Slide 1

Restoring Veteran Status Through VA Character of Discharge Review

March 24, 2019

Rose Carmen Goldberg
SWORDS TO PLOWSHARES
www.swords-to-plowshares.org

Slide 2

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.

Slide 3

Swords to Plowshares

Supportive Housing Programs
Employment & Job Training
Health & Social Services
Policy and Community Education
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>
</tr>
</thead>
<tbody>
<tr>
<td>Honorable</td>
<td>Honorable</td>
</tr>
<tr>
<td>General / Under Honorable Conditions</td>
<td>Honorable for VA Purpose</td>
</tr>
<tr>
<td>Uncharacterized</td>
<td>Subject to COD</td>
</tr>
<tr>
<td>Other Than Honorable / Undesirable</td>
<td>Poor Conduct</td>
</tr>
<tr>
<td>Dishonorable</td>
<td></td>
</tr>
</tbody>
</table>

COD Practice Site: Oakland Vet Center

• 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>
</tr>
</thead>
<tbody>
<tr>
<td>Honorable</td>
<td>Honorable</td>
</tr>
<tr>
<td>General / Under Honorable Conditions</td>
<td>Honorable for VA Purpose</td>
</tr>
<tr>
<td>Uncharacterized</td>
<td>Subject to COD</td>
</tr>
<tr>
<td>Other Than Honorable / Undesirable</td>
<td>Poor Conduct</td>
</tr>
<tr>
<td>Dishonorable</td>
<td></td>
</tr>
</tbody>
</table>

COD Practice Site: Oakland Vet Center

• 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.
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.

**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. § 5101(a) for statutory bars.

Discharge circumstances & Chapter 17 healthcare: 38 C.F.R. § 5101(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).

PERSISTENT

• Multiple offenses not necessarily persistent. M21-2 Part II.a.8.3.d.
• Not persistent if spread out in time.
• Duration of prior service may be a factor.
• AWOL: no set benchmark for how long is persistent. Winter v. Principi, 4 Vet. App. 29 (2001); 18% service persistent.
Slide 13

Minor Misconduct, Otherwise Meritorious

**MINOR**
- Technically, NJPs are minor. UCMJ Art. 15, w.e., e.g., Bd. Vet. App. No. 152396.

**OTHERWISE HONEST, FAITHFUL, & MERITORIOUS**
- Awards, deployment, performance marks, etc.

Slide 14

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.

Slide 15

Less Common Regulatory Bars

- In lieu of a General Court-Martial. 38 C.F.R. § 3.12(c)(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(b)(6) — (16).

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. § 3.354(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. “interferes with the peace of society.”
  3. “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

- 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.

VA Adjudication Manual

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.

Updated to delete a misleading note regarding health care.

*A former service member who has a disability for which he or she is rated 30% or higher, was not VA determined to be separated from VA service is not entitled to VA pension.**
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 receive a COD review and 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 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.
Service Chronology

IMPORTANT to create a complete chronology of veteran's service, using military records and other evidence. Use the chronology to:

• 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 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 30).
- 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.

Life After a Favorable COD

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.
Slide 37

Life After a Negative COD

Keep Fighting!

- Request Reconsideration, fast.
- File a Clear & Unmistakable Error (CUE) claim.
- Consider pushing for VA eligibility for service-connected conditions under Chapter 17 if eligible.

Slide 38

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!