



The Newsletter of the
Military Law Task Force

On Watch

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VA Claims: An Overview

By Tom Turcotte

Whether a service member wants to stay in the military or is fighting to get out, eventually that person will be a veteran, and the Department of Veterans Affairs may play a significant role in the transition from active duty to veteran status.

This article gives a very basic overview of some of the more relevant principles of VA benefits, how the VA system works and some common myths about benefit entitlement. A few "practice pointers" are thrown in to help avoid mistakes that newly discharged people often make in their attitude towards or dealings with the VA.

Some Observations about the VA

Both as an attorney and legal worker, I have represented vets before the Department of Veterans Affairs (formerly the Veterans Administration) for over 30 years. It is my strong suspicion that active duty personnel and newly discharged vets often harbor certain attitudes towards the VA that result from its longstanding and ongoing form of what might be called "military folklore." This includes rumors, "real life stories" about others taken out of context, half truths gleaned from government-issued pamphlets and misinformation perpetuated only by whatever credence sheer repetition can grant.

In reality, the VA is completely independent of the Defense Department. The VA is bound by determinations made by the military about a veteran only in very limited areas such as time served, initial degree of impairment awarded in medical discharge cases, and basic record entries regarding awards, training, etc.

For example, the VA can award basic benefit eligibility in all cases in which a vet received an other than honorable ("OTH") or even bad conduct discharge ("BCD") from a special court-martial sentence through a "character of service determination" made by a VA Regional Office ("VARO"). Only a bad conduct or dishonorable discharge ("DD") given as part of the sentence of a general court-martial creates a complete bar to VA benefits that cannot be touched by the VA.¹

The VA is not bound by an initial disability rating given by a service branch to a vet for medical discharge, but it can increase the rating if appropriate.²

Practice pointers:

1) Do not let a vet or soon to-be-discharged person assume any nexus – good or bad – between the military and the VA.

2) Encourage anyone facing discharge to secure copies of all military medical and administrative records.

New GI Rights Hotline number: 877. 447.4487



The VA will not automatically get these records from the service branch once a claim is made. A VARO will order records, but the process is, at best, slow and "hit and miss."

The VA will use copies of military medical and admin records as primary evidence in any claim. It will not necessarily get all records. There is no real "nexus" between the VA and the military that ensures complete records acquisition.

Access to Specific Benefits Predicated on "Basic Eligibility"

Eligibility for any VA benefit is determined by "basic eligibility," without which eligibility for a specific benefit cannot be established. Basic eligibility is determined by type of discharge and time served. For example, currently only a fully honorable discharge plus at least 24 months of continuous active duty for an enlistment of less than 3 years, or 36 months for an enlistment of over 3 years, entitle one to GI Bill benefits.³

Specific eligibility for educational assistance also requires the vet to have enrolled by paying an amount set aside from pay each month and to have been discharged for expiration of term of service ("ETS"). Only some exceptions apply, such as discharge for service-connected disability.⁴

Basic eligibility for a VA Home Loan Guarantee requires an honorable or general discharge, but the time served on active duty is dependent upon the era during which a vet served. Specific eligibility for the home loan depends on the terms involved in the sale of the home and the vet's credit, etc.

In contrast, eligibility for service-connected disability benefits is not affected by length or era of service. An honorable or general discharge is required for service-connected disability, unless the VA makes a favorable character-of-service determination.

These are examples of factors affecting just three types of benefits, but they illustrate that type of discharge, time in service, era of service and often even more specific requirements combine to determine eligibility for a benefit.

Practice pointers:

1) Whenever those facing discharge say that someone else in an apparent position to know has assured them that they will receive benefits regardless of the outcome of their case, urge them to rely on VA source materials and not oral representations of "the Chief," "Lt. Brown," "a friend in personnel," etc.

2) Fairly comprehensive but easy-to-read materials are available that describe the exact requirements for all

VA benefits. Encourage the vet or soon-to-be vet to get copies or provide them yourself if possible.⁵

Seek Schedule for Guidance on Service-Connected Disabilities

Service-connected disability is defined as a disease or injury incurred in or aggravated by active duty or manifested to a degree of 10% or more within one year after discharge.⁶

Disability ratings are made according to the seriousness of symptoms as they affect social and industrial adjustment. Some injuries, such as loss of a limb, are automatically rated at a certain percentage. Others are rated depending upon how disabling the symptoms of the condition are.

A particular skin disease may present symptoms that coincide with a 10%, 30% or 50% rating. A vet suffering from Post Traumatic Stress Disorder may have symptoms that could be rated at 10%, 30%, 50%, 70% or 100%.

Hundreds of conditions and their corresponding ratings are described in the VA's "Schedule for Rating Disabilities." Formulae for rating conditions not included in the schedule, for rating multiple disabilities and for additional ratings due to unemployability are also defined in the schedule.⁷ The schedule is essentially the same that the military uses to rate members discharged for medical reasons or for medical retirement.⁸

A claim can sometimes be resolved on the basis of a vet's military medical records, but the more typical case requires a "Compensation and Pension Exam" (C&P exam) at a VA Regional Office. The VA physician issues an exam report which, in theory, is considered with the vet's service medical records and any VA hospital or medical records by the Adjudication Division at a Regional Office.

As previously mentioned, there is generally a one year from discharge "presumptive period" in which any condition that manifests to a moderate degree is considered service-connected.

Practice pointers:

1) Always recommend that someone facing discharge who has a service-connected disability claim secure copies of all medical records. This applies whether or not a member is being considered for medical discharge or retirement! There is no guarantee that all records necessary to future resolution of a VA claim will be available.

Civilian medical reports are also very valuable, especially when prepared by a specialist in situations where



the military refuses to treat or diagnose someone properly. The VA can rely on non-government sources of documentation and frequently does so.

2) Recommend that someone facing discharge secure statements from people s/he worked with that corroborate in detail any injury or disease observed, regardless of whether or not medical records show evidence of diagnosis or treatment.

Here, it's a good idea to get the home of record address from fellow service members. Service "buddies" may be reluctant to provide written statements. They may not be able to do so near the time of a person's discharge but, if you have the home "of record" address, you probably have a potential witness's parents' address that can be used to locate the witness later.

3) Always impress upon a member about to be discharged the importance of filing a claim for service-connected disability within one year from discharge.

Some conditions have presumptive periods well beyond one year from discharge. Further, a claim is never invalid because it is made beyond a year from discharge, but the rule is that the earlier a claim is made, the better.

Seek Character-of-Service Determinations By Applying For Benefit at Local VARO

An often overlooked alternative to the lengthy process of making an application to the military's Discharge Review Boards and/or Boards for Correction of Military Records is to seek a character-of-service determination by applying for any benefit at a local VARO.

The VA can grant basic benefit eligibility in other-than-honorable and in bad conduct discharges given as part of the sentence of a special court-martial. On the other hand, the VA cannot touch a vet who has a BCD or DD from a general court-martial.

VA regs define enumerated circumstances that constitute bars to benefit eligibility as well as excuses, or fac-

tors in mitigation that remove the bars. For example, one may be conditionally barred from receipt of benefits because of a continuous AWOL period of over 180 days unless adjudication finds that there were "compelling circumstances," such as family emergencies, etc., that mitigate against imposition of the bar.⁹

A vet may also be barred from benefits because of "willful persistent misconduct," unless adjudication finds that the vet's overall service was otherwise "faithful and meritorious."

While results differ among VAROs, it is probably very safe to assume that a vet stands a much better chance of getting a favorable character-of-service determination than of getting a discharge upgraded. It's a given that the VA process will take only a fraction of the time a discharge review petition takes and, if successful, a favorable "C/S" determination can only help a case before a Correction or Review Board.

Practice pointers:

1) A vet should be encouraged to document a case for C/S determination in the same way he or she would a discharge review case (e.g., obtain "buddy statements" before discharge, get the home of record addresses of potential witnesses and keep all documents).

2) Remember that, currently, a vet must have at least 24 months of continuous active duty to establish basic benefit eligibility. If a vet does not have this, the VA will not adjudicate the case except in service-connected disability claims, which require no minimum time served.

3) On the other hand, vets who hold an honorable discharge given early for the purpose of immediate reenlistment may establish basic eligibility if their records show that "but for" the reenlistment, they would have been eligible for discharge at the time their original tour would have ended.¹⁰

Similarly, and despite ongoing rumors to the contrary, a vet absolutely establishes basic benefit eligibility from a separate and complete service period resulting in an Honorable discharge. A subsequent OTH, BCD, or even dishonorable discharge does not un-ring the bell of the previously honorable discharge for benefit purposes.

Disability and Character-of-Service Claims Procedures

A claim starts at the VARO nearest to the vet. It is made on VA form 21-526 or informally by letter to the VARO. The claim is "developed" by Adjudication at the VARO

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through acquisition of VA medical reports, service personnel and medical records and whatever evidence the vet submits. Then an initial decision is made in a document called a "Rating Decision."

In C/S determinations and in some types of medical claims, such as Post Traumatic Stress Disorder ("PTSD"), service administrative records should be secured by the VARO to determine the facts and circumstances of record leading to discharge or the existence of exposure to "stressors" leading to PTSD, etc.

A vet may have more than one claim at any given time. There may be many physical and mental conditions that are service connected and, in theory, each is treated separately. If a vet has an OTH or BD discharge, the C/S determination must be made before any other claims can be resolved.

At almost any stage in the development of a claim, a vet can request a personal hearing before a Rating Board or Hearing Officer at the VARO. The hearing is formal in the sense that it is recorded and that the vet has the right to make a sworn or unsworn statement, to be represented by attorney or non-attorney counsel and to obtain a copy of the hearing proceedings. Opening and closing statements are permitted, and the vet can elect to answer Board members' or the Hearing Officer's questions or remain silent. The vet can also submit new documentary evidence at the hearing.

The initial Rating Decision should explain what decision was made on each claim and why. In reality, the Rating Decision is often nothing more than a conclusory statement that offers little insight as to how the claim was decided.

The Appeals Process: How a VA Claim May Never Die

If an applicant is dissatisfied with all or part of the Rating Decision, a "Notice of Disagreement" can be filed within one year of the date of the Rating Decision. The Notice of Disagreement can be in any form, so long as it can reasonably be construed as such. Once it is filed, the VARO must prepare a "Statement of the Case," which is essentially an elaboration of the Rating Decision and is intended as a reference source for further administrative appeal to the Board of Veterans Appeals.

A vet has 60 days from the mailing date of the Statement of the Case or one year from the date of the initial Rating Decision, whichever is later, to file a formal appeal to the Board of Veterans Appeals ("BVA"). An appeal to the BVA is done via VA form 9, which is routinely sent with the Statement of the Case.

Once a final decision of the BVA is issued, the vet has 120 days to appeal further to the Court of Veterans Appeals. Traditional appellate doctrine kicks in at the Court of Veterans Appeals level. Accordingly, the Court looks only to the record on appeal as evidence; the appellant cannot expect any further evidence to be considered by that Court.

In theory, a VA claim can never die. Even after an adverse decision from the Court of Veterans Appeals or, in the more common situation, after a vet blows a deadline, "new and material" evidence can reopen a claim. The Court continues to narrow what constitutes "new" and "material" evidence but, especially where vets have not been adequately represented, re-opening even a very old claim remains possible in many cases.

Representation Before VA: Lack of Incentive for Private Bar Limits Access to Attorneys

"Traditional" veterans organizations such as Disabled American Veterans, American Legion, etc., offer free representation before VA, as do state Department of Veterans Affairs Offices often operating through county locations.

My experience has been that these sources of help, while often very good, tend to be swamped, understaffed and unable to spend the time necessary to develop claims. Recently, a handful of veterans organizations have received funding to secure attorney representation of their clients before VA at no cost to the vet. However, they are few and far between and have geographical and service-era restrictions.

By statute, a Civil War era law prevented attorneys from charging more than \$10 to represent a veteran before VA. That limitation remained essentially intact until passage of the Veterans Judicial Review Act of 1988, which established what is now called the U.S. Court of Appeals for Veterans (CAVC) and allowed for limited, VA pre-approved recovery of retroactive awards granted after a final decision from the Board of Veterans Appeals.

Practically, this meant that a vet had to lose a claim up to the point that appeal could be made to the CAVC before being able to pay an attorney out of "retro awards" that were subject to VA approval and limited. Further, the attorney would be stuck with a record on appeal made before his or her representation, unless the attorney worked the claim pro bono prior to final denial by the BVA – a process that can take years.

There was no mad rush from the private bar to do VA claims after passage of the 1988 law, and I strongly suspect that will remain the case despite recent changes in the law



that allow attorneys to represent vets after denial of an initial Notice of Disagreement made at the Regional Office.¹¹

This change simply puts the appeal level back one step from where it was for attorneys to be able to see any pay for their work, and their pay is still limited and subject to VA approval. Instead of not being able to work for pay until the Board of Veterans Appeals makes a final denial, lawyers can now charge after a Notice of Disagreement has been filed at a Regional Office – a requisite for BVA appeal.

Practice Pointers:

1) *Encourage the soon-to-be or new vet to seek help with a VA claim by shopping around. Some parts of the country still have excellent, nontraditional veterans groups, Legal Services organizations or volunteer Bar Association programs that provide free, quality representation before the VA. Self help with materials from the National Veterans Legal Services Project is always a viable alternative to traditional vets groups.*

2) *Warn potential VA claimants that there is no guarantee that they will be adequately represented by traditional organizations, and that they should expect to be very involved in their own claim if they choose to have a traditional organization as their representative.*

3) *It is crucial that a vet keep the VA and any representative advised of his or her current address. The VA can, and will, close a claim file if mail is sent to an address and returned. Also, the VA will not necessarily send correspondence to a vet's representative and the vet at the same time. I have dealt with this problem by giving the VA my office address as representative and "c/o [me]" at the office address as the vet's address as well.*

It is equally crucial that the vet secure and keep copies of everything sent to the VA regarding a claim. Traditional groups will not always provide copies of everything filed, let alone copies of medical records.

Claimants should always keep their own separate file of copies of everything submitted to and received from the VA. The VA often loses documents. The only safe way to deal with them is to keep an organized personal file.

Caveats

Obviously, this article is not intended to impart specific legal advice of any sort. The workings of the VA and advocacy before it are discussed in detail in the Veterans Benefits Manual published by the National Veterans Legal Services Office.

Advocates should understand that a lot of what people perceive about VA claims is based on what they hear while in the military and may be sheer myth. I hope this article helps to identify some of the common areas in which those "myths" occur and gives a nutshell overview of how the VA claims system operates.

Tom Turcotte is an attorney in private practice and part-time staff attorney at the San Francisco-based veterans rights organization Swords to Plowshares.

References

1. 38 USC § 101(2); 38 CFR Sec. 3.12(c)(2).
2. ⁱⁱ Op. VA Gen. Counsel (5-23-84) (unpublished).
3. 38 USC Ch. 30; the "new GI Bill" is commonly referred to as the "Montgomery GI Bill."
4. 38 USC § 3011(a).
5. *Federal Benefits for Veterans and Dependents*, VA PAM 80-07-01. This pamphlet is updated yearly and most veterans organizations have it, but supplies are typically limited. Vets can sometimes obtain a free copy from a local VARO or state Department of Veterans Affairs Office or County Veterans Service Office. It is also available on the DVA's website, at www.va.gov.
6. 38 USC §§ 110, 112(a)(1).
7. 38 CFR, Part IV.
8. Medical discharge and medical retirement and their connection to the VA are well beyond the scope of this article. An excellent review of the subject is provided in the February 1991 issue of *The Advocate*, a periodical published by the National Veterans Legal Services Project, "A Brief Review of Discharge Options for Disabled Servicemembers," David F. Addlestone, Esq., NVLSP Publications, P.O. Box 65762, Washington, DC 20035; 202-265-8305.
9. 38 CFR Sec. 3.12 *et seq.*
10. 38 USC Sec. 101(18).
11. Public Law 109-461; proposed implementing regulations published in the Federal Register, Vol. 72, No. 87/Monday 5-7-07. As of this writing 8-2-07), finalized regulations are pending.

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Oct. 31 through Nov. 4

MLTF NLG Convention Events

Washington, D. C.

The MLTF will be involved in many events throughout the NLG Convention in Washington, D.C., October 31 - November 4, 2007.

Please join us for the following:

Thur. November 1st 8:30 A.M. - 1:30 P.M.

CLE Seminar: "Representing Military Conscientious Objectors in Habeas Corpus Proceedings"

Sponsored by Center on Conscience & War and MLTF

This half-day seminar will develop skills for attorneys and military counselors in assisting the increasing numbers of conscientious objectors who are challenging military service and war.

Speakers include **James Feldman**, **Louis Font**, **Peter Goldberger**, **Deborah Karpatkin**, and **J.E. McNeil**, executive director of CCW. These speakers have been representing CO's for decades and have a wealth of knowledge and experience to share. The moderator is **Kathleen Gilberd**, co-chair of the NLG MLTF.

This seminar is not to be missed!

See Ad on page 7 for more information and registration form.

Thur. November 1st 2:30 P.M. - 5:30 P.M.

MLTF Meeting

This meeting will review the work of the MLTF over the past year and set priorities for the coming year.

All who wish to participate in the work of the MLTF are invited. New members are especially encouraged to attend.

Fri. November 2nd 8:30 A.M. - 9:45 A.M.

Workshop: Ending the Occupation: Legal Attacks on an Illegal Attack

Sponsored by Joint Anti-War Working Group and MLTF

This workshop will discuss legal strategies to help force the withdrawal of all US troops and bases from Iraq and forcing the US to make reparations for the destruction it has caused.

Speakers include **Jules Lobel**, **Phyllis Bennis** and **Jitendra Sharma**.

Fri. November 2nd 10:00 A.M. - 11:30 A.M.

Major Panel: The Intersection of Militarism and Sexism

Sponsored by NLG Anti-Sexism Committee and MLTF

This panel will examine the implications of war and military occupation on women's lives. The panel will also discuss action that activists can take to fight militarism and sexism and to support the women affected.

Speakers include **Yifat Susskind**, Communications Director at MADRE, an international human rights organization; **Tzareena Sajjad**, former Afghanistan fellow at Global Rights; **Margaret Stevens**, member of the executive board of Iraq Veterans Against the War; a speaker from the Philippines. The panel is moderated by **Kerry McLean**, a human rights lawyer in New York and a member of the NLG NEC.

Sat. November 3rd 1:00 P.M. - 2:15 P.M.

Workshop: Veteran's Benefits - Challenging the Military

Sponsored by NLG Disability Rights Committee and MLTF

This workshop will discuss challenging the military by representing veterans in military disability retirement cases and VA benefit cases.

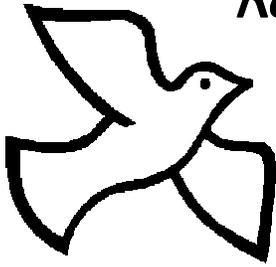
Speakers include **David Addlestone**, NLG member, author of numerous publications on veteran's law and a member of the board of Veterans for America; **Richard Cohen**, President of the National Organization of Veterans' Advocates, and **Larry Stokes**, National Service Officer for the National Association for Black Veterans. The moderator is **Aaron Frishberg**, VA law practitioner and member of the NLG DRC and MLTF.

Sun. November 4th 10:45 A.M. - 12:00 P.M.

Workshop: Anti-War Organizing: Vietnam and Iraq

Sponsored by Joint Anti-War Working Group and MLTF

This workshop will feature speakers who have been active in the GI rights movement old and new. Speakers include **Jim Lafferty**, founder and National coordinator of the National Peace Action Coalition and current Executive Director of the Los Angeles NLG; **Phyllis Bennis**, and **Marti Hiken**, military counselor since 1970 and current co-chair of the NLG MLTF.



Representing Military Conscientious Objectors in Habeas Corpus Proceedings

Thursday November 1st 8:30 A.M. - 1:30 P.M.
Holiday Inn on the Hill, Washington, D.C.

Sponsored by **Center on Conscience & War** and the **Military Law Task Force**

This half-day seminar will develop skills for attorneys and military counselors in assisting the increasing numbers of conscientious objectors who are challenging military service and war. Topics include an overview of habeas corpus, timing of petitions, creation of the administrative record, procedural and substantive requirements and common issues. Speakers:

- ◆ **James Feldman**, who has been representing and counseling CO's since 1982. Jim has served on the boards of the Central Committee for Conscientious Objectors (CCCO) and CCW.
- ◆ **Louis Font**, who has handled military law cases for more than 30 years. He represents Sergeant Camilo Mejia, the first soldier to publicly refuse to return to Iraq, in his case now pending before the U.S. Army Court of Criminal Appeals. He is also legal counsel in *Hanna v. Secretary*, a CO case now pending before the First Circuit Court of Appeals.
- ◆ **Peter Goldberger**, who has counseled and represented CO's for nearly 40 years. He is a former co-chair of CCCO and serves as legal adviser to the National War Tax Resistance Coordinating Committee.
- ◆ **Deborah Karpatkin**, who has represented CO's and military service members since 1991. On behalf of the NYCLU she recently brought habeas corpus petitions on behalf of two CO's. She is a member of the NYC Bar Association's Committee on Military Affairs and Justice.
- ◆ **J.E. McNeil**, who is executive director of CCW. She has worked with CCW/NISBCO on its legal committee, contributing to amicus briefs and representing CO's in court.
- ◆ The moderator is **Kathleen Gilberd**, who is co-chair of the NLG MLTF. She has worked in the areas of military administrative law since 1973 and discharge review since 1981.

This seminar is not to be missed!

REGISTRATION FORM

I would like to register for the Seminar. My information is as follows:

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For further information:

Kathleen Gilberd
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MLTF ANNOUNCEMENTS

MLTF Training Session Materials Available

Training Manual

MLTF Training Session Materials, August 2007, First Edition (binder) \$25.00

DVDs

Training Session I\$20.00 (two discs) Spring 2002

Trainings Session II\$25.00 (2 discs) Spring 2004

Training Session I & II\$45.00

Everything

MLTF Training Session Materials Binder and DVDs I and II \$60.00

Send announcements for the next issue to onwatch@nlgmtf.org

NEWS BRIEFS

Watada Court-Martial now set for Oct. 9



Lt. Ehren Watada

The second court-martial of 1st Lt. Ehren Watada, a Fort Lewis U.S. Army officer who refused to go to Iraq with his unit a year ago, has been rescheduled to Oct. 9. Watada's trial was postponed this summer at the request of government and defense lawyers. If convicted, Watada faces up to six years in prison and a dishonorable discharge. For updates, visit www.thankyoult.org

Representing Service Members in Involuntary Discharge Proceedings

by Kathleen Gilbert

An All-Too-Familiar Scenario

In the midst of war – with frenzied recruitment, fast-paced and often punishing training carried out in too little time, massive mobilizations 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 fed repeatedly into the maw of combat tend to be shuffled aside, their problems ignored and their mistakes or misconduct treated unreasonably 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 forbidden from going to sick bay for help. Immediately following the hasty training is deployment to Iraq, where he gets his first taste of combat. Along with the pressure and dehumanization that attends warfare, he feels the sting of the consequences for even minor disobedience. Back from his tour for a period of rest and further training, 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 mild PTSD. His frustration, poor attitude and a few small recent disciplinary problems, combined with his admission of ADD as a child, also result in a diagnosis of a personality disorder. He is given some Prozac and referred to an 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 or for a personality disorder.

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

PART I

Part 2 of this article, discussing administrative discharge board proceedings, will appear in the next issue of On Watch



problems result in punishment for disciplinary problems and 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.

Involuntary Administrative Discharges Destroy Careers, Hide Human Toll of War Effort

We are seeing increasing numbers of discharges for misconduct or for personality disorders, unsatisfactory performance or what used to be called “other designated physical and mental conditions.” 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 war. For a great many servicemembers, this means stigmatizing discharges. Other than Honorable (“OTH”) discharges 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 Montgomery GI bill benefits. Discharge documents showing OTH characterization, or stating that the reason for discharge was personality disorder or misconduct, create significant employment problems. And the military’s frequent failure to diagnose PTSD or other disorders makes it difficult for vets to show the VA that they have service connected problems warranting benefits 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 and Procedure: The Military Presumes No Rights

The criteria and procedures for enlisted administrative separations are set out in DoD 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.

These include Army Regulation (“AR”) 635-200, Air Force Instruction (“AFI”) 36-3208, Naval Military Personnel Manual (“MILPERSMAN”), part 1900 and Marine Corps Separation and Retirement Manual (“MARCORSEPMAN”), chapter 6. Navy and Marine discharges are also discussed in the more authoritative but less detailed Secretary of the Navy Instruction (“SECNAVINST”) 1910.4B. All of these regulations may be found on official military websites, with the occasional exception of the MARCORSEPMAN. This manual is sometimes restricted, but can be found on several civilian sites, including www.gidischarges.org and www.sdmcp.org, among others. JAG offices and command staff judge advocates often supplement the regs with very helpful (but not always quite accurate) gauges and guidelines for involuntary discharges 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 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’ criteria for discharge. Familiarity with these regulations give 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.

MILITARY LAW SEMINARS

Would you like to arrange a seminar on military law and counseling or conscientious objection in your area?

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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, court-martial or 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.

Personality disorders are also extremely common in this scenario.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 The 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 medical condition is severe enough to warrant discharge. Thus a member diagnosed with mild PTSD or depression and a sufficiently severe personality disorder will face administrative discharge. and behavior disorders," are considered long-term psychological disorders, often arising late in adolescence and often preceded by conduct disorders. They are extremely resistant to treatment, and are usually life-long problems. A number of specific personality disorders may be diagnosed under Axis II of the diagnostic system commonly used among mental health professionals, described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association ("DSM-IV"). This manual is used routinely by military physicians and psychologists, and its diagnostic terminology appears in medical and administrative regulations.

Although the diagnostic categories have changed from edition to edition of the DSM, common personality disorders include anti-social, dependent, and borderline personality disorders. The diagnostic system does not allow diagnosis of a personality disorder without reference to a specific type, though therapists sometimes fall back on personality disorder, not otherwise specified ("NOS"), for conditions that don't quite fit any type. Interestingly, one of the

most common military diagnoses under the prior edition of the DSM, passive-aggressive personality disorder, no longer exists as a separate type, but has been relegated to a group of criteria sets deserving of further study. In general, people with personality disorders may have difficulty in occupational and social situations, and may have problems with authority or rigid social structures and with stressful situations, but do not always feel emotionally troubled by the disorder.

Personality Disorder Discharge May Be a Quick Way Out, But Beware of the Stigma

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

Soldiers and sailors seeking discharge often utilize 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 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. Knowledgeable 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.

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/drug abuse, 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, erroneous enlistment and fraudulent enlistment are among the less common Honorable or General discharges. (Fraudulent enlistment discharges based on concealment of medical conditions or treatment must be Honorable, General or Entry Level, and so would be trumped by disability proceedings except among new enlistees, where medical problems may be subsumed under erroneous or fraudulent enlistment. Under current regulations, only one or two categories of fraudulent enlistment may be characterized as OTH.) Servicemembers are sometimes involuntarily discharged under the parenthood discharge provisions, though this would not supersede disability retirement or discharge. Discharges under the "Don't Ask, Don't Tell" provisions for homosexual conduct are less common in wartime, as commands facing personnel shortages may ignore homosexuality unless actual misconduct occurs or some separate problem (such as PTSD) makes the discharge convenient. Discharge for homosexual conduct would supersede medical proceedings only if certain specific aggravating circumstances warranting an OTH discharge were found.

"Counseling," Military-Style, Is Yelling; "Rehabilitation" May Amount to Shuffling and Labeling as "Dirtbag"

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, including homosexual conduct and misconduct based upon a serious offense, 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.

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. However, counselors and attorneys should understand that this 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 the member to yell at him or her about being a problem, threatens discharge or punishment if the problem happens again, and offers a typed record entry for the member to sign, acknowledging that the counseling occurred and that he or she can seek further help from appropriate sources (chaplains and the command structure are often mentioned). This encounter and its entry in the member's service record show sufficient counseling under the terms of the regulations.

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 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.

Procedure: Command Sloppiness May Open Door to Successful Challenge

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.

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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 most 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, and in discharge for homosexual conduct regardless of characterization. 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 non-commissioned officers. Part I of this article focuses on the notification procedure, though the initial stages are the same in both procedures.

In the Air Force, the formal discharge process is initiated by a letter from the commanding officer to the separation authority recommending discharge. In the other services, this formal recommendation usually follows notification. The recommendation must state the proposed reason for discharge, the specifics on which it is based, and the recommended character of discharge. It must give the separation authority specific information about the member's military service, disciplinary record, and any rehabilitative efforts required for the discharge involved; these are spelled out in the regulations and normally supplied in pro forma fashion.⁵

The First Step: 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.⁶ 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 the Marine Corps, in particular, 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 dis-

charge which the commanding officer recommends. The notice then sets out all of the rights available to the member 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, the sample forms in the regulations often encourage generalization. As a result, many servicemembers do not know the actual basis for their discharge until they see the DD-214 discharge document.

Beware of the Extremely Short Time Period Within Which to Demand Rights

This notice includes, is accompanied by, or is soon followed by a second form or letter, called something like "Acknowledgment of my rights to be exercised or waived during the separation proceedings." Here the members are supposed to waive or demand each of the rights in the discharge proceeding.⁷ (This should not be confused with an acknowledgment of receipt of the notification, used by some services to confirm that the notification was presented to the member.⁸) 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 the member's 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.

Servicemembers Pressured to Waive Rights and "Sign the Papers" – They Often Do

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 months. They will probably hear that a demand for rights is useless, that statements or hearings never work, that any response is just a waste of time. This talk usually ends with the ultimate military myth, that 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 basis of the proposed separation, 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.

Some Responsive Statements “Disappear” on the Way to the Separation Authority

In general, commands and separation authorities consider the Notification Procedure of little consequence, and rights receive cavalier treatment, with the possible 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 often left to prepare them on their own, even if they have consulted counsel. When respondents do submit statements, they are not always attached 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.⁹ 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 and character of discharge. 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 member’s quality of service or mitigating circumstances that would make less than honorable discharge, for example, seem inappropriate. Members who wish to challenge the discharge through litigation – and are able to get around the need to exhaust administrative remedies through

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lengthy discharge review proceedings – will be able to show that they used the available remedy of responding during the discharge proceeding.

Regs Don't Specifically Require Assistance of Counsel

The regulations do not specifically state that counsel should be made available to assist in preparing a 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 a response. 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.

Make a Broad Demand for Documents; Don't Forget FOIA

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 in Administrative Discharge Board Proceedings 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 tests, the results of any Inspector General (IG) 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 co-workers, and 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 the 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 get much more.

Seek Evaluations to Counter Diagnosis Supporting Discharge

Personality disorder discharges 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 personality disorder discharges after involuntary psychiatric evaluations, or misuse of therapy for PTSD or other problems resulting from harassment or abuse. In these cases, several tactics may be considered. The diagnosis is used to make them appear less credible as a complainant, and the discharge gets them out of the way.

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 psycholo-



gist administer the Minnesota Multiphasic Personality Inventory 2 (“MMPI 2”), one of the most common and respected 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 test 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, administered when clients are away from the stress of harassment from the command, can also be given 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 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, letters from family members, teachers and others in a position to observe the member’s behavior, etc.

Lack of Rules of Evidence Invites Creativity

Here it is important to look at the particular personality disorder diagnosed, since common symptoms vary widely among the disorders. A servicemember diagnosed with an avoidant personality disorder is not likely to show up in her high school yearbook as a cheerleader and most likely to become president; one diagnosed with an obsessive compulsive personality disorder is not likely to be described by teachers or his minister as a happy-go-lucky daredevil. Where childhood traumas or problems do exist, there may nonetheless be evidence of behavior other than that expected in the early stages of a personality disorder. This evidence is effective in itself, and can also be discussed in the reports of civilian experts. Since there are no rules of evidence, a great deal of creativity can be used to show the member’s background.

Military personality disorder diagnoses are often based on inaccurate assessments of performance and conduct. These are sometimes the result of incorrect information provided by commands. In involuntary psychiatric evaluations, commands are required to state the basis for their referrals, but commands 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.

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This discharge requires more than the mere presence of a personality disorder; there must be an opinion, usually by a military mental health professional, that the condition is so severe that it significantly impairs duty performance.¹⁰ Again, sudden onset of symptoms, particularly after a period of combat, can be used to argue that the personality disorder, even if present, is not the reason for the poor performance or misconduct used to support the discharge. 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 diagnosis and interference with duties. Here, too, it is useful to examine the DSM-IV symptoms for the particular personality 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.

Good-Character Letters Helpful

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 gloss over or dispute real problems, or deny symptoms of the more serious disorders 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.

Where the personality disorder has led to minor performance or conduct problems warranting a General discharge, it is important, but not easy, to use the diagnosis as mitigation. Commands and separation authorities tend to look at personality disorders as indications of bad character rather than medical problems. Advocates and civilian mental health experts can remind them that personality disorders are illnesses, often the result of painful childhood experiences, and frequently causing emotional pain and lifelong problems. Experts' statements or advocates' references to the DSM-IV 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.

Strategies for Taking Advantage of Procedural Errors

It is not uncommon to find significant legal errors in the discharge proceedings, in referrals for the underlying psychological evaluations,¹¹ 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 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 discharges 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.

Statements and evidence are to be submitted through the command recommending the discharge. In some cases, commanders will choose to respond, 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.¹² 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.¹³ With some discharges, he or she also has the responsibility to decide whether members should be transferred to the inactive reserve 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.¹⁴ The final decision or order must be recorded, though it is often cursory.¹⁵

Strong Responses May Prompt Command to Have Second Thoughts

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 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 dis-

charged within a week to ten days. They receive written information about the Discharge Review Board and Board for Correction of Military/Naval Records while being "out-processed." 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, as noted in Tom Turcotte's article in this issue of *On Watch*. 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 loses or destroys.

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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 command may have had the opportunity to create adverse records and a biased picture of servicemembers before and during the discharge proceedings, they seldom 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 can provide the best foundation for successful discharge review applications.

This article was written by Kathleen Gilberd, a legal worker in San Diego and a member of the MLTF steering committee.

Editor's Note: Part 2 of this article, discussing administrative discharge board proceedings, will appear in the next issue of On Watch.

References

- 1. DoD Directive 1332.14, Encl. 3, E3.A1.1.11; 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, E3.A1.1.3.4.8; AR 635-200, chap. 5-13; MILPERSMAN 1910-122; MARCORSEPMAN

6203.3; AFI chap. 5, sec. B, 5.11.9.1. Soldiers and sailors seeking discharge often utilize this discharge, and for many it provides an honorable and relatively quick way out. However, it does result in stigmatizing language on the DD 214 discharge document, which may put off knowledgeable employers. Unlike medical discharge or retirement, where specific diagnosis is not stated on the DD 214, the words "personality disorder" appear as the reason for discharge, since it is categorized as a separate reason for discharge under the general rubric of convenience of the government. While the Department of Defense lists it among a category of "other designated physical and mental conditions," all services but the Air Force have now set it out as a separate category.

- 3. DoD 1332.14, Encl. 3, E3.A1.3.4.8.3.
4. DoD 1332.14, sec. 4.2.3; 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 DoD E3.A1.1.3.4.8.2; AR 635-200, sec. 5-13.e; and MARCORSEPMAN 6203.c. Some specific discharge chapters include additional guidance on counseling and rehabilitation.
5. See AFI 36-3208, sec. 6.6.
6. DoD 1332.14, Encl. 3, E3.A3.1.2.1; AR 635-200, sec. 2-2 and fig. 2-1; MILPERSMAN 1910-402 and form NAVPERS 1910/32; MARCORSEPMAN 6303.3.a; AFI 36-3208, 6.9.4 and figs. 6-1 and 6-2.
7. DoD 1332.14, Encl. 3, E3.A3.1.2.1.3 to 8;; AR 635-200, sec. 2-2.c.(1) to (5); MILPERSMAN 1910-402 and form NAVPERS 1910/32; MARCORSEPMAN 6303.3.a.(5) to (9); AFI 36-3208, sec.6-8-1 to 5.
8. See AR 635-200, sec. 2-2.f.
9. DoD 1332.14, Enc.3, E3.A3.1.2.3; AR 635-200, sec. 2-2.c.(2) and d.(5).(a); MILPERSMAN 1910-402 and form NAVPERS 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.
10. See supra, note 3.
11. See Susan Bassein's excellent article on rights in involuntary psychiatric evaluations and treatment, in On Watch, Vol. XIX, No. 4.
12. The Army, for example, uses an intermediate level review, under AR 635-200, sec. 2-2.d.(4) and (5).
13. DoD 1332.14, Encl. 3, E3.A3.1.2.4; 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.
14. DoD 1332.14, Encl. 3, E3.A3.1.2.4.3; and, for example, MARCORSEPMAN 6309.1.
15. DoD 1332.14, Encl. 3, E3.A3.1.2.4.2; AR 635-200, sec. 2-3; MARCORSEPMAN 6309.

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Oklahoma Hotline launched

The Oklahoma GI Rights Hotline began operations on Monday, September 24, undertaking its mission of providing free, confidential, and accurate information on US military regulations and practices to servicemembers, veterans, potential recruits, and their families.

The Hotline can be reached at (405) 231-1138. Counselors will answer on Mondays from 10 AM to 5 PM. On other days messages will be returned within 24 hours. More live hours will be added gradually in the future.

The Hotline is managed by the Oklahoma Center for Conscience, an organization supported by Joy Mennonite Church, Veterans for Peace - Oklahoma City, Oklahoma Catholic Peace Fellowship and the Oklahoma City Religious Society of Friends. Operating funds for OCC and the Hotline come from private donations .

The volunteers who will staff the hotline took an intensive two-day workshop in April conducted by experienced counselors and attorneys from the National Lawyers Guild Military Law Task Force. The workshop was funded in part by a grant from the A. J. Muste Memorial Foundation.

Hotline volunteers will work under the guidance of Oklahoma attorney James M. Branum, a member of NLG-MLTF who specializes in military law. They will receive ongoing training updates as changes in military law may require, and will participate in national online discussions with other counselors across the country in order to stay informed about current issues that impact the work.

Mr. Branum, has two years experience in GI Rights counseling. He is also a founder and co-chair of Oklahoma



Members of the Oklahoma Center for Conscience announce the launch of the Oklahoma GI Rights Hotline. Several local media outlets covered the story.

Center for Conscience. He is a member of the MLTF.

Oklahoma is in an especially important position to offer GI Rights counseling services. Ft. Sill, located in Lawton, is one of only two Personnel Control Facility (PCF) locations in the U. S., to which many AWOL soldiers must pass through when they surrender themselves. Ft. Sill is also where many of those refusing to fight, claiming Conscientious Objector status, are incarcerated during the legal process the military requires.

More information about the Oklahoma GI Rights Hotline can be found online at okgirightshotline.org

NATIONAL ASSOCIATION OF VETERANS ADVOCATES

FALL 2007 CONFERENCE

October 26 - New Practitioner Seminar

This seminar will include the basics of VA Disability law, common problems in VA claims, practice at the veteran's court and attorney's fees in VA cases.

October 27-28 - Fall Conference

The conference will focus on issues related to VA claims and appeals for more experienced attorneys and advocates.

Hyatt Regency Crystal City
at Reagan National Airport
2799 Jefferson Davis Highway
Arlington, VA. 22202



Questions/Information:

Regina Alegre, Executive Assistant
RAlegre-NOVA@cox.net | (480) 220-3508

**NOVA is an association of over 200 lawyers and non-lawyer practitioners who represent veterans.
NOVA has been providing training sessions for veterans' advocates since 1993.**

Seminar and registration forms www.vetadvocates.com

About the Military Law Task Force

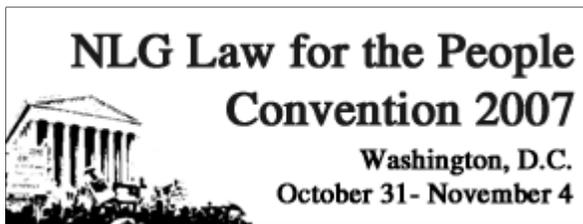
The National Lawyers Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes *On Watch* as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.

The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and

political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more valuable than property rights.

The Task Force encourages comments, criticism, assistance, subscriptions and membership from Guild members and others interested in military, draft or veterans law. To join, or for more information, please contact the Task Force at:

MLTF, 318 Ortega Street, San Francisco, CA 94122
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mlhiken@mltf.info, kathleengilberd@aol.com



National GI Rights Hotline

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