VA Character of Discharge Determinations

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Restoring Veteran Status Through VA Character of Discharge Review

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SWORDS TO PLOWSHARES
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AGENDA

- What is a Character of Discharge (COD) determination?
- VA COD v. DOD discharge upgrade.
- COD eligibility criteria.
- COD application process.
- COD hearings.
- Common VA COD errors.
- Next steps after a COD decision.
Swords to Plowshares

Supportive Housing Programs

Employment & Job Training

Policy and Community Education

Health & Social Services

Supportive Services for Veteran Families

Legal Services
Swords to Plowshares has been working with veterans with “bad paper” since 1974 and is a pioneer in this area of veterans law.

Oakland Vet Center-Swords to Plowshares Medical-Legal Partnership, launched November 2016.

Only 1 of ~3 Medical-Legal Partnerships at the ~300 Vet Centers across the country.

Vet Centers are unique! Unlike VHA, Vet Center doors are open to veterans with all discharge statuses.

To qualify for therapy at a Vet Center, veterans must have experienced Military Sexual Trauma, served in a combat theater or other area of hostility, or operated a drone.
What is a COD Determination?

Determination by the VA that a veteran’s discharge was “other than dishonorable.”

- **38 U.S.C. § 101 (2):** “The term ‘veteran’ means a person who served in the **active** military, naval, or air service, and who was discharged or released therefrom under conditions **other than dishonorable.**”

- Favorable COD renders a veteran “**Honorable for VA purposes.**”
When is a COD Required?

<table>
<thead>
<tr>
<th>Military discharge characterization</th>
<th>VA character of discharge</th>
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<tbody>
<tr>
<td>Honorable</td>
<td>Honorable for VA Purposes</td>
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<tr>
<td>General / Under Honorable Conditions</td>
<td></td>
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<tr>
<td>Uncharacterized</td>
<td></td>
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<tr>
<td>Other Than Honorable / Undesirable</td>
<td>Subject to COD</td>
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<tr>
<td>Bad Conduct</td>
<td></td>
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<td>Dishonorable</td>
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VA COD v. DOD Discharge Upgrade

- **VENUE:**
  - **VA** adjudicates CODs.
  - **DOD/DHS** adjudicates discharge upgrades.

- **CORRECTING MILITARY RECORDS:**
  - CODs do **NOT** change a veteran’s military records. VA issues a decision letter finding the veteran “Honorable for VA Purposes.”
  - Discharge upgrades **DO** change military records, including but not limited to the Character of Service and Narrative Reason for Separation.
VA COD v. DOD Discharge Upgrade

- **ELIGIBILITY:** *BOTH* restore eligibility for VA healthcare, compensation, pension, housing programs.

  ➢ *ONLY* DOD discharge upgrade restores eligibility for *G.I. Bill* education benefits.

- **AUTHORITY:** VA COD *persuasive* before DOD and DOD discharge upgrade *binding* on VA.

- **HEARINGS:** more accessible in COD process.

- **SPEED:** CODs tend to be *faster.*
COD Eligibility Criteria

38 C.F.R. § 3.12: VA’s criteria for determining whether a former service-member is “Honorable for VA purposes.”

- Contains Statutory and Regulatory Bars.
  - **Regulatory bar:** eligible for VA healthcare for service-connected conditions under “Chapter 17” without favorable COD.
  - **Statutory bar:** ineligible for Chapter 17 healthcare. See also 38 U.S.C. § 5303(a) for statutory bars.

Discharge circumstances & Chapter 17 healthcare: 38 C.F.R. § 3.360(b).
COD Regulatory Bars

38 C.F.R. § 3.12(d)

• Willful and persistent misconduct.
• Moral turpitude.
• Discharge in lieu of a General Court-Martial.
• Mutiny or spying.
• Homosexual conduct with aggravated circumstances.
**Willful & Persistent Misconduct**

Engaging in willful AND persistent misconduct during military service. A discharge because of a minor offense will not be considered willful and persistent misconduct if service was otherwise honest, faithful, and meritorious. 38 C.F.R. § 3.12(d)(4).

**WILLFUL**

- “Deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.” 38 C.F.R. § 3.1(n)(1).
- Mental health may mitigate against willfulness.
- Drug use: not willful if “isolated and infrequent” or secondary to in-service disability. 38 C.F.R. § 3.301(c)(3).
Willful & Persistent Misconduct

PERSISTENT


• Duration of prior service may be a factor. *See, e.g., Bd. Vet. App. No. 9621544.*

MINOR

• Not minor if precludes performance of duties. 

• Technically, NJPs are minor. 
  *UCMJ Art. 15; see, e.g., Bd. Vet. App. No. 1513960.*

• AWOL >30 days not minor. 
  *Winter v. Principi, 4 Vet. App. 29 (1993).*

OTHERWISE HONEST, FAITHFUL, & MERITORIOUS

• Awards, deployment, performance marks, etc.
Moral Turpitude

An offense involving moral turpitude. This includes, generally, conviction of a felony. 38 C.F.R. § 3.12(d)(3).

MORAL TURPITUDE

• “Willful act,” “gravely violates accepted moral standards,” “expected to cause harm to person or property.”
  VA OGC Prec. Op. 6-87.

• Felony creates rebuttable presumption of moral turpitude.
  VA OGC Prec. Op. 6-87.

• Must consider mitigating circumstances.
  M21-1 Part III.v.1.B.3.c.
Less Common Regulatory Bars

- In lieu of a General Court-Martial. 38 C.F.R. § 3.12(d)(1).
  - DD214 may state “in lieu of Court-Martial” or “for good of service” → look at record to see if in lieu General Court-Martial.

- Mutiny or spying. 38 C.F.R. § 3.12(d)(2).

- Homosexual conduct with aggravated circumstances. 38 C.F.R. § 3.12(d)(5).
COD Statutory Bars

38 U.S.C. § 5303(a); 38 C.F.R. § 3.12(c)

• Discharge by General Court-Martial.
  ➢ Dishonorable discharges and some Bad Conduct discharges; often not stated on DD214.

• AWOL >= 180 continuous days, unless:
  ➢ “Compelling circumstances,” e.g., quality of service, reasons for going AWOL, maturity, health, mitigating circumstances. 38 C.F.R. § 3.12(c)(6)(i – iii).
COD Statutory Bars

• Desertion.
  ➢ Refers to UCMJ Art. 85, not “AWOL,” “UA,” “Dropped from rolls.”

• Conscientious objector who refused to follow lawful orders.
  ➢ Some conscientious objectors follow orders.

• Alien during a period of hostilities when service-member requested his/her release.

• Resignation of an officer for the good of the service.
“Insanity” Exception

Not barred if *insane at the time of the offense leading to discharge.* 38 C.F.R. § 3.12(b).

Insane:

- Not “mentally defective or constitutionally psychopathic.”

- Exhibits, due to disease:
  1. “a more or less prolonged deviation from his normal method of behavior.”
  2. Or “interferes with the peace of society.”
  3. Or “lack[s] the adaptability to make further adjustment to the social customs of the community in which he resides.”

38 C.F.R. § 3.354(a).
“Insanity” Exception

VA OGC Prec. Op. 20-97

• Cannot be due to antisocial personality disorder.

• Cannot be directly attributable to a substance-abuse disorder.

• Must “deviate severely” from social norms or prior behavior.

• More or less synonymous with psychosis → PTSD can qualify. See Bd. Vet. App. No. 9726547.

Contains instructions for VA processing of COD applications:

Knowva.ebenefits.va.gov
Reader of the VA Manual beware!

Manual does not necessarily conform to law. For instance:

- Until 2016, Manual erroneously asserted Benefit of the Doubt N/A CODs.
- Until 2017, Manual erroneously asserted veterans with Bad Conduct discharges are not eligible for VA healthcare even if they get a favorable COD:

  “A former service member with a BCD is ineligible for health care, even if VA determines his/her service is HVA [Honorable for VA purposes].”

M21-1, Part III, Subpart v, Chapter 1, Section B - Statutory Bars to Benefits and Character of Discharge (COD) (III.v.1.B)

12/20/2017

Updated to delete a misleading note regarding health care.
COD Application Process

(1) VBA Directly: Must apply for a benefit.

- COD review not done spontaneously.
- COD review not necessarily done when seeking VA healthcare or housing.
- COD should be triggered automatically with benefit application.
- No separate COD application process or form.

Apply for: Compensation, Pension, Home Loan Eligibility
COD Application Process

(2) Through VA Health Administration eligibility review.

- Insist the VA hospital eligibility office complete VA Form 10-7131.
- Check that it requests COD review.
- Get copy. File the copy with a VA Form 21-4138 requesting establishment of a claim. Provide supporting COD evidence and arguments.

NOTE:

- Not uncommon for veterans to have received a COD review and a denial but not be aware.
- Need New & Material evidence to reopen if past appeal deadline.
Elements of a COD Application

To trigger COD review:

1. Benefit application.
   • E.g., 21-526EZ compensation form.
2. Request for hearing.
   • Form 21-4138: “I request a hearing on the issue of my COD.”
3. Notation of New & Material Evidence (if necessary).
   • Form 21-4138: “The attached claimant statement provides New & Material Evidence on the issue of Character of Discharge to reopen the claim.”

Can be provided with application or at/after hearing:

4. Legal brief.
5. Veteran statement.
6. Supporting statements.
   • Friends, family, fellow service-members, commanders.
7. Medical opinions/treatment records.
   • If arguing not willful and/or insanity.
8. Service records.
The importance of creating a complete chronology of a veteran’s service includes:

- **Tell your client’s story.**
- **Demonstrate behavior change** (e.g., Military Sexual Trauma).
- **Help medical experts write opinions.**
- **Argue against persistence, show insanity** (severe deviation in conduct), give reasons for AWOL, etc.
How to Obtain a COD Hearing

• Request a hearing in benefits application to trigger COD.

• Reaffirm desire for a hearing within 60 days of receiving COD development letter.

• Submit evidence entitling veteran to expedited consideration (homelessness, financial hardship, age, etc.) and request expedited scheduling of hearing.
COD Hearings at the VA Regional Office

• Sometimes in-person, sometimes by video.

• No time limit. (Mine have ranged from 20 min. to 2 hrs.)

• Usually two VA adjudicators, sometimes more.

• Sometimes possible to speak informally with Hearing Officer in advance and provide evidence directly.

• Do not assume Hearing Officer has read your filings.

• Hearing Officer is not a COD specialist.

Hearing Officer will not necessarily decide the COD!
COD Hearing Format

• Hearing will begin by Hearing Officer reading a script.

• Then will open the floor to you to conduct the hearing as you please, to give an opening, call witnesses, etc.

• Leading questions are permitted.

• Hearing is recorded and transcribed.

• You are allowed to take as many off-the-record breaks as you like to confer with the veteran or for any other reason.
COD Hearing Testimony

VETERAN

- Veteran should attend. (May be possible for veteran to call in.)

- Hearing Officer will always ask if veteran has something to say. But veteran is not required to testify.

- Not always a good idea for veteran to testify.

FRIENDS, FAMILY, BUDDIES, ETC.

- Friends/family likely only helpful if knew veteran during service. Can attend for moral support.

- Buddies can be very helpful, but rare for them to attend.

- Dogs: apparently permitted at Oakland RO hearings.
MEDICAL EXPERTS

• Permitted to attend and testify with veteran consent. (Form signed at hearing.)

• **Prepare your medical expert thoroughly.**
  
  ➢ Clinicians may tend to focus on current, as opposed to in-service, symptoms.
  
  ➢ Familiarize them with VA terms (e.g., insanity, willfulness).
Common VA Questions at COD Hearings

• You were denied before. Why should VA grant now?
• Why did you only start mental health treatment X years after service?
• Did you turn yourself in after your AWOL or were you caught?
• Did anyone in your command do anything to try to stop your discharge?
• Did anyone else in your unit receive an OTH?
• Were you satisfied with your Court-Martial lawyer?
• Are you getting treatment for your PTSD?
• How do you feel about your service?
• Have you filed a discharge upgrade application?
Often VA Asks Few Questions

Common for Hearing Officers not to Ask Many Questions

• Position that they are present simply to “absorb” veteran’s evidence and to get it on the record.

• Ask Questions to prompt Hearing Officer to reveal their reaction to evidence and overall assessment of veteran’s case to create opportunity to respond:
  ➢ E.g., given the evidence presented, are there any barriers to a favorable COD?

Get Hearing Officer’s contact information.
After the COD Hearing

• Wait for hearing transcript. (Can take several months.)

• Veteran has the right to waive the transcript to speed up decision process.

• Sometimes additional development if Hearing Officer suspects military records are incomplete, for instance.

• Can submit additional evidence.

• Follow up with Hearing Officer to make sure case has been assigned and is being worked.
Common VA COD Errors

• Fail to recognize multiple enlistment periods. (38 C.F.R. § 3.13).

• Patent factual errors (e.g., typo that AWOL was 100 days instead of 10).

• Higher evidentiary burden for Bad Conduct discharges irrespective of Court-Martial type.

• Mental health in service only relevant if condition amounts to “insanity” as defined in VA law.

• Failure to consider all evidence of record; look at list in denial.
Common VA COD Errors

• Benefit of the Doubt rule inapplicable because applicant is not a “veteran.”

• Refusal to expedite under Flashes (e.g., Homeless Flash) because applicant is not a “veteran.”

• Application of DOD-like “error” standard.

• Mixing up statutory and regulatory bars for Chapter 17 healthcare purposes.
VA healthcare, benefits, and housing eligibility!

• Some delay in processing of service-connection claims, but little confusion about eligibility post-COD.

• Sometimes a fight to get enrolled in VA healthcare due to inadequate training of eligibility staff.

• In many cases, easy to convert COD filings into DOD upgrade filings.
Life After a Negative COD

Keep Fighting!

- Request Reconsideration, *fast*.

- File a Clear & Unmistakable Error (CUE) claim.

- Consider pushing for VHA eligibility for service-connected conditions under Chapter 17 if eligible.
Some Takeaways

• Make friends at your VA Regional Office!

• Get contact information at every opportunity.

• Almost always request a hearing.

• Tell your client’s story through the lens of VA COD laws.

• Do not overlook traumas that occurred during service unrelated to service.

• Do not assume Hearing Officer/decision-maker knows COD laws or rules.

Try to prevent common VA errors!
QUESTIONS?