Taylor Street, Suite 404  
Columbia, SC 29201  
Telephone: 803.451.6057  
Facsimile: 844.270.0726  
tad@mcleod-lawgroup.com  
Counsel for Petitioner

June 16, 2017