

Utilizing the Secretary of Defense Memorandum of September 3, 2014 for upgrading discharges.

For many former service members an adverse discharge (AKA Bad Paper)ⁱ is a major impediment to post service life. These separations bar the former service member from most benefits administered by the Department of Veteran's Affairs,ⁱⁱ and such a discharge may also preclude certain types of employment, particularly employment with a governmental agency or any employment that requires a security clearance.ⁱⁱⁱ

Historically, review of the character of service as set forth on such discharges has been very limited. In 1948, Congress established mechanisms for administrative review in each service^{iv}. Those entities are the service discharge review boards and boards for correction of military and naval records. However, judicial review of the decisions of those boards which consider requests for recharacterization of the discharge (also known as an upgrade) remains very narrow.^v

Large numbers of former service members with adverse discharges suffer from Post Traumatic Stress Disorder (PTSD). The condition may manifest itself in many forms and often contributes to behaviors which cause the former members to be subject to military discipline, or be considered for adverse administrative action (e.g. separation for alcohol or substance abuse).

This issue is compounded by the fact that the American Psychiatric Association did not recognize Post Traumatic Stress Disorder as a separate condition until the publication of the Diagnostic and Statistical Manual II (DSM II) in 1980. Accordingly there is often little or no medical evidence in the service or medical records to support a claim of PTSD when an older former member seeks review of her/his adverse discharge. Consequently such claims were often rejected by the review boards as not supported by any evidence of PTSD at the time of the misconduct or other behavior which led to the separation.

In response to considerable publicity regarding the interrelationship of PTSD and military discipline and the administrative processes, the Secretary of Defense issued a memorandum on September 3, 2013, drawing attention to this issue^{vi}. Specifically the Secretary noted that:

BCM/NRs will carefully consider every petition based on PTSD brought by each veteran. This includes a comprehensive review of all materials and evidence provided by the petitioner. Quite often, however, the records of Service members who served before PTSD was recognized, including those who served in the Vietnam theater, do not contain substantive information concerning medical conditions in either service treatment records or personnel records. It has therefore been extremely difficult to document conditions that form the basis for mitigation in punitive, administrative, or other legal actions or to establish a nexus between PTSD and the misconduct underlying the service member's discharge with a character of service of other than honorable conditions.

Of greater use to practitioners are the attachments to the memorandum which provide more direct guidance to the review boards (particularly the boards for correction of military and naval records) of such cases. The attachments clearly indicate that great weight must be given to the assertions of PTSD by former members seeking review. For example the attachment directs the boards to give "special consideration" to findings by the Department of Veteran's Affairs (AKA the VA) that the former service member has PTSD that is connected to her/his military service. In addition, the boards must give "liberal consideration" to finding that the former member suffered from PTSD during her/his military service where her/his military service and medical records document one or more of the symptoms of PTSD or PTSD related conditions (see below for the symptomology).

Former service members who were discharged "under honorable conditions" (i.e. with a "general" discharge) and seek to have that separation recharacterized or to have the basis changed, should seek a mental health evaluation from the Department of Veteran's Affairs. Because the memorandum directs the discharge review authorities to give "special

consideration” to a finding of the existence of PTSD by the Department of Veterans Affairs this is strong evidence that the separation warrants changing.

Additionally it should be noted that many veterans discharged for misconduct in recent years had been diagnosed with PTSD while on active duty. However, they were administratively separated and not placed before a physical disability evaluation board. In the settlement of a class action suit before the Court of Federal Claims, the Department of the Defense agreed to reevaluate such veterans and consider whether the diagnosed PTSD warranted a finding that the veteran was “unfit for service”^{vii} and should have been placed on the retired list rather than administratively discharged. *Sabo v. United States*, (No 08-899C CtCl. July 28, 2011)

The practical problem here is that a former service member who has “bad paper” is normally precluded from medical treatment by the VA. However, where the former member suffers from severe mental illness the VA tends to be very liberal in its recognition of the impaired ability to serve honorably. In such cases counsel should have the former member apply concurrently for service connected disability compensation and a character of service (COS) review by the VA. A person with chronic PTSD arguably fits the VA’s definition of insanity “one who, while not mentally defective or constitutionally psychopathic...exhibits, due to disease, a more or less prolonged deviation from his normal method of behavior....” 38 CFR Sec. 3.354. *See* VA GCoun. Prec. 20-97 (May 22, 1997). In this regard the VA’s insanity definition is much more lenient than the military’s or civilian criminal standard, as the Court of Appeals for Veteran’s Claims (CAVC) has said that a person’s understanding of right/wrong and consequences is not germane to the VA’s determination. *See Gardner v. Shinseki*, 22 Vet. App. 415, 420 (2009). Thus even though the former member may have a discharge that characterizes

his service as “other than honorable” the VA may not hold it to be “under conditions of dishonor” and authorize diagnosis and treatment.

Other sources of a medical diagnosis of PTSD might include applications for Social Security Disability payments, or similar benefits, state or local economic compensation programs or the former member’s civilian medical records. While these types of documents do not carry the weight of a VA diagnosis, they are certainly strong evidence of the former member’s condition during her/his active duty. When combined with other evidence (e.g. military service records documenting the types of behavior recognized as symptomatic of PTSD), it strengthens the argument that the former member’s service should be recharacterized and her/his discharge be upgraded, or in appropriate cases that there be a change to the basis for discharge.

When reviewing the records of a former service member in preparation for a request for an upgrade, several facts must be considered. The first is the criteria for a diagnosis of PTSD. Those criteria are found in the Diagnostic and Statistical Manual of the American Psychiatric Association. The general criteria are;

- A. The person has been exposed to a traumatic event;
- B. The traumatic event is persistently reexperienced (e.g. dreams, flashbacks etc.)
- C. Persistent avoidance of stimuli associated with the trauma and [numbing](#) of general responsiveness
- D. Persistent symptoms of increased arousal (not present before the trauma),
- E. Duration of the disturbance is more than 1 month.
- F. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning (e.g., substance abuse, alcoholism, inability to hold sustained employment, sleep disorders).

Examination of the former member’s service records for evidence of the behaviors listed above is the key to finding evidence to support the upgrade. Discipline records for such offenses as failure to report for duty, dereliction of duty, minor assaults, and intoxication either

by alcohol or other substances, are often indications that the former member suffered from PTSD while on active duty. The attachment to the memorandum directs that where such offenses or other evidence shows the existence of the factors set forth above, the boards should give “liberal” consideration to finding that PTSD existed at the time of that member’s service thus mitigating the members conduct, and suggesting that the member’s service was not “other than honorable.”

The foregoing is not intended to be an exhaustive discussion of this issue. There are many sources of information that may be utilized in support of an argument that the former service member suffered from PTSD while on active duty. If the former member has remained in touch with peers or superiors, they may be able to supply statements supporting this contention. Civilian misconduct immediately following discharge which is similar in nature to that for which the former member was separated (e.g. alcohol related offenses) and similar behavior may lend support. The practitioner should remember that the review boards are not bound by the rules of evidence, and any evidence germane to the argument may be considered.

The memorandum should not be considered a “get out of jail free” card. By its terms it excludes pre-existing conditions that were not aggravated by military service. It also notes that “PTSD is not a likely cause of premeditated misconduct”. Finally, it directs that “caution” will be used in weighing the mitigating effect of PTSD “by carefully considering the likely causal relationship of symptoms to the misconduct.” Finally, the memorandum does not address the question of review of reenlistment (RE) codes. Thus many former members, particularly those discharged as a result of the sentence of a court-martial, may not be in a position to avail themselves of its language.

For the counsel who is consulted by a former service member seeking review of her/his involuntary adverse separation, particularly for minor misconduct, the memorandum provides a

strong floor for recharacterization of the veteran's discharge. As with all cases, marshalling of the evidence, and clear logical arguments are paramount. However the memorandum adds an additional basis for arguing that the discharge should not be considered "other than honorable."

ⁱ For the most part these are discharges that are either the product of the sentence of court-martial or issued for misconduct, e.g. use of controlled substances. Additionally in the past (prior to the 1980s) service members who either admitted being homosexuals or who engaged in homosexual acts were issued "undesirable" – i.e., other than honorable, discharges. For a fuller discussion of the types of discharges see "Curing Bad Paper" TFL July 2010. There is some debate as to whether a "general" discharge, that is one "under honorable conditions" is adverse.

ⁱⁱ See 38 U.S.C. § 101 (2) for a definition of a "veteran" – one whose service was "not under conditions of dishonor." This language often leads to confusion as to the type of discharge issued the former member. Many former service members (as well as the general public) refer to any adverse separation as being a "dishonorable discharge." A "dishonorable discharge" is only issued as the result of the sentence of a general court-martial, not an administrative proceeding and not a bad conduct discharge.

ⁱⁱⁱ For an extensive discussion of the implications and limitations of adverse (involuntary and punitive) discharges, see "Beyond "T.B.D." Understanding VA's Evaluation of a Former Service Member's Benefit Eligibility Following Involuntary or Punitive Discharge From the Armed Forces." 214 Mil.L.Rev. 1 (Winter 2012).

^{iv} 10 USC §§ 1552 and 1553. There are boards in each of the services. The Navy and Marine Corps are both considered part of the Naval Service.

^v *Kreis v. Secretary of the Air Force*, 866 F2d 1508 (D.C. Cir. 1989) (Judicial review limited to determine the service secretary (i.e., the review boards) abused his discretion in denying change.

^{vii} The text of the memorandum and supplemental guidance may be found at:

<http://archive.defense.gov/news/osd009883-14.pdf>

^{viii} 10 USC 1201