

ON WATCH



THE MILITARY LAW TASK FORCE OF THE NATIONAL LAWYERS GUILD



BORN IN VIETNAM

THE HISTORY (AND FUTURE) OF THE MLTF

By David Gespass

Editor's Note: In 2012 the President of the United States announced a period of commemoration of the Vietnam War to last through 2025. On July 8, 2015, the Secretary of Defense and Congressional Leaders spoke at an official commemoration of the 50th anniversary of the start of the Vietnam War. In light of these events, the editors of On Watch are reflecting on the origins of the NLG MLTF coming out of the war and its relevance today. This article was first printed in Guild Notes in 2007 and is reprinted here as a reminder of where we have been and where we need to go.

The defeat of the United States in Vietnam was primarily attributable to the will and spirit of the Vietnamese people. But they did have allies in their struggle and the most important, at least in the United States, was what came to be known as the "GI Movement." The GI Movement encompassed many differ-

ent political trends, from pacifists to liberals like John Kerry (who was much further left in those days) to Black nationalists to Marxist revolutionaries, and any number in between. And it manifested itself in many ways, from desertion to press conferences to "fragging" of officers to underground newspapers.

Others found ways to support and build the Movement. Coffee houses were established near bases, where those in the military could meet, organize and plan. Others assisted deserters in finding sanctuary. Inevitably, the government attempted to stop the Movement. Resisters were court martialed or otherwise disciplined. Ultimately, attempts at intimidation were to no avail. The Movement grew and, finally, the military was unable to prosecute the war.

In retrospect, it seems inevitable that the Guild would become an active ally to the GI Movement. Initially, however, there was oppo-

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sition. Many argued that our job was only to support the Vietnamese, not to assist GI resisters. In the end, support of GI resistance proved to be of enormous benefit to the Vietnamese. And, in the end, the Guild was there. This was new territory for the Guild and for the anti-imperialist struggle within the United States.

The original idea was for the Guild to establish an office in Vietnam. In fact, Howard DeNike did represent GI's in Vietnam, but not as part of a Guild office. The closest the NLG's Military Law Office came was the Philippines, Japan and Okinawa.

The degree of resistance within the ranks during Vietnam far exceeded anything that had gone before and it has had a lasting impact. It should be noted that there was resistance in prior wars as well, though one can search in vain through the millions of words that have been written detailing every battle of every war ever fought to find mention of it. For example, after World War II, plans were made for American forces to invade China, tens of thousands of GI's, mostly CIO union members, formed the Back Home Movement, saying that, while they were willing to fight fascism, they would not fight to assist American capitalists. But the resistance in Vietnam impaired, for at least forty years, how the United States could fight wars. After Vietnam, the draft was ended for fear that draftees would not be compliant enough "gangsters for capitalism" (the phrase is that of former Marine Corps Major General Smedley D. Butler), though many, if not most, resisters were enlistees. More importantly, until 9/11, the U.S. could not fight a war that lasted too long or led to any American casualties. And it is clear that, even after 9/11 and with the "all-volunteer" military, opposition to imperial designs, inside and outside the military, is

inevitable and far more massive than before Vietnam. These things, one hopes, make up the lasting legacy of Vietnam and the GI Movement.

Guild lawyers engaged in the work generally worked closely with both the GI's and civilian organizers, defending both from attack and assisting in producing the newspapers and in the organizing work. Coordination among those doing the work was tight. When Reber Boulton replaced Sandy Karp at a project in Iwakuni, Japan, "Bo" Bokesz was days from a court martial for violating an order making The Hobbit coffeehouse off limits to Marines. The transition from Sandy to Reber was seamless. After two or three days, the trial was recessed and, when it reconvened a couple of weeks later, the prosecutor announced he was dismissing it "in the interest of justice." There was support from the U.S. as well, where the office of Forer and Rein, two of the three Guild lawyers in Washington who stayed through the 50's, sued in federal court to stop the intimidation of Marines going to the Hobbit.

David Rein also represented Roger Priest, who was stationed in Washington and published his own newspaper. He was, as were so many GI's, not particularly active politically either before or after, but was radicalized by the times and the war he was being made to support. In one issue, he recounted a story attributed, if memory serves, to Huey P. Newton, founder of the Black Panther Party, about how a clear mountain stream that many animals drank from was polluted because the pigs up at the top were pissing and shitting in it. He concluded by saying: "L. Mendel Rivers (then chairman of the House Armed Services Committee), get your ass out of the water, boy!" The disenchantment with the military mission led many to engage in such conduct, heedless of the consequences, so legal support was critical, particularly from lawyers who welcomed political organizing around the cases.

The aircraft carrier Midway was homeported in Yokosuka, Japan and the sailors on board were increasingly unhappy with their conditions to the point where there was talk of a strike. About 40 or so did not show up when the ship went out on a cruise and were all charged with Missing Ship's Movement (not showing up for work can get you fired most places, it can saddle you with a felony conviction in the military) and sent to special courts martial. The defense was that the Midway had nuclear weapons on board, in violation of the Status of Forces Agreement with Japan and, therefore, they had an obligation to violate what was an illegal order. Eventually, agreements were reached settling the case, but for one of our clients, represented by Kathy Johnson (it was her first trial ever) and Chris Coates with the Guild's Military Law Office, the drama did not end with the plea. During sentencing, with Japanese media in attendance, our client testified that he did not sail with the ship because of the nuclear weapons. The judge called an immediate recess, met with the prosecutor for some time, reconvened and barred all reporters from the courtroom. Bill Schaap, who had come back from Okinawa the year before, handled the appeal

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and won on the grounds that our client was denied a public trial. The appellate court did not have any interest in addressing the issue of nuclear weapons.

Perhaps most emblematic of the times was the prosecution of several Marines in Iwakuni for passing out the Declaration of Independence outside the Air Station on the Fourth of July. At the same time, the Commandant of the Marine Corps was giving a speech saying the Declaration of Independence was as alive that day as it was in 1776. But, said the Corps, what was being passed out was a “communist Declaration of Independence.” And anyway, it called for the overthrow of the government. It was, in fact, true that revolution was in the air back in those days and people like Tom Paine and Thomas Jefferson were a threat to the established order in 1968 much as they were in 1776.

Stateside as well, there were projects and Guild lawyers. The Military Law Project began at Fort Ord in Monterey, CA, in 1970. NLG members were involved in GI projects at Fort Lewis in Washington, Fort Hood in Texas, Fort Benning, Fort Bragg, Camp Lejune, Fort Dix, Up Against the Bulkhead (Navy), and Camp Pendleton in California, to name a few, doing much the same work as the Military Law Office did.

Only with the end of the war, however, in the mid-1970s, was the Military Law Task Force set up in the Guild. Several members who had worked in the Military Law Office overseas and continued doing GI work on our return, along with those doing the work in the U.S. Due in large part to the lasting legacy of Vietnam, the work of the MLTF has been uneven over the years since. Without wars to fight – or at least wars in which Ameri-

can GI’s risked death – troops have been less rebellious. Indeed, among the most significant military law issues over the years before the invasion of Iraq, have been the demands for equality within military service of women and gays. Throughout, however, the MLTF developed into a permanent NLG committee and a repository of enormous amounts of information about military law and counseling.

With the invasion and occupation of Iraq, a new resistance movement developed. The MLTF had the infrastructure to respond to the needs of that movement and shifted into high gear. Its web site gets thousands of hits every month and its listserv and network of counselors and lawyers regularly responds to the needs of disaffected and exploited GI’s, by defending them, by assisting them with discharges and with such litigation as the suits to hold the “stop loss” program illegal. Times and technology have changed since Vietnam. Instead of coffeehouses, there is the Internet, which allows much faster communication, but is a lot more isolating than sitting in a room with like-minded dissidents. It remains for the new GI Movement and its civilian supporters to figure out how to harness that technology in a way that makes it as effective as was the Movement during the Vietnam War. But a couple of things are certain. GI’s are, in ever larger numbers, feeling the same disaffection and opposition to the military today that they did to the war in Vietnam. And the Guild, through the Military Law Task Force, will do its part to assist them in transforming their disaffection and opposition into effective resistance.

Reber Boulton, Eric Seitz, Ken Cloke, Sandy Karp, David Rockwell, Marti Hiken, David Addlestone and Kathy Gilbert provided information for this article.

Join the M.L.T.F. at the N.L.G. Convention

OCTOBER 22 - 25 OAKLAND, CA

Both our events are on Thursday, Oct. 22



1:30 - 4:30 pm **MLTF membership meeting**
(room will be posted at our table.)

4:30 pm - ? **MLTF social hour at
the hotel bar**



All welcome! Stop by the MLTF literature table anytime to see our latest material.

D.E.S. CHANGES

AN ANALYSIS OF UPDATES TO THE DISABILITY EVALUATION SYSTEM

By Lenore Yarger

Last year, the Department of Defense (DOD) issued a new regulation establishing policy and procedures for processing service members through the disability evaluation system (DES). This regulation, DODI 1332.18 (5 AUG 2014), reissues DOD Directive 1332.18 (4 NOV 1996) as an instruction and also incorporates DODI 1332.38 (14 NOV 1996), which it cancels. This article seeks to point out some of the main differences in policy, procedures, and responsibilities between the instruction and the regulations that it replaces. For the most part, what is documented here represents changes to the DES procedures and does not suffice to review the whole DES process in its entirety. Particular attention is given to those differences most relevant to counselors and attorneys assisting callers to the GI Rights Hotline with questions about DES procedures. In addition, counselors and attorneys will also find instructive DOD Manual 1332.18, VOLS 1 and 2, which provide detailed procedural guidance for the DES system. All references are to DODI 1332.18 unless otherwise specified.

Overview

DODI 1332.18 “[e]stablishes policy, assigns responsibilities, and provides procedures for referral, evaluation, return to duty, separation, or retirement of Service members for disability in accordance with Title 10, United States Code (U.S.C.)” (Paragraph 1 b.). The Disability Evaluation System is the process by which service members are returned to duty, separated, or retired because of a disability. In recent years, DOD policy regarding the DES has shifted to coordinate better the awarding of benefits with the Department of Veteran Affairs (VA), “to ensure continuity of care, timely processing, and seamless transition of the Service member from DoD to VA in cases of disability separation or retirement” (Paragraph 3 b.).

3 DES processes: To this end, under DODI 1332.18, service members may be processed through one of three DES processes: the Legacy Disability Evaluation System (LDES), the Integrated Disability Evaluation System (IDES), or the Expedited Disability Evaluation System (EDES). It will be important for counselors and attorneys to clarify with service members which process the member is or may be eligible for, as each contains differences in processing and responsibilities.

IDES: Most referrals to the DES will be processed through the IDDES, which has been designed specifically to coordinate evaluation and compensation consistently with the VA. To assist with that goal, the IDDES process includes a general medical examination, as well as any other medical exams, performed to VA and compensation and pension standards (Encl. 3.1.d.). Members referred to the IDDES, in addition to being appointed a Physical Evaluation Board Liaison Officer (PEBLO), will also be appointed a Military Service Coordinator (MSC). The MSC is charged with coordinating between the Service member and the VA and keeping the member informed of VA processes (DODM 1332.18-V2, Appendix 6 to Encl. 4).

Counselors and attorneys should note that no Service member may be discharged or released from active duty due to a disability without first filing a claim for compensation, pension, or hospitalization with the VA or waiving (in writing) his or her right to do so (Paragraph 3.g.). See DODM 1332.18-V2 for a detailed description of the IDDES process, including procedures for the Service member, medical care providers, patient administration, PEBLO, MSC, Commander, PEB, Military Department, etc.

LDES: The LDES, which is the prior medical evaluation system, will be used for non-duty related disability cases as well as for any service members who entered the DES before the IDDES was introduced at their Medical Treatment Facility (MTF). In addition, with written approval from the Under Secretary of Defense for Personnel and Readiness, members in initial entry training status may be referred to the LDES. These members must be offered enrollment before discharge in the VA Benefits Delivery at Discharge or Quick Start programs (Encl. 3.1.b.(2)). See DODM 1332.18-V1 for more detailed information of the LDES.

EDES: The EDES is reserved for Service members who incur a “catastrophic” illness or injury in the line of duty. A “catastrophic” condition is defined as, “permanently and severely disabling injury or illness that compromises the ability to carry out the activities of daily living” (Encl. 3.1.b.(4)). The EDES allows the referred member to waive the DES process and receive a combined rating of 100 percent (Under Secretary of Defense for Personnel and Readiness Memorandum,

“Expedited DES Process for Members with Catastrophic Conditions and Combat-Related Causes,” January 6, 2009). Further guidance on EDES processing will be published in a separate DOD issuance.

Reservists: DODI 1332.18 states up front that all reservists who are on active duty for more than 30 days who are referred into the DES may remain on active duty with their consent until final disposition of their case (Paragraph 3. h.). Note that the instruction omits the stipulation from 1332.38 that reservists must sign a waiver if they do not wish to be retained on active duty during disability evaluation (See DODI 1332.38, E3.P2.7.2.1).

Responsibilities

DODI 1332.18 charges the Assistant Secretary of Defense for Health Affairs (ASD(HA)) with the management and oversight of the DES process and policies, including communication with the Secretaries of the Military Departments and the Veterans Benefits Administration. The Assistant Secretary of Defense for Reserve Affairs (ASD(RA)) is responsible for coordinating with the ASD(HA) to implement DES policy for Reservists in an efficient and equitable manner consistent with active component policy. The Secretaries of the Military Departments (MD) are responsible for implementing DES policy and procedures in accordance with the DODI 1332.18. A few of the expanded responsibilities for each MD under the instruction include reviewing compliance with operational standards, development and implementation of training of DES personnel, and providing and training legal counsel to those referred to the DES system.

Referrals

Criteria: Perhaps one of the most noticeable changes in DODI 1332.18 is that it does not incorporate two enclosures of the canceled 1332.38: Enclosure 4, *Guidelines Regarding Medical Conditions and Physical Defects that Are Cause for Referral into the DES*; and Enclosure 5, *Conditions Not Constituting Physical Disability*. While referral into the DES was still dependent on the service member's ability to perform their duties, the listing in E4 nonetheless provided a degree of verifiable data that might indicate whether the Service member should receive strong consideration for a referral and/or advocate for such a referral. E5 provided clear cases where referral was not warranted. Service members may still refer to their Military Department regulations for a more specific list of conditions requiring referral to the DES.

Left in DODI 1332.18 are the much more general criteria that are largely performance based. Specifically, service members may be referred to the DES if they have:

- 1) one or more medical conditions that prevent them from “reasonably performing the duties of their office, grade, rank, or rating”;
- 2) a medical condition that presents an obvious risk to their

own health or the health or safety of other members;
3) a medical condition that imposes “unreasonable requirements on the military to maintain and protect” the member (Appendix 1, paragraph 2). In all cases, referral should be made within one year of diagnosis of the condition or when the course of the condition becomes relatively predictable, whichever is sooner.

Ineligibility for Referral: The only reference to conditions not comprising a disability addresses congenital or developmental defects not compensable under the Veterans Affairs Schedule for Rating Disabilities (VASRD). When these defects, circumstances or conditions interfere with assignment to or performance of duty, the member may be administratively separated and not referred to the DES (Paragraph 3.i.).

Counselors and attorneys should also note a potentially significant change in the language regarding service members who are facing punitive discharges or pending separation under provisions that authorize an Other Than Honorable characterization of service. Consistent with the canceled DODI 1332.38, members in these situations are usually not eligible for referral to the DES. DODI 1332.38 made exception to this rule, “when the medical impairment or extenuating circumstances may be the cause of the conduct” (E3.P2.4.4).

This provision has been very important to counselors and attorneys seeking to win DES referral for service members facing involuntary discharge under these conditions. That language has been rescinded and replaced by the much more subjective (and therefore hard to support with evidence), “when the medical impairment or disability evaluation is warranted as a matter of equity or good conscience” (Appendix 1, Paragraph 4.b., italics added). Counselors and attorneys should see MD regulations for more clarifying language.

DODI 1332.18 also adds in this section a stipulation that service members who are not “present and accounted for” shall not be processed for disability, nor will those whose disability was the result of intentional misconduct, willful neglect, or occurred during an unauthorized absence or excess leave. These additions are consistent with DES procedures prior to issuance of the instruction and do not signify a change in policy.

Medical Waivers: DODI 1332.18 stipulates that medical conditions waived at enlistment can only qualify for disability separation or retirement if the condition has been *permanently* aggravated by military service or if the service member has 8 years of active service at the time of separation (Appendix 3, Paragraph 7.f).

In the canceled regulation, Service members could waive their right to a PEB only under certain conditions (see DODI 1332.38, Paragraph E3.P2.7). DODI 1332.18 grants all members the right to waive their right to a PEB, subject to the approval of the Secretary of the Military Department (Appendix 1, Paragraph 6).

The only exception to this policy (consistent with the canceled reg), is that active duty members who have incurred a reserve obligation may not waive the PEB.

Medical Evaluation Board (MEB)

Purpose and Composition: Service members referred to the DES begin the process with the MEB, which is a review of the member's medical documents. (There is no personal appearance or hearing as part of the MEB). The purpose of the MEB is to document the member's medical condition and the duty limitations caused by the condition. DODI 1332.18 stipulates the composition of the board shall be "two or more physicians (civilian employee or military)," one of whom has detailed familiarity with medical fitness standards, disposition of patients, and disability processing. If the member has a behavioral health diagnosis, their record must include a thorough behavioral health evaluation signed by either a psychiatrist or psychologist with a doctorate in psychology. (Encl 3, Paragraph 2.b)

Evaluations and Exemptions: The MEB will evaluate 1) Service members who incurred or aggravated an illness or injury while under orders to active duty for more than thirty days, and 2) reservists referred for a duty-related determination. The language for reservists here has changed from the canceled 1332.38, which said that the MEB would evaluate reservists referred only for "duty related impairments" (E3.P1.2.2.2). Such language suggests that reservists can appeal to the DES when seeking compensation for service-incurred conditions not recognized as such by their commands.

Exempt from MEB evaluations are members who are on the Temporary Disability Retired List (TDRL), another change from 1332.38. Reservists with an illness or injury unrelated to military duty shall also not be evaluated by the MEB but referred to the PEB if the member requests an evaluation.

Impartial Medical Review and Rebuttal: According to DODI 1332.18, service members may now request an impartial medical review of the MEB findings by an "impartial physician or other appropriate medical health care professional who is independent of the MEB" (Encl 3, Paragraph 2.e.(4)). This person would independently review the findings of the MEB, counsel the member regarding the findings and recommendations, and advise the member on whether the findings reflect the scope of their medical condition and limitations. Service members may also submit at least one rebuttal to the MEB findings (Encl 3, Paragraph 2.e.(5)). These options are available to members in the LDES as well as the IDES.

Additional Changes: As with the canceled 1332.38, in addition to medical records, non-medical documentation to be submitted to the MEB includes the Line of Duty determination (when required), and a statement from the member's commander documenting the impact of the condition on the member's ability to perform their duties. The canceled 1332.38 re-

quired that, in the case of a member who had been reassigned for medical purposes (i.e. placed on medical hold), the MTF acquire this statement from the member's former unit commander. This qualification has been removed in DODI 1332.18. In addition, "pertinent personnel records" to establish a member's military history are no longer included as non-medical documentation.

Physical Evaluation Board (PEB)

Purpose and Composition: The purpose of the PEB is to determine the Service member's fitness for duty and, if unfit, their eligibility for benefits, including retirement and separation pay. Cases go first before an Informal PEB, which is another document review that does not allow a personal appearance by the Service member. DODI 1332.18 stipulates the IPEB will be comprised of "at least two military personnel at field grade or civilian equivalent or higher. In cases of a split opinion, a third voting member will be assigned" (Encl. 3, Paragraph 3.d.(1)). In the instruction, those found fit or unfit can rebut the findings of the IPEB and/or request a reconsideration of the findings.

Formal PEB: Those found unfit by the IPEB can also appeal their case before a Formal PEB, where the Service member can appear in person and have a right to legal representation (either appointed at no cost to the member by the military or hired at their own expense). Formal PEBs "must be comprised of at least three members and may be comprised of military and civilian personnel representatives. A majority of the FPEB members could not have participated in the adjudication process of the same case at the Informal Physical Evaluation Board." In addition, "The FPEB will consist of at least a president, who should be a military O-6, or civilian equivalent; a medical officer; and a line officer (or non-commissioned officer at the E-9 level for enlisted cases) familiar with duty assignments." The physician cannot have been the member's doctor, served on their MEB, or conducted their TDRL examination. (Encl. 3, Paragraph 3.d. (2)).

Previously, Service members who requested a FPEB were entitled to address "any issue that affects the member's benefits" (E3.P1.3.3.3.). DODI 1332.18 narrows those issues to a specific list: issues pertaining to their fitness, the percentage of disability, the degree of stability/instability of the condition, administrative determinations, or a determination that their condition was not duty related (Encl. 3. Paragraph 3.g). Under the instruction, members are entitled to have their case considered by a board of members, the majority of whom were not voting members of their IPEB (Encl. 3. Paragraph 3.h.(1)).

Perhaps most notable in DODI 1332.18, however, is that members no longer have a right to a written rationale explaining the findings and recommendations of the FPEB. Members may request in writing a record of the FPEB proceedings, and this record must include the findings and conclusions of the PEB, as well as the basis for those conclusions. Counselors and attor-

neys should note that this record is not furnished automatically and must be initiated by the service member.

Service members may also request in writing an appellate review of their case by their Military Department. DODI 1332.18 stipulates that the appropriate Military Department will furnish a response in writing that addresses each of the issues raised in the appeal (Encl. 3, Paragraph 3.I).

Right to Legal Counsel

DODM 1332.18-V. 1, Encl 6 clarifies service members' right to MD appointed legal counsel at no expense for IPEBs and FPEBs. Government-appointed legal counsel can also advise about adverse LOD determinations and any other issues relevant to final disposition of a case (DODM 1332.18-V. 1, Encl 6). Stipulations for qualification, training, and staffing are present in the same reference.

DES Counseling

Rights-counseling requirements omitted: Like the canceled instruction, DODI 1332.18 stipulates counseling of members referred to the DES to help them navigate the system. However, the instruction requires each Military Department to publish and provide written information on DES procedures, including the rights and responsibilities of the Service member. Omitted is the old requirement to counsel members on their estimated retirement or severance pay based on the outcome of the PEB. Gone also is the requirement that Ready Reservists being separated for disabilities be counseled about their rights, although presumably they are included in the more general counseling requirements for anyone being processed for disability.

Training of Personnel: DODI 1332.18 strengthens training requirements for personnel assigned to assist in the DES process, including PEBLOs, Medical officers, adjudicators, and judge advocates, requiring that they be certified annually. The formal training described in the reg requires that newly assigned PEBLOs receive at least one week on-the-job training with an experienced PEBLO.

Case Management

DODI 1332.18 contains no specific time standards for referrals and processing; instead, processing goals are found in DODM 1332.18-V 1-2. The processing goal for the entire IDES is "...for DoD and VA to complete 80 percent of cases of AC Service members in no more than 295 days from the date of referral to the IDES to the date of return to duty or notification of the VA benefits decision" (DODM 1332.18-V2, Encl. 7, Paragraph 2); for Reservists, due to "unique documentation and orders requirements", the goal is 305 days. See the Manual for a complete breakdown of time goals for each phase of the process. Processing goals for the LDES are considerably shorter (see DODM 1332.18-V1, Encl. 7, Paragraph 4.)

Final Disposition

Final Decision Authority: Final decision authority for DES processing lies with the Secretary of the Military Department, with two exceptions, which differ slightly from the old reg. When the Secretary of the MD disputes a finding of "fit" by the PEB, final decision authority will be the Secretary of Defense (Encl. 3, Paragraph 7.c.). In the case of disability retirement of any general, flag officer, or medical officer being processed for, scheduled for, or receiving non-disability retirement for age or length of service, final decision authority lies with the Under Secretary of Defense for Personnel and Readiness (USD(P&R) (Appendix 6, Paragraph 1).

Early Retirement for Length of Service: In DODI 1332.18, Selected Reservists who have between 15 and 20 years qualified service who are facing separation for disability may instead request early qualification for retired pay at age 60 (Appendix 6, Paragraph 2.a.(2)). In the canceled 1332.38, all members had the option of choosing length of service retirement over medical retirement if they had reached at least 15 years of service, under the Temporary Early Retirement Authority (TERA) available at that time (see DODI 1332.38, E3.P7.2.1). According to DODI 1332.18, active duty members who are eligible for length of service retirement may elect to retire for length of service instead of disability only if the date of their length of service retirement falls within the time frame they expect to be retired medically (Paragraph 3.f.). The 2015 TERA currently in effect does not allow for early retirement for those undergoing consideration for disability retirement.

Administrative Decisions: DODI 1332.18 states that if the DES finds a member fit for duty with a given condition, that member may not be administratively separated nor denied reenlistment for not being deployable or assignable worldwide due to that condition (Encl. 3, Paragraph 7.b.).

Preexisting Conditions

Like the canceled DODI 1332.38, DODI 1332.18 presumes sound condition for all members on active duty for over 30 days; however, the instruction contains different language for the standards to overcome this presumption, which seems to work in favor of protecting the Service member. According to DODI 1332.18, Secretaries of Military Departments may overcome this presumption only if "clear and unmistakable evidence" demonstrates the disability was preexisting and not aggravated by military service. Hereditary or genetic diseases also fall into this category and are no longer presumed incurred prior to entry. A finding of "not incurred or aggravated" by military service must be backed by "objective evidence in the record, as distinguished from personal opinion, speculation, or conjecture." In cases where the evidence is unclear, the finding shall be "incurred or aggravated by military service." This presumption does not exist for reservists ordered to active duty for 30 days or less. (Appendix 3, Paragraph 7.b.(3) and (4))

Subsequently, DODI 1332.18 states that disabling conditions are presumed incurred or aggravated in the line of duty for service members serving orders on active duty for 30 days or more unless the condition was noted upon entrance into service. (Again, this presumption does not exist for reservists on order to duty for 30 days or less.) Furthermore, for members who will have at least 8 years active service upon separation, preexisting conditions shall be considered “incurred while entitled to basic pay” if the member was “ordered to active duty for more than 30 days when the disease or injury was determined to be unfitting as subsequently determined by the PEB.” Those members ordered to active duty for over 30 days but who are released in less than 30 days due to identification of the preexisting condition do not qualify. (Appendix 3, Paragraph 7.c.(3))

DODI 1332.18 omits two sections of the old regulation that addressed preexisting conditions not waived prior to entry into the military: Under the canceled DODI 1332.38, service members with such conditions were administratively separated and not referred to the DES if the condition met certain criteria (see DODI 1332.38, Paragraph E3.P2.5). Also absent in the newer DODI 1332.18 is a description of conditions presumed to be preexisting (see DODI 1332.38, Paragraph E3.P4.5.4). In this regard, DODI 1332.18 seems to offer more protection to members to ensure that their conditions are not written off as preexisting when first diagnosed during military service.

Standards for Determining Unfitness

Under Paragraph 5 of Appendix 2, Presumption of Fitness, DODI 1332.18 states consistently with the old regulations that service members pending retirement at the time of referral to the DES are presumed fit for duty. DODI 1332.18 defines more precisely the “time of referral” as that time when the member’s MEB narrative summary occurs (paragraph 5.b). Under the instruction, RC members are considered pending retirement when they are within 12 months of mandatory retirement or removal date and they qualify for a 20-year letter (Paragraph 5.b.(4)). Also pending retirement (and therefore presumed fit) are retirees recalled with eligibility to collect retired pay upon reaching the appropriate age, unless they incurred or aggravated the condition while on current active duty orders (Paragraph 5.b.(5)).

Under Appendix 3 Paragraph 4, Reasonable Performance of Duties, DODI 1332.18 omits a paragraph stating that if a member performs adequately up until referred to the DES, she or he should be found fit despite medical evidence that suggests questionable ability to perform duties. Also, the following stipulation has been removed under Paragraph 4.a.(3) Deployability: “Inability to perform the duties of [a member’s] office, grade, rank, or rating in every geographic location and under every conceivable circumstance will not be the sole basis for a finding of unfitness.”

DODI 1332.18 adds a stipulation that an officer in pay grade O-7 or higher, or any medical officer, shall not be found unfit by the DES unless recommended by the Assistant Secretary of Defense for Health Affairs and approved by the Under Secretary of Defense for Personnel and Readiness (Appendix 2, Paragraph 4.b).

Standards for Determining Compensation

Standards for determining disability compensation are presented in Appendix 3 of DODI 1332.18. While the formatting of this section of the regulation is different, the standards themselves have not changed. The instruction lays out separate criteria for disability retirement (Paragraphs 2. and 3.) and disability separation (Paragraphs 4. and 5.).

Awards of Credit: New in the revised 1332.18 is the awarding of service credit for the purpose of calculating severance pay. Any part of a year of active service over six months is counted as one year, and anything less than 6 months is disregarded. Furthermore, any service member separated for a disability will be credited three years of service. If the disability was incurred in the LOD in certain combat-related circumstances, the credit awarded is six years. (Appendix 6, Paragraph 5.c.(2))

As before, DODI 1332.18 stipulates that aggravation of a preexisting condition that occurs during routine treatment of that condition is not compensable. However, added to the instruction is the qualifier that “unexpected and adverse events over and above known hazards directly attributable to treatment, anesthetic, or operation” performed for that condition could be considered service aggravated (Appendix 3, Paragraph 7.g.).

Conditions that result from elective surgery or treatment done at the member’s expense shall not be compensable, unless it can be shown that the decision to undergo said treatment was “reasonable” or the result of a “significant impairment of judgment” resulting from a ratable condition (Appendix 3, Paragraph 7.h.).

Like the canceled DODI 1332.38, DODI 1332.18 states that disabilities will be rated according to the VASRD. However, DODI 1332.18 also stipulates that after careful consideration of all data and evidence, when doubt arises regarding the degree of a disability, the doubt shall be resolved in favor of the service member (Appendix 3, Paragraph 7.i.).

TDRL Management

DODI 1332.18 stipulates that the Military Department shall reevaluate any member temporarily retired for medical disability within 16 months of placing him or her on the TDRL. Subsequent examinations shall take place within 18 months. These time requirements were not written into the canceled regulation.

Continues on next page.

CHELSEA MANNING UPDATE

By Jeff Lake

Chelsea Manning continues to be incarcerated at Fort Leavenworth, Kansas, serving a sentence of 35 years. She is now being represented on appeal by Nancy Hollander and Vincent Ward. The attorneys report that the trial record is the longest in military history.

The issues on appeal are the same as those raised at trial – Chelsea’s extended pretrial confinement under horrendous conditions and denial of her right to a speedy trial; denial of the right to call witnesses and denial of access to crucial evidence. In addition, the appeal will focus on the misuse of the Espionage Act by the government. The Act now serves as a way to intimidate potential whistleblowers who now have to fear pros-



Chelsea Manning supporters holding banner outside Army liaison office on Capitol Hill.

DES Changes, continued

Bonus Recoupment

DODI 1332.18 stipulates that members who are retired, separated or who die as a result of a combat-related disability (not caused by their own misconduct) will not be required to pay back any bonus or incentive pay received for their service. Furthermore, any remaining portion of said bonus or pay will be paid the member (or the member’s family, in the case of death). (Encl. 3, Appendix 5, Paragraph 3)

Conclusion

The DES is a complicated system that holds critical significance for service members who incur injuries or illness in service to the U.S. Military. This article provides an initial assessment to identify recent changes in policy that may affect those referred into the system. Counselors and attorneys are encouraged to engage in a thorough reading of the materials mentioned here to best serve those seeking our help navigating the system.

ecution and long prison sentences for exposing wrongdoing by the military. A victory by Chelsea on this issue will be of enormous benefit not only for her, but for the democratic process as well.

Supporters of Chelsea are conducting a campaign to win clemency for her. People who wish to support this effort are urged to [write to the Secretary of the Army and the Army Clemency and Parole Board](#). The addresses and suggestions for content of the letters can be found at chelseamanning.org.

In December 2014, Chelsea celebrated her 27th birthday. Many notable figures throughout the world [sent her birthday greetings](#).

Despite her confinement, Chelsea continues to speak out through the media. The New York Times published an [op-ed by Chelsea in June 2014](#) in which she argued that the public is still not receiving comprehensive and accurate information about how the United States is conducting military operations around the world. Chelsea stated, “I believe that the current limits on press freedom and excessive government secrecy make it impossible for Americans to grasp fully what is happening in the wars we finance.”

Other media outlets have published interviews and articles by Chelsea. In its [November-December issue of Wire](#), Amnesty International published an interview with Chelsea entitled, “[Why speaking out is worth the risk](#).” In February, the online news outlet The Guardian US announced that Manning would be a [contributing opinion writer](#). Chelsea had previously written a piece for the Guardian in December, 2014 entitled, “[I am a transgender woman and the government is denying my civil rights](#).”

In February the Army decided that Chelsea may receive hormone therapy while she remains in custody. The decision to administer this therapy is a first for the Army and came after legal action by the ACLU. However, in September, the Army inexplicably denied Chelsea the right to follow female grooming standards and at this time she cannot grow her hair. The ACLU has vowed to challenge this decision in the ongoing lawsuit.

In August, Chelsea was charged with Disrespect, Disorderly Conduct and Possession of Prohibited Property. The actions which prompted the conduct charges are not clear. The property was apparently an expired tube of toothpaste and a copy of Vanity Fair magazine. For this, she faced indefinite solitary confinement. After delivery of 100,000 petition signatures, the Army convicted Chelsea of the charges but sentenced her to only 21 days of restrictions.

Even while locked up and facing decades in prison, Chelsea Manning continues to make history. In addition to reading her at theguardian.com/us, you can follow her on Twitter [@xy-chelsea](#) and on medium.com [@xychelsea](#).

2015 LAW FOR THE PEOPLE CONVENTION

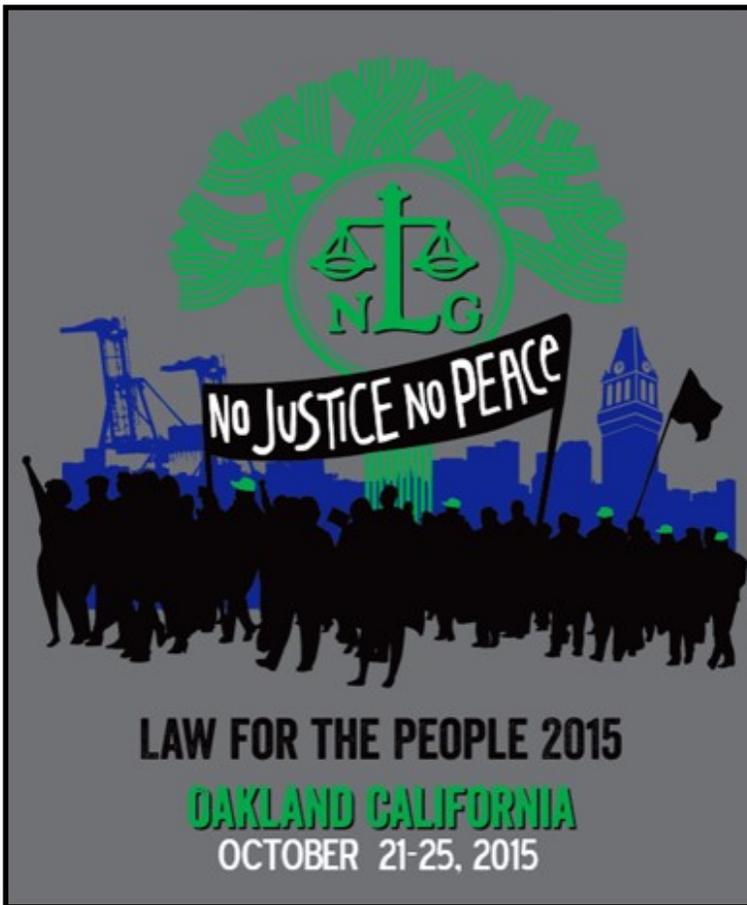
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The National Lawyer's Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes On Watch as well as a range of legal memoranda 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 sacred than property rights.

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