

 **NVLSP**
National Veterans Legal Services Program

Changes to the VA's Character of Discharge Regulation

Renee Burbank, Director of Litigation

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How to Obtain CLE Credit

Recorded Webinar Intro Notes

Renee Burbank

Agenda

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COD Framework

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Types of Discharges



- ▶ HON
- ▶ GEN (under honorable)
- ▶ OTH
- ▶ Uncharacterized
- ▶ BCD (SCM or GCM)
- ▶ DD

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DD Form 214



Box 24 Characterization of Service

- ▶ General (Under Honorable Conditions)
- ▶ Under Other Than Honorable Conditions
- ▶ Bad Conduct
- ▶ Dishonorable

Box 28 Narrative Reason for Separation

- Completion of Required Active Duty
- Misconduct (Serious Offense)
- Drug Abuse
- In Lieu of Trial by Court-Martial

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Impact of Characterization of Service at VA



- ▶ Honorable: Eligible for all VA benefits (disability comp, health care, GI Bill, home loans)
- ▶ General: Eligible for all VA benefits except GI Bill
- ▶ Not eligible for VA benefits:
 - ▶ OTH
 - ▶ Ch. 17 (VA medical) benefits for regulatory bars
 - ▶ Some mental health care in certain circumstances
 - ▶ Bad Conduct
 - ▶ Dishonorable

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DU or COD?

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DoD Boards: DU

- ▶ Upgrade the discharge itself
 - Equity or propriety
 - "error or injustice"
- ▶ A variety of memos provide guidance for when upgrade is appropriate

VA: COD

- ▶ Determine if discharge under conditions "other than dishonorable"
- ▶ Some bars are statutory; some are regulatory

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How to Start a VA COD Determination

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- ▶ Request for benefits (e.g., VA Form 21-526EZ or 20-0995)
 - Bifurcated determinations
- ▶ COD determination request (no form) under 38 U.S.C. § 5303B
 - Effective date for benefits?
- ▶ Request for Health Care (VA Form 20-0986, filled out by VHA)
 - Turn-aways

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Section 3.12 prior to 6/25/24

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Statutory Bars

- (1) Conscientious objector
- (2) GCM
- (3) Resignation by an officer for the good of the service
- (4) Deserter
- (5) Alien during a period of hostilities, where former service member requested release
- (6) OTH for AWOL for a continuous period of 180+ days, **unless compelling circumstances**

Regulatory Bars

- (1) Discharge in lieu of GCM
- (2) Mutiny or spying
- (3) Moral turpitude. This includes, generally, conviction of a felony
- (4) Willful and persistent misconduct
- (5) Homosexual acts involving aggravating circumstances

All bars: exception for "insanity"

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COD Determinations are Complex for Everyone

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VOR/ACO

Subject: RE: Possible Solution VOR Response to Swords Reg Petition - Section 17.34

Many of these suggestions fail to understand the issues involved in a COD determination. You do not simply look at a VOR and give a thumbs up or down. It is a legal and factual due process and a difficult one. Having opinion, is not the same as having facts.

To help you in this process in making these difficult determinations, you must:

- 1) Gather all relevant records. As VA's duty to assist applies, this would include requesting medical and personal records from the service department and any other source available. These could be civilian court records from decades ago, or records from overseas medical facilities.
- 2) Once evidence is gathered, a adjudicator must peer over these collected volumes of court proceeding and personal records to determine if the claimant has a "disability due to or aggravated by service, or if the claimant has a disability due to or aggravated by a disease, and if all the legal requirements for service connection are met."
- 3) Once the documents are read, the adjudicator must apply a series of complex legal and regulatory rules to make a determination. VA has the right to appeal the decision. VA will have to provide appropriate notice. And the claimant has the right to appeal the decision.

Even after all of this is done and the adjudicator makes the determination, that does not end the issue. VA still has to provide appropriate notice. And the claimant has the right to appeal the decision.

VVA wants to do a right by veterans, but this is not an easy process. I have just touched on a few of the issues involved in a COD. I'm sure [\[redacted\]](#) or [\[redacted\]](#) could explain the myriad of other steps that I have glossed over. [\[long story\]](#)

From: Karen, Cleveland, VBA/ACO
Sent: Mon, 11 Jul 2016 16:06:29 -0400
To: [\[redacted\]](#)
Subject: RE: Character of Discharge and Tentative Health Care Eligibility Reg Change
Status Update and Planning Meeting

It is copy that was sent to me. I had CS pull a VOR list last month and at that time - we had 7,805. I have attached the VOR Pull.

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The New Reg

Changes to the Regulatory Bars

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Section 3.12 as of 6/25/24

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Statutory Bars

- (1) Conscientious objector
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Regulatory Bars

- (1) Discharge in lieu of GCM
- (2) Mutiny or spying
- (3) Moral turpitude. This includes, generally, conviction of a felony
- (4) Willful and persistent misconduct: New Definition
- (5) Homosexual acts involving aggravating circumstances

All bars: exception for "insanity"

AWOL, MT, W&P: compelling circs. (new def)

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COD Population Data



1. 540,000 living vets with LTH discharges
2. 8% of LTHs vets have prior COD determination
3. VA projects that 4,072 vets + 213 survivors "newly" eligible under revised COD regulation

Table 6: Former SMs with a Previous COD Determination Found Newly HVA				
	Under OTH	Bad Conduct	Dishonorable	Total
Total Starting Population - Oct 1, 2023	41,741	400	2,403	44,604
Percent Applying for COD Determination	40%	10%	10%	
COD Claims	16,696	46	240	16,932
Deceased Found HVA	107	10%	3%	
Former SMs Newly HVA	1,670	5	7	1,682

Table 8: Former SMs without a Previous COD Determination Found Newly HVA				
	Under OTH	Bad Conduct	Dishonorable	Total
Total Starting Population - Oct 1, 2023	468,288	5,163	26,963	500,414
Percent Applying for COD Determination	5%	10%	1%	
COD Claims	23,414	516	270	24,200
Deceased Found HVA	152	3%	3%	
Former SMs Newly HVA	2,341	41	8	2,380

Table 12: Survivors of Deceased Former SMs Found Newly HVA				
	Under OTH	Bad Conduct	Dishonorable	Total
Total Starting Population - Oct 1, 2023	8,309	336	705	9,350
Percent Applying for COD Determination	25%	10%	10%	
COD Claims	2,077	34	71	2,182
Deceased Found HVA	100	8%	3%	
Survivors of Former SMs Newly HVA	268	3	2	273

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What's the same?



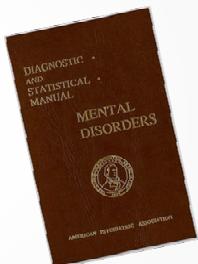
- **Section 3.12(a)**

- Everyone w/OTH, BCD, DD still needs a COD determination

- **Section 3.12(b)**

- "Insanity" definition remains the same in 38 C.F.R. § 3.354

- **Section 3.12(c): No change to statutory bars**



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Regulatory Bars: 3 of 5 Unchanged



- Discharge in lieu of court martial
- Mutiny or spying
- Moral turpitude



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Racial Disparities in Military Justice

Protect Our Defenders

Racial Disparities in Military Justice, 2017

- Overall, black service members were at least 1.29 times and as much as 2.61 times more likely than white service members to have an action taken against them in an average year
- Air Force: black airmen on average are 1.71 times (71%) more likely to face court-martial or Non-Judicial Punishment (NJP) than white airmen
- Marine Corps: black Marines are, on average, 1.32 times (32%) more likely to receive a guilty finding at a court-martial or NJP proceeding than white Marines, with the size of the disparity becoming more significant the more serious the disciplinary action was
- Navy: black sailors are on average 1.40 times (40%) more likely than white sailors to be referred to special or general court-martial
- Army: black soldiers are on average 1.61 times (61%) more likely to face a special or general court-martial compared to white service members

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Racial Disparities in Military Justice

RegAF Racial-Ethnic Disparity in Enlisted Courts-Martial and Article 15s (FY12-FY19)

Enlisted Grade	Native American	Asian	Black	Hispanic/Cuban	Pacific Islander	Multi-Racial	White
E1-E9	95%	-10%	53%	-3%	-1%	2%	-5%

Enlisted Grade: Native American, Asian, Black, Hispanic/Cuban, Pacific Islander, Multi-Racial, White

Source: Inspector General, Air Force Disparity Review, Sept. 2021

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Regulatory Bars: The Changes

- “Homosexual acts involving aggravating circumstances” removed
- “Willful & persistent” definition changed
 - In final rule, VA says new definition “brings both objectivity and liberalization” – Will it?

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Willful & Persistent Misconduct



- ▶ **Instances** of minor misconduct occurring within two years of each other are persistent; an instance of minor misconduct occurring within two years of more serious misconduct is **persistent**; and instances of more serious misconduct occurring within five years of each other are persistent
- ▶ “Minor misconduct” is misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial

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More than the CFR: Read the Preamble!



- ▶ “VA thanks these commenters for their comments and clarifies here that VA will consider multiple offenses that originate from a single event or circumstance (e.g., attempted robbery leading to fleeing and then leading to resisting arrest) as one “instance” of misconduct.”
- ▶ Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, 89 Fed. Reg. 32,361, 32,366 (Apr. 26, 2024)

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More than the CFR: Read the Preamble!



- “[A]s discussed below, VA agrees with the commenters who recommended limiting the conduct being considered for a COD determination to **only that which formed the basis of the discharge** from service.”
- VA says its new persistence definition “makes sense, because—if the military will no longer prosecute an offense after a certain period of time—there is no reason for VA to link that offense to other misconduct in order to find persistence.”

Manual for Court Martial: Example

Article 91 (10 U.S.C. § 891)—Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

Any warrant officer or enlisted member who— . . .
(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer

Sentence:

(4) Willfully disobeying the lawful order of a warrant officer. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(5) Willfully disobeying the lawful order of a noncommissioned or petty officer. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

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The New Reg

Compelling Circumstances

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Compelling Circumstances



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Reasons for Prolonged AWOL or Misconduct

What Was Removed From Compelling Circumstances?



The NVLSP logo is located in the top right corner. It features a stylized eagle with wings spread wide, perched on a circular base. The text "NVLSP" is prominently displayed in large, bold, blue letters, with "NATIONAL VETERANS LEGAL SERVICES PROGRAM" in smaller letters below it.

- **Removed:** "Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted....[Reasons for going AWOL are] to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began."
 - Used to be a clear subjective test. What is it now?
- **Removed:** "... other service-incurred or aggravated disability [are] to be carefully and sympathetically considered."
 - For the list of mental and physical health issues, there is no service-connection-like requirement
 - "VA confirms the mental or cognitive impairment need not be service connected or subject to service connection to be considered as a compelling circumstance to excuse the prolonged AWOL or misconduct. Neurodevelopmental conditions, such as ADHD or personality disorders, may excuse prolonged AWOL or misconduct even if no VA benefits can be awarded for the same condition."



Procedural Considerations

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Effective Date Issues

- **New regulation effective June 25, 2024**
 - 60-day pause for policy letter
- **If eligible only under new reg & apply by 6/25/25, ED = 6/25/24**
 - 38 U.S.C. § 5110(g); C.F.R. § 3.114(a)(1)
- **Pending COD? Expect issues with EDs**
- **Previously denied? – de novo review**
 - File supplemental claim (VA Form 20-0995)
 - The new regulation qualifies as “new & relevant” evidence

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Issues and Practice Tips

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Issue Spotting

More Issues and Concerns



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More Issues and Concerns



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More Issues and Concerns



► Hamill & Harris

- Beware of the implicit denial
- Manual M21-1 updated to require VA adjudicators to issue explicit NRE determinations when deciding whether a prior COD decision should be reopened
 - Manual M21-1, X.iv.1.A.1.r
- Clients may be receiving these NRE determinations "out of the blue"
- See *Hamill v. McDonough*, 37 Vet. App. 65 (2023); and *Harris v. McDonough*, 33 Vet. App. 269 (2021) for more info

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Practice Tips



- Equitable arguments
- Expansive evidence
- If prior COD determination, be explicit about request for benefits AND another COD determination
 - ED for benefits
- Keep on top of Ch. 17 (VA medical) benefit decisions & first time COD determinations
- Watch for Policy Letter and changes to Manual M21-1

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Questions?



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Upcoming Webinars



Dates	Topic	Presenter
Aug. 29	Understanding Recent Changes to VA's Rating of Digestive System Disabilities	Liz Tarloski

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Library of Past Webinars



- ▶ Previous NVLSP webinars are available at <https://productsbynvlsp.org/webinars/>
 - ▶ Webinars are available for 72 hours after purchase
 - ▶ Topics include:
 - ▶ VA Accreditation Training – Attorney and Agent Practice Before the VA
 - ▶ Navigating VA's Modernized/AMA Review System
 - ▶ VA Benefits Based on National Guard and Reserve Service

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NVLSP VA Benefits Identifier App

- ▶ Questionnaire/App: Helps Vets and advocates figure out what VA service-connected disability benefits or non-service-connected pension benefits they might be entitled to
- ▶ 3 WAYS to Access:
 - [NVLSP Website](#)
 - Download on the  [App Store](#)
 -  [Google play](#)

NVLSP Training Opportunities