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Restoring Veteran Status
Through VA Character of
Discharge Review

March 22, 2019

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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.

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Swords to Plowshares

- Supportive Housing Programs
- Health & Social Services
- Employment & Job Training
- Supportive Services for Veteran Families
- Policy and Community Education
- Legal Services

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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.

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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.



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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).

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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.

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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. § 3.302(c)(3).

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Willful & Persistent Misconduct

PERSISTENT

- Multiple offenses not necessarily persistent.
M21-1 Part III.v.1.B.3.d.
- Not persistent if spread out in time.
See, e.g., Bd. Vet. App. No. 1515536.
- Duration of prior service may be a factor.
See, e.g., Bd. Vet. App. No. 9621544.
- AWOL: no set benchmark for how long is persistent.
Winter v. Principi, 4 Vet. App. 29 (1993) (18% service persistent).

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Minor Misconduct, Otherwise Meritorious

MINOR

- Not minor if precludes performance of duties.
Stringham v. Brown, 8 Vet. App. 445, 448 (1995).
- 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.

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Moral Turpitude

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

MORAL TURPIDITY

- “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.

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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).

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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).

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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.



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"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).



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"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.
- Causation between insanity and misconduct not required; only need be contemporaneous. See *Struck v. Brown*, 9 Vet. App. 145 (1996).

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VA Adjudication Manual

Contains instructions for VA processing of COD applications:
[Knowva.ebenefits.va.gov](http://knowva.ebenefits.va.gov)



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VA Adjudication Manual

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.

[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.

"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]."

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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



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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.



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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.


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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.




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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.




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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!




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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.



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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.



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COD Hearing Testimony

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).




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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?



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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.



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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.

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Common VA COD Errors

- Fail to recognize multiple enlistment periods. (38 C.F.R. 4.3.43)
- 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.




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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.




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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.




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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.


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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!



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QUESTIONS?



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