

MILITARY LAW TASK FORCE OF THE NATIONAL LAWYERS GUILD

Representing Servicemembers in Involuntary Discharge Proceedings

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*This memo is designed for attorneys and counselors assisting enlisted servicemembers in challenging involuntary administrative discharges. It appeared originally as a series of articles in the MLTF quarterly publication, **On Watch**, and has been updated as of October 2013. Parts I and II were written by Kathleen Gilberd, a legal worker in San Diego who works in the areas of discharges and discharge review, and is executive director of the MLTF. Part III was written by Bridget Wilson, who practices military law in San Diego and is a volunteer attorney with the Servicemembers Legal Defense Network.*

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Introduction

In today's military – with high-pressure recruitment, fast-paced and often punishing training carried out in too little time, repeated deployments and brutal combat – many soldiers break. They are injured, become physically or emotionally ill, or grow dissatisfied with the war and their recruiters' false promises. Some object or resist, while others try to cope and do poorly. Those who cannot be returned repeatedly to combat tend to be shuffled aside, their problems ignored and their mistakes or misconduct treated harshly. Consider this scenario as a common example:

A young man enlists in the Marines during high school on promises of valuable training as a mechanic. He follows the recruiter's instructions to deny any medical problems and not mention prior treatment for an attention deficit disorder (ADD) during his physical exam. He is rushed through basic and advanced training, learning more about rifles than mechanics. During training the recruit incurs a painful back injury and begins to feel anxiety and depression. But he is

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forbidden from going to sick bay for help. Immediately following the hasty training is deployment to Afghanistan, where he gets his first taste of combat. Along with the pressure and dehumanization that attends warfare, he feels the sting of the consequences of even minor disobedience.

Back from his tour, he learns that he will deploy again in a few months. It becomes harder and harder to obey petty rules and treat boorish senior enlisted personnel with anything resembling respect. If he is given any post-deployment psychological screening at all, it is cursory, and the results simply vanish. After some harassment for asking to go to sick call, he finally sees a military psychologist and is diagnosed with post-traumatic stress disorder (PTSD). His frustration, poor attitude and a few small disciplinary problems, combined with his admission of ADD as a child, also result in a diagnosis of a personality disorder or adjustment disorder. He is given some Prozac and referred to anger management classes but receives no real help. The Marine goes out, gets drunk and goes UA for a week. Then he goes back to the psychologist when he feels he is losing it. Now he faces involuntary discharge proceedings for misconduct.

By now many readers probably recognize a number of their clients, including some who did not get this far, but were faced with involuntary discharge earlier in their service. This is an extremely common pattern, in which soldiers develop physical or mental injuries or illness as a result of pressured training and/or prolonged combat, or simply realize that they hate the war and the service.

Their problems are misdiagnosed or under-diagnosed, yet the symptoms of these problems result in punishment for disciplinary problems and involuntary discharge. With assistance and representation, many of these personnel can obtain better discharges and protect their benefits (including important medical benefits), or force the military to recognize that medical discharge or retirement is the appropriate response.

Part I – Administrative Discharges Generally, and Notification Procedure Discharges

Counselors and attorneys are seeing increasing numbers of discharges for misconduct or for other designated physical and mental conditions (ODPMC). Involuntary administrative discharges are used to get rid of problem soldiers with a minimum of effort, avoiding costly benefits and masking the true numbers of those injured and made ill by the current wars. For a great many servicemembers, this means stigmatizing discharges. Other than Honorable (OTH) discharges normally result in loss of VA care and benefits, though the VA has authority to grant benefits despite an OTH. Anything less than fully Honorable discharge mean loss of GI bill benefits in most cases. Discharge documents showing OTH characterization, or stating that the reason for discharge was a personality disorder or misconduct, create significant employment problems. And the military's frequent failure to diagnose PTSD or other serious disorders may make it difficult for vets to show the VA that they have service-connected problems warranting care and compensation. (Neither the military nor the VA classify personality disorders as disabilities deserving treatment or pensions.)

Military counselors and attorneys can play an important role in challenging involuntary discharges and protecting members' benefits and employment potential. While the military will provide military attorneys (JAGs) to those facing involuntary discharge, many servicemembers are persuaded to waive this right, and many JAGs lack the training and experience to oppose these discharges successfully. Information and assistance from civilian counselors or attorneys allow soldiers to make the best use of the rights available in the discharge process, and both attorneys and non-attorneys may represent clients in these administrative proceedings.

Involuntary Discharge Criteria

The criteria and procedures for enlisted administrative separations are set out in DoD Instruction 1332.14, and in implementing service regulations. These must conform to the DoD standards but may differ in the specific criteria for various discharges and in the details of administrative procedures. They include Army Regulation (AR) 635-200, Air Force Instruction (AFI) 36-3208, Naval Military Personnel Manual (MILPERSMAN), parts 1900 et seq., and Marine Corps Separation and Retirement Manual (MARCORSEPMAN), chapter 6. All of these regulations may be found on official military websites, at nlgmltf.org, and at gtrightshotline.org. JAG offices and command staff judge advocates often supplement the regs with very helpful (but not always quite accurate) gauges and guidelines for involuntary discharge procedures.

Soldiers and sailors know little about the regulations, and are not encouraged to read or use them. Involuntary discharges are one of the areas where military wisdom holds that there simply are no rights. Commands know only a little more, with personnel officers or legal officers handling many of the procedural details and (improperly) making many decisions in discharge cases. Commanding officers frequently rely on rote language from the regs to support their discharge recommendations, so that the requirements for discharge are sometimes met by stretching reality to fit the regulations' discharge criteria. Familiarity with these regulations gives civilian advocates a distinct advantage over many of the command personnel who prepare and carry out involuntary discharges, though JAGs tend to become quite knowledgeable once they are assigned to represent commands or servicemembers in this area.

Common Reasons for Involuntary Discharge

Misconduct discharge is a very common result of the service history described above.¹ Soldiers can be separated for misconduct for a wide range of behavior, with slight variations from service to service. A single incident of misconduct amounting to a “serious offense” or a series of smaller incidents may lead to discharge. The misconduct must have occurred in the current period of service, and can be used as a basis for discharge whether or not it resulted in an Article 15, UCMJ, non-judicial punishment procedure, in court-martial or in civilian conviction. When misconduct potentially warrants an OTH discharge, it takes precedence over any medical discharge or retirement proceedings which are contemplated or underway; these only resume if the administrative discharge action is resolved in the member’s favor. (In the Army, disability proceedings continue, and are presented to the officer authorized to order the administrative discharge; he or she may decide that medical discharge/retirement should take precedence over the misconduct discharge, though this is seldom done.)

Another common reason for discharge is other designated physical and mental conditions (ODPMC). ODPMC discharges are intended for servicemembers with physical or mental conditions that are too minor or transitory to warrant medical discharge or retirement (that is, they are not medically unfitting), but are significant enough to interfere with performance of duties. This can be a difficult distinction, and many critics believe the discharge has been used as an easy alternative to lengthy and ultimately costly medical retirement proceedings.

Until a few years ago, personality disorders were a very common reason for ODPMC discharge, often for those with more serious disorders and sometimes for those simply viewed as troublemakers.² These disorders warrant administrative discharge when a military doctor or psychologist diagnoses a specific personality disorder “so severe that the member’s ability to function effectively in the military environment is significantly impaired.”³

Under current regulations, a significant level of review is required for many personality disorder discharges. The Army now allows personality disorder discharges only for those in the first two years of service (thereafter a personality disorder diagnosis warrants discharge for ODPMC). And soldiers facing discharge for a personality disorder who have served in an imminent danger pay area within the previous 24 months cannot be discharged without a second opinion and a service Surgeon General-level review of the diagnosis. The Air Force requires a second opinion and Surgeon General review for all airmen who are serving or have served in a hazardous duty pay area, without the 24-month limitation. The Navy follows the same policy. The Marine Corps requires a second opinion and a review by a Regional Naval Medical Commander for all Marines facing this discharge. These provisions for peer and higher review have, to no one’s great surprise, significantly reduced the number of personality disorder diagnoses, as well as discharges.

It is not always easy to distinguish the symptoms of personality disorders from those of PTSD or other serious disorders in initial evaluations, particularly when these are cursory or when the PTSD, depression, or other disorder is acute. It is not uncommon for individuals to suffer from both a personality disorder and another, more serious disorder. In these cases, part of the therapist’s task (and, some would say, one of the military’s regular failings) is to determine which disorder is causing the symptoms that interfere with or make a member unfit or

unsuitable for military duties, and so would be severe enough to require medical or administrative processing.

Soldiers and sailors seeking discharge sometimes use this discharge category, and for many it provides an honorable and relatively quick way out. However, personality disorder discharge does result in stigmatizing language on the DD 214 discharge document. Unlike medical discharge or retirement, where the specific diagnosis is not stated on the DD 214, the term "personality disorder" is given as the reason for discharge on the document, since it is categorized as a separate reason for discharge (under the general grouping of convenience of the government discharges) in all services but the Air Force. Employers sometimes refuse to hire veterans with this discharge, assuming that they will be troublesome or unreliable workers because of the condition. In the VA system, while other diagnoses can be and often are considered, the military's conclusion that a personality disorder was the most significant or only psychiatric problem during service can affect VA physicians' diagnoses and determinations about severity of other disorders.

Characterization for this discharge is Honorable or General, depending on the member's overall record of service, or an uncharacterized Entry Level Separation for those in the first 180 days of active service. Because it cannot be OTH, this administrative discharge would be superseded by disability discharge or retirement processing, but is appropriate if no other medical condition is severe enough to warrant medical discharge. Thus a member diagnosed with mild PTSD or depression and a sufficiently severe personality disorder may receive an administrative discharge for personality disorder rather than medical discharge or retirement for PTSD.

As noted above, the requirements of a second opinion and review in personality disorder discharges decreased the number of such discharges significantly. In many cases, members who might have been diagnosed with personality disorders prior to the new provisions are now diagnosed with adjustment disorders, which also warrant discharge under the category of ODPMC, so that there has been a very significant rise in discharges for this reason. This led to another change in DoD 1332.14: members facing discharge for ODPMC on the basis of mental (rather than physical) disorders must now also receive a second, confirming evaluation and service Surgeon General-level review. (While it is too soon to tell how well this will be implemented, some observers are concerned that the military will decrease the number of admin discharges based on mental disorders and, instead, rely more heavily on discharges for minor misconduct.)

Adjustment disorders are considered relatively minor psychological reactions to new and difficult situations, such as a change in duty assignments, divorce, or adjusting to military life. They generally involve symptoms of depression and/or anxiety out of proportion to the stressor, and they are expected to resolve within a period of months unless the stressor is a continuing one. Previously considered too small and treatable a problem to warrant administrative discharge, adjustment disorder now seems to be the diagnosis of choice for people who would have been diagnosed with personality disorders in the past. As the result of a recent change to DoD 1332.38, *chronic* adjustment disorder may now be the basis for disability discharge or retirement rather than administrative discharge.

Other involuntary discharges, though less common, may raise problems for servicemembers. The military has gradually added other categories to the basic types of misconduct discharge,

again varying from service to service. These include misconduct based on activity in supremacist organizations, misconduct by HIV-positive personnel who disobey orders regarding “safer sex” and notification of partners, and misconduct involving sexual harassment. Unsatisfactory performance, parenthood, weight control failure, drug or alcohol rehabilitation failure and erroneous enlistment are among the less common Honorable or General discharges.

“Counseling” is Not Therapy

Some administrative discharges cannot be imposed unless the member has been offered counseling and rehabilitation, and thus an opportunity to improve performance or conduct.⁴ With some discharges in some services, counseling is required but rehabilitation can be waived if the commanding officer determines that rehabilitative efforts are considered futile. For some discharges, particularly misconduct based upon a serious offense or drug abuse, no rehabilitation is required prior to discharge processing, and the only counseling will be a notation, shown to the member for acknowledgment, that discharge is being recommended.

Counselors and attorneys should understand that this counseling process bears no resemblance to the counseling or rehabilitation we would anticipate in any civilian setting. Counseling does not mean therapy or assistance in understanding problems. Rather, a superior, usually a staff sergeant or chief, meets with members to yell at them about having a problem, threatens discharge or punishment if the problem happens again, and offers a typed record entry for the members to sign, acknowledging that the counseling occurred and that they can seek further help from appropriate sources (chaplains and the command structure are often mentioned). This encounter and its entry in the members’ service records show sufficient counseling under the terms of the regulations.

When counseling, or counseling and rehabilitation, must take place before discharge recommendation, failure to offer or record it may be a basis for at least a temporary challenge to the proposed discharge. In theory, counseled members should not be processed for discharge unless new or continuing problems are apparent after the counseling.

When it is offered, rehabilitation usually means a change in duty assignments or a transfer to another unit within the same command; only occasionally does it result in transfer to another command. In most cases, however, the new supervisors receive an informal “heads up” from their counterparts in the original unit, who make sure that sergeants, chiefs, and perhaps company commanders are aware that they are being sent a “dirtbag.” Nonetheless, rehabilitative reassignment or transfer may be helpful if discrimination or personality conflicts with a superior are at issue, or if harassment about medical problems and “weakness” is less common in the new area than the old. The rehabilitation period may provide an opportunity to build a record of better performance and conduct or, for those with underlying medical problems, an opportunity to obtain treatment. For members who have been denied access to medical care or have been wrongly diagnosed, rehabilitation will at least give them additional time to obtain an independent civilian medical evaluation and then seek further evaluation from military doctors.

Discharge Procedures

The procedures for involuntary discharge follow basic concepts of administrative law and are founded, at least in theory, on constitutional requirements of due process. Attorneys or counselors who have worked in other administrative law areas will see familiar forms of notice, right to counsel, and right to respond. The regulations are relatively precise, mistakes are common, and command failure to follow the more important provisions of the regs may offer a basis to prevent or overturn involuntary discharges. The rules of evidence do not apply in these proceedings, which means that commands –and respondents – can introduce almost any form of evidence.

The military uses two discharge procedures, one allowing written response to the proposed discharge and the other allowing a hearing before an administrative board. The former, called simply the Notification Procedure is used in discharges where the least favorable character of discharge may be General. The second, the Administrative Discharge Board Procedure, is required where the least favorable character of discharge may be OTH. Administrative discharge boards are also available to those who have served more than six years of active and reserve service, even if the Notification Procedure is used. The Air Force includes time in the Delayed Entry Program towards the six years and also allows hearings for all noncommissioned officers, regardless of time in service.

Notification Procedure Discharges

First Steps: Notification of Discharge and Acknowledgment of Rights

In most services, the first formal step in the discharge process is notification of servicemembers, though notification follows command recommendation in the Air Force.⁵ Members may have known for days or months that discharge was pending, receiving informal warnings or promises from superiors, often with wildly inaccurate information. In some cases, members may undergo a separation physical, as well as transitional classes on employment, VA benefits and the like before the discharge is technically initiated.

Servicemembers receive notice in a computer-printed form or a letter on the command's letterhead; it is usually titled "Notification of Separation Proceedings." The notification must state the specific reason for or type of discharge (the name and section number of the discharge as shown in the service's regulation), the specific circumstances on which it is based, the least favorable character of discharge which may be awarded, and the character of discharge which the commanding officer recommends. The notice then sets out all of the rights available in the discharge proceedings, including the right to waive other rights.

It is worth noting that, while the regulations require a good deal of specificity in notifications, the sample forms in the regulations often encourage generalization. As a result, servicemembers may not know the actual circumstances on which their discharge is based.

Waiver of Rights Form

This notice includes, is accompanied by, or is soon followed by a second form or letter, called something like "[a]cknowledgment of my rights to be exercised or waived during the separation

proceedings.” Here members are supposed to waive or demand each of the rights in the discharge proceeding.⁶ (This should not be confused with an acknowledgment of receipt of the notification, used to confirm that the notification was presented to the member.⁷) Failure to demand rights within a minimum of two working days is treated as a waiver of rights for active-duty personnel, unless a longer period of time is stated in the notice or allowed on members’ request. Longer response time, usually 30 days, is given for members who are in the reserves or in situations like civilian confinement. The minimum time to respond is treated as the maximum time to respond.

The notification and acknowledgment of rights forms are sometimes presented by the command’s legal or administrative officer, but often by a senior enlisted member – a staff sergeant or chief. It is at this point that soldiers and sailors are given a remarkably uniform lecture: They are told that their only viable option is to sign the papers, waive their rights, and accept the proposed discharge. They may be assured that they will retain their VA benefits with the recommended discharge, whether or not that is true, and that this is the best deal they could possibly get. They may be told that challenging the discharge will force the command to refer the case to court-martial, with Leavenworth looming in the background, or that it will result in a worse character of discharge than the one recommended. They may hear that demanding their rights will extend the time of discharge processing by many months. They will probably hear that a demand for rights is useless, that statements or hearings never work, and that any response is just a waste of time. This talk often ends with the ultimate military myth, that less than honorable discharges will automatically upgrade six months after separation.

Not surprisingly, many servicemembers waive all their rights. And many do so without reading the notice or statement of rights, so that they are completely unaware of what they are waiving and what the results may be.

The first right available in any administrative discharge, and the first listed on the notice and acknowledgment, is the right to consult counsel before waiving or demanding any other rights. If servicemembers demand this right, the command must arrange an appointment with JAG counsel, usually in person but occasionally by phone for members stationed far from area defense counsel. This right may be limited for servicemembers deployed at sea or otherwise out of communication with available JAG offices.

Servicemembers have the right to consult civilian counsel as well. When commands are aware that civilian counsel has been consulted, they may feel no further need to schedule time with military counsel, and most of the regs do not address this issue with respect to the initial consultation with counsel. (Where representation by counsel is available, as in Administrative Discharge Board Proceedings, use of civilian counsel does not waive the right to military counsel.)

Requesting the advice of counsel allows members to step back, read the paperwork, learn that they do in fact have useful rights in the proceedings, and talk with an attorney or counselor about mitigation or “defenses” against allegations of misconduct, inaccurate or improper reasons for discharge, or the characterization of discharge.

Respondents in Notification Procedure discharges also have the right to submit statements on their own behalf, the right to obtain copies of documents that will be forwarded to the

separation authority supporting the proposed separation, the right to be represented by civilian counsel, the right to an administrative discharge board if they have six or more years of service, and the right to waive any or all of these rights.

Statements and Evidence

In general, commands and separation authorities consider the Notification Procedure of little consequence, and rights receive cavalier treatment, with the exception of the right to consult counsel. Commands unofficially encourage waiver of all rights, and military counsel may point out, rightly, that statements make little or no difference in most cases. Members who do submit statements are generally left to prepare them on their own, even if they have consulted military counsel. When respondents do submit statements, commands sometimes neglect to attach them to the “discharge packet” to be forwarded to the separation authority for consideration. Some statements never make it into the members’ personnel records. Immediate commanders sometimes comment on these statements in further endorsements to the separation authority, without providing copies to members even if they have requested copies of all such documents.

Although members’ right to respond is limited under the Notification Procedure, it may still be significant.⁸ For members who wish retention, discharge for a different reason, such as medical discharge or retirement, or a better characterization of discharge, a strong response may get the separation authority’s attention and expose flaws in the basis for the discharge or the procedures themselves. Good responses can also highlight the members’ quality of service or mitigating circumstances that would make less than honorable discharge inappropriate. Members who wish to challenge the discharge through litigation – and are able to get around the need to exhaust administrative remedies through lengthy discharge review proceedings – will be able to show that they used the available remedy of responding during the discharge proceeding. For veterans seeking discharge upgrades or other discharge review, it is very helpful to show that an effort was made to oppose the discharge at the outset; review boards often point to waivers as a sign that the member really had no basis for challenging, or desire to challenge, the reason for and character of discharge.

The regulations do not specifically state that counsel should be made available to assist in preparing a statement in response to the discharge. Many JAGs assume that they should simply advise, or perhaps review materials prepared by the member. But requests for further assistance from JAGs may meet with success if respondents ask, and if they can point to real issues, such as an incorrect medical diagnosis or a flawed Article 15 proceedings, which warrant a strong response. In addition or in the alternative, civilian counsel or counselors can assist in preparing statements. Nothing prevents military counselors from representing respondents in these proceedings by submitting letters or briefs raising legal and factual arguments for the separation authority’s consideration.

It is useful for respondents to make a firm demand for the right to obtain documents which will be submitted to the separation authority, and to make it clear that this request includes any responses to matters they submit in opposition to the discharge, as well as advisory opinions, higher command endorsements or SJA legal reviews. The right to obtain statements is not stated as a right to real discovery of evidence, and commands sometimes claim that members are entitled only to documents which will actually be placed in the hands of the separation authority. But a broader right to discovery may be implied from the regulations, since the

significant discovery rights under the Administrative Discharge Board Procedure come from on the same language as that in the Notification Procedure. Requests to see all available evidence supporting the reason for discharge and all exculpatory and mitigating evidence can also be based on FOIA and Privacy Act provisions. Respondents and their advocates can make adamant requests for a wide range of documents, such as witness statements and investigative reports, the actual test results and chain of custody documents in drug urinalysis cases, or the results of any Inspector General or Equal Opportunity investigations made about the command or the events leading to the discharge. If these requests are denied, they can be raised directly to the separation authority, or to his or her superior.

In many cases, members facing involuntary discharge are viewed as troublemakers or nuisances. Such people are routinely harassed by superiors, and sometimes by co-workers. In many cases ordinary behavior or signs of emotional distress are mischaracterized as misconduct or poor performance to support a discharge recommendation. Performance evaluations, counseling entries, and similar records are often fudged to make a better record for discharge. Creative requests may reveal some of this impropriety – a hunt for records may show, for example, that preliminary performance evaluations showed stellar performance by soldiers whose supervisors later described them as inept or unskilled after some incident triggered a desire to get rid of them. While selective prosecution cannot be argued easily in any military case, evidence that a respondent was the first and only person in ten years to be written up or counseled for some common minor infraction may be used to show discrimination or simply unfair treatment. Brainstorming with clients often leads to useful evidence of this sort – evidence which might create embarrassing problems for commands if shown to the separation authority or revealed in discharge review or litigation. Occasionally, this will cause commands to rethink their objective of obtaining a bad discharge.

The right to make a statement includes the right to submit just about anything for the separation authority's review: legal arguments, a discussion of facts and medical issues, statements or evaluations from expert witnesses, affidavits or letters from witnesses to incidents leading to the discharge, the sort of documentary evidence mentioned above, and general character letters. Separation authorities are used to seeing the last of these, but seldom receive much more.

Personality disorder discharges and ODPMC discharges based on adjustment disorders deserve particular note here. These diagnoses often mask more serious psychological, neurological or other medical problems that warrant disability discharge or retirement. On the flip side of this, whistleblowers, complainants in sexual harassment or sexual assault cases, and other "trouble-making" servicemembers often face such discharges after involuntary psychiatric evaluations, or misuse of therapy for PTSD or other problems resulting from harassment or abuse. The diagnosis is used to make them appear less credible as complainants, and the discharge gets them out of the way. In these cases, several tactics may be considered. Evaluations by other military doctors and/or by civilian psychiatrists and psychologists should be used whenever possible to counter the diagnosis supporting the discharge. If resources allow, two or even three separate civilian evaluations may be impressive. If the military did not do psychological testing, it is useful to have a civilian psychologist administer the Minnesota Multiphasic Personality Inventory 2 (MMPI 2), one of the most common and respected psychological tests, and to supplement it with other testing. If the military did administer testing (most likely the MMPI 2), a civilian psychologist can look at the raw test results, the computerized interpretation, and

resulting report in order to determine their accuracy and make an independent evaluation based on the same data. While computerized scoring of the MMPI has reduced subjectivity as a factor in diagnosis, there is still room for bad interpretation. A second MMPI also can be given, administered when clients are away from the stress of harassment from the command, and compared to the first.

Because personality disorders normally arise during adolescence, may be preceded by childhood conduct disorders, and often show up in disciplinary, educational and social problems before enlistment, respondents in these cases may want to submit evidence of healthy and well-adjusted backgrounds, or at least civilian lives devoid of personality disorder symptoms. This may come in the form of pre-service medical or psychiatric reports, school records, and letters from family members, teachers and others in a position to observe members' behavior, etc. Military regulations now stress that these diagnoses should be made on the basis of a long-term view of patients' behavior, rather than problems occurring in a short period of time alone, and military doctors' reports may be attacked if they fail to do this.

Lack of Rules of Evidence Invites "Creativity"

Since there are no rules of evidence in administrative discharge proceedings, a great deal of creativity can be used to show the members' background, actual performance of duties, medical problems, etc. By way of example, military personality disorder diagnoses are often based on inaccurate assessments of performance and conduct. These are sometimes the result of incorrect information provided to military doctors by commands. In involuntary psychiatric evaluations, commands are required to state the basis for their referrals, but commanders and command medical officers often offer derogatory information even when consultations are requested by the servicemembers. Military psychiatrists may also hear more than they are told if they anticipate that enlisted personnel who come to them are doing badly at their commands.

Military doctors are not immune to the normal biases of officers towards enlisted personnel, or to racial and gender stereotyping. Factual mistakes and under-evaluation of performance in psychiatric reports should be challenged with documentary evidence – inspection results, log entries, preliminary forms of performance evaluations and the like – and statements from co-workers, superiors, and other personnel in a position to observe performance. Members of other commands who have the opportunity to observe respondents' work may be more willing than those in the same command to give objective descriptions of performance and conduct.

When problems with a command, or the onset of PTSD or other illnesses, cause a sudden change in performance, respondents can point to prior good performance and the sudden change as evidence that something other than a long-standing personality disorder is at work. This is particularly true when members who performed well under the stress of training and combat suddenly experience problems in the more relaxed atmosphere of their home bases.

Personality disorder and other ODPMC discharges require more than the mere presence of the medical condition; there must be an opinion, usually by a military mental health professional, that the condition is so severe that it significantly impairs duty performance.⁹ Showing another psychiatric or external cause for the sudden appearance of symptoms can put the military on the defensive, requiring it to show the nexus between the personality disorder or other condition and interference with duties. It is useful to examine the Diagnostic and Statistical

Manual of Mental Disorders of the American Psychiatric Society (DSM - 5) for a discussion of symptoms for the particular disorder at issue. Commands and even military doctors may grab any available symptom to justify a diagnosis, and close scrutiny may show that the symptoms fit depression, PTSD, or healthy anger after sexual harassment far better than an avoidant personality disorder or adjustment disorder.

In almost all cases, good-character letters from other military personnel are helpful. Separation authorities are likely to pay more attention to letters from officers, particularly officers in the respondents' chain of command, but well-crafted letters from co-workers and subordinates are valuable as well. Civilian friends and family, and ministers or others in respected positions, can also provide letters attesting to good character, commitment to the military, etc. It is important that letter-writers not gloss over or dispute real problems, or deny symptoms of more serious medical problems that may be at issue. On the contrary, lay witnesses can often give detailed descriptions of symptoms that fit other diagnostic categories and do not usually appear in particular personality disorders, adjustment disorders, etc.

Where minor performance or conduct problems may warrant a General discharge, it may be important, but not always easy, to use a mental disorder diagnosis as mitigation. Commands and separation authorities tend to look at personality disorders as indications of bad character rather than medical problems, and to view adjustment disorders as insignificant. Advocates and civilian mental health experts can remind them that such conditions are illnesses, in some cases the result of painful childhood experiences, frequently causing emotional pain and lifelong problems. Experts' statements or advocates' references to the DSM-5 can be used to emphasize the fact that these disorders are not the result of bad intentions or disrespect for the service, but rather medical problems deserving sympathy and objectivity. Other psychiatric or medical problems or family hardships can also be presented to mitigate misconduct and explain inattention to duties or difficulty in carrying them out. Here, too, letters from co-workers and superiors may show that the performance labeled unacceptable at the time of diagnosis was not consistently poor, and had been described in far better terms elsewhere.

Procedural Errors

It is not uncommon to find significant legal errors in the discharge proceedings, in referrals for the underlying psychological evaluations,¹⁰ in the preparation of performance evaluations, in counseling entries on performance or conduct deficiencies, and the like. Failure to follow the requirements of the regulations may be significant enough, individually or taken together, to render discharges improper. In every case, it is useful to compare the discharge notification and other documents with the DoD Instruction and service discharge reg.

In some of these cases, where the mistakes could be remedied easily with a new round of paperwork, respondents need to decide whether to raise the issues prior to discharge or reserve them for discharge review. These choices should be reviewed with counsel, since failure to object to improprieties may in some cases be treated as a waiver on review. In some situations, as where commands fail to provide or document the minimum counseling required before discharge may be initiated, servicemembers may buy time by challenging the error at the outset, and then use the time to improve performance, pursue medical evaluations, or appeal underlying disciplinary actions before the discharge process begins anew.

In some cases, commanders will choose to respond to statements, usually trying to discredit the respondent, explain away mistakes in the proceedings, or lay on additional allegations of poor performance or misconduct. As the discharge packet is forwarded up the chain of command, intermediate commanding officers will sometimes add endorsements or recommendations as well.¹¹ Respondents and counsel will need to make written demands to see and respond to any such command comments. Occasionally, commands may decide to withdraw discharge recommendations, or change their recommendation on characterization, to avoid exposure of the problems demonstrated in the respondents' statements.

The discharge paperwork is ultimately sent to the separation authority for a final determination on discharge or retention, character of discharge and, when the regulations permit, suspension of discharge.¹² With some discharges, the separation authority also has the responsibility to decide whether members should be transferred to the inactive reserves rather than discharged. Some reasons for discharge require review for legal sufficiency by the separation authority's Staff Judge Advocate. The separation authority must find that the allegations on which the proposed discharge is based are supported by a preponderance of the evidence.¹³ The final decision or order must be recorded, though it is almost always cursory.

The 2013 National Defense Authorization Act has added a new level of review of involuntary discharges where servicemembers who have made a sexual assault complaint within the previous year allege that the discharge is retaliatory. Beginning in the summer of 2013, cases must be reviewed and approved by a flag or general officer if members make such an assertion.

Separation authorities are likely to be surprised by well prepared and extensive responses to proposed discharges, and some may respond favorably. These officers, too, may want to avoid scrutiny of sloppy command procedures or command misconduct, and may be concerned about the possibility of discharge review or litigation. They can be encouraged to think about how the case will stand up to litigation by lawyerly presentation of the issues, or simply by the fact that attorneys or civil rights organizations may be involved. Some respondents note on their statements that copies have been sent to the ACLU, NAACP, NOW, MLTF, Service Women's Action Network (SWAN) or other organizations, to a member of Congress or to an attorney, in order to encourage the separation authority to pay attention to the issues.

If these efforts are not successful, and the separation authority authorizes discharge, servicemembers usually are discharged within ten days. They receive written information about the Discharge Review Board and Board for Correction of Military/Naval Records while being "outprocessed." It is important to talk with clients at this point about discharge upgrade and review procedures, time limits, and the types of arguments and evidence which may be used with these boards. Attorneys or counselors can help the clients gather copies of records and documents which may be useful in discharge review.

Thoughts on Discharge Review

Servicemembers should keep full copies of their personnel and medical records, any inpatient medical records (which are maintained separately at military hospitals), their JAGs' files, any relevant log entries, notices of NJP results, IG investigation reports or other documents that may shed light on the circumstances of the discharge. They should also obtain the names and permanent addresses of people who might later be asked to make character statements or

statements concerning performance and conduct, command improprieties, etc. Fellow servicemembers who are afraid to speak out on another's behalf to their commands may be willing to make statements once they are transferred to another duty station or discharged. Beginning a discharge review file at the time of discharge can save many hours of work later and avoid the loss of records or evidence that the military routinely misplaces or destroys. If psychiatric problems are at issue, and no civilian evaluation was obtained for the discharge proceedings, servicemembers should have a civilian evaluation as soon after discharge as possible.

While the overall success rates for discharge upgrades and other discharge review cases are not high, applications with well-documented responses at the discharge level often have greater chances of success. Although commands may have had the opportunity to create adverse records and a biased picture of servicemembers before and during the discharge proceedings, they almost never have opportunity to contribute to the discharge review process. Veterans can rebut command evidence and conclusions in a less stressful and slightly more objective setting before the review boards. At this point, it is often easier to demonstrate the flaws in psychiatric reports, performance evaluations and other record entries created to support the discharge, particularly if they can be compared to other evaluations or evidence from the same period of time. The statements and evidence initially submitted in response to the discharge proceedings may provide the best foundation for successful discharge review applications.

References

1. DoD Instruction 1332.14, Encl. 3, Sec. 10; AR 635-200, chapter 14; MILPERSMAN 1910-138 to 146; MARCORSEPMAN 6210; AFI 36-3208, Chap. 5, Sec. H, 5.46 et seq.
2. DoD 1332.14, Encl. 3, Sec. 3.a.(8); AR 635-200, chap. 5-13; MILPERSMAN 1910-122; MARCORSEPMAN 6203.3; AFI Chap. 5, Sec. B, 5.11.9.1.
3. DoD 1332.14, Encl. 3, Sec. 3.a.(8).(c).
4. AR 635-200, Sec. 1-16; MILPERSMAN 1910-202, 204; MARCORSEPMAN 6105; AFI 36-3208, Chap. 7 and Sec. 5.2. These requirements are also discussed in relation to individual reasons for discharge. For personality disorder discharges, for example, see AR 635-200, Sec. 5-13.e, and MARCORSEPMAN 6203.c.
5. DoD 1332.14, Encl. 5, Sec. 2; AR 635-200, Sec. 2-2 and Fig. 2-1; MILPERSMAN 1910-402 and NAVPERS form 1910/32; MARCORSEPMAN 6303.3.a; AFI 36-3208, Sec. 6.9.4 and Figs. 6-1 and 6-2.
6. AR 635-200, Sec. 2-2.c.(1) to (5); MILPERSMAN 1910-402 and NAVPERS form 1910/32; MARCORSEPMAN 6303.3.a.(5) to (9); AFI 36-3208, Sec.6-8-1 to 5.
7. See AR 635-200, Sec. 2-2.f.
8. AR 635-200, Sec. 2-2.c. (2) and d.(5).(a); MILPERSMAN 1910-402 and NAVPERS form 1910/32; MARCORSEPMAN 6303.3x.c; AFI 36-3208, Sec. 6-10.4 and Fig. 6.4. None of these offer guidance on substance or form of response, the burden of proof or legal presumptions applied to responses.
9. See supra, note 3.
10. See Susan Bassein's excellent article on rights in involuntary psychiatric evaluations and treatment, in *On Watch*, Vol. XIX, No. 4.
11. The Army, for example, uses an intermediate level review, under AR 635-200, Sec. 2-2.d.(4) and (5).
12. DoD 1332.14, Encl. 5, Sec. 2.d; AR 635-200, Sec. 1-19 and 2-3; MILPERSMAN 1910-700 et seq.; MARCORSEPMAN 6306 et seq.; AFI 36-3208, Sec. 1.1.2 and 1.2.
13. DoD 1332.14, Encl.5, Sec. 2.d.(3); and see, for example, MARCORSEPMAN 6309.1.

Part II – Administrative Discharge Board Procedure Discharges

This part looks at the more complex area of Administrative Discharge Board Procedure discharges, where other than honorable (OTH) discharge may be warranted, and where procedural rights are therefore greater. As with ostensibly good discharges for other designated physical and mental conditions, unsatisfactory performance and the like, civilian counselors and attorneys can play an important role in protecting servicemembers against unwanted discharges with highly stigmatizing characterization and reasons.

The Administrative Discharge Board (ADB) Procedure is used for discharge by reason of misconduct (unless the possibility of OTH characterization is removed), for misconduct-drug abuse, for unsatisfactory participation in the reserves and for security discharges. Its central right, a board hearing, is also available to members with six or more years of service and, in the Air Force, to noncommissioned officers.

Criteria and procedures for these discharges are found in Department of Defense (DoD) Directive 1332.14, and in implementing regulations for each branch of the service: Army Regulation (AR) 635-200; Air Force Instruction (AFI) 36-3208; Naval Military Personnel Manual (MILPERSMAN) Section 1900-010 et seq.; and Marine Corps Separation and Retirement Manual (MARCORSEPMAN) Chapter 6. An OTH discharge normally means loss of almost all veteran's benefits, while a General discharge preserves virtually all but Montgomery and the new GI Bill educational benefits.¹ Commands are usually well aware of these side effects of some administrative discharges, and may be vindictive in their use. At the same time, administrative discharge board members and reviewing authorities know or can be told of these effects and will sometimes consider them reasons for lenient treatment.

Reasons to Fight for Retention

Servicemembers facing an ADB Procedure may want to challenge the discharge and fight for retention, or may simply want a better character of discharge. Since military retirement does not vest until soldiers or sailors have served twenty years,² those with eighteen or nineteen years of service have a strong incentive to fight against separation. Because disability evaluation and discharge or retirement are deferred pending resolution of disciplinary proceedings or discharge proceedings which could involve OTH characterization, and generally denied for those who are so discharged,³ soldiers or sailors wishing to protect medical benefits often need retention to allow disability retirement processing, or characterization of Honorable or General to remain eligible for VA benefits.

Discharges Requiring ADB Procedure

Misconduct is the most common reason for involuntary discharge with an OTH characterization. The DoD Instruction provides the main descriptions, though there are some service variations. The types of misconduct include:

- “Minor disciplinary infractions. A pattern of misconduct consisting solely of minor disciplinary infractions.”⁴

- “Pattern of misconduct. A pattern of misconduct consisting of (a) discreditable involvement with civilian or military authorities or (b) conduct prejudicial to good order and discipline.”⁵
- “Commission of a serious offense. Commission of a serious military or civilian offense if a punitive discharge would be authorized for the same or a closely related offense under the Manual for Courts-Martial.”⁶
- “Civilian conviction. Conviction by civilian authorities or action taken that is tantamount to a finding of guilty, including similar adjudications in juvenile proceedings and the following conditions are present:
 - “A punitive discharge would be authorized for the same or a closely related offense under [the Manual for Courts-Martial];” or “The sentence by civilian authorities includes confinement for six months or more without regard to suspension or probation.”⁷

Although the Instruction gives no clear guidance on some of these terms, service regulations tend to be somewhat more specific, and to vary among themselves. The Army divides misconduct into conviction by a civilian court and acts or patterns of misconduct, including in the latter the other DoD categories of minor disciplinary infractions, pattern of misconduct, and commission of a serious offense; in the Army regulations, serious offenses include, among other things, drug abuse.⁸ The Marine Corps divides misconduct into minor disciplinary infractions, pattern of misconduct, drug abuse, commission of a serious offense, civilian conviction, sexual harassment, and participation in supremacist or extremist organizations or activities.⁹ For the Air Force, misconduct may be minor disciplinary infractions; pattern of misconduct; civilian conviction; commission of a serious offense, including sexual perversion, prolonged unauthorized absence, and “other serious offenses;” failure to comply with lawfully ordered preventive medicine procedures for HIV-positive personnel; and drug abuse.¹¹ The Navy has separate misconduct categories for minor disciplinary infractions, pattern of misconduct, commission of a serious offense, civilian conviction and drug abuse.¹²

Some services have made special note of misconduct related to sexual harassment and to extremist activity. The Navy gives “supremacist and extremist conduct” a separate discharge category altogether, but processes cases under the misconduct section.¹³ The Marine Corps mentions sexual harassment¹⁴ and “participation in supremacist or extremist organizations or activities” as individual subcategories of misconduct, but then advises commands to process such misconduct under one of the general categories (minor infractions, serious offense, etc.) if possible.¹⁵ The Army tends not to make these distinctions in the discharge regulation.

The counseling and rehabilitation requirements described in Part One of this memo normally apply only in the case of minor infractions or a pattern of misconduct, and even here the rehabilitation requirement may be waived. The Instruction authorizes use of the notification procedure, and discharge with no less than a general or entry-level discharge if the misconduct fits within the general guidelines for such characterization under DoD 1332.14, Encl. 4, Sec. 3. This is often done with minor infractions.

“Zero Tolerance” for Illegal Drugs Persists

Despite small differences in categorization of discharges, drug abuse is viewed as misconduct by all of the services. Since the 1980s, a “zero tolerance” policy has led to harsh treatment of drug use, with a move away from rehabilitation. Rehabilitation programs still exist, and a few service

members are returned to service after drug rehab, but these are the exception. For many soldiers and sailors, drug rehabilitation, if offered, is simply a prelude to discharge. Generally, a single instance of illegal drug possession or use results in OTH discharge, though the Army will sometimes retain after a single incident of drug use, or characterize drug abuse cases as General. Each service has very limited exceptions for drug use revealed during voluntary self-referral for rehabilitation and similar categories. Servicemembers discharged for misconduct as the result of drug use or possession are likely to find “misconduct–drug abuse” on their DD-214 discharge documents.

DoD and the services have extensive regulations governing drug urinalysis testing, disposition of drug users, and rehabilitation.¹⁶ These deserve review in any case involving drug use or possession. As noted above, there are some limitations on OTH characterization of discharge for certain nonrandom testing, and a very small number of limitations on discharge. But commands have remarkable difficulty in following the regulations, sometimes raising possibilities for challenges to characterization or discharge. Failure to follow proper procedures in urinalysis testing sometimes makes it possible to challenge the reliability of test results or the chain of custody of samples.

Other Discharges

Unsatisfactory participation is used as a basis for discharge with drilling reservists who fail to attend drills, and should not be confused with unsatisfactory performance, a Notification Procedure discharge designed for poor performers. The DoD Instruction relies on the services to define unsatisfactory participation in implementing regulations.¹⁷ This and other discharges for reservists are beyond the scope of this article; readers are referred to the regulations and the section on Unsatisfactory Participation in CCCO's Military Counselors Manual.¹⁸

Under some circumstances, fraudulent enlistment may be a basis for OTH discharge, but this is much less common than in the past. Most concealment involving prior criminal activity, medical conditions or treatment, or educational level results in a General discharge at the worst, so that the Notification Procedure is used. The DoD Instruction states that OTH and the ADB Procedure apply “[i]f the fraud involves concealment of a prior separation in which service was not characterized as honorable...,” and leaves open the possibility that other fraud may result in an OTH discharge.¹⁹ The Navy attempts to expand this, having added a second specific category, “concealing an offense warranting OTH, if offense occurred while on active duty and would have prevented their enlistment.”²⁰ The Army regulation states that fraudulent enlistment discharge will generally be OTH, then specifically mentions prior service concealment as warranting OTH; for members in entry-level status, non-prior service concealment will generally be ELS. The Air Force distinguishes between prior service concealment, which will normally warrant OTH but may in rare cases be General or ELS, and all other concealment which may be Honorable, General or ELS.

Security discharge is seldom used. DoD Instruction 1332.14 authorizes discharge on grounds of security when “retention is clearly inconsistent with the interest of national security.” It refers to the general guidance on characterization and to security regulations for characterization, and to service instructions and separate DoD regulations for criteria.²¹ In the Air Force, interestingly, the applicable instruction says that discharge for those in entry level status “will” be described as uncharacterized (ELS), but otherwise OTH is permissible; in any case, the ADB procedure will

be used.²² The Marine Corp uses the ADB process only when OTH is warranted.²³ The Navy appears to lack provisions for this discharge.

Discharge Procedures

Notification

Notification of the proposed ADB discharge is much like that used in the Notification Procedure, although the command is more likely to follow the requirement that specific reasons for discharge and specific facts on which they are based be stated in the notice. In ADB proceedings, the notice and accompanying (or following) statement of awareness/waiver of rights form include additional rights, and further rights are available to those who demand the most significant of the rights described in the waiver form, a hearing before an administrative discharge board. Representation by military counsel is available throughout the proceeding, rather than just in the initial decision to demand or waive rights.

In some cases, servicemembers have no warning that discharge is contemplated until they receive written notice – and considerable time may have passed since the conduct on which the discharge is based. Any conduct within the current period of enlistment is subject to discharge proceedings during that period, so that a command may defer action until after a deployment or operation, or until after a war.

It is worth noting that, since discharge is an administrative process, it does not preclude and is not precluded by disciplinary action. Some servicemembers hope that nonjudicial punishment or court-martial can be avoided by admin discharge, or vice versa. However, it is common for commands to subject members to disciplinary action and then to administrative discharge, based either on the underlying act of misconduct or the fact of conviction.

Waiver of Rights Form

With or shortly after written notification, servicemembers will be given a waiver of awareness/statement of rights form, discussed generally in part one. With the ADB procedure, soldiers are notified of a broader set of rights, including:

- the right to consult with counsel before demanding and waiving rights;
- the right to be represented by appointed military counsel or, if he or she wishes, the right to request individual military counsel;
- the right to civilian counsel at the respondent's own expense;
- the right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation;
- the right to request a hearing before an administrative discharge board;
- the right to present written statements instead of appearing at a hearing;
- the right to waive these rights;
- the fact that failure to demand rights after being afforded reasonable time to consult counsel will be deemed a waiver of rights.
- the fact that failure to appear at the hearing without good cause constitutes a waiver of the right to be present at the hearing.²⁴

The service regulations are in accord.²⁵ While not mentioned in all rights forms, respondents also have the rights normally associated with administrative hearings: the right to testify, to present witnesses and documentary or other evidence, to cross-examine witnesses produced by the government, to testify under oath or make an unsworn statement, submit a written statement, or have counsel read or make a statement, to challenge members of the board for cause, and so on. Many, but not all of these are discussed in the remainder of the regulations on ADB procedures.

The services are remarkably uniform in one part of the discharge process: In almost all cases, when the notice is presented or soon afterwards, a senior enlisted person or officer from the command will urge or warn servicemembers to waive all rights in the discharge proceeding. The reasons may include one or more of these: the discharge is inevitable; the discharge will be worse if the member doesn't waive; the command has recommended a general discharge and therefore the member will receive a general, but only if he or she waives; any bad discharge will automatically upgrade in six months; without a waiver the discharge will take much, much, much longer; the speaker has seen dozens or hundreds of cases just like this, and demanding rights never helped; or the alternative to waiver is Leavenworth (military prison). These things are not true, but the threats and promises are very effective, and waivers are extremely common as a result.

One other threat or promise is occasionally true, from a certain point of view. Servicemembers may be told that the command is offering the admin discharge as a deal, and will take the case to court-martial unless the members waive their rights. Occasionally, this may be the position of the command, and occasionally the person who makes the threat may know it is true. The reality of this informal "deal" can always be verified or disproved if members simply demand the right to consult counsel before waiving or demanding rights – that right is among those listed in the notification and on the waiver of rights form.

Soldiers or sailors may see a JAG (and/or a civilian attorney) before completing the waiver form. The attorney can talk with the command about its intentions without "skewing" any deal, and help servicemembers decide if there is any wisdom in waiving rights under these circumstances. While verbal agreements with a command are not enforceable, the CO or staff judge advocate will normally tell an attorney the command's current position, so that the attorney can advise members accordingly.

Periodically, the services utilize conditional waivers in cases warranting an OTH – these policies vary from service to service, and may be abandoned for several years before being revived.²⁶ In all cases, conditional waivers are made only after members have demanded the right to an ADB, and counsel is generally involved. (Army regulations allow members to negotiate a conditional waiver without counsel.) The members, generally through their JAG, and the command may make an agreement in which members waive the previously-demanded board on the condition that they be given a more favorable character of discharge. These waivers should only be done in writing, and use of counsel may avoid accidental waiver without any benefit.

Counsel

Soldiers are entitled to representation by military and/or civilian counsel throughout the discharge proceeding. Once a demand for counsel has been made, a JAG will be appointed through the local defense or “personal representation” legal office. This may not be the JAG who provided the initial advice about rights in the procedure. Once a JAG is appointed or detailed, members may request another military attorney to replace the JAG, referred to as Individual Military Council (IMC). No reason need be given, but the IMC should be asked for by name, must under normal circumstances be within a reasonable distance of the hearing location, and must be reasonably available, a matter decided by the JAG’s own command. Normally IMC replaces the assigned JAG, but in complex cases that JAG may be allowed to remain. If the members have formed an attorney-client relationship with a JAG in a related matter (such as a disciplinary action on the same alleged misconduct), that attorney may be detailed to the administrative discharge case, or may be requested in addition to the detailed or individual military counsel on the basis of the attorney-client relationship. This determination is normally made by the JAG command as well.

Civilian counsel can be retained at the members’ own expense, in addition to or instead of detailed counsel or IMC. (If a member wants IMC and civilian counsel, it is often wise to wait until IMC is appointed before mentioning civilian counsel.) Civilian counsel automatically becomes lead counsel in the case. Experienced civilian practitioners normally retain JAGs, and involve them in more than menial tasks. JAGs often provide a wealth of experience in military law, knowledge of local commands, and an important official presence alongside respondents during the proceedings.

Civilian counselors can play a role as counselor or advocate. Generally, service regs mention non-attorney counsel only as an alternative to an attorney; the common understanding is that this provision is used when members really want a particular military person to represent them and are willing to waive attorney counsel.

The DoD Instruction includes in its statement of rights that respondents have the right to be represented at the hearing by non-lawyer counsel if:

- The respondent expressly declines appointment of counsel qualified under Article 27(b)(1) of the UCMJ and requests a specific nonlawyer counsel, or
- The separation authority assigns non-lawyer counsel as assistant counsel.²⁷

Despite this language, one could argue that non-attorney civilian counselors should be permitted as assistant counsel or additional counsel if requested by the client, without loss of military counsel. This author has assisted in ADBs without question, but is not aware of any case that has tested the “right” to additional representation by a civilian counselor. Not all attorneys are experienced and comfortable with non-attorney advocates, and in some cases involving a counselor, civilian counsel and counselor must spend some time convincing the JAG to relax.

Counselors who do not serve as advocates can provide much other assistance in involuntary discharge cases. They may be more familiar than the JAG and/or civilian counsel with the specific discharge regulations, with medical or other specialized issues involved in the case, with the facts of the case, or simply with clients’ personalities and styles. Counselors can often help servicemembers work with their attorney effectively, suggesting questions, evidence and issues

the clients may wish to present to the attorney, and helping the client consider the attorney's strategic and tactical approach to the case. This is not to suggest that counselors should second-guess experienced attorneys or give legal advice. In some cases, however, they can help clients sort out the facts and consider the pros and cons of a suggestion from the JAG, or point out issues to the attorney with which he or she may not have experience.

Case Strategy and Preparation

At the outset, of course, it is important for counsel, counselor and client to develop a strategy for the case. In the course of military law practice, many JAGs receive limited training in handling these cases, and are provided little in the way of administrative law preparation by law school or specialized military legal training. There is sometimes a tendency to handle these cases on the run, as commands prefer to do them very swiftly (sometimes after months of inaction) and often resist requests for sufficient time to prepare and sufficient discovery of evidence to give a clear picture of underlying issues. In many cases, military counsel is not assigned or made available until very shortly before the hearing, limiting time to consider and prepare the case. And, needless to say, it is extremely difficult to obtain funding or military personnel for investigations, witness interviews and expert evaluation of evidence, so that clients and representatives must often do the bulk of the work themselves and hire civilian experts. Nonetheless, some efforts can be made to even the playing field or obtain additional ammunition for the respondents' side.

Two thoughtful discussions of involuntary homosexual conduct discharge cases can be useful in preparing for a hearing on any discharge. The 1985 manual, *Fighting Back: Lesbian and Gay Draft, Military and Veterans Issues*,²⁸ while out of date in other regards, has creative discussion of discovery, pre-hearing preparation, conduct of ADBs and post-hearing appeals that can be applied to other discharge areas. The chapter on "Military and Veterans Cases" in pre-DADT-repeal editions of *Sexual Orientation and the Law*,²⁹ has a very similar discussion.

In misconduct cases, it is important to look for underlying issues that led to the misconduct or motivated the command. A common issue, discussed in part one, is the tendency for soldiers with psychological or even physical problems to "act out," "self-medicate" or express frustration, depression or confusion in ways that are perceived as acts of misconduct. On rare occasions, the acts are defensible as inevitable consequences of the medical condition. More commonly, though, the underlying problems provide mitigation for the offense(s). For example, exploration may show that a soldier had severe PTSD after a combat tour, that he had been denied access to military doctors, or misdiagnosed by those doctors with a personality disorder (not seen as mitigating by most officers), or that the doctor's recommendations for duty limitations or discharge were ignored by the command. Similarly, a Marine with traumatic brain injury (TBI, considered the signature injury of the Iraq and Afghanistan wars) may be disciplined and considered for discharge for memory lapses, judgment problems and impulse control problems related directly to the injury. A soldier with a painful back injury may encounter disciplinary problems for self-medicating with alcohol or other drugs when physicians who do not recognize the injury deny her proper pain medication.

In such cases, symptoms of the problems may appear in the medical records even if they are not properly diagnosed. Some military physicians can be sympathetic and helpful when given opportunity to make a real evaluation of PTSD, TBI or, for that matter, disc herniation. And

civilian experts can be used as witnesses, or their reports brought in as evidence, to demonstrate the underlying cause of the alleged misconduct. Even in those cases in which administrative discharge processing itself is mandatory, the ADB members and separation authority have authority to process the case and then recommend retention, or recommend Honorable discharge. While ADBs cannot technically recommend medical retirement or convenience of the government discharge, boards often make their wishes known on these matters.

Given the large number of cases in which combat-induced PTSD or TBI have resulted in OTH discharges for misconduct, Congress has required the services to give special consideration to these cases. Under DoD1332.14, Encl. 2, Sec. 2.c.(5), servicemembers must receive a medical examination to assess whether the effects of PTSD or TBI “constitute matters in extenuation that relate to the basis for administrative separation” if members are being administratively separated under conditions Other Than Honorable, were deployed to a contingency operation within the previous 24 months, and are diagnosed as having, or reasonably allege, the influence of PTSD or TBI based on that service. Members in this situation may not be discharged until the results of the medical examination have been reviewed by all those responsible for “evaluating, reviewing and approving the separation case.” (These requirements do not apply to courts-martial or related proceedings; provisions of the 2014 National Defense Authorization Act should make them applicable to discharges in lieu of court-martial.)

Misconduct cases are sometimes the result of complaints about sexual harassment or sexual assault. Despite regulations claiming to expand the rights of those who make complaints,³⁰ military and civilian studies have shown that women in the service fear they will face career-altering reprisals if they report sexual attacks or harassment; studies and the experience of civilian attorneys and counselors show that these fears are well grounded. It is extremely common for complainants to experience involuntary psychiatric evaluations, lowered performance evaluations, and disciplinary action for minor offenses normally tolerated by the command. (An attorney who finds, for example, that her client is the only one of 40 Marines with office hours (non-judicial punishment) and a counseling entry for coming back late from lunch may want to inquire about the reasons for the command’s attitude.)

The sexual assault regulations should ensure that women are provided opportunity to make complaints, that reports of assault are handled respectfully, and that medical attention and evidence gathering are thorough, so that evidence of assaults may be clear. Retaliation is often harder to prove than the assault, since it may involve non-judicial punishment for collateral misconduct (such as drinking in the barracks before an assault), or evaluations of intangible matters like management skills in a performance evaluation.

A provision of the 2013 National Defense Authorization Act provides some additional protection to women subjected to retaliatory involuntary discharges after making sexual assault complaints. Sec. 578 of the act, which took effect in the summer of 2013, requires that a general or flag officer review and concur in involuntary discharges of members who have made unrestricted (non-confidential) sexual assault reports. Review is required for discharges occurring within a year after an unrestricted report is made, if the members request review on the ground that the discharge is retaliatory.

Similarly, victims of racial harassment or discrimination, or mistreatment based on religious, cultural or ethnic status, whether or not they complain about mistreatment, may also face involuntary discharge proceedings based on allegedly poor performance or the most minor of disciplinary problems. Demonstrating the discriminatory basis of the actions can be difficult. Since some forms of overt racism are understood to be unacceptable under social norms and military regulations, racism and similar biases may take more subtle and insidious forms. Sometimes it is possible to show discriminatory motivation by a pattern of treatment of others of the same race or religion, but this is not always feasible in small commands or units. Occasionally the offenders may leave symbols behind – a twine noose left over a bunk, crosses scrawled on a Muslim soldier's barracks wall, pornography left in a woman's workspace. And occasionally alert friends of the victim may overhear racist or discriminatory comments directed towards the victim. When these cases, or sexual harassment or discrimination cases, fall within the purview of military Equal Opportunity (EO) regulations,³¹ it is sometimes useful or necessary to file complaints within that system before raising the issue in the discharge proceedings, although EO is poorly designed for individual remedies.

Many of the people described above may have made or prepared to make complaints that would bring them within the scope of the Military Whistleblowers Protection Act (MWPA).³² Other servicemembers who have complained about waste, mismanagement, or violation of military regulations and policies, may come under the Act as well. In these cases, counsel, counselor and clients may wish to raise violation of the applicable regulations, which will trigger an investigation of the reprisal and the handling of the original complaint made by the servicemembers, and often of the underlying issue about which they complained. It offers some limited but useful rights to complainants who have suffered reprisals for their complaints, and flags the case in ways that may cause the command to re-consider its position about the discharge.

References

1. There is a separate bar to full VA benefits if a soldier received an OTH discharge after having been AWOL continuously for 180 days. See 38 CFR 3.12(c)(6) (2007). Denial of benefits for this reason can be appealed in the VA system.
2. There have been occasional exceptions to the twenty-year rule, particularly during the military drawdown in the 1990s. The services sometimes established 18- and even 15-year retirement programs to encourage retirement. This period also saw the development of transition programs to provide career counseling and short-term transitional benefits to retirees and discharges. Some of those transition programs remain in effect.
3. DoD 1332.38, Part E3.2.4.3 states that a service member is ineligible for physical disability evaluation unless service regulations are more favorable if "pending separation under provisions that authorize a characterization of service of Under Other Than Honorable....This provision is based on the provisions under which

the member is being separated and not on the actual characterization the member receives."

4. DOD 1332.14, Encl. 3, Sec.10.a.(1).
5. Id, Encl. 3, Sec. 10.a.(1).
6. Id, Encl. 3, Sec. 10.a.(3).
7. Id, Encl. 3, Sec. 10.a.(4)
8. AR 635-200, Parts 14-5 and 14-12.
9. MARCORSEPMAN 6210. Some of these categories are, in turn, processed under others of the categories.
11. AFI 36-3208, Section 5-H, Parts 5-49 through 5-54. Part 5-47 provides further guidance and specifically excludes fraudulent entry as a subtype of misconduct.
12. MILPERSMAN 1910-136 through 1910- 146.
13. MILPERSMAN 1910-160. This covers "any substantiated incident of serious misconduct resulting from participation in supremacist or extremist activities. The proscribed misconduct must relate to (1) illegal discrimination based on race, creed, color, sex, religion, or national origin; or (2) advocating the use of force or violence against any federal, state, or local

- government or agency thereof, in violation of federal, state or local laws.” These cases require coordination with personnel command headquarters. They are normally to be processed as misconduct—commission of a serious offense or, where incidents of misconduct cannot be shown, under best interests of the service (BIOTS), MILPERSMAN 1910-164. BIOTS discharges cannot be OTH.
14. MARCORSEPMAN 6210.8.
 15. MARCORSEPMAN 6210.9. Discharge by reason of the best interest of the service under Section 6214 is also mentioned. While 6210.9 requires “a substantiated incident of misconduct,” and a substantiated incident must involve conduct, it is likely that 6214 is designed to cover otherwise protected political speech, protest or association.
 16. DoD Directive 1010.1, DoD Instruction 1010.16. Service regulations include SECNAVINST 5300.28D, OPNAVINST 5350.4C, AR 600-85 and AFI 44-121.
 17. DoD 1332.14, Encl. 3, Sec. 7 and DoD Directive 1215.13 series.
 18. The Manual is currently out of print. Copies of the reserve section can be obtained from the Military Law Task Force.
 19. DoD 1332.14, Encl. 3, Sec 5.d. Service regulations include MILPERSMAN 1910- 134, MARCORSEPMAN 6204.3, AR 635-200, Part 7-17 et seq., AFI 36-3208, Sec. 5.15 et seq.
 20. MILPERSMAN 1910-134, Sec. 2. This section says that the notification procedure should be used for all but the most serious offenses falling in these two categories, including but not limited to “drug trafficking, concealing a prior service Dishonorable Discharge (DD), Bad Conduct Discharge (BCD), or OTH discharge and crimes of violence.” Sec. 2.b.
 21. DoD 1332.14, Encl.3, Sec. 13 governs security discharge. It refers to Encl. 4, which gives general guidance on the factors warranting Honorable, General, OTH and ELS discharge.
 22. AFI 36-3208, Sec. 5J, Parts 5.57 to 5.60.
 23. MARCORSEPMAN 6212. This section is silent about the procedure to be used if OTH is not warranted.
 24. DoD 1332.14, Encl. 5, Sec. 3.a.
 25. Service regulations include MILPERSMAN 1910-404, 1910-406, and 1910-512; MARCORSEPMAN 6304; AR 635- 200, Part 2-4; and AFI 36-3208 Sec. 6.13.
 26. MILPERSMAN 1910-226, MARCORSEPMAN 6304.5, AR 635-200, Part 2-5, and AFI 36-3208, Sec. 6-24 through 6-29.
 27. DoD 1332.14, Encl. 5, Sec. 3.a.(4).
 28. *Fighting Back: Lesbian and Gay Draft, Military and Veterans Issues*, 1985, Joseph Schuman and Kathleen Gilberd, eds., Katherine Bourdonnay, R. Charles Johnson, Joseph Schuman and Bridget Wilson, auths., produced by the National Lawyers Guild’s Military Law Task Force, the Midwest Committee for Military Counseling, the NLG Gay Rights Task Force and the NLG Committee to Combat Women’s Oppression. The principal work on representation in administrative discharge board hearings was done by Katherine Bourdonnay.
 29. *Sexual Orientation and the Law*, 2/2007 and subsequent Eds., Roberta Achtenberg, Orig. Ed., Karen Moulding, Updating Ed., “*Military and Veterans*,” Katherine A. Bourdonnay, Kathleen Gilberd, Mary Newcombe and Bridget Wilson, Leslie M. Hill and Sharon E. Debbage Alexander, Chapter Auths. and Eds., West Pub.
 30. *See, e.g.*, DoD Instruction 6495.02, “Sexual Assault Prevention and Response Program Procedures.”
 31. DoD Directive 1350.2, August 18, 1995, incorporating change 1 of May 7, 1997, “Department of Defense Military Equal Opportunity (MEO) Program.”
 32. 10 USC 1034. The Act is implemented by DoD Directive 7050.6, “Military Whistleblower Protection.”

Part III – Administrative Discharge Board Tactics

This part offers a very practical guide to representation in administrative discharge board hearings, useful for counselors – or attorneys – who wish to engage in advocacy.

Board procedures and post-board review are discussed in Department of Defense Instruction 1332.14, and in implementing regulations for each branch of the service: Army Regulation (AR) 635-200; Air Force Instruction (AFI) 36-3208; Marine Corps Separation and Retirement Manual (MARCORSEPMAN) Chapter 6; and Naval Military Personnel Manual (MILPERSMAN) 1910-400 et seq.

Military administrative/separation review boards (ADB) are often a bit of a free-for-all, with the recorder throwing mud at your client, and you slinging back mud to discredit witnesses and challenge dubious “evidence.” They are also a place in which you can make a record. Know the regulations, know the facts and you will get a better result for your client. You must be aware of the service regulations and the service “culture” when appearing before ADBs. The services’ regulations are similar but may vary in important details. Each service has tailored its implementing regulations to meet the service’s needs, philosophy or culture. You must know the regulations cold. Review the script or “gouge” [in Naval language] that the service uses for boards. The members will follow the script to the letter in most cases. As a basic approach to ADBs, you must convince the board members that they can follow the regulations and give your client the desired result.

The board members will be individuals who have dedicated their lives to following regulations and military discipline. It will be a rare occasion in which they defy that mandate. Know the ranks of the members and use the ranks and proper forms of address with the board members. Ask your client or Military Defense Counsel (MDC) to give you the proper ranks and forms of address for everyone in the room. This will go a long way to convince the board members that you know enough about the service to speak to them. The story is told of a civilian attorney in a court-martial who was admonished by the military judge, “Counsel, if you call the Command Sergeant Major ‘Major’ one more time, I am going to hold you in contempt.” Yes, they take this rank thing seriously. The members expect you to treat them with respect and demonstrate a basic respect for the institution to which they have dedicated their careers. If you cannot do that, perhaps someone else who can needs to represent the client. You cannot afford to prejudice your client by demonstrating a dislike of the military institution. ADBs are an excellent venue to use your trial skills without the restriction of strictly applied rules of evidence. Attorneys accustomed to the restraints of the courtroom will enjoy the opportunity at the relatively freewheeling proceedings. These are serious proceedings, but the lack of strict rules of evidence provides an opportunity for creative advocacy.

Be a vigorous advocate. I was once told by Military Defense Counsel that the members of a court or board expect the civilian attorney to “tear the paint off the walls.” The contribution of a civilian attorney is that you can say and do things and in a manner that would be uncomfortable for the MDC. You are expected to be the vigorous advocate. Respect witnesses and participants in the board, just as you would in a civilian court, but don’t be afraid to show you are there for the client. Use your MDC to your advantage. Be a colleague, not an opponent. It is a common belief among servicemembers that the JAG lawyers are “in the pocket of the command.” That is

not true. Most military defense counsel serve in separate defense commands and are not under the command of the accusers. Judge advocates range from superior attorneys to those who do little or are resentful of your involvement. In general, the MDC is an essential resource in defending your client. They can get information that otherwise is simply unavailable to you, at least not without a great deal of effort.

Officers are provided a verbatim transcript of the proceedings of a Board of Inquiry, the officers' version of the ADB, but enlisted members are not. Even if requested and granted, the government's idea of "verbatim" frequently will be setting up a cheap tape recorder somewhere in the room, guaranteed to make a bad record. If the funds are available, arrange to hire a private court reporter to record the board if the record is critical to additional appeals, especially if there may be a court challenge of the proceedings. When there is an OTH at issue, or when retirement benefits are at issue, it may be worth the money to get that professionally prepared transcript.

Use voir dire as a chance to educate the board. You will have a generous opportunity to question board members. Note that board members commonly assume that if this has come to a board, there must be a problem. Make a record of voir dire. If the board is being recorded, it is common that the voir dire is not recorded. Ask to have the voir dire recorded. In the larger services, and at large bases, it is possible that the board members will not be acquainted with anyone involved in the board. In a smaller service, the Coast Guard or Marine Corps, it is likely that some of the people in the room will have served with each other or the commanding officer who appointed the board. There should be no one on the board who is evaluated by the appointing officer. You should ask if the members know the client, each other, the recorder or the appointing officer.

Although you can challenge board members, it is usually a fruitless endeavor, because you are unlikely to get anyone appointed who is better for your client. It will also delay the proceeding. For board members, this is an additional duty, a bit like jury duty, pulling them away from their primary duties. They will hate you, and therefore your client, if they feel you are wasting their time.

The one rule of evidence that is applied at ADB is relevance. It is a battle to keep out anything that can be connected to the service member. Hearsay, even multiple hearsay, is admissible. Rumors may be given credibility, commonly in the form of eliciting opinions about how a service member is viewed within his or her command. That is a double-edged sword, and it benefits your client to use the looseness of the rules to his or her favor. Even if the information is accepted by the board senior member or legal advisor, you can frequently get board members to agree they will not consider evidence that is questionable. Remind them that your client's career, honor and reputation are at stake.

Your client will have an opportunity to make a sworn statement, or an unsworn statement that is not subject to cross-examination. Make certain you know what your client is going to say in that statement. I usually have the client do an initial draft of the statement so that the statement is in the client's voice not mine. Then I meet with the client to go over the statement, ensure it does not include inappropriate material, that it includes those things that need to be said, and then have the client practice the statement. Many of these clients are unaccustomed to making presentations and they need the rehearsal. Keep in mind that most boards involve

matters that are potentially criminal under the UCMJ. Don't allow your client to make statements that will cause more harm, spur additional investigation or result in a court-martial. Nothing stops the command from using information obtained in an ADB to instigate disciplinary action. Note that information asserted in an unsworn statement is subject to rebuttal evidence, and therefore needs to be accurate and limited in scope. Though there are risks, the unsworn statement is a potentially powerful tool and can humanize your client to the board members, who may have spent a day or more listening to a lot of unflattering evidence.

Have a good metaphor for explaining the burden of proof and the standard of proof. The recorder will inevitably state the government need only show that the allegations are "more likely than not." The burden of proof remains on the government throughout the proceedings, although the burden of production can shift for some bases of separation. The government must get beyond "the 50 yard line" or have more than half the weight on the scale to win its case. The government does not win just by creating the biggest stack of paper, but paper that matters.

I prepare for ADBs as I would a civil jury trial, with extensive factual research, trial notebooks, witness preparation and drafting opening and outlining closing argument. Be prepared to think on your feet. Boards are an uphill battle and most boards do not favor the client. But you can even the playing field a bit by thorough research and preparation. Good luck.

About the Military Law Task Force of the National Lawyers Guild

The NLG Military Law Task Force includes attorneys, legal workers, law students and "Barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes a quarterly newsletter, produces interim mailings on legal and political issues for Task Force members, sponsors seminars and workshops on draft, military and veterans law, produces educational materials on these issues, and provides support for members on particular cases or projects. It sponsors legal and educational work on military dissent, the rights of servicemembers, and challenges to oppressive military policies.

The Task Force encourages comments, criticisms, assistance and membership from Guild members and others interested in military law.